

MANAGEMENT AND OPERATING AGREEMENT

THIS MANAGEMENT AND OPERATING AGREEMENT (hereinafter referred to as the “Agreement”) dated as of the ____ day of _____, 2022 is made by and between the City of Delray Beach, a Florida municipal corporation (hereinafter referred to as “City”), whose address is 100 NW 1st Avenue, Delray Beach, FL 33444 and the Delray Beach Downtown Development Authority, a dependent taxing authority (hereinafter referred to as the “DDA”), whose address is 350 SE 1st Street, Delray Beach, FL 33483.

WHEREAS, the City owns the Cornell Art Museum (hereinafter referred to as the “Museum”) located in Delray Beach on the Old School Square Campus, with an address of 51 N. Swinton Avenue, Delray Beach, FL 33444 (the “OSS Campus”); and

WHEREAS, the City desires to enter into an agreement with the DDA for the management and operation of the Museum and the DDA is willing to manage and operate the Museum on the terms and conditions set forth herein; and

WHEREAS, the City desires to provide artistic, educational, recreational, and cultural activities that benefit the community of greater Delray Beach and its surrounding South Florida communities in order to expose said communities to artwork, art-related education, and art-related recreational and cultural experiences (collectively, the “Mission”); and

WHEREAS, the DDA desires to assist the City in the realization of the City’s Mission; and

WHEREAS, Section 2(b), Article VIII of the Florida Constitution, enables municipalities to have the government, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal function, and render municipal services; and

WHEREAS, the City Commission finds that the artistic, educational, recreational, and cultural activities and services referenced herein will assist the City in performing its municipal functions and rendering municipal services to its residents and public at large; and

WHEREAS, the City Commission finds that entering into this Agreement is in the best interests of the City.

NOW, THEREFORE, in consideration of the mutual promises contained herein and other good and valuable consideration of which the parties hereto acknowledge, the parties agree as follows:

1. The above recitals are true and correct and are incorporated herein by reference.
2. **Term.**
 - a. This Agreement shall provide for the management and operation of the Museum by the DDA commencing on November 16, 2022 and terminating upon execution of an

interlocal agreement between the City and the DDA for the management and operation of the Old School Square campus, unless terminated earlier by the City or the DDA in accordance with the provisions of Section 9 below.

- b. The City and the DDA agree that the DDA shall be the exclusive operator of the Museum for and during the term of this Agreement and all amendments thereof.

3. Operating Policy and Intent.

- a. The City and the DDA hereby agree that the Museum shall be managed and operated, in accordance with all applicable laws and ordinances and applicable federal, state, and local grants and tax-exempt status.
- b. The DDA shall duly observe, conform to, and comply with, all valid requirements of any governmental authority relative to the Museum and shall use best efforts to require all persons using the same or attending events therein to conform to and comply with all such requirements.
- c. The DDA shall not enter into any contract in the City's name; provided, however, that the DDA shall be permitted to enter into agreements in its name with third parties.

4. DDA's Obligations Under the Agreement.

- a. The DDA agrees to utilize its best efforts to assist the City in achieving its Mission.
- b. The Executive Director of the DDA shall serve as liaison between the public and the City Manager or designee. The Executive Director shall make all records, reports, financial statements, and other necessary documents related to DDA's obligations hereunder available to the City Manager.
- c. The DDA's activities shall include programing, commercial operations, collections, exhibitions, fundraising, philanthropic and all other activities in connection with the management and operation of the Museum on behalf of itself and the City pursuant to this Agreement.
- d. No alterations to the Museum in excess of \$65,000 shall be made by the DDA without the prior written consent of the City Commission at a public hearing. The DDA shall obtain the written consent of the City Manager, or designee, for alterations to the Museum totaling less than \$65,000. The City Manager, in his or her sole discretion, may determine that, due to the nature of the proposed alterations, City Commission approval is required. The DDA shall be responsible for procuring all permits, licenses and other authorizations required. All alterations when completed shall be of such a nature as not to (i) reduce or otherwise adversely affect the value of the Museum; (ii) diminish the general

utility or change the general character thereof; or (iii) adversely affect the mechanical, electrical, plumbing, security, or other such systems of the Museum.

- e. At the expiration of this agreement, the DDA shall provide a written report to the City Manager which shall include a description of the revenues, expenses, principal activities, programs, exhibitions, and services provided to and for the Museum during the term of the Agreement.
- f. The DDA shall maintain the exhibits and art installations in the Museum in a clean and exhibition-worthy condition; provided, however, that routine maintenance within the interior of the Museum shall be provided by the City, including any and all maintenance, repair, or replacement of mechanical, electrical, plumbing, security, or other such infrastructure systems, and also including any maintenance, repair, or replacement of any structural aspects of the Museum or its exterior, including the foundation or roof. The DDA shall hire a service to clean on a weekly basis at its sole expense.
- g. The DDA shall ensure that collections in its custody are lawfully held, protected, secure, unencumbered, cared for and preserved. All decisions made with respect to collections in the custody of the DDA including but not limited to maintenance, preservation, storage, public display and exhibition, accession or de-accession shall be the sole responsibility of the DDA and managed in accordance with standards of practice set forth by the American Alliance of Museums. The DDA will provide funds necessary for the care and stewardship of collections in its custody.
- h. The DDA will set its own fee schedules as approved by the DDA Board Members and the City. It is the intention of the parties to provide free admission to the Museum's exhibits.
- i. The City, upon reasonable prior written notice to the DDA, and provided that any such use by the City does not interfere with or interrupt the DDA programming or exhibits, shall have the right to use a portion of the Museum at no rental charge to the City. The City will assume clean up responsibilities for its use of the Museum. Any expenses related to personnel incurred by the DDA due to the City's use of the Museum outside of standard operating hours will be reimbursed to the DDA by the City.

5. The City's Obligations Under this Agreement.

- a. The City shall cooperate with the DDA to ensure the accomplishment and advancement of its Mission.
- b. The City shall be responsible for the prompt payment of all utilities provided to the Museum as the same become due, including charges for electricity, water, sewer, gas, and refuse removal.

- c. The City shall provide routine window cleaning service and pest control for the Museum at the City's expense.
 - d. The City, at the City's expense, shall provide maintenance and repair to the Museum Building not provided by the DDA under this Agreement. Additionally, the City agrees to use its best efforts to respond and complete repair requests from the DDA in a timely manner.
 - e. The City shall not be obligated, bound, or indebted for any transaction, function or activity of the DDA, except as may be approved during the City's annual budgeting process or as otherwise provided herein.
- 6. Fees.** Upon execution of the Agreement, the City shall pay the DDA a fee of Twenty Five Thousand Dollars (\$25,000.00) for the administration, setup, operation, maintenances, programming, and exhibitions for the Museum. It is expressly understood that any funds remitted under this Agreement will be deducted from any future management fees provided to the DDA under a separate agreement for these services during fiscal year 2022-2023.
- 7. Default by DDA.** If the DDA is in material default of its obligations, the City will notify the DDA in writing and give the DDA fifteen (15) calendar days to cure such default and the opportunity to cure within fifteen (15) calendar days, if feasible, or such other reasonable amount of time if the DDA has commenced good faith efforts to cure and such cure is completed timely and to the City's reasonable satisfaction, in which case no default shall be considered to have occurred. The City shall have the right to immediately terminate this Agreement if the DDA fails to cure the default within the requisite time period.
- 8. Default by the City.** If the City is in material default of this Agreement, the DDA will notify the City in writing and give the City fifteen (15) calendar days to cure such default and the opportunity to cure within fifteen (15) calendar days, if feasible, or such other reasonable amount of time if the City has commenced good faith efforts to cure and such cure is completed timely and to the DDA's reasonable satisfaction, in which case no default shall be considered to have occurred.
- 9. Right of Termination.** Either party may terminate this Agreement for any reason by giving the other party one hundred eighty (180) calendar days written notice of its intention to terminate.
- 10. Insurance.** The DDA shall carry and maintain, at its sole cost and expense, the following types of insurance, in the amounts specified and in the form hereinafter provided for:
- a. Workers' Compensation Insurance. The DDA shall, during the term of this Agreement, provide and maintain in accordance with statutory requirements of

the State of Florida workers compensation insurance or employee's liability insurance to protect against on-the-job injury or illness which may not fall within the provisions of the Florida State's Workers' Compensation Law. The limits shall be no less than Five Hundred Thousand Dollars (\$500,000) for each accident, and an occupational disease limit of Five Hundred Thousand Dollars (\$500,000) per employee/Five Hundred Thousand Dollars (\$500,000) aggregate.

- b. Commercial General Liability and Property Damage. The DDA shall maintain a Commercial General Liability policy applying to the use and occupancy of the interior of the Museum, with limits of liability not less than One Million Dollars (\$1,000,000.00) per occurrence and Two Million Dollars (\$2,000,000) general aggregate for Bodily Injury and Property Damage. Such policy shall specifically name the City as an additional insured. DDA's Commercial General Liability policy shall not provide for a deductible in excess of Two Thousand Dollars (\$2,000) without the prior written approval of the City.
 - c. Property Insurance. The DDA shall maintain a personal property insurance policy on all personal property, furniture and fixtures of The DDA.
 - d. Fine Arts Insurance. The DDA must maintain Fine Arts Insurance for the DDA collections and all art loans to the DDA for all times that such work is installed or stored on Museum property.
- 11. Right of Inspection.** The City shall have the right to enter upon the Museum Building for the purpose of inspection, serving or posting notices, making any necessary repairs to the Museum Building, complying with laws, ordinances or regulations, including, but not limited to, protecting the Museum Building or any other lawful purpose.
- 12. Liens, Waste.** The DDA shall not permit and shall have no right to cause any liens, encumbrances of any nature of kind to stand against the Museum in connection with any work performed by or at the direction of the DDA. The DDA shall not keep, use, sell or offer for sale at the Museum any article which may be prohibited by the standard form of fire insurance policies or other applicable provisions of law. The DDA shall not suffer or permit any waste upon the Museum property.
- 13. Removal of DDA's Property.** At or before the expiration or termination of this Agreement, at its expense, the DDA shall remove from the Museum all of its property (except such items thereof as the City shall have expressly permitted to remain, which property shall become the property of the City), and the DDA shall repair any damage to the Museum Building resulting from any installation and/or removal of the DDA's Property, and shall restore the Museum to the same physical condition and layout as existed at the time the DDA entered into this Agreement, reasonable wear and tear excepted. The City may request the DDA to pay to the City the cost of repairing any damage to the Museum resulting from any installation and/or removal of the DDA's property and the cost of restoring the Museum to the same physical condition and layout as existed at the time the DDA entered into this Agreement, reasonable wear and tear

excepted. No item accessioned into the DDA collection or loaned to the DDA will become property of the City under any circumstances.

14. No Discrimination. The DDA, for itself, its successors- in- interest, and assigns, as part of the consideration hereof, does hereby covenant and agree that no person on the basis of race, color, age, religion, sex, national origin, or sexual orientation shall be subjected to discrimination, concerning the provision of services provided by DDA to the Museum hereunder.

15. Indemnification.

- a. The DDA shall at all times hereafter indemnify, hold harmless and, at the City Attorney's option, defend or pay for an attorney selected by the City Attorney to defend City, its officers, agents, servants, and employees from and against any and all causes of action, demands, claims, losses, liabilities and expenditures of any kind, including attorney fees, court costs, and expenses, caused or alleged to be caused by any intentional, grossly negligent, or reckless act of, or omission of, the DDA, its employees, agents, servants, or officers, or accruing, resulting from, or related to the subject matter of this Agreement including, without limitation, any and all claims, losses, liabilities, expenditures, demands or causes of action of any nature whatsoever resulting from injuries or damages sustained by any person or property. In the event any lawsuit or other proceeding is brought against City by reason of any such claim, cause of action, or demand, the DDA shall, upon written notice from City, resist and defend such lawsuit or proceeding by counsel satisfactory to City or, at City's option, pay for an attorney selected by City Attorney to defend City. The obligations of this section shall survive the expiration or earlier termination of this Agreement. To the extent considered necessary by the Contract Administrator and the City Attorney, any sums due DDA under this Agreement may be retained by City until all of City's claims for indemnification pursuant to this Agreement have been settled or otherwise resolved. Any amount withheld shall not be subject to payment of interest by City.
- b. Subject to the financial limitations of Florida Statute 768.28, the City shall at all times hereafter indemnify, hold harmless and, at the option of the DDA's attorney, defend or pay for an attorney selected by the DDA's attorney to defend the DDA, its trustees, officers, agents, servants, and employees from and against any and all causes of action, demands, claims, losses, liabilities and expenditures of any kind, including attorney fees, court costs, and expenses, caused or alleged to be caused by any intentional, grossly negligent, or reckless act of, or omission of, the City, its employees, agents, servants, or officers, or accruing, resulting from, or related to the subject matter of this Agreement including, without limitation, any and all claims, losses, liabilities, expenditures, demands or causes of action of any nature whatsoever resulting from injuries or damages sustained by any person or property. In the event any lawsuit or other proceeding is brought against the DDA by reason of any such claim, cause of action, or demand, the

City shall, upon written notice from the DDA, resist and defend such lawsuit or proceeding by counsel satisfactory to the DDA or its counsel to defend the DDA. The obligations of this section shall survive the expiration or earlier termination of this Agreement. Nothing herein shall constitute a waiver of sovereign immunity.

16. Jurisdiction and Venue. This Agreement shall be construed in accordance with the City of Delray Beach's Code of Ordinances and the laws of the State of Florida. Any dispute relating to this Agreement shall only be filed in a court of competent jurisdiction in Palm Beach County, Florida, and each of the parties to this Agreement submits itself to the jurisdiction of such court.

17. Waiver of Trial by Jury. **IT IS MUTUALLY AGREED BY AND BETWEEN CITY AND THE DDA THAT THE RESPECTIVE PARTIES HERETO SHALL, AND THEY HEREBY DO, WAIVE TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM BROUGHT BY EITHER OF THE PARTIES AGAINST THE OTHER ON ANY MATTER ARISING OUT OF OR IN ANY WAY CONNECTED WITH THIS MANAGEMENT AND OPERATIONS AGREEMENT.**

18. Public Records. **IF THE DDA HAS QUESTIONS REGARDING THE APPLICATION OF CHAPTER 119, FLORIDA STATUTES, TO DDA'S DUTY TO PROVIDE PUBLIC RECORDS RELATING TO THIS AGREEMENT, CONTACT THE CUSTODIAN OF PUBLIC RECORDS AT CITY OF DELRAY BEACH, CITY CLERK, 100 N.W. 1ST AVE., DELRAY BEACH FLORIDA. THE CITY CLERK'S OFFICE MAY BE CONTACTED BY PHONE AT 561-243-7050 OR VIA EMAIL AT CITYCLERK@MYDELRAYBEACH.COM.**

a. The DDA shall comply with public records laws, specifically to:

- i. Keep and maintain public records required by the City to perform the service.
- ii. Upon request from the City's custodian of public records, provide the City with a copy of the requested records or allow the records to be inspected or copied within a reasonable time at a cost that does not exceed the cost provided in Florida Statute or as otherwise provided by law.
- iii. Ensure that public records that are exempt or confidential and exempt from public records disclosure requirements are not disclosed except as authorized by law for the duration of the Agreement and following completion of the Agreement if the DDA does not transfer the records to the City.
- iv. Upon completion of the Agreement, transfer, at no cost, to the City all public records in possession of the DDA or keep and maintain public records required by the City to perform the service. If the DDA transfers all public records to the City upon completion of the Agreement, the DDA shall destroy

any duplicate public records that are exempt or confidential and exempt from public records disclosure requirements. If the DDA keeps and maintains public records upon completion of the Agreement, the DDA shall meet all applicable requirements for retaining public records. All records stored electronically must be provided to the City, upon request from the City's custodian of public records, in a format that is compatible with the information technology systems of the City.

- v. If the DDA does not comply with this section, the City shall enforce the contract provisions in accordance with the contract and may unilaterally cancel this contract in accordance with state law.

19. Notice. Whenever either Party desires to give notice to the other, such notice must be in writing, sent by certified United States Mail, postage prepaid, return receipt requested, or sent by commercial express carrier with acknowledgement of delivery, or by hand delivery with a request for a written receipt of acknowledgment of delivery, addressed to the party for whom it is intended at the place last specified. The place for giving notice shall remain the same as set forth herein until changed in writing in the manner provided in this section. For the present, the Parties designate the following:

For City:

City of Delray Beach
100 N.W. 1st Avenue
Delray Beach, Florida 33444
Attn: City Manager

With copy to:

City of Delray Beach
200 NW 1st Avenue
Delray Beach, FL 33444
Attn: City Attorney

For DDA:

Delray Beach Downtown Development Authority
350 SE 1st Street
Delray Beach, FL 33483
Attn: Executive Director

20. No Assignment. Neither this Agreement nor any right or interest herein shall be assigned, transferred, or encumbered without the written consent of the other Party.

21. Inspector General. The DDA is aware that the Inspector General of Palm Beach County has the authority to investigate and audit matters relating to the negotiation and

performance of this contract and may demand and obtain records and testimony from the DDA. The DDA understands and agrees that in addition to all other remedies and consequences provided by law, the failure of the DDA to fully cooperate with the Inspector General when requested may be deemed by the City to be a material breach of this Agreement justifying its termination.

- 22. E-Verify.** By entering into this Agreement, the DDA acknowledges its obligation to comply with the provisions of Section 448.095, Fla. Stat., "Employment Eligibility." The DDA affirms and represents it is registered with the E-Verify system, utilizing same, and will continue to utilize same as required by law. Compliance with this section includes, but is not limited to, utilization of the E-Verify System to verify the work authorization status of all newly hired employees and requiring all subcontractors to provide an affidavit attesting that the subcontractor does not employ, contract with, or subcontract with, an unauthorized alien. Failure to comply with this section will result in the termination of this Agreement, or if a subcontractor knowingly violates the statute, the subcontract must be terminated immediately. Any challenge to termination under this provision must be filed in the Circuit Court no later than 20 calendar days after the date of termination. If terminated for a violation of the statute by the DDA, the DDA may be prohibited from conducting future business with the City or awarded a solicitation or contract for a period of 1 year after the date of termination. All costs incurred to initiate and sustain the aforementioned programs shall be the responsibility of the DDA.
- 23. Invalidity of Clauses.** The invalidity of any portion, article paragraph, provision or clause of this Agreement shall have no effect upon the validity of any other part or portion thereof.
- 24. Binding Effect.** The terms, conditions and covenants of this Agreement shall inure to the benefit of and be binding upon the parties hereto and their successors and assigns. This provision shall not constitute a waiver of any condition against assignment.
- 25. Modification.** This Agreement constitutes the entire agreement and shall be modified or amended only by written agreement of the parties.
- 26. Independent Contractor.** Nothing herein contained shall be deemed for any purpose as creating any relationship between the parties hereto other than the relationship of independent contracting parties. A landlord tenant relationship is not hereby created.
- 27. No assignment.** This Agreement shall be non-assignable by the DDA, in whole or in part.
- 28. Naming Rights.** The DDA may enter into a naming rights agreement for its exhibits, subject to the City's reasonable consent.
- 29. Force Majeure.** The City and the DDA are excused from the performance of their respective obligations under the contract when and to the extent that their performance is delayed or prevented by any circumstances beyond their control, including fire, flood,

explosion, strikes or other labor disputes, natural disasters, public emergency, war, riot, civil commotion, malicious damage, act or omission of any governmental authority, delay or failure or shortage of any type of transportation, equipment, or service from a public utility needed for their performance provided that:

- a. The non-performing party gives the other party prompt written notice describing the particulars of the force majeure, including, but not limited to, the nature of the occurrence and its expected duration, and continues to furnish timely reports with respect thereto during the period of the force majeure.
- b. The excuse of performance is of no greater scope and of no longer duration than is required by the force majeure.
- c. No obligations of either party that arose before the force majeure causing the excuse of performance are excused as a result of the force majeure.
- d. The non-performing party uses its best efforts to remedy its inability to perform.
- e. Notwithstanding the above, performance shall not be excused under this section for a period in excess of two (2) months, provided that in extenuating circumstances, the City may excuse performance for a longer term.

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IN WITNESS WHEREOF, the City and the DDA executed this Operations and Management Agreement as of the day and year first above written.

ATTEST:

CITY OF DELRAY BEACH

Katerri Johnson, City Clerk

By: _____
Shelly Petrolia, Mayor

Approved as to form and legal sufficiency:

Lynn Gelin, City Attorney

**DELRAY BEACH DOWNTOWN
DEVELOPMENT AUTHORITY**

By: _____

Print Name: _____

Title: _____

(SEAL)

STATE OF FLORIDA

COUNTY OF PALM BEACH

The foregoing instrument was acknowledged before me by means of ☐ physical presence or ☐ online notarization, this ____ day of _____, 20__, by _____ (name of person), as _____ (type of authority) for _____ (name of party on behalf of whom instrument was executed).

Personally known ____ OR Produced Identification

Type of Identification Produced _____

Notary Public – State of Florida