

**ORDINANCE NO. 28358**

**AN ORDINANCE OF THE CITY OF SAN JOSÉ AMENDING  
CHAPTERS 22.04 AND 22.08 OF TITLE 22 OF THE SAN  
JOSÉ MUNICIPAL CODE TO UPDATE AND MODIFY THE  
ART IN PUBLIC PLACES REQUIREMENTS AND THE  
PROVISIONS REGARDING THE OPERATION OF THE  
CONVENTION AND CULTURAL FACILITIES**

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF SAN JOSE:

SECTION 1. Chapter 22.04 of Title 22 of the San José Municipal Code is amended in its entirety, to be numbered, entitled and to read as follows:

**CHAPTER 22.04  
DEFINITIONS**

**22.04.005 Definitions**

Unless otherwise expressly defined herein, words and phrases used in this Title shall have the same meaning as those found in Part 8 of Chapter 2.08 of Title 2 of the Municipal Code.

**22.04.010 Acquisition**

“Acquisition” means the acquisition of Works of Art, as defined by Section 2.08.800, by purchase or commission.

**22.04.015 Capital Improvement Program**

“Capital Improvement Program” means the programs of the City or Redevelopment Agency for the funding and construction of public improvements including, without limitation, streets, parks,

structures, and other public works, as reflected in the City's Capital Improvement Program Budget and the Redevelopment Agency's Capital/Program Budget.

**22.04.020 Capital Improvement Project**

“Capital Improvement Project” means a publicly-funded construction project of a public improvement usually located in the City of San José and which is undertaken by the City, the Redevelopment Agency, or for which funding is provided through a Financing District (provided that the formation documents for the Financing District specify the Capital Improvement Project to be funded also includes funds for Public Art).

**22.04.025 Convention and Cultural Facilities**

“Convention and Cultural Facilities” means the Center for Performing Arts, Civic Auditorium Complex, Montgomery Theater, San Jose McEnery Convention Center, California Theatre, Susan and Phil Hammer Theatre, and related facilities and any other facility designated as Convention and Cultural Facilities by the City Council or the City Manager.

**22.04.030 Department**

“Department” means the Office of Economic Development or such other department designated by the City Manager to administer this Title.

**22.04.035 Director**

“Director” means the Chief Development Officer or such other director designated by the City Manager to administer this Title.

**22.04.040 Financing District**

“Financing District” means an assessment district, community facilities district or other district formed by the City under State law or this Code for the purpose of funding one or more Capital Improvement Projects provided that it may lawfully include funding for Public Art.

**22.04.045 Public Art or Public Artwork**

“Public Art” or “Public Artwork” means Works of Art, as defined in Section 2.08.800, which is acquired pursuant to this Title by the City, the Redevelopment Agency or a developer of a Redevelopment Agency Assisted Private Project.

**22.04.050 Public Place**

“Public Place” means any structure or open space which is visible or accessible from a public right-of-way. By way of example, the term “Public Place” shall include, but not be limited to, sidewalks, streetscapes, plazas, paseos, parks, buildings, bridges, parking garages, and sports and recreational facilities.

**22.04.055 Redevelopment Agency Assisted Private Project**

“Redevelopment Agency Assisted Private Project” means a private development project receiving funding or an interest in real property from the Redevelopment Agency through a Development and Disposition Agreement or an Owner Participation Agreement, except for Redevelopment Agency projects exempted pursuant to Section 22.08.030.

**22.04.060 Turnkey Parkland Project**

“Turnkey Parkland Project” means a park project constructed by developers as a part of their parkland requirements under Chapter 14.25 or 19.38 of this Code, which are then transferred to the City after construction.

SECTION 2. Chapter 22.08 of Title 22 of the San José Municipal Code is amended in its entirety, to be numbered, entitled and to read as follows:

**CHAPTER 22.08  
PUBLIC ART PROGRAM**

**22.08.010 Purpose**

The purpose of the San José City Public Art Program is:

- A. To enhance the appearance of Public Places constructed as City or Redevelopment Agency projects by incorporating Public Art in and about such places;
- B. To encourage the use of art and to engage artists to help beautify the appearance of the City;
- C. To provide staff to assist the City on matters pertaining to public art and to advise both the City and the Redevelopment Agency on placement of Public Art in Public Places;
- D. To implement the provisions of the Public Art Master Plan adopted by City Council on March 13, 2007, as it may be amended from time to time, to the extent that the Master Plan is consistent with the provisions of this Municipal Code.

**22.08.020 Funds For Public Art**

- A. The City's adopted annual capital improvement budget shall include funds for the acquisition of Public Artwork, in amounts not less than one percent (1%) of the total amount budgeted for the City's Capital Improvement Projects in that fiscal year, subject to the exclusions set forth in Section 22.08.030. The calculation of funds for Public Artwork shall be based upon the budgets for Capital Improvement Projects which are funded in whole or in part by the City or a Financing District and shall include the City's land acquisition costs, if the property was acquired for the identified Capital Improvement Projects.
- B. The Redevelopment Agency's annual adopted capital improvement budget shall include funds for the acquisition of Artwork for Public Places, in amounts not less than two percent (2%) of the total amount budgeted for each Redevelopment Agency Capital Improvement Project (as calculated in Section 22.08.040 D and subject to the exclusions set forth in Section 22.08.030 and not including land acquisition costs).
- C. The funds for Public Artwork shall be set aside and identified as sources of funds to be appropriated and expended for acquisition of Public Art in accordance with the provisions of this Title. Appropriations for purposes of acquiring Public Art in order to carry out the provisions of this Title shall be made in accordance with law and the budgeting procedures of the City and the Redevelopment Agency. To the extent that a Capital Improvement Project includes funding from both the City and the Redevelopment Agency, the percentage allocated to public art arising from the project shall be determined and appropriated by the lead agency for the project by applying the percentage for public art applicable to the lead agency (i.e., City one percent (1%) including land acquisition costs, Redevelopment Agency two percent (2%) not including land acquisition costs).

- D. The Redevelopment Agency shall use reasonable efforts to obtain agreements from private developers in Redevelopment Agency Assisted Private Projects to expend funding for the acquisition of public art in amounts and subject to the provisions of Section 22.08.040 below. The Redevelopment Agency shall include funds for Public Artwork as a requested project element in all Requests for Proposal issued by the Redevelopment Agency.
- E. Appropriations for Public Art may be expended to acquire Public Art if it is allowed under the terms of a contract, federal or state grant, law, rule, or regulation and may include the pooling of public art funds to the extent permissible, to provide artwork of larger scale or significance in a different location than the project. Appropriations for Public Art shall only be expended for acquisition of Public Art in a manner consistent with the specific restrictions established for each funding source.
- F. Artwork acquired through this Title should be installed in Public Places owned or leased by the City or another public agency, except that Artwork acquired through a Redevelopment Agency Assisted Private Project may also be installed in Public Places on the site of the private project generating the art funds.
- G. Appropriations and expenditures for Public Art may include, but are not limited to, the costs and expenses incurred in the process of selecting, installing, documenting, administering, and maintaining Public Art in Public Places, subject to applicable laws, rules and regulations. The Department shall track the funding sources for all public art funds including pooled funds, and shall oversee public art expenditures in a manner consistent with the funding restrictions.
- H. The City Manager or the City Council, as appropriate, shall approve the final Public Art to be acquired under the City's capital improvement budget and the Redevelopment

Agency's capital budget, taking into consideration the recommendations of the Arts Commission.

- I. Nothing herein shall require the City or Redevelopment Agency to expend funds in a manner that is inconsistent with any applicable law, rule or regulation.
- J. The Department shall work with other City departments to develop budgets for maintenance and conservation of Public Artworks in the City's facilities. Funds that may be legally used to maintain Public Art shall be identified in the annual operating funds of each City Department that includes Public Art in its facilities and in the General Fund budget for the Department.
- K. Appropriations for the acquisition of Public Art shall not be expended for any of the following:
  1. Art objects which are mass-produced and of standard design. However, limited editions, signed by the artist; original prints; cast sculpture or photographs may be purchased.
  2. Decorative or ornamental elements (unless for the security of the Public Art or to ensure public safety), which are designed by the building architect or consultants engaged by the architect.
  3. Expenses related to the ongoing operation of the Public Art, such as electrical, water, or mechanical service required to operate the Public Art.

**22.08.030 Exclusions or Additions to Public Art Program Requirements**

- A. If the terms of a contract, federal or state grant, law, rule or regulation prohibit or restrict the collection or use of funds in connection with a City Capital Improvement Project for expenditures upon Public Art, or if the eligible uses of the funding are limited and specified and do not include public art, then the amount equal to one percent (1%) of the funding from such source shall be subtracted from the one percent (1%) total Capital Improvement Budget for Public Artwork, so as to exclude from the total Public Art portion of the Capital Improvement Budget any funds that are so prohibited or restricted. For example and without limitation, the public art calculation of one percent (1%) shall not apply and shall be subtracted from the public art allocation of one percent (1%) of the Capital Improvement Budget, to remove any Capital Improvement Project, or the proportionate share of any Capital Improvement Project, that is funded through a fee or exaction on private development subject to the Mitigation Fee Act (Government Code Section 66000 et seq.) from the public art funding requirements set forth in this Title.

If the City Manager's Office or Executive Director of the Redevelopment Agency cannot resolve disagreement between departments regarding whether a funding source may be spent upon public art, the City Manager's Office shall forward the question to the City Attorney's Office for final resolution of the legal use of such funds before any reduction is made in the calculation of the Public Art funding.

- B. If the terms of a contract, federal or state grant, law, rule, or regulation or other limitation on the source of funds prohibit or restrict the collection or use of funds in connection with a Capital Improvement Project for expenditures upon Public Art, or if the eligible uses of the funding are limited and specified and do not include public art, then the not-less-than-two-percent (2%) to be expended by the Redevelopment Agency for Public Artwork consistent with this Title shall be calculated so as to exclude from the total cost of said project any funds that are so prohibited or restricted. For example and without limitation, the public art calculation of 2% shall not apply to Capital Improvement Project of the Redevelopment Agency, or the proportionate share of any Capital Improvement Project of the Redevelopment Agency, that is funded through a fee or exaction on private

development subject to the Mitigation Fee Act (Government Code section 66000 et seq.) from the public art funding requirements set forth in this Title.

If the City Manager's Office or Executive Director of the Redevelopment Agency cannot resolve disagreement between departments regarding whether a funding source may be spent upon public art, the City Manager's Office shall forward the question to the City Attorney's Office for final resolution of the legal use of such funds before any reduction is made in the calculation of the Public Art funding.

C. The following are also excluded from the City's and from the Redevelopment Agency's Public Art funding requirements and shall not be included in the budgets used to calculate the applicable Public Art funding requirements:

1. Costs of non-construction related activities such as studies, reports, leases, and easements; including, without limitation, activities in the City's Capital Improvement Budget which are designated as "non-construction."
2. The cost of environmental review, whether or not the environmental review is related to a construction project.
3. Capital Improvement Projects that are designated as "maintenance" in the City's Capital Improvement Budget or designated as "non-construction" projects in the Capital Improvement Budget, 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; and affordable housing projects.
4. Redevelopment Agency Assisted Private Projects and Public Capital Improvement Projects that are primarily rehabilitation or maintenance of existing

facilities; 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, including but not limited to Façade Improvements; and affordable housing projects.

- D. Public Art funds derived from Redevelopment Agency Capital Improvement Projects may not be used for maintenance or for projects located outside of Redevelopment Project Areas.
- E. Nothing is intended to prohibit the City Manager and the Redevelopment Agency Executive Director, in conjunction with the submission of the annual capital budgets of the City and Redevelopment Agency, respectively, and subject to the approval of the City Council and the Redevelopment Agency Board of Directors, from designating additional funds, subject to applicable restrictions, to be utilized to place Public Art in Public Places.
- F. In conjunction with submission of the City's and Redevelopment Agency's proposed annual capital improvement budget to the City Council, and to the Redevelopment Agency Board, respectively, the City Manager and the Redevelopment Agency Executive Director shall notify the Arts Commission of: (i) those capital improvement programs and projects that include Public Art allocations in said budgets; and (ii) any proposed discretionary funds added to the Art in Public Places program.
- G. The City Manager and the Redevelopment Agency Executive Director may adopt rules and guidelines consistent with this Chapter, further defining the process and method of calculation of the amount of funds to be set aside for acquisition of Public Art as provided in this Chapter.

**22.08.040 Additional Guidelines on Calculation of Public Art Funds**

A. Turnkey Parkland Projects.

Developers of Turnkey Parkland Projects shall be encouraged by the City to include Public Art with a value of one percent (1%) of the total project cost for the Turnkey Parkland project.

B. City Parks Capital Improvement Projects.

For Capital Improvement Projects funded from the Park Trust Fund, the City Manager shall have the option of allocating the one percent (1%) Public Art requirement from the Construction & Conveyance Tax Funds instead of deducting the one percent (1%) Public Art funding from the Park Trust Fund.

C. Financing Districts.

Subject to any applicable legal restrictions on such financing, the City and the Redevelopment Agency shall use reasonable efforts to provide that the formation documents for future Financing Districts include a requirement that one percent (1%) of the cost of the Capital Improvement Projects financed by the Financing District shall be expended for the acquisition and installation of Public Art.

D. Redevelopment Agency Capital Improvement Projects.

The Public Art funding for a Capital Improvement Project of the Redevelopment Agency shall be determined and fixed at the time of adoption of the Redevelopment Agency budget for the upcoming fiscal year. The total cost reflected in the Redevelopment Agency annual budget for the Project shall include two percent (2%) for Public Art. The two percent (2%) Public Art funding for each Redevelopment Agency capital improvement project shall be calculated as follows:  $(0.02) \times$  (the estimated cost of engineering, design and construction of the project, but excluding the costs related to land acquisition, demolition of buildings, soil remediation and off-site improvements).

E. Redevelopment Agency Assisted Private Project.

The Redevelopment Agency shall use reasonable efforts to provide for Public Art during negotiations with developers for Disposition and Development Agreements (DDAs). The Redevelopment Agency shall offer the Developers the option of (i) expending one percent (1%) of the total estimated project costs on artwork to be located onsite (minus the amount paid to the City for administrative costs); or (ii) placing six-tenths of one percent (0.6%) of the estimated total project costs in a Public Art Trust Fund to create Public Artwork located anywhere in the City in a manner consistent with an adopted public art focus plan or, if not within a focus plan area, within a Redevelopment Project Area.

**22.08.050 Reasonable Efforts to Include Funds for Public Art**

- A. City staff shall use reasonable efforts to obtain appropriate approvals from any funding source for any Capital Improvement Project, to allow use of one percent (1%) of such funds for the acquisition of Public Art as provided in this Title. Such efforts shall include, without limitation, identifying public art in grant applications for Capital Improvement Projects, efforts to include expenditures for public art in developer funded infrastructure projects, and efforts to include public art in developer- constructed infrastructure and public facilities.
- B. If the City enters into an agreement with another public entity, whereby City funds are transferred to such other public entity for the Capital Improvement Project that would otherwise be deemed subject to the Public Art requirements under this Title, City staff shall use reasonable efforts to include in such agreement, whenever it is lawful to do so, a requirement that the recipient entity or its successor in interest shall take appropriate measures to insure that not less than one percent (1%) of the City funds so transferred are expended for acquisition of Public Art.

- C. If the Redevelopment Agency enters into an agreement with another public entity, whereby Agency funds are transferred to such other public entity for the Capital Improvement Project that would otherwise be deemed subject to the Public Art requirements under this Title, Agency staff shall use reasonable efforts to include in such agreement, whenever it is lawful to do so, a requirement that the recipient entity or its successor in interest shall take appropriate measures to insure that not less than two percent (2%) of the Agency funds so transferred are expended for acquisition of Public Art.

SECTION 3. 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.

PASSED FOR PUBLICATION of title this 24th day of June 2008, by the following vote:

AYES: CAMPOS, CHIRCO, CHU, CORTESE, LICCARDO,  
NGUYEN, OLIVERIO, PYLE, WILLIAMS; REED.

NOES: NONE.

ABSENT: CONSTANT.

DISQUALIFIED: NONE.

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CHUCK REED  
Mayor

ATTEST:

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LEE PRICE, MMC  
City Clerk