

**AGREEMENT BETWEEN THE CITY OF MCKINNEY, TEXAS, AND KEN TOKI
FOR THE LOAN AND TEMPORARY DISPLAY OF ARTWORK**

THIS AGREEMENT for the loan and temporary display of certain artwork (“Agreement”) is made by and between the City of McKinney, Texas (“City”), a Texas home-rule city and municipal corporation, and Ken and Frances Toki (“Artist”), hereafter collectively referred to as the “Parties,” or, individually, as a “Party.”

Whereas, Artist is the sole owner and creator of that certain artwork valued and described or depicted more fully in Exhibit A, attached hereto and made a part hereof, known to the Parties as “Bellas Artes” (“Artwork A”); and

Whereas, the City wishes to display the Artwork A at a location to be determined by the City at the John and Judy Gay Library located in Gabe Nesbitt Community Park, 7001 West Eldorado Parkway, McKinney, Texas (“Site”); and

Whereas, the City wishes to remove the artwork described or depicted more fully in Exhibit B, attached hereto and made a part hereof, known to the Parties as “Great Western” (“Artwork B”), from the Site; and

Whereas, Artist wishes to temporarily loan Artwork A to the City for display at the Site; and

Whereas, the City and Artist wish to enter into this Agreement to establish the rights of the Parties relating to Artwork A.

Now, therefore, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

- 1. Recitals.** The recitals set forth above: (a) are true and correct as of the Effective Date, as hereafter defined; (b) form the basis upon which the parties negotiated and entered into this Agreement; and (c) reflect the final intent of the Parties with regard to the subject matter of this Agreement. In the event it becomes necessary to interpret any provision of this Agreement, the intent of the Parties, as evidenced by the recitals, shall be taken into consideration and, to the maximum extent possible, given full effect. The Parties have relied upon the recitals as part of the consideration for entering into this Agreement and, but for the intent of the Parties reflected by the recitals, would not have entered into this Agreement.
- 2. Term of Agreement.** This Agreement shall begin upon the Effective Date and shall terminate upon the transportation of Artwork A from the Site by Artist (“Term”).
- 3. Loan and Temporary Display of Artwork A.** Artist hereby agrees to loan Artwork A to the City for temporary display at the Site for a period of 24 months from the date of the completed installation (“Display Period”), pursuant to the following schedule, unless altered and/or extended by the written agreement of both of the Parties:

- a. Artwork B shall be removed by Artist on or before _____, 2016, and shall be picked up and transported from the Site by Artist on the same day.
- b. Artwork A shall be delivered by Artist to the Site on or before _____, 2016.
- c. Installation of Artwork A shall begin on or before _____, 2016, and shall be completed with Artwork A on display by _____, 2016.
- d. Artwork A shall be removed by Artist on or before _____, 201_, and shall be picked up and transported from the Site by Artist on the same day, unless otherwise agreed to by both of the Parties.

4. Artist's Responsibilities.

- a. Artist, using Artist's own or hired personnel and equipment, is fully responsible for the costs and handling involved in the delivery of Artwork A to, and the pick-up of Artwork A from, the Site.
- b. Artist hereby agrees to the installation and removal dates set forth above and that installation will occur during regular business hours unless specifically agreed to in writing, in advance, by the City. In addition, Artist is responsible for the oversight of the installation and removal of Artwork A. Artist shall be available for presentations, interviews, and ceremonies at the City's request on and around the date of installation and/or removal.
- c. Artist shall provide the following to the City prior to installation:
 - (1) A condition report of Artwork A that includes the condition of Artwork A and other details as may be reasonably warranted;
 - (2) Structural drawings detailing Artwork A and its integration to a display base, if applicable, including recommended instructions for installation and removal;
 - (3) A description of all parts and materials utilized in Artwork A and the recommended care, cleaning, and maintenance instructions. City approval of such recommendations is a condition precedent to the City's responsibility set forth in Section 5.f, below;
 - (4) A statement certifying the market value of Artwork A for insurance purposes.

- d. Artist shall be available for consultation with the City on the maintenance and repair of Artwork A.
- e. Artist shall comply with all city, county, state and federal regulations, laws, and ordinances that in any way bear on its performance under this Agreement.
- f. Artist shall modify Artwork A, if necessary, to effect installation and/or removal by the City, as may be authorized under this Agreement.

5. City's Responsibilities.

- a. The City has determined that the Artwork A will be displayed in the same location from which Artwork B was removed.
- b. The City will prepare the Site for installation in accordance with the structural drawings provided by Artist pursuant to Section 4(c)(2), above.
- c. Under the Artist's supervision, the City or the City's agents will install and remove Artwork A.
- d. The City will be responsible for compliance with all applicable laws and regulations related to its performance under this Agreement and will be responsible for providing or acquiring any permits necessary for the installation and removal of Artwork A.
- e. The City will provide and install an identification plaque next to Artwork A, prepared and designed by the City, containing a credit to the Artist.
- f. The City will maintain Artwork A to the extent possible in accordance with the recommended cleaning, care, and maintenance instructions provided by Artist pursuant to Section 4(c)(3), above. In the event Artwork A is in need of repair or restoration, the City shall notify Artist in writing and Artist shall have the right of first refusal to make or supervise such repairs or restorations. Such right must be exercised by responding to the City within ten (10) days from the date of receipt of such notice indicating that Artist wishes to make or supervise the repairs or restorations. In the event Artist does not respond within the time set forth in this Section, the City may cause such repairs or restorations to be effectuated in its sole discretion, or it may request that Artist remove Artwork A and terminate this Agreement.
- g. The City will not intentionally alter, modify or change Artwork A.

6. Display of Artwork A , Barrier, and Signage.

- a. **Display of Artwork A.** During the Display Period, the City shall make Artwork A available for viewing at the Site by the public. The City shall not charge any admission fee or similar fee as a condition of viewing Artwork A.
 - b. **Barrier and Signage.** The City may install a physical barrier as the City, in its sole discretion, deems appropriate in an attempt to prevent unauthorized persons from touching or damaging Artwork A; provided, however, that the City does not represent, warrant, or guarantee that unauthorized touching or damage of Artwork A will not occur. Additionally, the City may post signage as the City, in its sole discretion, determines to be appropriate, including signage indicating that touching or damaging Artwork A is prohibited.
7. **Risk of Loss.** Artist shall bear all risk of loss or damage to Artwork A, including but not limited to theft, vandalism, or any other act by a third party, and damage caused by acts of god, war, or natural conditions/disasters, including but not limited to floods, hurricanes, tornadoes, lightning, and any loss occurring during the storage, display transportation, delivery, installation, and removal of Artwork A, regardless of where such loss occurs, including all responsibility and risk for any deterioration or weathering caused to Artwork A.

8. Insurance and Liability.

Required Insurance. From the time Artwork A is fully installed at the Site until the sooner that (a) Artist removes Artwork A; (b) Artwork A is sold; or (c) Artwork A becomes the possession of the City, the City will provide property damage insurance for Artwork A in the amount of the market value (provided by Artist in accordance with Section 4(c)(5), above), covering damage, destruction, theft, or other casualty. The City will not be responsible to Artist for any damage, destruction, theft, or other casualty beyond the extent of the insurance coverage. Any additional insurance coverage shall be the Artist's responsibility to obtain at Artist's expense.

9. Indemnification and Notice.

- a. Artist hereby agrees to assume liability for and indemnify, hold harmless, and defend the City, its officials, employees, agents, and attorneys from and against all liability and expense, including reasonable attorneys' fees, in connection with any and all claims, demands, damages, actions, causes of action, and suits in equity of whatever kind or nature, including claims for personal injury, property damage, infringement of any kind, equitable relief, or loss of use, arising out of the execution, performance, nonperformance, or enforcement of this Agreement, whether or not due to or caused by the negligence of the City, its officials, employees, agents, and attorneys, excluding only the sole negligence of the City, its officials, employees,

agents, and attorneys. Artist's liability hereunder shall include all attorney's fees and costs incurred by the City in the enforcement of this indemnification provision. The City shall have the right, at its option, to participate in the defense of any third-party claim, without relieving Artist of any of its obligations hereunder. The obligations contained in this section shall survive termination of this Agreement and shall not be limited by the amount of any insurance required to be obtained or maintained under this Agreement.

- b. Each Party shall immediately notify the other of any written claim regarding any matter resulting from or relating to the Party's obligations under this Agreement. Each Party shall cooperate with the other in the defense or investigation of any such claim arising out of or relating to the performance of this Agreement.
- c. Nothing contained herein shall be construed as a waiver of any immunity from or limitation of liability to which the City may be entitled pursuant to the doctrine of sovereign immunity.

10. Warranties of Title, Quality, and Condition.

- a. Artist represents and warrants that:
 - (1) Artwork A is solely the result of the artistic effort of the Artist;
 - (2) Artwork A is unique and original and does not infringe upon any protected patent, trademark, or copyright;
 - (3) Artwork A is solely owned by Artist and is free and clear of any liens from any source whatsoever;
 - (4) Artist has full authority to agree to all terms of and to enter into this Agreement;
 - (5) Artist and the materials used are not currently known to be harmful to public health and safety;
 - (6) Artwork A will not require care or maintenance in excess of those described in the maintenance recommendations submitted to the City by Artist;
 - (7) All work has been and will be performed in accordance with professional "workmanlike" standards and free from defective or inferior materials and workmanship (including any defects consisting of "inherent vice" or qualities that cause or accelerate deterioration of Artwork A) for the duration of the Display Period;

- (8) Artwork A is made of durable materials and will withstand the usual weather and climate of the Site;
- (9) The routine cleaning, care, and maintenance instructions provided to the City will maintain Artwork A within an acceptable standard for public display and that foreseeable exposure to the elements and general wear and tear will cause Artwork A to experience only minor repairable damage, and will not cause Artwork A to fall below an acceptable standard for public display, and Artwork A will not experience irreparable conditions, including mold, rust, fracturing, staining, chipping, tearing, abrading, and peeling; and
- (10) The representations and warranties contained in this Section shall survive the termination of this Agreement, however terminated.

11. Title and Copyright.

- a. **Title and Copyright.** The City recognizes and agrees that the title to Artwork A shall remain with Artist, its successors or assigns. At no time shall title pass to the City as a result of this Agreement. Artwork A shall remain the sole property of Artist, its successors or assigns, including, but not limited to, copyrights under the Copyright Act of 1976, 17 U.S.C. §§101, et seq., as amended, or any rights provided by the Visual Artists Rights Act of 1990 (“VARA”) (17 U.S.C. §106A, as amended) unless otherwise granted by Artist to any other party. All future decisions regarding the use and continued ownership of Artwork A will be within the sole and unconditional discretion of Artist, its successors or assigns.
- b. **Reproduction Rights.**
 - (1) Artist grants to the City and its assigns an irrevocable license to make two-dimensional reproductions of Artwork A for non-commercial purposes, including, but not limited to, reproduction used in brochures, media publicity, and exhibition catalogues or other similar publications.
 - (2) All reproductions by the City shall contain a credit to the Artist and, if the Artist provides the City with proof of copyright of Artwork A, a copyright notice shall be included in substantially the following form: Copyright © [Artist’s name, date of publication].
 - (3) If the City wishes to make a reproduction of Artwork A for commercial purposes, the Parties shall execute a separate agreement to address the terms of the license granted by the Artist and the royalty Artist shall receive.
 - (4) The City is not responsible for any third-party infringement of Artist’s

copyright or ownership and is not responsible for protecting the intellectual property rights of Artist.

12. Default and Termination.

- a. **Force Majeure.** Either Party may terminate this Agreement upon written notice where performance is rendered impossible as a result of a Force Majeure. For purposes of this Agreement, “Force Majeure” shall be defined as a fire, flood, act of God, war, terrorism, riot, national emergency, sabotage, civil disturbance, strike, labor dispute, governmental act, law, ordinance, rule or regulation, or events which are not the fault or are beyond the control of the party.
- b. **Without Cause.** The City may terminate this Agreement without cause upon thirty (30) days’ written notice to Artist and Artist shall remove Artwork A immediately upon receipt of such notice from the City.
- c. **Threat to Public Safety.** The City may terminate this Agreement immediately upon written notice to Artist if the City determines, in its sole discretion that Artwork A, or any condition or aspect related thereto, poses a threat to the best interest of the health, safety, and welfare of the citizens of the City. In the event this Agreement is terminated pursuant to this section, Artist shall immediately remove and transport Artwork A from the Site.
- d. **For Cause.** If either Party willfully or negligently fails to perform its obligations under this Agreement, or otherwise violates any of the covenants, terms, agreements or stipulations of Agreement, the other Party shall thereupon have the right to terminate this Agreement by giving written notice to the defaulting party of its intent to terminate, specifying the grounds for termination. The defaulting party shall have thirty (30) days from the date of the notice to cure the default. If it is not cured by that time, this Agreement shall terminate.

13. Miscellaneous.

- a. **Agreement; Amendment; Severability.** This Agreement constitutes the entire agreement between the Parties and supersedes all prior agreements, whether oral or written, covering the subject matter of this Agreement. This Agreement shall not be modified or amended except in writing signed by the Parties. If any provision of this Agreement is determined by a court of competent jurisdiction to be unenforceable for any reason, such unenforceable provision shall be deleted from this Agreement, and the remainder of this Agreement shall remain in full force and effect and shall be interpreted to give effect to the intent of the Parties.
- b. **Agreement; Public Art Administrative Guidelines.** This Agreement is subject to the City of McKinney Public Art Administrative Guidelines (“Guidelines”), a copy of which is attached as Exhibit C. In any instance

where a conflict exists between the terms of this Agreement and the terms of the Guidelines, the Guidelines shall control.

- c. **Survival of Agreement Provisions.** The benefits of the representations, warranties, and covenants contained in this Agreement shall survive completion of the transaction contemplated by this Agreement.
- d. **Review of Agreement.** The Parties understand, agree, and represent to each other that they have had the opportunity to retain independent legal counsel to review the terms and conditions of this Agreement before its execution, irrespective of whether they in fact have retained or consulted with such legal counsel.
- e. **Waiver.** The failure of the City or Artist to exercise any right given hereunder or to insist upon strict compliance with any term, condition or agreement specified herein, shall not constitute a waiver of either Party's right to exercise such right or to demand strict compliance with any such term, condition or agreement under this Agreement.
- f. **Applicable Law; Venue; Dispute Resolution.** This Agreement shall be governed by and construed in accordance with the laws of the State of Texas, and shall be binding upon and inure to the benefit of the Parties and their respective heirs, legal representatives, successors, and assigns. Venue shall be exclusive in Collin County, Texas. The Parties agree that in the event any dispute should arise between them concerning this Agreement, they will make a good faith, concerted effort to resolve the dispute in an amicable manner without the necessity of litigation, and that they shall first engage in mediation before suit may be brought.
- g. **Counterparts.** This Agreement may be executed in any number of counterparts, each of which will be deemed to be an original, but all of which together will constitute one instrument.
- h. **Headings.** The headings contained in this Agreement are provided for convenience only and shall not be construed to constrict or expand the obligations and/or covenants set forth therein.
- i. **Attorneys' Fees.** In the event either Party incurs attorneys' fees in the enforcement of this Agreement, the prevailing party shall be entitled to recovery of all reasonable and necessary costs and attorneys' fees and other related expenses, including fees and costs incurred in any appeals.
- j. **Notices.** Any notices regarding this Agreement given by either Party to the other must be in writing and shall be deemed to have been given, delivered or made, as the case may be upon mailing via U.S. mail in a properly sealed and postage prepaid envelope addressed to the following:

If to the CITY:

City of McKinney, Texas
Attn: City Manager
222 N. Tennessee Street
McKinney, Texas 75069

If to ARTIST:

Ken and Frances Toki
6841 Virginia Pkwy #103-117
McKinney, TX 75071

Either Party may change its above address by giving the other Party written notice of any changes in the manner provided herein, but notice of change of address is effective only upon actual receipt.

- k. **Authorization.** Both Parties represent and warrant that they are authorized to enter into this Agreement and that the individuals executing this Agreement have full power and authority to bind their respective Parties to the terms hereof.
- l. **Construction of Agreement.** This Agreement is a result of mutual drafting and review and shall not be construed more strictly against either Party.

Agreed to and executed this 5th day of April, 2016 (“Effective Date”).

CITY OF MCKINNEY, TEXAS

By: _____
TOM MUEHLENBECK
INTERIM CITY MANAGER

Attest:

SANDY HART, TRMC, MMC
City Secretary
DENISE VICE, TRMC
Assistant City Secretary

DATE: _____
City Clerk

ARTIST:

By: _____
KEN TOKI

By: _____
FRANCES TOKI

Witness:

By: _____
Printed Name: _____

ARTWORK A



ARTWORK B

