

5G Deployment Training for Planners, Public Works Officials & Municipal Attorneys

Presenters:
Dr. Jonathan L. Kramer, Esq.
Telecom Law Firm, P.C.



and

Christy Marie Lopez, Esq.



ALESHIRE &
WYNDER^{LLP}
ATTORNEYS AT LAW



WELCOME!

Tony Ruggieri

President of SCAN NATOA
City TV Production Supervisor
CITY OF SANTA BARBARA
City Administrator's Office

www.**SCAN**NATO A.org



California MCLE Credit

An application requesting MCLE credit for this activity is pending for approval by the State Bar of California.

The web address for the necessary MCLE forms for attorneys to fill out and return will be provided at the end of this lecture.

Don't touch that dial...

Jonathan L. Kramer, Esq., J.D., LL.M, LP.D

Experience

- Licensed by FCC since early 70s (holds six licenses/certs)
- 35+ years in telecom engineering/safety reviews (RF, broadband, fiber, outside plant safety, code compliance, RF safety)
- 33 years consulting on telecom matters > 1,000 governments/firms; 25 years of wireless siting and planning >2,000 cases/matters
- Expert witness/trial advisor in 40+ wireless, wired telecom cases
- Co-author, Co-editor of FCC's "A Local Government Official's Guide to Transmitting Antenna RF Emission Safety: Rules, Procedures, and Practical Guidance"

Teaches

Doctoral, Masters level Instructor; Regulatory Law and Policy, Northeastern University; Boston and Seattle

Member

Admitted to practice law in California and New Mexico
IMLA (Attorney Member)
NATOA (Twice Member of the Year)
FCBA (Member)
Society of Broadcast Engineers (Senior Member)
SCTE (UK) (Fellow Member); SCTE (US) (Senior Member)

Education

Doctor of Law and Policy, Northeastern Univ., Boston (LP.D)
Master of Law *with honors*, Strathclyde University School of Law, Glasgow (I.T. & Telecom Law) (LL.M)
Juris Doctor *cum laude*, Abraham Lincoln School of Law, Los Angeles (JD)



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(Sort of a) Map to this Small Cell Presentation

0.

Why You Should Care About Small Cells

I.

Legal Stuff (Federal Level)

II.

Legal Stuff (State Level)

III.

Small Cells in the Wild

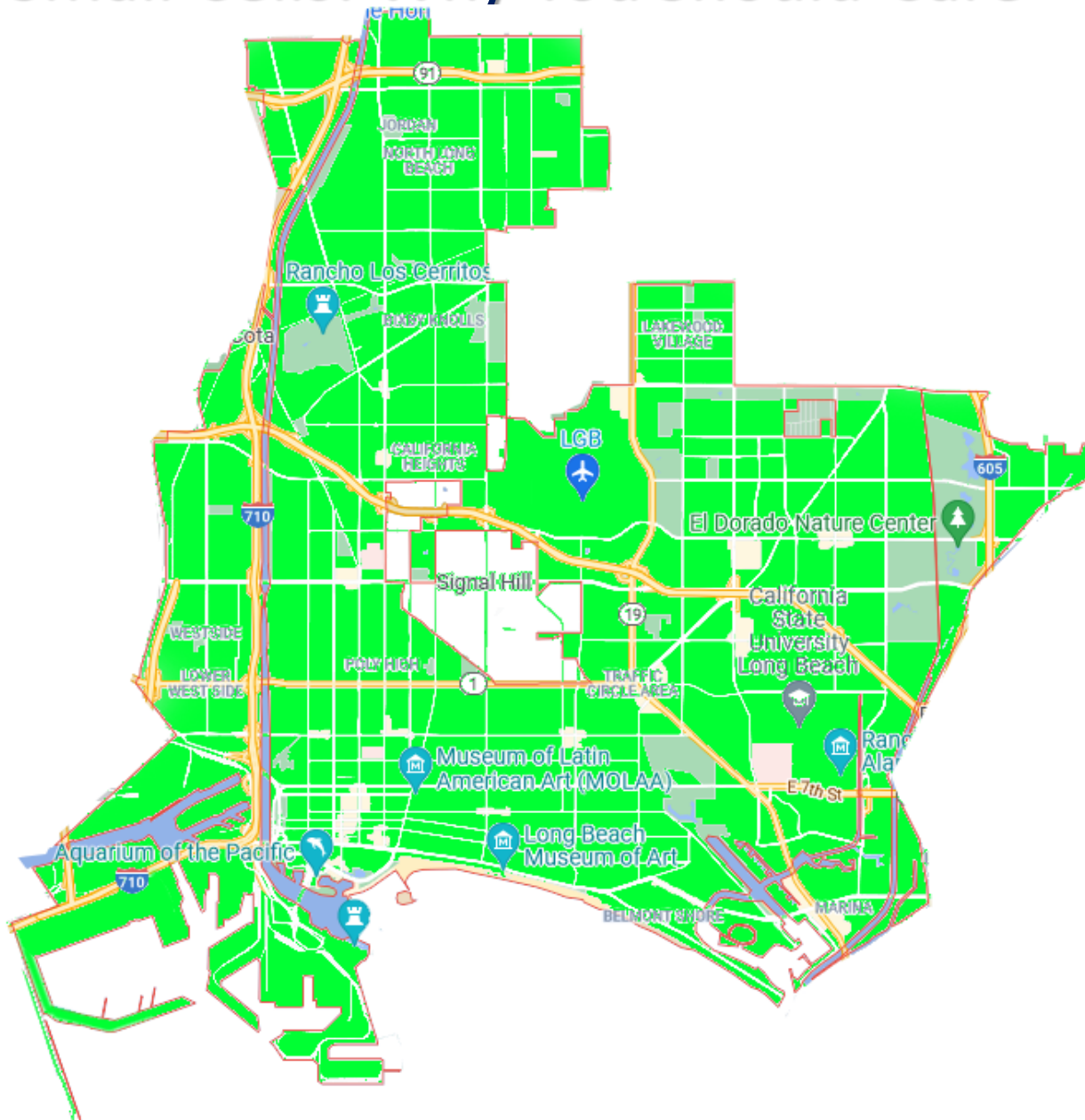
IV.

OTARD and Cable Bypass

IV.

Maintaining Your Sanity
Processing Small Cell Applications

Small Cells: Why You *Should* Care



Industry estimates:

10 to 60 small wireless facilities per sq. mile per carrier

3ish carriers: **VzW, AT&T, T-Mobile** (Dish later??)

City of Long Beach: 50.7 sq. miles (land)

The New (Conservative) Math:

Assume:

- x Start with **3** carriers
- x Only **20** SWFers per sq. mi.
- x Only **25** sq. mi.

= **~1,500ish** new

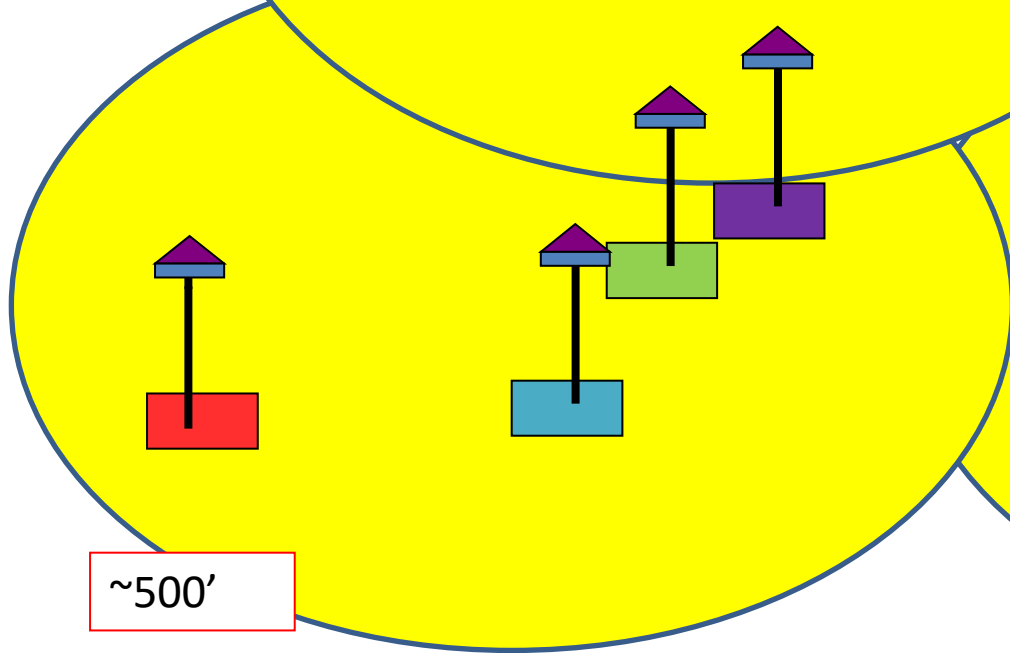
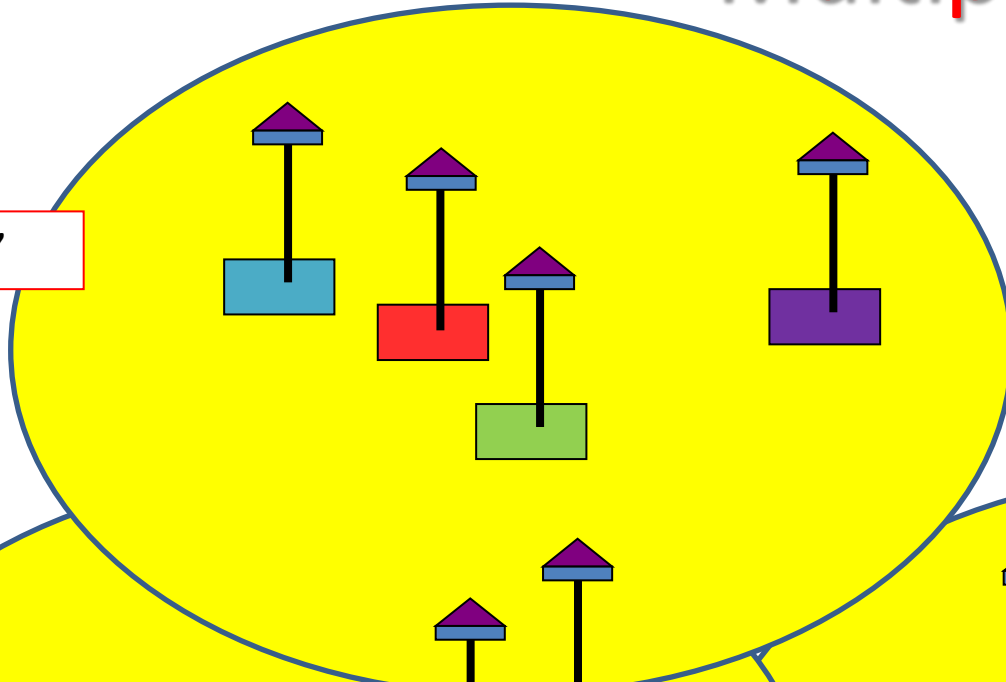
SWFers over the next 3 to 5 years, mostly in the PROW, but also some (hundreds?) possible on private property.

*Get ready, get set,
.....get swamped?*

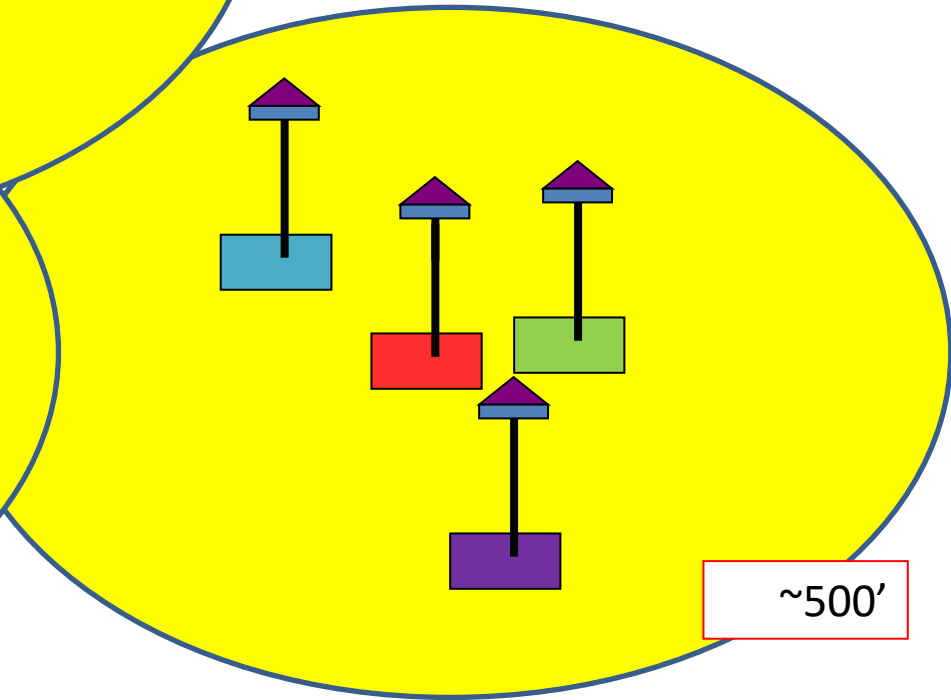


Multiple Carriers/Sites Per Area

~500'



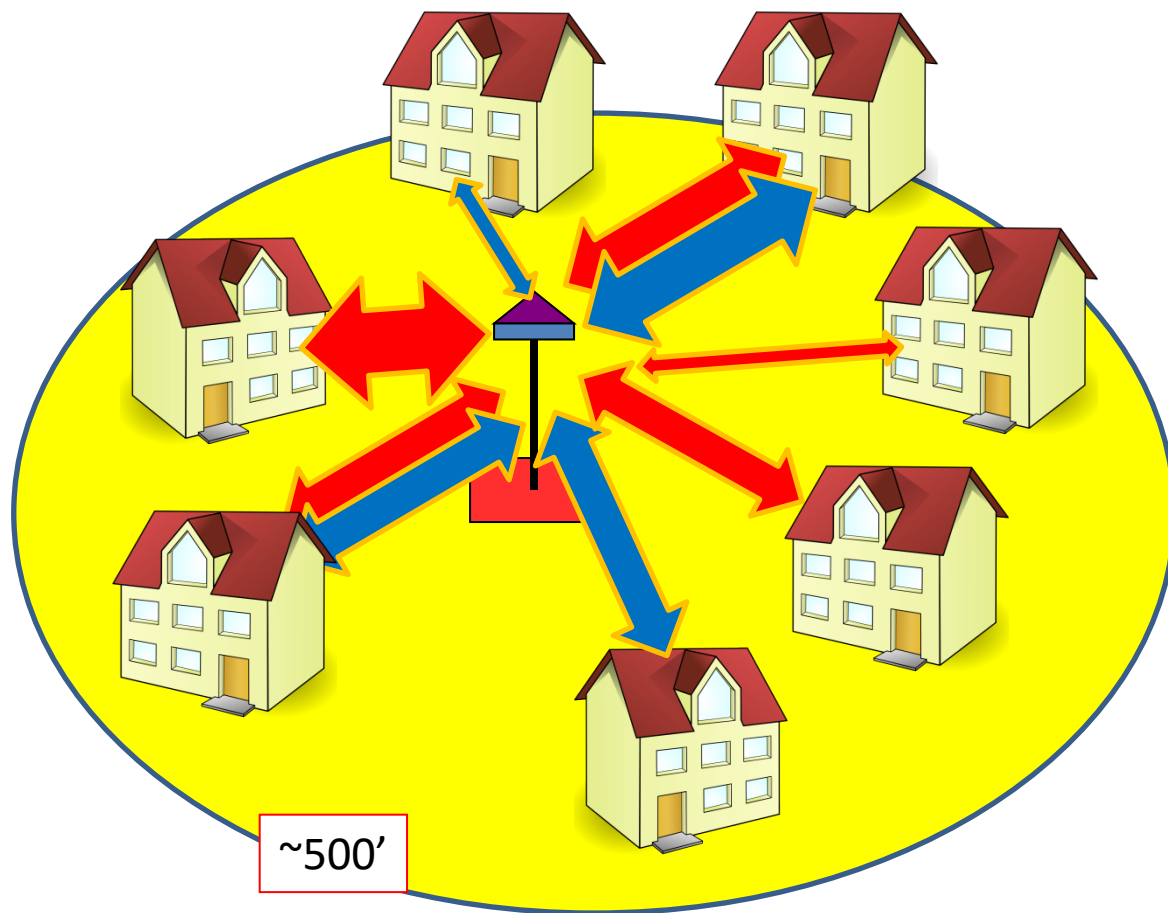
~500'



~500'



Fixed Wireless/OTT & OTARD



FCC's 2018 Small Cell Order:

What is a small cell?

(l) *Small wireless facilities*, consistent with section 1.1312(e)(2), are facilities that meet each of the following conditions:

(1) The facilities—

(i) are mounted on structures 50 feet or less in height including their antennas as defined in section 1.1320(d), or

(ii) are mounted on structures no more than 10 percent taller than other adjacent structures or

(iii) do not extend existing structures on which they are located to a height of more than 50 feet or by more than 10 percent, whichever is greater;

(2) Each antenna associated with the deployment, excluding associated antenna equipment (as defined in the definition of antenna in section 1.1320(d)), is no more than three cubic feet in volume;

(3) All other wireless equipment associated with the structure, including the wireless equipment associated with the antenna and any pre-existing associated equipment on the structure, is no more than 28 cubic feet in volume;

(4) The facilities do not require antenna structure registration under part 17 of this chapter;

(5) The facilities are not located on Tribal lands as defined under 36 CFR 800.16(x); and

(6) The facilities do not result in human exposure to radiofrequency radiation in excess of the applicable safety standards specified in section 1.1307(b).



A 28 cubic
foot box
can be very
slimming
(but not tasty)

3 cubic foot antennas

- antennas are **NOT** counted in the 28 cubic foot ‘small wireless facility’ volume calculation
- **No LIMIT** to the number of 3 cubic foot antennas, GPS antennas, other antennas
- typical 6’ tall panel antennas **are likely to be** 3 cubic feet in volume or less (check the manufacturer spec sheets)
- 8’ tall panels? *Not so likely.*

FCC's 2018 Small Cell Order: Further Restrictions

- (1) restricts the fees and other compensation state and local governments may receive from applicants;
- (2) requires all aesthetic regulations to be reasonable, ~~no more burdensome than those applied to other infrastructure deployments, objective and published in advance;~~

Per *City of Portland v. United States*, No. 18-72689 (9th Cir. 2020).

- (3) mandates that local officials negotiate access agreements, review permit applications and conduct any appeals within significantly shorter timeframes; and
- (4) creates new much lower evidentiary presumptions that make it more difficult for local governments to deny and then successfully defend themselves if an action or failure to act is challenged in court.

New Prohibitions

General Rule

A state or local requirement effectively prohibits deployment when it “materially limits or inhibits any competitor’s or **potential competitor’s** ability to compete in a fair and balanced legal and regulatory environment.” (huh?)

Fee Requirements

must be (1) reasonably approximate to cost; (2) objectively reasonable to pass to applicant; and (3) no higher than fees charged to competitors in similar circumstances (huh?)

Non-Fee Requirements (e.g. Aesthetics)

must be (1) reasonable; (2) no more burdensome than those applied to other infrastructure deployments; and (3) published in advance (huh? when? What about Dish?)

FCC's 2018 Small Cell Order: Fees

FCC's view of 'Reasonable Permitting Cost':

- \$500 for up to the first five bundled applications are presumed to be reasonable (1, or 2, or 3, or 4, or 5 a total of \$500)
- \$100 for each additional application in the bundle are presumed to be reasonable (6 per bundle = \$600; 9 per bundle = \$900)
- Includes all costs: Zoning; Building & Safety; Permits, etc.

FCC also says that all *reasonable* costs can be passed on (permit review, external review, permit issuance, inspections, etc.)

FCC's 2018 Small Cell Order: Litigation

- Small Cell Order approved by FCC on September 27, 2018
- *City of Portland v. FCC* in the 9th Circuit* on August 12, 2020
- Panel and *en banc* rehearing denied on October 22, 2021
- Petition for Cert. to SCOTUS denied on June 28, 2021, re-affirming *City of Portland*

*Disclosure: Telecom Law Firm represented the League of Oregon Cities; City of Seattle; City of Kirkland; City of Bellevue; City of Tacoma; City of Issaquah; City of Olympia; League of California Cities; the Arizona League of Cities and Towns; others in the appeal

Small Cell Legislation

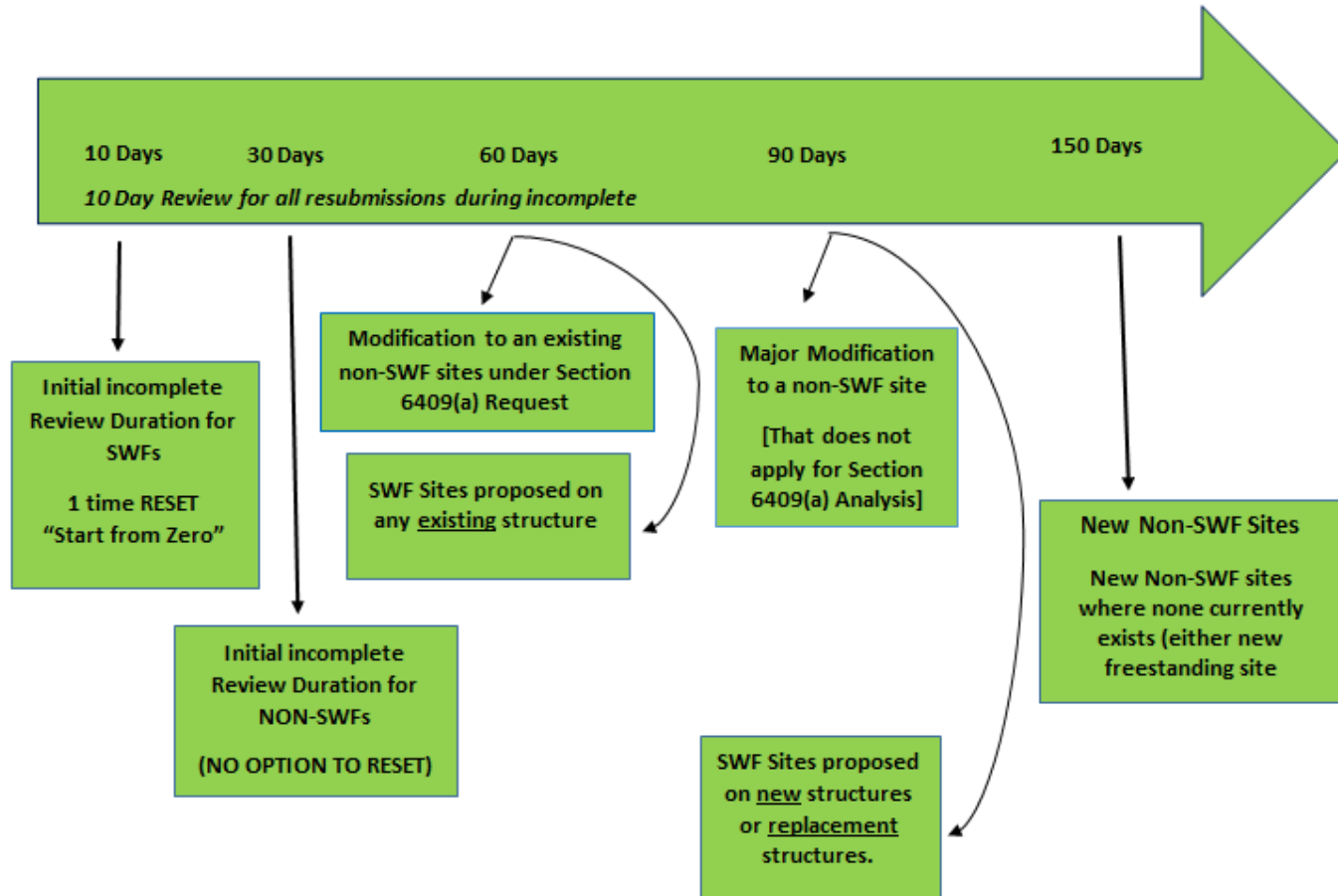
- As of January 2021, more than 25+ states, **including California**, have enacted some form of small cell legislation that streamlines regulations to facilitate the deployment of 5G small cells
- Higher demand in streamlined deployment due to remote working, distance learning, telehealth and the rapidly evolving technology



**More Small
Cell Legislation**

The New Shot Clock Rules

(Shortened to includes all processing, appeals, and permit issuance)

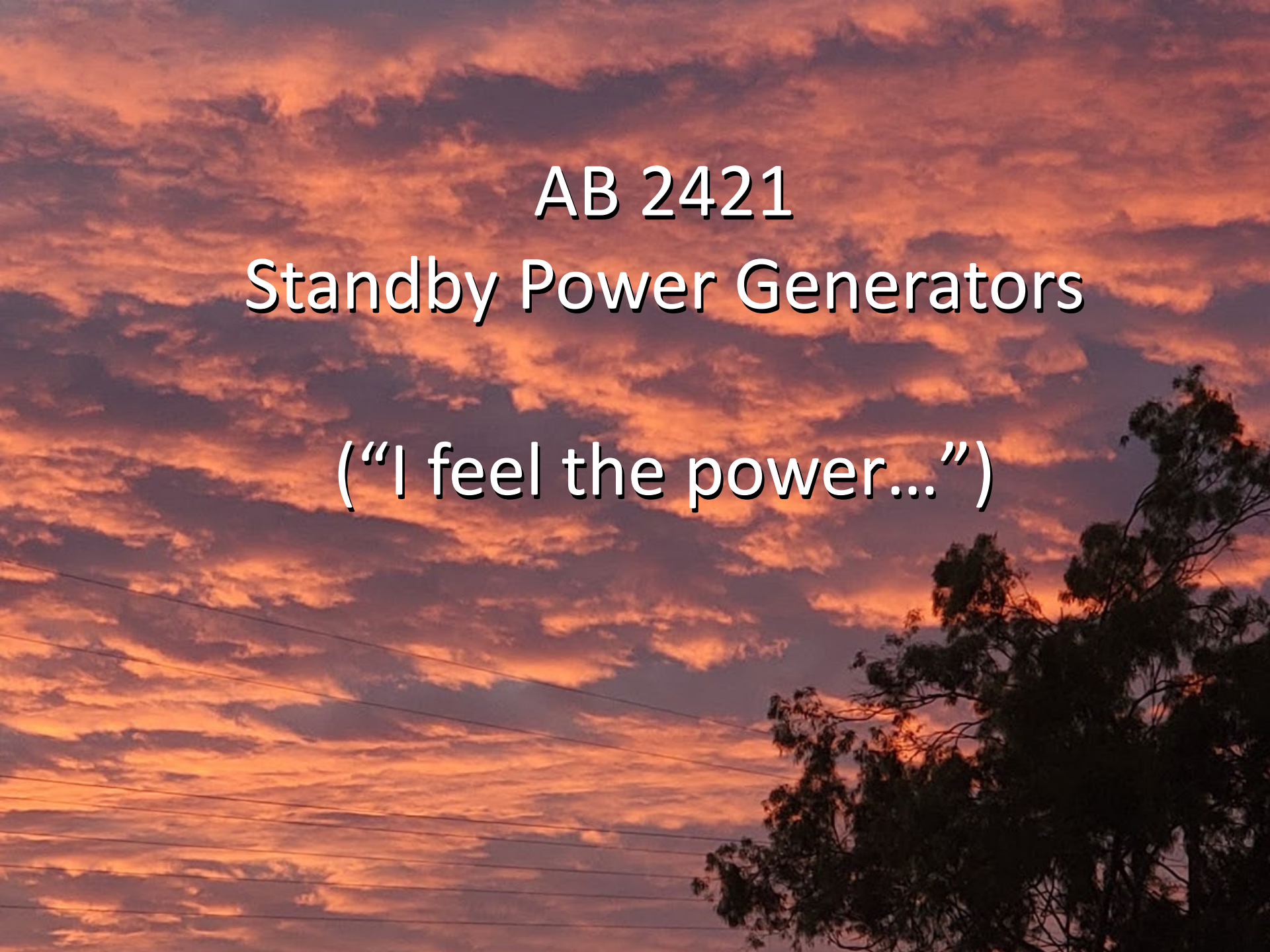


Surviving Shot Clocks

- Your APPLICATIONS are critical (require they provide last approved permits to catch **unpermitted** modifications) “Two legal wrongs don’t create a legal right.”
– Dr. Jonathan Kramer
- Incompleteness Review under the FCC’s **One-Bite Rule**
- Application appointments (Mondays, Tuesdays); Submissions via email are asking for trouble; show me the money (deposit)!
- Have your processing process well-defined and follow it
- Ministerial approvals where reasonable

Surviving Shot Clocks

- Consider a stale application automatic withdrawal rule in your ordinance to kill zombies (60 days?)
- Don't automatically sign tolling agreements (you might accidentally revive a potential claim against the COP if you do...oops)
- NEVER issue any form of 'complete letter' or 'incomplete letter' at the counter



AB 2421
Standby Power Generators

(“I feel the power...”)

GENERAC
**INDUSTRIAL
POWER**

GENERAC
**INDUSTRIAL
POWER**



Government Code 65850.75.

(a) For purposes of this section, the following terms have the following meanings:

(1) “Emergency standby generator” means a stationary generator used for the generation of electricity that meets the criteria set forth in paragraph (29) of subdivision (a) of Section 93115.4 of Title 17 of the California Code of Regulations.

(2) “Local agency” means a city, county, or city and county.

(3) “Macro cell tower site” means the place where wireless telecommunications equipment and network components, including towers, transmitters, base stations, and emergency powers necessary for providing wide area outdoor service, are located. A macro cell tower site does not include rooftop, small cell, or outdoor and indoor distributed antenna system sites.

(continued)

Government Code 65850.75.

b) Notwithstanding any law affecting local permitting, an emergency standby generator proposed to be installed to serve a macro cell tower site shall be a permitted use and a local agency shall review an application to install such emergency standby generator on an administrative, nondiscretionary basis **if it meets all of the following requirements:**

(1) The emergency standby generator is rated below 50 horsepower, compliant with applicable air quality regulations, has a double-wall storage tank, not to exceed 300 gallons, and is mounted on a concrete pad.

(2) The macro cell tower site at which the emergency standby generator is proposed to be installed is an existing **site that was previously permitted** by the applicable local agency.

(3) The emergency standby generator complies with all applicable state and local laws and regulations, including building and fire safety codes.

(4) The physical dimensions of the emergency standby generator and storage tank are cumulatively no more than 250 cubic feet in volume.

(5) The emergency standby generator shall be located not more than 100 feet from the physical structure of the macro cell tower or base station.

Government Code 65850.75. (Shot Clock)

(c) A local agency that receives a permit application to install an emergency standby generator that meets the requirements in subdivision (b) shall approve or deny the application within 60 days of submittal of the application, subject to both of the following:

(1) If, within 10 days of submission, the local agency notifies the applicant in writing that the application is incomplete, then the 60-day period shall be suspended. If the application is determined not to be complete, the local agency's determination shall specify those parts of the application that are incomplete and shall indicate the manner in which they can be made complete, including a list and thorough description of the specific information needed to complete the application. In any subsequent review of the application determined to be incomplete, the local agency shall not request the applicant to provide any new information that was not stated in the initial list of items that were not complete. Upon receipt of any resubmittal of the application, a new 60-day period shall begin, during which the local agency shall determine the completeness of the application.

(2) The local agency shall not require any new or different information for the permit applications than it routinely requires for applications for other emergency standby generators.

Government Code 65850.75. (Deemed Approved)

(d) (1) A completed application that the local agency has not approved or denied within 60 days of receiving the application or upon expiration of any tolling period shall be deemed approved.

(2) This section does not prohibit a local agency from revoking, through the appropriate process, the permit or approval status for an emergency standby generator that is determined to violate an applicable state or local law or regulation, including building and fire safety codes, or from otherwise enforcing state and local law with respect to the emergency standby generator.

Government Code 65850.75. (More stuff)

(e) If the local agency requires more than one permit application for the installation of an emergency standby generator, all applications submitted concurrently shall be issued within the same 60-day period set forth in subdivision (c).

(f) The local agency shall not require the applicant to submit proof of consent or other authorization from an underlying property owner as part of the initial application for an emergency standby generator permit; however, the applicant shall not install the emergency standby generator until the applicant provides documentation, if required, to the local agency.

Government Code 65850.75. (More stuff)

(g) A local agency may impose a permit fee to cover its costs associated with administering this section. The fee shall not exceed the reasonable costs of providing the service for which the fee is charged and shall not be levied for general revenue purposes.

(h) This section shall remain in effect until **January 1, 2024**, and as of that date is repealed.

SEC. 3. (Statewide concern language)

SEC. 4. (No reimbursement language)

Not an AB 2421 Standby Power Generator



Small Cell Wannabes...



235th St
CITY OF TORRANCE 2500

TRUCK
ROUTE
↑

Office Space
FOR LEASE
(310)326-9025

Sierra Gateway

PROFESSIONAL
BUILDING



DUCK
BRAND

PRODUCED AND PACKED BY
SAN DIMAS LEMON ASSOCIATION
SAN DIMAS, LOS ANGELES CO., CAL.

ROOMING



Even these might contain small cells, likely added under Section 6409(a)



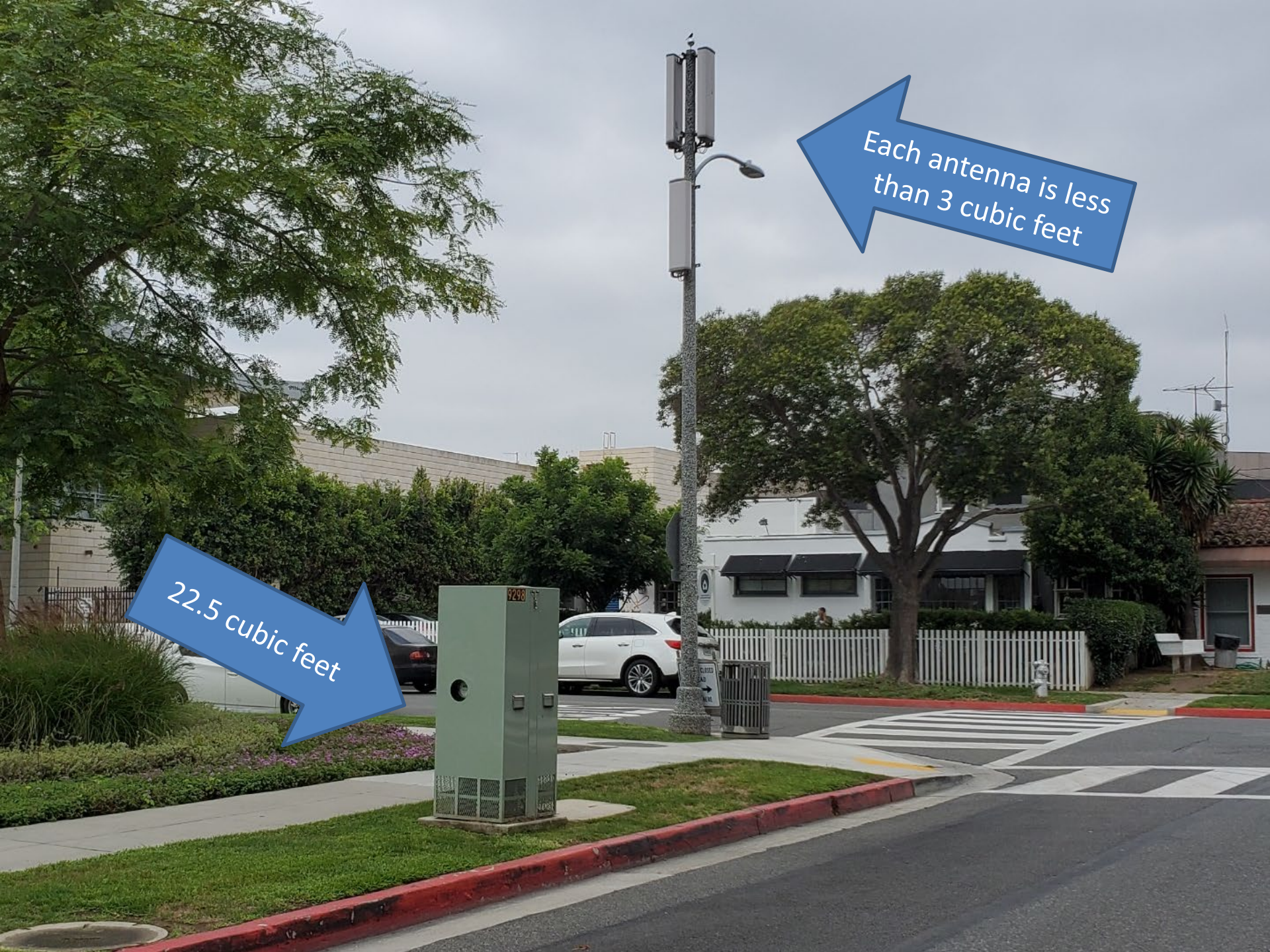


Different Infrastructure: small cell



Each antenna is less than 3 cubic feet

22.5 cubic feet



9312

5.25 feet

2.25 feet

1.90 feet

22.5 cubic feet





SYCAMORE CYN
← CAMPGROUNDS
800 FEET

VENTURA COUNTY
CALL
BOX
1-49

PARKING
ANY TIME



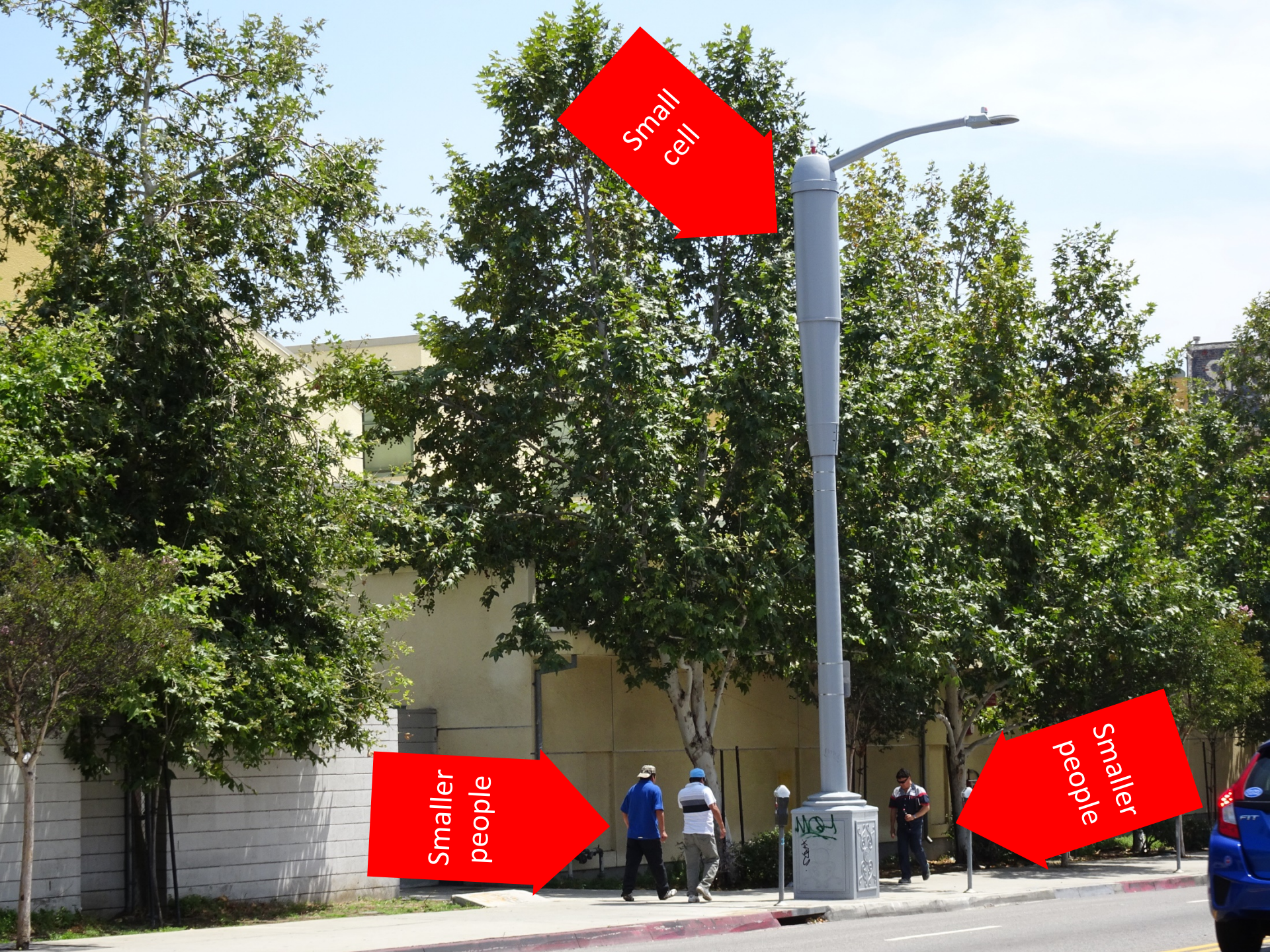




Small
cell

Smaller
people

Smaller
people



Down in the Microtrenches



AB 378

Government Code 65964.5.

(a) For purposes of this section, the following definitions apply:

(1) “Fiber” means fiber optic cables, and related ancillary equipment such as conduit, ancillary cables, hand holes, vaults, and terminals.

(2) “Local agency” means a city, county, city and county, charter city, special district, or publicly owned utility.

(3) “Microtrench” means a narrow open excavation trench that is less than or equal to 4 inches in width and not less than 12 inches in depth and not more than 26 inches in depth and that is created for the purpose of installing a subsurface pipe or conduit.

(4) “Microtrenching” means excavation of a microtrench.

(b) (1) The local agency with jurisdiction to approve excavations shall allow microtrenching for the installation of underground fiber if the installation in the microtrench is limited to fiber, unless the local agency makes a written finding that allowing microtrenching for a fiber installation would have a specific, adverse impact on the public health or safety.

AB 378

Government Code 65964.5.

(2) Upon **mutual agreement**, a microtrench may be placed shallower than 12 inches in depth.

(3) **To the extent necessary, a local agency with jurisdiction to approve excavations shall adopt or amend existing policies, ordinances, codes, or construction rules to allow for microtrenching pursuant to this subdivision.**



AB 378

Government Code 65964.5.

(4) Nothing in this section shall supersede, nullify, or otherwise alter the requirements to comply with safety standards, including, but not limited to, the following:

(A) Article 2 (commencing with Section 4216) of Chapter 3.1 of Division 5 of Title 1.

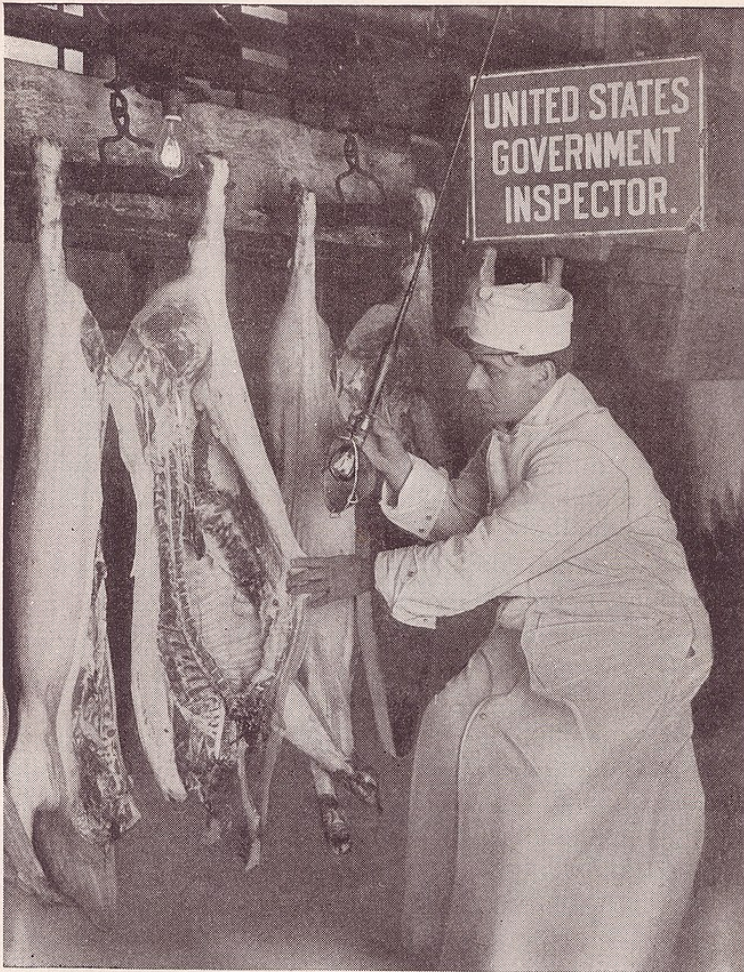
(B) Public Utilities Commission General Order No. 128, or a successor standard.

(c) (Fee recovery limited to the reasonable costs of the agency to process, issue, and inspect, **including any costs incurred if the applicant elects to expedite processing and review.**)

(d) (Statewide, not municipal matter.)

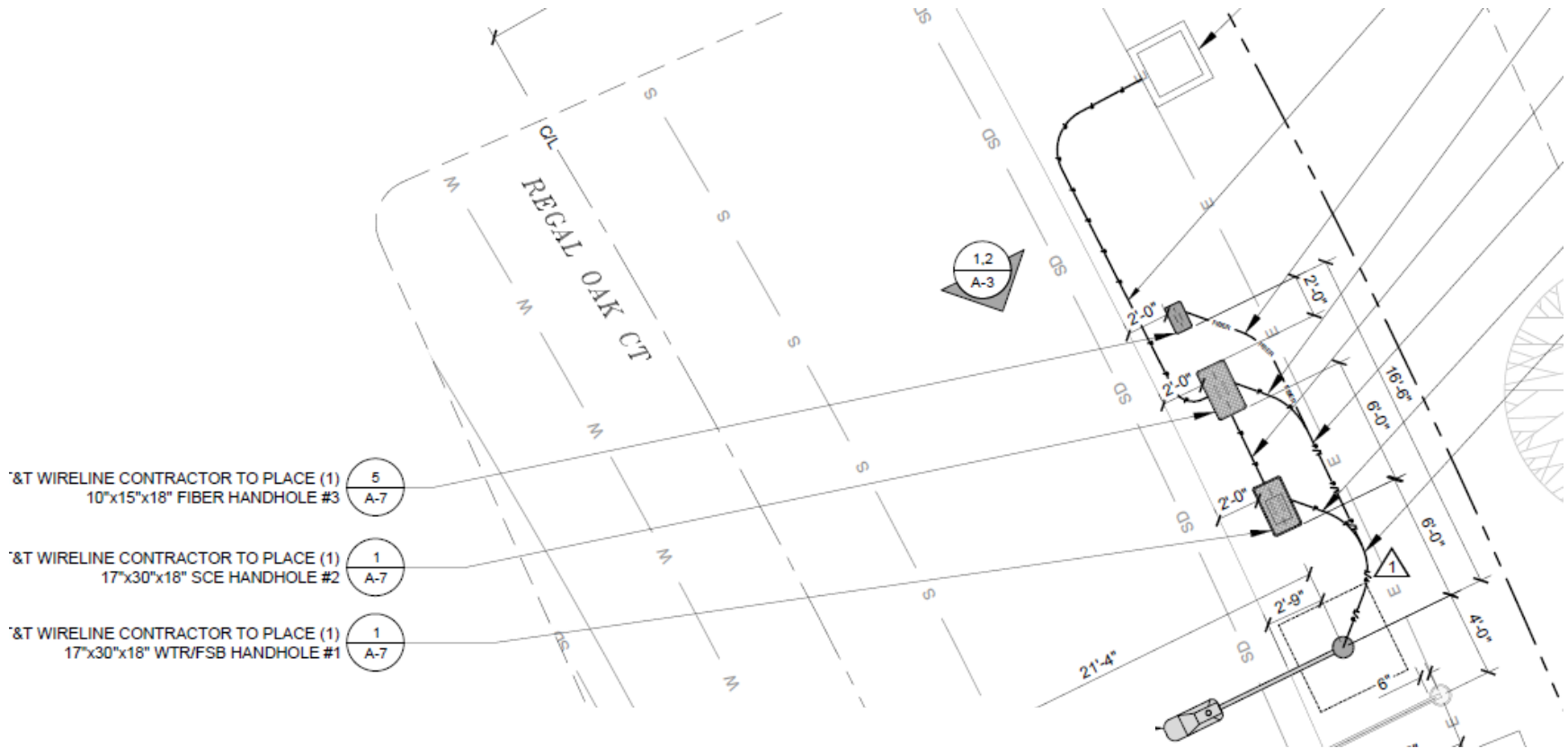
SEC. 4. (No reimbursement because of cost recovery.)

Staying Legal Processing Cell Site Applications

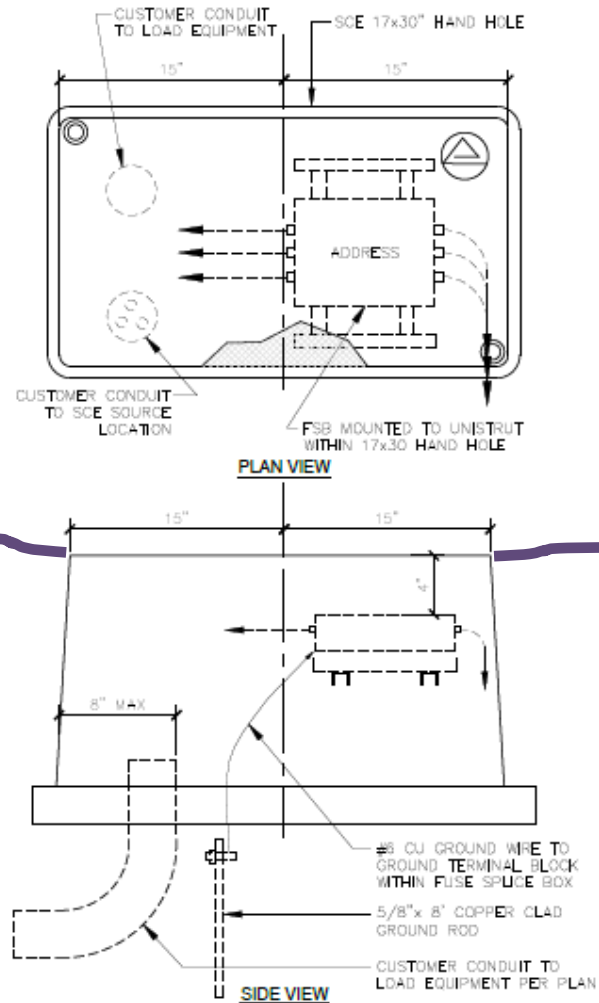


U. S. Government Inspector Making Inspection

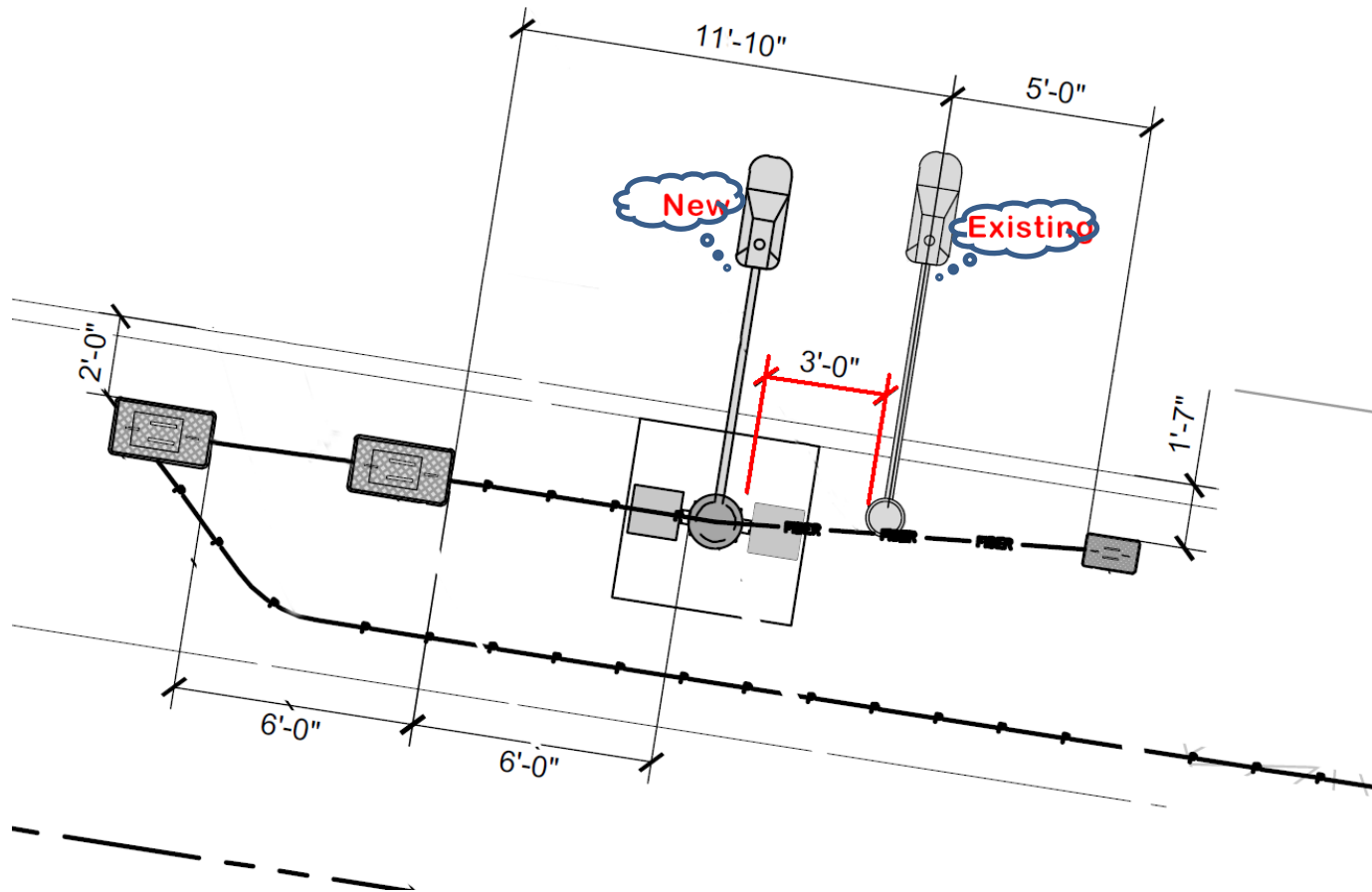
High Fiber Diet



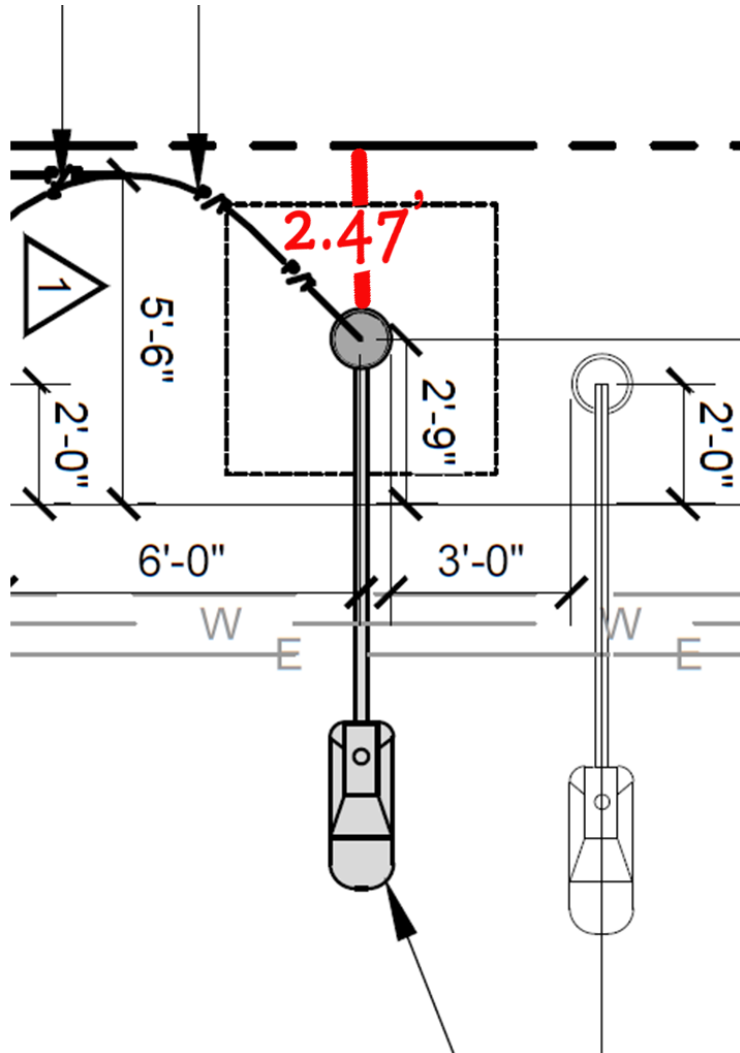
For SWFs, WTRs and mini-meters means fewer street furniture cabinets (good)



Example: 3 feet = 90 days



'It's never-gonna-happen ADA shot clock'



*Look for and squash: lurking
ADA ground clearance
violations*



An 'it's never-gonna-happen shot clock'

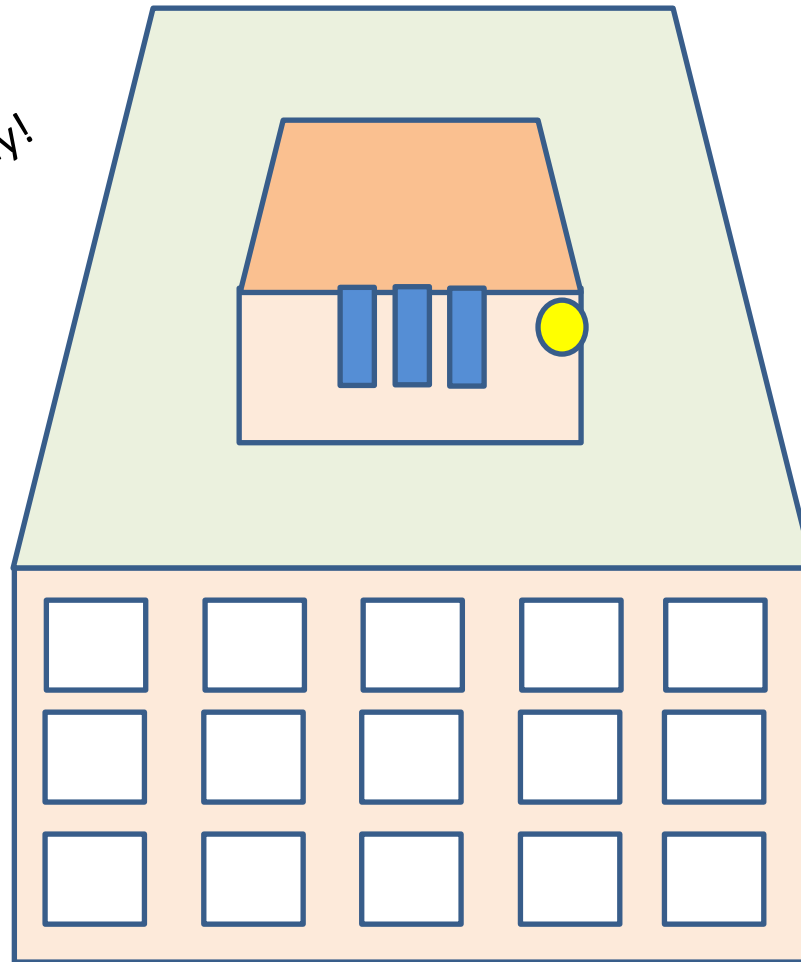
Look for and squash: lurking inverse condemnations



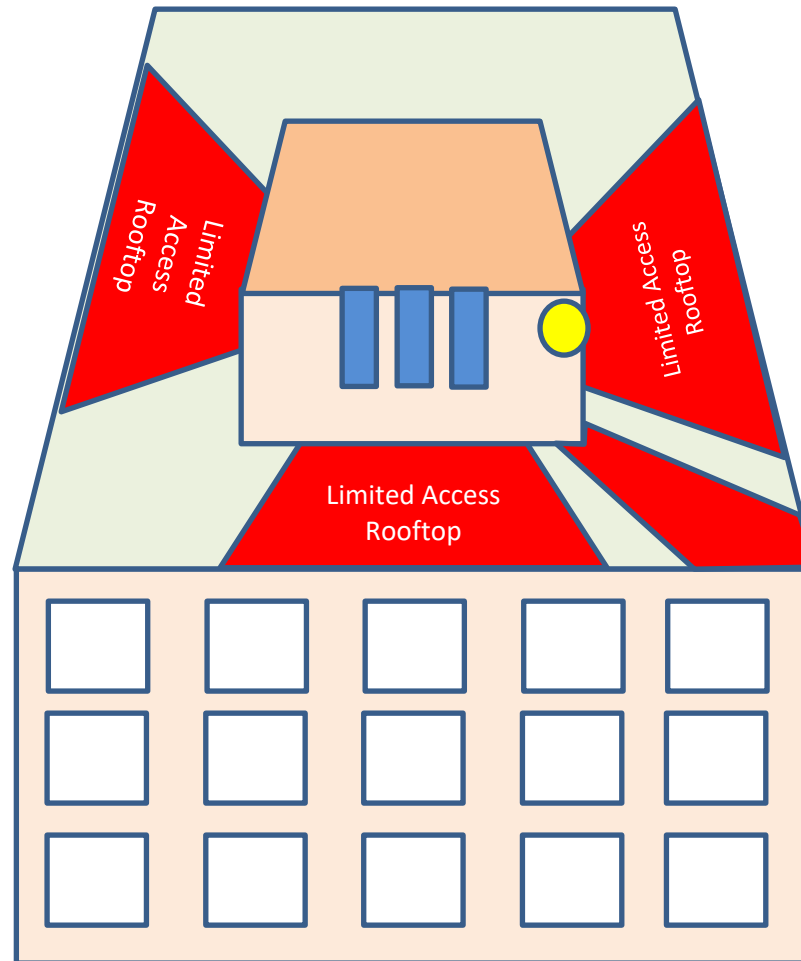
“Are Small Cells Safe?”

Small Cell RF safety on Buildings: Special Safety/Permitting Considerations

Small cells are NOT
Related to small power;
FCC RF safety rules apply!



Portions of Rooftop May be Closed Off for FCC RF Safety Reasons: This is a *Permit* Issue!



"Is it safe?" is not the Question...

Is it FCC compliant IS the question!

Small Cell RF Safety on Poles





Blossom says,

Let's look at **SMALL CELLS** and
the
legal/ordinance/reso/com
pliance
issues you'll want to
consider...

...strap in!



St

2 PARKING

M

MICHELIN

DOWNTOWN
TIRE & WHEEL

TV * LCD * HOME & ELECT

MOBILE

NOTICE OF

STOPPING
PLZ







Nebraska
1800
Ave

1800 S



LAOPERA.ORG
SEP 14 - OCT 6

Wellesley Av
1100 S



LAOPERA



SAVINGS
FEES & CAFE

BOHEME





WAY

YES,
WE'RE

ROAD
CLOSED

Please Contact Businesses Directly











Negotiating (?) Compliance (!)



What to DDDDDo Next

- **D**o your cost studies; count **EVERYTHING**
- **D**evelop your aesthetic standards;
- **D**evelop your application(s); Ask every question
- **D**evelop your jurisdiction's intake and processing procedures; no (or limited use of) emailed apps and drop boxes; no apps without fees; no apps on old forms; no apps on applicant-modified or created forms; no apps on the back of napkins.
- **D**o craft your ordinance to attach automatic conditions of approval to any 'deemed approved' projects

More of What to

DDDDDo Next

- **D**o make sure that your ordinance requires that all charged fees be paid before permit is issued
- **D**ismiss stale applications (60-90 days with no response from applicant to incomplete notice)
- **D**evelop a shot clock tracking system for projects
- **D**o not hesitate to convert non-SWF projects to standard 332(c)(7) projects (just like 6409a)
- **D**o consider putting your design standards into a resolution/policy, not an ordinance

Right after any construction, and before any permit amendments or modifications, staff needs to go look at the site and bring along a 100' measuring tape.



Take photos. Lots of photos.

**Photos from different angles.
Photos close up on every sign.
Photos pulled back from every
cluster of antennas.**

**When you think you have taken
enough photos, take another
dozen or two.**

Turn on Date Stamp

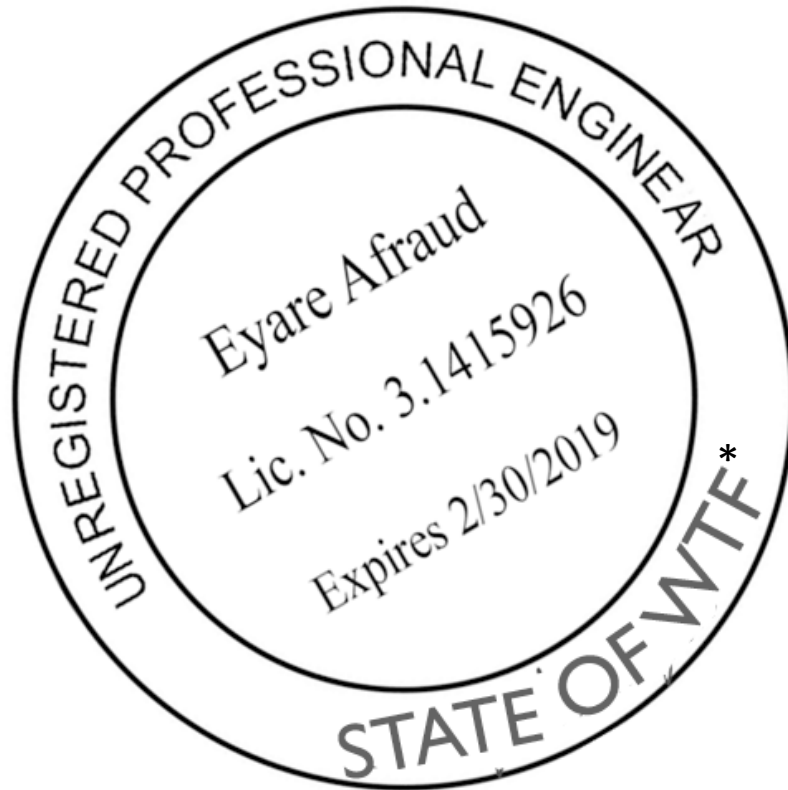
**Max image size; check to make
sure the photos are clear.**

**This is a key method to
prevent/catch any unauthorized
modification**



Visualize this as a modern high-quality cell phone camera or better yet a real DSLR camera in the 16+ megapixel range.

A Very Disturbing New SWF Wireless-Driven Problem...



We are already seeing multiple instances of the unauthorized use of P.E. stamps and signatures...

...and the apparent selling of stamps and signatures on safety plans and forms.

Includes...so far...site plans and RF safety reports

Questions and More Questions?

Ask us now, or call or email us later.

We would love to hear from you!



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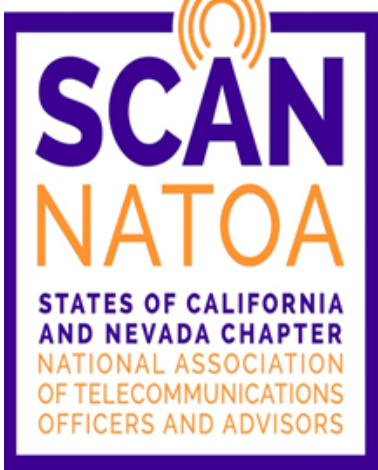
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Thanks for Attending!

Tony Ruggieri
President of SCAN NATOA

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