SULTAN CITY COUNCIL
AGENDA ITEM COVER SHEET

ITEM #: Action A 6

DATE: February 26, 2009

SUBJECT: Ordinance 1026-09

CONTACT PERSON: Laura Koenig, City Clerk/Deputy Finance Director

ISSUE:
The issue before the Council is Ordinance 1026-09 amending the requirement for public art as a part of construction projects.

SUMMARY STATEMENT:
SMC 3.70, Art in Public Places, requires the city to authorize and/or appropriate an amount equal to 1% of the total for municipal project costs for art enhancement. Projects include the construction or remodel of any building, park or parking facility.

In accordance with information received from MRSC (Attachment C), the City is not required to allocate funds for public art as a part of a municipal construction project. The City may be required under the condition of a loan or grant to include a percentage for art work.

Staff is recommending that 3.70.020 be amended to include the language "If required by the funding agency". This is a easy fix to the code section and would provide the required language for any grant or loan application.

RECOMMENDATION:
Introduction of Ordinance 1026-09 amending Chapter 3.70 and pass it on for a second reading.

Attachments:
A. Ordinance 1026-09
B. Chapter 3.70 – Art in Public Places Amended
C. E-Mail regarding Public Art

ATTACHMENT A

CITY OF SULTAN
WASHINGTON

ORDINANCE NO. 1026-09

AN ORDINANCE OF THE CITY OF SULTAN, WASHINGTON, AMENDING CHAPTER 3.70 ART IN PUBLIC PLACES IN THE SULTAN MUNICIPAL CODE; PROVIDING FOR SEVERABILITY; AND ESTABLISHING AN EFFECTIVE DATE

WHEREAS, the City Of Sultan adopted Ordinance 682-98 to provide for art in public places; and

WHEREAS, the City is not required to provide an appropriation for art for all construction projects;

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF SULTAN, WASHINGTON, DO ORDAIN AS FOLLOWS:

Section 1. Chapter 3.70.020 is hereby amended to read as follows:

3.70.020 Appropriations for municipal projects.

If required by the funding agency, authorization and/or appropriations for municipal construction projects shall include a percentage of the total project cost for art enhancement, which shall be deposited into the community improvements fund for art purposes. That amount shall not be modified because of subsequent change orders.

Section 2. Severability. Should any section, paragraph, sentence, clause or phrase of this Ordinance, or its application to any person or circumstance, be declared unconstitutional or otherwise invalid for any reason, or should any portion of this Ordinance be pre-empted by state or federal law or regulation, such decision or pre-emption shall not affect the validity of the remaining portions of this Ordinance or its application to other persons or circumstances.

Section 3. Effective Date. This Ordinance shall be published in the official newspaper of the City, and shall take effect and be in full force five (5) days after the date of publication.

ADOPTED BY THE CITY COUNCIL AT A REGULAR MEETING THEREOF ON THE ____DAY OF _____, 2009.

CITY OF SULTAN

_____
Carolyn Eslick, Mayor

ATTEST/AUTHENTICATED:

_____
Laura Koenig, City Clerk
Approved as to form:

_____
Margaret J. King, City Attorney

Date of Publication:
Effective Date:

ATTACHMENT B

Chapter 3.70
ART IN PUBLIC PLACES

Sections:
3.70.010 Purpose.
3.70.015 Definitions.
3.70.020 Appropriations for municipal projects.

3.70.010 Purpose.

The city of Sultan has determined that it is a benefit to the community to provide increased access to public art and to enhance the visual aesthetics of the community. Public art provides a stimulating environment for the building/site users and fosters community pride and identity. In harmony with this, it is the policy of the city to provide for acquisition, commissioning and display of works of art in public places of the city. (Ord. 682-98)

3.70.015 Definitions.

A. "Public art" means capital acquisitions of works of art by the city of Sultan.

B. "Municipal construction project" means any capital project paid for wholly or in part by the city of Sultan to construct or remodel any building, park, parking facility, or portion thereof, within the limits of the city except for utilities, streets, or sidewalks.

C. "Total project cost" means the total amount of funds appropriated for the project per construction bid award or negotiated construction contract award; provided, that the following shall be excluded when calculating the total project costs:

1. The amount received from a source of funds for construction projects which precludes expenditures for works of art or cultural projects.
2. The amount of funding provided by:
   a. Revenue bonds;
   b. Community development block grants;
   c. Other federal, state or local grants;
   d. LID projects unless specifically authorized in the LID process.
3. Any subsequent change orders for the project.
4. Sales tax or any other tax on the construction bid amount or negotiated construction contract award. (Ord. 682-98)

3.70.020 Appropriations for municipal projects.

If required by the funding agency, authorization and/or appropriations for municipal construction projects shall include ~~an amount equal to one percent~~ a percentage of the total project cost for art enhancement, which shall be deposited into the community improvements fund for art purposes. That amount shall not be modified because of subsequent change orders. (Ord. 682-98)

ATTACHMENT C -1

Laura Koenig

From: Deborah Knight [Deborah.Knight@ci.sultan.wa.us]
Sent: Thursday, April 24, 2008 12:31 PM
To: Erin Martindale; Rick Hawkins; Connie Dunn; Brad Collins; Donna Murphy; Laura Koenig
Cc: Carolyn Eslick; Dale Doornek; Deborah. Knight; Jim Flower; Jim Flower; Kristina. Blair; Ron Wiediger; Ron. Wiediger; Sarah Davenport-Smith; Steve. Slawson
Subject: FW: Research Request

There was a discussion on the 1% for art requirement in the City code at the April 10 council meeting. I did a little research and didn't find anything in the RCW. So I checked with MRSC.

There is no state requirement for code cities to set aside a percentage for art. See below

I recommend that we review the city's requirement and discuss whether this is a policy the city would like to continue.

Your thoughts?

Deborah Knight
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www.ci.sultan.wa.us

-----Original Message-----
From: Joe Levan [mailto:jlevan@mrsc.org]
Sent: Thursday, April 24, 2008 11:53 AM
To: deborah.knight@ci.sultan.wa.us
Subject: Research Request

As you and I discussed by phone, we are not aware of a statutory requirement that would require a city – in this case a code city (Sultan) – to allocate a percentage amount to be expended for the acquisition of works of art related to public works and/or capital projects. Although I found such statutory requirements related to state agencies (see, e.g., RCW 43.17.200), school districts (see, e.g., RCW 28A.335.210), and colleges and universities (see, e.g., RCW 28B.10.027), I did not locate such a requirement pertaining to cities.

This is consistent with a response I am providing below from one of our other legal consultants that addresses the issue more generally, and states, in relevant part, that a city, as a policy decision, may have a "percentage for arts program," but a city is not required to have such a program.

Keep in mind, however, that if a city is using "pass through" funds and/or funds from an entity (i.e., state and/or federal government) that requires a percentage for the arts, the city would presumably have to comply with that requirement. For example, if the city is receiving grant funds for a project and one of the conditions of the grant is to comply with the state's percentage for the arts program, the city would need to comply with that requirement.

The response I mentioned follows (note that some of the links to the city/county codes may have changed but the section references should still be up-to-date):

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INQ. NO.: 07-0969
Y/N: Y
CITY/COUNTY: Mill Creek
DATE: 2/14/2007
REC: PKJ
INQUIRER: Joanne Gregory
TITLE: Finance Director
FC: PL 10.1150
RE: We are currently working on a 'workable' procedure for our 1% for Municipal Arts program, trying to have clear guidelines and information. I don't know if you have any reference materials or practical application information you can share? We are confronting questions about: should the 1% be based on original budget or amended, what if actual expenditures are much lower than budget, what if they are higher, is there a minimum threshold that makes sense, what constitutes a qualifying project, what about acquisitions or property or buildings, etc. If you have anything you can share, I'd appreciate it. I have some other city ordinances, but was looking more for a 'best practice' or practical application type of information or maybe just your opinions!

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I do not believe that anyone has come up with a list of "best" practices. All I know is that, after reviewing a couple codes, jurisdictions have "different" practices for the one percent for the arts money. I've supplied a number of links to codes at the bottom of this message.

Some examples:

1. Not all use one percent. Issaquah does 1/2 percent of estimated costs up to $5 million and 1/4 percent for costs over $5 million.

Comment: This is purely a policy decision.

2. Kinds of projects that one percent (or some other percent) is applied to.

A. Olympia, Issaquah, Edmonds, and Edmonds all include buildings, structures, parks, streets, sidewalks and parking facilities. Bainbridge Island does not include parking facilities, but that could just be because they can't imagine they would ever build one. Burien applies its one percent to building, transit centers and parks.

B. Some of the cities include utilities in the one percent programs but, in most cases, probably should not because of a recent Appeals Court decision. In *Okeson v. City of Seattle*, 130 Wn App 814 (December 19, 2005) (the link is: http://www.mrsc.org/mc/courts/appellate/130wnapp/130wnapp0814.htm), the court ruled that one percent art funds from utility projects had to be spent on art for facilities owned by the utility. I just looked at your budget and it appears that the only utility you have is surface water. Don't apply the one percent to any construction for that.

C. Some jurisdictions have a threshold. Olympia only applies the one percent to projects costing more than $100,000. Snohomish County has a threshold of $100,000; Issaquah, $10,000.

Comment: Maybe it isn't worthwhile to have your staff make this calculation for small projects. Sort of the same reasoning as in deciding where to put the threshold for including fixed assets in your inventory.

3. Costs of the project that the one percent applies to.

A. Most cities have (all should have) language similar to the following:

> In the event any law, rule or regulation establishing a source of funds for a particular project prohibits, limits or excludes art and art works as a proper expenditure on the part of these entities, then the amount of funds from such source shall be excluded in computing the percentage amount of the "total project cost."

Our attorneys believe REET funds cannot be spent on art. For streets, I would think that gas tax receipts and grants would also be excluded.

B. Issaquah, Edmonds, Olympia apply the one percent to "total estimated cost." Shoreline and Mercer Island use the awarded contract. Shoreline adds language that says the amount will NOT be adjusted for change orders. Bainbridge seems to say that the total cost is the amount it actually pays. So, of the cities I have looked at, they are the only one that would make an adjustment for being over or under budget. Burien doesn't define "total project cost."

Comment: I think there is a practical reason why a city uses estimated costs or the awarded contract. In some cases it needs to know up "up front" how much money it has in its budget for art. For example, in cases where the one percent will be spent on art for the facility (for example, a city hall or library), some of the art may be an integral part of the structure. For something like a sculpture that will be free standing, the city needs to contract for the art work early enough in the construction process to ensure that the sculpture will finished when the facility opens. If the project were a parking garage (I am assuming that there would not be much art in the garage), the city could wait to find out what the actual costs were. I suppose one could define costs differently, depending on what kind of project it is.....

4. Uses of proceeds.

As you read through the code sections, you will see that some cities just say the council or an arts commission will decide. Snohomish County has the most detailed description in sec. 2.95.020 in its code. You will see that it includes performing media in its definition of "the arts" in subsection 5 and construction of a space to display visual art or a performance venue for performing art in its definition of "works of art" in subsection 8. Issaquah also identifies a facility or venue for performing art as a permitted use. (Sec. 3.99.010 E.) So, yes, I think you can spend the money on facilities. This is a policy decision for your council.

I suggest that when you write your ordinance, you follow Snohomish County's example of having good definitions. That, actually, is the reason I included the link in the first place. I think this is particularly important if you want to include spending on arts facilities or performing arts as uses. I have the impression that most cities spend their funds on the visual arts. And, I think most citizens, if they ever think about it, think the money is spent on visual arts. I know I did until I read these codes. So, if you are silent on facilities or performances in your ordinance, you may have problems if you want to make it possible to use the funds that way.

- Bainbridge Island Municipal Code, ch. 3.80, Sections B and C- http://www.mrsc.org/mc/bainbridge/bainis03.html#3.80

C.4.

- Burien Municipal Code, Ch. 3.31 - http://www.mrsc.org/mc/burien/burien03.pdf
- Edmonds City Code, Ch. 3.13 - http://www.mrsc.org/mc/edmonds/Edmond03.html#3.13
- Issaquah Municipal Code, Ch. 3.99 – http://www.mrsc.org/mc/issaquah/issaqa03.html#3.99
- Mercer Island Municipal Code, Sec. 4.40.972 and 4.40.974- http://www.mrsc.org/mc/mercerisl/mercis04.html#4.40.972
- Olympia Municipal Code, Sec. 2.42.90-100 and 110 http://www.olympiamunicipalcode.org/ (A little tricky -- you have to click on the plus sign next to Title 2 to open to a page where you can see links to all the chapters in Title. Then click on the plus sign next to Chapter 2.42.)
- Shoreline Municipal Code, Sec. 3.35.150 - http://www.mrsc.org/mc/shoreline/shore03.html#3.35.150
- Snohomish County Municipal Code Sec. 2.95.020 and 2.95.080 - http://www1.co.snohomish.wa.us/County_Services/county_code.htm (Scroll down a bit until you can see link to download Title 2 Then scroll more until you get to Chapter 2.95.)

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Best Regards,

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