

No. 55104-3-I

**DIVISION I OF THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON**

RUD OKESON, DORIS BURNS, WALTER L. WILLIAMS and
ARTHUR T. LANE, individually and on behalf of the class of all persons
similarly situated,

Respondents,

vs.

THE CITY OF SEATTLE,

Appellant.

**BRIEF OF AMICI CURIAE AMERICANS FOR THE ARTS AND
VARIOUS ARTS ORGANIZATIONS IN SUPPORT OF
APPELLANT ON ONE PERCENT FOR ART**

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TABLE OF CONTENTS

	Page
I. INTEREST OF THE AMICI CURIAE	1
II. SUMMARY OF ARGUMENT	3
III. ARGUMENT	4
A. Mitigation Is a Traditional and Appropriate Use of Percent for Art Funds	4
B. The Elaborate Community and Stakeholder Engagement Process Utilized in Public Art Programs Inevitably Yields an Appropriate Nexus to the Sponsoring Agency’s Needs	7
C. Flexibility Is Necessary for the Optimal Administration of Percent for Art Ordinances	12
D. Seattle’s Model Percent for Art Ordinance Should Be Reinstated As Applied to City Light	16
IV. CONCLUSION	20

TABLE OF AUTHORITIES

	<u>Page(s)</u>
American for the Arts, <i>Public Art: An Essential Component of Creating Communities</i> (Monograph, 2004)	2
Americans for the Arts, with University of Washington Press, <i>Public Art By The Book</i> (2005)	2, 5
Americans for the Arts, <i>Public Art Programs Fiscal Year 2001 Research Report</i> (2003)	2, 5
Arts Extension Service, in cooperation, with the National Endowment For the Arts, <i>Going Public: A Field Guide to Developments in Art in Public Places</i> (1988)	8, 16
Brown, Brenda & Rubin, Mary, <i>Public Art Funding: Developing Percent-for-Art Programs</i> (Americans for Arts Monograph, 2000)	4, 9, 17.
<i>Public Art</i> , 2003 United States Conference of Mayors Adopted Policy Resolutions at the 71 st Annual Meeting (Denver)	19

I. INTEREST OF THE AMICI CURIAE

Americans for the Arts is a nonprofit organization and the national association representing 5,000 local arts agencies and statewide arts organizations. A local arts agency is an agency of local government or a private nonprofit organization that presents programming to the public, provides services to artists and arts organizations, manages cultural facilities, administers public art programs, including percent for art ordinances, awards grants to artists or arts organizations, and participates in community cultural planning. Through these activities, local arts agencies promote the arts at the local level, endeavoring to make them part of the daily fabric of community living. Seattle's Office of Arts & Cultural Affairs is a local arts agency and a long-time professional member of Americans for the Arts.

Americans for the Arts is also the national source for practices and standards in the public art field. Its national Public Art Network program includes training for professional development, researching field trends, documenting best and innovative practices, promoting peer-to-peer networking, and offering technical assistance in the specific area of local and state public art programs. Americans for the Arts has published

several publications¹ about public art programs, and Seattle's Office of Arts & Cultural Affairs public art staff has been active and recognized leaders within the public art field.

Artist Trust is a state-wide nonprofit organization dedicated exclusively to supporting Washington State artists working in all creative disciplines. Founded in 1987 by a group of arts patrons and artists concerned about the lack of support for individual artists, this organization is shepherded by a 26-member Board of Trustees and a professional staff. Programs include direct grants to artists and a broad range of artist information, employment, and professional development services.

The **Washington State Arts Alliance**, Washington's statewide multidisciplinary arts advocacy and service organization, works to promote public funding, legislation, and policy favorable to the arts and to increase knowledge, understanding, appreciation, and practice of the arts in Washington through communication and education. Founded in 1976, the Washington State Arts Alliance includes in its membership and constituency over 1,000 arts organizations and local arts agencies, as well thousands of individual artists, educators, students, and patrons of the arts.

The *Amici* urge the Court of Appeals to reverse the trial court's

¹ See Americans for the Arts, with Univ. of Wash. Press, *Public Art By The Book* (2005); Americans for the Arts, *Public Art: An Essential Component of Creating Communities* (Monograph, 2004); Americans for the Arts, *Public Art Programs Fiscal Year 2001 Research Report* (2003).

decision to invalidate Seattle's 32-year old One Percent for Art Ordinance as applied to City Light and to reject the lower court's overly literal and narrow interpretation of the content and type of public art that can yield a "close nexus" between the proprietary interests of the public utility and the public art that it sponsors. *Amici* respectfully submit this brief to provide the Court with historical background, national context, public policy principles, and applied practices of Percent for Art programs generally and Seattle's recognized model Percent for Art program specifically.

II. SUMMARY OF ARGUMENT

Seattle's Public Art Program and specifically its Percent for Art Ordinance are national models that have been emulated by dozens of cities nationwide. Seattle's public art projects have been highly acclaimed and widely documented in national newspapers, art publications, and text books. Since the early years of its inception in 1973, Seattle's public art program has revolutionized the planning and engagement process of involving artists, architects, sponsoring agencies, and the community to achieve innovative, meaningful, and inspiring works of art sited in public places. Because Seattle has been so successful with its public art process, these same principles have been adopted in cities large and small across the country.

Seattle was one of the first cities to include the capital

improvement projects of utilities in its Percent for Art Ordinance. Today, it is more typical than not for municipalities to include city-owned utilities in their percent for art programs. To our knowledge, there has never been a court challenge to invalidate a percent for art ordinance in any city, county, or state in this nation. Seattle's public art program has set the standards which others follow. Its process of engaging sponsoring agencies, stakeholders, artists, and the public is among the best in the country. Its public art process exceeds any test of reasonableness with respect to a sponsoring agency's active participation in the selection of appropriate artworks and necessarily leads to a "close nexus" between the public art project and its funding source.

III. ARGUMENT

A. **Mitigation Is a Traditional and Appropriate Use of Percent for Art Funds**

In 1959, the City of Philadelphia and its Redevelopment Agency passed the first percent for art ordinance in America. "Their idea was a simple one: set aside a small portion of the construction costs of public projects for the inclusion of artworks which would enhance what they considered the stark modernist architecture of the time."² A percent for art movement was born. Several major cities and states soon followed, and

² Brown, Brenda & Rubin, Mary, *Public Art Funding: Developing Percent-for-Art Programs* 1 (Americans for the Arts Monograph, 2000).

by the mid-1980s, there were at least 135 public art programs across the country. Today, Americans for the Arts estimates that 350 public art programs exist in the United States (including 46 of 50 states and the District of Columbia), generating more than \$200 million annually for the commissioning, installation, maintenance, administration, and educational and community outreach of public works of art.³ The municipal public art programs are generally housed within a community's local arts agency. The percent for art funding model has also been embraced and adopted in private development throughout the United States. For instance, in Sacramento, private entities contract with the municipal local arts agency to administer its public art program using the same process. In contrast, in Long Beach, the city and private companies contract with the nonprofit local arts agency to administer the percent for art program.

Public art has evolved dramatically over the last 45 years. "The concept of 'art in public places,' artworks transported from the studio to the public plaza, gave way to 'public art,' with art reinforcing a sense of place and occasion."⁴ The definition of public art continues to evolve and change. During the 1970s and 1980s, the issue was whether public art should be a free-standing sculpture or work that is physically or

³ Americans for the Arts, *Year 2001 Research Report*, *supra* note 1, at 1.

⁴ Americans for the Arts, *Public Art By The Book*, *supra* note 1, at ix-x.

conceptually intertwined with a particular site or issue. Today, a public art program can encompass permanent, temporary, and portable works of art. Thanks to the pioneering and highly successful efforts in Seattle, artists are now commonly incorporated into architectural and landscape design teams from the start of construction in order to achieve a more holistic experience to the aesthetic execution of the capital project. This process has been replicated in numerous cities. Many ordinances today no longer limit projects to the visual arts; they now encompass an array of film, performing, computer, and visual arts. They also include resources for educational programming and funding for conservation and maintenance of the artworks. Today, public art programs have adopted public policies that require detailed processes for engaging community participation, specifically with key stakeholders and sponsoring agencies.

While no two municipal public art programs or percent for art ordinances are identical, there are key public policies, practices, and values that they generally share. Public art can serve one of several public purposes:

- **Mitigation** – enlivening and beautifying the area in, on, about, or around buildings and objects that are in public spaces or accessible to the public.
- **Identity** – creating a heightened sense of place, pride, and civic engagement, and enhancing a community's prestige or a particular sponsoring group's purpose.

- **Education** – enhancing public appreciation of art and/or educational messages communicated through the art.
- **Economic** – revitalizing neighborhoods, attracting attention, tourism, appreciated value of the works of art, and creating artist jobs.

In the Seattle Percent for Art case, the lower court ruled that City Light may not spend utility funds for the purpose of mitigating a substation’s appearance, when the primary purpose of the art is to provide artistic benefit to the surrounding neighborhood and the public as a whole. This is a misstatement of public art policy. The primary purpose of mitigating the negative appearance of a purely functional building or infrastructure *is* to enhance its aesthetic appearance *because* it is creating a physical mass or obstruction of some kind in or near a public space or in the interior area of a publicly-accessible space. The primary purpose of public art mitigation efforts is *not* to conduct a beautification project for the sake of good will. It’s because a negative action has taken place in a public area and it needs to be counter-balanced.

B. The Elaborate Community and Stakeholder Engagement Process Utilized in Public Art Programs Inevitably Yields an Appropriate Nexus to the Sponsoring Agency’s Needs

One of the cornerstones of the public art movement is the community and stakeholder engagement process. Public art programs proactively develop and facilitate extensive, detailed, and meaningful

engagement processes to address the needs of the sponsoring agency and of the general public or targeted group. Regardless whether the sponsoring agency is a private company or municipal government, if the physical environment of an area that is accessible to the public is altered, then good business practice requires good communication. Engaging the sponsoring agencies and the public early in the process has been shown to reduce negative reactions after-the-fact.

Public art program directors typically work closely with both the sponsoring agency and the community to ensure that the art has a strong connection to its site, either physically or conceptually. This approach became fully engrained in public art programs across the country when the National Endowment for the Arts, a federal agency, awarded its first-ever *Art in Public Places* matching grant of \$45,000 in 1967 to the city of Grand Rapids for the placement of Alexander Calder's monumental sculpture "La Grande Vitesse" in a public plaza. The Endowment's criteria for awarding the grant were the specific qualities of the site and the participation of various civic organizations in supporting the arts initiative."⁵ As a result, a fully realized "public art" movement was born, and similar criteria were adopted by municipal arts agencies both for their

⁵ Arts Extension Serv., with National Endowment for the Arts, *Going Public: A Field Guide to Developments in Art in Public Places* 9 (1988).

own public art programs, which include percent for art funds, and for purposes of applying for federally-matched funds.

The community and stakeholder engagement process has since built on these simple criteria and has become a dynamic, pro-active, and meaningful process where soliciting participation is not conducted to merely meet bureaucratic criteria, but to achieve a higher quality product, involving the fullest expression of the artist's creativity, the sponsoring agency's short- and long-term needs, and the public's enthusiastic involvement.

Depending on the general needs of the community and stakeholders and the specific needs of the sponsoring agency, public art projects can be executed in a variety of ways:⁶

- **Discrete object** – the traditional approach of placing stand-alone sculptures, murals, or other artworks in or around public-accessible buildings, plazas, and parks as a means to beautify and humanize the environment.
- **Integration of public art and architecture** – a multi-disciplinary design team approach wherein artists work on project teams with architects, engineers, landscape architects, and other design professionals to create capital improvement projects (CIPs), such as waste water treatment facilities, utility substations, and utility poles in order to achieve the highest aesthetic and functional innovation. (Note: Seattle's public art program was the first to do this; now, it is one of the nation's most popular approaches to public art.)

⁶ Brown, *supra* note 2, at 2.

- **Master planning** – artists working with policy makers and community groups to identify specific opportunities for the integration of art within specific and ongoing projects, such as transit systems and neighborhood redevelopment.
- **Temporary installations** – non-permanent works of art that respond to a specific physical or social environment.
- **Community development** – artists working directly with segments of the community to create public art that responds to the unique issues of that community, such as public housing or health care institutions for the elderly, youth, or disabled.

The public art process is a rigorous engagement exercise with very high communication standards in order to insure that sponsoring agencies are fully participating and engaged in identifying the right art project for their needs and their stakeholders' needs. This process, which is practiced by Seattle's public art program, necessarily leads to art projects with a close nexus to the sponsoring agency's CIP. Seattle City Light has benefited immensely from this process in selecting the best art projects for its CIP Percent for Art projects.

The Seattle Public Art Program Director and staff participate in City planning efforts and meet frequently with representatives from each of the City departments throughout the year to discuss capital improvement plans and how the public art program can reinforce the City's and each sponsoring agency's work. Public art staff reviews capital improvement plans with the sponsoring agency's staff to identify

appropriate locations for public art and prioritize projects that will meet the goals of the City and the department. Artworks are related to the capital improvement projects or the ongoing work of the sponsoring agency/department and must be located in places that are publicly accessible, usually on City-owned property. Once the work with City departments and each sponsoring agency is completed, funding allocation and project recommendations are presented to the Public Art Advisory Committee (PAAC), a standing committee of the Seattle Arts Commission, which helps develop final recommendations for the annual Municipal Art Plan (MAP). Following PAAC review, the plan goes to the full body of the Seattle Arts Commission for approval, and then to the Department of Finance and the Mayor for final approval. Throughout the year, as the City work plan changes and new funds are identified, the MAP can be amended.

The lower court is establishing bad precedent to second-guess the judgment of a sponsoring agency, in this case City Light, in determining which art projects serve the best interest of its agency and stakeholders. The lower court implies that City Light is some kind of bystander in the public art selection process with no opinion or decision-making authority of its Percent for Art funds. This is clearly not the case. City Light has participated in an extensive public art engagement process for each art

project in which it has invested. City Light's involvement is significantly more substantial than that of a mere funder, who writes the check, but grants full authority to the arts organization to produce the art independently as it sees fit. The public art process requires the sponsoring agency to fully participate in the process. A public art project cannot be recommended to the PAAC without the sponsoring agency's informed consent and recommendation. It is impossible to imagine how a public art project could not achieve a close nexus to the proprietary interests of each sponsoring agency after going through a public art engagement process. Seattle City Light appears to be very satisfied with its choices of public art projects. We urge the Appellate Court to focus on this public art engagement and selection process as the measurement of nexus to a utility's purpose and issues, rather than allowing courts to review each public art project sponsored by Seattle City Light one-by-one.

C. Flexibility Is Necessary for the Optimal Administration of Percent for Art Ordinances

Percent for art ordinance requirements can range from a half percent to two percent of capital improvement projects. Typically, municipalities and states include the cost of design and construction for all public projects in the percent for art formula. Some states, such as Florida, Minnesota, Nebraska, and Iowa, limit eligible costs to

construction only. Many municipal ordinances specifically include the CIP of public utilities, such as water, sewer, and waste management. Some cities, like Seattle and Los Angeles, also include electric in their percent for art programs, because they are municipally-owned power companies. Most major cities, such as San Diego, Austin, Phoenix, Miami, and Houston have municipally-owned water utilities that participate in their percent for art programs. Additionally, many municipal and county percent for art ordinances, such as Miami-Dade and Denver's International Airport program, also include airport CIP projects, whose funding support are derived from user fees and are also subject to Federal Aviation Administration approval. One need only look at the beautiful design and engaging public art sited throughout airports nationwide to see a thriving percent for art program at work.

It is also important to understand how public art program funds are collected and accounted for, as is done in Seattle's Percent for Art Ordinance, which stipulates the creation of a Municipal Arts Fund, a discrete pooling fund that allows for funds to be tracked by source. Seattle's ordinance has served as a model for many other cities' ordinances. The common practice today allows for flexibility within funding sources of an earmarked and discrete account. For instance, Seattle City Light's Percent for Art funds could pool funds derived from a

