

MEMORANDUM OF AGREEMENT

THIS MEMORANDUM OF AGREEMENT is made and entered into as of the ____ day of October, 2020 (the “Effective Date”) by and between **SHOWPROP LEXINGTON III, LLC**, having an address of 275 W. 190th Street, Suite 201, Torrance, CA 90504 (hereinafter referred to as “SHOWPROP”), the **LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT**, an urban-county government pursuant to KRS Chapter 67A, located at 200 East Main Street, Lexington, KY 40507 (hereinafter referred to as “LFUCG”), and **L-M ASPHALT PARTNERS, LTD, d/b/a ATS CONSTRUCTION**, having an address of 3009 Atkinson Avenue, Suite 400, Lexington, KY, 40509 (hereinafter referred to as “ATS Construction”), collectively referred to as the “Parties.”

RECITALS

WHEREAS, LFUCG owns and maintains that portion of the right-of-way identified Lexington Center Drive, located in Lexington, Kentucky; and

WHEREAS, SHOWPROP has constructed a multi-theater entertainment complex known as the Krikorian Theatre, at 301 South Broadway, which is situated between South Broadway, West High Street and Lexington Center Drive in Lexington, Kentucky; and

WHEREAS, the construction activity by SHOWPROP requires the resurfacing of a portion of the right of way on Lexington Center Drive; and

WHEREAS, LFUCG has an agreement with ATS Construction to perform general paving activities in Lexington, Kentucky, in those areas designated by LFUCG; and

WHEREAS, it would be mutually advantageous to the parties for ATS Construction to resurface the area surrounding the Krikorian Theatre on Lexington Center Drive, in accordance with construction plans and specifications approved by LFUCG, and for LFUCG and SHOWPROP to each pay their proportionate share of the repaving of Lexington Center Drive; and

WHEREAS, SHOWPROP and LFUCG have agreed to pay their proportionate share of the resurfacing of Lexington Center Drive by ATS Construction, as set forth herein, and the parties now desire to reduce their agreement to writing.

NOW, THEREFORE, in consideration of the premises and the foregoing mutually agreed upon promises, conditions, and covenants hereinafter set forth, SHOWPROP, LFUCG, and ATS Construction hereby covenant and agree as follows:

(1) **INCORPORATION OF RECITALS.** The above recitals are incorporated herein as if fully set forth.

(2) **AREAS TO BE PAVED/RESURFACED.** Attached as Exhibit A is a scan of the plot with the areas color coded for each party’s responsibility of resurfacing.

- a. LFUCG is responsible for the GREEN area of Broadway.
- b. SHOWPROP is responsible for the remaining area shown in PURPLE.
- c. SHOWPROP has agreed to assume responsibility of the North bound lane of Lexington Center Drive from Maxwell to the temporary electrical service trench, subject to a reservation of any and all rights and claims it may have to seek repayment of such amounts from 300 West Vine Street, LLC. Showprop's assumption of responsibility for this scope is not intended to waive any rights it may assert against 300 West Vine Street, LLC.

ATS Construction and SHOWPROP agree that this work shall be constructed, inspected, and surety shall be provided in accordance with the requirements of the LFUCG Division of Engineering manuals for a new development project. This work shall be constructed in a good, safe and workmanlike manner in compliance with all applicable codes, ordinances, laws and regulations. ATS Construction and SHOWPROP shall take necessary action to protect the life, health, safety, and property of all personnel on the job site, members of the public, and LFUCG personnel. The parties agree to cooperate each with the other to expedite the repaving of Lexington Center Drive.

(3) **COST ESTIMATES AND COST ALLOCATION.** Recognizing that the resurfacing of Lexington Center Drive is mutually beneficial to both SHOWPROP and LFUCG, these parties have agreed to pay their proportionate construction cost associated with the resurfacing as follows:

(a) Resurfacing of Lexington Center Drive: The estimated cost of this project is **THIRTY ONE THOUSAND NINE HUNDRED EIGHTY DOLLARS AND SEVENTEEN CENTS (\$31,980.17)**. SHOWPROP shall pay **TWENTY-TWO THOUSAND NINE HUNDRED TWENTY SIX DOLLARS (\$22,926.00)**, as shown by the estimate attached hereto and incorporated herein as **Exhibit B**. LFUCG shall pay the remaining in the amount of **NINE THOUSAND FIFTY FOUR DOLLARS AND SEVENTEEN CENTS (\$9,054.17)**. If the estimated construction cost changes, ATS Construction shall provide immediate notice of any change orders affecting the estimated project cost to SHOWPROP and LFUCG for approval. In that event SHOWPROP and LFUCG shall each separately pay their respective portion of the total cost of resurfacing Lexington Center Drive to ATS Construction and shall notify the other party of such payment in writing when payment has been made.

(4) **CONSTRUCTION APPROVALS; CHANGES IN THE WORK; CHANGE ORDERS.** Any and all work performed pursuant to this Agreement shall be approved by LFUCG's Department of Environmental Quality and Public Works. SHOWPROP and ATS Construction hereby agree to submit any changes or modifications to the plans to LFUCG's Department of Environmental Quality and Public Works for consideration and approval before the commencement of any work pursuant to those changes, modifications, or change orders. The final surface will be paced by ATS Construction in accordance with the cross sections provided by SHOWPROP on September 21, 2020. SHOWPROP affirms that that the water collecting in the transformer area is not from the curb/gutter being overwhelmed, but is from rainwater collecting in that area. SHOWPROP further affirms that the repaving will not increase or decrease the street watershed area leading to the new inlet.

LFUCG reserves the right in its sole discretion to demand that SHOWPROP and/or ATS Construction and all other construction contractors or subcontractors immediately cease any portion of, or all further work undertaken within the right of way or in the scope of work described in this agreement. Any authorized services performed, materials used or installed to the satisfaction of LFUCG before the demand to cease any and all further work shall be paid in accordance with the terms of this Agreement. LFUCG shall thereafter authorize ATS Construction in writing to undertake only minimal, reasonable, and necessary additional work or services and acquire, expend, use, or install only minimal, reasonable, and necessary additional materials to re-establish the original use and function of the right of way. ATS Construction shall notify SHOWPROP and LFUCG in writing, and obtain their approval, prior to any change orders to the construction plans for the site or service area that will affect the shared project costs.

(5) **COMMENCEMENT DATE; DELAY.** This Agreement will commence on the Effective Date. Time is of the essence in the performance of this Agreement. The work is expected to begin the week of **OCTOBER 21, 2020**. The performance period may be extended by agreement of the parties via change order executed by the parties and approved by the Urban County Council. Notwithstanding the foregoing, if delays result solely by reason of the acts of SHOWPROP, SHOWPROP shall be solely liable for any increased costs or penalties associated with such delays. If delays result solely by reason of the acts of ATS Construction, ATS Construction shall be solely liable for any increased costs or penalties associated with such delays. SHOWPROP and/or ATS Construction shall immediately notify LFUCG of any delay, regardless of cause, within five (5) business days and provide a written action plan regarding how it will attempt to resolve the delay, whenever SHOWPROP and/or ATS Construction observe or otherwise become aware of any development that affects the scope or timing of the work.

(6) **INSURANCE.** SHOWPROP and ATS Construction shall procure and maintain, and shall require its subcontractors to procure and maintain, insurance coverage at levels approved by LFUCG at all times during the period of this Agreement. SHOWPROP and ATS Construction shall provide at least thirty (30) days advance written notice via certified mail, return receipt requested, in the event that any required insurance coverages are canceled or not renewed.

(7) **TERMINATION.** SHOWPROP or ATS CONSTRUCTION may only terminate this Agreement due to LFUCG's material breach of the terms hereof which causes SHOWPROP or ATS Construction to be unable to perform its duties or responsibilities under this Agreement, and only upon thirty (30) days written advance notice to LFUCG by registered or certified mail. LFUCG shall have the right to terminate and cancel this Agreement at any time upon thirty (30) days written notice served on SHOWPROP or ATS Construction by registered or certified mail.

(8) **DEFAULT.** No party shall be in default under this Agreement unless and until the non-defaulting party shall have given the defaulting party written notice of such default and the defaulting party shall have failed to cure the default within thirty (30) days after written receipt of such notice. Upon the failure by the defaulting party to timely cure any default after notice thereof from the non-defaulting party, the non-defaulting party shall have the right to terminate the Agreement and pursue an appropriate remedy.

(9) **INDEMNIFICATION AND HOLD HARMLESS.** It is understood and agreed by the parties that, to the extent permitted by law, SHOWPROP and ATS Construction hereby assume the entire responsibility and liability for any and all damages to persons or property caused by or resulting from or arising out of any act or omission on the part of SHOWPROP, ATS Construction, its subcontractors, agents, servants, owners, principals, licensees, or assigns, under or in connection with this Agreement and/or the provision of services and the performance or failure to perform any work required thereby.

SHOWPROP and ATS Construction shall indemnify, save, hold harmless, and defend LFUCG and its elected and appointed officials, employees, agents, volunteers, and successors in interest from and against any and all liability, damages, and losses, including but not limited to, demands, claims, causes of action, judgments, penalties, fines, liens, costs, expenses, interest, defense costs, and reasonable attorney's fees that are in any way incidental to or connect with, or that arise or are alleged to have arisen, directly or indirectly, from or by the performance or breach of this Agreement and/or the provision of goods or services by SHOWPROP, ATS Construction, its contractors, or subcontractors pursuant to this Agreement, provided that (a) it is attributable to personal injury, bodily injury, sickness, or death, or to injury to or destruction of property (including the loss of use resulting therefrom), or to or from the negligent acts, errors or omissions or willful misconduct of SHOWPROP, ATS Construction, or its subcontractors; and (b) not caused solely by the active negligence or willful misconduct of LFUCG. These provisions shall in no way be limited by any financial responsibility or insurance requirements, and shall survive any termination of this Agreement.

(10) **BINDING EFFECT.** This Agreement shall be binding upon, and shall inure to the benefit of, the executors, heirs, successors, and assigns of the parties hereto, and no party shall assign, sublet, or transfer its interests in this Agreement without the written consent of the other parties.

(11) **NON-WAIVER.** The failure or delay on the part of SHOWPROP, ATS Construction, or LFUCG to exercise any right, power or privilege hereunder shall not operate as a waiver thereof.

(12) **ENTIRE AGREEMENT.** This Agreement constitutes the entire agreement and understanding between the parties with respect to the subject matter contained herein and supersedes all prior offers, negotiations, and other agreements concerning the subject matter contained herein. No part of this Agreement may be altered, modified, or changed in any way except in writing signed by the parties hereto or signed by the duly authorized representatives of said parties. Unless specifically waived herein, all LFUCG ordinances, manuals, rules, regulations, or similar requirements of LFUCG applicable to the subject matter of this Agreement shall control.

(13) **AMENDMENTS.** This Agreement may only be amended by a written agreement of all the parties hereto. No revision of this Agreement shall be valid unless made in writing and signed by an officer of SHOWPROP, an officer of ATS Construction, and an authorized signatory on behalf of LFUCG.

(14) **GOVERNING LAW; CHOICE OF FORUM.** The laws of the Commonwealth of Kentucky shall govern this Agreement. This Agreement shall be interpreted, applied and enforced according to the fair meaning of its terms and not be construed strictly in favor of or against either party, regardless of which party may have drafted any of its provisions. Any action brought against LFUCG, SHOWPROP, or ATS Construction on this Agreement, including but not limited to actions either for breach of the agreement or for enforcement of the agreement, shall be brought in a court of appropriate jurisdiction in Fayette County, Kentucky.

(15) **SEVERABILITY.** In the event that any one or more of the provisions contained herein shall, for any reason, be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provisions of this Agreement.

(16) **NO THIRD PARTY RIGHTS.** Nothing in this Agreement, expressed or implied, is intended or shall be construed to confer upon or give to any person other than the parties hereto any right, remedy, or claim under or by reason of such agreement or covenant, condition, or stipulation herein contained. Nothing expressed or mentioned in or to be implied from this Agreement is intended or shall be construed to give to any person other than the parties hereto any legal or equitable right, remedy, or claim under or in respect to this Agreement.

(17) **NOTICES.** All notices, consents, demands, or other communications required or permitted to be given or made hereunder shall be sufficiently given or made if given in writing, mailed by reliable overnight courier or by Certified Mail, return receipt, in a sealed envelope, postage prepaid, addressed to the following addresses:

LFUCG: Commissioner, Dept. of Environmental Quality and Public Works
 Lexington-Fayette Urban County Government
 200 East Main Street
 Lexington, KY 40507

With
copies to: Commissioner of Law
 Lexington-Fayette Urban County Government
 200 East Main Street
 Lexington, KY 40507

SHOWPROP: Mr. Todd Cummings, Vice President
 SHOWPROP LEXINGTON, III, LLC
 275 W. 190th Street, suite 201
 Torrance, CA 90504

ATS Construction: Gary R. Weitkamp
 500 West Jefferson Street, Suite 2400
 Louisville, KY 40202

SHOWPROP, LFUCG, or ATS Construction may from time to time designate any other address for this purpose by written notice to the other Party.

(18) This Agreement may be executed in duplicate counterparts, each of which shall be deemed an original. In the event that any signature is delivered by facsimile or by email of a ".pdf" format data file, such signature shall create a valid and binding obligation of such party with the same force and effect as if such facsimile or ".pdf" signature page were an original thereof.

(19) The execution, delivery and performance of this Agreement and any documents relating hereto have been duly authorized by all necessary parties, and this Agreement is enforceable in accordance with its terms. SHOWPROP, LFUCG, and ATS Construction have full power and authority to enter into this Agreement, to execute and deliver all instruments and documents referred to herein and to consummate the transactions contemplated hereby.

IN WITNESS WHEREOF, the parties by their authorized representative have executed this Agreement as of the Effective Date.

LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT

BY: *Linda Gorton*
Linda Gorton, Mayor

ATTEST:

Deputy
Mackenzie Summers
Clerk of the Urban County Council

SHOWPROP LEXINGTON III, LLC

BY: *[Signature]*
Name: *TODD CUMMINGS*
Title: *VP*

ACKNOWLEDGMENT

STATE OF *KENTUCKY*)
)
COUNTY OF FAYETTE)

On the *29th* day of *January*, *2021*, before me personally appeared *TODD CUMMINGS*, and acknowledged under oath that he/she is the authorized representative of SHOWPROP LEXINGTON III, LLC, and was authorized to execute this Agreement.

My Commission Expires: *March 9, 2022*

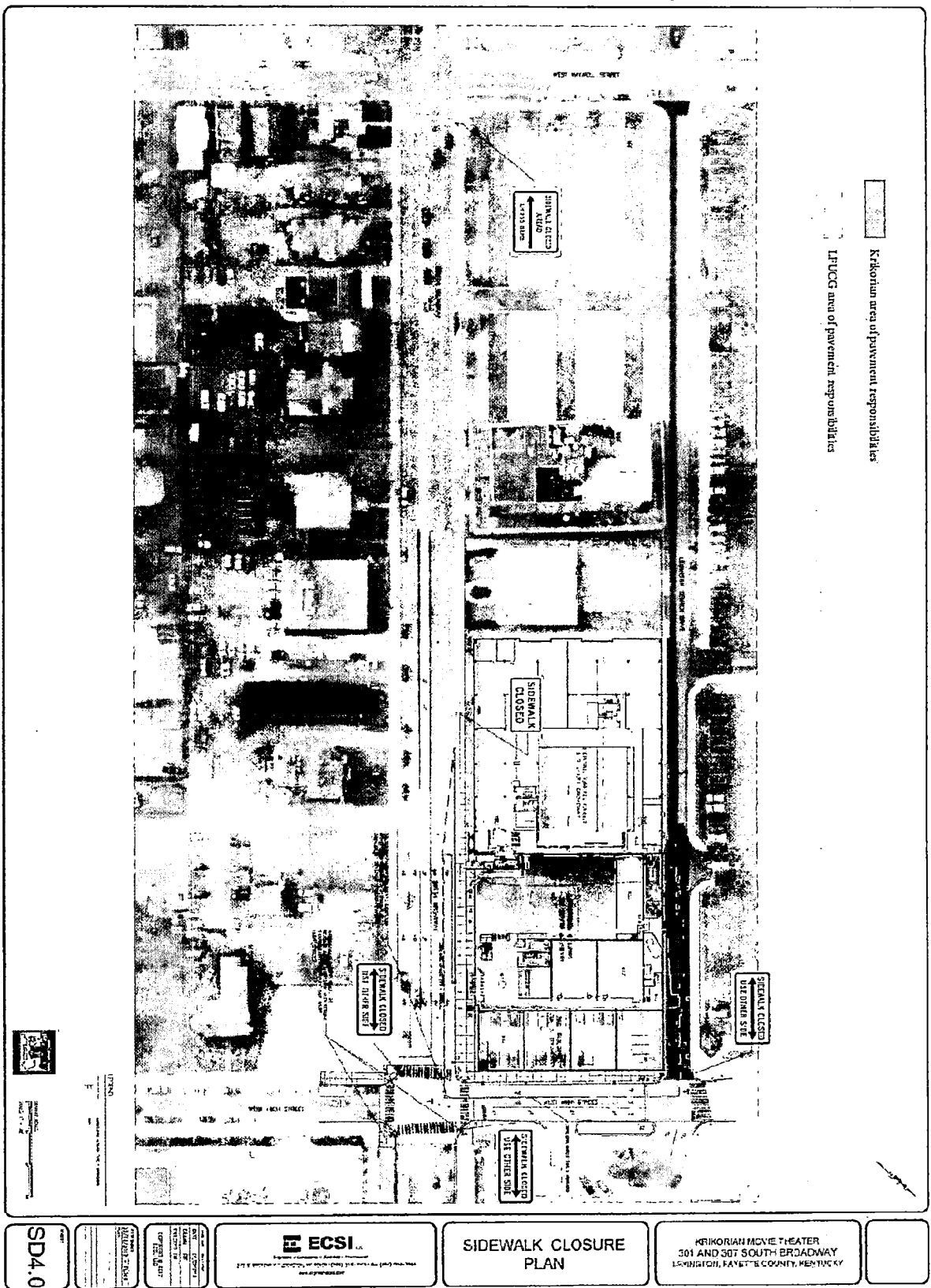


EXHIBIT A

PROPOSAL- LEXINGTON CENTER DRIVE- KRIKORIAN



ATS Construction

3009 Atkinson Ave, Suite 400

Lexington, KY 40509

Contact: Todd McDaniel

Phone: (606) 813-6671

Fax: (859) 231-0946

Quote To:

Date: 10-5-2020

Job Name:

Designer:

Plan Sheets:

Date of Plans:

Phone:

Email:

ITEM	DESCRIPTION	QUANTITY	UNIT	UNIT PRICE	AMOUNT
10	MILLING VARIOUS DEPTH	10,960.00	SF	0.60	6,576.00
20	ASPHALT SURFACE VARIOUS DEPTH	150.00	TON	99.00	14,850.00
30	STRIPING	1.00	LS	1,500.00	1,500.00
GRAND TOTAL					\$22,926.00

NOTES:

SCOPE OF WORK

10- MILLING VARIOUS DEPTH. INCLUDES MILLING, DISPOSING, CLEANING OF ASPHALT/CONCRETE

20- ASPHALT SURFACE VARIOUS DEPTH. MATCHING EXISTING GUTTER PANS OF CURB.

30- STRIPING PER PREVIOUS CONDITION. INCLUDES THERMO ARROWS AND CROSSWALK.

ATS IS NOT RESPONSIBLE FOR WATER ISSUES DUE TO PREVIOUS CONSTRUCTION ACTIVITIES ASSOCIATED WITH KRIKORIAN. ATS WILL DO OUR BEST TO CORRECT OR BETTER WATER ISSUES, BUT WE ARE CONSTRAINED BY EXISTING CURB GRADES.

CONTRACT TERMS

- ATS Construction is quoting the above as a UNIT PRICE PACKAGE. Final billing will be based off the amount of SF milled and TONS placed of asphalt.

- If scope of work and terms of contract are accepted, please sign and return a copy of this proposal.

- The above prices does not include performance and payment bond, add 3/4 of 1 percent performance and payment bond, if required.

- Includes two (2) mobilizations of equipment and crews. Additional mobilizations will be at a charge of \$1,500.00 per EACH.

- ATS Construction is quoting the above prices based on non prevailing wages.

- ATS Construction BID QUOTATION LETTER shall be made a part of subcontract agreement.

- Any alterations or deviations from the above specified scope of work involving extra work will be executed only upon written

orders and will be at an extra charge over and above the Lump Sum Price as quoted.

- ATS Construction proposes to furnish all materials, labor, and equipment to complete the work as described above.
- Grading and compaction of the sub grade is the responsibility of others. The site contractor shall place the sub grade to +/- 0.05' from the planned sub grade elevations. Grade errors or poor density conditions shall be corrected prior to start of work by ATS Construction.
- All traffic control shall be the responsibility of others with the exception of flagger personnel during the placement of the items listed in the scope of work above.
- All work will be completed in a workmanlike manner according to the standards of practice.
- All corrective work required for work performed by ATS Construction and damaged by others shall be considered extra work and become an extra charge to the LUMP SUM PRICE.
- Warranty for new construction and full depth asphalt pavement. All materials and workmanship is guaranteed for a period of one year. Acts of nature are not warranted. Acts of nature include, but are not limited to, damage from earthquakes, tornadoes, floods, uncontrolled vegetation, and cracks caused by hot and dry conditions.
- Warranty for asphalt overlay projects, ATS Construction will warranty defects associated with the resurfacing only. ATS Construction makes no investigation into the condition of the subgrade of overlay projects and shall not be liable for defects associated with the underlying pavement or subgrade.
- Payment is due upon completion, net 30. Projects requiring more than 30 days will be invoiced on a percentage of completion basis. Customer shall be charged 1.5% interest, compounded monthly, on accounts that are past due.
- ATS Construction is a pre-qualified contractor with the Kentucky Transportation Cabinet.
- Pricing is good for 60 days from date on proposal.

Please contact me with any questions you may have.

Respectfully Submitted,

Todd McDaniel, PE
Project Engineer and Estimator



Acceptance of Proposal

Date: _____

Signature: _____