

ENCROACHMENT & MAINTENANCE AGREEMENT

1. PARTIES

San Francisco Public Works (the “Department”) enters into this Encroachment and Maintenance Agreement (“Agreement”) with the San Francisco Arts Commission (the “Permittee”).

Both the Department and the Permittee are departments of the City and County of San Francisco (the “City”).

2. PERMIT INFORMATION

2.1 Major Encroachment Permit No.: _____

2.2 Description of Encroachment Permit Area (See Schedule 1): _____

2.4 Description of Proposed Improvements (“Improvements” or “Encroachment”): **installation of an original artwork by HYBYCOZO entitled Aurum (the “Artwork”), which shall become part of the City’s civic art collection Associated artwork description plaque and protective signage also to be installed under this encroachment permit.**

2.5 Permit Description/Type: Major Encroachment for the Artwork

2.6 Date of approved plans: _____

2.7 **Contact Information.** The Permittee, third party management company, or project sponsor in responsible charge shall provide to Public Works, Bureau of Street Use and Mapping (“BSM”), the information below regarding a minimum of two (2) contact persons with direct relation to or association with, or in charge of or responsible for, the Permit. Public Works shall provide the Permittee the information of the contact person at Public Works responsible for the processing of this Permit.

Contact Person Number 1

Last Name, First Name: Cummings, Allison
Title/Relationship to Owner: Senior Registrar
Phone Numbers: 415.252.2212
Email Addresses: allison.cummings@sfgov.org
Mailing Address: 401 Van Ness Avenue, Suite 325
San Francisco, CA 94102

Contact Person Number 2

Last Name, First Name: Chou, Mary
Title/Relationship to Owner: Civic Art Collection and Public Art Director

Phone Numbers: 415-252-2233
Email Addresses: mary.chou@sfgov.org
Mailing Address: 401 Van Ness Avenue, Suite 325
San Francisco, CA 94102

Public Works Contact Person

Last Name, First Name: _____
Title: _____
Phone Numbers: _____
Email Addresses: _____
Mailing Address: _____

3. REVOCABLE PERMIT; NON-EXCLUSIVE

Commencing on the date the Department authorizes commencement of the Permit (the “Effective Date”), City confers to Permittee a revocable, non-exclusive and non-possessory right to enter upon and use the public right-of-way (the “PROW”) for the limited purpose of installing and subsequently maintaining the approved elements of the permit within the dedicated area (the “Permit Area”) subject to the terms, conditions, and restrictions set forth herein. The privilege given to Permittee under this Agreement is effective only insofar as the rights of City in the PROW are concerned. Permittee shall obtain from other parties any further permission necessary to perform its activities under the Permit and this Agreement due to any other existing rights affecting the PROW.

Further permission from the Department may be required prior to Permittee’s performance of work within the Permit Area following the initial installation within the Permit Area including, but not limited to, the restoration of a temporarily restoration of a temporarily excavated trench, removal and replacement of trees or other landscaping, or repair of damaged or uplifted sidewalk or other paving material. This Agreement does not limit, prevent, or restrict the Department from approving and issuing permits for the Permit Area including, but not limited to, occupancy, encroachment, and excavation permits. The Department shall include as a condition in all new permits issued in the Permit Area that any new permittee notify and coordinate with the Permittee prior to occupying, encroaching, or excavating within the Permit Area.

4. PERMITTED USES AND ACTIVITIES

Commencing on the date(s) of the written authorization(s) from the Department, the Permittee may enter on and use the PROW for the purposes of constructing the Encroachment as set forth in the approved plans and described in the Department’s written authorization(s) to proceed, and to perform and complete the initial or phase of construction. Subsequent to completion of the initial or phase of construction, Permittee may enter on and use the PROW for the purposes of performing as-needed and routine maintenance, repair, and replacement activities set forth in this Agreement, as identified in Schedule 3. The Department acknowledges that Permittee has entered into, or will enter into, a Memorandum of Understanding with the Friends of Mint Plaza (“FoMP”) whereby FoMP will maintain the Artwork, and may perform Permitted Activities. The Director of Public Works (the “Director”) and Permittee may modify the scope of

such maintenance, repair, and replacement activities and other permitted activities (the “Permitted Activities”) by a written amendment to this Agreement that both parties execute.

5. CONDITIONS OF ENTRY AND USE

Permittee acknowledges its responsibility to construct the Improvements in the location as specified by the plans submitted, revised, approved, and filed in the Department. By entering into this Agreement, Permittee acknowledges its responsibility to comply with all requirements of construction, occupancy, maintenance, and liability of the Encroachment as specified in this Agreement, Declaration of Maintenance Covenants and Obligations (the “Declaration”), Public Works Code Section 786, Article 2.4 of the Public Works Code (“Excavation in the Public Right-of-Way”), the sidewalk maintenance requirements specified in Public Works Code Section 706, and as directed by the Director. Permittee shall comply and cause its agents to comply, with each of the following requirements in its performance of the Permitted Activities.

5.1 Permits and Approvals

5.1.A Requirement to Obtain all Regulatory Permits and Approvals.

Permittee shall obtain any permits, licenses, or approvals of any regulatory agencies (“Regulatory Permits”) required to commence and complete any of the Permitted Activities. Promptly upon receipt of any such Regulatory Permits, Permittee shall deliver copies of them to the Department. Permittee recognizes and agrees that no approval by City under this Agreement for purposes of the Permitted Activities shall be deemed to constitute the grant of any or all other Regulatory Permits needed for the Permitted Activities, and nothing herein shall limit Permittee's obligation to obtain all such Regulatory Permits, at Permittee's sole cost.

5.1.B Subsequent Excavation within Permit Area. When maintenance of the Permit Area requires excavation as described in Article 2.4 of the Public Works Code, or prevents accessible public access through the Permit Area, Permittee shall apply for applicable permits from the Department and any other affected City agencies. Permittee or agent of Permittee shall comply with all Department excavation permit bonding or security requirements when performing or causing to be performed any excavations within the Permit Area.

5.2 Exercise of Due Care

During any entry on the PROW to perform any of the Permitted Activities, Permittee shall, at all times and at its sole cost, perform the Permitted Activities in a manner that maintains the PROW in a good, clean, safe, secure, sanitary, and attractive condition. Permittee shall use due care at all times to avoid any damage or harm to the PROW or any Improvements or property located thereon, and to take such soil and resource conservation and protection measures with the PROW as are required by applicable laws and as City may reasonably request in writing. Permittee shall not perform any excavation work without Public Works’ prior written approval. While on

the PROW to perform the Permitted Activities, Permittee shall do everything reasonably within its power to prevent and suppress fires on and adjacent to the PROW attributable to such entry.

5.3 Cooperation with City Personnel & Agencies

Permittee shall work closely with City personnel to avoid unreasonable disruption (even if temporary) of access to the Improvements and property in, under, on or about the PROW and City and public uses of the PROW.

In the event that the Department seeks to physically alter or modify the Permit Area for City purposes, Department and Permittee shall work together, along with any other City agency with jurisdiction over the property, if applicable, to accommodate the City project. Except where the need for physical alteration or modification of the Permit Area results from an emergency, in the event the Department intends to take action that will require removal of the Artwork or that will destroy or significantly alter the Artwork, such as destruction of all or part of the site, the Department shall notify Permittee at least ninety (90) days in advance of such action. The Department shall bear the responsibilities for construction, installation, maintenance, and repair of said alterations or modifications and the alterations or modifications shall be wholly the obligation of the City to maintain and repair unless otherwise agreed upon between the parties to this Agreement. The Department shall be responsible for any costs associated with removing the Artwork to accommodate a City project that is not funded by the General Fund if the budget for the City project includes funds eligible and sufficient to cover these costs.

5.4 Inspection

Permittee acknowledges its inspection responsibility includes verifying and confirming it has constructed and installed all Improvements in compliance with the approved plans and as specified herein (including, but not limited to, materials, elements, fixtures, etc.). Permittee acknowledges its responsibility to schedule a preconstruction meeting with the required City inspector(s) prior to beginning the initial or phase of construction. Permittee acknowledges the Public Works' responsibility to perform inspections during and after the construction of installed Improvements to confirm general conformance to the approved plans, and such inspections do not relieve the Permittee from its obligations and responsibilities to ensure all work is performed and constructed in accordance with the approved plans.

5.5 Permittee's Maintenance and Liability Responsibilities

5.5.A Permittee to Construct and Maintain Improvements and Encroachments. Permittee acknowledges its maintenance and liability responsibility for Improvements and all other Encroachments (including, but not limited to, materials, elements, fixtures, etc.) in compliance with the approved plans and as specified herein. Permittee agrees to construct and maintain said Encroachments as described in the Agreement and Schedule 3 and in accordance with the approved plans, and as described in the Declaration (if applicable). The Department shall not be responsible for the maintenance or repair of the Artwork. Permittee is

wholly responsible for the quality of the work performed in the PROW under this Agreement, and the Permittee is liable for all consequences of any condition of such work and any facilities installed in the PROW. Neither the issuance of any permit nor the inspection, nor the repair, nor the suggestion, nor the approval, nor the acquiescence of any person affiliated with the Department shall excuse the Permittee from such responsibility or liability.

5.5.B Operations and Maintenance Plan or Manual. As a condition of the Department's issuance of the notice to proceed for construction of the Improvements or a phase of such construction, the Permittee shall submit to the Department a Maintenance Plan with a detailed description of means and methods to maintain any and all elements of the Permit. The Permittee shall be free to exercise its maintenance and repair obligations as determined within the Maintenance Plan on a regular basis without the necessity of receiving prior notification from the City.

5.5.C Abatement of Unsafe, Hazardous, Damaged, or Blighted Conditions. The Department will notify Permittee of an unsafe, damaged, or blighted condition of the Permit. The Permittee will acknowledge such notice within 48 hours and provide the Department with an estimate time period to restore the site to the agreed upon condition. For unsafe or hazardous conditions, the Permittee and Department shall work together to immediately place or cause to be placed temporary measures to protect the public. Permittee's failure to respond to a notice within 48 hours may result in the Department's performing the temporary repair or restoration. If Permittee fails to respond to such notice, then the Department may issue a Notice of Violation and/or request for reimbursement fees to the Department for departmental services necessary to abate the condition to address a health and safety hazard (e.g., placement of barriers around the Encroachment to prevent public access while the condition is being abated). Notwithstanding the above, or any other provision of the Permit, where time allows, if Permittee or the Department intend to take action that will destroy or significantly alter the Artwork, such as destruction of all or part of the site, Permittee shall have at least ninety (90) days to respond to the notice and restore the site to the condition specified in the approved plan. The Department will use its best efforts to consult with the Permittee prior to performing any temporary repair or restoration. The Department shall not be liable for any damages to the Artwork resulting from such temporary repair or restoration.

5.5.D Claims and Litigation Cost. To the extent there are any claims against the City, all costs associated with any litigation and/or claims shall be determined by the City's applicable laws, rules, and regulations governing claims against the City.

5.6 Damages, Cleanliness; Restoration of PROW

If any portion of the PROW or any property of City-owned or controlled property located adjacent to the PROW, including other publicly dedicated right-of-ways, is damaged by any of the activities conducted by Permittee hereunder, Permittee shall immediately contact the Department, and Permittee and Department will work together to repair any and all such damage and restore the PROW or property to its previous condition to the satisfaction of the Director.

Immediately following completion of the construction of the permitted Improvement or any of the Permitted Activities hereunder, Permittee shall remove all debris and any excess dirt

from PROW and Improvements. Permittee shall restore the PROW to its condition immediately prior to Permittee's commencement of such Permitted Activities to the satisfaction of the Director.

Upon termination or revocation of the Permit, the Permittee shall, within 90 calendar days (plus such additional time the Director determines is reasonably necessary to take the required corrective action in a practical manner given the circumstances), remove or cause to be removed all elements of the Permit Improvements and shall restore the site to a condition satisfactory to the Director.

5.7 Excavation or Temporary Encroachment within the Permit Area

Permittee acknowledges its maintenance responsibility following any excavation or temporary encroachment of any portion or portions of the Permit Area as described below.

5.8 Revocability

Permittee acknowledges and agrees that the obligations of the Permittee or successor owner(s) to perform the Permitted Activities shall continue for the term of the Permit or as otherwise addressed pursuant to the Declaration. Public Works reserves the right to revoke the Permit in the event that such removal is required for public right-of-way needs or use, public health or safety reasons as reasonably determined by the Director of Public Works, a Major Encroachment Permit applicable to the site of the artwork is revoked, or the site of the artwork is approved for conversion to a roadway.

Permittee's or successor owner's obligation to remove the Encroachment and restore the right-of-way to a condition satisfactory to Director of Public Works shall survive the revocation, expiration, or termination of this Permit.

Public Works shall be released from the responsibility to maintain the existence of the Encroachment and shall not be required to preserve or maintain the Encroachment in any capacity following the termination or revocation of the Permit unless the Department, in its discretion and in accordance with the Declaration, agrees to an alternative procedure.

6. USE RESTRICTIONS

Permittee agrees that the following uses of the PROW by Permittee or any other person claiming by or through Permittee are inconsistent with the limited purpose of this Agreement and are strictly prohibited as provided below. The list of prohibited uses includes, but is not limited to, the following uses.

6.1 Improvements

Permittee shall not make, construct, or place any temporary or permanent alterations, installations, additions, or improvements on the PROW, structural or otherwise, nor alter any existing structures or improvements on the PROW (each, a "Proposed Alteration"), without the Director's prior written consent in each instance. Director shall have a period of thirty (30) days from receipt of request for approval of an Improvement or Proposed Alteration to review and approve or deny such request for approval. Should the Director fail to respond to such request within said thirty (30) day period, Permittee's Proposed Improvement or Proposed Alteration shall be deemed disapproved. In requesting the Director's approval of an Improvement or a Proposed Alteration, Permittee acknowledges that the Director's approval of such Improvement or Proposed Alteration may be conditioned on Permittee's compliance with specific installation requirements and Permittee's performance of specific on-going maintenance thereof or other affected PROW. If Permittee does not agree with the Director's installation or maintenance requirements for any Improvement or Proposed Alteration, Permittee shall not perform the Improvement or the Proposed Alteration. If Permittee agrees with the Director's installation or maintenance requirements for any Improvement or Proposed Alteration, prior to Permittee's commencement of such Improvement or Proposed Alteration, Permittee and the Director shall enter into a written amendment to this Agreement that modifies the Permitted Activities to include such requirements. Prior approval from the Director shall not be required for any repairs and replacements made pursuant to and in accordance with the Permitted Activities.

If Permittee performs any City-approved Improvement or Proposed Alteration, Permittee shall comply with all of the applicable terms and conditions of this Agreement, including, but not limited to, any and all conditions of the proposed improvement(s) or alteration(s).

6.2 Dumping

Permittee shall not dump or dispose of refuse or other unsightly materials on, in, under, or about the PROW.

7. VIOLATIONS; SECURITY FOR PERFORMANCE

7.1 Notices of Violation; Uncured Defaults

If there is an unsafe, hazardous, damaged, and/or blighted condition(s) within the permitted area, the Department and Permittee agree to work together to determine the most efficient method to abate the condition(s). In the event of an emergency or other situation presenting a threat to public health, safety, or welfare, the Director may require the violation to be cured in a period less than thirty (30) days and may provide notice to the Permittee in an expedited manner that will be deemed received upon the Director's issuance of such notice.

8. COMPLIANCE WITH LAWS

Permittee shall, at its expense, conduct and cause to be conducted all activities on the PROW allowed hereunder in a safe and prudent manner and in compliance with all laws, regulations, codes, ordinances, and orders of any governmental or other regulatory entity (including, without limitation, the Americans with Disabilities Act and any other disability access laws), whether presently in effect or subsequently adopted and whether or not in the contemplation of the parties. Permittee shall, at its sole expense, procure and maintain in force at all times during its use of the PROW any and all business and other licenses or approvals necessary to conduct the Permitted Activities. Nothing herein shall limit in any way Permittee's obligation to obtain any required regulatory approvals from City departments, boards, or commissions or other governmental regulatory authorities or limit in any way City's exercise of its police powers. At the Director's written request, Permittee shall deliver written evidence of any such regulatory approvals Permittee is required to obtain for any of the Permitted Activities.

9. SIGNS

Permittee shall not place, erect, or maintain any sign, advertisement, banner, or similar object on or about the PROW without the Director's written prior consent, which the Director may give or withhold in its sole discretion; provided, however, that Permittee may install any temporary sign that is reasonably necessary to protect public health or safety during the performance of a Permitted Activity.

10. UTILITIES

Permittee has the sole responsibility to locate utilities and protect them from damage. To the extent required as a result of or in connection with activities conducted by or on behalf of Permittee. Permittee shall be solely responsible for arranging and paying directly for any utilities or services necessary for its activities hereunder.

Permittee acknowledges that it will provide and not obstruct access to any utilities and facilities owned and operated by any City or public utility company at any time within the Permit Area for maintenance, repair, and/or replacement. Furthermore, with respect to City owned and operated utilities and facilities, the Permittee acknowledges that following any such access, the City's restoration shall include only back-fill and patch restoration. The City shall not replace special finishes, structures, and surface improvements that the City may remove or damage in connection with such access. The City shall not be responsible for any property damage, injury, death, or flooding related to the condition, operation, maintenance, or repair of non-City improvements or other non-City utilities.

Permittee's obligations shall not include maintaining any underground utilities not associated with its operations of the Permit Area, nor shall its obligations include maintenance of any improvements outside of the Permit Area (Schedule 1 depicts Permit Area). The Permittee shall have no obligation in regard to signing or striping associated with traffic guidance and safety

on those portions of the public right-of-ways outside of the Permit Area. Should any agency other than a City department require access to any of the underground utilities for maintenance or repair, the Department shall impose permit or authorization conditions that such agency provide at least fourteen (14) calendar days' advance written notice and coordinate any such work with the Permittee. The City shall have access available 24 hours a day, 7 days a week as needed for maintenance purposes and the Department will strive to cooperate with affected City department to provide written notice to the Permittee for such work. In the case on an emergency, the City need not notify the Permittee of the work until after the emergency situation has been abated at which point the Department will strive to cooperate with affected City department to provide written notice to the Permittee concerning the emergency work.

11. PESTICIDE PROHIBITION

Permittee shall comply with the provisions of Section 308 of Chapter 3 of the San Francisco Environment Code (the "Pesticide Ordinance") which (a) prohibit the use of certain pesticides on PROW, (b) require the posting of certain notices and the maintenance of certain records regarding pesticide usage and (c) require Permittee to submit to the Director an integrated pest management ("IPM") plan that (i) lists, to the extent reasonably possible, the types and estimated quantities of pesticides that Permittee may need to apply to the PROW during the term of this Agreement, (ii) describes the steps Permittee will take to meet the City's IPM Policy described in Section 300 of the Pesticide Ordinance, and (iii) identifies, by name, title, address and telephone number, an individual to act as the Permittee's primary IPM contact person with the City. In addition, Permittee shall comply with the requirements of Sections 303(a) and 303(b) of the Pesticide Ordinance. Nothing herein shall prevent Permittee, through the Director, from seeking a determination from the Commission on the Environment that it is exempt from complying with certain portions of the Pesticide Ordinance as provided in Section 303 thereof.

12. GENERAL PROVISIONS

Unless this Agreement provides otherwise: This Agreement may be amended or modified only in writing and signed by both the Director and Permittee; provided that the Director shall have the right to terminate or revoke the Permit as described in Section 5.8 of this Agreement, or as otherwise in accordance with this Agreement.

[Signature Page to Follow]

In witness whereof the undersigned Permittee(s) have executed this agreement this _____ day of _____, 20____.

PERMITTEE:

CITY AND COUNTY OF SAN FRANCISCO
ARTS COMMISSION, a municipal corporation

CITY AND COUNTY OF SAN FRANCISCO
DEPARTMENT OF PUBLIC WORKS, a municipal corporation

City Engineer of San Francisco

By: _____

Name: Ralph Remington

Title: Director of Cultural Affairs

Director of Department of Public Works

SCHEDULE 1
Description and Depiction of PROW

SCHEDULE 2

Construction, Maintenance, Repair, and Replacement Activities