

MURAL INSTALLATION AND MAINTENANCE AGREEMENT

This MURAL INSTALLATION AND MAINTENANCE AGREEMENT (the “Agreement”) is made this 8th of June, 2022, in the City of Visalia, County of Tulare, State of California, by and between Habitat For Humanity Tulare County (“Owner”), Katy Kemalyan (“Artist”) and the City of Visalia (“City”).

WITNESSETH:

WHEREAS, City understands the importance of art in public places and the role that murals play in preserving our culture, conveying the history of our community, beautifying the city, and advancing the arts.

WHEREAS, murals are permitted under the City’s sign ordinance upon the issuance of a permit from City pursuant to Visalia Municipal Code § 17.48.040.

WHEREAS, pursuant to City’s Mural Guidelines and Procedures, murals meeting certain specification are allowed subject to review by the Mural Panel and final approval by the City Council in accordance with VMC § 17.48.040.

WHEREAS, pursuant to the City’s Mural Guidelines, following approval by the Mural Panel, Owner and Artist are required to provide to the City Manager, or his/her designee, evidence of an agreement which identifies the terms and conditions under which the mural will be applied; and

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

NOW, THEREFORE, 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:

Article 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 sign as defined in Visalia Municipal Code, Chapter 17.48. 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.

1.5 “Mural Panel” means the group of individuals approved by the City Manager to review applications to place murals in public places prior to presentation to Council.

Article 2 Owner’s Covenants

2.1 Authorization. Owner covenants that Owner owns the property located at 637 S. Lovers Lane, Visalia, California, 93292 (the “Property”), is authorized to permit the mural’s installation upon the east and north-facing 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 mural during the term of this Agreement so that the mural is at all times in a state of good condition.

Article 3 Artist’s Covenants

3.1 Installation. Artist covenants to complete installation of the mural on the west-facing wall of the Property within 120 days after this Agreement’s execution.

3.2 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.

Article 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 or Article 8.

4.2 Owner’s Termination. Owner may elect to terminate this Agreement without any liability to Artist or City 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 City’s Termination. City 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.

Article 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 Obscene and Indecent Content. The mural shall comply with City ordinances prohibiting indecency and obscenity in public.

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.

Article 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. Parties acknowledge that the site of the proposed mural does not contain landscaping. .

6.5 Application for Encroachment Permit. Artist shall determine whether installation of the mural requires an encroachment permit pursuant to Visalia Municipal

Code § 12.12.010, which requires an encroachment permit for any work performed in the public right of way or utility easements in the City, and, if required, Artist shall acquire said permit prior to commencing the mural's installation.

Article 7 **Maintenance and Repairs**

7.1 **Maintenance and Repairs.** Owner shall be responsible for maintaining the mural in good condition at all times while this Agreement is in force. If, for any reason, the mural is not so maintained, as determined by City, City 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 City's notification to Owner of the need for maintenance and/or repairs, Owner has not performed the actions identified by City as being necessary for compliance with this provision, City may enter Owner's property and perform any necessary maintenance and/or repairs at Owner's expense.

7.2. **Access.** Owner hereby grants City 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.

Article 8 **Removal**

8.1 **Removal by City.** City may remove the mural at Owner's expense if Owner fails to maintain the Mural 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 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 City with sixty (60) days' notice that Owner intends to remove the mural at the end of the notice period. If possible, Owner shall work with Artist and City to find another suitable site for the mural.

Article 9 **Insurance and Indemnification**

9.1 **Insurance.** Owner or Artist shall obtain adequate insurance, both in type and amount, as determined by the City's Risk Manager; provided however, that if either party is unable to obtain insurance coverage, then in lieu thereof the Owner and the Artist may agree to indemnify City pursuant to Section 9.2.

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 City for any costs the City 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 the City of Visalia, its officials, members, 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 the city 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 City; and

(ii) to cooperate with the City 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.

Article 10 **Intellectual Property**

10.1 Ownership: City, 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 City an unlimited and irrevocable license to do the following with respect to the Mural:

(i) Owner may use and display the mural on the Property only.

(ii) Owner and City may make, display, and distribute, and authorize the making, display, and distribution of photographs and other reproductions of the mural. Owner and City may use such reproductions for any Owner-related or City-related purpose, including advertising, educational and promotional materials, brochures, books, flyers, postcards, print, broadcast, film, electronic, and multimedia publicity. Owner and City shall ensure that such reproductions are made in a professional and tasteful manner, in their sole and reasonable judgment. Owner and City 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 City 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.

10.4 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 City 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 City against any claims brought against Owner or City alleging that the mural infringes the intellectual property rights of any third parties.

10.5 Publicity. Owner and City 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.

10.6 Trademark. In the event that Owner's or City's use of the mural creates trademark, service mark or trade dress rights in connection with the mural, Owner and City shall have an exclusive and irrevocable right in such trademark, service mark, or trade dress.

10.7 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 City, its officers, agents, employees, successors and assigns, arising under the federal Visual Artists Rights Act (17 U.S.C. §§106A and 113(d)), the California Art Preservation Act (Cal. Civil Code §§987, et seq.), 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, Cal. Civil Code §§ 987, 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 City. Artist hereby represents and warrants that the Artist is authorized to sign this waiver.

Article 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 California, 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 Visalia.

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 at all times 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 or not 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: Bob Hughes
Habitat For Humanity Tulare County
637 S. Lovers Lane
Visalia, CA 93292

Artist: Katy Kemalyan

City City of Visalia,
Attn: Leslie Caviglia, City Manager
220 N. Santa Fe Street
Visalia, CA 93292

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

Owner

Bob Hughes
Habitat For Humanity Tulare County

Artist

Katy Kemalyan

City

Leslie Caviglia
City Manager