Meeting the Challenges of Public Art Programs in Private Development

Christopher Chou and Karen Frank

Christopher Chou provides counsel on a variety of regulatory issues with a focus on land use, environmental, and municipal law. He has experience helping clients with innovative and challenging projects on issues related to land development and infrastructure, including entitlements, permitting, and environmental review.

Karen Frank is a partner at Coblentz Patch Duffy & Bass LLP, where her practice covers numerous aspects of intellectual property law, including copyright, trademark, right of publicity, internet, publishing and advertising law. She is past president of the Copyright Society of the USA, former chair of the Copyright Society of Northern California, a member of the International Trademark Association (INTA), and a member of the American Law Institute. She has been selected by her peers for inclusion over many years in Who's Who Legal: California, Trademarks chapter; Who's Who in American Law; and Who's Who in America; has been recognized as a Northern California Super Lawyer and Top Woman Lawyer; and was named Northern California Copyright Lawyer of the Year in 2017. She is a frequent speaker on intellectual property issues, including for the Practicing Law Institute and other forums.

INTRODUCTION

There is a growing effort among cities to leverage the private development permitting process to fund and provide art that is accessible to the public.[1] California, perhaps unsurprisingly, has proven to be fertile ground for these programs and many California cities adopted public art programs starting in the 1970s.

These programs, still in effect today, largely follow a similar template. As a condition of development, many cities require developers to either pay into a public art fund or to provide publicly accessible art as part of the development. The value of such a payment or installation is typically based on a percentage of total development costs. Where art is provided as part of the development, cities generally exercise some control in reviewing the proposed art/artist. Public art under these programs must remain in place for a specified period of time, if not indefinitely.

In this article, we assume that the goal of these public art programs differ materially from other development requirements such as traffic mitigation or aesthetic regulations to encourage visual harmony with the development's surroundings. Programs that encourage public art to be provided through private development requirements recognize private developments as an important locations for public interface and that art and cultural experiences at these sites can have immense benefits to the development and public alike. Public art provided by private development is, thus, ideally a collaborative process that encourages creative and even stimulating installations.

But the integration of public art into private developments can create challenges—between the developer and the city, the developer and the artist, and the developer and the general public.[2] In this article, we discuss some of the potential challenges created by programs requiring public art to be integrated into private development, including where

programs might inadvertently limit the creative possibilities of private development.[3]

I. BACKGROUND

In this section we provide an overview of the public art programs of California cities and discuss recent litigation involving public art requirements.

A. Public Art Requirements in California Cities

Unlike some states, California does not have a state law that specifically governs public art requirements.[4] Cities' authority to impose public art requirements on private development rests not on a specific statutory grant, but is instead grounded in their traditional police powers.[5]

One of the earliest public art programs in California was adopted by the City of Brea in 1975. Many additional California cities subsequently initiated programs, including San Francisco (1986), Emeryville (1990), West Hollywood (2004), Pasadena (2006), Berkeley (2017), and Oakland (2017). These are some of the typical features/components of these programs:

1. Types of Development Subject to Requirements

In most cities, the public art requirement is imposed based on the development's size[6] or value.[7] Cities also may base the requirement on the project's use, i.e., single-family residences are often exempted from the requirement.[8] And many jurisdictions exempt projects with an affordable housing component.[9] Some cities vary requirements based on the location/zoning of the project, including San Francisco, which originally only required public art in the downtown zoning district, and Pasadena, which imposes different criteria for downtown areas compared with other areas of the city.[10]

2. On-Site Provision and In-Lieu Fee Option

Almost universally, cities offer at least two options for fulfilling the public art requirement: on-site provision of art, or an in-lieu fee contribution to a public art fund.[11] Some cities, such as Berkeley, allow a developer to use a combination of on-site provision and in-lieu fees to fulfill the requirement. Other cities, such as San Luis Obispo, provide additional options, including dedicating art to the city.[12]

3. Value of the Obligation

Nearly all of the city public art requirements are based on a percentage of construction costs or building permit valuation. A typical requirement is 1% of building permit valuation,[13] although rates vary: the City of Indio imposes a 0.25% requirement based on assessed building value above $100,000 for single family residences; Berkeley's requirement is 1.75% of construction costs for on-site projects.[14] Some projects may vary the requirement based on the underlying use.[15] Some programs may also impose different value requirements depending on whether the requirement is fulfilled with on-site provision or an in-lieu fee. Berkeley, for example, requires that the value of on-site art is 1.75% of construction costs, but the in-lieu fee is only 0.8% of construction costs.

4. Defining "Art"

Cities vary in their criteria for what constitutes "art." Generally, cities have some requirement of originality.[16] West Hollywood, for example, requires that the public art be "made specifically for the project."[17] The guidelines for San Francisco's 2 Percent for Art program draws a distinction between art and architecture; decorative elements designed by the project architect or consultants do not constitute "art."[18] Most cities have some approval process for selecting the artist for a work of public art (discussed below in Subsection 7, *Approving the Art*).

Many cities allow a broad range of mediums to satisfy the public art requirement. Berkeley, for example, includes the following in its definition of "art": functional art integrated into the building, landscape, or element of infrastructure, including sculpture, monument, mural, painting, drawing, photography, fountain, banner, mosaic, textile, art glass, digital media art, video, earthworks, and multi-media installation.[19]

5. Defining "Public"

Privately provided art must be "public" in the sense that it is "accessible" to and enjoyable by the public.[20] Generally, this presumes that the art is accessible during business hours[21] or for some specified number of hours per day,[22] though some cities may expect that the public art be viewable at all times.[23] Some cities allow public art to be provided on public property.[24] The options to meet public access requirements in San Francisco vary based on use and location.[25]

6. The Artist

In some cities, the artist must be approved by a local art commission.[26] Other cities merely include considerations for artist selection as part of their review of the project application as a whole. Nearly all cities set expectations of

who qualifies as "an artist," including the expectation that artists will be established and recognized by critics and the art community.[27] Many cities also encourage the selection of local artists.[28]

7. Approving the Art

The approval of the public art is generally tied into the approval of the development itself—localities generally require approval of the art project/plan before the issuance of building permits, if not before issuance of land use entitlements.[29] Consequently, the public art project must be developed concurrently with the design and development of the overall project.[30] Some cities stress that the public art is an "integral part" of the development and even encourage including the artist as a member of the project design team.[31] Local processes for approval of public art projects vary, but generally involve multiple stages of review.[32] The City of Indio's program guidelines lay out a twelve-step review process.[33]

8. Duration of the Art

Generally, public art is expected to be permanent.[34] Some cities specify a minimum duration for a public art project;[35] other cities expect the public art to last the lifetime of the development project.[36] While the art is generally considered to be the property of the developer, developers are prohibited from selling the art separately from the project, and the art must be passed onto subsequent owners.[37] Property owners are generally responsible for maintenance of the public art.[38] Cities often require the recordation of instruments against the property memorializing the permanence of the art and the associated maintenance obligations.[39]

B. Litigation Challenging Public Art Requirements

Two major California cases have addressed public art requirements.

1. Ehrlich v. City of Culver City

One of the most important California cases concerning development fees also happens to have involved a public art requirement. In 1996, in *Ehrlich v. City of Culver City*,[40] the California Supreme Court considered a challenge to development requirements imposed by Culver City, including a fee to fund recreation and an in-lieu fee under the city's art in public places program. The court found the city's public art requirement to be a valid exercise of the city's police power and that it did not raise an issue under the Takings Clause of the Fifth Amendment. The court distinguished the public art requirement from the recreation fee, which it held was an "exaction," a fee intended to mitigate the impacts of the development on recreation opportunities in the location. The court found that the art in public places requirement was not an exaction, but, rather:

> more akin to traditional land-use regulations imposing minimal building setbacks, parking and lighting conditions, landscaping requirements, and other design conditions such as color schemes, building materials and architectural amenities. Such aesthetic conditions have long been held to be valid exercises of the city's traditional police power, and do not amount to a taking merely because they might incidentally restrict a use, diminish the value, or impose a cost in connection with the property.… The requirement of providing art in an area of the project reasonably accessible to the public is, like other design and landscaping requirements, a kind of aesthetic control well within the authority of the city to impose.[41]

2. BIA v. City of Oakland

A challenge was brought in federal court against the City of Oakland's public art requirement, imposed on private development for the first time in 2017. Like *Ehrlich*, this case brought a challenge under the Takings Clause of the Fifth Amendment, and specifically claimed that Oakland's art requirement was an unconstitutional exaction under the United States Supreme Court's *Nollan/Dolan* framework. The case also raised First Amendment issues, arguing that Oakland's program unconstitutionally required developers to engage in speech. The district court dismissed both of these claims (discussed below in Section II.C). The case is now being heard on appeal before the Ninth Circuit.[42]

II. CHALLENGES IN REQUIRING PUBLIC ART IN PRIVATE DEVELOPMENT

Programs requiring public art in private development serve a variety of interests including enriching civic life, creating a livable community, and contributing to economic development.[43] However, the requirements for public art provided in private development often create challenges for developers and ultimately may interfere with many of the worthy goals of public art programs. This Section discusses three particular areas of tension: 1) the influence of city policies in the selection and the control over the public art; 2) the difficulties in imposing requirements of public

access into private space; and 3) the way cities frame their relationship with developers.

A. Public Influence Over Privately Provided Art

Absent a city requirement for public art, art provided in private development has a limited set of stakeholders (the developer/owner and the artist) and the stakeholders' rights with respect to the art within the development are relatively straightforward. Bringing the public into the mix complicates this considerably. Where a municipality is involved, a development project's art program generally is subject to the discretion and approval of a locally appointed commission, such as a planning commission, design review board, or arts commission. Moreover, the privately provided art is generally expected to comport with and further the goals and objectives of the city's art program. As shown in the *BIA v. Oakland* case, these issues implicate the First Amendment, but at a more fundamental level, may influence the perspective and purpose of the privately provided art in a way that may run counter to the many of the worthwhile objectives of these programs.

1. City Influence Over the Public Art

In *BIA v. Oakland*, Judge Chhabria recognized that Oakland's ordinance involved some degree of compelled speech,[44] but ultimately rejected the challengers' First Amendment claims, in part, because "[t]he ordinance does not require a developer to express any specific viewpoint, because developers can purchase and display art that they choose."[45] Even though the ordinance implicated free speech concerns, because of this lack of compulsion, heightened scrutiny of the ordinance was not warranted and the city had laid out several rational interests that were furthered by the ordinance.[46]

Regardless of whether heightened scrutiny of the ordinance is warranted, the district court opinion potentially underestimates the degree of influence other cities can have over public art requirements. Several cities require such art to be recognized by plaques with mandatory language.[47]

Further, public art is subject to multiple rounds of review and cities have latitude to make a wide variety of considerations as part of their review including: the "quality and artistic merit" of the proposals, the "responsiveness and relevance" to the site, and the artist's achievement, education, and recognition.[48] This review is subject to political forces as are many local review processes. Many cities therefore require or encourage hiring consultants to aid the selection of art and artist and to facilitate the review process. These are costly processes that can impact the timeline of the overall development. While oversight like this may be typical of other city regulatory requirements, such processes may limit the degree of freedom developers have in their choice of art.

Given the degree of city influence in the art review process and the potential for costs and delays, another concern is that public art requirements may not result in the selection of the most creative or provocative art. Developers may seek out well-established artists who already have many public art projects to their credit instead of taking a risk on a less proven artist. And developers may steer clear of any art that may be viewed as controversial in an attempt to avoid project delays. This may not further city policies to encourage diversity in artists and art forms.[49]

2. Durability and Duration

Under the California Artist Preservation Act[50] and the federal Visual Artist's Rights Act (VARA),[51] a property owner seeking to remove a piece of art may need to provide proper notice to the artist in advance of the removal. However, art provided to satisfy a public requirement may be subject to significantly more local restrictions. While cities agree that the developer owns and is responsible for the physical copy of public art, the public art is effectively inalienable and must "run with the land" to successive owners of the development.[52] As discussed above, the public art may have a minimum duration at that property of ten to twenty years or it may be expected to last the entire life of the development.

The mandatory duration of the art affects the artist, too. In addition to the artist's moral rights to the integrity of his or her art, cities often require artist responsibility and involvement in the ongoing maintenance of the art.[53] Berkeley's program, for example, requires the following:

> The contract between the Developer and the Artist(s) will include a maintenance plan and requires the Artist(s) to make repairs for any inherent vice related to the design and fabrication of the artwork for one year. The Developer shall consult with the Artist(s) regarding repairs to the On-Site Publicly Accessible Art. If the Artist or Artists are deceased or choose not to do the repair, the Developer shall retain a professional art conservator to undertake repairs. If the Development Project on which the On-Site Publicly Accessible Art is located is destroyed beyond recognition of the original artwork, the Artist(s) will be given first refusal to buy the On-Site Publicly Accessible Art pursuant to the requirements of the California

Preservation of Works of Art Act and the VARA. If the Development Project property changes hands and the value of the art is itemized in the sale, the original owner may be subject to the California Art Resale Act.[54]

The expectation of permanence also implicates cities' review of public art. Many guidelines provide a preference for durable materials and art that is low maintenance. Combined with the mandate that art remain and be maintained for an extensive period, such requirements may limit the range of art and artists that are eligible to be considered for public art. Only a few cities have programs that provide for temporary or performative art or dynamic spaces.

B. A Space Between Public and Private

In transforming art in private development to "public art," another stakeholder is of central importance: the public at large. Public art requirements are intended to increase residents' understanding and enjoyment of art, to invite public interaction with public spaces, and to promote art as a cultural resource for the community.[55]

Public art provided in private space necessitates altering private space to accommodate access to the general public. But the demands and duties placed on public/accessible spaces can be considerable, and consequently, those obligations create tensions between norms of public access and private ownership and responsibility for these spaces. These tensions ultimately may result in reducing the public accessibility and enjoyment of the art that is provided under these programs.

1. Defining Access

One of the basic underlying purposes of public art requirements is to create opportunities for public interaction with art and to enhance the public realm. Consequently, it is not sufficient to merely include art within a private development; the art and the development must be designed to allow the art to be publicly enjoyable. As discussed above, public art requirements require public access during "business hours" or for a set number of hours per day.[56]

Cities, however, differ in what constitutes access. For many cities, "viewability" is of central importance. Viewability is often determined by whether the art is appreciable from a public right of way or other publicly accessible space.[57] Hence, for many cities, art inside a building that can be viewed through windows or decorative elements on the building face (such as gates and railings) can satisfy the public access requirement.[58] The issue of access becomes more complicated for certain forms of art that include an interactive or immersive component.

In San Francisco, the public art requirement is integrated with a separate development requirement for the provision of privately owned public open spaces ("POPOS").[59] POPOS are publicly accessible spaces in forms of plazas, terraces, atriums, small parks, and even snippets which are provided and maintained by private developers. Defining public access and other design requirements of POPOS is no simple task, and POPOS are subject to a variety of guidelines and requirements that often vary by the type of public space being provided.[60]

2. Responsibility and Maintenance

Another issue cities face is determining maintenance responsibilities for the publicly accessible space created for art. Cities, nearly universally, consider the art itself and any underlying publicly accessible space to be the property and responsibility of the developer.[61] Cities often record the requirements of providing publicly accessible space against the property as well as covenants mandating continued maintenance.[62] The City of Indio may impose liens against the property for failing to maintain art, even if the art is intentionally vandalized.[63] In addition to maintenance costs associated with public access, liability concerns also arise. Cities often require indemnification and insurance to cover vandalism.[64] And providing access to the public over an extended period may risk increasing the likelihood that a site (even a building's interior) might be considered a historic resource, further limiting the options to alter the development.[65]

Collectively, these considerations may give developers pause in encouraging broad public access. Even in a city like San Francisco, which mandates that certain developments provide open space, developers are reluctant to fully embrace providing access to the general public.[66] Over time, this could limit the types of art that are displayed and the types of public access and the interactiveness of the art provided under these programs.

C. Forging Partnerships Across the Public-Private Divide

Development can be contentious and political, and programs like public art requirements can be viewed as an imposition. This grievance is at the heart of the *BIA v. City of Oakland* case, where challengers argue that the city's public art requirement unfairly requires a private development to bear the cost and responsibilities for what is essentially a

public good. Ordinances that frame public art requirements as mitigation for negative impacts of development can further entrench the idea that public art requirements are impositions.[67]

But as noted in *Ehrlich*, public art requirements are not intended to serve as a tool for mitigating negative impacts; rather, they are features that are intended to improve the quality of life in the community.[68] In this view, public art is an equity investment by the developer.[69] This is evident in the very structure of the programs; the amount of public art to be provided is not based on development size or jobs or dwellings—it is based in the *value* of the development.

Cities, for their part, portray the public review process as an opportunity for collaboration: "The review process is seen as a collaborative one, with the single aim of developing the best possible art for the project and the community at large."[70] Developers, even those who understand the benefits of providing art on-site, might view the review process less as a dialogue and more as a source of delay and uncertainty. Public art may seem less like an opportunity for creativity and contribution, and instead, become just a hurdle to overcome.

To make the most of this collaboration, cities should take advantage of the fact that the art is "private" and not subject to all of the same restrictions and limitations of city-owned art or property. Generally, the private sector is better able to take risks and innovate. Publicly accessible private art and space is therefore potentially an opportunity for greater diversity in the art that is featured and for greater creativity in how the public can access and interact with this art. Imposing the same demands on privately provided public art as the city's own public art program might not be taking full advantage of this partnership between public and private enterprise.

Although some public art programs provide greater flexibility in how the art requirement can be met, public art programs could do more to cultivate creativity in developments. Given concerns over time and the costs and uncertainty of the development and approval process, developers may shy away from ambitious and provocative public art in favor of the formulaic.

Cities may want to consider how they can develop institutions that encourage ambitious public art and public spaces in private developments to engender a richer and more diverse set of public installations. Too prescriptive an approach, for the reasons discussed above, can limit the creative potential of art in private development. However, the converse, where a program is deliberatively permissive and provides little guidance and oversight might also inadvertently result in uncreative installations. Developers might be dissuaded from pursuing art projects in interesting locations (such as the right of way) or to experiment with different types of public interfaces if there is uncertainty about whether and how this can be done. Providing city staff and resources to help facilitate and foster a creative project through the approval process could be a way of fostering constructive collaboration between the developer and the city.

CONCLUSION

As urban populations continue to grow and diversify, and as cities embrace greater density and walkability, the importance of art in the urban landscape is only increasing. As the urban landscape develops further, the line between public and private space will continue to blur (e.g. windows, lobbies, plazas, etc.) and the potential for private property and private development to serve as important sites of civic interaction and recreation will continue to grow.

In light of these shifts, it might be worthwhile to reconsider the function of public art, and specifically to recognize the intended audiences and beneficiaries of public art.[71] One of the most important justifications for public art is its potential to benefit the community—to contribute to civic life and add to the cultural fabric of the community. As the City of Santa Rosa recognizes:

> Public art helps make our city more livable and more visually stimulating. The presence of and access to public art enlivens the public areas of buildings and their grounds and makes them more welcoming. It creates a deeper interaction with the places where we live, work, and visit. The visual and aesthetic quality of development projects has a significant impact on property values, the local economy, and vitality of the City. Public art illuminates the diversity and history of a community, and points to its aspirations for the future.[72]

Public art programs can create "public dialogue and interaction with public art." Ultimately, these programs should be about making art accessible and engaging to the wider public, especially those who might not otherwise have opportunities to enjoy art.

Many of California's public art programs continue to conceive of art as an "asset."[73] As an asset, public art is collected and is valued for its permanence, its durability, and its associated prestige.

Cities may wish to expand their notion of the potential of public art from this conception. Drawing a hard line between what constitutes art and architecture can be limiting; as San Francisco recognizes, "[i]n the past . . . buildings were less separable from art and artistic expression."[74] Pasadena's program is notable for its expansiveness; for example, it more broadly encourages artists, architects, and landscape architects in the design of projects, and allows the provision of cultural facilities (including exhibition and performance spaces) to meet the public art requirement. Santa Rosa, similarly, allows developers to fulfill some of the art requirement by including a space to be used as a rotating gallery.[75]

Public art programs may also benefit from reevaluating their expectations and demands for permanency. As discussed above, these demands may limit the range of art that is considered. Stasis may run counter to the interests of responsiveness and civic engagement. Programs like Pasadena's show several strategies to encourage more dynamic public art including encouraging cultural performances and the provision of cultural spaces.[76]

More fundamentally, public art programs should examine how they are fostering and encouraging creativity; not just in the pieces of art, but in the way the art is accessed, experienced, and enjoyed by the public. Private development should be seen as opportunities for reimagining the public-private interface. Towards this end, programs should avoid being overly prescriptive and encouraging formulaic public access and public art. To do so, cities can also create the space and provide incentives for greater creativity and more ambitious and unconventional spaces.

Endnotes

1 *Developers Fight Efforts to Make Them Pay for Public Art*, N.Y. Times, July 10, 2018.

2 These challenges raise concerns including free/compelled speech and the taking of private property for public use that are currently being litigated in a lawsuit challenging the City of Oakland's public art program.

3 Note that this article is focused on the actual provision of art by the developer, not the option to pay in-lieu fees.

4 State Percent for Art Programs, Nat'l Assembly of State Arts Agencies, https://nasaa-arts.org/nasaa_research/state-percent-art-programs/.

5 Discussed below in Section B.

6 *See, e.g.,* Berkeley Mun. Code § 23C.23.020 (requirement imposed on all construction exceeding 10,000 square feet with exceptions for affordable housing).

7 *See, e.g.,* West Hollywood Mun. Code § 19.38.020 (imposing requirements on developments greater than $200,000 in value); Public Art in Private Development Guidelines for Developers, City of Santa Rosa, https://srcity.org/DocumentCenter/View/22735/Developer-Guidelines-and-Flowchart-for-Public-Art-PDF (imposed on projects greater than $500,000 in value); San Luis Obispo Mun. Code § 17.70.140 (imposed on greater than $100,000).

8 *See, e.g.,* West Hollywood Mun. Code § 19.38.020.

9 *See, e.g.,* Berkeley Mun. Code § 23C.23.020; West Hollywood Mun. Code § 19.38.020.

10 Public Art Program Guidelines for New Private Development, City of Pasadena, https://ww5.cityofpasadena.net/planning/wp-content/uploads/sites/56/2017/07/Guidelines-for-New-Private-Development.pdf.

11 Such funds are generally used by the city to fund city art or cultural projects. *See, e.g.*, Public Art in Private Development Program Guidelines and Procedures, City of Berkeley, https://www.cityofberkeley.info/uploadedFiles/City_Manager/Level_3_-_Civic_Arts/Private%20Percent%20Guidelines.pdf (allowing the art fund to be used to implement the city's Arts and Cultural Plan).

12 Public Art Program Policies and Procedures Manual, City of San Luis Obispo (updated June 2017), http://www.slocity.org/home/showdocument?id=16187.

13 West Hollywood Mun. Code § 19.38.040; S.F. Planning Code § 429.3(b).

14 Berkeley Public Art in Private Development Program Guidelines and Procedures.

15 *See, e.g.,* Art in Public Places Program Guidelines, City of Indio, https://www.indio.org/your_government/development_services/public_arts_n_historic_preservation_commission/arts/default.htm.

16 *See, e.g.,* Berkeley Public Art in Private Development Program Guidelines and Procedures.

17 City of West Hollywood Urban Art Guidelines, https://www.weho.org/home/showdocument?id=9938.

18 City of San Francisco Fine Art Guidelines, http://archives.sfplanning.org/documents/5232-Fine_Arts_Guidelines.pdf.

19 Berkeley Mun. Code § 23C.23.040.

20 Access often implies visual access, but the meaning of access might vary based across cities and type of art.

21 Berkeley Mun. Code § 23C.23.040 (Berkeley: in a location that is accessible to and available for use by the general public during normal hours of business operation consistent with the operation and use of the premises).

22 West Hollywood Urban Art Guidelines (the art must be easily visible to the public for a minimum of ten hours per day); City of Emeryville Art in Public Places Program Policy and Procedure, http://www.ci.emeryville.ca.us/DocumentCenter/View/154/Resolution-90-115?bidId= (8 hours per day).

23 Indio Art in Public Places Program Guidelines.

24 San Luis Obispo Public Art Program Policies. Emeryville allows their public art to be provided on public or private property.

25 San Francisco provides three options for public access: (1) in areas on the site of the building or addition so that the public art is clearly visible from the public sidewalk or the open-space feature required by section 138, or (2) on the site of the open-space feature provided pursuant to section 138, or (3) in a publicly accessible lobby area of a hotel. S.F. Planning Code § 429.4.

26 West Hollywood Urban Art Guidelines (requiring the developer to present the proposed project artists for approval and authorizing the arts commission to review the artist selection procedure used, artist resume, biographical materials, and evidence of artistic/cultural experience).

27 Emeryville Art in Public Places Procedure, http://www.ci.emeryville.ca.us/DocumentCenter/View/154/Resolution-90-115?bidId=%20(generally%20recognized%20by%20critics%20and%20peers; City of Palo Alto Frequently Asked Questions—a Quick Guide for Private Developers, https://www.cityofpaloalto.org/civicax/filebank/blobdload.aspx?t=57524.13&BlobID=66226 (most important that is work of professional artist of recognized achievement); Berkeley Mun. Code § 23C.23.040 ("artist" judged by educational qualifications, history of creating public artwork, critical recognition, and record of exhibitions and sales); Santa Rosa Mun. Code § 21-08.020(B) ("Artist" means a person who has established a reputation of artistic excellence, as judged by peers through a record of exhibitions, public commissions, sale of works, or educational attainment).

28 *See, e.g.,* Pasadena Public Art Program Guidelines (Developers are "strongly encouraged" to consider local artists).

29 *See, e.g.*, West Hollywood Urban Art Guidelines (requiring commission approval of Final Art Plan for building permits to issue); Berkeley Guidelines and Procedures § 4 ("For each Development Project, the public art approval process ... must be completed before the issuance of a building permit.").

30 West Hollywood Urban Art Guidelines; Berkeley Public Art in Private Development Program (the public art approval process is designed to operate parallel to the land use review process to gain approvals in a simultaneous time frame).

31 West Hollywood Urban Art Guidelines.

32 *Id.* (Stage I Artist Approval, Stage II Review Schematic Plan, Stage III Review Final Art Plan, Stage IV Construction, and Final Review); Pasadena Public Art Program Guidelines (laying out an eight-step review process).

33 Indio Art in Public Places Program Guidelines.

34 *Id.* (site a permanent public artwork as part of the development project); West Hollywood Urban Art Guidelines (the developer and his or her successors in ownership must ensure that the art remain in-situ on the property as approved in the Final Art Plan unless otherwise approved in writing by the city).

35 Berkeley Public Art in Private Development Program (On-Site Publicly Accessible Art must remain on the site for a minimum of ten years); Santa Rosa Public Art in Private Development Guidelines (artwork should be of a "permanent nature" and remain for a minimum of twenty years).

36 West Hollywood Mun. Code § 19.38.080 (approved, installed urban art works shall be maintained by the owner of the site for the life of the project); San Francisco Fine Art Guidelines (art permanently affixed remain for the life of the project).

37 Palo Alto Quick Guide for Developers (In case the development project is sold, the ownership of the public art will be transferred with the property. The artwork must remain at the development in the location approved by the PAC and may not be claimed as the property of the seller or removed from the site).

38 Palo Alto Quick Guide for Developers (The property owner is responsible for the maintenance and conservation of the artwork. Durable materials should

be used for minimal maintenance and proven ability to withstand the specific environmental conditions of the site.); Santa Rosa City Code § 21-08.070(D) (The developer and subsequently, the property owner shall maintain or cause to be maintained in good condition the public art continuously after its installation and shall perform necessary repairs and maintenance to the satisfaction of the city).

39 Santa Rosa City Code § 21-08.080(D) (Developer or owner shall execute a restrictive covenant in a form acceptable to the city attorney enforceable by the city, which shall be recorded against the project site and shall run with the land for a period of twenty years from the installation date); Santa Rosa City Code § 21-08.070 (The maintenance obligations of the property owner shall be contained in a covenant and recorded against the property and shall run with the property); West Hollywood Urban Art Guidelines (The owner shall execute a maintenance covenant with the city. The maintenance covenant will be recorded against the property and binding on subsequent owners); San Luis Obispo Public Art Program Policies (CC&Rs to be recorded with the county, which require the property owner, successor in interest, and assigns to: (1) maintain the public art in good condition as required by the city's Guidelines for Public Art; (2) indemnify, defend, and hold the city and related parties harmless from any and all claims or liabilities from the public art, in a form acceptable to the city attorney; and (3) maintain liability insurance, including coverage and limits as may be specified by the city's risk manager). *See also* San Luis Obispo Mun. Code § 17.70.140.H (In addition to all other remedies provided by law, in the event the owner fails to maintain the public art, upon reasonable notice, the city may perform all necessary repairs and maintenance or secure insurance, and the costs shall become a lien against the real property).

40 12 Cal. 4th 854 (1996).

41 *Id.* at 886 (citations omitted).

42 *BIA v. City of Oakland*, 289 F. Supp. 3d 1056 (N.D. Cal. 2018).

43 City of Santa Rosa Council Policy No. 000-42, https://srcity.org/DocumentCenter/View/21850/Public-Art-Policy-000-42.

44 Some cities appear to recognize the potential First Amendment implications of these ordinances and have adopted provisions of their program to ostensibly limit the extent to which city oversight can be construed as regulation of content. *See, e.g.,* Berkeley Public Art in Private Development Program (The Civic Arts Commission, not the Design Review Committee or Zoning Adjustments Board, is responsible for providing review and recommendations on the Final Public Art Plan, but not content, viewpoint, or any other expressive aspect of the proposed On-Site Publicly Accessible Art).

45 *BIA*, 289 F. Supp. 3d at 1060.

46 *Id.* at 1060–61.

47 Note that other city programs may have more speech compelling components than the Oakland requirement. *See, e.g.*, West Hollywood Urban Art Guidelines (Developers must incorporate a plaque on or close to the work of art which properly acknowledges the artist and the city's Urban Art Program. The city-approved plaque must be 6" by 9" in weather resistant bronze. The plaque must identify the name of the artist and the title of the piece as approved by the artist, the year of completion and the following words "West Hollywood Urban Art Program." Any additional wording must be approved by the Arts and Cultural Affairs Commission).

48 West Hollywood Urban Art Guidelines.

49 Emeryville Art in Public Places Procedure.

50 Cal. Civ. Code § 987.

51 17 U.S.C. § 106A.

52 Art in Public Places Program Policy and Procedure, City of Emeryville, http://www.ci.emeryville.ca.us/1046/Ordinance-Policies-for-Art-in-Public-Pla (art must pass to successive owners of the development).

53 Palo Alto Quick Guide for Developers (Artwork shall have reasonable maintenance requirements as specified by the artist and these requirements shall be compatible with routine city maintenance procedures.); Emeryville (Developers should include maintenance provisions in the artist's contract that stipulate the length of time that the artist will be responsible for repairs or modifications (typically one year)).

54 *See* Pasadena Public Art Program Guidelines.

55 *Id.*; Art in Public Places Program Policy and Procedure, Emeryville.

56 *See supra* notes 21–23.

57 Some cities allow public art to be provided in the public right of way. This addresses the issues of access, but the placement of art in the public right of way may require additional approvals (such as an encroachment permit) and issues of maintenance and removal will likely still

remain and require contracting with the city. *See, e.g.,* Indio Art in Public Places Program Guidelines (Off-Site: At the request of the applicant for a Certificate of Occupancy, the artwork may be located on a site other than that of the development provided, however, that the site be selected by the Art in Public Places Commission and approved by the City Council).

58 Indio Art in Public Places Program Guidelines (providing that art can be provided on "commercial or residential buildings and adjoining plazas, parks, sidewalks, traffic islands, public buildings, entrances to the development and similar public areas").

59 San Francisco Planning Code § 429.4.

60 http://generalplan.sfplanning.org/images/downtown/TABLE1.HTM.

61 *See, e.g.,* Berkeley Public Art in Private Development Program (On-Site Publicly Accessible Art shall remain the property of the developer).

62 *See supra* note 39.

63 Indio Art in Public Places Guidelines: Failure to maintain the artwork will make the owner subject to possible liens against the real property, should the city be required to maintain the artwork.

64 San Luis Obispo Mun. Code § 17.70.140 (requiring execution of CC&Rs that require property owner, successors, and assigns to: (1) maintain the public art in good condition as required by the city's Guidelines for Public Art; (2) indemnify, defend, and hold the city and related parties harmless from any and all claims or liabilities from the public art, in a form acceptable to the city attorney; and (3) maintain liability insurance, including coverage and limits as may be specified by the city's risk manager); Indio Art in Public Places Program Guidelines ("In addition, the owner of artwork shall maintain in full force and effect fire and extended insurance coverage, including but not limited to vandalism coverage, in a minimum amount of the purchase price of said artwork").

65 *See* S.F. Planning Code § 1004(c)(1).

66 *See* https://www.spur.org/publications/spur-report/2009-01-01/secrets-san-francisco (making recommendations for improving access to San Francisco POPOs).

67 Some jurisdictions still ground their public art requirements, in part, based on the deleterious impacts of development. *See, e.g.*, City of West Hollywood Mun. Code § 19.38.010 ("The Council finds that the environment, image, and character of the city would be improved by art and that the impacts associated with new development projects would be mitigated, in part, by provision of urban art in compliance with this chapter").

68 Berkeley Mun. Code § 23C.23.010 ("Public art is an opportunity to "[m]ake a lasting contribution to the intellectual, emotional and creative life of the community at large, and to create a more desirable community to live, work, and recreate").

69 City of San Jose Private Sector Arts Requirement (June 2010), http://www.sanjoseca.gov/DocumentCenter/View/41799.

70 West Hollywood Urban Art Guidelines.

71 *See* Indio Art in Public Places Program Guidelines (requiring consideration of "Who are the primary and secondary audiences for the artwork (pedestrians, building users, tourists, or automobile traffic)?" and "How has the anticipated audience influenced the choice of artwork?" as part of the approval process).

72 Santa Rosa Public Art in Private Development Guidelines.

73 *Id.* (public art as a "fixed asset"); Indio Art in Public Places Program Guidelines ("The artwork shall be a permanent, fixed asset to the property").

74 San Francisco Downtown Area Plan Policy 16.5.

75 Santa Rosa: "Developer's inclusion of space within the project that is generally open to the public during regular business hours and is dedicated by developer or owner for regular use as a rotating gallery, free of charge, will be deemed to satisfy twenty-five percent (25%) of the public art contribution hereunder required, provided that developer or owner facilitates or arranges for the facilitation of regularly maintained display of original works of art, with no financial gain to developer or owner."

76 Pasadena Public Art Program Guidelines.