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October 13, 2022

Via e-email
Honorable Mayor and City Council
411 W Ocean Blvd
Long Beach, CA 90802

Re: APPEAL OF THE CITY'S APPROVAL OF THE WIRELESS TRANSMISSION FACILITY AT 4351 CLARK AVENUE.

Dear Honorable Mayor and Councilmembers:

We submit the following on behalf of Moira Hahn and Mark Hotchkiss (Appellants) in support of their appeal of the approval of a Wireless Transmission Facility ("WTF") by the City of Long Beach ("City"). New Cingular Wireless PCS, LLC d/b/a AT&T Mobility ("AT&T") filed an application for a Wireless Right-of-Way Facility Permit to install a WTF directly abutting Appellant's property at 4351 Clark Avenue.

The City avoided environmental review of the proposed WTF at this location, including the impacts of past, concurrent, or reasonably foreseeable WTFs, through its improper reliance on two categorical exemptions under the California Environmental Quality Act (CEQA). To this date, we have not seen *any* analysis conducted by the City of the impacts of the installation and operation of this WTF, or the 1000 plus other WTF sites being deployed, on safety, aesthetics, fire, energy use, or any other impacts, including cumulative impacts. As discussed below, Appellants have submitted extensive documentation of potentially significant impacts that warrant analysis.

Appellant Moira Hahn is diagnosed with disabling electromagnetic hypersensitivity (EMS). Her doctor cautioned that placement of this WTF within 25 feet of Ms. Hahn's home will cause harm to Ms. Hahn. (**Exhibit A.**) Hearing Officer Larry Minsky agreed with this contention:

> Appellants introduced a number of credible scientific articles and offered the testimony of Ms. Theodora Scarato, all of which support Appellants' contention that radio-frequency radiation emissions or wireless radiation (RF emissions) can and do cause injury to animal and human life depending on a number of factors. This evidence sufficiently established to this Hearing Officer that RF emissions may and can injure animals and humans and may very well cause further injury to Appellant Hahn if the WCF is installed. These articles call into question the scientific and medical legitimacy of the legally controlling Federal Communications Commission (FCC) regulations cited and relied upon jointly by the City and AT&T here as to what is safe and acceptable RF emission exposure levels to which the public in general and Appellant Hahn in particular can and should be allowed to be

> exposed, especially where, as here, a WCF is projected to be erected a few yards from Appellants' home.
>
> By way of said scientific/medical evidence, Appellants have shown that the FCC's determination as to what are safe and acceptable RF emission exposure levels are antiquated and not based on current scientific evidence and that the FCC regulations are instead industry-sponsored, outdated, and just plain wrong, causing the public to be exposed to unnecessary and harmful radiation.

(Hearing Officer Determination, April 18, 2022, pp. 6-7; **see also Exhibit B** [Pittsburgh Board of Health Emergency Order for supporting documentation].)

Appellants presented evidence to Officer Larry Minsky, via several memoranda and through a hearing on March 18, 2022. Appellants first contend that the hearing was irregularly and unfairly conducted because the Hearing Officer only swore in Appellants, but did not swear in the City or AT&T witnesses. Appellants detailed why the City has the authority and substantial evidence to deny the permit, must comply with the Americans with Disabilities Act (ADA), and must conduct adequate review under CEQA. While Officer Minsky made several findings in favor of appellants, he ultimately concluded Ms. Hahn was not denied or excluded from a City benefit, despite the fact he found Ms. Hahn would face harm inside her own home. (Determination, p. 11.) In regards to CEQA, he concluded that "**while Appellants may in fact be correct as to the possible cumulative effect** of installing numerous WCFs throughout the City, they did not establish that either CEQA nor NEPA mandated the City or AT&T to conduct a cumulative evaluation in this case. The force and clarity of 47 U.S.C. 332 (c)(7)(B)(iv) was not successfully countered by Appellants." Hence, the decision was improperly based in part on a perceived preemption by federal law.

We ask City Council to deny the permit application. In the alternative, we ask the City to suspend approval of the WTF until the necessary review is conducted, and incorporate mitigating conditions, including on the operation of the WTF as a reasonable accommodation to Ms. Hahn.

Hearing Officer Minsky found that the City effectively shut down the accommodation process, concluding "the City did correspond with Appellants on the issue of reasonable accommodation . . . but a fair reading of its reply to Appellants suggests it simply cut off Appellants from any further reasonable discussion on the issue." Ms. Hahn recently attempted to re-engage the City and submitted another formal request for accommodation, but was again shut down by the City.

Finally, Ms. Hahn submitted a Public Records Act (PRA) request for documents related to and necessary to resolution of this appeal. After forty days without response, Ms. Hahn alerted the City of its non-compliance with Government Code Section 6253(c). She received the records on October 11, 2022—only one week before this hearing. Appellants request the City Council consider delaying this hearing to give sufficient time to review these records.

I. The City Can Deny or Place Conditions on the WTF Permit.

Throughout the appeals, repeated again and again by AT&T and the City was the notion that the City absolutely cannot deny or require a different location of this WTF permit application. We caution the City against its wholesale reliance on these assertions.

The City retains local control over siting, including in relation to aesthetic concerns. It does not have to be objective. (*City of Portland v. United States* (9th Cir. 2020) 969 F.3d 1020, 1032, 1041 ["We also hold that the FCC's requirement that all aesthetic criteria must be "objective" lacks a reasoned explanation;" "requirement that all local aesthetic regulation be "objective" gives rise to serious concerns].) As discussed below, the City's ordinance includes some room for discretion, especially in regards to aesthetic preferences. We have highlighted and attached portions of the City's code that allows it discretion here. (**Exhibit J** [LBMC].)

On July 29, 2022, a federal court upheld a city's decision to deny an application to install 18 "small cell" 4G wireless antennas on public rights-of-way. (**Exhibit C** [Federal Ruling].) While in a different jurisdiction, this decision involved similar facts: opposition from residents "focused on the lack of need for improved 4G LTE coverage, adverse affects on Village's aesthetic and concerns about exposure to radio waves." (*Id.*, p. 2 [involving 20-30 ft poles, many disguised as streetlights].) As part of its findings, the Board stated concerns with "the significant adverse aesthetic and property values impacts of the 18 nodes permeating the tiny Village," and "there is no gap in wireless coverage for Verizon and no need to justify the significant adverse impacts." The Court noted, if "even one reason given for the denial is supported by substantial evidence, the decision of the local zoning body cannot be disturbed." Further, "the Act is not a model of clarity" because it "strikes a balance between two competing aims-to facilitate nationally the growth of wireless telephone service and to maintain substantial local control over siting of towers." (*Ibid.*)[1]

At the hearing, it was asserted that the City is simply unable to deny the permit. Similar unsuccessful arguments have been made before in the Court of Appeal in 2017, when Extenet challenged the City of Burlingame's decision to deny six of its eight permits for the siting of certain wireless carrier facilities. (**Exhibit E**.) This unpublished case involved a similar set of facts, where the City had governing regulations, but also provided an appeal process. After hearing two residents' appeal, the City denied the application. The Court of Appeal found: "The City received a large number of public comments expressing aesthetic objections to the proposed

[1] In response to arguments that federal law requires approval of WTFs where there is a gap in coverage, the Court noted "Improved capacity and speed are desirable (and, no doubt, profitable) goals in the age of smartphones, but they are not protected by the Act." Rather, coverage depends on the ability to make calls. The Court continued: "the lack of a gap in coverage is relevant here and can constitute substantial evidence justifying denial of a permit. . . And, since one reason given by the Board for its decision was supported by substantial evidence, the Court need not evaluate its other reasons." AT&T has made clear that it does not have a gap in coverage. (**Exhibit D** [internal emails].) This speaks to the infeasibility showing requirement within the City LBMC aesthetic preferences. (Section 15.34.030(B)(1)(b)(vi)(1),(2),(3)

DAS network nodes. These objections are sufficient to provide substantial record evidence for the City's denials. (citations omitted.)" Likewise, Appellants presented sufficient substantial evidence of aesthetic impacts in their First Memorandum.

Further, the City's code requires that the applicant make a "**factual showing that all higher preferences are infeasible**" for various aesthetic preferences. This WTF does not meet the highest preferences (15.34.030(b)(vi)(1).) This WTF requires a replacement street light pole, which is not the highest preference in minimizing aesthetic impacts (an existing streetlight pole is a higher priority). The Long Beach Municipal Code (LBMC) grants the City discretion in various aesthetic criteria, especially in this case where the highest preference is not met for more than one aesthetic category. (See **Exhibit F** [AT&T Application Requesting Lower Preferences]) AT&T has not provided factual evidence that it infeasible to meet the highest preference for minimizing aesthetic impacts. It is within the City's authority to deny the application for not meeting the highest preferences.

Appellants provided the City ample evidence for denial of this WTF, including: (1) inadequate environmental review under CEQA, as discussed below, (2) site-specific concerns (3) aesthetic impacts, (4) no gap in coverage or demonstrated need, and (5) the need to comply with the ADA.

II. The City Improperly Relied on Categorical Exemptions.

In approving the WTF, the City improperly relied on an exemption from review under the California Environmental Quality Act (CEQA) Sections 15302 and 15303. Neither exemption applies. Section 15302 only applies where a project replaces existing structures and "the new structure will be located on the same site as the structure replaced and will have substantially the **same purpose and capacity** as the structure replaced." Section 15303 only provides exemptions where a project "consist[s] of construction and location of **limited** numbers of new, small facilities or structures; installation of small new equipment and facilities in small structures, and the conversion of existing small structures from one use to another **where only minor modifications** are made in the exterior of the structure."

There are no limits on the number of WTFs. The WTF tower will be substantially taller, with the possible modification to become even taller (as discussed in Section III), will be wider, and will have new antennas. The WTF will create noise pollution, as well as electromagnetic and microwave emissions. The previous street light did not create any of these environmental effects or health risks. The potential locations for this particular installation (the original application indicated the pole "will be relocated 5 feet," (Ex. F), yet the Staff Report for this hearing states the pole will be "in the same location") create potential risks, especially considering the gas line on site. (Ex. D [noting potential lateral gas conflict with new pole location].) The City considered including a condition in regard to the gas line, but Appellants did not see this included in the Appeal Package. (**Exhibit G** [internal emails].) If the condition was not included, we ask why it was not included.

Even if the above exemptions applied, this WTF is excepted due to the unique circumstances of this particular WTF, and the potential cumulative impacts that have not been studied.

CEQA requires environmental review where there is potential for a significant impact. This includes consideration of cumulative impacts on surrounding population's health. (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1214.) A federal Court of Appeal recently finding that the FCC did not adequately respond to evidence that RF radiation at levels **below** its current limits—set in 1996—may cause negative health impacts. (*Environmental Health Trust v. Federal Communications Commission* (D.C. Cir. 2021) 9 F.4th 893, 903, see also 904 [discussing individuals who suffer illnesses from radiation exposure].)

Categorical exemptions are strictly construed, "in order to afford the fullest possible environmental protection." (*Save Our Carmel River v. Monterey Peninsula Water Management Dist*. (2006) 141 Cal.App.4th 677, 697.) "[T]he agency invoking the [categorical] exemption has the burden of demonstrating" that substantial evidence supports its factual finding that the project falls within the exemption. (*Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal.4th 372, 386.) A categorical exemption is "inapplicable when the cumulative impact of successive projects of the same type in the same place, over time is significant." (CEQA Guidelines§ 15300.2(b).) Cumulative impacts occur from past, present, and reasonably foreseeable projects. (CEQA Guidelines, § 15355, subd. (b).)

The change in structure, design, and purpose, and the impacts to install the WTF creates new environmental effects that preclude application of the exemptions. The new WTF will result in new, adverse environmental effects in the residential community, including due to its increased size, safety impacts, and potential change of location close to an existing gas line, and required excavation for cabling.

In response to questions at the hearing about conflicts with an existing gas line, the City deflected this concern on the grounds its ordinance requires all installations to follow building codes. Yet, the City cannot absolve itself of the responsibility to analyze potential impacts by simply requiring future compliance. Furthermore, the City's own ordinance requires compliance with CEQA, including that the applicant obtain any approvals that may be required under CEQA "to construct, install, and maintain the proposed wireless telecommunications facility." (LBMC 15.34.030(B)(1)(b)(iii).) It is unclear what further approvals are required, and whether AT&T obtained CEQA approval for those approvals.

Further, the new cell tower would emit a constant stream of electromagnetic radiation, unlike its predecessor, creating public safety impacts. Even more concerning, during the hearing, City Capital Projects Coordinator Daniel Ramirez indicated that over 1,000 WTF sites have been approved or have been submitted for approval, in the last couple years. The WTF at issue, and the cumulative impacts of this widespread deployment, have not been studied. There is no limit numerical limit on the number of WTFs that can be deployed in the City.

Various scientific studies have demonstrated the harmful effects of wireless radiation on humans, especially those who suffer from EMS, and biological resources. (See Appellants' Second Memorandum, Enclosure 2, 4 [Email and articles from Theodora Scarato, Executive Director of Environmental Health Trust], 6 [Email of Robert Berg providing example of a 5G small cell facility causing EHS in tenants]; Third Memorandum, Enclosure 9 [six scientific studies and articles demonstrating the biological effects of radiofrequency], Enclosure 10 [New Hampshire studying WTF setback law in response to health concerns].) Expert Martin Pall also submitted documents that clearly show the dangers of EMFs, especially those related to 5G facilities[2]—including at levels below FCC "safety guidelines." (Appellants' Third Memorandum, Enclosure 11.) A Harvard Report detailed the FCC's status as a "captured agency" by the industry it purports to regulate, and the Court of Appeal has cast doubt on these guidelines. (Appellants' Third Memorandum, Enclosure 9, Attachment C.)

In 2019, the New Yorker reported:

> Deploying millions of wireless relays so close to one another and, therefore, to our bodies has elicited its own concerns. Two years ago, a hundred and eighty scientists and doctors from thirty-six countries appealed to the European Union for a moratorium on 5G adoption until the effects of the expected increase in low-level radiation were studied. In February, Senator Richard Blumenthal, a Democrat from Connecticut, took both the F.C.C. and F.D.A. to task for pushing ahead with 5G without assessing its health risks. "We're kind of flying blind here," he concluded. A system built on millions of cell relays, antennas, and sensors also offers previously unthinkable surveillance potential.

(Available at: https://www.newyorker.com/news/annals-of-communications/the-terrifying-potential-of-the-5g-network.)

The D.C. Circuit Court of Appeals in its unanimous August 9, 2019 ruling in *United Keetoowah Band of Cherokee Indians in Oklahoma v. Federal Communications Commission* (DC Cir. 2019) 933 F.3d 728 vacated an FCC Order that exempted small cell WTFs from environmental review under the National Environmental Policy Act, and historic preservation review under the National Historic Preservation Act, and remanded the matter.

The Court of Appeal concluded that the FCC failed to "adequately address possible harms of deregulation and benefits of environmental and historic-preservation review." "In particular, the Commission failed to justify its confidence that small cell deployments pose little to no cognizable religious, cultural, or environmental risks, particularly given the vast number of proposed deployments."

This body of evidence requires the City to review the potentially significant impacts of its approval of the WTF, including the cumulative impacts. Hearing Officer Minsky's ruling cited

[2] During the hearing, AT&T contested that there were plans for 5G. Yet, as detailed in Appellants' Post-Hearing Brief, AT&T's own plans specifically reference 5G elements.

two CEQA cases allowing for categorical exemptions to apply to the deployment of wireless facilities. (p. 18.) Yet, crucially, neither of those two cases involved approval of an unlimited number of WTFs—rather, each involved a specified number of projects.

The Telecommunications Act specifically mandates that "Nothing in paragraph (1) shall be construed to relieve the Commission from the requirements of the National Historic Preservation Act or the National Environmental Policy Act of 1969." (47 U.S.C. (a)(3).) As described earlier, the Court of Appeal recently found that the FCC failed to conduct adequate analysis under NEPA. The City is not immune from conducting the required CEQA analysis.

At the hearing, the City's representative stated he did not know of the existing EM sources. Without a baseline of how much existing EM radiation occurs without the WTF on Clark Street, the City cannot conclude that EM cumulative radiation impacts are not significant.

III. The City's Approval Failed to Consider Significant Aesthetic Cumulative Impacts.

Appellants also demonstrated that the potential for aesthetic impacts, and detailed that the City has the authority to deny the WTF application based on other potential impacts (like aesthetics) under its local zoning power. (Appellants' First Memorandum [citing *Sprint PCS Assets, L.L.C. v. City of Palos Verdes Ests*., 583 F.3d 716, 726 (9th Cir. 2009); *T-Mobile USA, Inc. v. City of Anacortes*, 572 F.3d 987, 994 (9th Cir. 2009); *T–Mobile Cent., LLC v. Unified Gov't of Wyandotte County, Kan*., 546 F.3d 1299, 1312 (10th Cir.2008); *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 494 (2d Cir.1999)].)

The likelihood of cumulative aesthetic impacts across the City is exacerbated by the fact that once installed, wireless provides may increase the height. Under 47 U.S. Code § 1455 subsection (a), a "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 FCC interprets "substantial change" as "increases the height of the tower by more than 10% or by the height of one additional antenna array with separation from the nearest existing antenna not to exceed twenty feet, whichever is greater."[3]

The FCC recently reiterated local government's authority over local zoning decisions in the context of WTFs in a letter dated March 9, 2022 (**Exhibit H**).

IV. The City Failed to Analyze the Entire Project.

CEQA requires analysis of the entire project impacts. (*Natural Resources Defense Council, Inc. v. City of Los Angeles* (2002) 103 Cal.App.4th 268, 272.) Neither the City's initial Notice of Exemption or the approval for this Project considered the impacts—including

[3] See FCC 20-75, "Implementation of State and Local Governments' Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012," available at: https://docs.fcc.gov/public/attachments/FCC-20-75A1.pdf.

cumulative impacts—of cabling and excavation associated with this WTF and others, which creates its own host of impacts. (See, for example, Ex. D [discussing traffic impacts].) At the hearing, the City admitted that the application will require the trenching of a conduit but claimed this did not constitute a significant impact.

Further, the application improperly piecemealed the WTF's safety impacts. At the Administrative Hearing, AT&T claimed the WTF will only be used for 4G. Yet, AT&T's own application specifically refers to future 5G expansion. The effects of the 5G expansion should have been disclosed, considered, and analyzed.

V. Reasonable Accommodations and Mitigation Exist, and Must Be Incorporated as Conditions to the Application.

Ms. Hahn suffers from EMS.[4] The City did not engage in the legally required process to reasonably accommodate Ms. Hahn, on the grounds that it was precluded from taking any action under the Telecommunications Act. Officer Minsky found the City effectively shut down the communications. The ADA requires an interactive process. In addition, CEQA requires incorporation of feasible mitigation to minimize significant impacts, including impacts to public safety. The City is not preempted from incorporating mitigating measures or other reasonable accommodations.

There has been no effort to identify other feasible mitigation or accommodations. The incorporation of mitigation to minimize the impacts of wireless emissions, including from 5G, has been done before and very recently. For example, after the Federal Aviation Administration expressed concern about the impact of 5G on incoming planes, wireless companies "offered **to keep mitigations in place** . . . while they worked with the FAA to better understand the effects of 5G C-band signals on sensitive aviation instruments." (https://www.faa.gov/newsroom/faa-statements-5g [FAA Official Statement June 17, 2022].)

Therefore, we respectfully ask City Council to require feasible mitigation to minimize the significant impacts to the public, and to mitigate the health and safety impacts that will disproportionally affect Ms Hahn.

VI. Conclusion.

The City has conducted *zero* environmental review of the impacts from its approval of the WTF, including the cumulative impacts of its widespread deployment of over a thousand WTF sites. This creates public safety impacts, especially for individuals like Moira Hahn who suffer from EMS, among a host of other impacts. The unique circumstances of this WTF—which

[4] The U.S. Access Board, the federal agency charged with advising on disability related matters, recognizes EHS as a disabling condition under the ADA. See 69 Fed. Reg. 44087 (July 23, 2004). A December 2016 study entitled "The Effects of Exposure to Low Frequency Electromagnetic Fields in the Treatment of Migraine Headache: A Cohort Study" found a higher rate of headache attacks may be concomitant with low radiofrequency electromagnetic fields (RF-EMF). (https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5279981/.)

will have aesthetic impacts, demonstrated from the dearth of public comments—also create significant impacts that were not considered.

Feasible mitigation, and reasonable accommodation exists. We request that the WTF be denied, or in the alternative, denied until review is conducted and until City Council incorporates a condition that the City and AT&T incorporate feasible mitigation and reasonably accommodate Ms. Hahn under the ADA. The City could require a reduction in the WTF's power output if Ms. Hahn begins to experience symptoms. The City could also require monitoring of RF emissions that currently is not required. (AT&T's Post-Hearing Reply Brief p. 6 ["categorically excluded from routine evaluation"]). The City itself noted a potential accommodation. (**Exhibit I** [internal email].) The LBMC Section 15.34.030.F specifically empowers the City to add conditions, and precludes application approval without acceptance of conditions.

Thank you for your consideration.

Sincerely,

Douglas Carstens
Kathryn Pettit

cc:
City Attorney Erin Weesner-McKinley
City Planner Maryanne Cronin

Exhibit A

COAST
PERSONALIZED
CARE

Subject: Americans with Disabilities Act; status of current patient, Moira Elizabeth Hahn, with regard to Hypersensitivity to Wireless Radiation

Re: Department of Public Works permit application for the installation of Wireless Telecommunication Facility at or near 43651(sic) Clark Avenue, Long Beach CA 90808

Permit Number: PWRW48749, City of Long Beach, Applicant: New Cingular Wireless PCS, LLC dba AT&T Mobility, on behalf of Advantage Engineers, dba as Synergy Development Services

October 11 , 2022

To: The City of Long Beach (Long Beach City Council, Public Works Department, City Clerk, and any other City entities involved); AT&T Mobility, and its contractors

I, Richard J. Wexler, am an internist in Los Alamitos, CA. Medical License #G37612. I have been in practice in CA since 1980 in good standing, with no censures, license revocations or litigation.

Moira Elizabeth Hahn is a 66 year old woman who has been my patient since 2002. I am writing on Hahn's behalf for a second time, to provide the City Council with a clearer picture of my patient's health, and prognosis, should this cell tower be installed in front of her home.

Hahn has been disabled by migraine and cluster headaches and under the care of four neurologists, during the past 21 years. She has tried multiple coping strategies and medications to prevent and treat pain from chronic migraines and cluster headaches, none of which have been effective. Her symptoms were relentless, including throbbing pain in her head, nausea, ear pain, and vertigo.

When her husband hard-wired all of the electronic devices in their home, switched off WiFi, and Edison removed a (Edison) cellular meter from a wall of her studio, the disabling symptoms she had experienced for about 15 years stopped. She now rarely experiences headaches in her home. The cause and effect relationship between the wireless exposure and my patient's symptoms appears undeniable.

This cause and effect association was demonstrated to the patient and to her husband when they recently, unexpectedly, had to stay in a hotel with a WiFi access point mounted in the ceiling. Hahn experienced acute symptoms in that WiFi environment which included prolonged heart palpitations, migraine, unexplained feelings of acute anxiety as if the

patient were in a constant state of 'fight or flight', and what the patient described as a extreme jittery sensation that did not relent until the patient and her husband vacated the room early the following morning. None of the symptoms Hahn experienced that night have returned.

Hahn retired in 2010 at age 54 from a tenured, fulfilling teaching position at Santiago Canyon College due to pain from uncontrolled migraines that got worse every year. In retrospect, her migraines at her workplace are likely to have been caused, or exacerbated, by her exposure to WiFi at the college. As the chair of the college's Art department and the only full-time member of its Art faculty, Hahn frequently worked from 8:30 am until 9:30 or 10 pm. The administration encouraged students to bring cell phones, tablets, laptops and other cellular devices into the classrooms. Hahn allowed her students to utilize them as tools for research, photography, and other curricula-related purposes. Few knew at the time that this could be unsafe, particularly for someone who has a significant degree of sensitivity.

I understand from Ms. Hahn that an AT&T wireless company intends to install a wireless telecommunications facility on a streetlight in the public right of way adjacent to and just a few feet from Ms. Hahn's home. I further understand from Ms. Hahn that this facility will be transmitting wireless radiation on a full-time basis, indefinitely. In addition, my patient has informed me that the city encourages collocation, and the specifications on this WTF indicate that another carrier may be added, thereby increasing the radiation exposure.

The medical community now recognizes that wireless radiation poses substantial health risks to humans. Thousands of independent, peer-reviewed scientific papers have been published establishing links between wireless radiation and serious medical endpoints in humans, including cancers, diabetes, reproductive problems, anxiety and depression, insomnia, cardiac and neurological problems, dizziness, headaches, tingling, tinnitus, and electromagnetic hypersensitivity.

Certain people are more sensitive to wireless radiation than others, and those hypersensitive patients often experience an exacerbation of their underlying medical problems when they are exposed to continuous doses of wireless radiation.

Ms. Hahn is hypersensitive to wireless radiation due to her age (66), migraine and cluster disability, unilateral deafness and frequent pain and sensitivity in her functional ear. She has a strong family history of cancer, including brain cancer (mother's sister).

Based on my lengthy treatment of Ms. Hahn, my medical opinion is that Ms. Hahn suffers from electromagnetic sensitivity (EMS), a constellation of neurological symptoms classified as a disability by the US Access Board since 2002. Further, in my medical opinion, if a wireless telecommunications facility is located in close proximity to Ms. Hahn's house and transmits wireless radiation continuously – even at levels within the existing FCC guidelines, Ms. Hahn will be physically harmed by the wireless radiation. She will experience more severe migraine and cluster headaches, her pain and sensitivity in her functional ear may be worsened, and given her family history, her risk of developing cancer may be heightened.

I consider Ms. Hahn to be "disabled" within the meaning of the Americans with Disabilities Act, in that more than one critical life function is adversely affected. I request that reasonable accommodations be afforded to her under that the ADA. My prescription going forward is that it is imperative that Ms. Hahn avoid all forms of wireless radiation; nowhere is this more important than within her own home, where she spends the vast majority of her time.

I would urge the city to work toward a reasonable accommodation with my patient and modify the current wireless plan that places a cell tower in front of Ms. Hahn's home.

Please do not hesitate to contact me should you have further questions.

Sincerely,

Richard J. Wexler, MD.

Exhibit B

PITTSFIELD BOARD OF HEALTH

April 11, 2022

Pittsfield Cellular Telephone Company
d/b/a Verizon Wireless
99 East River Drive
East Hartford, CT 06108
Att: Attorney Ellen W. Freyman

Pittsfield Cellular Telephone Company
d/b/a Verizon Wireless
Mark J. Esposito, Esq.
Shatz, Schwartz & Fentin, P.C.
1441 Main Street, Suite 1100
Springfield, MA 01103

Farley White South Street, LLC
Att: Roger W. Altreuter, Manager
155 Federal Street, 18th Floor
Boston, MA 02110

EMERGENCY ORDER

REQUIRING THAT PITTSFIELD CELLULAR TELEPHONE COMPANY, D/B/A VERIZON WIRELESS, AND FARLEY WHITE SOUTH STREET, LLC, SHOW CAUSE WHY THE PITTSFIELD BOARD OF HEALTH SHOULD NOT ISSUE A CEASE AND DESIST ORDER ABATING A NUISANCE AT 877 SOUTH STREET ARISING FROM THE OPERATION OF A VERIZON WIRELESS CELL TOWER THEREON AND CONSTITUTING IMMEDIATE ORDER OF DISCONTINUANCE AND ABATEMENT IF NO HEARING IS REQUESTED

Pursuant to, *inter alia*, MGL 111 ss 122-125, 127-127I, 130, 143-144, 146-150, and State Sanitary Code 410.750, 410.831-832, 410.850-.960, the Board of Health deems the following actions necessary to protect the public health in the City of Pittsfield, State of Massachusetts.

Whereas, Verizon Wireless has constructed and operates a wireless telecommunications facility, a cell tower (the "facility"), located at 877 South Street, Pittsfield, Massachusetts, on property Verizon Wireless leases from owner Farley White South Street LLC. The Verizon Wireless facility was activated in August, 2020, and has been operating continuously since that date.

Whereas, soon after the facility was activated and began transmitting, the City started to receive reports of illness and negative health symptoms from residents living nearby the facility, and in particular, from residents living in the so-called "Shacktown" neighborhood. The negative health symptoms the affected residents have reported include complaints of headaches, sleep problems, heart palpitations, tinnitus (ringing in the ears), dizziness, nausea, skin rashes, and memory and cognitive problems, among other medical complaints.

Whereas, as further documented below, the neurological and dermatological symptoms experienced by the residents are consistent with those described in the peer-reviewed scientific and medical literature as being associated with exposure to pulsed and modulated Radio Frequency ("RF") radiation, including RF from cell towers.

Whereas, those symptoms are sometimes referenced in the scientific and medical literature as electromagnetic sensitivity, also known as Electro-Hypersensitivity ("EHS"), Microwave Sickness, or Radiation Sickness. All these names describe a syndrome where the afflicted develop one or more

recognized symptoms as a result of pulsed and modulated RF radiation ("RFR"). EHS is a spectrum condition. For some, the symptoms can become debilitating, and severely affect their ability to function.

Whereas, the federal government has officially recognized this syndrome in various ways. For example, in 2002, the "Access Board," an independent federal agency responsible for publishing Accessibility Guidelines used by the U.S. Department of Justice to enforce the Americans with Disabilities Act ("ADA"), recognized that "electromagnetic sensitivities may be considered disabilities under the ADA."[1] The Access Board contracted for the publication of the National Institute of Building Sciences 2005 report, which concludes that radiofrequency/electromagnetic frequency (RF/EMF) radiation is an "access barrier," and can render buildings "inaccessible" to those with electromagnetic sensitivity. The report recommends accessibility guidelines.[2] For ADA Title I purposes, the U.S. Department of Labor's Office of Disability Employment Policy has issued guidelines for accommodations; these guidelines emphasize exposure avoidance and list as a resource, the EMF Medical Conference 2021 which trains medical doctors on the issue of electromagnetic radiation and health.[3] [4]

Whereas, The Centers for Disease Control's 2022 Classification of Diseases Codes Clinical Modification and Procedural Classification System implements the International Classification of Diseases, 10th Revision, Clinical Modification (ICD-10-CM). The "diagnosis code" for Radiation Sickness" is "T66."[5] The "injury" code for "Exposure to Other Nonionizing Radiation" is "W90."[6] These codes cover electro-sensitivity along with other RF exposure-related injuries and maladies.

Whereas, the Health Board does not administer disability laws, but the foregoing authority strongly confirms that RF/EMF – even if emitted at levels within the FCC emissions guidelines – can be injurious to health or cause common injury to that significant portion of the public who are electromagnetic sensitive. Stated differently, pulsed and modulated RF can constitute a "public nuisance" or a "cause of sickness," and can constitute a trade which may result in a nuisance or be dangerous to the public health for purposes of G.L. ch. 111 ss 122-125, 127B, 127C, 143-150, and 152.

Whereas, the federal government's recognition that pulsed RF can directly cause harm to at least certain individuals or create an access barrier means that for the purposes of Massachusetts law, RF/EMF may effectively render certain dwellings Unfit for Human Habitation or constitute a Condition Which May Endanger or Materially Impair the Health or Safety and Well-Being of an Occupant as defined in State Sanitary Code 410.020 and 410.750(P).

Whereas, Verizon Wireless 877 South Street wireless facility is not itself a dwelling unit, but the Sanitary Code and other Massachusetts law allow the Health Board to act as necessary to ensure that

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[1] U.S. Access Board. (n.d.). *Indoor Environmental Quality*. U.S. Access Board - Introduction. Retrieved March 31, 2022, from https://www.access-board.gov/research/building/indoor-environmental-quality/.

[2] *IEQ Indoor Environmental Quality Project* (IEQ). (n.d.). National Institute of Building Sciences (NIBS), The Architectural and Transportation Barriers Compliance Board (Access Board). https://www.access-board.gov/files/research/IEQ-Report.pdf.

[3] U.S. Department of Labor Office of Disability Employment Policy Accommodations Webpage; Job Accommodation Network: Accommodation and Compliance: Electrical Sensitivity and Accommodation and Compliance Series: Employees with Electrical Sensitivity Publication Downloads.

[4] EMF – Medical Conference 2021 Continuing Medical Education for physicians and health professionals. Several experts who presented to the Board and provided information also presented at the EMF Medical conference including Sharon Goldberg MD, Magda Havas PhD, Paul Héroux, PhD, Cindy Russsell MD, Sheena Symington, B.Sc., M.A., Cecelia Doucette, and Theodora Scarato, MSW.

[5] *2022 ICD-10-CM Diagnosis Code T66: Radiation sickness, unspecified*. (n.d.). Retrieved March 31, 2022, from https://www.icd10data.com/ICD10CM/Codes/S00-T88/T66-T78/T66-/T66.

[6] *W90—ICD-10 Code for Exposure to other nonionizing radiation—Non-billable*. (n.d.). ICD-10 Data and Code Lookup. Retrieved March 31, 2022, from https://icd10coded.com/cm/W90/.

activity or operations in a non-dwelling building, structure, or facility do not contribute to conditions that impact occupants of a dwelling to the point they render a dwelling unfit for habitation for purposes of Sanitary Code 410.831.

Whereas, the Health Board has been presented with credible, independent, and peer-reviewed scientific and medical studies and reports that provide convincing evidence that pulsed and modulated RFR is bio-active and affects all living things over the long term. RFR can and does also cause more immediate harm and injury to human beings. The Health Board has also received strong evidence that the Verizon Wireless 877 South Street wireless facility is presently causing such harm and injury to numerous residents in the adjacent neighborhood.

Whereas, City of Pittsfield residents have submitted to the Health Board over 11,000 pages of evidence of studies, reports, and scientific and medical experts' opinion about the dangers to human health and the environment caused by exposure to wireless radiation.[7] The Health Board also has heard testimony from medical professionals who directly treat patients injured by RF/EMF as well as testimony from scientific experts. The Board has been presented with personal testimony from many of the City of Pittsfield residents who have been personally harmed by pulsed and modulated RF radiation transmitted from the Verizon Wireless 877 South Street wireless facility's operations. *Specifically, but without limitation, the Health Board bases its conclusions, findings, and actions on all the scientific, medical, and personal evidence that has been submitted*, but provides this general summary:

1. The evidence presented to the Board includes well over one thousand peer-reviewed scientific and medical studies which consistently find that pulsed and modulated RFR has bio-effects and can lead to short- and long-term adverse health effects in humans, either directly or by aggravating other existing medical conditions. Credible, independent peer-reviewed scientific and medical studies show profoundly deleterious effects on human health, including but not limited to: neurological and dermatological effects; increased risk of cancer and brain tumors; DNA damage; oxidative stress; immune dysfunction; cognitive processing effects; altered brain development, sleep and memory disturbances, ADHD, abnormal behavior, sperm dysfunction, and damage to the blood-brain barrier.[8]

2. Peer-reviewed studies have demonstrated that pulsed and modulated RFR can cause the symptoms suffered by and personally attested to by City of Pittsfield's residents, including studies showing that these symptoms can develop as a result of exposure to cell towers specifically.

3. The symptoms described by City of Pittsfield's residents are often referred to in the scientific and medical literature as "electrosensitivity." The record evidence shows that exposure to pulsed and modulated RFR within the emission limits authorized by the FCC can cause the

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[7] Environmental Health Trust et al. v. FCC Key Documents Volume 1, Volume 3, Volume , Volume 5, Volume 6, Volume 7, Volume 8, Volume 9, Volume 10, Volume 11, Volume 12, Volume 13, Volume 14, Volume 15, Volume 16, Volume 17, Volume 18, Volume 19, Volume 20, Volume 21, Volume 22, Volume 23, Volume 24: Volume 25, Volume 26, Volume 27 https://ehtrust.org/environmental-health-trust-et-al-v-fcc-key-documents/.

[8] The California Medical Association Wireless Resolution. (2015, March 9). *Environmental Health Trust*. https://ehtrust.org/the-california-medical-association-wireless-resolution/; bioadmin. (n.d.). Conclusions—BIOINITIATIVE 2012—CONCLUSIONS Table 1-1. *The BioInitiative Report*. Retrieved March 19, 2022, from https://bioinitiative.org/conclusions/; bioadmin. (n.d.). Table of Contents. *The BioInitiative Report*. Retrieved March 19, 2022, from https://bioinitiative.org/table-of-contents/; *EMFscientist.org—International EMF Scientist Appeal*. (n.d.). Retrieved March 19, 2022, from https://www.emfscientist.org/index.php/emf-scientist-appeal.

symptoms, injuries, and mechanisms of harm associated with electrosensitivity and exhibited by the residents near the facility.[9]

4. Electrosensitivity describes a constellation of mainly neurological symptoms that occur as a result of exposure to pulsed and modulated RFR. The symptoms described in the scientific and medical literature include headaches, sleep problems, heart palpitations, ringing in the ears, dizziness, nausea, skin rashes, memory, and cognitive problems, among others. According to the evidence, exposure avoidance is the only effective management.

5. There are diagnosis guidelines. The European Academy of Environmental Medicine (EUROPAEM) published the "*EUROPAEM EMF Guideline 2016 for the prevention, diagnosis and treatment of EMF-related health problems and illnesses*."[10] These peer-reviewed guidelines cite 235 scientific references for symptoms, physiological damage, and mechanisms of harm. These guidelines have been used by doctors in the U.S. and throughout the world. Dr. Sharon Goldberg, MD, who diagnosed three City of Pittsfield residents with electro-sensitivity following their continuous exposure to the Verizon Wireless 877 South Street wireless facility, uses these guidelines. Dr. Goldberg has provided this Board with documentation and supporting information on the injuries suffered by these three Shacktown residents which Dr. Goldberg has opined to a reasonable degree of medical certainty have been caused by their exposure to the wireless radiation being emitted by this facility.

6. The recent U.S. government reports regarding the "mystery illness" of U.S. diplomats in Cuba, China, Austria, and elsewhere provide further support that pulsed RF can cause injury similar to that suffered by Shacktown residents. In December 2020, the National Academy of Sciences, Engineering, and Medicine (NAS) concluded[11] that the diplomats' "mystery illness" is likely caused by pulsed RF. Prof. Beatrice Golomb, MD, PhD, 2018, wrote the first paper analyzing the science and showed that pulsed RFR is the likely cause of the symptoms suffered by some US diplomats in Cuba and China.[12] Her analysis relies on government studies as well as studies on commercial wireless devices and technology, and demonstrates how the diplomats' symptoms can result from pulsed RFR exposure. Dr. Golomb concluded that the diplomats likely suffer from electrosensitivity (which she refers to as "Microwave Illness"). Most recently, on February 1, 2022, the federal government published a report adopting the conclusion of the NAS, finding that pulsed RFR is likely the cause of the diplomats' sickness.[13]

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[9] Belyaev, I., Dean, A., Eger, H., Hubmann, G., Jandrisovits, R., Kern, M., Kundi, M., Moshammer, H., Lercher, P., Müller, K., Oberfeld, G., Ohnsorge, P., Pelzmann, P., Scheingraber, C., & Thill, R. (2016). EUROPAEM EMF Guideline 2016 for the prevention, diagnosis and treatment of EMF-related health problems and illnesses. *Reviews on Environmental Health*, *31*(3), 363–397. https://doi.org/10.1515/reveh-2016-0011 ; Bray, R. (n.d.). *Electromagnetic Hypersensitivity*. 81. https://maisonsaine.ca/uploads/2016/09/ehs-bray-13-08-2016.pdf.

[10] Belyaev, I., Dean, A., Eger, H., Hubmann, G., Jandrisovits, R., Kern, M., Kundi, M., Moshammer, H., Lercher, P., Müller, K., Oberfeld, G., Ohnsorge, P., Pelzmann, P., Scheingraber, C., & Thill, R. (2016). EUROPAEM EMF Guideline 2016 for the prevention, diagnosis and treatment of EMF-related health problems and illnesses. *Reviews on Environmental Health*, *31*(3), 363–397. https://doi.org/10.1515/reveh-2016-0011.

[11] National Academies of Sciences, E., and Medicine. (2020). *An Assessment of Illness in U.S. Government Employees and Their Families at Overseas Embassies*. The National Academies Press. https://doi.org/10.17226/25889.

[12] Golomb, B. A. (2018). Diplomats' Mystery Illness and Pulsed Radiofrequency/Microwave Radiation. *Neural Computation*, *30*(11), 2882–2985. https://doi.org/10.1162/neco_a_01133.

[13] *Executive Summary DECLASSIFIED by DNI Haines on 1 February 2022*. (2022). https://www.dni.gov/files/ODNI/documents/assessments/2022_02_01_AHI_Executive_Summary_FINAL_Redacted.pdf.

7. As the record shows, there is evidence of clusters of sickness around cell towers. Evidence filed in the *Environmental Health Trust, et al. v. FCC case*[14] and provided to the Board of Health shows that California firefighters developed electrosensitivity symptoms after a cell tower was installed on their stationhouse, including headaches, memory problems, sleeping problems, depression, and other neurological problems. SPECT brain scans found brain abnormalities. Additionally, TOVA testing found delayed reaction time, lack of impulse control, and difficulty in maintaining mental focus. Following these incidents, the International Association of Fire Fighters Division of Occupational Health Safety and Medicine investigated evidence of pulsed and modulated RF harm, and published a resolution opposing the use of fire stations as base stations for towers and/or antennas for the conduction of cell phone transmissions.[15]

8. In November 2020, New Hampshire's Commission to Study the Environmental and Health Effects of Evolving 5G Technology (the Commission was established by the State Legislature to learn about the health effects of 5G wireless radiation), published a report which concludes that RF emissions at levels below the FCC emissions guidelines can be harmful. The Committee's final report followed a thorough study of the evidence. The Committee's final report recommends adoption of cell tower antenna setbacks and acknowledges electrosensitivity and its association with RFR exposure.[16] Dr. Kent Chamberlin, former Chair, Department of Computer and Electrical Engineering, University of New Hampshire, and Dr. Paul Heroux, PhD, Professor of Toxicology and Health Effects of Electromagnetism, McGill University Faculty of Medicine, two of the expert members of the New Hampshire Committee, have provided testimony to the Pittsfield City Council about the health effects of RFR exposure, and this testimony has been included in the record considered by this Board.

9. Other highly-credentialed, independent academic research experts have also offered testimony, at no cost, in support of residents' contentions that the Verizon Wireless 877 South Street wireless facility is the cause of their electrosensitivity symptoms. Experts include Dr. Martha Herbert, MD PhD, pediatric neurologist and former Assistant Professor at Harvard Medical School, and Dr. Magda Havas PhD., Professor Emeritus, Trent School of the Environment, Trent University.

10. Professor David Carpenter, MD, former Dean, School of Public Health at University of Albany, New York, wrote a letter to the City of Pittsfield in which he discussed studies showing that cell towers increase cancer risk, and cause changes in hormones as well as electrosensitivity symptoms, including headaches, fatigue, "brain fog," and ringing in the ears. Dr. Carpenter has published numerous studies on the negative health effects of electromagnetic radiation which have been submitted to this Board and are part of the record herein.[17] Dr. Carpenter is the co-

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[14] *Envtl. Health Tr., et al. v. FCC*, 9 F.4th 893 (D.C. Cir. 2021).

[15] Cell Tower Radiation Health Effects. (2004). *IAFF*. Retrieved March 19, 2022, from https://www.iaff.org/cell-tower-radiation/; Susan Foster Ambrose, M.S.W., Medical Writer. (2004). *INTERNATIONAL ASSOCIATION OF FIREFIGHTERS (IAFF) VOTES TO STUDY HEALTH EFFECTS OF CELL TOWERS ON FIRE STATIONS Call for Moratorium on New Cell Towers on Fire Stations Until Health Effects Can Be Studied*. Advancing Sound Public Policy on the Use of Electromagnetic Radiation (EMR). https://ehtrust.org/wp-content/uploads/pr_iaff_vote-1.pdf.

[16] *Final Report of the Commission to Study The Environmental and Health Effects of Evolving 5G Technology* (HB 522, Chapter 260, Laws of 2019, RSA 12-K:12–14). (2020). State of New Hampshire. http://www.gencourt.state.nh.us/statstudcomm/committees/1474/reports/5G%20final%20report.pdf.

[17] Bandara, P., & Carpenter, D. O. (2018). Planetary electromagnetic pollution: It is time to assess its impact. *The Lancet. Planetary Health*, *2*(12), e512–e514. https://doi.org/10.1016/S2542-5196(18)30221-3.

editor of the BioInitiative Report,[18] a scientific review of the science on RF/EMF by independent expert scientists. The report reviewed approximately 2,000 published studies on RFR health effects. After it was first released, the content of the Bioinitiative Report underwent peer review and was published in condensed form as a special two-volume issue of the Journal Pathophysiology. Additional chapters have been published in various journals.[19] The Report concludes that bio-effects from wireless technology and infrastructure, including from cell towers, occur at radiation levels significantly below the FCC's emissions guidelines as documented in published research. The Report finds that the overwhelming majority of published neurological studies show bio-effects.[20] Over 90 percent of the studies that examine the oxidative stress mechanism (a mechanism of harm associated also with electro-sensitivity) show bio-effects.[21] The Report contains cell tower exposure studies that show harmful effects of radiation emitted by cell towers, and demonstrate that exposure to pulsed RF causes hormonal and cell stress effects at radiation levels far, far lower than the FCC emissions guidelines.[22] According to the 2012 Report's conclusion, public safety standards are 10,000 or more times higher than levels now commonly reported in mobile phone base station studies that reveal bio-effects. Because of the actual evidence of harm to humans from exposure to wireless radiation transmissions from cell towers, the Report uses mobile phone base station-RFR levels studies and other studies with very, very low RF exposures to determine the "lowest observed effect level" for RFR exposure as the basis for its recommendations for biologically-based exposure guidelines.[23]

11. Dr. Cindy Russell, a medical doctor and the executive director of "*Physicians for Safe Technology*,"[24] provided a synopsis of 28 studies showing cell tower harm in her letter to this Board, dated July 6, 2021, which explains how it is "well established" that wireless radiation at non-thermal levels causes oxidative stress, and "oxidative stress plays a major part in the development of chronic, degenerative, and inflammatory illnesses such as cancer, autoimmune

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[18] bioadmin. (n.d.). Table of Contents. *The BioInitiative Report*. Retrieved March 19, 2022, from https://bioinitiative.org/table-of-contents/.

[19] Martin Blank (Ed.). (2009). Electromagnetic Fields (EMF) Special Issue. *Pathophysiology*, *16*(2–3), CO2. https://doi.org/10.1016/S0928-4680(09)00066-2; Hardell, L., & Sage, C. (2008). Biological effects from electromagnetic field exposure and public exposure standards. *Biomedicine & Pharmacotherapy*, *62*(2), 104–109. https://doi.org/10.1016/j.biopha.2007.12.004; Herbert, M. R., & Sage, C. (2013). Autism and EMF? Plausibility of a pathophysiological link – Part I. *Pathophysiology*, *20*(3), 191–209. https://doi.org/10.1016/j.pathophys.2013.08.001; Herbert, M. R., & Sage, C. (2013). Autism and EMF? Plausibility of a pathophysiological link part II. *Pathophysiology*, *20*(3), 211–234. https://doi.org/10.1016/j.pathophys.2013.08.002.

[20] Neurological Effects Studies Percent Comparison, BioInitiative. (2022). https://bioinitiative.org/wp-content/uploads/2020/10/13-Neurological-Effects-Studies-Percent-Comparison-2020.pdf.

[21] Henry Lai. (n.d.). Research Summaries. *The BioInitiative Report*. Retrieved March 19, 2022, from https://bioinitiative.org/research-summaries/; Neurological Effects Studies Percent Comparison, BioInitiative. (2022). https://bioinitiative.org/wp-content/uploads/2020/10/13-Neurological-Effects-Studies-Percent-Comparison-2020.pdf.

[22] BUCHNER K, EGER H (2011) A Long-term Study Under Real-life Conditions / Umwelt-Medizin-Gesellschaft 24(1): 44-57. https://www.avaate.org/IMG/pdf/Rimbach-Study-20112.pdf.

[23] Henry Lai. (n.d.). Research Summaries. *The BioInitiative Report*. Retrieved March 19, 2022, from https://bioinitiative.org/research-summaries/; Neurological Effects Studies Percent Comparison, BioInitiative. (2022). https://bioinitiative.org/wp-content/uploads/2020/10/13-Neurological-Effects-Studies-Percent-Comparison-2020.pdf.

[24] Physicians for Safe Technology | Cell Tower Radiation Health Effects. (2017, September 11). *Physicians for Safe Technology*. https://mdsafetech.org/cell-tower-health-effects/.

disorders, aging, cataracts, rheumatoid arthritis, cardiovascular and neurodegenerative diseases, as well as some acute pathologies (trauma, stroke). Effects of oxidative stress are cumulative."[25]

12. Devra Davis PhD, MPH, the founder of the Environmental Health Trust, sent a scientific letter and briefing materials to this Board, documenting the published science indicating how FCC limits do not ensure safety to human health, and how legal levels of wireless radiation can damage the health of children, pregnant women, and the medically vulnerable. Studies of wireless radiation exposure from cell towers document neuropsychiatric problems, elevated diabetes, headaches, sleep problems, and genetic damage.[26] Attached to the letter were several published articles, including an article published in the journal Lancet Planetary Health, which presented an evaluation by the Oceania Radiofrequency Scientific Advisory Association of 2266 studies (including in-vitro and in-vivo studies in human, animal, and plant experimental systems and population studies). The evaluation found that most studies have demonstrated significant biological or health effects associated with exposure to anthropogenic electromagnetic fields.[27] Furthermore, a scientifically referenced Environmental Health Trust White Paper addressed common misconceptions around the health effects of wireless radiation.[28]

13. These and other studies and reports in the record before this Board show that wireless radiation transmitted from cell towers can have adverse effects even when the pulsed and modulated RF emissions are significantly lower than the FCC's emission guidelines. Compliance with FCC emission limits does not ensure safety nor protection from all harm. Published studies provided to the Board show negative health effects on human beings at legally allowed levels including: neurological effects and adverse effects on well-being, clear, measurable, physiological effects, hormonal changes, oxidative stress damage, negative effects on sperm, increased cancer risk, and DNA damage.[29]

14. Epidemiological studies demonstrate that exposure to wireless radiation emissions from cell towers causes symptoms similar to those suffered by Shacktown residents as a result of the operation of the Verizon Wireless 877 South Street wireless facility. The record includes a 2010 review of wireless radiation exposure from cell towers and numerous other studies which are relevant to chronic long-term exposure similar to that from cell towers. Effects documented in these studies include various neurological symptoms such as fatigue, sleep problems, headaches and other effects on "wellbeing" proportionate to the distance from the cell tower.[30] [31] [32] A

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[25] Russell, C., (2021, July 6). Cindy Russell MD to Pittsfield Board of Health. RE: Pittsfield testing of RFR emissions. [Letter].

[26] Scarato, T., (2021, May 27). Theodora Scarato to Gina Armstrong, City of Pittsfield Board of Health; Davis, D., et al., (2021, April 21). Dr. Devra Davis, et al., to the Honorable Joseph R. Biden, President/Science/Briefing. [Letters].

[27] Priyanka Bandara, David O Carpenter, Planetary electromagnetic pollution: it is time to assess its impact, The Lancet Planetary Health, Volume 2, Issue 12, 2018, Pages e512-e514,ISSN 2542-5196, https://doi.org/10.1016/S2542-5196(18)30221-3.

[28] Myth Fact Scientific Response EHT 2022 .

[29] See Appendices I and II.

[30] Abdel-Rassoul, G., El-Fateh, O. A., Salem, M. A., Michael, A., Farahat, F., El-Batanouny, M., & Salem, E. (2007). Neurobehavioral effects among inhabitants around mobile phone base stations. *Neurotoxicology*, *28*(2), 434–440. https://doi.org/10.1016/j.neuro.2006.07.012; Khurana, V., Hardell, L., Everaert, J., Bortkiewicz, A., Carlberg, M., & Ahonen, M. (2010). Epidemiological Evidence for a Health Risk from Mobile Phone Base Stations. *International Journal of Occupational and Environmental Health*, *16*, 263–267. https://doi.org/10.1179/107735210799160192.

[31] Levitt, B. B., & Lai, H. (2010). Biological effects from exposure to electromagnetic radiation emitted by cell tower base stations and other antenna arrays. *Environmental Reviews*, *18*(NA), 369–395. https://doi.org/10.1139/A10-018.

[32] 78 Studies Showing Health Effects from Cell Tower Radio Frequency; Oberfeld, G., & Gustavs, K. (2007). *Environmental Medicine Evaluation* (30). 48.

telecom company study found exposure to cell towers causes a variety of neurological symptoms and a dose response. The study also found a causal relationship with sleep disturbance. When, unknown to the subjects, the company secretly turned off the antennas for three days, the sleep quality improved in all subject groups that were studied.[33]

15. Evidence of electrosensitivity and its association to pulsed and modulated RF exposure, as well as evidence of harm to human health and the environment from exposure to wireless radiation from cell towers was filed in the case of *Environmental Health Trust, et al., v. Federal Communications Commission (FCC)* in the U.S. Court of Appeals for the District of Columbia Circuit. The petitioners challenged the FCC's decision in 2019 not to review and update its 1996 guidelines for wireless radiation emissions, following a multi-year proceeding to examine the developing science on the health and environmental effects of exposure to wireless radiation. The FCC determined in 2019 that its 1996 guidelines did not need to be updated.[34] On appeal, the DC Circuit court reversed the FCC, ruling in August 2021 that the FCC's determination that there is no evidence of non-cancerous and environmental harm from RF emissions below the FCC 1996 emissions guidelines was arbitrary, capricious, and not evidence-based. The DC Circuit court ruled that the FCC failed to explain why, despite the substantial evidence of harm filed in the FCC record, the agency decided to not further review its 1996 guidelines for possible updating. The DC Circuit remanded the case back to the FCC, and ordered the FCC to "*address the impacts of RF radiation on children, the health implications of long-term exposure to RF radiation" as well as environmental effects, new technological developments and adequacy of RF test procedures.* However, as of today's date, the FCC has not provided any response to the court order. Thus, while the 1996 FCC wireless emissions guidelines remain in effect, they have not been updated in 26 years, and they have not been substantiated by an up-to-date scientific review by any federal regulatory agency. Evidence provided to this Board confirms that when it comes to cell tower network RF emissions, there is no federal regulatory agency with health expertise monitoring the published science, nor providing surveillance for health effects, nor measuring RF levels in the environment.[35] As is also documented in a letter from the Environmental Protection Agency (the "EPA") to Theodora Scarato of Environmental Health Trust, the EPA has not reviewed the research on biological effects of exposure to wireless radiation since 1984.[36] The FDA has not reviewed the safety of environmental RF levels. The FDA stated in a letter[37] to a family requesting information on the safety of base station antennas that: "The Food and Drug Administration (FDA) does not regulate cell towers or cell tower radiation. Therefore, the FDA has no studies or information on cell towers to provide in response to your questions." The lack of oversight for the health effects of cell tower network radiofrequency exposure is a serious gap in

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[33] Cherry, N.J. (2002). Evidence of neurological effects of electromagnetic radiation: implications for degenerative disease and brain tumour from residential, occupational, cell site and cell phone exposures (9).

[34] *Environmental Health Trust, et al v. FCC*, 9 F.4th 893 (D.C. Cir. 2021). https://www.cadc.uscourts.gov/internet/opinions.nsf/FB976465BF00F8BD85258730004EFDF7/$file/20-1025-1910111.pdf.

[35] Myth Fact Scientific Response by Environmental Health Trust 2022, Theodora Scarato to Gina Armstrong, City of

[36] Pittsfield Board of Health; Davis, D., et al., (2021, April 21). EPA letter is page 24 of Dr. Devra Davis, et al., to the Honorable Joseph R. Biden, President/Science/Briefing. [Letters].

[37] Theodora Scarato presentation of the FDA letter in a video presentation submitted to Pittsfield Board of Health, Pittsfield MA Expert Forum on Cell Tower Cease-and-Desist Order , at minute 54:24, and also in Myth Fact Scientific Response EHT 2022 , under section "Myth: The Food And Drug Administration (FDA) has reviewed the science on 5G and cell towers and determined the radiation is safe and FCC limits protect public health."

federal accountability, especially when research documenting harmful effects continues to be published in respected journals.

16. In November 2021, scientific and policy experts, including Dr. Linda Birnbaum, former Head of the National Institute of Environmental Health Sciences and National Toxicology Program, Dr. Ronald Melnick, National Institute of Health scientist (now retired), Dr. Anthony Miller, Dr. Jerome A. Paulson, Devra Davis, PhD, and several others, sent new requests to the FCC calling for a full examination of the latest scientific evidence in order for the U.S. to develop regulatory safety limits that protect the public and environment from wireless radiation exposure. Included in their filing are over 1,000 pages of reports and studies on demonstrating harm to humans from exposure to RF radiation, including electrohypersensitivity, and harm to humans from exposure to RF radiation from cell towers specifically. The Environmental Health Trust filing to the FCC docket also includes letters from the BioInitiative Report, Environmental Working Group, Consumers for Safe Cell Phones, Phonegate Alerte, and Dr. Kent Chamberlin.[38]

17. The questions raised by the DC Circuit Court and the compelling scientific evidence submitted to this Board allows only one conclusion: pulsed and modulated RFR can and does cause harm, and at least a certain segment of the population can be severely harmed when exposed to this wireless radiation, especially for continuous periods of time. Exposure to wireless radiation can lead to significant temporary and possibly permanent injury, and according to the evidence, it seems that the most effective method to reduce the symptoms and mitigate the harm is through exposure avoidance.

18. This Board also finds that the information and testimony provided by Verizon Wireless do not convince this Board otherwise. In particular, this Board invited Verizon Wireless to meet by Zoom in September 2021 with Board Member Brad Gordon, then-Director of Public Health Gina Armstrong, and then-Senior Sanitarian (now current Director of Public Health) Andy Cambi to discuss the concerns of the City of Pittsfield Health Department, this Board, and residents of the City of Pittsfield about the wireless radiation emissions from the Verizon Wireless 877 South Street wireless facility ever since that facility was activated in August 2020. These concerns arose from the complaints reported by numerous residents of the adjacent residential neighborhood of negative health symptoms these residents and their relatives had been and were continuing to suffer from what they believed to be exposure to the continuous wireless radiation being transmitted from that Verizon Wireless facility. On September 9, 2021, Verizon Wireless appeared at the Board of Health Zoom session, represented by Verizon General Counsel New England Market, attorney Joshua E. Swift, Verizon Wireless Network Engineer, Jay Latorre, Verizon Wireless State and Government Affairs Director, Ellen Cummings, and Dr. Eric S. Swanson, Professor, Department of Physics and Astronomy, University of Pittsburgh. Professor Swanson was the primary spokesperson for Verizon Wireless at this meeting.

19. Professor Swanson presented prepared remarks, accompanied by a Powerpoint slide presentation. The Board did not place any time limits on Professor Swanson's presentation, and Ms. Armstrong and Mr. Gordon asked Professor Swanson many questions following his remarks. Professor Swanson's main points included: (a) electromagnetic radiation is the best understood phenomenon in the universe; it is not nuclear radiation; (b) electromagnetic waves form the

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[38] Reassessment of Federal Communications Commission Radiofrequency Exposure Limits and Policies, (2021). ET Docket No. 13-84, https://ecfsapi.fcc.gov/file/113028247216 50/Remand%20Filing%20-%20Nov%2030th.pdf; Linda S. Birnbaum, PhD, et al. (2021, November 24). *FCC Record Refresh Letter from Scientists to The Honorable Jessica Rosenworcel, Commissioner, Acting Chairwoman, Federal Communications Commission*. https://ehtrust.org/wp-content/uploads/FCC-Record-Refresh-Letter-from-ScientistsWireless-Radiation.pdf; Scientific and Policy Developments in Radiofrequency Radiation (2019 - 2021), https://ehtrust.org/wp-content/uploads/New-Scientific-Developments-in-RFR-FCC-EHT-Remand-with-Studies-2.pdf; Environmental Working Group, The Bioinitiative Report, Consumers for Safe Cell Phones, New Hampshire State Commission on 5G.

spectrum; (c) some radiation is ionizing which can sometimes cause cancer; (d) electromagnetic waves below the ionization threshold cannot cause cancer; (e) only wavelengths above visible light on the spectrum are ionizing; (f) wavelengths in the visible light portion of the spectrum are non-ionizing, and cannot cause cancer; (g) wavelengths below visible light on the spectrum, including thermal, microwave, 5G, 4G, and radio, are non-ionizing, and cannot cause cancer; (h) the only verified biological effect on tissue of non-ionizing radiation is heating; (i) the FCC regulates RFR to limit thermal effects, and FCC limits are very strict, set at 1/50 of the level of what is detectable in animal experiments; (j) the FCC limits are based on the evaluation of thousands of studies and the recommendations of expert organizations and agencies; (k) various international regulatory agencies and health organizations have concluded that there is no established evidence for health effects from radio waves used in mobile communications; (l) the FCC regularly updates its rules; (m) the consensus view of all scientists is that wireless radiation does not and cannot cause cancer; all studies to the contrary are from fringe scientists and those studies all show confirmation bias.

20. Following Professor Swanson's remarks, Ms. Armstrong acknowledged, without accepting, his contention that exposure to wireless radiation cannot cause cancer. But she pointed out that the immediate medical symptom residents of the Shacktown neighborhood adjacent to the Verizon Wireless 877 South Street wireless facility were complaining about were not cancer or thermal effects, but rather, headaches, tinnitus, and other conditions typical of electrohypersensitivity. Ms. Armstrong asked Professor Swanson to explain how to deal with those symptoms. Professor Swanson responded by insisting that the only verifiable biological effect of non-ionizing wireless radiation is heat, and the FCC so strictly regulates those emissions levels that heat cannot pose a problem from that Verizon Wireless cell tower. Professor Swanson acknowledged that certain people truly believe that they are hypersensitive to wireless radiation. But Professor Swanson suggested that those persons have psychological issues, and they should be dealt with sympathetically. Professor Swanson maintains that transmission of wireless radiation from Verizon's cell tower cannot actually cause those persons any injury because the immutable laws of physics make that impossible.

21. This Board has reviewed Professor Swanson's presentation and discussion and finds Professor Swanson's conclusions, several of which are strident and absolute, to lack credibility. A major problem with Professor Swanson is that he speaks as a purported expert about matters of human health and disease and medical and scientific studies about the health effects of exposure to wireless radiation, but he lacks any academic or professional qualifications in those fields. Professor Swanson is a professor of theoretical physics.[39] Professor Swanson's research interests focus on esoteric topics in nuclear physics, cosmology, and hadronic physics, especially in learning how "quarks" and "gluons" build the universe. All 124 of Professor Swanson's published scientific studies are limited to these subject areas.[40] Professor Swanson is not a medical doctor. Professor Swanson has no professional training or qualifications in medicine, medical research, biology, environmental studies, public health, epidemiology, or toxicology, and his professional credentials show no such expertise. *See* fn. 39. Yet Professor Swanson rejects the more than 2,000 peer-reviewed scientific studies showing that wireless radiation may or does negatively impact human health as outliers by "fringe" scientists who may be "conspiracy theorists" with an axe to grind, and asserts that their studies all show "confirmation bias." Professor Swanson asserts unequivocally that "the scientific consensus" is that wireless radiation cannot cause human harm. This Board finds that Professor Swanson lacks the qualifications and

[39] https://www.physicsandastronomy.pitt.edu/people/eric-s-swanson.

[40] https://inspirehep.net/literature?sort=mostrecent&size=100&page=2&q=fin%20a%20swanson%2C%20e%20s.

the expertise to make such sweeping statements, and his credibility as a witness is severely undermined thereby.

22. Further undermining Professor Swanson's credibility is his appearance before this Board as a paid expert on behalf of Verizon Wireless, retained through his consulting business, Swanson Scientific Consulting.[41] On Professor Swanson's private consulting business website, he lists on the "Past Clients" tab, "Pittsfield, MA," one of his 20 listed "Scientific Presentations and Depositions to Cities." Professor Swanson also lists presentations to 5 State Senate Committees, the New York State Senators, the New Jersey Urban Mayors Association, and the Center for Growth and Opportunity. He names Verizon and Crown Castle Development (a major cell tower operator) as clients, as well as CTIA, the U.S. wireless industry's trade and lobbying association. *See* fn. 41. This Board, in assessing Professor Swanson's credibility, takes notice that he works as a paid industry consultant when making presentations such as the one he made to this Board regarding matters outside of his academic research and professional qualifications. In contrast, the experts who presented to this Board and spoke about the hazards to human health posed by wireless radiation from cell towers all had particular professional qualifications in the subject matter; none of these experts has received any compensation for their appearances before this Board, and all are independent academic researchers, with no affiliation to Verizon Wireless and the telecommunications industry. These facts enhance the credibility of these experts, especially vis-a-vis Professor Swanson.

23. Verizon Wireless also submitted to this Board documents which consist primarily of self-promotional brochures or industry-funded advocacy pieces rather than peer-reviewed scientific studies. These materials generally deny *any* prospect of harm, but do not meaningfully address the scientific evidence in the record or counteract the fact that the majority of independent (not industry-funded) studies, especially studies that use pulsed and/or modulated signals, do show harm.[42] Verizon Wireless did not present government regulatory agency reports or systematic scientific or medical reviews of cell tower wireless radiation exposure studies (or studies of comparable levels of chronic environmental exposures) which conclude that safety to human health is assured. Furthermore, Verizon Wireless cannot and does not adequately rebut the personal testimonies provided by the residents of the neighborhood ("Shacktown") in the City of Pittsfield adjacent to the Verizon Wireless 877 South Street wireless facility at the several public hearings before the Health Board of the actual harms they have suffered and are suffering from the operation of this wireless facility. Simply stated, the position of Verizon Wireless is that what is plainly happening in Pittsfield cannot occur. That position has been stated most clearly by Professor Swanson during his September 9, 2021 presentation to this Board. But this Board finds that, in fact, Shacktown residents have suffered, and are continuing to suffer, negative health effects from the continuous operation of the Verizon Wireless 877 South Street wireless facility since it was activated in August 2020.

24. The evidence shows that involuntary wireless radiation exposure directed upon Shacktown residents in their homes has effectively evicted several residents injured by pulsed and modulated RFR; they have no choice but to leave. Pulsed and modulated RFR from the Verizon Wireless 877 South Street wireless facility has rendered their homes uninhabitable – unfit for human habitation – because the continued exposure causes them severe pain, unable to function, and endangers and materially impairs their health and safety.

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41 https://swansonscientific.com/.

42 Panagopoulos, D. J., Johansson, O., & Carlo, G. L. (2015). Real versus Simulated Mobile Phone Exposures in Experimental Studies. *BioMed Research International*, *2015*, 607053. https://doi.org/10.1155/2015/607053.

Whereas, this Board has received direct testimony and written submissions from specific individuals that reside, or previously resided, within the reach of the wireless facility in issue. These residents state that they and/or other family members (including their children) have developed symptoms shortly after the facility was activated.[43] Many of the residents have testified on multiple occasions, which indicates the symptoms are persisting. It appears, based on the evidence, that there is a cluster of illness around the Verizon Wireless 877 South Street wireless facility that is caused by the facility's operation. Since no comprehensive survey has been conducted of all neighborhood residents, there may be additional affected residents.

Whereas, the symptoms reported by affected neighborhood residents are mainly neurological; they include headaches, ringing in the ears, dizziness, heart palpitations, nausea, and skin rashes. As the evidence that was provided to this Board shows, these symptoms are consistent with the scientific literature regarding adverse health effects from exposure to pulsed and modulated RF, including evidence specific to cellular antennas.

Whereas, this Board has received evidence from at least seventeen residents who have suffered on-going medical symptoms that arose for the first time after the Verizon Wireless 877 South Street wireless facility was activated in August 2020 and who believe their symptoms are caused by their continuous exposure to the wireless radiation being transmitted from that wireless facility. This Board finds their letters and oral testimonies to be authentic, compelling, and credible. As a result of their now-impaired health, some of these residents have decided to leave their homes, while others split their time between their homes in Shacktown and other temporary locations. This indicates that some affected Shacktown residents have been constructively evicted from their homes because of the operation of the wireless facility, and have been effectively rendered homeless. According to the evidence in the record, these symptoms are consistent with a diagnosis of electromagnetic sensitivity.

Whereas, this Board has received and reviewed, *inter alia*, the following evidence from specific Shacktown residents who have been and are being injured by the continued operation of the Verizon Wireless 877 South Street wireless facility:

1. REDACTED a pre-school teacher, has testified that she and both of her daughters developed various symptoms immediately after the facility went into operation. Ms. REDACTED has provided a physician's medical diagnosis by Dr. Sharon Goldberg, MD, an internal and environmental medicine physician. This diagnosis has linked REDACTED symptoms directly to the RF/EMF emitted by the facility by way of causation. REDACTED diagnosis letter indicates her symptoms improve when she is away from home, but resume when she returns and is again exposed again to the facility's radiation.

2. REDACTED s minor daughter, testified that after the facility went into operation, she and her sister both started getting headaches. They feel dizzy and develop sleeping problems. Her sister also suffered itchiness and developed skin rashes, frequent nausea, and often has to sleep with a bucket next to her bed in case she needs to throw up. Both girls have missed school because of sickness caused by wireless radiation exposure from the cell tower. REDACTED explained that when she is away from home (and out of range of the facility) she feels better.

3. REDACTED reported that following the facility's activation they began to suffer nausea, headaches, and dizziness. They are especially concerned for their five year old son who has Sensory Processing Disorder, a neurological disease. Since he has limited verbal skills, they do not know whether he too suffers from exposure to the wireless radiation transmitted from the cell tower. They are concerned that the exposure to the cell tower's emissions will aggravate

[43] See Appendix V: Public Comment Testimony to Board of Health.

his condition. The literature indicates that it is not unusual for individuals to have or develop sensitivity to multiple toxins, and this can become an escalating feedback loop.

4. REDACTED and their two children all developed headaches and insomnia after the facility became operational. They left their home because it is essentially uninhabitable and inaccessible to them.

5. REDACTED , an elderly resident, testified that both he and his wife have been unable to sleep since the tower was activated and that his wife has been especially affected.

6. REDACTED reported that they have been severely affected. He is nauseous and has headaches in the morning and again as soon as he returns from work.

7. REDACTED testified that she and her husband developed tinnitus and other serious health issues following the facility's activation. They are suffering from headaches and sleeplessness. They are deciding whether they must abandon their home because it is inaccessible and uninhabitable.

8. REDACTED testified that he developed ringing in the ears and that his wife Luci has developed horrible headaches and migraines. He stated that he sent his wife and their three year old daughter REDACTED away from the house because they believe it is unsafe and therefore uninhabitable. They are concerned for their daughter as she also has limited verbal skills and therefore they don't know if she suffers.

Whereas, this evidence clearly demonstrates to this Board that specific Shacktown residents in the vicinity of the facility have suffered and are suffering injuries and illnesses directly caused by the pulsed and modulated RFR emitted by the facility in issue, and for so long as the facility is in operation it will continue to be injurious to the public health and continue to drive residents from their homes.

Whereas, the FCC's emissions guidelines provide limits for general population purposes. These guidelines were designed to measure and address primarily only "thermal" or heating related effects. The guidelines for whole body exposure (such as for exposure from cell towers) are for 30 minutes exposure, and protect only from thermal injury. They were not developed to protect sensitive populations against all harms. They ignore the effects of pulsation and modulation and non-thermal effects from long-term chronic exposure, cumulative effects, and effects of exposure to numerous sources of RF exposure.

Whereas, the FCC emissions guidelines do not address the demonstrated scientific, medical, and even legally-established fact that these general population limits do not adequately recognize that pulsed and modulated RF radiation emissions are "bioactive" – living things biologically respond to pulsed and modulated RF radiation, and this response can lead to harmful effects. More importantly, these guidelines entirely fail to address or provide for the situation where, at least, certain individuals develop adverse reactions such as those who experience electromagnetic sensitivity.

Whereas, this Board concludes that the FCC emissions guidelines do not prevent this Board, operating under State authority, from taking action to protect the health and safety of those specific individuals who have demonstrated that a continuously operating cell tower built adjacent to a densely populated residential neighborhood is injuring their health on a continuing basis, as well as the health of other neighborhood residents. The FCC has ruled that state and local zoning authorities can condition a land use permit on compliance with generally applicable state or local health and safety codes.[44] Verizon

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[44] *Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting; 2012 Biennial Review of Telecommunications Regulations*, 29 FCC Rcd 12865, 122951, ¶202 (Oct. 17, 2014): ("We therefore conclude that States and localities may require a covered request to comply with generally applicable building, structural, electrical, and safety codes or with other laws codifying objective standards reasonably related to health and safety, and that they may condition approval on such compliance.").

Wireless' permit for this facility does precisely that. Verizon Wireless' permit expressly requires compliance with the Massachusetts Sanitary Code and Pittsfield's health-related rules, regulations and requirements. By this Order, this Board finds the Verizon Wireless 877 South Street wireless facility to be in violation, and this Board requires Verizon Wireless and the property owner to bring their facility and the premises into compliance with Massachusetts' and Pittsfield's generally applicable health and safety codes, just as FCC precedent and the permit expressly allow.

Now, therefore, the Pittsfield Board of Health hereby FINDS AND ORDERS as follows:

1. The Verizon Wireless 877 South Street wireless facility operated by Verizon Wireless is a public nuisance, a cause of sickness, and a trade which may result in a nuisance or be dangerous to the public health for purposes of G.L. ch. 111 ss 122-125, 127B, 127C, 143-150 and 152.

2. The premises owner, Farley White South Street LLC, is also responsible for all activities on its premises and within its direction and control.

3. The Verizon Wireless 877 South Street wireless facility operated on the premises creates an access barrier that directly causes harm to certain individuals, and renders dwellings Unfit for Human Habitation or constitutes a Condition Which May Endanger or Materially Impair the Health or Safety and Well-Being of an Occupant as defined in State Sanitary Code 410.020 and 410.750(P).

4. The Verizon Wireless 877 South Street wireless facility operated on the premises creates conditions that impact occupants of a dwelling to the point that it renders a dwelling unfit for habitation for purposes of Sanitary Code 410.831.

5. Verizon Wireless and Farley White South Street LLC are jointly and severally responsible for these unsafe conditions.

6. This Order shall be served on Verizon Wireless, through its authorized agents, and on Farley White South Street LLC, through its authorized agents, the persons responsible for the violations as provided by *inter alia*, G.L. ch. 111 ss 124, 127B, 127D, 144, and State Sanitary Code for 410.833, 410.850, and 410.851.

7. Verizon Wireless and Farley White South Street LLC are hereby ORDERED to show cause why the Board of Health should not issue an order requiring cessation of operations at the facility pursuant to the Board of Health's statutory and historical police power to protect its citizens from injury and harm.

8. Verizon Wireless and Farley White South Street LLC shall have SEVEN (7) DAYS from the date of this order to request a hearing on this Order to Show Cause. The Board of Health will promptly schedule such hearing in accordance with the provisions of G.L. ch. 111 and the State Sanitary Code, and provide public notice thereof.

9. In the event Verizon Wireless and Farley White South Street LLC do not timely request a hearing, this Order shall become and constitute a notice of discontinuance requiring that Verizon Wireless and Farley White South Street LLC abate and eliminate all activities and operations leading to the present and ongoing nuisance and violations of the State Sanitary Code at their own expense within SEVEN (7) DAYS of the expiration of the deadline to request a hearing.

10. Verizon Wireless and Farley White South Street LLC shall have the right to inspect and obtain copies of all relevant inspection or investigation reports, orders, notices, and other documentary information in the possession of the Board of Health; the right to be represented at the hearing.

11. Any affected party has a right to appear at said hearing and present evidence and argument in favor of or against discontinuance.

12. This is an important legal document. It may affect your rights.

The Health Board reserves the right to take such other and further action as it deems necessary to ensure that all injurious activities and conditions end, including directly acting to remove the offending facilities at the expense of Verizon Wireless and Farley White South Street LLC and or appointment of a receiver responsible for accomplishing the same.

This Order shall take effect upon issuance.

Appendix I: Letters and Testimony from Experts

All links provided by reference

Russell, C., (2021, April 6). *Cindy Russell MD to Council Members in the City of Pittsfield. Re: 3/21/21 Agenda Item #15 to encourage the Pittsfield, Massachusetts Health Department to investigate the health effects reported in the vicinity of the Verizon 877 South Street Cell tower*. [Letter].

Russell, C., (2021, July 6). *Cindy Russell MD to Pittsfield Board of Health. RE: Pittsfield testing of RFR emissions*. [Letter].

Carpenter, D.O., (2020, October 8). Dr. David Carpenter to Mayor of the City of Pittsfield MA and Board of Health on Cell Tower Radiation [Letter].

Kulberg, A.G., (2021, August 31). Dr. Kulberg Chair of Pittsfield Board of Health to the Joint Committee on Consumer Protection RE: Senate Bill S.186 and in Support of MA Commission on Wireless Radiation. [Letter].

Havas, M., (2021, July 6). Dr. Magda Havas to Gina Armstrong, Director of Public Health, Pittsfield Health Department, City of Pittsfield MA on Cell Tower Radiation Measurements and the Lack of Protections by the FCC. [Letter]. Slide Presentation for BOH Forum.

Heroux, Paul., (2021, July 7) Paul Héroux, PhD, McGill University Medicine Comments on RF EMISSION STUDY of South St cell tower (SSct) on June 10th by VComm Telecommunications Engineering. [Letter].

White, P., (2021, October 4). Peter White, Councilor City of Pittsfield to Massachusetts State Legislature in Favor of Wireless Right to Know Legislation. [Letter].

Scarato, T., (2021, May 27). Theodora Scarato to Gina Armstrong, City of Pittsfield Board of Health; Davis, D., et al., (2021, April 21). Dr. Devra Davis, et al., to the Honorable Joseph R. Biden, President/Science/Briefing o=n Wireless.[Letters]. Myth Fact Scientific Response EHT 2022.

Boston Petitioners, (1997). Boston Physicians' and Scientists' Petition To Avert Public Exposures to Microwaves. [Petition Signatures].

Symington, S., (2021) Letter to Pittsfield Board of Health July 7 2021 [Letter].

Chamberlain, K., (2022, February 20). Kent Chamberlin PhD to Editor of the Berkshire Eagle Re: Response to Feb 19th Opinion on Verizon Cell Tower. [Letter].

Goldberg, S. (2022, February 28). *Wireless Health Effects* [Slides from presentation]. https://ehtrust.org/wp-content/uploads/Sharon-Goldberg-MD-Pittsfield-MA-2.28.22.pdf.

Appendix II Testimony and Research on Cell Towers and Radiofrequency

Note: This is not an exhaustive list, but rather a short list of studies included in evidence sent to the Board.

Compilation Documents

REDACTED testified repeatedly to the Board, communicated by email and submitted extensive scientific research, video lectures, documentation of health effects and reports.

Michael Maudin, (Numerous letters 2021 and 2022) The Alliance for Microwave Radiation Accountability, Inc. Sent the Board numerous resources, scientific papers, and documents demonstrating evidence of adverse effects, research dating back decades on electromagnetic radiation and more including links Primary Source Documents - Microwave Radiation Syndrome in April 2021, Michael Maudin's testimony of injury from base station antennas and primary source documents. Microwave-Radiation-Syndrome-Primary-Source-Documents-BoH-April-2021.pdf. Maudin also sent 35 peer-reviewed studies and charts on microwave sickness caused by the radiation from cell towers to the Pittsfield Board of Health on January 5, 2021 and these are included in the reference list.

Compilation of Research Studies on Cell Tower Radiation and Health. (n.d.). *Environmental Health Trust*. Retrieved March 20, 2022, from https://ehtrust.org/cell-towers-and-cell-antennae/compilation-of-research-studies-on-cell-tower-radiation-and-health/

Maryland Children's Environmental Health and Protection Advisory Council (2016) 78 Studies Showing Health Effects from Cell Tower Radio Frequency.

Research Studies

Gandhi, G., Kaur, G., & Nisar, U. (2015). A cross-sectional case control study on genetic damage in individuals residing in the vicinity of a mobile phone base station. *Electromagnetic Biology and Medicine*, *34*(4), 344–354. https://doi.org/10.3109/15368378.2014.933349.

Yakymenko, I., Sidorik, E., Kyrylenko, S., & Chekhun, V. (2011). Long-term exposure to microwave radiation provokes cancer growth: Evidences from radars and mobile communication systems. *Experimental Oncology*, *33*(2), 62–70. https://pubmed.ncbi.nlm.nih.gov/21716201/.

Santini, R., Santini, P., Le Ruz, P., Danze, J. M., & Seigne, M. (2003). Survey Study of People Living in the Vicinity of Cellular Phone Base Stations. *Electromagnetic Biology and Medicine*, *22*(1), 41–49. https://doi.org/10.1081/JBC-120020353.

Santini, R., Santini, P., Danze, J. M., Le Ruz, P., & Seigne, M. (2002). Investigation on the health of people living near mobile telephone relay stations: I/Incidence according to distance and sex. *Pathologie-Biologie*, *50*(6), 369–373. https://doi.org/10.1016/s0369-8114(02)00311-5. [Article in French].

Shahbazi-Gahrouei, D., Karbalae, M., Moradi, H. A., & Baradaran-Ghahfarokhi, M. (2014). Health effects of living near mobile phone base transceiver station (BTS) antennae: A report from Isfahan, Iran. *Electromagnetic Biology and Medicine*, *33*(3), 206–210. https://doi.org/10.3109/15368378.2013.801352.

Parsaei, H., Faraz, M., & Mortazavi, S. M. J. (2017). A Multilayer Perceptron Neural Network–Based Model for Predicting Subjective Health Symptoms in People Living in the Vicinity of Mobile Phone Base Stations. *Ecopsychology*, *9*(2), 99–105. https://doi.org/10.1089/eco.2017.0011.

Kato, Y., & Johansson, O. (2012). Reported functional impairments of electrohypersensitive Japanese: A questionnaire survey. *Pathophysiology: The Official Journal of the International Society for Pathophysiology*, *19*(2), 95–100. https://doi.org/10.1016/j.pathophys.2012.02.002.

Dode, A. C., Leão, M. M. D., Tejo, F. de A. F., Gomes, A. C. R., Dode, D. C., Dode, M. C., Moreira, C. W., Condessa, V. A., Albinatti, C., & Caiaffa, W. T. (2011). Mortality by neoplasia and cellular telephone base stations in the Belo Horizonte municipality, Minas Gerais state, Brazil. *The Science of the Total Environment*, *409*(19), 3649–3665. https://doi.org/10.1016/j.scitotenv.2011.05.051.

Abdel-Rassoul, G., El-Fateh, O. A., Salem, M. A., Michael, A., Farahat, F., El-Batanouny, M., & Salem, E. (2007). Neurobehavioral effects among inhabitants around mobile phone base stations. *NeuroToxicology*, *28*(2), 434–440. https://doi.org/10.1016/j.neuro.2006.07.012.

Blettner, M., Schlehofer, B., Breckenkamp, J., Kowall, B., Schmiedel, S., Reis, U., Potthoff, P., Schüz, J., & Berg-Beckhoff, G. (2009). Mobile phone base stations and adverse health effects: Phase 1 of a population-based, cross-sectional study in Germany. *Occupational and Environmental Medicine*, *66*(2), 118–123. https://doi.org/10.1136/oem.2007.037721.

Navarro, E. A., Segura, J., Portolés, M., & Gómez-Perretta de Mateo, C. (2003). The Microwave Syndrome: A Preliminary Study in Spain. *Electromagnetic Biology and Medicine*, *22*(2–3), 161–169. https://doi.org/10.1081/JBC-120024625.

Bortkiewicz, A., Zmyślony, M., Szyjkowska, A., & Gadzicka, E. (2004). [Subjective symptoms reported by people living in the vicinity of cellular phone base stations: Review]. *Medycyna Pracy*, *55*(4), 345–351. https://pubmed.ncbi.nlm.nih.gov/15620045/.

Navarro, E. A., Segura, J., Portolés, M., & Gómez-Perretta de Mateo, C. (2003). The Microwave Syndrome: A Preliminary Study in Spain. *Electromagnetic Biology and Medicine*, *22*(2–3), 161–169. https://doi.org/10.1081/JBC-120024625.

Gómez-Perretta, C., Navarro, E. A., Segura, J., & Portolés, M. (2013). Subjective symptoms related to GSM radiation from mobile phone base stations: A cross-sectional study. *BMJ Open*, *3*(12), e003836. https://doi.org/10.1136/bmjopen-2013-003836.

Levitt, B., & Lai, H. (2010). Biological effects from exposure to electromagnetic radiation emitted by cell tower base stations and other antenna arrays. *Environmental Reviews*, *18*, 369–395. https://doi.org/10.1139/a10-903.

Richter, E. D., Berman, T., & Levy, O. (2002). Brain cancer with induction periods of less than 10 years in young military radar workers. *Archives of Environmental Health*, *57*(4), 270–272. https://doi.org/10.1080/00039890209601409.

Wolf, R., & Wolf, D. (2004). Increased incidence of cancer near a cell-phone transmitter station. *International Journal of Cancer*, *1*(2), 123–128. [Google Scholar].

Yakymenko, I., Sidorik, E., Kyrylenko, S., & Chekhun, V. (2011). Long-term exposure to microwave radiation provokes cancer growth: Evidences from radars and mobile communication systems. *Experimental Oncology*, *33*(2), 62–70.https://pubmed.ncbi.nlm.nih.gov/21716201/.

Eger, et al., The Influence of Being Physically Near to a Cell Phone Transmission Mast on the Incidence of Cancer (2004). Umwelt·Medizin·Gesellschaft. http://www.tetrawatch.net/papers/naila.pdf.

Khurana, V. G., Hardell, L., Everaert, J., Bortkiewicz, A., Carlberg, M., & Ahonen, M. (2010). Epidemiological evidence for a health risk from mobile phone base stations. *International Journal of Occupational and Environmental Health*, *16*(3), 263–267. https://doi.org/10.1179/107735210799160192.

Zothansiama, Zosangzuali, M., Lalramdinpuii, M., & Jagetia, G. C. (2017). Impact of radiofrequency radiation on DNA damage and antioxidants in peripheral blood lymphocytes of humans residing in the vicinity of mobile phone base stations. *Electromagnetic Biology and Medicine*, *36*(3), 295–305. https://doi.org/10.1080/15368378.2017.1350584.

Gandhi, G., Naru, J., Kaur, M., & Kaur, G. (2014). DNA and Chromosomal Damage in Residents Near a Mobile Phone Base Station. *International Journal of Human Genetics*, *14*(3–4), 107–118. https://doi.org/10.1080/09723757.2014.11886234.

Gandhi, G., Kaur, G., & Nisar, U. (2015). A cross-sectional case control study on genetic damage in individuals residing in the vicinity of a mobile phone base station. *Electromagnetic Biology and Medicine*, *34*(4), 344–354. https://doi.org/10.3109/15368378.2014.933349.

Magras, I. N., & Xenos, T. D. (1997). RF radiation-induced changes in the prenatal development of mice. *Bioelectromagnetics*, *18*(6), 455–461. https://doi.org/10.1002/(sici)1521-186x(1997)18:6<455::aid-bem8>3.0.co;2-1.

Adang, D., Remacle, C., & Vander Vorst, A. (2009). Results of a Long-Term Low-Level Microwave Exposure of Rats. *IEEE Transactions on Microwave Theory and Techniques*, *57*(10), 2488–2497. https://doi.org/10.1109/TMTT.2009.2029667.

Eskander, E. F., Estefan, S. F., & Abd-Rabou, A. A. (2012). How does long term exposure to base stations and mobile phones affect human hormone profiles? *Clinical Biochemistry*, *45*(1–2), 157–161. https://doi.org/10.1016/j.clinbiochem.2011.11.006.

Eşmekaya, M. A., Seyhan, N., & Ömeroğlu, S. (2010). Pulse modulated 900 MHz radiation induces hypothyroidism and apoptosis in thyroid cells: A light, electron microscopy and immunohistochemical study. *International Journal of Radiation Biology*, *86*(12), 1106–1116. https://doi.org/10.3109/09553002.2010.502960.

Loscher W, Kas G, (1998) Extraordinary behavior disorders in cows in proximity to transmission stations. *Der Praktische Tierarz* 79:437- 444, 1998. (Article in German). http://www.teslabel.be/001/documents/Conspicuous%20behavioural%20abnormalities%20in%20a%20dairy%20cow%20herd.pdf.

Balmori, A. (2010). Mobile phone mast effects on common frog (Rana temporaria) tadpoles: The city turned into a laboratory. *Electromagnetic Biology and Medicine*, *29*(1–2), 31–35. https://doi.org/10.3109/15368371003685363.

Koppel, T., Ahonen, M., Carlberg, M., Hedendahl, L. K., & Hardell, L. (2019). Radiofrequency radiation from nearby mobile phone base stations-a case comparison of one low and one high exposure apartment. *Oncology Letters*, *18*(5), 5383–5391. https://doi.org/10.3892/ol.2019.10899.

Hardell, L., Carlberg, M., Hedendahl, L. K., Koppel, T., & Ahonen, M. (2019). Environmental radiofrequency radiation at the Järntorget Square in Stockholm Old Town, Sweden in May, 2018 compared with results on brain and heart tumour risks in rats exposed to 1.8 GHz base station environmental emissions. *World Academy of Sciences Journal*, *1*(1), 47–54. https://doi.org/10.3892/wasj.2018.5.

Carlberg, M., Hedendahl, L., Koppel, T., & Hardell, L. (2019). High ambient radiofrequency radiation in Stockholm city, Sweden. *Oncology Letters*, *17*(2), 1777–1783. https://doi.org/10.3892/ol.2018.9789.

Hardell, L., Carlberg, M., & Hedendahl, L. K. (2018). Radiofrequency radiation from nearby base stations gives high levels in an apartment in Stockholm, Sweden: A case report. *Oncology Letters*, *15*(5), 7871–7883. https://doi.org/10.3892/ol.2018.8285.

Hardell, L., Carlberg, M., Koppel, T., & Hedendahl, L. (2017). High radiofrequency radiation at Stockholm Old Town: An exposimeter study including the Royal Castle, Supreme Court, three major squares and the Swedish Parliament. *Molecular and Clinical Oncology*, *6*(4), 462–476. https://doi.org/10.3892/mco.2017.1180.

Hardell, L., Koppel, T., Carlberg, M., Ahonen, M., & Hedendahl, L. (2016). Radiofrequency radiation at Stockholm Central Railway Station in Sweden and some medical aspects on public exposure to RF fields. *International Journal of Oncology*, *49*(4), 1315–1324. https://doi.org/10.3892/ijo.2016.3657.

López, I., Félix, N., Rivera, M., Alonso, A., & Maestú, C. (2021). What is the radiation before 5G? A correlation study between measurements in situ and in real time and epidemiological indicators in Vallecas, Madrid. *Environmental Research*, *194*, 110734. https://doi.org/10.1016/j.envres.2021.110734.

Hardell, L., & Koppel, T. (2022). Electromagnetic hypersensitivity close to mobile phone base stations—A case study in Stockholm, Sweden. *Reviews on Environmental Health*. https://doi.org/10.1515/reveh-2021-0169.

Hardell, L., & Sage, C. (2008). Biological effects from electromagnetic field exposure and public exposure standards. *Biomedicine & Pharmacotherapy*, *62*(2), 104–109. https://doi.org/10.1016/j.biopha.2007.12.004.

Koppel, T., Ahonen, M., Carlberg, M., & Hardell, L. (2022). Very high radiofrequency radiation at Skeppsbron in Stockholm, Sweden from mobile phone base station antennas positioned close to pedestrians' heads. *Environmental Research*, *208*, 112627. https://doi.org/10.1016/j.envres.2021.112627.

Pearce, J. M. (2020). Limiting liability with positioning to minimize negative health effects of cellular phone towers. *Environmental Research*, *181*, 108845. https://doi.org/10.1016/j.envres.2019.108845.

SA, M., Alsubaie, Y., Almubarak, Z., Almutawa, H., AlQasem, Y., & Hasanato, R. (2015). Association of Exposure to Radio-Frequency Electromagnetic Field Radiation (RF-EMFR) Generated by Mobile Phone Base Stations with Glycated Hemoglobin (HbA1c) and Risk of Type 2 Diabetes Mellitus. *International Journal of Environmental Research and Public Health*, *12*, 14519-14528; https://doi.org/10.3390/ijerph121114519.

Roda, C., & Perry, S. (2014). Mobile phone infrastructure regulation in Europe: Scientific challenges and human rights protection. *Environmental Science & Policy*, *37*, 204–214. https://doi.org/10.1016/j.envsci.2013.09.009.

Meo, S. A., Almahmoud, M., Alsultan, Q., Alotaibi, N., Alnajashi, I., & Hajjar, W. M. (2019). Mobile Phone Base Station Tower Settings Adjacent to School Buildings: Impact on Students' Cognitive Health. *American Journal of Men's Health*, *13*(1), 1557988318816914. https://doi.org/10.1177/1557988318816914.

Oberfeld, G., Navarro, E., Portoles, M., Maestu, C., & Gómez-Perretta, C. (2002). *THE MICROWAVE SYNDROME - FURTHER ASPECTS OF A SPANISH STUDY*. https://www.researchgate.net/publication/237410769_THE_MICROWAVE_SYNDROME_-_FURTHER_ASPECTS_OF_A_SPANISH_STUDY.

Rodrigues, N. C. P., Dode, A. C., de Noronha Andrade, M. K., O'Dwyer, G., Monteiro, D. L. M., Reis, I. N. C., Rodrigues, R. P., Frossard, V. C., & Lino, V. T. S. (2021). The Effect of Continuous Low-Intensity Exposure to Electromagnetic Fields from Radio Base Stations to Cancer Mortality in Brazil. *International Journal of Environmental Research and Public Health*, *18*(3), 1229. https://doi.org/10.3390/ijerph18031229.

Buchner, K., & Eger, H. D. I. (2011). *Changes of Clinically Important Neurotransmitters under the Influence of Modulated RF Fields A Long-term Study under Real-life Conditions*. https://www.avaate.org/IMG/pdf/Rimbach-Study-20112.pdf.

Pachuau, Lalrinthara & Pachuau, Zaithanzauva. (2016). Health Effects of Mobile Tower Radiation on Human — Case Study. International Journal of Applied Physics and Mathematics. 6. 72-79. 10.17706/ijapm.2016.6.2.72-79.

Hecht, K., Savoley, E.N., (2007). Overloading of Towns and Cities with Radio Transmitters (Cellular Transmitter): a hazard for the human health and a disturbance of eco-ethics, IRCHET – International Research Centre of Healthy and Ecological Technology, Berlin, Germany. https://ecfsapi.fcc.gov/file/7521097890.pdf.

Study of Cell Tower Radiation and its Health Hazards on human body - Lalrinthara Pachuau and Zaithanzauva Pachuau – IOSR Journal of Applied Physics (IOSR-JAP) e-ISSN: 2278-4861. Volume 6, Issue 1 Ver. 1 (Jan 2014), PP 01-06.

Study of Cell Tower Radiation and its Health Hazards on human body – Lalrinthara Pachuau and Zaithanzauva Pachuau IOSR Journal of Applied Physics, Vol. 6, Ver. 1 – January 2014.

Belpomme, D., & Irigaray, P. (2020). Electrohypersensitivity as a Newly Identified and Characterized Neurologic Pathological Disorder: How to Diagnose, Treat, and Prevent It. *International journal of molecular sciences*, *21*(6), 1915. https://doi.org/10.3390/ijms21061915.

Shinjyo, T. & Shinjyo, A. (2014) Significant Decrease of Clinical Symptoms after Mobile Phone Base Station Removal – An Intervention Study, Tetsuharu Shinjyo and Akemi Shinjyo Umwelt-Medizin-Gesellschaft, 27(4), S. 294-301.

Hecht, K., English edition of the German edition (2012), August 2016. Health Implications of Long-term Exposure to Electrosmog. Brochure 6. https://kompetenzinitiative.com/wp-content/uploads/2019/08/KI_Brochure-6_K_Hecht_web.pdf.

Meo, S. A., Alsubaie, Y., Almubarak, Z., Almutawa, H., AlQasem, Y., & Hasanato, R. M. (2015). Association of Exposure to Radio-Frequency Electromagnetic Field Radiation (RF-EMFR) Generated by Mobile Phone Base Stations with Glycated Hemoglobin (HbA1c) and Risk of Type 2 Diabetes Mellitus. *International journal of environmental research and public health*, *12*(11), 14519–14528. https://doi.org/10.3390/ijerph121114519.

Gómez-Perretta, C., Navarro, E. A., Segura, J., & Portolés, M. (2013). Subjective symptoms related to GSM radiation from mobile phone base stations: A cross-sectional study. *BMJ Open*, *3*(12), e003836. https://doi.org/10.1136/bmjopen-2013-003836.

Alazawi, S. A. (2011). Mobile Phone Base Stations Health Effects. *Diyala Journal of Medicine*, *1*(1), 44–52. https://djm.uodiyala.edu.iq/index.php/djm/article/view/483.

Amraee, A., Seif, F., Bayatiani, M. R., Shakeri, M., & Zakeri, F. (2021). Correlation between Base Transceiver Station and the Quality of Sleep and Life of Nearby Residents. *Iranian Journal of Medical Physics*, *18*(1), 10–14. https://ijmp.mums.ac.ir/article_14561.html.

Marinescu, I. E., & Poparlan, C. (2016). Assessment of GSM HF-Radiation Impact Levels within the Residential Area of Craiova City. *Procedia Environmental Sciences*, *32*, 177–183. https://doi.org/10.1016/j.proenv.2016.03.022.

Hutter, H.-P., Moshammer, H., Wallner, P., & Kundi, M. (2006). Subjective symptoms, sleeping problems, and cognitive performance in subjects living near mobile phone base stations. *Occupational and Environmental Medicine*, *63*(5), 307–313. https://doi.org/10.1136/oem.2005.020784.

Kundi, M., & Hutter, H.-P. (2009). Mobile phone base stations-Effects on wellbeing and health. *Pathophysiology: The Official Journal of the International Society for Pathophysiology*, *16*(2–3), 123–135. https://doi.org/10.1016/j.pathophys.2009.01.008.

Bevington, M., (2017). Adverse Health Effects of Mobile Phone Masts and Planning Policy, Electrosensitivity UK (ES-UK).

Alster, Norm, *Captured Agency: How the Federal Communications Commission Is Dominated by the Industries It Presumably Regulates, Edmond J. Safra Center for Ethics Harvard University 2015*.

Appendix III: Videos Resources Sent to Board of Health

Pittsfield MA Expert Forum on Cell Tower Cease-and-Desist Order: With Senator Denise Ricciardi, NH; Dr. Paul Héroux; Dr. Magda Havas; Dr. Kent Chamberlin; Dr. Sharon Goldberg, Environmental Health Trust Director Theodora Scarato; Attorney Robert Berg; Attorney Scott McCollough.

Pittsfield MA Cell Tower Discussion 5 July 2021: Dr. Kent Chamberlin, EHTrust Policy Director Theodora Scarato & MA for Safe Technology Director Cecelia Doucette.

Town of Lenox Board of Health Remote Meeting, August 19, 2021, with presentation by Kent Chamberlin, Ph.D., on Cell Tower Research.

Sacramento City Council Meeting: Includes testimony of two young girls who became sick after Verizon cell installation was powered up.

Wireless Radiation- What Environmental Health Leaders Need to Know: Featuring Linda Birnbaum, former Director of the National Institute for Environmental Health Sciences and the National Toxicology Program • Michael Lerner, Co-Founder and President of Commonweal and Co-Founder of Collaborative on Health and the Environment • Joel M. Moskowitz, PhD, Director Center for Family and Community Health, School of Public Health, University of California- Berkeley and Founder of Electromagnetic Radiation Safety • Uloma Uche, PhD, Environmental Working Group, author of new study on hazards of wireless radiation on children. • Sharon Buccino, Legal Expert, NRDC • Cindy Russell, MD Founder of Physicians for Safe Technology • Larry Ortega, Founder of Community Union • Theodora Scarato, Executive Director of the Environmental Health Trust.

Appendix V: Public Testimony to the Board of Health

All links provided by reference.

In addition to public testimony referenced below, Pittsfield residents submitted numerous emails, documents and letters to the Board.

Board of Health Meetings
April 12, 2021
Agenda;https://cms2files.revize.com/pittsfieldma/calendar_app/docs/Boards_Commissions_Calendar/Board_of_Health/BOH_04_12.pdf
Meeting link; https://watch.pittsfieldtv.net/CablecastPublicSite/show/38962?channel=9

May 5, 2021
Agenda;https://cms2files.revize.com/pittsfieldma/calendar_app/docs/Boards_Commissions_Calendar/Board_of_Health/BOH_05_05.pdf.
Meeting link; https://watch.pittsfieldtv.net/CablecastPublicSite/show/40347?channel=9.

June 2, 2021
Pittsfield Board of Health Wireless Harm Expert Forum:

Agenda;https://cms2files.revize.com/pittsfieldma/calendar_app/docs/Boards_Commissions_Calendar/Board_of_Health/BOHAgenda_06_02.pdf.
Meeting Link; https://watch.pittsfieldtv.net/CablecastPublicSite/show/40684?channel=9.

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July 7, 2021
VComm presents readings from the cell tower (first in person meeting)
Agenda;https://cms2files.revize.com/pittsfieldma/calendar_app/docs/Boards_Commissions_Calendar/Board_of_Health/BOH_07_07.pdf.
Meeting link; https://watch.pittsfieldtv.net/CablecastPublicSite/show/40992?channel=9.

September 1, 2021
Agenda;https://cms2files.revize.com/pittsfieldma/calendar_app/docs/Boards_Commissions_Calendar/Board_of_Health/BoardofHealth_09_01.pdf.
Meeting link; https://watch.pittsfieldtv.net/CablecastPublicSite/show/41536?channel=9

October 6, 2021
Agenda;https://cms2files.revize.com/pittsfieldma/calendar_app/docs/Boards_Commissions_Calendar/Board_of_Health/BoardofHealth_10_06.pdf.
Meeting link; https://watch.pittsfieldtv.net/CablecastPublicSite/show/41802?channel=9.

November 3, 2021
Agenda;https://cms2files.revize.com/pittsfieldma/calendar_app/docs/Boards_Commissions_Calendar/Board_of_Health/BoardofHealth_11_03.pdf.
Meeting link; https://watch.pittsfieldtv.net/CablecastPublicSite/show/43053?channel=9.

December 1, 2021
Agenda;https://cms2files.revize.com/pittsfieldma/calendar_app/docs/Boards_Commissions_Calendar/Board_of_Health/BoardofHealth_12_01.pdf.
Meeting link; https://watch.pittsfieldtv.net/CablecastPublicSite/show/43228?channel=9.

February 2, 2022- Cease and desist unanimously voted on
Agenda;https://cms2files.revize.com/pittsfieldma/calendar_app/docs/Boards_Commissions_Calendar/Board_of_Health/BoardofHealth_02_02.pdf.
Meeting link; https://watch.pittsfieldtv.net/CablecastPublicSite/show/43842?channel=9.

February 23, 2022-Executive session for cease and desist order- order upheld
Agenda;https://cms2files.revize.com/pittsfieldma/calendar_app/docs/Boards_Commissions_Calendar/Board_of_Health/BoardofHealth_02_02.pdf.
Meeting link; https://watch.pittsfieldtv.net/CablecastPublicSite/show/44040?channel=9.

March 16, 2022-Second executive session for the cease and desist order
Agenda;https://cms2files.revize.com/pittsfieldma/calendar_app/docs/Boards_Commissions_Calendar/Board_of_Health/BOH_03_16.pdf
Meeting link; https://watch.pittsfieldtv.net/CablecastPublicSite/show/44241?channel=901:45

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Additional Testimony at City Board Meetings
Pittsfield residents and scientific experts testified at numerous City Council meetings as well as other City Board Meetings providing testimony on harm.

November 5, 2020 Community Development Board Meeting
Pittsfield Community Development Board - November 5, 2020
Topic: Cell towers setbacks

Community Development Board December 1, 2020
https://watch.pittsfieldtv.net/CablecastPublicSite/show/37825?channel=9

Certified and Regular Mail: **7021-0350-0000-4282-0554** (Pittsfield Cellular Telephone Company, Atty. Ellen W. Freyman)
Certified and Regular Mail: **7021-0350-0000-4282-0547** (Pittsfield Cellular Telephone Company, Mark J. Esposito, Esq.)
Certified and Regular Mail: **7021-0350-0000-4282-0530** (Farley White South Street, LLC, Roger W. Altreuter, Manager)

ORDERED by unanimous vote of the Pittsfield Board of Health on April 7, 2022

Roberta Orsi, MS, RN, CCP, Chairperson

Kimberly Loring, PMHNP-BC

Steve Smith, MA

Brad Gordon, JD

Jeffery A. Leppo, MD – Not Present-Did Not Participate

Exhibit C

No. 19-CV-5588-FB-VMS
United States District Court, E.D. New York

ExteNet Sys. v. Vill. of Flower Hill

Decided Jul 29, 2022

19-CV-5588-FB-VMS

07-29-2022

EXTENET SYSTEMS, INC., Plaintiff, v. VILLAGE OF FLOWER HILL and FLOWER HILL VILLAGE BOARD OF TRUSTEES, Defendants.

For the Plaintiff: CHRISTOPHER B. FISHER BRENDAN GOODHOUSE Cuddy & Feder LLP. For the Defendants: EDWARD M. ROSS JUDAH SERFATY Rosenberg Calica & Birney LLP.

FREDERIC BLOCK Senior United States District Judge.

For the Plaintiff: CHRISTOPHER B. FISHER BRENDAN GOODHOUSE Cuddy & Feder LLP.

For the Defendants: EDWARD M. ROSS JUDAH SERFATY Rosenberg Calica & Birney LLP.

MEMORANDUM AND ORDER

FREDERIC BLOCK Senior United States District Judge.

In this action under the Telecommunications Act of 1996 ("the Act"), 47 U.S.C. §§ 251-61, 332(c)(7), ExteNet Systems, Inc. ("ExteNet"), seeks judicial review of a decision of the Flower Hill Village Board of Trustees ("the Village" or "the Board") denying ExteNet's application for a permit to install wireless infrastructure on public rights-of-way in the village. Both parties move for summary judgment pursuant to Federal Rule of Civil Procedure 56. For the following, reasons the Village's motion is granted and ExteNet's is denied. *1

I

The following facts are taken from the pleadings and the parties' Rule 56.1 statements. Except where noted, they are undisputed.

ExteNet builds and operates telecommunications infrastructure, including "small wireless facilities" that house low-power antennas to improve network connectivity. It operates under a Certificate of Public Convenience and Necessity ("CPCN") from the New York State Public Service Commission.

As their name suggests, small wireless facilities are substantially smaller than the large, freestanding cellular towers traditionally used by providers. They are about the size of a backpack and, under regulations promulgated by the Federal Communications Commission ("FCC"), are mounted on structures (such as utility poles or buildings) no more than 50 feet high or 10% taller than adjacent structures, whichever is greater. See 47 C.F.R. § 1.6002(1)(1).

For approximately seven years, ExteNet has been under contract with Verizon Wireless, a major wireless provider, to build and operate small wireless facilities throughout Long Island. The stated goal of the contract is to improve coverage of Verizon's 4G LTE network.[1] In broad terms, Verizon identifies a deficiency in its network and asks ExteNet to design a solution that will provide a specified signal *2 strength over a specified area. Pursuant to its CPCN, ExteNet must secure permission from the local authorities before beginning installation.

1 4G LTE stands for "fourth-generation long-term evolution," a wireless standard that improves the capacity and speed of a carrier's network.

In 2016, Verizon identified the area around the Village of Flower Hill as having insufficient 4G LTE service and asked ExteNet to design and install a network of 66 small wireless facilities, eighteen of which would be located within the Village. Verizon estimated that the network would provide a signal strength of -85 decibel-milliwatts (dBm) to 90% of the area under consideration.

ExteNet first filed a permit application for one small wireless facility in May 2017. Shortly thereafter, the Village imposed a moratorium on such applications while it considered an ordinance governing them. In March 2019 the Board adopted Article VIII to Chapter 209 of the Village Code ("Article VIII"), which now regulates the approval process for small wireless facilities.

In the meantime, ExteNet had filed permit applications for the eighteen small wireless facilities to be located within the Village in late 2018 and early 2019. ExteNet proposed mounting the facilities on ten new utility poles, two existing poles and six replacement poles. At a meeting with ExteNet in April 2019, Village officials expressed a preference for more "decorative" poles disguised as streetlights and fewer utility poles. In response, ExteNet submitted a revised proposal for eleven streetlights, two existing poles and five replacement poles.

The Board held public hearings on ExteNet's application on May 6 and June 3, 2019. *3 Opposition to the proposal, which came from both members of the Board and residents, focused on the lack of need for improved 4G LTE coverage, adverse affects on Village's aesthetic and concerns about exposure to radio waves. In response, ExteNet offered to reduce the height of the mounting structures from 30 to 20 feet and to work with a consultant on an aesthetically acceptable streetlight design. Nevertheless, a third public meeting on July 1, 2019, revealed continued opposition.

Later in July, ExteNet hosted a public forum to discuss and identify designs for the decorative streetlights. No consensus emerged, with several participants rejecting the possibility of any acceptable design and others expressing a preference for existing utility poles. ExteNet then submitted yet another alternative using one or two streetlights, one flagpole, three existing poles, six or seven new poles and six replacement poles. At a fourth public meeting on August 5, 2019, ExteNet described the first proposal as focusing on utility poles, the second on decorative poles, and the third as a hybrid of the two.

At a public meeting held on September 3, 2019, the Board voted on ExteNet's application and unanimously denied it. It then approved a written statement of findings prepared by the Village Attorney and entered them into the record. As grounds for the denial, the statement of findings cited: "(1) the significant adverse aesthetic and property values impacts of the 18 nodes permeating the tiny Village; *4 (2) there is no gap in wireless coverage for Verizon and no need to justify the significant adverse impacts; and (3) ExteNet's abject refusal to submit for consideration an actual fixed plan for each of the 18 wireless nodes and poles, instead offering multiple different plans, with different pole/node locations and configurations, abject refusal and failure to provide onsite photo simulations for each of its proposed nodes, and refusal to comply with the public notice provisions of the Village Code which further required denial of the application." Defs. 56.1 Stmt. ¶ 13.

This action followed.

II

A. The Act's Preemptive Effect

The Act declares that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a). It then provides, however, that "[n]othing in this section affects the authority of a State or local government to manage the public rights-of-way . . ., on a competitively neutral and nondiscriminatory basis[.]" *Id.* § 253(c). These declarations are repeated -perhaps unnecessarily- later in the Act:

> (A) General authority
>
> Except as provided in this paragraph, nothing in this chapter shall limit
>
> 5 *5
>
> or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.
>
> (B) Limitations
>
> (i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof-
>
> (I) shall not unreasonably discriminate among providers of functionally equivalent services; and
>
> (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

Id. § 332(c)(7).

B. Substantial Evidence

In addition to banning prohibitions (or effective prohibitions) and discrimination, the Act requires that any denial of an application "to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record." 47 U.S.C. § 332(c)(7)(B)(iii). Substantial-evidence review is a "deferential standard, and courts may neither engage in their own fact-finding nor supplant the Board's reasonable determinations." Omnipoint Comm'ns, Inc. v. City of White Plains, 430 F.3d 529, 533 (2d Cir. 2005) (internal quotation marks and alterations omitted). "Substantial evidence, in the usual context, has been construed to mean less than a preponderance, but more than a scintilla of evidence." *Id.* (internal quotation marks omitted). 6 *6 "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (internal quotation marks omitted). "If the Court finds that even one reason given for the denial is supported by substantial evidence, the decision of the local zoning body cannot be disturbed." T-Mobile Ne. LLC v. Town of Islip, 893 F.Supp.2d 338, 355 (E.D.N.Y. 2012) (internal quotation marks and alteration omitted).

C. Summary

To summarize, the Act "is in many important respects a model of ambiguity or indeed even self-contradiction." AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 397 (1999). But at least three clear principles emerge from the statutory language and cases construing it.

First, the Act forbids a municipality from prohibiting or effectively prohibiting the provision of personal wireless services. Any local permitting requirement that does so is preempted.

Second, the Act requires a municipality to support its decision with substantial evidence.

Third, the Act requires a municipality to make its permitting decisions in a nondiscriminatory manner. A coverage gap has no apparent bearing on discrimination; rather, the statutory standard is whether the favored and disfavored applicants offer "functionally equivalent services," 47 U.S.C. § 332(c)(7)(B)(i)(I). 7 *7

With these principles in mind, the Court turns to ExteNet's claims in this case.

III

ExteNet's complaint includes four claims. First, it alleges that Article VIII is preempted because it facially constitutes an effective prohibition on personal wireless services in violation of 47 U.S.C. § 253(a). Second, it alleges that Article VIII, as it was applied to its permit application, is preempted for the same reason. Third, it alleges that the denial of its application violated § 332(c)(7) because it was an effective prohibition, discriminatory, and not supported by substantial evidence. Fourth, it claims that the denial violated § 27 of New York's Transportation Corporations Law.

The parties' motions for summary judgment reframe the issues in a more sensible way. The balance of this memorandum and order addresses those issues.

A. Did the Board's denial effectively prohibit personal wireless services?

As noted, the Act is not a model of clarity. In part, this is because it "strikes a balance between two competing aims-to facilitate nationally the growth of wireless telephone service and to maintain substantial local control over siting of towers." Omnipoint, 430 F.3d at 531 (internal quotation marks omitted).

The Second Circuit addressed where the balance lay in Sprint Spectrum L.P. v. Willoth, 176 F.3d 630 (2d Cir. 1999). After "a detailed parsing of the statutory language, including layers of highly technical definitions," the circuit court held that *8 the proper balance could be found by deciding "what Congress meant by 'personal wireless services.'" *Id.* at 641. It then concluded that "local governments may not regulate personal wireless service facilities in such a way as to prohibit remote users from reaching such facilities." *Id.* at 643. "In other words, local governments must allow service providers to fill gaps in the ability of wireless telephones to have access to land-lines." *Id.*

By contrast, the stated intent of Verizon's contract with ExteNet was to improve Verizon's 4G LTE service. Indeed, it is undisputed that a signal strength far less than Verizon's desired -85 dBm would still be sufficient to make a phone call. See Defs. Counter 56.1 Stmt. ¶ 151 ("At the level of signal strength is typically when the mobile user would experience their device 'downshift' into 3G or even 1X service which only supports voice." (quoting ExteNet's engineering expert)).

ExteNet objects that a 2018 ruling by the FCC expands the scope of the Act to include services beyond access to a telephone network. In that ruling, the FCC "clarif[ied] that an effective prohibition occurs where a state or local legal requirement materially inhibits a provider's ability to engage in any of a variety of activities related to its provision of a covered service. This test is met not only when filling a coverage gap but also when densifying a wireless network, introducing new services or otherwise improving service capabilities." In re Accelerating Wireless *Broadband Deployment by Removing Barriers to Infrastructure Inv.,* 33 F.C.C.R. 9088, 9104-05 (2018) *9 (footnotes omitted).

ExteNet argues that the FCC's ruling is entitled to deference under Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984). However, Chevron deference applies only when the statute in question is silent or ambiguous. See *Id.* at 842-43. Although the Second Circuit found the phrase "personal wireless services" "opaque," it ultimately relied on "[t]he plain statutory language" to define it. Therefore, the phrase was not ambiguous.

Improved capacity and speed are desirable (and, no doubt, profitable) goals in the age of smartphones, but they are not protected by the Act. See Willoth, 176 F.3d at 643 ("We hold only that the Act's ban on prohibiting personal wireless

services precludes denying an application for a facility that is the least intrusive means for closing a significant gap in a remote user's ability to reach a cell site that provides access to land-lines."). The circuit court may wish to reconsider its definition in light of new technology, but the Court is not in a position to ignore its binding pronouncement. Accord Crown Castle NG East LLC v. Town of Hempstead, 2018 WL 6605857, at *9 (E.D.N.Y. Dec. 17, 2018) ("A gap in 4G coverage does not establish that the target area is underserved by voice cellular telephone service."); Clear Wireless LLC v. Bldg. Dep't of Vill. of Lynbrook, 2012 WL 826749, at *9 (E.D.N.Y. Mar. 8, 2012) ("[I]t is not up to the FCC to construe the [Act] to say something it does not say, nor up to the Court to
10 find broadband communication *10 encompassed by the law." (internal quotation marks omitted)).

B. Was the Board's denial supported by substantial evidence?

Although the Act requires that the denial of an application to install wireless facilities be supported by substantial evidence, see 47 U.S.C. § 332(c)(7)(B)(iii), it does not set any substantive standards for evaluating the application; "[t]hat authority must be found in state or local law." Willoth, 176 F.3d at 644. Under New York law, lack of "public necessary" can justify a denial. See Omnipoint, 430 F.3d at 535 (citing Consol. Edison Co. v. Hoffman, 43 N.Y.2d 598, 611 (1978)). In the context of wireless facilities, public necessary requires the provider "to demonstrate that there was a gap in cell service, and that building the proposed [facility] was more feasible than other options." *Id.*

Thus, as with the effective prohibition issue, the lack of a gap in coverage is relevant here and can constitute substantial evidence justifying denial of a permit. For the reasons stated in the previous section, there was substantial evidence justifying the Board's conclusion that there was no gap in coverage justifying ExteNet's application. And, since one reason given by the Board for its decision was supported by substantial evidence, the Court need not evaluate its other reasons. See Town of Islip, 893 F.Supp.2d at 355.

C. Was the Board's denial discriminatory?

Unlike the prior two issues, there is little caselaw
11 as to what constitutes a *11 discriminatory denial. Fortunately, the statutory standard is clear. As noted, the comparison must be between "providers of functionally equivalent services." 47 U.S.C. § 332(c)(7)(B)(i)(I).

ExteNet principally argues that the Village's permitting process singles out small wireless facilities and impose requirements "above and beyond those applied to any other telecommunication structure." Pl's. Mem. of Law in Supp. of its Mot. for Summ. J. at 24. But it fails to identify any such structure that offers functionally equivalent services. The only other candidate in the record is a large cell tower, which, by ExteNet's own admission, does not offer the same functionality as its small wireless facilities.

ExteNet briefly argues that the Village allowed Altice USA to install small wireless facilities without prior permission, but the comparison is still not apt. Altice One is a cable provider to whom the Village was legally required to offer access to its rights-of-way. In addition, Altice USA offers cable and WiFi access; by ExteNet's own admission, these are not equivalent to the cell service provided by its small wireless facilities.

D. Did the Board's denial violate New York law?

Finally, ExteNet argues that the Board's denial violates § 27 of New York's Transportation Corporations Law. That statute-somewhat confusingly-governs telephone and telegraph corporations, and provides that "any such
12 corporation may *12 erect, construction and maintain the necessary fixtures for its lines upon, over or under any of the public roads, streets, and highways." *Id.*

Given its focus on "lines," it is far from clear that the statute applies to providers of wireless services. In any event, the statute requires that the corporation must "first obtain from . . . the trustees of villages . . . permission to use the streets within such . . . village . . . for the purposes herein set forth." *Id.* It is undisputed that ExteNet did not receive such permission.

IV

For the foregoing reasons, the Village's motion for summary judgment is granted and ExteNet's motion is denied. The Clerk shall enter a judgment dismissing the case.

13 **SO ORDERED.** *13

Exhibit D

Gladys Blankenship

From: Gladys Blankenship
Sent: Wednesday, December 30, 2020 9:56 AM
To: Michael Crawford
Cc: Marvin Callejas; Emilie Aure; Michael Crawford
Subject: RE: PWRW48749 Application (Long Beach)

Hi Michael,

Sorry about that. Please let me know if it works now. I've also sent it directly from OneDrive.

https://longbeach-my.sharepoint.com/:f:/g/personal/gladys_blankenship_longbeach_gov/EkcPjVaN4HNNkXAGDEpOdO8BOWlUnbhljZK96qxiT9xi2w?email=mcrawford%40synergy.cc&e=0sXUe6

Thank you.

From: Michael Crawford <mcrawford@synergy.cc>
Sent: Wednesday, December 30, 2020 8:19 AM
To: Gladys Blankenship <Gladys.Blankenship@longbeach.gov>
Cc: Marvin Callejas <mcallejas@synergy.cc>; Emilie Aure <Emilie.Aure@longbeach.gov>; Michael Crawford <mcrawford@synergy.cc>
Subject: RE: PWRW48749 Application (Long Beach)

-EXTERNAL-

Hi Gladys,

My access to use the link below is denied. Can you send me dropbox link or method to access the plans?

Thanks,
Michael

Michael Crawford | Project Manager | [redacted] (m) | mcrawford@synergy.cc
Advantage Engineers | 2500 Red Hill Avenue, Suite 240, Santa Ana, CA 92705 | www.advantageengineers.com

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From: Gladys Blankenship <Gladys.Blankenship@longbeach.gov>
Sent: Tuesday, December 29, 2020 4:20 PM
To: Michael Crawford <mcrawford@synergy.cc>
Cc: Marvin Callejas <mcallejas@synergy.cc>; Emilie Aure <Emilie.Aure@longbeach.gov>
Subject: FW: PWRW48749 Application (Long Beach)

Hi Michael,

The subject application has been reviewed and deemed incomplete, and the requested installations have been denied. Comments have been provided in the way of plan corrections to aid in completing the application.

In the link below, titled, "Redlines PWRW48749 12/27-20" are the marked up plans for the subject application. If you have any questions regarding the plan corrections provided, please contact Manuel Salgado at manuel.salgado@longbeach.gov. If you have any other questions regarding this matter, please contact me via email, at gladys.blankenship@longbeach.gov

https://longbeach-my.sharepoint.com/:f:/g/personal/gladys_blankenship_longbeach_gov/EkcPjVaN4HNNkXAGDEpOdO8BoikliOaGIVNu2xMtYk-M_w?e=bNzCLD

Important Notes:
PWRW48749_4 – This site lands within the Grand Prix Track. Special Events has approved review package.
PWRW48749_4 – The applicant is proposing to shut down all E. Bound traffic lanes on W. Seaside Way. The applicant has provided a detour map and custom traffic controls plans. These plans are required to be reviewed by Traffic Engineering for approval. Plans are redline because they are calling out W. Seashore Way instead of W. Seaside Way.
PWRW48749_5 – Excavation work affects the intersection of East 4th Street and Golden Ave. Traffic control will affect E. 4th Street and therefore plans should be provided with PE Stamp. Please specific which TCPs will be used to mitigate traffic for this area. Again, if traffic control impacts E. 4th Street, PE stamp must be applied.
PWRW48749_7 – This site lands within the Grand Prix Track. Special Events has approved review package.
PWRW48749_8 – RF Report missing from package. Possible gas lateral conflict with new pole location. Missing Tier B letter.

Once you have made all corrections to the plans please resubmit to me for another review.

Thank you,

Gladys Blankenship
Project Management Division
Gladys.Blankenship@longbeach.gov
PSOMAS | Balancing the Natural and Built Environment
ADDRESS CHANGE: Please note that the address for City Hall has changed from 333 W. Ocean Boulevard to 411 W. Ocean Boulevard, Long Beach, CA 90802.

From: Michael Crawford <mcrawford@synergy.cc>
Sent: Thursday, December 17, 2020 11:23 AM

To: Gladys Blankenship <Gladys.Blankenship@longbeach.gov>; Gladys Blankenship <gladys.blankenship@psomas.com>
Cc: Marvin Callejas <mcallejas@synergy.cc>; Emilie Aure <Emilie.Aure@longbeach.gov>; Michael Crawford <mcrawford@synergy.cc>
Subject: RE: PWRW48749 Application (Long Beach)

-EXTERNAL-

Gladys,

I created a dropbox folder for LKWD2_001 and shared the folder with you. You can also access it with the following URL--https://www.dropbox.com/sh/o8eclybt191uc6w/AAAZf38fs0EGI5dEFX3GrKZOa?dl=0.

I'm not sure that I know what a heat map is. If your referring to the propagation/coverage map, we don't submit those because we are not claiming that a "denial would cause a significant gap in coverage" per the city code section 15.34.030 D6. If you are not referring to the propagation/coverage map, then can you please clarify?

Thanks,
Michael

Michael Crawford | Project Manager | [redacted] (m) | mcrawford@synergy.cc
Advantage Engineers | 2500 Red Hill Avenue, Suite 240, Santa Ana, CA 92705 | www.advantageengineers.com

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From: Gladys Blankenship <Gladys.Blankenship@longbeach.gov>
Sent: Thursday, December 17, 2020 10:57 AM
To: Michael Crawford <mcrawford@synergy.cc>; Gladys Blankenship <gladys.blankenship@psomas.com>
Cc: Marvin Callejas <mcallejas@synergy.cc>; Emilie Aure <Emilie.Aure@longbeach.gov>; Michael Crawford <mcrawford@synergy.cc>
Subject: RE: PWRW48749 Application (Long Beach)

Hi Michael,

Thank you for your understanding.

It seems you're missing plans for site LKWD2_001 – 4351 Clark Ave and also missing the Heat Map. Can you please send those over?

Thank you,

From: Michael Crawford <mcrawford@synergy.cc>
Sent: Thursday, December 17, 2020 8:22 AM
To: Gladys Blankenship <gladys.blankenship@psomas.com>
Cc: Marvin Callejas <mcallejas@synergy.cc>; Emilie Aure <Emilie.Aure@longbeach.gov>; Gladys Blankenship <Gladys.Blankenship@longbeach.gov>; Michael Crawford <mcrawford@synergy.cc>
Subject: RE: PWRW48749 Application (Long Beach)

Exhibit E

2017 WL 5185481
Not Officially Published
(Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
Only the Westlaw citation is currently available.

Court of Appeal, First District, Division 4, California.

EXTENET SYSTEMS (CALIFORNIA), LLC, Plaintiff and Appellant,
v.
CITY OF BURLINGAME, Defendant and Respondent.

A145430
|
Filed 11/9/2017

(San Mateo County Super. Ct. No. CIV508756)

Attorneys and Law Firms

Robert Ronald Jystad, Robert Ronald Jystad, Julian Killen Quattlebaum, Channel Law Group, LLP, 8200 Wilshire Blvd., Suite 300, Beverly Hills, CA 90211, for Plaintiff and Appellant.

Jeffrey Thomas Melching, Rutan & Tucker, LLP, 611 Anton Blvd., Suite 1400, Costa Mesa, CA 92626, for Defendant and Respondent.

Opinion

Streeter, J.

***1** ExteNet Systems (California), LLC (ExteNet) appeals from the denial of its petition for a writ of administrative mandate, the denial of its motion for summary adjudication, and the grant of the City of Burlingame's (City) motion for summary adjudication. It raises a potpourri of issues, contending the City's decision to deny six of its eight requested encroachment permits for the siting of certain wireless carrier facilities (WCFs) (1) was not based on substantial evidence; (2) was an abuse of discretion; (3) violated articles XI and XII of the California Constitution, Government Code section 815.6, and 47 United States Code section 253; (4) was preempted by Public Utilities Code sections 701, 1001, 1002, 7901, and 7901.1;[1] (5) was in excess of any authority granted to the City under section 2902; and (6) violated the federal constitutional guarantees of due process and equal protection. The crux of ExteNet's appeal is that the City erred in all of these ways by denying its requested permits based on aesthetic considerations. We disagree with its various contentions, and affirm.

I. BACKGROUND

A. The Parties

ExteNet is a telephone corporation authorized to construct distributed antenna system (DAS) networks as a full facilities-based competitive local exchange carrier, pursuant to a certificate of public convenience and necessity granted by the California Public Utilities Commission (Commission). It provides infrastructure in the form of DAS networks to wireless service providers, like T–Mobile. A DAS network is composed of nodes, also known as wireless communication facilities (WCFs). Each node in the network is connected to all of the other nodes via fiber optic cable. The fiber optic cable runs back to an off-site location where a wireless service provider's equipment can connect it to the provider's overall network.[2]

At issue in this appeal is the City's denial of six of a total of eight DAS site permits sought by ExteNet in 2010. Before those denials, two wireless providers had successfully obtained encroachment permits from the City,[3] one by AT & T in 2007 and one by T–Mobile in 2009. The City did not have regulations in place that covered encroachments by telecommunications providers. When the permit process for T–Mobile in 2009 resulted in community complaints, especially about aesthetics and lack of community outreach and notification, the City adopted guidelines for "Permit, Location, Design and Public Notification Requirements Associated with Telecommunications Provider's Placement of Facilities On Utility Poles Located Within the City's Right-of-Way" (ROW Regulations), thereby setting forth a permitting process to engage the community more effectively than it was able to do prior to adoption of the ROW Regulations. Among other things, the ROW Regulations, which governed the ExteNet permit approval process in 2010, provided that any person could appeal to the City council a staff level decision (e.g., by the City engineer) to grant a permit for the installation of WCFs. Further, the ROW Regulations specifically allowed the City to consider aesthetics when deciding WCF site permit applications.

B. Procedural History of the Underlying Administrative Decision

***2** On September 28, 2010, ExteNet applied for WCF site permits allowing placement of DAS network antennas on eight utility poles in the City's residential neighborhoods. Invoking its recently adopted ROW Regulations, the City sought public comment on ExteNet's applications. Almost all of the public comments were critical of the applications, and many raised aesthetic concerns. Attempting to respond to these criticisms, ExteNet worked with the City to modify its plans over the next few months,[4] and it eventually obtained tentative approval from the City engineer in February 2012 for all eight nodes. Disappointed with the engineer's decision, in March two residents appealed it to their City council. The hearing on the appeal took place on April 16, 2012, where, during the appellant residents' presentation and the public comment portion of the hearing, the City council gathered input from residents, including more aesthetic criticisms. For instance, one resident referred to a node that would be placed near her home as a "piece of junk." Based on the continuing reservations expressed by community members about the aesthetics of ExteNet's proposed WCF sites, the City council unanimously disagreed with the engineer's decision in part, overturning six of the eight node site permits.

C. The Litigation

Given the need for more than two nodes, the denial of six of eight site permits effectively blocked ExteNet from implementing an operable DAS network in the City. Although the council members expressed a desire to engage further with ExteNet to find a workable solution, ExteNet chose instead to bring suit, seeking declaratory and injunctive relief, an administrative writ of mandate, and damages for negligence per se and interference with contractual relations. On cross-motions for summary adjudication, the court issued an order adverse to ExteNet on all claims and entered judgment in favor of the City on April 14, 2015. ExteNet filed a timely notice of appeal.

II. DISCUSSION

Grouped procedurally, ExteNet raises three groups of issues on appeal: (1) whether the trial court erred in denying a writ of administrative mandate, (2) whether the court erred in denying its motion for summary adjudication, and (3) whether the court erred in granting the City's motion for summary adjudication. We address its contentions below.

A. Writ of Administrative Mandate

ExteNet fails to articulate precisely its basis for attacking the trial court's denial of its petition for a writ of administrative mandate,[5] although it does present some arguments related to Code of Civil Procedure section 1094.5, subdivision (a), the statutory provision governing administrative writs. We conclude the trial court properly denied ExteNet's petition for a writ of administrative mandate.

1. Standard of Review

In administrative mandate proceedings, except where fundamental vested rights are concerned, the trial court reviews the agency's decisions on issues of law de novo and reviews the agency's factual determinations for substantial evidence in support of those findings in the administrative record. (Code Civ. Proc., § 1094.5, subds. (b) and (c); *Schafer v. City of Los Angeles* (2015) 237 Cal.App.4th 1250, 1260–1261, 188 Cal.Rptr.3d 655.) ExteNet has not suggested that fundamental vested rights are involved here. "An appellate court in a case not involving a fundamental vested right reviews the agency's decision, rather than the trial court's decision, applying the same standard of review applicable in the trial court." (*Id.* at p. 1261, 188 Cal.Rptr.3d 655.) Thus, the appellate court performs the same function as the trial court. (*Id.* at pp. 1260–1261, 188 Cal.Rptr.3d 655; accord, *Department of Health Care Services v. Office of Administrative Hearings* (2016) 6 Cal.App.5th 120, 140, 210 Cal.Rptr.3d 790.) For purposes of our review, evidence is "substantial" if it is " ' " ' "reasonable in nature, credible, and of solid value." ' " ' " (*Schafer*, at p. 1260, 188 Cal.Rptr.3d 655.) One witness's testimony may suffice. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614, 122 Cal.Rptr. 79, 536 P.2d 479 (*Mix*); *Doe v. Regents of University of California* (2016) 5 Cal.App.5th 1055, 1074, 210 Cal.Rptr.3d 479 (*Doe*).) We are authorized to overturn the City's decision only if no reasonable person could have reached the same conclusion. (*Doe*, at p. 1073,; accord, *Kutzke v. City of San Diego* (2017) 11 Cal.App.5th 1034, 1040, 218 Cal.Rptr.3d 206.) "The trier of fact's determination [of a witness's credibility] will be interfered with on appeal *only* when it appears that the witness'[s] testimony is inherently so improbable as to be unworthy of belief." (*Wilson v. State Personnel Bd.* (1976) 58 Cal.App.3d 865, 877, 130 Cal.Rptr. 292 (*Wilson*), italics

added.) That requires deference to the City's assessment of credibility, for the trial court "does not act as a trier of fact" in administrative mandate. (*Schafer*, at p. 1260, 188 Cal.Rptr.3d 655.)

***3** We begin with a " 'presumption that the record contains evidence to sustain the [City's] findings of fact. [Citation.] ... [Citation.] The burden is on [ExteNet] to prove the [City's] decision is neither reasonable nor lawful.' " (*Los Altos El Granada Investors v. City of Capitola* (2006) 139 Cal.App.4th 629, 648, 43 Cal.Rptr.3d 434 (*Capitola*); *Donley v. Davi* (2009) 180 Cal.App.4th 447, 455–456, 103 Cal.Rptr.3d 1.) ExteNet has not met this burden. "Because we are reviewing a *denial* of a requested [siting] permit, it is not necessary to determine that *each* finding by the [City] was supported by substantial evidence. As long as the [City] made a finding that any one of the necessary elements enumerated in the ordinances was lacking [(e.g., lacking appropriate amount of consideration for aesthetic concerns)], and this finding was itself supported by substantial evidence, the [City's] denial of [ExteNet's] application must be upheld." (*Desmond v. County of Contra Costa* (1993) 21 Cal.App.4th 330, 336–337, 25 Cal.Rptr.2d 842 (*Desmond*).)

2. The Trial Court Properly Denied the Writ of Mandate

ExteNet argues the City council abused its discretion by "reversing" the City engineer's tentative decision to grant ExteNet the permits it requested. Specifically, ExteNet contends the City failed to follow its own municipal code and regulations, and requests that this court (as it did with the trial court) require the City to follow what ExteNet contends is the proper interpretation of those provisions. In our view, ExteNet misreads the Burlingame Municipal Code (BMC) and the ROW Regulations, and simply seeks to have us read the record differently than the City did, ignoring the deference the City is due under the substantial evidence standard.

In general, we construe municipal codes and local regulations according to our independent judgment. (*Citizens for Responsible Equitable Environmental Development v. City of San Diego* (2010) 184 Cal.App.4th 1032, 1040–1041, 109 Cal.Rptr.3d 702 (*Citizens*).) But we give some degree of deference to a city's interpretation of its own municipal code; exactly how much deference we give is " 'fundamentally *situational*' " and depends on the individual facts—a case-by-case test set out by the Supreme Court in *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 6–15, 78 Cal.Rptr.2d 1, 960 P.2d 1031. (*Citizens,* at p. 1041, 109 Cal.Rptr.3d 702.) We afford greater deference if the City " ' "has expertise and technical knowledge, especially where the legal text to be interpreted is technical, obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion[,]" ' " "where there are 'indications of careful consideration by senior agency officials[,]' " and where there is " 'evidence that the agency "has consistently maintained the interpretation in question, especially if [it] is long-standing[.]" ' " (*Citizens,* at pp. 1041–1042, 109 Cal.Rptr.3d 702.)

Here, the municipal code provisions and regulations are not " ' "technical, [etc.]" ' " nor have they been " ' "consistently maintained ... [or] long-standing." ' " (*Citizens, supra*, 184 Cal.App.4th at pp. 1041–1042, 109 Cal.Rptr.3d 702.) Nonetheless, they are " ' "entwined with issues of fact, policy, and discretion," ' " and they, in our view, were adopted after " 'careful consideration by [City] officials.' " (*Id.* at p. 1041, 109 Cal.Rptr.3d 702.) Thus, while exercising our own independent judgment, we give the City's interpretation of its own codes and regulations substantial deference. (*Ibid.*)

a. The City Followed Its Municipal Code

Three provisions of the BMC are implicated here. First, BMC section 12.10.040, subdivision (f) provides that "[a]ny encroachment permit issued under this chapter [i.e., by the City engineer] *shall be revocable by the [C]ity* upon written notice." (Italics added.) Second, BMC section 12.10.050 provides that "[a]ny decision of the [C]ity engineer concerning an encroachment permit may be appealed by the applicant to the [C]ity council. Such appeal shall be made in writing within five (5) days after written notice of the decision of the [C]ity engineer is sent to the applicant. Additionally, all decisions of the [C]ity engineer shall be reported to [C]ity council and *shall not be final until the conclusion of the [C]ity council meeting at which such report is received.*" (Italics added.) And third, BMC section 12.10.060 provides that, "[i]n the event that an appeal is taken, the matter shall be referred to the [C]ity council for [a] hearing. At the conclusion of the hearing the [C]ity council shall make its order approving, modifying *or reversing the action of the [C]ity engineer. The decision of the [C]ity council shall be final and conclusive.*" (Italics added.)

***4** ExteNet reads BMC sections 12.10.050 and 12.10.060 to mean only the applicant can appeal the City engineer's

decision. And since it was in fact two residents, not ExteNet, who appealed the engineer's decision, ExteNet argues the City violated its own laws by allowing the appeal to proceed at all. We are not persuaded. BMC section 12.10.050 gives a right of appeal to a disappointed applicant, but there is no reason to conclude that the ability to seek review is exclusive to applicants. Section 12.10.060 does not (explicitly or implicitly) state that "an appeal" means only "an appeal under BMC section 12.10.050." And although the BMC does not specifically grant anyone but the applicant a right to appeal the engineer's decision, the ROW Regulations in fact do. (ROW Regs., § E ["[A]ny person may appeal the approval or denial of the permit."].) To the extent there is any contradiction between the BMC and the regulations, "[t]he City Attorney reconciled the provisions by interpreting the BMC to allow an appeal by any party to the City Council," a construction which we believe deserves deference. (See *Citizens*, *supra*, 184 Cal.App.4th at pp. 1041–1042, 109 Cal.Rptr.3d 702.) Moreover, ExteNet's reading downplays BMC section 12.10.040, subdivision (f), which unequivocally states that, even if the encroachment permit is (provisionally) granted (by the City engineer or council), it is at all times "revocable ... upon written notice." ExteNet received adequate notice here. [6]

b. The City Followed Its ROW Regulations

Among the grounds the City relied upon in denying ExteNet's permits was aesthetics. Without expressly mounting an attack on the use of aesthetics as a proper ground for decision, ExteNet argues that the City failed to follow its own ROW Regulations, and specifically, that the City denied its application on various unauthorized grounds, citing a laundry list of bases for the City's decision. [7] Because this line of argument boils down to a contention that the City council's decision was not supported by substantial evidence, we will affirm if the record supports any one ground for the City's denial. (*Desmond*, *supra*, 21 Cal.App.4th at pp. 336–337, 25 Cal.Rptr.2d 842.) Even if the City improperly relied on other grounds in its decision (an issue we need not, and do not, reach), we conclude that the record supports reliance on aesthetics alone as a proper basis for its decision. Any error in its reliance on other grounds was harmless. (See *Sun State Towers LLC v. Cty. of Coconino* (D. Ariz., Oct. 25, 2017, No. CV–17–08075–PCT–GMS), 2017 WL 4805117, p. *3, 2017 U.S. Dist. LEXIS 176541, pp. *8–9.)

c. There Is Substantial Evidence to Support the City's Decision

The City received a large number of public comments expressing aesthetic objections to the proposed DAS network nodes. These objections are sufficient to provide substantial record evidence for the City's denials. (Cf. *Mix*, *supra*, 14 Cal.3d at p. 614, 122 Cal.Rptr. 79, 536 P.2d 479; *Doe*, *supra*, 5 Cal.App.5th at p. 1074.) ExteNet invites us to give this chorus of objections no weight, by applying what it characterizes as a standard of "reasonableness," a test for which it supplies no authority. ExteNet rather floridly insists that the objections raised here reflect "an irrational public fear hidden under an overstated concern for aesthetics having an undue influence on local politicians who misused their own process in order to ensure that the network would not be constructed." That characterization points up why it would be ill-advised for us to announce some new test of "reasonableness" whenever aesthetic concerns are in play in administrative decisionmaking. The notion is at odds with the deference built in to our usual standards of judicial review in this setting. Since the testimony of a single witness, if believed by the trier of fact, can be substantial evidence (see *Mix*, at p. 614, 122 Cal.Rptr. 79, 536 P.2d 479; *Doe*, at p. 1074,), and since none of the public input relied upon by the City seems to us "inherently so improbable as to be unworthy of belief" (see *Wilson*, *supra*, 58 Cal.App.3d at p. 877, 130 Cal.Rptr. 292), we must conclude that the record here supports the City's permit denials.

***5** Were we to accept ExteNet's proposed standard of evaluating aesthetic concerns according to our own sense of "reasonableness," we wonder what evidence would suffice to support the City's permit denials? Since the time of Aristotle, philosophers have understood aesthetics to be largely subjective in nature. (See, e.g., *Beauty* (Oct. 5, 2016) Stanford Encyclopedia of Philosophy <https://plato.stanford.edu/entries/beauty/> [as of November 9, 2017].) ExteNet suggests that an approach focused solely on subjective standards, if "[t]aken to its extreme ... would allow [, e.g.,] Beverly Hills to require all telephone poles to be covered in gold and encrusted with diamonds." Maybe so, but that is not what occurred here. At the back of ExteNet's argument for a "reasonableness" standard, implicitly, is the suggestion that the City engaged in arbitrary and standardless decisionmaking. We do not see it.

The City set forth in its ROW Regulations various design factors it would consider in making its decision about aesthetics, including "placement, screening, and camouflage," as well as compatibility with existing "architectural elements." (ROW Regs., § A, subd. (2)(b).) The ROW Regulations also express a preference for the "smallest and least visible antennas" feasible in light of technical requirements. (*Ibid.*; see also *id.*, § A, subd. (2)(c) [colors must "match or blend with the primary background"]; *id.*, § A, subd. (2)(e) ["equipment shall be camouflaged"]; *id.*, § A, subd. (2)(g) ["Where appropriate, facilities shall be installed so as to maintain and enhance existing landscaping on the site ...."]; see also *id.*, § A, subd. (2)(k) ["The [C]ity shall retain the authority to limit the number of antennas and/or related equipment to be located at any site and adjacent sites in order to prevent negative visual impact associated with multiple facilities."].) The City's inclusion of such objective criteria, we believe, provided a safeguard against wholly subjective and arbitrary decisionmaking, and shaped the City's specific decision in this case. So long as a municipality announces in advance that aesthetic criteria will be taken into account in regulatory decisionmaking, as the City did here, and so long as its decision passes muster under the applicable standard of judicial review and adheres to the state and federal constitutions, as the decision under review does, our task in scrutinizing what it has decided is at an end.

B. Summary Adjudication

We next address the trial court's summary adjudication rulings. In granting summary adjudication to the City and denying it to ExteNet, we conclude the trial court ruled correctly.

1. Standard of Review

Unlike summary judgment, which disposes of the entire complaint, "[s]ummary adjudication motions are restricted to an entire cause of action, an affirmative defense, a claim for punitive damages, or an issue of duty." (*Travelers Indemnity Co. v. Maryland Casualty Co.* (1996) 41 Cal.App.4th 1538, 1542, 49 Cal.Rptr.2d 271.) Still, "[m]otions for summary adjudication are procedurally identical to motions for summary judgment." (*Dunn v. County of Santa Barbara* (2006) 135 Cal.App.4th 1281, 1290, 38 Cal.Rptr.3d 316.) "A trial court properly grants summary [adjudication] where no triable issue of material fact exists and the moving party is entitled to [adjudication] as a matter of law." (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476, 110 Cal.Rptr.2d 370, 28 P.3d 116; see also Code Civ. Proc., § 437c, subd. (f).) We review the trial court's decisions on both parties' motions for summary adjudication de novo, "considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports." (*Merrill*, at p. 476, 110 Cal.Rptr.2d 370, 28 P.3d 116.)

"In performing our de novo review, we must view the evidence in a light favorable to [ExteNet] as the losing party [citation], liberally construing [its] evidentiary submission while strictly scrutinizing [the City's] own showing, and resolving any evidentiary doubts or ambiguities in [ExteNet's] favor." (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768–769, 107 Cal.Rptr.2d 617, 23 P.3d 1143; accord, *Y.K.A. Industries, Inc. v. Redevelopment Agency of City of San Jose* (2009) 174 Cal.App.4th 339, 352–353, 94 Cal.Rptr.3d 424.) "If summary [adjudication] was proper on grounds other than those articulated by the trial court, the appellate court *must nevertheless affirm.*" (*Barton v. Elexsys Internat., Inc.* (1998) 62 Cal.App.4th 1182, 1187–1188, 73 Cal.Rptr.2d 212, italics added (*Barton*).)

***6** "Although our review of a summary [adjudication] is de novo, it is limited to issues which have been adequately raised and supported in [ExteNet's] brief[s]. [Citations.] Issues not raised in an appellant's brief are deemed waived or abandoned." (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6, 76 Cal.Rptr.2d 457.) "Since [ExteNet] ha[s] not addressed the court's summary adjudication of [its] causes of action" related to negligence per se and intentional interference with contractual relations, as the City points out, "we do not address the merits of those causes of action." (*Ibid.*; accord, *Tisher v. California Horse Racing Bd.* (1991) 231 Cal.App.3d 349, 361, 282 Cal.Rptr. 330.) We review questions of statutory interpretation and preemption de novo, following traditional principles of statutory interpretation (*Coyne v. City and County of San Francisco* (2017) 9 Cal.App.5th 1215, 1224, 215 Cal.Rptr.3d 589 [preemption]; *Hardesty v. Sacramento Metropolitan Air Quality Management Dist.* (2011) 202 Cal.App.4th 404, 420, 136 Cal.Rptr.3d 132 [statutory construction]), which require us "to ascertain the intent of the Legislature so as to effectuate the purpose of the law" (*Dyna–Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386–1387, 241 Cal.Rptr. 67, 743 P.2d 1323).

2. The Trial Court Properly Ruled on Both Parties' Motions for Summary Adjudication

ExteNet raises a number of issues challenging the trial court's rulings on both parties' motions for summary adjudication. We disagree with all of its arguments, as explained below.

a. No Violation of the California Constitution, Articles XI and XII

In its opening brief, ExteNet states a general contention: "the City did not act within its legitimate authority under the California Constitution." But the two sections to which it points in support of this proposition [8] do not help ExteNet (see Cal. Const., art. XII, §§ 5 & 8); nor do other provisions ExteNet conveniently disregards, minimizes, or ignores (see Cal. Const., Art. XI, §§ 5, 7 & 9). ExteNet's argument is essentially that the City encroached upon the Commission's purportedly exclusive authority under article XII to grant WCF siting permits.

Article XII, section 5 of the California Constitution provides that "[t]he Legislature has plenary power, unlimited by the other provisions of this constitution but consistent with this article, to confer additional authority and jurisdiction upon the [C]ommission, to establish the manner and scope of review of [C]ommission action in a court of record, and to enable it to fix just compensation for utility property taken by eminent domain." Section 8 further provides, in relevant part, that "[a] city, county, or other public body may not regulate matters over which the Legislature grants regulatory power to the Commission."

Far from demonstrating how the City has encroached upon power the Legislature has conferred upon the Commission, ExteNet has shown only that the Commission has given its approval of the DAS networks, and has exempted the equipment from review under the California Environmental Quality Act. But this does not mean the Legislature has given the Commission exclusive authority over these permits. And ExteNet points to no authority stating that once the Commission makes a decision on the considerations over which it has authority, a municipality like the City is thereby stripped of all power related to the permit application. Indeed, as we discuss below, the Legislature has time and again provided municipalities with the right to control some aspects of the application process. (See, e.g., §§ 2902, 7901 & 7901.1.) Such a balance between the powers the Legislature has granted the Commission and those left to the municipalities is understandable given the seemingly competing nature between article XII, sections 5 and 8, and Article XI, sections 5, subdivision (a) (cities can exercise all powers within their charters, limited by state laws), 7 (cities may exercise general police powers), and 9 (cities can regulate public works) of the California Constitution —as well as between different statutory provisions of the Public Utilities Code. (See *City of Huntington Beach v. Public Utilities Com.* (2013) 214 Cal.App.4th 566, 590–591, 154 Cal.Rptr.3d 241 (*Huntington Beach*).) We next turn to consider whether these statutory provisions are at odds with the constitutional provisions noted by ExteNet.

b. No Preemption by Sections 7901 and 7901.1

***7** ExteNet contends the City's decision to deny its permit application was preempted by sections 7901 and 7901.1. Section 7901 allows "[t]elegraph or telephone corporations [to] construct lines ... along and upon any public road or highway ... and [to] erect poles ... for supporting the ... wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway." ExteNet argues section 7901 does not allow the City to consider aesthetic impacts because "incommode," as used in the statute, means only blocking the ability to travel. Further, ExteNet argues the City did not act reasonably because it failed to treat ExteNet "in an equivalent manner," compared to AT & T (in 2007) and T–Mobile (in 2009), under section 7901.1, subdivision (b). [9] These arguments were rejected *in T–Mobile West LLC v. City and County of San Francisco* (2016) 3 Cal.App.5th 334, 208 Cal.Rptr.3d 248, review granted Dec. 21, 2016, S238001 (*T–Mobile*), which we find persuasive, and, as explained below, will follow.

In *T–Mobile,* the city of San Francisco, in an effort to maintain its property values and the beauty of its scenic vistas, enacted an ordinance requiring anyone seeking to construct telecommunications equipment (e.g., wireless facilities) in the public right-of-way to obtain a site-specific permit. (*T–Mobile, supra*, 3 Cal.App.5th at pp. 339–341, rev. granted.) The ordinance specifically "authorize[d] consideration of aesthetics" in making permitting decisions. (*Id.* at p. 339.) A few months later, the plaintiffs, who included ExteNet, sued San Francisco for declaratory and injunctive relief, arguing, among other things, the ordinance on its face violates and is

preempted by sections 7901 and 7901.1. (*Id.* at p. 342.) After losing at the trial court, the plaintiffs appealed. (*Id.* at p. 344.)

Our colleagues in Division Five determined that the ordinance, on its face, does not conflict with and is not preempted by sections 7901 and 7901.1. (*T–Mobile, supra*, 3 Cal.App.5th at p. 344, rev. granted.) The court's opinion was in two parts: (1) sections 7901 and 7901.1 do not impliedly preempt the municipal ordinance (*id.* at pp. 346–356), and (2) the ordinance does not directly conflict with (and thus is not preempted by) section 7901.1, subdivision (b) (*id.* at pp. 356–358). In part one of its opinion, the court agreed with the City: the "plain meaning of the term 'incommode' is broad enough 'to be inclusive of concerns related to [aesthetics].' " (*Id.* at p. 344.) In so holding, the court rejected the "[p]laintiffs' position ... that 'incommode' means only physical obstruction of travel in the public right-of-way." (*Id.* at p. 351; see also *id.* at p. 355.) [10] After reviewing pertinent provisions and histories of the California Constitution (discussed in section II.B.2.a, *ante*) and relevant statutes, the court concluded that "[t]elegraph and telephone corporations have long been granted the right (franchise) to construct their lines along and upon public roads and highways throughout the state ... subject to regulation to ensure such lines do not 'incommode' the public's use of those roads and highways." (*Id.* at p. 347, citations omitted.)

***8** In part two of its opinion, the court found the ordinance did not implicate section 7901.1, subdivision (b) because the City's ordinance "is not a regulation of '... *construction*—but is instead a regulation that permits Wireless Facilities to be installed in the public right-of-way subject to certain siting criteria.' " (*T–Mobile, supra*, 3 Cal.App.5th at p. 357, original italics; see also *id.* at pp. 344, 353.) The court construed the term "accessed" in subdivision (a) to be "concerned solely with 'temporary access' for construction purposes," based on its review of the section's legislative history, which included committee analyses and reports attached to the enacting statutes, as well as debates on the Legislature floor. (*Id.* at p. 358, citing *Sprint PCS Assets v. City of Palos Verdes Estates* (2009) 583 F.3d 716, 725 (*Palos Verdes Estates*).) Based on its construction of subdivisions (a) and (b), the court concluded section 7901.1 "does not apply to the [o]rdinance." (*T–Mobile,* at p. 344,, rev. granted.)

We see no reason to disagree with the panel's thorough treatment of this issue in *T–Mobile*: "incommode" under section 7901 encompasses far more than physical blockages to travel, and includes aesthetic concerns; and section 7901.1, subdivision (b) does not implicate the City's decision here because ExteNet does not argue it was treated differently for purposes of temporary construction. (See *T–Mobile*, *supra*, 3 Cal.App.5th at pp. 344–358, rev. granted.) This case, to be sure, differs procedurally from *T–Mobile* since ExteNet appeals from the denial of a group of site permits in a specific factual setting and thus its preemption challenge comes before us as applied, while the *T–Mobile* court addressed a facial preemption challenge. But that makes no difference to the result here, since, as we note above, the record supports the City's decision to deny ExteNet's site permits.

c. Section 2902 Applies

ExteNet deems section 2902 to be "deadwood," contending it applies only to certain types of municipal elections. We do not read the section so narrowly, given its broad language and the construction given it by the courts.

Section 2902 provides, in relevant part, that Chapter 1 of Part 3 of Division 1 of the Public Utilities Code "shall not be construed to authorize any municipal corporation to surrender to the [C]ommission its powers of control to supervise and regulate the relationship between a public utility and the general public in matters affecting the health, convenience, and safety of the general public, including matters such as the use and repair of public streets by any public utility [and] the location of the poles, wires, mains, or conduits of any public utility, on, under, or above any public streets ...." Taking sections 2902, 7901, and 7901.1 together, "the Public Utilities Code," as we read it, "specifically contemplates potential conflicts between the rights of telephone corporations to install telephone lines in the public right-of-way and the rights of cities to regulate local matters such as the location of poles and wires." (*Huntington Beach*, *supra*, 214 Cal.App.4th at p. 591, 154 Cal.Rptr.3d 241.) Hence, "[i]nstead of preempting local regulation," as ExteNet argues, "the statutory scheme (§§ 2902, 7901, 7901.1) and the above authority [including *Huntington Beach*] suggest the Legislature intended the state franchise would coexist alongside local regulation." (*T–Mobile*, *supra*, 3 Cal.App.5th at p. 349, rev. granted.) Thus, we conclude section 2902 indeed applies to this case and supports the finding that the City retains its general police powers (see § 2902).

d. No Violation of Government Code Section 815.6

ExteNet argues the City was not entitled to summary adjudication under Government Code section 815.6, on the theory that the City violated some "mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury." We disagree.

***9** "[Government Code] [s]ection 815.6 has three discrete requirements which must be met before governmental liability may be imposed under [that provision]: (1) an enactment must impose a mandatory duty; (2) the enactment must be meant to protect against the kind of risk of injury suffered by the party asserting section 815.6 as a basis for liability; and (3) breach of the mandatory duty must be a proximate cause of the injury suffered." (*San Mateo Union High School Dist. v. County of San Mateo* (2013) 213 Cal.App.4th 418, 428–429, 152 Cal.Rptr.3d 530 (*San Mateo*).) Failing to prove any one of these three requirements would defeat ExteNet's claim the City failed to carry out some supposed mandatory duty. (See *ibid.*) " ' "Whether an enactment creates a mandatory duty is a question of law: 'Whether a particular statute is intended to impose a mandatory duty, rather than a mere obligation to perform a discretionary function, is a question of statutory interpretation for the courts.' " ' " (*Id.* at pp. 428–429, 152 Cal.Rptr.3d 530.) We construe this requirement " 'strictly, [and will] find[ ] a mandatory duty only if the enactment "affirmatively imposes the duty and provides implementing guidelines." ' " (*Id.* at p. 429, 152 Cal.Rptr.3d 530.)

ExteNet fails to demonstrate what mandatory duty the City had, which is the first requirement for imposing liability on the City under Government Code section 815.6; and anyway, ExteNet does not point to "an enactment that is designed to protect against the risk of a particular kind of injury," which is the second requirement. To the extent ExteNet contends (1) its alleged deprivation of property rights or interests as "a particular kind of injury," and (2) the "enactment" imposing such mandatory duty derived from either one or more of the constitutional or statutory provisions cited throughout its briefs (i.e., Cal. Const., arts. XI & XII; Public Util. Code, §§ 701, 1001, 1002, 2902, 7901 & 7901.1; BMC §§ 12.10.040–12.10.060), we believe our discussion above concerning each of these provisions suffices to resolve the issues it raises here. [11] Thus, ExteNet has not demonstrated how the "particular kind of injury" requirement is satisfied, and has not identified a "mandatory duty" on the part of the City, "which is ultimately dispositive" against imposing liability on the part of a City under Government Code section 815.6. (*San Mateo*, *supra*, 213 Cal.App.4th at p. 428, 152 Cal.Rptr.3d 530.)

e. No Violation of 47 United States Code Section 253

ExteNet argues the City's denial of six of its eight site permits had the actual effect of prohibiting its ability to provide telecommunications services, in violation of 47 United States Code section 253 (section 253). Although we see no basis to question ExteNet's assertion that the realities of engineering a successful DAS network make it impossible to operate such a network with just two nodes, we cannot agree that the City's decision violated federal law in denying its site permits.

To begin with, ExteNet's analysis largely disregards the foundational authority preserved by 47 United States Code section 332(c)(7)(A): "Except as provided in this paragraph, nothing in this Act shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." 47 United States Code section 332(c)(7)(B) specifies certain exceptions, including that local governments "shall not unreasonably discriminate among providers of functionally equivalent services," and "shall not prohibit or have the effect of prohibiting the provision of personal wireless services." (47 U.S.C. § 332(c)(7)(B)(I) & (II).) By expressly providing for the power of local governments, federal law is consistent with state law in reserving to local authorities questions relating to placement and appearance of telecommunications systems. It is important to recognize this as the starting point of analysis, for ExteNet's argument turns on certain exceptions to recognized local power over "placement, construction, and modification of personal wireless service facilities." (47 U.S.C. § 332(c)(7)(A).)

***10** Two provisions of section 253 are most specifically pertinent. First, section 253(a), similarly to 47 U.S.C. section 332(c)(7)(B)(II), provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." Second, section 253(c) provides that "[n]othing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-

of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government." "Thus, section 253(a) states the general rule and section 253(c) provides the exception—a safe harbor functioning as an affirmative defense—to that rule." (*Level 3 v. City of St. Louis, Mo.* (8th Cir. 2007) 477 F.3d 528, 532 (*Level 3*).)

Under the *Level 3* analysis, we begin with section 253(a). The Ninth Circuit has held that " 'a plaintiff suing a municipality under section 253(a) must show actual or effective prohibition, rather than the *mere possibility* of prohibition.' " (*Palos Verdes Estates*, *supra*, 583 F.3d at p. 728, original italics, quoting *Sprint Telephony PCS, L.P. v. County of San Diego* (9th Cir. 2008) 543 F.3d 571, 578 (en banc).) Assuming it is true ExteNet cannot construct its DAS network with just two nodes, ExteNet has not persuaded us the City's decision was an outright prohibition, instead of "the mere possibility of prohibition." (See *Palos Verdes Estates,* at p. 728,.) After all, the City council members expressly asked ExteNet to reapply, showing their desire to continue working with the company to find a more agreeable solution. Or, as the trial court put it, ExteNet was "given the opportunity to [reapply], but chose not to" do so, and instead chose to initiate this lawsuit. Hence, the City did not violate section 253(a).

Then, even if the City's denial did meet the standard of "effect[ively]" prohibiting ExteNet from pursuing its telecommunications services, in violation of section 253(a), we look next to the "safe harbor" provision in section 253(c). (See *Level 3, supra*, 477 F.3d at p. 532.) ExteNet contends if section 253(c) were to apply, the City's "manage[ment] [of] the public rights-of-way" when it considered ExteNet's application was not "on a competitively neutral and nondiscriminatory basis," as it argues section 253(c) commands. We are not persuaded. We read section 253(c) to have essentially two parts, with the first including the phrase "manage the public rights-of-way," and the second to be all of the clauses after the disjunctive "or" immediately thereafter. The phrase "on a competitively neutral and nondiscriminatory basis" is most naturally read as an independent clause qualifying the broader language "to require fair and reasonable compensation from telecommunications providers ... for use of public rights-of-way on a nondiscriminatory basis." (See § 253(c).) After all, if we read the provision as ExteNet urges, it would read something like, "to manage the public rights-of-way ... for use of public rights-of-way," which seems awkward, somewhat nonsensical, and, even if sensible, would make the second use of the phrase "rights-of-way" mere surplusage or unnecessarily redundant.[12] Thus, we are unwilling to adopt ExteNet's interpretation of this statute. (See *Dyna–Med, supra*, 43 Cal.3d at pp. 1386–1387, 241 Cal.Rptr. 67, 743 P.2d 1323.) As a result, ExteNet has not, and cannot, argue the City failed to treat it "on a competitively neutral and nondiscriminatory basis" when it "require[d] fair and reasonable compensation from" ExteNet (when it applied for its siting permits). (See § 253(c).) And even if there were enough prohibitory effect here to create a problem under section 253(a), the City may still find refuge in the "safe harbor" of section 253(c). (See *Level 3*, *supra*, 477 F.3d at p. 532.)

f. No Violation of the Equal Protection Guarantee Under the Fourteenth Amendment

***11** ExteNet argues the City's actions violated the guarantee of equal protection under the United States Constitution. Within the cluster of arguments that ExteNet presents, this one appears to us to be an argument of last resort, and understandably so. It has no merit.

We construe ExteNet's equal protection argument to be one of that rare category of "[c]lass-of-one equal-protection claims," which are " 'an application of [the] principle' that the seemingly arbitrary classifications of a group or individual by a governmental unit requires a rational basis." (See *Integrity Collision Center v. City of Fulshear* (5th Cir. 2016) 837 F.3d 581, 587 (*Fulshear*), citing *Engquist v. Oregon Dept. of Agriculture* (2008) 553 U.S. 591, 602, 128 S.Ct. 2146, 170 L.Ed.2d 975.) We will assume arguendo there is here " 'a clear standard against which departures, even for a single plaintiff, could be readily assessed.' " (*Fulshear,* at p. 587,.)

We find ExteNet has failed to show a difference in treatment, compared to other companies. First, we note ExteNet was not excluded from installing its DAS network, for, as noted above, the City invited ExteNet to re-apply. (See *Fulshear*, *supra*, 837 F.3d at pp. 587–588.) Thus, ExteNet's claim fails there. Second, we further note ExteNet has not shown how it was treated differently from other companies at the same time. Although ExteNet tries to show differences in prior treatment of T–Mobile in 2009 and AT & T in 2007, when the City granted those companies' permits, the City had not yet adopted its ROW Regulations. And during ExteNet's application process, no other provider finished applying.[13] Since this is the sole point ExteNet relies on, its argument must fail, because surely a municipality is empowered to

change its regulations from time to time (see generally Cal. Const., art. XI, §§ 5, 7 & 9)—and all the more so here: the City learned from the 2009 decision that its lack of clear regulations upset its residents. Thus, ExteNet has failed to show how it was treated differently by the City's decision.

Furthermore, even if ExteNet had been treated differently, we need only find the City acted with a rational basis—the lowest standard of review for constitutional claims. [14] (See *Fulshear*, *supra*, 837 F.3d at p. 587.) We think that, for all the reasons discussed throughout this opinion, the City had a rational basis (aesthetics) for making its decision. (See *City Council v. Taxpayers for Vincent* (1984) 466 U.S. 789, 805, 104 S.Ct. 2118, 80 L.Ed.2d 772 ["It is well settled that the state may legitimately exercise its police powers to advance [a]esthetic values."]; see also *Honolulu Weekly, Inc. v. Harris* (9th Cir. 2002) 298 F.3d 1037, 1045 ["[T]he Supreme Court ... ha[s] found that aesthetics can be a substantial government interest."].)

g. Other Arguments: Economic and Technical Need, Due Process

***12** Finally, ExteNet argues the City impermissibly required it to prove economic and technical need, because such purported requirements are, it contends, preempted by sections 701, 1001, and 1002. But the purported requirements of proving economic and technical need are beside the point because we can uphold the City's decision on only one finding. (See *Desmond*, *supra*, 21 Cal.App.4th at pp. 336–337, 25 Cal.Rptr.2d 842; *Barton*, *supra*, 62 Cal.App.4th at pp. 1187–1188, 73 Cal.Rptr.2d 212.) Here, as stated above, we uphold the City's decision on aesthetic grounds.

ExteNet also argues the residents were not entitled to a hearing pursuant to the guarantee of due process. Its rationale is that, "[a]s a matter of law, affixing small equipment boxes to an existing utility pole in a developed urban area does not result in a ' "significant" or "substantial" deprivation[ ] of property' [of the residents living nearby] so as to trigger constitutional due process rights." (*Robinson v. City & County of San Francisco* (2012) 208 Cal.App.4th 950, 963, 146 Cal.Rptr.3d 1.) But none of the residents, nor the City, argued ExteNet's boxes were so large as to trigger due process rights, thus entitling residents to a hearing. [15] Rather, the City properly relied on BMC sections 12.10.040 through 12.10.060, its ROW Regulations, and sections 2902, 7901, and 7901.1, to hold a hearing after receiving two residents' appeal of the engineer's decision, and then relied on aesthetic grounds to make a different decision. ExteNet's argument therefore fails. [16]

III. DISPOSITION

The trial court's judgment is affirmed in all respects.

We concur:

Ruvolo, P.J.

Rivera, J.

All Citations

Not Reported in Cal.Rptr., 2017 WL 5185481

Footnotes

1 All statutory citations are to the Public Utilities Code unless otherwise specifically designated.

2 According to ExteNet's somewhat more technically detailed description, "[t]he sole purpose of a DAS network is to combine antennas and optical fiber in order to transport wireless voice and data communication signals.... [¶] ... [¶] A single DAS network generally consists of one hub and multiple nodes.... [¶] The hub is a central equipment room ... [¶] ... linked to the nodes by fiber optic cable lines. The nodes are typically comprised of small, low-power antennas[.] ... [¶] Each node is typically located on existing or replacement utility poles or light standards.... [¶] The nodes are more or less evenly spaced at multiple points along the public rights-of-way."

3 In the context of this case, a siting permit is the same as an encroachment permit because to be able to "site" the node at a particular location, ExteNet must, of course, simultaneously have permission from the City to "encroach" upon its public right-of-way.

4 During this process, ExteNet also heard from and corresponded with many residents, in an attempt to allay their concerns. On July 26, 2011, ExteNet's director of municipal relations relayed her understanding to one resident: "yes, [the City] has the right and obligation to review carefully and make decisions based on aesthetic impacts."

5 Although, as the City points out, ExteNet did not properly file a petition for a writ of administrative mandate, for purposes of our analysis we may (and here, do) construe the operative pleadings, its third amended complaint and its motion for adjudication on all issues therein, together, to be a petition for a writ of administrative mandate. (Cf. *Owens v. Superior Court* (1959) 52 Cal.2d 822, 827, 345 P.2d 921 ["If the facts justify such relief it is immaterial that defendant has prayed for the wrong remedy, and we treat his petition as one for a writ of mandate."].)

6 As the City argues, we also note that the City engineer's approval of ExteNet's application was a tentative decision. Thus, in one sense, given the provisional nature of the engineer's decision, it is illogical to think of the council's decision here as a "reversal" of the engineer's decision, or even a "revocation" of ExteNet's then-approved permits, because, procedurally, the council was simply making a decision in the first instance, not undertaking review of a prior decision.

7 ExteNet argues the City improperly considered and "require[d] (1) proof of a significant gap in service as a necessary precondition to approval, (2) a demonstration of the applicant's status as a common carrier, (3) consideration of locations outside the public right-of-way including public utility easements, (4) evidence of finalized customer contracts [and] (5) use of alternative technologies to neutral host DAS."

8 ExteNet's arguments related to the California Constitution at times conflate with its arguments related to sections 2902, 7901, and 7901.1, which we discuss in sections II.B.2.b and II.B.2.c, *post*, of this opinion. To the extent differences are discernable, we distinguish these respective lines of argument in our discussion as is necessary.

9 Section 7901.1, subdivisions (a) and (b) provide in full: "(a) It is the intent of the Legislature, consistent with Section 7901, that municipalities shall have the right to exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed. [¶] (b) The control, to be reasonable, shall, at a minimum, be applied to all entities in an equivalent manner."

10 T–Mobile's primary authority for this argument in *T–Mobile*, and ExteNet's here as well, consists of two cases, one of which relies on the other for authority. (See *Pacific Telephone & Telegraph Co. v. City & County of San Francisco* (1961) 197 Cal.App.2d 133, 146, 17 Cal.Rptr. 687, quoting *Western Union Tel. Co. v. City of Visalia* (1906) 149 Cal. 744, 750,751, 87 P. 1023.) Notably, though, the latter case, *Visalia*, was decided almost fifty years *prior* to the enactment of section 7901 in 1951. (See Stats. 1951, ch. 764, vol. 1, p. 2194.)

11 Furthermore, ExteNet seems to argue that 47 United States Code section 253, discussed in section II.B.2.e, *post*, creates "a mandatory duty to avoid prohibition of the provision of any telecommunication service." Even if federal law did impose on the City some mandatory duty, the City did not violate any such duty, as we explain below.

12 Moreover, the last clause of section 253(c), "if the compensation required is publicly disclosed by such government" clearly can apply only to the second part of this provision, not the first—which confirms both

(1) this provision is meant to have essentially two parts, and (2) everything after the disjunctive "or" (i.e., the second part of the provision) is meant to be read together, independent from the first part.

13 Although T–Mobile did apply for a second round of five permits, in 2010 it dropped its applications, and we cannot speculate as to how it might have been treated differently in the outcome compared to ExteNet.

14 ExteNet argues we should apply a heightened standard of review because it believes the City's decision necessarily implicated ExteNet's free speech rights. But ExteNet has not shown how *its own* free speech rights have been violated, nor how free speech was implicated here at all.

15 ExteNet moved this court to take judicial notice of an electronic version of a map of the San Francisco Bay Area from the 2010 U.S. Census, which it argues "proves" the City is indeed "urban" within the meaning of *Robinson*. We deny the motion, since the Census map does not "prove" what ExteNet claims it does and is otherwise immaterial to our analysis.

16 ExteNet attempts to raise for the first time in its reply brief issues related to unlawful takings. We "will not consider points raised for the first time in a reply brief." (*REO Broadcasting Consultants v. Martin* (1999) 69 Cal.App.4th 489, 500, 81 Cal.Rptr.2d 639.)

End of Document

Exhibit F

DEPARTMENT OF PUBLIC WORKS
411 W Ocean Blvd.
Long Beach CA 90802

CITY OF LONG BEACH

C – RIGHT-OF-WAY OCCUPANCY/ EXCAVATION

Complete this section if your project includes any of the following activities:
- Occupancy of the ROW for more than 90 days
- Occupancy on an Arterial Street (regardless of duration of work)
- Excavation on private property 3' or more below grade
- Excavation within the ROW 10" or more below grade
- New or addition to Multifamily or Nonresidential building
- Not required for E-PWOP or F-WTF

Applicants often request an Occupancy AND/OR Excavation Permit ahead of the Right of Way Improvement Permit due to project phasing or other reasons. For this reason, we have separated out the requirements, but an applicant can submit both at the same time for a single review and permitting process.

ITEMS THAT MUST ACCOMPANY ALL APPLICATIONS

- ☐ Notice of Final Action and Conditions of Approval (if applicable) [Application # _____]
- ☐ Drawings clearly identifying total area of ROW being occupied and any meters being impacted
- ☐ Traffic control drawings (for non-standard plans use 1:40 scale)
- ☐ Scaffolding plan and engineering calculations (if installed within ROW)
- ☐ Graphic fence wrap for temporary fencing (if project is longer than 6 months)

ADDITIONAL ITEMS THAT MUST ACCOMPANY EXCAVATION OR GRADING WORK

- ☐ Excavation drawings (if excavation is greater than 3' deep)
- ☐ Haul route plan (if hauling spoils)
- ☐ Hydrology report
- ☐ Dewatering report (if applicable)
- ☐ Geotechnical report (if applicable)
- ☐ Shoring plans (if excavation is greater than 5' deep)
- ☐ Tie back agreement (if applicable, LBMC 14.08.170)
- ☐ On-site grading & drainage plan (Applicable to New or Additions on Multifamily Dwellings and Nonresidential Buildings)

ADDITIONAL ITEMS THAT MUST ACCOMPANY TRENCHING OR UTILITY WORK

- ☐ Civil drawings clearly identifying total area (in square feet) of ROW being excavated AND repaired
- ☐ Approved design/ authorization from applicable utilities (SCE, LBWD, LB Fire, LA County…)

ADDITIONAL ITEMS THAT MUST ACCOMPANY MONITORING WELL WORK

- ☐ Health Department well permit
- ☐ Depth of well details
- ☐ Security (Cash, bond, CD) in the amount of $5,000 per monitoring well
- ☐ Completed Installation and Maintenance Agreement (IMA)
- ☐ California Regional Water Quality Control Board Letter of Approval

FEE (Office Use)	6.2% SURCHARGE	TOTAL FEE
$	$	$

DEPARTMENT OF PUBLIC WORKS
411 W Ocean Blvd.
Long Beach CA 90802

CITY OF LONG BEACH

D - RIGHT OF WAY/ PARK IMPROVEMENT(S)

Complete this section ONLY IF your project includes right of way improvements. This includes but is not limited to: paving of streets or alleys, installation of new driveway, curb, sidewalk, gutter, and/ or storm drains, upgrades to traffic signals, striping, parkway improvements etc. This section is not required for repairs due to utility tie in or monitoring wells.

Applicants often request an Occupancy AND/OR Excavation Permit ahead of the Right of Way Improvement Permit due to project phasing or other reasons. For this reason, we have separated out the requirements, but an applicant can submit both at the same time for a single review and permitting process.

ITEMS THAT MUST ACCOMPANY THIS APPLICATION

To expedite review, even if the following items were submitted previously for an excavation permit they MUST be resubmitted. This ensures that any changes are properly captured and that there is no delay in project review and permit issuance.

HAS AN OCCUPANCY/ EXCAVATION PERMIT ALREADY BEEN ISSUED?

- ☐ Yes, and there are no changes to any of the previously approved items
  - ☐ Previous Permit #: _____
- ☐ Yes, but there are some changes to the previously approved items
  - ☐ Previous Permit #: _____
  - ☐ Submit all applicable documents with revisions clouded
- ☐ No, a consolidated review and permitting process is requested
  - ☐ Complete the occupancy/ excavation section of this application and include all required submittals

ITEMS THAT MUST ACCOMPANY ALL APPLICATIONS

- ☐ Civil Improvement drawings
- ☐ Civil Drainage drawings
- ☐ Precise grading drawings
- ☐ Striping drawings
- ☐ Traffic signal drawings
- ☐ Landscape and irrigation drawings
- ☐ Arborist report (if trees are being removed or trimmed)
- ☐ Engineers estimate for the ROW improvements
- ☐ Cut sheet or Spec sheet for equipment (if applicable)
- ☐ Traffic impact analysis (if more than 100 vehicle trips per day)

ADDITIONAL ITEMS THAT MUST ACCOMPANY A PROJECT WITH MATERIALS THAT DEVIATE FROM THE STANDARDS
(Examples: decorative pavers, decorative crosswalk art, or other items noted within the conditions of approval)

- ☐ Completed installation and maintenance agreement (IMA)
- ☐ Articles of incorporation or other means to verify authority to sign IMA.
  NOTE: This must match with the information filed with the Secretary of State

FEE (Office Use)	6.2% SURCHARGE	TOTAL FEE
$	$	$

DEPARTMENT OF PUBLIC WORKS
411 W Ocean Blvd.
Long Beach CA 90802

CITY OF LONG BEACH

E - PUBLIC WALKWAYS OCCUPANCY

Complete this section ONLY IF your project includes sidewalk dining or a parklet

Permit Type: ☐ New ☐ Renewal (No Changes) ☐ Renewal (Minor Modifications) ☐ Change of Ownership

ITEMS THAT MUST ACCOMPANY THIS APPLICATION

ITEMS THAT MUST ACCOMPANY A NEW APPLICATION

- ☐ Drawings and specifications as applicable for the improvement
- ☐ Site plan drawings including all existing items and utilities within right of way clearly identifying area (in square feet) the total area being occupied
- ☐ Seating and equipment drawings
- ☐ Detail drawings/ cut sheet of the barrier/ railing and any equipment stamped by a CA registered engineer
- ☑ Photos of existing conditions of the area
- ☐ Renderings of the installation
- ☐ Landscape and irrigation drawings (if applicable)
- ☐ Arborist report (if trees are being removed or trimmed)
- ☐ Completed installation and maintenance agreement (IMA)
- ☐ Articles of incorporation or other means to verify authority to sign IMA.
  NOTE: This must match with the information filed with the Secretary of State
- ☐ Comprehensive certificate of liability insurance. Liquor liability must be included if serving beer, wine or liquor
- ☐ Completed City Insurance Endorsement Form
- ☐ Liquor license. NOTE: extension of premise can be provided after the PWOP is installed (if applicable)
- ☐ Engineers estimate for the cost of removal of the PWOP
- ☐ Security Deposit in the amount of the engineers estimate for the cost of removal of the PWOP
- ☐ California Coastal permit (if within the coastal zone)

ADDITIONAL ITEMS THAT MUST ACCOMPANY A NEW PARKLET APPLICATION

- ☐ Detail drawings of the platform and barricade stamped by a CA registered engineer
- ☐ Letter of approval from building owner, homeowners association (HOA) OR community association
- ☐ Location of relocated parking meters (if applicable)
- ☐ Traffic control drawings (for non-standard plans use 1:40 scale or 1:60 scale)

ITEMS THAT MUST ACCOMPANY A RENEWAL APPLICATION

- ☐ Previous permit or agreement
- ☐ Photos of existing conditions of the area
- ☐ Detail drawings of any modifications/ changes being requested (if minor modifications)
- ☐ Comprehensive certificate of liability insurance. Liquor liability must be included if serving beer, wine or liquor
- ☐ Completed City Insurance Endorsement Form

ITEMS THAT MUST ACCOMPANY A CHANGE OF OWNERSHIP

- ☐ All items required for a renewal application
- ☐ Completed installation and maintenance agreement (IMA)
- ☐ Articles of incorporation or other means to verify authority to sign IMA.
  NOTE: This must match with the information filed with the Secretary of State
- ☐ A letter from the previous owner relinquishing the security deposit to the new owner

OR

- ☐ Engineers estimate for the cost of removal of the PWOP
- ☐ Security Deposit in the amount of the engineers estimate for the cost of removal of the PWOP

FEE (Office Use)	6.2% SURCHARGE	TOTAL FEE
$	$	$

DEPARTMENT OF PUBLIC WORKS
411 W Ocean Blvd.
Long Beach CA 90802

CITY OF LONG BEACH

F – WIRELESS TELECOMMUNICATION FACILITY

Complete this section ONLY IF your project includes installation of a wireless telecommunications facility. (Submit Power and Fiber under Section C)

Type of Permit applying for (select only one): ☐ Tier A (Unprotected) ☑ Tier B (Protected) ☐ Modification ☐ Renewal

#	Pole #	Property Address Adjacent to Installation	GIS Coordinates	Site Number
1	DB1032	3501 EAST HARDING STREET	33 52' 06" N/118 09' 05" W	BLFWR_001
2	XT1027	7901 E BERNER STREET	33 48' 39" N/118 04' 41" W	CERT1_001
3	LC1460	1316 LEWIS AVENUE	33 46' 58" N/118 10' 48" W	LGBC2_002
4	QC1805	411 WEST SEASIDE WAY	33 45' 57" N/118 11' 49" W	LGBC2_005
5	QA1133	418 GOLDEN AVENUE	33 46' 18" N/118 12' 06" W	LGBC2_007
6	LC1449	1431 LEWIS AVENUE	33 47' 05" N/ 118 10' 48" W	LGBC2_013
7	QC1734	250 W SEASIDE WAY	33 45' 56" N/ 118 11' 42" W	LGBC2_015
8	HB1300	4351 CLARK AVENUE	33 50' 16" N/ 118 08' 03" W	LKWD2_001
9				
10				

ITEMS THAT MUST ACCOMPANY THIS APPLICATION

Items required at time of application submission:

- ☑ Site plan drawings (LBMC 15.34.030.D.2-3)
- ☑ Electrical drawings (LBMC 15.34.030.D.11)
- ☑ Structural drawings/calculations (LBMC 15.34.030.D.10)
- ☑ Photos of existing conditions of the surrounding area(s) (LBMC 15.34.030.D.5)
- ☑ Photo simulation of proposed project (LBMC 15.34.030.D.12)
- ☑ Traffic control drawings (for non-standard plans use 1:40 or 1:60 scale) (LBMC 15.34.030.D.9)
- ☐ Landscape drawings (if applicable) (LBMC 15.34.030.B.1.b.x.3)
- ☐ Propagation/Coverage Maps (if denial would cause a "significant coverage gap") (LBMC 15.34.030.D.6)
- ☐ CEQA categorical exemption or environmental review (if not covered under blanket exemption)
- ☐ Approval letter from the Cultural Heritage Commission (if placed on a designated Historic Landmark)
- ☑ GIS map of the proposed location(s) showing underground conduit runs in shapefile or KMZ file format (LBMC 15.34.030.D.4)
- ☑ Completed antenna, equipment and site location preference form (see pages 9 & 10) (LBMC 15.34.030.B.1.b.vi)

Items that can be provided after application submission:

- ☑ Radio frequency engineering report (LBMC 15.34.030.D.7)
- ☑ Noise analysis (manufacturer's specifications acceptable) (LBMC 15.34.030.D.14)
- ☑ Construction phasing plan (LBMC 15.34.030.D.15)
- ☑ Maintenance plan (LBMC 15.34.030.D.9)
- ☐ Joint pole commission approval letter for wooden poles only (if applicable) (LBMC 15.34.030.B.1.b.ii)

ADDITIONAL ITEMS THAT MUST ACCOMPANY A **TIER B** (PROTECTED LOCATION) APPLICATION

- ☐ Letter explaining the installation(s) will not significantly detract from any defining characteristics of the area or the view corridor (LBMC 15.34.020.Z)

Item that can be provided after application submission:

- ☐ Confirmation of public notification, including notice by mail and notice by posting (required prior to permit issuance) (LBMC 15.34.030.K.1-3)

FEE (Office Use)	6.2% SURCHARGE	TOTAL FEE
$	$	$

Per LBMC 15.34.030.B.1.b.vi Aesthetic Impacts, all wireless telecommunication facilities shall be designed and located to eliminate or substantially reduce their visual and aesthetic impacts upon the surrounding public rights-of-way and public vantage points. To accomplish this goal, all wireless telecommunication equipment shall be developed with the intent of locating and designing such facilities in the order of preference (from top to bottom) as outlined below. In instances where a facility is proposed at a location, or in a manner, that is not the highest preference (top of list), the applicant shall make a factual showing that ALL higher preferences are infeasible. Attach additional sheets as necessary.

If applying for more than one facility on a single permit, the antenna, equipment AND site preferences shall be the same for each location. If they are not the same, a separate application is required.

ALL higher preferences not selected MUST contain a factual statement about infeasibly.

Antenna Preferences (check the box of the preference being used)	
i. ☐Existing street light pole (No infeasibility statement required if this option is selected)	The existing street light would not structurally support an AT&T small cell wireless telecommunication facility
ii. ☑Replacement street light pole	
iii. ☐Existing structure other than a street light pole or utility pole	
iv. ☐New structure other than a street light pole or utility pole (e.g., wireless kiosk)	
v. ☐Existing non-wood utility pole	
vi. ☐New non-wood utility pole	
vii. ☐Existing wood utility pole	

Equipment preferences (check the box of the preference being used)	
i. ☐ Bundled in an all-in-one equipment cabinet with the antenna (No infeasibility statement required if this option is selected)	AT&T small cell equipment will not aesthetically or functionally fit in an all-in-one equipment cabinet with the antenna.
ii. ☑ Below-grade equipment vault, or on a street light or utility pole that does not place new cabinets or other above ground furniture, and the power supply equipment is undergrounded	
iii. ☐ Attached to existing power source in an existing utility box;	
iv. ☐ Enclosed at the base of the pole on which the antenna is proposed for installation	
v. ☐ In an existing ground-mounted (grade-level) equipment cabinet, with no expansion or additional cabinets to be added	
vi. ☐ Within a new equipment enclosure 26 mounted at grade.	

Site Location Preferences (check the box of the preference being used)	
i. ☐ Not in a center median, not requiring removal of parkway trees or landscaping, and not requiring modifications or relocation of existing infrastructure	The new pole will be relocated 5 feet from the existing pole so that light service will not be interrupted.
ii. ☑ Requires minor alteration to the existing public improvements and/or infrastructure (i.e. reduction of landscape area)	
iii. ☐ Requires significant alteration to the existing public improvements and/or infrastructure (i.e. removal of a street tree or relocation of infrastructure)	

Exhibit G

Fw: [EXTERNAL] Re: Safety concern regarding the installation of cell towers

Daniel Ramirez <Daniel.Ramirez@longbeach.gov>
Mon 8/22/2022 1:28 PM
To: Maryanne Cronin <Maryanne.Cronin@longbeach.gov>

Hi Maryanne, looping you in on this to see if we should add language to the CE Statement of Support.

"Per the request of Mahmoud Intably, the Program and Project Supervisor, Gas Safety and Reliability Branch - Safety and Enforcement Division of the California Public U li es Commission, the contractor shall coordinate to a have a member of the Safety and Enforcement Division present during excava on to verify proper clearances are maintained from the exis ng gas u lity line."

Please advise.

Thank You,

Daniel Ramirez
Capital Projects Coordinator

Public Works | Project Management Bureau
411 W. Ocean Blvd, 5th Floor | Long Beach, CA 90802
Office: (562) 570-5935 | Mobile: [redacted]
http://www.longbeach.gov/pw/

From: Daniel Ramirez <Daniel.Ramirez@longbeach.gov>
Sent: Thursday, August 18, 2022 4:55 PM
To: Intably, Mahmoud <mahmoud.intably@cpuc.ca.gov>
Subject: Re: [EXTERNAL] Re: Safety concern regarding the installa on of cell towers

Hello Mahmoud,

The permit has not been issued and this is not a City Driven project. If the permit is issued, I can make coordina on with your office a condi on of approval, but at this me there is not set date for construc on. It's worth no ng that there is an exis ng street light, so one can assume there is the proper clearance currently.

Thank You,

Daniel Ramirez
Capital Projects Coordinator

Public Works | Project Management Bureau
411 W. Ocean Blvd, 5th Floor | Long Beach, CA 90802
Office: (562) 570-5935 | Mobile: [redacted]
http://www.longbeach.gov/pw/

From: Intably, Mahmoud <mahmoud.intably@cpuc.ca.gov>
Sent: Thursday, August 18, 2022 1:14 PM
To: Daniel Ramirez <Daniel.Ramirez@longbeach.gov>
Subject: RE: [EXTERNAL] Re: Safety concern regarding the installa on of cell towers

-EXTERNAL-

Mr. Ramirez,

Please let us know the date to when the excava on will be performed so that we can be present to verify the clearances.

Thank you,

Steve

From: Daniel Ramirez <Daniel.Ramirez@longbeach.gov>
Sent: Wednesday, August 3, 2022 3:01 PM
To: Intably, Mahmoud <mahmoud.intably@cpuc.ca.gov>
Subject: [EXTERNAL] Re: Safety concern regarding the installa on of cell towers

CAUTION: This email originated from outside of the organiza on. Do not click links or open a achments unless you recognize the sender and know the content is safe.

Good A. ernoon Mahmoud, thank you for taking my call.

I want to clarify that the proposed installa□on at 4351 Clark Ave. is a Small Cell installa□on, and not a Cell Tower. The op□cs of the two are very different.

Linked here: Documents for CPUC, please find the site plan page of the construc□on drawings showing the loca□on of the gas line in rela□on to the street light, as well as a photo simula□on of the installa□on. Also, please find a GIS U□lity Map showing the loca□on of the gas line in rela□on to the street light along with a screensho□ed measurement for reference.

As you can see on the Site Plan, DigAlert is required and the □cket number must be provided to the inspector prior to any excava□on. If ever the exis□ng field condi□ons don't match City's GIS Maps, field changes will be made to ensure proper clearances.

If you have any ques□ons or concerns, please reach out.

Thank You,

Daniel Ramirez
Capital Projects Coordinator

Public Works | Project Management Bureau
411 W. Ocean Blvd, 5th Floor | Long Beach, CA 90802

Office: (562) 570-5935 | Mobile: [redacted]
http://www.longbeach.gov/pw/

From: Intably, Mahmoud <mahmoud.intably@cpuc.ca.gov>
Sent: Wednesday, August 3, 2022 1:24 PM
To: Daniel Ramirez <Daniel.Ramirez@longbeach.gov>
Subject: Safety concern regarding the installa□on of cell towers

-EXTERNAL-

Mr. Ramirez,

The Safety and Enforcement Division (SED) of the California Public Utilities Commission (CPUC) received a customer complaint regarding an ongoing project to install cell tower near 4351 Clark Ave, Long Beach, CA 90808. The complainer indicated that one possible location of the cell tower is where the street light located and the other location is five feet south of it. At this location, an underground gas pipeline will be in conflict with the cell tower installation. Please ensure that the excavator has a valid USA ticket at the time of the excavation, follow California Government Code 4216 – DigAlert (attached), and the city is in compliance with Title 49 Code of Federal Regulation (CFR) Part 192, §192.325 Underground Clearance states:

> "*(a) Each transmission line must be installed with at least 12 inches (305 millimeters) of clearance from any other underground structure not associated with the transmission line. If this clearance cannot be attained, the transmission line must be protected from damage that might result from the proximity of the other structure.*
> *(b) Each main must be installed with enough clearance from any other underground structure to allow proper maintenance and to protect against damage that might result from proximity to other structures.*
> *(c) In addition to meeting the requirements of paragraphs (a) or (b) of this section, each plastic transmission line or main must be installed with sufficient clearance, or must be insulated, from any source of heat so as to prevent the heat from impairing the serviceability of the pipe.*
> *(d) Each pipe-type or bottle-type holder must be installed with a minimum clearance from any other holder as prescribed in §192.175(b)."*

Please provide SED by 8/12/2022, with a map showing the projected location of the cell tower and the City of Long Beach underground gas pipeline(s) in conflict with the excavation/installation of the cell tower. If you have any questions, you can contact me at 213-364-0027 or by email at mai@cpuc.ca.gov

Thank you,

Mahmoud (Steve) Intably, P.E.
Program and Project Supervisor
Gas Safety and Reliability Branch
Safety and Enforcement Division
California Public Utilities Commission
Office: 213-576-7016 Cell: [redacted]
E-mail: mai@cpuc.ca.gov

Exhibit H

Federal Communications Commission
Washington, D.C. 20554

March 9, 2022

VIA ELECTRONIC MAIL

The Honorable Adam Smith (WA-09)
2264 Rayburn HOB
Washington D.C. 20515

Attn: Victoria Bautista, Legislative Assistant

Re: Constituent Inquiry -- Wireless Tower Permit in a Pet Cemetery

Dear Congressman Smith:

Thank you for forwarding the correspondence from your constituent, Julie Seitz, who contacted your office with a question concerning the authority of local governments to make decisions to approve or deny requests to construct communications towers and other wireless communications facilities.

Section 332(c)(7) of the Communications Act, as amended, intends to preserve the local zoning authority of state and local governments. It provides that: "Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. § 332(c)(7). There are some limitations to that authority, including section 332(c)(7)(B)(i), which provides that state and local governments may not unreasonably discriminate among providers of functionally equivalent services, may not regulate in a manner that prohibits or has the effect of prohibiting the provision of personal wireless services, and must act on applications within a reasonable period of time.

Nevertheless, a state or local government authority is generally responsible for deciding whether to grant a request to deploy a wireless facility in a particular location within its jurisdiction. Thus, state or local governments may enforce their zoning ordinances—which may include consideration of aesthetics, preservation of property value, consistency with neighboring land uses, structural safety, noise, and similar concerns—provided a community acts in a manner consistent with the conditions set out in section 332(c)(7). These decisions are made by the state or local government based on its own laws and the record before it.

I hope this information is helpful. Please let me know if we can be of further assistance to your office.

Sincerely,

Amy Brett

Amy Brett, Acting Chief of Staff
Wireless Telecommunications Bureau
Federal Communications Commission

Exhibit I

Thank you,

Dan Vozenilek | External Affairs | AT&T
dv574p@a. .com
(562)716-4647

From: Daniel Ramirez <Daniel.Ramirez@longbeach.gov>
Sent: Thursday, December 2, 2021 2:42 PM
To: Marvin Callejas <mcallejas@synergy.cc>; Michael Crawford <mcrawford@synergy.cc>
Cc: VOZENILEK, DAN <dv574p@att.com>
Subject: Re: [External] 4351 Clark Ave. Appeal Hearing

Hi Marvin, I don't have a spec on the paint, it was brought up by our Dep. City Attorney as it was an op□on in the Brown v. Los Angeles Unif. Sch. Dist. (2021) 60 Cal. App. 5th 1092 case, Unfortunately I don't have access to the case findings.

Thank You,

Daniel Ramirez

Capital Projects Coordinator

Public Works | Project Management Bureau

411 W. Ocean Blvd, 5th Floor | Long Beach, CA 90802

Cell: [redacted]

http://www.longbeach.gov/pw/

From: Marvin Callejas <mcallejas@synergy.cc>
Sent: Thursday, December 2, 2021 2:27 PM
To: Daniel Ramirez <Daniel.Ramirez@longbeach.gov>; Michael Crawford <mcrawford@synergy.cc>
Cc: VOZENILEK, DAN <dv574p@att.com>
Subject: RE: [External] 4351 Clark Ave. Appeal Hearing

-EXTERNAL-

Daniel,

Can you provide informa□on on the special paint men□oned so that I can follow up with AT&T to make sure it's something that can be used if resident was to accept that condi□on?

Thank you

Marvin Callejas
Project Manager
[redacted]

From: Daniel Ramirez <Daniel.Ramirez@longbeach.gov>
Sent: Tuesday, November 23, 2021 8:52 AM
To: Marvin Callejas <mcallejas@synergy.cc>; Michael Crawford <mcrawford@synergy.cc>
Cc: VOZENILEK, DAN <dv574p@att.com>
Subject: Re: [External] 4351 Clark Ave. Appeal Hearing

Good Morning Marvin,

I understand, and I appreciate yours and ATT&T's pa□ence on the matter. I have been in contact with outside counsel and was informed of the first case in the 9th Circuit that acknowledges WiFi sickness as a disability. Brown v. Los Angeles Unif. Sch. Dist. (2021) 60 Cal. App. 5th 1092.

The case has some interes□ng accommoda□on op□ons that the school district implemented, one was a special paint. Because of this, City is s□ll in conversa□on with the appellant and is in the process of bringing this to conclusion.

Again, I thank you for your pa□ence and I am sorry this has been delayed this long.

Thank You,

Daniel Ramirez

Capital Projects Coordinator

Public Works | Project Management Bureau

411 W. Ocean Blvd, 5th Floor | Long Beach, CA 90802

Cell: [redacted]

http://www.longbeach.gov/pw/

From: Marvin Callejas <mcallejas@synergy.cc>
Sent: Tuesday, November 23, 2021 8:25 AM
To: Daniel Ramirez <Daniel.Ramirez@longbeach.gov>; Michael Crawford <mcrawford@synergy.cc>
Cc: VOZENILEK, DAN <dv574p@att.com>
Subject: RE: [External] 4351 Clark Ave. Appeal Hearing

-EXTERNAL-

Good morning Daniel,

Checking one more □me for any update on the hearing date. AT&T is getting concerned due to the amount of □me since the original hearing was postponed.

Thank you

Marvin Callejas
Project Manager
[redacted]

Exhibit J

CHAPTER 15.34 WIRELESS TELECOMMUNICATIONS FACILITIES IN THE PUBLIC RIGHTS-OF-WAY

15.34.010 Purpose and objectives.

The purpose of this Chapter is to regulate the establishment and operation of wireless telecommunications facilities within the public right-of-way in the City of Long Beach, consistent with the General Plan, and with the intent to:

A. Allow for the provision of wireless communications services adequate to serve the public's interest within the City;

B. Minimize the negative impacts of wireless telecommunications facilities, establish a fair and efficient process for review and approval of applications, assure an integrated, comprehensive review of environmental impacts of such facilities in the context of other uses and users in the public right-of-way, and protect the health, safety and welfare of the City of Long Beach;

C. Strongly encourage the location of wireless telecommunications facilities in those areas of the City where the adverse aesthetic impact on the community is minimal;

D. Promote the public health, safety, convenience, and general welfare of the City's residents, and to protect historical resources, property values and the aesthetic appearance of the City of Long Beach;

E. Strongly encourage wireless telecommunications providers to configure all facilities in such a way that minimizes displeasing aesthetics through careful design, siting, landscaping, screening, and innovative camouflaging techniques;

F. Provide a uniform and comprehensive set of standards for the development, siting, installation, and operation of wireless telecommunications facilities in the limited physical resources and capacity of the available public right-of-way of the City of Long Beach in such a manner to not unreasonably discriminate, and to be competitively neutral, and non-exclusive as to the extent required under applicable law;

G. Encourage open competition and the provision of advanced and high quality telecommunications services on the widest possible basis to the businesses, institutions, and residents of the City;

H. Encourage economic development while preserving aesthetic and other community values and preventing proliferation of above ground wireless telecommunication equipment; and

I. Conform to all applicable federal and state laws.

(ORD-18-0012 § 2, 2018)

15.34.020 Definitions.

In addition to all those terms defined in Chapter 21.15 of the zoning regulations, the following terms shall have the meanings set forth below, for the purposes of this Chapter:

A. "Abandoned." Notwithstanding the definition of "abandoned" in Section 21.15.030, a wireless telecommunications facility use shall be considered abandoned if it is not in use for two (2) consecutive months.

B. "Adjacent" means on the same side of the street and in front of the building or the next building on either side, when used in connection with a national historic landmark, California landmark, City landmark as defined in Chapter 2.63, or cultural resource as defined in Chapter 2.63; and in front of and on the same side of the street, when used in connection with a City park or open space.

C. "Applicable Law" means all applicable federal, state, and City laws, ordinances, codes, rules, regulations and orders, as the same may be amended or adopted from time to time.

D. "Base Station" shall have the meaning as determined by the Director of Public Works in an order or regulation, provided that the Director of Public Works' definition shall be consistent with the definition of that term: (a) as it is used in Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012, codified at 47 U.S.C. § 1455(a) as may be amended from time to time; and (b) as it is defined by the FCC in any decision addressing that section or any regulation implementing that section, including without limitation the FCC Report and Order entitled "In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies; Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting; 2012 Biennial Review of Telecommunications Regulations," (FCC Report and Order No. 14-153).

E. "Business Day" means a day that Long Beach City Hall is open to conduct public business.

F. "Coastal Zone Protected Location" means a proposed location for a wireless telecommunications facility in the public right-of-way that is within or adjacent to a designated coastal zone (as that term is defined in Section 21.15.530).

G. "Coastal Zone Protected Location Compatibility Standard" means whether a wireless telecommunications facility that is proposed to be located in a Coastal Zone Protected Location would comply with all applicable requirements and standards applicable to the installation of public infrastructure within the coastal zone.

H. "Co-location" means the placement or installation of wireless telecommunications facilities, including antennas and related equipment onto an existing wireless telecommunications facility in the case of monopoles, or onto the same building in the case of roof/building-mounted sites or placement onto an existing pole or structure with existing wireless telecommunication facility in the public right-of-way.

I. "Co-location Facility" means a wireless telecommunications facility that has been co-located consistent with the meaning of "co-location" as defined above. It does not include the initial installation of a new wireless telecommunications facility where previously there was none, nor the construction of an additional monopole on a site with an existing monopole.

J. "Eligible Facilities Request" shall have the meaning as determined by the Director of Public Works in an order or regulation, provided that the Director of Public Works' definition shall be consistent with the definition of that term: (a) as it is used in Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012, codified at 47 U.S.C. § 1455(a) as may be amended from time to time; and (b) as it is defined by the FCC in any decision addressing that section or any regulation implementing that section.

K. "FCC" means the Federal Communications Commission.

L. "Modification Permit" means a Wireless Right-of-Way Facility Permit issued by the Department of Public Works pursuant to Subsection 15.34.030.S below, authorizing a permittee to modify equipment installed on a utility pole or street light pole by the permittee pursuant to a Wireless Right-of-Way Facility Permit.

M. "Permittee" means a person issued a permit pursuant to this Chapter 15.34.

N. "Person" means any individual, group, company, partnership, association, joint stock company, trust, corporation, society, syndicate, club, business, or governmental entity. "Person" shall not include the City of Long Beach.

O. "Phasing Plan" means a schedule in a form and with timing that is reasonable and acceptable to the Director of Public Works, setting forth milestones for completion of the construction and inspection of a wireless telecommunications facility, compliance with which shall be a condition of approval on each Wireless Right-of-Way Facility Permit.

P. "Planning Protected Location" means any of the following proposed locations for a wireless telecommunications facility:

1. On an historic, historically or architecturally significant, decorative, or specially designed street light pole located in the public right-of-way;

2. On a utility pole or street light pole that is on a public right-of-way that is within a national historic landmark district, listed or eligible national register historic district, listed or eligible California register historic district, listed or eligible City landmark, or listed or eligible City landmark district, as more specifically described and cataloged in materials prepared and maintained pursuant to Chapter 2.63;

3. On a utility pole or street light pole that is on a public right-of-way that is adjacent to a national historic landmark, California landmark, or City landmark, as more specifically described and cataloged in materials prepared and maintained pursuant to Chapter 2.63;

4. On a utility pole or street light pole that is on a public right-of-way that the General Plan has designated as being most significant to City pattern, defining City form, or having an important street view for orientation; or

5. On a utility pole or street light pole that is on a public right-of-way that the General Plan has designated as having views that are rated "excellent" or "good."

Q. "Planning Protected Location Compatibility Standard" means whether an applicant for a Wireless Right-of-Way Facility Permit demonstrates that a proposed wireless telecommunications facility would be compatible with any of the Planning Protected Locations as follows:

1. For a historic, historically or architecturally significant, decorative, or specially designed street light pole, the applicable standard is whether a proposed wireless telecommunications facility would significantly degrade the aesthetic attributes that distinguish the street light pole as historic, historically significant, architecturally significant, decorative, or specially designed.

2. For public right-of-way that is within a national historic landmark district, listed or eligible national register historic district, listed or eligible California register historic district, listed or eligible City landmark, or listed or eligible City landmark district, the applicable standard is whether a proposed wireless telecommunications facility would significantly degrade the aesthetic attributes that were the basis for the special designation of the district.

3. For a utility pole or street light pole that is adjacent to a national historic landmark, California landmark, or City landmark, the applicable standard is whether a proposed wireless telecommunications facility would significantly degrade the aesthetic attributes that were the basis for the special designation of the building.

4. For public right-of-way that the General Plan has designated as being most significant to City pattern, defining City form, or having an important street view for orientation, the applicable standard is whether a proposed wireless telecommunications facility would significantly degrade the aesthetic attributes that were the basis for the designation of the street for special protection under the General Plan.

5. For public right-of-way that the General Plan has designated as having views that are rated "excellent" or "good," the applicable standard is whether a proposed wireless telecommunications facility would significantly impair the views of any of the important buildings, landmarks, open spaces, or parks that were the basis for the designation of the street as a view street.

R. "Public Health Compliance Standard" means whether: (a) any potential human exposure to radio frequency emissions from a proposed wireless telecommunications facility described in an application is within the FCC guidelines; and (b) noise at any time of the day or night from the proposed wireless telecommunications facility described in an application is not greater than forty-five (45) dBA as measured at a distance three (3) feet from any residential building facade.

S. "Public right-of-way" means any public highway, street, alley, sidewalk, parkway, parking lot, and all extensions or additions thereto which is either owned, operated, or controlled by the City, or is subject to an easement or dedication to the City, or is a privately-owned area within City's jurisdiction which is not yet dedicated, but is designated as a proposed public right-of-way on a tentative subdivision map approved by the City.

T. "Replace" means to remove previously permitted equipment and install new equipment at a permitted wireless telecommunications facility that is identical or smaller in size and weight, equal or fewer in quantity, and identical in color when compared to the previously permitted equipment; provided, however, that an increase in size or weight to the extent required by applicable state or federal regulation may be permitted.

U. "Residential/Institutional Planned Development (PD) District" means the following Planned Development Districts within the City of Long Beach: PD-5 (Ocean Boulevard), PD-10 (Willmore City), PD-11 (Rancho Estates), PD-17 (Alamitos Land), PD-20 (All Souls), PD-25 (Atlantic Avenue), all RP residential planned unit development districts, as well as any future PDs and/or RPs designated as such by the City.

V. "Street Light Pole" means a pole used principally or solely for street lighting and which is located in the public rights-of-way.

W. "Substantially Change the Physical Dimensions" shall have the meaning as determined by the Director of Public Works in an order or regulation, provided that the Director of Public Works' definition shall be consistent with the definition of that term: (a) as it is used in Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012, codified at 47 U.S.C. § 1455(a) as may be amended from time to time; and (b) as it is defined by the FCC in any decision addressing that section or any regulation implementing that section.

X. "Tier A Compatibility Standard" means that an applicant for a wireless telecommunications facility on a public right-of-way that is within an Unprotected Location has demonstrated that the proposed wireless telecommunications facility would not significantly detract from any of the defining characteristics of the neighborhood.

Y. "Tier A Wireless Telecommunications Facility" means a wireless telecommunications facility where the proposed location for the facility is in an Unprotected Location.

Z. "Tier B Compatibility Standard" means: (i) in the case of applications for wireless telecommunications facility within or adjacent to the public right-of-way in a Planning Protected Location, a wireless telecommunications facility that complies with the Planning Protected Location Compatibility Standard, (ii) in the case of applications for wireless telecommunications facility within or adjacent to the public right-of-way in a Coastal Zone Protected Location, a wireless telecommunications facility that complies with the Coastal Zone Protected Location Compatibility Standard, and (iii) in the case of applications for wireless telecommunications facility within or adjacent to the public right-of-way in a Zoning Protected

Location, a wireless telecommunications facility that complies with the Zoning Protected Location Compatibility Standard. In addition to the foregoing, for all applications for wireless telecommunications facilities within or adjacent to Planning Protected Locations, Coastal Zone Protected Locations, and/or Zoning Protected Locations, satisfaction of the Tier B Compatibility Standard requires an affirmative demonstration that the proposed wireless telecommunications facility would not significantly detract from any of the defining characteristics of the Planning Protected Location, Coastal Zone Protected Location, or Zoning Protected Location.

AA. "Tier B Wireless Telecommunications Facility" means a wireless telecommunications facility where the proposed location for the facility is in a Planning Protected Location, Coastal Zone Protected Location, or Zoning Protected Location.

BB. "Transmission Equipment" shall have the meaning as determined by the Director of Public Works in an order or regulation, provided that the Director of Public Works' definition shall be consistent with the definition of that term: (a) as it is used in Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012, codified at 47 U.S.C. § 1455(a) as may be amended from time to time; and (b) as it is defined by the FCC in any decision addressing that section or any regulation implementing that section.

CC. "Unprotected Location" means a proposed location for a wireless telecommunications facility that is not located within or adjacent to a Planning Protected Location, a Coastal Zone Protected Location, and/or a Zoning Protected Location.

DD. "Utility Pole" means any pole or tower owned by any utility company that is located in the public right-of-way necessary for the distribution of electrical or other utility services regulated by the California Public Utilities Commission, as well as guyed poles. This does not include towers for high-voltage electrical power transmission between generating plants and electrical substations.

EE. "Wireless Telecommunications Facility" means equipment installed for the purpose of providing wireless transmission of voice, data, images, or other information including but not limited to, cellular telephone service, personal communications services, and paging services, consisting of equipment, antennas, and network components such as towers, utility poles, transmitters, base stations, conduits, pull boxes, electrical meters, and emergency power systems. "Wireless telecommunications facility" does not include radio or television broadcast facilities, nor radio communications systems for government or emergency services agencies.

FF. "Zoning Protected Location" means on a utility pole or street light pole that is on a public right-of-way that is within a residential or a residential/institutional planned development (PD) district.

GG. "Zoning Protected Location Compatibility Standard" means that an applicant for a wireless telecommunications facility on a public right-of-way that is within a Zoning Protected Location has demonstrated that the proposed wireless telecommunications facility would not significantly detract from any of the defining characteristics of the residential or a residential/institutional planned development (PD) district.

(ORD-18-0012 § 2, 2018)

15.34.030 Requirements and standards for wireless telecommunications facilities in the public right-of-way.

A. Permit Required. Any person seeking to construct, install, or maintain a wireless telecommunications facility in, on, under, or above the public right-of-way shall obtain a Wireless Right-of-Way Facility Permit pursuant to the requirements of this Chapter prior to installing such wireless telecommunications facility.

B. Permit requirements for wireless telecommunications facilities in the public right-of-way.

1. Minimum Permit Requirements.

a. The Department of Public Works shall not issue a Wireless Right-of-Way Facility Permit if the permit application does not comply with all of the applicable requirements of this Section 15.34.030.

b. The Department of Public Works shall require an applicant for a Wireless Right-of-Way Facility Permit to demonstrate to the satisfaction of the Department of Public Works that:

(i) Other Permits. The applicant has obtained all appropriate permits (e.g., encroachment and traffic control permits) from the Department of Public Works, together with all other applicable permits and approvals from the City and other governmental agencies (e.g., approvals and permits required under the City's local coastal program (Chapter 21.25), and approvals and permits required under the City's cultural heritage procedures (Chapter 2.63)).

(ii) Authorization to Install. If the facility is to be installed on an existing utility pole or street light pole, the applicant shall provide proof that either (a) the pole is either owned and controlled by the Joint Pole Commission and that the applicant is a member of the Joint Pole Commission with attachment rights, or (b) the owner of the pole has authorized the installation.

(iii) California Environmental Quality Act Compliance. The applicant has obtained any approvals that may be required under the California Environmental Quality Act (California Public Resources Code Section 21000 et seq.) to construct, install, and maintain the proposed wireless telecommunications facility.

(iv) California Public Utilities Commission Authorizations. The applicant has obtained any necessary certificate of public convenience and necessity issued by the California Public Utilities Commission.

(v) Operational Interference with Public Rights-of-Way. No part of a wireless telecommunication facility shall alter vehicular circulation or parking within the public right-of-way, nor shall it impede vehicular and/or pedestrian access or visibility along any public right-of-way. No permittee shall locate or maintain wireless telecommunication facilities to unreasonably interfere with the use of City property or the public right-of-way by the City, by the general public or by other persons authorized to use or be present in or upon the public right-of-way. Unreasonable interference includes disruption to vehicular or pedestrian traffic on City property or the public right-of-way, interference with public utilities, and any such other activities that will present a hazard to public health, safety or welfare when alternative methods of construction would result in less disruption. All such wireless telecommunications facilities shall be moved by the permittee, at the permittee's cost, temporarily or permanently, as determined by the Director of Public Works.

(vi) Aesthetic Impacts. All wireless telecommunication facilities shall be designed and located to eliminate or substantially reduce their visual and aesthetic impacts upon the surrounding public rights-of-way and public vantage points. To accomplish this goal, all wireless telecommunication equipment shall be developed with the intent of locating and designing such facilities in the following manner and order of preference (from top to bottom). In instances where a facility is proposed for installation at a location or in a manner that is not the highest preference for each of the following categories, the applicant shall make a factual showing that all higher preferences are infeasible:

1) Antenna preferences:

(i) On an existing street light pole;

(ii) On a replacement street light pole;

(iii) On an existing structure other than a street light pole or utility pole in the public-right-of-way;

(iv) On a new structure other than a street light pole or utility pole in the public right-of-way (e.g., wireless telecommunication kiosk);

(v) On an existing non-wood utility pole;

(vi) On a new non-wood utility pole;

(vii) On an existing wood utility pole.

2) Equipment preferences (for all appurtenant equipment, including, but not limited to, radio units, power supplies, voltage converters, and electrical service connections and meters):

(i) When bundled in an all-in-one equipment cabinet with the antenna(s), provided, however, that the size of the cabinet shall be minimized to the satisfaction of the Director of Public Works;

(ii) Within a below-grade equipment vault, or on a street light pole or utility pole that does not place new cabinets or other above ground furniture in the public right-of-way, provided, however, that the size of the boxes on the pole shall be minimized to the satisfaction of the Director of Public Works and that the power supply equipment is undergrounded;

(iii) Attached to existing power source in an existing utility box;

(iv) Enclosed at the base of the pole on which the antenna(s) is/are proposed for installation;

(v) In an existing ground-mounted (grade-level) equipment cabinet, with no expansion or additional cabinets to be added;

(vi) Within a new equipment enclosure mounted at grade.

3) Site location preferences:

(i) Within the public right-of-way, not in a center median, and not requiring the removal of existing parkway trees, reduction of the size of any parkway landscape planters, and not requiring any modifications to the existing location of any infrastructure within the public right-of-way;

(ii) Within the parkway landscaping within the public right-of-way, and requiring only minor alterations to the existing parkway landscaping (including planter size) and/or infrastructure;

(iii) Within the public right-of-way in a manner that requires significant alteration to the existing public improvements and/or infrastructure.

4) Site location restrictions. In addition to the orders of preference specified in the preceding subsections, the following location prohibitions shall be applicable to all applications for installations of wireless telecommunications facilities in the public rights-of-way.

(i) All wireless telecommunication facility antennas, equipment and related infrastructure shall be prohibited in all center street medians;

(ii) In Residential Zoning Districts or Residential Planned Development Districts, only one (1) wireless telecommunications facility and associated equipment per applicant (including contractors, subcontractors, agents, or lessors to applicant or applicant's affiliate) shall be permitted within the public right-of-way within a five hundred foot (500') radius. For all other applicants, only one (1) wireless telecommunications facility and associated equipment per applicant shall be permitted within the public right-of-way within a one hundred foot (100') radius. The separation requirements in the preceding two sentences may be waived by the Director of Public Works upon a demonstration that the refusal to allow an additional facility within a five hundred foot (500') or one hundred foot (100') radius will result in the creation of a significant coverage gap for the applicant and/or that such refusal will otherwise violate an applicable state or federal law;

(iii) Wireless on strand or overhead lines shall be prohibited;

(iv) New wood poles and strand mounts may be allowed by the Director of Public Works if the applicant demonstrates that a wooden pole or strand mount is less impactful (from public safety, visual, or logistic standpoints) at a specific location.

5) Height:

(i) Antenna installations on existing City infrastructure shall not exceed the height of the existing infrastructure piece by more than five and one-half feet (5.5') unless approved by the City Engineer or Director of Public Works after a finding is made that a greater height would promote the aesthetic or safety concerns of the City;

(ii) For antenna(s) proposed for placement on a new pole in the public right-of-way, the height to the top of the highest element shall not exceed the average height of utility poles on the same block as the subject site by more than five and one-half feet (5.5'). In cases of uncertainty, the Director of Public Works shall have the authority to determine the applicable height limit;

(iii) Pole-mounted equipment shall be a minimum of ten feet (10') above level of sidewalk for public safety reasons.

6) Design:

(i) Any pole to be installed in the public right-of-way shall be disguised to resemble a utility pole to the maximum extent possible. All antennas shall be limited to a diameter no more than the widest part of the main pole, excluding its base. All antennas and screening devices shall be painted or finished to match the pole. All pole or equipment shall be painted or otherwise coated, per City standard, to be visually compatible with existing poles and equipment. The installation of new wood poles is not preferred;

(ii) Omnidirectional antenna units and groups of panel antennas shall be placed on the same vertical axis as the center of the pole where feasible.

If not feasible, the installation shall utilize brackets and/or cross-arms that allow no more than a six-inch (6") extension (stand-off) from the pole except when additional stand-off is required to comply with health and safety regulations such as GO-95 and OSHA;

(iii) Antenna installations on existing City infrastructure shall be placed in a manner so that the size, appearance and function of the final installation is essentially identical to the installation prior to the antenna installation taking place;

(iv) No faux or otherwise nonfunctioning street lights, decorative elements, signs, clock towers, or artificial trees or shrubs or other such nonfunctioning screening elements made to resemble other objects shall be permitted;

(v) Wireless telecommunications facility equipment located above the surface grade in the public right-of-way including, but not limited to those on certain street lights, shall consist of small equipment components that are compatible in structure, scale, function and proportion to the poles they are mounted on. Equipment shall be painted or otherwise coated, per City standard (which may include public art), to be visually compatible with the subject pole. Underground vaults shall employ flush-to-grade access portals and vents that are heel shoe safe and slip safe; provided, however, that this restriction shall not apply in flood prone areas. Installations on City-owned or controlled public facilities shall be subject to applicable fees as approved by the City Council;

(vi) Facilities shall be designed to be as visually unobtrusive as possible. Applicant shall size antennas, cabinet equipment and other facilities to minimize visual clutter. Facilities shall be sited to avoid or minimize obstruction of views from public vantage points and otherwise minimize the negative aesthetic impacts of the public right-of-way;

(vii) All cables and conduits shall be routed through the interior of the subject pole; provided, however, that for wood poles all cables and conduits shall be mounted and routed in a manner calculated to minimize their visibility;

(viii) All cables shall be screened from public view.

(vii) Compliance With Applicable Laws. Permittee shall install and maintain permitted wireless telecommunications facilities in compliance with the requirements of the Uniform Building, National Electrical Code, City noise standards, and all other applicable codes, laws, and regulations (including without limitation, those specified in Title 21), as well as the restrictions specified in this Chapter.

(viii) Americans With Disabilities Act. The proposed wireless telecommunications facility and its location shall comply with the Americans with Disabilities Act.

(ix) Signs.

1) There shall be no advertising or signage on any portion of a wireless telecommunication facility, except that required by law and/or as may be required by the City of Long Beach.

2) Each wireless telecommunication facility shall be identified by a permanently installed plaque or marker, no larger than four inches (4") by six inches (6"), clearly identifying the addresses, email contact information, and twenty-four (24) hour local or toll-free contact telephone numbers for a live contact person for both the permittee and the agent responsible for the maintenance of the wireless telecommunications facility. Emergency contact information shall be included for immediate response. Such information shall be updated in the event of a change in the permittee, the agency responsible for maintenance of the wireless telecommunication facility, or both.

3) Signs shall be hidden from public view when feasible. Background shall match color of equipment.

(x) Performance standards. All wireless telecommunications facilities in the public right-of-way shall be subject to the following:

1) Interference. No wireless telecommunication facility shall interfere with any emergency communication system at any time.

2) Graffiti. All graffiti on any components of the wireless telecommunications facility shall be removed promptly in accordance with City regulations. Graffiti on any facility in the public right-of-way must be removed within twenty-four (24) hours notification to the applicant of its appearance.

3) Landscaping. All landscaping required in connection with the permitting of the wireless telecommunications facility, including landscaping of the public right-of-way, shall be maintained in good, healthy condition at all times. Any dead or dying landscaping shall be promptly replaced or rehabilitated.

4) Repair of public right-of-way. The permittee or its operator shall repair, at its sole cost and expense, any damage (including, but not limited to subsidence, cracking, erosion, collapse, weakening, or loss of lateral support) to City streets, sidewalks, walks, curbs, gutters, trees, parkways, or utility lines and systems, underground utility line and systems, or sewer systems or sewer lines that results from any activities performed in connection with the installation and/or maintenance of a wireless telecommunications facility by permittee. In the event permittee fails to complete said repair within the number of days stated on a written notice by the Director of Public Works, the Director shall cause said repair to be completed and shall invoice the permittee for all costs incurred by City as a result of such repair.

(i) Structural foundation must be removed when removing structures from the right-of-way;

(ii) All sidewalk panels affected by any work associated with the installation of a wireless telecommunications facility must be restored to their original condition.

5) Replacement of Equipment. During the term of a Wireless Right-of-Way Facility Permit, a permittee may replace equipment that is part of a permitted wireless telecommunications facility provided that the replacement equipment would be of the same (or smaller) size, quantity, weight, and appearance as the previously permitted equipment. The permittee shall notify the Department of Public Works prior to replacing any equipment, and shall not install the proposed equipment unless and until the Department of Public Works notifies

permittee in writing that the Department has determined that the proposed replacement equipment complies with the requirements of this subsection, and until all required permits have been obtained.

6) Abandonment. The owner or operator of the wireless telecommunications facility shall notify the Department of Public Works in writing upon abandonment of the facility. The wireless telecommunications facility and all equipment associated therewith shall be removed in its entirety by the owner or operator within sixty (60) business days of a FCC or California Public Utilities Commission license or registration revocation or of facility abandonment (as defined in Subsection 15.34.020.A) or other discontinuation of use. The site shall be restored to its pre-installation condition to the satisfaction of the Director of Public Works at the expense of the facility owner or operator. Restoration shall be completed within ten (10) business days of removal of the facility. If removal and restoration is not completed within these time limits, the Director of Public Works shall be authorized to cause such removal and restoration to be completed and shall invoice the permittee for all costs incurred by City as a result of such removal.

7) Liability, Indemnification, and Defense.

   (i) As a condition of a Wireless Right-of-Way Facility Permit, each permittee agrees on its behalf and on behalf of any agents, successors, or assigns to be wholly responsible for the construction, installation, and maintenance of any permitted wireless telecommunications facility. Each permittee and its agents are jointly and severally liable for all consequences of such construction, installation, and maintenance of a wireless telecommunications facility. The issuance of any Wireless Right-of-Way Facility Permit, inspection, repair suggestion, approval, or acquiescence of any person affiliated with the City shall not excuse any permittee or its agents from such responsibility or liability.

   (ii) As a condition of a Wireless Right-of-Way Facility Permit, each permittee agrees on its behalf and on behalf of its agents, successors, or assigns, to indemnify, defend, protect, and hold harmless the City from and against any and all claims of any kind arising against the City as a result of the issuance of a Wireless Right-of-Way Facility Permit including, but not limited to, a claim allegedly arising directly or indirectly from the following:

      (a) Any act, omission, or negligence of a permittee or its any agents, successors, or assigns while engaged in the permitting, construction, installation, or maintenance of any wireless telecommunications facility authorized by a Wireless Right-of-Way Facility Permit, or while in or about the public rights-of-way that are subject to the permit for any reason connected in any way whatsoever with the performance of the work authorized by the permit, or allegedly resulting directly or indirectly from the permitting, construction, installation, or maintenance of any wireless telecommunications facility authorized under the permit;

      (b) Any accident, damage, death, or injury to any of a permittee's contractors or subcontractors, or any officers, agents, or employees of either of them, while engaged in the performance of the

construction, installation, or maintenance of any wireless telecommunications facility authorized by a Wireless Right-of-Way Facility Permit, or while in or about the public right-of-way that are subject to the permit, for any reason connected with the performance of the work authorized by the permit, including from exposure to radio frequency emissions;

(c) Any accident, damage, death, or injury to any person or accident, damage, or injury to any real or personal property in, upon, or in any way allegedly connected with the construction, installation, or maintenance of any wireless telecommunications facility authorized by a Wireless Right-of-Way Facility Permit, or while in or about the public right-of-way that are subject to the permit, from any causes or claims arising at any time, including any causes or claims arising from exposure to radio frequency emissions; and

(d) Any release or discharge, or threatened release or discharge, of any hazardous material caused or allowed by a permittee or its agents about, in, on, or under the public right-of-way.

(iii) Permittee, at no cost or expense to the City, shall indemnify, defend, and hold harmless the City against any claims as set forth in Subsection 15.34.030.B.1.b.(x)7)(ii) above, regardless of the alleged negligence of City or any other party, except only for claims resulting directly from the sole negligence or willful misconduct of the City. Each permittee specifically acknowledges and agrees that it has an immediate and independent obligation to defend the City from any claims that actually or potentially fall within the indemnity provision, even if the allegations are or may be groundless, false, or fraudulent, which obligation arises at the time such claim is tendered to the permittee or its agent by the City and continues at all times thereafter. Each permittee further agrees that the City shall have a cause of action for indemnity against the permittee for any costs the City may be required to pay as a result of defending or satisfying any claims that arise from or in connection with a Wireless Right-of-Way Facility Permit, except only for claims resulting directly from the sole negligence or willful misconduct of the City. Each permittee further agrees that the indemnification obligations assumed under a Wireless Right-of-Way Facility Permit shall survive expiration of the permit or completion of installation of any wireless telecommunications facility authorized by the permit.

(iv) The Department may specify in a Wireless Right-of-Way Facility Permit such additional indemnification requirements as are necessary to protect the City from risks of liability associated with the permittee's construction, installation, and maintenance of a wireless telecommunications facility.

8) Insurance.

(i) Minimum Coverages. The Department of Public Works shall require that each permittee maintain in full force and effect, throughout the term of a Wireless Right-of-Way Facility Permit, an insurance policy or policies issued by an insurance company or companies satisfactory to the City's Risk Manager. Such policy or policies shall, at a minimum, afford

insurance covering all of the permittee's operations, vehicles, and employees, as follows:

(a) Workers' compensation, in statutory amounts, with employers' liability limits not less than one million dollars ($1,000,000) each accident, injury, or illness.

(b) Commercial general liability insurance with limits not less than five million dollars ($5,000,000) each occurrence combined single limit for bodily injury and property damage, including contractual liability, personal injury, products and completed operations. This insurance shall include coverage for electric and magnetic fields (EMF) liability, products and completed operations liability.

(c) Commercial automobile liability insurance with limits not less than one million dollars ($1,000,000) each occurrence combined single limit for bodily injury and property damage, including owned, non-owned and hired auto coverage, as applicable.

(d) Contractors' pollution liability insurance, on an occurrence form, with limits not less than one million dollars ($1,000,000) each occurrence combined single limit for bodily injury and property damage and any deductible not to exceed twenty-five thousand dollars ($25,000) each occurrence.

(e) "All Risk" property insurance, including debris removal, covering the full replacement value of permittee's improvements constructed on or upon any City-owned property.

(ii) Other Insurance Requirements.

(a) Said policy or policies shall include the City and its officers and employees jointly and severally as additional insureds, shall apply as primary insurance, shall stipulate that no other insurance effected by the City will be called on to contribute to a loss covered thereunder, and shall provide for severability of interests.

(b) Said policy or policies shall provide that an act or omission of one insured, which would void or otherwise reduce coverage, shall not reduce or void the coverage as to any other insured. Said policy or policies shall afford full coverage for any claims based on acts, omissions, injury, or damage which occurred or arose, or the onset of which occurred or arose, in whole or in part, during the policy period.

(c) Said policy or policies shall be endorsed to provide thirty (30) business days advance written notice of cancellation or any material change to the Department of Public Works.

(d) Should any of the required insurance be provided under a claims-made form, a permittee shall maintain such coverage continuously throughout the term of a Wireless Right-of-Way Facility Permit, and, without lapse, for a period of three (3) years beyond the expiration or termination of the permit, to the effect that, should occurrences during the term of the permit give rise to claims made

after expiration or termination of the permit, such claims shall be covered by such claims-made policies.

(e) Should any of the required insurance be provided under a form of coverage that includes a general annual aggregate limit or provides that claims investigation or legal defense costs be included in such general annual aggregate limit, such general aggregate limit shall be double the occurrence or claims limits specified in Subsection 15.34.030.B.1.b(x)8)(i) above.

(iii) Indemnity Obligation. Such insurance shall in no way relieve or decrease a permittee's or its agent's obligation to indemnify the City under Subsection 15.34.030.B.1.b.(x)7) above.

(iv) Proof of Insurance. Before the Department of Public Works will issue a Wireless Right-of-Way Facility Permit, a permittee shall furnish to the Department of Public Works certificates of insurance and additional insured policy endorsements with insurers that are authorized to do business in the State of California and that are satisfactory to the City evidencing all coverages set forth in Subsection 15.34.030.B.1.b.(x)8)(i) above.

(v) Self-Insurance. Where a permittee is self-insured, and such insurance is no less broad and affords no less protection to the City than the requirements specified in Subsection 15.34.030.B.1.b.(x)8)(i) above, the Department of Public Works, in consultation with the City's Risk Manager, may accept such insurance as satisfying the requirements of Subsection 15.34.030.B.1.b.(x)8)(i) above. Evidence of such self-insurance shall be provided in the manner required by the City's Risk Manager.

9) Bond. Each permittee, as a condition of the Wireless Right-of-Way Facility Permit, shall obtain, keep, and maintain a performance bond in an amount as determined by the City Engineer adequate to guarantee to the City the prompt, faithful and competent performance of the proposed work necessary to install the proposed telecommunication facility and restoration of the public right-of-way.

10) City Changes to Public Right-of-Way. The permittee shall modify, remove, or relocate its wireless telecommunications facility, or portion thereof, without cost or expense to the City, if and when made necessary by any street or alley reconstruction, widening, relocation or vacation, the undergrounding of utilities, or any other construction in the public right-of-way negatively impacted by the wireless telecommunications facilities as installed, to the maximum degree consistent with the regulations at the California Public Utilities Commission. Said modification, removal, or relocation of a wireless telecommunications facility shall be completed within ninety (90) business days of notification by City unless exigencies dictate a shorter period for removal or relocation. In the event a wireless telecommunications facility is not modified, removed, or relocated within said period of time, City may cause the same to be done at the sole expense of permittee. Further, in the event of an emergency, the City may modify, remove, or relocate wireless telecommunications facilities without prior notice to permittee provided permittee is notified within a reasonable period thereafter.

2. Exclusions. The Department of Public Works shall not issue a Wireless Right-of-Way Facility Permit if the applicant seeks to:

   a. Install a new overhead utility line on a public right-of-way where there are presently no overhead utility facilities; or

   b. Add a wireless telecommunications facility on a utility pole or street light pole for which a Wireless Right-of-Way Facility Permit has already been approved.

3. Permit Conditions. The Department of Public Works may include in a Wireless Right-of-Way Facility Permit such conditions, in addition to those already set forth in this Chapter 15.34 and other applicable law, as may be required to govern the construction, installation, or maintenance of wireless telecommunications facilities in the public rights-of-way, and to protect and benefit the public health, safety, welfare, and convenience, provided that no such conditions may concern the particular technology used for a wireless telecommunications facility.

C. Department of Public Works Orders and Regulations. The Department of Public Works may adopt such orders and regulations as it deems necessary to implement the requirements of this Chapter 15.34, or to otherwise preserve and maintain the public health, safety, welfare, and convenience, as are consistent with the requirements of this Chapter 15.34 and applicable law.

D. Application Requirements. All applicants for a Wireless Right-of-Way Facility Permit must provide at least the following information in the application (in addition to such further information as is required by an order or regulation of the Director of Public Works adopted in accordance with Subsection 15.34.030.C). Any required plans to be submitted must be stamped and signed by a qualified California licensed engineer.

1. Pole number and address;

2. A site plan illustrating the exact location and size of all proposed wireless telecommunication facility antennas, equipment and related infrastructure necessary for its operation within the public right-of-way;

3. A fully dimensioned and scaled site plan that illustrates the following information within one hundred fifty feet (150') of the proposed wireless telecommunication facility:

   a. The distances between all new and existing wireless telecommunication equipment and all other infrastructure within the public right-of-way such as, but not limited to, other existing telecommunication equipment, utility poles, street light poles, street trees, fire hydrants, bus stops, traffic signals and above and below ground utility equipment vault(s);

   b. The distance and location of adjoining property lines, including County's assessor parcel numbers (APN), and easement boundaries abutting the public right-of-way, curbs, center line tie at all streets, driveway approaches, easements, walls, existing utility substructures, and parkway trees from the wireless telecommunication facility;

   c. The immediate adjacent land uses and building locations;

   d. The dedicated width of the public right-of-way;

   e. The location of all existing sidewalks and parkway landscape planters.

4. Prior to final inspection of the facility, provide a GIS map (electronic format) of final facility and conduit locations and the infrastructure necessary to operate the antennas;

5. A detailed photograph of the exact location of all proposed wireless telecommunication facility antennas, equipment and related infrastructure within the public right-of-way. Additional photographs shall also be provided to document the existing setting of the wireless telecommunication facility

within one hundred fifty feet (150') to the north, south, east and west of the proposed facility with a corresponding location map key documenting where each photograph was taken;

6. Propagation/coverage maps, including "search rings" for new installations, shall be required only if and to the extent the applicant claims that denial of its application would or could cause a "significant coverage gap" within the meaning of the Federal Telecommunication Act. These maps shall demonstrate the feasibility of alternative locations and/or configurations for the proposed wireless telecommunications facility. These maps may also be relevant to applicant's demonstration that denial of an application would result in a violation of applicants rights under applicable law;

7. A study prepared by a qualified and independent engineer with expertise in radio frequency, deemed acceptable to the City, documenting that the new or modified telecommunication facility will not exceed Public Health Compliance Standard. The study shall include all proposed and existing telecommunication antennas at maximum operational capacity;

8. A narrative discussion, accompanied by evidence, explaining (if necessary) why a superior location or configuration (as established by the order of preferences in Subsection 15.34.030.B.1.b.(vi)) cannot be feasibly implemented;

9. Any additional information deemed necessary by the Director of Public Works to evaluate the proposed wireless telecommunication facility and its construction impact to the existing infrastructure and design of the public right-of-way;

10. Stamped plans and calculations by a qualified California licensed engineer approving additional load of new wireless facility equipment on the pole;

11. Plans showing how existing conduits inside or upon the pole will be separated and protected from new wireless conduits;

12. Photo simulation of proposed project;

13. Feasibility study supporting order of preference;

14. A noise study/analysis and/or manufacturer specifications demonstrating to the satisfaction of the Director of Public Works that noise from a proposed wireless telecommunications facility at any time of the day or night will not exceed forty-five (45) dBA as measured at a distance three (3) feet from any residential building facade; and

15. A phasing plan in a form and containing timing milestones for construction and inspection of the proposed wireless telecommunications facility that are acceptable to the Director of Public Works.

16. Applicants may request approvals for up to ten (10) wireless telecommunication facilities per application, so long as each of the proposed wireless telecommunications facilities is, in the judgment of the Director of Public Works, sufficiently similar in form to allow for the combined evaluation of the multiple proposed wireless telecommunications facilities.

E. Initial Review of Completeness of Wireless Right-of-Way Facility Permit Applications.

Following receipt of an application for a Wireless Right-of-Way Facility Permit, the Department of Public Works may conduct site visits and shall make an initial determination whether the application is complete, and shall promptly notify the applicant of that determination.

F. Conditions of Approval.

1. Conditions of Approval. During its review of an application for a Wireless Right-of-Way Facility Permit under this Chapter 15.34, the City may add conditions to its approval, tentative approval, or determination. The Department of Public Works shall promptly notify the applicant in writing of any such conditions and shall give the applicant ten (10) business days to accept or reject the conditions. If

applicant's response is not received by the City by the eleventh (11^{th}) business day, the application may be denied.

2. Acceptance of Conditions Required. The Department of Public Works shall not approve an application for a Wireless Right-of-Way Facility Permit unless the applicant accepts all of the conditions added to an approval, tentative approval, or determination.

G. Street Trees. When reviewing an application for a Wireless Right-of-Way Facility Permit, the City may require as a condition of approval that the permittee plant an appropriate street tree adjacent to the utility pole or street light pole so as to provide a screen for a permitted wireless telecommunications facility. If such a condition is imposed, the permittee shall be required to install a street tree that is a minimum of twenty-four (24)-inch, and up to a forty-eight (48)-inch, box size. The Department of Public Works shall work with the permittee to select the appropriate species and location for the required tree. In any instance in which the Department of Public Works cannot require the permittee to install a street tree, on the basis of inadequate sidewalk width, interference with utilities, or other reasons regarding the public health, safety, or welfare, the Department of Public Works shall instead require the permittee to make an "in-lieu" payment into the "Adopt-A-Tree" fund of the Department of Public Works. This payment shall be in the amount specified in the City's master fee schedule, and shall be payable prior to the Department of Public Works' issuance of the Wireless Right-of-Way Facility Permit.

H. Review of Tier A Wireless Right-of-Way Facility Permit Applications. Within twenty (20) business days following receipt of a completed application for a Wireless Right-of-Way Facility Permit for a Tier A Wireless Telecommunications Facility, the Department of Public Works shall review and determine whether the proposed Tier A Wireless Telecommunications Facility satisfies the Tier A Compatibility Standard, satisfies the Public Health Compliance Standard, and otherwise meets the conditions, standards, and requirements of this Chapter 15.34. The Department of Public Works may extend the time period for this review period beyond twenty (20) business days when additional information is required to make a determination. The Department of Public Works shall not approve an application for a Wireless Right-of-Way Facility Permit unless the Department of Public Works makes a determination that the application satisfies the Tier A Compatibility Standard, satisfies the Public Health Compliance Standard, and otherwise meets the conditions, standards, and requirements of this Chapter 15.34.

I. Review of Tier B Wireless Right-of-Way Facility Permit Applications. Within forty (40) business days following receipt of a completed application for a Wireless Right-of-Way Facility Permit for a Tier B Wireless Telecommunications Facility, the Department of Public Works, in consultation with other City departments as necessary, shall review and determine whether the proposed Tier B Wireless Telecommunications Facility satisfies the Tier B Compatibility Standard, satisfies the Public Health Compliance Standard, and otherwise meets the conditions, standards, and requirements of this Chapter 15.34. With the concurrence of the applicant, the Department of Public Works may extend the time period for this review period beyond forty (40) business days when additional information is required to make a determination. The Department of Public Works shall not approve an application for a Wireless Right-of-Way Facility Permit unless the Department of Public Works makes a determination that the application satisfies the Tier B Compatibility Standard, satisfies the Public Health Compliance Standard, and otherwise meets the conditions, standards, and requirements of this Chapter 15.34.

J. Department of Public Works Determination.

1. Approval. A Department of Public Works' approval of an application for a Wireless Right-of-Way Facility Permit shall be in writing and shall set forth the reasons therefor. If a Department of Public Works' approval contains any conditions, the conditions shall also be in writing. Construction on the approved permit must commence within six (6) months, after which (if construction has not commenced) the permit shall automatically and without further notice or action, expire.

2. Denial. The Department of Public Works shall issue a final determination denying an application for a Wireless Right-of-Way Facility Permit within three (3) business days of any of the following events:

    a. The Department of Public Works' determination that the application does not comply with the Public Health Compliance Standard;

    b. The Department of Public Works' determination that the application does not meet the applicable compatibility standard; or

    c. If the Department of Public Works receives notice from the applicant that it rejects any condition imposed upon the application for a Wireless Right-of-Way Facility Permit.

K. Notice Following Approval of Tier B Wireless Right-of-Way Facility Permit Applications

1. Notice Required. The Department of Public Works shall require an applicant for a Tier B Wireless Right-of-Way Facility Permit to notify the public of the approval of the application under Subsection 15.34.030.J above, and to provide the Department of Public Works with evidence, as the Department of Public Works may require, of compliance with this requirement.

2. Types of Notice Required.

    a. Notice by Mail. The applicant shall mail a copy of the notice to any person owning property or residing adjacent or across the street from the proposed location of the wireless telecommunications facility; and

    b. Notice by Posting. The applicant shall post a copy of the notice on the proposed wireless telecommunications facility is to be located.

3. Contents and Form of Notice. The notice shall contain such information, and be in such form, as the Department of Public Works reasonably requires in order to inform the general public as to the nature of the application for a Wireless Right-of-Way Facility Permit. At a minimum, the notice shall:

    a. Provide a description and a photo-simulation of the proposed wireless telecommunications facility;

    b. Summarize the determinations of any City departments that were necessary for the tentative approval of the application;

    c. Identify any conditions added by any City departments that have been accepted by the applicant and are now part of the application;

    d. State that any person seeking to appeal the grant of the application must submit an appeal notice to the Department of Public Works within ten (10) business days of the date the notice was mailed and posted;

    e. Describe the procedure for submitting a timely appeal;

    f. Specify the applicable grounds for appealing the application under this Chapter 15.34; and

    g. Explain how any interested person may obtain additional information and documents related to the application.

L. Appeal of Tier B Wireless Right-of-Way Facility Permit.

1. Appeal Allowed. The applicant for a Tier B Wireless Right of Way Facility Permit, and/or any person owning or residing at property that is adjacent to or across the street to the location of a proposed Tier B Wireless Telecommunications Facility, may appeal an approval or denial of an application for a Tier B Wireless Right-of-Way Facility Permit. An appeal must be in writing and must be submitted to the City Clerk within ten (10) business days of the date the notice was mailed and posted as required under Subsection 15.34.030.K.2, above.

2. Public Hearing Required. If an appeal is timely submitted, an independent hearing officer selected by the City shall hold a public hearing. The City Clerk shall set a date for the hearing that is at least fifteen (15) business days, but no more than sixty (60) business days, after the City Clerk's receipt of the appeal, unless the applicant and any person submitting an appeal agree to a later hearing date.

3. Notice of Public Hearing Date. At least ten (10) business days before the public hearing, the City Clerk shall notify in writing any person submitting an appeal, the applicant, and any City department that reviewed the application of the date set for the public hearing. The City Clerk shall follow its regular procedures for notifying the general public of the hearing.

4. Public Hearing Record. The public hearing record shall include:

    a. The application and the Department of Public Works' approval of the application;

    b. Any written determination from the Department of Public Works;

    c. Any further written evidence from any City departments submitted either prior to or during the hearing;

    d. Any written submissions from the applicant, any person submitting an appeal, or any other interested person submitted either prior to or during the hearing; and

    e. Any oral testimony from any City departments, the applicant, any person submitting a protest, or any interested person taken during the hearing.

5. Hearing Officer Determination. The Hearing Officer shall issue a written resolution containing its determination within fourteen (14) business days following the close of evidence at the conclusion of the public hearing on the appeal. The resolution shall include a summary of the evidence and the ultimate determination whether to grant, grant with modifications, or deny the appeal.

6. Notice of Determination on Appeal.

    a. The City Clerk shall promptly mail a notice of a determination on an appeal to both the applicant, to any neighborhood association identified by the Department of Development Services for any neighborhood within three hundred (300) feet of the approved wireless telecommunications facility, and to any person who either filed a protest, submitted evidence, or appeared at the hearing, and whose name and address are known to the Department of Public Works.

M. Notice of Completion and Inspection.

1. Notice of Completion. A permittee shall notify the Department of Public Works immediately upon completion of the installation of a wireless telecommunications facility. The notice of completion must include a written statement from a licensed California engineer confirming that the permitted wireless telecommunications facility complies with the Public Health Compliance Standard.

2. Inspection.

    a. Inspection After Installation. The Department of Public Works will inspect a wireless telecommunications facility installed in the public right-of-way within a reasonable time after a permittee provides the Department of Public Works with a notice of completion required under Subsection 15.34.030.M.1, above. The Department of Public Works will determine during the inspection whether:

        (i) The installation is in accordance with the requirements of the Wireless Right-of-Way Facility Permit; and

        (ii) The permitted wireless telecommunications facility complies with the Public Health Compliance Standard.

b. Subsequent Inspection. If at any time the Department of Public Works has a valid reason to believe that a permitted wireless telecommunications facility does not comply with any local or state regulation, ordinance or law, condition of approval, and/or the Public Health Compliance Standard, the Department of Public Works shall require the permittee to provide additional proof of compliance with such local or state regulation, ordinance or law, condition of approval, and/or the Public Health Compliance Standard, which proof shall be provided within forty-eight (48) hours of such request (or such additional time as the Department of Public Works may grant in its reasonable discretion). If such proof of compliance is not timely provided, or is determined by the Director of Public Works or designee to be insufficient, the City may initiate such additional code enforcement remedies and/or permit revocation procedures as are otherwise permissible. The procedures set forth herein are intended to augment, not limit, the City's permit and code enforcement remedies. The Department of Public Works may also inspect the facility.

N. Compliance.

1. Compliance Required. Any wireless telecommunications facility installed in the public rights-of-way pursuant to a Wireless Right-of-Way Facility Permit must comply with the terms and conditions of the permit and this Chapter 15.34.

2. Notice of Deficiency.

a. Non-Compliance with Permit. If the Department of Public Works determines, either after an inspection conducted under Subsection 15.34.030.M above or at any other time, that a wireless telecommunications facility is not in compliance with the Wireless Right-of-Way Facility Permit or this Chapter 15.34, the Department of Public Works shall issue a notice of deficiency and require the permittee to take corrective action to bring the wireless telecommunications facility into compliance.

b. Radio Frequency Emissions. If the Department of Public Works determines, either after an inspection required under Subsection 15.34.030.M above or at any other time, that potential human exposure to radio frequency emissions from a permitted wireless telecommunications facility exceeds FCC guidelines, the Department of Public Works shall issue a notice of deficiency and require the permittee to take corrective action to bring the wireless telecommunications facility into compliance with FCC guidelines.

c. Noise. If the Department of Public Works determines, either after an inspection required under Subsection 15.34.030.M above or at any other time, that noise from a permitted wireless telecommunications facility at any time of the day or night exceeds forty-five (45) dBA as measured at a distance three (3) feet from any residential building facade, the Department of Public Works shall issue a notice of deficiency and require the permittee to take corrective action to bring the wireless telecommunications facility into compliance with the noise limit.

3. Department Remedies.

a. Required Action. If a permittee fails to take corrective action with respect to a wireless telecommunications facility within twenty (20) business days after receiving a notice of deficiency, the Department of Public Works shall:

(i) Take all reasonable, necessary, and appropriate action to remedy a permittee's noncompliance; or

(ii) Require a permittee to remove the non-compliant wireless telecommunications facility from the public rights-of-way; and

(iii) Charge to a permittee the reasonable costs that the City has actually incurred including, but not limited to, administrative costs.

b. Discretionary Action. In addition to the foregoing, if a permittee fails to take corrective action with respect to a wireless telecommunications facility within twenty (20) business days after receiving a notice of deficiency the Department of Public Works may deny any pending application filed by permittee for a Wireless Right-of-Way Facility Permit.

O. Abandonment.

1. Permittee Must Maintain Facilities; Compliance with Phasing Plan. Any wireless telecommunications facility installed in the public rights-of-way pursuant to a Wireless Right-of-Way Facility Permit issued under this Chapter 15.34 must be properly maintained and used to provide wireless telecommunications services. Failure to comply with a phasing plan shall constitute an abandonment, and shall be subject to the remedy for noncompliance set forth in Subsection 15.34.030.O.3, below.

2. Notice of Abandonment. A permittee shall notify the Department of Public Works, or the Department of Public Works may determine and notify a permittee, that a wireless telecommunications facility installed in the public right-of-way has been abandoned either because it has not been properly maintained or because it is no longer being used to provide wireless telecommunications services. In such event, a permittee shall promptly remove the abandoned wireless telecommunications facility as required by the Department of Public Works and at permittee's expense.

3. Termination of Permits for Abandoned Wireless Telecommunications Facilities; Remedy for Non-Compliance. Wireless Right-of-Way Facility Permits shall automatically expire upon the abandonment of a wireless telecommunications facility. If a permittee fails to remove an abandoned wireless telecommunications facility within a reasonable period of time after receiving a notice of abandonment, the Department of Public Works shall take all reasonable, necessary, and appropriate action to remedy the permittee's failure to comply with the notice (including removing the wireless telecommunications facility) and may charge to the permittee the reasonable costs the City has actually incurred including, but not limited to, administrative costs.

P. Term of Permit. A Wireless Right-of-Way Facility Permit shall have a term of ten (10) years. The term shall commence upon the date of issuance of the permit.

Q. Renewal and New Applications.

1. When Permitted.

a. Renewal Permitted. At the end of the term set forth in Subsection 15.34.030.P above, the Department of Public Works may renew a Wireless Right-of-Way Facility Permit for an additional ten (10) year term, provided that the Department of Public Works did not issue a Modification Permit for the permitted wireless telecommunications facility during the term of the permit.

b. Renewal Not Permitted.

(i) A wireless telecommunications facility that has been issued a Modification Permit may not be renewed beyond the expiration of the Modification Permit term. Instead, the permittee may file a new application for a Wireless Right-of-Way Facility Permit for the permitted and modified wireless telecommunications facility at the same location.

(ii) A Wireless Right-of-Way Facility Permit that has been renewed once under Subsection 15.34.030.Q.1.a., above may not be renewed for a second time. Instead, the permittee may file a new application for a Wireless Right-of-Way Facility Permit for the permitted wireless telecommunications facility at the same location.

2. Renewal Application Required. A permittee seeking to renew a Wireless Right-of-Way Facility Permit that may be renewed under Subsection 15.34.030.Q.1., above must file a renewal application with the Department of Public Works no later than six (6) months prior to the expiration date of the existing permit. The renewal application shall include a written report from a certified engineer confirming that

the permitted wireless telecommunications facility complies with the Public Health Compliance Standard, and such other material/information as may be directed by the Director of Public Works, so long as such additional material is consistent with the application requirements set forth in Subsection 15.34.030.D, above.

3. Approval of Renewal Application.

    a. Satisfaction of Public Health Compliance Standard Required. The Department of Public Works shall review every application under the Public Health Compliance Standard. The Department of Public Works shall approve a timely-filed renewal application unless the Department of Public Works determines that the permitted wireless telecommunications facility does not comply with the Public Health Compliance Standard and/or that any other applicable standard for new wireless telecommunications facilities is not satisfied.

    b. Applicability of Other Provisions of this Chapter. The other provisions of this Chapter 15.34 related to approval of an application for a Wireless Right-of-Way Facility Permit shall not apply to the Department of Public Works' review of a renewal application.

4. New Application.

    a. Required When Renewal Not Permitted. If, in accordance with Subsection 15.34.030.Q.1. above, a wireless telecommunications facility cannot be renewed, the permittee must submit a new application for a Wireless Right-of-Way Facility Permit in order to continue to maintain the permitted wireless telecommunications facility in the public rights-of-way.

    b. Removal Not Required. Notwithstanding any other applicable law, if the permittee submits an application for a Wireless Right-of-Way Facility Permit no later than six (6) months prior to the expiration date of a previously issued Wireless Right-of-Way Facility Permit, the Department of Public Works shall not require the applicant to remove the permitted wireless telecommunications facility unless and until there is a final determination denying the application.

R. Replacement or Removal of Equipment.

1. Replacement. During the term of a Wireless Right-of-Way Facility Permit, a permittee may replace equipment that is part of a permitted wireless telecommunications facility without obtaining a Modification Permit.

2. Removal. During the term of a Wireless Right-of-Way Facility Permit, a permittee may remove equipment that is part of a permitted wireless telecommunications facility without obtaining a Modification Permit.

3. Department Procedures.

    a. Permittee's Notification. A permittee shall notify the Department of Public Works in writing that it intends to replace or remove equipment at a permitted wireless telecommunications facility as permitted by this Subsection 15.34.030.R. In the notice, the permittee shall at a minimum:

        (i) Identify the use and size of each piece of equipment that the permittee is seeking to remove from the utility pole or street light pole;

        (ii) Identify the use and size of the equipment that the permittee is seeking to install on the utility pole or street light pole to replace existing equipment; and

        (iii) If any new equipment will replace existing equipment, provide drawings and photo simulations of the existing and new equipment the permittee is seeking to install on the utility pole or street light pole.

b. Department of Public Works Notification. Within five (5) business days of receipt of the permittee's request to replace or remove equipment as described above, the Department of Public Works shall notify the permittee in writing whether the Department of Public Works has determined that the request complies with the requirements of this Subsection 15.34.030.R.

c. Permittee Replacement or Removal. Upon receipt of a Department of Public Works notice that the request complies with this Subsection 15.34.030.R, the permittee may replace or remove the equipment identified in the request.

d. Compliance with Other Requirements. Nothing in this Subsection 15.34.030.R shall be construed to relieve the permittee of its duty to comply with any City regulations or permitting requirements when removing equipment from or replacing equipment on a utility pole or street light pole.

S. Modification Permit.

1. Modification Permit Required. A permittee seeking to add equipment to a permitted wireless telecommunications facility that does not comply with the requirements of Subsection 15.34.030.R above, because the replacement equipment is not identical in size or smaller than the previously permitted equipment, must obtain a Modification Permit.

2. Department Procedures.

a. Application. In an application for a Modification Permit, the applicant shall at a minimum:

(i) State whether the permitted wireless telecommunications facility is a base station;

(ii) Identify the use and size of any piece of equipment that the applicant is seeking to remove from the utility pole or street light pole;

(iii) Identify the use and size of any equipment that the applicant is seeking to add to the utility pole or street light pole;

(iv) State whether any piece of equipment the applicant is seeking to add to the utility pole or street light pole is transmission equipment and, if so, explain why it meets the definition of transmission equipment;

(v) Provide drawings and photo-simulations of the existing and new equipment the permittee is seeking to install on the utility pole or street light pole; and

(vi) State whether the proposed modification will result in a substantial change to the physical dimensions of the utility pole or street light pole.

b. Time for Department Determination. The Department of Public Works shall by order or regulation establish the appropriate timeframe for the Department of Public Works to review an application for a Modification Permit that is consistent with the requirements of Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012, codified at 47 U.S.C. § 1455(a), as may be amended from time to time, and with any FCC decision addressing that section or any FCC regulation implementing that section.

3. Approval of Modification Permits at Base Stations.

a. No Substantial Change to the Physical Dimension. The Department of Public Works shall approve an eligible facilities request for a Modification Permit if the installation of the modified transmission equipment would not substantially change the physical dimensions of the utility pole or street light pole where the permitted base station equipment has been installed.

b. Substantial Change to the Physical Dimensions. The Department of Public Works may approve an eligible facilities request for a Modification Permit if the installation of the modified transmission

equipment would substantially change the physical dimensions of the utility pole or street light pole where the permitted base station equipment has been installed, provided the application complies with the requirements of Subsection 15.34.030.S.5, below.

c. Equipment Other than Transmission Equipment. The Department of Public Works may approve an application for a Modification Permit at a wireless telecommunications facility that is a base station if the application seeks to modify equipment other than transmission equipment, provided the application complies with the requirements of Subsection 15.34.030.S.5.b, below.

4. Approval of Modification Permits at Other Types of Facilities. The Department of Public Works may approve an application for a Modification Permit at a wireless telecommunications facility that is not a base station, provided the application complies with the requirements of Subsection 15.34.030.S.5.b, below.

5. Applicability of Other Provisions of this Chapter.

a. No Substantial Change to the Physical Dimension. The other provisions of this Chapter 15.34 related to approval of an application for a Wireless Right-of-Way Facility Permit shall not apply to the Department of Public Works' review of an application for a Modification Permit that complies with the requirements of Subsection 15.34.030.S.3.a, above.

b. Other Types of Modifications. Before approving an application for a Modification Permit under Subsections 15.34.030.S.3.b, S.3.c, and S.4 above, the Department of Public Works shall: (A) determine whether the proposed wireless telecommunications facility complies with the Public Health Compliance Standard; and (B) determine compliance with any applicable compatibility standards. The Department of Public Works may not approve the Modification Permit if any City department determines the application does not comply with the appropriate standard(s). In addition, the Department may determine that compliance with other provisions of this Chapter 15.34 shall be required.

6. Generally Applicable Laws. Nothing in this Subsection 15.34.030.S shall prohibit the Department of Public Works from denying an application for a Modification Permit (even where the application consists of an eligible facilities request) where the Department of Public Works determines that the proposed modified wireless telecommunications facility would violate any generally applicable building, structural, electrical, or safety code provision, or any applicable law codifying objective standards reasonably related to health and safety.

T. Fees and Costs.

1. Application Fees. The City shall impose fees for review of an application for a Wireless Right-of-Way Facility Permit. The purpose of these fees is to enable the City to recover its costs related to reviewing an application for a Wireless Right-of-Way Facility Permit. The fee amounts shall be established and/or adjusted pursuant to an adopted fee resolution of the City Council, or as otherwise established and/or adjusted pursuant to applicable law.

2. Hearing Fees. If one or more appeal hearings is required, each appellant shall pay the Department of Public Works a non-refundable hearing fee for each appeal.

3. Renewal Fees. A permittee seeking to renew a Wireless Right-of-Way Facility Permit shall pay the Department of Public Works a non-refundable permit renewal fee.

4. Modification Permit Fees. Each applicant for a Modification Permit shall pay the Department of Public Works a non-refundable permit modification fee, and shall further pay any other permit review fees as required by Subsection 15.34.030.T.1, above.

5. Inspection Fees. The Department of Public Works shall impose fees for the inspection of a permitted wireless telecommunications facility. The purpose of these fees is to enable the City to recover their costs related to inspecting a permitted wireless telecommunications facility.

6. Discretion to Require Additional Fees. In instances where the review of an application for a Wireless Right-of-Way Facility Permit is or will be unusually costly to the Department of Public Works or to other City departments, the Director of Public Works, in his or her discretion, may, after consulting with other applicable City departments, agencies, boards, or commissions, require an applicant for a Wireless Right-of-Way Facility Permit to pay a sum in excess of the amounts charged pursuant to this Subsection 15.34.030.T. This additional sum shall be sufficient to recover actual costs incurred by the Department of Public Works and/or other City departments, agencies, boards, or commissions, in connection with an application for a Wireless Right-of-Way Facility Permit and shall be charged on a time and materials basis. Whenever additional fees are charged, the Director of Public Works, upon request, shall provide in writing the basis for the additional fees and an estimate of the additional fees.

7. Deposit of Fees. All fees paid to the Department of Public Works for Wireless Right-of-Way Facility Permit shall be deposited in the General Fund. All other fees shall go directly to the appropriate City department.

8. Reimbursement of City Costs. The Department of Public Works may determine that it requires the services of an expert in order to evaluate an application for a Wireless Right-of-Way Facility Permit. In such case, the Department of Public Works shall not approve the application unless the applicant agrees to reimburse the applicable City department for the reasonable costs incurred by that department for the services of a technical expert.

U. Base Station Determination.

1. Request for Determination.

a. New Facilities. An applicant for a Wireless Right-of-Way Facility Permit may seek a determination from the Department of Public Works that a proposed wireless telecommunications facility is a base station.

b. Permitted Facilities. A permittee may seek a determination from the Department of Public Works that a permitted wireless telecommunications facility is a base station.

2. Single Determination Permitted. Once the Department of Public Works has determined that an applicant's new wireless telecommunications facility or a permittee's permitted wireless telecommunications facility is a base station, the Department of Public Works may apply that determination to the applicant's or permittee's other wireless telecommunications facilities that use the identical equipment.

3. Department Order. In lieu of a case-by-case determination, the Department may determine by order or regulation those types of wireless telecommunications facilities that meet the definition of the term base station.

(ORD-18-0012 § 2, 2018)

15.34.040 Other provisions.

A. Temporary Wireless Telecommunication Facilities. Installation, maintenance, or operation of any temporary wireless telecommunications site is prohibited except as allowed under a special events permit necessary during a special event authorized by Chapter 5.60, or during a government-declared emergency.

B. Illegal facilities. Illegal wireless telecommunications facilities or co-location facilities have no vested rights and shall either be brought into legal conforming status in accordance with this Chapter and Title 21 of the Long Beach Municipal Code, or shall be removed.

C. Transfer or Change of Ownership/Operator. Upon assignment or transfer of an already approved wireless telecommunications facility or any rights under that permit, the owner and/or current operator of the facility shall within thirty (30) business days of such assignment or transfer provide written notification to the Director of Public Works of the date of the transfer and the identity of the transferee. The Director may require submission of any supporting materials or documentation necessary to determine that the proposed use is in compliance with the existing permit and all of its conditions including, but not limited to, statements, photographs, plans, drawings, models, and analysis by a state-licensed radio frequency engineer demonstrating compliance with all applicable regulations and standards of the FCC and the California Public Utilities Commission. If the Director determines that the proposed operation is not consistent with the existing permit, the Director shall notify the applicant who may revise the application or apply for modification of the permit pursuant to the requirements of this Chapter.

(ORD-18-0012 § 2, 2018)

15.34.050 Severability clause.

If any provision or clause of this Chapter or the application thereof to any person or circumstance is held to be unconstitutional or to be otherwise invalid by any court of competent jurisdiction, such invalidity shall not affect other article provisions or clauses or applications, and to this end the provisions and clauses of this Chapter are declared to be severable.

(ORD-18-0012 § 2, 2018)