THE TALE OF TWO CITIES — LOS ANGELES AND ANY OTHER CITY

by

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Earlier this year, Pacific Palisades residents of homes at the intersection of Depauw and Via de la Paz saw an ugly monstrosity appear on the corner. No one knew at first what it was that was blighting their view. They knew that a small telephone pole had been located there previously had been replaced with this much higher monster. No one had received any notice from the City of Los Angeles that the old pole would be replaced and that wireless antennas would be installed on the top of the pole, made even more ugly with a large wiring harness running from the ground to the attached antennas protruding out from the pole like three sore thumbs.

That wouldn't have happened if these residents had lived in any other city in Southern California — certainly not in nearby Santa Monica or Beverly Hills. If they lived in any other city nearby residents would have not only received notice that there was an application for a permit to install a wireless facility in the right of way, they would have also had an opportunity to submit comments before the application was considered for approval.

If the application was approved, not only would the nearby residents have the right to appeal to the City Council but so would any interested party, including any community or other homeowners organization. Not in the City of Los Angeles.

Yet the Los Angeles Municipal Code provides that the installation of all wireless facilities with the exception of such facilities located on the tops of buildings in the commercial and manufacturing zones shall require that the applicant obtain a Conditional Use Permit from the City's Zoning Administrator.[1] The decision of the Zoning Administrator is appealable to the Area Planning Commission.

However, despite the requirement in the Municipal Code that they obtain a CUP before installing their facilities, wireless providers are not obtaining CUPs for installations of their facilities on either existing or replacement poles located in the City's rights of ways. In fact, wireless providers are not obtaining any permits from the City to install their antennas on existing or

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[1] LAMC §12.21.A.20 and §12.24.W.49

replacement poles.

The Above Ground Facilities Permit.

The only permits the City requires is if the wireless provider needs to install any part of the facility other than the antennas attached to the poles and the wiring thereto, in the public right of way (PROW). This would apply to electrical meters or other equipment on the surface of the right of way. These are what are called Above Ground Facilities or "AGF".

If the wireless provider needs such a permit, the provider applies to the City's Bureau of Engineering (BOE). Thus, if a wireless provider wants to install an antenna on an existing pole or a replacement pole, but needs to connect it to a structure, cabinet, electric meter, or other appurtenance above the existing surrounding grade in, on, or above the PROW, the wireless provider must obtain an AGF permit. But the permit has nothing to do with the installation of antennas. In other words, if the installation of an antenna requires any auxiliary facility in the PROW, it is this facility and not the antenna that requires the permit.

Whenever anyone, including a wireless provider, requests an AGF permit, to install a facility in the PROW, BOE must notify all owners of the adjoining lots, abutting lots, lots across the public right-of-way from adjoining and abutting lots, relevant Council District Offices, neighborhood councils, and homeowner associations via registered mail, of the proposed AGF. [2]The notification must identify whether or not the applicant is requesting a variance, and must include information regarding the specific AGF location and cabinet design. [3]

However, since there is no requirement that this notice include information that the applicant plans to use the AGF facility to service a wireless antenna, it is unlikely that anyone receiving a notice of an application for an AGF facility will be aware that the applicant intends to install a wireless antenna.[4] Therefore, it isn't until after the antenna is installed that neighbors become aware that an antenna has been installed on a pole.

But even when a notice is given of an application for a proposed AGF , there is no process for anyone other than the applicant to protest or be heard. Only when the BOE has approved the application does anyone have a right to a hearing on the application. When the application is approved, the applicant is required to notify the same persons and organizations of the approval of the application. This notice must include the BOE Approval or Disapproval, and language provided by the BOE detailing the AGF appeal process available to property owners. However, no information is required in the notice of approval that a wireless antenna is involved so it is unlikely that anyone receiving a notice will be aware that the AGF concerns the installation of a wireless antenna on a pole.

The BOE determination can be appealed to the Board of Public Works but only by the property owners and/or occupants of rental properties. If no appeals are submitted to the BOE within 14 calendar days of the date of notification, the BOE determination is final. The Board of Public Works conducts a hearing and can grant an appeal if it finds that an error or abuse of

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[2] Notice is not required to be given to renters, only to the property manager.

[3] LAMC §62.02.03.2.VIII.D

[4] However, if the applicant wants to install an antenna on a new free standing pole, which must have an AGF permit to install the pole, the notice must state that a pole is to be installed and it will usually include a diagram of the pole with an antenna attached so there is some notice that the pole is to be used for wireless transmissions.

discretion occurred.[5]

City Council Awareness of the Problem.

The City Council has been aware since 2006 that wireless providers were installing their wireless antennae in the PROW without any notice to the affected members of the public and that there did not appear to be any way that the public could object to or even comment on such installations. In Council file 06-2415, Cell Phone Antennas, the Council was advised:

> " Unlike requests to place new cell phone transmitters on top of homes and businesses, there is no public hearing for this type of installation. Decisions on location and the appearance of this equipment are made by cell phone companies and approved by a little known committee known as the **Joint Pole Authority**.
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> The Authority is a coalition of 10 southland cities, governmental agencies and telecommunications companies charged with negotiating 30-year leases for new cell phone antennas. The Department of Water and Power has a representative on this board, but its meetings are not open to the public and its minutes are not available for review, even to other City officials.
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> The Department of Public Works, which is responsible for maintaining the City's public right-of-way, does hold appeal hearings for any utility boxes installed to power the antenna, but only after the antennas are installed and poles replaced. *Cell phone companies have had the right to place repeater towers on top of City and privately owned utility poles since 1996, when Congress designated them as utilities as part of the Telecommunications Act. While this power has been theirs for a decade, it has only been in recent years that the full implications of this change have become clear.* Recently, the Federal Communications Commission passed mandates for improved service which call for more antennas in areas with spotty service. California's Public Utility Commission has ruled that cities who are parties to the Southern California Joint Pole Agreement must grant utility companies access to their poles as they are considered shared owners." (Emphasis added.)
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> The Council File notes that the City of Beverly Hills, which is not a party of a JPA, regulates:
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> > " the appearance of antennas placed on poles within its boundaries, and mandates that telecommunication companies provide them with requested areas where they would like to place antennas so that the City can decide the best exact location."

The Council file then suggested that the City of Los Angeles should have the same authority as the City of Beverly Hills and the Council directed the City Attorney, DWP, and the Department of Public Works develop (1) a process to notify Council offices, neighborhood councils and homeowners' associations of all proposed new cell phone antenna installations on utility poles located on public right-of-way and privately owned lot lines in the City of Los Angeles, as well as the locations of all such antennas installed to date; and (2) report to Council on the options available to the City to play a greater role in determining the placement and appearance of antennas and utility poles. Unfortunately, there was never a follow-up and the Council file was closed this year because there had been no action on the file for two years.

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[5] LAMC §62.02.03.2. VIII.E

The Report in the Council File is Erroneous.

The Report in the Council File not only contains erroneous information, it is circular in its contentions. None of them hold water.

a. The Telecommunications Act of 1996

First, are the contentions that somehow the Telecommunications Act of 1996 preempts the City from regulating wireless facilities installed on poles. The Report states that:

> " Cell phone companies have had the right to place repeater towers on top of City and privately owned utility poles since 1996, when Congress designated them as utilities as part of the Telecommunications Act. While this power has been theirs for a decade, it has only been in recent years that the full implications of this change have become clear."

First, it is not a power. Second, it is a conditional right. But clearly the elephant that is always in the room is the Telecommunications Act of 1996 and it is necessary to have some understanding of the legislative intent of the Act in order to understand the context in which regulations regarding wireless telecommunications facilities are formulated. A good summary of that intent was set forth by a California Appeals Court as follows:

> **"** Congress intended the TCA " 'to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies. The purpose of the Telecommunications Act is 'to provide for a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services . . . by opening all telecommunications markets to competition."
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> "Congress found that 'State and local requirements, siting and zoning decisions' had 'created an inconsistent and at times, conflicting patchwork of requirements' that was 'inhibiting the deployment' of wireless communications services." But "[w]hile Congress sought to limit the ability of state and local governments to frustrate the Act's national purpose of facilitating the growth of wireless telecommunications, *[it] also intended to preserve state and local control over the siting of towers and other facilities that provide wireless services. [Congress] struck a balance between the national interest in facilitating the growth of telecommunications and the local interest in making zoning decisions …. [A]uthority to regulate siting and construction of telecommunications towers is preserved in state and local governments, … but these decisions are subject to certain [statutory] limitations …."*[6] (Emphasis added.)

Given the decision of the 9th Circuit Court of Appeals in *Sprint Telephony PCS v. County of San Diego,* (2008), the City clearly has the authority to regulate the *placement, construction, and modification* of wireless telecommunications facilities in the PROW, so long as the regulations do not prohibit or have the effect of prohibiting the provision of such services or unreasonably discriminate among similar providers of these services.

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[6] *City of Rancho Palos Verdes v. Abrams* (2002) 101 Cal.App.4th 367, 379

What the Council File Report is probably referring to is a provision in the Telecommunications Act of 1996 that regulates pole attachments.[7] It provides that subject to capacity, reasons of safety, reliability and generally applicable engineering purposes, a utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it. If this was so, then neither the PUC or any local government could regulate the placement of wireless antennae on poles. However, the PUC has rejected this argument stating:

> "This Commission in its Right-of-Way (ROW) decision (D.98-10-058) concluded that the FCC does not have jurisdiction with respect to access to poles and rights-of-way where such matters are regulated by the state. (D.98-10-058, 82 CPUC2d 510, 530.) The Commission went on to conclude that it may, under the Pole Attachments Act, 47 U.S.C. § 224, impose on a competitively neutral basis utility pole requirements necessary to protect the public safety and welfare. In short, the Commission has jurisdiction over the safety of overhead electric line construction, operation and maintenance, and it may assert that jurisdiction as to the installation of wireless antennas (or, for that matter, any other attachment, such as fixtures or signs) on utility poles."[8]

All this provision requires is that utilities with existing poles must provide access to its poles. It doesn't in any way, restrict local governments from regulating the siting and construction of wireless facilities within their jurisdictions, so long as such regulations do not discriminate between providers or prohibit the installation of wireless facilities within that jurisdiction. Thus, while wireless providers can not be unreasonably prevented by the owner of a utility pole from placing their antennae on existing utility poles, a local government has the authority to either prevent the installation on that particular pole or authorize it subject to condiions.

b. The Joint Pole Authority (JPA)

> "Decisions on location and the appearance of this equipment are made by cell phone companies and approved by a little known committee known as the **Joint Pole Authority**. "

By inference, the Council File Report implies that all the decisions regarding the installation of the wireless facilities on utility poles in the PROW are solely under the jurisdiction of the JPA and not the City. But the Report does not explain why or how the JPA prevents the City from regulating the location and construction of wireless facilities on poles located in the PROW.

The Southern California Joint Pole Committee is made up of a group of member representatives of utilities and municipalities in Southern California who hold joint equity

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[7] 47 USC §224

[8] Order Instituting Rulemaking to Revise General Order 95, R05-02-023 (Filed February 24, 2005)

interest in utility poles. Established by telephone, electricity and railroad companies, the Committee has existed since October 10, 1906. It was formed as a result of the need to limit the number of poles in the field and to create a uniform procedure for recording ownership of poles.

The membership of the Southern California Joint Pole Committee consists of 10 cities (LA and nine small cities), Southern California Edison, and all the telecommunication and cable companies. The author could find no evidence that there are any other Joint Power Authorities or Committees in Southern California so that only approximately 5% of the local governments in Southern California belong to such organizations. The City of Los Angeles is represented on the Committee by DWP.[9]

According to the website for the Southern California Joint Pole Committee, its purpose is to keep accurate records of ownership for each pole and keep on file a master record of each jointly-owned pole. The principal function is to calculate the established value of each transaction, involving the sale or purchase of joint pole equity interests or maintenance of those interests. In other words, it is a method by which the owners of utility poles are compensated by other users of the poles for the use of the pole. It could be concluded that the function of the Committee is bookkeeping.

The author has found no statutory authority for the formation of JPAs and the California Public Utility Commission (PUC) does not oversee the compensation that JPAs assess its members for joint use of poles. However, any public utility or telecommunications company which is not a member of JPA can enter into a pole agreement with any utility company for use of its poles however, any such agreement must be approved by the PUC.[10]

The question then is if the primary purpose or function of the Southern California Joint Pole Committee is bookkeeping, then why doesn't the City of Los Angeles have the authority to regulate the installation of wireless antenna on poles located in the PROW.

1. Has the CPUC Prohibited the City From Regulating Installation of Wireless Facilities on Utility Poles Subject to the JPA?

In the Council File Report, it is stated that "California's Public Utility Commission has ruled that cities who are parties to the Southern California Joint Pole Agreement must grant utility companies access to their poles as they are considered shared owners."

Officials at the CPUC have advised the author that this statement is not correct. But even if it was, the CPUC does not prohibit local governments from regulating the installation of wireless facilities on utility poles in the PROW. PUC General Order 159A adopted May 8, 1996 states:

> "B. Deference to Local Government.
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> Commission acknowledges that local citizens and local government are often in a better position than the Commission to measure local impact and to identify alternative sites. Accordingly, the Commission will generally defer to local governments to regulate the location and design of cell sites and MTSOs including a)

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[9] City Charter Section 674 gives the DWP the power to contract with any public or private corporation for a sharing of the use and benefits and of the capital charges and other obligations associated with its facilities, provided that the contract is approved by ordinance.

[10] Public Utilities Code §765 and §765.5

the issuance of land use approvals; b) acting as the Lead Agency for purposes of satisfying the CEQA and c) the satisfaction of noticing procedures for both land use approvals and CEQA procedures.

However, in so doing, the Commission shall retain its right to preempt a local government determination on siting when there is a clear conflict with the Commission's goals and/or statewide interests. In those instances, the cellular service provider shall have the burden of demonstrating that accommodating local government's requirements for any specific site would unduly frustrate the Commission's goals or statewide interests. Further, local government and citizens shall have an opportunity to protest a request for preemption and to present their positions. If a cellular service provider establishes that an action by local government unduly frustrates the Commission's objectives, then the Commission may preempt a local government pursuant to Commission's authority under the California Constitution, Article XII, section 8."

Thus the PUC has ceded to local governments the authority to regulate wireless facilities in the PROWs.

2. By Entering Into the JPA, Has the City Either Contracted Away or Delegated its Authority to Regulate Wireless Facilities on Poles Subject to the JPA?

The answer is No. The City cannot either contract or delegate away its police power, particularly when it comes to zoning. *Santa Margarita Area Residents Together (SMART) v. San Luis Obispo County Board of Supervisors,* (2000) 84 Cal. App. 4th 221.["It is established that a city or county may not contract away its right to exercise police power in the future (*Avco Community Developers, Inc. v. South Coast Regional Com., supra*, 17 Cal.3d at p. 800) and that the power to enact, modify, and amend zoning and other land use regulations constitutes a part of a county's police power. (*Alameda County Land Use Assn. v. City of Hayward* (1995) 38 Cal.App.4th 1716, 1724."]

c. The Above Ground Facilities Ordinance.

A reading of the Above Ground Facilities Ordinance (AGF)[11] Ordinance indicates that neither the Zoning Code nor the AGF applies. LAMC §62.02.03.2.IX.C states:

"Pole-mounted and street light-mounted facilities,…street light poles, utility poles, and traffic and pedestrian control fixtures are not subject to the AGFSP, *but will be subject to all other applicable requirements of law*, including, but not limited to, the Joint Pole Agreement (JPA), the Department of Water and Power guidelines, and the Bureau of Street Lighting rules and regulations." (Emphasis added.)

What the AGF Ordinance is saying is that the BOE has no jurisdiction over certain poles including utility poles and that is why the BOE makes no effort to regulate the

[11] LAMC §62.02.03.2 Specifications and Procedures for above Ground Facilities Installations in the Public Rights-of-way.

installation of wireless facilities on these poles.

But it is what it does say that is important. It states that these poles will be subject to all other applicable requirements of law. While the section enumerates the JPA, DWP guidelines, and Bureau of Street Lighting rules and regulations, it does not limit the applicable requirements of law just to these provisions.

Thus, the poles are subject to any other City regulations that are applicable. Those regulations are set forth in LAMC §12.21.A.20 *et seq.* and §12.24.W.49 *et seq.* LAMC §12.21.A.20 provides that

> "**Wireless Telecommunication Facilities (WTF) Standards** - *Notwithstanding any provision of this Code to the contrary,* the following standards shall apply to the placement of all wireless telecommunication facilities." (Emphasis added.)

That includes all the provisions requiring a CUP for the installation of wireless facilities. When LAMC §12.21.A.20 is read together with §62.02.03.2.IX.C of the AGF ordinance, they are consistent. §12.21.A.20 states that "Notwithstanding any provision of this Code to the contrary" which means it overrides any other provision in the Code relating to the installation of wireless facilities, including those on utility poles in the PROW in §62.02.03.2.IX.C. But the language in §62.02.03.2.IX.C that these poles are subject to all other applicable requirements of the law makes the section consistent with §12.21.A.20.

Does the Fact That the AGF Ordinance Was Adopted Subsequent to §12.21.A.20 Make It Supercede That Section?

The answer is No. Under the rules of statutory interpretation, §12.21.A.20 takes precedence. In *Casterson v. Superior Court (Cardoso)* (2002) 101 Cal.App.4th 177, 187 the court stated that;

> "The principles of statutory interpretation support defendant's argument.In statutory construction cases, our fundamental task is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. [Citation.] 'We begin by examining the statutory language, giving the words their usual and ordinary meaning.' [Citations.] If the terms of the statute are unambiguous, we presume the lawmakers meant what they said, and the plain meaning of the language governs."

There is no ambiguity in the language of §12.21.A.20 and it is consistent with the language in §62.02.03.2.IX.C. But even if it is assumed for the sake of argument that the two sections are inconsistent, the courts would in all probability rule that there is no conflict.

There is a presumption that the Legislature is familiar with past and existing legislation. Therefore, the Council would be presumed to be aware that §12.21.A.20 had language in it that would override any other provision in the Municipal Code that contradicted that language. If the Council intended that §62.02.03.2.IX.C override §12.21.A.20, it would have amended one or both sections to eliminate any conflict.

In *FCC v. NextWave Personal Communications Inc.*, 537 U.S. 293, 304 (2003), NextWave was awarded 63 C-Block licenses on winning bids totaling approximately $4.74 billion, and 27 F-Block licenses on winning bids of approximately $123 million. In accordance with FCC regulations, NextWave made a downpayment on the purchase price, signed promissory notes for the balance. When NextWave failed to pay the remainder, the FCC revoked the licenses. NextWave then filed for bankruptcy protection and the Bankruptcy Court. The Court ruled for NextWave and held that Next Wave could keep the licenses at a

reduced price of just over $1 billion. The FCC appealed arguing that 11 USC §525 of the Bankruptcy Act conflicted with 47 USC §309(j) (Telecommunications Act of 1996) in that it interfered with the auction process. The U. S. Supreme Court held that nothing in §309 "…demands that cancellation be the sanction for failure to make agreed-upon periodic payments." The Court stated that if Congress wanted to make an exception in the Telecommunications Act of 1996 it would have done so,

> "…it flies in the face of the fact that, where Congress has intended to provide regulatory exceptions to provisions of the Bankruptcy Code, it has done so clearly and expressly, rather than by a device so subtle as denominating a motive a cause." (*supra* at p. 302)

The Court went on to state:

> "Finally, our interpretation of § 525 does not create any conflict with the Communications Act…." '[W]hen two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.' " J. E. M. Ag Supply, Inc. v. Pioneer Hi-Bred International, Inc., 534 U. S. 124, 143-144 (2001) (quoting Morton v. Mancari, 417 U. S. 535, 551 (1974)). There being no inherent conflict between § 525 and the Communications Act, "we can plainly regard each statute as effective."

Also *Whitfield v. United States,* 543 U.S. 209, 216 (2005) (Congress has imposed an explicit overt act requirement in 22 conspiracy statutes, yet has not done so in the provision governing conspiracy to commit money laundering). *Central Bank of Denver v. First Interstate Bank*, 511 U.S. 164, 176-77 (1994). ("Congress knew how to impose aiding and abetting liability when it chose to do so," it did not use the words "aid" and "abet" in the statute, and hence did not impose aiding and abetting liability.") *Franklin Nat'l Bank v. New York*, 347 U.S. 373, 378 (1954) (finding "no indication Congress intended to make this phase of national banking subject to local restrictions, as it has done by express language in several other instances") *Estate of Bell v. Commissioner,* 928 F.2d 901, 904 (9th Cir. 1991). ("Congress is presumed to act intentionally and purposely when it includes language in one section but omits it in another.")

There is no inherent conflict between the two subject sections in the Municipal Code and they are therefore, both effective. They coexist.

Street Lighting.

The Bureau of Street Lighting has adopted a Policy, Specifications, and Procedures for Communications Installations on Street Lighting Poles. It provides that installations of communications equipment shall be placed only on pre-approved steel or concrete poles that are taller than 25' in height and affixed with a cobrahead luminaire. Only one piece of communication equipment can be mounted on a pole unless approved by the Bureau.

The Policy also provides that an applicant can replace existing street lighting poles may be replaced, at the cost of the applicant, to accommodate weight in excess of maximum requirements.

The Policy also regulates aesthetics, requiring that the communication units be a color matching the existing luminaire, pole or arm or be white, brown, grey or beige. The Policy restricts the number of installations permitted to four on any city block that is less than a 1,000 feet long, and longer blocks, to four plus one for every additional 250 feet. There are no restrictions in manufacturing zones.

Communications equipment may not be installed on poles with the following conditions: 1. poles with more than one art display already attached. Art display refers to banners or other permanent medallion; 2. poles operating on series circuits; 3. poles with traffic signal equipment; 4. poles that have upright luminaries; 5. arms that are aluminum; and 6. ornamental poles.

Included in the Policy is the following statement:

> "Installations of communications equipment shall not be in conflict with any codes or specific plans of the Department of Planning, Building and Safety, or Department of Water and Power."

This is a strange position because the Policy does violate the Zoning Code in a number of aspects, first of all because the Zoning Code requires that a CUP be obtained which requires that notice be given and a hearing be held. The Policy does not provide for any notice to any other department, agency, Council office, or adjacent property owners. It does not provide for any appeal from any decision of the Department of Street Lighting to approve an application.

Nor does it comply with the height limit restrictions in the Zoning Code. An example is if an applicant decides it needs a 50 foot high pole and the existing pole is only 30 feet high. The applicant can replace the existing pole with a 50 foot high pole, even though the pole is located in a zone with a 35 foot height limit.

The Policy does have a restriction on pole mounted communications equipment which should be applied to all wireless antennae on any pole and that is that the equipment must not extend more than 6" from the exterior of the pole or extend more than 6" up from the top of the pole. Combined with the color requirements, this requires that the antenna be as inconspicuous as possible.

Although the City is a party to the Joint Pole Agreement, it is notable that street lighting poles are not included in the Agreement. What appears to have occurred is that the DWP, which is proprietory agency, unlike the Bureau of Street Lighting, and which qualifies as a utility under 47 USC §224 , Pole Attachments, is subject to that section that regulates and requires the sharing of poles

The JPA, AGF Ordinance, Street Lighting Regulations, and Are Consistent With §12.21.A.20 In That They Each Supplement §12.21.A.20,

LAMC §12.21.A.20 is not in conflict with the JPA, or the AGF ordinance or the Street Lighting Regulations. What §12.21.A.20 does is superimpose requirements over the JPA AGF, and the Street Lighting Regulations. In order for a wireless provider to get a permit to install wireless equipment on a pole in the PROW, the provider must get approval from the JPA in addition to a CUP from the Zoning Administrator. If the provider needs to install auxiliary equipment on the surface of the PROW, then the provider must also get an AGF permit. If the provider is installing its facilities on a street light, it must get both approval from the Bureau of Street Lighting and a CUP from the Zoning Administrator. No agency has the sole authority to approve the installation of a wireless facility on a utility pole or street light, The authority is jointly exercised.

CONCLUSION

Ironically, while the Council File Report gets it all wrong, the one item it does not mention and that is LAMC §12.21.A.20. That is the answer.

Dated: July 28, 2009