

To: President De La Fuente & City Councilmembers
From: Justin Horner, Office of Councilmember Jane Brunner
Date: December 19, 2006
Re: Proposed Moratorium, Item 23

Please find attached to this memo a proposed alternative moratorium, as accepted and recommended by the Public Works Committee on Tuesday, December 12th.

*This proposal would reduce the scope of the original moratorium in your packet. As the original asked for a moratorium on the issuance of permits and the construction of utility boxes, this would only place a moratorium on the *issuance* of permits to construct boxes. Any boxes permitted prior to the passage of the moratorium could therefore go forward.*

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REVISED BY PUBLIC WORKS COMMITTEE 12/12/06

4/5 VOTE REQUIRED FOR PASSAGE

APPROVED AS TO FORM AND LEGALITY

INTRODUCED BY COUNCILMEMBERS:

Oakland City Attorney's Office

ORDINANCE NO. _____ C.M.S.

AN URGENCY ORDINANCE, PURSUANT TO GOVERNMENT CODE SECTION 65858, ESTABLISHING A TEMPORARY MORATORIUM ON THE ISSUANCE OF PERMITS FOR THE CONSTRUCTION OF ABOVE-GROUND UTILITY OR EQUIPMENT CABINETS WITHIN THE PUBLIC RIGHT OF WAY

WHEREAS, Government Code § 65858 allows a city, including a charter city, without following the procedures otherwise required prior to the adoption of a zoning ordinance, to adopt, as an urgency measure, an interim ordinance prohibiting any uses which may be in conflict with a contemplated general plan, specific plan, or zoning proposal which the legislative body, planning commission, or planning department is intending to study within a reasonable time; and

WHEREAS, the City of Oakland's Community Economic Development Agency is in the process of evaluating new amendments to the City's zoning regulations, or other controls, relating to design, location and size requirements for the construction, modification or placement of above-ground utility or equipment cabinets; and

WHEREAS, until such time that the City concludes its review and adopts and institutes new land use regulations governing design, location and size requirements for the construction, modification or placement of above-ground utility or equipment cabinets, the community is in jeopardy that above-ground utility or equipment cabinets could be constructed, modified or placed prior to the imposition of new regulations necessary for the protection of public health, safety and welfare;

WHEREAS, the City Council finds and determines that the issuance of permits for above-ground utility or equipment cabinets during the moratorium period, in which possible amendments to the Zoning Regulations, or other controls, are being studied, could result in conflicts with any proposed amendments/controls and would undermine the purpose of studying such amendments/controls, thereby reducing the quality of life within the community to the extent the overall public health, safety and welfare are detrimentally affected; and

WHEREAS, the City's current utility or equipment cabinet regulations are administrative guidelines that are deficient in several areas, including but not limited to: they do

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not adequately address community concerns regarding locational standards and design, handicapped access, and they allow permit applications to be handled through an administrative review process that requires public notification through notice by the utility company but does not include a public review process with direct involvement of the City; and

WHEREAS, since 2002, the City of Oakland has received an increasing number of applications for the construction, modification, and/or placement of above-ground utility or equipment cabinets throughout the City, in response to changing technology and the physical requirements required to connect this new technology to residential neighborhoods; and

WHEREAS, currently, the City of Oakland Community and Economic Development Agency approves, on average, three permits per week for the installation, construction, placement, and/or modification of utility or equipment cabinets, and there are currently pending applications on file; and

WHEREAS, changes in broadband, energy, transportation and telecommunications technology, as well as projected increases in residential and commercial development throughout the City, coupled with the desire of utility providers to increase their services in the City and surrounding areas are all projected to result in additional permit applications for the placement or modification of utility or equipment cabinets within the City of Oakland; and

WHEREAS, significant concerns have been raised in the community regarding the continuing adequacy of the current procedures and guidelines to address the increased number of permit applications and new technologies, and to ensure informed, consistent, uniform, and fair decisions on permit applications for new and/or modified utility or equipment cabinets throughout the City; and

WHEREAS, citizens of the City of Oakland have also expressed significant concerns regarding the impacts that a proliferation of above-ground utility or equipment cabinets within the City of Oakland may have upon the community as a whole, including, but not limited to, safe public access, noise, maintenance, adverse visual impacts, and incompatibility of such large installations in residential zones; and

WHEREAS, citizens of the City of Oakland have expressed a desire that the City receive adequate services provided that these larger facilities are designed and located to minimize the concerns described above; and

WHEREAS, it is the intent of the Oakland City Council to consider and adopt new zoning regulations, or other controls, pertaining to above-ground utility or equipment cabinets in order to provide clear, consistent, and uniform guidance to utility or equipment cabinet providers regarding the siting and design of above-ground utility or equipment cabinets while also addressing the significant community concerns described above, and to better reflect the City's siting and regulatory objectives for such facilities, all within the limitations specified in the; and

WHEREAS, the Oakland City Council has determined that a temporary moratorium on the issuance of permits for above-ground utility or equipment cabinets will allow the City time to

complete its review and revisions of its design and procedural review regulations while ensuring to the maximum extent feasible that the siting and other objectives of the revised ordinance/regulations may be achieved; and

WHEREAS, for the reasons set forth above, this ordinance is declared by the Oakland City Council to be necessary for preserving the public peace, health, or safety and to avoid a current, immediate and direct threat to the health, safety, or welfare or the community, and the “Whereas” clauses above taken together constitute the City Council’s statement of the reasons constituting such necessity and urgency.

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

SECTION 1. The City Council finds and determines the foregoing recitals to be true and correct and hereby makes them a part of this ordinance.

SECTION 2. The City Council finds and determines, for the reasons stated in the recitals, the adoption of this ordinance is exempt from CEQA under Sections 15061(b)(3), 15307, 15308, and 15183 of the State CEQA Guidelines.

SECTION 3. The City Council hereby directs the *Community and Economic Development Agency* to immediately work on the preparation of amended zoning regulations, or other appropriate controls, governing the construction, modification, and placement of above-ground utility or equipment cabinets within the City of Oakland right of way and to submit them for consideration by the Planning Commission and City Council, as may be appropriate.

SECTION 4. Until such time as the City concludes the review described above, and adopts new Regulations or otherwise establishes new design and siting criteria or amends Chapter 12 and/or 17 of the Municipal Code, the City of Oakland hereby declares a moratorium on the issuance of permits for above-ground utility or equipment cabinets as defined in section 5 below. Nothing herein is intended to, nor does, prevent the submittal of such applications by utility or equipment cabinet providers, however, such applications are submitted at the sole cost, expense and risk of the providers and with the understanding that the permit requirements may change after application submittal.

SECTION 5. For purposes of this Ordinance, the following definition shall apply:

“Utility or Equipment Cabinet” means any above-ground structure, cabinet, electric meter, and any other appurtenance installed for or servicing telecommunication or utility purposes above surrounding grade in the public rights-of-way, excluding facilities which are regulated separately pursuant to Chapter 17.128 of the Oakland Zoning Regulations. For the purposes of reviewing allowable Utility or Equipment Cabinet Applications, all structures, cabinets, electric meters, and any other appurtenance that share a common structural foundation shall be defined as one Utility or Equipment Cabinet. All structures, cabinets, electric meters, and any other appurtenance required to operate a facility, but that do not share a common structural foundation, shall be considered a separate Utility or Equipment Cabinet installation. The number of separate Utility

or Equipment Cabinet installations shall be based on the number of separate structural foundations installed when the facility is fully operational.

SECTION 6. In accordance with Government Code Section 65858, this Ordinance shall be in full force and effect for a period of 45 days from the date of its adoption, i.e., **from December 19, 2006 through and including February 2, 2007**, or until permanent regulations are adopted, whichever occurs earlier, prohibiting the issuance of permits for above-ground utility or equipment cabinets, except as provided in Sections 7, 8 and 9, below. This 45-day period may be extended by the City Council in accordance with the provisions of California Government Code Section 65858.

SECTION 7. Exceptions. Any proposed above-ground utility or equipment cabinets that are reasonably necessary for the protection of life and public safety (including traffic control devices) are exempt from the moratorium established under this urgency ordinance. The Planning Director shall determine, based on substantial evidence in the record, whether such utility or equipment cabinets meet these requirements. In addition, the moratorium shall not apply to the following activities, as defined in Section 17.128.020 of the current Zoning Regulations, and as determined by the Planning Director:

- a. Minor modifications of existing utility or equipment cabinets, whether emergency or routine, provided there is little or no change in the visual appearance and no increase in external dimensions. Minor modifications are those modifications, including the addition of or modification of internal equipment or access doors.

SECTION 8. During the term of this ordinance as set forth in Section 6 hereof and unless expressly provided herein, no building, encroachment, excavation, zoning or other permits for the construction, modification, or placement of any above-ground utility or equipment cabinets shall be issued by any department, agency, employee, or agent of the City of Oakland; nor shall any department, agency, employee, contractor or agent of the City of Oakland construct, modify or place any above-ground utility or equipment cabinets unless such has commenced prior to the effective date of this Ordinance.

SECTION 9. Petition for Relief from Moratorium. Any person who has applied to construct, modify or place a utility or equipment cabinet which would be affected by this Moratorium, and who contends that the Moratorium as applied to him or her would be unlawful under Federal, State, or local law or regulation, must submit a written Petition to the Planning Director requesting relief from the Moratorium. Failure to submit such a Petition will preclude such person from challenging the moratorium in court. The Petition shall identify the name and address of the applicant, the affected application number, and shall state specifically and completely how the Moratorium as applied to him or her would be unlawful under Federal, State, or local law or regulation. Failure to raise each and every issue that is contested in the Petition and provide appropriate supporting evidence will be grounds to deny the Petition and will also preclude the Petitioner from raising such issues in court. Within fifteen (15) working days of receipt of the Petition, the City Administrator, or her designee, shall mail to the Petitioner a written determination accepting or rejecting the Petition. The City Administrator's decision shall be final and not subject to administrative appeal.

SECTION 10. The City Clerk shall certify to the passage and adoption of this Ordinance causing it to be posted, as required by the law, and it shall thereafter be in full force and effect. This Ordinance shall become effective immediately as an interim urgency ordinance, in order to protect the public health, safety, and welfare.

SECTION 11. For the term of this ordinance, as set forth in Section 6 hereof, the provisions of this ordinance shall govern, to the extent there is any conflict between the provisions of this ordinance and the provisions of any other City code, ordinance, resolution or policy, and all such conflicting provisions shall be suspended.

SECTION 12. This Ordinance is enacted pursuant to the City of Oakland's general police powers, Section 106 of the Charter of the City of Oakland, Article XI of the California Constitution and Government Code section 65858.

SECTION 13. If any section, subsection, sentence, clause or phrase of this Ordinance is for any reason held by a court of competent jurisdiction to be invalid, such decision shall not affect the validity of the remaining portions of this ordinance. The City Council declares that it would have adopted this Ordinance and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that any one or more section, subsection, sentence, clause, or phrase be declared invalid.

IN COUNCIL, OAKLAND, CALIFORNIA, _____, 2006

PASSED BY THE FOLLOWING VOTE:

AYES - BRUNNER, KERNIGHAN, NADEL, QUAN, BROOKS, REID, CHANG, and
PRESIDENT DE LA FUENTE

NOES –

ABSENT –

ABSTENTION –

ATTEST:

LATONDA SIMMONS
City Clerk and Clerk of the Council of
the City of Oakland, California

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OFFICE OF THE CITY CLERK
CITY OF OAKLAND

REVISED BY PUBLIC WORKS COMMITTEE 12/12/06

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APPROVED AS TO FORM AND LEGALITY

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WHEREAS, the City of Oakland's Community Economic Development Agency is in the process of evaluating new amendments to the City's zoning regulations, or other controls, relating to design, location and size requirements for the construction, modification or placement of above-ground utility or equipment cabinets; and

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WHEREAS, for the reasons set forth above, this ordinance is declared by the Oakland City Council to be necessary for preserving the public peace, health, or safety and to avoid a current, immediate and direct threat to the health, safety, or welfare or the community, and the "Whereas" clauses above taken together constitute the City Council's statement of the reasons constituting such necessity and urgency.

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SECTION 6. In accordance with Government Code Section 65858, this Ordinance shall be in full force and effect for a period of 45 days from the date of its adoption, i.e., **from December 19, 2006 through and including February 2, 2007**, or until permanent regulations are adopted, whichever occurs earlier, prohibiting the issuance of permits for above-ground utility or equipment cabinets, except as provided in Sections 7, 8 and 9, below. This 45-day period may be extended by the City Council in accordance with the provisions of California Government Code Section 65858.

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SECTION 8. During the term of this ordinance as set forth in Section 6 hereof and unless expressly provided herein, no building, encroachment, excavation, zoning or other permits for the construction, modification, or placement of any above-ground utility or equipment cabinets shall be issued by any department, agency, employee, or agent of the City of Oakland, nor shall any department, agency, employee, contractor or agent of the City of Oakland construct, modify or place any above-ground utility or equipment cabinets unless such has commenced prior to the effective date of this Ordinance.

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SECTION 9. Petition for Relief from Moratorium. Any person who has applied to construct, modify or place a utility or equipment cabinet which would be affected by this Moratorium, and who contends that the Moratorium as applied to him or her would be unlawful under Federal, State, or local law or regulation, must submit a written Petition to the Planning Director requesting relief from the Moratorium. Failure to submit such a Petition will preclude such person from challenging the moratorium in court. The Petition shall identify the name and address of the applicant, the affected application number, and shall state specifically and completely how the Moratorium as applied to him or her would be unlawful under Federal, State, or local law or regulation. Failure to raise each and every issue that is contested in the Petition and provide appropriate supporting evidence will be grounds to deny the Petition and will also preclude the Petitioner from raising such issues in court. Within fifteen (15) working days of receipt of the Petition, the City Administrator, or her designee, shall mail to the Petitioner a written determination accepting or rejecting the Petition. The City Administrator's decision shall be final and not subject to administrative appeal.

Deleted: Only utility or equipment cabinets which have vested rights, pursuant to the provisions of the State law, prior to the date of this Ordinance may proceed with construction, modification, or placement, unless expressly provided for herein

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SECTION 10. The City Clerk shall certify to the passage and adoption of this Ordinance causing it to be posted, as required by the law, and it shall thereafter be in full force and effect. This Ordinance shall become effective immediately as an interim urgency ordinance, in order to protect the public health, safety, and welfare.

SECTION 11. For the term of this ordinance, as set forth in Section 6 hereof, the provisions of this ordinance shall govern, to the extent there is any conflict between the provisions of this ordinance and the provisions of any other City code, ordinance, resolution or policy, and all such conflicting provisions shall be suspended.

SECTION 12. This Ordinance is enacted pursuant to the City of Oakland's general police powers, Section 106 of the Charter of the City of Oakland, Article XI of the California Constitution and Government Code section 65858.

SECTION 13. If any section, subsection, sentence, clause or phrase of this Ordinance is for any reason held by a court of competent jurisdiction to be invalid, such decision shall not affect the validity of the remaining portions of this ordinance. The City Council declares that it would have adopted this Ordinance and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that any one or more section, subsection, sentence, clause, or phrase be declared invalid.

IN COUNCIL, OAKLAND, CALIFORNIA, _____, 2006

PASSED BY THE FOLLOWING VOTE:

AYES - BRUNNER, KERNIGHAN, NADEL, QUAN, BROOKS, REID, CHANG, and
PRESIDENT DE LA FUENTE

NOES -

ABSENT -

ABSTENTION -

ATTEST:

LATONDA SIMMONS
City Clerk and Clerk of the Council of
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