



Municipal Corp. of Cape Charles

September 12, 2008

Mr. Richard S. Foster
Owner
Bay Creek Resort & Club
1 Club House Way
Cape Charles, VA 23310

Dear Mr. Foster,

This is in reply to your letter of August 18, 2008, in which you offer several reasons why you believe you cannot pay the July 31, 2008 invoice for the Bay Creek share of design fees for the new Wastewater Treatment Plant or any future design related invoices. The points contained in your letter are addressed below:

1. You state, "The Annexation Agreement calls for Bay Creek to participate in the funding of the expansion of the Water Treatment Plant (WTP) when demand exceeds the plant's permitted capacity. This has not occurred."

This is not an accurate interpretation of the Annexation Agreement which states that, "Brown & Root agrees to pay the cost of the physical expansion of the Town's sewer and water treatment systems, i.e. collection, distribution and treatment, to accommodate the additional treatment demands of the Brown & Root Property beyond the limits of the Town's current permitted capacities." Clearly, the language does not support your position. We are incurring costs on the time line necessary to provide additional capacity. Moreover, the July 31, 2008 invoice is only for design costs of the Wastewater Treatment Plant (WWTP). No design costs have been incurred for expansion of the WTP capacity, and we have repeatedly indicated to Bay Creek representatives that we would not do so until demand projections necessitated that we start that process.

2. You make the same argument in relation to the WWTP and also state, "The Town is replacing the plant (and expanding it at the same time) because of regulatory requirements, not because of capacity issues, so it is unclear to me why Bay Creek is expected to fund this now at a greater share than anyone else."

We certainly recognize that the schedule for replacement of the WWTP is primarily dictated by regulatory requirements as opposed to capacity expansion. That is why we have discounted the Bay Creek share by half (34% vs. 68%), in recognition that the first 250,000 of the 500,000 gallons per day capacity of the new WWTP represents

replacement of existing capacity. This has previously been conveyed to Bay Creek representatives and in my letter of July 11, 2008.

3. You state, "There are other successors and assigns that do not appear to be held to the same standards to which Bay Creek is being held."

We recognize that there may be additional development on portions of the former Brown & Root property and we will engage with the owners as plans mature. In any case, this does not affect Bay Creek's obligations under the Annexation Agreement. As stated in my July 11, 2008 letter, we will reevaluate and adjust the Bay Creek share as demand projections and other development plans evolve.

4. You state, "There are other properties in Town that are in various stages of development as well. All of these properties will contribute additional water and wastewater users. I've seen no indication that the Town is considering additional billing for these properties."

Other than the one proposed development discussed above, these are not located on the former Brown & Root property. While demand estimates for all planned developments have been included in our projections, they have no obligation to make payments beyond established connection charges as they are not subject to the Annexation Agreement.

5. You state, "Bay Creek has not agreed that water source, planning, engineering, legal and administrative fees are part of the "physical expansion" of the plant as described in the Annexation Agreement."

We recognize your position but fundamentally disagree. These costs are integral to the physical expansion of the water and wastewater systems.

6. You state, "Bay Creek has spent \$330,000 for the installation of the two new Town wells. The Town is getting ready to bring these wells on-line, but no consideration for our expenditure has been given."

We recognize the installation of these two wells and in fact have given consideration to their value. As you indicated, we are preparing to bring these wells on line and estimate that it will cost \$250,000 for the necessary pumping and piping. So, the estimate of total costs associated with making this additional water available to the treatment plant is \$580,000. The Bay Creek share would be \$394,400 (68% of \$580,000) an amount exceeding the cost of the two wells. As we do not yet have the actual costs of connection and have not started the design process for expanding the WTP, we felt that the Bay Creek share of this project was "close enough". This has previously been conveyed to

Bay Creek representatives but, if this is not satisfactory to you, we can recalculate after we have the actual cost of connecting the wells and either bill or credit Bay Creek for the variance from 68%. In that regard, we have repeatedly requested documentation to support the \$330,000 expenditure but it has not been provided.

7. The additional data concerning collection of facility fees has been provided by separate correspondence as it is a FOIA request.
8. Relative to cooperation, you make several statements concerning our contract task order with Stearns & Wheeler regarding provisions for Bay Creek participation in meetings and discussions. You state, "The Town has continually excluded Bay Creek from any of these contract provisions or any decision making discussions related to water or wastewater." You also indicate that you have been in favor of effluent reuse in the Bay Creek lake system for many years, and that this is another example of cooperative participation that would be of benefit to both parties.

The contract task order is an agreement between the Town and Stearns & Wheeler. The scope of the order is adjustable as we proceed with the project. In fact, the sentence you have quoted is contained in a section of the task order entitled "Recommended Plan". That aside, Bay Creek participated in the Project Chartering Meeting and has been provided copies of all Technical Memoranda produced under the task order. Relative to effluent reuse in the lake system, we are well aware that you have long been in favor of that concept. However, that has been contingent on not being required to post warning signs on the property. In our last meeting we thought you had expressed unconditional acceptance of effluent reuse. That led to our recent initiative to start the documentation necessary for a reuse plan acceptable to DEQ. In the response to Bob Panek's email, Oral Lambert made it clear that it was still your position that warning signs were unacceptable. Stearns & Wheeler recently confirmed that this still is a DEQ requirement. We are sorry if we misunderstood your statement in our last meeting, but at least we have confirmed that the level of cooperation being offered by Bay Creek on this issue is not quite sufficient given state regulations. This is indeed unfortunate for a variety of reasons, including environmental stewardship.

9. You state, "The Regional WWTP modeling studies appear to have been completed and they indicate that a WWTP of twice the capacity of the Phase I plant in Cape Charles (1 MGD vs. 0.5 MGD) can be built and maintained for approximately the same price being proposed by Cape Charles."

The Town has consistently expressed support for a regional solution if it is economically advantageous. We have also heard that the modeling studies have been completed but

have not yet seen the results. As indicated in my July 11, 2008 letter, we will not have firm cost estimates for a regional plant until a formal proposal is submitted for evaluation under the PPEA process. In any case, the work to produce the WWTP Preliminary Engineering Report, for which Bay Creek has been billed 34%, would be largely applicable to a plant at a regional site.

Although we have previously covered these points in several meetings with Bay Creek representatives and in correspondence, I hope the above will provide you sufficient information to favorably reconsider payment. So that there are no surprises, we are about to enter the comprehensive design process for the new WWTP and we will be submitting additional bills to Bay Creek as costs are incurred.

Moreover, we are very disappointed that you have still neither accepted one of the alternative proposals offered by the Town nor provided your own meaningful proposal. Instead, you have simply criticized the Town's efforts and continue to offer reasons to postpone any payment. Given this state of affairs, we appear to be heading towards litigation and perhaps downsizing the planned Wastewater Treatment Plant due to funding challenges. This will cost us all more in the long run. To avoid these eventualities, I would like to at least reach agreement that payment of these invoices would be credited against a future advance payment settlement that we would continue to work toward, as outlined in my letter of July 11, 2008.

Sincerely,



Joe Vaccaro
Town Manager

Cc:
Mayor and Members of Council