

RESOLUTION NO. 8 , 2022

**A RESOLUTION AUTHORIZING A SCULPTOR COMMISSION AGREEMENT
WITH TOM TSUCHIYA SCULPTOR LTD.**

WHEREAS, following the passing of Councilmember Gerri Harbison, a group of private citizens created a committee to plan an appropriate City memorial for Ms. Harbison using private funds consistent with the City's guidelines for memorial contributions; and

WHEREAS, the committee has reached out to Tom Tsuchiya Sculptor Ltd. to engage the services of renowned artist Tom Tsuchiya who has designed an appropriate memorial to Ms. Harbison to be received by the City and installed in Montgomery Park; and

WHEREAS, the committee of private citizens working through the Montgomery Chamber of Commerce has either received funds or pledges to cover the costs and contingencies for designing and assembling a sculpture to memorialize Ms. Harbison; and

WHEREAS, with these funds and pledges in place, no City funds will be expended to erect such memorial other than funding installation costs consistent with the City's guidelines; and

WHEREAS, with these commitments in place, Council does desire to enter into the Sculptor Commission Agreement with Tom Tsuchiya Sculptor Ltd. to complete this private funded memorial.

NOW THEREFORE, BE IT RESOLVED by the Council of the City of Montgomery, Hamilton County, Ohio, that:

SECTION 1. The City Manager is hereby authorized to enter into the attached Sculptor Commission Agreement with Tom Tsuchiya Sculptor Ltd., and to pay monies from collections received into the City Memorial Fund earmarked for such memorial to honor Gerri Harbison. If necessary, the City Manager is further authorized to terminate the Agreement consistent with the schedule for termination if unforeseen circumstances would impact the ability of the Memorial Fund to meet these costs.

SECTION 2. The City Manager is authorized to execute such additional documentation as may be necessary to complete this memorial.

SECTION 3. This Resolution shall be in full force and effect from and after its passage.

PASSED: March 2, 2022

ATTEST: 
Connie M. Gaylor, Clerk of Council


Craig D. Margolis, Mayor

APPROVED AS TO FORM:


Terrence M. Donnellon, Law Director

SCULPTOR COMMISSION AGREEMENT

THIS SCULPTOR COMMISSION AGREEMENT (“Agreement”) is made as of the ___ day of February, 2022 (“Effective Date”) between the undersigned client (“CLIENT”) and TOM TSUCHIYA SCULPTOR LTD. (“Sculptor”) with an address of Essex Studios, Studio 155, 2511 Essex Place Cincinnati, OH 45206.

In consideration of this Agreement’s mutual promises, CLIENT and Sculptor agree as follows:

1. Creation and Display of the Sculpture.

Sculptor will design, research, produce, and fabricate a work of art (the “Sculpture”) and perform any further Scope of Work as defined in attached Schedule A. CLIENT shall have the right to review and approve all designs, art and plans associated with the Sculpture prior to its fabrication.

2. Delivery/timeline.

The estimated delivery date and timeline for the Sculpture will be as described in Schedule A. The estimated date depends on CLIENT’s timely pre-fabrication approval and other factors beyond either party’s reasonable control.

3. Fee/payment schedule.

- a. CLIENT will pay Sculptor under this Agreement the amount stated in Schedule A (the "Fee"), subject to adjustment pursuant to this Agreement or by further written agreement signed by both parties. Partial payments of the Fee will be made as specified in Schedule A, with each partial payment representing payment for services provided to the date of payment.
- b. The Fee includes all of Sculptor’s costs incidental to the realization of the Sculpture, including, but not limited to, assistant fees, materials to complete the Sculpture, communications, films, tapes, and other related expenses.
- c. As part of or in addition to the Fee, CLIENT and Sculptor may establish a contingency amount as specified in Schedule A, to be applied as agreed by the parties.
- d. Certain raw materials used in creating sculptural objects are subject to volatile changes in price that may occur between the Effective Date and the date the raw materials are purchased by Sculptor to produce the Sculpture, as listed in Schedule A. If there are price changes for such raw materials between the Effective Date and Sculpture’s purchase date of such materials of more than five percent (5%) plus or minus, Sculptor will inform CLIENT and provide the documentation of such a price change, and a deduction or increase in the Fee will be made resulting from the change in such raw material prices.

4. CLIENT Responsibilities. Unless otherwise agreed in writing or as specified in Schedule A, CLIENT shall be responsible for preparing the location and installation of the Sculpture, and incoming and outgoing shipment, exhibition graphics, a brochure/catalogue, invitations, and promotion of the Sculpture.

5. Inspection and Approval/Termination. CLIENT may conduct reviews of Sculptor's progress during the development of the Sculpture as agreed with Sculptor. CLIENT's final acceptance of the Sculpture will be made upon its completion and delivery as described in Schedule A. Additional fees may be charged by Sculptor for revisions requested by CLIENT that are not the fault of Sculptor that require additional work by Sculptor to meet CLIENT's requests after two minor changes and for reasons reflecting a changed direction or new conceptual input from CLIENT. CLIENT may terminate this Agreement at any time by sending written notice to Sculptor of such termination. If Sculptor has begun to perform services when receiving such a termination notice, Sculptor will retain all partial payments made to that point and CLIENT will further pay Sculptor twenty percent (20%) of the total fee specified in Schedule A as liquidated damages for such termination, and Sculptor will retain ownership of all copyright, materials, and other aspects of the Work, including artwork, sketches, and other materials related to the Sculpture.

6. Shipping and Installation. Schedule A sets forth the terms of delivery. CLIENT and Sculptor will coordinate with each other concerning other details of timing, delivery, and installation. If Sculptor is responsible for delivering the Sculpture at CLIENT's designated site, Sculptor will be responsible for the safety of the Sculpture and timely shipment to the site, and will provide reasonable care to address the ordinary strains of packing, transportation, and handling. Risk of damage to or loss of the Sculpture shall pass to CLIENT in accordance with Schedule A.

7. Documentation of Creation. Sculptor will document the creation of the Sculpture and its installation by prevailing methods for archival, promotional, educational, and other purposes as reasonably requested by CLIENT.

8. Ownership; Copyright.

- a. This is an agreement for services. Each party considers the products and results of Sculptor's services (the "Work") to be a work made for hire. Upon delivery of the Sculpture to CLIENT, Sculptor acknowledges and agrees that the Work (and all rights therein, including copyright) will belong to and be the sole property of CLIENT.

If for any reason the Work is not considered a work made for hire under applicable law, upon full payment of the Fee, Sculptor hereby sells, assigns, and transfers to CLIENT, its successors and assigns, the entire right, title and interest in and to the copyright in the Work and any registrations and copyright applications relating thereto and any renewals and extensions thereof, and in and to all works based upon, derived from, or incorporating the Work, and in and to all income, royalties, damages, claims and payments now or hereafter due or payable with respect thereto, and in and to all causes of action, either in law or in equity for past, present,

or future infringement based on the copyrights, and in and to all applicable rights corresponding to the foregoing throughout the world.

- b. CLIENT shall be the sole party entitled to own and register copyrights, trademarks, and other intellectual property rights with respect to the Work. Sculptor will upon CLIENT's request execute and deliver to CLIENT, without additional compensation, any written assignments of copyrights, trademarks, or other intellectual property rights in the Work. Sculptor will not contest, challenge, or take any other action (a) against any of the intellectual property rights related to the Work, or (b) inconsistent with CLIENT's ownership of intellectual property rights to the Work.
 - c. CLIENT grants Sculptor the right to use the Work for his portfolio and history and for promotional purposes, subject to CLIENT's reasonable prior approval concerning promotional uses, which approval shall not be unreasonably withheld or delayed. In the event of such uses, Sculptor will cooperate with CLIENT to protect CLIENT's intellectual property rights in the Work.
 - d. The Sculpture and derivative Work produced as a result of this Agreement shall be credited as Sculptor's creation.
9. **VARA.** If the Work is one to which the provisions of 17 U.S.C. 106A (the Visual Artists Rights Act of 1990) (the "Act") apply, the Sculptor hereby waives and appoints CLIENT to assert on Sculptor's behalf Sculptor's moral rights or any equivalent rights regarding the form or extent of any alteration to the Work (including, without limitation, removal or destruction) or the making of any derivative works based on the Work, including, without limitation, photographs, drawings or other visual reproductions of the Work, in any medium, for CLIENT's purposes. Sculptor hereby specifically waives any and all rights that may be granted under the Act and understands that the Work may, at CLIENT's discretion, be destroyed after its exhibition. CLIENT may, at any time and at its sole discretion, remove all or part of the Work from exhibition or require alterations deemed by the curators, registrars or conservators to be hazardous to CLIENT's premises or visitors.
10. **Relationship of Sculptor and CLIENT.** Sculptor will be an independent contractor during the period of performance under this Agreement and not an employee of CLIENT. Sculptor will carry studio insurance and provide CLIENT with a certificate of insurance indicating such coverage upon request.
11. **Non-Transferability of Agreement.** This Agreement is intended to secure the personal services of Sculptor and shall not be transferred or assigned in any manner whatsoever without CLIENT's prior written consent.
12. **Entire Agreement.** This Agreement is the entire understanding between Sculptor and CLIENT and supersedes and replaces any previous documents, correspondence, conversations and other written or oral understandings related to this Agreement which are not consistent with it or are not contained herein. This Agreement cannot be modified except by written agreement signed by both parties.

SCHEDULE A

1. **The Sculpture:** a life-size bronze statue of Gerri Harbison seated on a park bench.
2. **Scope of Work:** Work to be done by Sculptor beyond what is described in section 1 of this Agreement includes the following: Sculptor will arrange and be responsible for delivering the Sculpture to the designated site at Montgomery Park and to place the Sculpture upon the park bench provided by Montgomery for its placement.

3. **Delivery/timeline:**

- a. The delivery date by July 1, 2022.
- b. The following timeline is projected:

February 8, 2022- April 1, 2022	Global Foam produces the life-size foam core. Tsuchiya sculpts the full-size clay/foam model. The internal structure is designed and approved by Doug Crawford, PE.
April 18, 2022: deadline for the clay/foam model	After Montgomery's approval, the full-size model is delivered to <i>Sincerus</i> to begin the mold making and casting process.
May 15, 2022: deadline for plaque text	Montgomery completes text for plaque(s). <i>Matthews</i> produces the plaque(s) and delivers the work by June 30.
June 29, 2022: deadline for bronze completion	Harbison's bronze is patinated and finished. Ready for delivery.
June 30, 2022	The bronze is delivered to Montgomery Park and installed on the bench by the Montgomery maintenance crew with assistance from Tsuchiya. A temporary tarp covers the statue.
July 2 or 3, 2022	Before the event, the tarp is replaced by an unveiling cloth. Harbison's statue is dedicated.

- c. Delivery will be to CLIENT's place of installation. CLIENT will install the foundation and park bench prior to the delivery of the statue.

4. Fee/payment schedule:

- a. The total Fee will be \$67,500.00 (U.S. dollars), payable on the following schedule, subject to any agreed changes pursuant to this Agreement or by mutual signed agreement.
 - i. \$16,875.00 on or before March 7, 2022;
 - ii. \$16,875.00 on or before April 15, 2022;
 - iii. \$16,875.00 on or before June 1, 2022;
 - iv. \$16,875.00 on July 1, 2022

- b. A contingency amount of \$2,500.00 (U.S. dollars) is included in the total Fee stated above, to be used to address additional amounts to be paid to Sculptor in fabricating, delivering, and installing the Sculpture as agreed by the parties. If such contingency expenses are not incurred by Sculptor, the final partial payment will be reduced by the amount of contingency payment not utilized and agreed.

- c. Raw materials for which a potential Fee adjustment may be made pursuant to section 3(d) of the Agreement are as follows: copper.

13. Severability. If any provision of this Agreement is held to be unenforceable in any respect, CLIENT and Sculptor agree that such term or provision shall be deemed to be modified to the extent necessary to permit its enforcement to the maximum extent permitted by applicable law.

14. Governing Law. In the unlikely event that a dispute arises out of this Agreement, such Agreement shall be governed by and construed in accordance with the laws of the State of Ohio. Exclusive venue and jurisdiction for any action pertaining to this Agreement shall lie only in the courts of Hamilton County, Ohio. This Agreement shall not be construed for or against any party on the basis of which party drafted any portion of this Agreement.

IN WITNESS WHEREOF, the parties execute this Agreement as of the Effective Date.

TOM TSUCHIYA SCULPTOR LTD.

By: _____
Tom Tsuchiya, Manager

CLIENT name: City of Montgomery

CLIENT address: 10101 Montgomery Road

Montgomery, OH 45242

By: _____
Print name, title Brian Riblet, City Manager