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EXEMPT FROM FILING FEES PURSUANT TO GOVERNMENT CODE SECTION 6103

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

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,

Plaintiffs and Petitioners,

v.

Case No. 23STCP00750
Judge: Hon. James C. Chalfant, Dept. 85

Filed Under California Environmental Quality Act ("CEQA")

DEFENDANTS' AND RESPONDENTS' NOTICE AND MOTION FOR JUDGMENT ON THE PLEADINGS; MEMORANDUM OF POINTS AND AUTHORITIES (CODE CIV. PROC. §438)

Filed concurrently herewith:
1. Request for Judicial Notice;
2. Declaration of A. Patricia Ursea; and
3. [Proposed Order]

COUNTY OF LOS ANGELES; COUNTY OF LOS ANGELES BOARD OF SUPERVISORS; COUNTY OF LOS ANGELES REGIONAL PLANNING COMMISSION; COUNTY OF LOS ANGELES DEPARTMENT OF REGIONAL PLANNING; COUNTY OF LOS ANGELES DEPARTMENT OF PUBLIC WORKS; and DOES 1-10, inclusive, Defendants, Respondents and Real Parties in Interest.	Date: February 13, 2024 Time: 9:30 p.m. Dept.: 85 Action Filed: March 7, 2023 Trial Date: Not Set

NOTICE AND MOTION FOR JUDGMENT ON THE PLEADINGS

TO ALL PARTIES AND THEIR COUNSEL OF RECORD IN THIS ACTION:

PLEASE TAKE NOTICE THAT on February 13, 2024, at 9:30 a.m., or as soon thereafter as counsel may be heard in Department 85 of this Court, located at 111 N. Hill Street, Los Angeles, CA, Defendants and Respondents County of Los Angeles, County of Los Angeles Board of Supervisors, County of Los Angeles Regional Planning Commission, County of Los Angeles Department of Regional Planning and County of Los Angeles Department of Public Works will and hereby do move for judgment on the pleadings in their favor, and against 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 ("Petitioners").

This Motion is made pursuant to Code of Civil Procedure section 438 and relevant case law on the grounds that Petitioners' Due Process Violation (Seventh Cause of Action), Unlawful Ministerial Designation (Sixth Cause of Action), General Plan Inconsistency (Fourth Cause of Action), Unlawful Delegation (Eighth Cause of Action), and Unlawful Colocation (Third Cause of Action) Claims fail to state a cognizable claim for relief. This Motion will be based upon this Notice and Motion, the Memorandum of Points and Authorities, the concurrently-filed Request for Judicial Notice, the concurrently-filed Declaration of A. Patricia Ursea, upon all the records and files in this action, and upon all oral and documentary evidence that may be presented at the hearing of this Motion.

Dated: January 17, 2024

BEST BEST & KRIEGER LLP

By: 

ALISHA M. WINTERSWYK
GAIL A. KARISH
A. PATRICIA URSEA
ALI V. TEHRANI
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COUNTY OF LOS ANGELES, et al

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Petitioners bring a facial challenge to Ordinance 2023-0001 enacted by the County of Los Angeles ("County"), which establishes permitting processes for the installation and modification of wireless facilities in the County (the "Ordinance"). The purpose of the Ordinance is, among other things, to exercise the County's police powers under the California Constitution consistent, and in compliance, with: (1) the County's policy objectives set forth in its General Plan to improve wireless networks and increase wireless access in the County; and (2) a complex web of federal and state laws that cabin the County's authority to regulate the placement of wireless facilities—and in many cases, limits and constrains—the County's authority to deny wireless applications.

The Ordinance establishes both ministerial and discretionary permitting processes for the siting of wireless facilities. Petitioners generally allege that that wireless facilities are "unsafe," "toxic" and an "***inferior*** communications delivery medium"[1] (Pet., ¶ 5, emphasis added.) Petitioners claim that the Ordinance violates constitutional due process protections, and seek a writ of mandate and declaratory relief to void the Ordinance on various grounds, including that it: (a) improperly labels certain permitting requirements as "ministerial" in violation of the California Environmental Quality Act ("CEQA"); (b) is inconsistent with the County's General Plan; (c) unlawfully delegates legislative discretion; and (d) violates Government Code section 65850.6, which governs processing of applications for certain types of wireless facilities uniquely defined in state law (collectively "Challenged Claims").

None of the Challenged Claims state a viable claim. ***First***, Petitioners' procedural due process challenge can survive this Motion only if Petitioners plead facts to show that the Ordinance is unconstitutional in "all conceivable circumstances."[2] (See *United States v. Salerno* (1987) 481 U.S. 739, 745.) Petitioners do not, and cannot, plead such facts. The Ordinance employs different processes for different types of wireless applications. Petitioners only challenge a subset of ministerial review processes

[1] As the name of the lead Petitioner (Fiber First Los Angeles) suggests, Petitioners apparently consider fiber optic networks to be superior to wireless. (See also https://www.fiberfirstla.org/take-action ("If you believe that everyone in LA County deserves fiber optic connections, and if you believe that the job of the municipal government is to serve the interests of the people and not the interests of the wireless industry, we hope you will support our efforts with your financial donation!")

[2] Petitioners plead their due process challenge under the guise of writ of mandate. Regardless, the outcome of the analysis is the same—the claim cannot survive the pleading stage.

and provisions authorizing quasi-legislative acts, facts that are themselves inadequate as due process applies only to adjudicative acts, and then only when a cognizable property interest has been harmed (*ibid.*). In numerous conceivable scenarios a wireless facility may be permitted under the ministerial processes Petitioners challenge that will have no significant effect on any person's property rights; California courts have held as a matter of law, that affixing small equipment boxes to an existing utility pole in a developed urban area does not result in a 'significant' or 'substantial' deprivation of property.

Second, for writ of mandate claims under Code of Civil Procedure section 1085[3] to survive this Motion, Petitioners must plead facts to show that the County, in adopting the Ordinance, either: (1) failed to discharge a clear, present, and ministerial duty prescribed by law (*Gilbert v. State of Cal.* (1990) 218 Cal.App.3d 234, 241), ***or*** (2) took action that is "so palpably unreasonable and arbitrary as to show an abuse of discretion as a matter of law." (*Carrancho v. California Air Resources Board* (2003) 111 Cal.App.4th 1255, 1264-1265). Petitioners fall far short of meeting this burden. Petitioners' writ claims do not identify any "clear, present, and ministerial duty" the County has failed to discharge—indeed, that is expressly ***not*** the basis for any of their Challenged Claims. Rather the basis for Petitioners' writ claims is that the County "prejudicially abused its discretion" in a variety of ways, including, e.g., by not limiting the amount of wireless facilities that can be built in the County (*see* Pet., ¶ 138), authorizing ministerial review of applications to add minor modifications to existing facilities (*id.*, ¶ 157), and failing to allow residents that may be "sickened" by "exposure to non-ionizing radiation emitted from" wireless towers to contest the installation of wireless facilities (*id.*, ¶ 8).

Petitioners' grievances are merely a reflection of Petitioners' personal views; their wish list of provisions illustrates only that if they had drafted the Ordinance, they would have done it differently. That is a far cry from showing that the Ordinance the County adopted is "so palpably unreasonable and arbitrary as to show an abuse of discretion as a matter of law." (*Carrancho, supra,* 111 Cal.App.4th 1255, 1264-1265.) Petitioners may desire to discourage wireless facilities, but mandamus does not lie to compel government to exercise its discretion in the "particular manner" that Petitioners wish. (*AIDS Healthcare*

[3] Petitioners plead "in the alternative" a mandamus claim under Code of Civil Procedure § 1094.5. But the law is clear that a challenges to legislative action, such as the passage of an Ordinance, are adjudicated under section 1085, not section 1094.5. (*Cal. Water Impact Network v. Newhall Cnty. Water Dist.* (2008) 161 Cal.App.4th 1464, 1483.)

Foundation v. Los Angeles Cnty. Dept. of Public Health (2011) 197 Cal.App.4th 693, 700-701.)

Moreover, in arguing that the County "prejudicially abused its discretion" by not adopting the provisions on their wish list, the Petitioners fail to acknowledge that many of those provisions would either be preempted by, or would violate, federal law. For example, federal law mandates that the County ***must*** approve certain types of wireless facility applications (47 U.S.C. § 1455(a); 47 C.F.R. § 1.6100), prohibits the County from enacting wireless regulations that ban or "have the effect of prohibiting the provision of personal wireless services" (47 U.S.C. § 332(c)(7)(B)(i)(II)), and prohibits the County from regulating wireless facilities siting on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with federally established standards. (47 U.S.C. § 332(c)(7)(B)(iv).) The County cannot predict how many applications it will receive that federal law dictates it must approve; thus, it could not limit the number of wireless facilities that may be approved under the Ordinance without potentially violating federal law. In addition, state and federal law proscribe short deadlines (e.g., 60 days) for County action on applications and a "deemed" approved remedy if deadlines are missed. (47 C.F.R. § 1.6001-1.6100; Gov. Code, § 65964.1.) Thus, as a practical matter, the County cannot offer hearings to any and all residents who may have an opinion on any given wireless application—by the time the hearings were completed, the application may well be deemed approved.

The writ claims fail as a matter of law for other reasons too. As described below, in attempting to meet their burden on a writ claim, Petitioners must overcome two presumptions in the County's favor, that: (1) the Ordinance is valid; and (2) the County has "performed its duty and ascertained the existence of any facts upon which its right to act depended." (*Griswold v. Cnty. of San Diego* (1973) 32 Cal.App.3d 56, 66.) Petitioners' hypothetical scenarios do not overcome the presumption of validity that attaches to the Ordinance. In addition, the writ claims (1) fail to allege any cognizable basis for their novel claim for an alleged "mislabeling" of certain provisions of the Ordinance as "ministerial"; (2) fail to show that the Ordinance is inconsistent with the General Plan's stated objectives to "improve[e] existing wired and wireless telecommunications infrastructure" and "expand[ ] access to wireless technology networks"; (3) fail to identify any provision of the Ordinance that comes even close to a "***total abdication of [legislative] power"*** as required for a claim for unlawful delegation of legislative authority.

Finally, Petitioners fail to state a claim for declaratory relief because their abstract facial challenge

does not present a "controversy of ***concrete actuality***" as required for declaratory relief, but rather "one which is merely academic or hypothetical." (*Wilson v. Transit Authority of Brougher* (1962) 199 Cal.App.2d 716, 722, emphasis added.) The declaratory relief claims also fail because it is duplicative of writ relief, and derivative of other causes of action. (*City of Pasadena v Cohen* (2014) 228 Cal.App.4th 1461, 1466; *Ball v. FleetBoston Financial Corp.* (2008) 164 Cal.App.4th 794, 800.) For all these reasons, and those set forth below, the Challenged Claims fail as a matter of law.

II. BACKGROUND

A. Relevant Terminology

There are three key terms of art that are relevant to the resolution of this Motion: (1) Small Cell Facilities; (2) Colocation; and (3) Eligible Facilities Requests. This section introduces these terms on a conceptual level; the specific definitions and related regulations in federal law, state law, and the Ordinance are detailed in the relevant argument sections below. First, "**Small Cell Facilities" (a.k.a. small wireless facilities or SCFs)** generally refers to wireless equipment such as small antennas and radios, which are typically attached to structures such as public streetlights or utility poles. (47 C.F.R. § 1.6002(l).) Second, "**colocation"** generally refers to the mounting of new antennas or other equipment onto a pre-existing structure (e.g., a light pole). Sometimes the pre-existing structure will have wireless equipment already mounted to it (47 C.F.R. § 1.6100(b)(2), (4) and (5)); other times it will not (47 C.F.R. § 1.6002(g)(1)). "Colocation" is defined differently in two separate federal regulations (and a third way in state law), with different rules applying depending on the source of law. Third, "**Eligible Facilities Requests (a.k.a. EFRs)"** is a term unique to federal law that refers to requests to modify an existing wireless facility by adding, removing or replacing wireless equipment. (47 C.F.R. § 1.6100(b)(3).)

B. Relevant Federal and State Regulations

Any local government that adopts regulations governing the installation or modification of wireless facilities must navigate a complex labyrinth of federal and state laws. Principal among them is a federal Telecommunications Act of 1996 (47 U.S.C. § 332(c)(7)) ("TCA"). The TCA 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* (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." (*Id.*, citing *360° Communications Co. v. Albemarle Cnty.* (4th Cir. 2000) 211 F.3d 79, 85-86.) "One of the ways in which the TCA accomplishes these goals is by 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, 1327 citing *City of Rancho Palos Verdes v. Abrams* (2005) 544 U.S. 113, 115, citations omitted and emphasis added.) Consequently, local and state laws that conflict with the TCA are generally preempted. (See e.g., 47 C.F.R. § 1.6100(b)(7)(vi); *T-Mobile W. LLC v. City & Cnty. of San Francisco* (N.D. Cal. 2023)658 F. Supp.3d 773, 778-779 (granting summary judgment because denial of wireless colocation facility application under local zoning regulation was preempted by TCA).)

Among the constraints on local governments, the TCA and the Federal Communications Commission's (FCC's) implementing regulations: (1) require actions on applications for wireless facilities to be taken within "a reasonable period of time" (typically 60-90 days for SCFs) (47 U.S.C. § 332(c)(7)(B)(ii); 47 C.F.R. § 1.6003(a) and (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 be in writing and supported by substantial evidence (47 U.S.C. § 332(c)(7)(B)(iii)); (4) prohibit regulating wireless facilities siting on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with FCC standards concerning such emissions (47 U.S.C. § 332(c)(7)(B)(iv)); (5) do not allow unreasonable discrimination among providers of functionally equivalent services (47 U.S.C. § 332(c)(7)(B)(i)(I)).

Another federal law, the Spectrum Act (47 U.S.C. § 1455(a)), preempts local authority to deny EFRs (i.e., modifications to existing wireless facilities) by providing that localities ***may not deny***, and ***must approve*** siting applications determined to be "insubstantial" under detailed criteria established by the FCC. (47 U.S.C. § 1455(a); 47 C.F.R. § 1.6100.) These same FCC regulations typically limit the time to act on EFRs to 60 days and provide for a deemed granted remedy if action is not timely taken. (*Ibid*.)

State law imposes still other constraints. Among them, Government 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 established under the TCA. Longstanding 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. (Pub. Util. Code, § 7901; *T-Mobile West LLC v. City & Cnty. of San Francisco* (2019) 6 Cal. 5th 1107, 1115.) Government Code section 65850.6 limits and constrains a local government's authority to deny applications for additional facilities at sites with existing wireless facilities under unique "colocation" circumstances defined by statute.

C. The Ordinance

On January 10, 2023, the Los Angeles County Board of Supervisors adopted the Ordinance[4], which established specific rules for permitting of wireless facilities in the County. The Ordinance amended two Titles in the County Code, the Highways Code and the Zoning Code, to establish regulations for the review and permitting of wireless facilities in in the unincorporated areas of the County. Of particular relevance to the causes of action in the Petition, the Highways Code Amendments created a ministerial review process for Small Cell Facilities in the public right-of-way and for EFRs (which the County ***must*** approve pursuant to federal law) pertaining to SCFs. The Zoning Code Amendments also created a ministerial review process for certain types of wireless facilities (e.g., EFRs, and SCFs) and a discretionary review process for other types of wireless facilities.

1. Highways Code Amendments

The Highways Code Amendments added a new Chapter 16.25 that sets forth the permit requirements for the installation and modification of Small Cell Facilities, including EFRs pertaining to SCFs, within the County's public rights-of-way.[5] These Amendments establish various development standards for SCFs related to, e.g., installation; location; height and dimensions; safety; and provide that the Road Commissioner "shall grant a permit" that "meets all applicable requirements for a permit under

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[4] A courtesy copy of Ordinance 2023-0001 is attached as Exhibit A to the Ursea Declaration, and is publicly available online at: https://library.municode.com/ca/los_angeles_county/ordinances/code_of_ordinances?nodeId=1194031. A copy of the relevant provisions of the County Code that were amended by the Ordinance, is attached as Exhibit 1 to the concurrently-filed Request for Judicial Notice ("RJN"). For purposes of brevity, this Motion will refer to these codified provisions of the Ordinance by specific citation to the Los Angeles County Code ("County Code").

[5] The Ordinance defines "small cell facility" and "EFR" in accordance with the federal regulations. (County Code, §§ 16.25.020(E) and (I) and 22.14.230.) "Highway" is defined as "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." (County Code § 16.04.100.)

this Chapter." (County Code, at §§ 16.25.030(B)(7) and 16.25.050).[6] In addition, the Amendments also authorize the Road Commissioner to "adopt and amend a design standards checklist" that "implement[s] the provisions of this Chapter." (*Id.*, at § 16.25.030(B)(2).)

2. Zoning Code Amendments

The Zoning Code Amendments establish procedures and standards to regulate the installation of ***all*** types of wireless facilities on private property, as well as on public property that are not governed the Highways Code. The purpose of the Zoning Code Amendments is to, among other things, "provide equitable, high-quality wireless communications service infrastructure to serve the current and future needs" of the County, "[e]stablish streamlined permitting procedures for the installation, operation, and modification of wireless facilities, while protecting the public health, safety, and welfare of the County residents," and "[e]stablish standards to regulate the placement, design, and aesthetics of wireless facilities to minimize visual and physical impacts to surrounding properties." (*Id.*, at § 22.140.760(A).) Depending on factors detailed in the Ordinance, including the applicable zone, size of the equipment, and nature of the application (e.g., an EFR or brand new facility), the Zoning Code Amendments provide that some permits may be issued under a ministerial process (*id.*, at §§ 22.16.030(C), 22.18.030(C), 22.20.030(C), 22.22.030(C), 22.22.040(A) and (C), 22.24.030(C), 22.26.020(B), 22.26.030(B), 22.26.060(B), and 22.186) and other permits may only be issued under a conditional use permit process (*ibid*; see also § 22.158). For applications subject to the conditional use permit process, there is a requirement of a public hearing and mandatory findings. (*Id.*, at §§ 22.140.760(I), 22.222.230, 22.230.010, 22.230.040, and 22.230.080.) The Zoning Code Amendments also require that all wireless facilities permits "comply with State and federal requirements, standards, and law." (*Id.*, at § 22.140.760(E)(1)(a).)

D. <u>Petitioners' Original Petition and First Amended Petition</u>

Petitioners filed this action on March 3, 2023 alleging a facial challenge to the Ordinance in eight separate causes of action. ("Original Petition"). The County identified pleading defects in the Original Petition and raised these issues to Petitioners both in writing and during a meet-and-confer. Petitioners

[6] For example, an SCF must be "designed to blend into, or to be incorporated into, the support structure" and the equipment must be "concealed on or within the support structure." (*Id.*, at § 16.25.050(A) and (H). In addition, an SCF shall not "interfere with the use of the highway," "impede the flow of vehicular or pedestrian traffic," or "produce exposure levels that exceed the applicable FCC Standards for radiofrequency (RF) emissions." (*Id.*, at §§ 16.25.040(E) and 16.25.050(B), (C), and (E).)

opted to amend some, but not all, of the claims. They filed their amended petition on November 2, 2023; this is the operative Petition. Petitioners failed to cure the pleading defects in the Petition; thus, the County timely met and conferred with Petitioners to try to resolve these issues, again, without motion practice but the Parties were unable to resolve their dispute. (Ursea Decl., ¶¶ 2-4.)

The County now moves for judgment on the pleadings on the: Seventh Cause of Action ("Due Process Claim"); Sixth Cause of Action ("Unlawful Ministerial Designation Claim"); Fourth Cause of Action ("General Plan Inconsistency Claim"); Eighth Cause of Action ("Unlawful Delegation Claim"); and Third Cause of Action ("Unlawful Colocation Claim"), as well as the Declaratory Relief Causes of Action Petitioners allege in the alternative in connection with most of the Challenged Claims.

III. LEGAL STANDARD

A motion for judgment on the pleadings ("MJOP") is a statutory motion expressly authorized by Code of Civil Procedure section 438. A MJOP may be filed to attack a writ of mandate cause of action just like any other civil claim. (See *California v. Newhall, supra,* 161 Cal.App.4th at p. 1471 (affirming trial court's grant of MJOP as to writ of mandate claim).) A MJOP may be filed up to 30 days before the date the action is initially set for trial. (Code Civ. Proc., § 438(e).) Like a demurrer, the grounds for a MJOP should appear on the face of the pleading or from any matter subject to judicial notice (Code Civ. Proc., § 438(d)) and courts are not required to accept as true or sufficient boilerplate allegations or mere legal conclusions. (*Doe v. City of Los Angeles* (2007) 42 Cal. 4th 531, 551.) "A trial court has no discretion in granting or denying a motion for judgment on the pleadings." (*Ludgate Insurance Co. v. Lockheed Martin Corp.* (2000) 82 Cal.App.4th 592, 602-603). "This is because … [t]he facts alleged [are] deemed true [and thus] the only question for determination is one of law. On a pure question of law, trial courts have no discretion. They must, without choice, apply the law correctly." (*Ibid.*)

IV. ARGUMENT

A. The Due Process Claim Fails As a Matter of Law

Petitioners allege that the Ordinance violates procedural due process because (1) the "[p]lacement of telecommunications devices near [private] individual properties ***may or will*** affect and interfere with individual property rights," (Pet., ¶ 232, emphasis added) but the Ordinance "does not provide any notice of or any opportunity for a hearing" (*id.*, ¶ 230); (2) the Ordinance "is overbroad as it blanketly (sic) allows

most, if not all, permit applications to be treated and processed as ministerial," but "fails to provide guarantees and safeguards to guard against arbitrary actions" (*id.*, ¶¶ 233-234); and (3) the "Ordinance allows a Commissioner or Planning Director to develop or modify [a] design checklist" but "provides for no due process for the public to review and shape such design checklist." (*Id.*, ¶ 231.)[7]

The claim fails as a matter of law. ***First***, to succeed on a facial challenge to an ordinance on due process grounds, Petitioners must allege facts to show that the Ordinance cannot, ***under any set of conceivable circumstances***, adequately safeguard an individual's protected property interest. (See *United States v. Salerno, supra,* 481 U.S. at p. 745 ["A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."]; see also *William Jefferson & Co. v. Bd. of Assessment & Appeals No. 3* (9th Cir. 2012) 695 F.3d 960, 963 [applying *Salerno* to facial procedural due process challenge].) Moreover, Petitioners must overcome the presumption that the Ordinance is valid. "The courts will presume a statute is constitutional unless its unconstitutionality ***clearly, positively, and unmistakably*** appears; all presumptions and intendments favor its validity." (*City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 10–11, citation omitted, emphasis added).

Petitioners fall far short of meeting this burden. Petitioners allege in passing that "[u]nder any possible circumstances, the Ordinance is unconstitutional"—but it is not enough to say the "magic words"; the law requires Plaintiffs to allege ***facts*** to support this allegation. (See *Cooper v. Equity Gen. Ins.* (1990) 219 Cal.App.3d 1252, 1263-1264 [allegations must be factual and specific, not vague or conclusory].) Yet, the best Petitioners can do is allege that some hypothetical permitted wireless facilities "may or will" affect some hypothetical property rights. (Pet., ¶ 232.) Courts have repeatedly held that such allegations do not support a facial constitutional challenge as a matter of law. (See *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084 (a plaintiff "cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise...".) Moreover, Petitioners can ***never*** make the requisite

[7] Petitioners also allege in passing that the Ordinance is "unconstitutional…for its vagueness [and] overbreadth…". (Pet., ¶ 229.) But Plaintiffs fail to explain, much less support by fact or law, how the Ordinance is vague or overbroad. (*Id.*, ¶¶ 229-37.) Similarly, Petitioners mention that "substantive due process prevents the government from engaging in conduct that shocks the conscience" (*Id.*, ¶ 237) but they do not allege that the County engaged in any such conduct, much less state any facts that would support any such allegation. (See *ibid.*)

showing. Petitioners acknowledge that the Ordinance requires discretionary review (which includes notice and opportunity to be heard) as to certain wireless permit applications (Pet., ¶ 2)—but they apparently fail to recognize what this means: If the Ordinance provides due process in certain circumstances, then Petitioners can never state facts showing that it fails to provide due process in all conceivable circumstances. (See, e.g., *United States v. Inzunza* (9th Cir. 2011) 638 F.3d 1006, 1019.)

Second, as Petitioners also acknowledge, only "[l]land use decisions which 'substantially affect' the property rights of owners of adjacent parcels may constitute 'deprivations' of property within the context of procedural due process." (Pet. ¶ 228.) Petitioners allege that "wireless facilities will be permitted immediately next to individual residents' property, and [] will have a significant effect on, and lead to a substantial loss of property rights..." (*Id.*, ¶ 230.) But not every wireless facility permitted under the Ordinance will be "immediately next to individuals residents' property." Even if it were the case, it will not necessarily have a "significant effect" on the property or lead to a "substantial loss." Indeed, California courts have held that "[a]s a ***matter of law***, affixing small equipment boxes to an existing utility pole in a developed urban area ***does not result*** in a 'significant' or 'substantial' deprivation[ ] of property." (*Robinson v. City & Cnty. of San Francisco* (2012) 208 Cal.App.4th 950, 963, emphasis added.)

Third, there is no merit to Petitioners' contention that due process gives them a right to "review and shape the design checklist" prepared by the Commissioner or Planning Director. (Pet., ¶ 231) because procedural due process applies "***only*** [to] those governmental decisions which are a*djudicative* in nature" (*Hobbs v. City of Pac. Grove* (2022) 85 Cal.App.5th 311, 322, first emphasis added); the development of a design checklist is a quasi-legislative—not an adjudicatory, act. (See *Pacific Legal Foundation v. Cal. Coastal Com.* (1982) 33 Cal.3d 158, 168-169.) At minimum, the claim is unripe. (See *Witt v. Dept of Air Force* (9th Cir. 2008) 527 F.3d 806, 812–813.) If a siting approval one day "substantially affects" someone's property rights, then an as-applied claim may be brought then, on a concrete factual record.

B. <u>The Unlawful Ministerial Designation Claim Fails As a Matter of Law</u>

Petitioners allege that a writ should issue invalidating the Ordinance because the County "erroneously label[ed]" certain provisions of the Ordinance as having "ministerial" permit review process but Petitioners believe these provisions should have been labeled "discretionary." (Pet., ¶ 208.) Petitioners contend that in doing so, the Ordinance violates "CEQA Guidelines sections 15369 and

15002subd. (i)(1)" (*ibid.*), CEQA's prohibition against "[u]nlawful precommitment (sic)" (*id.*, at ¶ 219).

Petitioners' novel claim is untethered to any facts or law. *First*, neither the Highways Code Amendments or Zoning Code Amendments "label" any particular process "ministerial." *Second*, the cited CEQA Guidelines, sections 15369 and 15002, impose no mandatory duties; they merely define terms and explain the CEQA process. Petitioners also have not stated any facts that would support a showing of an abuse of discretion. All that Petitioners offer is rank speculation. (See, e.g., Pet. ¶ 221 ("It is *reasonably foreseeable* that individual permits … *may* have significant … environmental impacts ….," emphasis added). The cases Petitioners cite do not help their pre-commitment claim because they involved specific governmental action in connection with a development project, not "labels" in an Ordinance. (See *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116 ("*Save Tara*") (agency took a "definite course of action" to approve a development project before completing CEQA); *RiverWatch v. Olivenhain Mun. Water Dist.* (2009) 170 Cal.App.4th 1186, 1212 (same).) Petitioners' hypothetical musings cannot overcome the presumption that the Ordinance is valid and fall far short of showing any abuse of discretion.

C. <u>The General Plan Inconsistency Claim Fails As a Matter of Law</u>

Citing Government Code section 65860, Petitioners allege that the Ordinance is "inconsistent with and frustrates" the policies in the County's General Plan with respect to general open space and resources policies. (*Id.*, ¶¶ 189; 190-196.)[8] But Petitioners wholly ignore the *specific* policies that address wireless facilities, including County objectives to "improve[e] existing wired and wireless telecommunications infrastructure" and "expand[ ] access to wireless technology networks, while minimizing visual impacts through co-location and design."[9] Petitioners cannot credibly claim that the Ordinance is inconsistent with these, plainly relevant, policy objectives. Nor can Petitioners succeed by pointing to a vague hypothetical conflict with other, unrelated, General Plan objectives. A local ordinance is only inconsistent if it conflicts with a "fundamental, mandatory, and clear" general plan policy. (*Endangered Habitats League, Inc. v. Cnty. of Orange* (2005) 131 Cal.App.4th 777, 782.) Just like the Ordinance, the County's

[8] For example, Petitioners allege an inconsistency with Policy C/NR 3.11, which states an objective to "[d]iscourage development in riparian habitats, streambed, wetlands, and other native woodlands." (Pet., ¶ 191.)

[9] The General Plan is available online at: https://case.planning.lacounty.gov/assets/upl/project/gp_final-general-plan.pdf. A copy of the relevant provisions are attached as Exhibit 2 to the concurrently-filed RJN.

determination of consistency "comes to this court with a *strong presumption of regularity*" and "[i]t is, emphatically, *not* the role of the courts to micromanage these [ ] decisions. Thus, as long as the [agency] *reasonably could have made a determination of consistency*, the [agency's] decision must be upheld." (*Cal. Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 638, second emphasis added.) Petitioners acknowledge that the County made a consistency finding (Pet., ¶ 196) and yet plead no facts to overcome the applicable reasonableness presumption. Petitioners' failure to carry their burden is unsurprising, particularly in light of the TCA's mandate that local government wireless facility siting regulations 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).) This claim thus fails as a matter of law.

D. <u>The Unlawful Delegation Claim Fails As a Matter of Law</u>

Petitioners allege that the Ordinance unlawfully delegates legislative authority to the Commissioner to adopt a design standards checklist, approve engineering plans, grant permits, and approve structural analysis (Pet., ¶ 241) and to the Director to modify a design standard checklist and to determine whether a historic resource assessment is required (*id*., ¶ 242). They contend that these delegations are unlawful because the Ordinance does not provide "ascertainable standards and safeguards" to implement the County's "policy decisions" and permits the County to evade mandatory CEQA review. (*Id*., ¶¶ 240-241 and 245-249.) ***The claim fails as a matter of law.*** To prevail, Petitioners must show that the Ordinance (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* (1983) 35 Cal.3d 184, 190.) Petitioners bear the burden to show a "***total abdication of [legislative] power***, through failure either to render basic policy decisions or to assure that they are implemented as made," only then may a court "intrude on legislative enactment [on the ground that] it is an 'unlawful delegation." (*Kugler v. Yocum* (1968) 69 Cal.2d 371, 384, emphasis added.) Petitioners fail to carry to this burden. ***First***, neither official is authorized to decide a fundamental policy issue. Such policy issues were decided by the Board of Supervisors in adopting the Ordinance. (See *Sacramentans for Fair Planning v. City of Sacramento* (2019) 37 Cal.App.5th 698, 716.) ***Second***, both Title 16 and 22 contain legislative direction and define the relevant "development standards," which are "sufficient guideline[s] to enable an agency to act constitutionally" (*Ibid.*; e.g., County Code, §§ 16.25.030(A)(2)

and 16.25.050.) On its face, the Ordinance shows no "total abdication of [legislative] power."

E. The Unlawful Colocation Claim Fails As a Matter of Law

Petitioners seek a writ to void the Ordinance on the basis that that two provisions requiring non-discretionary review (namely, the processes for SCFs under Zoning Code § 22.140.760.D.1, and EFRs under Highways Code § 16.25.030) allegedly "violate" Government Code section 65850.6, which requires discretionary review, a CEQA determination whether an Environmental Impact Report, negative declaration, or mitigated negative declaration needs to be established, and a public hearing for applications for a unique type of "wireless telecommunications colocation facility" that is specially defined in the statute (described more below). (Pet., ¶¶ 184-187 citing Gov. Code, § 65850.6(b)-(c).) Petitioners' claim fails as a matter of law.

First, section 65850.6 plainly does not impose a mandatory ministerial duty on the County to adopt an ordinance that includes any particular type of review process—and Petitioners do not argue otherwise. Section 65850.6 merely sets forth certain requirements that must be satisfied (unless preempted by federal law) when an application is made for a "wireless telecommunications colocation facility"—a term that is specifically defined in the statute and refers to a wireless telecommunications facility that (1) is designed such that it expressly anticipates, at the time of application submittal, that more wireless equipment will be added on or immediately adjacent to the approved facility after the initial approval (a later addition is a "colocation facility")—and (2) is approved pursuant to the specific procedures set forth in Section 68580.6. (See Gov. Code, § 65850.6(d)(3).)

Petitioners contend that the County "prejudicially abused its discretion by requiring the Commissioner to deem an application complete and thereafter grant a permit for collocated wireless facilities without first complying with [] Government Code section 65850.6." (Pet., ¶ 187.) But they fail to explain how this decision was "fraudulent or so ***palpably unreasonable and arbitrary*** to reveal an abuse of discretion ***as a matter of law***." (*Cnty. of Del Norte v. City of Crescent City, supra*, 71 Cal.App.4th at p. 972, emphasis added.) The Ordinance does not refer to "wireless telecommunications colocation facility," or "collocated facility" much less adopt special procedures for processing applications for such facilities. Nor does it use the phrase "collocated wireless facilities," which Petitioners attribute to it. Rather than making any genuine effort to show an abuse of discretion, they play fast and loose with the terms of

art in the law, arguing wrongly that because EFRs and SCFs may involve "colocation" (which federal law uniquely defines), EFRs and SCFs necessarily involve "colocation facilities" under Section 65850.6.

Second, to the extent an application for an EFR or for a SCF does actually also qualify as a "colocation facility" under Section 65850.6, then state law would mandate ministerial review, but only *if* state law applied. But EFRs and SCFs do not always have to involve colocation, however defined.[10] For EFRs, the County is duty bound to apply the federal rules in its Ordinance, ***not*** state law which is preempted, (47 U.S.C. § 1455(a)(1) ["Notwithstanding section 704 of the Telecommunications Act of 1996 (Public Law 104–104) or any other provision of law[]."]), and approve EFRs that meet those rules (47 C.F.R. § 1.6100(c); 47 U.S.C. § 1455(a)(1).) The Ordinance's EFR rules establish processes for considering "Collocation" facilities—but "Collocation" for EFR purposes is defined (in accordance with federal law) to mean simply "[t]he mounting or installation of transmission equipment on an eligible support structure for the purpose of transmitting and/or receiving radio frequency signals for communications purposes." (47 C.F.R. § 1.6100(b)(2); County Code §§ 16.25.020(E) and 22.14.230.) An "eligible support structure" in the federal rules is not synonymous with a "wireless telecommunications colocation facility" under state law. Even if it so happens that an EFR involves an eligible support structure that was approved initially as a wireless telecommunications colocation facility, the County must consider it under the EFR rules, which require the EFR to comply with any siting conditions of approval that were imposed on the eligible support structure, but only to the extent the federal rules allow (47 C.F.R. § 1.6100(b)(7)(vi).)

Third, Petitioners' arguments also fail in their example involving a Small Cell Facility, which the Ordinance defines consistent with federal law (County Code, § 22.14.230). As noted, an application for a SCF might be colocated on a pre-existing structure without any wireless facility on it or it might be deployed on a new structure. But a SCF "collocation" under federal law cannot be a "colocation facility" under state law. The former only applies to SCFs placed on pre-existing structures without wireless on them, and the latter only applies to wireless facilities placed on pre-existing structures with wireless on

[10] "EFR" is defined as a "request for modification of an existing tower or base station that does not substantially change the physical dimensions of that tower or base station, and involves collocation, removal, or replacement of transmission equipment…" (County Code, § 22.14.230). FCC regulations distinguish between two types of SCF applications, one to "collocate" a SCF on an existing structure, and another to "deploy" a SCF on a new structure (47 C.F.R. § 1.6003(c)(i) and (iii)).

them. Nor must a SCF deployed on a new structure be designed as a "wireless telecommunications colocation facility" in state law; it can simply be a "wireless telecommunications facility" under Section 65850.6, and therefore not subject to any of that statute's procedural requirements.

Thus, there is no reason why it would be a "prejudicial abuse of discretion" for the County to adopt processes for EFRs and SCFs without including requirements in section 65850.6, which apply to a different type of facility and application process. Indeed, Petitioners tacitly acknowledge this. They do not allege that all, or even ***any***, "Collocation" facilities under the Ordinance "will" be subject to Section 658550.6. Instead, they hypothesize that some applications processed under the Ordinance "***can*** involve 'colocation facilities' as defined in 658550.6." (Pet., ¶ 185, emphasis added.) This tepid speculation falls far short of meeting Petitioner's burden. Petitioners have not overcome the presumptions of validity and have not met their burden to show abuse of discretion. At a minimum, the claim is not ripe because Petitioners allege nothing more than a "hypothetical state of facts." (*California Water Telephone Co. v. Cty. of Los Angeles* (1967) 253 Cal.App.2d 16, 22.)

F. The Declaratory Relief Claims Fail As A Matter Of Law

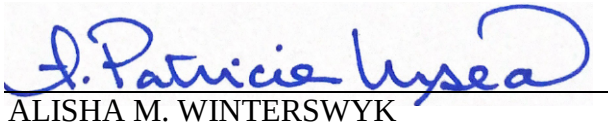
As to certain writ claims, Petitioners request declaratory relief in the alternative. (Pet., ¶ 226 and pp. 45, 48, and 51.) These claims fail because they do not allege "controvers[ies] of ***concrete actuality***." (*Wilson, supra*, 99 Cal.App.2d at p. 828, emphasis added.) Declaratory relief does not lie when it duplicates and is derivative of writ relief. (*Ibid*; *Pasadena, supra*, 228 Cal.App.4th at p. 1466; *Ball, supra*, 164 Cal.App.4th at p. 800.) These claims fail for the same reasons as each writ claim.

V. CONCLUSION

For all of the foregoing reasons, respectfully, the Court should grant the County's Motion.

Dated: January 17, 2024

BEST BEST & KRIEGER LLP

By: 

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PROOF OF SERVICE

At the time of service I was over 18 years of age and not a party to this action. My business address is 300 S. Grand Avenue, 25th Floor, Los Angeles, CA 90071. On January 17, 2024, I served the following document(s):

DEFENDANTS' AND RESPONDENTS' NOTICE AND MOTION FOR JUDGMENT ON THE PLEADINGS; MEMORANDUM OF POINTS AND AUTHORITIES; (Code Civ. Proc. §438)

☐ **By fax transmission.** Based on an agreement of the parties to accept service by fax transmission, I faxed the documents to the persons at the fax numbers listed below. No error was reported by the fax machine that I used. A copy of the record of the fax transmission, which I printed out, is attached.

☐ **By United States mail.** I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses listed below (specify one):

☐ Deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid.

☐ Placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at Riverside, California.

☐ **By personal service.** At ____ a.m./p.m., I personally delivered the documents to the persons at the addresses listed below. (1) For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents in an envelope or package clearly labeled to identify the attorney being served with a receptionist or an Individual in charge of the office. (2) For a party, delivery was made to the party or by leaving the documents at the party's residence with some person not less than 18 years of age between the hours of eight in the morning and six in the evening.

☐ **By messenger service.** I served the documents by placing them in an envelope or package addressed to the persons at the addresses listed below and providing them to a professional messenger service for service. A Declaration of Messenger is attached.

☐ **By overnight delivery.** I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses listed below. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

☒ **By e-mail or electronic transmission.** Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the persons .at the e-mail addresses listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on January 17, 2024, at Anaheim, California.

Houda Matar