



# KEYSER MARSTON ASSOCIATES

## PRIVATE SECTOR ARTS CONTRIBUTION PROGRAM

*Prepared for*  
**Town of Los Gatos**

*Prepared by:*  
**Keyser Marston Associates, Inc.**

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## A. Introduction

Many municipalities in California and elsewhere have adopted programs requiring private sector development projects to contribute to local art installations and programs. The requirement is most common on commercial projects; but some cities also require residential and/or industrial projects to contribute as well. The standard approach is to require a percent of building permit valuation, most commonly one percent (1%), to either be spent on constructing on-site art or contributed as an in-lieu payment to be deposited into a trust fund. This approach has been accepted by the California Courts and is widely used.

The Town of Los Gatos is considering adopting a policy to require private sector commercial and multi-family<sup>1</sup> residential projects to contribute to local art installments and programs. Such a policy would be consistent with the Town's General Plan and the Art Commission's "Strategic Plan," which was accepted by the Town Council on April 10, 2017. The adopted relevant policies include the following:

### *General Plan*

- Policy HS-14.1 Encourage public art in all new commercial development
- Policy HS 14.2 Encourage art-related uses in new and remodeled retail development
- Policy HS-14.5 Encourage private/public funding, development, and operation of cultural amenities, activities, and centers consistent with the small town character of Los Gatos

### *Art Commission's Strategic Plan*

- Investigate developing a Commercial or Residential Development Percent for Art Funding Policy

The Town has retained Keyser Marston Associates, Inc. (KMA) to assist the Town in establishing the parameters of an arts program and to evaluate the magnitude of revenues that could potentially be generated by the program. This report provides the necessary information to serve as the legal foundation for the Town's arts program, should the Town elect to proceed with adopting an ordinance.

## B. Legal Context

In the case of *Ehrlich v. the City of Culver City*, the California Supreme Court found in 1993 that a requirement for art, and an accompanying in-lieu "fee" payment, was a legitimate use of a government's land use powers. In this context, a requirement for art or a monetary contribution in-lieu of providing on-site art is not an impact fee and therefore is not in need of nexus analysis support. A municipality may simply adopt an ordinance establishing the requirement.

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<sup>1</sup> Projects consisting of two or more units

The *Ehrlich* case has been widely regarded in California as settled law and is commonly quoted by city attorneys in ordinance adoption packets. It was recently challenged, however, in a lawsuit brought by the Building Industry Association, Bay Area, against the City of Oakland (Case No. 15-cv-03392-VC). The lawsuit was ultimately dismissed in 2018 by the United States District Court, Northern District of California, which further reinforces the legal standing of arts requirements.

### **C. Building Permit Trends in Los Gatos**

Incorporated in 1887, Los Gatos is largely a built-out community with very little vacant land for new development. This condition is evidenced by the history of building permit valuations. Over the last three (3) years, the Town processed a total of seven (7) new non-residential building permits and zero multifamily residential permits. The average building permit valuation was \$317,200 and the average project size was 1,870 square feet. The largest project was 5,100 square feet with a building permit valuation of \$1.0 million. This 3-year record translates into 2.3 permits per year, 4,365 square feet of new non-residential development per year, and \$740,200 of building permit valuations per year. The Town's building permit history is provided in Table 1.

As this indicates, there is very little new commercial building activity in Los Gatos. Based on the level of activity over the last three years, if the Town were to adopt an arts contribution requirement, it would not support any on-site art construction and would generate very little in-lieu revenue. If the in-lieu contribution requirement was one percent (1%) and all seven projects made an in-lieu contribution, the projects would have generated \$22,205 of revenue for arts. This translates into \$7,400 per year. And given that many municipalities have a reduced rate for small projects, the annual revenue yielded by a Los Gatos program could be less than \$3,500 per year, which might be less than the annual cost to administer the fund.

If the Town desires to go forward with adopting a program, it will likely generate a negligible amount of revenue on an annual basis. However, if a significant development does occur at any point, having a program in place would enable the Town to either benefit from a new arts installation or collect a meaningful arts contribution.

### **D. Adoption Materials**

For good practice, it is advisable that the Town of Los Gatos set out criteria and establish procedures when instituting an arts requirement. KMA offers the following outline of the basic elements of a private sector arts requirement and recommendations for Los Gatos.

It is noted that most municipalities that adopt a private contribution to art program already have in place, or adopt simultaneously, a public projects art program. These programs typically commit the municipality to spending one percent (1%) of the construction budget of select public

works capital projects on public art. We recommend that Los Gatos enact a public program along with a private requirement.

One aspect of an on-site arts requirement on private development that differs from most other kinds of fees and requirements is that the artwork is owned by the project and is privately maintained. Good art, done well can add value to a project, which enables the cost to be recouped upon the sale of the project. This distinction may also influence how the program is structured with respect to providing for the option to make a payment in-lieu of providing on-site art (which pays for public art somewhere else).

The following are six topics that are, in our view, the advisable basic elements for a Private Sector Development Arts Requirement Program (Program). We offer some recommendations as a starting point and we offer models from other cities for the Town's consideration. A summary of the arts programs of other jurisdictions in Santa Clara County and other select communities is provided in Table 2.

The following topics are addressed below:

1. The requirement and how it is applied
2. Suggested thresholds for in-lieu contribution versus the on-site requirement
3. Process aspects
4. Criteria and definitions: acceptable on-site art, art placement, budget rules
5. Longer term issues
6. Expenditure of art trust fund monies

### **1. *The Requirement and How Is It Applied***

- a. If the Town elects to proceed with an arts contribution requirement on non-residential development and multi-family residential development, we recommend that the requirement be equal to one percent (1%) of Building Permit Valuation, which is the most commonly used requirement throughout the State. A reduced percentage is sometimes used below certain threshold levels; which could also be incorporated in Los Gatos' program. Some jurisdictions also place an overall cap on the arts contribution, regardless of the size of the project. For example, Los Altos' program has a cap of \$200,000 and San Luis Obispo has a cap of \$50,000.
- b. Apply the requirement to all new non-residential projects, which in Los Gatos means principally office, retail, restaurant, and hotel developments.
- c. Apply the requirement to multi-family residential projects with two or more residential units.
- d. Provide applicants with the discretion of either providing on-site art or making an in-lieu contribution, but incentivize fee payment for smaller projects or projects where public exposure is minimal or where art may be viewed as inappropriate for some reason.

- e. Include additions and alterations to non-residential buildings in the program.
- f. Exempt affordable housing, churches, seismic retrofit projects, and the reconstruction of structures due to natural disasters.

## **2. Suggested Thresholds – On-site Art or In-Lieu Contribution**

- a. Exemption threshold – Many municipalities exempt small projects, such as projects with less than 2,000 square feet. For example, Palo Alto has a two-component threshold of 10,000 square feet of GBA and a valuation of \$200,000. Los Altos has a minimum valuation threshold of \$1 million. As noted above, over the past three years, Los Gatos has only processed seven (7) new non-residential building permits and, of those, only one permit was valued over \$1 million and none were over 6,000 square feet. Given this history, we recommend that an arts contribution equal to one percent (1%) of valuation be established.
- b. For the next tier, it is common for these programs to set a threshold below which the City prefers an in-lieu fee contribution. Palo Alto's program requires an art selection process if the art contribution exceeds \$60,000. At one percent (1%) of building permit valuation, a \$60,000 art contribution translates back to a \$6 million building permit valuation threshold for requiring or strongly encouraging on-site art. (For illustrative purposes, this would be a commercial building in the size range of 25,000 to 35,000 square feet.). Sunnyvale is considering raising the value of the art to one and a half percent (1.5%) of construction costs for on-site art and retaining a one and one tenth percent (1.1%) requirement for in-lieu contributions.

A justification for preferring in-lieu contributions for smaller valuation projects may be based on the administrative costs associated with the process leading to approval of on-site art. Some jurisdictions further justify the threshold in light of the size and quality of the art that the program is aiming to achieve. Given the low level of building activity, we do not believe that this is an issue for a private arts requirement program in Los Gatos.

## **3. Process Aspects**

- a. For on-site art, the Town needs to establish a process for approving the art that the developer/applicant wishes to install in the project. Typically, the initial proposal is part of the early entitlement process.
- b. Town staff with the oversight of the Town Council and advice from a commission reviews the art proposal through the major steps of entitlement through construction and final placement. Usually the art must be in place prior to issuance of the first certificate of occupancy unless there is a written agreement for later installation.

- c. The process includes approval of the budget and ultimate expenditures (see below).
- d. The process includes application of the criteria for acceptable art and also criteria for placement of art (see sections below).
- e. There is significant variation in the process aspects from one jurisdiction to another. Some are time consuming and contentious, encouraging in-lieu contributions whenever possible; others make the selection and placement of on-site art easy and fast. Depending on one's perspective, the quality of art produced is heavily influenced by the process, commission, and staff.

#### **4. Criteria for Art, Placement, and Qualifying Costs**

- a. The Town will need to articulate what art is and is not to be considered as Public Art. It is our understanding that Los Gatos would like to permit the in-lieu revenue to be used to support a broad range of art forms including visual arts and performing arts programs.
- b. The Program should include criteria regarding the acceptable placement of art for public enjoyment. These criteria often refer to visibility from sidewalks, etc. Inside lobby spaces are generally acceptable assuming public access to the lobby during normal business hours.
- c. Extra architectural and landscaping features may qualify, but are subject to evaluation.
- d. The Program needs to articulate what costs qualify as expenditure toward the one percent (1%) building permit valuation "fee." Typically costs of consultants, installation, transportation, and other costs do qualify, but some limitations are set.
- e. Similarly, the Program will need to define "construction" costs or "building valuation," which is the basis for the art requirement. For ease of administration, it is preferable that the contribution be applied to the same definition of costs or valuation on which other building fees are applied.

#### **5. Long Term Issues**

- a. In order to insure the long term placement of art, typically the project and the city enter into a written agreement addressing longer term issues – what happens upon sale, destruction by natural disaster, conditions under which the art may be removed or replaced.
- b. Key longer term issues concern responsibility for maintenance. Typically, on-site art is maintained by the private property owner. Some municipalities, such as Sunnyvale, dedicate a portion of the in-lieu contribution toward a maintenance fund for public art.
- c. Maintenance of insurance and liability issues are also long term concerns.

## **6. Arts Trust Fund**

- a. With the collection of in-lieu contributions, the municipality must establish a dedicated trust fund for art installations and programs. An Arts Master Plan for expenditures and priorities is advisable, but probably need not be fully prepared at initial adoption.
- b. A few California cities broadly define art to also include cultural and performing arts. To be consistent, on-site art may be other than visual art and trust fund monies may be utilized for other art forms<sup>2</sup>. The Culver City program that was referenced in the *Ehrlich* Court ruling did include use of funds for other art forms and the Court did not comment on this aspect). Also, many cities expend arts money integrating art into landscaping and streetscape type projects.
- c. As with the Program overall, the Town needs to establish a process with Council oversight to expend the collected in-lieu revenues. Procedures for grants of various kinds are often outlined in the adoption materials.
- d. Regular reporting, typically annual, to the Town Council on the trust fund is usually established in the adoption materials. Revenues collected, art projects achieved through the program, and trust fund expenditures are minimal reporting requirements.
- e. There is not a legal time limit for the expenditure of collected in-lieu fee revenues.

In summary, the above six topic areas should be addressed before the Town proceeds to adopt an Arts Requirement on Private Sector Development Program. For the most part, the Town needs to decide the basic components of the Program and establish the processes involved.

## **E. Other Local Area Programs**

KMA researched the arts programs of jurisdictions within Santa Clara County. Five municipalities have an arts requirement on private sector development, including: Los Altos, Cupertino, Sunnyvale, Palo Alto, and Milpitas. Four of these municipalities apply the art requirement to both commercial and residential development. Sunnyvale is the only community in which the program is restricted to non-residential development. Four of the communities require a one percent (1%) contribution, with Milpitas being the exception with a requirement of one half of a percent (0.5%) of building development costs. Two other communities (San Jose and Mountain View) have arts requirements on public projects, but not on private development.

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<sup>2</sup> Culver City's program was expanded to include performing arts programs in 1994, after the Supreme Court ruling on the Ehrlich case 1993. We are not aware of any court challenges to the appropriateness of using arts in-lieu fee revenues to fund performing arts.



## **F. Models from Other Cities**

A number of Bay Area cities have recently adopted or are currently in the process of adopting one percent (1%) type arts programs. These adoptions offer the advantage of accessible staff reports and draft ordinances available on line. Some examples and references are:

- City of Los Altos, adopted July 10, 2018. Ordinance No. 2018-446.
- City of Cupertino. Municipal code chapter 19.148.
- City of Palo Alto, established in 2013. Ordinance No. 5226.
- City of Sunnyvale. Municipal code chapter 19.52.
- City of Milpitas, adopted May 19, 2015. Ordinance No. 38.821. Municipal code Section 14.
- City of Berkeley – Staff report for June 3, 2015 meeting of the Planning Commission provides extensive attachments including materials from Pasadena and Palo Alto. Also a recent opinion from legal counsel (4/2015) at the back.

## **G. Recommendations Summary**

If the Town of Los Gatos wishes to adopt a Private Development Arts Requirement, we recommend the following basic parameters for the Program. These recommendations are based on our understanding of the Town's objectives, the market strength of Los Gatos, the limited amount of new development in Los Gatos, and programs in neighboring jurisdictions.

- Given the strength of the real estate in Los Gatos, we suggest a one percent (1%) requirement.
- New construction projects and additions of new space should be similarly subject to the program.
- Provide owners a choice as to whether to build on-site art or make an in-lieu contribution.
- A process for approving on-site art installations should be established. The processes of other jurisdictions, such as Palo Alto, Sunnyvale, and Cupertino could be used as models.
- The Town should establish priorities and guidelines for the expenditure of the arts revenues.
- The Town should simultaneously adopt a similar requirement on Town funded building projects, excluding street overlays.

**Table 1****Los Gatos New Non-Residential Building Permit Activity over the past three years**

| Building Permit #    | Address                | Sq. Ft.    | Valuation        | Assumed Arts Contribution<br>@ 1% of Valuation* |
|----------------------|------------------------|------------|------------------|---|
| B18-0279             | 300 Marchmont Dr       | 2,980      | \$501,921        | \$5,019   |
| B17-0803             | 14595 Clearview Dr     | 1,260      | \$250,513        | \$2,505   |
| B16-0824             | 233 Blossom Hill Rd    | 240        | \$15,696         | \$157   |
| B16-0316             | 15445 Los Gatos Blvd   | 2,151      | \$157,690        | \$1,577   |
| B18-0280             | 300 Marchmont Dr       | 812        | \$136,765        | \$1,368   |
| B16-0837             | 354 N. Santa Cruz Ave. | 5,100      | \$1,013,982      | \$10,140  |
| B16-0656             | 17445 Zena             | <u>546</u> | <u>\$143,964</u> | <u>\$1,440</u>                                  |
| Totals, over 3 years |                        | 13,089     | \$2,220,531      | \$22,205  |
| Average annual       |                        | 4,363      | \$740,177        | \$7,402   |

\* Assumed 1% contribution is for illustrative purposes. Town has not adopted an arts requirement.

**Table 2**  
**Survey of Art Requirements**  
**Santa Clara County Municipalities and Select Other Communities with Private Development Art Requirements<sup>1</sup>**

|  | Los Altos<br>31,000   | Cupertino<br>60,000   | Sunnyvale<br>154,000  | Palo Alto<br>69,000   | San Luis Obispo<br>47,000  | Milpitas<br>75,000   |
|--|---|---|---|---|--|--|
| <b>Population</b>                        |   |   |   |   |  |  |
| <b>Projects Subject to Requirement</b>   | Private residential and non-residential developments and Public Projects.   | Public and private development.   | Public and private non-residential development. Non-residential must either be at major intersection or on 2+ acre lot.   | Public and private development.   | Public and private non-residential development.  | Private residential and non-residential development.   |
| <b>Project Size Thresholds</b>           | Residential within R-3-4-5, R3-5, R3-3, R3-1.8, R3-1 - 4 or more units;<br>Non-residential - minimum construction cost of \$1 million.  | 10,000 square feet of new or expansion space.   | At major street intersection - additions must be at least 10,000 sf;<br>2+ acre lots - additions must be at least 30,000 sf<br>New public projects over \$1 million or public renovation projects over \$100,000.   | Commercial - GBA of 10,000 square feet and valuation of \$200,000;<br>Residential - 5 or more units<br>Municipal - cost of \$200,000.   | Private non-residential - Minimum construction costs of \$100,000;<br>Public - All eligible CIP projects.  | Private non-residential - 2,000 square feet;<br>Private residential - 20 or more dwelling units. |
| <b>Exemptions</b>                        | Single family developments within the R1-10, R1-H, R1-20 and R1-40 districts;<br>Affordable housing units;<br>Projects not subject to design review.  |   | Residential development.<br>Public projects excluding utility projects, streets, sidewalks, landscaping or traffic improvements.  | Affordable housing, churches, historic renovations, seismic retrofit projects, repair of structures damaged by natural disasters.   | Public - utility and underground projects.<br>Private commercial - seismic improvements, fire lateral replacements.  | Affordable housing developments with a minimum of 20 percent affordable units.                   |
| <b>On-site or In-lieu contribution</b>   | Projects in residentially zoned districts make in-lieu contribution. Projects in non-residential zones have option of either on-site construction or in-lieu contribution.  | On-site strongly encouraged.<br>Developer may apply to Fine Arts Commission for approval of in-lieu contribution.   | Discretion of applicant.  | Discretion of applicant.  | Discretion of applicant.   | Discretion of applicant.   |
| <b>Value of Requirement</b>              | 1% of construction costs as calculated based on the City's building valuation fee schedule. Art contribution is capped at \$200,000. Costs associated with affordable housing is excluded. For public projects, contribution is 2%. | 1% of first \$100 million of construction valuation. 0.9% of valuation in excess of \$100 million.<br>In-lieu payment is 1.25% of construction valuation. | 1% of construction cost for public projects; 1% of valuation for on-site private projects. In-lieu contribution is 1.1%.  | 1% of construction valuation.   | Public - 1% of construction costs, excluding land, design<br>Private - .5% of construction cost in excess of \$100,000.<br>Contribution not to exceed \$50,000.                          | .5 of 1% of building development costs declared on building permit applications.                 |
| <b>Schedule for In-Lieu Contribution</b> | Prior to issuance of building permit.   |   | Prior to issuance of building permit.   | Prior to issuance of building permit.   | Prior to issuance of building permit.  | Contribution must be paid at the time of filing the building permit application.                 |
| <b>Notes</b>                             |   |   | On-site installations are subject to approval by Arts Commission and City Council. Draft 2019 Master Plan for Public Art recommends increasing on-site requirement to 1.5% and a reduced in-lieu contribution of 1.1% to encourage in-lieu contributions. | Developments with valuation of less than \$ 6 million are encouraged to provide in-lieu contribution. On-site installations are subject to approval by the Public Art Commission. | Approvals by Cultural Heritage Committee, Planning Commission, and/or Park and Recreation Commission or Mass Transportation Committee; Architectural Review Commission and City Council. | On-site required to be installed prior to issuance of certificate of occupancy.                  |

<sup>1</sup> San Jose, Mountain View, and Santa Cruz have art requirements that apply only to public projects.

