

ORDINANCE NO. 3609 C.S.

AN ORDINANCE OF THE COUNCIL OF THE CITY OF MONTEREY

ADD CHAPTER 32, ARTICLE 8 ENCROACHMENTS BY COMMUNICATION FACILITIES

THE COUNCIL OF THE CITY OF MONTEREY DOES ORDAIN, as follows:

SECTION 1:

WHEREAS, certain communications companies are permitted to use rights-of-way in the State of California in accordance with a state issued franchise;

WHEREAS, it is a limitation on the state-issued franchise that it must be used "in such manner and at such points as not to incommodate the public use of the road or highway or interrupt the navigation of the waters";

WHEREAS, the numbers, sizes and types of privately-owned communications structures in the rights-of-way are multiplying and are expected to multiply dramatically in the future;

WHEREAS, the City finds it is appropriate to establish uniform conditions that apply to the continuing occupancy of the rights-of-way to protect those interests it may protect consistent with the state grant; including aesthetic interests; and to establish conditions that ensure that such uses remain secondary to the primary uses of the right-of-way for pedestrian and vehicular traffic; and to ensure that communications companies cannot prevent, or increase the cost of, necessary improvements to the rights-of-way, or otherwise burden the City or its citizens;

WHEREAS, the proliferation of above-ground facilities threatens the scenic and historic beauty of the City of Monterey, and is inconsistent with the City's General Plan;

WHEREAS, it is the plan of the City, in accordance with State law, to provide for the undergrounding of utilities over time, and limiting new construction will reduce the burdens on the public, and allows for work to proceed over time, as new equipment is added or as existing equipment is replaced;

WHEREAS, it is the policy of this City to achieve, whenever feasible and consistent with sound environmental planning, the undergrounding of all future communication facilities which are proposed to be erected along, upon, above, or across any street subject to the control of the City of Monterey;

WHEREAS, the City of Monterey Planning Office determined the project is exempt from the California Environmental Quality Act (CEQA) Guidelines (Article 19, Section 15305, Class 5) because the project consists of a municipal code amendment to modify existing regulations affecting communication facilities, which would not result in any changes in density or traffic patterns. Furthermore, the project does not qualify for any of the exceptions to the categorical exemptions found at CEQA Guidelines Section 15300.2. Additionally, the project is exempt from CEQA pursuant to CEQA Guidelines section 15308 (Class 8) as an action taken by a regulatory agency to assure the enhancement and protection of the environment, which includes the visual environment of the City.

Exception a - Location. Classes 3, 4, 5, 6, and 11 are qualified by consideration of where the project is to be located - a project that is ordinarily insignificant in its impact on the environment may in a particularly sensitive environment be significant. Therefore, these classes are considered to apply in all instances, except where the project may impact an environmental resource of hazardous or critical concern where designated, precisely mapped, and officially adopted pursuant to law by federal, state, or local agencies. The environment is not particularly sensitive because the project is purely a municipal code amendment. Therefore, impacts would not occur. Any subsequent discretionary projects resulting from this action will be assessed for CEQA applicability.

Exception b - Cumulative Impact. All exemptions for these classes are inapplicable when the cumulative impact of successive projects of the same type in the same place, over time is significant. No cumulative impact would occur because the project is purely a municipal code amendment that would regulate the visual appearance and certain other characteristics of communications structures in City rights-of-way with uniform, objective standards. Therefore, cumulative impacts would not occur. Any subsequent discretionary projects resulting from this action will be assessed for CEQA applicability.

Exception c - Significant Effect. A categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances. There are no unusual circumstances with this project because the project is purely a municipal code amendment and the land use limitations imposed by the amendment are commonplace under Class 5 and Class 8 categorical exemptions. Therefore, significant impacts would not occur. Any subsequent discretionary projects resulting from this action will be assessed on a project-by-project basis for CEQA applicability.

Exception d - Scenic Highways. A categorical exemption shall not be used for a project which may result in damage to scenic resources, including but not limited to, trees, historic buildings, rock outcroppings, or similar resources, within a highway officially designated as a state scenic highway. This does not apply to improvements which are required as mitigation by an adopted negative declaration or certified Environmental Impact Report (EIR). The project is purely a municipal code amendment, which would not damage scenic resources, but rather, assure their protection. Any subsequent discretionary projects resulting from this action will be assessed for CEQA applicability.

Exception e - Hazardous Waste Sites. A categorical exemption shall not be used for a project located on a site which is included on any list compiled pursuant to Section 65962.5 of the Government Code. The project is purely a municipal code amendment regulating the visual effect and certain other characteristics of communications structures in City rights-of-ways. Therefore, impacts to hazardous waste sites would not occur. Any subsequent discretionary projects resulting from this action will be assessed for CEQA applicability.

Exception f - Historical Resources. A categorical exemption shall not be used for a project which may cause a substantial adverse change in the significance of a historical resource. The project is purely a municipal code amendment that would regulate the visual effect and certain other characteristics of communications structures in City rights-of-way, and not any historic resources. Therefore, impacts to historic resources would not occur. Any subsequent discretionary projects resulting from this action will be assessed for CEQA applicability.

NOW THEREFORE, the Monterey City Council declares as follows:

SECTION 2. Chapter 32, Article 8, Encroachments by Communications Facilities, is added to read as follows:

ARTICLE 8. ENCROACHMENTS BY COMMUNICATION FACILITIES.

Sec. 32-08.01 Definitions.

- (a) Occupant. A person who owns or controls permanent facilities in the rights-of-way, other than a government agency.
- (b) Secondary occupant. An occupant whose facilities are wholly within the facilities of another occupant that is subject to this Article.
- (c) Underground utility district. An area in the City designated pursuant to City Code section 18-30.
- (d) Utility. All persons or entities supplying electric, communication or similar or associated service by means of electrical materials or devices.
- (e) Utility encroachment. Any structure or object of any kind or character placed in, over or under any street, alley, sidewalk, or right-of-way owned or under the control of the City (collectively, the "right-of-way" or rights-of-way) used in the provision of a communications service.
- (f) Wireless communications facility. All elements of a facility at a fixed location used in connection with the provision of any FCC licensed or authorized wireless communications service to the public.

Sec. 32-08.02 Condition of Occupancy.

- (a) Generally. No occupant may place and maintain in, over, or under any right-of-way, a utility encroachment unless the occupant holds a franchise under Pub. Util. Code section 7901, or the Digital Infrastructure and Video Competition Act of 1996, Govt. Code sec. 5860 et seq., or a franchise issued by the City; the utility encroachment in the City is an encroachment authorized by that franchise; and the franchise is in full force and effect. Any other structure or object is subject to the same penalties, and may be removed, as an unauthorized encroachment under Article 3.
- (b) Each occupant shall be subject to the requirements of this Article, except as may be provided in a valid City-issued franchise held by such occupant, or as may be prohibited by law; provided that, an occupant's obligations may be limited to the duty to indemnify where:
 1. the occupant is a secondary occupant;
 2. the secondary occupant has no right to enter into the rights-of-way, or perform any work on its facilities;
 3. the secondary occupant's property may be treated for all purposes (including notice) as the property of the occupant within whose facilities the secondary occupant is located;

4. the occupant within whose property the secondary occupant's property is located accepts full responsibility and liability for complying with all obligations hereunder with respect to the facilities of the secondary occupant and can grant such access to the secondary occupant's facilities as necessary to permit the City, without liability to the secondary occupant, to perform any action contemplated hereunder;
 5. the secondary occupant accepts joint and several liability for the acts and omissions of the occupant;
 6. the City owes no duties to the secondary occupant; and
 7. the secondary occupant and the occupant responsible for the secondary occupant's facilities submit a jointly-signed writing confirming the foregoing.
- (c) **Code Compliance.** An occupant shall at all times comply with all applicable provisions of the City Code and regulations, and any permit issued in connection with occupancy. Subject to the other provisions of this Article, City may terminate any permit and require removal, or correction of any encroachment that violates the City Code, City regulations, or the permit conditions. Costs associated with compliance shall be borne solely by the occupant, and not by City, except as explicitly provided by applicable law.
- (d) **Rights Limited.** An occupant may not:
1. Install structures or objects that it is not authorized to install under the terms of its franchise or provide services without proper authorization;
 2. Attach to any structure or object it does not own, without the agreement of the owner;
 3. Remove, alter, or relocate any object or structure it does not own, except as specifically authorized by state law or the City Code; by agreement with the owner of the object or structure; or as may be expressly authorized by a permit; or
 4. Without the permission of the owner thereof, enter onto, or cause a trespass in any form, or take any action that renders any portion of property affected by the placement of the utility encroachment unusable, except as may be permitted by state or federal law.
- (e) **Inspections; Emergencies.** The City may inspect an occupant's property upon 48 hours prior notice to the occupant, and may as a condition of the inspection require occupant to disconnect or remove any facilities that may present a hazard to the inspectors. City may direct occupant to correct any non-compliance found. The occupant shall cooperate with all inspections and may be present for any inspection of its facility by the City. Notwithstanding the foregoing, in an emergency or when the facility threatens imminent harm to persons or property, City may, without notice, inspect, support, repair, disable, or remove any elements of the occupant's facilities and charge occupant the costs therefore, which costs may be recoverable from the bond provided by occupant.

- (f) Contact. The occupant shall at all times maintain accurate contact information for all parties responsible for the facility, which shall include a phone number, street mailing address and email address for at least one natural person who may be contacted at all times in the event of an emergency.
- (g) Resources. An occupant shall maintain the persons and equipment necessary to allow it to respond immediately to any condition of or relating to the facility presenting a hazard to persons or property.
- (h) No guarantee or warranty by City. The City does not guarantee it has the authority necessary to permit an occupant to place or maintain a facility at any site. An occupant is responsible for ensuring it has all authorizations required in order to place a facility at a particular location. Permits improperly granted may be revoked. An occupant assumes all risks associated with placement of facilities in the rights-of-way.
- (i) Insurance. Occupant shall obtain and maintain insurance in the amounts and of types, and subject to such conditions, as may be specified in administrative regulations adopted by the City. Any permit or franchise may specify higher or lower insurance requirements, based on the risks presented to the public and the City, and taking into the account the size of any particular project. Insurance must cover harms that may be caused by any dangerous substance or characteristic of the facilities, including, for example, harms associated with electrification, fire and harms associated with emissions from facilities.
- (j) Indemnification. The occupant shall defend, indemnify and hold harmless the City, its agents, officers, officials, and employees (i) from any and all damages, liabilities, injuries, losses, costs, and expenses, and from any and all claims, demands, law suits, writs of mandamus, and other actions or proceedings brought against the City or its agents, officers, officials, or employees to challenge, attack, seek to modify, set aside, void or annul the City's approval of the permit, and (ii) from any and all damages, liabilities, injuries, losses, costs, and expenses, and any and all claims, demands, law suits, or causes of action and other actions or proceedings of any kind or form, whether for personal injury, death or property damage, arising out of or in connection with any action, or failure to act of occupant or those acting on its behalf, and arising out of the construction, modification, maintenance or operation of facilities in the rights-of-way, except where instances where indemnification is prohibited by California law.
- (k) Performance Bond.
 - 1. Prior to issuance of an Encroachment Permit, the occupant shall file with the City, and shall maintain in good standing for so long as the facility is in place, a performance bond or other surety or form of security for the removal of the facility in the event that the use is abandoned or the occupant's rights to occupy expire, or are revoked, or are otherwise terminated, or which may be drawn upon to reimburse City for any costs it incurs as a result of the failure of an occupant to comply with its obligations.
 - 2. The amount of the performance bond will be specified by City and adjusted from time to time. The City may increase or decrease the

amount of the security based on the type and extent of the facilities of an occupant. Unless the City otherwise provides for good cause, based on the nature and risk presented by any installation:

- (A) The performance bond associated with utility encroachments will be \$100,000, except that for wireless facilities, the bond will be \$20,000 per facility, not to exceed \$100,000.
 - (B) Performance bond surcharge: in areas defined as high fire hazard areas by the state, a bond in addition to that required by subsection (k) shall be provided in the amount of \$100,000 will be provided, except that for wireless telecommunications facilities, the bond will be \$20,000 per facility, not to exceed \$100,000. The surcharge may be waived for good cause where an occupant demonstrates that its facilities present no material fire hazard by virtue of their design.
- (l) Adverse Impacts on Adjacent Properties. Occupant shall place and maintain its facilities to avoid adverse impacts to adjacent properties and/or uses and is responsible for restoring any property damage to its condition prior to the facility's installation, except as state law otherwise provides.
- (m) Visual burden minimized. Maintenance of facilities. All utility encroachments shall be neatly placed and maintained, with unused facilities removed, so that the burden and visual impact of the facilities in the rights-of-way is minimized. Without limitation, it is not permissible to leave wires hanging, or leaving disconnected cabling and conduits on the sides of supporting structures in the rights-of-way. To the extent that a utility Encroachment Permit is issued subject to any conditions designed to minimize the burdens, and visual and otherwise, presented by a particular facility, including but not limited to landscaping conditions, or other conditions related to the appearance or placement, the utility encroachment must be regularly inspected by occupant, and maintained as necessary to ensure continuing compliance with those requirements and the requirements of this Article.
- (n) Noninterference with pedestrian and vehicular traffic. Use by any occupant is secondary to use of the rights-of-way by vehicular and pedestrian traffic, and no facility may be placed in a manner that interferes with such uses. Without limitation, facilities may not be placed or maintained at locations that present a hazard to pedestrians or vehicular traffic (whether physically, or by obstructing sight lines); that violate ADA requirements; or that overhang any street, sidewalk, ramp or driveway unless the City has specifically approved that placement.
- (o) Noninterference with public projects. An occupant must promptly move, alter, temporarily relocate, or remove its facilities as necessary for any public project, including, but not limited to, installation of any publicly-owned utility, structure or facility, street widening or regrading, widening or installation of sidewalks, or as part of an undergrounding project. If an occupant fails to move, alter, temporarily relocate, or remove its facilities by a time specified by City, City may cause the facilities to be removed, and charge the occupant for the cost thereof, which cost shall be recoverable against the bond.

- (p) Movement for others. An occupant must promptly, and at no charge to the City, move, alter, or temporarily relocate its facilities as necessary to permit use of the rights-of-way by other franchised entities or entities holding special permits from City that require such movement, alteration or relocation. An occupant may charge the entity that causes such work to be performed for the cost of the work, except as may otherwise be provided by applicable laws or contract.
- (q) No Right, Title, or Interest. Permissions granted by the City to occupy the rights-of-way shall not in any event constitute an easement on or an encumbrance against the public right-of-way. No right, title, or interest in the public right-of-way, or any part thereof, shall vest or accrue in an occupant by reason of issuance of such permissions. Without limitation, City may require occupants to place their facilities in the rights-of-way underground, subject to applicable state law.
- (r) General Maintenance. The site and the facility, including, but not limited to, all landscaping, fencing, and related equipment, must be maintained in a neat and clean manner and in accordance with all approved plans. All graffiti on facilities must be removed at the sole expense of the occupant permittee within 48 hours after notification from the City.
- (s) Abandonment and termination. If a facility is not operated for a continuous period of six months, it may be treated as abandoned. The City will provide notice of abandonment, and unless an occupant contends it in writing submitted within 10 days of the date on the notice, that the facility has not been abandoned, the facility will be deemed abandoned and the rights to occupy terminated. If an occupant contends that the facility has not been abandoned, it must provide all facts on which it relies for that contention as part of the submission to the City. The City may then determine whether or not the facility is abandoned. If the facility is deemed or determined to be abandoned, the City may direct the facility to be removed, and if not removed by a time specified by the City, City may remove the facility and charge the occupant the cost therefore, which cost may be charged against the bond.
- (t) Records. Any occupant must maintain complete and accurate copies of all applications filed, and all permits and other regulatory approvals issued in connection with the facility, and maintain full and complete records identifying and showing the location of the facilities of occupant in the rights-of-way. Copies of the record shall be promptly provided to City upon request, unless production of the records is prohibited by law. Maps of facilities must be provided in a format that will permit the information to be incorporated in the City's GIS system.

Sec. 32-08.03 Undergrounding

- (a) From and after the effective date of this Article, no new utility encroachment may be placed aboveground in a street unless a deviation is granted, except in those areas excluded from this ordinance pursuant to Section 32-08.05, where undergrounding shall be controlled by the City Code provisions and plans applicable to those areas.
- (b) Repair or replacement of existing aboveground facilities in the same location that does not significantly alter the cumulative visual impact of aboveground facilities shall not be considered as a new utility encroachment.

- (c) Without limitation, the following are presumed to alter the cumulative visual impact of existing aboveground facilities, and require a request for a deviation where the impact of the addition may be considered. Cumulative impacts take into account the effect of a proposed repair or replacement on the overall viewshed in a particular area:
1. New attachments to aboveground facilities, other than equipment mounted flush to a pole or on strand and less than 1 cubic foot in size;
 2. Overlashing that increases the diameter of facilities lashed to a strand by more than one inch.

Sec. 32-08.04 Deviation. A deviation may be granted, but shall be limited in scope to that necessary where it is shown that:

- (a) In the case of repairs or replacement of existing aboveground facilities, a showing that as proposed the repairs or replacements do not significantly alter the cumulative visual impact of overhead facilities; or
- (b) In the case of a wireless communications facility:
 1. The facility will be placed on an existing aboveground structure and the only portions of the wireless communications facility that will be aboveground are an antenna otherwise complying with the requirements of Chapter 38, as may be amended, and meters and disconnects that are required to be placed aboveground;
 2. The wireless communications facility is approved as a stealth facility under Chapter 38, as may be amended;
 3. The wireless communications facility is integrated within an existing or replacement street light pole or other existing vertical structure, approved pursuant to Chapter 38, as may be amended. In an integrated design, there are no aboveground exterior wires or equipment cabinets other than those associated with a meter or disconnect that are required to be placed aboveground and outside of the structure; or
 4. It is not technically feasible to place equipment underground, and the City is required by state or federal law to permit placement in the area proposed; or
- (c) Placement underground would result in the violation of other provisions of the City Code, including the City's noise ordinances; or
- (d) There are unusual environmental circumstances which would cause:
 1. Injury or danger to persons;
 2. Landslides, soil erosion, or exposure of trenches;
 3. Widespread, long-term, or permanent destruction of vegetation or native trees;
 4. Serious property damage, including damage to historical or archeological resources; or

5. Hindrance to other construction or excessive relocation costs; and
- (e) The operator seeking the deviation has proposed a plan for placement that minimizes the visual impacts of the proposed facility; and
- (f) Along a section of roadway where the distribution lines of telephone and electric systems are underground, or are being converted to underground, a "technical feasibility" showing requires the applicant to show the proposed facility cannot be placed in an area where there are existing aboveground facilities, not subject to conversion.

Sec. 32-08.05 Exclusions. This Article shall not apply:

- (a) To facilities necessary to the operation of municipal street lights, traffic signals, and public safety equipment and facilities necessary to their operation.
- (b) To facilities that may be installed in a district now or hereafter designated as an underground utility district, or where undergrounding is controlled by Chapter 18, Art. 3 (Installation of Underground Facilities).

Sec. 32-08.06 Applications for Deviations. An application for a deviation must be filed with the City Manager, or designee, and shall contain the information required to justify an exception from Cal. Pub. Util. Code section 320. For wireless telecommunications facilities, a complete application for a deviation must be filed at the same time as an application is filed for a wireless permit.

Sec.32-08.07 Encroachment Permit Required.

Any occupant to whom Article 8 applies shall apply for and obtain an Encroachment Permit from the City for any encroachment other than an encroachment in place as of the effective date hereof. Except:

- (a) An Encroachment Permit is not required for repairs and ordinary maintenance which do not change the appearance of an encroachment; or
- (b) An encroachment may be installed in an emergency without a permit, provided the City is notified of the encroachment, its location and its character as promptly as possible, and a permit is sought as soon as possible after the emergency ends.

Sec. 32-08.08 Application for an Encroachment Permit.

- (a) An application for an Encroachment Permit shall be submitted to the City Manager, or designee, for any wireless facility subject to Chapter 38, as may be amended, and for any other encroachment. The Use Permit constitutes the Encroachment Permit required under this Article for wireless facilities.
- (b) In order to prevent any person from installing facilities that incommode the public, by cluttering the right-of-way or through installation of structures that unnecessarily and adversely affect the appearance of the community, or the use of the rights-of-way by others, in considering whether an application should be granted, denied or conditioned, City shall consider:

1. Whether each occupant is authorized to occupy the rights-of-way under state law;
 2. Whether the encroachment is a lawful encroachment under State law. Installation of facilities that are not compliant with safety codes and requirements established by the California Public Utilities Commission are not lawful;
 3. Whether an encroachment is necessary within the meaning of Sec. 7901. In the case of a wireline encroachment proposed solely to serve a wireless facility, construction may be conditioned on approval of the wireless facility encroachment. Placement of additional structures in the rights-of-way is discouraged;
 4. Whether the granting of an Encroachment Permit creates a hazard to public health or safety that the City may lawfully address;
 5. Whether the proposed encroachment will unreasonably affect vehicular and/or pedestrian traffic nor the parking of vehicles. Any encroachment that violates the ADA is an unreasonable encroachment;
 6. Whether the proposed encroachment will adversely impact the integrity of the roadways, drainage systems, or other structures within the rights-of-way, absent acceptable mitigation measures;
 7. Whether the encroachment has been subject to CEQA review by an agency of competent jurisdiction, and if so, whether the encroachment is consistent with that review; or in cases where the City is the lead agency, whether the encroachment may be permitted consistent with CEQA. Ministerial projects are not subject to CEQA;
 8. Whether the proposed encroachment diminishes public use or enjoyment, either visual or physical, of the public right-of-way to be encroached upon, or of adjoining properties. In considering the visual impacts, City will consider whether the proposed encroachment is consistent in size, design, configuration and placement to similar structures in the immediate area in the rights-of-way;
 9. Whether the encroachment proposed will adversely affect landscaping, including existing vegetation or its root structure, or significantly reduce greenbelt area that may be used for tree planting, or vegetation;
 10. Whether the encroachment is consistent with the General Plan and the adopted ordinances and regulations of the City, including ordinances governing undergrounding; and
 11. Whether the applicant can comply with the conditions of encroachment.
- (c) If City, taking these matters into consideration, and considering mitigation measures proposed, if any, that encroachment is proposed in such manner and at such points as to incommodate the public use of the road, or otherwise violate state law it is obligated to enforce, City may deny the application, or require such

modifications as may be necessary to protect the public health, safety and welfare. It shall approve the encroachment in other cases; and it may approve the encroachment, or permit an encroachment subject to reservations of rights to later revoke, if City determines an approval is required under federal or state law.

The specific requirements of Chapter 38, as may be amended, shall control over these general requirements, but it is the intent of the City that encroachments be addressed in a manner that conforms to any state or federal laws governing City management of rights-of-way.

Sec 32-08.09 Enforcement. City shall enforce this provision, and may require abatement of encroachments as provided under Art. 3, Sec. 32-21-32-22. It may revoke Encroachment Permits as provided in Art. 3, and shall do so where an occupant fails to comply with a permit condition, and fails to correct the non-compliance within a time specified by City, or repeatedly violates permit conditions.

Sec. 32-08.10 Regulations: Community Development Director is authorized to adopt regulations and forms to implement the requirements of this Article.

SECTION 3: All ordinances and parts of ordinances in conflict herewith are hereby repealed.

SECTION 4: If any section, subsection, sentence, clause, or phrase of this ordinance is for any reason declared unconstitutional, invalid, or ineffective by any court of competent jurisdiction, such decision shall not affect the validity or the effectiveness of the remaining portions of this chapter or any part thereof. The City Council hereby declares that it would have adopted this chapter notwithstanding the unconstitutionality, invalidity, or ineffectiveness of any one or more of its sections, subsections, sentences, clauses, or phrases.

SECTION 5: This ordinance shall be in full force and effect thirty (30) days from and after its final passage and adoption.

PASSED AND ADOPTED BY THE COUNCIL OF THE CITY OF MONTEREY this 4th day of February, 2020, by the following vote:

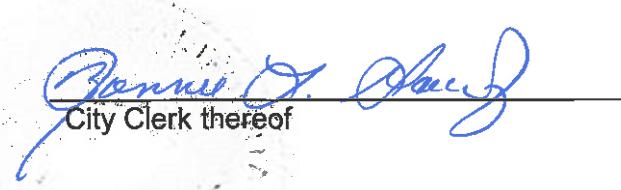
AYES:	5	COUNCILMEMBERS:	Albert, Haffa, Smith, Williamson, Roberson
NOES:	0	COUNCILMEMBERS:	None
ABSENT:	0	COUNCILMEMBERS:	None
ABSTAIN:	0	COUNCILMEMBERS:	None

APPROVED:

ATTEST:



Mayor of said City



City Clerk thereof