

**MOUNT AIRY, NORTH CAROLINA
CLOSED SESSION
August 16, 2018**

MEMBERS PRESENT: Mayor Pro Tem Jon Cawley, Commissioners Shirley Brinkley, Dean Brown, and Steve Yokeley. Mayor David Rowe participated by speaker phone.

APPROVAL OF AGENDA: On motion by Commissioner Brinkley, seconded by Commissioner Brown and passed unanimously, the agenda was approved.

APPROVAL OF MINUTES: On motion by Commissioner Brinkley, seconded by Commissioner Brown, the minutes of November 29, 2017, December 21, 2017, and January 11, 2018 were unanimously approved.

CLOSED SESSION: Pursuant to NCGS 143-318.11(a)(4) to discuss matters relating to Economic Development:

Goals and Expectations for Barter Negotiations/Goals and Expectations for Term Sheet with Dana and Gray

Hugh Campbell began the discussion regarding a term sheet to take to the Barter who have agreed to meet again and begin negotiations regarding this project. A negotiation team needs to be appointed and they will need to know what our Board's expectations and terms will be. Barry Schneider noted that this appointed group will work at the Board's direction. Their plan is to start with the Parker-Poe agreement as far as the legal language that is already prepared. However the design, construction, and financing details will all change. The new terms will address an agreement on subsidies, lease terms. Once we have the Board's approval on these terms we can move forward in discussions with Barter and a commitment from the County. We will need several agreements which include an operating agreement with Barter; lease agreement with Dana Bryson and Gray Angell; development agreement; and a revenue-sharing agreement with the County. Gray Angell plans to present a term sheet to the City in the next couple of weeks, which is a positive move. Hugh encouraged the board members to discuss any issues they had with the previous agreement to make sure we can fix those things. He noted that one of the points of contention through the committee conversations was a 5-year horizon, where some people feel that the City should be out of this at the end of five years, that after the end of the 5 years it would be up to the Barter and the developer to figure out the rest of that partnership. If that is a key piece for this Board, then we probably can't do a deal with the Barter. If you recall the original deal was a term of 20 years with an option to renew for 10, so what the Barter is looking for is a long-term commitment from the City. So we need to know what is an important negotiating point and what we can be flexible on. Bryan Grote stated that this draft document needs to be something with enough detail that the LGC will take seriously and provide meaningful feedback on. Doug Carter stated that the document needs to codify what the mutual parties agree are acceptable business terms. The County will want to know how we will calculate the sales tax revenue sharing. The County will want to see whatever study or assessment we have on this piece. Spelling out these terms will help us go to the LGC and he recommends

that we go in phases. Doug has already spoken with LGC a couple of times and they have a general understanding of how this deal has changed and of the County's willingness to be a partner. A private performing arts theater standing alone is not the City of Mount Airy's first priority, however a private performing arts theater run by one of the top private performing arts theaters in the country as part of a hotel and other attendant space and high quality apartments is a huge economic advantage to the city and will bring jobs and enhance the overall economy of the city will resonate with the LGC. An MOU (memorandum of understanding) with the County and a term sheet with the developers will codify the terms. Bryan asked if the MOU would come from the City or the County. Hugh answered that the County would be appointing the County Manager and one of their commissioners to meet with the delegation from this group. He recommends Barbara as City Manager along with Commissioner Cawley since he has met with them previously on this. The MOU can be assembled with input from the City and County. Barry asked about the order in which these agreements should be created. He suggests the priority should be on the Barter agreement to which Hugh agreed. Bryan agreed that we should have something specific for Barter personnel to review and react to. Commissioner Brinkley asked about the timelines to get these done. Gene Rees explained that the contracts and agreements have to be concluded by the end of the year. Dana and Gray have a 4th quarter of 2020 closing date by which they have to have a Certificate of Occupancy and certification approval otherwise they will have a full one year and four month carry of interest. Commissioner Brinkley is concerned that Gray may walk away from the project. Gene replied that once the agreements are signed and the money starts flowing than Gray will stay in it. The concern is that a delay with these agreements may affect their decision if this drags on into March. This is based on a lot of assumptions such as if the LGC's economic impact study comes back weak, or if county's amount of reimbursement is lower, these could all affect this. Doug explained that development projects move slowly. We need to get our business done. There were certain promises made during the presentations. One was no developer's fee, along with others. A developer's fee on a facility of this size would be substantial, so it is a huge allowance for them to be willing to abate this fee. However if that state that they will abate this fee, we need to make sure it will be abated. He feels that this is a good deal for the City, and we just need to keep things moving. Gene pointed out that the Internal Revenue allows 20% for a developer's fee on historic preservation, which would be 6 million on a 30 million dollar project so that is a huge allowance. Doug stated that our loan would have less interest than any return he could provide, due to the lower cost resulting from the developer's fee not being included. Gene stated that in addition, Gray did not calculate his investment terms without consideration for the tax credits. Gray is giving the City the full credit for his ward of tax credits. That is 60% of whatever the project is. Doug stated that the 8% on the non-tax portion comes out to half of what it would be, so we need to get the term sheets prepared and signed. This is what the LGC needs to see, the basic business terms, which will be vetted through the consultant.

Commissioner Brinkley asked what is in the contract that needs to be removed or what needs to be added that they will accept. Hugh explained that the one big issue is the length of the term. Unless this Board is committed to a 20-year term of obligation of support, he thinks we will lose the Barter. The 20-year term is important because that's what Gray Angell says

he needs to have as a return on his investment. The CFT and others have floated around a 5-year term with some sort of tax rebate or abatement or water rate refund and those can't be done because they are illegal. The City can't rebate money directly to a private developer for any reason. The flow of public money has to be for a public purpose, meaning something that comes back to the City in terms of a benefit. That benefit is easy to structure in terms of a 20-year lease, even if it is broken up in increments of 5-year terms. This is something that municipalities can do, to lease a building to put in an arts component, this is allowed by statute. The hitch of the 20-year term provides Barter the security they say they need, and it provides the developer the guarantee that he wants for the return on his investment. But if this Board is only agreeable to a 5-year term then we are done. At the end of the day, there is going to have to be a 20-year commitment. Commissioner Brinkley noted that they were told that the 20-year term would be beneficial to the City down the road. Barry stated that the CFT has strong and reasonable concerns about a long-term lease, so they had suggested a plan that would take the City out of it, which sounded good, but then it became clear that it wouldn't work for the first 5 years, with tax credit issues, and legal issues, and then today we found out it won't work at all. Based on the legal advice the City has received, 5 years is not a doable thing. Doug stated that the money is the same whether you have the 5-year or the 20-year. What you miss is, when you give away your leasehold after 5 years, you have given away your rights to communicate. If this project becomes hugely successful and in 8-10 years they make plans to add space, enlarge the theater, add meeting space, etc., then the City has no say. If you have a lease you have a right. The City is able to negotiate your terms as part of the lease. If you lose the lease, you lose your rights to deal inside the facility and make decisions. We can only make this work the way the statutes permit under unique NC laws, and the CFT's plan is not permitted by statutes. Bryan presented a flow chart explaining years 1-5 as allowed by statute. This is a lease between the City and the developers involving the theater, so you have lease payments that would flow from the City to the developers. Those lease payments are primarily funded by the facility fees coming off the theater (\$7.50), and to the extent those facility fees are short or fluctuating too much, you have the supplemental revenue stream flowing from the County to the City, which can be used to pay the developers. The legal basis is that the lease gives the City public consideration. The City has tax ownership, and is getting direct benefit of the facility, primarily the facility fees being generated by the facility which can be supplemented by the County revenues on top of the lease payment. If the lease goes away, then you basically have a deal between the operator and the developer, and it would be expected that the facility fees would then go to the developers. The developer would also expect to receive the County revenues that would be sent to the City. This cannot be done. The City has lost public consideration of the lease, and this would now be considered a gift. Hugh advised that the City could make a loan but it would have to be market-based interest rates, and encumber the building as collateral for a line of credit, however this is not the best option. The City also cannot be the guarantor of the Barter's payment to the developer. The lease is the cleanest traditional way to do this. Gray has said he will accept a term of 5 years, with only the City having the option to renew it for three additional 5-year terms. Commissioner Brinkley suggested that this arrangement incentivizes Barter to continue to provide entertainment to bring people in so that the City would renew the lease. Doug noted that four 5-year renewals are optimal for the City, but the developer has to agree to that. Barry

stated that he has updated Gray with the latest developments so he can consider those in his term sheet. Commissioner Cawley asked for clarification about subsidies to the Barter. Hugh confirmed no subsidies to the Barter from the City. Commissioner Cawley noted that this plan calls for the City collecting from the Barter and from Surry County. He stated that he couldn't understand the City making a 20-year commitment in the previous agreement, and possibly might be again with this one, however the Barter is not. Barry explained the original agreement stipulated that if the Barter had uncompensated losses that exceeded \$500,000 in the first three years then they could walk away from the agreement. We have discussed extending that three years to five years, but he is not aware of any other out clause to allow Barter to exit other than mutual termination. One of our goals is to address the Board's concern about how binding the agreement will be on both sides and based on informal discussion with Barter, Barry thinks we can find some common ground. Commissioner Cawley's concern is about Rick Rose's future with Barter, and how the next director might not have a positive feel about being in Mount Airy, and could choose to relocate elsewhere. We need the Barter's commitment to stay. Barry indicated that the agreement should include reasonable notice if either party intends to walk away, so that other plans can be made, such as a 6-month notice, which various other theaters have in place. Commissioner Cawley restated his concerns with the last agreement where he didn't see a commitment reciprocated, and which gave Barter the ability to overspend to claim losses without being financially responsible based on the subsidies agreement. Hugh noted that the two million dollars that was going to come from the City has changed now. The feasibility study will now be paid by Gray Angell, and the two million dollars has to be raised quickly and put into the project as non-QRE expenses, so this is an investment that Barter could not easily walk away from. If they don't raise the two million, that is money that Gray has to pay, so he assumes that risk. If he raises more than two million, Rick has stated that they will build apartments in the cube building for their actors and staff, which would be even more investment in the project, and would save them money as well. Doug stated that Barter has an enormous incentive to diversify their business. If they are going to raise this money and put their reputation on the line to come to Mount Airy to strengthen their business, they don't intend to make their business weaker. He noted that after 5 years, Mount Airy will only be paying Barter a management fee. A theater is an expensive upfront proposition. He thinks that Barter will want to work to make sure that both locations succeed. Gene advised that during the first 5 years when the City is at risk the agreement should provide for correct allocation of expenses to make sure expenses turned in are appropriate. Commissioner Cawley reiterated that Mount Airy should not subsidize Abingdon. Gene stated that there will be economies of scale for things like sets and costumes shared between locations. Barbara Jones noted several items that will need to be resolved including the length of the term, out clause, mechanics of the subsidy and accountability. Barry stated that a 5-year window where we front-load the first year and that is successful, and it is replenished, we would not be guaranteeing 2 million dollars. If it is not successful, Barter will want something in there that gives them up to that 2 million dollars, so the mechanics of putting that in the agreement will be very tedious. And how do we define the accountability and have everyone be comfortable with it. The \$7.50 facility fee coming back to the city will need to be properly documented as well. These things need to be incorporated into the agreement based on how the Board feels about it, or else to give direction to the

negotiation team on these things. Barry stated that the subsidies have to be handled with great care. During informal talks with Barter they have tried to explain LGC's logic regarding things like tax credits, facility fee revenue, and the two million dollar obligation, so they can understand the changes that need to be made. They discussed things like performance commitments, obligations on subsidies, and sharing of risk. Barter acknowledges that they can control the number of shows they perform, but cannot control the number of tickets that are purchased. This type of information would also be included in our term sheet based on the Board's directive. Commissioner Brinkley asked if they would be doing a mid-year fundraiser. Hugh explained that they do an annual fundraiser for their operating expenses. A dollar for dollar credit was discussed but Barter doesn't seem interested in offsetting the fundraiser by the subsidy.

Hugh agreed to work on the contract to include summary allocation of the risk on the subsidies. He stated that it is important that we have a 4-1 or unanimous vote on this. But a term of more than 5 years, which 5 is the maximum that CFT is saying they can support, would be a deal breaker for them. At the end of the day this will need to be a 20-year commitment, and if this Board is not comfortable with that long term, we need to know that now, and not wait until the end to say we only agreed to 5 years. Commissioner Brinkley asked if we could do it as four 5-year terms. Hugh answered ideally yes as long as the City is doing the renewing. Anything under 5 years doesn't require LGC approval, and anything over 5 years, including 5 year with renewals, does require full LGC approval. Commissioner Cawley stated that we don't want to alienate those opposed to this. What we want is the same spirit that he has had the last couple of weeks, and that we should move the focus from the Barter to the focus being on the County and what they will allow the City to reap from what this will generate. The focus has been on what the Barter is going to get, and with the last plan we didn't know if the County was going to help us. We can tell the County that the Barter is going to demand 20 years, and we need to get the County to give us sales tax for 20 years. Hugh stated that the Board will need to agree to endorse a commitment of more than 5 years because legally and practically that is what needs to be done. Commissioner Cawley noted that the Board already agreed to 5 years, so we would need to change this to keep it moving forward. Doug stated that the developer will not do 5 years and the Barter will not do 5. The City gains by doing a longer lease because we are not putting out any more money. In addition, the LGC will not approve the City making a payment to a private party. If you have an agreement beyond 5 years to pay a private party in the absence of a lease, the LGC would say no. Commissioner Brinkley asked if that meant that we need to do a 20-year lease, to which Doug replied yes. Commissioner Brinkley doesn't want this Board to be the force that prevents the developers from proceeding in order to be eligible for the tax credits. Doug advised that the City will be making the same payment as if we were building the facility ourselves, with the benefit of private development, no development fees, and a low return for the developer.

Hugh advised Commissioner Cawley to explain to the County that the City is on board for a 20-year term, so the County could also spread out their contribution over a longer period of time, rather than front-loading it with a large lump sum at the beginning, and smaller pieces as those revenues come in. Barry stated that Commissioner Johnson indicated that they

were leaning towards more upfront money and less time, although he may not be speaking for the full board. Gene believes Surry County will be receptive, although there will be discussion over the time commitment. Commissioner Cawley asked about the ongoing split of the sales tax. Doug stated that the County agreed to six years on the property tax. It is estimated that taxes on the new development would be \$150,000. Bryan noted that we will eventually get some sales tax projections from the School of Government, which they are hoping will be between \$350,000-\$500,000.

The Board agreed to appoint subcommittees to meet with Barter and the Surry County Board of Commissioners. Suggestions for the Barter meeting were Bryan Grote, Hugh Campbell, Steve Yokeley, and Mayor Rowe, while Barbara Jones, Jon Cawley, and Gene Rees were suggested to meet with Surry County's Board. These appointments will be made in open session.

Barbara summarized that the Board is of the understanding that we are talking about more than a 5 year lease with the developers and with the Barter and that everyone is in agreement with that. Hugh noted that this term is the most critical, and they will do the best they can to allocate the risks in the 6-20 years in a way that's fair and agreeable. She suggested continued negotiations on the tickets as that is a guarantee.

Commissioner Cawley suggested a goodwill effort to give every taxpayer in the city one ticket a year to the theater, which the group thought was a good idea considering there will likely be seat availability.

OPEN SESSION:

On motion by Commissioner Brown, seconded by Commissioner Yokeley and passed unanimously, the board entered back into open session with the following:

1) Negotiations with Surry County Board of Commissioners:

Commissioner Yokeley made a motion to appoint Barbara Jones, Commissioner Cawley, and Gene Rees to a committee with the charge of negotiations with the Surry County Board of Commissioners as it relates to the Spencer's Economic Development Project. Commissioner Brinkley seconded it and it was passed unanimously.

2) Negotiations with the Barter Theatre:

Commissioner Brinkley made a motion to appoint Hugh Campbell, Bryan Grote, Commissioner Yokeley, and Mayor Rowe to a committee with the charge of negotiations with the Barter Theatre as it relates to the Spencer's Economic Development Project. Commissioner Brown seconded it and it was passed unanimously.

CLOSED SESSION:

On motion by Commissioner Brinkley, seconded by Commissioner Brown and passed unanimously, the board entered back into closed session pursuant to:

b) NCGS 143-318.11(a)(3) Attorney-Client Privilege

Lowe's Mowing Services Contract Request

Barbara informed the Board that the contract for side-arm services was approved recently. We did not purchase a new side-arm when we found out we could outsource the work more cost effectively, so the City does not have a side-arm machine. Darren Lowes informed the Board that on April 18, we had a prebid meeting on the mowing contracts where we explained many of the different areas and what types of equipment we had used in the past. In addition there was a mandatory ride-along meeting on April 19 for the boom mowing contract to show the bidders all of the properties involved. Darren and Michella Huff along with Richard Sink went on the ride-along pointing out safety issues, special concerns, which ended up being a four-hour review of the boom-mowing areas.

When the bids came in, Lowe's bid was the lowest at \$17,950, which came in at a very cost-effective price, with the second lowest being \$25,000. Richard Lowe discussed with staff that this contract requires three rounds within the year, and with his specific type of equipment that Round 1 might be difficult, but Rounds 2 and 3 should be simpler and less time-consuming. About two weeks into the contract, Richard had concerns about the time it was taking and a couple of weeks later he met with Darren asking to terminate the contract, citing safety issues (equipment takes up more space in the road area), and unexpected time commitment. Richard states that he has worked 59.75 hours to date, with no work performed since July 31. Richard has calculated services performed at a cost of \$5,377.50. Staff has estimated roughly 1/3 of the work had been done although it is difficult to calculate. Commissioner Brinkley estimates three rounds in this contract would be \$5,983.33 per round, and if he only completed 1/3 of that work, then that comes out to \$1,944.44. She believes he should have known by his experience and the ride-along what this work would entail.

Barbara has concerns about allowing someone out of a contract, as we have no record of ever having done this before at the request of the contractor. Commissioner Brinkley asked about a performance bond. Hugh advised that there may be a minimum amount to require those. Darren noted that it would be hard for small companies on low bids to afford to bid on the contracts. Mayor Rowe advised that performance bonds are based on the amount of working capital the business has, which makes it difficult or impossible to get as a small business. Commissioner Cawley stated that we shouldn't have to pay him anything since he didn't fulfill the contract. He pointed out that he is costing the City additional money due to having to the City having to spend more on the next lowest bid which is a difference of over \$7,000. Darren has spoken to the next lowest bidder, who has agreed to reduce his bid by \$2,749.33 based on the amount of work already performed by Lowe's. Commissioner Brinkley noted this change will cost the City \$31,000 over the term of the 5-year contract. Darren stated that Richard had been asked if he could complete the round, but he declined based on the expected time to complete. S & S Cutting is willing to accept the contract. Mayor noted that if Lowe's accepted a contract and that his exit was going to cost the City

additional money then we should not pay him. Barbara advised that allowing someone to exit a contract will set a precedent for the next one. She noted that the contract allows the City to exit, but does not allow for an exit for the contractor. Hugh advised that the City could file a lawsuit in this case for breach of contract, to recoup the cost of cover, the additional amount the City would expend for the new lowest bid. This would be a small claims court suit. Commissioner Cawley thinks Lowe should be responsible for the additional \$31,000. Commissioner Yokeley agrees with not paying him, due to his breach of contract. Mayor Rowe thinks that not paying him is the best idea. Commissioner Brinkley suggested that the contracts should have wording to protect the City if someone wants to exit the agreement. Commissioner Brown agrees that the City should not pay him.

The Board agreed by consensus not to pay any amount to Lowe's Mowing Services. Hugh will prepare a letter to Richard regarding the breach and the Board's decision. Awarding the contract to the next lowest bidder will need to be done in open session.

These minutes are sealed until the transaction consummates or terminates.

OPEN SESSION:

On motion by Commissioner Brown, seconded by Commissioner Yokeley and passed unanimously, the board entered back into open session with the following:

1) New Boom Mowing Contract with S & S Cutting:

Commissioner Brown made a motion to award a new five-year boom mowing contract to S & S Cutting in the amount of \$25,000 (minus a discount of \$2,749.33) with a 5% increase in year 2 only (\$26,250 annually for years 2-5). Commissioner Yokeley seconded it and it was passed unanimously.

2) Budget Ordinance Amendment Number 2019-006 (Boom Mowing Contract):

On motion by Commissioner Brinkley, seconded by Commissioner Yokeley and passed unanimously, the following Budget Ordinance Amendment was approved:

**ORDINANCE NUMBER 2019-006
BUDGET ORDINANCE AMENDMENT**

WHEREAS, the City of Mount Airy adopted the 2018-19 budget on June 18, 2018;
and

WHEREAS, it is necessary to amend the budget ordinance in order to provide funding for the increase for the boom mowing contract; and

WHEREAS, General Statute 159-15 of the North Carolina Government Fiscal Control Act provides authority to amend a current municipal budget:

NOW, THEREFORE, be it ordained that authorization is hereby given to make the following adjustments:

	<u>Increase (Decrease)</u>
Section 1. <u>General Fund Appropriations</u>	
Parks and Recreation	<u>4,300</u>
	<u>4,300</u>
Section 2. <u>General Fund Revenue Estimates</u>	
Appropriation of Fund Balance	<u>4,300</u>
	<u>4,300</u>

Approved and adopted this the 16th day of August, 2018.

ADJOURNMENT:

On motion by Commissioner Cawley, seconded by Commissioner Brown and passed unanimously, the meeting was adjourned.

Approved this the 6th day of December, 2018.

CLOSED SESSION