

**AGREEMENT BETWEEN THE CITY OF SUNNYVALE AND JAMES MOORE
FOR PROFESSIONAL SERVICES
(DESIGN, FABRICATION AND INSTALLATION OF PUBLIC ART
AT FAIR OAKS PARK)**

THIS AGREEMENT is made and entered into by the City of Sunnyvale, a chartered municipal corporation of the State of California ("CITY"), and James Moore ("ARTIST"), located at PO BOX 720294, San Jose, CA 95172, this 14th day of July 2020.

RECITALS

WHEREAS, CITY intends to integrate five SITE-specific sculptures ("ARTWORK") as part of the renovations to Fair Oaks Park, located at 540 N. Fair Oaks Ave. in Sunnyvale, CA, and desires to engage an ARTIST to provide design, fabrication and delivery in connection with the ARTWORK (the "Services"); and

WHEREAS, ARTIST has represented that he has the necessary professional expertise, qualifications, and capability, and all necessary authority to provide the Services; and

WHEREAS, ARTIST was selected from a pool of applicants, as the most qualified to design and fabricate the ARTWORK. The Art Commission and City Council approved the conceptual proposals by ARTIST on Jan. 15, 2020 and Feb. 25, 2020, respectively; and

WHEREAS, the planned source of funds for the Services derives from funds made available from the CITY of Sunnyvale's CIP funds identified through the Municipal Percent for Art Policy; and

WHEREAS, in reliance on these representations, CITY desires to engage ARTIST to provide the Services as more fully described in Exhibit A ("Scope of Services"), attached to and made a part of this Agreement; and

WHEREAS, CITY has provided certain specifications for the Fair Oaks Park renovations, within which ARTIST has designed his ARTWORK to fit; and

WHEREAS, the ARTWORK is considered a permanent installation, intended to remain or remaining in a public place for one year or more after their completion by ARTIST, provided, however, CITY may remove the ARTWORK in accordance with CITY's Deaccession Policy or as described in this Agreement; and

WHEREAS, CITY may accession the completed ARTWORK consistent with the provisions of its Public Art Program into the CITY'S Collection of Public Art upon acceptance of the ARTWORK and own all right, title and interest in the ARTWORK pursuant to the specific terms of this Agreement.

NOW THEREFORE, in consideration of the recitals, covenants, terms and conditions in this Agreement, the parties agree as follows:

1. SERVICES BY ARTIST

ARTIST shall perform the Services as described in Exhibit A ("Scope of Services"), attached and incorporated by reference, in accordance with the terms and conditions contained in this Agreement. The performance of all Services shall be to the reasonable satisfaction of CITY. ARTIST shall determine the method, details and means of performing the services.

2. DUTIES OF CITY

- (a) CITY shall provide, at no cost to ARTIST, any non-confidential documents or information available to CITY that is required by ARTIST for performance of his duties.
- (b) CITY shall coordinate with ARTIST to define and plan a community workshop to promote interest in public art that includes public participation to create an art project (the "Workshop"). CITY shall provide outreach to community members for the event.
- (c) CITY shall provide and display a plaque, at CITY's cost, no less than eight inches by eight inches, at minimum identifying the ARTIST, title, date and medium for the ARTWORK. Placement of the plaque shall be done in consultation with ARTIST.

3. TIME FOR PERFORMANCE

ARTIST shall promptly commence the ARTWORK, deliver the agreed upon services to CITY as specified in Exhibit A, and diligently prosecute all of the ARTWORK to completion by September 1, 2021. Time is of the essence in performance of all obligations under this Agreement, and extensions of time may be granted by the Superintendent of Community Services only as provided in Section 28, Excuse From Performance, below.

4. COMPENSATION

CITY agrees to pay ARTIST as full compensation for the services rendered pursuant to this Agreement, the amounts set forth in Exhibit A. Total compensation, including Optional Services as described in Exhibit A, shall not exceed one hundred forty thousand dollars (\$140,000.00).

ARTIST shall submit invoices to CITY for services provided to date. All invoices, including detailed backup, shall be sent to City of Sunnyvale, attention Accounts Payable, P.O. Box 3707, Sunnyvale, CA 94088-3707. Payment shall be made within twenty-one working

days upon completion of each task as provided in Exhibit A and upon receipt of an accurate, itemized invoice by CITY's Accounts Payable Unit.

- (a) CITY has no obligations regarding commissions or any agreement with galleries or agents with whom ARTIST may have contracted. CITY shall not be responsible for paying sales tax.
- (b) As used herein, "working days" means all days, except Saturday, Sunday and CITY holidays (New Year's Day, New Year's Eve, Martin Luther King Day, President's Day, Memorial Day, Fourth of July, Labor Day, Thanksgiving, Day after Thanksgiving, Christmas Eve and Christmas Day).

5. PROGRESS REPORTS

CITY shall have the right at reasonable times to review ARTWORK while in the process of and upon completion of fabrication. ARTIST shall give progress reports electronically, including visuals, to the Superintendent of Community Services, or his designee, on the coordination of the project and not later than the tenth day of each month.

6. OWNERSHIP OF DOCUMENTS

CITY shall have full and complete access to ARTIST'S working papers, drawings and other documents during progress of the work. Copies of design documents, including but not limited to, renderings, design descriptions, design schematics and color charts, prepared by ARTIST shall be prepared for CITY at the completion of the project and prior to payment in full to the ARTIST. ARTIST may retain originals of all materials produced pursuant to this Agreement.

7. ARTIST WARRANTIES

- (a) **Warranty of Title.** ARTIST represents and warrants that ARTIST is the sole author of the ARTWORK and that ARTIST is the sole owner of any and all copyrights pertaining to the ARTWORK. ARTIST further represents that the ARTWORK is free and clear of any liens and that there are no outstanding disputes in connection with property rights, intellectual property rights or any other rights in the ARTWORK or any parts of the ARTWORK.
- (b) **Workmanship.** ARTIST shall warrant and maintain the ARTWORK free from all faults or defects related to material or workmanship for a period of two years after the ARTWORK is accepted by CITY.
- (c) **Originality.** ARTIST warrants that the design of the ARTWORK is an edition of one, and that neither ARTIST nor ARTIST'S agents will execute or authorize another to execute another work of the same or substantially similar image, design, dimensions and materials as the ARTWORK.

- (d) **Public Safety.** ARTIST represents and warrants that the ARTWORK will not pose a danger to the safety of persons or property in view of the possibility of misuse, if such misuse is in a manner that was reasonably foreseeable at any time during the term of this Agreement. ARTIST agrees to cooperate with CITY in making or permitting adjustments to the ARTWORK if necessary to eliminate hazards that become apparent after the ARTWORK is accepted by CITY.
- (e) **Acceptable Standard of Display.** ARTIST represents and warrants that:
- (1) General routine cleaning and repair of the ARTWORK and any associated working parts and/or equipment will maintain the ARTWORK within an acceptable standard of public display;
 - (2) Foreseeable exposure to the elements and general wear and tear will cause the ARTWORK to experience only minor repairable damages and will not cause the ARTWORK to fall below an acceptable standard of public display; and
 - (3) With general routine cleaning and repair consistent with instructions provided to CITY by ARTIST, and within the context of foreseeable exposure to the elements and general wear and tear, the ARTWORK will not experience irreparable conditions that fall below an acceptable standard of public display, including but not limited to mold, rust, fracturing, staining, chipping, tearing, abrading and peeling.
- (f) **Physical Warranty.** ARTIST shall provide a two-year warranty on each of the ARTWORKS and advise on maintenance at no cost to CITY as described in this Agreement. For each ARTWORK, the warranty shall begin on the date of the CITY'S acceptance of the ARTWORK, such acceptance not to be unreasonably withheld, conditioned or delayed.
- (g) **Errors/Omissions.** ARTIST shall correct, at no cost to CITY, any and all defects in the work product submitted to CITY, provided CITY gives not less than 30 days' prior written notice thereof to ARTIST. If ARTIST has prepared plans and specifications or other design documents to construct and install the ARTWORK, ARTIST shall be obligated to correct any and all technical errors or omissions on such plans. This obligation shall survive termination of the Agreement for a period of one year.

8. TRANSFER OF TITLE TO ARTWORK

Title to the ARTWORK shall remain in ARTIST'S name until CITY has accepted the ARTWORK as completed and it is installed to the satisfaction of CITY. Transfer of title shall be self-executing upon CITY's acceptance. ARTIST shall bear all risk of loss of the ARTWORK until title has been transferred to CITY, and CITY agrees to inspect ARTWORK and accept ARTWORK within thirty (30) days of ARTIST'S notification of completion, unless the provisions of Section 9(a) or (b) apply.

9. ACCEPTANCE OF WORK

CITY agrees to accept the completed ARTWORK unless:

- (a) The ARTWORK was not completed in substantial conformance with the approved final design, or
- (b) The ARTWORK as completed or any portion thereof does not conform to a reasonable standard of artistic or technical quality. CITY shall provide its reasons for this finding to ARTIST in writing no later than ten (10) days after ARTIST has tendered the ARTWORK to the CITY for CITY's acceptance. Where the ARTIST disputes this finding, the dispute shall be submitted to Arts Arbitration and Mediation Services ("A.A.M.S."), of California Lawyers for the Arts, San Francisco, CA for resolution, and any decision by A.A.M.S. shall be binding upon CITY and ARTIST and neither shall have any further recourse or cause of action regarding the matters so resolved.
- (c) Upon the CITY's refusal to accept the ARTWORK for the reasons stated in subparagraphs (a) or (b), CITY, in addition to other rights or remedies available to the CITY under the Agreement or applicable law, shall have the right to: (1) request that ARTIST correct the deficiencies in the ARTWORK within a reasonable time, or (2) terminate this Agreement and recover all sums previously paid to ARTIST.
- (d) No payments to ARTIST shall be deemed as a waiver of CITY's right to refuse to accept the ARTWORK.

10. CLEANING AND MAINTENANCE OF ARTWORK

- (a) ARTIST shall design the ARTWORK so that it is durable, taking into consideration that the SITE is an unsecured public space, and that the ARTWORK will be exposed to elements, including but not limited to, weather, temperature variation, and movement of people, vehicles and equipment. ARTIST shall design and construct the ARTWORK so that maintenance requirements are reasonable in terms of time and expense.
- (b) As a condition of and prior to acceptance of the ARTWORK, ARTIST shall supply CITY with written maintenance instructions for proper care of the ARTWORK, including standards for general routine cleaning and repair of the ARTWORK and any associated working parts and/or equipment.
- (c) Following acceptance of the work, CITY shall be responsible for the proper cleaning, maintenance and protection of the ARTWORK. Although CITY strives to maintain its public art collection in good repair and condition, CITY is not required by this Agreement to maintain the ARTWORK to any particular standard.

- (d) ARTIST will supply during his lifetime at no charge; four (4) hours of advice by telephone each calendar year as to problems arising in relation to maintenance of the ARTWORK. All repairs and restorations that are made during the lifetime of ARTIST shall be performed in consultation with ARTIST as provided in Section 11, below.
- (e) CITY shall have the right to determine, after consultation with ARTIST, when and if repairs and restorations to the ARTWORK will be made. It is the policy of CITY to consult with ARTIST regarding repairs and restoration which are undertaken during ARTIST'S lifetime when that is practicable. CITY shall make a reasonable effort to consult with ARTIST and a professional conservator in all matters concerning major repairs and restoration of the work. In the event that CITY makes repairs or restoration not approved by ARTIST, ARTIST shall have the right, at ARTIST's sole option, to have ARTIST's association with ARTWORK(S) severed and shall have no further maintenance or warranty obligations under this Section 17 of this Agreement to CITY.
- (f) All repairs and restorations, whether performed by ARTIST, CITY, or by third parties responsible to ARTIST or CITY, shall be made in accordance with professionally recognized principles of conservation of ARTWORK and in reasonable accordance with the maintenance instructions provided to CITY by ARTIST.

11. ARTIST'S MORAL RIGHTS; WAIVER OF VARA AND CAPA RIGHTS

- (a) The CITY, having expended considerable public funds to commission the ARTWORK, and pursuant to its responsibilities to maintain the ARTWORK owned by CITY, intends to make its best efforts to display the ARTWORK at the SITE, as originally created by ARTIST and to maintain the ARTWORK in good condition. However, CITY must preserve complete flexibility to operate and manage CITY property. Therefore, subject to CITY's obligation to make good faith efforts to consult with ARTIST as set forth in subsection (c), below, ARTIST agrees that CITY, in connection with its power and duty to operate and manage CITY property in the public's interest, shall have the absolute right to alter, repair, modify, remove, relocate, sell, dispose of, or destroy (collectively, "MODIFY") the ARTWORK in CITY'S sole judgment. For example, CITY may MODIFY the ARTWORK to eliminate hazards, to comply with the ADA, to otherwise aid CITY in the management of its property and affairs, or through neglect or accident. CITY also has the right to install the ARTWORK in an alternate location that the CITY chooses in its sole discretion. If CITY chooses to destroy artworks, ARTIST will be given the option of salvaging the ARTWORK at no cost to CITY.
- (b) ARTIST waives any and all claims, arising at any time and under any circumstances, against CITY, its officers, agents, employees, 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, Cal. Civil Code §§987 et seq., or any other type of moral right protecting the integrity of works of art. If the ARTWORK is incorporated into a SITE such that the ARTWORK cannot be removed from the SITE without MODIFYING the ARTWORK, ARTIST waives any and all such claims against any future owners of the SITE, and its agents, officers and employees, for MODIFYING the ARTWORK.

- (c) Where time permits, prior to MODIFYING the ARTWORK, CITY shall make reasonable good faith efforts to notify and consult with ARTIST, at the last phone number or address provided by ARTIST to the CITY, and to come to a mutually agreeable plan for disposition of the ARTWORK. Such consultation shall be without charge by ARTIST unless otherwise specifically agreed in writing. If the ARTWORK is MODIFIED and CITY intends to maintain the ARTWORK on display, CITY shall make a reasonable good faith effort to engage ARTIST in the restoration of the ARTWORK and to compensate ARTIST for ARTIST'S time and efforts at fair market value, which may be the subject of a future Agreement between ARTIST and CITY. However, CITY has no obligation under this Agreement to restore the ARTWORK or to compensate ARTIST for any restoration work. If ARTIST fails or refuses to negotiate with CITY in good faith with respect to any restoration, CITY may contract with any other qualified art conservator or artist for such restoration.
- (d) If CITY alters the ARTWORK without ARTIST'S consent in a manner that is prejudicial to ARTIST'S reputation, ARTIST may disclaim authorship of the ARTWORK.

12. QUALIFICATIONS/STANDARD OF CARE.

All of the Services shall be performed by ARTIST or under ARTIST's supervision. ARTIST represents that he possesses the professional and technical personnel necessary to perform the Services required by this Agreement and that the personnel have sufficient skill and experience to perform the Services assigned to them. ARTIST represents that he, his employees and subcontractors, if permitted, have and shall maintain during the term of this Agreement all professional licenses, qualifications, insurance and approvals of whatever nature that are legally required to perform the Services. All of the Services to be furnished by ARTIST under this agreement shall meet the professional standard and quality that prevail among professionals in the same discipline and of similar knowledge and skill engaged in related work throughout California under the same or similar circumstances.

13. PERFORMANCE OF AGREEMENT IN EVENT OF DEATH OR DISABILITY OF ARTIST

- (a) If ARTIST is unable to personally perform his obligation under this Agreement due to death or disability prior to the completion and installation of the ARTWORK, this Agreement may be terminated at the sole discretion of CITY,

and, in such event, all completed work, materials, and supplies related to the ARTWORK shall be delivered to CITY and shall become CITY's sole property.

(b) ARTIST, or his estate, as the case may be, shall refund to CITY whatever amount CITY paid to ARTIST pursuant to Paragraph 4(a) of this Agreement, less the total of:

(1) All costs and expenses incurred by ARTIST in connection with the performance of this Agreement prior to the time of his death or disability; such costs and expenses shall be supported by adequate documentary evidence before they can be credited against any refund;

(2) Five hundred dollars (\$500.00) per month for the nearest number of whole months which have elapsed from the execution of this Agreement at the time of such death or disability.

(c) In the event of such termination, CITY may take such action as may appear to it appropriate under the circumstances, including but not limited to commissioning another artist to complete the ARTWORK. In the event that CITY completes the ARTWORK or arranges to have it completed, ARTIST'S name shall be publicly displayed at, on or near the ARTWORK, unless ARTIST and CITY mutually agree otherwise.

14. CONFLICT OF INTEREST

ARTIST shall avoid all conflicts of interest, or appearance of conflict, in performing the services and agrees to immediately notify CITY of any facts that may give rise to a conflict of interest. ARTIST is aware of the prohibition that no officer of CITY shall have any interest, direct or indirect, in this Agreement or in the proceeds thereof. During the term of this Agreement ARTIST shall not accept employment or an obligation which is inconsistent or incompatible with ARTIST'S obligations under this Agreement.

15. CONFIDENTIAL INFORMATION

ARTIST shall maintain in confidence and at no time use, except to the extent required to perform his obligations hereunder, any and all proprietary or confidential information of CITY of which ARTIST may become aware in the performance of his services.

16. COMPLIANCE WITH LAWS

(a) **Nondiscrimination.** ARTIST shall not discriminate against, or engage in the harassment of, any CITY employee or volunteer or any employee of ARTIST or applicant for employment because of an individual's race, religion, color, sex, gender identity, sexual orientation (including heterosexuality, homosexuality and bisexuality), ethnic or national origin, ancestry, citizenship status, uniformed service member status, marital status, family relationship, pregnancy, age, cancer or HIV/AIDS-related medical condition, genetic characteristics, and

physical or mental disability (whether perceived or actual). This prohibition shall apply to all of ARTIST's employment practices and to all of ARTIST's activities as a provider of services to the CITY.

- (b) **Compliance with Other Laws.** ARTIST shall comply with all federal, state and city laws, statutes, ordinances, rules and regulations, and the orders and decrees of any courts, or administrative bodies or tribunals in any manner affecting the performance of this Agreement.

17. PREVAILING WAGES AND DIR REGISTRATION FOR PUBLIC WORKS CONTRACTS.

- (a) ARTIST is required to pay general prevailing wages as defined in Subchapter 3, Title 8 of the California Code of Regulations and Section 16000 et seq. and Section 1773.1 of the California Labor Code. Pursuant to the provisions of Section 1773 of the Labor Code of the State of California, the City Council has obtained the general prevailing rate of per diem wages and the general rate for holiday and overtime work in this locality for each craft, classification, or type of worker needed to execute the contract for this Project from the Director of the Department of Industrial Relations ("DIR"). A copy of the prevailing wage rates may be reviewed in the office of the Director of Public Works, City of Sunnyvale, 456 West Olive Avenue, Sunnyvale, California. Wage rates can also be obtained through the California Department of Industrial Relations website at: <http://www.dir.ca.gov/OPRL/DPreWageDetermination.htm>
- (b) ARTIST shall provide a copy of prevailing wage rates to any staff or subcontractor hired, and shall pay the adopted prevailing wage rates as a minimum. ARTIST shall comply with the provisions of all sections, including, but not limited to, Sections 1775, 1776, 1777.5, 1782, 1810, and 1813, of the Labor Code pertaining to prevailing wages.
- (c) It shall be mandatory upon ARTIST and upon any subcontractor to pay not less than the specified rates to all laborers, workers, and mechanics employed in the execution of the Contract. It is further expressly stipulated that ARTIST shall, as a penalty to Owner, forfeit two hundred dollars (\$200.00) for each calendar day, or portion thereof, for each laborer, worker, or mechanic paid less than the stipulated prevailing rates for any work done under this Contract by ARTIST or by any subcontractor; and ARTIST agrees to comply with all provisions of Section 1775 of the Labor Code. In case it becomes necessary for ARTIST or any subcontractor to employ on the project under this Contract any person in a trade or occupation (except executives, supervisory, administrative, clerical, or other non-manual workers as such) for which no minimum wage rate is herein specified, ARTIST shall immediately notify CITY, which will promptly thereafter determine the prevailing rate for such additional trade or occupation and shall furnish ARTIST with the minimum rate based thereon. The minimum rate thus furnished shall be applicable as a minimum for such trade or occupation from the

time of the initial employment of the person affected and during the continuance of such employment.

18. INDEPENDENT CONTRACTOR

ARTIST is acting as independent contractor in furnishing the services or materials and performing the work required by this Agreement and is not an agent, servant or employee of CITY. Nothing in this Agreement shall be interpreted or construed as creating or establishing the relationship of employer and employee between CITY and ARTIST. ARTIST is responsible for paying all required state and federal taxes.

19. HOLD HARMLESS/INDEMNIFICATION

To the extent permitted by law (including, without limitation, California Civil Code section 2782.8), ARTIST agrees to indemnify, defend and hold harmless CITY, its officers and employees from any and all claims, demands, actions, causes of action, losses, damages, liabilities, known or unknown, and all costs and expenses, including reasonable attorneys' fees in connection with any injury or damage to persons or property to the extent arising out of any negligence, recklessness or willful misconduct of ARTIST, his officers, employees, agents, contractor, subcontractors or any officer, agent or employee thereof in relation to ARTIST'S performance under this Agreement. Such defense and indemnification shall not apply in any instance of and to the extent caused by the sole negligence, recklessness or willful misconduct of CITY, its officers, employees, agents or representatives.

20. INSURANCE

ARTIST shall take out and maintain during the life of this Agreement, policies of insurance as specified in Exhibit C attached and incorporated by reference and shall provide all certificates or endorsements as specified in Exhibit C.

21. COPYRIGHT OWNERSHIP

ARTIST retains all rights under the Copyright Act of 1976, USC101, as the sole author of the ARTWORK for the duration of the copyright.

22. REPRODUCTION RIGHTS

- (a) ARTIST shall not make any additional exact duplicate reproductions of the final ARTWORK, nor shall ARTIST grant permission to others to do so except with the written permission of the CITY. However, nothing shall prevent ARTIST from creating works in the ARTIST'S manner and style of artistic expression.
- (b) ARTIST grants CITY license to make two-dimensional reproductions of the ARTWORK for non-commercial purposes, including, but not limited to, reproductions used in brochures, media publicity, and exhibition catalogues or other similar publication provided that these reproductions are exercised in a

tasteful and professional manner. All reproductions by the CITY shall contain a credit to the ARTIST and a copyright notice.

(c) CITY grants ARTIST license to make two-dimensional reproductions of the ARTWORK for non-commercial purposes, including, but not limited to, reproductions used in brochures, media publicity, and exhibition catalogues, ARTIST'S portfolio or other similar publication provided that these reproductions are exercised in a tasteful and professional manner. All reproductions by the ARTIST shall contain a credit to the CITY as the owner of the ARTWORK.

(d) If the CITY wishes to make reproductions of the ARTWORK 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.

23. CITY REPRESENTATIVE

Damon Sparacino, Superintendent of Community Services as the CITY Manager's authorized representative, shall represent CITY in all matters pertaining to the services to be rendered under this Agreement. All requirements of CITY pertaining to the services and materials to be rendered under this Agreement shall be coordinated through the CITY representative.

24. ARTIST'S REPRESENTATIVE

James Moore shall represent ARTIST in all matters pertaining to the services and materials to be rendered under this Agreement. All requirements of ARTIST pertaining to the services or materials to be rendered under this Agreement shall be coordinated through the ARTIST.

25. NOTICES

All notices required by this Agreement shall be in writing and shall be personally delivered, sent by first class mail with postage prepaid, or sent by commercial courier addressed as follows:

To CITY: Damon Sparacino
 Superintendent of Community Services
 Department of Library and Community Services
 CITY OF SUNNYVALE
 P.O. Box 3707
 Sunnyvale, CA 94088-3707

To ARTIST: James Moore
 PO BOX 720294
 San Jose, CA 95172

Nothing in this provision shall be construed to prohibit communication by more expedient means, such as by email or fax, to accomplish timely communication. Each party may change the address by written notice in accordance with this paragraph. Notices delivered personally shall be deemed communicated as of actual receipt; mailed notices shall be deemed communicated as of three business days after mailing.

26. NOTICE OF CHANGE OF ADDRESS

ARTIST agrees to notify CITY in writing promptly of any changes of address. A failure to do so shall be deemed a waiver of ARTIST'S rights under this Agreement.

27. NO ASSIGNMENT OR SUBCONTRACTING

- (a) The expertise and experience of ARTIST are material considerations for this Agreement. ARTIST shall not sublet or assign any right or obligation pursuant to this Agreement without the prior and express written consent of the CITY. Any attempted or purported assignment without CITY's written consent shall be void and of no effect. Consent to one assignment will not be deemed to be consent to any subsequent assignment.
- (b) ARTIST shall not subcontract any portion of the work to be performed under this Agreement without the prior and express written consent of the CITY. ARTIST shall be responsible for directing the work of any subcontractors and for any compensation due to subcontractors. CITY assumes no responsibility whatsoever concerning compensation of subcontractors. ARTIST shall be fully responsible to CITY for all acts and omissions of ARTIST's subcontractors in connection with their performance of the Services. ARTIST shall change or add subcontractors only with the prior approval of CITY.

28. EXCUSE FROM PERFORMANCE

In the event ARTIST'S performance of any of their obligations or undertakings under this Agreement is delayed, interrupted, or prevented by an act of God, unforeseen conditions, unusually severe weather, governmental order or occurrences that are beyond the control of either party to this Agreement, ARTIST shall be excused from any further performance for whatever period of time after the occurrence necessary to remedy the effects of that occurrence. ARTIST shall notify CITY in writing within ten (10) days after any occurrence described in this section that may delay ARTIST'S performance. The Superintendent of Community Services shall amend the schedule when, in his determination, ARTIST'S performance has been excused, and the delay or interruption has resulted in a material change in the time for performance.

29. TERMINATION

- (a) If ARTIST defaults in the performance of this Agreement or materially breaches any of its provisions, CITY at its option may terminate this Agreement by giving written notice to ARTIST.

- (b) If CITY fails to pay ARTIST, ARTIST at his option may terminate this Agreement if the failure is not remedied by CITY within thirty (30) days from the date payment is due. ARTIST shall present CITY with any work product completed at that point in time.
- (c) Without limitation to such rights or remedies as CITY shall otherwise have by law, CITY also shall have the right to terminate this Agreement for any reason by giving ten (10) days' written notice to ARTIST. In the event of such termination without cause, ARTIST shall be compensated in proportion to the percentage of services performed or materials furnished (in relation to the total which would have been performed or furnished), through the date of receipt of notification from CITY to terminate. ARTIST shall present CITY with any work product completed at that point in time.
- (d) No payment, partial payment, acceptance, or partial acceptance by CITY or acceptance of any payment or partial payment by ARTIST will operate as a waiver on the part of CITY or ARTIST of any of their rights under this Agreement.

30. ENTIRE AGREEMENT; AMENDMENT

This writing constitutes the entire Agreement between the parties relating to the services to be performed or materials to be furnished hereunder. No modification of this Agreement shall be effective unless and until such modification is evidenced by writing, signed by all parties.

31. GOVERNING LAW, JURISDICTION AND VENUE

This Agreement shall be governed by and construed in accordance with the laws of the State of California, excluding its conflict of law principles. Proper venue for legal actions will be exclusively vested in a state court in the County of Santa Clara. The parties agree that subject matter and personal jurisdiction are proper in state court in the County of Santa Clara, and waive all venue objections.

32. ATTORNEY'S FEES

In the event any legal action is commenced to enforce this Agreement, the prevailing party is entitled to reasonable attorney's fees, costs, and expenses incurred.

33. MISCELLANEOUS

Time shall be of the essence in this Agreement. Failure on the part of either party to enforce any provision of this Agreement shall not be construed as a waiver of the right to compel enforcement of such provision or any other provision.

IN WITNESS WHEREOF, the parties have executed this Agreement.

ATTEST:

CITY CLERK

CITY OF SUNNYVALE ("CITY")

Deputy City Clerk

By _____
City Manager

APPROVED AS TO FORM:

City Attorney

ARTIST

By _____
James Moore, ARTIST

EXHIBITS:

A. Scope of Services

A-1. Conceptual Designs approved by Arts Commission and City Council

C. Insurance Requirements

EXHIBIT A SCOPE OF SERVICES

Background

The purpose of this agreement is to define the scope of work for the fabrication, delivery, and installation of five original ARTWORKS designed by ARTIST James Moore to be integrated into renovations at Fair Oaks Park, located at 540 North Fair Oaks Ave., in Sunnyvale, California.

Fair Oaks Park is a 15-acre community park originally built in 1969. It is centrally located within the CITY and includes multi-use fields, large picnic areas, basketball courts, a volleyball court, playground, and a skate park. The proposed project objective is to provide a major renovation to the park and ensure its sustainability for the future by enhancing recreational usability, increasing attractiveness, and improving accessibility for all potential park users. Additionally, this project includes replacement of the athletic fields with the CITY'S first synthetic turf field, renovation of the picnic areas and park amenities, upgrades to existing lighting, ADA improvements, replacement of the water play feature with a more water efficient feature, replacement of basketball courts, installation of a new restroom facility, and a new parking lot. This project will also incorporate an all-inclusive playground designed by the Magical Bridge Foundation approved by Council.

In response to a Request for Qualifications, ARTIST created conceptual designs for the original ARTWORK approved by the Art Commission on January 15, 2020 and the City Council on February 25, 2020. ARTIST proposed a grouping of five sculptures placed in the open space(s) of the park. Each of the sculptures was designed with the themes of "movement" and "play" to represent human figures enjoying activities prominent in the park (basketball, soccer, baseball). The sculptures will vary in height, the tallest figure standing 10-feet tall and the shortest figure standing 6.5-feet tall. They will be secured to a 5-foot square base and anchored with concrete pilings below grade. Fabricated in aluminum, the sculptures will be treated with a metal dye to give it the appearance of pewter, connecting its contemporary style with the "Old English" theme of the park. The faces of the figures and the sports balls will be painted in primary colors (red, yellow and blue) using high-grade automotive paint to set them apart from the antiqued metal bodies. These elements will also be coated with a clear protective coat for protection and easy maintenance. The approved artist and conceptual designs are represented in Exhibit A-1.

It is mutually understood by the CITY and ARTIST that minor refinements to the conceptual design and engineering may take place. Should the initial conceptual design as approved by the - Art Commission and City Council shift significantly, CITY staff will report back to the Art Commission and City Council on those changes.

Summary of ARTWORK

ARTIST will further develop the conceptual proposals represented in Exhibit A-1, and fabricate, deliver, and coordinate installation of the finished ARTWORK with the CITY as detailed below. The images in Exhibit A-1 are for reference only. To view more details of the approved ARTWORK, please see the presentation to the Art Commission on January 15, 2020.

ARTIST Requirements for Each ARTWORK

- (1) ARTIST shall furnish and provide at his cost and expense all labor, supplies, materials, equipment and shipment thereof related to completion of the ARTWORK. ARTIST will provide all necessary foundations, anchoring hardware and finishes necessary for the installation of the ARTWORK as approved by the CITY. All services related to the ARTWORK shall be performed in a professional manner and in strict compliance with all terms and conditions in the Agreement.
- (2) Delivery of ARTWORK or art materials will be coordinated with the CITY on mutually agreeable delivery dates to the project SITE. ARTIST will supply any necessary delivery details to the CITY in advance regarding delivery vehicles, crates, and staging necessary for the installation. For all ARTWORK, ARTIST shall be responsible for all direct shipping costs, including packing materials, insurance, and use of any shipping vendors. CITY agrees that additional costs imposed on ARTIST by CITY'S delay will be reasonably compensated to ARTIST.
- (3) Installation dates will be determined by mutual agreement between the CITY and the ARTIST. The ARTIST or ARTIST'S representative shall be present to oversee each installation. In each case, the ARTIST shall provide to the CITY in advance information regarding equipment involved for installation, numbers of contractors involved to complete the installation, electrical or equipment needs, and any additional information required by the CITY. ARTIST shall be responsible for contracting with installation contractors. All installation contractors must be pre-approved by CITY and must comply with all requirements for subcontractors in this Agreement, including but not limited to, insurance and Prevailing Wage requirements.
- (4) ARTIST shall provide CITY with the names of all subcontractors along with a copy of the agreement between the ARTIST and each subcontractor.
- (5) In designing and fabricating the ARTWORK, ARTIST shall take all reasonable measures to protect or preserve the integrity of the ARTWORK including but not limited to application of a protective sealant, patina and/or anti-graffiti coating.
- (6) ARTIST shall cooperate with CITY and provide any documentation reasonably requested in order to assist CITY in preparing ARTIST'S payments in accordance to the terms set forth in Paragraph 4(a).

ARTWORK Services, Schedule, and Compensation

(1) Task 1: Final Design Development

(a) Services

- (1) Upon execution of this Agreement, and written notice from CITY to proceed, ARTIST shall commence the final design of the ARTWORK.
- (2) The ARTWORK shall substantially conform to the conceptual design proposal attached in Exhibit A-1 and any requested modifications approved and directed by the Sunnyvale City Council at their February 25, 2020 meeting.
- (3) ARTIST shall coordinate with CITY'S project manager to visit the project SITE to discuss and agree on final locations for the ARTWORK.
- (4) ARTIST shall coordinate with CITY to define and plan a community workshop to promote interest in public art that includes public participation to create an art project (the "Workshop"). ARTIST shall oversee community workshop and provide, at his cost, any necessary materials for the workshop.
- (5) ARTIST shall submit to CITY for approval a final design, including a final SITE plan for the ARTWORK locations and a detailed plan for the Workshop within thirty (30) working days of execution of this agreement.

(b) Compensation for Final Design Development Services

- (1) CITY shall pay ARTIST forty-two thousand dollars (\$42,000) within twenty-one (21) working days of final execution (complete signatures) of this Agreement;

(2) Task 2: CITY Approval of Final Design.

(a) Services

- (1) Within a reasonable period after ARTIST submits the final design to CITY, CITY will review and provide written approval of the final design.
- (2) After City's written approval, ARTIST may not change the approved SITE or the approved final design of the ARTWORK without written approval of the Superintendent of Community Services or his designee.

(b) Compensation for Services- CITY Approval of Final Design

- (1) CITY shall pay ARTIST forty-two thousand dollars (\$42,000) within twenty-one (21) working days of CITY's written acceptance of final design for the ARTWORK.

(3) Task 3: Fabrication of ARTWORK and Community Workshop

(a) Services

- (1) Following CITY's written approval by "CITY" of the final design, ARTIST shall commence the execution of the ARTWORK in accordance with the Final Plan approved by CITY.
- (2) Artist shall conduct the community Workshop at a date and time mutually agreed between City and Artist.

(b) Compensation for Fabrication and Community Workshop

- (1) CITY shall pay ARTIST twenty thousand dollars (\$20,000) within twenty-one (21) working days of City's verification of ARTIST's completion of fabrication of the Artwork and completion of the Workshop, whichever occurs later.

(4) Task 4: Installation of ARTWORK

(a) Services

- (1) ARTIST shall coordinate installation of ARTWORK with CITY, engineers, architects and contractors at his expense. ARTIST shall secure all required licenses permits and similar legal authorizations at the ARTIST'S expense as may be necessary for the installation of the ARTWORK at the SITE.
- (2) ARTIST shall be responsible for installation of the ARTWORK and all costs associated with placement and anchoring of the ARTWORK including required foundations, mounts and hardware. ARTIST must consult with the Superintendent of Community Services or his designee, CITY engineers, architects, contractors, and the Construction Project Manager prior to and during installation.
- (3) Fabrication, delivery and installation of ARTWORK must be completed by September 01, 2021, unless otherwise notified in writing by CITY. ARTIST will assume all costs associated with transportation and installation of completed ARTWORK. ARTIST will be required to inspect SITE, at his cost, prior to the transportation and installation of the ARTWORK and shall notify the CITY of any adverse SITE conditions

that will impact the installation of the ARTWORK. Failure to do so by the ARTIST shall be deemed as an acceptance of the SITE conditions.

- (4) Field meetings and installation drawings shall be required in order to prepare for final installation. Installation drawings shall take into account all municipal and state building codes and will also be reviewed by CITY's Project Manager in order to prepare for final installation.
- (5) ARTIST shall be present to supervise the installation of the ARTWORK.
- (6) Installation shall be required to meet all municipal and state building codes and obtain inspection approval from CITY's Project Manager. If installation does not meet inspection criteria, ARTIST at his own cost shall continue working until such time as approval is obtained from CITY's Project Manager. Final placement of the ARTWORK must be approved by the Project Manager and Superintendent of Community Services, or his designee, prior to installation.

(b) Compensation for Installation of the Artwork

- (1) CITY shall pay ARTIST twenty-one thousand dollars (\$21,000) within twenty-one (21) working days of completion of installation of the ARTWORK.

(5) Task 5: CITY'S Final Acceptance of ARTWORK

(a) Service

- (1) Following installation of the ARTWORK, CITY shall accept the ARTWORK as provided in this Agreement.
- (2) ARTIST shall provide CITY, engineers, architects and contractors with all drawings, plans, photos, and maintenance and other requirements set forth in this Agreement, prior to City's acceptance of Artwork.

(b) Compensation for Final Acceptance of ARTWORK

- (1) CITY shall pay ARTIST fifteen thousand dollars (\$15,000.00) within sixty (60) days of acceptance by CITY's Construction Project Manager and the Superintendent of Community Services or his designee as provided in this Agreement.

(6) **Optional Task 6: Storage of Art**

(a) **Service**

- (1) In the event that Fair Oaks Park is not ready for art installation as expected by September 01, 2021, additional storage may be required. CITY and ARTIST shall meet to discuss storage requirements and agree in writing on terms and compensation for such storage, estimated at an additional \$500 per month after October 01, 2021. Should additional storage be required, funds for Additional Services will be made available for this purpose in accordance with the terms of this section. Payment for additional services is subject to all requirements and restrictions in this Agreement.

(b) **Compensation for Storage of Art**

If additional storage is required, CITY's Project Manager may authorize up to five hundred dollars per month not to exceed a total of five thousand dollars (\$5,000), for additional storage beyond the installation dates set forth in this Agreement.

James Moore
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Selected Public Commissions and Exhibitions

Selected Commissions & Public Placements

Hyatt House Cupertino, CA, (2018 –anticipated completion date)
Harbourside Place , Jupiter, FL (2014)
Foothill College, - Lead Artist - Los Altos Hills, CA, (2013)
City of San Carlos, CA, 2011
City of Palo Alto, CA 2010
City of Orinda, CA 2010
City of San Rafael, City Hall 2009
City of Los Altos, CA Hill View Community Center, 2008
City of Avondale, AZ City Civic Center 2008
Perella, Weinsberg, Partners, LLC Austin TX 2008
DPS Telecom, Fresno, CA 2008
The Wiseman Group, San Francisco, CA 2006
Mr. and Mrs. Ron and Nan Chapman, Saratoga, CA 2005
Goodland Landscape and Construction, San Ramon, CA 2005
Creative Marketing Concepts, San Francisco, CA 2004
Chillag and Associates, Palo Alto, CA 2002
Kaiser Permanente, Oakland, CA 1994

Selected Exhibitions

Sculpturesite / A New Leaf Gallery, /Sonoma, CA – 2005-present
Gallery of Modern Masters, Sedona, AZ 2009-Present
Dennis Rae Fine Arts, San Francisco, CA 2010-present
Red Door Designs, Lagos State, Nigeria group show 2013
Thelma Harris Gallery, Oakland, CA 2007-2012
Artscape Gallery, Walnut Creek, CA 2003-2007
John Pense Gallery, San Francisco, CA 1997
MOCHA Museum of Children's Art, Oakland, CA 1995
American Institute of Architecture, Oakland, CA 1995
ACCI Gallery, Berkeley, CA 1995, Featured Artist
Center for the Visual Arts, Oakland, CA 1993
Pro Arts Gallery, Oakland, CA 1992

Davis Art Center, Davis CA 1991, Juried Competition
Galleria Mesa, Mesa AZ 1990, Juried competition

Gallery Representation

Sculpturesite Gallery
www.sculpturesite.com

Dennis Rae Fine Art, San Francisco, CA
www.dennisraefineart.com

Dennis Rae Fine Arts, St. Helena, CA
www.dennisraefineart.com

Gallery of Modern Masters, Sedona, AZ
www.galleryofmodernmasters.com

Red Door gallery, Lagos, Nigeria
www.reddoorgallery.com



Figure I
James Moore



Figure 2
James Moore

Figure 3
James Moore



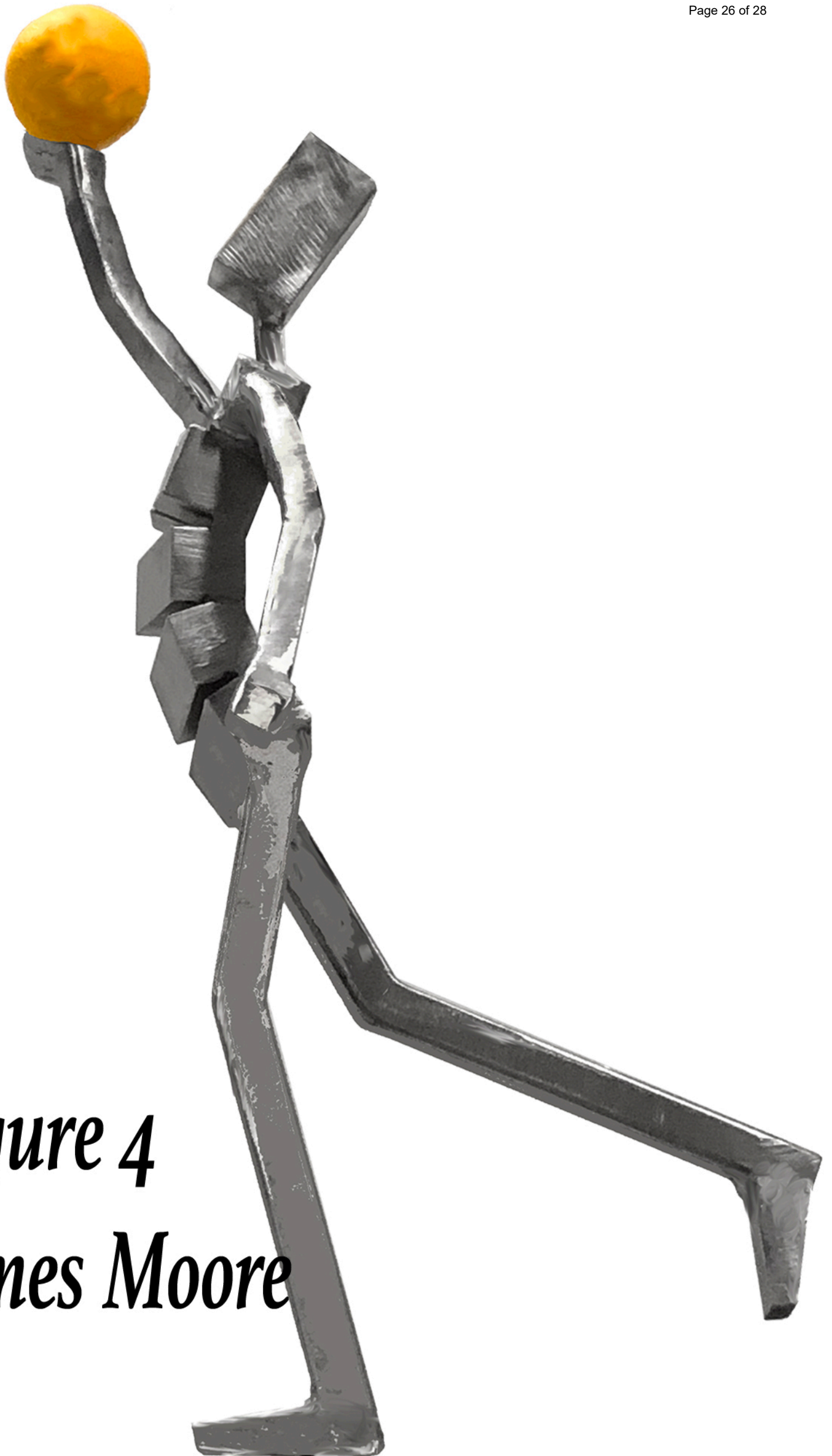


Figure 4
James Moore

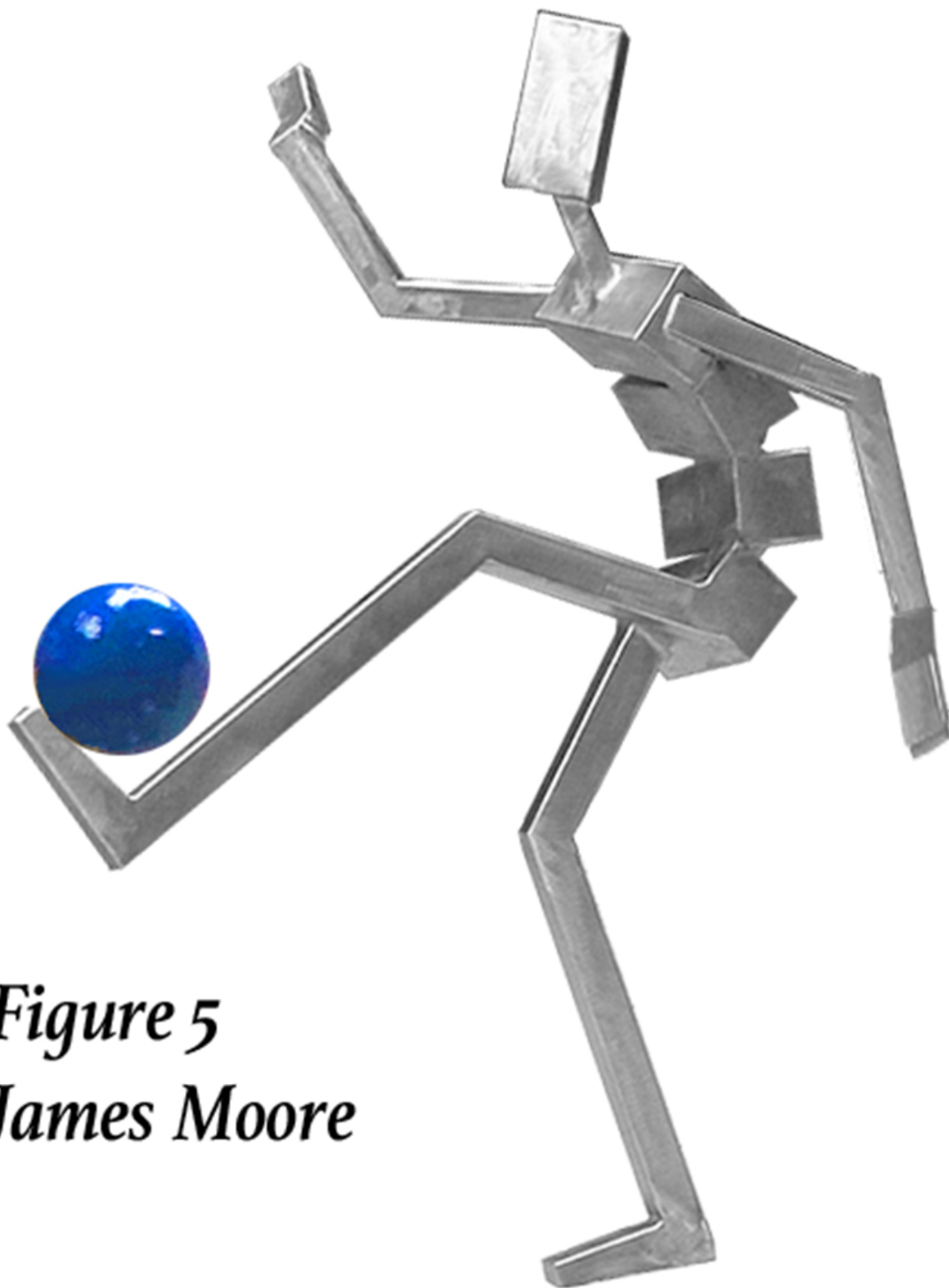


Figure 5
James Moore

EXHIBIT C

INSURANCE REQUIREMENTS FOR ARTIST CONTRACTS

Artist shall procure and maintain for the duration of the contract 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, his agents, representatives, or employees.

Minimum Scope and Limits of Insurance Artist shall maintain limits no less than:

1. **Commercial General Liability**: \$1,000,000 per occurrence and \$2,000,000 aggregate for bodily injury, personal injury and property damage. ISO Occurrence Form CG 0001 or equivalent is required.
2. **Automobile Liability**: \$1,000,000 per accident for bodily injury and property damage. ISO Form CA 0001 or equivalent is required.
3. **Workers' Compensation** Statutory Limits and **Employer's Liability**: \$1,000,000 per accident for bodily injury or disease.

Deductibles and Self-Insured Retentions

Any deductibles or self-insured retentions must be declared and approved by the City of Sunnyvale. The artist shall guarantee payment of any losses and related investigations, claim administration and defense expenses within the deductible or self-insured retention.

Other Insurance Provisions

The **general liability** policy shall contain, or be endorsed to contain, the following provisions:

1. The City of Sunnyvale, its officials, employees, agents and volunteers are to be covered as additional insureds with respects to liability arising out of activities performed by or on behalf of the Artist; products and completed operations of the Artist; premises owned, occupied or used by the Artist; or automobiles owned, leased, hired or borrowed by the Artist. The coverage shall contain no special limitations on the scope of protection afforded to the City of Sunnyvale, its officers, employees, agents or volunteers.
2. For any claims related to this project, the Artist's insurance shall be primary. Any insurance or self-insurance maintained by the City of Sunnyvale, its officers, officials, employees, agents and volunteers shall be excess of the Artist's insurance and shall not contribute with it.
3. Any failure to comply with reporting or other provisions of the policies including breaches of warranties shall not affect coverage provided to the City of Sunnyvale, its officers, officials, employees, agents or volunteers.
4. The Artist's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.
5. Each insurance policy required by this clause shall be endorsed to state that coverage shall not be suspended, voided, cancelled 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 of Sunnyvale.

Acceptability of Insurers

Insurance is to be placed with insurers with a current A.M. Best's rating of not less than A:VII, unless otherwise acceptable to the City of Sunnyvale.

Verification of Coverage

Artist shall furnish the City of Sunnyvale with original a Certificate of Insurance effecting the coverage required. The certificates are to be signed by a person authorized by that insurer to bind coverage on its behalf. All certificates are to be received and approved by the City of Sunnyvale prior to commencement of work.