Fiber First Los Angeles et al. v. County of Los Angeles et al, 23STCP00750

Decision on petition for writ of mandate: granted in limited part

Petitioners Fiber First Los Angeles, Mothers of East LA, Union Binacional De Organizaciones De Trabajadores Mexicanos Exbraceros 1942-1964, Boyle Heights Community Partners, United Keetoowah Band of Cherokee Indians in Oklahoma, California Fires & Firefighters, Malibu for Safe Tech, EMF Safety Network, Californians for Safe Technology, 5G Free California, and Children's Health Defense seek a writ of mandate compelling Respondents County of Los Angeles ("County"), County Board of Supervisors ("Board"), County Regional Planning Commission ("Planning Commission"), County Department of Regional Planning ("Regional Planning"), and County Department of Public Works ("DPW") (collectively, "County") to vacate all approvals of an ordinance.

The court has read and considered the moving papers, opposition, and reply, heard oral argument on March 7 and 21, 2024, and renders the following decision.

I. Statement of the Case

A. First Amended Petition

On March 7, 2023, Petitioners filed the Petition. The operative pleading is the First Amended Petition ("FAP"), which alleges (1) project ineligibility for exemptions under the California Environmental Quality Act ("CEQA"), (2) failure to substantially support findings, (3) unlawful collocation[1], (4) general plan inconsistency, (5) violation of County legislative land use and zoning process, (6) improper blanket designation of permit approval process as ministerial and unlawful precommitment to future approvals under CEQA, (7) violation of due process, and (8) unlawful delegation of legislative authority to an administrative agency. The FAP alleges in pertinent part as follows.

1. Introduction

The Project is an ordinance ("Ordinance") establishing regulations for the review and permitting of wireless telecommunication facilities. FAP, ¶1. It eliminates discretionary conditional use permitting ("CUP") and institutes ministerial review for most wireless telecommunication facilities. FAP, ¶2. As a result, it strips away site-specific environmental inquiries required by CEQA. FAP, ¶2.

The Ordinance illegally delegates the Board's legislative authority to the County's Regional Planning's Director ("Director") and the Highway Commissioner ("Commissioner") insofar as both can create new substantive obligations. FAP, ¶4. Regional Planning and the DPW would have unfettered authority to cut the public out of the wireless facility permitting process. FAP, ¶5. While the Board asserts this will close a digital divide for the less fortunate, it will worsen the divide because such persons will have no voice. FAP, ¶5.

Ample scientific evidence shows that wireless projects can so sicken residents as to

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[1] California uses the spelling "colocation" which federal authority uses "collocation". *Compare* Govt. Code §65850.6 (d)) *and* 47 C.F.R. §1.6100 (b)(2). The court will use the federal spelling.

constructively evict families who cannot tolerate continuous exposure to the radiation emitted from towers. FAP, ¶8. Basic justice demands that these families have adequate prior notice and a fair hearing before their voice is silenced. FAP, ¶8. The wireless facilities will endanger the air, water, flora, fauna, and objects of historic or aesthetic significance. FAP, ¶9. They also are not designed to withstand earthquakes or floods and will create new risks of fire. FAP, ¶9.

Petitioners seek relief vacating the Ordinance's approval and declaring that its adoption did not comply with CEQA, the Government ("Govt.") Code, the Los Angeles County Code ("LACC"), and the California and United States Constitutions. FAP, ¶10.

2. Ordinance Passage

Before the Ordinance's adoption, Regional Planning's policy required a CUP for a wireless facility. FAP, ¶119. Regional Planning would then process the CUP similar to those issued for radio and television towers. FAP, ¶119. The process was discretionary and required consideration of proper integration with the surrounding community, public notification of the application, and a public hearing. FAP, ¶119. To be complete, an application needed to conform with the requirements of LACC sections 22.222.060 *et seq*. FAP, ¶119.

On March 5, 2019, the Board instructed the Director to prepare an ordinance establishing standards for the location, height, and design of wireless communication facilities. FAP, ¶120. Regional Planning was required to conduct outreach to residents and interested parties, prepare an appropriate environmental document to comply with CEQA and the County's environmental review procedures, and present the ordinance and environmental document to the Planning Commission and Board at respective hearings. FAP, ¶120.

On March 23, 2022, Regional Planning presented to the Planning Commission amendments to Title 22 of the LACC. FAP, ¶121. The proposal did not include amendments to LACC Title 16. FAP, ¶121. Over vigorous public opposition, the Planning Commission recommended Board approval of the Title 22 amendments. FAP, ¶121.

In a Proposed Environmental Determination also dated March 23, 2022, Regional Planning asserted that the Title 22 Amendments qualified for Class 1 and Class 3 Exemptions to CEQA because the Project authorizes modifications to existing facilities and minor alterations to land with the construction or conversion of small structures, and neither action would have a significant environmental effect. FAP, ¶122.

At a public hearing on November 15, 2022, the Board discussed the Title 22 amendments with County staff, accepted public comment, passed a motion indicating its intent to approve the Project, and made a finding that the Project is exempt from CEQA. FAP, ¶124. The Board continued to discuss the Project with County staff and accept public comment through January 10, 2023. FAP, ¶125.

On January 3, 2023, County staff proposed amendments to the Ordinance. FAP, ¶126. The agenda for the Board's January 10, 2023 hearing made these changes public. FAP, ¶126. The amendments added changes to LACC Titles 16 and 22. FAP, ¶126. A change to LACC section 16.25.030(B)(2) authorized the Commissioner to amend a design standards checklist and permit conditions for small cell facilities, also known as small wireless facilities ("SCFs"), and eligible facilities requests ("EFRs") to modify existing facilities. FAP, ¶126(a). The Board approved the Ordinance at its January 10, 2023 hearing. FAP, ¶128.

3. The Ordinance Provisions

The Ordinance allows the construction of new SCFs, macro facilities, and EFRs. FAP, ¶¶

132-34. A wireless facility can be up to 75 feet tall in industrial, rural, agricultural, open space, resort-recreation, and watershed zones. FAP, ¶135. A temporary wireless facility can be up to 200 feet tall for as many as six months. FAP, ¶136.

The Ordinance does not estimate how many wireless facility structures will be built. FAP, ¶137. It does not limit the amount of new SCFs and macro facilities, including those on a Scenic Highway or in a Significant Ecological Area ("SEA"), Significant Ridgeline, or Coastal Zone. FAP, ¶¶ 138-139. The Ordinance permits installation of new towers and support structures on properties listed or eligible for listing on the National, California, or County historic registers. FAP, ¶140.

If a facility is on a site with an eligible historic resource, the Ordinance allows, but does not require, the Director to order a historic resource assessment to identify impacts to historic resources and mitigation to minimize such impacts. FAP, ¶141. The Ordinance does not include any mitigation measures, limit the number of facilities in any one location, or address the cumulative impacts of such facilities. FAP, ¶¶ 142-44.

The Commissioner has the authority to (1) adopt and amend a design standards checklist and permit conditions for SCFs and EFRs (FAP, ¶145), (2) approve or disapprove an applicant's engineered plans for SCFs mounted on new or replacement County infrastructure (FAP, ¶146), and (3) grant a permit when satisfied the application meets all applicable requirements (FAP, ¶147). The Commissioner may approve the structural analysis of the effect of placement of SCFs on County infrastructure. FAP, ¶150. The Commissioner's action on an application is the County's final action. FAP, ¶148.

The Director may periodically amend the Application Checklist and the Zoning Permit Instructions and Checklist. FAP, ¶151. If a zone or land use category within a specific plan is silent about wireless facilities, the Director may accept an application for a wireless facility if he or she determines that such facilities are similar to another permitted use in that zone or category. FAP, ¶153.

The Ordinance outlines the process and eligibility for a Ministerial Plan Review of existing macro facilities, EFRs, and SCFs on private property. FAP, ¶¶ 155-58.

4. <u>The Checklists</u>

On January 25, 2023, Regional Planning released a "Small Cell Wireless Communications Facilities Design Standards Self-Assessment Checklist" ("Self-Assessment Checklist") without circulation for public comment. FAP, ¶129. The Self-Assessment Checklist addressed wireless facilities subject to LACC Title 16 as well as facilities not on County infrastructure or on County highways. FAP, ¶129. The Commissioner made several subjective and/or policy decisions in the Self-Assessment Checklist. FAP, ¶129. It is unclear why Regional Planning handled a matter that should have been assigned to DPW. FAP, ¶129.

On the same day, Regional Planning released a "Land Use Application Checklist - Small Cell Facilities, Colocations and Eligible Facilities Requests" ("Application Checklist") without previous circulation for public comment. FAP, ¶130. The Commissioner made several subjective and/or policy decisions in this document, including insurance coverage requirements and notice radius. FAP, ¶130.

On February 7, 2023, DPW published a "Small Cell Facility in Public Right of Way Design Standards Checklist" ("Standards Checklist") without circulation for public comment. FAP, ¶131. The Commissioner made several subjective and/or policy decisions in this document, including insurance coverage requirements, minimum distance for a facility from residential windows, size

limitations, safety standards, and certain aesthetics requirements. FAP, ¶131. These specifics are not contained in the Ordinance. FAP, ¶131.

5. The General Plan

Guiding Principle 1 of the County General Plan is to protect and conserve the County's natural and cultural resources, including the character of rural communities. FAP, ¶159. This promotes land use development in rural areas compatible with the natural environment and landscape. FAP, ¶159.

The General Plan also seeks to: (1) discourage development in riparian habitats and woodlands to support preservation in their natural state; (2) protect scenic resources through land use regulations that mitigate development impacts; (3) protect ridgelines from incompatible development that diminishes their scenic value; (4) mitigate all impacts from new development on or adjacent to historic, cultural, and paleontological resources; (5) support an inter-jurisdictional collaborative system that protects and enhances such resources; and (6) ensure proper notification and recovery processes for development on or near such resources. FAP, ¶¶ 160-65.

6. Causes of Action

a. CEQA

The County unlawfully exempted the Ordinance from environmental review under the Class 1 and Class 3 categorical exemptions. Neither exemption can apply because (1) the cumulative impact of successive projects, which the Ordinance does not limit, may be significant; and (2) the Ordinance may cause a substantial adverse change in the significance of a historical resource.

b. General Plan Inconsistency

The Ordinance is inconsistent with the General Plan and the following underlying principles. FAP, ¶189. Guiding Principle 1 is to protect and conserve natural and cultural resources like rural communities by approving land uses and development compatible with the natural environment and landscape. FAP, ¶190. Policy C/NR 3.11 discourages development in riparian habitats and native woodlands to preserve them in a natural state. FAP, ¶191. Policy C/NR 13.1 protects scenic resources through land use regulations that mitigate development impacts. FAP, ¶192. Policy C/NR 13.2 protects ridgelines from incompatible development that diminishes their scenic value. FAP, ¶193. Policy C/NR 14.1 mitigates impact from new development on or adjacent to historic, cultural, and paleontological resources. FAP, ¶194. Policy C/NR 14.2 supports an inter-jurisdictional collaborative system that protects and enhances historic, cultural, and paleontological resources. FAP, ¶195.

Wireless facilities can be built up to 75 feet in height in industrial, rural, agricultural, open space, resort-recreation, and watershed zones. FAP, ¶¶ 190-95. Temporary facilities may extend up to 200 feet in height for up to six months. FAP, ¶¶ 190-95. The Ordinance does not limit how many facilities can be built in the same location. FAP, ¶¶ 190-95. Such facilities will pose a fire hazard and impact the character of rural communities, the natural state of riparian resources, the scenic value of ridgelines, and the protection of historic, cultural, and paleontological resources. FAP, ¶¶ 190-95.

c. Unlawful Precommitment to Future Approvals

The Ordinance's assertion that certain actions are ministerial is incorrect and violates

CEQA Guidelines sections 15369 and 15002(i)(l). FAP, ¶208. Those decisions involve subjective judgment from the Commissioner or Director. FAP, ¶208.

LACC section 16.25.030(B)(2) states the Commission may adopt and amend a design standards checklist and permit conditions for SCFs and EFRs. FAP, ¶209. This requires the Commissioner to exercise judgment to amend the list at its discretion. FAP, ¶209. Similarly, section 16.25.030.B.3 requires the Commissioner's approval of engineered SCF plans, but it does not define how or when the Commissioner should approve such plans. FAP, ¶210.

LACC section 22.140.760(G)(3) states that an EFR request may be processed through a Ministerial Site Plan Review application if minor modifications will bring the facility in conformance with all standards of the Ordinance. FAP, ¶216. If so, the application does not require a waiver. FAP, ¶216. However, LACC section 22.140.760(E) states that an historic resource assessment "may" be required for a facility to be located on a site containing an eligible resource. FAP, ¶216. This gives the Director two levels of discretion: whether the EFR request needs a historic resource assessment and whether that assessment is satisfactory. FAP, ¶216.

It is reasonably foreseeable that individual permits and projects approved under the Ordinance may have significant individual and cumulative environmental impacts. FAP, ¶221.

d. Due Process

A person may not be deprived of life, liberty, or property without due process of law. FAP, ¶228. Due process principles require reasonable notice and opportunity to be heard before governmental deprivation of a significant property interest. FAP, ¶228. Land use decisions which substantially affect the property rights of owners of adjacent parcels may constitute deprivation of property. FAP, ¶228.

The Ordinance is unconstitutional due to its vagueness, overbreadth, and failure to ensure procedural due process, including the failure to provide property owners with notice and fair hearing when the County processes permit applications and related approvals. FAP, ¶229. The placement of telecommunication devices near individual properties may or will affect and interfere with individual property rights, including the right to unimpeded use of property. FAP, ¶232. Despite this substantial loss of property rights, the Ordinance does not provide any notice or opportunity for a hearing. FAP, ¶230.

The Ordinance allows the Commissioner or Director to develop permit application design checklists without due process for the public to review and help shape these checklists. FAP, ¶231.

The Ordinance is overbroad in that it allows most permit applications to be treated as ministerial yet provides decision-makers with considerable discretion. FAP, ¶233. It fails to provide guarantees and safeguards to guard against arbitrary County action in the design of checklists or the adjudication of individual applications. FAP, ¶234.

e. Unlawful Delegation of Legislative Authority

Legislative bodies have limited authority to delegate their legislative powers to administrative bodies. FAP, ¶240. When they do, they must have ascertainable standards and safeguards. FAP, ¶240.

The Ordinance fails to establish this mechanism when the Board delegates its authority to the Commissioner. FAP, ¶241. It does not include a standard to guide the Commissioner in developing or amending the design standards checklist for SCFs or EFRs, approving an applicant's engineered plans for SCF's to mount on new or County infrastructure, granting permits based on a conclusion that an SCF or EFR application meets applicable requirements, developing criteria

for deciding to deny an application or order changes thereto, or approving the applicant's structural analysis of the effect of the SCF's placement. FAP, ¶241.

The Ordinance also fails to establish a standard when it delegates its authority to the Director to modify a design standard checklist or decide when a historic resource assessment is required. FAP, ¶242.

The delegation of the power to develop or modify the design checklist, and the power to adjudicate permit or modification applications, violates non-delegation law and due process safeguards under CEQA and other land use laws. FAP, ¶245. CEQA allows delegation of the power to find a project CEQA-exempt but not the power to approve an EIR or mitigated negative declaration. FAP, ¶245. The staff's finding of a CEQA exemption also must be appealable to elected decision-makers. FAP, ¶246.

7. Relief

Petitioners seek a writ of mandate compelling the County to vacate the Ordinance, perform an adequate CEQA review, and ensure public notice, review, comment, and participation as required by law. FAP Prayer for Relief, ¶A. Petitioners seek injunctive relief enjoining the County from taking any action to implement the Project until it complies comply with CEQA. FAP Prayer for Relief, ¶B. Petitioners also seek a declaration of the parties' rights and duties, including a declaration that the County violated its CEQA duties. FAP Prayer for Relief, ¶C. Petitioners seek such other relief as this court deems appropriate and just. FAP Prayer for Relief, ¶F.

B. Course of Proceedings

On March 13, 2023, Petitioners served the County with the Petition and Summons.

On September 9, 2023, the County filed an Answer.

On October 25, 2023, the parties stipulated that Petitioners could file an FAP and the court would take the County's motion for judgment on the pleadings off the calendar.

On November 2, 2023, Petitioners filed and served the FAP.

On December 5, 2023, the County filed an Answer to the FAP. Also on December 5, 2023, the court granted Petitioners' motion to augment the record in part.

On January 25, 2024, the court denied Petitioners' *ex parte* application to prohibit the County's motion for judgment on the pleadings as a common law motion.

On February 13, 2024, the court granted the County's motion for judgment on the pleadings for the third and seventh causes of action, including declaratory relief under those claims.

II. Governing Law[2]

A. Federal Law

1. Telecommunications Act of 1996

Except as specified, the Telecommunications Act of 1996 ("TCA") does not limit or affect

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[2] Petitioners request judicial notice of LACC Chapter 16, Division 1 (RJN Ex. A) and LACC Chapter 22.184 as amended by the Ordinance (RJN Ex. B). The requests are granted. Evid. Code §452(b).

The County requests judicial notice of excerpts from LACC Title 1 (RJN Ex. 1), Title 2 (RJN Ex. 2), Title 16 (RJN Ex. 3), and Title 22 (RJN Ex. 4), Article III, sections 10-11 of the County Charter (RJN Ex. 5); and relevant provisions of the County's General Plan (RJN Ex. 6). The requests are granted. Evid. Code §452(b).

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)(A).

Any state or local regulation shall neither (a) unreasonably discriminate among providers of functionally equivalent services, nor (b) prohibit or have the effect of prohibiting the provision of personal wireless services. 47 U.S.C. §332(c)(7)(B)(i).

A local government shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request. 47 U.S.C. §332(c)(7)(B)(ii).

Any decision by a local government to deny a request 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).

No state or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency ("RF") emissions to the extent that such facilities comply with the Federal Communication Commission's ("FCC") regulations concerning such emissions. 47 U.S.C. §332(c)(7)(B)(iv).

2. Spectrum Act

Notwithstanding the TCA or any other provision of law, a state or local government may not deny, and shall approve, any EFR 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. 47 U.S.C. §1455(a)(1). For such purposes, an "EFR" means any request for modification of an existing wireless tower or base station that involves collocation, removal, or replacement of transmission equipment. 47 U.S.C. §1455(a)(2). This limitation does not relieve the FCC from requirements under the National Historic Preservation Act, 16 U.S.C. section 470 *et seq.*, or the National Environmental Policy Act of 1969, 42 U.S.C. section 4321 *et seq.* 47 U.S.C. §1455(a)(3).

3. Federal Regulations

The FCC acts with respect to certain types of facilities which may significantly affect the environment and thus require the preparation of environmental assessments and may require additional environmental processing. Code of Federal Regulations Title 47 ("47 CFR") §1.1307(a). This includes facilities that (i) may affect listed threatened or endangered species or designated critical habitats, or (ii) are likely to jeopardize the continued existence of any proposed endangered or threatened species or likely to result in the destruction or adverse modification of proposed critical habitats. 47 CFR §1.1307(a)(3). It also includes facilities that may affect districts, sites, buildings, structures, or objects, significant in American history, architecture, archeology, engineering, or culture, that are listed, or are eligible for listing, in the National Register of Historic Places. 47 CFR §1.1307(a)(4).

Any FCC undertaking that has the potential to cause effects on historic properties, unless excluded under 47 CFR section 1.1320(b), shall be subject to review under the National Historic Preservation Act, by applying either (1) procedures set forth in 36 CFR sections 800.3-800.13, or (2) a program alternative established pursuant to 36 CFR section 800.14. 47 CFR §1.1320(a). Program alternatives include: (i) the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, 47 CFR Part 1 Appendix B; (ii) the Nationwide Programmatic Agreement for

Review of Effects on Historic Properties for Certain Undertakings 47 CFR Part 1 Appendix C, and (iii) the Program Comment to Tailor the Federal Communications Commission's Section 106 Review for Undertakings Involving the Construction of Positive Train Control Wayside Poles and Infrastructure, 79 CFR section 30861. 47 CFR §1.1320(a)(2).

"Collocation" is defined as the mounting or installation of transmission equipment on an eligible support structure for the purpose of transmitting and/or receiving RF signals for communications purposes. 47 CFR §1.6100(b)(2). Collocation includes (1) mounting or installing an antenna facility on a pre-existing structure and (2) modifying a structure to mount or install an antenna facility thereon. 47 CFR §1.6002(g). An "antennae facility" means an antenna and associated antenna equipment. 47 CFR §1.6002(d). A "structure" is any building used or to be used to provide personal wireless services, whether it has an existing antenna facility. 47 CFR §1.6002(m).

A "small wireless facility" ("SWF") is a personal wireless services facility that (1) is mounted on a structure up to 50 feet in height, including its antennae, (2) has no antennae with a volume of over three cubic feet, (3) has no more than 28 cubic feet of other wireless equipment associated with the structure, (4) does not require antenna structure registration, (5) is not on tribal lands, and (6) does not result in human exposure to RF radiation in excess of the applicable safety standards in 47 CFR section 1.1307(b). 47 CFR §1.6002(l).

A siting authority that does not act on a siting application on or before the date for the application is presumed to not have acted within a reasonable time. 47 CFR §1.6003(a). A presumptively reasonable period is (i) 60 days for review of a SWF application, (ii) 90 days for review of an application to collocate a facility other than a SWF with an existing structure, and (iii) 90 days for review of an application to deploy a SWF using a new structure. 47 CFR §1.6003(c)(1).

An "EFR" is defined as any request for modification of an existing tower or base station that does not substantially change the physical dimensions of such tower or base station. 47 CFR §1.6100(b)(3). This can include collocation of new transmission equipment as well as removal and replacement of equipment. Id.

An "eligible support structure" is a tower or base station as defined in 47 CFR section 1.6100, provided that it exists at the time the relevant application is filed with the state or local government. 47 CFR §1.6100(b)(4). It is existing if it has been reviewed and approved under the applicable zoning or siting process, or under another state or local regulatory review process. 47 CFR §1.6100(b)(5). A tower that has not been reviewed and approved because it was not in a zoned area when it was built, but was lawfully constructed, is also existing for purposes of this definition. Id.

A "modification" substantially changes the physical dimensions of an eligible support structure if it, *inter alia*, does not comply with conditions associated with the siting approval of the construction or modification of the eligible support structure or base station equipment. 47 CFR §1.6100(b)(7)(vi).

A "tower" is any structure built for the sole or primary purpose of supporting any Commission-licensed or authorized antennas and their associated facilities. CFR §1.6100(b)(9).

A state or local government may not deny, and shall approve, any EFR for modification of an eligible support structure, existing wireless tower, or base station that does not substantially change the physical dimensions of such structure. 47 U.S.C. §1455(a)(1); 47 CFR §1.6100(c). When an applicant asserts in writing that an EFR is covered by 47 CFR section 1.6100, the state or local government can only ask for sufficient information to reasonably confirm this is true. 47

CFR §1.6100(c)(1). It may not require an applicant to submit any other documentation, including the need for the wireless facility or justification of the business decision to modify the wireless facility. Id.

B. Collocation Under State Law

Telegraph or telephone corporations may construct lines of telegraph or telephone lines along and upon any public road or highway, along or across any of the waters or lands within this state, and may erect poles, posts, piers, or abutments for supporting the insulators, 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 or interrupt the navigation of the waters. Public Utilities Code §7901.

Govt. Code section 65850.6(a) exempts a collocation facility from a city or county discretionary permit if (1) the collocation facility is consistent with requirements for the wireless telecommunications collocation facility for which the collocation is proposed, and (2) that facility was subject to a discretionary permit and either an EIR was certified or a negative or mitigated negative declaration was adopted. The city or county must have held at least one public hearing on the discretionary permit and given notice under Govt. Code section 65091. Govt. Code §65850.6(c).

The term "collocation facility" refers to the placement or installation of wireless facilities, including antennas, and related equipment, on, or immediately adjacent to, a wireless telecommunications collocation facility. Govt. Code §65850.6(d)(1). The term "wireless telecommunications facility" refers to equipment and network components such as towers, utility poles, transmitters, base stations, and emergency power systems that are integral to providing wireless telecommunications services. Govt. Code §65850.6(d)(2). A "wireless telecommunications collocation facility" is a wireless telecommunications facility that includes collocation facilities. Govt. Code §65850.6(d)(3).

A collocation or siting application for a wireless telecommunications facility shall be deemed approved if (1) the county fails to approve or disapprove the application within a reasonable period of time in accordance with the time periods and procedures established by applicable FCC rules; (2) the applicant has provided all public notices regarding the application that the applicant is required to provide under applicable laws consistent with the public notice requirements for the application; and (3) the applicant has provided notice to the county that the reasonable time period has lapsed and that the application is deemed approved pursuant to this section. Govt. Code §65964.1(a).

C. Provisions of the LACC Other Than the Ordinance

If any portion of the LACC is found illegal or otherwise invalid, the invalid portion is severable and shall not affect or impair any remaining section, which shall remain enforceable. LACC §1.01.060 (RJN Ex. 1).

The same severability applies to Title 16 (Highways) (LACC §16.02.050), and Title 22 (Zoning) (LACC §222.02.100). RJN Exs. 3-4.

The director of DPW shall be the "road commissioner" ("Commissioner"), shall be *ex officio* County engineer, and shall perform the duties of the chief engineer of the Flood Control District as provided in LACC Chapter 2.108. LACC §2.18.13 (RJN Ex. 2). The director shall, *inter alia*, have the duty to observe and enforce Divisions 1-4 of the Highways Code. LACC §2.18.15(D).

1. Highways Code

For Highways Code's purposes, a "highway" is any public highway, public street, public way or public place in the unincorporated territory of the County, either owned by the County or dedicated to the public for the purpose of travel. LACC §16.04.100 (RJN Ex. 3). A highway includes all or any part of the entire width of right-of-way, and above and below the same, whether or not such entire area is actually used for highway purposes. Id.

The road commissioner (Commissioner) may make such changes or additions in any application for a permit as in his opinion are necessary for the protection of the highways, for the prevention of undue interference with traffic, for the safety of persons using such highways, as to the route over which to move any over height, width, length or weight load; as to the location, depth, dimensions, character and number of excavations; as to encroachments made or placed; and as to other permits issued pursuant to Division 1 of the Highways Code. RJN Ex. A (LACC §16.08.040).

The Commissioner may establish additional requirements for the work to be done under the permit, including equipment to be used, type of backfill, compaction, paving, traffic regulations, hours of work, flagmen, lights, inspection, and other similar requirements. LACC §16.08.050. He also may require whatever advance notice he deems proper for requests for inspection. Id. These requirements and conditions may be added by rubber stamp or attachments to the permit, or both, and they shall be an integral part thereof. Id. If any of the requirements of the permit are violated, the commissioner may revoke the permit and require that a new permit be secured before further work is done. Id.

If an applicant complies with every applicable provision of Division 1 of the Highways Code, and all other ordinances and statutes, the Commissioner may issue to the applicant a written permit to perform the work set forth in the application. LACC §16.08.080. However, the Commissioner still may refuse to issue a permit if he finds that it is not in the best interest of the general public to do so. Id.

2. Zoning Code

Revised Exhibit "A" provides a process to authorize limited modification to the plans of an approved discretionary permit or review that remain in substantial conformance with the conditions of approval. LACC §22.184.010 (RJN Ex. B). Such an application shall be filed and processed in compliance with LACC Chapter 22.226 concerning ministerial review. LACC §22.184.020(B).

The Planning Commission has the power to (A) initiate amendments to the General Plan, Zoning Code, or Zoning Map, (B) recommend approval or denial of such amendments or any other Board legislative action, (C) conduct public hearings and use the findings to approve, conditionally approve, or deny discretionary applications, (D) consider, adopt, or certify CEQA documents for applications, and (E) affirm, modify, or reverse decisions a hearing officer makes in appeals or calls for review under LACC section 22.240 and Govt. Code section 65903. LACC §22.220.030 (RJN Ex. 4).

The Regional Planning Director shall prepare a checklist that indicates the forms, information, and materials necessary for processing each permit or review application. LACC §22.222.070(A)(1).

III. Statement of Facts

A. The 2010 Memo

Prior to the Ordinance, Regional Planning processed wireless facility applications through a July 26, 2010 Departmental policy memorandum ("2010 Memo"). AR 64, 147-53. The 2010 Memo required a CUP for any wireless facility in any zone but did not address SCFs, EFRs, or application review deadlines. AR 7104.

The 2010 Memo discouraged wireless facilities along a scenic highway, on a significant ridgeline, or in or within 250 feet of a SEA. AR 151. If placed in such locations, the facility was required to be underground unless the applicant provided the Director with documentation that undergrounding was infeasible. AR 151. In that circumstance, the wireless facility was required to be screened with landscaping or camouflaged. AR 151.

The 2010 memo also required that any wireless facility on school grounds, a day care facility, or a park or recreational area be isolated from the educational or recreational activities thereon. AR 151. Whenever practicable, the facility was required to be located the farthest distance from the center of activity on the property. AR 151.

B. The Board's March 5, 2019 Motion

On March 5, 2019, the Board passed a motion instructing the Regional Planning Director to prepare an ordinance defining and establishing standards for the location, height, and design of wireless facilities; conduct outreach to residents, wireless service providers, and other interested parties; and present the Ordinance and the appropriate environmental documents to the Planning Commission and Board. AR 141-42.

C. Early Drafts and Comments

A pre-April 2020 draft of the Ordinance amending the Highways Code hinged facility approval on finding that the facility is not detrimental to the public health, safety, and welfare. AR 7351. In April 2020, either a County staff member or lawyer noted this language was discretionary. AR 7351.

An April 2020 draft Ordinance amending the Zoning Code included faux trees among the concealment measures that might be appropriate for a facility's proposed location, stating that the faux branches or fronds coverage "shall conceal" the antennas. AR 7393. In April 2020, either a County staff member or lawyer noted that this language was discretionary unless it stated that the fronds shall either "completely" or "reasonably" conceal. AR 7393. The April 2020 draft Ordinance stated in LACC section 22.159.030 that the processing of drafts would be subject to discretionary review. AR 7396.

On May 29, 2020, a Verizon representative emailed the County materials to consider for the Ordinance. AR 15769. Verizon included the design guidelines from Culver City as an example, explaining that Culver City worked with stakeholders to allow maximum flexibility in guidelines to adapt to industry limitations and future technology changes. AR 15769.

Verizon also attached a copy of the FCC's September 26, 2018 declaratory ruling. AR 15769. A footnote in the FCC ruling explained that 5G networks would need significant investment in new network infrastructure. AR 15778. Carriers would need to add three to ten times as many sites as their networks currently had, likely via small cells using lampposts, utility phones, and structures of similar size. AR 15778.

During an internal County discussion on May 4, 2021, a DPW employee asked about High Fire Hazard Severity Zones and received a response that whether a SCF is fire-safe requires technical expertise, not community input. AR 7519. It would be impossible to prohibit SCFs in those zones, but DPW would consider adding a requirement that they be reviewed for public safety.

AR 7519.

An undated draft of the Ordinance amending the Highways Code shows that LACC section 16.17.050 would have required findings that, *inter alia*. a facility "complies with the Chapter and all applicable" standards before any approval. AR 7640.24. A County employee struck that clause and commented that it was "Discretionary." AR 7640.24. The employee also struck the section as a whole because no findings are required for ministerial approval. AR 7640.24.

On February 21, 2022, Verizon provided comments to the County's Draft Wireless Facility Design Guidelines ("Design Guidelines"). AR 27364. Verizon noted that the draft Design Guidelines frequently stated that the support structures should not be "in front of windows", defined as a "20 feet distance in a 180-degree plane." AR 27364. They also discouraged equipment within "20 feet from the nearest residential window in any 180-degree angle." AR 27364. Verizon asked the County to clarify that this meant areas in front of a window, not above it. AR 27364. It therefore asked the County to change the wording to specify a "180-degree horizontal plane." AR 27364-65.

A log of Verizon's other comments shows that it recommended increasing the height of macro facilities to 50 feet in all residential zones to be consistent with SCFs. AR 7156. Regional Planning responded that this would allow macro facilities to reach 70 feet with an EFR. AR 7156. By keeping the maximum height to 35 feet, the height of a macro facility with an EFR would be limited to 55 feet. AR 7156.

Another Verizon comment requested that draft Design Guidelines sections 7.C.2, 7.H.1, and 7.H.2 permitted construction on a "discouraged" location if there is no technically feasible and available preferred option within a quarter mile. AR 7158. Regional Planning responded that "[d]iscouraged does not mean prohibited" and these sections only would apply to new support structures, which are subject to the CUP process. AR 7158.

On January 20, 2022, commenter Rola Masri ("Masri") submitted a letter asserting that the draft Ordinance was not grounded in good science and could put local businesses and residences at risk. AR 230, 7859. The FCC has not promulgated any science-based safety standards and what it has published does not pass the rigor required for standards, putting the County at risk in this complicated area of science and technology. AR 230.

Masri noted that the State of New Hampshire had recently acted on information that the combined effect of exposure to multiple RF waves could have health risks. AR 232. New Hampshire introduced a bill requiring at least 1,640 feet of distance between telecommunication antennas and residentially zoned areas, parks, playgrounds, hospitals, nursing homes, day care centers, and schools. AR 232.

D. <u>The Regional Planning Staff Report</u>

On March 10, 2022, Regional Planning staff submitted a report to the Planning Commission for its March 23, 2022 meeting. AR 61. The report recommended that the Planning Commission adopt a recommendation for approval of the Ordinance and finding it categorically exempt from CEQA under the Class 1 and 3 exemptions. AR 61, 67.

The staff report explained that the 2010 Memo had not been updated to reflect the growth in wireless services and technology, as well as recent changes in federal and state regulations, orders, and case law. AR 64. The Ordinance's changes to the Highways Code would supplant the 2010 Memo and shift the processing of SCF applications in public rights-of-way from Regional Planning to DPW. AR 64.

The staff report stated that the Ordinance is consistent with the County's General Plan and

supportive of its policies, including the improvement of existing wired and wireless telecommunications infrastructure (Policy PS/F 6.2) and the expansion of access to wireless technology networks, while minimizing visual impacts through collocation and design (Policy PS/F 6.3). AR 64.

The staff report noted that the FCC, based on a Ninth Circuit decision, had ruled that local regulations that materially inhibit the provision of personal wireless services are an effective prohibition barred by federal law. AR 65. The "materially inhibits" standard includes not only facilities intended to satisfy a coverage gap, but also those fortifying an existing network, improving existing wireless services, and providing new wireless services. AR 65. The TCA also prevents local governments from regulating the placement, construction, and modification of wireless facilities based on environmental or public health effects from RF emissions if the facilities meet FCC RF guidelines. AR 65.

The staff report stated that the draft Ordinance was released for public review in December 2021. AR 65. Based on feedback, staff made various changes to either clarify ambiguous provisions or comply with state and federal regulations. AR 65.

The staff report attached a revised draft of the Ordinance (AR 126-27) and included a redlined draft of the Ordinance's changes to Title 22 (Zoning). AR 86. The report highlighted a new requirement that CUP applications report whether the RF emissions levels of each wireless facility comply with FCC guidelines. AR 86. The staff report's summary of the Ordinance and proposed resolution for the Planning Commission only discussed changes to Title 22 (Zoning) and did not discuss changes to Title 16 (Highways). *See* AR 96-97, 100-01.

E. Public Comments

The staff report attached various public comments about the proposed Ordinance, including Masri's January 2022 letter. AR 230.

On January 18, 2022, Julie Levine asserted that the Board needed to accept the proven fact that cellular microwave radiation causes DNA strand breakage, resulting in harm to humans, plants, and animals. AR 251-22.

On February 28, 2022, Emma Sharp objected that the proposed changes, particularly the use of ministerial authority, would rush through permits without advance public notice, controls, or hearings and would deprive citizens of fundamental due process rights. AR 217. The Ordinance also would expose vulnerable populations like children, disabled persons, pregnant women, fetuses, the elderly, minorities, and economically disadvantaged populations to unchecked, unmonitored, continuous, and cumulative RF radiation. AR 217.

On March 8, 2022, Cynthia Jackson argued that the Ordinance codified ministerial authority for the approval of small cell towers, but it should still require CUPs. AR 216. The FCC had recently been found guilty of not acknowledging or responding to scientific evidence of electro-pollution's harm to health and the environment. AR 216. Adopting the same attitude would be contrary to goals in the County's sustainability plan. AR 216.

On March 9, 2022, the Research Conservation Project objected that the proliferation of wireless facilities under the Ordinance without a master plan will cause visual clutter in sensitive areas and scenic roads, pose a fire hazard, and negatively impact sensitive habitats. AR 214-15.

A commenter submitted reports from an entity, the National Toxicology Program, stating that microwave radiation from cellular sources is carcinogenic. AR 247. The harm is non-thermal, while the FCC's regulatory framework assumes the only possible mechanism of tissue damage is thermal. AR 247. The commenter directed Regional Planning to letters to school districts from

the Massachusetts General Hospital and Harvard Law School, citing hundreds of studies showing that 5G poses a cancer hazard. AR 247.

F. Regional Plannings Supplemental Memoranda

On March 17, 2022, Regional Planning submitted a supplemental memorandum to the Planning Commission attaching 11 additional public letters and emails in opposition to the Project. AR 359.

An attorney for 5G Free California objected to the Ordinance's attempts to accelerate densification of small cell and macro towers antennas emitting RF radiation in dangerously high concentrations in residential areas. AR 362, 367.

A 5G Free California founder argued that the TCA does not constrain the power of local protective ordinances. AR 368. An August 2021 DC Circuit case ruled that the FCC had ignored scientific evidence and failed to provide a reasoned explanation why its 1996 regulations adequately protect the public against all the harmful effects of wireless radiation. AR 368. Substantial research challenges the FCC's assumption that heat is the only proven harm from RF. AR 368. The County's efforts to circumvent CEQA for the Ordinance discount the risk of environmental harm, independent of fire and safety hazards also present. AR 368.

A commenter agreed that the TCA does not constrain the County. AR 370. Applying a doctrine of preemption to the Ordinance therefore violates due process. AR 370. *See also* AR 372.

Another commenter acknowledged that the Ordinance allows a hearing officer to impose additional conditions to ensure compliance with the Ordinance. AR 383. However, the list of conditions includes an RF emission report every five years. AR 383. The commenter argued that a five-year timeframe for learning that emissions are outside the acceptable range is unreasonable because RF emissions are a potentially hazardous condition. AR 383.

Another commenter requested a requirement that residents who live within 300 feet of a new or existing cell tower receive notice of any installation or modification thereof. AR 387.

On March 22, 2022, Regional Planning issued a second supplemental memorandum with additional public comments. AR 432.

5G Free California noted that the Ordinance requires all applicants to comply with federal and state laws and regulations regarding wireless facilities. AR 433. This would include the Historic Preservation Act because places like View Park are on the Historic Sites Registry. AR 433.

Another commenter attached the administrative manual for the Encinitas City Council which requires a 500-foot buffer between any small wireless facility and a residential dwelling unit, daycare facility, or school. AR 828, 856. It also states that any applicant for a small wireless facility permit must demonstrate that the project will be in full compliance with all applicable health and safety laws. AR 836. It further provides for voluntary pre-submittal meetings to discuss any potential issues with the application. AR 840.

G. The Planning Commission Hearing

The Planning Commission discussed the Ordinance at a public hearing on March 23, 2022. AR 1246, 1250-51. The hearing agenda described the Ordinance as amendments to the Zoning Code. AR 1246.

At the meeting, Regional Planning staff explained that the Ordinance seeks to improve public safety by enhancing real time emergency notification response through 5G coverage. AR

1257. This would also help with GPS navigation and contacting help during personal or medical emergencies. AR 1257. It further would encourage equity insofar as everyone would have access to broadband. AR 1257.

Regional Planning staff acknowledged that DPW was developing an ordinance for the Highways Code. AR 1250, 1256. Regional Planning had developed a draft ordinance for the Zoning Code to govern cell facilities on private and public properties. AR 7099. DPW had developed a draft ordinance for the Highways Code to govern cell facilities on highways and public rights-of-way. AR 7099. The changes to the Highways Code would regulate SCF placement within public rights-of-way. AR 1250. FCC regulations require ministerial processing and approval for SCFs within 60 days. AR 1250, 1257. The Ordinance would streamline the process for highway SCFs because all such applications would go directly to DPW for review before issuing road encroachment permits. AR 1250.

Regional Planning staff asserted that federal law and case law bar local jurisdictions from regulating facilities based on environmental and health impacts, RF emission limits, and coverage. AR 7106. They also could not impose restrictions or prohibitions that effectively prevent wireless service. AR 7106. Local jurisdictions can only regulate time, place, manner, aesthetics, and visual impacts. AR 7106. This means placement, height, design, and land use regulation procedures that comply with FCC orders. AR 7106.

Under the proposed Ordinance framework, (a) SCFs on private and public property would be processed ministerially, (b) collocations and existing macros with designs that meet all development standards for height, aesthetics, and dimensions also would be processed ministerially, (c) all new macros and existing macros that do not meet all standards or require a waiver will still require a CUP, and (d) EFRs will be processed ministerially, per FCC order through either a Ministerial Site Plan Review or a Revised Exhibit A. AR 7107.

A member of the public asserted that the Planning Commission should not proceed based on the inadequacy of FCC guidelines, which are not standards. AR 1266. They expose the community to liability, and the inadequacy of those guidelines was the subject of litigation against the FCC. AR 1266. Another commenter agreed that the FCC and scientists differ significantly on what are safe levels of RF exposure. AR 1268.

One Commissioner moved to continue the matter to April 27, 2022. AR 1291. Another Commissioner noted that County counsel had 30 years of experience and had reviewed the draft Ordinance from every possible angle. AR 1291. Regional Planning also had retained a firm that specialized in this issue. AR 1291. This Commissioner did not believe continuance would be helpful. AR 1291. As for public concern about FCC regulations, federal law and case law already held that localities cannot consider health impacts on such matters. AR 1291-92.

The Planning Commission unanimously voted to find that the Class 1 and Class 3 exemptions applies to Regional Planning's Title 22 amendments in the Ordinance and to recommend that the Board adopt it. AR 1251.

H. <u>The County's Climate Action Plan</u>

The County's April 2022 Draft 2045 Climate Action Plan ("Climate Plan") defines "disadvantage communities" as areas that suffer most from a combination of economic, health, and environmental burdens. AR 5157. Based on that definition, the Climate Plan estimated that the County has a population of 383,000 in disadvantaged communities. AR 5391.

The Climate Plan defines an "SEA" as land holding important biological resources representing the County's wide-ranging biodiversity. AR 5164. The General Plan defines the

criteria for SEA designation, and an SEA Policy Map marks the areas that qualify as SEA. The County's sustainability plan includes the preservation of agricultural and working lands, particularly within high climate hazard areas and SEAs. AR 5380.

On May 25, 2022, Regional Planning prepared a draft Environmental Impact Report ("EIR") for the Climate Plan. AR 5488. The draft EIR noted that Caltrans has designated four highways as scenic. AR 5621-22. Individual communities may use the County's definitions of scenic viewsheds and significant scenic resources to designate specific scenic viewsheds, routes, and resources. AR 5621.

The draft EIR discussed telecommunications infrastructure like SCFs and macro towers. AR 6031. SCFs are located on existing or proposed vertical infrastructure while macro towers are large independent structures with the single purpose of supporting telecommunications. AR 6031. Macro towers are usually large mono-towers, whether in the public right-of-way or on private or public property. AR 6031. The draft EIR noted the current discussions to adopt the Ordinance, which would be two separate amendments to the Highway and Zoning Codes to establish standards and review procedures for wireless facilities. AR 6040.

The draft EIR stated that construction of some utility projects, including telecommunication facilities, could have significant and unavoidable impacts on environmental resources like air quality, biological resources, cultural resources, water quality, transportation, and noise. AR 6042-43. The relocation and construction of new or expanded telecommunication facilities under the Climate Plan may have an additional significant and unavoidable cumulative impacts when combined with closely related past, present, and reasonably foreseeable future projects. AR 6046.

I. Further Ordinance Revisions

A May 31, 2022 edit of the Zoning Code portion of the draft Ordinance added that any mounting equipment required for monopoles must be eight feet from the structure. AR 7581. It also clarified that faux trees must be within 50 feet of an existing grove of at least two live trees. AR 7581. The faux branches must conceal antennas to the extent technically feasible, and they must be weather-resistant. AR 7582.

J. Petitioners' Comments to the Board

On September 23, 2022, Petitioner Fiber First sent the Board a letter contesting the Planning Commission's March 23, 2022 proposed environmental determination that the Ordinance is exempt under the Class 1 and Class 3 exemptions. AR 9705.

Fiber First argued that the categorical exemptions do not apply and, even if they did, the Ordinance falls under the exceptions to the exemptions because the circumstances are unusual. AR 9710-12. Fiber First added that the County had ignored various substantiated environmental risks, including to human health, wildlife, historic sites, wildfires, earthquakes, floods, plastic faux trees, energy use, and SEAs. AR 9713-19.

Fiber First noted that the Guejito Fire in 2007, Malibu Canyon fire in 2007, Woolsey Fire in 2018, and Silverado Fire in Irvine in 2020 all were related to telecommunications equipment. AR 9716-17. These fires collectively caused $6 billion in damages, destroyed over 2000 homes, cost five lives, severely burned firefighters and civilians, and triggered the largest mass evacuation in California history. AR 9716. The Malibu Canyon Fire was caused by structural overloading of utility poles with wireless telecommunication equipment. AR 9717.

Fiber First also argued that using faux trees or other products to camouflage macro cell

towers will produce and spread microplastics across the city. AR 9718. They will fall on the ground before stormwater carries them into discharge channels. AR 9718. Standard industry practice is to replace faux plastic on macro towers every five years. AR 9718-19. This results in up to 10,000 pounds of waste per tower, which contains lead and other carcinogenic materials. AR 9718-19. Scientific studies confirm microplastics are in human and animal lungs and blood, yet Regional Planning does not seem aware of the problem. AR 9719.

As for cumulative impacts, the wireless facilities under the Ordinance are part of a larger plan to cover the whole County with wireless facilities without any regard for the cumulative impact of the components of this plan. AR 9719. This is precisely the type of project anticipated by the cumulative impacts exception to the CEQA exemptions. AR 9719.

To the extent the County relies on the TCA, it only constrains the Planning Commission's regulatory authority for RF emissions. AR 9724. It does not inhibit inquiries into other aspects of wireless facilities, like the risks of shedding microplastics from faux camouflage. AR 9724.

Fiber First also noted the General Plan identifies SEAs in parts of the Coastal Zone and the Santa Monica Mountains. AR 9720. The County's Conservation and Open Space Element also includes the SEA Program. AR 9720. Fiber First argued that imposing a Ministerial Site Review in such areas would create conflict with County policies and programs, whereas the CUP process does not. AR 9720.

K. The November 2022 Board Meeting

On November 15, 2022, County staff presented to the Board the Ordinance amendments for both the Highway (Title 16) and Zoning (Title 22) Codes. AR 1308.

Fiber First sent the Board a redlined copy of proposed changes to the Ordinance. AR 1817, 1820-63. Other comments were received. AR 1583, 1889.

At the Board meeting, Regional Planning's Director and DPW's Deputy Director gave a presentation on the Ordinance. AR 2210. Representatives of California Fires & Firefighters, Fiber First, 5G Free California, and other organizations and communities spoke in opposition to the Ordinance. AR 2225-26, 2228, 2233-34.

The Board voted 4-1 to indicate its intent to approve the Ordinance, order it placed on the agenda for adoption, and find it exempt from CEQA. AR 1307-08.

L. The December 6, 2022 Board Meeting

On December 6, 2022, the Board met to adopt the Ordinance amending the Highway and Zoning Codes. AR 2412.

The Board's staff catalogued all the correspondence it received in favor and opposition of the Ordinance. AR 2480-572. Some comments asked the Board to adopt the redlined version Fiber First has submitted. AR 2487-88.

At the meeting, the Board heard from various members of the public, including representatives of 5G Free California (AR 3283), California Fires & Firefighters (AR 3283), the Coalition for Responsible Equitable Economic Development of Los Angeles (AR 3286-87), the Keep L.A. Housed General Coalition (AR 3288), Malibu for Safe Tech (AR 3314), and Fiber First (AR 3327-28).

The Board voted unanimously to continue adoption of the Ordinance to January 10, 2023. AR 2412, 3385-86.

M. Revisions to the Ordinance

On January 3, 2023, staff revised the Ordinance. AR 3478-566.[3] The pertinent revisions are as follows.

LACC section 16.25.030(B)(2) authorizes the Commissioner to adopt and amend design checklists and permit conditions for SCFs and EFRs. AR 3484. The checklist would include notification requirements for an applicant to provide. AR 3484.

LACC section 16.25.040(E) requires SCF owners and permittees to comply with all applicable safety rules and other applicable laws and regulations. AR 3487. This meant that no SCF or combination thereof could produce exposure levels exceeding applicable FCC RF emissions standards. AR 3487.

LACC section 16.25.050(I) requires the design and installation of all SCFs to ensure that the SCF and supporting structures meet minimum standards for public safety and to be maintained to prevent electrical and fire hazards. AR 3490.

LACC section 22.140.760(D)(4) requires applicants to provide all the information required by the applicable design checklists, which the Director may periodically modify. AR 3555. These checklists would include notification requirements with which an applicant must comply. AR 3556.

LACC section 22.140.760(D)(5) encourages permit applicants to schedule a voluntary pre-application meeting with Regional Planning to discuss the proposed facility, impacts thereof, and applicable guidelines and checklists. AR 3556.

LACC section 22.140.760(E)(1)(b)(v) requires that the location of new wireless facilities take into consideration the least aesthetically intrusive location. AR 3557.

LACC section 22.140.760(E)(1)(e) requires that (i) any wireless facility must be designed by qualified, licensed persons to meet minimum standards for public safety and shall comply with all applicable legal requirements, and (ii) no facility or combination thereof shall at any time expose the public to RF emissions levels beyond FCC standards. AR 3559.

LACC section 22.14.760(M) terminates the permit and approval for a wireless facility that ceases to operate for 90 consecutive days. AR 3565. This would not occur if the Director determined during the 90-day period that the facility has resumed operations or that an application has been submitted to transfer the facility to another operator. AR 3565.

The revised Ordinance was not presented to or recommended by the Planning Commission.

N. <u>The January 10, 2023 Board Hearing</u>

More public comments were presented to the Board before its January 10, 2023 hearing. AR 3732-33, 3719, 4418, 4452.

At the hearing, Fiber First argued that, despite the revisions, the Ordinance still deprived people of their due process right to be heard before installation of an antenna. AR 4679. Other opposing comments were made. AR 4691, 4709, 4721-22,

In response to comments, a Supervisor asserted that the Board had taken a lot of public input into consideration and did the best it could within legal parameters. AR 4753. The Ordinance includes a 500-foot notice requirement for any proposed SCF, which is new. AR 4754. A new process includes third-party oversight. AR 4754. It was not everything advocates asked for, but it was a step in the right direction. AR 4754.

Another Supervisor noted that fire safety measures would be included in the approval checklists discussed in the Ordinance, not the Ordinance itself. AR 4754-55. The required notice

[3] The County asserts that these revisions were made public on January 5, 2023. Opp. at 3.

to residents would also include the contact information for relevant authorities, including the FCC. AR 4754-55.

The Board unanimously voted to adopt the revised Ordinance amending both the Highway (Title 16) and Zoning (Title 22) Codes, effective February 9, 2023. AR 3456.

O. The Ordinance

The Ordinance establishes regulations for reviewing and permitting wireless facilities in the County's unincorporated areas, including highways. AR 16.

The Ordinance's amendments to the Highways Code (Title 16) establish permit requirements for SCFs and EFRs on all highways, including on County-owned infrastructure. AR 16. The amendments authorize the Commissioner to adopt a design standards checklist and permit conditions that implement the requirements of the implemented chapter. AR 16. The amended Highways Code provides for a permit approval process that meets the requirements of the FCC and law. AR 16.

The amendments to the Zoning Code (Title 22) establish regulations for wireless facilities on private property in the unincorporated areas of the County based on standards for placement, design, and aesthetics. AR 16. Associated provisions provide a land use review and permit approval process compliant with the FCC requirements and other applicable law. AR 16. The process is streamlined for the installation, operation, and modification of wireless facilities. AR 16-17. Macro wireless facilities that do not meet development standards or require a waiver for special circumstances require CUPs. AR 17.

1. Highways Code

A "SCF" is defined to match the definition of a "small wireless facility" in 47 CFR section 1.6002(l). LACC §16.25.020(I); AR 20, 33.

An "EFR" is a request for modification of an existing tower or base station pertaining to SCF, provided it does not substantially change the physical dimensions of that tower or base station, and involves collocation, removal, or replacement of transmission equipment under the definition of 47 CFR section 1.6100(b)(3). LACC §16.25.020(E); AR 19-20, 32. For purposes of this definition, "collocation" is as defined as in 47 CFR section 1.6100(b)(2). LACC §16.25.020(E); AR 20.

A "support structure" is defined as County infrastructure, streetlight poles, towers, or utility poles. LACC §16.25.020(J); AR 20.

A permit under the Ordinance is required for the installation, replacement, maintenance, modification, or removal of any SCF, Temporary SCF, or EFR pertaining to an SCF, on a highway. LACC §16.25.030(A); AR 21.

The Commissioner may adopt and amend a design standards checklist and permit conditions for SCFs and EFRs implementing Chapter 16.25 of the LACC. LACC §16.25.030(B)(2); AR 22. The applicant must comply with the public notification requirements set forth in the checklist. LACC §16.25.030(B)(2); AR 22. If the SCF will be mounted on new or replacement County infrastructure, engineered plans shall be submitted for the Commissioner's approval before permit issuance. LACC §16.25.030(B)(3); AR 22.

An application shall be processed within the period specified by applicable law, including any FCC-issued order(s), in accordance with all applicable requirements and procedures for a permit identified in Division 1 of the Highways Code. LACC §16.25.030(B)(6); AR 23.

The Commissioner shall grant a permit when satisfied that the SCF or EFR meets all

applicable requirements. LACC §16.25.030(B)(7); AR 23. In addition to the Commissioner's design standards checklist, the applicable requirements include support structure concealment, a location that does not interfere with use of the highway or flow of traffic, structural integrity, height, placement of pole-mounted SCF antennas and associated equipment, a power supply that does not comingle or share circuits with County power services, above-ground generators, no artificial lighting beyond the support structure itself, and minimum public safety standards. LACC §16.25.050; AR 26-28.

Once issued, the permit is subject to all applicable provisions of "Title 16 – Highways – Division 1" of the LACC. LACC §16.25.030(B)(7); AR 23. The Commissioner's final decision on any application is the final action of the County. LACC §16.25.030(B)(8); AR 23.

If the proposed SCF on a new support structure will be located on a highway identified as a Scenic Highway in the General Plan, within the boundaries of an SEA, within 50 feet of a Significant Ridgeline per LACC Title 22, or within the boundaries of a Coastal Zone per LACC Title 22, the applicant shall obtain land use approvals from Regional Planning. LACC §16.25.040(A)(1)(a), (b); AR 24. If the SCF will be on a highway on land within the National Park Service's ("NPS") jurisdiction, the applicant shall obtain a Right-of-Way permit as required under 54 U.S.C., section 100902(b) or any successor provisions. LACC §16.25.040(A)(2); AR 24.

SCF owners and permittees shall comply with all applicable federal, state, and local laws, regulations, and other rules, permits, and conditions. LACC §16.25.040(E); AR 25.

All SCFs shall comply with applicable utility facilities construction standards. LACC §16.25.050(C); AR 26. A SCF and its associated equipment that will be mounted on existing support structures shall not compromise the structural integrity of the support structure. Id. If it does, a replacement support structure shall be installed that will accommodate the SCF and its associated equipment. Id. If the proposed replacement structure is County infrastructure, it must adhere to all terms, conditions, and guidelines of any agreement or master license agreement between the County and the owner. Id. If an applicant requests placement of a SCF on County infrastructure, it must provide a structural analysis of the effect of such placement on the County infrastructure for the Commissioner's approval. Id. The purpose of this requirement is to ensure there is no overburden on County infrastructure. Id.

All SCFs shall be designed and installed to ensure the SCF and supporting structures meet minimum standards for public safety. LACC §16.25.050(I); AR 28. They must be maintained to prevent electrical and fire hazards. Id.

If any portion of the Ordinance is found illegal or otherwise invalid, the invalid portion is severable and shall not affect or impair any remaining section. LACC §16.25.080; AR 30.

2. Zoning Code

The purposes of the Ordinance's amendments to the Zoning Code are to (1) provide equitable, high-quality wireless communications service infrastructure to serve the County's current and future needs, (2) establish streamlined permitting procedures for the installation, operation, and modification of wireless facilities, while protecting the public health, safety, and welfare of the County residents, (3) establish standards to regulate the placement, design, and aesthetics of wireless facilities to minimize visual and physical impacts to surrounding properties, and (4) comply with all applicable federal and State laws and regulations regarding wireless facilities. LACC §22.140.760(A); AR 44.

The Ordinance defines various terms for purposes of LACC section 22.140.760, including

associated equipment, antenna facility, architectural tower, base station, collocation facility, EFR, faux rock outcroppings, faux trees, macro facility, personal wireless services facility, and SCF. LACC section 22.14.230(W); AR 31-33.

As in 47 CFR section 1.6002(g)(1)-(2), "collocation" is defined as (1) mounting or installing an antenna facility on a pre-existing structure, and/or (2) modifying a pre-existing structure for the purpose of mounting or installing an antenna facility on that structure. LACC §22.14.230(W); AR 32.

An "EFR" is defined as a request for modification of an existing tower or base station pertaining to SCF, provided it does not substantially change the physical dimensions of that tower or base station, and involves collocation, removal, or replacement of transmission equipment under the definition of 47 CFR section 1.6100(b)(3). LACC §22.14.230(W); AR 32. For purposes of this definition, "collocation" is defined as it is in 47 CFR section 1.6100(b)(2). Id.

An "SCF" is defined, as a "small wireless facility" is defined in 47 CFR section 1.6002(l), as a personal wireless services facility that (1) is mounted on a structure such that its height is no more than either 50 feet or 10% in height above other adjacent structures, whichever is greater, (2) has no antennae with a volume of over three cubic feet, (3) has no more than 28 cubic feet of other wireless equipment associated with the structure, (4) does not require antenna structure registration, (5) is not on tribal lands, and (6) does not result in human exposure to RF radiation in excess of the applicable safety standards in 47 CFR section 1.1307(b). LACC §22.14.230(W); AR 33-34.

A "macro facility" is any facility that does not meet the definition of an EFR or SCF. LACC §22.14.230(W); AR 33.

A "temporary facility" is defined as any facility used to provide wireless services on a temporary or emergency basis. LACC §22.14.230(W); AR 35. Examples include cells on wheels, sites on wheels, and cells on light trucks. Id. A temporary facility cannot be in place for more than six months, be more than 200 feet in height, or involve excavation except as required to anchor the facility. Id. Such excavation cannot exceed a depth of 24 inches on undisturbed ground, or 12 inches above any prior disturbance where one has occurred. Id.

If a zone or land use category within a Specific Plan is silent with regard to wireless facilities, the Director may accept an application for a wireless facility if the Director determines that a wireless facility is similar to another use permitted within such zone or land use category. LACC §22.26.030(B)(3); AR 42-43. If the wireless facility complies with LACC section 22.140.760(D)(1), the Director may accept a Ministerial Site Plan Review. If the wireless facility complies with LACC section 22.140.760(D)(2), the Director may accept a CUP application. LACC §22.26.030(B)(3); AR 43, 47-48. This authorization does not apply if the Specific Plan Zone is within a Local Coastal Program. LACC §22.26.030(B)(3)(c); AR 43.

LACC section 22.140.760's purpose in part is to establish standards regulating the placement, design, and aesthetics of wireless facilities to minimize visual and physical impacts to surrounding properties. LACC §22.140.760(A)(3); AR 44. The Chapter does not apply to SCFs in public rights-of-way, and LACC section 22.140.760 does not apply to Local Coastal Programs. LACC §22.140.760(B); AR 45. Wireless facilities shall be permitted in all zones, except Zones B-1 and B-2, subject to the required application. LACC §22.140.760(B); AR 45.

Wireless facilities subject to a Ministerial Site Plan Review include: (a) installation and operation of an SCF on private or public property other than a public right-of-way; (b) an EFR for a facility previously approved via Ministerial Site Plan Review, but not a SCF in a public right-of-way; (c) installation and operation of a macro facility on an existing base station or tower that

meets all standards in LACC section 22.140.760(E) and requires no waiver; (d) installation and operation of a temporary facility not described in LACC section 22.140.760(C)(4); and (e) placement and operation of an emergency generator to provide auxiliary power to a wireless facility for between seven and 90 days, provided the generator is not in the right-of-way. LACC §22.140.760(D)(1); AR 47.

A CUP is required for the installation and operation of either (a) a new macro facility not installed on an existing base station or tower, or (b) any wireless facility of any type that requires a waiver from one or more of the design standards under LACC section 22.140.760(E). LACC §22.140.760(D)(2); AR 48.

A Revised Exhibit A application (LACC Chapter 22.184) is required to collocate a macro facility on an existing base station or tower with an approved and unexpired discretionary permit that currently hosts another macro facility, or to make modifications to an existing macro facility with an approved and unexpired discretionary permit, including an EFR for the macro facility. LACC §22.140.760(D)(3); AR 48.

Any new application must include all the required materials listed on either the Land Use Application Checklist – SCF, Collocation, and EFR, or the Zoning Permit Instructions and Checklist, whichever is applicable – and which may be periodically modified by the Director. LACC §22.140.760(D)(4); AR 48. This includes a report on the individual and cumulative RF emissions levels of each wireless facility to demonstrate these emission levels comply with adopted FCC guidelines. LACC §22.140.760(D)(4); AR 48-49. The applicant must also provide proof of liability insurance and comply with the public notification requirements as set forth in the Checklists. LACC §22.140.760(D)(4); AR 49.

Before submitting an application, the applicant is encouraged to schedule a voluntary pre-application meeting with the Department to discuss the proposed facility, the requirements of this section, applicable checklists and guidelines, and potential facility impact. LACC §22.140.760(D)(5); AR 49.

All wireless facilities permits must comply with state and federal requirements, standards, and law. LACC §22.140.760(E)(1)(a); AR 49. In Residential Zones, including public right-of-way, wireless facilities shall be placed no farther than five feet from any common property line shared with adjoining lots, and shall use stealth or concealment techniques. LACC §22.140.760(E)(1)(b)(ii); AR 49-50.

New wireless facilities shall not be installed on buildings or structures listed or eligible for listing on the National, California, or County historic registers. LACC §22.140.760(E)(1)(b)(iv); AR 50. New towers and support structures installed on the grounds of properties listed or eligible for listing on the National, California, or County historic registers shall be located and designed to eliminate impacts to the historic resource. LACC §22.140.760(E)(1)(b)(iv); AR 50. An historic resource assessment, prepared to the satisfaction of the Director by a qualified architectural historian, may be required for a facility to be located on a site containing an eligible resource to identify impacts to historic resources and identify mitigation to minimize impacts. LACC §22.140.760(E)(1)(b)(iv); AR 50. The location of new facilities shall take into consideration the least aesthetically intrusive location. LACC §22.140.760(E)(1)(b)(v); AR 50.

In Industrial, Rural, Agricultural, Open Space, Resort-Recreation, and Watershed Zones, the maximum height of a non-building-mounted wireless facility shall be 75 feet. LACC §22.140.760(E)(1)(c)(i); AR 50. In Zones R-1, R-2, and R-3, the maximum height of a wireless facility shall be 35 feet. LACC §22.140.760(E)(1)(c)(ii); AR 51. In all other zones, the maximum height of a non-building-mounted wireless facility shall be 65 feet. LACC

§22.140.760(E)(1)(c)(iii); AR 51.

All wireless facilities shall be designed by qualified, licensed persons to meet minimum standards for public safety, including legal requirements under the County Building and Fire Codes, and to not produce exposure levels in any general population area that exceed the applicable FCC standards for RF emissions. LACC §22.140.760(E)(1)(e); AR 52.

Modifications to existing macro facilities may be eligible for Ministerial Site Plan Review or a Revised Exhibit A application under certain conditions. LACC §22.140.760(G); AR 54-55. To qualify for a Ministerial Site Plan Review, an existing macro facility must be redesigned with either shorter mounting equipment that extends no more than two feet from the structure or the removal of any existing mounting equipment. LACC §22.140.760(G)(1); AR 54. It must also use additional screening techniques that blend in with the structure, conform to all standards in LACC section 22.140.760(E), and require no waiver. LACC §22.140.760(G)(1); AR 54. If the modifications would not conform with LACC section 22.140.760(E) and require a waiver, it requires a Revised Exhibit A application. LACC §22.140.760(G)(2); AR 55.

An EFR may be eligible for Ministerial Site Plan Review if minor modifications will bring the facility in conformance with LACC section 22.140.760(E) and require no waiver. LACC §22.140.760(G)(3); AR 55. An EFR may otherwise be processed with a Revised Exhibit A application. LACC §22.140.760(G)(3); AR 55.

All facilities subject to the CUP process must comply with a set of standards. LACC §22.140.760(H); AR 55. Wireless facilities must be located and designed (a) to minimize visual impacts to vistas from adopted scenic highways and ridgelines and (b) to minimize visual impacts on adjacent residences and historic resources. LACC §22.140.760(H)(1); AR 55. Any proposed faux trees for facilities subject to the CUP process must (i) where possible, be located within 50 feet of an existing grove of at least two live trees, and shall be similar in appearance to that species, (ii) be appropriate for the climate and location, (iii) have any antennas of the facility painted or coated a color that matches the leaves, branches, or trunk, which the antennas cannot extend beyond, (iv) conceal the antennas to the extent technically feasible and be weather-resistant, and (v) include faux bark cladding from the ground to five feet beyond where the faux branches begin. LACC §22.140.760(H)(2)(b); AR 56. Faux rock outcroppings shall contain all equipment and be similar in appearance to real rocks in the immediate vicinity with respect to color, texture, and scale. LACC §22.140.760(H)(2)(c); AR 56.

For all facilities subject to the CUP process, there must be additional findings that (1) the facility complies with all applicable standards under LACC section 22.140.760 unless a waiver was requested, (2) its design and placement are as visually unintrusive as technically feasible and appropriate for the location, (3) in the case of new facilities, a facility at that location is necessary to close a significant gap in coverage, and (4) in the case of new facilities, the location is the least intrusive feasible and does not create a safety hazard. LACC §22.140.760(I), AR 57. The Planning Commission or hearing officer may grant the waiver described in LACC section 22.140.760(I)(1) if the applicant establishes the denial of the application would effectively prohibit the provision of personal wireless services, otherwise violate applicable laws or regulations, or require a technically infeasible design or installation of a wireless facility. LACC §22.140.760(L)(1); AR 57-58.

If a wireless facility has ceased to operate for 90 consecutive days, it is considered abandoned. LACC §22.140.760(M); AR 58. Any related approvals or permits will be terminated and discontinued unless the Director determines before the end of the 90-day period that either the facility has resumed operation or an application to transfer approval to another operator has been submitted. LACC §22.140.760(M); AR 58. After 90 consecutive days of inactivity, the owner or

permittee for the site shall remove the abandoned facility and restore the site to its original condition. LACC §22.140.760(M); AR 58. It must provide written verification to Regional Planning within 30 days of such removal. LACC §22.140.760(M); AR 58-59. If the removal is not complete within 30 days of abandonment, the facility shall be deemed a nuisance. LACC §22.140.760(M); AR 59.

P. The Checklists

On January 12, 2023, DPW released a Design Standards Checklist for SCFs and EFRs on highways and public rights-of-way. AR 7629. DPW released a second version on February 7, 2023. AR 7635. Each includes a checklist of required items (AR 7629, 7635) and a list of 18 design standards with which the applicant's facility must conform (AR 7632-33, 7638-40). Both lists of required materials include a copy of the public notification to be mailed to all affected residents within a 500-foot radius from the proposed SCF location. AR 7629, 7635. The February 7 checklist asks whether the SCF is at least 20 feet from any residential window, measured horizontally from the closer of the pole or the support arm. AR 7638.

Sometime in February 2023, Regional Planning released a Land Use Application Checklist for SCFs, collocations, and EFRs. AR 7163. Regional Planning also finalized an application for a CUP and waiver which was uploaded to its Applications and Forms webpage. AR 47994-98. Regional Planning made the same inquiry as DPW's checklist about proximity to residential windows. AR 7250-51.

Q. The Director's SCF Design Standards

Issued on February 7, 2023, the Director's SCF Design Standards note that, per 47 U.S.C. section 332(c)(7), no state or local government may personal wireless service facilities on the basis of the environmental effects of RF emissions if such facilities comply with FCC regulations concerning such emissions. AR 112.

The Design Standards provide that the maximum height of tower-mounted facilities in industrial or rural areas shall be 75 feet by-right, and no accessory equipment shall be visible or easily accessible. AR 118. The Design Guidelines include pictures of roof-mounted facilities showing the discouragement of unconcealed antennas. AR 118. Pictures of tower-mounted facilities show the discouragement of long arms, visible cables, and different coloring between antennas and the tower. AR 118-19.

The Design Standards require facilities to incorporate concealment measures, like faux trees and rocks, as appropriate. AR 122. Faux trees shall mimic the trees in the area and faux trees shall be discouraged if no mature live trees exist in the immediate area. AR 122-23. The Design Guidelines provide examples of faux rocks and advise developers only to use them in areas that already have large natural rocks or boulders. AR 123. Pictures of monopoles show the discouragement of long cross-arms extending outwards, as opposed to either short cross-arms or flush mounting. AR 124.

R. The Notice of Exemption

On February 2, 2023, the County filed a Notice of Exemption ("NOE") for the Ordinance based on Class 1 and 3 exemptions. AR 1. The NOE states that the Ordinance includes authorization for modifications to existing facilities, as well as for minor alterations to land with the construction or conversion of small structures and concluded that those actions would not have a significant effect on the environment. AR 1.

An attached Proposed Environmental Determination from Regional Planning reached the same conclusion. AR 6. Regional Planning explained that SCFs are a subset of wireless facilities comprised of smaller equipment, typically installed on streetlight and utility poles and other structures. AR 8. Due to a large number of SCF applications in the public right-of-way submitted over the past few years, Regional Planning and DPW sought a framework to streamline their approval. AR 8.

In another attachment, the NOE acknowledged that the Ordinance exempts areas covered by a Local Coastal Program. AR 2. It also noted that the Ordinance establishes additional regulations for wireless facilities in sensitive areas such as SEAs, ridgelines, scenic highways, and historical resources. AR 3.

The NOE asserted that a Class 1 exemption applies because the Ordinance will not have a direct physical impact on the environment and only establishes the permitting requirements for existing facilities. AR 3. It also will apply to future projects involving existing facilities that require a renewed CUP, receive a collocation on an existing support structure, or for upgrades and replacements like EFRs. AR 3-4. These modifications would be minor and would not increase the on-the-ground footprint of the modified facility. AR 4.

The NOE stated that the Class 3 exemption applies because the Ordinance will not have a direct physical impact on the environment and only establishes the permitting requirements for existing facilities. AR 4. It also will apply to future wireless facility projects that typically require only a small footprint and is similar to utility infrastructure. In the case of SCFs, such facilities are defined by federal law and have strict size limitations. AR 4. The Ordinance contemplates discretionary review for certain types of macro wireless facilities and any other wireless facility that does not meet this exemption, and both would undergo the environmental review that CEQA requires. AR 4.

The NOE included a resolution adopted by the Planning Commission on March 23, 2022 which found that the Ordinance establishes a regulatory framework that includes development standards and provides a streamlined review process for wireless facilities that meet all developmental standards or propose minor modifications. AR 13-14. At the same time, it codifies the CUP requirement for certain types of new wireless facilities and facilities that do not comply with all development standards. AR 14.

IV. Analysis

Petitioners challenge the Ordinance as (1) a violation of CEQA, (2) inconsistent with state law for collocation facilities, (3) adopted in violation of LACC and state law procedure, (4) unlawfully designating most permits as ministerial, (5) facially unconstitutional in violation of due process, (6) unlawfully delegating legislative authority to non-elected officials, and (7) inconsistent with the General Plan.[4]

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[4] On February 13, 2024, the court granted the County's motion for judgment on the pleadings for the third cause of action (inconsistency with state law for collocation facilities) and the seventh cause of action (facially unconstitutional), including declaratory relief under those claims. Petitioners filed their opening brief before this ruling. At the March 7, 2024 trial, the parties agreed that the court's February 13 ruling disposes of those two claims. As a result, the court need not address Petitioners' opening brief arguments for the third and seventh causes of action. Pet. Op. Br. at 18-20, 24-26.

A. Federal and State Law Limitations

Any local government adopting an ordinance governing the installation/modification of wireless facilities must comply with federal and state law. Principal among them is the TCA (47 U.S.C. §332(c)(7), which limits the authority of local entities to regulate "the placement, construction, and modification of facilities used for commercial mobile radio services." City of Rancho Palos Verdes v. Abrams, ("City of Rancho Palos Verdes") (2002) 101 Cal.App.4th 367, 378. In enacting the TCA, Congress intended "to promote competition and higher quality in telecommunications services and to encourage the rapid deployment of new telecommunications technologies," which includes "reducing the impediments imposed by local governments upon the installation of wireless communications facilities, such as antenna towers." Verizon Wireless LLC v. City of Rio Rancho, (D.N.M. 2007) 476 F.Supp.2d 1325, 1322 (citations omitted). The TCA strikes a balance between facilitating national growth of wireless telephone service and the maintenance of local control over the siting of towers. New York SMSA Limited Partnership v. Town of Clarkstown, (2d Cir. 2010) 612 F.3d 97, 105. Local ordinances conflicting with the TCA are preempted. Id. (federal law occupies the field of the regulation of RF interference and of technical and operational aspects of wireless communications service). Opp. at 4.

The TCA and its implementing FCC regulations: (1) require actions on applications for wireless facilities to be taken within "a reasonable period of time" (60-90 days for SCFs). 47 U.S.C. §332(c)(7)(B)(ii); 47 CFR §1.6003(a), (c)(i)-(ii)); (2) provide that local regulations and placement decisions "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)); (3) require that denials of wireless facility applications be in writing and supported by substantial evidence. 47 U.S.C. §332(c)(7)(B)(iii)); (4) prohibit the regulation of wireless facility siting on the basis of the environmental effects of RF emissions if such facilities comply with FCC emission standards. 47 U.S.C. §332(c)(7)(B)(iv)); and (5) do not allow unreasonable discrimination between providers of functionally equivalent services. 47 U.S.C. §332(c)(7)(B)(i)(I)).

Except as specified, the TCA does not 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)(A). Local jurisdictions retain zoning authority, albeit somewhat limited, for the placement, construction, and modification of facilities. City of Rancho Palos Verdes, *supra,* 101 Cal.App.4th at 378.

The Spectrum Act (47 U.S.C. §1455(a)) preempts local authority to deny EFRs. Localities must approve siting applications that do not substantially change the physical dimensions of the tower or base station under criteria specified by the FCC. 47 U.S.C. §1455(a); 47 CFR §1.6100(c). The FCC regulations limit the time for a local authority to act on an EFR to 60 days and provide for a "deemed granted" remedy if the action is not timely. 47 CFR §1.6100(c)(2), (4).

State law also imposes constraints. Govt. Code section 65964.1 provides for a "deemed granted" remedy in most instances if the local government fails to act within the time specified by FCC regulations under the TCA. State law grants telephone corporations, including wireless providers, a franchise right to use the public rights-of-way for their facilities, provided their use does not incommode the public use. Public Utilities Code §7901; T-Mobile West LLC v. City & Cnty. of San Francisco, ("T-Mobile") (2019) 6 Cal.5th 1107, 1115. Pursuant to Cal. Const. art. XII, section 8, local governments cannot regulate matters that intrude upon the authority of the Public Utilities Commission ("PUC"). Southern Cal. Gas Co. v. City of Vernon, ("City of Vernon") (1995) 41 Cal.App.4th 209, 217 (city's efforts to regulate placement of gas pipeline

based on safety issues unlawfully intruded on PUC authority). Govt. Code section 65850.6 limits a local government's authority to deny applications for additional facilities at sites with existing wireless facilities under circumstances defined by statute.

These limitations do not preclude environmental review[5] of wireless facility siting or zoning safeguards (*e.g.,* setbacks from private properties, public places, or sensitive sites) unless it does one or more of the following: (1) has the effect of prohibiting the provision of personal wireless services". 47 U.S.C. §332(c)(7)(B)(i)(II)). *See* Green Mt. Realty Corp. v. Leonard, (1st Cir. 2012) 688 F.3d 40, 55-57 (local jurisdictions retain siting decision-making on aesthetics grounds which will be upheld against effective prohibition claim if supported by substantial evidence); (2) regulates wireless facility siting on the basis of the environmental effects of RF emissions where the facility complies with FCC emission standards. 47 U.S.C. §332(c)(7)(B)(iv)); (3) allows unreasonable discrimination among providers of functionally equivalent services. 47 U.S.C. §332(c)(7)(B)(i)(I));[6] or (4) purports to deny EFRs that do not substantially change the physical dimensions of the tower or base station under criteria specified by the FCC. 47 U.S.C. §1455(a); 47 CFR §1.6100(c).

As stated, local jurisdictions retain zoning authority, albeit somewhat limited, as to the placement, construction, and modification of facilities. City of Rancho Palos Verdes, *supra,* 101 Cal.App.4th at 378. Specifically, Petitioners are correct (Reply at 9) that FCC regulations do not preempt CEQA review, including review of historic resource impacts. The TCA does not grant preemptive authority on environmental matters, which for federal matters are governed by the National Historic Preservation Act ("NHPA") (54 U.S.C. §300101 *et seq.*) and the National Environmental Policy Act ("NEPA") (42 U.S.C. §4321, *et seq.*). State and local environmental mandates must be followed if not preempted by federal limitations. Sprint Spectrum, L.P. v. Willoth, (2d Cir. 1999) 176 F.3d 630, 644-45 (New York's Environmental Quality Review Act applied to wireless facility application so long as not preempted by TCA limitations).

Hence, California state and local governments must still comply with CEQA with respect to wireless facilities. Petitioners correctly contend that the FCC preserves state environmental protections for the issuance of SCFs so long as the review is completed within the shot clock period. The FCC did "not intend to preempt state and local" environmental independent checks. In re Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure, (2018) 33 FCC Rcd 3102, 3132, n. 153 ("Finally, nothing we do in this order precludes any review conducted by other authorities–such as state and local authorities–insofar as they have review

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[5] For convenience, the court's references to environmental review under CEQA shall include historic preservation issues.

[6] Petitioners argue that 5G has different qualities than other generation technologies (3G or 4G) and nothing in the TCA prevents the County from investigating whether wireless deployment harms the environment more than fiber-based deployment. The TCA prohibits the County from unreasonably discriminating "among providers of functionally equivalent services" – *i.e.*, telecommunication providers. 47 USC §332 (c)(7)(B)(I). "Congress prohibited unreasonable discrimination but permitted state and local governments to differentiate in the regulation of functionally equivalent providers with very different physical infrastructure", including aesthetics. City of Portland v. United States, (9th Cir. 2020) 969 F.3d 1020, 1041. The County's review of the Ordinance under CEQA is not unreasonable discrimination between providers. Reply at 9. The County does not dispute this point or argue that Petitioners seek unreasonable discrimination between providers.

processes encompassing [SCF] deployments. The existence of state and local review procedures, adopted and implemented by regulators with more intimate knowledge of local geography and history, reduces the likelihood that [SCFs] will be deployed in ways that will have adverse environmental and historic preservation effects").

The same is not true for EFRs. Petitioners acknowledge that the County "may not deny and shall approve" an EFR. 47 U.S.C. §1455(a)(1); 47 CFR §1.6100(c). Yet, they argue that the permit application still must meet the definition of an EFR. AR 7640.24. In stating that a local government may not deny an EFR, 47 U.S.C. section 1455(a)(3) provides: "Nothing in paragraph (1) shall be construed to relieve the Commission from the requirements of [NHPA or NEPA]." *See also* 47 U.S.C. §1455(b)(3)(C). Petitioners argue that, if a project may adversely affect the environment or historical resources, it does not meet the criteria of EFR status. *See* In re Broadband Deployment by Improving Wireless Facilities Siting Policies, ("In re Broadband") (October 21, 2014) 29 FCC Rcd 12865, 12951, n. 556 (a "modification" that would have an adverse environmental impact is a "substantial change" and therefore not an EFR). Reply at 9-10.

Petitioners misconstrue what the FCC said in In re Broadband. The FCC's order states that an EFR application must comply with federal requirements, including NEPA and NHPA. 29 FCC Rcd at 12951. Petitioners' counsel acknowledged at the March 7 trial that NEPA and NHPA cannot be enforced in state court, and the FCC's order does not say that an EFR must comply with state environmental law. 47 U.S.C. section 1455(a)(1) and 47 CFR section 1.6100(c) plainly prevent a local government from disapproving a EFR for state environmental reasons. Petitioners may not escape that fact by arguing that a failure to meet CEQA requirements makes an EFR not an EFR.[7]

In sum, while federal law proscribes EFRs from being denied by local authority if they do not substantially change the physical dimensions of the tower or base station, and it also proscribes SCFs from being denied or conditioned for narrowly defined reasons, SCFs and macro wireless facilities can be reviewed and denied by the County for permissible reasons, including under CEQA. Reply at 10.

B. The CEQA Claims

In the FAP's first, second, and sixth causes of action, Petitioners challenge the Ordinance as a violation of CEQA. "[T]he overriding purpose of CEQA is to ensure that agencies regulating activities that may affect the quality of the environment give primary consideration to preventing environmental damage." Save Our Peninsula Committee v. Monterrey County Board of Supervisors, (2001) 87 Cal.App.4th 99, 117. CEQA must be interpreted "so as to afford the fullest, broadest protection to the environment within reasonable scope of the statutory language." Friends of Mammoth v. Board of Supervisors, (1972) 8 Cal.3d 247, 259. Public agencies must regulate both public and private projects so that "major consideration is given to preventing environmental

[7] Petitioners separately argue that any project – EFR, SCF, or macro – that may have an adverse effect on historic "districts, sites, buildings, structures or objects" and that is subject to review by the federal government for its effects on historic properties under 47 CFR section 1.1320, is not exempt. 47 CFR §1.1307(a)(3), (4). Many SCFs and some projects that fit EFR criteria are not subject to the 47 CFR section 1.1320(b) exclusions since they fall within the exceptions described in the Programmatic Agreements noted under 47 CFR § 1.1320(a)(2). Reply at 10. These FCC regulations cited by Petitioners concern SCF and other applications submitted to federal authorities and have no bearing on local government ordinances.

damage, while providing a decent home and satisfying living environment for every Californian." Public Resources Code[8] §21000(g). The Legislature chose to accomplish its environmental goals through public environmental review processes designed to assist agencies in identifying and disclosing both environmental effects and feasible alternatives and mitigations. §21002.

CEQA expressly applies to discretionary projects by public agencies, including but not limited to the enactment and amendment of zoning ordinances, issuance of conditional use permits, and approving tentative subdivision maps. §21080(a). Environmental analysis must be performed before an agency approves a project (Laurel Heights Improvement Association v. Regents of the University of California, ("Laurel Heights") (1988) 47 Cal.3d 376, 394), and an agency may not commit itself to a project without performing such review (National Resources Defense Council v. City of Los Angeles, (2002) 103 Cal.App.4th 268, 271-72),

A "project" is defined as any activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment (1) undertaken directly by any public agency, (2) supported through contracts, grants, subsidies, loans or other public assistance, or (3) involving the issuance of a lease, permit, license, certificate, or other entitlement for use by a public agency. §21065. The word "may" in this context means a reasonable possibility. Citizen Action to Serve All Students v. Thornley, (1990) 222 Cal.App.3d 748, 753.

The term "project" is the whole of the action, not simply its constituent parts, which has the potential for resulting in either direct or reasonably foreseeable indirect physical change in the environment. Guidelines §15378(a). The project may include several discretionary approvals by government agencies; it does not mean each separate government approval. Guidelines[9] §15378(c). Not every agency action is a project. Simi Valley Recreation & Park District v. Local Agency Formation Commission, (1975) 51 Cal.App.3d 648, 663.

"Environment" means the physical conditions which exist within the area which will be affected by a proposed project, including land, air, water, minerals, flora, fauna, noise, and objects of historical or aesthetic significance. §21060.5; Guidelines §15360. A project that may cause a substantial adverse change in the significance of an historical resource is a project that may have a significant effect on the environment. §§ 5020.1(q), 21084.1.

"Mitigation" includes, *inter alia*, (a) avoiding the impact by not taking the underlying action or parts thereof; (b) minimizing impact by limiting the degree or magnitude of the action and its implementation; (c) rectifying the impact by repairing, rehabilitating, or restoring the impacted environment; and (d) reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action. Guidelines §15370.

The Guidelines have established a three-tiered process to ensure that public agencies inform their decisions with environmental considerations. Davidson Homes v. City of San Jose, ("Davidson Homes") (1997) 54 Cal.App.4th 106, 112. The first tier, which is jurisdictional, requires that an agency conduct a preliminary review in order to determine whether CEQA applies to a proposed activity. Guidelines §§15060, 15061. If the project does not fall within any exemption, the agency must proceed with the second tier and conduct an initial study. Guidelines

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[8] All statutory references in this section are to the Public Resources Code unless otherwise stated.

[9] As an aid to carrying out the statute, the State Resources Agency has issued regulations called "Guidelines for the California Environmental Quality Act" ("Guidelines"), contained in California Code of Regulations, Title 14, Division 6, Chapter 3, beginning at section 15000.

§15063. If the initial study reveals that the project will not have a significant environmental effect, the agency must prepare a negative declaration, briefly describing the reasons supporting that determination. Guidelines §§15063(b)(2), 15070. Otherwise, the third step in the process is to prepare a full EIR on the proposed project. Guidelines §§15063(b)(1), 15080; §§21100, 21151; Davidson Homes *supra*, 54 Cal.App.4th at 113.

An agency may assign specific functions to its staff to assist in administering CEQA. Guidelines §15025(a). This includes (1) determining whether a project is exempt, (2) conducting an initial study and deciding whether to prepare a draft EIR or negative declaration, (3) preparing the negative declaration or EIR. Guidelines §15025(a). The decision-making body may not delegate (1) review and consideration of a final EIR or approval of a negative declaration prior to approving a project, or (2) the making of EIR findings as required by Guidelines sections 15091 and 15093. Guidelines §15025(b).

1. The Class 1 and Class 3 Exemptions

The Guidelines list 33 classes of projects that generally do not have a significant effect on the environment and may appropriately be exempted from CEQA for that reason. §21084; Asuza Land Recl. Co. v. Main San Gabriel Basin Watermaster, (1997) 52 Cal.App.4th 1165.[10] Classes of projects designated in the Guidelines pursuant to section 21084 are expressly exempt from CEQA. §21080(b)(9). These categorical exemptions are those classes of projects that the Secretary of the California Resources Agency "has found…do not have a significant effect on the environment" and in the CEQA Guidelines "has listed those classes and 'declared [them] to be categorically exempt from the requirement for the preparation of environmental documents.'" Berkeley Hillside Preservation v. City of Berkeley, ("Berkeley Hillside") (2015) 60 Cal.4th 1086,1092,1102.

The exemptions must be narrowly construed. Santa Monica Chamber of Commerce v. City of Santa Monica, (2002) 101 Cal.App.4th 786, 793. "'Exemption categories are not to be expanded beyond the reasonable scope of their statutory language.' [Citation.]" Save the Plastic Bag Coalition v. County of Marin, (2013) 218 Cal.App.4th 209, 226. "In order to support a categorical exemption under CEQA, a public agency must be able to marshal substantial evidence to support the conclusion that the project fell within the exemption." Id. at 228.

No CEQA review is required if a categorical exemption is determined to apply to a proposed project or activity. §§ 21080(b)(9), 21084(a); Muzzy Ranch Co. v. Solano County Airport Land Use Comm., ("Muzzy Ranch") (2007) 41 Cal.4th 372, 380. CEQA does not require any particular procedure for agency approval of a project that it finds to be exempt from CEQA review. *See* Apartment Assn. of Greater Los Angeles v. City of Los Angeles, (2001) 90 Cal.App.4th 1162. If the agency properly finds the project is exempt from CEQA, no further environmental review is necessary. The agency may prepare and file a NOE, citing the relevant section of the Guidelines and including a brief statement of reasons to support the finding. Guidelines §§ 15061(d), 15062(a)(3); Davidson Homes, *supra,* 54 Cal.App.4th at 113.

The Class 1 (Existing Facilities) categorical exemption applies to "the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private

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[10]A project not statutorily exempt or exempt under the 33 categories in the Guidelines may be found to be exempt under the "common sense" exemption that a project is not subject to CEQA where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment. Guidelines §15601(b)(3).

structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of use beyond that existing at the time of the lead agency's determination." Guidelines §15301. The existing facility exemption applies when there are only minor alterations made to an existing structure that involve "negligible" or "no expansion" of the previous use. Guidelines §15301. The Guidelines list as an example of "minor alterations" that qualify for the Class 1 exemption "[i]nterior or exterior alterations involving such things as interior partitions, plumbing, and electrical conveyances." Guidelines §15301(a). The Guidelines provide a non-exclusive list of projects falling within this category. Guidelines §15301.

A decision to exempt a project under the Class 1 exemption must be based on a baseline of the conditions existing at the time the local agency's exemption decision is made. Citizens for East Shore Parks v. State Lands Commission, (2011) 202 Cal.App.4th 549, 560. A public agency has discretion when establishing an environmental baseline under CEQA. Fat v. County of Sacramento, (2002) 97 Cal. App. 4th 1270, 1278; Save Our Peninsula Comm. v. Monterey County Bd. Of Supervisors, (2001) 87 Cal. App. 4th 99, 125.

The Class 3 (New Construction or Conversion of Small Structures) categorical exemption is for (1) the construction of limited numbers of new small structures, (2) the installation of small new equipment and facilities in small structures, and (3) the conversion of existing small structures with only minor exterior modifications. Guidelines §15303(a). A single-family residence, or a second dwelling unit in a residential zone, qualifies for this exemption. Guidelines §15303(a). The Class 3 exemption has been interpreted to apply "when the project consists of a small construction project and the utility and electrical work necessary to service that project. San Francisco Beautiful v. City and County of San Franciso, ("San Francisco Beautiful") (2014) 226 Cal.App.4th 1012, 1022.

Even if a categorical exemption applies, an agency may not find the activity categorically exempt if certain listed exceptions apply. *See* Guidelines §15300.2.

2. Standard of Review

A party may seek to set aside an agency decision for failure to comply with CEQA by petitioning for either a writ of administrative mandamus (CCP §1094.5) or of traditional mandamus. CCP §1085. A petition for administrative mandamus is appropriate when the party seeks review of a "determination, finding, or decision of a public agency, made as a result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in a public agency, on the grounds of noncompliance with [CEQA]." §21168. This is generally referred to as an "adjudicatory" or "quasi-judicial" decision. Western States Petroleum Assn. v. Superior Court, ("Western States") (1995) 9 Cal.4th 559, 566-67. A petition for traditional mandamus is appropriate in all other actions "to attack, review, set aside, void or annul a determination, finding, or decision of a public agency on the grounds of noncompliance with [CEQA]." Where an agency is exercising a quasi-legislative function, it is properly viewed as a petition for traditional mandamus. Id. at 567; §21168.5.

The issue whether section 21168 for administrative mandamus or section 21168.5 for traditional mandamus applies to a particular case is essentially academic as the two statutes embody the same standard of review. Laurel Heights, *supra,* 47 Cal.3d at 392, n. 5. That standard is whether the agency's decision is supported by substantial evidence. §§ 21168, 21168.5. "Substantial evidence" is defined as "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other

conclusions might also be reached. Guidelines §15384(a). This standard requires deference to the agency's factual and environmental conclusions based on conflicting evidence, but not to issues of law. Laurel Heights, *supra,* 47 Cal.3d at 393, 409. Whether substantial evidence exists is a question of law. *See* California School Employees Association v. DMV, (1988) 203 Cal.App.3d 634, 644. Argument, speculation, and unsubstantiated opinion or narrative will not suffice. Guidelines, 15384(a), (b).

An agency's decision that an action falls within a categorical exemption is reviewed under the substantial evidence standard. Banker's Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego, ("Banker's Hill") (2006) 139 Cal.App.4th 249, 261; Holden v. City of San Diego, (2019) 43 Cal.App.5th 404, 410. The agency has the burden of demonstrating that substantial evidence supports its categorical exemption determination. California Unions for Reliable Energy v. Mojave Desert Air Quality Management Dist., ("California Unions") (2009) 178 Cal.App.4th 1225, 1245. The court "must first determine as a matter of law the scope of the exemption and then determine if substantial evidence supports the agency's factual finding that the project fell within the exemption." Cal. Farm Bureau Fed. v. Cal. Wildlife Conservation Bd., ("Farm Bureau") (2006) 143 Cal.App.4th 173, 185 (citations omitted). Where the agency's determination that a project is exempt from CEQA "turns only on an interpretation of the language of the Guidelines or the scope of a particular CEQA exemption, this presents a question of law subject to de novo review by [the] court." San Francisco Beautiful, *supra*, 226 Cal.App.4th at 1021.

The court must "presume the agency's findings are correct and resolve all conflicts and reasonable doubts in favor of the findings." Citizens for Positive Growth & Preservation v. City of Sacramento, ("Citizens for Positive Growth") (2019) 43 Cal.App.5th 609, 629. "[A]fter resolving all evidentiary conflicts in the agency's favor and indulging in all legitimate and reasonable inferences to uphold the agency's finding, [the court] must affirm that finding if there is any substantial evidence, contradicted or uncontradicted, to support it." Berkeley Hillside, *supra*, 60 Cal.4th at 1114.[11]

3. Discretionary Approval Decisions Incorrectly Characterized as Ministerial

The County correctly points out (Opp. at 12) that CEQA does not apply to a public agency action unless (1) the action qualifies as a project and (2) the action will "result in a direct or reasonably foreseeable indirect physical change in the environment." Guidelines §§ 15060(c), 15368. The Ordinance does not result in any direct physical change in the environment because it does not approve any specific wireless facility. Nonetheless, as Petitioners' counsel argued at the March 21 trial, the Ordinance is a project because it may result in reasonably foreseeable indirect physical changes in the environment as a result of future wireless facilities that may be approved under the Ordinance.

The Ordinance designates most wireless facility permits as ministerial. The designation of a project or activity as ministerial precludes it from CEQA review. Guidelines §15002(i)(1). The term "ministerial" describes a governmental decision involving little or no personal judgment by the public official as to the wisdom or manner of carrying out the project. Guidelines §15369.

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[11] Petitioners point out that the favorable presumption for the agency in Citizens for Positive Growth involved CEQA review of an EIR and specific findings whereas this case involves CEQA exemptions. Reply at 13. Nonetheless, Berkeley Hillside shows that findings of exemption are entitled to the same presumption of accuracy.

The public official merely applies the law to the facts as presented but uses no special discretion or judgment in reaching a decision. Id. A ministerial decision involves only the use of fixed objective standards, and the public official cannot use personal, subjective judgment in deciding whether or how the project should be carried out. Id. Where a project involves an approval that contains both ministerial and discretionary action, the project must be deemed discretionary and subject to CEQA. Guidelines §§ 15268(d), 15378(c); Mountain Lion Foundation v. Fish & Game Com., ("Mountain Lion") (1997) 16 Cal.4th 105, 119.

Petitioners argue that, where an agency improperly labels a permit as ministerial, it violates CEQA and declaratory relief is proper. Protecting Our Water & Environmental Resources v. Cnty. of Stanislaus, ("Protecting Our Water") (2020) 10 Cal.5th 479, 497. Such a designation is also prejudicial because it is not subject to CEQA review as a ministerial action and evades public scrutiny. It also effectively bars the agency's ability to compel mitigation or shape a private project. *See* Friends of Westwood, Inc. v. City of Los Angeles, ("Friends of Westwood") (1987) 191 Cal.App.3d 259, 266-67. Pet. Op. Br. at 21-22.

In Friends of Westwood, the court considered an appeal from the trial court's denial of a preliminary injunction to prohibit construction of a 26-story office building. 191 Cal.App.3d at 259, 262. The issue under CEQA was whether the approval process for the building permit was discretionary or ministerial. Id. The court explained that ministerial decisions are exempt from CEQA because the agency has no authority to stop or modify the environmental consequences of the project. Id. at 272. Conversely, where the agency has authority to deny or modify a project due to environmental consequences, the permit process is discretionary under CEQA. Id. Accordingly, the question was whether the city had the power to deny or condition the building permit in ways that would mitigate environmental problems that an EIR would uncover. Id. at 273. The court concluded that the building permitting process involved discretionary decisions addressed to the sound judgment of the administrator and reversed the trial court and CEQA applied. Id. at 272, 279-82.

In the more recent case of Protecting Our Water, the California Supreme Court addressed an ordinance that categorically defined a subset of well construction permits as ministerial unless a county health officer granted a variance. 10 Cal.5th at 487, 491. The plaintiffs challenged that classification practice, alleging that the permits were discretionary projects requiring CEQA review. Id.

In analyzing the issue, the court noted its duty to interpret CEQA to afford the fullest possible protection of the environment within the reasonable scope of its language. Id. at 496. The court concluded that the ordinance committed significant discretion when deciding to approve or disapprove a permit. Although the ordinance imposed generally adequate minimum distance standards between wells and potential contamination sources, individual judgment may be required for adequate horizontal distance, including "[n]o set separation distance...for all conditions", "local conditions may require greater separation distances", and "adverse conditions" may require that the suggested distance be increased. Id. The health officer also had significant discretion to deviate from the general standards depending on the circumstances. Id. Thus, the permit approval process allowed the county to shape a well construction project in response to concerns that could be identified by an environmental review. Id. at 497 (*citing* Friends of Westwood, *supra,* 191 Cal.App.3d at 267).

The Protecting Our Water court stated that the county's position that the standards were objective guideposts constraining discretion would have been much stronger if the objective minimum distances were the only criteria the agency was authorized to consider. Id. The county

argued that the decision to issue a permit was ministerial when the ordinance's regulatory scheme was considered as a whole, but the court found that argument inconsistent with Guidelines section 15268(d) governing projects that contain both discretionary and ministerial approval components, and the declaration in Friends of Westwood that a project is discretionary if the government can shape it in any way in response to concerns that could be identified in environmental review. Id.

Finally, the county argued that permit issuance was ministerial because it has only limited options under its ordinances to mitigate potential environmental damage. Id. at 498. It can adjust well location to prevent groundwater contamination, but it cannot address concerns of groundwater depletion or measures to prevent contamination such as pesticide and fertilizer usage. Id. The court stated that "[j]ust because the agency is not empowered to do everything does not mean it lacks discretion to do anything." Id. The county can require a different well location or deny the permit. Id.

The court held that permits under the ordinance will not always be ministerial and therefore the blanket ministerial categorization was unlawful. Id. at 501. This is a case-by-case issue because some permits may not require the exercise of judgment when the agency decides to approve or disapprove it. Id. 500.

Petitioners argue that the Ordinance designates most permits as ministerial (AR 47, 54-55), despite the fact that it contemplates the Commissioner's exercise of official discretion in processing permits. LACC section 16.25.030(B(6) provides: "An application shall be processed within the time period as specified by applicable law, including any FCC-issued order(s), in accordance with all applicable requirements and procedures for a permit identified in Title 16 - Highways - Division 1 (Highway Permits)." AR 23. Hence, the Ordinance incorporates all of Division 1's "applicable requirements and procedures", including the Commissioner's discretion to make changes or additions to permit applications (LACC §16.08.040), add requirements (LACC §16.08.050), and "refuse to issue a permit if he or she finds that it is not in the best interest of the general public to do so", even if the application fully complies with requirements (LACC §16.08.080). RJN Ex A. Additionally, for any SCF to be placed on County infrastructure, there must be a structural analysis of the effect of such placement for the Commissioner to approve to ensure there is no overburden. LACC §16.25.050(C); AR 26. The Ordinance fails to provide any guidelines for the Commissioner's approval, and he/she must exercise discretion. Pet. Op. Br. at 22.

The Ordinance also grants discretion to the Director. If a zone or land use category within a Specific Plan is silent about wireless facilities, the Director may accept an application for a wireless facility if he/she determines that a wireless facility is similar to another use permitted within such zone of land use category. LACC §22.26.030(B)(3); AR 43. Both the Director's determination that a facility is similar to another permitted facility, and the decision to accept the application, involve subjective judgment. Pet. Op. Br. at 22.

A Ministerial Site Plan Review application is required for the installation and operation of a macro facility on an existing base station or tower that meets all standards in LACC section 22.140.760(E). LACC §22.140.760(D)(1); AR 47. In turn, LACC section 22.140.760(E) contains discretionary provisions: (a) subdivision (E)(1)(b)(iv) provides that a historic resource assessment "prepared to the satisfaction of the Director" "may" be required for a facility to be located on a site containing an eligible resource to identify impacts to historic resources and their mitigation. AR 50. This confers ministerial discretion upon the Director: (1) to compel a historic resource assessment and (2) to shape the project through mitigation that meets his/her satisfaction; (b) subdivision (E)(1)(b)(v) states that placement of new facilities must take into consideration the

"least aesthetically intrusive" location. AR 50. Similarly, subdivision (E)(1)(e)(i) states that all wireless facilities must be designed to "meet minimum standards for public safety," but provides no objective measure of those standards. AR 52. Pet. Op. Br. at 22-23.

Petitioners argue that the Ordinance further makes the permitting process discretionary by subjecting it to the design standards checklists adopted or amended by the Commissioner or Director at their discretion. LACC section 16.25.030(B)(2) permits the Commissioner to adopt and amend design standards checklists and permit conditions to adjudicate SCFs and EFRs, without setting a process for doing so. AR 22. The Commissioner retains discretion to decide when and how to amend those standards. Similarly, LACC section 16.25.030(B)(3) requires that, before permit issuance, the Commissioner must approve engineered plans for SCFs that are to be mounted on new or replacement County infrastructure. AR 22. The Ordinance fails to prescribe how the Commissioner should approve these engineering plans, and what elements must be included in such plans. Id. LACC section 16.25.030(B)(7) requires the Commissioner to grant a permit when he/she is "satisfied" that the SCF or EFR meets all requirements (AR 23), which involves the exercise of subjective judgment. Pet. Op. Br. at 23.[12]

Petitioners conclude, and the court generally agrees, that these examples show that the Ordinance provides the Director and Commissioner with discretion and that these examples are akin to those found in Friends of Westwood as discretionary because they involve relatively personal decisions depending on the sound judgment and enlightened choice of the Director or Commissioner. As in Friends of Westwood, the County's designation of applicable permits as ministerial is inconsistent with the definition of "ministerial" in Guidelines section 15369 and improperly forecloses CEQA review. Pet. Op. Br. at 23.[13]

At the March 21 trial, the County's attorney acknowledged that there is "some level of discretion" in the Ordinance. Nonetheless, the County's opposition argues that the Ordinance's ministerial approval process is proper. A project is not subject to CEQA merely because its approval requires the exercise of some discretion. Rather, "the discretionary component of the project" must "give[] the agency the authority to mitigate environmental impacts." McCorkle Eastside Neighborhood Group v. City of St. Helena, ("McCorkle") (2018) 31 Cal.App.5th 80, 94. While several Ordinance provisions require the exercise of some discretion, the discretion referenced generally does not relate to environmental impacts. Rather, the discretion relates to timing (AR 23), adoption of design standards and not project approval (AR 22), impacts of SCFs on County infrastructure, not the environment (AR 26),[14] and application acceptance not related to environmental impacts (AR 43). Opp. at 12-13.

The County's distinction is ineffectual. An agency's exercise of discretion is relevant under CEQA only if it is part of a project approval. Guidelines §§ 15268(d), 15378(c). With the exception of adopting design standards and checklists, Petitioners' examples of the discretion given to the Director and Commissioner are part of project approval.

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[12] In reply, Petitioners point out other express or implied discretionary determinations. AR 7351 (facility not "detrimental to the public health, safety, and welfare"), 7581 (eight feet from structure, 50 feet from existing grove), 7396 (discretionary). Reply at 19.

[13] Petitioners add that the margin notes and redacted materials in draft documents show that the County was aware of discretionary provisions in the Ordinance. *Compare* AR 23, 25, 44, 52, 57 *with* AR 7640.24. Pet. Op. Br. at 23.

[14] Petitioners correctly argue that the County's argument that County infrastructure is not part of the environment is unsupported by legal authority. Reply at 16.

The County also argues that the fact that the Director and Commissioner may exercise discretion in permit approval is not controlling because these future wireless facilities are categorically exempt from CEQA. In Protecting Our Water, the court explained that "[i]f a project is neither ministerial nor exempt, the agency must comply with [CEQA]." 10 Cal.5th at 498 (emphasis added). Because the future wireless facilities that may be ministerially approved under the Ordinance are categorically exempt, CEQA does not require any additional environmental review for the Ordinance. Id; San Francisco Beautiful, *supra,* 226 Cal.App.4th at 1019 ("no further environmental review is necessary" for exempt project). Opp. at 12.

Petitioners argue that the County is conflating the Ordinance itself and the permits enabled by it. Its argument is that the Ordinance is exempt from CEQA under the Class 1 and Class 3 exemptions and the future individual permits enabled by it therefore can be designated as ministerial. The County erroneously conflates CEQA's first tier (ministerial project not subject to CEQA) and its second tier (exempt from CEQA). *See* Muzzy Ranch, *supra,* 41 Cal.4th at 379-381. Reply at 16.

The court does not agree. An agency's ministerial action need not comply with CEQA because it is not a project, but an exempt project need not do so either. *See* Protecting Our Water, *supra,* 10 Cal.5th at 498. If the Ordinance mischaracterizes some permit approvals as ministerial, those discretionary permit approvals must comply with CEQA unless they are exempt. *See* id. at 500-01. The misclassification of permit issuance as ministerial prevents environmental review of discretionary approvals, thereby preventing the Director or Commissioner from denying or conditioning a permit in ways that would mitigate environmental problems unearthed by an EIR. Protecting Our Water, *supra*, 10 Cal.5th at 497; Friends of Westwood, *supra,* 191 Cal.App.3d at 273. Stated another way, "the discretionary component of the project gives the agency the authority to mitigate environmental impacts." McCorkle, *supra,* 31 Cal.App.5th at 94. But if that discretionary component is exempt, it does not matter whether the Director or Commissioner could mitigate environmental problems by denying or shaping the permit because, by definition, such problems do not rise to the level of significant impacts.[15]

In sum, the Ordinance contains discretionary decisions in permit issuance that require application of CEQA unless the Ordinance is otherwise exempt.

4. Threshold Issues for the Categorical Exemptions

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[15] As a corollary, Petitioners argue that the Ordinance's categorical designation of permits as ministerial violates CEQA's prohibition against precommitment since the County will be legally compelled to approve permits without any legal right to compel mitigation. *See* Save Tara v. City of West Hollywood, (2008) 45 Cal.4th 116, 138; Guidelines §15004(b)(2)(B). Unlawful precommitment to a project before the review of its impacts may be found based on the totality of circumstances even where the action includes a condition granting discretion over CEQA matters. RiverWatch v. Olivenhain Municipal Water Dist., (2009) 170 Cal.App.4th 1186, 1211-12 (agency's actions demonstrated that it "committed itself to a definite course of action regarding the project before fully evaluating its environmental effects). Pet. Op. Br. at 23-24.

Petitioners incorrectly rely on precommitment case law. The Ordinance's designation of permits as ministerial is not a precommitment to any individual project. CEQA "encourage[s] agencies to classify ministerial projects on either a categorical or individual basis." Protecting Our Water, *supra,* 10 Cal.5th at 489. There is no individual wireless facility project to which the County could pre-commit in an ordinance designating permits as ministerial.

As a threshold matter before analysis of the Class 1 and Class 3 categorical exemptions, Petitioners argue that (a) the County has admitted that wireless facilities may have significant impacts, (b) the County unlawfully applied mitigation before deciding whether the Ordinance is exempt, and (c) mandatory findings of significance are required due to cumulative impacts and adverse impacts to human beings.

a. The Purported Admission

Petitioners note that "[a]n activity that may have a significant effect on the environment cannot be categorically exempt." Mountain Lion, *supra,* 16 Cal.4th at 124. Petitioners argue that the County has admitted that relocation and construction of wireless facilities may have significant, unavoidable individual and cumulative impacts and fire hazards. AR 6031, 6042, 6046, 7519. As such, the Ordinance's permitted structures cannot be exempt. Pet. Op. Br. at 15, 21; Reply at 13-14.

Mountain Lion noted that a categorical exemption represents a determination by the Secretary of the California Resources Agency that a particular project does not have a significant effect on the environment. Guidelines §21084. 16 Cal.4th at 124. Yet, if an activity may have a significant effect on the environment, it cannot be categorically exempt. Id. The Mountain Lion court concluded that the delisting of an endangered or threatened species pursuant to the California Endangered Species Act is an activity that necessarily may have a significant effect on the environment and therefore cannot be categorically exempt. Id. Thus, Mountain Lion relied on an express statute to preclude categorical exemption.

The County has not admitted that wireless facilities may have significant, unavoidable environmental impacts. Petitioners' argument is based on the County's draft EIR for its 2045 Climate Plan. The draft EIR stated that construction or relocation of some projects, including water, wastewater treatment, stormwater drainage, electric power natural gas, or telecommunication projects could cause significant and unavoidable impacts on environmental resources like air quality, biological resources, cultural resources, water quality, transportation, and noise. AR 6042-43. Additionally, the relocation and construction of such new or expanded projects could cause significant and unavoidable cumulative impacts when combined with closely related past, present, and reasonably foreseeable future projects. AR 6046.

Nothing in the draft EIR singles out wireless facilities as potentially causing significant environmental impacts, individually or cumulatively. Nor does it suggest that wireless facilities are the type of telecommunication facilities to which the draft EIR was referring. This general reference, which was focused mostly on "utility-scale energy projects" (AR 6042), is insufficient to be an admission that wireless facilities may have a significant environmental impact.[16]

b. Unlawful Mitigation

Whether a categorical exemption applies is determined before any mitigation. An agency should decide whether a project is eligible for a categorical exemption without reference to or

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[16] Petitioners are correct (Reply at 13-14) that the County errs in relying on Berkeley Hillside, *supra,* 60 Cal.4th at 1098, as rejecting this argument. Berkeley Hillside merely explained that, for purposes of the unusual circumstances exception to a categorical exemption, "it is not alone enough that there is a reasonable possibility the project will have a significant environmental effect." There must also be unusual circumstances. Id. The unusual circumstances exception is not at issue in this portion of the court's analysis.

reliance upon proposed mitigation measures. Salmon Protection & Watershed Network v. Cnty. of Marin, (2004) 125 Cal.App.4th 1098, 1106-07. "Guidelines section 15060...makes it clear that the applicability of an exemption must be made *before* the agency begins its formal environmental evaluation of the project". Castaic Lake Water Agency v. City of Santa Clarita, (1995) 41 Cal.App.4th 1257, 1265 (emphasis in original). Reply at 13.

"Mitigation" includes, *inter alia*, (a) avoiding the impact by not taking the underlying action or parts thereof; (b) minimizing impact by limiting the degree or magnitude of the action and its implementation; (c) rectifying the impact by repairing, rehabilitating, or restoring the impacted environment; and (d) reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action. Guidelines §15370.

Petitioners contend that the Class 1 and Class 3 categorical exemptions do not apply because the County admits that it applied mitigation before deciding whether the Ordinance is exempt. *See* Opp. at 11 (the Ordinance sets "standards to ensure there are no significant impacts relating to these issues" (citing AR 44, 50-57 (aesthetics), 2-3, 7-10 (biology), 28, 52, 57 (hazards), and 25, 51-52 (human health)); Opp. at 12 ("the Ordinance includes numerous provisions to protect environmental resources, as noted above" (citing AR 2-3, 7-10, 24, 50)); Opp. at 11 ("the Ordinance requires wireless facilities "be maintained to prevent electrical and fire hazards" (citing to AR 28, 52, 57)). Petitioners contend that these so-called standards squarely fit the definition of mitigation in Guidelines section 15370 and disqualify the claimed exemptions as a matter of law. Reply at 13.

Because they apply generally to individual permits, the Ordinance's standards are not mitigation measures. An agency may rely on generally applicable regulations to conclude an environmental impact will not be significant and therefore does not require mitigation. San Francisco Beautiful, *supra*, 226 Cal.App.4th at 132-33 (standards for 726 utility cabinets were not improper mitigation).

c. Mandatory Findings of Significance

Petitioners argue that the Ordinance may have cumulative impacts and adverse impacts to human beings, both requiring mandatory findings of significance and an EIR. Guidelines §15065(a)(3)-(4). Also, under section 21082.2, there is a significant public controversy and evidence as to the human health impacts of wireless facilities, both individually and cumulatively, especially for the disadvantaged communities of the County. The County's Class 1 and 3 exemptions are improper as a matter of law. Pet. Op. Br. at 18.

The County fails to address Petitioners' claims. Nonetheless, they are not well taken. To compel an agency to find that a project may have a significant effect on the environment, thereby requiring an EIR, the petitioner must present substantial evidence of possible environmental effects that are individually limited but cumulatively considerable. Guidelines §15065(a)(3). Similarly, Guidelines section 15065(a)(4) requires substantial evidence of substantial adverse effects on human beings, directly or indirectly. Section 21082.2 expressly states that no EIR shall be prepared even if there is a significant public controversy over environmental effects where there is no substantial evidence of a significant environmental effect.

The public comments generally can be grouped into comments about RF exposure (AR 216, 217, 230, 247, 368, 7519, 7859), fire hazards and natural disaster risks (AR 368, 9713-19, 214-15), human health and wildlife safety from microplastics (AR 9713-19), and historic site issues (AR 433). The majority of public comments concerned human exposure to RF emissions, but this issue is preempted so long as the Ordinance requires compliance with FCC regulations on

RF emissions, which it does. 47 U.S.C. §332(c)(7)(B)(iv); LACC §22140.760(E)(1)(e). Even if, *arguendo,* the FCC has not adequately considered the science of RF emissions, the County remains unable to regulate wireless facilities based on human health issues.

The court discussed the public comments with counsel in detail at the March 21, 2024 trial. There was considerable discussion about fire hazard, and the Woolsey Fire in particular, which was caused by a loose transmission line attached to a pole that contacted another wire and caused an arc flash between them. AR 10162. Petitioners' counsel argued that the Malibu Fire was caused by utility poles overburdened by telecommunications equipment. Assuming this is true, there is no showing that the Woolsey Fire or the Malibu Fire was caused by a SCF, EFR, or macro facility.

Petitioners' counsel made the general comment that many of the wireless facilities permitted by the Ordinance will be on poles, they will be more densely populated for 5G, they are required to have an electrical source, and the fire hazard will be greater than previously. The court pointed out that it has no evidence on the mechanism of operation for wireless facilities, including that they require an electrical source. Nor can the court rely on the syllogism that the Ordinance will result in more wireless facilities, wireless facilities are a fire hazard, and therefore the fire hazard will be greater than previously existing.

The issue of fire hazard (and natural disaster) requires expert analysis, a point made by a DPW employee in an internal comment. AR 7519. Statements of residents who are not experts qualify as substantial evidence if they are based on personal information or non-technical issues. Bowman v. City of Berekley, (2004) 122 Cal.App.4th 572, 583. They do not qualify on complex scientific issues about which the resident has no special training, knowledge or experience. Id. This is true for wireless facilities as a fire hazard.

Similarly, issues of microplastics impacts and historic preservation issues require expert analysis to constitute substantial evidence. The remainder of the public comments consists of argument, speculation, and unsubstantiated opinion. *See* Guidelines 15384(a), (b). *See* §21082.2(e) (public comment on EIR not determinative of significant effect on environment). The public comments are insufficient to constitute substantial evidence. Petitioners have not presented substantial evidence of any environmental effect, health, fire hazard, or otherwise.

In sum, no mandatory finding of significance requiring an EIR is required based on an alleged County admission, improper mitigation, or substantial evidence of cumulative impacts or substantial adverse effects on human beings.

5. The Class 1 and Class 3 Exemptions

In deciding whether the Ordinance -- and all its future individual wireless facility projects -- are categorically exempt, the court must bear in mind that categorical exemptions are construed narrowly (Save Our Carmel River v. Monterey Peninsula Water Management Dist., ("Save Our Carmel River") (2006) 141 Cal.App.4th 677, 697), and the County is obligated to comply with CEQA's environmental protection mandate to the greatest extent possible "within the reasonable scope of the statutory language. Mountain Lion, *supra,* 16 Cal.4th at 119. While agencies may consider the combined effect of two exemptions to place the project outside the scope of CEQA, they may only do so if the combined exemptions apply to the whole of the project. Farm Bureau, *supra,* 143 Cal.App.4th at 191.

Petitioners contend that the County unlawfully exempted the Ordinance from CEQA environmental review under the Class 1 (existing facilities) and 3 (structures) categorical exemptions because the Ordinance permits far more than just existing facilities or small structures. Pet. Op. Br. at 12-13. Even when the Class 1 and Class 3 exemptions are considered together, the

Ordinance vastly exceeds their scope because it creates a permitting scheme not only for existing facilities and small structures, but also for macro towers up to 75 feet in height and temporary wireless facilities up to 200 feet in height, the latter requiring notice to the Federal Aviation Administration. Pet. Op. Br. at 13.

The Class 1 (Existing Facilities) categorical exemption applies to the minor alteration of existing facilities and requires "negligible or no expansion of use." Guidelines §15301. Petitioners argue that the NOE claims: "The Ordinance will apply to future projects that involve existing wireless facilities,...[and] any such modifications or upgrades to existing facilities will be minor in nature and will not increase the on-the-ground footprint[.]" Yet, the Ordinance manifestly contemplates new structures. AR 47-48. Even if the Ordinance were limited to existing facilities, it permits significant increases in the height – *e.g.*, an EFR may increase an existing 35-foot tower by 20 feet, reaching a 55-foot total height. AR 7156. Pet. Op. Br. at 13.

The court agrees that Class 1 exemption only applies to the Ordinance's EFRs, not SCFs. The County does not dispute that fact.

The Class 3 (New Construction or Conversion of Small Structures) categorical exemption is for (1) the construction of limited numbers of new small structures, (2) the installation of small new equipment and facilities in small structures, and (3) the conversion of existing small structures with only minor exterior modifications. Guidelines §15303(a). The Class 3 exemption has been interpreted to apply "when the project consists of a small construction project and the utility and electrical work necessary to service that project. San Francisco Beautiful, *supra,* 226 Cal.App.4th 1017-18, 1022 (citation omitted).

Petitioners argue that the Ordinance exceeds the scope of Class 3 because the number of structures is not limited. Class 3 applies to "construction and location of limited numbers of new, small facilities or structures." Guidelines §15303. Yet, the Ordinance's enabled structures are not limited in number. 5G technology aims for three to ten times more structures. AR 15778, n. 46. A commenter stated that there are 154,000 cell towers today and that the industry anticipates that 800,000 SCFs will be deployed by 2026. AR 8211. Another commenter reported: "The small cells required for the 5G network to properly function causes another issue of waste with the new network. Because of the weak nature of the millimeter waves used in the 5G technology, small cells will need to be placed around 250 meters apart to insure continuous connection." AR 1622 (emphasis added). The Ordinance sets no limit on the number of facilities and does not account for the fact that there will be large numbers of such facilities required for 5G. Pet. Op. Br. at 13-14.

Petitioners add that the list of examples in Guidelines section 15303(a)-(c) shows that the word "small" focuses on small impacts rather than small physical size. Moreover, not all of the Ordinance's proposed structures are small. The Ordinance enables SCFs up to 50 feet tall, EFRs, temporary wireless facilities up to 200 feet tall, and macro towers up to 70 feet tall. The County admits that macro towers are large independent structures (AR 6031) and EFRs allow up to a 20-foot height increase (7156). Pet. Op. Br. at 14.

Petitioners further complain that the Ordinance does not provide the accurate size of SCFs. It refers to LACC section 22.14.230(W) for the height and size of SCFs. AR 54. While LACC section 22.14.230(W) lists various structures -- associated equipment, antenna facility, architectural tower, base station, collocation facility, EFR, faux rock outcroppings, faux trees, macro facility, and personal wireless services facility -- it has no height/size requirements for them. AR 31-33. Further, the Ordinance's reference to SCF height is in relative dimensions. (AR 33-34 ("facility is mounted on a structure up to 50 feet in height...or is mounted on a structure and extends

no more than 10 percent in height above other adjacent structures, whichever is greater"; each antenna "is no more than three cubic feet in volume"; and "[a]ll other wireless equipment associated with the structure... is no more than 28 cubic feet in volume"). Thus, a SCF facility may be 50 feet high or extend 10% higher than existing structures in all dimensions. A commenter argued that actual SCFs with other associated structures may be 95 feet. AR 1889. Pet. Op. Br. at 14.

According to Petitioners, the size issue is compounded by the fact that the Ordinance vaguely defines a "macro" tower as a facility not qualifying as an SCF or EFR. AR 33. While the County "discourages" bulky facilities, it does not prohibit them. AR 118-19, 121-25. Moreover, the Ordinance allows for ministerial processing of temporary (six months) 200-foot-high structures in rural areas. AR 35, 47. Pet. Op. Br. at 14.

Lastly, Petitioners contend that the Ordinance fails to note that wireless technology has an impact radius far greater than physical structure because RF energy is projected outward over a wide area. AR 1595, 1598. As such, the relevant structures are neither limited nor small as required for Class 3. Pet. Op. Br. at 14.

The County responds that courts have repeatedly found wireless facilities to be exempt from CEQA under the Class 3 exemption, citing the following cases: Robinson v. City and County of San Francisco, (2012) 208 Cal.App.4th 950, 953-54 (installation of small wireless telecommunications equipment on 40 existing utility poles in scattered city locations fell within Class 3); San Francisco Beautiful, *supra,* 226 Cal.App.4th 1017-18, 1022 (installation of 726 utility cabinets to expand AT&T's fiber optic network fell within clause 2 of Class 3; court declined to consider whether it qualified as a limited number of small structures under clause 1); Aptos Residents Ass'n v. County of Santa Cruz, ("Aptos Residents") (2018) 20 Cal.App.5th 1039, 1047 (installation of 13 microcells consisting of two-foot by one-foot antenna mounted on existing utility poles that were part of utility extension expressly included in Class 3); Don't Cell Our Parks v. City of San Diego, ("Don't Cell Our Parks") (20018) 21 Cal.App.5th 338, 360-62 (construction of new small 534 square foot facility, much smaller than a single family residence, fell within first clause of Class 3). The County concludes that, as in these cases, the Ordinance falls within the scope of the Class 3 categorical exemption as a matter of law. Opp. at 6-7.

Petitioners distinguish these cases on the basis that none apply the Class 1 or Class 3 exemption to specific individual projects involving a fact-intensive inquiry as to type, size, number, and environmental context (urban, rural), and potential exceptions to the exemptions. Reply at 11, 13.

The court agrees, but this distinction is not dispositive. Petitioners cite no authority that the County cannot rely on the Class 1 or Class 3 exemption for the Ordinance.[17]

Class 3 has three clauses, any of which may apply to exempt a project. Guidelines §15303(a). The first clause is the construction of limited numbers of new small facilities or structures. Id. The second clause is the installation of small new equipment and facilities in small structures. Id. The third clause is the conversion of existing small structures with only minor exterior modifications. Id. The County relies on different clauses for different facilities, which is

[17] At the March 21 trial, Petitioners' counsel made the related argument that the Class 1 and Class 3 exemptions cannot apply to an ordinance. This issue was not adequately briefed and is waived. *Cf.* Protect Our Water, *supra,* 10 Cal.5th at 499-500 (holding that ordinance imposing well construction standards for specific well permits provided for discretionary approvals subject to CEQA without discussing categorical exemptions).

permissible so long as the combined exemptions apply to the whole of the project. Farm Bureau, *supra,* 143 Cal.App.4th at 191.

The County contends that all SCFs and temporary wireless facilities permitted by the Ordinance are categorically exempt under the Class 3 exemption, EFRs are not subject to CEQA, and macro facilities either will be minor modification of an existing facility exempt under both the Class 1 and Class 3 exemptions or will be a new facility requiring a CUP and undergoing environmental review. Opp. at 7-8.

a. SCFs

Petitioners' main argument is that SCFs do not qualify for the Class 3 exemption because the Ordinance does not limit their number. This argument fails. Petitioners point to the first clause of the Class 3 exemption, but the second clause permits the installation of small new equipment and facilities in small structures. Guidelines §15303(a). The "limited numbers" qualification does not apply to this clause. San Francisco Beautiful, *supra,* 226 Cal.App.4th at 1023. There is no number limitation in the second clause.

Are all SCF projects authorized by the Ordinance "small new equipment and facilities in small structures"? They are. The Ordinance defines an "SCF" by reference to 47 CFR section 1.6002(l), which in turn defines an "SCF" as an antenna and associated antenna equipment or structure mounted onto a structure meeting certain height requirements, and where the antenna cannot exceed three cubic feet in volume and the associated antenna equipment cannot exceed 28 cubic feet in volume. 47 CFR §1.6002(d)(i)(l); AR 20. SCFs "are a subset of wireless facilities comprised of smaller equipment that are typically installed on streetlight and utility poles and other structures." AR 8. Therefore, the Class 3 exemption permits them in unlimited numbers.

Petitioners argue that SCFs are not small because they can be mounted onto a 50-foot support structure. But courts analyze whether a wireless facility is small as a matter of law by comparing the square footage to other facilities that have been found to fall within Class 3. *See* Don't Cell Our Parks, *supra,* 21 Cal.App.5th at 360 (finding new 534 square foot facility much smaller than Class 3 examples). SCFs are small compared to other facilities that courts have found to fall within the Class 3 exemption. The Class 3 exemption applies because SCFs are new, small, and installed/mounted onto a small structure. 47 CFR §1.6002(d), (i), (l).

b. Temporary Wireless Facilities

The Ordinance provides for ministerial approval of Temporary Facilities, defined as wireless facilities "used to provide wireless services on a temporary or emergency basis" for no more than six months. AR 35.

Petitioners claim these facilities do not fall within the Class 3 exemption because they can be up to 200 feet tall and are not small. However, the definition of "Temporary Facilities" confirms that they are smaller than the examples provided in Guidelines section 15303 of single-family homes, garages, carports, stores, motels, restaurants, and similar structures. As contemplated by the Ordinance, Temporary Facilities are small enough to be mounted on a "light truck" or other vehicle, and they cannot require more than 24 inches of excavation. AR 35. Such facilities fall under the Class 3 exemption.

c. EFRs

A project is not subject to CEQA where the lead agency lacks discretion to deny the project. Guidelines §15060(c)(1); McCorkle, *supra,* 31 Cal.App.5th at 89-90 (projects with both

discretionary and ministerial components are subject to CEQA only if the discretionary component gives agency authority to consider the project's environmental consequences). The County lacks discretion to deny an EFR as a matter of law under 47 U.S.C. section 1455(a), which provides that "a State or 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 Ordinance defines an "EFR" in part as "a request for modification of an existing tower or base station pertaining to SCF that does not substantially change the physical dimensions of that tower or base station." AR 19-20. This definition is consistent with 47 U.S.C. section 1455(a). Thus, the County lacks discretion to disapprove an EFR. For this reason, they are not subject to CEQA.[18]

EFRs also are categorically exempt. They fit within the Class 1 existing facility exemption, which applies when there are only minor alterations made to an existing structure that involve "negligible" or "no expansion" of the previous use. Guidelines §15301. Existing facilities include publicly and privately owned utilities. Guidelines §15301(b). They also fit within the Class 3 exemption's third clause of the conversion of existing small structures with only minor exterior modifications. Guidelines §15303(a). EFRs modify an existing wireless tower or base station, and by definition, do not "substantially change the physical dimensions of such tower or base station." AR 19-20.

d. Macro Facilities

The Ordinance streamlined the permitting process for wireless facilities by providing ministerial review for some, but not all, wireless facilities. A "macro facility" is a facility that does not meet the requirements of a SCF or EFR. AR 33. The Ordinance provides for (1) ministerial approval of macro facilities on an existing base station or tower that meets specified standards and (2) discretionary review of new macro facilities not installed on an existing base station or tower. AR 47-48.

To qualify for ministerial review, the modification to the macro facility must entail "shorter mounting equipment that extends no more than two feet from the structure." AR 54. These minor modifications to macro facilities are therefore exempt under both the Class 1 and Class 3 exemptions.

The Ordinance's regulation of macro facilities requiring discretionary review is not subject to CEQA. The Ordinance does not authorize the ministerial approval of new macro facilities; it merely subjects them to development standards. AR 31-37. The County performed discretionary review and required a CUP for new macro facilities both before and after the Ordinance. AR 13-14. Permit applications for new macro facilities subject to discretionary review pursuant to these standards will be subject to CEQA review before a CUP is issued. AR 4. Hence, the Ordinance's regulation of new macro facilities that will require subsequent CEQA review is not by itself subject to environmental review.[19]

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[18] The court has rejected Petitioners' argument that an EFR must comply with CEQA to be identified as an EFR. *See supra,* at 28.

[19] At the March 21 trial, Petitioners' counsel argued that it violates CEQA to defer this environmental review to individual CUP applications. This issue was not raised in Petitioners' briefs and is waived. In any event, the 2010 Memo required environmental review for macro facilities and so does the Ordinance. Without a change, there can be no new environmental impact.

Petitioners argue that the exemption of the Ordinance's regulation of macro facilities, both ministerial and discretionary, is belied by the record where the County conceded for both Class 1 and Class 3 exemptions that there are permits enabled by the Ordinance that will "not qualify for this exemption" and which "will undergo required environmental review pursuant to CEQA." AR 3-4. Reply at 12. There is no inconsistency because the quoted statement is exactly what the Ordinance does. It exempts ministerial macro facilities under both Class 1 and Class 3 while also requiring CEQA review for macro facility applications involving discretionary CUP review.

Petitioners also argue that, while the County may apply multiple exemptions, it must ensure that the entire project is exempt. Farm Bureau, *supra,* 143 Cal.App.4th at 191. As admitted by the County (AR 3-4), the Class 1 and Class 3 exemptions do not cover the entire Ordinance and cannot fully exempt it from CEQA. Reply at 12.

In Farm Bureau, the project was the acquisition of a conservation easement on 235 acres of farmland for its conversion to wetlands. 143 Cal.App.4th at 181-82. The agency invoked the Class 13 exemption (acquisition of lands for wildlife preservation purposes) for the acquisition of the conservation easement part of the project and the Class 4 exemption (minor alterations to land) for the conversion part. Id. at 182. The court disallowed the Class 13 exemption because the purpose of the acquisition was to make the land suitable for conservation through active construction and maintenance, not acquisition for the preservation of existing wildlife habitat. Id. at 188-89. It disallowed the Class 4 exemption because it involved the creation of new habitat, not the improvement of existing habitat, and the construction project was not a minor alteration of land. Id. at 192.

Petitioners argue that, similar to Farm Bureau, the County's opposition erroneously focuses on a few actions enabled by the Ordinance, applies Class 1 only to EFRs, and the exemptions fail to cover the whole Ordinance. Reply at 11.[20] The NOE's Project description is for "authorization for modifications to existing facilities as well as for minor alterations to land with the construction or conversion of small structures". AR 1 (emphasis added). Contrary to this description, public comments show the Ordinance more broadly involves the following: (1) the approval of unlimited wireless facilities constituting fire hazards (AR 3732, 3719 (fire hazards)), 15778, n. 46 (facilities must be three to ten times more dense), 1622 (facilities will be 250 meters apart), 4709, 10306-27 (4G, 5G, 6G will have more impacts, including waste and greenhouse gas emissions ("GHG")), waivers for deviations from design standards (AR 48, 7156); (2) changing the previous CUP discretionary review to ministerial (AR 7104 (2010 Memo)), 7107; RJN Ex. B); and (3) empowering non-elected officials to legislate and fill in critical details as to the "time, place, and

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[20] The court is uncertain why Petitioners recite the facts of Farm Bureau, which did not hold that the agency improperly relied on the combine effect of multiple categorical exemptions to place it outside of CEQA.

Petitioners also rely on Los Angeles Dept. of Water & Power v. Cnty. of Inyo, ("LADWP") (2021) 67 Cal.App.5th 1018, where the project involved land condemnation to increase landfill operation for which the agency invoked the Class 1 (existing facilities) exemption and the commonsense exemption. Id. at 1030-31. The court found that the agency improperly described the project narrowly as constituting only condemnation, and as a result, it erroneously found an exemption applies. Id. at 1025. However, LADWP expressly stated that this conclusion was reached in the unpublished portion of its decision. Ibid. Unpublished decisions, including unpublished portions of such decisions, may not be cited. CRC 8.1110(c), 8.1115(a).

manner" of wireless facilities the County admittedly can regulate (AR 7106). The County's piecemeal description of the Ordinance understates its impacts and violates CEQA. Reply at 12.

This argument is specious. The Class 1 and Class 3 exemptions are relevant only to those portions of the Ordinance to which CEQA applies. CEQA does not apply to legitimate ministerial review and discretionary CUPs will be subject to environmental review when the application is submitted. All ministerial portions of the Project are categorically exempt, and all discretionary CUPs will be subject to environmental review. This fact does not violate the rule that the combined exemptions must apply to the whole of the project. Farm Bureau, *supra,* 143 Cal.App.4th at 191.[21]

The Ordinance is categorically exempt from CEQA unless an exception applies.

6. The Exceptions to the Exemptions

Petitioners argue that exceptions to the Class 1 and Class 3 exemptions apply under Guidelines section 15300.2. Pet. Op. Br. at 14-15.

Petitioners have the burden of proof to produce substantial evidence that an exception applies. Valley Advocates v. City of Fresno, ("Valley Advocates") (2008) 160 Cal.App.4th 1039, 1067-68, 1074; Banker's Hill, *supra,* 139 Cal.App.4th at 261. They must produce substantial evidence showing a reasonable possibility of adverse environmental impacts sufficient to remove the Ordinance from the categorically exempt class. Id. In other words, the fair argument standard applies to the factual determinations in Guidelines section 15300.2. Id.

a. Unusual Circumstances Exception

No categorical exemption may apply when there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances. Guidelines §15300.2(c). The Guidelines do not define "unusual circumstances", but it presumably was adopted to enable agencies to determine which specific activities within a class of otherwise permissible activities should be given further environmental evaluation. San Francisco Beautiful, *supra,* 226 Cal.App.4th at 1023.

The "unusual circumstances" exception has two alternative approaches. Berkeley Hillside, *supra,* 60 Cal.4th at 1105. Under the first alternative, there are two inquiries: (1) whether the project presents unusual circumstances; and (2) whether there is a reasonable possibility of a

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[21] Petitioners argue that the development or amendment of design standards and checklists by the Commissioner or Director by itself qualifies as a project and a project approval under CEQA. The application of such checklists in ministerially adjudicating wireless facility permits may have significant environmental impact and requires a CEQA determination. To the extent that CEQA determination is made in an EIR or mitigated negative declaration ("MND"), it must be made by the Board, not the Commissioner or Director. Guidelines §15025(b). If the determination is made that the design standards are exempt, that determination must be appealable to the Board. Guidelines §15061(e). As a result, the County unlawfully delegated legislative authority under CEQA. Pet. Op. Br. at 26.

The court concludes *post* that the delegation of design standards and checklists to the Director and Commissioner is not an unlawful delegation of legislative authority. Nor is their creation or amendment a separate CEQA project. *See* Guidelines §21065. The standards and checklists have no potential for an environmental impact by themselves. Rather, they are part of the whole of the Project, which is the Ordinance. Guidelines §15378(a), (c). As that determination was appealed to the Board, there was no violation of Guidelines section 15061(e).

significant effect on the environment due to the unusual circumstances. Under the second alternative, the petitioner "may establish an unusual circumstance with evidence that the project will have a significant environmental effect. Berkeley Hillside, *supra*, 60 Cal.4th at 1114.

Whether a particular project presents unusual circumstances that are unusual for projects in an exempt class is essentially a factual inquiry. Berkeley Hillside, *supra*, 60 Cal.4th at 1114. The court's role is to decide whether the evidence supports the agency's determination whether the project's circumstances are within the scope of the exception, resolving all conflicts in the agency's favor. Id. The unusual circumstances must relate to some feature of the project that distinguishes it from other features in the exempt class. Don't Cell Our Parks, *supra,* 21 Cal.App.5th at 361.

If there are unusual circumstances, the court then decides whether substantial evidence supports the agency's conclusion about whether a fair argument can be made that the project may cause a significant effect on the environment sufficient to remove the project from the categorically exempt class. Id; Berkely Hills Watershed Coalition v. City of Berkeley, (2019) 31 Cal.App.5th 880, 889-90; Aptos Residents, *supra,* 20 Cal.App.5th at 1049. The fair argument standard is a 'low threshold' test for requiring the preparation of an EIR. *See* Stanislaus Audubon Society, Inc. v. Cnty. Of Stanislaus, (1996) 42 Cal.App.4th 144, 151. It is a question of law whether a fair argument exists, and the courts owe no deference to the lead agency's determination. Review is de novo, with a preference for resolving doubts in favor of environmental review. Aptos Council v. Cnty. of Santa Cruz, (2017) 10 Cal.App.5th 266, 289.

Petitioners rely on the first alternative under Berkeley Hillside and argue that unusual circumstances apply due to the undisputed unusual nature and size of the Project. The Ordinance enables an unlimited number of SCFs, EFRs, and macro towers, which may rise up to 200 feet high, including in residential areas, without any limitation on the distance from private properties. The Ordinance's structures will have a wider radius of RF emissions and—unlike other facilities—may cause more adverse impacts on the environment, including on human health. Pet. Op. Br. at 15-16.

Petitioners contend that the County is aware that SCF network technologies mandate more densely spaced and larger numbers of towers. AR 15769 (Verizon email referring to FCC order). Yet, the County refuses to confront the fact that the Ordinance's wireless networks require far more energy, produce far more heat and GHG emissions, require many more structures and bulky visual items, and hence have far more impacts on the environment than Petitioners' preferred fiber optic network. *See* AR 10306-27 (advocate group The Small Cell Forum's paper). Specifically, the Small Cell Forum "predicts the installed base of small cells to reach 70.2 million in 2025 and the total installed base of 5G or multimode small cells in 2025 to be 13.1 million." AR 10306. "A 5G base station is generally expected to consume roughly three times as much power as a 4G base station. And more 5G base stations are needed to cover the same area." Id. "A lurking threat behind the promise of 5G delivering up to 1,000 times as much data as today's networks is that 5G could also consume up to 1,000 times as much energy." AR 10307. "5G technology could add between 2.7 to 6.7 million tonnes of CO2 equivalents per year by 2030." AR 10311. "Because of the weak nature of the millimeter waves used in the 5G technology, small cells will need to be placed around 250 meters apart to insure continuous connection.... Implementing these small cells into large cities where they must be placed at such a high density will have a drastic impact on technology waste." AR 1622 (advocacy group's paper). Petitioners conclude that the unusual nature of the Project is undisputed. Pet. Op. Br. at 16.

Petitioners' unusual circumstances argument fails at the first step. The unusual circumstances must relate to some feature of the project that distinguishes it from other features in the exempt class of wireless facilities. Don't Cell Our Parks, *supra,* 21 Cal.App.5th at 361. There is nothing about the wireless facilities authorized by the Ordinance that can be distinguished from other wireless facilities in the exempt class. Petitioners' argument about increased energy usage, heat production, GHG emissions, and density of structures are indistinguishable from other 5G projects in this exempt class. Assuming that these public comments are correct, all cellular wireless facilities will face these technological challenges.

As the County points out (Opp. at 10), courts have repeatedly found that wireless facility projects do not present unusual circumstances. San Francisco Beautiful, *supra*, 226 Cal.App.4th at 1025. (noting pervasiveness of wireless facilities in concluding that the unusual circumstances did not apply to the addition of 726 utility boxes); Aptos Residents, *supra,* 20 Cal.App.5th at 1054 (it is not unusual for a public agency to provide utilities, including cell coverage, and there was no evidence that it was unusual for small structures to be used for utility extensions in rural area or in an area zoned residential agricultural); Don't Cell Our Parks, *supra,* 21 Cal.App.5th at 361.

The only feature that could be a basis for unusual character is that the number of wireless facilities is unlimited by the Ordinance. The case law cited by the County addresses specific wireless facilities projects, not a general ordinance authorizing them. *See* Reply at 14. But this distinction does not aid Petitioners because the exempt class is the installation of small new equipment and facilities in small structures in the second clause of Class 3. There is no limit in the second clause on the number of structures, and therefore nothing that could be unusual about an unlimited number of wireless facilities exempt under the second clause of Class 3.

Petitioners argue that there is a fair argument that the Ordinance may have significant aesthetic, energy, GHG, biological, water, fire, flood, and earthquake hazards, and human health impacts. Again, Petitioners rely on public comments for this conclusion. AR 10885-91 (Petitioners' comments), AR 4452-54 (comment on 5G fire hazards), 9717, 10157-59 (press release re Malibu and Woolsey Fires) 10208-11 (news article about lawsuit against SCE for Silverado Fire). Petitioners add that the scope of this fair argument is enlarged by the fact that the Ordinance fails to set any meaningful distance limitation for the placement of such structures in residential areas or public sites. *Cf.* AR 49 ("no further than five feet" from any common areas adjoined by lots). The Ordinance acknowledges potential impacts of fire/safety (AR 28), RF emissions (AR 48), aesthetic (AR 44), and human exposure, yet makes most permit processing ministerial and allows non-elected officials to develop or amend design checklists (AR 16, 22, 48) and grant waivers (AR 57-58). The County chose not to prohibit or restrict placement in high fire hazard severity zones or allow public review, reasoning that the "concern should be on whether the SCF is fire-safe, which requires technical expertise, and should not be subject to community input." AR 7519. Last, while RF and electromagnetic frequency ("EMF") emissions impact all people similarly, the Ordinance will impact the County's 383,000 estimated population in disadvantaged communities (AR 5157, 5390-91), who will have no notice or opportunity to challenge the proposed facilities nor means to relocate. AR 217, 227-28; 533-37, 688-89. *See* Govt. Code §65302 (h)(4). Pet. Op. Br. at 16-17.

Petitioners fail to present substantial evidence of a reasonable possibility of a significant effect on the environment due to unusual circumstances. San Francisco Beautiful, *supra,* 226 Cal.App.4th at 1024. Federal law prevents the County from impeding 5G technology. 47 U.S.C. §332(c)(7)(B)(i)(I) (local agency lacks discretion to "unreasonably discriminate among providers of functionally equivalent services"). There is no viable health issue because the Ordinance

complies with the FCC's regulations concerning RF emissions. AR 52 ("No facility or combination of facilities shall produce at any time exposure levels in any general population area that exceed the applicable FCC standards for [RF] emissions").

To the extent Petitioners are arguing that 5G technology is inherently more energy-intensive than fiber optics or forms of wireless technology other than cellular, the County lacks discretion to mitigate such impacts or deny 5G technology in favor of alternative technology. 47 U.S.C. §332(c)(7)(B)(i)(I), (iv). The County is not required to review environmental impacts when it lacks discretion to mitigate or avoid them. McCorkle, *supra,* 31 Cal.App.5th at 90.

Finally, Petitioners present no substantial evidence that the Ordinance will result in significant aesthetic, biological, hazards, water, or human health impacts. The court has found the public comments insufficient to be substantial evidence supporting a mandatory finding of significance, and they are not substantial evidence supporting a fair argument of significance either. In addition, the Ordinance sets forth standards to ensure there are no significant impacts for these issues. *See, e.g.*, AR 44, 50-57 (aesthetics), 2-3, 7-10 (biology), 28, 52, 57 (hazards), and 25, 51-52 (human health).

Petitioners reply that they need not present evidence of impacts under the fair argument standard; they need only present evidence that supports a fair argument that the Ordinance may have impacts. Keep Our Mountains Quiet v. County of Santa Clara, (2015) 236 Cal.App.4th 714, 730, n. 9. Reply at 14-15. True, but they have not done so because their public comments are not substantial evidence on these issues. The unusual circumstances exception does not apply.

b. Cumulative Impacts Exception

All exemptions for certain classes, including Class 3, are inapplicable when the cumulative impact of successive projects of the same type in the same place, over time is significant. Guidelines §15300.2(b). The cumulative impacts exception is reviewed for fair argument. Aptos Residents, *supra,* 20 Cal.App.5th at 1052; Berkeley Hillside, *supra*, 60 Cal.4th at 1117.

Petitioners argue that there is a fair argument that the Ordinance may have cumulative impacts.[22] Under CEQA, cumulative impacts are impacts of "closely related past, present, and reasonably foreseeable probable future projects." Guidelines §15355. The Ordinance enables "densification". Yet, the County failed to consider the impacts of the whole of its action and contemplates ministerial or illusory future CEQA review of discretionary permits without setting any limits to the placement of facilities. The Ordinance also allows collocation (placement) of new wireless facilities on existing utility poles, which may lead to fire hazards due to overburdening, as in Malibu and Woolsey Fires. AR 10157-59, 10160-206. There is a fair argument that new facilities proposed at existing facilities and new locations may have significant cumulative impacts, including aesthetic, energy, GHG, biological, water impacts, hazards impacts (fire, flood, earthquake), and human health impacts. AR 10885-91. Pet. Op. Br. at 17.

Although Petitioners assert that the Ordinance will result in various environmental impacts, they fail to establish that any purportedly significant impacts are the result of the "cumulative

[22] Petitioners argue that the County admitted that the construction or relocation of telecommunication facilities will have "significant and unavoidable" impacts. AR 6042-43, 6046. Pet. Op. Br. at 17. The court has concluded to the contrary. The County did not admit in the draft EIR for the Climate Plan that the wireless facilities in the Ordinance could have "significant and unavoidable" impacts.

impact of successive projects of the same type, in the same place, over time." Guidelines §15300.2(b) (emphasis added). Petitioners rely on the fair argument standard, arguing that they need not show evidence of cumulative impacts, only evidence to support a fair argument of cumulative impacts. Reply at 15. True, but the evidence must concern successive projects of the same type, in the same place, over time. Petitioners point to no project similar to the Ordinance on which cumulative impacts could be based, and they cite no authority that the cumulative impacts of the very projects authorized by the Ordinance can be relied upon for this exception.

Assuming that Petitioners can rely on the Ordinance's contemplated individual wireless facility projects for cumulative impacts analysis, Petitioners fail to cite substantial evidence of increased density of wireless facilities that could lead to fire hazards. The prospect of more wireless facilities under the Ordinance does not show increased fire risk without expert testimony. The County further notes that the Ordinance requires wireless facilities "be maintained to prevent electrical and fire hazards." AR 28, 52, 57. Opp. at 11.

Petitioners respond that, under the fair argument standard, a standard that wireless facilities must be maintained to prevent fire hazards does not eliminate their fire risks. AR 4452-54. Reply at 15. True, but Petitioners have not presented substantial evidence supporting a fair argument of fire hazard, and the County can rely on the standard that wireless facilities must be designed pursuant to Fire Code standards (LACC §22.14.760(E)(1)(e); AR 52) in addition to the standard that they must be maintained to prevent a fire hazard (LACC §16.25.050(i); AR 28). The cumulative impacts exception does not apply.

c. Location Exception

The Class 3 exception does not apply where the project may impact on an environmental resource of hazardous or critical concern where "designated, precisely mapped, and officially adopted pursuant to law." Guidelines §15300.2(a). A "resource" is a "natural source of wealth or revenue" or a natural feature or phenomenon that enhances the quality of life." Berkeley Hills, *supra,* 31 Cal.App.5th at 891 (declining to apply environmental resource definition to earthquake and landslide zones).

The location exception is subject to the Berkeley Hillside's bifurcated standard. Berkeley Hills Watershed Coalition v. City of Berkeley, (2019) 31 Cal.App.5th 880, 890. To establish that the location exception applies, Petitioners must present substantial evidence that (1) the County has "designated, precisely mapped, and official adopted" an "environmental resource of hazardous or critical concern;" and (2) the Ordinance may result in a significant impact to such resource. Guidelines §15300.2(a); Don't Cell Our Parks, *supra,* 21 Cal.App.5th at 363 (petitioner failed to establish that the park was "designated" as an "environmental resource of hazardous or critical concern" by any agency); Aptos, *supra*, 20 Cal.App.5th at 1053 (no evidence that the county had "designated" a residential agricultural zone as "an environmental resource of hazardous or critical concern").

Petitioners argue that the location exception applies to the Ordinance since it does not limit the placement of wireless facilities placement in any mapped area of critical concern. AR 16-59, 48, 50. The County has many mapped environmentally sensitive areas, such as parts of the Coastal Zone and the Santa Monica Mountains, all of which are identified in the General Plan. AR 9720. Several of those areas are also mentioned in LACC sections 16.25.040(A)(1)-(2) and 22.140.760(E)(1)(b)(iii) as SEAs, Significant Ridgeline, Coastal Zone, and US National Park Service. AR 50, 24. The SEA Program is a component of the County's Conservation/Open Space Element. AR 9720. SEAs are mapped as "[l]and identified as holding important biological

resources representing the wide-ranging biodiversity of Los Angeles County, based on the criteria for SEA designation established by the General Plan and as mapped in the adopted SEA Policy Map." AR 5164. Petitioners contend that there is a fair argument that the mapped areas will be affected by the Ordinance's enabled unlimited and hazardous facilities. *See also* AR 7644-47 (comment by Resource Conservation District of the Santa Monica Mountains, Environmental Review Board). Pet. Op. Br. at 17-18.

While Petitioners have noted that the County has sensitive environmental resources, they have not presented any evidence that (1) the County or other public agency has "designated, precisely mapped, and official adopted" an "environmental resource of hazardous or critical concern" and (2) the Ordinance may result in a significant impact to such a resource.

Petitioners reply that the County has many mapped environmentally sensitive areas. AR 5164; *see also* AR 5380, 5604-06, 5621-22 (scenic areas, ridgelines in County unincorporated areas). Reply at 15.

Petitioners' citations show that the County has environmentally sensitive areas, including parts of the Coastal Zone and Santa Monica Mountains that are identified in the General Plan (AR 9720), numerous ridgelines, three state scenic highways and two County scenic highways at identified locations (AR 5606, 5622), and scenic vistas that are a key feature of a scenic viewshed. AR 5621. The cites do not show, however, that these locations have been precisely mapped and officially adopted. The possible exception is SEAs, which the County has mapped in a SEA Policy Map (AR 5164) but there is no showing that this mapping is precise, and that the SEA designation was officially adopted.

In any event, the Ordinance expressly discusses environmentally sensitive areas such as Scenic Highways, SEAs, Significant Ridgelines, and the Coastal Zone. AR 24. SCFs within SEAs on a Scenic Highway, within 50 feet of a Significant Ridgeline per Title 22, or within the boundaries of the Coastal Zone are subject to approval from Regional Planning. LACC §16.25.040(A)(1)(a), (b); AR 24. *See also* AR 3, 50.[23] The Santa Monica Mountains Local Coastal Program also has existing regulations in place for wireless facilities. AR 2. The location exception does not apply.

d. Historical Resource Exception

The environment includes "objects of historical or aesthetic significance." §21060.5; Guidelines §15360. "A project that may cause a substantial adverse change in the significance of an historical resource is a project that may have a significant effect on the environment." §21084.1; Valley Advocates, *supra*, 160 Cal.App.4th at 1051. No categorical exemption may apply when a project may cause a substantial adverse change in the significance of a historical resource. Guidelines §15300.2(f). The fact that an object of historical significance is man-made does not preclude it from being part of the environment protected by CEQA. Guidelines §15360.

The historical resources exception only applies if the physical changes will impact the features that make the resource historically significant. Gentry v. City of Murrieta, (1995) 36 Cal.App.4th 1359, 1418-19 (widening of road would not impact its historical significance because project did not impair road features that made it historically significant). The historical resource exception is reviewed for fair argument. Aptos Resident, *supra,* 20 Cal.App.5th at 1052.

Petitioners argue that the historical resources exception applies to the Ordinance. While

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[23] Petitioners question the nature of this Regional Planning approval with respect to the scenic highways exception. *See post.*

LACC section 22.140.760(E)(1)(b)(iv) prohibits wireless facilities on historical resources, it allows ministerial review for placement on the grounds of such resources, only making any historic site assessment optional at the discretion of the Director. Yet, impacts on historical resources are not determined by whether a structure is placed on its grounds, but rather by whether the Ordinance "may cause a substantial adverse change in the significance of a historical resource." §§ 21084(e), 21084.1; Guidelines §15064.5(b)(1), (2) (significant adverse change includes alteration of resource or its immediate surroundings such that its significance would be materially impaired). There is a fair argument that the Ordinance may have fire and other impacts on historical resources. Pet. Op. Br. at 18.

The County responds that the Ordinance does not permit wireless facilities to be installed on buildings or structures listed or eligible as a historic resource. LACC section 22.140.760(E)(1)(b)(iv); AR 50. While certain wireless facilities may be installed on the grounds of such properties, the Ordinance requires any such facilities to "be located and designed to eliminate impacts to the historic resource." Id. Petitioners do not cite any evidence explaining how, given this limitation, the Ordinance may cause a substantial adverse change in the significance of a historic resource. Opp. at 12.

The County's argument is not entirely correct. The mere facts that (a) the Ordinance prohibits wireless facilities on historic buildings, and (b) new towers and support facilities on historic property grounds must be located and designed to eliminate impacts to historic resources does not somehow negate the impacts of wireless facilities when they are located on historic building grounds. The grounds of historic properties are relevant to the evaluation of impacts to historic resources under Guidelines section 15064.5(b)(1), (2). The fact that the Director may, but is not required to, require an historic resource assessment for wireless facilities on historic resource grounds means that some wireless facilities on historic grounds can escape environmental assessment. This is substantial evidence of a fair argument that there may be environmental impacts. The historic resource exception applies to the Ordinance.

e. Scenic Highways Exception

A categorical exemption shall not be used for a project which may result in damage to scenic resources within a highway official designated as a state scenic highway. Guidelines §15300.2(d).

Petitioners argue that there is a fair argument that the Ordinance may have impacts on scenic highways. While the Ordinance provides for Regional Planning approval, it is only for an SCF on a new support structure. AR 24. The Ordinance fails to define what such review entails and who will be deciding it. Id. The Ordinance also is silent on all other SCFs and macro facilities on scenic highways, stating only that "[w]ireless facilities shall be located and designed to minimize visual impacts to vistas from adopted scenic highways[.]" AR 55.

The County responds that Petitioners speculate that the Ordinance could result in damage to scenic resources within a state scenic highway, but speculation does not constitute substantial evidence. Valley Advocates, *supra,* 160 Cal.App.4th at 1067-68, 1074. Opp. at 12. Petitioners reply that they have presented fact-based assumptions and inferences constituting substantial evidence. *See* Guidelines §15384 (a)-(b). The Ordinance fails to limit wireless facilities on scenic highways in any way, supporting a fair argument of impacts. Reply at 15-16.

As discussed *ante,* the County has state scenic highways. AR 5606, 5622. SCFs within a Scenic Highway are subject to approval from Regional Planning. LACC §16.25.040(A)(1)(a), (b); AR 24. Petitioners are correct that the Ordinance does not discuss whether Regional Planning's

approval will be ministerial or discretionary. If ministerial, Petitioners have a fair argument that there may be substantial impacts from wireless facilities that are not environmentally reviewed.

At the March 21 trial, the court discussed the ambiguity in Regional Planning's approval of SCFs within a Scenic Highway. The Ordinance refers to a "land use" approval by Regional Planning. LACC §16.25.040(A)(1)(a)-(b); AR 24. According to the County's attorney, the reference to a land use approval means a discretionary approval. The court cannot simply assume this to be true without citation to a definition or reference in the LACC. The scenic highways exception applies to the Ordinance.

f. Hazardous Sites Exception

A categorical exemption shall not be used for a project located on a site which is included on any list of hazardous waste facilities and sites compiled pursuant to Govt. Code section 65962.5. Guidelines §15300.2(e).

Petitioners argue that there is a fair argument that the Ordinance may have hazard impacts since it does not limit the placement of SCFs and macro facilities on any hazardous site. AR 18-59. It allows these wireless facilities anywhere with only a condition that "the location of the [new] facility is the least intrusive feasible and does not create a safety hazard." AR 57. Pet. Op. Br. at 18.

Petitioners fail to identify the existence of any hazardous waste facilities and sites compiled pursuant to Govt. Code section 65962.5. Consequently, they have not presented substantial evidence supporting a fair argument that the Ordinance could result in wireless facilities located on a hazardous waste site.

C. Non-CEQA Claims

Petitioners argue that the Ordinance was adopted in violation of LACC and state law procedure, unlawfully delegates legislative authority to non-elected officials, and is inconsistent with the General Plan.

1. Standard of Review

A petition for traditional mandamus is appropriate in all actions "to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station...." CCP §1085. Traditional mandamus permits judicial review of ministerial duties as well as quasi-legislative and legislative acts. County of Del Norte v. City of Crescent City, (1999) 71 Cal.App.4th 965, 972.

A traditional writ of mandate is the method of compelling the performance of a legal, ministerial duty required by statute. *See* Rodriguez v. Solis, (1991) 1 Cal.App.4th 495, 501-02. Generally, mandamus will lie when (1) there is no plain, speedy, and adequate alternative remedy, (2) the respondent has a duty to perform, and (3) the petitioner has a clear and beneficial right to performance." Pomona Police Officers' Assn. v. City of Pomona, (1997) 58 Cal.App.4th 578, 583-84 (internal citations omitted). Whether a statute imposes a ministerial duty for which mandamus is available, or a mere obligation to perform a discretionary function, is a question of statutory interpretation. AIDS Healthcare Foundation v. Los Angeles County Dept. of Public Health, (2011) 197 Cal.App.4th 693, 701.

In the absence of a ministerial duty, traditional mandamus relief is unavailable unless the petitioner can demonstrate an abuse of that discretion. An agency decision is an abuse of discretion only if it is "arbitrary, capricious, entirely lacking in evidentiary support, unlawful, or procedurally

unfair." Kahn v. Los Angeles City Employees' Retirement System, (2010) 187 Cal.App.4th 98, 106. In applying this deferential test, a court "must ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute." Western States, *supra,* 9 Cal.4th at 577. Mandamus will not lie to compel the exercise of a public agency's discretion in a particular manner. American Federation of State, County and Municipal Employees v. Metropolitan Water District of Southern California, (2005) 126 Cal.App.4th 247, 261. It is available to compel an agency to exercise discretion where it has not done so (Los Angeles County Employees Assn. v. County of Los Angeles, (1973) 33 Cal.App.3d 1, 8), and to correct an abuse of discretion actually exercised. Manjares v. Newton, (1966) 64 Cal.2d 365, 370-71. In making this determination, the court may not substitute its judgment for that of the agency, whose decision must be upheld if reasonable minds may disagree as to its wisdom. Id. at 371. A writ will lie where the agency's discretion can be exercised only in one way. Hurtado v. Superior Court, (1974) 11 Cal.3d 574, 579.

2. Compliance with Ordinance Adoption Procedure

In the FAP's fifth cause of action, Petitioners contend that the Ordinance was adopted in violation of LACC sections 22.244.030 and 22.232.040(B)(2)(a) and Govt. Code sections 65853-57.

a. State Zoning Ordinance Procedure

The Planning and Zoning Law is located in Govt. Code sections 65000 *et seq.* The purpose of Chapter 4, Zoning Regulations (Govt. Code section 65800 *et seq.*) is to provide for the adoption and administration of zoning laws, ordinances, rules and regulations by counties and cities, and to implement such general plan as may be in effect in any such county or City. Govt. Code §65800.

A zoning ordinance, or amendment to a zoning ordinance, which changes any property from one zone to another or imposes any regulation listed in Govt. Code section 65850 not previously imposed or otherwise removes or modifies any such regulation, must be adopted pursuant to Govt. Code sections 65854 to 65857. Govt. Code §65853. Pursuant to Govt. Code section 65850(a), the legislative body of a local government may regulate the use of structures and land.

The planning commission shall hold a public hearing on the proposed zoning ordinance or amendment. Govt. Code §65854. Notice of the hearing shall be given pursuant to Govt. Code section 65090 and, if the proposed ordinance or amendment thereof affects the permitted uses of real property, notice shall also be given pursuant to Govt. Code section 65091. Govt. Code §65854.

The planning commission shall render its decision through a written recommendation to the legislative body in the form and manner specified by the legislative body. Govt. Code §65855. The decision shall include the reasons for the recommendation and the relationship of the changes to applicable general and specific plans. Ibid.

Upon receipt of the planning commission's recommendation, the legislative body shall notice and hold a public hearing. Govt. Code §65856. The legislative body may approve, modify, or disapprove the planning commission's recommendation. Govt. Code §65857. Any modification of the proposed ordinance or amendment by the legislative body that was not previously considered by the planning commission during its hearing shall be first referred to the planning commission for report and recommendation, but the planning commission is not required

to hold a public hearing. Id. A failure of the planning commission to report within 40 days shall be be deemed approval of the proposed modification. Id.

Public hearings under the Planning and Zoning Law are not subject to the formal rules of evidence or procedure applicable in judicial actions unless a public agency otherwise provides by charter, ordinance, resolution, or rule of procedure. Govt. Code §65010(a). No action, inaction, or recommendation by any public agency, its legislative body, or its administrative agencies shall be set aside or held invalid due to improper admission or rejection of evidence or by reason of any error, irregularity, informality, neglect, or omission unless the court finds that the error was prejudicial and that the party complaining or appealing suffered substantial injury from that error and that a different result would have been probable if the error had not occurred. Govt. Code §65010(b). There is no presumption that the error is prejudicial. Id.

b. LACC Zoning Procedure

An ordinance amendment may be initiated to alter the boundaries of districts, to impose regulations not previously imposed, or to remove or modify any regulation already imposed by the Zoning Code. LACC §22.244.010. An ordinance amendment may be approved when the Board finds the public convenience, general welfare, or good zoning practice justifies such action. Id. Ordinance amendments shall be processed in compliance with LACC Chapter 22.232. LACC §22.244.030.

To review a discretionary zoning application, the Planning Commission shall hold a public hearing. LACC §22.232.040(A)(1). The Planning Commission shall make findings and may recommend approval or denial based on the findings. LACC §22.232.040(A)(2)(a), (b). It shall recommend denial of the application if it cannot make one or more of the required findings. LACC §22.232.040(A)(2)(b)(ii).

If the Planning Commission recommends approval of the application, the Board shall review the recommendation at a public hearing and give notice thereof. LACC §22.232.040(B)(1). The Board may approve, modify, or reject the recommendation of the Planning Commission. LACC §22.232.040(B)(2). For a zone change, ordinance amendment, or plan amendment, if the Board modifies the recommendation, any modification not previously considered during the Planning Commission's hearing shall first be referred to the Planning Commission for report and recommendation. LACC §22.232.040(B)(2)(a). The Planning Commission need not hold a public hearing before issuing this report. Id.

c. Analysis

The Planning Commission's agenda of March 23, 2022, was limited to Title 22 (Zoning) amendments and did not include Title 16 (Highway) amendments. AR 1244-46. On November 15, 2022, the Board's initial reading stated its intent to adopt the Ordinance amending both Title 16 and Title 22. On December 6, 2022, the Board considered the Ordinance and continued the hearing to January 10, 2023. On January 3, 2023, County staff revised the Ordinance and released the revised Ordinance for public review two days later. The revised Ordinance was not presented to or recommended by the Planning Commission. On January 10, 2023, the Board adopted it in a second reading.

According to Petitioners, this process violated LACC sections 22.244.030 and 22.232.040(B)(2)(a), and Govt. Code sections 65853-57, which require that the Planning Commission review any ordinance and that the Board remand to the Planning Commission for its review of revisions in the first instance. The County violated the LACC by (1) failing to notice

and place all the Ordinance amendments on the agenda for the March 23, 2022 Planning Commission hearing and its recommendation, (2) subsequently expanding the scope of the Ordinance by adding Title 16 amendments on November 15, 2022, and (3) revising and finally adopting the Ordinance on January 10, 2023 without first presenting it to the Planning Commission. The County also violated Govt. Code section 65853 since amendments to Titles 16 and 22 were adopted without Planning Commission review. Pet. Op. Br. at 21; Reply at 16-17.

Based on these contentions, Petitioners present two issues that should have been presented to the Planning Commission: (a) revisions to the Title 22 (Zoning) amendments and (b) the Title 16 (Highways) amendments.

The County first argues that Petitioners have not overcome the presumptions to which the Ordinance is entitled. "Legislative enactments are presumed to be valid, and to overcome the presumption of validity, the petitioner must produce evidence 'compelling the conclusion that the ordinance is, as a matter of law, unreasonable and invalid.'" Corona-Norco Unified Sch. Dist. v. City of Corona, ("Corona-Norco") (1993) 17 Cal. App. 4th 985, 993. It also is presumed that "the board ascertained the existence of necessary facts to support its action", and that those facts "are those required by the applicable standards which guided the board." Id. *See also* Hilton v. Bd. of Supervisors, ("Hilton") (1970) 7 Cal.App.3d 708, 717. Opp. at 13.

Petitioners characterize the presumption of validity as irrelevant and argue that neither Corona-Norco nor Hilton is on point. Petitioners are raising a procedural challenge to the Ordinance's adoption whereas Corona-Norco involved a substantive challenge to a general plan consistency findings. *See* 17 Cal.App.4th at 992-93. While Hilton's presumption of validity was based on former Govt. Code section 65801 (now section 65010(b)) and concerned the evidence necessary to invalidate a zoning ordinance, the court applied the presumption only because it found no prejudice and no violation of the notice requirement. 7 Cal.App.3d at 714-16. Reply at 17.

Petitioners are incorrect. The presumption of validity attaches both to the substance of an ordinance and the procedure for its adoption, as reflected by Hilton.

The County next argues that the substance of each of the challenged Board-level edits to Title 22 (Zoning) was considered by the Planning Commission. The Board has broad authority under state law and the LACC to modify any recommendations of the Planning Commission. The only time modifications must be sent back occurs when they were "not previously considered" by the Planning Commission. Govt. Code §65857; LACC §22.232.040(B)(2)(a). Opp. at 13-14.

The County explains that the revisions to Title 22 (Zoning) occurred between the Ordinance's introduction to the Board on November 15, 2022 and the adoption on January 10, 2023. The Board made two edits to the "Application Requirements" section (which applies to both ministerial and discretionary permit applications). Pursuant to the edits, the applicant: (1) shall "provide all of the required materials listed on the [applicable] Checklist…including a report on the individual and cumulative [RF] emissions levels of each wireless facility demonstrating that such emissions comply with adopted FCC guideline [and] provide proof of liability insurance for each facility…" (AR 48-49), and (2) "is encouraged to schedule a voluntary pre-application meeting with the Department to discuss the proposed facility, the requirements of this Section, applicable checklists and guidelines, and any potential impacts of the proposed facility." AR 49. The Planning Commission considered the topics referenced in these provisions in making its recommendations to the Board. *See* AR 86, 366, 383, 387, 431-96, 501, 840, 1266, 1268, 1270, 1278, 1280. Opp. at 14.

The Board made two edits to the "Development Standards" section that merely echo existing law: (1) "all wireless facility [sic] shall be designed by qualified, licensed persons to meet

minimum standard of public safety, and shall comply with all applicable legal requirements..." (AR 49-59) and (2) "[n]o facility or combination of facilities shall produce at any time exposure levels in any general population area that exceed the applicable FCC standards for [RF] emissions" (AR 52.) These provisions codify law that the Planning Commission had no discretion to change. *See* AR 370, 372, 473-87, 501, 510-32, 836, 1257, 1266. Opp. at 14.

Finally, the Board refined the aesthetic requirements listed in the Development Standards section by adding that "[t]he locating of new facilities shall take into consideration the least aesthetically intrusive location." AR 50. Finally, the Board merely codified the period in which an inoperative facility will be deemed abandoned. AR 58-59. This issue was considered by the Commission. *See* AR 467-70, 850.

The County argues that it was well within the Board's legislative authority to make the revisions in response to public comments made after the Planning Commission's recommendation. The Board has all the jurisdiction and power granted by the California Constitution, state law, and the County Charter. Charter §10 (RJN Ex. 5). The Board establishes the Planning Commission, appoints its members, and delegates to it certain powers and duties. The Planning Commission's role is administrative and subject to its delegated authority. Charter §11; LACC §22.220.030 (RJN, Ex. 4). The Board further is not required to follow the recommendation of the Planning Commission; it may adopt an ordinance even if the Commission "recommended a less sweeping change." *See* Ferris v. City of Alhambra, (1961) 189 Cal.App.2d 517, 522. Opp. at 15.

The Board's authority is not at issue. As Petitioners reply (Reply at 17), the County conflates its procedural duty to send revisions to the Planning Commission with whether the Board has the power to adopt an ordinance differing from the Planning Commission's recommendation. The power of the Board to adopt a "less sweeping change" than recommended by the Planning Commission is undisputed if proper procedure is followed.

The County also concludes that the Highways Code amendments were part of the materials considered by the Planning Commission. AR 64, 1251, 1250-51, 1256-58, 1293. Opp. at 16, n. 8. The County's citations show only that the Highways Code amendments prepared by DPW were mentioned to the Planning Commission, not presented to it. Petitioners also correctly respond that the fact that the staff report referred to the Highways Code is irrelevant. The Planning Commission could not consider a matter outside of its agenda, and that agenda was only for amendments to Title 22 (Zoning). *See* AR 1244-46. §54954.2(a)(3). *See* Reply at 16, n. 8. The LACC and Govt. Code do not require that the Planning Commission merely consider the subject matter of an ordinance or its amendments, but rather its language. The record does not show such consideration. Reply at 17.

The County further argues that the Highways Code amendments could not be reviewed and recommended by the Planning Commission. The provisions of the LACC and state law at issue govern zoning ordinances and their amendments. *See* Govt. Code §65800; LACC §22.244.010. Zoning ordinances governing land use are subject to separate requirements than ordinances adopted pursuant to the County's police power to regulate its public rights-of-way. The Highways Code principally regulates permitting on highways and is administered by the Director of DPW. *See* LACC §§ 16.04.100 (RJN, Ex. 3); 2.18.013; 2.18.015(D) (RJN, Ex. 2). Highways are governed by unique state and federal laws. *See, e.g.*, Public Utilities Code §7901 (franchise right for telephone corporations to use the public rights-of-way); 47 U.S.C. §253. The County's highways are not zoned in zoning maps and are regulated separately from land governed by the zoning ordinances. *See* https://planning.lacounty.gov/maps-and-gis/map-catalog/. Opp. at 16, n. 7. *See* City of Escondido v. Desert Outdoor Advert., Inc., (1973) 8 Cal.3d 785, 790-91 (zoning

procedures did not apply to ordinance prohibiting billboards adjacent to highways, with exception of those for the property on which billboard was located). The County concludes that the Title 16 (Highways) amendments do not implement the County's zoning authority and thus are not subject to the procedural requirements of zoning regulations. Opp. at 15-16.

Petitioners reply that permits for wireless facilities on County infrastructure previously were governed by Title 22 (Zoning) and the Ordinance moved them to Title 16 (Highways). The Planning Commission is authorized to address an ordinance amendment "to remove or modify any regulation already imposed by this Title 22". LACC §22.244.010 (RJN Ex. 4). Therefore, the Planning Commission should have addressed the removal to Title 16. Reply at 17-18.

At the March 7 trial, the County's attorney explained that Title 16 (Highway) amendments were never governed by Title 22 (Zoning). The 2010 Memo governed the installation of wireless facilities and required a CUP for any wireless facility in any zone but did not address SCFs, EFRs, or application review deadlines. AR 7104. The 2010 Memo discouraged wireless facilities along a scenic highway, on a significant ridgeline, or in or within 250 feet of any SEAs and required any such facility to be screened with landscaping or camouflaged. AR 151. The 2010 Memo also imposed other restrictions for a wireless facility on school grounds, a day care facility, or a park or recreational area. AR 151. Because wireless facilities in unincorporated rights-of-way were not in Title 16, DWP could present the Title 16 amendments directly to the Board and not the Planning Commission.

Petitioners' counsel responded at the March 7 trial that Regional Planning processed applications for SCFs in the public right-of-way pursuant to the 2010 Memo (AR 8), which therefore were in the scope of Title 22 (Zoning), that is an insufficient basis to require the Planning Commission to hear the Ordinance's Title 16 amendments. LACC section 22.244.010 (RJN Ex. 4) only authorizes the Planning Commission to consider an ordinance amendment "to remove or modify any regulation already imposed by this Title 22". The 2010 Memo was not a regulation, and it was not imposed by Title 22. The 2010 Memo was within the scope of Regional Planning's authority, but not within the scope of the Planning Commission's authority. Therefore, the Title 16 (Highways) amendments could be presented directly to the Board.

However, the County's argument fails to address the Title 22 (Zoning) amendments that were considered by the Board without remand to the Planning Commission. Any modification of a proposed ordinance or amendment by the legislative body that was not previously considered by the planning commission during its hearing shall be first referred to the planning commission for report and recommendation, but the planning commission is not required to hold a public hearing. Govt. Code §65857. For an ordinance amendment, any modification not previously considered during the Planning Commission's hearing shall first be referred to the Planning Commission for report and recommendation. LACC §22.232.040(B)(2)(a). The Board did not follow this procedure for the January 3, 2023 revisions.

The County argues (Opp. at 16) that, even if it has violated ordinance adoption procedure, Petitioners are not entitled to have approval of the Ordinance set aside. Petitioners have not shown prejudice in any way or that additional Planning Commission review would have led to a different result. *See* Govt. Code §65010(b) ("No action...by any []legislative body...shall be held invalid or set aside ...unless the court finds that the error was prejudicial and that the party complaining [] suffered substantial injury from that error and that a different result would have been probable if the error had not occurred."). There is no presumption that any error is prejudicial or that injury was done if the error is shown. Id.

The County notes that the Ordinance is substantially similar to the Ordinance that was

before the Planning Commission. The Board-level edits addressed more fully certain issues that the Commission had already addressed, some of which were made at the behest of one or more Petitioners, who cannot possibly have suffered prejudice from the adoption of their proposed changes. *See,* e.g., AR 3282-83, 4721-22, 10811-12, 1543-78, 2083-110, 2225-29, 2233-34, 3013-101, 4451-82, 9395-582, 10867-15. *See* Roberson v. City of Rialto, (2014) 226 Cal App.4th 1499, 1507-08 (petitioner suffered no prejudice from failure of city council hearing notice to include planning commission's recommendation where his attorneys appeared before city council and presented extensive objections to the ordinance). Opp. at 16-17.

Petitioners rely on Environmental Defense Project of Sierra County v. County of Sierra, ("Environmental Defense") (2008) 158 Cal.App.4th 877, 880-81. There, the court granted declaratory relief that the county violated a ten-day notice requirement in Govt. Code section 65856 for the board of supervisor's hearing to review a planning commission's recommendation, noting the "Legislature's recognition of 'the importance of public participation at every level of the planning process' and the policy of the state to give the public 'the opportunity to respond to clearly defined alternative objectives, policies, and actions' §65033." Id. at 881. *See also* Hamilton & High, LLC v. City of Palo Alto, ("Hamilton") (2023) 89 Cal.App.5th 528, 570-572 (construing Govt. Code §65010(b) to require prejudice would frustrate the statutory purpose of ensuring public review); *cf.* Environmental Protection Information Center v. California Dept. of Forestry & Fire Protection, (2008) 44 Cal.4th 459, 486–88 (failure to consider duplicative public comments in CEQA not prejudicial). Reply at 17-18.

Hamilton undermines Petitioners' position. The Hamilton court discussed Govt. Code section 65010(b), which has been described as a curative statute for recurring judicial decisions which invalidated local zoning proceedings for technical procedural violations. 89 Cal.App.5th at 569. The reported cases applying Govt. Code section 65010(b) have reflected this purpose. Id. (citations omitted). Those courts which have declined to apply Govt. Code section 65010(b) did so when the harmless error requirement was inconsistent with the statutory relief sought. Id. Hence, Environmental Defense declined to apply Govt Code section 65010(b) because it applies only when a party seeks to set aside an action, inaction, or recommendation whereas the petitioner was seeking declaratory relief. 158 Cal.App.4th at 887. Environmental Defense held that the agency's failure to comply with an express statutory directive to make findings was subject to declaratory relief and harmless error did not apply. Id.

Petitioners seek to set aside the Ordinance as non-compliant with the statutory and LACC procedure that required the Planning Commission to hear and consider the January 3, 2023 revisions and the Title 16 (Highways) amendments before they were considered by the Board. The court has found that the revisions should have been presented to the Board, but this violation was technical in nature. The purpose of the Planning Commission's review in the first instance is to apply its expertise and make a recommendation to the Board. *See* Govt. Code §65856. After such a recommendation, the Board was entitled to approve, modify, or disapprove the Planning Commission's recommendation as it saw fit. Govt. Code §65857. Therefore, the Board had the authority to adopt the Ordinance as revised.

The Board's failure to avail itself of the Planning Commission's expertise was technical in nature. The January 3 revisions presented to the Board were not major. Although Petitioners contend that the failure to remand to the Planning Commission deprived it of public comment, the Planning Commission would have had no obligation to hold a hearing and permit public comment. Govt. Code §65857; LACC §22.232.040(B)(2)(a). At the March 7 trial, Petitioners comment argued that a remand of the January 3 revisions would have given the public more time to provide

written comments, but that is not the purpose of the remand procedure. Moreover, the public had numerous opportunities to comment on the proposed Ordinance, and the revisions did not materially affect that right.[24] Although the County committed a procedural failure in adopting the Ordinance, Petitioners fail to show prejudice under Govt. Code section 65010(b).

3. Unlawful Delegation

The FAP's eighth cause of action asserts that the Ordinance unlawfully delegates legislative authority to the Commissioner and Director without ascertainable standards and safeguards.[25]

Generally, "powers conferred upon public agencies and officers which involve the exercise of judgment or discretion are in the nature of public trusts and cannot be surrendered or delegated to subordinates in the absence of statutory authorization." Southern California Edison Co. v. Public Utilities Com., (2014) 227 Cal.App.4th 172, 195. The legislature may not delegate the power to make the law, including the discretion to determine what the law will be. Carmel Valley Fire Protection District v. State of California, (2001) 25 Cal.4th 287, 299.

Discretionary legislative powers may not be delegated to a non-elected body in a way that abdicates those powers. Kugler v. Yocum, ("Kugler") (1968) 69 Cal.2d 371, 376. The purpose of this doctrine is to "assure that 'truly fundamental issues [will] be resolved by the Legislature' and that a 'grant of authority [is] accompanied by safeguards adequate to prevent its abuse." Id. A legislature may delegate the power to prescribe rules and regulations to promote the purpose of the legislation or carry the legislation into effect. Id. The legislature also can delegate if the administrative officer is governed by a sufficient standard. Id. at 375-76. It further may delegate the power to "determine some fact or state of things upon which the law makes or intends to make its own action depend." Id. at 376. Finally, public agencies may delegate the performance of ministerial tasks while retaining for themselves general policymaking power to determine the terms and conditions. Id. Moreover, an agency's subsequent approval or ratification of an act delegated to a subordinate validates the act, which becomes the act of the agency itself. Id.

The word "ministerial" describes a governmental decision involving little or no personal judgment by the public official as to the wisdom or manner of carrying out the project. 14 CCR §15369. The public official merely applies the law to the facts as presented but uses no special discretion or judgment in reaching a decision. Id. A ministerial decision involves only the use of fixed standards or objective measurements, and the public official cannot use personal, subjective judgment in deciding whether or how the project should be carried out. Id.

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[24] The County further argues that, even if Petitioners show that a provision of the Ordinance had not been adopted in compliance with law, such provision could be severed from the remainder of the Ordinance. LACC §§ 1.01.060 (RJN, Ex. 1), 22.02.100 (RJN Ex. 4), 16.02.050 (RJN, Ex. 3). Opp. at 17. Petitioners reply that severability has no bearing on their challenge to the procedure in adopting the Ordinance, which was not a challenge the substantive validity of its parts. Reply at 18. While the court potentially could sever the Title 16 (Highways) amendments, there is no need to do so.

[25] At the March 7 trial, the County objected to Reply footnote 9, which argues that the redacted margin note at AR 7579 would show that the 20-foot setback from residential windows was purposely omitted from the Ordinance. No inference can be drawn from the redacted margin note as a reason why the Ordinance does not contain a 20-foot window setback. The objection is sustained.

A delegation is unlawful if it (1) leaves the resolution of fundamental policy issues to others or (2) fails to provide adequate direction for the implementation of that policy. Carson Mobilehome Park Owners' Assn. v. City of Carson, ("Carson") (1983) 35 Cal.3d 184, 190. The petitioner must show a total abdication of legislative power through a failure to render basic policy decisions or assure that they are implemented. Kugler, *supra*, 69 Cal.2d at 376.

Petitioners contend that the Ordinance unlawfully delegates legislative powers to the non-elected Commissioner and Director to issue and amend design standards checklists to process wireless facility permits"[26] and to adjudicate ministerial permits, leaving their adjudication to the discretion of non-elected officials without the opportunity for review.

In its motion for judgment on the pleadings, the County argued that whether there is a total abdication of legislative power is a question of law. *See* Sims v. Kernan, (2018) 30 Cal.App.5th 105, 115 (upholding trial court ruling sustaining demurrer to inmate's claim improper delegation of lethal injection protocol). A legislative body may delegate some quasi-legislative or rule-making authority to determine some fact or state of things which the law is designed to address. Sacramentans for Fair Planning v. City of Sacramento, (2019) 37 Cal.App.5th 698, 717. The County contended that the Ordinance contains pages of detailed design and development standards and specific permitting procedures and is not a total abdication of authority even if "some critical details have been left out" as Petitioners contend.

In denying the motion for judgment on the pleadings for the non-delegation claim, the court ruled that the pertinent question is whether the Ordinance leaves the resolution of fundamental policy issues to the Director and/or Commissioner or fails to provide adequate direction to them for the implementation of that policy. Context is important, and the court did not know whether issues such as placement of wireless facilities near private homes or public spaces are fundamental policy matters. Nor did the court know whether the "pages of detailed design and development standards" were sufficient direction to avoid a total abdication of authority.

In reply, Petitioners argue that the County's opposition fails to answer the questions raised by the court. That the distance of wireless facilities from homes and public places is a fundamental policy issue is beyond dispute, and nowhere in its opposition does the County address the distance issue. The Ordinance's development standards refer to "required setbacks" without providing for them except for a five-foot setback in Residential Zones. AR 49-50. In contrast, the County's 2010 Memo regulating wireless facilities prior to the Ordinance required placement of wireless facilities at the "furthest distance" from activities in sensitive public areas, such as schools, day-care centers, parks or recreation areas, and a minimum 250-foot distance from scenic or sensitive areas. AR 151. Various other jurisdictions set larger setbacks to protect people and children. AR 856 (City of Encinitas), 7861 (New Hampshire). The hazards at issue here confirm the importance of setbacks. Reply at 18-19.

Petitioners add that the County's claims that there is no unlawful delegation because the Director will only implement the Ordinance ignores the fact that the design checklists fill in critical details omitted from the Ordinance. It is also at odds with the County's previous position in the motion for judgment on the pleadings that issuance of the checklists is a legislative act. MJOP Ruling, p. 15, n. 4. Reply at 19.

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[26] At the March 7 trial, the court inquired, and both parties agreed, that the Director and Commissioner both have authority to create checklists. There was uncertainty whether both have authority to create design standards, but it was agreed that the administrative record only contains the February 2023 SCF Design Standards issued by the Director.

Petitioners fail to meet their burden of proof that the Ordinance's delegation to the Commissioner and Director is "a total abdication of legislative authority." Petitioners rely on a single issue -- the placement of wireless facilities near private homes or public spaces – and claim without evidence that it is a fundamental policy issue. As the County's attorney argued at the March 7 trial, this is a new issue raised for the first time in reply and may be disregarded. Regency Outdoor Advertising v. Carolina Lances, Inc., (1995) 31 Cal.App.4th 1323, 1333. Petitioners also fail to show that the Ordinance leaves the resolution of this issue to the Director or Commissioner and fails to provide adequate direction for its implementation. It is insufficient to contend that the County's opposition does not address it; Petitioners were required to address the issue and meet their burden of proof in their opening brief.

Moreover, the Ordinance contains the fundamental policy for location of facilities and the means of carrying it out. The Ordinance's' Zoning Code amendments establish the County's policy, including standards for location, height, design, and safety. *See* AR 49-54. All wiring facilities permits must comply with state and federal requirements, standards, and law. LACC §22.140.760(E)(1)(a); AR 49. In Residential Zones, including public rights-of-way, wireless facilities shall be placed no farther than five feet from any common property line shared with adjoining lots, and shall use stealth or concealment techniques. LACC §22.140.760(E)(1)(b)(ii); AR 49-50. The fundamental policy for location of facilities is aesthetics and safety, and the Ordinance need not specifically describe permissible property setbacks. *Cf.* Sims v. Kernan, *supra,* 30 Cal.App.5th at 115 (death penalty for certain crimes through lethal injection was the fundamental policy and department could develop the protocol for executions). In answer to Petitioners' point about checklists, the Director had authority to prepare checklists even before the Ordinance's Title 22 (Zoning) amendments. LACC §22.222.070(A)(1); RJN Ex. 4.

The Ordinance's Title 16 (Highways) amendments also provide that "[t]he commissioner may adopt and amend a design standards checklist and permit conditions for SCFs and EFRs implementing the provisions of this Chapter." AR 22 (emphasis added). The "provisions of this Chapter" include the County's policies for SCF design, locations, structural integrity, height, and safety. AR 25-28. The Design Standards Checklist implements those policies. AR 7629-34, 7635-40. This is permissible. *See* Kugler, *supra,* 69 Cal.2d at 376 (legislative body may delegate the power to prescribe rules and regulations to promote the purpose of the legislation).

Hence, the Director and Commissioner are authorized to prepare design standards checklists, based on the Ordinance (or even before the Ordinance). There is no improper delegation because Petitioners fail to show what the Ordinance requires for the location of wireless facilities with respect to private and public spaces, including sensitive public areas such as schools, day-care centers, parks or recreation areas, scenic areas, and SEAs, some of which are subject to a CUP. LAMC §16.25.040(A)(1)(a)-(b); AR 24. Petitioners also fail to show what the checklists and Design Guidelines provide with respect to the locations of wireless facilities proximate to private and public spaces, if anything. The Ordinance's design and development standards are not a total abdication of authority even if they left out an important detail concerning the location of wireless facilities from public and private spaces.[27]

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[27] The parties debate whether allowing non-elected officials to "adjudicate ministerial permits" constitutes unlawful delegation of legislative authority. The County notes that a legislative body may lawfully delegate the performance of ministerial tasks so long as it retains general policymaking power. Kugler, *supra,* 69 Cal.2d at 376. Opp. at 19-20. Petitioners argue that the matter delegated is not ministerial. Petitioners distinguish Kugler, *supra,* 69 Cal.2d at

The Ordinance's delegation of checklists and design guidelines to the Director and Commissioner was not unlawful.

4. General Plan Consistency

In the FAP's fourth cause of action, Petitioners contend that the Planning and Zoning Law requires that all approved projects be consistent with the general plan both vertically (Govt. Code §65860 (any zoning ordinance) and horizontally or internally (Govt. Code §65300.5). A project's inconsistency with even one basic and clear general plan policy may be sufficient to scuttle a project. Families Unafraid to Uphold Rural El Dorado Cnty. v. El Dorado Cnty. Bd. of Supervisors, ("Families") (1998) 62 Cal.App.4th 1332, 1341-42. Pet. Op. Br. at 26-27.

Until 1972, cities and counties were required to adopt a general plan, but it was considered merely an "interesting study" and no law required local land use decisions to follow its dictates. DeVita v. County of Napa, ("DeVita") (1995) 9 Cal.4th 763, 772. In 1972, the Legislature required general law cities' zoning ordinances to be consistent with their general plans. Govt. Code §65067. The Legislature subsequently enacted statutes aimed at requiring cities and counties to act consistently with their general and specific plans. *See, e.g.,* Govt. Code §65860 (city or county ordinance shall be consistent with general plan); Govt. Code §65300.5 (general plan and its elements "comprise an integrated, internally consistent, and compatible statement of policies"); Govt. Code §65359 (specific plan shall be consistent with general plan).

Now, the general plan of a city or county is considered its constitution for future development. DeVita, *supra,* 9 Cal.4th at 772; Lesher Communications, Inc. v. City of Walnut Creek, (1990) 52 Cal.3d 531, 540. General plans generally do not set forth specific mandates or prohibitions, but rather policies and goals. Napa Citizens for Honest Government v. Napa County Bd. of Supervisors, (2001) 91 Cal.App.4th 342, 378.

The County's General Plan's policy goals include the improvement of existing wired and wireless telecommunications infrastructure (Policy PS/F 6.2) and the expansion of access to wireless technology networks, while minimizing visual impacts through collocation and design (Policy PS/F 6.3). RJN Ex. 6, p. 230.

Another General Plan goal is to protect visual and scenic resources. AR 6916. To fulfill this goal, Policy C/NR 13.1 seeks to protect scenic resources through land use regulations that mitigate development impacts. AR 6916. Policy C/NR 13.2 seeks to protect ridgelines from incompatible development that diminishes their scenic value. AR 6916.

380-83 (ordinance fixing Los Angeles rates as the minimum for Alhambra firemen's salaries was not unlawful delegation because market forces would set those wages at realistic level) and Carson, 35 Cal.3d at 188 (no unlawful delegation where city set maximum rent for mobilehomes and delegated the issue of rent increase to rent review board using 12 non-exhaustive list of factors) as inapposite because both cases found sufficient safeguards which do not exist here. Reply at 19.

This debate mixes apples and oranges. A legislature may delegate both ministerial and discretionary issues. Discretionary power may be delegated to non-elected officials so long as the grant of authority is accompanied by safeguards to prevent its abuse, is governed by a sufficient standard, to "determine some fact or state of things upon which the law makes or intends to make its own action depend." Kugler, *supra,* 69 Cal.2d at 375-76. Public agencies may delegate ministerial tasks involving the use of fixed standards or objective measurements while retaining for themselves general policymaking power to determine the terms and conditions. Ibid. The tests are different, but both may be delegated.

The General Plan also seeks to protect historic, cultural, and paleontological resources. AR 6921. Policies seek to mitigate all impacts from new development on or adjacent to such resources to the greatest extent feasible (Policy C/NR 14.1), support an inter-jurisdictional collaborative system that protects and enhances those resources (Policy C/NR 14.2), and ensure that proper notification and recovery processes are carried out for development on or near them (Policy C/NR 14.6). AR 6921.

Petitioners contend that the Ordinance is inconsistent with the General Plan because it frustrates (a) Policy C/NR 13.1 to "[p]rotect scenic resources through land use regulations that mitigate development impacts." (AR 6916), (b) Policy C/NR 13.2 to "[p]rotect ridgelines from incompatible development that diminishes their scenic value." (AR 6916), (c) Policy C/NR 14.1 to "[m]itigate all impacts from new development on or adjacent to historic, cultural, and paleontological resources to the greatest extent feasible." (AR 6921), (d) Policy C/NR 14.2 to "[s]upport an inter-jurisdictional collaborative system that protects and enhances historic, cultural, and paleontological resources." (AR 6921), and (e) Policy C/NR 14.6 to "[e]nsure proper notification and recovery processes are carried out for development on or near historic ... resources." (AR 6921). Pet. Op. Br. at 26-27.

In contravention of these policies, the Ordinance sets no limit as to the number or location of wireless facilities that can be built in a single area, including in scenic rural areas. AR 55 (no limit); AR 24 (only limits in scenic highways). It fails to limit the placement of wireless structures at or near historical resources or to require a historic resource assessment. AR 50. It contains no mitigation measures to protect paleontological or cultural resources. AR 18-59. The Ordinance's wireless structures will be placed at high densities of three to ten times greater than the existing facilities, 250 meters apart, because of density requirements. AR 15778, n. 46. The Ordinance also precludes public participation in the adjudication of hazardous permits by categorically designating most permits ministerial and failing to provide an opportunity to challenge them. Pet. Op. Br. at 27.

Petitioners misunderstand Govt. Code section 65860's general plan consistency requirements, which are only that the local jurisdiction determine that the ordinance is compatible with the general plan's policies and goals. Spring Valley Lake Ass'n v. City of Victorville, ("Spring Valley") (2016) 248 Cal.App.4th 91, 100; Families, *supra,* 62 Cal.App.4th at 1336. "Because policies in a general plan reflect a range of competing interests, the governmental agency must be allowed to weigh and balance the plans policies when applying them, and it has broad discretion to construe its policies in light of the plans purposes." Napa Citizens, 91 Cal.App.4th at 386. The nature of the policy and the nature of the inconsistency are critical factors in this analysis. Families, *supra*, 62 Cal.App.4th at 1341. A project is inconsistent with the general plan if "it conflicts with a general plan policy that is fundamental, mandatory, and clear." Spring Valley, *supra,* 248 Cal.App.4th at 100. The required balancing does not equate to inconsistency. "A given project need not be in perfect conformity with each and every general plan policy." Families, *supra,* 62 Cal.App.4th at 1336.

The County's determination may be invalidated only if Petitioners prove that the Ordinance clearly contradicts and frustrates a General Plan policy that is fundamental, mandatory, and clear. Petitioners must prove that, notwithstanding the evidence supporting the City's consistency determination, the Project "directly conflict[s] with "specific and mandatory" policies such that no reasonable person could conclude they were consistent. *See* San Francisco Tomorrow v. City and County of San Francisco, ("San Francisco Tomorrow") (2014) 229 Cal.App.4th 498, 518; Karlson v. City of Camarillo, (1980) 100 Cal.App.3d 789, 803 (that agency's interpretation of consistency

is debatable is not grounds for overturning its findings). The court may not substitute its judgment for the local government's nor reweigh competing evidence; it simply decides whether the local officials considered the applicable policies and the extent to which the project conforms to those policies. Naraghi Lakes Neighborhood Pres. Assn. v. City of Modesto, (2106) 1 Cal.App.5th 9, 17-18.

The Board found that "[t]he Ordinance is consistent with the County's General Plan and supportive of its policies, including Policy PS/F (Public Services and Facilities) 6.2: Improve existing wired and wireless telecommunications infrastructure; and Policy PS/F 6.3: Expand access to wireless technology networks, while minimizing visual impacts through collocation and design." AR 64. The Board's determination is entitled to deference and must be upheld so long as it "reasonably could have been made." Spring Valley, *supra,* 248 Cal.App.4th at 100. The deployment of telecommunications infrastructure is rationally related to the wireless telecommunications policies stated in the General Plan.

Petitioners fail to show that any of the policies upon which it relies is fundamental, mandatory, and clear. The general policies of protecting scenic resources through land use regulations (Policy C/NR 13.1), protecting ridgelines from incompatible development that diminishes their scenic value (Policy C/NR 13.2), mitigating impacts of development on historic, cultural, and paleontological resources to the greatest extent feasible (Policy C/NR 14.1), supporting a collaborative system to protect and enhance such resources Policy C/NR 14.2), and (e) ensuring proper notification and recovery processes are carried out on or near historic resources (Policy C/NR 14.6) are neither specific nor mandatory. *See* San Francisco Tomorrow, *supra,* 229 Cal.App.4th at 518 (examples of cases in which land use project was inconsistent with specific and mandatory general plan policies). Nor have Petitioners shown that the Ordinance is incompatible with these policies.

In reply, Petitioners shift the issue from the Ordinance's inconsistency with General Plan policies to a failure to show that the Board balanced the General Plan's policies. Petitioners rely on the fact that the court's role "'is simply to decide whether the [public] officials considered the applicable policies and the extent to which the proposed project conforms with those policies.'" Napa Citizens, *supra,* 91 Cal.App.4th at 386. The County's briefs cannot replace the Board's missing findings. *See* Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova, (2007) 40 Cal.4th 412, 443 ("The audience ... is not the reviewing court but the public and the government officials deciding on the project..."). The court cannot presume the County's "decision was based on the required findings or that those findings are supported by substantial evidence." Walnut Acres Neighborhood Assn. v. City of Los Angeles, (2015) 235 Cal.App.4th 1303, 1312–13. Reply at 18.

Petitioners' new issue of the failure of the Board's findings to show a balancing of General Plan policies raised for the first time in reply is waived. Regency Outdoor Advertising v. Carolina Lances, Inc., *supra,* 31 Cal.App.4th at 1333. In any event, the Board was not required to make specific findings about the policies considered. As the County's attorney argued at the March 7 trial, the Ordinance "carves out" additional scrutiny and land use approvals for certain wireless facilities in scenic highways, SEAs, and the coastal zone within National Park Service jurisdiction, and within 50 feet of a significant ridgeline. AR 23-24. This fact indicates that the Board did consider at least some policies mentioned by Petitioners.

Petitioners fail to show that the Ordinance is inconsistent with the General Plan.

V. Conclusion

The FAP is granted in limited part in that the historical resources and scenic highways exceptions apply to the Ordinance. In all other respects, the FAP is denied. An OSC re: judgment is set for May 7, 2024 at 1:30 p.m. The parties are ordered to meet and confer on the appropriate remedy. If they fail to agree, each side may file a three-page brief on the appropriate remedy two court days before May 7.

Dated: March 27, 2024

Superior Court Judge

JAMES C. CHALFANT