

Open Work Session
Discussion on Barren Creek
December 20, 2016

Mr. Wayne Strausburg, Director of Administration, and Mr. Weston Young, Director of Public Works, came before Council. Mr. Cannon said the purpose of today's meeting is get an overview of the meeting when the state representatives came to Barren Creek. He was not able to attend the meeting as he had some personal commitments that came up. He thinks it would be good for Council to know what transpired and where we think we are headed with it and anything that has developed since the meeting. Mr. Cannon said they have gotten some very positive letters since the meeting from the parties that are involved. Mr. Strausburg said he thinks Mr. Young should be the point person as he is the individual who has the most interaction with the state officials. Mr. Young said they had a very positive meeting with multiple state agencies and divisions within each agency. The two leads are the Maryland Department of Environment, which had their Director of Water Management there, as well as Dam Safety and Wetlands and so forth. Mr. Cannon clarified that this was a site visit, to which Mr. Young responded, yes, this was at Barren Creek. The other major agencies involved were the Department of Natural Resources, the fishery folks, the conservation and people who have program open space or money for property acquisition were there as well. He said County representatives showed the state representatives the current state of things and what Public Works intends to do if they have the needed property, at least to stabilize conditions out there to stop erosion, as well as what their thoughts were on the proposal at the time for the CIP, putting in culverts to restore the road and what is involved. The state confirmed that they are willing to help the County with expediting permitting that would be needed if the County goes that route. The course of action that was discussed is that the Director of Water Management with MDE was going to go back and talk with her attorneys, and they were going to draft a letter to the property owners. The details of that letter are basically who is at fault and that it needs to be stabilized and protected, and the County's intentions at the moment is that they will follow-up when the state delivers the letter, again they are willing to work with you, and the County needs the property, in some form to do whatever work that is proposed. Mr. Young said they have not heard from the state since that meeting. Mr. Hall asked Mr. Young if he has heard from the property owner, to which Mr. Young responded, not since the letters they received. Mr. Cannon asked what kind of timeline do you think the County is working with. Mr. Young said given the holidays and staff issues that all departments face during this time of year, it will probably be January or February realistically before the County will see a letter from the state. Probably no later than the spring. He said it became a hot item for the state when they saw the extent of the washout. The County will be ready to follow behind if the CIP project is approved as they will have money available in July, but they will need to start the permitting process before then. Mr. Kilmer said it is his understanding that there are two property owners that are on each side of the washout that are willing to work with the County. They have granted the County temporary easements to do work on their property to stabilize the road. He then asked what obstacles besides funding and permitting are still left. He understands the Council will need to appropriate the money to do the project. Mr. Culver came before Council. He said the property owners have sent conditional type letters of approval. Mr. Suggs has sent a letter saying that he will grant an easement, but if the County does not do it the ways he wants it done, then he is going to sue the County. Mr. Kilmer said Mr. Suggs' conditions are to keep him apprised of the construction and he has reestablished a different interest on Route 54. Mr. Kilmer said those are the conditions he placed on the easement for the right-of-way. The issue about the lawsuit is that if the dam cannot be rebuilt, which is if it is left as-is, he reserves his legal options. Mr. Kilmer said just because you reserve your legal option does not mean you are going to sue. Mr. Culver said the County does not own any more

than what it owns now. Mr. Culver asked why would the County want to put itself back into the same situation. The County needs to own the dam so it can be fixed right. Mr. Culver said five or ten years from now it could happen again, so why would we want to set the County up for potential problems down the road. Mr. Kilmer said he agrees and that is the best course of action. It seems that the County has an agreement with Mr. Suggs that at some point he will transfer the property. Mr. Culver said he has been trying to sell the property for five years and he does not know when he is going to sell it. Mr. Culver said he does not want to hold off on the road project. Mr. Kilmer said he does not either. He said his reservation of legal right would kick in if the County does not do anything. Mr. Culver said Lynn Buhl is sending Mr. Suggs a letter stating that it is his responsibility to clean this up. It is on Mr. Suggs. Mr. Culver said he is hoping the letter from MDE will ask Mr. Suggs to revisit it with the County and let the County own the property. Mr. Kilmer said it seems that Mr. Suggs has already granted the County permission for a construction easement to restore and maintain the road. Mr. Culver said that is with the condition that if Mr. Suggs is not happy with it then he still has his right to sue the County. Mr. Culver said Mr. Suggs wants a certain amount of water in it. Mr. Kilmer reiterated the condition of the easement is to keep him apprised on the road construction so he can enter the property. Mr. Kilmer said he does not think it is a condition on the easement. He is just letting the County know that if it does not restore the dam, he reserves the legal right to do something. Mr. Culver said he is going by Mr. Wilber's advice. Mr. Kilmer said he is going by the text of the letter that says even if the County does not rebuild the dam it is still in a position, so it seems to him that is a separate issue. If the County rebuilds the road or does not rebuild the road, Mr. Suggs reserves the right to sue the County. He said anybody has a legal right to go court, and he is sure that Mr. Wilber will tell him that his case is pretty weak. Mr. Kilmer said that is not a threat to sue the County, it is just his reservation to legal rights, which does not seem like an impediment to restoring the road. He has granted the easement and the County should keep him apprised of the situation. Mr. Culver said he looks at it differently, and he is not going to put the County at risk of a lawsuit because there is not enough water in his pond. Mr. Culver said he has offered to buy the property, and he would be happy to negotiate that price. He said Mr. Suggs's property would be a great asset for the County's WIP program. He said it could work out very well for the County, but he does not want rush into this to put in two culverts and try to fill in a hole. Mr. Kilmer said he understands. According to the letter, if the County does nothing, the County is just as much at risk of a lawsuit as if the County rebuilds the road. Mr. Culver said he does not read the letter that way. The land is owned by Mr. Suggs. He said contrary to whatever Mr. Suggs may say that is not the way. Mr. Kilmer said that is why he thinks his legal threat is baseless. Mr. Culver said that he is not going to leave the County at a cost of defending a lawsuit, baseless or not, when it can be worked out. We just have to have common minds. He needs to let him know that he has to pay for this cleanup now. Mr. Kilmer said if the County can get him to cooperate. Mr. Culver said he does not want to rush it just to get the road back. He wants to make sure the County looks at every avenue it can to make sure it is the County's road. Mr. Hall said he thinks the County is putting the cart before the horse. He said there are a lot of issues that need to be worked out before the County needs to address this matter. Mr. Culver said the state is addressing this matter with the County. It all falls in the same place, it is all part of the same puzzle. The state has addressed the issue with the County about cleanup. They have determined that Mr. Suggs owns the dam, just as the County did. Mr. Hall said the state is in the process of advising Mr. Suggs so this does not become an issue until he responds to the state. Mr. Culver said they were informed that it would probably be January before the letter would be written. Mr. Hall asked if Mr. Adkins, who owns the other portion of the road, if he has made an agreement with the County as he has not seen anything yet. Mr. Young said Mr. Jim Adkins, while he is a property owner, the County will not need property from him like the County needs from Mr. Suggs on the upstream side of the dam. Mr. Hall then asked if Mr. Adkins owns part of the road. Mr. Strausburg responded Mr. Adkins owns part of the road prior to the area. He said the reality of it is the next steps

are almost solely controlled by the state. The state is going to send whatever letters they send to the landowners in terms of stopping the silting into the creek. He said Public Works is at a standstill until the state advises the County in writing as to what they will allow the County to do in terms of restoration. He thinks it was made very clear by the state officials who were there that day that they are leaning towards agreeing to a culvert system and restoring the road over a culvert system, but he heard loud and clear that they have no appetite for a dam. Until they get that from the state and Mr. Young knows what to engineer, the County really cannot do anything. Mr. Hall said that brings up another question. How much has the County spent on resources on this issue that is no further along than it was four months ago. The County has spent a tremendous amount of resources dollar wise. Mr. Young said it has been primarily staff time. There was a lot of equipment time in trying to open the gates that were damaged during the event. It has primarily been staff time and some legal expenses. Mr. Hall asked if the County has hit \$100,000 yet, to which Mr. Strausburg responded, no. Mr. Joe Holloway said if you take time out of the timeline, the County is looking at a letter to the landowners from the state first. The state will advise Mr. Suggs what his responsibilities are. He clarified that there are no responsibilities from the Adkins Historical Trust and that it is just the responsibilities of Mr. Suggs, to which Mr. Strausburg responded that is his understanding. Mr. Culver said the County does need to go to the sides. Mr. Strausburg said that is for the construction easement, but he thinks in terms of the restoration and the silting into the creek bed that lies solely with Mr. Suggs. Mr. Joe Holloway said the County does not have any money invested that far. He said the County goes from deciding what it wants to do after Mr. Suggs makes his decision, whether the County is going to do a culvert or a dam. The County is pretty much saying that a dam is out of the question. Mr. Strausburg said he is not getting any sense from the state regulatory agencies that they have any appetite for a dam. Mr. Joe Holloway asked for clarification on a rumor that is going around that Mr. Kenny lifted the gate and bent the gate. Mr. Joe Holloway said he went to visit Mr. Kenny and he thinks Mr. Kilmer did to. Mr. Kenny denies the rumor. He said he does not have a backhoe or even access to a backhoe. Mr. Joe Holloway said that is something that needs to be corrected in the future. Mr. Young said he will defer that to the County Executive. He thinks it may have been a forklift. Mr. Joe Holloway said Mr. Kenney said they did not try to lift the gate that morning. Mr. Joe Holloway said he does not know how that rumor got started. Mr. Cannon said on the issue on buying the property, he is not familiar to what extent the County is looking to purchase the property, whether or not the County is looking to purchase the area the road is going to be placed or whether the County is buying the pond, or the whole house. He then asked exactly what is being considered, to which Mr. Culver responded, whatever Mr. Suggs is trying to put up for sale. Mr. Strausburg said whatever Mr. Suggs would like to sell. Mr. Cannon said he doubts Mr. Suggs is going to sell his pond and not his house. He then asked what does Mr. Suggs have up for sale, to which Mr. Culver responded, his entire property is what he has been promoting for sale. Mr. Cannon said he understands the incentives through the WIP program, but there is a house on the property and he does not know if the County wants to own a house. Mr. Strausburg said the County does not want to own another house. Mr. Young said the County does have to realize that by losing the dam, he has lost waterfront property. Mr. Suggs mentions in his letter he reserves the right to file a lawsuit at a later date is because he has suffered property value loss due to the pond going away. The County can say it is his fault, however, he thinks the County had some control over whether or not the County can bring water back. If the County were to purchase the pond bottom in addition to what the County needs to reestablish the road, then he is just selling the house and not worrying about a waterfront house. Mr. Joe Holloway asked if that would be an open space program project. Mr. Strausburg said project open space funding is pretty minimum right now. There may be an opportunity to take existing land that the County owns that was acquired through project open space and work a swap. In working a swap, he is a long way from understanding all the intricacies, but if the County can work a swap and acquire the pond bed and get WIP credit for taking the requisite actions in that pond bed, that drains a 20 square mile

area and the County would get enormous WIP credits. Mr. Strausburg said that is a preliminary idea but they need to understand what the state is and is not going to let the County do before they begin to tilt windmills. Mr. Joe Holloway said, for a thought down the road, there is an organization that just bought 700 acres of land down the road from where he lives, and they are digging ponds on this farm; it is called the Nature Conservatory. He does not know if down the road if work can be done with them. The Nature Conservatory is taking the land and restoring it to the way it was back in the 1700s. Mr. Joe Holloway said they work off grant money and they get a lot of federal funding. Mr. Strausburg said they are contemplating how they can obtain ownership of the pond bed so the County can get the series of WIP projects that will go a long way to satisfying the total WIP obligations. Mr. Strausburg said the first question that has to be answered is what is the state going to allow. Mr. Young cannot even do preliminary engineering until the County knows the answer to that question. Mr. Joe Holloway clarified that the ball is in the state's court, to which Mr. Strausburg responded, yes, this is a busy time of year for the state as they will be going into their budget cycle and the general assembly session. They do not move as quickly this time of the year as they do other times of the year. Mr. Strausburg said the County is pursuing it without being over bearing. Mr. Joe Holloway said he thought the meeting with the state representatives went really well that day. Mr. Kilmer said from an engineering prospective, there was some talk about having raised culverts. He thinks the discussion was on having two or three culverts. Mr. Kilmer said he thinks the state said up to three feet of water would not be considered a dam. He said, obviously, having the culverts level with a natural flow is cheaper. He then asked what is the difference between having the culverts level and raising the culverts up a little bit and having a couple feet of water. Mr. Joe Holloway said fisheries. Mr. Young said they will need at least one down low to allow fish passage. However, raising up the other culverts, depending on how much water backs up, just like if you have ditch and you move the pipe up two inches, you are going to have two inches of water. There is a chance with larger rain events there would be a wet bottom that could look like a pond. There is still the channel that will allow the fish to pass up and down. Mr. Young said they will probably look at raising the culverts. They will need to look at the design and permitting. The downstream end starts to hit tidal wetlands, so that footprint they will need to minimize and be cognizant of the impact that these pipes would have. Mr. Kilmer said Mr. Suggs has written that he has to retain any legal remedies to attain assistance in preventing the pond from becoming woodlands. Mr. Kilmer said if it periodically floods then that would take care of meeting his condition and it was satisfy the local people as well. Mr. Young said it is possible but there is no guarantee. For example, the Double Mills, what was the pond bottom reforested and once the trees were there, the state said no ponding. Mr. Cannon clarified that the road has always been an easement across the property, to which Mr. Strausburg responded, to the County's knowledge there was never any formal documentation. He said back in the 40s and 50s the state would come in and build roadbeds, but he has not seen any documentation. Mr. Strausburg said he has not even seen the documentation where the State deeded the property to the County. Mr. Young said they are looking for that documentation. Mr. Strausburg said the state built the road when Old Ocean City Road was Route 50. Mr. Cannon asked if the Deed to Mr. Suggs shows an easement on his property, to which Mr. Strausburg responded, he has not looked at the Deed. Mr. Strausburg said he does think there is a formal easement. Mr. Kilmer said there is one from 1961 that talks about a right-of-way that was recorded in the court. Mr. Strausburg said part of the problem with the right-of-way easement is that does it include the land under the roadbed that was constructed by the state. You may have an easement that is a thin layer that is across the dam that does not extend to the dam itself, but he would have to read the easement to really understand what the state had and then transferred to the County. Mr. Kilmer said it is just a line on a map, so that is really not going to help him. Mr. Strausburg said it is really a very quirky situation. He has not seen anything like it. Mr. Strausburg said Mr. Young has to be diligent to urge the state to move things along but you can push too hard as well. Mr. Joe Holloway said he thinks the citizens will be asking questions, and he thinks council

members have a good answer for them in that the County is doing something. He said government does not work fast.

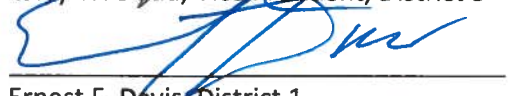
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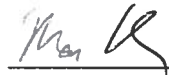
John T. Cannon, President



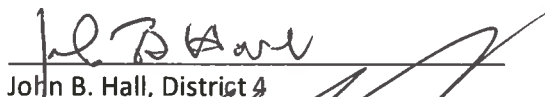
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