

**MEMORANDUM OF AGREEMENT BETWEEN  
THE CITY OF RAPID CITY**

and

**FIRST NATIONS SCULPTURE GARDEN, INC.**

This agreement is by and between the City of Rapid City, South Dakota, a municipal corporation (hereinafter referred to as City), and the First Nations Sculpture Garden, Inc., (hereinafter referred to as First Nations), a non-profit corporation in Rapid City, South Dakota. See *Exhibit A*.

**PREAMBLE**

The subject of this agreement is a portion of a larger park area of approximately 2.5 acres known as Halley Park. The larger park area encompasses the area between West Main Street and St. Joseph St. and West of West Blvd. The park encompasses the City of Rapid City Parks & Recreation Department Administration Office which is located in the former Sioux Museum building, a nationally registered historic place built in 1936.

The City Parks and Recreation Advisory Board has approved the use of approximately seven tenths of an acre within the larger park as a Native American Monument Sculpture Garden for sculptures of the First Nation's historical figures ("Sculpture Garden") according to the proposal submitted by First Nations. Among other responsibilities, First Nations will raise money to underwrite costs of promotion, design, planning, and purchase of sculptures, development and installation of the Sculpture Garden.

The Sculpture Garden is designed for passive contemplative and reflective use. Improvements are intended to demonstrate outstanding participation of Indian citizens within Rapid City and the Black Hills region.

**AGREEMENT**

The City and First Nations agree to cooperate in the development of a Sculpture Garden located in Halley Park, legally described as

All Blocks 1 and 2 in Section 2, Township 1N, Range 7E of Pennington County, South Dakota.

The Sculpture Garden covers approximately seven tenths of an acre in the middle of the larger park.

Both the City and First Nations agree to the following regarding the approved Sculpture Garden plan:

1. Sculpture Garden Elements. First Nations shall construct improved crosswalks, walking paths, lighting, irrigation, sculpture bases and sculptures substantially in accordance with the Sculpture Garden plan submitted by First Nations and approved by the City. First Nations agrees that it will address accessibility and parking substantially prior to construction of the other Sculpture Garden elements.

First Nations agrees that if the City deems the proposed accessibility and parking solutions developed by First Nations insufficient at the Halley Park location, it will suggest alternate locations for the Sculpture Garden. If the City deems the proposed accessibility and parking solutions offered by First Nations to be insufficient at the Halley Park location, and if the parties cannot agree on an alternative location, then this Agreement will terminate and the obligations of either party will expire. If the parties select a different location for the Sculpture Garden, the parties may agree to amend this Agreement.

2. Sculptures. First Nations agrees to provide all design and planning for the development and installation of the Monument Sculptures to be placed within the Sculpture Garden. First Nations retains ownership of the sculptures but grants the City the right to display them in Halley Park for twenty (20) years, this term to begin on the date of installation of the sculpture(s). At the end of the 20-year term, the City has the right to renew this Agreement for an additional five years upon 60 days notice to First Nations.

3. Expiration of Agreement. The parties agree that, if construction has not commenced within three (3) years of the date of this Agreement, the rights and obligations under this Agreement will expire and the Agreement will terminate.

4. Use of Sculpture Garden. The Sculpture Garden shall be open to the public at times prescribed or scheduled by the Rapid City Department of Parks and Recreation.

5. Construction. First Nations agrees to provide the money, materials, and resources for construction of Sculpture Garden elements. First Nations will seek and obtain all necessary permits for activities associated with the park improvements. The parties agree that the City will review and accept final plans for construction of Sculpture Garden improvements. Both parties will agree upon any substantial additions or modifications to the Sculpture Garden or to the plan submitted by First Nations and approved by the City. All costs expected and unexpected will be paid by First

Nations unless other arrangements are made with the City. Any portion of the project paid for with tax revenue shall comply with applicable bid laws.

Prior to commencement of construction, First Nations agrees to demonstrate to City that they have sufficient funding to construct the entire project. Sufficient funding is defined as total amount of the project estimate, plus ten percent of the estimate as contingency.

First Nations agrees that construction will be completed within eighteen months of the date construction commences.

6. First Nations' Maintenance Responsibilities. First Nations will be responsible for irrigating and seeding of all areas disturbed during park improvements from initial construction of the Sculpture Garden or any subsequent disruptions related to the Sculpture Garden.

The parties agree to cooperate to address emergency situations resulting from vandalism or acts of nature that may require immediate attention and intervention.

7. City's Maintenance Responsibilities. The City will be responsible for maintaining areas of grass throughout the park, as necessary, including trees within the park area. On-going irrigation of the surrounding park area will be the responsibility of the City. The City will be responsible for maintaining public parking areas, paths from parking areas to the Sculpture Garden, and paths and areas outside the park. The City will provide police and fire protection within the park.

The City agrees to provide maintenance and replacement of the sculptures, flags, and signs constructed by First Nations as part of the Sculpture Garden, as needed, with fees collected from First Nations for perpetual care in the amount of ten percent of the total cost of the sculptures, an amount to be deposited with the City upon its final acceptance of the sculptures.

8. Specifications for Improvements. All improvements will be in accordance with any and all City, State, and Federal rules and regulations. Construction of improvements shall follow the City of Rapid City Standard Specifications for Public Works Construction (2007 Edition), as currently revised. First Nations will be responsible for seeking and obtaining any and all permits required for the improvements.

9. Ownership. All improvements which are constructed as part of this Agreement will be owned by the City of Rapid City except for the sculptures themselves, which are owned at all times by First Nations. The City will have full authority over the type of use allowed in the Sculpture

Garden and the opening and/or closing of the Sculpture Garden as part of Halley Park. Any events held within the Sculpture Garden shall be permitted through the Parks Office.

10. Communication. First Nations shall keep the City informed of construction progress on the Sculpture Garden. If First Nations retains a contractor/landscaper to supervise construction of any improvements, the contractor/landscaper shall keep the City informed of progress on construction.

11. Insurance. First Nations will ensure that they or the Project contractor obtains liability insurance for the Project construction as required within the Standard Specifications adopted by the City. Any and all liability insurance policies obtained by First Nations or by any contractor, subcontractor, or other entity involved with the Project construction shall name the City as an additional insured, and any entity securing liability insurance shall furnish to City evidence of the same by a certificate of insurance. First Nations shall name the City an additional insured for the life of this agreement.

12. Indemnification. First Nations agrees to defend, indemnify and save harmless the City from any and all claims, damages, costs, and expenses, including reasonable attorney fees, arising out of or in connection with the conduct by First Nations, its designees, and/or its contractors.

13. Notice to Terminate. If, at any time, the City deems the Sculpture Garden a blight and/or not up to City standards for a park area, or if it deems First Nations to be in default under this agreement, the City will provide First Nations with notice of the defect/default and give First Nations ninety (90) days to comply with the terms of this agreement or correct the defect. If the defect/default is not corrected within 90 days, the City may terminate this agreement, dismantle, take out, or shut down the Sculpture Garden, and/or exercise any rights it has under the law.

In the event that the City determines the Sculpture Garden is to be removed or relocated from Halley Park, then the City agrees that the Sculpture Garden shall not be relocated to any other site following its removal without a joint agreement by First Nations and City as to the new location.

In the event that the City and First Nations cannot agree on a relocation site after removal by the City, then the City agrees to return the Sculptures to First Nations and, upon their return, the Sculptures shall then become the sole property of First Nations. The parties agree that First Nations may assign its rights under this paragraph to another person or entity, with

the prior written approval of City, which approval may not be unreasonably withheld.

14. Independent Contractor. Nothing contained herein shall be construed as creating a partnership or joint venture between City and First Nations, nor construed as making First Nations anything other than an independent contractor of City. First Nations shall have no right or power to act for City other than as contemplated in this agreement or otherwise expressly authorized by City.

15. Costs and Expenses. Each party shall pay all of its own costs and expenses incurred in connection with performance of its duties hereunder.

16. Waivers. No waiver of any breach of any of the terms or conditions of this Agreement shall be held to be a waiver of any other subsequent breach; nor shall any waiver be valid or binding unless the same shall be in writing and signed by the party alleged to have granted the waiver.

17. Consideration. The parties agree that the City's act of allowing First Nations to access and construct the Sculpture Garden within Halley Park constitutes sufficient good and valuable consideration for First Nations' promises made within this Agreement and for the execution and performance of this Agreement.

18. Miscellaneous Provisions.

a. GOVERNING LAW AND VENUE. This Agreement shall be governed by and construed in accordance with the laws of the State of South Dakota without regard for its conflict of laws provisions. The parties agree to bring any suit at law or equity only in Seventh Judicial Circuit Court in Pennington County, South Dakota.

b. TITLES AND CAPTIONS. All section titles or captions contained in this Agreement are for convenience only and shall not be deemed part of the context nor affect the interpretation of this Agreement.

c. ENTIRE AGREEMENT. This Agreement contains the entire understanding between and among the parties and supersedes any prior understandings and agreements among them respecting the subject matter of this Agreement. Any amendments to this Agreement must be in writing and signed by the party against whom enforcement of that amendment is sought.

d. AGREEMENT BINDING. This Agreement shall be binding upon the heirs, executors, administrators, successors and assigns of the parties hereto.

e. SEVERABILITY. If any provision of this Agreement, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of this Agreement, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

EFFECTIVE DATE: In witness where, the parties hereto have executed this agreement this \_\_\_\_\_ day of \_\_\_\_\_, 2013.

FIRST NATIONS SCULPTURE  
GARDEN, INC.

\_\_\_\_\_  
Elizabeth Cook-Lynn, President

STATE OF SOUTH DAKOTA     )

)ss.

COUNTY OF PENNINGTON     )

On this the \_\_\_\_\_ day of \_\_\_\_\_, 2013, the undersigned officer, personally appeared Elizabeth Cook-Lynn, who acknowledged herself to be the President of First Nations Sculpture Garden, Inc., and as such President, being authorized to do so, executed the foregoing document on behalf of First Nations Sculpture Garden, Inc.

IN WITNESS WHEREOF, my signature and official seal appear below.

(seal)

\_\_\_\_\_  
Notary Public, State of South Dakota  
My Commission Expires: \_\_\_\_\_

CITY OF RAPID CITY

\_\_\_\_\_  
Sam Kooiker, Mayor

ATTEST:

\_\_\_\_\_  
Finance Officer  
(SEAL)

State of South Dakota     )  
  SS.  
County of Pennington     )

On this the \_\_\_\_\_ day of \_\_\_\_\_, 2013, before me, the undersigned officer, personally appeared Sam Kooiker and Pauline Sumption, who acknowledged themselves to be the Mayor and Finance Officer, respectively, of the City of Rapid City, a municipal corporation, and that they as such Mayor and Finance Officer, being authorized so to do, executed the foregoing instrument for the purposes therein contained by signing the name of the City of Rapid City by themselves as Mayor and Finance Officer.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

\_\_\_\_\_  
Notary Public, South Dakota

My Commission Expires:  
(SEAL)