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CITY ATTORNEY'S OFFICE

INTRODUCED BY COUNCILMEMBER NOEL GALLO

AS REVISED IN COUNCIL

OAKLAND CITY COUNCIL

ORDINANCE NO. ~~13663~~ **13663** C.M.S.

ORDINANCE TO PROHIBIT OWNERS OF MULTIPLE OCCUPANCY BUILDINGS FROM INTERFERING WITH THE CHOICE OF COMMUNICATIONS SERVICES PROVIDERS BY OCCUPANTS, ESTABLISH REQUIREMENTS FOR COMMUNICATIONS SERVICES PROVIDERS TO OBTAIN ACCESS TO MULTIPLE OCCUPANCY BUILDINGS, AND ESTABLISH REMEDIES FOR VIOLATION OF THE ACCESS REQUIREMENT

WHEREAS, many occupants of residential and commercial multiple occupancy buildings are unable to choose between service providers because in some such buildings property owners allow only one provider to install the facilities and equipment necessary to provide services to occupants; and

WHEREAS, state and federal regulatory agencies have adopted policies that promote competition among service providers, believing that this competition will benefit all consumers by incentivizing lower costs and better service; and

WHEREAS, as the Federal Communications Commission ("FCC") has noted, "contractual agreements granting . . . exclusivity to cable operators harm competition and broadband deployment and . . . any benefits to consumers are outweighed by the harms of such [agreements]." In the Matter of Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units & Other Real Estate Developments, Report & Order & Further Notice of Proposed Rulemaking, 22 FCC Red 20235, at 20236 (2007), affirmed, National Cable & Telecommunications Association v. FCC, 567 F.3d 659 (D.C. Cir. 2009) ("FCC Decision"); and

WHEREAS, in 1998, the California Public Utilities Commission ("CPUC") prohibited telecommunications carriers from "entering into any type of arrangement with private property owners that has the effect of restricting the access of other [telecommunications] carriers to the owners' properties or discriminating against the facilities of other carriers." Decision 98-10-058, Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service, 82 CPUC 2d 510, 1998 WL 1109255 (CPUC 1998); and

WHEREAS, in 2007, the FCC prohibited cable television providers from executing contracts with property owners that contained exclusivity clauses and from enforcing existing contracts containing those clauses. FCC Decision, 22 FCC Rcd at 20235; and

WHEREAS, while state and federal laws prohibit providers from entering into exclusive access agreements with property owners, nothing in state or federal law directly regulates property owners; and

WHEREAS, Oaklanders should have the right to choose their own internet communications service providers, regardless of whether they own or rent their homes or business locations; and

WHEREAS, 59.3% of Oaklanders rent their homes, and the vast majority of business owners rent their store fronts; and

WHEREAS, the right to choose service providers of all types is fundamental. The ability to choose among providers benefits all Oaklanders by incentivizing providers to offer the best services at the lowest prices; and

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF OAKLAND DOES ORDAIN AS FOLLOWS:

SECTION 1. Enactment of Oakland Municipal Code Chapter 8.66, Communications Service Provider Choice Ordinance. Oakland Municipal Code Chapter 8.66 is enacted as set forth below.

Chapter 8.66 Communications Service Provider Choice Ordinance

Section 8.66.010 - Findings.

A. Oakland has long been recognized as a technology leader. Oaklanders expect that the communications services they receive at their residences and offices meet modern standards. Oaklanders also expect to be able to choose among different providers. The ability to choose among providers benefits all San Franciscans by incentivizing providers to offer the best services at the lowest prices.

B. Many Oaklanders can choose between at least two service providers, but some customers have only one option for service. This is particularly true for occupants of residential and commercial multiple occupancy buildings. It is common in such buildings for property owners to allow only one provider to install the facilities and equipment necessary to provide services to occupants.

C. While state and federal laws prohibit providers from entering into exclusive access agreements with property owners, nothing in state or federal law directly regulates property owners. The City of Oakland can use its police power to facilitate opportunities for access to multiple occupancy buildings by communication service providers to enable occupants to obtain

communications services from the providers of their choice, while respecting the rights of property owners.

Section 8.66.020 - Definitions

For purposes of this ordinance.

“City” means the City of Oakland.

“Communication Services” means a) video service as that term is defined in California Public Utilities Code § 5830(s) b) telecommunications services certified by the California Public Utilities Commission under California Public Utilities Code § 1001 c) services provided by a telephone corporation as that term is defined in California Public Utilities Code § 234 or d) Community-operated local or Internet-connected infrastructure, including peer-to-peer networks. Nothing in this definition is intended to limit the types of services that a communication services provider accessing a multiple occupancy building pursuant to this ordinance may provide to occupants.

“Communication Services Provider” means a person that a) has obtained a franchise to provide video service from the California Public Utilities Commission under California Public Utilities Code § 5840 b) has obtained a certificate of public convenience and necessity from the California Public Utilities Commission under California Public Utilities Code § 1001 to provide telecommunications services c) is a telephone corporation as that term is defined in California Public Utilities Code § 234 or d) A California not for profit corporation or subscriber-owned cooperative offering local or Internet-connected communications network infrastructure within the City of Oakland.

“Existing Wiring” means both home run wiring and cable home wiring, as those terms are defined by the Federal Communications Commission in 47 C.F.R § 76.800(d) and 47 C.F.R. § 76.5(II) respectively, except that those terms as used herein shall apply only to the home run wiring owned by the property owner.

“Just and Reasonable Compensation” means the “fair market value” of the impact on the multiple occupancy building as that term is defined in the California Code of Civil Procedure § 1263.320.

“Multiple Occupancy Building” means a) an apartment building, apartment complex or any other group of residential units located upon a single premises or lot, provided that such multiple dwelling unit contains at least four separate units and b) a multi-tenant building used for business purposes that has separate units occupied by at least four different persons. Hotels, guesthouses and motels, consisting primarily of guest rooms and/or transient accommodations, are not multiple occupancy buildings. Multiple occupancy buildings include properties that are rented to tenants, owned and occupied by individual owners, or occupied by shareholders/tenants of a cooperative.

“Occupant” means a person occupying a unit in a multiple occupancy building.

“Person” means any natural person or an entity including but not limited to a corporation or a partnership.

“Property Owner” means a person that owns a multiple occupancy building or controls or manages a multiple occupancy building on behalf of other persons.

“Request for Service” means an expression of interest from an occupant received by a communication services provider either by mail, telephone or by electronic mail. A contact between an occupant and a communication services provider through a sign-up list contained on the provider’s website will be deemed a request for service once the communication services provider confirms the request, either by telephone or electronic mail.

Section 8.66.030 - No Interference by Property Owner

- A. No property owner shall interfere with the right of an occupant to obtain communication services from the communication services provider of the occupant’s choice.
- B. A property owner interferes with the occupant’s choice of communication services provider by, among other things, refusing to allow a communication services provider to install the facilities and equipment necessary to provide communication services or use any existing wiring not currently in use by another provider to provide communication services as required by this ordinance.

Section 8.66.040 - No Retaliation by Property Owner Against Occupant

No property owner shall retaliate in any manner against an occupant on the account of the occupant’s requesting or obtaining communication services from the communication services provider of the occupant’s choice.

Section 8.66.050 - Applicability

All multiple occupancy buildings as defined in Section 8.66.020 are covered by this ordinance. A property owner that, as of the effective date of this ordinance, has an agreement with a communication services provider that purports to grant the communication services provider exclusive access to a multiple occupancy building and/or the existing wiring to provide services is not exempt from the requirements of this ordinance.

Section 8.66.060 - Request to Inspect a Multiple Occupancy Building

- A. Prior to issuing a notice of intent to provide service under Section 8.66.070 of this ordinance, a communication services provider shall inspect a multiple occupancy building to determine the feasibility of providing services to one or more occupants.
- B. A communication services provider shall request in writing that the property owner allow it to inspect the property for the purpose of providing service. Such request shall be sent

to the property owner by first-class mail, registered mail, or electronic mail at least 14 days before the proposed date for the inspection.

- C. A request for inspection shall include, but need not be limited to, the following.
1. A statement that the communication services provider a) is authorized to provide communication services b) has received a request for service from one or more occupants c) when inspecting the property will conform to such reasonable conditions as the property owner deems necessary to protect the safety, functioning and appearance of the property and the convenience and well-being of the occupants and d) will indemnify, defend and hold harmless the property owner for any damage caused by the inspection.
 2. A description of a) the communication services to be offered to occupants b) the facilities and equipment the communication services provider anticipates installing on the property c) the square footage generally required for the provider's facilities and equipment and d) the estimated electrical demand of the provider's facilities and equipment.
 3. The date and time the communication services provider proposes to inspect the property.
 4. A statement that the property owner has until five days before the proposed inspection date to notify the communication services provider in writing either that a) the property owner will not allow the communication services provider to provide services on the property. In this case, the property owner shall set forth the reasons for its refusal and whether any of those reasons are permitted by section 8.66.080 of this ordinance; or b) the property owner will allow the communication services provider to inspect the property. In this case, the property owner shall identify any reasonable conditions that the communication services provider must follow during the inspection in order to protect the safety, functioning and appearance of the property, and the convenience and well-being of the occupants.
 5. A reference to and a copy of this ordinance.

Section 8.66.070 - Notice of Intent to Provide Service

- A. A communication services provider that intends to provide communication services to one or more occupants shall send a notice of intent to the property owner at least 30 days before the proposed installation date. The notice of intent shall be sent by first-class mail, registered mail, or electronic mail.
- B. A notice of intent to provide communication services shall include but need not be limited to the following information.
1. A statement that the communication services provider a) is authorized to provide communication services b) has received a request for service from one or more occupants, including the unit number of each such occupant, c) when installing, operating, maintaining or removing its facilities and equipment from the property will conform to such reasonable conditions as the property owner deems necessary to protect the safety, functioning and appearance of the property, and the convenience and well-being of the occupants d) will pay the property owner just and reasonable

compensation for direct one-time costs for internal wiring of the building and/or the monthly cost of utilities to service the provider's facilities and equipment e) will indemnify, defend and hold harmless the property owner for any damage caused by the installation, operation, maintenance or removal of its facilities from the property.

2. A description of a) the communication services to be offered to occupants and b) a full set of the communication services provider's detailed plans and specifications for any work to be performed and facilities and equipment to be installed in or on the property, including any required utility connections and the electrical demand of any facilities and equipment to be installed.
3. The dates and times the communication services provider proposes to start and complete the installation.
4. A statement that the property owner has until 5 days before the proposed installation start date to notify the communication services provider in writing that; a) the property owner will not allow the communication services provider to provide services on the property or b) the property owner will allow the communication services provider to provide services on the property, but disagrees with the amount of the just and reasonable compensation the communication services provider has proposed. In this case the property owner shall state the amount of just and reasonable compensation the property owner will require, and in either the case of (a) or (b) the property owner shall state any reasonable conditions the communication services provider must follow during the installation to protect the safety, functioning and appearance of the property and the convenience and well-being of the occupants.

Section 8.66.080 - Permitted Refusal of Access

- A. Nothing in this ordinance shall be construed to require a property owner to allow a communications service provider to access its property to inspect the property where the communication services provider has failed or refused to agree to the property owner's request that the provider comply with any conditions on accessing the property contained in a notice pursuant to section 8.66.090 of this ordinance.
- B. Nothing in this ordinance shall be construed to require a property owner to allow a communication services provider to access its property to install the facilities and equipment necessary to provide services if:
 1. The communication services provider is not authorized to provide communications services;
 2. The communication services provider cannot verify that one or more occupants of the multiple occupancy building have made a request for services;
 3. The property owner can show that physical limitations at the property prohibit the communication services provider from installing the facilities and equipment in existing space that are necessary to provide communication services and/or from using existing wiring to provide such services;
 4. The communication services provider has not agreed to the property owner's request that the provider comply with any conditions on accessing the property contained in a notice from the property owner issued pursuant to section 8.66.090 of this ordinance;

5. The communication services provider proposed installation of facilities and equipment in or on the property would a) have a significant adverse effect on any historically or architecturally significant elements of the property b) disturb any asbestos or lead paint in or on the property c) have a significant adverse effect on the continued ability of existing communication services provider to provide services on the property d) cause undue damage to the property or e) impair the use of the property for the continued provision of any existing essential services; or
6. The property owner and communication services provider have not reached an agreement about any just and reasonable compensation to the property owner for allowing the communication services provider to install, operate and maintain facilities and equipment on its property as required by section 8.66.100 of this ordinance.

Section 8.66.090 - Permitted Limitations on Access

- A. A property owner that grants a communication services provider access to its property to inspect the property may require the communication services provider to conform to such reasonable conditions as the property owner deems necessary to protect the safety, functioning and appearance of the property and the convenience of well-being of the occupants during the inspection.
- B. A property owner that grants a communication services provider access to its property to install facilities and equipment on the property to be used to offer communications services to occupants may require the communication services provider when installing operating, maintaining or removing its facilities and equipment from the property to
 1. Conform to such reasonable conditions as the property owner deems necessary to protect the safety, functioning and appearance of the property and the convenience and well-being of the occupants
 2. Provide a certificate of insurance confirming coverage as is generally required by the property owner for contractors performing comparable work on the property
 3. Obtain any permits that might be required to install facilities and equipment on the property
 4. Accept responsibility for the cost a) to install any electrical facilities needed to serve the facilities and equipment installed by the provider and b) of any electricity to be used by those facilities and equipment.
 5. Allow the property owner to inspect the communication service providers installation of any facilities and equipment for compliance with the Building Code and generally acceptable construction standards.
 6. Remove its facilities and equipment and restore any area of the property occupied by the communication services provider to its prior condition when a) those facilities and equipment are no longer being used to provide communication services to any occupant or b) any access agreement between the property owner and the communication services provider has expired or been terminated.
- C. A property owner that has received an inspection request under Section 8.66.060 or an installation notice under Section 8.66.070, of this ordinance, shall notify the

communication services provider in writing at least five days before the inspection or installation of any conditions authorized under subsection A or B of this section, that the communication services provider must comply with while inspecting the property or installing facilities and equipment on the property.

Section 8.66.100 Just and Reasonable Compensation

A property owner is entitled to just and reasonable compensation as defined in section 8.66.070 of this ordinance from a communication services provider that obtains access to a multiple occupancy building under this ordinance to provide communication services to occupants.

Section 8.66.110 Notice of Violation

- A. A communication services provider or an occupant that believes that a property owner has failed to comply with the requirements set forth in this ordinance shall notify the property owner in writing that 1) the property owner is in violation of this ordinance and 2) unless the property owner agrees to come into compliance with this ordinance within 10 days, the communication services provider or occupant may take action against the property owner pursuant to this ordinance.
- B. The notice required by subsection A shall 1) describe the manner in which the property owner is in violation of this ordinance and 2) identify any actions the property owner is required to take to come into compliance with this ordinance.
- C. No communication services provider or occupant may enforce the requirements of this ordinance unless and until the communication services provider or occupant has complied with subsection A.

Section 8.66.115 Notification to Occupants

All property owners of multiple occupancy buildings as defined in section 8.66.020 are required to issue written notice to all existing occupants of their rights contained in this ordinance within 60 days after the city sends out notification of this ordinance. All new occupants shall receive written notice of their rights contained in this ordinance within 30 days of occupancy. The written notices required by this section may be contained within a lease or rental agreement, by way of a lease addendum, or as a separate written notification.

Section 8.66.120 Enforcement by the City

- A. Any property owner that violates this ordinance may be assessed an administrative citation pursuant to O.M.C. Chapter 1.12 for each day such violation is committed or continues.
- B. The City Attorney may institute a civil proceeding in the Alameda County Superior Court on behalf of the City, for injunctive and monetary relief including civil penalties as

specified in this ordinance to enforce this ordinance against a property owner that has violated this ordinance.

Section 8.66.130 Enforcement by Communication Services Providers and Occupants

- A. A communication services provider or occupant of a multiple occupancy building where the property owner has refused to allow a communication services provider to provide service may institute a civil proceeding to enforce this ordinance in Alameda County Superior Court against such property owner for injunctive and monetary relief.
- B. For the purpose of subsection A, monetary relief means the greater of actual damages or statutory damages of one thousand (\$1,000) dollars.
- C. A court may award punitive damages in a proper case as set out in Civil Code Section 3294 and pursuant to the standards set forth in that Code Section or any successor thereto.
- D. Prior to filing a civil proceeding in accordance with subsection A, the communication services provider or occupant shall comply with the notice requirements contained in section 8.66.110 of this ordinance.

Section 8.66.140 Attorney's Fees and Costs

- A. A court may award reasonable attorney's fees and costs to the City if it obtains injunctive relief under section 8.66.120 of this ordinance or to any person that obtains injunctive and monetary relief under section 8.66.130 of this ordinance.
- B. If a court finds that any action brought under this ordinance is frivolous, the court may award the property owner reasonable attorney's fees and costs.
- C. If a proceeding brought against a property owner under this ordinance concerns a multiple occupancy building that contains fewer than 25,000 square feet of space available for occupants to rent or own, the attorney's fees and costs recoverable against the property owner pursuant to subsection A or recoverable against a person commencing the action pursuant to subsection B, shall be limited to \$5,000.

Section 8.66.150 Civil Penalties

- A. Any property owner that violates this ordinance may be liable for a civil penalty not to exceed \$500 for each day such violation is committed or continues. Such penalty may only be recovered in a civil action brought by the City Attorney.
- B. In assessing the amount of a civil penalty, a court may consider any of the relevant circumstances including, but not limited to the following:
 - 1. The number of occupants affected by the violation;
 - 2. The number of communication services providers affected by the violation;

3. Whether the property owner has violated this ordinance at other properties in the City;
 4. The amount of revenues the property owner receives from any existing communication services provider serving the property;
 5. Whether the property owner has a legitimate reason for refusing access to its property by the communication services provider;
 6. The net assets and liabilities of the property owner, whether corporate or individual.
- C. Any civil penalty under subsection A will start to accrue following the completion of the notice required by section 8.66.110 of this ordinance.

Section 8.66.160 Statute of Limitations

- A. Any court proceeding by a communication services provider or occupant to enforce this ordinance against a property owner must be brought within 180 days of the communication services provider or occupant completing the notice requirements contained in sections 8.66.110 and 8.66.130 of this ordinance.
- B. The City Attorney may institute a court proceeding to enforce this ordinance within 180 days of the City Attorney receiving written notice that a property owner has violated this ordinance. The City Attorney has sole discretion to determine whether to bring such an action.

Section 8.66.170 Extensions of Time

Any of the deadlines set forth in sections 8.66.060, 8.66.070, 8.66.090 and 8.66.110 of this ordinance may be extended by agreement between a communication services provider or occupant and property owner, as applicable.

Section 8.66.180 Undertaking for General Welfare

In enacting or implementing this ordinance, the city is assuming an undertaking only to promote the general welfare. It is not assuming nor is it imposing on its officers and employees an obligation for breach of which it is liable in money damages to any person that claims that such breach proximately caused injury.

Section 8.66.190 No Conflict with Federal or State Law

Nothing in this ordinance should be interpreted or applied so as to create any requirement, power or duty in conflict with any federal or state law. Nothing in this ordinance should be interpreted or applied to require the sharing of in-use facilities or in-use wiring, as those terms are used in 34 FCC Rcd. 7202 (2019).

SECTION 2. Severability. If any section, subsection, sentence, clause or phrase of this Ordinance is for any reason held to be invalid or unconstitutional by decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of the

Chapter. The City Council hereby declares that it would have passed this Ordinance and each section, subsection, clause or phrase thereof irrespective of the fact that one or more other sections, subsections, clauses or phrases may be declared invalid or unconstitutional

SECTION 3. Effective Date. This ordinance shall become effective immediately on final adoption if it receives six or more affirmative votes; otherwise it shall become effective upon the seventh day after final adoption.

SECTION 4. CEQA Compliance. This action is exempt from the California Environmental Quality Act ("CEQA") pursuant to sections of the CEQA Guidelines, taken together and each as a separate and independent basis, including but not limited to: Section 15378 (regulatory actions), Section 15060(c)(2) (no direct or reasonably foreseeable indirect physical change in the environment), and Section 15061(b)(3) (no significant environmental impact). The legislation contains no provisions modifying the physical design, development, or construction of residential or nonresidential structures. Accordingly, it can be seen with certainty that there is no possibility that it: (1) may have a significant effect on the environment and/or (2) would result in any physical changes to the environment.

SECTION 5. Notice to Property Owners. The City Administer is directed to cause notice of this Ordinance to be mailed or emailed to all Property Owners of Multiple Occupancy Buildings, according to the business tax certification records of the Revenue Management Bureau, within 90 days of final adoption of this Ordinance.

IN COUNCIL, OAKLAND, CALIFORNIA,

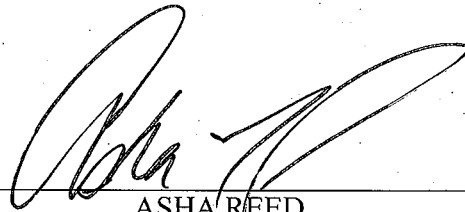
OCT 19 2021

PASSED BY THE FOLLOWING VOTE:

AYES – FIFE, GALLO, KALB, KAPLAN, REID, TAYLOR, THAO AND
PRESIDENT FORTUNATO BAS **-8**

NOES – **0**
ABSENT – **0**
ABSTENTION – **0**

ATTEST:



ASHA REED
City Clerk and Clerk of the Council of the
City of Oakland, California

Introduction Date

OCT 05 2021

Date of Attestation: October 29, 2021

NOTICE AND DIGEST

ORDINANCE TO PROHIBIT OWNERS OF MULTIPLE OCCUPANCY BUILDINGS FROM INTERFERING WITH THE CHOICE OF COMMUNICATIONS SERVICES PROVIDERS BY OCCUPANTS, ESTABLISH REQUIREMENTS FOR COMMUNICATIONS SERVICES PROVIDERS TO OBTAIN ACCESS TO MULTIPLE OCCUPANCY BUILDINGS, AND ESTABLISH REMEDIES FOR VIOLATION OF THE ACCESS REQUIREMENT

This ordinance to prohibit owners of multiple occupancy buildings from interfering with the choice of communications services providers by occupants, establish requirements for communications services providers to obtain access to multiple occupancy buildings, and establish remedies for violation of the access requirement.