

## PUBLIC ARTWORK LOAN AGREEMENT

**THIS AGREEMENT** is made and entered into on \_\_\_\_\_ between the City of Orinda (“City”), a municipal corporation, and \_\_\_\_\_ (“Donor”).

### RECITALS

**WHEREAS**, pursuant to Resolution 41-07, the City Council established an Art in Public Places Policy for the City;

**WHEREAS**, the policy authorizes the City to acquire artwork for public display through leases, loans, and donations of artwork;

**WHEREAS**, on \_\_\_\_\_, the City Council adopted Resolution No. \_\_\_\_\_, which authorized acquisition by loan of the artwork described in this Agreement;

**NOW, THEREFORE**, City and Donor agree as follows:

#### 1. Purpose of Agreement

Donor agrees to loan the artwork entitled \_\_\_\_\_ (“Artwork”) to the City for the period of time specified in Section 2 of this Agreement. The Public Art Application prepared by Donor, which describes the Artwork and includes a photograph of the Artwork, is attached and incorporated into this Agreement as Exhibit A.

In consideration of Donor=s loan of the Artwork to City, City agrees to publicly display the Artwork at \_\_\_\_\_, to credit Donor for the loan on a sign posted with the Artwork, and to insure the Artwork against loss or damage as specified in Section 7 of this Agreement. This Agreement is intended to implement and shall be interpreted in accordance with the terms of the City of Orinda Art in Public Places Policy, which is attached and incorporated into this Agreement as Exhibit B.

#### 2. Effective Date and Term of Agreement

This Agreement shall be effective on the date that it has been signed and executed by both parties. It shall remain in effect until \_\_\_\_\_, unless it is terminated earlier pursuant to Section 10 of this Agreement. At the end of the term, the City shall remove the Artwork and return it to the Donor, as provided in Section 11 of this Agreement.

### 3. **Payments**

- a. Donor shall loan the artwork to City for the limited term of this Agreement specified in Section 2 without the payment of compensation by the City.
- b. Donor agrees to pay any and all costs incurred by the City in connection with the installation and removal of the Artwork, as provided in Section 11 of this Agreement.

### 4. **Donor=s Warranties**

- a. Donor represents and warrants that Donor is the sole owner of the Artwork. Donor further represents and warrants 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 parts of the Artwork.
- b. Donor represents and warrants that \_\_\_\_\_ (“Artist”) is the creator of the Artwork.
- c. Donor represents and warrants that the Artwork will not pose a danger to public property, health or safety 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.
- d. Donor represents and warrants that foreseeable exposure to the elements and general wear and tear will cause the Artwork to experience only minor, repairable damage and will not cause the Artwork to fall below an acceptable standard of public display;
- e. Donor represents and warrants that general routine maintenance and repair of this Artwork will maintain the Artwork within an acceptable standard of public display.
- f. Donor represents and warrants that the installation and removal of the Artwork will not unacceptably damage or alter the Artwork.
- g. Donor represents and warrants that the value of the Artwork is \$\_\_\_\_\_, which is less than the \$50,000 maximum value established by the City of Orinda Art in Public Places Policy.

### 5. **Intellectual Property and Publicity Rights**

- a. City=s Intellectual Property License. Donor grants to City, and to City=s agents, authorized contractors and assigns, an unlimited, non-exclusive and irrevocable license to do the following with respect to the Artwork:

(1) Use and Display. City may use and display the Artwork for the term provided in

Section 2.

(2) Reproduction and Distribution. City may make and distribute, and authorize the making, display and distribution of, photographs and other 2-dimensional reproductions of the Artwork. City may use such reproductions for any City-related purpose, including advertising, educational and promotional materials, brochures, books, flyers, postcards, print, broadcast, film, electronic and multimedia publicity, documentation of City=s Art in Public Places Policy, and catalogues or similar publications. City shall ensure that such reproductions are made in a professional and tasteful manner, in the sole and reasonable judgment of the City.

b. Third Party Infringement. The City is not responsible for any third party infringement of any copyright to the Artwork held by Donor or Artist and is not responsible for protecting the intellectual property rights of Donor or Artist.

c. Credit. On each City reproduction of the Artwork, the Donor shall be acknowledged, using designations provided by the Donor, to be the donor of the Artwork.

d. Trademark. In the event that City=s use of the Artwork creates trademark, service mark or trade dress rights in connection with the Artwork, City shall have an exclusive and irrevocable right in such trademark, service mark, or trade dress.

**6. License to Reproduce Artwork and Limited Waiver**

Prior to and as a condition precedent to executing this Agreement, Artist and City have agreed that Artist has granted the City a license to display and reproduce the Artwork and that Artist has waived Artist=s rights to the Artwork under the California Art Preservation Act (California Civil Code §§ 987, 989), under the Visual Artists Rights Act (17 U.S.C. §§ 106A, 113(d)), and under similar laws. A copy of that agreement is attached and incorporated as Exhibit C.

**7. Liability for Damage to Artwork and Risk of Loss**

a. City shall insure the Artwork against damage and loss through the Municipal Pooling Authority (“MPA”). If the Artwork is lost or damaged while on public display, City=s liability (including the liability of MPA) shall in no event exceed the value of the Artwork stated in Section 4 of this Agreement.

b. The risk of loss or damage to the Artwork shall be borne solely by Donor until the City takes possession and accepts the Artwork. Once the artwork has been removed from public display pursuant to Section 11 of this Agreement, the risk of loss or damage to the Artwork shall be borne solely by Donor.

## 8. **Repair and Maintenance**

- a. Donor shall be responsible for all reasonably necessary maintenance and repairs of the Artwork during the term of this Agreement. "Maintenance" includes, but is not limited to, routine cleaning of the Artwork as necessary to maintain the Artwork in a condition appropriate for public display and any and all actions taken to preserve, restore, or conserve the Artwork.
- b. Prior to conducting any maintenance or repairs on the Artwork, Donor shall obtain the approval of the City. Donor shall request approval of the City in writing, at the address provided in Section 19 of this Agreement. The Donor=s request shall identify the method(s) of maintenance or repair proposed, the person(s) who will perform the repair or maintenance, and the time period in which the repair or maintenance will be performed. If the City approves the request, it may impose conditions on that approval as necessary to protect public property, health and safety.
- c. Maintenance and repairs must be performed in a manner that does not damage public property. Donor is liable to the City for any damage to public property caused by maintenance or repair activities.
- d. City shall not be liable to Donor for any damage to Artwork caused by maintenance or repairs undertaken by Donor or by the failure to undertake any such maintenance or repairs.

## 9. **Indemnification**

Donor shall indemnify, protect, defend and hold harmless the City and its subdivisions, officials, employees and agents (each a "Covered Person") from and against all liabilities, obligations, losses, damages, judgments, costs or expenses (including legal fees and costs of investigation) (collectively "Losses") arising from, in connection with or caused by: (a) any personal injury or property damage caused, directly or indirectly, by any act or omission of Donor and/or Donor=s agents, employees, or assigns; (b) any infringement of patent, copyright, trademark, trade secret or other proprietary right; or (c) any infringement of Artist=s rights under 16 U.S.C. § 106A, 16 U.S.C. § 113, Civil Code §§ 987 *et seq*, or similar state, federal, or international law. Notwithstanding the foregoing, Donor shall have no obligation under this Section with respect to any Loss that is caused solely by the active negligence or willful misconduct of the City and is not contributed to by any act or omission (including any failure to perform any duty imposed by law) by Donor. Donor acknowledges and agrees that its obligation to defend in this Section: (i) is an immediate obligation, independent of its other obligations hereunder; (ii) applies to any Loss which actually or potentially falls within the scope of this Section, regardless of whether the applicable allegations are or may be groundless, false or fraudulent; and (iii) arises at and continues after the time the Loss is tendered to Donor.

**10. Termination of Agreement**

- a. City=s Right to Terminate Agreement Before Expiration of the Term. Prior to the expiration of the term of this Agreement set forth in Section 2, the City may decide to remove the Artwork from public display and terminate this Agreement in accordance with the procedures established in Section 8 of the City=s Art in Public Places Policy. Prior to the meeting of the Art in Public Places Committee where the removal of the Artwork is being considered, the City shall provide written notice of the intent to remove the Artwork and terminate the Agreement to the Donor at the address listed in Section 19 of this Agreement.
- b. Donor=s Right to Terminate Agreement Before Expiration of the Term. Prior to the expiration of the term of this Agreement set forth in Section 2, the Donor may provide written notice of Donor=s intent to terminate this Agreement to the City, at the address listed in Section 19 of this Agreement. Upon receipt of Donor=s notice of termination, the City shall follow the procedures specified in Section 8 of the City=s Art in Public Places Policy, attached and incorporated hereto as Exhibit B.

**11. Installation and Removal of Artwork**

- a. The City shall install or arrange for installation of the Artwork for public display. Donor shall pay the costs incurred by the City in installing the Artwork. Donor shall pay such costs within thirty (30) days of receiving a written invoice from the City. In order to facilitate this Agreement, the Orinda Arts Council has committed to provide funding to the City, on behalf of Donor, for all installation costs. This commitment of the Orinda Arts Council is memorialized in an agreement with the City dated \_\_\_\_\_ and titled \_\_\_\_\_ (“OAC-City Agreement”).
- b. At the end of the term of this Agreement specified in Section 2, or if earlier terminated in accordance with Section 10, City shall remove or arrange for removal of the artwork from its public installation. Donor shall pay the costs incurred by the City in removing the Artwork. Donor shall pay such costs within thirty (30) days of receiving a written invoice from the City. In order to facilitate this Agreement, the Orinda Arts Council has committed to provide funding to the City, on behalf of Donor, for all removal costs. This commitment is memorialized in the OAC-City Agreement.

**12. Choice of Law & Venue**

This Agreement shall be governed by the laws of California. The venue for all litigation or other disputes relative to this Agreement shall be the Superior Court for the County of Contra Costa.

**13. Captions**

Section headings are for reference only and shall not be used to interpret this Agreement.

**14. Severability**

If any provision hereof is found to be invalid or unenforceable, such finding shall not affect the validity of any other provision hereof; and such provision shall be enforced to the maximum extent possible so as to effect the intent of the parties.

**15. No Waiver**

Any failure to enforce any right or to require performance of any provision of this Agreement shall not be considered a waiver of such right or performance.

**16. Entire Agreement**

This Agreement, including the attached and incorporated Exhibit A (Donor=s Public Art Application), Exhibit B (Orinda City=s Art in Public Places Policy), and Exhibit C (Artist's Grant of License to Reproduce Artwork and Limited Waiver of Artist's Rights Under the Visual Artists Rights Act and the California Art Preservation Act), contains the entire agreement between the parties, and supersedes all other oral or written provisions.

**17. Provisions that Survive Termination of this Agreement**

Sections 4, 5, 6, 7, 9, 11 and 12 shall survive the termination of this Agreement or the expiration of the term of this Agreement.

**18. Modifications and Amendments**

No amendment or modification to this Agreement shall be effective unless it is in writing and signed by authorized representatives of each of the parties hereto.

**19. Notices**

a. Unless otherwise indicated in this Agreement, all written communications sent by the parties may be made by U.S. Mail, e-mail, or fax, and shall be addressed as follows:

City of Orinda	Donor
Director of Parks and Recreation	Name
P.O. Box 2000	Address
Orinda, CA 94563	City, State Zip
Fax: (925) 254-2445	

b. Donor shall provide written notice to City of any change in address, or change in ownership of the Artwork, within thirty (30) days of such change.

**20. Binding Effect**

a. The provisions, covenants, and conditions in this Agreement shall inure to and bind the parties, their legal heirs, representatives, successors, and assigns.

b. If Donor transfers ownership of the Artwork during the term of this Agreement, all rights and obligations of Donor under this Agreement shall be transferred to the successor owner of the Artwork, and said successor owner shall be bound by this Agreement.

**21. Enforcement**

a. If Donor fails to pay the City's cost of installing or removing the Artwork, City may file litigation or take any other action authorized by law to recover the unpaid costs.

b. In the event of litigation between the parties arising out of this Agreement, the prevailing party shall recover its costs of litigation, including attorney's fees.

**IN WITNESS WHEREOF**, the parties hereto have executed this Agreement by having their signatures affixed below.

**City of Orinda**

Janet Keeter  
City Manager

*Attest:*

Michele Olsen  
City Clerk

*Approved as to form:*

Osa L. Wolff  
City Attorney

**Donor**

\_\_\_\_\_  
Donor Signature

\_\_\_\_\_  
Printed Name

\_\_\_\_\_  
Date