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AGENDA REPORT

TO: Members of the City Council

FROM: Councilmember Lynette
Gibson McElhaney

SUBJECT: Amendments to Chapter 15.78:
Public Art Requirements For Private
Development Ordinance

DATE: 04/12/18

RECOMMENDATION

Councilmember Lynette Gibson McElhaney recommends that the City Council adopt an ordinance amending Chapter 15.78 of the Oakland Municipal Code to (a) create an application process to evaluate alternative proposals to satisfy the public art requirement and (b) allow in-lieu contributions to a nearby public art and/or cultural facility to satisfy the public art requirement.

EXECUTIVE SUMMARY

Oakland Municipal Code (OMC) Chapter 17.78 'Public Art Requirements' currently offers few options for developers to make payments in-lieu of the required public art installation. These amendments allow the developer, subject to City Council approval, to satisfy the requirement by making an in-lieu contribution to a nearby, publicly owned art and/or cultural facility for capital improvements so that all Oaklanders can more fully utilize that resource. Additionally, these amendments provide an option for developers to apply for City Council approval to satisfy the public art requirement by alternate means.

BACKGROUND / LEGISLATIVE HISTORY

The City's current requirement for public art in private development, most recently amended by the City Council on June 20, 2017 (Ordinance No. 13443 C.M.S. and included in O.M.C. Chapter 15.78), is for certain nonresidential developments to contribute 1.0 percent and certain residential developments to contribute 0.5 percent of building development costs for freely accessible art and/or cultural facilities. The requirement for public art in private developments is applied to residential developments of 20 or more new dwelling units and subject to design review approval and nonresidential development of 2,000 square feet or more of new floor area and subject to design review approval. This contribution can be satisfied in one of three ways:

1. The entire contribution could be used by the developer for the acquisition and installation of permanent public art on the development site or the adjacent right-of-way (within one quarter of a mile).
2. The entire contribution could be satisfied through an in-lieu contribution by the developer that would be placed into the Public Art Project Account, which is used to acquire, place,

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and maintain public art on public property throughout the City, and to administer the Public Art Program.

3. The contribution could be satisfied, with approval from the City, including the Public Art Advisory Committee, through a combination of:
 - a. Up to 25 percent toward a rotating art gallery within the development project that is free and open to the public; and
 - b. Up to 50 percent toward design and dedication of a minimum 500 square feet of interior cultural and art space in the development that would be available to the public;
 - c. The balance would be paid as an in-lieu contribution into the Public Art Project Account.

ANALYSIS AND POLICY ALTERNATIVES

The proposed ordinance seeks to amend Chapter 15.78 to create two additional ways for developers to satisfy the required contribution:

- 1) The developer can apply to the City Council to satisfy the public art requirement by making an in-lieu contribution for capital improvements at a publicly owned art and/or cultural facility located within a mile from the development; or
- 2) The developer can apply to the City Council with an alternative means of satisfying the requirement.

These common sense amendments create additional flexibility to developers to satisfy the public art requirements while retaining strong public oversight by requiring City Council oversight. Additionally, funding for capital improvements for arts and culture facilities will bring badly needed improvements that all Oaklanders can enjoy.

FISCAL IMPACT

There is no anticipated fiscal impact from these amendments.

COORDINATION

Councilmember McElhaney's office coordinated with the Office of the City Attorney and the Cultural Affairs Division of the Department of Economic and Workforce Development in the drafting of this ordinance.

ACTION REQUESTED OF THE CITY COUNCIL

Adopt an ordinance amending Chapter 15.78 of the Oakland Municipal Code to (a) create an application process to evaluate alternative proposals to satisfy the public art requirement and (b) allow in-lieu contributions to a nearby public art and/or cultural facility to satisfy the public art requirement.

For questions regarding this report, please contact Alex Marqusee, Legislative Analyst, at 510-238-7031.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Lynette Gibson McElhaney", written in a cursive style.

Councilmember Lynette Gibson McElhaney

Prepared by:
Alex Marqusee, Legislative Analyst
Office of Councilmember McElhaney

OAKLAND CITY COUNCIL

ORDINANCE NO. _____ C.M.S.

ADOPT AN ORDINANCE AMENDING CHAPTER 15.78 OF THE OAKLAND MUNICIPAL CODE TO (A) CREATE AN APPLICATION PROCESS TO EVALUATE ALTERNATIVE PROPOSALS TO SATISFY THE PUBLIC ART REQUIREMENT AND (B) PERMIT IN-LIEU CONTRIBUTIONS TO NEARBY CITY OWNED ART AND/OR CULTURAL FACILITIES CONTINGENT ON COUNCIL APPROVAL TO SATISFY THE PUBLIC ART REQUIREMENT

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

WHEREAS, on December 9, 2014, the Oakland City Council adopted Ordinance No. 13275 C.M.S. to adopt Oakland Municipal Code Chapter 15.70, Public Art Requirements, which established a new requirement of .5% for residential or 1% for nonresidential of private development project costs for public art and codified, in part, the existing requirement of 1.5% of the City's capital improvement project costs for public art; and

WHEREAS, on June 27, 2017, the Oakland City Council adopted Ordinance No. 13443 C.M.S. that made amendments to Chapter 15.70 and adopted the chapter in a new section as Chapter 15.78; and

WHEREAS, new development generally results in aesthetic impacts to a community. As development and revitalization of real property within the City continues, the opportunity for creation of cultural and artistic resources is diminished. As these opportunities are diminished and urbanization occurs, the need to develop alternative sources for cultural and artistic outlets to improve the environment, image and character of the community is increased; and

WHEREAS, through the inclusion of public art or payment of an in-lieu fee, developers of benefitting land uses will address at least a portion of the impact of their developments on aesthetics; and

WHEREAS, the City of Oakland's public art requirement for private development was adopted so that development of cultural and artistic assets are financed by those

whose development diminishes the availability of the community's resources for those opportunities and contributes to community urbanization; and

WHEREAS, the Ordinance also provides the following benefits to the community: (a) maintain Oakland's art and culture for generations; (b) recognize the vital importance of the arts to the City as a whole; (c) enhance the economic sustainability of artists and arts organizations as a key to the vitality of the City of Oakland; and (d) make a lasting contribution to the intellectual, emotional and creative life of the community at large, and create a more desirable community to live, work, and recreate; and

WHEREAS, the public interest, convenience, health, safety and/or welfare require that public art be provided to address the legitimate public concern of mitigating the aesthetic impacts of development; and

WHEREAS, the legislative requirement to provide either public art or an in-lieu fee generally applies to all private developers, and is a permissible land use regulation and a valid exercise of the City's traditional police power; and

WHEREAS, public art enhances the quality of life for Oakland's citizens, residents, visitors and businesses, and provides a means to enjoy and experience the City's cultural diversity; and

WHEREAS, the City seeks to amend Chapter 15.78 to define a new mechanism by which residential developers can satisfy the previously adopted public art requirements by funding capital improvements to City owned art or cultural facilities; and

WHEREAS, funding capital improvements for the aforementioned facilities will increase the residents' resources for creating the arts and cultural activities that improve the environment, image and character of the community as intended by the public art requirements for residential developments; and

WHEREAS, the City seeks to amend Chapter 15.78 to create a process for developers to apply to the City Council to satisfy the public art requirement by alternative means; and

WHEREAS, this Ordinance serves the public interest and is necessary to protect and promote the health, safety, and/or welfare of the City of Oakland's constituents, and is enacted pursuant to Article XI, Sections 5 and 7, of the California Constitution, Section 106 of the Charter of the City of Oakland, the City's General Plan, specific plans and other land use plans; and

WHEREAS, Article XI, Section 5 of the California Constitution provides that the City, as a home rule charter city, has the power to make and enforce all ordinances and regulations in respect to municipal affairs, and Article XI, Section 7, empowers the City to enact measures that protect the health, safety, and/or welfare of its residents; and

WHEREAS, Section 106 of the Oakland City Charter provides that the City has the right and power to make and enforce all laws and regulations in respect to municipal affairs; and

WHEREAS, numerous policies enacted to support, protect and promote the health, safety and/or general welfare of Oakland's constituents are contained in the Land Use and Transportation Element of the City's General Plan and the Oakland Municipal Code, and include public art recommendations for the Broadway Valdez District Specific Plan, Central Estuary Area Plan, Coliseum Area Specific Plan, Lake Merritt Station Area Plan, West Oakland Specific Plan, and the pending Downtown Oakland Specific Plan; and

WHEREAS, the City has broad authority, under its general police power, to regulate the development and use of real property within its jurisdiction to promote the public welfare; and

WHEREAS, the public art requirement for private development serves the public interest and is necessary to protect the health, safety, and/or welfare of the citizens of Oakland; and

WHEREAS, this Ordinance is supported by sufficient justifications and/or evidence, including for reasons stated herein and in the record, and meets the appropriate legal standards, including without limitation the City's police power, constitutional standards, the terms of the Mitigation Fee Act, the Oakland City Charter, the Oakland Municipal and Planning Codes and the City's General Plan, specific plans and other land use plans/policies; and

WHEREAS, this action is exempt from the requirements of the California Environmental Quality Act (CEQA) pursuant to CEQA Guidelines sections 15060(c)(2) (no direct or reasonably foreseeable indirect physical change in the environment), 15061(b)(3) (no significant effect on the environment), and 15183 (projects consistent with a community plan, general plan, or zoning), each as a separate and independent basis, and when viewed collectively provide an overall basis for CEQA clearance; now, therefore,

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

SECTION 1. Recitals. The City Council finds and determines the foregoing recitals are true and correct and are an integral part of the City Council's decision, and are hereby adopted as findings.

SECTION 2. Amendments to Chapter 15.78 to the Oakland Municipal Code. Chapter 15.78 of the Oakland Municipal Code is hereby amended as follows. Existing provisions of the Oakland Municipal Code is shown as unmodified or in strikethrough, and new text shown in double underline.

15.78.070 - Contribution Requirements.

A. Calculation.

1. **Nonresidential Building Developments.** Private nonresidential building developments involving two thousand (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 freely accessible art on the development site or the adjacent right-of-way (within one-fourth (1/4) mile).
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 freely accessible art on the development site or the adjacent right-of-way (within one-fourth (1/4) mile).

B. In-Lieu Contribution. The in-lieu contribution can be satisfied in the following two (2) ways:

1. At the discretion of the developer and/or owner, and in lieu of installing public art, an in-lieu contribution shall be placed into the Public Art Project Account, as defined in Ordinance No. 11086 C.M.S., for acquisition and placement of public art throughout the City.

2. As an alternative to payment of the in-lieu contribution authorized under Subsection 15.78.070 (B)(1), the developer and/or owner may by special application to and approval by the City Council make a contribution to the City for the purpose of capital improvements to a specified City owned arts and/or cultural facility or facilities within one (1) mile of the development or any combination thereof.

- 2.3. As an alternative to payment of the in-lieu contribution authorized under Subsection 15.78.070(B)(1), the developer and/or owner may by special application and approval by the City satisfy up to seventy-five percent (75%) of the in-lieu contribution required hereunder as follows, if approved by the Public Art Advisory Committee, as defined in Ordinance No. 11086 C.M.S. The 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 in-lieu contribution; and/or
- b. Developer and/or owner's provision, design and commitment of at least five hundred (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 in-lieu contribution.

C. Exclusions. The requirements of this Chapter shall not apply to an affordable housing development if the developer and/or owner demonstrates to the satisfaction of the City that said requirements would cause the development project not to be economically feasible.

15.78.110 City Council Approval of Alternative Equivalent Proposals

As an alternative to strict compliance with the public art requirement, the developer and/or owner may by special application to and approval by the City Council complete an alternative equivalent proposal to fulfill the public art requirement imposed under this Chapter. The developer and/ or owner shall submit an application on a form prepared by the City Administrator or his or her designee specifically detailing all aspects of the alternative equivalent proposal, identifying each element of the proposal that will vary from any substantive or procedural requirements imposed under this Chapter. The developer and/ or owner must demonstrate that the cost of the alternative equivalent proposal will equal the cost of the public art contribution that would otherwise be required under Subsection 15.78.070, whether satisfied through the installation of public art, an in lieu fee, a combination thereof, or some other alternative. If the alternative equivalent proposal includes the installation of public art outside of the perimeter of ¼ mile of public right of way adjacent to the development site, or on real property or right of way owned or controlled by another public agency, the developer and/ or owner shall execute appropriate instruments transferring ownership and copyright of the artwork where required by the public agency, and assuming any additional maintenance, insurance or indemnity obligations on behalf of the City. The City Council may approve the alternative equivalent proposal by resolution if it finds that the alternative equivalent proposal will further the purposes of this ordinance as set forth under Subsection 15.78.020, that the cost of the alternative equivalent proposal will be equal to or greater than the cost of the public art contribution that would otherwise be required under Subsection 15.78.070, and that the developer and/ or owner has established, to the satisfaction of the City Council, that the alternative equivalent proposal will create freely accessible public art in the city to an equal or greater extent than installation of the public art on the development site or payment of in lieu fees. Compliance with the requirements of any alternative equivalent proposal approved by the City Council shall be demonstrated by the developer and/or owner at the time of filing the Building Permit application by submitting written proof to the Building Department and the Public Art Program of a checklist detailing all required documents for completion of the alternative equivalent proposal, including any agreements evidencing transfer of ownership or copyright and the developer and/ or owner's assumption of maintenance or indemnity obligations on the part of the city.

15.78.110-15.78.120 - Violations.

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 Chapter.

SECTION 3. Severability. If any section, subsection, sentence, clause or phrase of this Ordinance is for any reason held to be invalid or unconstitutional by

decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of the Chapter. The City Council hereby declares that it would have passed this Ordinance and each section, subsection, clause or phrase thereof irrespective of the fact that one or more other sections, subsections, clauses or phrases may be declared invalid or unconstitutional.

SECTION 4. Effective Date. This ordinance shall become effective immediately on final adoption if it receives six or more affirmative votes; otherwise it shall become effective upon the seventh day after final adoption.

IN COUNCIL, OAKLAND, CALIFORNIA,

PASSED BY THE FOLLOWING VOTE:

AYES - BROOKS, CAMPBELL WASHINGTON, GALLO, GUILLÉN, KALB, KAPLAN, GIBSON MCELHANEY AND
PRESIDENT REID

NOES -

ABSENT -

ABSTENTION -

ATTEST: _____

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

Date of Attestation: _____

NOTICE AND DIGEST

AN ORDINANCE AMENDING THE OAKLAND MUNICIPAL CODE CHAPTER 15.78 TO (A) CREATE AN APPLICATION PROCESS TO EVALUATE ALTERNATIVE PROPOSALS TO SATISFY THE PUBLIC ART REQUIREMENT AND (B) PERMIT IN-LIEU CONTRIBUTIONS TO NEARBY CITY OWNED ART AND/OR CULTURAL FACILITIES CONTINGENT ON COUNCIL APPROVAL TO SATISFY THE PUBLIC ART REQUIREMENT

The Ordinance amends the Public Art Requirements for Private Development contained in Chapter 15.78 of the Oakland Municipal Code to create an application process for developers to propose to the City Council alternative means of satisfying the public art requirements and allows for developers, with approval from City Council, to satisfy their public art requirements with an in-lieu contribution for capital improvements at nearby City owned arts and/or cultural facilities.