

ORDINANCE NUMBER O-_____ (NEW SERIES)

ADOPTED ON _____

AN ORDINANCE AMENDING CHAPTER 2, ARTICLE 6, DIVISION 7, OF THE SAN DIEGO MUNICIPAL CODE BY AMENDING SECTION 26.0701; BY RENUMBERING AND AMENDING SECTION 26.0702 TO 26.0703, SECTION 26.0703 TO 26.0704, AND SECTION 26.0705 TO 26.0702; BY ADDING NEW SECTION 26.0705; BY RETITLING AND AMENDING SECTIONS 26.0706 AND 26.0707; AND BY ADDING NEW SECTIONS 26.0708, 26.0709, 26.0710, AND 26.0711, ALL RELATING TO THE COMMISSION FOR ARTS AND CULTURE AND THE DEVELOPMENT OF CULTURAL AND ARTISTIC RESOURCES IN THE CITY OF SAN DIEGO.

WHEREAS, cultural and artistic resources, including the visual, performing, and literary arts, enhance the quality of life for individuals living in, working in, and visiting the City of San Diego; and

WHEREAS, the balanced development of cultural and artistic resources preserves and improves the quality of the urban environment and increases real property values in the City of San Diego; and

WHEREAS, as development and revitalization of the real property within the City of San Diego continues due to market forces, urbanization of the community results; and

WHEREAS, as this urbanization occurs, the need to develop cultural and artistic resources to improve the environment, image, and character of the City of San Diego is increased; and

WHEREAS, the expansion of cultural and artistic resources should be financed by those entities undertaking development projects that result most directly in this urbanization and the increased need to enhance the cultural and artistic resources of the City of San Diego; and

WHEREAS, establishing and augmenting the resources available to the Public Art Program will promote the general welfare through balancing the City of San Diego's urban growth with the expansion of its cultural and artistic resources; NOW, THEREFORE,

BE IT ORDAINED, by the Council of the City of San Diego, as follows:

Section 1. That Chapter 2, Article 6, Division 7, of the San Diego Municipal Code is hereby amended by amending Section 26.0701, to read as follows:

§26.0701 Purpose and Intent

It is the purpose and intent of the City Council to establish a Commission for Arts and Culture to serve in an advisory capacity to the Mayor, City Council and City Manager on promoting, encouraging, and increasing support for arts and culture.

It is also the purpose and intent of the City Council to encourage the preservation and augmentation of the City of San Diego's cultural and artistic resources, and to ensure that the City's increasing urbanization is offset by the creation of *artworks* and venues dedicated to artistic performances, exhibitions, and cultural events.

Section 2. That Chapter 2, Article 6, Division 7, of the San Diego Municipal Code is hereby amended by renumbering and amending Section 26.0702 to 26.0703, Section 26.0703 to 26.0704, and Section 26.0705 to 26.0702, to read as follows:

§26.0702 Definitions

Except as otherwise provided, for the purposes of this division:

Applicant has the same meaning as stated in Land Development Code section 113.0103.

Artist means an individual generally recognized by critics and peers as a professional practitioner of the visual, performing, or literary arts, as judged by the quality of that professional practitioner's body of work, educational background, experience, *public performances*, past public commissions, exhibition record, publications, and production of *artwork*.

Artwork includes:

Sculpture: may be made of any material or combination of materials; may be free standing, wall-supported or suspended, kinetic, electronic or mechanical.

Murals or paintings: may be made of any material or variety of materials with or without collage; may be made with traditional or non-traditional materials and means.

Earthworks, neon, glass, organic materials (i.e., fiber, clay, wood, etc.), mosaics, photographs, prints, literary expression, calligraphy, any combination of forms of media, including audio, video, film, CD-ROM, DVD, holographic or computer generated technologies, or new genres.

Artwork as defined herein may be permanent, fixed, temporary or portable, may be an integral part of a building, facility, or structure, and may be integrated with the work of other design professionals.

Capital Improvements Program project means any permanent public improvement project paid for wholly by monies appropriated by the City to construct, improve, or renovate a building, including its appurtenant facilities, a decorative or commemorative structure, a park, a street, a sidewalk, a parking facility, a utility, or any portion thereof, within the City limits or under the jurisdiction of the City.

Commission means the City of San Diego Commission for Arts and Culture.

Cultural use includes individual and group presentations, exhibitions, or *public performances* involving music, dance, theatre, opera, literature, sculpture, murals, paintings, earthworks, mosaics, photographs, prints, calligraphy, or any combination of media currently known or which may come to be known, including audio, video, film, CD-ROM, DVD, holographic or computer generated technologies.

Deemed complete has the same meaning as stated in Land Development Code section 113.0103.

Development has the same meaning as stated in Land Development Code section 113.0103.

Development permit has the same meaning as stated in Land Development Code section 113.0103.

Open and freely accessible means available for use by the general public at least six days a week and eight hours each day, excluding holidays recognized by the City of San Diego.

Premises has the same meaning as stated in Land Development Code section 113.0103.

Public art means *artwork* that is created using funds from the *public art fund* and is located in *public places*.

Public art fund means a separate fund established in the City Treasury into which funds allocated in accordance with Chapter 2, Article 6, Division 7 shall be deposited.

Public art program includes all responsibilities and activities of the *Commission* in accordance with Chapter 2, Article 6, Division 7 pertaining to *public art*.

Public art program allocation means the percentage of the *total building permit valuation* for a qualifying *development* in accordance with Chapter 2, Article 6, Division 7 which is set aside for the City's *public art program*.

Public performances includes individual and group presentations of music, dance, theatre, opera, literary, film/video and other forms of art generally recognized.

Public places means land and buildings owned by the City of San Diego.

Supplemental funds means those funds contributed by individuals, corporations, foundations, or government grants, and placed in the *public art fund* in addition to those funds made available in accordance with Chapter 2, Article 6, Division 7 which shall be used for implementing the purposes of *public art* projects recommended by the *Commission* and approved by the City Council.

Total building permit valuation means the combined total valuation of all structures within the *development* using the latest building valuation data as set forth by the International Code Council [ICC] unless, in the opinion of the Building Official, a different valuation methodology is more appropriate for a particular *development*.

§26.0703 Commission for Arts and Culture Established

There is hereby established a Commission for Arts and Culture consisting of fifteen members. *Commission* members shall be persons who represent the following: individual *artists*, arts and culture patrons, educators, the business community, those with professional qualifications and experience or knowledge of a particular arts and culture field, and the general public.

The members shall serve two year staggered terms for a maximum of eight consecutive years, and each member shall serve until a successor is duly appointed and confirmed. An interval of four years must pass before such persons may be reappointed. The members shall be appointed by the Mayor and confirmed by the City Council, subject to the following conditions: 1) The Mayor shall appoint seven members; and, 2) the Mayor shall appoint the remaining eight

members, one each from a list of three nominations submitted by each Councilmember. The expiration date of all terms shall be August 31. During September of each year, the Mayor may designate one member as chairperson; however, in the absence of such designation, the *Commission* shall on or after October 15 select from their members a chairperson. The *Commission* shall meet not less than monthly and report to the Mayor and Council on an as needed basis, but not less than one time per year.

The *Commission* shall adopt rules consistent with laws for the government of its business and procedures.

§26.0704 *Duties and Functions*

The *Commission* shall:

- (a) Strongly advocate a substantial increase in funds for arts and culture.
- (b) Make all funding recommendations directly to the Mayor, City Council and City Manager.
- (c) Explore new sources of funding for arts and culture and evaluate the current allocation of Transient Occupancy Tax funding as it pertains to arts and culture.
- (d) Develop, coordinate and regularly reevaluate the City's arts and culture policies.
- (e) Consistent with City Council policy, serve as advocates for arts and culture with the City Council, as well as the private sector, local, regional,

state and federal governments, and international entities, such as Mexico, Canada, Japan and Pacific Rim countries.

- (f) Serve as the State/Federal local arts program partner.
- (g) Manage the City's *public art program*, which shall include the following:
 - (1) Advising on the acquisition, placement and maintenance of *public art* on property of the City of San Diego. No *public art* shall be installed or existing work of *public art* removed from *public places* without a review by the *Commission*.
 - (2) Developing and recommending to the Mayor, City Council and City Manager as appropriate:
 - (A) Programs to promote *public performances* and the public exhibition of the visual, performing, and literary arts.
 - (B) Legislation to provide opportunities for inclusion of the visual, performing, and literary arts in private *development*.
 - (C) Legislation and policies to include *public art* in selected *Capital Improvements Program projects*.
- (h) Receive and accept applications for Transient Occupancy Tax funding, and using objective criteria evaluate the applications and recommend to the Mayor, City Council, and City Manager the allocation of that funding.

- (i) Recommend for the City Manager's review a budget for funding arts and culture programs in the City.
- (j) Establish guidelines to carry out the *public art program* which shall include methods of selecting *artists* or *public art* and for the placement of *public art*.
- (k) Advise the City Council regarding the possible purchase of *public art* or commissioning the design, execution or placement of *public art*. The *Commission* shall work with the City Manager regarding the design, execution or placement of *public art* in connection with *Capital Improvements Program projects*.
- (l) In the placement of *public art* in the City, give special attention to the placement of appropriate *public art* in City neighborhoods.
- (m) Receive input from the City Manager regarding operation and maintenance expenses associated with a work of *public art*. If the City Manager finds that a proposed work of *public art* requires extraordinary operation or maintenance expenses, the *Commission* shall recommend another work of *public art*, or submit with its recommendation to the City Manager and City Council a statement of overriding consideration of why the *public art* should be utilized notwithstanding its extraordinary operation or maintenance expense.

- (n) In cooperation with the City Manager, establish and adopt policies and procedures to implement the requirements of Chapter 2, Article 6, Division 7.
- (o) Where a work of *public art* is to be included in the construction of a *Capital Improvements Program project*, facilitate cooperation and early project coordination between City staff and *artists*.

Section 3. That Chapter 2, Article 6, Division 7, of the San Diego Municipal Code is hereby amended by adding a new Section 26.0705, to read as follows:

§26.0705 Exemptions

The requirements of Chapter 2, Article 6, Division 7 do not apply to the following:

- (a) Private non-residential, industrial and commercial *development* with a *total building permit valuation* of less than \$5,000,000.
- (b) Any *premises* which is designed for and dedicated to performing arts spaces or museum uses for so long as the *premises* is used for those purposes.
- (c) Residential *development*.

Section 4. That Chapter 2, Article 6, Division 7, of the San Diego Municipal Code is hereby amended by retitling and amending Section 26.0706, to read as follows:

§26.0706 General Public Art Program Allocation Regulations

Subject to the provisions of Section 26.0708, no final City approval to occupy any private non-residential, industrial or commercial *development*, or any portion thereof, with a *total building permit valuation* greater than or equal to \$5,000,000 may be granted unless an amount equal to one percent of its *total building permit valuation* has been set aside by the *applicant* as a *public art program allocation*. The *public art program allocation* may be used by the *applicant* to comply with the requirements of Chapter 2, Article 6, Division 7 through one of the following means:

- (a) Placement of *artwork* on the *premises*. If the value of the *artwork*, including its design, fabrication, and installation costs is not equal to or greater than the *public art program allocation*, the *applicant* shall pay an in lieu fee equal to the difference between the amount of the *public art program allocation* and the value of the *artwork*.
- (b) Maintaining a portion of the *premises open and freely accessible* for a *cultural use*. If the value of that portion of the *premises* which is *open and freely accessible* for a *cultural use* is not equal to or greater than the *public art program allocation*, the *applicant* shall pay an in lieu fee equal to the difference between the amount of the *public art program allocation* and the value of the *premises* which is *open and freely accessible* for a *cultural use*.

- (c) Payment of an in-lieu fee equal to one half of one percent of the *total building permit valuation* for the *development*.

§26.0707 Public Art Program Allocation Procedures

When the *applicant* applies for a building permit, the *applicant* shall be informed of the *public art program allocation* requirements and referred to the *Commission* in order to:

- (a) Declare in writing the means by which the *applicant* will comply with the requirements of Section 26.0706; and
- (b) Where applicable, enter into a Declaration of Covenants, Conditions, and Restrictions in accordance with Section 26.0709.

Section 5. That Chapter 2, Article 6, Division 7, of the San Diego Municipal Code is hereby amended by adding new Sections 26.0708, 26.0709, 26.0710, and 26.0711, to read as follows:

§26.0708 General Rules for Public Art Program Allocation Regulations

- (a) If the *applicant* pays an in-lieu fee in accordance with the provisions of Section 26.0706(c), no building permit for the *development* may be issued without payment of the in lieu fee to the City of San Diego.
- (b) If the *applicant* installs an *artwork* on the *premises* or maintains a portion of the *premises open and freely accessible* for a *cultural use* in accordance with the requirements of Section 26.0706(a) or (b), no building permit for the *development* may be issued until the *applicant* deposits a letter of

credit with the City in an amount equal to one half of one percent of the *total building permit valuation* for the *development*.

(c) Prior to issuance of the Certificate of Occupancy for the *development*, the *applicant* shall submit evidence, satisfactory to the Executive Director of the *Commission*, that:

(1) If applicable, the value of the *artwork* installed on the *premises* is equal to or greater than one percent of the *total building permit valuation* for the *development*. Such evidence may include the costs of *artist* design fees, fabrication of the *artwork*, and installation of the *artwork*.

(2) If applicable, the value of the portion of the *premises* which is maintained *open and freely accessible* for a *cultural use* is equal to or greater than one percent of the *total building permit valuation* for the *development*. Such evidence may include data establishing the proportional value of the total square footage and all tenant improvements for the *development*.

(d) If the Executive Director of the *Commission* determines that the *applicant* has not installed an *artwork* on the *premises* or maintained a portion of the *premises open and freely accessible* for a *cultural use* prior to the issuance of the Certificate of Occupancy for the *development*, the full amount of the *applicant's* letter of credit may be forfeited to the City of San Diego and a Certificate of Occupancy for the *development* will issue.

§26.0709 Declaration of Covenants, Conditions, and Restrictions

If the *applicant* installs an *artwork* on the *premises* or maintains a portion of the *premises open and freely accessible* for a *cultural use* in accordance with the requirements of Section 26.0706(a) or (b), the *development* shall have recorded against it a Declaration of Covenants, Conditions, and Restrictions in favor of the City and in a form approved by the City Attorney which shall include the following provisions as appropriate:

- (a) The owner of the *development* shall provide all necessary maintenance of the *artwork*, including preservation of the *artwork* in good condition to the reasonable satisfaction of the City and protection of the *artwork* against destruction, distortion, mutilation, or other modification.
- (b) The owner of the *development* shall ensure that the *artwork* will be located in an area that is *open and freely accessible*.
- (c) A description of that portion of the *premises* which will be maintained *open and freely accessible* and its designated *cultural use*.
- (d) Any other terms necessary to implement the provisions of Chapter 2, Article 6, Division 7.

§26.0710 Return of Fees

- (a) Fees paid to the City of San Diego which are unexpended within five years from the date of payment may be returned to the then current owner(s) of the *development*, with all interest actually earned thereon, if a written request for return is filed with the City Treasurer during the fifth

year after payment, and refund of the fees is approved by the City Council. The request for return shall be verified, and include the date of payment, the amount paid and method of payment, the location of the *development* for which the fee was paid, and a statement that the person making the request is the fee payer or the current owner of the *development*.

(b) The City Council shall determine if return of the then uncommitted portion of the fees and interest is appropriate and, if so, the method of refund. No refund shall be appropriate if the City Council determines any one of the following conditions applies:

- (1) The City Council finds that the fee is needed for the *public art program*.
- (2) Funds were not posted as fees, but were satisfied by letter of credit, bond or other instrument taken to secure payment at a future date.
- (3) The administrative cost of refunding uncommitted fees in accordance with the requirements of Section 26.0710(a) exceeds the amount to be refunded, provided notice of a public hearing on this issue has been published and posted on the site of the *development* in not less than three places.

§26.0711 Failure to Maintain Artwork

Failure to maintain *artwork* in accordance with Chapter 2, Article 6, Division 7 is declared to be a public nuisance.

Section 6. That City departments are instructed not to issue any building permits for *development* inconsistent with the provisions of this ordinance unless application for such permit was submitted and *deemed complete* by the City Manager prior to _____ [the City Clerk is instructed to insert the effective date of this ordinance, once known, in the blank space provided].

Section 7. That a full reading of this ordinance is dispensed with prior to its final passage, a written or printed copy having been available to the City Council and the public a day prior to its final passage.

Section 8. This ordinance shall take effect and be in force on the thirtieth day from and after its passage.

APPROVED: CASEY GWINN, City Attorney

By _____
Eric A. Swenson
Deputy City Attorney

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