

NORTH CAROLINA
WAKE COUNTY

AGREEMENT

THIS AGREEMENT entered into as of the _____ day of _____ 2018 by and between the COUNTY OF WAKE, a body politic and corporate of the State of North Carolina (the "County") and Marbles Kids Museum, a 501(c)(3) non-profit organization (Marbles) with operations in County owned facilities (together referred to as the "Parties").

PRELIMINARY STATEMENT

WHEREAS, pursuant to Session Law 1991-594, Wake County authorized a prepared food and beverage tax of up to 1% of the sales price of prepared food and beverages sold at retail; and

WHEREAS, pursuant to Session Law 1991-594, Wake County and City of Raleigh subsequently entered an Interlocal Agreement ("ILA") designating funds from the Occupancy and Prepared Food/Beverage Taxes for the purpose of acquiring, constructing, or financing convention centers, civic centers, performing arts centers, coliseums, auditoriums, and facilities related to sports and cultural events; and

WHEREAS, the terms of the ILA and subsequent amendments provide a basis for distribution of funds by the City and County consistent with the enabling legislation; and

WHEREAS, in April 2016 the Wake County Board of Commissioners approved a competitive process open to any non-profit or for-profit organization to allocate up to Three million three hundred fifty thousand and no/100s Dollars (\$3,350,000.00) of the Major Facilities Capital Trust Fund established with hotel/motel and prepared food and beverage taxes and subsequently issued a Request for Proposals ("RFP #16-045") for projects meeting the criteria set forth in the ILA; and

WHEREAS, Marbles submitted a response to RFP #16-045 on or before June 15, 2016 for the construction of a project described as the Marbles PLaY-stallation: A Fresh Welcome to Marbles & Moore Square (the "PLaY-stallation Project"); and

WHEREAS, the PLaY-stallation Project meets all criteria of RFP #16-045; and

WHEREAS, the County selected the PLaY-stallation Project after due consideration of all proposals submitted through the use of a competitive selection process; and

WHEREAS, on November 7, 2016 the Wake County Board of Commissioners authorized the requested funding commitment to Marbles in the amount not to exceed One Hundred Thousand and no/100s Dollars (\$100,000.00) ("Funding Commitment") for capital costs related to the demolition and construction of the PLaY-stallation Project contingent upon the terms and conditions set forth herein; and

WHEREAS, Marbles has accepted the Funding Commitment for capital costs related to the demolition and construction of the PLaY-stallation Project contingent upon the terms and conditions set forth herein.;

NOW THEREFORE, in consideration of the mutual promises contained herein, County and Marbles agree as follows:

ARTICLE I SCOPE AND DESCRIPTION OF THE PLAY-STALLATION PROJECT

The PLaY-stallation Project ("Project") is a public art and open space project to be constructed on a parcel of land adjacent to the current Marbles buildings in Raleigh, Wake County, North Carolina. The parcel, located at 101 South Blount Street, Raleigh, North Carolina, is currently owned by Marbles and shall be transferred to Wake County as a condition of an amendment to the existing Lease between Marbles and Wake County for the operation of Marbles. The PLaY-stallation Project shall consist of demolishing the existing building at 101 South Blount Street, a former automotive repair facility, and constructing a public art installation along with landscaping, exterior building improvements of the adjacent Marbles buildings. The original PLaY-stallation Project Proposal is attached to this Agreement as Exhibit "A" and incorporated by reference. The Project will allow for a colorful and interactive public space to improve a gateway into downtown and expand the visual footprint of the Marbles campus.

ARTICLE II PLAY-STALLATION PROJECT SCOPE

Marbles is solely responsible for all PLaY-stallation Project costs, decisions, the preparations of all plans and specifications, and for developing the PLaY-stallation Project in accordance with this Agreement and the incorporated PLaY-stallation Project Proposal. Marbles conducted cost estimates for demolition, construction, landscaping, and installation, including a 10% contingency factor in the cost estimates provided. Marbles determined that the improvements planned as part of the PLaY-stallation Project will not cause an impact on existing infrastructure such as roads or water and sewer facilities. Marbles shall be solely responsible for any damage or cost increase arising out of the demolition, construction, landscaping, and installation of the PLaY-stallation Project. Any comments or suggestions provided by the County, except as otherwise provided by the Agreement, shall be given solely for the purposes of monitoring compliance with the terms of the Agreement, and shall not in any event be construed as a representative or directive regarding the PLaY-stallation Project decision.

ARTICLE III OWNERSHIP of REAL PROPERTY

Marbles currently owns the site where the PLaY-stallation project will be constructed and installed at 101 South Blount Street, Raleigh, NC. The property by pre-existing agreement is to be conveyed to Wake County and shall become part of the Premises leased to Marbles by Wake County under the long-term lease agreement between Marbles and Wake County for the lease of space to operate Marbles. As a condition of this Agreement, Wake County shall have full ownership of the improvements to the property resulting from the Project, unless otherwise expressly provided for in this Agreement, subject to the leasehold rights of Marbles. Marbles shall be solely responsible for payment of any debt incurred by Marbles related to the Project, and none of the Wake County funds for the PLaY-stallation Project shall be used for any purpose other than as outlined herein. If any part of the leasehold interest currently held by Marbles is transferred notwithstanding the provisions of this Section, Marbles shall be required to notify the County as soon as practicable but in any event within three (3) business days of the execution of any contract for transferring all or part of the lease for the Property, including the improvements, to any other party; or if there is no contract, if any interest in or under the lease is or is intended to be transferred to a party other than Marbles.

ARTICLE IV TOTAL FUNDING FOR PLAY-STALLATION PROJECT

A. The total estimated expenditure for the PLaY-stallation Project is Three Hundred Fifty-One Thousand Dollars and no/1.00s (\$351,000.00) as set forth in Marbles' presentation to the Wake County Board of Commissioners on October 10, 2016. In addition to County committing funding pursuant to this Agreement, Marbles has committed to provide funding in the amount of Two Hundred Fifty-One Thousand Dollars and no/1.00s (\$251,000.00) from the following sources:

- Private donations = \$246,000
- City of Raleigh Façade Program = \$5,000

B. The County Funding Commitment shall be delivered to Marbles contingent upon the conditions defined in Article V of this Agreement. The above-listed descriptions of both dollar amount and funding sources are for illustrative purposes to show the funding required by Marbles for the PLaY-stallation Project relative to the County's grant. Nothing herein shall bind Marbles to draw specific dollar amounts from any particular funding source as described.

C. County shall only provide the applicable funding when due and upon satisfaction of conditions as outlined in Article V of this Agreement. Any funds not paid by County to Marbles under this Funding Agreement shall remain, or if drawn, be returned to the Major Facilities Capital Trust Fund.

D. The PLaY-stallation Project is under design with construction to be completed within six (6) months. County and Marbles agree that the PLaY-stallation Project shall be completed

on or about July 31, 2018 (the "Completion Date"). This date is intended to be tentative and Marbles shall not be subject to any penalties or liquidated damages related to the Completion Date, therefore time is not of the essence with respect to the Completion Date for purposes of this Funding Agreement. Prior to or on the Completion Date, Marbles may request, and the Wake County Manager may reasonably grant, extensions of time for the completion of the PLaY-stallation Project, subject to the conditions of funding set forth in Section V. Any such extensions of time shall not be unreasonably withheld by the Wake County Manager.

E. If requested by Marbles, County agrees to provide additional documentation to evidence the County's Funding Commitment as outlined herein for the purpose of Marbles financing the PLaY-stallation Project. This includes, but is not limited to, providing a written affirmation of County's contribution to the PLaY-stallation Project upon the terms and conditions of this Agreement. In no event shall the County be required to guarantee any commercial or private loan, or provide any manner of commitment or financing beyond what is set forth in this Agreement.

F. Marbles represents that this PLaY-stallation Project shall not require the on-going support of Wake County's general operating funds. Nothing herein shall obligate County to provide operating funds for the PLaY-stallation Project after completion.

G. County shall not fine or penalize Marbles in any way, unless specifically permitted in this Agreement.

H. Marbles agrees to abide by any review, reporting, or other legal requirements established by state or local law, County resolution, or Interlocal Agreement relating to the use of these funds.

ARTICLE V CONDITIONS OF FUNDING

Subject to Marbles' performance of the obligations of this Agreement, County shall tender the Funding Commitment in an amount up to and not to exceed One Hundred Thousand and no/100s Dollars (\$100,00.00), such amount equal to 28% of total estimated total cost of the PLaY-stallation Project, which is \$351,000.00, upon the following terms:

A. The County shall tender the total of the payment of One Hundred Thousand and no/100s Dollars (\$100,000) or at such time as Marbles has provided:

1. Satisfactory documentation of total PLaY-stallation Project budget including Marbles funding commitments at time of funding request.
2. A letter from the Marbles President certifying that the improvements are complete, any required certificates of occupancy or permits have been obtained, and the improvements are fully operational. This letter shall include photos of the before and after conditions of the improved area and confirmation of all scheduled events in the area that benefit from the improvements.

3. The County reserves the right to conduct a site inspection to verify PLAY-stallation Project completion and the site readiness prior to authorizing disbursement of payment to Marbles.

B. All requests for disbursement of the Funding Commitment under this section must be made within six (6) months of the effective date of this Agreement unless the parties have entered into a written agreement for an extension of this date.

C. If Marbles does not make a request for disbursement or does not meet the conditions precedent to disbursement under this section such that all or part of the funds committed are not disbursed, then such funds shall remain a part of the Major Facilities Capital Trust Fund free and clear of any further obligation to Marbles under this Agreement.

ARTICLE VI PERFORMANCE GOALS

Marbles acknowledges that by accepting the County's Funding Commitment and by signing the Agreement, the Project, is subject to certain target Performance Goals as described below in Table 1:

Fiscal Year	Campus Visitation
FY19 Estimated	699,300
FY20 Estimated	709,800
FY21 Estimated	724,000
FY22 Estimated	734,800
FY23 Estimated	745,800
FY24 Estimated	757,000
FY25 Estimated	768,300

Campus Visitation includes visitors to Marbles, both the museum and IMAX theatre. Visitation to Marbles has a positive economic impact for Wake County through food and beverage spending and overnight stays in hotels.

Year of Operation shall be defined as a 12-month period beginning July 1, 2018.

A. Performance Reporting. Marbles shall agree to provide annual reporting to the County Manager including actual visitation numbers for the fiscal year. Actual annual performance reporting shall be submitted using attached forms no later than 60 days after the close of the fiscal year, beginning in FY2019. In the event the facility

performance does not achieve the target visitation at the end of each Performance Reporting Period, Marbles must submit a plan to the County Manager to achieve performance goals.

B. Expiration of Performance Goals. After the Facility has reported seven (7) years of operations or the Total Number of Campus Visitors exceeds the cumulative total of 5,139,000 target visitors, whichever is sooner, the PLaY-stallation Project shall no longer be bound by Performance Goals of any kind and any such provision herein or in the Agreement shall expire.

C. Good Faith. The Parties agree to enforce and abide by the terms of this agreement in good faith and shall, in addition to Table 1, annual reports, and applicable performance plans, review all reasonable and good faith efforts made by Marbles to fulfill all PLaY-stallation Project requirements in any evaluation of Performance Goals, and in the event project goals are not met, commit to discuss further mitigation efforts. Furthermore, the Parties hereby agree that Article VIII of the Agreement shall also apply to this MOU and any evaluation of Performance Goals.

ARTICLE VII INDEPENDENT CONTRACTOR

The parties acknowledge that Marbles is an independent contractor, and that nothing in this Agreement is intended, and nothing will be construed, to create any form of partnership or joint venture relationship between Marbles and the County, or to allow either to exercise control or direction over the other; notwithstanding that each party is bound by the terms and conditions of this Agreement. Neither party is an officer, agent, or employee of the other party for any purpose.

ARTICLE VIII LIABILITY FOR DELAY IN PERFORMANCE

Neither party shall be liable to the other, or be deemed to be in breach of this Agreement, for any failure or delay in rendering performance arising out of causes beyond its reasonable control and without its fault or negligence. Such causes may include, but are not limited to, acts of God or of a public enemy, fires, floods, epidemics, quarantine restrictions, strikes, freight, embargoes, or unusually severe weather. Date or times of performance, including the term of this Agreement or eligibility for funding, may, but are not required, to be extended by the County to the extent of delays excused by this section, provided that the party whose performance is affected notifies the other promptly of the existence and nature of such delay.

ARTICLE IX
TERMINATION OF PLAY-STALLATION PROJECT PRIOR TO COMPLETION

Should the PLaY-stallation Project or any Phase thereof become terminated prior to completion, the County shall remain the sole owner of the PLaY-stallation improvement including all structures, and equipment. County shall have no further funding obligation to Marbles unless expressly described in this Agreement.

The County's obligation to fund under this Agreement is not transferrable to any subsequent owner or leasehold interest holder of the PLaY-stallation Project, or the underlying property upon which the Project is constructed.

ARTICLE X
INTERRUPTION OF OPERATION AFTER COMPLETION OF PLAY-STALLATION PROJECT

Should Marbles or any part thereof cease to operate at any time after the County has tendered any part of the Funding Commitment but before performance goals are met, and Marbles transfers any interest, whether ownership or leasehold, to an entity which does not operate the property for the purpose intended under this Agreement such that the performance goals of the Funding Agreement are frustrated ("Subsequent Operation"), then Marbles shall require the new owner or holder of the leasehold interest ("Interest Holder") to repay the County at the closing of the sale all of the Funding Commitment previously tendered based on the year of operation in which operation ceases per the schedule below. In the event that less than the full funding commitment has been tendered by the County, then Marbles shall require the new Owner or Interest Holder to repay the full amount at the closing of the sale.

Unamortized Portion of Original Facility Cost to be Paid to the County Upon Contract Termination	
Repayment Amount = \$100,000	
Year of Subsequent Operation	Payment to County
1	\$ 80,000
2	\$ 60,000
3	\$ 40,000
4	\$ 20,000
5	\$ -

Regardless of ownership of the Property, if the property continues in Operation for the purpose intended under this Agreement such that the performance goals of the Funding

Agreement are not frustrated, there will be no adjustment required. "Operation" shall be defined as a state of readiness of Marbles that allows the facility or facilities to be open and ready for intended operations in the ordinary course of business.

ARTICLE XI NO THIRD-PARTY BENEFICIARIES

This Agreement is not intended to and shall not be interpreted to inure to the benefit of any third parties.

ARTICLE XII MODIFICATION

This Agreement may only be modified in writing signed by both Parties; provided that any change in the scope of the PLaY-stallation Project or manner or amount of the payment obligation of the County hereunder shall require approval of the Board of Commissioners.

ARTICLE XIII ASSIGNMENT

Marbles shall not assign this Agreement, either in whole or in part, without the prior written approval of the County. County shall not assign any of its duties under this Agreement to any private or public agency, corporation, firm, or individual without the prior written approval of Marbles.

ARTICLE XIV MISCELLANEOUS

- A. Notices. All notices or other communications hereunder to Marbles and the County shall be sufficiently given and shall be deemed to have been received five (5) Business Days after deposit in the United States mail in certified form, postage prepaid, to the County and Marbles, as the case may be, at the following addresses:

If to the County:	Ms. Denise Foreman, Assistant County Manager Deliver to: 301 South McDowell Street, Fourth Floor Mail to: PO Box 550 Raleigh, North Carolina 27602 Tel: (919) 856-5555 E-mail: denise.foreman@wakegov.com
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If to Marbles: Ms. Sally Edwards, President
201 S. Hargett Street
Raleigh, NC 27601
Tel: (919) 857-1018
E-mail: sedwards@marbleskidsmuseum.org

- B. Severability. In the event any provision in this Agreement shall be held invalid or unenforceable by a court of competent jurisdiction, such holding shall not invalidate or render unenforceable any other provision hereof.
- C. Execution. This Agreement may be executed in any number of counterparts, each of which shall be an original and all of which shall constitute but one and the same instrument.
- D. Applicable Law. This Agreement shall be governed by and be construed in accordance with the laws of the State of North Carolina. Jurisdiction for the resolution of any conflict arising from this Funding Agreement shall lie with the General Court of Justice of the State of North Carolina with venue in Wake County, North Carolina.
- E. Headings. Paragraph or other headings contained in this Agreement are for reference purposes only and are not intended to affect in any way the meaning or interpretation of the Agreement.

IN WITNESS WHEREOF, Marbles has caused this Agreement to be executed in its name by its duly authorized officers and its corporate seal to be impressed hereon, and the County has caused this Agreement to be executed in its name by its duly authorized officers and its corporate seal to be impressed hereon, as of the Effective Date.

MARBLES KIDS MUSEUM

ATTEST:

By: _____
Sally Edwards
Title: President

By: _____
Name:
Title: Position

SEAL

COUNTY OF WAKE, NORTH CAROLINA:

By _____
Chairperson

Denise Hogan
Clerk to the Board of Commissioners

Approved as to form:

Scott W. Warren
County Attorney

This instrument has been pre-audited in the manner required by the Local Government Budget and Fiscal Control Act.

FINANCE DIRECTOR

The person responsible for monitoring the contract performance requirements is:

_____ Department Head Initials

