



Memorandum

TO: HONORABLE MAYOR AND CITY COUNCIL
FROM: DEBRA FIGONE
HARRY S. MAVROGENES
SUBJECT: PUBLIC ART ORDINANCE REVISIONS
DATE: June 12, 2008

COUNCIL DISTRICT: City-Wide

RECOMMENDATION

- (a) City Council approval of an Ordinance amending Title 22 of the San Jose Municipal Code modifying the basis for calculating the percent for public art in City and Agency Capital Improvement Projects and other changes to implement portions of the Public Art Master Plan approved by City Council on March 13, 2007.
- (b) City Council approval of an Ordinance amending Section 4.04.020 of Title 4 of the San Jose Municipal Code to increase administrative contract authority for public art contracts, grant agreements and sponsorship agreements to \$250,000.
- (c) Adopt of resolutions by the City Council and Redevelopment Agency Board rescinding City Council Resolution No. 64284 and Redevelopment Agency Board Resolution No. 3606, with the rescission to be effective upon the effective date of the foregoing ordinance.
- (d) Direct the City Manager and Executive Director to return to Council in August for policy discussion and consideration regarding the Public Art Master Plan's recommended one percent public art allocation on City capital projects funded with development fees and to engage in discussions with the development community before returning to Council.

OUTCOME

Adoption of the Ordinance amending Title 22 (the "Public Art Ordinance") enables the Office of Cultural Affairs to implement the City's Public Art program as recommended in San Jose NEXT!, the Public Art Master Plan approved by City Council on March 13, 2007. Implementation of the Plan will better align public art with the next generation of design and development in San Jose, simplify administration of public art Citywide, improve stakeholder involvement, create opportunities for higher-impact art in high-traffic locations, and resolve issues identified in the 2006 Auditor's report.

Adoption of the Ordinance amending Title 4.04 (the "Contract Authority Ordinance") will increase the City Manager's contract authority to \$250,000 for agreements relating to public art, the grant of funds to or from the City, and sponsorship agreements. It will streamline process and improve service delivery; reduce administrative and City Council workload and accelerate the payment process resulting from said agreements.

EXECUTIVE SUMMARY

In 2006, the Office of Cultural Affairs (OCA), in close collaboration with an Advisory Committee, City and Redevelopment Agency staff, embarked on a Public Art Master Plan process. The Plan, San Jose NEXT!, was approved by City Council on March 13, 2007. It established a bold vision of public art that embraces San José/Silicon Valley's innovative attitude and becomes a proactive contributor to the design of public places. It identified geographic priorities for focusing resources in high-traffic, high-visibility locations -- from a reinvigorated Downtown to a new urban corridor in North San José; from community gathering places to the planning of new communities -- and it recommended the planning, funding and decision-making processes that would be necessary to achieve the vision.

Over the last sixteen months, OCA has implemented many of the procedural recommendations outlined in the plan and has worked with City Departments and the Redevelopment Agency to refine the plan's funding recommendations: to clarify funding eligibility, expand the funding base, and provide incentives to private developers to contribute to a public art pool. These funding recommendations are contained in the revised Public Art Ordinance.

BACKGROUND

In May 2005, the City Auditor completed a review of the Public Art Program and recommended that the City Manager's Office and the Office of Cultural Affairs address issues related to funding eligibility, tracking of public art funds, and community involvement in the Public Art Program. Some of the issues raised in the Audit were the same issues that were to have been addressed in the ordinance based on the 2001 Master Plan. Others were procedural issues that were contemplated to be addressed by revising Council Resolution No. 64284 and Redevelopment Agency Board Resolution No. 3606, related to the operation of the percent for Public Art program and which contain more detailed provisions than the Municipal Code.

In January 2006, OCA hired the firm of Brown & Keener Bressi and their associates, Via Partnership LLP (public art planners), to develop a new Public Art Master Plan for the city. To advise the planners, OCA established a Steering Committee that included representatives from the business and development community, each Council District, the arts and culture interests, San Jose Redevelopment Agency and City Departments. This Steering Committee, together with focus groups, individual interviews and research and observation, provided background for the development of the Master Plan. The Arts Commission provided oversight for development of the Plan.

The Public Art Master Plan, entitled San Jose NEXT!, included the following vision for Public Art in San Jose:

- Prioritize innovative public art in three regional destination areas: Downtown, North San José, Airport;
- Incorporate public art in high-traffic transportation corridors and pedestrian areas;
- Continue to create projects in community-gathering places;
- Integrate public art in long-term planning initiatives;
- Establish ongoing, collaborative planning relationships with other City departments and the Redevelopment Agency to insure that the Public Art Program aligns with their plans;
- Encourage private financial participation in public art, beginning with Downtown and North San José;
- Clarify the ground rules for funding public art projects and apply them equally across the board, building in more flexibility for how funds can be allocated and exploring the expansion of public art to private development in major growth areas;
- Establish a project oversight process that involves a broader range of stakeholders and clarifies each stakeholder's role in the decision-making process; and
- Create new operating funds to support a higher level of public art maintenance, public outreach and education.

The plan also pointed out significant challenges to achieving this vision. Chief among these was the level of Public Art funding: issues related to how funding is structured, which funds are eligible and how funds can be expended. The proposed ordinance change addresses the Public Art funding structure but does not fully implement the Master Plan recommendations (see "Ordinance Variation" section below).

On March 13, 2007, the City Council considered and approved Public Art NEXT! San Jose's new Public Art Master Plan. The Plan recommended changing the calculation method for funding public art associated with Capital Improvement Projects of the City and the Redevelopment Agency and for public/private projects of the Redevelopment Agency. It recommended that the public art assessment apply to all CIP projects, regardless of funding source, unless legally prohibited. The City Council directed the City Attorney's Office to draft an ordinance to implement the Public Art Master Plan and to work with the Office of Cultural Affairs to prepare updated resolutions to set forth applicable procedures in more detail for City and Agency projects.

Contract Authority

Municipal Code Section 22.08.030 provides the City Manager's authority to enter into public art contracts, and Section 4.04.020 provides the City Manager's authority to enter into contracts, including agreements related to grants and sponsorship agreements. On May 15, 2001, as part of a contract streamlining effort to improve service delivery to customers, City Council increased

the City Manager's contract authority for public art contracts from \$20,000 to \$100,000 and for grant agreements from \$75,000 to \$100,000. The City Manager's current contract authority for Sponsorship agreements is also \$100,000. Recent procurement-related changes increased the City Manager's contract authority for purchases and professional services to \$250,000, but did not increase the contract authority level for grant agreements, sponsorship agreements or public art agreements.

ANALYSIS

Public Art Ordinance Changes

The proposed Public Art Ordinance implements most of the Public Art Master Plan's recommendations. The proposed Ordinance clearly establishes and simplifies public art calculations for City and Redevelopment Agency Capital budgets. It clearly defines project eligibility for public art funds and enables public art funds to be pooled whenever legally possible. The ability to pool public art funds will encourage the creation of art that has greater public impact. The proposed Ordinance codifies additional information regarding calculation of the public art amounts that was previously set forth in the separate resolutions.

The intent of the proposed Ordinance is to clearly describe the method of calculating the public art contribution. Remaining procedural details regarding day-to-day administration of the public art program are proposed to be established by the Office of Economic Development through administrative guidelines that are being developed collaboratively with the Redevelopment Agency and City Department staffs and which will be reviewed by the Arts Commission.

Calculation Methods – City Projects

The Plan made several key financial and procedural recommendations that affect the operation of the Public Art Program. Currently, funding for public art is calculated at two percent for art on a per-project cost basis for eligible City Capital Improvement Projects over \$500,000. Eligibility for project types was unclear, excluding many projects from the calculation. Determining eligibility was also administratively cumbersome. To simplify the calculation, the Plan recommended amending the Municipal Code, lowering the percent for art and broadening the eligibility. It recommended that an annual appropriation be established equal to one percent for art of all City CIP construction program funds for each fiscal year and that land acquired for the Capital Improvement Projects be included in the calculation. This change means that it is no longer necessary for each City department to analyze every Capital Improvement Project and make individual determinations regarding whether the ordinance applies.

The Plan recommended that as CIP programs are created, whether they are bond-based, rate-based or funded through another mechanism, once it is determined that the project funds are eligible for the public art requirement, one percent will be set-aside from the overall capital program budget for

the fiscal year and placed in discrete public art appropriations. The one percent for public art would be assessed in the CIP budget for the upcoming fiscal year. The source of funds will be tracked to ensure compliance with funding restrictions.

A current example of this kind of pooled funding is the Measure P bond program. Measure P public art funds that were set aside from many small public art projects through Measure P have been pooled to create a small number of significant public art projects. The current ordinance change will make this approach standard because public art funding will be identified within major Capital Improvement Programs, rather than by individual projects.

San Jose NEXT! recommends pooling public art appropriations to create public art projects with greater impact in high traffic locations. Where pooling is not legally possible, as with the Treatment Plant CIP program and programs that are funded with Proposition 218 restricted fees (e.g. sanitary sewer and storm sewer programs), public art appropriations will be restricted to allowable expenditures on art associated with those programs.

Calculation Methods for Redevelopment Agency-Related Funding

The Plan recommended that Redevelopment Agency projects retain the current public art funding calculation of two percent for art on all eligible public Capital Improvement Projects contained in the Agency's Budget, exclusive of land acquisition. These funds can be pooled with City and other funds to support public art projects in Redevelopment Project areas. On Redevelopment Agency-assisted private projects (projects where the Agency provides financial assistance or land to a developer), the Ordinance offers an incentive for developers to place funds into the public art pooled fund. The proposed Ordinance specifies that the Agency use reasonable efforts to obtain a commitment from developers in Development and Disposition Agreements (DDAs) and Owner Participation Agreements (OPAs) to invest up to one percent of project costs for on-site public art or 0.6% of project costs if the funds are placed in the public art pool. A key recommendation in the Public Art Master Plan was that Public Art Focus Plans be developed for Downtown, North San Jose and other areas of planned development. These focus plans will act as a guide for the investment of pooled funds.

Funding Exclusions

The cost of capital projects of the City and Agency are generally assumed to be included in the calculation of the public art appropriations. However, the Ordinance provides exceptions for the cost of City projects that are designated as "maintenance" or designated as "non-construction" projects in the Capital Improvement Budget. These include retrofits (such as seismic or those required to meet legal requirements such as the Americans with Disabilities Act); site remediation; acquisition or installation of fixtures, furnishings and equipment; and affordable housing projects. The Ordinance also provides an exception for Redevelopment Agency public and Assisted Private Projects that are primarily rehabilitation or maintenance of existing facilities; facade

improvements, signs, retrofits (such as seismic or those required to meet legal requirements such as the Americans with Disabilities Act); site remediation; acquisition or installation of furniture, fixtures and equipment; or similar projects that do not expand the capacity of an existing facility.

Also exempted from the public art requirements at this time are public infrastructure improvements paid for by developer fees or constructed by developers as mitigation measures for private projects. Project funding sources that are not permitted to be used for public art will not be included in calculating the public art allocation for capital projects.

Ordinance Variation from the 2007 Approved Master Plan

The Public Art Ordinance varies from the 2007 Public Art Master Plan recommendations in three significant regards:

1. **Turnkey Parkland Projects:** The Plan recommended that all turnkey projects be treated like City projects and be required to include one percent for art in design of parks. Parks, Recreation and Neighborhood Services (PRNS) does not recommend this because revisions to the PIO/PDO ordinance were completed in 2006 following a long period of discussion and negotiation. Council may choose to revisit this issue in the future. In the meantime, both PRNS and developers' representatives are willing to endorse a plan that *encourages* developers to include art in the design of turnkey parkland projects. OCA is currently designing a program that will facilitate the inclusion of simple public art elements into turnkey parkland projects.
2. **Redevelopment Agency-Assisted Private Development:** The Plan recommended that Redevelopment Agency-assisted private developments be *required* to include one percent of the project cost for art or to contribute 0.6% to a public art pool. Because the Redevelopment Agency has had ongoing success in negotiating with developers to expend one percent of construction costs for art on site or contributions to the public art pool, Agency staff did not recommend making this requirement mandatory, but will continue to use reasonable efforts to negotiate public art in all applicable Agency DDAs and OPAs. The Arts Commission will monitor these efforts.
3. **Other Development Fee-Based City Capital Projects:** The intent of the Public Art Master Plan advanced by the Arts Commission was to require all City public infrastructure built in the City of San Jose, whatever its funding source, to include a funding allocation for public art. However, there are legal issues and economic development impacts that arise when considering the inclusion of a public art allocation in city capital projects funded by Developer Mitigation Fees. Therefore, these projects are currently exempt from the public art requirement; further study and policy discussion would be required to implement this Master Plan recommendation.

Upon the effective date of this Ordinance, the following resolutions shall no longer apply toward the calculation of public art funds for projects: City Council Resolution No. 64284 and Redevelopment Agency Board Resolution No. 3606. Nothing herein is intended to alter public art appropriations already in effect pursuant to provisions of the Municipal Code modified by this Ordinance or pursuant to the resolutions. Assuming that City Council approves the ordinance, public art budgets will be determined pursuant to the provisions of the ordinance, and will be calculated and formatted as described in the City FY 2008-09 budget documents. If this ordinance is approved by the Council, the Agency's proposed Amended FY 2008-09 Capital Budget, which will be considered by the Agency Board in September, will include a public art appropriation based on the proposed ordinance.

Additional Recommendations

While the Ordinance does not include procedural guidelines, the Office of Cultural Affairs has already implemented most of the procedural changes to its community involvement program recommended in the Master Plan. Furthermore, the Arts Commission will formally review and approve administrative guidelines for public art at its July 9 meeting. Other recommendations that are currently being implemented include the development of Public Art Focus Plans for Downtown and for North San Jose. Both of these Focus Plans are scheduled to be presented to the City Council and Agency Board for review and approval in August/September of 2008. The Focus Plans will form the basis for expending pooled funds in key, high-visibility locations and for encouraging independent private developers to participate in San Jose's Public Art Program.

In approving the Public Art Master Plan, the Council recommended that staff review the Public Art Ordinance with the Treatment Plant Advisory Committee (TPAC) and with developers. The TPAC review is expected to take place August 14, so the second reading of the ordinance would have to be delayed until August 19. Staff has also reviewed the intent of the Ordinance with the Director of the Homebuilders Association and the Developers Roundtable.

Contract Authority Ordinance

The proposed Contract Authority Ordinance would increase the City Manager's contract authority from the current level of \$100,000 to \$250,000 for public art contracts, grant agreements and sponsorship agreements. The administration requests this increase to improve service delivery to customers; to increase time efficiencies in public art contracting and the processing of sponsorship agreements and agreements related to the granting of funds to or by the City; and to align with the City Manager's current contract authorization for procurement of most service contracts, which was increased from \$100,000 to \$250,000 by City Council on February 27, 2007.

The Contract Authority Ordinance does not affect contract authority for other types of contracts. All authorized contracts will continue to be subject to the following conditions:

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1. The money for the contract must have been appropriated.
2. There must be an unexpended and unencumbered balance of such appropriation sufficient to pay the expense of the contract.
3. The contract must be in writing.
4. The form of the contract must be approved by the City Attorney.
5. Contracts awarded administratively having a value of \$100,000 or more will be reported to City Council on a quarterly basis.

EVALUATION AND FOLLOW-UP

The impact of the revised Municipal Code on the Public Art Program will be reported in the Office of Cultural Affairs' bi-annual reports in April and September and will be reflected in its Five-Year Public Art Work Plan. As the total number of public artworks in the City's collection increases, the information will be reported in the City's annual performance measure data.

PUBLIC OUTREACH/INTEREST

- Criterion 1:** Requires Council action on the use of public funds equal to \$1 million or greater.
- Criterion 2:** Adoption of a new or revised policy that may have implications for public health, safety, quality of life, or financial/economic vitality of the City.
- Criterion 3:** Consideration of proposed changes to service delivery, programs, staffing that may have impacts to community services and have been identified by staff, Council or a Community group that requires special outreach.

This action meets Criterion 2 above. The OCA included public outreach as a key component throughout the development of the Public Art Master Plan. Public meetings, including all meetings of the Arts Commission, Public Art Committee and Strong Neighborhoods Initiative Project Advisory Committee, were posted on the City's website and notices were mailed to a broad group of stakeholders. This item will be posted on the City of San Jose website for the June 3, 2008, City Council Agenda.

COORDINATION

The Public Art Ordinance has been coordinated with PRNS, the City Manager's Budget Office, Department of Transportation, Environmental Services Department, Department of Public Works, the City Attorney and General Counsel's Office.

FISCAL/POLICY ALIGNMENT

The Public Art Master Plan aligns with the following strategic initiatives in San Jose's Economic Development Strategy:

- Build a world-class airport facility and air services;
- Evolve and position Downtown as a unique creative and cultural center of Silicon Valley;
- Revise key land use and transportation policies to reflect the new realities of the San Jose economy;
- Communicate a compelling, consistent community identity for San Jose;
- Engage private sector leadership for San Jose's economic strategy.

The Public Art Master Plan also aligns with the 2005-2009 Redevelopment Agency Five Year Implementation Plan goals and objectives, as follows:

Goal: Establish the Downtown as the 24-hour center of urban life and activity.

Objectives:

- Use public investment in land, infrastructure, and public-use space to attract and stimulate private investment.
- Provide Downtown cultural and entertainment destinations.

Goal: Develop a market for private and commercial development opportunities.

Objectives:

- Use public investment to attract and stimulate private investment.

Goal: Provide new or enhanced cultural, convention, recreational and entertainment facilities.

Objectives:

- Support public art projects in both publicly and privately funded projects.
- Collaborate with diverse cultural organizations to create facilities supporting their art.

Goal: Provide public infrastructure improvements to support private development.

Objectives:

- Implement the Downtown Streetscape Master Plan (including the public art element) as funding is available.

COST SUMMARY/IMPLICATIONS

1. **SOURCE OF FUNDING:** The sources of funding will include Bond Funds and other CIP Funds, San Jose Redevelopment Agency Funds, Private Development Funds and Special District Funds.

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2. **FISCAL IMPACT:** The fiscal impact of the Public Art Master Plan will be the creation of new artworks that will require maintenance and conservation. To ensure the City's investment in public art, funding for annual maintenance of public art will be evaluated and if additional funding is necessary, augmentations will be proposed through the annual budget process in the General Fund or eligible funds from other sources to address these needs. OCA thoroughly investigated the option of funding maintenance through the % for Art and determined that, legally, this was an ineligible expense for most funds. The actual fiscal impacts cannot be determined at this time and will need further review.

BUDGET REFERENCE

Not applicable.

CEQA

Exempt, File No. PP05-184



DEBRA FIGONE
City Manager



HARRY S. MAVROGENES
Executive Director

For questions please contact BARBARA GOLDSTEIN, PUBLIC ART DIRECTOR, at (408) 277-5144 ext 27.