



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.