

## Legislation Text

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**PREPARED BY:** TRICIA STEVENS

**DATE OF MEETING:** 10/16/17

**SUBJECT:**

PUBLIC HEARING ON ORDINANCE OF THE CITY COUNCIL OF THE CITY OF SAN PABLO AMENDING THE ZONING ORDINANCE CHAPTER 17.63 RELATING TO ART IN PUBLIC PLACES

**CITY MANAGER RECOMMENDATION**

Conduct public hearing; waive first reading; introduce Ordinance

**COUNCIL PRIORITY WORKPLAN**

The Public Art Memorial and Community Murals Program was an adopted policy item under the FY 2013-15 Council Priority Workplan, effective September 1, 2014, when Chapter 17.63 of the San Pablo Municipal Code, "Art in Public Places" was adopted. The Policy Item, which includes implementation of the program, is also an adopted policy item under the FY 2015-17 Council Priority Workplan, effective October 1, 2016.

**CEQA Compliance Statement**

Chapter 17.63, "Art in Public Places," was part of the Zoning Code amendments adopted by the City Council on May 18, 2015 following CEQA review and adoption of an Addendum to the General Plan 2030 Environmental Impact Report (State Clearinghouse No. 2008082069). The proposed ordinance does not include any substantial changes to Chapter 17.63, "Art in Public Places," of the Zoning Ordinance, or substantial changes to the circumstances in which the Zoning Ordinance was adopted, or new information of substantial importance pursuant to 14 California Code of Regulations section 15162 to require the preparation of a subsequent EIR or an Addendum to the EIR.

**Public Hearing Notice**

A public hearing notice was published in the East Bay Times newspaper on Friday, October 6, 2017.

**PROJECT OVERVIEW AND DESCRIPTION**

On May 18, 2015, the City Council adopted a new Zoning Ordinance that included Chapter 17.63, "Art in Public Places." The purpose of this Chapter was to create a process for including public art in new commercial and industrial projects with a value of \$200,000 or more, or alterations or repairs with a value of \$200,000 or more. Applicants who do not want to place public art on their site have the option to contribute one percent of the valuation to the City's public arts fund or provide the public art at an alternative site acceptable to the City. The Zoning Ordinance, including Chapter 17.63, "Art in Public Places," became effective 30 days after approval, which was June 18, 2015.

Since that time, concern has been expressed over certain provisions of the ordinance. Staff has identified a need to reexamine the ordinance to assist in more effective implementation. The City has also been concerned about the implications of a court case file against the City of Oakland's public art ordinance. The timing of any settlement in the Oakland case is uncertain, and staff believes the

City should proceed to consider amendments based on the specific needs of San Pablo. The City Council has approved five deferrals of the ordinance starting on July 6, 2015. The latest deferral will expire on March 31, 2018, or the effective date of a revised ordinance, whichever is sooner.

The City Council Economic Development/Project Management Standing Committee considered amendments to the Art in Public Places at their July 27, 2017 meeting. The Committee considered the issues outlined in an Art in Public Places policy matrix (Attachment C). Their discussion centered on whether non-profit service providers should be exempt from the ordinance (see further discussion below). They voted 2-0 to support all other staff recommendations.

The Planning Commission held a public hearing on September 19, 2017 and recommended approval (5-0) of an amended Art in Public Places ordinance, with changes. The Commission recommended changes to the staff recommendation regarding: (a) requiring reconstruction of public art if destroyed by calamity, (b) exceptions for non-profit organizations if in rented facilities, (c) not allowing indoor public art, (d) requiring efforts to outreach to San Francisco Bay area local artists, and (e) requiring consideration for art reflecting the history and culture of San Pablo. The Planning Commission's discussion and recommended changes are discussed under each topic area below.

## **GENERAL PLAN COMPLIANCE**

ED-G-10 Support and contribute to a clean, attractive, and safe environment for residents, business owners, employees, and shoppers.

LU-G-3: Preserve and strengthen the City's overall image and create a safe, walkable and attractive urban environment for the current and future generations of residents.

## **OVERVIEW AND KEY ISSUES**

### **Overview**

Overall, staff supports the retention of the Art in Public Places Ordinance with recommended adjustments. The Art in Public Places ordinance provides an opportunity to enrich the quality of life and liven the built environment. Although there is limited commercial activity in San Pablo and the art requirement may only have a limited impact, and may increase the cost to development, it is one tool to increase the quality of development. At least seven cities in the East Bay, including Walnut Creek, Emeryville, Dublin, Albany, Union City, Alameda, Oakland and Richmond, have a public art requirement.

The proposed ordinance revises several provisions from the existing ordinance to respond to concerns about implementation and fairness. Staff researched other cities in the East Bay area, and consulted with knowledgeable staff from Alameda and Emeryville. A summary of ordinances from other cities is included as Attachment D.

### **Key issues**

*General Applicability and Exceptions to Fee:* The existing ordinance applies to new commercial and industrial development, and exempts the following projects:

- Any housing project
- Remodeling and repair of structures damaged by a calamity
- A development primarily financed by public funds (this exception includes city and county funded projects)

- Projects for seismic retrofit or fire sprinkler installation
- Capital improvement projects performed by the city
- Non-profit service providers

These exceptions are typical among other cities with an Art in Public Places ordinance, with two main differences. Most cities require art with housing projects (except affordable housing which typically has some public funding) and require art with non-profit service provider developments. Because the city has few housing projects, staff recommends that the existing exception for housing projects be retained.

The exception for non-profit service providers was discussed at length at the Council Economic Development and Project Management Standing Committee (Councilmembers Kinney and Cruz). Councilmember Cruz felt that non-profit developments should continue to be exempted, and Councilmember Kinney felt that they should not be exempted as there are larger non-profit organizations that can afford public art, and smaller ones that cannot afford it can request a waiver.

Examples of how other cities address non-profit service providers include:

- City of Walnut Creek: Exempts alterations by non-profit organizations if such organizations do not own the building. Otherwise, non-profits are subject to a .5 percent fee, instead of the one percent applicable to other developments.
- Dublin: Non-profit service providers are exempt upon approval of the City Council.

The Planning Commission's discussion focused on exemptions for capital improvement projects, housing, and non-profit organizations. Some of the Commissioners wanted the ordinance to apply to market-rate housing (not affordable housing) and capital improvement projects, but a majority did not agree to delete those exemptions. The majority of the Commission agreed to the following language that limits the number of non-profit exemptions (Section 17.63.030 E.): *Nonprofit Service Providers in Rented Facilities. Alteration projects that are undertaken by nonprofits organized under Section 501 (c)(3) of the Internal Revenue Code where such nonprofits do not own the building.* This provision means that all other non-profit organizations would be subject to the public art requirement, unless a waiver is granted by the City Council. This language is reflected in the proposed ordinance.

The Planning Commission also recommends that Section 17.63.030 A. be revised to clarify that any public art that is destroyed by a natural calamity be replaced.

**Applicability of Fee: Minimum Valuation:** The current ordinance requires that any commercial or industrial project with a valuation more than \$200,000 is subject to the public art requirement. The vast majority of new development projects have a valuation of \$30,000-\$120,000. Only two projects since July 1, 2015 were over \$200,000. If the City collected in-lieu fees for the two projects, the total amount in the Arts Fund would be \$37,567.50 based on a one percent fee.

Most other cities have a minimum valuation of \$250,000-\$500,000, but most include housing developments. The Planning Commission and staff recommend that the current \$200,000 valuation threshold be retained as shown in the proposed ordinance (Section 17.63.020). The number of projects subject to the requirement is small and raising the minimum to \$250,000- \$300,000 would not have an appreciable effect.

Percentage of Valuation as Basis for Fee: The current ordinance requires that one percent (1%) of project construction valuation be dedicated to public art. There has been consideration to reduce the burden on development projects by either decreasing the percentage to .5% or having a maximum fee of \$25,000. Most other cities with a public art ordinance have a 1% fee, although Dublin has a .5% requirement. Based on the two projects noted above, a reduction to .5 percent would have resulted in \$18,783.75 to the Art Fund instead of \$37,567.50.

Alameda is the only city with a maximum amount of \$150,000 but they are considering eliminating the maximum to allow more flexibility for larger projects. None of the recent projects in San Pablo would have had a requirement over \$150,000. For the future, there may be key economic development projects that would result in a requirement over \$150,000 so maintaining flexibility without a cap is recommended.

The Planning Commission and staff recommend that the one percent obligation be retained and that there not be a maximum as set forth in the proposed ordinance (Section 17.63.020).

On-site or Off-site Art or Payment In-Lieu Fee: The current ordinance allows that the public art requirement may be satisfied by (a) on-site art, (b) payment of in-lieu fee, or (c) off-site art. Staff and the Planning Commission recommends streamlining the effort by deleting the developer provided off-site art.

One Planning Commissioner wanted to retain the off-site option, but the majority agreed to delete it because off-site art can be provide via the in-lieu fund. The deletion is included in the proposed ordinance. (Section 17.63.040(C) is deleted.)

Location of Art on Private Property: The current ordinance requires that all public art be exterior, either in landscaped areas or as part of the building's architecture. In order to provide greater flexibility and to promote art that may be affected by weather, most cities allow an option for public art to be indoors in private buildings (e.g. office buildings, hospitals) as long as it is accessible to the public during normal business hours (eight hours a day).

Staff originally recommended that interior options be permitted. The Planning Commission felt that all public art should be outdoors to ensure public accessibility, and did not concur with the staff recommendation. The proposed ordinance reflects the Planning Commission recommendation that public art be located exterior (Section 17.63.050 (E)).

Decision Pathway for Public Art Placement: As proposed, there are two pathways for public art in the City; 1) as part of a private development; and 2) a fund for purchase and placement of art.

Under the current ordinance, public art for installation on a private development is decided by the reviewing body as part of the approval process for the project. The reviewing body is the Planning Commission for most projects (e.g. design review).

In past, the City Council clarified they wanted to be the deciding body on art in the city. Reflecting that interest, the proposed ordinance creates a pathway for art on private property and with the selection of public art by the City purchased through the public art fund that includes a recommendation from Planning Commission to City Council.

Since most projects stop at Planning Commission, this extra step will increase time and cost to the developer. This may result in developers opting to pay into the Public Art Fund to streamline their development. Most other cities have a Public Art Commission or Committee that selects the art apart from the approval process for the project. This approach includes a jury qualified to evaluate art. San Pablo does not have a Public Art Committee, but does have a part-time professional Art Curator. The Art Curator will be relied upon to make recommendations to developers on artists, to City Council on the private property art, and on use of money accumulating in the Fund.

This will slightly increase workload for the Art Curator to create a list of San Francisco Bay artists, to make written recommendations to City Council on proposed art pieces, to make written recommendations to City Council on use of Funds, and maintenance agreements.

The use of the Public Art Fund is likely to be folded into the City Council work plan, and budget processes.

**Deletion of Mural Fund:** The existing ordinance references both a Public Art Fund and a Mural Fund. The Public Art Fund can be used for murals. Thus, staff recommends that the reference to a separate mural fund be deleted (Section 17.63.090).

**Local artists/local art:** The current ordinance does not address any preference for local artists or local art. No other cities indicate a preference for local artists and generally allow flexibility to the developer to select an artist and the type of art, if it meets other criteria. Alameda does have a policy statement that public art be reminiscent of their history but is considering deleting that provision to allow more variation with public art. Staff recommends that the ordinance not include any amendments that express preference to local artists or local art. Instead, consultation with the City Art Curator would provide an opportunity to connect to local artists.

The Planning Commission agreed that local artists or art reflecting San Pablo culture and history not be mandated. However, they recommended stronger ordinance language that consideration be given in the approval process to local artists in San Pablo or the broader San Francisco Bay area and to art that reflects San Pablo history or culture. This language is included in the proposed ordinance (Sections 17.63.050 and 17.63.090).

**Waivers:** The current ordinance does not provide for a general waiver based on hardship. Most cities do not have a broad waiver provision, although some cities are considering such a waiver provision to respond to developer concerns. Emeryville has waiver provision, but there have been no recent requests. To allow flexibility, staff recommends that the ordinance include an appeal procedure to the City Council that allows for a waiver of the public art requirement based on demonstrated hardship. An appeal could be made from any staff or Planning Commission determination that a project is subject to the ordinance. This provision makes the ordinance more legally defensible. Because this provision is necessary from a legal perspective, the Planning Commission did not discuss this topic (Section 17.63.080 E.).

## **CONCLUSION**

The purpose of this public hearing is for the City Council to review the proposed zoning ordinance and Municipal Code amendments, take public testimony, and introduce the ordinance. The proposed ordinance would be continued to a date certain for second reading.

The Art in Public Places ordinance provides an opportunity to enrich the quality of life and liven the built environment. The proposed ordinance revises several provisions from the existing ordinance to respond to concerns about implementation and fairness. Based on research from other cities, the most successful and unchallenged programs are flexible in their implementation. The Planning Commission and staff recommends retention of the Art in Public Places ordinance with amendments outlined in this report as recommended by the Planning Commission.

### **FISCAL IMPACT**

There will be increases in workload to the city Art Curator initially to organize a list of San Francisco Bay artists, and to contribute to the development of the first maintenance agreement. Following that initial effort, time could be spent on project recommendations. Since 2015, there were two projects that qualified, and this workload increase is not significant. Administrative costs of implementing the ordinance will be borne by the Public Arts Fund. The Master Fee Schedule currently includes a General Fund miscellaneous fee for consultant management of 17%, which would help offset the additional work borne by Development Services and Community Services.

### **ATTACHMENTS**

- A. Notice of Hearing & Proof of Publication
- B. Art in Public Places policy matrix dated July 17, 2017
- C. Art Ordinance Research Matrix
- D. Planning Commission Minutes 09-19-17