



Edwin M. Lee, Mayor
Mohammed Nuru, Director

BOARD OF APPEALS

AUG 21 2014

APPEAL 14-111 | 14-113



Jerry Sanguinetti, Bureau Manager

August 21, 2014

Ann Lazarus, President
Arcelia Hurtado, Vice President
Frank Fung, Commissioner
Darryl Honda, Commissioner
Board of Appeals
City and County of San Francisco
1650 Mission, Room 304
San Francisco, CA 94103

Re: Appeal Nos. 14-111 (326 Craut St.) and 14-113 (996 Cayuga Ave.)

Dear President Lazarus, Vice President Hurtado, and Commissioners Fung,
and Honda:

The City and County of San Francisco ("City") Department of Public Works ("DPW") submits this combined response to AT&T's appeals of DPW's denials of AT&T's applications for excavation permits to install a surface-mounted facility ("SMF") in the vicinity of each of 326 Craut Street (Appeal No. 14-111) and 996 Cayuga Avenue (Appeal No. 14-113).

I. INTRODUCTION

These appeals concern DPW's denials of AT&T's applications for excavation permits based on the DPW Director rejecting the locations proposed for each of the SMFs. Under DPW Order No. 175,556 (commonly referred to as the "SMF Order"), before DPW may issue an excavation permit for an SMF the applicant must obtain DPW's approval of the proposed location for the SMF in the public rights-of-way. Part of the SMF siting process is public notice of the proposed location for an SMF, after which local residents and property owners



can object to the proposed location. If objections are submitted, DPW will hold a hearing on the proposed location. At the end of the hearing, the hearing officer will make a recommendation to the DPW Director whether to approve the proposed site and the DPW Director will issue an order.

Objections were submitted for both of AT&T's proposed locations for the SMFs that are the subject of these two appeals. DPW denied both of AT&T's applications for excavation permits that are on appeal here following the issuance of a DPW Director's order rejecting AT&T's proposed locations for its SMFs.

In these appeals, AT&T asks the Board of Appeals ("Board") to require DPW to issue excavation permits at these two proposed locations. AT&T argues that the hearing officers' recommendations, and the DPW Director's orders based on those recommendations, are without any legal basis and were issued in violation of certain state laws. For the reasons discussed below, however, the Board should uphold DPW's determinations.

The denials were properly based on the Director's determination to deny AT&T's requests to site its SMFs at these proposed locations. As the City will show herein, AT&T's failure to follow the SMF process left the Director with no other option when more preferable sites were identified by local residents.

The denials also did not violate any state laws for three reasons. First, under state law the City may deny these applications based on the City's concerns over the affects a proposed SMF would have on the aesthetic character of the streetscape, as provided in the SMF Order. Second, there is no evidence that the City has granted more favorable treatment to other persons seeking to install similar types of SMFs in the public rights-of-way. Third, the City will show that DPW's denials occurred in a timely manner.

Finally, since DPW denied the excavation permit applications on appeal here the Board of Supervisors adopted Ordinance No. 76-14 in which the Board of Supervisors established for the first time a Surface-Mounted Facility Site Permit. These permits replace the requirement that persons seeking to install SMFs in the public rights-of-way follow the SMF Order and obtain excavation permits, as AT&T did with respect to the matters on appeal.

Ordinance No. 76-14 also impacts the Board's determination on these appeals. In Section 4 of Ordinance No. 76-14, the Board determined that the requirements of Article 27 of the Public Works Code should apply to any "permit under Article 2.4 of the Public Works Code that is not final on the effective date of this ordinance." Ordinance No. 76-14 became effective on June 27, 2014. Because DPW denied the excavation permit applications at issue herein, those permits certainly were not "final" prior to June 28, 2014.

II. STATEMENT OF FACTS

A. The SMF Order And The Memorandum of Understanding Between AT&T And DPW

In the SMF Order, then DPW Director (and now Mayor) Edwin M. Lee established guidelines to enable DPW to work with entities seeking to install SMFs in the public rights-of-way to find the best possible location for an SMF, both by ensuring that the SMF does not deny users of the public rights-of-way – particularly persons with disabilities – access to the public rights-of-way and by taking into account the aesthetic character of the neighborhood. The SMF Order also established a process to ensure that local residents and property owners have the opportunity to express their concerns over a proposed SMF location. The siting process required by the SMF Order occurs prior to an application for an excavation permit under Article 2.4 of the Public Works Code. DPW will not

approve an excavation permit application for an SMF unless the site has been approved through the SMF process.

The purpose of the SMF Order is to “minimize the impact that the placement of any surface-mounted facilities will have on use of the public rights-of-way.” Consistent with this purpose, the siting process in the SMF Order serves two basic functions.

The first function is to ensure that an SMF is sited at a location that will have the least negative impact on the surrounding neighborhood. In order to do so, it is generally necessary for the applicant to identify more than one suitable location at the beginning of process. The following sections of the SMF Order contemplate that the purpose of the process is for the Director to choose among various proposed locations for a single SMF: (i) allowing DPW to require a site visit to “identify appropriate locations” for the proposed SMF (section 3.B.1.a); (ii) requiring public notice of the applicant’s “proposed locations” for the SMF (section 3.C.1.a); and (iii) authorizing the hearing officer to choose the best of the proposed locations, keep the hearing open to consider other proposed locations, and take into account whether there are other preferable locations that had not been considered (sections 3.E.4-6).

The second function is to ensure that local residents and property owners have the opportunity to participate in the location selection process. The following sections of the SMF Order contemplate that DPW will not choose a proposed location unless affected local residents and property owners are given the opportunity both to object to the applicant’s proposed locations and propose alternate locations: (i) requiring the applicant to post notice of all proposed locations for a single SMF (section 3.C.1.a); (ii) allowing any person to object to the proposed locations for the SMF (section 3.E.1); (iii) requiring a hearing if any person submits an objection (section 3.E.3); (iv) allowing the hearing officer to

keep the hearing open to “consider additional evidence concerning other locations identified during the hearing;” (section 3.E.4); and (v) requiring public notice of any newly proposed locations (section 3.E.5).

B. AT&T’s U-Verse Project

AT&T has been providing telephone service in San Francisco for at least 100 years. To do so, AT&T must install certain infrastructure in the public rights-of-way. In 2007, the California Public Utilities Commission authorized AT&T to provide video services in San Francisco. AT&T’s existing utility infrastructure used to provide telephone and internet service does not have the capacity to provide video services.

DPW has been working with AT&T since 2011 on its efforts to upgrade its utility infrastructure in San Francisco so that AT&T can offer its video services (called “U-Verse”) to all San Francisco residents and business. This is not a small undertaking. Over the next few years, AT&T intends to install over 726 SMFs in the public rights-of-way to bring fiber-optic facilities closer to its customers. According to AT&T, each SMF must be installed within a radius of 300 feet of AT&T’s existing SMF that is serving its customers in that neighborhood.

The scope of AT&T’s U-Verse project has taxed DPW’s resources. Yet DPW has worked diligently with AT&T on the rollout of its U-Verse project. During 2013 alone, AT&T issued 196 notices of intent to install SMFs and DPW received over 2,000 objections to those notices. DPW held hearings on over 100 of those sites, most of which resulted in the Director’s approval of AT&T’s proposed site. Since 2013, DPW has also issued AT&T over 300 excavation permits to install those SMFs, only ten of which have been appealed.¹ It is

¹ Only two of those appeals have been heard by the Board. The Board upheld DPW’s determination in one appeal and overturned DPW’s determination in the other. The rest are still pending.

readily apparent that DPW is providing unprecedented resources to process and approve AT&T's proposed SMF sites.

Indeed, at the time DPW adopted the SMF Order neither DPW, AT&T, nor any of the other stakeholders involved in the process could have contemplated that one entity would seek to install over 726 SMFs in a short period of time, or that local residents would broadly object to those SMFs, due to the number or size of AT&T's proposed SMFs. In part to address those concerns, on July 10, 2011 AT&T and DPW entered into a Memorandum of Understanding for AT&T Lightspeed Network Upgrade in the City of San Francisco ("MOU").²

The MOU supplements the requirements of the SMF Order for AT&T's network upgrade. Among other things, AT&T agreed in the MOU to conduct a "pre-application community meeting and site walk with interested parties for each [SMF] location" and to provide notice by mail to all local residents and property owners within 300 feet of its proposed SMF locations (commonly referred to as a "box walk"). (Section II.A.1.) Furthermore, AT&T agreed to take the following aesthetic concerns into consideration when siting its SMFs:

AT&T is willing to collaboratively consider various screen options, including but not limited to decorative bollards, community signage, trellises, bulb-outs, public seating, consolidated news racks and participation in the Facade Improvement/Community Challenge Grant program. AT&T will maintain hardscape structures so they [sic] structural [sic] sound. By this letter, AT&T is agreeing that it will not object to such design requirements as conditions to the City's permit approval.

AT&T will coordinate with Friends of the Urban Forest for potential greening projects at Lightspeed cabinet locations and will coordinate with City Departments on screening in a manner consistent with future streetscape and neighborhood beautification projects where appropriate.

² A copy of the MOU is attached hereto as Exhibit A.

C. AT&T's Failure To Comply With The SMF Order And MOU

As noted above, the SMF Order contemplates that during a hearing on objections to a proposed SMF location the hearing officer will be in a position to choose among more than one proposed location. The process outlined in the SMF Order and MOU allows five different opportunities for AT&T and/or local residents and property owners to identify alternate locations for its proposed SMF: (i) during AT&T's initial location scouting process; (ii) during DPW's site visit (if required); (iii) in the notice posted on the block and mailed to local residents and property owners; (iv) during the box walk; and (v) during the hearing on any objections. DPW's denials of AT&T's excavation permit applications at issue in these appeals stem from AT&T's failure to give the hearing officers the ability to approve alternative locations for AT&T's proposed SMFs that are preferred by the community and acceptable to AT&T.

Rather than allowing the SMF process to focus on finding the best location for a proposed SMF, AT&T has used the process to have the Director review and approve AT&T's chosen location for each SMF. AT&T's failure to properly implement the process begins with its scouting process, which results in AT&T's selection of only one proposed site. It continues in the public notice, which at no time has included more than one proposed site for the SMF. Finally, it continues during the hearing. While on many occasions local residents and AT&T have identified alternate locations for AT&T's proposed SMFs during the box walks and hearings, AT&T has failed to take proper steps to notify local residents and property owners of these potential alternate locations so that the hearing officers could be in a position to select those sites.

As discussed below, proper notice of an alternate location is a fundamental due process requirement, even if AT&T, the objectors, and the hearing officer all seem to agree that it is preferable.

III. DPW PROPERLY DENIED AT&T'S EXCAVATION PERMIT APPLICATIONS

In both of the excavation permit applications on appeal here, following hearings on the objections to AT&T's proposed SMF sites the hearing officers recommended that the DPW Director deny AT&T's requests to install its SMFs at those proposed sites, and the Director accepted the hearing officer's recommendations. As shown below, consistent with the purpose of the SMF Order the DPW Director properly adopted the hearing officers' recommendations and, therefore, DPW properly denied AT&T's applications for excavation permits at those sites.

The record shows that two people attended the box walk for AT&T's proposed SMF location at 326 Craut Street. During the box walk, local residents identified three alternate locations. AT&T agreed that one of those proposed locations (432 Sliver Avenue) satisfied its technical requirements.

The record shows that two people attended the box walk for AT&T's proposed SMF location at 996 Cayuga Avenue. During the box walk, local residents identified two alternate locations. AT&T agreed that one of those proposed locations (91 Onondaga Street) satisfied its technical requirements. Testimony at the hearing also indicated that 91 Onondaga Street was preferable to 996 Cayuga Avenue.

However, in neither of these matters AT&T did issue a new notice of intent for this alternate proposed locations, nor did AT&T make any effort to notify local residents and property owners who did not attend the box walks – but that could be affected by these alternate locations – that the hearing officers could chose this alternate locations instead of the sites AT&T had identified in the notices of intent. The hearing officer, therefore, had no authority to approve the alternate locations, even though he appeared to agree that the alternate locations were preferable to AT&T's proposed sites.

The reason for this is both clear and required by the SMF Order. The alternate sites would impact different local residents and property owners than AT&T's proposed sites. Basic principles of due process require notice before DPW could approve the installation of the proposed SMFs at locations that are different from those AT&T proposed in its notices of intent. Local residents and property owners that had no objections to AT&T's proposed site at 326 Craut Street or 996 Cayuga Avenue might have objections to AT&T's proposed alternate locations. For this reason, under the SMF Order the hearing officers could not approve these alternate sites unless the public had been notified that the hearing could result in the DPW issuing a permit to install SMFs at these alternate sites instead. In neither of the locations identified above, did AT&T provide that notice.

Given the process AT&T followed in these matters, the hearing officers had little choice but to recommend that the Director reject the locations proposed by AT&T. The hearing officers could not approve the installation of the SMFs at the less desirable locations, because the SMF Order requires the selection of the more desirable locations. And, the hearing officers could not recommend approval of any of these proposed alternate locations, because proper notices had not been issued.

AT&T's argument that the Director must approve its proposed sites under these circumstances would render the hearings a nullity. Preventing the hearing officers from making these types of choices is contrary to the very purpose of the SMF Order. In the two matters on appeal, therefore, the hearing officers properly recommended that the Director deny AT&T's requests to site its SMFs at these proposed locations, and the Director properly accepted the hearing officers' recommendations. For this reason, the Board should deny both of these appeals and uphold the Department's determinations.

IV. THE BOARD CANNOT GRANT AT&T'S APPEALS BASED ON A FINDING THAT DPW VIOLATED PUBLIC UTILITIES CODE SECTIONS 7901, 7901.1, OR 5885

AT&T argues that DPW's denials of its applications for excavation permits to install SMFs in the public rights-of-way violate Public Utilities Code sections 7901, 7901.1, and 5885. This argument is not properly before the Board. The Board lacks the power to declare a statute or ordinance unconstitutional or to refuse to enforce a statute or ordinance. (Cal. Const., Art. III, § 3.5; *see Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055; *California State Teachers' Ret. Syst. v. County of Los Angeles* (2013) 216 Cal.App.4th 41, 59, fn.8.) Instead, the Board is required to enforce City laws.

V. DPW PROPERLY EXERCISED ITS AUTHORITY UNDER THE PUBLIC UTILITIES CODE TO ENSURE THAT AT&T'S SMFS DO NOT INCOMMUNE THE USE OF THE PUBLIC RIGHTS-OF-WAY

A. The City Is Properly Exercising Its Authority Under Section Public Utilities Code Section 7901

The City does not dispute that AT&T may install utility infrastructure in the public rights-of-way. Under Public Utilities Code section 7901, however, the City can regulate AT&T's installation of telephone lines in the public rights-of-way to ensure that those facilities do not "incommode" the use of the public rights-of-way. Under Public Utilities Code section 7901.1, the City can "exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed." Under Public Utilities Code section 5885, the City can regulate AT&T's use of the public rights-of-way as a state video franchise holder in the same manner in which it regulates AT&T's installation of telephone lines.

Contrary to AT&T's argument, the City's denials at issue here have not prevented AT&T from exercising its franchise right to install facilities in the public rights-of-way. Rather, the City has properly exercised its authority under state

law to deny AT&T's applications for excavation permits to install the SMFs at issue here in the public rights-of-way, once the Director did not approve AT&T's proposed locations for its SMFS as required by the SMF Order.

One of the important purposes of the SMF Order is to ensure that any SMFs installed in the public rights-of-way do not obstruct the public's use of the public rights-of-way. In *Western Union Tel. Co. v. City of Visalia* (1906) 149 Cal. 744, 746–75, the California Supreme Court recognized that local governments may regulate the use of the public rights-of-way by telegraph and telephone lines for this purpose. The other important purpose of the SMF Order is to protect the aesthetic character of the streetscape. A federal appellate court has affirmed the authority of local governments to impose similar aesthetic limitations on the use of the public rights-of-way under section 7901. (*Sprint PCS Assets, L.L.C. v. City of Palos Verdes Estates* (9th Cir. 2009) 583 F.3d 716, 721-24 [holding that the city's "authority to regulate local aesthetics" is undisturbed by section 7901]); see also *City of Huntington Beach v. P.U.C.* (2013) 214 Cal.App.4th 566, 591 [*citing Palos Verdes Estates* as authority for the proposition that local governments are not prohibited from "taking into account aesthetic considerations" when permitting telephone lines.]) The Ninth Circuit in *Palos Verdes Estates* correctly construed the legislature's use of the term "incommodate" to include aesthetics:

To "incommodate" the public use is to "subject [it] to inconvenience or discomfort; to trouble, annoy, molest, embarrass, inconvenience" or "[t]o affect with inconvenience, to hinder, impede, obstruct (an action, etc.)." 7 *The Oxford English Dictionary* 806 (2d ed.1989; see also *Webster's New Collegiate Dictionary* 610 (9th ed. 1983) ("To give inconvenience or distress to."). The experience of traveling along a picturesque street is different from the experience of traveling through the shadows of a [wireless facility], and we see nothing exceptional in the City's determination that the former is less discomforting, less troubling, less annoying, and less distressing than the latter. After all, travel is often as much about the journey as it is about the destination. (583 F.3d 716 at pp.723-24.)

AT&T argues that there is no evidence that AT&T's installation of the proposed SMFs at issue here would incommode the public use of the road or highway. The objections DPW has received suggest otherwise. The purpose of the SMF Order is to mitigate the inconvenience these facilities could have on the public's use of the streets. For this reason, DPW has not violated section 7901 the Public Utilities Code. Its denials of AT&T's excavation permit applications are consistent with its authority under section 7901.

B. The City Is Properly Exercising Its Authority Under Section Public Utilities Code Section 7901.1

The City's long-standing authority under § 7901 to regulate AT&T's use of the public rights-of-way for was not impacted by the enacted of Public Utilities Code § 7901.1 in 1996. As the *Palos Verdes Estates* court held, the city's "consideration of aesthetics [did not] conflict with PUC § 7901.1's statement that "municipalities shall have the right to exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed." (*Id.* at p. 724.) The court found instead that section 7901.1 was added to the Public Utilities Code to "bolster the cities' abilities with regard to construction management and to send a message to telephone corporations that cities have authority to manage their construction, without jeopardizing the telephone corporations' statewide franchise." (*Id.* [internal quotation marks and citation omitted].)

The Board should also reject AT&T's claim that the City has failed to exercise its authority under § 7901.1 in any "equivalent manner" as required by § 7901.1(b). AT&T argues that it is "the only entity whose SMF applications or excavation permits have been denied by DPW on the basis that it did not apply for multiple alternative locations in its initial permit applications." AT&T argues that its Exhibits E and F support this conclusion. They do not

Exhibit F is a list of other excavation permits for SMFs that were granted by DPW for entities other than AT&T. Exhibit E is a DVD containing the various documents related to the permits identified in Exhibit F. DPW issued the majority of those permits to the San Francisco Municipal Transportation Agency ("SFMTA"). Most of the SMFs the SFMTA installed pursuant to those permits were for traffic signal controllers, train controller signals, and vehicle tagging systems, which SFMTA showed cannot be installed at more than one location.³ As SFMTA stated in its applications for one of those permits:

Because of the purpose, function and special requirements of signal controllers, their placement is critical to public safety and is limited to the portion of sidewalk as close to the intersection as practical, such that the controller is curbside with a direct line of sight to as much of the intersection, signal indications and vehicle and pedestrian traffic as possible.

SFMTA also submitted applications for SMFs used in its bike sharing program.⁴ Once again, SFMTA informed DPW that:

Bike share facilities are for public use and therefore require direct access by the public. . . . Bike share stations should . . . be placed as close to the roadway as possible, where individuals operate bicycles. . . . Additionally, stations are planned for specific locations, providing access to nearby origins and destinations.

There is nothing "equivalent" about these SFMTA facilities and AT&T's SMFs. At no time has AT&T ever asserted that there is only one appropriate location for its proposed SMFs. Moreover, there is no evidence in the record that any of these SFMTA permits AT&T were issued after a protest was filed and a DPW hearing was held.

³ See, e.g., Permit No. 13-SMF-0176 (traffic signal controller), Permit No. 14-SMF-0014 (train signal and traffic signal controller) Permit No. 14-SMF-0008 (traffic signal controller and vehicle tagging system).

⁴ See, e.g., Permit No. 13-SMF-0210.

AT&T also includes in Exhibit F a handful of DPW Director's decisions approving SMF locations that it claims show how other entities are not subject to similar requirements. Once again, AT&T's argument is wrong.

A review of the Director's orders identified by AT&T show that when a similar situation presented itself the Director came to a similar result. DPW Order No. 181353 concerned an application by PG&E to install an SMF consisting of a Supervisory Control Analog Data Acquisition device to monitor gas pressure in the vicinity of 745 Grandview Avenue. During the hearing, one person objected to the proposed location because it would "impede the line of sight while entering and exiting his driveway." The hearing officer recommended that PG&E "either find an alternate site" or "conduct a site distance/traffic study to further assess its proposed site." The Director approved the hearing officer's recommendation. PG&E never applied for an excavation permit at this location.

Moreover, there is nothing similar to the situation here and most of the other proceedings AT&T has cited in which the Director approved the applicant's proposed SMF location:

- DPW Order No. 182441. This order concerns an SMF installed by the SFMTA. The record shows that the only objector to the SFMTA's proposed location ultimately agreed that it was the "best" one and "retracted the objection."
- DPW Order No. 181004. This order was not issued under the SMF Order. It instead concerns SFMTA's application for a major encroachment permit for up to three SFMTA "operator convenience facilities/restrooms."
- DPW Order No. 182528. This order was not issued under the SMF Order. It instead concerns JCDecaux's application to relocate an advertising kiosk.
- DPW Order No. 181242. This order was not issued under the SMF Order. It instead concerns the location of Clear Channel/SFMTA transit shelters.
- DPW Order No. 181307. This order was not issued under the SMF Order. It concerns the location of a T-Mobile personal wireless service

facility on a utility pole, which is permitted under Article 25 of the Public Works Code.

- DPW Order No. 181308. This order also concerns the location of a T-Mobile personal wireless service facility on a utility pole, which is permitted under Article 25 of the Public Works Code.
- DPW Order No. 181451. This order also concerns the location of a T-Mobile personal wireless service facility on a utility pole, which is permitted under Article 25 of the Public Works Code.
- DPW Order No. 181560. This order concerns the location of a Crown Castle personal wireless service facility on a utility pole, which is permitted under Article 25 of the Public Works Code.

The only DPW order contained in Exhibit F that is even remotely relevant is DPW Order No. 181327. That order concerns an SMF installed by Sonic.Net, which like AT&T provides telephone and Internet services in San Francisco. The evidence in the record is that there was a single protest to the site. There were also seven letters in support of the proposed site. The only citizen to speak at the hearing was in favor of the proposed site. The record in the matters before the Board here, therefore, is not "equivalent" to the record in DPW Order No. 181327.

VI. DPW HAS NOT VIOLATED PUBLIC UTILITIES CODE SECTION 5885(C)(2)

AT&T also argues that DPW has violated Public Utilities Code § 5885(c)(2), which provides that the City must "either approve or deny an application from a holder of a state franchise for an encroachment permit within 60 days of receiving a completed application."⁵ As previously noted, at the time of this application the City did not offer an SMF permit. Instead, the SMF Order established a pre-permitting process for SMFs that otherwise required an excavation permit. Here, DPW denied AT&T's applications for excavation

⁵ The City does not dispute that its excavation permits are "encroachment permits" as that term is used in Public Utilities Code section 5885(c)(2). Section 5885(c)(1) defines the term "encroachment permit" to mean "any permit issued by a local entity relating to construction or operation of facilities pursuant to this division."

permits within days of submission. For this reason, there is no evidence that DPW failed to comply with the time requirements of Section 5885(c)(2).

Even if the 60-day time period started to commence with AT&T's submission of an application under the SMF Order, AT&T cannot show the City failed to meet the time limit. The time limit contained in section 5885(c)(2) is not absolute. Section 5885(c)(5) provides that "[n]othing in this section precludes an applicant and a local entity from mutually agreeing to an extension of any time limit provided by this section."

In three ways, AT&T has implicitly agreed to extend the 60-day limit. First, in the MOU AT&T agreed to conduct a box walk for each proposed SMF site, even though the SMF Order does not require a box walk. This process invariably would increase the time for DPW to approve excavation permit applications for AT&T's proposed SMF sites. Second, the sheer number of applications AT&T has submitted has virtually assured that DPW could not meet the deadline for each excavation permit application in light of the process DPW must follow each time. Third, for both of the proposed SMFs at issue here AT&T failed to expeditiously complete those parts of the approval process that were tasked to it, which prevented DPW from meeting the 60-day deadline. As the table below, AT&T's own actions significantly contributed to any delays in completing the SMF pre-permitting process at these locations.

TASK	PROPOSED SMF SITE LOCATION	
	326 Craut Street	996 Cayuga Avenue
1. AT&T submits application under SMF Order	10/18/2013	11/15/2013
2. AT&T posts the notice of intent	3/13/2014 (146 days)	3/10/2014 (115 days)
3. Notification period ends	4/3/2014 (21 days)	3/31/2014 (21 days)
4. AT&T conducts box walk	4/16/2014 (13 days)	4/10/2014 (10 days)
5. DPW conducts hearing	4/28/14 (12 days)	4/21/14 (11 days)
6. Director issues decision	5/27/2014 (29 days)	5/22/2014 (31 days)

AT&T's actions, therefore, made it impossible for DPW to issue a Director's decision for an SMF site within 60 days of AT&T's submission of an application. The completion of Tasks 1 through 4 in the table above is under AT&T's sole control. AT&T took over five months to complete those tasks on both the matters on appeal here. In light of these delays, DPW cannot be faulted for failing to complete the SMF Order's pre-application process within 60 days.

VII. ORDINANCE NO. 76-14 REQUIRES THE BOARD TO DENY THE APPEAL

Even though AT&T's appeal has no merit and should be denied for this reason, there is a separate ground for the Board to deny the appeal. In

Ordinance No. 76-14, the Board of Supervisors added Article 27 to the Public Works Code and established a separate Surface-Mounted Facility Site Permit. No longer will SMFs be permitted under Article 2.4 of the Public Works Code, or be subject to the requirements of the SMF Order.

While the substantive requirements for siting SMFs contained in Article 27 are similar to those in the SMF Order, Article 27 contains a permitting process that is very different from the process contained in the SMF Order. It ensures community involvement in the siting process, while making it clear that applicants must identify more than one proposed location for their proposed SMFs. It also requires the Planning Department to review all of the proposed SMF sites.

In Section 4 of Ordinance No. 76-14, the Board of Supervisors indicated its intent that the permitting requirements contained in Article 27 would apply to any permit that was not "final on the effective date" of the ordinance. The Board of Supervisors also determined that a permit was not "final if the permit is subject to a pending appeal before the Board of Appeals."

That is exactly the situation here. Ordinance No. 76-14 was approved by Mayor Lee on May 28, 2014 and was effective on June 27, 2014. The Board should uphold the appeal on this basis and require AT&T to submit a new application to install its proposed SMFs at 326 Craut Street and 996 Cayuga Avenue under Article 27.⁶ In order to ensure that AT&T is not prejudiced, the Board should find that the one-year prohibition contained in Section 31 of the

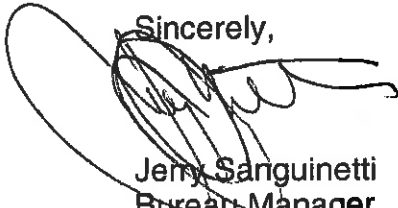
⁶ DPW is not accepting applications under Article 27 at the present time. DPW must first adopt a Director's order implementing the requirements of Article 27. The Board of Supervisors required DPW to adopt this order within 60 days of the effective date of the ordinance. On August 14, 2014 DPW issued a draft of the order. On August 18, 2014 DPW held a hearing on a draft of the order. At the close of the hearing, the hearing officer decided to leave the hearing open in order to allow stakeholders to submit additional written comments. Due to this delay, DPW expects that the Director will issue a final order in the beginning of September.

Business and Tax Regulations Code for applying for a new permit at this location does not apply.

VIII. CONCLUSION

Based on the foregoing, DPW respectfully requests that the Board find that DPW acted within its authority when it denied AT&T's applications for excavation permits to install the SMFs at issue on these appeals. In addition, the Board should deny the appeal based on the directive of the Board of Supervisors in Ordinance No. 76-14.

Sincerely,

A handwritten signature in black ink, appearing to read "Jerry Sanguinetti", is written over the word "Sincerely,".

Jerry Sanguinetti
Bureau Manager
Bureau of Street-use and Mapping

cc: John diBene (AT&T) (via e-mail)
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July 19, 2011

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

Re: Memorandum of Understanding for AT&T Lightspeed Network Upgrade in the City of San Francisco

This Memorandum of Understanding is provided by AT&T California to the City and County of San Francisco to memorialize the terms that AT&T is voluntarily proposing and agreeing to in connection with its City-wide upgrade of its existing telecommunications network, referred to as the Lightspeed upgrade.

The commitments contained in this Memorandum are voluntary and do not change the project description, but rather provide additional notice and community outreach in conjunction with the City's existing Surface Mounted Facilities Order, and a commitment to hire local workers, and to pay the City's cost in addressing the Lightspeed upgrade. AT&T offers these voluntary commitments in this unique situation.

AT&T acknowledges and agrees to voluntarily limit the Lightspeed upgrade to 495 Lightspeed cabinets initially. These 495 cabinet locations will be consistent with the 726 locations detailed in AT&T's CEQA application. In order to determine which locations it will construct, AT&T will work with the city, community organizations, neighborhood associations and residents to determine the best locations for potential cabinets and will not build locations where there is significant community opposition to the placement of additional cabinets. Once 495 Lightspeed cabinets are constructed, AT&T will confer with the Supervisors in whose districts additional cabinets would be placed and the Director of DPW before filing any permit applications for any additional cabinets.

I. Background

Since 2006, AT&T has been seeking excavation permits from the Department of Public Works (DPW) to install telecommunications cabinets that will allow AT&T to provide improved telecommunications services to City residents. DPW had begun issuing these permits under the Surface Mounted Facilities Order, but stopped processing the permits so that the City's Planning Department could review the City-wide upgrade under the California Environmental

Quality Act (CEQA). In 2008, the Planning Department reviewed a proposal to upgrade the entire City and determined that the project was categorically exempt pursuant to CEQA Guidelines Section 15303. The Board of Supervisors heard an appeal of this determination and, based on feedback AT&T received through the appeal process, AT&T revised and resubmitted its proposal.

The revised proposal reduced the size and number of the cabinets, including removing all cabinets located in historic districts and reducing the total number by refining the build plan, provided additional mounting and screening options, increased the flexibility as to the locations where the cabinets can be sited, and AT&T withdrew all permits that it had received to date from DPW. AT&T also conducted a significant amount of community outreach to explain the purpose and extent of the upgrade. In February 2011, the Planning Department found this revised proposal to be exempt from CEQA pursuant to CEQA Guidelines Section 15303. A new appeal was filed in March 2011. In conjunction with consideration of that appeal, AT&T has spoken with several Supervisors and offers the following additional commitments in response to comments it has received.

II. Commitments by AT&T

A. Commitments Beyond the Surface Mounted Facilities Order

The City has the most robust permitting process that AT&T has found in any jurisdiction under DPW's Surface Mounted Facilities Order. However, AT&T is hereby voluntarily agreeing to the following requirements for processing and enhancing the Lightspeed network build as part of the DPW Surface Mounted Facilities Order.

1. Additional Notice for Each Cabinet Site

AT&T will voluntarily mail notice required under the Surface Mounted Facilities Order to property owners and residents within 300 feet of the proposed locations (this is consistent with AT&T prior commitment). AT&T will conduct a pre-application community meeting and site walk with interested parties for each cabinet location. AT&T will also meet on-site with DPW and any member of the public who has concerns with a proposed cabinet location.

Once a location is permitted by DPW, AT&T will provide pre-construction notice to residents within 300 feet via door hangers (this is also consistent with AT&T prior commitment).

2. Provision of Information to the Public in General

AT&T will maintain a public website containing information about the upgrade. AT&T will maintain a project manager and email and phone contact information for public inquiries regarding the upgrade.

AT&T commits to attending and presenting at an informational hearing before the Board of Supervisors after year one, and again after year two, of the upgrade to gather information on what works and what needs improving in the community outreach and permitting process.

3. Additional Cabinet Siting Considerations

AT&T, when siting any cabinet, will first look for available alley space or non-sidewalk public right of way. Working with DPW and the community, consistent with Surface Mounted Facilities Order Section 3.B.a and 3.B.b. and the City's Better Streets Plan, AT&T is willing to collaboratively consider various screen options, including but not limited to decorative bollards, community signage, trellises, bulb-outs, public seating, consolidated news racks and participation in the Façade Improvement/Community Challenge Grant program. AT&T will maintain hardscape structures in accordance with lawfully and uniformly applied City standards. By this letter, AT&T is agreeing that it will not object to such design requirements as conditions to the City's permit approval.

AT&T will coordinate with Friends of the Urban Forest for potential greening projects at Lightspeed cabinet locations and will coordinate with City Departments on screening in a manner consistent with future streetscape and neighborhood beautification projects where appropriate.

AT&T will annually provide information about its vendors that offer undergrounding technologies and the feasibility of undergrounding future AT&T equipment upon request.

AT&T will work cooperatively with City officials, DPW, and interested residents and community organizations in determining the best location to place Lightspeed cabinets.

B. Commitment to Hire Local Workforce

AT&T will commit to continued marketing of vacancies in local and niche Job Boards that provide opportunities to the local population of San Francisco. This would include connecting with the San Francisco CityHire program to make certain that their base of Job Seekers are given full advantage of external AT&T opportunities in the San Francisco area. To the extent reasonably possible given the number and qualifications of local residents, consistent with all of AT&T's existing legal, regulatory, and contractual obligations, AT&T will hire residents of San Francisco to fill at least 33 percent of the new jobs created for the purpose of installing U-verse service in the City of San Francisco within two years after the execution date of this MOU.

C. Commitment to Pay Cost of Lightspeed Permit Processing

To address the City's cost of processing Lightspeed applications, consistent with Municipal Code Section 2.4.43, AT&T will reimburse time and materials for the City's review and processing of Lightspeed permits including coordination that may be necessary between City departments.

D. Commitment to Pay Cost of Graffiti Removal


As stated in our project description, AT&T strives to remove graffiti within 48 hours of being notified. AT&T will also comply with Section 8 of the Surface Mounted Facilities Order with respect to graffiti removal standards. If AT&T fails to remove such graffiti within the timeframe required by the Surface Mounted Facilities Order, a City employee that complies with AT&T's policies and procedures for graffiti removal may remove such graffiti from a Lightspeed cabinet and AT&T will reimburse the City for its costs. For five years following the date of this Memorandum, AT&T will provide a \$25,000 bond or other security acceptable to AT&T and the City for graffiti removal done by the City in compliance with this paragraph and will replenish that fund if the balance falls below \$10,000.

E. Commitment to Pay Cost of Cabinet Relocation

Consistent with state law, AT&T will pay the cost of relocation of any Lightspeed cabinet when required for a governmental use. Where relocation is paid for by a private party, AT&T will work collaboratively with the City to facilitate relocation of a Lightspeed cabinet.

Lastly, we also want to address a misconception that AT&T is not paying to use the public right-of-way. Under state law, AT&T pays 5 percent of its gross revenue receipts on their video product for the use of the public right-of-way. This requirement is set by state law.

AT&T is committed to implementing the Lightspeed upgrade in the City of San Francisco in a manner that includes San Francisco residents and its community leaders. With the above commitments, we are confident that the upgrade will be conducted in a manner that fully informs the public and effectively brings improved telecommunications services which are sorely needed in the City.

Sincerely,


Marc Blakeman

Regional Vice President - External Affairs