

TOWN OF SUPERIOR
RESOLUTION NO. R-22
SERIES 2018

A RESOLUTION OF THE BOARD OF TRUSTEES OF THE TOWN OF
SUPERIOR APPROVING A PUBLIC ART COMMISSION AGREEMENT
WITH DOUWE STUDIOS FOR THE ROUNDABOUT ART

BE IT RESOLVED BY THE BOARD OF TRUSTEES OF THE TOWN OF
SUPERIOR, COLORADO, as follows:


Section 1. The Public Art Commission Agreement between
the Town of Superior and Douwe Studios for the Roundabout Art is
hereby approved in substantially the same form as attached
hereto, subject to final approval by the Town Attorney.

ADOPTED this 23rd day of April, 2018.




Clint Folsom, Mayor

ATTEST:



Phyllis L. Hardin, Town Clerk-Treasurer



The seal is circular with a rope-like border. It contains the text 'TOWN OF SUPERIOR' at the top, 'SEAL' in the center, and 'COLORADO' at the bottom. Two stars are positioned on either side of the word 'SEAL'.

PUBLIC ART COMMISSION AGREEMENT

THIS PUBLIC ART COMMISSION AGREEMENT (the "Agreement") is made and entered into this 27 day of APRIL, 2018 (the "Effective Date"), by and between the TOWN OF SUPERIOR, a Colorado municipal corporation with an address of 124 East Coal Creek Drive, Superior, Colorado 80027 (the "Town"), and DOUWE STUDIOS, a SOLE PROPRIETORSHIP with an address of 3175 HWY 467, DE MOSSVILLE ("Artist") (each a "Party" and collectively the "Parties").
124, 70133

WHEREAS, the Town owns the real property more particularly described and depicted in **Exhibit A**, attached hereto and incorporated herein by this reference (the "Site");

WHEREAS, in response to the Town's request for proposals for art for the Site, Artist submitted to the Town a preliminary design of artwork for the Site, as identified on **Exhibit B**, attached hereto and incorporated herein by this reference (the "Artwork");

WHEREAS, the Town has selected the Artwork for the Site; and

WHEREAS, the Town and Artist desire to set forth the terms upon which Artist will design, execute, fabricate and install the Artwork.

NOW, THEREFORE, in consideration of the mutual covenants contained herein, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

I. SCOPE OF SERVICES

A. Artist shall submit a final design plan (the "Plan") to be approved by the Town prior to commencing any work on the Artwork. The Plan shall comply with **Exhibit B**, but shall include additional details of the Artwork, including without limitation a detailed description of the materials to be used and overall dimensions. Once the Town has accepted and approved the Plan, Artist shall create the Artwork and install it at the Site in substantial conformity with the Plan on or before April 15, 2019.

B. In the design, creation, and installation of the Artwork, Artist shall comply with all applicable federal, state and local laws, rules and regulations.

C. Artist shall inspect the Site prior to the creation and installation of the Artwork and shall notify the Town of any adverse Site conditions that will impact the installation of the Artwork and which are in need of correction. Failure to do so by Artist shall be deemed an acceptance of the Site conditions.

D. Artist shall schedule all deliveries with the Town at least 72 hours in advance.

E. Artist shall take reasonable measures to protect or preserve the integrity of the Artwork with the application of a protective sealant, patina or anti-graffiti coating, if applicable, unless the Town specifically disapproves of such measures.

G. Artist shall make no alterations, additions or improvements in or to the Site, other than the installation of the Artwork, without the Town's prior written consent.

H. Artist shall notify the Town in writing when creation of the Artwork and all services as required of Artist under this Agreement have been completed. The Town shall inspect the Artwork within 10 days after receiving notification.

I. Artist shall bear the risk of loss or damage to the Artwork until the Town's final acceptance of the Artwork. Artist shall take such measures as are reasonably necessary to protect the Artwork from loss or damage.

J. Commencing on the Effective Date and continuing until the Town's final acceptance of the Artwork, Artist shall provide the Town with bi-weekly progress updates, including photographs.

II. COMPENSATION

For the Artwork, the Town shall pay Artist a fee (the "Fee") of \$185,000 in accordance with **Exhibit C**, attached hereto and incorporated herein by this reference. The Fee shall constitute full compensation for all services, goods, expenses and materials to be performed and furnished in the design, creation and installation of the Artwork by Artist under this Agreement.

III. INDEPENDENT CONTRACTOR

Artist, for all purposes arising out of this Agreement, is an independent contractor and not an employee of the Town. It is expressly understood and agreed that Artist shall not be entitled to any benefits to which the Town's employees are entitled, such as overtime, retirement benefits, worker's compensation, injury leave or other leave benefits.

IV. ARTIST'S REPRESENTATIONS AND WARRANTIES

A. Warranties of Title. The Artist and Town both intend that the Artwork is and shall remain unique to the Town. Artist represents and warrants to the Town that:

1. The Artwork is solely the result of Artist's artistic effort;
2. The Artwork is unique and original and does not infringe upon any copyright or the rights of any person;
3. The Artwork has not been sold, assigned, transferred to a third party, licensed, granted, encumbered, or accepted for sale elsewhere;
4. The Artwork shall not be reproduced in the future for display elsewhere;
5. The Artwork is free and clear of liens from any source whatsoever; and

6. Artist has not utilized the Artwork or any element thereof or any copyright related thereto which may affect or impair this Agreement or infringe upon or violate the rights of any third party.

B. Warranties of Quality and Condition. Artist represents and warrants to the Town that:

1. All materials used in creating the Artwork and made a part of the Artwork shall be new and of good quality, free of defects (including qualities that cause or accelerate deterioration of the Artwork).

2. The Artwork and any materials used in creating the Artwork, and made a part of the Artwork, or placed permanently in the Artwork, are not currently known to be harmful to public health and safety and are durable to withstand swings in temperature from 20 degrees below zero to 100 degrees Fahrenheit and wind speeds up to 130 miles per hour.

3. The Artwork will not fall below an acceptable standard of public display or experience irreparable conditions, beyond general wear and tear, that do not fall within an acceptable standard of public display, including mold, rust, fracturing, staining, chipping, tearing, abrading and peeling, for a period of 3 years from the date of final acceptance of the Artwork by the Town.

4. Artist agrees to repair, cure, restore or replace, at its own expense and under the direction of the Town, any portion of the Artwork which fails or is defective, unsound, unsatisfactory because of materials or workmanship, or which is not in conformity with the provisions of this Agreement, for a period of 3 years from the date of final acceptance of the Artwork by the Town. Should Artist fail to perform any such work after a request by the Town, the Town may seek the services of qualified personnel to perform such work, and Artist shall reimburse the Town for all associated costs.

V. OWNERSHIP AND INTELLECTUAL PROPERTY RIGHTS

A. The Artwork shall be exclusively owned by the Town. Artist expressly acknowledges and agrees that the Artwork constitutes a "work made for hire." To the extent, if at all, it shall be determined that the Artwork does not constitute a "work made for hire," Artist hereby transfers, sells, and assigns to the Town all of its worldwide right, title, and interest in and to the Artwork, including without limitation, all rights of copyright, patent, trade secret, trademark, service mark, trade dress, artistic and moral rights, mask rights, character rights, publicity rights, and any and all other proprietary rights of any kind whatsoever relating to the Artwork, together with any and all applications, registrations, renewal and extension rights, and rights to sue for any past, present, or future infringement (collectively, the "Rights").

B. Artist shall execute such documents and take such actions as may be requested by the Town which may, in the sole discretion of the Town, be required to perfect, protect, enforce, register, or transfer the Town's interest in the Artwork and the Rights. Artist hereby irrevocably authorizes and empowers the Town to make, constitute, and appoint, in its sole discretion, any

officer or agent of the Town as Artist's true and lawful attorney-in-fact, with the power to endorse Artist's name on, and file of record, all documents, instruments, and agreements of any kind whatsoever which the Town may, in its sole discretion, require for the Town or its transferees, successors, or assigns to perfect, protect, enforce, register, or transfer its interest in the Artwork and the Rights.

C. The Town may, with respect to all or any portion of the Artwork, use, publish, display, reproduce, distribute, destroy, alter, retouch, modify, adapt, translate, use in a performance, or change the Artwork without providing notice to or receiving consent from Artist. Artist expressly waives any and all artistic and moral rights associated with the Artwork.

D. Artist may use the Artwork for Artist's portfolio purposes and in Artist's marketing materials, provided that Artist shall include an attribution with any such use as follows: "Commissioned and owned by the Town of Superior, Colorado."

VI. INSURANCE

A. Artist shall procure and maintain, at its own cost, a policy or policies of insurance sufficient to insure against all liability, claims, demands, and other obligations assumed by Artist pursuant to this Agreement. At a minimum, Artist shall procure and maintain, and shall cause any subcontractor to procure and maintain, the insurance coverages listed below, with forms and insurers acceptable to the Town.

1. Worker's Compensation insurance as required by law.

2. Commercial General Liability insurance with minimum combined single limits of \$1,000,000 each occurrence and \$1,000,000 general aggregate. The policy shall be applicable to all premises and operations, and shall include coverage for bodily injury, broad form property damage, personal injury (including coverage for contractual and employee acts), blanket contractual, products, and completed operations. The policy shall contain a severability of interests provision, and shall include the Town and the Town's officers, employees, and contractors as additional insureds. No additional insured endorsement shall contain any exclusion for bodily injury or property damage arising from completed operations.

B. Such insurance shall be in addition to any other insurance requirements imposed by law. The coverages afforded under the policies shall not be canceled, terminated or materially changed without at least 30 days prior written notice to the Town. In the case of any claims-made policy, the necessary retroactive dates and extended reporting periods shall be procured to maintain such continuous coverage. Any insurance carried by the Town, its officers, its employees or its contractors shall be excess and not contributory insurance to that provided by Artist. Artist shall be solely responsible for any deductible losses under any policy.

C. Artist shall provide to the Town a certificate of insurance as evidence that the required policies are in full force and effect. The certificate shall identify this Agreement.

VII. INDEMNIFICATION

Artist agrees to indemnify and hold harmless the Town and its officers, insurers, volunteers, representative, agents, employees, heirs and assigns from and against all claims, liability, damages, losses, expenses and demands, including attorney fees, on account of injury, loss, or damage, including without limitation claims arising from bodily injury, personal injury, sickness, disease, death, property loss or damage, or any other loss of any kind whatsoever, which arise out of or are in any manner connected with this Agreement if such injury, loss, or damage is caused in whole or in part by, the act, omission, error, professional error, mistake, negligence, or other fault of Artist, any subcontractor of Artist, or any officer, employee, representative, or agent of Artist, or which arise out of a worker's compensation claim of any employee of Artist or of any employee of any subcontractor of Artist.

VIII. TERMINATION

A. This Agreement shall terminate upon the earlier of: (i) the Town's final acceptance of the Artwork; or (ii) upon 30 days' prior written notice to Artist if Artist defaults in the timely performance of any provision of this Agreement or otherwise fails to perform under this Agreement; provided that the ownership, indemnification and warranty provisions of this Agreement shall survive termination. Termination of the Agreement by the Town shall not be the Town's exclusive remedy, and the Town may pursue such other remedies and actions lawfully available to the Town.

B. If Artist is unable, for any reason beyond Artist's control (such as serious illness, disability or death) to complete the Artwork, this Agreement shall terminate, title to any Artwork in progress shall transfer to the Town immediately. Artist agrees that the Town may, at its sole option, cause the unfinished Artwork to be completed, keep the unfinished Artwork as is or destroy the unfinished Artwork.

IX. MISCELLANEOUS

A. Governing Law and Venue. This Agreement shall be governed by the laws of the State of Colorado, and any legal action concerning the provisions hereof shall be brought in Boulder County, Colorado; provided that any federal claims may be litigated in the United States District Court for the District of Colorado.

B. No Waiver. Delays in enforcement or the waiver of any one or more defaults or breaches of this Agreement by the Town shall not constitute a waiver of any of the other terms or obligation of this Agreement.

C. Integration. This Agreement constitutes the entire agreement between the Parties, superseding all prior oral or written communications.

D. Third Parties. There are no intended third-party beneficiaries to this Agreement.

E. Notice. Any notice under this Agreement shall be in writing, and shall be deemed sufficient when directly presented or sent pre-paid, first class United States Mail to the party at the address set forth on the first page of this Agreement.

F. Severability. If any provision of this Agreement is found by a court of competent jurisdiction to be unlawful or unenforceable for any reason, the remaining provisions hereof shall remain in full force and effect.

G. Modification. This Agreement may only be modified upon written agreement of the Parties.

H. Assignment. Neither this Agreement nor any of the rights or obligations of the Parties hereto, shall be assigned by either Party without the written consent of the other.


I. Governmental Immunity. The Town and its officers, attorneys and employees, are relying on, and do not waive or intend to waive by any provision of this Agreement, the monetary limitations or any other rights, immunities or protections provided by the Colorado Governmental Immunity Act, C.R.S. § 24-10-101, *et seq.*, as amended, or otherwise available to the Town and its officers, attorneys or employees.

J. Rights and Remedies. The rights and remedies of the Town under this Agreement are in addition to any other rights and remedies provided by law. The expiration of this Agreement shall in no way limit the Town's legal or equitable remedies, or the period in which such remedies may be asserted, for work negligently or defectively performed.

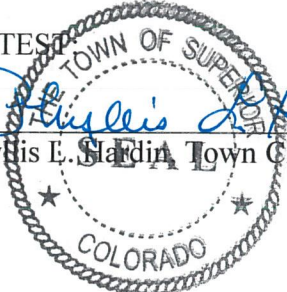

K. Subject to Annual Appropriation. Consistent with Article X, § 20 of the Colorado Constitution, any financial obligation of the Town not performed during the current fiscal year is subject to annual appropriation, shall extend only to monies currently appropriated, and shall not constitute a mandatory charge, requirement, debt or liability beyond the current fiscal year.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the Effective Date.

TOWN OF SUPERIOR, COLORADO



Clint Folsom, Mayor

ATTEST



Phyllis E. Stardin, Town Clerk

DOUWE STUDIOS

Douwe Blumberg

STATE OF Kentucky)
) ss:
COUNTY OF Pendleton)

Subscribed to and affirmed before me by Douwe Blumberg of Douwe Studios this 27 day of April, 2018.

(SEAL)

Kelly Griffith
Notary Public

My commission expires: Sept, 6, 2021



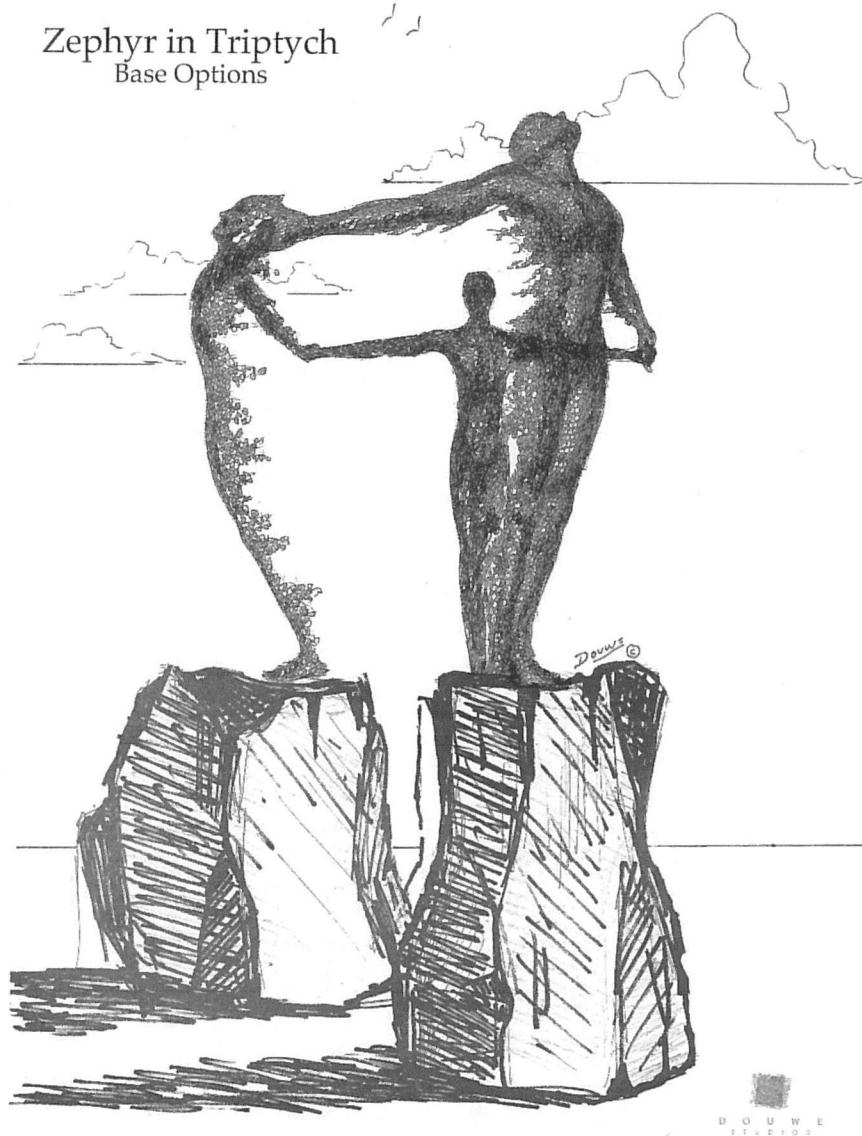
**EXHIBIT A
SITE**

The Artwork shall be installed in the center of the McCaslin Boulevard and Main Street roundabout, located south of Coal Creek Drive and north of Discovery Parkway, as shown below.



**EXHIBIT B
THE ARTWORK**

Zephyr in Triptych
Base Options



The Artwork shall consist of three abstracted, gender-neutral figures standing with outstretched arms, heads thrown back in poses of rapture or exaltation, similar to the illustration shown above. The figures will face outward towards viewers and the environment; outstretched hands touching, forming a triangular composition. Their bodies will bow slightly away from each other accentuating a subtle sense of sculptural movement and flow. Each figure will be constructed of thousands of aluminum/magnesium alloy rings, welded together to form a rigid "skin" through which both light and wind passes creating a fascinating ethereal look that changes

with the viewers' aspect. The height of the Artwork will be at least 12', not including the cut boulder pedestals.

The Artwork will be large enough to compete with the open and busy site. The three figures shall be constructed to ensure viewers can experience the work from all angles, so there is no "back" to the piece. The figures will be constructed in aluminum magnesium rings with silver, bronze and gold finish. The gold and bronze figures will be painted to achieve optimal colors using a proprietary technique for maximum durability. The finishing technique shall impart a clean, contemporary feel while being extremely easy to illuminate at night. Each figure will be represented only by the front part of the body, and be open-backed. The sides will be blowing back and trailing off as if blown and torn by a strong wind.

The Artwork shall:

- Be a minimum of 12' in height, not including the cut boulder pedestals;
- Be viewable from all angles;
- Not obstruct motorists' site lines;
- Be easy to illuminate;
- Be constructed of rings; and
- Be low maintenance.

The cost of boulders for installation at the Site are not included in the Fee. The Town will coordinate selection of the boulders with local contractors, and the Town will pay for installation of the boulders at the Site, with Artist's input and direction.

Artist shall cooperate with Town staff to design a landscaping and lighting plan that draws the eye upward towards the sculptures, and Artist's cooperation shall not entitle Artist to any additional compensation.

**EXHIBIT C
BUDGET AND PAYMENT**

The Fee of \$185,000 is based on the following budget:

Studio expenses (salaries, materials, consumables, etc.)	\$ 43,000
Engineering	\$ 5,000
Foundry expenses (molds, metal, castings, etc.)	\$ 75,000
Transportation (models to foundry, shipping castings, etc.)	\$ 5,000
Artist's Fee	\$ 40,000
Installation (vehicles, equipment rentals, salaries, per-diem, etc.)	\$ 15,000
Insurance	\$ 2,000
TOTAL	\$185,000

The Fee shall be payable as follows:

\$25,000 on the Effective Date.

\$60,000 upon approval of the Plan.

\$50,000 upon 50% completion of the Artwork.

\$25,000 upon 100% completion of the Artwork, but prior to delivery (Artist shall provide photographic proof of all 3 figures complete).

\$25,000 upon the Town's final acceptance of the Artwork.