

CITY OF FRESNO

AGREEMENT FOR REFURBISHMENT OF ARTWORKS BY ARTIST

THIS AGREEMENT, is made by and between the City of Fresno, a municipal corporation ("City") and Joyce Aiken ("Artist").

WHEREAS, City owns artwork created by the Artist located in the Fulton Mall (the "Mall") titled Mosaic Benches (the "Artwork"); consisting of eighteen mosaic panels on two sides of nine benches.

WHEREAS, City is proceeding with the important public project of rehabilitating the Mall (the "Mall Rehabilitation Project");

WHEREAS, due to the Mall Rehabilitation Project the Artwork must be relocated from its current location in the area of the Mall to another location in the area of the Mall (the "Relocation Site"), equally accessible by the public in the general location as shown on Exhibit A, attached hereto and incorporated herein by this reference, subject to reasonable modifications by City (the "Relocation Work");

WHEREAS, the Artwork is also in need of a degree of refurbishment, which includes cleaning and repair (the "Refurbishment Work");

WHEREAS, pursuant to California Art Preservation Act (Civil Code section 987) ("CAPA") and the Federal Visual Artist Rights Act (17 USC section 106A and portions of sections 107 and 113) ("FVARA"), Artist has the right to perform the Relocation Work and Refurbishment Work, subject to a schedule and fee acceptable to City, and she has indicated a desire to exercise her right to complete only the Refurbishment Work;

WHEREAS, the timely completion of the Refurbishment Work is essential to the successful completion of the Mall Rehabilitation Work; and

WHEREAS, City and Artist wish to have the Refurbishment Work be governed by the mutual obligations, covenants and conditions set forth herein.

NOW THEREFORE, in consideration of the foregoing and the mutual covenants hereinafter set forth, the parties agree as follows:

1. The parties agree the Artwork shall be relocated generally to the location described on Exhibit A by the City's Contractor, subject to final approval of City's Project Manager.

2. Artist agrees, solely for the fee set forth in Section 4., below, to complete the Refurbishment Work within 45 Calendar Days from a written Notice to Proceed from the City and to comply with the following schedule:

	ACTION	Timeline
Step 1	Artist shall submit to City's Project Manager for approval a plan for Refurbishment Work (the "Final Design")	On or before <u>15</u> days after the notice of completion of the Site Preparation, as defined in Section 3.
Step 2	Artist shall commence the Refurbishment Work. Commence shall mean when Artist has actually expended \$1000 in hard costs on the Refurbishment Work	Within <u>15</u> days after City's Project Manager sends a written notice to proceed (the "Notice to Proceed") to Artist, which notice shall follow City's Project Manager's approval of the Final Design.
Step 3	Artist shall have completed the Refurbishment Work. Completed shall mean when the Artwork is ready for public display.	Within 45 working days after the Notice to Proceed

The parties understand the time for planning and completing Refurbishment Work shall be extended for such period of time as Artist may be disabled by illness preventing progress of the Artwork, or in the event delay is caused by events beyond the control of Artist, including only fire, theft, strikes, shortages of materials (provided Artist has timely ordered the materials), a supplier default and act of nature. The just stated provisions relating to extensions of time of completion are subject to the termination provisions set forth in Paragraph 7.

3. Relocation/Site Preparation City shall be responsible for preparation of the Relocation Site and for the completion of the Relocation Work (collectively, the "Site Preparation") and notify Artist, in writing, when the Site Preparation is completed.

4. Fee and Payment Schedule City shall pay Artist a total all-inclusive fee of Forty Five Thousand Dollars (\$ 45,000.00) for the Refurbishment Work (the "Total Fee"). Such fee includes all overhead, materials, labor, insurance, shipping,

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installation, travel, taxes, preparation of proposals and reimbursable expenses. The schedule of payment for such fee shall be as follows:

- a. Fifteen Thousand Dollars (\$15,000.00) upon City's issuance of the notice of completion of the Site Preparation;
- b. Fifteen Thousand Dollars (\$15,000.00) upon satisfactory completion of Fifty Percent (50%) of the Refurbishment Work;
- c. Fifteen Thousand Dollars (\$ 15,000.00) upon satisfactory completion of the Refurbishment Work.

5. Billing In lieu of billing submitted by Artist to City, Artist shall submit to City 10-days advance notice of the occurrence of each above described event requiring payment. Within 10-days Artist and City's Project Manager shall confer to confirm occurrence of the event calling for payment. Once the confirmation is made the Artist shall submit a billing to City prior to each applicable scheduled payment date and such billing shall be reviewed by City's Project Manager. Upon his/her determination such billing accurately reflects work satisfactorily completed to date, payment shall be authorized and made through City's normal disbursement procedure. All checks for this project shall be made payable to Artist.

6. Insurance Throughout the life of this Agreement, Artist shall pay for and maintain in full force and effect all insurance as required in **Exhibit B** or as may be authorized in writing by City's Risk Manager or his/her designee at any time and in his/her sole discretion.

7. City's Right to Terminate City shall have the right to terminate this Agreement if after ten-days' (10-days') notice, Artist fails, without cause, to meet the schedule set forth in Paragraph 2. Termination pursuant to this Paragraph shall not terminate the provisions set forth in this Paragraph or in Paragraphs 9, 11, 14, and 15. In the event of termination of this Agreement, Artist shall return all payments made pursuant to Paragraph 4. Artist shall be paid compensation for services satisfactorily performed prior to the effective date of termination, but shall not be paid for any work or services performed or costs incurred which, within City's sole discretion, could have reasonably been avoided. In addition, City shall have the right to keep copies of the Final Design or preliminary drafts of the Final Design, to complete the Relocation and Refurbishment Work and exhibit and Artwork and to exercise all the rights established by this Agreement.

8. Artist' Right to Terminate Artist shall have the right to terminate this Agreement, if City fails to substantially perform its obligations after ten-days' (10-days') written notice from Artist, which specifically identifies the obligations, which are then outstanding. If this Agreement is terminated pursuant to this Paragraph, then Artist shall returns all payments made pursuant to Paragraph 4. Artist shall be paid compensation for services satisfactorily performed prior to the effective date of

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termination, but shall not be paid for any work or services performed or costs incurred after the effective date of termination, which, within City's sole discretion, could have reasonably been avoided. City shall have the right to keep copies of the Final Design or preliminary drafts of the Final Design, to complete the Relocation and Refurbishment Work and exhibit and Artwork and to exercise all the rights established by this Agreement.

9. Alteration of Artwork City agrees if any alteration of any kind occurs to the Artwork after receipt and installation, whether done by City or others, then the Artwork shall no longer be represented to be the Artwork of Artist without written consent. No alteration shall be made, except in emergency situations, without first giving Artist thirty-days' (30-days') written notice of such alteration.

10. Maintenance of Artwork City agrees to see the Artwork is properly maintained. Any and all relocation, repair and restoration, during the lifetime of Artist, shall be made only after reasonable good faith attempts have been made to give Artist notice of the need of such repairs and restoration, and Artist shall be given the opportunity to accomplish such relocation, repair and restoration; provided, that the parties agree, within ninety (90) days after such notice, to a fee and schedule for such service. If no agreement is reached within ninety (90) days after such notice, then City may proceed with the relocation, repair and restoration. Artist shall retain all rights under Visual Arts Acts Act of 1990 (17 U.S.C. §106A and 113(d), the California Art Preservation Act (Cal. Civ. Code §987), or any other local, state, foreign or international law, as currently drafted or as may hereafter be amended.

11. Assignment Neither party hereto shall have the right to assign this Agreement without the written approval of the other party.

12. Cooperation with Artist All City staff shall work cooperatively with Artist and Artist shall work cooperatively with all City staff. In addition, Artist shall work with City staff in locating the exact placement of elements of the Artwork.

13. Liquidated Damages If Artist's actions or inactions cause a delay in the completion of the Mall Rehabilitation Project, except for the delays described in Paragraph 2, then Artist shall pay City liquidated damages in the amount of One Hundred Dollars (\$100.00) per day for each day, or portion thereof, of delay in the completion of the Mall Rehabilitation Project which results from Artist's actions or inactions. This Paragraph shall not apply to any delays caused by contractors or subcontractors not under contract with Artist.

14. Hold Harmless Artist agrees to and hereby does hold harmless, defend and indemnify City and each of its officers and employees from and against any and all losses, claims, demands, damages, liabilities, obligations, costs, and expenses, of any nature whatsoever, including court costs and reasonable attorney's fees, arising out of or incurred in connection with Artist's work hereunder; provided

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that, this Paragraph shall apply until one year after the final payment, pursuant to Paragraph 4; and provided, further, that the obligation to indemnify and hold harmless shall only be to the extent Artist causes the Damages.

15. Warranty Artist warrants the Artwork against defects in materials and workmanship for one year after the date of completion of installation and will replace or repair any part of the Artwork shown to be defective during that period at no cost to City. City shall notify Artist, in writing, as soon as possible upon discovery of a defect.

16. Successors This Agreement shall be binding upon the parties hereto, their heirs, successors, permitted assigns and personal representatives, and references to Artist and City shall include their heirs, successors, permitted assigns and personal representatives.

17. Waivers A waiver of any breach of any of the provisions of this Agreement shall not be construed as a continuing waiver of other breaches of the same or breaches of other provisions hereof.

18. Notices All notices shall be sent to the addresses set forth at the end of this Agreement. Each party shall give written notification of any change of address prior to the date of such change. Any notices required to be given pursuant to this Agreement shall be deemed completed upon deposit in the U.S. Mail, first class postage paid.

19. Dispute Resolution In the event of a dispute between the parties in connection with the performance of work hereunder, prior to the initiation of any litigation, the dispute shall be submitted to at least one good faith session of non-binding mediation, in accordance with the Mediation Rules of the American Arbitration Association.

20. Attorney's Fees If any litigation is brought to enforce any provision of this agreement, then the prevailing party shall be entitled to an award of reasonable attorney's fees and court costs.

21. Heading All paragraph headings are inserted for convenience only and shall not affect any construction or interpretation of this Agreement.

22. Entire Agreement This Agreement constitutes the entire understanding between the parties and its terms can be modified only by an instrument in writing signed by both parties.

23. Governing Law This Agreement shall be governed by the laws of the State of California.

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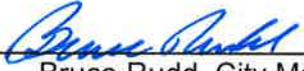
24. Effective Date The effective date of this Agreement is November 1, 2015.

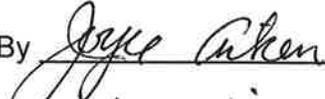
25. Extent of Agreement. This Agreement constitutes the entire understanding between the parties regarding the subject matter hereof and its terms can be modified only by an instrument in writing signed by both parties.

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City of Fresno
a California municipal corporation

Artist: Joyce Aiken

By 
Bruce Rudd, City Manager

By 
Name Joyce Aiken

Attest:
YVONNE SPENCE, CMC
City Clerk

By  10/13/15
Deputy

Approved as to form:
DOUGLAS T. SLOAN
City Attorney

By 
Deputy

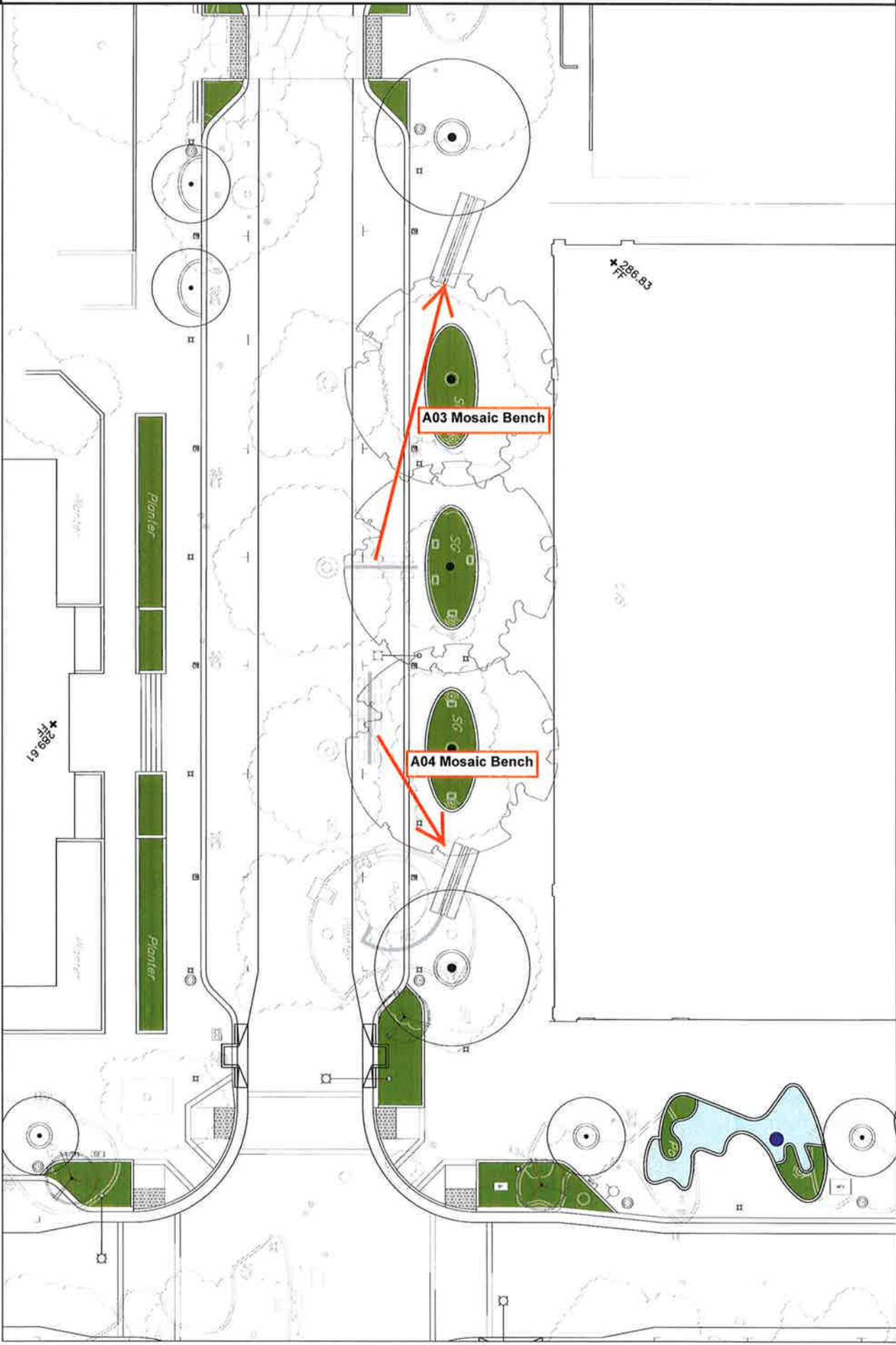
Addresses:

City of Fresno
Attention: Randall Morrison
2600 Fresno Street
Fresno, CA 93721
Telephone: (559) 621-8703

Artist
Attention: Joyce Aiken
3774 W. Buena Vista
Fresno, CA 93711
Telephone: (559) 261-2482

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Exhibit A
Mosaic Benches Relocation Map



A03 Mosaic Bench

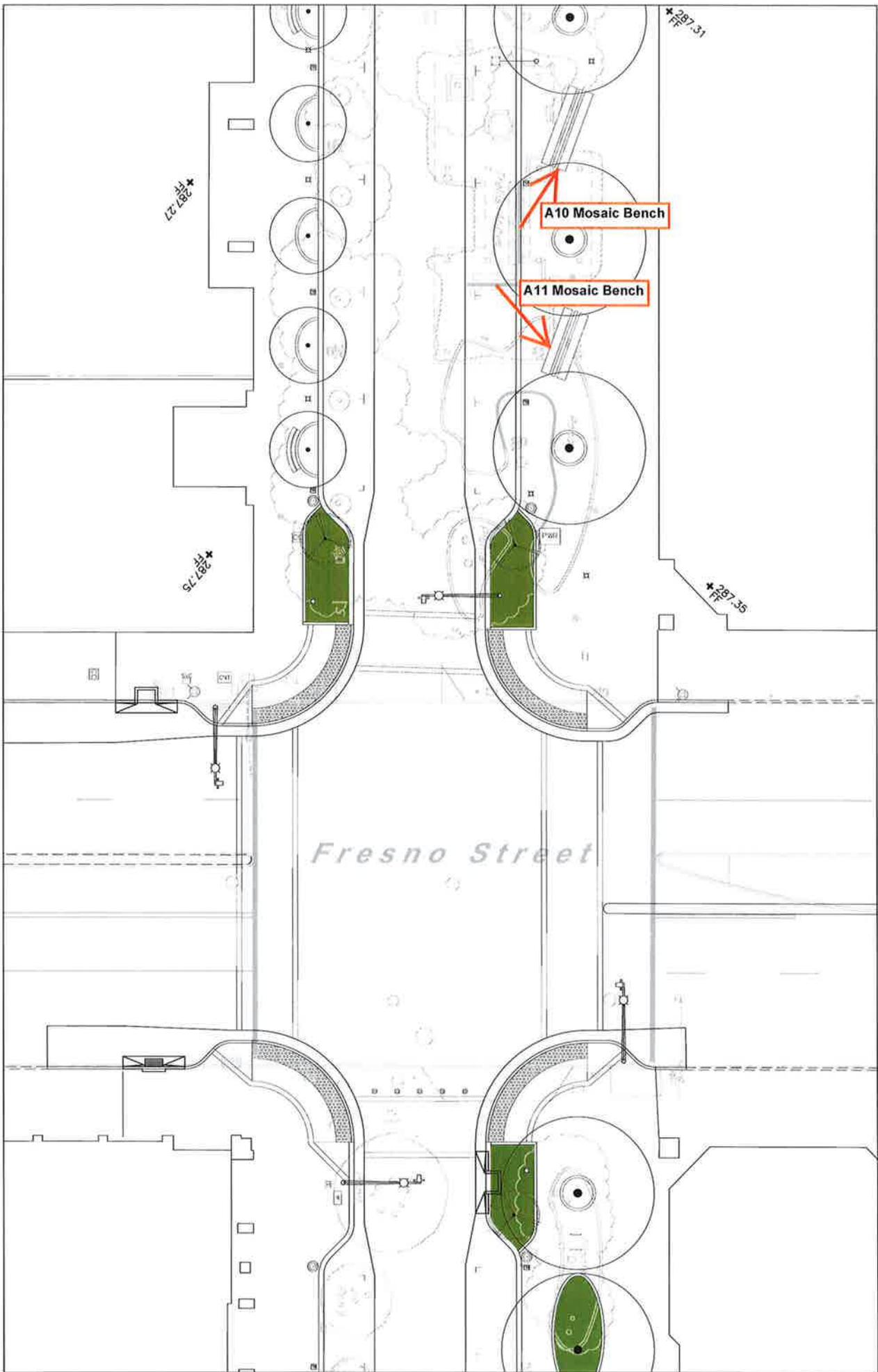
A04 Mosaic Bench

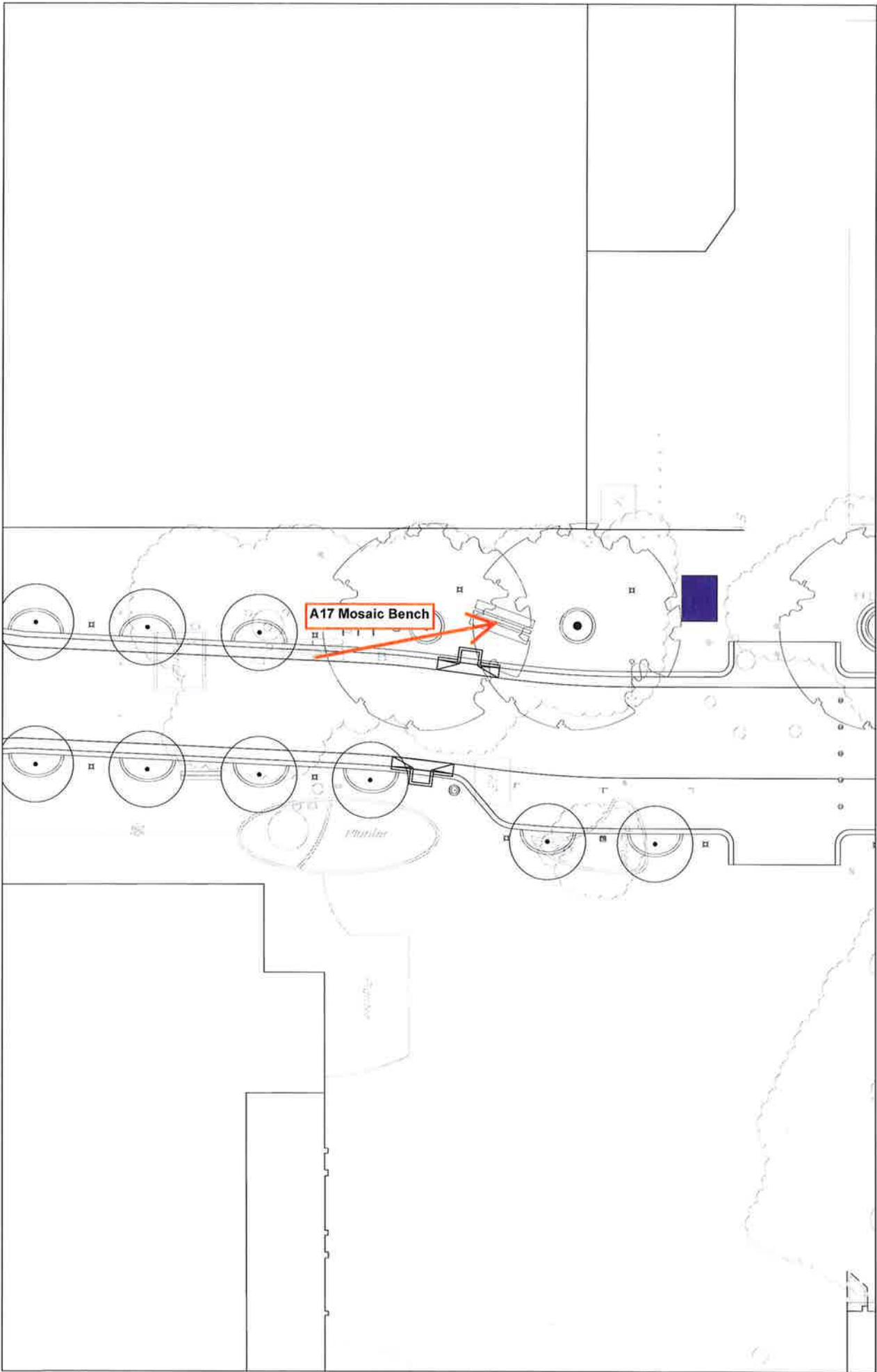
+289.61
FF

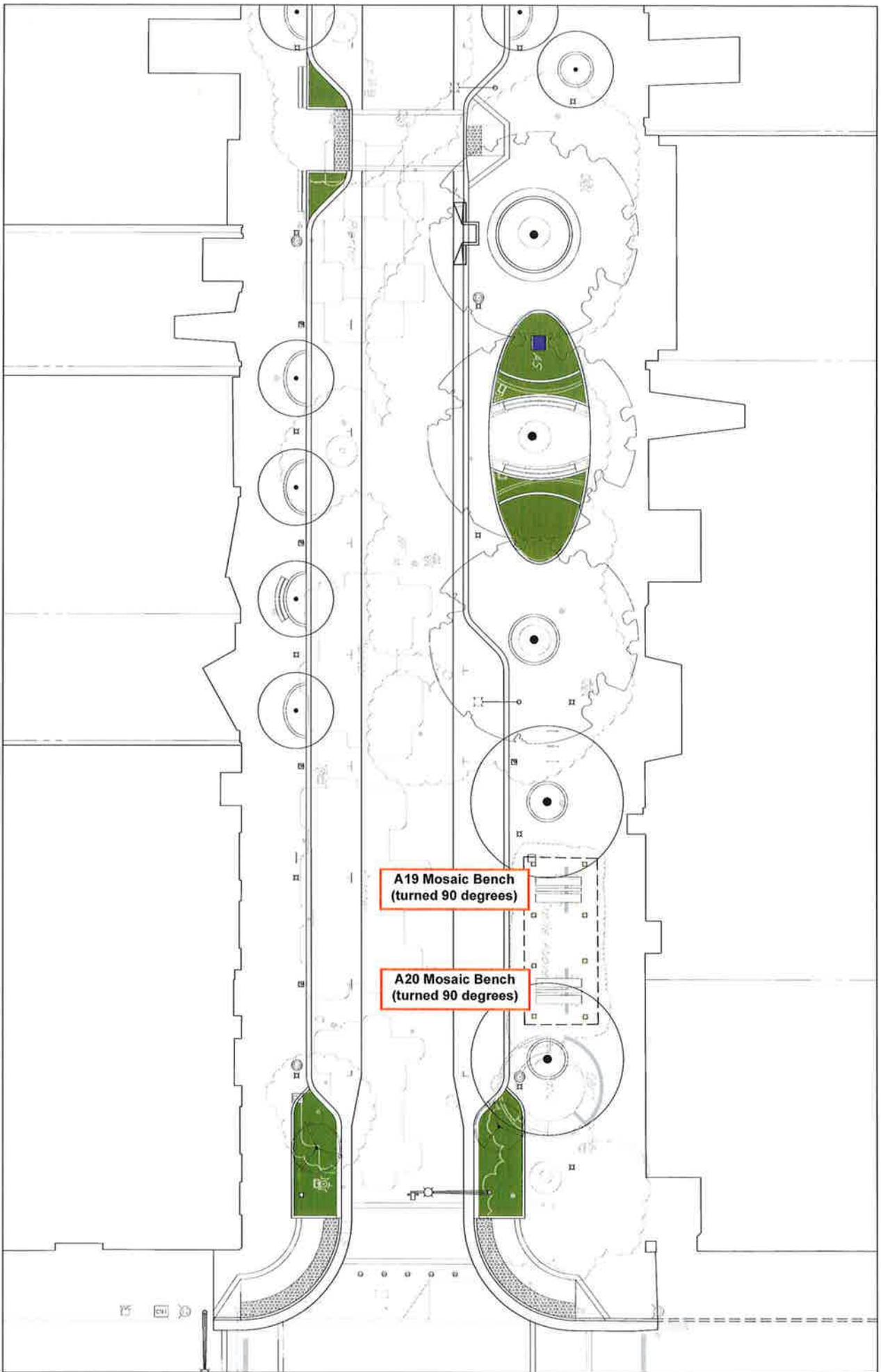
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Planter

Planter

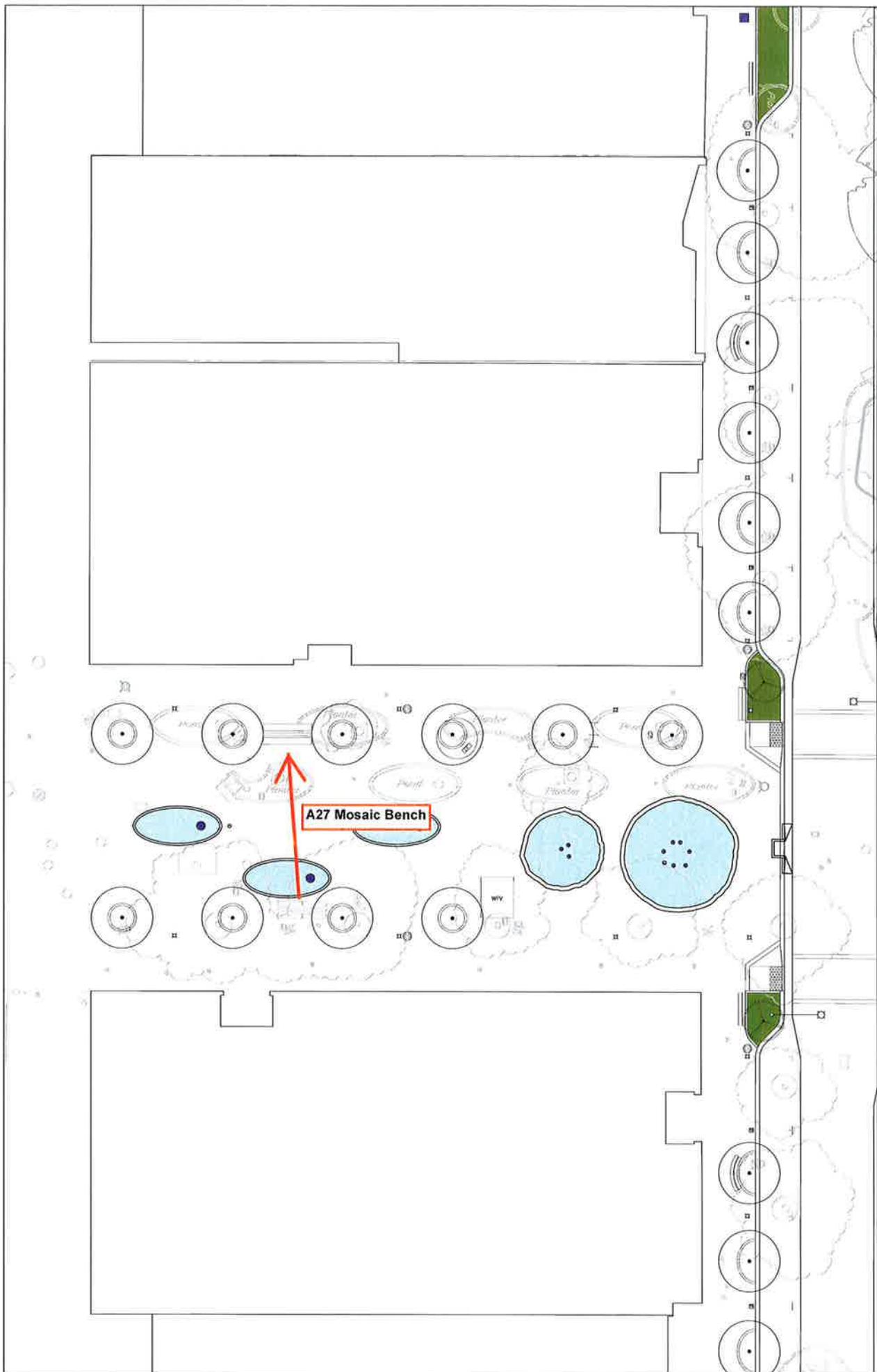






**A19 Mosaic Bench
(turned 90 degrees)**

**A20 Mosaic Bench
(turned 90 degrees)**



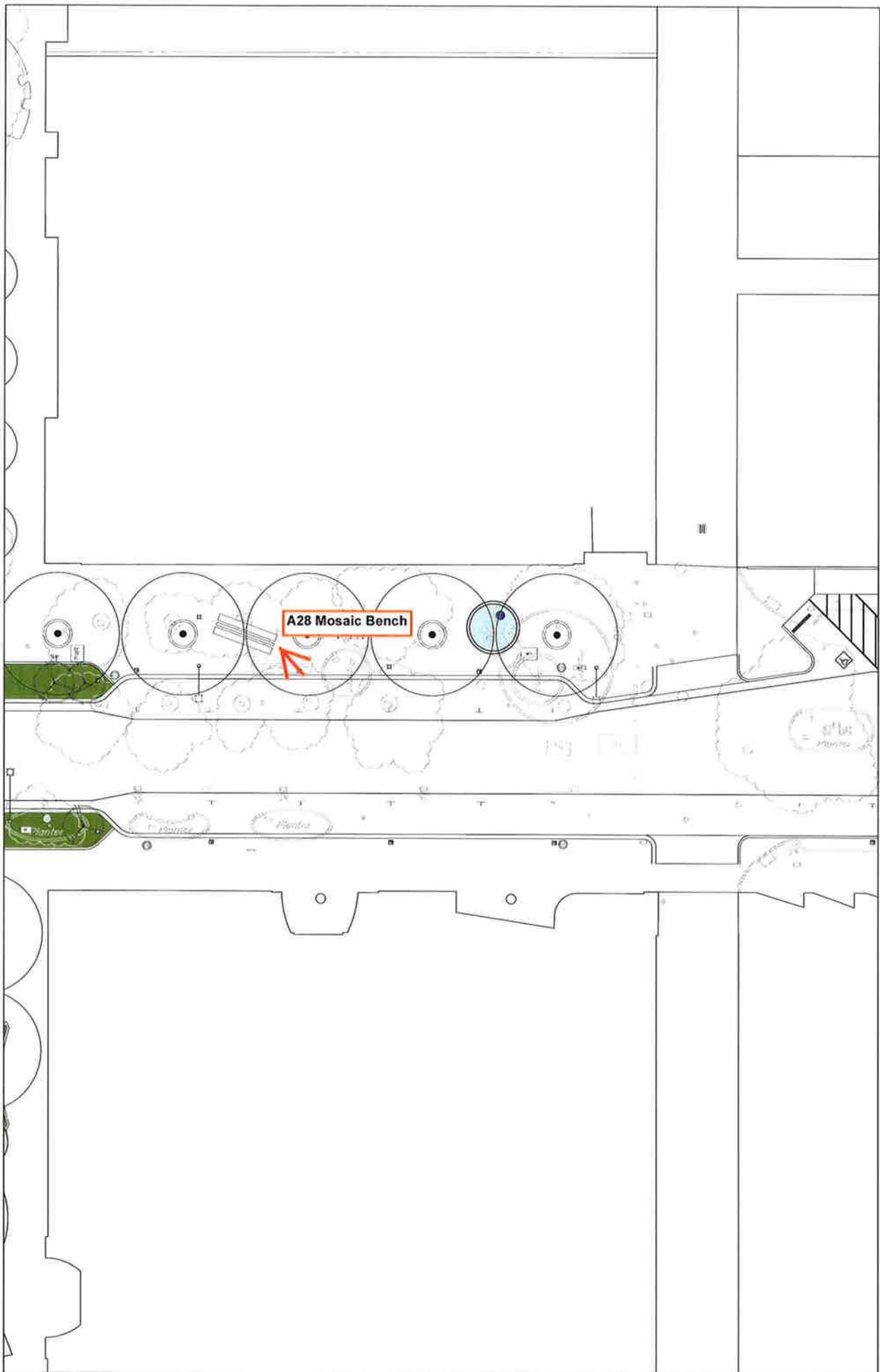


Exhibit B

**INSURANCE REQUIREMENTS
AGREEMENT FOR *REFURBISHMENT OF ARTWORKS*
BY ARTIST
MOSAIC BENCHES ARTWORKS**

Artist shall pay for and maintain in full force and effect all policies of insurance required herein with an insurance company(ies) either (i) admitted by the California Insurance Commissioner to do business in the State of California and rated not less than "A-VII" in Best's Insurance Rating Guide, or (ii) authorized by the City's Risk Manager or his/her designee. The following policies of insurance are required and shall maintain limits of liability not less than those amounts stated below, however, the insurance limits available to the City of Fresno, its officers, officials, employees, agents and volunteers as additional insured's, shall be the greater of the minimum limits specified herein or the full limit of any insurance proceeds available to the named insured.

1. **COMMERCIAL GENERAL LIABILITY:**
 - (i) \$1,000,000 per occurrence for bodily injury and property damage;
 - (ii) \$1,000,000 per occurrence for personal and advertising injury;
 - (iii) \$2,000,000 aggregate for products and completed operations; and,
 - (iv) \$2,000,000 general aggregate applying separately to the work performed under the Agreement.

2. **PERSONAL AUTOMOBILE LIABILITY** insurance with limits of liability not less than:
 - (i) \$100,000 per person;
 - (ii) \$300,000 per accident for bodily injury; and,
 - (iii) \$50,000 per accident for property damage.

3. **WORKERS' COMPENSATION** insurance as required by the State of California and **EMPLOYERS' LIABILITY** insurance with limits of \$1,000,000 each accident, \$1,000,000 disease each employee and \$1,000,000 disease policy limit.

4. ***ENDORSEMENTS:** All non-ISO endorsements amending policy coverage shall be executed by a licensed and authorized agent or broker. **The City shall be furnished with the Certificate(s) and applicable endorsements for ALL required insurance fourteen (14) days prior to commencement of the work under this Agreement.**

- I. All policies of insurance required herein shall be endorsed to provide that the coverage shall not be cancelled, non-renewed, reduced in coverage or in limits except after thirty (30) calendar day written notice by certified mail, return receipt requested, has been given to the City. The insured is also responsible for providing written notice to the City under the same terms and conditions. Upon issuance by the insurer, broker or agent of a notice of cancellation, non-renewal or reduction in coverage or in limits, insured shall furnish the City with a new Certificate and applicable endorsements for such policy(ies).
- II. The General Liability and Automobile policy shall name the City of Fresno, its officers, officials, agents, employees and volunteers as additional insured's.

The coverage shall contain no special limitations on the scope of protection afforded to CITY, its officers, officials, employees, agents and volunteers. Any available insurance proceeds in excess of the specified minimum limits and coverage shall be available to the Additional Insured.

For any claims related to this Agreement, Artist insurance coverage shall be primary insurance with respect to the CITY, its officers, officials, employees, agents and volunteers. Any insurance or self-insurance maintained by the CITY, its officers, officials, employees, agents and volunteers shall be excess of Artist insurance and shall not contribute with it. Artist shall establish primary and non-contributory status by using ISO Form CG 20 01 04 13 or by an executed manuscript insurance company endorsement that provides primary and non-contributory status as broad as that contained in ISO Form CG 20 01 04 13.

- III. Any Workers' Compensation policy shall contain a Waiver of Subrogation as to city of Fresno, its officers, officials, agents, employees and volunteers.
5. **PROVIDING OF DOCUMENTS:** Upon request of City, the insured shall immediately furnish City with a complete copy of any insurance policy required under this Agreement, including all endorsements, with said copy certified by the underwriter to be a true and correct copy of the original policy. This requirement shall survive the expiration or termination of this Agreement.
6. If the Professional Liability (Errors & Omissions) insurance is written on a claims-made form:
 - (i) The retroactive date must be shown and must be before the effective date of the Agreement or commencement of work.
 - (ii) Insurance must be maintained and evidence of insurance must be provided for at least five (5) years after completion of the Agreement

work or termination of the Agreement, whichever occurs first, or, in the alternative, the policy shall be endorsed to provide not less than a five (5) year discovery period.

- (iii) If coverage is cancelled or non-renewed and not replaced with another claims-made policy form with a retroactive date prior to the effective date of the Agreement or commencement of work, "extended reporting" coverage must be purchased for a minimum of five (5) years after completion of the Agreement work or termination of the Agreement, whichever occurs first.
 - (iv) A copy of the claims reporting requirements must be submitted to CITY for review.
 - (v) These requirements shall survive expiration or termination of the Agreement.
7. If Artist should subcontract all or any portion of the services to be performed under this Agreement, Artist shall require each subcontractor/subconsultant to provide insurance protection, as an additional insured, to the CITY and each of its officers, officials, employees, agents and volunteers in accordance with the terms of this Agreement. Any subcontractor/subconsultant shall establish additional insured status for CITY, its officers, officials, employees, agents and volunteers by using Insurance Service Office (ISO) Form CG 20 10 11 85 or both CG 20 10 10 01 and CG 20 37 10 01 or by an executed manuscript company endorsement providing additional insured status as broad as that contained in ISO Form CG 20 10 11 85.
8. In the event Artist purchases an Umbrella or Excess insurance policy(ies) to meet the "Minimum Limits of Insurance", this insurance policy(ies) shall "follow form" and afford no less coverage than the primary insurance policy(ies).
9. Artist shall be responsible for payment of any deductibles contained in any insurance policy(ies) required herein and Artist shall also be responsible for payment of any self-insured retentions. Any deductibles or self-insured retentions must be declared on the Certificate of Insurance and approved by the CITY's Risk Manager or his/her designee.

*** NOTE: A Certificate of Insurance is not acceptable in lieu of the additional insured and/or Waiver of Subrogation endorsements required above.**