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OAKLAND

2017 FEB 16 PM 7:31

AGENDA REPORT

TO: Sabrina B. Landreth
City Administrator

FROM: Darin Ranelletti
Interim Director, PBD

SUBJECT: Revisions to Public Art Requirements
For Private Developments

DATE: February 6, 2017

City Administrator Approval

Date:

2/16/17

RECOMMENDATION

Staff Recommends That The City Council Conduct A Public Hearing And Upon Conclusion Consider Adopting An Ordinance Repealing Ordinance No. 13275 C.M.S., Amending The Oakland Municipal Code To Adopt Chapter 15.78, Public Art Requirements for Private Development, and Adopting CEQA Exemption Findings.

EXECUTIVE SUMMARY

Staff proposes several minor changes to the Public Art requirement for private development, which is currently contained in Chapter 15.70 of the Oakland Municipal Code. This Chapter is proposed to be deleted and replaced by a new Chapter 15.78, as described below. The most significant change to the requirements is a 20 percent reduction of the in-lieu contribution for new development that does not provide on-site public art to incentivize payments into the City's Public Art Projects Account.

BACKGROUND / LEGISLATIVE HISTORY

Current Requirements

The City's current requirement for public art in private development, adopted by the City Council on December 9, 2014 (Ordinance No. 13275 C.M.S. and included in O.M.C. Chapter 15.70), is for nonresidential development to contribute 1.0 percent and residential development 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 nonresidential development of 2,000 square feet or more. 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.
2. The entire contribution could be satisfied through an in-lieu contribution by the developer that would be placed into the Public Art Projects Account. This account is

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used to acquire, place, and maintain public art on public property 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:
 - 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 free and open to the public;
 - Up to 25 percent toward a rotating art gallery within the development project that is free and open to the public; and
 - The balance would be paid as an in-lieu contribution into the Public Art Projects Account.

Public Hearings

This item was previously brought to the Planning Commission on January 18, 2017, as an informational item, and to the Public Art Advisory Committee (PAAC) on January 9, 2017. At the PAAC and the Planning Commission, staff conveyed that these recommendations are being made now with the recognition that some other proposals may be considered during community discussions occurring in 2017 as part of the Downtown Specific Plan and Cultural Plan processes. Because these requirements are proposed for the Municipal Code (and not within the Planning Code), there was no formal action by the Planning Commission.

ANALYSIS AND POLICY ALTERNATIVES

Proposal

Staff proposes to delete Chapter 15.70 and adopt a new Chapter 17.78, entitled Public Art Requirements for Private Development. As authorized in Section 3 of Ordinance No. 13275 C.M.S., Staff further proposes the following changes to the existing requirements to improve the implementation of the ordinance, clarify the requirements, and provide internal consistency:

1. Reduce the in-lieu contribution for new development that does not provide public art to the following:

In-lieu contribution: percent of nonresidential building cost		In-lieu contribution: percent of residential building cost	
Existing Ordinance	Proposed Ordinance	Existing Ordinance	Proposed Ordinance
1.0%	0.8%	0.5%	0.4%

This change is proposed to provide an incentive to developers to pay the in-lieu contribution into the City's Public Art Projects Account. This account funds public art to

- be developed throughout the City, not just at or adjacent to a development site and gives the City more control over the provision of public art citywide;
2. Addition of a "procedure for exception" to provide a City process for an entity to petition a public art requirement on Fifth and Fourteenth Amendment grounds;
 3. Broaden the definition of "Developer" to be consistent with other jurisdictions with similar public art ordinances;
 4. Provide a clear requirement that the in-lieu contribution is due at the time of application for the building permit;
 5. Clarify that the public art requirement for private development can be placed either on site or on the right-of-way adjacent to the site;
 6. Revise the "Artist Verification" section to more accurately reflect City requirements;
 7. Provide more specific maintenance/ownership requirements; and
 8. Require signage identifying the public art at the site.

The proposal also includes changes to several definitions and terms in the Chapter to provide clearer direction to staff, the public, and developers. For instance, the definition of affordable housing is proposed to be consistent with the definition of affordable housing in the impact fee regulations. Other revisions include new or modified definitions of the terms "artist", "maintenance", "person", "developer", and "freely accessible".

Broader Changes to the Requirements

Community stakeholders have communicated to staff that additional changes should be proposed to the existing ordinance than those proposed, such as allowing public art to be located off-site and for the in-lieu contribution to be spent on cultural facilities and programs that are off-site from a development.

Staff believes that these changes require a broader policy discussion and public process than envisioned for the relatively minor changes proposed in this update. In particular, there are equity issues regarding concentrating public art funds, generated through in-lieu contributions, in the neighborhoods where development is most active instead of distributing the funds to projects throughout the City through an open and transparent process (currently, decisions on the distribution of funds in the Public Art Projects Account are made through an established public process that involves the Public Arts Advisory Committee and the City Council). There is no process for a developer to equitably choose which off-site arts program or facility should be provided funding from the public art requirement.

Staff also believes that relatively straightforward art requirements should be instituted until the implementation and administration of the program is well established. Introducing off-site cultural funding or public art into the regulations creates significant implementation challenges such as tracking how funds are spent, maintenance responsibilities, liability issues, code enforcement, and identifying appropriate permitting processes.

Therefore, staff proposes to have a future discussion of these broader changes as part of the City's Cultural Plan and Downtown Specific Plan processes. The Cultural Plan will commence

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this spring. A deeper discussion regarding related public art and cultural policy priorities will be reviewed in community and stakeholder discussions over the course of 2017 before making any additional proposed revisions to the ordinance. Staff proposes to return to the City Council with a report that evaluates the performance of the program within 12 months.

FISCAL IMPACT

Staff expects that lowering the in-lieu contribution will provide an incentive to developers to pay into the Public Art Projects Account instead of providing on-site art. The cost of administering the program through the Planning and Building Department is cost-covering through permit fees and in the Public Art Program through cost-recovery fees established in the Master Fee Schedule. Administration costs for any City-initiated projects funded directly by the Public Art Projects Account are covered by a percentage of those funds.

PUBLIC OUTREACH / INTEREST

Staff presented the proposal at a community meeting on January 26, 2017. Representatives from the development, public art, and performing arts communities attended. Staff presented background on the Public Art Program, to demonstrate engagement of artists early in the design process, and reviewed current public art requirements and proposed revisions. Several issues were discussed at that meeting, including, but not limited to:

- The original intent of the art in private development requirement as a land use enhancement;
- Allowing required public art to be located at off-site locations;
- The proposal to reduce the required in-lieu fees by 20 percent; and
- Allowing the public art requirement to be spent more flexibly than currently allowed, such as at off-site cultural spaces and programs.

Attendees requested further clarification on how funds in the public art account are allocated, expressed concern regarding funding for the arts in general and how to ensure funds generated are restricted to the creation of artwork. Additionally, attendees expressed a range of opinions on whether the proposed revisions, and a reduction in the in-lieu contribution, would result in more support for local artists, and how to create more flexible options for meeting the requirement.

COORDINATION

Planning staff has worked with the Cultural Affairs Division of the Economic and Workforce Development Department, the City Attorney, and the Controller's Bureau in the preparation of the proposed changes.

SUSTAINABLE OPPORTUNITIES

Economic: The generation of public art project opportunities financially supports local artists and attracts tourism by creating a sense of place and more sightseeing opportunities. Public art also supports the local arts culture, which had been a major contributor to making Oakland a destination for visitors.

Environmental: Staff believes the proposal will not have a negative impact on the environment and will enhance the aesthetic environment of the city.

Social Equity: Public art is supportive of equity because it is free of charge to the viewer and is freely accessible to the public.

CEQA

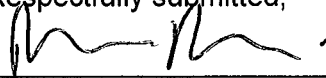
This action is exempt from the requirements of the California Environmental Quality Act (CEQA) pursuant to CEQA Guidelines sections 15060(c)(2) (no direct or reasonably foreseeable indirect physical change in the environment), 15061(b)(3) (no significant effect on the environment), and 15183 (projects 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.

ACTION REQUESTED OF THE CITY COUNCIL

Staff requests that the City Council adopt the subject ordinance repealing Ordinance No. 13275 C.M.S., amending the Oakland Municipal Code to adopt chapter 15.78, Public Art Requirements for Private Development, and adopting CEQA exemption findings.

For questions regarding this report, please contact Neil Gray, Planner IV, at (510) 238-3878 or ngray@oaklandnet.com.

Respectfully submitted,



DARIN RANELLETTI
Interim Director, Planning and Building
Department

Reviewed by:
Scott Miller, Zoning Manager

Prepared by:
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Zoning Division

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OFFICE OF THE CITY ATTORNEY

INTRODUCED BY COUNCILMEMBER _____

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

**ORDINANCE REPEALING ORDINANCE NO. 13275 C.M.S.,
AMENDING THE OAKLAND MUNICIPAL CODE TO ADOPT
CHAPTER 15.78, PUBLIC ART REQUIREMENTS FOR PRIVATE
DEVELOPMENT, AND ADOPTING CEQA EXEMPTION FINDINGS**

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, Ordinance No. 13275 C.M.S. expressly provides that the public art requirement 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; 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, the public art requirement is not a development exaction or development impact fee subject to heightened scrutiny under *Nollan/Dolan* or the Mitigation Fee Act, but even if heightened scrutiny were applicable, the public art requirement meets such heightened standards; and

WHEREAS, the Los Angeles County Economic Development Corporation's annual Otis Report on the Creative Economy consistently demonstrates that the arts have a significantly positive economic impact to overall tourism revenues in California and are one of the top five creative economy centers; and

WHEREAS, the Americans for the Arts, in their Arts & Economic Prosperity IV Report, document that the arts serve as economic drivers in the community, support jobs, and are the cornerstone of the tourism industry. Both the Otis Report and the Arts & Economic Prosperity IV Report also document the link between the arts and the overall economic health and vibrancy of the State; and

WHEREAS, cultural and artistic resources, which include visual artwork, the performing arts, and architectural resources, enhance the quality of life for individuals living in, working in, and visiting the City of Oakland, and enrich Oakland's visual environment and integrates the creative thinking of artists into the public realm and the streetscape; and

WHEREAS, balanced development of cultural and artistic resources preserves and improves the quality of the urban environment, increases real property values, and has a positive economic impact; 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 repeal Ordinance 13275 C.M.S. and amend the Oakland Municipal Code to adopt Chapter 15.78 to clarify the requirements and process that apply to the public art requirement for private development; 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, including the February 6, 2017 City Council Agenda Report, incorporated herein by reference, 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, the proposed amendments to the Oakland Municipal Code were considered at a regular, duly noticed meeting of the Public Art Advisory Committee on January 9, 2017; and

WHEREAS, the proposed amendments to the Oakland Municipal Code were considered at a regular, duly noticed meeting of the City Planning Commission on January 18, 2017; and

WHEREAS, this Ordinance was considered, after a duly noticed public meeting of the Community and Economic Development Committee on February 28, 2017, and the Committee recommended adoption of this Ordinance; and

WHEREAS, this Ordinance was considered, after a duly noticed public hearing, at a regular meeting of the City Council on March 7, 2017, and all interested parties were provided an ample opportunity to participate in said hearing and express their views; 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 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. Repeal of Ordinance No. 13275 C.M.S. Ordinance No. 13275 C.M.S., adopted by the City Council on December 9, 2014, is hereby repealed.

SECTION 3. Addition of Chapter 15.78 to the Oakland Municipal Code. Title 15 of the Oakland Municipal Code is hereby amended to add a new Chapter 15.78, to read as follows:

Chapter 15.78 - Public Art Requirements for Private Development

Sections:

Article I – Title

15.78.010 – Title

Article II – Administrative

15.78.020 – Purpose

15.78.030 – Definitions

15.78.040 – Conflict

15.78.050 – Amendments

15.78.060 – Administrative Regulations

Article III – Public Art Requirements

15.78.070 – Contribution Requirements

15.78.080 – Procedure for Exception

15.78.090 – Artist Requirement

15.78.110 – Compliance, Ownership and Maintenance

15.78.120 – Violations

Article I - Title

15.78.010 - Title

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

Article II - Administrative

15.78.020 – Purpose

The purpose of this Chapter is to establish a public art requirement for private development in order to provide 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. A policy is hereby established to require developers and/or owners of certain private developments to use a portion of building development costs for the acquisition and installation of freely accessible works of art for placement on or directly adjacent to the development site as a condition of project approval. Developers and/or owners are encouraged to employ Oakland artists and/or arts organizations to fulfill the public art requirement.

15.78.030 – 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" means housing that is restricted to occupancy at an affordable rent or an affordable housing cost to moderate-income households, low-income households, or very low-income households. The terms "affordable rent" and "affordable housing cost" shall be as defined in California Health & Safety Code sections 50053 and 50052.5 and their implementing regulations.

"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, sale of works, exhibition record, publications, and production of art work.

"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.

"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 this Chapter.

"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.

"FREELY ACCESSIBLE" means the artwork is accessible to the public for viewing, in its entirety and in a direct line of sight without hindrances or visual obstacles, during regular business hours consistent with the operation and use of the premises.

"MAINTENANCE" of artwork shall include, without limitation, preservation of the artwork and, where applicable, of the lighting and surrounding landscaping, in good condition to the satisfaction of the City; and protection of the artwork against physical defacement, mutilation or alteration.

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

"PERSON" means both the singular and plural and means and refers to any natural person, firm, association, organization, partnership, business, trust, corporation or public entity, or other group or combination of the foregoing acting as one.

"PUBLIC ART PROJECTS" are projects which involve artists working through the public art process that result in the creation of original works in freely 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, and/or 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 freely accessible space.

15.78.040 – Conflict

Wherever the provisions of this Chapter conflict with each other or with the provisions of other associated codes, regulations, or ordinances, the applicable requirements of this Chapter shall control.

15.78.050 – 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.

15.78.060 – Administrative Regulations

The City Administrator is hereby authorized to adopt rules and regulations consistent with this Chapter as needed to implement this Chapter, subject to the review and approval of the Office of the City Attorney, and to develop all related forms and/or other materials and take other steps as needed to implement this Chapter, and make such interpretations of this Chapter as he or she may consider necessary to achieve the purposes of this Chapter.

Article III - Public Art Requirements

15.78.070 – General Requirements

A. Nonresidential. Developers and/or owners of private nonresidential building facilities 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 subject to this Chapter shall elect one of the following to satisfy the public art contribution requirement:

1. Include freely accessible art on or directly adjacent to the development site valued at 1% of building development costs.
2. Pay an in-lieu fee of .80% of the building development costs to the City's Public Art Project Account for acquisition and placement of public art throughout the City.
3. By special application and approval by the City Administrator and the Public Art Advisory Committee, include cultural space on the development site valued at up to .75% of building development costs and pay an in-lieu fee of the remaining 1% to the City's Public Art Project Account for acquisition and placement of public art throughout the City, the combination of which is valued at 1% of building development costs. The on-site cultural space may consist of one or both of the following:

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 committed by the developer and/or owner for regular use as a rotating art gallery, free of charge, will be deemed to satisfy .25% of the Public Art Program in-lieu contribution; and/or

b. Developer and/or owner's provision, design and commitment that at least five hundred (500) square feet of space within the development project be made available to the public for the primary use of arts and cultural programming, will be deemed to satisfy .50% of the Public Art Program in-lieu contribution.

B. Residential. Developers and/or owners of private residential building facilities of twenty (20) or more new dwelling units shall elect one of the following to satisfy the public art contribution requirement:

1. Include freely accessible art on or directly adjacent to the development site valued at .50% of building development costs.

2. Pay an in-lieu fee of .40% of building development costs to the City's Public Art Project Account for acquisition and placement of public art throughout the City.

3. By special application and approval by the City Administrator and the Public Art Advisory Committee, include cultural space on the development site valued at up to .375% of building development costs and pay an in lieu fee of the remaining .50% to the City's Public Art Project Account for acquisition and placement of public art throughout the City, the combination of which is valued at .50% of building development costs. The onsite cultural space may consist of one or both of the following:

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 committed by the developer and/or owner for regular use as a rotating art gallery, free of charge, will be deemed to satisfy .125% of the Public Art Program in-lieu contribution; and/or

b. Developer and/or owner's provision, design and commitment that at least five hundred (500) square feet of space within the development project be made available to the public for the primary use of arts and cultural programming, will be deemed to satisfy .25% of the Public Art Program in-lieu contribution.

C. Exclusions. The requirements of this Article III shall not apply to that part of a development restricted to affordable housing 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.

15.78.080 – Procedure for Exception

1. Any person who contends application of this Chapter to him or her would constitute a First Amendment violation of speech and/or an uncompensated taking of property (in violation of the Fifth and Fourteenth Amendments of the U.S. Constitution or Article 1, Section 19, of the California Constitution) may petition the City Administrator to be excepted from the application of this Chapter.

2. Petitions must be on the form provided by the Planning Bureau of the Planning and Building Department ("Department") and submitted to the Department to the attention of the Planning Director. Failure to submit such a Petition will preclude such person from challenging this Chapter in court. The Petition shall identify the name and address of the applicant and property owner, the affected application number, and shall state specifically and completely how this Chapter applied to him or her would constitute a First Amendment violation of speech and/or an uncompensated taking of property (in violation of the Fifth and Fourteenth Amendments of the U.S. Constitution or Article 1, Section 19, of the California Constitution), and shall include payment of fees in the same amount as specified in the City's Master Fee Schedule for appeals of zoning determinations to the City Planning Commission. Failure to raise each and every issue and provide appropriate supporting evidence will constitute waiver of that issue and be grounds for denial of the Petition.

3. The Petition may be granted only if the City Administrator finds, based upon substantial evidence, that both (a) the application of any aspect of this Chapter would constitute an unconstitutional restriction on speech and/or an unconstitutional taking of property, and (b) the exception will allow additional or continued land uses only to the minimum extent necessary to avoid such restriction on speech and/or taking. If the Petition is granted, the City may impose reasonable conditions on the project.

4. The City Administrator, or designee, shall mail to the applicant a written determination accepting or rejecting the Petition.

5. If any interested party seeks to challenge the written determination of the City Administrator, he or she must appeal to the City Council and such appeal must be filed within ten (10) calendar days of the date from which the City Administrator's written determination was issued, by 4:00 p.m. Appeals must be on the form provided by the Department and submitted to the Department to the attention of the Planning Director. The appeal must state specifically wherein it is claimed there was error or abuse of discretion by the City Administrator and/or wherein the decision is not supported by substantial evidence. The appeal also must include payment of fees in the same amount as specified in the City's Master Fee Schedule for zoning appeals to the City Council of decisions by the City Planning Commission.

6. Failure to make a timely appeal will preclude any interested person from challenging the City's decision in court. The appeal itself must raise each and every issue that is contested, along with all arguments and evidence in the record which support the basis for the appeal. Failure to do so will preclude any interested person from raising such issues during the appeal and/or in court. However, the appeal will be limited to issues and/or evidence presented in the Petition to the City Administrator.

7. The City Council will conduct a public hearing and render a final administrative decision on the appeal via a resolution. The Petition may be granted only if the City Council finds, based upon substantial evidence, that both (1) the application of any aspect of this Chapter would constitute an unconstitutional restriction on speech and/or an unconstitutional taking of property, and (2) the exception will allow additional or continued land uses only to the minimum extent necessary to avoid such restriction on speech and/or taking. If the Petition is granted, the City may impose reasonable conditions on the project.

15.78.090 – Artist Requirement

Public art installed on or directly adjacent to the development site shall be designed by independent artists or artists working in conjunction with an arts or community organization that is verified by the City to be a 501(c)(3) tax designated organization in good standing. Developers and/or owners are encouraged to employ Oakland artists and/or arts organizations to fulfill the public art requirement. For the purposes of this Article III, "artists" shall not include members of the architectural, engineering, design, or landscaping firms retained for the design and construction of a development project.

15.78.110 – Compliance, Ownership and Maintenance

A. 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 by either: (a) payment of the full amount of the in-lieu fee, or (b) written proof to the Building Department and the Public Art Program of the Public Art for Private Development Checklist complete submittal package including budget and artist contract(s) for projects on or directly adjacent to the development site, or (c) a complete and approved cultural space plan.

B. The developer and/or owner shall install any required artwork or cultural space before issuance of the certificate of occupancy, unless the City has approved some other method of assuring compliance with the provisions of this Article, and maintain said artwork or cultural space in proper condition on an ongoing basis, in accordance with the maintenance guidelines referenced below.

C. All artwork or cultural space shall become the property of the developer and/or owner and successor(s) in interest. Artwork and cultural space cannot be sold or transferred other than to a subsequent successor in interest. The obligation to provide maintenance and security, as necessary to preserve the artwork or cultural space in good condition, shall remain with the developer and/or owner. In cases where public art is acquired and installed on or directly adjacent to the development site, or the developer and/or owner elects to provide cultural space on the development site, all of the following must occur prior to issuance of a certificate of occupancy for any project subject to this Article III:

1. A copy of the maintenance plan that includes information on materials, parts and fabricator contact information has been submitted to the City. Funds for maintenance are not part of the public art contribution requirement; and

2. A covenant setting forth the developer and/or owner's obligations under this Chapter has been executed and recorded with the Alameda County Recorder, and a conformed copy has submitted to the City. The covenant shall include a financial plan for the maintenance of the artwork or cultural space, a schedule of future condition checks, and preventative maintenance and restoration to conserve the artwork or cultural space at an appropriate level; and

3. A plaque has been installed adjacent to the artwork measuring no less than 8" x 8" or a proportionate size.

D. The City reserves the right to inspect the artwork or cultural space at any time to ensure it is being maintained as required by any covenant entered into pursuant to the provisions of Subsection 15.78.110(C).

E. Unless an artwork poses imminent danger to life or property, no person may destroy, permanently remove, relocate, change, alter, modify, or allow to be defaced, any artwork or portion thereof without the express consent of the City. This requirement will be included in the covenant to be recorded against the property.

F. If the developer and/or owner satisfies the public art requirement by installing artwork on or directly adjacent to the development site, and such artwork is subsequently removed or destroyed, the developer and/or owner must either 1) pay an in lieu fee to the City's Public Art Project Account in an amount equivalent to the original value of the removed artwork, or 2) install replacement art that fulfills the requirements of this Chapter. The decision on which option is chosen is made by the City, not the applicant.

G. If the developer and/or owner satisfies the public art requirement by including cultural space on the development site and such cultural space is subsequently removed or destroyed or ceases to be regularly available to the public, the developer and/or owner must pay an in lieu fee to the City's Public Art Project Account in an amount equivalent to the original value of the space.

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. California Environmental Quality Act. The City Council independently finds and determines that this action is exempt from 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 of which provides a separate and independent basis for CEQA clearance and when viewed collectively provide an overall basis for CEQA clearance.

SECTION 4. Authority. This Ordinance is enacted to serve the public interest and is necessary to protect the health, safety, and/or welfare of the citizens of Oakland, 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, and the City's General Plan, specific plans, and other land use plans.

SECTION 5. Severability. The provisions of this Ordinance are severable, and if any article, section, subsection, sentence, clause, phrase, paragraph, provisions, 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 remaining portions of the Ordinance which shall remain in full force and effect.

SECTION 6. Ordinance Effective Date. Pursuant to Section 216 of the Charter of the City of Oakland, this Ordinance shall become effective immediately on final adoption if it receives six (6) or more affirmative votes on final adoption; otherwise, it shall become effective upon the seventh day after final adoption. This Ordinance shall not apply to (a) building/construction related permits already issued and not yet expired, or (b) zoning applications approved by the City and not yet expired, or (c) 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 Oakland Municipal Code amendments if the applicant chooses to do so.

SECTION 7. Conforming Changes. The City Council hereby authorizes the City Administrator or designee to make non-substantive, technical conforming changes (essentially correction of typographical and clerical errors) prior to formal publication of the amendments in the Oakland Municipal Code.

SECTION 8. Conflict. Nothing in this Ordinance shall be interpreted or applied so as to create any requirement, power, or duty in conflict with any federal or state law.

SECTION 9. Notice of Exemption. The Environmental Review Officer, or designee, is directed to cause to be filed a Notice of Exemption with the appropriate agencies.

IN COUNCIL, OAKLAND, CALIFORNIA,

PASSED BY THE FOLLOWING VOTE:

AYES - BROOKS, CAMPBELL-WASHINGTON, GALLO, GIBSON MCELHANEY, GUILLEN, KALB, KAPLAN 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

ORDINANCE REPEALING ORDINANCE NO. 13275 C.M.S., AMENDING THE OAKLAND MUNICIPAL CODE TO ADOPT CHAPTER 15.78, PUBLIC ART REQUIREMENTS FOR PRIVATE DEVELOPMENT, AND ADOPTING CEQA EXEMPTION FINDINGS

This ordinance repeals Ordinance No. 13275 C.M.S. and makes several minor clarifications and refinements to the public art requirement for private development, which is currently in Chapter 15.70 of the Oakland Municipal Code. Chapter 15.70 of the Oakland Municipal Code will be deleted and replaced with a new Chapter 15.78.