



Date of Council Meeting: March 8, 2016

**TOWN OF LEESBURG
TOWN COUNCIL MEETING**

Subject: Termination of public art agreement for the parking garage mural project

Staff Contact: Barbara Notar, Town Attorney
Anne D. Geiger, P.E., Commission on Public Art Staff Liaison

Council Action Requested: Terminate the agreement between the Town and Northland Design and Construction, Inc., for the Town parking garage mural project.

Staff Recommendation: Staff recommends that the Town Council terminate the public art agreement between the Town of Leesburg and Northland Design and Construction, Inc., to provide a mural on the Town parking garage.

Commission Recommendation: The Commission on Public Art recommends the termination of the public art agreement with Northland Design and Construction, Inc.

Fiscal Impact: There is no fiscal impact to the Town. The design fee of \$15,000 was to be paid in installments, divided into thirds. The initial 1/3 payment of \$5,000, was donated to the Town by the Friends of Leesburg Public Arts (FOLPA) for this project. The pay structure to Northland Design and Construction, Inc., involved: an initial remittal of 1/3 of the \$15,000 fee for the design of the mural; remittal of 1/3 after 50% of the cost of the mural was raised by one or more entities that support the creation and installation of public art within the Town; and remittal of the final 1/3 after the mural was complete.

The initial 1/3 payment of \$5,000 was paid to Northland Design and Construction, Inc., when the contract was signed. This payment came directly from the funds donated to the Town by FOLPA for this project. No additional funds have been paid or are owed to Northland Design and Construction, Inc.

Work Plan Impact: None.

Executive Summary: The Town Council requested that a mural be designed and constructed for the Town parking garage, and asked the Commission on Public Art (COPA) to oversee the project. COPA identified Northland Design and Construction, Inc., for the project. On April 28, 2015, the Town Council authorized the Town Manager to execute a public art agreement with Northland for design and installation of the mural. Due to lack of design performance by Northland as set forth in the agreement, COPA is requesting that the agreement be terminated.

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Background: In August 2012, the Town Council passed Resolution No. 2012-R102 for the development of a public mural art project for the Town parking facility.

At the February 11, 2014 meeting, the Town Council passed motion 2014-007 authorizing a tile mural project, and asked COPA to present a final design to Council prior to award of the final contract.

On March 13, 2014, the Town Council approved a supplemental appropriation of \$5,000 for the mural resulting from a donation from FOLPA to fund the parking garage mural (Resolution 2014-R031). On April 28, 2015, the Town Council authorized the Town Manager to sign a public art agreement with Northland Design and Construction, Inc.

Attachment: Public Art Agreement
Proposed Resolution

PUBLIC ART AGREEMENT BETWEEN ARTIST AND TOWN

This Public Art Agreement (hereinafter referred to as "Agreement") made this 5th day of May 2015, by and between the Town of Leesburg, Virginia (hereinafter referred to as the "Town") and Northland Design and Construction, Inc., (hereinafter referred to as "Artist").

WHEREAS, the Town is a local government, developing a tourist attraction by the use of public art to include the use of murals, paintings and related artistic creations; and

WHEREAS, the Town requires the services of an artist to create a work of art (the "Artwork") and to formulate and oversee plans for fabrication of the Artwork as an event enlisting participation by members of the public and to provide for permanent installation of the completed Artwork (the "Mural Project") on the Town of Leesburg Parking Garage located at 25 W. Market Street (herein referred to as the "Garage") which is owned by the Town.

WHEREAS, the Town has determined that Artist is qualified to create the Artwork desired based upon the skill, reputation and creativity of Artist, and the Artist is willing and able to perform under the terms and conditions of this Agreement for the design of the Artwork and implementation of the Mural Project and is willing and able to perform these functions under the terms and conditions of this Agreement.

WHEREAS, the Town is not providing public funding for the Mural Project except as specifically provided in this Agreement and all fundraising and financing of the Mural Project shall be undertaken by one or more entities that support the creation and installation of public art within the Town (hereinafter "private sources")

WHEREAS, the Town will be the repository of all funds raised by the fundraising efforts of private sources and will process payments to the Artist as set forth in this Agreement.

NOW THEREFORE, in consideration of the foregoing and the covenants set forth below and other good and valuable consideration, the parties agree as follows:

1. PRELIMINARY DESIGN

Artist shall present a preliminary design for the Artwork to the Town on or before June 1, 2015 for review, approval and recommendation by the Commission on Public Art ("COPA") for approval by the Town Council. The preliminary design will include a color rendering of the mural design as it will appear on the parking garage wall, the artwork's dimensions, installation event schedule and anticipated costs, description of materials to be used, installation details, and considerations for longevity and conservation and maintenance requirements.

2. CREATION AND INSTALLATION

(a) Artist represents and warrants that the Artwork to be created will be an original work of art by Artist and that the Artwork to be created as part of the Mural Project will be a faithful rendition of the preliminary design submitted by Artist and approved by the Town. All changes to the Artwork shall be first reviewed, approved and recommended by the COPA for approval by the Town Council.

(b) Artist shall create and be responsible for installation of the Artwork in accordance with the terms of this Agreement. Following installation and acceptance by the Town, the Artwork will be the property of the Town free and clear of all claims, subject, however, to the provisions of Sections 13 and 17 below.

(c) Artist agrees to start construction of the mural no later than sixty (60) days from notice by the Town of final approval and funding of the Mural Project. Upon mutual agreement of both the Town and the Artist a different schedule may be agreed upon taking into consideration the other factors including the availability of the volunteers and community participation and resources and availability of funding for the fabrication and installation of the mural. The Artist agrees to have the artwork completely installed including all touch-up work by April 30, 2016 or on a date mutually agreed upon by the parties. The Artist also agrees to be present for the dedication ceremony. Upon completion of installation, the Town shall acknowledge its completion in writing, and will not unreasonably withhold approval.

(d) Except as otherwise set forth in this Agreement, the funding and financing for the Mural Project shall be provided by private sources and not by Town funds. Such costs to be funded by private sources shall include, but not be limited to, design of the Artwork, costs for installation, including painting, tools, laborer wages, workers compensation and general liability insurance and any other costs necessary for installation. Such costs shall be paid by donations raised for the Mural Project by private sources and other donations which may be in "like kind."

(e) Except as set forth in this Agreement, the Artist as the designer and consultant shall be paid no more than \$15,000.00 for the design and renderings of the mural and oversight of the fabrication and installation of the Mural Project (the "Artist's Fee"). In addition to the Artist's Fee, all reasonable travel and accommodations to and from Vermont and Leesburg for development and research and oversight of the Mural Project are reimbursable expenses for the Artist and assistant as part of the Mural Project costs.

(f) Any additional expenses incurred by the Artist not included in subsection (e) above must be approved by the COPA and the Town in order to qualify for reimbursement.

(g) If work on the Mural Project is delayed by adverse weather conditions, or any other cause beyond the Artist's reasonable control, then the completion date shall be extended for such reasonable time as the parties may agree.

(h) If work on the design of the Artwork or installation of the Mural Project is delayed by any fault, neglect, act or failure of Artist, then Artist shall take all reasonable steps to complete the art work within as agreed or within such time as is subsequently approved by the Town. In the event that Artist is unable to complete the Mural Project within the time provided above, Artist shall be required to pay all costs caused by the delay.

(i) If the work on design of the Artwork or installation of the Mural Project is delayed by any fault, neglect, act or failure of the Town, then the Town shall take all reasonable steps to enable the Artist to complete the artwork and shall pay all costs associated therewith including paying for additional scaffolding, laborers, additional insurance costs and any other costs reasonably necessary to complete the artwork.

3. COMMUNITY PARTICIPATION

Upon request by the Town, Artist agrees to participate in community activities which involve and enlighten the community about mural painting and related artistic creations. It is anticipated that the Mural Project will require the extensive use of volunteers and members of the community to complete. The volunteers will be utilized to help with the assembly of the interactive mural frame and to assist the Artist with the oversight of the painting of tiles by citizens so that they are ready to be installed by the Artist. Volunteers for the Mural Project will be recruited and organized by the Town through the efforts of one or more entities that support the creation and installation of public art within the Town. The Artist will be responsible for supervising volunteer work in creating and installing the Artwork.

4. PROTECTIVE COATING

The Town agrees to notify Artist of any subsequent restoration treatments or graffiti guard or other anti-graffiti coating, which shall be applied by and paid for by the Town. The Town agrees to consult with Artist prior to doing said work and cooperate in determining solutions; but if Artist is unavailable or unwilling to cooperate, the Town shall secure and pay for restoration and graffiti guard and/or graffiti guard alone in a manner that conforms with currently accepted standards of restoration and anti-graffiti coating application as it deems appropriate.

5. PERMITS

The Town agrees to procure at its own cost all necessary permits including any easements, encroachment permits, signage permits, scaffolding permits, alley closure permits or otherwise.

6. COMPLIANCE WITH ALL LAWS

Artist agrees to comply with all federal and state laws, and local ordinances that pertain to the creation and installation of the artwork.

7. WALL PREPARATION

The Town shall be responsible for preparing the wall for the artwork with funds raised and donated for the purpose of supporting the Mural Project. The preparation shall be done pursuant to Artist's written specifications submitted at the time the preliminary design is submitted.

8. AMOUNT OF PAYMENT

Artist will be paid a total of \$15,000.00 within thirty (30) days of receipt of invoice by the Town, which shall be submitted by the Artist at the end of each phase of the Mural Project as set forth below:

(a) One third upon both parties signing this Agreement;

(b) One third upon Town receipt of 50% of the anticipated Mural Project costs or Town acceptance of pledges for in-kind donations of materials and services for the Mural Project in amount estimated to equal 50% or more of the total project cost.

(c) One third when the Mural Project is complete and accepted by the Town.

9. INCREASE IN PAYMENT

If additions or deletions are approved by the Town and Artist and made to the Artwork which results in an increase in cost, such increased costs shall be agreed to in writing and paid to the Artist within thirty (30) days of receipt by the Town of an invoice.

10. TIMELY PAYMENT

If the Town fails to make any payment within (30) days of the date it is due, Artist may cease all work until such time as payment is made and the completion date of the Mural Project shall be adjusted accordingly.

11. MURAL MAINTENANCE

The Town recognizes that the maintenance of the artwork on a regular basis is essential to the integrity of the Artwork. Therefore, for the length of time that the Artwork is on the site, the Town shall be responsible, at its own cost, for maintaining and repairing the artwork, with due consideration of the conservation and maintenance standards presented by Artist and approved by the Town at the time of the preliminary design, which standards shall be in conformance with recognized principles of conservation. If Artist fails or refuses to provide guidance on maintenance and repairs, the Town shall have the right to proceed alone as it deems appropriate. All maintenance, repairs and restorations shall be made in accordance with recognized principles of conservation.

12. INDEPENDENT CONTRACTOR

Artist is an independent contractor and not an employee, agent or other representative of the Town. Artist shall have the right to select the means, manner and method of performing the services described herein and has complete artistic discretion and control over the execution of the artwork. Artist understands and agrees that he is not authorized to incur any expenses or any liability whatsoever on behalf of the Town and has no authority, expressed or implied, to obligate or make representations on behalf of the Town.

13. COPYRIGHT/LICENSE

Artist agrees that the Artwork is a work made for hire and conveys a license to the Town to use the image for all purposes, subject, to the retained interests described in this paragraph and in Paragraph 17.

(a) Artist retains the right to reproduce the Artwork for all purposes, including reproducing the image for Artist's portfolio.

(b) The Town agrees to notify the Artist should the Town ever desire to use the Artist's Artwork in an individual (i.e., not coupled with the works of other Artists as in a calendar or book) sale. Artist agrees to cooperate in the development of such a piece (i.e., autograph of piece, oversee production artwork, participation in public announcements, etc.). Funds raised shall be designated in an account for the maintenance of the Artwork for so long as it remains on public property that is owned by the Town. Artist will not deny the reasonable use of the Artwork to the Town.

(c) Artist retains usage for purposes that do not compete with the Town's fundraising efforts as long as the Artwork is identified as being a part of the Town of Leesburg, Mural Project. Artist agrees to contact the Town for permission for such

non-competing formats, and the Town agrees not to withhold permission for any reasonable purpose.

14. THE ARTIST'S INSURANCE

The Artist shall obtain and keep in force a comprehensive general liability insurance policy, in standard form, protecting the Town against any and all liabilities arising out of or related to the installation and maintenance of the Artwork in a combined single limit amount of one million dollars (\$1,000,000) per occurrence in respect of injuries to or death of any person or persons and destruction of or damage to any property. Such policy of insurance (i) shall be issued by an insurance company with general policy holder's ratings of not less than "A" and financial ratings of not less than "B plus" as rated in the most current Bests insurance reports, (ii) shall list the Town as an additional insured, and (iii) shall provide that it may not be canceled by the insurer or lapse of its own accord without proper notice to the insured and the additional insured's. Such policy shall also be written as a primary policy not contributing with any other coverage, which Artist may carry.

15. INDEMNIFICATION

The Artist shall defend, indemnify and hold harmless the Town, his or her agents, and contractors from any and all claims, demands, damages, costs, expenses (including attorneys' fees), judgments or liabilities arising from the negligence or willful misconduct of the Artist.

16. TERMINATION

Either party may terminate this Agreement for cause if the other party fails to perform any material obligation hereunder. In the event Artist abandons the artwork, defaults on any material term of this Agreement or otherwise causes it to be terminated without cause prior to completion of the work, Artist shall not be entitled to recover further compensation from the Town, and Artist shall be liable for any additional costs that the Town has to assume because Artist terminated without cause. If the Town fails to perform any material obligation hereunder, including failure to pay Artist, Artist may cease work and exercise any remedies available pursuant to Section 18 below.

17. ART PRESERVATION

Without constituting a waiver of the Town's sovereign immunity, the Town agrees to preserve the integrity of the artwork and agrees to comply with applicable sections of the Visual Artists' Right Act of 1990 as codified by 17 U.S.C. § 106A ("VARA"). Nothing in this paragraph shall be deemed to create a right or cause of action on behalf of any person not a party hereto.

18. MISCELLANEOUS TERMS AND CONDITIONS

(a) The Artist acknowledges that no public funds will be used for the Mural Project and that the fundraising and financing of the Mural Project shall be undertaken by private sources; should such private sources be unable or unwilling to raise the funds needed for the completion of the Mural Project, this contract may be terminated by the Town upon reasonable notice to the Artist from the Town. Any funds paid to the Artist pursuant to this Agreement provided by the private sources and conveyed to the Town for the Mural Project may be retained by the Artist.

(b) No Artist or employee or subcontractor of Artist shall be covered by Workers Compensation Insurance purchased by the Town.

(c) The Town agrees to acknowledge Artist in connection with the Mural Project in, but not limited to, publicity, presentations, exhibitions, reports, fundraising activities, etc.

(d) Any substantive change in the Mural Project, including but not limited to a major change in size, site, or sponsorship may void this contract or be cause for it to be renegotiated.

(e) Every reasonable effort will be made to lend non-monetary support and technical assistance to the Artist and the Mural Project by the Town.

(f) Artist agrees to acknowledge sponsorship of the Town in the inscription of the resulting Artwork and to the best of his/her ability will acknowledge sponsorship of the Town in any publicity, reports, presentations, program notices, etc.

(g) Artist shall be responsible for supervising the Artist's employees and agents with regard to all safety precautions and programs used in connection with the Mural Project or work.

(h) Artist shall also be responsible to take all reasonable precautions for the safety of and provide all reasonable protection to prevent damage, injury, or loss to:

- (1) all Artist's employees and agents on the Mural Project and volunteers or persons who may be affected thereby;
- (2) all of the work and materials and equipment to be incorporated in the Artwork or the Mural Project, whether stored on or off the site, under the care, custody, or control of Artist or any of the subcontractors; and
- (3) other property at the site or adjacent thereto including trees, shrubs, lawns, walks, pavements, roadways, structures, and utilities.

(i) Artist shall use the utmost care and shall exercise the utmost security measures to carry out the work necessary for the execution of the Mural Project.

19. NOTICE PROVISION

Any notices deemed necessary shall be given by either party to the other as follows:

Town of Leesburg: Town Manager, 25 W. Market Street, Leesburg, VA 20176

Artist: Northland Design and Construction, Inc.
P.O. Box 848, Route 100, Waitsfield, Vermont 05673
849

20. SIGNATURES R.B.

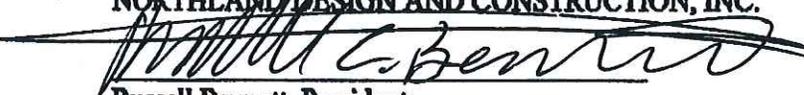
The parties agree that a signature by facsimile is as valid as an original signature.

21. ENTIRE AGREEMENT

This Agreement represents the entire agreement of the parties and may not be amended unless in writing signed by both parties.

Dated this 5 day of May, 2015, at Waitsfield, Vermont.

NORTHLAND DESIGN AND CONSTRUCTION, INC.


Russell Bennett, President

Dated this 12 day of May, 2015, at Leesburg, Virginia.

TOWN OF LEESBURG, VIRGINIA


Kaj Dentler, Town Manager

Approved by:


Town Attorney

PRESENTED March 8, 2016

RESOLUTION NO. 2016_____

ADOPTED _____

A RESOLUTION: TERMINATION OF AGREEMENT BETWEEN TOWN AND ARTIST FOR
 THE PARKING GARAGE MURAL PROJECT

WHEREAS, the Town Council directed the Commission on Public Art to initiate and manage a mural project to be constructed on the Town's parking garage; and

WHEREAS, the Commission on Public Art recommended that Northland Design and Construction Inc., ("Northland") design and help oversee the construction of the mural project; and

WHEREAS, in April 2015, the Town Council authorized the Town Manager to enter into an agreement with Northland for this purpose; and

WHEREAS, the Friends of Leesburg Public Arts donated to the Town a sum of \$5,000, for this project, which was paid to Northland for the initial design; and

WHEREAS, the Town has not paid any additional funds and does not owe any additional funds to Northland; and

WHEREAS, Northland has not fulfilled the preliminary design requirements as per the terms of the agreement; and

WHEREAS, there has been no fiscal impact to the Town as a result of this project, and no fiscal impact will result from the termination.

THEREFORE, RESOLVED by the Council of the Town of Leesburg in Virginia that the Town Manager is authorized to terminate the public art agreement for a parking garage mural with Northland Design and Construction Inc.

A RESOLUTION: TERMINATION OF AGREEMENT BETWEEN TOWN AND ARTIST
 FOR THE PARKING GARAGE MURAL PROJECT

PASSED the ____ day of _____, 2016.

David S. Butler, Mayor
Town of Leesburg

ATTEST:

Clerk of Council