

REUBEN, JUNIUS & ROSE, LLP

Daniel A. Frattin
dfattin@reubenlaw.com

September 8, 2021

Delivered Via Email (erica.major@sfgov.org)

Chair Myrna Melgar
Supervisor Aaron Peskin
Supervisor Dean Preston
San Francisco Board of Supervisors
Land Use and Transportation Committee
1 Dr. Carlton B. Goodlett Place
City Hall, Room 244
San Francisco, CA 94102-4689

**Re: 800 Chestnut Street – Diego Rivera Fresco Landmark Designation
File No. 210565
Hearing Date: September 13, 2021
Our File No.: 11665.01**

Dear Chair Melgar and Supervisors Peskin and Preston:

Our office represents the San Francisco Art Institute (“SFAI”), the leaseholders of the UC-Regents owned property at 800 Chestnut Street (the “**Property**”) and the owners of “The Making of a Fresco Showing the Building of a City” fresco (the “**Fresco**”). We are writing to respectfully request that the Land Use and Transportation Committee amend the proposed landmark designation to allow for the creation of direct street access to the Fresco gallery. An allowance for direct access from the street would enhance the public’s enjoyment of the mural and position SFAI to attract philanthropic funding to endow the Fresco gallery as a museum. In addition to improving public access and conserving the mural, this change to the landmark ordinance will help SFAI recover its footing after a financial crisis that nearly caused the 150-year-old school to close.

I. SFAI’s Lease and Future Plans

SFAI formerly owned the Property. However, due to SFAI’s financial difficulties, which were compounded by the pandemic, the UC Regents assumed SFAI’s loan on the Property, took title to it, and leased it back to SFAI. Under the terms of its lease, SFAI has five years to purchase the Property back from the Regents by paying off the loan. If it fails to do so, SFAI must vacate and pay millions of dollars in liquidated damages if it leaves the Fresco in place at the end of the term.

SFAI has made excellent progress in stabilizing its condition. It has reopened and is on track for a return to full enrollment over the next three years. However, in order to realize its plans

to purchase the Property back from the Regents, it is essential for it to attract philanthropic funding to endow the Fresco gallery as a pocket museum. Doing so would ensure that public access to the Fresco is retained in perpetuity, give SFAI the wherewithal to purchase the Property back from the Regents, and relieve SFAI of the significant expense associated with conserving and insuring the Fresco.

II. SFAI’s Plan for the Diego Rivera Fresco

Currently, the Fresco is hidden from public view in the building with the round window, pictured below. The entrance to the gallery is through a courtyard that is not open to the general public at all times and which doubles as outdoor space for the school. In order to create a pocket museum and improve public awareness of and access to the mural, improved access is a must. Therefore, SFAI is requesting that the Landmark Ordinance include express language allowing the HPC to permit new compatible entryways that would allow direct access from the street and provide views of the Fresco from the public right-of-way. See below for images of the existing condition and a potential compatible entryway.



Existing Condition



Potential Street Entryway



Close Up of Potential Street Entryway

This amendment is essential for SFAI to realize its vision of a pocket museum centered around the Diego Rivera Fresco, promote the conservation of the Fresco, and help the oldest art school west of the Mississippi continue as a San Francisco institution.

III. Conclusion

If the Land Use and Transportation Committee recommends approval of the landmark designation, we respectfully request that it do so with an amendment that will allow improved public access to the Fresco as well as the continued survival of the San Francisco Art Institute.

Very truly yours,

REUBEN, JUNIUS & ROSE, LLP



Daniel A. Frattin

cc: Mark Kushner, SFAI

REUBEN, JUNIUS & ROSE, LLP

Daniel A. Frattin
dfrattin@reubenlaw.com

May 3, 2021

Delivered Via Email

President Diane Matsuda and Commissioners
Historic Preservation Commission
49 South Van Ness Ave, Suite 1400
San Francisco, CA 94103

**Re: 800 Chestnut Street – Opposition to Landmark Designation
Record No. 2021-001721DES
Hearing Date: May 5, 2021
Our File No.: 11665.01**

Dear President Matsuda and Commissioners:

Our office represents the San Francisco Art Institute (“SFAI”), the leaseholders of the UC-Regents owned property at 800 Chestnut Street (the “**Property**”) and the owners of “The Making of a Fresco Showing the Building of a City” fresco (the “**Fresco**”). We are writing to respectfully request that the Historic Preservation Commission disapprove the proposed landmark designation of the Fresco given that (1) it is a movable piece of personal property that is outside the scope of the City’s landmarking authority, and (2) the landmark designation could effectively force SFAI to violate its lease with the University of California and result in significant liquidated damages, thus effecting a taking.

I. Diego Rivera’s Movable Fresco

In 1930, SFAI commissioned Diego Rivera to create an art piece for the school. The work was painted in Diego Rivera’s preferred *buon fresco* style where the painting is completed on fresh plaster. In this case, the plaster was applied to a metal lath installed on a furred-out wall that was attached to the existing concrete wall with bolts. This was common practice for Diego Rivera, who is known for creating movable frescos that are structurally independent of the architectural setting. The purpose of creating movable frescos was to ensure that the works of art would outlast the building in which they were displayed and allow them to be moved if desired.

Therefore, unlike a typical mural that is painted directly onto the building, this Fresco is structurally independent and intended to be movable. As such, the Fresco is not part of the real property, but instead part of SFAI’s personal property. This has been confirmed by the current

owners of the Property, the Regents of the University of California (“**Regents**”), and incorporated into the lease agreement with SFAI.

II. Landmark Designation Authority

The Planning Code allows the Historic Preservation Commission and Board of Supervisors to landmark “an individual structure or other feature.”¹ Read in context, it is clear that the term “other feature” refers to architectural features, not works of art that are movable pieces of personal property. For example, any landmark designation “shall be in furtherance of and in conformance with the purposes of...Article 10,” which is to protect “structures, sites and areas” of significance.² The landmark designation must include “the location and boundaries of the landmark site” and specifically refers to the “property,” which may include a “park, square, plaza or garden” and any significant “architectural features.”³ Taken together, it is clear the term “other features” is not intended to encompass movable works of art, but architectural features of the property. Article 10 does not provide the City the authority to designate a movable piece of personal property, like “The Making of a Fresco Showing the Building of a City” fresco, as a landmark. To do so would be beyond the scope of the City’s power under Article 10.

III. Landmark Designation Would Amount to a Taking

The Fresco is SFAI’s sole permanent interest in the Property. SFAI is currently subject to a lease agreement with the Regents that makes clear the Fresco is SFAI’s personal property. Unless SFAI purchases the Property, the Fresco will become the property of the University of California if it is not removed at the end of the lease term. The lease further specifies that SFAI is required to pay millions of dollars in liquidated damages if it leaves the Fresco in place at the end of the term. SFAI is attempting to amend the lease, but if it is not successful, the landmarking action may result in millions of dollars in liquidated damage payments plus thousands of dollars in daily penalties for each day the Fresco remains in place. Even worse, SFAI would suffer the complete loss of the mural, SFAI’s largest asset, to the University of California. SFAI’s survival is at stake here: it is struggling to regain its financial footing and is not in a position to make millions of dollars in payments. The proposed landmark designation could effectively deprive SFAI from either the ownership of the Fresco or deprive SFAI all economically beneficial use of the Fresco, plus subject SFAI to the millions of dollars in liquidated damages.

The Supreme Court and the 9th Circuit have applied takings jurisprudence to personal property.⁴ A regulation that results in the deprivation of all economically viable use of personal property is a clear taking. The landmark designation would go a step further than necessary to

¹ Planning Code Section 1004(a)(1).

² Planning Code Sections 1001 and 1004(b).

³ Planning Code Sections 1004(b) and (c).

⁴ See *Horne v. Dept. of Agriculture* (2015) 576 U.S. 350; *Sierra Medical Services Alliance v. Kent* (9th Cir. 2018) 883 F.3d 1216, 1225.

President Diane Matsuda
Historic Preservation Commission
May 3, 2021
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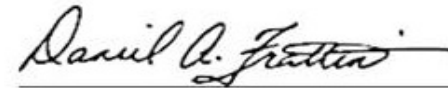
establish a taking by not only depriving SFAI all economic use of the Fresco, but also requiring SFAI to incur a significant loss, one that SFAI may not survive.

IV. Conclusion

We respectfully request the Historic Preservation Commission disapprove the landmark designation of “The Making of a Fresco Showing the Building of a City” fresco because it is beyond the scope of the City’s landmarking power and would constitute a taking.

Very truly yours,

REUBEN, JUNIUS & ROSE, LLP



Daniel A. Frattin

cc: Commissioner Kate Black
Commissioner Chris Foley
Commissioner Richard S.E. Johns
Commissioner Ruchira Nageswaran
Commissioner Lydia So
Commissioner Jonathan Pearlman
Jonas Ionin, Commission Secretary
Pilar LaValley, Planning Department
Mark Kushner, SFAI



Historic Preservation Commission
49 South Van Ness Avenue, Suite 1400
San Francisco, Ca 94103

Regarding: Item 7, 2021-00172IDES, "The Making of a Fresco Showing the Building of City", 800 Chestnut Street.

Dear Commissioners,

It is important that the mural "The Making of a Fresco Showing the Building of City" by Diego Rivera be designated in place as a Article 10 Landmark for the following reasons:

1. The Chicano Mural Movement in the state of California was inspired by Diego Rivera, Orozco and Siqueiros. These Mexican Muralists used art as a weapon to address social injustice in the lower classes of society. Diego Rivera brought the Mexican public art movement to San Francisco in person by painting 3 murals in public spaces in San Francisco, one of which is this mural. This mural is particularly important in this location because of the Chicano muralists who attended the Art Institute during the period from 1966 to 1999 and were influenced by the Rivera's work.

During the 1960's Chicano artists, inspired by the example of the Mexican muralists, promulgated the social justice theme in their Mission District Murals and in the political poster art produced for a variety of organizations and events. The mural work of Rene Yanez, Graciella Carillo, Consuelo Lopez, Patricia Rodriguez, Ray Patlan, Juan Alicia, Irene Perez, Luis Cervantes, Michael Rios and later Cristianne Dugan-Cuadra and Manuel Sanchez were all influenced by Diego Rivera's "*The Making of a Fresco Showing the Building of City*" at the San Francisco Art Institute.

Therefore this painting, in it's current location, a location where Chicano artists were students, represents an important part of Latino Culture in San Francisco.

2. Diego Rivera painted murals that were meant to be seen by the public, and which have public significance.

Therefore this mural should remain in a place where it can be seen by the public, rather than suffer the possibility of becoming part of a private collection.

3. The mural was designed specifically for the room that it is in now. Besides the shape of the painting conforming to the shape of the roof, the scaffolding echoes the rhythms of the roof framing and trusses. Note how the spacing of the rungs of the ladder up the scaffold echo the spacing of the roof rafters. The light and shadows in the painting reflect the sources of light from the skylight and windows to the side. Even the coloring of the painting and the ceiling and other wood trim are complement each other. This painting is part of the room it was designed for and would lose something by being moved elsewhere.

Sincerely

SAN FRANCISCO LATINO HISTORICAL SOCIETY-FOUNDING MEMBER

Anne Cervantes, *Architect*, former City Hall Preservation Commissioner

Alan Martinez, *Architect*, former Preservation Commissioner

Lorraine Garcia- Nakata, *Artist, Arts/Cultural Specialist, Commissioner, the National Museum of the American Latino, former Director, The Mexican Museum, former San Francisco Arts Commissioner, and Chair, SF Public Arts Program*

Dr. Carlos Cordova, *Historian, Professor of History-San Francisco State University, Latino Context Statement Historian*