

CONTRACT ROUTING FORM

****NOTE: CITY ATTORNEY MUST REVIEW CONTRACTS BEFORE SUBMISSION TO CITY COUNCIL**

SUBMITTED BY: CHRIS FROST DATE: 5-28-19
SERVICE AREA/UNIT: CITY ATTORNEY'S OFFICE
CONTRACTOR: VICTORIA FULLER
PURPOSE: CANOE FAN ART PURCHASE

CONTRACT TYPE:

- SERVICES
- MATERIALS/CONSTRUCTION
- CHANGE ORDER/AMENDMENT
- CHANGE AMOUNT: \$ _____

OTHER: _____
CONTRACT AMOUNT: \$ 35,000.00

DATE CONTRACT EXPIRES: _____

RESOLUTION REQUIRED: YES NUMBER: R-19-237

NO PROJECT MEMO ATTACHED

SIGNATURES: **PLEASE MARK PAGES**
(IN ORDER)

	REQUIRED	SIGNED	DATE SIGNED
CONTRACTOR	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<u>5-28-19</u>
SERVICE AREA	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<u>5-29-19</u>
CITY ATTORNEY	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<u>5-30-19</u>
CITY ADMINISTRATOR	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<u>5.31.19</u>
MAYOR	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<u>6.4.19</u>
CITY CLERK	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<u>6/5/19</u>

RETURN CONTRACT TO: MICHELE YANGA PHONE: 41879



Legislation Details (With Text)

File #: 19-0709 **Version:** 2 **Name:** 5/20/19 - Resolution to Purchase Canoe Fan Art
Type: Resolution **Status:** Passed
File created: 5/20/2019 **In control:** City Council
On agenda: 5/20/2019 **Final action:** 5/20/2019
Enactment date: 5/20/2019 **Enactment #:** R-19-237

Title: Resolution to Authorize Purchase of Canoe Fan Artwork and Appropriate \$35,000 from General Fund Unobligated Fund Balance (8 Votes Required)

Sponsors: Jane Lumm, Ali Ramlawi, Jack Eaton, Julie Grand, Christopher Taylor

Indexes:

Code sections:

Attachments: 1. Standard purchase agreement for artwork.pdf, 2. AAPAC Resolution.pdf

Date	Ver.	Action By	Action	Result
5/20/2019	1	City Council		
5/20/2019	2	City Council		
5/20/2019	2	City Council		

Resolution to Authorize Purchase of Canoe Fan Artwork and Appropriate \$35,000 from General Fund Unobligated Fund Balance (8 Votes Required)

The City currently has a loan agreement with the artist Victoria Fuller for her piece "Canoe Fan" which is installed at Gallup Park. Canoe Fan was installed as part of the City's Canoe Imagine Art program in 2015 (<https://www.a2gov.org/departments/Parks-Recreation/play/Pages/canoeimagineart.aspx>). Ms. Fuller's piece was the only one loaned to the City - the other pieces in the program are the property of the City. The loan agreement was initially a two-year agreement that was extended for an additional two years. Ms. Fuller has been seeking a purchaser for the piece throughout the loan period, but has not found one.

The loan period ends May 30, 2019, after which Ms. Fuller will be required to remove the piece. Ms. Fuller initially offered to sell the piece to the City for \$45,000, which she indicates was her cost to produce it. The Ann Arbor Public Art Commission (AAPAC) reviewed the request and recommended not purchasing the piece. On May 6, 2019, Council passed resolution R-19-215, directing the City Administrator to enter negotiations to potentially purchase the artwork and to prepare a proposal for Council consideration, including a recommended funding source. Following these negotiations, Ms. Fuller has offered to sell the piece for the reduced price of \$40,000.

Ms. Fuller has also offered a lease to own option, with \$20,000 paid now and the remainder paid at \$416.50 a month over a 4-year period. Staff does not recommend the installment option, given the amount of funds in question, the administrative overhead of negotiating and drafting an installment agreement and issuing payments and related tax documents, etc. over 4 years, and the preference to have full control of the artwork immediately.

Staff does not object to the City acquiring the artwork. However, there is concern that no money is

budgeted for maintenance. To date, no maintenance has been required, but the artwork is exposed to weather year-round and eventually it may require upkeep. Staff recommends that if the artwork is acquired, that the artist be required to sign the City's standard contract for purchasing artworks, which provides that the City acquires the right to maintain, repair, move, or dispose of the artwork as the City sees fit.

Prepared by: Christopher Frost, Senior Assistant City Attorney

Reviewed by: Derek Delacourt, Community Services Area Administrator

Approved by: Howard S. Lazarus, City Administrator

Whereas, The City has a loan agreement with the artist Victoria Fuller for her artwork "Canoe Fan" which is installed at Gallup Park;

Whereas, The loan period ends May 30, 2019, after which the artist will be required to remove the artwork;

Whereas, The artist initially offered to sell the artwork to the City for \$45,000;

Whereas, On May 6, 2019 City Council passed a resolution (R-19-215) directing the City Administrator to enter negotiations to potentially purchase the artwork and to prepare a proposal for Council consideration, including a recommended funding source;

Whereas, The artist has offered to sell the piece to the City at the reduced price of \$35,000, but is requesting a right-of-first refusal if the City decided to remove or destroy the artwork; and

Whereas, The City's normal practice and standard purchase agreement for artwork retains the City's right to dispose of the artwork as it sees fit, but not alter the artwork without the artist's permission;

RESOLVED, That City Council authorizes the purchase of Canoe Fan artwork from Victoria Fuller for \$35,000;

RESOLVED, That City Council hereby appropriates \$35,000.00 from the General Fund unobligated fund balance to increase the Parks General Fund expenditure budget for the purchase;

RESOLVED, That the funding be available without regard to fiscal year;

RESOLVED, That the purchase is conditioned upon the artist signing the City's standard purchase agreement for artwork; and

RESOLVED, That the Mayor and City Clerk are authorized and directed to sign the purchase agreement after approval as to form by the City Attorney and as to content by the City Administrator.

Sponsored by: Councilmembers Lumm, Ramlawi, Eaton, Grand and Mayor Taylor

As Amended and Approved by Ann Arbor City Council on May 20, 2019

PURCHASE AGREEMENT FOR PUBLIC ART

CANOE FAN

This purchase agreement is between the City of Ann Arbor ("**City**"), a Michigan municipal corporation with its address at 301 E. Huron St., Ann Arbor, MI 48104, and Victoria Fuller ("**Artist**"), an individual whose address is 1949 W. Wabansia Ave., Chicago, IL 60622.

This agreement specifies the terms under which the City will purchase the "Canoe Fan" artwork produced by Artist.

The City and Artist therefore agree as follows:

1. **Effective Date**

This agreement shall become effective when all parties have signed.

2. **Definitions**

"Artwork" means the "Canoe Fan" artwork depicted in Exhibit A including any material derived from or based on the artwork that is created under this agreement.

3. **Ownership and Use of Artwork; Intellectual Property Rights**

- A. Waiver of "Droit Moral" and Rights Under Visual Artists Rights Act: As to Artist's rights in the Artwork, the provisions of this agreement shall supersede the provisions of the Visual Artists Rights Act of 1990, 17 U.S.C. § 101 et. seq., as amended ("VARA"). Artist waives all rights in or protections applied to the Artwork and any uses of the Artwork set forth in VARA or in the nature of "Droit Moral."
- B. Maintenance, Repairs, or Restorations: The City shall have the right to determine, in its sole discretion, when and if maintenance, repair, or restoration of the Artwork will be made. Maintenance, repair, or restoration (or lack of maintenance, repair, or restoration) shall not be considered alterations of the Artwork by the City. In order to effectuate maintenance, repair, or restoration, Artist shall provide the City with a detailed list of materials and methods used to create the Artwork upon the City's request.
- C. Damage or Alteration: Subject to paragraph D below of this section 3, the City shall not intentionally alter the Artwork without the prior written consent of Artist. Artist acknowledges, for the benefit of the City, that the artwork may be installed into a building, structure, landscape, or other City facility and that such installation may subject the artwork to destruction, damage, distortion, mutilation, or alteration by reason of its removal. Artist acknowledges that the artwork may be placed outdoors, in a public location, or be unsecured. Artist acknowledges the possibility of and waives all claims against the City arising from the destruction, damage, distortion, mutilation, or alteration of the artwork by third parties or force majeure, including by weather, graffiti, or vandalism.

- D. Safety; Removal, Relocation, Sale, Donation or Destruction: If the Artwork or any portion of the Artwork becomes or is determined by the City to be a safety hazard, the City may immediately take all appropriate measures to make it safe. If those measures have resulted in an alteration of the Artwork, the City shall attempt to contact Artist and receive Artist's written consent to the measures that were taken. If Artist states that they do not consent and the City and Artist cannot agree on subsequent measures or alterations that satisfy the City as to safety concerns, the City shall remove, scrap or destroy the Artwork in the City's discretion. Nothing in this agreement shall preclude the right of the City, in its sole discretion, to remove, relocate, sell, donate, scrap, or destroy the Artwork or any discrete piece thereof.
- E. Default Consent: For any provision of this agreement requiring consent or a response by Artist, if the City does not receive consent or a response from Artist within 30 days of receipt of the City's request, Artist shall be deemed to have consented to the City's request and waived the right to respond.
- F. Transfer of Waiver and Other Rights with Artwork: Upon the transfer by the City to a third party of title to the Artwork or portion of the Artwork, all Artist's waivers and grants of rights to the City under this agreement shall apply to the transferee.
- G. Intellectual Property Rights: All intellectual property rights in the Artwork shall vest in and at all times remain vested in the originator of the material produced. Artist shall identify and clearly mark all portions of the Artwork that constitute intellectual property, the rights to which are vested in or retained by any other originator, and shall identify that other originator. The City may require that any intellectual property that is not wholly owned or controlled by Artist and that is used in the Artwork delivered under this agreement be subject to substantially similar terms as if it were to be transferred to the City under this agreement, including waiver of VARA rights.
- H. Copyright Identification: When displaying or reproducing any image of the Artwork that is subject to Artist's or another party's copyright (as identified and marked in accordance with this agreement), the parties shall acknowledge such copyright with "©," as appropriate, in immediate adjacency to the image.
- I. No Liability: The City shall not be liable and Artist shall not seek to hold the City liable for the further interpretation, design, or implementation by others of ideas, concepts, or intellectual copyright materials derived from the Artwork. Artist waives all claims against the City for royalties, compensation, or damages that arise from the City's use of the Artwork or the City's authorization of third-party use of the Artwork.
- J. Ownership of Materials: The City shall own the physical embodiment of the Artwork, including designs, schematics, templates, images, or computer files from which the Artwork may be reproduced. The City shall be permitted to create, display, or distribute photographs, scans, or other representations of the Artwork in any media, including brochures, books, flyers, postcards, posters, broadcasts, films, and electronic files. If the Artwork is a plan, design, or template, the City may reproduce the Artwork in any location, in any format, in whole or in part, for any City purpose.
- K. Survival: The provisions of this section 3 shall survive the expiration or termination of this agreement.

4. Delivery and Transfer of Title

The parties acknowledge that the Artwork is already in the City's possession and that transfer of title to the Artwork shall be upon the effective date of this agreement.

5. Compensation

The City shall pay Artist \$35,000.00, which shall be the total compensation for the Artwork. Compensation shall be due upon Artist's provision of a completed form W-9 to the City, unless another schedule is specified in Exhibit A.

6. Warranties

A. Artist warrants that:

- 1) Artist has the authority to grant the uses of the Artwork permitted under this agreement.
- 2) The Artwork does not infringe or violate any copyright, trade secret, trademark, patent, or other proprietary or personal right held by any third party.
- 3) The Artwork is free of defects in workmanship, materials, and design.
- 4) The Artwork is safe and fit for its intended purpose and operates as intended.
- 5) The City will receive ownership of the Artwork free of liens, security interests, or other encumbrances.
- 6) The Artwork has been created by Artist in accordance with applicable laws.

B. These warranties are in addition to all other express, implied, or statutory warranties. These warranties will survive inspection, test, delivery, acceptance, use, and payment by the City. If any warranty is nonconforming, the City may, at its sole option:

- 1) Retain the Artwork, in whole or in part, with a refund of the value of the nonconforming portion.
- 2) Require Artist to correct or replace the nonconforming portion at Artist's expense (including delivery and installation costs).
- 3) Correct or replace the nonconforming portion and recover the costs from Artist.
- 4) To the extent that any portion of the Artwork is in any action held to constitute an infringement of any third party's rights and its use is enjoined, require Artist, at Artist's expense, to do one of the following: (a) procure for the City the right to continue its use of the Artwork, (b) provide a revised or new Artwork that does not infringe, the acceptance of which shall be entirely at the City's discretion, or (c) repay the purchase price to the City.
- 5) Exercise any other statutory rights.

- C. The provisions of this section 6 shall survive the expiration or termination of this agreement.

7. Risk Of Loss; Insurance; Indemnification

- A. Protective Measures: Artist shall take such measures as are reasonably necessary to protect the Artwork from loss or damage until Artist has delivered it to the City and the City has accepted it.
- B. Insurance: Artist is responsible for procuring and maintaining at Artist's own expense whatever insurance is required during this agreement to protect Artist from claims for bodily injuries, death, or property damage which may arise under this agreement and to cover bodily injuries, death, property damage, or other losses that Artist may suffer while performing this agreement, including damage to or loss of the Artwork while in Artist's possession or control.
- C. Indemnification: To the fullest extent permitted by law, Artist shall indemnify, defend, and hold the City, its officers, employees, and agents harmless from all suits, claims, judgments, and expenses, including attorney's fees, resulting or alleged to result, to its proportionate extent, from any negligent, grossly negligent, reckless, or intentional, wrongful, or tortious act or omission by Artist or Artist's agents arising from the performance of this agreement.

8. Notices; Contacts

All notices shall be in writing. Notices and communications shall be deemed to have been received upon the earlier of (1) actual receipt or (2) the third day after being mailed to the following addresses or to such other address noticed hereafter by either party:

City: City of Ann Arbor
Community Services Area Administrator
301 E. Huron St.
Ann Arbor, MI 48104

With a copy to:

City of Ann Arbor
ATTN: Office of the City Attorney
301 East Huron Street
Ann Arbor, Michigan 48104

Artist: Victoria Fuller
1949 W. Wabansia Ave.
Chicago, IL 60622
vfullerart@comcast.net
773-680-4937

Artist's failure to keep the City informed of Artist's current address shall be deemed a waiver of the City's notice and delivery requirements provided for under this agreement.

9. Miscellaneous

- A. Entire Agreement: This agreement represents the entire understanding between the City and Artist and supersedes all prior representations or agreements, including the Loan Agreement with a last signature date of 5/17/17. Neither party has relied on any prior representations in entering into this agreement. This agreement may be altered, amended or modified only by written amendment signed by Artist and the City.
- B. Severability: Whenever possible, each provision of this agreement will be interpreted in a manner as to be effective and valid under applicable law. However, if any provision of this agreement or the application of any provision to any party or circumstance will be prohibited by or invalid under applicable law, that provision will be ineffective to the extent of the prohibition or invalidity without invalidating the remainder of the provisions of this agreement or the application of the provision to other parties or other circumstances.
- C. Independent Contractor: Artist is an independent contractor. Each party to this agreement is solely responsible for the acts of its own employees and agents. No liability, right, or benefit arising out of any employer/employee relationship shall arise out of this agreement. Artist does not have any authority to execute any agreement on behalf of the City or to assume or create any obligation or liability on the City's behalf.
- D. Governing Law: This agreement shall be governed and interpreted under the laws of the State of Michigan. The parties agree to venue in a court of appropriate jurisdiction in Washtenaw County for any action arising under this agreement.
- E. Authority: The undersigned state that they have the authority to execute this agreement on behalf of the party for which they sign.

(Signatures on the following page)


ARTIST



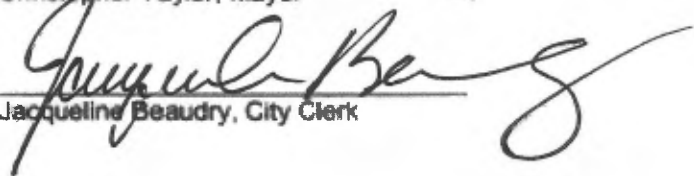
Victoria Fuller

Date: 5/28/19

CITY OF ANN ARBOR

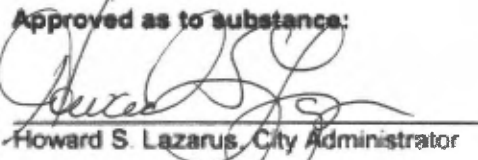


Christopher Taylor, Mayor



Jacqueline Beaudry, City Clerk

Approved as to substance:



Howard S. Lazarus, City Administrator

Date: 5/31/19



Derek Delacourt, Community Services Area Administrator

Approved as to form:



Stephen K. Postema, City Attorney

EXHIBIT A

Canoe Fan

