MONCHAMP ELDRUM LLP

October 17, 2022

Via email

Long Beach City Council
411 W. Ocean Boulevard
Long Beach, CA 90802

RE: October 18, 2022 Agenda Item 20 (Council File No. 22-1228)

Dear Honorable Mayor and City Councilmembers:

On behalf of AT&T, the applicant for the subject Small Cell Wireless Telecommunications Facilities Permit (PWRW48749-8), we support staff's recommendation and respectfully request that the City Council deny the CEQA appeal and uphold the Hearing Officer's decision.

The appellants raise a number of concerns related to wireless facilities, the Federal Communications Commission standards, and the City's Telecom Ordinance. However, as discussed in the staff report, the federal Telecommunications Act of 1996 specifically precludes state and local governments from considering any alleged effects of radio frequency emissions in making decisions on the siting of wireless telecommunications facilities "to the extent such facilities comply with the [Federal Communications] Commission's regulations concerning such emissions."[1] Because the proposed small wireless facility will comply with the FCC's regulations concerning allowable levels of radio frequency emissions, the City is preempted from regulating radio frequency emissions associated with wireless telecommunications.

The only issue before the City Council is the use of a Categorical Exemption under CEQA for the subject small cell permit. Consistent with established case law, the City's Telecom Ordinance, and the previously adopted Citywide Categorical Exemption for the construction and modification of small cell wireless telecommunications facilities in the public right-of-way (CE-19-013), City staff and the Hearing Officer appropriately determined the subject small cell permit is exempt from CEQA pursuant to two clearly applicable classes of statutory exemptions.

California courts have already determined that small cell wireless facilities fit squarely within the Class 3 categorical exemption under the CEQA Guidelines for small facilities and structures.[2] The

[1] 47 U.S.C. § 332(c)(7)(B)(iv).
[2] 14 California Code of Regulations § 15303(d); *Robinson v. City and County of San Francisco* (2012) 208 Cal.App.4th 950; see also *San Francisco Beautiful v. City and County of San Francisco* (2014) 226 Cal.App.4th

proposed facility does not trigger any of the exceptions to the exemptions found in CEQA Guidelines Section 15300.2. Appellants have suggested that a cumulative impact exception should apply; however, that exception applies only when there is evidence of significant cumulative impacts associated with "successive projects of the same type in the same place,"[3] which has not been provided. Further, none of the cases cited by Appellants with regard to cumulative impacts involve analogous facts or similar circumstances or even involve categorical exemptions.

Appellants have also argued that an exception to the use of a Categorical Exemption should apply because there are unusual circumstances. Again, however, the cases cited in support of Appellants' claims do not involve similar facts or facilities. In fact, some of the cases cited by Appellants contain broader established propositions related to CEQA that undermine Appellants' assertions, including the California Supreme Court's determination that "to establish the unusual circumstances exception, it is not enough for a challenger merely to provide substantial evidence that the project *may* have a significant effect on the environment."[4] Contrary to Appellants' contention, there are no unusual circumstances here, and the presence of a gas line nearby is not an unusual circumstance. Gas lines exist all over cities and one or more gas lines are near most projects, including the types of projects that would be expected to use the Class 2 and Class 3 exemptions.[5] Further, as discussed in the *San Francisco Beautiful* case, telecommunications infrastructure is a common and widespread use and has become part of our environment, thus, there is nothing unusual about placing wireless facilities at the site.[6]

We note also that CEQA's focus is on the effects of projects on the environment at a broader public level rather than individual persons. "In general, CEQA does not regulate environmental changes that do not affect the public at large: 'the question is whether a project [would] affect the environment of persons in general, not whether a project [would] affect particular persons."[7] In addition, despite Appellants' contention that the City has conducted "*zero* environmental review of the impacts from its approval", it is well established, as stated in one of the cases cited by

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1012 regarding the applicability of the Class 3 exemption to above ground telecommunications cabinets and associated trenching throughout San Francisco.

[3] 14 California Code of Regulations § 15300.2(b).

[4] *Berkeley Hillside Preservation v. City of Berkeley*, 60 Cal.4th 1086, 1105 (2015). The court also explained: "In listing a class of projects as exempt, the Secretary has determined that the environmental changes typically associated with projects in that class are not significant effects within the meaning of CEQA, even though an argument might be made that they are potentially significant. The plain language of Guidelines section 15300.2, subdivision (c), requires that a potentially significant effect must be 'due to unusual circumstances' for the exception to apply." *Id.* at 1104-1105.

[5] *See Wollmer v. City of Berkeley*, 193 Cal.App.4th 1329, 1350-1351 (2011). In *Wollmer*, the court found that the location of a project at an intersection of two major streets that also serve as state highway routes was not an unusual circumstance, "let alone a circumstance creating an environmental risk that does not generally exist for other in-fill projects." In determining that there was no unusual circumstance preventing the use of a categorical exemption, the court also referred to the established principle that "[u]nsubstantiated opinions, concerns, and suspicions about a project, though sincere and deeply felt, do not rise to the level of substantial evidence supporting a fair argument of significant environmental effect" (*Id.*, internal citations omitted).

[6] *San Francisco Beautiful*, 226 Cal.App.4th at 1025.

[7] *Parker Shattuck Neighbors v. Berkeley City Council*, 222 Cal.App.4th 768, 782 (2013) (internal citations omitted).

Appellants, that "[i]f the agency finds the project is exempt from CEQA, no further environmental review is necessary."[8]

We appreciate your consideration and respectfully request denial of the CEQA appeal, consistent with staff's recommendation and the Hearing Officer's decision.

Very truly yours,

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cc: Christopher Koontz, Acting Director of Development Services
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[8] *Save Our Carmel River v. Monterey Peninsula Water Management District*, 141 Cal.App.4th 677, 688 (2006).