

Date: Sept. 14, 2010

Item No. 3

File No. 10041

SUNSHINE ORDINANCE TASK FORCE
COMPLAINT COMMITTEE
AGENDA PACKET CONTENTS LIST*

- ~ Determination of jurisdiction on complaint filed by William and
- Robert Clark against the Mayor, the Board of Supervisors and
- the Arts Commission
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-

Completed by: Chris Rustom

Date: Sept. 9, 2010

***This list reflects the explanatory documents provided**

~ Late Agenda Items (documents received too late for distribution to the Task Force Members)

** The document this form replaces exceeds 25 pages and will therefore not be copied for the packet. The original document is in the file kept by the Administrator, and may be viewed in its entirety by the Task Force, or any member of the public upon request at City Hall, Room 244.



DENNIS J. HERRERA
City Attorney

JANA CLARK
Deputy City Attorney

Direct Dial: (415) 554-3968
Email: jana.clark@sfgov.org

**MEMORANDUM
PRIVILEGED AND CONFIDENTIAL**

TO: Sunshine Ordinance Task Force
FROM: Jana Clark
Deputy City Attorney
DATE: September 7, 2010
RE: 10041 *William and Robert Clark v. Mayor, Board of Supervisors, San Francisco Arts Commission*

Background

Complainants William and Robert Clark allege that the Mayor, the Board of Supervisors, and the San Francisco Arts Commission violated section 67.26 and 67.28(a) of the Ordinance by approving an annual fee to be charged to street artists to pay for City Attorney staff time spent in processing public records requests.

Complaint

On July 28, 2010, Complainants filed a complaint with the Task Force alleging a violation.

Discussion and Analysis

The Mayor is a charter department under the Ordinance. The Task Force therefore has jurisdiction to hear the complaint against the Mayor.

The Board of Supervisors is a charter department under the Ordinance. The Task Force therefore has jurisdiction to hear the complaint against the Board.

The Arts Commission is a policy body and legislative body under the Ordinance. The Task Force therefore has jurisdiction to hear a public records complaint against the Arts Commission.



<complaints@sfgov.org>
07/28/2010 02:44 PM

To <soft@sfgov.org>
cc
bcc

Subject Sunshine Complaint

To:soft@sfgov.orgEmail:complaints@sfgov.orgDEPARTMENT:Mayor, Board of Supervisors,
Arts Commission
CONTACTED:Luis R. Cancel, Howard Lazar, Sup. David Chiu, Mayor Gavin Newsom
PUBLIC_RECORDS_VIOLATION:Yes
PUBLIC_MEETING_VIOLATION:No
MEETING_DATE:Several meetings of Arts Commission and Board of Supervisors
SECTIONS_VIOLATED:Section 67.26 and Section 67.28(a)
DESCRIPTION:On July 23, 2010 Mayor Newsom signed an ordinance approved by the Board
of Supervisors and Arts Commission which charges an annual fee of \$47 to approximately 400
street artists in order to pay for Arts Commission and City Attorney staffs' time to process public
document requests made by street artists pursuant to the sunshine ordinance. This fee conflicts
with and has the effect of amending Sections 67.26 and 67.28(a) of the Sunshine Ordinance
which state "The work of responding to public-records request and preparing documents for
disclosure shall be considered part of the regular work duties of any employee, and no fee shall
be charged to the requester to cover the personnel costs of responding to a records request." and
"No fee shall be charged for making public records available for review." Therefore, the Arts
Commission charging a fee to process public document requests violates the Sunshine
Ordinance.
HEARING:Yes
PRE-HEARING:Yes
DATE:July 28, 2010
NAME:William J. Clark and Robert J. Clark
ADDRESS:P.O. Box 882252
CITY:San Francisco
ZIP:94188
PHONE:415-822-5465
CONTACT_EMAIL:billandbobclark@access4less.net
ANONYMOUS:
CONFIDENTIALITY_REQUESTED:No



SAN FRANCISCO ARTS COMMISSION

RECEIVED
BOARD OF SUPERVISORS
SAN FRANCISCO

2010 AUG 27 PM 4:16

BY CR

GAVIN NEWSOM
MAYOR

LUIS R. CANCEL
DIRECTOR OF
CULTURAL AFFAIRS

Honorable Members
Sunshine Ordinance Task Force
Office of the Clerk, Board of Supervisors
(Attention: Chris Rustom)
Room 244, City Hall
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102

PROGRAMS

CIVIC ART COLLECTION
CIVIC DESIGN REVIEW
COMMUNITY ARTS
& EDUCATION
CULTURAL EQUITY GRANTS
PERFORMING ARTS
PUBLIC ART
STREET ARTISTS LICENSES

RE: Complaint No. 10041 – William and Robert Clark v. Mayor, Board of Supervisors and Arts Commission

Dear Task Force Members:

The Office of the Mayor, Clerk of the Board of Supervisors, and Arts Commission jointly file this letter in response to the above-entitled complaint.

ARTS COMMISSION GALLERY
401 VAN NESS AVENUE
415.554.6080

Overview

WWW.SFARTSCOMMISSION.ORG

ARTSCOMMISSION@SFGOV.ORG

The Task Force should dismiss this complaint because the Task Force lacks jurisdiction to adjudicate a challenge to the City's ability to set a certificate fee for street artists under the Street Artists Ordinance. We request that the Complaint Committee hear this matter at its meeting of September 14, 2010, and then forward to the Task Force a recommendation of "no jurisdiction."

In the event the Task Force nonetheless decides to address the merits of the complaint, the Task Force should find that the respondents have not violated the Sunshine Ordinance.

The Facts

The complaint states in relevant part:

On July 23, 2010 Mayor Newsom signed an ordinance approved by the Board of Supervisors and Arts Commission which charges an annual fee of \$47 to approximately 400 street artists in order to pay for Arts Commission and City Attorney staffs' time to process public document requests made by street artists pursuant to the Sunshine Ordinance. This fee conflicts with and has the effect of amending Sections 67.26 and 67.28(a) of the Sunshine Ordinance which state "the work of responding to [a] public-records request and preparing documents for disclosure shall be considered part of the regular work duties of any [city] employee, and no fee shall be charged to the requester to cover the personnel costs of responding to a records request."[(Sec. 67.26)] and "No fee shall be charged for making public



CITY AND COUNTY OF
SAN FRANCISCO

records available for review." [(Sec. 67.28(a)] Therefore, the Arts Commission charging a fee to process public document requests violates the Sunshine Ordinance.

The complaint incorrectly states the substance of Ordinance No. 189-10 (copy attached), which Mayor Newsom signed into law on July 23, 2010 and also mistakenly equates the imposition of a street artist certificate to cover program operating costs with a fee charged to a records requester specifically for processing his or her individual records request. This ordinance does not charge "an annual fee of \$47" to each street artist "to process public document requests made by [those individual] street artists" Instead, the ordinance just sets the new annual fee for Street Artists Certificates for street artists who wish to participate in the Arts Commission's Street Artists Program. Hence, the entire premise of the complaint – that a street artist who makes a public records request is charged a fee for their request – is wrong.

The San Francisco Board of Supervisors has the authority and discretion to set, and annually adjust, Street Artist Certificate fees. San Francisco Police Code Section 2404.2 states that each year "the Board of Supervisors shall, by ordinance, establish or readjust the fee for a Street Artist Certificate. The fee set shall be equal to, but not greater than, the fees necessary to support the costs of administering and enforcing the provisions of the Street Artists Ordinance." S.F. Police Code §2404.2 (Fee Setting Procedure).

Administration and enforcement of the Street Artists Ordinance, in turn, includes, but is not limited to, reviewing and processing Street Artist Certificate applications, managing street artist budget issues, issuing street artist certificates and withdrawals, coordinating and documenting meetings of the relevant commission and advisory committees, arranging street artist studio visits and screening sessions, coordinating Police Department enforcement of the program rules, conducting hearings for program violations, creating and distributing written materials, agendas, and other correspondence regarding Street Artist Program matters and rules, consulting with the City Attorney's office regarding legal issues arising out of the Street Artists program, coordinating street artist sales space lotteries, processing and investigating street artist complaints, processing warnings and license revocations, as well as processing of public records requests regarding the Street Artists Program from any individual – not just certified street artists.

Board of Supervisors Ordinance No. 189-10 sets the certificate fee that a street artist must pay to remain in the Street Artist Program. The quarterly (three-month) fee, starting July 1, 2010, is \$166.02. If paid on an annual basis, the fee is \$664.08, representing an increase of \$47.44 from the prior fiscal year. Every permitted street artist must pay the same certificate fee to remain in the Street Artist Program. A permittee's obligation to pay the fee has nothing to do with whether the street artist

submits one or more public records requests to the City in connection with the Street Artist Program, or otherwise. Indeed, in our experience, the large majority of permitted street artists submit no public records requests concerning the Street Artists Program.

Before submitting its budget to the Board of Supervisors with a recommended fee increase, the Arts Commission's Street Artists Program determined that a fee increase was necessary in order to cover the costs of administering the program, including, but not limited to, increased staff salary and benefit costs, enforcement costs, as well as additional administrative costs arising out of processing and responding to public records requests.

The Law

Section 67.26 of the Sunshine Ordinance states: "The work of responding to a public records request and preparing documents for disclosure shall be considered part of the regular work duties of any city employee, and no fee shall be charged to the requester to cover the personnel costs of responding to a records request." S.F. Admin. Code § 67.26. This provision precludes a City department from charging a requester for costs associated with responding to a request, such as the time it takes to search for, review, and redact records.

Section 67.28(a) of the Sunshine Ordinance states: "No fee shall be charged for making public records available for review." This provision precludes a City department from charging a requester for inspecting records. As the City Attorney's Good Government Guide (available on the City Attorney's website) states, at page 73: "The department may not charge any fees for a requester to inspect records. Admin. Code § 67.28(a)."

Other provisions of the Sunshine Ordinance regulate the fees a department may charge a requester for copies of public records. E.g., S.F. Admin. Code §§ 67.28(b), (c).

In sum, the Sunshine Ordinance precludes the City from charging a requester for its costs associated with processing a public records request and for the requester's inspection of records, but authorizes departments to charge certain fees to the requester for copies of records.

The Sunshine Ordinance does not address, much less regulate, permit fees that departments charge to individuals or entities who receive a City permit, such as participants in the Street Artists Program. The Sunshine Ordinance does not prohibit the City from setting a permit fee based on the costs of administering a permitting program or, in calculating that fee, from including the costs the department incurs in complying with public records requests.

The Task Force Lacks Jurisdiction To Adjudicate The Complaint

If a department charged a records requester a fee to cover the personnel costs of responding to the request, the Task Force would have jurisdiction to determine whether the department had violated Section 67.26 of the Sunshine Ordinance. Similarly, if a department charged a records requester for inspecting a record, the Task Force would have jurisdiction to determine whether the department had violated Section 67.28(a). But those facts are not present here. Ordinance No. 189-10 sets the certificate fee for street artists in the Street Artists Program.

Nothing in the Sunshine Ordinance remotely suggests that the Task Force has jurisdiction to determine the legality of permit fees charged to street artists – or, for that matter, the legality of fees charged to other individuals or entities for other types of permits the City issues, such as place of entertainment permits, taxi permits, or building permits. Challenges to the legality of permit fees are properly brought in a court of law, not before the Task Force.

The Complaint Is Without Merit

In the event the Task Force addresses the merits of the complaint, it is clear that Ordinance No. 189-10 does not violate the Sunshine Ordinance. Because it does not authorize charging a requester for the costs of processing a records request, it does not violate Section 67.26. Because it does not authorize charging a requester for inspecting records, it does not violate Section 67.28(a).

As with many other permit fees, the Board of Supervisors sets the certificate fee for street artists by ordinance. The ordinance may specify a certificate fee as high as necessary to offset costs associated with the implementation and administration of the Street Artists Program.

The Street Artists Program is funded through Street Artists certificate fees. The Street Artist Ordinance, San Francisco Police Code Article 24 (“Street Artists Ordinance”) implements a 1975 voter initiative ordinance (“Proposition L”) and allows artist to sell their handcrafted art and craft items on designated San Francisco sidewalks. S.F. Police Code §§2400, 2405. The Street Artists Ordinance authorizes the City to collect a street artist certificate fee as well as a related “application/examination fee” (referred to collectively in this memorandum as “certificate fees”). S.F. Police Code §§ 2400, (Sec. 6), 2404.1 and 2404.1.1. In 1983 the voters passed Proposition K, amending the Street Artist Ordinance to state that “the Board of Supervisors may increase the certificate fee when necessary in order to finance the costs of the Art Commission in administering and enforcing the provisions of this Ordinance.” Proposition K (currently codified as S.F. Police Code § 2400 (Sec. 6)).

To sell artwork on designated public property, a street artist must pay the certificate fees specified by the Board of Supervisors each year. As noted above, San Francisco

Police Code Section 2404.2 states that each year "the Board of Supervisors shall, by ordinance, establish or readjust the fee for a Street Artist Certificate. The fee set shall be equal to, but not greater than, the fees *necessary to support the costs of administering and enforcing the provisions of the Street Artists Ordinance.*" S.F. Police Code §2404.2 (Fee Setting Procedure) (emphasis added). All street artists must pay the *same* street artist fee to cover all of those operational costs.

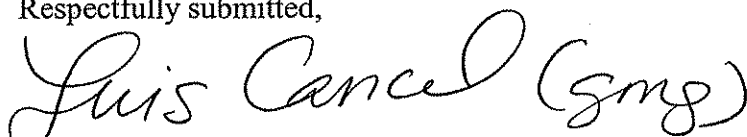
While the Arts Commission uses those certificate fee revenues to defray operating costs as required by the Street Artists Ordinance, and while those costs encompass a myriad of administrative and enforcement expenses, including the costs related to responding to records requests, the Arts Commission does not charge any street artist or any other member of the public, a fee for processing his or her individual records request. As a result, the street artist certificate fee, like any other fee the City imposes for any permit that may be used to cover general operating costs, does not violate the Sunshine Ordinance restriction on charges to individuals for records requests.

Conclusion

The Task Force should dismiss this complaint because it lacks jurisdiction to adjudicate the complaint. If the Task Force nonetheless addresses the merits, it should dismiss the complaint because the complaint does not state a violation of law.

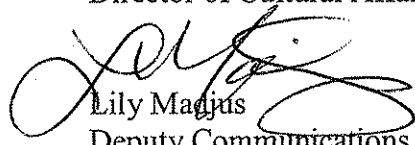
We recognize that the Task Force, in its oversight role regarding operation of the public records laws, may conduct a nonadjudicatory hearing into the City's costs associated with responding to records requests, and the degree to which permit fees are used to pay those costs. But the Task Force may not judge the legality of an ordinance setting certificate fees for street artists (or any other category of City permittees), and thus should neither assert jurisdiction over the complaint nor find the complaint to be legally valid.

Respectfully submitted,



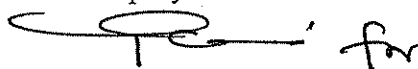
Luis Cancel

Director of Cultural Affairs, San Francisco Arts Commission



Lily Madjus

Deputy Communications Director, Mayor's Office



Angela Calvillo

Clerk of the Board

1 [Increasing Street Artist Certificate Fee]

2
3 Ordinance amending the San Francisco Police code, Article 24, by amending Section
4 2404.1 to increase the fee for a Street Artist Certificate and making environmental
5 findings.

6 NOTE: Additions are single-underline italics Times New Roman;
7 deletions are ~~strike-through italics Times New Roman~~.
8 Board amendment additions are double-underlined;
9 Board amendment deletions are ~~strikethrough normal~~.

9 Be it ordained by the People of the City and County of San Francisco:

10 Section 1. Findings.


11 The Planning Department has determined that the actions contemplated in this
12 Ordinance are in compliance with the California Environmental Quality Act (California Public
13 Resources Code sections 21000 et seq.). Said determination is on file with the Clerk of the
14 Board of Supervisors in File No. 100710 and is incorporated herein by reference.

15 Section 2. The San Francisco Police Code is hereby amended by amending Section
16 2404.1, to read as follows:

17 **SEC. 2404.1. STREET ARTIST CERTIFICATE: FEE.**

18 Pursuant to the provisions of Proposition K, adopted by the voters at an election held
19 on November 8, 1983, the Board of Supervisors hereby establishes the fee for a Street Artist
20 Certificate to be as follows: Beginning ~~July 1, 2009~~ July 1, 2010, the fee for a quarterly Street
21 Artist Certificate shall be ~~\$154.16~~ \$166.02 and said certificate shall be valid for a period of three
22 months from the date of issuance; except that any person certified as a street artist pursuant
23 to the provisions of this Article shall have the option of purchasing for ~~\$616.64~~ \$664.08 an
24 annual certificate valid for a period of one year from the date of issuance.

1 APPROVED AS TO FORM:
2 DENNIS J. HERRERA, City Attorney

3 By: 
4 ADINE VARAH
5 Deputy City Attorney
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City and County of San Francisco
Tails
Ordinance

City Hall
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4689

File Number: 100710

Date Passed: July 13, 2010

Ordinance amending the San Francisco Police code, Article 24, by amending Section 2404.1 to increase the fee for a Street Artist Certificate and making environmental findings.

June 29, 2010 Board of Supervisors - PASSED ON FIRST READING

Ayes: 9 - Avalos, Campos, Chiu, Chu, Dufty, Elsbernd, Mar, Maxwell and Mirkarimi

Noes: 2 - Alioto-Pier and Daly

July 13, 2010 Board of Supervisors - FINALLY PASSED

Ayes: 9 - Avalos, Campos, Chiu, Chu, Dufty, Elsbernd, Mar, Maxwell and Mirkarimi

Noes: 2 - Alioto-Pier and Daly

File No. 100710

I hereby certify that the foregoing Ordinance was FINALLY PASSED on 7/13/2010 by the Board of Supervisors of the City and County of San Francisco.

Mayor Gavin Newsom

Angela Calvillo
Clerk of the Board

July 23, 2010

Date Approved



City and County of San Francisco

City Hall
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4689

Certified Copy
Ordinance

100710 [Increasing Street Artist Certificate Fee]

Sponsor: Mayor

Ordinance amending the San Francisco Police Code, Article 24, by amending Section 2404.1 to increase the fee for a Street Artist Certificate and making environmental findings.

6/29/2010 Board of Supervisors - PASSED ON FIRST READING

Ayes: 9 - Avalos, Campos, Chiu, Chu, Dufty, Elsbernd, Mar, Maxwell and Mirkarimi

Noes: 2 - Alioto-Pier and Daly

7/13/2010 Board of Supervisors - FINALLY PASSED

Ayes: 9 - Avalos, Campos, Chiu, Chu, Dufty, Elsbernd, Mar, Maxwell and Mirkarimi

Noes: 2 - Alioto-Pier and Daly

7/23/2010 Mayor - APPROVED

STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO

CLERK'S CERTIFICATE

I do hereby certify that the foregoing Ordinance is a full, true, and correct copy of the original thereof on file in this office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of the City and County of San Francisco.

August 27, 2010

Date

Angela Calvillo

Clerk of the Board