AGREEMENT

THIS AGREEMENT is made and entered into as of the _____day of _____by and among MILPITAS ALLIANCE FOR THE ARTS (hereinafter called the "MAFTA"), a California non-profit corporation, and Laurel True (hereinafter called the "Artist"), and the CITY OF MILPITAS, a Municipal Corporation (hereinafter called the "City").

WITNESSETH:

WHEREAS, MAFTA 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 Starlite Park ("Site"), Milpitas, California; and

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

NOW, THEREFORE, the parties agree as follows:

1. **COMMISSION.** MAFTA 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:

In star shape, a steel frame, with foam, acrylic concrete and fiberglass mesh. The surface shall be smooth, non-toxic, and safe to the touch. It shall be constructed with highly durable exterior grade ceramic tile, bits of mirror to reflect light, smooth glass half marbles and accents of hand made shaped tile and fused glass. It shall be sealed with an anti-graffiti sealant. It shall be 7' in diameter, 42" high and the seat height shall be 22" off the ground. A small plaque shall be installed near the Work, which describes the Work, identifies Laurel True as the artist who created the Work, and acknowledges MAFTA and the City of Milpitas as the contributors. In addition to the construction of the bench, the artist shall provide a presentation about mosaics and upon mutual agreement of the Parties a one-day workshop for the community.

The City of Milpitas Public Works Department shall assume responsibility for installation of the foundation as follows:

The artwork shall sit on a round concrete base eight feet in diameter. The Work shall be anchored to the concrete slab. The slab thickness shall follow standard sidewalk specs, of approximately 6" thickness.

The Work's final design and location shall be approved by the Milpitas City Council.

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2. **ARTIST'S SERVICES.**

A. MAFTA and the City have approved the proposal for the Maquette and the Site. The Maquette shall remain the property of the Artist.

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 all parties and receipt of the payment described in Section 3(A)(1) of this Agreement, Artist shall proceed with the fabrication of the Work. Artist shall complete the fabrication and installation of the Work within eight months from the date of receipt of said payment.

3. **FEES.**

A. MAFTA shall pay to the Artist, as the commission for the Work and the services to be rendered by the Artist, a sum not to exceed fifteen thousand dollars ($5,000 from MAFTA funds; $10,000 from City funds paid to MAFTA) to be paid in the following installments:

(1) $5,000 upon execution of the contract
(2) $5,000 upon completion of the construction of the Work
(3) $5,000 upon delivery and installation of the Work

B. 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 Maquette and the Proposal as presented to MAFTA and City subject to minor changes as necessary to the materials or the production process as determined by Artist. MAFTA and City understand that it may not be possible to create the Work precisely as depicted in the Maquette. If during the fabrication process, Artist makes significant changes in size, imagery, color, or other approved elements of the Work, Artist shall notify MAFTA and City in writing and shall receive MAFTA's and 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 Maquette.

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.

The Artist shall guarantee the Work to MAFTA and City against all defects in its design, workmanship and materials for a period of three (3) years following the completion and written acceptance by MAFTA and 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 MAFTA and 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 MAFTA and City. Upon completion of the installation of the Work and acceptance thereof by MAFTA and 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 MAFTA and 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 MAFTA and 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, MAFTA and City hereby acknowledge 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 MAFTA's or City's request and expense, Artist shall execute and deliver to MAFTA and City any instruments that MAFTA or City may reasonably require to confirm ownership of the Work, or to enable MAFTA or 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 MAFTA and 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. If installation of the Work is delayed by an event under the control of MAFTA or City, and the Artist is fully prepared to begin installation of the Work, then MAFTA or 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 or MAFTA, 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 MAFTA and City against loss or damage until final acceptance of the Work by MAFTA and the City, 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, MAFTA, their officers, officials, employees and volunteers for losses arising from work performed by the Artist or Artist's Team for the City.

(3) 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 and MAFTA 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 and MAFTA before work commences. The

City and MAFTA reserve 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 and MAFTA as additional insured's. 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. MAFTA and 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 MAFTA and 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, MAFTA 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 MAFTA's and 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 MAFTA's or City's rights of privacy or any other personal or proprietary right either MAFTA or 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. MAFTA and City shall use their best efforts to give a credit in any publication, substantially in the following form: "© Laurel True and True Mosaics Studio, 2005 (date of installation)." Artist shall use her best efforts to give a credit reading substantially "an original work by Laurel True, commissioned by Milpitas Alliance for the Arts and the City of Milpitas for the Starlite Park, Milpitas, California" in any publication or public showing under her control of any two-dimensional reproductions of the Work.

D. MAFTA and City agree to not intentionally damage, alter, relocate, modify or change the Work in any way. If the Work is damaged, altered, modified, changed or otherwise in need of restoration, MAFTA and 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 the Work including transportation, supplies, foundry expenses, and Artist's time and expenses to repair said damages and to re-install the Work.

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 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 reproduction in the Work, the preliminary design and any incidental works made in the creation of the Work. Neither the City nor MAFTA 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, neither MAFTA, nor City shall 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 both MAFTA and the City ("final acceptance") and the Artist has been paid in full. Artist shall transfer her right of ownership in writing to MAFTA which shall immediately transfer the title and Artist's right of ownership to City, which title and right shall be accepted by resolution of the City Council. In the event of termination of this Agreement pursuant to Subparagraph 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 MAFTA of ownership of the Work to City, City shall assume all rights and obligations of MAFTA as set forth in this Agreement, excepting any obligations whatsoever related to the funding of or payment for the Work by MAFTA or any claims, suits, costs, damages or liabilities of any kind whatsoever associated with the funding or payment of the Work by MAFTA.

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

A. 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. MAFTA 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, MAFTA may declare this Agreement terminated and Artist surrenders and shall pay back all monies paid to the Artist. .

B. Artist shall have the right to terminate this Agreement if, pursuant to Section 3, MAFTA is more than sixty (60) days late in making any payment.

C. If Artist is unable to complete the Work or to commence the installation on the installation date because of illness or disability or because of events beyond the control of the Artist, as provided herein, the time to complete the Work and its installation shall be extended by the length of such interruption or interruptions, provided that in the aggregate the installation date is not delayed more than six (6) months.
This agreement shall automatically terminate on the death of the Artist, provided, however, that the Artist's estate shall retain all payments made up to the point of the Artist's death.

13. ENTIRE AGREEMENT; APPLICABLE LAW. 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. Artist shall retain the right to assign monies due to the Artist under the terms of this Agreement. This contract shall be governed by the laws of the State of California.

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 MAFTA at:	Milpitas Alliance for the Arts 142 N. Milpitas Blvd. #330 Milpitas, California 95035
To City at:	City of Milpitas City Manager's Office 455 East Calaveras Boulevard Milpitas, California 95035
To the Artist at:	Laurel True/ True Mosaics Studio 3001 Chapman St. Oakland, CA 94601

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. ARBITRATION. All disputes arising out of this Agreement shall be submitted to non-binding arbitration. The arbitrator shall be selected in accordance with the rules of the Arts Arbitration and Mediation Services, a program of California Lawyers for the Arts. If such service is not available, any disputes shall be submitted to arbitration in accordance with the rules of the American Arbitration Association. The parties shall jointly agree on an arbitrator. The costs of arbitration shall be borne equally by the parties to the arbitration. In no event shall any monetary award be made against the City.

17. HOLD HARMLESS/INDEMNIFICATION.

A. Artist shall indemnify, defend, and hold harmless 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 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 Section 2782 of the Civil Code, the parties hereto recognize and agree that this Agreement is not a construction contract. 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.

MILPITAS ALLIANCE FOR THE ARTS

By: _____

ATTEST:

By: _____

ARTIST:

By:_____
Laurel True

THE CITY OF MILPITAS

By:_____
Charles Lawson, Interim City Manager

ATTEST:

By: _____
Mary Lavelle, City Clerk

Approved as to form.

By: _____
Steve Mattas, City Attorney