

MEMORANDUM of UNDERSTANDING
ASPHALT ART PROGRAM PARTICIPATION

1. Purpose: This Memorandum of Understanding (“MOU”) is made as of _____, 20____ between THE COUNTY BOARD OF ARLINGTON COUNTY, VIRGINIA, a body corporate and politic, (the “County”) acting by and through its Department of Environmental Services (“DES”) as part of its duty to maintain its rights-of-way, and _____ (the “Artist”) (individually a “Party,” collectively “Parties”) and outlines the Parties’ agreement for the installation and maintenance of artwork located in County right of way pursuant to the County’s “Asphalt Art Program” (“Asphalt Art”) to be located at _____ (the “Asphalt Art Location”).

2. Scope: The County seeks to strengthen its role in streetscape activation and neighborhood placemaking and seeks to enter into this MOU to allow the display of Asphalt Art by the Artist at the Asphalt Art Location as is in accordance with the County’s Arlington Community Canvas, Asphalt Art Guide document dated [INSERT DATE HERE], as may be amended (the “Asphalt Art Guide”). The County shall maintain complete editorial control over the installation of all artwork pursuant to this MOU.

3. Rights and Responsibilities:

3.1 County Responsibilities. Under this MOU, the County shall:

- A. Allow the installation of Asphalt Art as shown in Attachment A - Artwork Design Concept at the Asphalt Art Location for a period of ____ months from the execution of this MOU (the “Term”). For clarity, the County will not execute any MOU regarding the subject matter herein which includes a Term longer than 12 months.
- B. Provide guidance for, and the inspection of, the installation of the Asphalt Art.
- C. Upon approval or disapproval of any changes contemplated by section 3.3(E) of this MOU, notify the Artist of such approval or disapproval.
- D. Notify the Artist of its final acceptance of the installed Asphalt Art after the Artist has submitted its notice pursuant to section 3.3(I) of this MOU or, if applicable, completed all corrective actions pursuant to a Correction Notice (as defined in section 3.2(A) of

this MOU *infra*) issued after the Artist has submitted its Completion Notice to the County (“Final Acceptance Notice”). The effective date of the County’s final acceptance shall be the date the County submits its Final Acceptance Notice to the Artist. Final acceptance of the Asphalt Art is solely within the discretion of the County.

- E. Maintain complete editorial control over the installation of all artwork pursuant to this MOU.

3.2 County Rights. Under this MOU, the County may:

- A. Notify the Artist of maintenance, repair, relocation, design, or other issues associated with the Asphalt Art (“Correction Notice”).
- B. Remove, relocate, maintain, or dispose of the Asphalt Art.
- C. Upon receipt of the Artist’s notice under section 3.3(I) of this MOU, if the County disputes that the Asphalt Art has been installed according to all requirements of this MOU, issue a Correction Notice. Final determination as to whether all activities required by this MOU have been performed by the Artist shall remain with solely the County.
- D. Terminate this MOU for any reason, including any failure by the Artist to complete corrective actions pursuant to a Correction Notice. If the County terminates the MOU, then the termination shall be immediate after notice from the County to the Artist (“Termination Notice”).

3.3 Artist General Responsibilities. Under this MOU the Artist shall:

- A. Coordinate closely with the County to ascertain that the Asphalt Art Location is prepared to receive the Asphalt Art.
- B. Promptly notify the County of any adverse conditions at the Asphalt Art Location that would affect or impede the installation of the Asphalt Art.
- C. At the Artist’s sole expense, secure all required licenses, permits, and similar legal authorizations necessary for installation and maintenance of the Asphalt Art at the Asphalt Art Location.
- D. Install the Asphalt Art as shown in Attachment A to this MOU (“Attachment A”) at no cost to the County.

- E. Present to the County, in writing, for further review and approval, any significant changes in the scope, design, color, size, material, or texture of the artwork not permitted by or not in substantial conformity with Attachment A. A “significant change” is any change in the scope, design, color, size, material, texture, or location on the Asphalt Art Location that affects installation, scheduling, Asphalt Art Location preparation, or maintenance of the Asphalt Art or the concept of the Asphalt Art as represented in Attachment A. If the County disapproves changes proposed under this section 3.3(E), the Artist shall continue to install the Asphalt Art in substantial conformity with Attachment A.
- F. Install the Asphalt Art in a manner approved by the County. This includes:
- (1) Conducting all activities within County right-of-way in accordance with all applicable laws, regulations, rules, and requirements, including all work rules and regulations adopted by the County for the public space.
 - (2) Adhering to all applicable Asphalt Art guidelines and other requirements as set forth in the Asphalt Art Guide, including the list of approved and prohibited materials, design, and siting.
 - (3) Adhering to the approved Asphalt Art design concept.
 - (4) Not using or permitting the use of the Asphalt Art Location or any other County property for the manufacture, storage, dispensing, sale, or drinking of intoxicants, or use or sale of any illegal drugs or substances, gambling, or any other illegal practices.
 - (5) Install the Asphalt Art on _____, 20____ between the hours of 8:30 am and 3:30 pm (including set-up and take-down) (the “Installation Hours”). Any installation or street closure of the public space beyond this day and time without the consent of DES is not permitted. Notwithstanding, if installation cannot be completed in the Installation Hours because rain is forecasted during or 48 hours after the installation, the Artist shall install the Asphalt on _____, 20____ between the hours of 8:30 am and 3:30 pm (including set-up and take-down).

- G. Be responsible for all expenses, labor, and equipment to prepare the Asphalt Art Location for the installation of the Asphalt Art, including public access and public security of the Asphalt Art.
- H. Promptly restore the public space to the condition existing immediately before its entry thereon following expiration of the permit or upon request from DES.
- I. Provide the County with prompt notice upon completion of Asphalt Art installation activities.
- J. Upon receipt of a Correction Notice, promptly perform all corrective actions required by the County.
- K. Provide monthly inspection, maintenance, and repair of the Asphalt Art for the duration of this MOU.
- L. Cause maintenance and repair of the Asphalt Art to occur within ten (10) days after monthly inspection or after notification by the County.
- M. Make reasonable efforts to address vandalism and general wear and tear of the Asphalt Art.
- N. Comply with the terms and conditions of the Asphalt Art Guide or any other applicable law, rule, regulation, guidance, or any other legally binding requirement. In the event any of the terms and conditions of the Asphalt Art Guide conflict with the terms and conditions of this MOU, the terms and conditions of this MOU shall control.
- O. Represent and warrant that:
 - (1) The Asphalt Art is solely the result of the artistic efforts of the Artist.
 - (2) The Asphalt Art is unique and original and does not infringe upon any copyright.
 - (3) The execution and maintenance of the Asphalt Art shall be performed in a workmanlike manner.
 - (4) The Asphalt Art, as installed, shall be free of defects in material and workmanship.

- P. Save, defend, indemnify, and hold harmless the County, its respective representatives, directors, officers, employees, agents, subsidiaries, or affiliates or any third party (collectively the “County *et al.*” for the purposes of this section 3.3(P)) from or against all damages, losses, settlement payments, obligations, liabilities, claims, suits, penalties, assessments, citations, directives, demands, judgments, actions or causes of action, whether statutorily created or under common law, including all costs or expenses (including reasonable fees and disbursements of attorneys, engineers, or consultants) or all other liabilities whatsoever (including liabilities under any applicable environmental laws, regulations, or rules) which shall at any time or times be incurred, suffered, sustained, or required to be paid by any such party on account of or in relation to or in any way in connection with any of the arrangements or transactions contemplated by, associated with, or ancillary to this MOU, or any documents executed or delivered in connection herewith or therewith, all as the same may be amended from time to time, whether or not all or part of the transactions contemplated by, associated with or ancillary to this MOU or any other documents are ultimately consummated, resulting from any conduct, act, or failure to act by the County *et al.* This duty to save, defend, hold harmless, and indemnify shall survive the termination of this MOU. The Artist shall promptly pay all amounts due pursuant to this section 3.3(P) upon demand from the County *et al.* For the avoidance of all doubt and without limiting any provision or condition of this MOU, this section 3.3(P) is applicable in the event the County exercises its rights pursuant to section 3.2(B) of this MOU.
- Q. Except as otherwise directed by the County, stop work on the date of receipt of a Termination Notice or other date specified in the Termination Notice.

3.4 Artist Insurance and Liability Responsibilities. In addition to all other conditions and provisions of this MOU, the Artist shall adhere to the following insurance and liability requirements:

- A. The Artist shall provide the County with a Certificate of Insurance indicating that the Artist has in force the coverage below prior to the start of any work pursuant to this MOU. The Artist Agrees to maintain such insurance until the completion of this MOU. All required insurance coverage must be acquired from insurers authorized to do business in the Commonwealth of Virginia and

acceptable to the County. The minimum insurance coverage must be:

- (1) **Commercial General Liability** - \$1,000,000 combined single limit coverage with \$1,000,000 general aggregate covering all premises and operations and including Personal Injury, Completed Operations, Contractual Liability, Independent Contractors, and Products Liability. The general aggregate limit shall apply to this Contract. Evidence of Contractual Liability coverage shall be typed on the certificate.
 - (2) **Additional Insured** - Arlington County, its officers, elected and appointed officials, and employees shall be named as an additional insured in the Artist's Commercial General Liability policy; evidence of the Additional Insured endorsement shall be typed on the certificate.
 - (3) **Cancellation** - All insurance policies required hereunder shall be endorsed to include the following provision: "It is agreed that this policy is not subject to cancellation, non-renewal, material change, or reduction in coverage until thirty (30) days prior notice has been given to the Purchasing Agent, Arlington County, Virginia." Therefore, the words "endeavor to" and "but failure to mail such notice shall impose no obligation of liability of any kind upon the company, its agents or representatives" are to be eliminated from the cancellation provision of standard ACORD certificates of insurance.
 - (4) **Contract Identification** - The insurance certificate shall state this Contract's title.
- B. The Artist assumes all risks for direct and indirect damage or injury to the property or persons used or employed on or in connection with the work described in this MOU, and of all damage or injury to any person or property wherever located, resulting from any action, omission, commission or operation under this MOU, or in connection in any way whatsoever with the contracted Asphalt Art.
- C. No acceptance or approval of any insurance by the County shall be construed as relieving or excusing the Artist from any liability or obligation imposed upon the Artist by the provisions of this MOU.

- D. The Artist shall be responsible for the Artwork performed under this MOU and every part thereof, and for all materials, tools, equipment, appliances, and property of any description used in connection with this MOU.
- E. The Artist shall be as fully responsible to the County for the acts and omissions of the Artist's subcontractors and of persons employed by the Artist as the Artist is for acts and omissions of persons directly employed by the Artist.
- F. Notwithstanding any of the above, the Artist may satisfy his obligations pursuant to section 3.4 of this MOU by means of self insurance for all or any part of the insurance required, provided that the alternative coverage is submitted to and acceptable to the County.

4. General Provisions:

- 4.1 Project Responsibility.** The performance of the Artist required by this MOU is subject to the review and approval of the County. However, it shall be the responsibility of the Artist to manage the details of the execution and performance of its Asphalt Art pursuant to this MOU.
- 4.2 Amendments.** The Parties may amend this MOU. Any Party may request that this MOU be amended. The Parties may amend this MOU only by a written agreement signed by all Parties, provided such written amendment identifies itself as an amendment to this MOU.
- 4.3 No Waiver of Sovereign Immunity.** Notwithstanding any other provisions of this MOU to the contrary, neither anything in this MOU, nor any action taken by either the County pursuant to this MOU, nor any document that arises out of this MOU, shall constitute or be construed as a waiver of the County's sovereign immunity or the governmental immunity of the County or its officers, employees, and elected or appointed officials.
- 4.4 Individuals Acting on Behalf of Parties.** The Artist agrees and acknowledges, in entering this MOU, that the individuals acting on behalf of the County are acting within the scope of their official authority and capacity and the Artist agrees that they shall not bring a suit or assert a claim against any official, officer, or employee of the County, in their individual or personal capacity for breach or violation of the terms of this MOU or otherwise to enforce the terms and conditions of this MOU. The foregoing notwithstanding, nothing in this paragraph shall prevent the enforcement of the terms and conditions of this MOU by or against any party in a court of law authorized by this MOU.

- 4.5 Choice of Law; Jurisdiction.** The laws of the Commonwealth of Virginia, without giving effect to its choice of law principles, govern all matters arising under or related to this MOU. Any suit, action, proceeding, or claim arising out of or relating to this MOU must be brought exclusively in the Arlington County, Virginia Circuit Court, and undersigned agrees that such court is the most convenient forum for resolution for any such action and further agrees to the submit to the jurisdiction of such court and wave any rights to object to venue in such court.
- 4.6 No Third-Party Beneficiary.** No provision of this MOU is intended to nor must it in any way inure to the benefit of any third party so as to constitute any such person a third-party beneficiary under this MOU, or of any one or more of the terms of this MOU, or otherwise give rise to any cause of action in any person not a Party of this MOU.
- 4.7 Assignment.** The Artist may not assign all, or any portion of, the Artist's rights or obligations under this MOU without the prior written consent of the County, which consent may be withheld at the sole discretion of the County.
- 4.8 Entire Agreement.** This MOU contains the entire agreement between the Parties concerning the subject matter of this MOU, and supersedes all prior agreements, arrangements, understandings, letters of intent, conversations, and negotiations, whether oral or written, with respect to their subject matter. The Parties stipulate that there are no representations with respect to the subject matter of this MOU except those representations specifically set forth in this MOU and the documents signed or delivered in connection with this MOU.
- 4.9 Severability.** Each clause, paragraph, and provision of this MOU is entirely independent and severable from every other clause, paragraph, and provision. If any judicial authority or state or federal regulatory agency or authority determines that any portion of this MOU is invalid or unenforceable or unlawful, such determination must affect only the specific portion determined to be invalid or unenforceable or unlawful and must not affect any other portion of this MOU which will remain and continue in full force and effect. In all other respects, all provisions of this MOU must be interpreted in a manner which favors their validity and enforceability and which gives effect to the substantive intent of the parties.
- 4.10 Waivers.** No waiver of any right or obligation hereunder is binding unless made in a writing signed by the waiving party. The waiver of any right

under this MOU as to any transaction or occurrence must not be deemed a waiver as to any future transaction or occurrence. No failure to enforce or require strict performance of any provision of this MOU shall be deemed to waive or alter such provision.

- 4.11 Counterparts.** This MOU may be executed in counterparts, each of which constitutes an original and all of which constitute one and the same MOU.
- 4.12 Authority.** Each individual executing this MOU on behalf of a party hereto hereby represents that he or she is, on the date he or she signs this MOU, duly authorized by all necessary and appropriate action to execute this MOU on behalf of such Party and does so with full legal authority.
- 4.13 Warranties.** The warranties described in section 3.3(O) of this MOU (the “Warranties”) shall survive for the duration of the Term. The County may provide the Artist with notice of any observed breach of any of the Warranties. Upon such notification, the Artist shall, at the Artist’s sole cost and expense, cure the breach within a reasonable amount of time.
- 4.14 Nonexclusivity of Remedies.** All remedies available to the County pursuant to this Contract are cumulative, and no such remedy shall be exclusive to any other remedy available to the County at law or in equity.
- 4.15 Headings.** Headings provided herein are for convenience only and are not to serve as a basis for interpretation or construction of this MOU.
- 4.16 Attachments.** Each Attachment to this MOU is incorporated herein and made a part hereof as if set forth herein in full.
- 4.17 Licensing.** The Artist grants the County an irrevocable, non-exclusive license to make reproductions of the Asphalt Art for noncommercial purposes in perpetuity. For purposes of this MOU, reproductions for non-commercial purposes include the following: reproductions in exhibition catalogues, books, slides, photographs in art magazines, art books, and art and news sections of newspapers; in general books and magazines of an educational, historical or critical nature; slides and film, video, or digital pieces, and television from stations operated for educational purposes or on programs for educational purposes from all stations. Since the Asphalt Art will be located in a public space, its incidental appearance or use in images, videos, or films of events using space shall not be considered commercial use. In addition to and without limiting the requirements of section 3.3(P) of this MOU, the Artist shall save, defend, indemnify, and hold harmless the County from and against any liability, including the costs of claims, demands, threatened litigation or actual litigation, including damages and the County’s and the Artist’s attorneys’ fees,

arising out of any allegation or claim by any individual, institution or other entity claiming full or partial title to, or intellectual property right, including copyright, in any or all of the artwork or any reproduction thereof, arising under the laws of the United States of America, international law, treaty or convention, the Commonwealth of Virginia, or common law.

5. Notices:

5.1 All notices, requests, demands, and other communications required by this MOU shall be in writing and shall be (A) delivered in person, by courier, or commercial overnight delivery service; (B) mailed by first class registered or certified mail; (C) delivered by facsimile transmission; or (D) delivered by email transmission, as follows, or to such other address as a party may designate to the other in writing:

A. If to Arlington County: [here include address, telephone number, fax number, and if appropriate, email address].

[If appropriate: with a copy to: .]

B. If to [INSERT PARTY HERE]: [here include address, telephone number, fax number, and if appropriate, email address].

[If appropriate: with a copy to: .]

5.2 If delivered personally, by courier or overnight delivery service, the date on which the notice, request, instruction, or document is delivered shall be the date on which the delivery is made, and if delivered by facsimile transmission, email transmission, or mail as aforesaid, the date on which the notice, request, instruction, or document is received [or sent or mailed] shall be the date of delivery.

(SIGNATURES LOCATED ON FOLLOWING PAGE)

In WITNESS WHEREOF, the parties hereby have executed this MOU as of the date set forth below.

Artist Name:

By: _____

Title: _____

Date: _____

Approved as to form

**The County Board of Arlington
County, Virginia**, a body corporate and
politic

County Attorney

By: _____

Title: _____

Date: _____