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February 19, 2013

David L. Pond, PE
Executive Vice President/COO
WK Dickson
616 Colonnade Drive
Charlotte, NC 28205

Re: Boone Water Project

Dear David:

Greg has asked that I write you in response to your and Ryan's letters of January 4, 2013, January 9, 2013, and January 28, 2013. As I'm sure you realize, Greg's goal is to try to get the water project back underway as soon as possible, and his preference is to continue to work with W.K. Dickson toward what we had hoped was a common purpose. I think that ultimately you and he are going to need to meet again face-to-face to try to work out the payment issues which have arisen, some of which I will address here. He understands your desire to be paid additional compensation, and he's not entirely opposed to that. At the same time he hopes you recognize that W.K. Dickson has now received more than 1.1 million dollars from the Town, despite the fact that some key parts of the firm's work have been unsatisfactory.

The Town has incurred substantial, additional, and what should have been unnecessary costs in the form of right-of-way agent's fees, appraisal fees, attorney's fees, surveying costs and staff expenses from what we see as errors on the part of W.K. Dickson. Some of W.K. Dickson's work has actually set the project back, such as recommending a CLOMR when we are now told that none was needed, designing the course of the intake route along Brownwood Road without first pursuing expected, needed and promised research, and at times taking actions without appreciating the potential risks to the project which would result from a lack of precision.

The design history of the intake road is illustrative. Part of the original deal with the Cooper family was that the Town would construct a subdivision quality road from the intake to Cranberry Road. We relied on W.K. Dickson to give us the information about the dimensions of the easement/license we would need, prepared documents based on that

information, and recorded the plat which W.K. Dickson had prepared. After the plat was recorded, your engineers realized that your design was inadequate because no one there had thought about drainage and stormwater issues. As a result, you had to prepare new designs, for which I assume the Town was charged, and the Town had to renegotiate with the Coopers, with the Town not only paying my fees, but also paying their attorney's fees to convince them to accept the new design. You then produced a revised set of plats, but when Rick and I were reviewing them, we luckily noticed that the second design had stormwater and drainage "easements" indicated and labeled as such in Ashe County. You and your engineers knew we had no right to have any easement there, and in this form, the plats could not be used. Rick also noticed that the county line was described on the plats as an "approximate location." No one at W.K. Dickson had ever raised the issue that there was any uncertainty about the location of the county line, but when I contacted Ryan about this, he said it was impossible to ascertain the exact location of the line. Ryan's statement caused us no little consternation and a potentially very serious problem since the original easement was supposed to go right to the county line. We therefore renegotiated our deal with the Coopers once more, again at considerable expense, to provide a margin for error, and we spent money doing our own research on Ryan's assertion. The Town also had little choice but to spend additional funds to locate the line on the ground, which was indeed possible, and to search for and obtain copies of documents confirming its location. Our survey showed that both of the plats prepared by W.K. Dickson contained multiple errors and that the location of the county line on both plats which your firm prepared was wrong. I have since been told that both you and our independent surveyor were right, but this, too, is not true. I have been told that our surveyor confirmed that your plat was correct, but I have spoken with him, and that is also not true.

We now know that our recorded easement did not actually cross into Ashe County, but that was pure accident as the calls for the easement based on the metes and bounds description you provided were wrong and did not, as intended, take the easement to the county line. Luckily, the description didn't match the calls on either of your plats, or we **would** have strayed into Ashe County by about five feet. These errors have cost the Town much money, but in some ways it is even more disconcerting that substantial, repeated errors were made around one of the most critical design features of the project.

Brownwood Road is another example, and again, there have been multiple and expensive errors there, ranging from surveys where key monuments were missed to design errors which have wasted Town resources and delayed the project. In 2008 Brian promised to

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follow up with DOT to find out exactly what evidence it had for its right of way claim there. He did not follow up, but instead W.K. Dickson designed the raw water pipe route in areas where DOT's claim is questionable. All along, except for several culverted areas, Greg, Rick and I thought the design took the pipes under the pavement. With DOT's lack of documentation, even if it eventually provides an encroachment agreement, as W.K. Dickson designed this I cannot certify to USDA that the Town has acquired the necessary right to pursue this route, and the Town is in a very vulnerable position if we proceed with this design without acquiring easements or condemning the entire course. Since Brian either did not follow up or least never disclosed DOT's lack of support for its claim to Greg, there was never an opportunity for Greg to weigh the competing alternatives. Now, although he must make this decision, Greg is unable to do so without reliable information regarding the relative costs of these choices.

Ryan's recent letter quotes a cost for redirecting the design under the pavement as \$700,000, but there is no explanation as to how this was calculated, what part relates to Brownwood Road, where there is a problem, and what part related to other areas, where there might not be. Even if the estimate is accurate, Greg has no information as to how much additional property will have to be acquired if we stay off the edge of the road since your easement plats failed to account for the area between the pavement and the edge of the claimed right of way, and ignored many properties along the route. He can only compare the costs of going under the pavement with the costs of sticking with the original design if he has this information.

Please don't read these examples the wrong way. I'm not setting them out to create more controversy; I'm just trying to make the point that a significant amount of additional work on your part and ours already has been necessitated because of W.K. Dickson's errors and failures to discuss critical issues with Greg. The Town has incurred and will continue to incur significant additional expenses. Document preparation, payments to right-of-way agents, and much staff time is negated. All the appraisals which were done on Brownwood Road will have to be revised. All the easements there will have to be redone. The right-of-way agents will have to go back to square one in their negotiations, and the money which has been paid to them is wasted. Whereas we expected that by now all needed easements would have been acquired or condemnation actions filed, at best we are several months away from being able to proceed with either.

In terms of the contract and my interpretation of the payment provisions as "milestone" payments for the basic contract stages, both Greg and I have reviewed the e-mail you

solicited from Vernon Harris. Neither of us thinks it says what you interpreted it to say. From your letter I think we agree that strictly speaking, neither the "preliminary design" nor the "final design" work can be considered complete at this point. I believe that under either your or my interpretation of the contract, you should not have been paid **more** than the milestone amounts until all work contemplated within each stage was completely finished. Simply, I cannot advise Greg that he has the right or legal authority to pay more than the milestone limits for services that were part of the original or amended contracts as part of the pertinent phases until they have been completed, but I agree with you that to the extent your work can be properly justified as "additional services," it can be paid for separately based upon monthly invoicing.

Greg realizes that we have the capacity to simply get into a back and forth on these and other issues, which helps neither of us and does not advance the project. He would like to avoid that. He has therefore asked me to propose the following approach to you, contingent upon the required Town Council approval:

1. First, Greg has authorized me to assure you that once a final design is submitted, approved by the pertinent agencies and the Town, and ready to go out to bid, all "additional funds" which have been agreed upon and earned, and any retained funds from the original contract other than the amounts designated for the bidding process, construction oversight and project closeout, the last three phases of the work contemplated in the contract, will be paid to W.K. Dickson.
2. Greg is willing to treat the design down the median of U.S. 421 as additional services and will pay for a redesign. However, he questions the \$39,000 figure which you have requested since both the complications of a design down the median and the projected construction costs there should be less than those along the side. Greg is willing to support your request for appropriate additional funds, but he will need more information as to the basis and justification for the requested amount.
3. Both Greg and I are uncertain whether the \$2,250 which you requested for resubmittal of the permit applications to the Army Corps of Engineers and NCDENR DWQ was to cover the new application fees, additional engineering, time in repackaging and resubmitting them, or all three. The Town will pay the fees for the resubmittals although if we had not been delayed in our contact with property owners because of design errors, the resubmittals would not have been needed. As for the engineering expenses, Greg is open to discussing additional

compensation for services which are not the result of W.K. Dickson's prior errors, but he will need to understand what additional engineering is actually needed.

4. Before Greg can make a decision about whether to stick with your design along Brownwood Road, he has to have better information concerning the amount of property which will need to be acquired from the edge of the pavement to the edge of the work for both permanent and temporary easement acquisition. He also must have a more detailed explanation for the basis for Ryan's \$700,000 estimate for going under the pavement and a clear idea of how much additional off-road property is needed for temporary and permanent easements if the design stays under the pavement where it can. Greg expects W.K. Dickson to provide the needed information and any redesign there at its own expense. Even if the course of the pipes is unchanged, new easement maps and descriptions will have to be prepared which show the correct areas of each property from the edge of the pavement to the edge of the work, and Greg believes that should be your expense. Alternatively, Greg is willing to pay for the preparation of this information and redesign if W.K. Dickson agrees to pay the Town what it has spent for appraisals which cannot be used, survey work that has now had to be done to confirm W.K. Dickson's survey work which was in error, money paid to the right-of-way agents for work which must be repeated, legal fees paid to me for preparation of now useless easements, research, and my attendance at meetings and preparation of materials, including this letter, to try to address the problems which have been created by W.K. Dickson's errors, legal fees paid to the Coopers' attorney for the renegotiation of the easement and license, and Greg's and Rick's time which has been wasted as a result of the various errors. Greg also believes that part of the survey work for which you were already paid should have included staking the property out so the owners would know what was being sought. As we go about a redesign, Greg also believes that you therefore should stake out the easement areas needed on request, without additional fees.
5. As for the possibility of pursuing a "no-rise" certification and the difficulties we have encountered with the CLOMR application, the Town pursued a CLOMR on W.K. Dickson's advice. Until it was too late, no one from W.K. Dickson ever told Greg that Ashe County would have to sign off on an MT-2 form for the CLOMR to be issued. In fact, he was actually told that Ashe County's consent was unnecessary. If Greg had been informed that Ashe County could stop the application, he never would have agreed to seek a CLOMR in the first place, and it is hard for any of us to understand how anyone from W.K. Dickson could have

thought that Ashe County would cooperate. Your staff now say that a No-Rise Certification will suffice, but by even asking for the CLOMR, we have created the impression that we have to have one, which may continue to cause us problems. Greg has not yet decided how to proceed and whether there still might be recourse with FEMA. He has been told conflicting things regarding the availability of a No-Rise, on the one hand being told that the project has no impact on flood elevations and the need for the CLOMR was due to FEMA mapping errors, but on the other hand being told that to eliminate the need for any FEMA involvement, we would need to do extensive grading around the intake site. As far as money goes, the original contract provided \$17,500 for the "CLOMR/No-Rise," and my view is that the Town contracted for either the No-Rise or CLOMR from the beginning, that we have neither, and that this is not a new service. Though there have been complications, they were completely predictable if we had known that Ashe County had to sign off on this. Greg also believes that most of the information needed for a No-Rise has already been developed for the CLOMR. He is therefore only willing to pay a small fee, up to \$1,000 as a not-to-exceed amount, to convert the CLOMR to a No-Rise if we abandon our effort to get the CLOMR, but he is going to need better information before he can decide which course to follow.

6. Greg is willing to recommend some extra compensation for the "alternate intake road conceptual design," but part of this charge has been explained as the cost of "redesign" of the temporary easement across Ronald Cooper's property as a permanent easement. That only involved removing the dotted lines showing the original permanent easement boundaries and the creation of a new map. Although, the Town has no interest at this point in a full design of an access road across the Ronald Cooper property, if you provide us with a metes and bounds description and map of the outside dimensions of an easement across the property which could be used as an easement for the water lines and for a road, should that become necessary, and your engineers certify that what has been described and depicted will actually work as a "driveway type" road (e.g., sufficient sight distance from the curve, sufficient width to encompass all off-road drainage, etc.) then Greg is willing to compensate you for the time spent, again as a not-to-exceed amount.
7. Greg accepts your offer to absorb the costs of the fire suppression system design. This was required by the building codes when this was first designed and should have been covered by the original contract. The Town does not want to seek a variance from this requirement.

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8. Greg also expects W.K. Dickson to follow through and provide, at its own expense, a recordable mylar showing the final course of the easement and license areas and the associated stormwater easements and areas across the Randy Cooper property for the intake road. He expects, as you've proposed, that W.K. Dickson will continue to reexamine its work on the other portions of the project, and to the extent changes are needed due to its prior errors, correct these at its own expense.

David, I hope we can get things going again on these terms. Please direct any written response to me.

Sincerely,



Samuel F. Furgiuele, Jr.
Attorney at Law

cc: Greg Young
Town Manager

Rick Miller
Director, Public Utilities