

BOARD of SUPERVISORS



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MEMORANDUM

TO: Toney D. Chaplin, Acting Chief of Police, Police Department
Jon Givner, Deputy City Attorney, Office of the City Attorney
Mohammed Nuru, Director, Public Works
Tom Hui, Director, Department of Building Inspection
John Rahaim, Director, Planning Department

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

DATE: October 25, 2016

SUBJECT: LEGISLATION INTRODUCED

The Board of Supervisors' Public Safety and Neighborhood Services Committee has received the following proposed legislation, introduced by Supervisor Farrell on October 18, 2016:

File No. 161110

Ordinance amending the Police Code to prohibit owners of multiple occupancy buildings from interfering with the choice of communications services providers by occupants, establish requirements for communications services providers to obtain access to multiple occupancy buildings, and establish remedies for violation of the access requirement.

If you have any 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.

c:
Christine Fountain, Police Department
Frank Lee, Public Works
William Strawn, Department of Building Inspection
Scott Sanchez, Planning Department
Lisa Gibson, Planning Department
AnMarie Rodgers, Planning Department
Aaron Starr, Planning Department
Joy Navarrete, Planning Department
Jeanie Poling, Planning Department

1 [Police Code - Choice of Communications Services Providers in Multiple Occupancy Buildings]

2
3 **Ordinance amending the Police Code to prohibit owners of multiple occupancy**
4 **buildings from interfering with the choice of communications services providers by**
5 **occupants, establish requirements for communications services providers to obtain**
6 **access to multiple occupancy buildings, and establish remedies for violation of the**
7 **access requirement.**

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

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

16 Section 1. Findings

17 (a) San Francisco has long been recognized as a technology leader. San
18 Franciscans expect that the communications services they receive at their residences and
19 offices meet modern standards. San Franciscans also expect to be able to choose among
20 different providers. The ability to choose among providers benefits all San Franciscans by
21 incentivizing providers to offer the best services at the lowest prices.

22 (b) There are a handful of different entities offering communications services in San
23 Francisco, though several of these provide service only in limited areas. Many San
24 Franciscans can choose between at least two service providers, but some customers have
25 only one option for service. This is particularly true for occupants of residential and
commercial multiple occupancy buildings. It is common in such buildings for property owners

1 to allow only one provider to install the facilities and equipment necessary to provide services
2 to occupants.

3 (c) While state and federal laws prohibit providers from entering into exclusive
4 agreements with property owners, nothing in state or federal law directly regulates property
5 owners. The City and County of San Francisco can use its police power to ensure that
6 occupants of multiple occupancy unit buildings can obtain communications services from the
7 providers of their choice.

8
9 Section 2. The Police Code is hereby amended by adding Article 52, consisting of
10 Sections 5200 to 5216, to read as follows:

11
12 **ARTICLE 52:**

13 **OCCUPANT'S RIGHT TO CHOOSE A COMMUNICATIONS SERVICES PROVIDER**

14 **SEC. 5200. DEFINITIONS.**

15 *For purposes of this Article 52:*

16 *"City" means the City and County of San Francisco.*

17 *"Communications services" means: (a) video service as that term is defined in California*
18 *Public Utilities Code § 5830(s); (b) telecommunications services certificated by the California Public*
19 *Utilities Commission under California Public Utilities Code § 1001; or (c) services provided by a*
20 *telephone corporation as that term is defined in California Public Utilities Code § 234.*

21 *"Communications services provider" means a person that: (a) has obtained a franchise to*
22 *provide video service from the California Public Utilities Commission under California Public Utilities*
23 *Code § 5840; (b) has obtained a certificate of public convenience and necessity from the California*
24 *Public Utilities Commission under California Public Utilities Code § 1001 to provide*
25 *telecommunications services; or (c) is a telephone corporation as that term is defined in California*

1 Public Utilities Code § 234. In addition, a communications services provider must have obtained a
2 Utility Conditions Permit from the City under Administrative Code Section 11.9.

3 “Existing wiring” means both home run wiring and cable home wiring, as those terms are
4 defined by the Federal Communications Commission in 47 C.F.R. § 76.800(d) and 47 C.F.R. § 76.5(l)
5 respectively, except that those terms as used herein shall apply only to the home run wiring or cable
6 home wiring owned or controlled by a property owner.

7 “Just and reasonable compensation” means the “fair market value” of the impact on the
8 multiple occupancy building as that term is defined in California Code of Civil Procedure § 1263.320.

9 “Multiple occupancy building” means: (a) an apartment building, apartment complex, or any
10 other group of residential units located upon a single premises or lot, provided that such multiple
11 dwelling unit contains at least four separate units; and (b) a multi-tenant building used for business
12 purposes that has separate units occupied by at least four different persons. Hotels, guesthouses, and
13 motels, consisting primarily of guest rooms and/or transient accommodations, are not multiple
14 occupancy buildings. Multiple occupancy buildings include properties that are rented to tenants,
15 owned and occupied by individual owners, or occupied by shareholders/tenants of a cooperative.

16 “Occupant” means a person occupying a unit in a multiple occupancy building.

17 “Person” means any natural person or an entity including but not limited to a corporation or
18 partnership.

19 “Property owner” means a person that owns a multiple occupancy building or controls or
20 manages a multiple occupancy building on behalf of other persons.

21 “Request for service” means an expression of interest from an occupant received by a
22 communications service provider either by mail, telephone or electronic mail. A contact between an
23 occupant and a communications services provider through a sign-up list contained on the provider’s
24 website will be deemed a request for service once the communications services provider confirms the
25 request either by telephone or electronic mail.

1 **SEC. 5201. NO INTERFERENCE BY PROPERTY OWNER.**

2 (a) No property owner shall interfere with the right of an occupant to obtain
3 communications services from the communications services provider of the occupant's choice.

4 (b) A property owner interferes with the occupant's choice of communications services
5 provider by, among other things, refusing to allow a communications services provider to install the
6 facilities and equipment necessary to provide communications services or use any existing wiring to
7 provide communications services as required by this Article 52.

8
9 **SEC. 5202. NO DISCRIMINATION BY PROPERTY OWNER AGAINST OCCUPANT.**

10 No property owner shall discriminate in any manner against an occupant on account of the
11 occupant's requesting or obtaining communications services from the communications services
12 provider of the occupant's choice.

13
14 **SEC. 5203. APPLICABILITY.**

15 All property owners as defined in Section 5200 are covered by this Article 52. A property
16 owner that, as of the effective date of this Article, has an agreement with a communication services
17 provider that purports to grant the communications services provider exclusive access to the property
18 and/or the existing wiring to provide services is not exempt from the requirements of this Article.

19
20 **SEC. 5204. REQUEST TO INSPECT A MULTIPLE OCCUPANCY BUILDING.**

21 (a) Prior to issuing a notice of intent to provide service under Section 5205 of this Article
22 52, a communications services provider shall inspect a multiple occupancy building to determine the
23 feasibility of providing services to one or more occupants.

24 (b) A communications services provider shall request in writing that the property owner
25 allow it to inspect the property for the purpose of providing service. Such request shall be sent to the

1 property owner by registered mail at least 14 days before the proposed date for the inspection. The
2 request may be sent by electronic mail instead, but the 14-day period shall not commence until the
3 communications services provider is able to confirm that the property owner actually received the
4 electronic mail communication.

5 (c) A request for an inspection shall include, but need not be limited to, the following:

6 (1) A statement that the communications services provider: (A) is authorized to
7 provide communications services in the City; (B) has received a request for service from one or more
8 occupants; (C) when inspecting the property, will conform to such reasonable conditions as the
9 property owner deems necessary to protect the safety, functioning, and appearance of the property and
10 the convenience and well-being of the occupants; and (D) will indemnify the property owner for any
11 damage caused by the inspection.

12 (2) A description of: (A) the communications services to be offered to occupants;
13 and (B) the facilities and equipment to be installed on the property, if known.

14 (3) The date and time the communications services provider proposes to inspect the
15 property.

16 (4) A statement that the property owner has until three days before the proposed
17 inspection date to notify the communications services provider in writing either that:

18 (A) The property owner will not allow the communications services provider
19 to provide services on the property. In this case, the property owner shall set forth the reasons for its
20 refusal and whether any of those reasons are permitted by Section 5206 of this Article 52; or

21 (B) The property owner will allow the communications services provider to
22 inspect the property. In this case, the property owner shall identify any reasonable conditions that the
23 communications services provider must follow during the inspection in order to protect the safety,
24 functioning, and appearance of the property and the convenience and well-being of the occupants.

1 (5) A reference to and a copy of this Article 52.

2
3 **SEC. 5205. NOTICE OF INTENT TO PROVIDE SERVICE.**

4 (a) A communications services provider that intends to provide communications services to
5 one or more occupants shall send a notice of intent to the property owner at least 14 days before the
6 proposed installation date. The notice of intent shall be sent by registered mail or electronic mail. If
7 the notice of intent is sent by electronic mail, the 14-day period shall not commence until the
8 communications service provider is able to confirm that the property owner actually received the
9 electronic mail communication.

10 (b) A notice of intent to provide communications services shall include, but need not be
11 limited to, the following information:

12 (1) A statement that the communications services provider: (A) is authorized to
13 provide communications services in the City; (B) has received a request for service from one or more
14 occupants; (C) when installing, operating, maintaining or removing its facilities and equipment from
15 the property, will conform to such reasonable conditions as the property owner deems necessary to
16 protect the safety, functioning, and appearance of the property and the convenience and well-being of
17 the occupants; (D) will pay the property owner just and reasonable compensation for its use of the
18 property, and the proposed amount of such just and reasonable compensation to be paid as required by
19 Article 52 of the Police Code; and (E) will indemnify the property owner for any damage caused by the
20 installation, operation, maintenance, or removal of its facilities from the property.

21 (2) A description of: (A) the communications services to be offered to occupants;
22 and (B) the facilities and equipment to be installed on the property.

23 (3) The dates and times the communications services provider proposes to start and
24 complete the installation.

1 (4) A statement that the property owner has until five days before the proposed
2 installation start date to notify the communications services provider in writing either that:

3 (A) The property owner will not allow the communications services provider
4 to provide services on the property. In this case, the property owner shall set forth the reasons for its
5 refusal and whether any of those reasons are permitted by Section 5206 of this Article; or

6 (B) The property owner will allow the communications services provider to
7 provide services on the property, but disagrees with the amount of the just and reasonable
8 compensation the communications services provider has proposed. In this case, the property owner
9 shall state the amount of just and reasonable compensation the property owner will require; and, in
10 either case, the property owners shall state:

11 (C) Such reasonable conditions the communications services provider must
12 follow during the installation to protect the safety, functioning, and appearance of the property and the
13 convenience and well-being of the occupants.

14 (5) A reference to and a copy of this Article 52.

15
16 **SEC. 5206. PERMITTED REFUSAL OF ACCESS.**

17 (a) Nothing in this Article 52 shall be construed to require a property owner to allow a
18 communications services provider to access its property to inspect the property where the
19 communications services provider has failed or refused to agree to the property owner's request that
20 the provider comply with any conditions on accessing the property contained in a notice pursuant to
21 Section 5207 of this Article.

22 (b) Nothing in this Article 52 shall be construed to require a property owner to allow a
23 communications services provider to access its property to install the facilities and equipment that are
24 necessary to offer services to occupants where:

1 (1) The communications services provider is not authorized to provide
2 communications services in the City;

3 (2) The communications services provider cannot verify that one or more occupants
4 of the multiple occupancy building have made a request for services;

5 (3) The property owner can show that physical limitations at the property prohibit
6 the installation of facilities and equipment by the communications services provider;

7 (4) The communications services provider has not agreed to the property owner's
8 request that the provider comply with any conditions on accessing the property contained in a notice
9 from the property owner issued pursuant to Section 5207 of this Article; or

10 (5) The property owner and communications services provider have not reached an
11 agreement concerning any just and reasonable compensation to the property owner for allowing the
12 communications services provider to install, operate, and maintain facilities and equipment on its
13 property as required by Section 5208 of this Article.

14
15 **SEC. 5207. PERMITTED LIMITATIONS ON ACCESS.**

16 (a) A property owner that grants a communications services provider access to its property
17 to either inspect the property or install facilities and equipment on the property to be used to offer
18 communications services to occupants may require the communications services provider, when
19 inspecting, installing, operating, maintaining, or removing its facilities and equipment from the
20 property, to conform to such reasonable conditions as the property owner deems necessary to protect
21 the safety, functioning, and appearance of the property and the convenience and well-being of the
22 occupants.

23 (b) A property owner that has received an inspection request under Section 5204(a) of this
24 Article 52 or an installation notice under Section 5205(b) of this Article shall notify the
25 communications services provider in writing at least five days before the inspection or installation of

1 any conditions authorized under subsection (a) that the communications services provider must comply
2 with while inspecting the property or installing facilities or equipment on the property.

3
4 **SEC. 5208. JUST AND REASONABLE COMPENSATION.**

5 (a) A property owner is entitled to just and reasonable compensation from a
6 communications service provider for installing, operating, and maintaining on its property the facilities
7 and equipment necessary to provide communications services to occupants.

8 (b) In accordance with Section 5205(b)(4) of this Article 52, a property owner shall notify a
9 communications services provider in writing at least five days before the proposed installation date if
10 the property owner disagrees with the amount of the just and reasonable compensation that the
11 communications services provider has proposed to pay. The property owner shall include in such
12 notice the amount of just and reasonable compensation the property owner will require the
13 communications services provider to pay.

14
15 **SEC. 5209. ENFORCEMENT BY THE CITY ATTORNEY.**

16 The City Attorney may institute a civil proceeding in the San Francisco Superior Court on
17 behalf of the City, for injunctive and monetary relief, including civil penalties as specified more fully in
18 Section 5212 of this Article 52, to enforce this Article against a property owner that has violated this
19 Article.

20
21 **SEC. 5210. ENFORCEMENT BY COMMUNICATIONS SERVICES PROVIDERS AND**
22 **OCCUPANTS.**

23 (a) Except as stated in subsection (b), any communications services provider or occupant of
24 a multiple occupancy building where the property owner has refused to allow the communications
25

1 services provider to provide service may institute a civil proceeding to enforce this Article 52 in San
2 Francisco Superior Court against such property owner for injunctive and monetary relief.

3 (b) Prior to filing a civil proceeding in accordance with subsection (a), the communications
4 services provider or occupant shall notify the City Attorney in writing of its intent to proceed against a
5 property owner. No communications service provider or occupant may commence such a proceeding
6 until at least 30 days after this notice has been sent to the City Attorney.

7 (c) If the City Attorney institutes a civil proceeding against the property owner before or
8 during the 30-day notice period, then no communications services provider or occupant may file a
9 proceeding under subsection (a). If the City Attorney institutes a civil proceeding after the 30-day
10 notice period has elapsed, any communications services provider or occupant that provides the notice
11 required under subsection (b) may file a separate civil proceeding.

12 (d) The City Attorney shall notify any person submitting a notice under subsection (b) that
13 the City Attorney has instituted a civil proceeding or decided not to institute a civil proceeding.

14
15 **SEC. 5211. ATTORNEYS' FEES AND COSTS.**

16 (a) A court may award reasonable attorneys' fees and costs to the City if it obtains
17 injunctive relief under Section 5209 of this Article 52 or to any person who obtains injunctive and
18 monetary relief under Section 5210 of this Article.

19 (b) If a court finds that any action brought under this Article 52 is frivolous, the court may
20 award the property owner reasonable attorneys' fees and costs.

21
22 **SEC. 5212. CIVIL PENALTIES.**

23 (a) Any property owner that violates this Article 52 may be liable for a civil penalty not to
24 exceed \$500 for each day such violation is committed or continues. Such penalty shall be assessed and
25 recovered in a civil action brought in the name of the people of the City by the City Attorney.

1 **(b) In assessing the amount of a civil penalty, a court may consider any of the relevant**
2 **circumstances, including, but not limited to, the following:**

3 **(1) The number of occupants affected by the violation;**

4 **(2) The number of communications services providers affected by the violation;**

5 **(3) Whether the property owner has violated this Article 52 at other properties;**

6 **(4) The amount of revenues the property owner receives from any existing**
7 **communications services providers serving the property;**

8 **(5) Whether the property owner has a legitimate reason for refusing access to its**
9 **property by the communications services provider; and**

10 **(6) The net assets and liabilities of the property owner, whether corporate or**
11 **individual.**

12
13 **SEC. 5213. STATUTE OF LIMITATIONS.**

14 **(a) After satisfying the preconditions for filing suit under Section 5210 of this Article 52,**
15 **any person so authorized under Section 5210 may institute a court proceeding to enforce this Article**
16 **against a property owner. Such proceeding must be brought within 180 days of the earliest of the**
17 **following occurrences:**

18 **(1) The receipt of notice from the property owner refusing to allow a**
19 **communications services provider to enter the premises for an inspection;**

20 **(2) The date the property owner was required by Section 5204(c)(4) of this Article to**
21 **object to a request for an inspection if the property owner does not respond to the request;**

22 **(3) The receipt of notice from the property owner refusing to allow the**
23 **communications services provider to enter the premises to provide communications services to**
24 **occupants or use existing wiring to provide service to occupants; or**

1 (4) The date the property owner was required by Section 5205(b)(4) of this Article to
2 object to a notice of intent to provide communications services if the property owner does not respond
3 to the notice.

4 (b) The City Attorney may institute a court proceeding to enforce this Article 52 within 180
5 days of the City Attorney receiving written notice that a property owner has violated this Article.

6
7 **SEC. 5214. UNDERTAKING FOR GENERAL WELFARE.**

8 In enacting or implementing this Article 52, the City is assuming an undertaking only to
9 promote the general welfare. It is not assuming, nor is it imposing on its officers and employees, an
10 obligation for breach of which it is liable in money damages to any person who claims that such breach
11 proximately caused injury.

12
13 **SEC. 5215. SEVERABILITY.**

14 If any section, subsection, sentence, clause, phrase, or word of this Article 52, or any
15 application thereof to any person or circumstance, is held to be invalid or unconstitutional by a
16 decision of a court of competent jurisdiction, such decision shall not affect the validity of the remaining
17 portions or applications of the ordinance. The Board of Supervisors hereby declares that it would have
18 passed this Article, and each and every section, subsection, sentence, clause, phrase, and word not
19 declared invalid or unconstitutional, without regard to whether any other portion of this Article or
20 application thereof would be subsequently declared invalid or unconstitutional.

21
22 **SEC. 5216. NO CONFLICT WITH FEDERAL OR STATE LAW.**

23 Nothing in this Article 52 shall be interpreted or applied so as to create any requirement,
24 power, or duty in conflict with any federal or state law.

1 Section 3. Effective Date. This ordinance shall become effective 30 days after
2 enactment. Enactment occurs when the Mayor signs the ordinance, the Mayor returns the
3 ordinance unsigned or does not sign the ordinance within ten days of receiving it, or the Board
4 of Supervisors overrides the Mayor's veto of the ordinance.

5
6
7 APPROVED AS TO FORM:
8 DENNIS J. HERRERA, City Attorney

9
10 By: 
11 WILLIAM K. SANDERS
12 Deputy City Attorney

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LEGISLATIVE DIGEST

[Police Code - Choice of Communications Services Providers in Multiple Occupancy Buildings]

Ordinance amending the Police Code to prohibit owners of multiple occupancy buildings from interfering with the choice of communications services providers by occupants, establish requirements for communications services providers to obtain access to multiple occupancy buildings, and establish remedies for violation of the access requirement.

Existing Law

Not applicable.

Amendments to Current Law

The ordinance establishes the right of occupants of residential multiple dwelling units and commercial office buildings (“multiple occupancy buildings”) to choose among providers of communications services by prohibiting property owners from either: (i) interfering with the choice of communications services providers by occupants; and/or (ii) denying communications services providers access to wiring within the building.

The ordinance: (i) establishes a procedure for a communications services provider to obtain access to multiple occupancy buildings and existing wiring to provide communications services; (ii) requires communications services providers to pay property owners just and reasonable compensation for access to their properties; (iii) specifies those circumstances under which it would be proper for a property owner to refuse a communications services provider request for access to its property; and (iv) allows the City Attorney, the occupant, or the communications services provider to enforce the ordinance in court.

The ordinance applies to state video service providers and telecommunications services providers. Only these types of providers have the right under both state and City law to use the public right-of-way to provide communications services to their customers.

Background Information

Many occupants of residential and commercial multiple occupancy buildings are unable to choose between service providers because in some such buildings property owners allow only one provider to install the facilities and equipment necessary to provide services to occupants.

State and federal regulatory agencies have adopted policies that promote competition among service providers, believing that this competition will benefit all consumers by incentivizing

lower costs and better service. As the Federal Communications Commission (“FCC”) has noted, “contractual agreements granting . . . exclusivity to cable operators harm competition and broadband deployment and . . . any benefits to consumers are outweighed by the harms of such [agreements].” *In the Matter of Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units & Other Real Estate Developments, Report & Order & Further Notice of Proposed Rulemaking*, 22 FCC Rcd 20235, at 20236 (2007), affirmed, *National Cable & Telecommunications Association v. FCC*, 567 F.3d 659 (D.C. Cir. 2009) (“FCC Decision”).)

In 1998, the California Public Utilities Commission (“CPUC”) prohibited telecommunications carriers from “entering into any type of arrangement with private property owners that has the effect of restricting the access of other [telecommunications] carriers to the owners’ properties or discriminating against the facilities of other carriers.” Decision 98-10-058, *Order Instituting Rulemaking on the Commission’s Own Motion into Competition for Local Exchange Service*, 82 CPUC 2d 510, 1998 WL 1109255 (CPUC 1998).

In 2007, the FCC prohibited cable television providers from executing contracts with property owners that contained exclusivity clauses and from enforcing existing contracts containing those clauses. *FCC Decision*, 22 FCC Rcd at 20235.¹

In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the United States Supreme Court considered a New York City law mandating that property owners allow cable television providers to install their facilities and equipment on their properties. The Supreme Court decided that this use of plaintiff’s property required payment of just and reasonable compensation. This ordinance requires communications services providers to pay property owners just and reasonable compensation for the use of their properties.

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¹ Pursuant to that decision, the FCC promulgated certain regulations to ban exclusive contracts. See 47 C.F.R. § 76.2000.