

MEMORANDUM

January 4, 2019

TO: MEMBERS, PORT COMMISSION
Hon. Kimberly Brandon, President
Hon. Willie Adams, Vice President
Hon. Gail Gilman
Hon. Victor Makras
Hon. Doreen Woo Ho

FROM: Elaine Forbes
Executive Director

SUBJECT: Request Adoption of Protest and Appeal Process for Personal Wireless Service Facilities Site Permits

DIRECTOR'S RECOMMENDATION: Approve the Attached Resolution

Executive Summary

The Port applies the substantive provisions of the City's Public Works Code in issuing certain types of encroachment permits including permits for Personal Wireless Service Facility Sites in rights-of-way under Port jurisdiction. Article 25 of the City's Public Works Code establishes permit procedures for Personal Wireless Service Facility Sites including a protest and appeal procedure. In order to provide a clear and equivalent process for Port-issued Personal Wireless Service Facility Site permits taking into account appropriate aesthetic, health, safety and welfare concerns, fairness and special conditions and considerations that appropriately reflect the Port's jurisdiction, organizational structure, facilities and operations, Port staff requests that the Port Commission designate the Chief Harbor Engineer to hear any protest of the tentative approval of an encroachment permit for a Personal Wireless Service Facility Site and the Port Building Code Review Board (Review Board) to hear an appeal of the Chief Harbor Engineer's decision. Except as otherwise noted, the protest and appeal procedures will follow the substantive and procedural requirements specified in Article 25 of the City's Public Works Code.

Strategic Objectives

This Project supports the Port's Strategic Plan strategies of Engagement, Economic Vitality, and Stability.

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Engagement: Establishing a clear process equivalent to the process used when the Department of Public Works is the permitting entity maintains good customer service with the public and Port tenants.

Economic Vitality: The process contributes to the Port's ability to provide for permitting and leasing, and to deepen the Port's revenue base.

Stability: The process supports critical Port fiscal policies by streamlining permit resolution.

Background

The federal Communications Act preserves state and local authority over zoning and land use decisions for personal wireless service facilities, but sets forth specific limitations on that authority including that a state or local government may not unreasonably discriminate among providers of functionally equivalent services; may not regulate in a manner that prohibits or has the effect of prohibiting the provision of personal wireless services; must act on applications within a reasonable period of time; and must make any denial of an application in writing supported by substantial evidence in a written record. The federal statute also preempts local regulatory decisions premised directly or indirectly on the environmental effects of radio frequency (RF) emissions. State law provides that municipalities may ensure that the installation of telephone lines does not "incommode the public use" of roads and highways, and may exercise reasonable control as to the time, place, and manner in which rights of way are accessed for construction activities by providers of telecommunications services.

The Port of San Francisco derives its authority to regulate and permit building construction or improvements within its jurisdiction from the Burton Act (Chapter 1333 of the Statutes of 1968) and from relevant sections of the Agreement Relating to Transfer of the Port of San Francisco from the State of California to the City and County of San Francisco. In 2007, the Port first adopted its own Port Building Code (Port Commission Resolution 07-55). At that time, the Port Commission directed Port staff to continue to process encroachment permits for work within the rights-of-way in the Port's jurisdiction using the substantive standards of the City's Public Works Code in order to appropriately document the Port's permit processes and requirements for encroachment permits until a Port Public Works Code is adopted.

Article 25 of the City's Public Works Code provides for detailed multi-departmental review, notice, conditions, modification, security, permit and hearing fees, liability, insurance and other provisions for Personal Wireless Service Facilities permits and outlines the protest and appeals procedure for the issuance of such permits by the Department of Public Works. Under Article 25, the Department of Public Works makes a tentative decision on whether to issue a permit and provides notice to the potentially affected public of such tentative decision. A person may protest that decision in which case a hearing officer will hold a hearing and make a recommendation to the Department of Public Works Director for a final determination on the permit. After public notice of the final determination, an appeal of the permit can be made to the City's Board of Appeals. Article 25 lists the specific grounds on which a protest can be granted.

Proposed Port Procedure

As described below, in order to preserve the underlying substantive requirements of Article 25 for encroachment permits for Personal Wireless Service Facilities Sites under Port jurisdiction and make the protest and appeal procedural requirements equivalent to those for other Port-issued permits taking into account appropriate aesthetic, health, safety and welfare concerns, fairness and special conditions and considerations that appropriately reflect the Port's jurisdiction, organizational structure, facilities and operations, Port staff recommends that (1) a protest of the tentative approval of a permit shall be to the Chief Harbor Engineer who shall also serve as the hearing officer; and (2) an appeal of the issuance of such permit shall be to the Review Board.

The Chief Harbor Engineer has authority to hold hearings on various protests made under the Port Building Code under Port Building Code Section 102A.4. For all protests of Port's tentative approval of an encroachment permit for a Personal Wireless Service Facilities Site, Port staff proposes the protest and hearing procedure follow the standards and procedures outlined in Article 25 of the City's Public Works Code with the exception of substitution of the Chief Harbor Engineer for the Director of Public Works.

The specific allowable grounds for granting a protest of a Port-issued permit will be limited to (all defined terms in the following are defined by Article 25): (1) the Department of Public Health incorrectly determined that the application complies with the Public Health Compliance Standard; (2) in the case of an application for a Tier A or Tier B Personal Wireless Service Facilities Site permit, the Port incorrectly determined that the application meets the applicable Tier A or Tier B Compatibility Standard; (3) the application does not comply with any other requirement for obtaining a Personal Wireless Service Facilities Site permit; or (4) the evidence shows that the applicant intends to apply for a modification permit after the permit is issued and that the proposed modification(s) would not comply with any applicable Compatibility Standard. Article 25's notice requirements and the timeframes for protests, hearing and decisions will apply to the Chief Harbor Engineer's decision.

For all appeals of a final decision on a Personal Wireless Service Facilities Site permit, Port staff proposes the substitution of the Review Board for the Board of Appeals. Section 105A of the Port Building Code establishes a Review Board to hear and adjudicate appeals of (1) the granting, disapproval, denial, suspension or revocation of any Port Building permit under the Code, (2) written Port Building Code interpretations made by the Port's Chief Harbor Engineer and (3) orders of abatement. The Port Building Code specifies that the Review Board shall consist of five members selected by the Port Executive Director and approved by the Port Commission. In June 2017, by Resolution 17-27, the Port Commission appointed the current five members of the Review Board for a three-year term. On July 14, 2011, the Review Board duly adopted governing rules including appeals procedures (Review Board Rules).

For appeals of a final decision on a Personal Wireless Service Facilities Site permit, the provisions of Port Building Code Section 105A and the Review Board's Rules will apply and the grounds for granting a protest will be limited to those specified above. If the

Review Board finds it necessary, the Review Board may adopt addition or supplemental procedures.

Recommendation

In order to provide a clear and fair process for protesting and appealing Port-issued Personal Wireless Service Facilities Site permits, Port staff requests that the Port Commission adopt the attached Resolution to designate the Chief Harbor Engineer to hear any protest of the tentative approval of an encroachment permit for a Personal Wireless Service Facilities Site and the Review Board to hear an appeal of the Chief Harbor Engineer's decision as described above.

Prepared by: Rod K. Iwashita, Chief Harbor Engineer

**PORT COMMISSION
CITY AND COUNTY OF SAN FRANCISCO**

RESOLUTION NO. 19-04

WHEREAS, On, July 17, 2007, by Resolution 07-55, the Port Commission directed Port staff to continue to apply the standards of the San Francisco Public Works Code as the basis to regulate all encroachment work until the Port Commission adopts a Port version of the Public Works Code; and

WHEREAS, Article 25 of the San Francisco Public Works Code (Sections 1500-1529) (“Article 25”) provides a procedure for issuance of Personal Wireless Service Facilities Site Permits, including protests and appeals related to such permits; and

WHEREAS, Article 25 provides a process for protesting the tentative approval of a Personal Wireless Service Facilities Site Permit to the Department of Public Works and a process for appealing the issuance of such permit to the City’s Board of Appeals; and

WHEREAS, In order to preserve the underlying substantive requirements of Article 25 for encroachment permits for Personal Wireless Service Facilities Sites under Port jurisdiction and make the procedural requirements clear and equivalent to those for other Port-issued permits, taking into account appropriate aesthetic, health, safety and welfare concerns, fairness and special conditions and considerations that appropriately reflect the Port’s jurisdiction, organizational structure, facilities and operations, Port staff recommends that a protest of the tentative approval of a Personal Wireless Service Facilities Site permit shall be to the Chief Harbor Engineer and an appeal of the issuance of such permit shall be to the Port Building Code Review Board (Review Board) established by Port Building Code Section 105A; now, therefore be it

RESOLVED, That the Port Commission designates the Chief Harbor Engineer to hear and decide any protest of a tentative approval of a permit for a Personal Wireless Service Facilities Site using the substantive and procedural requirements established by Section 1513 of Article 25 supplemented by any duly adopted rules and procedures necessary to ensure fairness in the process; and be it further

RESOLVED, The Chief Harbor Engineer may grant a protest of a tentative approval of a permit for a Personal Wireless Service Facilities Site only if the Chief Harbor Engineer finds that the evidence at the hearing supports any one of the following findings: (1) the Department of Public Health incorrectly determined that the application complies with the Public Health Compliance Standard; (2) in the case of an application for a Tier A or Tier B Personal

Wireless Service Facilities Site permit, the Port incorrectly determined that the application meets the applicable Tier A or Tier B Compatibility Standard; (3) the application does not comply with any other requirement for obtaining a Personal Wireless Service Facilities permit; or (4) the evidence shows that the applicant intends to apply for a modification permit after the permit is issued and that the proposed modification(s) would not comply with any applicable Compatibility Standard; and be it further

RESOLVED, That the Port Commission designates the Review Board to hear any appeal of a final Personal Wireless Service Facilities Site permit using its duly adopted rules and any duly adopted supplemental rules and applying the grounds for granting a protest specified above.

I hereby certify that the foregoing resolution was adopted by the San Francisco Port Commission at its meeting of January 8, 2019.

Secretary