



NATIONAL
MULTIFAMILY
HOUSING
COUNCIL



BACKGROUND | MAY 2017

San Francisco Mandatory Access Ordinance 161110/Article 52

Background

The multifamily rental housing industry is concerned about a recently-enacted ordinance in San Francisco that could limit a property owner's ability to manage communications services for their apartment communities. The new ordinance may also impact the market for broadband overall. Many are concerned that the ordinance could be replicated by additional local governments and may have implications at the federal level.

The ordinance, also known as Article 52, creates a right for residents to request service from any city-authorized communications provider regardless of whether, or how many, providers already serve the property. Apartment firms are entitled to "just and reasonable compensation" from a provider based on the fair market value of installing, operating and maintaining equipment and facilities to deliver service to residents but those parameters are unclear. The impact on existing contracts between apartment owners and service providers are also uncertain since the ordinance does not make an exception for agreements already in place. The ordinance imposes liability for a civil penalty of up to \$500 per day plus attorney's fees and costs against a "property owner," which includes both owners and third-party managers, for a violation.

Status

On October 18, 2016, San Francisco Board of Supervisors Member Mark Farrell introduced Ordinance 161110. Without evidence, the proposal moved forward based on the assertion that multifamily owners commonly allow only one provider to serve an apartment community.

On December 13, 2016, the Board of Supervisors unanimously passed Ordinance 161110 notwithstanding language in the measure acknowledging existing market competition and noting that “many San Franciscans can choose between at least two service providers.” Despite the outcome, it’s important to note that NMHC member firms from across the country, along with the San Francisco Apartment Association and other interested parties, raised significant concerns with the Board and several helpful amendments were made.

The ordinance, which covers both apartments and commercial office buildings, was signed into law by San Francisco Mayor Ed Lee and took effect in January 2017.

On February 24, the [Multifamily Broadband Council \(MBC\)](#), a trade organization that represents independent, non-franchised competitive broadband providers to the multifamily housing industry, filed two petitions with the Federal Communications Commission (FCC) that seek to block the ordinance. MBC argued that the ordinance is federally preempted and conflicts with the FCC’s regulations governing inside wiring, network sharing and bulk billing arrangements for broadband service to apartment communities. MBC also contended that the San Francisco ordinance interferes with consumer rights to antenna-based services recognized in the [FCC’s Over the Air Reception Devices \(OTARD\)](#) rule. Although the challenged ordinance applies to San Francisco, it raises national concerns because similarly problematic proposals are under consideration across the country, and it implicates federal regulations governing agreements between apartment companies and communications providers.

NMHC will file comments with the FCC to support MBC’s challenge and intends to argue that the market for communications services in the rental apartment industry is competitive in San Francisco and across the nation. NMHC will also contend that ordinances like the one in San Francisco conflict with federal law and are unnecessary and ultimately harmful to consumers.

Summary of Ordinance 161110/Article 52

As enacted, the legislation:

- Creates a right for an “occupant” of most multifamily communities with four or more units and commercial office buildings to request service from a communications provider. Control over building access and use of equipment and facilities will shift from the building owner to service providers and residents or tenants.
- Defines “property owners” to include both owners and third-party managers but does not specifically limit the definition of an “occupant” to apartment residents who are party to a lease.
- Forces a property owner to grant access to a communications provider, including installation of facilities and equipment, and the use of existing “home run wiring” and “cable home run wiring” owned by the building owner. Access to wiring essentially would be forced even if a building owner has contractually assigned the use of the wiring to a provider that already serves the building, thereby creating a conflict with existing provider agreements, and potentially impacting service quality.

Exceptions may be made for impairing an existing “essential” building service or a significantly adverse impact on the continued ability of an existing provider to serve the property. Exceptions may also be made for a significantly adverse impact on historical or architectural features, and lead paint or asbestos disturbance.

- Allows an authorized communications provider to request an inspection of a property to determine whether the provider believes service is feasible. An inspection request must affirm a provider’s receipt of at least one service request, specify the requested service type, and identify the anticipated facilities and equipment including the square footage needed and the estimated electrical demand.

A building owner must either allow the service provider to inspect the property, agree subject to “reasonable conditions,” or state reasons for turning down the request. An inspection request may be refused only for reasons specified by the ordinance such as physical constraints that would prevent the new provider’s equipment or use of existing wiring.

- Requires an apartment community to grant access to a provider following a property inspection and the provider's notice of intent to the building, subject to specific exceptions. A notice must include a unit number for each resident requesting service and detailed installation plans, among other things. The service provider must also propose an amount for compensation to the owner.

The burden then shifts to the building owner, who must either allow service or cite reasons authorized by the proposal to deny access. If an owner allows building access, it must either accept the service provider's proposal for compensation or set forth an alternative, and identify "reasonable conditions" for service. The ordinance leaves major issues to be resolved through costly legal proceedings, including conflicts with existing contracts with providers already serving a building and parameters for determining "just and reasonable" compensation.

- Creates a cause of action by the City Attorney, any communications provider, *and* an occupant of the building to force a building owner to allow service to even one occupant, and imposes attorney's fees and a civil penalty of up to \$500 per day for non-compliance.

Multifamily Rental Housing Industry Position Statements

- Resident satisfaction is a primary motivation for apartment owners in selecting communications services providers. Owners recognize the importance of robust, reliable broadband service for residents. Owners support competition among providers for better service standards and prices that meet resident expectations.
- To encourage market competition, federal and state laws already bar exclusive access agreements between building owners and most communications services providers. But federal law recognizes the importance of negotiating agreements to foster market competition, higher service standards and competitive prices and does not require a property owner to enter an agreement with a service provider.
- The market is working effectively to allocate scarce capital for network construction, maintenance and service upgrades. The ordinance will interfere with an apartment owner's ability to negotiate with providers to invest in their properties and bring quality service to apartment residents. Most apartment companies manage communications services on a property by property basis at the market level, but even the largest apartment firm is dwarfed by most communications service providers.

Providers are formidable competitors and they simply do not need assistance from the Board of Supervisors. Moreover, some buildings are simply too small to support more than one or two providers, and the presence of additional providers seeking to serve a limited number of residents is a disincentive for investment and competition. This dynamic could have a particularly troublesome impact on residents of buildings with an already-limited return on a provider's investment, including smaller properties and affordable housing.

- Smaller, independent providers ("Private Cable Operators") play an important role in bringing service to buildings that may not otherwise be served. Federal law recognizes the value of these providers, specifically exempting them from its ban on exclusive access agreements. The ordinance does not recognize the importance of exclusivity to investors that fund infrastructure costs on the assumption such providers will capture subscribers to recoup that investment.
- The number of providers serving a particular building depends on multiple factors, including a provider's corporate consolidation, provider willingness to serve a property because of its ability to recoup an infrastructure investment, or a provider's refusal to fairly compensate an owner for the value of accessing the building and installing or using existing infrastructure.
- There are legitimate reasons for an owner to limit building access. The ordinance shifts the costly burden of demonstrating harm to the building owner. In so doing, the ordinance subverts private property rights and grants controlling rights to communications providers. Moreover, the ordinance identifies a limited, but overly broad, scope of reasons for limiting building access.
- Enforcement of the ordinance will not sufficiently distinguish between various reasons for why a provider has not been given permission to access a building. For example, an agreement on the length of the contract or customer service standards may not be reached.
- The ordinance does nothing to advance broadband access for underserved communities. Instead, it allows communications providers to "cherry pick" lucrative opportunities in larger buildings with more affluent residents. Accordingly, competitive providers will most likely target properties with ample service. Although the ordinance acts as a mandate for a property owner to allow a communications provider to serve a building upon request, it will not obligate a provider to deliver service to a building.
- The ordinance is a retroactive ban on existing agreements for the use of wiring and providers will undoubtedly refuse to honor other terms of many existing

agreements. This has the potential to set the stage for costly legal battles and uncertainty among building owners, incumbent service providers and consumers.

- The ordinance seems to allow providers to share wiring, which will be a disincentive to build infrastructure or agree to maintain it. Importantly, the complexities of such sharing arrangements, and managing use, pose a real threat to service reliability.