California Wireless Site Permitting Update

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1. Constraints on local agency discretion

As of 1 January 2016, permit applications for wireless facilities within California have to be approved or denied by local governments within specific time frames, commonly referred to as "shot clocks". If the clock runs out, the application is "deemed approved". The new rules are the combined result of a new California state law – Assembly Bill 57 – which took effect in January, two Federal Communications Commission decisions (and subsequent affirming decisions from federal appeals courts), existing California public utilities law and a California Public Utilities Commission rulemaking.

The legal landscape is not static. Even though Governor Jerry Brown vetoed Senate Bill 649, which would have rolled back local authority even further, it's likely to reappear next year, albeit in a slightly watered down form. The FCC opened a new proceeding earlier this year, entitled "Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment". The language in its Notice of Proposed Rule Making, and comments filed by industry and municipal groups, parallels the rhetoric that surrounded SB 649 and the result could eventually be federal rules that are similar to it.

Depending on the type of facility and location involved, the applicable shot clock could be 60, 90 or 150 days. The clock begins running when the application is submitted. California cities have 30 days to review the application and request additional information. In that case, the clock is tolled – stops – but starts again when the applicant responds. Additional requests for information are allowed under stricter limits and will toll the clock, but a response by the applicant starts it running again.

The only other ways to toll the clock is by mutual consent, or by approving or denying the application. It will not stop due to CEQA review, public hearing requirements, council meeting schedules or any other local agency process requirement. If a city has not approved or denied the application when the clock runs out, it is "deemed approved". The applicant must notify the city that it is proceeding with construction on that basis and the city has 30 days to file a lawsuit seeking to block it.

There are three primary methods a city can use to maintain control of the process:

- Front load the application process by requiring a comprehensive submission (backed up by a standard checklist), covering all contingencies from the very beginning.
- Structure the review process so that a legitimate administrative denial can be quickly issued if appropriate.
- Adopt a short form application and review process for pre-approved, standard solutions for wireless facilities, to encourage applicants to voluntarily choose appropriate designs and locations.

2. Determining which shot clock applies

The wireless permit "shot clock" rules that went into effect in 2016 result in three different shot clock limits (60, 90 and 150 days), and California law (including a California Public Utilities Commission rulemaking, 14-05-001) creates two different classes of wireless facilities: construction by a mobile

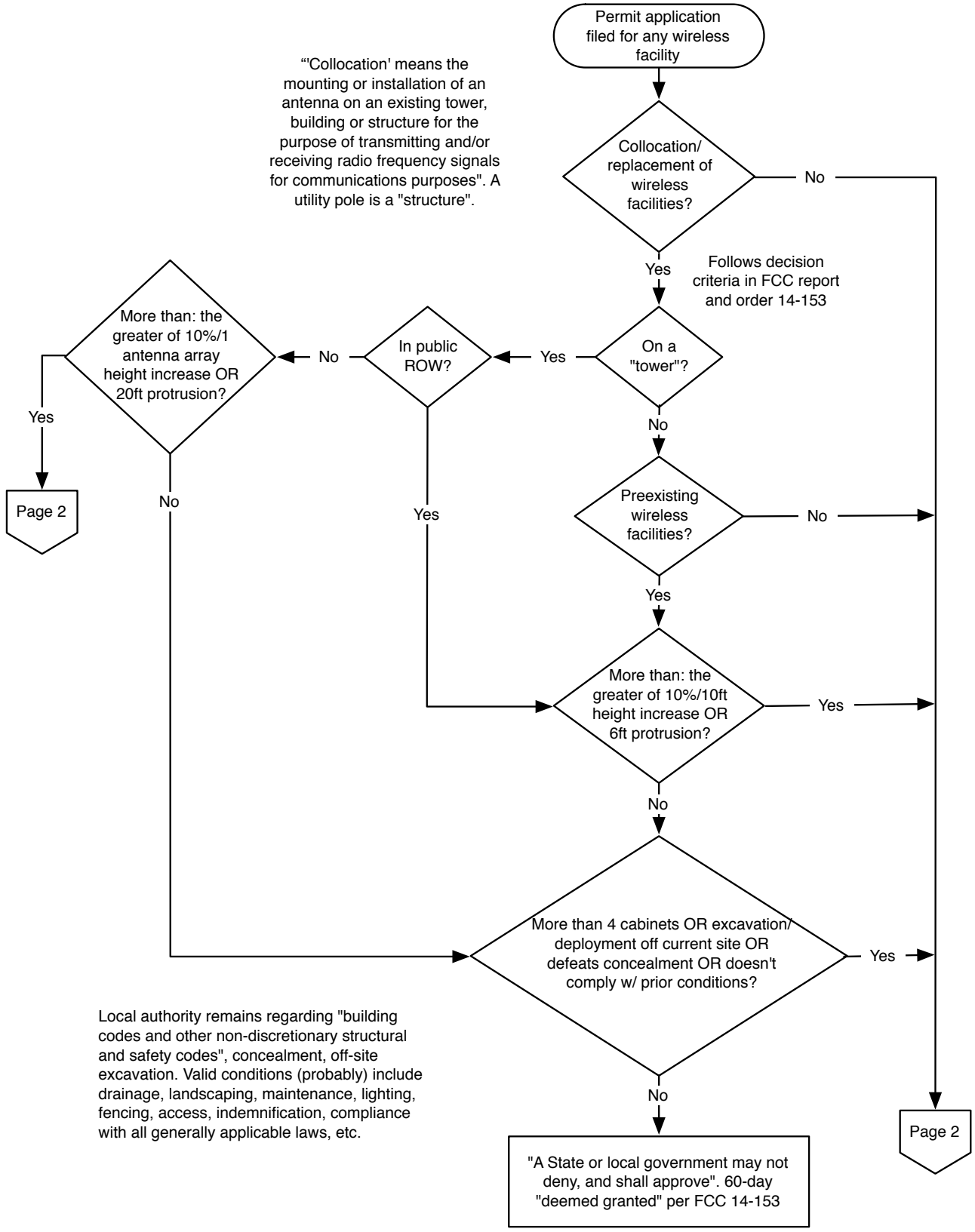

Figure 1 – Wireless permit "shot clock" flowchart, page 1.

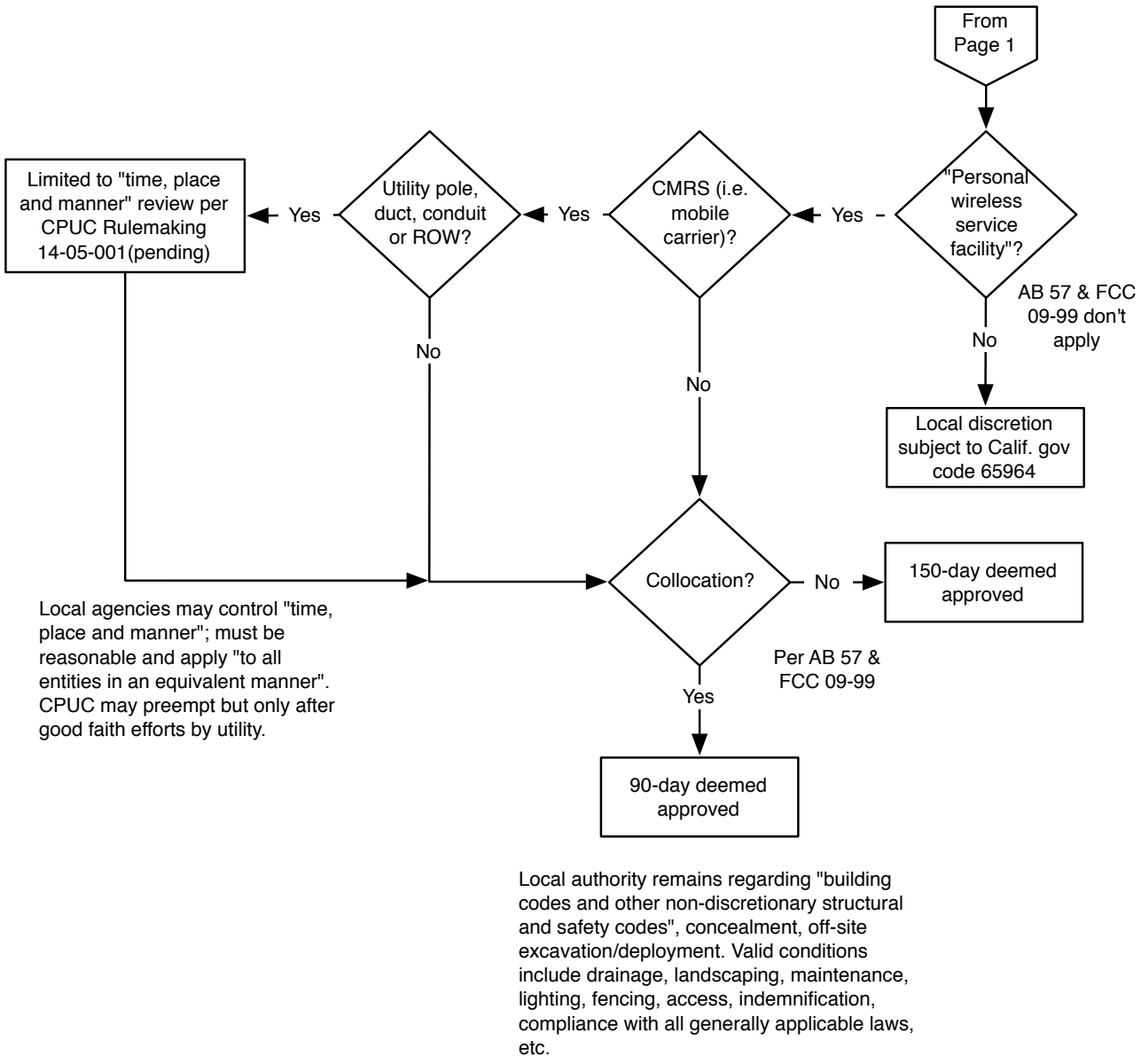

Figure 2 – Wireless permit "shot clock" flowchart, page 2.

carrier in the public right of way and everything else.

Figures 1 and 2 contain a flowchart that gives an overview of how the different rules relate to each other. The result is three basic scenarios:

- Minor collocation of transmission equipment on an existing structure (or replacement of existing transmission equipment): 60 days with significant limits on criteria a city may consider when reviewing the application. This shot clock results from a 2014 FCC order (14-153), which was recently upheld by the federal fourth circuit court of appeals.

- Major collocation: 90 days. This shot clock is the result of the combination of Assembly Bill 57 and a 2009 FCC ruling (09-99), which AB 57 references (for the sake of brevity, I'll just refer to this as the AB 57 rule).
- New facilities (i.e., anything else): 150 days, per AB 57.

The 60-day shot clock applies to wireless facilities built for nearly any purpose; the 90 and 150-day clocks only apply to "personal wireless service", which are defined as "commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services". In other words, wireless telephone or broadband facilities. It wouldn't include, for example, satellite services or public safety facilities.

Another potential difference could be in the definition of "collocation". The FCC 60-day order is based on Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012, and is often referred to as the "6409 rules". The order makes it clear that in order to be eligible, a collocation has to be on an existing wireless facility, while the 2009 shot clock ruling could be interpreted as applying to any preexisting structure. That's one of many details that are likely to be worked out in court or by the FCC.

Section 6409 says in part that "a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station". The order says...

> A modification “substantially changes” the physical dimensions of a tower or base station, as measured from the dimensions of the tower or base station inclusive of any modifications approved prior to the passage of the Spectrum Act, if it meets any of the following criteria:
>
> - For towers outside of public rights-of-way, it increases the height by more than 20 feet or 10%, whichever is greater; for those towers in the rights-of-way and for all base stations, it increases the height of the tower or base station by more than 10% or 10 feet, whichever is greater;
> - For towers outside of public rights-of-way, it protrudes from the edge of the tower more than twenty feet, or more than the width of the tower structure at the level of the appurtenance, whichever is greater; for those towers in the rights-of-way and for all base stations, it protrudes from the edge of the structure more than six feet;
> - It involves installation of more than the standard number of new equipment cabinets for the technology involved, but not to exceed four cabinets;
> - It entails any excavation or deployment outside the current site of the tower or base station;
> - It would defeat the existing concealment elements of the tower or base station; or
> - It does not comply with conditions associated with the prior approval of the tower or base station unless the non-compliance is due to an increase in height, increase in width, addition of cabinets, or new excavation that does not exceed the corresponding “substantial change” thresholds.

The order also allows local governments to "continue to enforce and condition approval on compliance with generally applicable building, structural, electrical, and safety codes and with other laws codifying

objective standards reasonably related to health and safety". However, local governments "may only require applicants to provide documentation that is reasonably related to determining whether the eligible facilities request meets the requirements of Section 6409(a)".

Similarly, existing CPUC policy limits the scope of local authority over utility pole use in the public right of way by licensed mobile carriers to the same kind of "time, place and manner" restrictions that might apply to other telephone companies (and, as a practical matter, to cable and electric companies).

Under the AB 57 criteria, the definition of a major collocation is fairly narrow. Generally, it's any attachment of new equipment to an existing structure that falls within the same dimension limits as the 6409 rules (except the tighter restrictions on facilities in the public right of way don't apply) but entails more construction work, or modifications to existing conditions. There is room to debate whether an apparent collocation actually falls under the 150-day instead of the 90-day clock, but the clock will run while the debate continues.

Although AB 57 doesn't directly apply to the 60-day shot clock – it specifically excludes facilities that are eligible under the 6409 rules – the procedural requirements are, for the most part, identical. As a practical matter, the only question is whether the applicable shot clock is 60, 90 or 150 days. Expect wireless carriers to be more aggressive about claiming "deemed granted" status now that any application for wireless facilities falls under one shot clock or another.

Once a shot clock expires, or an applicant believes it has, then the applicant has to notify the city that it is proceeding on that basis and a city then has 30 days to challenge the "deemed approved" assumption in court. There's no guidance in AB 57 as to what happens if the city doesn't go to court – alternatives range from an applicant being able to simply start work on the basis of the notice, to the city being required to automatically issue the permits, to an applicant being required to obtain a court order confirming the deemed approved status. Any city should consider the position it will initially take in those circumstances, but be prepared to adjust as practice and the courts clarify the procedure.

However it happens, though, carriers are likely to prevail eventually in at least some cases, and the cities need to consider what they will do in that event. One option is to create conditions of approval that would automatically apply if a deemed granted action occurs. Rather than trying to craft a default policy from scratch, however, a city might instead rely on existing design requirements or precedent. The carrier could be served notice that even though the applicable permits have been automatically granted, it is still responsible for adhering to the standards, conditions and precedent that apply to such permits and the city will enforce those terms as it would with any other permit. In other words, there's nothing special or exempt about a permit that's been deemed granted. The same rules apply, the only difference is in the method of approval.

3. Preserving municipal control of wireless permitting

A city now has only a couple of sticks and one carrot left when it comes to administering permits for wireless facilities.

The biggest stick is the application requirements. An incomplete application is the only specific grounds for "tolling" (i.e., stopping) the clock, other than mutual agreement. A city has 30 days to ask for additional information, and 10 days for subsequent (albeit limited) requests if it falls under 6409 rules. The time it takes to review the application and request additional information counts against the shot clock, but the clock will be tolled (stopped) while the applicant is responding. Once an application is complete, either by default or formal acceptance by a city, the clock will run while any discussions or questions or negotiations continue.

The only way to maintain control of the clock is to explicitly require all potentially relevant information be included in the initial application. Specific, predetermined information should be routinely required in an initial application and itemized in a detailed checklist provided to the applicant.

A checklist allows a city to quickly review an application and, where necessary, write a comprehensive request for additional information. The less time required to determine that an application is incomplete, the more quickly the clock is stopped. But more importantly, it helps ensure that all deficiencies will be caught in the first review. Under 6409 rules, a city can make subsequent requests for additional information within 10 days but only in regard to items identified in the initial request. The primary FCC ruling referenced in AB 57 is less specific about limitations on additional requests for information, but until the question has been fully litigated the safest course is to assume that the same limits apply.

A further step is requiring wireless carriers to hold their own community meeting, prior to either considering an application complete or allowing a carrier to submit a new facility or colocation permit application. Such a meeting would make any subsequent public hearing less contentious by reducing the sense of surprise for community members and allow more potentially unforeseen land use challenges (e.g., noise concerns from specific equipment cabinet or generator placement) to be resolved earlier on during the review process. Furthermore the community meetings may allow for more substantive engagement by wireless carriers with neighborhood groups, so that less-intrusive sites are initially proposed. Any challenges that do occur will happen while the clock is running and could, perversely, result in an application being deemed granted because the process required for denial was not completed.

Cities should take what steps they can to guard against “Trojan Horse” applications, where a seemingly innocuous facility is approved and built under the more rigorous review allowed by AB 57, but then significantly modified later under the more lax standards of the 6409 rules.

Cities should also require the inclusion evidence of approval by all other necessary public agencies, such as Caltrans, as a mandatory item on the application checklist.

A community meeting requirement or Caltrans approval are examples of requirements that might apply to a new facility but not a minor collocation, for example. It's an important consideration because 6409 limits application requirements to items necessary for determining whether a proposed collocation qualifies for the expedited 60-day review. The application should establish that all applications are considered to be subject to the 150-day shot clock rule unless the applicant submits specific

information that demonstrates otherwise. If the information is omitted or insufficient, the application could be tolled or denied on that basis.

The only other stick is the threat of denial. The value of that threat is greatest when the information included in the application creates a sufficient record to support denial because subsequent inquiries could end up providing the applicant an opportunity to run out the clock. If possible, denials should be done on an administrative basis. Noticing and other requirements for city council and planning commission agenda items could likewise result in a deemed granted outcome.

It can be argued that the shot clock requirements make it less likely that a denial will be appealed. Refiling the application would reset the clock and could provide the applicant with greater predictability and a faster outcome than a court challenge would offer. At that point, however, an even better alternative for the applicant might be to agree to toll the clock. The credible threat of denial creates an incentive for mutual cooperation, and does it in a way that gives the applicant a clearer idea of how to balance the costs.

The one carrot to offer is the establishment of standard, pre-approved plans and thereby create the opportunity for the applicant to avoid lengthy and detailed application requirements up front and the possibility of denial down the road. The 6409 rules allow cities to give preferential treatment to proposals for facilities that would be located on municipal property, and presumably the same would apply under the AB 57 rules.

4. Considerations for applications involving the public right of way

Other than the more restrictive qualification criteria for the 60-day shot clock and a categorical exclusion for NEPA (but not section 106 NHPA) review in the 6409 rules, the FCC's rules do not differentiate between applications for facilities in the public right of way and on private property. The 6409 order does, however, "conclude that Section 6409(a) applies only to State and local governments acting in their role as land use regulators and does not apply to such entities acting in their proprietary capacities", and it specifically refuses to draw a clear line between those two roles except to say "like private property owners, local governments enter into lease and license agreements to allow parties to place antennas and other wireless service facilities on local-government property, and we find no basis for applying Section 6409(a) in those circumstances".

The arguments laid out in the order and in subsequent court cases indicate that at least some cities consider ROWs to be municipal property, so that question is likely to be litigated at some point. California law, though, effectively makes ROWs state property and limits municipal authority over telephone company work (wired or wireless) in the public right of way to "reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed". However, local ordinances that regulate the location and appearance of wireless facilities in the ROW are allowed so long as a local government 1. "does not abuse its discretion or arbitrarily or unfairly deny requests for access", 2. establishes reasonable rules, 3. applies the rules "to all entities in an equivalent manner" and 4. the rules do not effectively prohibit wireless facilities.

Consequently, a city can enforce aesthetic and other standards for installation of wireless facilities, particularly small/micro cell sites often referred to as distributed antenna systems (DAS), on existing utility poles and on new poles placed in the ROW. The process is subject to federal shot clock limits and it may be reviewed by the California Public Utilities Commission. Location may also regulated, but not in a way that particularly singles out wireless carriers.

5. Pre-approval of standard solutions

As noted above, a city can offer the carrot of a short form application and/or expedited processing for projects that involve standard, pre-approved cell site installations. Over time, detailed specifications for what is and isn't acceptable could be developed either by the city or others, but in the short term a city could establish a process for approving reference designs submitted by either carriers or equipment manufacturers. It's possible that an interagency group, for example under the auspices of the California League of Cities or a professional organization, could assume that responsibility, but for now it's up to the city.

As a general and quickly implementable policy, a city can encourage the organization of applications such that generic, non-proprietary information – manufacturer's specs or a particular landscaping scheme, for example – is presented separately in a standardized format. Once the application has been approved, the generic elements can be published on the city's website as an example of an acceptable solution. Those elements could either be downloaded and included "as is" in subsequent applications by anyone – allowing virtually instant review by the city – or modified to the minimum extent necessary for faster review. This process could speed up review of multiple applications by a single carrier, and in the long run it could simplify the process for everyone. But any acceleration of the city's overall processing ability would happen gradually over time.

Other fast track considerations could include locating facilities in the ROW on busier or wider streets in commercial and industrial areas, rather than in residential neighborhoods, or when set back a certain distance from residential properties.

Rather than try to establish a comprehensive reference design review process, a city could consider immediately pursuing some degree of standarization for two specific cases: replacement/upgrade of streetlights and installation of new or upgraded utility poles.

There are a couple of different ways to approach light standards. From an administrative perspective, the simplest solution is to establish specifications for new light standards intended to support wireless facilities (existing city light standard specifications might suffice) and design parameters for the attachments. Initially those parameters can be stated generally, in terms of high and width/ circumference and placement on the pole (e.g., on the pole top), but as experience is accumulated, the general requirements could be replaced by specific reference designs. The carrier would either rent space on an existing city light standards, or replace a deficient city-owned light standard with a conforming one, with the city maintaining ownership of the new pole. Rent can be deferred for a period of time sufficient for the carrier to recoup the construction cost. Since it's a city-owned asset, an

encroachment permit and, possibly, a use permit wouldn't be necessary. A design permit could be issued, if necessary, on the basis of the standardized, pre-approved specifications.

Maintaining ownership of the supporting pole also gives the city more flexibility under FCC rules, since it will be acting in its capacity as a landlord, rather than a regulator. For example, it could limit or prohibit attachment of additional equipment, as would otherwise be allowed under the 6409 rules.

Another alternative is for the carrier to own the light standard and operate it under terms that are similar to those that apply to electric utilities. The carrier might be persuaded to absorb some or all of the operating cost of the light, but the city's negotiating power in that regard is limited: past a certain point, it would make more sense economically for the carrier to apply for permits under standard procedures. There's also the question of how much of the standard permitting procedure may be waived, although presumably any precedents set by the city in regard to other public utilities would apply.

It would be more difficult for the city to create significantly different standards for installation of new utility poles by wireless carriers in the ROW – in general, rules that apply to one utility must apply to all – but creating a fast track process based on the city's future needs could be defendable. It would also be reasonable to create a fast track permit process for a metal pole – either completely new or as a replacement for an overloaded wooden one – that would be available to any utility. As with light standards, the city could also establish specifications and/or reference designs for the wireless equipment that would be attached. Although opponents could still invoke the appeals process, the worst case is that the shot clock would simply expire (and a city might, in that case, be able to agree that a 90-day shot clock applies). A city could choose not to challenge the "deemed approved" status, but still be confident that the resulting installation would comply with all applicable regulations.

6. Summary

AB 57 has created a situation where rigorous review of applications for wireless facilities, including opportunities for public comment and decisions by elected officials, works against the original purpose of safeguarding the public interest. In order to work within the limits set by State and federal rules, cities should adapt current wireless facilities review process to allow for rapid decisions via comprehensive application information, rapid administrative decisions and incentives for applicants to propose conforming designs from the very beginning. Existing city code should be reviewed and modifications considered to ensure its provisions do not work against the original intent, now that the game has changed.

2. Recommendations

Development of wireless facilities, particularly those designed to support mobile broadband services, is necessary to meet increasing consumer demand and because construction of mobile infrastructure also requires additional investment in the fiber optic networks that support it. On the other hand, cities have a stewardship responsibility regarding environmental regulations, community standards and the use of

the public right of way. Recent changes in state law and federal regulations has made exercising this responsibility problematic, and require adjustments to city policy and procedures in the near term.

2.1. Wireless facilities management

The changes in California and federal law regarding municipal authority over wireless facilities, as described in Section 6 above, make it advisable to quickly respond by changing city procedures, specific policies and, where necessary, municipal codes to ensure continued control of the process and avoid permit issuance by default. A dozen specific steps are recommended:

1. Create a comprehensive checklist of items that must be included in a wireless facilities application.
2. In the application, establish the presumption that the 150-day clock applies unless the applicant 1. states otherwise and 2. provides specific information that demonstrates eligibility for the 60 or 90 day clocks. Any application for a location that doesn't already support wireless facilities would automatically be subject to the 150-day clock. Failure to provide the necessary information would be grounds for either denial or immediate tolling.
3. Include all possible questions, documentation, other city departments/outside agency approvals , etc., as a standard requirement of an initial design permit application. In particular, the application should include all information required for use and encroachment permits or other approvals by other city departments to demonstrate that it complies "with generally applicable building, structural, electrical, and safety codes and with other laws codifying objective standards reasonably related to health and safety".
4. Descriptions of the facilities, including photo simulations, should include 1. the facilities as currently designed. 2. as potentially modified according to the federal rules described in Section 6.2 above (e.g. 20 feet higher and 20 feet wider in all directions).
5. Require evidence, including blueprints and photo simulations, that shows that proposed modifications to existing facilities will not "defeat concealment" and that new facilities will be able to support concealment even if later modified under federal rules.
6. Require full documentation regarding all previous permits for existing facilities, in order to determine that a collocation/modification complies "with conditions associated with the prior approval".
7. Require all CEQA-related studies, including seasonal-dependent biological assessments, to be completed and included in the application.
8. Structure the application and the process so that denials can be issued administratively during the design permit review, even for reasons pertinent to use and encroachment permit reviews.
9. Decide what position the city will take if and when presented with the initial "deemed approved" notices from carriers. Will the city routinely challenge the presumption in court? Will it demand that the applicant obtain a court order confirming the presumption (and use its enforcement powers

if the applicant refuses)? Will it concede the point but still require the applicant to follow city policies and conditions? If so, what are those policies and conditions?

10. Establish preferred specifications for streetlight mounted wireless facilities, including the light standard itself, and for equipment mounted on utility poles.
11. Create a short form application/checklist for proposed wireless facilities that are mounted on light standards or utility poles and conform to the preferred specifications.
12. Review the Municipal Code to determine if procedural changes can be made to safeguard the city's ability to reach decisions within the allowable time frames.