

LICENSE AGREEMENT

This License Agreement ("Agreement") made by and between the City of Napa, a California charter city ("City"), and the Peter A. and Vernice H. Gasser Foundation, a California non-profit corporation ("Licensee") is effective on the Effective Date identified on the signature page.

RECITALS

- A. The City holds a right-of-way easement over the roundabout located at the intersection of Peatman Drive and Saratoga Drive and depicted on Exhibit "A" attached hereto and incorporated herein by reference ("Premises").
- B. Licensee desires to use the Premises for the purpose of installing and maintaining the sculpture known as the "Silver Twist" created by artist Gordon Huether as depicted in Exhibit "B" ("Sculpture").
- C. City is willing to grant a revocable license to Licensee for use of the Premises upon the terms and conditions and for the purposes set forth herein.

NOW, THEREFORE, the City and the Licensee, for the mutual consideration described herein, agree as follows:

- 1. **Grant of License.** City grants to Licensee a non-exclusive revocable license to use the Premises for the sole purpose of installing and maintaining the Sculpture, hardscaping and landscaping in accordance with the plans to be approved by the City Public Works Director ("License").
- 2. **Term of License.** The term of this Agreement shall commence on effective date ("Commencement Date") and continue through the twentieth (20th) anniversary of the Commencement Date ("Term") unless terminated earlier as provided in Section 12 of this Agreement. City shall have the option to extend the Term for an additional five (5) years on the same terms and conditions set forth herein by providing written notice to Licensee 30 days prior to the expiration of the Term.
- 3. **License Fee.** As consideration for the rights granted to Licensee herein, Licensee shall comply with all obligations set forth herein. No additional monetary fee shall be required.
- 4. **Conditions of License.** City grants the License to Licensee subject to the following conditions:
 - a. Licensee shall, at its sole cost, install the Sculpture on the Premises and obtain a building permit from the City for the installation of the Sculpture.
 - b. Licensee shall, at its sole cost, install landscaping and hardscape around the Sculpture in accordance with plans approved in advance by the City.
 - c. Licensee shall, at its sole cost, maintain the landscaping, Sculpture and hardscape on the Premises during the term of this Agreement in accordance with City standards. If Licensee fails to perform maintenance after 30 days' written notice from the City, City shall have the right, but not the obligation, to perform the maintenance, and Licensee shall reimburse City within 30 days of receipt of an invoice from City for such maintenance costs.
 - d. Licensee shall, at its sole cost, repair any damage to the Sculpture, landscaping or hardscaping on the Premises. If damage to the Sculpture is beyond repair or if the Sculpture is stolen, Licensee shall restore the Premises to a finished and attractive condition in accordance with plans approved by the City. If Licensee fails to perform repairs after 30 days written notice from the City; or fails to restore the site within a reasonable time after written notice from the City, City shall have the right, but not the obligation, to perform the repairs or restoration, and Licensee shall reimburse City within 30 days of receipt of an invoice from City for such repair or restoration costs.

- for such repair or restoration costs.
- e. Licensee hereby grants to City an irrevocable license to graphically depict the Sculpture for any non-commercial purpose whatsoever. For the purposes of this limitation, the graphic depiction of the Sculpture on materials designed to promote the City shall be deemed to be a non-commercial use. City shall not be responsible for any third party infringement of Licensee's or artist's copyright.
 - f. Licensee hereby represents and warrants that the Sculpture does not, and Licensee has not and will not, utilize any protected patent, trademark or copyright in performance under this Agreement unless and until Licensee has obtained proper permission and all releases and other necessary documents.
 - g. Without limiting any of the provisions of Section 8 of this Agreement, "Indemnification," Licensee agrees to release, indemnify, defend and save harmless City, its elected and appointed officials, officers and employees from any and all claims, damages, suits, costs, expenses, liabilities, actions or proceedings of any kind relating to the Sculpture or performance under this Agreement which infringes or alleges to infringe upon any patent, trademark or copyright or other right protected by law.
 - h. Licensee's installation of the Sculpture pursuant to this Agreement is not intended to satisfy any prior, current or future public art obligations of Licensee pursuant to Napa Municipal Code Chapter 15.108.
5. **Insurance.** Without limiting Licensee's indemnification obligations in Section 8, Licensee shall take out and maintain, throughout the Term, the following policies of insurance against injury and or death to persons or damage to property which may arise from or in connection with the activities hereunder of Licensee, its agents, employees or subcontractors:
- a. Comprehensive or Commercial General Liability Insurance at least as broad as Insurance Services Office Commercial General Liability coverage (occurrence form CG 0001), in an amount of \$2,000,000.00 per occurrence. If a general aggregate limit is used, either the general aggregate limit shall apply separately to this Agreement or the general aggregate shall be twice the required occurrence limit. Said policy shall contain, or be endorsed with, the following provisions:
 - (1) The City and its officers, employees and agents, are covered as insured for liability arising out of the operations performed by or on behalf of Licensee on the Premises. The coverage shall contain no special limitations on the scope of protection afforded to the City and its officers, agents and employees.
 - (2) The inclusion of more than one insured shall not operate to impair the rights of one insured against another insured, and the coverage afforded shall apply as though separate policies had been issued to each insured, but the inclusion of more than one insured shall not operate to increase the limits of the insurer's liability.
 - (3) For claims related to Licensee's use of the Premises, the Licensee's insurance is primary coverage to the City, and any insurance or self-insurance programs maintained by the City is excess to Licensee's insurance and will not be called upon to contribute with it.
 - (4) Any failure to comply with reporting or other provisions of the parties, including breach of warranties, shall not affect coverage provided to City, its officers, employees and agents.
 - b. Licensee shall furnish City with certificates and original endorsements effecting the required coverage prior to the Commencement Date. The endorsements shall be on forms provided by the City or as approved by the City Attorney. Any deductible or self-insured

retention over \$100,000.00 shall be disclosed to and approved by City. If Licensee does not keep all required insurance policies in full force and effect, City may, in addition to other remedies under this Agreement, take out the necessary insurance, and Licensee agrees to pay the cost of said insurance.

- c. Licensee shall obtain and maintain insurance coverage for the Sculpture in the amount of the certified assessed value of the Sculpture.
6. **Uses prohibited.** The Premises shall not be used or permitted to be used in whole or in part during the Term of this Agreement for any purpose or use in violation of the laws or ordinances applicable thereto. Licensee agrees at all times during the Term of this Agreement to maintain the Premises in compliance with any and all federal, state, or laws, statutes, regulations, ordinances, policies, procedures or permits now or hereafter enacted concerning the Premises or the conduct of Licensee in and on the Premises. Licensee shall not use, or permit said Premises, or any part thereof, to be used, for any purpose other than the purpose described in Section 1. Licensee shall not make, or cause to be made, any alterations to the Premises without the prior and express written consent of the City.
7. **No liens.** Licensee shall keep the Premises free from any and all liens arising out of Licensee's use of the Premises, materials furnished, or obligations incurred by Licensee.
8. **Indemnification.** To the fullest extent permitted by law, Licensee shall indemnify, hold harmless, release and defend City and its officers, employees and agents from and against any and all actions, claims, demands, damages, disability, losses, expenses including attorney's fees and other defense costs and liabilities of any nature that may be asserted by any person or entity including Licensee arising out of the Sculpture or the activities of Licensee, its officers, employees, or agents on the Premises, including installation, maintenance and repair of the Sculpture, landscaping and hardscaping excepting only liabilities due to the sole negligence or willful misconduct of City. This indemnification obligation is not limited in any way by any limitation on the amount or type of damages or compensation payable by or for Licensee under Worker's Compensation, disability or other employee benefit acts or the terms, applicability or limitations of any insurance held or provided by Licensee and shall survive the expiration or termination of this Agreement.
9. **Hazardous Materials.**
 - a. Licensee agrees that it will not cause or permit any hazardous material (as defined herein) to be generated, brought onto, used, stored, released or disposed of on, under, about or within the Premises by Licensee, or its agents, employees, contractors, sub Licensees, invitees or other third parties. In the event during the Term of this Agreement it is determined that the Premises is contaminated by hazardous materials through no action or inaction of Licensee, its employees, agents, contractors or invitees, Licensee shall have the right to terminate this Agreement upon thirty (30) days written notice to City, but shall not have the right to sue City for damages.
 - b. If either party becomes aware of any actual or threatened release of hazardous materials on, under, or about the Premises or any inquiry, investigation, proceeding or claim by any agency or person regarding the presence of hazardous materials on, under, or about the Premises, that party shall give the other party written notice of the same within five (5) days of learning of it and shall simultaneously furnish the other party copies of any claim, notices of violation, reports, or other writings received.
 - c. To the fullest extent permitted by law, Licensee shall, with counsel reasonably acceptable to City, indemnify, defend, release, and hold harmless City, its officers, agents, and employees, regarding all losses arising out of or resulting from Licensee's use or storage of any hazardous materials on or about the Premises, the release of any hazardous material in or about the Premises or the violation of any environmental law by Licensee, its agents, contractors, or invitees including, but not limited to, losses attributable to diminution in the value of the Premises, liability for penalties, costs, fines, claims, expenses, actions, acts of remediation, obligations, changes, etc., resulting from Licensee's use or storage of hazardous materials or any release or violation. This

indemnification obligation shall survive the expiration or termination of this Agreement.

d. If the presence of any hazardous material brought onto the Premises by Licensee or Licensee's employees, agents, contractors, and/or invitees results in contamination of the Premises, Licensee shall promptly take all necessary actions, at Licensee's sole cost and expense, to return the Premises to the condition that existed prior to the introduction of such hazardous material; provided however, Licensee shall first obtain the City's approval of the proposed remediation action. Remediation shall not limit Licensee's indemnification obligation set forth above.

e. As used herein, hazardous materials shall mean any hazardous or toxic substance, material, or waste that is or becomes regulated by the federal, state or local government, including:

(1) "Hazardous substances" and "pollutants and contaminants" as defined in CERCLA, 42 USC §§960114 and (33) and regulations issued pursuant thereto;

(2) "Extremely hazardous substances," "hazardous chemicals," and "toxic chemicals" as defined in the Emergency Planning and Community Right to Know Act, 42 USC §§1102(a), 1121(e) and 1122(c) and regulations issued pursuant thereto;

(3) "Hazardous chemicals" within the meaning of OSHA's Hazard Communication Rules, 29 CFR §1910.1200;

(4) Any such materials regulated under state or local environmental laws and regulations similar to the foregoing federal authorities listed in 1-3 above; and

(5) Any materials not covered by, or exempted from, the sources listed in subsections 1-4 above that may nevertheless pose a threat to human health or welfare or to the environment including, without limitation, petroleum, including crude oil or any fraction thereof, radon, PCB's, radioactive material, toxic pesticides and herbicide, solvents, and materials containing asbestos or formaldehyde.

10. **Notices.** Any notice or other communication under this Agreement shall be in writing and either served personally or sent by prepaid, first-class mail, addressed to the other party at the following addresses:

City: City of Napa
Attn: Parks and Recreation Director
P. O. Box 660
Napa, CA 94559

Licensee: Peter A. and Vernice H. Gasser Foundation
Attn: _____
433 Soscol Ave #120
Napa, CA 94559

11. **No Assignment or Subletting by Licensee.** This Agreement is personal to Licensee. Licensee shall not voluntarily or by operation of law assign, transfer, sublet or otherwise transfer or encumber all or any part of Licensee's interest in this Agreement or in the Premises without City's prior written consent. Any request for assignment shall be accompanied by such data relating to the identity and financial condition of the proposed assignee and the material terms of the transfer as may be requested by City to make its decision. Any attempt to assign this Agreement or Licensee's obligations hereunder without the prior written consent of City is void, and at the option of City, shall terminate this Agreement.

12. **Termination.** This Agreement may be terminated by the City upon a determination by the Director of Public Works that the Sculpture constitutes a public health or safety hazard or that the

Premises are required for another public purpose, with 90 days' prior written notice to Licensee.

13. Removal of the Sculpture.

- a. Prior to Expiration or Termination. Licensee shall not remove the Sculpture from the Premises prior to the expiration or City's termination of this Agreement. If the maintenance of the Sculpture becomes too cost prohibitive, as determined by Licensee in its reasonable discretion, and the Parties agree to the early removal of the Sculpture and the City decides, in its sole and absolute discretion, not to replace the Sculpture with another piece of art at City's cost, Licensee shall leave the Premises in a finished and attractive condition in accordance with plans approved in advance by the City.
- b. Upon Expiration. Upon expiration of this Agreement, Licensee shall remove the Sculpture from the Premises at its sole cost or donate the Sculpture to the City. If Licensee removes the Sculpture from the Premises, and the City decides not to replace the Sculpture with another piece of art upon termination, Licensee shall leave the Premises in a finished and attractive condition in accordance with plans approved in advance by the City.
- c. Upon Termination by City. If the City terminates this Agreement "for cause" pursuant to Section 12 based on a breach of this Agreement by Licensee (e.g., inadequate maintenance), then Licensee shall, at its sole cost, remove the Sculpture and leave the Premises in a finished and attractive condition in accordance with plans approved in advance by the City. If the City terminates this Agreement for convenience pursuant to Section 12, then the City shall, at its sole cost, remove the Sculpture and leave the Premises in a finished and attractive condition.

- 14. Surrender of Premises.** Upon the expiration of the Term or the earlier termination of this Agreement, Licensee shall remove the Sculpture from the Premises and restore the Premises to its condition prior to the Commencement Date. Licensee shall timely repair any damages to the Premises, including but not limited to landscaping caused by, or resulting from, Licensee's activities on the Premises. If Licensee fails to timely repair any damages in accordance with this Section 14, Licensee will be charged for the cost of such repairs, including any associated staff costs.

15. General Provisions.

- a. Headings. The heading titles for each paragraph of this Agreement are included only as a guide to the contents and are not to be considered as controlling, enlarging, or restricting the interpretation of the Agreement.
- b. Severability. If any term of this Agreement (including any phrase, provision, covenant, or condition) is held by a court of competent jurisdiction to be invalid or unenforceable, the Agreement shall be construed as not containing that term, and the remainder of this Agreement shall remain in full force and effect; provided, however, this paragraph shall not be applied to the extent that it would result in a frustration of the parties' intent under this Agreement.
- c. Governing Law, Jurisdiction, and Venue. The interpretation, validity, and enforcement of this Agreement shall be governed by and interpreted in accordance with the laws of the State of California. Any suit, claim, or legal proceeding of any kind related to this Agreement shall be filed and heard in a court of competent jurisdiction in the County of Napa.
- d. Attorney's Fees. In the event any legal action is commenced to enforce or interpret this Agreement, the prevailing party is entitled to reasonable attorneys' fees, costs, and expenses incurred, whether or not such action or proceeding is prosecuted to judgment.
- e. Modifications. This Agreement may not be amended or modified orally. No amendment or modification of this Agreement is binding unless it is in a writing signed by both parties.
- f. Waivers. No waiver of a breach, default, or duty under this Agreement will be effective

unless it is in writing and signed by the party waiving the breach, default, or duty. Waiver of a breach, default, or duty under this Agreement will not constitute a continuing waiver or a waiver of any subsequent breach, default, or duty under this Agreement.

g. **Time**. Time is of the essence in carrying out the duties hereunder. Each Party shall, upon request by the other party, execute, acknowledge, and deliver such documents or take such action as may be necessary or convenient to carry out the terms and conditions of this Agreement.

h. **Entire Agreement**. This Agreement, including all documents incorporated herein by reference, comprises the entire integrated understanding between the parties concerning the subject matter herein. This Agreement supersedes all prior negotiations, agreements, and understandings regarding this matter, whether written or oral. The documents incorporated by reference into this Agreement are complementary; what is called for in one is binding as if called for in all. If any provision in any document attached or incorporated into this Agreement conflicts or is inconsistent with a provision in the body of this Agreement, the provisions in the body of this Agreement will control over any such conflicting or inconsistent provisions.

i. **Each Party's Role In Drafting The Agreement**. Each party to this Agreement has had an opportunity to review the Agreement, and to consult with its respective legal counsel regarding the meaning of the Agreement. Accordingly, Civil Code Section 1654 will not apply to interpret any uncertainty in the meaning of the Agreement.

j. **Signatures**. The individual executing this Agreement represent they have the right, power, legal capacity, and authority to enter into and to execute this Agreement on behalf of the respective legal entities of the Licensee and City.

h. **Counterparts**. This Agreement may be executed in counterparts, each one of which is deemed an original, but all of which together constitute a single instrument.

[SIGNATURES ON FOLLOWING PAGE]

IN WITNESS WHEREOF, the parties hereto have executed this Agreement to be effective on the Effective Date set forth below.

LICENSEE:

Peter A. and Vernice H. Gasser Foundation, a California non-profit corporation

By: _____

By: _____

CITY:

CITY OF NAPA, a California charter city

By: _____
Steve Potter, City Manager

APPROVED AS TO FORM:

By: _____
Michael Barrett, City Attorney

COUNTERSIGNED:

By: _____
Desiree Brun, Auditor

ATTEST:

By: Tiffany Carranza, City Clerk

Date: _____
("Effective Date")

Exhibit "A"

Premises

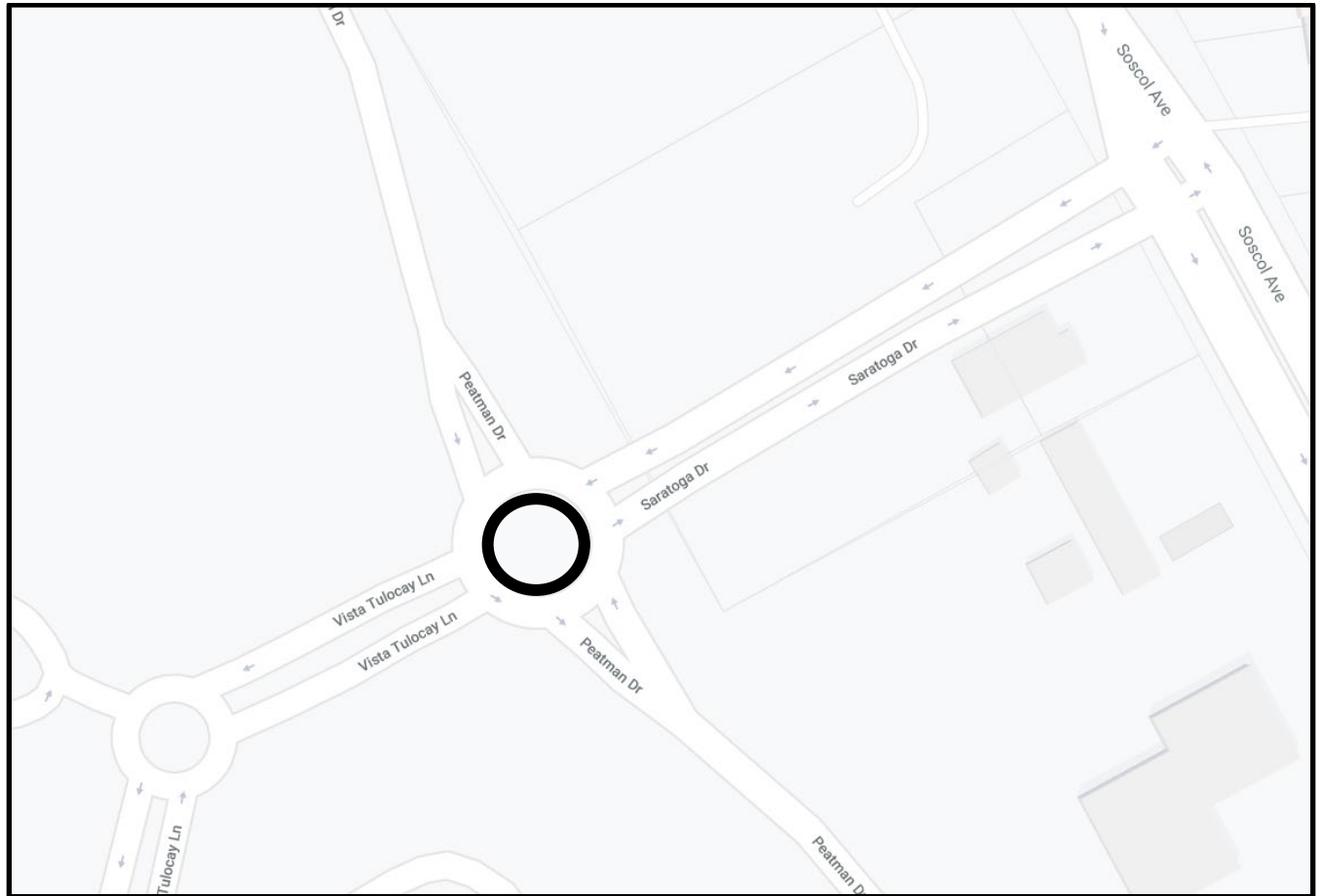
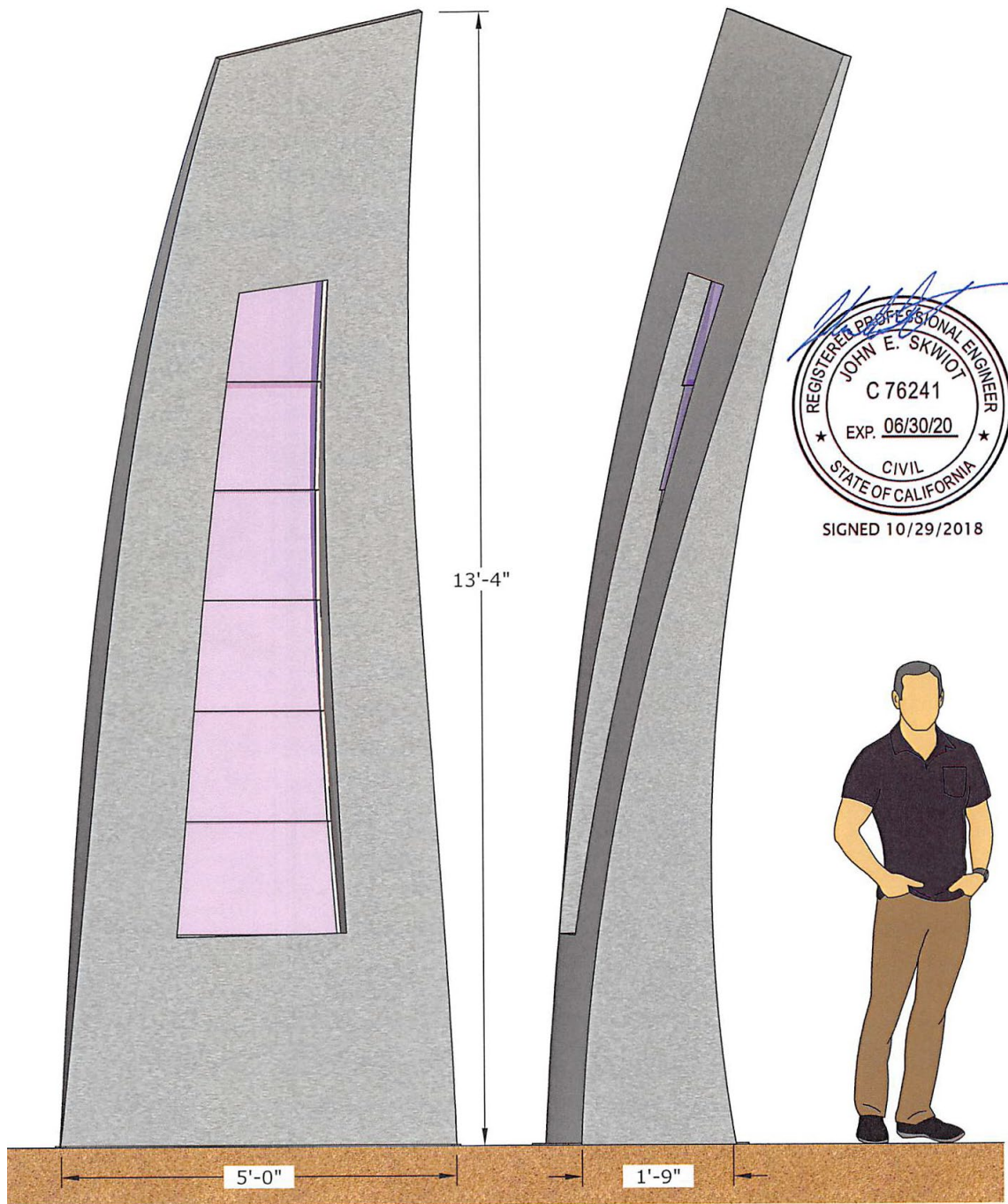


Exhibit "B"

Sculpture



SCULPTURE RENDERING