



Civic Arts Commission

CONSENT CALENDAR  
September 24, 2024

To: Honorable Mayor and Members of the City Council

From: Civic Arts Commission

Submitted by: Dana Blecher, Chairperson, Civic Arts Commission

Subject: Civic Arts Commission Fund Request - Mitigation Fee Nexus Study, Public Art on Private Development Requirement

RECOMMENDATION

The Civic Arts Commission recommends that the City Council allocate \$125,000 in the FY24/25 Budget to fund a nexus study on the existing Public Art on Private Development Requirement (Berkeley Municipal Code 23.316), which was established in 2017. The Civic Arts Commission would like to make changes to the requirement to ensure ongoing support for the arts and culture sector in Berkeley. In order to make any changes to the Public Art on Private Development Requirement, first a nexus study is required by the State of California's Mitigation Fee Act.

SUMMARY

Established by ordinance in 2017, the City's [Public Art on Private Development Requirement](#), codified in the Berkeley Municipal Code (BMC) section 23.316, requires that construction developers of private property in Berkeley do one of the following:

- A. Include on-site publicly accessible art valued at 1.75 percent of the construction cost. If the value of on-site publicly accessible art as installed is less than 1.75 percent of the construction cost, an amount equal to 80 percent of the difference in value shall be paid to the City of Berkeley as an in-lieu fee.
- B. Pay an in-lieu fee to the City of 0.80 percent of the construction cost.

This requirement applies to:

- New multifamily residential projects of five or more dwelling units
- New commercial structures
- New industrial structures
- All construction of building additions exceeding 10,000 square feet

The following project types are exempt from the requirement:

- Development projects where at least 60 percent of the units are affordable housing
- Buildings with religious assembly uses or nonprofit arts/cultural uses
- Transitional housing

A complete list of projects participating in this program current through July 2024, entitled "Private Percent Project Payment Tracking" is included in this report as Attachment 1.

In the eight years since the Public Art on Private Development Requirement was established, City Zoning regulations and State laws have changed which have impacted the public art requirement and are preventing it from fully fulfilling its original intent. The Civic Arts Commission wishes to address these issues by making amendments to Berkeley Municipal Code 23.316.

### FISCAL IMPACTS OF RECOMMENDATION

The fiscal impact of this recommendation is the allocation of \$125,000 in General Funds in Fiscal Year 2024/2025 to fund a mitigation fee Nexus Study for the Public Art on Private Development Requirement. The cost of the Nexus Study cannot be funded from the fees collected through the Public Art on Private Development Requirement, because those funds are limited by policy to expenditures related to public art and the staffing to administer the projects.

### CURRENT SITUATION AND ITS EFFECTS

Since the establishment of the Public Art on Private Development Requirement in 2017, the Civic Arts Commission has noted the following issues that it would like to address by making amendments to Berkeley Municipal Code 23.316.

1. Currently projects that were not expressly exempt from this requirement are seeking an exemption by claiming that their project's type of structure is not expressly included in the "applicability" section (for example "Group Living Accommodations"). To address this, changes could be made to 23.316.020 Applicability, specifically by editing section "B. Uses." in this chapter to "Structures" so that it would apply to all types of structures, not just "residential, commercial, and industrial."
2. In 2023, the City made administrative changes to Zoning BMC Section 23.328 (Inclusionary Housing) which changed thresholds used for the affordable housing in-lieu fee from a "per unit" threshold to square feet. This created a discrepancy with the thresholds used in the Public Art Requirement section where the threshold of "five or more dwelling units" is used. To address this, the Public Art Requirement thresholds could be changed to bring consistency between the methodology used in the two requirements.
3. The Commission is interested in exploring the inclusion of another option beyond "on-site art" or "paying an in-lieu fee" such as allowing developers to designate a percentage of construction costs to build out publicly accessible non-profit arts venue space at the ground floor that would be designated as such in perpetuity.
4. Currently, pursuant to the State Density Bonus law, developers are able to request concessions to waive the public art requirement for projects that have a certain increased percent of inclusionary affordable housing.

The Commission is interested in exploring zoning amendments that would result in fewer developers leveraging concessions to waive the Public Art Requirement, and instead:

- a. Alternatively, explore whether inclusionary affordable units can be set aside for artists/arts workers when developers seek concessions on the public art requirement.
- b. Change the Public Art Requirement to be solely a Mitigation Impact Fee so that it is not on the list of costs that may be waived as a “concession” as is currently allowed under the State Density Bonus laws.

### BACKGROUND

The City of Berkeley is well known for its diversity in art, music and culture. Arts and culture are also an important economic engine, bringing visitors from throughout the region and world to Berkeley to take part in our community’s numerous cultural activities and admire our public art program. The City of Berkeley established the Public Art in Private Development policy by Ordinance in 2017, which requires qualifying private development projects to either incorporate a public art element or pay an in-lieu fee to the Cultural Trust Fund to support the ongoing activities outlined above. The Public Art on Private Development Program plays an essential role in maintaining and advancing Berkeley’s cultural arts landscape.

#### *Public Art Program Impact*

Since the establishment of Public Art in Private Development policy and the adoption of the Ordinance in 2017, 49 development projects have completed their Public Art on Private Development requirement as follows:

- 8 have created on-site public art (Total value = \$1,347,013)
- 35 have paid the in-lieu fee (Total collected = \$4,729,284)
- 6 had “State Density Bonus” concessions granted to waive the public art requirement (Art requirement amount waived = \$89,793,613 for three of the six projects - three did not provide values.)

There are currently 53 eligible projects in the development pipeline:

- 10 stated intentions to create on-site public art (Estimated total value = \$2,429,949)
- 41 stated intentions to pay the in-lieu fee (Estimated total = \$5,995,920)
- 1 stated intention to seek a “State Density Bonus” concession to waive the public art requirement (Value unknown.)

Details for all the development projects being tracked as subject to this requirement may be found in Attachment 1, the total received as of July 2024, since program inception is approximately \$4.73M.

#### *Use of In-Lieu Funds*

By policy, 70% of the monies received from art in-lieu fees contributed primarily from commercial developers on large-scale projects goes towards acquiring and installing public art in the City of Berkeley. The recent sculpture by Mildred Howard installed near

BART's Ashby Station is an example of such an acquisition. The City of Berkeley has many unfunded Public Art needs that are dependent upon this fund source. For example, there are some projects which have been identified on the Civic Arts Commission Work Plan, which have not yet been fully funded through this fund source, such as Turtle Island Monument.

20% of the art in-lieu fees goes to administration which in turn support a portion of staff salaries for two FTEs in the Civic Arts team. These staff manage public art selection processes, contracts with artists, fabrication of artwork, installation of art and maintenance of the City's art collection. These functions are essential to maintaining the high quality of cultural arts in the City of Berkeley.

The remaining 10% of the art in-lieu fee contributes to the care and maintenance of existing public art in the City's public art collection, an essential factor in responsible art ownership. The recent cleaning and restoration of the *Mak Roote* murals at the University Avenue underpass at the Berkeley Amtrak station is an excellent case in point where several City departments teamed up to restore commissioned murals from the natural occurring weather damage but also to clean and beautify the surrounding area to greatly improve the setting for the artworks. This budget allows for the proper care and maintenance of dozens of public artworks in the City of Berkeley public art collection.

In 2019, the Civic Arts Program completed a comprehensive assessment of the City's Public Art Collection, which included a complete inventory and condition evaluation of all the artworks in the City's collection. The assessment found that 65% of the City's outdoor artworks require conservation attention. The estimated cost to conserve all the artworks in need of treatment is between \$782,135 to \$995,530. To preserve the collection, the artwork should also be regularly maintained at a cost of approximately \$50,000 annually. Additionally, artwork is sometimes vandalized, and those repair costs can vary depending upon the damage.

#### ENVIRONMENTAL SUSTAINABILITY AND CLIMATE IMPACTS

There are no identifiable environmental effects, climate impacts, or sustainability opportunities associated with the subject of this report.

#### RATIONALE FOR RECOMMENDATION

The Public Art on Private Development Program is critical in the acquisition, installation, care and maintenance of many of the cultural artifacts and artworks that are integral to the City of Berkeley's unique identity. These attributes are world-renown, enjoyed by the public and can attract residents/tenants to reside in Berkeley. As the state law related to housing and private development evolves, so must the public art program and its fee structure.

#### ALTERNATIVE ACTIONS CONSIDERED

None.

CIVIC ARTS COMMISSION APPROVAL

The Civic Arts Commission took the following action at their regular meeting on July 24, 2024:

M/S/C (Covarrubias/Blecher) to request Council Referral for amendments to the Public Art on Private Development Ordinance and Budget Referral Request for Fee Nexus Study.

Vote: Ayes — Anno, Bachrach, Blecher, Covarrubias, Crandall, Ibarra, Pineda, Woo;  
Nays — None; Abstain — None; Absent — Bullwinkel.

CITY MANAGER

The City Manager takes no position on the content and recommendations of the Commission's Report.

CONTACT PERSON

Jennifer Lovvorn, Secretary, Civic Arts Commission, (510) 981-7533

Attachment:

1: Public Art on Private Development, Private Percent Project Payment Tracking, 2024.



	Bayer Annual Payment FY26	Community Benefit Agreement				not yet paid												
2127	Dwight (2127-2159)	In-Lieu Fee (20% for Admin)			\$125,476.26	7/1/2024					1							
3030	TELEGRAPH	In-Lieu Fee (20% for Admin)			\$156,056.16	7/1/2024					1							
			\$0.00	\$0.00	\$281,532.42		\$0.00	0	2	0		8	\$1,347,013.78	35	\$4,729,284.75	6	\$89,805,056.69	
In Progress																		
742	Grayson	In-Lieu Fee			\$314,637.06						1							
805	Jones	On-Site Art (5% Admin Fee)	\$9,712.50	\$485.63							1							
1110	University	On-Site Art (5% Admin Fee)	\$175,000.00								1							
1155 (-1173)	Hearst	In-Lieu Fee											No Declaration Yet					
1200 (-1214)	SAN PABLO	In-Lieu Fee			\$66,166.54	Not yet paid/This FY or next					1							
1201	SAN PABLO	In-Lieu Fee			\$65,789.48						1							
1207	TENTH	On-Site Art (5% Admin Fee)	\$56,039.00								1							
1367	University	In-Lieu Fee (20% for Admin)			\$7,651.19						1							
1598	University	In-Lieu Fee (20% for Admin)			\$106,658.34						1							
1650	Alcatraz					not compliant												
1650	SHATTUCK				\$32,000.00						1							
1652	University	In-Lieu Fee			\$29,939.27						1							
1740	SAN PABLO					not compliant												
1752	Shattuck	In-Lieu Fee (20% for Admin)			\$73,218.48						1							
1773	Oxford	In-Lieu Fee (20% for Admin)			\$30,548.77						1							
1790	University	In-Lieu Fee (20% for Admin)			\$39,286.00						1							
1822	San Pablo					not compliant												
1835	SAN PABLO	In-Lieu Fee			\$94,198.00	Not yet paid					1							
1900	FOURTH	In-Lieu Fee			\$560,000.00	Not yet paid					1							
1914	Fifth	In-Lieu Fee			\$224,385.86						1							
2001	ASHBY					no applic- not complaint												
2015	Blake	In-Lieu Fee			\$246,317.00	Not yet paid					1							
2018	Blake	In-Lieu Fee (20% for Admin)			\$32,000.00	Not yet paid					1							
2023	SHATTUCK aka 2025 Kala Bagai Way	In-Lieu Fee			\$30,822.00	Not yet paid					1							
2037	Kala Bagai Way	Concession?										1						
2065	KITTREDGE																	
2115	KITTREDGE	In-Lieu Fee			\$237,979.00	Not yet paid					1							
2127	Dwight (2127-2159)	In-Lieu Fee (20% for Admin)			\$125,476.26	Not yet paid					1							
2128	Oxford (2132-2154 Center)	Concession? Value in DRC packet \$1.1M			\$917,163.00	Not yet paid					1							
2136	SAN PABLO	In-Lieu Fee			\$104,878.65	Not yet paid					1							
2190	SHATTUCK	In-Lieu Fee			\$680,000.00						1							
2198	SAN PABLO	In-Lieu Fee			\$46,400.00	Not yet paid					1							
2210	Harold	In-Lieu Fee			\$122,500.00	Not yet paid					1							
2221	Fourth/2216 5th St	In-Lieu Fee			\$87,200.00						1							
2229	FOURTH/2222 5th Street																	
2300	Ellsworth	In-Lieu Fee			\$263,324.00						1							
2317	Channing	In-Lieu Fee			\$23,274.81	Not yet paid					1							
2325	MCGEE Ave	In-Lieu Fee			\$8,000.00	Not yet paid					1							
2420	Shattuck	On-Site Art (5% Admin Fee)	\$314,864.00	\$15,743.20							1							
2427	SAN PABLO (2427-2433)	In-Lieu Fee			\$72,106.00	Not yet paid					1							
2434	SAN PABLO				\$9,600.00	Not yet paid					1							
2435	SAN PABLO	In-Lieu Fee			\$24,671.14	Not yet paid					1							
2440	SHATTUCK				\$120,000.00	received declaration 11/18/21												
2441	Le Conte	In-Lieu Fee (20% for Admin)			\$31,994.00	received declaration 2/21/24					1							
2449	Dwight	In-Lieu Fee (20% for Admin)			\$70,880.00	received declaration 11/9/22					1							
2462	BANCROFT	In-Lieu Fee (20% for Admin)			\$75,228.00						1							
2527	SAN PABLO	In-Lieu Fee			\$59,200.00	Not yet paid					1							
2538	Durant	In-Lieu Fee (20% for Admin)			\$132,000.00	Not yet paid					1							
2538	Durant	In-Lieu Fee			\$132,000.00						1							
2550	Shattuck	TBD																
2587	Telegraph	In-Lieu Fee (20% for Admin)			\$139,044.00	Not yet paid					1							
2601	San Pablo	On-Site Art (5% Admin Fee)	\$496,920.00	\$24,846.00							1							
2712	TELEGRAPH	In-Lieu Fee (20% for Admin)			\$58,118.00	Not yet paid												
2720	SAN PABLO	On-Site Art (5% Admin Fee)	\$ 191,501.00	\$ 9,575.05							1							
2733	San Pablo	On-Site Art (5% Admin Fee)	\$ 383,583.00	\$ 19,179.15							1							
2795	SAN PABLO																	
2800	TELEGRAPH	In-Lieu Fee			\$24,573.85	not yet paid					1							
2847	Shattuck	On-Site Art (5% Admin Fee)	\$247,415.72	\$12,370.79							1							
2920	Shattuck	On-Site Art (5% Admin Fee)	\$449,914.00	\$22,495.70							1							
2942	College	In-Lieu Fee (20% for Admin)			8636.05						1							
3000	SHATTUCK					No Declaration Yet												
3030	TELEGRAPH	In-Lieu Fee (20% for Admin)			\$156,056.16						1							
3031	Adeline	On-Site Art (5% Admin Fee)	\$105,000.00	\$ 5,250.00							1							
3031	TELEGRAPH	In-Lieu Fee			\$312,000.00						1							
TOTAL			\$2,429,949.22	\$109,945.51	\$5,995,920.91		\$0.00	10	40	2	18	\$3,776,963.00	76	\$10,835,151.17	8	\$89,805,056.69		

