

**AGREEMENT  
BETWEEN THE CITY OF MILPITAS  
AND  
JOE BOLOGNA AND PATRICIA VADER  
FOR  
DESIGN AND INSTALLATION OF ARTWORK**

THIS AGREEMENT is made and entered into as of the 4th day of November ("Effective Date") by and among Joe Bologna and Patricia Vader, as individuals (hereinafter collectively called the "Artist"), and the CITY OF MILPITAS, a municipal corporation of the State of California (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 City property located at Cardoza Park ("Site"), Milpitas, California; and

WHEREAS, the Artist desires to carry out this commission, and upon installation by Artist, 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:

One (1) visually interesting, safe, 3-dimensional "Kicker Kid" with base public art piece that enhances Cardoza Park and relates to the children and sports activities held at the park. The dimensions for the Work shall be approximately twenty (20) feet high with all moving parts of the piece at least nine (9) feet high. The Artist shall be responsible to determine the exact dimensions for the design of the Kicker Kid and base. The Artist is responsible for any and all foundation requirements associated with the Work. The Artist shall be responsible for the design of any required footing for the Work. The Artist shall be responsible for the complete installation of the Work including any required footings upon approval from the City. The Work must be designed to withstand the elements and allow for proper drainage. The Work shall be in conformance to the conceptual plan and depiction in **Exhibit A**, attached hereto and incorporated herein.

**2. ARTIST'S SERVICES.**

A. City has approved a model of the Work to be installed at the Site as further depicted in Exhibit A with the agreed upon change of the child's face being on both sides of the Work and incorporated fully herein.

B. The method of installation of the Work shall comply with all structural integrity and safety requirements of the City's Public Works, Building, Fire and Engineering Departments. Artist is subject to all required City review, permit and approval for the installation of the Work. The City will provide a site plan. Site information shall also include locations of buried utilities, as furnished by the city and the utility companies, and locations of irrigation lines and other improvements in the vicinity of the work that may need to be protected from damage during the installation of the sculpture. The City will cooperate with Artist with respect to such review, permit and approval processes, including providing information about the site, timely response to approval requests and scheduling as are reasonably required by the Artist. Renee Lorentzen will facilitate Artist's request for information or provide an alternative City representative for such purposes.

### **3. SCHEDULE OF PERFORMANCE.**

A. Following the execution of this Agreement by both parties and receipt of the payment 1 described in Section 3(B)(i) of this Agreement, Artist shall proceed with the fabrication of the Work. Artist shall complete the fabrication and installation of the Work on or before October 1, 2015.

B. Artist shall provide a schedule of installation to City subject to City review and approval.

C. Since the work to be performed by Artist under this Agreement is subject to City approvals, in the event that the City fails to approve or give specific reasons for its refusal to approve upon notice from Artist that inspection and approval is due, or the City otherwise delays Artist's performance of this Agreement, then the City shall promptly act to address the problem(s) identified by Artist. If the City unreasonably fails to promptly act as requested, timelines for performance by Artist shall be extended as needed.

### **4. FEES.**

A. The City shall pay the Artist a total of Twenty Thousand Dollars (\$20,000) as commission for the Work.

B. City shall pay to the Artist, as follows: thirty (30%) percent of contract price upon execution of Agreements (hereinafter "Payment 1"); thirty (30%) percent upon completion of the Design Phase by Artist and approval by the City Engineering Department (hereinafter "Payment 2"); thirty (30%) percent upon completion and approval by City of art fabrication (hereinafter "Payment 3") and ten (10%) 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, plan approval, permits, insurance, 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.

### **5. OWNERSHIP.**

A. Artist shall retain all rights of ownership, including but not limited to title of and copyrights associated with the Work, until the Work has been installed and accepted by the City which is considered "final acceptance" and the Artist has been paid in full.

B. Upon final acceptance by the City, the Artist hereby transfers to the City all rights of ownership of the physical Work. Thereafter, all risks associated with the Work shall pass to the City, excepting repair of latent defects as warranted by the Artist in paragraph 8D, below.

C. If the City desires to make reproductions of the Work for commercial purposes including, but not limited to, tee shirts, post cards and posters, the Parties shall execute a separate agreement to address the terms of the license granted by the Artist and the royalty the Artist shall receive.

## **6. ARTIST'S WAIVER.**

A. Without limitation of any other provision hereof, Artist expressly agrees to waive any and all rights Artist may have pursuant to title 17 U.S.C. Section 106A, (commonly known as the "Visual Artists Rights Act of 1990") as Artist's rights under Act apply, if at all, to uses of the Work discussed in Section 10.

B. Artist further agrees that to the extent California Civil Code Section 987 has force or effect with respect to Artist's rights to the Work, Artist expressly waives such rights.

C. If City intends to take action that will permanently destroy the Work, City will use reasonable efforts to first allow Artist to remove the Work at Artist's sole cost and expense within thirty (30) days of notice from the City of the intent to destroy or permanently remove the Work, in which case title shall revert to Artist upon removal of the Work.

## **7. RESPONSIBILITIES OF THE ARTIST.**

A. The Work shall be fabricated and installed by the Artist in conformity with the Model and 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.

B. 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.

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

D. Final completion shall be deemed upon an issuance of a Notice of Completion by City at its sole discretion. The City will take steps to consider final approval promptly upon notice that the Work is installed and ready for inspection.

E. 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.

F. 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.

G. 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.

H. Each individual Artist acknowledges and agrees to be jointly and severally responsible and liable for every term, condition, and obligation under this Agreement.

## **8. ARTIST'S WARRANTY.**

A. The Artist represents and warrants that the Artist has not previously sold assigned, licensed, granted, encumbered, or utilized the Work design or any element thereof, in any manner which may affect or impair the rights granted pursuant to this Agreement including without limited to, inhibiting the City's ability to show the Work, reproduce the Work as defined in Section 16, or maintain/conservate the Work into the future.

B. 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.

C. The Artist hereby represents and warrants that with maintenance as directed, 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 for a reasonable amount of time. 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 however, that bronze galvanized painted steel by it's very nature will change in patina and fade over time, and that moving parts need maintenance.

D. The Artist shall guarantee the Work to City against all defects in its design, workmanship and materials for a period of one (1) 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.

E. 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.

F. Artist further warrants that the Work shall not constitute any threat to the safety of persons or property when used in the manner for which it is designed. Artist agrees to cooperate with City in making or permitting adjustments to the Work if necessary to eliminate hazards which become apparent after the Work is accepted by City.

**9. RISK OF LOSS.** Artist shall bear the risk of loss or damage to the Work until the Work has been completed, delivered and installed and accepted by City pursuant to a Notice of Completion. 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. Notwithstanding the above, Artist shall not be responsible for damage to the Work directly caused by the City or third parties once that portion(s) of the work has been installed and accepted by City.

## **10. INSURANCE.**

A. **General requirements.** Artist, at its own cost and expense, shall maintain commercial general and automobile liability insurance for the term of this Agreement in an amount not less than ONE MILLION DOLLARS (\$1,000,000.00) per occurrence, combined single limit coverage for risks associated with the work contemplated by this Agreement. If a Commercial General Liability Insurance or an Automobile Liability form or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to the work to be performed under this Agreement or the general aggregate limit shall be at least twice the required occurrence limit. Such coverage shall include but shall not be limited to, protection against claims arising from bodily and personal injury, including death resulting therefrom, and damage to property resulting from activities contemplated under this Agreement, including the use of owned and non-owned automobiles.

B. **Minimum scope of coverage.** Commercial general coverage shall be at least as broad as Insurance Services Office Commercial General Liability occurrence form CG 0001 (ed. 11/88) or Insurance Services Office form number GL 0002 (ed. 1/73) covering comprehensive General Liability and Insurance Services Office form number GL 0404 covering Broad Form Comprehensive General Liability. Automobile coverage shall be at least as broad as Insurance Services Office Automobile Liability form CA 0001 (ed. 12/90) Code 1 ("any auto"). No endorsement shall be attached limiting the coverage.

1. **Additional requirements.** Each of the following shall be included in the insurance coverage or added as an endorsement to the policy:
  - a. City and its officers, employees, agents, contractors, consultants, and volunteers shall be covered as insureds with respect to each of the following: liability arising out of activities performed by or on behalf of Consultant, including the insured's general supervision of Consultant; products and completed operations of Consultant; premises owned, occupied, or used by Consultant; and automobiles owned, leased, or used by the Consultant. The coverage shall contain no special limitations on the scope of protection afforded to City or its officers, employees, agents, contractors, consultants, or volunteers.
  - b. The insurance shall cover on an occurrence or an accident basis, and not on a claims-made basis.
  - c. An endorsement must state that coverage is primary insurance with respect to the City and its officers, officials, employees, contractors, consultants, and volunteers, and that no insurance or self-insurance maintained by the City shall be called upon to contribute to a loss under the coverage.
  - d. Any failure of Artist to comply with reporting provisions of the policy shall not affect coverage provided to CITY and its officers, employees, agents, and volunteers.
  - e. 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.

- f. An endorsement shall state that coverage shall not be suspended, voided, or 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.

C. **Requirements for All Policies.**

1. **Acceptability of insurers.** All insurance required by this section is to be placed with insurers with a Bests' rating of no less than A.
2. **Verification of coverage.** Prior to beginning any work under this Agreement, Artist shall furnish City with certificates of insurance and with original endorsements effecting coverage required herein. 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 City reserves the right to require complete, certified copies of all required insurance policies at any time.
3. **Subcontractors.** Artist shall include all subcontractors as insureds under its policies or shall furnish separate certificates and endorsements for each subcontractor. All coverages for subcontractors shall be subject to all of the requirements stated herein.
4. **Deductibles and Self-Insured Retentions.** Artist shall disclose to and obtain the approval of City for the self-insured retentions and deductibles before beginning any of the services or work called for by any term of this Agreement.
5. **Notice of Reduction in Coverage.** In the event that any coverage required by this section is reduced, limited, or materially affected in any other manner, Artist shall provide written notice to City at Artist's earliest possible opportunity and in no case later than five days after Artist is notified of the change in coverage.
6. **Remedies.** In addition to any other remedies City may have if Artist fails to provide or maintain any insurance policies or policy endorsements to the extent and within the time herein required, City may, at its sole option exercise any of the following remedies, which are alternatives to other remedies City may have and are not the exclusive remedy for Artist's breach:
  - Obtain such insurance and deduct and retain the amount of the premiums for such insurance from any sums due under the Agreement;
  - Order Artist to stop work under this Agreement or withhold any payment that becomes due to Artist hereunder, or both stop work and withhold any payment, until Artist demonstrates compliance with the requirements hereof; and/or
  - Declare Artist in material breach of the Agreement and terminate the Agreement.
- 4.6 **Waiver.** The Risk Manager of the City has the authority to waive or vary any insurance provision. Any such waiver or variation shall not be effective unless made in writing.

11. **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. The Artist may take such other action as the Artist may choose in order to disavow the Artwork if the City fails to maintain the Work or it is damaged in a manner that the Artist finds objectionable and is not repaired.

B. Following acceptance of the Work by the City, City shall be responsible for the maintenance of the Work.

C. 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.

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

A. City may terminate this Agreement with seven (7) days written notice to Artist. City shall pay for cost and expense incurred by Artist under this Agreement up to the date of termination.

B. If Artist fails to commence installation of the Work on the installation date or to complete the installation within a reasonable time thereafter (not to exceed thirty (30) days) and such delay or failure to complete is not due to causes excusable by the terms of this Agreement, City shall send written notice of default to Artist setting forth a stated time in which to cure, which time shall not be less than thirty (30) days. If Artist fails to cure and such failure is not excusable by the terms of this Agreement, City may declare this Agreement terminated and Artist surrenders and shall pay back all monies paid to the Artist.

13. **ENTIRE AGREEMENT.** This Agreement constitutes the entire understanding between the parties with respect to the subject matter herein and no modification or amendment of any of its provisions shall be valid unless in writing and signed by all parties. This Agreement is personal in nature and may not be assigned by any of the Parties.

14. **NOTICE.** All notices herein required shall be in writing, sent by certified mail, return receipt requested, and shall be served on the parties as follows:

To City at: City of Milpitas  
City Manager's Office  
455 East Calaveras Boulevard  
Milpitas, California 95035

To the Artist at: Joe Bologna  
361 Castle Crest Rd.  
Alamo, CA 94507

Patricia Vader  
1085 Pereira Road  
Martinez, CA 94553

Any of the above addresses may be changed by written notice sent to the other party as herein provided.

**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. To the fullest extent permitted by law, 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 misconduct or gross negligence. 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.

**17. GOVERNING LAW.**

This Agreement shall be governed by and construed in accordance with California law.

**18. INDEPENDENT CONTRACTOR.**

**Independent Contractor.** At all times during the term of this Agreement, Consultant shall be an independent contractor and shall not be an employee of City. City shall have the right to control Consultant only insofar as the results of Consultant's services rendered pursuant to this Agreement and assignment of personnel pursuant to Subparagraph 1.3. Otherwise, City shall not have the right to control the means by which Consultant accomplishes services rendered pursuant to this Agreement. Notwithstanding any other City, state, or federal policy, rule, regulation, law, or ordinance to the contrary, Consultant and any of its employees, agents, and subcontractors providing services under this Agreement shall not qualify for or become entitled to, and hereby agree to waive any and all claims to, any compensation, benefit, or any incident of employment by City, including but not limited to eligibility to enroll in the California Public Employees Retirement System (PERS) as an employee of City and entitlement to any contribution to be paid by City for employer contributions and/or employee contributions for PERS benefits.

**Consultant No Agent.** Except as City may specify in writing, Consultant shall have no authority, express or implied, to act on behalf of City in any capacity whatsoever as an agent. Consultant shall have no authority, express or implied, pursuant to this Agreement to bind City to any obligation whatsoever.

**19. MISCELLANEOUS PROVISIONS.**

A. Captions and sections of this Agreement are for convenience only and shall not be considered in resolving any questions of interpretation or construction.

B. In the event that suit shall be brought by any of the parties, the parties agree that venue shall be exclusively vested in the state courts of the County of Santa Clara, or if federal jurisdiction is appropriate, exclusively in the United States District Court, Northern District of California, San Jose, California.

C. Artist agrees that waiver by City of any breach or violation of any term or condition of this Agreement shall not be deemed to be a waiver of any other term or condition contained herein or a waiver of any subsequent breach or violation of the same term or condition.

D. Artist has read each and every part of this Agreement, including without limitation, its exhibits, and Artist freely and voluntarily has entered into this Agreement. This Agreement is a negotiated document and shall not be interpreted for or against any party by reason of the fact that such party may have drafted this Agreement or any of its provisions.

E. Whenever in this Agreement words or obligation or duty are used, such words shall have the force and effect of covenants.

F. Artist shall comply or cause to comply with all applicable federal, state and local laws, regulations, policies, or guidelines.

G. Artist shall maintain any and all ledgers, books of account, invoices, vouchers, cancelled checks, and other records or document evidencing or relating to the activities performed by Artist under this Agreement for a minimum period of three (3) years.

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

**THE CITY OF MILPITAS**

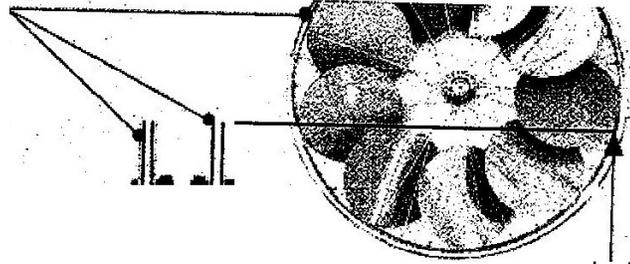
ARTIST:

By: \_\_\_\_\_  
Joe Bologna

By: \_\_\_\_\_  
Patricia Vader

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

Approved as to form:  
By: \_\_\_\_\_  
Johnny Phan, Assistant City Attorney



W

pivot point  
aluminum shorts, legs  
head, arms and shoes

steel corner  
brackets

steel arc

12" steel ball

1:1 el.

6nerete  
foritrig  
and Pad.

7'

9'