

## Memorandum

**To:** Scott Morelli, City Manager  
**From:** Jon Pottle, City Solicitor  
**Date:** November 17, 2014  
**Re:** Gardiner's Participation in the Kennebec Regional Development Authority

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### INTRODUCTION

This memorandum provides a general legal analysis of the City's participation in the Kennebec Regional Development Authority ["KRDA"], and outlines potential options for the Council's review and consideration.

Please note there are potential risks and liabilities associated with each option and therefore any detailed discussion of these risks and liabilities would be more appropriate in executive session.

### BACKGROUND

**Establishment of KRDA.** On April 3, 1998, the Maine Legislature passed "An Act to Create the Kennebec Regional Development Authority" [the "Act"]. A copy of the Act is attached as Exhibit A. The Act does not take effect until it is accepted by cities, towns, and plantations located in the territory known as the Kennebec Valley Economic Development District that vote for its approval and have a combined state valuation of at least \$3 billion. P.L. 1998, Ch. 79, § 14. Such approvals were required to occur by June 30, 1999. *[It is my understanding that this threshold was satisfied (even if Gardiner's valuation in the 1998-1999 tax year is excluded), and therefore the Act is effective, though I have not conducted an independent investigation to verify.]*

**Purpose and General Powers of KRDA; Voting Rights of Members.** The Act's overall purpose is to allow local governments in the territory of the KRDA to combine resources and share risks to facilitate economic development activities in the region. P.L. 1998, Ch. 79, § 1. To accomplish this overall purpose, the KRDA is granted certain general powers (e.g., borrow money, lend money, contract, sell property, and sue and be sued), which are exercised through a General Assembly. P.L. 1998, Ch. 79, § 3.<sup>1</sup>

Each city, town or plantation that becomes a member of the KRDA is entitled to at least one voting representative on the General Assembly. P.L. 1998, Ch. 79, § 3. The municipal

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<sup>1</sup> The Act requires the General Assembly to provide for an Executive Board from the KRDA's membership. P.L. 1998, Ch. 79, § 3.

officers of each city, town, or plantation select and appoint its representative(s) to the General Assembly. P.L. 1998, Ch. 79, § 3.

**Levy of Taxes; KRDA.** The Act specifies that when the KRDA does not have sufficient projected revenues in a fiscal year, the General Assembly determines what sum of money should be raised, which is an obligation of the member cities, towns, and plantations of the KRDA (which is apportioned amongst members). P.L. 1998, Ch. 79, § 10.

**Gardiner's Participation in the KRDA.** Minutes dated May 17, 1999, state the City Council voted to authorize the City of Gardiner to become a participating member in the KRDA and to appropriate a sum not to exceed \$29,952 as the city's pro rata share of the first year budget of the KRDA. *See Gardiner City Council Minutes, Exhibit B.* It is my understanding there has not been any other vote on the issue of approving the Act and joining the KRDA by either the voters of Gardiner or the City Council.

It is also my understanding that the City Council, acting as the City's municipal officers, has selected and appointed voting representatives to the KRDA, that these individuals have, over the years, participated on the General Assembly of the KRDA, and that Gardiner through its annual budget process has contributed funds to the KRDA because of insufficient income generated by the KRDA to cover its expenses and payments to satisfy notes, bonds, or other obligations. For example, the KRDA borrowed money to finance the development of a regional business park in the Town of Oakland known as FirstPark. Gardiner's contributions to the KRDA over the years have, in part, covered the debt service for this project.

*[Please note I have not conducted independent investigations to verify the above understandings, and I have not reviewed the transactional documents associated with the FirstPark development project.]*

## **GENERAL LEGAL ANALYSIS OF THE ACT**

**Requirements to Approve the Act & Join or Leave the KRDA.** The Act, in several locations, includes language referencing how a city, town, or plantation may approve the Act and have a voting representative(s) on the General Assembly of the KRDA. The interplay of these provisions (designated as "excerpts" below) is important to consider when interpreting how cities, towns, and plantations approve the Act and become members of the KRDA (and may withdrawal from the KRDA or dissolve its existence), and therefore they are set forth below for the Council's immediate reference:

[EXCERPT #1]

"Each city, town or plantation located within the authority's territory, **upon voting to accept the provisions of this Act and to become a member of the authority**, is entitled to be represented by at least one voting representative to the general assembly of the authority, which is its overall governing body."

- P.L. 1998, Ch. 79, § 3 "Governing body; general assembly; executive board" (emphasis supplied)

[EXCERPT #2]

“Cities, towns and plantations that are located within the geographic territory of the authority, as described in section 1 of this Act, **and that do not vote to become members of the authority by the date specified in section 14** [June 30, 1999] **of this Act may vote to become members of the authority at a later date**, if the voters of the cities, towns and plantation that are members of the authority vote at a meeting of the authority to authorize the addition of the requesting city, town or plantation as a member of the authority.”

- *P.L. 1998, Ch. 79, § 13 “Other cities, towns and plantations may join; procedure for withdrawing from the authority” (emphasis supplied)*

[EXCERPT #3]

“A city, town or plantation **that is already a member of the authority may vote to withdraw its membership; however, it continues to be legally obligated on any outstanding indebtedness of the authority until such time as all of the indebtedness is paid in full.** The withdrawal only becomes effective on the date that marks the end of a fiscal year of the authority that is preceded by a full fiscal year in which the income was at least sufficient to pay the indebtedness and expenses of the authority for that fiscal year.”

- *P.L. 1998, Ch. 79, § 13 “Other cities, towns and plantations may join; procedure for withdrawing from the authority” (emphasis supplied)*

[EXCERPT #4]

“[T]his Act takes effect when approved only for **the purpose of permitting its submission to the legal voters of the cities, towns and plantations described in section 1 of this Act** [establishing the territory of the KRDA] **at a regular or special town and plantation meetings and city elections called and held for that purpose before June 30, 1999. Such city elections and town and plantation meetings must be called, advertised and conducted according to the law relating to municipal elections and meetings. . . .** The votes taken at town and plantation meetings must be by written ballot.

The municipal clerks shall reduce the subject matter of this Act to the following question:

**‘Do you favor approving the Act creating the Kennebec Regional Development Authority passed by the 118th Legislature, and (insert name of city, town or plantation) becoming a participating member of that authority?’**

**The voters must indicate by a cross or check mark placed against the words ‘Yes’ or ‘No’ their opinion of the same.**

**This Act takes effect immediately upon acceptance by the cities, towns, and plantations so voting approval and having a combined state valuation of at least \$3,000,000,000; but only if the total number of votes cast for and against the acceptance of this Act at each of the city, town or plantation meetings approving this Act equals or exceeds 10% of the total votes for all candidates for Governor cast in that city, town or plantation at the next preceding gubernatorial election.** Failure of approval by the necessary percentage of voters at any such meetings does not prevent a subsequent meeting or meetings to be held for those purposes on or before June 30, 1999. **The result of the vote must be declared by the municipal officers of the cities, towns or plantations, and due certification thereof must be filed by the city, town or plantation clerks with the Secretary of State.**

- *P.L. 1998, Ch. 79, § 14 “Emergency clause; referendum; effective date” (emphasis supplied)*

Excerpts #1 through #3 above use general language referencing the act of “voting” by cities, towns, and plantations to accept the Act, joining the KRDA, and/or withdrawal from the KRDA. The term “voting”, in this sense, contains some ambiguity. While “voting” generally refers to individual voters within a jurisdiction or authority, in the municipal sense it typically refers to the governing legislative body. Indeed, in Maine, the legislative power can be held by the voters of a municipality, by elected representatives (e.g., a council, like the Gardiner City Council, that votes), or some combination of the two (e.g., voter approval for budget; ordinance power to councils), which will depend on the form of governance chosen by a municipality. Reading these three excerpts in isolation, I would interpret them to mean acceptance of the Act and the decision to join or withdrawal from KRDA requires action by the legislative body of a specific city, town, or plantation, which will depend upon each municipality’s form of governance.

However, Excerpt #4 directly addresses how municipalities accept the Act and join the KRDA, using specific language that plainly states a city election or town or plantation meeting by written ballot must be conducted prior to June 30, 1999.<sup>2</sup> Under generally accepted rules of statutory construction, more specific language controls general language and, when read as a whole (and not in isolation), the more reasonable interpretation of the Act is to require a city election or town or plantation meeting by written ballot in order to (i) adopt the Act (especially before June 30, 1999); (ii) decide to be a participating member of the KRDA (especially before June 30, 1999); and/or (iii) withdrawal from the KRDA.

Moreover, the Legislature demonstrated in the Act that it understood how to use language to vest authority with municipal officers by stating they select and appoint a representative(s) to the General Assembly of the KRDA. *See* P.L. 1998, Ch. 79 § 3 (“The municipal officers of each city, town or plantation shall select and appoint its representative to the general assembly.”) For this additional reason, it is logical to interpret the Act to require a city election or town or plantation meeting by written ballot in order to become a member of the KRDA (since the Legislature did not use this specific language in reference to the process to approve the Act and

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<sup>2</sup> As stated in Excerpt #2, a city, town, or plantation may also choose to join the KRDA after June 30, 1999.

join or withdrawal from the KRDA, and instead used specific language in Section 14 that requires city elections or town and plantation meetings by written ballot).

Accordingly, based on the above legal analysis, a council does not have authority to approve the Act, join the KRDA, or withdrawal from the KRDA. Only the voters of each respective city, town, or plantation may exercise that authority and, in Gardiner's case, the City's voters did not approve the Act or make the decision to join the KRDA in 1999 or thereafter.

The City Council's 1999 vote authorizing Gardiner to become a member of the KRDA and its subsequent selections and appointments of representatives to the KRDA were therefore *ultra vires* actions because they are not based on approval by the voters of the City and thus the actions of the City Council were beyond the authority of the City Council in these specific circumstances.

**GENERAL LEGAL PRINCIPLES:**  
**UNAUTHORIZED ACTS OF A MUNICIPAL BODY, AGENT, OR OFFICER**

No specific case in Maine was found that directly concerned unauthorized acts of a municipal body/officer/agent in relation to membership in a regional authority created by statute, such as the KRDA. There are, however, several cases involving contracts that are instructive.

With respect to contracting, Maine municipalities are not generally liable for payment of unauthorized services.<sup>3</sup> See e.g., *Forrest Assocs. V. Passamaquoddy Tribe*, 2000 ME 195, ¶ 13, 760 A.2d 1041. Maine courts have followed the rule that a person dealing with officers or agents of a municipality does so at his or her peril and must determine for themselves whether municipal officers/agents are properly authorized to make a contract. See *State v. Town of Franklin*, 489 A.2d 525, 528 (Me. 1985) (“Our court has been zealous in protecting the rights of property owners from seizure for the debts of the municipality. On numerous occasions the rule has been stated that a person dealing with officers or agents of a municipality does so at his peril, and that it is his duty to determine whether the parties with whom he is contracting were authorized to make the contract.’ ... If the property owners in a community are to be charged with an obligation, the authority of the person acting for the Town must be established.”) (*quoting School Admin. Dist. No. 3 v. Maine School Dist. Commission*, 185 A.2d 744, 747 (Me. 1962).<sup>4</sup>

Maine courts have further stated unauthorized acts and contracts of its officers and agents may be ratified, provided such acts are within the scope of the corporate powers of a municipality or instrumentality thereof to make. See *School Admin. Dist. No. 3 v. Maine School Dist. Commission*, 185 A.2d 744, 747 (Me. 1962) (*quoting Dillon's Municipal Corporations* (3d

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<sup>3</sup> However, under general agency law, and as applied to individuals or private entities, a principal is generally bound by the acts of his or her agent who acts within the apparent scope of authority granted by the principal. However, as noted, the Maine court has formulated a more specific rule relating to contracting with Maine municipalities.

<sup>4</sup> See also *Michaud v. St. Francis*, 127 Me. 255, 259, 143 A. 56; *Stewart v. York*, 117 Me. 385, 387, 104 A. 701; *Van Buren Light & Power Co. v. Inhabitants of Van Buren*, 116 Me. 119, 124, 100 A.371; *Morse v. Inhabitants of Montville*, 115 Me. 454, 457, 99 A. 438.

Ed.) §§ 463 & 797; citing *Morse v. Inhabitants of Montville*, 115 Me. 454, 458, 99 A. 438, 439, and *Lincoln v. Inhabitants of Stockton*, 75 Me. 141, 146). Regarding municipalities, ratification generally requires affirmative action, as opposed to silence or inaction, by the body or officials empowered to approve the original act (though each situation should be assessed on a case-by-case basis). See, e.g., *Otis v. Inhabitants of Stockton*, 76 Me. 506, 508 (1884).

Absent ratification, courts in Maine have considered imposing quasi-contract or applying equitable principles (e.g., estoppel) against municipalities. In these cases, the courts are generally reluctant to either impose quasi-contract liability and or apply estoppel against municipalities when the underlying actions were not authorized or ratified. See e.g., *Forrest Assocs. v. Passamaquoddy Tribe*, 2000 ME 195, ¶ 13, 760 A.2d 1041 (“[W]e have been reluctant to impose quantum meruit liability on municipalities when the services rendered were not authorized by the municipality.”); *Budge v. Town of Millinocket*, 2012 ME 122, ¶ 22, 55 A.3d 484 (“when a party seeks to estop the government we have viewed the claim with caution”) (quoting *Mrs. T. v. Comm’r of the Dep’t of Health & Human Servs.*, 2012 ME 13, ¶ 10, 36 A.3d 888); see also *Trull v. Nursing Home, Inc. v. State Dep’t of Human Servs.*, 461 A.2d 490, 499 n. 16 (Me. 1983) (“Estoppel against the government should be carefully and sparingly applied, especially where application would have an adverse impact on the public fisc.”).

While courts in Maine may be reluctant to impose quasi-contract and apply estoppel principles, each case is driven by fact-specific circumstances that should be carefully evaluated.

### **POTENTIAL OPTIONS**

Outlined below are various options for the Council’s consideration. These options are in a general outline form, since discussion of details and various strategic elements are more appropriate for executive session(s).

**Option #1: Continue to Make Contributions to the KRDA.** The City Council could follow prior practice and continue to contribute funds to the KRDA through its annual budgeting processes. This approach would potentially avoid a likely legal claim by and dispute with the KRDA concerning whether Gardiner is legally obligated to pay the KRDA for expenses and other obligations that exceed its income as it pertains to FirstPark and other expenses/projects. However, if the KRDA incurs future expenses or obligations (bonds, notes, or otherwise), the same question will nonetheless continue—specifically, whether the City of Gardiner is legally responsible to make contributions as a member of the KRDA. Furthermore, to the extent membership in the KRDA does or may result in revenue sharing opportunities, absent any specific agreements between the KRDA and Gardiner, a question would remain on whether the KRDA is obligated to share revenue with Gardiner.

**Option #2: Hold City Election to Approve Act, Join the KRDA, and Ratify Prior Actions.** Holding a city election for voter consideration of whether to approve the Act, join the KRDA, and ratify prior acts by the Council is, from a pure legal perspective, the cleanest way to address the current uncertainty of Gardiner’s relationship and obligations, if any, to the KRDA. If the voters vote in the affirmative, then the City would carry on as a clear member of the KRDA (assuming members of the KRDA accept the City’s request to join in this respect). If,

however, the voters vote in the negative, then a dispute between the City and the KRDA will likely result regarding Gardiner's membership and obligations, if any.

**Option #3: Cease Contributions to KRDA.** A third approach is for the City Council to stop appropriating money in its annual budget process to contribute to the KRDA, and have the individual designated by the Council as its representative at the KRDA stop attending meetings. This approach presents issues on two fronts: (i) whether or not the Council should cease contributions without first conducting a city election that presents the KRDA question to the voters; and (ii) as noted above, disputes may occur between the City and the KRDA regarding Gardiner's membership and obligations, if any, either currently or for future endeavors of the KRDA.

**Option #4: File a Declaratory Judgment Action.** A fourth approach is for the City to file a declaratory action seeking a court ruling that declares the rights and obligations of the City relative to the KRDA, which could be done either in conjunction with or without resort to the above three options.

**Option #5: Notify KRDA; City Election.** Inform KRDA that Gardiner did not properly determine whether the legal voters of the City would vote to authorize the City's membership in the KRDA and that the City is bound to place that question before the voters and that Gardiner will pay its fees to KRDA, but also require all benefits from KRDA, until the vote is taken. Again, this could be done either in conjunction with any one or more of the first three options or in conjunction with Option 4. Specifically, as to the latter alternative, the City Council could schedule the City election, file a declaratory judgment action, and notify KRDA that the earlier deficiency must be corrected.

### **RECOMMENDATION**

At this juncture, there are a number of political and strategic considerations that need to be carefully evaluated prior to making a decision on what course of action to pursue. There are also, in all likelihood, additional background facts that should be gathered and evaluated as part of the Council's review of the KRDA issues and its next steps.

Accordingly, prior to taking any action, I recommend that the Council (i) hold an executive session to discuss these KRDA issues with legal counsel regarding its rights and duties as well as strategic considerations associated with possible litigation; and (ii) engage in further fact-finding to analyze all relevant events and circumstances regarding the KRDA and Gardiner.

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