

Think It Over: Dealing with Fiber Companies that Want to Use Your City's Right-of-Way

Texas City Attorneys Association Fall Conference
(October 5, 2023)

David Johnson, Assistant City Attorney, City of Arlington

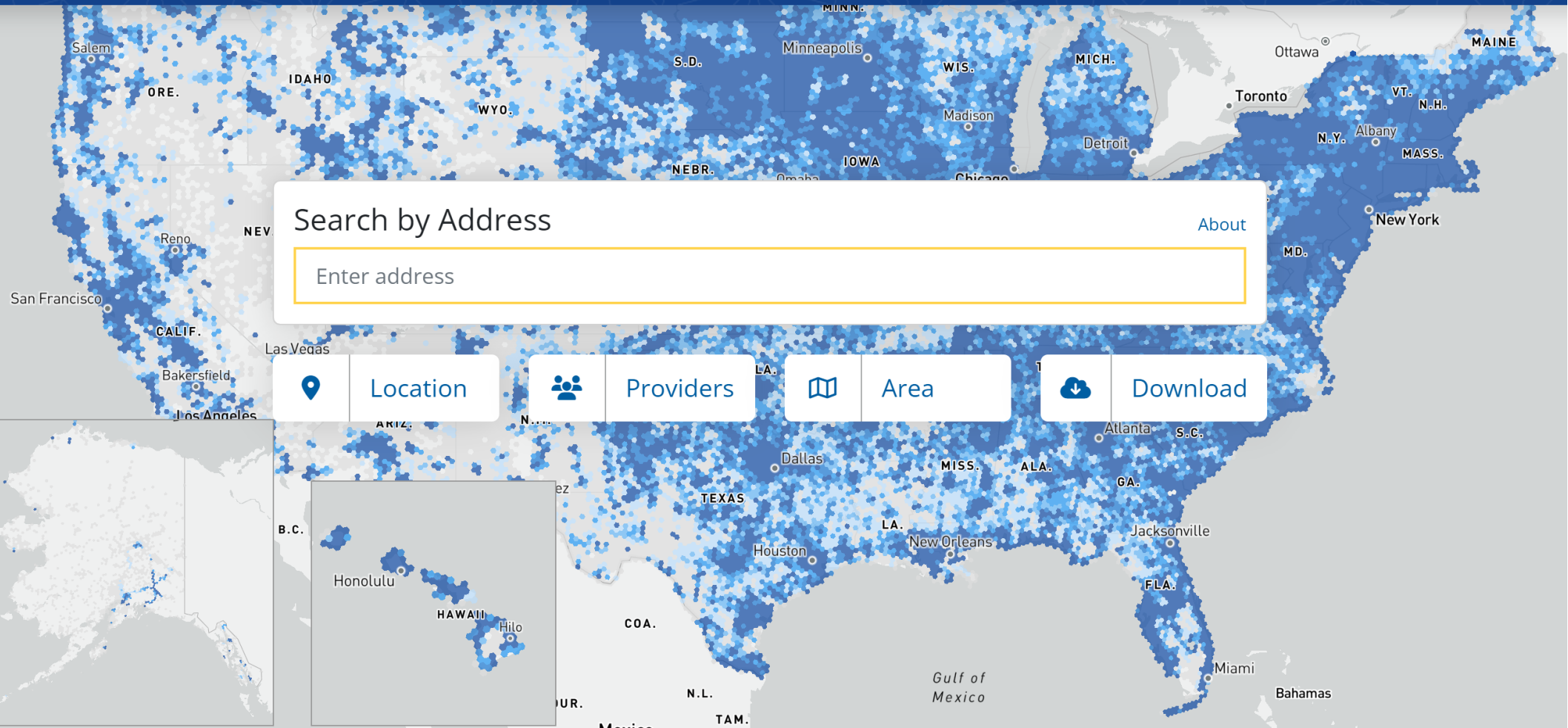
FCC Broadband Map

<https://broadbandmap.fcc.gov/home>

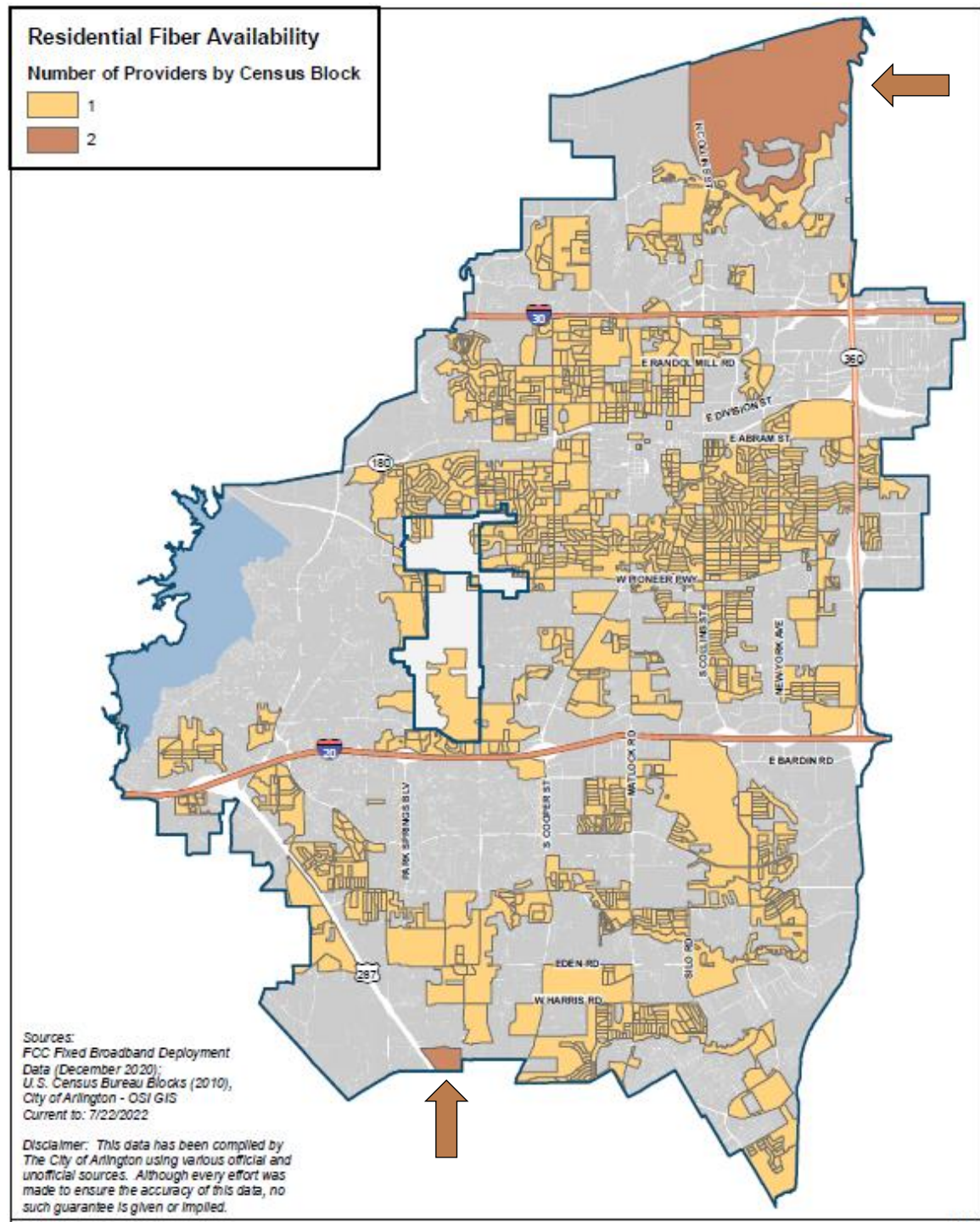


Federal
Communications
Commission

FCC National Broadband Map



Residential Fiber Deployment Arlington



City Authority Over the Right-of-Way

- Cities have exclusive control over and under the public highways, streets, and alleys. Tex. Transp. Code §§ 311.001–311.002
- Other state laws, re: city authority over the ROW.
Tex. Loc. Gov't Code §§ 283.001(b), 284.001(c), & 284.301(b);
Tex. Util. Code §§ 66.011(a) & 66.016(b); & Tex. Transp. Code §§ 311.071 & 316.021
- Statutory authority* or an agreement is needed to access the right-of-way. **e.g.*, Tex. Local Gov't Code Ch. 283 or 284; or Tex. Util. Code Ch. 66

One or More Contracts



License Agreement



Ground Lease(s) for Shelters

Compensation

Fair compensation for use of right-of-way

- Avoid an unconstitutional gift of public funds or thing of value.

Tex. Const. Art. III § 52(a) & Art. XI § 3

Methods of compensation

- Percentage of gross revenues*
- Number of connected customers**
- Per linear foot rate

*e.g., cable franchise fees, Tex. Util. Code § 66.005

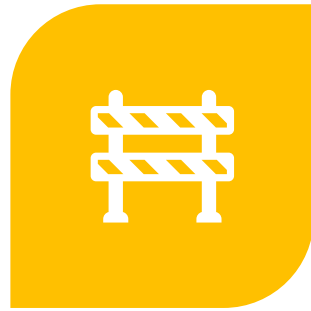
**e.g., ROW/access line fees, Tex. Loc. Gov't Code § 283.051

<http://www.puc.texas.gov/industry/communications/row/linerates.aspx>

Varying Interests of City Departments



Water Utilities



Public Works

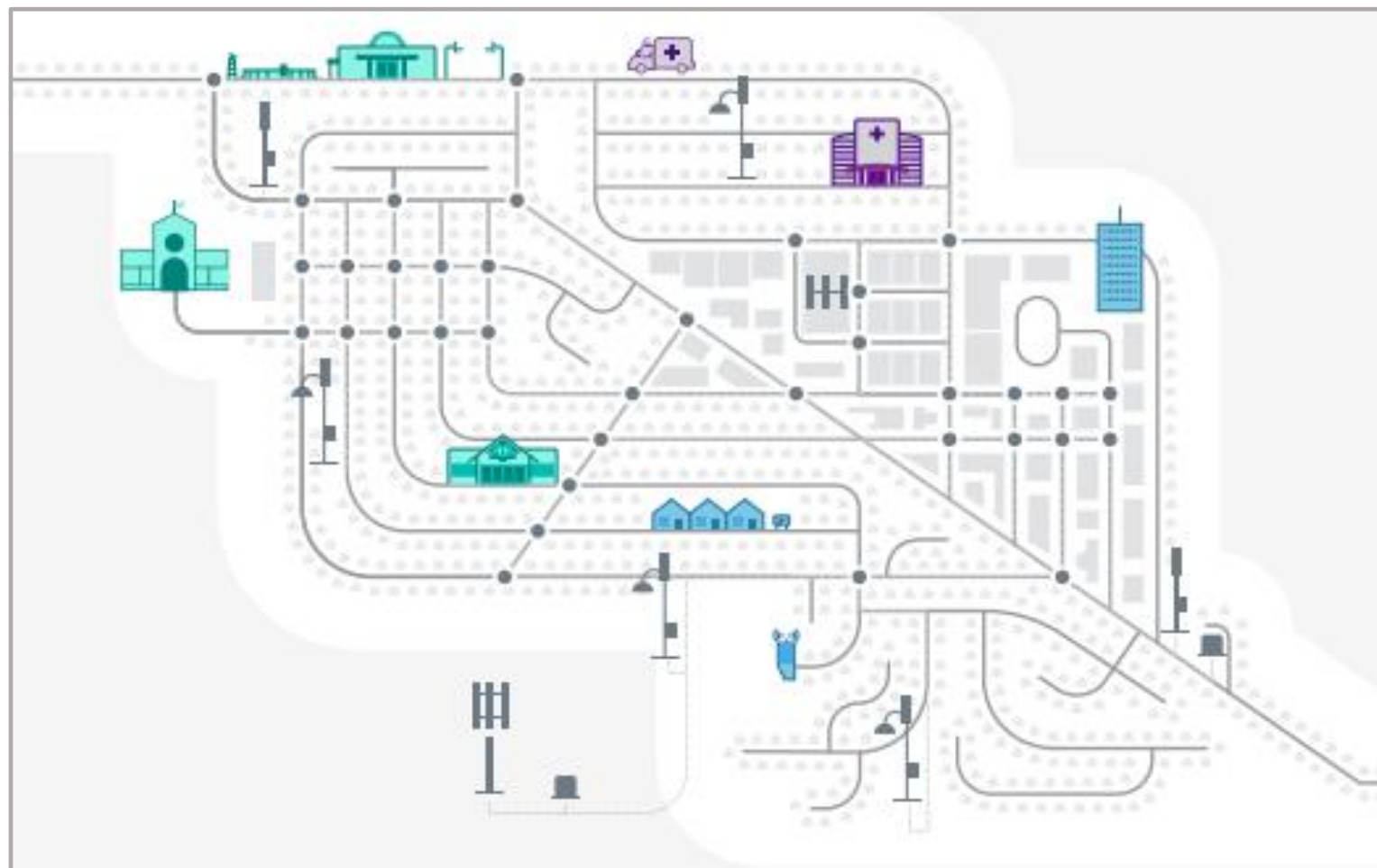


Information
Technology



Risk Management

License Agreement



Location Considerations



City-wide



Designated Area

Microtrenching Pilot Program Boundary Map

San Antonio Ord. No. 2016-09-29-0757

San Antonio



<https://www.sanantonio.gov/PublicWorks/Fiber-Deployment>

Deadlines and Milestones



Deadline examples

32 months to start construction

60 months to complete construction



Milestone examples

15% in Year 1 35% in Year 2

55% in Year 3 75% in Year 4

100% in Year 5

Construction Methods

Regulations

- Establish construction methods, including microtrenching, by City regulation, e.g., ROW construction manual, ordinance, etc.

Contract

- Explicitly require compliance with all applicable laws
- Do not approve specific types of construction methods in the contract

Microtrenching in Streets



Microtrenching Regulations - example

- Default rule: microtrenching is only allowed in the parkway.
- Microtrenching is allowed in asphalt streets, concrete streets, driveways, and sidewalks only with City approval.
- Microtrenching is not allowed on concrete streets designated as thoroughfares, major/minor arterials, major/minor collectors.
- Minimum 12-inch depth. City may require 16-inch depth to avoid endangering the health, safety, or welfare of the public or property.
- Trenches must be reinstated with like material, consistent with the site.

Microtrenching Regulations - example [continued]

- When microtrenching is approved in the streets, sidewalks, or driveways, trenches must be cut in existing seams or joints.
- Microtrenching is not allowed in driveways of decorative stone, pavers, or other unique non-concrete or non-asphalt material; must bore under driveway 24 inches deep.
- Trenches must be 3 feet behind the curb.
- Rebar, dowels, or other structural supports in concrete must not be cut.

Pilot Project

Evaluate overall project and construction methods

Example:

- Within 90 days after execution of the agreement
- 2,000 linear feet
- Microtrenching different surfaces: asphalt, concrete, parkway, intersections
- Installing conduit
- Locating utilities
- Filling the trench
- City may terminate agreement if pilot project is not to City's satisfaction

Microtrenching Pilot Project video

<https://www.youtube.com/watch?v=d7VtG0zmzJo>

Permits and Reimbursement



Company Must Get All
Required Permits



No “Shot Clock” for City
to Act on Permits



Company Reimburses
City for Permitting and
Utility Locate Costs

Relocation



Always at Company's
expense*



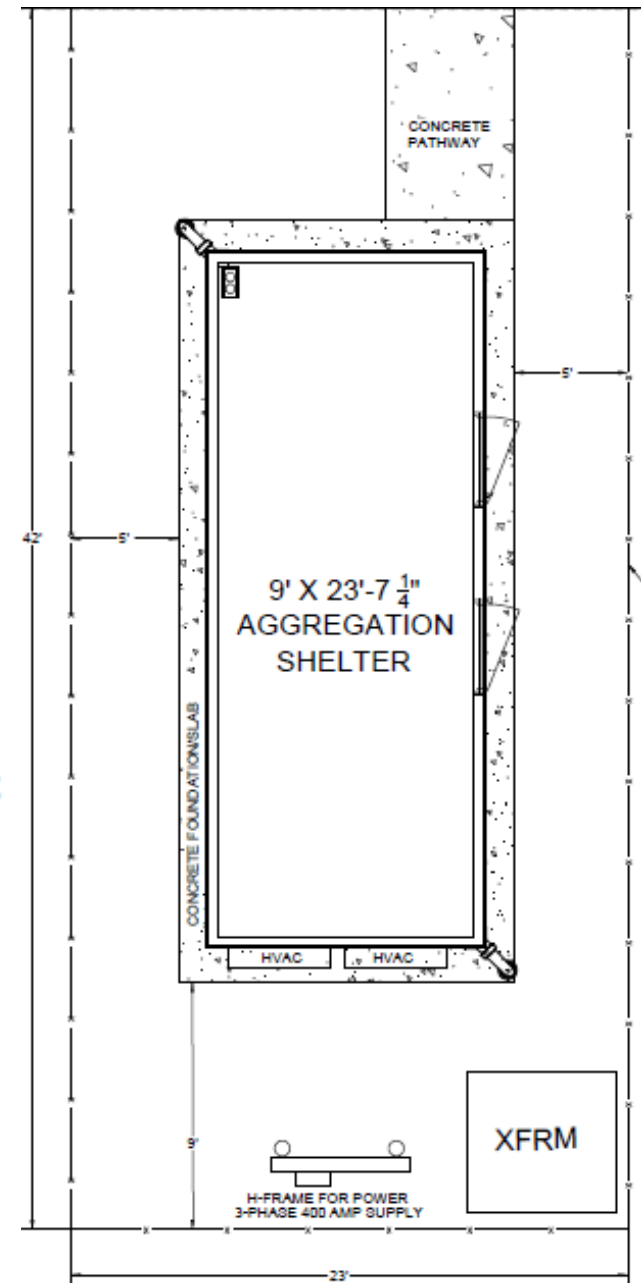
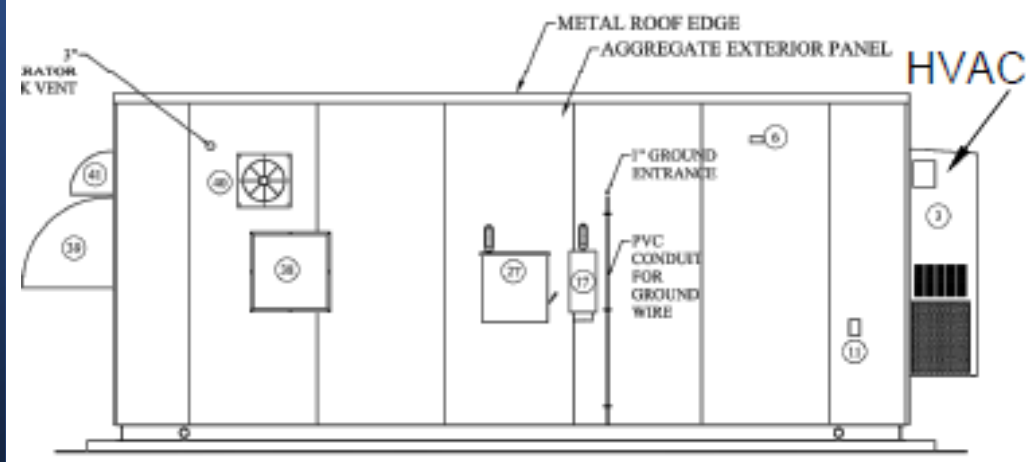
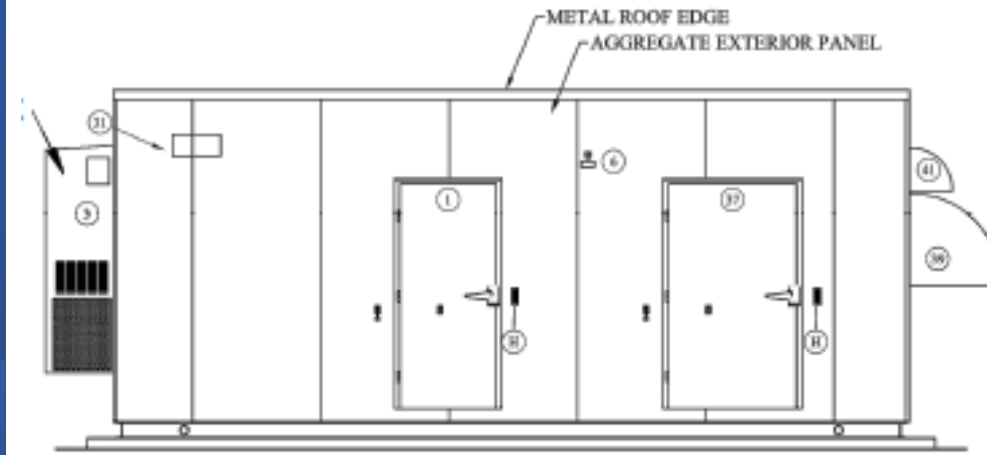
Franchise utility
meetings



Notifications about
City street projects

**See e.g., City of Richardson v. Oncor Elec. Delivery Co. LLC, 539 S.W.3d 252, 259-60 (Tex. 2018).*

Ground Leases for Shelters



Shelter Lease Area

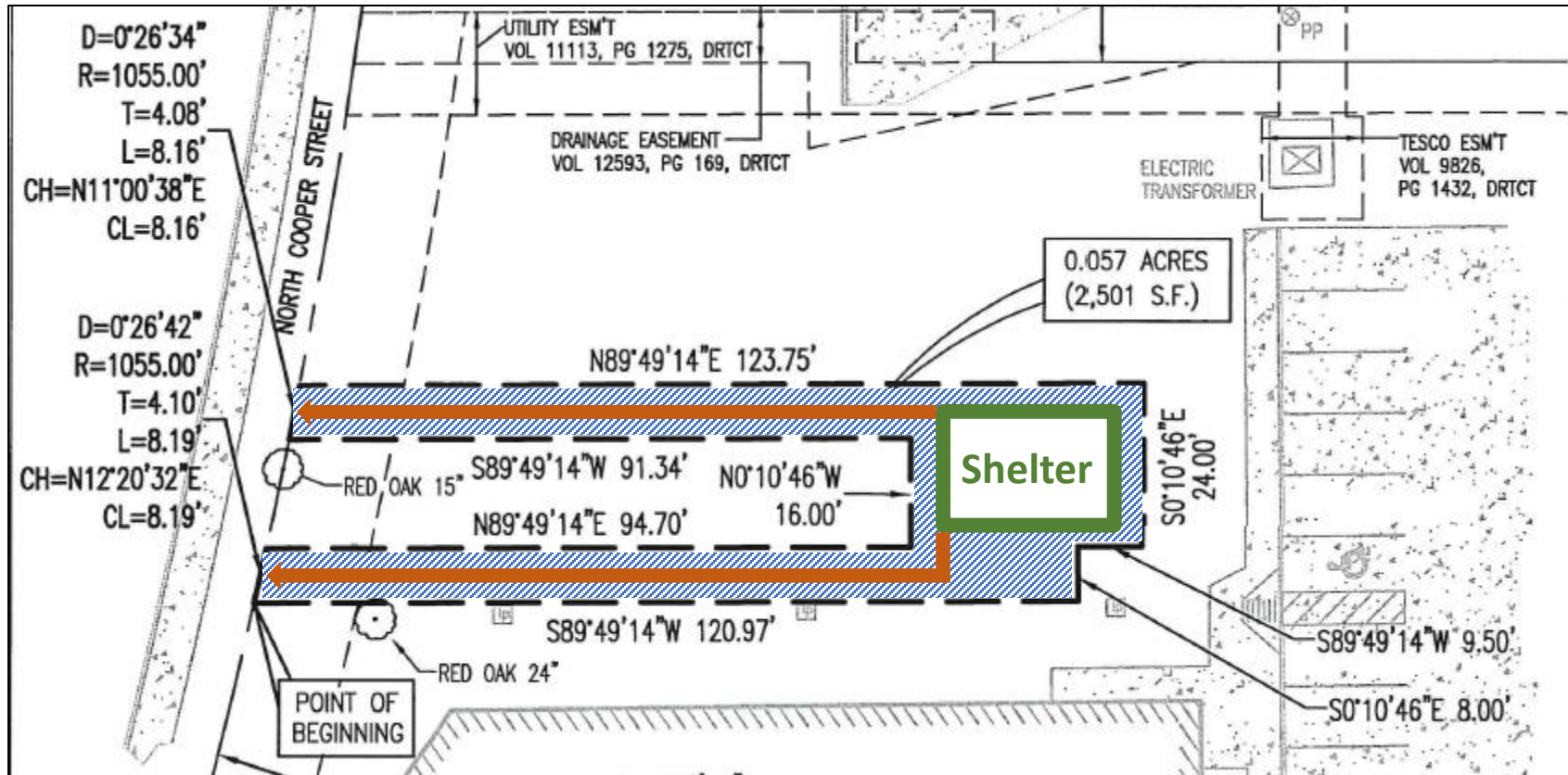


Extend Lease Area to
Street or Right-of-Way



Avoid Granting
Easements in Lease

Shelter Lease Area - example



Term Length of Shelter Lease



Shorter term – ideally, less than 35 years (overall)



Longer term leases may qualify as a “sale or exchange” of land that triggers the state notice-and-bidding laws. Tex. Loc. Gov’t Code § 272.001



Resource

TML Legal Q&A, *Bidding - Real Property**: 40-50+ year lease could be a “sale or exchange” of land

* <https://www.tml.org/254/Legal-Questions-Answers-QA>

Shelter Leases - Other Terms

Non-exclusive
ground lease

Move shelters if
City needs to
use the land

List specific
uses. No other
uses allowed.

Arlington City Council Agenda Resources

https://www.arlingtontx.gov/city_hall/government/city_council/meetings/watch/city_council_meetings

- [Agenda \(5/18/21\)](#) – [click here](#)
 - License Agreement (item 13.2)
- [Agenda \(6/28/22\)](#) – [click here](#)
 - Right-of-Way Permitting and Construction Manual (item 8.41)
 - License Agreement exhibit amendment (item 8.42)
 - Four Ground Leases (items 8.43 - 8.46)
- [Agenda \(3/21/23\)](#) – [click here](#)
 - Ground Lease amendment (item 8.24)
- [Agenda \(6/27/23\)](#) – [click here](#)
 - License Agreement amendment (item 8.34)



Questions

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