



Date Filed:

BOARD OF APPEALS

JUN 13 2014

APPEAL # JR

City & County of San Francisco  
BOARD OF APPEALS

# JURISDICTION REQUEST

Date of request: **June 12, 2014.**

**George Choppelas, (requestor(s)) hereby seeks a new appeal period for the following departmental action: ISSUANCE of Excavation Permit 14EXC-2144 by Department of Public Works, issued to: SBC-Pacific Bell Engineering, for property at 301-26th Avenue, that was issued or became effective on April 14, 2014, and for which the appeal period ended at close of business on April 29, 2014.**

**Your Jurisdiction Request will be considered by the Board of Appeals on Wednesday, July 02, 2014 at 5:00 p.m. City Hall, Room 416, One Dr. Carlton B. Goodlett Place.**

Pursuant to Article V, § 10 of the Board Rules, the **RESPONSE** to the written request for jurisdiction must be submitted by the permit, variance, or determination holder(s) and/or department(s) no later than **10 days from the date of filing, on or before June 23, 2014**, and must not exceed 6 pages in length (double-spaced), with unlimited exhibits. An original and 10 copies shall be submitted to the Board office with additional copies delivered to the opposing parties the same day.

You or your representative **MUST** be present at the hearing. It is the general practice of the Board that only up to three minutes of testimony from the requestor, the permit holder, and the department(s) will be allowed. Your testimony should focus on the reason(s) you did not file on time, and why the Board should allow a late filing in your situation.

Based upon the evidence submitted and the testimony, the Board will make a decision to either grant or deny your Jurisdiction Request. Four votes are necessary to grant jurisdiction. If your request is denied, an appeal may not be filed and the decision of the department(s) is final. If your request is granted, **a new five (5) day appeal period shall be created which ends on the following Monday**, and an appeal may be filed during this time.

**Please Print:**

Name: George T. Choppelas

Address: 311-26th Ave, S.F. CA 94121

Phone: 415 307 5801

Email: gchoppelas@yahoo.com

Signature of Requestor or Agent

14EXC-2144\_streetusa.pdf

1 of 7

City and County of San Francisco



(415) 354-8118  
FAX (415) 634-8161  
http://www.sfpw.org

Department of Public Works  
Bureau of Street Line and Mapping  
1185 Market St., 3rd Floor  
San Francisco, CA 94102

BOARD OF APPEALS

JUN 12 2014

APPEAL # SR

14EXC-2144

Utility Excavation Permit

Address: Multiple Locations

Cost: \$1,242.02

Street Lot: 210

Pursuant to Article 2.4 of the Public Works Code in conjunction to DPW Order 178,840 permission, revocable at the will of the Director of Public Works, to excavate and restore the public right-of-way is granted to Permittee.

Permittee

Name: SBC - Pacific Bell Engineering

Address: 795 Folsom Street, Room 428 San Francisco, CA 94107-1243

Contact: Bob Pickard

Phone: (415) 644-7057

Conditions	NE-R, NW-L, NW-R, SW-L, SW-R, SE-L curb ramps required.
Emergency Confirmation Number	
24 Hour / 7 Day Contact:	Paul Wolfson (925) 426-3221, Cell (925) 648-4937
Service Address/Project:	301 28th Ave at California St LSMF EV 9078907 58A (13SMF-0265)
Start Date	6/18/14
Permit expires on:	6/29/2014
Purpose	Telephone
Excavation Reason	Install New Cabinet
Excavation Reason Description	
Method:	Open Cut Sawcut
Tracking Number1	9078907 R201 4c
Tracking Number2	13SMF-0265 SF13-120802
Project Size	221
Inspection	

The undersigned Permittee hereby agrees to comply with all requirements and conditions noted on this permit  
Approved Date: 04/16/2014

"When drilling/excavating in sidewalk area, entire flag(s) must be replaced."

App. - Bob Pickard Date: 04/16/2014 Dist. Justice: Inside BSMC Utility Inspection

Printed: 6/12/2014 11:42:08 PM Plan Checker: Gene Chen

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**GEORGE T. CHOPPELAS**  
311 - 26<sup>th</sup> AVENUE  
SAN FRANCISCO, CA 94121

June 11, 2014

BOARD OF APPEALS

JUN 13 2014

APPEAL # JR

**Board of Appeals**  
**City and County of San Francisco**  
**1650 Mission Street**  
**San Francisco, Ca 94103**  
**ATTN: Cynthia G. Goldstein, Executive Director**

**RE: Jurisdictional Request Re. 13SMF-0265**

**Members of the Board:**

**It is requested that I be allowed to file an appeal of a Utility Excavation Permit approved by the Department of Public Works on April 14, 2014.**

**On May 5, 2014 I appeared at the office of the Board of Appeals for the purpose of filing a Jurisdictional Request to enable me to file an appeal of a Utility Excavation Permit which was approved by the Department of Public Works on May 2, 2014. Said approval enabled Permittee SBC-Pacific Bell Engineering to "install a new cabinet" at 301-26<sup>th</sup> Avenue at California Street.**

**At that time, I was informed that an action by the Department of Public Works enabled me to file the Appeal of the Utility Excavation Permit, of which I did on that day. As a result, the Jurisdictional Request was not filed with the Board.**

**An Appeal Brief was subsequently submitted on June 4<sup>th</sup>, 2014, and set for hearing on June 25, 2014.**

**Since then, on Tuesday, June 5, 2014, a Notice of Excavation has been posted on the site, indicating that excavation on the site will begin on June 12<sup>th</sup> and will last until June 27<sup>th</sup>.**

**It is the purpose of this writer to file this Jurisdictional Request, by utilizing the**

same document that was prepared for filing on May 5, 2014, a copy of which is attached hereto as Exhibit A, in an effort to halt any excavation at the site until the Board of Appeals Hearing scheduled for June 25, 2014.

Thank you for your consideration and assistance in this matter.

  
GEORGE T. CHOPPELAS

**GEORGE T. CHOPPELAS**  
311 - 26<sup>th</sup> AVENUE  
SAN FRANCISCO, CA 94121

May 5, 2014

Board of Permit Appeals  
City and County of San Francisco  
1650 Mission Street  
San Francisco, CA 94103

ATTN: Cynthia G. Goldstein, Executive Director

Re: Jurisdictional Request Re. 13SMF-0265

Dear Members of the Board:

It is requested that I be allowed to file an appeal of a Utility Excavation Permit approved by the Department of Public Works on April 14, 2014.

I am the property owner of the four unit apartment located at 303 to 26<sup>th</sup> Avenue, and reside at 311-26<sup>th</sup> Avenue. The placement of the Surface Mounted Facility Installation is to be placed in front of the property.

I believe that the City inadvertently caused me to be late in filing the appeal.

On January 13, 2014 (supplementing a previous letter 9/13/2013), I prepared and forwarded a Letter to the Department of Public Works setting forth my objections to AT&T's application to install a SMF at 301-26<sup>th</sup> Avenue.

On January 23, 2014 I appeared at a hearing, and testified in opposition to the placement.

In March of 2014, in an undated e-mail, I received a copy of DPW Order No:182200, which set forth the Hearing Officer's Decision, and the Director of Public Works approval of the Application.

I immediately contacted the Department of Public Works regarding an appeal of the decision, and was advised that an appeal to the Board of Permit Appeals must wait until AT&T filed for an Excavation Permit, and that I would receive a notice at that time. I was also told that it "would probably be a few months."

On April 23, 2014, I called the Department of Public Works, in anticipation of being away from San Francisco, April 24 - 28<sup>th</sup>, inquiring of the status of the filing of the Excavation Application Notice. I was told that the file was not available, that there could have been some action, and that there was no notice forthcoming as of yet. I was given a number for reference (13SMF-0265).

On April 28, 2014, I returned to San Francisco, and on April 29<sup>th</sup> called the DPW (left a message), and the Board of Permit Appeals to see if I could file an appeal with the reference number. I was advised that I would need to bring a copy of the permit with me.

On April 29<sup>th</sup>, 2014 I immediately called the Department of Public Works, and had to leave a voice message.

On April 30<sup>th</sup>, 2014 I called DPW again, and left a detailed message of what I needed to file the appeal.

On May 1, 2014, I received a call back from DPW and told that a copy of the Permit would be e-mailed to me. An e-mail copy of the Permit was received the same day. On May 2, 2014, I went to the Department of Permit Appeals to file the appeal. At that time, I was told that the time for appeal had passed on the April 29<sup>th</sup>.

**Conclusion:**

I believe the information provided me in March of 2014 that I would receive a notice in a few months, and the April 23, 2014 information "that there was no notice forthcoming as of yet," was instrumental in causing confusion as to if a Permit had been issued, and the to the amount of time for appeal.

**FOR EXAMPLE:** The conversations with both representatives of the DPW led me to believe that nothing had transpired up to and including April 23<sup>rd</sup>, and that I could check again on my return April 28<sup>th</sup> for a notification by mail or the internet. There was none. On April 29<sup>th</sup> I called the DPW for additional information and left a voice message. I then called the Board of Permit Appeals Office to inquire as to the procedure for filing an appeal, and if it could be filed with only a reference number. I was told I would need a copy of the Permit. I called the DPW on April 29 and April 30, and left messages. Assured that the Permit had not been issued as of

April 23<sup>rd</sup>, and not receiving any subsequent notification I continued oblivious that the time for appeal was running. On April 30, I telephoned the DPW and requested that a copy of the Permit be e-mailed, and upon receipt went to the Board of Appeals Office.

### BRIEF OUT LINE OF THE CASE

At the January 13, 2014 SMF APPLICATION Hearing, a three page letter was submitted to the Hearing Officer, together with exhibits, setting forth the rationale for denying the application for issuance of the Permit. Said letter, and attached exhibits, are attached hereto and marked EXHIBIT 1.

For example: The location chosen aggravates existing problems, such as Autumn Leaves, Illegal dumping (photos provided by AT&T), and excessive "Legal" Dumping. (photos provided by Requester)

In addition, there are two very important objections which were brought up at the Hearing.

First: DPW Regulation (initial S.M.F. Application) provides:

"3 - Verification of attempts to place SMF's on Private Property on at least three locations." AT&T chose only two locations.

"4 - Verification of attempts to place Surface-Mounted Facility Underground" AT&T claimed "not technologically feasible to place cross connect boxes underground at this time." AT&T Referred to 1970's attempt, and same issues being discussed at SMF Committee meetings in 2004 and 2005 However, no mention of recent contemporary technology or alternatives,

Second: Location at 291 - 26<sup>th</sup> Avenue

At the January 13<sup>th</sup> Hearing, AT&T focused only on 25<sup>th</sup> and California gas station as an alternative location. Requester pointed out that there was another site to be considered, as evidenced by AT&T's Representative Julian Chang's November 21, 2013 E-mail, attached hereto as EXHIBIT 2. This was thoroughly covered on page 2 of Requester's January 13, 2014 letter to the Hearing Officer prior to the Hearing, attached as EXHIBIT 1.

To date, this issue has never been mentioned nor studied, and therefore continues to remain unresolved.

In conclusion, Requester asks that the Jurisdictional Request be granted. Throughout the process of this matter these many months, Requester has in the past depended on timely notification of hearings by mail or e-mails. In this instance, I realize that I was wrong to do so. However, I hope that my error to do so, does not preclude me from proceeding forward and presenting my case before the Board.

Thank you for your consideration in this matter.

  
GEORGE T. CHOPPELAS



**GEORGE T. CHOPPELAS**  
311-26<sup>th</sup> AVENUE  
SAN FRANCISCO, CA 94121

January 13, 2014

**Department of Public Works  
Bureau of Street-use and Mapping  
1155 Market Street, 3<sup>rd</sup> Floor  
San Francisco, CA 94103  
Attn: Hearing Officer for 1/13/14 Hearing**

**Re: SMF APPLICATION FOR "301"-26<sup>TH</sup> AVENUE  
(DPW ORDER NO:182012)**

**Dear Hearing Officer:**

I am the property owner of the four unit apartment building located at 303 to 309 - 26<sup>th</sup> Avenue, and reside at 311-26<sup>th</sup> Avenue.

This is a supplement to my letter of September 13, 2013, which strongly opposed the application to install an electronic cabinet at "301-26<sup>th</sup> Avenue." I request that the contents of said letter be read and incorporated in today's hearing.

The following are additions which further substantiate my contention that the cabinet should not be placed on the proposed site.

**The Location Chosen Aggravates Existing Problems**

**1. "Autumn" Leaves (See Photo 1A)**

During three or four months of the year, wind patterns in the surrounding area deposit leaves dropping from the trees to the area designated in Photos 1A & B. The area can be swept and bagged one day, and accumulate again the following day. Although not always as frequent, during those months the addition of the cabinet on the sloped sidewalk will create a hazardous obstruction to both elderly and child pedestrians.

## **2. "Illegal" Dumping (See Photo 2)**

The NW corner of 26<sup>th</sup> and California St. unfortunately is the "dumping ground" of for people who move, purchase new furniture and appliances, or just want to discard junk. See Photo 2. The "discards" The discards are placed against the wall, and the large or small sign poles. Cardboard "No Dumping" signs posted on the large pole and building, are somewhat effective until torn down.

## **3. Excessive "Legal" Dumping? (See Photos 2,3,4,5)**

The intersection of 26<sup>th</sup> and California Street presently has two, either AT&T, or PG&E, large electronic magnetic boxes on the S/W and S/E corner telephone poles. AT&T has a Surface Mounted Electronic Facility on the N/E corner. AT&T now proposes to place another Surface Mounted Electronic Facility on the N/W corner. At this time, while there is no definitive scientific proof that "electric magnetic fields" can cause permanent bodily damage, the additional placement of proposed Surface Mounted Facility is cause for concern. Should Electro Magnetic Pollution be deemed to cause injury, the close concentration of said four could be toxic.

### **Size Of Boxes**

On the AT&T Website the size of the cabinets to be installed in San Francisco are 48"H, 26"D, 51.7W. The Cabinet at this location is stated to be 59"W. In addition, the DPW Application mentions a "cement pad" for the Cabinet to be 60"H, 38"D, 72"W. It is presently, unclear which dimensions are the true dimensions for the proposed site.

### **Other Locations (See E-Mail 1 - Chang 11/21/13 E-Mail)**

On November 15, 2013, Helga Falkenstein (309-26<sup>th</sup> Avenue) and I met with AT&T representatives Julian Chang and Lynn Sousa on the site of 26<sup>th</sup> and California Street for the purpose of discussing alternative locations for the placement of the Surface Mounted Facility. During the walk around the neighborhood, other locations were discussed.

One such location was that of a gas station located at the SW corner of 25<sup>th</sup> and California Streets. However, Mr. Chang, rejected the suggestion because it might "possibly exceed the 300' distance to the cross-connect box." Ms. Sousa also suggested that the site might be too close to the underground gasoline storage tank. However, in the absence of construction engineers to measure the distance between the proposed site and cross-connect box, and not inquiring as to where the underground gasoline tanks were located, it seems that the best site for Facility was arbitrarily ruled out by the AT&T representatives.

Later, after walking around the neighborhood, Mr. Chang suggested the alternative location in front of a fence at 291-26<sup>th</sup> Avenue. This was confirmed in written form on November 21, 2013, and , attached hereto as "E-Mail 1." Mr. Chang explained the procedure for proposing an alternative location and departed. To date, I have not heard from Mr. Chang, although I called when receiving notice of this hearing, and left two messages on his answering device.

It would seem that the procedure that was explained by Mr.Chang was never initiated, nor were questions concerning the measurements of distances regarding the gas station, and location of the underground gasoline storage tank was ever resolved. This does not seem to correspond with the representations made by AT&T in the past, indicating that alternative sites would be considered if residents objected to the initial site selection.

#### Overall Observation

1. The decision by AT&T to proceed with the "outmoded" utilization of Surface Mounted Electronic Facilities is wrong. There are other innovative solutions available, either to utilize entirely new methods, or at least drastically reduce the number of Surface Mounted Facilities.

For example: On December 14, 2011, IDG News Service reported that Sonic.net unveiled a plan to build a "fiber network" for internet service in San Francisco. Sonic.net claimed that a network with fewer boxes by using all fiber instead of a combination of fiber and copper. Sony.net claimed that San Francisco's utility wires on poles enabled deployments of fiber over those poles. Did AT&T consider such a more innovated method of delivering service?

2. Comcast presently services with the same basic services, including X-FINITY, which is similar to AT&T's U-VERSE. COMCAST delivers such service through cable system. Why the necessity of AT&T Surface Boxes.

3. The average AT&T Surface Mounted Facilities (59"W x 26"D) equals 10.53 sq. ft, excluding the larger cabinets, and/or platforms. Multiplied by the proposed 726 locations results in 7,631.38 sq. ft. of San Francisco sidewalk being utilized by a commercial enterprise ( AT&T) for the purpose of only serving their paying customers. THIS IS WRONG.

In Conclusion, I feel that the AT&T application for the placement of a Surface Mounted Facility at "301-26<sup>th</sup> Avenue" should be denied.

Thank you for your consideration in this matter.

GEORGE T. CHOPPELAS

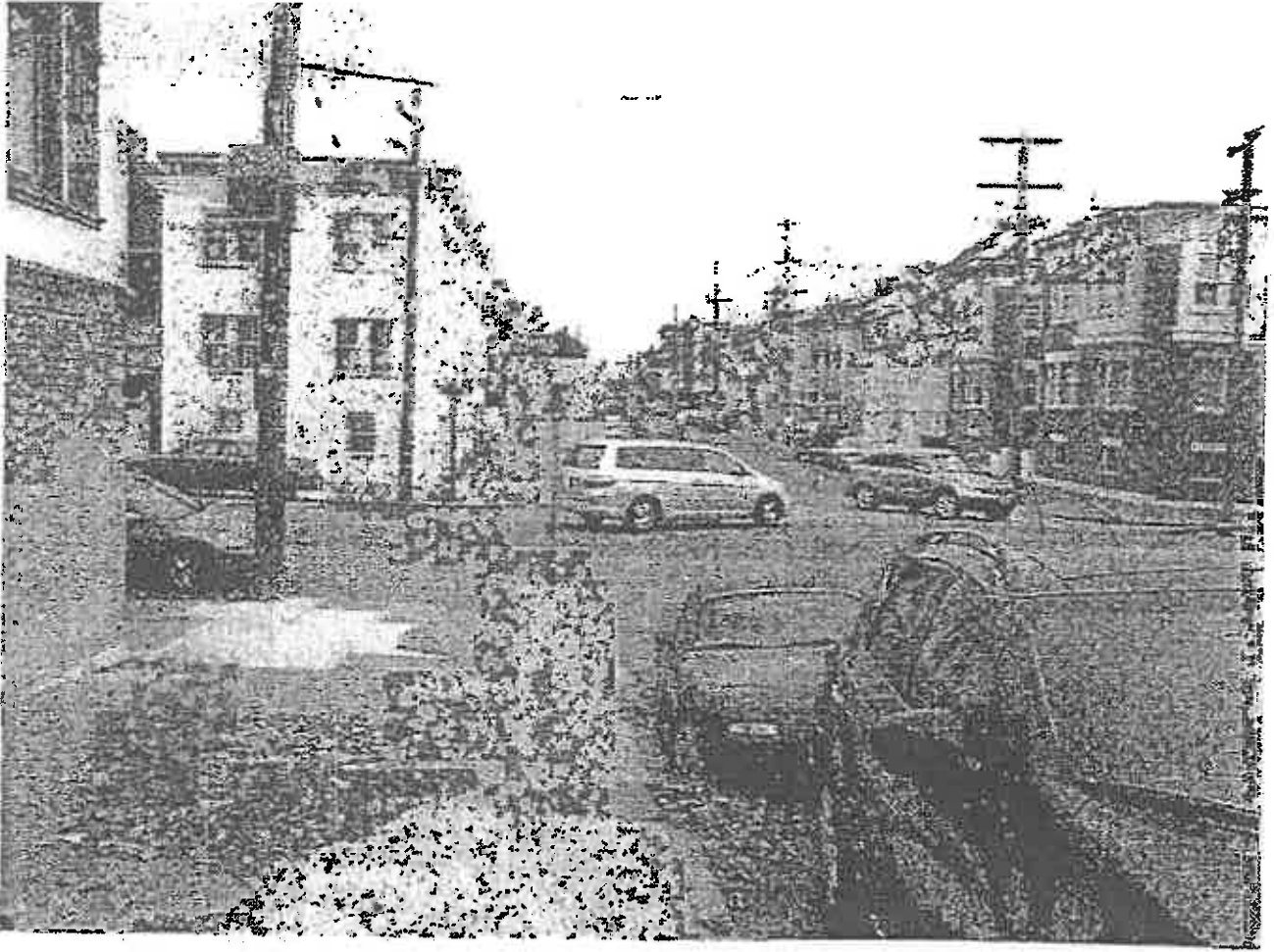
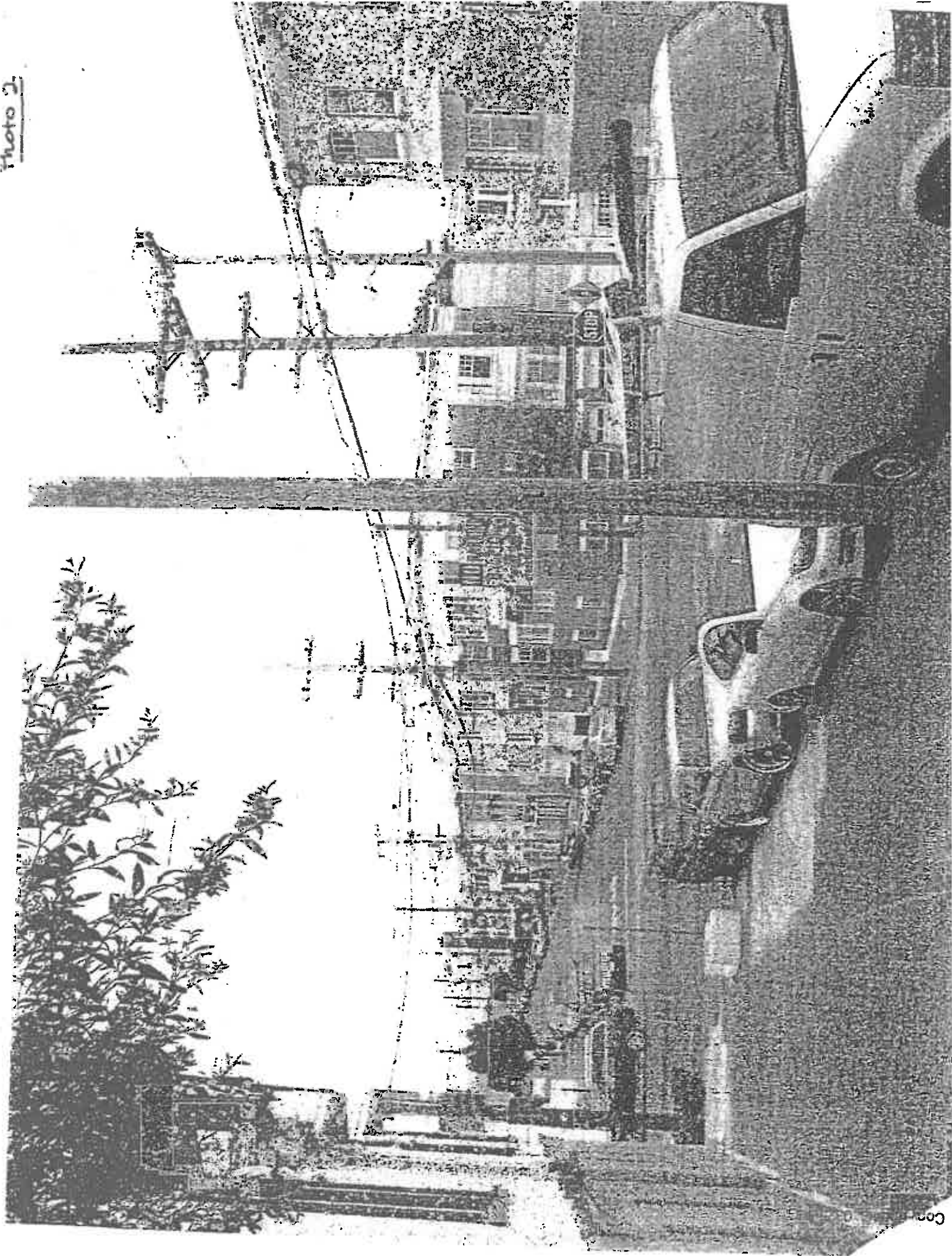




Photo 2











~~EXHIBIT~~  
EXHIBIT 2

Julian Chang  
To Mekinesthesia@sbcglobal.net Lynn Sousa and 3 More...  
Nov 21, 2013  
Dear Mr. Choppelas and Ms. Falkenstein,

Thank you for taking the time to meet with Lynn Sousa and me on November 15, 2013 during the Box Walk for AT&T VRAD 58A.

Your objection to siting the VRAD at 301 26th Avenue was noted and discussed.

( After our walk, 291 26th Avenue was identified as a possible alternative location for the VRAD. )

As I mentioned during our Box Walk, AT&T's engineering team will be validating whether the alternate location is feasible or acceptable since it must meet three legal lists of criteria and guidelines (local, state, federal) as well as be within AT&T's internal guidelines for the placement of VRAD cabinets.

Your voice is important in the San Francisco municipal process which will now continue. As Lynn and I explained, if the alternate location is feasible and acceptable, another posting will be made for the new location.

Eventually there will be a hearing on the matter, and the DPW hearing officer will receive all communications and inputs and then will make a recommendation to the Director of the DPW who will issue the final approval, if any, for AT&T's request for a permit to place the VRAD at either its original site 301 26th Avenue or at the alternative location of 291 26th Avenue, San Francisco.

Please note that any notices about the hearing itself will come from DPW, not from AT&T. Your input into the hearing process is welcomed and important. You can participate either electronically or in person.

Thank you for your interest in AT&T's upgraded network.

Julian Chang for AT&T

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**CITY AND COUNTY OF SAN FRANCISCO  
BOARD OF APPEAL**

**RESPONDENT'S BRIEF ON JURISDICTION REQUEST  
FOR 301 – 26<sup>th</sup> AVENUE**

**AT&T** ( Appeal No.  
**CALIFORNIA,** ( 14-079  
Respondent ( 301 – 26<sup>th</sup> Avenue

**EXHIBITS**

May 7, 2014 Meeting Minutes of the San Francisco Board of Appeals ..... Exhibit A

Crown Castle NG West Decision ..... Exhibit B

DPW Order No. 182200 ..... Exhibit C

14EXC-2144 Permit Approval dated April 14, 2014 ..... Exhibit D

Activity Log for 14EXC-2144 Permit ..... Exhibit E

DPW Order 175,566 (SMF Order) ..... Exhibit F

Board of Appeals Rules ..... Exhibit G

Briefing in *Crown Castle NG* case..... Exhibit H

## INTRODUCTION

Appellant George Choppelas requests that the Board hear this late-filed appeal. That request should be denied. The Department of Public Works (“DPW”) approved AT&T’s request for an Excavation Permit at 301 26<sup>th</sup> Avenue on April 14, 2014. By law, the appeal period for challenging DPW’s permit approval expired on April 29, 2014. But Mr. Choppelas’s appeal was not filed until May 6, 2014—one week too late. No extraordinary circumstances excuse this tardy filing. The law is clear: Mr. Choppelas’s late-filed appeal must be dismissed.

The Board itself recently affirmed this principle. On May 7, 2014, the Board of Appeals unanimously voted to set aside the Board’s decision on Appeal No. 11-004. (Ex. A.) That decision came after the Honorable Judge Ernest H. Goldsmith of the San Francisco Superior Court issued a writ of mandate declaring the Board’s decision void on grounds that the Board had inappropriately accepted an untimely appeal in excess of its jurisdiction and its own rules. *See Crown Castle NG West Inc. v. The City and County of San Francisco, et al.* (Case No. CPF-11-511369) (Ex. B).

Mr. Choppelas’s appeal is nearly identical to the facts in *Crown Castle*. As in that case, the basis of Mr. Choppelas’s request for relief is that DPW did not give him notice after approving AT&T’s permit. (*See* Ex. H.) But DPW was under no legal obligation to provide such notice. In *Crown Castle*, Judge Goldsmith specifically held that in these circumstances “the lack of notice [is] not grounds for acceptance of an untimely appeal.” (Ex. B.) The same result applies here. Mr. Choppelas’s untimely appeal should be denied for lack of jurisdiction.

## ARGUMENT

### **I. Mr. Choppelas’s Appeal Was Late-Filed After the Appeal Deadline Expired.**

As a threshold matter, the Board’s jurisdiction to hear Mr. Choppelas’s appeal expired on April 29, 2014—more than a week before Mr. Choppelas late-filed his appeal.

**A. DPW Approves and Issues Excavation Permit 14EXC-2144.**

On August 2, 2013, AT&T filed an application with DPW to install a surface mounted facility in the vicinity of 301 26<sup>th</sup> Avenue. (*See* Ex. C.) On September 4, 2013, AT&T mailed and posted Notices of Intent to all businesses and residences within a 300-foot radius of 301 26<sup>th</sup> Avenue. (*Id.*) DPW received four objections and scheduled a public hearing to consider testimony on that site. (Ex C.)

At the subsequent hearing, on January 13, 2014, four community members provided testimony regarding the project at 301 26<sup>th</sup> Avenue. (Ex. C.) After considering the record and testimony at the hearing, the Hearing Officer recommended that the SMF application be approved. (*Id.*) In March 2014, DPW issued Order No. 182200 approving the SMF application. (*Id.*; App. Jdx. Req. Ex. A.) On April 14, 2014, DPW approved and issued Excavation Permit 14EXC-2360 for AT&T's excavation in the vicinity of 301 26<sup>th</sup> Avenue. (Ex. D.<sup>1</sup>)

**B. Mr. Choppelas's Late Appeal of Permit 14EXC-2144.**

DPW provided Appellants with a copy of the DPW Order, which was issued on February 18, 2014 (Ex. C.), by e-mail in March 2014. (App. Jdx. Req. Ex. A.) That Order specifically advised that appellants have only 15 days to file an appeal from the date a permit is issued: **"APPEAL PROCESS:** This decision may then be appealed to the Board of Appeals within fifteen (15) calendar days of DPW's issuance of an Excavation Permit to install surface mounted facilities **13SM-0265 in the vicinity of 301 26<sup>th</sup> Avenue.**" (Ex. C.)

It is unclear when Mr. Choppelas became aware of that the permit had been issued, but from the statement filed with his request it appears that he first contacted DPW about filing an appeal on April 29, 2014, his last day to file a timely appeal. (*See* App. Jdx. Req. Ex. A.)

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<sup>1</sup> The Excavation permit attached as Exhibit D provides: **"Approved Date: 04/14/2014."** While DPW subsequently modified the permit on 05/02/2014, that modification is irrelevant to the date the permit was *granted*. *Id.* The activity log attached as Exhibit E confirms that the permit was indeed approved on April 14, 2014.

Specifically, Mr. Choppelas’s Jurisdiction Request states that he was told by DPW that there was “no notice forthcoming” on April 23, that he left San Francisco between April 24 and 28, and that he attempted to contact DPW about filing an appeal on April 29. (*Id.*) It is unclear when he became aware that the permit had been issued. Mr. Choppelas attempted to file an appeal with the Board of Appeals on May 2, 2014. (*Id.*) He concedes that, despite the clear language of this notice stating that the issuance of the permit should be appealed to the Board of Appeals, he then attempted to file a jurisdiction request with DPW on May 5, 2014. (*Id.*) Mr. Choppelas then filed an appeal on May 6, 2014—a week after the filing deadline had passed—and then filed a Jurisdiction Request with the Board on June 11, 2014.

Article 1, Section 8 of the San Francisco Business and Tax Regulations Code provides that all appeals to the Board of Appeals must be made within 15 days from the issuance of a City permit.<sup>2</sup> Pursuant to the City Code, therefore, the appeal period for Excavation Permit 14EXC-2144 expired on April 29, 2014. Because Mr. Choppelas waited until May 6, 2014 to file an appeal, his appeal is untimely and the Board is without jurisdiction to hear it.

## **II. The Board Lacks Jurisdiction to Consider the Mr. Choppelas’s Untimely Appeal.**

Section 10(a) of the Rules of the Board of Appeals, pertaining to “Jurisdiction Requests” governs late appeals. It provides: “After the appeal period has expired, the Board lacks jurisdiction over a matter except in extraordinary cases where the Board finds that the City intentionally or inadvertently caused the requestor to be late in filing the appeal.” (Ex. G.) There is no other authority permitting the Board of Appeals to accept a late-filed appeal.

As a matter of law, the City did not either “intentionally or inadvertently” cause the Mr.

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<sup>2</sup> See Article 1, Section 8 of the City and County of San Francisco Business and Tax Regulation Code (“Except for variance decisions and place of entertainment, limited live performance, extended hours premises, and loudspeaker permits issued by the Entertainment Commission, appeals to the Board of Appeals shall be taken within 15 days from the making or entry of the order or decision from which the appeal is taken.”).

Chopelas to be late in filing his appeal.<sup>3</sup> He essentially argues that the Board should grant his jurisdiction request because DPW provided him with late notice of its issuance of Excavation Permit 14EXC-2144. (*See* App. Jdx. Req. Ex. A.) That argument fails, however, because DPW was under no legal obligation to provide him with notice that it had issued the permit. Neither the City Municipal Code nor the SMF Order (Ex. F) require that DPW notify any private objector that the City has issued an Excavation Permit. Nor does Mr. Choppelas identify any other source of authority that would have required DPW to provide such notice.

This same issue was recently litigated on nearly identical facts in *Crown Castle NG West Inc. v. The City and County of San Francisco* (Case No. CPF-11-511369). (*See* Exs. B & H.) In that case, the appellants filed an untimely appeal challenging the issuance of a wireless facility permit to Crown Castle. In their “Jurisdiction Request” filed with the Board of Appeals, the appellants argued that DPW had “inadvertently” caused them to late-file their appeal by not providing them notice of the permit application. (Ex. H.) The Board accepted the appeal on the basis that local residents in the area “should have” been provided notice of the wireless facility application, even though such notice was not required by any law. (*Id.*) Crown Castle then filed a Writ of Mandate in San Francisco Superior Court challenging the Board’s decision. (*See id.*)

On March 11, 2014, Judge Ernest Goldsmith granted Crown Castle’s writ, finding that the Board of Appeals has abused its discretion by hearing the late-filed appeal in violation of its own rules and city law. (Ex. B.) The Court’s Order specifically held that, because DPW was under no legal obligation to provide the appellants with notice of the wireless permit application, **“the lack of notice was not grounds for acceptance of an untimely appeal.”** (*Id.* [emphasis added].) The same result applies here. Because DPW had no legal obligation to provide Mr.

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<sup>3</sup> Mr. Choppelas does not argue that anyone at DPW “intentionally” caused him to file his appeal more than five weeks late.



Choppelas with notice that it had issued the challenged Excavation Permit on April 14, 2014, DPW did not “intentionally or inadvertently” cause him to file his appeal more than five weeks late, and his purported “lack of notice” is not “grounds for acceptance of an untimely appeal.”<sup>4</sup> *Id.*; see also *Franklin v. Steele* (1982) 131 Cal.App.3d 558, 562 (holding Board of Appeals has no authority to accept a late-filed appeal in violation of its own rules).

Moreover, it does not appear that the Board has authority to grant late-filed appeals under *any* circumstances. Article 1, Section 8 of the City and County of San Francisco Business and Tax Regulation Code requires that “appeals to the Board of Appeals **shall** be taken within 15 days from the making or entry of the order or decision from which the appeal is taken.” (Emphasis added.) It is well-established California law that the word “shall” is construed as mandatory when it appears in legislation. *Cole v. Antelope Valley Union High School Dist.* (1996) 47 Cal.App.4th 1505, 1511 (observing that “[t]here is nothing ... [that] permits us to construe the word “shall” as other than mandatory). Nothing in the City Charter or the Municipal Code authorizes the Board to override this unambiguous requirement of the City Code. Nor does the Board’s inherent authority to consider whether it *has* jurisdiction permit it to grant late-filed appeals where it plainly *lacks* jurisdiction: “that power must be exercised within the bounds of all applicable city charter, ordinance and code sections, and any action on its part that exceeds those bounds is void.” *City and County of San Francisco v. Board of Permit Appeals* (1989) 207 Cal.App.3d 1099, 1105 (holding board action overruling zoning administrator was in excess of jurisdiction and that its findings were legally irrelevant and contrary to city planning code).

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<sup>4</sup> The Board of Appeals acknowledged its error in granting the untimely appeal without jurisdiction at public hearing on May 7, 2014. Upon motion by Commissioner Fung, the Board voted 4-0-1 to set aside and void its decision on Appeal No. 11-004 in light of Judge Goldsmith’s ruling. (*See Ex. A.*)

### **III. Mr. Choppelas's Hearsay Evidence Cannot Support Any Finding By The Board.**

By law, hearsay evidence cannot support an administrative board's findings. *See Furman v. Department of Motor Vehicles* (2002) 100 Cal.App.4th 416, 420-23 (citing Gov't Code § 11513(d) (prohibiting hearsay in administrative proceedings). "[T]here must be substantial evidence to support such a board's ruling, and hearsay, unless specially permitted by statute, is not competent evidence to that end." *Daniels v. Department of Motor Vehicles* (1983) 33 Cal.3d 532, 536-537.

California Evidence Code § 1200(a) defines hearsay as "a statement that was made other than by a witness at the hearing and that is offered to prove the truth of the matter stated." Other than the exceptions provided by law, hearsay evidence is inadmissible in California. Cal. Evid. Code § 1200(b).

Here, Mr. Choppelas has offered statements that he alleges were made to him by DPW, including "that there was no notice forthcoming as of yet." (*See App. Jdx. Req. Ex. A.*) These are out of court statements offered to prove what they assert—the very definition of hearsay. Indeed, not only are these statements inadmissible hearsay, but Mr. Choppelas does not even identify what person allegedly made these statements. Nor has Mr. Choppelas provided any argument that these statements fall under a relevant hearsay exception. Accordingly, these statements are not sufficient to support a finding by this Board.

Mr. Choppelas's late-filed appeal is not the City's fault. DPW was under no obligation to notify him that the permit had been issued, and his hearsay evidence to the contrary is inadmissible. Mr. Choppelas was notified in writing by DPW that he would only have 15 days to file an appeal once the permit had been granted. Despite this, Mr. Choppelas waited until May 6, 2014 to file his Appeal Brief. On these facts, his request must be denied.

**EXHIBIT A**

**BOARD OF APPEALS**

**CITY & COUNTY OF SAN FRANCISCO**

**AGENDA FOR REGULAR MEETING - WEDNESDAY, MAY 07, 2014**

**5:00 P.M., CITY HALL, ROOM 416, ONE DR. CARLTON B. GOODLETT PLACE**

**(1) PUBLIC COMMENT**

At this time, members of the public may address the Board on items of interest to the public that are within the subject matter jurisdiction of the Board except agenda items. With respect to agenda items, your opportunity to address the Board will be afforded when the item is reached in the meeting with one exception. When the agenda item has already been reviewed in a public hearing at which members of the public were allowed to testify and the Board has closed the public hearing, your opportunity to address the Board must be exercised during the Public Comment portion of the calendar. Each member of the public may address the Board for up to three minutes. If it is demonstrated that comments by the public will exceed 15 minutes, the President may continue Public Comment to another time during the meeting.

**(2) COMMISSIONER COMMENTS & QUESTIONS**

**(3) ADOPTION OF MINUTES**

Discussion and possible adoption of the April 16, 2014 minutes.

**(4) POSSIBLE ACTION TO SET ASIDE AND VOID BOARD DECISION IN APPEAL NO. 11-004**

**Possible Action:** Approval of resolution setting aside and declaring void, in accordance with the order of the San Francisco Superior Court in Crown Castle NG West Inc. v. The City and County of San Francisco, et al. (CPF-11-511369), the Board of Appeal's April 20, 2011 decision on Appeal No. 11-004 (Jeff & Nicole Cooper v. Dept. of Public Works, Bureau of Street-Use & Mapping) to revoke the subject permit. (Discussion and possible action.)

**ITEMS 5(A) and 5(B) SHALL BE HEARD TOGETHER:**

**(5A) REHEARING REQUEST**

**Subject property at 69 Montezuma Street.** Appeal No. 11-012, Buscovich vs. DBI, PDD, decided July 11, 2012. At that time, the Board voted 4-0-1 (one vacancy) to deny the appeal and uphold the denial of the permit on the basis of Planning Code §150. Project: existing large gate to be removed and replaced with fence and gate combination; comply with NOV Nos. 201033584 and 201036174; APPLICATION NO. 2011/01/25/8939.

**REGULAR MEETING, BOARD OF APPEALS, MAY 07, 2014 - PAGE 2**

**(5B) POSSIBLE REHEARING OF APPEAL NO. 11-012, IF REQUEST FOR REHEARING IN ITEM 5(A) IS GRANTED**

<p>PATRICK BUSCOVICH, Appellant(s) vs. DEPT. OF BUILDING INSPECTION, Respondent PLANNING DEPT. DISAPPROVAL</p>	<p>69 Montezuma Street. Appealing the denial on Jan. 26, 2011, of Permit to Alter a Building (existing large gate to be removed and replaced with fence and gate combination; comply with NOV Nos. 201033584 and 201036174). APPLICATION NO. 2011/01/25/8939. FOR POSSIBLE REHEARING HEARING TODAY.</p>
--	---

**(6) REHEARING REQUEST**

**Subject property at 480 Potrero Avenue.** Letter from Mica Ringel, appellant, requesting rehearing of Appeal No. 14-025, Ringel vs. DBI, PDA, decided on April 9, 2014. At that time, the Board voted 4-0-1 (Commissioner Honda recused) to deny the appeal and uphold the permit on the basis that the project is Code compliant and has gone through extensive review, and with the adoption of California Environmental Quality Act (CEQA) findings that were read into the record. Project: Erect a six-story 77-unit mixed-use building with 10,590sf of ground floor area. APPLICATION NO. 2013/06/25/0465S.

**(7) APPEAL NO. 14-046**

<p>SAN FRANCISCANS FOR REASONABLE GROWTH, Appellant(s) vs. ZONING ADMINISTRATOR, Respondent</p>	<p>3130 - 20th Street. Protesting the ISSUANCE on February 10, 2014, to Twentieth Street Associates LP, Letter of Legitimization (regarding a request to legitimize the existing office use on a portion of the 3rd floor in the existing 3-story building). FOR HEARING TODAY.</p>
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**(8) APPEAL NO. 14-058**

<p>CHRISTOPHER DELANEY, ROCKNE BOGER, LORIE MAAK-INGRAM, JIM MAGER &amp; VICTORIA ZACKSORN, Appellant(s) vs. DEPT. OF PUBLIC WORKS BUREAU OF URBAN FORESTRY, Respondent</p>	<p>2051 - 3rd Street aka 650 Illinois Street. Protesting the ISSUANCE on January 14, 2014, to Richard Price, Tree Removal Permit (approval to remove six (6) existing trees and plant nine (9) new trees). APPLICATION NO. 771015. JURISDICTION GRANTED MARCH 19, 2014. FOR HEARING TODAY.</p>
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**ITEMS 9 - 16 MAY BE HEARD TOGETHER:**

**(9) POSSIBLE ACTION TO DESIGNATE COURT REPORTER TRANSCRIPT AS OFFICIAL RECORD OF PROCEEDINGS**

**Possible Action:** Pursuant to Article IV, Section 2 of the Rules of the Board of Appeals, designation of transcript prepared by court reporter retained for AT&T as official record of the proceedings on Items 10-16. (Discussion and possible action.)

**(10) APPEAL NO. 14-049**

AT&T CALIFORNIA, Appellant(s) vs. DEPT. OF PUBLIC WORKS BUREAU OF STREET-USE & MAPPING, Respondent	1301 Hampshire Street. Appealing the DENIAL on March 05, 2014, of EXCAVATION PERMIT (excavation in the public right-of-way related to installation of surface mounted facility). APPLICATION NO. 14EXC-1360. FOR HEARING TODAY.
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**(11) APPEAL NO. 14-050**

AT&T CALIFORNIA, Appellant(s) vs. DEPT. OF PUBLIC WORKS BUREAU OF STREET-USE & MAPPING, Respondent	1311 Hampshire Street. Appealing the DENIAL on March 05, 2014, of EXCAVATION PERMIT (excavation in the public right-of-way related to installation of surface mounted facility). APPLICATION NO. 14EXC-1361. FOR HEARING TODAY.
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**(12) APPEAL NO. 14-051**

AT&T CALIFORNIA, Appellant(s) vs. DEPT. OF PUBLIC WORKS BUREAU OF STREET-USE & MAPPING, Respondent	198 Palm Avenue. Appealing the DENIAL on March 05, 2014, of EXCAVATION PERMIT (excavation in the public right-of-way related to installation of surface mounted facility). APPLICATION NO. 14EXC-1362. FOR HEARING TODAY.
--	---

**(13) APPEAL NO. 14-052**

AT&T CALIFORNIA, Appellant(s) vs. DEPT. OF PUBLIC WORKS BUREAU OF STREET-USE & MAPPING, Respondent	398 Carl Street. Appealing the DENIAL on March 05, 2014, of EXCAVATION PERMIT (excavation in the public right-of-way related to installation of surface mounted facility). APPLICATION NO. 14EXC-1363. FOR HEARING TODAY.
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**REGULAR MEETING, BOARD OF APPEALS, MAY 07, 2014 - PAGE 4**

**(14) APPEAL NO. 14-053**

AT&T CALIFORNIA, Appellant(s) vs.  DEPT. OF PUBLIC WORKS BUREAU OF STREET-USE & MAPPING, Respondent	4590 Balboa Street. Appealing the DENIAL on March 05, 2014, of EXCAVATION PERMIT (excavation in the public right-of-way related to installation of surface mounted facility). APPLICATION NO. 14EXC-1364. FOR HEARING TODAY.
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**(15) APPEAL NO. 14-054**

AT&T CALIFORNIA, Appellant(s) vs.  DEPT. OF PUBLIC WORKS BUREAU OF STREET-USE & MAPPING, Respondent	2103 Hayes Street. Appealing the DENIAL on March 05, 2014, of EXCAVATION PERMIT (excavation in the public right-of-way related to installation of surface mounted facility). APPLICATION NO. 14EXC-1366. FOR HEARING TODAY.
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**(16) APPEAL NO. 14-055**

AT&T CALIFORNIA, Appellant(s) vs.  DEPT. OF PUBLIC WORKS BUREAU OF STREET-USE & MAPPING, Respondent	1303 – 17 <sup>th</sup> Avenue. Appealing the DENIAL on March 05, 2014, of EXCAVATION PERMIT (excavation in the public right-of-way related to installation of surface mounted facility). APPLICATION NO. 14EXC-1367. FOR HEARING TODAY.
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**ADJOURNMENT.**

**Note A:** Each item on this agenda may include the following documents: 1) Preliminary Statement of Appeal and Appellant's Brief; 2) Permit Holder's, Respondent's or Other Parties' Brief; 3) Departmental decision, order, permit, determination, resolution, or notice of violation; 4) submittals by members of the public; and 5) correspondence. These items are available for public inspection at the Board's office during normal office hours (Monday to Friday, 8am to 5pm, 1650 Mission Street, Room 304) and in the hearing room on the date the matter is scheduled to be heard. **Note B:** If any materials related to an item on this agenda have been distributed to the Board members after distribution of the agenda packet, those materials are available for public inspection at the Board's office during normal office hours (Monday to Friday, 8am to 5pm, 1650 Mission Street, Room 304) and in the hearing room on the date the matter is scheduled to be heard. Please call 415-575-6880 if you have any questions concerning this agenda.

Date posted: **May 2, 2014**

<b>MEMBERS OF THE BOARD OF APPEALS</b>	
<b>ANN LAZARUS</b>	<b>PRESIDENT</b>
<b>ARCELIA HURTADO</b>	<b>VICE PRESIDENT</b>
<b>FRANK FUNG</b>	<b>COMMISSIONER</b>
<b>DARRYL HONDA</b>	<b>COMMISSIONER</b>
<b>CHRIS HWANG</b>	<b>COMMISSIONER</b>

**PROCEDURE AT HEARINGS**

Except when the Presiding Officer finds good cause to order the presentations otherwise, the order of presentation of an appeal shall be as follows: (a) the appellant shall speak first and shall be allowed seven (7) minutes to present relevant testimony and evidence. Then the permit holder, representatives of the department, board, commission or person from whose order the appeal is taken, and/or other parties, shall be allowed seven (7) minutes for presentation of relevant testimony and evidence. Three minutes for rebuttal shall be provided to all parties in this same order; (b) the Board may request a departmental response at its own discretion. For rehearing requests and jurisdiction requests, each party shall be allowed three (3) minutes to present testimony and evidence, with no rebuttal.

Other persons desiring to speak before the Board on an appeal may speak once for up to three minutes, unless the presiding officer further limits time uniformly.

Those members of the public who intend to testify about a particular appeal and wish to have the Board give their testimony evidentiary weight for purposes of deciding the appeal are asked to take an oath. Please note that any member of the public may speak without being sworn-in pursuant to their rights under the Sunshine Ordinance (Chapter 67 of the San Francisco Administrative Code).

**SPECIAL NOTES**

If the Board continues a matter to a specific date that is announced to the parties in the hearing room, no additional mailed notice will be sent. Please call the Board office at 415-575-6880 for scheduling or other information during regular business hours, or visit our website at [www.sfgov.org/boa](http://www.sfgov.org/boa).

The complete Rules of the Board are available for review at the Board office, and on our website.

Material submitted by the public for Board review prior to a scheduled hearing before the Board, should be addressed to the Board President, and be received at the Board office, 1650 Mission Street, Room 304, no later than 4:30 p.m. one (1) Thursday prior to the scheduled public hearing. Persons unable to attend the scheduled public hearing may submit written comments regarding a calendared item to the Board office. Comments received before noon on the day of the hearing will be made a part of the official record and will be brought to the attention of the Board at the public hearing. For complete distribution to all Commissioners of the Board, necessary staff and case files, submit an original and



## **REGULAR MEETING, BOARD OF APPEALS, MAY 07, 2014 - PAGE 6**

ten copies. Please note that names and addresses included in these submittals will become part of the public record. Submittals may be made anonymously.

Pursuant to Government Code § 65009, if you challenge, in court, the approval of a variance or development permit, you may be limited to raising only those issues you or someone else raised at the public hearing described in this notice, or in written correspondence delivered to the Board of Appeals at, or prior to, the public hearing.

Calendared items are sometimes withdrawn or rescheduled the day of hearing, or are taken out of order to accommodate special needs. The Board urges all parties to be present in the hearing room from 5:00 p.m. so that everyone has an opportunity to participate in the relevant public hearing when it is called.

### **PROHIBITION OF SOUND-PRODUCING ELECTRONIC DEVICES**

The ringing of and use of cell phones, pagers and similar sound-producing electronic devices are prohibited at this meeting. Please be advised that the Chair may order the removal from the meeting room of any person(s) responsible for the ringing or use of a cell phone, pager, or other similar sound-producing electronic devices.

### **ACCESSIBILITY INFORMATION**

American sign language interpreters and/or sound enhancement system will be available upon request by contacting Board staff at 575-6880 at least 48 hours prior to the hearing. Individuals with severe allergies, environmental illness, multiple chemical sensitivity or related disabilities should call the accessibility hotline at 554-8925 to discuss meeting accessibility. In order to assist the City's efforts to accommodate such people, attendees at public meetings are reminded that other attendees may be sensitive to various chemical-based products. Please help the City to accommodate these individuals. The closest accessible BART station is the Civic Center station located at the intersection of Market, Hyde and Grove Streets. Accessible curbside parking has been designated at points along McAllister Street. Accessible MUNI lines serving City Hall are the 42 Downtown Loop, 9 San Bruno and 71 Haight/Noriega and the F line. Accessible MUNI Metro lines are the J, K, L, M, and N. For more information regarding MUNI accessible services, call (415) 923-6142.

### **KNOW YOUR RIGHTS UNDER THE SUNSHINE ORDINANCE**

Government's duty is to serve the public, reaching its decisions in full view of the public. Commissions, boards, councils and other agencies of the City and County exist to conduct the people's business. This ordinance assures that deliberations are conducted before the people and that City operations are open to the people's review.

For more information on your rights under the Sunshine Ordinance (Chapter 67 of the San Francisco Administrative Code) or to report a violation of the ordinance, contact the Sunshine Ordinance Task Force: by mail to Administrator, Sunshine Ordinance Task Force, City Hall, Room 244, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102-4689; by phone at (415) 554-7724; by fax at (415) 554-7854; or by e-mail at [sotf@sfgov.org](mailto:sotf@sfgov.org). Citizens interested in obtaining a free copy of the Sunshine Ordinance

## **REGULAR MEETING, BOARD OF APPEALS, MAY 07, 2014 - PAGE 7**

may request a copy from the Sunshine Ordinance Task Force Administrator or by printing Chapter 67 of the San Francisco Administrative Code on the internet at [www.sfgov.org/sunshine](http://www.sfgov.org/sunshine).

### **LOBBYING ACTIVITY**

Individuals and entities that influence or attempt to influence local legislative or administrative action may be required by the San Francisco Lobbyist Ordinance [SF Campaign and Governmental Conduct Code § 2.100] to register and report lobbying activity. For more information about the Lobbyist Ordinance, please contact the San Francisco Ethics Commission at 30 Van Ness Avenue, Suite 3900, San Francisco, CA 94102; telephone (415) 581-2300; fax (415) 581-2317; web site [www.sfgov.org/ethics](http://www.sfgov.org/ethics).

### **SUGGESTIONS TO IMPROVE EFFICIENCY**

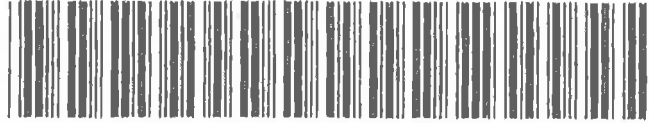
The Board welcomes suggestions from the public regarding improvement of the efficiency of its operations. Please direct your comments and suggestions to Board staff, at 415-575-6880 or fax 415-575-6885. A customer satisfaction survey form is available at the meetings, the Board office, and on the Board's web site, [www.sfgov.org/boa](http://www.sfgov.org/boa).

### **DVD'S OF MEETINGS**

DVD's of meetings may be obtained from SFGOVTV, Channels 26 & 78. Please telephone 415-554-4188 for information.

**BOARD OF APPEALS  
CITY & COUNTY OF SAN FRANCISCO**  
1650 Mission Street, Room 304  
San Francisco, California 94103  
Phone: 415-575-6990  
Email: [boardofappeals@sfgov.org](mailto:boardofappeals@sfgov.org)

**EXHIBIT B**



SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SAN FRANCISCO

**Document Scanning Lead Sheet**

Mar-11-2014 4:48 pm

Case Number: CPF-11-511369

Filing Date: Mar-11-2014 4:47

Filed by: LESLEY FISCELLA

Juke Box: 001 Image: 04407887

ORDER

NEXTG NETWORKS OF CALIFORNIA, INC., A DELAWARE VS. THE CITY AND  
COUNTY OF SAN FRANCISCO et al

001C04407887

**Instructions:**

Please place this sheet on top of the document to be scanned.

4

1 MARTIN L. FINEMAN (CA State Bar No. 104413)  
2 SAM DAWOOD (CA State Bar No. 178862)  
3 DAVIS WRIGHT TREMAINE LLP  
4 505 Montgomery Street, Suite 800  
5 San Francisco, CA 94111-6533  
6 Telephone: (415) 276-6575  
7 Facsimile: (415) 276-6599  
8 Email: martinfineman@dwt.com  
9 samdawood@dwt.com

10 Attorneys for Petitioner  
11 Crown Castle NG West Inc.

FILED  
San Francisco County Superior Court

MAR 11 2014

CLERK OF THE COURT  
C. S. [Signature]  
Clerk of Court

12 IN THE SUPERIOR COURT STATE OF CALIFORNIA

13 IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

14 UNLIMITED JURISDICTION

DAVIS WRIGHT TREMAINE LLP

15 CROWN CASTLE NG WEST INC., a  
16 Delaware corporation,

17 Petitioner,

18 v.

19 THE CITY AND COUNTY OF SAN  
20 FRANCISCO, THE CITY AND COUNTY  
21 OF SAN FRANCISCO DEPARTMENT OF  
22 PUBLIC WORKS, and THE CITY AND  
23 COUNTY OF SAN FRANCISCO BOARD  
24 OF APPEALS, public entities organized and  
25 existing under the laws of the State of  
26 California,

27 Respondents.  
28

Case No. CPF-11-511369

~~[PROPOSED]~~ ORDER GRANTING  
PETITIONER CROWN CASTLE NG  
WEST INC.'S MOTION FOR A WRIT  
OF ADMINISTRATIVE MANDAMUS

Date: March 11, 2014

Time: 9:30 a.m.

Dept: 302

Petition Filed: June 21, 2011

DAVIS WRIGHT TREMAINE LLP

1 The Petition for a Writ of Administrative Mandamus or Writ of Mandate filed by  
2 Petitioner CROWN CASTLE NG WEST INC. came on regularly for hearing on March 11, 2014  
3 in Department 302 of this Court, the Honorable Ernest H. Goldsmith, presiding. Petitioner was  
4 represented by Sam Dawood of Davis Wright Tremaine LLP, and Respondents were represented  
5 by William K. Sanders, Deputy City Attorney.

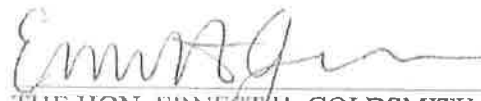
6 The Court, having reviewed the administrative record of the proceedings before  
7 Respondent the San Francisco Board of Appeals (the "Board"), and having considered all  
8 pleadings filed in support of and in opposition to Petitioner's Motion for Writ of Administrative  
9 Mandamus or Writ of Mandate, as well as oral argument by the parties, finds as follows:

10 PETITIONER CROWN CASTLE NG WEST INC.'s Motion for Writ of Administrative  
11 Mandamus or Writ of Mandate is hereby **GRANTED**. All requests for judicial notice are granted.  
12 Respondents proceeded without or in excess of jurisdiction and abused their discretion in  
13 considering the late-filed appeal to the Department of Public Works' issuance of Wireless Box  
14 Permit No. 10WR-0021. The record shows that the appeal period had expired, and the City had  
15 not intentionally or inadvertently caused the requestor to be late in filing the appeal. (See  
16 Administrative Record, 1; see also Petitioner's Request for Judicial Notice, Exh, C, Rules of the  
17 Board of Appeals, Section 10(a)). Under then-existing law, the lack of notice was not grounds for  
18 acceptance of an untimely appeal. *Petitioner is ordered to submit Wireless Box Permit No.*

19 *10WR-0021, to the San Francisco Department of Public Works for transmittal, which was required*  
*under then-existing law, Administrative Code Section 11.9*  
*which the Board's decision inappropriately*  
*revoked, shall remain in effect, and the*  
*Board's decision is void.*

20 **IT IS SO ORDERED.**

21 Dated: *March 11*, 2014

22   
23 THE HON. ERNEST H. GOLDSMITH  
24 JUDGE OF THE SAN FRANCISCO  
25 SUPERIOR COURT

26 *Approved as to Form*

27 

28 *Deputy City Attorney*

**EXHIBIT C**



**Edwin M. Lee, Mayor**  
**Mohammed Nuru, Director**



**Jerry Sanguinetti, Bureau Manager**

**DPW Order No: 182200**

DIRECTOR'S DECISION REGARDING AT&T CALIFORNIA'S REQUEST TO INSTALL A SURFACE MOUNTED FACILITY IN THE VICINITY OF **301 26th Avenue (13SMF-0265)**

**APPLICANT:** AT&T CALIFORNIA  
795 Folsom Street, #426  
San Francisco, Ca 94107

**DESCRIPTION OF REQUEST:** Surface Mounted Facility Installation

**BACKGROUND:**

1. On **August 2, 2013** the applicant (AT&T California) filed an application with the Department of Public Works (DPW) to install a Surface Mounted Facility (SMF) at the above referenced locations. If approved, the applicant will file for an excavation permit to install the SMF.
2. On **September 4, 2013**, the applicant mailed and posted Notices of Intent to all businesses and residences within a 300-foot radius of the subject location.
3. DPW received **four (4)** objections to the application during the 20-day notification period. DPW subsequently scheduled a public hearing to consider testimony received for this site. The objections included:
  - a. Will impede on the path of travel and ingress/egress to vehicles parked next to the surface-mounted facility.
  - b. Will create visual blight.
  - c. Will negatively impact property values.
  - d. Will not benefit the public at large.
  - e. Request to plant trees around the surface-mounted facility.
  - f. Will attract graffiti.
  - g. AT&T should have to pay rent to place surface-mounted facility on the sidewalk.
4. On **January 13, 2014**, DPW Hearing Officer **Greg Crump** conducted a hearing on the application to consider testimony regarding the subject SMF.
5. At the hearing, Lynn Fong of DPW presented a summary of the permit application stating that the Applicant was in compliance with Article 2.4 of the Public Works Code and technical merits DPW Order No. 175,566.
6. At the hearing, **Ms. Tedi Vriheas** of AT&T stated a box walk was conducted on **November 15, 2013** and two (2) members of the community that was invited attended.





7. At the hearing, four (4) members of the community testified at the hearing in opposition to the proposed installation of the SMF cabinets in the vicinity of **301 26th Avenue**. The objector's testimony included:
  - a. Leaves accumulate around the existing cabinet and have to be maintained by fronting property owner.
  - b. There is currently a high density of surface-mounted facilities in the area.
  - c. An alternate location can be at the gas station on the corner of 25<sup>th</sup> Avenue and California Street.

**RECOMMENDATION:** APPROVE the request by AT&T to locate Surface Mounted Facility **13SMF-0265**, in the vicinity of **301 26th Avenue**.

**FINDINGS:**

1. The Hearing Officer reviewed the application, materials from DPW's files, the objections, additional materials submitted by the applicant and persons protesting the application, and the testimony at the hearing.
2. The Hearing Officer determined that the application complies with the requirements of Article 2.4 of the Public Works Code and DPW Order No. 756,566.
3. Hearing was extended for 20 days to evaluate **one (1)** potential alternate location at a gas station on the corner of **25<sup>th</sup> Avenue and California Street**. On **January 15, 2014** and **January 22, 2014**, AT&T submitted a report stating that placement is unacceptable under ARTICLE 514 of the National Electrical Code.
  - a. DPW does not agree with the merits of the report. However, DPW finds that the only location fronting the gas station that may potentially be feasible includes an underground utility that does not comply with DPW Order 175,566 Exhibit B, item #8 to maintain 40 inches from any other above-ground structures, and item #12 that prohibits placement over any storm drain or other utility facility.
4. The Director of Public Works has reviewed the Hearing Officer's recommendation. The Director of Public Works hereby adopts the hearing officer's recommendation.

**APPEAL PROCESS:** This decision may then be appealed to the Board of Appeals within fifteen (15) calendar days of DPW's approval or denial of an Excavation Permit to install surface mounted facilities **13SMF-0265 in the vicinity of 301 26<sup>th</sup> Avenue**. The Board of Appeals is located at 1650 Mission Street, Suite 304. To obtain further information regarding the appeal process, you can contact the Board of Appeals at 415-575-6880. You can also visit the Board of Appeals website at: <http://www.sfgov3.org/index.aspx?page=763>



2/13/2014

2/13/2014

X



---

Sanguinetti, Jerry  
Bureau Manager

X



---

Sweiss, Fuad  
Deputy Director and City Engineer

2/18/2014

X

Mohammed Nuru

---

Nuru, Mohammed  
Director, DPW



**EXHIBIT D**



(415) 554-5810  
 FAX (415) 554-6161  
<http://www.sfdpw.org>

Department of Public Works  
 Bureau of Street-Use and Mapping  
 1155 Market St, 3rd Floor  
 San Francisco, CA 94103

**14EXC-2144**

**Utility Excavation Permit**

**Address : Multiple Locations**

**Cost: \$1,242.02**

**Block: Lot: Zip:**

Pursuant to Article 2.4 of the Public Works Code in conjunction to DPW Order 178,940 permission, revocable at the will of the Director of Public Works, to excavate and restore the public right-of-way is granted to Permittee.

**Permittee**

**Name:** SBC - Pacific Bell Engineering  
**Address:** 795 Folsom Street, Room 426 San Francisco, CA 94107-1243  
**Contact:** Bob Pickard **Phone:** (415) 644-7057

<b>Conditions</b>	NE-R, NW-L, NW-R, SW-L, SW-R, SE-L curb ramps required.
<b>EmergencyConfirmationNumber</b>	
<b>24 Hour / 7 Day Contact:</b>	Paul Wolfson (925) 426-3221, Cell (925) 548-4937
<b>Service Address/Project:</b>	301 26th Ave at California St LSMF EV 9078907 58A (13SMF-0265)
<b>Start Date</b>	6/16/14
<b>Permit expires on:</b>	6/29/2014
<b>Purpose</b>	Telephone
<b>Excavation Reason</b>	Install New Cabinet
<b>Excavation Reason Description</b>	
<b>Method:</b>	Open Cut: Sawcut
<b>TrackingNumber1</b>	9078907 R201 4c
<b>TrackingNumber2</b>	13SMF-0265 SF13-120802
<b>Project Size</b>	221
<b>Inspection</b>	

The undersigned Permittee hereby agrees to comply with all requirements and conditions noted on this permit

Approved Date : 04/14/2014

\*\*When drilling/excavating in sidewalk area, entire flag(s) must be replaced.\*\*

\_\_\_\_\_  
 Applicant/Permittee

\_\_\_\_\_  
 Date

Distribution:  
 Inside BSM: Utility Inspection

Printed : 4/15/2014 8:10:58 AM

Plan Checker

Gene Chan

#### STREET EXCAVATION REQUIREMENTS:

1. The permittee shall call Underground Service Alert (U.S.A.), telephone number 1-800-227-2600, 48 hours prior to any excavation.
2. All work including sidewalk and pavement cutting and removal, lagging, excavation, backfill, and sidewalk and pavement restoration shall be done by a licensed paving contractor and in accordance with the requirements of the Standard Specifications of the Bureau of Engineering, Department of Public Works, July 1986 Edition and Department of Public Works Order Nos. 176,707, copy attached.
3.
  - a. DPW Order 181,305, dated 6/17/13, Reinforced Concrete Bus pads, shall be constructed in accordance with SFPDW Standard Plan, File No. 96,607 and SFPDW Standard Specification Section 210 except that the concrete bus pad shall have a minimum compressive strength of 5,000 psi. Concrete bus pads shall be constructed at a minimum thickness of 10 to 12 inches and shall be approximately 10-feet wide.
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13. In consideration of this Permit being issued for the work described in the application, Permittee on its behalf and that of any successor or assign, and on behalf of any lessee, promises and agrees to perform all the terms of this Permit and to comply with all applicable laws, ordinances and regulations.
14. Permittee agrees on its behalf and that of any successor or assign to hold harmless, defend, and indemnify the City and County of San Francisco, including, without limitation, each of its commissions, departments, officers, agents and employees (hereinafter collectively referred to as the "City") from and against any and all losses, liabilities, expenses, claims, demands, injuries, damages, fines, penalties, costs or judgments including, without limitation, attorneys' fees and costs (collectively, "claims") of any kind allegedly arising directly or indirectly from (i) any act by, omission by, or negligence of, Permittee or its subcontractors, or the officers, agents, or employees of either, while engaged in the performance of the work authorized by this Permit, or while in or about the property subject to this Permit for any reason connected in any way whatsoever with the performance of the work authorized by this Permit, or allegedly resulting directly or indirectly from the maintenance or installation of any equipment, facilities or structures authorized under this Permit, (ii) any accident or injury to any contractor or subcontractor, or any officer, agent, or employee of either of them, while engaged in the performance of the work authorized by this Permit, or while in or about the property, for any reason connected with the performance of the work authorized by this Permit, or arising from liens or claims for services rendered or labor or materials furnished in or for the performance of the work authorized by this Permit, (iii) injuries or damages to real or personal property, good will, and persons in, upon or in any way allegedly connected with the work authorized by this Permit from any cause or claims arising at any time, and (iv) any release or discharge, or threatened release or discharge, of any hazardous material caused or allowed by Permittee in, under, on or about the property subject to this Permit or into the environment. As used herein, "hazardous material" means any substance, waste or material which, because of its quantity, concentration of physical or chemical characteristics is deemed by any federal, state, or local governmental authority to pose a present or potential hazard to human health or safety or to the environment.
15. Permittee must hold harmless, indemnify and defend the City regardless of the alleged negligence of the City or any other party, except only for claims resulting directly from the sole negligence or willful misconduct of the City. Permittee specifically acknowledges and agrees that it has an immediate and independent obligation to defend the City from any claim which actually or potentially falls within this indemnity provision, even if the allegations are or may be groundless, false or fraudulent, which obligation arises at the time such claim is tendered to Permittee by the City and continues at all times thereafter. Permittee agrees that the indemnification obligations assumed under this Permit shall survive expiration of the Permit or completion of work.
16. Permittee shall obtain and maintain through the terms of this Permit general liability, automobile liability or workers' compensation insurance as the City deems necessary to protect the City against claims for damages for personal injury, accidental death and property damage allegedly arising from any work done under this Permit. Such insurance shall in no way limit Permittee's indemnity hereunder. Certificates of insurance, in form and with insurers satisfactory to the City, evidencing all coverages above shall be furnished to the City before commencing any operations under this Permit, with complete copies of policies furnished promptly upon City request.
17. The permittee and any permitted successor or assign recognize and understand that this permit may create a possessory interest.

# Special Conditions

14EXC-2144

## Conditions

NOTES: Per the Public Works Excavation Code:

- 1) ' T ' trench shall be the standard restoration practice for all trenches greater than 18 inches in width. The restoration of the concrete base and pavement will be equal to 1 ft. as measured from the edge of the trench;
- 2) The minimum pavement restoration requirements (mill and fill) for trenches exceeding 25% of the length of the block shall include the restoration of all affected lanes for the entire length of the block. For streets that are not delineated by painted lanes and the width of the excavation is less than thirteen (13) feet, the pavement restoration requirements (mill and fill) shall be for the entire length of the block thirteen (13) feet in width;
- 3) For excavation in the intersection, the restoration shall be to pave all affected quadrants either with the 13 foot rule for streets without delineated traffic lanes unless it is on a Muni route and for streets with multiple delineated traffic lanes in one direction, the restoration shall be limited to the affected lane(s).

Per DPW sign specifications, all projects impacting the length of one (1) block face or more will require the installation of a project information sign, for the duration of the project. The project information sign should be located at either end of the project facing oncoming vehicular traffic. For larger projects that exceed five (5) blocks, the project information sign should be placed at five (5) block intervals in both directions. The signage is intended to keep the public informed of the intent of the project, project schedule, contact information and allow for updates as needed.

If concrete street, gutter or parking strip is excavated, SBC/Pacific Bell shall remove and replace the entire concrete section from construction joint to construction joint. (No new construction joint will be allowed).

When drilling/excavating in the sidewalk area, entire sidewalk flag(s) must be replaced to adjacent score lines.

Placement or installation of any utility facilities within the curb return area is prohibited per DPW Order No. 175,387.

The Department of Public Works approves this permit pursuant to the following special conditions, which the Department of Public Works incorporates into the permit and makes a part thereof.

### SPECIAL PERMIT CONDITIONS:

This permit is approved for 45 day duration under the following conditions:

- 1) All work (excavation to final paving) shall be completed within fourteen (14) calendar days.
  - 2) SBC/Pacific Bell shall comply with Code Section 2.4.50(a), post and maintain notice(s) at the site of the excavation 72 hours prior to start of construction. If the work is anticipated to take longer than fourteen (14) calendar days, SBC/Pacific Bell shall comply with Code Section 2.4.50(b)(i), provide written notice(s) delivered by mail to each property owners on the block(s) affected by the excavation at least thirty (30) days prior to start of construction. SBC/Pacific Bell shall also comply with Code Section 2.4.50(b)(ii) and (b)(iii), post and maintain notice(s) at the site of the excavation and deliver a written notice to each dwelling unit on the block(s) affected by the excavation at least ten (10) days prior to start of construction.
  - 3) SBC/Pacific Bell shall comply with Code Section 2.4.55(b)(i)(ii) and (iii), the 120-Hour Rule.
  - 4) SBC/Pacific Bell shall coordinate all work with other construction projects and events known or unforeseen such as to minimize the impact of construction project on the general public and/or event(s).
  - 5) SBC/Pacific Bell work shall be in accordance with DPT Blue Book or with any DPT approved traffic routing plans or DPT Special Traffic Permit.
  - 6) SBC/Pacific Bell shall replace any existing traffic stripings and markings that are removed or damaged by the work activity with temporary stripings and markings after the restoration of the pavement as specified on Section 6.2 'Pavement Markings' of DPT's 'Blue Book'. Also, SBC/Pacific Bell shall pay to DPT the cost of replacing the permanent pavement markings. For any questions, please call Conrad Magat of DPT at (415) 701-4680.
  - 7) SBC/Pacific Bell shall restore all trenches per the Excavation Code.
  - 8) SBC/Pacific Bell shall remove all temporary pavement markings including USA marking on both the sidewalk and street at the conclusion of the excavation.
  - 9) SBC/Pacific Bell shall construct curb ramps, if applicable, per Standard Curb Ramp Drawing Nos. CR-1 and CR-3, Revision 4 and Drawing Nos. CR-2, CR-4 thru Cr-6, Revision 0 on any curb return/angular corner where excavation occurs. All curb ramp installation shall comply with ADA requirements.
- Failure to comply with the above requirements may render this permit void and may subject SBC/Pacific Bell to a fine or citation.

# Permit Addresses

14EXC-2144

\*RW = RockWheel, SMC = Surface Mounted Cabinets, S/W = Sidewalk Work, DB = Directional Boring, BP= Reinforced Concrete Bus Pad, UB = Reinforced Concrete for Utility Pull Boxes and Curb Ramps

Number of blocks: 3    Total repair size:221 sqft    Total Streetspace:    Total Sidewalk: sqft

ID	Street Name	From St	To St	Sides	*Other	Asphalt	Concrete	Street Space Feet	Sidewalk Feet
1	26TH AVE	CALIFORNIA ST	CLEMENT ST	West	RW : False SMC : True S/W Only : True DB: False BP: False UB: True	0	46		
3		LAKE ST	CALIFORNIA ST	Both	RW : False SMC : False S/W Only : False DB: False BP: False UB: False	40	39		
<b>Total</b>						<b>40</b>	<b>85</b>		
2	CALIFORNIA ST	26TH AVE	Intersection	West	RW : False SMC : False S/W Only : False DB: False BP: False UB: False	46	50		
<b>Total</b>						<b>46</b>	<b>50</b>		

# Exceptions

14EXC-2144

Street Name	From St	To St	Message	Job	Contact	Dates
26TH AVE						
	CALIFORNIA ST	CLEMENT ST -	Conflict with existing Street Use Permit.	13SMF-0265	Refer to Agent - Refer to Agent	
	LAKE ST	CALIFORNIA ST -	Conflict with existing Street Use Permit.	14ECN-0271	800-743-5000 - 800-743-5000	Mar 6 2014-
	LAKE ST	CALIFORNIA ST -	Conflict with existing Street Use Permit.	14ECN-0409	800-743-5000 - 800-743-5000	Apr 7 2014-
	LAKE ST	CALIFORNIA ST -	Conflict with existing excavation permit. It is mandatory that you coordinate all work for joint paving.	14EXC-1969	800-743-5000 - 800-743-5000	Mar 27 2014-May 10 2014
	CALIFORNIA ST	Intersection	Proposed Excavation.	AT&T - Construction and Engineering	Paul Lucq -	Aug 5 2014-Nov 2 2014
	CALIFORNIA ST	CLEMENT ST -	Banners are allowed on this street	N/A		
	CALIFORNIA ST	Intersection	Under G095 requirement, Contractor shall contact Muni Overhead Line Division of any work 10 feet in horizontal or vertical direction of overhead lines. Contact: Tim Lipps @ (415) 554-9227	N/A		
	CALIFORNIA ST	CLEMENT ST -	Proposed Paving.	PAVING	Richard Lee -	Aug 16 2016-Dec 16 2016
	CALIFORNIA ST	Intersection	Proposed Excavation.	SF MTA Capital Programs and Construction	Darton Ito -	Jan 1 2020-Dec 31 2020
	CALIFORNIA ST	CLEMENT ST -	Prior to performing any construction, all CCSF survey monuments shall be referenced by a licensed Land Surveyor on a Corner Record or a Record of Survey, if any construction will take place within 10ft of the monument. For any questions, please call Mapping at #554-5827	Stone or Concrete Monument		
	CALIFORNIA ST	Intersection	Prior to performing any construction, all CCSF survey monuments shall be referenced by a licensed Land Surveyor on a Corner Record or a Record of Survey, if any construction will take place within 10ft of the monument. For any questions, please call Mapping at #554-5827	Stone or Concrete Monument		
	LAKE ST	CALIFORNIA ST -	Prior to performing any construction, all CCSF survey monuments shall be referenced by a licensed Land Surveyor on a Corner Record or a Record of Survey, if any construction will take place within 10ft of the monument. For any questions, please call Mapping at #554-5827	Stone or Concrete Monument		

"IMPROVING THE QUALITY OF LIFE IN SAN FRANCISCO" We are dedicated individuals committed to teamwork, customer service and continuous improvement in partnership with the community.

Customer Service

Teamwork

Continuous Improvement



Street Name	From St	To St	Message	Job	Contact	Dates
CALIFORNIA ST						
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## Curb Ramps

Street	Specification	Direction
26TH AVE : CALIFORNIA ST - Intersection	55,017, Rev.4 (A) - R - Standard	NorthEast
26TH AVE : CALIFORNIA ST - Intersection	55,017, Rev.4 (A) - L - Standard	NorthWest
26TH AVE : CALIFORNIA ST - Intersection	55,017, Rev.4 (A) - R - Standard	NorthWest
26TH AVE : CALIFORNIA ST - Intersection	55,017, Rev.4 (A) - L - Standard	SouthEast
26TH AVE : CALIFORNIA ST - Intersection	55,017, Rev.4 (A) - L - Standard	SouthWest
26TH AVE : CALIFORNIA ST - Intersection	55,017, Rev.4 (A) - R - Standard	SouthWest

# No Diagram submitted

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Permit Type	Excavation	Permit Number	14EXC-2144	Street Address	
Agent Name	SBC - Pacific Bell Engineering				
Received Date	2014-04-14	Permit Status	RENEWED	BSM working 0 work day(s) out of 10 expected days	
Approval Goal Date	2014-04-27	Approval Warning Date		Approved Date	2014-05-02

>>>CHOOSE FROM LIST BELOW FOR SPECIFIC VIEW

<input type="radio"/> Permit Data	<input type="radio"/> Street Information	<input type="radio"/> Exceptions	<input type="radio"/> Diagram
<input type="radio"/> View Criteria	<input type="radio"/> Address Information	<input type="radio"/> Insurance/Bond	<input type="radio"/> Violations
<input type="radio"/> Estimated Cost	<input type="radio"/> Approval Check	<input checked="" type="radio"/> Activity Log	<input type="radio"/> Pictures
<input type="radio"/> StreetSpace Usage	<input type="radio"/> Important Dates	<input type="radio"/> Letters	<input type="radio"/> Curb Ramp Inspections
<input type="radio"/> Change Log			

[Add Comment](#)

referenceid	activitytext	activityvalue	comment	datefirststamp	AddedBy
14EXC-2144	Email Sent	Invoice Paid Email	Plan Checker	6/9/2014 2:21:34 PM	Public User
14EXC-2144	PAYMENT	96377.74	Check	6/8/2014 2:21:34 PM	Arthur Cervantes
14EXC-2144	DRAW DOWN PAYMENT	1242.02	Reference:3317611692	6/9/2014 2:20:37 PM	Arthur Cervantes
14EXC-2144	Inspector Notes		5-29-14: Pre-con with Arsenio Marcelo, WVC (ATT) 12:30am	6/2/2014 8:57:05 AM	Ray Oropeza
14EXC-2144	Renewed	14EXC-2606		5/6/2014 1:53:51 PM	Bob Pickard
14EXC-2144	PERMIT STATUS CHANGE	RENEWED		5/6/2014 1:53:40 PM	Bob Pickard
14EXC-2144	Email Sent	Approve Email Sent	rp6825@att.com	5/2/2014 3:36:31 PM	Gene Chan
14EXC-2144	PERMIT STATUS CHANGE	APPROVED		5/2/2014 3:36:30 PM	Gene Chan
14EXC-2144	PERMIT STATUS CHANGE	ACTIVE		5/2/2014 3:35:17 PM	Gene Chan
14EXC-2144	INSPECTOR ASSIGNED	Ray Oropeza		5/2/2014 3:35:00 PM	Gene Chan
14EXC-2144	Email Sent	Approve Email Sent	rp6825@att.com	4/14/2014 4:42:54 PM	Gene Chan
14EXC-2144	PERMIT STATUS CHANGE	APPROVED		4/14/2014 4:42:53 PM	Gene Chan
14EXC-2144	CHARGED	1242.02	Invoice # 118749	4/14/2014 4:36:53 PM	Gene Chan
14EXC-2144	PERMIT STATUS CHANGE	TO_ACCOUNTING		4/14/2014 4:35:53 PM	Gene Chan
14EXC-2144	PERMIT STATUS CHANGE	PLANCHK		4/14/2014 4:31:59 PM	Gene Chan
14EXC-2144	PLAN CHECKER ASSIGNED	Gene Chan		4/14/2014 4:31:00 PM	Gene Chan
14EXC-2144	PERMIT STATUS CHANGE	ONLINE		4/14/2014 1:10:31 PM	Bob Pickard

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(415) 554-5810  
FAX (415) 554-6161  
http://www.sfdpw.org

Department of Public Works  
Bureau of Street-Use and Mapping  
1155 Market St, 3rd Floor  
San Francisco, CA 94103

**14EXC-2144**

**Utility Excavation Permit**

**Address : Multiple Locations**

**Cost: \$1,242.02**

**Block: Lot: Zip:**

Pursuant to Article 2.4 of the Public Works Code in conjunction to DPW Order 178,940 permission, revocable at the will of the Director of Public Works, to excavate and restore the public right-of-way is granted to Permittee.

**Permittee**

**Name:** SBC - Pacific Bell Engineering

**Address:** 795 Folsom Street, Room 426 San Francisco, CA 94107-1243

**Contact:** Bob Pickard

**Phone:** (415) 644-7057

<b>Conditions</b>	NE-R, NW-L, NW-R, SW-L, SW-R, SE-L curb ramps required.  Permittee shall adhere to any conditions of 13SMF-0265.
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**Approved Date : 05/02/2014**

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Applicant/Permittee

Date

Distribution:  
Inside BSM: Utility Inspection

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Plan Checker

Gene Chan

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*Customer Service*

*Teamwork*

*Continuous Improvement*

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  - b. Granite Curb shall be neatly and securely placed on pallets so they can be moved about safely after delivery. The Contractor shall exercise care in transporting the granite curb to minimize damage. The length limit of recyclable granite curbs shall be no less than four feet. The granite curb shall be delivered, including off loading, to the back lot at the Griffith Pump Station located at 1105 Thomas Street or at an alternative location directed by the Department within the City of San Francisco. Contact Bureau of Street and Sewer Repair (BSSR) at least forty-eight hours (48 hours) prior to delivery. BSSR can be reached at (415) 695-2087.
13. In consideration of this Permit being issued for the work described in the application, Permittee on its behalf and that of any successor or assign, and on behalf of any lessee, promises and agrees to perform all the terms of this Permit and to comply with all applicable laws, ordinances and regulations.
14. Permittee agrees on its behalf and that of any successor or assign to hold harmless, defend, and indemnify the City and County of San Francisco, including, without limitation, each of its commissions, departments, officers, agents and employees (hereinafter collectively referred to as the "City") from and against any and all losses, liabilities, expenses, claims, demands, injuries, damages, fines, penalties, costs or judgments including, without limitation, attorneys' fees and costs (collectively, "claims") of any kind allegedly arising directly or indirectly from (i) any act by, omission by, or negligence of, Permittee or its subcontractors, or the officers, agents, or employees of either, while engaged in the performance of the work authorized by this Permit, or while in or about the property subject to this Permit for any reason connected in any way whatsoever with the performance of the work authorized by this Permit, or allegedly resulting directly or indirectly from the maintenance or installation of any equipment, facilities or structures authorized under this Permit, (ii) any accident or injury to any contractor or subcontractor, or any officer, agent, or employee of either of them, while engaged in the performance of the work authorized by this Permit, or while in or about the property, for any reason connected with the performance of the work authorized by this Permit, or arising from liens or claims for services rendered or labor or materials furnished in or for the performance of the work authorized by this Permit, (iii) injuries or damages to real or personal property, good will, and persons in, upon or in any way allegedly connected with the work authorized by this Permit from any cause or claims arising at any time, and (iv) any release or discharge, or threatened release or discharge, of any hazardous material caused or allowed by Permittee in, under, on or about the property subject to this Permit or into the environment. As used herein, "hazardous material" means any substance, waste or material which, because of its quantity, concentration of physical or chemical characteristics is deemed by any federal, state, or local governmental authority to pose a present or potential hazard to human health or safety or to the environment.
15. Permittee must hold harmless, indemnify and defend the City regardless of the alleged negligence of the City or any other party, except only for claims resulting directly from the sole negligence or willful misconduct of the City. Permittee specifically acknowledges and agrees that it has an immediate and independent obligation to defend the City from any claim which actually or potentially falls within this indemnity provision, even if the allegations are or may be groundless, false or fraudulent, which obligation arises at the time such claim is tendered to Permittee by the City and continues at all times thereafter. Permittee agrees that the indemnification obligations assumed under this Permit shall survive expiration of the Permit or completion of work.
16. Permittee shall obtain and maintain through the terms of this Permit general liability, automobile liability or workers' compensation insurance as the City deems necessary to protect the City against claims for damages for personal injury, accidental death and property damage allegedly arising from any work done under this Permit. Such insurance shall in no way limit Permittee's indemnity hereunder. Certificates of insurance, in form and with insurers satisfactory to the City, evidencing all coverages above shall be furnished to the City before commencing any operations under this Permit, with complete copies of policies furnished promptly upon City request.
17. The permittee and any permitted successor or assign recognize and understand that this permit may create a possessory interest.

# Special Conditions

14EXC-2144

## Conditions

NOTES: Per the Public Works Excavation Code:

- 1) ' T ' trench shall be the standard restoration practice for all trenches greater than 18 inches in width. The restoration of the concrete base and pavement will be equal to 1 ft. as measured from the edge of the trench;
- 2) The minimum pavement restoration requirements (mill and fill) for trenches exceeding 25% of the length of the block shall include the restoration of all affected lanes for the entire length of the block. For streets that are not delineated by painted lanes and the width of the excavation is less than thirteen (13) feet, the pavement restoration requirements (mill and fill) shall be for the entire length of the block thirteen (13) feet in width;
- 3) For excavation in the intersection, the restoration shall be to pave all affected quadrants either with the 13 foot rule for streets without delineated traffic lanes unless it is on a Muni route and for streets with multiple delineated traffic lanes in one direction, the restoration shall be limited to the affected lane(s).

Per DPW sign specifications, all projects impacting the length of one (1) block face or more will require the installation of a project information sign, for the duration of the project. The project information sign should be located at either end of the project facing oncoming vehicular traffic. For larger projects that exceed five (5) blocks, the project information sign should be placed at five (5) block intervals in both directions. The signage is intended to keep the public informed of the intent of the project, project schedule, contact information and allow for updates as needed.

If concrete street, gutter or parking strip is excavated, SBC/Pacific Bell shall remove and replace the entire concrete section from construction joint to construction joint. (No new construction joint will be allowed).

When drilling/excavating in the sidewalk area, entire sidewalk flag(s) must be replaced to adjacent score lines.

Placement or installation of any utility facilities within the curb return area is prohibited per DPW Order No. 175,387.

The Department of Public Works approves this permit pursuant to the following special conditions, which the Department of Public Works incorporates into the permit and makes a part thereof.

### SPECIAL PERMIT CONDITIONS:

This permit is approved for 45 day duration under the following conditions:

- 1) All work (excavation to final paving) shall be completed within fourteen (14) calendar days.
- 2) SBC/Pacific Bell shall comply with Code Section 2.4.50(a), post and maintain notice(s) at the site of the excavation 72 hours prior to start of construction. If the work is anticipated to take longer than fourteen (14) calendar days, SBC/Pacific Bell shall comply with Code Section 2.4.50(b)(i), provide written notice(s) delivered by mail to each property owners on the block(s) affected by the excavation at least thirty (30) days prior to start of construction. SBC/Pacific Bell shall also comply with Code Section 2.4.50(b)(ii) and (b)(iii), post and maintain notice(s) at the site of the excavation and deliver a written notice to each dwelling unit on the block(s) affected by the excavation at least ten (10) days prior to start of construction.
- 3) SBC/Pacific Bell shall comply with Code Section 2.4.55(b)(i)(ii) and (iii), the 120-Hour Rule.
- 4) SBC/Pacific Bell shall coordinate all work with other construction projects and events known or unforeseen such as to minimize the impact of construction project on the general public and/or event(s).
- 5) SBC/Pacific Bell work shall be in accordance with DPT Blue Book or with any DPT approved traffic routing plans or DPT Special Traffic Permit.
- 6) SBC/Pacific Bell shall replace any existing traffic stripings and markings that are removed or damaged by the work activity with temporary stripings and markings after the restoration of the pavement as specified on Section 6.2 'Pavement Markings' of DPT's 'Blue Book'. Also, SBC/Pacific Bell shall pay to DPT the cost of replacing the permanent pavement markings. For any questions, please call Conrad Magat of DPT at (415) 701-4680.
- 7) SBC/Pacific Bell shall restore all trenches per the Excavation Code.
- 8) SBC/Pacific Bell shall remove all temporary pavement markings including USA marking on both the sidewalk and street at the conclusion of the excavation.
- 9) SBC/Pacific Bell shall construct curb ramps, if applicable, per Standard Curb Ramp Drawing Nos. CR-1 and CR-3, Revision 4 and Drawing Nos. CR-2, CR-4 thru Cr-6, Revision 0 on any curb return/angular corner where excavation occurs. All curb ramp installation shall comply with ADA requirements.

Failure to comply with the above requirements may render this permit void and may subject SBC/Pacific Bell to a fine or citation.

# Permit Addresses

14EXC-2144

\*RW = RockWheel, SMC = Surface Mounted Cabinets, S/W = Sidewalk Work, DB = Directional Boring, BP= Reinforced Concrete Bus Pad, UB = Reinforced Concrete for Utility Pull Boxes and Curb Ramps

Number of blocks: 3    Total repair size:221 sqft    Total Streetspace:    Total Sidewalk: sqft

ID	Street Name	From St	To St	Sides	*Other	Asphalt	Concrete	Street Space Feet	Sidewalk Feet
1	26TH AVE	CALIFORNIA ST	CLEMENT ST	West	RW : False SMC : True S/W Only : True DB: False BP: False UB: True	0	46		
3		LAKE ST	CALIFORNIA ST	Both	RW : False SMC : False S/W Only : False DB: False BP: False UB: False	40	39		
						40	85		
2	CALIFORNIA ST	26TH AVE	Intersection	West	RW : False SMC : False S/W Only : False DB: False BP: False UB: False	46	50		
						46	50		



# Exceptions

14EXC-2144

Street Name	From St	To St	Message	Job	Contact	Dates
	CALIFORNIA ST	CLEMENT ST -	Conflict with existing Street Use Permit.	13SMF-0265	Refer to Agent - Refer to Agent	
	LAKE ST	CALIFORNIA ST -	Conflict with existing Street Use Permit.	14ECN-0271	800-743-5000 - 800-743-5000	Mar 6 2014-
	LAKE ST	CALIFORNIA ST -	Conflict with existing Street Use Permit.	14ECN-0409	800-743-5000 - 800-743-5000	Apr 7 2014-
	LAKE ST	CALIFORNIA ST -	Conflict with existing excavation permit. It is mandatory that you coordinate all work for joint paving.	14EXC-1969	800-743-5000 - 800-743-5000	Mar 27 2014-May 10 2014
	CALIFORNIA ST	Intersection	Proposed Excavation.	AT&T - Construction and Engineering	Paul Lucq -	Aug 5 2014-Nov 2 2014
	CALIFORNIA ST	CLEMENT ST -	Banners are allowed on this street	N/A		
	CALIFORNIA ST	Intersection	Under G095 requirement, Contractor shall contact Muni Overhead Line Division of any work 10 feet in horizontal or vertical direction of overhead lines. Contact: Tim Lipps @ (415) 554-9227	N/A		
	CALIFORNIA ST	CLEMENT ST -	Proposed Paving.	PAVING	Richard Lee -	Aug 16 2016-Dec 16 2016
	CALIFORNIA ST	Intersection	Proposed Excavation.	SF MTA Capital Programs and Construction	Darton Ito -	Jan 1 2020-Dec 31 2020
	CALIFORNIA ST	CLEMENT ST -	Prior to performing any construction, all CCSF survey monuments shall be referenced by a licensed Land Surveyor on a Corner Record or a Record of Survey, if any construction will take place within 10ft of the monument. For any questions, please call Mapping at #554-5827	Stone or Concrete Monument		
	CALIFORNIA ST	Intersection	Prior to performing any construction, all CCSF survey monuments shall be referenced by a licensed Land Surveyor on a Corner Record or a Record of Survey, if any construction will take place within 10ft of the monument. For any questions, please call Mapping at #554-5827	Stone or Concrete Monument		
	LAKE ST	CALIFORNIA ST -	Prior to performing any construction, all CCSF survey monuments shall be referenced by a licensed Land Surveyor on a Corner Record or a Record of Survey, if any construction will take place within 10ft of the monument. For any questions, please call Mapping at #554-5827	Stone or Concrete Monument		

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Customer Service

Teamwork

Continuous Improvement

Street Name	From St	To St	Message	Job	Contact	Dates
CALIFORNIA ST						
	26TH AVE	Intersection	Proposed Excavation.	AT&T - Construction and Engineering	Paul Lucq -	Aug 5 2014-Nov 2 2014
	26TH AVE	Intersection	Under G095 requirement, Contractor shall contact Muni Overhead Line Division of any work 10 feet in horizontal or vertical direction of overhead lines. Contact: Tim Lipps @ (415) 554-9227	N/A		
	26TH AVE	Intersection	Proposed Excavation.	SF MTA Capital Programs and Construction	Darton Ito -	Jan 1 2020-Dec 31 2020
	26TH AVE	Intersection	Prior to performing any construction, all CCSF survey monuments shall be referenced by a licensed Land Surveyor on a Corner Record or a Record of Survey, if any construction will take place within 10ft of the monument. For any questions, please call Mapping at #554-5827	Stone or Concrete Monument		

## Curb Ramps

Street	Specification	Direction
26TH AVE : CALIFORNIA ST - Intersection	55,017, Rev.4 (A) - R - Standard	NorthEast
26TH AVE : CALIFORNIA ST - Intersection	55,017, Rev.4 (A) - L - Standard	NorthWest
26TH AVE : CALIFORNIA ST - Intersection	55,017, Rev.4 (A) - R - Standard	NorthWest
26TH AVE : CALIFORNIA ST - Intersection	55,017, Rev.4 (A) - L - Standard	SouthEast
26TH AVE : CALIFORNIA ST - Intersection	55,017, Rev.4 (A) - L - Standard	SouthWest
26TH AVE : CALIFORNIA ST - Intersection	55,017, Rev.4 (A) - R - Standard	SouthWest

# No Diagram submitted

**EXHIBIT E**



Welcome, Bob Pickard

[User Manual](#)

Search -->14EXC-2144 -->Current Page

Application Street Information Diagram **Review**

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[Account Information](#)

[User Information](#)

[Log Out](#)

>>>> [Void](#) [Print Permit](#) **Recently Paid \$1,242.02** <<<<<

Permit Type	Excavation	Permit Number	14EXC-2144	Street Address	
Agent Name	SBC - Pacific Bell Engineering				
Received Date	2014-04-14	Permit Status	RENEWED	BSM working 0 work day(s) out of 10 expected days	
Approval Goal Date	2014-04-27	Approval Warning Date		Approved Date	2014-05-02

>>>CHOOSE FROM LIST BELOW FOR SPECIFIC VIEW

Permit Data	Street Information	Exceptions	Diagram
View Criteria	Address Information	Insurance/Bond	Violations
Estimated Cost	Approval Check	<input checked="" type="checkbox"/> Activity Log	Pictures
StreetSpace Usage	Important Dates	Letters	Curb Ramp Inspections
Change Log			

[Add Comment](#)

referenceid	activityid	activitydate	comments	datefirststamp	AddedBy
14EXC-2144	Email Sent	Invoice Paid Email	Plan Checker	6/9/2014 2:21:34 PM	Public User
14EXC-2144	PAYMENT	56377.74	Chuck	6/8/2014 2:21:34 PM	Arthur Cervantes
14EXC-2144	DRAW DOWN PAYMENT	1242.02	Reference 3317811852	6/8/2014 2:20:37 PM	Arthur Cervantes
14EXC-2144	Inspector Notes		5-29-14. Prac con with Arsenio Marcelo. WVC (ATT) 12.30am	6-2/2014 8:57:05 AM	Ray Oropeza
14EXC-2144	Renewed	14EXC-2898		5/8/2014 1:53:51 PM	Bob Pickard
14EXC-2144	PERMIT STATUS CHANGE	RENEWED		5/5/2014 1:53:49 PM	Bob Pickard
14EXC-2144	Email Sent	Approve Email Sent	<a href="#">rp6825@att.com</a>	5/2/2014 3:36:31 PM	Gene Chan
14EXC-2144	PERMIT STATUS CHANGE	APPROVED		5/2/2014 3:36:30 PM	Gene Chan
14EXC-2144	PERMIT STATUS CHANGE	ACTIVE		5/2/2014 3:35:17 PM	Gene Chan
14EXC-2144	INSPECTOR ASSIGNED	Ray Oropeza		5/2/2014 3:35:00 PM	Gene Chan
14EXC-2144	Email Sent	Approve Email Sent	<a href="#">rp6825@att.com</a>	4/14/2014 4:42:54 PM	Gene Chan
14EXC-2144	PERMIT STATUS CHANGE	APPROVED		4/14/2014 4:42:53 PM	Gene Chan
14EXC-2144	CHARGED	1242.02	Invoice # 116745	4/14/2014 4:35:53 PM	Gene Chan
14EXC-2144	PERMIT STATUS CHANGE	TO_ACCOUNTING		4/14/2014 4:35:53 PM	Gene Chan
14EXC-2144	PERMIT STATUS CHANGE	PLANCHK		4/14/2014 4:31:55 PM	Gene Chan
14EXC-2144	PLAN CHECKER ASSIGNED	Gene Chan		4/14/2014 4:31:00 PM	Gene Chan
14EXC-2144	PERMIT STATUS CHANGE	ONLINE		4/14/2014 1:10:31 PM	Bob Pickard

[Export to Excel](#)



**EXHIBIT F**



Gavin Newsom, Mayor  
Edwin M. Lee, Director



Phone: (415) 554-6920  
Fax: (415) 554-6944  
TDD: (415) 554-6900  
<http://www.sfdpw.org>

Department of Public Works  
Office of the Director  
City Hall, Room 348  
1 Dr. Carlton B. Goodlett Place  
San Francisco, CA 94102-4645

**ORDER NO. 175,566**

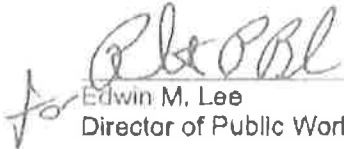
**Regulations for Issuing Excavation Permits for the Installation of  
Surface-Mounted Facilities In the Public Rights-Of-Way**

The Department of Public Works (the "Department") has broad authority under Article 18 of the City and County of San Francisco Public Works Code to regulate the placement of utility facilities in the public rights-of-way. In addition, under Article 2.4 of the Public Works Code, any person excavating in the public rights-of-way must obtain an excavation permit and comply with any orders and regulations adopted by the Department that are necessary to preserve and maintain the public health, safety, welfare, and convenience.

The Department has received applications for excavation permits from a number of utility companies and City departments seeking to install surface-mounted facilities in the public rights-of-way. The Department is concerned that the installation of surface-mounted facilities in the public rights-of-way will impede travel on public streets, inconvenience property owners, create visual blight, or otherwise incommode the use of the public rights-of-way by the public.

The Department has consistently informed applicants and potential applicants for excavation permits that it is the Department's policy to require that such surface-mounted facilities be installed on private property or be placed underground to the extent either of these options is technologically and economically feasible. At the very least, the Department has required that applicants minimize the impact that the placement of any surface-mounted facilities will have on use of the public rights-of-way.

The Department adopts this Order to establish rules and regulations for excavators seeking permits to install such surface-mounted facilities in the public rights-of-way. In so doing, the Department will be better able to enforce this long-standing policy. The Department will also ensure that persons affected by the installation of such surface-mounted facilities will have an opportunity to be heard before the Department issues any permits.

  
Edwin M. Lee  
Director of Public Works

Approved: August 17, 2005

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*Customer Service*

*Teamwork*

*Continuous Improvement*

**Regulations for Issuing Excavation Permits for the Installation of  
Surface-Mounted Facilities in the Public Rights-Of-Way**

**Section 1. Definitions.**

- A. For purposes of this Order, the following terms, phrases, words, abbreviations their derivations, and other similar terms, when capitalized, shall have the meanings given herein:
1. "Aesthetic" means pleasing in appearance in the context of the surrounding area.
  2. "Applicable Law" means all applicable federal, state, and City laws, ordinances, codes, rules, regulations, orders, standard plans and specifications, as the same may be amended or adopted from time to time. Where applicable, Applicable Law also means the requirements contained in any franchise agreement, utility conditions permit or encroachment permit.
  3. "Applicant" means any person filing an application for a Permit to install a Surface-Mounted Facility in the Public Rights-of-Way. Unless expressly stated herein or otherwise prohibited by law, for the purpose of this Order Applicant shall include Municipal Applicant.
  4. "Approval," "Approve," or "Approved," when used with reference to City approval, mean the prior written approval of the Director unless another person or method for approval is specified herein or under Applicable Law. When used in reference to another agency, they mean the final approval of that agency as provided under Applicable Law.
  5. "City" means the City and County of San Francisco.
  6. "City Business Day" means any Monday through Friday that is not observed as an official holiday by the City.
  7. "Day" means any calendar day, unless a City Business Day is specified. For the purposes hereof, the time in which an act is to be performed shall be computed by excluding the first day and including the last. For the purposes hereof, if the time in which an act is to be performed falls on a Saturday, Sunday, or any day observed as an official holiday by the City, the time for performance shall be extended to the following City Business Day. For the purposes hereof, the time in which an act is to be performed shall be computed by excluding the first day and including the last.
  8. "Department" means the Department of Public Works.
  9. "Director" means the Director of the Department or his designee.
  10. "Graffiti" means any inscription, word, figure, marking or design that is affixed, marked, scratched, drawn or painted on a Surface-Mounted Facility, whether permanent or temporary, without the consent of the Applicant.



11. "Municipal Applicant" means any agency, board, commission, department, or subdivision of the City filing an application to install a Surface-Mounted Facility in the Public Rights-Of-Way.
12. "Order" means these Regulations for Issuing Excavation Permits for the Installation of Surface-Mounted Facilities in the Public Rights-Of-Way.
13. "Permit" means a permit to perform an excavation to install a Surface-Mounted Facility as it has been approved, amended, or renewed by the Department.
14. "Public Rights-Of-Way" means the area in, on, upon, above, beneath, within, along, across, under, and over the public, sidewalks, within the geographic area of the City in which the City now or hereafter holds any property interest, which is dedicated to public use.
15. "Public Works Code" means the City and County of San Francisco Public Works Code.
16. "Surface-Mounted Facility" means any Utility facility (physical element or structure) that installed, attached, or affixed in the Public Rights-of-Way on a site that is above the surface of the street, except a Utility pole or associated appurtenances. The term Surface-Mounted Facility shall not include transit shelters, ramps, and platforms, or traffic signal poles; but shall include other facilities installed in the Public Rights-of-Way for transportation purposes such as, but not limited to traffic signal controllers, communications hubs, back-up power supplies, switch controllers, electric service panels, and ticket vending machines.
17. "Utility" means any of the following services: electricity, gas, information, sewer, steam, telecommunications, high-speed Internet, voice over Internet protocol, video over Internet protocol, cable television, open video, water, or other services that require the provider to install facilities in the Public Rights-of-Way to serve its customers.

**Section 2. Permit Required.**

- A. An Applicant shall apply for and obtain a Permit and/or all other required regulatory permits and/or Approvals for placement of a Surface-Mounted Facility in the Public Rights-Of-Way that is regulated by the Department in accordance with this Order and Applicable Law, except that no Permit shall be required where the Applicant has applied for and obtained an encroachment permit as required under Applicable Law.
- B. Unless otherwise agreed to by the Department in writing, the requirements of this Section shall apply to an Application to install a Surface-Mounted Facility that is replacing an existing Surface-Mounted Facility, except where the new Surface-Mounted Facility will be placed on an existing foundation and the size of the new Surface-Mounted Facility shall be the same or smaller.

**Section 3. Pre-Application Procedures for Obtaining Permits for Surface-Mounted Facilities.**

**A. Request for a Department Site Visit.**

1. Prior to submitting an application for a Permit to construct a Surface-Mounted Facility, an Applicant shall request that the Department conduct a site visit to explore proposed locations for the Surface-Mounted Facility.
2. The Department will not conduct a site visit unless an Applicant sufficiently demonstrates to the Department (by submitting to the Department a complete copy of the form attached hereto as Exhibit A and incorporated by this reference) that it made a good faith effort to comply with each of the following requirements (unless the Department determines that any or all of the requirements of this Section should not apply to a particular Surface-Mounted Facility):
  - a. Prepared and submitted to the Department, or has on file with the Department, a plan, in a format specified by the Department, that shows all Surface-Mounted Facilities anticipated to be installed in the Public Rights-Of-Way in the next five years. Any Applicant that does not anticipate installing any other Surface-Mounted Facilities in the next five years shall submit a plan with a statement to that effect and shall immediately report any Surface-Mounted Facilities that are anticipated to the Department. The Department may refuse to conduct more than five site visits in a calendar year for any Applicant that has not completed a five-year plan.
  - b. Prepared and submitted to the Department plans showing all of the sizes and shapes of the cabinets proposed to be used for its Surface-Mounted Facilities. If the Applicant is seeking Approval of a larger cabinet of the Surface-Mounted Facility, the Applicant shall sufficiently demonstrate to the Department why the larger cabinet is necessary.
  - c. Surveyed the area to be serviced by a Surface-Mounted Facility to identify at least three locations on private property (including City-owned property) that may be appropriate for the installation of the Surface-Mounted Facility.
  - d. Contacted the owners of such properties to determine whether the owners will allow the Applicant to use the property to install the Surface-Mounted Facility.
  - e. Attempted to enter into an agreement with any interested property owner.
  - f. Attempted to place the Surface-Mounted Facility (or parts thereof) underground where such underground placement is technologically or economically feasible. An Applicant may satisfy the requirement contained in this Section by demonstrating to the satisfaction of the Director that it is not technologically or economically feasible for the Applicant to place the Surface-Mounted Facility (or parts thereof) underground. At a minimum, the Applicant must demonstrate to the Director that it conducted a thorough search for adequate underground technology.

- g. Notified the Department of any special requirements for the Surface-Mounted Facility that limits the location for the Surface-Mounted Facility (i.e. line of sight requirements) to a specific site.
    - h. Explored reasonable opportunities to collocate the Surface-Mounted Facility with any other Surface-Mounted Facility installed or to be installed in the Public Rights-Of-Way by other entities including City departments and entities providing services.
    - i. Notified the Department whether the Applicant could remove a Surface-Mounted Facility from the Public Rights-Of-Way because it would no longer be used or useful to the Applicant as a result of the Applicant's installation of a new Surface-Mounted Facility.
  3. In lieu of requesting a site visit under Section 3.A above, an Applicant may request that the Department determine that a site visit is not required by providing the Department with sufficient information for the Department to substantiate that a site visit is not required.

**B. Department Site Visits.**

1. Where the Department has determined that a site visit is necessary, prior to the site visit an Applicant will identify appropriate locations for the Surface-Mounted Facility. In selecting an appropriate location for a Surface-Mounted Facility in the Public Rights-Of-Way, an Applicant shall minimize the impact that the placement of the Surface-Mounted Facility will have on use of the Public Rights-Of-Way by, among other things:
  - a. Placing the Surface-Mounted Facility in the Public Rights-Of-Way so that the path of travel for pedestrians will not be unreasonably impeded, paying particular attention to the needs of persons with disabilities. To the extent feasible, an Applicant shall locate the Surface-Mounted Facilities on streets where pedestrian travel is minimal.
  - b. Placing the Surface-Mounted Facility in the Public Rights-Of-Way so that the Aesthetic character of the streetscape will not be unreasonably affected by the installation of the Surface-Mounted Facility. Where it is not technologically or economically feasible to underground the entire Surface-Mounted Facility, an Applicant shall: (i) limit the height and footprint of the Surface-Mounted Facility to the maximum extent feasible; (ii) use either stainless steel or paint the Surface-Mounted Facility the color used for City structures in the vicinity (e.g. JCDecaux green, Embarcadero blue) unless otherwise specified by the Department and shall have a graffiti-proof coating; (iii) screen the Surface-Mounted Facility by landscaping the Public Rights-Of-Way in the area around the Surface-Mounted Facility or camouflaging the Surface Mounted Facility where requested by the Department; and (iv) make such other changes that are reasonably required by the Department to fully comply with the requirements of this Section.

- c. Ensuring that the Surface-Mounted Facility will not obstruct access to other facilities that are installed or the Department knows are to be installed in the Public Rights-Of-Way (whether above or below ground) by other entities including City departments and entities providing Utility services.
  - d. Placing the Surface-Mounted Facility in a location that is consistent with the placement criteria set forth in Exhibit B attached hereto and incorporated by this reference.
2. During the site visit, the Department will explore any proposed site for the Surface-Mounted Facility that has been identified by the Applicant and any other sites that are consistent with the placement criteria set forth in Exhibit B.
  3. Within five City Business Days of the site visit, the Department will notify the Applicant:
    - a. Whether any of the proposed locations are acceptable locations consistent with the guidelines set forth in Exhibit B.
    - b. How the proposed locations should be prioritized if more than one of the proposed locations are acceptable under the guidelines.
    - c. If the Department has any recommendations to minimize the Aesthetic affect of the Surface Mounted Facility of the streetscape including, but not limited to, a color for the Surface-Mounted Facility, any screening that should be installed around the Surface-Mounted Facility, any Aesthetic changes to the Surface-Mounted Facility itself or to its installation, and any opportunities for collocating the Surface-Mounted Facility.
    - d. If the Department will require the Applicant, pursuant to Section 3.C below, to notify the public of the proposed installation of the Surface-Mounted Facility prior to submitting an application for a Permit.

C. Notice of Intent to Submit Application.

- I. If the Department so requires, prior to submitting an application for a Permit to install a Surface-Mounted Facility an Applicant shall notify the public of its intent to submit an application in the following manner:
  - a. The Applicant shall post the notice in conspicuous places along the Public Rights-Of-Way within 300 feet of either side of the fronting streets of any of the proposed locations for the Surface-Mounted Facility. An example of the area required to be noticed is attached hereto as Exhibit C and incorporated herein by this reference. A minimum of two notices shall be posted along the fronting streets in every direction. The Applicant shall ensure that the notices remain posted for 20 Days after they are first posted and shall remove the notices after the 20 Day notice period ends.

- b. The Applicant shall send the notice to any neighborhood association identified by the Department of City Planning for any neighborhood within 300 feet of any of the proposed locations for the Surface-Mounted Facilities.
  - c. If the Applicant is seeking a permit to install a Surface-Mounted Facility in any location prohibited by item numbers 14 through 18 of Exhibit B, the Applicant shall send the notice to the appropriate City agency identified in Exhibit D attached hereto and incorporated by this reference.
  - d. The Applicant shall send the notice to the Department at the following address: Bureau of Street-use and Mapping, 875 Stevenson Street, Room 460, San Francisco, California, 94103-0942 (Tel: (415) 554-5810; Fax: (415) 554-5843).
2. The notice shall be in a form to be approved by the Department and shall be similar to the form attached hereto as Exhibit E and incorporated herein by this reference. At a minimum, the notice shall contain the following information:
    - a. A picture of the Surface-Mounted Facility in each proposed location.
    - b. If there is more than one acceptable location for the Surface-Mounted Facility, the Applicant's order of preference for the proposed locations.
    - c. That the recipient has 20 Days from the date of notice to notify the Department that the recipient objects to any or all of the proposed locations for the Surface-Mounted Facility.

D. Notice of Site Approval.

Where the Department has Approved a site for a Surface Mounted Facility without requiring the Applicant to send a notice of intent to submit an Application, the Applicant shall instead notify the public of the location of the Approved site at least 30 Days prior to filing an application for a Permit. The notice shall comply with the requirements of Section 3.C.1 and Section 3.C.2 above.

E. Department Hearing.

1. An objection to an intent to submit an application will be timely if made by telephone or postmarked within 20 Days of the date of the notice. Within two City Business Days of the Department's receipt of an objection, the Department shall notify the Applicant by electronic mail of such objection.
2. If the Department receives a timely objection to the notice of intent to apply from the public, the Director will convene a hearing unless the Director in his sole discretion determines that the objection is frivolous or vexatious.
3. If the Director determines that a hearing is required, within ten days after receiving the objection the Director will issue a notice scheduling the hearing for a date that is no later than thirty days after the date of the notice. The hearing will be conducted in accordance with the following procedures:

- a. The Director will appoint an impartial hearing officer to conduct the hearing. The hearing officer will be experienced in conducting proceedings of this kind. The hearing officer shall take evidence and testimony from the Department, the Applicant, and any persons objecting to or supporting any of the proposed locations for the Surface-Mounted Facility.
  - b. The hearing officer will issue a report to the Director. In the report, the hearing officer will summarize the evidence and testimony and recommend that the Director either Approve one of the proposed locations for the Surface-Mounted Facility, or Approve one of the proposed locations provided that the Applicant make reasonable changes to the installation of the Surface-Mounted Facility consistent with Section 3.E.6.b below and Section 3.E.6.c below. The Director may adopt, modify, or reject the hearing officer's recommendation.
4. At the conclusion of the hearing, the hearing officer may keep the hearing open for up to 20 Days to consider additional evidence concerning other locations identified during the hearing. The Applicant and the Department will report to the hearing officer within three City Business Days after the hearing whether or not any of these locations are acceptable and shall provide a copy of the report to all persons participating in the hearing. If the Applicant and the Department determine that none of these locations are acceptable, the hearing officer shall close the hearing.
5. If the Applicant and the Department determine that any of these proposed locations are acceptable, within three City Business Days of issuing the report to the hearing officer the Applicant will notify all persons owning or occupying any property located within 300 feet along either side of the fronting streets of the proposed locations and any neighborhood associations of the hearing. The notice shall be posted and mailed as required in Section 3.C.1 above. The notice shall state that: (a) the hearing officer may recommend to the Director that the Surface-Mounted Facility be installed in one of these proposed locations; and (b) any objection to these proposed locations must be in writing and must be sent to the Department within seven Days of the notice. The Department will provide a copy of such objections to the hearing officer, the Applicant, and all persons participating in the hearing.
6. The hearing officer will base the recommendation, and the Director will base his determination, upon the following matters only:
  - a. Which of the proposed locations (if there is more than one) will have less of an impact on the convenience and necessities of the property owners and occupants in the immediate vicinity of the Surface-Mounted Facility.
  - b. Whether the Applicant could make any reasonable changes to the location of the Surface-Mounted Facility within the same frontage of the given address of the proposed location such that it will have less of an impact on the convenience and necessities of the property owners and occupants in the immediate vicinity of the Surface-Mounted Facility.

- c. Whether the Applicant could make any reasonable changes to the installation of the Surface-Mounted Facility at the proposed location that would address any of the objections.
  - d. Whether the Applicant could install the Surface-Mounted Facility in other acceptable locations (in accordance with Exhibit B) that are preferable to any of the proposed locations because use of such other acceptable locations will have less of an impact on the convenience and necessities of the property owners and occupants in the immediate vicinity of the Surface-Mounted Facility.
7. Within thirty days after the conclusion of the Director's hearing or any decision not to hold a hearing, the Department will notify the Applicant in writing which one of the proposed locations for the Surface-Mounted Facility the Director has Approved and whether the Director will require the Applicant to make reasonable changes to the installation of the Surface-Mounted Facility.

**Section 4. Application Procedures for Obtaining Permits for Surface-Mounted Facilities.**

- A. Any application that an Applicant submits to the Department for a Permit to install a Surface-Mounted Facility in the Public Rights-Of-Way shall contain, in addition to the information required under Article 2.4 of the Public Works Code and Department Order No. 171,442, the information set forth in Exhibit F attached hereto and incorporated by this reference.
  1. An Applicant may submit an application for a Permit to install a Surface-Mounted Facility if the Department does not require public notice under Section 3.C above, the Department does not receive a timely objection to the notice of intent to apply for a Permit under Section 3.E.1 above, or a proposed location for a Surface-Mounted Facility has been Approved under Section 3.E.7 above.
  2. The Department will process an application for a Permit to install a Surface-Mounted Facility for one of the approved sites in the manner set forth below and as shown in Exhibit G attached hereto and incorporated herein by this reference:
    - a. The Department will notify an Applicant within a reasonable time after receipt of an application to install a Surface-Mounted Facility whether the application is complete. If an application is not complete, the Department will return the application to the Applicant along with a checklist in the form attached hereto as Exhibit H and incorporated by this reference showing where the application is incomplete. The Applicant may complete the application and resubmit it at any time.
    - b. If the Department notifies an Applicant that an application is complete, the Applicant may apply for a Permit using the Department's electronic permitting system.
    - c. Within three City Business Days after receiving an application through the Department's electronic permitting system, the Department will notify the Applicant within whether the application has been Approved or denied.

3. The Department's Approval or denial of any Permit to install a Surface-Mounted Facility under this Order may be appealed to the Board of Permit Appeals pursuant to Section 4.106(b) of the City's Charter.

**Section 5. Department Meetings.**

Once a year the Department will convene a meeting with persons who submitted applications for Permits to install Surface-Mounted Facilities in the past year and any other interested persons to discuss issues related to the permitting and construction of Surface-Mounted Facilities in the Public Rights-Of-Way. The Department may also invite equipment vendors to the meeting. At such meetings, the Department will discuss any advancement in technology that would permit Applicants to install Surface-Mounted Facilities underground and any opportunities for Applicants to collocate their Surface-Mounted Facilities. The Department will also post a public notice of the meeting.

**Section 6. Additional Permit Fees.**

The Department has determined that processing an application for a Permit to install a Surface-Mounted Facility in accordance with the requirements of this Order will require the Department to incur expenses for employee time and materials in excess of those the Department generally incurs to process an application for a Permit. Pursuant to Public Works Code Section 2.4.43, in addition to all other fees required under Subarticle IV of Article 2.4 of the Public Works Code, the Department shall charge an Applicant filing an application for a Permit to install a Surface-Mounted Facility a pre-application site visit fee of \$75.00 for each site visit, an additional administrative fee of \$75.00 for any application Approved without a hearing, a hearing fee of \$150.00 for any application for which a Department hearing is required, and an additional hearing fee of \$100.00 if a hearing is continued to investigate other potential sites for a Surface-Mounted Facility.

**Section 7. Applicant's Use of the Public Rights-Of-Way is Subordinate to City's Use.**

A. Use of the Public Rights-Of-Way by an Applicant other than a Municipal Applicant for installation of a Surface-Mounted Facility shall be subordinate to any prior lawful occupancy and the continuing right of the City to use and occupy the Public Rights-Of-Way, or any part thereof, exclusively or concurrently with any other person or persons, and further subject to the public easement for streets and any and all other deeds, easements, dedications, conditions, covenants, restrictions, encumbrances, franchises and claims of title which may affect the Public Rights-Of-Way.

B. An Applicant shall not place a Surface-Mounted Facility in the Public Rights-Of-Way in a manner inconsistent with the Public Works Code, the rules, regulations, orders, and standard plans and specifications issued by the Department, other Applicable Law, or in such a way as to interfere with or incommode public use of the Public Rights-Of-Way or create visual blight.

C. When required to ensure the public health, safety or welfare, an Applicant shall at its own cost and expense temporarily or permanently remove, relocate, adjust, and/or support a Surface-Mounted Facility or any part thereof, to such other locations in the Public Rights-Of-Way, in such manner as appropriate and as may be approved by the City in writing and in advance, or otherwise required by the City. The City may not unreasonably withhold its approval of any plan for removal, relocation, adjustment, and/or support of a Surface-Mounted Facility ordered pursuant to this Section. Such removal, relocation, adjustment, and/or support shall be completed within the time and manner prescribed by the



City; however, where feasible the City may require the Applicant to follow the procedures set forth in this Order to obtain a new site for the Surface-Mounted Facility. If an Applicant does not remove, relocate, adjust, and/or support a Surface-Mounted Facility in the manner and time prescribed by the Department, the Department shall take all reasonable, necessary, and appropriate action, including removing the Surface-Mounted Facility, and may charge the Applicant the reasonable costs actually incurred including, but not limited to, administrative costs.

D. Whenever the Department requires an Applicant to remove, relocate, adjust, and/or support a Surface-Mounted Facility to ensure the public health, safety or welfare, the Applicant shall, after such work is complete, at its own cost and expense, promptly restore the Public Rights-Of-Way in accordance with Applicable Law. If an Applicant fails to restore the Public Rights-Of-Way in accordance with Applicable Law, the Department shall have the option to perform or cause to be performed such restoration in such manner as the Director deems expedient and appropriate on behalf of the Applicant and charge the actual costs incurred including, but not limited to administrative costs, to the Applicant.

E. Upon the receipt of a demand for payment by the Department, the Applicant shall reimburse the City for any costs incurred by the Department to remove a Surface-Mounted Facility, as required under Section 7.C above, or to restore the Public Rights-Of-Way, as required under Section 7.D above, or the costs may be deducted from the Applicant's deposit under Public Works Code Section 2.4.46(c).

**Section 8. Maintenance and Abandonment of Surface-Mounted Facilities.**

A. An Applicant shall be solely responsible for maintaining a Surface-Mounted Facility installed in the Public Rights-Of-Way in a clean and safe condition. The Applicant shall inspect each Surface-Mounted Facility installed in the Public Rights-Of-Way and shall repair any damage to or remove any Graffiti found on a Surface-Mounted Facility within three City Business Days after discovering such damage or Graffiti during an inspection or being notified that there is such damage to or Graffiti on a Surface-Mounted Facility.

B. In the event an Applicant fails to timely repair any damage to or remove Graffiti from a Surface-Mounted Facility as required in this Section, the Department shall have the option to perform or cause to be performed such repair or removal in such manner as the Director deems expedient and appropriate on behalf of the Applicant and to charge the Applicant the actual costs incurred, including but not limited to administrative costs.

C. An Applicant shall place a sign on all Surface-Mounted Facilities that shall contain the Applicant's name and provide a telephone number for people to call to notify the Applicant that there is damage to or Graffiti on a Surface-Mounted Facility. A telephone call to that number will be considered notice to the Applicant.

D. An Applicant shall maintain a written record of damage repair and Graffiti removal from Surface-Mounted Facilities in the Public Rights-Of-Way that contains the following information: (i) the date the damage/Graffiti was discovered; (ii) the location of the Surface-Mounted Facility; (iii) whether the discovery was made as a result of an inspection or from a report; and (iv) the date the damage was repaired or the Graffiti was removed. A copy of this written record shall be sent to the Department on a quarterly basis commencing on October 1, 2005.

E. An Applicant shall notify the Department or the Department may determine that a Surface-Mounted Facility has been abandoned. At the Department's direction, an Applicant shall promptly remove the abandoned Surface-Mounted Facility and restore City property as required by the Department and consistent with Applicable Law, at the Applicant's expense. If the Applicant fails to remove the abandoned Surface-Mounted Facility within a reasonable period of time after receiving such a demand from the Department, the Department may take all reasonable, necessary, and appropriate action to remedy the Applicant's failure to comply and may charge the reasonable costs actually incurred including, but not limited to administrative costs, to the Applicant.

F. Upon the receipt of a demand for payment by the Department, an Applicant shall reimburse the City for any costs incurred by the Department to remove Graffiti from a Surface-Mounted Facility, as required by Section 8.B above, or to remove an abandoned Surface-Mounted Facility, as required by Section 8.E above, or the costs may be deducted from the Applicant's deposit under Public Works Code Section 2.4.46(c).

**Section 9. Additional Indemnity Requirements.**

In addition to the indemnity contained in Public Works Code Section 2.4.23(b), or any other indemnity required by Applicable Law, an Applicant other than a Municipal Applicant shall protect, defend, indemnify, and hold harmless the City, its commissions, departments, officers, employees, and agents from and against any and all claims, actions, demands, liability, loss, fines, penalties, damages or expense (including reasonable attorney's fees), for claims for injury or damages (collectively "Claims"), including without limitation, Claims arising out of injury to or death of a person, or loss of or damage to real or personal property or to goodwill allegedly resulting from or arising, directly or indirectly out of the installation, maintenance or use of any Surface-Mounted Facility in the Public Rights-Of-Way authorized pursuant to Applicable Law. In addition to an Applicant's obligation to indemnify the City contained in Public Works Code Section 2.4.23(b) and in this Section, an Applicant other than a Municipal Applicant specifically acknowledges and agrees that it has an immediate and independent obligation to defend the City from any Claim that actually or potentially falls within this indemnification provision, even if the allegations are or may be groundless, false or fraudulent; this obligation arises at the time such claim is tendered to the Applicant by the City and continues at all times thereafter. An Applicant's indemnity obligations hereunder shall continue for so long as the Applicant continues to maintain and use any Surface-Mounted Facility in the Public Rights-Of-Way.

**Section 10. Additional Insurance Requirements.**

A. Without in any way limiting the requirement that an Applicant indemnify the City pursuant to the Section 9 above, and in addition to the insurance obligation contained in Public Works Code Section 2.4.23(c) or any other insurance required by Applicable Law, an Applicant other than a Municipal Applicant must maintain in force, for so long as the Applicant continues to maintain and use any Surface-Mounted Facility in the Public Rights-Of-Way, insurance in the following amounts and coverages:

1. Workers' Compensation, with Employers' Liability Limits not less than \$1,000,000 each accident.

2. Commercial General Liability Insurance with limits not less than \$2,000,000 each occurrence Combined Single Limit for Bodily Injury and Property Damage, including Contractual Liability, Personal Injury, Products and Completed Operations.
  3. Business Automobile Liability Insurance with limits not less than \$2,000,000 each occurrence Combined Single Limit for Bodily Injury and Property Damage, including Owned, Non-Owned and Hired auto coverage, as applicable.
- B. Commercial General Liability and Business Automobile Liability Insurance policies must provide the following:
1. Name as Additional Insured the City, its officers, agents, and employees.
  2. That such policies are primary insurance to any other insurance available to the Additional Insureds, with respect to any claims arising out of this Agreement, and that insurance applies separately to each insured against whom claim is made or suit is brought.
  3. That the City is entitled to 30 days' advance written notice if the policy should be canceled or materially changed.
- C. Should any of the required insurance be provided under a form of coverage that includes a general annual aggregate limit or provides that claims investigation or legal defense costs be included in such general annual aggregate limit, such general annual aggregate limit shall be double the occurrence or claims limits specified above.
- D. In the event an Applicant fails to maintain insurance as required herein, the Department may revoke the Applicant's authority to maintain and use any Surface-Mounted Facility in the Public Rights-Of-Way. Upon such revocation, an Applicant shall remove any Surface-Mounted Facility previously installed in the Public Rights-Of-Way, as required Section 7.C above, and restore the Public Rights-Of-Way, as required in Section 7.D above.

**EXHIBIT A  
PRE-SITE VISIT CHECKLIST**

City and County of San Francisco



Department of Public Works  
Bureau of Street-Use & Mapping

**Surface-Mounted Facility  
Pre-Site visit Checklist**

Applicant Name: \_\_\_\_\_ ADDRESS: \_\_\_\_\_

Contact Name: \_\_\_\_\_ TEL. NO.: \_\_\_\_\_

Date: \_\_\_\_\_ Proposed Location: \_\_\_\_\_

- 1. Five-year plan or letter indicating no additional work is planned for the next five years is on file.
- 2. Verification that cabinet size is consistent with the plans on file.
- 3. Verification of attempts to place Surface-Mounted Facility on private property (at least 3 locations). Please attach the following:
  - a. Copy of letter mailed to property owners
  - b. Copy of mailing list
  - c. Statement verifying date of mailing
  - d. Copy of responses from property owners
  - e. Verification of attempt to enter into an agreement with any interested property owners
- 4. Verification of attempts to place Surface-Mounted Facility underground.
- 5. Verification of attempts to collocate the Surface-Mounted Facility.
- 6. Verification of special requirements that limit the possible locations for the Surface-Mounted Facility.
- 7. Verification that proposed locations conforms to the placement guidelines.
- 8. Verification that an existing Surface-Mounted Facility could/could not be removed.

ITEM NOS. _____ not required. Request for site visit is accepted AND Site visit is scheduled for: _____, 2005 with: _____ Tel. No.: _____ <input type="checkbox"/> Request for site visit is denied <input type="checkbox"/> Site visit not required because: _____ Reviewed By: _____ Tel. No.: _____
---

## EXHIBIT B

### SURFACE-MOUNTED FACILITY PLACEMENT GUIDELINES

The following are guidelines for the Department to use during a site visit to determine acceptable locations for Surface-Mounted Facilities in the Public Rights-of-Way. The Department is not required to apply any guideline that the Department determines is not applicable to a particular installation of a Surface-Mounted Facility.

1. Surface-Mounted Facilities shall be no larger than is reasonably necessary to contain and protect the required equipment.
2. Surface-Mounted Facilities shall not obstruct pedestrians. A minimum of four feet (4') of pedestrian clearance (free of all obstacles for a clear path of travel, unobstructed pedestrian walkway) shall be maintained at all times.
3. Surface-Mounted Facilities shall not intrude on pedestrian "clear zones" at street corners.
4. Surface-Mounted Facilities shall be set back a minimum of five feet (5') from edge of crosswalk areas.
5. Surface-Mounted Facilities shall be set back a minimum of eighteen inches (18") from the face of the curb.
6. Surface-Mounted Facilities shall be set back a minimum of eight feet (8') from any fire escape and/or fire exit.
7. Surface-Mounted Facilities shall be set back a minimum of five feet (5') from any fire hydrant, driveway, curb ramp, or blue zone parking space.
8. Surface-Mounted Facilities shall be set back a minimum of forty inches (40") from any other above-ground structure not otherwise specified herein including, but not limited to, street light poles, parking meters, trees, etc.
9. Surface-Mounted Facilities shall be set back a minimum of sixty feet (60') from any Municipal Railway transit shelter and/or kiosk, unless the location of the Surface-Mounted Facility is coordinated with the transit shelter and/or kiosk.
10. Surface-Mounted Facilities shall be set back a minimum of five feet (5') from any certified street artist's designated area per list to be provided by the Department (which list is complete only as of the date of this order and will be updated when any new street artist's designated areas are established).
11. Surface-Mounted Facilities shall be set back a minimum of sixty feet (60') from any public art work under the jurisdiction of the Arts Commission of San Francisco, except for public art on kiosks, per the San Francisco Civic Art Collection published by the Arts Commission of San Francisco (which book is complete only as of the date of this order and will be updated when any new public art works are established).
12. Surface-Mounted Facilities shall not be placed over any storm drain or other utility facility.
13. Surface-Mounted Facilities shall not obstruct the view of any traffic sign, wayfinding sign, traffic signal or any other existing facility.
14. Surface-Mounted Facilities shall not be placed on the property of, or adjacent to a designated local, State or National Historic Landmark. For the purposes of applying the limitations and conditions specified in this paragraph, in relation to any specific location, the word adjacent shall mean on the same side of the street and in front of the subject building or in front of the next building on either side.
15. Surface-Mounted Facilities shall not be placed in Local Historic Districts listed in Appendices B-L of Article 10 of the San Francisco Planning Code.

16. Surface-Mounted Facilities shall not be placed in Conservation Districts designated in Appendices E-J of Article 11 of the San Francisco Planning Code.
17. Surface-Mounted Facilities shall not be placed in California Register Historic Districts, National Historic Districts, and National Register Historic Districts.
18. Surface-Mounted Facilities shall not front the boundaries of a park, recreation area, or open space.
19. Surface-Mounted Facilities shall be either stainless steel or painted to match the color used for City structures in the vicinity (e.g., JCDecaux green, Embarcadero blue) unless otherwise specified by the Department and shall have graffiti-proof coating.
20. Surface-Mounted Facilities shall be screened by landscaping where appropriate for the neighborhood and required by the Department.
21. Surface-Mounted Facilities shall not unreasonably affect the aesthetic character of neighborhoods or the natural character of regional open spaces in accordance with the City and County of San Francisco General Plan.
22. Surface-Mounted Facilities may be placed in local, State or National Historic Landmarks as discussed in No. 14 above, Local Historic Districts as discussed in No. 15 above, Conservation Districts as discussed in No. 16 above, and California Register Historic Districts, National Historic Districts, National Register Historic Districts as discussed in No. 17 above, and parks, recreation areas, and open spaces as discussed in No. 18 above, if they are to be collocated with existing transit shelters, kiosks, or other street furniture, provided that the size and footprint of the existing facility is not unreasonably increased by the addition of the Surface Mounted Facility.

### EXHIBIT C

#### Example of Area Required to be Noticed



The Applicant shall post the notice in conspicuous places along the Public Rights-Of-Way for a distance of 300 feet on both sides of the street in all directions of the proposed location(s) for the Surface-Mounted Facility. A minimum of two notices shall be posted along the fronting streets in every direction.

**EXHIBIT D**

**City Department Notification**

If the Applicant is seeking to install a Surface Mounted Facility on the property of, or adjacent to a designated local, State or National Historic Landmark; in a Local Historic District listed in Appendices B-L of Article 10 of the San Francisco Planning Code; in a Conservation Districts designated in Appendices E-J of Article 11 of the San Francisco Planning Code; in a California Register Historic District, a National Historic District, or a National Register Historic District, the Applicant shall send notice to the following City departments:

Department of City Planning  
1660 Mission, Suite 500  
San Francisco, CA 94103

Landmarks Preservation Advisory Board  
The Planning Department Preservation Coordinator  
1660 Mission Street, Suite 500  
San Francisco, CA 94103

Preservation Coordinator 415-558-6338  
Landmarks Board Recording Secretary 415-558-6266

San Francisco Arts Commission  
25 Van Ness Ave, Ste 240  
San Francisco CA 94102  
415-252-2591

If the Applicant is seeking to install a Surface Mounted Facility in front of the boundaries of a park, recreation area, or open space, the Applicant shall send notice to the following City departments:

Department of Recreation and Parks  
Planning Unit  
501 Stanyan Street  
San Francisco, CA 94117  
Tel: (415) 831-2700  
Fax: (415) 666-7130

Department of City Planning  
1660 Mission, Suite 500  
San Francisco, CA 94103



**EXHIBIT E**

**COMPANY/AGENCY NAME  
MAILING ADDRESS**

**IMPORTANT NOTICE**

**CONCERNING YOUR RIGHTS**

---

DATE:

Dear San Francisco Resident:

(**Company/Agency Name**) has filed an application with the San Francisco Department of Public Works (DPW) for a permit to install a (**unit name/description**) at one of the following proposed locations: (**location/address**). A photograph of the Surface Mounted Facility (SMF) in each of the proposed locations and the specifications for the SMF are shown on the next page.

(**Briefly describe the nature of the use of the facility and consequence of not installing**)

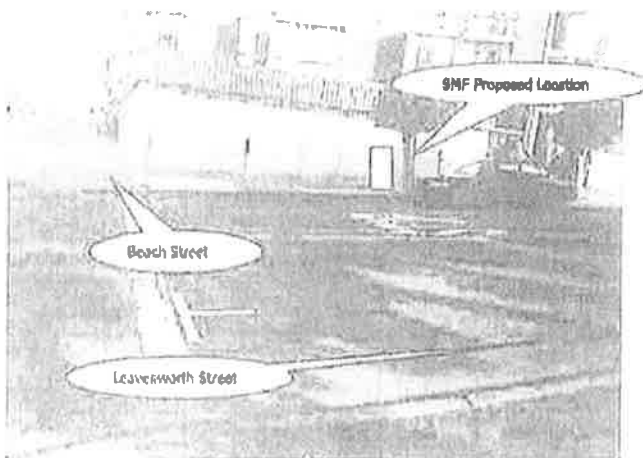
(**Briefly provide information about the safety of the cabinet/unit**)

If you object to the installation of the SMF at any of the proposed locations, you must notify the Department of Public Works of your objection either by phone at (415) xxx-xxxx554-7222 or by mail at the Bureau of Street-use and Mapping, 875 Stevenson Street, Room 460410, San Francisco, California 94103-0942. You have 20 days from the date of this notice to either telephone or send written notice of your objection to DPW. DPW will not consider any objection unless it is made within this 20-day period.

If you submit an objection, DPW may convene a hearing to determine whether the permit for placement of the SMF should be issued. DPW will commence any such hearing within 40 days after the receipt of any objections. You will have the opportunity to express your concerns about the SMF at the hearing should you choose to attend.

Thank you,

**Company/Agency Representative  
Address & Phone**



cabinet is 43" W x 75" H x 41" D, pedestal is 24" W x 48" H x 17" D.

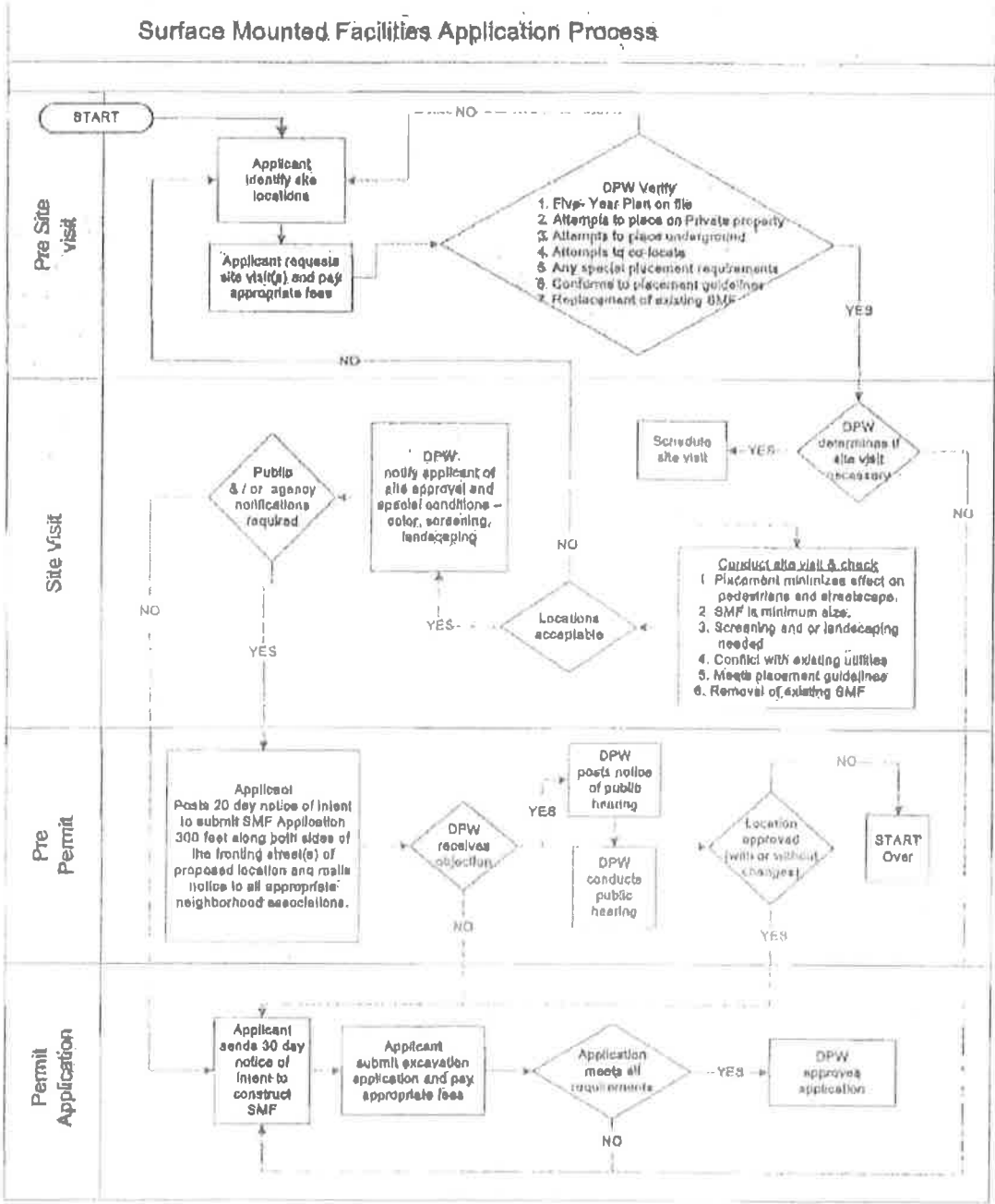
**EXHIBIT F**  
**Surface-Mounted Facility Application Check List**

Each application for a Permit to install a Surface-Mounted Facility (SMF) shall contain the following information:

- a. Transmittal letter containing the following information:
  - i. Identification of proposed location of SMF
  - ii. Type of cabinet (include specification if not on file with the Department of Public Works)
  - iii. Date of site visit
  - iv. Name, address, telephone number, facsimile number and e-mail address for contact person
- b. Drawing showing each of the following:
  - i. Street name
  - ii. Names of cross streets
  - iii. Face of curb (FOC)
  - iv. Property lines (PLs)
  - v. Distance from FOC to face of the SMF
  - vi. Distance from FOC to PLs
  - vii. Distance from FOC to back of the SMF
  - viii. Locations and dimensions of existing above-ground street furniture (utility poles, bus shelters, fire hydrants, garbage receptacles, parking meters, etc) and distance from the proposed location of the SMF
  - ix. Locations and dimensions of existing underground utility facilities (vaults, manholes, handholds, meters, etc.) and distance from the proposed location of the SMF
  - x. Distance from nearest cross street to the SMF
  - xi. Identification of SMF type and dimensions
  - xii. Color of the SMF
  - xiii. Screening or aesthetic changes required by the Department
- c. Photographs of the SMF in the proposed location showing the following:
  - i. Front view of the SMF
  - ii. Side view of the SMF
  - iii. View of the SMF in relation to the nearest building or other structure
- d. The location of any SMF to be removed

**EXHIBIT G**

**Surface Mounted Facilities Application Process**



**EXHIBIT H**  
**Application Deficiency Checklist**  
**SURFACE-MOOUNTED FACILTY APPLICATION**  
**DEFICIENCY NOTICE**

Applicant Name: \_\_\_\_\_ Contact Name: \_\_\_\_\_ Tel. No: \_\_\_\_\_

Proposed Location: \_\_\_\_\_

*The application package is deficient for the reasons indicated below and is returned to:* \_\_\_\_\_

On: \_\_\_\_\_ By: \_\_\_\_\_ Tel  
No. \_\_\_\_\_

1. **Transmittal letter** is missing the following information:
  - a. Identification of proposed location of Surface Mounted Facility (SMF)
  - b. Type of cabinet (include specification if not on file with the Department of Public Works)
  - c. Date of site visit
  - d. Name, address, telephone number, facsimile number and e-mail address for contact person.
  - e. Other: \_\_\_\_\_
  
2. **Detailed Drawing** is missing the following information:
  - a. Street name
  - b. Name of cross streets
  - c. Face of curb (FOC)
  - d. Property lines (PLs)
  - e. Distance from FOC to face of the SMF
  - f. Distance from FOC to PLs
  - g. Distance from FOC to back of the SMF
  - h. Locations of existing aboveground street furniture (utility poles, bus shelters, fire hydrants, garbage receptacles, parking meters, etc) and distance from the proposed location of the SMF.
  - i. Locations of existing underground utility facilities (vaults, manholes, handholds, meters, etc.) and distance from the proposed location of the SMF.
  - j. Distance from nearest cross street to the SMF.
  - k. Other: \_\_\_\_\_
  
3. **Photographs of the SMF** in the proposed location is missing the following:
  - a. Front view of the SMF
  - b. Side view of the SMF
  - c. View of the SMF in relation to the nearest building or other structure
  - d. Other: \_\_\_\_\_

Location of SMF is incorrect. **Explain:** \_\_\_\_\_

**EXHIBIT G**



## RULES OF THE BOARD OF APPEALS

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### ARTICLE I – OFFICERS AND TERMS OF OFFICE

**Section 1.** The President and Vice President shall be elected at the first regular meeting of the Board held after the 15th day of January of each year, or at a subsequent meeting after the 15th day of January. They shall hold office for one year at the pleasure of the Board, and until their successors are elected.

**Section 2.** The Board at any regular or special meeting shall appoint an Executive Secretary, who shall hold office at the pleasure of the Board and shall serve as Department Head of the Board of Appeals.

### ARTICLE II – DUTIES OF OFFICERS

**Section 1.** The President shall preside at all meetings of the Board, and shall perform all other duties necessary or incidental to his or her office.

**Section 2.** In the event of the incapacity or absence of the President, the Vice President shall take the place and perform the duties of the President.

**Section 3.** It shall be the responsibility of the Presiding Officer to assure a fair hearing to all parties, and that these Rules as adopted are adhered to. It shall be the responsibility of the majority of the Board that the duties of the President and Vice President are properly exercised.

**Section 4.** The Executive Secretary shall serve as administrative head of the department and shall have responsibility for all activities of the department. He or she shall direct and supervise the personnel of the department and shall plan, assign, coordinate and review the work and activities of the department. He or she shall allocate the time, personnel and funds of the department and shall be responsible for the administration of all regulatory measures entrusted to the department. He or she shall make investigations and reports of the Board's hearings and official actions, and shall certify all Notices of Decision and Order and all documents relating to

the department. He or she shall examine incoming mail for proper referral and answer correspondence, shall maintain records of accounts and departmental operations, and shall verify payrolls and requisitions. The Executive Secretary shall prepare an agenda for each regular meeting, showing the names of the parties and the nature of the order or decision from which an appeal has been taken.

### **ARTICLE III – MEETINGS**

**Section 1. Regular Meetings.** Regular meetings shall be open to the public and shall be held as scheduled on Wednesdays at 5:00 p.m. in the Board hearing room provided in City Hall.

**Section 2. Special Meetings.** Subject to the provision of appropriate notice, the President or a majority of Board members may call a special meeting at any time.

**Section 3. Meeting Cancellation.** The President may cancel any regular or special meeting when notified by the Executive Secretary that there is insufficient business to be conducted or that a quorum (i.e., three Members) will not be in attendance. The Executive Secretary shall notify Board members, parties and members of the public as soon as reasonably possible that the meeting has been cancelled, and shall cause a notice of the cancelled meeting to be conspicuously posted on or near the door of the meeting place prior to the scheduled time of the meeting.

**Section 4. Notice of Hearing.** When an appeal is filed, the Executive Secretary shall mail notice of the initial hearing to the parties. Announcement at a public hearing of the time and place to which a hearing is rescheduled or continued shall be deemed sufficient notice and no mailed notice shall be required for any such rescheduled or continued hearing.

**Section 5. Order of Agenda.** Requests for jurisdiction and for rehearing, and matters for further hearing shall generally be considered first on the agenda. At the President's discretion, the ordering of items on the published agenda or the order in which the Board takes up items at any meeting may differ depending upon the circumstances.

**Section 6. Order of Presentations.** Except when the Presiding Officer finds good cause to order the presentations otherwise, the order of presentation of an appeal shall be as follows:



(a) In all cases, the appellant shall speak first and shall be allowed seven minutes to present relevant testimony and evidence. Then the permit holder, representatives of the department, board, commission or person from whose order the appeal is taken, and/or other parties, shall be allowed seven minutes for presentation of relevant testimony and evidence. Three minutes for rebuttal shall be provided to all parties in this same order.

(b) In all cases, the Board may request a departmental response at its own discretion.

(c) In cases of multiple appeals of the same departmental action or permit, the appeals shall be joined and the appellants shall each be allowed seven minutes to present relevant testimony and evidence and three minutes for rebuttal. The President shall set the amount of time given to the respondent(s) and other parties, as circumstances warrant and in the interest of fairness, but shall allow no less than seven minutes to present relevant testimony and evidence and three minutes for rebuttal.

(d) Public Comment.

(i) Persons who are not parties to an appeal or representatives of a party may speak once for up to three minutes during the public comment portion of the hearing. The Presiding Officer may limit public comment on an agenda item to less than three minutes per speaker based on such factors as the nature of the agenda item, the number of anticipated speakers for that item, and the number and anticipated duration of other agenda items. Board staff shall provide speaker cards for those intending to speak during public comment to assist in maintaining decorum in the hearing room and to aid in the preparation of Board minutes. The completion of a speaker card is not required; members of the public may speak anonymously.

(ii) Representatives of a party shall address the Board during that party's allotted time and may not also speak during public comment. Representatives are persons with a financial or other close connection to a party, such as family or household members; architects, attorneys, engineers, or similar paid advisors or agents; and, in appeals where an association or organization is a party, officers or board members of the governing board of the association or organization.

**Section 7. General Public Comment.** On each agenda, there will be time set aside for members of the public to address the Board on items of interest to the public that are within the subject matter jurisdiction of the Board and do not relate to a matter calendared on the agenda

for hearing. Each member of the public may address the Board for up to three minutes. (California Government Code §54954.3(a); S.F. Administrative Code §67.17.) Members of the public shall reserve comment with respect to agenda items to when that item is called.

#### **ARTICLE IV – ADMINISTRATIVE RECORD**

**Section 1. Recording as Official Record.** Board proceedings are video recorded and broadcast by SFGTV (Department of Technology). Except as provided in Section 2, below, the SFGTV recording shall be the administrative record for each hearing.

**Section 2. Designating Transcript as Official Record.** Any party (or parties, jointly) may provide a certified court reporter to transcribe an appeal hearing. Upon request of such party or parties prior to the start of the hearing, the Board may designate the court reporter's transcription as the official record of that proceeding if the parties so stipulate, provided that the requestor agrees to supply the Board with a certified copy of the transcript at no cost to the Board.

#### **ARTICLE V – APPEAL PROCEDURES**

**Section 1. Filing an Appeal.** The method of appeal shall be as set forth in the San Francisco Business and Tax Regulations Code, Article I, Sections 8 through 16, 26, 30 and 31, and under these Rules. When counting "calendar days" for purposes of calculating the deadline for filing an appeal, the appeal period begins the day after the date of the written departmental determination being appealed. If the last calendar day falls on a weekend or City holiday, the last day to file the appeal or other action is the next business day.

(a) The appellant shall submit one copy of the permit, application or other departmental determination being appealed.

(b) The appellant shall complete a Preliminary Statement of Appeal form provided by the Board setting forth the reasons or grounds for the appeal and what action is being requested of the Board. The appellant may attach a brief supplementary statement to the Preliminary Statement of Appeal, which shall be double-spaced and shall not exceed one (1) page in length. No other exhibits or submissions are allowed at this time.

(c) The Executive Secretary or his or her designee will assign a hearing date and provide the hearing date and briefing schedule to the parties, in writing.

(d) The appellant shall submit the required fee and provide Board staff with a valid address and telephone number.

(e) Appeals shall be filed at the Board office during regular business hours up to 4:30 p.m.

**Section 2. Briefing.** Briefs and other submittals shall conform to the requirements set out in Section V.4, and will be accepted as follows:

(a) Appellant may submit an **APPELLANT'S BRIEF**, due at the Board office no later than 4:30 p.m. three (3) Thursdays prior to the hearing date.

(b) The permit holder, variance holder, determination holder, Business and Tax Regulations Code, Article I Section 14 party, or Department may submit a **RESPONDENT'S/OTHER PARTIES' BRIEF** (whether or not the appellant submits an Appellant's Brief), due at the Board office no later than 4:30 p.m. one (1) Thursday prior to the hearing date.

(c) **MEMBERS OF THE PUBLIC** who are not parties to an appeal or representatives of a party (as defined in Rule III.6(d)(ii)), are welcome to submit written materials to the Board. Members of the public who want their submittals considered by the Board prior to the hearing, may submit materials due at the Board office no later than 4:30 p.m. one (1) Thursday prior to the hearing date. In addition, non-parties may present materials in person during public comment. This subsection is to give direction to those members of the public who want their submittals to be considered by the Board prior to hearing, and in no way interferes with the public's rights under the San Francisco Sunshine Ordinance (S.F. Adm. Code Ch. 67). Parties to an appeal may request copies of materials submitted by members of the public pursuant to San Francisco Administrative Code Chapter 67.28.

(d) Pursuant to Business and Tax Regulations Code, Article I, Section 14, requestors of Discretionary Review (DR) by the Planning Commission, whose property is immediately adjacent to the subject property and who have prevailed or partially prevailed at the Planning Commission, shall have the status of a party in an appeal to the Board. In the event there is more than one such requestor, the Board may, at its discretion, limit the time for oral

presentation to three minutes for each adjacent property owner and a combined total of three minutes of rebuttal for all adjacent property owners.

(e) If the last calendar day to submit a brief or other submittal falls on a weekend or City holiday, the last day to file the brief or other submittal will be as established by the Executive Secretary.

(f) Parties shall be limited to the briefs or submittals authorized by these Rules unless otherwise instructed by the Board. In the event a public hearing is continued by the Board, the Board shall rule on whether to accept any additional written materials and set the deadline for submittal.

(g) In appeals where architectural, construction or engineering plans are at issue, the permit holder or project sponsor is encouraged to submit the City-approved plans associated with the project at the time they submit their brief. The plans should be reduced to an 11" x 17" format.

(h) The parties are encouraged to submit photographs, maps, plans and drawings as exhibits to their briefs. Such exhibits may also be used in presentations and submitted at hearing by displaying the document on the overhead projector and providing a copy to the clerk. Computer-assisted presentations are permitted at hearing to the extent the requisite technology is available in the hearing room. The presenter bears the sole risk that such technology may not be available or operative at any given meeting.

(i) Except as otherwise provided in this section, the Executive Secretary shall reject late submittals and will not include them in the administrative record in the case or provide them to Board members for their review. A party may file a written request for permission to file late on a form provided by the Board. The request must be provided to the other parties. Late submittals will be accepted upon (i) the consent of the other parties, or (ii) the consent of the President upon a showing of good cause. This section does not apply to the submittal of plans.

(j) These Rules shall be interpreted so as to be consistent with the public's rights under the San Francisco Sunshine Ordinance, S.F. Admin. Code Ch. 67.

**Section 3. Designation of Experts.** The Board may call upon and may designate without charge independent experts as it deems necessary, to report upon and make recommendations concerning technical matters in appeals.

**Section 4. Requirements for Written Submittals.**

(a) All briefs, whether typewritten or handwritten, shall be double-spaced. Typewritten submittals shall be in a font size no smaller than twelve (12) point. The Executive Secretary, at his or her discretion, may reject submittals that do not conform to these requirements.

(b) Unless otherwise permitted by the President pursuant to subsection (vii) below, the following page limits shall apply:

(i) Appeal briefs shall not exceed twelve (12) pages.

(ii) Jurisdiction Request and Rehearing Request briefs shall not exceed six (6) pages.

(iii) Letters requesting revisions to draft Findings submitted pursuant to Section V.8 below shall not exceed three (3) pages. No exhibits or attachments shall be allowed.

(iv) Except for the filing of a letter requesting revisions to draft Findings, in all other cases, submittals may include an unlimited number of pages of exhibits. Exhibits shall not include additional written argument by a party. Where exhibits exceed ten (10) pages in length, the Board encourages the parties to separate exhibits with tabs and provide a table of contents.

(v) Parties may offer arguments and exhibits as part of their oral presentations to the Board which are not part of their written brief.

(vi) The Executive Secretary shall reject any pages of briefing that exceed the applicable page limit and shall not include them in the administrative record in the case or provide them to Board members for their review.

(vii) A party may file a written request for permission to file a longer brief at least 48 hours before the brief is due. The request must be provided to the other parties, and must state extraordinary reasons why the argument cannot be made within the stated page limit. For good cause shown, the President may grant such a request.

(c) In all cases, an original and ten copies of the brief, all exhibits, including plans, must be submitted, in collated form, to the Board office at the time of filing.

(d) Except for the filing of a Preliminary Statement of Appeal, a Jurisdiction Request or Rehearing Request, every submittal by a party must be delivered to the opposing parties or, if

known, to a party's representative, using a method that ensures delivery on the same day as it is delivered to the Board. An item is "submitted" when delivered to the Board offices.

**Section 5. Communications With the Board.**

The Board is a quasi-adjudicatory body whose decisions are rendered based on the evidence that is before the Board in the public record. In order to preserve the fairness and integrity of the Board's proceedings, any evidence that the parties or members of the public wish the Board to consider in deciding a case must be made part of the public record as follows:

(a) Parties, their representatives, and members of the public should present evidence regarding a pending case only through the following means: (i) at a public meeting of the Board; and/or (ii) through written submissions to the Board, as provided for in these Rules. Parties, their representatives, and members of the public should refrain from communicating evidence, facts or information about the subject matter of a pending case outside of the public record.

(b) Any written communications to the Board containing information or evidence pertaining to a case pending before the Board must be submitted through the Executive Secretary, and not sent to individual Board member(s).

(c) This Section does not apply to communications with the Board about purely procedural matters or ministerial issues, including but not limited to, scheduling hearings.

(d) This Section is in no way intended to interfere with the public's rights under the San Francisco Sunshine Ordinance (S.F. Adm. Code Ch. 67).

**Section 6. Site Visits.** If a Board member makes a site visit to the subject property of a pending appeal, the Board member shall limit any discussion to understanding the site's physical conditions underlying the appeal, and shall not otherwise discuss the matter under appeal outside of a public hearing. Prior to commencement of the hearing to which such visit relates, the Board member must disclose the visit, and what he or she observed during the visit, on the record. If a quorum of the Board conducts a site visit at the same time, it must be noticed pursuant to the special meeting requirements of the Sunshine Ordinance (S.F. Admin. Code Ch. 67.6(f)).

### **Section 7. Continuances and Reschedulings.**

(a) At the time of hearing, upon the request of any party, the Board may grant rescheduling requests or continuances for good cause shown. The Board generally will not reschedule a matter based solely on the fact that fewer than five members are present at the hearing. But when the Board hears a matter with less than five members present, and the vote(s) of the missing member(s) could alter the Board's decision, the Board generally will move to continue its deliberation so that the missing member(s) may participate in the final vote.

(b) At any time before the hearing date, the parties may jointly request that the Executive Secretary reschedule the hearing to a mutually agreed upon date. Where a rescheduling request is opposed by one or more parties, the President may approve the request if it is made prior to the publication of the agenda for that hearing. After the relevant meeting agenda has been published, a contested rescheduling request may be granted only by a majority of the members present at a public hearing on the matter.

### **Section 8. Consideration of Written Findings**

In cases where the Board decides to adopt written Findings summarizing the reasons for its decision at a separate subsequent hearing, the parties will be given an opportunity to review and comment on the draft Findings before they are considered by the Board. In such cases, parties may submit comments to the Executive Secretary in a format and on a schedule specified by the Executive Secretary. If any suggested revisions are not accepted by the Executive Secretary, the parties may, but are not required to, submit a letter to the Board addressing the change(s) requested and the reason(s) for or against such change(s) one Thursday prior to the Board's hearing on the Findings. Such letter must conform to the requirements set out in Section V.4. In addition, the parties will have three (3) minutes to present oral argument to the Board at the hearing on the Findings.

### **Section 9. Rehearing Requests.**

(a) Requests for rehearing must be filed within ten days of the hearing at which the Board made its decision. A Rehearing Request may be filed only in writing by a party to an appeal. Written requests for rehearing shall conform to the briefing requirements in Section V.4. The response to a written request for rehearing must be submitted by the other party or real party in interest no later than ten days from the date of filing and shall conform to the briefing requirements set out in Section V.4. Any written material from any party that is not submitted in

accordance with these Rules shall only be accepted by the Board pursuant to Section V.4. No requests for rehearing shall be accepted after the Board has either considered and rejected such a request for rehearing or has voted to rehear such a matter and has reheard it and voted.

(b) Except in extraordinary cases, and to prevent manifest injustice, the Board may grant a Rehearing Request only upon a showing that new or different material facts or circumstances have arisen, where such facts or circumstances, if known at the time, could have affected the outcome of the original hearing. The written request shall state:

- (i) the nature and character of the new facts or circumstances;
- (ii) the names of the witnesses and/or a description of the documents to be produced; and
- (iii) why the evidence was not produced at the original hearing.

(c) Failure to exercise due diligence to produce the new facts and circumstances at the previous hearing shall be deemed grounds for denial of the request.

(d) The Board shall allow testimony of up to three minutes from each party when hearing a Rehearing Request.

(e) This section shall not apply to any motion to rehear a case made by the Board's own initiative.

#### **Section 10. Jurisdiction Requests.**

(a) After the appeal period has expired, the Board lacks jurisdiction over a matter except in extraordinary cases where the Board finds that the City intentionally or inadvertently caused the requestor to be late in filing the appeal.

(b) A request for jurisdiction must be in writing and shall conform to the briefing requirements set out in Section V.4. The response to a written request for jurisdiction must be submitted by the permit or determination holder(s) no later than ten days from the date of filing, and shall conform to the briefing requirements set out in Section V.4. Any written material from any party that is not submitted in accordance with these Rules shall only be accepted by the Board pursuant to Section V.4.

(c) The Board shall allow testimony of up to three minutes from each party when hearing a Jurisdiction Request.



(d) If the Board grants a Jurisdiction Request, the requestor must file any appeal within five (5) days from the date of the Board's decision.

**Section 11. Administrative Dismissals.** The Executive Secretary shall administratively dismiss any appeal for which the underlying subject matter has become moot as a matter of law. The Executive Secretary shall promptly notify all parties to such appeal that the matter has been dismissed.

**Section 12. Parliamentary Procedure.** At the discretion of the President, except where the Charter or other rules provide required procedure, meetings shall be governed by the most recent edition of Robert's Rules of Order.

**Section 13. Indigency.** The Executive Secretary may waive the required appeal fee where the filing party meets the indigency standards set out in California Government Code Section 68632 or its successor, and submits an Affidavit of Indigency.

## ARTICLE VI – AMENDMENTS

**Section 1. Amendment of Rules.** These Rules may be amended by the Board at any Regular Meeting by a majority vote following a public hearing, provided that at least 10 days public notice is given.

Rules effective as of November 16, 1982; Amended August 28, 1985; Amended February 5, 1986; Amended April 20, 1988; Amended November 30, 1988; Amended October 14, 1992; Amended September 22, 1993; Amended April 12, 1995; Amended July 10, 1996; Amended February 5, 1997; Amended August 13, 1997; Amended June 10, 1998; Amended February 10, 1999; Amended April 4, 2001; Amended November 7, 2001; Amended January 9, 2002; Amended February 20, 2008; Amended July 9, 2008; Amended December 15, 2010.

**EXHIBIT H**



**SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SAN FRANCISCO**

**Document Scanning Lead Sheet**

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Case Number: CPF-11-511369

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**MEMORANDUM OF POINTS AND AUTHORITIES**

**NEXTG NETWORKS OF CALIFORNIA, INC., A DELAWARE VS. THE CITY AND  
COUNTY OF SAN FRANCISCO et al**

001C04314221

**Instructions:**

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7 Attorneys for Petitioner  
8 Crown Castle NG West Inc.

9 IN THE SUPERIOR COURT STATE OF CALIFORNIA  
10 IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO  
11 UNLIMITED JURISDICTION

13 CROWN CASTLE NG WEST INC., a  
14 Delaware corporation,  
15  
16 Petitioner,  
17  
18 v.  
19 THE CITY AND COUNTY OF SAN  
20 FRANCISCO, THE CITY AND COUNTY  
21 OF SAN FRANCISCO DEPARTMENT OF  
22 PUBLIC WORKS, and THE CITY AND  
23 COUNTY OF SAN FRANCISCO BOARD  
24 OF APPEALS, public entities organized and  
25 existing under the laws of the State of  
26 California,  
27  
28 Respondents.

Case No. CPF-11-511369

**PETITIONER CROWN CASTLE NG  
WEST INC.'S MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT OF MOTION FOR WRIT OF  
ADMINISTRATIVE MANDAMUS OR  
WRIT OF MANDATE**

**Date:** February 5, 2014  
**Time:** 9:30 a.m.  
**Dept:** 302

**Petition Filed: June 21, 2011**

**FILED**  
San Francisco County Superior Court  
DEC 18 2013  
CLERK OF THE COURT  
BY: \_\_\_\_\_ Deputy Clerk

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## I. INTRODUCTION

1  
2 This case stems from the arbitrary denial of a wireless facility permit to Petitioner Crown  
3 Castle NG West Inc. ("Crown Castle" or "Petitioner") to place small equipment and a small  
4 wireless antenna on a utility pole in the public right-of-way near 156 27th Avenue in San  
5 Francisco.<sup>1</sup> Respondents the City and County of San Francisco ("San Francisco"), the City and  
6 County of San Francisco Department of Public Works ("DPW"), and the City and County of San  
7 Francisco Board of Appeals ("Board of Appeals" or "Board") (collectively, the "City")  
8 inappropriately accepted an untimely appeal of Crown Castle's wireless permit by two local  
9 residents in excess of its jurisdiction and the Board of Appeals' own rules. The City then denied  
10 the wireless permit purportedly because of an error in the City's general map and ordered Crown  
11 Castle to remove its equipment. The California Court of Appeal immediately granted Crown  
12 Castle a peremptory writ of mandate commanding this Court to stay the City's directive to remove  
13 the equipment pending final resolution of this proceeding. The City then refused to correct its  
14 error by promptly processing Crown Castle's renewed permit application. What shows through  
15 the City's actions is its clear antipathy towards wireless telecommunications facilities.

16 When Crown Castle applied for the wireless facility permit at this location, the permit was  
17 granted (Permit No. 10WR-0021)(the "Permit"). But almost four months after the expiration of  
18 the appeal period, the Board of Appeals improperly accepted an untimely appeal by Jeff Cooper  
19 and Nicole Cooper (the "Coopers"), residents of 156 27th Avenue, in direct violation of the  
20 Board's own rules which prohibit it from assuming jurisdiction over a late appeal except in  
21 "extraordinary cases" where it finds that the City "intentionally or inadvertently caused the  
22 requestor to be late in filing the appeal". Section 10(a) of the Rules of the Board of Appeals  
23 ("Jurisdiction Requests"). Though the City did not in any way intentionally or inadvertently cause  
24 the Coopers' late appeal, the Board accepted the appeal on the purported basis that local residents  
25 in the vicinity "should have" been provided notice of the wireless facility application, though such  
26 notice was not required by any law. The Board then granted the Coopers' appeal and revoked the

27  
28 <sup>1</sup> Crown Castle was formerly known as NextG Networks of California, Inc., the original petitioner  
in this proceeding. On May 17, 2012, NextG filed with the Secretary of State of the State of  
California an Amended Statement and Designation officially changing its name to Crown Castle  
NG West Inc. Pet., ¶¶ 1-2. On December 12, 2013, pursuant to the parties' stipulation, this Court  
entered an Order recognizing the name change in this action.



1 Permit because of a purported error in the City's map, which failed to designate this portion of  
 2 27th Avenue as having a "good" view, requiring approval by the City's Planning Department.

3 Crown Castle petitions this Court for a writ of traditional mandate under Code of Civil  
 4 Procedure § 1085 or for administrative mandate under Code of Civil Procedure § 1094.5, directing  
 5 the City to issue the Permit. The Board unlawfully accepted the Coopers' late appeal in violation  
 6 of its own rules and in excess of its jurisdiction. Also, its acceptance of the late appeal and its  
 7 subsequent revocation of the Permit was an abuse of discretion, wholly unsupported by the law or  
 8 the evidence in the administrative record. Additionally, the denial of the Permit exceeded the  
 9 City's legal powers, in violation of Sections 7901 and 7901.1 of the Public Utilities Code, which  
 10 grants a statewide franchise to use and occupy the public rights of way within California without  
 11 the need for any discretionary approval by local governments. Writ relief is appropriate because  
 12 Crown Castle has no other adequate legal remedy and the City has exceeded its jurisdiction and  
 13 abused its discretion by accepting the Coopers' very late appeal and denying the Permit.

## 14 II. STATEMENT OF FACTS

### 15 A. Crown Castle's Services

16 Crown Castle is a telecommunications provider that has installed personal wireless service  
 17 facilities in the public rights of way in San Francisco. Crown Castle's Verified Petition for Writ  
 18 of Mandate ("Pet."), ¶¶ 1-11. Crown Castle holds a certificate of public convenience and  
 19 necessity ("CPCN") from the California Public Utilities Corporation ("CPUC") to provide full  
 20 facilities-based and resold local exchange, access and interexchange telecommunications services  
 21 in California. *Id.* Crown Castle is a "carriers' carrier," meaning that it constructs "distributed  
 22 antenna systems" via which it provides telecommunications services to other companies, who then  
 23 use Crown Castle's services and systems to provide wireless services to retail consumers.<sup>2</sup> *Id.*

24 Crown Castle's typical telecommunications service offering, and the one that it provides  
 25 currently in San Francisco, involves a communication signal handed off from Crown Castle's

26 <sup>2</sup> Crown Castle provides telecommunications services that consist of providing transport, over  
 27 fiber optic lines, of Crown Castle's customers' communications (both voice and data) between  
 28 points designated by the customer without alteration of the content of the communications. Crown  
 Castle's customers typically are providers of retail wireless telecommunications services [also  
 known as Commercial Mobile Radio Services ("CMRS") providers, cellular, or Personal  
 Communications Services ("PCS") providers]. Crown Castle may also provide  
 telecommunications services to other large users of telecommunications services. Pet., ¶¶ 1-11.

1 customer to Crown Castle that Crown Castle then transports over its fiber optic facilities. *Id.* This  
2 handoff and transport takes place at and through equipment configurations called “nodes” that are  
3 located on utility or streetlight poles located in the public rights-of-way or in private utility  
4 easements. *Id.*

5 The typical node in Crown Castle’s network consists of electronic equipment that converts  
6 Radio Frequency (*i.e.*, “RF” or wireless) format communications to light signals carried over  
7 Crown Castle’s fiber optic lines. *Id.* The equipment comprising a typical node in Crown Castle’s  
8 network includes a small, low-power antenna, laser and amplifier equipment for the conversion of  
9 RF signals to optical signals (and vice versa, *i.e.*, from optical to RF), that is connected to the  
10 antenna, fiber optic lines, and associated equipment such as power supplies, all of which are  
11 owned, operated, controlled, managed, or maintained by Crown Castle. *Id.* To operate its  
12 network, Crown Castle routinely applies for and receives wireless permits to construct its nodes in  
13 the public rights-of-way in San Francisco. *Id.*

14 **B. Crown Castle’s Permit Application for the Node at 27th Avenue**

15 In July 2010, Crown Castle filed a complete application for a wireless permit to install a  
16 node on a utility pole in the public right of way between 156 27th Avenue and 161 27th Avenue  
17 (between Lake and El Camino Del Mar) (hereafter the “Site”) in San Francisco. *See* the  
18 Administrative Record (“AR”) 243-328.<sup>3</sup> Crown Castle’s permit application complied in every  
19 respect with the City’s then-applicable wireless permitting requirements under Administrative  
20 Code § 11.9(b) (the “Wireless Ordinance”) and DPW Order No. 177,163. *See* Crown Castle’s  
21 Request for Judicial Notice, filed concurrently, Exhibits A and B.

22 On September 8, 2010, DPW found that Crown Castle’s application fully complied with the  
23 Wireless Ordinance and granted Crown Castle’s application for the Permit for the Site. AR 135-  
24 178.

25 In reliance on the Permit, Crown Castle completed substantially all of the construction for its  
26 node at the Site on December 28, 2010, and on December 31, 2010 the Site began carrying  
27 commercial and E911 (emergency 911) telecommunications traffic. *Pet.*, ¶¶ 15-17. The node, as  
28 constructed, is minimally visually intrusive and does not negatively impact the view on 27th

<sup>3</sup> Pursuant to the City’s Notice of Certification of Administrative Record, the City will lodge a copy of the Administrative Record with the Court at the time Crown Castle files its opening brief.

1 Avenue. AR 321-328. For example, the node equipment box measures 47.34 inches by 14 inches  
2 by 8.31 inches and the antenna is just 22.8 inches by 10 inches by 5.5 inches. Pet., ¶¶ 15-17. The  
3 node is largely screened by existing street trees, and the utility poles at the Site already contain  
4 various utility equipment similar in size to Crown Castle's node, as well as telephone and electric  
5 power lines. *Id.* Importantly, Crown Castle's node at the Site was registered in both the State and  
6 Federal Public Safety Answering Points ("PSAP") systems. *Id.* Thus, removal of this node would  
7 create a gap in which fire, police, and other first responders would encounter a dead zone and an  
8 inability to respond to emergencies or E911 calls. *Id.*

9 **C. The Coopers' Late Appeal of the Original Permit**

10 Pursuant to the City's Code, the period for appeal of DPW's permit approval to the Board of  
11 Appeals expired 15 days after the September 8, 2010 decision. *See* Article 1, Section 8 of the City  
12 and County of San Francisco's Business and Tax Regulations Code. Nevertheless, almost four  
13 months later, on December 22, 2010, the Coopers, residents of 156 27th Avenue, filed a request  
14 for permission to allow a late-filed appeal with the Board. AR 1-64; AR 146-238.

15 Section 10(a) of the Rules of the Board of Appeals, pertaining to "Jurisdiction Requests"  
16 governs late appeals. It provides that: "After the appeal period has expired, the Board lacks  
17 jurisdiction over a matter except in extraordinary cases where the Board finds that the City  
18 intentionally or inadvertently caused the requestor to be late in filing the appeal." Request for  
19 Judicial Notice, Exhibit C. There is no other authority for the Board of Appeals to accept a late  
20 appeal.

21 At the hearing before the Board of Appeals on whether to allow the Coopers' late appeal, the  
22 Board conceded that Crown Castle's node fully complied with the Wireless Ordinance and DPW's  
23 standards and that all permit conditions were met. AR 24, AR 239-331. It also acknowledged that  
24 it was limited in what actions it could take with respect to fully compliant wireless node permits.  
25 AR 6. Nevertheless, acting in excess of its jurisdiction and the City's Code, on January 12, 2011,  
26 the Board granted the Coopers' request to file an appeal of Crown Castle's Permit nearly four  
27 months after the expiration of the time for filing appeals. AR 1-64. The Board ignored its own  
28 jurisdictional rule allowing expired appeals only in "extraordinary cases" where the City  
"intentionally or inadvertently" was responsible for the Coopers' late appeal, as required by  
Section 10(a) of the Rules of the Board of Appeals. Instead, the Board arbitrarily decided to

1 accept jurisdiction on the sentiment that there should have been a notice requirement for nearby  
2 residents in the vicinity of the wireless node, though no such requirement existed in the Wireless  
3 Ordinance or any other law. AR 1-64. The Board's decision was unanimous. *Id.* Commissioner  
4 Garcia summed up the Board's motivation for accepting the Coopers' untimely appeal as follows:  
5 "If [Crown Castle] had reached out to neighbors [to provide notice], I would not even think about  
6 granting jurisdiction". AR 39.

7 After the Board accepted jurisdiction of the expired appeal, the Coopers appealed the  
8 validity of Crown Castle's Permit on January 18, 2011. AR 1-3. The Board held a hearing on the  
9 Coopers' appeal on March 16, 2011. AR 68-126. On April 20, 2011, the Board of Appeals ruled  
10 to revoke Crown Castle's Permit, finding that the City's DPW had created and reviewed an  
11 inaccurate City map when it approved the Permit. AR 1-3. The Board found that DPW should  
12 have referred the application to the Planning Department for consideration of the visual impact of  
13 Crown Castle's node on the view on 27th Avenue because that street is designated as having a  
14 "good" view. *Id.* The Board explicitly found that the error and reason for revoking the Permit  
15 was the fault of the City, not Crown Castle, and invited Crown Castle to apply again under a much  
16 more burdensome wireless ordinance which the City had just recently passed.<sup>4</sup> *Id.* The City then  
17 refused to correct its error by promptly processing Crown Castle's renewed permit application  
18 under the new ordinance. AR 116-126.

19 On May 2, 2011, Crown Castle filed a Rehearing Request with the Board. *Id.* On May 20,  
20 2011, the Board denied the rehearing request and released its official findings and conclusions  
21 purporting to revoke Crown Castle's Permit for the Site. *Id.*

22  
23 <sup>4</sup> On February 13, 2011, during the Coopers' appeal of the Permit, the City enacted  
24 Ordinance No. 12-11, which rewrote the City's wireless permitting process and created Public  
25 Works Code Article 25 and repealed the Wireless Ordinance (former Administrative Code §  
26 11.9(b)). AR 240. Public Works Code Article 25 became effective on February 13, 2011, and  
27 created a new and significantly more burdensome wireless permitting process. *Id.* After the  
28 Board of Appeal revoked Crown Castle's Permit, Crown Castle submitted a renewed application  
for a wireless permit under Article 25 to operate its node at the Site, which was granted and  
affirmed by both DPW and the Planning Department on multiple occasions in the face of protests  
from the Coopers. After the Coopers appealed the new permit to the Board of Appeals, the Board  
granted the appeal and denied the permit on unsupported aesthetic grounds that had no basis in the  
record. Crown Castle sought writ relief from the denial in this Court in a related case, entitled  
*Crown Castle NG West, Inc. v. City & County of San Francisco, et al.* (Case No. CPF 12-512623).  
On October 28, 2013, Judge Ernest Goldsmith entered an Order denying Crown Castle's  
application for writ of administrative mandamus and writ of mandate.

1 **D. DPW Demands Removal of the Node and Crown Castle Seeks Writ Relief**

2 The Board's decision did not require the removal of Crown Castle's node at the Site. Pet.,  
3 ¶¶ 31-36. Nor did the Board's decision authorize DPW to require the removal of, or authorize  
4 DPW itself to remove, Crown Castle's node at the Site. *Id.* Nonetheless, on May 25, 2011, DPW  
5 sent Crown Castle a letter demanding that Crown Castle remove the node by June 20, 2011. *Id.*  
6 By e-mail sent June 17, 2011, DPW ordered Crown Castle to remove the node by June 20, 2011 or  
7 else threatened that DPW would remove the node itself. *Id.*

8 On June 21, 2011, Crown Castle filed a Verified Petition for Writ of Mandate or  
9 Administrative Mandate in this action, challenging the City's actions described. Pet., ¶1-57. In  
10 the related appellate writ proceeding entitled, *NextG Networks of California, Inc. v. Superior*  
11 *Court of City and County of San Francisco, et al.*, First District Court of Appeal Case No.  
12 A132482, the Court of Appeal issued a peremptory writ of mandate commanding this Superior  
13 Court to issue an order granting a stay of the directive to Crown Castle remove its node at the Site  
14 pending final resolution of proceedings in the Superior Court. Request for Judicial Notice, Exhibit  
15 D. On the issue of likelihood of success, the Court of Appeal's opinion expressly stated that "in  
16 view of the fact that the failure to obtain planning department approval resulted from two errors on  
17 the part of the city, and that without knowledge of the errors [Crown Castle] relied on the permit,  
18 [Crown Castle's] position may well have merit." *Id.*

19 **III. ARGUMENT**

20 **A. Standard of Review**

21 A petition for writ of mandate or mandamus is the appropriate method of obtaining judicial  
22 review of decisions issued by an agency. A court may review an agency action pursuant to a writ  
23 of mandate or a writ of administrative mandamus. CCP §§ 1085, 1094.5. Crown Castle seeks  
24 review pursuant to both Code of Civil Procedure §§ 1985 and section 1094.5.

25 A Court may issue a writ of mandate to compel the performance of an act which the law  
26 specially enjoins, as a duty resulting from an office, trust or station. CCP § 1085. Mandate lies  
27 when (1) the respondent has a clear, present duty to act, and (2) the petitioner has a beneficial right  
28 to performance of that duty. *People ex. Rel. Younger v. County of El Dorado* (1971) 5 Cal. 3d  
480, 491; *Conlan v. Bonta* (2002) 102 Cal. App. 4th 745, 752. Code of Civil Procedure § 1086  
provides that when a verified petition is submitted by a party "beneficially interested," a writ  
"must issue where there is not a plain, adequate speedy remedy in the ordinary course of law."

1           Alternatively, a Court may issue a writ of mandate where an administrative order or decision  
2 is made in excess of the administrative body's jurisdiction, or as a result of a prejudicial abuse of  
3 discretion. CCP § 1094.5(a), (b). "Mandamus will lie to correct an abuse of discretion or the  
4 actions of an administrative agency which exceed the agency's legal powers." *Saleeby v. State*  
5 *Bar* (1985) 39 Cal. 3d 547, 562. An abuse of discretion is established if the agency did not  
6 proceed as required by law, the administrative decision is not supported by the findings, or the  
7 findings are not supported by the evidence. CCP § 1094.5(b).

8           In determining whether an agency's findings are supported by the evidence, the standard of  
9 review depends on the nature of the right involved. CCP § 1094.5(c). If the administrative  
10 decision substantially affects a fundamental vested right, the trial court must exercise its  
11 independent judgment on the evidence. *Wences v. City of Los Angeles* (2009) 177 Cal. App. 4th  
12 305, 313. The trial court must not only examine the administrative record for errors of law, but  
13 must also conduct an independent review of the entire record to determine whether the weight of  
14 the evidence supports the administrative findings. *Id.* If, on the other hand, the administrative  
15 decision neither involves nor substantially affects a fundamental vested right, the trial court's  
16 review is limited to determining whether the administrative findings are supported by substantial  
17 evidence. *Id.* For purposes of applying the independent judgment test, a fundamental vested  
18 right<sup>5</sup> is one that is already possessed as opposed to a right that is merely sought. *Kalway v. City*  
19 *of Berkeley* (2007) 151 Cal. App. 4th 827, 832.

20           Because Crown Castle has been operating its node at the Site since the City issued the  
21 Permit in 2010, its rights at the Site have vested and this Court should exercise the independent  
22 judgment standard of review with respect to the evidence. But even an application of the  
23 substantial evidence standard will result in the granting of this petition as the Board of Appeals'  
24 decision to accept the late appeal and deny the Permit was in excess of its jurisdiction and an  
25 abuse of discretion. The Board failed to proceed in the manner required by law and its findings  
26 were arbitrary and capricious, and wholly unsupported by the Board's own rules and the evidence  
27 in the administrative record.

28 <sup>5</sup> Under *Whaler's Vill. Club v. Cal. Coastal Com.* (1985) 173 Cal. App. 3d 240, 252, the test for  
"vestedness" and "fundamentalness" of a right is one and the same. "The ultimate question in  
each case is whether the affected right is deemed to be of sufficient significance to preclude its  
extinction or abridgement by a body lacking judicial power." *Id.*

1 **B. The Board of Appeals Exceeded its Jurisdiction and Abused Its Discretion By**  
2 **Accepting the Coopers' Expired Appeal and Denying the Permit**

3 Should the Court determine the substantial evidence standard of review is applicable to the  
4 denial of the Permit, it should issue the writ as the Board of Appeals' decision to accept the  
5 Coopers' late appeal and deny the Permit was in excess of its jurisdiction and an abuse of  
6 discretion.

7 Abuse of discretion is established if the Court determines the City has not proceeded in the  
8 manner required by law or that its findings are not supported by substantial evidence in light of the  
9 whole record. Code of Civil Procedure § 1094.5(c). Substantial evidence is defined as relevant  
10 evidence that a reasonable mind might accept as adequate to support a conclusion. *California*  
11 *Youth Authority v. State Personnel Bd.* (2002) 104 Cal. App. 4th 575. It has been described as  
12 "[e]vidence of ponderable legal significance . . . reasonable in nature, credible, and of solid value."  
13 *Young v. Gannon* (2002) 97 Cal. App.4th 209, 225. In applying the substantial evidence standard,  
14 a trial court must review the entire administrative record, including evidence that does not support  
15 the agency's decision. *Bixby v. Pierno* (1971) 4 Cal. 3d 130, 143 n.10.

16 The Board of Appeals' decision to accept the Coopers' extremely late appeal of the Permit  
17 exceeded its jurisdiction and was a clear abuse of discretion as failed to proceed in the manner  
18 required by law and its findings fail the substantial evidence standard. In accepting jurisdiction of  
19 the expired appeal, the Board wholly ignored its own governing rules. Section 10(a) of the Rules  
20 of the Board of Appeals, which it is bound to follow, clearly mandates that the Board does not  
21 have jurisdiction over an expired appeal except in "extraordinary cases where the Board finds that  
22 the City intentionally or inadvertently caused the requestor to be late in filing the appeal".  
23 Request for Judicial Notice, Exhibit C.

24 Despite this clear mandate, the Board accepted jurisdiction without any finding that the  
25 Coopers' late appeal was in any way caused by the City. Indeed, under the facts, it could not  
26 possibly have made such a finding. Instead, the Board contrived out of thin air an imaginary  
27 "notice" requirement to neighbors in the vicinity that did not exist in the Wireless Ordinance or  
28 any other relevant law. As Commissioner Garcia noted at the hearing, he was inclined to accept  
jurisdiction over the late appeal simply because he thought a notice requirement for nearby  
residents regarding the wireless facility "should have" been in place. AR 39. As he summed up  
the Board's reasoning, "[i]f [Crown Castle] had reached out to neighbors, I would not even think

1 about granting jurisdiction".<sup>6</sup> *Id.* These arbitrary requirements manufactured by the Board,  
 2 coupled with its wholly unsupported written findings and conclusions, demonstrate an antipathy  
 3 towards wireless facilities and a complete disregard of its own jurisdictional laws and evidence in  
 4 the administrative record. It proceeded in excess of its jurisdiction by accepting the Coopers' late  
 5 appeal. Moreover, it abused its discretion by failing to proceed in the manner required by law and  
 6 its decision is not supported by the substantial evidence standard of review. As such, a writ should  
 7 issue granting the Permit.

8 Additionally, the Board of Appeals' denial of the Permit on appeal also exceeded its  
 9 jurisdiction and was a clear abuse of discretion. Since the Board's initial acceptance of the appeal  
 10 exceeded its jurisdiction, its subsequent denial of the Permit lacked any jurisdictional foundation.  
 11 Moreover, the facts of this case make clear that Crown Castle has done everything in its power to  
 12 follow proper procedure to obtain its Permit and operate its node at the Site. DPW and the Board  
 13 of Appeals admit that the permit was revoked, not because of Crown Castle's mistake, but because  
 14 of the City's. AR 13-39. The City itself created the erroneous map relied on in the permitting  
 15 process, which failed to designate the Site as a "good" view street requiring DPW to refer the  
 16 application to the Planning Department for consideration of the visual impact of Crown Castle's  
 17 node on the view in compliance with the Wireless Ordinance. AR 1-3. The Board, on review,  
 18 failed to take any of this evidence in the record into consideration. Its denial of the Permit  
 19 demonstrated a complete disregard of the law and evidence in the administrative record. Clearly,  
 20 its actions were in excess of its jurisdiction and an unreasonable abuse of discretion, warranting  
 21 the issuance of a writ granting the Permit.

22 **C. The Board's Acceptance of Jurisdiction and Denial of the Permit Are Not Supported  
 23 By the Weight of the Evidence**

24 Because Crown Castle has been operating at the Site since the City first issued the Permit,  
 25 Crown Castle's rights at the Site have vested. California's vested rights doctrine can be  
 26 summarized as follows:

27 Once a use permit has been properly issued the power of a municipality to  
 28 revoke it is limited . . . . Where a permit has been properly obtained and in  
 reliance thereon the permittee has incurred material expense, he acquires a  
 vested property right to the protection of which he is entitled.

<sup>6</sup> The Board altogether ignored representations by Crown Castle's representative at the hearing that she personally provided courtesy notice to neighborhood residents in the vicinity of the wireless node. AR 49-50.



1 *Goat Hill Tavern v. City of Costa Mesa* (1993) 6 Cal. App. 4th 1519, 1530 (citations omitted). *See*  
 2 *also Malibu Mts. Rec. v. County of L.A.* (1998) 67 Cal. App. 4th 359, 367 (“it seems clear that a  
 3 grant of a [conditional use permit] with subsequent reliance by the permittee creates a fundamental  
 4 vested right that subjects a revocation to judicial review under the independent judgment test”).

5 Pursuant to Code of Civil Procedure § 1094(c), Crown Castle is entitled to independent  
 6 judicial review of the Board’s actions accepting jurisdiction over the Coopers’ untimely appeal  
 7 and denying the Permit under the “independent judgment test.” *Strumsky v. San Diego County*  
 8 *Employees Ret. Ass’n* (1974) 11 Cal. 3d 28, 31 (if the agency decision affects a vested right, the  
 9 trial court must exercise its independent judgment on the evidence and find an abuse of discretion  
 10 if the findings are not supported by the weight of the evidence).

11 Because the Board’s decision denying the Permit fails to meet the substantial evidence  
 12 standard of review, as demonstrated above, it also cannot meet the more rigorous independent  
 13 judgment standard of review.

14 **D. The Wireless Ordinance Exceeds the City’s Legal Powers in Violation of the Public  
 15 Utilities Code**

16 The City’s Wireless Ordinance exceeds the City’s legal powers in violation of Public  
 17 Utilities Code §§ 7901 and 7901.1. Public Utilities Code § 7901 grants telephone corporations,  
 18 such as Crown Castle, the right to install their equipment in the public rights-of-way, so long as  
 19 the installation does not “incommode the public use of the road or highway.” Pub. Util. Code §  
 20 7901. Section 7901 and its precursor, Civil Code Section 536, have governed the placement of  
 21 telecommunications facilities in the public rights-of-way since 1905. *Anderson v. Time Warner*  
 22 *Telecom of Cal., Inc.* (2005) 129 Cal. App. 4th 411, 415; *Pac. Tel. & Tel. Co. v. City & County of*  
 23 *San Francisco* (1959) 51 Cal. 2d 766, 769-70 (“*Pacific Tel. P.*”).

24 In Section 7901, the California Legislature extended to telephone corporations “a franchise  
 25 from the state to use the public highways for the prescribed purpose without the necessity for any  
 26 grant by a subordinate legislative body.” *Pacific Tel. I*, 51 Cal. 2d at 771. These franchise rights  
 27 cannot be taken away and necessarily extend to all of California and to advancements in  
 28 technology. *Pacific Tel. & Tel. Co. v. City of Los Angeles* (1955) 282 P.2d 36, 39; *Williams*  
*Communications, LLC v. City of Riverside* (2003) 114 Cal. App. 4th 642, 650 n.4, 651-54.

Crown Castle is a telephone corporation and its facilities at issue here are telephone lines.  
*City of Huntington Beach v. Public Utilities Com.* (2013) 214 Cal. App. 4th 566, 584-588; *NextG*

1 *Networks of Cal., Inc. v. City & County of San Francisco* (N.D. Cal. 2008) 2008 U.S. Dist LEXIS  
2 120648, at \*2. Crown Castle has been issued a CPCN by the CPUC to provide competitive local  
3 exchange and nondominant interexchange telecommunications services. *Id.* at 571-572.

4 The only authority reserved to municipalities such as the City over the deployment of  
5 telephone lines in the public rights of way is to exercise “reasonable” control as to the “time,  
6 place, and manner” in which roads are accessed. Public Utilities Code Section 7901.1 states in  
7 pertinent part that:

8 (a) It is the intent of the Legislature, consistent with Section 7901, that  
9 municipalities shall have the right to exercise reasonable control as to the time,  
10 place, and manner in which roads, highways, and waterways are accessed.

11 (b) The control, to be reasonable, shall, at a minimum, be applied to all  
12 entities in an equivalent manner.

13 Public Util. Code § 7901.1(a). The plain language of Section 7901.1(a) permits the City only to  
14 exercise “reasonable control as to the time, place, and manner, in which roads, highways and  
15 waterways are accessed”. To be reasonable, the control must “*at a minimum, be applied to all*  
16 *entities* in an equivalent manner.” Pub. Util. Code § 7901.1(b) (emphasis added).

17 The City’s Wireless Ordinance, which regulates only “wireless” facilities in the public  
18 rights-of-way, is not reasonable because the City imposes no such discretionary regulation on any  
19 other user of the public right-of-way. Moreover, telephone corporations are not the only users of  
20 the public rights-of-way. Utility poles, such as the poles at the Site at issue here, are frequently  
21 also used by electric utilities and cable television operators, and even municipal facilities. As the  
22 Planning Department found, the Site contain numerous varieties of pole attached communications  
23 and utility equipment. Yet the City does not require similar discretionary permits for any of the  
24 other communications and utility equipment located on those poles. Indeed, only “wireless”  
25 facilities are subject to the discretionary permit requirements.<sup>7</sup>

26 Public Utilities Code § 7901.1(b) does not permit the City to impose restrictions on a  
27 telephone corporation’s access to the public right of way based solely on the use of wireless  
28

<sup>7</sup> San Francisco’s prior ordinances governing access to the public rights-of-way by wireless telecommunications companies have been invalidated in two prior lawsuits between Crown Castle and the City. *NextG Networks of Cal., Inc. v. City & County of San Francisco* (N.D. Cal 2008) 2008 U.S. Dist LEXIS 120648; *NextG Networks of Cal., Inc. v. City & County of San Francisco* (N.D. Cal. 2006) 2006 U.S. Dist LEXIS 36101. A challenge to the current ordinance is currently pending before this Court. *T-Mobile West LLC v. City & County of San Francisco*, Case No. CGC-11-510703.

1 technology. Because the City does not regulate Crown Castle's installation, operation, and  
2 maintenance of telecommunications facilities in the public ways in a manner equivalent to the  
3 City's regulation of facilities and equipment other than wireless telecommunication facilities in the  
4 public ways, the Wireless Ordinance violates Public Utilities Code §§ 7901 and 7901.1(b). Thus,  
5 the City's denial of the Permit exceeded its legal powers. Consequently, a writ should issue  
6 granting the Permit.

7 **IV. CONCLUSION**

8 For the foregoing reasons, Petitioner Crown Castle respectfully requests that the Court grant  
9 the petition for writ of administrative mandamus or, in the alternative, writ of mandate and order  
10 Respondents to grant or reinstate the Permit at the Site.

11 Dated: December 18, 2013

Respectfully Submitted,

12 DAVIS WRIGHT TREMAINE LLP

13  
14 By: 

Martin L. Fineman

15 Attorneys for Petitioner  
16 Crown Castle NG West Inc.  
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**Proof of Service**  
Case No. CPF-11-511369

I declare under penalty of perjury under the laws of the State of California that the following is true and correct:

I am employed in the City and County of San Francisco, State of California, in the office of a member of the bar of this court, at whose direction the service was made. I am over the age of eighteen (18) years, and not a party to or interested in the within-entitled action. I am an employee of DAVIS WRIGHT TREMAINE LLP, and my business address is 505 Montgomery Street, Suite 800 San Francisco, California 94111.

I caused to be served the following documents:

**PETITIONER CROWN CASTLE NG WEST INC.'S NOTICE OF MOTION AND MOTION FOR WRIT OF ADMINISTRATIVE MANDAMUS OR WRIT OF MANDATE**

**PETITIONER CROWN CASTLE NG WEST INC.'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR WRIT OF ADMINISTRATIVE MANDAMUS OR WRIT OF MANDATE**

**PETITIONER CROWN CASTLE NG WEST INC.'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF MOTION FOR WRIT OF ADMINISTRATIVE MANDAMUS OR WRIT OF MANDATE**

I caused the above documents to be served on each person listed below by the following means and as indicated on the attached list:

- I enclosed a true and correct copy of said document in an envelope, and caused it to be hand delivered on December 18, 2013, to the following parties indicated on the attached list.  
*(Indicated on the attached address list by a [H] next to the address.)*

I am readily familiar with my firm's practice for collection and processing of correspondence for delivery in the manner indicated above, to wit, that correspondence will be deposited for collection in the above-described manner this same day in the ordinary course of business.

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County of San Francisco

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13 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
14 COUNTY OF SAN FRANCISCO  
15 UNLIMITED JURISDICTION

16 CROWN CASTLE NG WEST INC.,  
17 a Delaware corporation,

18 Petitioner,

19 vs.

20 THE CITY AND COUNTY OF SAN  
21 FRANCISCO, THE CITY AND COUNTY OF  
22 SAN FRANCISCO DEPARTMENT OF  
23 PUBLIC WORKS, AND THE CITY AND  
COUNTY OF SAN FRANCISCO BOARD OF  
APPEALS, public entities organized under the  
laws of the State of California,

24 Respondents.  
25  
26  
27  
28

**Case No. CPF-11-511369**

**RESPONDENTS' BRIEF IN OPPOSITION  
TO THE PETITION FOR A WRIT OF  
ADMINISTRATIVE MANDAMUS OR  
WRIT OF MANDATE**

**Date: February 5, 2014**

**Time: 9:30 a.m.**

**Dept: 302**

**Petition Filed: June 21, 2011**

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1 **I. INTRODUCTION**

2 The City and County of San Francisco (“Respondent” or “City”<sup>1</sup>) submits this brief in  
3 opposition to the Petition of Crown Castle NG West Inc. (“Petitioner”) for a writ of administrative  
4 mandamus or writ of mandate.<sup>2</sup> The facts of this application are very simple. Under applicable City  
5 law, any person installing a personal wireless service facility (“Wireless Facility”) in the public rights-  
6 of-way must obtain a permit. Crown Castle applied and initially obtained a permit to install a Wireless  
7 Facility in front of 156 27th Avenue in San Francisco (“Petitioner’s Permit”). Subsequently,  
8 Respondent Board of Appeals (“Board”) accepted a late-filed appeal of Petitioner’s Permit, granted  
9 the appeal of the Permit, and revoked the Permit. Petitioner now seeks a writ requiring the City to  
10 grant or reinstate Petitioner’s Permit. As the City will show herein, this Court should deny Petitioner’s  
11 application and uphold the Board’s determination.

12 The petition raises two issues. The first issue is whether the Board properly granted the request  
13 to accept jurisdiction over the appeal of Petitioner’s Permit even though the appeal was not timely.  
14 Based on the undisputed facts contained in the Administrative Record,<sup>3</sup> the answer to that question is  
15 yes. At the time that the Petitioner’s Permit was issued, City law did not require Petitioner to notify  
16 local residents that Petitioner’s Permit had been issued. Since Petitioner waited more than three  
17 months after Petitioner’s Permit was issued to begin construction of its permitted Wireless Facility, no  
18 one had the opportunity to file an appeal within 15 days after DPW issued Petitioner’s Permit, as City  
19 law required. Granting the request for late jurisdiction was within the Board’s authority, because the  
20 lack of notice was not the fault of the local residents who were seeking to file an appeal of Petitioner’s  
21 Permit.

22 The second issue is whether the Board properly granted the appeal and revoked Petitioner’s  
23 Permit. Based on the undisputed facts contained in the Administrative Record, the answer to that  
24

---

25 <sup>1</sup> While Respondents are the City and County of San Francisco and its Department of Public  
26 Works and Board of Appeals, in this opposition the City will refer to all Respondents as “City.”

27 <sup>2</sup> Petitioner has improperly styled its pleading as a “motion.”

28 <sup>3</sup> On February 20, 2013, the City filed a Notice of Certification of the Administrative Record.  
The City will lodge a copy of the Administrative Record along with this Brief.

1 question is also yes. City law at the time required that Petitioner's application for Petitioner's Permit  
2 be approved by the City's Planning Department before it could be granted by Respondent Department  
3 of Public Works ("DPW"). Under applicable City law, the Planning Department must approve all  
4 applications to install Wireless Facilities on streets that have "good" views. While the block of 27th  
5 Avenue that is between Lake Street and El Camino del Mar (where 156 27th Avenue is located) has a  
6 "good" view, the map DPW created for the convenience of Petitioner and other applicants for permits  
7 to install Wireless Facilities inadvertently omitted this segment of 27 Avenue. As a result, DPW  
8 approved Petitioner's Permit without first referring the application to the Planning Department.  
9 Because DPW did not follow the procedures required by City law when it issued Petitioner's Permit,  
10 the Board had no choice but to grant the appeal and revoke the permit.

11 For these reasons, the City requests that the Court deny the writ and approve the Board's  
12 determination to grant the appeal and revoke Petitioner's Permit. This Court should also find that,  
13 upon revocation of the Permit, Petitioner must comply with DPW's direction to remove its Wireless  
14 Facility from the public rights-of-way.

## 15 **II. STATEMENT OF FACTS**

### 16 **A. Former Section 11.9(b) of the San Francisco Administrative Code**

17 In 2007, the Board of Supervisors added Section 11.9(b) to the San Francisco Administrative  
18 Code.<sup>4</sup> Section 11.9(b) required any person seeking to install a Wireless Facility in the public rights-  
19 of-way to obtain a Personal Wireless Facility Site Permit from DPW. (S.F. Admin. Code, §  
20 11.9(b)(1).) On certain streets, including a "street where the City and County of San Francisco  
21 General Plan has identified valued scenic resources that should be protected and conserved," DPW  
22 could not issue a permit until the Planning Department had reviewed the application and  
23 "recommended approval." (S.F. Admin. Code, § 11.9(b)(2)(A).)

24 One notable aspect of Section 11.9(b) was that it did not require any public notice that DPW  
25 had issued a Section 11.9(b) Permit. That remained City law until 2011, when the Board of  
26

---

27 <sup>4</sup> A copy of Ordinance No. 214-07 adopting Section 11.9(b) is attached as Exhibit A to the  
28 City's Request for Judicial Notice submitted along with this opposition.

1 Supervisors in Ordinance No. 12-11 repealed Section 11.9(b) and adopted a new permitting scheme  
2 for Wireless Facilities, which is now contained in Article 25 of the Public Works Code.<sup>5</sup> In Article  
3 25, the City requires public notice of the issuance of all permits. (See Public Works Code, § 1514.)<sup>6</sup>

4 **B. DPW's Implementation of Section 11.9(b)**

5 DPW adopted DPW Order No. 177,163 to implement the requirements of Section 11.9(b).<sup>7</sup>  
6 Among other things, DPW Order No. 177,163 specified those locations in San Francisco where DPW  
7 would refer applications for Article 25 Wireless Permits to the Planning Department for its review and  
8 approval. Those locations included a "street identified in the City and County of San Francisco  
9 General Plan as one that . . . has street views that are rated 'excellent' or 'good.'" (DPW Order No.  
10 177,163, § III.D.4(d).) In addition, DPW created a digital map intended to show those locations in San  
11 Francisco where DPW would require Planning Department approval of those applications.<sup>8</sup>

12 **C. The Appeal of Petitioner's Permit**

13 On September 8, 2010, DPW granted Petitioner's application for a permit pursuant to construct  
14 a Wireless Facility on an existing utility pole in front of 156 27th Avenue ("Petitioner's Permit").<sup>9</sup>  
15  
16  
17

18 \_\_\_\_\_  
19 <sup>5</sup> A copy of Article 25 is attached as Exhibit B to the City's Request for Judicial Notice. The  
20 City generally requires public notice that a permit might be or has been issued. (See S.F. Bus. and Tax  
21 Regs. Code, § 5, 22, 28, 29.) (A copy of these Sections is attached as Exhibit C to the City's Request  
22 for Judicial Notice.)

23 <sup>6</sup> The City did not require public notice of applications for permits under § 11.9(b), because at  
24 that time the federal courts had found that federal law preempted many local requirements for the use  
25 of the public rights-of-way by telecommunications providers. (See *City of Auburn v. Qwest Corp.* (9th  
26 Cir. 2001) 260 F.3d 1160, *overruled en banc*, *Sprint Telephony PCS, L.P. v. County of San Diego* (9th  
27 Cir. 2008) 543 F.3d 571.) In *City of Auburn*, the Ninth Circuit had found that federal law preempted  
28 local requirements that required public hearings before granting or revoking permits. (See *City of  
Auburn, supra*, 260 F.3d, at p. 1179, fn. 19.) In *Sprint Telephony*, the Ninth Circuit rejected City of  
Auburn's "expansive reading" of the extent of federal preemption. (*Sprint Telephony, supra*, 543 F.3d,  
at p. 577.)

<sup>7</sup> A copy of DPW Order No. 177,163 is attached as Exhibit B to Petitioner's Request for  
Judicial Notice.

<sup>8</sup> See AR 239-241.

<sup>9</sup> AR 135.

1 Petitioner was not required to and did not notify local residents that DPW had issued Petitioner a  
2 permit to construct a Wireless Facility in front of 156 27th Avenue.<sup>10</sup>

3 On December 6, 2010, Petitioner began constructing its Wireless Facility.<sup>11</sup> Shortly after  
4 construction began, the residents of 156 27th Avenue (Jeff and Nicole Cooper [the “Coopers”]) filed a  
5 request that the Board allow a late-filed appeal of Petitioner’s Permit.<sup>12</sup> Under City law, permit  
6 appeals generally must be filed 15 days after the permit was issued. (S.F. Bus. and Tax Regs. Code, §  
7 8.)<sup>13</sup> Under Section 10 of the Board’s Rules, the Board will accept jurisdiction over a late-filed appeal  
8 if the City “intentionally or inadvertently caused the requester to be late in filing the appeal.”<sup>14</sup> The  
9 Coopers claimed that they had “been denied their right to appeal” because they had not received notice  
10 that Petitioner’s Permit had been issued until the time to appeal the permit had expired.<sup>15</sup>

11 After a hearing in which Jeff Cooper, Petitioner, DPW and others spoke, the Board voted to  
12 allow the late-filed appeal.<sup>16</sup> Before voting, Commissioner Garcia stated that it was “reasonable that  
13 when equipment is placed in front of your house or proximate to your house, that you have the right to  
14 know about it.”<sup>17</sup> Commissioner Hwang noted that the “principle of having a process is really an  
15 important one.”<sup>18</sup>

16  
17 <sup>10</sup> See AR 031, 129.

18 <sup>11</sup> See AR 129.

19 <sup>12</sup> AR 128-34.

20 <sup>13</sup> A copy of Section 8 is attached as Exhibit B to the City’s Request for Judicial Notice.

21 <sup>14</sup> A copy of Section 10 is attached as Exhibit C to Petitioner’s Request for Judicial Notice.

22 <sup>15</sup> AR 031 and 129. Petitioner argues that the Board “altogether ignored representations by  
23 Crown Castle’s representative at the hearing that she personally provided courtesy notice to  
24 neighborhood residents in the vicinity of the wireless node. AR 049-050.” (Petitioner’s Memorandum  
25 of Points and Authorities in Support of Motion for Writ of Administrative Mandamus or Writ of  
26 Mandate (“Petitioner’s MPA”) at 9, fn.6.) That statement mischaracterizes the record in this  
27 proceeding. Petitioner’s representative only stated that she went around the neighborhood at the time  
28 Petitioner “was picking locations” for the proposed Wireless Facility. (AR 049.) At that time, she  
informed “[a]nybody that was on the street” that she was scouting locations for a Wireless Facility.  
(AR 049). This does not constitute notice that Petitioner had obtained Petitioner’s Permit and that the  
time to file an appeal is running.

<sup>16</sup> See 004-067.

<sup>17</sup> AR 042.

<sup>18</sup> AR 043.

1 After the Board accepted jurisdiction, the Coopers filed their appeal. In their appeal, the  
2 Coopers demonstrated that their block had a “good,” view, that DPW had inadvertently omitted the  
3 “good” view designation of their block from the digital map that Petitioner used when it applied for  
4 Petitioner’s Permit, and that DPW had failed to refer Petitioner’s application to the Planning  
5 Department.<sup>19</sup> A hearing was then held on the appeal.<sup>20</sup> DPW, the Planning Department, and  
6 Petitioner all agreed with the Coopers that the map was erroneous.<sup>21</sup> As DPW explained, “the data  
7 set” DPW used to create the map “did not identify this street segment as [having] a good view.”<sup>22</sup>

8 The Board voted to grant the appeal and revoke Petitioner’s Permit.<sup>23</sup> The Board found that  
9 Petitioner’s Permit had not been properly issued, because DPW had failed to refer the application to  
10 the City’s Planning Department as required by City law.<sup>24</sup> The Board subsequently voted to adopt  
11 written findings granting the appeal and revoking Petitioner’s Permit.<sup>25</sup> Those findings clearly state  
12 the reasons for the Board’s decision:

13 4. At the time [Petitioner] submitted the Permit application, the rules governing  
14 [Wireless] Facility permits were set forth in Section 11.9 of the San Francisco  
15 Administrative Code. Section 11.9 required an application be routed to the  
16 Planning Department for review and approval where the proposed Facility  
17 would be located “on a street where the City and County of San Francisco  
18 General Plan has identified the presence of valued scenic resources that should  
19 be protected and conserved.” (Admin. Code § 11.9(b)(2)(A)(iv).) DPW Order  
20 No. 177,163 § III.D.4.d further required Planning Department review for  
21 Facility permits “on a street identified in the City and County of San Francisco  
22 General Plan as one that has street views that are rated ‘excellent’ or ‘good.’ . . .

23 5. The Board finds that DPW acknowledged in its written and oral testimony  
24 before this Board that it erroneously failed to refer the Permit to the Planning  
25 Department as then-existing law required. DPW explained that the  
26 Department’s map showing the locations that required Planning Department  
27 approval mistakenly omitted the designation of 27th Avenue between Lake  
28 Street and El Camino del Mar as a “good” view street. [Petitioner] does not  
dispute that DPW committed this error. On this basis the Board concludes

19 See 070, 187, and 194.

20 See AR 068-104.

21 See 083, 087, 194, 219, and 239-241. Petitioner simply argued it had “relied” on the  
“discrepancy in the map.” (AR 078.)

22 AR 083.

23 AR 103-104.

24 AR 101-104.

25 AR 113-114.

1 DPW issued the Permit in violation of then-existing City law and therefore the  
2 Permit should be denied. In addition, the Board finds that because the Permit  
was issued in error, [Petitioner] did not acquire a vested right to the Permit. (see  
*Pettit v. Fresno* (1973) 34 Cal.App.3d 813.)

3 6. As a separate and independent ground for its decision, the Board finds the  
4 Permit also cannot be granted under the new City requirements for the review  
and approval of Facility permits which took effect on February 13, 2011. (See,  
5 Public Works Code Article 25.) Under the new legislation, [Petitioner's]  
6 application must meet the requirements of a Tier III-B Facility. (Public Works  
Code § 1502(gg), which include Planning Department review and approval  
7 when the proposed location is on a "good" view street in a Planning Protected  
Locations, or in a residential zoning district (in a Zoning Protected Location).  
8 (Public Works Code § 1503(c)(2)(B).) The new law also requires public notice  
for such permit applications. (Public Works Code §§ 1512-1514.) Because it is  
9 undisputed that the Permit did not go through either public notice or the  
Planning Department review that is required under the current governing law,  
10 the Board cannot grant the Permit. (See *Russian Hill Improvement Assn et al. v.  
Board of Permit Appeals of the City and County of San Francisco* (1967) 66  
Cal.2d 34.)<sup>26</sup>

11 The Board noted that City law "barring reapplication for a permit denied by the Board" for one  
12 year "would not apply if [Petitioner] were to reapply for a Permit at this location due to the change in  
13 the applicable Code provisions."<sup>27</sup> As previously noted, after DPW approved Petitioner's Permit, but  
14 before the appeal was heard, the Board repealed Section 11.9(b) and adopted Article 25 of the Public  
15 Works Code creating a different permitting process for Wireless Facilities.<sup>28</sup>

16 Petitioner then filed a request for rehearing.<sup>29</sup> Under Section 9(b) of the Board's Rules, the  
17 Board will grant such a request only under "extraordinary cases, and to prevent manifest injustice."<sup>30</sup>  
18 In its request for rehearing, Petitioner asserted that the City's failure to process Petitioner's application  
19 for an Article 25 permit created an "extraordinary circumstance" and rehearing was necessary to  
20 prevent "manifest injustice."<sup>31</sup>

21  
22  
23  
24 <sup>26</sup> AR 002.

25 <sup>27</sup> AR 002-003.

26 <sup>28</sup> See pp. 3-4, *infra*.

27 <sup>29</sup> AR 368.

28 <sup>30</sup> A copy of Section 9(b) is attached as Exhibit C to Petitioner's Request for Judicial Notice.

<sup>31</sup> AR 348.



1 The Board held a third hearing on Petitioner's request for rehearing.<sup>32</sup> The Board denied  
2 Petitioner's request for rehearing, finding that Petitioner had not made the required showing of  
3 "manifest injustice."<sup>33</sup>

4 **D. Petitioner Continues to Maintain a Wireless Facility at the Site Due to a Court**  
5 **Order**

6 After the Board revoked the Petitioner's Permit, DPW advised Petitioner that it must remove  
7 Petitioner's Wireless Facility from the public rights-of-way. (See *NextG Networks of California v.*  
8 *Superior Court* (2011) 2011 WL 4499310, at p\*1.<sup>34</sup>) Instead of complying with DPW's request,  
9 Petitioner filed this Petition along with an *ex parte* application for an alternative writ and for an  
10 immediate stay. (*Id.*) While this Court did not grant Petitioner any relief at that time, those requests  
11 ultimately resulted in a peremptory writ of mandate from the Court of Appeal requiring this Court to  
12 issue an order staying DPW's "directive" that Petitioner remove its Wireless Facility from the pole in  
13 front of 156 27th Avenue. (*Id.*, at p.\*4.) While this Court never issued such an order, the City has  
14 complied with the Court of Appeal's directive. Petitioner's Wireless Facility is still in operation.

15 In granting the writ, the Court of Appeal did not find that Petitioner would likely prevail on the  
16 merits. (*Id.*, at p.\*3.<sup>35</sup>) Instead, the Court ruled in favor of Petitioner due to what the Court described  
17 as a "lopsided balance of potential harm." (*Id.*) The Court was also swayed by the fact that DPW had  
18 tentatively approved Petitioner's application for the Wireless Permit at issue there and a new permit  
19 was expected to be issued soon. (*Id.*) That permit has never been issued.<sup>36</sup>

20 \_\_\_\_\_  
21 <sup>32</sup> See AR 116-126.

22 <sup>33</sup> See AR 124-25.

23 <sup>34</sup> A copy of the Court of Appeal's unreported decision is attached as Exhibit D to Petitioner's  
24 Request for Judicial Notice.

25 <sup>35</sup> The Court of Appeal stated "we are not presently in a position to evaluate the respective  
26 arguments of the parties, and express no views as to the proper outcome of the trial court  
27 proceedings." (*Id.*, at p.\*3.)

28 <sup>36</sup> DPW did issue Petitioner a permit under Article 25 to install the same Wireless Facility at  
the same location as Petitioner's Permit at issue here. The Coopers timely appealed the issuance of  
that permit too. After the Board upheld the appeal, Petitioner filed a writ with this Court challenging  
that determination. On October 28, 2013, this Court issued an order denying the petition for a writ.  
(A copy of this Court's order in *Crown Castle NG West, Inc. v. The City and County of San Francisco*  
(Case No. CPF-12-512623) is attached as Exhibit D to the City's Request for Judicial Notice.)

1 **III. STANDARD OF REVIEW**

2 **A. The Petitioner's Only Remedy is for Administrative Mandamus under Code of**  
3 **Civil Procedure § 1094.5**

4 The Board "is an administrative tribunal empowered to exercise full discretion in passing on  
5 the matter as submitted [to it] for decision." (*Lindell Co. v. Board of Permit Appeals of the City and*  
6 *County of San Francisco* (1943) 23 Cal.2d 303, 313-14.<sup>37</sup>) The Board denied Petitioner's application  
7 for Petitioner's Permit following a hearing. While Petitioner claims to seek a traditional mandate  
8 under § 1085 and an administrative mandamus under § 1094.5, its only remedy is under § 1094.5.

9 A § 1085 writ "may be issued . . . to any . . . board, or person, to compel the performance of an  
10 act which the law specially enjoins, as a duty resulting from an office, trust, or station." (Code Civ.  
11 Proc., § 1085.) Such a writ "will not lie to control discretion within the area lawfully entrusted to an  
12 administrative board. [Citations.]" (*City and County of San Francisco v. Superior Court* (1959) 53  
13 Cal.2d 236, 244.) Here, § 1085 is inapplicable both because the Board had the discretion to grant the  
14 appeal, and because the Board issued its decision following a hearing in which evidence was taken.

15 Section 1094.5 establishes the remedy of administrative mandamus, which is available when  
16 three conditions have been met: "the order or decision sought to be reviewed must be the result of a  
17 proceeding in which (1) by law a hearing is required to be given, (2) evidence is required to be taken,  
18 and (3) the determination of the facts is the responsibility of the administrative agency." (*Gong v. City*  
19 *of Fremont* (1967) 250 Cal.App.2d 568, 572.) In other words, administrative mandamus is the  
20 appropriate remedy where an agency has been called upon to exercise an "adjudicatory or quasi-  
21 judicial function." (*Western States Petroleum Association v. Superior Court* (1995) 9 Cal.4th 559, 567  
22 [internal quotation marks omitted.] Because that is exactly the situation here, Petitioner's only remedy  
23 is under section 1094.5.

24  
25  
26 

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<sup>37</sup> While this case concerned the City's 1932 Charter, it has been cited for authority in cases  
27 since the City adopted its present Charter in 1996. (See *Martin v. City and County of San Francisco*  
28 (2005) 135 Cal.App.4th 392, 399-400.)

1                   **B.     The Court Should Review the Decision Under the Substantial Evidence Test**

2                   Generally, the inquiry for the issuance of a writ of administrative mandamus is whether the  
3                   entity whose decision is being challenged abused its discretion. “Abuse of discretion is established if  
4                   the respondent has not proceeded in the manner required by law, the order or decision is not supported  
5                   by the findings, or the findings are not supported by the evidence.” (Code Civ. Pro., § 1094.5(b).) In  
6                   cases in which the court is “authorized by law to exercise its independent judgment on the evidence,  
7                   abuse of discretion is established if the court determines that the findings are not supported by the  
8                   weight of the evidence.” (Code Civ. Pro., § 1094.5(c).) In all other cases, “abuse of discretion is  
9                   established if the court determines that the findings are not supported by substantial evidence in the  
10                  light of the whole record.” (Code Civ. Pro., § 1094.5(c).)

11                  In determining which test to apply, this Court must look to whether the matter at issue concerns  
12                  a “fundamental vested right.” (*Bixby v. Pierno* (1971) 4 Cal. 3d 130, 143.) Generally, administrative  
13                  decisions that “result in restricting a property owner’s return on his property, increasing the cost of  
14                  doing business, or reducing profits are considered impacts on economic interests, rather than on  
15                  fundamental vested rights.” (*E.W.A.P., Inc. v. City of Los Angeles* (1997) 56 Cal.App.4th 310, 325-  
16                  326.)

17                  Petitioner does not deny that its rights here are clearly economic. For that reason, to assert that  
18                  it has a fundamental vested right Petitioner argues that it has been operating a Wireless Facility at 156  
19                  27th Avenue since it was granted Petitioner’s Permit.<sup>38</sup> In making this assertion, Petitioner ignores the  
20                  fact that it has no validly issued permit for that facility. Once the Coopers filed their appeal, under  
21                  City law DPW’s determination to issue Petitioner’s Permit was “suspended.” (S.F. Bus. and Tax Regs  
22                  Code, § 8(i)(5).)<sup>39</sup> As the California Supreme has held, a City permit is not “‘lawfully granted’ until  
23                  all administrative action with respect to the permit application has been completed.” (*Russian Hill*

24  
25                  <sup>38</sup> See Petitioner’s MPA at 7, 9-10. It is worth noting that Petitioner continued to construct its  
26                  Wireless Facility at the site after the Coopers filed their jurisdictional request with the Board. (*See*  
27                  Petitioner’s MPA at 3.) Petitioner, therefore, expended the funds to complete the construction of the  
28                  facility with full knowledge that the Board could grant the appeal and revoke Petitioner’s Permit.

<sup>39</sup> A copy of Section 8(i)(5) is attached as Exhibit B to the City’s Request for Judicial Notice.

1 *Improvement Association v. Board of Permit Appeals of City and County of San Francisco* (1967) 66  
2 Cal.2d 34, 43.)

3 Petitioner also improperly relies on *Goat Hill Tavern v. City of Costa Mesa* (1993) 6  
4 Cal.App.4th 1519, 1530 and *Malibu Mountain Recreation, Inc. v. County of Los Angeles* (1998) 67  
5 Cal.App.4th 359, 367.<sup>40</sup> In *Goat Hill Tavern*, the court noted that the “courts have rarely upheld the  
6 application of the independent judgment test to land use decisions.” (*Goat Hill Tavern, supra*, 6  
7 Cal.App.4th, at p.1527.) In finding that the independent judgment test applied, however, the court was  
8 swayed by the “unique facts” of the case. Petitioner, who had been operating the tavern for many  
9 years, would lose the right to “continue operating an established business in which he has made a  
10 substantial investment” if the city did not renew its conditional use permit. (*Id.*) Here, unlike in *Goat*  
11 *Hill Tavern*: (i) Petitioner’s Permit was not final, because the Coopers appealed DPW’s issuance of the  
12 permit (see also *Malibu Mountain Recreation, supra*, 67 Cal.App.4th, at pp.362-66); (ii) Petitioner had  
13 not even completed construction of its Wireless Facility when the Coopers filed their jurisdiction  
14 request; and (iii) there is no evidence in the record that Petitioner’s ability to do business, even within  
15 the City and County San Francisco, was threatened by the loss of its ability to provide service at this  
16 one Wireless Facility. So, even if Petitioner had a valid permit for its Wireless Facility, there is no  
17 need for this Court to diverge from the general rule.

18 Since no vested rights are at issue, this Court should review the Board’s decision under the  
19 substantial evidence test. The Petitioner has a heavy burden under that test. An agency’s findings “are  
20 presumed to be supported by the administrative record and the appellant challenging them has the  
21 burden to show that they are not. [Citation.]” (*JKH Enterprises, Inc. v. Department of Industrial*  
22 *Relations* (2006) 142 Cal.App.4th 1046, 1062.) Under the substantial evidence test, the “courts  
23 generally will defer to the broad discretion vested in administrative agencies when the evidence is  
24 conflicting, or even when reasonable men might well differ on questions of the credibility of  
25 witnesses, or upon the proper inferences to be drawn from the evidence. [Citations.]” (*Lorimore v.*  
26 *State Personnel Board* (1965) 232 Cal. App. 2d 183, 186.) The court may reverse the agency only if

27 \_\_\_\_\_  
28 <sup>40</sup> See Petitioner’s MPA at 9-10.

1 the court finds that “a reasonable person could not reach the conclusion reached by the agency.”  
2 (*McMillan v. American General Finance Corp.* (1976) 60 Cal.App.3d 175, 186.)

3 **IV. ARGUMENT**

4 **A. The Board Did Not Abuse Its Discretion by Granting the Request for Late**  
5 **Jurisdiction**

6 Administrative agencies “have only such powers as have been conferred on them, expressly or  
7 by implication, by constitution or statute.” (*Ferdig v. State Personnel Board* (1969) 71 Cal.2d 96, 103;  
8 *United States Fidelity & Guaranty Co. v. Superior Court* (1931) 214 Cal. 468, 471.) “An  
9 administrative agency, therefore, must act within the powers conferred upon it by law and may not  
10 validly act in excess of such powers. [Citations.]” (*Ferdig, supra*, 71 Cal.2d, at p. 104.) Accordingly,  
11 it is well settled that “when an administrative agency acts in excess of, or in violation, of the powers  
12 conferred upon it, its action thus taken is void.” (*Id.*)

13 Here, the Board acted within its authority when it granted the Coopers’ request that the Board  
14 accept jurisdiction over their late-filed appeal. The Court of Appeal has found that the Board has  
15 “jurisdiction to determine its jurisdiction,” which includes the authority to find that the failure to  
16 timely file an appeal was “excusable.” (*Franklin v. Steele* (1982) 131 Cal.App.3d 558, 562.) The  
17 Board has the power to grant a request to accept a late-filed appeal when the City either intentionally  
18 or inadvertently caused the requester to miss the deadline. As the California Supreme Court has held,  
19 the Board’s time requirements are generally considered to be “directory” rather than “mandatory” and  
20 where, as here, noncompliance with a time requirement is “wholly beyond [the Coopers’] control”  
21 they should not be deprived of their right to appeal. (*Edwards v. Steele* (1979) 25 Cal.3d 406, 413.)  
22 The question for this Court is whether the Board’s determination to accept the late-filed appeal was  
23 supported by substantial evidence. (See *Franklin, supra*, 131 Cal.App.3d, at pp. 561-63.)

24 Well-accepted principles of due process require that a person be given notice and an  
25 opportunity to be heard before being deprived of a substantial right. (See *Horn v. County of Ventura*  
26 (1979) 24 Cal.3d 605, 612.) Here, the undisputed evidence is that the Coopers did not receive notice  
27 that Petitioner had been issued Petitioner’s Permit until after the 15-day period to file an appeal had  
28

1 long expired. It is also undisputed that the reason they didn't receive notice is that City law at that  
2 time did not require either the Petitioner or DPW to issue any notice to the public that a permit to  
3 install a Wireless Facility had been issued. Under these circumstances, substantial evidence supports  
4 the Board's finding that the Coopers' failure to timely file the appeal was caused by the City – and not  
5 by the Coopers. Consistent with the requirements of due process, the Board properly granted their  
6 jurisdiction request and allowed their appeal to be heard on the merits.

7 This Court should find that the Board did not abuse its discretion when it agreed to hear the  
8 Coopers' late-filed appeal.

9 **B. The Board Did Not Abuse its Discretion by Granting the Appeal and Revoking**  
10 **Petitioner's Permit**

11 None of the following facts contained in Administrative Record contains are in dispute:

- 12 • Petitioner applied for a permit under Section 11.9(b) to construct a Wireless Facility on  
13 a segment of a street that the S.F. General Plan had designated as having a “good”  
14 view.
- 15 • Under Section 11.9(b) and DPW Order No. 177,163, DPW was required to refer  
16 Petitioner's application to the Planning Department for its review and approval.
- 17 • DPW did not refer the application to the Planning Department, because the map that  
18 DPW prepared and Petitioner used to find a location for its proposed Wireless Facility  
19 did not indicate that this segment of 27th Avenue had a “good” view.
- 20 • After the Coopers filed their appeal, the Board of Supervisors enacted Article 25 of the  
21 Public Works Code imposing different requirements for permits for Wireless Facilities.
- 22 • Under the new permitting process in Article 25, Petitioner's application for a permit in  
23 front of 156 27th Avenue required Planning Department review and public notice.

24 Based on these undisputed facts, the Board properly denied the Petitioner's Permit for two  
25 reasons. First, DPW issued the Permit in violation of then-existing City law, because DPW had not  
26 referred the application to the Planning Department. Petitioner has presented no argument that  
27 suggests the Board could deny an appeal under these circumstances. Second, Petitioner's Permit could  
28 not be granted under the new City requirements for the review and approval of Wireless Facility  
permits set forth in Article 25 of the Public Works Code, including: (i) Planning Department review  
and approval; and (ii) public notice prior to the issuance of the permit. In this regard, the Board  
properly cited *Russian Hill Improvement Association*. In that case, the Supreme Court found that the

1 Board properly applied the requirements of a new City ordinance to a permit that had been issued prior  
2 to the enactment of that ordinance, but before the Board acted on the appeal. (*Russian Hill*  
3 *Improvement Association, supra*, 66 Cal.2d 34, at p.43.)

4 Petitioner does not attempt to dispute either these findings or the facts upon which the Board  
5 based these findings. Instead, Petitioner makes two arguments. Petitioner's first argument is that,  
6 since the Board abused its discretion in granting jurisdiction in the first instance, the Board's decision  
7 to deny Petitioner's Permit "lacked any jurisdictional foundation."<sup>41</sup> While this statement itself makes  
8 little sense, the City agrees that this Court must first find that the Board properly accepted jurisdiction  
9 over the Coopers' late-filed appeal in order for this Court to deny Petitioner's application for a writ. If  
10 this Court finds that the Board abused its discretion by accepting jurisdiction, this Court will not have  
11 to reach the question of whether the Board's determination to revoke Petitioner's Permit was based on  
12 substantial evidence.

13 Petitioner's second argument is that the Board failed to take into account that it was DPW's  
14 failure to include this segment of 27th Avenue on its map that caused the Board to revoke Petitioner's  
15 Permit – and not any "mistake" by Petitioner.<sup>42</sup> Nonetheless, Petitioner has not cited a single case to  
16 suggest that the Board could ignore the undisputed evidence in the record that Petitioner's Permit was  
17 not properly issued, simply because Petitioner should somehow be absolved of any blame. Moreover,  
18 it cannot be said that Petitioner is blameless. The information necessary to determine that DPW's map  
19 was inaccurate was readily available to Petitioner. The Coopers, who were unfamiliar with the  
20 requirements of Section 11.9(b) until Petitioner installed the Wireless Facility in front of their home,  
21 were readily able to locate the map contained in the S.F. General Plan, compare that map to the map  
22 prepared by DPW, and determine that DPW's map was inaccurate. Petitioner could have done the  
23 same before filing its application.

24 This Court should find that the Board did not abuse its discretion when it granted the appeal  
25 and revoked Petitioner's Permit.

26  
27 <sup>41</sup> See Petitioner's MPA at 9.

28 <sup>42</sup> See Petitioner's MPA at 9.

1                   **C. This Court Should Reject Petitioner’s Separate Claim that in Section 11.9(b) the**  
2                   **City Exceeded its Legal Authority in Violation of the Public Utilities Code**

3                   This writ proceeding concerns whether the Board acted within its lawful authority when it  
4                   granted the appeal of Petitioner’s application for Petitioner’s Permit and revoked the permit. Rather  
5                   than just challenging the Board’s findings, Petitioner also argues that the Board exceeded its authority  
6                   by enforcing a local ordinance that Petitioner claims is preempted by Public Utilities Code § 7901<sup>43</sup>  
7                   and § 7901.1.<sup>44</sup> As discussed below, this Court should reject that claim for two reasons.<sup>45</sup>

8                   **1. The Board Could Not Refuse To Apply the Requirements of Section 11.9(b)**  
9                   **to Petitioner’s Application for a Permit To Construct a Wireless Facility**

10                  Before the Board, Petitioner argued that under Public Utilities Code § 7901 and § 7901.1 the  
11                  City could not deny Petitioner’s application for a Petitioner’s Permit.<sup>46</sup> In fact the opposite is the case.  
12                  Under state law, the Board could not have rejected the appeal of Petitioner’s permit on this ground.  
13                  An administrative agency is required to enforce a lawfully enacted statute or ordinance. It lacks the  
14                  power to declare a statute or ordinance unconstitutional or to refuse to enforce a statute or ordinance.<sup>47</sup>  
15                  (Cal. Const., Art. III, § 3.5; see *California State Teachers’ Retirement System v. County of Los Angeles*

16                  <sup>43</sup> Section 7901 reads:

17                                 Telegraph or telephone corporations may construct lines of telegraph or  
18                                 telephone lines along and upon any public road or highway, along or across any  
19                                 of the waters or lands within this State, and may erect poles, posts, piers, or  
20                                 abutments for supporting the insulators, wires, and other necessary fixtures of  
21                                 their lines, in such manner and at such points as not to incommode the public  
22                                 use of the road or highway or interrupt the navigation of the waters.

23                  <sup>44</sup> See Petitioner’s MPA at 10-12. Section 7901.1 reads:

24                                 (a) It is the intent of the Legislature, consistent with Section 7901, that  
25                                 municipalities shall have the right to exercise reasonable control as to the time,  
26                                 place, and manner in which roads, highways, and waterways are accessed.  
27                                 (b) The control, to be reasonable, shall, at a minimum, be applied to all entities  
28                                 in an equivalent manner. (c) Nothing in this section shall add to or subtract from  
                                       any existing authority with respect to the imposition of fees by municipalities.

<sup>45</sup> In the related case entitled *Crown Castle NG West, Inc. v. The City and County of San Francisco* (Case No. CPF-12-512623), this Court rejected this very same argument. (See Petitioner’s Memorandum of Points and Authorities in Support of Motion for Writ of Administrative Mandamus or Writ of Mandate, a copy of which is attached as Exhibit E to the City’s Request for Judicial Notice.)

<sup>46</sup> See AR 225-227.

<sup>47</sup> Preemption claims, like Petitioner’s herein, concern local authority under Article 11, § 7 of the California Constitution. (*Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 290-91.)



1 (2013) 216 Cal.App.4th 41, 59, fn.8; *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th  
2 1055.) Even if this Court were to agree with Petitioner on the preemption issue, to grant a writ on this  
3 basis this Court would have to ignore this well-settled law and find that the Board had both the  
4 authority and duty to ignore the requirements of City law.

5  
6 **2. Section 11.9(b) Was a Proper Assertion of the City's Authority**

7 Petitioner is also wrong that state law preempted the City's authority to require Petitioner to  
8 obtain a permit under Section 11.9(b) to install a Wireless Facility in the public rights-of-way. Public  
9 Utilities Code § 7901 does not preempt local authority to regulate the use of the public rights-of-way  
10 by telephone corporations. The state in Section 7901 relinquished that authority to local governments.  
11 (See *Western Union Tel. Co. v. Hopkins* (1911) 160 Cal. 106, 118.) As a Court of Appeal explained  
12 long ago: "[B]ecause of the state concern in communications, the state has retained to itself the  
13 broader police power of granting franchises, leaving to the municipalities the narrower police power of  
14 controlling location and manner of installation." (*Pacific Tel. & Tel. v. City and County of San*  
15 *Francisco* (1961) 197 Cal.App.2d 133, 152.)

16 Consistent with that holding, in Section 11.9(b) the City properly regulated Petitioner's use of  
17 the public rights-of-way to install and maintain Wireless Facilities based on aesthetics. In a recent  
18 federal case, the court affirmed the authority of local governments to impose similar aesthetic  
19 limitations on Wireless Facilities under Section 7901. (See *Sprint PCS Assets, L.L.C. v. City of Palos*  
20 *Verdes Estates* (9th Cir. 2009) 583 F.3d 716, 721-24 [holding that "City authority to regulate local  
21 aesthetics" is undisturbed by § 7901].<sup>48</sup>) The Court correctly construed the legislature's use of the  
22 term "incommode" to include aesthetics:

23 To "incommode" the public use is to "subject [it] to inconvenience or  
24 discomfort; to trouble, annoy, molest, embarrass, inconvenience" or "[t]o affect  
25 with inconvenience, to hinder, impede, obstruct (an action, etc.)." 7 The Oxford  
26 English Dictionary 806 (2d ed.1989; see also Webster's New Collegiate  
27 Dictionary 610 (9th ed. 1983 ("To give inconvenience or distress to.")). The

28  
<sup>48</sup> While not controlling, the Ninth Circuit's interpretation of state law is persuasive authority.  
(*People ex rel. Dept. of Public Works v. Rodoni* (1966) 243 Cal.App.2d 771, 774; see, e.g., *City of*  
*Huntington Beach v. Public Utilities Commission* (2013) 214 Cal.App.4th 566, 591 [citing *Palos*  
*Verdes Estates*].) There has been no significant discussion of these issues in any reported decision  
since the 1961 Court of Appeal decision in *Pacific Tel. & Tel.*

1 experience of traveling along a picturesque street is different from the  
2 experience of traveling through the shadows of a [wireless facility], and we see  
3 nothing exceptional in the City's determination that the former is less  
4 discomfoting, less troubling, less annoying, and less distressing than the latter.  
5 After all, travel is often as much about the journey as it is about the destination.  
6 (*Id.*, at pp.723-24.)

7  
8 Petitioner also argues that Public Utilities Code § 7901.1 bars the Board from denying its  
9 application under Section 11.9(b). That argument should also be rejected. As the Ninth Circuit  
10 explained: "If the preexisting language of PUC § 7901 did not divest cities of the authority to consider  
11 aesthetics in denying [wireless facility] construction permits, then, a fortiori, neither does the language  
12 of PUC § 7901.1, which only 'bolsters cities' control.'" (*Palos Verdes Estates, supra*, 583 F.3d, at  
13 p.724.) "[T]he City's consideration of aesthetics [does not] conflict with PUC § 7901.1's statement  
14 that 'municipalities shall have the right to exercise reasonable control as to the time, place, and manner  
15 in which roads, highways, and waterways are accessed.' . . . Aesthetic regulations are "time, place,  
16 and manner" regulations. . . ." (*Id.*, at p.724, citations and footnote omitted.)

17 This Court should similarly find that nothing in Sections 7901 or 7901.1 prohibited the City  
18 from requiring Petitioner to comply with all of the requirements of Section 11.9(b).

19 **D. This Court Should Find that DPW May Require Petitioner to Remove Its Wireless  
20 Facility from the Public Rights-of-Way**

21 If this Court agrees with the City and denies Petitioner's application for a writ, this Court will  
22 have found that the Board has lawfully revoked Petitioner's Permit. As previously noted, after the  
23 Board revoked the permit, DPW ordered Petitioner to remove its Wireless Facility from the public  
24 rights-of-way. While Petitioner claims that the Board's decision "did not require the removal" of  
25 Petitioner's Wireless Facility,<sup>49</sup> that argument makes no sense. Under applicable City law, the  
26 operation and maintenance of a Wireless Facility requires a permit. Once the Board revoked  
27 Petitioner's Permit, Petitioner had *no authority* to maintain a Wireless Facility at its site in front of 156  
28 27th Avenue. DPW acted properly by requiring Petitioner to remove the unpermitted Wireless  
Facility.

---

<sup>49</sup> Petitioner's MPA at 6.

1 Petitioner has been able to delay DPW's action by obtaining a preemptory writ of mandate  
2 from the Court of Appeal requiring this Court to issue an order granting a stay of DPW's directive  
3 "pending final resolution" of the proceedings in this Court on Petitioner's application. (*NextG*  
4 *Networks, supra*, 2011 WL 4499310, at p\*3.) This Court never issued such an order. Should this  
5 Court deny Petitioner's request for a writ, this Court should now make clear that DPW is no longer  
6 barred from taking such action.

7 **V. CONCLUSION**

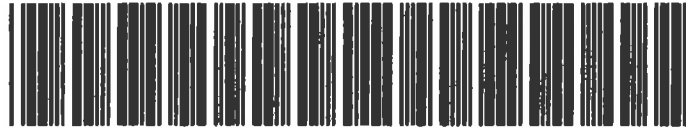
8 Based on the foregoing, the City respectfully requests that the Court deny Petitioner's request  
9 for a writ, uphold the determination of the Board, and authorize the City to require Petitioner to  
10 remove its Wireless Facility from the public rights-of-way.

11  
12 Dated: January 16, 2014

13 DENNIS J. HERRERA  
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14 THERESA L. MUELLER  
Chief Energy and Telecommunications Deputy  
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23 CITY AND COUNTY OF SAN FRANCISCO  
24 BOARD OF APPEALS  
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**SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SAN FRANCISCO**

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**FILED**  
San Francisco County Superior Court

JAN 28 2014

CLERK OF THE COURT  
BY: Amajee Jones  
Deputy Clerk

9 IN THE SUPERIOR COURT STATE OF CALIFORNIA  
10 IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO  
11 UNLIMITED JURISDICTION

12 CROWN CASTLE NG WEST INC., a  
13 Delaware corporation,

14 Petitioner,

15 v.

16 THE CITY AND COUNTY OF SAN  
17 FRANCISCO, THE CITY AND COUNTY  
18 OF SAN FRANCISCO DEPARTMENT OF  
19 PUBLIC WORKS, and THE CITY AND  
20 COUNTY OF SAN FRANCISCO BOARD  
21 OF APPEALS, public entities organized and  
22 existing under the laws of the State of  
23 California,

22 Respondents.

Case No. CPF-11-511369

**PETITIONER CROWN CASTLE NG  
WEST INC.'S REPLY BRIEF IN  
SUPPORT OF MOTION FOR WRIT OF  
ADMINISTRATIVE MANDAMUS OR  
WRIT OF MANDATE**

**Date:** February 5, 2014

**Time:** 9:30 a.m.

**Dept:** 302

**Petition Filed:** June 21, 2011

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19	<i>Sprint PCS Assets, L.L.C. v. City of Palos Verdes Estates</i> (9th Cir. 2009),	
20	583 F.3d 716.....	7
21	<i>T-Mobile West LLC, Crown Castle NG West Inc., and Extenet Systems (California) LLC v.</i>	
22	<i>The City and County of San Francisco, et al.,</i>	
23	(SF Superior Court Case No. CGC-11-510703) .....	2
24	<b>Statutes</b>	
25	CCP § 1094.5(a), (b) .....	6
26	CCP § 1094.5(b).....	1, 4, 5
27	CCP § 1094(c) .....	3
28	City Public Works Code Article 25.....	2
	City’s Wireless Ordinance.....	4
	Pub. Util. Code § 7901.1 .....	2, 6
	Pub. Util. Code § 7901.1(a).....	6

1	Pub. Util. Code § 7901.1(b) .....	7
2	Public Utilities Code §§ 7901 and 7901.1(b) .....	7
3	S.F. Bus. And Tax Regs Code, § 8.....	3
4	S.F. Bus. And Regs Code § 8(i)(5) .....	3
5	Wireless Ordinance .....	<i>passim</i>
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I. INTRODUCTION

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2 Respondents the City and County of San Francisco, the San Francisco Department of  
3 Public Works, and the San Francisco Board of Appeals' (collectively, the "City") Opposition  
4 focuses only on whether the Board of Appeals' grant of the Coopers' request for jurisdiction over  
5 their expired appeal and revocation of the Permit constituted an "abuse of discretion".<sup>1</sup> Certainly  
6 it did. But remarkably, the City altogether fails to address or even acknowledge that Code of Civil  
7 Procedure § 1094.5(b) separately mandates granting a writ of administrative mandamus where a  
8 "respondent has proceeded without, or in excess of, jurisdiction", as the Board of Appeals clearly  
9 did here. Code of Civil Procedure § 1094.5(b). Clearly, both the "no jurisdiction" and "abuse of  
10 discretion" prongs of Section 1094.5(b) are met here and each constitutes separate grounds for  
11 granting the writ.

12 Writ relief is warranted under the "no jurisdiction" prong of Section 1094.5(b) as the  
13 Board of Appeals unlawfully accepted the Coopers' expired appeal of Crown Castle NG West  
14 Inc.'s ("Crown Castle") Permit in violation of its own rules and in excess of its prescribed  
15 jurisdiction. The Board never found that the City intentionally or inadvertently caused the  
16 Coopers to be late in filing their appeal, as required by Article V, Section 10(a) of the Board of  
17 Appeals' own rules. Nor could it under the facts. Instead, it contrived to accept jurisdiction over  
18 the late appeal on the grounds that a "notice" requirement to local residents "should have" existed  
19 in the Wireless Ordinance.

20 Writ relief is also warranted under the "abuse of discretion" prong of Section 1094.5(b) as  
21 the Board's acceptance of the Coopers' untimely appeal and its subsequent revocation of the  
22 Permit was an abuse of discretion that was wholly unsupported by the law or the evidence in the  
23 administrative record, regardless of which standard the Court applies. The Board's decision was  
24 based on clear antipathy towards wireless telecommunications facilities, not on the law or  
25 evidence in the administrative record. This conclusion is supported, among other things, by the  
26 Board's eagerness to deem the Coopers' very late filed appeal an "extraordinary case" within the

27 <sup>1</sup> The City's 17 page Opposition Brief also exceeds the California Rules of Court's 15 page  
28 limit for an opposition brief without Court authorization. See Crown Castle's concurrently filed  
Objection to and Motion to Strike the City's Opposition.

1 ambit of Article V, Section 10(a) of the Board's Rules, allowing it to improperly accept  
 2 jurisdiction and revoke Crown Castle's Permit. Whereas it resolutely denied Crown Castle's  
 3 request for rehearing of the revocation decision, absolutely refusing to find the City's mapping  
 4 error was an "extraordinary case" resulting in "undue hardship" to Crown Castle under Article V,  
 5 Section 9(b) of the Board's rules, though Crown Castle bore no responsibility for the City's  
 6 mapping error. The City then refused to correct its error by promptly processing Crown Castle's  
 7 renewed permit application under its new wireless permitting scheme. Additionally, the Coopers  
 8 recently sold their residence at 156 27th Avenue on December 16, 2013 and moved away. With  
 9 their departure, the City should no longer have any interest in opposing Crown Castle's node at the  
 10 Site. Yet it continues to do so, further evidencing its longstanding animosity towards wireless  
 telecommunications facilities.

11 Denial of the Permit also exceeded the City's legal powers, in violation of Sections 7901  
 12 and 7901.1 of the Public Utilities Code.<sup>2</sup> The City's Wireless Ordinance regulates only "wireless"  
 13 facilities in the public rights-of-way. Moreover, the City fails to treat all entities in an equivalent  
 14 manner as it imposes no such discretionary regulation on any other user of the public right of way.

15 In sum, writ relief is appropriate here because Crown Castle has no other adequate legal  
 16 remedy and the City has both proceeded without jurisdiction and abused its discretion by  
 17 improperly accepting a very late appeal and revoking the Permit. Additionally, its Wireless  
 18 Ordinance violates Sections 7901 and 7901.1 of the Public Utilities Code.

## 19 II. ARGUMENT

### 20 A. The Court Should Apply the Independent Judgment Standard of Review in 21 Determining Abuse of Discretion

22 The City claims that the Court should review the Board of Appeals' decision for abuse of  
 23

24 <sup>2</sup> The City erroneously claims in its Opposition that this Court rejected this same argument  
 25 in the related case of *Crown Castle NG West, Inc. v. The City and County of San Francisco* (Case  
 26 No. CPF-12-512623). Opposition, fn. 45. But Judge Ernest Goldsmith's October 28, 2013 Order  
 27 in that case denying Crown Castle's application for writ did not rule on the matter. The issue of  
 28 whether Sections 7901 and 7901.1 of the Public Utilities Code preempt the City's current wireless  
 ordinance (San Francisco Public Works Code Article 25) is now before Judge James McBride in  
 the trial of *T-Mobile West LLC, Crown Castle NG West Inc., and Extenet Systems (California)  
 LLC v. The City and County of San Francisco, et al.* (SF Superior Court Case No. CGC-11-  
 510703), an unrelated case, that commenced trial on January 22, 2014.

1 discretion under a substantial evidence test. But as the City itself acknowledges, *Goat Hill Tavern*  
 2 *v. City of Costa Mesa* (1993) 6 Cal. App. 4th 1519 and other authority fully support applying the  
 3 independent judgment test in cases where a petitioner would lose the right to “continue operating  
 4 an established business in which [it] has made a substantial investment.” *Goat Hill Tavern, supra*,  
 5 6 Cal. App. 4th at 1527. Crown Castle has operated its node at the Site since its Permit was  
 6 granted in 2010. Administrative Record (“AR”) 1-126. There is no question that Crown Castle  
 7 made a substantial investment and incurred material expense in installing and maintaining its node  
 8 back in 2010 in reliance on a validly issued permit. As the California Supreme Court held, a City  
 9 permit is not “lawfully granted until all administrative action with respect to the permit application  
 10 has been completed.” *Russian Hill Improvement Association v. Board of Permit Appeals of City*  
 11 *& County of San Francisco* (1967) 66 Cal. 2d 34, 43. Crown Castle’s Permit was lawfully granted  
 12 when the appeal period expired 15 days after the Department of Public Works’ approval of the  
 13 Permit on September 8, 2010. AR 1-64. *See* S.F. Bus. And Tax Regs Code, Section 8 (preamble),  
 14 attached as Exhibit C to the City’s Request for Judicial Notice. Contrary to the City’s assertion,  
 15 no legal authority exists for finding the Permit was “suspended” under S.F. Bus. & Tax Regs Code  
 16 § 8(i)(5) by the Coopers’ untimely appeal outside of the 15 day appeal period. Once the appeal  
 17 period expired, Crown Castle’s Permit was considered lawfully granted and became a vested right.  
 18 Consequently, it will lose that right to operate its node at the Site without the Permit.  
 19 Accordingly, pursuant to Code of Civil Procedure § 1094(c), Crown Castle is entitled to  
 20 independent judicial review of the Board’s action denying its application.

21 Although the independent judgment test is appropriate here, even application of the more  
 22 deferential substantial evidence standard of review will result in granting this petition, as the  
 23 Board of Appeals’ revocation of Crown Castle’s application was arbitrary and capricious and  
 24 unsupported by the administrative record.

25 **B. The Board of Appeals Exceeded its Jurisdiction and Abused Its Discretion By**  
 26 **Accepting the Coopers’ Expired Appeal and Denying the Permit**

27 The City’s Opposition myopically focuses only on whether the Board of Appeals’ grant of  
 28 the Coopers’ very late appeal and revocation of the Permit constituted an “abuse of discretion”.

1 Opposition 11:21-23 (“The question for this Court is whether the Board’s determination to accept  
2 the late-filed appeal was supported by substantial evidence.”). Of course it was. But remarkably,  
3 the City altogether fails to address or even acknowledge that Code of Civil Procedure § 1094.5(b)  
4 also separately mandates granting a writ of administrative mandamus where a “respondent has  
5 proceeded without, or in excess of, jurisdiction”, as the Board of Appeals clearly did here. Code  
6 of Civil Procedure § 1094.5(b).

7 As the City concedes, administrative agencies, like the Board of Appeals “have only such  
8 powers as have been conferred on them, expressly or by implication, by constitution or statute”,  
9 “may not validly act in excess of such powers”, and that when “an administrative agency acts in  
10 excess of, or in violation, of the powers conferred upon it, its action thus taken is void”. *Ferdig v.*  
11 *State Personnel Board* (1967) 71 Cal. 2d 96, 103-104 (citations omitted). Writ relief under the  
12 “no jurisdiction” prong of Section 1094.5(b) is warranted as the Board of Appeals unlawfully  
13 accepted the Coopers’ expired appeal in violation of its own rules and in excess of its jurisdiction.  
14 Article V, Section 10(a) of the Rules of the Board of Appeals, the controlling statute, clearly  
15 mandates that the Board does not have jurisdiction over an expired appeal except in “extraordinary  
16 cases where the Board finds that the City intentionally or inadvertently caused the requestor to be  
17 late in filing the appeal”. Crown Castle’s Request for Judicial Notice, Exhibit C. The City in no  
18 way intentionally or inadvertently caused the Coopers’ late appeal.

19 The City unpersuasively argues in its Opposition that Section 10(a)’s jurisdictional  
20 requirement was satisfied because the Board found that the reason the Coopers did not receive  
21 notice was “caused by the City” as the City’s Wireless Ordinance did not require any kind of  
22 public notice. Opposition 12:1-5. However, the Board never made any such finding. Indeed,  
23 under the facts, it could not possibly have made such a finding. Instead, the Board elected to  
24 contrive out of thin air an imaginary “notice” requirement to neighbors in the vicinity that did not  
25 exist in the Wireless Ordinance or any other relevant law and based its decision to accept the late  
26 appeal on the fact this non-existent “notice” provision had not been met. The Board’s artificial  
27 construction does not satisfy Section 10(a)’s requirement that the Board find the “City  
28 intentionally or inadvertently caused the requestor to be late in filing an appeal”. The Board had

1 no authority to assume jurisdiction over the Coopers' late appeal and revoke Crown Castle's  
2 Permit. As it unequivocally proceeded without jurisdiction, a writ should issue.

3 The Board's acceptance of the late appeal and its subsequent revocation of the Permit was  
4 also an "abuse of discretion" under Code of Civil Procedure Section 1094.5(b). Abuse of  
5 discretion is established if the Court determines the City has not proceeded in the manner required  
6 by law or is unsupported by the evidence in the administrative record. Code of Civil Procedure §  
7 1094.5(b). For the reasons stated above regarding the Board's failure to comply with Article V,  
8 Section 10(a) of its own rules, there is no question the Board did not proceed in the manner  
9 required by law. Additionally, the Board's decision to accept the Coopers' late appeal and revoke  
10 the Permit was not supported by the evidence in the administrative record, regardless of the  
11 standard of review applied. The administrative record contains no evidence whatsoever  
12 supporting a finding that the City "intentionally or inadvertently caused" the Coopers' late appeal  
13 and the City's Opposition fails to point to any evidence that establishes the Board ever made such  
14 a finding. Nor does the administrative record in any way support the Board's unsupported finding  
15 that the Wireless Ordinance "should have" contained a notice requirement to local residents.

16 The City also argues that *Franklin v. Steele* (1982) 131 Cal. App. 3d 558, 562 somehow  
17 supports finding that the Board of Appeals' decision was supported by substantial evidence. Just  
18 the opposite is true. The Court of Appeal in *Franklin* held that the San Francisco Board of Permit  
19 Appeals had no authority to accept a late filed appeal of a building permit in violation of its own  
20 rules. *Id.* It also explicitly rejected the City's argument in that case that substantial evidence in  
21 the administrative record supported the Board of Permit Appeals decision finding that the late  
22 appeal was "excusable" under its rules. *Id.* Similarly, the City's reliance on *Edwards v. Steele*  
23 (1979) 25 Cal.3d 406, 413, for the proposition that the Board of Appeals' time requirements are  
24 "directory" rather than "mandatory" is misplaced and troubling, to say the least. That decision has  
25 been superseded and is not citable as precedent. Further, it concerned only whether certain Board  
26 of Appeals' rules governing its internal deadlines for holding certain types of hearings were  
27 "directory" or "mandatory". That superseded decision has no relevance whatsoever to the Board's  
28 jurisdictional appeal rules like Article V, Section 10(a) at issue here.

1 The Board's acceptance of the Coopers' untimely appeal and revocation of Crown Castle's  
2 Permit was clearly not based on the evidence in the administrative record, but on its antipathy  
3 towards wireless telecommunications facilities. This conclusion is supported, among other things,  
4 by the Board's eagerness to deem the Coopers' very late filed appeal an "extraordinary case"  
5 under Article V, Section 10(a) of the Board's Rules, justifying it accept jurisdiction over their  
6 expired appeal. Whereas it resolutely denied Crown Castle's request for rehearing of the decision,  
7 absolutely refusing to find the City's mapping error was an "extraordinary case" resulting in  
8 "undue hardship" to Crown Castle under Article V, Section 9(b) of the Board's rules, though  
9 Crown Castle bore no responsibility for the City's mapping error. AR 116-126; 348-368. See  
10 Article V, Section 9(b) of the Board of Appeals Rules (Rehearing Requests), attached as Exhibit C  
11 to Crown Castle's Request for Judicial Notice. Adding to the injury, the City then refused to  
12 correct its error by promptly processing Crown Castle's renewed permit application under its new  
13 wireless ordinance. AR 116-126.

14 Moreover, the Coopers recently sold their residence at 156 27th Avenue on December 16,  
15 2013. See Crown Castle's Supplemental Request for Judicial Notice, Exhibit A, filed  
16 concurrently. With the Coopers' departure, the City should no longer have any interest in  
17 opposing Crown Castle's node at the Site. Yet it continues to do so, further evidencing its  
18 longstanding animosity towards wireless telecommunications facilities.

19 In sum, the Board of Appeals' unlawful acceptance of the Coopers' expired appeal and  
20 subsequent revocation of the Permit were in excess of its jurisdiction and an unreasonable abuse of  
21 discretion. A writ should issue granting the Permit.

22 **C. The Wireless Ordinance Exceeds the City's Legal Powers in Violation of the Public  
23 Utilities Code**

24 Contrary to the City's arguments, this Court has authority to issue a writ of mandate where  
25 an administrative order or decision is made in excess of the administrative body's jurisdiction.  
26 CCP § 1094.5(a), (b). "Mandamus will lie to correct an abuse of discretion or the actions of an  
27 administrative agency which exceed the agency's legal powers." *Saleeby v. State Bar* (1985) 39  
28 Cal. 3d 547, 562.

The Wireless Ordinance exceeds the City's legal powers in violation of Public Utilities

1 Code §§ 7901 and 7901.1. The plain language of Section 7901.1(a) permits the City only to  
 2 exercise “reasonable control as to the time, place, and manner, in which roads, highways and  
 3 waterways are accessed”. To be reasonable, the control must “*at a minimum*, be applied to *all*  
 4 *entities* in an equivalent manner.” Pub. Util. Code § 7901.1(b) (emphasis added).

5 The City’s Wireless Ordinance, which regulates only “wireless” facilities in the public  
 6 rights-of-way, is not reasonable because the City imposes no such discretionary regulation on any  
 7 other user of the public right of way. Wireless corporations are not the only users of the public  
 8 rights-of-way. Utility poles, such as the poles at the Site at issue here, are frequently also used by  
 9 landline telephone companies, electric utilities, and cable television operators, and even municipal  
 10 facilities. As the Planning Department found, the Site itself contains numerous varieties of pole-  
 11 attached communications and utility equipment. Yet the City does not require similar  
 12 discretionary permits for any of the other communications and utility equipment located on those  
 13 poles. Indeed, only “wireless” telephone facilities are subject to the discretionary permit  
 14 requirements.

15 The City’s reliance on *Sprint PCS Assets, L.L.C. v. City of Palos Verdes Estates* (9th Cir.  
 16 2009) 583 F.3d 716, 721-724 is misplaced. That case has been roundly criticized for lacking any  
 17 basis in California law. But even accepting the case for the proposition it stated, it merely allowed  
 18 local governments to impose certain aesthetic limitations on facilities placed in the right of way.  
 19 But Public Utilities Code § 7901.1(b) does not permit the City to impose restrictions on a  
 20 telephone corporation’s access to the public right of way based solely on the use of wireless  
 21 technology. The utility pole at the Site at issue here contains electrical and power lines associated  
 22 with large-scale electrical, power, and telephone equipment belonging to PG&E, the cable  
 23 company, and telephone landline companies. The City does not impose the same discretionary  
 24 restrictions on these companies to use the public right of way as it does on Crown Castle. Because  
 25 the City does not regulate Crown Castle’s installation, operation, and maintenance of  
 26 telecommunications facilities in the public ways in a manner equivalent to the City’s regulation of  
 27 facilities and equipment other than wireless telecommunication facilities in the public ways, the  
 28 Wireless Ordinance violates Public Utilities Code §§ 7901 and 7901.1(b).

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Thus, the City's denial of the application exceeded its legal powers and a writ should issue granting the Permit.


**III. CONCLUSION**

For the foregoing reasons, Petitioner Crown Castle respectfully requests that the Court grant the petition for writ of administrative mandamus or, in the alternative, writ of mandate and order Respondents to grant the Permit at the Site.

Dated: January 28, 2014.

Respectfully Submitted,

DAVIS WRIGHT TREMAINE LLP

By:   
Martin L. Fineman  
Sam N. Dawood

Attorneys for Petitioner  
Crown Castle NG West Inc.



DAVIS WRIGHT TREMAINE LLP

**Proof of Service**

I declare under penalty of perjury under the laws of the State of California that the following is true and correct:

I am employed in the City and County of San Francisco, State of California, in the office of a member of the bar of this court, at whose direction the service was made. I am over the age of eighteen (18) years, and not a party to or interested in the within-entitled action. I am an employee of DAVIS WRIGHT TREMAINE LLP, and my business address is 505 Montgomery Street, Suite 800 San Francisco, California 94111.

I caused to be served the following documents:

**PETITIONER CROWN CASTLE NG WEST INC.'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF MOTION FOR WRIT OF ADMINISTRATIVE MANDAMUS OR WRIT OF MANDATE**

**PETITIONER CROWN CASTLE NG WEST INC.'S REPLY BRIEF IN SUPPORT OF MOTION FOR WRIT OF ADMINISTRATIVE MANDAMUS OR WRIT OF MANDATE**

**PETITIONER CROWN CASTLE NG WEST INC.'S OBJECTION TO AND MOTION TO STRIKE RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF ADMINISTRATIVE MANDAMUS OR WRIT OF MANDATE**

I caused the above document to be served on each person listed below by the following means and as indicated on the attached list:

I enclosed a true and correct copy of said document in an envelope and caused it to be delivered to the United States Post Office for mailing by U.S. Mail on ----, following the ordinary business practice.  
*(Indicated on the attached address list by a [M] next to the address.)*

I consigned a true and correct copy of said document for facsimile transmission on ----.  
*(Indicated on the attached address list by an [F] next to the address.)*

I enclosed a true and correct copy of said documents via email on ---  
*(Indicated on the attached address list by an [E] next to the address.)*

I enclosed a true and correct copy of said document in an envelope, and caused it to be hand delivered on January 28, 2014, to the following parties indicated on the attached list.  
*(Indicated on the attached address list by a [H] next to the address.)*

I am readily familiar with my firm's practice for collection and processing of correspondence for delivery in the manner indicated above, to wit, that correspondence will be deposited for collection in the above-described manner this same day in the ordinary course of business.

Executed on January 28, 2014, at San Francisco, California.



Edith Shertz

DAVIS WRIGHT TREMAINE LLP

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