

## ORDINANCE NO. 7,726-N.S.

INSTALLATION OF VIDEO AND TELECOMMUNICATIONS SYSTEMS; AMENDING  
BERKELEY MUNICIPAL CODE CHAPTER 16.10

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

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

**16.10.010 Purpose.**

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

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

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

**16.10.020 Definitions.**

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

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

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

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

15. "Technically Feasible" means a circumstance in which the applicant has demonstrated by clear and convincing evidence submitted to the Director that compliance with a specific requirement within this Chapter and any administrative regulations or guidelines is physically impossible or unreasonable (e.g., incapable of being accomplished based on existing technology compatible with an applicant's existing network) and not merely more difficult or expensive than a noncompliant alternative.

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

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

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

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

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

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

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

**16.10.030 PROW Permit Required—Applicability.**

**A. PROW Permit Required**

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

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

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

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

D. Nothing in this Chapter shall be deemed to authorize the installation of facial recognition or other Surveillance Technology (as defined in Section 2.99.020) in the public-right-of-way.

E. Nothing in this Chapter shall be deemed to limit the City’s authority to regulate the placement, construction, and modification of wireless devices that are not Personal Wireless Service Facilities nor shall this Chapter limit the authority of the City to refuse or otherwise condition approval of installation of a Personal Wireless Service Facility on City property in its proprietary capacity or in any other non-regulatory capacity.

**16.10.040 PROW Permit Application.**

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

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

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

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

2. Photographs with superimposed images showing any proposed Facilities.

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

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

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

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

D. Estimated construction start and completion dates.

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

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

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

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

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

**16.10.045 Additional Application Requirements for Facilities on Utility Poles.**

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

B. Such applications shall also include proof that all property owners and occupants specified in Section 16.10.040.F have been given notice by first class mail, no later than the date of the application, of the proposed construction or installation of the Facility. Notice shall be printed on a template form to be provided by the Director, which, among other terms, shall appraise recipients of the right to request a reasonable accommodation from the City pursuant to 28 C.F.R. § 35.106. Such notice shall also be posted on the pole on which the Facility is proposed to be installed. Notices under this Section shall identify the specific pole on which the Facility is proposed to be installed and contact information for the Company or its authorized representative, and for the Director of Public Works. The purpose of this notice is to ensure that property owners and residents have an opportunity to contact the Company, the Department of Public Works, and any entities responsible for the pole on which the Facility is proposed to be located so that they can try to resolve any objections they may have.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**16.10.060 Issuance of PROW Permits.**

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

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

1. The capacity of the PROW to accommodate all proposed Facilities.
2. The capacity of the PROW to accommodate the City's planned uses of the PROW.
3. The damage or disruption, if any, to the PROW or use and enjoyment of any public or private facilities, improvements adjacent to it, pedestrian or vehicle travel, and landscaping, if the permit is granted.
4. The visual and aesthetic impact and compatibility of Facilities with the surrounding neighborhood or zone.
5. The impact of the Facilities on views, parks, and on cultural resources protected by or eligible for protection under Chapter 3.24 of the Berkeley Municipal Code or the State Public Resources Code Section 5020.1(j).
6. The availability of technically compatible existing Facilities or Excess Capacity, or alternate routes and/or locations for the proposed Facilities, which would be less disruptive or which better protect the PROW for its dedicated use, and the feasibility of using such Facilities, Excess Capacity or alternate routes and/or locations.
7. The effect of any Facilities on traffic or pedestrian safety or access.
8. Completion of any environmental review under the California Environmental Quality Act (CEQA) that may be required by law.
9. Whether the Company has the legal entitlement to provide the services for which the Facilities will be used.



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

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

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

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

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

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

**16.10.070 Construction Activities.**

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

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

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

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

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

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

**16.10.080 Excavation.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

F. Restoration of PROW

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

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

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

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

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

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

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

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

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

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

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

#### **16.10.090 Remedies During Construction.**

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

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

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

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

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

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

#### **16.10.100 Maintenance of Facilities—Continuing Obligations.**

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

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

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

D. A Company shall be responsible for maintaining all Facilities in good condition, well-painted and free of graffiti and other markings; provided, however, that Companies shall not be responsible for maintenance of any plantings or vegetative screening materials, whether preexisting installation of the Proposed Facilities or installed by the Company during installation. A Company assumes all responsibility for damage or injury resulting from placement or maintenance of any Facility. If a Company fails to comply with

any written City demand relating thereto, the City may perform said work and withdraw its costs and expenses from the security fund.

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

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

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

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

G. No Personal Wireless Service Facility or combination of Facilities subject to this Chapter shall produce power densities that exceed applicable FCC limits for electric and magnetic field strength and power density for transmitters. In order to ensure compliance with all applicable radiofrequency exposure standards, Personal Wireless Service Facilities that are subject to field testing of radiofrequency emissions under FCC standards may be required to submit reports as required by this subdivision and applicable regulations and guidelines adopted by the Director. Testing and certification in the same manner shall also be conducted upon the upgrade or substantial modification of radio or antenna equipment.

H. Notwithstanding anything herein, no operator of any Personal Wireless Service Facility shall be required to provide any report, or any information in any report, that

exceeds reports or information that may be required by the FCC. The City may obtain, at the operator's expense, independent verification of the results of any analysis. If an operator of a Personal Wireless Service Facility fails to supply any required report or fails to correct a violation of the FCC standard following notification, the PROW Permit for that Personal Wireless Service Facility shall be suspended until the operator complies with this subdivision.

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

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

#### **16.10.110 Emergency Repairs.**

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

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

C. Upon completion of that work, the City shall submit to the Company an itemized statement of costs, which shall be due no later than 30 days of billing. Amounts not timely paid may be deducted from the performance bonds or security fund. Costs that may be



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

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

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

A. Each Company operating Video or Telecommunications Systems in the PROW shall submit to the Director an annual certification attesting under penalty of perjury that Facilities in the PROW remain necessary to provide Video or Telecommunication Services, and shall specifically identify any Facilities that are no longer necessary to provide said services. The Director may order a Company to remove its Facilities from public property or PROW at its own expense whenever a Company materially breaches its PROW Permit, ceases to operate any Facility for a continuous period of six months, or fails to complete construction of the Video or Telecommunications System within six months, or its PROW Permit is revoked. No such order may be issued without first giving the Company a reasonable opportunity to cure.

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

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

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

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

**16.10.130 City Vacation or Abandonment.**

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

**16.10.140 System Location Data.**

Annually, each Company shall provide the Director with data in a digital or other format specified by the Director which details and documents all the geographic locations of Facilities located in PROW. The record shall be updated whenever there have been significant changes in the location of the Facilities. In addition, the Company shall maintain in its local office a complete, fully-dimensioned, and up-to-date set of as-built system maps and drawings upon completion of construction. As-built drawings shall show all Facilities and reflect whether the Facilities, including but not limited to cable facilities are presently being used. Dark fiber shall be denoted as such. The scale of maps and drawings shall be sufficient to show the required details in easily readable form and size.

**16.10.150 Appeals.**

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

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

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

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

#### **16.10.160 Indemnity and Liability Insurance.**

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

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

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

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

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

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

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

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

**16.10.170 Revocation, Termination, and Modification of Permits.**

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

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

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

**16.10.180 Possessory Interest.**

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

B. The information supplied in an application covered by this Chapter may be made available to all taxing jurisdictions covering the area affected by the application for purposes of determining the full cash value of the property, facilitating auditing and comparison with any property statements, and validating whether and to what extent Facilities in the PROW are "new construction" as defined by California Revenue and Taxation Code Section 70.

**16.10.190 Violations.**

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

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

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

**16.10.200 Adoption of Administrative Regulations or Guidelines.**

A. The Director will develop, publish, and periodically, at a frequency of no less than every five years, update or amend permit application requirements, forms, checklists,

guidelines and informational handouts under this Chapter so long as such updates or amendments do not diminish any requirement provided in the Code or any regulations or guidelines approved by the City Council. All such administrative regulations or guidelines shall be immediately effective when made publicly available in any format, which may include, but shall not be limited to, posting on the City's website.

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

**16.10.210 Interpretation and Severability.**

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

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

At a special meeting of the Council of the City of Berkeley held on July 7, 2020, this Ordinance was passed to print and ordered published by posting by the following vote:

Ayes: Bartlett, Droste, Hahn, Harrison, Kesarwani, Robinson, Wengraf, and Arreguin.

Noes: Davila.

Absent: None.