



Town of Westport
110 Myrtle Avenue
Westport, CT 06880

Lynn Scully, Audit Manager
lscully@westportct.gov
203-341-1054

To: James Marpe, First Selectman
Gary Conrad, Finance Director
Sheila Carey, Controller
Brian Stern, Chairman, Board of Finance
Sheri Gordon, Board of Finance Audit Subcommittee Chair

Cc: Eileen Flug, Assistant Town Attorney
Velma Heller, RTM Moderator
Jeff Weiser, RTM Finance Committee Chair

Date: February 5, 2019

Re: Levitt Pavilion Review IA 19-03

In response to a request from the Board of Finance Audit Subcommittee, I spent some time reviewing some specific questions regarding the activities of the Levitt Pavilion that were brought to my attention. The objectives of this review were to:

1. Determine if the license agreement between the Town of Westport (“Town”) and the Friends of the Levitt Pavilion (“Friends”) was properly approved by the Town;
2. Determine whether parties of existing license agreement between the Town and the Friends are in compliance with the terms of the agreement;
3. Identify opportunities to improve the existing contractual relationship through proposed amendments to the agreement.

Background

The Levitt Pavilion for the Performing Arts (“Levitt”) is a concert venue that is owned by the Town of Westport and is operated under a 25-year License Agreement with an outside non-profit organization (501c3), The Friends of the Levitt Pavilion, Inc. (“Friends”). The Friends employs 2 staff members that are responsible for producing 50+ free concerts per year that are open to the public.

The Levitt was originally constructed as an amphitheater and band shell in 1973, with funds raised by the Kiwanis Club, Westport Young Woman’s League and private donors. It was named after the Levitt family in honor of their financial support. That structure was demolished in 2006 and a temporary structure, which was provided by the Friends, was utilized until 2014, when the current structure was complete. The Town provided \$1.1

IA 19-03 Levitt Pavilion

million toward this new construction and approximately \$8.4 million was raised by the Friends for this project.

In 2012 while the new Levitt was under construction, the Friends and the Town drafted a license agreement which “formalized” the nature of the relationship between the two parties. It was approved in draft form by the Board of Selectmen on July 18, 2012. It was finalized and signed by both parties on November 26, 2012. This agreement is referenced in the findings to follow. A copy of this agreement is attached as Appendix A.

The Levitt is primarily sustained by fundraising efforts of the Friends, raising \$600-800k annually, and Town support. The Town currently provides \$28k per year in direct financial support (\$20k for programming sponsorship through Parks and Recreation and \$8k for “managing director services” from the Town’s general fund miscellaneous account). In addition, the Town pays approximately \$9k per year in utilities for the Levitt and provides certain grounds and facility maintenance for the property. Westport Public Schools used the facility for its annual Westport Pops Concert (student orchestra) in June at a discounted rental fee of \$7,500. Lastly, the Friends is provided office space within the Parks and Recreation Department’s administrative offices. The is also provided with Town network and email services as part of this accommodation.

In November 2014, the construction of the current Levitt Pavilion was included in IA 14-01, Audit of Capital Projects. There were no control-related findings in that audit associated with the project, which was managed by the Town.

OBSERVATIONS AND RECOMMENDATIONS

1. ***Determine if the license agreement between the Town of Westport (“Town”) and the Friends of the Levitt Pavilion (“Friends”) was properly approved by the Town***

The form of the current contractual agreement between the Town and the Friends is a 25-year “License Agreement” whereas the Town has granted a license to the Friends to operate and manage the Town-owned concert facility (Levitt Pavilion). **I was able to confirm that the contract was properly approved in draft form by Westport’s Board of Selectmen on July 18, 2012.** Once the agreement was finalized, it was signed by representatives of the Town and Friends on November 26, 2012.

Because this contract is in the form of a license agreement, it is not subject to the same approval requirements associated with a lease of town property, which would involve approvals from both the Town’s Planning and Zoning Commission and the Board of Finance. Connecticut real property law defines a license in real property as “*a mere privilege to act on the land of another, which does not produce an interest in the property.*”¹ The Town is also party to another license

¹ CT Judicial Branch, Glossary of Connecticut Real Property Law Terms, 2017 Edition

agreement with the Police Athletic League (PAL) for the operation of an ice skating rink.

Recommendations:

None.

2. *Determine whether parties of existing license agreement between the Town and the Friends are in compliance with the terms of the agreement*

As mentioned previously, in 2012 the Town and the Friends entered into a contract in the form of a 25-year license agreement which was intended to formalize the working relationship that had been in existence since 1974.

In reviewing the current license agreement, the following sections were the focus of this review:

- a) “Governing Committee”
- b) #5 Responsibilities of the Friends
- c) #6 Responsibilities of the Town
- d) #7 Expenses; Contributions from the Town
- e) #9 Insurance

a. Governing Committee

The license agreement refers to the existence of a “Governing Committee” whose members are appointed by the First Selectman. This committee is “charged with the responsibility of managing operations of the Levitt Pavilion.”² **I was unable to obtain any evidence that the Governing Committee is currently active.** Further, it is my understanding that this committee, which appears to also have been referred to as the “Levitt Pavilion for the Performing Arts Committee,” no longer meets.

Obligations of the Governing Committee (in working with the Friends to make operating decisions for the Levitt) are included within the license agreement³ but the Governing Committee is not a party to the contract.

The license agreement further stipulates that the Friends was to work with the Governing Committee in fulfilling its charge to manage the enterprise and to ensure that members of the Governing Committee would “*hold a voting majority on the Board of Directors of the Friends.*”⁴ From an internal controls standpoint, such an

² Levitt Pavilion License Agreement (Appendix A), page 1

³ Levitt Pavilion License Agreement (Appendix A), 5.(ii), page 2

⁴ Levitt Pavilion License Agreement (Appendix A), 5.(ix), page 3

arrangement presents a potential conflict of interest for members of the Governing Committee, as their board-level membership in the Friends implies a sometimes substantial financial interest in the organization. Ideally, the role of a governing committee should be to provide independent oversight of the organization, ensuring the best interest of both parties (Town, Friends).

Recommendation:

The Town (in conjunction with the Friends) needs to determine if there is a need to reconstitute the Governing Committee. The Governing Committee was originally formed at a time when the Levitt Pavilion was run solely by volunteers and it was responsible for all financial and operational activities of the enterprise. The Friends have been running the Levitt without supervision by an active governing committee for several years through an Executive Director and a Director of Marketing and Communications.

If the Town can alternatively obtain the level of assurance that an active Governing Committee would provide through routine financial and/or operational reports to the Town, this might be considered a compensating control. In the majority of Fairfield County municipalities, summer concert series are the responsibility of the Department of Parks and Recreation. Westport's Parks and Recreation Commission oversees many outsourced recreational functions and might therefore be the best public body to represent the Town in providing oversight.

Once the fate of the Governing Committee is determined, the license agreement will need to be amended to reflect these changes, to the satisfaction of both parties.

b. #5 Responsibilities of the Friends

This section of the contract is quite specific regarding the scope of responsibilities of the Friends, with the exception of 5(i) where it says that they are responsible for “ensuring that all programs, hours and activities of the Levitt Pavilion continue to be conducted generally in keeping with past practices.”⁵ This is not a very clear directive.

Section 5(ii) also states that the Friends were to work “in conjunction with the Committee” on key planning and operating activities of the Levitt. This is referring to the Governing Committee, which is not active. Therefore, neither party is able to comply with this particular clause.

Section 5(ix) requires that members of the (inactive) Governing Committee hold a voting majority on the Board of Directors of the Friends. This arrangement sets up a potential conflict of interest, as the original Governing Committee, appointed by the First Selectman, was intended to represent the interests of the

⁵ Levitt Pavilion License Agreement (Appendix A), 5.(i), page 2

Town in the running of the Levitt. It is clear that the charge of the Committee was to work *with* the Friends in this capacity, rather than to become one with the organization itself.

Recommendation:

5(i): It is recommended that general expectations regarding programs, hours and activities be more clearly defined, for the sake of both parties.

5(ii): See Recommendation 2.a. (above).

5(ix): It is recommended that members of the Governing Committee should not also be members of the Board of Directors of the Friends. While it is important that these two groups work together well, it is equally important that both parties of the License Agreement are represented. Therefore, it recommended that 5.ix. be removed from the contract.

c. ***#6 Responsibilities of the Town***

I was able to confirm the Town's payment of Levitt utilities (6.iv.), along with the provision of office space (6.viii.) and information technology services (6.ix., 6.x.).

Recommendation:

None.

d. ***#7 Expenses; Contributions from the Town***

I was able to confirm that the Town pays \$20,000 annually to the Friends through the Parks and Recreation's budget for programming. In addition, the Town pays \$8,000 annually through a miscellaneous account to supplement the Levitt Director's salary.

Recommendation:

None.

e. ***#9 Insurance***

The Town maintains both Public Officials Liability and Property coverage through CIRMA (9A). I was able to obtain a copy of the current general liability insurance certificate provided to the Town from the Friends (9B).

Recommendation:

None.

3. *Identify opportunities to improve the existing contractual relationship through proposed amendments to the agreement*

See recommendations below.

Recommendations:

In addition to the suggested amendments in 2.a. and 2.b., the Town should consider adding a financial reporting clause similar to that which is the current License Agreement with the Police Athletic League (PAL), clause 8. as follows:

8. Financial Statements. Upon the request of the TOWN, the PAL shall provide copies of its financial statements to the extent they relate to the operation of the RINK. Said financial statements shall include a financial statement certification, signed by the President and Treasurer (or other duly authorized officer) stating that they have reviewed the financial statements and that they are true, complete, and correct.

This amendment should be considered independently of the decision regarding the Governing Committee. While the Town does have access to the Form 990 tax returns of the organization when they are made public, these documents are not published in a timely manner (through no fault of the Friends). Given the level of support provided to the organization by the Town, the requirement of financials is reasonable.

Respectfully Submitted,

Lynn Scully, Audit Manager/Senior Accountant
Town of Westport

APPENDIX A