
M E M O R A N D U M

DATE: April 16, 2004
TO: City Council Members
FROM: Russell Weeks
RE: Briefing: Proposed Amendments to *City Code* Chapter 14.38 titled *Sidewalk Entertainers and Artists*
CC: Cindy Gust-Jenson, Rocky Fluhart, Sam Guevara, Ed Rutan, Lee Martinez, Alison McFarlane, Rick Graham, Nancy Boskoff, David Dobbins, Boyd Ferguson, Larry Spendlove, Linda Cordova, Gary Mumford, Janice Jardine

This memorandum is intended to address issues pertaining to proposed amendments to City Code Chapter 14.38 titled Sidewalk Entertainers and Artists. The City Council is scheduled to hear a briefing on the proposed amendments at its April 20 work session. Chapter 14.38 expired on November 30 under its sunset clause.

The memorandum contains a number of attachments including: proposed amendments to Chapter 14.38 and Administration cover letter dated October 27, 2003; a proposed ordinance from the Citizen Artists group; a City Council staff memorandum dated February 13, 2004; and other items that may be pertinent.

KEY POINTS

- The proposed ordinance is almost identical to the proposed ordinance contained in the Administration's October 27, 2003 transmittal.
- At two meetings last week representatives of The Downtown Alliance indicated that the Farmers Market is scheduled to open on June 12 in Pioneer Park. They indicated that the market will expand this year to include more than 300 vendors and take up about three-fourths of the space in Pioneer Park.
- The Administration held two public meetings, one on February 4, 2004 and another with a focus group involving participants in the February 4 meeting to review and comment on the proposed ordinance.
- As mentioned, Chapter 14.38 originally contained a May 31, 2003 sunset date. The City Council later extended the sunset date to November 30, 2003.
- At the February 13 meeting, the City Attorney's Office indicated that the City cannot constitutionally enforce the City's existing ordinances that prohibit the sale of artwork on sidewalks or parks other than under ordinances such as those regulating the blocking of sidewalks, disturbing the peace, and littering. Except for those ordinances the City has no restrictions regulating when or where artists may display or sell artwork including "the

absence of any limitation on where ... artists may display or sell in proximity to special events, to other artists, to art galleries, to entrances to businesses, to intersections or to other locations of possible concern.” (Please see Attachment No. 1.)

- According to the Administration, the proposed ordinance is intended to simplify the original Chapter 14.38 to foster more interest among artists to exhibit work or perform on City sidewalks or in parks.
- The proposed ordinance would:
 - Include the block containing the new Main Library as a place where sidewalk artists and entertainers could display work or perform.
 - Change the definition of “sidewalk art” from “original works of art displayed upon publicly owned sidewalks and park strip areas, or in city operated parks. It shall not include: 1) any artwork produced by any person other than the sidewalk artist displaying the artwork, 2) any artwork purchased or taken on consignment and held for resale, or 3) any clothing other than jewelry and other accessories or hand painted or tie dyed garments, which if containing mass produced or commercially manufactured parts, such mass produced or commercially manufactured parts have been assembled by the artist and are not the predominant element of an item sold,” to “*original or reproduced works of art displayed upon publicly owned sidewalks and park-strip areas, or in city operated parks. It shall not include: produce or other products not constituting art.*”
 - Eliminate requirements in the original ordinance for obtaining registration permits, renewing permits, filing permit applications and paying fees for permits.
 - Eliminate the original ordinance’s spacing requirements for locations on City block faces.
 - Eliminate a location restriction that prohibits a sidewalk artist or entertainer from exhibiting or performing “at the same location for more than seven (7) consecutive days.”
 - Clarify the 100-foot distance requirement for displaying artwork or performing during special events.
 - Increase the height restriction for displays from five-feet-high to six-feet-high on sidewalks and park strips. However, the proposed ordinance would eliminate any display restrictions in City parks.

POTENTIAL OPTIONS

- Adopt the proposed ordinance.
- Adopt the proposed ordinance but include a sunset provision to give time to determine the ordinance’s effectiveness.
- Amend the proposed ordinance to include requirements for obtaining registration permits, renewing permits, filing permit applications, paying fees for permits, spacing displays on City sidewalks and park strips, and displays in City parks.
- Amend the proposed ordinance to increase the distance from special events.
- Amend the proposed ordinance to limit locations where sidewalk art and entertainment may be displayed or performed.
- Re-adopt the original ordinance.
- Adopt the proposed ordinance submitted by the Citizen Artist group.

- Employ counsel from outside the Attorney’s Office to review the proposed ordinance, review other cities’ ordinances regulating sidewalk art displays and entertainment, and recommend potential amendments to the proposed ordinance.

POTENTIAL MOTIONS

Potential motions will be prepared after the City Council is briefed on the proposed amendments April 20.

ISSUES/POTENTIAL QUESTIONS FOR CONSIDERATION

- Is there any sentiment among the City Council to pursue enacting an ordinance different than what the Administration has proposed?
- Last year, the Administration estimated that there was a core of about “three dozen artists” who regularly show and sell work or perform on City sidewalks and in parks, including Pioneer Park. Given that number, what is the potential effect of any ordinance to regulate sidewalk art sales or entertainment?
- The City Council held a public hearing before adopting the original ordinance; should a public hearing be held before formal consideration of the proposed ordinance?
- Should permits and permit fees be eliminated?
- Should spacing requirements on sidewalks and park strips be eliminated?
- Within City government, which agency would be responsible for enforcing the proposed amendments, particularly if the City does not issue permits?
- Were any citations issued under the original ordinance?
- If an artist’s or performer’s property is removed in an emergency, and the artist or performer requests a hearing on the removal, is the City Property Manager’s Office the proper forum to determine whether the removed display constituted “an immediate threat to the public’s life, safety, or health?”
- Is it better public policy to designate certain streets or areas as places to display art or perform, or is it better public policy to designate land-use zones listed in the original and proposed as locations for displaying art or performing – each based on a time, place, and manner analysis?

DISCUSSION/BACKGROUND

The City Council first addressed this issue in the latter half of 2001. The Council adopted Ordinance No. 22 of 2002 on May 14 that year. The ordinance contained a one-year sunset provision to allow study of the ordinance’s effect and City officials’ possible reconsideration of the ordinance. As the date of the sunset provision neared, the Administration requested an extension of the sunset date, in part because the summer season had yet to begin. The City Council adopted a motion to extend the sunset date to November 30, 2003.

According to the Administration, between the adoption of the original ordinance and its November 30 sunset the City issued 14 permits to artists or entertainers who paid the required \$50 fee. Council Members may recall that the \$50 fee was required of artists or entertainers older than age 18 who displayed work “for sale or profit” more than 12 times in any 12-consecutive month period.

The Administration also estimated that there was a core of about “three dozen artists” who regularly showed and sold work or performed on City sidewalks and in parks. Roughly 35 to 40 artists displayed wares in Pioneer Park when the Downtown Alliance’s Farmers Market was held, according to estimates. Perhaps a “handful” of artists routinely display works or perform on sidewalks or in parks throughout the City. (Please see Attachment No. 2.)

Last summer, the Administration held a series of events called Mainly Art in which artists and entertainers exhibited or performed on the west side of Main Street between South Temple and 200 South streets. One result of the events was that a cooperative of local artists rented space on the second floor of the Crossroads Plaza mall near Nordstrom and Tabula Rasa. According to the cooperative-store’s managers, the store opened November 6. According to the store’s manager at the February 4 public meeting, close to 50 artists displayed work for sale in the store by that date. The managers said they would like to participate in Mainly Art events this year, but the store would remain open permanently. The store’s marquee is titled *Mainly Art*.

According to the City Attorney’s Office, when the original ordinance expired on November 30, sidewalk artists or entertainers had to comply with City Code provisions regulating vending carts, sidewalk sales by adjacent businesses, and temporary merchants participating in special events. However, the Attorney’s Office emphasized at the February 4 public meeting that except for those ordinances the City has no restrictions regulating when or where artists may display or sell artwork including “the absence of any limitation on where ... artists may display or sell in proximity to special events, to other artists, to art galleries, to entrances to businesses, to intersections or to other locations of possible concern.”

Mayor Anderson at the February 4 public meeting told participants that he preferred to have artists concentrated in an area or areas of sidewalks to build a critical mass of activity. The Mayor said the original ordinance’s requirement of three artists or entertainers per block face did not work. He said the Mainly Art activities organized by the City last year were more successful because artists and entertainers concentrated into a group. (It should be noted that the Mainly Art program was organized under a special event permit.) Artists who spoke to that issue agreed with the Mayor that a concentration of activity was more effective than the spacing required under the original ordinance.

The Mayor also said he preferred that the City require no permits or fees for artists and entertainers. He said there were a lot of young people and elderly people who want to try to sell artwork or perform to see if there is an audience or market for their craft or performance. Those people “should never be deterred by City bureaucracy” by requiring that they obtain a permit. The Mayor said that if problems arose after an ordinance is adopted, then the issue of permits could be addressed.

PROPOSED AMENDMENTS

As mentioned in the *Key Points* section of this memorandum, there are a variety of proposed amendments. To review, the proposed amendments would:

Include the block containing the new Main Library as a place where sidewalk artists and entertainers could display work or perform. According to the Administration, the designated area for sidewalk artists and performers would be the south wall of the reflection pond starting at the southwest corner of the Main Library to the small amphitheater near the library’s south entrance. The space would be 10 feet wide.

Change the definition of “sidewalk art.” The change would replace the original definition of sidewalk art. The original definition included the words “original works of art displayed upon publicly owned sidewalks and park strip areas, or in city operated parks. It shall not include: 1) any artwork produced by any person other than the sidewalk artist displaying the artwork, 2) any artwork purchased or taken on consignment and held for resale, or 3) any clothing other than jewelry and other accessories or hand painted or tie dyed garments, which if containing mass produced or commercially manufactured parts, such mass produced or commercially manufactured parts have been assembled by the artist and are not the predominant element of an item sold.” The proposed definition reads, “... *original or reproduced works of art displayed upon publicly owned sidewalks and park strip areas, or in city operated parks. It shall not include: produce or other products not constituting art.*”

Eliminate requirements in the current ordinance for obtaining registration permits, renewing permits, filing permit applications and fees for permits. It should be noted that the City Council supported permits and fees when it adopted the original ordinance. It also might be noted that in researching the proposed amendments, Council staff found that some concerns have been raised about who will enforce the proposed amendments, particularly if no permits are issued. A City Property Management official said at the February 4 public meeting that long-term the City should issue permits to help manage activity on City property. Issuing permits also could be an opportunity for the City to educate artists and entertainers about any City ordinance regulating their presence on City property. Mayor Anderson disagreed.

Moreover, last year business owners contacted at least one Council Member with the following concerns:

- 1) Property owners are asked to maintain park strips between sidewalks and curbs. However, some artists use the park strips to set up artwork or store boxes. Property owners contend the artists’ activity destroys grass and trees in the park strips.
- 2) Business owners claim that artists park in one-hour metered parking stalls for extended periods of time – sometimes all day. Although the owners have contacted Parking Enforcement officers, they can’t always respond the same day.
- 3) Many business owners say they depend on foot traffic for their businesses. However, some artists make it difficult for individuals to pass by in order to get to other businesses.

Eliminate spacing requirements for locations on City block faces in the current ordinance. The current ordinance allows three artists or entertainers on every 330 feet of a block’s face. That means artists or entertainers must locate about 110 feet away from each other on City sidewalks. It is Council staff’s understanding that one reason the Administration obtained a special events permit and organized the Mainly Art program was a concern that the current ordinance made it difficult to achieve a critical mass of density and activity where sidewalk artists, sidewalk entertainers and the public could interact.

Given that one of the proposed ordinance’s stated purposes is to “enliven and increase commerce and create a festive atmosphere in the downtown area and in city parks,” the City Council may wish to consider whether fostering a critical mass of activity is necessary to achieve that purpose.

There are perhaps four factors the City Council may wish to consider:

- The original and proposed ordinances allow sidewalk artists and entertainers to display or perform in areas zoned CN (Neighborhood Commercial District), CB (Community Business District), CS (Community Shopping District), CC (Corridor Commercial District), CSHBD (Sugar House Business District), CG (General Commercial District), D-1 (Central Business District), D-2 (Downtown Support District), D-3 (Downtown Warehouse/Residential District), D-4 (Downtown Secondary Central Business District) and G-MU (Gateway-Mixed-Use District). The original and proposed ordinances permit displays and performances in City parks. According to the Administration, all city parks have designated areas for art displays and performances.
- Again, according to the Administration, there is a core of about “three dozen artists” who regularly show and sell work or perform on City sidewalks and in parks.
- The City’s Mainly Art program last summer appears to have been relatively successful, in part because the program’s events achieved a critical mass of density between sidewalk artists and entertainers and the public.

Given the above, one might ask: If the City’s goal is to “enliven and increase commerce and create a festive atmosphere in the downtown area and in city parks,” is the area where sidewalk artists and entertainers can locate too large, particularly if estimates of the core group of artists and entertainers is correct?

The City Council may have two options. The first option would be to adopt the proposed ordinance and see if it creates the density and activity achieved in special events such as Mainly Art programs last year. A second option might be to designate an area or areas of the City where sidewalk artists and entertainers could perform so they would know certainly where they could display, sell or perform, and the public would know where to find them. City Council staff’s reading of Section 8 of San Francisco’s street artist ordinance appears to give that City’s Board of Supervisors the authority to designate “areas in or on any public street or public place where any street artist or craftsman ... may sell, offer for sale, expose for sale, or solicit offers to purchase any art or craft item of his own creation.” Designating certain streets may increase the potential for sidewalk artists to reach a critical density of interest with the public, and perhaps help establish an arts and entertainment district in the City – a long-held goal dating back to at least the 1988 Regional/Urban Design Assistance Team study.

It should be noted that, San Francisco’s ordinance requires artists who display on streets designated for art to obtain a certificate from that city. Artists may obtain an annual license for \$350. If artists choose to display on streets not designated for art displays, they must be licensed as peddlers.

It also should be noted that Salt Lake City Arts Council Director Nancy Boskoff told Council staff that designating specific streets or areas could create problems because under the original ordinance artists or performers could choose locations that worked for them. She noted that two artists preferred to display works for sale in the 900 South 900 East area instead of downtown because they live in the Ninth and Ninth area.

Eliminate a location restriction that prohibits a sidewalk artist or entertainer from exhibiting or performing “at the same location for more than seven (7) consecutive days.” According to the Administration, none of the artists the Administration contacted felt it was necessary to limit someone to seven consecutive days at one location. The City Council may wish to consider whether the number of artists and entertainers who seem to actually display work or

perform in the City warrants requiring them to move more than 110 feet away from a location after seven days, as the original ordinance required.

Clarify the 100-foot distance requirement for displaying artwork or performing during special events. The proposed ordinance would prohibit artists or entertainers from displaying or performing within 100 feet of a special event or free expression activity permitted under City Code Chapter 3.50. The distance would be measured “from any boundary of the special event or free expression activity area.” The proposal also would allow artists or entertainers to obtain permission to perform nearer than 100 feet “from the sponsor of the special event or free expression activity.” The City Attorney’s Office said at the February 4 public meeting that it arrived at the 100 foot limit because it is the same limit required of vending carts for special events in Chapter 5.65.120. The Attorney’s Office also said the 100-foot limit would be defensible in court if challenged, but to restrict a sidewalk artist to a distance where the artist would be completely excluded from a special event in a park is not defensible.

The Downtown Alliance’s plans to take up three-fourths of the space in Pioneer Park may test that issue. Three-fourths of 660 feet – the length of the block containing Pioneer Park equals 495 feet. If one subtracts 100 feet from the remaining 165 feet, that leaves about 65 feet of space north and south for sidewalk artists and entertainers who are not part of the Farmers Market to locate. In other words, if the Alliance indeed uses 495 feet of the 660 feet north and south on the block, the artists and entertainers would be confined to a relatively thin strip along the southern part of the park. It should be noted that the City apparently has turned down an application by The Downtown Alliance for a special event permit to use the entire area enclosed in Pioneer Park. Previously, the Alliance has raised concerns about the effect sidewalk artists and entertainers have had on the Farmers Market and vendors who have leased space within the market. According to the Attorney’s Office there is an argument that the City may restrict the proximity of a sidewalk artist to a special event to the extent that the sidewalk artist’s message may be confused with the message of a special event.

Increase the height restriction for displays from five-feet-high to six-feet-high. According to the Administration, sidewalk artists previously have indicated that the five-foot height restriction in the original ordinance prevented them from displaying their work. However, the proposed ordinance would omit height and display requirements for sidewalk artists and entertainers in City parks. Previously, the Administration noted that most display tables are three feet high, and a typical display unit set on the table may take up another three feet in height.

Other Issues

Citizen Artists Proposed Ordinance

The proposed ordinance submitted by the Citizen Artist group mirrors the Administration’s proposed ordinance in several ways. However, the Citizen Artist group’s proposed ordinance contains the following differences:

- The proposed ordinance defines “Displaying Visual Art” as “original works of art and prints of original works of art.” Its definition does not include as visual art “produce or other, purchased for resale commercial products not constituting art; any work of art created by a person or persons other than the visual artist displaying the art; any work of art purchased or taken on consignment and held for resale ; and any clothing unless constituting or containing original art or intertwined with a particular individual message

being conveyed by the citizen displaying the clothing.” The definition appears to be more restrictive than the Administration’s definition of art.

- The proposed ordinance would limit the space between a commercially related or special event to no more than 100 feet from activities at the special event.
- The proposed ordinance would codify that artists who “choose not to participate in special events ... will be allowed equal access to the same city properties at other times as per 14th Amendment rights of equal protection.” The clause would seem to indicate that if an artist did not show at a special event, the artist could show at a different time or date at the special event’s location.
- The proposed ordinance also appears to seek entry for sidewalk artists to special events through the following clause: “If the special event or free expression activity is to be held on city property and participation in the event is to be open to the general public, then the city will deem the event a “public event” and the applicant cannot use a jury review committee to select who is worthy of participation but must allow all citizens who wish to participate an equal opportunity based upon a content neutral lottery.”

LEGAL ISSUES

The City Attorney’s Office raised the following legal observations at the February 4 public meeting:

- Courts have ruled that under the Constitution cities must allow artists and entertainers to express themselves on public sidewalks, streets and parks – subject to time, place and manner restrictions.
- The City cannot constitutionally enforce the City’s existing ordinances that prohibit the sale of artwork on sidewalks or parks other than under ordinances such as those regulating the blocking of sidewalks, disturbing the peace, and littering. According to the Attorney’s Office, the City has no restrictions – other than those in the preceding sentence – regulating when or where artists may display or sell artwork including “the absence of any limitation on where ... artists may display or sell in proximity to special events, to other artists, to art galleries, to entrances to businesses, to intersections or to other locations of possible concern.”
- Cities have the right to regulate the time, place and manner of First Amendment activities.
- The City must at minimum amend existing ordinances to allow for expression by artists and entertainers on public streets, sidewalks and parks.
- Unless the City has a compelling interest, it cannot discriminate between and artist selling his or her’s own created art and reproductions of another person’s art.
- “Art” has to be perceived as art. For instance, a basket of apples where each apple is for sale may not be perceived by the general public as art.

- Without a significant governmental interest, the City cannot restrict the numbers of artists that should be allowed to display and sell products on each block face of sidewalk and within parks.
- The City may restrict the proximity of a sidewalk artist to a free expression special event to the extent that the sidewalk artist's message may be confused with the message of a special event. Restricting a sidewalk artist's display to no closer than 100 feet is legally defensible. Restricting a sidewalk artist to a distance where the artist is completely excluded from a special event in a park is not legally defensible.
- The Administration arrived at the 100-foot restriction during special events after reviewing the City's ordinance regulating vending carts.
- The Constitution allows governments to have a permit structure and charge reasonable fees for issuing permits.

OTHER CITIES' ORDINANCES

Council staff has attached ordinances from two California cities, San Francisco and Santa Monica for comparison purposes.

The San Francisco ordinance is described on that city's web page as follows:

“San Francisco's street artists provide residents and visitors with a colorful outdoor marketplace that contributes to the economic life of the city. The Street Artists Program licenses these independent artists and craftspeople to sell their own handcrafted wares in designated sidewalk vending spaces Downtown and on Fisherman's Wharf. Street artists are allowed to sell every day of the year, and selection of the approximately 350 spaces is by daily lottery. Annual license fees, which may be paid quarterly, are \$350. Application forms must be accompanied by a \$20 application fee.”

Perhaps the most pertinent section of the ordinance is Section 8 titled *Designation of Sales Areas*. The section appears to give the San Francisco Board of Supervisors the authority to designate “areas in or on any public street or public place where any street artist or craftsman certifies pursuant to the provisions of this ordinance may sell, offer for sale, expose for sale, or solicit offers to purchase any art or craft item of his own creation ...”

The Santa Monica ordinance defines the creation of “visual art in its entirety” as performance. (Section 6.112.020 (d) and (j)). The ordinance also appears to designate specific areas where performances can take place. It also requires performers to apply for a permit issued by Santa Monica and pay a “non-refundable annual fee in an amount to be set by resolution adopted by the City Council.” (Section 6.112.040 (f)).

It should be noted that the San Francisco and Santa Monica ordinances probably are the result of mature markets for sidewalk art and entertainment while Salt Lake City's market probably is in a nascent stage.