ADMINISTRATIVE HEARING

CITY OF LONG BEACH

MOIRA HAHN and MARK HOTCHKISS, APPELLANTS vs. CITY OF LONG BEACH, PERMITTING AUTHORITY.	RECOMMENDATION AND FINDINGS HEARING DATE: 3/18/22 ADMIN HEAING OFFICER : LARRY MINSKY
A T & T MOBILITY, PERMIT APPLICANT	

I. BACKGROUND, POSITIONS OF THE PARTIES AND DECISION

This matter came on for a remote hearing, via the WebEx platform, on March 18, 2021 at 9:30 a.m. The hearing was conducted pursuant to the provisions of § 15.34.030(L) of the Long Beach Municipal Code. The hearing was conducted by Administrative Hearing Officer Larry Minsky, assigned to this matter by the

CITY OF LONG BEACH to hear the undisputedly timely appeal filed on February 26, 2021 by Appellants Ms. MOIRA HAHN and Mr. MARK HOTCHKISS (hereinafter generally referred to as Appellants unless otherwise appropriate) (Appeal). The Appeal challenges the CITY of LONG BEACH, DEPARTMENT OF PUBLIC WORKS' (City) January 19, 2021 decision to grant a Tier B Wireless Right-of-Way Facility Permit application for the installation of a small cell wireless communication facility (WCF) within the public right-of-way adjacent to and/or across from Appellants' home located at 4351 Clark Avenue, Long Beach, California (Permit). The WCF Applicant, AT&T Mobility (AT&T), seeks through its application to replace an existing light pole with a new special light pole on which a wireless telecommunication facility would be housed[1].

The Parties: Appearing on behalf of Appellants was Douglas P. Carstens of the law firm of Chatten-Brown, Carstens and Minteer, LLP. Appearing on behalf of the City were Deputy City Attorney Erin Weesner-McKinley and Jeffrey T. Melching of the law firm of Rutan & Tucker. Appearing on behalf of AT&T was Aaron M. Shank of the law firm of PorterWright.

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[1] The City describes the installation as follows: "As proposed, the WCF will be integrated into a new ConcealFab light pole that will replace the existing light pole at the site. The existing light pole is twenty-six feet and three inches high and the top of the existing luminaire is twenty-eight feet and three inches at the center of the luminaire." (Ex. 7, p. 168) "The ConcealFab replacement light would be thirty-one feet and five inches at the top of the pole and twenty-eight feet and six inches at the center of the luminaire....The ConcealFab pole design allows three radios to sit concealed inside the pole, with the antenna installed at the top of the pole. The center line of the antenna will sit thirty feet and five inches above the ground. One pull box for fiber and power will be placed adjacent to the pole with all associated cables routed inside the box....The proposed site does not exceed the existing street light pole's height by more than five and one-half feet and the pole-mounted equipment is installed higher than ten feet." [City's Pre-Hearing Brief, pg. 5, line 25-pg.6, line 22]

The Hearing: Because this matter arose from the granting of the Permit, the City's Municipal Code requires the opportunity for Public Comment to be had as part of the hearing. See: LBMC §15.34.030(l)(2). In compliance therewith, the first thirty minutes of the hearing were set aside for members of the public to orally express their concerns. Members of the public who spoke were: Corliss Lee, Khalil Gharios, Stafford Cox, Andrew Campanelli, George Jackson, Nancy Vandover, Patricia Hahn, Edwin Bernbaum, and Robert Berg. None of the members of the public who spoke were sworn. Written statements were also received and reviewed by the Hearing Officer and were admitted into the Record. The Record of this proceeding is to be maintained by the City.

Briefing was submitted by the parties both prior to the hearing and by way of post-hearing and rebuttal briefs. All exhibits from all parties were received and admitted, each to be given the weight it is due. Each party was permitted the opportunity to and did examine and cross-examine witnesses. The time within which this Decision was to issue was extended by all parties from 14 days to 30 days following the Hearing Officer's receipt of all briefs.

The Position of the Parties: The City's actions were, by its own admission, governed solely by Chapter 15.34 of its Municipal Code, referred to as the City's Telecom Ordinance.[2] The City and AT&T jointly assert that the only viable issue

[2] Unless otherwise stated, all references to the Long Beach Municipal Code are to Chapter § 15.34.

which can and should be addressed by way of this hearing is whether substantial evidence supports the City's decision that AT&T satisfied all factual and legal obligations under Chapter 15.34 in seeking said Permit and that the City's decision to grant AT&T's Permit application was neither arbitrary nor capricious. Having satisfied all conditions precedent for obtaining the Permit, the City and AT&T submit that the appeal must be denied. The City and AT&T further jointly assert that the objections asserted by Appellant are without merit and/or are simply inapplicable to the present proceedings.

On the other hand, Appellants contend the City violated Chapter 15.34 in granting the Permit application and that the City's decision in granting the Permit application was both arbitrary and capricious in that the City's decision violates both Chapter 15.34's provisions as well as the intent of the Telecom Ordinance. Appellants further assert that the City's decision cannot stand as a matter of law as the granting of the Permit here violated Appellants' rights to: (1) be free from discrimination on the basis of disability, citing Title II of the Americans with Disabilities Act, 42 USC § 12132 et seq. (ADA), the Fair Housing Act, 42 USC §§ 3604 et seq. (FHA), and California's Fair Employment & Housing Act, CGC §§ 12900 et seq. (FEHA), and (2) a healthy environment free from the injurious effects of electromagnetic or wireless radiation. Appellants further assert that the exemption to the City's need to comply with the California Environmental Quality

Act, California Pubic Resources Code §§ 21000 et seq., and the National Environmental Policy Act, 42 USC §§ 4321 et seq. was not satisfied despite the City's receipt of a CEQA exemption.

The Decision: For the reasons set forth below, I find that on this Record substantial evidence supports the acts of the City in granting AT&T'S Permit application. I further find that the City did not abuse its discretion in its interpretation of Chapter 15.34 in the granting AT&T's Permit application. Accordingly, the appeal is hereby denied.

II. SUMMARY OF RELEVANT EVIDENCE

A. The Potential Harm Created by the Prospective WCF to Appellants and the Public:

Appellant Hahn is a sixty-five-year-old retired Community College Professor and artist who since 2001 has resided at 4351 Clark Avenue, Long Beach, California 90808. (See: Hahn's 3/24/22 Dec.¶2.) Her physician, Dr. Richard Wexler, an internist who has treated Ms. Hahn since 2002, opined in his 2/24/21 report that Ms. Hahn has experienced severe headaches since childhood. Dr. Wexler also noted that during the previous nineteen years, she has had four separate neurologists who have treated her for chronic migraines and cluster headaches. In his report, Dr. Wexler states that despite Ms. Hahn's use of various coping mechanisms to address her migraines and headaches, she was nevertheless required to retire from teaching due to the pain from her uncontrolled migraines.

Dr. Wexler also notes that she suffers from repeated ear infections and is 100% deaf in her left ear (Exhibit D, Appellant's Pre-Hearing Brief).

Dr. Wexler goes on to opine at page two of his report, " [C]ertain people are more sensitive to wireless radiation than others and those hypersensitive patients often experience an exacerbation of their underlying medical problems when they are exposed to continuous doses of wireless radiation." Dr. Wexler attributes Appellant Hahn's radiation hypersensitivity to the various conditions to which she suffers, such as her cluster headaches and migraines, sensitivity in her ears, and strong family history of cancer. Dr. Wexler then opinioned as follows,

> "In my medical opinion, if a wireless telecommunications facility is located in close proximity to Ms. Hahn's house and transmits wireless radiation continuously-even at levels within the existing FCC guidelines, Ms. Hahn may be physically harmed by the wireless radiation," concluding with a request for accommodation to be made for her by restricting any WCF to not be placed within a 1,000-foot radius of her home.

In further support of its appeal, Appellants introduced a number of credible scientific articles and offered the testimony of Ms. Theodora Scarato, all of which support Appellants' contention that radio-frequency radiation emissions or wireless radiation (RF emissions) can and do cause injury to animal and human life depending on a number of factors. This evidence sufficiently established to this

Hearing Officer that RF emissions may and can injure animals and humans and may very well cause further injury to Appellant Hahn if the WCF is installed. These articles call into question the scientific and medical legitimacy of the legally controlling Federal Communications Commission (FCC) regulations cited and relied upon jointly by the City and AT&T here as to what is safe and acceptable RF emission exposure levels to which the public in general and Appellant Hahn in particular can and should be allowed to be exposed, especially where, as here, a WCF is projected to be erected a few yards from Appellants' home.

By way of said scientific/medical evidence,[3] Appellants have shown that the FCC's determination as to what are safe and acceptable RF emission exposure levels are antiquated and not based on current scientific evidence and that the FCC regulations are instead industry-sponsored, outdated, and just plain wrong, causing the public to be exposed to unnecessary and harmful radiation.[4]

B. The City's Purported Inadequate Notice of the WFC:

Appellants cite to the City's failure, inter alia, to provide accurate photo

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[3] See for example: Norm Alster's article, Captured Agency: How the Federal Communications Commission is Dominated by the Industries It Presumably Regulates; Anthony Miller, et. al., Risks to Health & Well-Being from Radio Frequency Radiation Emitted by Cell Phones & Other Wireless Devises, and Martin Pall's article, Millimeter Wave & Microwave Frequency Radiation Produces Deeply Penetrating Biology and Physics; Levitt and Lai's article, Biological Effects from Exposure to Electromagnetic Radiation Emitted by Cell Tower Base Stations and Other Antenna Arrays.

[4] However, Appellant here has failed to cite let alone establish a legal basis upon which the City or this Hearing Officer can disregard the legal mandate established by Congress through the Telecommunications Act of 1966 (See: 47 USC §§ 332(c) (7)(B)(iv) (Telecom Act) (hereinafter §332) in situations such as the one at bar. Resort to other judicial or legislative channels might be appropriate.

simulations of what the WCF will actually look like when installed. Appellants assert that the photo depictions provided by AT&T and relied upon by the City inaccurately depict the WCF as being the same height as the existing light standard. In point of fact, the actual light standard is but 26 feet tall whereas the WFC will stand 31 feet tall. Appellants also cite to the fact that the address of the proposed WCF was listed by the City as 43651 Clark Avenue when in fact the correct address is 4351 Clark Avenue (Appellants' Pre-Hearing Brief, pps. 2, 5, 8-10, and Appellants' Fourth Brief, pg.14). Appellants also assert that AT&T in its application fail to disclose its plans for 5G expansion by and through use of the proposed WCF (Appellants' Fifth Brief, pg.7). These objections are not material to the determination at issue here.

C. The City's Failure to Comply with Chapter 15.34:

Appellants asserts that the City's evaluation and decision making here was flawed in that the City did not: (1) engage in "strategic" or "smart planning" by ensuring that WCFs were strategically placed within the City generally and outside of Appellants' home in particular to ensure against enhanced RF emission exposure, (2) consider whether the proposed WCF location was, in fact, needed or even necessary, (3) consider the deleterious effects the placement of the WCF would have on both the aesthetics of their community generally and Appellants' home in particular, (4) consider the projected diminished property value Appellants would experience if the WCF is placed but a few yards from the front door of

Appellants' home, (5) failed to consider the cumulative harm to Appellants as members of the general public, and to Appellant Hahn in particular,[5] and (6) consider Ms. Hahn's need for reasonable accommodation as a person with a disability, by and through accommodating Appellant's disability by either placing a hold on the granting of the Permit to allow a fair and objective study of the possible ill effects of erecting the WCF within yards of Appellants' home or simply moving the WCF to a location which is not within a 1,000-foot radius of Appellants' home. For the reasons noted infra, these contentions are rejected.

D. The City's Evaluation of AT&T's Permit Application:

AT&T submitted its Permit application to the City on November 16, 2020 (City's Ex.#2), which the City approved on January 29, 2021. On February 26, 2021, Appellants filed the instant Appeal (City Pre-Hearing Brief pg. 10, lines 12-19). The factual mechanics of what the City actually did to evaluate and eventually approve the Permit application, such as, for example, the noise study or structural analysis, were undisputed by Appellants[6].

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[5] In its Post-Hearing, 4th Brief, at page 7, lines 4-15, Appellants point out that by its own admission, AT&T's proposed WCF will violate FCC's RF emission regulations which should have, but did not, cause the City to reject AT&T's Permit application. In support of this argument, Appellants quote from AT&T's Permit application that the proposed WCF will, "at the working surfaces that are nearest to AT&T antennas at the light fixture level, the maximum power density generated by the AT & T antenna is approximately 132.34 percent of the FCC's general public limit." Because the harmful exposure levels admittedly violate FCC's standards, by law, the City had no alternative but to deny the application. For the reasons articulated by AT&T in its Post-Hearing Reply Brief at pages 1-2, I find this argument unpersuasive and misleading.

[6] In its Pre-Hearing Brief, the City sets forth precisely what it did to evaluate, consider, and eventually approve AT&T's Permit application in its claimed compliance with the mandates of Chapter 15.34. While Appellants dispute the City's conclusions on the Permit application as noted above and attack the approval by arguing that other considerations should have been done

III. DISCUSSION

A. Appellant's Disability Discrimination Contentions:

A key component of Appellants' argument hinges on their claim that because Appellant Hahn is a qualified person with a disability, she is, as a matter of law, entitled to reasonable accommodation, a legal right secured her by the federal and state disability discrimination statutes. Neither the City nor AT&T presented much to rebut Appellants' factual/legal conclusion that Appellant Hahn was a qualified individual with a disability and accordingly based on this record, I find that Appellant Hahn is a qualified person with a disability.

However, the right to reasonable accommodation for Appellant Hahn does not attach unless Appellants can also establish that by granting the Permit application, they/she is, was, or will be excluded from the benefits of a City program, service, or activity.[7] Under the law, if one seeks to avail her- or himself of the protections of the anti-disability discrimination statutes and to be reasonably accommodated, one must establish, that she is: (1) a qualified person with a disability, (2) she was excluded from participation in or denied the benefits of a public entity's services, programs, or activities or otherwise discriminated against

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but were not, Appellants did not contest what the City actually did in its evaluation process, such as its evaluation of the appropriate design for the WCF, or the noise analysis, or the structural analysis and accordingly the Hearing Officer adopts the City's factual account of what it did as spelled out at pages 5 to 11 of the City's Pre-Hearing Brief; however, the legal conclusions of the City and AT&T are not adopted here.

[7] Even assuming that the ADA, like the FHA or even the Rehabilitation Act of 1973 at section 504 (29 USC § 794) are not preempted by the Telecommunication Communications Act, Appellants here cannot, for the reasons cited herein, make out a claim entitling Appellants to reasonable accommodation.

by the public entity, and (3) that the exclusion from said programs, services, or activities was by reason of her disability. See: *Updike v. Multnomah City* (9th Cir., 2017) 870 F3rd 939, 949; *Wolf v. City of Millbrae* (N.D. Cal., 2021), 2021 U.S. Dist. LEXIS 159025.

Here, there has been no showing by the Appellants that they jointly or severally were denied or excluded from a City benefit, program, or activity. Likewise, no evidence has been presented which suggests let alone establishes that the City or AT&T has engaged in any denial of opportunities to participate in any City program because of Appellant Hahn's disability.[8] The issue of reasonable accommodation comes into play as a vehicle through which persons with disabilities can show they can participate either with or without reasonable accommodation. In the employment context, for example, the employee or applicant is able to use the opportunities provided by reasonable accommodation to prove she is qualified, that is, reasonable accommodation is irrelevant if the employee is unable to establish that she was not subjected to an adverse employment action. Here, Appellants must be able to prove they were denied access to a City benefit or program and where, as here, Appellant Hahn cannot satisfy that element, she cannot avail herself of an entitlement to be accommodated. Without such a showing, Appellants' reasonable accommodation/

[8] The Record here establishes that the City did correspond with Appellants on the issue of reasonable accommodation (see Appellants Ex. E) but a fair reading of its reply to Appellants suggests it simply cut off Appellants from any further reasonable discussion on the issue.

disability discrimination arguments must and fail.[9]

Focusing on a different approach to this issue of accommodation, the USDC of the Northern District in *Wolf* addressed this issue by focusing on the issue of reasonableness. The plaintiff there, like Appellant Hahn here, suffered from electromagnetic hypersensitivity causing him to suffer a myriad of mental and physical impairments which would be made worse by RF emissions resulting from cell towers located near his home. Mr. Wolf sought to be accommodated by moving or halting the operation of the cell tower near his home which would lessen and/or alleviate his impairments. In dismissing Mr. Wolf's ADA, FHA, and FEHA disability claims, the Court found that as a matter of law, that because Mr. Wolf's reasonable accommodation requests (the moving of the cell tower or shutting it down) would cause the City of Millbrae to violate §332 of the Telecom Act, the accommodations sought were not reasonable.

The Telecommunications Act of 1996 provides in pertinent part, at 47 U.S.C. 332(c)(7)(B)(iv) that,

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[9] While Appellants in their briefs refer to the ADA, FHA, and FEHA and provide some case authority regarding the contours of reasonable accommodations, none of the Title II, FHA, or FEHA authority Appellants cite address the key issue which is missing from its analysis, that being, was Appellant Hahn denied access to a City program, service, or activity or discriminated because of her disability. If they had, then Appellants might have been able to establish the existence of what may have been a reasonable accommodation which the City might have been required to provide, despite the language of 47 U.S.C. §332(c)(7)(B)(iv). However, having failed to establish that missing factual element, their reasonable accommodation argument must fail and this Hearing Officer need not decide that issue. Moreover, Appellants' reference to the ADA set forth at LBMC §15.34.030(B)(1)(b)(viii) appears to be of no help. As noted by the City, the inclusion of ADA reference at LBMC §15.34.030(B)(1)(b)(viii) only meant that the City needed to comply with the ADA, *for example*, where and when a WCF or other device is erected on a sidewalk, the WCF must be constructed in such a way so as to ensure that persons in wheelchairs can ambulate around the WCF.

> "No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of environmental effects of radio frequency emissions to the extent that such facilities comply with the [Federal Communications] Commission's regulations concerning said emissions." [Explanation supplied]

As noted supra, while it does appear through reliable, credible evidence that the FCC's regulations as to what are safe RF emission standards are outmoded and inadequate to safeguard the public, until those FCC RF emission standards are successfully challenged or amended, this Hearing Officer is precluded from disallowing the legal import of said mandated FCC RF emission standards. For the reasons stated, Appellants' disability arguments cannot be sustained.

B. Appellants' Failed Notice Contentions:

There is no dispute that the City failed to correctly cite the location for the projected AT&T WCF location. Likewise, it appears there is no real dispute that the photographs do not depict how the WCF would look if one were to be looking at the WCF from the vantage point if one were in Appellants' home or garden and looking toward the WCF site situated on Clark Avenue. However, it is also clear that both the public and Appellants had no difficulty in discerning prior to the hearing as to where the WCF was to be erected or what the WCF would look like once installed. Finally, as to AT&T's projected use of the WCF for 5G purposes, even if accurate, Appellants failed to prove that such an omission can and should, as a matter of law, amount to a denial of AT&T's Permit application. Accordingly,

I find Appellants' notice arguments de minimis and unpersuasive.

C. Appellants' Contentions that the Granting of AT&T's Permit Application Violated LBMC Chapter 15.34:

All of Appellants' arguments that the City violated Chapter 15.34, with the exception of its disability arguments, hinge on two claims, those being: (1) that the intent of Chapter 15.34 as expressed in the Purpose and Objections section of the Chapter (see: LBMC §15.34.010) were violated by the City when it granted AT&T's Permit application and (2) the City should have engaged in "smart" or "strategic" planning, which §15.34.010 implicitly requires, the City would and should have required AT&T to prove as part of its application that: (a) the WCF at issue was needed and/or necessary, (b) the WCF would not adversely affect the aesthetics or property value of Appellants' home or the community's homes or the community in general, and (c) that RF emissions emanating from the WCF would not harm Appellants or the public in general.

While there are a great many things that local governments may do when evaluating how to handle the servicing of its communities and its residents, that is not what is before this Hearing Officer in this matter. Local governments possess a great deal of discretion in the enforcement of their regulations and responding to regulations imposed upon it by law. But where, as here, the acts of a city are called into question, for courts and administrative officers seeking to oversee said acts, the focus must be on what the local entity did legislate and whether it complied

with its legal obligations thereunder and not what it could or should have[10] legislated.

Appellants here did not establish that the City was mandated either by California or federal law or its Telecom Ordinance to employ "smart" or "strategic" planning. The federal case law and regulatory actions of other states cited by Appellants, stand for the proposition that when local entities exercise their discretion to enact requirements such as strategic planning, the acts and course of conduct of said legislative bodies can be scrutinized to ensure compliance therewith. While the actions of those other jurisdictions are interesting, they are not controlling in evaluating the validity of the actions of the City at issue here.

Hence, if the City had exercised its discretion and had legislated into its Telecom Ordinance "strategic planning," Appellants would be correct in arguing that City's approval of AT&T's Permit application would be an abuse of its discretion in that "smart" or "strategic" planning was required but not considered. If that were the case, this Appeal would be granted. But the City here did not include such requirements into its Telecom Ordinance and therefore the City's failure to ensure that the projected WCF was needed or was strategically necessary is of no help to Appellants here.

As to the issue of aesthetics and property values, I find that the permit

[10] If Appellants believe that the City failed to properly legislate when it enacted its Telecom Ordinance, then Appellants may choose to attack the Ordinance by way of a different attack in a different forum.

standard requirements set forth in the City's Telecom Ordinance (§15.34.030) do not require the considerations sought here by Appellants, other than those aesthetics-related requirements actually set forth at §15.34.030(b)(vi), requirements the City did in fact evaluate.

Like the proposition of "smart planning," Appellants' concerns relative to a potential decrease in the value of their property is a subject which the City could have but did not include in its Telecom Ordinance other than the general reference to promoting property values in the purpose clause of the Telecom Ordinance. While it may be true that the property values of Appellants' and their neighbors' homes may suffer as a result of the WCF installation, because the City did not include into the permit requirement sections a mandate for the City to consider the individual property values where a resident's home is impacted, neither the City nor AT&T here need prove whether Appellants have or will suffer a diminution in the value of their property.

While the loss in the value of Appellants' home caused by the WCF may, in a different forum, be a viable claim, here it is not. Hence the reference to aesthetics, property values, health and safety of its residents as set forth in the City's Telecom Ordinance at (§15.34.010(D)) cannot be inserted into the specific permit requirements set forth at §15.34.030(b) through §15.34.030(K) other than as referenced within §15.34.030. (See for example the reference to aesthetics noted in the City's Telecom Ordinance at §15.34.030(b)(vi).)

D. Appellant's CEQA and National Environmental Act Contentions:

Appellants assert that the California Environmental Quality Act, California Pubic Resources Code §§ 21000 et seq. (CEQA) and the National Environmental Policy Act, 42 USC §§ 4321 et seq. (NEPA) establish viable reasons why this Appeal should be granted.

In support, Appellants note that the law disfavors the application of exemptions obtained here by the City. Appellants cite to the case law which holds that such exemptions are to be strictly and narrowly construed, *Save Our Carmel River v. Monterey Peninsula Water Management Dist.* (2006) 141 Cal. App. 4th 677, 697, and the agency invoking an exemption bears the burden of demonstrating that substantial evidence supports the factual basis of the proposed exemption, *Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal. 4th 372, 386. Additionally, Appellants point out that where, as here, a party asserts that an exception to the agency's proposed exception exists, then the party asserting that an exception to the exemption exists, here Appellants, need only show a reasonable possibility of a significant effect due to unusual circumstances such as a project's size or location, *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal. 4th 1086, 1116.

Appellants further cite to: (a) the District of Columbia decision in *United Keetoowah Band of Cherokee Indians in Oklahoma v. FCC* (DC Cir., 2019) 933 F. 3d.728 which held, inter alia, that the FCC failed to justify its confidence that small

cell deployments pose little to no cognizable environmental risks given the vast number of proposed deployments, and (b) CEQA's finding that California's Legislature seeks to ensure the long-term protection of the environment, see: Public Resources Code §§ 21000 et seq. and more specifically §15065(a) and §21001(a)&(d).

Armed with this authority, Appellants assert that the City failed to articulate any viable or substantive support for its use of the CEQA exemption it obtained and that the granting of the Permit application at issue fails to account for the unusual circumstances which the installation of the WCF at issue creates, namely (1) cabling and excavation (Appellants' Fifth Post-Hearing Brief p.9), and (2) the cumulative effect of the unlimited installation of multiple WCFs throughout the City (Appellants' Fifth Post Hearing Brief p.9).

Countering Appellants' argument, the City posits the argument that the California Courts have consistently supported class 1, 2, and 3 exemptions as obtained here by the City in situations similar to the one at bar. See: *San Francisco Beautiful et al. v. City and County of San Francisco, et al.,* (2014) 226 Cal. App. 4th 1012 [Court approved installation of AT&T's 726 new utility cabinets at undetermined locations on public sidewalks throughout the city within 300 feet of existing cabinets] and *Robinson v. City and County of San Francisco* (2012) 208 Cal. App. 4th 950 [Court held class 3 CEQA exemption applied to the installation of small telecommunications equipment on utility poles]. Supporting said

exemption, the City did introduce evidence supporting its sought-for and awarded exemption.

While Appellants may in fact be correct as to the possible cumulative effect of installing numerous WCFs throughout the City, they did not establish that either CEQA nor NEPA mandated the City or AT&T to conduct a cumulative evaluation in this case. Appellants fail to cite specific sections of the City's Telecom Ordinance nor to CEQA or NEPA which mandated that the City engage in such an analysis here. The force and clarity of 47 U.S.C. 332 (c)(7)(B)(iv) was not successfully countered by Appellants.

It is worthy of note that Appellants citation to AT&T's admission that the WCF at the antenna level is 132.43% of the FCC's general public RF emission exposure level is disingenuous (Appellants' fourth Post-Hearing Brief at page 7). As pointed out by AT&T in its Post-Hearing Brief, FCC's general public exposure level is not in fact breached at the level where the public will be. The 132.4% measurement is predicated on the location of the antennas at 28.5 feet above the ground, whereas the actual public exposure level where the public will be is at .04% of the FCC general public exposure limit.

As to the excavation, cabling, and pulling of lines to install the WCF, the City's Deputy Director of Development Services Christopher Koontz's testimony affirmed that as such activities must and will comply with applicable building and safety codes, such activities fall outside of any special circumstances which would

trigger the need for an environmental study. See, unofficial Hearing Transcript at pps. 93-100.

Hence, while issues of cumulative harm caused or potentially caused to Appellants and the community appear to be a real danger, for the reasons noted supra such concerns do not and cannot serve, in this instance, as a viable argument to overturn the City's approval of the AT&T's Permit application, *San Francisco Beautiful v. City and County of San Francisco, supra*, 226 Cal. App. 4th at 1022-1023 [An agency's determination that project falls within categorical exemption include implied finding that none of the exceptions is applicable. Burden then shifts to challenging party to produce evidence showing that one of the exceptions apply.]

V. RECOMMENDATION AND FINDINGS

This Hearing Officer Issues the following findings of fact and conclusions of law:

A. Findings of Fact:

1. Appellants Ms. Moira Hahn and Mark Hotchkiss are homeowners who, since 2001, have resided at 4351 Clark Avenue, Long Beach, California 90808.
2. Appellant Hahn is a sixty-five-year-old retired Community College Professor and artist who has been medically determined to have chronic migraines and cluster headaches since childhood, is 100% deaf in her left

ear, and has a history of cancer in her family, which impairments have not abated despite her use of various coping mechanisms.

3. Dr. Richard Wexler, Appellant Hahn's internist of over two decades, established that Appellant Hahn is hypersensitive to RF emissions and that her impairments will be exacerbated if she is exposed to RF emissions from the projected cite location of AT&T's projected WCF unless said WCF is located at a distance further than 1,000 feet of her home.
4. The evidence in the Record supports a factual finding that Appellant Hahn was a qualified and able to participate in the City's programs, services and activities.
5. Scientific and medical literature admitted in this proceeding places into question the FCC RE emission standards and establishes that the FCC RF emission standards will not and do not protect Appellants and Appellant Hahn in particular from unsafe RF emissions and from RF exposure.
6. The City engaged Appellants only in a limited interactive process because it determined that the accommodation sought, the moving of the site for the WCF, would have forced it to violate the law.
7. Reasonable accommodations other than the movement of the WCF location site might have been considered.
8. On November 16, 2020, AT&T submitted its Permit application.

9. In connection with its evaluation of AT&T's Permit application, the City conducted several reviews and satisfactorily performed all aspects of its review of said Permit application in compliance with the mandates of the City's Telecom Ordinance as set forth at LBMC § 15.34.

10. In compliance with the notice provision set forth at LBMC § 15.34.030(K), on February 21, 2021, the City mailed and posted its required notice to the public and Appellants in particular.

11. On February 26, 2021, Appellants filed their Appeal.

12. On March 18, 2022, an administrative hearing was held, with the public given an opportunity to comment about the City's actions at issue here.

13. The Permit Application submitted by AT&T and reviewed by the City satisfied all obligations and requirements as set forth at LBMC § 15.34.

14. To the extent any conclusion of law identified below constitutes a finding of fact, it is hereby incorporated.

B. Conclusions of Law:

A. Appellants timely appealed the City's decision to grant AT&T's Permit application, triggering this Hearing.

B. The jurisdictional limits of this Administrative Hearing are controlled by the City's Telecom Ordinance, LBMC §§ 15.34, and by applicable law, where appropriate.

C. Appellant Hahn is a qualified individual with disabilities. Appellant

Hahn's disabilities include but are not limited to: her family history of cancer, her hypersensitivity to RF emissions, her cluster headaches and migraines, and that she is 100% deaf in her left ear, *Brown v. LAUSD* (2021) 60 Cal. App. 5th 1092, 1103-1104.

D. Appellants have failed to establish that either of them are entitled to invoke the protections of Title II of the Americans with Disabilities Act, the Fair Housing Act, the Fair Employment and Housing Act, or even Section 504 of the Rehabilitation Act of 1973, as neither Appellant has shown they have been deprived of a City program, service, or activity, *Updike v. Multnomah City* (9th Cir., 2017) 870 F. 3rd 939, 949; *Wolf v. City of Millbrae* (N.D. Cal., 2021), 2021 U.S. Dist. LEXIS 159025.

E. Appellants have failed to establish that the exemption to CEQA obtained by the City was inappropriate or unsupported by substantial evidence or legally deficient sufficient to grant this Appeal.

F. Appellants have failed to establish that the City's decision to grant AT&T's Permit application was an abuse of the City's obligations as imposed on it by the provisions of the City's Telecom Ordinance, LBMC §§15.34 et seq.

G. Appellants have failed to establish that the City's notice or its actions in connection with its notice obligations pertaining to the proposed installation of the WCF at issue here violated due process or Appellants'

rights guaranteed them by LBMC § 15.34.030(K).

H. The City has met its evidentiary burden by establishing through the introduction of admissible substantial evidence that it did not abuse its discretion in granting AT&T's Permit application.

J. To the extent any conclusion of fact identified above constitutes a conclusion of law, said conclusion is hereby incorporated.

VI CONCLUSION

For the foregoing reasons, the Appeal is denied and the Permit application sought by AT&T should be granted. To the extent Appellants' arguments challenging this decision are viable, Appellants are not forestalled from seeking appropriate relief elsewhere.

Dated: April 18, 2022

LARRY MINSKY,
ADMINISTRATIVE HEARING OFFICER

LARRY MINSKY, ESQ., SBN 096592
Administrative Hearing Officer
Telephone: (562) 435-7878
Facsimile: (562) 432-3822
Email: larry@minskyesq.com