

MEMORANDUM OF UNDERSTANDING

THIS MEMORANDUM OF UNDERSTANDING dated October 7, 2004 between the TOWN OF HERNDON, VIRGINIA a municipal corporation (Town) and HERNDON FOUNDATION FOR THE CULTURAL ARTS, a Virginia non-profit, charitable corporation (Foundation).

Foundation is a charitable institution, association, or organization that provides recreational or cultural services to the residents of the Town of Herndon, Virginia and of the surrounding communities and jurisdictions.

In consideration of \$1.00 paid by each party to the other, and of the mutual benefits and obligations of this memorandum of understanding ("MOU"), the parties agree as follows:

1. Purpose. The purpose of this MOU is to define the relationship between the Town and the Foundation in the establishment of a community cultural arts center ("arts center") on Town owned land at or near 750 Center Street, Herndon, Virginia ("land"), a goal that both parties share. The arts center will provide recreational or cultural services to the residents of the Town of Herndon, Virginia and the surrounding communities and jurisdictions.

2. Legal. The Town is a public body under Virginia law and is compelled to comply, chooses to comply, and will comply with the constitutional provisions assuring the right of free speech, with laws requiring appropriation of funds prior to Town expenditure or commitment to spend funds, with the Virginia Freedom of Information Act, and with the Town's public procurement ordinances, among many other laws. Section 15.2-2506, Code of Virginia provides that "[n]o [Town] money shall be paid out or become available to be paid out ... unless and until there has first been made an ... appropriation for such ... expenditure

by the governing body.” Foundation is a private corporation, separate from the Town and by design is not an element of the government of Town. Town may appoint by resolution six of the original thirteen Foundation Board members. This proportion of elected and appointed directors shall be maintained thereafter, should the board size increase or decrease. The Town appointed directors will always be at least one less than 50% of the entire board.

3. Planning. Town, in consultation with the Foundation, intends to plan for the design, development, financing, outfitting, and construction of the arts center. Foundation will serve as an active participant in consulting and advising Town on planning. Town will remain responsible for and in control of the planning.

4. Financing. Upon eventual appropriation of Town funds, Town and Foundation will finance the planning, development, construction, and outfitting, of the arts center. Foundation may make donations to Town to this end.

Upon eventual appropriation of funds, Town may make grants to Foundation to advance or achieve the planning, development, construction, and outfitting, of the arts center.

Specifically, the parties intend that subject to Town appropriation the Town and Foundation provide necessary funds to complete the construction of a shell arts center from 2006 to 2008 and Town and Foundation would fund finishing out of the arts center during and after 2008 to 2010.

The Town Council may by ordinance make a yearly appropriation to provide an operating financial subsidy to the Foundation to support the Foundation’s operation of the arts center. Foundation intends to manage the arts center with the goal of recovering at least two thirds of the cost to operate and manage the arts center, which funds Foundation will dedicate toward these purposes. The subsidy will be based on a yearly financial plan to be developed

by Foundation and submitted to Town for possible approval and acceptance as an element of the Town's yearly budget. The financial plan will describe the financial aspects of the operation of the arts center and specify a possible yearly subsidy.

Foundation may operate or see to the operations of food and beverages and other retail concessions at the arts center. Foundation will dedicate the proceeds from the concessions to operation of the arts center.

5. Fundraising. Foundation intends to conduct fundraising activities in its name to advance the planning, development, construction, and outfitting of the arts center. Foundation intends to make the funds raised available to Town for the arts center or to utilize the funds raised directly for financial obligations Foundation might incur in its efforts to support the planning, development, construction, and outfitting of the arts center. Town intends to appropriate for these purposes the funds provided by the Foundation to Town.

If this MOU is terminated, Town and Foundation will honor any donor restrictions on funds in their close out use or the return of unspent portions to donors.

Town shall not be responsible to third parties with respect to funds raised by Foundation in the Foundation's name; for Foundation's failure to expend or to account for these funds; or for failure or delay in the planning, development, construction, or outfitting of the arts center.

It is the intention of the Town and Foundation to plan, develop, construct, and outfit the arts center. However, if this intention should not be realized before September 16, 2014, or if by that date substantial progress toward realization of this intention has not been made such that success appears unlikely, or if the MOU is terminated by either party without having realized the construction of the arts center, both parties, subject to Town appropriation, shall

return before September 16, 2015 unused contributions to the donor, its successors or assigns, honoring donor restrictions.

When Foundation transfers to Town such funds or other property raised by Foundation, these funds shall upon the transfer assume the character of Town's public funds, intended to be used and appropriated for the planning, development, construction, or outfitting of the arts center, or else returned to the original donor, subject in any case to donor restrictions.

Town and Foundation shall hold each other harmless for any claims one or the other, or third parties, may assert, against the other growing out of any fundraising for the arts center conducted by the Foundation.

Foundation as a fundraising technique may provide non-corporeal, non-real estate licenses to have names of arts center donors to the Foundation or to the Town inscribed on bricks, indoor murals, plaques, equipment, furniture, or interior displays. The Town Council by ordinance may authorize the Foundation as a fundraising technique to accord to a donor to the Town or the Foundation non-corporeal, non-real estate 20-year revocable licenses to name the arts center or any room or component facility thereof. Otherwise, Town retains this naming prerogative.

Foundation will report to Town quarterly on Foundation's fundraising activities under this MOU. Each party may inspect the financial books and financial records of the other related to this MOU on reasonable notice and during normal business hours.

6. Service Contracts. Town intends to involve Foundation in the selection of architectural and engineering services for the planning, development, and construction of the arts center. Any professionals employed by the Town for the planning, development, or

construction of the arts center shall report to and take direction from the Town. Town intends to share information with Foundation concerning the Town's procurement of these services and to provide for Foundation's representation on Town selection committees for such procurements. Town intends generally to seek the Foundation's advice and counsel in this regard.

7. Development of the arts center. Town will undergo any necessary site planning, subdivision, or other land use approval process to achieve the development and construction of the arts center. Town intends to benefit from the advice, counsel, and support of Foundation in this process.

8. Construction of the arts center. Town intends to have the arts center constructed with the advice, counsel, and support of the Foundation.

9. Management of the arts center. During the initial start-up period the Town will play a key role in the overall administration of the arts center through the Executive Director. The Executive Director is expected to be hired by the Town as a Town employee, with the advice of the Foundation, approximately two years before the expected opening of the arts center. The parties intend that the Executive Director will be employed by and report to the Foundation two years after the opening of the arts center. The Executive Director will manage and operate the facilities, programs and activities to occur within and around the arts center. The Town intends to provide interior maintenance; janitorial services; general building maintenance; maintenance of roof, utility systems, heating and air conditioning, escalators, walls, and foundation; and to provide for the overall structural integrity for the arts center building.

10. Programming at the arts center. Foundation will assume responsibility for establishment, over-sight, form, and content of any artistic or other recreational programming and the fees therefor to occur at the arts center. Programming, artistic, recreational, form, fee, and content decisions of the Foundation as to the arts center represent private decisions of a private entity. The Foundation will assume responsibility for establishing the policies for planning, design, promotion, and supervision of arts center programs and activities.

Town reminds Foundation that the arts center is not a purely private facility but represents a public-private undertaking. As such, Foundation must ensure that program content decisions reflect contemporary community standards or that any specific programming taken as a whole is not obscene.

11. Insurance. Each party will obtain and maintain in commercially reasonable amounts all appropriate insurance with respect to the arts center.

12. Assignment. This MOU may not be assigned.

13. Term. The term of this MOU shall run to December 31, 2014. In the absence of a negotiated renewal by a date one year prior to the scheduled expiration date, this agreement will automatically be renewed for one two-year period.

14. Termination. In the event that completion of the arts center appears futile, the parties will terminate the MOU and subject to donor restrictions shall return unused contributions to the donors, their successors or assigns. Either party may terminate the MOU on 90 days written notice to the non-terminating party, prior to beginning construction of the arts center. After the beginning of construction of the arts center, either party may terminate the MOU on one year's written notice to the non-terminating party.

15. No partnership. The parties are not partners or joint-venturers.

16. Effective Date. This MOU is effective on and after October 13, 2004.

17. Supplementation. The parties intend that they will supplement and define this MOU with detailed amendments addressing functional areas set out in the MOU.

18. Shared Objectives. In accordance with the Governance Recommendations submitted by the Citizen's Advisory Committee in April 2003, the following are the shared objectives of the Town and the Foundation with respect to the operation of the arts center:

(a) Programming

- Provide year round programming which strives for artistic excellence seeking to entertain, stimulate, and enhance the quality of life for our community.
- Encourage development of resident companies to foster successful and vibrant programming.
- Develop mentoring programs, master classes, and other participatory events to complement the performance schedule and encourage program development.
- Include lectures, demonstrations, and exhibits, which explore Herndon's culture, history, and way of life.
- Supplement the programs of local presenters by identifying or encouraging outside presenters to provide programs or events to fill out the schedule.

(b) Community Involvement

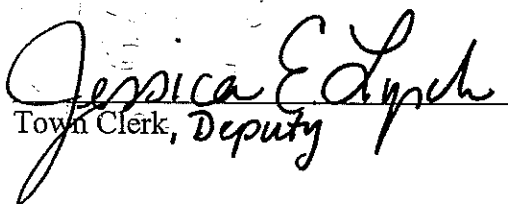
- Engage the richness of our citizen's heritage by providing opportunities to showcase the diversity in the arts of many cultures.
- Encourage broad community participation by seeking to include programs with affordable ticket prices.
- Promote local restaurants and caterers as resources for functions & events when permitted under local law.
- Promote the vitality and continued development of the Town's Downtown by developing strong ties with associations and organizations in the community.
- Supplement programs for our young people by forming a cooperative partnership with local schools.
- Develop programs that encourage citizens to participate in creating and supporting art as part of their life experience.
- Utilize volunteer efforts to foster community ownership and advance the spirit of community service.
- Include a display area or hall.

(c) Management & Fiscal Responsibility

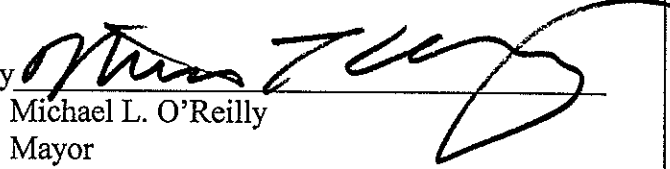
- Provide a well-designed and professionally managed venue.
- Maintain an outstanding fundraising and marketing program to support the goals of artistic excellence and financial responsibility.
- Manage the schedule to encourage a diverse season representing theater, music, dance, and visual arts (including film/TV).
- Provide a convenient and attractive function area for use by local community groups and businesses when the center is not scheduled for cultural activities.
- Encourage rental of the center to the business community for conferences and events when the center is not scheduled for cultural activities.
- Utilize volunteer efforts to reduce the cost of operation and maintenance.

TOWN OF HERNDON, VIRGINIA

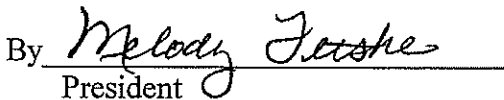
ATTEST:


Town Clerk, Deputy

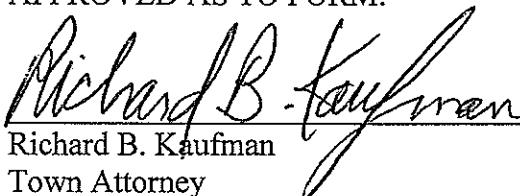
By


Michael L. O'Reilly
Mayor

HERNDON FOUNDATION
FOR THE CULTURAL ARTS

By 
President

APPROVED AS TO FORM:


Richard B. Kaufman
Town Attorney