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December 7, 2017

The Honorable Howard W. Long  
Town of Boonsboro  
21 N. Main Street  
Boonsboro MD 21713

Re: Referendum Petition

Dear Mayor Long:

You have requested my review of a letter dated November 28, 2017, from Andrew F. Wilkinson, Esquire, received on Monday, December 4, 2017, in response to the opportunity extended to the referendum petitioners to submit legal opinions or analysis addressing the validity of the referendum petition.

In my letter of October 2, 2017, I concluded that the actions challenged in the referendum petition constituted administrative matters which are not subject to referendum.

Attorney Wilkinson's letter concurs. Specifically, Mr. Wilkinson opines that administrative ordinances are not subject to referendum, irrespective of what the Charter dictates, and that the utility rates reapproved in the budget constituted administrative action.

Mr. Wilkinson further concurs that new rates for water and sewer utilities are to be determined initially by the Utilities Commission and approved by the Mayor and Council and that the sequence in which the Utilities Commission and the Mayor and Council acted was appropriate.

The remainder of Mr. Wilkinson's letter deals with the Maryland Open Meetings Act.

Mr. Wilkinson erroneously concludes that the Steering Committee or its constituent petitioners may file an action in the Circuit Court asking the court to void the approval of the budget.

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The enforcement provisions of the Open Meetings Act (the "Act") are found in §3-401 of the General Provisions Article of the Maryland Code. Section 3-401(a)(1) expressly excludes public appropriations from the enforcement provisions of the Act. Because a budget is considered an appropriation, a petition to void the Town budget is not permitted under §3-401.

Moreover, under §3-401, a petition based on lack of notice must be commenced within 45 days from the date of the alleged violation. Md. Ann. Code, General Provisions Article, §3-401(d)(2) Because the contentions summarized in Mr. Wilkinson's letter occurred on August 7, 2017, the time for filing such a petition has now expired.

Finally, even if a petition challenging the action of the Mayor and Council (i) did not concern appropriation of public funds and (ii) had been timely filed, the Circuit Court is without authority to declare the final action of a public body void based on deficiencies in an agenda under §3-302.1 of the Act. The statutory authority of the Circuit Court is found in §3-401(d)(4) of the Act, which excludes §3-302.1. A court may only:

"(4) declare the final action of a public body void if the court finds that the public body willfully failed to comply with §3-301, §3-302, §3-303, or §3-306(c) of this title and that no other remedy is adequate;"

Accordingly, the action to enforce the Open Meetings Act with respect to the challenged action of the Mayor and Council under §3-302.1 is not among the types of conduct listed in §3-401(d)(4) upon which the Circuit Court is authorized to rule.

The Steering Committee having concurred in the position that the budget is administrative in nature and not subject to the referendum, it follows that the filing of the referendum petition does not suspend the application of the revised utility rates proposed by the Utilities Commission and approved by the Mayor and Council on August 7, 2017.

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Further, for the reasons set forth in my letter of October 2, 2017, because the referendum petition challenges only administrative acts, no election need be scheduled or conducted in response to the petition.

Very truly yours,



William C. Wantz

WCW/psm

cc: Town Manager  
Members of the Council



DIVELBISS & WILKINSON  
ATTORNEYS AT LAW

November 28, 2017

ATTORNEY CLIENT PRIVILEGED COMMUNICATION

To the Steering Committee for the Citizen's  
Referendum in the Town of Boonsboro:

RE: Imposition of New Water & Sewer Rates and Adoption of FY 2018  
Budget by the Mayor and Council of the Town of Boonsboro

I have been asked to review the increase of water and sewer utility rates in the Town of Boonsboro following the action of the Town in enacting new rates and the FY 2018 Budget in August 2017. I have reviewed the Charter of the Town of Boonsboro, the minutes of the Town Council dated August 7 and September 5, 2017, Budget Ordinance 2017-01, and the correspondence from the Town Attorney dated October 2, 2017.

I understand a group of citizens filed a Petition for Referendum concerning the passage of the Budget Ordinance. Those citizens have asked for direction beyond Mr. Wantz's letter of October 2. Please note that Mr. Wantz's letter was well-researched and goes into significant depth concerning the legal issues. Here are my thoughts after review of the documents:

1. The Town Charter provides that any ordinance is subject to referendum. However, Maryland case law (and case law from other jurisdictions) provides a distinction between the types of ordinances that can be subject to referendum. Ordinances, or parts of ordinances, that deal with ongoing fees for services that have been provided over a long period of time are generally considered "administrative" ordinances and are not subject to referendum, irrespective of what the Charter dictates. Alternatively, ordinances, or parts thereof, that deal with new legislation or new spending are generally considered "legislative" ordinances and are subject to referendum.

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The reason "administrative" ordinances are not subject to referendum is that the public could theoretically stop all rate increases for all public services during every budget cycle if rate increases were subject to referendum. In such an instance, the public could stop the officials whom they elected from doing the job they elected them to do.

If the Council decides not to allow the Referendum to go to public vote, the citizens could bring an action in the Circuit Court for Washington County seeking an injunction to stop the rate increase and a declaratory judgment to determine whether the referendum would be allowed to go to public vote. Such litigation would be costly and, in my opinion, would not lead to the outcome desired by the citizens. I believe the Circuit Court would rule that the rate increase was an administrative function of the Council and is not subject to referendum. As such, I do not think this would be a viable avenue for the citizens.

2. In review of the materials, there seems to be some question as to whether the rate increase was properly passed by the Council on August 7<sup>th</sup> just prior to approval of the Budget Ordinance and then "re-approved" when the Budget Ordinance was passed. Subject to my comments below, I believe the Council acted appropriately and the citizens will not get their desired result by questioning the order in which the rate increase and the Budget were approved.

The Charter is clear that new rates for water and sewer utilities are to be determined by the Municipal Utilities Commission (*MUC*) and then approved by the Council. In turn, the new rates necessarily become part of the new budget to be approved by the Council. It is clear to me that this procedure was followed by the *MUC* and the Council and there is nothing inappropriate with the order in which the approvals occurred.

3. However, the citizens may be able to question the method by which the public was given notice that the Council intended to act on August 7, 2017 on the new utility rates and the FY 2018 Budget. Reading the August 7<sup>th</sup> Minutes, it is clear the Council decided that it had acted inappropriately in June 2017 by either: (i) adopting an interim budget; or (ii) extending the prior fiscal year budget. As such, the Council decided on August 7<sup>th</sup> to remedy the situation by approving the new utility rates and the FY 2018 Budget without any apparent notice to the public that the Council intended to vote on the rates or the FY 2018 Budget on August 7, 2017.

Section 3-302.1 of the General Provisions Article of the Maryland Code is a fairly new provision to the Maryland Code, becoming effective on October 1, 2016. As part of the Open Meetings Act, Section 3-302.1 requires that "[b]efore meeting in an open session, the public body must make available to the public an agenda" that (1) contains

"known items of business or topics to be discussed at the portion of the meeting that is open" and (2) indicates "whether the public body expects to close any portion of the meeting." A public body may alter the agenda after publication. The agenda must be made available to the public at least 24 hours before the meeting. There is one exception to the 24-hour rule if the public body cannot meet the deadlines because it scheduled the meeting "in response to an emergency, a natural disaster, or any other unanticipated situation."

I find nothing in the materials that gives the Council an exemption from the Agenda rule or the 24-hour rule.

My review of the materials suggests the August 7, 2017 agenda does not state any intention of the Council to discuss or vote on the MUC rate increase or the FY 2018 Budget. Nothing in the agenda suggests these items being "known items of business or topics to be discussed" as required by the Maryland Code. While the Council can change the agenda after it is published, there does not appear to have been any public announcement of the change at least 24-hours prior to the meeting. The Minutes do reflect that Councilmember Solberg asked at the meeting that the MUC rate increase and the FY 2018 Budget be added to the agenda under "old business." However, the Minutes do not reflect that the Council approved the inclusion of these items and the amendment to the agenda. The Minutes only state that a motion was made to accept the agenda; the Minutes are silent as to whether the vote included Councilmember Solberg's request to add the MUC rate increase or the FY 2018 Budget.

In any event, I suggest the published agenda is clearly inadequate for putting the public on notice that the Council intended to discuss: (1) rescinding its June budget action, (2) the MUC rate increase, or (3) the FY 2018 budget adoption. The failure to give any notice of the addition of these items to the agenda and the purported change to the agenda at the last moment in the meeting room on August 7<sup>th</sup> (if such change was even approved by the Council) seems to have denied the public of any notice of the significant actions the Council went on to take that evening.

In addition, the Town Charter requires the Council to give at least 2-weeks' notice before adopting a Budget. Given that the Council decided its June 2017 budget action was inappropriate and rescinded it, and the Town Attorney confirmed the interim budget that went to public hearing was not the same budget up for approval on August 7<sup>th</sup>, I find it difficult to understand how the public was at all aware (or given the opportunity to be aware) that the FY 2018 Budget was to be approved on August 7<sup>th</sup>.

If the citizens decide to seek redress, there are four (4) ways to do so:

1. File a Complaint in Circuit Court to ask the Court to enforce the Open Meetings Act and force the Town to start the process again with adequate notice to the public.

2. File a Complaint with the State Compliance Board. The State Compliance Board cannot penalize or sanction the Council. However, an advisory opinion against the Council could cause the Council to revisit the rates and budget to avoid concern over the legality of its budget.
3. Request an opinion letter from the Attorney General. The Attorney General cannot penalize or sanction the Council. However, an advisory opinion against the Council could cause the Council to revisit the rates and budget to avoid concern over the legality of its budget.
4. The citizens could attend any open session meeting and raise their concerns. With enough voices, the Council could decide to revisit the rates and budget to avoid concern over the legality of its budget.

Thank you for allowing me to review this interesting matter. I trust this will assist the citizens in considering how to proceed.

Very truly yours,  
DIVEBBISS & WILKINSON



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