

**AGREEMENT**

THIS AGREEMENT is made and entered into as of the \_\_\_\_ day of \_\_\_\_\_ by and among Mary Ann Baker (hereinafter called the "Artist"), and the CITY OF MILPITAS, a Municipal Corporation (hereinafter called the "City").

**WITNESSETH:**

WHEREAS, City desires to commission and acquire a certain work of art (the "Work"), which has been conceived and designed by Artist, to be installed in and upon Milpitas Senior Center ("Site"), Milpitas, California; and

WHEREAS, the Artist desires to carry out this commission, and upon installation by Artist and Artist's Team, City desires to accept ownership of the Work from Artist according to the terms of this Agreement and consideration detailed below.

NOW, THEREFORE, the parties agree as follows:

1. **COMMISSION.** City hereby commissions the Artist and the Artist hereby accepts the commission and agrees to design and oversee the fabrication and installation of the Work which shall be described as follows:

Four (4) visually interesting, safe, comfortable, senior-friendly benches that will be located around the Milpitas Senior Center property as determined by City Staff (the "Site"). One (1) bench will be considered the anchor piece, which should be substantially bronze, incorporating a sculpture(s) reflecting multi-generations as it related to seniors. This will be the first of a series of public art located at this center.

The nominal dimensions for the benches should be 72 inches long; seat bench 12 inches wide; seat back at least 31 inches high; 18 inches from the from foundation to seat, or as required to meet ADA requirements, and as appropriate for the location the bench is to be located. The artist shall be responsible to determine the exact dimensions for the design of the bench(s).

The Artist shall be responsible for the secure installation and attachment of all benches to the satisfaction of the City, including providing all hardware, concrete piers/aprons as needed to fix the benches to the locations. Installation shall commence upon the completion of the Senior Center Construction and notification by the City.

A small plaque shall be installed near the Work, which describes the Work, identifies Mary Ann Baker as the artist who created the Work, and acknowledges the Public Art Committee, Senior Advisory Commission and the City of Milpitas as the contributor, to be provided by the City of Milpitas.

**2. ARTIST'S SERVICES.**

A. City has approved the proposal for the Marquette. The Marquette shall remain the property of the City.

B. The method of installation of the Work shall comply with all structural integrity and safety requirements of the City's Public Works and Engineering Departments.

C. Following the execution of this Agreement by both parties and receipt of the payment 1 described in Section 3(B) of this Agreement, Artist shall proceed with the fabrication of the Work. Artist shall complete the fabrication and installation of the Work within 6 months from the date of receipt of said payment.

**3. FEES.**

A. The City shall pay the Artist a total of \$86,500 as commission for the Work.

B. City shall pay to the Artist, as follows: twenty-five (25%) percent of Contract Price upon execution of Agreements (hereinafter "payment 1"); twenty-five (25%) percent upon completion of the Design Phase by Artist and approval by the City Engineering Department (hereinafter "payment 2"); twenty-five (25%) percent upon completion and approval by City of art fabrication (hereinafter "payment 3") and twenty-five (25%) percent upon complete installation of the art and final acceptance of the Project by the City (hereinafter "payment 4").

C. The commission includes all of the Artist's costs and expenses including materials, design, fabrication, transportation, installation and use of any employees, independent contractors or laborers of Artist or hired by Artist, or subcontractors in contract with or by the Artist in the design, production or installation of the Work.

**4. RESPONSIBILITIES OF THE PARTIES.**

A. The Work shall be fabricated and installed by the Artist in conformity with the Marquette and the Proposal as presented to the City, subject to minor changes as necessary to the materials or the production process as determined by Artist. City understands that it may not be possible to create the Work precisely as depicted in the Marquette. If during the fabrication process, Artist makes significant changes in size, imagery, color, or other approved elements of the Work, Artist shall notify City in writing and shall receive City's written approval prior to proceeding with changes. A significant change is any change in the scope, design, size, material, texture or location on the Site of the Work, which affects installation, scheduling, Site preparation or maintenance of the Work or the concept of the Work as represented in the Marquette.

B. The Artist shall be responsible for arranging, supervising and paying all costs associated with transporting the Work to the Site.

C. The Artist represents and warrants that the Work, as fabricated and installed, will be free from any defects in materials and workmanship, and that the Work is free and clear of any liens or encumbrances from any source and of any kind or nature whatsoever. The Artist hereby represents and warrants that the work as fabricated and installed, including the design and materials, is suitable to withstand without cracking, chipping, peeling, fading, rusting, or otherwise deteriorating, the climatic and environmental conditions commonly experienced within and in the general vicinity of the City of Milpitas. Such periodic conditions include but are not limited to temperature in excess of 100 degrees Fahrenheit and below 32 degrees Fahrenheit, high velocity winds, heavy rainfall and periods of very low humidity. It is understood by both parties that bronze by its very nature will change in patina over time.

The Artist shall guarantee the Work to City against all defects in its design, workmanship and materials for a period of three (3) years following the completion and written acceptance by City of the Work's installation. If any such defects occur within this time period, the Artist agrees to promptly and satisfactorily repair, correct, or replace the defective portion of the Work at the Artist's own expense. The final inspection of the Work by the City shall take place within seven (7) days after written request by the Artist. Final completion shall be deemed to occur upon correction of all items noted in the final inspection by City. Upon completion of the installation of the Work and acceptance thereof by City, Artist shall not be responsible for any damage inflicted on the Work by any third parties, or resulting from any defects in the technical and working drawings or engineering instructions and drawings provided by engineers retained by City.

The Artist guarantees that repairs to any defective portion of the Work shall begin within thirty (30) days of receiving notice of the need for repair. If necessary, the Artist may substitute others to perform the repair work.

D. The Artist hereby represents and warrants to City that the Work is solely the result of the artistic and creative effort of the Artist, is original, one of a kind, and does not knowingly infringe upon any trademark or copyright.

Notwithstanding the foregoing representation and warranty, City hereby acknowledges that Artist has used in the past and may use in the future some of the same elements comprising the Work. The Artist reserves the right to use elements and portions of the Work in other works of art in different configurations.

E. At City's request and expense, Artist shall execute and deliver to City any instruments that City may reasonably require to confirm ownership of the Work, or to enable City to dispose of any rights therein. Following completion of the installation of the Work, the Artist agrees to sign and submit, on request, photographs of the Work to City certifying the Work's authenticity.

F. Artist shall provide a schedule of installation to City. Artist shall provide a decorative, ceremonial shroud for the Work's unveiling. Installation shall not occur until after completion of all construction related to the City of Milpitas Senior Center project, anticipated to be August 2010. If installation of the Work is delayed by an event under the control of City, and the Artist is fully prepared to begin installation of the Work, then City shall pay the cost to transport and store the Work should additional fees for rental and transport be required.

5. **FORCE MAJEURE.** Any delay in the performance of any provision of this Agreement by the Artist shall be excused if such delay is caused by acts of the City, their respective agents, contractors, employees or by acts of God, accident, war, war-like operations, civil commotion, riots, labor disputes, sabotage, governmental acts, regulations or controls other than City's, fire or other casualty. Failure to fulfill contract obligations due to conditions beyond either party's reasonable control shall not be considered a breach of this Agreement provided those obligations affected shall be suspended only for the duration of such conditions.

6. **RISK OF LOSS.** Artist shall bear the risk of loss or damage to the Work until the Work has been completed, delivered and installed. Artist shall take all measures necessary to insure the Work for the benefit of City against loss or damage until final acceptance of the Work by the City as defined in Section 10, which shall not exceed thirty (30) days after final completion.

7. **INSURANCE.** The Artist agrees to procure at Artist's expense and to maintain through the fabrication, transportation, installation, and transfer of ownership title of the Work, insurance against claims for injuries to persons or damages to property which may arise from or in connection with the performance of the Work by the Artist or their agents, employees, representatives or subcontractors.

A. **Minimum Scope of Insurance.** Coverage shall be at least as broad as:

- i. Insurance Services Office Form Number CA 0001 (Ed. 1/73) covering comprehensive General Liability and Insurance Offices Form Number GL 0404 covering Broad Form Comprehensive General Liability coverage (occurrence Form CG 0001)
- ii. Insurance Services Office Form Number CA 0001 (Ed. 1/78) covering Automobile Liability, code 1 "any auto" and endorsement CA 0025.

B. **Minimum Limits of Insurance.** Artist and/or Artist's Team shall maintain limits no less than:

- i. General Liability: \$1,000,000 combined single limit per occurrence for bodily injury and property damage. If

commercial General Liability Insurance or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to this project/location or the general aggregate limit shall be twice the required occurrence limit.

- ii. Automobile Liability: \$300,000 combined single limit per accident for bodily injury and property damage.

C. Deductibles and Self-Insured Retentions. Any deductibles or self-insured retentions in excess of \$5,000.00 must be declared to and approved by the City. At the option of the City, either the insurer shall reduce or eliminate such deductibles or self-insured retentions in excess of \$5,000.00 with respects to the City, its officers, officials and employees; or the Artist Team shall procure a bond guaranteeing payment of losses and related investigations, claim administration and defense expenses in excess of \$5,000.00.

D. Other Insurance Provisions. The policies are to contain or be endorsed to contain the following provisions, if applicable:

- i. Workers' Compensation and Employers Liability coverage

The insurer shall agree to waive all rights of subrogation against the City, their officers, officials, employees and volunteers for losses arising from work performed by the Artist or Artist's Team for the City.

- ii. All Coverage – Each insurance policy required by this clause shall be endorsed to state that coverage shall not be suspended, voided, canceled by either party, reduced in coverage or in limits except after thirty (30) days prior written notice by certified mail, return receipt requested, has been given to the City. Insurance under 7(a) and (b) shall be evidenced by certificates provided within ten (10) days of the notice to proceed. Insurance under 7(d) 1 shall be provided (10) days prior to shipment of the work.

E. Acceptability of Insurers. Insurance is to be placed with insurers with a Bests' rating of no less than A: VII.

F. Verification of Coverage. The Artist shall furnish City with certificates of insurance and with original endorsements effecting coverage required by this clause. The certificates and endorsements for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf. The certificated and endorsements are to be received and

approved by the City before work commences. The City reserves the right to require complete, certified copies of all required insurance policies at any time.

- G. Subcontractors. All coverage for subcontractors working on site shall be subject to all of the requirements stated herein. Artist shall assure that all subcontractors working on site shall furnish separate certificates and endorsements, and name the City as an additional insured. All coverage for subcontractors shall be subject to all of the requirements stated herein.
- H. Upon acceptance and transfer of title to the City, the City shall become responsible for such insurance, as the City may deem necessary.

## **8. RIGHTS OF THE PARTIES.**

A. City shall have the right to inspect the Work at the Artist's studio(s) during its fabrication at dates and times mutually agreed upon between the parties.

B. The Artist retains all rights under the Copyright Act of 1976 and all other rights in and to the work, except ownership and possession and except as such rights are limited by this paragraph. The Artist grants to City and their assigns an irrevocable right and license to make two-dimensional reproductions of the Work for non-commercial purposes including, but not limited to: (i) use in advertising, brochures, media publicity and catalogs or other similar publications; (ii) use in promotional materials; (iii) reproductions for use in non-profit fundraising activities for Milpitas Alliance for the Arts or official City of Milpitas business, but in such uses, Artist shall have the right of aesthetic approval of the image which approval shall not be unreasonably withheld, provided these rights are exercised in a tasteful and professional manner. Where the Artist exercises a right of approval, such approval shall be deemed to have been given if the City receives no response after 21 days' written notice.

Whenever City and/or their assigns makes a two-dimensional reproduction of the Work for any of the aforementioned purposes, the party making the reproduction shall provide Artist with notice of its intent to make the reproduction and copies of the reproduced images of the Work.

Artist shall have permission to use the City's name and seal in pictures, portraits, and photographs, in all forms and media in all manners, including but not limited to exhibition, display, advertising, trade, and editorial uses, without violation of City's rights of privacy or any other personal or proprietary right the City may possess individually or collectively in connection with reproduction and sale of the Work, the preliminary design, or any incidental works made in the creation of the Work.

C. City shall use their best efforts to give a credit in any publication, substantially in the following form: Artist: Mary Ann Baker. Artist shall use her best efforts to give a credit reading substantially “an original work by Mary Ann Baker, commissioned by the City of Milpitas for the Milpitas Senior Center, Milpitas, California” in any publication or public showing under her control of any two-dimensional reproductions of the Work.

D. City agrees to not intentionally damage, alter, modify or change the Work in any way. If the Work is damaged, altered, modified, changed or otherwise in need of restoration, City shall make every effort to arrange with the Artist for its restoration. If City chooses Artist to make the repairs, City shall negotiate a fair price with Artist to cover any costs incurred to remove, repair, and re-install the Work, including transportation, supplies, foundry expenses, and Artist’s time and expenses.

E. The parties acknowledge that the Work is a site-specific work and in no event may the Work be exhibited or lent to others to exhibit separate from the Site without the prior written consent of Artist, which consent shall be based upon the opinion of Artist, in her sole discretion, as to whether the Work can exist as a work of art by her in the proposed new location.

F. Should the City decide to sell the Work, Artist shall have the right of first refusal to purchase the Work upon the same terms as offered to others.

G. If, for any reason, the City ever intends to destroy the Work, it shall give written notice to Artist of its intention and shall give Artist ninety (90) days to recover the Work, at the sole cost of Artist. Within thirty (30) days after receipt of notice, Artist shall notify City whether or not she intends to recover the Work. If no notice is received from Artist within the thirty (30) day period, she shall be deemed to have waived her right to recover the Work and City may proceed to destroy it. Upon recovery of the Work by Artist, title shall revert to Artist.

In the event City is required to damage or destroy the Work in order to preserve public health, safety or property, City shall notify Artist to the best of its ability at least 24 hours before the emergency actions are taken, but in any event within 48 hours after any action was taken related to the Work. In no event shall City be liable to Artist for any right Artist may have in the existence of the Work under this Agreement nor shall Artist have any cause of action under either Federal or State law because of the City damaging or destroying the Work to take action to protect public safety or property because of emergency circumstances. Emergency for purposes of this section shall mean a sudden and unexpected occurrence that poses a danger to public health, safety, welfare or property.

H. Artist shall retain the right to claim authorship of the Work. Artist reserves all rights of copyright and the preliminary design and any incidental works made in the creation of the Work. Neither the Artist nor the City shall have permission to re-cast or reproduce the Work in any size. In the event that any part of the Work is materially

damaged or altered in any manner, City shall not continue to represent the Work to be the work of any Party to this Agreement without the Parties' written consents.

**9. MAINTENANCE.**

A. Artist shall provide the City with complete information on appropriate care and maintenance of the Work, including specifications on any surface finishes and expected frequency of application and any other information pertinent to the proper care and maintenance of the Work. Artist shall also provide to City information on interior structure and all fabrication methods and materials pertinent to the possibility of later repair or restoration.

B. Following acceptance of the Work by the City, City shall be responsible for the maintenance of the Work, and agrees to take all reasonable precautions to protect the Work against damage or destruction.

C. During the lifetime of the Artist and to the extent practicable, City shall notify Artist promptly in the event of the need for any major maintenance or restoration services. City agrees to give Artist a reasonable opportunity either to perform such work or to supervise or consult in the performance of such work for reasonable compensation. If Artist chooses not to perform such work and refuses to approve repair and restoration by anyone other than herself, City may proceed with the repair of the Work and Artist shall have the right to have her name removed from the Work.

D. Following acceptance of the Work by the City, Artist agrees to give both written and verbal advice to the City at no charge as to how to maintain or address problems that may arise with the appearance or maintenance of the Work.

**10. OWNERSHIP.** Title of the Work shall remain with the Artist until the Work has been installed and accepted in writing by the City which is considered "final acceptance" and the Artist has been paid in full. Artist shall transfer her right of ownership in writing to City, in which title and right shall be accepted by resolution of the City Council. In the event of termination of this Agreement pursuant to Section 12 (A) or Section 12(B), all rights of ownership in the Work shall revert to Artist who shall have the sole right to complete, exhibit and sell the Work and any of its preliminary designs.

Notwithstanding anything to the contrary herein, Artist shall retain all rights of ownership of the preliminary design, all incidental works made in the creation of the Work, and all copies and reproductions thereof.

**11. CITY ASSUMPTION OF RIGHTS AND OBLIGATIONS.** Upon transfer by Artist of ownership of the Work to City, City shall assume all rights and obligations of Artist as set forth in this Agreement.

**12. TERMINATION.** This Agreement may be terminated under the following circumstances:



15. **BINDING EFFECT.** This Agreement shall be binding upon and inure to the benefit of the heirs, executors and administrators, successors and assigns of the parties.

16. **HOLD HARMLESS/INDEMNIFICATION.**

A. Artist shall indemnify, defend, and hold harmless the City and its officers, employees, agents, and volunteers, against liability for injury or damage caused by a negligent act or omission of Artist in the performance of this Agreement and shall hold the City harmless from any loss or damages directly or indirectly resulting to the City or its officers, employees, agents, and volunteers on account of the performance or character of the Work, unforeseen difficulties, accidents, occurrences, or other causes predicated on active or passive negligence of the Artist or any subcontractor of Artist. Artist shall indemnify, defend, and hold harmless the City, its officers, officials, directors, employees, agents, and volunteers from and against any or all loss, liability, expense, claim, costs (including costs of defense), suits, and damages of every kind, nature and description directly or indirectly arising from the performance or installation of the work. This paragraph shall not be construed to exempt the City, its employees, officers, agents and volunteers, from its own willful fraud, injury, or violation of law. For purposes of Civil Code Section 2782.8, the parties hereto recognize and agree that this Agreement is not for design professional services. By execution of this Agreement, Artist acknowledges and agrees that she has read and understands the provisions hereof and that this paragraph is a material element of consideration.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals to this Agreement on the date first written.

THE CITY OF MILPITAS

ARTIST:

By: \_\_\_\_\_  
Mary Ann Baker

By: \_\_\_\_\_  
Thomas C. Williams, City Manager

Attest: \_\_\_\_\_  
Mary Lavelle, City Clerk

Approved as to form:

By: \_\_\_\_\_  
Michael J. Ogaz, City Attorney