

No. 55104-3-I

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

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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.*

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**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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## 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 publications<sup>1</sup> 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

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<sup>1</sup> 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."<sup>2</sup> A percent for art movement was born. Several major cities and states soon followed, and

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<sup>2</sup> 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.<sup>3</sup> 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."<sup>4</sup> 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

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

<sup>4</sup> 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."<sup>5</sup> As a result, a fully realized "public art" movement was born, and similar criteria were adopted by municipal arts agencies both for their

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<sup>5</sup> 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:<sup>6</sup>

- **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.)

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<sup>6</sup> 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

series of smaller City Light CIP projects (not from other agencies' discrete accounts) in order to fund larger projects. This avoids tit-for-tat public art projects in order to give City Light, through its own direction, the opportunity to make a larger public art statement through pooled funds.

Many municipalities also allow flexibility of uses of the sponsoring agencies' funds. For instance, an underground wiring project's CIP funds for public art may not be best suited for this same site, so the funds can be directed to another, more public City Light site. For purposes of planning public art projects, it is very important for City Light, as the sponsoring agency, to inform the public art director of the budget levels of the proposed CIP project and its goals.

Flexibility in administrative authority and resources directly benefits the goals of both the sponsoring agency (here, City Light) and the local arts agency. The sponsoring agencies are treated like clients, which never forgo their decision-making authority to "green light" a public art project. Public art administrators, who work closely with each sponsoring agency, serve as experts on staff of the local arts agencies. They maintain quality control, standardized contracting, engage public and stakeholder involvement, realize cost-efficiencies by maintaining a roster of high quality artists, and have knowledge of placing and installing public art.

Flexibility in educational programming resources is also important

in order to maximize the budget and enhance communications with the community and key stakeholders. Educational programming can include illustrating the theme of the artwork or producing educational materials for a public art project that is situated in a public space (a City Light space in this case). If the subject matter of the artwork is linked to a utility issue, then it is less critical that the work be sited at a utility-owned location. Sometimes it is desirable to pool funds within a discrete account for a larger-scale educational campaign, ranging from organizing school lectures and public art site visits, to publishing placards, brochures, websites, and catalogues. For instance, rather than publishing a brochure about each public art piece generated through City Light's percent for art account, funds earmarked for education from some of its other public art projects can be used to develop comprehensive materials and programs, such as an educational website. Such material can teach current and future ratepayers (*e.g.* school children) about conservation and other educational issues that are integral to City Light's proprietary utility purpose.

The lower court acknowledged the proper use of utility funds for the educational component of City Light-sponsored public art projects, but drew a confusing and arbitrary line between the types of educational activities that are and are not permissible. The lower court erroneously focused its review on the artworks themselves, which are interpreted and

appreciated differently from individual to individual, rather than focusing on the *process* in which the sponsoring agency engaged in selecting the public art projects and their educational components.

**D. Seattle's Model Percent for Art Ordinance Should Be Reinstated As Applied to City Light**

“Seattle has been a pioneer in the process of integrating urban and public art planning.”<sup>7</sup> Its community, stakeholder, and artist engagement processes are regularly cited and applauded in every major publication concerning public art and are replicated in cities across the country. Seattle's Office of Arts & Cultural Affairs has served and continues to serve as an educational resource for public art programs across the country, hosting workshops, publishing workbooks, and lecturing at conferences. Seattle's former Public Art Director Barbara Goldstein recently completed editing the most comprehensive nuts-and-bolts guide for public art professionals published to date, entitled *Public Art by the Book* (2005).

Through its exemplary program, Seattle engages artists as critical thinkers and problem-solvers within specific city departments. One of the most successful examples of this approach was the landmark Skagit Streaming public art project developed by Seattle artist Dan Corson for

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<sup>7</sup> Arts Extension Serv. *supra* note 5, at 19.

Seattle City Light. This project capitalizes on the use of existing city infrastructure and technology to better illustrate the relationship between the utility, the natural environment, and the residents. The project is most dramatically visible in downtown Seattle, far from the source of the dam which is one element of the delivery of power for the city.

One of the then-unique features of the Seattle model was that eligible Capital Improvement Projects included utility facilities in addition to the construction or remodeling of any building, structure, park, street, sidewalk, or parking facility. At the time, the inclusion of utility projects within the parameters of eligible CIPs was unusual for a public art program. Today, many municipalities include city-owned utilities within their percent for art ordinances. In 1976, Seattle's Viewland-Hoffman electrical substation was a pioneer project that set the precedent for the now widely adopted "design team" approach to public art. In a design team project, artists are commissioned to work in collaboration with architects, engineers, and other professionals to approach a project as a whole and integrate the artwork into the fabric of the CIP."<sup>8</sup>

Because Seattle owns its own water and electrical utilities, and because both utilities construct and maintain large amounts of in-city infrastructure, Percent for Art funds have been used to mitigate these

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<sup>8</sup> Americans for the Arts, *supra* note 2, at 7.

construction projects' negative impacts on the cityscape that impact the public and people working around these areas.

This precedent was emulated by the City of Phoenix when it hired artists Michael Singer and Linnea Glatt through its percent for art program to serve as the lead designers for a solid waste management facility. Through the input and direction of the artists, the design for the facility was opened up dramatically, creating not only a more sculptural building, but a more functional facility that better served the needs of the Public Works Department. Careful attention was also paid to the design of the facilities for employees of the plant, creating a more welcoming work environment. Funded through bonds, waste collection fees, and percent for art, the Phoenix facility is a nationally-acclaimed architectural site that reveals and provides new opportunities for community members and school groups to visit the facility and learn about the role and importance of waste management and recycling through large windows, catwalks, and viewing amphitheaters, all designed by the artists. *The New York Times* selected the project as one of the top ten design events of 1993.

In California, the City of Santa Monica's percent for art program also encompassed CIP funds from the Big Blue Transit System, a local bus system. A portion of the percent for art funds generated by bus stop shelter construction was used to place art into the sidewalks along the

designated transit corridor and near the bus stop shelters.

Seattle's Office of Arts & Cultural Affairs public art program was nationally recognized in 1994 with the prestigious U.S. Conference of Mayors City Livability Award, highlighting Seattle's program as a model for thousands of cities across the country. Coincidentally, this award program is underwritten by the Waste Management Corporation to spotlight innovative programs that help offset the negative plights of urban environments. Moreover, the Conference of Mayors unanimously passed a policy resolution in 2003 "reaffirming the valuable contribution of local and state public art programs across country in making our cities more livable, beautiful, and unique."<sup>9</sup> Seattle's role as a leader in the field, is frequently recognized, for example:

Seattle was one of the first cities in the United States to adopt a Percent for Art ordinance in 1973. For **more than thirty years since then its public art programme has been considered exemplary.**

– *Public Art Online, Case Study* (emphasis added).<sup>10</sup>

The Americans for the Arts' Public Art Network recently completed the first national survey of public art programs, revealing trends in program funding, structure, and administration. . . . **The City of Seattle is one of the best models and is internationally renowned for its innovative public art program** that expands the

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<sup>9</sup> *Public Art*, 2003 United States Conference of Mayors Adopted Policy Resolutions at the 71<sup>st</sup> Annual Meeting (Denver).

<sup>10</sup> See [http://www.publicartonline.org.uk/case/seattle/public\\_art.html](http://www.publicartonline.org.uk/case/seattle/public_art.html).

traditional boundaries for understanding how artists work and what public art can be.

– *The Edge* (emphasis added).<sup>11</sup>

#### IV. CONCLUSION

The trial court's decision to invalidate Seattle's longstanding Percent for Art Ordinance as it applies to City Light is erroneous and sets bad precedent. We urge the Appellate Court to establish the comprehensive public art engagement and selection process as the measurement of whether an appropriate nexus to a utility's purpose and proprietary interests has been achieved. The sponsoring agencies in every public art project are full participants in the process and have final decision-making authority. It is unreasonable and arbitrary for trial judges to second-guess a widely-used public art process and the decisions of a fully informed sponsoring agency on issues related to the artistic integrity, validity, appropriateness, and educational value of each and every public art project sponsored by City Light. This process has worked effectively for years in Seattle and hundreds of other cities whose utilities are subject to percent for art ordinances. There is no legal or policy basis for invalidating the percent for art ordinance as it applies to Seattle City Light.

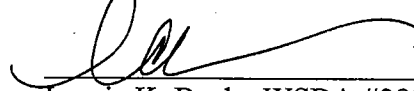
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<sup>11</sup> Grantmakers in the Arts Annual Conference, Oct. 2002, *see* <http://www.giarts.org/Conf03/fullconf03.html>.

Dated this 15<sup>th</sup> day of August, 2005.

Respectfully submitted,

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