

BOARD of SUPERVISORS



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## MEMORANDUM

TO: Mohammed Nuru, Director, Public Works  
John Rahaim, Director, Planning Department  
Phil Ginsburg, General Manager, Recreation and Parks Department  
Tom DeCaigny, Director of Cultural Affairs, Arts Commission

FROM: Erica Major, Assistant Clerk, Public Safety and Neighborhood Services  
Committee, Board of Supervisors

DATE: April 24, 2017

SUBJECT: LEGISLATION INTRODUCED

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The Board of Supervisors' Public Safety and Neighborhood Services Committee has received the following proposed legislation, introduced by Supervisor Cohen on April 18, 2017:

**File No. 170442**

**Ordinance amending the Public Works Code to modify the exceptions to the Surface-Mounted Facility Site Permit requirement; to allow a permittee to choose to pay an "in-lieu" fee instead of installing a street tree; to allow a permittee to choose to pay an "in-lieu" fee instead of permitting the installation of a mural on its Surface-Mounted Facility; to repeal the requirements that a permittee install landscaping or pay an "in-lieu" fee and maintain the required landscaping; to repeal the requirement that an applicant for a Surface-Mounted Facility Site Permit make reasonable efforts to locate the facility on private property before submitting an application; and to amend the requirement that a permittee maintain any required street tree.**

If you have any additional comments or reports to be included with the file, please forward them to me at the Board of Supervisors, City Hall, Room 244, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102.

Referral from the Office of the Clerk of the Board  
Public Safety and Neighborhood Services Committee  
April 24, 2017  
Page 2

c: Jennifer Blot, Public Works  
Scott Sanchez, Planning Department  
Lisa Gibson, Planning Department  
AnMarie Rodgers, Planning Department  
Aaron Starr, Planning Department  
Joy Navarrete, Planning Department  
Jeanie Poling, Planning Department  
Sarah Madland, Recreation and Parks Department  
Susan Pontious, Arts Commission  
Rebekah Krell, Arts Commission  
Sharon Page Ritchie, Arts Commission

1 [Public Works Code - Requirements for Surface-Mounted Facility Site Permits]

2  
3 **Ordinance amending the Public Works Code to modify the exceptions to the Surface-**  
4 **Mounted Facility Site Permit requirement; to allow a permittee to choose to pay an “in-**  
5 **lieu” fee instead of installing a street tree; to allow a permittee to choose to pay an “in-**  
6 **lieu” fee instead of permitting the installation of a mural on its Surface-Mounted**  
7 **Facility; to repeal the requirements that a permittee install landscaping or pay an “in-**  
8 **lieu” fee and maintain the required landscaping; to repeal the requirement that an**  
9 **applicant for a Surface-Mounted Facility Site Permit make reasonable efforts to locate**  
10 **the facility on private property before submitting an application; and to amend the**  
11 **requirement that a permittee maintain any required street tree.**

12  
13 **NOTE:** **Unchanged Code text and uncodified text** are in plain Arial font.  
14 **Additions to Codes** are in *single-underline italics Times New Roman font*.  
15 **Deletions to Codes** are in *strikethrough italics Times New Roman font*.  
16 **Board amendment additions** are in double-underlined Arial font.  
17 **Board amendment deletions** are in ~~strikethrough Arial font~~.  
18 **Asterisks (\* \* \* \*)** indicate the omission of unchanged Code  
19 subsections or parts of tables.

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

21 Section 1. The Public Works Code is hereby amended by revising Article 27, Sections  
22 2700, 2710, 2711, 2712, 2713, 2722, 2726, and 2727, to read as follows:

23 **SEC. 2700. SURFACE-MOUNTED FACILITY SITE PERMIT.**

24 (a) **Surface-Mounted Facility Site Permit Required.** It shall be unlawful for any  
25 Person to construct or install a Surface-Mounted Facility in any Public Right-of-Ways that are

1 under the jurisdiction of the Department without first obtaining from the Department a Surface-  
2 Mounted Facility Site Permit under this Article 27 authorizing such construction or installation.

3 (b) **Minimum Permit Requirements.** The Department shall require an Applicant for  
4 a Surface-Mounted Facility Site Permit to demonstrate to the satisfaction of the Department  
5 that:

6 (1) The City has granted Applicant the authority to construct, install, and  
7 maintain the proposed Surface-Mounted Facility in the Public Right-of-Ways; and

8 (2) The Director has approved the proposed location for the Surface-  
9 Mounted Facility pursuant to the requirements of this Article 27.

10 (c) **Permit Conditions.** The Department may include in a Permit such Conditions,  
11 in addition to those already set forth in this Article 27 and other Applicable Law, as may be  
12 required to govern the construction, installation, removal, or maintenance of Surface-Mounted  
13 Facilities in the Public Right-of-Ways, and to protect and benefit the public health, safety,  
14 welfare, and convenience.

15 (d) **Authority Granted.** A Permit shall authorize the Permittee to perform any  
16 excavation that is required to install the Surface-Mounted Facility in the Public Right-of-Ways.

17 (e) **Exceptions to Permit Requirement.** The requirements of this Article 27 shall  
18 not apply to the following:

19 (1) The replacement of an existing Surface-Mounted Facility at the  
20 same location, provided the replacement Surface-Mounted Facility would be installed on the  
21 existing foundation and would *not be substantially larger in height or volume ~~be the same size or~~*  
22 *smaller* than the existing Surface-Mounted Facility.

23 (2) The installation of any equipment in the Public Right-of-Ways  
24 pursuant to an encroachment permit issued by the Department pursuant to Article 15 of the  
25 Public Works Code.

1 (f) **Other Provisions Inapplicable.** This Article shall govern all actions taken by  
2 the City with respect to the approval or denial of an Application for a Surface-Mounted Facility  
3 Site Permit under this Article 27. The requirements of *San Francisco* Business and Tax  
4 Regulations Code Sections 5, 6, and 26(a) shall not apply to this Article 27 to the extent those  
5 provisions are in conflict with the provisions of this Article 27.  
6

7 **SEC. 2710. STREET TREE LANDSCAPING.**

8 (a) **Required for Permit.**

9 (1) The Department shall require every Permittee to install a suitable street  
10 trees ~~and landscaping~~ in order to minimize any negative effects on the Aesthetic Character of  
11 the streetscape resulting from Permittee's construction, installation and maintenance of the  
12 permitted Surface-Mounted Facility. ~~The Department shall determine the number of required street~~  
13 ~~trees and the total area of the landscaped area. Generally, the Department shall require the installation~~  
14 ~~of at least one street tree and sidewalk landscaping of approximately 100 square feet with each~~  
15 ~~permitted Surface Mounted Facility.~~

16 (b) **"In-Lieu" Fee.**

17 (2)(1) In any instance in which the Department cannot require the Permittee to  
18 install ~~either an~~ appropriate street trees ~~or landscaping~~ in the vicinity of the permitted Surface-  
19 Mounted Facility, including on the basis of inadequate sidewalk width, interference with  
20 utilities, or other reasons regarding the public health, safety, or welfare, the Department shall  
21 instead require the Permittee to ~~pay~~ make an "in-lieu" ~~fee.~~ ~~payment into the Department's "Adopt-~~  
22 ~~A Tree" fund. This payment shall be in the amount specified in Public Works Code Sections 802(h) and~~  
23 ~~807(f) for the installation of one street tree in addition to a payment of \$7,500 for sidewalk~~  
24 ~~landscaping, and shall be payable prior to the Department's issuance of the Permit. These on lieu fees~~  
25

1 ~~may be adjusted to reflect changes in the relevant Consumer Price Index, subject to the requirements of~~  
2 ~~Section 2729(e).~~

3 (2) An Applicant may elect to pay the “in-lieu” fees described in subsection (b)(1)  
4 instead of installing any required street tree. The Applicant shall notify the Department of its election  
5 in the Notice of Intent required under Section 2712 of this Article 27.

6 (3) The “in-lieu” fee required by this subsection (b) shall be in the amount specified  
7 in Public Works Code Sections 802(h) and 807(f) for the installation of one street and shall be paid into  
8 the “Public Works Adopt-A-Tree Fund” established under Administrative Code Section 10.100-227.

9  
10 ~~(bc) **Care and Maintenance of Street Trees and Landscaping.** The Permittee shall be~~  
11 ~~responsible for the care and maintenance of any street trees and landscaping required to be~~  
12 ~~installed in the Public Right-of-Ways under this Section shall be in accordance with the terms and~~  
13 ~~conditions of. In this regard, the Permittee shall assume the duty of a “property owner” Article 16 of~~  
14 ~~the as set forth in Public Works Code, Section 800, et seq. Section 805(a).~~

15 ~~(ed) **No Separate Permit Required.** Where required, the installation of a ~~The~~ street tree~~  
16 ~~and landscaping requirements set forth subsection (a) above shall be incorporated into the Surface-~~  
17 ~~Mounted Facility Site Permit issued by the Department under this Article 27. No separate~~  
18 ~~permit will be required under Section 810B of the Public Works Code.~~

19  
20 **SEC. 2711. MURALS.**

21 (a) **Required for Permit.** Any Person or group of Persons may propose to the  
22 Department and the Permittee that the permitted Surface-Mounted Facility be used for a  
23 mural that is appropriate for the location. The Department shall require every Permittee to  
24 work with any Person or group of Persons selected by the San Francisco Arts Commission in  
25 consultation with the Department and the Permittee to facilitate the installation of the mural at

1 Permitee's sole expense and at no cost to the City. No mural shall be allowed unless it is  
2 approved by the San Francisco Arts Commission. No mural may contain any product  
3 advertising of any kind. The Department may establish by order or regulation the process for  
4 placing a mural on a permitted Surface-Mounted Facility.

5 (b) **Maintenance.** The Permitee shall at Permitee's expense work with the Person  
6 or Persons that installed the mural to ensure that the mural is properly maintained. The  
7 requirements of this subsection *(b)* shall be in addition to Permitee's responsibilities under  
8 this Article 27 to maintain any permitted Surface-Mounted Facilities and remove any Graffiti  
9 from its permitted Surface-Mounted Facilities.

10 (c) "In-Lieu" Fee.

11 (1) An Applicant may elect to pay an "in-lieu" fee instead of permitting the  
12 installation of a mural on its Surface-Mounted Facility. The Applicant shall notify the Department of  
13 its election in the Notice of Intent required under Section 2712 of this Article 27.

14 (2) The "in-lieu" fee required by this subsection (c) shall be in the amount of \$500  
15 and shall be paid into the "Public Works Excavation Fund" established under Administrative Code  
16 section 10.100-230. The in-lieu fee may be adjusted to reflect changes in the relevant Consumer Price  
17 Index, subject to the requirements of Section 2729(e) of this Article 27.

18  
19 **SEC. 2712. NOTICE OF INTENT TO SUBMIT APPLICATION.**

20 (a) **Submission to the Department.** As part of the Pre-Application Approval  
21 Process, within *± one* day after the Preferred Location List has been reviewed and approved  
22 by all applicable City departments, the Applicant may submit a Notice of Intent to the  
23 Department for its review. An Applicant may request additional time to submit a Notice of  
24 Intent.

1 (b) **Form and Contents.** The Notice of Intent shall be in the form approved by the  
2 Department by order or regulation, but at a minimum shall contain the information required in  
3 Section 2713(c)(1)-~~(9)~~(11).

4 (c) **Department Approval.** If the Department determines that a Notice of Intent is  
5 complete, the Department will approve the Notice of Intent and authorize the Applicant to post  
6 and mail the Notice of Intent as required in Section 2713.

7 (d) **Completion Requirements.** The Notice of Intent shall not be complete unless  
8 the Department determines that the Applicant has complied with the following requirements:

9 (1) The Applicant has satisfactorily conducted the community meeting  
10 required in Section 2705.

11 (2) The Applicant has submitted to the Department plans showing all of the  
12 sizes and shapes of the cabinets proposed to be used for its Surface-Mounted Facilities,  
13 including the dimensions of any ancillary equipment. For Applicants that conduct business in  
14 jurisdictions other than San Francisco, the Applicant shall certify that the cabinets proposed  
15 for San Francisco are no larger than the smallest used in any other jurisdiction for similar  
16 services.

17 (3) If the Applicant is seeking approval of a larger cabinet on an existing  
18 Surface-Mounted Facility site, the Applicant has sufficiently demonstrated to the Department  
19 the reasons the larger cabinet is necessary.

20 ~~(4) The Applicant has surveyed the vicinity of the Preferred Locations for its~~  
21 ~~Surface Mounted Facility to identify locations outside of the Public Right of Ways (including City-~~  
22 ~~owned property) that may be appropriate for the installation of the Surface Mounted Facility and the~~  
23 ~~Applicant has made reasonable efforts to determine whether the owners of any and all suitable~~  
24 ~~properties would be willing to allow the Applicant to use their property for Applicant's proposed~~  
25 ~~Surface Mounted Facility. For purposes of this subsection, the term "reasonable efforts" includes~~



1 ~~offering the owners of any suitable property market rate compensation for the use of the property for~~  
2 ~~the Applicant's Surface Mounted Facility. The Department shall by order or regulation establish~~  
3 ~~guidelines defining "reasonable efforts" and "market rate compensation."~~

4 (5)(4) The Applicant attempted to place the Surface-Mounted Facility (or parts  
5 thereof) underground where such underground placement is technologically or economically  
6 feasible. An Applicant may satisfy the requirement contained in this subsection (d)(4) by  
7 demonstrating to the satisfaction of the Director that it is not technologically or economically  
8 feasible for the Applicant to place the Surface-Mounted Facility (or parts thereof)  
9 underground. At a minimum, the Applicant shall demonstrate to the Director that it conducted  
10 a thorough search for adequate underground technology and provide a report from a licensed  
11 engineer certifying the information.

12 (6)(5) Where it is not technologically or economically feasible to underground  
13 the entire Surface-Mounted Facility, the Applicant has agreed: (A) to underground part of the  
14 Surface-Mounted Facility; (B) to limit the height and footprint of the Surface-Mounted Facility  
15 to the maximum extent feasible; (C) either to use stainless steel or to paint the Surface-  
16 Mounted Facility the color used for City structures in the vicinity, unless otherwise specified by  
17 the Department, and added a Graffiti-proof coating; (D) to screen ~~the Surface Mounted Facility~~  
18 ~~by landscaping the Public Right of Ways in the area around the Surface Mounted Facility or~~  
19 ~~camouflaging or camouflage~~ the Surface-Mounted Facility where requested by any City  
20 department; and (E) to comply with any Conditions imposed by any City department that  
21 reviewed the Applicant's Preferred Location List.

22 (7)(6) The Applicant has explored reasonable opportunities to co-locate the  
23 Surface-Mounted Facility with any other Surface-Mounted Facility installed or to be installed in  
24 the Public Right-of-Ways by other entities including City departments.

1           ~~(8)~~(7) The Applicant has explored reasonable opportunities for its Surface-  
2 Mounted Facility to serve a dual function such as a bench or other amenity. The Department  
3 shall have the authority to require that a Surface-Mounted Facility serve a dual function,  
4 where the Department determines that such dual function is technologically and economically  
5 feasible.

6           ~~(9)~~(8) The Applicant has notified the Department whether the Applicant could  
7 remove an existing Surface-Mounted Facility from the Public Right-of-Ways because it would  
8 no longer be used or useful to the Applicant once the proposed Surface-Mounted Facility has  
9 been installed.

10           ~~(10)~~(9) The Applicant has submitted a plan to the Department, in a format  
11 specified by the Department, showing all of the Surface-Mounted Facilities the Applicant  
12 expects to install in the City within five years of the Application date. Any Applicant that does  
13 not anticipate installing any other Surface-Mounted Facilities in the next five years may satisfy  
14 this requirement by submitting a statement to that effect instead of a five-year plan.

15           ~~(11)~~(10) The Department has determined that at least two of the Applicant's  
16 Preferred Locations for the Surface-Mounted Facility are acceptable or the Notice of Intent will  
17 include additional proposed locations identified by the Department or another City department  
18 that reviewed the Applicant's Preferred Location List, unless the Department has determined  
19 that there is only one feasible location for the proposed Surface-Mounted Facility.  
20

21           **SEC. 2713. PUBLIC NOTICE OF NOTICE OF INTENT TO SUBMIT APPLICATION.**

22           (a)   **Public Notice Required.** As part of the Pre-Application Approval Process, the  
23 Department shall require an Applicant to notify the public that the Applicant has submitted a  
24 Notice of Intent to the Department.

25           (b)   **Notice Requirements.**

1 (1) The Applicant shall send a copy of the Notice of Intent to all Persons  
2 owning or occupying any property located within 300 feet along either side of the fronting  
3 streets of any of the Preferred Locations for the Surface-Mounted Facility.

4 (2) The Applicant shall post a copy of the Notice of Intent in conspicuous  
5 places along the Public Right-of-Ways within 300 feet of either side of the fronting streets of  
6 any of Applicant's Preferred Locations for the Surface-Mounted Facility.

7 (3) The Applicant shall send a copy of the Notice of Intent to any  
8 neighborhood planning association identified by the Planning Department for any  
9 neighborhood within 300 feet of any of the Applicant's Preferred Locations for the Surface-  
10 Mounted Facility.

11 (c) **Form of Notice of Intent.** The Notice of Intent shall be in a form to be approved  
12 by the Department by order or regulation. At a minimum, the Notice of Intent shall contain the  
13 following information:

14 (1) The fronting address for each of the Preferred Locations and photo-  
15 simulations of the Surface-Mounted Facility at each of the Preferred Locations. Such photo-  
16 simulations shall accurately depict the proposed Surface-Mounted Facility and any *proposed*  
17 *required* street trees ~~or landscaping~~.

18 (2) The Applicant's order of preference for the Preferred Locations.

19 (3) A brief description of the nature of the use of the proposed Surface-  
20 Mounted Facility and the consequences of not installing the facility.

21 (4) Any assessment made of the Applicant's Preferred Locations by the  
22 Planning Department and/or Recreation and Park Department.

23 (5) Any Conditions on the installation of the proposed Surface-Mounted  
24 Facility at each of the Preferred Locations imposed by any City department that reviewed the  
25

1 Applicant's Preferred Location List (including a statement indicating whether the Applicant has  
2 accepted the Conditions).

3 (6) Any additional proposed locations for the Surface-Mounted Facility  
4 identified by any City department that reviewed the Applicant's Preferred Location List  
5 (including a statement indicating whether the Applicant has accepted the proposed locations).

6 (7) The procedure for protesting any or all of the Preferred Locations  
7 contained in the Notice of Intent.

8 (8) The Applicant's contact information for obtaining information related to  
9 the Notice of Intent and/or the technical requirements for the proposed Surface-Mounted  
10 Facility.

11 (9) A statement that more information about the proposed Notice of Intent  
12 can be obtained from the Applicant and more information about submitting a protest can be  
13 obtained from the Department.

14 (10) If applicable, a statement that the Applicant will elect to pay an "in-lieu" fee  
15 rather than installing a street tree.

16 (11) If applicable, a statement that the Applicant will elect to pay an "in-lieu" fee  
17 rather than permitting the installation of a mural on its permitted Surface-Mounted Facility.

18 ~~(d)(10)~~ **Language Requirement.** The Department may require an Applicant to translate  
19 the Notice of Intent into such language(s) that the Department determines are appropriate  
20 based on the locations for the proposed Surface-Mounted Facility contained in the Notice of  
21 Intent. Prior to issuing the Notice of Intent, the Applicant shall inquire of the Department as to  
22 whether translation is required, and if so, into which language or languages such translation  
23 shall be offered.

24 ~~(d)(e)~~ **Filing with the Department.** The Applicant shall file with the Department proof  
25 that the Applicant has complied with the notice requirements contained herein.

1           **SEC. 2722. POST-INSTALLATION OBLIGATIONS.**

2           (a)   **Required Signage.** A Permittee shall place a sign on a permitted Surface-  
3 Mounted Facility that shall contain the Permittee's name and provide a telephone number for  
4 people to call to notify the Permittee that there is damage to or Graffiti on a Surface-Mounted  
5 Facility or that an associated street tree landscaping is in need of maintenance. A telephone call  
6 to that number will be considered notice to the Permittee. Such sign shall be displayed in a  
7 conspicuous manner and shall be maintained and/or replaced as necessary.

8           (b)   **Surface-Mounted Facility Maintenance.** A Permittee shall be solely  
9 responsible for maintaining a Surface-Mounted Facility installed in the Public Right-of-Ways in  
10 a clean and safe condition. A Permittee shall repair any damage to a Surface-Mounted Facility  
11 within 30 days after discovering or being notified of such damage to a Surface-Mounted  
12 Facility.

13           ~~(c) — Landscaping Maintenance. A Permittee shall be solely responsible for the maintenance~~  
14 ~~of any installed landscaping or street tree installed by the Permittee as a Condition of the Department's~~  
15 ~~issuance of a Surface Mounted Facility Site Permit for so long as the permitted Surface Mounted~~  
16 ~~Facility remains at the location. Such landscaping shall be kept in a state of good visual quality, with~~  
17 ~~any dead or diseased material promptly removed and replaced. The Permittee shall remove any litter~~  
18 ~~accumulating within the landscaped area within 72 hours after discovering or being notified of such~~  
19 ~~litter accumulation. —~~

20           ~~(d)~~(c) **Graffiti Removal.** A Permittee shall be solely responsible for the removal of any  
21 Graffiti from a Surface-Mounted Facility installed in the Public Right-of-Ways. A Permittee  
22 shall remove all Graffiti from a Surface-Mounted Facility within 72 hours after discovering or  
23 being notified that there is Graffiti on a Surface-Mounted Facility.

24           ~~(e)~~(d) **Inspection Required.** A Permittee shall regularly inspect each Surface-  
25 Mounted Facility installed in the Public Right-of-Ways to determine whether any of its Surface-

1 Mounted Facilities are damaged, in need ~~of a landscaping~~ street tree maintenance, or have  
2 been tagged with Graffiti.

3 ~~(f)(e)~~ **Records.** A Permittee shall maintain written records of all inspections, repairs  
4 to, and maintenance of any permitted Surface-Mounted Facilities in the Public Right-of-Ways  
5 in such form as may be required by the Department. The Department may require that a copy  
6 of these written records be sent to the Department on a regular basis.

7  
8 **SEC. 2726. LIABILITY.**

9 As a condition of a Surface-Mounted Facility Site Permit, each Permittee agrees on  
10 behalf of itself and any agents, successors, or assigns to be wholly responsible for the  
11 construction, installation, and maintenance of any permitted Surface-Mounted Facility ~~and any~~  
12 required street trees ~~or landscaping~~. Each Permittee and its agents are jointly and severally  
13 liable for all consequences of such construction, installation, and maintenance of a Surface-  
14 Mounted Facility and any required street trees ~~or landscaping~~. The issuance of any Permit,  
15 inspection, repair suggestion, approval, or acquiescence of any Person affiliated with the City  
16 shall not excuse any Permittee or its agents from such responsibility or liability.

17  
18 **SEC. 2727. INDEMNIFICATION AND DEFENSE OF CITY.**

19 (a) **Indemnification of City.** As a condition of a Surface-Mounted Facility Site  
20 Permit, each Permittee agrees on behalf of itself and its agents, successors, or assigns, to  
21 indemnify, defend, protect, and hold harmless the City from and against any and all claims of  
22 any kind allegedly arising directly or indirectly from the following:

23 (1) Any act, omission, or negligence of a Permittee or its ~~any~~ agents,  
24 successors, or assigns while engaged in the construction, installation, or maintenance of any  
25 Surface-Mounted Facility authorized by a Permit, or while in or about the Public Right-of-Ways

1 that are subject to the Permit, for any reason connected in any way whatsoever with the  
2 performance of the work authorized by the Permit, or allegedly resulting directly or indirectly  
3 from the construction, installation, or maintenance of any Surface-Mounted Facility authorized  
4 under the Permit or any required street trees ~~or landscaping~~;

5 (2) Any accident, damage, death, or injury to any of a Permittee's contractors  
6 or subcontractors, or any officers, agents, or employees of either of them, while engaged in  
7 the performance of the construction, installation, or maintenance of any Surface-Mounted  
8 Facility authorized by a Permit or any required street trees ~~or landscaping~~, or while in or about  
9 the Public Right-of-Ways that are subject to the Permit, for any reason connected with the  
10 performance of the work authorized by the Permit, including from exposure to radio frequency  
11 emissions;

12 (3) Any accident, damage, death, or injury to any Person or accident,  
13 damage, or injury to any real or personal property in, upon, or in any way allegedly connected  
14 with the construction, installation, or maintenance of any Surface-Mounted Facility authorized  
15 by a Permit or any required street trees ~~or landscaping~~, or while in or about the Public Right-of-  
16 Ways that are subject to the Permit, from any causes or claims arising at any time, including  
17 any causes or claims arising from exposure to radio frequency emissions; and

18 (4) Any release or discharge, or threatened release or discharge, of any  
19 hazardous material caused or allowed by a Permittee or its agents about, in, on, or under the  
20 Public Right-of-Ways.

21 (b) **Defense of City.** Each Permittee agrees that, upon the request of the City, the  
22 Permittee, at no cost or expense to the City, shall indemnify, defend, and hold harmless the  
23 City against any claims as set forth in subsection (a) above, regardless of the alleged  
24 negligence of City or any other party, except only for claims resulting directly from the sole  
25 negligence or willful misconduct of the City. Each Permittee specifically acknowledges and

1 agrees that it has an immediate and independent obligation to defend the City from any claims  
2 that actually or potentially fall within the indemnity provision, even if the allegations are or may  
3 be groundless, false, or fraudulent, which obligation arises at the time such claim is tendered  
4 to the Permittee or its agent by the City and continues at all times thereafter. Each Permittee  
5 further agrees that the City shall have a cause of action for indemnity against the Permittee for  
6 any costs the City may be required to pay as a result of defending or satisfying any claims that  
7 arise from or in connection with a Permit, except only for claims resulting directly from the sole  
8 negligence or willful misconduct of the City. Each Permittee further agrees that the  
9 indemnification obligations assumed under a Permit shall survive expiration of the Permit or  
10 completion of installation of any Surface-Mounted Facility authorized by the Permit.

11 (c) **Additional Requirements.** The Department may specify in a Permit such  
12 additional indemnification requirements as are necessary to protect the City from risks of  
13 liability associated with the Permittee's construction, installation, and maintenance of a  
14 Surface-Mounted Facility or any required street trees ~~or landscaping~~.

15  
16 Section 2. Scope of Ordinance. In enacting this ordinance, the Board of Supervisors  
17 intends to amend only those words, phrases, paragraphs, subsections, sections, articles,  
18 numbers, punctuation marks, charts, diagrams, or any other constituent parts of the Municipal  
19 Code that are explicitly shown in this ordinance as additions, deletions, Board amendment  
20 additions, and Board amendment deletions in accordance with the "Note" that appears under  
21 the official title of the ordinance.

22 Section 3. Severability. If any section, subsection, sentence, clause, phrase, or  
23 word of this ordinance, or any application thereof to any person or circumstance, is held to be  
24 invalid or unconstitutional by a decision of a court of competent jurisdiction, such decision  
25 shall not affect the validity of the remaining portions or applications of the ordinance. The




1 Board of Supervisors hereby declares that it would have passed this ordinance and each and  
2 every section, subsection, sentence, clause, phrase, and word not declared invalid or  
3 unconstitutional without regard to whether any other portion of this ordinance or application  
4 thereof would be subsequently declared invalid or unconstitutional.

5  
6 Section 4. No Conflict with Federal or State Law. Nothing in this ordinance shall be  
7 interpreted or applied so as to create any requirement, power, or duty in conflict with any  
8 federal or state law.

9  
10 Section 5. Effective Date. This ordinance shall become effective 30 days after  
11 enactment. Enactment occurs when the Mayor signs the ordinance, the Mayor returns the  
12 ordinance unsigned or does not sign the ordinance within ten days of receiving it, or the Board  
13 of Supervisors overrides the Mayor's veto of the ordinance.

14  
15 APPROVED AS TO FORM:  
16 DENNIS J. HERRERA, City Attorney

17 By:   
18 WILLIAM K. SANDERS  
19 Deputy City Attorney

20 n:\egana\as2017\1700410\01185652.docx

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22  
23  
24  
25

## LEGISLATIVE DIGEST

[Public Works Code – Requirements for Surface-Mounted Facility Site Permits]

**Ordinance amending the Public Works Code to modify the exceptions to the Surface-Mounted Facility Site Permit requirement; to allow a permittee to choose to pay an “in-lieu” fee instead of installing a street tree; to allow a permittee to choose to pay an “in-lieu” fee instead of permitting the installation of a mural on its Surface-Mounted Facility; to repeal the requirements that a permittee install landscaping or pay an “in-lieu” fee and maintain the required landscaping; to repeal the requirement that an applicant for a Surface-Mounted Facility Site Permit make reasonable efforts to locate the facility on private property before submitting an application; and to amend the requirement that a permittee maintain any required street tree.**

### Existing Law

Under Article 27 of the Public Works Code, any person installing a Surface-Mounted Facility (“SMF”) in the public right-of-way must obtain a Surface-Mounted Facility Site Permit from Public Works. Article 27 contains certain specified application requirements and permitting conditions for SMFs.

### Amendments to Current Law

The proposed ordinance would amend the following sections of Article 27:

- Section 2700(e) (2) would be amended to allow a permittee to make modest changes to the height or volume of an existing SMF on the same foundation without obtaining a new permit.
- Section 2710 would be amended to: (a) repeal the requirement that a permit include a condition that the permittee install landscaping around the permitted SMF and maintain the landscaping; (b) allow an applicant to choose to pay an “in-lieu” fee instead of installing a street tree; and (c) to amend the street tree maintenance requirement to be consistent with San Francisco Charter § 16.129 (added by Proposition E).
- Section 2711 would be amended to allow an applicant to choose to pay an “in-lieu” fee instead of permitting the installation of a mural on its SMF.
- Section 2712 would be amended to: (a) repeal the requirement that an applicant make reasonable efforts to install an SMF on private property; and (b) delete the reference to landscaping.

- Section 2713 would be amended to: (a) delete the reference to landscaping; and (b) in part implement the amendments to Sections 2710 and 2711.
- Section 2722 would be amended to delete the landscaping maintenance requirement.
- Section 2726 would be amended to delete the reference to landscaping.
- Section 2727 would be amended to delete the reference to landscaping.

### Background Information

The City has been actively engaged in the SMF siting process since 2005 when the Department of Public Works adopted Director's Order 175,556 to establish a pre-permitting process for SMFs in the public rights-of-way ("Order"). In 2014, the Board of Supervisors replaced the Order by adopting Article 27 of the Public Works Code.

The street tree and mural requirements are being amended to allow the applicant to choose to pay "in-lieu" fees instead of installing a street tree and permitting the installation of a mural. The City could then use these funds for planting new street trees and landscaping and graffiti abatement. At present, the Bureau of Urban Forestry chooses whether to require the permittee to plant a street tree or pay an "in-lieu" fee. A mural would only be required if neighborhood residents came forward with a plan to create and install one.

The requirement that a permittee maintain any required street tree is being amended in light of section 16.129 to the San Francisco Charter, which the voters approved in Proposition E during the November 2016 election. Section 16.129 transfers responsibility to maintain street trees and sidewalks damaged by street trees from property owners to the City. The proposed amendment would require that the responsibility for maintaining street trees be consistent with Public Works Code Article 16, which section 16.129 requires the Board of Supervisors to amend. The proposed amendment would also repeal the landscaping maintenance requirement.

Section 2712(d)(4) is being repealed in response to a court ruling against the City. In 2014, Pacific Bell sued the City claiming that Public Utilities Code sections 5885 and 7901 preempted the City's authority to require a telephone corporation or state video provider to attempt to place its SMF on private property before applying for a Surface-Mounted Facility Site Permit. The San Francisco Superior Court in *Pacific Bell Telephone Company v. City and County of San Francisco* (Docket No. CGC-14-541846) found for Pacific Bell on that claim. In light of that ruling, San Francisco could not enforce Section 2712(d)(4) against Pacific Bell or other telephone corporations or state video providers.