

ATTACHMENT 1

ABSTRACT OF MEMORANDUM OF UNDERSTANDING (MOU) BETWEEN WICOMICO COUNTY AND LIVE WIRE, LLC, DATED SEPTEMBER 2, 2023

SECTION 1: RECITALS

1. Named Events

Existing Verbiage: The permitted events include, “*Jeeps at the Quarry, Open Wheeling, Quads at the Quarry, Broncos at the Quarry. Additional dates or transfer of dates may be completed by mutual consent of the County and the Event Organizer under the same conditions of this sponsorship.*”

Comment: This clause does not impose limitations as to the number or types of events that can be held following mutual consent by the parties to the MOU, thereby potentially burdening adjacent homeowners with excessive noise and traffic disruptions throughout the year. Additionally, the term “sponsorship” alludes to the County being a sponsor rather than a party to the MOU. The legal distinction between these roles is potentially significant, and the inconsistency and ambiguity created by this undefined substitution of terms may mitigate the County's ability to enforce certain provisions of the MOU, or create unforeseen obligations or liabilities.

2. Identification of Subject Property

Existing Verbiage: “*The Event Organizer intends to use the following parcel: Connelly Mill Road, Delmar, Maryland property containing 111.58 acres, more or less.*”

Comments: The existing verbiage identifying the property to be used for the proposed events (the “event site”) is ambiguous. The event site is properly described as two parcels totaling 111.58-ac. identified in the land records of Wicomico County as (1) Map 0020, Grid 0022, Parcel 0169 (86.58 ac.), and (2) Map 0020, Grid 0021, Parcel 0167 (25.00 ac.). This section should also state that the adjacent County-owned parcel identified as Map 0020, Grid 0021, Parcel 0168 – 123.27-ac. is specifically excluded from use, thus placing additional burden on the Event Organizer to ensure that there is no encroachment.

SECTION 2: OBLIGATIONS OF THE EVENT ORGANIZER

1. Line Item 8

Existing Verbiage: “[*The Event Organizer will:*] Provide **ALL** [emphasis added] *staff and security for the Event.*”

Comments: This clause appears to conflict with the County's obligation to, “*Provide personnel to manage off-site traffic flow.*” as set forth in §3, Line Item 6. If enforceable as a County obligation, significant costs would be imposed on the County. Furthermore, this clause should contain a provision obligating the Event Organizer to submit a staffing and security plan to the County by a specified point in time prior to any event, thus allowing the County sufficient time to review and allocate/mobilize personnel and equipment resources. Such staffing and security plan should be subject to the County's approval in its discretion.

2. Line Item 10

Existing Verbiage: “[*The Event Organizer will:*] *Inform neighboring property owners of scheduled Events.*”

Comments: The lead time and means by which neighboring property owners are to be informed of scheduled events has not been stipulated. It is reasonable that neighboring property owners are notified by a reliable means at least one month in advance of any event.

3. Line Item 11

Existing Verbiage: “[*The Event Organizer will:*] *Provide a plan to the County to prevent public access to the site when the site is closed to the public*”

Comments: The intent of the existing verbiage is ambiguous, as it fails to address whether any public access prevention plan is effective only in the days preceding or following a scheduled event, or for a longer, perhaps year-round duration. If this obligation is interpreted to be year-round, it may imply that the Event Organizer has exclusive use of the site, which can potentially impose other obligations, liabilities or restrictions on the County. In either case, this clause should require that the plan be submitted well in advance and subject to the County's approval.

It must also be noted that absent the installation of fencing around the entire event site perimeter, access by people or small vehicles such as ATVs and motorcycles cannot be prevented.

4. Line Item 12

Existing Verbiage: “[*The Event Organizer will:*] *Provide traffic control into the staged area for an Event.*”

Comments: This verbiage of this clause creates ambiguity as to whether the Event Organizer's obligation is limited to onsite traffic control or whether it includes traffic

control on Connelly Mill Rd. or other county/state highways. This clause may also conflict with the County's obligation to, "Provide personnel to manage off-site traffic flow." as set forth in §3, Line Item 6. If traffic control on Connelly Mill Rd. is enforceable as a County obligation, significant costs will be imposed on the County.

Additionally, this clause should require the Event Organizer to submit a Maintenance of Traffic (MOT) Plan to the County at a specified time prior to any scheduled Event, thus providing the County with adequate review time, as well as sufficient time to arrange for any necessary County personnel or equipment resources. The MOT Plan should be subject to the approval of the County in its discretion. This is of particular importance considering the relatively high traffic volume of Connelly Mill Rd., which has only two lanes and serves as a connector between the Salisbury Bypass and U.S. 13 Business, in addition to the traffic impediment posed by the Delmarva Central Railroad crossing and switching yard on Connelly Mill Rd. adjacent to the Subject Property's highway entrance.

5. Line Item 23

Existing Verbiage: "[The Event Organizer will:] "Produce a schedule of events for each year."

Comments: The MOU fails to establish a deadline for submission of a schedule of events in any year, thus making planning and allocation of County resources potentially problematic. Any proposed schedule of events should be subject to the County's approval in its discretion.

6. Line Item 24

Existing Verbiage: "[The Event Organizer will:] Provide a report to the County about each Event, including an accounting of revenue and expenses."

Comments: This clause is ambiguous as to whether the referenced "accounting of revenues and expenses" is a pre-event proforma or post-event financial statement. Assuming that the intent is for a pre-event proforma, such proforma should be submitted by a specified point in time prior to any event, and should include documentation supporting the projected revenues, expenses and other underlying assumptions. Acceptance of the proforma and supporting documentation should be at the County's discretion. It should also be noted that submission and review of a proforma should have been part of the due diligence effort prior to execution of the MOU to assess feasibility and costs to be borne by the County.

If the intent of this clause is for the Event Organizer to provide a post-event financial statement, then it is redundant with the requirements of Line Item 26 of this section. Additionally, the contents of the “*report about each event*” required by this clause is undefined and ambiguous.

7. Line Item 25

Existing Verbiage: “*The County shall receive ten percent (10%) of the **net profit** [emphasis added] from each Event.*”

Comments: The County's interests are not adequately protected by this clause. In the absence of supported proforma financial projections, net profitability can neither be foreseen nor assured. Additionally, by its commonly used definition, the term “*net profit*” implies that the Event Organizer can allocate a pro rata share of its overall corporate operating expenses, interest liabilities and tax liabilities to the calculation, thus creating additional uncertainty as to whether the County will ultimately receive any financial benefit at all, or even be able to recover its expenses. *No evidence has been provided indicating that the County performed the appropriate level of due diligence by reviewing the Event Organizer's financial statement to determine impacts to net profitability, should it be interpreted in strict accordance with its generally accepted definition. Neither has any evidence been provided indicating that the Event Organizer submitted, or that the County has reviewed, a proforma financial projection to determine probable gross revenues from all sources derived.*

Furthermore, the MOU is silent as to when the Event Organizer will remit the County's agreed upon share following any event. This should have been clearly established and may result in an unsatisfactory deferral of payment to the County.

The County's interests would have been far better protected by requiring the Event Organizer to pay front-loaded, stipulated fees (e.g., permit fee, land use fee, asset support fee, etc.) of sufficient value to ensure that the County is remunerated for its expenses. As the MOU is currently structured, the County may not be able to recover its expenses, thus placing tax dollars at risk. Furthermore, the distribution of profits renders the MOU a de facto venture partnership agreement potentially exposing the County to unforeseen and unintended financial and civil liabilities.

8. Line Item 26

Existing Verbiage: “*Financials and economic impact statement will be prepared after each Event.*”

Comments: This term “*financials*” is ambiguous. Whereas, the County is to receive a share of net profits, the Event Organizer's complete *financial statement* with supporting

documentation acceptable to the County in its discretion will be necessary to identify event-related direct, and corporate indirect expenses that may be applied to the net profitability calculation. It should also be noted that no time limitation has been imposed for submission of the “financials” following an event, which may unsatisfactorily defer payment to the County insofar as the financial data will form the basis upon which the County's share of profits is calculated.

The post-event “**Economic Impact Statement**” requirement imposed on the Event Organizer is of no value insofar as it will be unable to fully avail itself of the necessary base data. *An Economic Impact Statement should have been prepared by the County as part of a due diligence process prior to entering into any agreement with the Event Organizer.* In conjunction with the Event Organizer's proforma financial projections (which has apparently not been submitted), the Economic Impact Statement would reflect probable tax revenues to be generated by the events, estimates of business revenues (e.g., lodging, food & beverage, entertainment, etc.), and estimates of County expenditures. Lacking these projections and a scientific approach thereto, the economic impacts to the County are purely guesswork..

Also, as part of the due diligence effort that was not undertaken by the County prior to entering into the MOU, a **Community Impact Statement** (CIS) with supporting documentation obtained from similar events with similar neighborhood characteristics should have been submitted by the Event Organizer for the County's review and approval. There is no evidence that a CIS was submitted to assess such issues as sound levels affecting adjacent residential communities, extent of traffic disruptions, and impacts to real estate values of neighboring communities should the proposed events become ongoing.

SECTION 3: OBLIGATIONS OF THE COUNTY

1. Line Item 3:

Existing Verbiage: “[The County will:] “Cooperate with Event Organizer to develop a marketing plan for the Event.”

Comments: “Cooperate” is an excessively broad and ambiguous term. The type and extent of such cooperation with respect to preparation of a marketing plan should be specifically defined and explicitly exclude County funding of the Event Organizer's expenses and the use of county-owned materials or equipment, (e.g., paper media, printing devices, etc.) at taxpayer cost. This also begs the question as to the extent and cost of the use of County staff assigned to fulfill this requirement. There is no indication that any of these costs have been quantified. In the interest of promoting sound accounting practices and government transparency, all County expenditures related to

the MOU should be enumerated and made available to the public.

2. Line Item 4:

Existing Verbiage: “[The County will:] “Provide roll fencing or barriers to mark off-limit areas at the site during the Event.”

Comments: Fulfillment of this requirement entails direct labor, material and equipment usage costs to be borne by the County. There is no indication that these costs have been quantified. In the interests of promoting sound accounting practices and government transparency, all County expenditures related to the MOU should be enumerated and made available to the public.

3. Line Items 5, 6 & 8:

Existing Verbiage: “[The County will:] (Line Item 5) “Provide County social media notice to the public and participants for Events.” (Line Item 6) “Provide personnel to manage off-site traffic flow.” (Line Item 8) “Provide manpower and equipment to assist with setup.”

Comments: Line Item 6 stating that the County will, “Provide personnel to manage off-site traffic flow.” appears to conflict with §2, Line Item 8 requiring the Event Organizer to “Provide **ALL** [emphasis added] staff and security for the Event,” and §2, Line Item 12 stipulating that the Event Organizer will, “Provide traffic control into the staged area for an Event.” If enforceable as County obligations, significant costs would be imposed on the County.

Specific to Line Item 6, the Event Organizer is likely not authorized to manage traffic on public thoroughfares. As such, traffic control on Connelly Mill Rd. must be provided by County employees (Sheriff’s Dept., Fire Dept., etc.) and the costs associated therewith will be borne by the County. There is no indication that these costs have been quantified. In the interest of promoting sound accounting practices and government transparency, all County expenditures related to the MOU should be enumerated and made available to the public.

SECTION 4: TERMS AND CONDITIONS

1. Indemnification

Existing Verbiage: “The Event Organizer will indemnify the County, its officers, agents and employees ...”

Comments: A *duty to defend* should be imposed on the Event Organizer in addition to the indemnification obligation. A duty to defend is generally standard in municipal contracts, and serves to protect the County from legal expenditures should a civil suit be initiated by a third party.

Additionally, the indemnification requirement should be extended to include the County's contractors, subcontractors, employees-in-kind, and perhaps the County Executive and County Council.

2. Insurance Requirements

Several problematic deficiencies were noted in the insurance requirements as follows:

- i. The limits of coverage are insufficient in consideration of the personal injury risks associated with the events. Coverage in the aggregate amount of \$6 million would be more satisfactory and consistent with events of this nature, rather than the stipulated \$5 million.
- ii. No obligation has been imposed on the Event Organizer to verify that all participating vehicles are insured in accordance with state law.
- iii. The MOU fails to require the Event Organizer's insurance coverage to be primary, non-contributory and without regard to the named insured's fault or lack thereof as is typical of municipal contracts.
- iv. The MOU fails to require that the County, as additional insured, be notified by Event Organizer as well as the insurer in the event of cancellation or reduction of coverage. This is important, whereas, the insurer will likely only agree to "endeavor" to notify the additional insured of cancellation.
- v. The MOU's insurance provisions fail to include a waiver of subrogation requirement as is typical of municipal contracts. Waiver of subrogation will protect the County from the costs, inconvenience and time necessary to materially support the Event Organizer's insurer's efforts to recover claims paid out in settlement of a third-party lawsuit.
- vi. The undefined term "**Sponsors**" appears to have been substituted for the defined term, "County" in the Insurance clause. Such substitution of terms creates ambiguity subject to judicial interpretation, thus potentially limiting the County's rights and remedies, or creating unintended obligations.

3. Responsibility of Event Organizer

Existing Verbiage: *“The Event Organizer must perform the services with the standard of care, skill, and diligence normally provided by a Contractor in the performance of services similar to the services.”*

Comments: This clause is generally only applicable to contracts for construction or professional services rather than public events. Nonetheless, the existing verbiage does not meet current standards, which have been adapted to address certain nuances in case law. Standard of care clauses have generally been updated to read, *“The Event Organizer shall perform the services with the standard of care, skill and diligence normally provided by an event promoter in the performance of similar or the same services described herein, at the same or similar site, and with the same or similar conditions as exist at the Event Site”*

Additionally, the term “*Contractor*” has been substituted for the term “Event Organizer” without definition. It is clear that the Event Organizer is not a contractor in accordance with the term's generally accepted definition. This substitution of terms may relieve the Event Organizer from its obligation to exercise an appropriate standard of care, or result in other adverse consequences arising from differing legal interpretations of the undefined term “Contractor” within the context of the MOU.

4. Subcontracting or Assignment

Existing Verbiage: *“The Event Organizer may not subcontract or assign any part of the Contract without the prior written consent of the **Sponsors** [emphasis added]. The **sponsors** [emphasis added] have the right to withhold consent for any reason deemed appropriate.*

Comments: The undefined term “Sponsors” appears to have been substituted for the defined term, “County” in this clause. Such substitution of terms creates ambiguity subject to judicial interpretation thus potentially limiting the County's rights and remedies, or creating unintended obligations.

5. Termination

Existing Verbiage: *“If this Contract is terminated or the sponsored event(s) do not occur, County will not be paid.”*

Comments: Although it is understood that the County's pro rata share of profits will not be realized should an event be canceled, the County will nonetheless incur significant expenses. This clause provides no means for the County to

recover expenses from the Event Organizer, particularly in the circumstance under which an event is canceled through no fault of the County. The Event Organizer can arbitrarily cancel an event without reimbursement to the County for its labor, materials or equipment expenditures.

6. Termination of Contract for Convenience

Existing Verbiage: *“Upon written notice, the **Sponsors** [emphasis added] may terminate the Contract...The County will only be responsible and pay for reasonable costs allocable to the Contract for work or costs incurred by the Event Organizer up to the date of termination, in whole or in part, when the **Sponsors** [emphasis added] determine termination is in their best interest...The County will only be responsible and pay for reasonable costs allocable to the Contract for work or costs incurred by the Event Organizer up to the date of termination.”*

Comments: ***This clause is inequitable*** insofar as it obligates the County to reimburse the Event Organizer for expenses should the County cancel an event, but does not obligate the Event Organizer to reimburse the County for expenses should the Event Organizer cancel, or if an event is otherwise canceled through no fault of the County.

Additionally, The undefined term “Sponsors” appears to have been substituted for the defined term, “County” in this clause. Such substitution of terms creates ambiguity subject to judicial interpretation thus potentially limiting the County's rights and remedies, or creating unintended obligations.

7. Use of County Facilities

Existing Verbiage: *“Event Organizer and its employees or agents have the right to use only those facilities of the County that are necessary to perform the services under this Contract.”*

Comments: This language is excessively broad and fails to identify precisely which County facilities may be utilized by the Event Organizer, or the manner in which any such facilities may be used. In the absence of these parameters, the costs associated with the Event Organizer's use of County facilities cannot be quantified.

8. No Partnership

Existing Verbiage: *“This MOU does not create a partnership or any other business entity or affiliation between the parties, other than to define the*

respective rights and obligations of the parties as to the presentation of the Event.”

Comments: Considering the structure of the MOU and the manner in which profits are to be distributed, this clause may not be entirely enforceable, thus potentially exposing the County to unforeseen costs or liabilities. It appears that in essence, the MOU is, in fact, a partnership agreement.

SECTION 5: NOTED OMISSIONS FROM THE MOU

1. No addendum to the MOU is known to have been executed permitting the first planned Jeep Event reportedly scheduled to be held May 4-5, 2024. Failure to subjoin the event to the MOU may foreclose the County's ability to enforce the provisions thereof, in whole or in part.
2. The MOU is silent on the means by which the County can monitor and verify gross receipts, whether paid by bank draft, credit card transaction or cash. Absent the County's ability to verify, calculation of profitability can be based only on trust and faith, which are inadequate protections of the County's interests.
3. The MOU does not address whether revenues and expenses associated with the Kylan's Barn “after event” are shared by the County and the Event Organizer, with net profits distributed accordingly. Generated revenues may include admission fees, rental of vendor space, or capture of a percentage of vendor revenues.
4. The MOU contains no requirement for the Event Organizer to submit vendor or contractor invoices documenting expenses incurred in connection with any Event, which may be applied to reduce profitability, nor does it authorize the County to review and reject expenses it considers unreasonable, excessive or inapplicable.
5. The MOU is silent on the topic of dispute resolution, whether through litigation, arbitration or non-binding mediation. In the event of a legal dispute, this omission may lead to expensive litigation with uncertain outcome.
6. The MOU contains no termination or “sunset” date and will, therefore, remain perpetually in force, subject only to the mutual consent of the parties thereto with respect to staging of any future events. This can limit the County's ability to modify or abandon the MOU without cost should it determine that it is disadvantageous to the County's interests.
7. The MOU contains no provisions respecting termination for cause or non-payment. This may result in expensive litigation with uncertain outcome.

Attachment 1

*Abstract of MOU Between Wicomico County and
Live Wire, LLC, Dated September 2, 2023*

8. The MOU does not impose an obligation on the Event Organizer to prohibit the possession or use of alcoholic beverages, marijuana or illegal drugs during events. Such a clause may serve to limit the County's exposure to certain civil liabilities if alcohol or drugs are a factor in any vehicular accident or other mishap that may occur.
9. The MOU fails to impose an obligation on the Event Organizer to mitigate and cleanup hazardous materials spills should they occur (i.e., gasoline, motor oil, hydraulic fluid, etc.). Additionally, the MOU fails to require the Event Organizer to submit a Hazardous Materials Abatement Plan describing procedures for immediate containment of any spills, nor does it obligate the Event Organizer to provide the onsite resources necessary to contain such spills (e.g., absorbents, containment booms, fire suppression devices, etc.). Furthermore, the MOU contains no requirement for the Event Organizer to perform an inspection of participating vehicles to identify any visually discernible leaking fluids.
10. The MOU fails to require the Event Organizer to review evidence of participant's liability insurance or ensure that all participating vehicles are properly tagged and street-legal.

End of Document