

## **Special Joint Meeting with Asheboro City Council**

11/30/06

The Randolph County Board of Commissioners met in a special called joint meeting with the Asheboro City Council at 11:00 a.m. in the Commissioners Meeting Room, County Office Building, Asheboro, NC, to hold a public hearing to consider entering into an economic incentives contract with Malt-O-Meal Company. Commissioners Holmes, Kemp, Frye, Davis, and Lanier were present.

Chairman Holmes called the meeting to order for the County, welcomed those present and announced that the following item will be added to the agenda at the conclusion of business regarding Malt-O-Meal: "Consider Approval of an Interlocal Agreement between the County and the Town of Franklinville Concerning Water Transmission Lines."

Mayor David Jarrell called the meeting to order for the City, explained the purpose of the meeting and opened the public hearing on behalf of the City.

Chairman Holmes opened the public hearing on behalf of the County and called on Bonnie Renfro, Director of the Randolph County Economic Development Corporation, for comments.

Bonnie Renfro said that Malt-O-Meal Company is a privately-owned cereal company based in Minneapolis, Minnesota. The Company, which was founded in 1919, produces more than 20 ready-to-eat cereal products. They currently operate two production facilities in Minnesota and a manufacturing facility in Utah, which opened in 2003. Its products are shipped across the U.S. through a network of four regional warehouses. Malt-O-Meal currently employs about 1,100 employees across the Company. In 2002, Malt-O-Meal acquired the bagged cereal business of Quaker Corporation, firmly establishing a presence on the east coast. Since the acquisition, Malt-O-Meal has continued to grow its market share in the east. Malt-O-Meal's long-range strategic plan calls for a cereal plant that is well positioned to service the eastern region of the U.S. In mid-2005, a decision was made to initiate a site search for the best location to effectively and efficiently serve a growing customer base in this region of the country. Logistics played a key role in determining potential locations and a preferred five state area was identified including Virginia, West Virginia, Tennessee, Kentucky and North Carolina. During the search, the Company identified the existing Unilever food facility in Asheboro and first visited the site in November 2005. Company representatives have spent subsequent months evaluating the site and community to determine if it is feasible as a long-term cereal-manufacturing site. In addition to purchasing the food facility, Malt-O-Meal would also purchase an available industrial site next to the plant to have enough room for the long-term needs of the operation.

This expansion would include an investment of a minimum of \$104 million in real and personal property and the creation of 164 new jobs over the next five years. Cereal manufacturing is a capital-intensive process, requiring significant investment in machinery and equipment in a state of the art facility. In addition to renovations to the existing 175,000 square foot facility, the Company would construct a 100,000 square foot facility during the first construction phase. The Unilever building offers advantages that include existing infrastructure suitable for food production and rail service, a key requirement for the project.

Malt-O-Meal would bring quality jobs that would pay an average of \$691 per week and offer a full benefit package. Most of the jobs would be filled locally with few transfers into the community. These jobs would be very welcome given the number of layoffs affecting our citizens and uncertainties in our

county's employers. Future expansion of the facility and job opportunities is a good possibility provided that sales and market share continue to grow at the current pace.

The Company is seeking all available assistance from local and state governments to help offset the site and development costs associated with the project. Ms. Renfro asked that the City of Asheboro and the County of Randolph authorize all appropriate resolutions and document preparation to enter into an economic development incentives contract with Malt-O-Meal, as permitted by North Carolina General Statute Section 158-7.1, in the total amount of \$4,000,000 to assist the Company with costs associated with the expansion as well as construction of rail access to service the building and site. She proposed that the City of Asheboro provide a total of \$2,000,000 and the County of Randolph provide a total of \$2,000,000, sharing equally in the funding assistance. The funding will be paid in no less than six annual installments in escalating amounts contingent on the Company's satisfaction of specific performance requirements for investment and job creation. Those requirements would be formalized in an economic incentives agreement. That agreement will include among other things that during the economic development project, the Company must obtain from the City of Asheboro a Certificate of Occupancy or a letter/certificate of compliance certifying that the buildings or land affected by this project may be used or occupied for factory/industrial occupancy. The Company must deliver to the County and the City written certification that the actual value of investment in real and personal property of the project equals or exceeds the sum of \$104,000,000, such investment occurring in increments over four years. Also, the Company must deliver to the City and the County reports evidencing the creation of a minimum of 164 new permanent jobs at an average weekly wage that meets or exceeds \$691 per week. Jobs would be created over the first five years of the project.

A portion of the assistance would be used to construct a new rail spur track to service the industrial building. On behalf of Malt-O-Meal, the City of Asheboro will be asked to seek a Community Development Block Grant in the amount of \$750,000 from the North Carolina Department of Commerce to assist in the cost of rail access construction and to seek a rail access grant in the amount of \$124,000 from the North Carolina Department of Transportation for additional assistance for rail construction. That funding would be used in conjunction with local funding to build the new spur track. Community Development Block Grants require local matching funds of one local dollar for each three state dollars. A total of \$250,000 of the local funding assistance would be used to meet the required match of \$125,000 provided by the City and \$125,000 provided by the County.

The Company would agree to remain in operation for a period of five years immediately following the date of the final installment of the incentive payment. If the Company does not remain in full operation, a portion of the incentive money must be returned to the City and County.

Based on the current city and county tax rate, and the Company's planned investment of \$104,000,000, the City of Asheboro and the County of Randolph can expect new tax revenues in excess of this incentive over the next six years. This very large investment will grow our tax base and with the outlook for future growth, Malt-O-Meal has the potential to become Randolph County's largest taxpayer.

Equally important, the new location of Malt-O-Meal will create 164 quality jobs for residents, adding more than \$6 million annually in new payroll dollars to our community. These quality jobs pay above 110% of our average county wage and offer excellent benefits. Given the loss of more than 4,300 good manufacturing jobs over the last six years including 150 jobs lost at Unilever, this is very good news.

Ms. Renfro said that industry standards tell us that every new job in food processing results in the creation of 3 additional jobs. Using a conservative measure, the project would indirectly support 323 jobs in our local economy and \$11.8 million in indirect income dollars.

Chairman Holmes asked for questions and comments from the public on behalf of the City and the County.

**Chris Neugent**, Malt-O-Meal President and Chief Operating Officer, thanked everyone involved in this process. He reviewed the Company's keys to success: 1) providing a great place for employees to do great work, 2) providing a great product for a low price and 3) (the Company's) commitment to growth. He said that the Company was already working on the design for 2007 construction to commence and that hiring would probably begin in 2008.

**Jack Marcus**, Unilever's current plant manager, spoke as a private citizen and expressed great excitement about this announcement. He praised both local governments for their roles in the project. He also mentioned that Unilever has refunded both the County and the City for the portion of the 2003 incentives grant that the Company did not fulfill. He encouraged the Boards to agree to the incentives proposal.

**Kim Markham** spoke as a small business owner, saying that he was excited at the prospect of this company providing business opportunities to other local businesses.

Mayor Jarrell closed the public hearing for the City.

Chairman Holmes closed the public hearing for the County.

The City Council voted to adopt a resolution to enter into an economic development incentives contract with Malt-O-Meal.

*On motion of Frye, seconded by Lanier, the County voted unanimously to adopt a resolution to enter into an economic development incentives contract with Malt-O-Meal, as follows;*

**WHEREAS**, Section 158-7.1 of the North Carolina General Statutes authorizes a county to undertake an economic development project by extending assistance to a company in order to cause the Company to locate or expand its operations within the county; and

**WHEREAS**, the Board of Commissioners of Randolph County has held a public hearing to consider whether to participate in an economic development project that will result in the County of Randolph (the "County"), the City of Asheboro (the "City"), and Malt-O-Meal Company (the "Company") approving an economic development incentives package whereby the County and the City each contribute up to two million and no/100 dollars (\$2,000,000.00) for a total payment of up to four million and no/100 dollars (\$4,000,000.00) to or for the benefit of the Company to offset the site and development costs of locating a food manufacturing plant in the City of Asheboro, Randolph County, North Carolina, said incentives to be granted pursuant to an economic development incentives contract entered into pursuant to Section 2 of this resolution and participation in a Community Development Block Grant pursuant to Section 3 of this resolution; and

**WHEREAS**, upon the completion by the Company of this expansion project, the Company will have generated new value/investment in real and personal property associated with the project in an amount equal to or in excess of one hundred four million dollars (\$104,000,000.00) and created a minimum of one hundred sixty-four (164) new full-time jobs in the County and City; and

*WHEREAS, this economic development project will stimulate and stabilize the local economy, promote business in the County and City, and result in the creation of a significant number of jobs in the County and City; and*

*WHEREAS, the County has in its General Fund available revenues sufficient to fund this economic development project;*

*NOW, THEREFORE, BE IT RESOLVED* by the Board of Commissioners of Randolph County, this 30<sup>th</sup> day of November, 2006, as follows:

**Section 1.** *The County is authorized to expend up to two million dollars (\$2,000,000.00) of County funds for the Malt-O-Meal economic development project.*

**Section 2.** *In addition to the standard terms found in contracts that the County routinely executes in the ordinary course of business, the economic development incentives contract entered into by and between the County, the City, and the Company must contain the following essential terms and conditions:*

- a. *Subject to the contingency provision found in Section 3 of this resolution, the total payment made to the "Company" under this contract shall not exceed three million seven hundred fifty thousand and no/100 dollars (\$3,750,000.00).*
- b. *Fifty-percent of the contract amount will be paid by the County, and the other fifty-percent of the contract amount will be paid by the City.*
- c. *The contract amount will be paid in six (6) installments in escalating amounts as detailed below at a frequency not to exceed one installment per fiscal year (July 1-June 30). The initial installment payment shall be made no sooner than July 1, 2007, and the obligation of the County to make any installment payments specified herein shall be conditioned upon the satisfactory completion by the Company of certain performance requirements, including but not limited to, the following:*
  - i. *The Company must deliver to the City and the County written certification that the Company has invested a sum equal to or in excess of four million dollars (\$4,000,000.00) in the real property located at 2525 Bank Street in Asheboro, North Carolina (Randolph County Parcel Identification Number 7753779951) and in the adjoining parcel identified by Randolph County Parcel Identification Number 7753881407. Upon receipt of said certification, the County and the City shall remit a total payment of one hundred eighty-seven thousand five hundred and no/100 (\$187,500.00), fifty-percent to be paid by the County and fifty-percent to be paid by the City.*
  - ii. *The Company must properly obtain from the City a Certificate of Occupancy or letter/certificate of compliance, as appropriate, certifying that the proposed food manufacturing facility may be occupied or used for Factory-Industrial Occupancy in accordance with the provisions of zoning, building, and other applicable ordinances and laws of the City of Asheboro and the State of North Carolina. Furthermore, the Company must deliver to the County and the City written certification that the actual new value/investment in real property of the project equals or exceeds the sum of ten million dollars (\$10,000,000.00) and that the actual new value-investment in machinery and equipment equals or exceeds the sum of thirty million dollars (\$30,000,000.00). Upon receipt of the required certifications, the County and the City shall remit a total payment of three hundred seventy-five thousand and no/100 dollars (\$375,000.00), fifty-percent to be paid by the County and fifty-percent to be paid by the City; and*
  - iii. *The Company must deliver to the County and the City a written certification that the cumulative new value/investment in real property of the project equals or exceeds the sum of twenty-five million dollars (\$25,000,000.00) and that the cumulative new value-investment in machinery and equipment equals or exceeds the sum of sixty million dollars (\$60,000,000.00). Furthermore, the Company must provide to the County and the City Employment Security Reports evidencing the creation of fifty-six (56) new full-time jobs. Upon receipt of the required certifications, the County and the City shall remit a total payment of five hundred sixty-two thousand five hundred and no/100 dollars*

- (\$562,500.00), fifty-percent to be paid by the County and fifty-percent to be paid by the City; and*
- iv. The Company must deliver to the County and the City a written certification that the cumulative new value-investment in machinery and equipment equals or exceeds the sum of seventy-five million dollars (\$75,000,000.00). Furthermore, the Company must provide to the County and the City Employment Security Reports evidencing the creation of an additional fifty-six (56) new full-time jobs. Upon receipt of the required certifications, the County and the City shall remit a total payment of seven hundred fifty thousand and no/100 dollars (\$750,000.00), fifty-percent to be paid by the County and fifty-percent to be paid by the City; and*
  - v. The Company must deliver to the County and the City a written certification that the Company has retained all one hundred twelve (112) new full-time jobs. Furthermore, the Company must deliver to the County and the City written certification that the Company has not reduced its level of operations in the County and City since the date of payment by the County and City of the immediately preceding installment payment. Upon receipt of the required certifications, the County and the City shall remit a total payment of nine hundred thirty-seven thousand five hundred and no/100 dollars (\$937,500.00), fifty-percent to be paid by the County and fifty-percent to be paid by the City; and*
  - vi. The Company must provide to the County and the City Employment Security Reports evidencing the creation of an additional fifty-two (52) new full-time jobs over and above the one hundred twelve (112) full-time jobs for which Employment Security Reports were previously submitted to the County and the City. Furthermore, the Company must deliver written certification to the County and the City that the Company has not reduced its level of operations in the County and the City since the date of payment by the County and the City of the immediately preceding installment payment. Upon receipt of the required certifications, the County and the City shall remit a total payment of nine hundred thirty-seven thousand five hundred and no/100 dollars (\$937,500.00), fifty-percent to be paid by the County and fifty-percent to be paid by the City*
- d. The contract must provide the County and the City with a means of recouping a portion of the contract amount if the Company fails to maintain its level of operations in the County and City at the same level that existed at the time of the sixth and final installment payment for a period of five (5) years immediately following the date on which the said final installment of the contract amount is paid to the Company. By way of illustration and without limitation, the Company shall be deemed to have reduced its level of operations in the County and City if at any point during the said 5-year period the Company fails to maintain the entirety of the newly-created jobs referenced above.*
- e. If the Company does not remain in full operation during this five (5) year period, a portion of the incentive money must be returned. The amount to be returned shall decrease on a pro-rated amount for each year that the Company remains in the City and County. Any amounts returned by the Company in this manner shall be divided equally between the County and the City.*

**Section 3.** *In addition to the incentives granted by the economic development incentives contract provided for in Section 2 of this resolution, the City anticipates applying for a Community Development Block Grant (the "CDBG") for the construction of rail access to the property for the benefit of the Company. In the event that this CDBG is applied for and obtained, the County agrees to provide one-half of the required local matching funds up to a total County contribution under this Section of one hundred twenty-five thousand and no/100 dollars (\$125,000.00). In the event that said CDBG is not applied for and/or obtained, the County shall have no obligations to the Company save increasing the total amount of the respective installment payments prescribed above in Section 2.c.v. and Section 2.c.vi. from nine hundred thirty-seven thousand five hundred and no/100 dollars (\$937,500.00) to one million sixty-two thousand five hundred and no/100 dollars (\$1,062,500.00), fifty-percent of each payment to be paid by the County and fifty-percent of each payment to be paid by the City.*

**Section 4.** *The County Manager is hereby authorized to execute on behalf of the County of Randolph a contract drafted in accordance with this resolution and any other documents necessary for the implementation of this economic development project.*

The City voted to adopt a resolution of support to locate a manufacturing facility in Randolph County for the purposes of NCDOT's funding support for a rail industrial access track to serve Malt-O-Meal.

The City Council voted to adjourn the special meeting for the City.

Chairman Holmes called on David Townsend for a presentation concerning adoption of an interlocal agreement.

David Townsend, III, Public Works Director, presented an interlocal agreement between the County and the Town of Franklinville for water line construction. The line would serve the new Providence Grove High School and Grays Chapel Elementary School.

*On motion of Kemp, seconded by Davis, the Board voted unanimously to adopt an interlocal agreement with Franklinville for water line construction, as follows:*

***THIS AGREEMENT***, made and entered into this 30<sup>th</sup> day of November, 2006, by and between the County of Randolph, a political subdivision of the State of North Carolina hereinafter referred to as the "County", and the Town of Franklinville, a municipal corporation duly and legally created by the General Assembly of the State of North Carolina hereinafter referred to as the "Franklinville"; and

***WHEREAS***, the parties hereto acknowledge that the purpose of this Agreement is to allocate responsibilities regarding the engineering, construction and operation of a water main along Highway 22 in Randolph County; and

***WHEREAS***, said water main will service the new Providence Grove High School and will be the first stage of a County-Wide Water Plan; and

***WHEREAS***, the implementation of a County-Wide Water Plan will insure potable water for citizens residing along major thoroughfares while enhancing economic development opportunities in Randolph County; and

***WHEREAS***, the parties hereto desire to enter into this Agreement subject to the terms and conditions contained herein.

#### **ARTICLE ONE** **BACKGROUND/OVERVIEW**

1.1 *The County is currently working with every municipality located within its borders to develop and implement a County-Wide Water Plan, hereinafter referred to as the "Plan".*

1.2 *The Plan envisions an arrangement whereby permanent water lines are put into place through financial cooperation between the County and various municipalities with ownership and operation of said lines being the province of the municipalities involved.*

1.3 *The Plan requires the installation of water mains along the major highway corridors in the County in order to serve major residential developments while enhancing economic development. One of the planned water mains will be located along Highway 22 from Franklinville to Mack Lineberry Road.*

1.4 *The County is building a new high school commonly known as the Providence Grove High School, hereinafter referred to as the "School", which, when completed, will be located at 5555 Mack Lineberry Road just off Highway 22.*

1.5 In building said School, the County must provide adequate water for the operation of the facility. While the County could provide water through the installation of large groundwater wells, the construction of the School is the perfect impetus for the first phase of the Plan, the installation of the water main along Highway 22.

1.6 As a pre-requisite to the construction of the water main along Highway 22 and in order to have the capacity to service customers along this main, Franklinville has recently modified an interlocal agreement in place for the purchase of water from the Town of Ramseur.

1.7 The County and Franklinville will cooperate in the financing of the engineering and construction of the water main along Highway 22. The County will provide the majority of the up-front costs of said engineering/construction to be repaid over time by Franklinville. Franklinville will be responsible for operation and maintenance of the improvements once installed and will ultimately own said improvements as part of its water distribution system.

1.8 It is the purpose of this Agreement to define oversight, financial and ownership responsibilities in regard to the engineering, construction and continuing operation of the water main along Highway 22 in accordance with the Plan and the goals and objectives as set out in this Background/Overview Section.

## **ARTICLE TWO** **DEFINITIONS**

2.1 **Agreement**—means this interlocal agreement between the Town of Franklinville and Randolph County.

2.2 **Construction Phase**—means the second phase of the Term of this Agreement. It begins on the date that the contract for construction of the Project is awarded and terminates when construction has been completed, has passed final inspection, and is accepted by the Town.

2.3 **Contractor**—means the contracting firm or corporation awarded the Construction Contract for this Project.

2.4 **Construction Contract**—means the contract awarded for the construction and installation of the Project.

2.5 **County**—means the County of Randolph.

2.6 **County's Designated Representative**—means the County official or employee identified by the County to serve as liaison with the Town and the Engineer and Contractor and to oversee the Project on the County's behalf.

2.7 **Day**—for the purpose of computing time under this Agreement, the word day shall refer to a calendar day.

2.8 **DENR**—means the North Carolina Department of Environment and Natural Resources.

2.9 **Engineer**—means the consulting engineer firm or corporation appointed by the Town.

2.10 **EPA**—means the United States Environmental Protection Agency.

2.11 **Force Majeure**—means an occurrence which affects the respective duties and obligations of the Parties hereunder, which duties and obligations shall be suspended while and so long as performance thereof is prevented or impeded. A Force Majeure occurrence includes civil disturbances, riots, vandalism, vendor delays, fires, floods, hurricanes, tornadoes, epidemics, inclement weather, federal, state or local governmental action or inaction, acts of war, acts of terrorism, acts of God, or any other cause which is beyond the reasonable control of the Party from whom the performance was due.

2.12 **Installment Payment**—means the monthly payment made to the County by the Town applied towards the Total Repayment Amount. For the first two years of the Repayment Phase, the amount of the Installment Payment each month shall be calculated as follows: Each month, the Town shall remit five dollars (\$5.00) for each residential customer of the Project and twenty dollars (\$20.00) for each business/commercial customer of the Project. Each month, for each industrial customer of the Project, the town shall remit two dollars (\$2.00) per each one-thousand gallons of water used by said customer per month. Beginning with the Town's twenty-fifth (25<sup>th</sup>) monthly installment payment and for each month thereafter, the amount of the Installment Payment shall be calculated as follows: Each month, the Town shall remit seven dollars and fifty cents (\$7.50) for each residential customer of the Project and twenty dollars (\$20.00) for each business/commercial customer of the Project. Each month, for each industrial customer of the Project, the town shall remit two dollars (\$2.00) per each one-thousand gallons of water used by said customer per month. For the purposes of this Agreement, an industrial

customer is defined as a customer whose daily water usage exceeds one-thousand gallons. A detailed accounting of the Town's customer's, by category, shall accompany each Installment Payment.

2.13 **Party or Parties**—means those entities that have executed this Agreement, their successors or assigns.

2.14 **Pre-Construction Phase**—means the first phase of the Term of this Agreement. It begins on the date that this Agreement is signed and terminates on the date that the construction contract for the Project is awarded by the Town.

2.15 **Project**—means the engineering, construction and continuing operation of a water main along Highway 22 from the Town to Mack Lineberry Road, including a booster pump station, the water main, and the construction of an elevated storage tank on the Providence Grove School site.

2.16 **Project Invoice**—means an invoice for property purchased and/or work performed on this Project, whether by the engineer, the construction contractor, or any subcontractor thereof.

2.17 **Repayment Phase**—means the final phase of this Agreement. It begins with the Town's first billing cycle for customers of the Project. This Phase shall continue until such time as the total amount of Installment Payments made by the Town to the County pursuant thereto equals the Total Repayment Amount.

2.18 **Total Repayment Amount**—means the total amount of monies provided by the County pursuant to this Agreement as determined by a reconciliation of accountings under Section 5.3 of this Agreement.

2.19 **Town**—means the Town of Franklinville.

2.20 **Town's Designated Representative**—means the Town official or employee and an alternate identified by the Town to serve as liaison with the County and the Engineer and Contractor and to oversee the Project on the County's behalf.

### **ARTICLE THREE** **FINANCIAL RESPONSIBILITIES**

3.1 The Town shall provide Seven Hundred Fifty Thousand Dollars (\$750,000.00) of the upfront engineering and construction costs of the Project during the Construction Phase as provided in Article Five below.

3.2 The County shall provide engineering and construction costs during the Pre-Construction and Construction Phases, as provided in those respective Sections below. The total amount of the County's payments under this Agreement shall be repaid to the County as provided for in Article Six, Repayment Phase, below.

3.3 The County and the Town shall each keep detailed and accurate accounting records with respect to any payments made or received pursuant to this Agreement.

### **ARTICLE FOUR** **PRE-CONSTRUCTION PHASE**

4.1 **Town Responsibilities**—During the Pre-Construction Phase, the Town shall have the following responsibilities:

- (a). The Town shall appoint a Designated Representative to work with the County and the Engineer in overseeing all work done during this Pre-Construction Phase.
- (b). The Town shall contract with an Engineer to design the Project and to prepare bid specifications for use in selecting a Contractor to build and install the project.
- (c). The Town shall submit Requests for Payment to the County upon receiving Project Invoices for services rendered during this Pre-Construction Phase. The Requests for Payment shall be for the amount of the Project Invoice(s) and a copy of the corresponding Project Invoice(s) shall accompany each Request for Payment.
- (d). The Town shall remit payment on the Project Invoice within fifteen (15) days of receipt of County payments made pursuant to the Requests for Payment issued under Section 4.1 (b) above.
- (e). The Town shall submit copies of the designs and specifications to the County's Designated Representative for approval before putting the Project out for bidding. The Town shall not send out the bid specifications until final approval of said designs/specifications is provided in writing by the County's Designated Representative.

- (f). Upon receiving written approval of the design/specifications of the Project as provided in Section 4.1 (d) above, the Town shall put the Project out for bid. The County's Designated Representative shall be present at the bid opening and shall be provided with copies of all bids submitted in connection with this Project.
- (g). Before awarding the construction contract, the Town must secure written approval of its choice of Contractor from the County's Designated Representative.
- (h). The Town shall work directly with the Engineer and with the County's Designated Representative in overseeing all work done during this Pre-Construction Phase.

4.2. **County Responsibilities**—During the Pre-Construction Phase, the County shall have the following responsibilities:

- (a). The County shall appoint a Designated Representative to work with the Town and the Engineer in overseeing all work done during this Pre-Construction Phase
- (b). The County's Designated Representative shall review all designs and specifications submitted to him promptly and shall not unreasonably delay or withhold approval. Final approval of the Project design/bid specifications shall be provided to the Town in writing within ten (10) days of the County's Designated Representative's receipt of said documents.
- (c). Upon receipt of a Request for Payment, as provided in Section 4.1(b) above, the County shall remit payment to the Town in the amount requested, provided however that all Requests for Payment shall be accompanied by a Project Invoice to the Town in the same amount. Payments shall be remitted to the Town within fifteen (15) days of the receipt of the Request for Payment.

#### **ARTICLE FIVE** **CONSTRUCTION PHASE**

5.1. During the Construction Phase, the Town shall have the following responsibilities:

- (a). The Town shall contract with the selected Contractor for the construction of the Project. A copy of this contract, hereinafter referred to as the "Construction Contract" shall be provided to the County's Designated Representative, and written approval of this Construction Contract shall be obtained from the County prior to its execution.
- (b). Upon receipt of Project Invoices for work completed during this phase, the Town shall submit Requests for Payment to the County, provided however, that prior to submitting any Request for Payment to the County, the Town's Designated Representative shall approve the Project Invoice. The Requests for Payment shall be for the amount of the Project Invoice(s) and a copy of the corresponding Project Invoice(s) shall accompany each Request for Payment.
- (c). The Town shall remit payment to the Contractor, Engineer, or appropriate agency, as applicable, within fifteen (15) days of receipt of County payments made pursuant to the Requests for Payment issued under Section 5.1 (b) above.
- (d). The Town's Designated Representative shall work directly with the Contractor, the Engineer, and with the County's Designated Representative in overseeing all work done during this Construction Phase.
- (e). Not later than six months following the date of Notice to Proceed on the construction contract, the Town shall remit payment to the County in the amount of seven hundred and fifty thousand dollars (\$750,000.00).
- (f). Upon completion of construction, the Town shall secure written approval of the Project from the County's Designated Representative and the Engineer before final acceptance of the Contractor's work is issued pursuant to the Construction Contract.

5.2. During the Construction Phase, the County shall have the following responsibilities:

- (a). *The County's Designated Representative shall work directly with the Town's Designated Representative and with the Contractor and Engineer in overseeing all work done during this Construction Phase.*
- (b). *Upon receipt of a Request for Payment, as provided in Section 5.1 (b) above, the County shall remit payment to the Town in the amount requested, provided however that all Requests for Payment shall be accompanied by a Project Invoice to the Town in the same amount from the Contractor, Engineer, or appropriate agency. Payments shall be remitted to the Town within fifteen (15) days of the receipt of the Request for Payment.*

5.3 *At the end of the Construction Phase, the County and the Town shall reconcile their accounting documents concerning the Project in order to arrive at the Total Repayment Amount.*

## **ARTICLE SIX** **REPAYMENT PHASE**

- 6.1 *During the Repayment Phase, the Town shall have the following responsibilities:*
- (a). *At all times following the completion of the Construction Phase, the Town shall have ownership of the Project and shall be responsible for the operation and maintenance of all aspects of the Project, including but not limited to customer relations, ongoing operations, upkeep, maintenance, improvements, billing and collections.*
  - (b). *Each month, beginning with the second monthly billing cycle of customers of this Project, the Town shall remit an Installment Payment to the County. The Installment Payment shall be calculated as defined in Article Two above and shall be sent to the County on the same date that monthly bills are mailed to the customers of this Project. A detailed accounting of the Town's customers, by category shall accompany each Installment Payment submitted under this Section. Interest shall begin to accrue on a late Installment Payment beginning on the thirty-first (31) day after which payment was due and shall accrue and be calculated at the same rate and in the same manner prescribed by North Carolina General Statute 150-241.1(i).*
  - (c). *The Town shall make monthly Installment Payments pursuant to Section 6.1 (b) until such time as the total amount of Installment Payments made by the Town to the County equals the Total Repayment Amount.*
- 6.2 *During the Repayment Phase, the County shall have the following responsibilities:*
- (a). *The County shall keep accurate accounting records of Installment Payments submitted by the Town pursuant to Section 6.1 (b) above.*

## **ARTICLE SEVEN** **COVENANTS, REPRESENTATIONS AND WARRANTIES**

7.1 **Authority of the County:** *The County represents and warrants that it is a political subdivision of the State of North Carolina and that it has the full power and authority required to enter into this Agreement and to perform its obligations hereunder.*

7.2 **Authority of the Town:** *The Town represents and warrants that it is duly organized as a municipal corporation fully chartered in the State of North Carolina and that it has the fully power and authority to required to enter into this Agreement and to perform its obligations hereunder.*

7.3 **Approval and Permits:** *The Town covenants to use its best efforts to obtain all federal, state and local government regulatory approvals and permits, all licenses and other rights necessary to perform its obligations under this Agreement.*

7.4 **Regulatory Compliance:** *The Town represents and warrants that the Project and any related facilities will comply with all applicable regulatory standards of EPA and DENR or other applicable governmental entities.*

7.5 **Operation and Maintenance:** *The Town covenants to provide all of the operation, preservation, and maintenance requirements of the Project and to maintain the system in good repair and working condition unless prevented therefrom by Force Majeure.*

## **ARTICLE EIGHT** **FORCE MAJEURE**

*In the event that either Party, by reason of Force Majeure, shall be rendered unable, in whole or in part, to carry out its obligations under this Agreement, then if such Party shall give notice and full particulars of such Force Majeure in writing to the other Party within twenty-four (24) hours of the existence of such Force Majeure subject to the following conditions: (i) the obligation of the Party giving such notice so far as it is affected by such Force Majeure shall be suspended during the continuance of the inability then claimed, but for no longer period; and (ii) any such Party shall be required to resume performance of its obligations under this Agreement upon the termination of the aforementioned Force Majeure; provided, however, the Party unable to perform shall use its best efforts and act in good faith to avoid or overcome the impediment. No Force Majeure, which renders any of the parties unable to perform under this Agreement, shall relieve a Party of its obligations to make any payments provided for herein.*

## **ARTICLE NINE** **DISPUTE RESOLUTION**

*The Dispute Resolution process will provide an orderly mechanism to address disagreements and disputes related to this Agreement. Disputes could relate to the amount requested in Requests for Payment under Sections 4.2 (c) and 5.2 (b), the amount of monthly Installment Payments made under Section 6.1(b), or to other matters of common interest to the Parties.*

*9.1. **Payments Required:** Both Parties are responsible for making undisputed payments. If a Party chooses to dispute all or part of any billing or payment arising under the terms of this Agreement, said Party shall provide written notification to the other Party immediately. If the dispute cannot be resolved in a reasonable period of time, it will be subject to the dispute resolution process as set forth in Section 10.2.*

*9.2 **Dispute Resolution Process:***

- (a) Any claims, disputes or other matters in question not resolved or settled by the Parties hereto shall be initially referred to mediation, unless mediation is waived by mutual written consent of both parties. All mediation shall be conducted in accordance with N.C. G.S. § 7A-38.1 et. seq. and rules and revisions adopted by the Supreme Court of North Carolina.*
- (b) If the parties are unable to resolve the dispute by mediation, a civil action for any litigation due to any breach of this Agreement shall be filed in a court of competent jurisdiction in North Carolina.*

## **ARTICLE TEN** **DEFAULT AND ENFORCEMENT REMEDY**

*In the event that any Party breaches or fails to perform any material obligation of this Agreement, other than the obligation of the Town to make Installment Payments under Section 6.1 (which will automatically result in the conversion of the amount due to an interest-bearing loan as provided in Article Fourteen below), the other Party, after expiration of the time set forth in the Notice to Cure and the exhaustion of the initial procedure for the resolution of disputes set forth in this Agreement may seek declaratory relief, a writ of mandamus, or sue for specific performance of the obligation in the General Courts of Justice of North Carolina, and may seek both a temporary or permanent mandatory injunction requiring performance by the defaulting Party. In addition, and as a part of the same proceeding, the prevailing Party may recover reasonable attorneys' fees incurred and may recover for the actual loss of any net revenues during the period of default caused by the failure of performance of this Agreement. In no event shall any Party be entitled to sue for or recover any consequential or punitive damages. Specific performance, declaratory or injunctive relief, recovery of damages for loss of net revenues and reasonable attorneys' fees shall be the sole remedies of the Plaintiff Party against the Defaulting Party.*

## **ARTICLE ELEVEN**

## **DUTY TO MINIMIZE DAMAGES**

*Each Party to this Agreement shall have the affirmative duty to use its best efforts in good faith to minimize any losses or damages arising against the other.*

## **ARTICLE TWELVE NOTICE TO CURE**

*Any Party defaulting shall be given a written notice and demand to cure the breach of failure to perform within thirty (30) days by the Party claiming a breach or failure who shall prepare a certificate of mailing.*

## **ARTICLE THIRTEEN PROJECT LIEN**

*The County shall have a lien, in the nature of a mechanic's and materialman's lien, on the Project from the time that construction on the Project is completed and accepted until the Town makes the final Installment Payment required by Article Six. Upon the County's receipt of the final Installment Payment, the County shall provide the Town with written documentation of the release of said lien.*

## **ARTICLE FOURTEEN TERM/TERMINATION**

*14.1 The Term of this Agreement is from the day and year first written above until the end of the Repayment Phase, as set out more fully in Article Six above, including the Pre-Construction Phase, the Construction Phase, the Repayment Phase, and any time that occurs between these phases, subject only to the limitations in Section 14.2 below.*

*14.2 This Agreement is predicated upon the respective financial obligations set out more fully in Article Three, Financial Responsibilities. The failure of the Town remit the total amount of Seven Hundred Fifty Thousand Dollars (\$750,000.00) to the County within six months after construction has proceeded on the Project, in accordance with Article Five of this Agreement shall render this Agreement null and void and shall result in the Town's immediate forfeiture to the County of all rights and ownership in this Project, whether in real property, personal property or capital improvements.*

## **ARTICLE FIFTEEN AUDITS, RECORD KEEPING AND REPORTS**

*15.1 The Town shall keep separate, distinct and accurate records and accounts for all activities and endeavors provided for in this Agreement.*

*15.2 The County shall keep separate, distinct and accurate records and accounts for all activities and endeavors provided for in this Agreement.*

*15.3 The County shall have the right, at any time, to audit the Town's accounting records, customer lists, and any other record pertaining to the construction, engineering, operation and maintenance of this Project.*

## **ARTICLE SIXTEEN MISCELLANEOUS PROVISIONS**

*16.1 **Regulatory Bodies**—The Parties through this Agreement seek to exercise and maintain all sovereign rights granted to them under and through the Constitution and laws of the State of North Carolina. This Agreement shall be subject to all valid rules, regulations, and laws applicable hereto passed or promulgated by the United States of America, the State of North Carolina, or any governmental body or agency having lawful jurisdiction, or any authorized representative or agency of any of them; provided, however, that this clause shall not be construed as waiving the right of any Party to challenge the validity of such rule, regulation, or law on any basis, including the impairment of this Agreement.*

16.2 **Applicable Law**—This Agreement shall be construed and enforced exclusively in accordance with the laws of the State of North Carolina.

16.3 **Notices and Evidence of Actions**—All notices or communications provided for herein shall be in writing and shall be delivered either in person or by United States Mail, by certified mail, return receipt requested, postage prepaid. Notices or communications delivered or mailed to any Party shall be addressed to the principal office of such Party as follows:

The Town of Franklinville  
Attn: Mayor  
163 W. Main Street  
Franklinville, NC 27248

Randolph County  
Attn: County Manager  
725 McDowell Road  
Asheboro, NC 27205

16.4 **Severability**—Should any part of this Agreement, for any reason, be declared invalid or void, such decision shall not affect the remaining portions which shall remain in full force and effect as if this Agreement had been executed with the invalid portion eliminated.

16.5 **Non-Assignability**—No Party shall assign or transfer this Agreement or any rights or interests or responsibilities herein without the express written consent of the other Party.

16.6 **Execution in Counterparts**—This Agreement may be executed in several counterparts, each of which shall be deemed an original, and all of which shall constitute one and the same instrument.

16.7 **Modification and Amendment**—No change, amendment, or modification to this Agreement shall be made except in writing and agreed to by both Parties.

*On motion of Davis, seconded by Kemp, the County Commissioners voted unanimously to adjourn the special meeting for the County.*

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J. Harold Holmes, Chairman

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Darrell L. Frye

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Phil Kemp

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Robert B. Davis

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Arnold Lanier

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Cheryl A. Ivey, Clerk to the Board