



DEPARTMENTAL CORRESPONDENCE



OFFICE OF THE CITY ATTORNEY

TO: Mayor Jordan City Council

CC: Susan Norton, Chief of Staff Paul Becker, Chief Financial Officer Jonathan Curth, Development Services Director

Kit Williams City Attorney Blake Pennington Assistant City Attorney Jodi Batker Paralegal

FROM: Kit Williams, City Attorney [Signature]

DATE: May 25, 2022

RE: TheatreSquared’s proposal for a second amendment of its June 2016 Lease

Executive Director Martin Miller of TheatreSquared and his attorney have contacted me and several Council Members to request amendments to the Lease Agreement negotiated by TheatreSquared, Inc. in 2016. Reviewing the recordings of the three City Council meetings for these negotiations, I see that of our current City Council, only Council Members Sarah Bunch and Mark Kinion are still in office. Thus, I need to provide our six newer Council Members a brief history of how and why the Lease Agreement and the \$3.1 Million City taxpayer investment were agreed to by the City Councils of 2015-2017.

History of City Council Approvals of Lease Agreement

The City Council passed a Resolution To Express The City Council’s Support Of TheatreSquared And Its Intent To Lease 0.8 Acre of City Property At The Southeast Corner of West And Spring As TheatreSquared’s New Permanent Performance Facility on October 6, 2015. After passage of this Resolution supporting the creation of a lease, I began to draft a proposed lease. I used our long-negotiated Lease Agreement between the City, University of Arkansas and the Walton Arts Center as an appropriate model. Indeed, I used the same basic format, terms and much of the wording we had worked out with the University and Walton Arts Center in our first draft of the proposed lease with TheatreSquared. It seemed logical to treat both theater organizations leasing City property in the same manner.

Much of the legal consideration flowing to our taxpayers to support this 100-year lease requested by TheatreSquared mirrored the Walton Arts Center’s long-term lease with its promise to “operate, manage, and maintain the premises”. (emphasis added)

That maintenance requirement was specifically agreed to by Theatre Squared, Inc in their lease and constituted a substantial amount of consideration for our citizens to justify and legally support the 100 year no money paid lease agreement.

After some negotiations, I notified the City Council that TheatreSquared's attorney had "supplied my office with a revised Lease Agreement which is the version Mayor Jordan has authorized to be furnished to the City Council for its review, consideration, approval or rejection, or to be changed by the City Council to meet its approval ..." memo from City Attorney to Mayor/Council on May 24, 2016. As you see, the Lease Agreement presented to the City Council was the final version drafted by TheatreSquared itself. Now, TheatreSquared, Inc. seeks to dramatically change this Lease Agreement by shifting tens of thousands of dollars of its annual legal obligations onto the backs of Fayetteville's taxpayers. With over 94 years remaining in the agreed lease term, TheatreSquared's shifting of even just the building insurance premium expenses alone would cost our taxpayers at least Five Million Dollars for a building in which our citizens have no possessory rights until 2116 at the earliest.

Executive Director Martin Miller and Artistic Director Bob Ford jointly presented TheatreSquared's request to the City Council and public to agree to this no monetary payment 100-year lease. They told the City Council that this season TheatreSquared had passed 40,000 in yearly attendance and that the current budget was \$2 Million. They predicted a **doubling** of TheatreSquared's impact after completion of the theater project. With those promising numbers, the City Council agreed to TheatreSquared's proposed Lease Agreement and authorized Mayor Jordan to sign it.

3.1 Million Dollar Investment Into TheatreSquared's Project

TheatreSquared, Inc. later requested that the City of Fayetteville also invest several million dollars into this theater project. This was no surprise and was the main reason that the City could only lease the parking lot land to TheatreSquared, not sell it. If the City had sold the land, the City could not have constitutionally made any direct monetary investment into this Theater project. Because the City leased rather than sold the land, the City could invest in this building project because we would legally own the building being constructed upon City property even though the City would have no legal possessory rights to the building for a century.

If we no longer owned the property, the *Arkansas Constitution* would prevent using tax payer money to construct another entity's theater project. *Arkansas Constitution*, Article 12 §5 "No county, city, town or other municipal corporation shall ... obtain or appropriate money for ... any corporation, association, institution or individual." This Constitutional provision was amended in 2016 to allow cities to appropriate money to "Finance economic development projects." However, the long list

of allowed economic development projects in that Constitutional amendment did NOT include theaters. Therefore, it is still unconstitutional to obtain or appropriate taxpayer funds to finance theaters or their operation.

Council Member Justin Tennant stated he was concerned for TheatreSquared's longevity and its ability to pay its maintenance costs in the long run. He asked if TheatreSquared had a maintenance plan to ensure it could pay for ongoing expenses. "What I'm trying to do is guard against in five years from now TheatreSquared has financial problems and goes away and the City is stuck with a very pretty building that does not give any money back to the community."

Martin Miller responded by repeating that they had had a surplus every year for seven years and built up a \$400,000 cash reserve. He pointed out that TheatreSquared would save between \$150,000 and \$200,000 annually by no longer having to pay rent and ticketing costs to the Walton Arts Center. Martin Miller assured the Council that even if their campaign to raise money was only able to raise 70% of their goal, TheatreSquared would still be able to operate successfully.

During the final comments from the City Council, some Council Members said they would vote for \$3.1 Million dollar investment since it was a one time expense. Council Member Tennant was concerned that TheatreSquared did not even have a five year maintenance plan and could come back in five years looking for more money. His prediction appears to have been correct as TheatreSquared is now, less than six years later, asking the Council to take over all significant maintenance costs, as well as building insurance costs and utility expenses.

Legal Consideration Necessary To Amend Lease

The October 6, 2015 Resolution showed that the Administration and City Council wanted to assist TheatreSquared as much as legally and constitutionally possible. To accomplish the intention of the Council, I included within the 100-year no monetary rent payment Lease Agreement as much performance, management, and maintenance consideration as TheatreSquared could provide to legally and constitutionally justify the lease. I have known for over 20 years that a city cannot constitutionally give taxpayer money away, even to a worthy charity. The City can recognize services such as paying for maintenance, repair, and insurance for its building as consideration supporting a lease. The considerations required of TheatreSquared in the lease must be fair, adequate, and valid for our taxpayers in relation to the value the City and our citizens would be providing the charity by the longest no money lease Fayetteville has ever agreed to.

Shortly after I became Fayetteville City Attorney in 2001, a Council Member asked me whether a Resolution passed the year before to appropriate 2 mills of

property tax for two years (approximately 2.3 million dollars) and give this money to match a generous private donation to build a new Fayetteville Boys & Girls Club on private land was legal. After extensive research, I had to conclude the City could not give this taxpayer money to match the private grant.

Some on the City Council and many others immediately objected, challenged my interpretation, and claimed I was endangering or maybe even personally opposed to the proposed new Boys & Girls Club. A Council Member called for an Attorney General's Opinion. Soon the Arkansas Attorney General issued his official opinion and said I was correct. The AG quoted from the same Arkansas Supreme Court case I had cited: *Halbert v. Helena-West Helena Industrial Development Corp.* 226 Ark. 620, 625-626 (1956) which: "establishes beyond all question that a municipality cannot contribute to a private, non-profit corporation regardless of whether the corporation serves a 'public purpose.'" The AG then cited and quoted *Arkansas Constitution, Article 12 § 5* which I have already quoted earlier.

The Arkansas Attorney General continued his opinion by stating "Nothing in the constitution precludes the county (or city) from contracting with a private nonprofit charity, **so long as the contract is supported by adequate consideration** and serves a governmental end. Cities and counties clearly can enter into contract that are supported by valid consideration." (emphasis added) Arkansas Attorney General Opinion No. 2001-135, page 2.

"Under Arkansas law, there must be additional consideration when the parties enter into an additional contract." *Youree v. Eshaghoff*, 99 Ark App. 4, 256 S.W. 3d 551, 555 (2007).

"The weight of authority is that a subsequent agreement that purports to modify or change an existing agreement must be supported by consideration other than the consideration involved in the existing agreement." *Sorrells v. Bailey Cattle Co.* 260 Ark. 800, 595 SW. 2d 950 (1980, Ark. App.)

When I prepared the original draft of the lease which the City Council had expressly requested, I had had to carefully include all the possible legal consideration that TheatreSquared could provide to support the granting this 100 year lease with no monetary payment to our citizens. **All of these promises by TheatreSquared in the lease were necessary to provide fair, adequate, and valid consideration to support the Lease Agreement's constitutionality.** With these promises to pay for all maintenance and repair of the building, its mechanical, electrical and plumbing systems, the building's insurance, and all utilities, this lease would likely be determined by a Court to be legal and constitutional.

However, I could not and did not omit any additional possible valid consideration which TheatreSquared could now use to support an amendment for the City taxpayers to assume expenses for the maintenance of the building, its insurance and utilities that TheatreSquared had promised to pay. TheatreSquared's promises to pay these expenses were necessary to protect the 100 year lease with no monetary payment against any legal challenges that Fayetteville had not received "adequate," "valid", and "fair and equitable consideration," *City of Fort Smith v. Bates*, 260 Ark. 777, 544 S.W. 2d 525, 527 (1976).

Paragraph (3) of the Lease Agreement states "**Rental**. As primary rental for the Premises, TheatreSquared, Inc. agrees to faithfully perform all of the Representations and Warranties of TheatreSquared, Inc. contained in Paragraph 36 of the Lease Agreement."

"Paragraph (36) Representations and Warranties of TheatreSquared, Inc. TheatreSquared, Inc. hereby covenants and warrants to the City of Fayetteville, Arkansas that:

...
"(C) At all times during the Term, Theatre Squared, Inc. shall operate, manage and **maintain** the Premises at the corner of West Avenue and Spring Street. . . ." (emphasis added)

Conclusion

To provide adequate, fair, valid, and equitable constitutional consideration to support the rent-free 100 year lease of City property to TheatreSquared, Inc., the Lease Agreement signed by TheatreSquared almost six years ago placed the monetary burden on TheatreSquared (just as it is placed upon the Walton Arts Center) to insure its building (Paragraph 6 Insurance). This is very reasonable because TheatreSquared, Inc. will have full possessory rights to the building for another 94 years with the City only holding legal title with potential full ownership and possession not available until 2116. At that point, the building will be 100 years old and probably in need of very substantial rehabilitation. The Walton Arts Center has long paid for insurance for its long-term leased building.

Both the Walton Arts Center and TheatreSquared are required to pay for the utilities they use. This is also quite fair as both have very long-term use and control of their buildings and good reason to be frugal, economic, and careful to conserve energy, water, etc. as long as it is their expense to pay. This is certainly an operating expense not appropriate or legal for the City to pay.

Building insurance and utility costs were both explicitly agreed to be paid by TheatreSquared in paragraph (6) Insurance and (9) Utilities of the Lease Agreement TheatreSquared signed on May 25, 2016. These were both important parts of the necessary adequate, fair, valid, and equitable consideration for our taxpayers necessary for the constitutional validity of the Lease Agreement. Removing any of these parts of the constitutional consideration necessary to support the Lease Agreement would be legally and constitutionally dangerous and suspect. Shifting this burden upon Fayetteville taxpayers for the next 94 years (which would add up to many millions of dollars during the lease terms) doubles the danger and loss of consideration necessary to support the lease.

Even more constitutionally dangerous would be to remove all major maintenance responsibilities required of TheatreSquared in the Lease Agreement it agreed to and signed and shift this financial burden to Fayetteville taxpayers. Paragraph (8) Maintenance by TheatreSquared, Inc. expressly requires: "TheatreSquared, Inc. shall, at its sole cost, risk and expense (i) maintain the Premises in good condition ... (iii) make, or cause to be made, all necessary repairs, whether interior, exterior or structural, on the Premises; and (iv) provide for the reasonable care, landscaping and cleaning of the Premises."

Maintenance costs and potential repair expenses were the very issues and concerns expressed by Council Member Tennant during the final City Council meeting before TheatreSquared could go forward toward construction. As I reported earlier, TheatreSquared's representatives told the Council in response to Council Member Tennant's concerns that even if they could "never raise another dime above 70% of the (fundraising) goal threshold needed to begin construction", that will not stop operations. I believe the City Council and our taxpayers are entitled to rely upon TheatreSquared's assertions made to convince the City Council to pass the Lease Agreement and the \$3.1 Million payment.

Maintenance and repair of the TheatreSquared's building and all of its structure and mechanical systems (elevator, air conditioning and heating systems, plumbing and electrical systems, exterior walls, roofs, windows, etc.) are very important parts of the valid, adequate and fair consideration TheatreSquared agreed to provide our taxpayers for the no monetary rent, 100 year lease of almost an acre of very valuable property in the Entertainment District. The City Council in June of 2016 approved TheatreSquared's own final draft proposal of the Lease Agreement which expressly and clearly placed the payment for maintenance, repair, insurance, and utilities upon TheatreSquared. Shifting the burden for any of these agreed to expense burdens from TheatreSquared to the citizens and taxpayers of Fayetteville would endanger the legality and constitutionality of this whole Lease Agreement.

A Better Way To Assist TheatreSquared, Inc.

First, I need to acknowledge that my wife and I are longtime season ticket holders for TheatreSquared productions. We have even contributed to TheatreSquared fundraisers, and we certainly hope it long continues its presentations of wonderful, intimate theatrical performances. However, I cannot allow my own admiration for TheatreSquared and its management and artists to cloud my judgment and duty to the citizens and taxpayers of Fayetteville.

Instead of risking a constitutional violation and possible litigation against the City by changing the Lease Agreement and locking the City into 94 years of taxpayers having to pay expenses TheatreSquared promised to pay and said they could pay even if they failed to achieve 30% of their fundraising goal, the City Council has a one-time opportunity to ensure TheatreSquared will receive the federal American Rescue Plan Act (ARPA) funds they may be entitled to.

Federal funds like ARPA can be paid pursuant to federal regulations and do not have the Arkansas Constitutional restrictions that our taxpayer funds in our General Fund have. I believe that this one-time opportunity for assistance is the best possible and legal way that the City Council can now assist TheatreSquared.