

1 WINDING OUT ACCEPTANCE AGREEMENT

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4 **THIS AGREEMENT** (the “Acceptance Agreement”), is dated as of the ____ day of
5 _____, 2014, between the **CITY OF DURHAM**, a North Carolina municipal
6 corporation, (the “City”), and Liberty Arts Inc. (the “Company” or “Contractor”), a nonprofit
7 corporation organized and existing under the laws of the State of North Carolina, hereinafter
8 collectively referred to as the “Parties”.

9
10 **NOW, THEREFORE**, for and in consideration of the mutual terms and conditions
11 hereinafter contained, and other good valuable consideration, the receipt and sufficiency all of
12 which are hereby acknowledged, the Parties agree as follows:

13
14 **1.0 BACKGROUND AND PURPOSE**

15
16 The Company entered into a contract with a certain artist named Robert Winkler of 3
17 Round Oak Road, Asheville, NC 28804 (hereinafter, the “Artist”) for the purchase of artwork
18 created by the Artist titled “Winding Out” (hereinafter referred to as the “Artwork”). A
19 photographic representation of the Artwork is attached hereto as Exhibit A., “Photograph of
20 ARTWORK”. The title of the contract for purchase of the Artwork is “Artist Agreement of
21 Sculpture ‘Winding Out’” dated September _____, 2014 (hereinafter, “Artist Agreement”). The
22 Artwork is a sculpture made primarily of natural cedar wood pieces attached with steel
23 components and configured into a spiraling structure. The Artwork is currently on display as
24 part of the “Bull City Sculpture Show” (“BCSS”) in an outdoor location in the City of Durham,
25 adjacent to the Durham Farmer’s Market at 501 Foster Street between Hunt Street and W.
26 Corporation Street. The Company is the sponsor and organizer of the BCSS, and is responsible
27 for the Artwork until the end of the BCSS. The Company wishes to donate the Artwork to the
28 City at the termination of the BCSS and the City is desirous of accepting the Artwork subject to
29 the terms of this Acceptance Agreement.

30
31 **2.0 RELOCATION AND INSTALLATION OF ARTWORK**

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33 **2.1 Notice to Proceed and Right of Entry.** Upon conclusion of the BCSS, the
34 Company shall provide the City with written notice that it is ready to relocate and install the
35 Artwork at a new permanent location, to be designated by the City. The City Manager or his
36 designee shall issue a written notice to proceed (NTP) to the Company, which NTP shall
37 constitute the authorization for the Company to enter onto city property for the purpose of
38 removing the Artwork from its current location and installing the Artwork at the approved,
39 permanent location.

40
41 **2.1 Assumption of all Costs, Expenses and Liabilities by Company.** The
42 Company shall assume all costs and expenses relating to the relocation and installation of the
43 Artwork on city property. The Company shall obtain and provide, without cost to the City, all labor,
44 materials, equipment, transportation, facilities, services, permits, and licenses necessary to perform the
45 work of relocating and installing the Artwork at a new, permanent location identified by the City
46 (hereinafter referred to as “Work”). The Company shall be responsible for repairing, replacing or re-
47 constructing any damage to the property caused by its activities relating to the Work. As the Company

48 will be responsible for all work activities relating to the Artwork installation, the Company shall assume
49 all risks and liabilities relating to such Work, except to the extent that any liability is caused by a
50 negligent or wrongful act or omission of the City.

51
52 **2.2 Signage.** The Company shall be responsible, at its sole cost and expense, for
53 installing signage or plaques describing the Artwork, the Artist and the reason for the creation
54 and installation of the Artwork. All signage or plaques must be approved by the City in writing
55 in its reasonable discretion and must comply with all applicable city signage regulations.

56
57 **3.0 ACCEPTANCE, ASSIGNMENT AND MAINTENANCE OF THE ARTWORK**

58
59 **3.1 Acceptance and Maintenance of the Artwork.** Upon installation of the
60 Artwork in accordance with the specification and requirements of the Artist, the City shall be
61 granted, and through the City Manager, the City shall accept, full title and ownership of Artwork
62 by means of a dated, written document in a form acceptable to the parties (a sample of which is
63 attached hereto as Exhibit B, "Certificate of Acceptance"). If the installation of the Artwork was
64 not properly completed in accordance with City requirements, the City shall give written notice
65 to the Company and the Artist specifying the basis for the City's objection to the installation.
66 After the Company and Artist cure the deficiencies specified in the City's written notice, they
67 shall give written notice of such cure to the City. If the City is satisfied, in its reasonable
68 discretion, that the Artwork was properly installed, then the City shall execute and deliver the
69 Certificate of Acceptance to the Company. If the City is still not satisfied with the installation,
70 the parties will continue the process of written objection and attempt to cure as described above
71 until Acceptance. If the City fails to accept the Artwork within three (3) months after the initial
72 installation, the City may require the Company to remove the Artwork from the city property and
73 may terminate this Acceptance Agreement by written notice to Company.

74
75 Prior to acceptance of the Artwork through execution and delivery of the Certificate of
76 Acceptance, the Company shall bear all risk of loss or damage to the Artwork. Upon the date of
77 acceptance of the Artwork, and except as otherwise provided herein, the City shall be responsible
78 for all liabilities, costs, and expenses resulting or arising out of owning, operating and
79 maintaining the Artwork pursuant to the terms of this Acceptance Agreement and the Artist
80 Agreement. The City agrees to maintain the Artwork consistent with the requirements of Section
81 9 of the Artist Agreement, attached hereto as Exhibit C. The City shall insure the Artwork
82 consistent with the coverage the City would carry for all public works of art installed and
83 maintained on City property, and the City shall provide, upon request from Company, evidence
84 of such insurance.

85
86 **3.2 Assignment of Artist Agreement Rights to City.** The Artist Agreement
87 transferred ownership in the Artwork to the Company, including certain copyright and visual arts
88 interests in the Artwork. The Company hereby assigns to the City all rights, benefits, duties and
89 obligations arising from the Artist Agreement, excluding the payment to Artist for the Artwork
90 and any obligations assumed by the Company as part of this Acceptance Agreement.

91
92 **3.3 Restoration, Removal, Destruction of the Artwork.** In the event of damage to
93 the Artwork requiring restoration or repair, the City and any future owner, successor, donee,
94 assignee or transferee of the City shall, if practicable, offer the Artist the first opportunity to

95 restore or repair the Artwork and, in any case, shall consult with the Artist with respect to the
96 restoration or repairs by attempting to contact Artist in accordance with Section 6.0, Notice,
97 below. The City shall not be obligated to display the Artwork on city property for any specified
98 period of time; however, the City shall not destroy the Artwork or permit the Artwork to be
99 destroyed without first offering to return ownership of the Artwork to the Artist or his or her
100 successors in interest by first attempting to contact Artist in accordance with Section 6.0, Notice
101 below.

102
103 **3.4 Alteration or Modification of the Artwork.** The City shall not distort, mutilate,
104 or otherwise alter the Artwork, except to the extent necessary for safety reasons. In the event
105 such distortion, mutilation, or other alteration occurs, the Artist shall, in addition to any other
106 rights and remedies, have the right to have his or her name removed from the Work and no
107 longer have it attributed to him as its creator.

108
109 **4.0 ASSIGNMENT AND TRANSFER OF RIGHTS IN ARTWORK TO CITY**

110
111 The Company hereby irrevocably grants, transfers, conveys, assigns and sets over to the
112 City, and its successors and assigns the entire right, title, and interest in perpetuity in and to the
113 Artwork in the United States and worldwide.

114
115 The Company hereby irrevocably grants, transfers, conveys, assigns and sets over to the
116 City a worldwide, perpetual, irrevocable, royalty-free, non-transferable, non-sublicensable,
117 exclusive license to use, display, exhibit, prepare derivative works of, distribute copies of,
118 photograph, video, and otherwise reproduce two-dimensional images of the Artwork for non-
119 commercial purposes. Notwithstanding the foregoing, the license does not restrict the Artist
120 from producing, marketing, selling or otherwise transferring works substantially similar to the
121 Artwork for installation and display elsewhere and granting rights similar to those granted herein
122 to such other works.

123
124 The Company further agrees to execute and deliver at the request of the City any and all
125 other papers, instruments and assignments and to perform any other reasonable acts the
126 Company may require in order to vest all of Company's rights, title and interest in and to the
127 Artwork in the City (i) as are deemed necessary by City, (ii) for maintaining and perfecting the
128 City's rights to the Artwork, and (iii) as may be or become necessary for obtaining, maintaining,
129 or protecting said Artwork.

130
131 **5.0 WAIVER BY ARTIST RIGHTS UNDER VARA IN ARTWORK.**

132 The Company has obtained from the Artist a waiver of his rights to the Artwork consistent with
133 the terms of this Agreement under the Visual Artists Rights Act of 1990 (17 U.S.C. § 106A
134 (2008)) ("VARA") in a form acceptable to the City. It is understood and agreed that, pursuant to
135 the Artist Agreement, and the terms and provisions of this Acceptance Agreement, the City has
136 the requisite authority to remove and disassemble the Artwork, if the City chooses to exercise its
137 rights to do consistent with the terms of this Acceptance Agreement.

141 **6.0 NOTICES, CHANGE OF NOTICE INFORMATION**
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143 **6.1** All notices, documentation and other communications required or permitted by this
144 Agreement shall be in writing and shall be given either by personal delivery or certified United
145 States Mail, return receipt requested, addressed as follows:
146

147 To the City:

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149 Office of Economic and Workforce Development
150 City of Durham
151 807 E. Main Street, Suite 5-100
152 Durham, NC 27701
153

154 Attn: Peter Coyle
155

156
157 To the Company:

158
159 Liberty Arts, Inc.
160 Attn: Jackie MacLeod, President
161 923 Franklin St.
162 Durham, NC 27701
163 E-mail: hello@jackiemacleod.com
164 Phone 919-260-2931
165

166
167 To the Artist:

168
169 Robert Winkler
170 3 Round Oak Road
171 Asheville, NC 28804
172 E-mail: studio@robertwinklersculpture.com
173 Phone: 828-225-3766
174

175 **6.2** A change of address or person to receive notice may be made by either party by
176 notice given to the other party. It shall be the sole responsibility of each individual party to
177 provide accurate, updated notice information. Any notice or other communication under this
178 Agreement shall be deemed given at the time of actual delivery, if it is personally delivered or
179 sent by fax. If the notice or other communication is sent by United States mail, it shall be
180 deemed given upon the third calendar day following the day on which such notice or other
181 communication is deposited with the United States Postal Service or upon actual delivery,
182 whichever first occurs.
183

184 **7.0 EXHIBITS**
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186 The following exhibits are made a part of this contract:

- 187
- 188 Exhibit A “Photograph of Artwork” consisting of 1 page;
- 189 Exhibit B Certificate of Acceptance” consisting of 2 pages; and,
- 190 Exhibit C “Artist Agreement,” consisting of 9 pages;
- 191

192 In case of conflict between an exhibit and the text of this Agreement excluding the exhibit, the
193 text of this Agreement shall control.

194 8.0 INSURANCE

195 The Company shall maintain insurance not less than the following:

- 196
- 197 I. Commercial General Liability, covering
- 198 a. Premises/Operations
- 199 b. Products Completed Operations
- 200 c. Broad form Property Damage
- 201 d. Contractual Liability
- 202 e. Independent Contractors (if used in the performance of this agreement)
- 203 f. City of Durham must be named an additional insured, and an original of
204 the endorsement to effect the coverage must be attached to the certificate.
205 (if by blanket endorsement, then agent may so indicate in the GL section
206 of the certificate, in lieu of an original endorsement)
- 207 g. Combined single limits not less than \$1,000,000 per occurrence.
- 208 II. Property Coverage, covering
- 209 a. Fine Arts in any one occurrence up to \$100,000.
- 210 b. Property in Transit in any one occurrence up to \$100,000
- 211
- 212
- 213 III. All insurance shall be provided by companies authorized to do business in the
214 State of North Carolina with a best rating of A-VIII or better.
- 215
- 216 IV. Insurance shall be evidenced by a certificate:
- 217 a. Providing notice to the City of not less than 30 days prior to cancellation
218 or reduction of coverage.
- 219 b. Certificates of Insurance shall be addressed to:
220 City of Durham
221 Attn: Risk Manager
222 101 City Hall Plaza (Annex)
223 Durham, NC 27701
- 224

225 9.0 INDEMNIFICATION

226

227 **9.1 Definitions.** In this Section 11.0, the following definitions shall apply:
228 “Claims” are claims, losses, damages, liabilities, fines, penalties, fees, royalties, costs, demands,
229 actions, suits, and judgments of any kind or nature whatsoever, whether at law or in equity,
230 including court costs and reasonable attorney’s fees assessed as part of any of said items.

231 “Persons Connected with Company” are Company’s officers, members, managers, board
232 members, employees, agents, contractors, subcontractors of all tiers, and invitees, but excluding
233 the City.
234

235 **9.2 Indemnification by Company.** “City Indemnitees” are defined as City, its
236 officers, officials, employees, agents, and independent contractors, but excluding Company.
237 Company shall indemnify, defend, and hold harmless the City Indemnitees from and against all
238 Claims arising out of, relating to, or resulting from acts or omissions by Company or Persons
239 Connected with Company occurring prior to Acceptance arising out of, relating to, or resulting
240 from the Company’s obligations with respect to this Agreement. Without limiting the preceding
241 sentence, and as an additional obligation of Company, it is agreed that Company shall indemnify,
242 defend, and hold harmless the City Indemnitees from and against all Claims made by
243 independent contractors, including subcontractors of all tiers, where the independent contractor
244 was engaged by Company to perform work pursuant to this Agreement, except to the extent the
245 Claim is the result of a negligent or wrongful act or omission by any of the City Indemnitees. In
246 performing its duties under this Section 9.2, Company shall defend City Indemnitees with legal
247 counsel reasonably acceptable to City.
248

249 **9.3 Survival.** This Section 9.0 shall remain in force despite termination of this
250 Agreement with respect to acts and omissions occurring before termination of this Agreement
251 (whether by expiration of the term or otherwise) and termination of the services of Company
252 under this Agreement.
253

254 **10.0 MISCELLANEOUS PROVISIONS**
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256 **10.1 City Policy.** THE CITY OPPOSES DISCRIMINATION ON THE BASIS OF
257 RACE AND SEX AND URGES ALL OF ITS CONTRACTORS TO PROVIDE A FAIR
258 OPPORTUNITY FOR MINORITIES AND WOMEN TO PARTICIPATE IN THEIR WORK
259 FORCE AND AS SUBCONTRACTORS AND VENDORS UNDER CITY CONTRACTS.
260

261 **10.2 Choice of Law and Forum.** This Agreement shall be deemed made in Durham
262 County, North Carolina. This Agreement shall be governed by and construed in accordance with
263 the laws of the State of North Carolina. The exclusive forum and venue for all actions arising
264 out of this Agreement shall be the North Carolina General Court of Justice in Durham County.
265 Such actions shall neither be commenced nor removed to federal court. This section shall not
266 apply to subsequent actions to enforce a judgment entered in actions heard pursuant to this
267 section.
268

269 **10.3 Principles of Interpretation and Definitions.** In this Agreement, unless the
270 context requires otherwise (a) the singular includes the plural and the plural the singular. The
271 pronouns “it” and “its” include the masculine and feminine. References to statutes or regulations
272 include all statutory or regulatory provisions consolidating, amending, or replacing the statute or
273 regulation. References to contracts and agreements shall be deemed to include all amendments
274 to them. The words “include,” “including,” etc. mean include, including, etc. without limitation;
275 (b) references to a “Section” or “section” shall mean a section of this Agreement; (c) “Contract”
276 and “Agreement,” whether or not capitalized, refer to this instrument; (d) titles of sections,

277 paragraphs, and articles are for convenience only, and shall not be construed to affect the
278 meaning of this Agreement; (e) “Duties” includes obligations; (f) the word “person” includes
279 natural persona, firms, companies, associations, partnerships, trusts, corporations, governmental
280 agencies and units, and other legal entities; (g) the word “shall” is mandatory; and (h) the word
281 “day” means calendar day.
282

283 **10.4 Waiver.** No action or failure to act by either party hereto shall constitute a waiver
284 of any of its rights or remedies that arise out of this Agreement, nor shall such action or failure to
285 act constitute approval of or acquiescence in a breach thereunder, except as may be specifically
286 agreed in writing.
287

288 **10.5 Performance of Government Functions.** Nothing contained in this Agreement
289 shall be deemed or construed so as to in any way estop, limit, or impair the City from exercising
290 or performing any regulatory, policing legislative, governmental, or other powers or functions.
291

292 **10.6 Severability.** If any provision of this Agreement shall be unenforceable, the
293 remainder of this Agreement shall be enforceable to the extent permitted by law.
294

295 **10.7 Compliance with Law.** In performing all of the Work, the Company shall
296 comply with all applicable law. The City shall also comply with all applicable laws in fulfilling
297 its obligations under the Agreement
298

299 **10.8 No Third Party Rights Created.** This Agreement is intended for the benefit of
300 the City and the Company and not any other person.
301

302 **10.9 Modifications; Entire Contract.** A modification of this Agreement is not valid
303 unless signed by both parties and otherwise in accordance with requirements of law. Further, a
304 modification is not enforceable against the City unless the City manager or a Deputy or Assistant
305 City Manager signs it for the City. This Agreement contains the entire agreement between the
306 parties pertaining to the subject matter of this Agreement. With respect to that subject matter,
307 there are no promises, contracts, conditions, inducements, warranties, or understandings, written
308 or oral, expressed or implied, between the parties, other than as set forth or referenced in this
309 Agreement.
310

311 **10.10 City’s Manager’s Authority.** To the extent, if any, the City has the power to
312 exercise the City’s rights and remedies under this Agreement that power may be exercised by the
313 City Manager or a Deputy or Assistant City Manager without City Council action.
314

315 **10.11 E-Verify Compliance.** The contractor represents and covenants that the
316 contractor and its subcontractors comply with the requirements of Article 2 of Chapter 64 of the
317 North Carolina General Statutes (NCGS). In this E-Verify Compliance section, "contractor," "its
318 subcontractors," and "comply" shall have the meanings intended by NCGS 160A-20.1(b). The
319 City is relying on this section in entering into this contract. The parties agree to this section only
320 to the extent authorized by law. If this section is held to be unenforceable or invalid in whole or
321 in part, it shall be deemed amended to the extent necessary to make this contract comply with
322 NCGS 160A-20.1(b).

Winding Out Artwork Acceptance Agreement

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IN WITNESS WHEREOF, the City and the Company have caused this Agreement to be executed under seal themselves or by their respective duly authorized agents or officers.

City:

CITY OF DURHAM

_____ By: _____

preaudit certificate, if necessary:

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Liberty Arts, Inc.

By: _____ (SEAL)

Title: _____

State of NORTH CAROLINA

ACKNOWLEDGMENT BY
LIBERTY ARTS, INC.

County of _____

I, a notary public in and for the aforesaid county and state, certify that
_____ personally appeared before
me this day and stated that he or she is (strike through the inapplicable:) chairperson/ president/
chief executive officer/ vice-president/ assistant vice-president/ treasurer/ chief financial officer
of LIBERTY ARTS, INC., a corporation, and that by authority duly given and as the act of the
corporation, he or she signed, under seal, the foregoing contract or agreement. This the _____
day of _____, 20_____.

My commission expires: _____

Notary Public