

CONTRIBUTION AGREEMENT

THIS CONTRIBUTION AGREEMENT (this “Agreement”) is made and entered into as of the _____ day of _____, 20____ (the “Effective Date”) by and between TOWN OF CORNELIUS, a North Carolina municipal corporation (“Town”), and CORNELIUS ARTS/COMMUNITY CENTER, INC., a North Carolina non-profit corporation (“CAIN CENTER”) dba, Cain Center for the Arts (“Cain Center”) (Town and CAIN CENTER herein collectively, the “Parties”).

WHEREAS, Town is authorized, pursuant to N.C.G.S. §160A-488, to establish and support public museums, art galleries, art centers, arts facilities and arts programs; and

WHEREAS, CAIN CENTER has successfully commenced fund raising and has established a capital fund (“Capital Fund”), completed the design and engaged a contractor for purposes of constructing The Cain Center for the Arts (the “Arts Center”) and a plaza immediately adjacent to the Arts Center (the “Plaza”) and a public park adjacent to the Arts Center (the “Park”) in downtown Cornelius as shown on the plans attached hereto as **Exhibit A** (the “Project”); and

WHEREAS, in addition to the Capital Fund, the Town Contribution, and the County Contribution, CAIN CENTER will obtain a construction loan from Aquesta Bank in an amount sufficient to fully fund any remaining cost of construction of the Project (the “Construction Loan”) as shown on the Loan Commitment Letter attached hereto as **Exhibit B**; and

WHEREAS, Mecklenburg County has agreed to Contribute one million five hundred thousand dollars pursuant to the terms of a Contribution Agreement (the “County Contribution” attached hereto as **Exhibit C**) to construction of the Project; and

WHEREAS, the Town has agreed to donate land upon which the Art Center and Plaza portion of the Project will be constructed subject to certain deed restrictions and easements as more thoroughly described on **Exhibit D** (the “Cain Lot”); and

WHEREAS, the Town retains ownership of land upon which the Park portion of the Project shall be constructed subject to certain joint easements as more thoroughly described on **Exhibit D** (the “Town Parcel”); and

WHEREAS, in addition to the donation of the Cain Parcel, the Town has agreed to sell general obligation bonds in the amount of four million dollars (\$4,000,000) and contribute the proceeds from the sale of those bonds to the Project (the “Town Contribution”); and

WHEREAS, the sum of the Capital Fund, the County Contribution, the Construction Loan and the Town Contribution is sufficient to fully fund construction of the Project inclusive of a fifteen percent contingency; and

WHEREAS, CAIN CENTER wishes to accept the Town’s donation of the Cain Lot and also wishes to accept the Town Contribution and is able and willing to complete the Project, subject to receipt of the County Contribution and the Town Contribution.

NOW THEREFORE, in consideration of the foregoing recitals, of mutual promises of the Parties and of other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Town and CAIN CENTER agree as follows:

1. **Purpose and Scope.** In consideration of the making and receipt by CAIN CENTER of the Town Contribution in the amount of four million dollars (\$4,000,000) CAIN CENTER shall develop and construct the Project in accordance with the design plans that have been approved by both CAIN CENTER and Town and as detailed on **Exhibit A**. Construction shall commence on or before _____ and be completed by _____ subject to any and all delays not within the control of Cain Center (the “Funding Period”). CAIN CENTER agrees to perform and carry out in full the Project at a cost not to exceed the Project Budget attached hereto as **Exhibit E** within the Funding Period. For avoidance of any doubt, the term CAIN CENTER as used herein or in any other Project Document, shall include any successor or assign of CAIN CENTER.

2. **Conditions Precedent to Town Contribution.**

a. **Execution of Complimentary Agreements:** Prior to or contemporaneously with the execution of this Agreement and as a condition precedent to the acceptance of this Agreement by the Town, CAIN CENTER must demonstrate that the cost of the Project is fully committed and the following must occur:

- i. CAIN CENTER shall finalize and execute all construction documents and contracts necessary to complete the Project to render it ready to open to the public including but not limited to the primary General Contractor contract, those for sitework, environmental remediation & monitoring work, and commitments of in-kind donated equipment and or services for the Project; and
- ii. CAIN CENTER shall obtain all necessary government approvals and permits necessary to commence construction of the Project; and
- iii. CAIN CENTER shall finalize and execute all contracts and documentation necessary to obtain the Construction Loan proceeds; and
- iv. CAIN CENTER shall certify that they have established and funded any Interest Reserve Account that may be required by the terms of the Construction Loan; and
- v. CAIN CENTER shall finalize and execute all documentation necessary to obtain the County Contribution if provided from the TOWN; and
- vi. CAIN CENTER shall represent and warrant that it has cash-on-hand in the Capital Fund restricted to construction of the Project in the amount of no less than \$_____; and
- vii. CAIN CENTER and Town shall execute all documents necessary to transfer the Cain Lot to CAIN CENTER, including this Agreement, the Deed, Joint Easement, Joint Use Agreement, and Annual Memorandum of Understanding (collectively, the “Project Documents”); and
- viii. CAIN CENTER will certify that the sum of the Capital Fund, the County Contribution, the Construction Loan and the Town Contribution is sufficient to fully fund construction of the Project inclusive of a 15% contingency.

- b. The Town Contribution will be derived from the proceeds of the Town's sale of general obligation bonds. The ability of the Town to sell these bonds and obtain the proceeds therefrom is subject to the requirements of Chapter 159 Subchapter IV Article 4 of the North Carolina General Statutes, and the approval of the Local Government Commission of the Treasury Department of the State of North Carolina ("LGC"). **LGC'S SCHEDULING OF THE SALE OF BONDS BY THE TOWN FOR PURPOSES OF THE PROJECT IS A CONDITION PRECEDENT TO THE TOWN'S OBLIGATIONS UNDER THIS CONTRACT.** The Town has consulted with the LGC and provided documentation related to the Project. The LGC has given provisional feedback to the bond sale based on the information presented. The Town will continue to exercise best efforts to consummate the sale of the bonds for purposes of the Town Contribution on or before April 30, 2022.

Notwithstanding the foregoing, should the Town's ability to sell the general obligation bonds be delayed, restricted or prohibited by the LGC for any reason beyond the control of the Town, **THIS AGREEMENT SHALL BE NULL AND VOID.** For clarity, the Town will not be obligated to contribute funds to the Project from any other source including but not limited to the Town's general fund nor alternative financing and will have no further obligation to CAIN CENTER to contribute funding to the Project if LGC does not schedule the sale of the general obligation bonds by the Town.

3. **Use of the Town Contribution.** Use of the Town Contribution is restricted to those uses set forth in the voter referendum certified by the Board of Commissioners of the Town of Cornelius in Resolution 2013-00736 on November 18, 2013, a copy of which is attached hereto as **Exhibit F**. CAIN CENTER agrees to use the Town Contribution solely for the approved purpose of construction of the Project and may not use Town Funds for other purposes including but not limited to Center operations and/or debt service. CAIN CENTER will, at all times, comply with the terms and conditions of any installment financing agreements, Municipal Bond requirements or any other financing arrangement related to Project funding.
4. **Payment of Town Funds by Reimbursement:** The Town will distribute the Town Contribution to CAIN CENTER in the form of reimbursement for expenses incurred throughout the construction project. During the course of construction when the project requires town funds, CAIN CENTER will send the Town a request to draw town bond funds within 24 hours of receipt of an application for payment submitted by its contractor. ("Draw Request"). The Draw Request will include a detail of the invoices included to be paid. The draw request will be submitted for work completed. The Town shall make payment 15 days after receipt of the Draw Request only if the application for payment has been received by Cain's Architect and payment upon that application has been authorized by Cain's Architect. In the event Architect authorization is not received within 15 days of Town's receipt of a Draw Request, Town shall delay payment until such payment has been Authorized by the Architect. Invoices will follow all AIA standards established in the construction contract. Invoices shall be sent to the Town's Chief Finance Officer with a copy to the Town

Manager. No payment shall be made in advance of expenses incurred by CAIN CENTER without approval of the Town Board of Commissioners. CAIN CENTER shall return Town Funds that remain un-obligated and unspent at the end of the Funding Period.

5. **Town Not Responsible for Funding Shortfalls.** The Town shall not be liable nor responsible for funding shortfalls nor Project deficits. The Town Contribution to the Project shall not exceed \$4,000,000 and the Cain Lot unless the Town agrees otherwise.
6. **Reimbursement of Funds.** So long as the Town has provided to the costs of the Project the Town Contribution, CAIN CENTER shall complete the Project in accordance with Exhibit A within the Funding Period. Should CAIN CENTER, or its successors or assigns, fail to complete the Project other than by reason of the failure of the Town to make the Town Contribution, the Arts Center and Plaza shall revert to the Town and all Town funds contributed shall be returned to Town.
7. **Accounting of Funds:** CAIN CENTER shall submit to the Town a full and accurate accounting summarizing all expenditures for the Project along with all funding sources on or before the 20th day of each month for the previous month (example: May 20th report will summarize through April 30) during the Funding Period. Additionally, CAIN CENTER shall submit a Final Report to the Town no later than 60 days after receiving a certificate of occupancy for the Project that summarizes all expenditures made and all funding sources contributed to the project. CAIN CENTER shall retain and keep safe financial and other records that corroborate the information contained in the Final Report (invoices, receipts, pay vouchers, etc.) for a period of no less than three years. The Town shall have the authority to review these financial records from time to time.
8. **Construction of Project:** CAIN CENTER will develop and construct the Project in accordance and in full compliance with (i) **Exhibit A**; (ii) all applicable laws and regulations, and (iii) applicable zoning requirements and declarations of covenants, conditions and restrictions. Moreover, all development, construction and alteration will be performed in a professional, workmanlike manner, free from defects and hazardous waste.
 - a. **Changes To Approved Plans:** Any changes to the construction contract approved drawings attached as Exhibit A must be approved in writing, by CAIN CENTER and Town.
 - b. **Change Orders and/or Revisions to the Project Budget:** If, during the course of construction, change orders or revisions to Project Budget (collectively “Change Orders”) are requested or required by CAIN CENTER:
 - i. Change Orders that require notice to Town: CAIN CENTER shall be required to notify the Town of Change Orders that do not exceed \$250,000 within seven (7) days of executing the Change Order.
 - ii. Change Orders that require approval of Town: Should a Change Order(s) result in costs that exceed either \$250,000 or the Project Budget, any such Change Order must be approved by Town, such approval to not be unreasonably withheld.

iii. Changes Orders Affecting Town-owned Park Lot: Notwithstanding Paragraph 8(b)(i) above, any changes, regardless of cost, that affect the portion of the Project that includes the Town Park Lot must be approved, in writing by Town.

c. **Town's Right to Inspect and Monitor Improvements to Park Parcel**: The Town shall have the right to inspect and monitor construction of improvements to the Park Parcel.

9. **Indemnification**: CAIN CENTER assumes sole responsibility and liability, and will defend, indemnify, and hold Town harmless from and against all liabilities, fines, suits, claims, demands, actions, injuries, damages, judgments, costs, expenses, penalties or losses of any kind or nature whatsoever (including without limitation for damage to real or personal property, and/or or injury or death to a person) (collectively, the "Liabilities") caused by, arising out of, or in any manner related to the development and construction of the Project, including from intentional or negligent acts by CAIN CENTER or its agents, employees, licensees and contractors; provided, however, that CAIN CENTER shall not be liable to Town for liabilities arising from or directly related to Town's gross negligence or willful misconduct. CAIN CENTER waives all claims against Town for Liabilities arising from or related to the Project, except for claims arising from or directly related to Town's gross negligence or willful misconduct. CAIN CENTER's indemnity obligations pursuant to this Section shall survive the termination or expiration of this Agreement.

10. **Insurance, No Subrogation.**

- a. Town will procure and maintain a policy or policies of insurance on the Town-owned portion of the Project, and any public liability which may arise out of, or by virtue of, the Town's ownership of the fee interest in that portion of the Project.
- b. CAIN CENTER will procure and maintain a builder's risk policy or policies of insurance adequately covering the replacement cost of the Project, and any liability which may arise out of, or by virtue of, the development and construction of the Project including without limitation by CAIN CENTER or its agents, employees, licensees and contractors. Without limiting the foregoing, CAIN CENTER will at all times maintain (i) comprehensive general liability insurance (including premises-operations, contractual liability and completed operations coverage, if listed as separate coverage parts) with per occurrence limits and aggregate limits (including any excess or umbrella coverage) of not less than \$1,000,000 and \$3,000,000, respectively, (ii) such workers' compensation and other employers' liability insurance as may be required by the jurisdiction in which CAIN CENTER is doing business. All such insurance policies will name both CAIN CENTER and Town as "named insureds" so as to create the same liability on the part of insurer as though separate policies had been written for CAIN CENTER and Town.
- c. CAIN CENTER will provide Town with copies of all insurance policies and renewals of insurance policies required under this Agreement. All policies will contain endorsements providing that they will not be cancelled, reduced in amount or coverage, or otherwise modified by the insurance carrier, without at least thirty (30)

days' prior written notice to Town. Town will be entitled to participate in the settlement or adjustment of any losses covered by such policies.

- d. Each of CAIN CENTER and Town (in such case, the "Injured Party") hereby waives any claim it might have against the other party to the extent that the Injured Party suffers loss or damage which is caused by the other party, but which is covered by the Injured Party's insurance policies required herein. Each of CAIN CENTER and Town will obtain from its insurance carrier a provision acknowledging this waiver and agreeing that such insurance carrier will not be subrogated to the rights of the Injured Party to the extent that these rights have been waived.

- 11. **Notices:** Whenever this Agreement requires either party to give notice to the other, such notice will be given in writing and delivered in person (including by commercial courier service), mailed via the United States Postal Service, by certified or registered mail, return receipt requested, or via confirmed email to the party at the address set forth below, or at such other address designated by like written notice:

Town of Cornelius
21445 Catawba Avenue
P.O. Box 399
Cornelius, North Carolina 28031
Attention: Town Manager

Cornelius Arts/Community Center, Inc.

Attention: _____

- 12. **Severability and Duration:** If any provision of this Agreement is deemed or declared illegal, unenforceable or invalid, such provision will be read out of this Agreement, and will not affect the validity of any other provision or give rise to any cause of action of the parties against the other, and the remainder of this Agreement will be valid and enforced to the fullest extent permitted by law.
- 13. **Waiver:** Any waiver at any given time of any term or condition of this Agreement, or the failure to take action with respect to any breach of any such term or condition, will not be deemed to be a waiver of the term or condition with regard to any subsequent breach of the term or condition, or of any other term or condition of the Agreement.
- 14. **Modifications:** This Agreement may be modified, altered or amended only by written agreement executed by Town and CAIN CENTER.
- 15. **Governing Law:** This Agreement shall be governed in all respects, including as to validity, interpretation and effect, by the internal laws of the state of North Carolina. The language in all parts of this Agreement will be, in all cases, construed according to its fair meaning and not strictly for or against Town or CAIN CENTER.

16. **Waiver of Jury Trial:** The Parties waive trial by jury in any action, proceeding or counterclaim brought by or against the other with respect to any matter arising out of or in connection with this Agreement.
17. **Relationship:** The parties agree that neither any provision of this Agreement nor any act of the parties shall be deemed to create any joint venture relationship or other partnership agreement between CAIN CENTER and Town.
18. **Time of the Essence:** Time is of the essence for each of the provisions of this Agreement.
19. **Counterparts:** This Agreement may be executed in counterparts, each of which shall be deemed an original but all of which counterparts collectively shall constitute one Agreement. Signatures may be exchanged by copy, or with original signatures to follow. Each party shall be bound by its own copied signature and shall accept the copied signature of the other party.
20. **Performance of Government Function:** Nothing contained in this Agreement shall be deemed or construed to estop, limit, or impair Town from exercising or performing any regulatory, legislative, governmental or other powers or functions.

IN WITNESS WHEREOF, the parties have executed this Agreement under seal in Cornelius, North Carolina, as of the Effective Date.

Cornelius Arts/Community Center, Inc.

Signature of Authorized Representative Date

Federal Identification #

Town of Cornelius

Signature of Authorized Representative Date

This instrument has been preaudited in the manner required by the Local Government Budget and Fiscal Control Act.

Signature of Authorized Finance Officer Date