CITY AND COUNTY OF SAN FRANCISCO

OFFICE OF THE CITY ATTORNEY

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September 24, 2012

Hon. Judge Feinstein
Presiding Judge
San Francisco Superior Court
400 McAllister Street – Room 008
San Francisco, CA 94102-4512

Re: **City Attorney Office's response to the June 2012 Civil Grand Jury Report released on July 26, 2012 and entitled, *"Where There's Smoke ... The Need to Strengthen the Art[s] Commission's Stewardship of San Francisco's Cultural Legacy"***

Dear Judge Feinstein:

In accordance with Penal Code Sections 933 and 933.05, the Office of the City Attorney submits the following response to the June 2012 Grand Jury Report entitled, *Where There's Smoke ... The Need to Strengthen the Art[s] Commission's Stewardship of San Francisco's Cultural Legacy."* The Grand Jury requested that this office respond to the report.

For each Civil Grand Jury finding for which you ask a response from the City Attorney's Office, you asked that we either:

1. agree with the finding; or
2. disagree with it, wholly or partially, and explain why.

For each Civil Grand Jury recommendation for which you ask a response from the City Attorney's Office, you asked that we report either:

1. that the recommendation has been implemented, with a summary explanation of how it was implemented;
2. that the recommendation has not been implemented, but will be implemented in the future, with a time frame for implementation;
3. the recommendation requires further analysis, with an explanation of the scope of that analysis and a time frame for the officer or agency head to be prepared to discuss it (less than six months from the release of the report); or

4. that the recommendation will not be implemented because it is not warranted or reasonable, with an explanation of why that is.

The Civil Grand Jury Report regarding the San Francisco Arts Commission ("SFAC"), is divided into five Report Categories: I - SFAC Governance, II - SFAC and the Civic Art Collection, III - Neighborhood Cultural Centers, IV - Street Artists Program, and V- Symphony Fund. Of the 39 findings and 24 corresponding recommendations in the Report, you have asked for the City Attorney's Office to respond to finding numbers 8, 28, 31, and 34 – 39, and recommendations number 1, 3, 5, 6, 13 - 16, 19, 22, and 24. The following City Attorney's Office responses are grouped by Report Category and then by number within each category.

I. SFAC Governance

Finding #8.

SFAC's website and published materials are out-of-date.

City Attorney's Office Response To Finding #8.

Agree. The City Attorney's Office understands from the Arts Commission that the Arts Commission is currently reviewing and updating its website and printed materials.

Recommendation #1.

To improve the governance of the department, increase the number of at-large [lay member] Commissioners [from four] to eight members, through Charter amendment.

City Attorney's Office Response To Recommendation #1.

The City Attorney's Office does not have the authority to implement Recommendation #1. Whether to modify the composition of the 15 member San Francisco Arts Commission under Charter Section 5.103 (Arts Commission) is a policy decision for Board of Supervisors and the voters. The City Attorney's Office will assist the Board of Supervisors in preparing a Charter amendment if requested.

Recommendation #3.

Encourage the creation of a non-profit organization dedicated to raising funds to meet [SFAC] program and operational needs.

City Attorney's Office Response To Recommendation #3.

The City Attorney's Office does not have the authority to implement Recommendation #3. Recommendation #3 may require further analysis by the Arts Commission to determine whether the private philanthropic community is interested in establishing a private, non-profit charitable organization dedicated to supporting SFAC program and operational needs. The City Attorney's Office will assist the SFAC in implementing or responding to this recommendation if requested.

Recommendation #5.

Furnish the means for each Commissioner to conduct an annual self-assessment to evaluate personal and commission performance in order to promote a focus on the full array of Commission responsibilities.

City Attorney's Office Response To Recommendation #5.

Recommendation #5 requires further analysis. The Mayor appoints, and may remove, the Arts Commissioners under the Charter. (*See* Charter § 3.100(17), and § 5.103 (Arts Commission). The Mayor's Office would have the discretion regarding whether, and how, to evaluate the performance of the Arts Commissioners. The City Attorney's Office has no authority over the evaluation of Commissioners, but will assist the SFAC or the Mayor with such a process if requested.

Recommendation #6.

Update the SFAC website and materials to confirm to current law and policy.

City Attorney's Office Response To Recommendation #6.

The City Attorney's Office has no authority to manage or update the SFAC website, but will continue to provide legal advice to the SFAC regarding compliance with applicable laws and policies.

II. SFAC and the Civic Art Collection

Recommendation #13.

Clarify ownership and maintenance responsibilities for art and statuary on Rec & Park property.

City Attorney's Office Response to Recommendation #13.

This recommendation, if implemented by the SFAC and Recreation and Park Commission in the form of an interdepartmental agreement, would remain subject to the Arts Commission's powers and duties regarding artwork on City property under Charter Section 5.103(2). The Charter does not vest exclusive jurisdiction in the Recreation and Park Department over its property, including any artwork on such property. *See* Charter Section 4.113. Instead, Charter section 5.103 vests in the Arts Commission the authority to maintain works of art on Recreation and Park property. The Charter, rather than the Administrative Code, dictates the respective jurisdiction of those departments over maintenance of artwork on City property.

San Francisco Administrative Code Section 2A.150.1(b) gives the Arts Commission discretion "to enter into agreement[s] with the Recreation and Park Commission, upon such terms as may be mutually agreed, for the cataloging, care and maintenance of any or all of the above media located on properties under the jurisdiction of the Recreation and Park Commission." But that section does not supersede the Charter imposed obligation of the Arts Commission to

maintain works of art on Recreation and Park property or expend appropriations made in support of the visual arts. (*See* Charter Section 5.103(2) and 5.013(4).)

Moreover, with respect to any conflict between the 1996 Charter, as amended, and the now outdated San Francisco Administrative Code Section 2A.150.1(a), which provides that the Arts Commission has jurisdiction over the "cataloguing, care and maintenance of all sculptures, statutes, murals, paintings, and other art media belonging to the City and County of San Francisco" that are not on property under, among others, the Recreation and Park Commission, the City Attorney's Office, following consultation with the Arts Commission and the Recreation and Park Commission, will recommend to the Board of Supervisors appropriate updates to those Administrative Code provisions to make them consistent with current Charter provisions.

Recommendation #14.

Complete a SFAC – Rec & Park agreement to ensure compensation for maintenance of art in the City's parks is adequate to support that task and does not impair conservation and maintenance elsewhere.

City Attorney's Response to Recommendation #14.

Please see response to Recommendation #13. The business terms of any interdepartmental agreement regarding allocation of funds for maintenance of artwork are a policy matter for the departments, subject to available City funding and the budgetary and fiscal provisions of the Charter. The City Attorney's Office will assist the departments with preparation of such agreements if requested and will continue to advise the departments on any legal issues arising out of interdepartmental agreements.

III. Neighborhood Cultural Centers

Recommendation #15.

SFAC hold public hearings about the Cultural Centers and their short-and-long term funding (for programs and facility maintenance), facility, and safety needs to develop an action plan to secure the Cultural Centers.

City Attorney's Response to Recommendation #15.

Recommendation #15 to hold public hearings regarding the Cultural Centers is a policy matter for the SFAC. The City Attorney's Office has no authority over the SFAC's decision whether to hold hearings on particular topics.

Recommendation #16.

SFAC enter long term leases with their Cultural Center operators.

City Attorney's Response to Recommendation #16.

Recommendation #16 is a policy matter for the SFAC, subject to any required Board of Supervisors approval under Charter Section 9.118 (Contract and Lease Limitations). If the SFAC elects to pursue long term leases with the Cultural Centers, subject to any Board of Supervisors approval requirements under Charter Section 9.118, the City Attorney's office will assist in drafting such leases and in approving them as to form.

IV. Street Artists Program

Finding #28.

The Street Artists Annual Fees since 2000 have increased in large part due to the costs of defending the Program Manager for violations of the Sunshine ordinances from the Street Artists.

City Attorney's Office Response to Finding #28.

Disagree. The City Attorney's Office understands that the costs of administering and enforcing the Street Artists Program have increased since 2000 primarily because of the increasing cost of salary and fringe benefits for City employees on the SFAC staff, rather than being primarily attributable to any other costs, including City Attorney costs.

Finding #31.

There has been no current memorandum of understanding between SFAC and the Recreation and Park Department Concerning the use of Justin Herman Plaza since 1991.

City Attorney's Office Response to Finding #31.

Agree. The City Attorney's Office is not aware of the existence of any such agreement.

Recommendation #19.

Legal expenses for the Sunshine Ordinance defense be paid from an account other than the Street Artists Fund.

City Attorney's Office Response to Recommendation #19.

This recommendation will not be implemented by the City Attorney's Office. Billing legal expenses to a particular fund is a policy matter for the SFAC and Board of Supervisors. Under the Street Artists Ordinance, the fees for a Street Artist Certificate "shall be equal to, but not greater than, the fees necessary to support the costs of administering and enforcing the provisions of the Street Artist Ordinance." (S.F. Police Code § 2404.2 (Fee Setting Procedure).) In other words, the Ordinance contemplates that the program will be self-supporting. The SFAC may lawfully expend monies in the Street Artist Fund to pay for legal expenses relating to the administration of the Street Artist Program, including responding to issues arising out of the Sunshine Ordinance.

V. Symphony Fund

Finding # 34.

For general operating and SFAC Gallery exhibition expenses, SFAC relies on public funds that are designated by Charter for "maintenance of a symphony orchestra."

City Attorney's Office Response to Finding #34.

Disagree. This Office is informed by the SFAC that, in compliance with the Charter, the SFAC provides the entire amount mandated under Charter Section 16.106(1) for "maintenance of a symphony orchestra" to the San Francisco Symphony.[1] The SFAC uses funds from a variety of other sources, including general fund revenues, grants, and gifts from a variety of individuals and organizations (including any gift from the San Francisco Symphony), for its general operating expenses and SFAC Gallery exhibition expenses.

Finding #35.

Since 1935, SFAC has chosen the San Francisco Symphony as recipient of those funds [allocated to the Arts Commission under Charter Section 16.106(1))].

City Attorney's Office Response to Finding #35.

Agree.

Finding #36.

SFAC is without legal or practical resources if [the San Francisco Symphony] revoked its annual contribution of 40% of those funds given to SFAC.

City Attorney's Office Response to Finding #36.

Disagree. In the absence of a donation from the Symphony or other donor for assistance with SFAC operating expenses, the SFAC could request a supplemental appropriation from the Board of Supervisors and the Mayor. In the absence of more specific facts and circumstances, the City Attorney's Office is not able to speculate as to the merits of any particular claim by the City against a donor.

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[1] Charter Section 16.106(1) provides that the Board of Supervisors "shall annually" appropriate "[t]o the Arts Commission, the revenue from a tax of one-eighth of one cent ($0.00125) per one hundred dollars ($100) of taxable assessed valuation in the City and County for maintaining a symphony orchestra[.]" (Charter §16.106 (Cultural, Educational, and Recreational Appropriations).)

Finding #37.

The manner in which SFAC funds its operations by a giveback donation from the [San Francisco Symphony] monies, creates, at least, an appearance of fiscal impropriety and violates the intent of the 1935 Charter Amendment.

City Attorney's Office Response to Finding #37.

Disagree. Our office understands that the SFAC, in compliance the Charter, appropriates all funds it receives under that section to the Symphony for the purpose of "maintaining a symphony orchestra." (Charter §16.106 (Cultural, Educational, and Recreational Appropriations).)

Under Section 5.100 of the Charter, the SFAC "may accept and shall comply with the terms and conditions of" gifts, including the gift from the San Francisco Symphony. (Charter §5.100). In the absence of any gift restriction precluding the SFAC's use of the Symphony's gift for general operating expenses, the SFAC may use that gift for such purposes.

How the City funds the SFAC operations as part of its budget process is a budgetary and policy matter over which the City Attorney has no authority.

Finding #38.

GFTA funds the San Francisco Symphony for over $600,000 annually for operating expenses.

City Attorney's Office Response to Finding #38.

Agree. The City Attorney's Office understands from GFTA that it currently funds the Symphony over $600,000 annually.

Finding #39.

Until December 2011, SFAC was out of compliance with City and State regulations and Arts Commission policy governing the gifting of donated Symphony tickets to public officials and other organizations.

City Attorney's Office Response to Finding #39.

Agree.

Recommendation #22.

The Arts Commission/Symphony Agreement comply with the intent of the Charter and the full amount of the tax revenues go toward Symphony operating expenses.

City Attorney's Office Response to Recommendation #22.

The City has implemented this recommendation. This Office has been informed by the Arts Commission that, in compliance with Charter Section 16.106(1), the SFAC expends all funds

it receives under that section to the Symphony for the purpose of "maintaining a symphony orchestra." (Charter §16.106 (Cultural, Educational, and Recreational Appropriations).)

Under Section 5.100 of the Charter, in turn, the SFAC "may accept and shall comply with the terms and conditions of loans, gifts, devises, bequests or agreements donating works of art or other assets to their department without action of the Board of Supervisors so long as acceptance of the same entails no expense for the City and County beyond ordinary care and maintenance." (Charter §5.100 (Arts and Culture Departments - General).) By this language, the Charter vests in SFAC the authority to accept gifts from individuals and organizations, including gifts of funds from organizations such as the Symphony.

The San Francisco Symphony is a private, nonprofit organization that is not owned or operated by the City.

Recommendation #24.

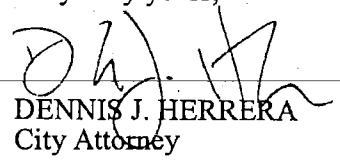
SFAC properly report the disposition of the concert tickets given to it by SFS [the San Francisco Symphony] in compliance with City and State regulations.

Response by the City Attorney's Office to Recommendation #24.

The City Attorney's Office does not have authority to implement Recommendation #24 but will continue to advise the SFAC regarding its ticket distribution reporting obligations.

We hope this information is helpful.

Very truly yours,



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cc: Civil Grand Jury Office (c/o – Mario Choi, Foreperson Pro Tem)
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