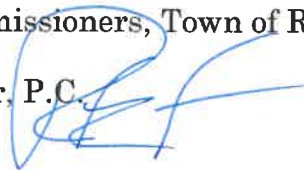


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CONFIDENTIAL MEMORANDUM

To: Water and Sewer Commissioners, Town of Richmond
From: Stitzel, Page & Fletcher, P.C. 
Date: March 12, 2020
Re: Consecutive Sewer System Agreements

We understand that the Water and Sewer Commission (“Commission”) has been approached by Robert and Joy Reap (“Owners”) to permit them to finance and construct a private sewer line extension from the Town’s system westerly to property of the Owners at Willis Farm Road in Richmond (“Property”). We understand the Reaps want to construct and retain ownership over the sewer extension (“Extension”)¹ to benefit from depreciation of their investment, transferring it to the Town eventually. There are concerns about this “structure” and approach which the Commission should consider in deciding whether, and if so on what terms, to allow this private sewer connection.

SYSTEM OWNERSHIP AND CONTROL

Most fundamentally, there are concerns with the Town not owning or controlling infrastructure connected to and discharging into its sewer system. For instance, as a practical matter how does the Town ensure (with respect to the Extension) that it complies, and can certify to compliance, with its WWTF discharge permit? How should/must the Town respond to a line break, a meter problem, an illicit discharge (e.g., introduction of prohibited substances to the sewer system), etc.? Unless there is an easement or similar legal right to access, inspect, repair, monitor, etc., the Extension, the Town’s ability to manage its owned system may be at risk. Without an enforceable obligation on the Owners to operate and maintain the Extension consistent with the requirements of the Town, there is legal exposure.

¹ For the purposes of this Memorandum, we include within the term “Extension” all related pumps, meters, meter vaults, valves, and any other components of the extended system necessary for its connection to and operation in conjunction with the Town’s system.

The Commission should consider requiring the Owners to establish a separate association or organization, with proper organizational documents and suitable bylaws, binding on all persons using the extension. The obligations under those documents should run with the benefitted lands, and require at a minimum: regular financial contribution toward the costs of operating, maintaining and repairing the Extension (fund set aside); insurance coverage for property damages and loss, and for personal injury (including defense and indemnification of the Town); that only permitted materials may be deposited into and discharged to the Extension and no improper, illegal or injurious “use” may be made of the Extension; and that the “group” be responsible to handle all problems and concerns related to and operate the Extension.

Consistent with the Commission’s “Policy” regarding line extensions to future public and private land development projects dated June 2019², it is necessary for the RWRD to be formally expanded to encompass the area to be served.

FEES AND NONPAYMENT

Another issue is fees.

If the users of the Extension ultimately utilize the Town system, they should be responsible to the Town for its sewer fees. Ordinarily, if a sewer system user does not pay disposal fees, the Town has the legal right to effect collection by discontinuing the delivery of public potable water until the utility fees are paid. Alternately, after filing a notice of lien, the Town can proceed to collect the fees via means available for the collection of taxes. To the extent that the property(ies) served by the Extension are public water customers, the Town arguably would have the power to shut off water service for non-payment of sewer charges. If they are private water customers, we are not sure there is a permissible/legal method or a practical way for the Town to interrupt their water service as a collection mechanism. It may be possible for the Town to be “guaranteed” payment by the organization/association (discussed above) and shift the risk of non-payment to the beneficiaries of the Extension and away from ratepayers of the Town system.

REAL ESTATE ISSUES

A. The Property and that of the adjacent landowner, Richmond Land Trust (“RLT”), come from a common grantor (Willis Family Trust). The Willis Family

² We previously advised the Town Manager concerning aspects and elements of the Policy after being requested to review it. We assume those observations have been shared with the Commission and are not necessary to reiterate here.

Trust reserved a 50' wide utility easement and right-of-way through the lands it eventually sold to Richmond Land Trust for the "benefit of the ... conveyed parcel" being an 8.91-acre parcel.

We are aware that there has been discussion about the Town extending the Extension at some point to serve properties to the north or west like the Mobile gas station and Park & Ride near I-89 Exit 12. Given the reserved utility easement limits the benefit of that easement to the Property, future extension/expansion may be viewed by Richmond Land Trust as an over-burdening of the easement across its property. This may require negotiation, or condemnation³, of an unrestricted or broader easement.

B. The Owners do not have an easement from the School District to run the Extension through its property to connect to the Town's sewer main (located in the right-of-way for School Street). Although the Owners' deed describes the general location of the 50' wide utility easement, there is concern about its ultimate location and route. Topography in the area is the issue as discussed next.

DESIGN ISSUES

We anticipate that designing and installing the required capital elements of the Extension will be an engineering challenge. The Richmond Land Trust property is reported to us to be very steep in location being discussed. There are a few ravines, and there have been wash-outs and trees have fallen after heavy rains/wind. These conditions likely will make construction more difficult (not the Town's concern) and make for challenges in the future related to access, maintenance, etc., and make the Extension more susceptible to failure or breach. Any such failure/breach could result in discharge onto the lands of Richmond Land Trust or the School District, or both, and will require resources to remediate the Extension and clean up any discharge. These are responsibilities/risks that should be allocated to the Owners.

It would be useful, in our opinion, for the Owners to present to the Commission a set of engineering drawings, including a list of required materials, to be reviewed by the RWRD personnel. Also useful would be a certificate from the engineer addressed to RWRD that the Extension can be constructed to applicable code and quality, that once constructed, it should function normally and require only routine maintenance and repair (barring a natural disaster or force majeure),

³ The 2017 Supreme Court decision in *In re Vermont Gas Systems, Inc.*, 2017 VT 83, 174 A.3d 1253 authorized condemnation of lands subject to a conservation easement if the new use (underground sewer transmission) doesn't materially impact the conserved use(s) of the land.

and that its interconnection with the RWRD system will not imperil the integrity, operation or function of the RWRD system or cause (or be likely to cause) the system to fail to comply with the WWTF standards or any permit or regulation applicable to the RWRD system.

CONCLUSIONS

In summary, then, we have concerns about the mechanics and ultimate viability of this proposal. Nonetheless, if the Commission chooses to proceed, the Town/Commission should:

- A. Obtain from the Owners certification/commitment that they are:
 - 1. willing to establish an association or similar entity with whom the RWRD can contract as described above and which will take on the allocated risks;
 - 2. able obtain a certification(s) (in form suitable to the Town) from their engineer/engineers as described above addressed to RWRD.

- B. Prepare an agreement addressing the issues here and others that the Commission/RWRD identifies as necessary/relevant.

- C. Consider making the Owners responsible to negotiate with Richmond Land Trust for a more expansive easement as a precondition of the deal, especially if there is a plan (possibility) for the line to be extended further west along Route 2.

- D. Require that the location (boundaries) of the 50' wide easement be definitively established, and the RWRD/Town be given access/right of entry to it for M&O operations if necessary.

We are available to assist the Town/Commission as it moves forward and are available to respond to questions.

REF/gc

RID20-001 (Reap) REF Memo to W&S Commissioners 20-03-12 cor