

JONATHAN C. NAVARRO, ESQ., CSB #198310
ADMINISTRATIVE HEARING OFFICER
TEL.: (714) 647-9361
FAX: (714) 647-9362
EMAIL: jnavarro@navarro-law.com

CITY OF LONG BEACH
ADMINISTRATIVE APPEAL HEARING
PER LONG BEACH MUNICIPAL CODE CHAPTER 15.34.030.L

ROBERT ALLISON and KATHY
ALLISON,

Appellants,

vs.

CITY OF LONG BEACH,

Respondent/Permitting
Authority

LOS ANGELES SMSA LIMITED
PARTNERSHIP, d/b/a VERIZON
WIRELESS,

Real Party in Interest /
Permit Applicant

HEARING OFFICER’S FINDINGS AND
RECOMMENDATION

I. INTRODUCTION

This appeal came on regularly for hearing before Administrative Hearing Officer Jonathan C. Navarro on October 23, 2020 at 3:00 PM via WebEx virtual hearing. The WebEx hearing was administered by Daniel Ramirez with the Public Works Department (“PWD”) for the City of Long Beach. The Appellants, Robert Allison and Kathy Allison (“Appellants” or “Appellant”), appeared *pro se*. The City of Long Beach (“City” or “Respondent”) appeared and

HEARING OFFICER’S FINDINGS AND RECOMMENDATION

1 was represented by Erin Weesner-McKinley, Esq. with the Office of the City Attorney for the
2 City of Long Beach. Applicant Los Angeles SMSA Limited Partnership, D/B/A Verizon
3 Wireless (“Verizon” or “Applicant”) appeared and was represented mainly by Daisy Uy
4 Kimpang. The following also appeared for the Applicant: Barbara Breeden, Ethan Rogers, Joel
5 Crane, Mario De La Mora, Katherine Baxendale, Bill Hammett, Charaka Wijeweera, and Jesus
6 Roman. The PWD for the City of Long Beach was represented by Joshua Hickman and Pablo
7 Leon.
8

9 The following member(s) of the public also appeared: Crystal Soto (residence address -
10 1800 Carfax Avenue, Long Beach, CA 90815); Loraine Carnes (did not provide residence
11 address); Nicole Carnes (residence address – 10531 Ketch Avenue, Garden Grove, CA 92843);
12 Nicholas Cabeza (Field Rep with Assemblymember Patrick O’Donnell’s Office. No Public
13 Comment provided); Stanley Hsu (did not provide residence address); Ramon Soto (did not
14 provide residence address); and Jonathan Allison (10962 W. Ocean Air Dr., #2109, San Diego,
15 CA 92130).
16

17 **II. STATEMENT OF FACTS**

18 On or around February 28, 2020, Verizon submitted an application (“Application”) for a
19 permit to the City for the installation of a “small cell” wireless telecommunications facility
20 (“WTF”) in the public right-of-way. (Respondent’s Group Exhibit, pages 4-13). The Application
21 process is governed by Chapter 15.34 of the Long Beach Municipal Code (“LBMC”) that
22 includes requirements and applicable standards for WTFs in the public right-of-way to ensure
23 that the proposed WTF complies with said requirements and standards. WTF means equipment
24 installed for the purpose of providing wireless transmission of voice, data, images, or other
25 information including but not limited to, cellular telephone service, personal communications
26
27
28

1 services, and paging services, consisting of equipment, antennas, and network components
2 such as towers, utility poles, transmitters, base stations, conduits, pull boxes, electrical meters,
3 and emergency power systems. WTF does not include radio or television broadcast facilities,
4 nor radio communications systems for government or emergency services agencies. LBMC
5 15.34.020.EE. "Public right-of-way" means any public highway, street, alley, sidewalk,
6 parkway, parking lot, and all extensions or additions thereto which is either owned, operated,
7 or controlled by the City, or is subject to an easement or dedication to the City, or is a
8 privately-owned area within City's jurisdiction which is not yet dedicated, but is designated as
9 a proposed public right-of-way on a tentative subdivision map approved by the City. LBMC
10 15.34.020.S.

11
12
13 The Application sought a permit for the installation of a proposed WTF in the public
14 right-of-way in front of the property located at 1800 Carfax Avenue, which is in a residential
15 zoning district. The proposed WTF is a "co-location facility"¹ that will be integrated into a new
16 light pole that will replace the existing light pole at the site. The site is designated as
17 "CA002_LBC_LNGBCH_185" in the Application ("Site"), and it is located on the Northeast
18 corner of Carfax Avenue and E. Atherton Street, which is a multi-lane street. The replacement
19 light pole would be thirty (30) feet high with luminaire. (See Respondent's Gr. Ex., pp. 213-
20 214). Three shrouded antennas will be placed at the top of the pole, with the bottom of the
21
22

23
24 ¹ "Co-location facility" means a Wireless Telecommunications Facility that has been co-
25 located consistent with the meaning of "co-location" as defined above. It does not include the
26 initial installation of a new Wireless Telecommunications Facility where previously there was
27 none, nor the construction of an additional monopole on a site with an existing monopole.
28 LBMC 21.56.020.D. "Co-location" means the placement or installation of Wireless
Telecommunications Facilities, including antennas and related equipment onto an *existing*
Wireless Telecommunications Facility in the case of monopoles, or onto the same building in
the case of roof/building-mounted sites. LBMC 21.56.020.C.

1 antennas twenty-five (25) feet one (1) inch from the ground. (Id.) Three (3) pull boxes for fiber
2 and power will be placed in the parkway next to the pole with all associated cables routed inside
3 the pole. (Id.).

4 Upon two (2) subsequent rounds of reviews and six (6) plan revisions—the latest being
5 June 11, 2020—the City approved the Application on August 21, 2020. (See approval stamp on
6 Respondent’s Gr. Ex., pp. 206-225). Thereafter, pursuant to LBMC 15.34.030.K., a notice of the
7 approval was mailed out on September 2, 2020, and a posted notice was placed on the pole in
8 front of Appellants’ home and on the Site on September 2, 2020. (See Respondent’s Gr. Ex., pp.
9 227-233 [proof of mailing]; Respondent’s Gr. Ex., pp. 234-235 [proofs of posting]). Said posted
10 notice triggered the commencement of the 10-day appeal period under LBMC 15.34.030.L. The
11 deadline for filing an appeal was September 17, 2020. Appellants filed the Appeal on September
12 10, 2020. (See Respondent’s Gr. Ex., pp. 1-3).

13 **III. LEGAL AUTHORITY FOR APPEAL**

14 LBMC 15.34.030.L. (Appeal of Tier B Wireless Right-of-Way Facility Permit)
15 provides ...

- 16 1. Appeal Allowed. The applicant for a Tier B Wireless Right of Way Facility
17 Permit, and/or any person owning or residing at property that is adjacent to
18 or across the street to the location of a proposed Tier B Wireless
19 Telecommunications Facility, may appeal an approval or denial of an
20 application for a Tier B Wireless Right-of-Way Facility Permit. An appeal
21 must be in writing and must be submitted to the City Clerk within ten (10)
22 business days of the date the notice was mailed and posted as required under
23 Subsection 15.34.030.K.2, above.
- 24 2. Public Hearing Required. If an appeal is timely submitted, an independent
25 hearing officer selected by the City shall hold a public hearing. The City
26 Clerk shall set a date for the hearing that is at least fifteen (15) business
27 days, but no more than sixty (60) business days, after the City Clerk’s receipt
28 of the appeal, unless the applicant and any person submitting an appeal agree
to a later hearing date.

- 1 3. Notice of Public Hearing Date. At least ten (10) business days before the
2 public hearing, the City Clerk shall notify in writing any person submitting
3 an appeal, the applicant, and any City department that reviewed the
4 application of the date set for the public hearing. The City Clerk shall follow
5 its regular procedures for notifying the general public of the hearing.
- 6 4. Public Hearing Record. The public hearing record shall include:
7
8 a. The application and the Department of Public Works' approval of the
9 application;
10 b. Any written determination from the Department of Public Works;
11 c. Any further written evidence from any City departments submitted either
12 prior to or during the hearing;
13 d. Any written submissions from the applicant, any person submitting an
14 appeal, or any other interested person submitted either prior to or during
15 the hearing; and
16 e. Any oral testimony from any City departments, the applicant, any person
17 submitting a protest, or any interested person taken during the hearing.
- 18 5. Hearing Officer Determination. The Hearing Officer shall issue a written
19 resolution containing its determination within fourteen (14) business days
20 following the close of evidence at the conclusion of the public hearing on
21 the appeal. The resolution shall include a summary of the evidence and the
22 ultimate determination whether to grant, grant with modifications, or deny
23 the appeal.
- 24 6. Notice of Determination on Appeal.
25
26 a. The City Clerk shall promptly mail a notice of a determination on an
27 appeal to both the applicant, to any neighborhood association identified by
28 the Department of Development Services for any neighborhood within three
hundred (300) feet of the approved wireless telecommunications facility, and
to any person who either filed a protest, submitted evidence, or appeared at
the hearing, and whose name and address are known to the Department of
Public Works.

IV. **LEGISLATIVE BACKGROUND FOR WIRELESS TELECOMMUNICATIONS**
FACILITIES

1. Federal and State Laws and Regulations

In 1996, Congress conducted a major overhaul of the telecommunications law in almost 62 years in the Telecommunications Act of 1996 (“Act”). The goal of this new law is to let anyone enter any communications business—to let any communications business compete in any market against any other. The Federal Communications Commission (“FCC”) was then tasked to create fair rules for this new era of competition. The advent of the newest generation of wireless broadband technology known as “5G” requires the installation of thousands of “small cell” wireless facilities. These facilities have become subject to a wide variety of local regulations. *City of Portland v. United States* (9th Cir. 2020) No. 18-72689, p. 29. The Federal Communications Commission (FCC) in 2018 therefore promulgated orders relating to the installation and management of small cell facilities, including the manner in which local governments can regulate them. *Id.* Sections 253(a) and 332(c)(7) of the Act provided FCC with the statutory authority for limiting local regulation on the deployment of [5G] technology that reflects congressional intent in 1996 to expand deployment of wireless services. *Id.* at p. 30.

These limitations provide that local government regulations:

- a. shall not unreasonably discriminate among providers of functionally equivalent services, 47 U.S.C. § 332(c)(7)(B)(i)(I);
- b. shall not prohibit or have the effect of prohibiting the provision of personal wireless services, 47 U.S.C. § 332(c)(7)(B)(i)(II);
- c. a local government ... shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period

1 of time after the request is duly filed with such government². 47 U.S.C. §
2 332(c)(7)(B)(ii).

- 3 d. No State or local government or instrumentality thereof may regulate the
4 placement, construction, and modification of personal wireless service facilities
5 on the basis of the environmental effects of radio frequency emissions to the
6 extent that such facilities comply with the Commission's regulations concerning
7 such emissions. 47 U.S.C. § 332(c)(7)(B)(iv).
8

9 Those provisions authorize the FCC to preempt any state and local requirements that “prohibit or
10 have the effect of prohibiting” any entity from providing telecommunications services. *Id.* *See*
11 *also* 47 U.S.C. § 253(a), (d). Consequently, the FCC promulgated orders limiting local
12 governments in regulating the deployment of 5G technology in order to remove the barriers to
13 entry for businesses to compete in the telecommunications market.
14

15 California case law and statutory authorities provide additional regulatory guidance for
16 installation of WTFs. Wireless providers are granted a statewide franchise to engage in the
17 telecommunications business. Pub. Util. Code § 7901; *see also T-Mobile West LLC v. City and*
18 *County of San Francisco* (2019) 6 Cal.5th 1107, 1117). In *T-Mobile*, the California Supreme
19 Court held that while the California legislature did not intend to deprive local governments of
20 the ability to impose aesthetic regulations and public safety issues, local agencies must
21 nonetheless respect that statewide franchise when making decisions on proposed facilities. *Id.*
22
23
24
25

26 ² The FCC has specifically shortened the shot clock for approving/denying applications for installation
27 of WTFs on existing infrastructure (i.e., collocation) from 90 to 60 days and from 150 to 90 days for all
28 other collocation applications. *Accelerating Wireless Broadband Deployment by Removing*
Barriers to Infrastructure Inv., 33 FCC Rcd. 9088 (2018), ¶¶ 104–05, ¶ 132, ¶ 136).

Further, California Public Utilities Commission (“PUC” or “Commission”) reserves the right to preempt local decisions about specific sites “when there is a clear conflict with the Commission’s goals and/or statewide interests.” (PUC, General order No. 159-A (1996) p. 3 (General Order 159A), available at < <http://docs.cpuc.ca.gov/PUBLISHED/Graphics/611.PDF>>) Generally, the PUC will step in if statewide goals such as “high quality, reliable and widespread cellular services to state residents” are threatened. (*T-Mobile West, supra*, 6 Cal.5th at 1124, citing General Order 159A, at p. 3.).

2. The City’s Telecom Ordinance

On May 1, 2018, the City adopted LBMC §15.34, Wireless Telecommunications Facilities in the Public Rights-Of-Way (“Telecom Ordinance). The Telecom Ordinance governs the installation of WTFs within the jurisdiction of the City of Long Beach, and the City’s scope of regulatory authority for the installation of WTFs is limited to this ordinance. The Telecom Ordinance provides for the requirements and standards for WTFs in the public right-of-way. These include comprehensive permit requirements and standards (LBMC 15.34.030.B), application process requirements (application, review, and approval) (LBMC 15.34.030.D), conditions of approval (LBMC 15.34.030.F), notice following approval (LBMC 15.34.030.K), and the appeal process of a Tier B³ WTF permit (LBMC 15.34.030.L). The Telecom Ordinance also provides for, among others, compliance and modifications, of WTFs after installation (LBMC 15.34.030.N; LBMC 15.34.030.S).

///

///

³ “Tier B Wireless Telecommunications Facility” means a wireless telecommunications facility where the proposed location for the facility is in a Planning Protected Location, Coastal Zone Protected Location, or Zoning Protected Location.

1 **V. STATEMENT OF ISSUES OF APPEAL BEFORE THE HEARING OFFICER**

2 By letter dated September 10, 2020, Appellants expressed their strong opposition to the
3 proposed WTF due to health concerns and its dangerous proximity to their two-story residence.
4 In support, Appellants cited a 2017 letter of comment submitted by scientists with the
5 International EMF Scientist Appeal to the U.S. FCC in opposition to FCC regulations that would
6 allow streamlined approval of 5G infrastructure to be built on existing utility poles, in greater
7 number than current cellular Antennas. Their letter calls on The FCC to consider the potential
8 impact of the 5G wireless infrastructure on the health and safety of the U.S. population before
9 proceeding to deploy the infrastructure, and stated that “[n]umerous recent scientific publications
10 have shown that EMF affects living organisms at levels well below most international and
11 national guidelines—[t]hese effects can include an increased cancer risk, genetic damage,
12 structural and functional changes to the reproductive system, learning and memory deficits, and
13 neurological disorders.” (See <[https://interestingengineering.com/the-danger-of-5g-5th-
14 generation-cellular-technology-might-be-a-threat-to-public-health?fbclid=IwAR2PjoOts
15 A2clSDxAix9oQCWxbwxqLT5J6LhoBpp--i3qp9UsST4SBEUA3w](https://interestingengineering.com/the-danger-of-5g-5th-generation-cellular-technology-might-be-a-threat-to-public-health?fbclid=IwAR2PjoOtsA2clSDxAix9oQCWxbwxqLT5J6LhoBpp--i3qp9UsST4SBEUA3w)>).
16
17
18

19 In addition, Appellants cited a 2020 letter from over 400 medical and public health
20 professionals to the FCC stating that:

21 “Americans are entitled to know the full extent of any potential health risks
22 associated with exposure to RF microwave radiation, particularly at this time
23 when wireless companies are busy installing hundreds of thousands of new
24 wireless antennas in close proximity to homes and apartments. The determination
25 of risk can best be evaluated from properly conducted, independent studies. The
26 alternative of waiting for decades to learn whether or not these exposures increase
27
28

disease rates in human populations and in the natural world is a dangerous and irresponsible strategy.”(See <<https://ecfsapi.fcc.gov/file/1061850512373/FCC%20letter%20Medical%20Professionals.pdf>>)

Appellants also addressed their concern regarding the effect the proposed WTF would have on the value of their home as it “will negatively affect [their] property value and aesthetic appearance as it will be a huge eyesore as [one] enter[s] [their] neighborhood.” (See Respondent’s Gr. Ex., p.2). Appellants thereafter requested the City to have the “proposed WTF be placed elsewhere.”

Upon receipt of Appellants’ letter, the Long Beach City Clerk’s office then scheduled a formal hearing with regard to Appellants’ objections.

VI. SUMMARY OF RELEVANT EVIDENCE INTRODUCED BY PARTIES

1. Appellants’ Evidence

During the WebEx virtual hearing on October 23, 2020, this hearing officer explained to all the participants the guidelines for the hearing. These include examination of witnesses and presentation of evidence. It was stated on the record that the hearing officer received the City’s submission package⁴ in advance of the hearing both in hardcopy and electronic format. The hardcopy was received at this hearing officer’s business address and included a Proof of Service indicating that the hardcopy was sent to said business address and to Appellants’ address on record. The package also included a Proof of Service that the electronic copy was transmitted to the email addresses of the hearing officer, the Appellants, and the Applicant’s representatives. During the hearing, all parties acknowledged receipt of the City’s submission package.

⁴ The City’s submission package included a copy of Appellants’ letter dated September 10, 2020.

1 In addition to Appellants' September 10, 2020 letter, Appellants conducted a presentation
2 during the hearing reiterating their strong opposition to the proposed WTF and requested the City
3 to relocate the Site pursuant to the contract between the City and Applicant. (*See* Appellants'
4 slide presentation, slide 2). Appellants contend that the Application doesn't take into account the
5 height of their residential living area and the duration of RF exposure from the proposed WTF.
6 (*See* Appellants' slide presentation, slides 12-16). Appellants also addressed the impact of "small
7 cells" on residential property values (*See* Appellants' slide presentation, slides 18-19), and the
8 current state of Federal and State legislation and court cases vis-à-vis local regulation of WTFs.
9 (*See* Appellants' slide presentation, slides 20-22).

11 **2. The City's (and Applicant's) Evidence**

12 In advance of the formal hearing, the City submitted the following evidence (Respondent's
13 Group Exhibit) in support of its opposition to the appeal:

- 15 • September 10, 2020 Appeal Letter to the City of Long Beach from Robert and
16 Kathy Allison (Respondent's Group Exhibit, Pages 1-3)
- 17 • Verizon's February 28, 2020 City of Long Beach Application (Respondent's
18 Group Exhibit, Pages 4-13)
- 19 • Verizon Master License Agreement (MLA) (which includes Verizon's
20 maintenance obligations) (Respondent's Group Exhibit, Pages 14-109)
- 21 • Small Cell Noise Study (Respondent's Group Exhibit, Pages 110-128)
- 22 • Coverage Map - Verizon (Respondent's Group Exhibit, Page 129)
- 23 • Structural Analysis (Respondent's Group Exhibit, Pages 130-204)
- 24 • Radio Frequency Electromagnetic Fields Exposure Analysis Letter dated June 5,
25 2020 (Respondent's Group Exhibit, Page 205)

- August 21, 2020 - Approved Application (Respondent's Group Exhibit, Pages 206-225)
- Tier B Justification (Respondent's Group Exhibit, Pages 226)
- Mailing Map (Respondent's Group Exhibit, Pages 227)
- Mailing Notice List Affidavit (Respondent's Group Exhibit, Pages 228-229)
- September 2, 2020 - Mailing Notice (Respondent's Group Exhibit, Pages 230-232)
- September 2, 2020 - Mailing Affidavit (Respondent's Group Exhibit, Page 233)
- September 2, 2020 - Certification of Posting (Respondent's Group Exhibit, Page 234)
- September 2, 2020 - Proof of Posting (Respondent's Group Exhibit, Pages 235)

Immediately prior to the hearing, the Applicant submitted via email a Radio Frequency Electromagnetic Energy Measurement and Compliance Report to supplement the City's submission package. In addition, the Applicant also conducted a presentation during the hearing that discussed the (1) increasing need for better wireless infrastructure in the City of Long Beach, (2) photo depictions of the existing light pole and proposed WTF, (3) alternative locations for the proposed WTF that were evaluated by Applicant, and (4) health and safety key facts regarding wireless RF technology.

3. Supplemental Issues and Evidence

The public hearing record for the appeal of a Tier B Wireless Right-of-Way Facility Permit shall include any written submissions from the applicant, any person submitting an appeal, or any other interested person submitted either prior to or during the hearing; and any oral testimony from any City departments, the applicant, any person submitting a protest, or any

1 interested person taken during the hearing. LBMC 15.34.030.L.4. The Hearing Officer shall
2 determine the order of proceedings and shall afford all parties a reasonable opportunity to present
3 any relevant evidence. (LBMC 2.93.050). The Hearing Officer has the discretionary authority to
4 place reasonable time limits on the right to cross-examine and the presenting of evidence.
5 (LBMC 2.93.040). Consequently, no single standard of proof governs in all types of
6 administrative hearings; the standard applicable to a particular type of hearing depends on the
7 relevant statute; and the burden of meeting this standard of proof may shift between the parties.
8

9 A typical public hearing is conducted in-person where the parties appear personally
10 before the Hearing Officer. The parties are afforded an opportunity to present and offer
11 additional relevant evidence in support of their arguments. Due to extraordinary circumstances in
12 COVID-19 era, hearings are conducted virtually. Consequently, the Hearing Officer is unable to
13 receive additional evidence in real time and in-person. Although the LBMC is silent with regard
14 to additional evidence being offered and admitted in virtual hearings, LBMC nonetheless
15 provides that all parties shall be afforded a reasonable opportunity to present any relevant
16 evidence (LBMC 2.93.050), to which the Hearing Officer has the discretionary authority to place
17 reasonable time limits on the presenting of evidence. (LBMC 2.93.040).
18
19

20 At the conclusion of Applicant's presentation during the hearing, a discussion was made
21 regarding the height on the proposed WTF from which the radio signal was to be emitted and the
22 height of the Appellants' residential structure. (*See* October 23, 2020 video recording of hearing,
23 starting at 02:06:54). Appellants contend that the proposed WTF would be placed at a height
24 where the radio signal will be emitted below the roofline of their two-story residence. Applicant
25 disputed Appellants' contention and confirmed that for the proposed WTF to function properly,
26
27
28

HEARING OFFICER'S FINDINGS AND RECOMMENDATION

1 “it has to be higher than the house.” (Id.). This factual issue remained in dispute at the conclusion
2 of the public hearing.

3 Appellants were then given until Saturday, October 24, 2020, to supplement their
4 arguments with additional evidence. On October 24, 2020, Appellants sent an email to all
5 interested parties containing two (2) video files showing that: (1) the distance from their roof line
6 to the base of their house is 26’ 4”;
7 and (2) the distance from the sidewalk to the base of their
8 house is 12” for a total distance from roof line to sidewalk being approximately 27’ 4”. However,
9 Appellants did not provide any measurements for the distance between their home and the
10 proposed WTF. The City and Applicant were given until the close of business on Tuesday,
11 October 27, 2020, to submit any additional materials in response to Appellants’ supplemental
12 submission. On October 27, 2020, Applicant sent an email to all interested parties containing
13 arguments in direct opposition to the arguments Appellants addressed during the public hearing.
14 (See Applicant’s email dated October 27, 2020). Applicant reiterated its position that: (1)
15 notwithstanding Appellants’ contention that the small cell was at the same height as, and was
16 directly pointed at, the second floor of the Appellants’ home,⁵ Applicant has nonetheless
17 complied with the City’s Public Health Compliance Standard; (2) alleged effect on Appellant’s
18 home value should not be deciding a factor; (3) Appellants’ aesthetic comments should not be a
19 deciding factor; (4) legislative pushback trends actually favor federal preemption in the areas of
20 RF emissions exposure limits and property value issues; (5) Applicant’s contract with the City
21 does not govern the issues on appeal; and (6) Applicant has concluded that proposed location for
22 the Site is still the best overall location to achieve the network’s objectives in this area. On
23
24
25
26

27 ⁵ Applicant, in its October 27, 2020 email, does not dispute the height measurements of
28 Appellants’ home provided by Appellants in their October 24, 2020 email.

October 28, 2020, on Appellants' request, Appellants were granted an additional day to submit their rebuttal argument, but limiting Appellants' response to the scope of Applicant's responses.

On October 29, 2020, Appellants submitted their closing statement by email to all interested parties. In summary, Appellants argue that (1) LBMC § 15.34 and § 21.56 work in unison, with LBMC § 21.56 mostly imposing substantive limitations on WTFs and LBMC § 15.34 mostly imposing procedural requirements; and (2) the Telecom Ordinance requires the City to deny the Application because the application, and its approval by the City, failed to comply with all of the requirements of both LBMC § 15.34 and § 21.56. The Appellants then stated eight (8) different reasons why the application and approval process were deficient, and thereby requested for the appeal to be granted and the permit be ultimately denied.

VII. DISCUSSION

1. Health Concerns

Appellants' main issue addressed on their appeal letter relates generally to "health concerns." (*See* Respondent's Gr. Ex., pp. 1-3; *See also* Appellants' Slide Presentation, slides 12-17, *See also* Appellants' Closing Statement, p.1). Appellants contend that "based upon the enormity of peer-reviewed, scientific articles and letters of appeal from scientists and doctors on the issues regarding these WTFs, we are very concerned . . . [t]his [is] an enormous risk and detrimental to our health and the health of our neighbors!" Appellants argue that the City is in non-compliance with LBMC 15.34.010.D. because the proposed WTF does not promote the ***public health and safety*** of the City's residents in that it will be in close proximity to their two-story dwelling and duration that the Appellants would be exposed to RF emissions, at least eight hours a day, seven days a week.

1 Appellants contend that the reports submitted by the Applicant fail to adequately show
2 that the proposed Facility does not exceed Public Health Compliance Standards pursuant to
3 LBMC 15.34.030.D.7.⁶ Appellants allege that the reports incorrectly assume the locations of
4 individuals who would be near the antenna, and thus fail to acknowledge that there may be
5 individuals located inside a two-story residence in close proximity⁷ of the antennas or that the
6 proposed antenna would be below the roofline of that residence. Furthermore, Appellants argue
7 that the third (3rd) report submitted by Applicant subsequent to the hearing purports to include
8 calculations of anticipated exposure on the second floor of the residence but still falls short of
9 what is required for the specific location.
10

11 Notwithstanding Appellants' assertion that the location, height, and angle of the proposed
12 WTF in relation to their residence pose a serious health detriment to them and their neighbors,
13 Appellants have failed to show that the RF emissions of the proposed WTF do not comply with
14 FCC regulations. Appellants' argument that the FCC's RF guidelines make clear that the areas
15 where exposure to emissions should be measured are those areas where "people may be located"
16 does not take into account the language in the guidelines stating that "in order for a transmitting
17 facility or operation to be *out of compliance* with the FCC's RF guidelines an area or areas
18 where levels *exceed* the MPE limits must, first of all, be in some way accessible to the public or
19 to workers. The Applicant's October 27, 2020 RF study states that the maximum calculated
20 levels for a person on the ground and second floors of the adjacent residence are 0.81% and 3.7%
21 of the applicable public exposure limit, respectively, and therefore do not exceed the MPE limits.
22
23
24

25
26 ⁶ See discussion on Paragraph 3 below regarding legal deficiency of the Application and the
27 approval process.

28 ⁷ Appellants allege that their home is within 20 feet of the antennas.

1 The City's regulatory authority in this regard is limited and preempted by federal law. 47 U.S.C.
2 § 332(c)(7)(B)(iv) ("No State or local government or instrumentality thereof may regulate the
3 placement, construction, and modification of personal wireless service facilities on the basis of
4 the environmental effects of radio frequency emissions to the extent that such facilities comply
5 with the [FCC]'s regulations concerning such emissions.) The Applicant's submission of a Radio
6 Frequency Electromagnetic Energy Measurement and Compliance Report (and a RF Study
7 submitted after the hearing) demonstrating that the emissions from the proposed WTF is within
8 general population and occupational limits established by the FCC for radio frequency emissions
9 complies with FCC regulations. [See Applicant's submission prior to hearing; *See also* Radio
10 Frequency Electromagnetic Fields Exposure Analysis Letter (Respondent's Gr. Ex., p. 205); *See*
11 *also* RF Study prepared by Hammett & Edison, Inc. subsequent to the hearing on October 27,
12 2020]. There is, therefore, no basis to deny the approved permit for the proposed WTF on the
13 basis of "health concerns."

16 **2. Property Values**

17 Appellants' next argument hinges on the negative impact of the proposed WTF to
18 "property values." (See Respondent's Gr. Ex., pp. 1-2). Aside from anecdotal evidence provided
19 by Appellants in their appeal letter and slide presentation, Appellants submitted no evidentiary
20 support on the impact of WTFs on residential property values, or more specifically, the impact of
21 the proposed WTF on the value of their residential property. Although the purpose of the
22 Telecom Ordinance, among others, is to promote property values (LBMC 15.34.010.D), the
23 subsequent provisions in the Telecom Ordinance set forth the "requirements and standards" with
24 which the City and prospective WTF permit applicants should comply in order to meet this
25 Telecom Ordinance objective. (*See* LBMC 15.34.030). Consequently, the Telecom Ordinance
26
27
28

1 does not vest in this hearing officer the authority to consider property values in determining
2 whether to deny or uphold the approved permit.

3 **3. Legal deficiency of the application and approval process**

4 Appellants also argued that the Telecom Ordinance required the City to deny the
5 Application because the application and the City's approval process failed to comply with all of
6 the requirements of the ordinance provided in LBMC 15.34 and LBMC 21.56. Appellants
7 contend that the application and approval process were legally deficient because: (1) the City
8 failed to issue a written approval of the permit detailing the reasons for the approval; (2) the
9 Applicant failed to justify in writing why it was not feasible to place the pull boxes in the most
10 preferred location; (3) the Applicant's Tier B Justification letter failed to adequately demonstrate
11 that the wireless facility would not significantly detract from the any of the defining features of
12 the residential area; (4) the Applicant made no evidentiary showing to justify placing a Wireless
13 Facility in a residential area, as required by LBMC 21.56.040.A; (5) the Applicant failed to show
14 that there were no feasible co-location sites nearby for placement of their Wireless Facility; (6)
15 the Applicant failed to provide an actual coverage map, as required if they are making any
16 arguments that placement of the Proposed Facility at the Site was necessary to provide adequate
17 coverage in the area; (7) the Applicant failed to establish that it did not own any other Wireless
18 Facilities within a 500-foot radius of the Proposed Facility; and (8) the Applicant did not submit
19 an adequate Radio Frequency Emission study, as required by the Telecom Ordinance.

20 While the hearing officer notes that Appellants' legal argument regarding the legal
21 deficiency of the Application and the corresponding approval process was only raised in their
22 reply brief that was submitted along with their closing arguments, the hearing officer will
23 nonetheless consider said argument as a matter of fairness and due process.
24
25
26
27
28

1 No single standard of proof governs in all types of administrative hearings; the standard
2 applicable to a particular type of hearing depends on the relevant statute. (Hearing Officer's
3 Handbook, pursuant to LBMC §§ 2.93.050 and 3.80.429.1) The burden of meeting this standard
4 of proof may shift between the parties. (Id.). While Appellants are correct that the Telecom
5 Ordinance is silent on which party has the burden of proof during an appeal post-approval of a
6 permit application, the California Administrative Procedures Act ("APA") provides guidance in
7 a similar scenario. In a "Statement of Issues" hearing where the agency has denied a license
8 application and the applicant is appealing the denial, the burden of proof on the applicant is
9 "preponderance of evidence." (CA Gov. Code, § 11504; See also CA Evid. Code, § 500, 115 for
10 Citation hearings.). Therefore, the burden of proof on an interested party appealing a post-
11 approval permit of a proposed WTF is by "preponderance of evidence" that the approval of the
12 permit was in non-compliance to the Telecom Ordinance.

15 Appellants acknowledge that the City and the Applicant have the unique experience in
16 these cases, as well as the superior knowledge the City and Applicant have of what materials
17 were submitted with the application and how the application was evaluated and approved (See
18 Appellant's brief, page 3). Therefore, due to the City and Applicant's experience and knowledge,
19 there is a presumption that the approval of the permit complied with all provisions of the
20 Telecom Ordinance. The burden thus remains with the Appellants to prove by preponderance of
21 the evidence that the City's approval of the permit did not comply with the Telecom Ordinance.
22 Although the Appellants urge the hearing officer, in making its determination, to only consider
23 materials that were presented to the PWD in the application process, and not to accept evidence
24 that was not presented to the PWD, fairness dictates for the hearing officer to consider all
25 relevant evidence and arguments submitted on or before the respective deadlines given all
26
27
28

HEARING OFFICER'S FINDINGS AND RECOMMENDATION

1 interested parties. Appellants' attempt at two bites at the apple by urging the hearing officer not
2 to consider materials presented on or after the hearing while presenting new legal arguments in
3 their closing arguments does not comport with due process and fairness.

4 Turning to Appellants' argument regarding the legal deficiency of the Application and
5 the approval process, the hearing officer has no basis to conclude by preponderance of the
6 evidence that the approval of the Application was granted in violation of the Telecom Ordinance.
7 This determination does not take into account whether internal work documents within the PWD
8 contain the materials that Appellants contend were not submitted as part of the appeal record.
9 With respect to Appellants' bases (1), (3), (7), and (8), the hearing officer finds that the City and
10 Applicant have provided sufficient evidence on the record that the permit was granted in
11 compliance with the Telecom Ordinance. On bases (2) and (6), Appellants' contentions require
12 further clarifications from the Applicant and/or modifications of the Application. Page 10 of the
13 Application (See Respondent's Gr. Ex., p. 13) stating that the equipment is bundled in an all-in-
14 one equipment is not consistent with Applicant's testimony on the record that the pull boxes will
15 be below grade (See video recording of hearing). In addition, the City's evidence of a
16 propagation map showing deficiencies in the existing coverage at or near the Site does not show
17 purported gaps in the coverage areas, but merely show percentage of demand within the City of
18 Long Beach. The City's coverage map is also inconsistent with the coverage map submitted by
19 Appellants as Exhibit A with their reply brief.

20 With regard to bases (4) and (5), Appellants contention that the Application failed to
21 comply with LBMC 21.56.040 is without merit. The proposed WTF in the Application is a co-
22 location facility and is therefore not bound by the provisions of LBMC 21.56.040 (Development
23
24
25
26
27
28

and design standards for new Wireless Telecommunications Facilities that are *not* co-location facilities).

4. Relocation and contract between the City and Applicant

Appellants made numerous requests for the proposed WTF to be relocated pursuant to the contract between the City and the Applicant. However, Appellants have not shown a purported breach of the contract by either party or sufficient standing thereof. Furthermore, Appellants' request is outside the scope of authority vested in the hearing officer pursuant to LBMC 15.34.030.L.5.⁸

VIII. RECOMMENDATION

Appellants are credible witnesses. This hearing officer has no reason to doubt the veracity and sincerity of Appellants' statements in either their appeal letter(s) or during the formal hearing. However, inasmuch as Appellants' concerns and grievances warrant serious consideration and notwithstanding their relevant legal arguments, Appellants have otherwise not shown by a preponderance of the evidence that the appeal be granted and the permit be denied. Both the City and Applicant (as an interested party) submitted a comprehensive package in opposition to the appeal that included the City's brief and supporting legal authorities and relevant evidence. The City's evidence included all the materials and documentation that the Applicant submitted to the City as part of the application process. After two (2) subsequent rounds of plan review and six (6) plan revisions, the City determined that the Applicant's proposed WTF met all the applicable requirements and standards set forth in the LBMC 15.34, and approved the permit application accordingly. As stated above, this

⁸ The Hearing Officer shall issue a written resolution . . . shall include a summary of the evidence and the ultimate determination whether to grant, grant with modifications, or deny the appeal.

1 hearing officer is bound by the provisions of the LBMC 15.34, and cannot look elsewhere in
2 making its determination. Accordingly, this hearing officer has found nothing on the record by
3 a preponderance of the evidence to conclude that the Applicant's permit for the proposed WTF
4 was granted in violation of LBMC 15.34.

5 Based on the foregoing, this hearing officer hereby recommends that Appellants'
6 appeal be denied and that Applicant's permit for the proposed WTF be upheld with leave to
7 modify/clarify the following:
8

- 9 1. Modify/clarify Page 10 of the Application re: Equipment Preferences
 - 10 2. Modify/clarify lack of Applicant's coverage map for the proposed WTF.
- 11

12
13 Dated this 23th day of November 2020

14 /s/ JONATHAN C. NAVARRO, ESQ.
15 Administrative Hearing Officer
16
17
18
19
20
21
22
23
24
25
26
27
28