



Board of Park Commissioners Project Summary

Parks Comprehensive Plan Consultant Contract

Scope of Project:

On Monday, November 7, 2022, four proposals were received in response to an advertised Request for Proposals for professional services related to preparation of a Parks Comprehensive Plan.

A selection committee of six Park staff members and two Park Commissioners was formed and reviewed all proposals, scoring each by the evaluation criteria established on the Request for Proposals.

The Design Workshop consultant team scored the highest with 237 out 279 possible points. (see attached Score Tabulation)

Funding Source: Parks General Fund (121)

Estimated Completion: March 2024

Park staff respectfully recommends and requests that the Fort Wayne Board of Park Commissioners agree to this contract in the amount of **\$234,874.00.**

We, the Board of Park Commissioners, on the date stated do ATTEST, sign to the above-referenced and attached documents, and approve as presented.

William Zielke, President

Justin Shurley, Vice President

Cory Miller, Commissioner

Richard Briley, Commissioner

Steve McDaniel, Director/Board Secretary

Score Tabulation

Parks Comprehensive Plan
Quest # 8317838

November 7, 2022

CONSULTANT:	Design Workshop	Perez Planning	MKSK	Berry Dunn	
SCORE:	237	201	165	153	
PERCENTAGE OF HIGHEST POSSIBLE SCORE	85%	72%	59%	56%	

Board of Park Commissioners Project Summary



Lakeside and Shoaff Parks Sculpture Project

Scope of Project:

The Northeast Area Partnership received a \$50,000 Investing in Neighborhoods Now grant. They chose to invest that grant in two sculptures to be located at **Lakeside** and **Shoaff Parks**. In partnership with the Public Art Commission, the Fort Wayne Parks and Recreation Department invited 5 sculptors to submit proposals for a sculpture in Lakeside Park and a sculpture in Shoaff Park. The budget for both sculptures totals \$40,000, with \$10,000 being held back by the Public Art Commission for future maintenance of the sculptures.

The Board of Park Commissioners approved the placement and acceptance of the sculptures in October.

Attached please find the contract with the artist that the staff is submitting for Board approval.

Funding Source: INN Fund Grant (to be transferred into Parks Trust)

Estimated Completion: June 2023

Board Approval: (December 8, 2022)

Park staff respectfully recommends and requests that the Fort Wayne Board of Park Commissioners agree to this contract for **\$40,000.00**.

We, the Board of Park Commissioners, on the date stated do ATTEST, sign to the above-referenced and attached documents, and approve as presented.

William Zielke, President

Justin Shurley, Vice President

Cory Miller, Commissioner

Richard Briley, Commissioner

Steve McDaniel, Director/Board Secretary

AGREEMENT FOR COMMISSION OF SCULPTURE

THIS AGREEMENT, is entered into this ____ day of _____, 2022, by and between **THE CITY OF FORT WAYNE BOARD OF PARK COMMISSIONERS** (“BPC”) (hereinafter the “Owner”) with offices at 705 East State Boulevard, Fort Wayne, Indiana 46805 and **Jim Merz** (“Artist”) with offices at 11235 Dell Loch Way, Fort Wayne, IN 46814.

WHEREAS, Owner requires the services of an artist to create a prominent sculpture (the “Artwork”) in a public space located at Shoaff and Lakeside Parks in Fort Wayne, Indiana (hereinafter the “Sites”); and

WHEREAS, Artist is a professional artist whose qualifications and previous work make Artist uniquely qualified to create the Artwork; and

WHEREAS, Owner has selected Artist based upon Artist’s submission of Artist’s proposal for the Artwork to be designed and constructed by Artist for the Site, as more particularly described and defined in Artist Proposal attached hereto and incorporated herein; and

WHEREAS, Artist and the Owner wish to perform under the terms and conditions of this Agreement.

NOW, THEREFORE, in consideration of the above-stated premises and subject to the conditions hereinafter set forth, the parties agree as follows:

ARTICLE 1 SCOPE OF SERVICES

1.1 Artist’s Obligations

- a. Artist shall perform all services and furnish all supplies, material and equipment required for the design, fabrication, transportation and installation of the Artwork. Artists’ Services shall be performed in a professional manner and in strict compliance with all terms and conditions in this Agreement.

- b. Artist shall determine Artistic expression, design, dimensions and materials of the Artwork, subject to review and acceptance by Owner and any regulatory agencies with project oversight, as set forth in this Agreement. Artist will do so in a manner that ensures that the Artwork as installed shall not interfere with the intended use of the Site, pedestrian and other traffic flow, parking, safety devices and procedures, and other needs and functions of the Site as determined by Owner.
- c. Artist has prepared the design concept described in Section 1.3 of this Agreement.
- d. Artist shall complete the construction, fabrication, transportation and installation of the Artwork by the scheduled dates as provided in Section 1.4(b) (i) of this Agreement.
- e. Artist shall secure any and all required licenses, permits and similar authorizations at Artist's expense as are required for the installation of the Artwork at the Site.
- f. Artist shall provide the transportation and perform the installation of the Artwork in coordination with Owner. If Artist does not install the Artwork, Artist shall supervise and approve the installation. Prior to the installation of the Artwork, Artist shall inspect the Site to ensure that the Site is in the proper condition to accept the Artwork and complies with the specifications provided by Artist. Artist shall notify Owner of any perceived conflict, defect or non-compliance with Artist's specifications. All work related to the transportation and installation of the Artwork shall be performed by qualified professionals and by licensed contractors as required by law.
- g. Artist shall provide required insurance in amounts and limits specified in Article 5 and attached Exhibit C.
- h. Artist shall provide Owner a list of all subcontractors engaged by Artist to design, construct, transport and install the Artwork.
- i. Artist shall provide Owner with a maintenance manual with a description of all materials, processes and products utilized in the Artwork and the

required care and upkeep for the Artwork, as well as recommended conservation procedures.

- j. Artist shall provide a set of "as built" drawings for the Artwork if there is significant deviation from approved and permitted construction documents.
- k. Artist shall provide photographic documentation of the Artwork in a format acceptable to Artist and Owner.
- l. Artist shall be available upon reasonable advance notice for meetings requested to coordinate, design, construction and installation of the Artwork.

1.2 Owner's Obligations

- a. Owner shall be responsible for providing Artist, at Owner's expense, with a list of required municipal permits and other relevant information , if any, which relates to the design, construction and installation of the Artwork.
- b. Owner shall inform Artist with respect to all applicable municipal laws and regulations relating to the design, construction and installation of the Artwork.
- c. Owner shall prepare the Site in accordance with the specifications provided by Artist in the approved design concept in Section 1.3 of this Agreement. Owner shall complete the Site preparations by the scheduled installation date as provided in Section 1.4(b) (i) of this Agreement or inform Artist in advance of any delays.
- e. Owner shall provide and install a plaque on or in the proximity of the Artwork containing a credit to Artist and a copyright notice substantially in the following form: Copyright © [Artist's name, date of publication, and donor's name]. Artist shall be consulted if the plaque is to be placed directly on the Artwork or Artwork pedestal.

1.3 Design

- a. Concept/Schematic
 - i. Artist submitted a design concept/schematic (the "Design") which was selected and approved by Owner. The Design is attached to this Agreement as Exhibit A.
- b. Approval
 - i. Within 30 days after the execution of this Agreement, Owner shall notify Artist if Owner requires any revisions to the Design in order to comply with any applicable laws, ordinances and/or regulations or for other reasons including, but not limited to ensuring the physical integrity of the Artwork or its installation at the Site. Such revisions will become a part of the Design.
- c. Final Design

Upon approval of the schematic design by Owner, Artist is authorized to proceed with the Final Design which shall include the following: When used in reference to the proposed Artwork, Final Design Documents shall fix and describe the size and character of the Artwork with respect to its relationship to the Site, including architectural, structural, mechanical and electrical systems, materials and other elements as may be appropriate.
- d. Final Construction Documents

Artist shall submit Final Construction Documents for construction and/or installation of the proposed Artwork as approved, which must be accompanied by a letter of confidence from a licensed structural engineer in the State of Indiana.
- e. Artist shall deliver a schedule describing Artist's specific timelines for completing the Artwork.

1.4 Budget, Completion Milestone and Payment and Deliverables Schedule

a. Budget

- i. Artist shall prepare a budget, which shall include all goods, services and materials with such costs itemized. The Budget shall be attached to this Agreement as Exhibit B.
- ii. Budget shall mean a specific and detailed document identifying the cost of completion of all work under this Agreement, including all modifications. The Budget shall include the costs for all design fees and costs; preliminary and final engineering requirements; materials and labor for fabrication, including Artist and subcontractors' costs; consultants, including engineers and specifications writers; transportation of Artwork; installation of Artwork, including any necessary permits; permits and licenses; required insurance; sales tax (if any); and a 5% to contingency allowance. Calculation of the Budget will consider the possible inflation of service and material costs between the date of execution of this Agreement and the anticipated completion date.
- iii. If Artist incurs costs in excess of the amount listed in the Budget, Artist shall pay such excess from Artist's own funds unless Artist obtains written approval in writing for such additional costs from Owner.

b. Completion Milestone and Payment Schedule

Artist's completion Milestone and Payment Schedule is attached hereto and incorporated as Exhibit C.

1.5 Deliverables Schedule and Progress Reports

- i. Artist's Deliverables Schedule, which identifies the dates for the fabrication, transportation and installation of the Artwork is attached hereto and incorporated herein as Exhibit D. The Deliverables

Schedule may be amended only by written agreement of Artist and Owner.

- ii. Artist shall provide Owner with periodic progress reports which describes the progress of each phase of work being completed under the Agreement.

1.6 Fabrication Stage

- a. Artist shall fabricate and install the Artwork in substantial conformity with the Design. Artist may not deviate from the approved design without written approval of Owner.
- b. Owner shall have the right to inspect the Artwork at reasonable times during the fabrication process upon reasonable advance notice to Artist.
- c. If Owner, upon review of the Artwork, determines that the Artwork does not conform to the approved Final Design, Owner reserves the right to notify Artist in writing of the deficiencies and that Owner intends to withhold the next budget installment within five (5) days of Owner's the determination as provided in paragraph (f) below.
- d. Artist will have thirty (30) days to cure Owner's objections and will notify Owner in writing upon completion of the cure. Owner shall promptly review the Artwork, and upon approval shall release the next budget installment. If Artist disputes Owner's determination that Artwork does not conform, Artist shall promptly submit reasons in writing to Owner within five (5) days of the Owner's notification. Owner shall make reasonable efforts to resolve the dispute with Artist; however, the final determination as to whether the Artwork shall remain with Owner.
- e. Artist shall notify Owner in writing when fabrication of the Artwork has been completed and that Artwork is ready for delivery and installation at the Site.
- f. Prior to the transportation and installation of the Artwork, the Owner shall:
 - (a) inspect the Artwork to determine that the Artwork conforms with the Final

Design; (b) give final approval of the fabricated Artwork; and (c) authorize the installation of the Artwork at the Site. In the event that Owner withholds final approval, Owner shall submit the reasons for such disapproval in writing within five (5) days of examining the fabricated Artwork. Artist shall then have (10) days from the date of the Owner's notice of disapproval to make the necessary corrections to the fabricated Artwork in response to Owner's objections. Artist shall not be penalized for any delay in the delivery and installation of the Artwork to the Site unless Artist has materially deviated from the Design without the prior approval of Owner, in which event Artist shall be assessed a delinquency charge at the rate of \$25 per day until the Artwork is installed on the Site in accordance with this Agreement. Owner may at its election deduct the delinquency charges, if any, from the payment due Artist hereunder.

- g. Owner shall promptly notify Artist of any delays impacting the scheduled installation of the Artwork. Any additional storage and insurance costs incurred by Artist as a result of such delay shall be borne by Owner if such delay is caused by Owner.
- h. Artist shall be required to inspect the Site prior to the transportation and installation of the Artwork and shall notify Owner of any adverse Site conditions that will impact the installation of the Artwork and which require correction. Failure to so notify Owner by Artist shall be deemed an acceptance of the Site conditions by Artist.
- i. Artist shall protect and preserve the integrity of the Artwork with the application of an industrial paint system, if applicable, which is not injurious to the Artwork, unless the Owner specifically disapproves of the same. Artist shall inform Owner of the specifics of the coating in advance of its application.

1.7 Installation

- a. Upon Owner's final approval of the fabricated Artwork conforming to the Design, Artist shall deliver and install the completed Artwork to the Site in accordance with the schedule provided for in Section 1.4(b).
- b. Artist will coordinate closely with the Owner to ascertain that the Site is prepared to receive the Artwork. Artist must notify Owner of any adverse conditions at the Site known to Owner that would affect or impede the proper installation of the Artwork.
- c. Artist is responsible for timely installation of the Artwork. Artist may not install the Artwork until authorized to do so by Owner. The cost of installing the Artwork shall be borne by Artist.
- d. Artist shall be present to supervise the installation of the Artwork on site.
- e. Upon installation, the Artwork shall be deemed to be in the custody of Owner for purposes of Article 3 and Article 5 of this Agreement, and Owner thereafter shall assume liability for any damage to the Artwork or injury to persons or property caused by the Artwork.
- f. Upon completion of the installation of the Artwork, Artist shall provide Owner with written instructions for the future maintenance and preservation of the Artwork. Except as otherwise provided herein, Owner is thereafter responsible for the proper care and maintenance of the Artwork.

1.8 Approval and Acceptance

- a. Artist shall notify Owner in writing when all services to be provided by under this Agreement have been completed in substantial conformity with the Design and hereunder.
- b. Owner shall promptly notify Artist in writing of its final acceptance of the Artwork within seven (7) days after Artist submits written notice pursuant to paragraph (a) above. The effective date of Owner's final acceptance shall be the date upon which Owner submits written notice to Artist of its final acceptance of the Artwork. The final acceptance shall be deemed to mean that Owner acknowledges completion of the Artwork in substantial conformity with the Design, and that Owner confirms that all services to be

provided by Artist under this Agreement have been completed. Title to the Artwork passes to Owner upon final acceptance of Artwork and final payment by Owner to Artist. If the Artwork requires the approval of a regulatory agency, obtain such approval will be a precondition to Owner's ability to approve and accept the Artwork from Artist.

- c. If Owner disputes all services of Artist have been performed, Owner shall notify Artist in writing of those services Artist has failed to perform within five (5) days after Artist submitted written notice pursuant to paragraph (a) above. Artist shall promptly perform those services indicated by the Owner.
- d. Upon the resolution of any disputes that arise under paragraph (c) of this Section, Owner shall notify Artist of its final acceptance of the Artwork pursuant to paragraph (b).

ARTICLE 2 TERM OF AGREEMENT

- a. Duration

This Agreement shall be effective on the date that this Agreement has been signed by Artist and Owner, and, unless earlier terminated as provided hereunder, shall continue until final acceptance by Owner under Section 1.8(b), or submission of final payment to Artist by Owner under Exhibit B, whichever is later. Extension for time of performance hereunder for good cause may be granted only upon the written agreement of Owner and Artist, which written agreement shall be attached to the schedule described in Section 1.4(b) (i).

- b. Force Majeure

Owner shall grant to Artist a reasonable extension of time in the event that conditions beyond Artist's control render timely performance of Artist's services impossible or unduly burdensome. All such performance obligations shall be suspended for the duration of the condition. Both parties shall take all reasonable steps during the existence of the condition to assure performance of their contractual obligations due to conditions

beyond either party's reasonable control will not be considered a breach of contract, provided that such obligations shall be suspended only for the duration of such conditions.

ARTICLE 3. RISK OF LOSS

Artist shall bear the risk of loss or damage to the Artwork until the completion of the installation of the Artwork. Artist shall take such measures as are necessary to protect the Artwork from loss or damage. Owner shall bear the risk of loss or damage to the Artwork prior to final acceptance only if, during such time, the Artwork is in the exclusive custody, control and supervision of Owner or its agent(s) for the purposes of transporting, storing and installing the Artwork.

ARTICLE 4 ARTIST'S REPRESENTATIONS AND WARRANTIES

4.1 Warranties of Title.

Artist represents and warrants that:

- a. the Artwork is solely the result of Artistic effort of Artist;
- b. except as otherwise disclosed in writing to Owner, Artwork is unique and original and does not infringe upon any copyright or proprietary rights of any person;
- c. the Artwork (or duplicate thereof) has not been offered for sale elsewhere;
- d. Artist has not sold, assigned, transferred, licensed, granted, encumbered or utilized the Artwork or any element thereof or any copyright related thereto which may affect or impair the rights granted to Owner pursuant to this Agreement;
- e. the Artwork is free and clear of any liens and encumbrances from any source whatsoever.
- f. the Artwork created by Artist under this Agreement, whether created by Artist alone or in collaboration with others, shall be wholly original with Artist and shall not infringe upon or violate the rights of any third party.

- g. Artist has the full power to enter into and perform this Agreement and to make the grant of rights contained in this Agreement.
- h. all services performed by Artist hereunder shall be performed in accordance with all applicable laws, regulations, ordinances and regulations.
- i. these representations and warranties shall survive the expiration or earlier termination of this Agreement.

4.2 Warranties of Quality and Condition

- a. Artist represents and warrants that all work will be performed in accordance with professional, workmanlike standards and free from defective or inferior materials and workmanship (including any defects consisting of qualities or conditions that cause or accelerate deterioration of the Artwork for a period of one (1) year.)
- b. Artist represents and warrants that the Artwork and the materials used are not currently known to be harmful to public health and safety.
- c. Artist represents and warrants that reasonable maintenance of the Artwork will not require procedures materially in excess of those described in the maintenance and preservation recommendations submitted by Artist pursuant to Section 1.7(f).
- d. If within one (1) year following acceptance of the Artwork Owner observes any breach of warranty described in this Section 4.2, Artist shall cure the breach promptly, satisfactorily and consistent with professional conservation standards, at Artist's expense. Owner shall notify Artist of such breach with reasonable promptness. However, if the breach is not curable by Artist, Artist is responsible for reimbursing Owner for damages, expense and loss incurred by the Owner as a result of such breach, including the cost incurred by Owner to cause such breach to be cured.
- e. If after one (1) year the Owner observes any breach of warranty described in this Section 4.2 that is curable by Artist, Owner shall contact Artist regarding the repair or restoration required by such breach. Artist shall have the right of first refusal to make or supervise repairs or restorations

occasioned by such breach at Artist's costs. Should Artist be unable or unwilling to perform such repairs or restoration Owner may obtain the repair or restoration services from a qualified third party and Artist shall bear the cost thereof.

ARTICLE 5. INSURANCE

5.1 General

- a. Artist agrees that until completion of the installation of the Artwork under Section 1.7(e), any injury to property or persons caused by the Artwork or Artist's activities under or in connection with the Agreement, or any damage to, theft, of, vandalism to, or acts of God affecting the Artwork are the sole responsibility of Artist, including, but not limited to, any loss occurring during the creation, construction, storage, transportation of, delivery and installation of Artist's Artwork, regardless of where such loss occurs
- b. Artist to provide proof of liability insurance.

5.2 Indemnity

- a. Artist shall indemnify Owner, its respective officers, members, agents, and employees, departments and divisions from any claims brought arising out of Artist's breach of this Agreement or any negligent or intentional act or omission by Artist, its contractors, subcontractors, agents, employee's vendors or licensees in connection with the performance under or in connection with this Agreement by any such party.
- b. Owner shall indemnify Artist, Artist's subcontractors, agents and employees from any claims arising out of the breach of this Agreement by Owner or any negligent or intentional act or omission by the Owner, its officers, agents, or employees in connection with the performance under or in connection with this Agreement by any such party.
- c. Owner shall immediately notify Artist of any written claim regarding any mater resulting from or relating to Artist's obligations under this Agreement. Owner and Artist shall cooperate, assist, and consult with the other party hereto in the defense or investigation of any such claim arising out of or

relating to the performance of this Agreement by Artist or Owner, as the case may be.

- d. The foregoing indemnification shall include reasonable attorneys' fees and legal costs.
- e. This indemnification shall survive the termination or expiration of this Agreement for any reason.
- f. This indemnification is limited to indemnification for direct damages and excludes indemnification for indirect, punitive, consequential and incidental damages.

ARTICLE 6. OWNERSHIP AND INTELLECTUAL PROPERTY RIGHTS

6.1 Title

Title to the Artwork shall pass to Owner upon Owner's written final acceptance and payment for the Artwork pursuant to Section 1.8(b) and Exhibit B.

6.2 Ownership Documents

One set of presentation materials prepared by Artist and submitted to Owner under this Agreement shall be retained by Owner.

6.3 Copyright Ownership

Artist retains all rights under the Copyright Act of 1976, 17 U.S.C. §101 et seq., as the sole author of the Artwork for the duration of the copyright.

6.4 Reproduction Rights

- a. In view of the intention that the final Artwork shall be unique, Artist shall not make any additional duplicate [three]-dimensional reproductions of the final Artwork, nor shall Artist grant permission to others to do so except with the written permission of Owner.
- b. Artist grants to Owner a revocable license to make two-dimensional reproduction 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 rights are

- exercised in a tasteful and professional manner. All such reproductions shall be subject to the prior written approval of Owner.
- c. All reproductions by Owner shall contain a credit to Artist and a copyright notice in substantially the following form: © [Artist's name, date of publication].
 - d. Artist shall use his/her best efforts in any public showing or resume use of the reproductions of the Artwork to acknowledge Owner in substantially the following form: "An original artwork owned and commissioned by the City of Fort Wayne Board of Park Commissioners."
 - e. Artist shall, at Artist's expense, cause to be registered with the United States Register of Copyrights, a copyright for the Artwork in Artist's name.

ARTICLE 7. ARTIST'S RIGHTS

7.1 General

- a. Artist retains all rights under state and federal laws including §106A of the Copyright Act of 1976.
- b. Owner agrees that it will not intentionally alter, modify, change, destroy or damage the Artwork without first obtaining permission from Artist. Owner further agrees to take reasonable measures to avoid these from occurring from the gross negligence of Owner, its representatives, or employees pursuant to the federal Visual Artists' Rights Act.
- C If substantial alteration or damage to the Artwork occurs, Artist shall have the right to disclaim authorship of the Artwork in addition to any remedies he/she may have in law or equity under this Agreement. Upon written request, Owner shall remove the identification plaque and all attributive references to Artist at its own expense within thirty (30) days of receipt of the notice. No provision of this Agreement shall obligate the Owner to alter or remove any such attributive reference printed or published prior to Owner's receipt of such notice.

7.2 Alteration of Site or Removal of Artwork

- a. Owner shall notify Artist of any proposed significant alteration of the Site that would affect the intended character and appearance of the Artwork. Owner shall consult with Artist in the planning and execution of any such alteration. Owner shall make a reasonable effort to maintain the integrity of the Artwork.
- b. Owner agrees not to arbitrarily remove or relocate Artwork without first consulting with Artist concerning such removal or relocation. Artist shall provide Owner with written handling instruction. In the event that Artist is deceased or unable to otherwise give owner of the copyright of the Artwork shall not unreasonably withhold permission, keeping in mind the intentions of Artist at the time of commission.
- c. If Owner reasonably determines that the Artwork presents an imminent hazard to the public, other than as a result of Owner's failure to maintain the Artwork as required under this Agreement, Owner may authorize the removal of the Artwork without the prior approval of Artist.
- d. This Section 7.2 is intended to replace and substitute for the rights of Artist under the Visual Artists' Rights Act to the extent that any portion of this Agreement is in direct conflict with those rights. The Parties acknowledge that this Agreement supersedes that law to the extent that this Agreement is in direct conflict therewith.

ARTICLE 8. ARTIST AS AN INDEPENDENT CONTRACTOR

Artist agrees to perform all work under this Agreement as an independent contractor and not as an employee of Owner. Artist acknowledges and agrees that Artist shall not hold himself out as an authorized agent of Owner with the power to bind in any manner.

Artist shall provide Owner with Artist's Tax Identification number and any proof of such number as requested by Owner.

ARTICLE 9. ASSIGNMENT OF ARTWORK

The work and services required of Artist are personal and shall not be assigned, sublet or transferred. Any attempt by Artist to assign this Agreement or any rights, duties or obligations arising hereunder shall be void and of no effect unless prior written consent is given by Owner. Owner shall have the right to assign or transfer any and all of Owner's rights and obligations under this Agreement, if ownership of the Site is transferred.

ARTICLE 10. TERMINATION

- a. Either Party may terminate this Agreement without recourse by the other where performance is rendered impossible or impracticable for reasons beyond such Party's reasonable control such, as but not limited to, acts of nature; war or warlike operation; superior governmental regulator or control; public emergency; or strike or other labor disturbances. Notice of termination of this Agreement shall be given to the non-terminating party in writing not less than ten (10) days prior to the effective date of termination.
- b. Owner may terminate this Agreement without cause upon thirty (30) days written notice to Artist. Owner shall pay Artist for services performed and commitments made prior to the date of the termination, consistent with the schedule of payments set forth in Exhibit B of this Agreement. Artist shall retain possession and title to the drawing, designs, maquettes and model[s] already prepared and submitted or prepared for submission to Owner by Artist under this Agreement prior to the date of termination.
- c. If either Party to this Agreement shall willfully or negligently fail to fulfill in a timely and proper manner, or otherwise violate any of the covenants, agreements or stipulations material to this 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 fifteen (15) days after the date of the notice to cure the default. If such default is not timely cured this

Agreement shall terminate upon written notice from the non-defaulting party.

- d. If Artist defaults or is unable to perform his/her obligations hereunder (for any reason other than death or incapacity), Artist shall return to Owner all funds provided by Owner in excess of the expenses directly related to the design, construction and installation of the Artwork previously incurred by Artist. Artist shall provide an accounting of these expenses. All finished and unfinished drawings, sketches, photographs and other work products prepared and submitted or prepared for submission by Artist under this Agreement shall be retained by Artist. Owner shall retain the right to have the Artwork fabricated and executed. However, Artist shall retain the copyright in Artwork and all rights under Article 7 and Article 8.
- e. Upon notice of termination, Artist and his/her subcontractors shall cease all services affected.

ARTICLE 11. DEATH OR INCAPACITY

- a. If Artist becomes unable to complete this Agreement due to death or incapacity, such death or incapacity will not be deemed a breach of this Agreement or a default by Artist for purposes of Article 10.
- b. In the event of incapacity, Artist shall assign his/her obligations and services under this Agreement to another artist subject to Owner's written consent. If Owner does not consent to such assignment, Owner may terminate this Agreement upon written notice to Artist. Artist shall retain all rights under Article 6 and Article 7. The Artwork and any reproductions thereof shall contain a credit to Artist and a copyright notice in substantially the following form: © [Artist's name, date of publication].
- c. In the event of Artist's death, this Agreement shall terminate effective the date of death. Artist's heirs shall retain right under Article 6 and Article 7.

ARTICLE 12. NOTICES AND DOCUMENTS

Notices under this Agreement shall be delivered personally or through the [registered or certified mail, return receipt requested] mail, postage prepaid, to the addresses stated below, or to any other address as may be noticed by a Party:

For Owner:

City of Fort Wayne Board of Park Commissioners
705 East State Boulevard
Fort Wayne, Indiana 46805
Attn: Alec Johnson

For Artist:

Jim Merz
11235 Dell Loch Way
Fort Wayne, IN 46814

Notice shall be deemed effective on the date personally delivered or, if mailed, three (3) days after the postmarked date.

ARTICLE 13. WAIVER

The Parties agree that a waiver of any breach or violation of any term or condition of this Agreement shall not be deemed to be a waiver of any other term or condition contained herein or a waiver of any subsequent breach or violation of the same or any other term or condition.

ARTICLE 14. CONFLICT OF INTEREST

Artist and Owner shall avoid all conflicts of interest or appearance of conflicts of interest in the performance of this Agreement

ARTICLE 15. ARBITRATION

If during the creation of the Artwork, its installation and subsequent existence, either Party breaches this Agreement, each Party agrees to submit to arbitration upon the request of the other Party provided that the breach is not timely cured hereunder.

If an ambiguity arises regarding this Agreement upon which the Parties cannot agree or a dispute arises as to the completion of a provision, the Parties shall submit to arbitration.

Notwithstanding any provision of this Agreement to the contrary, any damage award to a party on account of a Party's breach of this Agreement, with the exception of Artist's duty under Article 6 to procure and maintain insurance, shall not exceed and amount equal to the sum of the payment in Exhibit B.

Each party agrees to be responsible for its own attorney's fees except as otherwise provided by statute.

All arbitrations to which the Parties shall submit under this Agreement shall be held in the City of Fort Wayne, Indiana.

ARTICLE 16. AMENDMENT

No alteration, change or modification of the terms of this Agreement shall be valid unless made in writing and signed by both Parties hereto.

ARTICLE 17. CONFLICT WITH THE LAW

If any term, covenant, condition or provision of this Agreement, or the application thereof to any person or circumstance, shall be held by a court of competent jurisdiction or arbitration panel to be in conflict with the laws, rules and/or regulations of the United States or the State of Indiana, invalid, void or unenforceable, the remainder of the terms, covenants, conditions or provisions of this Agreement, or the application thereof to any person or circumstance, shall remain in full force and effect and shall in no way be affected, impaired, or invalidated thereby to the extent the remainder of the terms, covenants, conditions or provisions of this Agreement are capable of execution.

ARTICLE 18. CHOICE OF LAW

This contract shall be governed by the laws of the State of Indiana both as to interpretation and performance.

ARTICLE 19. ENTIRE AGREEMENT

This Agreement, including the exhibits, comprises all of the covenants, promises, agreements and conditions between the Parties. No verbal agreements or conversation between the Parties prior to the execution of this Agreement shall affect or modify and of the terms or obligation.

EXHIBIT A

ARTIST PROPOSAL

**Lakeside Park Sculpture
Proposal**

Jim Merz

JimMerz@mac.com

260-388-9617

www.jwmerz@mac.com 11235 Dell Loch Way,
Fort Wayne, IN 46814

Sculpture Name Crescent

Moon Quartet **Design**

Narrative

The design uses a series of crescent moon shapes to demarcate space and time. The subtle movement of the elements will also call attention to the passage of time and the importance of human interactions with the natural world.

The crescent moon shaped elements will be attached to pivots that allow them to move in the wind. These movements will be small and slow, creating an effect that the moons are floating.

Dimensions

19' High x 7' Wide x 5' Deep

Materials

The sculpture will be constructed primarily of TIG welded Aluminum. Fasteners and mechanical components will be stainless steel. Bearings will be lifetime lubricated. The moon shaped elements will be powder coated and the post will be brushed Aluminum.

Weight

300 lbs.

Installation and foundation

The sculpture will be attached to a cylindrical concrete foundation, similar to a street light pole. Foundation size will be determined during engineering.

Maintenance requirements No maintenance is required.

Shoaff Park Sculpture Proposal

Jim Merz

JimMerz.com 260-388-9617

jwmerz@mac.com 11235 Dell

Loch Way, Fort Wayne, IN 46814

Sculpture Name

Mystery of Continuity and Change

Design Narrative

The sculpture embodies the tension between being at rest and the joy of being active in the natural environment. When at rest it's easy to forget the simple, life affirming pleasures of trees and grass, wind and water. Seeing the sculpture respond to the wind reminds us to be active, to engage in life with nature and friends.

Powered by the wind, the top circular element spins and the top rectangular element will rock back and forth like a pendulum keeping time.

Dimensions

17' High x 6' Wide x 9' Deep (at the fullest extent of kinetic elements)

Materials

The sculpture will be constructed primarily of TIG welded Aluminum. Fasteners and mechanical components will be stainless steel. Bearings will be lifetime lubricated. The sculpture will be powder coated.

Weight

450 lbs.

Installation and foundation

The sculpture will be attached to a cylindrical concrete foundation, similar to a street light pole. Foundation size will be determined during engineering.

Maintenance requirements No maintenance is required.

EXHIBIT B

BUDGET; COMPLETION MILESTONE AND PAYMENT SCHEDULE

Owner shall pay Artist a fixed fee of \$40,000.00, which shall constitute full and complete compensation for all the services performed and material furnished by Artist under this Agreement. Payment shall be made in accordance with the following schedule installments, each installment representing full and final payment for all services and material provided prior to payment thereof:

- a. \$ 14,000 upon the execution of Agreement, [recognizing that Artist will invest time and expense in preparing the Design as set forth under Section 1.3;
- b. \$ 12,000 upon completion of 50% of the fabrication;
- c. \$ 14,000 upon final acceptance of the Artwork by Owner as set forth under Section 1.8(b).

EXHIBIT C

SCHEDULE OF WORK

Proposed Schedule

- | | |
|---|---------------------------------|
| 1. Submit Engineer's letter of approval | 12 weeks from notice to proceed |
| 2. Begin Fabrication | 2 weeks from letter submittal |
| 3. 25% Fabrication | 5 weeks total |
| 4. 50% Fabrication | 5 weeks total |
| 5. 75% Fabrication | 5 weeks total |

Budget

Artist design fees	\$6,000
Engineering	\$1,500
Materials	\$4,800
Welding and Fabrication	\$17,200
Powder Coating	\$2,200
Concrete Foundations	\$2,900
Installation	\$800
Insurance	\$600
Contingency	\$4,000
Total	\$40,000.00

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|----------------------------------|---------------|
| 6. Install sculpture foundations | |
| 7. 100% Fabrication | 5 weeks total |
| 8. Delivery and Installation | 2 weeks total |

**CITY OF FORT WAYNE
BOARD OF PARK COMMISSIONERS**

By:

Steve McDaniel
Executive Director

Jim Merz
Artist

Date
("OWNER")

Date
("ARTIST")