

AGREEMENT FOR THE
CREATION AND TRANSFER OF A WORK OF ART

This Agreement is between the City of Portland (CITY) and Don Merkt, (ARTIST).

RECITALS: The Metropolitan Arts Commission (MAC) has been designated by the CITY to select art works and to monitor contracts to create and install works of art in designated CITY buildings.

Don Merkt, ARTIST has been selected to create and install the work hereinafter described and referred to as 'WORK'.

AGREEMENT

1) SCOPE OF CONTRACTOR SERVICES

ARTIST shall execute and install the WORK in accordance with the design proposal attached as Exhibit B and the following description and specifications:

Description of Work:

Name of Public Art Project: "The Drivers Seat"

Location of Project: NW Fifth Avenue & Irving St.

Location of Work of Art: Transportation Plaza

Type of Work:

Design, Dimensions, Materials, Installation-

The sculpture is a stylized, steel eye, approximately 10' high by 27': A steering wheel is located behind the iris and the bus driver's seat is accessible to the public. (See Exhibit B description and drawings).

A detailed installation plan will be submitted by the ARTIST prior to the second payment. The ARTIST is responsible only for lighting within the sculpture. Ground level lighting will be provided within the Transit Mall extension construction documents.

Date for completion of work: June 30, 1994.

The CITY will notify artist of any design or scheduling changes that affect the immediate site of the sculpture. Notification will be in writing with drawings if necessary.

If completion of the Plaza is delayed, installation may be delayed the same number of days.

2) EFFECTIVE AND TERMINATION DATES

This Agreement shall be effective as of April 19, 1993 and shall terminate as of September 1, 1994. ARTIST shall receive compensation for the WORK in the amount and manner payable as proved in Exhibit A.

3) COMPENSATION

ARTIST shall receive compensation for the WORK in the amount and manner payable as provided in Exhibit A.

4) INDEPENDENT CONTRACTOR STATUS

(A) The ARTIST is engaged as an independent contractor and will be responsible for any federal, state and local taxes and fees applicable to payments hereunder.

(B) The ARTIST and its subcontractors and employees are not employees of the CITY and are not eligible for any benefits through the CITY, including without limitation of federal social security, health benefits, workers' compensation, unemployment compensation, and retirement benefits.

5) SUBCONTRACTING

ARTIST shall not subcontract its work under this Agreement, in whole or in part, without the written approval of the CITY. The ARTIST shall require any approved subcontractor to agree, as to the portion subcontracted, to fulfill all obligations of the ARTIST as specified in this Agreement. Notwithstanding CITY approval of a subcontractor, the ARTIST shall remain obligated for full performance hereunder and the CITY shall incur no obligation other than its obligations to the ARTIST hereunder. ARTIST agrees that if subcontractors are employed in the performance of this Agreement, ARTIST and its subcontractors are subject to the requirements and sanctions of ORS Chapter 656 Workers' Compensation.

6) ASSIGNMENT

ARTIST shall not assign this Agreement, in whole or in part, or any right or obligation hereunder, without the prior written approval of the CITY.

7) OWNERSHIP OF WORK/COPYRIGHT/REPRODUCTION AND RESALE

A) OWNERSHIP. The WORK created under this agreement shall be the property of MAC. ARTIST shall deliver a bill of sale or other appropriate evidence of transfer to MAC upon final payment of ARTIST'S fee.

B) COPYRIGHT. The ARTIST shall retain copyright, but shall make no exact duplications to full scale of the WORK at another location.

C) REPRODUCTIONS. The ARTIST shall allow MAC and the CITY to make and authorize the making of photographs and other two-dimensional reproductions of the WORK for educational, public relations, arts promotional and other limited commercial purposes. For the purposes of this agreement, the following shall be deemed reproductions for educational, public relations, and non-commercial purposes; reproductions in exhibition catalogues, books, slides, photographs, postcards, posters, and calendars; in art magazines, art books and art and news sections in newspapers; in general books and magazines not primarily devoted to art but of an educational, historical or critical nature; slides and film strips not intended for mass audience; and television stations operated for educational purposes or on programs for educational purposes on all stations. On any and all such reproductions, MAC and the CITY will acknowledge the ARTIST'S authorship and provide copyright notification in compliance with the US copyright law.

D) CREDITS. The ARTIST also agrees that photographic reproductions of the WORK made by ARTIST for publicity purposes shall refer to the fact that the WORK is installed at The Transportation Plaza under the CITY Percent for Public Art Program, administered by the Metropolitan Arts Commission.

E) RESALE. The CITY agrees that if in the future it sells the WORK during the lifetime of the ARTIST, the CITY shall pay the ARTIST a sum equal to fifteen percent (15%) of the appreciated value of the WORK. For the purposes of this agreement, appreciated value shall mean the sales price of the work of art less the original purchase price as stated in this agreement. Nothing in this agreement shall be construed so as to impose any obligation to the CITY with respect to the method of sale or disposal except that the CITY shall give written notification to ARTIST of impending sale.

8) DELIVERY AND INSTALLATION. Upon acceptance of WORK in manner described in Exhibit A, ARTIST shall deliver WORK in good condition as specified in Exhibits A and B. ARTIST shall control installation and shall advise MAC on the lighting of the WORK to achieve the proper artistic effect.

9) WARRANTY, LOSS OR DAMAGE.

A) ARTIST warrants that the work is and will be the original product of ARTIST'S own creative efforts. This shall not, however, preclude ARTIST from subcontracting certain processes as described in Exhibit B.

B) ARTIST warrants for a period of one year from the date of acceptance by MAC of the WORK that the WORK shall be free from defects in material and workmanship. MAC shall not unreasonably withhold acceptance of the completed WORK or of its installation, and shall accept or reject the WORK no later than forty-five days after its completion. ARTIST shall repair or replace at MAC's discretion, and at no additional cost to MAC or the COUNTY any portion of the WORK that is found to be defective during the warranty period. MAC agrees to notify ARTIST of any such defect immediately upon discovery. Confirmation of notice shall be made in writing.

C) ARTIST shall assume all risk of loss or damage to the WORK Prior to completion and installation. The CITY shall assume all risk or loss or damage to the WORK between the time of installation and the time of acceptance, provided such loss or damage is not the fault of ARTIST.

D) In the event of physical loss or damage to the WORK prior to completion and installation, the ARTIST shall rectify the loss or damage by repair, restoration, replacement or other appropriate means as soon as possible at no additional cost to MAC or CITY.

10) REPAIR. With respect to any repair or restoration of the WORK not covered by the warranty provided in Paragraph 9, ARTIST shall be given the first opportunity to accomplish such repair or restoration, provided ARTIST and MAC are able to agree on a fee to be paid to ARTIST for such restoration or repair. MAC may proceed with repair or restoration if ARTIST cannot be located after a reasonable effort to do so is made, or if a fee cannot be reasonably agreed upon between MAC and ARTIST.

11) NON-DESTRUCTION/ALTERATION. The CITY agrees not to destroy, damage, alter, modify or otherwise change the WORK in any way whatsoever. If any alteration of any kind occurs after the receipt of the WORK by MAC whether intentional or accidental and whether done by MAC or others, the ARTIST has the right, in the ARTIST'S sole discretion, to request that the WORK shall no longer be represented to be the WORK of the ARTIST or that the WORK be removed until restored at the CITY's expense.

12) MAINTENANCE. The CITY shall be responsible for the proper cleaning, maintenance, and protection of the WORK after installation, pursuant to the instructions provided by ARTIST and attached as Exhibit B.

13) EARLY TERMINATION OF AGREEMENT.

(A) The CITY and ARTIST, by mutual written agreement, may terminate this Agreement at any time.

(B) The CITY, on thirty (30) days written notice to the ARTIST, may terminate this Agreement for any reason deemed appropriate in its sole discretion.

(C) Either the CITY or the ARTIST may terminate this Agreement in the event of a breach of the Agreement by the other. Prior to such termination, however, the party seeking the termination shall give to the other party written notice of

the breach and of the party's intent to terminate. If the party has not entirely cured the breach within fifteen (15) days of the notice, then the party giving the notice may terminate the Agreement at any time thereafter by giving a written notice of termination.

14) PAYMENT ON EARLY TERMINATION

(A) In the event of termination under subsection 13(a) or (b) EARLY TERMINATION OF AGREEMENT, hereof, the CITY shall pay the ARTIST for work performed in accordance with the Agreement prior to the termination date.

(B) In the event of termination under subsection 13 (c), EARLY TERMINATION OF AGREEMENT, hereof, by the ARTIST due to a breach by the CITY, the CITY shall pay the ARTIST as provided in subsection (a) of this section.

(C) In the event of termination under subsection 13(c) EARLY TERMINATION OF AGREEMENT, hereof by the City due to a breach by the ARTIST, then the CITY shall pay the ARTIST as provided in subsection (a) of this Section, subject to set off of excess costs provided for in section 15(a), REMEDIES.

(D) In the event of early termination all ARTIST'S work product will become and remain property of the CITY.

15) REMEDIES

(A) In the event of termination under subsection 13(C) EARLY TERMINATION OF AGREEMENT, hereof by the City due to a breach by the Artist, then the City may complete the work either itself or by agreement with another artist, or by a combination thereof. In the event the cost of completing the work exceeds the amount actually paid to the Artist hereunder plus the remaining unpaid balance of the compensation provided, then the Artist shall pay to the City the amount of the excess.

(B) the remedies provides to the City under Section 13 EARLY TERMINATION OF AGREEMENT, and 15 REMEDIES, hereof for a breach by the Artist shall not be exclusive. The City also shall

be entitled to any other equitable and legal remedies that are available.

(C) In the event of breach of this Agreement by the City, then the Artist's remedy shall be limited to termination of the Agreement and, receipt of payment as provided in Sections 13(c) EARLY TERMINATION OF AGREEMENT, and 14(b) PAYMENT ON EARLY TERMINATION, hereof.

16) CITY PROJECT MANAGER

(A) The City Project Manager shall be Bill Bulick or such other person as shall be designated in writing by the head of the Metropolitan Arts Commission.

(B) The Project Manager is authorized to approve work and billings hereunder, to give notices referred to herein, to terminate this Agreement as provided herein, and to carry out any other CITY actions referred to herein.

17) COMPLIANCE WITH LAWS

(A) In connection with its activities under this Agreement, the ARTIST shall comply with all applicable federal, state, and local laws and regulations.

(B) In the event the ARTIST provides goods or services to the CITY in the aggregate in excess of \$2,500.00 per fiscal year, ARTIST agrees it has certified with the City's Equal Employment Opportunity certification process.

18) INDEMNIFICATION. The ARTIST shall hold harmless, defend, and indemnify the Metropolitan Arts Commission, its individual commission members and employees and the CITY and the CITY's officers, agents, and employees against all claims, demands, actions, and suits (including all attorney fees and costs) brought against any of them arising from the ARTIST'S work or any subcontractor's work under this agreement.

19) LIABILITY INSURANCE

(A) The ARTIST shall maintain public liability and property damage insurance that protects the ARTIST and the CITY and its officers, agents, and employees from any and all claims,

demands, actions and suits for damage to property or personal injury, including death, arising from the ARTIST'S work under this Agreement. The insurance shall provide coverage for not less than \$200,000 for personal injury to each person, \$500,000 for each occurrence, and \$500,000 for each occurrence involving property damages; or a single limit policy of not less than \$500,000 covering all claims per occurrence. The limits of the insurance shall be subject to statutory changes as to maximum limits of liability imposed on municipalities of the State of Oregon during the term of the Agreement. The insurance shall be without prejudice to coverage otherwise existing and shall name as additional insureds the CITY and its officers, agents and employees. Notwithstanding the naming of additional insureds, the insurance shall protect each insured in the same manner as though a separate policy had been issued to each, but nothing herein shall operate to increase the insurer's liability as set forth elsewhere in the policy beyond the amount or amounts for which the insurer would have been liable if only one person or interest had been named as insured. The coverage must apply as to claims between insureds on the policy. The insurance shall provide that the insurance shall not terminate or be cancelled without thirty (30) days written notice first being given to the City Auditor. If the insurance is cancelled or terminated prior to completion of the contract, ARTIST shall provide a new policy with the same terms. ARTIST agrees to maintain continuous uninterrupted coverage, for the duration of the contract.

(B) The ARTIST shall maintain on file with the City Auditor a certificate of insurance certifying the coverage as required above. The adequacy of the insurance shall be subject to the approval of the City Attorney. Failure to maintain liability insurance shall be cause of immediate termination of this agreement by the CITY.

20) WORKERS' COMPENSATION INSURANCE

(A) The ARTIST shall obtain workers' compensation insurance coverage for all of its workers, employees and subcontractors either as a carrier-insured employer or a self-insured employer, as provided by Chapter 656 of the Oregon

Revised Statutes, before this Contract is executed. A certification of insurance, or copy thereof, shall be attached to this Contract as Exhibit C, and shall be incorporated herein and made a term and part of this Agreement. The ARTIST further agrees to maintain workers' compensation insurance coverage for the duration of the Agreement.

(B) In the event the ARTIST's workers' compensation insurance coverage expires during the term of this Agreement, the ARTIST agrees to timely re;new its insurance, either as a carrier-insured employer or a self-insured employer as provided by Chapter 656 of the Oregon Revised Statutes, before its expiration, and the Contractor agrees to provide the City of Portland such further certification of worker's compensation insurance as renewals of said insurance occur.

(C) The ARTIST agrees to properly complete the City of Portland's Workers' compensation Insurance Questionnaire prior to commencing work under this Agreement. Questionnaire is attached to this Agreement as Exhibit C and shall remain attached to this Agreement and become a part thereof as if fully copied herein.

21) FUNDS. The City certifies that sufficient funds are available and authorized for expenditure to finance the cost of this contract.

22) BUSINESS LICENSE. ARTIST shall obtain a City of Portland business license as required by PCC 7.06.010 prior to beginning work under this agreement. ARTIST shall provide a business license number in the space provided at the end of this agreement.

23) COMMENCEMENT OF WORK. ARTIST agrees that work being done pursuant to this contract will not be commenced until after:

(A) workers' compensation insurance is obtained, as outlined in Section 20 above.

(B) This Agreement is fully executed by the parties and approved by the City Attorney's office; and

(C) the effective date of this agreement as specified in Section 2. EFFECTIVE AND TERMINATION DATES.

EXHIBIT A

Contract Supplement to Agreement Between the City of Portland (CITY) and Don Merkt (ARTIST).

PAYMENT PROVISIONS. The CITY shall pay the ARTIST a fixed fee of \$ 24,025 which shall constitute full compensation for all services, materials, travel, delivery, insurance, and installation to be furnished under the terms of this agreement.

Such fee shall be paid in installments as follows:

1st payment: \$ 7,207.50 to be paid upon execution of this contract by all parties and receipt of an appropriate invoice from the artist.

2nd payment: \$ 12,012.50 to be paid upon completion of one third of the project as determined by the Artist and MAC.

3rd payment: \$ 4,805.00 to be paid upon completion of all work by the Artist, including installation and final acceptance of the project by MAC.

These payments are based on completion of WORK and inspection and acceptance by MAC and the CITY for conformance with project specifications. ARTIST will notify MAC of the date upon which fabrication of the WORK commences and will submit maintenance and installation plans prior to receipt of the second payment.

ACCEPTANCE. Representatives of MAC shall inspect ARTIST'S progress through on-site studio visits or photographic documentation provided by the ARTIST. Progress payments specified above will be made when MAC representatives and the ARTIST certify WORK has been performed.

To facilitate scheduling of MAC's inspections under the phases shown above, ARTIST shall notify MAC thirty days in advance of the completion of fabrication in each phase. MAC shall conduct its

inspection at the conclusion of fabrication and shall indicate its acceptance or rejection within three days thereof. If ARTIST requests a delay in the review after the thirty-day notification has been given, MAC shall have up to ten working days thereafter to conduct the review. ARTIST shall be paid no later than thirty days from the time of MAC's acceptance of fabrication in the above phases.

MAC may reject WORK and require that it be redone if it is not in conformance with the project specifications agreed upon by ARTIST and MAC. MAC will accept the finished WORK when it conforms sufficiently to specifications. MAC reserves the right to reject any portion of the WORK outright if it cannot be brought into satisfactory conformance.

EXHIBIT B

Contract Supplement to Agreement between the City of Portland (CITY) and Don Merkt (ARTIST).

The ARTIST has been commissioned based upon a design submitted for jurying in the Transportation Plaza. The design proposal is attached as part of Exhibit B. It is understood the ARTIST will make every effort to create the WORK in the spirit of the design, but that the necessity for continuous refinement and development may alter the final rendering. The ARTIST therefore, with the approval of MAC, which approval shall not be unreasonably withheld, may make necessary design modifications as the WORK progresses so long as general concept and materials remain the same.

ARTIST SHALL:

- 1) Deliver and install WORK in good condition in accordance with specifications described in Exhibit B. ARTIST shall leave WORK and site in good condition when installation is complete.
- 2) Provide MAC with detailed description of proposed installation plans, the materials and fabrication methods used in WORK, and the recommended maintenance instructions and means of future conservation or restoration that may be required, including the names and addresses of relevant manufacturers or agencies.
- 3) Design, fabricate and install the WORK in accordance with the artist's original design proposal, the model and slides submitted, and subsequent discussions between the ARTIST, MAC, the CITY and representatives of the project site.
- 4) Install the WORK in a manner acceptable to MAC and the CITY.
- 5) Shall provide MAC with proper documentation including catalogue sheet, 3 slides of each work and 2 black and white photographs and negatives of each work. Final payment shall be withheld until documentation is received in a manner acceptable to MAC and the City.

SIGNATURES

ARTIST

Name: DON MERIET BUSN. LIC. # 203737
Address: 1801 N.W. UPSHUR ST.
PORT. OR. 97209
Phone(s) 274-4400
SSN# 568-64-3278
Signature: Don Meriet
Date: 4/27/93

CITY OF PORTLAND

Name: Mike Lindberg
Signature: Mike Lindberg
Title: Commissioner of Public Utilities
Date: 5-27-93

APPROVED:
Richard Clark
City Auditor

APPROVED AS TO FORM:
Frank Hudson
Dep. City Attorney

METROPOLITAN ARTS COMMISSION

Name: Bill Bulick
Signature: Bill Bulick
Title: Executive Director
Date: 4/20/93

PROJECT DESCRIPTION

Transportation Plaza Sculpture: "The Driver's Seat"

Location: Transportation Plaza
S.E. Corner of N.W. Fifth Ave. & N.W. Irving St.
Portland, Oregon

Title: "The Driver's Seat"

Description: The sculpture is a large, stylized eye, approximately 10' high by 27' wide (for exact dimensions see drawings on file with the Metropolitan Arts Commission). The eye is oriented to the N.W., fixing its sight on Union Station's clock tower. A steering wheel is located immediately behind the iris. The empty driver's seat is accessible to the public.

Materials: The piece is fabricated out of steel, approximately 1/4" thick, then dipped with a galvanized finish. Connections are oversized bolts. The iris is constructed of rigid steel mesh.

DON MERKT
1801 N.W. UPSHUR ST.
PORTLAND, ORE. 97209
503 274-4400

2/4/92

Transportation Plaza Sculpture- "The Drivers Seat"

BUDGET

Preliminary Design.....	\$2,100
Design Development, Fabrication Drwgs.....	\$4,325
Supervision, Coordination	
Materials and Bending.....	\$2,595
Fabrication and Installation.....	\$14,405
Galvanizing.....	\$1,100
Insurance.....	\$1,200
Photography.....	<u>\$400</u>
Total Budget	\$26,125

EXHIBIT B

D O N M E R K T
1801 N.W. UPSHUR ST.
PORTLAND, OR 97209
503 274-4400

Metropolitan Arts Commission
Eloise MacMurray

3/16/93

TRANSPORTATION PLAZA SCULPTURE

Title : "The Driver's Seat"

INSTALLATION :

Installation will occur after total completion of the plaza site. The artist will supervise the placement and assembling of the sculpture, the larger elements will be located with the aid of a small crane. All precautions will be taken to not damage the existing plaza and to leave it free of debris.

ARTIST

CAST-IN-PLACE CONCRETE
STOP BAR (ALTERNATE: PERCAST
CONCRETE)- ALIGN FACE W/
PROPERTY LINE

PROJECT
CONSTRUCTION
BOUNDARY

N.W. IRVING ST. - W. BURNSIDE ST. (PORTLAND) SEC. N.W. 5TH, N.W. 6TH, & N.W. IRVING ST. MULTNOMAH COUNTY				SHEET No. 2C-15
FED. ROAD Div. No.	STATE	PROJECT NUMBER	FISCAL YEAR	TOTAL SHEETS
10	OREGON		1993	See Index

IN ORDER TO PROTECT
UNDERGROUND FACILITIES,
EXCAVATORS PERFORMING WORK
SHOWN ON THESE PLANS MUST
COMPLY WITH THE PROVISIONS OF
ORS 757.541 TO 757.571.

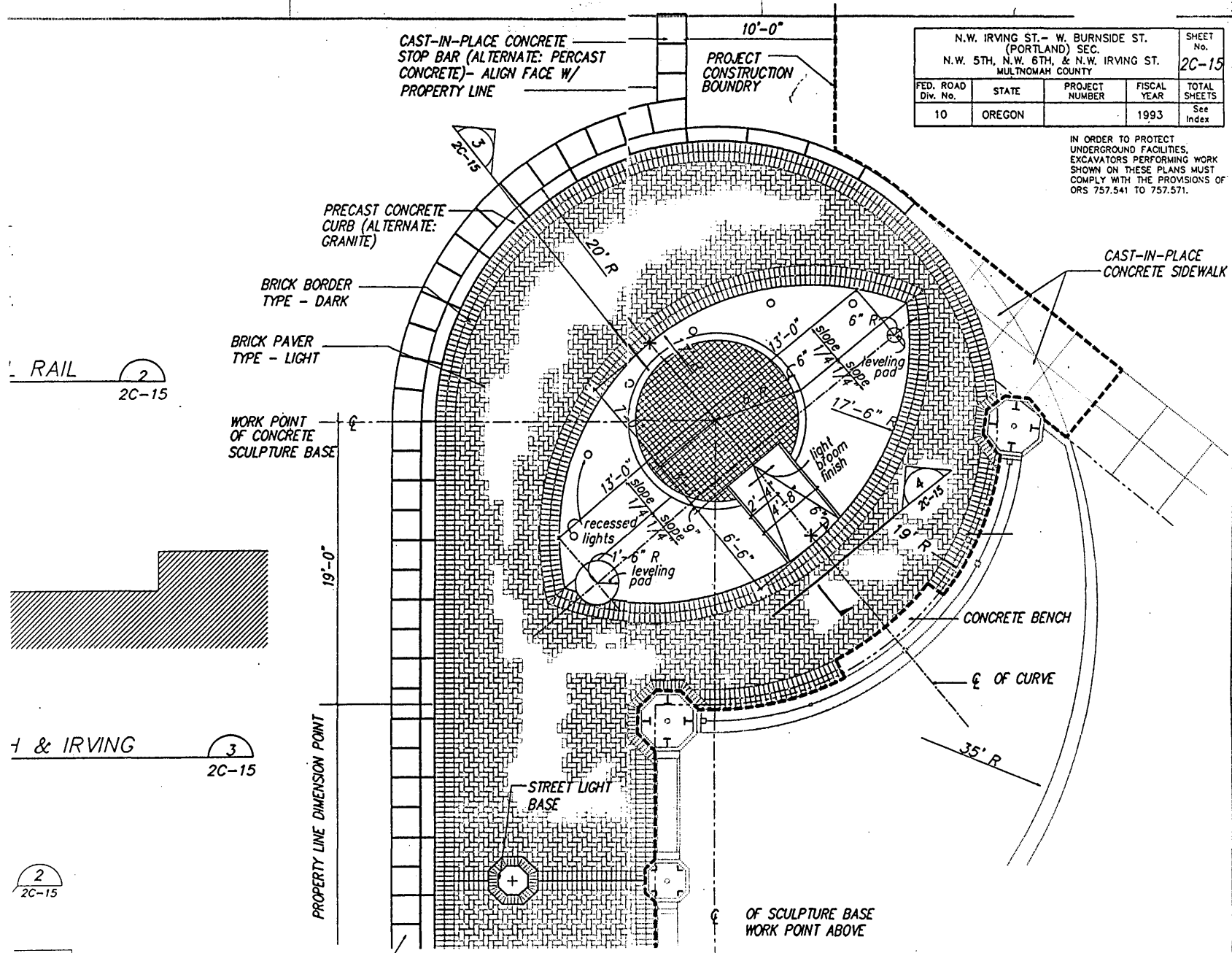


EXHIBIT B

RAIL 2
2C-15

1 & IRVING 3
2C-15

2
2C-15

ORDINANCE No. 166546

* Contract with Don Merkt for the creation and installation of a public art project to be located at the Transportation Plaza, NW Fifth Avenue and Irving. (Ordinance)

The City of Portland ordains:

Section 1. The Council finds that:

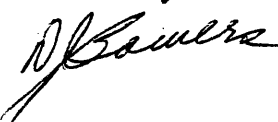
1. The City of Portland and Multnomah County have established the Metropolitan Arts Commission in order to promote and encourage public programs to further the development, public awareness of, planning for, and interest in, literary, performing and visual arts.
2. The Transportation Plaza Percent for Art Committee appointed by the Metropolitan Arts Commission and Commissioner Mike Lindberg held an open competition and selected artist Don Merkt to create a work of art to be located at the Transportation Plaza on NW Fifth Avenue and Irving Street.
3. The Metropolitan Arts Commission desires to contract with Don Merkt to create and install a stylized, steel eye sculpture which whimsically engages pedestrians and responds to the site as a transportation hub.
4. Total payments under the contract shall not exceed \$24,025.

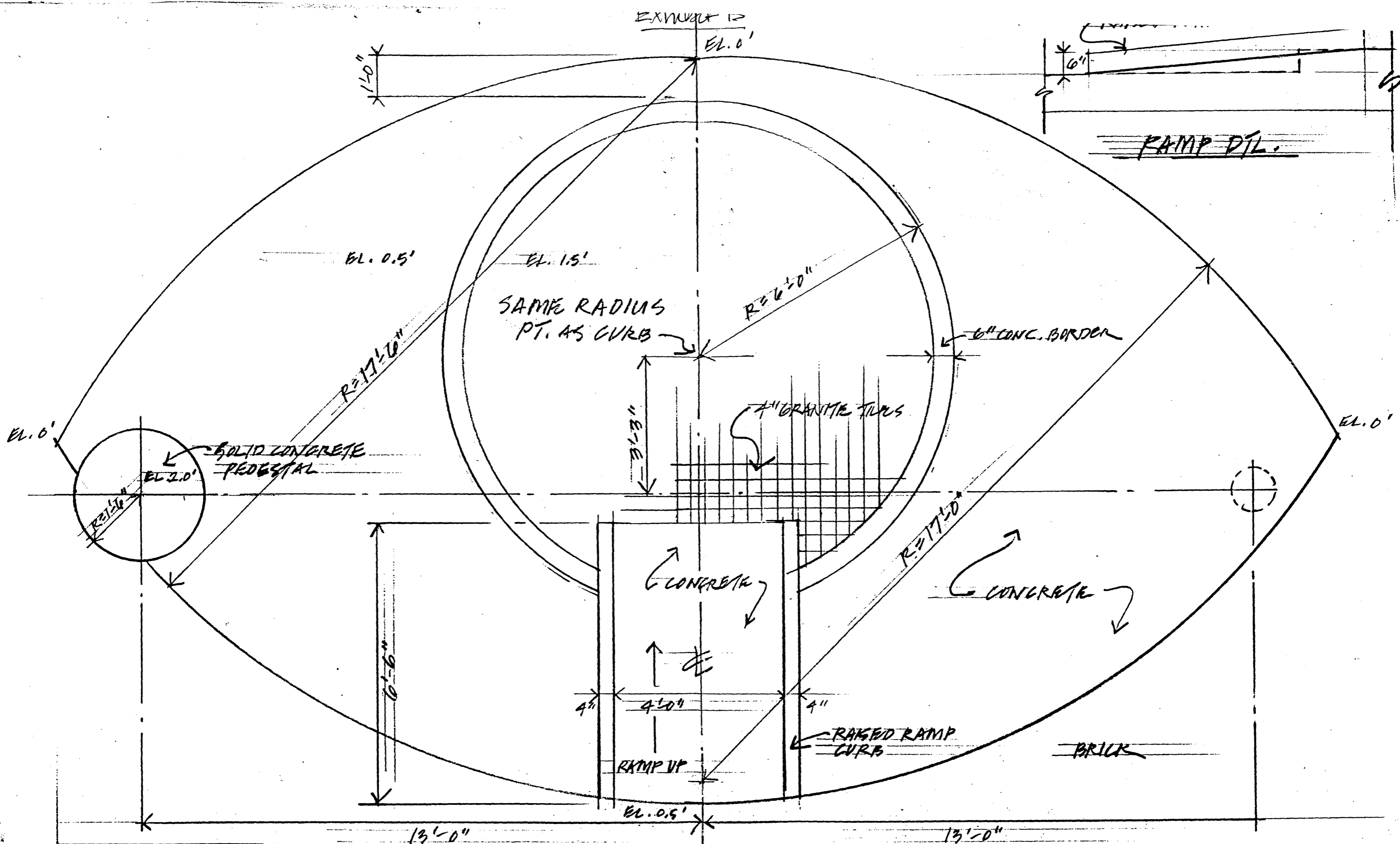
NOW THEREFORE, The Council directs:

- a. The Auditor, The Commissioner of Public Utilities, and the Executive Director of the Metropolitan Arts Commission to execute on behalf of the City a contract similar in form to exhibit A in the amount of \$24,025 with Don Merkt, 1801 NW Upshur, Portland, Oregon 97209.
- b. The Mayor and Auditor to draw and deliver warrants pursuant to Exhibit A to Don Merkt in an amount not to exceed \$24,025 to be charged to the Metropolitan Arts Commission Public Art Trust Fund.

Section 2. The Council declares that an emergency exists because delay in proceeding with the contract may unnecessarily deprive the citizens of Multnomah County and the City of Portland of the services being provided; therefore this Ordinance is in force and effect from and after its passage by the Council.

Passed by the Council, **MAY 19 1993**
Commissioner Lindberg
Susan Crabtree
5/12/93

BARBARA CLARK
Auditor of the City of Portland
By  Deputy

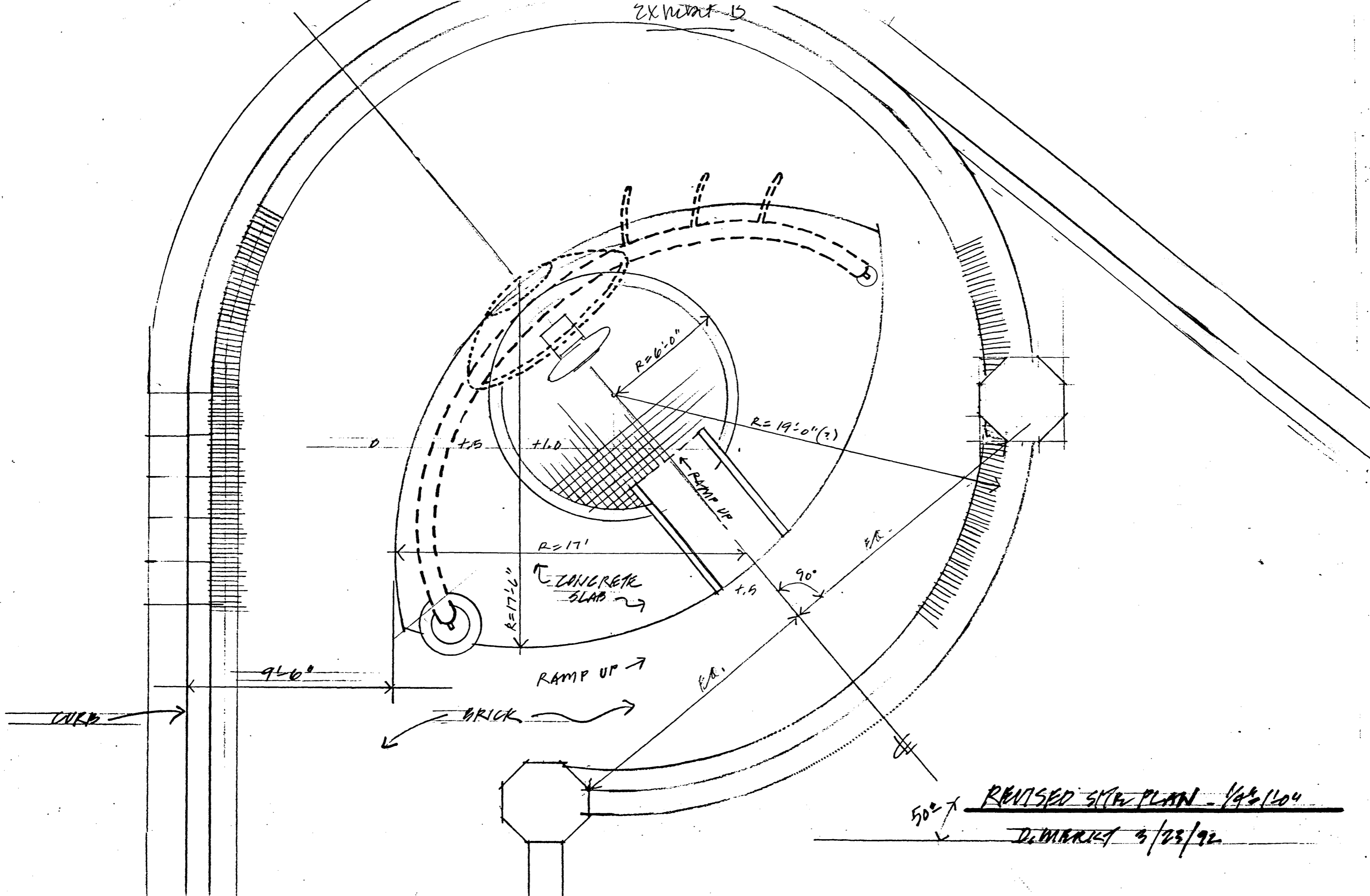


DON MERKT
 1801 N.W. UPSHUR ST.
 PORTLAND, ORE. 97209
 (503) 274-4400

BASE LAYOUT FOR SCULPTURE

9/10/92

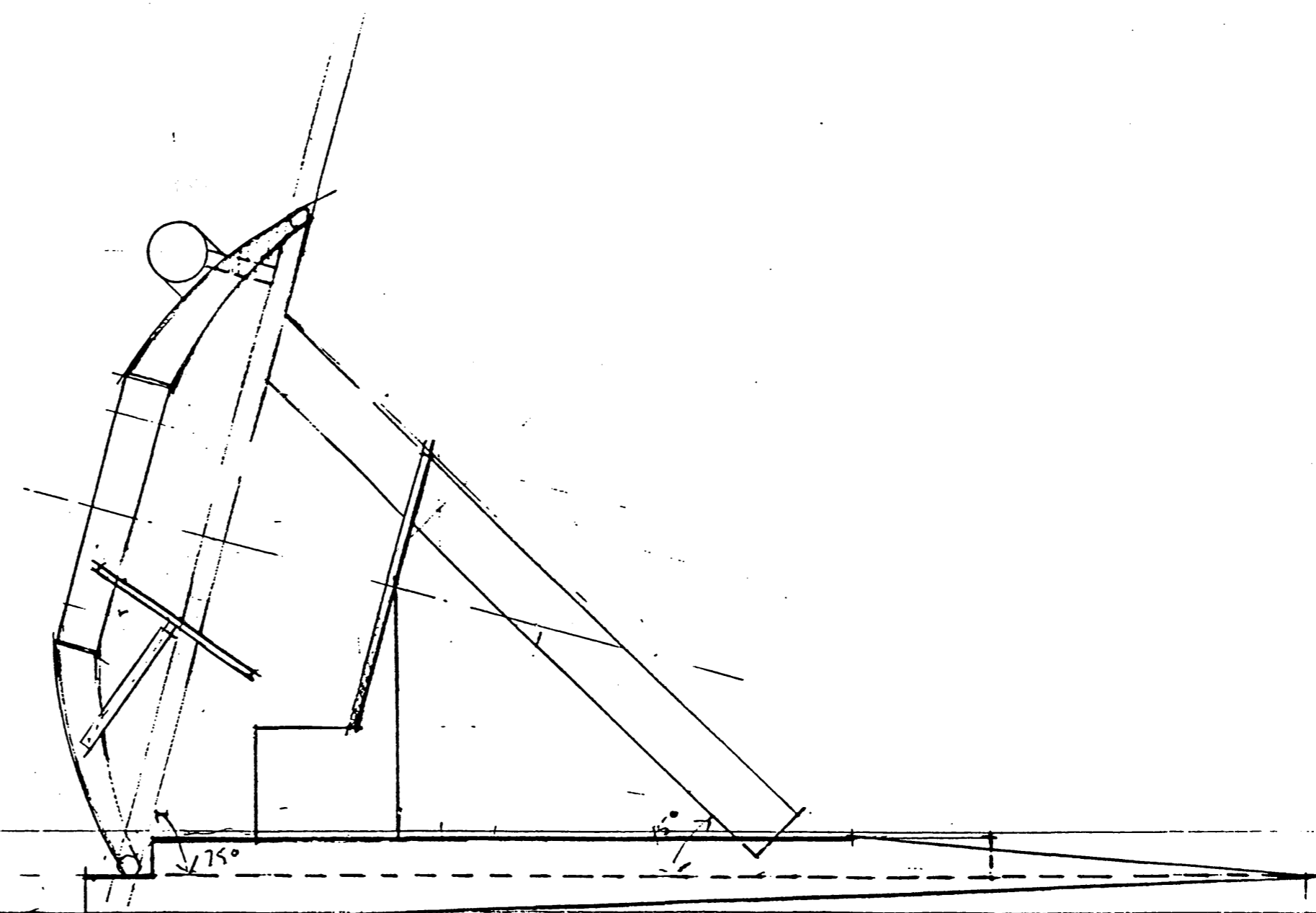
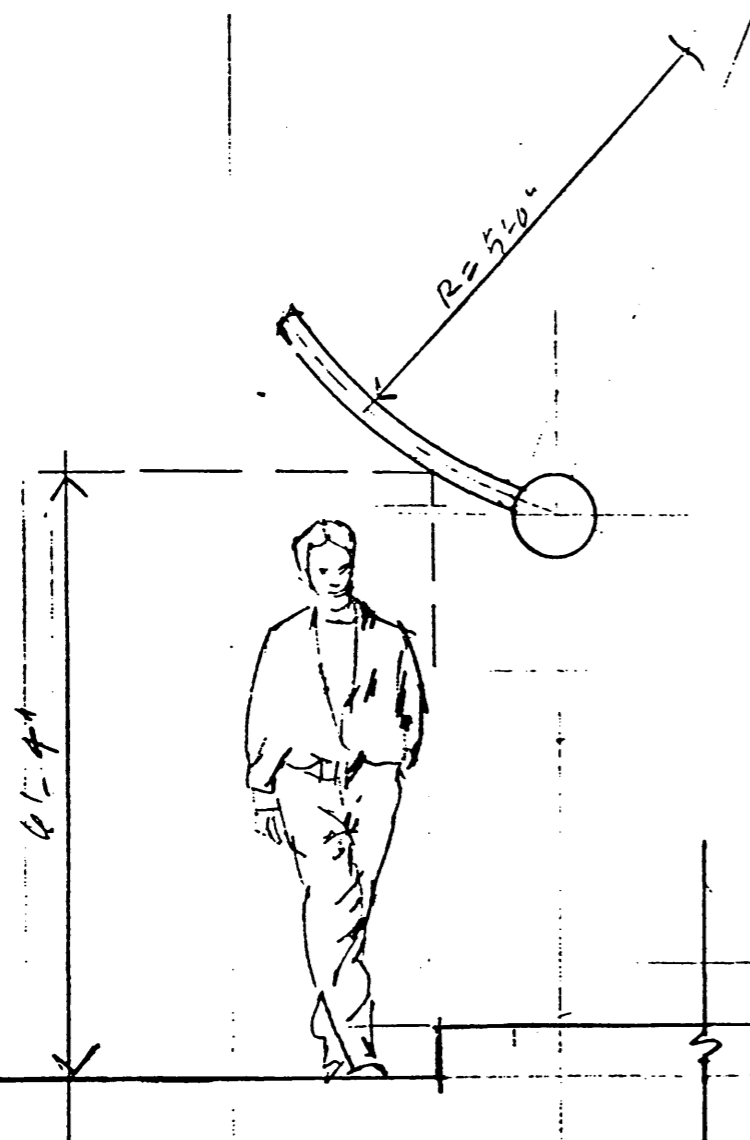
EXHIBIT B



REVISED SITE PLAN - 1/9/2004

DECEMBER 3/23/92

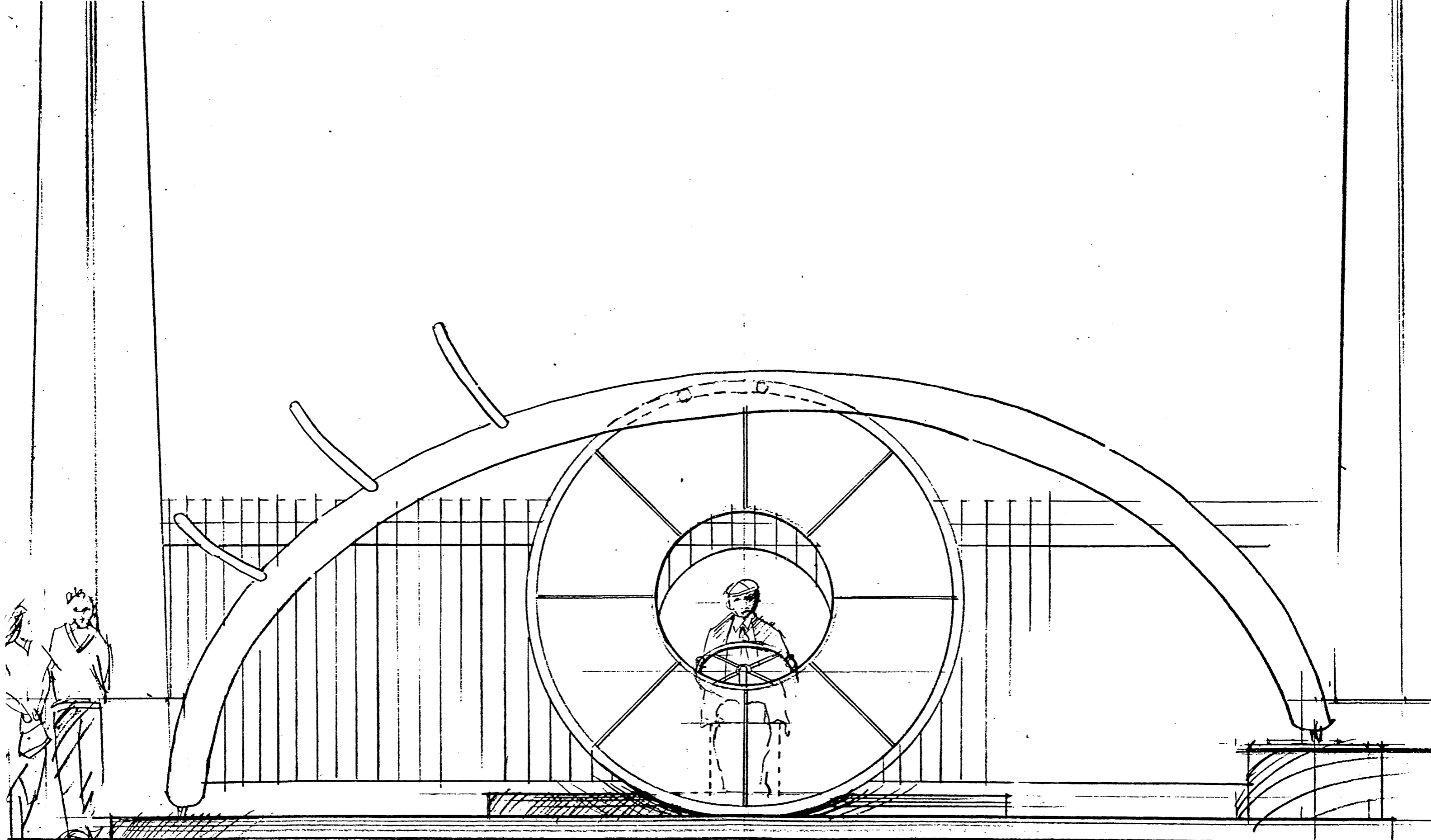
Exhibit B



LAST CLEARANCE

REVISED SECTION - 1/2" = 1'-0"

DON MERKT
1801 N.W. UPSHUR ST.
PORTLAND, ORE. 97209
(503 274-4400



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PORTLAND, ORE. 97209
(503 274-4400

REVISED ELEVATION

DMERKT