

REPORT OF THE CHIEF LEGISLATIVE ANALYST

DATE: November 25, 2014

TO: Honorable Members of the Arts, Parks, Health, Aging and River Committee

FROM: Sharon M. Tso *smtso* Council File No.: 13-0933
Chief Legislative Analyst Assignment No.: 13-11-1015

SUBJECT: Arts Development Fee

SUMMARY

On November 20, 2013, the City Council approved Motion (Huizar – O’Farrell – Cedillo) to instruct this Office, with the assistance of various City departments and in consultation with the City Attorney, to report with recommendations and a draft Ordinance to update the process for collecting and disbursing funds relative to the Arts Development Fee. As part of its consideration of the Motion, the Council also adopted recommendations from the Budget and Finance Committee to instruct this Office to review options to expand the use of the Arts Development Fees (C.F. 13-0933).

This Office, the City Attorney, and Department of Cultural Affairs (DCA) met to discuss the status of unexpended Arts Development Fees, expenditure plan development for projects located in all Council Districts, and any necessary recommendations and/or Ordinances to effectuate expenditure plans and expand use of the funds. As described further in this report, the DCA states that it has: (1) met with all Council Districts to develop and finalize expenditure plans for \$1.3 million in fees that will expire in December 2014, and (2) developed Arts Development Fee Program Administrative Guidelines to provide a framework for the development and implementation of expenditure plans in the future.

The recommendations contained in this report primarily address the Arts Development Fee Paid-In Program (Paid-In Program). The report also contains additional recommendations to ensure that developers comply with the requirements of the Arts Development Fee Developer-Led Program (Developer-Led Program) and effectuate reports to Council for the Public Works Improvement Art Program (PWIAP). Developers who participate in the Developer-Led Program receive a credit and are exempt from paying the Arts Development Fee. The Paid-In Program and the Developer-Led Program are administered by the DCA, and the originating department uses funds for the PWIAP for the public arts project administered by the DCA. Additional information on these programs is provided below.

Arts Development Fee Programs

The City established the Arts Development Fee Trust Fund (Trust Fund) based on the California Mitigation Act. In 1988, the Arts Development Fee program was established by Ordinance No. 164,243 for the purpose of mitigating the additional burden that private development places on the City’s existing art and cultural services, facilities, and community amenities, among other items (C.F. 85-1794). The amount of the fee will not exceed \$1.57 per gross square foot of any structure or one percent of the valuation of the project, whichever is lower, as determined by the Department of Building and Safety. The DCA reports that the Arts Development Fee Program complies with the tenets of a 1991 Nexus Study and the Cultural Master Plan. At this time, the fee is assessed on commercial development such as office buildings, retail establishments,

warehouses, and hotels. Housing developments, religious institutions, and schools are exempt. If the Council desires to alter the reach of the Arts Development Fee to cover more than the current types of properties, further research will be required, including legal review by the City Attorney.

Allowable uses for the expenditure of Arts Development Fees include acquisition or placement of publicly accessible works of art, acquisition or construction of arts or cultural facilities, provision of arts and cultural services, and restoration or preservation of existing works of art. Examples of allowable permanent public art include sculpture, murals, photographs, film, holographic and video projections. Examples of allowable temporary projects include performing arts, literary arts, media arts (including film and video), lectures, presentations and training relative to arts and culture, and tours, and performances.

There are two options used to fund art projects on private developments: (1) the Developer-Led Program, and (2) the Paid-In Program. For the Developer-Led Program, a developer designs and constructs an artistic or cultural amenity as part of its development. For the Paid-In Program, developers are required to pay a fee to the City which, in turn, is used to fund an art project. For the Developer-Led Program, the DCA obtains a letter of credit or a certificate of deposit to ensure that a developer will construct the required art project.

Similarly, the PWIAP requires that one percent of the cost for a City capital project be set aside to fund an art component and that these funds be deposited into the Arts and Cultural Facilities and Services Trust Fund. The DCA indicates that it will prepare an annual status report on PWIAP projects and will submit to Council for review.

Budget and Finance Committee Requests

On October 28, 2013, the Budget and Finance Committee considered Motion (Huizar – O’Farrell – Cedillo) and requested that the report include additional information related to the Arts Development Fee. The Committee requested that this Office review options to expand the use of the Arts Development Fee. Below are the items requested by the Budget and Finance Committee and responses from the DCA.

1. Changing the fee allocation process for off-site art to be in line with the process for on-site art; specifically in regards to performing arts as opposed to visual arts.

The DCA states that the fee allocation process is the same for off-site art and on-site art, and is outlined in the proposed Administrative Guidelines which describe the overall structure of the Arts Development Fee Program. The City Attorney has confirmed that Arts Development Fees may be used for visual and performing arts.

2. To the extent legally permissible, review options to allow fee revenue for visual and performing arts in addition to physical arts within a specific radius of development.

The City Attorney advises that fee revenue may be used for visual and performing arts in addition to physical arts as long as a reasonable relationship between the development and the proposed art project is demonstrated. The DCA will work with each Council District to utilize fees to construct art projects within the Council District from which they were generated to ensure the needs of the Council District are being addressed.

3. Review feasibility of using funds for citywide arts programs including arts education programs to benefit everyone in the City including those in the development projects.

In conjunction with the City Attorney, the DCA has reviewed the use of Paid-In Program fees to support citywide arts programs including arts education programs. The City Attorney has confirmed that the DCA may utilize Arts Development Fees for these purposes provided

that a reasonable relationship exists between the source of the Arts Development Fee to be expended and the project.

Use and Expenditure of Funds

The City Attorney previously advised the DCA that since the Municipal Code is based on the State Mitigation Fee Act, the City must demonstrate a reasonable relationship between the development project and the impact of the fee. In addition, the language in the Municipal Code states that such “artistic facilities, services and community amenities will be available to the development project and its future employees.” Therefore, in 2007, the City Attorney recommended that the fee’s permitted use be focused on a one-block geographical radius around the Developer Paid-In Program projects. The City Attorney also offered to review and advise on any proposals to spend fees on projects that were beyond the one block radius by examining in each circumstance the nexus between the source of the fee and the project. As a result, DCA found it difficult to expend the funds and funds have accrued.

Subsequently, the City Attorney worked with City stakeholders, including the DCA, to define new parameters for the expenditure of funds. Consistent with the 1991 Nexus Study, the City Attorney has indicated that as long as a reasonable relationship between the development and the project is demonstrated and that the services are available to future development employees, a wider geographic parameter can be consistent with the law on a case by case basis and does not require a new Ordinance.

Due to this interpretation, the DCA has met with all Council Districts to discuss and finalize expenditure plans for \$1.3 million portion of unexpended Arts Development Fees that are scheduled to expire unless Council makes certain findings. DCA will meet with Council Districts in the near future to discuss and develop expenditure plans for the balance that do not require Council to make findings at this time. In future years, the DCA will meet annually with Council Districts to develop and discuss expenditure plans which will be transmitted to the City Council for approval. DCA will also meet with Council Districts throughout the year to incorporate any changes in the following year’s expenditure plan. In addition, the DCA states that interest funds and savings from completed projects will be used for projects provided that the reasonable relationship requirement is met.

The DCA reports that it will transmit expenditure plans for the \$1.3 million in expiring fees to Council under separate cover in the near future prior to expiration.

Administrative Guidelines

The DCA has prepared Administrative Guidelines which provide a framework for the implementation of the Arts Development Fee. The Administrative Guidelines provide an enumeration of the allowable permanent and temporary art projects, the organizational structure of the DCA which implements the program, arts provider selection procedure, and articulate the requirement that a reasonable relationship exists between the use of the fee and the type of development on which the fee is imposed. The Administrative Guidelines also note that the Arts Development Fee Program must comply with the tenets of the 1992 Cultural Masterplan, which includes equity in the arts, youth and education, and cultural infrastructure.

The Administrative Guidelines state that the DCA will consult with Council Districts with regard to the proposed location of projects which utilize Arts Development Fees generated within the district. In addition, the guidelines state that the placement of art projects will not be limited to the locations that generated the fees provided that the reasonable relationship requirement is met. According to the Administrative Guidelines, the DCA will seek approval from the appropriate

Council District for fees generated within the district that are proposed to be expended on a Citywide program or project outside the Council District.

The DCA reports that it will submit these Administrative Guidelines to the City Council for approval under separate cover.

Reporting

At this time we recommend that the DCA meet with all Council Districts quarterly to discuss ongoing projects, and include the quarterly meeting schedule in the Administrative Guidelines. We also recommend that the DCA submit a status report relative to the PWIAP on an annual basis. We further recommend that the DCA formalize updates to the letter of agreement and certificate of deposit to ensure that processes are consistently enforced and applied under the Developer-Led Program.

Consumer Price Index (CPI)

The DCA has not revised the Arts Development Fee by an amount equal to the CPI for Los Angeles, as required by the Municipal Code. The DCA states such a revision has the potential to generate additional Arts Development Fees but would require additional analysis to determine the exact amount of additional fees that will be generated. We recommend that the Council instruct the DCA to work with the CAO to annually adjust the Arts Development Fee by the higher of CPI or 1%, and request that the City Attorney prepare and present any necessary Ordinance(s).

RECOMMENDATIONS

That the City Council instruct the Department of Cultural Affairs to:

- a. Submit final expenditure plans reflecting current discussions with all Council Districts for funds expiring at the end of the 2014 calendar year to the City Council for review and approval.
- b. Report to the City Council on an annual basis with expenditure plans for all Council Districts, and include any updates and adjustments to expenditure plans that may be necessary and have been approved by the affected Council District.
- c. Provide to each Council Office on a quarterly basis the amount of Arts Development Fees collected and how these fees are being expended, and include the quarterly meeting schedule in the Administrative Guidelines.
- d. Submit to the City Council on an annual basis a status report on ongoing public arts projects relative to the Public Works Improvements Arts Program.
- e. With the assistance of the City Attorney, update letters of agreements and certificates of deposits which guarantee the construction of an art project in the Developer-Led Program.
- f. Conduct an analysis to determine the amount of additional Arts Development Fees generated upon adjustment of the Consumer Price Index.

- g. Work with the CAO annually to adjust the Arts Development Fee by the higher of Consumer Price Index or 1%, and request that the City Attorney prepare and present any necessary Ordinance(s).

FISCAL IMPACT

Approval of the recommendations contained in this report will not have a fiscal impact to the General Fund. DCA reports that it recovers an 18 percent administrative fee which provides partial reimbursement of eligible staff time devoted toward the implementation of Arts Development Fee-funded projects. DCA states that it intends to request additional staff to implement the program as part of the City's annual Budget process. According to DCA, available Arts Development Fees are sufficient to complete the majority of art projects but grant funds will be used as-needed to complete projects.



Brian Randol
Brian Randol
Analyst

Attachment: Motion (Huizar – O'Farrell – Cedillo)

ADDITIONAL INFORMATION

1. Basis for Report

On November 20, 2013, the City Council approved Motion (Huizar – O’Farrell – Cedillo) to instruct this Office, with the assistance of various City departments and in consultation with the City Attorney, to report with recommendations and a draft Ordinance to update the process for collecting and disbursing funds relative to the Arts Development Fee. As part of its consideration of the Motion, the Council also adopted recommendations from the Budget and Finance Committee to instruct this Office to review options to expand the use of the Arts Development Fees (C.F. 13-0933).

As part of its consideration of the Motion, the City Council also adopted recommendations from the Budget and Finance Committee to instruct this Office to review options to expand the use of the Arts Development Fee including: (1) changing the fee allocation process for off-site art to be in line with the process for on-site art; specifically with regard to performing arts as opposed to visual arts, (2) reviewing options to allow fee revenue for visual and performing arts in addition to physical arts within a specific radius of development and construct the radius as broadly as possible to use transit routes, major boulevards, etc. to increase effectiveness of funds, and (3) reviewing the feasibility of using funds for citywide arts programs including arts education programs to benefit everyone in the City including those in the development projects (C.F. 13-0933).

2. Arts Development Fee Trust Fund

Creation and Administration of the Arts Development Fee Trust Fund

The Arts Development Fee Trust Fund (Trust Fund) was established in 1992 by Ordinance No. 164,243 to receive funds derived from the construction of a commercial development. The Trust Fund was adopted as a mitigation measure to address burdens on City services created by new construction. Compliance with the fee is required if the value of all construction work exceeds \$500,000 which is calculated by the Department of Building and Safety. Monies are received by the Department of Building and Safety, and all interest and earnings accrue to the Trust Fund. The Ordinance also states that the City Council shall make findings with respect to any portion of the fee remaining unexpended or uncommitted in this Trust Fund five or more years after deposit. The findings shall specify the proposed use of the fee and demonstrate a reasonable relationship between the fee and the purpose for which the fee was charged. A claim may be made in writing to the City Clerk’s Office within 12 months from the date of expiration of the building permit or within 12 months of the date of any extensions granted. The DCA is responsible for maintaining records relating to the Trust Fund and establishing appropriate procedures to carry out the Ordinance, including payment.

Developers may pay the fee when permits are obtained, or they may enter into an agreement with the DCA to complete a DCA-approved art project. After construction of the art project, the DCA issues a compliance certificate that can be submitted to the Department of Building and Safety to provide proof of payment.

3. Arts Development Fee Program

The General Manager of the DCA is responsible for the administration of the Arts Development Fee Program. The Cultural Affairs Commission (CAC) is responsible for the review and

approval of all construction and artwork on or over City property. In order to expedite review of public art, the CAC has designated a Public Arts Committee to work with DCA staff to develop public arts policy and procedures. The Committee includes three CAC Commissioners, public art professionals, working artists, and DCA staff. DCA staff is responsible for administrative tasks including artist selection oversight, project development, and maintenance. DCA reports that administration of the program can be financed by an administrative fee of up to 18 percent of the total arts budget.

Arts Provider Selection Procedures

The Department has the following options available to select an arts provider to implement a project:

- A. Request for Proposals** – This process is used for projects which are site-specific or those projects that can easily be adapted to multiple sites. Any artist or arts organization is eligible to apply.
- B. Request for Qualifications/Proposals** – This process is used when the nature or specific location of the artwork has been determined in advance of an artist or arts organization selection. An artist selection panel reviews all qualifications submitted, then commissions a small number of arts to submit proposals before DCA assembles a second panel to make a final selection.
- C. Request for Qualifications/Interview** – DCA reports that this approach is used when it is determined that it would be appropriate to include an artist as a lead member of the art program development team working in tandem with DCA staff in identifying the nature of the arts project or program.
- D. Direct Commission** – This selection method may be used when severe time restraints exist and the need for a specific type of artwork or project has been identified by DCA. It may be necessary to have an artist selection panel make a direct selection.
- E. Artist Sub/Contractor** -- This selection process may be used for artwork restoration by the original artist

Each project is overseen by an artist curatorial/selection panel to implement the project and is comprised of the following members: one community representative, one representative of a relevant City agencies, and one to three art professionals.

5. Controller Audit

On April 11, 2014, the Controller released an audit relative to the Arts Development Fee Program. The Controller reports that its audit was conducted in response to the fact that the Department has not developed spending plans for approximately \$7.5 million of the \$10 million of Arts Development Fees that have accumulated since 2006. The audit is currently pending in Audits and the Arts, Parks, Health, Aging and River Committees for further consideration (C.F. 14-0464). The DCA has prepared a response to the audit under separate cover.

6. Other Requests to Update the Arts Development Fee Program

On May 23, 2013, the City Council requested the City Attorney and the CAO to report to the Arts, Parks, Health and Aging Committee on broadening the usages of the Arts Development Fee funds (C.F. 13-0600-S30). On May 21, 2014, the City Council instructed the DCA to report to

the Arts, Parks, Health, Aging and River Committee and the Budget and Finance Committee on the status of proposed changes to the Arts Development Fee Ordinance, and consideration of expanded use of fees, including performances and artist education (C.F. 14-0600-S74). This report addresses these requests, as well. These Council Files may be received and filed at a later date.

7. Current Department Budget Condition

In Fiscal Year 2003-04, the General Fund ceased providing financial support to the DCA. The Department is currently supported by proceeds from the Transit Occupancy Tax and the Arts Development Fee. According to the DCA, the use of these funding sources has created the need to constantly re-evaluate budget projections throughout the year due to the uncertainty in the number of development projects that are completed each year. According to the DCA, this uncertainty may compromise the DCA's ability to support an art project over multiple years.

Currently, the Arts Development Fee Ordinance does not specify a percentage that may be used for the DCA to administer projects. Consistent with the Public Works Improvement Art Program Ordinance which allows staff cost reimbursements, the City Attorney has confirmed that the DCA is allowed up to an 18 percent fee for administration or consultant expenses related to the use of Arts Development Fees. According to the City Attorney, it is not required that the Arts Development Fee Ordinance be updated to allow the DCA to charge the administrative fee.

DCA states that it does not currently have the staff capacity to manage multiple Arts Development Fee-supported projects in every Council District and will request additional staff as part of the annual City Budget process.

8. Public Works Improvement Art Program

While this report is specific to the Arts Development Fee for private projects, the City also has a Public Works Improvement Art Program (PWIAP) which requires that one percent of the cost for a City capital project be set aside for an art component. Funds are placed in the Arts and Cultural Facilities and Services Trust Fund No. 480. The PWIAP funds are expended directly by the originating department on public art projects administered by the DCA. The DCA states that expenditures for PWIAP are included in construction project reports. On a go-forward basis, the DCA indicates that it will prepare an annual status report to Council and will work with the CAO to present this information to Council.

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ARTS, PARKS, HEALTH, AGING, BUDGET & FINANCE
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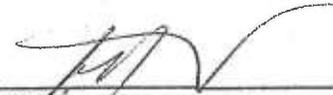
On November 29, 1988, the City Council enacted the "Arts Development Fee" ordinance (No. 164,243). The ordinance was further revised in 1991, with the creation of the Arts Development Fee Trust Fund (Ordinances No. 166,724 & 166,725). The ordinance established fees based on size for certain types of new construction authorized by building permits on given development projects. Such fees are to be used for provision of "adequate cultural and artistic facilities, service and community amenities for the project." Section 91.107.4.6 of the Municipal Code requires owners of development projects for commercial or industrial buildings to pay an arts fee (Arts Development Fee).

The Arts Development Fee is an exaction whereby owners of private development projects for commercial or industrial buildings are required to pay an arts fee in exchange for the right to develop the project and to lessen the burden placed on the City for services caused by the project. The amount of the fee is based on the project's type of land use; however, the amount of the Fee cannot exceed \$1.57 per gross square foot of any structure authorized by the building permit or one percent of the valuation of the project designated on the permit, whichever is lower, as determined by the Department of Building and Safety.

The Arts Development Fee Ordinance has not been amended in over two decades. In practice, the use of these funds is constrained in a number of ways. First, the multitude of separate and often small fund pools have made their comprehensive and coordinated use very difficult. Further, each fund is available solely to "the development project and its future employees" as opposed to the surrounding community at large. Finally, the code directs this funding to be used in compliance with the principals and standards of the five-year "Cultural Master Plan" being implemented at the time. However, this plan has long expired. To better serve the city's many diverse and distinct local communities new standards must be put in place to direct the use of these funds in public art capital improvement projects.

WE THEREFORE MOVE that the Council instruct the Department of Cultural Affairs, with the assistance of the Planning Department, the Department of Building & Safety, and the City Administrative Officer, and in consultation with the City Attorney, to prepare and present a report with recommendations and a draft ordinance to update the Arts Development Fee Ordinance, to update the amounts collected and the process for collecting and disbursing funds, as well as recommendations for expanding the types of projects generating Arts Development Fees and appropriate credits and exemptions.

CO-PRESENTED BY:

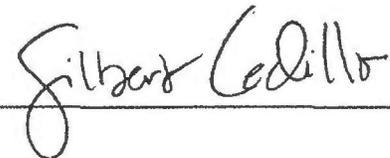

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