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EXEMPT FROM FILING FEE PURSUANT TO GOVT. CODE § 6103

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SONOMA

EMF SAFETY NETWORK, et al.,

Petitioners,

vs.

CITY OF SEBASTOPOL, et al.,

Respondents.

CROWN CASTLE GT COMPANY LLC; GTE MOBILNET OF CALIFORNIA LIMITED PARTNERSHIP D/B/A VERIZON WIRELESS; and DOES 11 through 15, inclusive,

Real Parties in Interest.

Case No.: SCV 250976
(Administrative Mandamus Proceeding)

MEMORANDUM OF RESPONDENT CITY OF SEBASTOPOL IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

Judge: Honorable Elliot Lee Daum
Dept.: 16
Date Action Filed: January 11, 2012
Trial Date: December 7, 2012
Time: 9:00 a.m.

BY FAX

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INTRODUCTION

This case concerns the addition of three 8-foot panel antennas to an existing 96-foot telecommunications tower that has operated in downtown Sebastopol since 1996. (AR 1, 2, 9-10.) The tower already holds three Verizon Wireless antennas at the 92-foot level, three MetroPCS antennas installed at 85 feet, and two "whip" antennas owned by the City below the MetroPCS antennas. (AR 9-10.)

Petitioner EMF Safety Network ("EMF") claims that in approving this minor modification of a large, pre-existing tower, the City of Sebastopol (the "City") violated the California Environmental Quality Act ("CEQA") and its own zoning code. *See* Amended Petition for Writ of Mandate filed on or about February 17, 2012 (the "Petition"), ¶¶ 17-23. As discussed in the brief of Real Parties in Interest Crown Castle and Verizon Wireless filed concurrently herewith (the "Real Parties' Brief"), EMF's claims are largely if not entirely based on its concerns about the environmental impact of radio-frequency ("RF") emissions, and thus expressly preempted by federal law. The City writes separately to explain that EMF's claims fail even when considered purely as a matter of state law.

First, the CEQA claim is barred because EMF failed to exhaust its administrative remedies. Exhaustion is a *jurisdictional* prerequisite to any claim under CEQA, and is not subject to judicial discretion.[1] Among other things, the exhaustion doctrine required EMF to comply with the City's zoning code in appealing the original approval to the City Council. The code required that the written appeal identify the specific issues being appealed, and expressly limited the appeal to those issues: "Action on the appeal shall be limited to the issues raised in the appeal." Sebastopol Zoning Code § 17.320.020(B)(3) (*see* Joint Request for Judicial Notice filed concurrently herewith [the "RJN"], Exhibit A). Yet EMF's appeal to the Council made *no mention whatsoever* of CEQA, the categorical exemption, or any claim that the City erred in applying it. These omissions are fatal to any CEQA claim. In addition, EMF failed to exhaust any claim based on "cumulative

[1] *See* Public Resources Code § 21177; *Citizens for Responsible Equitable Environmental Development ["CREED"] v. City of San Diego* (2011) 196 Cal. App. 4th 515, 527 ("Exhaustion of administrative remedies is a jurisdictional prerequisite to maintenance of a CEQA action.").

impacts," "mandatory findings of significance," "hazardous materials" or the aesthetic impact of the Modifications, under CEQA or otherwise.

Quite apart from the failure to exhaust, there is no factual basis for any CEQA claim. In arguing that the addition of three small antennas to an existing 96-foot tower may have a significant environmental impact (Opening Brief ["Op. Br."] at 1:13), EMF forgets that "Common sense . . . is an important consideration at all levels of CEQA review." *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal. 4th 155, 176. The City approved both the existing tower and the later addition of MetroPCS's antennas without an EIR; it adopted a negative declaration for the construction of the tower (AR 1), and determined that adding three MetroPCS antennas was categorically exempt (AR 4, 261). Its finding that the addition of three Verizon Wireless antennas was also exempt was consistent with these prior determinations, with CEQA, and with all substantial evidence.

EMF's second cause of action alleging that the City's actions violated its own zoning code is also without merit. It is telling that EMF cannot make up its own mind about the basis of this claim. In the Petition, it was based solely upon alleged impacts on migratory birds and aesthetics in violation of the City's Telecommunication Ordinance (*see* Petition, ¶ 23). Yet EMF's brief reframes the claim entirely as a scatter-shot attack on the City's findings for approval, which EMF claims are not supported by substantial evidence. (Op. Br. at 14-15.) The Court should not countenance this "moving target" approach to EMF's claims.

In any event, both the claim EMF pled and the different one it argues in the brief rest almost exclusively on its preempted concerns about RF emissions. The only exceptions are its passing reference to visual impacts (Op. Br. at 14:18-21) and the belated claim that the approval violated the code because Verizon Wireless allegedly does not need the new antennas. The former is barred because, as discussed above, EMF failed to exhaust administrative remedies as to any claim of visual impacts. The argument that the facility is not needed is barred for the simple reason that EMF did not raise it in the Petition, and in any event has no basis because the City's code does not require proof that the modifications were necessary.

In short, none of Petitioner's claims have any merit, and the Court should deny the writ.

STATEMENT OF FACTS

The City concurs in the Statement of Facts set forth in Real Parties' Brief.

STANDARD OF REVIEW

The City concurs in the discussion in Real Parties' Brief of the applicable standard of review and the deference accorded to the City's decisions.

ARGUMENT

I. PETITIONER FAILED TO EXHAUST ADMINISTRATIVE REMEDIES FOR ANY CLAIM UNDER CEQA OR ANY CLAIM OF AESTHETIC IMPACT.

A. The Exhaustion Standard Under CEQA Required EMF to Present the Specific Alleged Grounds for Noncompliance With CEQA to the City.

CEQA expressly requires the exhaustion of administrative remedies. *See* Pub. Res. Code § 21177. This is a *jurisdictional* prerequisite to judicial review under CEQA. *See e.g., CREED, supra,* 196 Cal. App. 4th at 527 ("Exhaustion of administrative remedies is a jurisdictional prerequisite to maintenance of a CEQA action."); *Tahoe Vista Concerned Citizens v. County of Placer* (2000) 81 Cal. App. 4th 577, 589 ("exhaustion is a jurisdictional prerequisite, not a matter of judicial discretion").

The exhaustion requirement has two aspects. First, a person filing a CEQA lawsuit must have objected to the project at the administrative level, the so-called "objection" requirement. *See* Pub. Res. Code § 21177(b) ("A person shall not maintain an action or proceeding unless that person objected to the approval of the project orally or in writing during the public comment period provided by this division or prior to the close of the public hearing on the project . . . .")

Second – and more relevant here – the specific alleged *grounds* for noncompliance with CEQA must have been presented to the lead agency during the administrative process. This is referred to as the "issue exhaustion" requirement. *See* Pub. Res. Code § 21177(a) (CEQA action "shall not be brought . . . *unless the alleged grounds for noncompliance with this division* were presented to the public agency orally or in writing by any person during the public comment period provided by this division or prior to the close of the public hearing on the project before the

issuance of the notice of determination.") (emphasis added).

With respect to the issue exhaustion requirement, generalized comments about the potential environmental affects of a project do *not* satisfy the CEQA exhaustion standard. "The essence of the exhaustion requirement is the public agency's opportunity to receive and respond to *articulated factual issues and legal theories* before its actions are subjected to judicial review." *Coalition for Student Action v. City of Fullerton* (1984) 153 Cal. App. 3d 1194, 1197-1198 (emphasis added). Thus, "bland and general references to environmental matters" do not satisfy the exhaustion requirement. *Id.,* at 1197.

Rather, "'[t]o advance the exhaustion doctrine's purpose "[t]he *'exact issue'* must have been presented to the administrative agency . . . ." *CREED, supra,* 196 Cal. App. 4th at 527 (citations omitted) (emphasis added). In other words, to exhaust a CEQA claim, the public agency must have been notified of the *specific* alleged grounds of *noncompliance with CEQA* and presented with the opportunity to respond. *Coalition for Student Action, supra,* 153 Cal. App. 3d at 1198; *CREED, supra,* 196 Cal. App. 4th at 527; *see also* Pub. Res. Code § 21177(a).

This rule was summarized in *Sierra Club v. City of Orange* (2008) 163 Cal. App. 4th 523, 535, as follows:

> To advance the exhaustion doctrine's purpose "***[t]he 'exact issue' must have been presented to the administrative agency*** . . . ." . . . While "'less specificity is required to preserve an issue for appeal in an administrative proceeding than in a judicial proceeding' because, . . . parties in such proceedings generally are not represented by counsel . . .' [citation]" . . . ***"generalized environmental comments at public hearings," "relatively . . . bland and general references to environmental matters" . . . , or "isolated and unelaborated comment[s]" . . . will not suffice.*** The same is true for "'[g]eneral objections to project approval [Citations.]" . . . "'***[T]he objections must be sufficiently specific so that the agency has the opportunity to evaluate and respond to them.***' [Citation]."

Sierra Club, supra, 163 Cal. App. 4th at 535-536 (citations omitted) (emphasis added).

Applying this standard, the court in *Coalition for Student Action, supra,* held that an organization had not exhausted administrative remedies because it failed to object *specifically* to the issuance of a Negative Declaration for the challenged project. In that case, the petitioner alleged that the City of Fullerton had violated CEQA by issuing a Negative Declaration rather than

preparing a full environmental impact report (EIR) for a hotel project. *Coalition for Student Action,* 153 Cal. App. 3d at 1196. In the administrative proceedings, however, the petitioners had never specifically objected to the issuance of the Negative Declaration. *Id*., at 1197. The Court of Appeal affirmed dismissal of the CEQA claim:

> The essence of the exhaustion doctrine is the public agency's opportunity to receive and respond to articulated factual issues and legal theories before its actions are subjected to judicial review. The doctrine was not satisfied here by a relatively few bland and general references to environmental matters. The city was entitled to consider any objection to proceeding by Negative Declaration in the first instance, if there was one. ***Mere objections to the project, as opposed to the procedure, are not sufficient to alert an agency to an objection based on CEQA.*** Petitioners, having failed to raise their CEQA claims at the administrative level, cannot air them for the first time in the courts.

Id., at 1198 (emphasis added).

Similarly, in the recent case *CREED, supra,* the petitioner alleged the City of San Diego had not followed statutory procedures in adopting a water supply assessment, as required by CEQA. In affirming the trial court's dismissal of the petition, the Court of Appeal found a failure to exhaust administrative remedies under CEQA:

> To satisfy the exhaustion doctrine, an issue must be "fairly presented" to the agency. . . . ***Evidence must be presented in a manner that gives the agency the opportunity to respond with countervailing evidence.*** . . . It was never contemplated that a party to an administrative hearing should... make only a perfunctory or 'skeleton' showing in the hearing and thereafter obtain an unlimited trial de novo, on expanded issues, in the reviewing court.

Id., at 528 (citations and internal quotations omitted) (emphasis added). *See also Banker's Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal. App. 4th 249, 280 (an "isolated and unelaborated comment by a member of the public" about "project splitting" was insufficient to exhaust a claim of "piecemealing" in violation CEQA).

B. Exhaustion Also Required EMF to Comply With the City's Appeal Procedures by Specifically Identifying any Alleged CEQA Violations in its Appeal to the City Council.

Exhaustion also requires a party to present the alleged CEQA violation to the administrative body with final decision-making authority before raising it in court, and

"[c]onsideration of whether such exhaustion has occurred in a given case will depend upon the procedures applicable to the public agency in question." *Tahoe Vista, supra,* 81 Cal. App. 4th at 591 (citation omitted). Thus, for example, if the local code requires that an appeal *specify* the issues presented, exhaustion will not occur *unless the CEQA issues are specifically made part of the appeal*. *Id.,* 81 Cal. App. 4th at 592.

In *Tahoe Vista,* the petitioners alleged that Placer County violated CEQA in issuing a Negative Declaration and CUP for the redevelopment of a resort property. Although the petitioners had objected to issuance of the Negative Declaration during the Planning Commission's review, their appeal to the Board of Supervisors stated the reason for the appeal as "not enough parking," and made no mention of the Negative Declaration or any CEQA issue. *Id.,* at 582. In holding that the petitioners had failed to exhaust a CEQA claim, the court relied on the Placer County Code's requirement that an appellant *specify* the issues presented in any appeal of a planning decision, and that an appeal be limited to those issues: "These procedures thus provided plaintiffs with an appeal from the Planning Commission's decision, but required plaintiffs to specify the particular subject or grounds of the appeal." *Id.,* at 592. Because the appeal to the Board of Supervisors (the lead agency) had not mentioned the Negative Declaration or any other issue under CEQA, the court held that there had been no exhaustion of administrative remedies. *Id.,* at 592-594.

Just like the local code in *Tahoe Vista*, the City of Sebastopol's appeal procedures required that EMF identify the specific issues being appealed in its written appeal to the City Council, and expressly limited the appeal to those issues:

> The appeal shall state specifically wherein it is claimed there was an error or abuse of discretion by the Planning Commission or Design Review Board, as the case may be, or wherein their decision is not supported by the evidence in the record. The appeal shall be accompanied by such information as may be required to facilitate review. *Action on the appeal shall be limited to the issues raised in the appeal*.

Sebastopol Zoning Code § 17.320.020(B)(3) (RJN, Exh. A) (emphasis added). Thus, EMF was required to identify the *specific grounds for non-compliance with CEQA* in its appeal in order to exhaust a CEQA claim.

C. EMF Failed to Appeal the CEQA Exemption to the City Council.

When the governing principles summarized above are applied to this case, it is clear that EMF cannot establish exhaustion of administrative remedies as to any CEQA claim. In its appeal to the Council, filed on September 21, 2011, EMF failed to make *any mention whatsoever* of CEQA, the categorical exemption, or any claim that the City erred in applying it. (AR 295-316.)

Although the appeal included vague and unsubstantiated arguments about the alleged environmental impacts of the Modification, primarily related to RF emissions,[2] courts have repeatedly held that these types of generalized comments about potential environmental affects are insufficient for exhaustion purposes. *See Coalition for Student Action, supra,* 153 Cal. App. 3d at 1197 ("bland and general references to environmental matters" do not satisfy the exhaustion requirement); *CREED, supra,* 196 Cal. App. 4th at 527 (the "exact issue" must be presented); *Resource Defense Fund v. Local Agency Formation Com. (1987) 191 Cal. App. 3d 886, 894* ("the exact issue raised in the lawsuit must have been presented to the administrative agency"), *overruled on other grounds, Voices of the Wetlands v. State Water Resources Control Board* (2011) 52 Cal. 4th 499.

Further, as noted above, the City's Zoning Ordinance expressly provides that an appeal must "state specifically wherein it is claimed there was an error or abuse of discretion by the Planning Commission," and that "[a]ction on the appeal shall be limited to the issues raised in the appeal." Sebastopol Zoning Code § 17.320.020(B)(3) (RJN, Exh. A). Because it is the "procedures applicable to the public agency in question" that determine whether exhaustion has occurred, *see Tahoe Vista,* 81 Cal. App. 4th at 591, and because EMF's appeal did not "state specifically" (or otherwise) any issue under CEQA, there were no CEQA issues presented to the Council, and thus no exhaustion of administrative remedies.

[2] In addition, the appeal alleged that Verizon Wireless does not need to upgrade its network (AR 298), that the information on RF emissions and the number of antennas was incomplete (AR 296-97), and that the existing tower "visually dominates the downtown core" (AR 299).

D. EMF's Last-minute Correspondence to the Council Did Not Expand the Scope of its Appeal to Include CEQA Issues.

EMF apparently seeks to overcome its failure to exhaust by reference to its counsel's letter dated December 5, 2011, alleging various CEQA violations, which EMF rehashed at the hearing. (AR 416-419, 177-78; *see also* Op. Br. at 8, n. 6.) However, neither the letter nor references to it at the hearing overcome the failure to exhaust, because the City's code provides that the scope of the hearing is determined by the specific issues set forth *in the appeal itself*. Any attempt to rely on the belated attorney's letter or statements at the hearing for exhaustion purposes simply underscores the wisdom behind the City's requirement that appellants identify the issues when the appeal is filed. The letter was submitted by email after 4:00 p.m. on December 5, 2011 (AR 415-419), the day before the Council hearing, and several days *after* the detailed staff report was prepared by the Planning Department to advise the Council about the issues raised in the appeal. (AR 62-139, 390.) The letter obviously came too late to provide the City (or any other interested party) with a meaningful opportunity to respond to any new issues raised.

E. Discussion of CEQA Issues by Other Parties Cannot Overcome Petitioner's Failure to Exhaust its CEQA Claim.

In the opening brief, EMF also claims that it satisfied the exhaustion requirement because the Mayor, City Staff, and Crown Castle's attorney discussed CEQA issues at the hearing. (Op. Br. at 8, n. 6.) This is completely beside the point, because it is the *issues raised by Petitioner* that matter for exhaustion purposes. The court in *Tahoe Vista, supra,* rejected an argument very similar to that advanced by EMF here, holding that county staff's reference to a negative declaration in a meeting agenda and staff report did not excuse the failure to exhaust CEQA issues: "it is the grounds as stated by plaintiffs, not the title given by County staff, that define the scope and nature of the administrative appeal. *What staff called the appeal is irrelevant*." *Tahoe Vista, supra,* at 593 (emphasis added). The same logic applies here. The CEQA claim is barred because EMF failed to raise any CEQA issues in its appeal.

F. EMF Has Not Exhausted Any Claim Regarding "Hazardous Materials," Mandatory Findings of Significance, Cumulative Impacts, or Aesthetic Impacts of the Modification.

In its Opening Brief, EMF seeks to buttress its CEQA claim by vague references to unspecified "hazards and hazardous materials," "cumulative impacts," and "mandatory findings of significance," and its discussion of both of its causes of action includes vague claims of unidentified aesthetic impacts. (Op. Br. at 13:11-17, 14:18-21.) Even if EMF had exhausted some type of CEQA claim in general, it has not exhausted any claim regarding "hazardous materials," "mandatory findings of significance," or "cumulative impacts," nor has it exhausted any claim – CEQA or otherwise – based on the alleged aesthetic impact of the Modification.

While the record includes repeated references to the alleged "hazards" of RF emissions (which, as noted above, is a subject preempted by federal law), EMF made no claims whatsoever at the administrative level regarding hazardous *materials*. Nowhere in the written appeal, EMF's subsequent correspondence, or in the hearing testimony is there any mention of "hazardous materials." The same is true of "mandatory findings of significance" and "cumulative impacts."[3] Consequently, all of these issues are barred for failure to exhaust administrative remedies.

Similarly, EMF's reliance on unspecified aesthetic impacts is barred because it never alleged, at any time during the City's review, that the Modification would have any such impact. Although EMF's appeal included a single, passing reference to aesthetic impacts of the *Existing Facility*,[4] it never alleged that *the new antennas* would have any visual or aesthetic impact (AR 72-77). As noted above, failure to raise the issue in the appeal is controlling for exhaustion purposes under the City's code.[5] Even so, it is telling that there was *not one mention* of aesthetics or visual

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[3] While the record contains a few references to EMF's concern about "cumulative RF exposures" (e.g., AR 74), which is preempted by federal law as discussed above, EMF never raised any concern about cumulative impacts of any other kind at the administrative level. In addition, EMF did not even plead any "cumulative impact" issue in the Petition, which precludes it from litigating the issue quite apart from any failure to exhaust.

[4] *See* AR 76 ("The cell tower visually dominates the downtown core," and "is already an eyesore").

[5] In the Petition and the Opening Brief, EMF seeks to raise aesthetic concerns in support of both its CEQA claim and its second, non-CEQA cause of action. (Pet. at ¶¶ 20, 23, Op. Br. at 13:11-17, 14:18-21.) This second cause of action is subject to similar exhaustion requirements as those which apply under CEQA. In land use litigation, "the issues raised shall be limited to those raised in the public hearing or in written correspondence delivered to the public

impact in EMF's extensive post-appeal correspondence or its testimony at the Council hearing, which focused almost exclusively on EMF's actual – and preempted –concern: the alleged dangers of RF emissions. (AR 176:19-189:23, 203:14-205:6, 207:9-223:21, 225:9-232:4, 234:11-20, 236:25-237:10, 238:11-15, 244:18-245:7, 317-19, 341, 352, 370-80, 390-96, 408, 425.)

In sum, EMF failed to exhaust any claim under CEQA, or any claim based on allegations of "hazardous materials," "mandatory findings of significance," "cumulative impacts," or the visual impact of the Modification. Because exhaustion is jurisdictional, all such claims are barred.

II. THE CITY PROPERLY APPLIED THE CATEGORICAL EXEMPTION.

Even if EMF had exhausted administrative remedies, its CEQA claim would still fail because the City's determination that the Class 1 exemption applies was well supported by substantial evidence. In contrast, EMF's argument that the exemption does not apply rests on nothing more than unsupported allegations, but no actual *evidence*.

A. The City's Determination that the Modifications Fit the Exemption was Amply Supported by Substantial Evidence.

As EMF concedes, "whether a project actually fits within an exempt category is determined by the substantial evidence standard of review." (Op. Br. at 6:14-6:15.) As discussed in Real Parties' Brief, this is a highly deferential standard, under which "the trial court may only overturn the agency's decision if, based on the evidence before it, a reasonable person could not have reached the same conclusion." *Wollmer v. City of Berkeley* (2011) 193 Cal. App. 4th 1329, 1338-39.

Here, the City's exemption determination had ample support in both the plain language of the exemption itself and in substantial evidence in the record. The Class 1 exemption applies to the "minor alteration of existing public or private structures, facilities, [or] mechanical equipment," Guidelines § 15301, which is an accurate description of the proposed Modification of the Existing Facility. The Guideline includes a non-exhaustive list of examples of the types of activities covered under the Class 1 exemption, which includes additions to existing structures up to 50% of

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agency prior to, or at, the public hearing." Govt. Code § 65009(b)(1). In addition, as discussed above, the City's code required EMF to present such issues to the City in order to preserve them for litigation.

floor area or – in certain circumstances – 10,000 square feet. Guidelines § 15301(b) and (e). The proposed addition of three antennas at issue here is far smaller than these examples permitted under the Guideline, so its plain language fully supports the City's use of the Class 1 exemption in this case.

The City's exemption determination was also supported by substantial evidence in the record. In its notice of exemption, the City gave several reasons for its conclusion that the exemption applied, including the project's location in a "downtown, urban area" that is not a wetland, wildlife habitat, or otherwise environmentally sensitive; the existing use as a "major telecommunications facility, including a 96-foot tall monopole with multiple antennas on it," the minor nature of the modifications (adding three antennas to a large existing tower), its compliance with the City's telecommunications ordinance and FCC standards, and its minor visual impact. (AR 2.) The Planning Commission staff report, the Commission's resolution of approval, and the City Council staff report cited very similar reasons for the City's exemption determination. (AR 10, 12, 63-64, 69, 148, 292-294.)

Furthermore, those reasons were supported by substantial evidence in the record. This included the approved plans for the project (AR 435-38), the photo-simulations demonstrating its minor visual impact (AR 22-23), and reports of two separate independent engineers confirming that the facility will continue to operate well below the FCC's RF emissions limits after the Modification. (AR 263-86, 428-34.)

B. No Substantial Evidence Supports EMF's Argument Against the Exemption.

Against this substantial body of evidence, EMF's argument that the exemption does not apply consists of nothing more than preempted RF concerns, unsubstantiated opinion, and speculation. As discussed in Real Parties' Brief, EMF's claim that the project does not meet the terms of the exemption rests entirely on the increased RF emissions, changes in frequencies used, and new wireless services associated with the project, all of which are preempted by federal law.

EMF's fallback argument is that even if the exemption would otherwise apply, it falls under the exception for activities that may "have a significant effect on the environment due to

unusual circumstances." Guidelines § 15300.2(c). (Op. Br. at 11-13.) EMF stresses that the threshold for applying this exception (and thus making the categorical exemption inapplicable) is very low, requiring only a "fair argument" that a significant environmental impact may exist. (Op. Br. at 6:27-7:9.) Even under this liberal standard, however, it is still *EMF's burden* to "bring forth substantial evidence that the project has the potential for a substantial adverse environmental impact." *Wollmer, supra,* 193 Cal. App. 4th at 1350. This EMF has not done.

Remarkably, in arguing that the exception applies, EMF claims the requisite "unusual circumstances" consist in *both* its "proximity to the Laguna, an internationally recognized wetlands, *and* its location in a crowded urban area." (Op. Br. at 11:24-26 [emphasis added].) This is nonsense. By EMF's own estimate, the Laguna is approximately a *half-mile away* from the Existing Facility (AR 187:3-5, 208:2-6), and there is no evidence to suggest that the facility would have any impact at that distance. Similarly, EMF offers no evidence at all to suggest that the addition of three antennas, 92 feet above street level, to an existing 96-foot tower would have any significant environmental impact on a "crowded urban area." Its only purported support is the bare allegation that the urban location will lead to "negative aesthetic impacts" (Op. Br. at 11:26-28), which claim is barred for failure to exhaust, as discussed above.[6]

In the end, EMF's CEQA argument comes down to nothing more than the unsupported *opinions* of EMF and its attorney. Indeed, EMF conceded as much at the hearing: "the main evidence that we have right now is a letter from our lawyer, Rose Zoia, who is talking about the exemption, the CEQA exemption." (AR 177:3-5.) In *Wollmer, supra,* the court rejected a similar argument, upholding a categorical exemption despite claims that the project's location was an unusual circumstance and the exemption was based on flawed technical studies:

> Wollmer's hostility to the decision of the City and its experts to use a reduction factor is nothing more than argument and unsubstantiated opinion. What is lacking are the

[6] EMF also alleges that the project was not exempt due to alleged cumulative impacts and mandatory findings of significance. As already discussed, neither claim was exhausted, and in any event EMF offers no substantial evidence in support of either claim. The *bare allegation* that there are unspecified cumulative impacts due to the alleged presence of other cell towers at other unspecified locations in Sebastopol (Op. Br. at 13:22-24) does not constitute substantial evidence, and EMF provides even less support for its vague claim of "mandatory findings of significance." (*Id*. at 13:2-11.)

> facts, reasonable assumptions predicated on the facts, and expert opinion supported by the facts. (Pub. Resources Code, § 21082.2, subd. (c).)

Wollmer, 193 Cal. App. 4th at 1352. The same is true of EMF's claim here.

III. THE DECISION WAS SUPPORTED BY SUBSTANTIAL EVIDENCE AND COMPLIED WITH THE ZONING CODE.

EMF's second cause of action is a moving target. In the Petition, it claimed simply that the City's approval violated the Telecommunications Ordinance (the "Ordinance") because "the project is proposed to be sited such that its presence threatens the health and safety of migratory birds and/or in a way that creates negative visual impacts." (Pet., ¶ 23.) In its brief, rather than support this claim with any evidence, EMF simply reframed the issue as a claim that several of the City's findings were not supported by substantial evidence. (Op. Br. at 14-15.) In the first place, the Court should not consider this alternate version of EMF's claim to the extent it was not set forth in the Petition itself.

In any event, both versions of the claim rest largely on EMF's primary concern about RF emissions, and are preempted to that extent. EMF has consistently tied its claim of impacts on migratory birds exclusively to RF emissions, and its attack on the City's findings that the project will not be detrimental and that it constitutes a minor alteration rest entirely on the same concern. (*See* Op. Br. at 14:8-21.)

The only other purported grounds for the second cause of action (either as pled or as argued in the brief) are the vague allegations of visual impacts (Pet., ¶ 23, Op. Br., 14:18-21) and the new claim that the approval violated the "Purpose statement" of the Ordinance because EMF and one Council member felt that Verizon Wireless did not need to modify the facility. (Op. Br. at 14:21-15:18.) Neither claim has any basis.

As discussed above, any claim regarding the aesthetic impact of the new antennas is barred for the simple reason that EMF never presented any such claim to the City. In addition, the City's finding of minimal visual impact was supported by the photo-simulations and other substantial evidence in the record (AR 22-23, 435-38), while EMF can point to no contrary evidence.

Finally, EMF's claim that Verizon Wireless does not need the facility was not pled in the Petition, and should be rejected for that reason alone. *See, e.g., Lein v. Parkin* (1957) 49 Cal. 2d 397 (reversing defense judgment based on assumption of risk because no such defense was raised by the pleadings). In addition, it rests on a mis-reading of the Ordinance, which did not require that Crown Castle or Verizon Wireless demonstrate that the modifications were necessary. EMF's argument rests entirely on a single word in the *statement of purpose* in the Ordinance. (Op. Br. at 14:21-28.) As both its wording and its placement under the heading "Purpose/Applicability" make clear, this section sets forth the *broad intent* of the City's wireless regulations, but does not impose any actual development standards.

In any event, even if the applicants had been required to demonstrate need for the modification, they did so. Crown Castle presented evidence that the antennas would enable Verizon Wireless to provide new, 4th-generation LTE services that will enhance wireless data service for the growing number of subscribers who use their smart phones, tablets, and other mobile devices for wireless internet access. (AR 96, 105, 162, 329.) EMF's argument to the contrary rests on nothing more than its lay *opinion* that Sebastopol "already has adequate wireless coverage" (AR 75), which was echoed by a single member of the City Council. (Op. Br. at 15:6-15; AR 241:20-242:11.) That Council member was obviously motivated by the same fear of RF emissions as EMF itself (AR 239:21-240:7), and neither she nor EMF referred to any actual *evidence* to support their opinions. Under these circumstances, the City's decision must be upheld.

CONCLUSION

The claims of petitioner EMF Safety Network are based largely if not entirely on its overriding concern with the alleged environmental impacts of RF emissions, and are preempted by federal law to that extent. Even judged purely on state-law grounds, however, its claims have no merit. Its core CEQA claim was not exhausted, and none of its claims have any factual or legal basis. The Court should deny the writ.

DATED: August 22, 2012

SEBASTOPOL CITY ATTORNEY'S OFFICE

By:_____
Lawrence W. McLaughlin

Attorneys for Respondent City of Sebastopol

PROOF OF SERVICE

I, James A. Heard, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the within entitled action. My business address is 220 Sansome Street, 14th Floor, San Francisco, California 94104.

On August 23, 2012, I served the foregoing: **MEMORANDUM OF RESPONDENT CITY OF SEBASTOPOL IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS**

on the interested parties in said action, by placing a true copy thereof in sealed envelope(s) addressed as follows: **SEE ATTACHED SERVICE LIST**

and served the named document in the manner indicated below:

☐ **BY MAIL**: I caused true and correct copies of the above document(s) to be served by mail on the above date by personally placing and sealing said document(s) in an envelope or package suitable for mailing, addressed to the addressee(s) and including this firm's return address, and then, following ordinary office practice, placing said sealed envelope in the office's usual location for collection and mailing with the United States Postal Service.

☐ **BY NEXT-DAY OVERNIGHT SERVICE**: I caused true and correct copies of the above document(s) to be placed within a sealed envelope or other package suitable for overnight shipment, addressed to the addressee(s) and including this firm's return address, and delivered on the date stated above to an overnight delivery service for delivery to the addressee(s) on the following business day.

☐ **BY HAND DELIVERY**: I caused true and correct copies of the above document(s) to be placed within a sealed envelope or other package suitable for handling by a messenger or courier service and then caused the package to be hand-delivered by a same-day messenger service to the addressee(s) on this date.

☐ **BY FACSIMILE**: I caused true and correct copies of the above document(s) to be sent via facsimile to the addressee(s) on this date. The facsimile machine used complies with California Rule of Court 2003(3) and no error was reported by the sending facsimile machine. The transmission record for this facsimile complies with California Rule of Court 2003(6).

☒ **BY EMAIL**: I caused true and correct copies of the above document(s) to be sent via email to the addressee(s) on this date.

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

Executed August 23, 2012, at San Francisco, California.

Jim Heard

James A. Heard

SERVICE LIST
EMF Safety Network v. City of Sebastopol, et al.
(Sonoma County Superior Court Case No. SCV 250976)

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