ADMINISTRATIVE REPORT

Date: January 19, 2012

Agenda Item No.: 3

Meeting Date: January 25, 2012

To: **COST OF SERVICE AND RATE DESIGN CITIZEN ADVISORY COMMITTEE**

From: **SHANA EPSTEIN, VENTURA WATER GENERAL MANAGER**

Subject: **PUBLIC ART REGARDING WATER AND WASTEWATER ENTERPRISE FUND CAPITAL PROJECTS**

RECOMMENDATION

Upon approval of this action, the Committee recommends to the City Council to remove the Water and Wastewater Enterprise Funded Capital Projects from the 2% Public Art obligation *in order to remove an undue hardship on the customers of Ventura Water to support public art as part of paying for water and wastewater services.*

SUMMARY

The Committee has requested staff to formulate a recommendation to the affect above after reports from Community Partnerships staff regarding the Public Art program and the City Attorney's legal opinion that the Public Art program is admissible by Proposition 218 to be applied to water and wastewater enterprise fund capital projects. *The Committee requested stronger reasoning in the recommendation and requested staff to return with this item on January 25, 2012.*

DISCUSSION

The majority of the Committee is opposed to water and wastewater customers contributing to the Public Art program indirectly through their utility bills. Customers' rates include operational costs and capital improvement costs. New capital improvement projects include a 2% construction cost obligation toward the Public Art program. The Committee would prefer customers actively choose to support Public Art through direct donations rather than embedded in the rates. This decision was reached after thorough discussion

and requested information from three City Departments: City Attorney, Recreation, Parks & Community Partnerships, and Finance and Technology.

Attached is a summary of Ventura Water's participation in the Public Art Program. In compliance with City Policy, Ventura Water has contributed a total of $3,145,620.97 to the Public Art Program (Fund 19). A total of $1,431,249.91 has been collected from the Wastewater Fund 71 and a total of $1,714,371.06 from the Water & State Water Revolving Fund 72 and 74.

Fund 71 public art project, Harbor Wastewater Wetlands, is currently on hold, pending the future use of the ponds. However, the project team has conducted interviews with key stakeholders, two focus group workshops, and a town hall meeting. The draft vision was approved by the Commission in December 2007. A total of $431,265.27 has been expensed to support this project.

Projects completed as funded through Fund 72 and 74 include the gates at the Avenue Water Treatment Plant depicting an assembly of mechanical designs associated with water projects, enhancements to the entrance at the Golf Course Booster Pump Stations, and McWherter Conservation Garden Booster Pump Station improvements, which include native plantings and amenities to increase water conservation landscaping. A total of $582,294.53 has been expensed to support these three public art projects.

In addition, the Redevelopment Agency of the City of San Buenaventura was issued a promissory note of $1,000,000.00 from Fund 19 through Fund 72 contributions, which City Council approved on February 4, 2008 to facilitate the construction of the Working Artists Ventura ("WAV") development in the City.

This reflects a cash balance of $999,984.64 from Fund 71 and $132,076.53 from Fund 72 & 74 for a total of $1,132,061.17.

Also, attached for your reference is the City Attorney's legal opinion for the Public Art Program and the Municipal Code Chapter 4.610-Public Art Program.

Shana Epstein
Ventura Water General Manager

Attachments:
Public Art Actuals.xlsx
Public Art City Atty 12-8-2011.pdf
Public Art Muni code.pdf

VENTURA WATER - PUBLIC ART PROGRAM STATUS AS OF JANUARY 2012

CONTRIBUTED	Fund 71	Fund 72/74	Total	Actual %
Administration [1]	$ 204,957.34	$ 227,250.60	$ 432,207.94	14%
Project	$ 1,226,292.57	$ 1,487,120.46	$ 2,713,413.03	86%
	$ 1,431,249.91	$ 1,714,371.06	$ 3,145,620.97	

EXPENSED	Fund 71	Fund 72/74	Total	
Administration	$ 204,957.34	$ 227,250.60	$ 432,207.94	43%
Project	$ 226,307.93	$ 355,043.93	$ 581,351.86	57%
	$ 431,265.27	$ 582,294.53	$ 1,013,559.80	
Project Cash Balance	$ 999,984.64	$ 1,132,076.53	$ 2,132,061.17	
WAV Loan		$ 1,000,000.00	$ 1,000,000.00	
1/26/2008 Original	Expires on: Jan 26, 2010			
6/30/2010 First Amend [2]	Expires on: March 1, 2012			
3/14/2011 Second Amend [3]	Expires on: Dec. 1, 2016			
Total Loans		$ 1,000,000.00	$ 1,000,000.00	
NEW Cash Balance	$ 999,984.64	$ 132,076.53	$ 1,132,061.17	

AS ORIGINALLY PROPOSED/PLANNED	Fund 71	Fund 72/74	Total
Harbor Wetland Phase I	$ 440,000.00		$ 440,000.00
Harbor Wetland Phase II	$ 400,000.00		$ 400,000.00
Avenue Gates		$ 223,000.00	$ 223,000.00
Golf Course BPS		$ 40,000.00	$ 40,000.00
McWherter Conservation Garden		$ 75,000.00	$ 75,000.00
	$ 840,000.00	$ 338,000.00	$ 1,178,000.00

Notes:

[1] Per Public Art Program SBMC section 4.610.040.B, "Monies appropriated under this ordinance may be used for operating costs of the public art program, but in no event should such costs exceed 20 percent of the public art fund."

[2] - Per first amendment to promissory note: The loan and this note shall have a term (the "Term") that expires on the earlier of (i) March 1, 2012 or (b) thirty (30) days after the last unit in the Project is sold

[3] - Per second amendment to promissory note: The loan and this note shall have a term (the "Term") that expires on the earlier of (i) December 1, 2016, or (b) thirty (30) days after the last unit in the Project is sold

CITY OF VENTURA

CITY ATTORNEY

December 8, 2011

To: Shana Epstein, General Manager, Ventura Water

From: Ariel Calonne, City Attorney

Subject: Applicability of the City's Public Art Program to Ventura Water Capital Improvement Projects

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Question Presented

May the City lawfully impose its "2% for Public Art" program upon projects undertaken by Ventura Water?

Short Answer

Yes. Public art charges pursuant to Chapter 4.610 of the San Buenaventura Municipal Code (the City's public art program) are lawful elements of the cost of service which may be constitutionally recovered from ratepayers by the City via Ventura Water's rates.

Discussion

Under both the pre-Proposition 218 California Constitution and the common law of utility ratemaking, utility charges may not exceed the "reasonable" cost of providing the service in question. (*Hansen v. City of San Buenaventura* (1986) 42 Cal.3d 1172, 1180-1181 ["reasonableness, then, is the beginning and end of the judicial inquiry."]; *Beaumont Investors v. Beaumont-Cherry Valley Water Dist.* (1985) 165 Cal.App.3d3d 227, 234-235.) The post-Proposition 218 inquiry is similar:

> The theme of these sections [of Proposition 218] is that fee or charge revenues may not exceed what it costs to provide fee or charge services. ***Of course, what it costs to provide such services includes all the required costs of providing service, short-term and long-term, including operation, maintenance, financial, and capital expenditures.*** The key is that the revenues derived from the fee or charge are required to provide the service, and may be used only for the service. In short, the section 6(b) fee or charge must reasonably represent the cost of providing service. (*Howard Jarvis Taxpayers Ass'n v. City of Roseville* (2002) 97 Cal.Ap..4th 637, 647-648; emphasis added.)

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We look next to the Council's enabling powers to determine what the appropriate costs of service may include. City Charter Section 1406 authorizes the City Council to establish and operate municipal utilities:

> Section 1406. Establishment of public utilities.
> The City may establish, acquire, lease, and/or operate, or cease to operate and dispose of, public utilities and quasi-public utilities or any part thereof, at its own option ***in the manner provided by the laws now existing or hereafter enacted,*** or by the majority vote of the registered qualified electors of the City in the manner provided by ordinance enacted by the Council by the affirmative vote of five members of such Council. All amendments of such ordinances shall require a like vote. (Emphasis added.)

Likewise, Charter Section 1210 requires the Council to review and adopt a five-year capital improvement program:

> Section 1210. Capital improvement program.
> The Manager shall prepare and submit to the Council a five-year capital improvement program at least three months prior to the final date for submission of the budget. The contents of the program shall include:
> (a) A clear general summary of its contents.
> (b) A list of all capital improvements which are proposed to be made during the next five fiscal years, with appropriate supporting information as to the necessity for such improvements.
> (c) Cost estimates, method of financing and recommended time schedules for each such improvement.
> (d) The estimated annual cost of operating and maintaining the facilities to be constructed or acquired.
> The above information may be revised and extended each year with regard to capital improvements still pending or in process of construction or acquisition.
> On or before the first day of April of each year, the Council shall hold a public hearing and adopt by resolution a capital improvement program, with or without amendments.

Finally, and most critically, the Council has exercised its charter-based powers to enact San Buenaventura Municipal Code Chapter 4.610 establishing the City's Public Art Program. That program carefully includes utility projects within the definition of "eligible capital improvement project." (SBMC, § 4.610.020.) The program specifically provides that "[a]s part of the annual capital improvement plan budget, the city council will

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appropriate within each project two percent of each eligible capital improvement project for public art." (SBMC, § 4.610.030 A.)

Taking these powers together, it is clear that the City Council, as the City's ratemaking authority, has determined that the public art program constitutes a reasonable cost of service for capital improvements attributable to Ventura Water. While we have found no case directly testing public art programs against California's evolving constitutional rate, fee and tax restrictions, it seems reasonable enough to require, essentially, that City utility improvements mitigate some of their impact on the public spaces of the community through public art improvements. We believe that a court would conclude that such expenditures are a reasonable cost of service for Ventura Water.

Chapter 4.610 - Public Art Program [36]

Sec. 4.610.010. - Intent and purpose.

Sec. 4.610.020. - Definitions.

Sec. 4.610.030. - Funding.

Sec. 4.610.040. - Use of funds.

Sec. 4.610.050. - Public art funds.

Sec. 4.610.060. - Annual projects plan.

Sec. 4.610.070. - Public art commission.

Sec. 4.610.080. - Ownership.

Sec. 4.610.090. - Application.

Sec. 4.610.100. - Severability.

Sec. 4.610.010. - Intent and purpose.

The city council of the City of San Buenaventura accepts responsibility for expanding the opportunities for its citizens to experience public art and other projects resulting from the creative expression of artists in public places throughout the city. The city further recognizes the substantial economic benefits to be gained through aesthetic enhancement of its public spaces and consequent retail activity throughout the city. A policy is hereby established to direct the inclusion of works of art in public spaces throughout the city and/or the design services of artists in certain city capital improvement projects.

(Code 1971, § 1820.1; Ord. No. 2000-05, § 1, 2-8-00)

Sec. 4.610.020. - Definitions.

The following terms are defined for the purpose of the ordinance:

Annual projects plan means a prioritized list of arts projects developed by the public art supervisor in conjunction with the appropriate city departments and in consultation with the

public art commission to be approved by the city council concurrent with the capital improvement plan and budget.

Eligible capital improvement project means any capital improvement paid for wholly or in part by funds appropriated by the City of San Buenaventura to construct or remodel a building, decorative or commemorative structure, park, street, sidewalk, parking facility, or utility or any portion thereof, within the city limits of, or under the jurisdiction of, the City of San Buenaventura. Specifically excluded from this definition are street resurfacing and water and sewer line replacement projects.

Eligible capital improvement project budget means project appropriations, including land acquisition, contracted planning and design services, construction, contracted construction management services and capital equipment, but not including, legal fees, demolition, soils remediation, and portable equipment of standard manufacture.

Public art fund means a fund established for the purpose of tracking the public art program that will consist of specific accounts established according to fund source and can include sources other than the capital improvement plan as may be appropriate.

Public art projects involve all necessary tasks associated with the selection of sites for art works through their design, construction and installation.

Public art supervisor means either a contract consultant hired for this purpose, the position of public art supervisor, or the city manager or designee.

Public artworks means enduring original works of public art. The art should be integral to both the location and the associated work of other design professionals. They should contribute to a sense of place and enhance the quality of life in the city by contributing to its unique identity. The works of art should be of the highest quality and engage one's mind and senses. They should be of a lasting nature, but may incorporate such transitory design elements as light, sound, odor and touch. While they are the creation of an artist, the art works may rely on natural forces and human interaction to be fulfilled. The artworks may be permanently sited or be portable, and may serve as venues for various performing and cultural art forms.

(Code 1971, § 1820.2; Ord. No. 99-15, § § 1, 2, 6-21-99; Ord. No. 2000-05, § 1, 2-8-00)

Sec. 4.610.030. - Funding.

A.

Appropriations. As part of the annual capital improvement plan budget, the city council will appropriate within each project two percent of each eligible capital improvement project for public art. Public art monies will be transferred to the public art fund each time a contract for any portion of the overall eligible capital improvement project is approved. The two percent will be based upon the approved contract amount. Further adjustments will not be made if the project's completion produces a final cost that is different from the council's initial award of contract.

B.

Pooling. Funds appropriated for the public art program through a two percent dedication from any one capital improvement project, but not deemed necessary or appropriate to be expended in total or in part for public art at said project site, may be expended on other projects approved under an annual projects plan when such funds are eligible to be so used.

C.

Exclusions. If the source of funding or other applicable law or regulation with respect to any particular capital improvement project or portion thereof prohibits or restricts the use of the two percent dedication of such funds for art in public places, this ordinance shall not apply to those funds so prohibited or restricted.

D.

Grant applications. All city departments shall, from the effective date of this ordinance, include in applications to outside granting authorities for capital improvement projects which will include site-specific artwork, amounts for artists' services and/or artworks as specified herein, where permitted or unless otherwise waived by the city council. Receipt of such funds shall be administered as part of the city's public art program.

E.

Waiver. The city council may exclude certain capital improvement projects or budgeted portions thereof from the provisions of this ordinance by passage of an authorizing motion.

(Code 1971, § 1820.3; Ord. No. 99-15, §§ 1, 4—6, 6-21-99; Ord. No. 2000-05, § 1, 2-8-00)

Sec. 4.610.040. - Use of funds.

A.

Monies appropriated under this ordinance may be used for hiring artists to develop design concepts and for the selection, acquisition, purchase, and commissioning of public artworks. Artist fees may also include the following:

1.

Structures which enable the display of artwork(s).

2.

Artistic design and fabrication fees.

3.

Labor of assistants, materials, and contracted services, including engineering, required for the production and installation of the work of art.

4.

Any required permit or certificate fees, business and legal costs directly related to the project.

5.

Dealer's fees of up to 15 percent of the artist's fee to be paid as a dealer or gallery commission, if necessary and where appropriate.

6.

Communication and other indirect costs (insurance, utilities, travel and per diem expenses).

7.

Transportation of the work of art to the site.

8.

Preparation of site to receive artwork.

9.

Installation of the completed work of art.

B.

Monies appropriated under this ordinance may be used for operating costs of the public art program, but in no event should such costs exceed 20 percent of the public art fund. Eligible costs may include the following:

1.

Costs incurred in the process of managing the public art program including staff time, direct costs and overhead.

2.

Documentation (color slides and black and white photographs) of the artwork's fabrication and installation and plaques to identify the artwork.

3.

Costs to maintain and refurbish public art when the cost of such maintenance exceeds funds currently available for the maintenance of public property in general.

4.

Other expenses which are, or may become, an integral part of the public art program, including community educational activities and public dedications of completed art works.

C.

Monies appropriated under this ordinance shall not be used for the following:

1.

Directional elements such as supergraphics, signage, or color coding except where these elements are integral parts of the original work of art or executed by artists in unique or limited editions.

2.

"Art objects" which are mass produced of standard design such as playground equipment or fountains.

3.

Reproduction, by mechanical or other means, of original works of art, except in cases of film, video, photographs, printmaking or other media arts.

4.

Decorative or functional elements, or architectural details, which are designed solely by the building architect as opposed to an artist commissioned for this purpose working individually or in collaboration with the building architect.

5.

Landscape architecture and landscape gardening except where these elements are designed by the artist and are an integral part of the work of art by the artist.

(Code 1971, § 1820.4; Ord. No. 99-15, §§ 1, 5, 6-21-99; Ord. No. 2000-05, § 1, 2-8-00)

Sec. 4.610.050. - Public art funds.

A.

Funds appropriated to the public art fund within each capital improvement fund, if not expended in any given fiscal year, shall be carried over to the next fiscal year. Funds appropriated from sources placing time restrictions on expenditure of such funds shall be expended according to such restrictions. Funds in the public art fund be used solely for the public art program.

B.

Disbursements from the public art fund shall be made in accordance with the annual projects plan adopted by the city council as part of the capital improvement program and budget.

(Code 1971, § 1820.5; Ord. No. 99-15, §§ 1, 5, 6-21-99; Ord. No. 2000-05, § 1, 2-8-00)

Sec. 4.610.060. - Annual projects plan.

The public art supervisor and appropriate city departments, in consultation with the public art advisory committee, shall review all on-going and new capital improvement projects from any eligible funds, grants and other sources at least once a year. An annual projects plan, including project descriptions, budgets, locations, and recommended design approaches, will be submitted to the city council for approval and implementation as part of the annual capital improvement program and budget process.

(Code 1971, § 1820.6; Ord. No. 99-15, §§ 1, 3—5, 6-21-99)

Sec. 4.610.070. - Public art commission.

A public art commission will be appointed by and be advisory to the city council. The commission will provide general oversight of the public art program, its projects, the sites, project scopes, artworks, and artists for public art projects. The composition and responsibilities of the public art commission will be established by ordinance or city council resolution.

(Code 1971, § 1820.7; Ord. No. 99-15, § 7, 6-21-99)

Sec. 4.610.080. - Ownership.

All art objects acquired by monies appropriated pursuant to this ordinance shall be acquired in the name of the City of San Buenaventura and title shall vest in the City of San Buenaventura.

(Code 1971, § 1820.8)

Sec. 4.610.090. - Application.

This ordinance shall apply to all existing and future capital improvement projects that begin construction on or after July 1, 1992.

(Code 1971, § 1820.9)

Sec. 4.610.100. - Severability.

Should any section, subsection, paragraph, sentence, clause, or phrase of this ordinance be declared unconstitutional or invalid for any reason, such declaration shall not affect the validity of the remaining portions of this ordinance.

(Code 1971, § 1820.10)