



City of Hollywood

Staff Summary

Hollywood City Hall
2600 Hollywood Blvd
Hollywood, FL 33020
<http://www.hollywoodfl.org>

File Number: PO-2021-03

Agenda Date:	3/3/2021	Agenda Number: 21
To:	Regular City Commission Meeting	
Title:	An Ordinance Of The City Of Hollywood, Florida, Amending Section 3.22. Of Article 4 Of The Zoning And Land Development Regulations Entitled "Standards For The Painting And Color Of Exterior Surfaces Of Buildings And Structures" To Establish Regulations For Art In Public Places. (20-T-19)	

Staff Recommends: Approval of the attached Ordinance.

Explanation:

First Reading:

During recent City Commission meetings, the Commission directed Staff to develop regulations that would allow for artwork installations on private properties within the City, with the intent of enhancing the appearance of buildings and the built environment. This text amendment proposes to amend Section 3.22 of the Zoning and Land Development Regulations to create regulations for art in public places by establishing the following:

1. Public art permit. A public art permit shall be required for the installation of artwork. The text amendment also determines application requirements for such permits (e.g. descriptive narrative, drawings, photographs, specifications, location, schedule for completion).
2. Public Art Review Committee. Similar to the Technical Advisory Committee or Platting Committee, the Public Art Review Committee shall be comprised of staff members from various departments/divisions of the City, including the City Manager's Office, Development Services, Planning and Urban Design, Communications, Marketing, and Economic Development, and Parks, Recreation, Cultural Arts (Engineering as determined necessary). The Public Art Review Committee shall meet, as necessary, to review and approve, approve with conditions, or deny Public Art Applications.
3. Review guidelines. Review of public art permits shall be governed by the following:
 - a. Content. Artwork shall not be deemed a sign, identify a specific business or

- establishment, or contain a commercial message; or include alcohol, tobacco, adult entertainment, or obscene or offensive materials;
- b. Context. The design, location, scale, and content of the artwork shall be contextual and complement the design and architecture of the building or site; and should enhance and contribute to the character of the area; and
 - c. Design and quality. Media, materials, and methods of installation used shall be of high quality and durable. Painted artwork shall include an ultraviolet fade resistant clear coat. The permanence of the artwork, environmental conditions of the site, and maintenance are also factors that will also be considered.
4. Appeal process. Appeals shall be considered by the Historic Preservation Board or Planning and Development Board, as applicable.
 5. Ownership responsibilities and maintenance requirements. Artwork shall be maintained in good condition by the property owner and all successors and assigns.
 6. Enforcement procedures. Artwork not maintained in good condition and appearance, showing evidence of deterioration, weathering, discoloration, rust, or other conditions reflective of deterioration or inadequate maintenance, shall be subject to enforcement procedures and may be subject to removal.

At the November 10, 2020 Planning and Development Board meeting, the Board, acting as the Local Planning Agency, forwarded a recommendation of approval to the City Commission.

Attachment I: November 10, 2020 Planning and Development Board Staff Report

Fiscal Impact:

Approval of this ordinance will not fiscally impact the City as this is a request to amend the City's regulations as it relates to urban design on private properties.

Recommended for inclusion on the agenda by:

Deandrea Moise, Planning Administrator

Leslie A. Del Monte, Planning Manager

Shiv Newaldass, Director, Development Services

Gus Zambrano, Assistant City Manager/Sustainable Development

(20-T-19)

AN ORDINANCE OF THE CITY OF HOLLYWOOD, FLORIDA, AMENDING SECTION 3.22. OF ARTICLE 4 OF THE ZONING AND LAND DEVELOPMENT REGULATIONS ENTITLED "STANDARDS FOR THE PAINTING AND COLOR OF EXTERIOR SURFACES OF BUILDINGS AND STRUCTURES" TO ESTABLISH REGULATIONS FOR ART IN PUBLIC PLACES.

WHEREAS, Section 3.22 of the Zoning and Land Development Regulations sets forth the regulations and standards for painting and color of exterior surfaces of buildings and structures; and

WHEREAS, the City Commission requested that staff develop regulations to allow for installation of artwork on properties within the City to enhance the appearance of buildings and to promote excellence in urban design; and

WHEREAS, Planning and Urban Design Division staff have proposed a text amendment to Section 3.22 to establish an art in public places program that allows for the installation of artwork within private property in non-residential and mixed-use zoning districts and providing for standards for such installations; and

WHEREAS, Planning and Urban Design Division staff analyzed the proposed text amendments and submitted those amendments to the Planning and Development Board; and

WHEREAS, on November 10, 2020, the Planning and Development Board, acting in its capacity as the Local Planning Agency, held a duly noticed public hearing to review the proposed text amendment to Article 3, Section 3.22 and have forwarded a recommendation of approval to the City Commission; and

WHEREAS, the City Commission, following review of the proposed text amendments at a public hearing, accepts these recommendations and finds them to be in the best interest of the citizens of the City of Hollywood.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COMMISSION OF THE CITY OF HOLLYWOOD, FLORIDA:

Words in ~~struck through~~ type are deletions from existing text, and underscoring words are additions to existing text.

Section 1: That the foregoing “WHEREAS” clauses are ratified and confirmed as being true and correct and are incorporated into this Ordinance.

Section 2: That Article 4, Section 3.22 entitled “Standards for the Painting and Color of Exterior Surfaces of Buildings and Structures” of the Zoning and Land Development Regulations is amended as follows:

ARTICLE 4: GENERAL PROVISIONS

* * *

§ 3.22 Standards for the Painting and Color of Exterior Surfaces of Buildings and Structures and Art in Public Places Regulations.

* * *

A. Purpose. The purpose of this section is to enhance the appearance of buildings and the built environment and promote excellence in urban design within designated areas of the City city.

* * *

J. Art in Public Places.

1. Definitions. For purposes of this subsection, the following definitions shall apply unless the context clearly indicates or requires a different meaning.

Artwork shall mean durable creations that can be original or limited editions of art, including but not limited to sculptures, murals, monuments, frescoes, fountains, paintings, stained glass or ceramics and may include architectural designs, components or structures. The “Artwork” medium may include but not be limited to paint, glass, steel, bronze, wood, stone and concrete. Artwork shall not be construed as a Sign.

Public Place shall mean any exterior area on private property within the City that is easily accessible or clearly visible to the general public from adjacent public property such as a street or other public thoroughfare or sidewalk for a period of 10 hours per day, seven days per week, with the option of excluding national holidays.

2. Public Art.

a. Applicability. Art in Public Places may be permitted in non-residential and mixed-use zoning districts, located outside of the Community Redevelopment Districts, pursuant to all applicable regulations of this section.

b. Public Art Permit. A public art permit shall be required for the creation and installation of Artwork on any building or public place. As determined by the Building Official, artwork may require a building permit after obtaining the public art permit and prior to installation.

c. Public Art Permit Fees. The fee for the public art permit shall be established by a resolution adopted by the City Commission. All public art permit fees shall be paid at the time of permit application.

d. Public Art Permit Application Requirements. Prior to the issuance of any public art permit, a written application, in a form provided by the City, shall be filed with the consent of the property owner, to the Planning and Urban Design Division, together with the following:

(1) A narrative of sufficient descriptive clarity to indicate the nature of the proposed Artwork;

(2) Drawings, photographs, and specifications as are necessary to demonstrate that the public art complies with the requirements of this section. Such drawings (surveys, site plans, elevations, sketches, and other illustrations) shall be to scale and fully dimensioned; illustrate property lines, rights-of-way, internal streets, sidewalks, overhead utility lines (if Artwork is three dimensional), and parking areas immediately surrounding the intended location of the Artwork. Drawings shall also indicate the setting and location; design; media and materials; methods of construction; and methods of application, securing, or fastening of the Artwork.

(3) Schedule of Completion outlining the schedule of work that includes the proposed date of completion.

e. Public Art Review Committee. A Public Art Committee shall be established that consists of representatives from the following administrative departments/divisions of the City: the City Manager's Office; Development Services, Planning and Urban Design Division; Communications, Marketing and Economic Development; Parks, Recreation and Cultural Arts; and the Engineering Division (as applicable). The Public Art Review Committee shall meet, as necessary, to review and approve, approve with conditions or deny Public Art Permit Applications based upon the review guidelines set forth in subsection f. below. Upon approval of a Public Art Permit Application, the applicant will receive written notification of such approval along with information regarding whether the Building Official has determined a building permit is also necessary. In the event that a Public Art Permit Application is denied, the Applicant shall receive written notification of such denial and the reasons for such denial. Upon

receipt of the denial notification, the Applicant may file an appeal to the Planning and Development Board or Historic Preservation Board as applicable, within 10 days from the denial notification.

f. Permit Application Review Guidelines. The Public Art Review Committee shall review all applications based upon the following:

(1) Content:

- a. The Artwork shall not be deemed a sign, nor shall such Artwork identify a specific business or establishment or contain a commercial message; and
- b. The Artwork shall not include any alcohol, tobacco, adult entertainment, or obscene or offensive materials.

(2) Context:

- a. The design, location, scale, and content of the Artwork shall be contextual and compliment the design and architecture of the building or site;
- b. The Artwork should enhance and contribute to the character of the area; and
- c. The Artwork shall be in compliance with all life safety requirements and with the vision clearance requirements of § 4.23.B.7.c. of this Code.

(3) Design:

- a. The quality of the Artwork, media, materials, and methods of installation used shall be of high quality and durable. Painted Artwork shall include an ultraviolet fade resistant clear coat; and
- b. The permanence of the Artwork considering environmental conditions of the site and maintenance requirements.
- g. Completion of Artwork. All Artwork shall be completed and/or installed in accordance with the schedule of completion as approved through the Public Art Permit. The Public Art Review Committee may approve extensions should they been deemed necessary.
- h. Ownership and Maintenance. All Artwork shall remain the property of the property owner. The obligation for maintenance to preserve the Artwork in good condition shall remain with the property owner and

the owner's successors and assigns. All Artwork shall be maintained to ensure its appearance and shall not show evidence of deterioration, weathering, discoloration, rust, or other conditions reflective of deterioration or inadequate maintenance. Maintenance shall not result in changes or alterations to the approved Artwork. Failure of any persons or entities to comply with the regulations pertaining to the Artwork as set forth in this subsection shall be subject to enforcement procedures set forth in Chapter 36 of the Code of Ordinances, Section 10.3 of the Zoning and Land Development Regulations, and the removal requirements set forth in i. below.

- i. Removal of Artwork. The property owner shall be responsible for removal of the Artwork that is not maintained in good condition and appearance, showing evidence of deterioration, weathering, discoloration, rust, or other conditions reflective of deterioration or inadequate maintenance. Failure to remove the Artwork upon notification by the City shall subject the property owner to all enforcement procedures.

Section 3: That it is the intention of the City Commission that the provisions of this section shall be made a part of the Zoning and Land Development Regulations, and the sections of the Regulations may be renumbered to accomplish such intention.

Section 4: That if any word, phrase, clause, subsection or section of this Ordinance is for any reason held unconstitutional or invalid, such invalidity shall not affect the validity of any remaining portions of this Ordinance.

Section 5: That all sections or parts of sections of the Zoning and Land Development Regulations, all regulations or parts of regulations, and all resolutions or parts of resolutions in conflict are repealed to the extent of such conflict.

Section 6: That this Ordinance shall be in full force and effect immediately upon its passage and adoption.

Advertised _____, 2021.

PASSED on first reading this _____ day of _____, 2021.

AN ORDINANCE OF THE CITY OF HOLLYWOOD, FLORIDA, AMENDING SECTION 3.22. OF ARTICLE 4 OF THE ZONING AND LAND DEVELOPMENT REGULATIONS ENTITLED "STANDARDS FOR THE PAINTING AND COLOR OF EXTERIOR SURFACES OF BUILDINGS AND STRUCTURES" TO ESTABLISH REGULATIONS FOR ART IN PUBLIC PLACES.

PASSED AND ADOPTED on second reading this _____ day of _____, 2021.

JOSH LEVY, MAYOR

ATTEST:

PATRICIA A. CERNY, MMC
CITY CLERK

APPROVED AS TO FORM AND LEGAL SUFFICIENCY for the use and reliance of the City of Hollywood, Florida, only.

DOUGLAS R. GONZALES
CITY ATTORNEY

**CITY OF HOLLYWOOD, FLORIDA
DEPARTMENT OF DEVELOPMENT SERVICES
DIVISION OF PLANNING AND URBAN DESIGN**

DATE: November 10, 2020 **FILE:** 20-T-19

TO: Planning and Development Board/Local Planning Agency

FROM: Leslie A. Del Monte, Planning Manager

FROM: Deandrea Moise, Planning Administrator

SUBJECT: Text Amendment to Article 3 of the Zoning and Land Development Regulations amending Section 3.22 titled “Standards for the Painting and Color of Exterior Surfaces of Buildings and Structures” and establishing regulations for art in public places (Art in Public Places).

REQUEST:

The City of Hollywood requests a Text Amendment to Article 3 of the Zoning and Land Development Regulations amending Section 3.22 titled “Standards for the Painting and Color of Exterior Surfaces of Buildings and Structures” and establishing regulations for art in public places (Art in Public Places).

RECOMMENDATION:

The Planning and Development Board, acting as the Local Planning Agency, forward this petition a ***recommendation*** of Approval from the City Commission.

REQUEST

During recent City Commission meetings, the Commission directed Staff to develop regulations that would allow for artwork installations on properties within the City. With the intent of enhancing the appearance of buildings and the built environment and promote excellence in urban design, this text amendment proposes to amend Section 3.22 of the Zoning and Land Development Regulations to establish an art in public places program. The proposed program allows for the installation of artworks (sculptures, murals, etc.) within private property in non-residential and mixed-use zoning districts and institutes regulations and standards for such installations, by establishing the following:

1. Public art permit. A public art permit shall be required for the installation of artwork. The text amendment also determines application requirements for such permits (e.g. descriptive narrative, drawings, photographs, specifications, location, schedule for completion);
2. Public Art Review Committee. Similar to the Technical Advisory Committee or Platting Committee, the Public Art Review Committee shall be comprised of staff members from various departments/divisions of the City, including the City Manager’s Office, Development Services, Planning and Urban Design, Communications, Marketing, and Economic Development, and Parks, Recreation, and Cultural Arts. The Public Art Review Committee shall meet, as necessary, to review

and approve, approve with conditions, or deny Public Art Applications;

3. Review guidelines. Review of public art permits shall be governed by the following:
 - a. Content. Artworks shall not be deemed a sign, identify a specific business or establishment, or contain a commercial message; or include alcohol, tobacco, adult entertainment, or obscene or offensive materials;
 - b. Context. The design, location, scale, and content of the artwork shall be contextual and complement the design and architecture of the building or site; and should enhance and contribute to the character of the area; and
 - c. Design and quality. Media, materials, and methods of installation used shall be of high quality and durable. Painted artwork shall include an ultraviolet fade resistant clear coat. The permanence of the artwork, environmental conditions of the site, and maintenance.
4. Appeal process. Appeals shall be considered by the Historic Preservation Board or Planning and Development Board, as applicable;
5. Ownership responsibilities and maintenance requirements. Artwork shall be maintained in good condition by the property owner and all successors and assigns;
6. Enforcement procedures. Artwork not maintained in good condition and appearance, showing evidence of deterioration, weathering, discoloration, rust, or other conditions reflective of deterioration or inadequate maintenance, shall be subject to enforcement procedures and may result in removal.

SITE INFORMATION

Owner/Applicant: City of Hollywood
Address/Location: City-wide

CONSISTENCY WITH THE COMPREHENSIVE PLAN

The proposed text amendment is consistent with the Comprehensive Plan per the following policies:

Objective 3: *To revitalize and encourage re-investment in older neighborhood in which housing conditions are in a state of decline.*

Policy 4.9: *Place a priority on protecting, preserving and enhancing residential neighborhoods while incorporating the unique characteristics of redevelopment areas. (CWMP Policy CW.15 & CW.19)*

Policy 2.46: *Preserve stable neighborhoods and encourage rehabilitation initiatives that will revitalize and promote stability of neighborhoods.*

CONSISTENCY WITH THE CITY-WIDE MASTER PLAN:

The proposed text amendment is consistent with the City-Wide Master Plan per the following policies:

Guiding Principle: *Promote the highest and best use of land in each sector of the City without compromising the goals of the surrounding community.*

Policy CW.15 & CW.19: *Place a priority on protecting, preserving and enhancing residential neighborhoods while incorporating the unique characteristics of redevelopment areas.*

Policy CW.44: *Foster economic development through creative land use, zoning and development regulations, City services and City policies.*

Policy CW.81: *Develop and implement city-wide and neighborhood design guidelines which must be consistent with the City's Design Review Guidelines Manual.*

APPLICABLE CRITERIA

Analysis of Criteria and Findings for Text Amendments as stated in the City of Hollywood Zoning and Land Development Regulations.

CRITERIA 1: The proposed change is consistent with and in furtherance of the Goals, Objectives and Policies of the adopted Comprehensive Plan as amended from time to time.

ANALYSIS: The proposed amendment is consistent with multiple policies of the City's Comprehensive Plan as outlined previously in the Consistency section of this Report. Furthermore, the proposed text amendment reinforces the desire to streamline regulations and also create regulations that would continue to promote Hollywood's unique character.

FINDING: Consistent

CRITERIA: That conditions have substantially changed from the date the present zoning regulations were established.

ANALYSIS: That conditions have substantially changed from the date the present zoning regulations were established. Public Art installations have become extremely popular in many neighboring cities, and even within our own downtown. The proposed regulations allow for the City to continue promoting its unique character as well as stay relevant with the growing trends.

FINDING: Consistent.

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**CITY OF HOLLYWOOD, FLORIDA
MEMORANDUM
DEPARTMENT OF DEVELOPMENT SERVICES
DIVISION OF PLANNING AND URBAN DESIGN**

DATE: October 12, 2021

MEMO NO: P-21-08

TO: Planning and Development Board/ Local Planning Agency

FROM: Deandrea Moise, Planning Administrator
Leslie A. Del Monte, Planning Manager

SUBJECT: Text Amendment to Article 3 of the Zoning and Land Development Regulations amending Section 3.22 titled "Standards for the Painting and Color of Exterior Surfaces of Buildings and Structures" and establishing regulations for art in public places (Art in Public Places).

EXPLANATION:

This item was heard at the November 10, 2020 Planning and Development Board meeting, whereas the Board, acting as the Local Planning Agency, forwarded a recommendation of approval to the City Commission.

Following that recommendation, the proposed text amendment was considered by the City Commission at the March 3, 2021 meeting. During this meeting the Commission was expressed overwhelming support of the concept of public art within private property in non-residential and mixed-use zoning districts. However, they expressed concern regarding the potential for offensive, religious, and political content and directed Staff to consider revising the text to offer City Staff additional authority when reviewing artwork (sculptures, murals, etc.). Understanding First Amendment principles and the inherent limitations of content-based restrictions, Staff procured the help of outside counsel, Susan L. Trevarthen, Esq. of Weiss Serota, to review, evaluate, and recommend changes to the language. Given the City Commission's support of the concept, Staff's goal was to find a mechanism that would allow for the balance of First Amendment rights and the Commission's desire for additional protections. For this purpose, Counsel has recommended, the best approach is to create a program for private buildings/property to apply to dedicate a façade or other (spatial) easement to public art. Thus allowing such easements to be regarded as public property for the purposes of the public art and therefore, allowing the City to restrict content.

Due to the introduction of this concept and for the sake of transparency, Staff deemed it appropriate for the Board to consider this change prior to Commission consideration.

RECOMMENDATION:

The Planning and Development Board, acting as the Local Planning Agency, forward a recommendation of approval to the City Commission.

ATTACHMENTS:

ATTACHMENT I: November 10, 2021 Planning and Development Board Staff Report

ATTACHMENT II: Susan L. Trevarthen, Esq. of Weiss Serota Memo

**CITY OF HOLLYWOOD, FLORIDA
DEPARTMENT OF DEVELOPMENT SERVICES
DIVISION OF PLANNING AND URBAN DESIGN**

DATE: November 10, 2020

FILE: 20-T-19

TO: Planning and Development Board/Local Planning Agency

FROM: Leslie A. Del Monte, Planning Manager

FROM: Deandrea Moise, Planning Administrator

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RECOMMENDATION:

The Planning and Development Board, acting as the Local Planning Agency, forward this petition a **recommendation** of Approval from the City Commission.

REQUEST

During recent City Commission meetings, the Commission directed Staff to develop regulations that would allow for artwork installations on properties within the City. With the intent of enhancing the appearance of buildings and the built environment and promote excellence in urban design, this text amendment proposes to amend Section 3.22 of the Zoning and Land Development Regulations to establish an art in public places program. The proposed program allows for the installation of artworks (sculptures, murals, etc.) within private property in non-residential and mixed-use zoning districts and institutes regulations and standards for such installations, by establishing the following:

1. Public art permit. A public art permit shall be required for the installation of artwork. The text amendment also determines application requirements for such permits (e.g. descriptive narrative, drawings, photographs, specifications, location, schedule for completion);
2. Public Art Review Committee. Similar to the Technical Advisory Committee or Platting Committee, the Public Art Review Committee shall be comprised of staff members from various departments/divisions of the City, including the City Manager's Office, Development Services, Planning and Urban Design, Communications, Marketing, and Economic Development, and Parks, Recreation, and Cultural Arts. The Public Art Review Committee shall meet, as necessary, to review

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The proposed text amendment is consistent with the Comprehensive Plan per the following policies:

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APPLICABLE CRITERIA

Analysis of Criteria and Findings for Text Amendments as stated in the City of Hollywood Zoning and Land Development Regulations.

CRITERIA 1: The proposed change is consistent with and in furtherance of the Goals, Objectives and Policies of the adopted Comprehensive Plan as amended from time to time.

ANALYSIS: The proposed amendment is consistent with multiple policies of the City's Comprehensive Plan as outlined previously in the Consistency section of this Report. Furthermore, the proposed text amendment reinforces the desire to streamline regulations and also create regulations that would continue to promote Hollywood's unique character.

FINDING: Consistent

CRITERIA: That conditions have substantially changed from the date the present zoning regulations were established.

ANALYSIS: That conditions have substantially changed from the date the present zoning regulations were established. Public Art installations have become extremely popular in many neighboring cities, and even within our own downtown. The proposed regulations allow for the City to continue promoting its unique character as well as stay relevant with the growing trends.

FINDING: Consistent.



MEMORANDUM

To: Leslie Del Monte, Planning Manager
City of Hollywood (the "City")

Cc: Doug Gonzales, City Attorney

From: Susan L. Trevarthen, Esq.
Chanae Wood, Esq.

Date: August 10, 2021

RE: City's Proposed Ordinance Establishing Public Art Program

At its March 3, 2021 meeting, the City Commission approved on first reading proposed regulations that establish a public art program in the City (the "Proposed Regulations"). The Proposed Regulations include a regulation of the content of the art. In addition to the Proposed Regulations, the City Commission specifically discussed: (1) allowing someone other than an applicant to appeal a decision of the Public Art Review Committee; (2) assuring that single-family homes are not eligible for participating in the public art program; and (3) excluding religious and political messages from the scope of the Proposed Regulations (collectively, "Proposed Changes").

You have asked us to review the Proposed Regulations and Proposed Changes, recommend any needed refinements (including those required by the First Amendment), counsel City staff and City attorneys on their implications prior to second reading of the final regulations by the City Commission. Based solely upon our review of the foregoing items and applicable case law, we conclude that the first two Proposed Changes are permissible.

However, the content restriction in the Proposed Regulations and the third Proposed Change (the "Content Regulations") cannot be accomplished in the Ordinance as proposed at first reading. Specifically:

Option 1. The City may only pursue the Content Regulations by: (1) implementing a public art program on certain city-owned property; or (2) creating a program for private buildings to apply to dedicate a façade or other easement to public art; or (3) both.

Option 2. If the City does not wish to limit the program to public property or easements, then the Content Regulations cannot be incorporated.

These conclusions are further discussed below. As discussed, staff is interested in revising the Ordinance to accomplish the Commission's Proposed Changes, including the Content Regulations, and returning to first reading. As such, this memo focuses on Option 1 above, for both public property and public easements. Exhibit 1 contains our recommendations for revising the Ordinance as it went to first reading to follow Option 1.

Finally, we also provide recommended structural and substantive changes to the Proposed Regulations and Proposed Changes in Exhibit 2, should the City ultimately decide to proceed with Option 2.

I. First Amendment Principles

When establishing and implementing a public art program, the City must effectively balance the interests of businesses and residents, while remaining within the bounds of the United States Constitution. Art has been characterized by the courts as a form of First Amendment-protected speech.¹ However, the First Amendment's application to specific works of art is largely based on the ownership—public or private—of the underlying property where the artwork is being displayed.

Regulations pertaining to artwork on private property must be content neutral, contain adequate procedural safeguards, and may not be unconstitutionally vague.² Content-neutral regulations must be supported by a substantial or significant government interest, and the regulation must be narrowly tailored to that interest.³ Specifically, content-neutral regulations of artwork should focus on the non-communicative aspects of the artwork. Examples of content-neutral regulation of art include, but are not limited to, regulating the size, height, placement, or lighting of works of art.

While content-based restrictions on protected speech are presumptively unconstitutional, the Supreme Court has recognized that “the right to free speech is not absolute at all times and under all circumstances.”⁴ Restrictions on the content of speech are permitted in a few very limited areas, including artwork that contains obscenity, fighting words, and incites violence.⁵ The Supreme Court has defined obscenity as “works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value,” as determined by an “average person, applying contemporary community standards.”⁶ The Court has also provided guidance concerning speech or artwork that include fighting words or incite violence, as such speech or artwork may lose constitutional protection if it *intends* to provoke viewers towards violence.⁷ While these are long-established standards, it is important to note that the trend in recent First Amendment jurisprudence has been away from traditional standards and towards less tolerance for restriction of free speech.

Ultimately, these underlying constitutional mandates (and very limited exceptions) should be taken into consideration prior to a final decision on the Content Regulations.

II. Proposed Changes

A. The City has Discretion Whether to Allow a Third Party Appeal of a Public Art Permit Decision by the Public Art Review Committee.

Sound public art regulations usually include adequate procedural safeguards, such as an appeal process for applicants to exhaust administrative remedies.

However, ultimately, while it is uncommon, it is up to the City's discretion whether to allow a third party to appeal an administrative decision by the Public Art Committee to the City Commission. While most municipal codes are silent on this issue, the City of Miami does provide a process for third parties to appeal

¹ See *ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915, 924 (6th Cir. 2003) (“The protection of the First Amendment is not limited to written or spoken words, but includes other mediums of expression, including music, pictures, films, photographs, paintings, drawings, engravings, prints, and sculptures.”)

² See *DA Mortg., Inc. v. City of Miami Beach*, 486 F.3d 1254, 1266 (11th Cir. 2007) (“[T]he government may, nevertheless, impose reasonable restrictions on the time, place and manner in which persons exercise [their First Amendment right], subject to certain provisos. Those provisos are that: 1) the restrictions are content-neutral; 2) they are narrowly tailored to serve a significant governmental interest, and 3) they leave open ample alternative channels of communication.”).

³ *Id.*

⁴ *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 571 (1942).

⁵ *Id.*

⁶ *Miller v. California*, 413 U.S. 15, 24, 93 S. Ct. 2607 (1973).

⁷ See *Terminiello v. City of Chicago*, 337 U.S. 1, 4, 69 S. Ct. 894, 896, 93 L. Ed. 1131 (1949) (“That is why freedom of speech, though not absolute . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.”). Note the artwork may be constitutionally protected if the artist does not intend for the work to provoke unlawful action. The risk of unlawful action is not great when an artist does not intend for their work to provoke unlawful action, and when the risk of such unlawful action is not great, the work would presumably be constitutionally protected.

“Permit/Property specific mural issuance.”⁸ A potential concern with such a process is whether third parties who have other objections to a property or development will appeal just to delay redevelopment.

Regardless of whether the City choose to include a third-party appeal process in the Proposed Regulations, it is worth noting that an individual can always try to seek relief through the judicial system if they are unhappy with the City’s decisions and can show the requisite standing. This change was not incorporated into Exhibit 1.

B. Single-Family Homes are Ineligible to Participate in the Public Art Program as Drafted, and This is Acceptable Under the Governing Law.

Article VIII, Section 2 of the Florida Constitution, and Chapter 166, Florida Statutes, provide municipalities the authority to exercise any power for municipal purposes, except where prohibited by law, and to adopt ordinances in furtherance of such authority. Thus, under its home rule authority, the City can choose to limit the public art program to certain zoning districts within the City, so long as such restriction is reasonable and not arbitrary. The City may take into consideration the needs of the community, purpose of the restriction, character of the zoning districts, and the effect on the value of the property involved. However, the City should refrain from treating similarly situated properties differently.

The City may keep its current approach of excluding all residential properties, including single-family homes from participating in the public art program, as provided in the Proposed Regulations and in Exhibit 1.

C. Exclusion of Religious and Political Messages from the Scope of the Proposed Regulations Is Not Possible under the Proposed Regulations.

As indicated in Section I., the City is limited in its regulation of art on private property; the Proposed Regulations must be content-neutral. Therefore, the Proposed Regulations cannot exclude art or treat it differently in any way because of “alcohol, tobacco, adult entertainment, or obscene or offensive materials” (Section 3.22.J.2.(f)(1) of the Proposed Regulations) or because of religious or political messages (the third Proposed Change).

If the City changes its approach so that the public art program is limited to public property or easements that are deemed a limited public forum or nonpublic forum as described below, then it may reasonably define the scope of the content, including restricting all political and religious content. However, even with such an approach, the City cannot make such restrictions applicable only to certain political parties or candidates or certain religious beliefs, as that would violate viewpoint neutrality. This change was incorporated into Exhibit 1.

III. Revised Approach to Regulation to Allow Consideration of Content Regulation

A. Public Property

The U.S. Supreme Court has established a forum-based approach to determine the applicable constitutional standard for restrictions on expressive activities.⁹ As drafted, the Proposed Regulations are applicable to artwork on private property in “non-residential and mixed-use zoning districts, located outside of the Community Redevelopment Districts.” Accordingly, the Proposed Regulations must be content-neutral, supported by a substantial or significant regulatory interest, and narrowly tailored to that interest.

⁸ <https://www.miamigov.com/Services/Building-Permitting/Planning-Zoning/Appeal-a-PermitProperty-Specific-or-Qualified-Applicant-Mural-Decision> (last visited July 25, 2021).

⁹ *Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 44 (1983) (providing that the “existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue).

However, if the public art program were implemented on public property or easements, the U.S. Supreme Court has indicated that even protected speech may be regulated, and is not equally permissible in all places and at all times:

Nothing in the Constitution requires the government freely to grant access to all who wish to exercise their right to free speech on every type of government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities.¹⁰

Essentially, art on public property is analyzed as the message of the government owner of the property, and the government has much more discretion over what message to express on its own property than it does as the regulator of expression on private property.

Generally, the government has wide latitude to choose artwork for government properties and to relocate or remove that artwork in the event the government chooses to redevelop or otherwise modify government properties. Thus, to provide for the most flexibility, we recommend that the City consider implementing a public art program that allows for public art only on City-owned property or easements that are considered limited public fora¹¹ or non-public fora.¹²

Specifically, if the property is considered a limited public forum, regulations must only be viewpoint neutral and reasonable, and content regulation is permissible.¹³ This is a far more deferential standard than is applied when administering a public art program on **private** property. When the government establishes a limited public forum, it is not required to allow persons to engage in every type of speech, and may be justified in reserving the forum for certain groups or certain subject matter.¹⁴ For example, the City can restrict all political activities in a limited public forum (content); however, the City cannot make such restrictions applicable only to certain political parties or candidates (viewpoint). However, such regulation must still be reasonable, a requirement which is also applicable to a non-public forum.

When regulating speech in a non-public forum, the City's control over the forum is analogous to that of a private owner, which means the City has broad discretion to regulate content. Case law provides that when local governments retain public property for its "specific official uses," it remains non-public in character.¹⁵ The government may limit access to a non-public forum "based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral."¹⁶

Therefore, in order to retain the Content Regulations, the City should consider establishing a public art program that is restricted to City property only. If the City desires to have the program apply more broadly, it can design a public art program for private property that conditions participation in the program on the grant of a façade or other easement to the City, as described below.

B. Public Easement

The government has the right not to endorse a message that might be offensive or contrary to its interest on its property. As such, the City may design its public art program to allow buildings or business owners to apply to dedicate a public art façade easement to the City for installing, maintaining, operating

¹⁰ *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 799 (1985).

¹¹ A limited public forum is public property that the government has designated for only certain types of activities. See *Good News Club v. Milford Central School*, 121 S. Ct. 2093 (2001); *Bloedorn v. Grube*, 631 F.3d 1218 (11th Cir. 2011).

¹² A non-public forum is any other public property that has not been traditionally used for or designated for use as a forum for expressive activity. See *International Society for Krishna Consciousness (ISKON) v. Lee*, 505 U.S. 672, 679 (1992). *United States v. Kokinda*, 497 U.S. 720, 726 (1990).

¹³ *Id.*

¹⁴ *Miller v. City of Cincinnati*, 622 F.3d 534, 622 (6th Cir. 2010) ("A government entity may create a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects."); *Perry*, 460 U.S., at 47 (1983) ("Selective access does not transform government property into a public forum.")

¹⁵ See *Mehdi v. U.S. Postal Serv.*, 988 F. Supp. 725, 723 (S.D.N.Y. 1997).

¹⁶ *Kokinda*, 497 U.S. at 726 (1990); see *ISKON*, 505 U.S. at 679 (1992); *Miller*, 622 F.3d at 535 (6th Cir. 2010).

and exhibiting public art on their private buildings, or an easement for placement of sculpture or other artwork that is not attached to a façade.

Relevant policy details and legal concerns for approval of a public art easement-based program include:

- whether there will be a limit on the size of the art,
- whether the City wants to incentivize the provision of murals by:
 - allowing the amount of building signage that could have been placed on that façade to be available to use on other façades or on a freestanding sign for the building (added to Exhibit 1 based on discussion),
 - providing City loans or grants to cover their costs,
- which façades will be eligible for approval of a façade easement, considering factors such as whether the façade is safely visible to the public from multiple perspectives, whether it has enough suitable blank wall space in good repair, whether the art will block access or parking, and whether façade is lit (added to Exhibit 1),
- the process for approval of the easement, and for inspection and approval of the completion of the art in accordance with the approved plans,
- details associated with the easement documents, which may include:
 - which parties must execute the easement (building owner and affected tenant(s))
 - whether it runs with the land and binds future owners,
 - whether maintenance of the art will be provided by the building owner or the City, and remedies for lack of maintenance,
 - provision of liability insurance coverage for the work involved in completion and maintenance of the art,
 - the scope of the City's rights of entry to inspect or maintain the art,
 - a prohibition on the building owner blocking the public from access to view the art or charging for such access,
 - provisions addressing copyright, ownership, and the rights to reproduce or profit from images of the art,
 - provisions for the length of the initial term of the art, and for potential extension or termination of the easement following the conclusion of the initial term, and
 - provisions for the disposition of the art upon termination.

IV. Conclusion

Designing and implementing a public art program requires careful thought and consideration to avoid (or minimize the risk of) running afoul of the First Amendment. To provide for control over the content of proposed artworks or murals, the City will have to implement a public art program only on its property (limited or non-public forum) or on easements. Exhibit 1 provides the recommended changes to the Ordinance to implement Option 1.

If, however, the City chooses to proceed with the Proposed Regulations with a public art program on private property, it should consider implementing the recommended changes set forth in Exhibit 2. While some of the Proposed Changes can be implemented into the Proposed Regulations, the Content Regulations cannot.

By revising the Proposed Regulations as recommended herein, the City will further strengthen its proposed public art program.