FILE NO. 100041

REVISED LEGISLATIVE DIGEST

(Amended in Committee: 12/6/2010)

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

Ordinance amending the San Francisco Public Works Code by (1) adding Article 25, Sections 1500 through 1528, to establish new requirements for Personal Wireless Service Facility Site Permits and to increase certain fees for obtaining such permits, (2) amending the San Francisco Administrative Code by amending Chapter 11, Article 1, Section 11.9, to eliminate obsolete provisions related to such permits, (3) making the provisions of the ordinance retroactive, and (4) making environmental findings.

Existing Law

San Francisco Administrative Code § 11.9(b) requires a permit from the City and County of San Francisco ("City") Department of Public Works (the "Department") to install a personal wireless service facility in the public rights-of-way ("Wireless Permit").

Section 11.9(b) enables the City to regulate the location and design of wireless facilities by requiring the Planning Department or the Recreation and/or Park Department to review an application for a Wireless Permit in specified protected locations. The Department may not issue a Wireless Permit in these protected locations unless the Planning Department and/or the Recreation and Park Department recommend approval. For facilities that are not in protected locations, the Department may issue the permit without referring the application to the Planning or Recreation and Park Departments. Section 11.9(b) does not contain any restrictions or design standards for wireless facilities that would be installed in such unprotected locations.

Section 11.9(b) requires the Department to refer an application for a Wireless Permit to the Department of Public Health to determine whether human exposure to radio frequency emissions from the proposed wireless facility complies with Federal Communications Commission ("FCC") guidelines. The Department may not issue a Wireless Permit without the approval of the Department of Public Health.

Section 11.9(b) does not require public notice of an application for a Wireless Permit, nor is public notice given after a Wireless Permit is issued. No protest is allowed, and no public hearing is required on an application for a Wireless Permit. While an appeal may be filed with the Board of Appeals, the general public may not find out that a Wireless Permit has been issued until it is too late to file an appeal.

Amendments to Current Law

The Ordinance retains the requirement to obtain a Wireless Permit presently contained in Administrative Code § 11.9(b), but moves the provisions governing Wireless Permits to Article 25 of the Public Works Code. The Ordinance therefore repeals those sections of the Administrative Code that would be rendered obsolete by the Ordinance.

The Ordinance also retains the following requirements in Section 11.9:

- A wireless carrier must obtain a Utilities Conditions Permit ("UCP") prior to applying for a Wireless Permit. The UCP sets forth general terms and conditions for such installations by utilities.

- The Planning Department must review an application for a Wireless Permit adjacent to a historic or architecturally significant building, within a historic district, or on a scenic street, and the Recreation and Park Department review an application for a Wireless Permit adjacent to a park and open space.

- The Department of Public Health must review an application for a Wireless Permit to ensure that it complies with FCC guidelines.

The Ordinance, however, changes the Wireless Permit requirements now contained in Section 11.9(b) in several respects:

- Prohibits the issuance of a Wireless Permit if it would add a new utility or street light pole to a street that does not have any existing overhead utility facilities.

- Establishes different requirements for Wireless Permits depending on the proposed size and location of the wireless facility:

    - Tier I facilities are relatively small facilities with minimal visual impact. The Ordinance establishes a streamlined process for an application to install a Tier I facility. If the Department determines that the proposed equipment meets the Tier I criteria, the Department will approve the Wireless Permit.

    - Tier II facilities are somewhat larger facilities. The Ordinance establishes different review processes depending on the location of the Tier II facility. There is a streamlined process for an application to install a Tier II facility in an unprotected location. In a protected location, the Department must refer the application for discretionary review by the Planning and/or Recreation and Park Departments to ensure that the additional visual impact of the larger facility (as compared to a Tier I facility) would be compatible with the protected resource. Under the Ordinance,

the Department may also exercise its discretion to refer an application to install a Tier II facility in an unprotected location to the Planning and/or Recreation and Park Department if the proposed location for this facility is within the immediate vicinity of a protected location.

- Tier III facilities are those that are too large to meet the Tier I or Tier II size criteria. The Ordinance does not establish any limit on the size of a Tier III facility. The Ordinance requires a discretionary review of an application for a Tier III facility by: (i) the Department to ensure that the applicant has a bona fide need for a larger facility; and (ii) the Planning and/or Recreation and Park Departments to ensure that the additional visual impact of the larger facility (as compared to a Tier II facility) would be compatible with the protected resource.

- Adds residential and neighborhood commercial zoning districts as protected areas for Wireless Permits. The Planning Department would review applications for Tier II or Tier III Wireless Permits in these zoning districts.

- Authorizes the Planning and Recreation and Park Departments to require an applicant for a Wireless Permit to plant a street tree next to the facility in order to provide a screen, or to pay an "in lieu" fee where it is impracticable to require planting a tree at the permitted location. The permittee would also be required to maintain the street tree.

- Establishes new standards for the Planning and Recreation and Park Departments to review Wireless Permit applications. The standards are both detailed and specific to the City resources that are protected by the ordinance.

- Requires public notice and an opportunity to protest before final approval of an application for a Tier III Wireless Permit. Any protest would trigger a hearing before a Department hearing officer and a final decision by the Director of Public Works.

- Requires public notice of a final determination approving any Wireless Permit application.

- Requires certification that a wireless facility complies with FCC guidelines and City-proscribed noise limitations before the Department can renew a Wireless Permit.

- Adds a number of provisions to protect the City from undue risk including liability, indemnity, and insurance requirements.

The Ordinance also provides that the requirements are retroactive and apply to previously permitted and/or installed wireless facilities. As a result, upon the effective date of the Ordinance the requirements of former Section 11.9(b) shall no longer apply to pending

applications for Wireless Permits. These applications will have to be issued under the requirements of the Ordinance. In addition, any previously permitted and/or installed wireless facilities must eventually be permitted under the Ordinance.

Background Information

In recent years, wireless carriers seeking to improve coverage and add capacity have increasingly requested permission to install antennas and associated electronic equipment (such as repeaters, electric meters, and battery back-up) on utility and street light poles in the public rights-of-way. Local governments have attempted to regulate the installation of such facilities in the public-rights-of-way to limit their aesthetic impact, among other reasons.

In the Telecommunications Act of 1996 ("TCA"), Congress limited state and local authority to regulate telecommunications carriers. (47 U.S.C. § 253.) Since 1996, telecommunications carriers have frequently sued to overturn local regulations by claiming that they are preempted by the TCA. Such lawsuits were common in California because a 2001 decision from the United States Court of Appeals for the Ninth Circuit Court in *City of Auburn v. Qwest Corp.* made it relatively easy for federal courts to preempt local regulations in California.

The *City of Auburn* court broadly construed the scope of federal preemption by holding that the TCA preempts local regulations that *may* have the effect of prohibiting the provision of telecommunications services. Following that decision, many federal courts in California preempted local regulations under the TCA, including City provisions regulating the installation of wireless facilities in the public rights-of-way.

In 2008, the Ninth Circuit in *Sprint Telephony v. County of San Diego* reversed the decision in *City of Auburn* and made it more difficult for telecommunications carriers to successfully challenge local ordinances under the TCA. Now, under *Sprint*, to preempt local regulations a telecommunications carrier must show that such local regulations *actually* prohibit or have the effect of prohibiting the provision of telecommunications services. Furthermore, *Sprint* recognized that local authority over the use of the public rights-of-way by telecommunications carriers includes the authority to regulate that use based on aesthetic concerns.

The TCA also limits the authority of local governments to regulate wireless facilities based on the environmental effects of radio frequency emissions. (47 U.S.C. § 332(c)(7)(B)(iv).) Local governments may only ensure that such wireless facilities comply with FCC guidelines regarding human exposure to radio frequency emissions.

State law also provides certain rights to "telephone corporations" to install "telephone lines" in the public rights-of-way. (Public Utilities Code § 7901.) At present, it is unclear under state law whether: (i) telecommunications carriers have a right to install wireless facilities in the public rights-of-way; or (ii) local governments may regulate the installation of such facilities based on aesthetic impacts. It is unclear because no state court has decided these issues.

In 2009, however, the Ninth Circuit in *Sprint PCS Assets, L.L.C. v. City of Palos Verdes Estates* interpreted state law to authorize local governments to consider aesthetics in deciding whether to permit the installation of wireless facilities in the public rights-of-way.