

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**

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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 15, 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.
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31 **2.0 RELOCATION AND INSTALLATION OF ARTWORK**

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33 **2.1 Notice to Proceed and Right of Entry.** The City shall provide the Company
34 with written notice that the City is ready to relocate and install the Artwork at a new permanent
35 location, to be designated by the City. The City Manager or his designee shall issue a written
36 notice to proceed (NTP) to the Company, which NTP shall require Company to coordinate with
37 the City for the removal and relocation of the Artwork. Company shall require the presence of
38 the Artist during the removal and relocation of the Artwork..
39

40 **2.2 Assumption of Costs and Expenses.** The City shall assume all costs and
41 expenses relating to the relocation and installation of the Artwork at a new, permanent location
42 on city property. The City shall be responsible for all labor, materials, equipment, transportation,
43 facilities, services, permits, and licenses necessary to perform the work of relocating and installing the
44 Artwork at a new, permanent location identified by the City (hereinafter referred to as "Work").
45

46 **2.3 Signage.** Afer the Artwork is relocated to a new, permanent location, the
47 Company agrees to work with the City in an effort to create and install a sign or plaque

48 describing the Artwork, the Artist and the reason for the creation and installation of the Artwork.
49 All signage or plaques must be approved by the City in its reasonable discretion and must
50 comply with all applicable city signage regulations.
51

52 **3.0 ACCEPTANCE, ASSIGNMENT AND MAINTENANCE OF THE ARTWORK**
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54 **3.1 Acceptance and Maintenance of the Artwork.** Upon issuance of the NTP, the
55 City shall be granted, and through the City Manager, the City shall accept, full title and
56 ownership of the Artwork by means of a dated, written document in a form acceptable to the
57 parties (a sample of which is attached hereto as Exhibit B, "Certificate of Acceptance"). The
58 Company and Artist shall assist the City with the proper relocation and installation of the
59 Artwork.
60

61 Prior to acceptance of the Artwork through execution and delivery of the Certificate of
62 Acceptance, the Company shall bear all risk of loss or damage to the Artwork. Upon permanent
63 installation of the Artwork in the new location and after the date of acceptance of the Artwork
64 (as evidenced by the Certificate of Acceptance), and except as otherwise provided herein, the
65 City shall be responsible for all liabilities, costs, and expenses resulting or arising out of owning,
66 operating and maintaining the Artwork pursuant to the terms of this Acceptance Agreement and
67 the Artist Agreement. The City agrees to maintain the Artwork consistent with the requirements
68 of Section 9 of the Artist Agreement, attached hereto as Exhibit C. The City shall insure the
69 Artwork consistent with the coverage the City would carry for all public works of art installed
70 and maintained on City property, and the City shall provide, upon request from Company,
71 evidence of such insurance.
72

73 **3.2 Assignment of Artist Agreement Rights to City.** The Artist Agreement
74 transferred ownership in the Artwork to the Company, including certain copyright and visual arts
75 interests in the Artwork. The Company hereby assigns to the City all rights, benefits, duties and
76 obligations arising from the Artist Agreement, excluding the payment to Artist for the Artwork
77 and any obligations assumed by the Company as part of this Acceptance Agreement.
78

79 **3.3 Restoration, Removal, Destruction of the Artwork.** In the event of damage to
80 the Artwork requiring restoration or repair, the City and any future owner, successor, donee,
81 assignee or transferee of the City shall, if practicable, offer the Artist the first opportunity to
82 restore or repair the Artwork and, in any case, shall consult with the Artist with respect to the
83 restoration or repairs by attempting to contact Artist in accordance with Section 6.0, Notice,
84 below. The City shall not be obligated to display the Artwork on city property for any specified
85 period of time; however, the City shall not destroy the Artwork or permit the Artwork to be
86 destroyed without first offering to return ownership of the Artwork to the Artist or his or her
87 successors in interest by first attempting to contact Artist in accordance with Section 6.0, Notice
88 below.
89

90 **3.4 Alteration or Modification of the Artwork.** The City shall not distort, mutilate,
91 or otherwise alter the Artwork, except to the extent necessary for safety reasons. In the event
92 such distortion, mutilation, or other alteration occurs, the Artist shall, in addition to any other

93 rights and remedies, have the right to have his or her name removed from the Work and no
94 longer have it attributed to him as its creator.

95
96 **4.0 ASSIGNMENT AND TRANSFER OF RIGHTS IN ARTWORK TO CITY**
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98 The Company hereby irrevocably grants, transfers, conveys, assigns and sets over to the
99 City, and its successors and assigns the entire right, title, and interest in perpetuity in and to the
100 Artwork in the United States and worldwide.

101
102 The Company hereby irrevocably grants, transfers, conveys, assigns and sets over to the
103 City a worldwide, perpetual, irrevocable, royalty-free, non-transferable, non-sublicensable,
104 exclusive license to use, display, exhibit, prepare derivative works of, distribute copies of,
105 photograph, video, and otherwise reproduce two-dimensional images of the Artwork for non-
106 commercial purposes. Notwithstanding the foregoing, the license does not restrict the Artist
107 from producing, marketing, selling or otherwise transferring works substantially similar to the
108 Artwork for installation and display elsewhere and granting rights similar to those granted herein
109 to such other works.

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

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118 **5.0 WAIVER BY ARTIST RIGHTS UNDER VARA IN ARTWORK.**

119 The Company has obtained from the Artist a waiver of his rights to the Artwork consistent with
120 the terms of this Agreement under the Visual Artists Rights Act of 1990 (17 U.S.C. § 106A
121 (2008)) ("VARA") in a form acceptable to the City. It is understood and agreed that, pursuant to
122 the Artist Agreement, and the terms and provisions of this Acceptance Agreement, the City has
123 the requisite authority to remove and disassemble the Artwork, if the City chooses to exercise its
124 rights to do consistent with the terms of this Acceptance Agreement.

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128 **6.0 NOTICES, CHANGE OF NOTICE INFORMATION**
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130 **6.1** All notices, documentation and other communications required or permitted by this
131 Agreement shall be in writing and shall be given either by personal delivery or certified United
132 States Mail, return receipt requested, addressed as follows:

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134 To the City:

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136 Office of Economic and Workforce Development
137 City of Durham
138 807 E. Main Street, Suite 5-100

139 Durham, NC 27701

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141 Attn: Peter Coyle

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144 To the Company:

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146 Liberty Arts, Inc.

147 Attn: Jackie MacLeod, President

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149 923 Franklin St.

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151 E-mail: hello@jackiemacleod.com

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To the Company:

Liberty Arts, Inc.

Attn: Jackie MacLeod, President

923 Franklin St.

Durham, NC 27701

E-mail: hello@jackiemacleod.com

Phone 919-260-2931

To the Artist:

Robert Winkler

3 Round Oak Road

Asheville, NC 28804

E-mail: studio@robertwinklersculpture.com

Phone: 828-225-3766

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

7.0 EXHIBITS

The following exhibits are made a part of this contract:

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

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

8.0 INSURANCE

The Company shall maintain insurance not less than the following:

- 185 I. Commercial General Liability, covering
186 a. Premises/Operations
187 b. Products Completed Operations
188 c. Broad form Property Damage
189 d. Contractual Liability
190 e. Independent Contractors (if used in the performance of this agreement)
191 f. City of Durham must be named an additional insured, and an original of
192 the endorsement to effect the coverage must be attached to the certificate.
193 (if by blanket endorsement, then agent may so indicate in the GL section
194 of the certificate, in lieu of an original endorsement)
195 g. Combined single limits not less than \$1,000,000 per occurrence.
196 II. All insurance shall be provided by companies authorized to do business in the
197 State of North Carolina with a best rating of A-VIII or better.
198
199 III. Insurance shall be evidenced by a certificate:
200 a. Providing notice to the City of not less than 30 days prior to cancellation
201 or reduction of coverage.
202 b. Certificates of Insurance shall be addressed to:
203 City of Durham
204 Attn: Risk Manager
205 101 City Hall Plaza (Annex)
206 Durham, NC 27701
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209 **9.0 INDEMNIFICATION**

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211 **9.1 Definitions.** In this Section 11.0, the following definitions shall apply:
212 “Claims” are claims, losses, damages, liabilities, fines, penalties, fees, royalties, costs, demands,
213 actions, suits, and judgments of any kind or nature whatsoever, whether at law or in equity,
214 including court costs and reasonable attorney’s fees assessed as part of any of said items.
215 “Persons Connected with Company” are Company’s officers, members, managers, board
216 members, employees, agents, contractors, subcontractors of all tiers, and invitees, but excluding
217 the City.
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219 **9.2 Indemnification by Company.** “City Indemnitees” are defined as City, its
220 officers, officials, employees, agents, and independent contractors, but excluding Company.
221 Company shall indemnify, defend, and hold harmless the City Indemnitees from and against all
222 Claims arising out of, relating to, or resulting from acts or omissions by Company or Persons
223 Connected with Company occurring prior to Acceptance arising out of, relating to, or resulting
224 from the Company’s obligations with respect to this Agreement. Without limiting the preceding
225 sentence, and as an additional obligation of Company, it is agreed that Company shall indemnify,
226 defend, and hold harmless the City Indemnitees from and against all Claims made by
227 independent contractors, including subcontractors of all tiers, where the independent contractor
228 was engaged by Company to perform work pursuant to this Agreement, except to the extent the
229 Claim is the result of a negligent or wrongful act or omission by any of the City Indemnitees. In

230 performing its duties under this Section 9.2, Company shall defend City Indemnitees with legal
231 counsel reasonably acceptable to City.

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233 **9.3 Survival.** This Section 9.0 shall remain in force despite termination of this
234 Agreement with respect to acts and omissions occurring before termination of this Agreement
235 (whether by expiration of the term or otherwise) and termination of the services of Company
236 under this Agreement.

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238 **10.0 MISCELLANEOUS PROVISIONS**

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240 **10.1 City Policy.** THE CITY OPPOSES DISCRIMINATION ON THE BASIS OF
241 RACE AND SEX AND URGES ALL OF ITS CONTRACTORS TO PROVIDE A FAIR
242 OPPORTUNITY FOR MINORITIES AND WOMEN TO PARTICIPATE IN THEIR WORK
243 FORCE AND AS SUBCONTRACTORS AND VENDORS UNDER CITY CONTRACTS.

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245 **10.2 Choice of Law and Forum.** This Agreement shall be deemed made in Durham
246 County, North Carolina. This Agreement shall be governed by and construed in accordance with
247 the laws of the State of North Carolina. The exclusive forum and venue for all actions arising
248 out of this Agreement shall be the North Carolina General Court of Justice in Durham County.
249 Such actions shall neither be commenced nor removed to federal court. This section shall not
250 apply to subsequent actions to enforce a judgment entered in actions heard pursuant to this
251 section.

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253 **10.3 Principles of Interpretation and Definitions.** In this Agreement, unless the
254 context requires otherwise (a) the singular includes the plural and the plural the singular. The
255 pronouns “it” and “its” include the masculine and feminine. References to statutes or regulations
256 include all statutory or regulatory provisions consolidating, amending, or replacing the statute or
257 regulation. References to contracts and agreements shall be deemed to include all amendments
258 to them. The words “include,” “including,” etc. mean include, including, etc. without limitation;
259 (b) references to a “Section” or “section” shall mean a section of this Agreement; (c) “Contract”
260 and “Agreement,” whether or not capitalized, refer to this instrument; (d) titles of sections,
261 paragraphs, and articles are for convenience only, and shall not be construed to affect the
262 meaning of this Agreement; (e) “Duties” includes obligations; (f) the word “person” includes
263 natural persona, firms, companies, associations, partnerships, trusts, corporations, governmental
264 agencies and units, and other legal entities; (g) the word “shall” is mandatory; and (h) the word
265 “day” means calendar day.

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267 **10.4 Waiver.** No action or failure to act by either party hereto shall constitute a waiver
268 of any of its rights or remedies that arise out of this Agreement, nor shall such action or failure to
269 act constitute approval of or acquiescence in a breach thereunder, except as may be specifically
270 agreed in writing.

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272 **10.5 Performance of Government Functions.** Nothing contained in this Agreement
273 shall be deemed or construed so as to in any way estop, limit, or impair the City from exercising
274 or performing any regulatory, policing legislative, governmental, or other powers or functions.

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276 **10.6 Severability.** If any provision of this Agreement shall be unenforceable, the
277 remainder of this Agreement shall be enforceable to the extent permitted by law.

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279 **10.7 Compliance with Law.** In performing all of the Work, the Company shall
280 comply with all applicable law. The City shall also comply with all applicable laws in fulfilling
281 its obligations under the Agreement

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283 **10.8 No Third Party Rights Created.** This Agreement is intended for the benefit of
284 the City and the Company and not any other person.

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286 **10.9 Modifications; Entire Contract.** A modification of this Agreement is not valid
287 unless signed by both parties and otherwise in accordance with requirements of law. Further, a
288 modification is not enforceable against the City unless the City manager or a Deputy or Assistant
289 City Manager signs it for the City. This Agreement contains the entire agreement between the
290 parties pertaining to the subject matter of this Agreement. With respect to that subject matter,
291 there are no promises, contracts, conditions, inducements, warranties, or understandings, written
292 or oral, expressed or implied, between the parties, other than as set forth or referenced in this
293 Agreement.

294
295 **10.10 City's Manager's Authority.** To the extent, if any, the City has the power to
296 exercise the City's rights and remedies under this Agreement that power may be exercised by the
297 City Manager or a Deputy or Assistant City Manager without City Council action.

298
299 IN WITNESS WHEREOF, the City and the Company have caused this Agreement to be
300 executed under seal themselves or by their respective duly authorized agents or officers.

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302 City:

303
304 CITY OF DURHAM

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309 _____ By: _____

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312 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