

THE CITY OF MANHATTAN BEACH

ART AGREEMENT

This Agreement is made and entered into as of this ____ day of ____, 2023, by and between the City of Manhattan Beach, a municipal corporation (the “City”) and ____ (“Artist”) (collectively referred to herein as the “Parties”, and individually as a “Party”).

RECITALS

- A. On March 1, 2023, the City selected issued a Request for Proposals and the Artist created a proposal for an Artwork (the “Artwork”) titled ____ to be installed at Bruce’s Beach Park.
- B. The City now desires to purchase this Artwork as is more particularly described in Exhibit A to be permanently installed at ____ in Bruce’s Beach Park (“Site”).
- C. The Artist desires to create the Artwork and sell said Artwork to the City.
- D. The Artist represents that s/he has the appropriate background, training, and experience to create the Artwork.

NOW, THEREFORE, in consideration of the mutual obligations, covenants, and conditions hereinafter set forth, and for other valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

I. SCOPE OF WORK

- A. In accordance with the terms of this Agreement and with the more detailed Scope of Work set forth in Exhibit A and hereby incorporated, the Artist shall create and install the Artwork – ____ – in Bruce’s Beach Park.
- B. The Artist shall guarantee the structural integrity and surface integrity of the Artwork for ten (10) years and complete any repairs related to the original creation of the Artwork in that time period at the expense of the Artist.
- C. The Artist shall perform all services required under this Agreement to the highest professional standards and in a manner reasonably satisfactory to the City. The Artist shall comply with all applicable federal, state, and local laws, ordinances, codes, and regulations.

II. AMOUNT AND MANNER OF PAYMENT

- A. In consideration of the Artist’s execution of the Artwork, the City shall pay the Artist a fixed sum of \$____ (the “Artist Fee”). The City shall pay 50%,

\$_____ to the Artist upon execution of this Agreement, and shall pay the remaining 50%, \$_____ to the Artist upon satisfactory completion and installation of the Artwork.

- B. After completing the Artwork and receiving final approval from the City's Parks and Recreation Director or designee, the Artist shall submit an invoice to the City for the Artist Fee. The City shall pay all undisputed amounts within forty five days.

III. TRANSPORTATION, DELIVERY, AND INSTALLATION

- A. Artist certifies that the Artwork is in such condition as to withstand ordinary strains of transportation, delivery, and handling and that Artist shall coordinate the transportation, delivery, and installation of the Artwork with City. City shall have no liability to Artist for damage to the Artwork which results from the transportation, delivery, and installation of the Artwork at the Site.
- B. The Artist shall be responsible for the costs of transporting, delivering, and installing the Artwork at the Site. The Artist hereby releases and holds City, City Council and each member thereof, and every officer, employee and agent harmless from any liability for damage to or loss of the Artwork, regardless of who causes such damage, during the installation of the Artwork.

IV. MAINTENANCE OF THE ARTWORK

- A. City shall exercise the same care with respect to the Artwork as it does in the safekeeping of comparable property of its own, except as set forth in paragraph B of this section. It is understood, however, that the Artwork shall be displayed out of doors and shall be exposed to extremes of rain, wind, heat, sun, humidity, and other features of weather, as well as dirt, pollution, insects, birds, and other animals, and the possibility of theft, vandalism, and malicious mischief.
- B. The Artist shall repair damage to the Artwork resulting from a manufacturing deficiency (such as rust, bubbling of paint, chips, peeling paint, peeling varnish/sealant/clear layer, structural deterioration) for the 10-year warrantee period.

V. RIGHT AND TITLE TO, AND INTEREST IN, THE ARTWORK

- A. The Artist shall not retain ownership of or any right, title or interest in the Artwork. The Parties agree that the Artwork and all such rights, title, and interest in or to the Artwork are being sold to City for whatever use the City desires, and that the City does and shall at all times own, solely and exclusively, complete and unencumbered, all rights, title, and interest in and to the Artwork and any modifications to the Artwork. Nothing contained herein shall be deemed to constitute a mere license or franchise in City. The Parties further agree that the City, and its successors and assigns, will be free to use, modify, distribute, sell, license, or otherwise exploit the Artwork and any modifications to the Artwork without any restrictions or limitations or any obligations or payments to the Artist.

- B. The City hereby authorizes the Artist to make, and to authorize the making of, limited photograph and video reproductions of the Artwork for educational and self-promotional purposes. For purposes of this Agreement, the following are deemed to be photograph and video reproductions for educational and self-promotional purposes: slides, film strips, and video episodes not intended for a mass audience and used solely for educational programs that are hosted by the Artist in print media, on the Artist's website and social media sites, and on the Artist's computers and on any other electronic media, as long as such reproduction is provided to others at no cost. Under no circumstances shall the Artist use or make any photograph or video reproductions of the Artwork for commercial purposes and any photograph or video reproductions used or made by the Artist shall not compete with any City endeavor to sell or promote reproductions of the Artwork. The City has sole discretion to determine whether a photograph or video reproduction is utilized for educational and self-promotional purposes or whether the reproduction competes with the City's endeavors to sell or promote its reproductions in the City. If the City determines that the photograph or video reproduction does not meet the terms of this section, the City shall provide written notice to the Artist, as appropriate, and – upon receipt of such notice – the noticed Party shall immediately cease and desist the use of the reproduction.
- C. The Artist hereby transfers to the City all rights of reproduction, as that term is defined in California Civil Code Section 982, in the Artwork, including, but not limited to, the right to reproduce the Artwork in any manner whatsoever for commercial and non-commercial purposes. Hereinafter, the Artist shall not acquire or claim any rights in or to the Artwork, any uses, or reproductions thereof by the City or any proceeds therefrom.
- D. The Artist hereby waives, releases, and disclaims any rights, demands, or claims as may arise at any time and under any circumstances against the City, its elected officials, officers, agents, employees, attorneys, servants, volunteers, successors, and assigns arising under the federal Visual Artists Rights Act (17 U.S.C. §§ 106A and 113(d)), the California Art Preservation Act (Cal. Civil Code § 987 *et seq.*), and any other local, state, federal, or international laws that convey rights of the same nature as those conveyed under 17 U.S.C. § 106A, California Civil Code § 987 *et seq.*, or any other type of moral right protecting the integrity of works of art. The Artist acknowledges and agrees that the City, in its sole and exclusive discretion, may, among other acts, temporarily or permanently modify, alter, change or destroy the Artwork.
- E. The Artist represents and warrants that (i) until the time of transfer hereunder, the Artist is the sole owner of the Artwork and of all rights therein including copyright, trademark, and other proprietary rights therein; (ii) the Artist is and will be the sole creator of the Artwork; (iii) the Artist has and will have full and sufficient right to assign all rights granted herein and to waive all rights relinquished herein; (iv) the Artist is not under any obligation to transfer or sell any of the Artwork to any third party; (v) the Artwork has not been and will not be published under circumstances which have or will cause a loss of any copyright, trademark, or other proprietary

rights therein; and (vi) the Artwork does not and will not infringe any patent, copyright, trademark, or other proprietary rights, privacy rights, or other rights of any third party, nor has any claim (whether or not embodied in a legal action, past or present) of such infringement been threatened or asserted, nor is such a claim pending, against the Artist (or, insofar as the Artist is aware, against any entity from which the Artist has obtained any rights).

- F. The Artist shall defend any action or proceeding brought against the City based on any claim that the Artwork, or any portion thereof, or the use of the Artwork, or any part thereof, constitutes infringement on any United States patent, copyright or trademark, now or hereafter issued. The City shall give prompt written notice to the Artist of any such claim or proceeding and will reasonably provide authority, information, and assistance in the defense of the same. The Artist shall indemnify and hold harmless the City from and against all liabilities in any such action or proceeding. The Artist shall keep the City informed of all new developments in the defense of such actions or proceedings.
- G. Notwithstanding any other provision of this Section V, the City hereby authorizes the Artist to create up to nine (9) sculptures similar to the Artwork for installation outside of the City of Manhattan Beach.

VI. INDEMNIFICATION

The Artist shall defend, indemnify, and hold harmless the City, its elected and appointed officials, officers, agents, and employees from any and all claims, demands, damages, costs, expenses (including attorney's fees), judgments, or liabilities arising out of this Agreement or occasioned by the performance or attempted performance of the provisions hereof; including, but not limited to, any act or omission to act on the part of the Artist, or the Artist's agents or employees, or other independent contractors directly responsible to them, except those claims, demands, damages, costs, expenses (including attorneys' fees), judgments or liabilities resulting from the sole negligence or willful misconduct of the City. The Artist's indemnifications and obligations under this Agreement shall survive the expiration or termination of this Agreement.

VII. INSURANCE

- A. The Artist shall at all times during the transportation, delivery, installation, and subsequent repairs of the Artwork, carry, maintain, and keep in full force and effect, insurance as follows:
 - 1. A policy or policies of Comprehensive General Liability Insurance, with minimum limits of \$1,000,000 for each occurrence, combined single limit, against any personal injury, death, loss, or damage resulting from wrongful or negligent acts by the insured Party.
 - 2. A policy or policies of Comprehensive Vehicle Liability Insurance covering personal injury and property damage, with minimum limits of \$1,000,000

per occurrence combined single limit, covering any vehicle utilized by the Artist in performing the work required by this Agreement.

3. Workers' compensation insurance as required by the State of California.
- B. The Artist shall require each of its sub-contractors (if any) to maintain insurance coverage that meets all of the requirements of this Agreement.
- C. The City's Risk Manager may, in writing, amend and/or waive the insurance provisions set forth in paragraph A. of this section. In such case, the Artist shall comply with the insurance provisions required by the City's Risk Manager.
- D. The policy or policies required by this Agreement shall be issued by an insurer authorized in the State of California and with a rating of at least A-;VII in the latest edition of Best's Insurance Guide.
- E. The Artist agrees that if the Artist does not keep the aforesaid insurance in full force and effect, the City may immediately terminate this Agreement.
- F. At all times during the term of this Agreement, the Artist shall maintain on file with the City Clerk a certificate or certificates of insurance on the form approved by the City's Risk Manager, showing that the aforesaid policies are in effect in the required amounts. The Artist shall, prior to commencement of work under this Agreement, file with the City Clerk such certificate or certificates. The general liability insurance and vehicle insurance shall contain an endorsement naming the City as an additional insured. All of the policies required under this Agreement shall contain an endorsement providing that the policies cannot be canceled or reduced except on thirty days' prior written notice to the City, and specifically stating that the coverage contained in the policies affords insurance pursuant to the terms and conditions as set forth in this Agreement.
- G. The insurance provided by the Artist shall be primary to any coverage available to the City. The policies of insurance required by this Agreement shall include provisions for waiver of subrogation.
- H. Any deductibles or self-insured retentions must be declared to and approved by the City. At the option of the City, the Artist shall either reduce or eliminate the deductibles or self-insured retentions with respect to the City, or the Artist shall procure bonds guaranteeing payment of losses and expenses.

VIII. INDEPENDENT CONTRACTOR

The Parties agree, understand, and acknowledge that the Artist is not an employee of the City, but is solely an independent contractor. The Artist expressly acknowledges and agrees that the City has no obligation to pay or withhold state or federal taxes or to provide workers' compensation or unemployment insurance or other employee benefits and that any person employed by the Artist shall not be in any way an employee of the City. As such, the Artist shall have the sole legal responsibility to remit all federal and state income

and social security taxes and to provide for its own workers compensation and unemployment insurance and that of its employees or subcontractors. Neither the City nor any of its agents shall have control over the conduct of the Artist, or any of the Artist's employees. The Artist shall not, at any time, or in any manner, represent that he or any of his agents or employees are in any manner agents or employees of the City. The Artist shall indemnify and hold harmless the City and its elected officials, officers and employees, servants, designated volunteers, and agents serving as independent contractors in the role of City officials, from any and all liability, damages, claims, costs and expenses of any nature to the extent arising from the Artist's personnel practices.

IX. TERMINATION OF CONTRACT

- A. The City retains the right and privilege of canceling, suspending, or abandoning the execution of any work in connection with this Agreement.
- B. The City shall have the right to terminate this Agreement for any reason, or for no reason, upon seven calendar days' written notice to the Artist. The Artist agrees to cease all work under this Agreement on or before the effective date of such notice.
- C. In the event of termination or cancellation of this Agreement by the City, the Artist shall be paid by City based on the percentage of work satisfactorily performed at the time of termination. In no event shall the Artist be entitled to receive more than the amount that would be paid to the Artist for the full performance of the services required by this Agreement. The Artist shall have no claim against the City by reason of such termination, including any claim for compensation.

X. FAILURE TO OBJECT NOT A WAIVER

No waiver of full performance by any Party shall be construed or operate as a waiver of any subsequent default or any of the terms, covenants, and conditions of this Agreement. The payment or acceptance of fees for any period after a default shall not be deemed a waiver of any right or acceptance of defective performance.

XI. LIMITATION ON ASSIGNMENT

- A. The personal skill, judgment, and creativity of the Artist is an essential element of this Agreement. Therefore, although the Parties recognize that the Artist may employ qualified personnel or volunteers to work under the Artist's supervision, the Artist shall not assign, transfer or subcontract the creative and artistic portions of the Artwork to another party without the prior written consent of the City.
- B. Any such purported assignment without the City's prior written consent shall be null and void, and the Artist shall hold harmless, defend, and indemnify the City and its officers, officials, employees, agents and representatives with respect to any claim, demand or action arising from any unauthorized assignment.

XII. APPROVAL

Whenever approval, consent, information, or data is herein required of any or all Parties, the same shall not be unreasonably or arbitrarily delayed or withheld.

XIII. NOTICES

Any notices, bills, invoices, etc. required by this Agreement shall be deemed received on (a) the day of delivery if delivered by hand during the receiving party's regular business hours or by facsimile before or during the receiving party's regular business hours; or (b) on the second business day following deposit in the United States mail, postage prepaid, to the addresses set forth below, or to such other addresses as the Parties may, from time to time, designate in writing pursuant to this section.

If to the City:

City of Manhattan Beach
1400 Highland Avenue
Manhattan Beach, CA 90266
ATTN: Cultural Arts Manager

If to the Artist:

XIII. AMENDMENTS

No modification or amendment of the terms hereof shall be effective unless written and signed by authorized representatives of the Parties. The Parties expressly reserve the right to modify this Agreement from time to time by mutual written agreement.

XIV. LAW AND VENUE

The validity, interpretation, and performance of this Agreement shall be controlled by and construed under the laws of the State of California, excluding California's choice of law rules. Venue for any such action relating to this Agreement shall be in the Los Angeles County Superior Court.

XV. ATTORNEYS' FEES

If any legal action or other proceeding, including action for declaratory relief, is brought for the enforcement of this Agreement or because of an alleged dispute, breach, default or misrepresentation in connection with this Agreement, the prevailing Party shall be entitled to recover all attorneys' fees, experts' fees, and other costs, in addition to any other relief to which the Party may be entitled.

XVI. ENTIRE AGREEMENT

This Agreement constitutes the entire understanding between the Parties with respect to the subject matter hereof and supersedes any and all prior understandings or agreements in regard thereto.

XVII. SEVERABILITY

If any term or portion of this Agreement is held to be invalid, illegal, or otherwise unenforceable by a court of competent jurisdiction, the remaining provisions of this Agreement shall continue in full force and effect.

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IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed as of the first date above written.

CITY OF MANHATTAN BEACH

BRUCE MOE
City Manager

ARTIST

Artist

ATTEST:

LIZA TAMURA
City Clerk

APPROVED AS TO CONTENT:

MARK LEYMAN
Parks & Recreation Director

APPROVED AS TO FORM:

QUINN M. BARROW
City Attorney

APPROVED AS TO FISCAL IMPACT:

STEVE CHARELIAN
Finance Director

EXHIBIT A

SCOPE OF WORK

In accordance with the terms of this Agreement, the Artist shall execute the approved Artwork and install it at _____ in Bruce's Beach Park.

1. Detailed description of approved artwork

The Artist shall create, construct, paint/enamel, engineer, deliver, install, attach, and coordinate, the approved Artwork as approved by City Council (see Image 1 below). Any significant deviations from the approved design must be approved by City's Parks & Recreation Director or designee prior to execution.

Roles and Responsibilities

The Artist shall be responsible for:

- i. Planning, organizing, coordinating, creating, transporting, and installing the approved Artwork as approved by City Council (see Image 1 below).
- ii. All costs of and coordination related to any and all necessary permits, inspections, certificates, licenses, engineering and/or architectural services, site survey services necessary for completion of this project.
- iii. All costs relating to and coordination of any subcontractor, consultant, engineer, architect, inspector, electrician, fabricator, installer, or other persons involved in the creation, transportation, storage, or installation of the Artwork, including the removal and disposal of any refuse or debris generated in the process.
- iv. All costs of and coordination related to General and Automobile Liability Insurance, Workers Compensation Insurance, and any and all costs of necessary licenses, inspections, and permits.
- v. Procuring, providing, and any costs relating to all necessary tools and equipment for the execution of this project, including but not limited to scaffolding, ladders, protective materials for the site, personal protective attire, refuse receptacles and removal, and other necessary items as needed for the installation/creation process.
- vi. Making all approved alterations to the site including.
- vii. Returning the site to its original state at the end of any installation session/day including removal and disposal of all garbage/refuse at Artist's expense.
- viii. All costs of and coordination related to travel, lodging, per diem expenses and other necessary accommodations for Artist and/or his/her employees, contractor, agents, representatives, or other involved parties.

The City shall be responsible for:

- i. Presenting the site in 'as is' condition.

Timeline

The Artist shall complete and present the completed Artwork no later than 24 months after the execution of this Agreement. Any delays in the timeline must be mutually agreed upon in writing.