



PLAYSPACE PARTNER AGREEMENT

August 20, 2020(the "Effective Date")

KABOOM!, Inc. ("KABOOM!") is pleased that the City of Fresno (the "Playspace Partner") has agreed to collaborate with KABOOM! on the creation of a new Playspace at Tollhouse Park (the "Project") Millbrook and Ashlan (APN 43615002T). This Playspace Partner Playspace Agreement (this "Agreement"), which sets forth the Playspace Partner's obligations in connection with the Project and certain matters on which the parties have agreed, will, when executed by the duly authorized representatives of each party, supersede any prior agreements and represent the complete legally binding agreement between the parties.

1. Obligations of KABOOM!

- (a) Project Management. KABOOM! shall manage the overall execution of the Project on behalf of the Playspace Partner. KABOOM! shall assign a project manager (the "Project Manager") who shall supervise the planning and installation of the Playspace, including overseeing a "Design Day" event, presenting Playspace designs, convening committee conference calls, assuring that the necessary materials, tools and equipment are on hand and managing the Playspace installation, which is scheduled to occur by December 31, 2020. KABOOM! shall also provide technical and organizational leadership and guidance for the Project, manage construction logistics for the Project, coordinate Playspace site preparation activities with the Playspace Partner, inventory equipment and materials, and assure that the necessary tools and materials are available during the Playspace Installation Period.
- (b) Vendors. KABOOM! shall select and manage vendors that will provide necessary equipment for the Playspace (e.g., surfacing, Playspace equipment, peripheral projects, landscaping, etc.). KABOOM! shall use commercially reasonable efforts to guard against any loss to the Playspace Partner through the failure of suppliers to properly honor their commitments, but KABOOM! shall not be held responsible for any such failure on their part. If the Playspace Partner requires different surfacing, due to environmental or municipal regulations, than that which is provided by KABOOM! the Playspace Partner shall have sole responsibility for vendor selection and installation of the surfacing materials.
- (c) Warranty. KABOOM! will obtain a warranty from the Playspace equipment manufacturers that all equipment meets or exceeds current government-approved safety standards. Obtaining such warranty shall be the total extent of the liability of KABOOM! to the Playspace Partner with respect to the Playspace equipment, and the Playspace Partner agrees that KABOOM! has not made nor is it in any manner responsible or liable for any warranty, representation, or guarantee, express or implied, in fact or in law, relative to any Playspace equipment, including without limitation the quality, mechanical condition or fitness for a particular purpose of the Playspace equipment. Any and all warranties and/or guarantees on Playspace equipment are subject to the respective manufacturers' terms and therefore, the Playspace Partner agrees to look solely to such manufacturers for any such warranty and/or guarantee.
- (d) Inspection. KABOOM!, in collaboration with the Playspace Partner, will secure a Certified Playspace Safety Inspector to review the Playspace structure at the conclusion of the Playspace Installation Period (or, if KABOOM! assumes responsibility for the Playspace construction going beyond one day, at the conclusion of the installation) to ensure that the structure is safe and built to all appropriate standards and guidelines, unless the Build Day is not completed on the Build Day due to failure of the Playspace Partner, in which case the Playspace Partner shall secure the Certified Playspace Safety Inspector.
- (e) Insurance.
 - (i) KABOOM! represents and warrants it has, and, upon request, shall provide evidence of, the following insurance coverage: Commercial General Liability with a limit of \$1,000,000 per occurrence with a general aggregate limit of \$2,000,000 and umbrella coverage of at least \$1,000,000 per occurrence; Workers' Compensation with statutory limits for the state in which the work is performed and employers liability insurance with a minimum of \$500,000 per accident; and Automobile Liability for owned, hired and non-owned autos with a combined single limit of \$1,000,000. KABOOM! shall require that any subcontractor hold and maintain insurance coverage that includes Commercial General Liability and Worker's Compensation coverage of at least the levels held by KABOOM! with a limit of \$1,000,000 per occurrence and Worker's Compensation with statutory limits for the state in which the work is performed.
 - (ii) As promptly and reasonably practicable following execution of this Agreement and, in any event, prior to the Playspace Installation Period, the Playspace Partner will be added to the Commercial General Liability policies held by KABOOM! and by the Playspace equipment manufacturer, as an additional insured by endorsement, which coverage shall be primary and non-contributing with any other insurance.
- (f) Website Listing. KABOOM! will place the Playspace on its list of KABOOM! builds on the KABOOM! website and KABOOM! will send information to the Playspace Partner on Playspace maintenance programming and enhancements.

2. Obligations of the Playspace Partner.

- (a) Compensation.¹ In consideration for KABOOM! management of the Project, the Playspace Partner agrees to contribute to KABOOM! the amount of \$113,500 according to the following schedule:
- (i) Twenty-five percent (25%) of the total (\$28,375) shall be due within thirty (30) days of signing of this Agreement.
 - (ii) Seventy percent (70%) of the total (\$79,450) shall be due forty-five (45) days prior to the Playspace Installation Period.
 - (iii) Five (5%) of the total (\$5,675) shall be due within fifteen (15) days of the completion of the Playspace installation.
 - (iv) The total of any additional fees and expenses incurred pursuant hereto will be due within thirty (30) days of invoicing.
- (b) Timeline. The Playspace Partner will respond to KABOOM! on the dates and times reasonably set forth for the Project.
- (i) The Playspace Partner will identify its Project market to KABOOM! at least six (6) months in advance of the Build Installation Period.
 - (ii) Following the identification of the Project market, the Playspace Partner and KABOOM! will identify a Build Installation Period which shall occur on a mutually agreeable date no later than December 31, 2020.
- (c) Project Site.
- (i) Ownership. At the time of execution of this Agreement, the Playspace Partner shall provide KABOOM! with proof of land ownership evidenced by either a deed granting title to the property to the Playspace Partner or a letter from the property owner showing approval for the Project. The Playspace Partner is the owner of the Playspace in its entirety, for the lifetime of the Playspace, including the equipment and/or safety surfacing at the time purchased by KABOOM! and/or the Playspace Partner.
 - (ii) Permits. Prior to the Build Day, the Playspace Partner shall obtain all necessary permits and licenses regarding the installation, possession and use of the Playspace in compliance with applicable laws and regulations.
 - (iii) Preparation. The Playspace Partner shall ensure that the Project site is (1) prepared two to three days prior to the start of the Playspace Installation Period; (2) preparing the site for the installation of the Project at least two (2) weeks before Playspace Installation Period, which includes but is not limited to removing existing Playspace equipment, footers and safety surfacing, grading the land, removing fencing and performing soil tests; (3) conducting up to two (2) utility checks as reasonably requested by KABOOM! with the appropriate utility companies with the first test being completed within two weeks of Design Day and with all utility check documentation provided upon completion to the KABOOM! project manager who shall supervise the planning and installation of the Playspace (the "Project Manager"); and (4) conducting up to two (2) soil site tests as reasonably requested by KABOOM!, with the first test being completed within two weeks of Design Day and with all soil check documentation provided to the Project Manager upon completion. The Playspace Partner is responsible for undertaking any necessary risk mitigation should the soil be deemed unsafe for children and adults.
 - (iv) Safety and Security. The Playspace Partner shall ensure the security of equipment, tools, and supplies provided by the Playspace Partner, if any, during the Playspace Installation Period.
 - (v) Maintenance. Maintenance of the Playspace facility and supervision of its use is the sole responsibility of the Playspace Partner. The Playspace Partner shall collaborate with KABOOM! during the Project planning process to develop a maintenance program for the Playspace and, with the support of the property owner (if owner is a separate party), shall maintain the Playspace and the property before and after the Build Day to ensure a safe and attractive playspace. In furtherance of the foregoing, in the event any Playspace equipment included in the Project no longer is permitted for any reason to be located at its original site of construction or such site is no longer controlled by the Playspace Partner for any reason, then the Playspace Partner promptly shall notify KABOOM! following its becoming aware of such situation and shall, at the Playspace Partner's sole cost and expense, take such steps as may be necessary to promptly and safely relocate the Playspace equipment (including any permanent signage and other fixtures) to an alternate site that serves children or to ensure that the successor controlling person of such site shall continue to make such Playspace available to children in the same manner contemplated as of the Playspace Installation Period and maintain (or permit the Playspace Partner to maintain) such Playspace in accordance with the maintenance program.² In addition, the Playspace Partner shall accept and maintain engineered wood fiber as Playspace safety surfacing, meeting standards established by Consumer Product Safety Commission guidelines, for the lifetime of the Playspace. Guidance and materials for the purpose of developing a maintenance plan for the Playspace are available, upon request, from the Playspace equipment and safety surfacing manufacturers, including Landscape Structures, Inc.

- (d) Design Day. The Playspace Partner agrees to host a (virtual) KABOOM!-facilitated Design Day with at least twenty (20) adult volunteers and twenty (20) children. Such adult volunteers shall remain engaged in the planning activities throughout the Project's planning process.
 - (e) Playspace Installation Period. KABOOM! on the behalf of the Playspace Partner and in collaboration with the Playspace Partner will manage construction logistics for the playground installation, including the inventory, assembly and installation of playground equipment. The installation, which is which is scheduled to occur on dates to be determined at a later time and which is referred to herein as the Playspace Installation Period. The Playspace Partner will accept all project deliveries, provide access to the site, and ensure that water and dumpsters are available for use during the Playspace Installation Period.
 - (f) Additional Materials. If the Playspace Partner decides to purchase additional equipment, including materials for site preparation, upgrades or improvements, to supplement materials secured by KABOOM! through the Project budget, then the Playspace Partner is responsible for paying for the materials directly. The Playspace Partner will hold KABOOM! harmless of any payments or liability with respect to the additional items ordered.
 - (g) Playspace Costs. The Playspace Partner is solely responsible for and shall hold KABOOM! harmless from any costs beyond the proposed Project budget, including costs incurred by the Playspace Partner for any prior site preparation, upgrades or improvements or any equipment or materials purchased to supplement those secured by KABOOM!.
 - (h) Signage. The Playspace Partner shall allow the name and logo of KABOOM! to be displayed on permanent Playspace signage, which shall be substantially in the form provided to the Playspace Partner during the application process and shall be 12 ¼ inches wide by 30 ¼ inches tall and mounted on poles in a mutually agreed location.
 - (i) Insurance. The Playspace Partner is self-insured and is responsible for providing coverage for its own employees and against liability for bodily injury, death and property damage that may arise out of or be based on the use of the playspace at Tollhouse Park, from 7 (seven) calendar days before the Playspace Installation Period and for a minimum of one year afterward, in each case, in amounts not less than one million dollars (\$1,000,000). This self-insurance shall be primary and non-contributing with any other insurance covering KABOOM!.
 - (j) Data Reporting. The Playspace Partner shall (i) promptly following the confirmation of the Project, distribute one or more play-related surveys provided by KABOOM! to its stakeholders, including parents/caregivers, volunteers, staff and board members, (ii) cause members of its planning committee to complete a post-build survey provided by KABOOM! within 2 weeks from the completion of the Playspace Installation Period and a 6-month survey provided by KABOOM! within 7 months from the completion of the Playspace Installation Period.
 - (k) Code of Conduct. The Playspace Partner agrees to comply with the build site rules (a copy of which has been provided). The Playspace Partner shall allow the build site rules to be displayed on site and communicate and enforce the build site rules for all participants in the Project's Design Day events.
3. Term. This agreement shall commence as of the Effective Date and remain in effect through 12/31/20 unless the term ("Term") is extended or terminated in writing and signed by both parties.
 4. Grant of Promotional Rights. KABOOM! will provide an opportunity for the Playspace Partner name and logo to appear on the permanent Playspace site sign and on certain materials developed jointly by KABOOM! and the Playspace Partner pertaining to the Project. The Playspace Partner may post banner(s) with its name and logo at the Project site for Design Day and during the Playspace Installation Period.
 5. Intellectual Property.
 - (a) During the term of this Agreement, KABOOM! hereby grants to the Playspace Partner a limited, non-exclusive, non-transferable, non-sublicensable, worldwide, royalty-free license to use the name and mark KABOOM! (the "Mark") in any form or embodiment, as well as the designs and logos as specified on the KABOOM! website at www.kaboom.org/style (the "Logos", and together with the Mark and the Tagline (and any successor marks, taglines, or logos), the "KABOOM! Marks"), and the Playspace Partner hereby grants to KABOOM! a limited, non-exclusive, non-transferable, non-sublicensable, worldwide, royalty-free license to use the Playspace Partner's name, trademarks, service marks, and logos (collectively, the "Playspace Partner Marks"), solely to promote the Project, including, without limitation, in broadcast, print, and Internet media and advertising, press releases, and other media materials, internal communications materials, and promotional materials, but only as provided below. Other than in connection with the materials jointly developed as provided in Section 3, each party will obtain the prior written approval of the other before using the other party's name, marks, or logos in connection with any publicly distributed materials, provided that the party whose approval is being sought will not unreasonably withhold or delay its approval. KABOOM! shall have the right to review and approve the type, manner, location, and duration of any advertisements or promotions in which the Playspace Partner references the KABOOM! Marks, the Project, or its participation in the Project. All such advertisements and promotions, inclusive of merchandising, sampling and special events, shall be at the expense and liability of the Playspace Partner.

- (b) The Playspace Partner acknowledges and agrees that KABOOM! is the sole owner of all right, title and interest in and to the KABOOM! Marks, as well as all goodwill attached or which shall become attached to any of the KABOOM! Marks. The Logo is comprised of the Mark and Tagline in a starburst design. On occasion, the Logo may be used without the Tagline; however, prior written approval of KABOOM! is required for such use. Guidelines for the usage of the Logo are available from KABOOM! or via the Internet at www.kaboom.org/style. The Playspace Partner further acknowledges and agrees that, as between the parties, KABOOM! is the sole owner of all label designs, product identifications, artwork, symbols, devices, manuals, guides, inventions, and publications produced as part of KABOOM! operations, services, and programs. The parties acknowledge that KABOOM! may take all steps to protect the KABOOM! Marks and its other property as KABOOM! deems appropriate.
- (c) KABOOM! acknowledges and agrees that the Playspace Partner is the sole owner of all right, title and interest in and to the Playspace Partner Marks, as well as all goodwill attached or which shall become attached to any of the Playspace Partner Marks. The Playspace Partner shall make available to KABOOM! the guidelines, if any, for the usage of the Playspace Partner Marks. KABOOM! further acknowledges and agrees that, as between the parties, the Playspace Partner is the sole owner of all label designs, product identifications, artwork, symbols, devices, manuals, guides, inventions, and publications produced as part of the Playspace Partner operations, services, and programs. The parties acknowledge that the Playspace Partner may take all steps to protect the Playspace Partner Marks and its other property as the Playspace Partner deems appropriate.
- (d) The Playspace Partner shall not manufacture, sell, or distribute, or license or otherwise permit the manufacture, sale or distribution of, any merchandise that incorporates or includes the KABOOM! Marks, without prior written consent of KABOOM!.
- (e) Any use of the KABOOM! Marks by the Playspace Partner will inure to the sole benefit of KABOOM!. The Playspace Partner shall not use the KABOOM! Marks in any manner that would harm the reputation of KABOOM! or disparage or negatively reflect upon the KABOOM! Marks. Upon expiration of or termination of this contract for any reason, the Playspace Partner shall cease all use of the KABOOM! Marks.
6. Playspace Installation Postponement. Playspace Installation shall not be postponed except when weather or other conditions jeopardize the safety of the installers or threaten the structural integrity of the Playspace. The decision to postpone a Build Day will be made by majority agreement of the representatives of KABOOM! and the Playspace Partner, except where such decision must be made by KABOOM! on the construction site and representatives of the Playspace Partner are not available for consultation. In the event that a Playspace Installation is postponed, KABOOM! and the Playspace Partner shall develop a plan for rescheduling the Playspace Installation at the next earliest date possible for each party. The Playspace Partner shall be responsible for all additional expenses related to the rescheduled Playspace Installation, including, without limitation, equipment, labor and materials, storage and travel costs and expenses; *provided, however*, that the Playspace Partner shall be notified of the estimated amount of such additional expenses in connection with the rescheduling of the Playspace Installation.
7. Termination. In the event that the Playspace Partner fails to make the payments required under this Agreement, KABOOM! may terminate the Agreement upon written notice to the Playspace Partner of such termination. In addition, either party may terminate this Agreement in the event of a breach by the other party of any of its obligations hereunder, which breach (other than in the case of a payment breach), to the extent curable, remains uncured for thirty (30) days after such party has provided written notice of such breach to the other party. Furthermore, if either party is delayed or prevented from fulfilling any of its obligations hereunder by any cause beyond its reasonable control, including acts of God, acts or omissions of civil or military authorities, fire, strike, flood, riot, act of terrorism, war, transportation delay, or inability due to such causes to obtain required labor, materials or facilities, such party shall not be liable hereunder for such delay or failure and either party may terminate this Agreement if the other is unable to perform any obligation hereunder for a period longer than ten calendar days due to such force majeure event, in which case KABOOM! shall refund to the Playspace Partner any amounts paid to KABOOM!, less expenses already committed and/or incurred prior to the date of such termination. If, upon termination as provided herein, the sum due KABOOM! by Playspace Partner exceeds the sum paid to KABOOM! hereunder, the Playspace Partner shall pay KABOOM! for any such additional sum due upon presentation of appropriate documentation within thirty (30) days of invoice. Except as set forth above, upon any termination, this Agreement shall become void and have no effect, and no party shall have any liability to the other party, except that nothing herein will relieve any party from liability for any intentional breach of this Agreement prior to such termination.
8. Indemnification. Except as expressly prohibited by state law, each party will indemnify, defend and hold harmless the other party and its and their respective affiliates' directors, officers, managers, partners, members, shareholders, employees, agents, representatives, successors and permitted assigns from any and all losses, liabilities, claims, actions, fees and expenses (including interest and penalties due and payable with respect thereto and reasonable attorneys' and accountants' fees and any other reasonable out-of-pocket expenses incurred in investigating, preparing, defending or settling any action), arising under, out of or in connection with any actions associated with the Project due to: (a) any alleged or actual breach of this Agreement; (b) any act or omission in the performance of this Agreement by the indemnifying party or any volunteer or other person participating in the Project at the behest of the indemnifying party; or (c) any claims that the indemnifying party's intellectual property infringes a third party's intellectual property, as long as the indemnifying party's intellectual property has been used in the manner contemplated hereby. In addition, the Playspace Partner shall indemnify and hold harmless KABOOM! and its and its affiliates' directors, officers, managers, partners, members, shareholders, employees, agents and representatives from any and all losses, liabilities, claims, actions, fees and expenses (including interest and penalties due and payable with respect thereto and reasonable attorneys' and accountants' fees and any other reasonable out-of-pocket expenses incurred in investigating, preparing,

defending or settling any action), resulting from the use of any Playspace property and equipment, including those for personal injury, death, or property damage, except to the extent resulting from the willful misconduct of such indemnified person. This provision shall survive any termination or expiration of this Agreement.

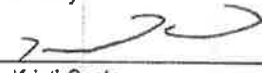
9. General Provisions. The Playspace Partner represents to KABOOM! that all information provided by it to KABOOM!, including in the Playspace Profile Application, is true, correct and complete in all respects and does not omit any information relevant to the Project. Each party has all requisite power and authority, including any necessary approval by its governing body, to execute and deliver this Agreement, and to perform its obligations hereunder. This Agreement may not be assigned or transferred by either party without the prior written consent of the other party hereto. This Agreement shall inure to the benefit of and be binding upon the parties hereto, their respective successors and permitted assigns, and where expressly stated, their affiliates and representatives. This Agreement shall be governed by and construed under the laws of the State of California, without regard to conflicts of laws principles to the extent that the application of the laws of another jurisdiction would be required thereby. This Agreement may be altered, modified or amended only by a written document signed by both parties. This Agreement may be executed in two or more counterparts, each of which shall be an original and all of which, when taken together, shall constitute the same agreement and may be delivered by facsimile or electronic mail transmission with the same force and effect as if originally executed copies hereof were delivered. Any notices required or permitted to be given hereunder shall be sent by certified or registered United States mail, postage prepaid, by personal delivery addressed to the applicable party or by facsimile or electronic mail transmission (the receipt of which is confirmed) at the address set forth under such party's signature below.

By executing this Agreement where indicated below, each of KABOOM! and the Playspace Partner agrees, as of the date identified above, to be legally bound by all of the terms and provisions set forth above.

CITY OF FRESNO,
A California municipal corporation

By: _____
[Name],
[Title]

APPROVED AS TO FORM:
DOUGLAS T. SLOAN
City Attorney

By:  8/20/2020
Kristi Costa
Deputy City Attorney
Date

ATTEST:
YVONNE SPENCE, MMC
City Clerk

By: _____
Deputy

CITY:
City of Fresno
Attention: [Name]
[Title]
[Street Address]
Fresno, CA [Zip]
Phone: (559) [#]
FAX: (559) [#]

KABOOM!, Inc.

DocuSigned by:

By: 
Name: George I. Megas
Title: Chief Financial Officer

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