



Office of the City Attorney

MEMORANDUM

July 1, 2020

To: Honorable Mayor and Members of the City Council

From: Dee Williams-Ridley, City Manager
Phillip L. Harrington, Director, Department of Public Works
Farimah Brown, City Attorney

Re: Revisions to Proposed Amendments to Berkeley Municipal Code Chapter 16.10 (Installation of Video and Telecommunications Systems) and Revised Guidelines for Issuance of Public Right-of-Way Permits

On May 19, 2020, the City Council considered proposed amendments to Berkeley Municipal Code Chapter 16.10 (Installation of Video and Telecommunications Systems) and Revised Guidelines for Issuance of Public Right-of-Way Permits. The enclosed versions of the proposed amendments to the Ordinance and Guidelines show new revisions proposed since the May 19 City Council meeting, as described below. Non-substantive textual amendments are omitted from the list below.

Revisions to Proposed Ordinance

- **Section 16.10.010:** Additional language has been added to the Ordinance to clarify its purpose.
- **Section 16.10.020.A.10:** This paragraph is revised to clarify that the issuance of a franchise agreement does not waive or diminish the requirements to comply with the Ordinance and its implementing regulations or guidelines.
- **Section 16.10.030.D:** A new paragraph is added to clarify that Chapter 16.10 does not authorize the installation of facial recognition technology in the public right-of-way.
- **Section 16.10.045.B:** New language is added regarding the form of the notice of an application to construct a telecommunications facility in the public right-of-way.

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- **Section 16.10.050:** New language is added to clarify that undergrounding requirements apply only to the non-antenna portions of wireless facilities, and to clarify the requirements for allowing aboveground accessory structures (including the requirement to consider the aesthetic impacts of a proposed installation).
- **Section 16.10.070.B:** The revised paragraph requires the Director of Public Works to develop written guidelines for the granting of waivers that allow deviations from standard plans and specifications, orders, or regulations.
- **Section 16.10.120.A:** This paragraph is amended to require each operator of video or telecommunications equipment in the public right-of-way to submit an annual certification attesting under penalty of perjury that its facilities remain necessary to provide video or telecommunication services.
- **Section 16.10.150:** This paragraph is revised to state that the prohibition on appeals based on the environmental effects of radiofrequency emissions will apply only so long as consideration of such effects is prohibited by federal law. The appeal period is also extended to 10 business days.
- **Section 16.10.160:** This paragraph is revised to clarify which entities are responsible for indemnifying the City in the event of a claim arising from the operation of a facility in the public right-of-way.
- **Section 16.10.200:** Paragraphs A and B of this section are revised to clarify the requirements for the adoption and modification of administrative regulations and guidelines.

Revisions to Administrative Guidelines

- **Section 1(a)(4):** This revision clarifies that the purpose and intent of the Guidelines includes providing opportunities for public comment on and review of undergrounding work.
- **Section 4(a)(6):** This paragraph is revised to state that an analysis of a gap in wireless services must be included in the project narrative and justification unless doing so is prohibited by federal or state law.
- **Section 4(a)(11):** This paragraph is revised to limit an applicant's ability to provide manufacturer specifications in lieu of an acoustic analysis to proposed facilities that involve no noise-emitting equipment such as mechanical fans or emergency generators.

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- **Section 6(a)(19):** The revised paragraph includes a statement that all certifications required by the Guidelines must be made under penalty of perjury.
- **Section 6(a)(23):** This paragraph includes a minor clarification addressing continued monitoring for the risk of fire hazards.
- **Section 7(a):** The locational preferences in this section are revised to state that where feasible, applicants shall be prohibited from installing strand-mounted equipment of any kind.
- **Section 8(b):** This design standards for noise are revised, and the revised paragraph imposes additional restrictions on the testing of backup generators.
- **Section 8(h):** The revised paragraph recognizes that shrouding may be technically infeasible at certain wireless facilities and includes additional design standards to limit the visual impact of such facilities.

ORDINANCE NO. -N.S.

INSTALLATION OF VIDEO AND TELECOMMUNICATIONS SYSTEMS

BE IT ORDAINED by the Council of the City of Berkeley as follows:

Section 1. That Berkeley Municipal Code Chapter 16.10 is amended to read as follows:

16.10.010 Purpose.

A. The purpose of this Chapter is to establish policies and procedures for use of the public rights-of-way by Video Service Providers and Telephone Corporations, in order to minimize the inconvenience to and negative effects on the public and their use of the public rights-of-way, and to eliminate the cost to taxpayers that results from installation, maintenance and removal of the Facilities needed for Video and Telecommunication Systems while ensuring that all users of the public rights-of-way are treated in an equivalent manner. It is also the policy of the City to promote undergrounding of Facilities, whether related to Video Services, Telecommunications Services, or any other utility or service, whenever Technically Feasible, in order to preserve historic and local character and minimize industrial clutter and ensure optimal pedestrian accessibility and traffic safety.

B. This Chapter is intended to protect and promote public safety, community welfare, and the aesthetic quality of the City consistent with the goals, objectives, and policies of the Berkeley General Plan, while at the same time providing for managed development of wireless communications infrastructure in compliance with federal and state law.

C: The City recognizes that judicial interpretation of Public Utilities Code Sections 7901 and 7901.1 authorizes the City to take notice that "lines or equipment might generate noise, cause negative health consequences, or create safety concerns", which "could disturb public road use, or disturb its quiet enjoyment." (*T-Mobile West LLC v. City and County of San Francisco* (2019) 6 Cal. 5th 1107, 1119.) This Chapter seeks to protect the public welfare in a manner consistent with Public Utilities Code sections 7901 and 7901.1.

16.10.020 Definitions.

A. For the purposes of this Chapter, the following words, terms, phrases, and their derivations shall have the meanings set forth herein unless a different meaning is clearly intended by the use and context of the word, term or phrase. When not inconsistent with the context, words used in the present tense include the future tense, and words in the singular number include the plural number.

1. "City" means the City of Berkeley, California, acting by and through its City Council or a representative as the governing body may designate to act on its behalf.
2. "City Manager" means the City Manager of the City or their designee.

3. "Company" means any Video Service Provider or Telephone Corporation that is authorized by any governmental entity or law to provide Video Services or Telecommunications Services in the City of Berkeley.
4. "Construction Plan" means information regarding the design, potential locations, and estimated time schedule for the construction and/or installation of a Facility submitted in accordance with the requirements of this Chapter and any regulations or guidelines adopted by the Director for the implementation of this Chapter.
5. "Department" means the City Department of Public Works.
6. "Director" means the Director of the City's Department of Public Works or their designee.
7. "Excess Capacity" means the volume or capacity in any existing or future duct, conduit, maintenance hole, hand hole or Facility that is or will be made available by the owner for use by third party Facilities, and any installed fiber that has not been activated for use.
8. "Facility" or "Facilities" means any cable or other wire or line, antenna, radio, pipeline, pipes, duct, conduit, converter, cabinet, pedestal, meter, tunnel, vault, equipment, drain, manhole, splice box, surface location marker, pole, structure, utility, or other appurtenance, structure, property, or tangible thing owned, leased, operated, or licensed by a Company to provide or aid in the provision of cable, personal wireless or telecommunications services that are located or are proposed to be located on the PROW.
9. "FCC" means the Federal Communications Commission.
10. "Franchise" means a written legal undertaking or action issued by any level of government, which authorizes a specific Company to utilize the City's PROW for the purpose of installing, operating, maintaining, or reconstructing a Telecommunications System or providing Video Services. No franchise agreement for any such system or service may diminish or waive compliance with the requirements of this Chapter or with any regulations or guidelines issued by the City Manager for the implementation of this Chapter.
11. "Person" means any person, corporation, partnership, proprietorship, individual, organization, or other entity.
12. "Personal Wireless Service Facility" means a personal wireless service facility as defined in 47 U.S.C. § 332(c)(7)(C)(ii), as may be amended or superseded Personal Wireless Service Facility does not include radio towers, television towers, and government-operated public safety networks.
13. "PROW Permit" means a permit issued pursuant to this Chapter.

14. "Public rights-of-way" ("PROW") means any street, public way, or right-of-way, now laid out or dedicated, and the space on, above or below it, and all extensions thereof and additions thereto, owned, operated and/or controlled by the City or subject to an easement owned by the City, and any privately owned area within the City's jurisdiction which is not yet, but is designated as, a proposed public place on a tentative subdivision map approved by the City.

15. "Technically Feasible" means a circumstance in which the applicant has demonstrated by clear and convincing evidence submitted to the Director that compliance with a specific requirement within this Chapter and any administrative regulations or guidelines is physically impossible or unreasonable and not merely more difficult or expensive than a noncompliant alternative.

16. "Telephone Corporation" is defined as set forth in Section 234 of the California Public Utilities Code, as amended.

17. "Telecommunications Service" is defined as set forth in 47 U.S. Code § 153(52), as amended.

18. "Telecommunications System" means the Facilities necessary or convenient for a telecommunications carrier to provide Telecommunications Service.

19. "Traffic Control Plan" means a plan describing the manner in which the Company will manage vehicle, bicycle, and pedestrian traffic along affected streets that have a speed limit greater than 35 miles per hour when installing or maintaining Facilities.

20. "Video Service" is defined as set forth in Section 5830(s) of the California Public Utilities Code, as amended.

21. "Video Service Provider" is defined as set forth in Section 5830(t) of the California Public Utilities Code, as amended.

22. "Video System" means the Facilities necessary or convenient for a Video Service Provider to provide Video Service.⁷

16.10.030 PROW Permit Required—Applicability.

A. PROW Permit Required

1. Except as provided in subdivision B below, in addition to any agreement, license, permit or Franchise required by any City ordinance or any other local, state or federal law, no Company may undertake any activity in the PROW in order to construct, install, or repair any Facility, or a portion thereof, without first obtaining a PROW permit pursuant to this Chapter and paying all lawful fees required by any City ordinance.

2. All Facilities proposed to be located on utility poles owned or controlled by the Northern California Joint Pole Authority shall be subject to the application requirements and process set forth in Section 16.10.045.

B. Notwithstanding anything stated herein, a PROW Permit shall not be required (1) if the Director makes a written determination that a proposed Facility described in subdivision A relates to the maintenance, replacement or insubstantial modification of existing Facilities; or (2) if the applicant requests approval to collocate, replace or remove transmission equipment at an existing wireless tower or base station submitted pursuant to 47 U.S.C. § 1455, which will be subject to the current FCC rules and regulations applicable to “eligible facilities requests” as defined by FCC and as may be amended or superseded.

C. In addition to the requirements of this Chapter, a Company shall obtain all otherwise necessary City permits including, without limitation, encroachment permits, building permits, electrical permits, and other permits that may be lawfully required by this Code or other applicable laws or regulations.

C.D. Nothing in this Chapter shall be deemed to authorize the installation of facial recognition or other surveillance technology in the public-right-of-way.

16.10.040 PROW Permit Application.

No fewer than 30 days prior to a Company’s intended Construction start date, a written application for a PROW Permit, along with payment of any fees or deposit required by the City, shall be filed with the Director, in the form and manner required by the Director, and shall contain, at a minimum, all of the following information:

A. General information regarding any Facilities that the Company plans to apply for permits to install within the PROW in the next six months, regardless of whether a permit is currently sought for those Facilities.

B. A site plan of the Facilities proposed to be located within the PROW, including a map in electronic and/or other form required by the City. The plans and specifications shall show:

1. The location and dimensions of all existing street trees of at least six inches in diameter, Facilities, and improvements in the PROW where the new Facilities are proposed.

2. Photographs with superimposed images showing any proposed Facilities.

3. A description of the proposed Facilities, including, if such information has not previously been provided to the City, a general description of the Facilities, including whether the Facilities will contain any electronic components, natural gas generator, electrical fans, and/or emergency backup equipment.

4. The specific landscaping, structures, improvements, Facilities and obstructions, if any, that the Company proposes to temporarily or permanently remove or relocate.

5. A detailed description or plan showing any proposed screening and/or landscaping associated with any proposed Facilities.

C. If the Company is proposing new underground installation of Facilities within the PROW, it shall provide to the Director information regarding any Excess Capacity that presently exists, will exist in such Facilities or does or will exist in nearby Facilities after the installation or the Company's Facilities.

D. Estimated construction start and completion dates.

E. A Traffic Control Plan, if required, that complies with guidelines established by the Director.

F. An application for any Facility shall include proof of written public notification by first class mail to property owners and residents within 500 feet of the proposed Facility, or greater distance subject to additional conditions, if provided by administrative regulations, guidelines, or City Council policy.

G. To the extent practicable, proof that the Company has obtained any other governmental approvals and permits required to construct the Facilities in question. If a Company has not previously provided information sufficient to show that it is a Telephone Corporation or Video Service Provider, the City may also require that the Company provide such information.

H. In any application for a Personal Wireless Service Facility, the applicant shall demonstrate by clear and convincing evidence that the facility is a "small wireless facility" as defined by the FCC in 47 C.F.R. § 1.6002(l), as amended.

I. The operator of each new or modified telecommunications antenna associated with that Personal Wireless Service Facility shall submit to the City a written certification under penalty of perjury that the Personal Wireless Service Facility's radiofrequency exposure will comply with applicable FCC regulations. The report shall state the radio frequency radiation of the proposed Personal Wireless Service Facility, including the cumulative impact from other nearby Personal Wireless Service Facilities, and state whether it meets any applicable FCC requirements. The City shall not issue any PROW Permit if the operator fails to demonstrate compliance with applicable FCC requirements for radiofrequency exposure. The City may require, at the applicant's expense, peer review or independent verification of the results of the analysis.

16.10.045 Additional Application Requirements for Facilities on Utility Poles.

A. Applications for Facilities subject to Section 16.10.030.A.2 shall include proof that all entities with authority to grant or deny permission for installation of the Facility have approved it.

B. Such applications shall also include proof that all property owners and occupants specified in Section 16.10.040.F have been given notice by first class mail, no later than the date of the application, of the proposed construction or installation of the Facility.

Notice shall be printed on a template form to be provided by the Director, which, among other terms, shall appraise recipients of the right to request a reasonable accommodation from the City pursuant to 28 C.F.R. § 35.106. Such notice shall also be

posted on the pole on which the Facility is proposed to be installed. Notices under this Section shall identify the specific pole on which the Facility is proposed to be installed and contact information for the Company or its authorized representative, and for the Director of Public Works. The purpose of this notice is to ensure that property owners and residents have an opportunity to contact the Company, the Department of Public Works, and any entities responsible for the pole on which the Facility is proposed to be located so that they can try to resolve any objections they may have.

16.10.050 Design, Installation, and Construction of Video and Telecommunications Systems.

A. All Facilities shall be so located, constructed, installed and maintained so as not to incommode the public use of the road or highway or interrupt navigation of the waters, including access to and from the PROW from private property and access by persons with disabilities.

B. In the event a Company creates a hazardous or unsafe condition on either public or private property, or unreasonably interferes with access between the PROW and private property, the Company shall remove or modify that part of the Facility to eliminate such condition at its own cost.

C. No Facility may be located or installed in such a manner that it will unreasonably interfere with existing or adopted City plans to use the PROW, with the access rights of private property owners, with existing gas, electric, sewer or telephone fixtures, with existing water hydrants and mains, with existing sewers, storm drains or v-ditches, or any existing wastewater stations, or with any existing traffic control System.

D. Construction, installation, maintenance and repair of Facilities shall not substantially affect the integrity of any structures, and shall, to the extent feasible, be installed either perpendicular or parallel to property lines or the sides of structures.

E. All underground taps shall, to the extent reasonably possible, follow property lines and cross property at right angles unless otherwise required due to the physical characteristics of the subsurface or required under applicable law.

F. All construction of new and replacement Facilities shall be accomplished between the hours reasonably specified by the City in the approved permit or ordinances. Construction shall seek to minimize any adverse impact on services of the City or third parties.

G. Whenever existing Facilities or electric utility facilities are located underground along a particular street or public way, new non-antenna portions of Facilities shall be installed underground along that street or public way and in existing or newly installed adjacent conduit to the extent Technically Feasible. The application shall demonstrate, with appropriate documentary support, why existing Facilities are inadequate to support the project.

H. Whenever any new or existing Facilities or electric utility lines are relocated underground along a particular street or public way, a Company shall relocate its non-antenna portions of Facilities underground to the extent Technically Feasible concurrently with the other lines at its sole expense, in accordance with existing legal and regulatory requirements.

I. Companies shall advise and coordinate major construction efforts with other utility companies through City-sponsored utility coordination meetings, and, to the extent reasonably possible, coordinate their construction work with other utilities installing infrastructure in the PROW. In new developments, a Company shall contact the developer to determine whether any surplus conduit is available in the areas that the Company plans to install facilities, and whether any joint trenching or boring projects are feasible.

J. Overhead facilities may be installed only if sufficient space is available on existing utility poles or other structures, consistent with applicable regulations and agreements, as determined by the Director.

K. If proposed new Facilities would require excavation, or involve excavation for installation of new facilities, those Facilities shall be installed within existing Facilities whenever sufficient Excess Capacity is available on commercially reasonable terms and conditions.

L. Where feasible, the City strongly encourages that new Facilities be installed underground to the maximum extent feasible. All non-antenna portions of proposed Facilities shall be installed underground or in flush-mounted vaults or low-profile waterproof pedestals, unless the Director determines that installing the non-antenna portions of the proposed Facility aboveground would not result in a significant adverse aesthetic impact relative to an undergrounded installation, would not result in significant detriment to the PROW or the environment surrounding it, or and would not incommode the public use of the PROW. In making a feasibility determination, the Director shall consider the information in the application and the record, including information provided by the Company and members of the public. Undergrounding requirements must be applied on a non-discriminatory basis, unless the imposition of additional requirements is authorized by federal and state law.

M. Companies shall coordinate with affected property owners to locate Facilities so as to reasonably minimize inconvenience and disruption to residents, consistent with installation of permitted Facilities.

16.10.060 Issuance of PROW Permits.

A. Each PROW Permit shall be subject to the criteria and provisions of this Chapter. The PROW Permit may be issued upon review of a completed application and a determination by the Director that a Company has filed a complete application and has complied with all applicable requirements of this Chapter, including any duly adopted administrative regulations or guidelines. Any owner or resident of property located within

500 of a proposed Facility may request to receive notice of the Director's decision to issue or deny a PROW Permit.

B. Criteria. In determining whether to grant or deny a PROW Permit, the Director shall, unless prohibited by applicable state or federal law, consider factors permitted under Section 7901 and 7901.1 of the California Public Utility Code and this Chapter. In particular, the Director shall consider:

1. The capacity of the PROW to accommodate all proposed Facilities.
2. The capacity of the PROW to accommodate the City's planned uses of the PROW.
3. The damage or disruption, if any, to the PROW or use and enjoyment of any public or private facilities, improvements adjacent to it, pedestrian or vehicle travel, and landscaping, if the permit is granted.
4. The visual and aesthetic impact and compatibility of Facilities with the surrounding neighborhood or zone.
5. The availability of technically compatible existing Facilities or Excess Capacity, or alternate routes and/or locations for the proposed Facilities, which would be less disruptive or which better protect the PROW for its dedicated use, and the ~~f~~Feasibility of using such Facilities, Excess Capacity or alternate routes and/or locations.
6. The effect of any Facilities on traffic or pedestrian safety or access.
7. Completion of any environmental review under the California Environmental Quality Act (CEQA) that may be required by law.
8. Whether the Company has the legal entitlement to provide the services for which the Facilities will be used.
9. Any administrative regulations or guidelines adopted by the Director to implement this Chapter.

C. The Director may deny a PROW Permit or require modifications to the proposed excavation or installation of any Facility based on the factors set forth above. However, no such modifications or denial may have the effect of prohibiting the provision of personal wireless services or Video Service.

D. Where the Director has information that there is a substantial risk that a Company may not fulfill its obligations under the permit, the Director may require that the Company provide satisfactory financial security in an amount not to exceed 110% of the total estimated cost of all work to be performed under the PROW Permit, as determined by the Director, and as necessary and appropriate to compensate the City for any costs that may be required to ensure full compliance with all of the requirements of this Chapter. Such security shall consist of an irrevocable letter of credit, cash

deposit, or performance bond as determined by the Director. The security shall be maintained in full force and effect until the permitted work in the PROW is completed to the satisfaction of the Director, at which time the security shall be reduced to ten percent (10%) of the actual cost of the work. The reduced security shall be maintained by the Company for a period of one year as a guarantee that the work is of good quality and free from any defective or faulty material or workmanship. Any surety supplying a performance bond must be an "admitted surety insurer," as defined in Code of Civil Procedure section 995.120, and authorized to do business in the State of California. Return of the security shall be conditioned upon the Company's faithful performance of all work in the PROW specified in the applicable permit. In the event the Company fails to comply with any provision of this Chapter related to such work, or any provision of any applicable permit or other approval related to such work, any damages or loss suffered by the City as a result thereof shall be recoverable from the security, including but not limited to the full amount of any compensation, indemnification, cost of removal, or abandonment of any property of the Company, plus reasonable attorneys' fees and costs up to the full amount of the security. Neither the provisions of this section nor any damages recovered by the City hereunder shall be construed to limit liability or damages of licensee under this Chapter, either to the full amount of the security or otherwise. In addition to its rights to take action under the security, the City may pursue any other remedy provided by law. For any wireless telecommunications facility, as defined in Government Code section 65850.6, the financial security provided by the Company shall not exceed the estimated cost of removal of the Facility. In establishing the amount of the security, the City shall take into consideration information provided by the Company and other evidence in the record regarding the cost of removal.

E. Fees. As a condition of the issuance of any permit, a Company shall pay all applicable cost-based fees assessed by resolution of the City Council; provided, however, that such payments and submittals shall not be deemed a waiver of any right the Company may have to challenge the legality of such permit fees if the Company specifies in writing the basis of any objection to such fees and pays under protest.

F. Right to Inspect. The City may inspect any work performed pursuant to a PROW Permit at any reasonable time during normal business hours that the City deems appropriate, upon reasonable notice to the Company performing that work, when necessary. In addition, the City shall inspect a Company's work reasonably promptly upon notice from the Company that the work has been completed.

G. Duration and Validity. Work should begin within 180 calendar days of the start date specified in the permit and should be prosecuted diligently to completion, including restoration. The Director at their sole discretion may grant an extension of the deadline for completion of construction upon a request by the applicant.

16.10.070 Construction Activities.

A. Not less than 10 business days prior to the intended start of construction, the Company shall provide written public notification by door hanger to residents within 500 feet of the proposed construction.

B. All work in or affecting the PROW shall be performed in accordance with this Chapter, the Construction Plan, and with the standard plans and specifications of the Department and any Department orders or regulations, except where the Director, at their discretion, grants prior written approval to deviate from the standard plans and specifications, orders, or regulations. The Director shall develop written guidelines to implement the granting of waivers authorized pursuant to this Chapter.

C. A Company shall provide reasonable advance notification, but in any case not less than three business days, to the City of the initiation of any construction activities pursuant to a PROW Permit issued under this Chapter.

D. A Company shall make its best efforts to complete any work authorized by a permit under this Chapter no later than the date specified in the permit.

E. A Company shall post and maintain notice at the site of the excavation or installation during the construction period. The notice shall include the name, telephone number, and address of the Company, a description of the excavation or installation to be performed, and the duration of the excavation or installation. The notice shall be posted along all streets where the excavation or installation is to take place.

F. If a Company requires additional time to complete work, it shall so notify the Director, and the Director may, upon a written demonstration of good cause, grant an extension of time to complete the work. In addition, the Company shall provide the Director with a telephone contact number to enable the Director to report any concerns regarding construction of the Facilities.

16.10.080 Excavation.

A. A Company that excavates or causes to be made an excavation in the PROW shall maintain, repair, or reconstruct the site of the excavation as specified by the City until such time as the site of the excavation is repaved or resurfaced by the Department, or by another party pursuant to a subsequently issued PROW permit.

B. If a Company excavates in the PROW, it shall comply with the requirements of Underground Service Alert North ("USAN") regarding notification of excavation or installation and marking of subsurface Facilities. The Company shall provide USAN with the assigned number of the permit to excavate or other information as may be necessary to properly identify the proposed excavation or installation.

C. Limits on Work in the Public Right-of-Way

1. Scope. It is unlawful for a Company to make, cause, or permit to be made any excavation in the PROW outside the boundaries, times, and description set forth in the PROW Permit.

2. Trenching. Trenching in the PROW shall be by the "direct buried method," as defined by the Director. Use of a rock wheel or other trenchless technology to excavate in the PROW is prohibited without prior written approval of the Director.

3. Single Excavation Maximum. No single excavation site shall be longer than 1,200 feet at any time except with the prior written approval of the Director.

4. A Company may not excavate any street that has been reconstructed or resurfaced by the Department or at its direction in the preceding five-year period and shall participate in City efforts to coordinate excavation activities. However, subject to Section 16.12.030, the Director may, for good cause and in their discretion, grant a waiver of the requirements of this paragraph. Good cause shall include (a) the fact that the need to excavate arose in spite of a Company's full compliance with the coordination of excavation provisions; or (b) the excavation facilitates the deployment of new technology or new service. The Director shall issue their decision on a waiver within a reasonable period after receipt of a written request for a waiver.

D. Companies shall be subject to the following requirements for excavation sites:

1. Companies shall cover open excavation with non-skid steel plates ramped to the elevation of the contiguous street, pavement, or other PROW, or otherwise protected in accordance with guidelines prescribed by the Department.

2. Companies shall keep the area surrounding the excavation clean and free of loose dirt or other debris. Excavation sites shall be cleaned at the completion of each workday. In addition, Permittees shall remove all excavated material from the site of the excavation no later than the end of each workday.

3. Materials and equipment to be used for the excavation within seven calendar days may be stored at the site of the excavation, except that fill material, sand, aggregate, and asphalt-coated material may be stored at the site only if it is stored in covered, locked containers.

4. Companies shall comply with all federal, state, and local laws regarding hazardous materials, including with respect to (a) data collection; (b) disposal, handling, release, and treatment of hazardous material; site remediation; and (c) worker safety and training. "Hazardous material" means any gas, material, substance, or waste which, because of its quantity, concentration, or physical or chemical characteristics, is deemed by any federal, state, or local authority to pose a present or potential hazard to human health or safety or to the environment.

5. Companies shall develop and implement a Water Quality Management Plan and/or Stormwater Pollution Prevention Plan for any excavation project as required by law.

E. If the Director determines that a Company has violated this Chapter or that an excavation poses a hazardous situation or constitutes a public nuisance, public emergency, or other threat to public health, safety, or welfare, the Director may issue a stop work order, impose new conditions upon a permit, or suspend or revoke a permit by notifying the Permittee company of such action in a written, electronic, or facsimile communication.

F. Restoration of PROW

1. In any case in which a Company causes a sidewalk, street, or other PROW to be excavated or disturbed by an excavation, the Company shall restore the sidewalk, street or other PROW in the manner prescribed by the orders, regulations, and standard plans and specifications of the Director.

2. Activities concerning backfilling, replacement of pavement base, and finished pavement shall be performed in a manner specified by the orders, regulations, and standard plans and specifications of the Director. In addition, these activities shall be subject to the following requirements:

a. Each excavation shall be backfilled and compacted within 72 hours from the time the construction related to the excavation is completed.

b. Replacement of the pavement base shall be completed within 72 hours from the time the excavation is backfilled.

c. Finished pavement and sidewalk restoration shall be completed within 10 days after completion of the substructure installation or sooner as directed by the Director.

3. Upon written request from a Company, the Director may grant written approval for modifications to the requirements of this section.

4. In any case where an excavation is not completed or restored in the time and manner specified in the permit, this Chapter, or the orders, regulations, and standard plans and specifications of the Department, the Director shall order the Company to complete the excavation as directed within 24 hours. If the Company fails, neglects, or refuses to comply with the order, the Director may complete or cause to be completed such excavation and/or restoration in such manner as the Director deems expedient and appropriate. The Company shall compensate the City for any reasonable costs, including but not limited to administration, construction, consultants, equipment, inspection, notification, remediation, repair, restoration, or any other actual costs incurred by the City or other agencies, boards, commissions, or departments of the City, that were made necessary by such excavation and/or restoration. The cost of such work also may be deducted from the Company's security fund.

5. Subject to the limitation set forth in this Chapter, completion of an excavation or restoration by the Department in accordance with this Chapter shall not relieve the Company from liability for future pavement failures at the excavation site.

G. In order to verify that a Company has constructed the Telecommunications or Video System in the manner required by this Chapter, the City reserves the right to inspect the construction, as well as to inspect all necessary documents related to said construction.

H. A Company, at its own expense, shall temporarily disconnect or relocate any of its Facilities when necessitated by reason of:

1. Traffic conditions;
2. Public safety;
3. Temporary or permanent street closing not for the benefit of a private party;
4. Street and sidewalk construction or resurfacing;
5. A change or establishment of street grade; or
6. Installation of sewers, drains, water pipes, storm drains, lift stations, force mains, street light Facilities, traffic signal Facilities, tracks, or any other public use of the PROW.

16.10.090 Remedies During Construction.

A. Whenever construction is being performed in a manner contrary to the provisions of this Chapter, the City Manager, or an inspection official representing the City, may order the work stopped by notice in writing served on any person or Company engaged in or causing the construction. Any work stopped shall not resume until authorized in writing by the Director.

B. Upon the failure, refusal or neglect of a Company to cause any construction or repair, or comply with a permit under this Chapter, the City may cause such work to be completed in whole or in part, and recover its costs of doing so, as set forth in this Section.

C. Upon knowledge of a Company's failure, refusal or neglect under Paragraph B, the City shall give the Company notice of default and a reasonable time, but not less than 20 days, to cure the default. If the Company does not cure the default or make substantial good faith efforts to do so within that period, the City may perform the work itself. Upon completion of that work, the City shall submit to the Company an itemized statement of costs, which shall be due no later than 30 days of billing.

D. Costs that may be recovered include, but are not limited to, administration, construction, consultants, equipment, inspection, notification, remediation, repair, restoration, or any other actual costs incurred by the Department or other agencies, boards, commissions, departments of the City, that were made necessary by reason of the emergency remediation undertaken by the Department. The cost of such work also may be deducted from the Company's security fund.

E. Remediation by the City in accordance with this section shall not relieve the Company from responsibility or liability for subsequent conditions necessitating remediation.

F. The remedies available under this section shall be cumulative of any other remedies the City may seek under the provisions of this Chapter.

16.10.100 Maintenance of Facilities—Continuing Obligations.

A. Construction, installation, maintenance and repair of any Facilities shall comply, as applicable, with the provisions of the most current editions of the City's Zoning Ordinance, Building Code, Plumbing Code, Electrical Code, any applicable City-adopted Public Works construction standards, specifications and plans, or guidelines, as they are modified from time to time, and any applicable federal, state or local statutes, ordinances, regulations, guidelines, or requirements.

B. The exterior of any newly installed Facility shall be manufactured or treated so as to resist graffiti and shall be maintained in good condition.

C. Each Facility installed in the PROW shall be clearly identified with the name of the owner of the Facility and a toll-free telephone number for the Company for which it was installed. The Director may adopt orders or regulations to specify other appropriate methods for identification.

D. A Company shall be responsible for maintaining all Facilities in good condition, well-painted and free of graffiti and other markings; provided, however, that Companies shall not be responsible for maintenance of any plantings or vegetative screening materials, whether preexisting installation of the Proposed Facilities or installed by the Company during installation. A Company assumes all responsibility for damage or injury resulting from placement or maintenance of any Facility. If a Company fails to comply with any written City demand relating thereto, the City may perform said work and withdraw its costs and expenses from the security fund.

E. Companies shall be required to monitor and abate graffiti on Facilities installed pursuant to permits issued under this Chapter. In addition, Companies shall provide the City with a method or contact information to report graffiti on their facilities and other Facility maintenance. Companies shall make reasonable commercial efforts to remove graffiti within 72 hours of such notification.

F. By applying for and accepting a PROW Permit under this Chapter, a Company assumes all responsibility for damage or injury resulting from the presence of any Facility in the PROW. If a Company fails to comply with any written Director's demand relating thereto, the City may perform said work, or pay for such damage or injury, and withdraw its costs and expenses from the security fund or other security provided by the Company. However, remediation by the City in accordance with this section shall not relieve the Company from responsibility or liability for subsequent conditions necessitating remediation.

1. In the event that subsurface material or pavement over or immediately adjacent to any excavation becomes depressed, broken, or fails in any way at any time after the work has been completed, the Director shall notify the responsible Company, if any, of the condition, its location, and the required remedy. The Director shall give the Company notice of default and a reasonable time, but not less than 20 days, to cure the default. If the Company does not cure the default or make substantial good faith efforts

to do so within that period, the City may perform the work itself. Upon completion of that work, the City shall submit to the Company an itemized statement of costs, which shall be due no later than 30 days of billing.

2. Costs that may be recovered include, but are not limited to, administration, construction, consultants, equipment, inspection, notification, remediation, repair, restoration, or any other actual costs incurred by the Department or other agencies, boards, commissions, or departments of the City, that were made necessary by reason of the emergency remediation undertaken by the Department. The cost of such work also may be deducted from the Company's security fund.

G. No Personal Wireless Service Facility or combination of Facilities subject to this Chapter shall produce power densities that exceed applicable FCC limits for electric and magnetic field strength and power density for transmitters. In order to ensure compliance with all applicable radiofrequency exposure standards, Personal Wireless Service Facilities that are not categorically excluded from the FCC's standards may be required to submit reports as required by this subdivision and applicable regulations and guidelines adopted by the Director. Such testing in the same manner shall also be conducted upon the upgrade or substantial modification of radio or antenna equipment.

H. Notwithstanding anything herein, no operator of any Personal Wireless Service Facility shall be required to provide any report, or any information in any report, that exceeds reports or information that may be required by the FCC. The City may obtain, at the operator's expense, independent verification of the results of any analysis. If an operator of a Personal Wireless Service Facility fails to supply any required report or fails to correct a violation of the FCC standard following notification, the PROW Permit for that Personal Wireless Service Facility shall be suspended until the operator complies with this subdivision.

1. Prior to January 31 of each year, an authorized representative for the operator of each antenna at the Personal Wireless Service Facility permitted under this Chapter shall provide under penalty of perjury a written certification to the City that each antenna is being operated in accordance with all applicable FCC radiofrequency exposure standards.

2. To the extent required by the FCC standards, the operator of a Personal Wireless Service Facility shall be required to submit to the City a report, based on actual measurements, of compliance with applicable FCC radiofrequency exposure limits within 90 days of a reduction of any FCC radiofrequency exposure limit for electric and magnetic field strength and power density for transmitters, or of any modification of each Personal Wireless Service Facility requiring a new submission under FCC standards to determine compliance. If calculated levels are not in compliance with the FCC's radiofrequency exposure limits, the operator shall cease operation of the Personal Wireless Service Facility until it is brought into compliance with the FCC's standards. A report of these calculations and required measurements, if any, and the findings with respect to compliance with the current radiofrequency exposure limits, shall be submitted to the City. If at any time, radiofrequency levels are not in compliance

with the FCC's radiofrequency exposure limits, the operator shall immediately cease operation of the Personal Wireless Service Facility until it is brought into compliance with the FCC's standards. A report of these calculations and required measurements, if any, and the findings with respect to compliance with the current radiofrequency exposure limits, shall be submitted to the City.

16.10.110 Emergency Repairs.

A. Notwithstanding anything to the contrary in this Chapter, if the site of an excavation, whether during installation of Facilities or at any time thereafter, is or becomes hazardous, or constitutes a public nuisance, public emergency, or other imminent threat to the public health, safety, or welfare, such that it requires immediate action, the Director may order the responsible Company, by a written, electronic, or facsimile communication, to remedy the condition within a specified period of time.

B. If the responsible Company or its designated representative party is inaccessible or fails, neglects, or refuses to take prompt action to remedy the condition as specified in the communication, the Director may remedy the condition or cause the condition to be remedied.

C. Upon completion of that work, the City shall submit to the Company an itemized statement of costs, which shall be due no later than 30 days of billing. Amounts not timely paid may be deducted from the performance bonds or security fund. Costs that may be recovered include, but are not limited to, administration, construction, consultants, equipment, inspection, notification, remediation, repair, restoration, or any other actual costs incurred by the Department or other agencies, boards, commissions, or departments of the City, that were made necessary by reason of the emergency remediation undertaken by the Department. The cost of such work also may be deducted from the Company's security fund.

D. Remediation by the City in accordance with this section shall not relieve the Company from responsibility or liability for subsequent conditions necessitating remediation.

16.10.120 Duty to Remove Facilities from PROW and Public Property— Abandonment in Place.

A. Each Company operating Video or Telecommunications Systems in the PROW shall submit to the Director an annual certification attesting under penalty of perjury that Facilities in the PROW remain necessary to provide Video or Telecommunication Services, and shall specifically identify any Facilities that are no longer necessary to provide said services. The Director may order a Company to remove its Facilities from public property or PROW at its own expense whenever a Company materially breaches its PROW Permit, ceases to operate substantially all of its Video or Telecommunications System for a continuous period of six months, or fails to complete construction of the Video or Telecommunications System within six months, or its PROW Permit is

revoked. No such order may be issued without first giving the Company a reasonable opportunity to cure.

B. If a Company does not remove Facilities subject to removal by the deadline specified therein, the City may remove the Facilities at the Company's expense. The security fund shall be available to pay for such work.

C. If officials or representatives of the City remove Facilities, and if the Company for which they were installed does not claim the property within 30 days after service of notice of its removal upon the Company, the City may take whatever steps are available under state law to declare the property surplus and sell it, with the proceeds of such sale going to the City.

D. A Company that removes its Facilities from the PROW shall, at its own expense, replace and restore such PROW to a condition comparable to that which existed before the work causing the disturbance was done. If the Company does not do so after a reasonable period, the City may do so at the Company's expense. The security fund shall be available to pay for such work.

E. The City may, upon written application by a Company, approve the abandonment of any property in place by the Company under such terms and conditions as the City may approve. Upon City-approved abandonment of any property in place, the Company shall cause to be executed, acknowledged, and delivered to the City such instruments as the City shall prescribe and approve transferring and conveying the ownership of such property to the City.

16.10.130 City Vacation or Abandonment.

In the event any PROW or portion thereof used by a Company is vacated by the City consistent with state law, upon 180 days' prior notice, the Company shall forthwith remove its Facilities from the PROW unless specifically authorized in writing to continue. As a part of the removal, the Company shall restore, repair or reconstruct the area where the removal has occurred, consistent with Section 16.10.080, or to a lesser standard as may be specified by the Director. In the event of any failure, neglect or refusal of the Company, after 30 days' notice by the Director, to do such work, the Director may cause it to be done, and the Company shall, within 45 days of billing, pay any reasonable costs, including but not limited to administration, construction, consultants, equipment, inspection, notification, remediation, repair, restoration, or any other costs actually incurred by the Department or other agencies, boards, commissions, or departments of the City, that were made necessary by reason of the failure, neglect, or refusal to perform the work. The security fund shall be available to pay for such work.

16.10.140 System Location Data.

Annually, each Company shall provide the Director with data in a digital or other format specified by the Director which details and documents all the geographic locations of Facilities located in PROW. The record shall be updated whenever there have been

significant changes in the location of the Facilities. In addition, the Company shall maintain in its local office a complete, fully-dimensioned, and up-to-date set of as-built system maps and drawings upon completion of construction. As-built drawings shall show all Facilities and reflect whether the Facilities, including but not limited to cable facilities are presently being used. Dark fiber shall be denoted as such. The scale of maps and drawings shall be sufficient to show the required details in easily readable form and size.

16.10.150 Appeals.

A. An applicant for a PROW permit under this Chapter or any resident or owner of property located within 500 feet of the proposed Facility may appeal the decision of the Director to issue or deny that permit to the City Manager by filing with the City Clerk a statement addressed to the City Manager setting forth the facts and circumstances regarding the Director's decision and the basis for the appeal. The appeal shall be accompanied by a fee as established by resolution of the City Council. Appeals from an approval will not be permitted to the extent that the appeal is based on environmental effects from radiofrequency emissions that comply with all applicable FCC regulations, so long as such considerations are prohibited by federal law.

B. The right to such an appeal shall terminate upon the expiration of 10 business days following the deposit of the Director's decision in the United States mail to the Company and all persons who have requested notice of the Director's decision pursuant to Section 16.10.060.A. A decision by the Director shall inform the Company and any person receiving notice of the decision of their right to appeal to the City Manager.

C. The City Manager shall hear the appeal not less than 10 business days from the date on which it has been filed with the City Clerk, or such later date as the Company, any other appellant, and the City may agree to. The City Clerk shall provide written notification of the time and place set for hearing the appeal. The City Manager may sustain, overrule or modify the action of the Director. The decision of the City Manager shall be final. In the event that the time to approve or deny a permit application under state or federal law expires before the City Manager decides an appeal, the decision of the Director shall be final. Any such deadline may be extended by mutual agreement of all parties to the appeal, including the permit applicant.

D. Appeals shall be accompanied by such fees as are established by resolution of the City Council except that such fee may be waived in the discretion of the Director to avoid denying equal access to the appeals process, or other good cause.

16.10.160 Indemnity and Liability Insurance.

A. To the maximum extent permitted by applicable law, a Company, including each owner or operator of any Facility, shall at all times defend, indemnify, protect, save harmless, and exempt the City, the City Council, its officers, agents, servants, attorneys and employees from any and all expenses, and any and all penalties, damages or charges arising out of claims, suits, demands, causes of action, award of damages,

imposition of fines and penalties, whether compensatory or punitive, or expenses arising therefrom, either at law or in equity, which arise out of, or are caused by, the construction, erection, location, performance, operation, maintenance, repair, installation, replacement, removal or restoration of Facilities within the City based upon any act or omission of a Company, its agents or employees, contractors, subcontractors, independent contractors, or representatives, except for that which is attributable to the negligence or willful misconduct of the City, the City Council, its officers, agents, servants, attorneys and employees. With respect to the penalties, damages or charges referenced herein, reasonable attorneys' fees, consultants' fees, expert witness fees, and other litigation expenses are included as those costs which shall be recovered by the City. The City shall provide reasonable notice to a Company of any claim or lawsuit with which it has been served that is based on the construction, erection, location, performance, operation, maintenance, repair, installation, replacement, removal or restoration of Facilities within the City by a Company. For purposes of this paragraph, "Company" shall include the Company and its parents, subsidiaries, or affiliates to the fullest extent permitted by the law.

B. Except as provided in or as supplemented by any PROW Permit, a Company shall secure and maintain commercial general liability insurance, including bodily injury and property damage, with limits of \$7,000,000 per occurrence and \$7,000,000 in the aggregate, and shall have coverage at least as broad as the Insurance Service Office (ISO) Form No. CG 0001 or its successor, so long as any Facility of the Company remains in the PROW.

C. The commercial general liability insurance policy shall include the City, the City Council, and City employees and agents as additional insureds.

D. The commercial general liability insurance policy shall be issued by an agent or representative of an insurance Company licensed to do business in the State and rated A-VII or higher by A.M. Best Key Rating Guide for Property and Casualty Insurance Companies, or having an equivalent credit rating score issued by a comparable credit rating provider.

E. The certificate of insurance evidencing the required commercial general liability policy and additional insureds shall state that the insurer shall furnish the Director with at least 30 days' written notice in advance of the cancellation of the policy.

F. Before a Company commences any construction, the Company shall deliver the policies or certificates representing the insurance to the Director as required herein.

G. Renewal or replacement policies or certificates shall be delivered to the Director within five days of the expiration of the insurance which such policies are to renew or replace.

H. The Director may for good cause increase the coverage amounts specified in paragraph B of this section. Any Company required to maintain increased coverage under this section shall provide the Director with a certificate of insurance showing the

increased coverage amount. The Director shall provide at least 30 days' notice of intent to increase coverage amounts pursuant to this paragraph.

16.10.170 Revocation, Termination, and Modification of Permits.

A. In addition to all other rights and powers retained by the City, the City shall have the right to revoke any permit granted hereunder and to terminate all rights and privileges of the permit hereunder in the event of a substantial breach of the terms and conditions of said permit. A substantial breach shall include, but shall not be limited to, the following:

1. Violation of any material provision of this Chapter or of any material provision of a permit granted pursuant to this Chapter;
2. Any attempt to evade any material provision of a permit granted under this Chapter or to practice any fraud or deceit or deception upon the City;
3. The failure to obtain permits for or to begin or complete construction as provided under this Chapter or a permit granted under this Chapter;
4. Material misrepresentation of fact in the application for or negotiation of a permit under this Chapter; or
5. Failure to pay any fee or other payment required by this Chapter or a permit granted hereunder when due. Failure to pay said fee shall also require the telecommunications carrier to pay interest on any past-due fee or compensation to the City at the rate of 1.5% per month on the unpaid amount.

B. It is the intent of the City Council to regulate the installation of small wireless facilities in the PROW in a manner consistent with applicable state and federal law, including but not limited to the FCC's Declaratory Ruling and Third Report and Order, In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, 83 FR 51867-01 (adopted September 26, 2018 and released September 27, 2018, hereinafter "FCC Report and Order"). In the event that the FCC Report and Order is invalidated, modified, or limited in any way that expands the City's authority with respect to the placement and/or design of the small wireless facility, the Director may review and revoke or modify any permit issued under this Chapter based on any amendments to this Chapter, or based on new regulations established pursuant to Section 16.10.200.B. The requirements of this paragraph shall be included as a condition of approval of any permit issued pursuant to this Chapter.

16.10.180 Possessory Interest.

By accepting a permit under this Chapter, a Company acknowledges that notice is and was hereby given to it pursuant to California Revenue and Taxation Code Section 107.6 that use or occupancy of any public property may cause certain taxes to be levied upon such interest. A Company shall be solely liable for, and shall pay and discharge prior to delinquency, any and all possessory interest taxes or other taxes levied against its right

to possession, occupancy or use of any PROW or public property pursuant to any right of possession, occupancy or use created by any permit.

16.10.190 Violations.

A. The Director may issue an administrative citation pursuant to Chapter 1.28 for any violation of this Chapter.

B. If any violation of this Chapter is determined to constitute a public nuisance, the City may order the abatement of the nuisance pursuant to Chapter 1.24, and said violation shall upon application by the City be enjoined by a court of competent jurisdiction.

C. The foregoing remedies shall be deemed non-exclusive, cumulative remedies and in addition to any other remedy the City may have at law or in equity.

16.10.200 Adoption of Administrative Regulations or Guidelines.

A. The Director may adopt administrative regulations or guidelines to implement the provisions of this Chapter, so long as such guidelines do not diminish any requirement provided in this Chapter~~so long as such guidelines are consistent with the requirements of this Chapter~~. All such administrative regulations or guidelines shall be immediately effective when made publicly available in any format, which may include, but shall not be limited to, posting on the City's website.

B. In the event that the FCC Report and Order or any other law restricting local authority over the PROW is invalidated, modified, or limited in any way, or at any other time as deemed appropriate by the Director, the Director shall review any administrative regulations or guidelines adopted to implement this Chapter, and shall revise any such administrative regulations or guidelines to the extent necessary or appropriate to protect the public health, safety, and welfare consistent with applicable state and federal law.

16.10.210 Interpretation and Severability.

If any word, phrase, sentence, part, section, subsection, or other portion of this Chapter, or any application thereof to any person or circumstance, is declared void, unconstitutional, or invalid for any reason, then such word, phrase, sentence, part, section, subsection, or other portion, or the proscribed application thereof, shall be severable, and the remaining provisions of this Chapter, and all applications thereof not having been declared void, unconstitutional or invalid, shall remain in full force and effect.

Section 2. Copies of this Ordinance shall be posted for two days prior to adoption in the display case located near the walkway in front of the Maudelle Shirek Building, 2134 Martin Luther King Jr. Way. Within 15 days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation.

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SECTION 1. PURPOSE AND INTENT

(a) The City of Berkeley (“City”) intends these Guidelines to establish reasonable, uniform and comprehensive standards and procedures for the implementation of Berkeley Municipal Code Chapter 16.10. The standards and procedures contained in these Guidelines are intended to, and should be applied to, protect and promote public health, safety and welfare, and balance the benefits that flow from robust, advanced wireless services with the City’s local values, which include without limitation the aesthetic character of the City, its neighborhoods and community. These Guidelines are intended to achieve the following objectives:

(1) foster an aesthetically pleasing urban environment, protect and preserve public safety and general welfare, and protect the character of residential and adjacent neighborhood commercial areas by preventing visual blight and clutter from inappropriately designed and sited infrastructure facilities to the extent permitted by applicable laws;

(2) promote location and design of facilities to minimize interference with pedestrian and vehicular traffic, avoid damage to street trees, and protect historic and cultural, and natural resources by preventing degradation of their surrounding setting;

(3) minimize noise, traffic disruption, dust, air pollution, and other short-term impacts of construction activities and day-to-day operation;

(4) provide opportunities for citizens to comment on the location and design of overhead facilities, undergrounding work and aboveground structures to make installations more responsive to neighborhood concerns about their aesthetic and environmental effects;

(5) ensure that restoration of sidewalks, landscaped area, streets or other infrastructure damaged or removed is completed consistent with City specifications;

(6) provide greater certainty to both applicants and interested members of the public while ensuring compliance with all applicable City requirements;

(7) protect and preserve the City’s public rights-of-way and municipal infrastructure located within the City’s public rights-of-way; and

(8) promote access to high-quality, advanced wireless services for the City’s residents, businesses and visitors.

(b) These Guidelines are intended to establish regulations, and standards for small wireless facilities consistent with the City’s regulations for other infrastructure deployments unless specifically prohibited by applicable law. Different infrastructure deployments may be managed through other mechanisms, such as franchise or license

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agreements. These Guidelines are intended to be administered such that small wireless facility deployments shall apply the same aesthetic, maintenance and public safety regulations and standards to the permit or other approval issued in connection with a request for authorization under such franchise, license or other agreement. However, different infrastructure deployments may have different impacts on the public rights-of-way that require different regulations, standards or guidelines to protect public health, safety and welfare. To the extent that different regulations, standards or guidelines are applied to small wireless facilities or other infrastructure deployments, the City intends that one set be no more burdensome than comparable infrastructure when viewed under the totality of the circumstances.

(c) These Guidelines are not intended to, nor shall it be interpreted or applied to: (i) prohibit or effectively prohibit any personal wireless service provider's ability to provide personal wireless services; (ii) prohibit or effectively prohibit any entity's ability to provide any telecommunications service, subject to any competitively neutral and nondiscriminatory rules, regulations or other legal requirements for rights-of-way management; (iii) unreasonably discriminate among providers of functionally equivalent personal wireless services; (iv) regulate the placement, construction or modification of personal wireless service facilities on the basis of environmental effects of radio frequency emissions to the extent that such wireless facilities comply with the FCC's regulations concerning such emissions; (v) prohibit any collocation or modification that the City may not deny under federal or California state law; (vi) impose any unreasonable, discriminatory or anticompetitive fees that exceed the reasonable cost to provide the services for which the fee is charged; or (vii) otherwise authorize the City to preempt any applicable federal or California law.

(d) These Guidelines are not intended to and will not limit or prejudice any individual's ability to seek a reasonable accommodation under the Americans with Disabilities Act, the Fair Housing Act Amendments of 1988, the California Fair Employment and Housing Act or any other similar federal or state law due to electromagnetic sensitivity or symptoms based on exposure to radio frequency emissions.

SECTION 2. DEFINITIONS

The definitions in this Section 2 are applicable to the terms, phrases and words of these Guidelines. Undefined terms, phrases or words will have the meanings assigned to them in 47 U.S.C. § 153 or, if not defined therein, will have the meaning assigned to them in the Berkeley Municipal Code or, if not defined in either therein, will have their ordinary meanings. If any definition assigned to any term, phrase or word in this Section 2 conflicts with any federal or state-mandated definition, the federal or state-mandated definition will control.

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“Accessory equipment” means equipment other than antennas used in connection with a small wireless facility or other infrastructure deployment. The term includes “transmission equipment” as defined by the FCC in 47 C.F.R. § 1.6100(b)(8), as may be amended or superseded.

“Antenna” means the same as defined by the FCC in 47 C.F.R. § 1.6002(b), as may be amended or superseded.

“Batched application” means more than one application submitted at the same time by the same applicant with the intention that the City shall process the requests for authorization together as a group.

“Collocation” means the same as defined by the FCC in 47 C.F.R. § 1.6002(g), as may be amended or superseded.

“CPUC” means the California Public Utilities Commission established in the California Constitution, Article XII, § 5, or its duly appointed successor agency.

“Decorative pole” means any pole that includes decorative or ornamental features, design elements and/or materials intended to enhance the appearance of the pole or the public rights-of-way in which the pole is located.

“Director” means the same as defined in Berkeley Municipal Code Section 16.10.020.

“FCC” means the Federal Communications Commission or its duly appointed successor agency.

“FCC Shot Clock” means the FCC’s presumptively reasonable time frame, accounting for any tolling or voluntary extension, or unusual circumstances justifying additional time, within which the City generally must act on a duly filed request for authorization in connection with a personal wireless service facility, as such time frame is defined by the FCC and as may be amended or superseded. For small wireless facilities, the FCC Shot Clock is 60 days for collocations and 90 days for new structures. For batched applications, the longest shot clock applicable to any small wireless facility in the batch shall be applicable to the entire batch (e.g., in a batch with four collocations and one new/replacement pole, the FCC Shot Clock would be 90 days for the entire batch even though the collocation applications would be 60 days if submitted on an individual basis).

“OTARD” means an “over-the-air reception device” and includes all antennas and antenna supports covered by 47 C.F.R. § 1.4000(a)(1), as may be amended or superseded.

“Personal wireless services” means the same as defined in 47 U.S.C. § 332(c)(7)(C)(i), as may be amended or superseded.

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“**Personal wireless service facilities**” means the same as defined in 47 U.S.C. § 332(c)(7)(C)(i), as may be amended or superseded.

“**Public right-of-way**” or “**public rights-of-way**” has the meaning provided in BMC section 16.10.020.A.14.

“**RF**” means radio frequency or electromagnetic waves.

“**Shot clock days**” means calendar days counted toward the presumptively reasonable time under the applicable FCC Shot Clock. The term “shot clock days” does not include any calendar days on which the FCC Shot Clock is tolled. As an illustration and not a limitation, if an applicant applies on February 1, receives a valid incomplete notice on February 5 and then resubmits on February 20, only four “shot clock days” have elapsed because the time between the incomplete notice and resubmittal are not counted.

“**Small wireless facility**” means the same as defined by the FCC in 47 C.F.R. § 1.6002(l), as may be amended or superseded.

“**Support structure**” means a “structure” as defined by the FCC in 47 C.F.R. § 1.6002(m), as may be amended or superseded.

“**Underground district**” means any area in the City within which overhead wires, cables, cabinets and associated overhead equipment, appurtenances and other improvements are either (i) prohibited by ordinance, resolution or other applicable law; (ii) scheduled to be relocated underground within 18 months from the time an application is submitted; or (iii) primarily located underground at the time an application is submitted.

SECTION 3. APPLICABILITY

(a) **Small Wireless Facilities.** Except as expressly provided otherwise, the provisions in these Guidelines shall be applicable to all existing small wireless facilities and all applications and requests for authorization to construct, install, attach, operate, collocate, modify, reconstruct, relocate, remove or otherwise deploy small wireless facilities within the public rights-of-way within the City’s jurisdictional and territorial boundaries.

(b) **Other Infrastructure Deployments.** To the extent that other infrastructure deployments, including without limitation any deployments that require approval pursuant to Chapter 16.10, involve the same or substantially similar structures, apparatus, antennas, equipment, fixtures, cabinets, cables or improvements as those deployed for small wireless facilities, the City official or designee responsible to review and approve or deny requests for authorization in connection with such other

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infrastructure deployment shall apply the provisions in these Guidelines unless specifically prohibited by applicable law.

(c) **Exemptions.** These Guidelines shall not be applicable to (i) OTARD facilities and (ii) requests for approval to collocate, replace or remove transmission equipment at an existing wireless tower or base station submitted pursuant to as 47 U.S.C. § 1455(a), which will be subject to the current FCC rules and regulations applicable to “eligible facilities requests” as defined by FCC and as may be amended or superseded.

SECTION 4. APPLICATION AND REVIEW PROCEDURES

(a) **Application Requirements for Small Wireless Facilities.** Berkeley Municipal Code Sections 16.10.040 and 16.10.045 set forth the minimum application requirements for a PROW Permit. In addition, or as clarification, to the minimum requirements in the Berkeley Municipal Code and any other publicly stated requirements, all PROW Permit applications for small wireless facilities must include the following information and materials:

(1) **Application Form.** The applicant shall submit a complete, duly executed PROW Permit application on the current City of Berkeley form.

(2) **Application Fee.** The applicant shall submit the applicable PROW Permit application fee established by City Council resolution. Batched applications must include the applicable PROW Permit application fee for each small wireless facility in the batch. If no PROW Permit application fee has been established, then the applicant must submit a signed written statement that acknowledges that the applicant will be required to reimburse the City for its reasonable costs incurred in connection with the application within 10 days after the City issues a written demand for reimbursement.

(3) **Construction Drawings.** The applicant shall submit true and correct construction drawings, prepared, signed by a licensed or registered engineer, that depict all the existing and proposed improvements, equipment and conditions related to the proposed project, which includes without limitation any and all poles, posts, pedestals, traffic signals, towers, streets, sidewalks, pedestrian ramps, driveways, curbs, gutters, drains, handholes, maintenance holes, fire hydrants, equipment cabinets, antennas, cables, trees and other landscape features. The construction drawings must: (i) contain cut sheets that contain the technical specifications for all existing and proposed antennas and accessory equipment, which includes without limitation the manufacturer, model number and physical dimensions; (ii) identify all potential support structures within 75 feet from the proposed project site and call out such structures' overall height above ground level; (iii) depict the applicant's preliminary plan for electric and data backhaul utilities, which shall include the anticipated locations for all conduits, cables, wires, handholes, junctions, transformers, meters, disconnect switches, and points of connection; (iv) include locations for existing utility facilities

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within 50 feet of the footprint of work; and (v) demonstrate that proposed project will be in full compliance with all applicable health and safety laws, regulations or other rules, which includes without limitation all building codes, electric codes, local street and sidewalk standards and specifications, and public utility regulations and orders. All pole attachments shall be shown with pole numbers.

(4) **Site Survey.** For any small wireless facility, the applicant shall submit a survey prepared, signed and stamped by a licensed engineer. The survey must identify and depict all existing boundaries, encroachments and other structures within 75 feet from the proposed project site and any new improvements, which includes without limitation all: (i) traffic lanes; (ii) all private properties and property lines; (iii) above and below-grade utilities and related structures and encroachments; (iv) fire hydrants, roadside call boxes and other public safety infrastructure; (v) streetlights, decorative poles, traffic signals and permanent signage; (vi) sidewalks, driveways, parkways, curbs, gutters and storm drains; (vii) benches, trash cans, mailboxes, kiosks and other street furniture; and (viii) existing trees, planters and other landscaping features.

(5) **Photo Simulations.** The applicant shall submit site photographs and photo simulations that show the existing location and proposed small wireless facility in context from at least three vantage points within the public streets or other publicly accessible spaces, together with a vicinity map that shows the proposed site location and the photo location for each vantage point. At least one simulation must depict the small wireless facility from a vantage point approximately 50 feet from the proposed support structure or location. The photo simulations and vicinity map shall be incorporated into the construction plans submitted with the application.

(6) **Project Narrative and Justification.** The applicant shall submit a written statement that explains in plain factual detail whether and why the proposed facility qualifies as a “small wireless facility” as defined by the FCC in 47 C.F.R. § 1.6002(l). A complete written narrative analysis will state the applicable standard and all the facts that allow the City to conclude the standard has been met—bare conclusions not factually supported do not constitute a complete written analysis. As part of the written statement the applicant must also include (i) an analysis of whether and why the proposed support structure is a “structure” as defined by the FCC in 47 C.F.R. § 1.6002(m); (ii) where required or permitted by federal or state law, an analysis of whether and why the facility fills a gap in personal wireless services, introduces new personal wireless services, or improves existing personal wireless services, together with evidence of the existence of such gap or provision of such new service or improvement (including but not limited to applicable service area and network maps); (iii) an analysis of whether and why the proposed wireless facility meets the location and design standards in these Guidelines; (iv) evidence of a bona fide plan to actually deploy facilities by the applicant or specified third-party lessee(s); and (v) any additional information required in BMC Section 16.10.040 or Section 16.10.045.

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(7) **RF Compliance Report.** The applicant shall submit an RF exposure compliance report that certifies that the proposed small wireless facility, both individually and cumulatively with all other emitters that contribute more than 5% to the cumulative emissions in the vicinity (if any), will comply with applicable federal RF exposure standards and exposure limits. The RF report must be prepared and certified by an RF engineer acceptable to the Director. The RF report must include the actual frequency bands and power levels (in watts effective radiated power) for all existing and proposed antennas at the site and exhibits that show the location and orientation of all transmitting antennas and the boundaries of areas with RF exposures in excess of the uncontrolled/general population limit (as that term is defined by the FCC) and also the boundaries of areas with RF exposures in excess of the controlled/occupational limit (as that term is defined by the FCC). Each such boundary shall be clearly marked and identified for every transmitting antenna at the project site. If the applicant submits a batched application, a separate RF report shall be prepared for each facility associated with the batch.

(8) **Public Notices.** The applicant shall include with the application an affidavit that attests that notice has been posted at the project site and three other conspicuous locations within 500 feet of the project site, and delivered by first class mail to all record owners and legal occupants of all properties within 500 feet from the proposed project site. Notice to the legal occupants shall be deemed given when sent to the property's physical address. The notice shall be posted or delivered pursuant to Berkeley Municipal Code Section 16.10.040 and must contain: (i) a general project description; (ii) the applicant's identification and contact information as provided on the application submitted to the City for interested parties to submit comments; (iii) contact information for the Director; (iv) a statement that the Director will act on the application without a public hearing and that the owner or occupant may request to be notified of the Director's decision; (v) if the application is for a small wireless facility, a general statement that the FCC requires the City to take final action on such applications within 60 days for collocations and 90 days for facilities on new support structures; and (vi) a statement that any person that wishes to seek a reasonable accommodation under the American with Disabilities Act or Fair Housing Amendments Act may do so. The notice shall be delivered in an envelope that prominently displays the operator's logo and shall prominently display the text "NEW WIRELESS FACILITY INFORMATION" on the front of the envelope. The applicant shall maintain (a) a list of recipients of the public notice and a log of any correspondence to or from the recipients of the notice prior to the City's final decision on the application, and (b) a separate list of recipients of the public notice who have requested to receive notice of the Director's decision to issue or deny a PROW Permit under Berkeley Municipal Code section 16.10.060.A.

(9) **Regulatory Authorization.** The applicant shall submit evidence of the applicant's regulatory status under federal and California law to provide the services and construct the small wireless facility proposed in the application. As an illustration, but not as a limitation, the applicant's status as a telephone corporation under California

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law could be established by providing a copy of the applicant's Certificate of Public Convenience and Necessity.

(10) **Property Owner's Authorization.** For any small wireless facility proposed to be installed on an existing or replacement support structure in the public rights-of-way, the applicant must submit the support structure identification number and a written authorization from the support structure owner(s). As an illustration, but not as a limitation, an applicant that proposes to install a small wireless facility on a utility pole owned or controlled by the Northern California Joint Pole Authority ("NCJPA") shall, pursuant to Berkeley Municipal Code Section 16.10.045.A, provide evidence that the proposed facility has been (i) affirmatively approved by all entities with authority to grant or deny permission for the installation or (ii) deemed approved by the operation of the NCJPA's procedures.

(11) **Acoustic Analysis.** The applicant shall submit an acoustic analysis prepared and certified by a California licensed engineer for the proposed small wireless facility and all associated equipment including all environmental control units, sump pumps, temporary backup power generators and permanent backup power generators demonstrating compliance with the applicable provisions in Berkeley Municipal Code Chapter 13.40. The acoustic analysis must also include an analysis of the manufacturers' specifications for all noise-emitting equipment and a depiction of the proposed equipment relative to all adjacent property lines. ~~In lieu of an acoustic analysis~~Where no generator, mechanical fan, or other noise-emitting equipment is proposed for installation, the applicant may submit, in lieu of an acoustic analysis, evidence from the equipment manufacturer(s) that demonstrates the ambient noise emitted from all the proposed equipment will not, both individually and cumulatively, exceed the applicable noise limits.

(12) **Structural Analysis.** The applicant shall submit a report prepared and certified by an California-licensed structural engineer (or other qualified personnel acceptable to the City) that certifies (i) the underlying pole or support structure has the structural integrity and/or capacity to support all the proposed equipment and attachments; (ii) the foundation has the capacity to support additional loading and to accommodate any modifications to the pole base and bolt pattern; and (iii) any drilling or cutting will preserve the structural integrity of the pole. At a minimum, the analysis must be consistent with all applicable requirements in CPUC General Order 95 (including, but not limited to, load and pole overturning calculations), the National Electric Safety Code, the standards and practices required for an ANSI/TIA-222 Maintenance and Conditions Assessment (under the most current revision at the time of submittal), and any safety and construction standards required by law and the utility provider.

(b) **Community Meeting.** The City strongly encourages, but does not require, applicants to schedule, notice, arrange, and attend a pre-submittal community meeting with all interested members of the public. This voluntary, pre-submittal public meeting

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does not cause the FCC Shot Clock to begin and is intended to give applicants the opportunity to hear from members of the public regarding proposed deployment. Applicants are encouraged (but not required) to bring any draft applications, plans, maps, presentations or other materials to facilitate the public's understanding of the applicant's proposal. The City seeks to encourage dialogue that may allow applicants to address and resolve areas of concern prior to the applicant submitting an application.

(c) **Submittal Appointments.** All applications must be submitted in person to the City at a pre-scheduled appointment with the Director. Prospective applicants may generally submit one application per appointment, or up to five individual applications per appointment as a batch. Potential applicants may schedule successive appointments for multiple applications whenever feasible and not prejudicial to other applicants for any other development project as determined by the Director. The Director shall use reasonable efforts to offer an appointment within five working days after the Director receives a written request from a potential applicant. Any purported application received without an appointment, whether delivered in-person, by mail or through any other means, will not be considered duly filed, regardless of whether the City retains, returns or destroys the materials received.

(d) **Incomplete Applications Deemed Withdrawn.** Any application governed under these Guidelines shall be automatically deemed withdrawn by the applicant when the applicant fails to submit a substantive response to the Director within 60 calendar days after the Director deems the application incomplete by written notice. As used in this subsection (d), a "substantive response" must include, at a minimum, some or all the materials identified as incomplete in the written incomplete notice.

(e) **Peer and Independent Consultant Review.** Pursuant to Berkeley Municipal Code Section 16.10.040.I, the Director may, ~~in~~at their discretion, select and retain an independent consultant with specialized training, experience and/or expertise in applicable regulations for human exposure to RF emissions to verify the results of the applicant's RF compliance report and analysis including, without limitation: (i) pre-construction planned compliance with applicable regulations for human exposure to RF emissions; (ii) post-construction actual compliance with applicable regulations for human exposure to RF emissions; and (iii) the applicability, reliability and/or sufficiency of any information, analyses or methodologies used by the applicant to reach any conclusions about any issue within the City's discretion to review. The Director may require that the independent consultant prepare written reports, testify at public meetings, hearings and/or appeals and attend meetings with City staff and/or the applicant. Subject to applicable law, in the event that the Director elects to retain an independent consultant in connection with any permit application, the applicant shall be responsible for the reasonable costs in connection with the services provided, which may include without limitation any costs incurred by the independent consultant to attend and participate in any meetings or hearings. Before the independent consultant may perform any services, the applicant shall tender to the City a deposit in an amount

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equal to the estimated cost for the consultant's services to be provided, as determined by the Director until the City adopts the initial required deposit by fee schedule. The Director may request additional deposits as reasonably necessary to ensure sufficient funds are available to cover the reasonable costs in connection with the independent consultant's services. In the event that the deposit exceeds the total costs for consultant's services, the Director shall promptly return any unused funds to the applicant after the wireless facility has been installed and passes a final inspection by the Director. In the event that the reasonable costs for the independent consultant's services exceed the deposit, the Director shall invoice the applicant for the balance. The City shall not issue any construction or PROW Permit to any applicant with any unpaid deposit requests or invoices.

(f) **Public Comment Log.** Applicants shall maintain a log of all calls and correspondence received by the applicant from the public in response to the public notice required pursuant to Berkeley Municipal Code Section 16.10.040.F, including the commenter's name, property address and comment, the date the comment was received and the applicant's response and resolution. A copy of the log shall be provided to the City upon the Director's request, prior to the Director's decision or before the applicable shot clock expires, whichever occurs first.

(g) **Public Information.** Information regarding the location and status of all proposed and active small wireless facilities and applicant contact information shall be posted on the City of Berkeley website.

SECTION 5. DECISIONS

(a) **Initial Administrative Decision.** Not more than 29 shot clock days after the application has been deemed complete, the Director shall approve, conditionally approve or deny a complete and duly filed PROW Permit application without a public hearing. Failure of the Director to comply with the timetable in this paragraph shall not affect the Director's authority to approve or deny any permit.

(b) **Criteria for Approval.** Berkeley Municipal Code Section 16.10.060.B sets forth the criteria for the Director to determine whether to grant or deny a PROW Permit. To clarify such criteria in the context of small wireless facilities, the Director shall also consider whether:

(1) the proposed project complies with all applicable design standards (Section 7) and location standards (Section 8) in these Guidelines; and

(2) the applicant has demonstrated that the proposed project will be in planned compliance with all applicable FCC regulations and guidelines for human exposure to RF emissions.

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(c) **Conditional Approvals; Denials Without Prejudice.** Subject to any applicable state or federal laws, nothing in these Guidelines is intended to limit the Director's ability to conditionally approve or deny without prejudice any PROW Permit application as may be necessary or appropriate to ensure compliance with these Guidelines.

(d) **Application Decision Notice.** Within five calendar days after the Director acts on a PROW Permit application, the Director shall provide written notice to the applicant. If the Director denies an application (with or without prejudice) for a small wireless facility, the written notice must also contain the reasons for the denial.

SECTION 6. CONDITIONS OF APPROVAL

(a) **Standard Conditions.** In addition to, and consistent with, the construction, operation, maintenance, removal and relocation standards in Berkeley Municipal Code Chapter 16.10, and except as may be authorized in subsection (b), all PROW Permits issued under these Guidelines shall be automatically subject to the conditions in this subsection (a).

(1) **Permit Term.** Any PROW Permit will automatically expire 10 years and one day from its issuance unless California Government Code § 65964(b) authorizes the City to establish a shorter term for public safety or substantial land use reasons. Any other permits or approvals issued in connection with any collocation, modification or other change to this wireless facility, which includes without limitation any permits or other approvals deemed-granted or deemed- approved under federal or state law, will not extend this term limit unless expressly provided otherwise in such permit or approval or required under federal or state law.

(2) **Permit Renewal.** Not more than one year before the PROW Permit expires, the permittee may apply for permit renewal. The permittee must demonstrate that the subject small wireless facility or other infrastructure deployment complies with all the conditions of approval associated with the PROW Permit and all applicable provisions in the Berkeley Municipal Code and the Guidelines that exist at the time the decision to renew or not renew is rendered. The Director may modify or amend the conditions on a case-by-case basis as may be necessary or appropriate to ensure compliance with the Berkeley Municipal Code, these Guidelines or other applicable law. Upon renewal, the PROW Permit will automatically expire 10 years and one day from its issuance unless issued for a shorter duration pursuant to the previous paragraph.

(3) **Post-Installation Certification.** Within 60 calendar days after the permittee receives the final inspection or completes the construction/installation of a small wireless facility, the permittee shall provide the Director with documentation reasonably acceptable to the Director that the small wireless facility has been installed and/or constructed in strict compliance with the approved construction drawings and photo

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simulations. Such documentation shall include without limitation as-built drawings, GIS data and site photographs.

(4) **Build-Out Period.** Any PROW Permit will automatically expire 12 months from the approval date (the “build-out period”) unless the permittee obtains all other permits and approvals required to install, construct and/or operate the approved small wireless facility or other infrastructure deployment, which includes without limitation any permits or approvals required by any federal, state or local public agencies with jurisdiction over the subject property, support structure or the small wireless facility or other infrastructure deployment and its use, and delivers the Post-Installation Certification to the City as required under this Section. The permittee may request in writing, and the City may grant in writing, one, six-month extension if the permittee submits substantial and reliable written evidence demonstrating justifiable cause for a six-month extension. If the build-out period and any extension finally expires, the permit shall be automatically void but the permittee may resubmit a complete application, including all application fees, for the same or substantially similar project.

(5) **Site Maintenance.** The permittee shall comply with the provisions of the most current editions of the City’s Building Code, Plumbing Code, Electrical Code, any applicable City-adopted Public Works construction standards, and specifications and plans, as they are modified from time to time, and any applicable federal, state or local statutes, ordinances, regulations, guidelines, or requirements. The permittee shall keep the site, which includes without limitation any and all improvements, equipment, structures, access routes, fences and landscape features, in a neat, clean and safe condition in accordance with the approved construction drawings and all conditions in the PROW Permit. The permittee shall keep the site area free from all litter and debris at all times. The facility shall be manufactured or treated to resist graffiti. The permittee, at no cost to the City, shall monitor and abate any graffiti or other vandalism at the site. The permittee shall make reasonable commercial efforts to remove graffiti within 72 hours after the permittee receives notice or otherwise becomes aware that such graffiti or other vandalism occurred.

(6) **Compliance with Laws.** The permittee shall maintain compliance at all times with all federal, state and local statutes, regulations, orders or other rules that carry the force of law (“laws”) applicable to the permittee, the subject property, the small wireless facility or other infrastructure deployment or any use or activities in connection with the use authorized in the PROW Permit, which includes without limitation any laws applicable to human exposure to RF emissions and the City’s RF compliance procedures as set forth in Berkeley Municipal Code Section 16.10.100.G and consistent with applicable FCC regulations. The permittee expressly acknowledges and agrees that this obligation is intended to be broadly construed and that no other specific requirements in these conditions are intended to reduce, relieve or otherwise lessen the permittee’s obligations to maintain compliance with all laws. No failure or omission by the City to timely notice, prompt or enforce compliance with any applicable provision in

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the Berkeley Municipal Code, these Guidelines, any permit, any permit condition or any applicable law or regulation, shall be deemed to relieve, waive or lessen the permittee's obligation to comply in all respects with all applicable provisions in the Berkeley Municipal Code, these Guidelines, any permit, any permit condition or any applicable law or regulation.

(7) Construction Activities and Adverse Impacts on Other Properties.

Construction shall be coordinated with other utility companies or applicants installing infrastructure in the public rights-or-way as provided for in Berkeley Municipal Code Section 16.10.050. Construction shall be scheduled and conducted so as to minimize interference with public use of the right-of-way including access to the right-of-way from private property. The permittee shall use all reasonable efforts to avoid any and all unreasonable, undue or unnecessary adverse impacts on nearby properties that may arise from the permittee's or its authorized personnel's construction, installation, operation, modification, maintenance, repair, removal and/or other activities on or about the site, including the public's use of rights-of-way and the public's access to the rights-of-way from private property. The permittee shall not perform or cause others to perform any construction, installation, operation, modification, maintenance, repair, removal or other work that involves heavy equipment or machines except during normal construction work hours authorized by the Berkeley Municipal Code. The restricted work hours in this condition will not prohibit any work required to prevent an actual, immediate harm to property or persons, or any work during an emergency declared by the City or other state or federal government agency or official with authority to declare an emergency within the City. The Director may issue a stop work order for any activity that violates this condition in whole or in part. The permittee agrees to fully cooperate with the City in assisting the City to achieve its accommodation obligations under the Americans with Disabilities Act, the Fair Housing Act Amendments of 1988 and other applicable laws.

(8) Inspections; Emergencies. The permittee expressly acknowledges and agrees that the City's officers, officials, staff, agents, contractors or other designees may enter onto the site and inspect the improvements and equipment upon reasonable prior notice to the permittee. Notwithstanding the prior sentence, the City's officers, officials, staff, agents, contractors or other designees may (i) at any time inspect the facility visually or with any remote sensing equipment from the PROW and (ii) may, but will not be obligated to, enter onto the site area without prior notice to support, repair, disable or remove any improvements or equipment in emergencies or when such improvements or equipment threatens actual, imminent harm to property or persons. The permittee, if present, may observe the City's officers, officials, staff or other designees while any such inspection or emergency access occurs.

(9) Permittee's Contact Information. Within 10 days from the final approval, the permittee shall furnish the City with accurate and up-to-date contact information for a person responsible for the small wireless facility or other infrastructure deployment,

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which includes without limitation such person's full name, title, direct telephone number, mailing address and email address. The permittee shall keep such contact information up-to-date at all times and promptly provide the City with updated contact information if either the responsible person or such person's contact information changes.

(10) **Indemnification and Insurance.** The permittee shall indemnify the City, and secure and maintain liability insurance in favor of the City, in accordance with Berkeley Municipal Code Section 16.10.160. In the event the City becomes aware of any claims, the City will use best efforts to promptly notify the permittee and the private property owner (if applicable) and shall reasonably cooperate in the defense. The permittee expressly acknowledges and agrees that the City shall have the right to approve, which approval shall not be unreasonably withheld, the legal counsel providing the City's defense, and the property owner and/or permittee (as applicable) shall promptly reimburse the City for any costs and expenses directly and necessarily incurred by the City in the course of the defense. The permittee expressly acknowledges and agrees that the permittee's indemnification obligations under this condition are a material consideration that motivates the City to approve this PROW Permit, and that such indemnification obligations will survive the expiration, revocation or other termination of this PROW Permit.

(11) **Performance Bond; Contractor Information.** Before the City issues any permit required to commence construction in connection with this permit, the permittee shall post a performance bond from a surety and in a form acceptable to the Director in an amount reasonably necessary to cover the cost to remove, store and/or dispose of the improvements and restore all affected areas based on a written estimate from a qualified contractor with experience in wireless facilities or other infrastructure removal. The written estimate must include the cost to remove, reasonably store and/or dispose of all equipment and other improvements, which includes without limitation all antennas, radios, batteries, generators, utilities, cabinets, mounts, brackets, hardware, cables, wires, conduits, structures, shelters, towers, poles, footings and foundations, whether above ground or below ground, constructed or installed in connection with the wireless facility, plus the cost to completely restore any areas affected by the removal work to a standard compliant with applicable laws. In establishing or adjusting the bond amount required under this condition, the Director shall take into consideration any information provided by the permittee regarding the cost to remove, reasonably store and/or dispose of the small wireless facility or other infrastructure deployment to a standard compliant with applicable laws. The performance bond shall expressly survive the duration of the permit term to the extent required to effectuate a complete removal of the subject wireless facility or other infrastructure deployment in accordance with this condition. In addition, before the City issues any permit required to commence construction, the permittee shall furnish the City with accurate and up-to-date contact information for the contractor responsible for the construction of the facility, which includes without limitation such person's full name, title, direct telephone number, mailing address and email address

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(12) **Permit Revocation.** Any permit granted under these Guidelines may be revoked in accordance with the provisions and procedures in Berkeley Municipal Code Section 16.10.170. The Director may initiate revocation proceedings when the Director has information that the facility may not be in compliance with all applicable laws, which includes without limitation, any permit in connection with the facility and any associated conditions with such permit(s). Before any public hearing to revoke a permit granted under these Guidelines, the Director must issue a written notice to the permittee that specifies (i) the facility; (ii) the violation(s) to be corrected; (iii) the timeframe in which the permittee must correct such violation(s); and (iv) that, in addition to all other rights and remedies the City may pursue, the City may initiate revocation proceedings for failure to correct such violation(s). The Director may revoke a permit if the violation(s) are not corrected within 30 days of the date of mailing of the notice, or within the timeframe to correct such violation(s), whichever is longer, when the Director finds that the facility is not in compliance with any applicable laws, which includes without limitation, any permit in connection with the facility and any associated conditions with such permit(s). The permittee may appeal the decision of the Director to the City Council within 10 days of service of the decision via first class mail. Any decision by the City Council to revoke or not revoke a permit shall be made after a duly noticed public hearing, and shall be final and not subject to any further appeals. Within five business days after the City Council adopts a resolution to revoke a permit, the Director shall provide the permittee with a written notice that specifies the revocation and the reasons for such revocation.

(13) **Record Retention.** Throughout the permit term, the permittee must maintain a complete and accurate copy of the written administrative record, which includes without limitation the PROW Permit application, PROW Permit, the approved plans and photo simulations incorporated into this approval, all conditions associated with this approval, any permits or approvals issued in connection with this approval and any records, memoranda, documents, papers and other correspondence entered into the public record in connection with the PROW Permit (collectively, "records"). If the permittee does not maintain such records as required in this condition, any ambiguities or uncertainties that would be resolved by inspecting the missing records will be construed against the permittee. The permittee shall protect all records from damage from fires, floods and other hazards that may cause deterioration. The permittee may keep records in an electronic format; provided, however, that hard copies or electronic records kept in the City's regular files will control over any conflicts between such City-controlled copies or records and the permittee's electronic copies, and complete originals will control over all other copies in any form. The requirements in this condition shall not be construed to create any obligation to create or prepare any records not otherwise required to be created or prepared by other applicable laws. Compliance with the requirements in this condition shall not excuse the permittee from any other similar record-retention obligations under applicable law.

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(14) **Landscaping.** The permittee shall replace any landscape features damaged or displaced by the construction, installation, operation, maintenance or other work performed by the permittee or at the permittee's direction on or about the site. The permittee shall comply with the requirements in Berkeley Municipal Code Chapter 12.44 and Section 8(d) of these Guidelines.

(15) **Cost Reimbursement.** The permittee acknowledges and agrees that (i) the permittee's request for authorization to construct, install and/or operate the wireless facility will cause the City to incur costs and expenses; (ii) the permittee shall be responsible to reimburse the City for all costs incurred in connection with the permit, which includes without limitation costs related to application review, permit issuance, site inspection and any other costs reasonably related to or caused by the request for authorization to construct, install and/or operate the wireless facility or other infrastructure deployment; (iii) any application fees required for the application may not cover all such reimbursable costs and that the permittee shall have the obligation to reimburse the City for all such costs 10 days after a written demand for reimbursement and reasonable documentation to support such costs; and (iv) the City shall have the right to withhold any permits or other approvals in connection with the wireless facility until and unless any outstanding costs have been reimbursed to the City by the permittee.

(16) **Future Undergrounding Programs.** Notwithstanding any term remaining on any PROW Permit, if other utilities or communications providers in the public rights-of-way underground their facilities in the segment of the public rights-of-way where the permittee's small wireless facility or other infrastructure deployment is located, the permittee must also underground its equipment, except the antennas and any approved electric meter, at approximately the same time. Accessory equipment such as radios and computers that require an environmentally controlled underground vault to function shall not be exempt from this condition. Such undergrounding shall occur at the permittee's sole cost and expense except as may be reimbursed through tariffs approved by the state public utilities commission for undergrounding costs.

(17) **Electric Meter Upgrades.** If the commercial electric utility provider adopts or changes its rules obviating the need for a separate or ground-mounted electric meter and enclosure, the permittee on its own initiative and at its sole cost and expense shall remove the separate or ground-mounted electric meter and enclosure. Prior to removing the electric meter, the permittee shall apply for any permit(s) required to perform the removal. Upon removal, the permittee shall restore the affected area to its original condition that existed prior to installation of the equipment.

(18) **Rearrangement and Relocation.** The permittee acknowledges that the City, in its sole discretion and at any time, may: (i) change any street grade, width or location; (ii) add, remove or otherwise change any improvements in, on, under or along any street owned by the City or any other public agency, which includes without limitation

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any sewers, storm drains, conduits, pipes, vaults, boxes, cabinets, poles and utility systems for gas, water, electric or telecommunications; and/or (iii) perform any other work deemed necessary, useful or desirable by the City (collectively, "City work"). The City reserves the rights to do any and all City work without any admission on its part that the City would not have such rights without the express reservation in this PROW Permit. If the Director determines that any City work will require the permittee's small wireless facility located in the public rights-of-way to be rearranged and/or relocated, the permittee shall, at its sole cost and expense, do or cause to be done all things necessary to accomplish such rearrangement and/or relocation. If the permittee fails or refuses to either permanently or temporarily rearrange and/or relocate the permittee's small wireless facility or other infrastructure deployment within a reasonable time after the Director's notice, the City may (but will not be obligated to) cause the rearrangement or relocation to be performed at the permittee's sole cost and expense. The City may exercise its rights to rearrange or relocate the permittee's small wireless facility or other infrastructure deployment without prior notice to permittee when the Director determines that City work is immediately necessary to protect public health or safety. The permittee shall reimburse the City for all costs and expenses in connection with such work within 10 days after a written demand for reimbursement and reasonable documentation to support such costs.

(19) **Truthful and Accurate Statements.** The permittee acknowledges that the City's approval relies on the written and/or oral statements by permittee and/or persons authorized to act on permittee's behalf. In any matter before the City in connection with the PROW Permit or the infrastructure approved under the PROW Permit, neither the permittee nor any person authorized to act on permittee's behalf shall, in any written or oral statement, recklessly or intentionally provide material factual information that is incorrect or misleading or intentionally or recklessly omit any material information necessary to prevent any material factual statement from being incorrect or misleading. Failure to comply with this paragraph may result in permit revocation and other sanction pursuant to this Section. All certifications required by these Guidelines shall be made under penalty of perjury.

(20) **Trenching and Excavation.** Facilities that require excavation shall be installed within existing facilities whenever sufficient excess capacity is available subject to reasonable terms and conditions. Excavation and trenching activities shall not disturb the root systems of trees measuring 24 inches or more in diameter. Protective fencing should be installed around street trees within or adjacent to the work area to prevent damage to branches, trunks, or root systems. If any cultural resources are discovered during excavation, trenching, or other construction activities, work shall be stopped immediately and the Director of Planning and Development shall be notified. Directional boring should be used instead of trenching whenever possible to minimize interference with vehicular traffic and may be required by the City when working in streets that have been recently resurfaced or resealed. When trenching is necessary, all trenches shall

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be covered at the end of each workday. The total time that a trench may remain open in any segment of the road system should not exceed one week.

(21) **Construction Hours and Noise Control.** Noise-producing site preparation and construction activities shall comply with Berkeley Municipal Code Section 13.40.070, or as designated in the permit. All trucks and equipment shall use the best available noise control techniques and equipment including improved mufflers, intake silencers, ducts, engine enclosures, and noise-reducing shields or shrouds. Impact tools such as jackhammers, pavement breakers, and noise drills shall be hydraulically or electrically powered wherever feasible to avoid noise associated with compressed air exhaust from pneumatically powered tools. When the use of pneumatic tools is unavoidable, an exhaust muffler shall be used on the compressed air exhaust to lower noise levels. External jackets shall be used on tools where feasible to achieve noise reductions. To the extent as technically feasible, quieter procedures shall be used, such as drilling instead of jack hammering. Stationary noise sources shall be located as far as technically feasible from sensitive receptors. If location within 20 feet of homes, schools, neighborhood parks, and retail businesses is necessary, stationary noise sources shall be muffled and enclosed with temporary sheds. Trucks and other vehicles should not be permitted to idle when waiting at or near the construction site.

(22) **Dust and Stormwater Control.** Construction sites shall be watered at least twice daily to control dust caused by site preparation and construction activities. Watering intervals shall be increased whenever wind speeds exceed 15 miles per hour. Where feasible, reclaimed water shall be used for this purpose. Cover all trucks hauling soil, sand, paving materials, and other loose materials or require all trucks to maintain at least two feet of space between the top of the load and the top of the trailer. Streets shall be swept at the end of each workday if soil, sand, or other material has been carried onto adjacent paved streets or sidewalks. When feasible, streets shall be swept using reclaimed water. Best Management Practices shall be used to prevent oil, dirt, and other materials from construction equipment or activity from washing into the City storm drainage system. Water discharge resulting from both construction and underground facility drainage shall comply with National Pollutant Discharge Elimination System (NPDES) regulations.

(23) **Safety Hazard Protocols.** If the Fire Chief (or their designee) finds good cause to believe that the wireless facility (including, without limitation, its accessory equipment, antenna and/or base station) presents a fire risk, electrical hazard or other immediate threat to public health and safety in violation of any applicable law, such officials may order the facility to be shut down and powered off until such time as the fire risk or electrical hazard has been mitigated. Any mitigations required shall be at the permittee's sole cost and expense.

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- (i) **Continued Monitoring.** The permittee shall certify in writing continued compliance with the safety standards of this policy (with special attention to potential fire hazards) on or before January 30 of each calendar year.
- (ii) **Oversight Authority.** The Fire Chief, in his or her discretion, may issue written fire safety performance directives that shall apply to all existing permits within the scope of such directives and shall be considered as though incorporated into such permits. All permittees shall be required to comply with such directives at the permittee's sole cost and expense.
- (b) **Right to Modify Permit.** In the event that the FCC Report and Order is invalidated, modified, or limited in any way that expands the City's authority with respect to the placement and/or design of the small wireless facility, the Director may review and revoke or modify any permit issued under this Chapter based on any amendments to this Chapter, or based on new regulations established pursuant to Berkeley Municipal Code Section 16.10.200.B.
- (c) **Successors and Assigns.** The conditions, covenants, promises and terms contained in this PROW Permit will bind and inure to the benefit of the City and permittee and their respective successors and assigns. Prior to any voluntary assignment or assumption, the permittee shall notify the City in writing of the assignment or assumption and shall provide all contact information required by the Director for the permittee's successor or assign.
- (d) **Modified Conditions.** Subject to and only in compliance with the requirements of Chapter 16.10, the Director may modify, add or remove conditions to any PROW Permit as the Director deems necessary or appropriate to: (i) protect and/or promote the public health, safety and welfare; (ii) tailor the standard conditions in subsection (a) to the particular facts and circumstances associated with the deployment; and/or (iii) memorialize any changes to the proposed deployment need for compliance with the Berkeley Municipal Code, these Guidelines, generally applicable health and safety requirements and/or any other applicable laws. Only to the minimum extent required by applicable FCC regulations, the Director shall take care to ensure that any different conditions applied to small wireless facilities are no more burdensome than those applied to other infrastructure deployments.

SECTION 7. LOCATION STANDARDS

- (a) **Location Preferences.** To help applicants and decision makers understand and respond to the community's aesthetic preferences and values, this subsection sets out listed preferences for locations to be used in connection with small wireless facilities in an ordered hierarchy.

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The City prefers small cells in the public rights-of-way to be installed in locations, ordered from most preferred to least preferred, as follows:

- (1) locations within manufacturing districts, mixed use districts or commercial districts on or along arterial streets;
- (2) locations within manufacturing districts, mixed use districts or commercial districts on or along collector streets;
- (3) locations within manufacturing districts, mixed use districts or commercial districts on or along residential streets;
- (4) locations within any neighborhood commercial district on or along arterial streets;
- (5) locations within any neighborhood commercial district on or along collector streets;
- (6) locations within any neighborhood commercial district on or along residential streets;
- (7) any location within 1,500 feet of an existing or proposed small wireless facility;
- (8) locations within residential districts on or along arterial streets;
- (9) locations within residential districts on or along collector streets;
- (10) locations within residential districts on or along residential streets;
- (11) any location within 200 feet of a City park, a property designated as a City landmark, or a property that contains an historic resource as defined by the State Public Resources Code.

Where feasible, applicants shall be prohibited from installing strand-mounted equipment of any kind.

(b) **Prohibited Support Structures.** Small wireless facilities shall not be permitted on the following support structures:

- (1) decorative poles (including historic or ornamental streetlight poles);
- (2) traffic signal poles, mast arms, cabinets or related devices or structures;
- (3) new, non-replacement wood poles;

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(4) any utility pole scheduled for removal or relocation within 24 months from the time the Director acts on the small cell application.

(c) **Encroachments over Private Property.** No small cell antennas, accessory equipment or other improvements may encroach onto or over any private or other property outside the public rights-of-way without the property owner's express written consent.

(d) **No Interference with Other Uses.** Small cells and any associated antennas, accessory equipment or improvements shall not be located in any place or manner that would physically interfere with or impede access to any: (i) worker access to any aboveground or underground infrastructure for traffic control, streetlight or public transportation, including without limitation any curb control sign, parking meter, vehicular traffic sign or signal, pedestrian traffic sign or signal, barricade reflectors; (ii) access to any public transportation vehicles, shelters, street furniture or other improvements at any public transportation stop; (iii) worker access to aboveground or underground infrastructure owned or operated by any public or private utility agency; (iv) fire hydrant, water valve or mains; (v) access to any doors, gates, sidewalk doors, passage doors, stoops or other ingress and egress points to any building appurtenant to the rights-of-way; (vi) wastewater stations; (vii) access to any fire escape; or (viii) any other similar service or facility that benefits the City or the health, safety, or welfare of its residents.

(e) **Replacement Poles.** All replacement poles must: (i) be located as close to the removed pole as possible; (ii) be aligned with the other existing poles along the public rights-of-way; and (iii) be substantially similar in height and width to the existing pole and be compliant with all applicable standards and specifications by the Director.

(f) **Additional Placement Requirements.** In addition to all other requirements in these Guidelines, small wireless facilities, other infrastructure deployments and all related equipment and improvements shall:

(1) be placed on existing structures to the extent feasible;

(2) be placed as close as possible to the property corners or the property line between two parcels that abut the public rights-of-way;

(3) not be placed in front of the primary entrance to a residence or retail business or at any other location where they would unduly interfere with the operation of a business, including blocking views of the entrance or display windows;

(4) not be located where they would reduce the amount of space available for on-street parking spaces or interfere with access of the public or workers to meters, fire hydrants, or other objects of street hardware in the right-of-way;

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- (5) not be placed within any sight distance triangles at any intersections, street corners driveways and/or other points of ingress or egress, or otherwise obstruct the view of any traffic control devices installed or authorized by the City;
 - (6) be placed at least two feet away from any driveway or established pedestrian pathway between a residential structure and the public rights-of-way;
 - (7) be placed at least 50 feet away from any driveways for police stations, fire stations or other emergency responder facilities;
 - (8) not be placed in any location that obstructs view lines for traveling vehicles, bicycles and pedestrian;
 - (9) not be placed in any location that obstructs views of any traffic signs or signals;
 - (10) not be placed where they would reduce the amount of space available for on-street parking spaces; and
 - (11) not be placed at any location that will obstruct a designated view corridor, scenic vista, historical resource or unique archaeological resource.
- (g) **Demonstration of Technical Infeasibility.** Applications that involve lesser-preferred locations or structures or otherwise fail to meet the requirements of this Section may be approved if the applicant demonstrates by clear and convincing evidence in the written record that either (i) no more preferred location or structure exists within 500 feet from the proposed site; or (ii) any more preferred locations or structures within 500 feet from the proposed site would be technically infeasible.

SECTION 8. DESIGN STANDARDS

- (a) **Finishes.** All exterior surfaces shall be painted, colored and/or wrapped in flat, non-reflective hues that match the underlying support structure or blend with the primary background. All surfaces shall be treated with graffiti-resistant sealant. All finishes shall be subject to the Director's prior approval.
- (b) **Noise.** Small cells and all associated antennas, accessory equipment and other improvements must comply with all applicable noise control standards and regulations in the Berkeley Municipal Code Chapter 13.40, as either may be amended or superseded, and shall not exceed, either on an individual or cumulative basis, the noise limit in the applicable district. All air conditioning units and any other equipment that may emit noise that would be exceed the applicable noise control standards shall only be ~~enclosed or~~ equipped with noise attenuation devices or otherwise modified to comply with applicable noise limits. Backup generators shall ~~only~~ be operated during periods of

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power outages or for testing, and shall not be tested on weekends, holidays or between the hours of 5:00 p.m. and 9:00 a.m.-

(c) **Lights.** All lights and light fixtures must be aimed and shielded so that their illumination effects are directed downwards and confined within the public rights-of-way in a manner consistent with any other standards and specifications by the Director. All antennas, accessory equipment and other improvements with indicator or status lights must be installed in locations and within enclosures that mitigate illumination impacts visible from publicly accessible areas.

(d) **Trees and Landscaping.** Small wireless facilities and other infrastructure deployments on or beneath the ground surface shall not be installed (in whole or in part) within any tree drip line. Small wireless facilities and other infrastructure deployments may not displace any existing tree or landscape features unless: (i) such displaced tree or landscaping is replaced with native and/or drought-resistant trees, plants or other landscape features approved by the Director; and (ii) the applicant submits and adheres to a landscape maintenance plan. Only International Society of Arboriculture certified workers under a licensed arborist's supervision shall be used to install the replacement tree(s). Any replacement tree must be substantially the same size as the damaged tree unless approved by the Director. The permittee shall, at all times, be responsible to maintain any replacement landscape features.

(e) **Signs and Advertisements.** All small wireless facilities and other infrastructure deployments that involve RF transmitters must include signage that, consistent with applicable state and federal regulatory requirements, accurately identifies the site owner/operator, the owner/operator's site name or identification number and a toll-free number to the owner/operator's network operations center. The signage shall be attached to the support structure base (or as otherwise required by applicable regulations and standards) to which the equipment is affixed. Dimensions shall not exceed 8.5 inches by 11 inches. Small wireless facilities and other infrastructure deployments may not bear any other signage or advertisements unless expressly approved by the City, required by law or recommended under FCC or other United States governmental agencies for compliance with RF emissions regulations. Informational signage required by these Guidelines may include an identifying logo.

(f) **Site Security Measures.** Small wireless facilities and other infrastructure deployments may incorporate reasonable and appropriate site security measures, such as locks and anti-climbing devices, to prevent unauthorized access, theft or vandalism. The Director shall not approve any barbed wire, razor ribbon, electrified fences or any similarly dangerous security measures. All exterior surfaces on small wireless facilities shall be constructed from or coated with graffiti-resistant materials.

(g) **Compliance with Health and Safety Regulations.** All small wireless facilities and other infrastructure deployments shall be designed, constructed, operated and

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maintained in compliance with all generally applicable health and safety regulations, which includes without limitation all applicable regulations for human exposure to RF emissions, the California Environmental Quality Act (California Public Resources Code §§ 2100 *et seq.*) and compliance with the federal Americans with Disabilities Act of 1990 (42 U.S.C. §§ 12101 *et seq.*).

(h) **Antennas.** The provisions in this subsection (h) are generally applicable to all antennas.

- (1) **Shrouding.** All antennas and associated cables, jumpers, wires, mounts, masts, brackets and other connectors and hardware must be installed within a shroud or radome unless shrouding is technically infeasible. For pole-top antennas, the shroud shall not exceed 18 inches in 1.5 times the median pole diameter and must taper down to pole to cover mounting hardware, cables, wires, jumpers and other equipment between the pole and the antenna. For side-arm antennas, the shroud must cover the cross arm and any cables, jumpers, wires or other connectors between the vertical riser and the antenna. The antenna shroud shall be finished in a flat, non-reflective color to match the underlying support structure. If an antenna shroud is not used, chin straps/chin covers are required. Straps/chin covers should be no more than six inches long and no wider than antennas. Cables should be routed directly from chin straps into the pole, minimizing exposed cabling. Cables should not loop or bunch. 90-degree connectors should be used.

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Figure 1: Antenna concealed within a single shroud (or radome) with a tapered cable shroud between the antenna and pole-top

(2) **Antenna Volume.** Each individual antenna associated with a single small cell shall not exceed three cubic feet. The cumulative volume for all antennas on a single small cell shall not exceed: (i) three cubic feet in residential areas; or (ii) six cubic feet in nonresidential areas. Notwithstanding the preceding sentence, the Director may grant an exception when the applicant demonstrates by clear and convincing evidence that compliance with this section would not be technically feasible.

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(3) **Overall Height.** No antenna may extend more than five feet above the support structure, plus any minimum separation between the antenna and other pole attachments required by applicable health and safety regulations.

(4) **Horizontal Projection.** Side-mounted antennas, where permitted, shall not project: (i) more than 24 inches from the support structure; (ii) over any roadway for vehicular travel; or (iii) over any abutting private property. If applicable laws require a side-mounted antenna to project more than 24 inches from the support structure, the projection shall be no greater than required for compliance with such laws.



Figure 2: Pole-top antenna on a wood utility pole with tapered shroud.

(i) **Accessory Equipment Volume.** The cumulative volume for all accessory equipment for a single small wireless facility or other infrastructure deployment shall not exceed: (i) seven cubic feet to the extent feasible, but in no event greater than nine cubic feet in residential areas; or (ii) 12 cubic feet in nonresidential areas. The volume limits in this subsection do not apply to any undergrounded accessory equipment.

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(j) **Undergrounded Accessory Equipment.**

(1) **Where Required.** Accessory equipment (other than any electric meter emergency disconnect switch) shall be placed underground when proposed in any (i) underground district or (ii) any location where the Director finds substantial evidence that the additional aboveground accessory equipment would incommode the public's uses in the public rights-of-way. Notwithstanding the preceding sentence, the Director may grant an exception when the applicant demonstrates by clear and convincing evidence that compliance with this section would be technically infeasible.

(2) **Vaults.** All undergrounded accessory equipment must be installed in an environmentally controlled vault that is load-rated to meet applicable standards and specifications. Underground vaults located beneath a sidewalk must be constructed with a slip-resistant cover. Vents for airflow shall be flush-to-grade when placed within the sidewalk and may not exceed two feet above grade when placed off the sidewalk. All vault lids shall be constructed from materials rated for heavy traffic and acceptable to the Director. Only non-toxic sealants may be used.

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Figure 3: Flush-to-grade underground equipment vault.

(k) **Pole-Mounted Accessory Equipment.** The provisions in this subsection (k) are applicable to all pole-mounted accessory equipment in connection with small wireless facilities and other infrastructure deployments.

(1) **Preferred Concealment Techniques.** Applicants should propose to place any pole-mounted accessory equipment in the least conspicuous position under the circumstances presented by the proposed pole and location. Pole-mounted accessory equipment may be installed behind street, traffic or other signs to the extent that the installation complies with applicable public health and safety regulations.

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(2) **Minimum Vertical Clearance.** The lowest point on any pole-mounted accessory equipment shall be at least eight feet above ground level adjacent to the pole. If applicable laws require any pole-mounted accessory equipment component to be placed less than eight feet above ground level, the clearance from ground level shall be no less than required for compliance with such laws.

(3) **Horizontal Projection.** Pole-mounted accessory equipment shall not project:

(i) more than 18 inches from the pole surface, unless a great distance is required to comply with legal requirements imposed by the CPUC; (ii) over any roadway for vehicular travel; or (iii) over any abutting private property. All pole-mounted accessory equipment shall be mounted flush to the pole surface. If applicable laws preclude flush-mounted equipment, the separation gap between the pole and the accessory equipment shall be no greater than required for compliance with such laws and concealed by opaque material (such as cabinet “flaps” or “wings”).



Figure 4: Flush-mounted radio shroud.

(4) **Orientation.** Unless placed behind a street sign or some other concealment that dictates the equipment orientation on the pole, all pole-mounted accessory equipment should be oriented away from prominent views, and shall not substantially obstruct a view from the primary living area of a residence. In general, the proper orientation will likely be toward the street to reduce the overall profile when viewed from the nearest abutting properties. If orientation toward the street is not feasible, then the proper orientation will most likely be away from oncoming traffic. If more than one

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orientation would be technically feasible, the Director may select the most appropriate orientation.



Figure 5: Accessory equipment concealed behind banners.

(l) **Ground-Mounted or Base-Mounted Accessory Equipment.** The provisions in this subsection (l) are applicable to all ground-mounted and base-mounted accessory equipment in connection with small wireless facilities and other infrastructure deployments.

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Figure 6: Base-mounted accessory equipment.

(1) **Ground-Mounted Concealment.** All ground-mounted equipment cabinets shall be placed six inches behind the sidewalk, at least two feet from the curb, and two feet from driveway and curb edges. Pedestals must be at least three feet from fire hydrants. Installations must leave a minimum horizontal clear space for the path of travel of at least six feet. The Director may require more clear space for travel in heavily used commercial areas to provide sufficient room for pedestrian traffic. On collector streets and local streets, the City prefers ground-mounted accessory equipment to be concealed as follows: (i) within a landscaped parkway, median or similar location, behind or among new/existing landscape features and painted or wrapped in flat natural colors to blend with the landscape features; and (ii) if landscaping concealment is not technically feasible, disguised as other street furniture adjacent to the support structure, such as, for example, mailboxes, benches, trash cans and information kiosks. On major streets outside underground districts, proposed ground-mounted accessory equipment

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should be completely shrouded or placed in a cabinet substantially similar in appearance to existing ground-mounted accessory equipment cabinets.



Figure 7: Ground-mounted accessory equipment concealed as a mailbox.

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(2) **Public Safety Visibility.** To promote and protect public health and safety and prevent potential hazards hidden behind large equipment cabinets, no individual ground-mounted accessory equipment cabinet may exceed four feet in height, four feet in width and two feet in depth. Ground-mounted and base-mounted equipment cabinets shall not have any horizontal flat surfaces greater than 1.5 square inches to prevent litter or other objects left on such surfaces. Cabinets and pedestals shall be located at least two feet from the curb of the street. No unit higher than three feet shall be placed in any location that would interfere with vehicular sight lines at street corners, driveways, and other points of ingress or egress or obstruct the view of any traffic devices installed or authorized by the City. Pedestals, amplifier units, equipment cabinets, and similar above ground installations shall, where feasible, be located at least six inches from any sidewalk and two feet from driveway and curb edges. As required by the State Fire Code, pedestals must be at least three feet from fire hydrants. Installations must leave a minimum horizontal clear space for the path of travel that complies with the requirements of the Americans with Disabilities Act, and shall be at least six feet wide, where feasible. The Director may require more clear space for travel in heavily used commercial areas to provide sufficient room for pedestrian traffic, or may approve applications with less clear space where it is not feasible to comply with the requirements of this paragraph.

(3) **Fire Protection.** The exterior walls and roof covering of all ground-mounted accessory equipment cabinets and equipment shelters shall be constructed of materials rated as nonflammable in the Uniform Building Code. Openings in all aboveground equipment shelters and cabinets shall be protected against penetration by fire and windblown embers to the extent feasible.

(m) **Strand-Mounted Wireless Facilities.** No more than one strand-mounted wireless facility may be installed (i) on any single span between two poles or (ii) directly adjacent to any single pole. The Director shall not approve any ground-mounted equipment in connection with a strand-mounted wireless facility, unless the ground-mounted equipment consists of a remote power source used to power a cluster of strand-mounted wireless facilities. All equipment and other improvements associated with a strand-mounted wireless facility must comply with all applicable health and safety regulations. Strand-mounted wireless facilities shall not exceed one cubic foot in total volume. Any accessory equipment mounted on the pole shall be finished to match the underlying pole. "Snow shoes" and other spooled fiber or cables are prohibited.

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Figure 8: Strand-mounted wireless facility with a ground-mounted remote power source.

(n) **Utilities.** The provisions in this subsection (n) are applicable to all utilities and other related improvements that serve small wireless facilities and other infrastructure deployments.

(1) **Overhead Lines.** The Director shall not approve any new overhead utility lines in underground districts. In areas with existing overhead lines, new communication lines shall be “overlashed” with existing communication lines to the maximum extent feasible. No new overhead utility lines shall be permitted to traverse any roadway used for vehicular transit.

(2) **Vertical Cable Risers.** All cables, wires and other connectors must be routed through conduits within the pole or other support structure, and all conduit attachments, cables, wires and other connectors must be concealed from public view. To the extent that cables, wires and other connectors cannot be routed through the pole, such as with wood utility poles, applicants shall route them through a single external conduit or shroud that has been finished to match the underlying pole.

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(3) **Spools and Coils.** To reduce clutter and deter vandalism, excess fiber optic or coaxial cables shall not be spooled, coiled or otherwise stored on the pole outside equipment cabinets or shrouds. Fiber or cable placement on existing poles shall have a minimum safety slack for sway and wind. Looped fiber storage for future use is prohibited.

(4) **Electric Meters.** Small cells and other infrastructure deployments shall use flat-rate electric service or other method that obviates the need for a separate above-grade electric meter. If flat-rate service is not available, applicants may install a shrouded smart meter. If the proposed project involves a ground-mounted equipment cabinet, an electric meter may be integrated with and recessed into the cabinet, but the Director shall not approve a separate ground-mounted electric meter pedestal.

(o) **Existing Conduit or Circuits.** To reduce unnecessary wear and tear on the public rights-of-way, applicants are encouraged to use existing vaults, utility holes, conduits, ducts, manholes, electric circuits and/or other similar facilities whenever available and technically feasible. Access to any conduit and/or circuits owned by the City shall be subject to the Director's prior written approval, which the Director may withhold or condition as the Director deems necessary or appropriate to protect the City's infrastructure, prevent interference with the City's municipal functions, and protect public health and safety.

SECTION 9. MODIFICATION OF FACILITIES

These Guidelines shall apply to the modification of existing facilities, provided, however, that any application that qualifies as an "eligible facilities request" under 47 U.S.C. § 1455(a) shall be exempt from the requirements of these Guidelines, as set forth in Section 3(c).



Office of the City Attorney

MEMORANDUM

June 29, 2020

To: Honorable Mayor and Members of the City Council

From: Dee Williams-Ridley, City Manager
Phillip L. Harrington, Director, Department of Public Works
Farimah Brown, City Attorney

Re: Response to City Council Questions Regarding Proposed Amendments to Berkeley Municipal Code Chapter 16.10 (Installation of Video and Telecommunications Systems) and Revised Guidelines for Issuance of Public Right-of-Way Permits

1. What are the least-preferred locations for siting a wireless facility under the proposed Guidelines?

The least-preferred locations for siting a wireless facility in the proposed Guidelines are “any location within 200 feet of a City park, a property designated as a City landmark, or a property that contains an historic resource as defined by the State Public Resources Code.” (Guidelines § 7(a)(11).) If Council wishes to add other locations to the Guidelines, it must identify a legally permissible (e.g., non-health related) and reasonable basis for their inclusion.

2. What are the insurance requirements of telecommunications facilities in the PROW?

The Ordinance requires permittees to carry liability insurance with limits of \$7,000,000 per occurrence and \$7,000,000 in the aggregate. Permittees are required to indemnify the City against any claims arising from the operation of telecommunications facilities in the PROW.

3. Are telecommunication companies required to remove nonoperational equipment?

Yes. Companies are required to remove nonoperational equipment and provide a performance bond from a surety and in a form acceptable to the Director in an amount reasonably necessary to cover the cost to remove.

4. Is there liquid diesel at small cell installations, and what are the health implications?

There is no backup generator or any other equipment using liquid diesel at a typical small cell facility. In emergency situations, wireless providers may seek approval to place temporary facilities in the PROW, which would be powered by diesel generators. Emissions for emergency backup generators would be regulated by the Bay Area Air Quality Management District.

5. Will telecommunication companies be required to pay for banners on concealment structures?

Telecommunications companies would be required to construct and pay for concealment structures required under the Ordinance and Guidelines. The incidental cost of banners may be borne by the applicant in certain circumstances. In other cases, the City or other stakeholders may pay to install or replace banners.

6. Does “Director” in the PROW Permitting Ordinance Guidelines refer to the Public Works Director?

Yes. “Director” means the Public Works Director or their designee.

7. What does it mean to say that the City may recover “reasonable costs” of processing a permit application?

The City is legally limited to the recovery of “reasonable costs.” This is a case-by-case determination, but would include staff time to review permits and consultant costs, including peer review in appropriate cases.

8. What signage is required prior to the construction and installation of small wireless facilities?

When applying for a PROW permit application for a telecommunications facility, the applicant is required to post a notice at the site and at three conspicuous locations within 500 feet of the site. After construction, signage is regulated by FCC rules, and the Guidelines require compliance with those rules.

9. How does the City process requests for reasonable accommodation of a disability?

Requests for reasonable accommodation are evaluated by the City’s ADA Coordinator. The coordinator may ask the person requesting the accommodation for medical documentation of their disability. If it is determined that a disability

exists, the ADA Coordinator must make a determination as to what, if any, accommodation is reasonable, in consultation with the City Attorney's Office.

10. What is timeline for successors to a permittee to comply with the Ordinance and Guidelines?

Any successor to a permittee is bound by the permit conditions. Compliance must be continuous.

11. How would an appeal of the Public Work's Director decision to approve or deny a permit be heard?

The City Manager would in most cases designate a hearing officer to hear appeal. The hearing officer may consider written evidence and oral testimony in connection with the appeal. Because of the FCC shot clock, appeals would need to be heard on an expedited basis.

12. Can the Ordinance address energy use or the impacts of telecommunications facilities on insect and plant life?

The Telecommunications Act and FCC rules preempt the local regulation of the "environmental effects" of RF emissions from small wireless facilities. FCC regulations also preempt local regulation of the technological or network engineering choices by providers. However, providers and their facilities remain subject to federal NEPA review (although a typical small wireless facility may be approved with categorical exclusion under NEPA). Thus, as a general matter, local regulation of energy use and the impact on insect and plant life is preempted by federal law.

13. Can the City require in-field testing of RF emissions from small wireless facilities?

Cases where federal regulations would require or allow field testing of a small wireless facility at the permittee's cost are very rare. Where field testing is federally required, the applicant must demonstrate compliance with those requirements. (BMC § 16.10.040.I.) The City is not permitted to require field testing in other circumstances.

The City may always conduct its own field tests at its cost and may also include those costs in code enforcement cost recovery if the facility is found to be out of compliance with the FCC's rules. Where field testing may not be required, the applicant must still certify under penalty of perjury that RF emissions must comply with applicable federal standards.

14. Are there other cities that have “stopped” 5G?

It is not accurate to say that other cities have “stopped” 5G. Other cities that have been reported to “ban 5G in residential or other areas must allow exceptions to the ban to comply with federal law. Some cities that have taken such an approach, like Los Altos, have been sued over these restrictions. Other cities that have taken similar approaches but have not been sued, like Mill Valley and Petaluma, generally either have not yet received small cell applications or have not denied any small cell applications. Any local ordinance that effectively prohibits the provision of wireless service would be preempted by federal law.

15. How can the City regulate strand-mounted facilities?

Strand-mounted facilities are included with the proposed Guidelines to ensure that there are objective standards for controlling their installation and their dimensions. However, because strand-mounted facilities are generally not considered “small wireless facilities” under the Telecommunications Act, Council has discretion to regulate strand-mounted facilities under separate guidelines. To the extent that any strand-mounted facilities are also “personal wireless service facilities,’ the same federal preemptions would be applicable.

16. How would a franchise agreement with a telecommunication provider impact the placement and regulation of wireless facilities in the PROW?

A franchise agreement would have the effect of providing a carrier access to City-owned structures (e.g., light poles) for the placement of wireless facilities. A franchise agreement would not limit the permittee’s obligation to comply with the requirements of the Ordinance and Guidelines.

17. Does the Surveillance Technology Ordinance apply to small cell facilities?

The Surveillance Technology Ordinance applies to the acquisition of surveillance technology by City departments. The PROW Permitting Ordinance (with proposed amendments) does not authorize the installation of surveillance technology in the PROW, although acquisition of such technology by City departments could be authorized by the City Council under the Surveillance Technology Ordinance.

The PROW Permitting Ordinance does not address the use of facial recognition by private entities. The Ordinance addresses the permitting of wireless telecommunications systems, not applications that use wireless technology by private parties. (Small cell facilities do not capture visual information, although applications of wireless technology may do so.) If Council wishes to consider limitations on the use of surveillance technology by private entities, proposed

*Response to City Council Questions Regarding Proposed Amendments to BMC
Chapter 16.10 and Guidelines for Issuance of Public Right-of-Way Permits
June 29, 2020
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legislation should be considered in a manner consistent with Brown Act requirements.



Office of the City Manager

ACTION CALENDAR

July 7, 2020

To: Honorable Mayor and Members of the City Council
From: Dee Williams-Ridley, City Manager
Submitted by: Phillip L. Harrington, Director, Department of Public Works
Subject: Adoption of an Ordinance Amending Berkeley Municipal Code Chapter 16.10 (Excavations for Video and Telecommunications Systems) and Revised Guidelines for Issuance of Public Right-of-Way Permits

RECOMMENDATION

Adopt first reading of an ordinance amending Berkeley Municipal Code Chapter 16.10 (Excavations for Video and Telecommunications Systems), and adopt revised administrative guidelines for the issuance of Public Right-of-Way Permits.

SUMMARY

Small cell wireless facilities (“Small Wireless Facilities”) are low-power, short-range wireless transmission systems that cover a more limited geographic range than traditional wireless facilities. Small Wireless Facilities are designed to accommodate emerging “5G” technology, which transmits higher volumes of data at higher speed than existing networks. Because of the short range of these facilities, projected 5G network buildouts require installation of Small Wireless Facilities at more locations and closer in proximity to each other than is the case with traditional wireless facilities.

On September 26, 2018, the FCC adopted its Declaratory Ruling and Third Report and Order (the Report and Order) relating to small cell wireless (5G) technology, and the placement of small wireless facilities in the PROW (“Small Cell Order”).¹ The rules adopted in the Report and Order interpret the federal Telecommunications Act of 1996.² The Small Cell Order grants wireless providers the right to deploy small wireless communication facilities within the City’s right of way; requires that local jurisdictions streamline the application and approval process for such deployments; and places limitations on local jurisdictions’ ability to deny, condition or restrict small wireless installations.

¹ Declaratory Ruling and Third Report and Order In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, <https://docs.fcc.gov/public/attachments/FCC-18-133A1.pdf>

² Federal Telecommunications Act of 1996, 47 U.S.C. § 151 *et seq.*, <https://www.fcc.gov/general/telecommunications-act-1996>

In response to the adoption of the Small Cell Order, by a July 19, 2019 referral, the City Council requested that the City Manager consider amending the language of the City's Wireless Telecommunications Ordinance (BMC Chapter 23C.17) and provisions applicable to telecommunications permits in the PROW (BMC Chapter 16.10 and the Aesthetic Guidelines for PROW permits) and return to City Council for adoption as soon as possible.³

FISCAL IMPACTS OF RECOMMENDATION

There is no direct fiscal impact associated with the proposed ordinance and PROW permitting guidelines. However, it is anticipated that additional staffing and administrative costs will be incurred to process applications to construct small cell sites. The Public Works Department will seek to recover the cost of implementing the ordinance and guidance through application and other permitting fees, consistent with the requirements of the Small Cell Order.

CURRENT SITUATION AND ITS EFFECTS

Chapter 23C.17 (Wireless Telecommunications) of the City's Zoning Ordinance regulates the installation of wireless telecommunications facilities on property outside the PROW. Applications to install wireless facilities within the PROW are governed by BMC Chapter 16.10 (Excavations for Video and Telecommunications Systems). The existing ordinance is administered by the Engineering Division of the Public Works Department and requires a PROW Permit for wireless facilities located in the PROW.

In March 2011, the City adopted Aesthetic Guidelines under BMC Chapter 16.10 to regulate the placement of wireless telecommunications facilities in the PROW.⁴ The Aesthetic Guidelines are intended "to protect and preserve the character of residential and adjacent neighborhood, commercial areas by preventing visual blight and clutter from inappropriately designed and sited wireless communication facilities to the extent allowed by applicable state and federal legislation."⁵ The Guidelines include requirements for site selection, design and landscaping, and operation and maintenance of wireless facilities.

Changes in technology—specifically, the trends toward the development of 5G small cell wireless facilities—and legal developments since the adoption of the Aesthetic Guidelines in 2011 have led to the need to make revisions to the guidelines for

³ Referral to City Manager to consider amending the language of the City's Wireless Telecommunications Ordinance and Aesthetic Guidelines, City of Berkeley, July 19, 2019, https://www.cityofberkeley.info/Clerk/City_Council/2019/07_Jul/Documents/2019-07-16_Item_09_Referral_to_the_City_Manager_to_Consider.aspx.

⁴ Guidelines for Projects Requiring Telecommunications Encroachment/Excavation Permits ("Aesthetic Guidelines"), Mar. 15, 2011, https://www.cityofberkeley.info/uploadedFiles/Public_Works/Level_3_-_Sidewalks,_Streets_-_Utility/Aesthetic%20Guidelines%20for%20PROW%20Permits%20Under%20BMC%20Chapter%2016_10.pdf,

⁵ Aesthetic Guidelines at p. 1.

permitting wireless facilities in the PROW, as well as the need to make conforming revisions to BMC Chapter 16.10. The purpose of these revisions is to ensure that the City maintains oversight and control over the installation of Small Wireless Facilities to the maximum extent permitted under state and federal law, in order to preserve and protect the aesthetic character of Berkeley's neighborhoods.

This item relates to the City's Strategic Plan Goals, and is a Strategic Plan Priority Project, advancing our goal to provide state-of-the-art, well-maintained infrastructure, amenities, and facilities.

BACKGROUND

The regulation of wireless facilities is governed by the Telecommunications Act of 1996.⁶ Under the Telecommunications Act, state and local regulation of the "operation" of wireless facilities is preempted by federal law.⁷ The preemptive effect of the Telecommunications Act includes the preemption of state and local regulation of the health effects of exposure to wireless facilities, which are instead governed by federal standards for exposure to radiofrequency (RF) emissions.⁸

In July 2009, the City Council adopted a Wireless Communications Ordinance, codified as BMC Chapter 23C.17. This ordinance governs wireless installations outside of the PROW. In addition, on March 15, 2011, the City Manager approved Aesthetic Guidelines for the installation of wireless facilities in the PROW.⁹ The Aesthetic Guidelines set parameters for issuance of PROW Permits for wireless facilities under BMC Chapter 16.10.

Traditionally, wireless facilities have been installed on private property, although some are located on public buildings or lands. These traditional facilities generally consist of multiple antennas, oriented in different directions to cover separate "sectors" of the broader service area they are supporting. The antennas are generally 10-12 inches in width and 3-5 feet in height. The facilities are typically mounted on existing buildings, utility infrastructure, or on standalone poles or towers.

In comparison, it is anticipated that most or all small cell/5G installations will be placed on existing or new utility poles or street light standards located in the PROW. Small Wireless Facilities installations subject to the Small Cell Order are limited in size, such that antennas may generally not exceed three cubic feet in volume, and support equipment is limited to no more than 28 cubic feet. All equipment may be mounted above pedestrian height on a pole, or the support equipment can be mounted on the ground adjacent to the pole, affixed to the base of the pole, or undergrounded, where feasible.

⁶ 47 U.S.C. § 151 *et seq.*

⁷ *Cellular Phone Taskforce v. F.C.C.* 205 F.3d 82, 96 (2d Cir. 2000).

⁸ 47 U.S.C. § 332(c)(7)(B)(v).

⁹ See note 6, *supra*.

While 5G facilities are small than traditional wireless facilities, achieving 5G coverage using Small Cell Wireless Facilities will require a significantly higher density of installations than is typical of traditional wireless facilities. Despite community concerns about aesthetic and other impacts of widespread deployment of small cell technology, the FCC has taken regulatory steps to support rapid small cell deployment. Most notably, on September 26, 2018, the FCC adopted new rules governing the installation of Small Wireless Facilities (the “Small Cell Order”). The new rules expansively interpret the preemptive effect that the Telecommunications Act has on certain zoning and land use regulations. The Small Cell Order became fully effective on April 15, 2019.

While the Small Cell Order preserves state and local authority to regulate the aesthetics, undergrounding, and location of wireless facilities, the Order requires local regulations to be “technically feasible and reasonably directed to avoiding or remedying the intangible public harm of unsightly or out-of-character deployments are also permissible.”¹⁰ Such state and local regulations imposed on Small Wireless Facilities must be no “more burdensome than those the state or locality applies to similar infrastructure deployments” and may not be applied in a manner “that has the effect of materially inhibiting wireless service.”¹¹ State and local regulations must also be “objective and published in advance.”¹² The Small Cell Order also reaffirms the long-standing prohibition on state and local regulations based on the health effects of wireless facility operations.¹³

In addition, the Small Cell Order imposes 60- or 90-day time limits (depending on the type of application) for local government review of small wireless facility applications.¹⁴ The 60- or 90-day “shot clock” requires local permitting authorities to take a final action on permit applications for wireless facilities, including the resolution of any administrative appeals.

Finally, the Small Cell Order places presumptive limits on fees that may be charged for access to utility poles and similar infrastructure, including a limit of \$270 per Small Wireless Facility per year for fee for attachment to municipally owned structures in the PROW.¹⁵ While the Order also includes presumptive limits for application fees, the Order allows local jurisdictions to recover reasonable costs incurred in processing wireless facility applications.¹⁶

¹⁰ Small Cell Order ¶ 87.

¹¹ *Ibid.* The “materially inhibiting” standard adopted by the Small Cell Order replaced the “significant gap” test that had been adopted the U.S. Court of Appeals for the Ninth Circuit.

¹² *Id.* ¶ 86.

¹³ *Id.* ¶ 33 & n. 72.

¹⁴ Small Cell Order ¶ 105.

¹⁵ Small Cell Order ¶ 79.

¹⁶ *Id.* ¶ 80 & n. 235.

Following the adoption of the Small Cell Order, the City Council requested that the City Manager consider amending the language of the City's Wireless Telecommunications Ordinance (BMC Chapter 23C.17), BMC Chapter 16.10, and the Aesthetic Guidelines.¹⁷ Now presented for Council's consideration are Administrative Guidelines for Issuance of Public Right-of-Way Permits under Berkeley Municipal Code Chapter 16.10 ("PROW Permit Guidelines," or "Guidelines") and amendments to BMC Chapter 16.10.

The PROW Permit Guidelines are intended to give the City the greatest possible control over the location and aesthetics of the wireless facilities installed in the PROW, consistent with applicable state and federal law. The Guidelines set forth a PROW Permit application requirements and a process for reviewing permit application, and establish required conditions of approval for PROW Permits. The Guidelines also include standards for the placement and design of wireless facilities in the PROW.

The proposed ordinance includes amendments to ensure conformance with state and federal law, as well as consistency with the Guidelines. The proposed ordinance:

- Clarifies that financial security provided by a permit applicant must be consistent with the requirements of Government Code section 65850.6, where applicable.
- Repeals certain requirements for RF exposure verification that are not enforceable under existing federal law, while retaining legally enforceable requirements to verify compliance with federal RF exposure standards, including a provision authorizing the Public Works Director to obtain a peer review of an applicant's RF exposure analysis at the applicant's expense.
- Amends the timing of certain pre-application notification requirements to ensure consistency with shot clock requirements under the Small Cell Order.
- Grants the permit applicant or any resident or owner of property located within 500 feet of a proposed wireless facility the right to appeal the Public Works Director's decision regarding a permit application to the City Manager.
- Repeals a provision allowing the permit applicant the right to appeal the Public Works Director's decision to City Council.
- Adds a provision that authorizes the Public Work's Director to review and revoke or modify permits based on changes in the state or federal law that expand the City's authority with respect to the placement and/or design of Small Wireless Facilities.
- Authorizes the City Manager to adopt administrative regulations or guidelines to implement Chapter 16.10, and requires the Public Works director to review any adopted

¹⁷ See note 4, *supra*.

regulations or guidelines in the event of that the Small Cell Order is invalidated, modified, or limited in any way.

In addition to these revisions, other conforming, stylistic, or technical amendments are reflected in the redline version of the proposed ordinance (Attachment 2).

ENVIRONMENTAL SUSTAINABILITY

The proposed ordinance and Aesthetic Guidelines support the objectives of avoiding damage to street trees and otherwise reducing the aesthetic and environmental impacts of telecommunications facilities in the PROW.

RATIONALE FOR RECOMMENDATION

Amendments to BMC Chapter 16.10 and the Aesthetic Guidelines are necessary to account for changes in the technological and legal environment since the Aesthetic Guidelines were adopted in 2011, and to ensure that the City retains the ability to regulate the deployment of Small Wireless Facilities to the maximum extent permissible under applicable state and federal law.

ALTERNATIVE ACTIONS CONSIDERED

Staff considered adopting revisions to the Aesthetic Guidelines administratively, but elected to bring this item to the City Council to make necessary revisions to BMC Chapter 16.10 and allow Council to consider the proposed PROW Permit Guidelines prior to their implementation.

CONTACT PERSON

Phillip L. Harrington, Director, Department of Public Works, (510) 981-6300

Attachments:

- 1: Ordinance: Proposed BMC Chapter 16.10 (Excavations for Video and Telecommunications Systems)
- 2: Redline of Proposed BMC Chapter 16.10
- 3: Proposed Administrative Guidelines for Issuance of Public Right-of-Way Permits Under Berkeley Municipal Code Chapter 16.10
- 4: Council Report Entitled "Updating Berkeley Telecom Ordinances and BMC Codes"

ORDINANCE NO. -N.S.

EXCAVATIONS FOR VIDEO AND TELECOMMUNICATIONS SYSTEMS; AMENDING
BERKELEY MUNICIPAL CODE CHAPTER 16.10

BE IT ORDAINED by the Council of the City of Berkeley as follows:

Section 1. That Berkeley Municipal Code Chapter 16.10 is amended to read as follows:

16.10.010 Purpose.

The purpose of this Chapter is to establish policies and procedures for use of the public rights-of-way by Video Service Providers and Telephone Corporations, in order to minimize the inconvenience to and negative effects on the public and their use of the public rights-of-way, and to eliminate the cost to taxpayers that results from installation, maintenance and removal of the Facilities needed for Video and Telecommunication Systems while ensuring that all users of the public rights-of-way are treated in an equivalent manner. It is also the policy of the City to promote undergrounding of Facilities, whether related to Video Services, telecommunications services, or any other utility or service, whenever Technically Feasible, in order to ensure optimal pedestrian accessibility and traffic safety.

16.10.020 Definitions.

A. For the purposes of this Chapter, the following words, terms, phrases, and their derivations shall have the meanings set forth herein unless a different meaning is clearly intended by the use and context of the word, term or phrase. When not inconsistent with the context, words used in the present tense include the future tense, and words in the singular number include the plural number.

1. "City" means the City of Berkeley, California, acting by and through its City Council or a representative as the governing body may designate to act on its behalf.
2. "City Manager" means the City Manager of the City or his/her designee.
3. "Company" means any Video Service Provider or Telephone Corporation that is authorized by any governmental entity or law to provide Video Services or telecommunications services in Berkeley.
4. "Construction Plan" means information regarding the design, potential locations, and estimated time schedule for the construction and/or installation of a Facility submitted in accordance with the requirements of this Chapter and any regulations or guidelines adopted by the Director for the implementation of this Chapter.
5. "Department" means the City Department of Public Works.

6. "Director" means the Director of the City's Department of Public Works or his or her designee.
7. "Excess Capacity" means the volume or capacity in any existing or future duct, conduit, maintenance hole, hand hole or Facility that is or will be made available by the owner for use by third party Facilities.
8. "Facility" or "Facilities" means any cable or other wire or line, antenna, radio, pipeline, pipes, duct, conduit, converter, cabinet, pedestal, meter, tunnel, vault, equipment, drain, manhole, splice box, surface location marker, pole, structure, utility, or other appurtenance, structure, property, or tangible thing owned, leased, operated, or licensed by a Company to provide or aid in the provision of cable, personal wireless or telecommunications services that are located or are proposed to be located on the PROW.
9. "FCC" means the Federal Communications Commission.
10. "Franchise" means a written legal undertaking or action issued by any level of government, which authorizes a specific Company to utilize the City's PROW for the purpose of installing, operating, maintaining, or reconstructing a Telecommunications System or providing Video Services.
11. "Person" means any person, corporation, partnership, proprietorship, individual, organization, or other entity.
12. "Personal Wireless Service Facility" means a personal wireless service facility as defined in 47 U.S.C. § 332(c)(7)(C)(ii), as may be amended or superseded, including, but not limited to, facilities that transmit and/or receive electromagnetic signals for cellular radio telephone service, personal communications services, enhanced specialized mobile services, paging systems, and related technologies. Such facilities include, but are not limited to, antennas, microwave dishes, parabolic antennas, and all other types of equipment used in the transmission or reception of such signals; telecommunication towers or similar structures supporting said equipment; associated equipment cabinets and/or buildings; and all other accessory development used for the provision of personal wireless services. Personal Wireless Service Facility does not include radio towers, television towers, and government-operated public safety networks.
13. "PROW Permit" means a permit issued pursuant to this Chapter.
14. "Public rights-of-way" ("PROW") means any street, public way, public place or right-of-way, now laid out or dedicated, and the space on, above or below it, and all extensions thereof and additions thereto, owned, operated and/or controlled by the City or subject to an easement owned by the City, and any privately owned area within the City's jurisdiction which is not yet, but is designated as, a proposed public place on a tentative subdivision map approved by the City.

15. "Technically Feasible" means a circumstance in which the applicant has demonstrated by clear and convincing evidence submitted to the Director that compliance with a specific requirement within this Chapter and any administrative regulations or guidelines is physically impossible and not merely more difficult or expensive than a noncompliant alternative.

16. "Telephone Corporation" is defined as set forth in Section 234 of the California Public Utilities Code.

17. "Telecommunications System" means the Facilities necessary or convenient for a Telecommunications Carrier to provide telecommunications service.

18. "Traffic Control Plan" means a plan describing the manner in which the Company will manage vehicle, bicycle, and pedestrian traffic along affected Streets that have a speed limit greater than 35 miles per hour when installing or maintaining Facilities.

19. "Video Service" is defined as set forth in Section 5830(s) of the California Public Utilities Code.

20. "Video Service Provider" is defined as set forth in Section 5830(t) of the California Public Utilities Code.

21. "Video System" means the Facilities necessary or convenient for a Video Service Provider to provide Video Service.

16.10.030 PROW Permit Required—Applicability.

A. PROW Permit Required

1. Except as provided in subdivision B, in addition to any agreement, license, permit or Franchise required by this Code or any other local, state or federal law, no Company may undertake any project involving excavation in the PROW in order to construct, install, or repair any Facility, or a portion thereof, without first obtaining a PROW permit pursuant to this Chapter and paying all lawful fees required by this Code.

2. All Facilities proposed to be located on utility poles owned or controlled by the Northern California Joint Pole Authority shall be subject to the application requirements and process set forth in Section 16.10.045.

B. Notwithstanding anything stated herein, a PROW Permit shall not be required (1) if the Director makes a written determination that a proposed Facility described in subdivision A relates to the maintenance, replacement or insubstantial modification of existing Facilities; or (2) if the applicant requests approval to collocate, replace or remove transmission equipment at an existing wireless tower or base station submitted pursuant to 47 U.S.C. § 1455, which will be subject to the current FCC rules and regulations

applicable to “eligible facilities requests” as defined by FCC and as may be amended or superseded.

C. In addition to the requirements of this Chapter, a Company shall obtain all otherwise necessary City permits including, without limitation, encroachment permits, building permits, electrical permits, and other permits that may be lawfully required by this Code or other applicable laws or regulations.

16.10.040 PROW Permit Application.

No fewer than 30 days prior to a Company’s intended Construction start date, a written application for a PROW Permit, along with payment of any fees or deposit required by the City, shall be filed with the Director, in the form and manner required by the Director, and shall contain, at a minimum, all of the following information:

A. General information regarding any Facilities that the Company plans to apply for permits to install within the PROW in the next six (6) months, regardless of whether a permit is currently sought for those Facilities.

B. Site plan of the Facilities proposed to be located within the PROW, including a map in electronic and/or other form required by the City. The plans and specifications shall show:

1. The location and dimensions of all existing street trees of at least 6" in diameter, Facilities, and improvements in the PROW where the new Facilities are proposed.
2. Photographs with superimposed images showing any proposed Facilities.
3. A description of the proposed Facilities, including, if such information has not previously been provided to the City, a general description of the facilities, including whether the facility will contain any electronic components, natural gas generator, electrical fans, and/or emergency backup equipment.
4. The specific landscaping, structures, improvements, Facilities and obstructions, if any that the Company proposes to temporarily or permanently remove or relocate.
5. A detailed description or plan showing any proposed screening and/or landscaping associated with any proposed Facilities.

C. If the Company is proposing new underground installation of Facilities within the PROW, it shall provide, upon request of the Director, information regarding any Excess Capacity that will exist in such Facilities after the installation of the Company’s Facilities.

D. Estimated construction start and completion dates.

E. A Traffic Control Plan, if required, that complies with guidelines established by the Director.

F. An application for any Facility shall include proof of written public notification by first class mail to property owners and residents within 500 feet of the proposed Facility.

G. To the extent practicable, proof that the Company has obtained any other governmental approvals and permits required to construct the Facilities in question. If a Company has not previously provided information sufficient to show that it is a Telephone Corporation or Video Service Provider, the City may also require that the Company provide such information.

H. In any application for a Personal Wireless Service Facility that is not categorically excluded from the FCC standards for radiofrequency exposure, the operator of each new or modified telecommunications antenna associated with that Personal Wireless Service Facility shall submit to the City a written report that the Personal Wireless Service Facility's radiofrequency exposure is in compliance with applicable FCC regulations. The report shall state the radio frequency radiation of the proposed Personal Wireless Service Facility, including the cumulative impact from other nearby Personal Wireless Service Facilities, and state whether it meets any applicable FCC requirements. The City shall not issue any PROW Permit if the operator fails to demonstrate compliance with applicable FCC requirements for radiofrequency exposure. The City may require, at the applicant's expense, peer review or independent verification of the results of the analysis.

16.10.045 Additional Application Requirements for Facilities on Utility Poles.

A. Applications for Facilities subject to Section 16.10.030.A.2 shall include proof that all entities with authority to grant or deny permission for installation of the Facility have approved it.

B. Such applications shall also include proof that all property owners and occupants within 500 feet of the proposed location of the Facility have been given notice by first class mail, no later than the date of the application, of the proposed construction or installation of the Facility. Such notice shall also be posted on the pole on which the Facility is proposed to be installed. Notices under this Section shall identify the specific pole on which the Facility is proposed to be installed and contact information for the Company or its authorized representative. The purpose of this notice is to ensure that property owners and residents have an opportunity to contact the Company and any entities responsible for the pole on which the Facility is proposed to be located so that they can try to resolve any objections they may have.

C. The application shall include all communications received by the Company in response to the public notice, as well as its responses to those communications.

16.10.050 Design, Installation, and Construction of Video and Telecommunications Systems.

A. All Facilities shall be so located, constructed, installed and maintained so as not to incommode the public use of the road or highway or interrupt navigation of the waters, including access to and from the PROW from private property.

B. In the event a Company creates a hazardous or unsafe condition on either public or private property, or unreasonably interferes with access between the PROW and private property, the Company shall remove or modify that part of the Facility to eliminate such condition.

C. No Facility may be located or installed in such a manner that it will unreasonably interfere with existing or adopted City plans to use the PROW, with the access rights of private property owners, with existing gas, electric, sewer or telephone fixtures, with existing water hydrants and mains, with existing sewers, storm drains or v-ditches, or any existing wastewater stations, or with any existing traffic control System.

D. Construction, installation, maintenance and repair of Facilities shall not substantially affect the integrity of any affected structures, and shall, to the extent reasonably feasible, be installed either perpendicular or parallel to property lines or the sides of structures.

E. All underground taps shall, to the extent reasonably possible, follow property lines and cross property at right angles unless otherwise required due to the physical characteristics of the subsurface or required under applicable law.

F. All construction of new and replacement Facilities shall be accomplished between the hours reasonably specified by the City in the approved permit or ordinances. Construction shall seek to minimize any adverse impact on services of the City or third parties.

G. Whenever existing Facilities or electric utility facilities are located underground along a particular street or public way, new Facilities shall be installed underground along that street or public way to the extent Technically Feasible.

H. Whenever any new or existing Facilities or electric utility lines are relocated underground along a particular street or public way, a Company shall relocate its Facilities underground to the extent Technically Feasible concurrently with the other lines at its sole expense, in accordance with existing legal and regulatory requirements.

I. Companies shall advise and coordinate major construction efforts with other utility companies through City-sponsored utility coordination meetings, and, to the extent reasonably possible, coordinate their construction work with other utilities installing infrastructure in the PROW. In new developments, a Company shall contact the developer to determine whether any surplus conduit is available in the areas that the Company plans to install facilities, and whether any joint trenching or boring projects are feasible.

J. Overhead facilities may be installed only if sufficient space is available on existing utility poles or other structures, consistent with applicable regulations and agreements, as determined by the Director.

K. If proposed new Facilities would require excavation, or involve excavation for installation of new facilities, those Facilities shall be installed within existing Facilities

whenever sufficient Excess Capacity is available on commercially reasonable terms and conditions.

L. Where feasible, all proposed Facilities shall be installed underground or in flush mounted vaults or low profile waterproof pedestals, unless the Director determines that installing the proposed Facility above ground would not result in significant detriment to the PROW or the environment surrounding it or incommode the public use of the PROW. In making this determination, the Director shall consider the information in the application and the record, including information provided by the Company and members of the public.

M. Companies shall coordinate with affected property owners to locate Facilities so as to reasonably minimize inconvenience and disruption to residents, consistent with installation of permitted Facilities.

16.10.060 Issuance of PROW Permits.

A. Each PROW Permit shall be subject to the criteria and provisions of this Chapter. The PROW Permit may be issued upon review of a completed application and a determination by the Director that a Company has filed a complete application and has complied with all applicable requirements of this Chapter, including any duly adopted administrative regulations or guidelines. Any owner or resident of property located within 500 of a proposed Facility may request to receive notice of the Director's decision to issue or deny a PROW Permit.

B. Criteria. In determining whether to grant or deny a PROW Permit, the Director shall consider factors permitted under Section 7901 and 7901.1 of the California Public Utility Code and this Chapter. In particular, the Director shall consider:

1. The capacity of the PROW to accommodate all proposed Facilities.
2. The capacity of the PROW to accommodate the City's planned uses of the PROW.
3. The damage or disruption, if any, to the PROW or any public or private facilities, improvements adjacent to it, pedestrian or vehicle travel, and landscaping, if the permit is granted.
4. The availability of technically compatible existing Facilities or Excess Capacity, or alternate routes and/or locations for the proposed Facilities, which would be less disruptive or which better protect the PROW for its dedicated use, and the Feasibility of using such Facilities, Excess Capacity or alternate routes and/or locations.
5. The effect of any Facilities on traffic or pedestrian safety or access.
6. Completion of any environmental review under the California Environmental Quality Act (CEQA) that may be required by law.

7. Whether the Company has the legal entitlement to provide the services for which the Facilities will be used.

8. Any administrative regulations or guidelines adopted by the Director to implement this Chapter.

C. The Director may require modifications to the proposed excavation or installation of any Facility based on the factors set forth above. However, no such modifications may make it infeasible to undertake to install the Facility in the PROW to provide the service they are intended to provide.

D. Where the Director has information that there is a substantial risk that a Company may not fulfill its obligations under the permit, the Director may require that the Company provide satisfactory financial security in an amount not to exceed 110% of the total estimated cost of all work to be performed under the PROW Permit, as determined by the Director, and as necessary and appropriate to compensate the City for any costs that may be required to ensure full compliance with all of the requirements of this Chapter. Such security shall consist of an irrevocable letter of credit, cash deposit, or performance bond as determined by the Director. The security shall be maintained in full force and effect until the permitted work in the PROW is completed to the satisfaction of the Director, at which time the security shall be reduced to ten percent (10%) of the actual cost of the work. The reduced security shall be maintained by the Company for a period of one year as a guarantee that the work is of good quality and free from any defective or faulty material or workmanship. Any surety supplying a performance bond must be an "admitted surety insurer," as defined in Section 995.120 of the Code of Civil Procedure, and authorized to do business in the state of California. Return of the security shall be conditioned upon the Company's faithful performance of all work in the PROW specified in the applicable permit. In the event the Company fails to comply with any provision of this Chapter related to such work, or any provision of any applicable permit or other approval related to such work, any damages or loss suffered by the City as a result thereof shall be recoverable from the security, including but not limited to the full amount of any compensation, indemnification, cost of removal, or abandonment of any property of the Company, plus reasonable attorneys' fees and costs up to the full amount of the security. Neither the provisions of this section nor any damages recovered by the City hereunder shall be construed to limit liability or damages of licensee under this Chapter, either to the full amount of the security or otherwise. In addition to its rights to take action under the security, the City may pursue any other remedy provided by law. For any wireless telecommunications facility, as defined in Government Code section 65850.6, the financial security provided by the Company shall not exceed the estimated cost of removal of the Facility. In establishing the amount of the security, the city or county shall take into consideration information provided by the Company and other evidence in the record regarding the cost of removal.

E. Fees. As a condition of the issuance of any permit, a Company shall pay all applicable cost-based fees assessed by resolution of the City Council; provided, however, that such payments and submittals shall not be deemed a waiver of any right the

Company may have to challenge the legality of such permit fees if the Company specifies in writing the basis of any objection to such fees and pays under protest.

F. Right to Inspect. The City may inspect any work performed pursuant to a PROW Permit at any reasonable time during normal business hours that the City deems appropriate, upon reasonable notice to the Company performing that work, when necessary. In addition, the City shall inspect a Company's work reasonably promptly upon notice from the Company that the work has been completed.

G. Duration and Validity. Work should begin within 180 calendar days of the start date specified in the permit and should be prosecuted diligently to completion, including restoration. The Director at their sole discretion may grant an extension of the deadline for completion of construction upon a request by the applicant.

16.10.070 Construction Activities.

A. Not less than 10 business days prior to the intended start of construction, the Company shall provide written public notification by door hanger to residents within 500 feet of the proposed construction.

B. All work in or affecting the PROW shall be performed in accordance with this Chapter, the Construction Plan, and with the standard plans and specifications of the Department and any Department orders or regulations, except where the Director, at his or her discretion, grants prior written approval to deviate from the standard plans and specifications, orders, or regulations. The Director shall develop written guidelines to implement the granting of waivers authorized pursuant to this Chapter.

C. A Company shall provide reasonable advance notification, but in any case not less than three business days, to the City of the initiation of any construction activities pursuant to a PROW Permit issued under this Chapter.

D. A Company shall make its best efforts to complete any work authorized by a permit under this Chapter no later than the date specified in the permit.

E. A Company shall post and maintain notice at the site of the excavation or installation during the construction period. The notice shall include the name, telephone number, and address of the Company, a description of the excavation or installation to be performed, and the duration of the excavation or installation. The notice shall be posted along all Streets in the area where the excavation or installation is to take place.

F. If a Company requires additional time to complete work, it shall so notify the Director and the Director may, upon a written demonstration of good cause, grant a work completion extension. In addition, the Company shall provide the Director with a telephone contact number, answered 24 hours per day during the construction period, to enable the Director to report any concerns regarding construction of the Facilities.

16.10.080 Excavation.

A. A Company that excavates or causes to be made an excavation in the PROW shall maintain, repair, or reconstruct the site of the excavation as specified by the City until such time as the site of the excavation is repaved or resurfaced by the Department, or by another party pursuant to a subsequently issued PROW permit.

B. If a Company excavates in the PROW, it shall comply with the requirements of Underground Service Alert North ("USAN") regarding notification of excavation or installation and marking of subsurface Facilities. The Company shall provide USAN with the assigned number of the permit to excavate or other information as may be necessary to properly identify the proposed excavation or installation.

C. Limits on Work in the Public Right-of-Way

1. Scope. It is unlawful for a Company to make, cause, or permit to be made any excavation in the PROW outside the boundaries, times, and description set forth in the PROW Permit.

2. Trenching. Trenching in the PROW shall be by the "direct buried method," as defined by the Director. Use of a rock wheel or other trenchless technology to excavate in the PROW is prohibited without prior written approval of the Director.

3. Single Excavation Maximum. No single excavation site shall be longer than one thousand two hundred (1,200) feet at any time except with the prior written approval of the Director.

4. A Company may not excavate any Street that has been reconstructed or resurfaced by the Department or at its direction in the preceding five-year period and shall participate in City efforts to coordinate excavation activities. However, subject to Section 16.12.030, the Director may, in his or her discretion, grant a waiver of this subsection for good cause. Good cause shall include the fact that the need to excavate arose in spite of a Company's full compliance with the coordination of excavation provisions. The Director is authorized to grant a waiver for an excavation that facilitates the deployment of new technology or new Service as directed pursuant to official City policy. The Director shall issue his or her decision on a waiver within a reasonable period after receipt of a written request for a waiver.

D. Companies shall be subject to the following requirements for excavation sites:

1. Companies shall cover open excavation with non-skid steel plates ramped to the elevation of the contiguous Street, pavement, or other PROW, or otherwise protected in accordance with guidelines prescribed by the Department.

2. Companies shall keep the area surrounding the excavation clean and free of loose dirt or other debris. Excavation sites shall be cleaned at the completion of each workday. In addition, Permittees shall remove all excavated material from the site of the excavation no later than the end of each workday.

3. Materials and equipment to be used for the excavation within 7 calendar days may be stored at the site of the excavation, except that fill material, sand, aggregate, and asphalt-coated material may be stored at the site only if it is stored in covered, locked containers.

4. Companies shall comply with all federal, state, and local laws regarding hazardous materials, including with respect to (a) data collection; (b) disposal, handling, release, and treatment of hazardous material; site remediation; and (c) worker safety and training. "Hazardous material" means any gas, material, substance, or waste which, because of its quantity, concentration, or physical or chemical characteristics, is deemed by any federal, state, or local authority to pose a present or potential hazard to human health or safety or to the environment.

5. Companies shall develop and implement a Water Quality Management Plan and/or Stormwater Pollution Prevention Plan for any excavation project as required by law.

E. If the Director determines that a Company has violated this Chapter or that an excavation poses a hazardous situation or constitutes a public nuisance, public emergency, or other threat to public health, safety, or welfare, the Director may issue a stop work order, impose new conditions upon a permit, or suspend or revoke a permit by notifying the Permittee company of such action in a written, electronic, or facsimile communication.

F. Restoration of PROW

1. In any case in which a Company causes a sidewalk, Street, or other PROW to be excavated or disturbed by an excavation, the Company shall restore the sidewalk, Street or other PROW in the manner prescribed by the orders, regulations, and standard plans and specifications of the Director.

2. Activities concerning backfilling, replacement of pavement base, and finished pavement shall be performed in a manner specified by the orders, regulations, and standard plans and specifications of the Director. In addition, these activities shall be subject to the following requirements:

a. Each excavation shall be backfilled and compacted within seventy-two (72) hours from the time the construction related to the excavation is completed.

b. Replacement of the pavement base shall be completed within seventy-two (72) hours from the time the excavation is backfilled.

c. Finished pavement restoration shall be completed within 10 days after completion of the substructure installation or sooner as directed by the Director.

3. Upon written request from a Company, the Director may grant written approval for modifications to the requirements of this section.

4. In any case where an excavation is not completed or restored in the time and manner specified in the permit, this Chapter, or the orders, regulations, and standard plans and specifications of the Department, the Director shall order the Company to complete the excavation as directed within twenty-four (24) hours. If the Company fails, neglects, or refuses to comply with the order, the Director may complete or cause to be completed such excavation and/or restoration in such manner as the Director deems expedient and appropriate. The Company shall compensate the City for any reasonable costs, including but not limited to administration, construction, consultants, equipment, inspection, notification, remediation, repair, restoration, or any other actual costs incurred by the City or other agencies, boards, commissions, or departments of the City, that were made necessary by such excavation and/or restoration. The cost of such work also may be deducted from the Company's security fund.

5. Subject to the limitation set forth in this Chapter, completion of an excavation or restoration by the Department in accordance with this Chapter shall not relieve the Company from liability for future pavement failures at the excavation site.

G. In order to verify that a Company has constructed the Telecommunications or Video System in the manner required by this Chapter, the City reserves the right to inspect the construction, as well as to inspect all necessary documents related to said construction.

H. A Company, at its own expense, shall temporarily disconnect or relocate any of its Facilities when necessitated by reason of:

1. Traffic conditions;
2. Public safety;
3. Temporary or permanent street closing not for the benefit of a private party;
4. Street constructions or resurfacing;
5. A change or establishment of street grade; and
6. Installation of sewers, drains, water pipes, storm drains, lift stations, force mains, Street light Facilities, traffic signal Facilities, tracks, or any other public use of the PROW.

16.10.090 Remedies During Construction.

A. Whenever construction is being performed in a manner contrary to the provisions of this Chapter, the City Manager, or an inspection official representing the City, may order the work stopped by notice in writing served on any person or Company engaged

in or causing the construction. Any work stopped shall not resume until authorized in writing by the Director or his or her designated representative.

B. Upon the failure, refusal or neglect of a Company to cause any construction or repair, or comply with a permit under this Chapter, the City may cause such work to be completed in whole or in part, and recover its costs of doing so, as set forth in this Section.

C. Upon knowledge of a Company's failure, refusal or neglect under subdivision B, the City shall give the Company notice of default and a reasonable time, but not less than 20 days, to cure the default. If the Company does not cure the default or make substantial good faith efforts to do so within that period, the City may perform the work itself. Upon completion of that work, the City shall submit to the Company an itemized statement of costs, which shall be due no later than 30 days of billing.

D. Costs that may be recovered include, but are not limited to, administration, construction, consultants, equipment, inspection, notification, remediation, repair, restoration, or any other actual costs incurred by the Department or other agencies, boards, commissions, departments of the City, that were made necessary by reason of the emergency remediation undertaken by the Department. The cost of such work also may be deducted from the Company's security fund.

E. Remediation by the City in accordance with this section shall not relieve the Company from responsibility or liability for subsequent conditions necessitating remediation.

F. The remedies available under this section shall be cumulative of any other remedies the City may seek under the provisions of this Chapter.

16.10.100 Maintenance of Facilities—Continuing Obligations.

A. Construction, installation, maintenance and repair of any Facilities shall comply, as applicable, with the provisions of the most current editions of the City's Zoning Ordinance, Building Code, Plumbing Code, Electrical Code, any applicable City-adopted Public Works Construction Standards, Specifications and Plans, and the Municipal Code, as they are modified from time to time, and any applicable Federal, State or local statutes, regulations, guidelines, or requirements.

B. The exterior of any newly installed Facility shall be manufactured or treated so as to resist graffiti and be maintained in good condition.

C. Each Facility installed in the PROW shall be clearly identified with the name of the owner of the Facility and a toll-free telephone number for the Company for which it was installed. The Director may adopt orders or regulations to specify other appropriate methods for identification.

D. A Company shall be responsible for maintaining all Facilities in good condition, well painted and free of graffiti and other markings; provided, however, that Companies shall not be responsible for maintenance of any plantings or vegetative screening

materials, whether preexisting installation of the Proposed Facilities or installed by the Company during installation. A Company assumes all responsibility for damage or injury resulting from placement or maintenance of any Facility. If a Company fails to comply with any written City demand relating thereto, the City may perform said work and withdraw its costs and expenses from the security fund.

E. Companies shall be required to monitor and abate graffiti on Facilities installed pursuant to permits issued under this Chapter. In addition, Companies shall provide the City with a method or contact information to report graffiti on their facilities and other Facility maintenance. Companies shall make reasonable commercial efforts to remove graffiti within seventy-two (72) hours of such notification.

F. By applying for and accepting a PROW Permit under this Chapter, a Company assumes all responsibility for damage or injury resulting from the presence of any Facility in the PROW. If a Company fails to comply with any written Director's demand relating thereto, the City may perform said work, or pay for such damage or injury, and withdraw its costs and expenses from the security fund or other security provided by the Company. However, remediation by the City in accordance with this section shall not relieve the Company from responsibility or liability for subsequent conditions necessitating remediation.

1. In the event that subsurface material or pavement over or immediately adjacent to any excavation becomes depressed, broken, or fails in any way at any time after the work has been completed, the Director shall notify the responsible Company, if any, of the condition, its location, and the required remedy. The Director shall give the Company notice of default and a reasonable time, but not less than 20 days, to cure the default. If the Company does not cure the default or make substantial good faith efforts to do so within that period, the City may perform the work itself. Upon completion of that work, the City shall submit to the Company an itemized statement of costs, which shall be due no later than 30 days of billing.

2. Costs that may be recovered include, but are not limited to, administration, construction, consultants, equipment, inspection, notification, remediation, repair, restoration, or any other actual costs incurred by the Department or other agencies, boards, commissions, or departments of the City, that were made necessary by reason of the emergency remediation undertaken by the Department. The cost of such work also may be deducted from the Company's security fund.

G. No Personal Wireless Service Facility or combination of Facilities subject to this Chapter shall produce power densities that exceed applicable FCC limits for electric and magnetic field strength and power density for transmitters. In order to ensure compliance with all applicable radiofrequency exposure standards, Personal Wireless Service Facilities that are not categorically excluded from the FCC's standards may be required to submit reports as required by this subdivision and applicable regulations and guidelines adopted by the Director.

Notwithstanding anything herein, no operator shall be required to provide any report, or any information in any report, that exceeds reports or information that may be required by the FCC. The City may obtain, at the operator's expense, independent verification of the results of any analysis. If an operator of a Personal Wireless Service Facility fails to supply the required report or fails to correct a violation of the FCC standard following notification, the PROW Permit for that Personal Wireless Service Facility shall be suspended until the operator complies with this subdivision.

1. Prior to January 31 of each year, an authorized representative for the operator of a Personal Wireless Service Facility permitted under this Chapter shall provide written certification to the City that each Personal Wireless Service Facility is being operated in accordance with all applicable FCC radiofrequency exposure standards.

2. To the extent required by the FCC standards, the operator of a Personal Wireless Service Facility shall be required to submit to the City a report, based on actual measurements, of compliance with applicable FCC MPE limits within 90 days of a reduction of any FCC radiofrequency exposure limit for electric and magnetic field strength and power density for transmitters, or of any modification of each Personal Wireless Service Facility requiring a new submission under FCC standards to determine compliance. If calculated levels are not in compliance with the FCC's MPE limits, the operator shall cease operation of the Personal Wireless Service Facility until it is brought into compliance with the FCC's standards. A report of these calculations and required measurements, if any, and the findings with respect to compliance with the current radiofrequency exposure limits, shall be submitted to the City.

16.10.110 Emergency Repairs.

A. Notwithstanding anything to the contrary in this Chapter, if the site of an excavation, whether during installation of Facilities or at any time thereafter, is or becomes hazardous, or constitutes a public nuisance, public emergency, or other imminent threat to the public health, safety, or welfare, such that it requires immediate action, the Director may order the responsible Company, by a written, electronic, or facsimile communication, to remedy the condition within a specified period of time.

B. If the responsible Company or its designated representative party is inaccessible or fails, neglects, or refuses to take prompt action to remedy the condition as specified in the communication, the Director may remedy the condition or cause the condition to be remedied.

C. Upon completion of that work, the City shall submit to the Company an itemized statement of costs, which shall be due no later than 30 days of billing. Amounts not timely paid may be deducted from the performance bonds or security fund. Costs that may be recovered include, but are not limited to, administration, construction, consultants, equipment, inspection, notification, remediation, repair, restoration, or any other actual costs incurred by the Department or other agencies, boards, commissions, or departments of the City, that were made necessary by reason of the emergency

remediation undertaken by the Department. The cost of such work also may be deducted from the Company's security fund.

D. Remediation by the City in accordance with this section shall not relieve the Company from responsibility or liability for subsequent conditions necessitating remediation.

16.10.120 Duty to Remove Facilities from PROW and Public Property—Abandonment in Place.

A. The Director may order a Company to remove its Facilities from public property or PROW at its own expense whenever a Company materially breaches its PROW Permit, ceases to operate substantially all of its Video or Telecommunications System for a continuous period of six (6) months, or fails to complete construction of the Video or Telecommunications System within six (6) months, or its PROW Permit is revoked. No such order may be issued without first giving the Company a reasonable opportunity to cure.

B. If a Company does not remove Facilities subject to removal by the deadline specified therein, the City may remove the Facilities at the Company's expense. The security fund shall be available to pay for such work.

C. If officials or representatives of the City remove Facilities, and if the Company for which they were installed does not claim the property within 30 days after service of notice of its removal upon the Company, the City may take whatever steps are available under State law to declare the property surplus and sell it, with the proceeds of such sale going to the City.

D. A Company that removes its Facilities from the PROW shall, at its own expense, replace and restore such PROW to a condition comparable to that which existed before the work causing the disturbance was done. If the Company does not do so after a reasonable period, the City may do so at the Company's expense. The security fund shall be available to pay for such work.

E. The City may, upon written application by a Company, approve the abandonment of any property in place by the telecommunications carrier under such terms and conditions as the City may approve. Upon City-approved abandonment of any property in place, the Company shall cause to be executed, acknowledged, and delivered to the City such instruments as the City shall prescribe and approve transferring and conveying the ownership of such property to the City.

16.10.130 City Vacation or Abandonment.

In the event any PROW or portion thereof used by a Company is vacated by the City consistent with state law, upon 180 days' prior notice, the Company shall forthwith remove its Facilities from the PROW unless specifically authorized in writing to continue. As a part of the removal, the Company shall restore, repair or reconstruct the area where the removal has occurred, consistent with Section 16.10.080, or to a lesser standard as may

be specified by the Director. In the event of any failure, neglect or refusal of the Company, after 30 days' notice by the Director, to do such work, the Director may cause it to be done, and the Company shall, within 45 days of billing, pay any reasonable costs, including but not limited to administration, construction, consultants, equipment, inspection, notification, remediation, repair, restoration, or any other costs actually incurred by the Department or other agencies, boards, commissions, or departments of the City, that were made necessary by reason of the failure, neglect, or refusal to perform the work. The security fund shall be available to pay for such work.

16.10.140 System Location Data.

Annually, each Company shall provide the Director with data in a digital or other format specified by the Director which details and documents all the geographic locations of Facilities located in PROW. The record shall be updated whenever there have been significant changes in the location of the Facilities. In addition, the Company shall maintain in its local office a complete, fully-dimensioned, and up-to-date set of as-built system maps and drawings upon completion of construction. As-built drawings shall show all Facilities. The scale of maps and drawings shall be sufficient to show the required details in easily readable form and size.

16.10.150 Appeals.

A. An applicant for a PROW permit under this Chapter or any resident or owner of property located within 500 feet of the proposed Facility may appeal the decision of the Director to issue or deny that permit to the City Manager by filing with the City Clerk a statement addressed to the City Manager setting forth the facts and circumstances regarding the Director's decision and the basis for the appeal. The appeal shall be accompanied by a fee as established by resolution of the City Council. Appeals from an approval will not be permitted to the extent that the appeal is based on environmental effects from radiofrequency emissions that comply with all applicable FCC regulations.

B. The right to such an appeal shall terminate upon the expiration of 10 days following the deposit of the Director's decision in the United States mail to the Company and all persons who have requested notice of the Director's decision pursuant to Section 16.10.060.A. A decision by the Director shall inform the Company and any person receiving notice of the decision of their right to appeal to the City Manager.

C. The City Manager shall hear the appeal not less than 10 days from the date on which it has been filed with the City Clerk, or such later date as the Company, any other appellant, and the City may agree to. The City Clerk shall provide written notification of the time and place set for hearing the appeal. The City Manager may sustain, overrule or modify the action of the Director. The decision of the City Manager shall be final. In the event that the time to approve or deny a permit application under state or federal law expires before the City Manager decides an appeal, the decision of the Director shall be final. Any such deadline may be extended by mutual agreement of all parties to the appeal, including the permit applicant.

D. Appeals shall be accompanied by such fees as are established by resolution of the City Council.

16.10.160 Indemnity and Liability Insurance.

A. To the maximum extent permitted by applicable law, a Company shall at all times defend, indemnify, protect, save harmless, and exempt the City, the City Council, its officers, agents, servants, attorneys and employees from any and all expenses, and any and all penalties, damages or charges arising out of claims, suits, demands, causes of action, award of damages, imposition of fines and penalties, whether compensatory or punitive, or expenses arising therefrom, either at law or in equity, which arise out of, or are caused by, the construction, erection, location, performance, operation, maintenance, repair, installation, replacement, removal or restoration of Facilities within the City based upon any act or omission of a Company, its agents or employees, contractors, subcontractors, independent contractors, or representatives, except for that which is attributable to the negligence or willful misconduct of the City, the City Council, its officers, agents, servants, attorneys and employees. With respect to the penalties, damages or charges referenced herein, reasonable attorneys' fees, consultants' fees, expert witness fees, and other litigation expenses are included as those costs which shall be recovered by the City. The City shall provide reasonable notice to a Company of any claim or lawsuit with which it has been served that is based on the construction, erection, location, performance, operation, maintenance, repair, installation, replacement, removal or restoration of Facilities within the City by a Company.

B. Except as provided in or as supplemented by any PROW Permit, a Company shall secure and maintain commercial general liability insurance, including bodily injury and property damage, with limits of \$7,000,000 per occurrence and \$7,000,000 in the aggregate, and shall have coverage at least as broad as the Insurance Service Office (ISO) Form No. CG 0001 or its successor, so long as any Facility of the Company remains in the PROW.

C. The commercial general liability insurance policy shall include the City, the City Council, and City employees and agents as additional insureds.

D. The commercial general liability insurance policy shall be issued by an agent or representative of an insurance Company licensed to do business in the State and rated A-VII or higher by A.M. Best Key Rating Guide for Property and Casualty Insurance Companies.

E. The certificate of insurance evidencing the required commercial general liability policy and additional insureds shall state that the insurer shall furnish the Director with at least 30 days' written notice in advance of the cancellation of the policy.

F. Before a Company commences any construction, the Company shall deliver the policies or certificates representing the insurance to the Director as required herein.

G. Renewal or replacement policies or certificates shall be delivered to the Director within five days of the expiration of the insurance which such policies are to renew or replace.

H. The Director may for good cause increase the coverage amounts specified in paragraph B of this section. Any Company required to maintain increased coverage under this section shall provide the Director with a certificate of insurance showing the increased coverage amount. The Director shall provide at least 30 days' notice of intent to increase coverage amounts pursuant to this paragraph.

16.10.170 Revocation, Termination, and Modification of Permits.

A. In addition to all other rights and powers retained by the City, the City shall have the right to revoke any permit granted hereunder and to terminate all rights and privileges of the permit hereunder in the event of a substantial breach of the terms and conditions of said permit. A substantial breach shall include, but shall not be limited to, the following:

1. Violation of any material provision of this Chapter or of any material provision of a permit granted pursuant to this Chapter;
2. Any attempt to evade any material provision of a permit granted under this Chapter or to practice any fraud or deceit or deception upon the City;
3. The failure to obtain permits for or to begin or complete construction as provided under this Chapter or a permit granted under this Chapter;
4. Material misrepresentation of fact in the application for or negotiation of a permit under this Chapter; or
5. Failure to pay any fee or other payment required by this Chapter or a permit granted hereunder when due. Failure to pay said fee shall also require the telecommunications carrier to pay interest on any past-due fee or compensation to the City at the rate of 1.5% per month on the unpaid amount.

B. It is the intent of the City Council to regulate the installation of small wireless facilities in the PROW in a manner consistent with applicable state and federal law, including but not limited to the FCC's Declaratory Ruling and Third Report and Order, In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, 83 FR 51867-01 (adopted September 26, 2018 and released September 27, 2018, hereinafter "FCC Report and Order"). In the event that the FCC Report and Order is invalidated, modified, or limited in any way that expands the City's authority with respect to the placement and/or design of the small wireless facility, the Director may review and revoke or modify any permit issued under this Chapter based on any amendments to this Chapter, or based on new regulations established pursuant to Section 16.10.200.B.

16.10.180 Possessory Interest.

By accepting a permit under this chapter, a Company acknowledges that notice is and was hereby given to it pursuant to California Revenue and Taxation Code Section 107.6 that use or occupancy of any public property may cause certain taxes to be levied upon such interest. A Company shall be solely liable for, and shall pay and discharge prior to delinquency, any and all possessory interest taxes or other taxes levied against its right to possession, occupancy or use of any PROW or public property pursuant to any right of possession, occupancy or use created by any permit.

16.10.190 Violations.

A. The Director may issue an administrative citation pursuant to Chapter 1.28 for any violation of this Chapter.

B. If any violation of this Chapter is determined to constitute a public nuisance, the City may order the abatement of the nuisance pursuant to Chapter 1.24, and said violation shall upon application by the City be enjoined by a court of competent jurisdiction.

C. The foregoing remedies shall be deemed non-exclusive, cumulative remedies and in addition to any other remedy the City may have at law or in equity.

16.10.200 Adoption of Administrative Regulations or Guidelines.

A. The Director may adopt administrative regulations or guidelines to implement the provisions of this Chapter. All such administrative regulations or guidelines shall be immediately effective when made publicly available in any format, which may include, but shall not be limited to, posting on the City's website or at any Public Works Department office.

B. In the event that the FCC Report and Order is invalidated, modified, or limited in any way, or at any other time as deemed appropriate by the Director, the Director shall review any administrative regulations or guidelines adopted to implement this Chapter, and shall revise any such administrative regulations or guidelines to the extent necessary or appropriate to protect the public health, safety, and welfare consistent with applicable state and federal law.

16.10.210 Interpretation and Severability.

A. The City recognizes that, pending further judicial interpretation or legislative amendment, Public Utilities Code Sections 7901 and 7901.1 currently limit the City's power to control use of the public rights-of-way by telephone companies as that term is used therein, and cable operators subject to the Digital Infrastructure and Video Competition Act of 2006 (Public Utilities Code Section 5800 *et seq.*), to reasonable time, place and manner regulations. Accordingly, this Chapter shall be interpreted and applied in a manner consistent with Public Utilities Code Sections 7901 and 7901.1.

B. If any word, phrase, sentence, part, section, subsection, or other portion of this Chapter, or any application thereof to any person or circumstance, is declared void, unconstitutional, or invalid for any reason, then such word, phrase, sentence, part,

section, subsection, or other portion, or the proscribed application thereof, shall be severable, and the remaining provisions of this chapter, and all applications thereof not having been declared void, unconstitutional or invalid, shall remain in full force and effect.

Section 2. Copies of this Ordinance shall be posted for two days prior to adoption in the display case located near the walkway in front of the Maudelle Shirek Building, 2134 Martin Luther King Jr. Way. Within 15 days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation.

EXCAVATIONS FOR VIDEO AND TELECOMMUNICATIONS SYSTEMS

16.10.010 Purpose.

The purpose of this Chapter is to establish policies and procedures for use of the public rights-of-way by Video Service Providers and Telephone Corporations, in order to minimize the inconvenience to and negative effects on the public and their use of the public rights-of-way, and to eliminate the cost to taxpayers that results from installation, maintenance and removal of the Facilities needed for Video and Telecommunication Systems while ensuring that all users of the public rights-of-way are treated in an equivalent manner. It is also the policy of the City to promote undergrounding of Facilities, whether related to Video Services, ~~Telecommunications Services~~telecommunications services, or any other utility or service, whenever Technically Feasible, in order to ensure optimal pedestrian accessibility and traffic safety.

16.10.020 Definitions.

A. For the purposes of this Chapter, the following words, terms, phrases, and their derivations shall have the meanings set forth herein unless a different meaning is clearly intended by the use and context of the word, term or phrase. When not inconsistent with the context, words used in the present tense include the future tense, and words in the singular number include the plural number.

~~1. "Above Ground Facility" or "AGF" means all structures, poles, pedestals, cabinets, electric meters, equipment, and any other Facility installed on or at the immediately surrounding grade in the Public Right Of Way ("PROW") but excludes any items installed on existing structures, poles, pedestals, cabinets, electric meters, equipment or other Facilities.~~

~~21.~~ "City" means the City of Berkeley, California, acting by and through its City Council or a representative as the governing body may designate to act on ~~cable matters on~~ its behalf.

~~32.~~ "City Manager" means the City Manager of the City or his/her designee.

~~43.~~ "Company" means any Video Service Provider or Telephone Corporation that is authorized by any governmental entity or law to provide Video ~~or Telecommunications Services~~ or telecommunications services in Berkeley.

~~54.~~ "Construction Plan" means information regarding the design, potential locations, and estimated time schedule for the construction and/or installation of a Facility, ~~as further specified in Section 16.10.070 submitted in accordance with the requirements of this Chapter and any regulations or guidelines adopted by the Director for the implementation of this Chapter.~~

~~65.~~ "Department" means the City Department of Public Works.

76. "Director" means the Director of the City's Department of Public Works or his or her designee.

87. "Excess Capacity" means the volume or capacity in any existing or future duct, conduit, ~~manhole~~maintenance hole, hand hole or Facility that is or will be made available by the owner for use by third party Facilities.

98. "Facility" or "Facilities" means any cable or other wire or line, antenna, radio, pipeline, pipes, duct, conduit, converter, cabinet, pedestal, meter, tunnel, vault, equipment, drain, manhole, splice box, surface location marker, pole, structure, utility, or other appurtenance, structure, property, or tangible thing owned, leased, operated, or licensed by a Company to provide or aid in the provision of ~~Cable or Telecommunications Services, excluding antennas, cable, personal wireless or telecommunications services~~ that are located or are proposed to be located on the PROW.

~~10. "Feasible" means capable of being accomplished in a successful manner within a reasonable period of time, taking into account appropriate environmental, physical, legal, economic and technological factors.~~

449. "FCC" means the Federal Communications Commission.

10. "Franchise" means a written legal undertaking or action issued by any level of government, which authorizes a specific Company to utilize the City's PROW for the purpose of installing, operating, maintaining, or reconstructing a Telecommunications System or providing Video Services.

4211. "Person" means any person, corporation, partnership, proprietorship, individual, organization, or other entity.

12. "Personal Wireless Service Facility" means a personal wireless service facility as defined in 47 U.S.C. § 332(c)(7)(C)(ii), as may be amended or superseded, including, but not limited to, facilities that transmit and/or receive electromagnetic signals for cellular radio telephone service, personal communications services, enhanced specialized mobile services, paging systems, and related technologies. Such facilities include, but are not limited to, antennas, microwave dishes, parabolic antennas, and all other types of equipment used in the transmission or reception of such signals; telecommunication towers or similar structures supporting said equipment; associated equipment cabinets and/or buildings; and all other accessory development used for the provision of personal wireless services. Personal Wireless Service Facility does not include radio towers, television towers, and government-operated public safety networks.

13. "PROW Permit" means a permit issued pursuant to this Chapter.

14. "Public rights-of-way" ("PROW") means any street, public way, public place or right-of-way, now laid out or dedicated, and the space on, above or below it, and all extensions thereof and additions thereto, owned, operated and/or controlled by the

City or subject to an easement owned by the City, and any privately owned area within the City's jurisdiction which is not yet, but is designated as, a proposed public place on a tentative subdivision map approved by the City.

~~1515.~~ "Technically Feasible" means a circumstance in which the applicant has demonstrated by clear and convincing evidence submitted to the Director that compliance with a specific requirement within this Chapter and any administrative regulations or guidelines is physically impossible and not merely more difficult or expensive than a noncompliant alternative.

~~16.~~ "Telephone Corporation" is defined as set forth in Section 234 of the California Public Utilities Code.

~~1617.~~ "Telecommunications System" means the Facilities necessary or convenient for a Telecommunications Carrier to provide ~~Telecommunications Service~~telecommunications service.

~~1718.~~ "Traffic Control Plan" means a plan describing the manner in which the Company will manage vehicle, bicycle, and pedestrian traffic along affected Streets that have a speed limit greater than 35 miles per hour when installing or maintaining Facilities.

~~1819.~~ "Video Service" is defined as set forth in Section 5830(s) of the California Public Utilities Code.

~~1920.~~ "Video Service Provider" is defined as set forth in Section 5830(t) of the California Public Utilities Code.

~~2021.~~ "Video System" means the Facilities necessary or convenient for a Video Service Provider to provide Video Service~~;~~.

~~B. — Terms Not Defined. Words, terms, or phrases not defined herein shall first have the meaning as defined in the California Digital Infrastructure and Video Competition Act (DIVCA) of 2006 (AB2987), codified at Section 5800 et seq. of the California Public Utility Code, and then the special meanings or connotations used in any industry, business, trade, or profession where they commonly carry special meanings. If there are no such special meanings, they will have the standard definitions as set forth in commonly used and accepted dictionaries of the English language.~~

16.10.030 PROW ~~permit required~~Permit Required—Applicability.

~~A. —~~ A. PROW Permit Required

1. Except as provided in subdivision B, in addition to any agreement, license, permit or Franchise required by this Code or any other local, state or federal law, no Company may undertake any project involving excavation in the PROW ~~for a Facility or installation of an AGF,~~ in order to construct, install, or repair ~~a Telecommunications or Video System~~any Facility, or a portion thereof, without first obtaining a PROW permit pursuant to this Chapter and paying all lawful fees required by this Code. ~~The~~

~~Director shall have the authority to determine whether a proposed Facility is an AGF as defined in Section 16.10.020.A.1.~~

2. All Facilities proposed to be located on utility poles owned or controlled by the Northern California Joint Pole Authority shall be subject to the application requirements and process set forth in Section 16.10.045.

B. Notwithstanding anything stated herein, a PROW Permit shall not be required (1) if the Director makes a written determination that a proposed Facility described in subdivision A relates to the maintenance, replacement or insubstantial modification of existing Facilities, except that replacement of an AGF shall require a PROW Permit; or (2) if the applicant requests approval to collocate, replace or remove transmission equipment at an existing wireless tower or base station submitted pursuant to 47 U.S.C. § 1455, which will be subject to the current FCC rules and regulations applicable to “eligible facilities requests” as defined by FCC and as may be amended or superseded.

C. In addition to the requirements of this Chapter, a Company shall obtain all otherwise necessary City permits including, without limitation, encroachment permits, building permits, electrical permits, and other permits that may be lawfully required by this Code or other applicable laws or regulations.

16.10.040 PROW ~~permit application~~ Permit Application.

No fewer than 30 days prior to a Company’s intended Construction start date, a written application for a PROW Permit, along with payment of any fees or deposit required by the City, shall be filed with the Director, in the form and manner required by the Director, and shall contain, at a minimum, all of the following information:

A. General information regarding any Facilities that the Company plans to apply for permits to install within the PROW in the next six (6) months, regardless of whether a permit is currently sought for those Facilities.

B. Site plan of the Facilities proposed to be located within the PROW, including a map in electronic and/or other form required by the City. The plans and specifications shall show:

1. The location and dimensions of all existing street trees of at least 6" in diameter, AGFsFacilities, and improvements in the PROW where the new Facilities are proposed.

2. Photographs with superimposed images showing any proposed AGFsFacilities.

3. A description of the proposed Facilities, including, if such information has not previously been provided to the City, a general description of the facilities, including whether the facility will contain any electronic components, natural gas generator, electrical fans, and/or emergency backup equipment.

4. The specific landscaping, structures, improvements, Facilities and obstructions, if any, that the Company proposes to temporarily or permanently remove or relocate.

5. A detailed description or plan showing any proposed screening and/or landscaping associated with any proposed ~~AGFs~~Facilities.

C. If the Company is proposing new underground installation of Facilities within the PROW, it shall provide, upon request of the Director, information regarding any Excess Capacity that will exist in such Facilities after the installation of the Company's Facilities.

D. Estimated ~~Construction Start~~construction start and ~~Completion~~completion dates.

E. A Traffic Control Plan, if required, that complies with guidelines established by the Director.

F. An application for ~~an AGF~~any Facility shall include proof of written public notification by first class mail to property owners and residents within 500 feet of the proposed ~~AGF~~Facility.

G. To the extent practicable, proof that the Company has obtained any other governmental approvals and permits required to construct the Facilities in question. If a Company has not previously provided information sufficient to show that it is a Telephone Corporation or Video Service Provider, the City may also require that the Company provide such information.

16.10.045 Applications for Facilities other than AGFs.~~H. In any application for a Personal Wireless Service Facility that is not categorically excluded from the FCC standards for radiofrequency exposure, the operator of each new or modified telecommunications antenna associated with that Personal Wireless Service Facility shall submit to the City a written report that the Personal Wireless Service Facility's radiofrequency exposure is in compliance with applicable FCC regulations. The report shall state the radio frequency radiation of the proposed Personal Wireless Service Facility, including the cumulative impact from other nearby Personal Wireless Service Facilities, and state whether it meets any applicable FCC requirements. The City shall not issue any PROW Permit if the operator fails to demonstrate compliance with applicable FCC requirements for radiofrequency exposure. The City may require, at the applicant's expense, peer review or independent verification of the results of the analysis.~~

16.10.045 Additional Application Requirements for Facilities on Utility Poles.

A. Applications for Facilities subject to Section 16.10.030.A.2 shall include proof that all entities with authority to grant or deny permission for installation of the Facility have approved it.

B. Such applications shall also include proof that all property owners and occupants within 500 feet of the proposed location of the Facility have been given

notice by first class mail, ~~at least 30 days prior to~~ no later than the date of the application, of the proposed construction or installation of the Facility. Such notice shall also be posted on the pole on which the Facility is proposed to be installed. Notices under this Section shall identify the specific pole on which the Facility is proposed to be installed and contact information for the Company or its authorized representative. The purpose of this notice is to ensure that property owners and residents have an opportunity to contact the Company and any entities responsible for the pole on which the Facility is proposed to be located so that they can try to resolve any objections they may have.

C. The application shall include all communications received by the Company in response to the public notice, as well as its responses to those communications.

16.10.050 Design, ~~installation~~Installation, and ~~construction~~Construction of ~~video~~Video and ~~telecommunications systems~~Telecommunications Systems.

A. All Facilities shall be so located, constructed, installed and maintained so as not to incommode the public use of the road or highway or interrupt navigation of the waters, including access to and from the PROW from private property.

B. In the event a Company creates a hazardous or unsafe condition on either public or private property, or unreasonably interferes with access between the PROW and private property, the Company shall remove or modify that part of the Facility to eliminate such condition.

C. No Facility may be located or installed in such a manner that it will unreasonably interfere with existing or adopted City plans to use the PROW, with the access rights of private property owners, with existing gas, electric, sewer or telephone fixtures, with existing water hydrants and mains, with existing sewers, storm drains or v-ditches, or any existing wastewater stations, or with any existing traffic control System.

D. Construction, installation, maintenance and repair of Facilities shall not substantially affect the integrity of any affected structures, and shall, to the extent reasonably feasible, be installed either perpendicular or parallel to property lines or the sides of structures.

E. All underground taps shall, to the extent reasonably possible, follow property lines and cross property at right angles unless otherwise required due to the physical characteristics of the subsurface or required under applicable law.

F. All construction of new and replacement Facilities shall be accomplished between the hours reasonably specified by the City in the approved permit or ordinances. Construction shall seek to minimize any adverse impact on services of the City or third parties.

G. Whenever existing Facilities or electric utility facilities are located underground along a particular street or public way, new Facilities shall be installed underground along that street or public way to the extent Technically Feasible.

H. Whenever any new or existing Facilities or electric utility lines are relocated underground along a particular street or public way, a Company shall relocate its Facilities underground to the extent Technically Feasible concurrently with the other lines at its sole expense, in accordance with existing legal and regulatory requirements.

I. Companies shall advise and coordinate major construction efforts with other utility companies through ~~city-sponsored~~City-sponsored utility coordination meetings, and, to the extent reasonably possible, coordinate their construction work with other utilities installing infrastructure in the PROW. In new developments, a Company shall contact the developer to determine whether any surplus conduit is available in the areas that the Company plans to install facilities, and whether any joint trenching or boring projects are feasible.

J. Overhead facilities may be installed only if sufficient space is available on existing utility poles or other structures, consistent with applicable regulations and agreements, as determined by the Director.

K. If proposed new Facilities would require excavation, or involve excavation for installation of new facilities, those Facilities shall be installed within existing Facilities whenever sufficient Excess Capacity is available on commercially reasonable terms and conditions.

L. ~~All~~Where feasible, all proposed ~~AGFs~~Facilities shall be installed underground or in flush mounted vaults or low profile waterproof pedestals, unless the Director determines that ~~it would be infeasible to do so or installing~~ the proposed ~~AGF~~Facility above ground would not result in significant detriment to the PROW or the environment surrounding it: or incommode the public use of the PROW. In making ~~these~~ determinations~~this determination~~, the Director shall consider the information in the application and the record, including information provided by the Company and members of the public.

M. Companies shall coordinate with affected property owners to locate ~~AGFs~~Facilities so as to reasonably minimize inconvenience and disruption to residents, consistent with installation of permitted Facilities.

~~N. — The City Manager or his/her designee may adopt regulations, guidelines and standards to implement this Section.~~

16.10.060 Issuance of PROW ~~permits~~Permits.

A. Each PROW Permit shall be subject to the criteria and provisions of this Chapter. The PROW Permit ~~shall~~may be ~~promptly~~ issued upon review of a completed application and a determination by the Director that a Company has filed a complete application and has complied with all applicable requirements of this Chapter ~~—~~ including any duly adopted administrative regulations or guidelines. Any owner or resident of property located within 500 of a proposed Facility may request to receive notice of the Director's decision to issue or deny a PROW Permit.

B. Criteria. In determining whether to grant or deny a PROW Permit, the Director shall consider factors permitted under Section 7901 and 7901.1 of the California Public Utility Code and this Chapter. In particular, the Director shall consider:

1. The capacity of the PROW to accommodate all proposed Facilities.
2. The capacity of the PROW to accommodate the City's planned uses of the PROW.
3. The damage or disruption, if any, to the PROW or any public or private facilities, improvements adjacent to it, pedestrian or vehicle travel, and landscaping, if the permit is granted.
4. The availability of technically compatible existing Facilities or Excess Capacity, or alternate routes and/or locations for the proposed Facilities, which would be less disruptive or which better protect the PROW for its dedicated use, and the Feasibility of using such Facilities, Excess Capacity or alternate routes and/or locations.
5. The effect of any ~~Above Ground~~ Facilities on traffic or pedestrian safety or access.
6. Completion of any environmental review under the California Environmental Quality Act (CEQA) that may be required by law.
7. Whether the Company has the legal entitlement to provide the services for which the Facilities will be used.

8. Any administrative regulations or guidelines adopted by the Director to implement this Chapter.

C. The Director may require modifications to the proposed excavation or installation of ~~AGFs~~any Facility based on the factors set forth above. However, no such modifications may make it infeasible to undertake to install the ~~Facilities~~Facility in the PROW to provide the service they are intended to provide.

D. Where the Director has information that there is a substantial risk that a Company may not fulfill its obligations under the permit, the Director may require that the Company provide satisfactory financial security in an amount not to exceed 110% of the total estimated cost of all work to be performed under the PROW Permit, as determined by the Director, and as necessary and appropriate to compensate the City for any costs that may be required to ensure full compliance with all of the requirements of this Chapter. Such security shall consist of an irrevocable letter of credit, cash deposit, or performance bond as determined by the Director. The security shall be maintained in full force and effect until the permitted work in the PROW is completed to the satisfaction of the Director, at which time the security shall be reduced to ten percent (10%) of the actual cost of the work. The reduced security shall be maintained by the Company for a period of one year as a guarantee that the work is of good quality and free from any defective or faulty material or workmanship. Any

surety supplying a performance bond must be an "admitted surety insurer," as defined in Section 995.120 of the Code of Civil Procedure, and authorized to do business in the state of California. Return of the security shall be conditioned upon the Company's faithful performance of all work in the PROW specified in the applicable permit. In the event the Company fails to comply with any provision of this Chapter related to such work, or any provision of any applicable permit or other approval related to such work, any damages or loss suffered by the City as a result thereof shall be recoverable from the security, including but not limited to the full amount of any compensation, indemnification, cost of removal, or abandonment of any property of the Company, plus reasonable attorneys' fees and costs up to the full amount of the security. Neither the provisions of this section nor any damages recovered by the City hereunder shall be construed to limit liability or damages of licensee under this Chapter, either to the full amount of the security or otherwise. In addition to its rights to take action under the security, the City may pursue any other remedy provided by law. For any wireless telecommunications facility, as defined in Government Code section 65850.6, the financial security provided by the Company shall not exceed the estimated cost of removal of the Facility. In establishing the amount of the security, the city or county shall take into consideration information provided by the Company and other evidence in the record regarding the cost of removal.

E. Fees. As a condition of the issuance of any permit, a Company shall pay all applicable cost-based fees assessed by resolution of the City Council; provided, however, that such payments and submittals shall not be deemed a waiver of any right the Company may have to challenge the legality of such permit fees if the Company specifies in writing the basis of any objection to such fees and pays under protest.

F. Right to Inspect. The City may inspect any work performed pursuant to a PROW Permit at any reasonable time during normal business hours that the City deems appropriate, upon reasonable notice to the Company performing that work, when necessary. In addition, the City shall inspect a Company's work reasonably promptly upon notice from the Company that the work has been completed.

G. Duration and Validity. Work should begin within ~~one hundred and eighty (180)~~ calendar days of the start date specified in the permit and should be prosecuted diligently to completion, including restoration. ~~If the start of work is unreasonably delayed beyond 180 days and it is necessary and prudent for the city to conduct an entirely new review of the proposed installation, the Director may void the permit and require resubmission.~~ The Director at their sole discretion may grant an extension of the deadline for completion of construction upon a request by the applicant.

16.10.070 Construction ~~activities~~ Activities.

A. Not less than 10 business days prior to the intended start of construction, the Company shall provide written public notification by door hanger to residents within 500 feet of the proposed construction.

B. All work in or affecting the PROW shall be performed in accordance with this Chapter, the Construction Plan, and with the standard plans and specifications of the

Department and any Department orders or regulations, except where the Director, at his or her discretion, grants prior written approval to deviate from the standard plans and specifications, orders, or regulations. The Director shall develop written guidelines to implement the granting of waivers authorized pursuant to this Chapter.

C. A Company shall provide reasonable advance notification, but in any case not less than ~~3~~three business days, to the City of the initiation of any construction activities pursuant to a PROW Permit issued under this Chapter.

D. A Company shall make its best efforts to complete any work authorized by a permit under this Chapter no later than the date specified in the permit.

E. A Company shall post and maintain notice at the site of the excavation or installation during the construction period. The notice shall include the name, telephone number, and address of the Company, a description of the excavation or installation to be performed, and the duration of the excavation or installation. The notice shall be posted along all Streets in the area where the excavation or installation is to take place.

F. If a Company requires additional time to complete work, it shall so notify the Director and the Director may, upon a written demonstration of good cause, grant a work completion extension. In addition, the Company shall provide the Director with a telephone contact number, answered ~~twenty-four (24)~~ hours ~~aper~~ day during the construction period, to enable the Director to report any concerns regarding construction of the Facilities.

16.10.080 Excavation.

A. A Company that excavates or causes to be made an excavation in the PROW shall maintain, repair, or reconstruct the site of the excavation as specified by the City until such time as the site of the excavation is repaved or resurfaced by the Department, or by another party pursuant to a subsequently issued PROW permit.

B. If a Company excavates in the PROW, it shall comply with the requirements of Underground Service Alert North ("USAN") regarding notification of excavation or installation and marking of subsurface Facilities. The Company shall provide USAN with the assigned number of the permit to excavate or other information as may be necessary to properly identify the proposed excavation or installation.

C. Limits on Work in the Public Right-of-Way:

1. Scope. It is unlawful for a Company to make, cause, or permit to be made any excavation in the PROW outside the boundaries, times, and description set forth in the PROW Permit.

2. Trenching. Trenching in the PROW shall be by the "direct buried method," as defined by the Director. Use of a rock wheel or other trenchless technology to excavate in the PROW is prohibited without prior written approval of the Director.

3. Single Excavation Maximum. No single excavation site shall be longer than one thousand two hundred (1,200) feet at any time except with the prior written approval of the Director.

4. A Company may not excavate any Street that has been reconstructed or resurfaced by the Department or at its direction in the preceding five-year period and shall participate in City efforts to coordinate excavation activities. However, subject to Section 16.12.030, the Director may, in his or her discretion, grant a waiver of this subsection for good cause. Good cause shall include the fact that the need to excavate arose in spite of a Company's full compliance with the coordination of excavation provisions. The Director is authorized to grant a waiver for an excavation that facilitates the deployment of new technology or new Service as directed pursuant to official City policy. The Director shall issue his or her decision on a waiver within a reasonable period after receipt of a written request for a waiver.

D. Companies shall be subject to the following requirements for excavation sites:

1. Companies shall cover open excavation with non-skid steel plates ramped to the elevation of the contiguous Street, pavement, or other PROW, or otherwise protected in accordance with guidelines prescribed by the Department.

2. Companies shall keep the area surrounding the excavation clean and free of loose dirt or other debris. Excavation sites shall be cleaned at the completion of each workday. In addition, Permittees shall remove all excavated material from the site of the excavation no later than the end of each workday.

3. Materials and equipment to be used for the excavation within 7 calendar days may be stored at the site of the excavation, except that fill material, sand, aggregate, and asphalt-coated material may be stored at the site only if it is stored in covered, locked containers.

4. Companies shall comply with all federal, state, and local laws regarding hazardous materials, including with respect to (a) data collection; (b) disposal, handling, release, and treatment of hazardous material; site remediation; and (c) worker safety and training. "Hazardous material" means any gas, material, substance, or waste which, because of its quantity, concentration, or physical or chemical characteristics, is deemed by any federal, state, or local authority to pose a present or potential hazard to human health or safety or to the environment.

5. Companies shall develop and implement a Water Quality Management Plan and/or Stormwater Pollution Prevention Plan for any excavation project as required by law.

E. If the Director determines that a Company has violated this Chapter or that an excavation poses a hazardous situation or constitutes a public nuisance, public emergency, or other threat to public health, safety, or welfare, the Director may issue a stop work order, impose new conditions upon a permit, or suspend or revoke a permit

by notifying the Permittee company of such action in a written, electronic, or facsimile communication.

F. Restoration of PROW

1. In any case in which a Company causes a sidewalk, Street, or other PROW to be excavated or disturbed by an excavation, the Company shall restore the sidewalk, Street or other PROW in the manner prescribed by the orders, regulations, and standard plans and specifications of the Director.

2. Activities concerning backfilling, replacement of pavement base, and finished pavement shall be performed in a manner specified by the orders, regulations, and standard plans and specifications of the Director. In addition, these activities shall be subject to the following requirements:

a. Each excavation shall be backfilled and compacted within seventy-two (72) hours from the time the construction related to the excavation is completed.

b. Replacement of the pavement base shall be completed within seventy-two (72) hours from the time the excavation is backfilled.

c. Finished pavement restoration shall be completed within ~~ten~~10 days after completion of the substructure installation or sooner as directed by the Director.

3. Upon written request from a Company, the Director may grant written approval for modifications to the requirements of this section.

4. In any case where an excavation is not completed or restored in the time and manner specified in the permit, this Chapter, or the orders, regulations, and standard plans and specifications of the Department, the Director shall order the Company to complete the excavation as directed within twenty-four (24) hours. If the Company fails, neglects, or refuses to comply with the order, the Director may complete or cause to be completed such excavation and/or restoration in such manner as the Director deems expedient and appropriate. The Company shall compensate the City for any reasonable costs, including but not limited to administration, construction, consultants, equipment, inspection, notification, remediation, repair, restoration, or any other actual costs incurred by the City or other agencies, boards, commissions, or departments of the City, that were made necessary by such excavation and/or restoration. The cost of such work also may be deducted from the Company's security fund.

5. Subject to the limitation set forth in this Chapter, completion of an excavation or restoration by the Department in accordance with this Chapter shall not relieve the Company from liability for future pavement failures at the excavation site.

G. In order to verify that a Company has constructed the Telecommunications or Video System in the manner required by this Chapter, the City reserves the right to inspect the construction, as well as to inspect all necessary documents related to said construction.

H. A Company, at its own expense, shall temporarily disconnect or relocate any of its Facilities when necessitated by reason of:

1. Traffic conditions;
2. Public safety;
3. Temporary or permanent street closing not for the benefit of a private party;
4. Street constructions or resurfacing;
5. A change or establishment of street grade; and
6. Installation of sewers, drains, water pipes, storm drains, lift stations, force mains, Street light Facilities, traffic signal Facilities, tracks, or any other public use of the PROW.

16.10.090 Remedies ~~during construction~~During Construction.

A. Whenever construction is being performed in a manner contrary to the provisions of this ~~chapter~~Chapter, the City Manager, or an inspection official representing the City, may order the work stopped by notice in writing served on any person or Company engaged in or causing the construction. Any work stopped shall not resume until authorized in writing by the Director or his or her designated representative.

B. Upon the failure, refusal or neglect of a Company to cause any construction or repair, or comply with a permit under this Chapter, the City may cause such work to be completed in whole or in part, and recover its costs of doing so, as set forth in this Section.

C. Upon knowledge of a Company's failure, refusal or neglect under subdivision B, the City shall give the Company notice of default and a reasonable time, but not less than 20 days, to cure the default. If the Company does not cure the default or make substantial good faith efforts to do so within that period, the City may perform the work itself. Upon completion of that work, the City shall submit to the Company an itemized statement of costs, which shall be due no later than 30 days of billing.

D. Costs that may be recovered include, but are not limited to, administration, construction, consultants, equipment, inspection, notification, remediation, repair, restoration, or any other actual costs incurred by the Department or other agencies, boards, commissions, departments of the City, that were made necessary by reason of the emergency remediation undertaken by the Department. The cost of such work also may be deducted from the Company's security fund.

E. Remediation by the City in accordance with this section shall not relieve the Company from responsibility or liability for subsequent conditions necessitating remediation.

F. The remedies available under this section shall be cumulative of any other remedies the City may seek under the provisions of this Chapter.

16.10.100 Maintenance of ~~facilities~~Facilities—Continuing ~~obligations~~Obligations.

A. Construction, installation, maintenance and repair of any Facilities shall comply, as applicable, with the provisions of the most current editions of the City's Zoning Ordinance, Building Code, Plumbing Code, Electrical Code, any applicable City-adopted Public Works Construction Standards, Specifications and Plans, and the Municipal Code, as they are modified from time to time, and any applicable Federal, State or local statutes, regulations, guidelines, or requirements.

B. The exterior of any newly installed AGFFacility shall be manufactured or treated so as to resist graffiti and be maintained in good condition.

C. Each AGFFacility installed in the PROW shall be clearly identified with the name of the owner of the AGFFacility and a toll-free telephone number for the Company for which it was installed. The Director may adopt orders or regulations to specify other appropriate methods for identification.

D.- A Company shall be responsible for maintaining all AGFsFacilities in good condition, well painted and free of graffiti and other markings; provided, however, that Companies shall not be responsible for maintenance of any plantings or vegetative screening materials, whether preexisting installation of the Proposed Facilities or installed by the Company during installation. A Company assumes all responsibility for damage or injury resulting from placement or maintenance of any AGFFacility. If a Company fails to comply with any written City demand relating thereto, the City may perform said work and withdraw its costs and expenses from the security fund.

E. Companies shall be required to monitor and abate graffiti on Facilities installed pursuant to permits issued under this Chapter. In addition, Companies shall provide the City with a method or contact information to report graffiti on their facilities and other Facility maintenance. Companies shall make reasonable commercial efforts to remove graffiti within seventy-two (72) hours of such notification.

F. By applying for and accepting a PROW Permit under this Chapter, a Company assumes all responsibility for damage or injury resulting from the presence of any AGFFacility in the PROW. If a Company fails to comply with any written Director's demand relating thereto, the City may perform said work, or pay for such damage or injury, and withdraw its costs and expenses from the security fund or other security provided by the Company. However, remediation by the City in accordance with this section shall not relieve the Company from responsibility or liability for subsequent conditions necessitating remediation.

1. In the event that subsurface material or pavement over or immediately adjacent to any excavation becomes depressed, broken, or fails in any way at any time after the work has been completed, the Director shall notify the responsible Company, if any, of the condition, its location, and the required remedy. The Director shall give the

Company notice of default and a reasonable time, but not less than 20 days, to cure the default. If the Company does not cure the default or make substantial good faith efforts to do so within that period, the City may perform the work itself. Upon completion of that work, the City shall submit to the Company an itemized statement of costs, which shall be due no later than 30 days of billing.

2. Costs that may be recovered include, but are not limited to, administration, construction, consultants, equipment, inspection, notification, remediation, repair, restoration, or any other actual costs incurred by the Department or other agencies, boards, commissions, or departments of the City, that were made necessary by reason of the emergency remediation undertaken by the Department. The cost of such work also may be deducted from the Company's security fund.

G. No ~~wireless telecommunications facility ("WTF")~~Personal Wireless Service Facility or combination of ~~facilities~~Facilities subject to this Chapter shall produce power densities that exceed applicable FCC limits for electric and magnetic field strength and power density for transmitters. In order to ensure compliance with all applicable radiofrequency exposure standards, ~~WTFs~~Personal Wireless Service Facilities that are not categorically excluded from the FCC's standards may be required to submit reports as required by this subdivision: and applicable regulations and guidelines adopted by the Director.

Notwithstanding anything herein, no operator shall be required to provide any report, or any information in any report, that exceeds reports or information that may be required by the FCC. The City may obtain, at the operator's expense, independent verification of the results of any analysis. If an operator of a ~~WTF~~Personal Wireless Service Facility fails to supply the required report or fails to correct a violation of the FCC standard following notification, the PROW Permit for that ~~WTF~~Personal Wireless Service Facility shall be suspended until the operator complies with this subdivision.

~~1. — Within forty five (45) days of initial operation or modification of a WTF that is not categorically excluded from the FCC's standards, the operator of each new or modified telecommunications antenna associated with that WTF shall submit to the City a written report that the WTF's radio frequency exposure is in compliance with applicable FCC regulations. The report shall state the radio frequency radiation of the approved WTF, including the cumulative impact from other nearby WTFs, and state whether it meets any applicable FCC requirements. If the report shows that the WTF does not comply with applicable FCC requirements, the owner or operator shall cease operation of the WTF until it complies with, or has been modified to comply with, FCC requirements. Proof of compliance shall be a report provided by the person who prepared the original report. The City may require, at the applicant's expense, peer review or independent verification of the results of the analysis.~~

~~2.~~ Prior to January ~~31st~~31 of ~~every~~each year, an authorized representative for the operator of a ~~WTF~~Personal Wireless Service Facility permitted under this Chapter shall provide written certification to the City that each ~~WTF~~Personal Wireless Service

Facility is being operated in accordance with ~~the~~all applicable FCC ~~Maximum Permissible Exposure (MPE)~~radiofrequency exposure standards.

~~3. With respect to a WTF that is not categorically excluded from the FCC's standards, once every two years, at the operator's expense, the City may conduct, or retain a licensed professional engineer to conduct, an unannounced spot check of the WTF's compliance with applicable FCC MPE standards.~~

42. To the extent required by the FCC standards, the operator of a ~~WTF~~Personal Wireless Service Facility shall be required to submit to the City a report, based on actual measurements, of compliance with applicable FCC MPE limits within 90 days of a reduction ~~in the FCC's MPE limits~~of any FCC radiofrequency exposure limit for electric and magnetic field strength and power density for transmitters, or of any modification of ~~the WTF~~each Personal Wireless Service Facility requiring a new submission under FCC standards to determine compliance. If calculated levels are not in compliance with the FCC's MPE limits, the operator shall cease operation of the ~~WTF~~Personal Wireless Service Facility until it is brought into compliance with the FCC's standards. A report of these calculations and required measurements, if any, and the findings with respect to compliance with the current ~~MPE~~radiofrequency exposure limits, shall be submitted to the City.

~~For purposes of this subdivision, "wireless telecommunications facility" means personal wireless service facilities as defined in the Telecommunications Act of 1996, including, but not limited to, facilities that transmit and/or receive electromagnetic signals for cellular radio telephone service, personal communications services, enhanced specialized mobile services, paging systems, and related technologies. Such facilities include antennas, microwave dishes, parabolic antennas, and all other types of equipment used in the transmission or reception of such signals; telecommunication towers or similar structures supporting said equipment; associated equipment cabinets and/or buildings; and all other accessory development used for the provision of personal wireless services. WTF does not include radio towers, television towers, and government-operated public safety networks.~~

16.10.110 Emergency ~~repairs~~Repairs.

A. Notwithstanding anything to the contrary in this Chapter, if the site of an excavation, whether during installation of Facilities or at any time thereafter, is or becomes hazardous, or constitutes a public nuisance, public emergency, or other imminent threat to the public health, safety, or welfare, such that it requires immediate action, the Director may order the responsible Company, by a written, electronic, or facsimile communication, to remedy the condition within a specified period of time.

B. If the responsible Company or its designated representative party is inaccessible or fails, neglects, or refuses to take prompt action to remedy the condition as specified in the communication, the Director may remedy the condition or cause the condition to be remedied.

C. Upon completion of that work, the City shall submit to the Company an itemized statement of costs, which shall be due no later than 30 days of billing. Amounts not timely paid may be deducted from the performance bonds or security fund. Costs that may be recovered include, but are not limited to, administration, construction, consultants, equipment, inspection, notification, remediation, repair, restoration, or any other actual costs incurred by the Department or other agencies, boards, commissions, or departments of the City, that were made necessary by reason of the emergency remediation undertaken by the Department. The cost of such work also may be deducted from the Company's security fund.

D. Remediation by the City in accordance with this section shall not relieve the Company from responsibility or liability for subsequent conditions necessitating remediation.

16.10.120 Duty to ~~remove facilities~~Remove Facilities from PROW and ~~public property~~Public Property—~~Abandonment in place~~Place.

A. The Director may order a Company to remove its Facilities from public property or PROW at its own expense whenever a Company materially breaches its PROW Permit, ceases to operate substantially all of its Video or Telecommunications System for a continuous period of six (6) months, or fails to complete construction of the Video or Telecommunications System ~~outlined in its PROW Permit~~within six (6) months, or its PROW Permit is revoked. No such order may be issued without first giving the Company a reasonable opportunity to cure.

B. If a Company does not remove Facilities subject to removal by the deadline specified therein, the City may remove the Facilities at the Company's expense. The security fund shall be available to pay for such work.

C. If officials or representatives of the City remove Facilities, and if the Company for which they were installed does not claim the property within ~~thirty (30) days~~ after service of notice of its removal upon the Company, the City may take whatever steps are available under State law to declare the property surplus and sell it, with the proceeds of such sale going to the City.

D. A Company that removes its Facilities from the PROW shall, at its own expense, replace and restore such PROW to a condition comparable to that which existed before the work causing the disturbance was done. If the Company does not do so after a reasonable period, the City may do so at the Company's expense. The security fund shall be available to pay for such work.

E. The City may, upon written application by a Company, approve the abandonment of any property in place by the telecommunications carrier under such terms and conditions as the City may approve. Upon City-approved abandonment of any property in place, the Company shall cause to be executed, acknowledged, and delivered to the City such instruments as the City shall prescribe and approve transferring and conveying the ownership of such property to the City.

16.10.130 City ~~vacation~~Vacation or ~~abandonment~~Abandonment.

In the event any PROW or portion thereof used by a Company is vacated by the City consistent with state law, upon 180 days' prior notice, the Company shall forthwith remove its Facilities from the PROW unless specifically authorized in writing to continue. As a part of the removal, the Company shall restore, repair or reconstruct the area where the removal has occurred, consistent with Section 16.10.080, or to a lesser standard as may be specified by the Director. In the event of any failure, neglect or refusal of the Company, after 30 days' notice by the Director, to do such work, the Director may cause it to be done, and the Company shall, within 45 days of billing, pay any reasonable costs, including but not limited to administration, construction, consultants, equipment, inspection, notification, remediation, repair, restoration, or any other costs actually incurred by the Department or other agencies, boards, commissions, or departments of the City, that were made necessary by reason of the failure, neglect, or refusal to perform the work. The security fund shall be available to pay for such work.

16.10.140 System ~~location data~~Location Data.

Annually, each Company shall provide the Director with data in a digital or other format specified by the Director which details and documents all the geographic locations of Facilities located in PROW. The ~~computer disk or other~~ record shall be updated whenever there have been significant changes in the location of the Facilities. In addition, the Company shall maintain in its local office a complete, fully-dimensioned, and up-to-date set of as-built system maps and drawings upon completion of construction. As-built drawings shall show all Facilities. The scale of maps and drawings shall be sufficient to show the required details in easily readable form and size.

16.10.150 Appeals.

A. An applicant for a PROW permit under this Chapter or any resident or owner of property located within 500 feet of the proposed Facility may appeal the decision of the Director to issue or deny that permit to the City Manager by filing with the City Clerk a statement addressed to the City Manager setting forth the facts and circumstances regarding the Director's decision and the basis for the appeal. The appeal shall be accompanied by a fee as established by resolution of the City Council. Appeals from an approval will not be permitted to the extent that the appeal is based on environmental effects from radiofrequency emissions that comply with all applicable FCC regulations.

B. The right to such an appeal shall terminate upon the expiration of 10 days following the deposit of the Director's decision in the United States mail to the Company- and all persons who have requested notice of the Director's decision pursuant to Section 16.10.060.A. A decision by the Director shall inform the Company of its and any person receiving notice of the decision of their right to appeal to the City Manager.

C. The City Manager shall hear the appeal not less than 10 days from the date on which it has been filed with the City Clerk, or such later date as the Company, any other appellant, and the City may agree to. The City Clerk shall provide written notification of the time and place set for hearing the appeal. The City Manager may sustain, overrule or modify the action of the Director. The decision of the City Manager shall be final. In the event that the time to approve or deny a permit application under state or federal law expires before the City Manager decides an appeal, the decision of the Director shall be final. Any such deadline may be extended by mutual agreement of all parties to the appeal, including the permit applicant.

~~D. An applicant may appeal a decision of the City Manager to the City Council by filing with the City Clerk a statement addressed to the City Council setting forth the facts and circumstances regarding the City Manager's decision and the basis for the appeal. The right to such an appeal shall terminate upon the expiration of 10 days following the deposit of the City Manager's decision in the United States mail to the Company. A decision by the City Manager shall inform the Company of its right to appeal to the City Council.~~

~~E. The City Council shall hear the appeal at the next opportunity consistent with its agenda procedures and timelines. The City Council may sustain, overrule or modify the action of the City manager, and its decision shall be final.~~

~~FD.~~ Appeals shall be accompanied by such fees as are established by resolution of the City Council.

16.10.160 Indemnity and liability insurance~~Liability Insurance~~.

A. ___ To the maximum extent permitted by applicable law, a Company shall at all times defend, indemnify, protect, save harmless, and exempt the City, the City Council, its officers, agents, servants, attorneys and employees from any and all expenses, and any and all penalties, damages or charges arising out of claims, suits, demands, causes of action, award of damages, imposition of fines and penalties, whether compensatory or punitive, or expenses arising therefrom, either at law or in equity, which arise out of, or are caused by, the construction, erection, location, performance, operation, maintenance, repair, installation, replacement, removal or restoration of Facilities within the City based upon any act or omission of a Company, its agents or employees, contractors, subcontractors, independent contractors, or representatives, except for that which is attributable to the negligence or willful misconduct of the City, the City Council, its officers, agents, servants, attorneys and employees. With respect to the penalties, damages or charges referenced herein, reasonable attorneys' fees, consultants' fees, expert witness fees, and other litigation expenses are included as those costs which shall be recovered by the City. The City shall provide reasonable notice to a Company of any claim or lawsuit with which it has been served that is based on the construction, erection, location, performance, operation, maintenance, repair, installation, replacement, removal or restoration of Facilities within the City by a Company.

B. Except as provided in or as supplemented by any PROW Permit, a Company shall secure and maintain commercial general liability insurance, including bodily injury and property damage, with limits of \$7,000,000 per occurrence and \$7,000,000 in the aggregate, and shall have coverage at least as broad as the Insurance Service Office (ISO) Form No. CG 0001 or its successor, so long as any Facility of the Company remains in the PROW.

C. The commercial general liability insurance policy shall include the City, the City Council, ~~its~~ and City employees and agents as additional insureds.

D. The commercial general liability insurance policy shall be issued by an agent or representative of an insurance Company licensed to do business in the State and rated A-VII or higher by A.M. Best Key Rating Guide for Property and Casualty Insurance Companies.

E. The certificate of insurance evidencing the required commercial general liability policy and additional insureds shall state that the insurer shall ~~endeavor to~~ furnish the Director with at least ~~thirty (30)~~ days' written notice in advance of the cancellation of the policy.

~~F. — Renewal or replacement policies or certificates shall be delivered to the Director within five (5) days of the expiration of the insurance which such policies are to renew or replace.~~

~~GF.~~ Before a Company commences any construction, the Company shall deliver the policies or certificates representing the insurance to the Director as required herein.

G. — Renewal or replacement policies or certificates shall be delivered to the Director within five days of the expiration of the insurance which such policies are to renew or replace.

~~H. The Director may reasonably adjust for good cause increase the coverage amounts specified in subsection paragraph B of this section; provided, that the adjustments result in the Any Company meeting or exceeding the required to maintain increased coverage specified in under this section, and provided shall provide the Company is given thirty days in which to procure such adjusted Director with a certificate of insurance showing the increased coverage amount. The Director shall provide at least 30 days' notice of intent to increase coverage amounts and provide evidence of same to the Director pursuant to this paragraph.~~

16.10.170 Revocation ~~and termination~~, Termination, and Modification of Permits.

A. In addition to all other rights and powers retained by the City, the City shall have the right to revoke any permit granted hereunder and to terminate all rights and privileges of the permit hereunder in the event of a substantial breach of the terms and conditions of said permit. A substantial breach shall include, but shall not be limited to, the following:

~~A1.~~ Violation of any material provision of this ~~chapter~~Chapter or of any material provision of a permit granted pursuant to this ~~chapter~~Chapter;

~~B2.~~ Any attempt to evade any material provision of a permit granted under this Chapter or to practice any fraud or deceit or deception upon the City;

~~C3.~~ The failure to obtain permits for or to begin or complete construction as provided under this Chapter or a permit granted under this Chapter;

~~D4.~~ Material misrepresentation of fact in the application for or negotiation of a permit under this Chapter; or

~~E5.~~ Failure to pay any fee or other payment required by this Chapter or a permit granted hereunder when due. Failure to pay said fee shall also require the telecommunications carrier to pay interest on any past-due fee or compensation to the City at the rate of 1.5% per month on the unpaid amount.

B. It is the intent of the City Council to regulate the installation of small wireless facilities in the PROW in a manner consistent with applicable state and federal law, including but not limited to the FCC's Declaratory Ruling and Third Report and Order, In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, 83 FR 51867-01 (adopted September 26, 2018 and released September 27, 2018, hereinafter "FCC Report and Order"). In the event that the FCC Report and Order is invalidated, modified, or limited in any way that expands the City's authority with respect to the placement and/or design of the small wireless facility, the Director may review and revoke or modify any permit issued under this Chapter based on any amendments to this Chapter, or based on new regulations established pursuant to Section 16.10.200.B.

16.10.180 Possessory ~~interest~~Interest.

By accepting a permit under this chapter, a Company acknowledges that notice is and was hereby given to it pursuant to California Revenue and Taxation Code Section 107.6 that use or occupancy of any public property may cause certain taxes to be levied upon such interest. A Company shall be solely liable for, and shall pay and discharge prior to delinquency, any and all possessory interest taxes or other taxes levied against its right to possession, occupancy or use of any PROW or public property pursuant to any right of possession, occupancy or use created by any permit.

16.10.190 Violations.

A. ~~Violation~~The Director may issue an administrative citation pursuant to Chapter 1.28 for any violation of this Chapter ~~will~~.

B. If any violation of this Chapter is determined to constitute a public nuisance ~~that may be abated by~~, the City ~~or may order the abatement of the nuisance pursuant to Chapter 1.24, and said violation shall, upon application by the City, be enjoined by a court of competent jurisdiction.~~

BC. The foregoing remedies shall be deemed non-exclusive, cumulative remedies and in addition to any other remedy the City may have at law or in equity.

16.10.200 Adoption of Administrative Regulations or Guidelines.

A. The Director may adopt administrative regulations or guidelines to implement the provisions of this Chapter. All such administrative regulations or guidelines shall be immediately effective when made publicly available in any format, which may include, but shall not be limited to, posting on the City’s website or at any Public Works Department office.

B. In the event that the FCC Report and Order is invalidated, modified, or limited in any way, or at any other time as deemed appropriate by the Director, the Director shall review any administrative regulations or guidelines adopted to implement this Chapter, and shall revise any such administrative regulations or guidelines to the extent necessary or appropriate to protect the public health, safety, and welfare consistent with applicable state and federal law.

16.10.210 Interpretation and ~~severability~~Severability.

A. The City recognizes that, pending further judicial interpretation or legislative amendment, Public Utilities Code Sections 7901 and 7901.1 currently limit the City’s power to control use of the public rights-of-way by telephone companies as that term is used therein, and ~~Cable Operators~~cable operators subject to the Digital Infrastructure and Video Competition Act of 2006 (Public Utilities Code ~~Sections~~Section 5800 *et seq.*), to reasonable time, place and manner regulations. Accordingly, this Chapter shall be interpreted and applied in a manner consistent with Public Utilities Code Sections 7901 and 7901.1.

B. If any word, phrase, sentence, part, section, subsection, or other portion of this ~~chapter~~Chapter, or any application thereof to any person or circumstance, is declared void, unconstitutional, or invalid for any reason, then such word, phrase, sentence, part, section, subsection, or other portion, or the proscribed application thereof, shall be severable, and the remaining provisions of this chapter, and all applications thereof not having been declared void, unconstitutional or invalid, shall remain in full force and effect.

ADMINISTRATIVE GUIDELINES FOR ISSUANCE OF PUBLIC RIGHT-OF-WAY PERMITS UNDER BERKELEY MUNICIPAL CODE Chapter 16.10

SECTION 1. PURPOSE AND INTENT

- (a) The City of Berkeley (“City”) intends this Policy to establish reasonable, uniform and comprehensive standards and procedures for the implementation of Berkeley Municipal Code Chapter 16.10. The standards and procedures contained in this Policy are intended to, and should be applied to, protect and promote public health, safety and welfare, and balance the benefits that flow from robust, advanced wireless services with the City’s local values, which include without limitation the aesthetic character of the City, its neighborhoods and community. This Policy is intended to achieve the following objectives:
- (1) foster an aesthetically pleasing urban environment, protect and preserve public safety and general welfare, and protect the character of residential and adjacent neighborhood commercial areas by preventing visual blight and clutter from inappropriately designed and sited infrastructure facilities to the extent permitted by applicable laws;
 - (2) promote location and design of facilities to minimize interference with pedestrian and vehicular traffic, avoid damage to street trees, and protect historic and cultural, and natural resources by preventing degradation of their surrounding setting;
 - (3) minimize noise, traffic disruption, dust, air pollution, and other short-term impacts of construction activities and day-to-day operation;
 - (4) provide opportunities for citizens to comment on the location and design of overhead facilities and aboveground structures to make installations more responsive to neighborhood concerns about their aesthetic and environmental effects;
 - (5) ensure that restoration of sidewalks, landscaped area, streets or other infrastructure damaged or removed is completed consistent with City specifications;
 - (6) provide greater certainty to both applicants and interested members of the public while ensuring compliance with all applicable City requirements;
 - (7) protect and preserve the City’s public rights-of-way and municipal infrastructure located within the City’s public rights-of-way; and
 - (8) promote access to high-quality, advanced wireless services for the City’s residents, businesses and visitors.

- (b) This Policy is intended to establish regulations, standards and guidelines for small wireless facilities consistent with the City's regulations for other infrastructure deployments unless specifically prohibited by applicable law. Different infrastructure deployments may be managed through other mechanisms, such as franchise or license agreements. This Policy is intended to be administered such that small wireless facility deployments shall apply the same aesthetic, maintenance and public safety regulations, standards and guidelines to the permit or other approval issued in connection with a request for authorization under such franchise, license or other agreement. However, different infrastructure deployments may have different impacts on the public rights-of-way that require different regulations, standards or guidelines to protect public health, safety and welfare. To the extent that different regulations, standards or guidelines are applied to small wireless facilities or other infrastructure deployments, the City intends that one set be no more burdensome than the other when viewed under the totality of the circumstances.
- (c) This Policy is not intended to, nor shall it be interpreted or applied to: (1) prohibit or effectively prohibit any personal wireless service provider's ability to provide personal wireless services; (2) prohibit or effectively prohibit any entity's ability to provide any telecommunications service, subject to any competitively neutral and nondiscriminatory rules, regulations or other legal requirements for rights-of-way management; (3) unreasonably discriminate among providers of functionally equivalent personal wireless services; (4) deny any request for authorization to place, construct or modify personal wireless service facilities on the basis of environmental effects of radio frequency emissions to the extent that such wireless facilities comply with the FCC's regulations concerning such emissions; (5) prohibit any collocation or modification that the City may not deny under federal or California state law; (6) impose any unreasonable, discriminatory or anticompetitive fees that exceed the reasonable cost to provide the services for which the fee is charged; or (7) otherwise authorize the City to preempt any applicable federal or California law.
- (d) This Policy is not intended to limit or prejudice any individual's ability to seek a reasonable accommodation under the Americans with Disabilities Act, the Fair Housing Amendments Act or any other similar federal or state law due to electromagnetic sensitivity or symptoms based on exposure to radio frequency emissions.

SECTION 2. DEFINITIONS

The definitions in this Section 2 are applicable to the terms, phrases and words of this Policy. Undefined terms, phrases or words will have the meanings assigned to them in 47 U.S.C. § 153 or, if not defined therein, will have the meaning assigned to them in the Berkeley Municipal Code or, if not defined in either therein, will have their ordinary meanings. If any definition assigned to any term, phrase or word in this Section 2

conflicts with any federal or state-mandated definition, the federal or state-mandated definition will control.

“Accessory equipment” means equipment other than antennas used in connection with a small wireless facility or other infrastructure deployment. The term includes “transmission equipment” as defined by the FCC in 47 C.F.R. § 1.6100(b)(8), as may be amended or superseded.

“Antenna” means the same as defined by the FCC in 47 C.F.R. § 1.6002(b), as may be amended or superseded.

“Batched application” means more than one application submitted at the same time by the same applicant with the intention that the City shall process the requests for authorization together as a group.

“Collocation” means the same as defined by the FCC in 47 C.F.R. § 1.6002(g), as may be amended or superseded. As defined by the FCC and adopted in this Policy, “collocation” means mounting or installing an antenna and/or accessory equipment on a pre-existing structure (whether such structure currently supports a wireless facility or not) and/or modifying a structure in connection with such installation.

“CPUC” means the California Public Utilities Commission established in the California Constitution, Article XII, § 5, or its duly appointed successor agency.

“Decorative pole” means any pole that includes decorative or ornamental features, design elements and/or materials intended to enhance the appearance of the pole or the public rights-of-way in which the pole is located.

“Director” means the same as defined in Berkeley Municipal Code Section 16.10.020.

“FCC” means the Federal Communications Commission or its duly appointed successor agency.

“FCC Shot Clock” means the presumptively reasonable time frame, accounting for any tolling or extension, within which the City generally must act on a duly filed request for authorization in connection with a personal wireless service facility, as such time frame is defined by the FCC and as may be amended or superseded. For small wireless facilities covered by this Policy, the FCC Shot Clock is 60 days for collocations, 90 days for new structures. For batched applications, the longest shot clock applicable to any small wireless facility in the batch shall be applicable to the entire batch (e.g., in a batch with four collocations and one new/replacement pole, the FCC Shot Clock would be 90 days for the entire batch even though the collocation applications would be 60 days if submitted on an individual basis).

“OTARD” means an “over-the-air reception device” and includes all antennas and antenna supports covered by 47 C.F.R. § 1.4000(a)(1), as may be amended or superseded.

“Personal wireless services” means the same as defined in 47 U.S.C. § 332(c)(7)(C)(i), as may be amended or superseded.

“Personal wireless service facilities” means the same as defined in 47 U.S.C. § 332(c)(7)(C)(i), as may be amended or superseded.

“Public right-of-way” or **“public rights-of-way”** means land or an interest in land which by deed, conveyance, agreement, easement, dedication, usage or process of law is reserved for or dedicated to or open to the use by the general public for road or highway purposes. The term does not include private or public utility easements unless such easement is reserved for or dedicated to or open to the use by the general public for road or highway purposes.

“RF” means radio frequency or electromagnetic waves.

“Section 6409” means Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156, codified as 47 U.S.C. § 1455(a), as may be amended or superseded.

“Shot clock days” means calendar days counted toward the presumptively reasonable time under the applicable FCC Shot Clock. The term “shot clock days” does not include any calendar days on which the FCC Shot Clock is tolled. As an illustration and not a limitation, if an applicant applies on February 1, receives a valid incomplete notice on February 5 and then resubmits on February 20, only four “shot clock days” have elapsed because the time between the incomplete notice and resubmittal are not counted.

“Small wireless facility” means the same as defined by the FCC in 47 C.F.R. § 1.6002(l), as may be amended or superseded.

“Support structure” means a “structure” as defined by the FCC in 47 C.F.R. § 1.6002(m), as may be amended or superseded.

“Underground district” means any area in the City within which overhead wires, cables, cabinets and associated overhead equipment, appurtenances and other improvements are either (1) prohibited by ordinance, resolution or other applicable law; (2) scheduled to be relocated underground within 18 months from the time an application is submitted; or (3) primarily located underground at the time an application is submitted.

SECTION 3. APPLICABILITY

- (a) **Small Wireless Facilities.** Except as expressly provided otherwise, the provisions in this Policy shall be applicable to all existing small wireless facilities and all applications and requests for authorization to construct, install, attach, operate, collocate, modify, reconstruct, relocate, remove or otherwise deploy small wireless facilities within the public rights-of-way within the City's jurisdictional and territorial boundaries.
- (b) **Other Infrastructure Deployments.** To the extent that other infrastructure deployments, including without limitation any deployments that require approval pursuant to Chapter 16.10, involve the same or substantially similar structures, apparatus, antennas, equipment, fixtures, cabinets, cables or improvements as those deployed for small wireless facilities, the City official or designee responsible to review and approve or deny requests for authorization in connection with such other infrastructure deployment shall apply the provisions in this Policy unless specifically prohibited by applicable law.
- (c) **Exemptions.** This Policy shall not be applicable to (1) OTARD facilities and (2) requests for approval to collocate, replace or remove transmission equipment at an existing wireless tower or base station submitted pursuant to Section 6409, which will be subject to the current FCC rules and regulations applicable to "eligible facilities requests" as defined by FCC and as may be amended or superseded.

SECTION 4. APPLICATION AND REVIEW PROCEDURES

- (a) **Application Requirements for Small Wireless Facilities.** Berkeley Municipal Code Sections 16.10.040 and 16.10.045 set forth the minimum application requirements for a PROW Permit. In addition, or as clarification, to the minimum requirements in the Berkeley Municipal Code and any other publicly stated requirements, all PROW Permit applications for small wireless facilities must include the following information and materials:
 - (1) **Application Form.** The applicant shall submit a complete, duly executed PROW Permit application on the current City of Berkeley form.
 - (2) **Application Fee.** The applicant shall submit the applicable PROW Permit application fee established by City Council resolution. Batched applications must include the applicable PROW Permit application fee for each small wireless facility in the batch. If no PROW Permit application fee has been established, then the applicant must submit a signed written statement that acknowledges that the applicant will be required to reimburse the City for its

reasonable costs incurred in connection with the application within 10 days after the City issues a written demand for reimbursement.

- (3) **Construction Drawings.** The applicant shall submit true and correct construction drawings, prepared, signed by a licensed or registered engineer, that depict all the existing and proposed improvements, equipment and conditions related to the proposed project, which includes without limitation any and all poles, posts, pedestals, traffic signals, towers, streets, sidewalks, pedestrian ramps, driveways, curbs, gutters, drains, handholes, maintenance holes, fire hydrants, equipment cabinets, antennas, cables, trees and other landscape features. The construction drawings must: (i) contain cut sheets that contain the technical specifications for all existing and proposed antennas and accessory equipment, which includes without limitation the manufacturer, model number and physical dimensions; (ii) identify all potential support structures within 500 feet from the proposed project site and call out such structures' overall height above ground level; (iii) depict the applicant's preliminary plan for electric and data backhaul utilities, which shall include the anticipated locations for all conduits, cables, wires, handholes, junctions, transformers, meters, disconnect switches, and points of connection; (iv) include locations for existing utility facilities within 50 feet of the footprint of work; and (v) demonstrate that proposed project will be in full compliance with all applicable health and safety laws, regulations or other rules, which includes without limitation all building codes, electric codes, local street standards and specifications, and public utility regulations and orders. All pole attachments shall be shown with pole numbers.
- (4) **Site Survey.** For any small wireless facility, the applicant shall submit a survey prepared, signed and stamped by a licensed or registered engineer. The survey must identify and depict all existing boundaries, encroachments and other structures within 75 feet from the proposed project site and any new improvements, which includes without limitation all: (i) traffic lanes; (ii) all private properties and property lines; (iii) above and below-grade utilities and related structures and encroachments; (iv) fire hydrants, roadside call boxes and other public safety infrastructure; (v) streetlights, decorative poles, traffic signals and permanent signage; (vi) sidewalks, driveways, parkways, curbs, gutters and storm drains; (vii) benches, trash cans, mailboxes, kiosks and other street furniture; and (viii) existing trees, planters and other landscaping features.
- (5) **Photo Simulations.** The applicant shall submit site photographs and photo simulations that show the existing location and proposed small wireless facility in context from at least three vantage points within the public streets or other publicly accessible spaces, together with a vicinity map that shows the proposed site location and the photo location for each vantage point. At least one simulation must depict the small wireless facility from a vantage point approximately 50 feet from the proposed support structure or location. The

photo simulations and vicinity map shall be incorporated into the construction plans submitted with the application.

- (6) **Project Narrative and Justification.** The applicant shall submit a written statement that explains in plain factual detail whether and why the proposed facility qualifies as a “small wireless facility” as defined by the FCC in 47 C.F.R. § 1.6002(l). A complete written narrative analysis will state the applicable standard and all the facts that allow the City to conclude the standard has been met—bare conclusions not factually supported do not constitute a complete written analysis. As part of the written statement the applicant must also include (i) whether and why the proposed support structure is a “structure” as defined by the FCC in 47 C.F.R. § 1.6002(m); and (ii) whether and why the proposed wireless facility meets the location and design standards in this Policy.
- (7) **RF Compliance Report.** The applicant shall submit an RF exposure compliance report that certifies that the proposed small wireless facility, both individually and cumulatively with all other emitters that contribute more than 5% to the cumulative emissions in in the vicinity (if any), will comply with applicable federal RF exposure standards and exposure limits. The RF report must be prepared and certified by an RF engineer acceptable to the Director. The RF report must include the actual frequency and power levels (in watts effective radiated power) for all existing and proposed antennas at the site and exhibits that show the location and orientation of all transmitting antennas and the boundaries of areas with RF exposures in excess of the uncontrolled/general population limit (as that term is defined by the FCC) and also the boundaries of areas with RF exposures in excess of the controlled/occupational limit (as that term is defined by the FCC). Each such boundary shall be clearly marked and identified for every transmitting antenna at the project site. If the applicant submits a batched application, a separate RF report shall be prepared for each facility associated with the batch.
- (8) **Public Notices.** The applicant shall include with the application an affidavit that attests that notice has been posted at the project site and delivered by first class mail to all record owners and legal occupants of all properties within 500 feet from the proposed project site. Notice to the legal occupants shall be deemed given when sent to the property’s physical address. The notice shall be posted or delivered pursuant to Berkeley Municipal Code Section 16.10.040 and must contain: (1) a general project description; (2) the applicant’s identification and contact information as provided on the application submitted to the City for interested parties to submit comments; (3) contact information for the Director; (4) a statement that the Director will act on the application without a public hearing and that the owner or occupant may request to be notified of the Director’s decision; (5) if the application is for a small wireless facility, a general statement that the FCC requires the City to take final action on such applications within 60 days for collocations and 90

days for facilities on new support structures; and (6) a statement that any person that wishes to seek a reasonable accommodation under the American with Disabilities Act or Fair Housing Amendments Act may do so. The notice shall be delivered in an envelope that prominently displays the operator's logo and shall prominently display the text "NEW FACILITY INFORMATION" on the front of the envelope. The applicant shall maintain a list of recipients of the public notice and a log of any correspondence to or from the recipients of the notice prior to the City's final decision on the application.

- (9) **Regulatory Authorization.** The applicant shall submit evidence of the applicant's regulatory status under federal and California law to provide the services and construct the small wireless facility proposed in the application. As an illustration, but not as a limitation, the applicant's status as a telephone corporation under California law could be established by providing a copy of the applicant's Certificate of Public Convenience and Necessity.
- (10) **Property Owner's Authorization.** For any small wireless facility proposed to be installed on an existing or replacement support structure in the public rights-of-way, the applicant must submit the support structure identification number and a written authorization from the support structure owner(s). As an illustration, but not as a limitation, an applicant that proposes to install a small wireless facility on a utility pole owned or controlled by the Northern California Joint Pole Authority ("NCJPA") shall, pursuant to Berkeley Municipal Code Section 16.10.045.A, provide evidence that the proposed facility has been (i) affirmatively approved by all entities with authority to grant or deny permission for the installation or (ii) deemed approved by the operation of the NCJPA's procedures.
- (11) **Acoustic Analysis.** The applicant shall submit an acoustic analysis prepared and certified by a licensed engineer for the proposed small wireless facility and all associated equipment including all environmental control units, sump pumps, temporary backup power generators and permanent backup power generators demonstrating compliance with the applicable provisions in Berkeley Municipal Code Chapter 13.40. The acoustic analysis must also include an analysis of the manufacturers' specifications for all noise-emitting equipment and a depiction of the proposed equipment relative to all adjacent property lines. In lieu of an acoustic analysis, the applicant may submit evidence from the equipment manufacturer(s) that the ambient noise emitted from all the proposed equipment will not, both individually and cumulatively, exceed the applicable noise limits.
- (12) **Structural Analysis.** The applicant shall submit a report prepared and certified by an California-licensed structural engineer (or other qualified personnel acceptable to the City) that certifies (i) the underlying pole or support structure has the structural integrity and/or capacity to support all the proposed equipment and attachments; (ii) the foundation has the capacity to

support additional loading and to accommodate any modifications to the pole base and bolt pattern; and (iii) any drilling or cutting will preserve the structural integrity of the pole. At a minimum, the analysis must be consistent with all applicable requirements in CPUC General Order 95 (including, but not limited to, load and pole overturning calculations), the National Electric Safety Code, the standards and practices required for an ANSI/TIA-222 Maintenance and Conditions Assessment (under the most current revision at the time of submittal), and any safety and construction standards required by law and the utility provider.

- (b) **Community Meeting.** The City strongly encourages, but does not require, applicants to schedule, notice, arrange, and attend a pre-submittal community meeting with all interested members of the public. This voluntary, pre-submittal public meeting does not cause the FCC Shot Clock to begin and is intended to give applicants the opportunity to hear from members of the public regarding proposed deployment. Applicants are encouraged (but not required) to bring any draft applications, plans, maps, presentations or other materials to facilitate the public's understanding of the applicant's proposal. The City seeks to encourage dialogue that may allow applicants to address and resolve areas of concern prior to the applicant submitting an application.
- (c) **Submittal Appointments.** All applications must be submitted in person to the City at a pre-scheduled appointment with the Director. Prospective applicants may generally submit one application per appointment, or up to five individual applications per appointment as a batch. Potential applicants may schedule successive appointments for multiple applications whenever feasible and not prejudicial to other applicants for any other development project as determined by the Director. The Director shall use reasonable efforts to offer an appointment within five working days after the Director receives a written request from a potential applicant. Any purported application received without an appointment, whether delivered in-person, by mail or through any other means, will not be considered duly filed, whether the City retains, returns or destroys the materials received.
- (d) **Incomplete Applications Deemed Withdrawn.** Any application governed under this Policy shall be automatically deemed withdrawn by the applicant when the applicant fails to submit a substantive response to the Director within 60 calendar days after the Director deems the application incomplete by written notice. As used in this subsection (d), a "substantive response" must include, at a minimum, some or all the materials identified as incomplete in the written incomplete notice.
- (e) **Peer and Independent Consultant Review.** Pursuant to Berkeley Municipal Code Section 16.10.100.G.1, the Director may, in the Director's discretion, select and retain an independent consultant with specialized training, experience and/or expertise in applicable regulations for human exposure to RF emissions to verify the results of the applicant's RF compliance report and analysis including,

without limitation: (a) pre-construction planned compliance with applicable regulations for human exposure to RF emissions; (b) post-construction actual compliance with applicable regulations for human exposure to RF emissions; and (c) the applicability, reliability and/or sufficiency of any information, analyses or methodologies used by the applicant to reach any conclusions about any issue with the City's discretion to review. The Director may request that the independent consultant prepare written reports, testify at public meetings, hearings and/or appeals and attend meetings with City staff and/or the applicant. Subject to applicable law, in the event that the Director elects to retain an independent consultant in connection with any permit application, the applicant shall be responsible for the reasonable costs in connection with the services provided, which may include without limitation any costs incurred by the independent consultant to attend and participate in any meetings or hearings. Before the independent consultant may perform any services, the applicant shall tender to the City a deposit in an amount equal to the estimated cost for the services to be provided, as determined by the Director until the City adopts the initial required deposit by fee schedule. The Director may request additional deposits as reasonably necessary to ensure sufficient funds are available to cover the reasonable costs in connection with the independent consultant's services. In the event that the deposit exceeds the total costs for consultant's services, the Director shall promptly return any unused funds to the applicant after the wireless facility has been installed and passes a final inspection by the Director. In the event that the reasonable costs for the independent consultant's services exceed the deposit, the Director shall invoice the applicant for the balance. The City shall not issue any construction or PROW Permit to any applicant with any unpaid deposit requests or invoices.

- (f) **Public Comment Log.** Applicants shall maintain a log of all calls and correspondence received by the applicant from the public in response to the public notice required pursuant to Berkeley Municipal Code Section 16.10.045.B, including the commenter's name, property address and comment, the date the comment was received and the applicant's response and resolution. A copy of the log shall be provided to the City upon the Director's request, prior to the Director's decision or before the applicable shot clock expires, whichever occurs first.

SECTION 5. DECISIONS

- (a) **Initial Administrative Decision.** Not more than 29 shot clock days after the application has been deemed complete, the Director shall approve, conditionally approve or deny a complete and duly filed PROW Permit application without a public hearing.
- (b) **Criteria for Approval.** Berkeley Municipal Code Section 16.10.060.B sets forth the criteria for the Director to determine whether to grant or deny a PROW

Permit. To clarify such criteria in the context of small wireless facilities, the Director shall also consider whether:

- (1) the proposed project complies with all applicable design standards (Section 7) and location standards (Section 8) in this Policy; and
 - (2) the applicant has demonstrated that the proposed project will be in planned compliance with all applicable FCC regulations and guidelines for human exposure to RF emissions.
- (c) **Conditional Approvals; Denials Without Prejudice.** Subject to any applicable federal or California laws, nothing in this Policy is intended to limit the Director's ability to conditionally approve or deny without prejudice any PROW Permit application as may be necessary or appropriate to ensure compliance with this Policy.
- (d) **Application Decision Notice.** Within five calendar days after the Director acts on a PROW Permit application, the Director shall provide written notice to the applicant. If the Director denies an application (with or without prejudice) for a small wireless facility, the written notice must also contain the reasons for the denial.

SECTION 6. CONDITIONS OF APPROVAL

- (a) **Standard Conditions.** In addition to, and consistent with, the construction, operation, maintenance, removal and relocation standards in Berkeley Municipal Code Chapter 16.10, and except as may be authorized in subsection (b), all PROW Permits issued under this Policy shall be automatically subject to the conditions in this subsection (a).
- (1) **Permit Term.** Any PROW Permit will automatically expire 10 years and one day from its issuance unless California Government Code § 65964(b) authorizes the City to establish a shorter term for public safety reasons. Any other permits or approvals issued in connection with any collocation, modification or other change to this wireless facility, which includes without limitation any permits or other approvals deemed-granted or deemed-approved under federal or state law, will not extend this term limit unless expressly provided otherwise in such permit or approval or required under federal or state law.
 - (2) **Permit Renewal.** Not more than one year before the PROW Permit expires, the permittee may apply for permit renewal. The permittee must demonstrate that the subject small wireless facility or other infrastructure deployment complies with all the conditions of approval associated with the PROW Permit and all applicable provisions in the Berkeley Municipal Code and this Policy that exist at the time the decision to renew or not renew is rendered. The

Director may modify or amend the conditions on a case-by-case basis as may be necessary or appropriate to ensure compliance with the Berkeley Municipal Code, this Policy or other applicable law. Upon renewal, the PROW Permit will automatically expire 10 years and one day from its issuance.

- (3) **Post-Installation Certification.** Within 60 calendar days after the permittee receives the final inspection or completes the construction/installation of a small wireless facility, the permittee shall provide the Director with documentation reasonably acceptable to the Director that the small wireless facility has been installed and/or constructed in strict compliance with the approved construction drawings and photo simulations. Such documentation shall include without limitation as-built drawings, GIS data and site photographs.
- (4) **Build-Out Period.** Any PROW Permit will automatically expire 12 months from the approval date (the “build-out period”) unless the permittee obtains all other permits and approvals required to install, construct and/or operate the approved small wireless facility or other infrastructure deployment, which includes without limitation any permits or approvals required by the any federal, state or local public agencies with jurisdiction over the subject property, support structure or the small wireless facility or other infrastructure deployment and its use. The permittee may request in writing, and the City may grant in writing, one six-month extension if the permittee submits substantial and reliable written evidence demonstrating justifiable cause for a six-month extension. If the build-out period and any extension finally expires, the permit shall be automatically void but the permittee may resubmit a complete application, including all application fees, for the same or substantially similar project.
- (5) **Site Maintenance.** The permittee shall comply with the provisions of the most current editions of the City’s Building Code, Plumbing Code, Electrical Code, any applicable City-adopted Public Works Construction Standards, Specifications and Plans, and the Berkeley Municipal Code, as they are modified from time to time, and any applicable federal, State or local statutes, regulations, guidelines, or requirements. The permittee shall keep the site, which includes without limitation any and all improvements, equipment, structures, access routes, fences and landscape features, in a neat, clean and safe condition in accordance with the approved construction drawings and all conditions in the PROW Permit. The permittee shall keep the site area free from all litter and debris at all times. The facility shall be manufactured or treated to resist graffiti. The permittee, at no cost to the City, shall monitor and abate any graffiti or other vandalism at the site. The permittee shall make reasonable commercial efforts to remove graffiti within 72 hours after the permittee receives notice or otherwise becomes aware that such graffiti or other vandalism occurred.

- (6) **Compliance with Laws.** The permittee shall maintain compliance at all times with all federal, state and local statutes, regulations, orders or other rules that carry the force of law (“laws”) applicable to the permittee, the subject property, the small wireless facility or other infrastructure deployment or any use or activities in connection with the use authorized in the PROW Permit, which includes without limitation any laws applicable to human exposure to RF emissions and the City’s RF compliance procedures as set forth in Berkeley Municipal Code Section 16.10.100.G and consistent with applicable FCC regulations. The permittee expressly acknowledges and agrees that this obligation is intended to be broadly construed and that no other specific requirements in these conditions are intended to reduce, relieve or otherwise lessen the permittee’s obligations to maintain compliance with all laws. No failure or omission by the City to timely notice, prompt or enforce compliance with any applicable provision in the Berkeley Municipal Code, this Policy any permit, any permit condition or any applicable law or regulation, shall be deemed to relieve, waive or lessen the permittee’s obligation to comply in all respects with all applicable provisions in the Berkeley Municipal Code, this Policy, any permit, any permit condition or any applicable law or regulation.
- (7) **Construction Activities and Adverse Impacts on Other Properties.** Construction shall be coordinated with other utility companies or applicants installing infrastructure in the public rights-of-way as provided for in Berkeley Municipal Code Section 16.10.050. Construction shall be scheduled and conducted so as to minimize interference with public use of the right-of-way including access to the right-of-way from private property. The permittee shall use all reasonable efforts to avoid any and all unreasonable, undue or unnecessary adverse impacts on nearby properties that may arise from the permittee’s or its authorized personnel’s construction, installation, operation, modification, maintenance, repair, removal and/or other activities on or about the site, including the public’s use of rights-of-way and the public’s access to the rights-of-way from private property. The permittee shall not perform or cause others to perform any construction, installation, operation, modification, maintenance, repair, removal or other work that involves heavy equipment or machines except during normal construction work hours authorized by the Berkeley Municipal Code. The restricted work hours in this condition will not prohibit any work required to prevent an actual, immediate harm to property or persons, or any work during an emergency declared by the City or other state or federal government agency or official with authority to declare an emergency within the City. The Director may issue a stop work order for any activities that violates this condition in whole or in part.
- (8) **Inspections; Emergencies.** The permittee expressly acknowledges and agrees that the City’s officers, officials, staff, agents, contractors or other designees may enter onto the site and inspect the improvements and equipment upon reasonable prior notice to the permittee. Notwithstanding the prior sentence, the City’s officers, officials, staff, agents, contractors or other

designees may, but will not be obligated to, enter onto the site area without prior notice to support, repair, disable or remove any improvements or equipment in emergencies or when such improvements or equipment threatens actual, imminent harm to property or persons. The permittee, if present, may observe the City's officers, officials, staff or other designees while any such inspection or emergency access occurs.

- (9) **Permittee's Contact Information.** Within 10 days from the final approval, the permittee shall furnish the City with accurate and up-to-date contact information for a person responsible for the small wireless facility or other infrastructure deployment, which includes without limitation such person's full name, title, direct telephone number, facsimile number, mailing address and email address. The permittee shall keep such contact information up-to-date at all times and promptly provide the City with updated contact information if either the responsible person or such person's contact information changes.
- (10) **Indemnification and Insurance.** The permittee shall indemnify the City, and secure and maintain liability insurance the City, in accordance with Berkeley Municipal Code Section 16.10.160. In the event the City becomes aware of any claims, the City will use best efforts to promptly notify the permittee and the private property owner (if applicable) and shall reasonably cooperate in the defense. The permittee expressly acknowledges and agrees that the City shall have the right to approve, which approval shall not be unreasonably withheld, the legal counsel providing the City's defense, and the property owner and/or permittee (as applicable) shall promptly reimburse the City for any costs and expenses directly and necessarily incurred by the City in the course of the defense. The permittee expressly acknowledges and agrees that the permittee's indemnification obligations under this condition are a material consideration that motivates the City to approve this PROW Permit, and that such indemnification obligations will survive the expiration, revocation or other termination of this PROW Permit.
- (11) **Performance Bond.** Before the City issues any permits required to commence construction in connection with this permit, the permittee shall post a performance bond from a surety and in a form acceptable to the Director in an amount reasonably necessary to cover the cost to remove, store and/or dispose of the improvements and restore all affected areas based on a written estimate from a qualified contractor with experience in wireless facilities or other infrastructure removal. The written estimate must include the cost to remove, reasonably store and/or dispose of all equipment and other improvements, which includes without limitation all antennas, radios, batteries, generators, utilities, cabinets, mounts, brackets, hardware, cables, wires, conduits, structures, shelters, towers, poles, footings and foundations, whether above ground or below ground, constructed or installed in connection with the wireless facility, plus the cost to completely restore any areas affected by the removal work to a standard compliant with applicable

laws. In establishing or adjusting the bond amount required under this condition, the Director shall take into consideration any information provided by the permittee regarding the cost to remove, reasonably store and/or dispose of the small wireless facility or other infrastructure deployment to a standard compliant with applicable laws. The performance bond shall expressly survive the duration of the permit term to the extent required to effectuate a complete removal of the subject wireless facility or other infrastructure deployment in accordance with this condition.

- (12) **Permit Revocation.** Any permit granted under this Policy may be revoked in accordance with the provisions and procedures in Berkeley Municipal Code Section 16.10.170. The Director may initiate revocation proceedings when the Director has information that the facility may not be in compliance with all applicable laws, which includes without limitation, any permit in connection with the facility and any associated conditions with such permit(s). Before any public hearing to revoke a permit granted under this Policy, the Director must issue a written notice to the permittee that specifies (i) the facility; (ii) the violation(s) to be corrected; (iii) the timeframe in which the permittee must correct such violation(s); and (iv) that, in addition to all other rights and remedies the City may pursue, the City may initiate revocation proceedings for failure to correct such violation(s). The Director may revoke a permit if the violation(s) are not corrected within 30 days of the date of mailing of the notice, or within the timeframe to correct such violation(s), whichever is longer, when the Director finds that the facility is not in compliance with any applicable laws, which includes without limitation, any permit in connection with the facility and any associated conditions with such permit(s). The permittee may appeal the decision of the Director to the City Council within 10 days of service of the decision via first class mail. Any decision by the City Council to revoke or not revoke a permit shall be made after a duly noticed public hearing, and shall be final and not subject to any further appeals. Within five business days after the City Council adopts a resolution to revoke a permit, the Director shall provide the permittee with a written notice that specifies the revocation and the reasons for such revocation.
- (13) **Record Retention.** Throughout the permit term, the permittee must maintain a complete and accurate copy of the written administrative record, which includes without limitation the PROW Permit application, PROW Permit, the approved plans and photo simulations incorporated into this approval, all conditions associated with this approval, any permits or approvals issued in connection with this approval and any records, memoranda, documents, papers and other correspondence entered into the public record in connection with the PROW Permit (collectively, "records"). If the permittee does not maintain such records as required in this condition, any ambiguities or uncertainties that would be resolved by inspecting the missing records will be construed against the permittee. The permittee shall protect all records from damage from fires, floods and other hazards that may cause deterioration.

- The permittee may keep records in an electronic format; provided, however, that hard copies or electronic records kept in the City's regular files will control over any conflicts between such City-controlled copies or records and the permittee's electronic copies, and complete originals will control over all other copies in any form. The requirements in this condition shall not be construed to create any obligation to create or prepare any records not otherwise required to be created or prepared by other applicable laws. Compliance with the requirements in this condition shall not excuse the permittee from any other similar record-retention obligations under applicable law.
- (14) **Landscaping.** The permittee shall replace any landscape features damaged or displaced by the construction, installation, operation, maintenance or other work performed by the permittee or at the permittee's direction on or about the site. The permittee shall comply with the requirements in Berkeley Municipal Code Chapter 12.44.
- (15) **Cost Reimbursement.** The permittee acknowledges and agrees that (i) the permittee's request for authorization to construct, install and/or operate the wireless facility will cause the City to incur costs and expenses; (ii) the permittee shall be responsible to reimburse the City for all costs incurred in connection with the permit, which includes without limitation costs related to application review, permit issuance, site inspection and any other costs reasonably related to or caused by the request for authorization to construct, install and/or operate the wireless facility or other infrastructure deployment; (iii) any application fees required for the application may not cover all such reimbursable costs and that the permittee shall have the obligation to reimburse the City for all such costs 10 days after a written demand for reimbursement and reasonable documentation to support such costs; and (iv) the City shall have the right to withhold any permits or other approvals in connection with the wireless facility until and unless any outstanding costs have been reimbursed to the City by the permittee.
- (16) **Future Undergrounding Programs.** Notwithstanding any term remaining on any PROW Permit, if other utilities or communications providers in the public rights-of-way underground their facilities in the segment of the public rights-of-way where the permittee's small wireless facility or other infrastructure deployment is located, the permittee must also underground its equipment, except the antennas and any approved electric meter, at approximately the same time. Accessory equipment such as radios and computers that require an environmentally controlled underground vault to function shall not be exempt from this condition. Small wireless facilities and other infrastructure deployments installed on wood utility poles that will be removed pursuant to the undergrounding program may be reinstalled on a streetlight that complies with the City's standards and specifications. Such undergrounding shall occur at the permittee's sole cost and expense except as may be reimbursed through tariffs approved by the state public utilities commission for undergrounding costs.

- (17) **Electric Meter Upgrades.** If the commercial electric utility provider adopts or changes its rules obviating the need for a separate or ground-mounted electric meter and enclosure, the permittee on its own initiative and at its sole cost and expense shall remove the separate or ground-mounted electric meter and enclosure. Prior to removing the electric meter, the permittee shall apply for any permit(s) required to perform the removal. Upon removal, the permittee shall restore the affected area to its original condition that existed prior to installation of the equipment.
- (18) **Rearrangement and Relocation.** The permittee acknowledges that the City, in its sole discretion and at any time, may: (A) change any street grade, width or location; (B) add, remove or otherwise change any improvements in, on, under or along any street owned by the City or any other public agency, which includes without limitation any sewers, storm drains, conduits, pipes, vaults, boxes, cabinets, poles and utility systems for gas, water, electric or telecommunications; and/or (C) perform any other work deemed necessary, useful or desirable by the City (collectively, "City work"). The City reserves the rights to do any and all City work without any admission on its part that the City would not have such rights without the express reservation in this PROW Permit. If the Director determines that any City work will require the permittee's small wireless facility located in the public rights-of-way to be rearranged and/or relocated, the permittee shall, at its sole cost and expense, do or cause to be done all things necessary to accomplish such rearrangement and/or relocation. If the permittee fails or refuses to either permanently or temporarily rearrange and/or relocate the permittee's small wireless facility or other infrastructure deployment within a reasonable time after the Director's notice, the City may (but will not be obligated to) cause the rearrangement or relocation to be performed at the permittee's sole cost and expense. The City may exercise its rights to rearrange or relocate the permittee's small wireless facility or other infrastructure deployment without prior notice to permittee when the Director determines that City work is immediately necessary to protect public health or safety. The permittee shall reimburse the City for all costs and expenses in connection with such work within 10 days after a written demand for reimbursement and reasonable documentation to support such costs.
- (19) **Truthful and Accurate Statements.** The permittee acknowledges that the City's approval relies on the written and/or oral statements by permittee and/or persons authorized to act on permittee's behalf. In any matter before the City in connection with the PROW Permit or the small wireless facility or other infrastructure approved under the PROW Permit, neither the permittee nor any person authorized to act on permittee's behalf shall, in any written or oral statement, intentionally provide material factual information that is incorrect or misleading or intentionally omit any material information necessary to prevent any material factual statement from being incorrect or misleading.

- (20) **Trenching and Excavation.** Facilities that require excavation shall be installed within existing facilities whenever sufficient excess capacity is available subject to reasonable terms and conditions. Excavation and trenching activities shall not disturb the root systems of trees measuring 24 inches or more in diameter. Protective fencing should be installed around street trees within or adjacent to the work area to prevent damage to branches, trunks, or root systems. If any cultural resources are discovered during excavation, trenching, or other construction activities, work shall be stopped immediately and the Director of Planning and Development shall be notified. Directional boring should be used instead of trenching whenever possible to minimize interference with vehicular traffic and may be required by the City when working in streets that have been recently resurfaced or resealed. When trenching is necessary, all trenches shall be covered at the end of each workday. The total time that a trench may remain open in any segment of the road system should not exceed one week.
- (21) **Construction Hours and Noise Control.** Noise-producing site preparation and construction activities shall comply with Berkeley Municipal Code Section 13.40.070, or as designated on permit notes or attachments. All trucks and equipment shall use the best available noise control techniques and equipment including improved mufflers, intake silencers, ducts, engine enclosures, and noise-reducing shields or shrouds. Impact tools such as jackhammers, pavement breakers, and noise drills shall be hydraulically or electrically powered wherever feasible to avoid noise associated with compressed air exhaust from pneumatically powered tools. When the use of pneumatic tools is unavoidable, an exhaust muffler shall be used on the compressed air exhaust to lower noise levels. External jackets shall be used on tools where feasible to achieve noise reductions. To the extent as technically feasible, quieter procedures shall be used, such as drilling instead of jack hammering. Stationary noise sources shall be located as far as technically feasible from sensitive receptors. If location within 20 feet of homes, schools, neighborhood parks, and retail businesses is necessary, stationary noise sources shall be muffled and enclosed with temporary sheds. Trucks and other vehicles should not be permitted to idle when waiting at or near the construction site.
- (22) **Dust and Stormwater Control.** Construction sites shall be watered at least twice daily to control dust caused by site preparation and construction activities. Watering intervals shall be increased whenever wind speeds exceed 15 miles per hour. Where feasible, reclaimed water shall be used for this purpose. Cover all trucks hauling soil, sand, paving materials, and other loose materials or require all trucks to maintain at least two (2) feet of space between the top of the load and the top of the trailer. Streets shall be swept at the end of each workday if soil, sand, or other material has been carried onto adjacent paved streets or sidewalks. When feasible, streets shall be swept using reclaimed water. Best Management Practices shall be used to prevent oil, dirt, and other materials from construction equipment or activity from washing into the City

storm drainage system. Water discharge resulting from both construction and underground facility drainage shall comply with National Pollutant Discharge Elimination System (NPDES) regulations.

- (b) **Modified Conditions.** The Director may modify, add or remove conditions to any PROW Permit as the Director deems necessary or appropriate to: (1) protect and/or promote the public health, safety and welfare; (2) tailor the standard conditions in subsection (a) to the particular facts and circumstances associated with the deployment; and/or (3) memorialize any changes to the proposed deployment need for compliance with the Berkeley Municipal Code, this Policy, generally applicable health and safety requirements and/or any other applicable laws. To the extent required by applicable FCC regulations, the Director shall take care to ensure that any different conditions applied to small wireless facilities are no more burdensome than those applied to other infrastructure deployments.

SECTION 7. LOCATION STANDARDS

- (a) **Location Preferences.** To help applicants and decision makers understand and respond to the community's aesthetic preferences and values, this subsection sets out listed preferences for locations to be used in connection with small wireless facilities in an ordered hierarchy.

The City prefers small cells in the public rights-of-way to be installed in locations, ordered from most preferred to least preferred, as follows:

- (1) locations within manufacturing districts, mixed use districts or commercial districts on or along arterial streets;
- (2) locations within manufacturing districts, mixed use districts or commercial districts on or along collector streets;
- (3) locations within manufacturing districts, mixed use districts or commercial districts on or along residential streets;
- (4) locations within any neighborhood commercial district on or along arterial streets;
- (5) locations within any neighborhood commercial district on or along collector streets;
- (6) locations within any neighborhood commercial district on or along residential streets;
- (7) any location within 500 feet of an existing or proposed small wireless facility;

- (8) locations within residential districts on or along arterial streets;
 - (9) locations within residential districts on or along collector streets;
 - (10) locations within residential districts on or along residential streets;
 - (11) any location within 200 feet of a City park, a property designated as a City landmark, or a property that contains an historic resource as defined by the State Public Resources Code.
- (b) **Prohibited Support Structures.** Except when authorized as a pre-approved design pursuant to this Policy, small wireless facilities shall not be permitted on the following support structures:
- (1) decorative poles (including historic or ornamental streetlight poles);
 - (2) traffic signal poles, mast arms, cabinets or related devices or structures;
 - (3) new, nonreplacement wood poles;
 - (4) any utility pole scheduled for removal or relocation within 24 months from the time the Director acts on the small cell application.
- (c) **Encroachments over Private Property.** No small cell antennas, accessory equipment or other improvements may encroach onto or over any private or other property outside the public rights-of-way without the property owner's express written consent.
- (d) **No Interference with Other Uses.** Small cells and any associated antennas, accessory equipment or improvements shall not be located in any place or manner that would physically interfere with or impede access to any: (1) worker access to any aboveground or underground infrastructure for traffic control, streetlight or public transportation, including without limitation any curb control sign, parking meter, vehicular traffic sign or signal, pedestrian traffic sign or signal, barricade reflectors; (2) access to any public transportation vehicles, shelters, street furniture or other improvements at any public transportation stop; (3) worker access to aboveground or underground infrastructure owned or operated by any public or private utility agency; (4) fire hydrant, water valve or mains; (5) access to any doors, gates, sidewalk doors, passage doors, stoops or other ingress and egress points to any building appurtenant to the rights-of-way; (6) wastewater stations; (7) access to any fire escape; or (8) any other similar service or facility that benefits the City or the health, safety, or welfare of its residents.
- (e) **Replacement Poles.** All replacement poles must: (1) be located as close to the removed pole as possible; (2) be aligned with the other existing poles along the

public rights-of-way; and (3) be substantially similar in height and width to the existing pole and be compliant with all applicable standards and specifications by the Director.

- (f) **Additional Placement Requirements.** In addition to all other requirements in this Policy, small wireless facilities, other infrastructure deployments and all related equipment and improvements shall:
- (1) be placed on existing structures to the extent feasible;
 - (2) be placed as close as possible to the property corners or the property line between two parcels that abut the public rights-of-way;
 - (3) not be placed in front of the primary entrance to a residence or retail business or at any other location where they would unduly interfere with the operation of a business, including blocking views of the entrance or display windows;
 - (4) not be located where they would reduce the amount of space available for on-street parking spaces or interfere with access of the public or workers to meters, fire hydrants, or other objects of street hardware in the right-of-way;
 - (5) not be placed within any sight distance triangles at any intersections, street corners driveways and/or other points of ingress or egress, or otherwise obstruct the view of any traffic control devices installed or authorized by the City;
 - (6) be placed at least two feet away from any driveway or established pedestrian pathway between a residential structure and the public rights-of-way;
 - (7) be placed at least 15 feet away from any driveways for police stations, fire stations or other emergency responder facilities;
 - (8) not be placed where they would reduce the amount of space available for on-street parking spaces; and
 - (9) not be placed at any location that will obstruct a designated view corridor, scenic vista, historical resource or unique archaeological resource.
- (g) **Demonstration of Technical Infeasibility.** Applications that involve lesser-preferred locations or structures or otherwise fail to meet the requirements of this Section may be approved if the applicant demonstrates by clear and convincing evidence in the written record that either (1) no more preferred location or structure exists within 500 feet from the proposed site; or (2) any more preferred locations or structures within 500 feet from the proposed site would be technically infeasible.

SECTION 8. DESIGN STANDARDS

- (a) **Finishes.** All exterior surfaces shall be painted, colored and/or wrapped in flat, non-reflective hues that match the underlying support structure or blend with the primary background. All surfaces shall be treated with graffiti-resistant sealant. All finishes shall be subject to the Director's prior approval.
- (b) **Noise.** Small cells and all associated antennas, accessory equipment and other improvements must comply with all applicable noise control standards and regulations in the Berkeley Municipal Code, Chapter 13.40, as either may be amended or superseded and shall not exceed, either on an individual or cumulative basis, the noise limit in the applicable district. All air conditioning units and any other equipment that may emit noise that would be exceed the applicable noise control standards shall be enclosed or equipped with noise attenuation devices. Backup generators shall only be operated during periods of power outages or for testing.
- (c) **Lights.** All lights and light fixtures must be aimed and shielded so that their illumination effects are directed downwards and confined within the public rights-of-way in a manner consistent with any other standards and specifications by the Director. All antennas, accessory equipment and other improvements with indicator or status lights must be installed in locations and within enclosures that mitigate illumination impacts visible from publicly accessible areas.
- (d) **Trees and Landscaping.** Small wireless facilities and other infrastructure deployments on or beneath the ground surface shall not be installed (in whole or in part) within any tree drip line. Small wireless facilities and other infrastructure deployments may not displace any existing tree or landscape features unless: (A) such displaced tree or landscaping is replaced with native and/or drought-resistant trees, plants or other landscape features approved by the Director and (B) the applicant submits and adheres to a landscape maintenance plan. Only International Society of Arboriculture certified workers under a licensed arborist's supervision shall be used to install the replacement tree(s). Any replacement tree must be substantially the same size as the damaged tree unless approved by the Director. The permittee shall, at all times, be responsible to maintain any replacement landscape features.
- (e) **Signs and Advertisements.** All small wireless facilities and other infrastructure deployments that involve RF transmitters must include signage that accurately identifies the site owner/operator, the owner/operator's site name or identification number and a toll-free number to the owner/operator's network operations center. The signage shall be attached to the support structure base (or as otherwise required by applicable regulations and standards) to which the equipment is affixed. Dimensions shall not exceed 8.5 inches by 11 inches. Small wireless facilities and other infrastructure deployments may not bear any other

signage or advertisements unless expressly approved by the City, required by law or recommended under FCC or other United States governmental agencies for compliance with RF emissions regulations. Informational signage required by these guidelines may include an identifying logo.

- (f) **Site Security Measures.** Small wireless facilities and other infrastructure deployments may incorporate reasonable and appropriate site security measures, such as locks and anti-climbing devices, to prevent unauthorized access, theft or vandalism. The Director shall not approve any barbed wire, razor ribbon, electrified fences or any similarly dangerous security measures. All exterior surfaces on small wireless facilities shall be constructed from or coated with graffiti-resistant materials.
- (g) **Compliance with Health and Safety Regulations.** All small wireless facilities and other infrastructure deployments shall be designed, constructed, operated and maintained in compliance with all generally applicable health and safety regulations, which includes without limitation all applicable regulations for human exposure to RF emissions, the California Environmental Quality Act (California Public Resources Code §§ 2100 *et seq.*) and compliance with the federal Americans with Disabilities Act of 1990 (42 U.S.C. §§ 12101 *et seq.*).
- (h) **Antennas.** The provisions in this subsection (h) are generally applicable to all antennas.
 - (1) **Shrouding.** All antennas and associated cables, jumpers, wires, mounts, masts, brackets and other connectors and hardware must be installed within a shroud or radome. For pole-top antennas, the shroud shall not exceed 1.5 times the median pole diameter and must taper down to pole to cover mounting hardware, cables, wires, jumpers and other equipment between the pole and the antenna. For side-arm antennas, the shroud must cover the cross arm and any cables, jumpers, wires or other connectors between the vertical riser and the antenna. The antenna shroud shall be finished in a flat, non-reflective color to match the underlying support structure.



Figure 1: Antenna concealed within a single shroud (or radome) with a tapered cable shroud between the antenna and pole-top

- (2) **Antenna Volume.** Each individual antenna associated with a single small cell shall not exceed three cubic feet. The cumulative volume for all antennas on a single small cell shall not exceed: (A) three cubic feet in residential areas; or (B) six cubic feet in nonresidential areas. Notwithstanding the preceding sentence, the Director may grant an exception when the applicant demonstrates by clear and convincing evidence that compliance with this section would be technically infeasible.
- (3) **Overall Height.** No antenna may extend more than five feet above the support structure, plus any minimum separation between the antenna and other pole attachments required by applicable health and safety regulations.

- (4) **Horizontal Projection.** Side-mounted antennas, where permitted, shall not project: (A) more than 24 inches from the support structure; (B) over any roadway for vehicular travel; or (C) over any abutting private property. If applicable laws require a side-mounted antenna to project more than 24 inches from the support structure, the projection shall be no greater than required for compliance with such laws.



Figure 2: Pole-top antenna on a wood utility pole with tapered shroud.

- (i) **Accessory Equipment Volume.** The cumulative volume for all accessory equipment for a single small wireless facility or other infrastructure deployment shall not exceed: (A) seven cubic feet to the extent feasible, but in no event greater than nine cubic feet in residential areas or (B) 12 cubic feet in nonresidential areas. The volume limits in this subsection do not apply to any undergrounded accessory equipment.
- (j) **Undergrounded Accessory Equipment.**
- (1) **Where Required.** Accessory equipment (other than any electric meter (where permitted) emergency disconnect switch) shall be placed underground when

proposed in any (A) underground district or (B) any location where the Director finds substantial evidence that the additional aboveground accessory equipment would incommode the public's uses in the public rights-of-way. Notwithstanding the preceding sentence, the Director may grant an exception when the applicant demonstrates by clear and convincing evidence that compliance with this section would be technically infeasible.

- (2) **Vaults.** All undergrounded accessory equipment must be installed in an environmentally controlled vault that is load-rated to meet applicable standards and specifications. Underground vaults located beneath a sidewalk must be constructed with a slip-resistant cover. Vents for airflow shall be flush-to-grade when placed within the sidewalk and may not exceed two feet above grade when placed off the sidewalk. All vault lids shall be constructed from materials rated for heavy traffic and acceptable to the Director.



Figure 3: Flush-to-grade underground equipment vault.

- (k) **Pole-Mounted Accessory Equipment.** The provisions in this subsection (k) are applicable to all pole-mounted accessory equipment in connection with small wireless facilities and other infrastructure deployments.
- (1) **Preferred Concealment Techniques.** Applicants should propose to place any pole-mounted accessory equipment in the least conspicuous position under the circumstances presented by the proposed pole and location. Pole-mounted accessory equipment may be installed behind street, traffic or other signs to the extent that the installation complies with applicable public health and safety regulations.
 - (2) **Minimum Vertical Clearance.** The lowest point on any pole-mounted accessory equipment shall be at least eight feet above ground level adjacent to the pole. If applicable laws require any pole-mounted accessory equipment

component to be placed less than eight feet above ground level, the clearance from ground level shall be no less than required for compliance with such laws.



Figure 4: Pole-mounted accessory equipment shroud on a wood utility pole.

- (3) **Horizontal Projection.** Pole-mounted accessory equipment shall not project: (i) more than 18 inches from the pole surface; (ii) over any roadway for vehicular travel; or (iii) over any abutting private property. All pole-mounted accessory equipment shall be mounted flush to the pole surface. If applicable laws preclude flush-mounted equipment, the separation gap between the pole and the accessory equipment shall be no greater than required for compliance with such laws and concealed by opaque material (such as cabinet “flaps” or “wings”).



Figure 5: Shrouded, side-mounted antenna on wood utility pole to comply with CPUC horizontal separation requirements.



Figure 6: Flush-mounted radio shroud.

- (4) **Orientation.** Unless placed behind a street sign or some other concealment that dictates the equipment orientation on the pole, all pole-mounted accessory equipment should be oriented away from prominent views, and shall not substantially obstruct a view from the primary living area of a residence. In general, the proper orientation will likely be toward the street to

reduce the overall profile when viewed from the nearest abutting properties. If orientation toward the street is not feasible, then the proper orientation will most likely be away from oncoming traffic. If more than one orientation would be technically feasible, the Director may select the most appropriate orientation.



Figure 7: Accessory equipment concealed behind banners.

- (l) **Ground-Mounted or Base-Mounted Accessory Equipment.** The provisions in this subsection (l) are applicable to all ground-mounted and base-mounted accessory equipment in connection with small wireless facilities and other infrastructure deployments.



Figure 8: Base-mounted accessory equipment.

- (1) **Ground-Mounted Concealment.** All ground-mounted equipment cabinets shall be placed six inches behind the sidewalk, at least two feet from the curb, and two feet from driveway and curb edges. Pedestals must be at least three feet from fire hydrants. Installations must leave a minimum horizontal clear space for the path of travel of at least six feet. The Director may require more clear space for travel in heavily used commercial areas to provide sufficient room for pedestrian traffic. On collector streets and local streets, the City prefers ground-mounted accessory equipment to be concealed as follows: (A) within a landscaped parkway, median or similar location, behind or among new/existing landscape features and painted or wrapped in flat natural colors to blend with the landscape features; and (B) if landscaping concealment is not technically feasible, disguised as other street furniture adjacent to the support structure, such as, for example, mailboxes, benches, trash cans and information kiosks. On major streets outside underground districts, proposed ground-mounted accessory equipment should be completely shrouded or placed in a cabinet substantially similar in appearance to existing ground-mounted accessory equipment cabinets.



Figure 9: Ground-mounted accessory equipment concealed as a mailbox.

- (2) **Public Safety Visibility.** To promote and protect public health and safety and prevent potential hazards hidden behind large equipment cabinets, no individual ground-mounted accessory equipment cabinet may exceed four feet in height, four feet in width and two feet in depth. Ground-mounted and base-mounted equipment cabinets shall not have any horizontal flat surfaces

greater than 1.5 square inches to prevent litter or other objects left on such surfaces. Cabinets and pedestals shall be located at least two feet from the curb of the street. No unit higher than three feet shall be placed in any location that would interfere with vehicular sight lines at street corners, driveways, and other points of ingress or egress or obstruct the view of any traffic devices installed or authorized by the City. Pedestals, amplifier units, equipment cabinets, and similar above ground installations shall, where feasible, be located at least six inches from any sidewalk and two feet from driveway and curb edges. As required by the State Fire Code, pedestals must be at least three feet from fire hydrants. Installations must leave a minimum horizontal clear space for the path of travel that complies with the requirements of the Americans with Disabilities Act, and shall be at least six feet wide, where feasible. The Director may require more clear space for travel in heavily used commercial areas to provide sufficient room for pedestrian traffic, or may approve applications with less clear space where it is not feasible to comply with the requirements of this paragraph.

- (3) **Fire Protection.** The exterior walls and roof covering of all ground-mounted accessory equipment cabinets and equipment shelters shall be constructed of materials rated as nonflammable in the Uniform Building Code. Openings in all aboveground equipment shelters and cabinets shall be protected against penetration by fire and windblown embers to the extent feasible.

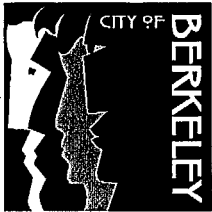
- (m) **Strand-Mounted Wireless Facilities.** No more than one strand-mounted wireless facility may be installed (1) on any single span between two poles or (2) directly adjacent to any single pole. The Director shall not approve any ground-mounted equipment in connection with a strand-mounted wireless facility, unless the ground-mounted equipment consists of a remote power source used to power a cluster of strand-mounted wireless facilities. All equipment and other improvements associated with a strand-mounted wireless facility must comply with all applicable health and safety regulations. Strand-mounted wireless facilities shall not exceed one cubic foot in total volume. Any accessory equipment mounted on the pole shall be finished to match the underlying pole. "Snow shoes" and other spooled fiber or cables are prohibited.



Figure 10: Strand-mounted wireless facility with a ground-mounted remote power source.

- (n) **Utilities.** The provisions in this subsection (n) are applicable to all utilities and other related improvements that serve small wireless facilities and other infrastructure deployments.
 - (1) **Overhead Lines.** The Director shall not approve any new overhead utility lines in underground districts. In areas with existing overhead lines, new communication lines shall be “overlashed” with existing communication lines. No new overhead utility lines shall be permitted to traverse any roadway used for vehicular transit.
 - (2) **Vertical Cable Risers.** All cables, wires and other connectors must be routed through conduits within the pole or other support structure, and all conduit attachments, cables, wires and other connectors must be concealed from public view. To the extent that cables, wires and other connectors cannot be routed through the pole, such as with wood utility poles, applicants shall route them through a single external conduit or shroud that has been finished to match the underlying pole.

- (3) **Spools and Coils.** To reduce clutter and deter vandalism, excess fiber optic or coaxial cables shall not be spooled, coiled or otherwise stored on the pole outside equipment cabinets or shrouds. Fiber or cable placement on existing poles shall have a minimum safety slack for sway and wind. Looped fiber storage for future use is prohibited.
- (4) **Electric Meters.** Small cells and other infrastructure deployments shall use flat-rate electric service or other method that obviates the need for a separate above-grade electric meter. If flat-rate service is not available, applicants may install a shrouded smart meter. If the proposed project involves a ground-mounted equipment cabinet, an electric meter may be integrated with and recessed into the cabinet, but the Director shall not approve a separate ground-mounted electric meter pedestal.
- (o) **Existing Conduit or Circuits.** To reduce unnecessary wear and tear on the public rights-of-way, applicants are encouraged to use existing conduits, ducts, manholes, electric circuits and/or other similar facilities whenever available and technically feasible. Access to any conduit and/or circuits owned by the City shall be subject to the Director's prior written approval, which the Director may withhold or condition as the Director deems necessary or appropriate to protect the City's infrastructure, prevent interference with the City's municipal functions and public health and safety.



Cheryl Davila
Councilmember
District 2

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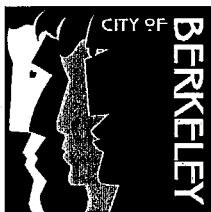
CITY OF BERKELEY

REVISED AGENDA MATERIAL

Item Description: Updating Berkeley Telecom Ordinances and BMC codes

Submitted by: Councilmember Cheryl Davila

Updated agenda report action and resolution revising recommended action and formatting.



Cheryl Davila
Councilmember
District 2

CONSENT CALENDAR
December 10, 2019

To: Honorable Mayor and Members of the City Council
From: Councilmember Cheryl Davila
Subject: Updating Berkeley Telecom Ordinances and BMC codes

RECOMMENDATION

Adopt a resolution directing ~~Direct~~ the City Manager to ~~adopt a resolution to~~ include the attached sample language and contained hyperlinked references to update the City's Telecom Ordinances and BMC codes.

BACKGROUND

For several months now, the community has been concerned about the potential installation of 5G technology and small cells throughout the city. The technology has not been thoroughly tested concerning radiation.

Some City of Berkeley communities bear the brunt of health-related impacts caused by industrial and other activities. The California Environmental Protection Agency has identified various census tracts within the City as disadvantaged communities disproportionately burdened by and vulnerable to multiple sources of pollution.

It is important now more than ever, to update the City's Telecom Ordinances to protect the health and safety of our residents that cover the following areas:

1. FCC CLAUSE: Include a clause voiding relevant sections of the ordinance, or requiring modification, in the event of a regulatory change or overturning of the FCC Order. (see report by Next Century Cities) **Laws, permits, and re-certifications need to be CONDITIONAL**, so that they may be revoked or modified if out of compliance or if/when federal law is modified. (Fairfax, Sonoma City) Also include a **SEVERABILITY** clause.

2. PERMITS

2.a. Conditional Use Permits: Maintain that each wireless facility requires a Conditional Use Permit (Planning Dept, ZAB, or Public Works) followed by an encroachment permit

2.b. Significant Gap in coverage: Require that a significant gap in coverage be proven by applicant before approval of a wireless antenna and confirmed by an independent engineer.* (Calabasas, Old Palos Verdes)

Least Intrusive Methods: Require the least intrusive methods to fill any gaps for small cells and other wireless facilities. A justification study which includes the rationale for selecting the proposed use; a detailed explanation of the coverage gap that the proposed use would serve; and how the proposed use is the least intrusive means for the applicant to provide service. Said study shall include all existing structures and/or alternative sites evaluated for potential installation of the proposed facility and why said alternatives are not a viable option. (Old Palos Verdes) An independent* engineer shall confirm, or not.

2.c. **Radio-frequency Data Report:** Require a thorough radio-frequency (RF) data report as part of the permit submittal for consultants. For all applications, require both an RF Compliance Report signed by a registered, independent professional engineer, and a supporting RF Data Request Form. (Calabasas, Palos Verdes, Suisun City, Sonoma City) The independent* engineer will be hired by the City of Berkeley and billed to the applicant.

2.d. **Mock-up, Construction Drawings, Site Survey, Photo Simulations:** Require full-size mock-up of proposed Small Cell Facilities (SCF) and other pertinent information in order to adequately consider potential impacts. (Larkspur, Calabasas, Palos Verdes. Also see Boulder, CO Report) Require **Balloon Tests**. (Town of Hempstead NY 2013)

2.e. **Public notification:** Telecom related Planning Commission, Public Works, and Zoning Adjustment Board hearings shall be publicized in the most widely read local newspapers and local online news sources* and on the City website no less than 30 days prior to the hearing or meeting. No less than 30 days prior, a U.S. 1st class mail shall be sent to all addresses within 3,000 feet of the proposed facilities. The outside of the envelope shall be printed with "Urgent Notice of Public Hearing." Due to the "shot clock", City requires applicants to hold a publicly noticed meeting two weeks prior to submitting an application within the affected neighborhood. Applicants mail all affected residents and businesses date, time, and location of hearings at least two weeks prior. The applicant pays associated costs including mailings and meeting location rent.

Community Meeting: Applicant is required to [publicize in local newspapers and local online news sources* and] hold a community meeting at least two weeks prior to the hearing on the use permit. (San Anselmo, Palos Verdes) Applicants shall mail all affected residents and businesses date, time, and location of hearings at least two weeks prior, 1st class etc. [as in 2.e].

2.f. **Notification:** Notify property owners, residents, tenants, business owners, and workers within 3000 feet of a proposed wireless installation within one week of application submittal and again within one week of permit approval. 1st class etc. [as in 2.e].

2.g. **Independent Expert*** The City shall retain an independent, qualified consultant to review any application for a permit for a wireless telecommunications facility. The review is intended to be a review of technical aspects of the proposed wireless telecommunications facility and shall address any or all of the following: xxxx (Old Palos Verdes) Paid by applicant (San Anselmo)

2.h. **Trees:** No facility shall be permitted to be installed in the drip line of any tree in the right-of-way. (Old Palos Verdes, 15' in Los Altos) (See Berkeley's Heritage Tree ordinance.)

2.i. **Transfer of Permit:** The permittee shall not transfer the permit to any person prior to the completion of the construction of the facility covered by the permit, unless and until the transferee of the permit has submitted the security instrument required by section 12.18.080(B)(5). (Palos Verdes)

2.j. **General Liability Insurance:** To protect the City, the permittee shall obtain, pay for and maintain, in full force and effect until the facility approved by the permit is removed in its entirety from the public right-of-way, an insurance policy or policies of commercial general liability insurance, with minimum limits of two million dollars for each occurrence and four million dollars in the aggregate, that fully protects the City from claims and suits for bodily injury and property damage. The insurance must name the City and its elected and appointed council members, boards, commissions, officers, officials, agents, consultants, employees and volunteers as additional named insureds, be issued by an insurer admitted in the State of California with a rating of at least a A:VII in the latest edition of A.M. Best's Insurance Guide, and include an endorsement providing that the policies cannot be canceled or reduced except with 30 days prior written notice to the city, except for cancellation due to nonpayment of premium.... (Old Palos Verdes, Fairfax, Newark. San Anselmo has an indemnification clause.)

2.k. **Attorneys' Fees:** The Permittee is required to pay any/all costs of legal action. (Suisun City)

2.l. **Speculative Equipment:** Pre-approving wireless equipment or other alleged improvements that the applicant does not presently intend to install, but may wish to install at an undetermined future time, does not serve the public interest. The City shall not pre-approve telecom equipment or wireless facilities. (Fairfax, Old Palos Verdes, Sebastopol)

2.m. **Citizens may appeal** decisions made. (San Anselmo)

3. ACCESS Americans with Disabilities Act (ADA): All facilities shall be in compliance with the ADA. (New Palos Verdes, Fairfax, Sebastopol, Mill Valley, Sonoma City, Suisun City) Electromagnetic Sensitivity (EMS) is a disabling characteristic, recognized by the Federal Access Board since 2002. The main treatment for this condition is avoidance of exposure to wireless radiation. Under the 1990 Americans with Disabilities Act, people who suffer from exposure to Electromagnetic Fields (EMF) are part of a protected disabled class under Title 42 U.S. Code § 12101 et seq. (Heed Berkeley's pioneering disability rights laws and Berkeley's Precautionary Principle ordinance NO. 6,911-N.S "to promote the health, safety, and general welfare of the community.")

4. SETBACKS:

4.a. **Prohibited Zones** for Small Cells: Prohibits small cell telecommunication facilities in residential zones and multi-family zoning districts (Calabasas, Mill Valley, Los Altos, Sonoma City)

4.b. **Preferred or Disfavored Locations:** In addition to residential areas, designate areas where cell towers are disfavored and not permitted, i.e. near schools, residential areas, city buildings, sensitive habitats, on ridge lines, public parks, Historic Overlay Districts, in open spaces or where they are favored i.e. commercial zoning areas, industrial zoning areas. (Calabasas, Sebastopol, Boulder Report)

4.c. **Disfavored Location:** Small cell installations are not permitted in close proximity to residences, particularly near sleeping and living areas. Viable and defensible setbacks will vary based on zoning. (ART ordinance) 1500 foot minimum setback from residences that are not in residential districts!

4.d. **1500 Foot Setback from other small cell** installations: Locate small cell installations no less than 1500 feet away from the Permittee or any Lessee's nearest other small cell installation. (Calabasas, Petaluma, Fairfax, Mill Valley, Suisun City, Palos Verdes, Sebastopol San Ramon, Sonoma City, -Boulder Report)

4.e. **1500 Foot Minimum Setback** from any educational facility, child/elder/healthcare facility, or park. (ART Ordinance) The California Supreme Court ruled on April 4, 2019 that San Francisco may regulate based on "negative health consequences, or safety concerns that may come from telecommunication deployment." (Sebastopol forbids potential threat to public health, migratory birds, or endangered species, also in combination with other facilities. Refer to Berkeley's Precautionary Principle Ordinance)

4.f. **500 Foot Minimum Setback from any business/workplace** (Petaluma, Suisun City)

5. LOCATION PREFERENCE:

5.a. **Order of preference:** The order of preference for the location of small cell installations in the City, from most preferred to least preferred, is: (1) Industrial zone (2) Commercial zone (3) Mixed commercial and residential zone (4) Residential zone (ART Ordinance, New Palos Verdes) [Residential zone ban]

5.b. **Fall Zone:** The proposed small cell installation shall have an adequate fall zone to minimize the possibility of damage or injury resulting from pole collapse or failure, ice fall or debris fall, and to avoid or minimize all other impacts upon adjoining property

5.c. **Private Property:** If a facility (such as a street light pole, street signal pole, utility pole, utility cabinet, vault, or cable conduit) will be located on or in the property of someone other than the owner of the facility, the applicant shall provide a duly executed and notarized authorization from the property owner(s) authorizing the placement of the facility on or in the property owner's property. (Palos Verdes) [Many Berkeleyans do not want wireless antennas allowed on private property. If a permit is considered for private property, not just the property owners but all those who spend time or own/rent property within 1500 feet must be notified immediately of how they may weigh in, and be informed of the decision immediately with possibility of appeal if a permit is granted.]

5.d. **Endangerment, interference:** No person shall install, use or maintain any facility which in whole or in part rests upon, in or over any public right-of-way, when such installation, use or maintenance endangers or is reasonably likely to endanger the safety of persons or property, or when such site or location is used for public utility purposes, public transportation purposes or other governmental use, or when such facility unreasonably interferes with or unreasonably impedes the flow of pedestrian or vehicular traffic including any legally parked or stopped vehicle, ingress into or egress from any residence or place of business, the use of poles, posts, traffic signs or signals, hydrants, mailboxes, permitted sidewalk dining, permitted street furniture or other objects permitted at or near said location.

6. TESTING:

6.a. **Random Testing for RF Compliance:** The City shall employ a qualified, independent * RF engineer to conduct an annual random and unannounced test of the Permittee's small cell **and other** wireless installations located within the City to certify their compliance with all Federal Communications Commission (FCC) RF emission limits. The reasonable cost of such tests shall be paid by the Permittee. (Fairfax, (ART, Old Berkeley. Suisun City requires annual inspections and testing.)

6.b. **RF/EMF Testing:** Berkeley's current law states that the City Manager "may" require independent testing of telecom equipment. Change "may" to "shall" and delete the word "Manager" so that, if s/he does not find time to hire an independent expert, other City staff or a Council Committee may do so. The law needs to require independent testing of all equipment, unannounced in advance, twice annually, with permittees required to reimburse the City for costs and to pay a deposit in advance. Dates, addresses, and results of testing shall be posted on the City website and published in local media. ** [Montgomery County Maryland studied RF radiation levels from small cells and found that FCC exposure levels were exceeded within 11 feet.]

6.c. **Violation of Compliance Notification:** In the event that such independent tests reveal that any small cell installation(s) owned or operated by Permittee or its Lessees, singularly or in the aggregate, is emitting RF radiation in excess of FCC exposure standards as they pertain to the general public, the City shall notify the Permittee and all residents living within 1500 feet of the installation(s) of the violation(s), and the Permittee shall have 48 hours to bring the installation(s) into compliance. Failure to bring the installation(s) into compliance shall result in the forfeiture of all or part of the Compliance Bond, and the City shall have the right to require the removal of such installation(s), as the City in its sole discretion may determine is in the public interest. (ART)

6.d. **Non-acceptance of Applications:** Where such annual recertification has not been properly or timely submitted, or equipment no longer in use has not been removed within the required 30-day period, no further applications for wireless installations will be accepted by the City until such time as the annual re-certification has been submitted and all fees and fines paid. (ART)

7. **RIGHT TO KNOW:** The City shall inform the affected public via website, local news publications **, and US 1st class mail (with topic prominently announced in red on outside of envelope) of Master Licensing Agreement between the City and telecom, Design Standards for Small Cells or other wireless equipment, other telecom agreements, and notification within 2 business days of receiving permit applications, calendaring related hearings/meetings, and approving permits. Notice shall include location and date of expected installations, description of the appeals process, and dates of installations. A map featuring all telecom equipment shall be on the City website and available to residents who request it at 2180 Milvia St. Applicants/Permittees, who are profiting from using Berkeley's public right of way, will reimburse City for the reasonable cost of mailings, Town Halls, and staff to handle telecom applications, public notification, inspections, recertifications, etc.

8. RECERTIFICATION:

8.a. **Annual Recertification:** Each year, commencing on the first anniversary of the issuance of the permit, the Permittee shall submit to the City an affidavit which shall list all active small cell

wireless installations it owns within the City by location, certifying that (1) each active small cell installation is covered by liability insurance in the amount of \$2,000,000 per installation, naming the City as an additional insured; and (2) each active installation has been inspected for safety and found to be in sound working condition and in compliance with all federal safety regulations concerning RF exposure limits. (ART) Any installation that is out of compliance will be promptly removed; the permit for that installation will be terminated, with all associated expenses paid by the applicant.

8.b. **Recertification Fees:** Recertification fees will be calculated each year by the City. They will be based on the anticipated costs of City for meeting the compliance requirements put in place by this ordinance. The total costs will be divided by the number of permits and assigned to the permit-holders as part of the recertification process

8.c. **Noise Restrictions (Sonoma City):** Each wireless telecommunications facility shall be operated in such a manner so as not to cause any disruption to the community's peaceful enjoyment of the city.

o Non-polluting backup generators shall only be operated during periods of power outages, and shall not be tested on weekends, holidays, or between the hours of 5:00 p.m. and 9:00 a.m.

o At no time shall any facility be permitted to exceed 45 DBA and the noise levels specified in Municipal Code XXX. (Los Altos)

8.d. **Noise Complaints:** If a nearby property owner registers a noise complaint, the City shall forward the same to the permittee. Said complaint shall be reviewed and evaluated by the applicant. The permittee shall have 10 business days to file a written response regarding the complaint which shall include any applicable remedial measures. If the City determines the complaint is valid and the applicant has not taken steps to minimize the noise, the City may hire a consultant to study, examine and evaluate the noise complaint and the permittee shall pay the fee. The matter shall be reviewed by City staff. If sound proofing or other sound attenuation measures are required to bring the project into compliance with the Code, the City may impose conditions on the project to achieve said objective. (Old Palos Verdes, Calabasas)

9.a. **AESTHETICS and UNDERGROUNDING:** At every site where transmitting antennas are to be placed, all ancillary equipment shall be placed in an underground chamber beneath the street constructed by the Permittee. (Calabasas, Mill Valley, Petaluma) The chamber shall include battery power sufficient to provide a minimum of 72 hours of electricity to the ancillary equipment. ***

Permittee is responsible for placing on the pole two signs with blinking lights, with design approved by City, each in the opposite direction, to inform people walking on the sidewalk, what is installed on the pole. Should a sign be damaged, Permittee shall replace it within 5 business days. (Town of Hempstead NY required a 4 foot warning sign on each pole.)

9.b. **Aesthetic Requirements:** According to the Baller Stokes & Lide law firm, some of the aesthetic considerations that local governments may consider include: ****

o Size of antennas, equipment boxes, and cabling;

o Painting of attachments to match mounting structures;

o Consistency with the character of historic neighborhoods;

o Aesthetic standards for residential neighborhoods, including "any minimum setback from dwellings, parks, or playgrounds and minimum setback from dwellings, parks, or playgrounds; maximum structure heights; or limitations on the use of small, decorative structures as mounting locations." (Boulder Report)

"Independent" means: The RF engineering company has never provided services to a telecom corporation, and the company's employee who tests exposure levels has also never provided services to a telecom corporation.

Right to Know - Publish on City website, in online local news: Berkeley Daily Planet, Berkeleyside, and local newspapers: Berkeley Voice, Berkeley Times (2019. Update as needed)

***** Undergrounding** - A single shielded multi-wire cable from the underground chamber shall be used to transmit radiation to the antennae for the purpose of transmitting data. If the pole is of hollow metal, the cable shall be inside the pole; if the pole is solid wood, the cable can be attached to the pole. Installation shall include its own analogue electricity meter and Permittee shall pay the electrical utility a monthly charge for the amount of electricity used.

Except during construction, or essential maintenance, automobiles and trucks, of an allowed weight, shall be allowed to park at the site of the underground chamber. If maintenance is required within the underground chamber the Permittees shall place a notice on the parked car or truck, to be moved within 24 hours. If no vehicle is parked on top of the underground chamber the Permitted shall place a No Parking sign for up to 24 hours.

FISCAL IMPACTS OF RECOMMENDATION

None.

ENVIRONMENTAL SUSTAINABILITY

It is imperative to protect the most vulnerable and all our citizens from these hazards. .

CONTACT PERSON

Cheryl Davila,
Councilmember, District 2
510.981.7120
cdavila@cityofberkeley.info

ATTACHMENTS:

1. Resolution

RESOLUTION NO. XXXX

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF BERKELEY SUPPORTING AMENDMENTS TO THE CITY'S TELECOM ORDINANCES

WHEREAS, communities in the City of Berkeley are disadvantaged and disproportionately bear the brunt of health-related impacts caused by industrial and other activities. The California Environmental Protection Agency has identified various census tracts within the City of Richmond as disadvantaged communities disproportionately burdened by and vulnerable to multiple sources of pollution

Now, THEREFORE, BE IT RESOLVED by the Council of the City of Berkeley support amendments to the City Telecom Ordinances to protect the health and safety of our residents.

BE IT FURTHER RESOLVED, the City Council directed the City ~~Manager~~ Attorney to prepare any draft ordinances using the attached sample language and hyperlink references to update the City's Telecom Ordinances:

1. FCC CLAUSE: Include a clause voiding relevant sections of the ordinance, or requiring modification, in the event of a regulatory change or overturning of the FCC Order. (see report by Next Century Cities) **Laws, permits, and re-certifications need to be CONDITIONAL**, so that they may be revoked or modified if out of compliance or if/when federal law is modified. (Fairfax, Sonoma City) Also include a **SEVERABILITY** clause.

2. PERMITS

2.a. **Conditional Use Permits:** Maintain that each wireless facility requires a Conditional Use Permit (Planning Dept, ZAB, or Public Works) followed by an encroachment permit

2.b. **Significant Gap in coverage:** Require that a significant gap in coverage be proven by applicant before approval of a wireless antenna and confirmed by an independent engineer.* (Calabasas, Old Palos Verdes)

Least Intrusive Methods: Require the least intrusive methods to fill any gaps for small cells and other wireless facilities. A justification study which includes the rationale for selecting the proposed use; a detailed explanation of the coverage gap that the proposed use would serve; and how the proposed use is the least intrusive means for the applicant to provide service. Said study shall include all existing structures and/or alternative sites evaluated for potential installation of the proposed facility and why said alternatives are not a viable option. (Old Palos Verdes) An independent* engineer shall confirm, or not.

2.c. **Radio-frequency Data Report:** Require a thorough radio-frequency (RF) data report as part of the permit submittal for consultants. For all applications, require both an RF Compliance Report signed by a registered, independent professional engineer, and a supporting RF Data Request Form. (Calabasas, Palos Verdes, Suisun City, Sonoma City) The independent* engineer will be hired by the City of Berkeley and billed to the applicant.

2.d. **Mock-up, Construction Drawings, Site Survey, Photo Simulations:** Require full-size mock-up of proposed Small Cell Facilities (SCF) and other pertinent information in order to adequately consider potential impacts. (Larkspur, Calabasas, Palos Verdes. Also see Boulder, CO Report) Require **Balloon Tests**. (Town of Hempstead NY 2013)

2.e. **Public notification:** Telecom related Planning Commission, Public Works, and Zoning Adjustment Board hearings shall be publicized in the most widely read local newspapers and local online news sources* and on the City website no less than 30 days prior to the hearing or meeting. No less than 30 days prior, a U.S. 1st class mail shall be sent to all addresses within 3,000 feet of the proposed facilities. The outside of the envelope shall be printed with "Urgent Notice of Public Hearing." Due to the "shot clock", City requires applicants to hold a publicly noticed meeting two weeks prior to submitting an application within the affected neighborhood. Applicants mail all affected residents and businesses date, time, and location of hearings at least two weeks prior. The applicant pays associated costs including mailings and meeting location rent.

Community Meeting: Applicant is required to [publicize in local newspapers and local online news sources* and] hold a community meeting at least two weeks prior to the hearing on the use permit. (San Anselmo, Palos Verdes) Applicants shall mail all affected residents and businesses date, time, and location of hearings at least two weeks prior, 1st class etc. [as in 2.e].

2.f. **Notification:** Notify property owners, residents, tenants, business owners, and workers within 3000 feet of a proposed wireless installation within one week of application submittal and again within one week of permit approval. 1st class etc. [as in 2.e].

2.g. **Independent Expert*** The City shall retain an independent, qualified consultant to review any application for a permit for a wireless telecommunications facility. The review is intended to be a review of technical aspects of the proposed wireless telecommunications facility and shall address any or all of the following: xxxx (Old Palos Verdes) Paid by applicant (San Anselmo)

2.h. **Trees:** No facility shall be permitted to be installed in the drip line of any tree in the right-of-way. (Old Palos Verdes, 15' in Los Altos) (See Berkeley's Heritage Tree ordinance.)

2.i. **Transfer of Permit:** The permittee shall not transfer the permit to any person prior to the completion of the construction of the facility covered by the permit, unless and until the transferee of the permit has submitted the security instrument required by section 12.18.080(B)(5). (Palos Verdes)

2.j. **General Liability Insurance:** To protect the City, the permittee shall obtain, pay for and maintain, in full force and effect until the facility approved by the permit is removed in its entirety from the public right-of-way, an insurance policy or policies of commercial general liability insurance, with minimum limits of two million dollars for each occurrence and four million dollars in the aggregate, that fully protects the City from claims and suits for bodily injury and property damage. The insurance must name the City and its elected and appointed council members, boards, commissions, officers, officials, agents, consultants, employees and volunteers as additional named insureds, be issued by an insurer admitted in the State of California with a rating of at least a A:VII in the latest edition of A.M. Best's Insurance Guide, and include an endorsement providing that the policies cannot be canceled or reduced except with 30 days prior written notice to the city, except for cancellation due to nonpayment of premium.... (Old Palos Verdes, Fairfax, Newark. San Anselmo has an indemnification clause.)

2.k. **Attorneys' Fees:** The Permittee is required to pay any/all costs of legal action. (Suisun City)

2.l. **Speculative Equipment:** Pre-approving wireless equipment or other alleged improvements that the applicant does not presently intend to install, but may wish to install at an undetermined future time, does not serve the public interest. The City shall not pre-approve telecom equipment or wireless facilities. (Fairfax, Old Palos Verdes, Sebastopol)

2.m. **Citizens may appeal** decisions made. (San Anselmo)

3. ACCESS Americans with Disabilities Act (ADA): All facilities shall be in compliance with the ADA. (New Palos Verdes, Fairfax, Sebastopol, Mill Valley, Sonoma City, Suisun City) Electromagnetic Sensitivity (EMS) is a disabling characteristic, recognized by the Federal Access Board since 2002. The main treatment for this condition is avoidance of exposure to wireless radiation. Under the 1990 Americans with Disabilities Act, people who suffer from exposure to Electromagnetic Fields (EMF) are part of a protected disabled class under Title 42 U.S. Code § 12101 et seq. (Heed Berkeley's pioneering disability rights laws and Berkeley's Precautionary Principle ordinance NO. 6,911-N.S "to promote the health, safety, and general welfare of the community.")

4. SETBACKS:

4.a. **Prohibited Zones** for Small Cells: Prohibits small cell telecommunication facilities in residential zones and multi-family zoning districts (Calabasas, Mill Valley, Los Altos, Sonoma City, Elk Grove Ca)

4.b. **Preferred or Disfavored Locations:** In addition to residential areas, designate areas where cell towers are disfavored and not permitted, i.e. near schools, residential areas, city buildings, sensitive habitats, on ridge lines, public parks, Historic Overlay Districts, in open spaces or where they are favored i.e. commercial zoning areas, industrial zoning areas. (Calabasas, Sebastopol, Boulder Report)

4.c. **Disfavored Location:** Small cell installations are not permitted in close proximity to residences, particularly near sleeping and living areas. Viable and defensible setbacks will vary based on zoning. (ART ordinance) 1500 foot minimum setback from residences that are not in residential districts!

4.d. **1500 Foot Setback from other small cell** installations: Locate small cell installations no less than 1500 feet away from the Permittee or any Lessee's nearest other small cell installation. (Calabasas, Petaluma, Fairfax, Mill Valley, Suisun City, Palos Verdes, Sebastopol, San Ramon, Sonoma City, -Boulder Report)

4.e. **1500 Foot Minimum Setback** from any educational facility, child/elder/healthcare facility, or park. (ART Ordinance) The California Supreme Court ruled on April 4, 2019 that San

Francisco may regulate based on "negative health consequences, or safety concerns that may come from telecommunication deployment." (Sebastopol forbids potential threat to public health, migratory birds, or endangered species, also in combination with other facilities. Refer to Berkeley's Precautionary Principle Ordinance)

4.f. **500 Foot Minimum Setback from any business/workplace** (Petaluma, Suisun City)

5. LOCATION PREFERENCE:

5.a. **Order of preference:** The order of preference for the location of small cell installations in the City, from most preferred to least preferred, is: (1) Industrial zone (2) Commercial zone (3) Mixed commercial and residential zone (4) Residential zone (ART Ordinance, New Palos Verdes) [Residential zone ban]

5.b. **Fall Zone:** The proposed small cell installation shall have an adequate fall zone to minimize the possibility of damage or injury resulting from pole collapse or failure, ice fall or debris fall, and to avoid or minimize all other impacts upon adjoining property

5.c. **Private Property:** If a facility (such as a street light pole, street signal pole, utility pole, utility cabinet, vault, or cable conduit) will be located on or in the property of someone other than the owner of the facility, the applicant shall provide a duly executed and notarized authorization from the property owner(s) authorizing the placement of the facility on or in the property owner's property. (Palos Verdes) [Many Berkeleyans do not want wireless antennas allowed on private property. If a permit is considered for private property, not just the property owners but all those who spend time or own/rent property within 1500 feet must be notified immediately of how they may weigh in, and be informed of the decision immediately with possibility of appeal if a permit is granted.]

5.d. **Endangerment, interference:** No person shall install, use or maintain any facility which in whole or in part rests upon, in or over any public right-of-way, when such installation, use or maintenance endangers or is reasonably likely to endanger the safety of persons or property, or when such site or location is used for public utility purposes, public transportation purposes or other governmental use, or when such facility unreasonably interferes with or unreasonably impedes the flow of pedestrian or vehicular traffic including any legally parked or stopped vehicle, ingress into or egress from any residence or place of business, the use of poles, posts, traffic signs or signals, hydrants, mailboxes, permitted sidewalk dining, permitted street furniture or other objects permitted at or near said location.

6. TESTING:

6.a. **Random Testing for RF Compliance:** The City shall employ a qualified, independent * RF engineer to conduct an annual random and unannounced test of the Permittee's small cell **and other** wireless installations located within the City to certify their compliance with all Federal Communications Commission (FCC) RF emission limits. The reasonable cost of such tests shall be paid by the Permittee. (Fairfax, (ART, Old Berkeley, Suisun City requires annual inspections and testing.)

6.b. **RF/EMF Testing:** Berkeley's current law states that the City Manager "may" require independent testing of telecom equipment. Change "may" to "shall" and delete the word "Manager" so that, if s/he does not find time to hire an independent expert, other City staff or a Council Committee may do so. The law needs to require independent testing of all equipment, unannounced in advance, twice annually, with permittees required to reimburse the City for costs and to pay a deposit in advance. Dates, addresses, and results of testing shall be posted on the City website and published in local media. ** [Montgomery County Maryland studied RF radiation levels from small cells and found that FCC exposure levels were exceeded within 11 feet.]

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the forfeiture of all or part of the Compliance Bond, and the City shall have the right to require the removal of such installation(s), as the City in its sole discretion may determine is in the public interest. (ART)

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- o Size of antennas, equipment boxes, and cabling;
- o Painting of attachments to match mounting structures;
- o Consistency with the character of historic neighborhoods;
- o Aesthetic standards for residential neighborhoods, including "any minimum setback from dwellings, parks, or playgrounds and minimum setback from dwellings, parks, or playgrounds; maximum structure heights; or limitations on the use of small, decorative structures as mounting locations." (Boulder Report)

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Right to Know - Publish on City website, in online local news: Berkeley Daily Planet, Berkeleyside, and local newspapers: Berkeley Voice, Berkeley Times (2019. Update as needed)

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**** WiRED deleted four of the points that were either not approved or not understood.

Various cities' wireless facilities ordinances are hyperlinked in the Key Points.

Scroll down ~20 pages to find them: <https://mdsafetech.org/cell-tower-and-city-ordinances/>

N.B. More cities than those listed have adopted these points.



Cheryl Davila
Councilmember
District 2

ACTION CALENDAR
July 7, 2020

To: Honorable Mayor and Members of the City Council
From: Councilmember Cheryl Davila
Subject: Updating Berkeley Telecom Ordinances and BMC codes

RECOMMENDATION

Direct the City Manager to adopt a resolution to include the attached sample language and contained hyperlinked references to update the City's Telecom Ordinances and BMC codes.

POLICY COMMITTEE RECOMMENDATION

On February 24, 2020, the Agenda and Rules Committee adopted the following action: M/S/C (Hahn/Arreguin) to move the item with a positive recommendation that the City Council consider the materials at the March 17, 2020 special meeting, and without comment from the Committee regarding the content of the materials.
Vote: All Ayes.

BACKGROUND

For several months now, the community has been concerned about the potential installation of 5G technology and small cells throughout the city. The technology has not been thoroughly tested concerning radiation.

Some City of Berkeley communities bear the brunt of health-related impacts caused by industrial and other activities. The California Environmental Protection Agency has identified various census tracts within the City as disadvantaged communities disproportionately burdened by and vulnerable to multiple sources of pollution.

It is important now more than ever, to update the City's Telecom Ordinances to protect the health and safety of our residents that cover the following areas:

1. FCC CLAUSE: Include a clause voiding relevant sections of the ordinance, or requiring modification, in the event of a regulatory change or overturning of the FCC Order. (see report by Next Century Cities) **Laws, permits, and re-certifications need to be CONDITIONAL**, so that they may be revoked or modified if out of compliance or if/when federal law is modified. (Fairfax, Sonoma City) Also include a **SEVERABILITY** clause.

2. PERMITS

2.a. **Conditional Use Permits:** Maintain that each wireless facility requires a Conditional Use Permit (Planning Dept, ZAB, or Public Works) followed by an encroachment permit

2.b. **Significant Gap in coverage:** Require that a significant gap in coverage be proven by applicant before approval of a wireless antenna and confirmed by an independent engineer.* (Calabasas, Old Palos Verdes)

Least Intrusive Methods: Require the least intrusive methods to fill any gaps for small cells and other wireless facilities. A justification study which includes the rationale for selecting the proposed use; a detailed explanation of the coverage gap that the proposed use would serve; and how the proposed use is the least intrusive means for the applicant to provide service. Said study shall include all existing structures and/or alternative sites evaluated for potential installation of the proposed facility and why said alternatives are not a viable option. (Old Palos Verdes) An independent* engineer shall confirm, or not.

2.c. **Radio-frequency Data Report:** Require a thorough radio-frequency (RF) data report as part of the permit submittal for consultants. For all applications, require both an RF Compliance Report signed by a registered, independent professional engineer, and a supporting RF Data Request Form. (Calabasas, Palos Verdes, Suisun City, Sonoma City) The independent* engineer will be hired by the City of Berkeley and billed to the applicant.

2.d. **Mock-up, Construction Drawings, Site Survey, Photo Simulations:** Require full-size mock-up of proposed Small Cell Facilities (SCF) and other pertinent information in order to adequately consider potential impacts. (Larkspur, Calabasas, Palos Verdes. Also see Boulder, CO Report) Require **Balloon Tests**. (Town of Hempstead NY 2013)

2.e. **Public notification:** Telecom related Planning Commission, Public Works, and Zoning Adjustment Board hearings shall be publicized in the most widely read local newspapers and local online news sources* and on the City website no less than 30 days prior to the hearing or meeting. No less than 30 days prior, a U.S. 1st class mail shall be sent to all addresses within 3,000 feet of the proposed facilities. The outside of the envelope shall be printed with "Urgent Notice of Public Hearing." Due to the "shot clock", City requires applicants to hold a publicly noticed meeting two weeks prior to submitting an application within the affected neighborhood. Applicants mail all affected residents and businesses date, time, and location of hearings at least two weeks prior. The applicant pays associated costs including mailings and meeting location rent.

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2.f. **Notification:** Notify property owners, residents, tenants, business owners, and workers within 3000 feet of a proposed wireless installation within one week of application submittal and again within one week of permit approval. 1st class etc. [as in 2.e].

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2.h. **Trees:** No facility shall be permitted to be installed in the drip line of any tree in the right-of-way. (Old Palos Verdes, 15' in Los Altos) (See Berkeley's Heritage Tree ordinance.)

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2.j. **General Liability Insurance:** To protect the City, the permittee shall obtain, pay for and maintain, in full force and effect until the facility approved by the permit is removed in its entirety from the public right-of-way, an insurance policy or policies of commercial general liability insurance, with minimum limits of two million dollars for each occurrence and four million dollars in the aggregate, that fully protects the City from claims and suits for bodily injury and property damage. The insurance must name the City and its elected and appointed council members, boards, commissions, officers, officials, agents, consultants, employees and volunteers as additional named insureds, be issued by an insurer admitted in the State of California with a rating of at least a A:VII in the latest edition of A.M. Best's Insurance Guide, and include an endorsement providing that the policies cannot be canceled or reduced except with 30 days

prior written notice to the city, except for cancellation due to nonpayment of premium.... (Old Palos Verdes, Fairfax, Newark. San Anselmo has an indemnification clause.)

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2.m. **Citizens may appeal** decisions made. (San Anselmo)

3. ACCESS Americans with Disabilities Act (ADA): All facilities shall be in compliance with the ADA. (New Palos Verdes, Fairfax, Sebastopol, Mill Valley, Sonoma City, Suisun City) Electromagnetic Sensitivity (EMS) is a disabling characteristic, recognized by the Federal Access Board since 2002. The main treatment for this condition is avoidance of exposure to wireless radiation. Under the 1990 Americans with Disabilities Act, people who suffer from exposure to Electromagnetic Fields (EMF) are part of a protected disabled class under Title 42 U.S. Code § 12101 et seq. (Heed Berkeley's pioneering disability rights laws and Berkeley's Precautionary Principle ordinance NO. 6,911-N.S "to promote the health, safety, and general welfare of the community.")

4. SETBACKS:

4.a. **Prohibited Zones** for Small Cells: Prohibits small cell telecommunication facilities in residential zones and multi-family zoning districts (Calabasas, Mill Valley, Los Altos, Sonoma City)

4.b. **Preferred or Disfavored Locations:** In addition to residential areas, designate areas where cell towers are disfavored and not permitted, i.e. near schools, residential areas, city buildings, sensitive habitats, on ridge lines, public parks, Historic Overlay Districts, in open spaces or where they are favored i.e. commercial zoning areas, industrial zoning areas. (Calabasas, Sebastopol, Boulder Report)

4.c. **Disfavored Location:** Small cell installations are not permitted in close proximity to residences, particularly near sleeping and living areas. Viable and defensible setbacks will vary based on zoning. (ART ordinance) 1500 foot minimum setback from residences that are not in residential districts!

4.d. **1500 Foot Setback from other small cell** installations: Locate small cell installations no less than 1500 feet away from the Permittee or any Lessee's nearest other small cell installation. (Calabasas, Petaluma, Fairfax, Mill Valley, Suisun City, Palos Verdes, Sebastopol San Ramon, Sonoma City, Boulder Report)

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4.f. **500 Foot Minimum Setback from any business/workplace** (Petaluma, Suisun City)

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5.a. **Order of preference:** The order of preference for the location of small cell installations in the City, from most preferred to least preferred, is: (1) Industrial zone (2) Commercial zone (3) Mixed commercial and residential zone (4) Residential zone (ART Ordinance, New Palos Verdes) [Residential zone ban]

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owner of the facility, the applicant shall provide a duly executed and notarized authorization from the property owner(s) authorizing the placement of the facility on or in the property owner's property. (Palos Verdes) [Many Berkeleyans do not want wireless antennas allowed on private property. If a permit is considered for private property, not just the property owners but all those who spend time or own/rent property within 1500 feet must be notified immediately of how they may weigh in, and be informed of the decision immediately with possibility of appeal if a permit is granted.]

5.d. **Endangerment, interference:** No person shall install, use or maintain any facility which in whole or in part rests upon, in or over any public right-of-way, when such installation, use or maintenance endangers or is reasonably likely to endanger the safety of persons or property, or when such site or location is used for public utility purposes, public transportation purposes or other governmental use, or when such facility unreasonably interferes with or unreasonably impedes the flow of pedestrian or vehicular traffic including any legally parked or stopped vehicle, ingress into or egress from any residence or place of business, the use of poles, posts, traffic signs or signals, hydrants, mailboxes, permitted sidewalk dining, permitted street furniture or other objects permitted at or near said location.

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6.a. **Random Testing for RF Compliance:** The City shall employ a qualified, independent * RF engineer to conduct an annual random and unannounced test of the Permittee's small cell **and other** wireless installations located within the City to certify their compliance with all Federal Communications Commission (FCC) RF emission limits. The reasonable cost of such tests shall be paid by the Permittee. (Fairfax, (ART, Old Berkeley. Suisun City requires annual inspections and testing.)

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6.c. **Violation of Compliance Notification:** In the event that such independent tests reveal that any small cell installation(s) owned or operated by Permittee or its Lessees, singularly or in the aggregate, is emitting RF radiation in excess of FCC exposure standards as they pertain to the general public, the City shall notify the Permittee and all residents living within 1500 feet of the installation(s) of the violation(s), and the Permittee shall have 48 hours to bring the installation(s) into compliance. Failure to bring the installation(s) into compliance shall result in the forfeiture of all or part of the Compliance Bond, and the City shall have the right to require the removal of such installation(s), as the City in its sole discretion may determine is in the public interest. (ART)

6.d. **Non-acceptance of Applications:** Where such annual recertification has not been properly or timely submitted, or equipment no longer in use has not been removed within the required 30-day period, no further applications for wireless installations will be accepted by the City until such time as the annual re-certification has been submitted and all fees and fines paid. (ART)

7. **RIGHT TO KNOW:** The City shall inform the affected public via website, local news publications **, and US 1st class mail (with topic prominently announced in red on outside of envelope) of Master Licensing Agreement between the City and telecom, Design Standards for Small Cells or other wireless equipment, other telecom agreements, and notification within 2 business days of receiving permit applications, calendaring related hearings/meetings, and approving permits. Notice shall include location and date of expected installations, description of the appeals process, and dates of installations. A map featuring all telecom equipment shall be on the City website and available to residents who request it at 2180 Milvia St.

Applicants/Permittees, who are profiting from using Berkeley's public right of way, will reimburse City for the reasonable cost of mailings, Town Halls, and staff to handle telecom applications, public notification, inspections, recertifications, etc.

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8.a. **Annual Recertification:** Each year, commencing on the first anniversary of the issuance of the permit, the Permittee shall submit to the City an affidavit which shall list all active small cell wireless installations it owns within the City by location, certifying that (1) each active small cell installation is covered by liability insurance in the amount of \$2,000,000 per installation, naming the City as an additional insured; and (2) each active installation has been inspected for safety and found to be in sound working condition and in compliance with all federal safety regulations concerning RF exposure limits. (ART) Any installation that is out of compliance will be promptly removed; the permit for that installation will be terminated, with all associated expenses paid by the applicant.

8.b. **Recertification Fees:** Recertification fees will be calculated each year by the City. They will be based on the anticipated costs of City for meeting the compliance requirements put in place by this ordinance. The total costs will be divided by the number of permits and assigned to the permit-holders as part of the recertification process

8.c. **Noise Restrictions (Sonoma City):** Each wireless telecommunications facility shall be operated in such a manner so as not to cause any disruption to the community's peaceful enjoyment of the city.

- o Non-polluting backup generators shall only be operated during periods of power outages, and shall not be tested on weekends, holidays, or between the hours of 5:00 p.m. and 9:00 a.m.

- o At no time shall any facility be permitted to exceed 45 DBA and the noise levels specified in Municipal Code XXX. (Los Altos)

- 8.d. **Noise Complaints:** If a nearby property owner registers a noise complaint, the City shall forward the same to the permittee. Said complaint shall be reviewed and evaluated by the applicant. The permittee shall have 10 business days to file a written response regarding the complaint which shall include any applicable remedial measures. If the City determines the complaint is valid and the applicant has not taken steps to minimize the noise, the City may hire a consultant to study, examine and evaluate the noise complaint and the permittee shall pay the fee. The matter shall be reviewed by City staff. If sound proofing or other sound attenuation measures are required to bring the project into compliance with the Code, the City may impose conditions on the project to achieve said objective. (Old Palos Verdes, Calabasas)

9.a. **AESTHETICS and UNDERGROUNDING:** At every site where transmitting antennas are to be placed, all ancillary equipment shall be placed in an underground chamber beneath the street constructed by the Permittee. (Calabasas, Mill Valley, Petaluma) The chamber shall include battery power sufficient to provide a minimum of 72 hours of electricity to the ancillary equipment. ***

- Permittee is responsible for placing on the pole two signs with blinking lights, with design approved by City, each in the opposite direction, to inform people walking on the sidewalk, what is installed on the pole. Should a sign be damaged, Permittee shall replace it within 5 business days. (Town of Hempstead NY required a 4 foot warning sign on each pole.)

9.b. **Aesthetic Requirements:** According to the Baller Stokes & Lide law firm, some of the aesthetic considerations that local governments may consider include: ****

- o Size of antennas, equipment boxes, and cabling;
- o Painting of attachments to match mounting structures;
- o Consistency with the character of historic neighborhoods;
- o Aesthetic standards for residential neighborhoods, including "any minimum setback from dwellings, parks, or playgrounds and minimum setback from dwellings, parks, or playgrounds; maximum structure heights; or limitations on the use of small, decorative structures as mounting locations." (Boulder Report)

“Independent” means: The RF engineering company has never provided services to a telecom corporation, and the company’s employee who tests exposure levels has also never provided services to a telecom corporation.

Right to Know - Publish on City website, in online local news: Berkeley Daily Planet, Berkeleyside, and local newspapers: Berkeley Voice, Berkeley Times (2019. Update as needed)

***** Undergrounding** - A single shielded multi-wire cable from the underground chamber shall be used to transmit radiation to the antennae for the purpose of transmitting data. If the pole is of hollow metal, the cable shall be inside the pole; if the pole is solid wood, the cable can be attached to the pole. Installation shall include its own analogue electricity meter and Permittee shall pay the electrical utility a monthly charge for the amount of electricity used.

Except during construction, or essential maintenance, automobiles and trucks, of an allowed weight, shall be allowed to park at the site of the underground chamber. If maintenance is required within the underground chamber the Permittees shall place a notice on the parked car or truck, to be moved within 24 hours. If no vehicle is parked on top of the underground chamber the Permitted shall place a No Parking sign for up to 24 hours.

FISCAL IMPACTS OF RECOMMENDATION

None.

ENVIRONMENTAL SUSTAINABILITY

It is imperative to protect the most vulnerable and all our citizens from these hazards. .

CONTACT PERSON

Cheryl Davila,
Councilmember, District 2
510.981.7120
cdavila@cityofberkeley.info

ATTACHMENTS:

1. Resolution

RESOLUTION NO. XXXX

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF BERKELEY SUPPORTING AMENDMENTS TO THE CITY’S TELECOM ORDINANCES

WHEREAS, communities in the City of Berkeley are disadvantaged and disproportionately bear the brunt of health-related impacts caused by industrial and other activities. The California Environmental Protection Agency has identified various census tracts within the City of Richmond as disadvantaged communities disproportionately burdened by and vulnerable to multiple sources of pollution

Now, THEREFORE, BE IT RESOLVED by the Council of the City of Berkeley support amendments to the City Telecom Ordinances to protect the health and safety of our residents.

BE IT FURTHER RESOLVED, the City Council directed the City Attorney to prepare any draft ordinances using the attached sample language and hyperlink references to update the City's Telecom Ordinances:

1. FCC CLAUSE: Include a clause voiding relevant sections of the ordinance, or requiring modification, in the event of a regulatory change or overturning of the FCC Order. (see report by Next Century Cities) **Laws, permits, and re-certifications need to be CONDITIONAL**, so that they may be revoked or modified if out of compliance or if/when federal law is modified. (Fairfax, Sonoma City) Also include a **SEVERABILITY** clause.

2. PERMITS

2.a. **Conditional Use Permits:** Maintain that each wireless facility requires a Conditional Use Permit (Planning Dept, ZAB, or Public Works) followed by an encroachment permit

2.b. **Significant Gap in coverage:** Require that a significant gap in coverage be proven by applicant before approval of a wireless antenna and confirmed by an independent engineer.* (Calabasas, Old Palos Verdes)

Least Intrusive Methods: Require the least intrusive methods to fill any gaps for small cells and other wireless facilities. A justification study which includes the rationale for selecting the proposed use; a detailed explanation of the coverage gap that the proposed use would serve; and how the proposed use is the least intrusive means for the applicant to provide service. Said study shall include all existing structures and/or alternative sites evaluated for potential installation of the proposed facility and why said alternatives are not a viable option. (Old Palos Verdes) An independent* engineer shall confirm, or not.

2.c. **Radio-frequency Data Report:** Require a thorough radio-frequency (RF) data report as part of the permit submittal for consultants. For all applications, require both an RF Compliance Report signed by a registered, independent professional engineer, and a supporting RF Data Request Form. (Calabasas, Palos Verdes, Suisun City, Sonoma City) The independent* engineer will be hired by the City of Berkeley and billed to the applicant.

2.d. **Mock-up, Construction Drawings, Site Survey, Photo Simulations:** Require full-size mock-up of proposed Small Cell Facilities (SCF) and other pertinent information in order to adequately consider potential impacts. (Larkspur, Calabasas, Palos Verdes. Also see Boulder, CO Report) Require **Balloon Tests**. (Town of Hempstead NY 2013)

2.e. **Public notification:** Telecom related Planning Commission, Public Works, and Zoning Adjustment Board hearings shall be publicized in the most widely read local newspapers and local online news sources* and on the City website no less than 30 days prior to the hearing or meeting. No less than 30 days prior, a U.S. 1st class mail shall be sent to all addresses within 3,000 feet of the proposed facilities. The outside of the envelope shall be printed with "Urgent Notice of Public Hearing." Due to the "shot clock", City requires applicants to hold a publicly noticed meeting two weeks prior to submitting an application within the affected neighborhood. Applicants mail all affected residents and businesses date, time, and location of hearings at least two weeks prior. The applicant pays associated costs including mailings and meeting location rent.

Community Meeting: Applicant is required to [publicize in local newspapers and local online news sources* and] hold a community meeting at least two weeks prior to the hearing on the use permit. (San Anselmo, Palos Verdes) Applicants shall mail all affected residents and businesses date, time, and location of hearings at least two weeks prior, 1st class etc. [as in 2.e].

2.f. **Notification:** Notify property owners, residents, tenants, business owners, and workers within 3000 feet of a proposed wireless installation within one week of application submittal and again within one week of permit approval. 1st class etc. [as in 2.e].

2.g. **Independent Expert*** The City shall retain an independent, qualified consultant to review any application for a permit for a wireless telecommunications facility. The review is intended to be a review of technical aspects of the proposed wireless telecommunications facility and shall address any or all of the following: xxxx (Old Palos Verdes) Paid by applicant (San Anselmo)

2.h. **Trees:** No facility shall be permitted to be installed in the drip line of any tree in the right-of-way. (Old Palos Verdes, 15' in Los Altos) (See Berkeley's Heritage Tree ordinance.)

2.i. **Transfer of Permit:** The permittee shall not transfer the permit to any person prior to the completion of the construction of the facility covered by the permit, unless and until the transferee of the permit has submitted the security instrument required by section 12.18.080(B)(5). (Palos Verdes)

2.j. **General Liability Insurance:** To protect the City, the permittee shall obtain, pay for and maintain, in full force and effect until the facility approved by the permit is removed in its entirety from the public right-of-way, an insurance policy or policies of commercial general liability insurance, with minimum limits of two million dollars for each occurrence and four million dollars in the aggregate, that fully protects the City from claims and suits for bodily injury and property damage. The insurance must name the City and its elected and appointed council members, boards, commissions, officers, officials, agents, consultants, employees and volunteers as additional named insureds, be issued by an insurer admitted in the State of California with a rating of at least a A:VII in the latest edition of A.M. Best's Insurance Guide, and include an endorsement providing that the policies cannot be canceled or reduced except with 30 days prior written notice to the city, except for cancellation due to nonpayment of premium.... (Old Palos Verdes, Fairfax, Newark. San Anselmo has an indemnification clause.)

2.k. **Attorneys' Fees:** The Permittee is required to pay any/all costs of legal action. (Suisun City)

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**** WiRED deleted four of the points that were either not approved or not understood.

Various cities' wireless facilities ordinances are hyperlinked in the Key Points.

Scroll down ~20 pages to find them: <https://mdsafetech.org/cell-tower-and-city-ordinances/>

N.B. **More cities than those listed have adopted these points.**

