

Special Meeting

Germanna Center for
Advanced Technology
June 18, 2009

The Council of the Town of Culpeper and the Culpeper County Board of Supervisors convened in special joint session at 5:35 p.m. with Vice Mayor William M. Yowell and Chairman William C. Chase Jr. presiding. Present: Calvin L. Coleman, Duke M. duFrane, F. Steve Jenkins, Michael T. Olinger, James C. Risner, Christopher H. Snider, Council Members. Also present: Jeffrey B. Muzzy Town Manager; Kimberly D. Allen, Town Clerk; Christopher D. Hively, Environmental Services Director; Robert W. Bendall, and Carter Glass IV Town Attorneys. Absent: Pranas A. Rimeikis, Mayor, and Robert M. Ryan, Council Member.

County Board of Supervisors present were Chairman William C. Chase Jr., Larry W. Aylor, Sue D. Hansohn, Bradley C. Rosenberger, Steven E. Nixon, Vice Chairman, Steven L. Walker, and Tom S. Underwood. Also present: Frank T. Bossio, County Administrator; Roy Thorpe, County Attorney; Donna Foster, Deputy Clerk; Karrie Hill, Administrative Assistant to the Deputy Clerk; John Egertson, County Planner; and Paul Howard, Environmental Services Director.

AGENDA APPROVAL

Council Member Risner moved, Council Member Olinger seconded, approval of the agenda as presented. The motion carried by voice vote.

NEW BUSINESS

Amendment to the 2003 Water & Sewer Agreement between the County of Culpeper and the Town of Culpeper

Introduction by the County Administrator and Town Manager

County Administrator Bossio reviewed water and sewer issues between the Town and County and stated the problem was how to provide County customers with water and sewer service under the 2003 Memorandum of Understanding (MOU). The current court case between the County and Town was a result of conflicting interpretations of it.

He stated the amendment being presented this evening, represented the best effort of lawyers and staff to provide short-term water and sewer service to County customers and move towards a regional water and sewer authority. The amendment would give both sides one year to negotiate an authority and in return, the County would remove the lawsuit.

Town Manager Muzzy concurred and added the agreement was a good example of how both parties could work together. He noted there had been frank, open, and heated discussions between both sides; however, the attorneys and staff managed to craft this agreement with the recommendation for approval. He added it was an opportune time to work together given the possibility of waste water allocations, the need for boundary adjustments to maintain the Town's fiscal health, and to serve the growing community.

Attorneys' Overview of the Amendment

Attorney Glass stated he and County Attorney Thorpe would summarize the amendment and give their view as to why it was a reasonable compromise for both governments. Mr. Glass discussed key elements of the agreement, if approved, including the following:

- It would temporarily dissolve the lawsuit and avoid any contested annexation proceedings;
- Short-term County needs for additional water and sewer capacity would be addressed;
- Nine or ten business owners who requested immediate access to services would be provided 30,000gpd on average. The charge would involve the capacity or availability fee that is a compromise of what the two governing bodies requested.

- Both parties would engage in good faith negotiations for one year unless both decide more time was needed for a joint regional water/sewer authority and to provide for a voluntary boundary adjustment. If either side breaches any part of the agreement, the County could resume its lawsuit and the Town could institute an annexation action;
- The amendment would provide for an orderly termination of the 2008 MOU if negotiations are not successful:
- Each government would provide its own water and sewer services;
- The Town would refund the \$3.3 million the County paid in 2007 for service; most would be refunded immediately and a portion would be held back equal to the amount of capacity already used;
- The last section provides for a transitional five-year period to allow the County to develop its own water and sewer system for customers, including Terremark and Eastern View High School (a technical correction was made to Section 4.3 – Delayed Termination of Water/Sewer Services for Existing County Customers: Negotiations for Service for Additional County Customers to include Terremark and the high school.)

Attorney Glass stated the language of the 2003 MOU was unclear and not drafted well; he discussed potential risks for both bodies if the present lawsuit continued including the following:

- The Town could receive dramatically less in compensation and the County could pay much more than either thought in their interpretations of the 2003 MOU;
- Even if the judge sides with the County, it could receive little capacity because the 2003 MOU states the Town only has to provide surplus capacity of which it says it has little;
- The lawsuit will likely “poison” the relationship between the Town and County for a considerable time which may result in neither side willing to negotiate.

Attorney Glass outlined the benefits both parties would gain by adopting the agreement including the following:

- Short-term satisfaction of the County's needs with 30,000gpd;
- Creation of an enforceable agreement;
- One-year negotiations could build good faith between the two parties;
- The County has recourse if the Town refuses to create water/sewer connections or provide the average capacity over the course of the year;
- Water and sewer services will cost the County less if it joins the Town's system;
- A joint effort will help the Town secure future water sources;
- The Town will need to expand boundaries to maintain its tax base which will cost more with a contested annexation.

Attorney Glass stated if negotiations were unsuccessful, the five-year transitional period for the County to develop its own system would be orderly and allow the County to take over customers currently served by three-party agreements; capacity would be returned to the Town during the five-year period.

Attorney Glass stated the attorneys and staff unanimously recommend the amendment to Council and the Board of Supervisors and would give the Town and County an opportunity to create a “win-win” outcome that would benefit the larger community.

County Attorney Thorpe stated the Town and County had struggled with growth and providing utilities for a number of years as evidenced by the 2003 MOU; however, disagreements regarding how to apply the MOU led to a “logjam” and the present court case. He noted the amendment will give both parties more options than the judge's ruling on the 2003 MOU and made the following comments:

- The judge can only address issues in the 2003 MOU;
- The MOU does not discuss a regional joint water/sewer authority or boundary issues;
- The proposed amendment gives elected official the opportunity to determine water and sewer services for residents rather than a judge.

County Attorney Thorpe stated all of the attorneys approached the agreement with totally different points of view and aggressively represented what they believed their clients were trying to achieve; the document before the Council and Board of Supervisors was a fair settlement that would help promote the best interests of all the “Culpeper family.”

Board of Supervisors' Concerns

Supervisor Hansohn spoke on behalf of the Board of Supervisors and outlined their three main concerns:

- In the past, two agreements had been signed and neither had been honored. The Board needed some assurance that the amendment, if signed, would be followed. She noted the Board had been “burned” before;
- 30,000gpd on average had been allocated for the County to serve new businesses; however, staff indicated another business may come. The Board requested the capacity be changed to 50,000gpd, which would only be used if needed;
- Most of the connection fees for capacity purchased by the County listed in “Exhibit B” are 200% of the Town's rates; the Board requests to negotiate lower fees.

Council Member duFrane addressed the issue of cooperation and stated Council Members he had spoken with were committed to a regional water authority; he indicated it should not be a problem to increase the amount of capacity to 50,000gpd. He stated it may be more difficult to decrease the connection fees. He suggested in exchange for the Board's requests, that the timeframe be decreased from one year to ten months.

Vice Mayor Yowell referenced his informal discussions with Council Members and indicated they were not “willing to move” on fees.

One-Year Timeframe

Chairman Chase stated the timeframe could be decreased to six months because if the two bodies could not reach an agreement in that time, it was unlikely they would succeed after one year.

County Attorney Thorpe stated one reason for the one-year timeframe was because an agreement between the County and Town on boundary adjustment and the creation of a regional water and sewer authority must be submitted to the Commission on Local Government (CLG), which by statute has a minimum of six months before it recommends an approval or disapproval. He noted it was not uncommon for the commission to take longer than six months to make a recommendation and stated he hoped that after two months of intense work, the agreement could be submitted to the commission in early autumn.

Attorney Glass concurred with Mr. Thorpe's explanation and noted the one-year timeframe was reasonable.

Chairman Chase indicated he believed the amendment was to facilitate negotiations between the two governments rather than find a solution.

County Attorney Thorpe stated Chairman Chase was correct and noted the amendment would settle the lawsuit on the 2003 MOU; however it provides for the commitment of the Town and County to make the best effort to negotiate boundary adjustments and a regional authority. He stated if the negotiations result in a new agreement, then both parties would be required to go through the approval process.

Supervisor Nixon questioned if both parties would have only six months to negotiate rather than one year. Attorney Glass responded that Section 3.2 – Duration of Negotiations stated the deadline may be extended to complete review by the commission and obtain court approval as long as both parties agree to extend the timeframe.

County Attorney Thorpe stated he, Town Attorney Bendall and Attorney Glass had worked with the commission in the past; however, it had been reformed and had a new staff. Mr. Thorpe added if a new agreement settles boundary adjustments and creates a regional authority, the commission should approve it as long as it is consistent with state law; however, this amendment could be settled and signed at tonight's meeting.

Chairman Chase questioned if the proposed amendment to the 2003 MOU became effective immediately. Attorney Glass replied yes, however it was not well drafted in regards to how payments would be made, the definition of surplus capacity, and how it would be terminated. He stated the new amendment was detailed to cover all eventualities and indicated the attorneys and staff believed it was the last real opportunity to create an authority and settle boundary line adjustments. He noted if negotiations were not successful after one year, this amendment provides for the termination of the 2003 MOU.

Chairman Chase stated at the end of the one-year period, the County could not go to court to argue the interpretation of the 2003 MOU because it would have been dissolved under the terms of this amendment. County Attorney Thorpe responded that was correct; however, he made the following comments regarding the terms of the amendment:

- The amendment was a “bridge” to extend negotiations for one year;
- If negotiations fail and the County can assert the Town failed to negotiate, the County could refile the current or any other litigation to enforce the 2003 MOU;
- If both parties negotiate in good faith and the issues remain unresolved, the 2003 MOU would be dissolved and the five-year transition process would begin.

Attorney Glass noted the 2003 MOU was not a perpetual or a forty-year contract which was one of its ambiguities.

Supervisor Hansohn stated the main issues were the regional authority and boundary line adjustment. She addressed the timeline and suggested within the first 60 days, the two sides should determine one to three mechanisms to create a regional authority; if these efforts are successful, the parties should spend an additional 60-90 days negotiating a boundary line adjustment.

Council Member Risner supported Mrs. Hansohn's timeframe and stated discussions should begin immediately. He indicated the connection fee changes were not going to be an issue; however, he recommended the County give Council a brief period of time to discuss it with staff. He stated if the fee issue could be resolved, both parties would sign the amendment.

Vice Mayor Yowell stated Council was willing to agree to increased capacity of 50,000gpd to facilitate the amendment.

Mr. Coleman stated he was willing to agree to all three of the Board's requests; however, he requested the timeframe be decreased to ten months in order to finish negotiations before the elections in May 2010.

Review of Sections in the Amendment

Cost and Refund of Connection Fees – Exhibit B and Section 4.2(a)

Supervisor Nixon stated he would support Mr. Risers' request to consult with staff and noted most of the fees listed in the amendment were 200% of the cost of in-town fees. He indicated he recognized why the Town set the fees at 200%; however, the Board asked that all connection fees be changed to 150%.

Vice Mayor Yowell stated Council would like to sign the amendment at tonight's meeting and questioned if Council should go into closed session. Council Member Coleman responded, yes.

Council Member Risner requested clarification regarding connection fees and Town Environmental Services Director Hively responded with the following comments:

- For residential connections, the tap fee in the agreement is 150% of the regular in-town rate;
- The other connection fee of 200% of the regular in-town rate was consistent with the fee charged to serve County customers directly according to the 2003 MOU;
- If a regional authority is not created, the connection fees for the ten customers listed in “Exhibit A” would be refunded to the County.

Supervisor Underwood questioned the refund. Mr. Glass responded Section 4.2(a) – Effect of Termination of 2003 Agreement detailed the repayment of \$3.3 million to the County. He stated most of the money would be refunded within 20 days following the termination of the 2003 MOU; the remaining \$192,000 would be refunded within five years or when the disconnection was completed, whichever is first.

County Attorney Thorpe noted the County was not required to make additional payments to the Town according to the amendment and expenses would be charged against the \$3.3 million the Town has on deposit.

Supervisor Underwood stated the Board would like all connection fees changed to 150% given the current economic climate; the Town would still receive a significant premium and the lower fees would help businesses including Terremark.

Council Member Risner stated Mr. Thorpe indicated connection fees would be paid through the \$3.3 million deposit paid by the County and no additional funds would be spent. Mr. Risner stated it was unnecessary to spend more time and energy on the issue.

Section 2.4 – Capacity Available for Additional Connections

Supervisor Nixon referenced the combined County hourly peak flow of 3,500gph and questioned how the amount was determined as well as what would happen if the County exceeded the amount.

Town Environmental Services Director Hively responded with the following comments:

- The hourly peak flow was set at 3,500gph which equals 1.5 of the average 30,000gpd allocated for the County;
- In typical agreements, average and peak usage are set at an amount the system can handle, which means customers need to be good stewards of the system and not exceed 1.5 times the average gallons per day;
- The amendment does not contain specific language regarding penalties if usage exceeds 3,500gph because the intent was that all parties would work together.

Supervisor Nixon stated both parties were supposed to work together under the 2003 MOU and suggested the amendment be more specific. Attorney Glass noted the specificity is the maximum hourly rate of flow which is 1.5 of 30,000 gallons or 3,500gph and questioned if the County used 3,500gph continuously, if the flow would equal 45,000gpd. Town Environmental Services Director Hively responded yes, and stated he and Mr. Paul Howard, the County's Environmental Services Director, would work together if the issue arose.

County Attorney Thorpe stated the benefit for the County was there are no consequences for this short-term risk and stated “under the circumstances, this is reasonable.”

Supervisor Underwood suggested increasing the combined County hourly peak flow to 5,500gph to reflect an increase in capacity to 50,000gpd.

Supervisor Walker referenced the phrase “previously-approved customers” and stated the Board requested 50,000gpd in order to serve future customers. County Attorney Thorpe referenced Section 2.4 – Sale of Water and Sewer Capacity that stated capacity may be used for the ten customers listed in the amendment and “other customers as County may determine, at its discretion.”

Section 2.5 – Monthly Consumption Charges

Supervisor Nixon referenced Section 2.5(a) – Graduated Rates and questioned specific costs not included. County Attorney Thorpe replied the graduated rates were based on the in-town rates. Attorney Glass concurred.

Section 2.8 – Requirement for Master Meters

Supervisor Nixon questioned if master meters would not be required as long as the County did not exceed 15 customers. Town Environmental Services Director Hively responded master meters are not required as long as no more than 10% of unmetered water occurs in the system, i.e. if water from the Town system leaks into the County system. He stated that section asks the County to be good stewards.

Town Environmental Services Director Hively noted the 15 residential connections would not be connected to master meters; check valves would be installed because the County would be required to test water samples if it has more than 15 residential customers. He stated check valves will separate the Town and County systems should contamination occur.

2003 MOU and Future Regional Authority and Boundary Line Adjustment Discussions

Council Member Jenkins stated the amendment was a reasonable compromise and questioned if a public hearing would be required before Town assets could be transferred to a regional authority.

Council Member Jenkins questioned if the 2003 MOU would be used as a guide for discussions on boundary line adjustments and stated the County filed the court case due to a lack of cooperation. Council Member Risner responded the issue would be discussed after the amendment was signed and noted Town residents were County residents as well. He stated both parties would better serve the community by adopting the amendment.

A brief discussion ensued to clarify the Board's request to change the capacity to 50,000gpd and connection fees to 150% of the in-town rate.

Chairman Chase and Council Member Coleman suggested shortening the timeframe to ten months. Council Member duFrane stated he preferred shortening the timeframe to six months. Chairman Chase noted Mr. Thorpe recommended a longer timeframe. Council Member Risner stated the one-year timeframe was equitable.

Supervisor Rosenberger stated he would support the amendment if the 2003 MOU was used as the basis to begin discussions on a regional authority and boundary line adjustments. Vice Mayor Yowell noted circumstances had changed since the 2003 MOU was signed and stated this amendment would be legally binding.

Supervisor Underwood stated the County needed to know where it stood because it made a difference in whether or not the Board would sign the agreement tonight. Council Member Jenkins stated the majority of Council voted to use it as a guide last year.

Council Member Risner stated the meeting was getting “sidetracked” again and noted both parties should move forward rather than tie future discussions to older documents. He reiterated the amendment would allow both parties to “craft our own destiny” rather than risk a judge's ruling that neither side may want.

Council Member Coleman moved, Council Member Risner seconded, approval of the Proposed Amendment to the 2003 Water & Sewer Agreement with the following amendments; increase capacity to 50,000gpd, adjust connection fee rates in “Exhibit B” to 150% more than in-town rates and necessary adjustments relating thereto.

The motion carried by voice vote: Ayes: Coleman, duFrane, Jenkins, Olinger, Risner, Snider, Yowell (7); Nay: (0); Absent: Rimeikis, Ryan (2).

2003 MOU and Good Faith

Supervisor Underwood questioned if discussions on boundary line adjustments and a regional authority would resume where they ended last year and indicated he was not asking for a firm commitment. He noted if discussions started anew it may be difficult to reach an agreement in the one-year timeframe and added he was trying to act in good faith.

Council Member Risner moved, Council Member duFrane seconded, for Council to adjourn; however, Vice Mayor Yowell did not call the question.

Supervisor Hansohn stated the process should not begin this way. Council Member Risner stated Council took action to support the document and added the discussion would be a valid one after the amendment is signed. Supervisor Hansohn asked Mr. Underwood to resume the discussion at the next meeting during which the 2008 agreement could be discussed. Supervisor Nixon stated both parties may reach a better agreement than what was signed in 2008.

Supervisor Aylor questioned the definition of good faith. County Attorney Thorpe replied there was not a clear definition of good faith; however, he indicated there was community pressure on both governing bodies to work together. He noted if the Council and Board could look at constituents in the eye and state they did the best they could for the community, it would constitute good faith. He added in court a judge would determine who failed to act in good faith.

Supervisor Aylor stated the amendment would give specific customers water and sewer service immediately but questioned the advantage of the amendment over the 2003 MOU. County Attorney Thorpe responded elected officials would commit to negotiate a regional authority and boundary line adjustments and would bring the community “peace in the valley.” He noted both sides had strong contrasting opinions as to the meaning of the 2003 MOU and a court ruling may not please either side.

Supervisor Aylor thanked the Town Council for adopting the changes the Board of Supervisors requested.

Supervisor Underwood made the following comments regarding good faith:

- He was hesitant to sign the amendment because Council did not state whether or not the 2008 MOU would be used as a guide to discuss boundary line adjustments and a regional authority;
- He would gladly tell Council where he stood on the issue and indicated other Supervisors would as well;
- The Board could agree the amendment was a “joke,” receive 50,000gpd for one year, and subsequently build its own system or both parties could agree to work hard on the issue.

Council Member Risner stated the fundamental problem the Board was having difficulty “wrapping its arms around” was the issue of good faith and noted the amendment was created in response to the lawsuit. He indicated the Board was unsure if Council would act in good faith.

Council Member Risner made the following comments regarding his intent to work towards a solution:

- It would be in the best interest of the community, allow for Town growth and save its revenue base;
- A water and sewer authority would serve all county residents;
- Council Members and staff he spoke with are adamant the issues may be resolved;
- If the process fails, new problems would be created.

Council Member Risner asked the Board to take a “step of faith” and stated if it believed Council did not act in good faith, it could refile the lawsuit.

Supervisor Hansohn concurred and stated neither side should walk away from the table when discussions become heated.

Board of Supervisors Action

Supervisor Nixon requested attorneys and staff make the necessary changes to the amendment before both parties sign it.

Chairman Chase stated the Board should vote on whether or not to adopt the amendment first.

Supervisor Hansohn moved, Supervisor Nixon seconded, approval of the Amendment to the 2003 Memorandum of Understanding as amended to include an increase in capacity to 50,000gpd, and a reduction in connection fees to 150% of in-town rates. The motion carried by voice vote: Ayes: Chase, Aylor, Hansohn, Nixon, Rosenberger, Walker (6); Nay: Underwood (1); Absent: none (0).

Council Member Coleman reiterated that council had made a motion to adjourn. Vice Mayor Yowell clarified he did not call the question.

Discussion ensued as to signing the agreement with the changes approved this evening. Town Attorney Bendall stated Council should authorize Vice Mayor Yowell to sign the amendment before the body adjourns to avoid debate in case a council member leaves before the document is signed.

Council Member Coleman moved, Council Member Risner seconded, to authorize the Vice Mayor to sign the amendment on behalf of the Town Council. The motion carried by voice vote: Ayes: Coleman, duFrane, Jenkins, Olinger, Risner, Snider, Yowell (7); Nay: (0); Absent: Rimeikis, Ryan (2).

Vice Mayor Yowell and Chairman Chase declared a 30 minute recess at 7:09 p.m.

Vice Mayor Yowell and Chairman Chase reconvened the meeting at 7:39 p.m.

Vice Mayor Yowell and Chairman Chase executed the document as amended.

ADJOURNMENT

There being no further business to discuss, a motion was made to adjourn. The meeting adjourned at 8:45 p.m.

Clerk

Vice Mayor