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**Date:** November 28, 2018  
**To:** Cultural Commission  
**From:** City Attorney  
**Subject:** Utility Box Art Program

This memorandum is in response to a request to remove certain artwork on a City utility box, the removal of which implicates the artist's moral rights, the government speech doctrine, and the First Amendment.

### **Background**

The City and its Cultural Commission currently sponsor the Utility Box Art program, which provides artists the opportunity to paint utility boxes (City-owned traffic signal controller cabinets located in public right of way) in the City. The artists must apply by submitting their artwork to the City, and the encouraged "theme" of the artwork involves using City of Santa Clara subjects. The application requires a rendering of the artwork, a statement about how the rendering represents the City of Santa Clara community, and requires the applicant to sign a release of liability form. Aside from the release of liability form, the program does not require artists to enter into an agreement with the City. A panel of judges selected by the Cultural Commission evaluates entries and chooses the "winner." The winning artist receives a \$250 stipend per utility box, artist recognition by way of signature on the utility box, and the artist and/or artwork may be featured in City publications.

After it was approved by the Commission and painted on a utility box on Tasman Drive across from Levi's Stadium, an artwork entitled "Our Ladies of Perpetual Football" was challenged by a member of the public as "blasphemous." The artwork on the utility box in question has a football theme and features cheerleaders in red outfits on each side of the box. Behind the cheerleaders are colorful images, including footballs with wings, and football fields, and also includes the title of the artwork. The artwork was approved by the Cultural Commission on October 5, 2015; however, the approved artwork did not include the title, and has been on this utility box since 2016. The member of the public challenges the artwork as offensive to Catholics, and claims that the images intend to parody sacred images of the Catholic faith. It has been requested that the artwork be removed.

After the Cultural Commission (the "Commission") was notified of the complaint by the member of the public, the Commission took several actions. At its February 5, 2018 meeting, a motion was made and passed to request the artist of the artwork to take one of the following options: (1) remove the title of the artwork in line with the Commission's recommendations; (2) submit a new proposal/design to replace the artwork; or (3) allow the City to paint over the artwork within a specified time frame. The Commission also took action to add additional guidelines to the Utility Box Art program.<sup>1</sup>

Before the City considers the request to remove the artwork, it must be determined if this action would implicate the rights of the artist under federal and state artist protections and under the First Amendment.

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<sup>1</sup> February 5, 2018 Cultural Commission meeting minutes, pp. 1-2.

### **Artist's Moral Rights**

Federal and state laws recognize an artist's "moral rights" to their artwork, including the right of integrity, which empowers an artist to object to the destruction of one's work and to prevent its mutilation, distortion, or alteration.<sup>2</sup> An artist's moral rights are statutorily protected under Federal and state law. Although those rights may be expressly waived by an agreement, no such agreement exists under the current Utility Box Art program and thus the artist maintains moral rights to the artwork on the utility box in question.

#### *California Art Preservation Act (Civ. Code §§ 987 & 989)*

In 1979, the Legislature enacted the California Art Preservation Act ("CAPA"), granting artists a legal interest in protecting works of "fine art against any alteration or destruction."<sup>3</sup> To enforce those interests, artists are entitled to injunctive relief, damages and attorneys' fees and costs.<sup>4</sup> An artist can waive these rights either expressly in writing, or implicitly by creating the art where it cannot be removed from a building without damage to the art or the building.<sup>5</sup> An organization acting in the public interest can also sue to prevent destruction or alteration of fine art, but can obtain only injunctive relief and attorney's fees and costs.<sup>6</sup> Protected fine art includes original paintings "of recognized quality," which depends on expert opinion, including from artists, art dealers, and museum curators.<sup>7</sup> Murals are a protected subset of paintings.<sup>8</sup> CAPA has been preempted, in part at least, by Federal law.

#### *Visual Artists Rights Act of 1990 (17 U.S.C. §§ 106A & 113(d))*

In 1990, Congress amended the Copyright Act by enacting the Visual Artists Rights Act of 1990 ("VARA"), which grants a visual artist the rights, *inter alia*, to "prevent any intentional distortion, mutilation, or other modification" of their visual work of art and also to prevent any intentional or grossly negligent "destruction of a work of recognized stature."<sup>9</sup>

Courts have acknowledged in dicta that the part of VARA enabling an individual artist to enforce legal rights preempts corresponding portions of CAPA, though there has been no decisive holding.<sup>10</sup> There has been no such holding regarding an organization's rights to bring an action under CAPA.

#### *Integrity of Artwork on Utility Boxes Protected by VARA*

Given the preemption, similarities of CAPA and VARA, and the existence of more instructive case law thereunder, the Utility Box Art Program is analyzed under VARA. A work of visual art under VARA

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<sup>2</sup> *Lubner v. City of Los Angeles* (1996) 45 Cal.App.4th 525, 530.

<sup>3</sup> Civ. Code § 987(a).

<sup>4</sup> § 987(e).

<sup>5</sup> § 987(g)(3), (h), (i).

<sup>6</sup> § 989.

<sup>7</sup> § 987(b)(2), (f).

<sup>8</sup> *Botello v. Shell Oil Co.* (1991) 229 Cal.App.3d 1130, 1138 (CAPA applied to 1,200 sq. ft. mural on side of Shell service station).

<sup>9</sup> 17 U.S.C. § 106A(a).

<sup>10</sup> *Lubner, supra*, 45 Cal. App. 4th at 531 (declining to analyze merits of artist's appeal under CAPA after remarking that "it appears that section 987 has been preempted by" VARA); *Cort v. St. Paul Fire and Marine Ins. Companies, Inc.* (9th Cir. 2002) 311 F.3d. 979, fn. 1, citing *Lubner*.

includes a single painting "existing in a single copy, [or] in a limited edition of 200 copies or fewer."<sup>11</sup> A mural can be a work of visual art.<sup>12</sup>

In order to obtain protection under VARA, an author must make a "two-tiered showing: (1) that the visual art in question has "stature," i.e. is viewed as meritorious, and (2) that this stature is "recognized" by art experts, other members of the artistic community, or by some cross-section of society."<sup>13</sup> "The stature of a work of art is generally established through expert testimony."<sup>14</sup> Recognized stature can be based upon evidence of community publicity, opinions, and news articles.<sup>15</sup> Outdoor works of art intended to beautify outdoor public spaces have sufficient recognized stature under VARA.<sup>16</sup>

There are exceptions, which are pertinent here. "Applied art," is not protected under VARA, which is not defined in the statute, but courts have interpreted to mean "an object with a utilitarian function that also has some artistic or aesthetic merit."<sup>17</sup> According to *Cheffins*, exempted applied art includes a "functional object... decorated after manufacture but [that] continues to serve a practical purpose."<sup>18</sup> Also, works with a primary purpose of advertising or being promotional cannot be a work of visual art under VARA.<sup>19</sup>

Here, VARA likely protects paintings created as part of the Utility Box Art Program from destruction. Painted murals are plainly covered by VARA. There are no statutory exceptions that would apply to these paintings based on their content and locations, unless they were promoting specific events. Moreover, it is unlikely that paintings are integrated with the function of the utility boxes so as to be considered exempt applied art. If litigated, an artist would have the burden to establish their painting on the utility box is of a recognized stature. But, the burden of establishing an artwork's stature is relatively easy to satisfy, particularly if there is any media coverage of the painting. The more community visibility a work of art has, the more likely it would have recognized stature. Accordingly, a painting on a utility box in a visually-prominent and high-traffic place may have recognized stature and is likely protected under VARA.

#### *Removing Artwork under VARA*

If a property owner wants to remove a protected work of visual art and the artwork can be removed without destroying or modifying it, the property owner must make a good faith effort to notify the artist.<sup>20</sup> After receiving notice from the property owner, an artist has 90 days to either remove the work of visual art or pay for its removal, or else they waive their right to later bring a civil suit.<sup>21</sup>

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<sup>11</sup> 17 U.S.C. § 101.

<sup>12</sup> *Pollara v. Seymour* (2d Cir. 2003) 344 F.3d. 265, 270.

<sup>13</sup> *Carter v. Helmsley-Spear, Inc.* (S.D.N.Y. 1994) 861 F.Supp. 303, 325.

<sup>14</sup> *Scott v. Dixon* (E.D.N.Y. 2004) 309 F. Supp. 2d 395, 400.

<sup>15</sup> *Martin v. City of Indianapolis* (7th Cir. 1999) 192 F.3d. 608, 612.; see also *Hanrahan v. Ramirez* (C.D. Cal., June 3, 1998) 1998 WL 34369997, at \*4 (recognizing statute of mural based on publicity and nomination for awards).

<sup>16</sup> See *Hunter v. Squirrel Hill Associates, L.P.* (E.D. Pa. 2005) 413 F.Supp.2d 517, 518 (landscape mural painted on building overlooking park).

<sup>17</sup> *Cheffins v. Stewart* (9th Cir. 2016) 825 F.3d 588, 593–594.

<sup>18</sup> *Id.* at 594 (replica of Spanish warship built from used school bus to transport [participants at Burning Man] is not a work of art).

<sup>19</sup> *Pollara, supra*, 344 F.3d at 271 (hand-painted banner for a single event was not a protected work of visual art).

<sup>20</sup> 17 U.S.C. § 113(d)(2).

<sup>21</sup> *Id.*

The rights of an artist to prevent destruction do not apply if the work of visual art “has been incorporated in or made part of a building in such a way “that removing the work from the building will cause the destruction, distortion, mutilation, or other modification of the work” and the artist has expressly consented in writing to a waiver of their rights.”<sup>22</sup> An artist may waive his or her rights under VARA expressly and in writing.<sup>23</sup> Here, the artwork in question cannot be removed without destruction, distortion, mutilation, or other modification, and therefore the only way the City can remove the artwork without violating the artist’s rights under VARA is with the artist’s express and written waiver of his or her rights. The City does not have a waiver of those rights at this time, and it is unknown as to whether the artist would agree to waive those rights.

Therefore, before any works of visual art in the Utility Box Art Program are altered, modified or removed (i.e. painted over), the City must obtain a waiver of their CAPA and VARA rights in writing. Going forward, the City Attorney’s Office recommends that all artists who participate in the Utility Box Art Program sign an express written waiver under both VARA and CAPA to their moral rights, including the right to object to the destruction or alteration of the artwork.

### **Government Speech Doctrine**

Taking action on the Utility Box Art program artwork may implicate the First Amendment. The First Amendment has a much more limited effect when the government is the speaker. The US Supreme Court has declared that a government entity is “entitled to say what it wishes” as long as it is in comportment with the Establishment Clause.<sup>24</sup>

In *Johanns v. Livestock Marketing Ass’n*<sup>25</sup>, the Court further developed the government speech doctrine by articulating three criteria for determining whether a particular message is government speech or private speech: (1) whether the government effectively controls the program setting forth the communication; (2) whether the government determined in general terms the nature of the message to be communicated; and (3) whether the government approved the message.

In *Pleasant Grove City v. Summum*<sup>26</sup>, the Court analyzed the issue of whether privately funded monuments permanently displayed in a public constituted government or private speech. In this case, Pleasant Grove City had a policy for requests to erect permanent, privately donated monuments that limited the City’s park monuments to those either directly relate to the City’s history or donated by groups with longstanding ties with the community.<sup>27</sup> The requestor did not submit information to demonstrate that the monument was in accord with the policy, and thus the City denied the request and the requestors challenged the denial as a violation of the First Amendment. The Court held that the placement of a permanent monument in a public park is best viewed as a form of government speech and is therefore not subject to scrutiny under the Free Speech Clause. The Court identified important factors in its decision, including the City’s exercise of selectivity and control of the monuments to be included in its park, the permanent nature of the monuments, and that the monuments are meant to convey and have

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<sup>22</sup> 17 U.S.C. § 113(d)(1).

<sup>23</sup> 17 U.S.C. § 106A(e).

<sup>24</sup> See *Rosenberger v. Rector and Visitors of Univ. of Va.* (1995) 515 U.S. 819, 833 and *Rust v. Sullivan* (1991) 500 U.S. 173, 193 (“The Government can, without violating the Constitution, selectively fund a program to encourage certain activities . . . In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.”

<sup>25</sup> 544 U.S. 550 (2005).

<sup>26</sup> 555 U.S. 460 (2009).

<sup>27</sup> *Id.* at 465.

the effect of conveying a government message. These factors have been subsequently used to determine the application of the government speech doctrine.<sup>28</sup>

The City's Utility Box Art program is essentially a public art program. Several cases have explored when the government's involvement with public art constitutes government speech. In *Newton v. LePage*<sup>29</sup>, the Court held that the Governor of Maine did not violate the First Amendment by removing a large state-owned mural on the walls of a waiting room for visitors to the Maine Department of Labor. The Court held that the government speech doctrine supported the Governor's decision to relocate the mural based on its message (pro-labor and anti-business), and that the government has discretion with respect to the display of art on its own property, and discretion to make aesthetic judgments.<sup>30</sup>

The City's Utility Box Art Program provides for the City to decide which artwork is to be displayed on public property, and the City has control over the utility boxes. Although utility boxes have not been traditionally used to convey messages, like monuments, the City's exercise of discretion and control of the artwork and utility boxes provides a strong argument for the artwork to be government speech and thus rendering the First Amendment inapplicable. Accordingly, the City may alter, modify, and/or remove the artwork without implicating the First Amendment.

#### *Establishment Clause*

The artwork in question has been challenged as blasphemous to Catholicism, and thus an analysis of whether the City's past action to approve the artwork and the request for the City to remove the artwork implicates the Establishment Clause. The Establishment Clause of the First Amendment prohibits the government from making laws relating to the establishment of religion, or prohibiting the free exercise of religion. Here, "Our Ladies of Perpetual Football," has a football theme and features cheerleaders in red outfits on each side of the box. Behind the cheerleaders are colorful images, including footballs with wings, and football fields, and also includes the title of the artwork. The artwork has been challenged as blasphemous and parodic of the Catholic faith.

In *Lemon v. Kurtzman*<sup>31</sup>, the Supreme Court set forth the "Lemon test", used to determine whether the Establishment Clause has been violated. If any of the following three prongs of the test is violated, the government's action is deemed unconstitutional under the Establishment Clause: (1) the government action must have a secular legislative purpose; (2) the principal or primary effect of the action must not advance nor inhibit religion; and (3) the action must not result an excessive government entanglement with religion. Here, the City's decision, by way of the Cultural Commission, to approve artwork or remove artwork on City utility boxes served a secular legislative purpose, to beautify the City, and there is no indication that the artwork was intended to have any religious message at all.

While it does not appear that the work itself is a religious symbol that the placing of which would violate the Establishment Clause, the Commission's consideration of the request to remove or modify the artwork may have implications in terms of entanglement. The complaining party's assertion that the artwork is offensive to his religious beliefs places the Commission in the position of evaluating the validity of the complaining party's religious objection when the artist's message was not intended to be religious in nature. This places the Commission in the middle of a discussion about the religious beliefs of two competing interested parties. Because it appears that the Commission's action to recommend changes to

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<sup>28</sup> *Walker v. Texas Div., Sons of Confederate Veterans, Inc.* (2015) 135 S.Ct. 2239 (holding state's specialty license plate program constituted government speech).

<sup>29</sup> 700 F.3d 595 (2012).

<sup>30</sup> *Id.* at 603-604.

<sup>31</sup> 403 U.S. 602 (1971).

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government speech may have been based upon the religious views of a member of the public, it inadvertently inserted itself into an assessment of the religious nature of the artwork.

### **Recommendations**

1. The Commission should reconsider its prior recommendation to change the artwork. Instead, the Commission may consider advising the artist of the concerns expressed by the member of the public and seek a response from the artist on whether he or she would like to remove the artwork, or modify it, or replace it with another. This decision lies solely with the artist.
2. If the City intends to continue with the Utility Box Art program, it is recommended that the program's guidelines and application be amended to include a defined theme(s).
3. The program's guidelines and application should require an artist who wishes to participate to sign an agreement waiving the artist's rights under VARA and the California Art Preservation Act, as well as an acknowledgement of the City's right to alter, modify, and/or remove the artwork, and other contractual obligations as deemed appropriate by this office.

**cc:** Mayor & Council  
City Manager

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