



## Memorandum

TO: HONORABLE MAYOR AND CITY COUNCIL FROM: RICHARD DOYLE  
City Attorney

SUBJECT: Review of City Council Authority regarding the City's Public Art Program DATE: August 31, 2004

### **BACKGROUND**

In the Fiscal year 2004-2005 Budget message, the City Manager's Office and the City Attorney's Office were requested to provide City Council with an analysis of possible alternative ways that the City's 2% public art funds may be used. The Budget message also requested an evaluation of the possibility of a cap on public art per CIP project.

This memorandum discusses legal issues related to the possible alternate use of funds currently designated for public art and a proposed cap. The City Manager's Office has prepared a separate report, which will respond to the policy issues in the Budget Message.

### **ANALYSIS**

#### **City Council has Authority to Change the Public Art Program Requirements for New Projects.**

In 1984, City Council established the City's original public art program, requiring funds for public art to be allocated as a part of the project costs for certain City and Agency projects. The Public Art program was revised at least once, in 1992. The current Municipal Code provisions setting forth the public art requirements for City and Agency projects, are found in Chapter 22.04 of the San Jose Municipal Code. Additional procedural guidance is set forth in Resolution 64284 adopted by City Council on December 15, 1992, and Resolution 3606 adopted by the Board of Directors of the Redevelopment Agency on December 15, 1992.

The establishment of the Public art program was a discretionary action of the City Council. As such, City Council clearly has the authority to modify the public art program requirements for future City or Agency projects. For example the City Council may increase or decrease the percentage of project costs to be allocated to public art. City Council could change the definition of eligible construction

projects, either increasing or decreasing the number of projects that would be subject to the public art requirement. City Council may also establish caps on the amount of funds that will be allocated to public art for all projects, or limit the caps to larger projects.

### **2001 Public Art Master Plan.**

City Council usually engages in a public review process when considering modifications to a program such as the public art program. City Council approved a Public Art Master Plan in March 2001, which proposed changes to public art program from those currently described in the Municipal Code Sections referenced above. The 2001 Public Art Master Plan called for a general expansion of the public art program by, among other things, increasing the number of projects that would be subject to the City's public art requirement.

The provisions of the Public Art Master Plan have not been formally codified in the Municipal Code, nor have new Public Art Resolutions been brought before City Council. This is due in part, to the high volume of public art projects already generated by City projects, and in part, to requests made by City Council (similar to the request in this year's Budget message), in which City Council appears to be reconsidering expansion of the public art program. However, it should be noted that City Council is not legally required to update or revise the 2001 Public Art Master Plan before implementing changes to the Public Art program.

### **Implementation of Changes to the Public Art Program.**

If City Council desires to implement any of the changes to the City's public art program discussed above or any other changes, City Council could adopt an ordinance, modifying the current Municipal Code provisions regarding public art. In addition, and if applicable, City Council would adopt new resolutions (superceding the existing resolutions), which would set forth the new procedural guidelines for the public art program.

In the alternative, City Council may want to reconsider whether the Municipal Code is the best location for the City and Agency's public art requirements. The Municipal Code is most commonly thought of as a regulatory document. The public art requirements do not have to be expressed in a regulatory manner. The public art requirements could be expressed as policy direction to staff from City Council and the Agency Board on the public art component of City and Agency projects. Because it is primarily an internal policy, the Council may find it more appropriate for the public art requirements to be set forth as a City Council

policy and a Redevelopment Agency Board policy, rather than in the Municipal Code.

### **More Specific Review needed Regarding Projects Already Underway.**

For City and Agency projects already underway, City Council may have less discretion to use the public art funds for other purposes. The City's ability to change the use of funding for ongoing project depends, to a great extent, upon the source of those project funds. A further analysis of restrictions associated with different funding sources is set forth below.

Another factor that must be evaluated for projects already underway, is whether the City has already entered into contracts with artists for the design or fabrication of public artworks or whether the project has been designed to accommodate the public art. Unless otherwise described, the analysis set forth below assumes that all of these issues have been reviewed and found not to restrict the City's ability to reallocate the public art funds to use them for other purposes.

### **ANALYSIS OF PROJECT FUNDING RESTRICTIONS AND PROPOSED CHANGE IN USE OF PUBLIC ART FUNDS**

#### **General Fund Projects.**

If City Council modifies the Municipal Code and accompanying resolution No. 64284 to remove the requirement that 2% of project costs be dedicated to public art, then the "2% public art funds" currently allocated for public works projects funded with general funds, could be reallocated by the City Council for any other permissible purpose.

#### **Agency Funded Construction Projects.**

RDA funds may only be used for certain purposes. In general, such funds may be used only for acquiring and disposing of property for private development, and on planning, design, and construction of public capital improvements in redevelopment Project Areas. Agency funds may not be used for maintenance or operational costs of City facilities. Therefore if City Council desires to re-allocate the public art funding on Agency projects for a different purpose, the new use of these funds must be an allowable use of Agency funds.

### **Airport Public Art Project.**

As a part of the proposed Airport construction, certain funds have been identified as public art funds. For the most part, the proposed construction at the Airport is funded through tax-exempt bond financings and other funds restricted for Airport purposes. Tax-exempt bond funds and other restricted funds are the source of the public art funds for the Airport security-related project, and must be used on the airport capital project and may not be used for non-airport purposes or on non-capital projects. To the extent that the public art funds for the Airport project derive from funds that are not tax-exempt bond proceeds, we would need to identify the funding source to determine whether those funds are subject to similar restrictions.

### **Tax-Exempt Bond Funded Projects.**

The City currently has three capital improvement programs funded with tax-exempt general obligation bonds approved by the voters: parks, libraries and public safety. The G.O. bond funds are subject to numerous restrictions under State and Federal law. They may only be used for land acquisition and capital improvements on identified or approved bond projects, and on certain limited overhead expenditures directly related to the bond funded projects. For example – the G.O. library bond proceeds, may not be used for non-library projects. Also the G.O. bond proceeds allocated to public art capital projects may not be used to for general operating expenditures, such as to provide operating support for arts organizations or the maintenance of public art.

In addition to the G.O. bond projects, there are City projects funded with other types of tax-exempt bonds specific to the particular project. These tax-exempt bond proceeds also are restricted to the capital costs and other development costs for the project identified in the bond financing documents.

### **Projects Funded With Construction and Conveyance Taxes.**

The Municipal Code limits the use of revenues from the Construction and Conveyance Taxes (C&C Taxes) for the acquisition, construction, remodeling of certain public improvements such as libraries, parks, community centers, fire stations, and certain expenditures associated with those facilities. C&C tax funds are a special tax, not a general tax. The City Council could reallocate public art funding derived from the C&C Taxes, but the new use must be a permitted project or permitted cost for C&C taxes.

### **Parkland Dedication Ordinance/Parkland Impact Fee Funded Projects.**

Funds derived from Parkland Dedication Ordinance fees (Chapter 19.38 of the Municipal Code) or the Parkland Impact Fees (Chapter 14.25 of the Municipal Code) may only be used for the development or renovation of community serving parks or neighborhood or community serving elements of regional parks, and must serve the residents of the developments generating these fees. The City Council could decide to modify the Public Art funding for projects paid for with PDO or PIF fees, however those funds could only be used for projects that meet the criteria set forth in the Municipal Code Sections cited above. The City's ability to impose these fees is derived from a state law known as the Quimby Act, with respect to the PDO fee, and the City Charter.

### **Redevelopment Agency Agreements with Private Developers - Projects With Public Art Components.**

Recent Redevelopment Agency agreements with private developers, in which the Agency provides land rights, funding or other support to private development projects, usually designate certain project funds for public art. The public art may be paid from either the Developer's own project funding, or the Agency's contribution to the Project.

The Agency's public art resolution calls for Agency staff to try to negotiate with developers to allocate 2% percent of the project construction cost for public art. Typically the agreement between the Agency and the Developer (usually a DDA) limits the use of these funds for the acquisition of public art, however the actual contract provisions vary from one DDA to another. If an outstanding DDA limits the use of these funds to the acquisition of public art, then the Agency would need to seek the consent of the developer to allow these funds to be used for other purposes. However, if the new use for this funding does not appear to benefit the private development, it may be difficult for Agency staff to reach agreement with developers on the new use of these funds.

### **Park Trust Fund.**

It is our understanding that most or all of the funds in the Park Trust Fund are derived from PDO/PIF funds. The restrictions on use of PDO or PIF funds are discussed above.

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### **TOT Funded Projects.**

Transient Occupancy Tax Revenues are derived from a tax imposed upon transient use of San Jose hotels. The TOT is currently 10% of the rent charged for occupancy of a hotel in San Jose.

Chapter 4.72 of the Municipal Code defines the permitted uses for a portion of the TOT tax, an amount equal to 6% of the room rent ("6% Room Rent TOT"). City Council may allocate the 6% Room Rent TOT into three general areas, one portion is designated for support of the City's operating subsidies for the City's convention and cultural facilities (approximately 50% of the 6% Room Rent TOT). The remainder of the 6% Room Rent TOT may be used by City Council to support the cultural grants and other programs of the City's Office of Cultural Affairs (including the public art program), and/or to provide support for the convention and visitor's bureau. If any portion of the 6% Room Rent TOT is designated for the public art program, City Council could change the proposed use of those funds for other purposes permitted under the Municipal Code, such as to provide operating support for other arts groups or funding additional cultural grants.

The remaining 4% of room rent comprising the TOT is referred to as the General Fund TOT and is described in Chapter 4.74 of the Municipal Code. The use of these funds may be designated by City Council. Public art funding from the General fund TOT may also be used for any permissible purpose designated by City Council.

### **5 Year CIP Budget.**

We reviewed the list of public art projects shown in the current 5 year CIP Budget with staff from the Office of Cultural Affairs and the Budget Office. The list of public art projects and the funding sources are shown on Attachment 1 to this memorandum. The funding restrictions that apply to the public art projects shown in the 5 year CIP Plan, appear to limit the City from reallocating any significant amount of the public art funds to the alternative uses identified in the accompanying memorandum from the Office of Cultural Affairs. If City Council desires an analysis of alternate uses for the public art funds other than those described in staff's memorandum, our Office would need to review the proposed alternate uses before we could determine if the particular funding source would permit reallocation of the public art funds for that purpose.

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## **CONCLUSION**

City Council and the Board of Directors of the Redevelopment Agency have broad authority to revise the City's current public art program for future projects. City Council and the Agency Board could also impose caps upon public art projects. The City's ability to change the use of public art funds for projects already underway will, to a great extent, depend upon the source of those public art funds and the whether there are already outstanding contracts in place for the use of those public art funds.

RICHARD DOYLE, City Attorney

By: \_\_\_\_\_  
BARBARA JORDAN  
Senior Deputy City Attorney

attachment

cc: Del Borgsdorf  
Kay Winer  
Larry Lisenbee

# City of San Jose

## 2005-2009 Adopted Capital Improvement Program Public Art Projects

	<u>2004-2005</u>	<u>2005-2006</u>	<u>2006-2007</u>	<u>2007-2008</u>	<u>2008-2009</u>
<b><u>Traffic Capital Program</u></b>					
King Road: Penitencia Creek Bridge		\$56,000			
Fund 429 Building And Structure Construction Tax Fund					
<b>Total Traffic Capital Program</b>		<b>\$56,000</b>			
<b><u>Airport Capital Program</u></b>					
Public Art	\$690,000	\$1,061,000	\$1,017,000	\$1,022,000	
Fund 527 Airport Renewal & Replacement Fund					
<b>Total Airport Capital Program</b>	<b>\$690,000</b>	<b>\$1,061,000</b>	<b>\$1,017,000</b>	<b>\$1,022,000</b>	
<b><u>Civic Center Capital Program</u></b>					
Public Art	\$918,000				
Fund 425 Civic Center Construction Fund					
<b>Total Civic Center Capital Program</b>	<b>\$918,000</b>				
<b><u>Public Safety Capital Program</u></b>					
Public Art	\$2,242,000	\$41,000			
Fund 475 Neighborhood Security Bond Fund					
<b>Total Public Safety Capital Program</b>	<b>\$2,242,000</b>	<b>\$41,000</b>			
<b><u>Library Capital Program</u></b>					
Almaden Branch	\$139,000				
Fund 472 Branch Libraries Bond Projects Fund					
Alum Rock Branch	\$160,000				
Fund 472 Branch Libraries Bond Projects Fund					
Calabazas Branch			\$1,000	\$82,000	\$16,000
Fund 472 Branch Libraries Bond Projects Fund					
Cambrian Branch	\$221,000	\$9,000			
Fund 472 Branch Libraries Bond Projects Fund					
East San José Carnegie Branch		\$37,000	\$83,000	\$3,000	\$2,000
Fund 472 Branch Libraries Bond Projects Fund					
Edenvale Branch	\$200,000	\$10,000			
Fund 472 Branch Libraries Bond Projects Fund					
Educational Park Branch			\$58,000	\$131,000	\$5,000
Fund 472 Branch Libraries Bond Projects Fund					
Evergreen Branch	\$164,000				
Fund 472 Branch Libraries Bond Projects Fund					
Hillview Branch	\$169,000	\$7,000			
Fund 472 Branch Libraries Bond Projects Fund					
Joint Library Public Art	\$105,679				
Fund 450 Redevelopment Capital Projects Fund					
Joyce Ellington Branch	\$152,000	\$3,000	\$4,000		
Fund 472 Branch Libraries Bond Projects Fund					

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**2005-2009 Adopted Capital Improvement Program  
Public Art Projects**

	<u>2004-2005</u>	<u>2005-2006</u>	<u>2006-2007</u>	<u>2007-2008</u>	<u>2008-2009</u>
<b><u>Library Capital Program</u></b>					
Pearl Avenue Branch	\$43,000	\$98,000	\$3,000		
Fund 472 Branch Libraries Bond Projects Fund					
Rose Garden Branch	\$120,000				
Fund 472 Branch Libraries Bond Projects Fund					
Santa Teresa Branch		\$66,000	\$151,000	\$4,000	
Fund 472 Branch Libraries Bond Projects Fund					
Seventrees Branch		\$63,000	\$142,000	\$5,000	
Fund 472 Branch Libraries Bond Projects Fund					
Southeast Branch				\$36,000	\$82,000
Fund 472 Branch Libraries Bond Projects Fund					
Vineland Branch	\$100,000				
Fund 472 Branch Libraries Bond Projects Fund					
West Side Branch			\$32,000	\$176,000	\$7,000
Fund 472 Branch Libraries Bond Projects Fund					
West Valley Branch Public Art	\$1,000				
Fund 393 Library Construction & Conveyance Tax Fund					
Willow Glen Branch	\$17,000	\$95,000	\$4,000		
Fund 472 Branch Libraries Bond Projects Fund					
<b>Total Library Capital Program</b>	<b>\$1,591,679</b>	<b>\$388,000</b>	<b>\$478,000</b>	<b>\$437,000</b>	<b>\$112,000</b>
<b><u>Municipal Improvements Capital Program</u></b>					
Paseo Plaza Public Art	\$193,000				
Fund 450 Redevelopment Capital Projects Fund					
Public Art- Administration- Taxable	\$299,999				
Fund 434 Hayes Mansion Phase Iii (434)					
Public Art- Tax Exempt	\$70,000				
Fund 434 Hayes Mansion Phase Iii (434)					
Twohy Building Public Art	\$192,814				
Fund 450 Redevelopment Capital Projects Fund					
<b>Total Municipal Improvements Capital Program</b>	<b>\$755,813</b>				
<b><u>Parks and Community Facilities Capital Program - Council District 1</u></b>					
Council District 1 Public Art	\$27,000				
Fund 377 District 1 Parks Construction & Conveyance Tax Fund					
<b>Total Parks and Community Facilities Capital Program - Council District 1</b>	<b>\$27,000</b>				

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	<u>2004-2005</u>	<u>2005-2006</u>	<u>2006-2007</u>	<u>2007-2008</u>	<u>2008-2009</u>
<b><u>Parks and Community Facilities</u></b>					
<b><u>Capital Program - Council District 2</u></b>					
Council District 2 Public Art	\$52,000				
Fund 378 District 2 Parks Construction & Conveyance Tax Fund					
<b>Total Parks and Community Facilities Capital Program - Council District 2</b>	<b>\$52,000</b>				
<b><u>Parks and Community Facilities</u></b>					
<b><u>Capital Program - Council District 3</u></b>					
Council District 3 Public Art	\$15,000				
Fund 380 District 3 Parks Construction & Conveyance Tax Fund					
<b>Total Parks and Community Facilities Capital Program - Council District 3</b>	<b>\$15,000</b>				
<b><u>Parks and Community Facilities</u></b>					
<b><u>Capital Program - Council District 4</u></b>					
Council District 4 Public Art	\$11,000				
Fund 381 District 4 Parks Construction & Conveyance Tax Fund					
<b>Total Parks and Community Facilities Capital Program - Council District 4</b>	<b>\$11,000</b>				
<b><u>Parks and Community Facilities</u></b>					
<b><u>Capital Program - Council District 5</u></b>					
Council District 5 Public Art	\$23,000				
Fund 382 District 5 Parks Construction & Conveyance Tax Fund					
<b>Total Parks and Community Facilities Capital Program - Council District 5</b>	<b>\$23,000</b>				
<b><u>Parks and Community Facilities</u></b>					
<b><u>Capital Program - Council District 6</u></b>					
Council District 6 Public Art	\$28,000				
Fund 384 District 6 Parks Construction & Conveyance Tax Fund					
<b>Total Parks and Community Facilities Capital Program - Council District 6</b>	<b>\$28,000</b>				
<b><u>Parks and Community Facilities</u></b>					
<b><u>Capital Program - Council District 7</u></b>					
Council District 7 Public Art	\$14,000				
Fund 385 District 7 Parks Construction & Conveyance Tax Fund					
<b>Total Parks and Community Facilities Capital Program - Council District 7</b>	<b>\$14,000</b>				

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**2005-2009 Adopted Capital Improvement Program  
Public Art Projects**

	<u>2004-2005</u>	<u>2005-2006</u>	<u>2006-2007</u>	<u>2007-2008</u>	<u>2008-2009</u>
<b><u>Parks and Community Facilities</u></b>					
<b><u>Capital Program - Council District 8</u></b>					
Council District 8 Public Art	\$24,000				
Fund 386 District 8 Parks Construction & Conveyance Tax Fund					
<b>Total Parks and Community Facilities Capital Program - Council District 8</b>	<b>\$24,000</b>				
<b><u>Parks and Community Facilities</u></b>					
<b><u>Capital Program - Council District 9</u></b>					
Council District 9 Public Art	\$24,000				
Fund 388 District 9 Parks Construction & Conveyance Tax Fund					
<b>Total Parks and Community Facilities Capital Program - Council District 9</b>	<b>\$24,000</b>				
<b><u>Parks and Community Facilities</u></b>					
<b><u>Capital Program - Council District 10</u></b>					
Council District 10 Public Art	\$6,000				
Fund 389 District 10 Parks Construction & Conveyance Tax Fund					
<b>Total Parks and Community Facilities Capital Program - Council District 10</b>	<b>\$6,000</b>				
<b><u>Parks and Community Facilities</u></b>					
<b><u>Capital Program - Citywide Parks</u></b>					
Alum Rock Park Penitencia Creek Entrance Public Art	\$15,000				
Fund 391 City-Wide Parks Construction & Conveyance Tax Fund					
Alum Rock Park Penitencia Creek Trail Public Art	\$9,000				
Fund 391 City-Wide Parks Construction & Conveyance Tax Fund					
Guadalupe Creek/Los Alamitos Connection Public Art	\$15,000				
Fund 391 City-Wide Parks Construction & Conveyance Tax Fund					
Guadalupe River Reach 12 Public Art	\$25,000				
Fund 391 City-Wide Parks Construction & Conveyance Tax Fund					
Guadalupe River Trail Bridge at Almaden Lake Public Art	\$17,000				
Fund 391 City-Wide Parks Construction & Conveyance Tax Fund					
Historic Homes-Overfelt House Public Art	\$15,000				
Fund 391 City-Wide Parks Construction & Conveyance Tax Fund					
Municipal Rose Garden Public Art	\$4,000				
Fund 391 City-Wide Parks Construction & Conveyance Tax Fund					
Pala Youth Center Public Art	\$2,187				
Fund 450 Redevelopment Capital Projects Fund					

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	<u>2004-2005</u>	<u>2005-2006</u>	<u>2006-2007</u>	<u>2007-2008</u>	<u>2008-2009</u>
<b><u>Parks and Community Facilities</u></b>					
<b><u>Capital Program - Citywide Parks</u></b>					
River Oaks/Coyote Creek Trail Public Art	\$8,000				
Fund 391 City-Wide Parks Construction & Conveyance Tax Fund					
<b>Total Parks and Community Facilities Capital Program - Citywide Parks</b>	<b>\$110,187</b>				
<b><u>Parks and Community Facilities</u></b>					
<b><u>Capital Program - Park Trust Fund</u></b>					
Public Art - Park Trust Fund	\$238,000				
Fund 375 Park Trust Fund					
<b>Total Parks and Community Facilities Capital Program - Park Trust Fund</b>	<b>\$238,000</b>				
<b><u>Parks and Community Facilities</u></b>					
<b><u>Capital Program - Lake Cunningham</u></b>					
Lake Cunningham Public Art	\$62,000				
Fund 462 Lake Cunningham Fund					
<b>Total Parks and Community Facilities Capital Program - Lake Cunningham</b>	<b>\$62,000</b>				
<b><u>Parks and Community Facilities</u></b>					
<b><u>Capital Program - Bond Projects</u></b>					
Public Art-Park and Recreation Bond Projects	\$2,964,000	\$584,000		\$153,000	
Fund 471 Parks And Recreation Bond Projects Fund					
<b>Total Parks and Community Facilities Capital Program - Bond Projects</b>	<b>\$2,964,000</b>	<b>\$584,000</b>		<b>\$153,000</b>	
<b>Total Public Art Projects</b>	<b>\$9,795,679</b>	<b>\$2,130,000</b>	<b>\$1,495,000</b>	<b>\$1,612,000</b>	<b>\$112,000</b>