

**STATE OF NORTH CAROLINA
COUNTY OF WATAUGA**

**INTERIM AGREEMENT BETWEEN
TOWN OF BOONE
AND THE DOWNTOWN BOONE DEVELOPMENT ASSOCIATION, INC.**

THIS INTERIM Agreement (“Agreement”) is entered into this 1st day of October, 2010, by and between the TOWN OF BOONE, a North Carolina municipality (hereafter referred to as “the Town”) and the DOWNTOWN BOONE DEVELOPMENT ASSOCIATION, INC., a North Carolina non-profit membership corporation (hereafter referred to as “the DBDA”), collectively referred to as “the Parties.”

W I T N E S S E T H:

THAT, WHEREAS, the Town is a municipal corporation organized pursuant to the laws of the State of North Carolina and located in Watauga County, North Carolina; and

WHEREAS, the Town has established a Municipal Service District pursuant to N.C. Gen. Stat. § 160A-535, et seq., (hereafter, the “MSD”) from which it collects a Municipal Service District tax the authorized purposes of which are identified under State law; and

WHEREAS, pursuant to N.C. Gen. Stat. § 160A-536(d), the Town is authorized to enter into contracts to administer, in whole or in part, the Municipal Service District tax; and

WHEREAS, the Town is a participant in the North Carolina Main Street Program administered by the North Carolina Department of Commerce (hereafter, “the Main Street Program”); and

WHEREAS, the DBDA is a North Carolina Non-Profit Corporation, duly organized pursuant to the laws of the State of North Carolina and authorized by law to enter into Agreements for the purposes for which it was created, including the promotion, encouragement and assistance in the revitalization and economic health and stability of the Town’s Municipal Service District (the “MSD”); and

WHEREAS, the Town Council of the Town of Boone has voted not to renew its contract with the DBDA, but while it is studying the most effective means by which it may benefit the MSD with MSD tax funds wishes to enter an interim Agreement with the DBDA for the provision of certain activities for which the expenditure of Municipal Service District taxes are authorized and for the continued participation in the Main Street Program, while initiating safeguards to enhance the Town’s ability to ensure the expenditure of MSD funds in accordance with its wishes and with the law; and

WHEREAS, the parties wish to confirm this Agreement in writing;

NOW, THEREFORE, for and in consideration of the mutual promises and covenants set forth herein, and other good and valuable consideration passing from each party to the other, the receipt of which is hereby respectively acknowledged by each of the parties hereto, the parties agree

and contract as follows:

ARTICLE I. Term: This in an interim Agreement and recognized by each party as thus. The term of this Interim Agreement shall be six (6) months, commencing on July 1, 2010 and ending December 31, 2010. No continuation or renewal of the Agreement shall be inferred following its expiration, nor shall any further commitment by either party exist without specific action by each of the parties to authorize, create and adopt a new contract.

ARTICLE II. Consideration: In consideration of the DBDA's performance of the duties and responsibilities set out herein, the Town will pay the DBDA one-half of the 2010-2011 MSD tax revenues, when those revenues become available, estimated as Fifty-Five Thousand, Two Hundred and Fifty-Five and no/hundredths dollars (\$55,255.00) (hereafter, "MSD funds"). Each party recognizes and confirms that all MSD funds are derived from MSD taxes and are subject to all relevant restrictions for MSD tax funds set out in the North Carolina General Statutes. Should the Agreement be terminated or end before all funds have been paid, the Town shall reimburse the DBDA for any uncompensated activities performed pursuant to this Agreement.

ARTICLE III. Responsibilities of the DBDA: The DBDA shall utilize the MSD funds solely for purposes authorized by this Agreement, but may expend funds from other sources for other purposes so long as: (1) they are fully segregated from MSD funds; (2) they are accounted for using methods which satisfactorily assure that they are not commingled with MSD funds; (3) no MSD funds are used, either directly or indirectly, to support any activities which are not appropriate for the use of MSD funds; and (4) such other funds are expended in accordance with pertinent law and the DBDA's own by-laws.

- A. **Before** any funds are paid by the Town to the DBDA pursuant to this Agreement, the DBDA will complete the following actions:
1. Update its registration information with the North Carolina Secretary of State, designating as its registered agent for service of process a current staff or board member of the organization;
 2. Amend its website so that all businesses of whatever type and character within the MSD are listed there with correct and current information, and businesses outside the MSD are removed.
 3. Correct all business directional signs installed by the Town at the request of the DBDA so that they reflect all current businesses of every type and character within the MSD and so that the names of businesses which are no longer in existence within the MSD or are located in the downtown but outside the MSD are removed.
 4. Amend its bylaws to re-define the area of service with MSD funds, from "Boone's traditional downtown area" to Boone's "downtown area, comprised and coextensive with the Town's Municipal Service District," and limit its promotional activities to promotion of businesses within the MSD.
 5. Amend its bylaws:

- a. To require that every decision of the DBDA regarding the expenditure of MSD funds be approved, in advance, by the DBDA's Board of Directors; and
 - b. To make clear that the DBDA's "organizational committee" can only exercise the authority of the Board of Directors in the management of the DBDA pursuant to policies hereafter adopted by the full board and that any action authorized by the organizational committee shall be fully disclosed to the full board at the first opportunity and ratified by the full board.
6. Establish and post on its website, and begin keeping in accordance with the posted schedule, regular public office hours, in amounts and at times authorized by the DBDA's board of directors.
 7. Adopt a personnel policy which requires all DBDA staff to maintain time sheets accounting for all time spent in the pursuit of DBDA business in increments no greater than .25 hours, referenced and designated by the source of funds which are paying for the activity, and providing sufficient detail regarding the actual work conducted during the time reported so that a person reviewing the records will be able to discern exactly and specifically what activities were undertaken during the time reported.
 8. Provide the Town Manager with a complete accounting of all funds currently on hand, with the source of funds fully explained so that it can be determined which funds have derived from activities partially or fully underwritten with MSD taxes, which funds have been raised from private contributions, which funds have been raised from dues, which funds have been raised by charging for DBDA activities, which funds have been raised by foundation grant, and so on.
 9. Arrange for any employee or officer of the DBDA having access to the funds of the DBDA to be bonded in an amount sufficient to cover the full amount of all MSD funds currently or potentially in the control of the DBDA, and provide a copy of the bond to the Town Manager.

B. **After** funds are paid by the Town to the DBDA, the DBDA will:

1. Update its website and MSD directory signage at least on a **quarterly** basis.
2. Maintain regular office hours in accordance with the hours reflected on the website and approved by the DBDA's full board of directors.
3. Provide copies of staff time sheets showing activities and time spent and recorded with the adopted aforesaid personnel policy, by e-mail to the Town Council and Town Manager, or their individual designees, on a monthly basis, no later than five days following the end of each calendar month.
4. Adopt and provide to the Town Manager a comprehensive personnel policy

which addresses and ensures the proper performance of staff and expenditure of MSD funds, and which includes procedures for the supervision of staff and the discipline of staff, with personnel actions up to and including dismissal authorized.

5. Provide a detailed general ledger by e-mail or hard copy within ten days of the end of each calendar quarter to the Town Manager and Town Council, or their individual designees.
6. By September 1, 2010, provide the Town Manager and Town Council a full copy of an annual audit prepared by an independent auditing firm having no conflicts of interest and selected by the DBDA board of directors after a general solicitation to appropriate accounting firms in the region, including an Audited Income Statement with detailed expense categories, not just one generic “downtown redevelopment” expense item. The audit must disclose itemized expenditures by funding source, including such things as expenditures for each specific fringe benefit, rent, capital expenditure, activity, etc., and it must determine and disclose what portion and amount of the DBDA’s fund balance is comprised of MSD funds.
7. At least five days before each meeting of the DBDA board of directors, post on its website and provide by e-mail to those who have provided an e-mail address, or regular mail to those who have paid a reasonable fee, established by the DBDA board of directors, an agenda for the meeting and a copy of the draft minutes of the previous meeting to each MSD taxpayer and each business within the MSD which has provided the necessary contact information. The DBDA shall notify every MSD property owner and every MSD business owner at least once annually of the availability of the agenda and minutes, and it shall offer each an opportunity to provide an e-mail address or fee to cover the costs of mailing these materials.
8. At least five days before each meeting of the DBDA board of directors or membership, provide an agenda for the meeting and proposed minutes from the prior meeting by e-mail or regular mail to the Town Manager and the Town Council.
9. Adopt a comprehensive policy for the administration of facade and sign grants to be awarded by the DBDA during the term of the interim Agreement, which includes directives for advance notification to all MSD taxpayers and businesses of every kind within the MSD of the grant application process and award criteria in sufficient time to allow all eligible property owners and businesses to apply, and which specifically lists the criteria which will be used to award the grants.
10. Provide the Town Manager and Town Council with a copy of the organization’s Form 990 as soon as it is prepared.
11. Adopt a written policy which requires that a fund accounting system is created and maintained which ensures that MSD funds are used only in

accordance with the purposes authorized under State law and this contract.

12. Adopt written policies ensuring that MSD funds are used to benefit only the MSD area, are used to benefit the entire range of stakeholder categories (i.e. including service providers and other non-retail establishments) and all MSD locations (e.g. less traveled streets and outer boundary edges), and prohibiting the use of MSD funds, in whole or in part, to promote businesses or activities outside the MSD.
- C. The DBDA is required to apply at least 30% of MSD funds to infrastructure expenditures, which may include funds distributed as part of MSD authorized grant funds. Subject to said limitation, the DBDA may use the MSD funds to create, coordinate and administer District revitalization projects which provide for services or functions, such as additional garbage pick up, which are in addition to or to a greater extent than those provided or maintained by the Town for the entire town, but such expenditures shall be subject to advance review and permission by the Town's Town Manager. However, this shall not prohibit the DBDA from committing MSD funds back to the Town for use in any duly adopted plan by the Town aimed at improving the MSD, which is specifically authorized herein. In addition, the DBDA may, once it has complied with Article III(B)(9), administer a facade or sign grant program.
- D. The DBDA is required to apply at least 30% of MSD funds to infrastructure expenditures, which may include funds distributed as part of MSD authorized grant funds. Consistent with said limitation, the DBDA shall use MSD funds to create, coordinate and administer District revitalization projects which at a minimum include:
1. Promotion and developmental activities, such as sponsoring festivals and markets in the MSD, promoting business investment in the MSD, helping to coordinate public and private actions in the MSD, and developing and issuing publications on the MSD designed to improve the economic well-being of the MSD;
 2. Administration of any MSD revitalization project specifically requested by the Town;
 3. Creation, maintenance and administration of a clearinghouse for information concerning the availability of properties within the MSD for purchase or rent, by creating, maintaining and administering a repository of such information to which MSD property owners may contribute, as they may wish, and which shall be in a format which will make it broadly available to the public and to persons potentially interested in investment in the MSD;
 4. Without limiting the right of the Town to directly participate therein, participating in all activities requested or required by or of the Town and by the North Carolina Department of Commerce in order for the Town to continue to participate in good standing in the North Carolina Main Street Program and for the Town to derive all available benefits from its continued

participation in the Main Street program;

5. Without limiting the right of the Town to directly participate therein, maintaining all information requested or required by or of the Town in order for the Town to continue to participate in good standing in the North Carolina Main Street Program and for the Town to derive all available benefits from its continued participation in the Main Street program;
6. Without limiting the right of the Town to directly participate therein, timely submitting all information requested or required by or of the Town and by the North Carolina Department of Commerce to the Town and to the North Carolina Department of Commerce in order for the Town to continue to participate in good standing in the North Carolina Main Street Program and for the Town to derive all available benefits from its continued participation in the Main Street program; and
7. Reporting to the Town Council the duly adopted collective views of its full membership and its Board of Directors as to those actions and policies which the Town may consider within the District to improve the District's economic well-being.

ARTICLE IV. Activities to Serve entire Municipal Service District without Charge: All activities of the DBDA with MSD funds shall be undertaken in such manner, insofar as possible, as to provide benefits to and throughout the entire District. The DBDA shall not charge any business a fee for participating in any of its activities which are supported in whole or in part by MSD funds.

ARTICLE V. Compliance with Laws: The DBDA shall comply with all pertinent federal, State, county and Town laws, regulations and ordinances, including but not limited to all North Carolina and federal laws relating to the operation of non-profit membership corporations, including but not limited to those laws which govern the conduct of the annual meetings of its membership and the selection of its directors and officers. In addition, and not by way of exclusion, in any and all its actions and activities, the DBDA shall comply with and hereby certifies its compliance with the Americans with Disabilities Act, as amended, Title VII of the Civil Rights Act of 1964, as amended, the Fair Labor Standards Act, as amended, the Occupational and Health Safety Act, as amended, the North Carolina Employment Security Act, as amended, and the North Carolina Worker's Compensation Act, as amended, to the extent each such law applies to the DBDA or any of its activities.

ARTICLE VI. Compliance with its By-laws and Organizational Reporting to the Town: The DBDA will operate and act in accordance with its duly adopted by-laws, including but not limited to the provisions which govern the conduct of the annual meetings of its membership, the notice and quorum requirements for meetings of its board of directors, the selection of its directors and officers, and its prohibition against legislative advocacy. Contemporaneous with the execution of this Agreement, the DBDA shall provide the Town with its current by-laws and a roster of its current board of directors and officers, including their names, addresses, terms, and class of membership, and it shall seasonably notify and provide a copy to the Town of any changes in its by-laws or in its board of directors or officers. So long as the DBDA receives MSD funds, its by-laws shall provide that two members of the Town Council, appointed by the Town Council for one year terms, shall

serve as ex-officio members of its Board of Directors. In addition, so long as it receives MSD funds, the DBDA shall invite and include in its membership all property owners and businesses within the Municipal Service District. Should the DBDA's corporate status be revoked by the North Carolina Secretary of State, or should the DBDA's non-profit status be revoked by the United States Internal Revenue Service or otherwise, the DBDA shall immediately notify the Town, and this Agreement shall immediately terminate and any remaining MSD funds shall be immediately refunded and remitted to the Town.

ARTICLE VII. Reporting on its Activities: At least once during the term of the interim contract and no later than the October 2010 regular meeting of the Town Council, and at such additional times as may be requested by the Town, the DBDA shall report to the Town Council on its expenditure of MSD funds and shall submit its proposed work plan for its ongoing utilization of MSD funds. Said report shall include at a minimum descriptions of activities of the DBDA which have taken place during the period of time from July 1, 2010 to the date of the report and those activities which are planned for the remainder of the term. In addition, the report shall disclose all measurable outcomes from the activities of the DBDA which have been supported by the expenditure of MSD funds from July 1, 2010 through the date of the report, and the measurable outcomes anticipated during the remainder of the term.

ARTICLE VIII. Financial Reporting: In addition to providing the annual audit, as provided in Article 3(B)(6), the DBDA shall operate in accordance with generally accepted accounting principles. Financial information shall be provided in a form acceptable to the Town and shall include, among other things, a detailed accounting for all funds from all sources received or collected by the DBDA during the reporting period. In addition, the DBDA shall provide such records, verification of the expenditure of the funds, and other such information as requested by the Town. Should the DBDA at any time be advised by a funding, taxing or other governmental entity, or by its accountants, of any misappropriation of funds from any source or of any malfeasance or misfeasance, it shall immediately report such advice to the Town. Should the DBDA itself discover or determine any wrong doing, misappropriation, malfeasance or misfeasance, it shall immediately report such matter to the Town. The DBDA will notify the Town in writing within five days if any member of its staff is charged with or convicted of any crime involving malfeasance or misfeasance, or dishonesty in the use or handling of any DBDA funds, whatever the source, or if the DBDA itself is accused of any wrongdoing. Should the DBDA become aware of or suspicious of any embezzlement, malfeasance or misfeasance by an employee, agent, officer, director or other person connected with DBDA, of any of the DBDA's funds, whether from this grant or elsewhere, whatever the source, it hereby commits that it will promptly report to and notify the appropriate law enforcement agency of such act, omission or suspicion.

ARTICLE IX. Accountability: All records of the DBDA shall be available for inspection by the Town Manager or the Town Manager's designee. The DBDA agrees that records of all disbursements of funds will be maintained by it for a period of no less than three years, and upon request such books and records will be made available to the Town or its representative for inspection. The DBDA shall keep such full and detailed accounts as may be necessary for proper financial management under this Agreement, and the accounting methods shall be satisfactory to the Town. Should the DBDA cease doing business within three years of its last receipt of MSD funds, it will turn over its financial records to the Town for storage and eventual destruction.

ARTICLE X. Information regarding Staff: Within ten days of any change, the DBDA shall notify the Town of any change in its management staff.

ARTICLE XI. Indemnity: The DBDA is responsible for the proper expenditure of all MSD funds, and it shall indemnify and reimburse the Town for any misuse of said funds. The DBDA hereby releases, acquits and forever discharges the Town, its agents, officers and employees, from any claims, demands, costs, loss of services, expenses, compensation, liabilities and obligations, suits at law or equity, including claims or suits for contribution and/or indemnity of whatever nature and all consequential damages resulting from or on account of its use of MSD funds allocated or for other Town funds for which the DBDA is the conduit, and it hereby agrees to indemnify and defend the Town from any claims brought as a result of its use or misuse of said funds.

ARTICLE XII. Insurance: The DBDA confirms that it maintains sufficient liability insurance coverage to satisfactorily compensate any person for injury to a person or property caused by the operation of DBDA's programs and/or services. Within five days of its execution of this Agreement and upon request, it will provide the Town with proof of insurance. The DBDA agrees that should the Town determine, in its sole discretion, that the DBDA does not maintain adequate liability insurance to satisfactorily protect itself and its participants, it will promptly increase its coverage to a level determined necessary by the Town.

ARTICLE XIII. Lobbying: The DBDA will use no funds for purposes of local, state, or legislative advocacy or lobbying, or to attempt to influence the legislative process at the local, State, or federal level. Likewise, no funds will be used to carry on any religious or political activities, or to attempt to influence the outcome of any public election.

ARTICLE XIV. Default: If the DBDA defaults in the performance of any of its duties under Article III of this Agreement, all of which are deemed material, or violates any of the terms of Article IV through XIV of this Agreement, all of which are deemed material, the Town may immediately terminate the Agreement or suspend the payment of the funds, at its choice, without prior notice or an opportunity for the DBDA to cure its violation. Should the Town provide notice of default or notice of termination by the Town for any breach of the Agreement, the provision of such notice shall not be interpreted as a waiver of the enforcement of this or any other provision of the Agreement, and it shall not create any future requirement for notice prior to suspension of payments or termination of the Agreement. On the date specified in any such notice of default or notice of termination, this Agreement shall terminate. Should this Agreement be terminated, with or without notice, prior to the full expenditure of the funds by the DBDA, any unexpended Municipal Service District funds shall be immediately and fully remitted to the Town. The Parties acknowledge that due to past methods of record keeping and the passage of time it is not feasible to determine with precision the portion of the DBDA's fund balance which was comprised of MSD funds or direct earnings from those funds as of the close of its prior contract with the Town. Therefore, in order to resolve any future ambiguity and to protect the Town in its discharge of its fiduciary responsibility regarding MSD funds, the parties agree to the following:

- A. The DBDA's full fund balance from all sources as of June 30, 2010 was \$63,975.
- B. Of said fund balance, the parties agree that 50% of the full fund balance are MSD funds and 50% derive from other sources. Should any funds be subject to remission by the DBDA to the Town at the end of the term of this Agreement or due to early termination of this Agreement, this division of funds will guide the calculation of the amount of funds which must be remitted by the DBDA, recaptured by the Town or

withheld by the Town.

- C. The DBDA agrees that ninety percent (90%) of any funds not remitted, recaptured or withheld in connection with the foregoing shall nevertheless be subsequently expended by the DBDA solely on activities permissible under North Carolina State law and this Agreement for MSD funds, even if the term of this Agreement has expired, and the DBDA shall maintain sufficient records to confirm compliance with this provision until all affected funds have been fully expended and shall produce such records to Town upon request.

ARTICLE XV. Return of Unspent Funds: At the end of the term, the DBDA shall immediately remit and refund to the Town any unspent MSD funds, subject to the provisions of Article XIV, paragraphs A, B, and C.

ARTICLE XVI. Modification of Agreement, Merger: This Agreement contains all of the terms and conditions agreed upon by the Town and the DBDA. All discussions between them have been merged into this Agreement, and there are no oral terms or conditions agreed upon by the parties hereto which are not contained in this written Agreement. There shall be no modification of this Agreement unless the modification is in writing and signed by both parties.

ARTICLE XVII. Waiver: The Town's failure to strictly enforce any of its rights under this Agreement shall not constitute a waiver of such rights, and the parties agree that this provision may itself not be waived by the conduct of the parties, but only by a written instrument executed by each.

ARTICLE XVIII. Relationship of Parties: Each party shall be considered an independent contractor in relation to the other, and neither shall be construed to be an agent or representative of the other party except as otherwise provided herein with regard to the North Carolina Main Street Program. Therefore, neither party shall have any liability to a third party for the acts or omissions of the other party. In addition, neither party nor any of its employees, agents, or contractors shall be deemed to be employees or agents of the other party. Neither party nor any of that party's employees, agents or contractors shall be entitled to compensation for services, worker's compensation, or employee benefits from the other party by virtue of this Agreement or actions taken in furtherance of the Agreement.

ARTICLE XIX. Assignments: The DBDA shall not assign any of its duties under this Agreement or its right to compensation from the Town to any other person or entity without the written consent of the Town, but the Town shall have no responsibility, express or implied, to approve any proposed assignment.

ARTICLE XX. Force Majeure: In the event that either party shall be interrupted or delayed in completing performance of its obligations hereunder by an act of God or any other occurrence which is wholly beyond the control of the parties hereto, then it shall be excused from such performance for such period of time as is reasonably necessary after such occurrence to remedy the effects thereof.

ARTICLE XXI. Partial Invalidity: If any term, covenant, condition or provision of this Agreement shall, to any extent, be held by a court of competent jurisdiction to be invalid or

unenforceable, the remainder of the Agreement shall not be affected thereby, and shall be valid and enforceable to the fullest extent permitted by law. Any provision or part of the Agreement held to be void or unenforceable under any law or regulation shall be deemed stricken, and all remaining provisions shall continue to be valid and binding upon the parties, who agree that the Agreement shall be reformed to replace such stricken provision or part thereof with a valid and enforceable provision that comes as close as possible to expressing the intention of the stricken provision.

ARTICLE XXII. Headings and Construction of Agreement: The headings used in this Agreement have been prepared for the convenience of reference only and shall not control, affect the meaning, or be taken as an interpretation of any provisions of this Agreement. This Agreement has been prepared on the basis of mutual understanding of the parties and shall not be construed against either party by reason of such party being the drafter hereof.

ARTICLE XXIII. Entirety of Agreement: This Agreement supersedes any and all other Agreements, either oral or in writing, between the parties hereto with respect to the subject matter hereof and contains all of the covenants and Agreements between the parties with respect to said matter. Each party to this Agreement acknowledges that no representations, inducements, promises, or Agreements, orally or otherwise, have been made by any party, or anyone acting on behalf of any party, and that no other Agreement, statement, or promise not contained in this Agreement shall be valid or binding.

ARTICLE XXIV. Governing Law and Venue: This Agreement shall be governed by and construed in accordance with the laws of the State of North Carolina, and venue of any dispute between the parties shall be in Watauga County, North Carolina.

ARTICLE XXV. Execution: Each party represents and warrants to the other that all necessary authorizations and approvals required for execution and performance of this Agreement have been given and obtained, and that the undersigned individual is duly authorized to execute this Agreement and bind the party for which it signs.

ARTICLE XXVI. Notices: All notices, requests, demands, and other communications hereunder shall be in writing and shall be deemed given if personally delivered or mailed, certified mail, return receipt requested; to the following addresses:

If to the Town, to: Greg Young
Town Manager
Town of Boone
P.O. Drawer 192
Boone, NC 28607

If to the DBDA, to: Dempsey Wilcox, President
The Downtown Boone Development Association, Inc.
PO Box 362 DTS
Boone, NC 28607

IN WITNESS WHEREOF, the **parties** have executed this Agreement in duplicate originals, and agree to all of the terms and conditions set forth above, the day and year first above

written.

Town of Boone, by

Loretta Clawson, Mayor

Attest: _____(Seal)
Town Clerk, Town of Boone

Downtown Boone Development Association, Inc., by

President

Attest: _____(Seal)
Secretary, Downtown Boone Development Association, Inc.