

MURAL INSTALLATION AND MAINTENANCE AGREEMENT

This MURAL INSTALLATION AND MAINTENANCE AGREEMENT (the “Agreement”) is made this _____, in Keith County, Nebraska, by and between _____ (“Owner”), _____ (“Artist”) and Keith County Area Development, Inc. (“KCAD”).

WITNESSETH:

The First Impressions Committee (Committee) is a committee overseen by KCAD. The Committee and KCAD understand the importance of art in public places and the role that murals play in preserving our culture, conveying the history of our community, beautifying local community, and advancing the arts as quality of place enhancements.

WHEREAS, murals are not restricted under the City of Ogallala or Keith County respective City and County Ordinances and Zoning Laws.

KCAD has adopted a process for the placement of murals on public and private buildings throughout Keith County. The Mural Project Guidelines and Process (Mural Guidelines) have established criteria by which financial support will be provided when the Owner, Artist and Committee establish a Mural Project subject to review by the by the KCAD Board of Directors. The Mural Project Guidelines and Process are set forth more specifically in the Mural Project Packet attached and incorporated herein as Exhibit 1.

WHEREAS, to comply with the KCAD’s Mural Guidelines, Owner, Artist, and KCAD desire to execute an agreement establishing the Parties’ rights and responsibilities with respect to the installation, maintenance, and ownership of the mural.

NOW, THERFORE, in consideration of the mutual covenants contained in this Agreement and for other good and valuable consideration, the receipt and adequacy of which is hereby acknowledged, the parties hereto agree as follows:

1 Definitions

1.1 “Commercial” means words or images used elsewhere in the marketplace for the purpose of promoting a particular business, product, service, cause, place or brand.

1.2 “Commercial element” means art that by virtue of its location or proximity to a business may serve a minimal commercial purpose. If that art were in a different location, it would be considered pure art and not commercial in nature.

1.3 “Good condition” means that the mural is free of dirt, debris, and any other object or substance interfering with the public’s view of the mural.

1.4 “Mural” means a public art mural. It is also generally described as a picture or representation, in any type of medium, on an exterior surface of a building, structure, fence or garden wall, whether public or private, with exposure to the public at all times.

2 Owner's Covenants

2.1 Authorization. Owner covenants that Owner owns the property located at _____ (the "Property"), is authorized to permit the mural's installation upon the _____ wall of the Property and will permit Artist to do so following this Agreement's execution.

2.2 Maintenance and Repair. Owner covenants to maintain and repair the physical property along with providing appropriate insurance coverage as a building improvement. Such proof of insurance shall be provided to KCAD upon written request within 7 days. During the terms of the Agreement, Owner shall notify KCAD of any damage, repairs and upkeep prior to such repairs. The physical property on which the mural is placed such be kept at all times in a state of good condition.

2.3 Ownership. Owner shall own the physical wall on which the Mural is placed.

2.4 Sale of Property. If the property is sold, this Agreement and Mural Guidelines shall exist as an easement upon the property and any new Owner shall become subject to said Agreement.

3 Artist's Covenants

3.1 Installation. Artist covenants to complete installation of the mural on the Property within 120 days after this Agreement's execution.

3.2 Intellectual Property. Artist retains all copyrights and intellectual property rights to the Mural.

3.3 Insurance. Artist shall have in place and provide proof of liability insurance prior to beginning installation.

3.4 Copyright. Artist shall provide proof of copyright rights and other proprietary rights to the Public Art Mural design as requested by KCAD.

3.5 Necessary Artistic Repairs. Artist covenants to assist Owner in making any necessary repairs to the mural's artistic content, including, but not limited to, restoring a damaged portion of the mural's content. Artist shall provide a price list for any restoration work during the term of this Agreement.

4 Term, Termination, and Extension

4.1 Term. This Agreement shall have a term of ten (10) years from the date of execution, unless terminated pursuant to Article 4. After the ten (10) year term, the agreement may be terminated by any party to this Agreement upon 60 days written notice except as it may be extended under 4.4.

4.2 Owner's Termination. Owner may elect to terminate this Agreement without any liability to Artist or KCAD if Artist: (a) fails to install the mural as specified in this Agreement; or (b) fails to complete installation of the mural on the date required by Section 3.1 for any reason. In the event of such termination, Owner may elect to cover or remove those parts of the Mural that have been installed.

4.3 KCAD's Termination. KCAD may elect to terminate this Agreement without any liability to Artist or Owner if the Mural is not maintained in accordance with Section 7.1.

4.4 Extension. The Parties hereto may mutually agree in writing to extend the term of this Agreement for successive five (5) or ten (10) year periods.

5 Mural Specifications

5.1 Artistic Freedom. The provisions of this Article 5 shall not in any way limit or restrict Artist's right to include content in the mural that is not commercial, indecent, or obscene.

5.2 Commercial Content. The mural shall not include an advertisement or be commercial in nature. Murals shall not contain copy, lettering, symbols or references directly to the promotion of any product, business, brand, organization, service, cause or place. Murals may contain limited commercial elements so long as they are not considered commercial speech with the purpose of promoting a commercial transaction.

5.3 Content. The mural shall be appropriate for all audiences (not reflecting partisan politics, containing religious content, or promoting sexual indecency and obscenity except as may be specifically approved KCAD as it relates to historical accuracy).

5.4 Sponsor and Artist Identification. In no event shall the name of a sponsor, a sponsor product likeness, or the Artist's signature individually comprise more than one (1) percent of the mural.

5.5 Configuration and Dimensions. The mural shall be of the same configuration and dimensions as the scale rendition preliminarily approved by the Mural Panel and Owner.

6 Installation

6.1 Time of Installation. Artist shall begin installing the mural as soon as reasonably practicable after this Agreement's execution.

6.2 Notice of Installation. Artist shall provide advance notice in writing to Owner of the date and time Artist intends to install the mural. Artist may thereafter proceed with the installation if Owner is not present unless Owner notifies Artist in writing otherwise.

6.3 Materials. Artist shall be responsible for providing, at its cost, all materials necessary to install the mural.

6.4 Landscape Protection and Removal. To the extent reasonably practicable under the circumstances, Artist shall take care to protect any landscaping on the Property during installation. If installation requires the removal of any landscaping on the Property, Artist shall be responsible for replacing the landscaping after completing installation. Prior to removing or altering any landscaping on the Property, Artist shall first acquire Owner's consent to such removal or alteration.

6.5 Application for Encroachment Permit. Artist and the Committee shall determine whether installation of the mural requires an encroachment permit pursuant to any Codes or Statutes, such as would be necessary for any work performed in the public right of way or utility easements in the County or City, and, if required, Artist shall acquire said permit prior to commencing the mural's installation.

7 Maintenance and Repairs

7.1 Maintenance and Repairs. Owner shall be responsible for always maintaining the physical wall or structure in good condition on which the Mural is placed while this Agreement

is in force. If, for any reason, the wall is not so maintained, as determined by KCAD, KCAD shall notify Owner of the need to perform maintenance and/or repairs and identify the actions necessary for compliance with this provision. If, after thirty (30) days from the date of the KCAD's notification to Owner of the need for maintenance and/or repairs, Owner has not performed the actions identified by KCAD as being necessary for compliance with this provision, KCAD may enter Owner's property and perform any necessary maintenance and/or repairs at Owner's expense or take steps to terminate this agreement and paint over the mural.

7.2 Mural Maintenance. KCAD shall be considered the owner of the Mural and will determine the need for repairs to the Mural. KCAD will be responsible for paying for and arranging any repairs to the Mural as deemed necessary by KCAD along with the Committee.

7.3 Access. Owner hereby grants the Committee, KCAD and Artist a right of access to the Property to paint the mural and to perform maintenance and repairs required pursuant to this Agreement, and otherwise to ensure the mural remains in good condition while this Agreement is in force. The license shall continue for a period of ten (10) years from the date of this Agreement's execution and for all extensions thereafter.

8 Removal

8.1 Removal by KCAD. KCAD may remove the mural at Owner's expense if Owner fails to maintain the Physical Wall in good condition as provided in Section 7.1.

8.2 Removal by Owner. Owner may remove the mural at Owner's expense if Owner reasonably determines that KCAD is not maintaining the mural as required or the Mural Physical Wall is so damaged that restoration is not financially feasible. Owner may also remove the mural if the mural is harming the Property or limiting Owner's ability to use the Property for the purpose for which it is intended. Provided that Owner shall provide Artist and KCAD with ninety (90) days' written notice with sufficient justification that Owner intends to remove the mural at the end of the notice period. If possible, Owner shall work with Artist and KCAD to maintain or find another suitable site for the mural.

9 Insurance and Indemnification

9.1 Insurance. Owner and Artist shall obtain adequate insurance, both in type and amount, as determined by the KCAD's Risk Manager; provided however, that if either party is unable to obtain insurance coverage, then in lieu thereof that party may agree to indemnify KCAD pursuant to Section 9.2 after submitting a verified statement (a) stating that the party was unable to obtain insurance coverage after a reasonable and good faith attempt to do so and (b) identifying the name and address of at least two insurance agents or other sources contacted for the purpose of obtaining insurance pursuant to this Agreement.

9.2 Indemnification and Coordination. Unless insurance coverage has been obtained in accordance with Section 9.1, Owner and Artist hereby agree: (i) to jointly and severally indemnify KCAD for any costs KCAD incurs in connection with the mural caused by the actions of the Owner or Artist, their officers, employees, or agents, or any person who was under their control insofar as permitted by law. Further, Owner and Artist hereby agree to hold harmless, indemnify, and defend KCAD, its officials, members, committees, agents, and employees against any claims, costs, damages, demands, liability, and notices, or any of these, arising or resulting

from any damage or injury proximately caused by actions of either party in connection with the mural, regardless of whether KCAD is actively negligent or passively negligent, except for those claims, costs, damages, demands, liability, and notices, or any of these, caused solely by the negligence or willful misconduct of KCAD; and (ii) to cooperate with KCAD to respond to specific risks, hazards, and dangers to public health and safety that are reasonably foreseeable consequences of the activity contemplated by this Agreement.

10 Intellectual Property

10.1 Ownership: KCAD, its successors and assigns, shall own all rights in the mural except as specified below.

10.2 Copyright. Subject to the restrictions and usage rights and licenses granted to Owner hereunder, and unless otherwise agreed to by the parties in writing, Artist shall retain all 17 U.S.C. §106 copyrights in all original works of authorship produced under this Agreement. If Artist is comprised of two or more individual persons, the individual persons shall be deemed joint authors of the mural.

10.3 Owner's Intellectual Property License. Artist hereby grants to Owner, and to Owner's agents, authorized contractors and assigns, and to KCAD an unlimited and irrevocable license to do the following with respect to the Mural:

10.4 (i) Owner may use and display the mural on the Property only. (ii) Owner and KCAD may make, display, and distribute, and authorize the making, display, and distribution of photographs and other reproductions of the mural. Owner and KCAD may use such reproductions for any Owner-related or KCAD-related purpose, including advertising, educational and promotional materials, brochures, books, flyers, postcards, print, broadcast, film, electronic, and multimedia. Owner and KCAD shall ensure that such reproductions are made in a professional and tasteful manner, in their sole and reasonable judgment. Owner and KCAD shall make reasonable efforts to ensure that such reproductions include the following credit line and copyright notice where practicable: "[Title of Artwork]" © [Year of completion] by [Artist's name]. Failure to include such credit line and notice in any reproductions shall not constitute a breach of this agreement. Neither Owner nor KCAD may license or sublicense its rights for any private or commercial purpose. This license granted hereunder does not include the right to sell photographs or reproductions of the mural or to reproductions.

10.5 Third Party Infringement. Artist represents and warrants that the mural is the sole work of the Artist and does not infringe the intellectual property rights of any third parties. Neither Owner nor KCAD is responsible for any third-party infringement of Artist's copyright or for protecting Artist's intellectual property rights. Further, Artist agrees to indemnify Owner and KCAD against any claims brought against Owner or KCAD alleging that the mural infringes the intellectual property rights of any third parties.

10.6 Publicity. Owner and KCAD shall have the right to use Artist's name, likeness, and biographical information, in connection with the display or reproduction and distribution of the mural. Artist shall be reasonably available to attend any ceremonies related to the mural.

10.7 Trademark. If Owner's or KCAD's use of the mural creates trademark, service mark or trade dress rights in connection with the mural, Owner and KCAD shall have an exclusive and irrevocable right in such trademark, service mark, or trade dress.

10.8 Waiver of Artist's Rights. With respect to the mural produced under this Agreement, and in consideration of the procedures and remedies specified in this Agreement, Artist hereby waives any and all claims, arising at any time and under any circumstances, against Owner and KCAD, its officers, agents, employees, successors and assigns, arising under the federal Visual Artists Rights Act (17 U.S.C. §§106A and 113(d)), and any other local, state, federal or international laws that convey rights of the same nature as those conveyed under 17 U.S.C. §106A, et seq., or any other type of moral right protecting the integrity of works of art. Specifically, Artist hereby waives any and all such claims against Owner or any future owners of the Property, and its agents, officers and employees, and KCAD. Artist hereby represents and warrants that the Artist is authorized to sign this waiver.

11 Miscellaneous Provisions

11.1 Limitation of Liability. UNDER NO CIRCUMSTANCES SHALL ONE PARTY TO THIS AGREEMENT BE LIABLE TO THE OTHER PARTY FOR ANY SPECIAL, CONSEQUENTIAL, INDIRECT, OR INCIDENTAL DAMAGES, INCLUDING LOST PROFITS, ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT, OR ANY ACTIVITIES PERFORMED IN CONNECTION WITH THIS AGREEMENT, REGARDLESS OF WHETHER A CLAIM MADE BY THAT PARTY IS BASED ON CONTRACT OR TORT.

11.2 Survival. The provisions contained in Article 10 shall survive the expiration or termination of this Agreement.

11.3 Modification and Amendment. This Agreement may not be modified, nor may compliance with any of its terms be waived, except by written instrument executed and approved in the same manner as this Agreement.

11.4 Governing Law; Venue. The formation, interpretation and performance of this Agreement shall be governed by the laws of the State of Nebraska, without regard to its conflict of laws principles. Venue for all litigation relative to the formation, interpretation and performance of this Agreement shall be in Keith County.

11.5 Headings. All article and section headings and captions contained in this Agreement are for reference only and shall not be considered in construing this Agreement.

11.6 Entire Agreement. This Agreement sets forth the entire agreement between the parties and supersedes all other oral or written provisions.

11.7 Counterparts. This Agreement may be executed in multiple counterparts and signatures may be exchanged by facsimile or electronically, each of which shall be deemed to be an original document, and all of which together shall constitute one and the same document.

11.8 Relationship of the Parties. Nothing contained in the Agreement shall be construed as creating any agency, partnership, or other form of joint enterprise between the Parties. The relationship between the Parties shall always be that of independent contractors. Neither Party shall have authority to contract for or bind the other in any manner whatsoever. The Agreement confers no rights upon either Party except those expressly granted herein.

11.9 Attorney Fees. In the event either party commences legal proceedings for the enforcement of this Agreement, the prevailing party shall be entitled to recovery of its attorney's fees, litigation expenses, and court costs incurred in the action brought thereon. Attorney's fees and litigation expenses shall include without limitation costs of preparation and discovery and

retaining expert witnesses, and such fees and expenses shall be payable whether the litigation proceeds to final judgment. "Prevailing party" shall be defined as the party with a net monetary recovery, a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant. When any party recovers other than monetary relief and in situations other than as specified herein, the prevailing party shall be as determined by the court.

11.10 Notices. Notices or other communications required by this Agreement will be sufficiently made or given if mailed by certified First Class United States mail, postage pre-paid, or by commercial carrier (e.g., FedEx, UPS, etc.) when the carrier maintains receipt or record of delivery, addressed to the address stated below, or to the last address specified in writing by the intended recipient.

Owner: Owner Name
 Address
 City, State Zip

Artist: Artist Name
 Address
 City, State Zip

KCAD: KCAD, Attn: KCAD Director
 10 North Spruce St., Suite C
 P.O. Box 418
 Ogallala, NE 69153

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed as of the date first specified herein.

Owner

NAME

Artist

NAME

KCAD

NAME