DEPARTMENT 85 LAW AND MOTION RULINGS

Case Number: 23STCP00750 **Hearing Date:** February 13, 2024 **Dept:** 85

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

Tentative decision on motion for judgment on the pleadings: granted in part

Respondents County of Los Angeles ("County"), County Board of Supervisors ("Board"), County Regional Planning Commission ("Planning Commission"), County Department of Regional Planning ("Planning Department"), and County Department of Public Works ("DPW") (collectively, "County") move for judgment on the pleadings for five causes of action in the First Amended Petition ("FAP") filed by 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.

The court has read and considered the moving papers, opposition, and reply, and renders the following tentative decisions.

A. Statement of the Case

1. First Amended Petition

On March 7, 2023, Petitioners filed the Petition. The operative pleading is the FAP, which alleges (1) project ineligibility for exemptions under the California Environmental Quality Act ("CEQA"), (2) failure to substantially support findings, (3) unlawful colocation, (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.

a. Introduction

The project at issue is an ordinance ("Ordinance") establishing regulations for the review and permitting of wireless telecommunication facilities. FAP, ¶1. It eliminates discretionary conditional use

permitting ("CUP") for most wireless telecommunication facilities and institutes ministerial review. 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 Planning Department's Director ("Director") and the Highway Commissioner ("Commissioner") insofar as both can create new substantive obligations. FAP, ¶4. The Planning Department and DPW would have unfettered authority to cut the public out of the wireless facility permitting process. FAP, ¶5. They can exercise discretion with no constraint, even as the process is supposed to be ministerial. FAP, ¶4. While the Board asserts this will close a digital divide for the less fortunate, it actually will worsen the divide because such persons will have no voice. FAP, ¶5.

Ample scientific evidence shows that wireless projects can so sicken residents that it constructively evicts families who cannot tolerate continuous exposure to the radiation emitted from towers. FAP, ¶8. Poor and minority families holding on to affordable housing lack any financial means of escape. 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 they 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 Code, the Los Angeles County Code ("LACC"), and the California and U.S. Constitutions. FAP, ¶10.

b. <u>Ordinance Passage</u>

Before the Ordinance's adoption, Planning Department policy required a CUP for a wireless facility. FAP, ¶119. The Planning Department would then process the CUP similar to CUPs 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 by publication, mail, and a sign posted on the property, and a public hearing. FAP, ¶119. To be complete, an application needed to conform with the requirements in 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. The Planning Department 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 for consideration at respective hearings. FAP, ¶120.

On March 23, 2022, the Planning Department presented to the Planning Commission amendments to Title 22 of the LACC ("Title 22 Amendments"). 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, the Planning Department asserted that the Title 22 Amendments qualified for Class 1 and Class 3 Exemptions to CEQA because the Project authorized 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, ¶¶ 125-26.

c. The Ordinance Provisions

The Ordinance allows the construction of new support structures to serve small cell facilities, also known as small wireless facilities ("SCFs") and macro facilities. FAP, ¶¶ 132-33. Eligible facilities requests ("EFRs") to modify existing facilities also would include co-located wireless facilities. FAP, ¶134. A wire facility can be up to 75 feet tall in industrial, rural, agricultural, open space, resort-recreation, and watershed zones. FAP, ¶135. If a wireless facility is used to provide temporary service, it can be up to 200 feet tall for up to six months. FAP, ¶136.

The Ordinance does not estimate how many wireless facility structures can 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, 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 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 to mount 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's action on an application is the County's final action. FAP, ¶148.

SCFs must comply with a design standards checklist adopted by the Commissioner. FAP, ¶149. The Commissioner may approve the structural analysis of the effect of placement of SCFs on County infrastructure. FAP, ¶150.

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, ¶¶ 155-158.

d. The Checklists

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 SCFs and EFRs. FAP, ¶126(a). The Board approved the Ordinance at its January 10, 2023 hearing. FAP, ¶128.

On January 25, 2023, the Planning Department 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 now subject to LACC Title 16 and 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 the Planning Department handled a matter that should have been assigned to DPW. FAP, ¶129.

On the same day, the Planning Department 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 the 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. FAP, ¶131. These included insurance coverage requirements, the minimum distance a facility must be from residential windows, size limitations, applicable safety standards, and certain aesthetics requirements. FAP, ¶131. These specifics are not contained in the Ordinance. FAP, ¶131.

e. 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 that is 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.

f. Relevant Causes of Action

(1). Unlawful Colocation

Government Code section 65850.6 ("section 65850.6") only allows the colocation of a wireless facility as a permitted use not subject to discretionary permitting if it meets the conditions of sections 65850.6(a)(1)-(2) and 65850.6(b). FAP, ¶184. This includes a certified environmental impact report ("EIR"), negative declaration, or mitigated negative declaration, or mitigation measures that conform to the same, pursuant to CEQA. FAP, ¶184.

SCFs and EFRs can involve such colocation facilities. FAP, ¶185. The Ordinance authorizes the Commissioner to deem an application complete and grant a permit for a co-located wireless facility when it determines the application meets the Ordinance's requirements. FAP, ¶185. The Ordinance violates section 65850.6 because it bypasses the determination whether an EIR, negative declaration, or mitigated negative declaration was established on the original co-located facility. FAP, ¶185.

Section 65850.6(c) also requires notice and at least one public hearing on the discretionary permit for wireless telecommunications colocation facilities. FAP, ¶186. Ordinance section 22.140.760.D.1.a instead allows approval of SCFs through a plan review which is ministerial. FAP, ¶186.

The County prejudicially abused its discretion by requiring the Commissioner to deem an application for a colocated wireless facility complete, and grant a permit, without complying with section 65850.6. FAP,

¶187.

(2). General Plan Inconsistency

The Ordinance is inconsistent with and frustrates General Plan 2035 and its underlying principles. FAP, ¶189. This includes Guiding Principle 1, 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 is to protect scenic resources through land use regulations that mitigate development impacts. FAP, ¶192. Policy C/NR 13.2 is to protect ridgelines from incompatible development that diminishes their scenic value. FAP, ¶193. Policy C/NR 14.1 is to mitigate impact from new development on or adjacent to historic, cultural, and paleontological resources. FAP, ¶194. Policy C/NR 14.2 is to support 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 within 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.

(3). 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.

For example, 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 plans for SCFs, but it does not define how or when the Commissioner should approve such plans. FAP, ¶210.

Section 22.140.760.G.3 states that an EFR request may be processed with 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, 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 an 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.

(4). Constitutional 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 also 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 decisionmakers 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.

(5). 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, and approving the applicant's structural analysis of the effect of the SCF's placement. FAP, ¶241.

The Ordinance also fails to establish such a mechanism when it delegates its authority to the Director. FAP, ¶242. It does not include a standard to guide the Director in how 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, or 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. For example, 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 must also be appealable to elected decisionmakers. FAP, ¶246.

f. Relief

Petitioners seek a writ of mandate compelling the County to vacate Project approvals, 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 rights and duties of parties to this FAP, including declaratory relief that the County violated its CEQA duties. FAP Prayer for Relief, ¶C. Aside from specific relief, Petitioners request such relief as this court deems appropriate and just. FAP Prayer for Relief, ¶F.

2. 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 to the Petition.

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. It augmented the record with all requested exhibits but redacted portions of the first 11 based on attorney-client privilege.

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.

B. Applicable Law

1. Motion for Judgment on the Pleadings

A motion for judgment on the pleadings serves the same function as a general demurrer, but it is made after the time for demurrer has expired. Weil & Brown, Civil Proceedings Before Trial, (1998) §7:275.

The rules governing demurrers apply to statutory motions for judgment on the pleadings except as provided by Code of Civil Procedure ("CCP") section 438. Cloud v. Northrop Grumman Corp., ("Cloud") (1998) 67 Cal.App.4th 995, 999; Lance Camper Mfg. Corp. v. Republic Indemnity Co. of America, ("Lance") (1996) 44 Cal.App.4th 194, 198. A motion by defendant can be made on the ground that (1) the court lacks jurisdiction of the subject of one or more of the causes of action alleged or (2) the complaint (or any cause of action) does not state facts sufficient to state a cause of action. CCP §438(c). Except with leave of court, a motion for judgment on the pleadings cannot be made after entry of a pretrial conference order or 30 days before the initial trial date, whichever is later. CCP §438(e).

A motion for judgment on the pleadings performs the same function as a general demurrer, and hence attacks only defects disclosed on the face of the pleadings or by matters that can be judicially noticed. *See, e.g.*, Weil & Brown, Civil Procedure Before Trial, (1998) §§ 7:275, 7:322; Lance, *supra*, 44 Cal.App.4th at 198. Presentation of extrinsic evidence is therefore not proper on a motion for judgment on the pleadings. Cloud, *supra*, 67 Cal.App.4th at 999. Both a demurrer and a motion for judgment on the pleadings accept as true all material factual allegations of the challenged pleading, unless contrary to law or to facts of which a court may take judicial notice. The sole issue is whether the complaint, as it stands, states a cause of action as a matter of law. Mechanical Contractors Assn. v. Greater Bay Area Assn., ("Contractors") (1998) 66 Cal.App.4th 672, 677; Edwards v. Centex Real Estate Corp., (1997) 53 Cal.App.4th 15, 27. On a motion for judgment on the pleadings a court may take judicial notice of something that cannot reasonably be controverted, even if it negates an express allegation of the pleading. *See* Columbia Casualty Co. v. Northwestern Nat. Ins. Co., (1991) 231 Cal.App.3d 457; Evans v. California Trailer Court, Inc., (1994) 28 Cal.App.4th 540, 549.

In addition to statutory grounds, a motion for judgment on the pleadings may be made under the common law at any time either prior to or at the trial itself. *See* Stoops v. Abbassi, (2002) 100 Cal.App.4th

644, 650; Weil & Brown, Civil Proceedings Before Trial, (2015) §7:277.

2. Telecommunications Act of 1996

Except as specified in title 47 of the United States Code ("U.S.C.") section 332(c)(7)(B), the federal Telecommunications Act of 1996 ("TCA") generally 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).

Any such regulation shall neither (I) unreasonably discriminate among providers of functionally equivalent services, nor (II) 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 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).

3. Federal Regulations

Title 47 of the Code of Federal Regulations ("47 CFR") defines "colocation" to include (1) mounting or installing an antenna facility on a pre-existing structure, or (2) modifying a structure to mount or install an antenna facility thereon. 47 CFR §1.6002(g). A "structure" is any building used or to be used to provide personal wireless services, whether or not it has an existing antenna facility. 47 CFR §1.6002(m).

A "small wireless facility" is a personal wireless services facility that (1) is mounted on a structure up to 50 feet in height, (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 radiofrequency 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 "Small Wireless Facility" application, (ii) 90 days for review of an application to collocate a facility other than a Small Wireless Facility with an existing structure, and (iii) 90 days for review of an application to deploy a Small Wireless Facility using a new structure. 47 CFR §1.6003(c)(1).

"Collocation" is defined as the 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 CFR §1.6100(b)(2). 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 colocation 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).

Notwithstanding the TCA or any other provision of law, 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 confirm this is true. 47 CFR §1.6100(c)(1). It may not require an applicant to submit any other documentation. Id.

5. Section 65850.6

Section 65850.6(a) exempts a colocation facility from a city or county discretionary permit if (1) the colocation facility is consistent with requirements for the wireless telecommunications colocation facility for which the colocation 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. §65850.6(c).

For purposes of that statute, a "colocation facility" refers to the placement or installation of wireless facilities, including antennas, and related equipment, on, or immediately adjacent to, a wireless telecommunications colocation facility. §65850.6(d)(1). A "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. §65850.6(d)(2). A "wireless telecommunications colocation facility" means a wireless telecommunications facility that includes colocation facilities. §65850.6(d)(3).

C. Statement of Facts[1]

1. The Ordinance

The Ordinance applies to all highways and private property in the unincorporated areas of the County. AR 16.

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

The Ordinance defines an "EFR" 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 colocation, 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, "colocation" is as defined as in 47 CFR section 1.6100(b)(2). LACC §16.25.020(E); 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.

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. Aside from the Commissioner's design standards checklist, such 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 meeting minimum safety standards. LACC §16.25.050; AR 26-28.

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

The Commissioner's final decision on any application is the final action of the County. LACC §16.25.030(B)(8); AR 23.

b. <u>Zoning Code</u>

The purposes of the Ordinance's amendments to the Zoning Code include 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.

This portion of the Ordinance applies to all wireless facilities located on private and public property except for SCFs located in public rights-of-way. LACC §22.140.760(B); AR 45. Where another regulation in the Zoning Code applies to a wireless facility, it takes precedence over the Ordinance. LACC §22.140.760(B); AR 45.

As in 47 CFR section 1.6002(g)(1)-(2), "colocation" 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; 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 colocation, removal, or replacement of transmission equipment under the definition of 47 CFR section 1.6100(b)(3). LACC §22.14.230; AR 32. For purposes of this definition, "colocation" is defined as it is in 47 CFR section 1.6100(b)(2). LACC §22.14.230; AR 32.

Like a "small wireless facility" under 47 CFR section 1.6002(l), an "SCF" is defined as a personal wireless services facility that (1) is mounted on a structure up to 50 feet in height, (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 radiofrequency radiation in excess of the applicable safety standards in 47 CFR section 1.1307(b). LACC §22.14.230; AR 33-34.

The Ordinance outlines the permits that are subject to a ministerial process (LACC §22.140.760(D)(1)) (AR 47) and those that are subject to the CUP process under LACC 22.158. LACC §22.140.760(D)(2); AR 48. Any SCF on private or public property other than a public right-of-way is subject to Ministerial Site Plan Review. LACC §22.140.760(D)(1)(a); AR 48. A CUP is required to authorize installation and operation of 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)(b); AR 48.

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). This type of application is required to colocate 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. Such an application shall be filed and processed in compliance with LACC Chapter 22.226, which is a chapter on ministerial review. LACC §22.184.020(B) (RJN Ex. B).

Any new application must include all the required materials listed on either the Land Use Application Checklist – SCF, Colocation, 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.

EFRs and 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)(1); AR 54-55.

All facilities subject to the CUP process must comply with a set of standards. LACC §22.140.760(H); AR 55. A Commission or hearing officer may impose conditions to ensure the approval will be in accordance with the findings required by the application. LACC §22.140.760(J); AR 57.

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 right-of- way, wireless facilities shall be placed no further than five feet from any common property line shared with adjoining lots. 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.

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.

2. General Plan

Policy goals of the General Plan 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 colocation and design (Policy PS/F 6.3). RJN Ex. 2.

D. Analysis

The County moves for judgment on the pleadings on the FAP's causes of action for (1) unlawful colocation; (2) General Plan inconsistency; (3) improper blanket designation of the permit approval process as ministerial and unlawful precommitment to future approvals under CEQA; (4) violation of constitutional due process; and (5) unlawful delegation of legislative authority to an administrative agency.

1. Meet and Confer[2]

On October 12, 2023, the County sent Petitioners detailed meet-and-confer letters reflecting its arguments for judgment on the pleadings of the relevant causes of action in the Petition. Ursea Decl., ¶6. On October 20, 2023, Petitioners stated that they would not dismiss the disputed causes of action but asked to stipulate to allow filing of an FAP. Ursea Decl., ¶9. The parties entered into such a stipulation on October 23, 2023. Ursea Decl., ¶10.

Between Petitioners' November 2, 2023 filing of the FAP and the County's December 5, 2023 Answer, County reserved a hearing date for a motion for judgment on the pleadings. Ursea Decl., ¶14. On December 5, 2023, the day the County filed its Answer, Petitioners asked the County about its intent to file this motion and its effect on the trial date. Ursea Decl., ¶15. On January 9, 2024, the parties met and conferred by video for a second time concerning the anticipated motion and were unable to resolve the issues. Ursea Decl., ¶¶ 19-20.

The County fulfilled its statutory meet and confer requirement.

2. Due Process

The seventh cause of action alleges that the Ordinance is unconstitutional due to its vagueness, overbreadth, and failure to ensure procedural due process. FAP, ¶229. This includes its 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.

A challenge of a statute, ordinance, or regulation is facial if it considers only the text of the measure itself, while an as-applied challenge concerns application of the measure to the particular circumstances of an individual. Tobe v. City of Santa Ana, ("Tobe") (1995) 9 Cal.4th 1069, 1084. A constitutional challenge to statute is "as-applied" when it turns on specific factual scenario pled, including the agency's application of the statute to the petitioner. Monsanto Co. v. Office of Environmental Health Hazard Assessment, (2018) 22 Cal.App.5th 534, 550.

A facial attack on the overall constitutionality of a statute or ordinance "considers only the text of the measure itself, not its application to the particular circumstances of an individual." Tobe, *supra*, 9 Cal.4th at 1084 (citation omitted). The petitioner cannot prevail by suggesting that problems may arise in some future hypothetical situation in application of the statute. Ibid. Rather, he or she must demonstrate that the law's

provisions inevitably pose a present total and fatal conflict with applicable constitutional provisions. Ibid. (citation omitted). Under a facial challenge, the fact that the statute or ordinance "might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid...." Sanchez v. City of Modesto, (2006) 145 Cal.App.4th 660, 679. If a statute is constitutional in its general and ordinary application, it is not facially unconstitutional merely because there might be some applications where it would impinge upon constitutional rights. City of San Diego v. Boggess, (2013) 216 Cal.App.4th 1494, 1504 (citation omitted). *See also* Sturgeon v. Bratton, (2009) 174 Cal.App.4th 1407, 1418.

Although the strictest standard of facial unconstitutionality requires total and fatal conflict in every circumstance, the courts have sometimes imposed a more lenient standard. Our Supreme Court has acknowledged that it has "sometimes applied [the] more lenient standard, asking whether the statute is unconstitutional 'in the *generality* or *great majority* of cases.'" Gerawan Farming, Inc. v. Agricultural Labor Relations Board, (2017) 3 Cal.5th 1118, 1138 (emphasis in original). In Alliance for Responsible Planning v. Taylor, ("Alliance for Responsible Planning") (2021) 63 Cal.App.5th 1072, 1084, the court explained: "For a facial challenge to succeed, the plaintiff must demonstrate the challenged portion will result in legally impermissible outcomes in the generality or great majority of cases, the minimum showing we have required for a facial challenge to the constitutionality of a statute….[W]e may not uphold the law simply because in some hypothetical situation it might lead to a permissible result." (emphasis added).

The party challenging the constitutionality of a statute carries a "heavy burden." City of Los Angeles v. Superior Court, (2002) 29 Cal.4th 1, 10. "A statute is presumed to be constitutional and must be upheld unless its unconstitutionality clearly, positively and unmistakably appears." Boyer v. County of Ventura, (2019) 33 Cal.App.5th 49, 53 (internal quotations and citations omitted). A court considering a facial challenge to a procedural scheme must determine whether the procedures "provide sufficient protection against erroneous and unnecessary deprivations of liberty" and property. Schall v. Martin, (1984) 467 U.S. 253, 274.

The FAP alleges that the wireless facilities will endanger the air, water, flora, fauna, and objects of historic or aesthetic significance, are not designed to withstand earthquakes or floods, and will create new risks of fire. FAP, ¶9. Because there is no limitation on the number of facilities that can be built, the operation of multiple facilities in a single location may cause adverse environmental impacts to aesthetics and safety by increasing the risk of fire hazard and exposing sensitive species to RF/EMF radiation. FAP, ¶175. The Ordinance's proposed ministerial processing also raises issues of environmental justice without recourse. FAP, ¶7.

The FAP alleges that the Ordinance is facially unconstitutional because: (1) the placement of telecommunications devices near [private] individual properties may or will affect and interfere with individual property rights and the Ordinance "does not provide any notice of or any opportunity for a hearing." FAP, ¶¶230, 232; (2) the Ordinance is overbroad because it allows most, if not all, permit applications to be treated as ministerial but fails to provide safeguards against arbitrary actions (FAP, ¶¶ 233-34); and (3) the Ordinance allows the Commissioner and Director to develop or modify checklists without due process for the public to review and shape the checklist (FAP, ¶231).

The County notes that a facial challenge to a statute is the most difficult challenge to mount successfully because the plaintiff must establish that "no set of circumstances exists" in which the law could be validly applied. United States v. Salerno, ("Salerno") (1987) 481 U.S. 739, 745. The law requires the pleading to allege facts that meet this burden. *See* Cooper v. Equity General Insurance, (1990) 219 Cal.App.3d 1252, 1263-64. The County asserts that the allegations in the FAP do not meet this burden. At best, they allege that some hypothetical circumstances may arise that would affect individual property rights. Mot. at 9.

The County is correct. For a facial challenge, Petitioners must allege facts showing that the Ordinance is unconstitutional in all or the great majority of applications. Alliance for Responsible Planning, *supra*, 63 Cal.App.5th at 1084. Petitioners acknowledge that the Ordinance requires discretionary review, including notice and an opportunity to be heard, for certain wireless permit applications (FAP ¶2), but fail to recognize that this admission is fatal to the facial invalidity claim. Unless all or the great majority of SCFs and EFRs will be placed near private properties that will affect or interfere with their property rights the facial challenge fails. Even then, not every wireless facility permitted next to an individual residents' property will have an

adverse impact on the property or its inhabitants. *See* Robinson v. City & County of San Francisco, (2012) 208 Cal.App.4th 995, 963 (affixing small equipment boxes to existing utility pole in an urban area did not result in significant deprivation of property).

Petitioners try to distinguish Salerno on the basis that it did not involve a motion for judgment on the pleadings and held that the challenger must "establish" that no set of circumstances exists under which the law at issue is valid. 481 U.S. at 745. Petitioners argue that it may establish facial invalidity of the Ordinance at trial and is not required to do so on a motion for judgment on the pleadings. Id. Opp. at 12.

Petitioners are incorrect. A motion for judgment on the pleadings seeks to determine whether the complaint, as it stands, states a cause of action as a matter of law. Contractors, *supra*, 66 Cal.App.4th at 677. Facial challenges are routinely disposed of at the pleading stage. *See, e.g.,* Browne v. County of Tehama, (2013) 213 Cal.App.4th 704, 711. As the County notes, courts have held that this means a petitioner or plaintiff needs to plead sufficient facts to sustain the facial constitutional challenge. Rubin v. Padilla (2015) 233 Cal.App.4th 1128, 1155; Browne v. Cnty. of Tehama (2013) 213 Cal.App.4th 704, 711. Reply at 3.[3]

Petitioners argue that the County's argument that wireless facilities may not always be placed next to houses ignores the liberal construction mandated for the Ordinance and the fact that the FAP alleged proximity to houses merely as an example and not as the only instance in which due process is triggered. Petitioners should not have to wait until a wireless facility is placed next to a private property to challenge the Ordinance. Robinson also is distinguishable as it involved a specific permit application for the installation of 40 small structures on existing utility poles in an urban environment. 208 Cal.App.4th at 953-54. Opp. at 14-15.

This argument ignores the test for facial invalidity. The Ordinance cannot be facially invalid unless all, or a great majority, of wireless facilities installed will create the safety, environmental, and health hazards alleged. Whether or not pled as examples, the Petition admits that discretionary permits will be issued which provide the procedural due process safeguards Petitioners want. This fact is fatal to the facial invalidity clam. [4]

The Petition also fails to allege facts supporting a conclusion that the Ordinance is void for vagueness or overbreadth. *See* FAP, ¶¶ 229-37. Petitioners argue that the Ordinance is both vague and overbroad under United States v. Inzunza, (9th Cir. 2011) 638 F.3d 1006, 1017, 1019, because it allows, under all conceivable circumstances, hazardous wireless facilities to be ministerially placed at or near private properties or public places within five feet of private property and empowers non-elected officials to make or amend design standards for permits without safeguards to curb abuses or contest agency actions. Opp. at 14.

This argument has little to do with vagueness or overbreadth. Petitioners allege no facts showing that the Ordinance is vague such that it cannot be understood by a reasonable reader. The Ordinance is not vague. As for overbreadth, the Ordinance provides for both ministerial and discretionary permits but that fact does not make it overbroad; the County intended the Ordinance to cover both circumstances. The placement of wireless facilities near private property and creation of design standards are not overbreadth issues.[5]

The motion for judgment on the pleadings is granted for the seventh cause of action.

3. Ministerial Designation

The sixth cause of action alleges that the Ordinance calls for discretionary review of permit applications yet designates the permits as ministerial. Those decisions involve subjective judgment from the Commissioner or Director. FAP, ¶208. For example, the Commissioner may adopt and amend a design standards checklist and permit conditions for SCFs and EFRs. FAP, ¶209. In doing so, the Commissioner necessarily must exercise judgment and discretion. FAP, ¶209. Similarly, the Commissioner may approve engineered plans for SCFs, but there is no standard for how and when the Commissioner should approve such plans. FAP, ¶210. The designation of such acts as ministerial is inconsistent with CEQA Guidelines sections

15369 (defining ministerial acts) and 15002(i)(l) (where law requires governmental agency to act without discretion, it is ministerial) as well as CEQA's prohibition against pre-commitment to a project. FAP, ¶¶ 208, 219. Opp. at 16.

The County disputes whether the Ordinance's amendments to the Highway and Zoning Code are ministerial, noting that the amendments do not use the word "ministerial". Mot. at 11. Petitioners correctly respond that the Ordinance outlines the permits that are subject to a ministerial review process and those to which a discretionary CUP process applies. LACC 22.140.760(D)(1)-(2); AR 47-48. Opp. at 16.

The County then argues that this does not give rise to a cause of action because CEQA Guidelines sections 15369 and 15002(i)(l) only define terms and do not impose a duty. The cases relied on by Petitioners involve governmental action constituting pre-commitment for specific projects, not the labels in an ordinance. *See* Sava Tara v. City of West Hollywood, (2008) 45 Cal.4th 116 (city took definite course of action to approve project before complying with CEQA). Mot. at 11.

Petitioners cite Protecting Our Water & Environmental Resources v. County of Stanislaus, ("POW") (2020) 10 Cal. 5th 479, 497, which was a declaratory relief action in which the court held that an ordinance that categorically classified a subset of well construction permits as ministerial violated CEQA because at least some permits may involve discretionary judgment. The court explained that the distinction is important because ministerial projects require no environmental review and mislabeling decisions as ministerial allows an agency to shield them from CEQA review. Id. at 487, 499. The CEQA Guidelines allow an agency to categorically classify approvals as ministerial only when its conferred authority is solely ministerial. Id. at 498. The plaintiffs were therefore entitled to a declaration that the blanket ministerial categorization of such decisions was unlawful. Id. at 501.

The County replies that, if Petitioners are contending that the Ordinance improperly exempts EFRs and a macro facility permit as inconsistent with CEQA, the argument is duplicative of the FAP's two CEQA causes of action. To the extent that Petitioners argue that the entire Ordinance should be deemed invalid because there are some instances where it violates CEQA, that is not a proper facial attack, particularly since federal law requires the County to process EFRs ministerially. Whether the proper interpretation of the Ordinance is to provide for ministerial or discretionary acts is an issue of law properly addressed in this motion. Reply at 4.

The County's arguments are not dispositive. Even if the sixth cause of action is duplicative, that is not a basis for judgment on the pleadings. Nor is total invalidation of the Ordinance necessary should Petitioners prevail on this claim. Rather, as in POW, Petitioners would be entitled to a decision that the blanket ministerial categorizations in the Ordinance are unlawful. The FAP seeks a declaration of the rights and duties of parties to this FAP, along with any such relief as this court deems appropriate. FAP Prayer for Relief, ¶¶ C, F.

The motion for judgment on the pleadings is denied for the sixth cause of action.

4. General Plan Inconsistency

The fourth cause of action asserts that the Ordinance frustrates General Plan 2035 and its underlying principles. FAP, ¶189. Guiding Principle 1 seeks 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. Specific General Plan policies seek to discourage development in riparian habitats and native woodlands as to preserve them in a natural state. FAP, ¶191. Other specific policies seek to protect scenic resources, ridgelines, and historic, cultural, and paleontological resources. FAP, ¶¶ 192-95.

The County argues that the FAP ignores the fact that the General Plan policies also specifically address wireless facilities, including the objective to "improve[d] existing wired and wireless telecommunications infrastructure" and "expand[] access to wireless technology networks, while minimizing visual impacts

through co-location and design." RJN Ex. 2. The Ordinance clearly furthers these specific policies. A local ordinance is inconsistent with a general plan only if it conflicts with a "fundamental, mandatory, and clear" general plan policy. Endangered Habitats League, Inc. v. County of Orange, (2005) 131 Cal.App.4th 777, 782. The FAP acknowledges that the Ordinance makes a general plan consistency finding (FAP, ¶196) and this determination carries a strong presumption of regularity. Petitioners cannot carry their burden, particularly in light of the fact that the TCA proscribes local governments from adopting wireless facility siting regulations that have the effect of prohibiting personal wireless services. Mot. at 11-12.

Petitioners respond that Govt. Code section 65860(a)(2) requires consistency with all objectives, policies, general land uses, and programs specified in the general plan, not a single policy. A project's inconsistency with even one basic and clear general plan policy may scuttle a project. Families Unafraid to Uphold Rural etc. County v. Board of Supervisors ("Families") (1998), 62 Cal. App. 4th 1332, 1341. Additionally, Govt. Code section 65300.5 requires internal consistency between various policies of a general plan, which cannot be achieved if the Ordinance is consistent with only one policy. The County's argument about the TCA's preemption fails because the County retains zoning authority under 47 U.S.C. section 332(c)(7)(A) and the County wrongly assumes that the General Plan policies relied on in the FAP would prevent the provision of wireless services. Opp. at 17.

The County replies that Petitioners do not raise a factual dispute and only argue that the County is trying to evade Govt. Code section 65860. Yet, Petitioners do not allege a direct conflict with any fundamental, mandatory and clear General Plan policy. General provisions about open space and natural and cultural resources do not impose obligations incompatible with the Ordinance. Although Petitioners contend that the Ordinance is incompatible with these policies because it permits wireless facilities to have certain heights, does not limit their number, and can create a fire hazard, the FAP does not show an inconsistency with these policies. For example, Petitioners fail to explain why a 75-foot wireless facility in an industrial zone is incompatible with policies concerning riparian rights or protection of natural and cultural resources. Reply at 5.

The land use policy at issue in Families, *supra*, 62 Cal. App. 4th at 1342, was fundamental, mandatory, and clear. The court also held that a local determination finding a policy consistent with the general plan carries a strong presumption of regularity. Id. at 1338. A general plan inconsistency would exist only if a reasonable person could not agree based on the evidence that was before the governing body. Id. Reply at 5, n. 4. While the County retains authority to make zoning regulations under federal law, its authority is limited. *See* T-Mobile, LLC v. City of Roswell, (2015) 574 U.S. 293, 300. Thus, if the County enacted an ordinance that limited the number of wireless facilities, imposed height restrictions different from federal law, or denied siting applications based on fire hazard or local resident health, it would be preempted. Reply at 6.

Although the County contends that Petitioners fail to raise an issue of fact, this cause of action cannot be addressed without the development of facts. Whether the facilities pose a risk to the surrounding environment is a factual allegation that Petitioners may demonstrate at trial. FAP, ¶175. The inconsistency between two General Plan policies and whether they can be harmonized also requires specific facts. Petitioners are not required to allege specific examples of inconsistency between General Plan policies because that is a matter of proof at trial.

As for preemption by the TCA, 47 U.S.C. section 332(c)(7)(A) generally respects the authority of local governments and instrumentalities thereof as to the placement, construction, and modification of personal wireless service facilities. However, a locality may not regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions, to the extent that such facilities comply with the Commission's regulations concerning such emissions. 47 U.S.C. §332(c)(7)(B)(iv). It also may not prohibit or take action that has the effect of prohibiting the provision of personal wireless services. 47 U.S.C. §332(c)(7)(B)(i). The TCA clearly limits the County's authority on the placement of wireless facilities, but the County has not shown that these limitations bar Petitioners' claim of General Plan inconsistency.

The motion for judgment on the pleadings of the fourth cause of action is denied.

5. Unlawful Delegation of Legislative Authority

The eighth cause of action asserts that the Project unlawfully delegated legislative authority to the Commissioner and Director without ascertainable standards and safeguards. FAP, ¶¶ 240-242. The Ordinance unlawfully delegates legislative authority to the Commissioner to adopt a design standards checklist for SCFs and ERFs, approve an applicant's engineered plans for SCF's to mount on new or existing County infrastructure, grant permits based on a conclusion that the SCF or EFR application meets applicable requirements, develop criteria for deciding to deny an application or order changes thereto, and approve the applicant's structural analysis of the effect of the SCF's placement. FAP, ¶241. The Ordinance unlawfully delegates to the Director to modify a design standard checklist and to determine whether a historic resource assessment is required. FAP, ¶242.

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. 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. 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.

A legislature may delegate the power to prescribe rules and regulations to promote the purpose of the legislation or carry the legislation into effect. Kugler, *supra,* 69 Cal.2d at 376. The legislature also can delegate if the administrative officer is governed by a sufficient standard. Id. at 375-376. 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. Ibid. 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. Ibid. 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.

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, (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.

The County argues that the Ordinance, at both LACC Titles 16 and 22, contains legislative direction and defines relevant safety standards sufficient to enable the Commissioner and Director to act constitutionally. LACC §§ 16.25.030(A)(2), 16.020.050. As a result, the Ordinance on its face shows no total abdication of legislative power. Mot. at 12-13.

Petitioners respond that this cause of action concerns contested factual allegations which may not be decided on a motion for judgment on the pleadings. Whether the delegation of design standards is a fundamental policy and whether there has been a total abdication of authority are issues of fact. Petitioners distinguish Kugler, 69 Cal.2d at 375, and Carson Mobilehome, *supra,* 35 Cal.3d at 188, as cases not decided at the

pleading stage. The courts in both cases also held that there was no unlawful delegation because there were sufficient standards for the official to use. Kugler, *supra*, 69 Cal.2d at 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); Carson Mobilehome, *supra*, 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). Opp. at 17-18.

Here, the Ordinance enables ministerial permitting of unlimited wireless facilities and empowers non-elected officials to make design standards and adjudicate permits. Whether the Ordinance contains all required development standards and whether they are sufficient are questions of fact. In fact, the Ordinance leaves out a critical detail of the distance of wireless facilities from public or private places. Petitioners distinguish Sacramentans for Fair Planning v. City of Sacramento, ("Sacramentans") (2019) 37 Cal.App.5th 698, 716-717, cited by the County, as a case involving approval of a single project based on a general plan policy for approval of a project providing significant public benefits that also was appealable to the city council. Opp. at 17.

The County replies that whether there is a total abdication of legislative power is a question of law that can be decided at the pleading stage. *See* Sims v. Kernan, (2918) 30 Cal.App.5th 105, 115 (upholding trial court ruling sustaining demurrer to improper delegation claim). A legislative body may delegate some quasi-legislative or rule-making authority and the standards for administrative application of a statute may be implied and need not be express. Id. at 110-111. To hold otherwise would be to require the delegation to define the "metes and bounds" of the agency's authority, which is unnecessary. Sacramentans, *supra*, 7 Cal.App.5th at 717. 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. Reply at 6.

The County has not adequately presented the non-delegation issue. The pertinent question is whether the Ordinance leaves the resolution of fundamental policy issues to the Director and Commissioner or fails to provide adequate direction to them for the implementation of that policy. Context is important and the court does not know whether issues such as placement of wireless facilities near private homes or public spaces are fundamental policy matters and whether the "pages of detailed design and development standards" are sufficient direction to avoid a total abdication of authority. It may be that this issue is a matter of law, but even matters of law must be adequately presented.

The motion for judgment on the eighth cause of action is denied.

6. Unlawful Colocation

The third cause of action alleges that the Ordinance authorizes the Commissioner to deem an application complete and grant a permit for a colocated wireless facility when it determines the application meets the Ordinance's requirements. FAP, ¶185. The Ordinance requires ministerial issuance of these permits in violation of section 65850.6's requirement of a discretionary review, a CEQA determination, and a public hearing for a specially defined type of "wireless telecommunications colocation facility" because SCFs and EFRs can involve the colocation facilities described in section 65850.6. FAP, ¶185.

Section 65850.6(a) exempts a colocation facility from a city or county discretionary permit if (1) the colocation facility is consistent with requirements for the wireless telecommunications colocation facility for which the colocation 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. §65850.6(c).

For purposes of section 65840.6, a "colocation facility" refers to the placement or installation of wireless facilities, including antennas, and related equipment, on, or immediately adjacent to, a wireless telecommunications colocation facility. §65850.6(d)(1). A "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. §65850.6(d)(2). A "wireless telecommunications colocation facility" means a wireless telecommunications facility that includes a colocation facility. §65850.6(d)(3).

The Highway Code adopted the federal definition of "colocation" in 47 CFR section 1.6100(b)(2). AR 20 (LACC §16.25.020(E)). "Colocation" refers to the 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 CFR §1.6100(b)(2).

The Zoning Code adopted the federal definition of "colocation" in 47 CFR section 1.6002(g)(1)-(2), which includes (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; AR 32.

The County asserts that the third cause of action wrongly assumes that the term "colocation" in the Ordinance refers to the "colocation facility" or "wireless telecommunications colocation facility" used in section 65850.6. Mot. at 13-14. Section 65850.6 applies to an application for a wireless telecommunications facility that is designed to anticipate that more wireless equipment will be added on or immediately adjacent to the approved facility and is approved pursuant to a specific procedure. This facility is called a "wireless telecommunications colocation facility." Mot. at 13.

The County acknowledges that it is possible for a SCF or EFR to qualify as a "colocation facility" under section 65850.6(d)(1). However, the County is duty bound to follow federal law in the TCA, not section 65850.6, and approve EFRs that meet those requirements. 47 U.S.C. §1455(a)(1); 47 C.F.R. §1.6100(c). Even if an EFR involves an eligible support structure that was approved initially as a wireless telecommunications colocation facility under section 65850.6(d)(3), the County must consider it under EFR rules permitted by the TCA. 47 C.F.R §1.6100(b)(7)(vi). Opp. at 14.

As for SCFs, a SCF colocation under federal law cannot be a colocation facility under section 65850.6. An application for a SCF might be collocated on an existing structure or it might be deployed on a new structure. A "colocation" under federal law applies to SCFs placed on existing structures which have no wireless facility whereas a "colocation facility" under section 65850.6 only applies to wireless facilities placed on existing structures with a wireless facility. A SCF on a new structure need not be a "wireless telecommunications relocation facility" under section 65850.6; it can simply be a "wireless telecommunications facility" under that statute. Opp. at 14-15.

The County concludes that Petitioners cannot show that the Ordinance commits a prejudicial abuse of discretion in requiring the Commissioner to deem an application complete and grant a permit for a collocated wireless facility without complying with section 65850.6. The County need not adopt processes for EFRs and SCFs with section 65850.6's requirements because that statute applies to a different type of facility and application process. At best, Petitioners show that some applications processed under the Ordinance can involve colocation facilities defined in section 65850.6(d)(1). Additionally, this claim is not ripe because Petitioners allege nothing more than a hypothetical state of facts. *See* California Water Telephone Co. v. County of Los Angeles, (1967) 253 Cal.App.2d 16, 22-23. Mot. at 13, 15.

Petitioners assert that the County raises only semantic differences; the result of colocation under both federal and state law is that a new facility is placed on an existing facility. Opp. at 20.

The County replies that Petitioners' argument ignores the scope of each "colocation" definition. The general federal definition is broadest and includes placement of any wireless facility on any pre-existing structure. 47 C.F.R. §2.60002(g)(1-2), 1.6002(k), 1.6003(c)(1)(i). The federal definition for EFRs is narrower and involves

placement only on an existing tower or base station. 47 C.F.R. §1.6100(b)(3), (7). Section 65850.6 is narrowest, defining placement on a structure intended for "wireless telecommunications colocation facility" as a structure intended for future colocation facilities. Reply at 7.

The court agrees that the definitions are different, but that conclusion is not dispositive of the claim. Petitioners are correct that section 65850.6 would apply to an SCF that is a colocation facility for a wireless telecommunications colocation facility. Opp. at 21.

However, the County is correct (Reply at 809) that Petitioners want the court to rewrite section 65850.6, which only mandates ministerial review for a colocation facility if it is consistent with the requirements of a wireless telecommunications colocation facility that was subject to discretionary review and CEQA procedures and a public hearing. Section 65850.6 does not perform the converse by prohibiting ministerial review of every type of colocation except for a wireless telecommunications colocation facility. By subjecting a broader set of applications to ministerial review than required by section 65850.6, the Ordinance does not violate the statute. Petitioners have not shown that section 65850.6 has any bearing on a local ordinance requiring ministerial permits for colocation wireless facilities.

Petitioners argue that the County admits that some EFR and SCF applications may qualify as "colocation facilities" under section 65850.6(d)(1), this is a partial challenge to the cause of action, which is improper. If any part is properly pleaded, the demurrer will be overruled. *See* Fire Ins. Exchange v. Superior Court, (2004) 116 Cal.App.4th 446, 452. Opp. at 20.

Petitioners are incorrect. The County concedes that some SCFs and ERFs may meet the definition of "colocation facilities" in section 65850.6(d)(1), but that fact does not undermine its argument that section 65850.6 does not govern them. Section 65850.6 only governs a ministerial permit requirement for colocation facilities placed on wireless telecommunications colocation facilities. While it is conceivable that some SCFs and ERFs will meet this limited scope, section 65859.6 does not proscribe the Ordinance's ministerial review of a broader range of wireless facilities. This is not a partial challenge to the cause of action. *See* Reply at 9.

Petitioners then argue that 47 U.S.C. section 1455(a)(1) -- which requires local government approval of EFRs that do not substantially change the physical dimensions of a tower or base station -- does not preempt the Ordinance -- which does not require approval or denial of EFRs. The Ordinance merely discusses the requirements for an EFR application the County can approve or deny the application. It therefore never triggers the duty under 47 U.S.C. section 1455(a)(1) not to deny the application. Section 65850.6 also sets conditions for an EFR which involve CEQA compliance. The County can implement section 65850.6 for EFRs without running afoul of federal law. Opp. at 20.

The County rebuts this point by noting that federal law requires approval of an EFR if the federal criteria set forth in 47 C.F.R. section 1.6100 are met, "notwithstanding…any other provision of law…" 47 U.S.C. §1455(a)(1). The County may also require the applicant to provide documentation [] only to the extent reasonably related to determining whether the request meets [the EFR criteria] … and may not require an applicant to submit any other documentation." 47 C.F.R. §1.600(c)(1). This clear preemption prevents the County from imposing for any EFR the CEQA compliance and public hearing criteria imposed in section 65850.6(a) and (b). Reply at 9-10.

Finally, Petitioners argue that federal preemption is an affirmative defense for which there is a factual dispute. Opp. at 21. Petitioners provide no facts that are disputed, but the preemption issue pertains only to ERFs anyway. If made solely on this ground, the motion would have been denied for this cause because the Ordinance's treatment of SCFs is not preempted. *See* Fire Ins. Exchange v. Superior Court, *supra,* 116 Cal.App.4th at 452. But the motion does not concern solely ERFs; section 65850.6 does not bar ministerial treatment of colocations on any type of structure.

The motion for judgment on the pleadings is granted for the third cause of action.

7. Declaratory Relief

Where a trial court has concluded the plaintiff did not state sufficient facts to support a statutory claim and therefore sustained a demurrer as to that claim, a demurrer is also properly sustained as to a claim for declaratory relief which is "wholly derivative" of the statutory claim. Ball v. FleetBoston Financial Corp. (2008) 164 Cal.App.4th 794, 800

The last three causes of action (FAP, ¶¶ 205-250) seek declaratory relief as an alternative to mandamus. The County argues that they are duplicative. Mot. at 15.

Petitioners concede that these claims are proper because declaratory relief is cumulative and does not restrict any other remedy. Case law bars joining declaratory relief with administrative mandamus (City of Pasadena v. Cohen, (2014) 228 Cal.App.4th 1461, 1467), but the Ordinance is not an administrative approval of a specific project and rather is a legislative act. Where a court believes that more effective relief can be granted through another procedure, it may deny declaratory relief. Guilbert v. Regents of University of California, (1979) 93 Cal.App.3d 233, 245. This discretionary issue should not be decided on demurrer. Opp. at 22.

The motion for judgment on the pleadings for declaratory relief is granted with respect to the third and seventh causes of action.

E. Conclusion

The motion for judgment on the pleadings is granted for the third and seventh causes of action, including declaratory relief under those claims.

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[1] The County requests judicial notice of (1) the provisions of Titles 16 and 20 of the LACC that were amended by Ordinance 2023-001 (RJN Ex. 1); and (2) relevant provisions of the County's General Plan 2035 ("General Plan") (RJN Ex. 2). Both requests are granted. Evid. Code §452(b).

Petitioners request judicial notice of (1) the provisions of LACC Titles 16 and 20 amended by the Ordinance as they appear in the Administrative Record (RJN Ex. A); and (2) LACC Chapter 22.184 as referenced in the amended LACC Title 16 (AR 48, 55) (RJN Ex. B). The requests are granted. Evid. Code §452(b).

[2] Petitioners' objection to footnote 1 in the County's moving papers is not an evidentiary objection and need not be ruled upon. Petitioners' objection to paragraphs 5-21 of the Declaration of Patricia Ursea on the ground that the moving papers do not cite these paragraphs is overruled; the declaration is relevant to the County's meet-and-confer obligation and need not be discussed in the motion itself.

[3] Petitioners also address the merits of the Bail Reform Act at issue in Salerno, noting that the high court upheld it because it contained various adjudicative safeguards for a federal criminal defendant's bail. 481 U.S. at 750. As the County replies, the merits of Salerno are irrelevant to the general principles for facial challenges. Reply at 3.

[4] The County also correctly notes (Mot. at 10) that the creation of design checklists is a legislative, not adjudicative act, to which due process does not apply. *See* Pacific Legal Foundation v. California Coastal Commission, (1982) 33 Cal.3d 158, 168-69. Petitioners argue that this argument is inconsistent with Horn v. County of Ventura, (1979) 24 Cal.3d 605, 614-15, which rejected a legislative defense in a zoning case where resolution of issues involved the exercise of judgment and careful balancing of conflicting interests, which is the hallmark of the adjudicative process. Opp. at 15.

There is no doubt that the creation of checklists is a legislative act. Horn decided that the zoning resolution in question was adjudicative in nature, but the FAP alleges no facts which could support the design checklist as adjudicative. Indeed, the checklists have the hallmark of a legislative act because it is intended for general use, not a specific determination. This does not mean that the checklists cannot be challenged, but the challenge must be under the arbitrary and capricious standard of CCP section 1085, not due process.

[5] The County argues that the due process claim is unripe based on the fact that, since a facial challenge fails, Petitioners can only make as-applied claims and no permit has been issued which can be challenged. Mot. at 10. The County is correct. No as-applied challenge is ripe.
