

1 J. DAVID BREEMER, No. 215039
E-mail: jdb@pacificallegal.org
2 ANTHONY L. FRANÇOIS, No. 184100
E-mail: alf@pacificallegal.org
3 Pacific Legal Foundation
930 G Street
4 Sacramento, California 95814
Telephone: (916) 419-7111
5 Facsimile: (916) 419-7747

6 Attorneys for Plaintiff
7

8 UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA
10 OAKLAND DIVISION
11

12 BUILDING INDUSTRY ASSOCIATION – BAY)
AREA,)
13)
Plaintiff,)
14)
v.)
15)
CITY OF OAKLAND,)
16)
Defendant.)
17 _____

No. _____
**COMPLAINT FOR
VIOLATION OF
FEDERAL CIVIL RIGHTS
UNDER 42 U.S.C. § 1983**

**DECLARATORY AND
INJUNCTIVE RELIEF**

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

18
19
20
21
22
23
24
25
26
27
28

1 **INTRODUCTION**

2 1. Building Industry Association – Bay Area (Association), brings this complaint for
3 declaratory and injunctive relief against the City of Oakland (City) to overturn the Oakland Public
4 Arts Requirements Ordinance (Ordinance). This law requires citizens seeking building permits
5 to transfer property interests (including public art, fees, and public access to private facilities) to
6 the City as a condition of developing their property, and to engage in government-approved
7 speech, all in violation of the United States Constitution.

8 2. The Ordinance requires property developers to spend .5% or 1% of their project cost
9 for on-site public art installations, provide public access to projects, and/or pay an in-lieu fee that
10 the City will use to fund public art in public places.

11 3. These requirements compel developers to communicate or fund government
12 approved art messages to obtain permits. Moreover, new development does not create the need
13 for the art conditions and the Ordinance recognizes that it is not related to any public impact
14 arising from new development.

15 4. The Ordinance therefore violates the United States Constitution. While the Fifth
16 and Fourteenth Amendments allow the City to reasonably regulate development, they forbid local
17 governments from imposing permit exactions that are unconnected and disproportionate to the
18 direct impacts of development. The First Amendment forbids the government from forcing
19 property owners to fund and convey government messages, including through art, as a condition
20 of granting a permit. Since the Ordinance does all of this, it is unconstitutional, and the
21 Association is entitled to equitable relief under 42 U.S.C. § 1983, and the Declaratory Judgment
22 Act, including a preliminary injunction.

23 **THE PARTIES**

24 5. Building Industry Association – Bay Area is a nonprofit corporation organized
25 under the laws of the State of California and doing business in Alameda County and the City of
26 Oakland. The Association comprises hundreds of home builders, developers, property owners,
27 contractors, subcontractors, building trades, suppliers, engineers, and design professionals
28 involved in the business of providing housing throughout the Bay Area, including Alameda

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

1 County and the City of Oakland. The Association's mission includes advocacy in support of
2 housing opportunities for prospective home buyers and renters, and legal representation of the
3 interests of its members and the community. Its mission also includes the enforcement of the law
4 governing housing and residential development.

5 6. Some members of the Association are subject to the Ordinance. Others have
6 considered applying for development permits, or may want to do so in the future, but are now
7 subject to unconstitutional conditions on the exercise of the right to apply for development
8 permits. Because the Ordinance causes particularized harm to the Association and its members,
9 both would benefit from judicial relief.

10 7. Defendant City of Oakland is a political subdivision of the State of California, and
11 the local governing authority in Oakland. The City enacted the Ordinance challenged by this
12 lawsuit. The City is entitled to sue and be sued, and is constrained by the laws of the United
13 States, including the United States Constitution, and 42 U.S.C. § 1983.

14 JURISDICTION AND VENUE

15 8. The claims in this action arise under the First and Fifth Amendments to the United
16 States Constitution, as incorporated against the states by the Fourteenth Amendment. The Court
17 has jurisdiction under 42 U.S.C. § 1983 and 28 U.S.C. § 1331. A remedy is sought under the
18 Declaratory Judgment Act, 28 U.S.C. § 2201.

19 9. Venue is proper in this Court because this action concerns private property located
20 in Oakland, California, and a legislative enactment of the City, all of which are within the
21 jurisdiction of the Northern District of California.

22 FACTS

23 10. The City is responsible for approving development permits for property located in
24 Oakland, under provisions of California state law and subject to constraints imposed by the United
25 States Constitution.

26 11. The City has historically carried out a public art program for its own capital
27 improvement projects, under its Public Art Ordinance No. 11086 C.M.S., adopted in 1989. This

28 ///

1 Public Art Ordinance does not apply to private construction, and does not require provision of
2 publicly accessible art within private development.

3 12. In October, 2014, the City council proposed a new ordinance—the Oakland Public
4 Arts Requirements Ordinance (Ordinance), Oakland Municipal Code Section 15.70.010,
5 *et seq.*,—to require private developers to install publicly accessible art in new development
6 projects or pay an in-lieu fee to fund public art on or within the City's capitol improvement
7 projects.

8 13. The City adopted the law on December 9, 2014. The Ordinance went into effect on
9 February 8, 2015. A copy of the Ordinance is attached hereto as Exhibit A and incorporated
10 herein by reference.¹

11 14. The Ordinance requires developers to install art works (worth at least .5% of the
12 total cost for residential and 1% for commercial projects) on their property as part of a
13 development project. While such art is to be placed on private property, the Ordinance demands
14 that it be “publicly accessible.” Sections 15.70.050, 15.70.020, and 15.70.060A.

15 15. Developers may meet up to 75% of the art requirements by dedicating a space in
16 the project, for either a free-of-charge art gallery, or for arts and cultural programming. Section
17 15.070.060B.2. Such an area must be open to the general public during business hours.

18 16. When installing art to satisfy the Ordinance, builders must choose from a limited
19 number of artists “verified” by the City. Section 15.70.070. Builders may use a different artist
20 only if the City approves that person. All art designs must be submitted to the City before they
21 are installed. Section 15.70.090.

22 17. Builders may opt out of the public art requirement only if they pay an in-lieu fee
23 to the City, which fee will be used to fund the installation of publicly owned and accessible art on
24 City property elsewhere in the City. Section 15.70.060B.1.

25 ///

26 ///

27 _____

28 ¹ Subsequent section references are to the Oakland Municipal Code unless otherwise stated.

DECLARATORY RELIEF ALLEGATIONS

1
2 18. Under the Fifth and Fourteenth Amendments to the United States Constitution, the
3 Association and its members have a right to just compensation for takings of their private property.
4 They have a collateral right to be free from building permit conditions that exact private property
5 interests, without just compensation, where there is no reasonable connection between the impacts
6 of a proposed project and the exaction.

7 19. Under the First and Fourteenth Amendments to the United States Constitution, the
8 Association and its members have a right not to speak. They have a right to refrain from
9 conveying government speech. They have a collateral right to be free from permit conditions that
10 coerce them to give up First Amendment rights to obtain a building permit.

11 20. On its face, the Ordinance exacts property from building applicants—including
12 physical property, money, and the right to exclude strangers from private property—without just
13 compensation and without any reasonable connection between these exactions and the social
14 impacts of development. There is accordingly a justiciable controversy in this case as to whether
15 the Ordinance violates the Fifth and Fourteenth Amendments.

16 21. On its face, the Ordinance further requires building applicants to engage in
17 expressive, noncommercial speech as a condition of putting private property to developmental use.

18 22. There is accordingly a justiciable controversy in this case as to whether the
19 Ordinance violates the First and Fourteenth Amendments.

20 23. A declaratory judgment as to whether the Ordinance and the permit conditions it
21 imposes violate the Fifth and First Amendments will clarify the legal relations between the
22 Association and Defendant, with respect to enforcement of the Ordinance.

23 24. A declaratory judgment as to the constitutionality and legality of the Ordinance will
24 give the parties relief from the uncertainty and insecurity giving rise to this controversy.

25 ///

26 ///

27 ///

28 ///

INJUNCTIVE RELIEF ALLEGATIONS

25. The Association has no adequate remedy at law to address the violations of their Fifth and First Amendment rights arising from the Ordinance and occurring under color of state law.

26. There is a substantial likelihood that the Association will succeed on the merits of its claims that the Ordinance violates the Fifth and First Amendment by requiring property owners to surrender unrelated property without compensation, where there is no connection between development and such exactions, and to engage in noncommercial speech.

27. The Association and its members will suffer irreparable injury absent a permanent injunction restraining Defendant from enforcing the Ordinance.

28. The Association’s injuries—subjection to uncompensated exactions of property which bear no relation to development, and forced speech—outweigh any harm the injunction might cause Defendant.

29. An injunction restraining Defendant from enforcing the unconstitutional Ordinance on its face will enhance, not impair, the public interest.

LEGAL CLAIMS

FIRST CLAIM

**Unconstitutional Exaction and Taking of Private Property—
Facial Claim Under 42 U.S.C. § 1983**

30. The Association hereby re-alleges each and every allegation contained in Paragraphs 1 through 29 as though fully set forth herein.

31. The Ordinance conditions the exercise of a state law and common law property right—a property owners’ right to use and develop property—on the transfer of protected property interests, such as real and personal property, the right to control public access to property, and money to the City.

32. Money is constitutionally protected property.

33. The right to exclude the public from private property, and to control the time, place, and manner of any permitted public access, is constitutionally protected property.

1 34. Real property and art works are constitutionally protected property.

2 35. If Defendant simply demanded that the Association’s members hand over portions
3 of their real property, money, art works, or grant public access, it would be liable for a per se
4 unconstitutional physical taking of property.

5 36. Under *Nollan v. California Coastal Commission (Nollan)*, 483 U.S. 825 (1987),
6 *Dolan v. City of Tigard (Dolan)*, 512 U.S. 374 (1994), and *Koontz v. St. Johns River Water*
7 *Management District (Koontz)*, 133 S. Ct. 2586 (2013), the government may constitutionally exact
8 real property interests, money, and other property from property owners as a condition of
9 development permission only if:

10 a. The exaction directly mitigates a public impact directly arising from the
11 property owners’ development of their property;

12 b. The exaction is roughly proportionate in both nature and degree to the
13 public impact arising from the property owners’ development of their
14 property.

15 37. The public art requirements of the Ordinance and art fees are not related to, and do
16 not address, any impact arising from the property owners’ exercise of their right to residential or
17 commercial development of private property.

18 38. The exactions imposed by the Ordinance are not proportionate in either nature or
19 degree to any impact arising from the property owners’ exercise of their right to residential or
20 commercial development of property.

21 39. In requiring property owners such as the Association’s members to pay money,
22 and/or dedicate art works and public access as a condition of exercising their state law property
23 right to develop their property, the Ordinance imposes unconstitutional conditions and
24 unconstitutionally exacts and takes private property.

25 40. The exactions imposed by the Ordinance violate the constitutional principles
26 articulated in *Nollan*, *Dolan*, and *Koontz*.

27 41. The unconstitutional exactions arising from the Ordinance are imposed under color
28 of state law and violate 42 U.S.C. § 1983.

1 42. This claim does not seek “just compensation,” but only equitable relief sufficient
2 to restrain the enforcement of the unconstitutional exactions arising from the Ordinance.

3 43. The Ordinance contains no waiver provision or administrative remedy, and in any
4 event, the Association need not exhaust administrative remedies prior to bringing this claim.

5 44. This facial unconstitutional conditions/takings claim is ripe for immediate
6 resolution in federal court.

7 **SECOND CLAIM**

8 **Violation of First Amendment—Coerced Noncommercial Speech and Unconstitutional Conditions**

9 **Facial Claim Under 42 U.S.C. § 1983**

10 45. The Association hereby re-alleges each and every allegation contained in
11 Paragraphs 1 through 44 as though fully set forth herein.

12 46. The Association and its members have a protected First Amendment right that
13 includes the right to refrain from speaking at all. This right includes the right to be free from being
14 coerced by government to convey a government-approved message or other speech. *Wooley v.*
15 *Maynard*, 430 U.S. 705, 714 (1977); *Frudden v. Pilling*, 742 F.3d 1199, 1202-03 (9th Cir. 2014).

16 47. Art work, including the art works required and regulated by the Ordinance, are
17 within the ambit of First Amendment protection. Art works are noncommercial speech.

18 48. The Ordinance requires the Association’s members to install art works in their
19 projects as a condition of developing their property, in violation of their right to refrain from
20 engaging in expressive First Amendment activity.

21 49. The Ordinance requires the Association’s members to install only those forms of
22 public art approved by the City in violation of the right of the Association’s members to refrain
23 from conveying government mandated messages.

24 50. The in-lieu fees option, designed to coerce money from the Association’s members
25 to fund public art on City projects, violates the Association’s members right not to engage in
26 speech.

27 51. The public art mandate and in-lieu fees option imposed by the Ordinance violate
28 the unconstitutional conditions doctrine in the First Amendment context.

1 52. The First Amendment violations arising from the Ordinance are imposed under
2 color of state law and violate 42 U.S.C. § 1983.

3 53. This claim seeks equitable relief sufficient to restrain the enforcement of the
4 unconstitutional speech requirements arising from the Ordinance.

5 54. The Ordinance contains no waiver provision or administrative remedy and in any
6 event, the Association need not exhaust administrative remedies prior to bringing this claim.

7 55. This facial First Amendment claim is ripe for immediate resolution in federal court.

8 **RELIEF SOUGHT**

9 WHEREFORE, the Association prays for judgment from this Court as follows:

10 1. A declaratory judgment that the Ordinance violates *Nollan, Dolan, and Koontz* and
11 the Takings Unconstitutional Conditions doctrine on its face, and is therefore invalid and
12 unenforceable;

13 2. A declaratory judgment that the Ordinance violates the First Amendment and the
14 Unconstitutional Conditions doctrine on its face, and is therefore invalid and unenforceable;

15 3. A preliminary prohibitory injunction preventing Defendants from enforcing or
16 taking further action to enforce the Ordinance on its face;

17 4. A permanent prohibitory injunction preventing Defendant from enforcing or taking
18 further action to enforce the Ordinance on its face;

19 5. An award to the Association of reasonable attorneys' fees and expert fees for
20 bringing and maintaining this action, including under 42 U.S.C. § 1988;

21 6. An award to the Association of costs of suit pursuant to Federal Rule of Civil
22 Procedure 54(d); and

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

1 7. An award to the Association of any other and further relief that the Court deems
2 just and proper under the circumstances of this case.

3 DATED: July 23, 2015.

4 Respectfully submitted,

5 J. DAVID BREEMER
6 ANTHONY L. FRANÇOIS

7 By /s/ Anthony L. François
8 ANTHONY L. FRANÇOIS

9 Attorneys for Plaintiff
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

EXHIBIT A

FILED
OFFICE OF THE CITY CLERK
OAKLAND

2014 NOV 17 AM 11:43

INTRODUCED BY COUNCILMEMBER SCHAAF

REVISED NOVEMBER 5, 2014
APPROVED AS TO FORM AND LEGALITY


OFFICE OF THE CITY ATTORNEY

OAKLAND CITY COUNCIL
ORDINANCE NO. 13275 C.M.S.

ORDINANCE AMENDING THE OAKLAND MUNICIPAL CODE TO ADOPT CHAPTER 15.70 PUBLIC ART REQUIREMENTS, WHICH ESTABLISHES A NEW REQUIREMENT OF .5% FOR RESIDENTIAL OR 1% FOR NONRESIDENTIAL OF PRIVATE DEVELOPMENT PROJECT COSTS FOR PUBLIC ART AND CODIFIES AN EXISTING REQUIREMENT OF 1.5% OF THE CITY'S CAPITAL IMPROVEMENT PROJECT COSTS FOR PUBLIC ART, ADOPTED BY THE CITY COUNCIL THROUGH ORDINANCE NO. 11086 C.M.S.

WHEREAS, on February 28, 1989, the Oakland City Council adopted the Percent for Public Art Ordinance through Ordinance No. 11086 C.M.S., authorizing the allocation of 1.5% of City capital improvement project costs to commission and acquire public art; and

WHEREAS, the Percent for Public Art Ordinance, which the City Council now seeks to codify, enriches Oakland's visual environment, integrates the creative thinking of artists into public construction projects, and provides a means for citizens and visitors to enjoy and experience cultural diversity; and

WHEREAS, unlike many other cities in California and the United States, Oakland's existing public art program, while successful, does not apply to private development projects; and

WHEREAS, the proposed policy, which is modeled closely on the successful policy of the City of Emeryville, imposes a new public art requirement for private development projects, and provides developers with the option of commissioning public art on the development site or making an in-lieu contribution to the City's existing Public Art Project Account; nearby cities with policies on public art in private development include Emeryville, San Francisco, San Jose, Walnut Creek and Santa Rosa; and

WHEREAS, deposits to the Public Art Project Account may be used for the commission, acquisition and placement of public art throughout the City, and will be

managed by the City's Public Art staff with guidance from the Public Art Advisory Committee; and

WHEREAS, the City of Oakland has been the cultural hub of the East Bay for over 150 years with the visual arts growing into the 21st century alongside industry, academics, and architecture, with public and private art being created throughout; and

WHEREAS, the artist community has always been a creative force within the City; and

WHEREAS, a new public art requirement for private development will encourage and require works of art in new development in Oakland, which is important for the vitality of the artist community as well as the quality of life for all Oakland residents; and,

WHEREAS, developers and/or owners shall be encouraged to integrate art from the earliest possible stages of development planning to assure design elements which respond to the unique physical attributes and geographic location of the development project; now, therefore,

THE COUNCIL OF THE CITY OF OAKLAND DOES ORDAIN AS FOLLOWS:

SECTION 1. Recitals. The City Council finds and determines the foregoing recitals to be true and correct and hereby makes them a part of this Ordinance.

SECTION 2. Addition of Chapter 15.70 to the Oakland Municipal Code. Title 15 of the Oakland Municipal Code is hereby amended to add a new Chapter 15.70 Public Art Requirements, attached hereto as **Exhibit A** and incorporated as if fully set forth herein.

SECTION 3. Reevaluation. The provisions of this Ordinance should not be construed as placing a higher priority on public art than other development requirements or impact fees. This Ordinance may be reevaluated whenever new requirements or fees are considered so that the totality and allocation of all development requirements and fees are deemed reasonable and appropriate.

SECTION 4. Severability. The provisions of this Ordinance are severable, and if any section, subsection, sentence, clause, phrase, paragraph, provision, or part of this Ordinance, or the application of this Ordinance to any person, is for any reason held to be invalid, preempted by state or federal law, or unconstitutional by decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of the Ordinance. If any provision of this Ordinance is held to be inapplicable, the provisions of this Ordinance shall nonetheless continue to apply with respect to all other covered development projects and developers and/or owners. It is hereby declared to be the legislative intent of the City Council that this Ordinance would have been adopted had such provisions not been included or such persons or circumstances been expressly excluded from its coverage.

SECTION 5. California Environmental Quality Act. Prior to adopting this Ordinance, the City Council independently finds and determines that this action is exempt from CEQA (California Environmental Quality Act) pursuant to CEQA Guidelines sections 15060(c)(2), 15061(b)(3) (general rule), 15183 (projects consistent with a community plan, general plan, or zoning), each of which provides a separate and independent basis for CEQA clearance and when viewed collectively provide an overall basis for CEQA clearance.

SECTION 6. Effective Date. Except as to provisions relating to City Capital Improvement Projects and the existing Public Art Project Account, which shall continue to apply, this Ordinance shall be effective 60 days from the date of final passage by the City Council, but shall not apply (a) to building/construction related permits already issued and not yet expired; or (b) to zoning applications approved by the City and not yet expired; or (c) to zoning applications deemed complete by the City as of the date of final passage. However, zoning applications deemed complete by the City prior to the date of final passage of this Ordinance may be processed under provisions of these amendments if the developer and/or owner chooses to do so.

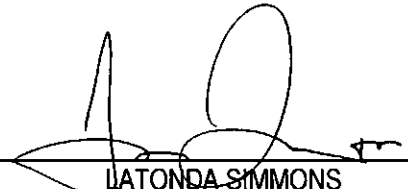
IN COUNCIL, OAKLAND, CALIFORNIA,
PASSED BY THE FOLLOWING VOTE:

DEC 09 2014

AYES - BROOKS, GALLO, GIBSON MCELHANEY, KALB, KAPLAN, REID, SCHAAF AND PRESIDENT
KERNIGHAN --8

NOES - ∅
ABSENT - ∅
ABSTENTION - ∅

ATTEST:


LATONDA SIMMONS
City Clerk and Clerk of the Council
of the City of Oakland, California

Date of Attestation: 12/12/14

Introduction Date
NOV 05 2014

EXHIBIT A

The following Chapter 15.70 Public Art Requirements is hereby adopted by this Ordinance and incorporated into the Oakland Municipal Code.

**Title 15 – Buildings and Construction
Chapter 15.70 Public Art Requirements**

Sections:

**Article I – Title
15.70.010 Title**

**Article II – Administrative
15.70.020 Definitions
15.70.030 Conflict
15.70.040 Amendments**

**Article III – Public Art Requirements for Private Development
15.70.050 Purpose
15.70.060 Contribution Requirements
15.70.070 Artist Verification
15.70.080 Public Art Project Account
15.70.090 Compliance
15.70.100 Violations of this Article**

**Article IV – Public Art Requirements for City Capital Improvement
Projects
15.70.110 Purpose
15.70.120 Funding**

**Article V – Use of Public Art Project Account
15.70.130 Use of Funds**

Article I – Title

Section 15.70.010 Title

This Chapter shall be known as the “Public Art Requirements” and is referred to herein as this Chapter.

**Article II – Administrative
15.70.020 Definitions**

As used in this Chapter, the following terms shall have the meanings set forth hereto or as otherwise specified in the guidelines referenced herein. Where terms are not defined, they shall have their ordinary accepted meanings within the context with which they are used.

AFFORDABLE HOUSING is defined in Chapter 17.107 of the Oakland Planning Code.

BUILDING DEVELOPMENT COSTS means those construction costs as declared on building permit applications, and as accepted by the Building Official. Building permit applications shall include building, plumbing, mechanical and electrical permit applications for the project.

CAPITAL IMPROVEMENT COSTS include all construction costs as well as architectural and engineering fees and site work associated with capital improvement projects. Capital improvement costs do not include administrative costs or costs related to the investigation and remediation of hazardous materials.

CITY CAPITAL IMPROVEMENT PROJECT means any capital improvement project paid for wholly or in part by funds appropriated by the City of Oakland to construct or remodel a building, decorative or commemorative structure, park, street, sidewalk, parking facility, or utility or any portion thereof, within the City limits of, or under the jurisdiction of, the City of Oakland.

DEMOLITION COSTS means payment for any work needed for the removal of buildings or other existing structures from City property.

DEVELOPER and/or OWNER means any individual, firm, limited liability company, association, partnership, political subdivision, government agency, municipality (other than the City of Oakland), industry, public or private corporation, or any other entity that undertakes any construction within the City subject to the requirements in Article III.

ECONOMICALLY FEASIBLE is defined in Section 17.107.020 of the Oakland Planning Code.

FLOOR AREA is defined in Section 17.09.040 of the Oakland Planning Code.

OAKLAND PLANNING CODE means Title 17 of the Oakland Municipal Code.

PUBLIC ART is a process which results in the incorporation of original works of art by artists in publicly accessible spaces and which serves a socio-environmental function identifiable with people; is accessible to the mind and the eye; is integral to the site and responds to the concept of place making; is

integrated with the work of other design professionals; is of high quality; serves the City by enhancing the quality of life for citizens and contributes to the City's prestige; is unique to its moment in time and place.

PUBLIC ART ADVISORY COMMITTEE means a professionally qualified citizen committee recommended by the Oakland arts commission and approved by City Council to oversee quality control of the public art program, its projects, and to recommend to the Cultural Arts Division (CAD) the sites, scope of project, artworks and artists for the public art projects funded through the Public Art Project Account.

PUBLIC ART PROGRAM IN-LIEU CONTRIBUTION means the percentage of building development costs required herein.

PUBLIC ART PROJECT ACCOUNT IN THE CULTURAL ARTS DIVISION BUDGET means a project account which is established by the City to receive monies from both in lieu contributions made by a developer and/or owner and appropriated from the capital improvement project budgets to the public art program.

PUBLIC ART PROJECTS are projects which involve artists working through the public art process that result in the creation of original works in publicly accessible spaces that include but are not limited to paintings, mural decorations, inscriptions, stained glass, fiber work, statues, reliefs or other sculpture, monuments, fountains, arches, or other structures intended for ornament or commemoration, carvings, frescoes, mosaics, mobiles, photographs, drawings, collages, prints, crafts both decorative and utilitarian in clay, fiber, wood, metal, glass, plastics and other materials. Public Art projects also include artists serving on design and development teams to identify opportunities to incorporate art in publicly accessible space.

PUBLICLY ACCESSIBLE ART means art that is accessible to the general public.

REAL PROPERTY ACQUISITION COSTS means payments made for the purchase of parcels of land, existing buildings or structures, and costs incurred by the City for appraisals or negotiations in connection with such purchases.

SHALL/WILL means a determinative directive which includes the common meaning of the word *must*.

15.70.030 Conflict

Wherever the provisions of this Chapter conflict with each other or with the provisions of other associated codes, regulations, or ordinances, the more restrictive provision or standard shall control.

15.70.040 Amendments

Where any section, subsection, sentence, clause, phrase, or other part of this Chapter and the referenced law recited herein are amended subsequently, all provisions of the original recitation not so specifically amended shall remain in full force and effect and all amended provisions shall be considered as added thereto.

Article III – Public Art Requirements for Private Development

15.70.050 Purpose

This Article III is intended to promote the arts in the City of Oakland by requiring the inclusion of a public artwork component in new development projects in Oakland. A policy is hereby established to require certain private developments to use a portion of building development funds for the acquisition and installation of publicly accessible works of art for placement on the development site as a condition of project approval. Developers and/or owners are encouraged to employ Oakland artists or arts organizations to fulfill the public art requirement.

15.70.060 Contribution Requirements

A. Calculation

1. Nonresidential Building Developments

Private nonresidential building developments involving 2,000 square feet or more of new floor area and subject to design review approval pursuant to Chapter 17.136 of the Oakland Planning Code shall devote an amount not less than one percent (1%) of building development costs for acquisition and installation of publicly accessible art on the development site.

2. Residential Building Developments

Private residential building developments of twenty (20) or more new dwelling units and subject to design review approval pursuant to Chapter 17.136 of the Oakland Planning Code shall devote an amount not less than one-half of one percent (0.5%) of building development costs for acquisition and installation of publicly accessible art on the development site.

B. In-Lieu Contribution

1. Compliance

At the discretion of the developer and/or owner, and in lieu of installing on-site public art, a Public Art Program in-lieu contribution shall be placed into the Public Art Project Account for acquisition and placement of public art throughout the City.

2. Alternative Compliance

Alternatively, developer and/or owner may by special application and approval by the City satisfy up to seventy-five percent (75%) of the Public Art Program in-lieu contribution required hereunder as follows, if approved by the Public Art Advisory Committee. Any remaining in-lieu contribution shall be placed into the Public Art Project Account.

- a. Developer and/or owner's inclusion of space within the development project that is generally open to the public during regular business hours and is dedicated by developer and/or owner for regular use as a rotating art gallery, free of charge, will be deemed to satisfy twenty-five percent (25%) of the Public Art Program in-lieu contribution; and/or
- b. Developer and/or owner's provision, design and dedication of at least 500 square feet of space within the development project, to be made available to the public for the primary use of arts and cultural programming, may be deemed to satisfy fifty percent (50%) of the Public Art Program in-lieu contribution.

C. Subsequent Removal of Public Art or Alternative Compliance Space

If the developer and/or owner satisfies the public art requirement in accordance with subsection (A)(1), (A)(2), or (B)(2), above, the public art previously installed on the development site or the inclusion and/or dedication of space within the development project may subsequently be removed if the developer and/or owner makes a Public Art Program in-lieu contribution equivalent to the original amount to the Public Art Project Account.

D. Exclusions

The requirements of this Article III shall not apply to an affordable housing development if the developer demonstrates to the satisfaction of the City that said requirements would cause the development project not to be economically feasible.

15.70.070 Artist Verification

Public art installed on the development site shall be designed by independent artists, or artists working in conjunction with arts or community organizations, that

are verified by the City to either hold a valid Oakland business license or be an Oakland-based 501(c)(3) tax designated organization in good standing. Developers and/or owners installing art created by an artist not verified by the City shall pay a verification fee to the City in accordance with the Master Fee Schedule.

15.70.080 Public Art Project Account

Any in-lieu contributions placed in the Public Art Project Account shall be used to implement the Public Art Program, as described in Article V, below. Such funds may be used to acquire, place, and maintain public art on public property throughout the City, and to administer the Public Art Program.

15.70.090 Compliance

Compliance with the provisions of this Article III shall be demonstrated by the developer and/or owner at the time of filing the Building Permit application as follows: (a) payment of the full amount of the Public Art Program in-lieu contribution, or (b) written proof to the Building Department and the Public Art Program of a contractual agreement to commission or purchase and to install the requested artwork on the development site. The developer and/or owner shall provide the City with proof of installation of the requested artwork on the development site or proof of full payment of the Public Art Program in-lieu contribution before issuance of the certificate of occupancy, unless the City has approved some other method of assuring compliance with the provisions of this article. In the case of installation of public art on the development site, the developer and/or owner shall maintain said artwork in proper condition on an ongoing basis.

15.70.100 Violations of this Article

In addition to other fines or penalties provided by State or municipal law, the City may revoke or suspend any permit granted to any developer and/or owner who violates the provisions of this Article III.

Article IV – Public Art Requirements for City Capital Improvement Projects

15.70.110 Purpose

The City of Oakland accepts responsibility for expanding the opportunities for its citizens to experience public art and other projects resulting from the creative expression of its artists in public places throughout the City. A policy is hereby established to direct the inclusion of works of art in public spaces throughout the City and/or the design services of artists in certain City capital improvement projects.

Ordinance No. 11086 C.M.S. and the Public Art Policies and Procedures, adopted by the City Council on February 28, 1989, as such documents may be amended from time to time, continue to remain in effect.

15.70.120 Funding

A. Appropriations

All appropriations for City capital improvement projects, including all bond projects and all other capital projects funded from other sources excluding sewer repairs funded from sewer service charge fees shall include an amount equal to one-and-one-half percent (1.5%) of the total capital improvement project cost to be dedicated to the Public Art Project Account. Funds appropriated will be used for design services of artists, for the selection, acquisition, purchase, commissioning, installation, examination and/or display of original artworks, for the maintenance of artworks, for educating the public about the artwork and the Cultural Arts Division administrative costs to manage the program.

The 1.5% appropriation shall include but not be limited to General Fund funded capital improvements, gas tax funded capital improvements, Measure B funded capital improvements, off street parking funded capital improvements and any and all other capital improvements funded from other revenues including grants which may be so appropriated.

B. Method of Calculation

The minimum amount to be appropriated to the Public Art Project Account to fund artists' services and/or artworks, maintenance, administration, and education shall be the total capital project appropriation including all construction costs as well as architectural and engineering fees and site work expenses multiplied by 0.015, excluding amounts budgeted for real property acquisition; demolition; and financing costs.

C. Pooling

Funds appropriated as part of any one project, but not deemed necessary or appropriate in total or in part for public art at said project site by the Cultural Arts Division in consultation with the Public Art Advisory Committee and the capital improvement project manager, may be expended on other projects approved under the Public Art Project Plan when such funds are eligible to be so used.

D. Exclusions

If the source of funding or other applicable law or regulation with respect to any particular capital improvement project or portion thereof prohibits or restricts the use of the 1.5% dedication of such funds for public art, this Article IV shall not apply to the project's expenses, so prohibited or restricted.

E. Grant Applications

All City departments shall include in applications for capital improvement projects to outside granting authorities amounts for artists' services and/or artworks as specified herein, where permitted or unless otherwise waived by the City Council. Receipt of such funds shall be administered as part of the City's Public Art Program.

F. Waiver

The City Administrator may request that the City Council exclude certain capital improvement projects from the provisions of this Article IV by the passage of a resolution authorizing such a waiver.

Article V – Use of Public Art Project Account

15.70.130 Use of Funds

It is intended that funds in the Public Art Project Account will be appropriated in the annual budget to obtain and install art in public places, to maintain and refurbish art in public places when the cost of such maintenance exceeds funds currently available for the maintenance of public property in general, to fund staff time in the Cultural Arts Division necessary to administer the public art program, and to defray such other expenses which are, or may become, an integral part of the public art program, including programs to educate the public about the public art.

A. Eligible Costs

Monies appropriated under Article IV, above, and any in-lieu contributions made in accordance with Article III, above, may be used for hiring artists to develop design concepts and for the selection, acquisition, purchase, commissioning, placement, installation, exhibition, and/or display of artworks. Artworks may be permanent or temporary and integral to the architecture. Integration of the artists' design concepts and/or the artworks into the project architecture should be insured insofar as feasible, by concurrent selection of the artist(s) with the architect or designer. All of the above are considered eligible expenses for the Public Art Program artist fees. Artist fees for such projects can include the following:

- Structures which enable the display of artwork(s).

- Artistic design and fabrication fees.
- Labor of assistants, materials and contracted services required for the production and installation of the work of art.
- Any required permit or certificate fees, business and legal costs directly related to the project.
- Dealer's fees, if necessary and where appropriate CAD, in concurrence with the National Endowment for the Arts (N.E.A.) and several other arts agencies around the country, recommends that no more than 10% of the artist's fees be paid as a dealer/gallery commission.
- Communication and other indirect costs (insurance, utilities).
- Transportation of the work of art to the site.
- Preparation of site to receive artwork.
- Installation of the completed work of art.
- Administrative fees can include the following:
 - Cultural Arts Division's administration costs incurred in the process of administering the Public Art Program including staff time, direct costs and administrative overhead.
 - Documentation (color slides and black and white photographs) of the artwork's fabrication and installation and plaques to identify the artwork.

B. Ineligible Costs

Monies appropriated under Article IV, above, and any in-lieu contributions made in accordance with Article III, above, may not be used for the following:

- Directional elements such as supergraphics, signage, or color coding except where these elements are integral parts of the original work of art or executed by artists in unique or limited editions.
- "Art objects" which are mass produced of standard design such as playground equipment or fountains.

- **Reproduction, by mechanical or other means, or original works of art, except in cases of film, video, photography, printmaking or other media arts.**
- **Decorative or functional elements which are designed by the building architect as opposed to an artist commissioned for this purpose.**
- **Landscape architecture and landscape gardening except where these elements are designed by the artist and are an integral part of the work of art by the artist.**

NOTICE AND DIGEST

ORDINANCE AMENDING THE OAKLAND MUNICIPAL CODE TO ADOPT CHAPTER 15.70 PUBLIC ART REQUIREMENTS, WHICH ESTABLISHES A NEW REQUIREMENT OF .5% FOR RESIDENTIAL OR 1% FOR NONRESIDENTIAL OF PRIVATE DEVELOPMENT PROJECT COSTS FOR PUBLIC ART AND CODIFIES AN EXISTING REQUIREMENT OF 1.5% OF THE CITY'S CAPITAL IMPROVEMENT PROJECT COSTS FOR PUBLIC ART, ADOPTED BY THE CITY COUNCIL THROUGH ORDINANCE NO. 11086 C.M.S.

This ordinance would amend the Oakland Municipal Code to create Chapter 15.70 Public Art Requirements, which establishes a new public art requirement for private development projects and codifies an existing public art requirement for the City's capital improvement projects, which was adopted by the City Council through Ordinance No. 11086 C.M.S. The new public art requirement applies a 1% public art contribution to private nonresidential building developments involving 2,000 square feet or more of new floor area and subject to design review approval, and a 0.5% public art contribution to private residential building developments of 20 or more new dwelling units and subject to design review approval.