



Memo

To: Honorable Mayor Pinkham
Board of Trustees
Town Administrator Halburnt

From: Gregory A. White, Town Attorney

Date: April 22, 2011

RE: Friends of Stanley Hall Agreement – Town Board Options

I have been requested by the Town Board to provide a legal opinion with regard to the Town Board's options with regard to provisions of the Amendment to the Agreement between the Friends of Stanley Hall, Inc. (FOSH) and the Town of Estes Park (the "Town") dated May 9, 2006, relating to the decision required to be made by the Town Board on or before May 9, 2011.

BACKGROUND

In January of 1994, the Town of Estes Park entered into three development agreements with the owners of property known as the Stanley Historic District. One of the development agreements was between Stanley Hotels Limited (the "Stanley Hotel") and the Town. Section 6.01 of that Development Agreement provided that the Stanley Hotel would lease Stanley Hall to the Town for ten years subject to certain conditions, one of which was "the Town will use Stanley Hall as a performing arts center..." Shortly thereafter, the ownership of the Stanley Hotel filed bankruptcy. In 1995, New Stanley Associates acquired the Stanley Hotel property as part of the liquidation of the bankruptcy estate. Also, in 1995, the Town, EPURA and New Stanley Associates determined that it was necessary to make emergency repairs to Stanley Hall in order to allow Stanley Hall to be used as a performing arts facility.

The Town received a grant from the Colorado Historical Society for the renovation of Stanley Hall as a performing arts facility. As part of that process, an Advisory Committee was formed to advise the three entities with regard to the renovation of Stanley Hall. It became apparent to the entities and the Advisory Committee that more funding was necessary for the renovation of Stanley Hall than was available through the three entities including the Colorado Historical Society grant monies. A non-profit corporation was formed for the purpose of raising funds for the renovation of Stanley Hall known as Friends of Stanley Hall (FOSH).

New Stanley Associates subsequently determined that it was no longer interested in partnering with the Town, EPURA, and FOSH in the renovation of Stanley Hall and unilaterally took over the renovation. In 2002, FOSH had at its disposal the sum of approximately \$475,000 that had been raised for the renovation of Stanley Hall for a performing arts facility. The Town and FOSH entered into an Agreement dated May 14, 2002, which provided that FOSH transfer to the Town the sum of \$475,434.34. The Town agreed to accept those funds from FOSH and maintain those funds in a segregated account.

Paragraph 3 of the Agreement provided that the Town use the funds “as partial funding for the design and construction of a facility for the preservation of the performing arts”. The Town had four years from the date of the Agreement to determine whether or not the facility was feasible with the decision being within the sole discretion of the Town. If the facility was feasible, the Town would then have a total of seven years from the date of the Agreement to design and substantially complete construction of said facility and use the FOSH funds for the facility.

In the event the Town determined, within the original four year period, that the facility was not feasible, the Town then had two separate options as provided for in the Agreement. A copy of the FOSH Agreement is attached as Exhibit A.

In 2006, FOSH and the Town entered into the Amendment to the Agreement (the Amended FOSH Agreement). The Amended FOSH Agreement amended paragraphs 3 and 4 of the FOSH Agreement by extending the decision dates in the original Agreement for an additional five years. The Amended FOSH Agreement is attached as Exhibit B.

In June, 2006, a Goal Team of the Town Board reported back to the Town Board regarding the feasibility of building and operating a Performing Arts Theater at Stanley Park. Memo of June 10, 2006 attached hereto as Exhibit C. Subsequent to June of 2006, a non-profit corporation was formed specifically to raise funds for and operate a performing arts facility at Stanley Park known as the “Supporters of Performing Arts, Inc.” (SOPA). Following discussion between SOPA and the Town Board, the parties entered into a Memorandum of Understanding dated January 28, 2008 outlining the responsibilities and understandings between the parties regarding the location, construction, operation of the proposed Performing Arts Facility to be located on a portion of the Stanley Park Fairgrounds. As part of that Memorandum of Understanding, in Paragraph C.3, the Town agreed to use the then current balance of the funds in the Theater Fund (FOSH Monies) for construction of the Theater subject to the terms and conditions of the Memorandum of Understanding. A copy of the Memorandum of Understanding is attached hereto as Exhibit D.

On April 28, 2009, SOPA and the Town amended the Memorandum of Understanding. Paragraph C.3 of the Amended Memorandum of Understanding remained the same. A copy of this Amended Memorandum of Understanding is attached as Exhibit E.

Some time after the execution of the Amended FOSH Agreement of May 9, 2006, FOSH dissolved as a non-profit corporation in accordance with the applicable provisions of the Colorado Statutes.

TOWN BOARD OPTIONS

According to the terms and conditions of the FOSH Agreement and Amended FOSH Agreement, the Town Board has until May 9, 2011 to determine whether or not a facility for the preservation of the performing arts is feasible and, if the Town Board determines such feasibility, the Town shall have until May 9, 2014 to design and substantially complete construction of said facility and use the FOSH funds for said facility. The Amended FOSH Agreement also provides that "all the funds shall be disposed of by the Town pursuant to this Agreement within eight (8) years of the date of this Agreement (May 9, 2014).

In the event the Town determines on or before May 9, 2011 that a facility is not feasible, the Town shall then have the following options:

Donate the funds to any non-profit organization whose primary focus is within the Estes Valley and whose non-profit purpose involves the performing arts, or if the Town determines in its sole discretion that there is no appropriate organization within the Estes Valley which provides support for the performing arts, the Town may donate the funds to such an organization located within the Northern Colorado area.

Due to the fact that FOSH has been dissolved, there is no party with which the Town can negotiate a further amendment to the FOSH Agreement and Amended FOSH Agreement.

It is my opinion that the Town Board has the following options:

1. Make a determination that the Stanley Park Performing Arts Facility as designed by SOPA is feasible; and based upon that determination, the Town shall have an additional three years to participate with SOPA in the design and substantial completion of said facility and use the FOSH funds for said facility. As part of this determination, the Town Board may want to further modify or amend the current Memorandum of Understanding with SOPA to reflect appropriate terms and conditions with regard to this determination.
2. It is my opinion the Town Board has the option of extending the time periods in the Amended FOSH Agreement to allow for additional time in which to make the determination of feasibility.

Due to the fact that FOSH is no longer a legal entity and there is no legal successor in interest to FOSH, it is my opinion that the Town does not incur any substantial legal liability in extending the deadline in Section C of the Amended FOSH Agreement. The

only possible affected parties would be those entities within the Estes Valley whose purpose involves the performing arts or like organizations within the Northern Colorado area. Since it is within the sole discretion of the Town Board as to which entity or entities would be entitled to distribution of the Amended FOSH funds under Paragraph 3.c, it is my opinion that individual entities would not have legal recourse against the Town for the extension of the deadline in the Amended FOSH Agreement. In rendering this opinion, I have consulted with numerous attorneys in the Northern Colorado area who have experience with regard to foundations and non-profit corporations. None of these attorneys have been able to provide any legal reason why this option is not legally available to the Town. Also, I have consulted with the Colorado Attorney General's Office who has informed me that the Colorado Attorney General's Office does not have jurisdiction over this matter pursuant to the applicable provisions of the Colorado Statutes.

Section 7-134-105(2) C.R.S. provides that a 501(c)(3) non-profit corporation (FOSH) may distribute, as part of its dissolution, its assets to a local government for a public purpose. It is my opinion that FOSH met the terms and conditions of this provision of the State Statute by distributing its assets to the Town pursuant to the terms and conditions of the FOSH Agreements. There was no provision in the FOSH Agreements for return of the FOSH funds to FOSH nor any successor entity. It is my opinion that extension of the deadline in the Amended FOSH Agreement by the Town Board to allow sufficient time to determine the feasibility of the Performing Arts Theater at Stanley Park is consistent with the public purpose of the transfer of the FOSH funds to the Town.

The Town Board may make its decision with regard to the above options by motion.



Memo

To: Honorable Mayor Pinkham
Board of Trustees
Town Administrator Lancaster

From: Gregory A. White, Town Attorney

Date: April 18, 2013

RE: FOSH Agreement – Determination of Feasibility

Background:

Pursuant to an Agreement dated May 14, 2002 between Friends of Stanley Hall (FOSH) and the Town of Estes Park (the “Town”), FOSH transferred to the Town \$475,435.34. The Agreement was amended on May 9, 2006 (the “FOSH Agreements”). The current amount of the FOSH funds held by the Town is approximately \$458,215.

Pursuant to a Memorandum of Understanding between the Town and the Supporters of the Performing Arts, Inc. (SOPA), the Town agreed to use the FOSH funds for construction of the Performing Arts Facility (the “Theater”) located on the Stanley Park Fairgrounds property owned by the Town. On April 26, 2011, the Town Board extended the FOSH Agreements to determine feasibility of the SOPA Theater project to May 9, 2012, and extend all other dates in the FOSH Agreements by one year. In March, 2012, SOPA terminated the MOU with the Town effective April 12, 2012.

Town Staff has developed an application process for Estes Valley Non-Profit Organizations whose non-profit purpose involves the performing arts to apply for donation of the FOSH funds. However, the Town Board has never made a determination pursuant to Section 3.c of the FOSH Agreement and Paragraph 3.c of the Amendment to Agreement “that a facility is not feasible”. The FOSH Agreement refers for use of the FOSH funds as follows:

“As partial funding for the design and construction of a facility for the presentation of performing arts. Said facility may be a part of or combined with other uses in a multi-task purpose facility. Said facility may be either an indoor or partially enclosed facility. The Town may be the sole owner or lessee of the facility and/or the Town may partner with another entity for the design, construction and operation of the facility.”

Prior to moving forward with the application process for donation of the FOSH funds, the Town Board needs to make a determination that “a facility is not feasible”. There are no other references within the FOSH Agreements as to how a determination of non-feasibility is to be made by the Town Board.

Section 4 of the Amendment to Agreement provides that all the funds shall be disposed of by the Town within eight years of May 9, 2006. This date was extended by the Board’s action on April 26, 2011, for an additional year. Accordingly, the last potential date of distribution of all the FOSH funds will be May 9, 2015.

Accompanying this Memo is a Memo dated April 22, 2011 which provides further background information to the Town Board.

Budget:

There are no implications to the Town Budget as the Town is holding the FOSH funds in a fiduciary capacity pursuant to the terms of the FOSH Agreements.

Staff Recommendation:

The Town Staff has no recommendation for this action as this is a policy decision of the Town Board.

Sample Motion:

I move that that pursuant to the applicable provisions of the FOSH Agreements a facility is not feasible and direct Staff to begin the application process.

or

I move that pursuant to the applicable provisions of the FOSH Agreements a facility is feasible as (identify facility and feasibility).

acquisition and resale of low-income housing. Extensions of the agreement have been approved by the Town Board in 2008, 2010 and 2011. The current extension expires on June 1, 2013; however, a balance of the loan remains with approximately \$313,000 still outstanding. The Authority has requested an additional two-year extension through June 1, 2015 with a commitment to continue to make principal payments on the loan with each unit sold as well as monthly payments of \$2,000 regardless of unit sales.

Director Kurelja was present and thanked the Town Board for the continued support of the Authority. She stated the Authority through the partnership with the Town has provided low income housing to seniors, provided housing to teachers, seasonal housing and filled a tremendous community need.

It was **moved and seconded** (Koenig/Ericson) **to extending the Estes Park Housing Authority Loan for two years, expiring on June 1, 2015**, and it passed unanimously.

7. **FOSH AGREEMENT - DETERMINATION OF FEASIBILITY.** Pursuant to an Agreement dated May 14, 2002 between Friends of Stanley Hall (FOSH) and the Town of Estes Park, FOSH transferred to the Town \$475,435.34 raised to build a performing art theater in Estes Park. A Memorandum of Understanding (MOU) between the Town and the Supporters of the Performing Arts, Inc. (SOPA), stated the FOSH funds would be used to construct a theater at Stanley Park Fairgrounds property owned by the Town. On April 26, 2011, the Town Board extended the FOSH Agreements to determine feasibility of the SOPA Theater project to May 9, 2012, and extend all other dates in the FOSH Agreements by one year. In March, 2012, SOPA terminated the MOU with the Town effective April 12, 2012. The original FOSH agreement stated if a performing arts theater was determined to not be feasible the funds should be distributed; however, the Town Board has not determined the feasibility of a theater. Prior to moving forward with the application process for donation of the FOSH funds, the Town Board needs to make a determination that "a facility is not feasible". There are no other references within the FOSH Agreements as to how a determination of nonfeasibility is to be made by the Town Board.

Trustee comments have been summarized: Trustee Blackhurst stated the Town should follow through with the original intent of the donors and terminate the agreement and distribute the funds per the agreement; Trustee Elrod commented the theater has been determined to be feasible based on the recent approval by the Board to agree to a land purchase by EPIC for a theater downtown; and Trustee Norris would support the feasibility of the theater to allow EPIC the opportunity to move forward with the current plan.

Stan Black/EPIC Board President read a prepared statement from the EPIC Board stating the approval of the purchase option agreement between EPIC and the Town was predicated on the fact the proposed performing arts theater downtown was in fact feasible. The EPIC Board continues to move forward investing time and money into the project including funds dedicated to the development plan, consultants and a capital campaign. He requested the Town honor the intent of the 270 FOSH donors to build a performing art theater in Estes Park.

Teresa Marie Widawski/County resident and EPIC supporter reaffirmed the Board's approval of the land option suggested the project was feasible and requested the Board provide EPIC the time to raise the capital before determining the project is not feasible.

It was **moved and seconded** (Blackhurst/) **that pursuant to the applicable provisions of the FOSH Agreements a facility at the Stanley Park fairground is not feasible and directed staff to begin the application process to distribute the existing FOSH funds**, motion died for a lack of a second.

It was moved and seconded (Phipps/Koenig) the construction of a Performing Art Theater appears to be feasible as of this date. The Town will continue to hold FOSH funds as it has been until January 31, 2017. If no significant construction of a new Performing Art Theater in Estes Park is underway by said date, applications for funds shall then be taken and acted upon by the Town Board. What will constitute significant construction shall be determined by the Board of Trustees at that time. The motioned passed with Mayor Pro Tem Blackhurst voting "No".

Mayor Pinkham whereupon he adjourned the meeting at 11:51 p.m.

William C. Pinkham, Mayor

Jackie Williamson, Town Clerk