MEMORANDUM OF LAW

DATE: June 12, 1986

TO: Martin Breslauer, Assistant Property Director
FROM: John W. Witt, City Attorney
SUBJECT: Easements to provide cable service

The owner of an eight-unit apartment building located in Southwestern Cable Company's Southwestern franchise area inquired whether Southwestern, as a prerequisite for the provision of service to a tenant, could require the apartment owner to grant an easement for the cable drop to the tenant's apartment. (See your memorandum of May 7, 1986, attached. There is no law which prevents such a requirement.

The jurisprudence surrounding occupation of easements for cable facilities has primarily been concerned with the right of cable operators to use public utility (telephone or power) easements. The Cable Communications Act of 1984, 47 U.S.C., Section 521 et seq., provides that cable systems are entitled to occupy easements "which have been dedicated for compatible uses," so long as, among other things, "the cost of the installation, construction, operation, or removal of ╒cableσ facilities ╒areσ borne by the cable operator or subscriber, or a combination of both." 47 U.S.C., Sec. 541(a)(2).

The question of the right of an apartment owner to require a cable operator to obtain an easement for its cable drop separate from any already held by telephone or power utilities has never been litigated. See Ferris, Lloyd and Casey, Cable Television Law, .13.06 ╒3σ (1986).

The closest appellate decision to the inquiry under consideration here is the U. S. Supreme Court's holding in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 73 L.Ed.2d 868, 102 S.Ct. 3164 (1982). That case involved a statute which provided that a landlord could not "interfere with the installation of cable television facilities upon his property," or demand payment for permission to install from either a tenant or the cable operator. The Supreme Court held that the minor but

permanent physical occupation of the owner's property by the drop facilities, as authorized by state law to be made over the owner's protest, constituted a taking of property for which compensation is required by the Constitution.

The situation involved in the current inquiry varies from the Loretto facts in that the landlord and tenant both want the drop

installed and service provided and the landlord is not demanding compensation. Rather, the cable operator is the reluctant party requiring the grant of an easement as a condition to installation and service.

The Cable Act does authorize the City, as franchising authority, to enforce franchise "customer service requirements of the cable operator." 47 U.S.C., Sec. 552. Southwestern's franchise requires it to "extend and offer service" to 100 percent of the housing units in its franchise area by April 30, 1982. Ord. No. 15213 (N.S.), Sec. 11, .(a). There is nothing in the franchise or the Cable Act which requires Southwestern to offer service without reasonable conditions, however.

The question comes down, then, to whether it is reasonable for Southwestern to condition its service on grant of an easement. The rationale for the easement requirement is set forth ably in the April 22, 1986 letter to Southwestern from its attorney, William E. Nelson, a copy of which is attached. Mr. Nelson, it seems to me, makes it clear why the requirement is reasonable. Although it may seem to you and me to be "overkill," as you put it in your May 7 memorandum, it does not appear unreasonable under the rationale Mr. Nelson supplies. Therefore, unless additional facts or contrary reasoning or both are brought to my attention, I advise you that Southwestern may require the grant of an easement as a condition for the provision of its service.

JOHN W. WITT
City Attorney

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Attachments
cc William E. Nelson, Esq.
ML-86-69