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BERCHEM, MOSES, & DEVLIN, PC

Memo

TO: Members of the Town Council **cc:** Honorable James R. Miron, Mayor

FROM: Richard J. Buturla, Town Attorney

DATE: April 20, 2009

RE: **Shakespeare Theater**

The following sets forth a summary of the most recent revisions proposed by William Hanney, President of Cinema Designs Group, Inc. ("CDG"), regarding the terms and conditions of a proposed construction and facility use and management agreement (the "Proposed Agreement") concerning the Shakespeare Theater.

1) Introduction and Recitals

The Town requested that CDG "professionally" renovate the Theatre. CDG has deleted this requirement.

CDG has proposed forming a new entity to be known as American Shakespeare Theatre, LLC ("AST") to operate the Theater. AST appears to be single purpose entity and there has not been any financial, historical or other information provided to the Town about AST. Indeed, there are no personal or performance guarantees by Mr. Hanney, individually, with respect to this project.

2) Use of the Facility

AST has required the Town to agree and approve 1) AST's use of the White House, and possibly the storage building as residence facilities for Theater or artistic staff; and 2) use of the White House or another *new structure* to be constructed on the site as a *restaurant facility* (with *full liquor privileges* in any restaurant, in the Theater or on the grounds), subject only to appropriate state and local regulatory approvals. In other words, by virtue of the Proposed Agreement, the Town Council has agreed to the use of the property as a restaurant and the construction of new buildings and improvements without the benefit of any plans and/or without any further approval necessary by the Town Council.

The Town required that the Facility and the Theatre Grounds shall be exclusively available for use by the Town of Stratford Art's Commission, or other such Related Town

Entities, for an annual arts and theatre festival for a period of three (3) consecutive weeks sometime during the months of June, July, August and September of each calendar year of the Term.

AST has rejected this proposal. Instead, AST will only allow the Stratford Art's Commission to use 1) the exterior grounds, not the interior; 2) on a non-consecutive basis; and 3) if the Town reimburses AST for any costs associated with the Stratford Art Commission's use of the Facility.

AST has required the Town to also reimburse AST for any of its costs anytime the Town and Related Town Entities use the facility or grounds.

Additionally, AST has required the Town to provide police and fire protection to the facility and its grounds throughout the Term at no cost to AST. It is not clear if this provision applies to special duty officers.

Also, AST wants the authority to direct and require the Town to perform and provide maintenance and other municipal services, including police and fire.

3) CDG Construction and Renovation Responsibilities.

CDG has deleted any responsibility for it to prepare, review or provide to the Town design and construction documents (the "Construction Documents") in accordance with the Approved Plan and the Work. CDG has also deleted the responsibility for it to provide the Town with an As-Built or any other construction documents.

CDG has deleted any responsibility for it to prepare, review or provide to the Town for approval any bid packages for the Approved Plan and the Work or to otherwise comply with municipal, state and federal regulations and laws regarding public construction projects on municipally owned property.

CDG has deleted provisions regarding CDG's responsibility to the Town for acts and omissions of CDG's employees, Subcontractors and their agents and employees, and other persons performing portions of the Work under a contract with CDG.

CDG has eliminated the need for the Town's prior approval for CDG to make advance payments to, suppliers for materials or equipment, which have not been delivered and stored at the site.

CDG has reduced the time period from fifteen (15) to ten (10) business days for the Town to make payment to CDG.

CDG has mandated that no Certificate of Occupancy shall be issued by the Town if there is pending mediation between the Town and CDG.

CDG has eliminated any responsibility for CDG to pay for any additional costs and expenses incurred to correct CDG's defective Work during the one-year period commencing

on the date of Substantial Completion and/or to provide any warranties and guaranties for one year.

CDG has required the Town to provide written notice to CDG if the Town observes or otherwise becomes aware of any fault or defect in the performance of Town's obligations under this Agreement.

CDG has eliminated the Town's option to perform any work related to the Project with the Town's own forces and award contracts in connection with the Project, even if identified by the Town and coordinated by the CDG with other Project activities.

4) Term

AST has requested a 10 year term with three 10 year options for a total of 40 years. It has been our position that a lengthy term could provide AST with too many indicia of fee ownership, rather than simply, certain rights to use and operate the property.

5) Options to Renew Term

As has been stated previously, CDG has requested an initial term for a period of ten (10) years and further provided that CDG is not in default, CDG would have the option to renew for up to three (3) additional ten year terms.

However, the Town has proposed that in order for CDG to exercise any option to extend the terms, CDG would make a payment to the Town of the sum of Seventy Five Thousand ($75,000.00) dollars. Such a Renewal Payment would be made by CDG each and any time that CDG extended the term.

CDG has rejected this proposal and is not willing to make any such renewal payment in order to extend the initial or any subsequent term.

6) Annual Fees

AST has proposed that its requirement to pay an annual fee in conjunction with its use of the facility not commence until the 4th year of the term. Additionally, AST has agreed to only pay such an annual fee to the Town, if AST shall be entitled to a credit against the annual fee for the costs and expenses incurred and paid by AST to repair, maintain and improve the Facility and the Theater Grounds during each year of the term. Any excess costs could be carried over by AST and set off against future rent.

The Town had proposed annual fees of at least $120,000.00 during the initial term and increasing to as much as $320,000.00 during the final term of the Proposed Agreement.

AST proposed to pay only $50,000.00 during the first 10 year term, $60,000.00 during the second 10 year term, $70,000.00 during the third 10 year term and $80,000.00 during the last 10 year term.

However, these annual payments would be offset by CDG's maintenance costs and it is unlikely the Town would receive any fees at the fee level proposed by AST, nor would AST have any incentive to spend funds to maintain the facility beyond that specified in the agreement.

7) Concessions and Merchandise

AST has eliminated the Town's right to sell food and other such concession items at any community or municipal event.

AST has eliminated the Town's right to market and sell merchandise with regard to the Facility and the Theater Grounds.

8) Maintenance Costs

AST has eliminated any requirement to pay for any capital improvement cost necessitated by any code compliance resulting from a casualty loss which shall be the burden of the Town.

9) PILOT

The Town has proposed that commencing on the third anniversary of the Proposed Agreement and continuing for the entire term that CDG shall pay a payment in lieu of taxes ("PILOT") to Stratford.

AST has refused to agree to make any PILOT payment to the Town.

10) Productions

AST has proposed that it only be required to operate the Facility as a theater exhibiting the following number of productions 1) a minimum of *thirty (30)* live Performances each year for years *two thought ten*; 2) a minimum of *fifty (50)* performances each year during the next ten year renewal term; 3) a minimum of *seventy five (75)* performances per year during the second renewal term; and 4) a minimum of one hundred (100) Performances during the final renewal term.

AST eliminated any definitive obligation for AST to include during each year of the Term the works of William Shakespeare. Rather, the number of performances of a production or productions of the works of William Shakespeare would only be determined by the demand for tickets for such performances.

AST has eliminated any requirement to provide to the Town for its for review and approval AST's annual performance schedule setting forth dates, times and the title of any proposed performance. To the contrary, the Town is now required to provide AST with a schedule of any events that the Town wishes to hold at the facility.

11) Sponsorship of the Theater

AST has required that any and all revenue or other benefits related to any corporate sponsorship and any and all payments or other benefits received in exchange for the right to name or sponsor the Theater shall be retained by AST.

12). Taxes and Surcharges The Town has proposed that except for real estate property taxes which shall be waived by the Town in consideration of the payment by AST of the PILOT Amount, AST shall pay all taxes, if any, imposed as a result AST's use and operation of the Theater or the business conducted by AST at the Facility and Theater Grounds. Additionally, commencing on the third anniversary of the Commencement Date, the Town has proposed the right, but not the obligation, to assess a ticket surcharge, e.g., $1.25 per ticket during the initial term and increasing to $3.00 per ticket during the last renewal term.

AST will not agree to any ticket surcharge.

However, beginning at the First Renewal Term and continuing through the end of any Renewal Term, AST agreed to pay to the Town the sum of $100,000 per year, payable monthly in arrears. All such revenues derived from such surcharge may be deposited into a Town fund to be utilized a) to pay the bonds issues by the Town to renovate the facility; b) to pay for economic development and other activities to promote and maintain the facility and theater grounds; and c) use the surplus of such funds in the Town's sole and absolute discretion.

13) Construction of New Buildings

AST has requested the ability to construct certain improvements at the Property, including but not limited to a restaurant/banquet facility and/or a multi-unit residential dwelling building for employees and/or actors at the Facility. AST has strictly limited the Town Council's discretion/ability to approve any such improvements, i.e., consent may not be unreasonably withheld by either the Town Council or the zoning agencies.

14). Insurance AST has eliminated its responsibility to maintain fire and casualty insurance on the theatre. AST now requires that the Town obtain and maintain throughout the term of this Agreement, insurance coverage in the aggregate amount equal to the replacement cost of the theater for fire and casualty loss to the theater.

15) Fire and Casualty Damage. AST now requires that if the Facility or any part thereof shall be damaged by fire, natural disaster, invasion or other casualty, AST shall give immediate notice thereof to the Town. If the casualty loss cannot be repaired within twelve (12) months, either the Town or AST may at its option terminate this Agreement. If the casualty loss can be repaired within twelve (12) months, or if both the Town and AST choose not to terminate this Agreement, the T*own shall repair, restore, replace, or rebuild the damaged or destroyed Facility* as nearly as possible to its prior condition; this would apparently include the restaurant and any new building, such as the multi-family residential building to be constructed by AST.

16) Assignment and Transfer. Hanney proposes that the ownership of both AST and CDG can be changed and the Town cannot unreasonably withhold its consent.

17) Suspension or Termination by the Town.

AST has significantly limited the Town's ability to enforce the terms of the Proposed Agreement and to terminate the Proposed Agreement. Indeed, AST has proposed that it shall have the right to step into the shoes of CDG and complete CDG's obligations if CDG is in breach of the Proposed Agreement. Moreover, AST has eliminated the Town's right to terminate the Proposed Agreement even if AST should fail to properly furnish administration and management services or to use best efforts to operate the Theater in a professional and economical manner consistent with the highest industry standards and practices and with the interests of the Town.

18) Payment Bonds.

CDG has eliminated its obligation to purchase and maintain insurance in compliance with Section 49-41 (a) of the Connecticut General Statutes. Specifically, the Town had required CDG to provide a labor and material payment bond in the entire amount of the Guaranteed Maximum Price. In addition, a performance bond must also be provided in the entire amount of the Guaranteed Maximum Price. Such bonds must conform to the Town of Stratford's current requirements and be approved by the Town as to the form.

CDG has removed this provision from the Proposed Agreement.

19) Conclusion.

In summary, as Town Attorney, I have significant reservations concerning the Proposed Agreement. Therefore, at this time and in the present form, I do not recommend that the Town enter into this contract with AST and CDG. While we all share in the goal of a revitalized Shakespeare Theater, a deficient contract will burden the Town for generations to come.