

Asserting Local Government Rights-of-Way Regulatory Authority (or, use it if you've got it!)

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Attribution and thanks

Some of the material in this presentation is courtesy of Brian Grogan, Esq.



Moss & Barnett

... with whom I have shared countless panels and hours trying to figure this stuff out and help you be in the best position to protect your public!

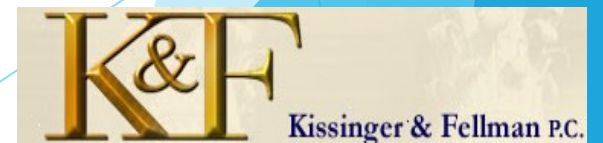


Foundational Premise for this Part of the Presentation:

Your state law preempts local jurisdictions from charging rent or some other form of fair market value to broadband/telecom entities' use of the public rights-of-way



So how do you maximize regulatory authority over the rights-of-way?



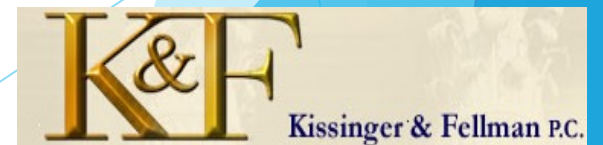
Is Your Rights-of-Way Regulatory Code Current?



- If not,
 - How much authority do you have under state law, and
 - How is it being exercised?

- Who has located their infrastructure in your ROW?
 - Public utilities
 - Other non-regulated utilities
 - Wireless companies
- Do you have franchise authority?

"A good hockey player plays where the puck is. A great hockey player plays where the puck is going to be."
- Wayne Gretzky



Objectives of a Comprehensive Rights-of-Way Ordinance



- Establish a public policy for enabling the local government to discharge its public trust consistent with:
 - the evolving federal and state regulatory policies,
 - industry competition and
 - technological development
- Promote cooperation among permittees and the local government in the occupation of the public rights-of-way, and work therein, in order to:
 - eliminate duplication that is wasteful, unnecessary or unsightly,
 - lower a permittee's and the local government's costs of providing services to the public, and
 - minimize street cuts

Key Ordinance Provisions

- Definitions
- Recognition of local government police powers
- Permits – When Required – per site versus blanket maintenance permits
- Permits – Application/Contents
- Permit Fees
 - Cost recovery – staff time; degradation fee (if state law allows it)



- Insurance
- Indemnification
- Bonds/Letters of Credit
- Warranties
- Inspections
 - Number
 - Timing
- Traffic Control Provisions
- Relocations
- Standards for Repairs and Restoration

Key Ordinance Provisions

- Standards for Newly Constructed/Overlaid Streets
- Exemptions – Emergencies
- Exemptions – Non-emergencies
- ROW Construction: Open Trench/Dig Once
- Coordination meetings/Joint Planning
- Policy to install conduit and/or fiber when trench opened?
- Undergrounding/Use of Poles
- Common Users
- Insurance
- Locates
- Abandonment & Removal
- Revocations of Permits/Stop Work Orders
- Appeals
- Penalties
- Emergency Provisions



What to Avoid: Examples of Unacceptable ROW Provisions

- Proof of financial, technical and legal qualifications
Bell South Telecommunications v. Town of Palm Beach
AT&T Communications v. City of Dallas
- Per foot annual fees and in-kind contribution requirements
City and County of Denver v. Qwest Corp.
- Description of telecommunications services to be provided
Bell South Telecommunications v. City of Coral Springs
- Regulation of stock transfers
City of Auburn v. Qwest Corp.
- Most favored community status – best available rates and terms
TCG New York, Inc. v. White Plains
- Unspecified franchise terms - ability to revoke on unnamed factors
TCG New York, Inc. v. White Plains

Wireless Facilities in the Rights-of-Way



Photo courtesy of Dr. Jonathan L. Kramer, Esq.

- If you don't have criteria in your code for determining the conditions under which you will allow poles and related small cell facilities in the ROW (including design criteria), you need them!
- Issues that may come up:
 - “Some of our facilities will go on utility company poles”
 - Get a copy of their pole attachment agreement
 - The utility may have design criteria - make sure your code doesn't preclude attachments to that infrastructure
 - “Some of our facilities will be on state roads in your jurisdiction”
 - Get a copy of their agreement with the DOT (you may still have authority to regulate)

Understand the Scope of Local Regulatory Authority Over Small Wireless Facilities in Your Streets

- Unless preempted by state law:
- Local government may exercise police power regulatory authority over small cell facilities, which includes ability to address safety and aesthetic issues, such as:
 - Placement of poles do not block visibility in the rights-of-way
 - Placement does not change vehicle/pedestrian travel or parking
 - Placement a certain distance from trees, streetlights or utility pole
 - Placement of poles required closer to lot lines and not in the center of a lot
 - Height of poles must generally be consistent with zone districts
- ... so long as your regulations do not have the effect of prohibiting the provision of services

Understand the Scope of Local Regulatory Authority Over Small Wireless Facilities in Your Streets

- Know where you can't go:
 - No regulatory authority to address public's concerns about health and safety stemming from effects of radio frequency emissions
 - You likely need to allow the full range of public testimony, while at the same time being prohibited by law from considering it
- Santa Fe Alliance for Public Health and Safety v. City of Santa Fe*
- This will make local decision makers extremely unpopular with their public and you have to help them navigate through that

"How would you like a job where, every time you make a mistake, a big red light goes on and 18,000 people boo?"

– Jacques Plante



Local Regulatory Authority Over Small Wireless Facilities in Your Streets

- Local governments may impose design standards for small cell facilities in the rights-of-way
- Design standards are intended to ensure that deployment of small cell facilities will be done in a way that will minimize the impact on the surrounding neighborhood and to maintain the character and appearance of the community



Local Regulatory Authority Over Small Wireless Facilities in Your Streets

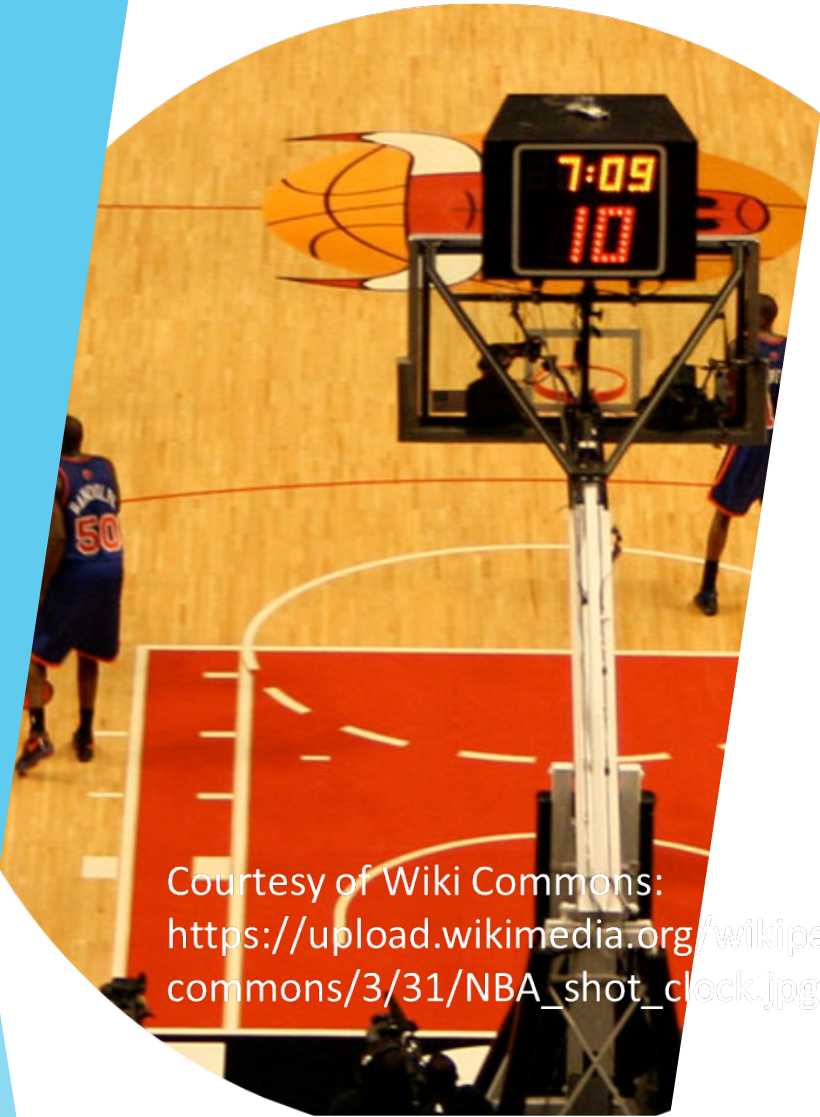
- Standards can address small cells on existing wooden utility poles, new replacement streetlight poles and new stand-alone poles
- Note that federal and state law do not require investor-owned utilities to make their poles available – it is the utility's choice



Photo courtesy of
Brandon M.
Dittman, Esq.

Ensure that Code Complies with Shot Clocks Rules

- Shot clocks- for small cell applications, must act on a complete application within 90 days (for new) or 60 days (for colocation) under federal law
- Shot clock applies to all permits necessary to start construction - land use, construction, lane closure, etc.
- Applications of this kind require **significant communication and coordination** between Planning and Public Works



Courtesy of Wiki Commons:
https://upload.wikimedia.org/wikipedia/commons/3/31/NBA_shot_clock.jpg

“The only job worse (than mine) is a javelin catcher at a track and field meet.”
- Gump Worsley



Grounds for Challenges

- Claims that the regulation “prohibit or effectively prohibit” under 47 USC Sections 253 and 332
 - Per the FCC, this means the regulations “materially inhibit” the ability to provide service
- Claims that small wireless facilities regulations violate the presumptively reasonable limits for fees or time frames to act resulting in a material inhibition in the ability to provide service
- Claims that requirements related to aesthetics, undergrounding, spacing, etc. amount to a material inhibition
- If you hear these claims you could say *“I can’t hear them - my two Stanley Cup rings are clogging my ears.”*
- Patrick Roy
- Suggestion: include a provision in the code for administrative waiver should a claim like this merit it



Photo courtesy of Dr. Jonathan L. Kramer, Esq.

Other Suggestions

- Include industry and the public in your discussions of code amendments

("Hockey is not a one-man show; it's a team effort. If you don't work as a team - even if one or two guys aren't working - you're not going to win. That's the way it is.") - Guy LaFleur

- Publish application materials on your jurisdiction's website
- Update and improve with experience
- Be explicit about what and how materials must be submitted
- Make sure there is a good rationale for each application requirement
- Try to avoid requirements that empower local officials to require additional information on a case-by-case basis

Other Suggestions

- Make sure staff is fully aware of ALL the different shot clocks
- Update fee schedules - publish application materials on your website
- Develop a standard license or permit agreement for access to the rights of way for wireline and wireless deployment
- Support NATOA efforts at the FCC, on the Hill and in court to preserve local authority

"You miss 100 percent of the shots that you don't take."

-Wayne Gretzky



THANKS!



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