



November 4, 2019

**VIA Email jklein@cityofberkeley.info
and Overnight Priority U.S. Mail**

Jordan Klein
Economic Development Manager
Office of Economic Development
City of Berkeley
2180 Milvia Street
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Berkeley, California 94704

**Re: Urgent Request for Standstill Agreement because of Arbitrary
and Capricious Implementation of the City of Berkeley's Artwork
Deaccession Policy and Breach of Contract with Respect to
Berkeley Big People Causing Immediate Irreparable Harm**

Dear Mr. Klein,

I represent Scott Donahue in connection with City of Berkeley's arbitrary and capricious implementation of its brand new Artwork Deaccession Policy based upon incomplete and flawed information in violation of his rights as the artist protected under the Visual Artists Rights Act, 17 U.S.C. §106 and §113 and the California Art Preservation Act, California Civil Code §987-89 law with respect to the commissioned public art sculptures entitled *Berkeley Big People*. I write in response to your October 28, 2019 email to my client stating the City of Berkeley's position which is attached as Exhibit 1 to this letter. I also represent Mr. Donahue in connection with his breach of contract claim against the City of Berkeley for failing make good faith efforts to maintain the *Berkeley Big People* and failing to consult with my client with respect to all repair, maintenance and restoration to be made the artwork. I write to request that the City of Berkeley enter into a six month standstill agreement with my client and suspend any and all notices and deadlines with respect to the deaccession of the *Berkeley Big People* until these disputes can be resolved and to prevent irreparable harm to my client's reputation and his rights as the artist who created the *Berkeley Big People*.

The City of Berkeley's Breach of Contract Is Central to the Alleged Rationale for Deaccession of the *Berkeley Big People*

The 2003 contract between the City of Berkeley and my client requires the City of Berkeley in Section 12 to do the following:

Contingent upon the necessary funds being appropriated for such action, the City ***shall make a good faith effort*** to maintain the artwork as instructed by the Artist on "Exhibit A" and to ***secure the Artist's recommendations with respect to all repair, maintenance and restoration to be made to the work*** during the lifetime of the Artist."

Artwork Commission Agreement, June 1, 2003 (attached as Exhibit 2)(the "Contract")

Specifically, the City of Berkeley ignored the recommendations of my client approximately 4 years ago to make \$6,000 of repairs and maintenance to the *Berkeley Big People* that would have avoided the present circumstances. The City of Berkeley has also ignored and refused to implement current repairs which were bid by my client ***for free*** (worth approximately \$15,000) to repair and restore *the Berkeley Big People*. Other than these two recommendations from my client, as far as my client can tell, the City of Berkeley has ***never*** made any good faith efforts to maintain the *Berkeley Big People* and certainly has never sought my client's recommendations ***with respect to all repair, maintenance and restoration*** as required by the Contract. Significantly, the staff report recommending deaccession does not discuss a single dollar spent by the City of Berkeley on maintenance or repairs to the *Berkeley Big People* between its installation in 2008 and July 2019. The Staff Report only discusses what one consultant said who looked at the site once 10 days before the Staff Report was written.

While there is considerable doubt as to the conclusions reached by the City of Berkeley with respect to the reason and cost of needed repairs, any such repairs appear to be the result of the City of Berkeley's failure to engage in good faith efforts to maintain *the Berkeley Big People* and consult with my client about any such needed repairs, maintenance and restoration. Yet the City of Berkeley seeks to justify deaccession and its threat to destroy the *Berkeley Big People* based on its

own failure to maintain the artwork. (See October 19, 2019 email from Scott Donahue attached to Exhibit 1 and Staff Report Exhibit 4, p.5)

When asked by my client what was the basis for the deaccession, my client was told in a July 19, 2019 email from Jennifer Lovvern, the Chief Cultural Affairs Officer for the Civic Arts Program that:

The agenda for the Civic Arts Commission meeting will include a staff report that has the rationale for deaccession. That will be posted later today and I will send you the link as soon as it is up.

Jennifer Lovvern July 19, 2019 email Exhibit 3, p. 1

The staff report recommendation states:

STAFF RECOMMENDATION

While it is ultimately a decision of the Civic Arts Commission, staff recommends that the commission consider the following three conditions relative to possible action to initiate the deaccession of *Berkeley Big People* by Scott Donahue:

- The work requires excessive or unreasonable maintenance, or has faults in design or workmanship.
- The condition of the work requires restoration in gross excess of its market value, or is in such a deteriorated state that restoration is infeasible, impractical, or would be so extensive as to fundamentally transform the work for the artist's original intent.
- The Civic Arts Commission wishes to replace a work with a more appropriate work by the same artist.

Staff Report July 19, 2019 Exhibit 4, page 5

Since the City of Berkeley has never approached my client "seeking to replace a work with a more appropriate work by the same artist" that could not be the basis for the deaccession decision.

Thus, the sole basis for the deaccession decision is the evaluation by a consultant who looked at Berkeley People on July 10, 2019 just days before the staff recommendation was made. As is apparent from the report as my client pointed out to you, the consultant never examined the interior of the sculpture nor did she accurately determine which of the mixed media materials were used at least at one location (she said it was fiberglass – it is in fact mortar at that location). It is unclear from the report how much time she devoted to her inspection. She never contacted the artist to determine if her assessment of the materials used was correct. Moreover, the City of Berkeley did nothing to consult with my client as required by the Contract with respect to recommendations for repair, maintenance or restoration, and apparently did nothing to ascertain whether the cost estimates provided were competitive or reasonable nor did the City of Berkeley even consider my client's offer to complete the repairs for free.

Instead, in your statement of the City of Berkeley's position you told my client that:

We empathize with your disappointment in seeing your work removed from our collection, but unfortunately it is not always possible or preferable to maintain and/or retain artwork indefinitely.

Jordan Klein email October 28, 2019 Exhibit 1.

The City of Berkeley's Application of its Brand New Deaccession Policy to the Berkeley Big People Was Arbitrary and Capricious and Failed to Follow the Required Procedures Which Will Cause the Artist Irreparable Harm

The arbitrary and capricious application of the brand new Artowrk Deaccession Policy is further demonstrated by the attempt to "check the box" approach that the City of Berkeley has used with respect to my client and his artwork. Contrary to your assertion that "Each step as set forth in Section K has been carefully observed", in fact, the City failed to follow several crucial steps that are causing my client irreparable harm. See Klein email Exhibit 1 paragraph 2.

The City of Berkeley Failed to Provide My Client with the Deaccession Notification at the time the Berkeley Big People was Being Considered for Deaccession In Violation of the Artwork Deaccession Policy

First, the City of Berkeley never provided my client with a Deaccession Notification at the time the *Berkeley Big People* **was being considered for deaccession**. The never before used Artwork Deaccession Policy defines “Deaccession Notification” as:

A written letter to the artist or donor referencing the applicable conditions of the artwork and ***describing the reasons why deaccession review is being undertaken***.

Exhibit 5 p. 49 (emphasis added). This requires notice to the artist at the beginning not at the end of the deaccession process.

The procedure for providing Deaccession Notification set forth in the Artwork Deaccession Policy states:

City Staff shall comply with any applicable state or federal notice requirements ***and shall make every reasonable effort to contact the artist whose work is being considered for deaccession, and any other known parties with a vested interest in the artwork***.

Exhibit 5, p. 50 (emphasis added).

Public records of the Public Art Subcommittee reveal that the first discussions reported about the *Berkeley Big People* started in its May 1, 2017 meeting ***more than two years before any notice was provided to my client***. (See Exhibit 6 Summary and Exhibit 8, p. 2 excerpts of the public record) The *Berkeley Big People* was on the agenda for that committee at four different meetings in 2017, four separate meetings in 2018, and was on the January 2019 special meeting agenda to approve a \$60,366 relocation budget. Scott Donahue was unaware that any of these meetings or discussions were underway. The only contact that he received was several years ago from a committee member asking if would oppose moving the *Berkeley Big People* to which he responded that he would not if there was an appropriate alternative location. My client heard nothing thereafter.

Moreover, in July 2017, the subcommittee commissioned a legal opinion on the “Scott Donahue Bike Bridge Sculpture.” See Exhibit 8, p. 5-6 From this public record it is apparent that City of Berkeley was told that since it did not have

a written deaccession policy, it would be very difficult to deaccess *the Berkeley Big People*. At the January 17, 2018 meeting of the Public Arts subcommittee the first deaccession policy for the City of Berkeley was introduced. See Exhibit 8, p. 7. Five days later, the same committee was again discussing the *Berkeley Big People* statute. See Exhibit 8, p. 8. The discussions at the Public Art Committee continued in parallel with approval process for the new Artwork Deaccession Policy. Exhibit 8, p. 9-28. The Artwork Deaccession Policy was adopted April 30, 2019 and on July 19, 2019 the staff of the Public Art Committee was recommended deaccession of the *Berkeley Big People*.

But instead of following the new procedure described for Deaccession Notification when the artwork is being considered for deaccession, the City of Berkeley sent an email to my client after that conclusion had already been reached. At 7 pm on Wednesday July 17, 2019, my client was informed that a vote would be taken on deaccession of the *Berkeley Big People* on the following Monday July 22, 2019 (less than six calendar days and only two business days later) and that the Civic Art Commission would vote two days later. See Exhibit 3, p. 3 But that email did not even tell my client what were the reasons for deaccession. My client had to ask for the reasons. See Exhibit 3, p. 1 The Staff Recommendation containing the alleged rationale was not provided to my client until Saturday July 20, 2019, one business day before the meeting. See Exhibit 3, p.1 and Exhibit 9

It is inconceivable that any legal opinion received by the City of Berkeley would condone the City working on this issue for over two years, including the time needed to draft the new Artwork Deaccession Policy, and then providing the artist with one business day notice of the reasons for deaccession and no meaningful opportunity to respond. This was an arbitrary and capricious application of the Deaccession Notification process. There is very strong circumstantial evidence that my client was not told that deaccession was being considered until after the deaccession decision had all been but made. The committee meetings on July 22, 2019 and July 24, 2019 appear to be simply an implementation of a decision that was set up as a forgone conclusion. We believe that discovery into the discussions held over the two year period will reveal the real reason that the committee voted for deaccession of the *Berkeley Big People* as alluded to in your email that in fact preferences have changed and that committee members had reached that conclusion long before July 22, 2019. However, under the terms of the Artwork Deaccession Policy, the City of Berkeley would have been required to show that there was "Significant adverse public reaction

over an extended period of time (5 years or more)". See Exhibit 5, p. 49. Rather than debating publicly the popularity of the *Berkeley Big People* which has always had its supporters and detractors, the evidence to date shows that the City of Berkeley simply let the artwork fall into disrepair and then cited that as a reason for the deaccession because it would be faster and simpler.

Your conclusion that my client's appearance at the public hearing satisfies any notice deficiencies by the City of Berkeley is simply wrong. The reason for notice is to allow an artist to have sufficient time to prepare and understand the actual reasons for deaccession. The fact that my client identified significant factual flaws in the stated reasons for deaccession in the short time he had available, does not substitute for "making every reasonable effort" to notify him at the time deaccession was being considered as required by the Arts Deaccession Policy. The requirement that the City of Berkeley notify the artist of the required public committee meetings is a separate and additional requirement to the Deaccession Notification – not a substitute. See Ex. 5 Section 4.2, p. 50

The City of Berkeley Failed to Follow the Policy Directive that Deaccession be Done Cautiously After Careful and Impartial Analysis

Second, the circumstances here demonstrate the City of Berkeley failed to follow the policy directive set forth in the Artwork Deaccession Policy that:

Removing artwork from the City's civic art collection by deaccession should be cautiously applied only after careful and impartial evaluation of the artwork to avoid the influence and the premature removal of a work from the collection.

The work done in evaluating the *Berkeley Big People*, with respect to repairs and conservation was anything but careful and was done in breach of the Contract with the artist.

Sale to Third Party

For the first time on October 28, 2019 my client learned that he has the ability to locate a third party buyer for the *Berkeley Big People*. See Exhibit 1 paragraph 6. There simply is not enough time between now and the threatened date of destruction of my client's artwork for him to identify and confirm potential buyers for his artwork.

Irreparable Harm

My client was not provided adequate notice that his artwork *Berkeley Big People* was being considered for deaccession. Moreover, there is strong evidence that the reason for deaccession is not as stated in the Staff Report. Because of the lack of notice, he was not able to adequately prepare to challenge the two stated reasons for deaccession.

My client mistakenly believed that when the flaws in the rationale for deaccession were pointed out to the City of Berkeley that rationally it would rescind its deaccession decision either to allow him, as the artist who created the artwork and the person the City of Berkeley was contractually required to consult with regarding repairs, maintenance and restoration, sufficient time to demonstrate the error in the consultant's evaluation or to allow the repairs to be made. But, as he has learned over time, the City of Berkeley has no interest in evaluating the merits of its consultant's report or acknowledging its role in the current state of the artwork because the stated reasons appear to be a pre-text for other reasons for deaccession of the controversial artwork. The City of Berkeley's conduct demonstrates that it never fairly considered the evidence or the facts.

The threatened destruction of the *Berkeley Big People* under these false pretenses and after an arbitrary and capricious application of the brand new Artwork Deaccession Policy will result in irreparable harm to my client's reputation. The destruction of the *Berkeley Big People* under these circumstances will violate my clients rights under 17 U.S.C. §106(A)(a)(3)(A) and (B) which provides that the artist

Subject to the limitations of section 113(d), shall have the right

- (A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation or modification of that work is a violation of that right, and
- (B) to prevent the destruction of a work of recognized stature and any intentional or grossly negligent destruction of that work is a violation of that right.

Because the *Berkeley Big People* are not attached to any building, the limitations of Section 113(d) are inapplicable.

The arbitrary and capricious application of the Artwork Deaccession Policy to the *Berkeley Big People* is also in violation of California Civil Code section 987 *et seq.* which provides in pertinent part:

The Legislature hereby finds and declares that the physical alteration or destruction of fine art, which is an expression of the artist's personality, is detrimental to the artist's reputation, and artists therefore have an interest in protecting their works of fine art against any alteration or destruction; and that there is also a public interest in preserving the integrity of cultural and artistic creations.

Artist's Request

My client does not want his reputation and honor irreparable damaged by the destruction of the *Berkeley Big People* by the City of Berkeley. Had my client understood at the outset that the current administration of the City of Berkeley just wants the *Berkeley Big People* gone no matter what, he would have searched for other patrons who value and appreciate his work to find a new home for the artwork. My client requests a six-month standstill agreement with the City of Berkeley to allow him to do exactly that.

In the notice provided to my client at the conclusion of the arbitrary and capricious application of the Artwork Deaccession Policy, the City of Berkeley told my client that "In accordance with VARA and CAPA, you have the option to remove or pay for removal of the Artwork no later than ninety (90) days from the receipt of this notice... Should you chose to remove or pay for the removal of the Artwork, upon such removal, legal title shall pass to you along with physical

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possession.” See Exhibit 10 We understand, therefore, that City of Berkeley has determined that the *Berkeley Big People* has under the terms of the Artwork Deaccession Policy “negligible market value”.

Please confirm by the close of business November 5, 2019 whether or not the City of Berkeley will agree to a six month standstill agreement and rescind all notices issued by the City of Berkeley, including published notices. The reason for this deadline is that we understand the 90 day period described in Exhibit 10 may expire very soon. This is a fair and equitable solution given the circumstances and one that will prevent irreparable harm to my client.

Alternatively, if the *Berkeley Big People* is destroyed or disposed of please be aware that my client reserves the right to pursue all his legal remedies against the City of Berkeley.

If you have questions, please do not hesitate to contact me.

Sincerely,



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