FILE NO. 141297

LEGISLATIVE DIGEST

[Public Works Code - Personal Wireless Service Facility Site Permits, and Amending Fees]

Ordinance amending the Public Works Code to modify certain requirements for Personal Wireless Service Facility Site Permits, amending the fees for obtaining such permits; and making environmental findings.

Existing Law

Since 2007, the City and County of San Francisco ("City") has required a permit to install a personal wireless service facility ("Wireless Facility") on a utility or street light pole in the public right-of-way ("Wireless Permit"). These permits are issued by the Department of Public Works ("Department"). In Ordinance, 214-07, the Board of Supervisors ("Board") added the Wireless Permit requirement to Administrative Code § 11.9(b). In Ordinance No. 12-11, the Board of Supervisors repealed § 11.9(b) and added the Wireless Permit requirement to Article 25 of the Public Works Code.

Article 25 enables the City to regulate the location and design of Wireless Facilities by requiring the Planning Department and/or the Recreation Park Department to review an application for a Wireless Permit in specified locations based on aesthetic criteria contained in Article 25. The Department may not issue a Wireless Permit in those locations unless the Planning Department and/or the Recreation and Park Department recommend approval.

Article 25 also requires the Department to refer an application for a Wireless Permit to the Department of Public Health to determine whether: (i) any potential human exposure to radio frequency emissions from a proposed Wireless Facility would comply with the Federal Communications Commission ("FCC"); and (ii) potential noise from the proposed Wireless Facility would be not greater than 45 dBA as measured at a distance three feet from any residential building facade. The Department may not issue a Wireless Permit without the approval of the Department of Public Health.

Article 25 requires public notice of an application for a Wireless Permit and allows local residents to protest the Department's issuance of the proposed Wireless Permit. If a protest is filed, the Department will conduct a hearing before issuing a Wireless Permit. The Department will only issue the Wireless Permit if the Director of Public Works determines after the hearing that the applicant complied with all of the requirements of Article 25. The Wireless Permit may then be appealed to the Board of Appeals.

Article 25 also contains certain requirements for modifying previously permitted Wireless Facilities. The modification provisions were intended to allow the Department to permit those modifications that had limited aesthetic impacts without public scrutiny or even review by other City departments.

Amendments to Current Law

The proposed Ordinance would retain the basic structure and purpose of Article 25. Wireless Permits would still be required, as would the requirement that other City departments review the application. Local residents would still be allowed to protest the Department's issuance of a Wireless Permit, and a hearing would still be held following the filing of a protest.

The purpose of the Ordinance is to amend Article 25 to simplify the present permitting scheme that divides Wireless Facilities into three sized-based tiers ("Tier System"). The Ordinance would also amend Article 25 so that its provisions are consistent with both a recent trial court decision and with changes to federal law enacted after the adoption of Article 25.

In these regards, the Ordinance would:

- Repeal the Tier System that established more rigorous permitting requirements as the proposed Wireless Facilities got larger.[1] Instead of the Tier System, the Department would use the permitting process that had been established only for the largest Wireless Facilities (called Tier III) for all Wireless Facilities, which includes aesthetic review and public notice. Eliminating the Tier System simplifies the permitting process. It could also reduce the impacts of a recently enacted federal law limiting local authority to deny requests to modify permitted Wireless Facilities by increasing the size of those facilities.[2]

- Repeal the provisions that allowed the City to deny a Wireless Permit application or renewal application based on the applicant's technological need for the proposed Wireless Facility. As discussed below, a Superior Court judge found that this requirement was inconsistent with State law.

[1] The Ordinance would retain a tier structure solely to identify whether the Planning Department or Recreation and Park Department will determine whether the proposed Wireless Facility is "compatible" with the proposed location.

[2] The Ordinance would require an applicant for a Wireless Permit to disclose whether it had any intention to modify the Wireless Facility after the Department issued the permit.

- Change the term of a Wireless Permit from two years to ten years. As discussed below, a Superior Court judge found that the two-year term was inconsistent with State law.

- Change the modification provisions to be consistent with federal law as construed by the FCC. As discussed below, a Superior Court judge found that the modification provisions were inconsistent with a federal law that was enacted after the City adopted Article 25.

- Clarify that Article 25 applies to support poles owned by the Municipal Transportation Agency ("MTA"). This change is necessary because the MTA recently entered into agreements with certain wireless carriers allowing them to install Wireless Facilities on MTA support poles.

Background Information

In May 2011, T-Mobile and two other telecommunications carriers (hereinafter "Plaintiffs") sued the City in the Superior Court challenging the permitting requirements contained therein.

In their initial complaint, Plaintiffs alleged that: (i) under California Public Utilities Code §§ 7901[3] and 7901.1[4] the City did not have the authority to regulate Plaintiffs' use of the public rights-of-way to install Wireless Facilities for aesthetics; and (ii) under California Government Code § 65964(b) the City could not limit the term of a Wireless Permit to fewer than ten years.[5]

[3] Public Utilities Code § 7901 provides in part: "Telegraph or telephone corporations may construct lines of telegraph or telephone lines along and upon any public road or highway. . . in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters.

[4] Public Utilities Code § 7901.1 provides in part: "(a) It is the intent of the Legislature, consistent with Section 7901, that municipalities shall have the right to exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed. (b) The control, to be reasonable, shall, at a minimum, be applied to all entities in an equivalent manner."

[5] Government Code § 65964(b) provides that a city cannot: "Unreasonably limit the duration of any permit for a wireless telecommunications facility. Limits of less than 10 years are presumed to be unreasonable absent public safety reasons or substantial land use reasons."

In June 2011, Plaintiffs amended their complaint to allege that Article 25 improperly allowed the City to review certain of the Plaintiffs' compliance with the California Environmental Quality Act ("CEQA"). According to Plaintiffs, the California Public Utilities Commission had preempted the City's CEQA authority when permitting Wireless Facilities.

In March 2012, Plaintiffs amended their complaint for a second time to include a federal preemption claim based on Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012 (codified at 47 U.S.C. § 1455(a)) ("§ 6409(a)").[6] In § 6409(a), which was passed on February 22, 2012, Congress limited local authority to deny applications to modify existing Wireless Facilities. Section 6409(a) requires the City to grant an application to modify a previously permitted Wireless Facility unless the proposed modification would "substantially change the physical dimensions" of the facility. Plaintiffs alleged that § 6409(a) preempted the provisions of Article 25 that concerned the modification of permitted Wireless Facilities.[7]

Plaintiffs and the City sought summary judgment on all of the claims in the complaint. The Superior Court ruled for the City on Plaintiffs' CEQA preemption claim, finding that the City had the authority to conduct CEQA review of all of the Plaintiffs' applications for Wireless Permits. The Superior Court ruled for the Plaintiffs on their Government Code preemption claim, finding that the City could not limit the term of Plaintiffs' Wireless Permits to two years. The Court denied both parties' motions on Plaintiffs' Public Utilities Code §§ 7901 and 7901.1 State law preemption claim and their § 6409(a) federal law preemption claim.

The matter was then sent to trial on the remaining to claims. After trial, the Court found for the City on Plaintiffs' claim that Public Utilities Code §§ 7901 and 7901.1 preempted Article 25.[8] The Court ruled that nothing in those provisions limited the City's authority

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[6] Section 6409(a) provides in part: "a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station."

[7] Plaintiffs' also challenge certain uncodified provisions in Ordinance No. 12-11 related to obtaining new permits under Article 25 for Wireless Facilities that had been permitted under Section 11.9(b). While the City lost that aspect of the case, there is nothing in the proposed Ordinance that addresses this issue.

[8] The Court did find that Public Utilities Code §§ 7901 and 7901.1 preempted Article 25 to the extent it allowed the City to deny an application for a Wireless Permit for economic or technological reasons. The proposed amendments would repeal the applicable sections.

to regulate Plaintiffs' use of the public right-of-way for aesthetics. The Court ruled for the Plaintiffs on their claim that the newly passed federal law – § 6409(a) – preempted the modification provisions contained in Article 25. The Court found: (i) the distributed antenna system ("DAS") nodes that Plaintiffs had installed on utility poles pursuant to Wireless Permits are "base stations" as that term is used in § 6409(a); and (ii) that the City's modification provisions did not comply with federal law.

On November 26, 2014, Superior Court issued a final judgment incorporating both the rulings on summary judgment and the rulings following the trial. In the final judgment, the Court enjoined the City's enforcement of the modification provisions. The City intends to appeal the Court's rulings that went against the City. Plaintiffs will likely appeal the Court's rulings that were in favor of the City.

In addition to the Court's ruling, after the trial the FCC issued a decision construing § 6409(a) and adopting implementing regulations.[9] From the City's prospective, the most important aspects of the FCC's decision and regulations are the FCC's construction of the terms "base station" and "substantially change the physical dimensions of such tower or base station" as those terms are used in § 6409(a).[10]

The FCC agreed with the Superior Court that Plaintiffs' DAS nodes are "base stations" entitled to the benefits of § 6409(a). Unlike the Court, which did not address the meaning of the term "substantially change the physical dimensions," the FCC made specific findings in this regard. Under the FCC's decision and regulations, when applied to utility poles in the public rights-of-way that term means: (i) increasing the height of a pole by more than ten percent or more than ten feet, whichever is greater; (ii) adding an appurtenance to the body of the pole that would protrude from the edge of the pole by more than six feet; (iii) installing on the pole more than the standard number of new equipment cabinets for the technology involved, or more than four cabinets; (iv) installing equipment cabinets on the ground if there are no existing ground cabinets

[9] *In re: Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, FCC 14-153, WT Docket No. 13-238, 2014 WL 5374631 (Oct. 21, 2014). The FCC's decision will not be effective until 90 days after is published in the Federal Register. Thereafter, parties to the FCC proceeding may file petitions for rehearing (30 days) and/or appeals to federal circuit courts (60 days).

[10] The proposed Ordinance identifies these terms in the Section 1502 (Definitions), but grants the Department the authority to establish the actual definitions for these and the other terms used in § 6409(a). Granting this authority to the Department is preferable to including the definitions in the Ordinance, because the FCC's decision is not final (*see* footnote 9, above). In the event the FCC on rehearing makes any changes to the definitions, or a court of appeal finds that the FCC's construction is erroneous, the Department could amend the definitions by order or regulation.

associated with the facility; or (v) installing new ground cabinets that are more than ten percent larger in height or volume than any existing ground cabinets.

While the FCC would view these types of modifications as insubstantial, they certainly could have a negative impact on the City's streetscape. Nonetheless, the FCC determined that the City is powerless to deny a modification request that falls within these parameters.

The FCC also addressed the appropriate time for a permitting authority to issue a final determination on a modification application. While the FCC determined that 60 days was a sufficient time, the FCC did more than that. The FCC determined that a modification application would be "deemed granted" if the permitting authority did not issue a final decision within 60 days.[11]

[11] The proposed Ordinance would leave it to the Department to establish a permitting process for modification permits that complies with the FCC's 60-day processing requirement.