

DONATION AND WAIVER AGREEMENT

THIS DONATION AND WAIVER AGREEMENT is made and entered into as of the date set forth on the City's signature page below, by and between the **CITY AND COUNTY OF DENVER**, a municipal corporation of the State of Colorado, 1437 Bannock Street, Denver, Colorado 80202, hereinafter referred to as the "**City**", and **YVONNE DOMENGE** (the "**Grantor**"), whose address is Moya de Contreras 160, Lomas de Virreyes, Mexico D.F., 11000.

WITNESSETH:

WHEREAS, the City desires to accept a grant from the Grantor of a work of art by the Grantor (as the artist) consisting of a carbon steel sculpture and related components, as further described on Exhibit A hereto, entitled "Coral Sphere" (the "**Work**"), for inclusion in the City's collection of public art;

WHEREAS, the Work is currently displayed at the McNichols Civic Center Building pursuant to an Agreement between the Grantor and the City, dated October 25, 2012, under which Agreement Grantor allowed the City to take possession of the Work and to show the Work prior to the City taking ownership of the Work by means of this Agreement;

WHEREAS, the City believes that the grant is appropriate and serves a public purpose and wishes to accept such grant on the conditions specified herein; and

NOW, THEREFORE, in consideration of the mutual agreements herein contained, and subject to the terms and conditions hereinafter stated, the parties hereto agree as follows:

1. **GRANTOR PERFORMANCE**: The Grantor owns and now grants and donates the Work to the City in cooperation with the Director of Arts and Venues Denver (the "**Director**").
2. **GRANTOR WARRANTIES**: The Grantor represents and warrants to the City that:
 - a. The Work is solely the result of the artistic effort of the Grantor.
 - b. The Grantor has full authority to allow the City to take possession, store, and display the Work as contemplated by this Agreement, and to give, transfer and assign the Grantor's right, title and interest in and to the Work.
 - c. The Work is unique and original and does not infringe upon any

13-0125

copyright.

d. Neither the Work described hereunder, nor a duplicate thereof, has been accepted for sale elsewhere. Notwithstanding the foregoing, the City acknowledges that the Grantor may create up to five (5) additional sculptures with a likeness to the Work; provided, however, that such additional sculptures shall be of a different scale and color.

e. The Work is free and clear of any liens or claims from any source whatsoever.

f. The Grantor represents that the Work is in good condition for exhibit and the fabrication of the work was completed in a workmanlike manner. The Work, as fabricated and installed, will be free of defects in material and workmanship, including any defects consisting of "inherent vice" or qualities which cause or accelerate deterioration of the Work

g. Reasonable maintenance of the Work will not require procedures substantially in excess of those described in the maintenance recommendations to be submitted by the Grantor to the City hereunder.

h. The Work has not been imported or exported into or from any country contrary to the laws of such country or the laws of the United States.

The warranties described in this Section 2 shall survive for a period of two (2) years after the date of this Agreement. The City shall give notice to the Grantor of any observed breach with reasonable promptness. The Grantor shall, at the request of the City, and at no cost to the City, cure reasonably and promptly the breach of any such warranty which is curable by the Grantor utilizing artistic skill and which cure is consistent with professional conservation standards as determined solely by the City (including, for example, cure by means of repair or refabrication of the Work).

3. **OWNERSHIP AND REPRODUCTION RIGHTS:**

a. Title. Title to the Work shall pass to the City upon the effective date of this Agreement.

b. Waiver of Rights Under Visual Artists Rights Act of 1990 ("VARA"). The Grantor understands and agrees that, as to her rights in the Work, 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"), including but not limited to §106A(a) and §113, as to the

Work, and that execution of this Agreement by the Grantor shall constitute a waiver by the Grantor, as permitted in 17 U.S.C. §106A(e), as amended, of any and all rights or protections in the Work, and any uses of the Work whatsoever, set out in or otherwise granted by 17 U.S.C. §101, et seq., as amended, including but not limited to §106A(a) or §113, or otherwise in the nature of "Droit Moral" under which artists claim an interest in their work. The Grantor understands that despite the City's commitment not to intentionally damage, alter, or modify the Work without the prior written approval of the Grantor, removal of the Work from its current site or future sites may subject the Work to destruction, distortion, mutilation, or other modification, by reason of its removal.

c. Grantor's Remaining Retained Rights in the Work. The Grantor therefore retains: (i) all other right, title and interest in the Work including all copyrights, but expressly excluding any rights in the Work under VARA, including but not limited to §106A(a) and §113, or otherwise in the nature of "Droit Moral" under which artists claim a continuing interest in their products and in the maintenance or modification of their products; and (ii) all rights expressly granted in this Agreement. The Grantor's waived rights as described above are, insofar as such rights are transferable, assigned to the City. The Grantor shall not make any additional exact duplicate, two or three-dimensional reproductions of the Work, including but not limited to miniatures or jewelry applications, nor shall the Artist grant permission to others to do so except with the written permission of the City. The City is unable to grant permission of any kind for political use of the Work. The restriction for duplication or reproduction shall not apply to the Grantor's use of photographic reproductions of the Work in portfolio or in critical and scholarly writings or to the extent described in Section 2.d above. The Grantor grants to the City and its assigns an irrevocable license to make two-dimensional reproductions of the Work for non-commercial purposes, in the sole discretion of the City and its assigns, including but not limited to reproductions used in advertising brochures, media publicity, and catalogues or other similar publications.

d. Notice. All reproductions by the City shall contain a credit to the Grantor and a copyright notice substantially in the following form: Yvonne Domenge, date of publication.

e. Plaque. The City shall provide a plaque at the site where the Work is

located with the Grantor's name, the date, and the title "Coral Sphere" and that the Work was donated to the City by "Yvonne Domenge."

f. Registration. The Grantor shall at her expense cause to be registered, with the United States Register of Copyrights, a copyright of the Work in the Grantor's name.

4. **GRANTOR'S RIGHTS:**

a. Grantor's Enumerated Contractual Rights in the Work. Subject to and consistent with the provisions of Article 3 above, the Grantor understands and agrees that she is therefore granted the following rights in the Work pursuant to this Agreement.

b. Maintenance and Repair.

(i) The City shall have the right to determine, in its sole discretion, after consultation with a professional conservator, selected by the City, when and if maintenance, repairs and restorations to the Work will be made. To the extent practical, the Grantor, during the Grantor's lifetime, shall be given the opportunity to make or personally supervise significant repairs or restorations and shall be paid a reasonable fee for any such services, provided that the City and the Grantor shall agree in writing, prior to the commencement of any significant repairs or restorations, upon the Grantor's fee for such services, and subject to appropriation by the City of such fee.

(ii) All repairs and restorations shall be made in accordance with recognized principles of conservation.

c. Damage. Subject to Section 4.d below, the City agrees that it will not intentionally damage, alter, or modify the Work without the prior written approval of the Grantor.

d. Removal, Relocation, Sale, Donation or Destruction. Nothing in this Agreement shall preclude any right of the City, in its sole discretion, (i) to remove the Work from public display, (ii) to move or relocate the Work to another location selected solely by the City for public display, (iii) to donate or sell the Work to a third person or entity, or (iv) to destroy the Work. In addition, the Grantor will have the right of final refusal as to any sale or donation of the Work. If the City decides to donate or sell the Work, the donee or buyer of the Work will assume all of the City's duties toward the Grantor stated herein, will be obligated to defend and indemnify the City with respect to such duties, and will take the Work subject to all

of the Grantor's rights as stated herein, and the donee or buyer shall be given a copy of this executed Agreement at the time of donation or sale. The City will make all reasonable efforts to notify the Grantor of such donation and sale and of the identity of the donee or buyer. If the City shall at any time decide to destroy the Work, it shall by notice to the Grantor offer the Grantor a reasonable opportunity to recover the work at no cost to the Grantor, except for an obligation of the Grantor to indemnify and reimburse the City for the amount by which the cost to the City of such recovery exceeds the costs to the City of the proposed destruction as determined solely by the City. Without limiting the generality of Section 4.a, the Artist agrees that her rights in connection with the destruction of the Work are as described in this Section 4.d; as set out above, the Artist waives any rights which she might have in connection with the removal or destruction of the Work under VARA, including but not limited to §106A(a) and §113.

f. Record. The City shall maintain on permanent file in the Office of the Denver City Clerk, Ex-Officio Clerk and Recorder, a record of this Agreement and of the location and disposition of the Work.

g. Grantor's Address. The Grantor shall notify the City of changes in her address. The failure to do so, if such failure prevents the City from locating the Grantor, shall be deemed a waiver by the Grantor of the rights granted to the Grantor in this Article 4, or otherwise retained by the Grantor, the exercise of which requires response by the Grantor. A mailing of notice by the City in accordance with Section 25 below to the address of the Grantor currently on file with the City at the time of such mailing shall be deemed to be an adequate notification effort by the City hereunder.

h. Surviving Covenants. The covenants and obligations set forth in this Article shall be binding upon the parties, their heirs, legatees, executors, administrators, assigns, transferees and all their successors in interest, and the City's covenants do attach and run with the Work and shall be binding to and until twenty (20) years after the death of the Grantor. However, the obligations imposed upon the City by Sections 4.b through 4.d shall terminate on the death of the Grantor. The City shall give any subsequent owner of the Work notice in writing of the covenants herein by providing such owner with an executed copy of this Agreement.

5. COORDINATION AND LIAISON: The Grantor agrees that during

performance under this Donation and Waiver Agreement it shall fully coordinate all services hereunder with the City, including the Director, or as otherwise directed by the City. The Grantor understands that the Director is the City's representative under this Donation and Waiver Agreement through whom contractual services performed hereunder shall be coordinated.

6. **TERM OF DONATION AND WAIVER AGREEMENT:** The term of the Donation and Waiver Agreement shall commence on the date of execution, and remain in effect perpetually, unless and until the City shall determine at a later date, to rescind such grant or to deaccession the Work.

7. **PAYMENT:** It is understood and agreed that the Work is a donation to the City and no payment is due to the Grantor. Upon acceptance of the Work by the City, it is within the City's sole discretion to pay for any maintenance, repair, insurance, or other cost related to the City's future ownership of the Work. It is understood and agreed that any payment obligation of the City associated with this grant, whether direct or contingent, shall extend only to funds appropriated by the Denver City Council for the purpose of this Donation and Waiver Agreement, and paid into the Treasury of the City. The Grantor acknowledges that (i) the City does not by this Agreement irrevocably pledge present cash reserves for payments in future fiscal years, and (ii) this Agreement is not intended to create a multiple-fiscal year direct or indirect debt or financial obligation of the City.

8. **STATUS OF GRANTOR:** It is understood and agreed by and between the parties that the status of the Grantor shall be that of an independent contractor and it is not intended, nor shall it be construed, that the Grantor or any employee or subcontractor is an employee, officer, or agent of the City under Chapter 18 of the Denver Revised Municipal Code for purposes of unemployment compensation, workers' compensation, or for any purpose whatsoever.

9. **TERMINATION OF DONATION AND WAIVER AGREEMENT:** The City may terminate the grant without cause or deaccession the Work for its convenience upon thirty (30) days' notice to the Grantor. Upon termination or deaccession, the City may, but shall have no obligation to, sell, transfer, move, or otherwise dispose of the Work.

10. **WHEN RIGHTS AND REMEDIES NOT WAIVED:** In no event shall any acceptance by the City hereunder constitute or be construed to be a waiver by the City of any breach of term, covenant, or condition or any default which may then exist on the part of the Grantor, and the rendering of any such acceptance when any such breach or default shall exist shall not impair or prejudice any right or remedy available to the City with respect to such breach or default; and no assent, expressed or implied, to any breach of any one or more terms, covenants, or conditions of the Donation and Waiver Agreement shall be construed as a waiver of any succeeding or other breach.

11. **EXAMINATION OF RECORDS:** The Grantor agrees that any duly authorized representative of the City, including the City auditor or his representative, shall, until the expiration of three (3) years after the final payment under this Agreement, have access to and the right to examine any directly pertinent books, documents, papers and records of the Grantor involving transactions related to this Agreement.

12. **VENUE, GOVERNING LAW:** Each and every term, condition, or covenant herein is subject to and shall be construed in accordance with the provisions of Colorado law, the Charter of the City and County of Denver and the ordinances, regulations, and Executive Orders enacted and/or promulgated pursuant thereto. The Charter and Revised Municipal Code of the City and County of Denver, as the same may be amended from time to time, are hereby expressly incorporated into this grant as if fully set out herein by this reference. Venue for any action arising hereunder shall be in the Denver County or Denver District Court in the City and County of Denver, Colorado.

13. **ASSIGNMENT AND SUBCONTRACTING:** The City is not obligated or liable under this Donation and Waiver Agreement to any party other than the Grantor named herein.

14. **NO DISCRIMINATION IN EMPLOYMENT:** In connection with the performance of work under this Donation and Waiver Agreement, the Grantor agrees not to refuse to hire, discharge, promote or demote, or to discriminate in matters of compensation against any person otherwise qualified, solely because of race, color, religion, national origin, gender, age, military status, sexual orientation, marital status, gender variance, or physical or mental disability; and the Grantor further agrees to insert the foregoing provision in all

subcontracts hereunder.

15. **INDEMNIFICATION**: The Grantor shall defend, release, indemnify and save and hold harmless the City against any and all damages to property or injuries to or death of any person or persons, including property and employees or agents of the City, and shall defend, release, indemnify, and save and hold harmless the City from any and all claims, demands, suits, actions, liabilities, causes of action or legal or equitable proceedings of any kind or nature, including copyright and workers' compensation claims, of or by anyone whomsoever, in any way resulting from or arising out of the Grantor's activities or performance in connection herewith, including acts or omissions of the Grantor or its officers, employees, representatives, suppliers, invitees, licensees, subconsultants, subcontractors, and agents, prior to the completion of the donation of the Work hereunder and passage of title of the Work to the City; provided, however, that the Grantor need not indemnify and save harmless the City, its officers, agents, and employees from damages proximately resulting from the sole negligence of the City's officers, agents, and employees. This indemnity clause shall also cover the City's defense costs, in the event that the City, in its sole discretion, elects to provide its own defense. The Grantor shall procure and maintain, at its own expense and cost, any insurance that, in its judgment, may be necessary for its proper protection in the prosecution of the services hereunder.

16. **CONFLICT OF INTEREST**: The parties agree that no official, officer or employee of the City shall have any personal or beneficial interest whatsoever in the services or property described herein and Grantor further agrees not to hire or contract for services any official, officer, or employee of the City or any other person which would be in violation of the Denver Revised Municipal Code Chapter 2, Article IV, Code of Ethics, or Denver City Charter Sections 1.2.8, 1.2.9, and 1.2.12.

17. **NO THIRD PARTY BENEFICIARY**: It is expressly understood and agreed that enforcement of the terms and conditions of this Donation and Waiver Agreement, and all rights of action relating to such enforcement, shall be strictly reserved to the City and the Grantor, and nothing contained in this grant shall give or allow any such claim or right of action by any other or third person on such grant, including but not limited to subcontractors, subconsultants, and suppliers. It is the express intention of the City and the Grantor that any person other than the City the Grantor receiving services or benefits under this grant shall be

deemed to be an incidental beneficiary only.

18. **DISPUTES**: All disputes of whatsoever nature between the City and Grantor regarding this Donation and Waiver Agreement shall be resolved by administrative hearings pursuant to the procedure established by Denver Revised Municipal Code 56-106. For the purposes of that procedure, the City official rendering a final determination shall be the Director.

19. **TAXES, CHARGES AND PENALTIES**: The City shall not pay or be liable for any claimed interest, late charges, fees, taxes or penalties of any nature, except as required by the City's Revised Municipal Code.

20. **PARAGRAPH HEADINGS**: The captions and headings set forth herein are for convenience of reference only, and shall not be construed so as to define or limit the terms and provisions hereof.

21. **SEVERABILITY**: It is understood and agreed by the parties hereto that if any part, term, or provision of this Donation and Waiver Agreement is by the courts held to be illegal or in conflict with any law of the State of Colorado, the validity of the remaining portions or provisions shall not be affected, and the rights and obligations of the parties shall be construed and enforced as if the grant did not contain the particular part, term, or provision held to be invalid.

22. **DONATION AND WAIVER AGREEMENT AS COMPLETE INTEGRATION-AMENDMENTS**: This Donation and Waiver Agreement is intended as the complete integration of all understandings between the parties. No prior or contemporaneous addition, deletion, or other amendment hereto shall have any force or effect whatsoever, unless embodied herein in writing. No subsequent novation, renewal, addition, deletion, or other amendment hereto shall have any force or effect unless embodied in a written amendatory or other Donation and Waiver Agreement properly executed by the parties. This Donation and Waiver Agreement and any amendments shall be binding upon the parties, their successors and assigns.

23. **ELECTRONIC SIGNATURES AND ELECTRONIC RECORDS**: The Grantor consents to the use of electronic signatures by the City. This Agreement, and any other documents requiring a signature hereunder, may be signed electronically by the City in the manner specified by the City. The parties agree not to deny the legal effect or enforceability of

this Agreement solely because it is in electronic form or because an electronic record was used in its formation. The parties agree not to object to the admissibility of this Agreement in the form of an electronic record, or a paper copy of an electronic document, or a paper copy of a document bearing an electronic signature, on the ground that it is an electronic record or electronic signature or that it is not in its original form or is not an original.

24. **COUNTERPARTS OF THIS AGREEMENT**: This Agreement shall be executed in counterparts, each of which shall be deemed to be an original of this Agreement.

25. **NOTICES**: All notices, requests, demands, and other communications which are required or permitted to be given under this Agreement shall be in writing and shall be deemed to have been duly given upon the delivery or receipt thereof, as the case may be, if delivered personally or sent by certified mail, return receipt requested, postage prepaid, as follows:

To the City: Arts and Venues Denver
1245 Champa Street, First Floor
Denver, Colorado 80204

To the Grantor: The address first above written.

Reminder of page left intentionally blank.

Contract Control Number: THTRS-201208618-00

Contractor Name: Yvonne Domenge

IN WITNESS WHEREOF, the parties have set their hands and affixed their seals at Denver, Colorado as of

SEAL

CITY AND COUNTY OF DENVER

ATTEST:

By _____

APPROVED AS TO FORM:

REGISTERED AND COUNTERSIGNED:

DOUGLAS J. FRIEDNASH, Attorney
for the City and County of Denver

By _____

By _____

By _____



Contract Control Number: THTRS-201208618-00

Contractor Name: Yvonne Domenge

By: Yvonne Domenge

Name: YVONNE DOMENGE
(please print)

Title: ARTIST
(please print)

ATTEST: [if required]

By: _____

Name: _____
(please print)

Title: _____
(please print)



EXHIBIT A

DESCRIPTION OF THE WORK

Artist	Yvonne Domenge
Title	Coral Sphere
Year	2010
Medium	Carbon Steel
Color	Blue
Dimensions	8.2 ft Ø