

Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Nanci Klein
Matt Cano
Jim Shannon

**SUBJECT: THOMAS FALLON STATUE
DEACCESSION**

DATE: October 28, 2021

Approved



Date

10/29/21

COUNCIL DISTRICT: 3

RECOMMENDATION

- (a) Approve the deaccession and removal of the *Thomas Fallon Statue* by artist Robert Glen located at W. Julian Street.
- (b) Adopt the following 2021-2022 Appropriation Ordinance Amendments in the General Fund:
 - (1) Decrease the Unanticipated/Emergency Maintenance Capital Improvements appropriation to the Public Works Department by \$450,000; and
 - (2) Establish the Thomas Fallon Statue Deaccession City-Wide appropriation to the Public Works Department in the amount of \$450,000.

OUTCOME

To deaccess and remove the *Thomas Fallon Statue* by artist Robert Glen located at W. Julian Street. Additionally, the statue could be made exclusively available for educational settings, such as museums and places of higher education, only at the approval and full public review of the Public Art Committee, Arts Commission, and City Council.

BACKGROUND

The *Thomas Fallon Statue* was commissioned by the San José Redevelopment Agency in 1988 with art funds from private developments (Fairmont Hotel/Kimball Small properties, Goldrich and Kest for the Paseo housing developments, etc.) to commemorate the raising of the U.S. flag in San José in 1846, when California was still part of Mexico. In 1987, City and Agency officials organized a committee of City staff and historians and advanced the concept for the statue. It did not go through a broad public art process, an artist was not involved, nor was any feedback from the community at large sought during the concept phase – all measures that are incorporated in public art projects today to tailor public art to the community. It was not until a design was unveiled in 1990 that the idea of the statue inspired significant community protest.

To recognize this concern, the Mayor and City Council created a Historical Art Advisory Committee (HAAC) to investigate the issues fomenting the controversy. The Historic Arts Advisory Committee, composed of a diverse panel of fifteen (15) residents, conducted 20 hours of community meetings, and 20 hours of deliberation meetings in 1990, to ultimately recommend the City acknowledge four aspects of its heritage: agriculture, Ohlone, Mexican heritage, and the placement of the flag in San José. The work moved forward based on the Historical Art Advisory Committee recommendations and the other artworks completed and installed were:

Remembering Agriculture, located on Santa Clara at 87; two Mexican commemorative works - *Founding of the Pueblo*, located at Market and South First Street and *Man of Fire*, a tribute to Dr. Ernesto Galarza on Paseo de San Antonio; and *The Weaver's Gifts* at Confluence Point. All other artworks were completed before the *Thomas Fallon Statue* was installed in 2002. Meeting materials from the Historical Art Advisory Committee can be found in Attachment A.

After all artworks were completed and the statue was installed, the controversy continued for two decades. Press/documentation of a troubled history (Attachment B), public input (Attachment C), and sample images of vandalism (Attachment D) exist that affirm significant adverse reaction has continued unabated over an extended period of time.

In 2020, the controversy surrounding the *Thomas Fallon Statue* was re-invigorated by protests across the United States that led to the successful removal of Confederate statues. Though Thomas Fallon was not associated with the Confederacy, some local protestors associate him with Spanish and European colonialism and its subsequent injuries to indigenous people. These protests were recognized by Mayor Liccardo and he requested a community meeting be called to discuss the issues. That meeting was held on Friday, January 29, 2021 and 162 members of the public attended. The video of that meeting can be found here:

https://www.youtube.com/watch?v=gH5vvuJISGs&ab_channel=CityofSanJose%2CCA.

The community members that attended this meeting overwhelmingly requested the removal of the *Thomas Fallon Statue*. In response and with research into the history of the statue and the history of Captain Thomas Fallon, the Mayor issued a memorandum (Attachment F) to the Rules Committee recommending that the City begin the City process to remove the statue. The Rules Committee met on February 10, 2021 to discuss this item and unanimously approved of the Mayor's recommendation.

According to the City of San José's process, the Policy for Deaccession and Removal of Artworks (Attachment E), artworks can be removed from San José's Public Art Collection when:

- The condition or security of the artwork cannot be reasonably guaranteed;
- The artwork requires excessive maintenance or has defaults of design or workmanship and repair or remedy is impractical or unfeasible, or the artwork endangers public safety; and
- Significant adverse public reaction has continued unabated over an extended period of time.

ANALYSIS

The *Thomas Fallon Statue* is comprised of two statues and a flagpole. The statues are 16 feet high, roughly 12,000 lbs. of bronze, with a spread steel footing embedded into three feet of concrete. Though only one criteria is enough to qualify an artwork for deaccession, three criteria for deaccessioning the *Thomas Fallon Statue* have been met:

1. Significant adverse public reaction has continued unabated over an extended period of time: Over the course of its 30+ year history, the *Thomas Fallon Statue* has been the subject of significant adverse public reaction. For many members of the San José community, it has been an unwelcome activator of community distress and has resulted in numerous protests, vandalism, and public outcry (see Attachments B, C, D for documentation attesting to this troubled history).
2. The condition or security of the artwork cannot be reasonably guaranteed: The security of the *Thomas Fallon Statue* cannot be guaranteed as the statue is a location for continual protest and vandalism. Recent vandalism has resulted in road closures, violent and threatening language directed toward City staff, City officials, and residents. There has also been damage to auxiliary City property, private property, and numerous cleanups (Attachment D).
3. The artwork requires excessive maintenance: Two staff, at an average of six hours per cleanup, have had to remove tagging, paint spills, signage, burn marks, debris, and other forms of residue. The cleanups have been a regular occurrence for the life of the statue in the public realm, but the need has been more demanding since May 2020, resulting in cleanups on a weekly basis (Attachment D).

Fair market value and cost recovery are considerations in this recommendation. An art appraisal by a certified fine art appraiser accredited by the Appraisers Association of America has been completed (Attachment G). The appraisal value, or estimated Fair Market Value, of the statue is \$6,000. Due to its size, site-specificity, installation requirements, and genre, there is not a present viable market for the City to consider selling the artwork, and the costs associated with marketing the work would exceed any revenue from its sale. The value to auction this statue is not enough to recover the costs to de-install it. In January 2021, the average melt price in California for bronze was \$1.40 per pound. A metal recycler will need to make a profit, usually 70% to 80% of the gross melt value, which represents a hypothetical sale price bracket of \$5,880 – \$6,720 to melt one of the statues, and \$11,760 - \$13,440 for both. It is not uncommon for the melt value of metal works such as estate silver and large bronzes to be worth more than the object itself (exclusive of costs to sell such as de-installation and transportation). The artwork is worth more in melt value, but that value will not be enough to pay for the costs to de-install it which is estimated to be up to \$450,000 to: barricade road, shut down a lane of traffic, jackhammer concrete foundation, de-install the statues with crane, engineer and build two stabilizing steel transportable foundations with crates for statues, transport to storage (yet to be determined), cleanup, and build back concrete demolition.

It should also be noted that the Artist has rights under the Visual Artist Rights Act of 1990 (17 U.S.C. §§106A and 113(d)) and the California Art Preservation Act (Cal. Civ. Code §§987 and 989). Under the Visual Artist Rights Act and California Art Preservation Act protections, the Artist maintains all rights to the attribution and integrity with respect to the artwork unless a signed written waiver explicitly identifying the artist, artwork, location, and use is specifically obtained from the Artist. An artwork cannot be altered or destroyed without the permission of the artist. Prior to melting or otherwise destroying an artwork, a written waiver must be secured from the Artist.

For disposition of a deaccessioned artwork, the City deaccession policy (Attachment E) requires that the artist (if alive) be offered the first rights of buyback. Artist Robert Glen currently resides in Tanzania, Africa, and was responsive to email. Robert was notified of the deaccession process and responded to the City on February 2, 2021. He stated he would not be willing or interested in buying back the statue, but requested the statue not be melted. After the artist declined to repurchase the statue, the City contacted History San José to determine their level of interest in receiving the statue and using it as an educational tool. History San José declined for three reasons:

1. The *Thomas Fallon Statue* is seen as a symbol of racism by members of our community.
2. History San José does not have space for the large statue at History Park and it is not a portable object.
3. History Park does not have proper security to protect the statue from vandalism.

The History San José letter is included in Attachment H.

City staff do not recommend re-installing the statue at another public location within the City because:

1. The *Thomas Fallon Statue* is culturally problematic and unwelcoming for a large portion of our population.
2. The cost to build a new foundation at a new location is estimated to be \$350,000, and there are no available City funds to do this.
3. There is no way to stop ongoing vandalism at any publicly available location in the City.
4. To install the statue at another City location would void the deaccession process and perpetuate the ill regard many residents have for this statue.

CONCLUSION

The *Thomas Fallon Statue* has evolved to become a symbol of subjugation and racial inequality by many members of our community. Despite additional attempts to tell the histories of multiple San José communities through public art, the sculpture remains a scar to many and has not added positive public value to the San José community.

The estimated Fair Market Value of the *Thomas Fallon Statue*, and melt value, are not enough to cover the costs of de-installation. The artist has requested the statue not be melted and has stated he is not interested in buying back the statue. Staff do not recommend that the statue be melted or sold at Fair Market Value because the fiscal gain from either action would not be enough to pay for the costs of de-installation. Staff do not recommend that the statue be installed at another City location as this would circumvent the purpose of deaccessioning the work.

The Arts Commission met on October 18, 2021, to deliberate on this matter and review the Mayor, Rules and Public Art Committee recommendations and to formulate a recommendation of their own. After public input, the Arts Commission deliberated and unanimously decided to recommend to the full City Council the following:

“To deaccess and remove the *Thomas Fallon Statue* by artist Robert Glen located at W. Julian Street. Additionally, the statue could be made exclusively available for educational settings such as museums and places of higher education and only at the approval and full public review of the Public Art Committee, Arts Commission, and City Council.”

This recommendation meets the following criteria of the City’s deaccession policy:

- Significant adverse public reaction has continued unabated over an extended period of time;
- An exorbitant amount of time and cost is required to clean/maintain the artwork;
- The artwork endangers public safety, as protests have become violent at times;
- The condition or security of the artwork cannot be reasonably guaranteed; and
- The lack of fiscal value of the artwork.

EVALUATION AND FOLLOW-UP

City staff will manage the work necessary to complete the de-installation of the statues. No additional follow up action with the Council is planned or expected at this time.

CLIMATE SMART SAN JOSE

The recommendation in this memorandum has no effect on Climate Smart San José energy, water, or mobility goals.

PUBLIC OUTREACH

The City of San José held a public art forum meeting on Friday, January 29, 2021, and 162 members of the public attended. Based on community input, Mayor Liccardo wrote a memo and submitted it to the Rules and Open Government Committee on February 10, 2021, recommending the process to deaccess and remove the statue begin. The Rules and Open Government Committee unanimously agreed with the Mayor's recommendation. The Public Art Committee took up the conversation to deaccess and remove the statue during a special study session on Tuesday, May 4, 2021 and recommended to not just deaccess and remove, but to permanently store the statue with no option to sell or redisplay in any capacity in the future. Though not a requirement of the deaccession policy, on August 26, 2021, historians, anthropologists, and ethnic study professors, as well as the Muwekma Ohlone Tribal Chairperson, with knowledge specific to the Bay Area were contacted to provide their historical perspectives. All submitted documents are included in Attachment I (Historical Perspectives). Other community outreach has occurred verbally at the Public Art Committee meetings on August 3, 2021, and September 7, 2021, and at the Arts Commission meeting on September 20, 2021. The Arts Commission met on October 18, 2021, to discuss this item and 37 members of the community attended this meeting.

In addition, this memorandum will be posted on the City's Council Agenda website for the November 9, 2021 City Council Meeting.

COORDINATION

This memorandum has been coordinated with the City Attorney's Office.

COMMISSION RECOMMENDATION/INPUT

The Public Art Committee met on Tuesday, May 4, 2021, at 5:30 p.m. to hold a study session on the staff recommendation. There were 42 residents at this meeting that spoke, the majority in favor of the staff recommendation for deaccession and removal of the statue. The Committee listened to two hours of community input and deliberated on a recommendation to make to the full Arts Commission. Ultimately, the recommendation was unanimously approved to deaccess, remove, and permanently store with no option to sell or redisplay in any capacity the *Thomas Fallon Statue* by artist Robert Glen located at W. Julian Street.

While the spirit of the Public Art Committee's additional condition of having no option to sell or redisplay the statue is understood, it is recommended that the City have more flexibility in the future disposition of the sculpture.

Across the United States, as monuments are reconsidered and removed, there may be at some future time an opportunity to exhibit the Thomas Fallon Statue with appropriate historical context to contextualize and educate the community related to how art is interpreted so that we can advance our collective goals of an inclusive society. There are examples of initiatives and exhibitions about providing perspective on the injuries that monuments can and instead impede a sense of belonging for viewers. As such the staff recommended that the City be open to including the saga of the *Thomas Fallon Statue* in this larger art historical framework as is suggested by many historians who wrote in about the statue (Attachment I).

With this in mind, the Arts Commission met on October 18, 2021 to deliberate. Thirty-seven members of the community attended this meeting. After much deliberation the Arts Commission unanimously agreed to recommend to City Council that the City Council take action to deaccess and remove the Thomas Fallon Statue by artist Robert Glen located at W. Julian Street. Additionally, the statue could be made exclusively available for educational settings such as museums and places of higher education and only at the approval and full public review of the Public Art Committee, Arts Commission, and City Council.

COST SUMMARY/IMPLICATIONS

The total estimated cost of the de-installation is up to \$450,000. The work associated with the de-installation will include traffic control, demolition of the concrete foundation, removal of the statues with a crane, engineering and construction of crate and stabilizing steel holding foundation, transportation to storage (yet to be determined), cleanup/build back of damage left from the foundation demolition, as well as a ten percent contingency for any unforeseen conditions encountered while de-installing. This estimated amount also includes costs for staff time to develop construction drawings and specifications, procure a contractor through the public bidding process, inspection of the project and construction management. Staff anticipates the project duration to be approximately ten months upon Council's approval of this memo, finishing in August 2022.

The recommendations in this memorandum will reallocate \$450,000 from the Unanticipated/Emergency Maintenance appropriation to establish the Thomas Fallon Statue Deaccession appropriation in the General Fund. There is sufficient funding in the appropriation for this project due to repair savings attributed from lighter usage of City facilities during the pandemic.

BUDGET REFERENCE

The table below identifies the fund and appropriations to fund the project recommended as part of this memorandum including project delivery, construction, and contingency costs.

Fund #	Appn #	Appn. Name	Current Total Appn	Recommended Budget Action	2021-2022 Proposed Operating Budget Page*	Last Budget Action (Date, Ord. No.)
001	5393	Unanticipated/ Emergency Maintenance	\$2,211,000	(\$450,000)	IX-44	10/19/2021, Ord No. 30682
001	NEW	Thomas Fallon Statue Deaccession	N/A	\$450,000	N/A	N/A

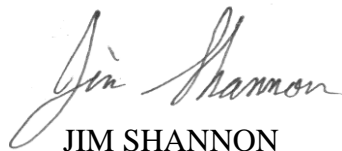
* The 2021-2022 Adopted Operating Budget was approved on June 15, 2021 and adopted on June 22, 2021 by the City Council.

CEQA

Environmental status granted exempt by the Planning, Building and Code Enforcement Department. Project Exempt per File No. ER20-225, CEQA Guidelines Section 15301, Existing Facilities.

/s/
NANCI KLEIN
Director of Economic Development
and Cultural Affairs

/s/
MATT CANO
Director of Public Works


JIM SHANNON
Budget Director

For questions, please contact Kerry Adams Hapner, Deputy Director, Office of Economic Development and Cultural Affairs at (408) 793-4333.

Attachments:

- A) Attachment A: Historic Arts Advisory Committee documents (1990-1991)
- B) Attachment B: Press/documentation of a troubled history
- C) Attachment C: Other public Input
- D) Attachment D: Sample images of vandalism
- E) Attachment E: Policy for the deaccession and/or removal of permanent public art
- F) Attachment F: Mayor Liccardo's memo
- G) Attachment G: Fair Market Value appraisal of Thomas Fallon Statue
- H) Attachment H: History San José letter
- I) Attachment I: Historical Perspectives