

**CITY OF BERKELEY**  
**GUIDELINES AND PROCEDURES:**  
**PUBLIC ART IN PRIVATE DEVELOPMENT PROGRAM**

**I. INTRODUCTION**

Berkeley Municipal Code (BMC) Chapter 23C.22 (One-Percent for Public Art on Private Projects) requires that specified projects include public art with a minimum value of 1% of the construction cost, pay an in lieu fee of .8% to the City, or comply through a combination of the two methods. (See section IV for more complete information.) This requirement will add to the artistic fabric of our community.

**II. PURPOSE OF GUIDELINES**

The purpose of these Guidelines is to set forth the specific requirements for the production of public art pursuant to Chapter 23C.22 or the use of in lieu payments pursuant to it.

In general, these Guidelines call for:

- A. The commissioning of artists of the highest artistic merit who can bring artistic recognition and expression to the City of Berkeley;
- B. The encouragement of local artistic endeavors and support of local artists;
- C. The encouragement of public dialogue and interaction with art in public places, through appropriate education forums and public meetings, and programs;
- D. The inclusion of a broad range of works of art, reflective of the overall diversity of current works in the field of visual arts;
- E. The commissioning of works of art varying in genre, style, scale, medium, form and intent, and reflective of trends and disciplines in art on a local, regional, national and international level; and
- F. Broad and equitable distribution of works of art in the City of Berkeley.

**III. DEFINITIONS**

- A. “Artist” has the meaning prescribed by BMC Section 23C.22.040.A.
- B. “Arts and Cultural Plan” means the long term plan approved by the Berkeley City Council in 2004 by Resolution No. 62,599-N.S., as amended from time to time.
- C. “Civic Arts Coordinator” means the designated staff position within the office of

the City Manager that supports the Developer through the Public Art in Private Development Program and reviews the Preliminary Public Art Plan.

- D. “Conceptual Public Art Plan” means the preliminary design phase of On-Site Publicly Accessible Art, which includes the proposed artwork medium and proposed location(s) for the artwork, including the placement of the artwork within the site plan of the Development Project.
- E. “Construction Costs” means the value of project construction as stated on the building permit. For projects with phased construction, Construction Costs shall include the cumulative value of project construction for all permits.
- F. “Cultural Services” mean classes, performances or events that provide opportunities for the public to freely experience visual, performing, media, dance or literary arts activities.
- G. “Private Percent Art Fund” means the fund established by the City for the purpose of implementing the Arts and Cultural Plan.
- H. “Developer” has the meaning prescribed by BMC Section 23C.22.040.D.
- I. “Development Project” means any project subject to the requirements of Chapter 23C.22.
- J. “Final Public Art Plan” means the final design phase of On-Site Publicly Accessible Art, and includes scale drawings and/or maquettes, materials and color samples that fully describe the Artist’s or Artists’ approach to the project, as well as fabrication and installation methods of the On-Site Publicly Accessible Art.
- K. “On-Site Publicly Accessible Art” has the meaning prescribed by BMC Section 23C.22.040.E. “Publicly Accessible” means a location that is accessible to and available for use by the general public during normal hours of business operation consistent with the operation and use of the premises.
- L. “Preliminary Public Art Plan” means the plan submitted by the Developer’s Public Art Consultant to the Civic Arts Coordinator that describes the Artist’s or Artists’ proposed scope of work for On-Site Publicly Accessible Art, the proposed location(s) for the artwork, and the Artist(s) selection process that will be employed, and includes a written agreement between the Public Art Consultant

and the Developer with a payment schedule directly related to the scope of work and extending through the completion of the project proposal.

- M. “Public Art Consultant” means a curator, designer or art consultant with proven experience of overseeing artist selection and management of art in public places.

#### **IV. PLANNING APPLICATION AND REVIEW**

- A. The Planning Department will advise Developers of their obligations under Chapter 23C.22 as part of the Use Permit application process. The public art approval process is designed to operate parallel to the land use review process in order to gain approvals in a simultaneous time frame. For each Development Project, the public art approval process, as described below, must be completed prior to the issuance of a building permit.
- B. The Developer shall identify in its Use Permit application whether it elects to provide On-Site Publicly Accessible Art. Developers who do so will be provided with these Guidelines and directed to meet with the Civic Arts Coordinator.
- C. The Civic Arts Commission, not the Design Review Committee or Zoning Adjustments Board, is responsible for providing review and recommendations on the Final Public Art Plan, but not content, viewpoint or any other expressive aspect of the proposed On-Site Publicly Accessible Art. (See Section V.C.4.)
- D. Developers who elect as part of their application to provide On-Site Publicly Accessible Art must develop three plans during the On-Site Publicly Accessible Art process:
  - a. A Conceptual Public Art Plan to be presented to the Planning Department at the time of submitting an application for Use Permit. (See Section V.C.1.)
  - b. A Preliminary Public Art Plan to be presented to the Civic Arts Coordinator for review and approval prior to development of a Final Public Art Plan. Projects with On-Site Publicly Accessible Art budgets of less than \$100,000 do not require a Preliminary Public Art Plan and may proceed directly to the development of the Final Public Art Plan. (See Section V.C.3.)
  - c. A Final Public Art Plan, approved by the Civic Arts Commission, to be included with building permit application materials submitted to Planning staff prior to issuance of a building permit for the Development Project. (See Section V.C.6.)

For projects with phased development, staff may make the determination that initial permits (e.g., a demolition or foundation permit) be issued prior to completion of the Final Public Art Plan.

- E. Developers who elect to provide On-Site Publicly Accessible Art must pay an administrative fee equal to 5% of the 1% requirement directly to the Private Percent Art Fund prior to issuance of the building permit.
- F. In the event the value of On-Site Publicly Accessible Art as installed is less than 1% of the Construction Cost, an amount equal to 80% of the difference in value shall be paid to the City as an in-lieu fee for deposit into the Private Percent Art Fund prior to issuance of a certificate of occupancy.
- G. In cases where the Developer has elected to pay an in lieu fee under Section 23C.22.070, the Developer shall pay that fee to the City for deposit into the Private Percent Art Fund prior to issuance of a building permit.

**V. ON-SITE PUBLICLY ACCESSIBLE ART**

- A. The placement of pre-existing artworks and restoration or preservation of existing historic artworks and Artist-designed elements on building facades and other Publicly Accessible areas may be considered On-Site Publicly Accessible Art in limited circumstances if, by the determination of the Civic Arts Coordinator, they are appropriate to the site and integrated into the design of the Development Project.
- B. On-Site Publicly Accessible Art that is freestanding or consists of site-integrated visual art elements shall be sited within Publicly Accessible areas of the Development Project. On-Site Publicly Accessible Art may not be located inside the structure unless the space in which it is located is Publicly Accessible.
- C. The procedures for review and approval of the On-Site Publicly Accessible Art are as follows:
  - 1. The Developer shall submit to the Planning Department the Conceptual Public Art Plan at the time of submission of an application for a Use Permit.
  - 2. The Developer shall engage the services of a Public Art Consultant.  
Developers may select a Public Art Consultant from a list of pre-approved Public Art Consultants, which is developed by the Civic Arts Commission

through a call for consultants process. Developers may alternatively select an individual not on the pre-approved list. In that case, the Developer must produce materials for the Civic Arts Coordinator's approval demonstrating the individual's experience and competency as a Public Art Consultant. Projects with On-site Public Art budgets of less than \$100,000 do not require a Preliminary Public Art Plan and may skip the remainder of step 2. The Public Art Consultant and Developer shall create a Preliminary Public Art Plan to present to the Civic Arts Coordinator for review and approval prior to development of a Final Public Art Plan. Information the Public Art Consultant will present at the Preliminary Public Art Plan stage includes:

- i. Background research conducted on the project location and its parameters, what was learned about the site and community that influenced the Preliminary Art Plan.
  - ii. General conceptual and material approach to artwork design: what ideas the Artist will explore, media that are being considered; imagery that is under consideration.
  - iii. Specific location(s) for the artwork within the Development Project.
  - iv. How the theme was developed, how the artwork location was selected, how the stakeholders influenced and responded to the idea, and the media/materials that are being considered and whether the On-Site Publicly Accessible Art meets the criteria of paragraphs A and B of this section.
  - v. Artist selection process to be employed.
  - vi. Written agreement between the Public Art Consultant and the Developer with a payment schedule directly related to the scope of work and extending through the completion of the project proposal.
3. Once the Civic Arts Coordinator has completed review and approval of the Preliminary Public Art Plan, the Developer and Public Art Consultant may proceed with the development of the Final Public Art Plan, including Artist selection. During this process, the Civic Arts Coordinator will monitor the Artist's or Artists' progress and may request technical information as needed.

The Civic Arts Coordinator may recommend that the Artist(s) consult with a conservator on materials choices, fabrication methods and artwork maintenance requirements.

4. The Developer shall submit a Final Public Art Plan to the Civic Arts Coordinator, who will review the plan for completeness and subsequently schedule it for review and final approval by the Civic Arts Commission. The Civic Arts Commission's review criteria include consistency with the Preliminary Public Art Plan, whether the Artist or Artists have adequately addressed issues of durability and maintenance, and whether the requirements of the Final Public Art Plan (as listed below) are adequately addressed. For projects with On-Site Publicly Accessible Art budgets greater than \$500,000, if the Commission believes that the criteria have not been adequately addressed it may request that the project return for another review. Information that the Artist(s) will present at the Final Public Art Plan stage includes:
  - i. Complete plan for On-Site Publicly Accessible Art, including artwork rendering, scale, materials, and methods of fabrication and attachment.
  - ii. Description of artwork materials, including samples, explanation of selection process, durability, and any other relevant information.
  - iii. Explanation of the relationship between the artwork and the site, the function of the artwork, next stage of project evolution, and any issues the Artist considered relative to conservation and maintenance of the artwork.
  - iv. An executed agreement between the Developer and the Artist(s).
  - v. A construction budget for the On-Site Publicly Accessible Art component of the Development Project.
5. The Developer must include the approved Final Public Art Plan in the building permit application submission, prior to the issuance of any building permits for the Development Project.
6. Prior to construction and installation of the On-Site Publicly Accessible Art, signed engineering and construction documents must be reviewed as part of the overall building permit review for the Development Project.

## **VI. ELIGIBLE AND INELIGIBLE COSTS**

- A. The following costs may be charged to the On-Site Publicly Accessible Art requirement of Chapter 23C.22.
1. All direct expenses to create the On-Site Publicly Accessible Art;
  2. Professional fees for the Artist(s) (up to 20% for design through construction document phase);
  3. Additional labor costs incurred by the Artist(s) and/or contracted services such as engineering required for the production and installation of the On-site Public Art;
  4. Required permit fees associated with the On-Site Publicly Accessible Art, including the administrative fee described in section IV.F.;
  5. Pre-approved travel expenses directly related to the On-Site Publicly Accessible Art;
  6. Transportation of the On-Site Publicly Accessible Art to the site;
  7. Structural elements to mount, display or secure the On-Site Publicly Accessible Art;
  8. Installation of the On-Site Publicly Accessible Art;
  9. Identification and information plaque containing the Artist's or Artists' name(s), media, and date.
- B. The following costs may not be charged to the On-Site Publicly Accessible Art requirement of Chapter 23C.22.
1. Public Art Consultant fees;
  2. Services or utilities necessary to operate, maintain or conserve the On-Site Publicly Accessible Art for the life of the Development Project;
  3. Publicity;
  4. Insurance for the On-Site Publicly Accessible Art for the life of the Development Project.
- C. Any proposed On-Site Publicly Accessible Art that includes facade treatments, hardscapes or functional elements, must demonstrate that the associated costs are supplemental to the original construction budget for these surface areas.

Documentation of these added funds must be submitted for approval to the Civic Arts Commission as a part of the Final Public Art Plan.

**VII. OWNERSHIP MAINTENANCE AND REMOVAL OR REPLACEMENT**

- A. On-Site Publicly Accessible Art shall remain the property of the Developer.
- B. On-Site Publicly Accessible Art must remain on the site for a minimum of 10 years. After 10 years, if the Developer wishes to remove the On-Site Publicly Accessible Art, the Developer shall notify the City at least 6 months before doing so, and shall replace the On-Site Publicly Accessible Art that is removed with alternative On-Site Publicly Accessible Art of equal or greater value, which shall be subject to the same review and approval process for the original On-Site Publicly Accessible Art set forth in these Guidelines.
- C. The Developer shall notify the Artist(s) prior to removal of On-Site Publicly Accessible Art according to the California Preservation of Works of Art Act and the Federal Visual Artists Rights Act (VARA).
- D. The contract between the Developer and the Artist(s) will include a maintenance plan and requires the Artist(s) to make repairs for any inherent vice related to the design and fabrication of the artwork for one year. The Developer shall consult with the Artist(s) regarding repairs to the On-Site Publicly Accessible Art. If the Artist or Artists are deceased or choose not to do the repair, the Developer shall retain a professional art conservator to undertake repairs. If the Development Project on which the On-Site Publicly Accessible Art is located is destroyed beyond recognition of the original artwork, the Artist(s) will be given first refusal to buy the On-Site Publicly Accessible Art pursuant to the requirements of the California Preservation of Works of Art Act and the VARA. If the Development Project property changes hands and the value of the art is itemized in the sale, the original owner may be subject to the California Art Resale Act.

**VIII. THE PRIVATE PERCENT ART FUND**

- A. The City of Berkeley recognizes the important role the arts play in creating livable places. Therefore, Developers subject to Chapter 23C.22 are strongly encouraged to consider development of On-Site Publicly Accessible Art. Nonetheless, Developers

have the option of paying an in lieu fee. All such payments will be deposited into the Private Percent Art Fund.

- B. The purpose of the Private Percent Art Fund is to provide arts and Cultural Services to the community at large by funding implementation of the Arts and Cultural Plan. Not including the portion of the fund comprised of administrative fees described in Section IV.E., expenditures from the Private Percent Art Fund will be recommended annually by the Civic Arts Commission to the City Council as part of the annual budget process. The recommendations of the Civic Arts Coordinator and Civic Arts Commission shall conform to the following allocations:
  - 1. Grants to nonprofit arts and cultural organizations for the provision of Publicly Accessible Cultural Services to Berkeley's communities;
  - 2. Commissions for Art in public places including unique permanent and temporary artworks, and enhancements to City-funded capital improvement projects for public art on City property or public rights of way;
  - 3. 20%: Administration of the Private Percent Art Fund
  - 4. 10%: Conservation of the City's collection of public art.
- C. The Civic Arts Commission shall maintain a regular annual public process for deciding how the funds shall be allocated in accordance with the priorities of the Arts and Cultural Plan following the Guidelines for Public Art in the City of Berkeley Public Art Program.
- D. The City will create an inventory, with condition assessments, for all work in the City's collection of public art on City property. The inventory will identify conservation and will be prioritized by the severity of conservation need. The Private Percent Art Fund will be used to address those artworks with the highest priority first. The Commission will continue to assess the collection and prioritize conservation needs on an annual basis.