

TO: JAMES L. APP, City Manager
FROM: ANN ROBB, Interim Director, Library & Recreation Services
SUBJECT: DISPLAYS AND ART IN THE LIBRARY
DATE: June 7, 2005

Needs: For the City Council to consider the Art Policy and Guidelines recommended by the Library Board of Trustees

- Facts:
1. Since 1995, the Library has offered wall and cabinet space for rotating art and other displays.
 2. To meet growing requests for display space, the Library Board of Trustees established a protocol for selecting and scheduling displays in the library. The policy and guidelines were approved by the Library Board of Trustees in August, 2004.
 3. According to the guidelines, the library will select work on the following criteria:
 - Artistic features of submissions
 - Appropriate size and number of works to be displayed
 - Desire to display a variety of artistic styles and media
 - Community, historical or regional interest
 - Educational significance
 - Ability to highlight or stimulate the use of Library resources
 4. The Library is considered a limited public forum, subject to review for reasonableness under First Amendment law. The policy and guidelines have been reviewed by the City Attorney with an emphasis on First Amendment issues. A critical component of the legal analysis is that the policy and guidelines do not discriminate on the basis of content or viewpoint. A city cannot exclude art that is controversial, that it finds offensive, or that may be found offensive to some members of the community.

Analysis
and

Conclusion: In response to increased requests for art and display space, the Library Board of Trustees developed and adopted a policy and guidelines for art and displays in the Library. The Library is considered a limited public forum, and as such is

subject to First Amendment law. The policy and guidelines dictate content neutral criteria that can be used for selection of art and displays.

Policy

Reference: First Amendment of the US Constitution

Fiscal

Impact: None

Options:

- a.** Approve the Paso Robles Public Library Policy & Guidelines for Selection of Art and Displays
- b.** Amend, modify or reject the foregoing option.

Attachment:

Legal Analysis
Paso Robles Public Library Policy & Guidelines for Selection of Art and Displays

THE PASO ROBLES PUBLIC LIBRARY POLICY & GUIDELINES FOR SELECTION OF ART AND DISPLAYS

POLICY:

The Paso Robles Public Library (the “Library”) seeks to encourage the artistic and cultural interests of the community by providing wall and cabinet space in the Library for local artists to display visual art and other work. The Library Board of Trustees (the “Board”) is responsible for selecting work and scheduling art displays in the space provided.

GUIDELINES:

I. Proposals for Art Displays

A. The Board will periodically invite proposals for art displays. The Board will publicize submission date(s) for proposals. The Board may meet once a year, as determined by the Board President, to select and schedule art displays for the following year.

B. Proposals for displays should include:

- A completed application, the exact contents of which will be designated by the Board;
- A statement from the artist, the exact contents of which will be designated by the Board;
- Relevant background information on the artist;
- Photographs or other representation of the work to be displayed; and
- Any additional items or information requested by the Board.

II. Selection of Art Displays

A. The following criteria may be used by the Board when selecting and scheduling art work to be displayed in the Library:

- Artistic features of the art work to be included in the proposed display;
- Size and number of works appropriate to the display space;
- Desire to display a variety of artistic styles and media in the Library during the year;
- Community, historical or regional interest of the proposed art display;
- Educational significance of the proposed art display; and
- Ability of the proposed art display to highlight or stimulate the use of Library resources.

In addition, the Board may invite an art professional to assist with selection and scheduling decisions.

III. Installation of Art Displays

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A. Once the Board has selected proposals and established a schedule for art displays, a library representative will:

- Arrange and confirm display dates with the artist;
- Provide staff to hang and/or arrange work; and
- Instruct interested parties to contact the artist directly regarding purchase of the artist's work.

B. Once the Board has selected proposals and established a schedule for art displays, the artist or his or her representative will:

- Submit photographs or other visual representation of all works to be included in the final art display. This must be done in time for the Board of to review all work for final approval at its monthly meeting prior to the scheduled display date. The Board may use the criteria set forth in Section II, above, when considering the final approval of art work to be displayed;
- Arrange delivery and pick up of the work to be displayed at a scheduled time;
- Provide title cards for hanging works and/or printed information to be included in the display;
- Provide a brief artist statement, biography, flyers or other material if desired;
- Provide a price list and contact information if the work is for sale; and
- Schedule an opening reception, if desired, at the artist's expense. If the reception is not open to the public, regular fees will be charged for room rental. If the reception is open to the public, regular fees for room rental will be waived.

C. Prior to the display of any work by any selected artist, the artist will acknowledge, in writing, that he or she understands the authority of the Board to postpone, reschedule or curtail any art display, as set out in these Guidelines. In addition, the artist will acknowledge in writing that the Library reserves the right to immediately remove any work displayed by the artist which has not been expressly approved by the Board prior to display in the Library.

D. The Library will not receive a commission on the sale of any work displayed in the Library. Donations to the Paso Robles Library Foundation are appreciated.

IV. Authority of the Board Regarding the Display of Art Work in the Library

A. The Board reserves the right to make exceptions to these Guidelines in order to take advantage of unanticipated opportunities for display or if the space reserved in the Library for local artists is otherwise needed for Library purposes.

B. The Board reserves the right to postpone, reschedule or curtail an exhibit at any time.

Adopted by the Library Board of Trustees August 12, 2004



Memorandum

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DATE January 28, 2005

TO Paso Robles City Council
Barbara Partridge
Jim App

FROM Iris Yang
Rachael Durrett
Amber Hyman

RE First Amendment Freedom of Speech Issues Associated with the "Paso Robles Public Library Policy & Guidelines for Selection of Art Displays" and the "Paso Robles Public Art Program"

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Questions Presented:

- 1) If the City Council approves the proposed Public Library Policy & Guidelines for Selection of Art Displays ("Proposed Library Policy") what are the First Amendment issues, if any, that the City needs to be aware of?
- 2) If the City Council adopts the proposed Public Art Program ordinance what are the First Amendment issues, if any, that the City needs to be aware of?

Brief Answers:

1) The interplay between the First Amendment and public art is a complex area of law that does not lend itself to bright line rules and obvious answers. It is clear, however, that the First Amendment requires that the policies and guidelines which the City adopts for the purpose of exhibiting privately owned art must not discriminate on the basis of content or viewpoint. Courts have found cities violated the First Amendment when they failed to apply their policies consistently and excluded art that was controversial or offensive to some. In order to comply with the First Amendment, the Proposed Library Policy is drafted to contain criteria for the display of art that are viewpoint neutral while at the same time imposing some boundaries on the display space. We recommend that the City consistently and strictly adhere to the policies and guidelines of the Proposed Library Policy to avoid any First Amendment challenges.

2) The Public Art Program involves the display of government-commissioned (rather than privately-owned) artwork on city property. Therefore, the "speaker" is

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the government, rather than a private individual. There is case law in other contexts that suggests that there is nothing in the First Amendment that precludes the government from controlling its own expression or that of its agents. Under this theory, there is no First Amendment restriction on the government's acquisition of art. However, because we could find no case law directly on point, we recommend that the City use selection criteria that are viewpoint neutral and reasonable in light of the purpose served by the program. Consistent with this recommendation, the Public Art Program contains viewpoint neutral selection criteria for the acquisition of art.

FACTS

The City is considering two programs relating to public art. The first is the guidelines for art displays in the Paso Robles Public Library ("Library"). The Library has traditionally encouraged the use of certain wall and cabinet space in the Library by members of the public for art and cultural displays. The Library Board selects the works to be displayed from submissions it receives. The Library Board has recently revised and updated its policies for selection of displays. The Revised Policy identifies criteria for selecting works which are designed to be viewpoint neutral. These criteria include: 1) the artistic features of submissions, 2) the size and number of works to be displayed, 3) the desire to have varying styles and media displayed in the library throughout the year, 4) the community, historical, or regional interest of submissions, 5) the education significance of the proposed art display and 6) the ability of submissions to highlight or stimulate the use of the Library's resources.

The second program for the Council's consideration is an ordinance creating a Public Art Program. The Public Art Program would appropriate one percent (1%) of the construction costs of City capital improvement projects to the acquisition and installation of public art on City property. Under this program, the City would enter into contracts with selected artists for the creation and design of artwork for specific areas of the City. The Parks and Recreation Advisory Committee is proposed to be the body that would oversee the program. While the policies and guidelines for the selection of artists will be drafted after the adoption of the ordinance, the proposed ordinance does contain a list of content-neutral criteria for the selection of the artwork (i.e. visible and accessible to the public, made out of durable materials, related in scale and form to the buildings and landscaping, compatible with the design character of the site, and designed by persons experienced in the production of artwork). The City Council would have final authority for approving any public art selected by the Committee.

ANALYSIS**I. Overview of First Amendment Law****A. Basic Principles**

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The First Amendment to the U.S. Constitution reads in full:

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”¹

While the First Amendment speaks only of Congress, the requirements of the First Amendment also apply in full to the states and their subdivisions through the Fourteenth Amendment.² The current “test” for constitutionality of laws, regulations and policies which impact the freedom of speech is set out in *Perry Education Association v. Perry Local Educators’ Association*, decided by the United State Supreme Court in 1983.³ The *Perry* test divides government owned property into three categories: (1) the traditional public forum,⁴ (2) the designated public forum⁵ and (3) the nonpublic forum.⁶ The degree to which the government can regulate or control speech on public property is determined by the characterization of the forum in question. Moreover, the Ninth Circuit in which we are located recognizes a subclass of the designated public forum: the limited public forum. These forum characterizations are relevant to any First Amendment and public art analysis because they dictate the level of scrutiny courts will use to review a government's decision to restrict the display of art on city property.

B. “Forum” Characterization**a. Public Forums**

Traditional public forums include what the United State Supreme Court labels “quintessential public forums.”⁷ These are spaces which are traditional locations for assembly and discourse.⁸ Traditional public forums include parks and streets.⁹ In a traditional public forum the government may not introduce restrictions which are based on the content of the speech unless the regulation is necessary to serve a “compelling state interest that is narrowly drawn to achieve that end.”¹⁰ In practice, this is a very high burden which is rarely met. Instead, in a traditional public forum,

¹ U.S. Const. Am. 1.

² *Pfeifer v. City of West Allis*, 91 F. Supp. 2d 1253, 1258 (2000).

³ *Perry Education Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37 (1983).

⁴ *Perry* at 45.

⁵ *Perry* at 45-46.

⁶ *Perry* at 46.

⁷ *Perry* at 45.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Perry* at 45.

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the government may enforce regulations regarding the “time, place and manner” of expression.¹¹ In addition, restrictions must be content-neutral and narrowly tailored.¹² This is to avoid discrimination based on what is being said or who is saying it.

b. Nonpublic Forums

Nonpublic forums are publicly-owned property that is not traditionally opened to the public for assembly and discourse. Nonpublic forums include office buildings and, in *Perry*, a school’s mail room. The government may regulate speech in a nonpublic forum based on subject matter and speaker identity as long as “distinctions are reasonable in light of the purpose served by the forum and are viewpoint neutral.”¹³ In practice, this has been a relatively easy standard for the government to meet. As discussed below, we recommend the application of this standard to the City's selection of artwork for acquisition under the Public Arts Program

c. Designated Public Forums

A designated public forum exists where the government intentionally opens up a nontraditional forum for public discourse.¹⁴ Such actions may include the practice of inviting or allowing such spaces to be used for gathering and speech.¹⁵ Restrictions on activity in designated public forums are subject to strict scrutiny by the courts.¹⁶ Designated public forums are generally subject to the same limitations that concern a traditional public forum: the government may not introduce restrictions which are based on the content of the speech unless the regulation is necessary to serve a “compelling state interest that is narrowly drawn to achieve that end.”

The Ninth Circuit also recognizes “limited public forums” as a distinct “sub-category” of designated public forums.¹⁷ A “limited public forum” is a nonpublic forum that the government has intentionally opened to certain groups or to certain topics. In a limited public forum, restrictions that are viewpoint neutral and reasonable in light of the purpose served by the forum are permissible. This is a significantly less restrictive standard than the strict scrutiny applicable to designated public forums generally.

The terms on which the forum operates determines whether it is a designated public forum or a limited public forum. The intent of the legislative body and its actions in carrying out the program (i.e. is the forum open to only certain groups or

¹¹ *Id.*

¹² *Id.*

¹³ *Cornelius* at 806.

¹⁴ *Hopper v. City of Pasco*, 241 F. 3d 1067, 1074 (Ninth Cir. 2001).

¹⁵ *Perry* at 46.

¹⁶ *Hopper* at 1074.

¹⁷ *Id.*

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certain topics) dictates whether the courts will apply strict scrutiny or the more lenient reasonableness test. As discussed below, depending on how the City applies the Proposed Library Policy, the Library exhibits create either a designated or a limited public forum.

II. Content and Viewpoint Neutral Regulations

The designation of the forum dictates the level of scrutiny that the court will use to review restrictions on speech. However, regardless of the characterization of the forum, the subsidization of art by the City must be viewpoint neutral. This is a very confusing standard to both understand and apply. Art by its very nature does not fit into easily defined categories. Similarly, it is difficult to fit criteria for the selection of art into labels such as viewpoint and content neutral. It is particularly challenging because some content restriction is both allowed and advisable. As discussed in the *Hopper* case below, if the City applies no content restriction, it creates a designated public forum and it is very difficult to place any limitation on the display of art. On the other hand, if the City limits the forum to only certain groups or topics, these criteria must be objective and easily defined. That is, content regulation cannot be for the purpose of excluding art which is controversial or offensive to some. Many law review articles explain that these nebulous definitions place local governments in very confusing positions in crafting their public art policies.

Two recent cases involving public art are insightful in reviewing the interconnection between public art and the First Amendment. Both cases involve First Amendment challenges to decisions by local governments to restrict the display of public art and are relevant to the Library display case and the proposed Public Art Program.

In *Hopper v. City of Pasco*,¹⁸ the Ninth Circuit found that the City of Pasco, Washington violated the First Amendment when it refused to display art that it found was distasteful and controversial. The City had invited local artists to display their art in City Hall on a rotating basis. The City's policy was not to accept "controversial art", but, in application, no city staff screened the art before it was displayed. At issue were: 1) a sculpture entitled in part "to the Democrats, Republicans and Bipartisans" depicting a large nude headless woman and 2) ten linoleum prints entitled "Adam & Eve" showing a naked couple in post World War II Germany kissing and embracing. The city told the artists it would not display these pieces because they could be misconstrued as "sexual" or "prurient," and would make the decision whether to maintain the art program a political one, thereby endangering the entire program.

¹⁸ *Hopper v. City of Pasco*, 241 F. 3d 1067 (Ninth Cir. 2001).

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The court found that because the City had failed to consistently apply its policy not to display "controversial art" (it had earlier allowed art that depicted nudes and a statue displaying a starving man that some found offensive) that, in fact, the city had no public art policy at all. Therefore, the city had created a designated public forum and any limitation on the display of art had to be necessary to serve a compelling state interest narrowly drawn to achieve that end. The city could not meet this high burden (as mentioned earlier, in practice, this standard is almost never achieved.) Further, the court criticized the stated, but not consistently applied, policy of not accepting "controversial" art because it was intrinsically flawed; its enforcement was contingent upon the subjective reaction of viewers of the artwork, as perceived by the city management. According to the court, "censorship by public opinion" suggests constitutional impropriety. The court went on to explain: "This is not to say that community standards of decency have no place in the regulation of government property; our cases merely insist that such standards be reduced to objective criteria set out in advance." The court did not give examples of what these criteria would be.

Similarly, in *People for the Ethical Treatment of Animals, Inc v. Gittens*¹⁹ the court found that the District of Columbia violated the First Amendment when it rejected an art design submitted by the People for the Ethical Treatment of Animals ("PETA") that depicted a crying elephant in shackles wearing a blanket that read "The CIRCUS is coming, See Shackles, bull hooks, loneliness all under the Big Top." The district had implemented an arts program called "Party Animals" which placed decorative elephants and donkeys throughout the district in tourist locations. The animals were to be "festive and whimsical, reach a broad based audience, and foster an atmosphere of enjoyment and amusement" and could not advertise any product or show social disrespect.

The court overturned on First Amendment grounds the district's exclusion of the PETA elephant. The court found that the Party Animals exhibit created a limited public forum because it was not open to the general public and there were criteria in place for the selection of art. Therefore, any restriction of art had to be viewpoint neutral and reasonable in light of the purpose served by the forum. The exclusion of the PETA design was unreasonable because the district had approved other animals with designs relating to September 11th and the civil rights movement (clearly not images that were "whimsical" and "festive"). According to the court, it was apparent that it was the "message" or "content" of the elephant that was objectionable to the district. This violated the First Amendment requirement that regulations be viewpoint neutral. While the district was free to exercise its discretion in determining which submissions comply with the theme, spirit, and objectives of the exhibit, it must do so reasonably. Here, the district had not followed its own policy. As the court

¹⁹ *People for the Ethical Treatment of Animals, Inc v. Gittens*, 215 F. Supp. 2d 120 (D.C. Circuit 2002).

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explained, the district could not ignore certain fundamental criteria in accepting one or more groups of designs and then cite the same criteria in another case as grounds for rejecting it.

From these cases, it can be gleaned that a public building that is being used by a city to display private works of art becomes a designated or limited purpose public forum. Courts will review the intent of the local government and the application of the art selection policies to determine whether to apply strict scrutiny or the lesser reasonableness standard. In both instances, the selection criteria cannot include the desire to suppress protected speech. A city cannot exclude from the public forum art that it finds merely offensive, that may be found offensive to some members of the community, or seems to be out of keeping with “community values.” On the other hand, the City can define the public space which it has dedicated to the display of art in narrow terms, as long as these terms are objective and readily susceptible of verification.

The City may also select art based on “quality”. The First Amendment does not require the government to be “quality neutral.” The government must choose among works of art, and must choose in part in terms of the quality of art. For this reason, people who are knowledgeable on artistic merit and insulated from the usual political process should, as far as possible, make the decisions about which types of art should be selected for display.²⁰

III. Applying First Amendment Principles to the Proposed Art Programs**A. The Library Display**

The Library will select artwork for the display based on the following criteria that were drafted to comply with First Amendment principles: 1) the artistic features of submissions, 2) the size and number of works to be displayed, 3) the desire to have varying styles and media displayed in the library throughout the year, 4) the community, historical, or regional interest of submissions, 5) the educational significance of the proposed art display and 6) the ability of submissions to highlight or stimulate the use of the Library’s resources. If the city consistently applies these criteria in a viewpoint neutral manner, we believe it will create a limited public forum subject only to review for reasonableness. The purpose of the art exhibit is to complement the Library and highlight the library's resources. The Library serves a broad audience and all age members. Therefore, it is reasonable to place limitations on the display of art that compliment the purpose of the Library. Moreover, the Library Board of Trustees (the "Board") is responsible for selecting and scheduling

²⁰ See Shiffrin, Government Speech, *U.C.L.A. Law Review* 565, 645, 646.

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art displays. The members of the Board are appointed by the City Council and therefore are reasonably insulated from the political process.

Of course, criteria such as "educational" or "community and historical interest" are not as subjective as criteria limiting art to a certain size or number of pieces. The Library has already received one letter from the public criticizing the criteria as subjective and questioning the Board's qualifications for judging artistic merit. If the Library rejects a piece of art, there is a possibility that the artist will claim the decision was viewpoint-based or that the guidelines are subjective. For this reason, it is imperative that the Library consistently apply all of the criteria to the selection of art for the exhibits. Moreover, the City Council should recognize that it is almost impossible to create a public art program such as the rotating library display that is completely insulated from First Amendment challenges. The City is placed in somewhat of a Catch-22 position. If it places no criteria on the selection of artwork (like the City of Pasco did) it creates a "designated public forum" and may not restrict the display of any artwork unless it serves a compelling state interest and the restriction is narrowly tailored to meet that interest. On the other hand, if the City places limitations on who may display artwork and the topics that may be displayed, it is subject to criticism for being too limiting or applying criteria that may be construed as "subjective". In our opinion, the consistent application of neutral criteria selected for the stated purposes of the library display is the best way to create a "limited public forum" and comply with First Amendment principles.²¹

B. The Public Art Program

If the City adopts the Public Art Program, one percent (1%) of all construction costs for capital improvement programs will be appropriated for the acquisition of art to be installed on City property. That is, the program involves government-commissioned (rather than privately-owned) artwork. Therefore, the "speaker" is the government, rather than a private individual. The only case that our office could find that somewhat discussed this issue in the context of First Amendment principles is *Serra v. United States General Services Administration*²² In that case, the court held that the First Amendment had only limited application in a case where the Government wanted to move a large piece of artwork that it had previously commissioned and installed in front of a government building. The issue was not the selection of art, but what rights an artist retains after he or she sells her artwork (i.e. does the artist have a free speech right to not have their art moved or altered?).²³

²¹ It should be noted that the City, of course, is not obligated to display art in the Library or any public building. However, it would be unfortunate if the City ended this program because of a fear that it would not be able to avoid the display of certain art.

²² *Serra v. United States General Services Administration*, 847 F.2d 1045 (Second Circuit 1988).

²³ Since this case was decided, Congress passed the Visual Artists Rights Act of 1990 which protects artists' post-sale rights to prevent alteration or destruction of the artwork. Similarly, California has

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In dicta, the court noted that "the purpose of the First Amendment is to protect private expression and nothing in the guarantee precludes the government from controlling its own expression or that of its agents." Therefore, the court stated, "the Government may advance or restrict its own speech in a manner that would clearly be forbidden were it regulating the speech of a private citizen." However, the court then found that the artist may have some First Amendment rights in his artwork even though he sold it to the City.

This case is only somewhat helpful in that it doesn't address the standards a city should use in selecting artwork for purchase. While it may be true that the First Amendment doesn't extend to government expression, there is an argument that the use of public funds to purchase art is analogous to the subsidization of private art, which is subject to the First Amendment. Therefore, we suggest that the City apply the nonpublic forum standards to its criteria for the Public Art Program. This would require that the criteria used for selection of art is reasonable and viewpoint neutral in light of the purpose of the forum.

The ordinance was drafted with these restrictions in mind. While it does not specify the process for selecting artists, the City will likely "pre-qualify" a pool of artists from whom it would like to commission artwork. The qualification criteria would be viewpoint neutral and pertain to the artist's qualification in his or her field. Moreover, the selection of a piece of art itself would involve the relation of the artwork in scale and form to the buildings and landscaping and design compatibility with the site. As stated above, the criteria selected for the acquisition of art should be consistently applied to comply with First Amendment principles.

CONCLUSION

The interplay between the First Amendment and public art is a complex area of law that does not lend itself to bright line rules and obvious answers. The First Amendment requires that the Proposed Library Policy not discriminate on the basis of content or viewpoint. Accordingly, the criteria for the selection of art for the Library display have been drafted to comply with these principles. The Library Board should consistently apply the guidelines to all selections of art displays. Similarly, while it is unclear whether the First Amendment applies to the City's acquisition of art, we recommend that the City consistently apply viewpoint neutral criteria when selecting art for purchase.

adopted Civil Code section 987 entitled "Preservation of Works of Art" which protects artists' post-sale rights. If the City decides to adopt the Public Art Program, our office will work with the City to ensure that all public art contracts conform to these statutes.