



**CITY OF SOUTH PASADENA
PUBLIC ART COMMISSION
SPECIAL MEETING AGENDA**

**Council Chamber
1424 Mission Street, South Pasadena, CA 91030
September 28, 2020, at 6:30 p.m.**

South Pasadena Public Art Commission Statement of Civility

As your elected governing board, we will treat each other, members of the public, and city employees with patience, civility and courtesy as a model of the same behavior we wish to reflect in South Pasadena for the conduct of all city business and community participation. The decisions made tonight will be for the benefit of the South Pasadena community and not for personal gain.

NOTICE ON PUBLIC PARTICIPATION & ACCESSIBILITY

Pursuant to Section 3 of Executive Order N-29-20, issued by Governor Newsom on March 17, 2020, the Special Meeting of the Public Art Commission for September 28, 2020 will be conducted remotely and held by Zoom video conference.

Please be advised that pursuant to the Executive Order, and to ensure the health and safety of the public by limiting human contact that could spread the COVID-19 virus, the Council Chambers will not be open for the meeting. Commission Members will be participating remotely and will not be physically present in the Council Chambers.

To maximize public safety while still maintaining transparency and public access, members of the public can observe the meeting via Zoom in one of the three methods below.

**Public Art Commission
Zoom Meeting Information
Meeting ID: 994 9348 5342
Passcode: 317576**

1. Go to the Zoom website, <https://zoom.us/join> and enter the Zoom Meeting information accordingly; or
2. Click on the following unique Zoom meeting link:
<https://zoom.us/j/99493485342?pwd=cIM4ZVFhS2dmbldYNIBHd3V1Rlo2Zz09>; or
3. You may listen to the meeting by calling: +1-669-900-6833 and entering the Zoom Meeting ID and Passcode when prompted to do so.

For additional Zoom assistance with telephone audio, you may find your local number at:
<https://zoom.us/u/adz9VBkd7p>

IMPORTANT NOTE: Members of the public may access the meeting to observe the meeting’s proceedings; however, at this time, there is no live, real-time participation by members of the public.

PUBLIC COMMENTS

The Public Art Commission welcomes public input. For Public Comment on Special Meeting Agenda Items, please note that pursuant to Government Code § 54954.3(a), members of the public may provide public comment on any item **described on the agenda only.**

If you would like to comment on an agenda item, members of the public may submit public comments in writing for Public Art Commission consideration by emailing comments or questions to PublicArtComments@southpasadenaca.gov by 12:30 p.m. on Monday, September 28, 2020, to ensure adequate time to compile and post. Please provide: 1) your name, and 2) agenda item for the comments/questions. All comments/questions will be distributed to the Commission for consideration and will also be posted on the City’s website prior to the meeting.

Pursuant to state law, the Public Art Commission may not discuss or take action on issues not on the meeting agenda, except that members of the Public Art Commission or staff may briefly respond to statements made or questions posed by persons exercising public testimony rights (Government Code Section 54954.2). Staff may be asked to follow up on such items.

CALL TO ORDER: Steven Wong, Chair

ROLL CALL: Phung Huynh, Vice-Chair
Jeffrey Burke
Kris Kuramitsu
Jaz Sawyer, Ed.D.

COUNCIL LIAISONS: Richard D. Schneider, M.D.

STAFF PRESENT: Margaret Lin, Manager of Long Range Planning and Economic Development

COMMUNICATIONS

- 1. **City Council Liaison Communications**
- 2. **Commissioner Communications**
- 3. **Staff Liaison Communications**

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ACTION/DISCUSSION**4. August 26, 2020 Meeting Minutes**Recommendation

It is recommended that the Commission review and approve the August 26, 2020 Meeting Minutes.

5. Al Fresco Dining and Retail Pilot Program - Traffic Control DevicesRecommendation

It is recommended that the Commission discuss and provide feedback regarding the proposal by the South Pasadena Arts Council to incorporate art on the traffic control devices for the Al Fresco Dining and Retail Pilot Program.

6. Artist Rights - California Art Preservation ActRecommendation

It is recommended that the Commission discuss and provide feedback regarding the California Arts Preservation Act.

ADJOURNMENT**PUBLIC ACCESS TO AGENDA DOCUMENTS**

The complete agenda packet may be viewed on the City's website at:

<https://www.southpasadenaca.gov/government/boards-commissions>

Meeting recordings will be available for public viewing after the meeting. Recordings will be uploaded to the City's YouTube Channel no later than the next business day after the meeting.

The City's YouTube Channel may be accessed at:

https://www.youtube.com/channel/UCnR169ohzi1AIewD_6sfwDA/featured

ACCOMMODATIONS

The City of South Pasadena wishes to make all of its public meetings accessible to the public. If special assistance is needed to participate in this meeting, please contact the City Clerk's Division via e-mail at CityClerk@southpasadenaca.gov or by calling (626) 403-7230. Upon request, this agenda will be made available in appropriate alternative formats to persons with disabilities. Notification at least 48 hours prior to the meeting will assist staff in assuring that reasonable arrangements can be made to provide accessibility to the meeting (28 CFR 35.102-35.104 ADA Title II).

I declare under penalty of perjury that I posted this notice of agenda on the bulletin board in the courtyard of City Hall at 1414 Mission Street, South Pasadena, CA 91030, and on the City's website as required by law.

9/24/20

Date



Margaret Lin

Manager of Long Range Planning and Economic Development

**MINUTES OF THE REGULAR MEETING OF THE
PUBLIC ART COMMISSION
OF THE CITY OF SOUTH PASADENA
CONVENED THIS 26th DAY OF AUGUST 2020 6:32 P.M.
CITY COUNCIL CHAMBERS
1414 MISSION STREET**

CALL TO ORDER/ROLL CALL	The regular meeting of the Public Art Commission (Commission) was convened at 6:32 P.M. Commissioners present: Burke, Kuramitsu, Huynh, Sawyer, and Wong; Commissioner absent: none; Council Liaison: Schneider; and Staff present: Manager of Long Range Planning and Economic Development (Manager) Lin.
PUBLIC COMMENTS (ITEMS NOT ON THE AGENDA)	None.
1. CITY COUNCIL LIAISON COMMENTS	Councilmember Schneider referred the Al Fresco Dining and Retail Pilot Program barricades to the Public Art Commission for consideration to incorporate public art.
2. COMMISSIONER COMMENTS	None.
3. STAFF LIAISON COMMENTS	None.
ACTION/DISCUSSION ITEMS	
4. APPROVAL OF THE MINUTES	Commissioner Huynh made a motion to approve the minutes, seconded by Commissioner Burke (5 ayes, 0 noes, 0 absent).
5. BLACK LIVES MATTER MURAL AD HOC COMMITTEE	<p>Students from the Anti-Bias Club provided a presentation of their proposed Black Lives Matter (BLM) Mural project and their Request for Proposals. The Commission held a discussion and asked questions of the students. Commissioner Huynh stated that the BLM Mural Ad Hoc Committee will guide the students through the artist selection process but will not be voting members. The Commission praised the students for their work.</p> <p>Commissioner Huynh raised concerns that the City's contract would require artists to waive their rights. Councilmember Schneider stated that this should be brought to the City Council's attention. Commissioner Sawyer stated that he wanted to make sure that a copyright waiver does not happen. Commissioner Burke stated that the Commission should develop a position on artist rights and requested that an item regarding intellectual property and artists rights, including the California Art Preservation Act be discussed by the Commission.</p>

6. AL FRESCO DINING AND RETAIL PILOT PROGRAM - TRAFFIC CONTROL DEVICES	Manager Lin provided a presentation regarding the City’s Al Fresco Dining and Retail Pilot Program. Councilmember Schneider stated that some cities have used other materials and would like the Commission to consider the integration of public art on the cement barricades. Chair Wong suggested that SPARC could extend their utility box art project and work with the City to identify funding sources for the project. Commissioner Burke suggested that an Ad Hoc Committee be created to work with SPARC and develop a public art program for the barricades. Commissioner Huynh suggested using the remainder of the funds from the Civic Center Art Gallery to fund the project. Commissioners Burke and Kuramitsu were nominated to serve on the ad hoc committee.
ADJOURNMENT	By consensus, the Commission adjourned the meeting at 7:45 P.M.

Approved By:

Steven Wong
Chair

DRAFT



Public Art Commission Agenda Report

DATE: September 24, 2020

FROM: Joanna Hankamer, Director of Planning and Community Development
Margaret Lin, Manager of Long Range Planning and Economic Development

SUBJECT: **Al Fresco Dining and Retail Pilot Program - Traffic Control Devices**

Recommendation

It is recommended that the Commission review and discuss the South Pasadena Arts Council's (SPARC) proposal for the Al Fresco Dining and Retail Pilot Program (Al Fresco Program) traffic control devices.

Discussion/Analysis

SPARC is proposing to curate images from up to approximately 40 artists, with an emphasis on works by artists from South Pasadena. The artwork will include paintings, drawings, photography, poetry and prose printed on vinyl wraps. The available space includes approximately 1,000 square feet of space (approximately 355 linear feet comprised of 20, 10, and 5-foot concrete traffic control barricades). The selected artwork will be presented to the Commission for final approval. SPARC will be able to begin installation of the artwork within 10-days of the contract execution and will do so in a phased approach over four to five days during a three week period. SPARC's proposal to administer, curate, produce, install, maintain and uninstall the project will be for a total not-to-exceed of \$7,000. The artwork display is intended to be temporary. The barricades, and therefore the artwork, is anticipated to remain in place until 90-days after the end of the local emergency.

Background

On August 19, 2020, the City Council approved Phase 2 of the Al Fresco Program authorizing the use of parking lanes, where feasible, for outdoor dining and retail purposes to support local businesses. Based on applications submitted and local business feedback five locations were finalized. On September 10 and 17, 2020, concrete barricades used for the Program were installed at the five locations on Mission Street, in front of the following businesses:

- Jones Coffee Roasters
- Teamorrow/Griffins of Kinsale
- Aro Latin
- Mike and Anne's
- Shiro

Public Notification of Agenda Item

The public was made aware that this item was to be considered this evening by virtue of its inclusion on the legally publicly noticed agenda, posting of the same agenda and reports on the City's website and/or notice in the *South Pasadena Review* and/or the *Pasadena Star-News*.

Attachment: SPARC Proposal (to be provided in an Additional Document)



Public Art Commission Agenda Report

DATE: September 24, 2020

FROM: Joanna Hankamer, Director of Planning and Community Development
Margaret Lin, Manager of Long Range Planning and Economic Development

SUBJECT: Artists Rights - California Art Preservation Act

Recommendation

It is recommended that the Commission review and discuss the California Art Preservation Act.

Discussion/Analysis

The California Art Preservation Act was adopted in 1979 to provide legal protection for artists' rights. The City's Public Art Program Ordinance outlines the public art approval process and includes the following requirement:

“Written agreement executed by or on behalf of the artist who created or is creating the artwork which expressly waives their rights under the California Art Preservation Act or other applicable laws;”

This provision was included to provide the City with the ability to remove or relocate public art from public properties if necessary; and to take photos of the artwork and reproduce them.

Background

On October 17, 2018, the City Council also approved Ordinance No. 2325 to establish a Public Art Development Fee Program.

Public Notification of Agenda Item

The public was made aware that this item was to be considered this evening by virtue of its inclusion on the legally publicly noticed agenda, posting of the same agenda and reports on the City's website and/or notice in the *South Pasadena Review* and/or the *Pasadena Star-News*.

Attachments:

1. California Art Preservation Act
2. Framework for an Artist Friendly Municipal Policy
 - a. Item 1 is a draft of best practices for municipally sponsored art projects.
 - b. Item 2 is a white paper specifically discussing copyright and IP issues. It gives an example of how to mitigate public liability while still leaving Artist owning and controlling of their works.

State of California

CIVIL CODE

Section 987

987. (a) The Legislature hereby finds and declares that the physical alteration or destruction of fine art, which is an expression of the artist's personality, is detrimental to the artist's reputation, and artists therefore have an interest in protecting their works of fine art against any alteration or destruction; and that there is also a public interest in preserving the integrity of cultural and artistic creations.

(b) As used in this section:

(1) "Artist" means the individual or individuals who create a work of fine art.

(2) "Fine art" means an original painting, sculpture, or drawing, or an original work of art in glass, of recognized quality, but shall not include work prepared under contract for commercial use by its purchaser.

(3) "Person" means an individual, partnership, corporation, limited liability company, association or other group, however organized.

(4) "Frame" means to prepare, or cause to be prepared, a work of fine art for display in a manner customarily considered to be appropriate for a work of fine art in the particular medium.

(5) "Restore" means to return, or cause to be returned, a deteriorated or damaged work of fine art as nearly as is feasible to its original state or condition, in accordance with prevailing standards.

(6) "Conserve" means to preserve, or cause to be preserved, a work of fine art by retarding or preventing deterioration or damage through appropriate treatment in accordance with prevailing standards in order to maintain the structural integrity to the fullest extent possible in an unchanging state.

(7) "Commercial use" means fine art created under a work-for-hire arrangement for use in advertising, magazines, newspapers, or other print and electronic media.

(c) (1) No person, except an artist who owns and possesses a work of fine art which the artist has created, shall intentionally commit, or authorize the intentional commission of, any physical defacement, mutilation, alteration, or destruction of a work of fine art.

(2) In addition to the prohibitions contained in paragraph (1), no person who frames, conserves, or restores a work of fine art shall commit, or authorize the commission of, any physical defacement, mutilation, alteration, or destruction of a work of fine art by any act constituting gross negligence. For purposes of this section, the term "gross negligence" shall mean the exercise of so slight a degree of care as to justify the belief that there was an indifference to the particular work of fine art.

(d) The artist shall retain at all times the right to claim authorship, or, for a just and valid reason, to disclaim authorship of his or her work of fine art.

(e) To effectuate the rights created by this section, the artist may commence an action to recover or obtain any of the following:

(1) Injunctive relief.

(2) Actual damages.

(3) Punitive damages. In the event that punitive damages are awarded, the court shall, in its discretion, select an organization or organizations engaged in charitable or educational activities involving the fine arts in California to receive any punitive damages.

(4) Reasonable attorneys' and expert witness fees.

(5) Any other relief which the court deems proper.

(f) In determining whether a work of fine art is of recognized quality, the trier of fact shall rely on the opinions of artists, art dealers, collectors of fine art, curators of art museums, and other persons involved with the creation or marketing of fine art.

(g) The rights and duties created under this section:

(1) Shall, with respect to the artist, or if any artist is deceased, his or her heir, beneficiary, devisee, or personal representative, exist until the 50th anniversary of the death of the artist.

(2) Shall exist in addition to any other rights and duties which may now or in the future be applicable.

(3) Except as provided in paragraph (1) of subdivision (h), may not be waived except by an instrument in writing expressly so providing which is signed by the artist.

(h) (1) If a work of fine art cannot be removed from a building without substantial physical defacement, mutilation, alteration, or destruction of the work, the rights and duties created under this section, unless expressly reserved by an instrument in writing signed by the owner of the building, containing a legal description of the property and properly recorded, shall be deemed waived. The instrument, if properly recorded, shall be binding on subsequent owners of the building.

(2) If the owner of a building wishes to remove a work of fine art which is a part of the building but which can be removed from the building without substantial harm to the fine art, and in the course of or after removal, the owner intends to cause or allow the fine art to suffer physical defacement, mutilation, alteration, or destruction, the rights and duties created under this section shall apply unless the owner has diligently attempted without success to notify the artist, or, if the artist is deceased, his or her heir, beneficiary, devisee, or personal representative, in writing of his or her intended action affecting the work of fine art, or unless he or she did provide notice and that person failed within 90 days either to remove the work or to pay for its removal. If the work is removed at the expense of the artist, his or her heir, beneficiary, devisee, or personal representative, title to the fine art shall pass to that person.

(3) If a work of fine art can be removed from a building scheduled for demolition without substantial physical defacement, mutilation, alteration, or destruction of the work, and the owner of the building has notified the owner of the work of fine art of the scheduled demolition or the owner of the building is the owner of the work of

fine art, and the owner of the work of fine art elects not to remove the work of fine art, the rights and duties created under this section shall apply, unless the owner of the building has diligently attempted without success to notify the artist, or, if the artist is deceased, his or her heir, beneficiary, devisee, or personal representative, in writing of the intended action affecting the work of fine art, or unless he or she did provide notice and that person failed within 90 days either to remove the work or to pay for its removal. If the work is removed at the expense of the artist, his or her heir, beneficiary, devisee, or personal representative, title to the fine art shall pass to that person.

(4) Nothing in this subdivision shall affect the rights of authorship created in subdivision (d) of this section.

(i) No action may be maintained to enforce any liability under this section unless brought within three years of the act complained of or one year after discovery of the act, whichever is longer.

(j) This section shall become operative on January 1, 1980, and shall apply to claims based on proscribed acts occurring on or after that date to works of fine art whenever created.

(k) If any provision of this section or the application thereof to any person or circumstance is held invalid for any reason, the invalidity shall not affect any other provisions or applications of this section which can be effected without the invalid provision or application, and to this end the provisions of this section are severable.

(Amended by Stats. 1994, Ch. 1010, Sec. 30. Effective January 1, 1995.)

STATEMENT OF PURPOSE:

Proposed Best Practices For Public Art Projects

Throughout the United States, agencies and organizations have been using art to expand constituents' experience of the public realm. With so many entities involved in managing public art projects in varying manners, the Public Art Network (PAN) [Council](#) and [Americans for the Arts](#) (AFTA) established these Best Practices out of a desire to establish a baseline for public art practices. The starting place, or baseline stage, must provide general principles that are equally relevant and agreeable to administrators, artists and other public art professionals. Once established, the baseline will provide a framework for more in-depth conversations to tease out the more complex underlying issues.

This more detailed exchange will clarify instances where different players in the public art field have diverse interests or specific pressures dictating their particular viewpoint. By parsing and articulating these diverse perspectives, the baseline principles will be annotated to provide a multi-dimensional look at public art practices.

These Best Practices are specifically drafted with discourse in mind. It is true that enforcement at this point can only be achieved through peer opinion, but Best Practices Standards will be a great resource for both developing and maturing programs. Administrators, artists and other public art professionals will be able to point to clear Best Practice Standards that have been developed and approved on a national level designed specifically to assist in the development, drafting and execution of public art policy at the local level.

In sum, our goals are:

1. To approve Best Practices recognized as the national standard by AFTA/PAN.
2. Disseminate the approved Best Practices through AFTA's outreach and [supportive communication](#) from Robert L. Lynch, President and CEO of AFTA.
3. Programs that adopt and follow these Best Practices will be recognized by AFTA/PAN.
4. A committee comprised of PAN Council members and general members shall meet regularly to discuss and draft annotated language to accompany these Best Practices.
5. Communications to AFTA/PAN membership regarding amendments and developments in the Best Practices will be regularly disseminated to the AFTA membership and public art community.

DEFINED TERMS

Administrator: includes public art administrators, public art program representatives, art consultants, developers and any other person or team working on behalf of a commissioning body or entity.

Agreement: includes any written agreement pertaining to the planning, design, development, fabrication, delivery and/or installation of an Artwork, including but not limited to letters of intent (LOIs), memoranda of understanding (MOUs), commission agreements, contracts and construction agreements.

Artist: includes individual artists as well as artist teams.

Artwork: unless otherwise restricted by the language of the particular statement, and excluding ancillary deliverables such as budgets and maintenance manuals, “Artwork” includes any permanent and/or temporary work as defined in the scope of work of an Agreement.

PROPOSED BEST PRACTICES FOR PUBLIC ART PROJECTS

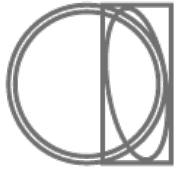
1. Administrators should clearly represent the scope and budget of project in Calls for Artists and communications.
2. Artists should truthfully represent their role and the nature of past work when presenting portfolios.
3. Artists should design to available budgets and propose what they can realistically deliver within budget, especially during design competitions.
4. Administrators/Consultants should not ask Artists to appropriate or use designs proposed by other Artists in a competition (e.g. cherry pick from among other competitors). Nor should Artists use other Artists’ ideas or concepts proposed during a competition.
5. Any organization or entity commissioning Artwork should pay Artists for design proposals.
6. Administrators should ensure a legal and fair process for developing projects and selecting Artists.
7. All organizations and entities commissioning Artwork should consider their process for developing projects and selecting Artists in light of the principles in Americans for the Arts [Statement on Cultural Equity](#).
8. As reasonably possible and consistent with existing privacy policies and legal requirements, Agencies should protect Artists’ private information.
9. Arts professionals should be involved in the Artist selection process.
10. Administrators/Consultants should not receive money from Artists being considered or awarded a project.

11. To avoid actual conflict or the appearance of impropriety, real or perceived conflicts of interest should be disclosed, and impacted decision-makers should abstain from involvement in the process.
12. All projects should have a written Agreement that includes a clear articulation of: scope of work, budget and schedule. *
13. All parties should have time to read and understand agreements prior to signing, and may seek legal and/or business counsel.
14. Agreements should clearly articulate the process by which project changes are approved and any changes should always be made in writing.
15. If substantial redesign of a contracted artwork or an entirely new proposal is requested, due to no fault of the Artist, the Artist should be compensated.
16. Realistic life span of an Artwork should be mutually agreed by all parties and written into the Agreement.
17. Artists should choose appropriate materials for artwork based on the expected life. Care should be taken when integrating components into the Artwork that are not warranted for the minimum warranty period required in the Agreement. Attention should be paid to integrated components that may void underlying warranties.
18. Artist warranties should not exceed two years.
19. With regard to manufacturer warranties for integrated components, Artists should be required to only pass along those warranties provided by the manufacturer.
20. Where reasonable, obtainable insurance is required by law, municipal policy and/or in an Agreement, Administrators should work with Artists to assess the true cost of this insurance so that Artists can budget. As only licensed professionals can obtain professional liability and/or errors and omission progressive insurance, Artists who are not licensed professionals should have this requirement waived. However, Agreements may require licensed sub-contractors carry professional liability or errors and omissions insurance.
21. Administrators should not ask Artists to take on unreasonable or inappropriate liability.
22. Artists should have Agreements with their subcontractors, and include all relevant requirements of the prime contract in the sub-contract Agreement.*
23. Project payment schedule should meet the cash flow needs of the Artwork schedule of deliverables.
24. Artists should retain copyright to their Artwork. However, Artists should expect to grant license to the contracting agency or ultimate owner for reasonable use of images of the Artwork for publicity, educational, and reasonable promotional purposes upon which the parties agree.
25. Artists and commissioning bodies and/or owners should provide reciprocal credit for their respective roles in commissioned Artworks.
26. Maintenance and conservation plans should be discussed and mutually agreed

upon and Artists should prepare a detailed and feasible maintenance and conservation plan.

27. Commissioning bodies and/or ultimate owners should have collection management policies in place and notify Artists of these policies.
28. If an Artwork is damaged, Administrators should make a good faith effort to consult the Artist about repairs. Administrators are not obligated to work with Artists to make repairs, but should use best conservation practices.
29. If Visual Artist Rights Act (VARA) rights are waived, Agreements should nonetheless provide that, in the event of damage, alteration, or destruction of an Artwork that is not remedied to Artist's satisfaction, or relocation without Artist's approval, if the Artist believes the Artwork no longer represents his/her work, the Artist should have the right to remove his/her name from the Artwork.

*Look at the PAN [resources](#) available on the Americans for the Arts website for sample documents.



ArtConverge White Paper:

COPYRIGHT OWNERSHIP FOR COMMISSIONED ART

By Sarah Conley Odenkirk

A. THE CHALLENGE

Ownership of copyrights has become a hot topic in public art commissions as the value and importance of public art collections in both public and private contexts is more widely recognized. Historically, copyright remains with the artist even after a project is installed. But, in an effort to preclude future challenges or liabilities, lawyers representing commissioning parties are more frequently drafting commission agreements to require a full assignment and transfer of copyrights as well as a blanket waiver of Visual Artist Rights Act (VARA) rights (and in California, California Arts Preservation Act (CAPA) rights as well). Not only is this recognized as a violation of best practices in the public art field, but it is not necessary in order to provide the owner of the public art with legal protection. In fact, owning the copyright may very well create unintended liabilities and ultimately damage the ability of developers and public art programs to realize the maximize potential of their public art commissioning opportunities.

Best Practices Dictate That Artists Retain Copyright Ownership

In 2017 the Public Art Network Council of the Americans for the Arts adopted a 29-point statement outlining the most important best practices to be followed in the field of public art. This document can provide a helpful basis for conversations and the construction of policies, procedures and contracts. One of the best practices listed is that artists should retain copyright to their artwork.¹ Currently, the Council

¹ “Artists should retain copyright to their Artwork. However, Artists should expect to grant license to the contracting agency or ultimate owner for reasonable use of images of the Artwork for publicity, educational, and reasonable promotional purposes upon which the parties agree.” Best Practices as published by Americans for the Arts online at <https://www.americansforthearts.org/by-program/networks-and-councils/public-art-network/tools-resources/public-art-administrators>.

and other public art professionals are in the process of annotating these best practices, so look for updates in the near future.

Tools To Bridge The Disconnect Between Art And The Law

Having tools to assist in constructing an acceptable and functional structure for public art commissions is crucial in building impactful programs at every level. One valuable tool is that of *communication*. Open and respectful communication is crucial for all contract negotiations, and particularly helpful when all parties should be working toward the same outcome.

Another effective tool to be employed at the beginning of any conversation about commission contract language is *empathy*. Commissioning Parties are concerned with liability and efficient expenditure of public, donor, or investor funds. Artists are concerned with building and maintaining sustainable careers and being treated respectfully. Commissioning Parties approach most issues from an objective standpoint that puts the financial interests and well-being of the community or company front and center. Artists, no matter how business-savvy, tend to focus on creative expression and aesthetic impact. Ultimately, creative and aesthetic considerations are what makes artistic interventions powerful and able to touch a diverse audience. Most lawyers try to keep personal feelings out of the work of drafting contracts, but passion and engagement is a crucial component to creating good art. This is where the nexus of art and law can expose a disconnect in the different thinking processes of lawyers and artists. Luckily, the goals of Commissioning Parties and Artists need not be mutually exclusive. Using good communication and empathy, both parties will be able to better negotiate mutually satisfactory contract language and sustainable public art programs.

B. THE COMMISSIONING PARTY PERSPECTIVE

Commissioning Parties Worry About Future Liabilities

As we deploy empathy to consider the position of Commissioning Parties, an important question to ask is: Why, contrary to best practices, do lawyers want to include blanket waivers of rights and copyright transfers in the commission agreements in the first place? They are almost certainly not planning to go into business exploiting the works for gift shop profits (though that is another potential concern in some cases). Generally, the answer is that waivers and transfers are an easy and expeditious way to ensure that Owners need not advise Artists of what happens to the artwork in the future, and Artists cannot raise any objections down the road to the way in which the art is treated, exploited, maintained, relocated removed or destroyed. The fear of possible future liability can be heightened in the public context by the fact that many municipalities commissioning work are self-insured. Thus, government attorneys tend to be especially highly motivated by the quest to reduce potential municipal liabilities, present and future. Ultimately, it is

hoped that requiring blanket waivers and transfers will nip in the bud any potential future challenges from artists and definitively ensure that Artists do not create other duplicate works for another client down the road. Unfortunately, this stance may unwittingly create other potential concerns.

Owners Must Be Prepared To Manage And Protect The Copyrights

When a copyright is transferred to an artwork, the owner (Commissioning Party or otherwise) also acquires the administrative burden that comes with the ownership of intellectual property rights. Proper intellectual property management dictates that copyrights should be registered with the Library of Congress. Proof of registration is the only way to access potential remedies in the event of third party infringements. Failure to register the copyrights will prevent the owner from pursuing any enforcement actions and could result in squandering the intellectual property and damaging the reputation of the artist. It is both disrespectful to the artist and the artwork and a waste of individual, company or taxpayer resources to require the waivers and transfers solely to prevent future issues with the artist while neglecting to properly manage and defend, if necessary, the intellectual property assets.

Copyright Transfer Does Not Include or Negate Moral Rights

Pursuant to the terms of the Visual Artists Rights Act (VARA) found at §106A of the Copyright Law, even if copyright ownership is transferred pursuant to a signed writing, the moral rights granted by VARA are not transferrable and last for the life of the author. Additionally, a number of states also have state law equivalents to VARA which either match or exceed the protection offered under VARA. In order to avoid future liability based on state or federal moral rights legislation, commission agreements often contain a waiver of these rights. Again, best practices dictate that when moral rights are waived, there should be some replacement language included in the agreement which provides for reasonable notice to the artist of any impending plans to remove, relocate or destroy an artwork.² Rather than hinder the process of commissioning and maintaining public art, recognition of sensible and administrable rights should clarify what each party can reasonably expect in the future with regard to how the artwork and Artist will be treated.

The Big Picture

The attorneys advising art programs need to be especially cognizant of the way that contract terms impact the overall reputation and character of the program.

² "If Visual Artist Rights Act (VARA) rights are waived, Agreements should nonetheless provide that, in the event of damage, alteration, or destruction of an Artwork that is not remedied to Artist's satisfaction, or relocation without Artist's approval, if the Artist believes the Artwork no longer represents his/her work, the Artist should have the right to remove his/her name from the Artwork." Best Practices as published by Americans for the Arts online at <https://www.americansforthearts.org/by-program/networks-and-councils/public-art-network/tools-resources/public-art-administrators>.

Choosing to take a hardline approach might create more certainty with regard to liability issues and sound good to owners and oversight bodies relatively uninformed on art-specific issues. But fostering a program that is viewed as not friendly to artists can have long term effects on the ability of that program to attract the best talent and curate the best public art collection. Taking a softer approach that focuses on what the Commissioning Party actually needs and letting the Artists retain the rest, broadcasts a very different approach. Showing that a company or community is enlightened about artists' concerns will set the stage for not only a better public art collections, but allow for broader support of the increasingly popular (and necessary) public-private collaborations: using art as a means to promote community engagement; diversifying into temporary and performance-based works; and embedding artists as residents in other private and municipal programs to support creative thinking in a variety of sectors.

C. THE ARTIST PERSPECTIVE

Artists Need To Be Free To Create Derivative Works

If the empathy is to be employed in the opposite direction to take into account the Artists' perspective, Commissioning Parties will need to consider the nature of working as an Artist. Artists, who build sustainable careers working in the public art arena, need to be free to create works in different locations and settings over time. These works will, in many cases, have a common theme, thread or style that identifies the work as that of the particular artist. When copyright is assigned or transferred, one of the rights included is the right to create derivative works. By transferring ownership of the copyright, an artist potentially jeopardizes his or her ability to create works that could be considered derivative and this could negatively impact the artist's ability to work in the field.³ Lawyers need to understand that this is a legitimate concern for artists. Artists should not be asked to simply trust that the Commissioning Party or owner will act reasonably in the future. Generally speaking, a simple assurance from the Artist that the commissioned work is a unique artwork and will not be exactly duplicated elsewhere will serve to adequately protect the Commissioning Party's interests and needs.

Public Art Budgets Are Mostly Not Big Enough To Warrant Copyright Transfer

Another concern with requiring waivers and copyright transfers is the shift in project esprit that this creates. Often the commission budgets are not enough to justify the transfer of the artwork itself *and* the copyright. Generally, there is barely enough money in the budgets to pay for the fabrication of the artwork and allow for a modest artist fee. Adding a requirement that the intellectual property assets be

³ Though less likely, it could also cut off an artist's ability to take advantage of the popularity of a public art piece by creating merchandise derivatives of the original work. Generally speaking, municipalities are not in the business of creating, marketing and distributing merchandise, but this may be an issue appropriately considered at the outset of the contracting process. If merchandising is in fact a viable opportunity, it could be one shared by the parties to everyone's mutual benefit. Of course, if the artist has an international reputation, the negotiation power lies with the artist who will likely not want to share merchandising rights or profits with the municipality.

transferred with no additional compensation feels exploitative and does not engender good feelings on projects that should feel unreservedly mutually-beneficial. Leveraging the power differential between Commissioning Parties and Artist to change the rules and expand the historic scope public art commissions by forcing Artists to also transfer their copyrights could be seen as overreaching. It could also diminish the ability of a public art program to establish a reputation as an artist-friendly collaborator. Again, considering the big picture, everyone wins when there is a collective effort to construct an artist-friendly ecosystem, which in turn enhances the creative economy for everyone.

D. THE ANSWER

Limited Waivers and Licenses Can Address All Concerns

A Commissioning Party need not own the copyrights to a public art project in order to have assurances that it can freely manage its public art collection without burdensome requirements to obtain the artist's permission. The best way to accomplish this is through limited licenses and waivers. Normally, Commissioning Parties want the freedom to reproduce two-dimensional images of the artwork for educational, marketing and promotional purposes;⁴ and to have the freedom to address maintenance, conservation and removal or relocation issues that come up from time to time. The best way to obtain this type of enduring flexibility is to create a limited, perpetual license as well as a waiver of moral rights with replacement language that establishes a base level respect for the artist and the artwork. One example of effective language to address intellectual property and moral rights issues is as follows:

INTELLECTUAL PROPERTY OWNERSHIP

a. **General.** Except as provided in this Agreement, Artist retains all copyrights and other intellectual property interests in the Artwork and in the Design, drawings, sketches, prototypes and other materials for the Artwork. Artist may place a copyright notice on the Artwork and may, at Artist's option, register the copyright with the Library of Congress.

b. **Reproductions.** Artist hereby grants to Owner the non-exclusive right to make, and to authorize the making of, photographs and other two-dimensional reproductions of the artwork for any Owner-related purposes, including, but not limited to educational, advertising, marketing, public relations, promotion, any documentation of Owner's art collection or other noncommercial purposes in print or electronic media. This license does not include the right to create three-dimensional works or to reproduce the Artwork for merchandising purposes. Any rights to reproduce the work three-dimensionally or to merchandise the Artwork must be established pursuant to a separate agreement with the Artist.

⁴ If they intend to make images or derivative works for sale, then the use of the artwork then falls into a different category of commercial use for which a separate agreement is advisable and the artist should be additionally compensated.

MAINTENANCE, REPAIR AND RESTORATION. For the lifetime of the work, which for purposes of this Agreement is defined as no less than _____ (____) years, Owner will be responsible for the routine inspection and maintenance of the Artwork in accordance with the Maintenance Manual. Owner shall have the right to determine, after consultation with a professional conservator, when and if repairs and restorations to the Artwork will be made. It is the policy of Owner to consult with Artist regarding repairs and restorations undertaken during Artist's lifetime when practicable. In the event the Owner wishes to have Artist personally undertake or supervise repairs, Owner agrees to pay Artist a reasonable fee for such supervision to be negotiated at the time. In the event that Owner makes repairs or restoration not approved by Artist, Artist shall have the right, at Artist's sole option, to have Artist's association with the Artwork severed. All repairs and restorations, no matter who performs them, shall be made in accordance with professionally recognized principles of conservation and in accordance with the Maintenance Manual.

MODIFICATION, DESTRUCTION OR REMOVAL OF ARTWORK.

a. Owner shall notify Artist in writing of any proposed significant alteration of the Site that would affect the intended character and appearance of the Artwork including removal or relocation of the Artwork that might result in the Artwork being destroyed, distorted or modified. The Owner shall make a good faith effort to consult with the Artist in the planning and execution of any such alteration. The Owner shall make a reasonable effort to maintain the integrity of the Artwork. If the Artwork cannot be successfully removed or relocated as determined by the Owner, the Artist may disavow the Artwork or have the Artwork returned to the Artist at the Artist's expense.

b. The Artwork may be removed or relocated or destroyed by the Owner should the Artist and the Owner not reach mutual agreement on the removal or relocation of the Artwork after a period not to exceed ninety (90) days after written notice to the Artist. During the ninety (90) day period, the Parties shall engage in good faith negotiations concerning the Artwork's removal or relocation.

c. In the event of changes in building codes or zoning laws or regulations that cause the Artwork to be in conflict with such codes, laws or regulations, the Owner may authorize the removal or relocation of the Artwork without the Artist's permission. In the alternative, the Owner may commission the Artist by a separate agreement to make any necessary changes to the Artwork to render it in compliance with such codes, laws or regulations.

d. If the Owner reasonably determines that the Artwork presents imminent harm or hazard to the public, other than as a result of the Owner's failure to maintain the Artwork as required under this Agreement, the Owner may authorize the removal of the Artwork without the prior approval of the Artist.

e. Owner shall have the right to donate or sell the Artwork at any time. Before exercising this right, Owner, by written notice to Artist at Artist's last known address, agrees to give Artist the opportunity to purchase the Artwork for the greater of the Contract Amount or the amount of any offer which Owner has received for the purchase of the Artwork, plus all costs associated with the removal of the Artwork from the Site, clean-up of the Site and delivery to Artist. Artist shall have thirty (30) days from the date of Owner's notice to exercise the option to purchase the Artwork.

f. This clause is intended to replace and substitute for the rights of the Artist under the Visual Artists' Rights Act ("VARA") and, if applicable, the California Art Preservation Act (CAPA), to the extent that any portion of this Agreement is in

direct conflict with VARA and/or CAPA rights. The parties acknowledge that this Agreement supersedes that law to the extent that this Agreement is in direct conflict with VARA and/or CAPA.

If you have further questions or concerns about this topic or other art law matters, please do not hesitate to contact Sarah Conley Odenkirk at sarah@artconverge.com or call 310.990.9581.