# LOCAL GOVERNMENTS' REGULATORY AUTHORITY LIMITATIONS

## 1. Radiofrequency (RF) Emissions

Under federal law, the County cannot regulate wireless facilities based on the environmental effects (including health and safety) of RF emissions as long as the proposed installation complies with applicable FCC regulations. The County can confirm compliance with FCC standards as both an application requirement and a condition of approval (post-installation).

## 2. Federal Law – Effective Prohibition of Service

Under federal law, state and local governments cannot take actions that prohibit or effectively prohibit the provision of personal wireless services. When interpreting and applying federal law, the Ninth Circuit uses a two-part test to determine if a local regulation effectively prohibits service. This test requires the applicant to show that: (1) a significant gap in service exists; and (2) the proposed installation is the least intrusive means of filling that gap, having considered alternatives. Recently, the FCC interpreted federal law for SWFs to establish a "materially inhibits" standard for determining if a regulation or decision is an effective prohibition of service. The FCC stated that local regulations that materially inhibit the provision of personal wireless services are an effective prohibition. It also expanded the scope beyond simple filling a coverage gap to also include such actions as densifying a network, improving existing wireless services, and providing new wireless services.

## 3. Small Wireless Facilities – Use of County-Owned PROW Infrastructure

Under the FCC's recent orders, any prohibition of the placement of small wireless facilities installations on County-owned infrastructure in the public rights-of-way (such as street lights), will likely be challenged by wireless carriers as an effective prohibition of service.

## 4. FCC Ban on Moratoria

The FCC has issued an order that prohibits local governments from imposing any moratoria on the processing of applications for telecommunications facilities, including wireless. As a result, the County cannot refuse to accept wireless applications, even those that may be incomplete.

## 5. State Law – Use of Public Right-of-Way and Regulation of Placements

Under Pub. Util. Code Section 7901, telephone companies (including wireless carriers) have a franchise to use the public rights-of-way. However, that franchise right is not unfettered, and local governments have the authority to ensure that deployments do not incommode, or interfere, with the public's use of the public right-

of-way. Further, the California Supreme Court has held that this authority includes imposing reasonable aesthetic standards on installations.

**6. Small Wireless Facilities – Aesthetics**

The FCC has established limitations on aesthetic standards that may be imposed on small wireless facilities. The FCC said that such aesthetic standards must be: (1) reasonable; (2) no more burdensome than those applied to other types of infrastructure deployments; and (3) objective and published in advance. The FCC's goal was to have local governments implement standards that make it fairly clear in advance what is required for approval. Based on federal law and regulations, outright prohibitions have a greater risk of being challenged by wireless carriers than mere expressions of preferences.

**7. State Law – Unlawful Conditions**

Gov. Code § 65964 prohibits three types of conditions from being imposed on wireless telecommunications facilities. The County may not:

- Require an escrow deposit for removal of a facility or any of its components. You can still require that a bond be posted to cover the cost of removal, but must "take into consideration" the project applicant's estimate of removal costs.
- Limit the duration of any permit for a facility to less than 10 years, unless there are "public safety reasons" or "land use reasons." You are still permitted to require a site to be built and operational within a certain amount of time.
- Require all facilities to be located on sites owned by particular parties.

**8. FCC Shot Clocks & Timing**

Since 2009, local governments have been subject to time limits or "shot clocks" that require a final decision to be reached on a wireless application within a specified period or be subject to expedited judicial review or other remedies. There are currently five different shot clocks, which vary in length and operation based on the type of wireless communications facility that the applicant is seeking. The FCC requires that final action be taken within the shot clock period, which includes any appeals and other County-required permits.

Each shot clock will start to run upon receipt of the application and will continue to run unless it is stopped. There are only two ways to toll or stop the running of a shot clock: (1) provide a timely notice of incompleteness (NOI); or (2) mutual agreement with the applicant. Tolling agreements may be reached at any time during the process and should be in a writing, signed by both parties.

The table below sets forth the existing shot clocks for eligible facilities requests (EFRs), small wireless facilities (SWFs), collocations, and the catchall "other" personal wireless services facilities that do not fall into any other categories.

## FCC Shot Clocks

| FCC Category | | Applicable Shot Clock | Initial Notice of Incompleteness Deadline | Subsequent Notice of Incompleteness Deadline (on resubmittals) |
|---|---|---|---|---|
| **Eligible Facilities Requests (EFR)** Must involve modification to existing wireless facility (tower or base station) and meet size and other requirements to qualify as EFR | | 60 days | 30 days | 10 days |
| **Small Cells** (Small Wireless Facility (SWF)) Must be personal wireless services facility that meets size and other requirements to qualify as SWF. | **Placement on existing structure** (need not be existing wireless facility) | 60 days | 10 days* | 10 days |
| | **New** (including replacements) | 90 days | 10 days* | 10 days |
| **Collocations** Must involve placement of personal wireless services facility (that does not qualify as EFR or SWF) on existing structure which need not have wireless facility already on it | | 90 days | 30 days | 10 days |
| **Other** Personal wireless services facility that does not fall in any other category | | 150 days | 30 days | 10 days |

* For SWFs only, the first review and timely NOI **resets** the shot clock to Day 0 on resubmittal. For all others, the time spent reviewing and preparing the NOI uses up review and decision time.

Applicant's Remedies: Deemed Granted & Other Special Remedies

Both the federal government and the State of California have developed a number of remedies for a local agency's failure to reach a final decision on a wireless facilities application within the applicable shot clock period.

For EFRs only, if the local government fails to take action on the application within the shot clock period, the request is "deemed granted" effective as of the time the applicant notifies the local government in writing that the applicable shot clock has expired and the application has been deemed granted. It is important to note that under FCC rules there are limitations on what can be requested in an application for an EFR and if a request qualifies as an EFR under FCC rules, there is no discretion; the application must be approved. However, if the decision is that it does not qualify as an EFR, then the application is automatically to be considered as another type of application (typically a collocation), and the County may require the additional information for that type of application.

For collocations and "other" applications that do not fall into any other category, Gov. Code section 65964.1 establishes a separate deemed approved remedy. If an applicant invokes this remedy, the County would have 30 days to petition the court and challenge the deemed approved status.

For SWFs, there is no deemed granted remedy; however, the FCC has created a so-called "enhanced remedy" wherein a local government's failure to act on a SWF application within the applicable shot clock is presumptively an effective prohibition of the provision of personal wireless services.