

HILLCREST PARK KOREAN WAR MEMORIAL AGREEMENT

BY AND BETWEEN

THE ORANGE COUNTY KOREAN WAR MEMORIAL COMMITTEE

AND

THE CITY OF FULLERTON

This Agreement is entered into by and between the ORANGE COUNTY KOREAN WAR MEMORIAL COMMITTEE (the “Committee”), a California Nonprofit Corporation, and the CITY OF FULLERTON (“CITY”), a California municipal corporation, collectively referred to as the “Parties” or individually as a “Party.”

RECITALS

WHEREAS, the Committee desires to promote a historical remembrance for those United States Service Members (“US Service Members”) who sacrificed their lives for the United States during the Korean War, and the CITY is supportive of the Committee’s desire; and

WHEREAS, the Parties previously agreed to, and entered into, a Memoranda of Understanding for their mutual benefit in collaborating and cooperating with each other for the development of the aforementioned Korean War Memorial, the most recent Memorandum of Understanding having been entered into on November 5, 2019; and

WHEREAS, the Parties now desire to memorialize their commitment to the design and construction of the aforementioned Korean War Memorial at Hillcrest Park, as well as responsibilities for continued maintenance of the Korean War Memorial once built, which shall not be the obligation of the City; and

WHEREAS, the City Council of the CITY previously approved the construction, placement and design of the Korean War Memorial at Hillcrest Park on July 7, 2020, and recorded a notice of exemption pursuant to the California Environmental Quality Act on April 2, 2021, finding the project categorically exempt from CEQA, and this Agreement is in furtherance of that prior approval; and

WHEREAS, the Korean War Memorial is consistent with the Hillcrest Park Master Plan; and

WHEREAS, the Parties intend that the construction of the Korean War Memorial will include placement of several star-shaped monuments, flag poles and bench seating in the area designated for the Memorial, as previously approved by the CITY for construction at Hillcrest Park in the City of Fullerton (the “Korean War Memorial”), which location for the Memorial is adjacent to the “Duck Pond” and the parking lot, along North Brea Boulevard; and

WHEREAS, the CITY is the owner of the real property upon which the Korean War Memorial will be constructed and permanently located, as more particularly described in the documents attached hereto and incorporated herein by reference as "Exhibit A"; and

WHEREAS, the Committee will be afforded non-exclusive use of and access to the designated portion of Hillcrest Park only for the construction and maintenance obligations relating to the Korean War Memorial, as more particularly set forth in this Agreement; and

WHEREAS, in furtherance of the preceding, the Parties have agreed to execute this Agreement in order to document the duties and responsibilities of each Party, related to the payment for and construction of the Korean War Memorial, and related to the ongoing liability and maintenance of or relating to the Memorial, and as to non-exclusive use of a portion of the real property on which the Memorial will be located by the Committee, exclusively for construction and ongoing maintenance purposes.

NOW, THEREFORE, for and in consideration of the foregoing and the mutual promises, covenants and conditions herein contained, the CITY and the Committee agree as follows:

General Conditions

1. All costs, fees and liabilities associated with the design, construction, and maintenance of the Korean War Memorial, as set forth herein, including any impacts caused by the Korean War Memorial to adjacent or other areas of Hillcrest Park or public improvements, including the Duck Pond and/or its rehabilitation, restoration or renovation, whether during or as a result of construction and/or ongoing maintenance obligations or activities of the Committee at or on the Memorial, will be the responsibility of the Committee. No CITY funds shall be used or obligation in any way for the construction or maintenance of the Korean War Memorial. The Parties agree that the CITY shall have no liability, responsibility or obligation relating to any construction, reconstruction, repair, maintenance, care, cleaning, rehabilitation or otherwise relating to the Memorial, which shall be the sole obligation and responsibility of the Committee.
2. Nothing herein is intended to create or constitute a joint venture, partnership, or agency relationship between the Parties. No Party shall have any right, power, or authority to create any obligation, express or implied, on behalf of the other Party with respect to the matters governed by this Agreement. Without the prior written consent of the other Party, no Party may use the logo, trademark, name, or other sign of identification of the other Party, unless otherwise expressly provided herein.
3. The Parties expressly agree that neither Party shall be required or otherwise obligated to incur any cost or expense in connection with its obligations or responsibilities pursuant to this Agreement on behalf of the other Party, without the prior written approval of the Party to be obligated.
4. The CITY acknowledges that the Committee previously provided to the CITY the sum of \$71,818, which has been used by the CITY to fund the design and engineering work done by the CITY's landscape consultant for Hillcrest Park relating to preliminary matters for

construction of the Memorial. The CITY's use of these funds for engineering drawings for the Memorial construction, and such drawings, are complete.

5. It is the CITY's understanding that the Committee has thus far raised in excess of approximately \$1 million for construction of the Korean War Memorial. This sum is expected to be fully sufficient to completely fund the entirety of construction of the Memorial; however, any shortfall in the amount necessary to actually fund construction of and/or to construct the Memorial shall be solely the responsibility and liability of the Committee. No CITY funds shall be used for the construction or maintenance of the Korean War Memorial, and the CITY shall not be responsible or liable in any way if the sum raised by the Committee for the Memorial is in any way insufficient to construct the Memorial. The Committee shall be responsible for raising, acquiring or providing any additional funds that may become necessary in order to complete construction of the Memorial once commenced. The construction of the Memorial will be a Committee project and not a CITY project. No CITY services or CITY employees shall be used at any CITY expense for construction or maintenance of the Memorial.

6. The Committee is currently in the process of obtaining the services of a construction manager, who will oversee, supervise and manage the construction of the Memorial on behalf of the Committee. The Committee shall be solely responsible and liable for any and all costs, expenses and services provided by the construction manager, and the CITY shall in no way be responsible or liable for such services by the construction manager. Moreover, the services of the construction manager relating to construction or other services relating to the Memorial construction shall not be on behalf of or for the CITY, shall not in any way be considered to be for the CITY's benefit, or otherwise in any manner subject the CITY to compensation, contribution or funding in any way. Further, the agreement between the Committee and the construction manager shall be subject to the CITY's prior written approval, shall provide that the CITY is in no way a third party beneficiary or otherwise responsible for the agreement or services provided thereunder, and shall provide that the construction manager and/or the Committee shall indemnify the CITY and name the CITY as an additional insured on insurance coverage for the construction manager's services and/or the construction of the Memorial, all subject to the CITY's prior written approval of such agreement and insurance coverage.

7. The Parties currently expect that construction of the Memorial will be completed prior to September 28, 2021.

8. The Committee shall be responsible for insuring that its construction manager and any contractors providing construction-related services to or on behalf of the Committee for or relating to construction of the Korean War Memorial shall obtain and maintain throughout the course of construction activities commercial general liability insurance in the minimum amount of \$2 million, naming the City and the Committee as additional insureds, and otherwise meeting the CITY's insurance requirements for contractors. Such insurance shall be subject to the CITY's prior approval before any work and/or physical entrance may be permitted to Hillcrest Park or the Memorial area site, for purposes related to construction services.

9. The Committee shall also maintain, throughout the time of construction, and in perpetuity as to maintenance activities, for and relating to the Memorial under this Agreement: commercial general liability insurance, including insurance coverage for the Memorial premises and its use by the Committee and/or the public, and directors' and officers' liability insurance, each in the minimum amount of \$2 million, with the City named as an additional insured with respect to all Committee or Committee officers, directors, employees, volunteers or others conducting or engaging in activities relating to construction and maintenance of the Memorial and/or on the Committee's behalf relating thereto, and relating to all of the obligations and responsibilities of the Committee in this Agreement. The Committee shall also ensure that any of its contractors or sub-contractors obtain and maintain insurance meeting the CITY's insurance requirements during any such time that services are being provided for or on behalf of the Committee relating to the construction and maintenance of the Memorial, and that such insurance shall name the CITY as an additional insured.

The Parties agree that no use shall be made by the Parties or shall be permitted to be made of the Memorial nor shall any acts be done at the Memorial which will cause the cancellation of any insurance policy required herein covering the Memorial premises. The Committee shall, at its sole cost and expense, comply with all requirements imposed by any insurance company concerning or related to the maintenance of any insurance policy required herein. The insurance requirements herein shall be subject to initial and periodic approval, verification, and review by the CITY to ensure compliance with the requirements herein, and shall be subject to the CITY's advance approval for any renewal, reinsurance, replacement coverage, change in coverage, change in carrier, or other material changes, modifications or alterations thereto.

10. The Committee agrees to abide by, and to ensure that its contractors or sub-contractors, or anyone acting on the Committee's behalf, are at all times and in all manner in compliance with all applicable federal, state, county, municipal and other governmental statutes, ordinances, laws, court orders, and regulations in connection with or related to the installation, construction, repair and maintenance of the Memorial.

11. The City shall retain ownership of all land underlying, appurtenant to and relating to the Memorial, and the Committee shall have no right, or exclusive right, to use of or access to the Memorial, except as specifically set forth in this Agreement, or to the same extent as members of the general public. Upon execution of this Agreement, the Committee shall execute such documents as may be necessary to dedicate the Memorial to the CITY, and any and all associated property rights of any kind that may be held by the Committee in the Memorial.

12. Upon completion of the construction of the Memorial, the Memorial shall be open to the public and only during hours approved by the City consistent with other CITY parks, and as the same may be modified from time to time in the CITY's sole discretion. The Memorial shall be open for the use of the general public during all operating hours, except if a Special Event Permit may be approved by the CITY. The Committee acknowledges that it is not being granted hereby any right to use or occupy the Memorial different from the general public, once the Memorial is constructed, except as may directly necessary to its satisfaction only of maintenance, or other obligations to keep the Memorial in a continuing state of good repair. As

to any permit for use of the Memorial, nothing in this Agreement shall be construed as creating a guarantee or any affirmative obligation on the part of the CITY or the City Council to approve any Special Event or any other permit for any event proposed to be held at the Memorial, whether by the Committee or any other person or group, and that the same factors will be considered by the CITY as are considered for issuance of any permit for the Committee and for any other person or group.

13. The Committee shall indemnify, defend and hold harmless the CITY, its City Council and any boards and commissions, or any members thereof, as well as its officers, volunteers, and employees from and against all loss, damages, liability, claims, suits, costs and expenses whatsoever, including reasonable attorneys' fees arising out of, resulting from, relating to, or occurring in connection with the Committee's construction and maintenance of the Memorial, without the necessity of actual negligence or other wrongdoing on the part of the Committee, unless such damage or injury shall have resulted solely from the acts or omissions of the CITY or its representatives. The CITY shall not be liable to the Committee or to any third party for such loss or damage, and the Committee hereby waives all claims against the CITY for any injury or damage to any person or property relating to the Committee's construction and maintenance of the Memorial, by or from any cause whatsoever, except injury or damage resulting solely from the acts or omissions of the CITY or its authorized agents, which shall not include the Committee or any person acting in his or her capacity as a member of the Committee or as a member of its boards or committees, or as an officer, agent, volunteer or employee of the Committee, or acting on behalf of or for the benefit of the Committee or relating to any of its construction or maintenance obligations in this Agreement.

14. The Committee shall, in perpetuity from and after completion of the construction of the Memorial, pay, be responsible and shall forever be liable for the entire cost, and shall have full responsibility for keeping and maintaining the Memorial clean, in good condition and repair, and to restore and rehabilitate it as needed, specifically as to any part of the Memorial that may be destroyed or damaged by any cause whatsoever, except as to any damage that was actually caused solely by the CITY or its agents or representatives.

15. Once constructed and installed, the CITY shall be responsible for any utilities relating to the Memorial, including costs of the installed lighting. The CITY shall also be responsible for all maintenance obligations surrounding the Memorial; the Committee's maintenance and repair obligations herein shall be limited to only the Memorial itself, including walkways within the Memorial, the stone blocks, the flag poles, and any landscaping materials within the Memorial itself, which shall not be the responsibility or liability of the CITY, but shall only be the responsibility or liability of the Committee.

16. No sign, banner, flag, notice, or other advertisement shall be displayed on the Memorial by the Committee without the prior written consent of the CITY, except the flags and monument sign installed as part of the original construction of the Memorial, or replacement due to reasonable wear and tear of the same, or substantially similar as originally installed.

17. The Committee shall keep the Memorial free and clear from all mechanics' and material liens and other liens for claims or work or labor done, services performed, materials,

appliances, used or furnished, or to be used on the Memorial for or in connection with any operation of the Committee, for any construction, repairs or maintenance of the Memorial, which the Committee may make or permit or cause to be made, or any work or construction by, for, or permitted by the Committee on the Memorial. The Committee may not encumber, by mortgage or deed of trust or other instrument, the Memorial.

18. The Committee shall not assign obligations under this Agreement, without the prior written consent of the CITY. This Agreement shall bind and inure to the benefit of the Parties and their respective heirs, successors, and assigns, subject however, to the provisions of this Agreement. It is the intent of the Parties that, should the Committee become unable for any reason to perform under this Agreement, that the Committee shall undertake to find an assignee which is acceptable to the CITY to continue the Committee's rights and obligations under the Agreement for its duration. In the event of the Committee's forfeiture of its obligations under the Agreement, or other failure or inability to satisfy such obligations, the CITY may elect, at its option, to undertake the maintenance of the Memorial at its own expense, which shall remain an expense and liability chargeable to the Committee.

19. From and after the date of this Agreement the Committee shall have access to and shall have the right to use that portion of the Park where the Memorial are to be constructed. Such access as may be necessary to complete the Memorial shall be granted during the term of construction of the Memorial. At the conclusion of the construction term the Committee shall have no greater or lesser right of access to the Memorial or the Park than is available to any member of the public except as shall be agreed to in a separate agreement, license or permit approved by the City or as shall be necessary for the Committee to execute its power of termination as set forth below.

20. If the Committee shall fail or neglect to observe, keep or perform any of the covenants, terms, or conditions herein contained on its part to be observed, kept, or performed, and if such default shall continue for a period of sixty (60) days after certified written notice from the CITY setting forth the nature of the Committee's default, then and in such event, the CITY shall have the right at its option to terminate this Agreement, and all rights of the Committee hereunder shall thereupon cease, including any right the Committee may have to access or use the Memorial. In such event, the CITY shall have the right to remove, dismantle, modify, repurpose, or otherwise change or destroy the Memorial or any of its component parts in its sole discretion.

Notwithstanding anything to the contrary herein, if the Committee shall become insolvent or declare bankruptcy, be disbanded or otherwise cease to exist or operate in its present form or structure, and with no replacement or successor form or structure – which successor shall be subject to the CITY's prior written approval for purposes of this Agreement, then such state of insolvency, declaring bankruptcy or act of disbandment, dissolution or other cessation of the Committee's existence or current structure or form shall constitute an immediate abandonment and forfeiture of any rights under this Agreement.

The right of the CITY to take any of the remedial actions in this paragraph upon abandonment, forfeiture and/or default by the Committee, or other termination of the Agreement,

shall not in any way change, modify or lessen the Committee's continuing responsibility or liability for the construction and maintenance of the Memorial, and the Committee shall also remain responsible and liable for any and all costs relating to any actions by the CITY, in its sole discretion, to remove, dismantle, repurpose, destroy, or recycle the Memorial, and any other costs to the CITY to put the Memorial area back to a state and condition reasonably similar to that prior to construction of the Memorial, if the CITY chooses to do so in its sole discretion.

21. If the Committee fails to complete the construction of the Memorial in accordance with the terms of this Agreement, within twelve (12) months from the date of execution of this Agreement, the premises and the rights and obligations hereunder shall be considered abandoned and all rights of the Committee pursuant to the Agreement shall be forfeited and terminated. In the event of forfeiture by abandonment, the Committee and the CITY may, but have no obligation to, assign the Committee's rights and obligations under the Agreement. However, the Committee shall make every effort to complete construction of the Memorial in accordance with the terms of the Agreement within six (6) months. In the event of any such abandonment, forfeiture and/or termination, or any other default by the Committee, CITY shall have the rights, and the Committee shall have the continuing obligations, as stated in paragraph 20.

22. The Committee shall retain the right, with the CITY's approval which shall not be unreasonably withheld, to remove and dismantle the entirety of the Memorial, or any portion agreed to between the Parties in writing, as long as the cost of such removal and dismantling, and any associated costs for disposal of materials from such actions, are borne solely by the Committee or its designee. After any such removal and dismantling of the Memorial, the Committee, or its designee, shall be responsible for returning the site back to a state and condition reasonably similar to that prior to construction of the Memorial, to the CITY's sole satisfaction. Upon written confirmation of the CITY's acceptance of the site having been returned to its original condition, the Committee shall thereafter be relieved of its continuing obligation herein to maintenance of the Memorial.

23. Both parties agree that the CITY shall have quiet and peaceable possession of the Memorial and the area where it is to be constructed prior to construction, during the term of this Agreement. The CITY use and occupancy of the Memorial area and the Memorial, once constructed, shall be, at all times, paramount to the Committee's use or occupancy thereof. Any use or occupancy of the Memorial area and the Memorial, once constructed, by the Committee, or those acting on its behalf, and even as to the Committee's satisfaction of its duties and responsibilities for repair and maintenance of the Memorial, shall be at all times coordinated with the CITY, and if not relating directly to such repair and maintenance obligations, shall be approved in writing through the Special Event Permit or other process, so that each party hereto and the public may enjoy use of the Memorial.

24. This Agreement contains the entire Agreement of the Parties with respect to the subject matter hereof, and supersedes all prior negotiations, understandings, or agreements whether verbal or written, concerning the same subject matter. This Agreement may be modified only by a writing signed by both Parties.

25. The Committee's maintenance and repair obligation as to the Memorial shall continue and exist in perpetuity, except as may be provided otherwise expressly in this Agreement. The Committee shall pay and otherwise be responsible and liable for the full and entire cost to keep the Memorial clean and in continuing good condition and repair, and to restore and rehabilitate the Memorial as necessary destroyed or damaged by any cause whatsoever except those actually caused solely by the CITY or its agents. Regular maintenance shall include routine cleaning, repair of holes, cracks, lifted concrete or other hazards or unsightly conditions, and any other defects or circumstances that create a nuisance, a danger to the public, or otherwise requires correction. If any such hazard or repair exists and, in the sole opinion of the CITY, needs to be immediately corrected for the safety of the public, the CITY shall have the option, but not the obligation, to make such repair or otherwise remedy such condition. In such case, the CITY can invoice and bill the Committee for all costs associated therewith, or an amount necessary for reasonable reimbursement to the CITY associated with such repair or correction work, and the Committee shall be responsible and liable for such costs.

26. Wherever in this Agreement it shall be required or permitted that notice be given by either party, such notice must be in writing and must be given personally or forwarded by certified mail, addressed as follows, unless modified as permitted by this Section:

To the City of Fullerton:

Attention: Director of Parks & Recreation
303 W Commonwealth Avenue
Fullerton, CA 92832

To the Committee:

Attention: Secretary General
12762 Monarch Street
Garden Grove, CA 92841

The addresses for notice pursuant to this section may be amended from time to time by either party giving written notice as required in this Section. It is the sole responsibility of the Committee to keep the City apprised in writing of any change in address of the Committee, and to provide an address and contact person for any assignee or designee of the Committee.

27. If the Committee shall at any time during the term of this Agreement become insolvent or have proceedings in bankruptcy instituted by or against it or have a receiver appointed over its property, the CITY shall have the right at its option to terminate this Agreement and all rights of the Committee hereunder shall thereupon cease, including use of or access to the Memorial, except as members of the public, and no greater or different therefrom. In the event of termination, the CITY shall have all rights, and the Committee shall have all obligations set forth in paragraph 20.

28. No waiver of any provision of this Agreement shall be effective unless in writing and signed by a duly authorized representative of the party against whom enforcement of a waiver is sought referring expressly to this Paragraph. The waiver of any right or remedy by

either party in respect to any occurrence or event or any breach of any term, covenant, or condition contained herein shall not be deemed a waiver of any right or remedy in respect to any other occurrence or event and shall not be deemed a waiver of any subsequent breach of the same or any other term, covenant or condition hereof, nor shall any waiver constitute a continuing waiver.

29. This Agreement shall be governed by and construed with the laws of the State of California. Any action to enforce the terms of this Agreement or for the breach thereof shall be brought and tried in the courts of the State of California for the County of Orange. Each Party hereto agrees that the exclusive venue for any action arising out of the breach or the interpretation of this Agreement shall be the Superior Court of the State of California for the County of Orange.

30. This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same document only upon execution of this Agreement, in faxed counterparts or otherwise, by all parties. Further, for purposes of this Agreement, facsimile and electronic signatures will be deemed to be original signatures.

31. Each Party declares that prior to the execution of this Agreement, he/she/it has had the opportunity to consult with his/her/its attorney in order that he/she/it may intelligently exercise his/hers/its own judgment in deciding whether to execute this Agreement. Each Party also declares that he/she/it has participated in the drafting of this Agreement, such that the Agreement shall not be construed against either Party.

IN WITNESS WHEREOF the Parties hereto have executed this Agreement as of the dates set forth below.

Dated: _____, 2021

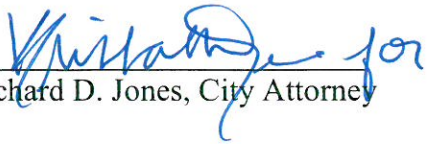
CITY OF FULLERTON

Bruce Whitaker, Mayor

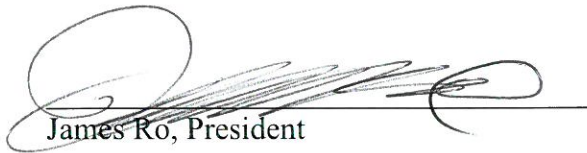
ATTEST:

City Clerk

APPROVED AS TO FORM:


Richard D. Jones, City Attorney

ORANGE COUNTY KOREAN WAR MEMORIAL COMMITTEE


James Ko, President

APPROVED AS TO FORM:

Attorney

Attachment A
 Hillcrest Park Duck Pond and Korean War Memorial

