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FILED
Superior Court of California
County of Los Angeles
NOV 12 2013
Sherri R. Carter, Executive Officer/Clerk
By _____ Deputy
Steve Wong

Crown Castle USA, Inc., et al v. City of Calabasas, et al.
BS 140933

Modified
Tentative decision on petition for writ of mandate: granted in part

Petitioners Crown Castle USA, Inc. ("Crown Castle") and Crown Castle NG West, Inc. ("Crown Castle NG West") (collectively, "Crown") seek a writ of traditional mandamus directing Respondents City of Calabasas and the City Council of the City of Calabasas (collectively, "City") to set aside an ordinance which purports to vest the City with the power to require Petitioners to obtain a wireless facilities permit. The court has read and considered the moving papers, opposition, and reply, and renders the following tentative decision.

A. Statement of the Case

Petitioners commenced this proceeding on December 20, 2012, alleging in the Petition/Complaint ("Petition") claims for declaratory relief and traditional mandamus.[1]

The Petition alleges in pertinent part as follows. The Legislature enacted Public Utilities Code ("PUC") section 7901 and its predecessor statute, former Civil Code section 536, to confer on telephone corporations a special statewide franchise to "erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines" in the public rights-of-way without having to proceed through the morass of discretionary planning and zoning processes imposed by local government. The statewide franchise right conferred by PUC section 7901 is a vested right.

Petitioner Crown Castle NG West is a "telephone corporation," as defined by the PUC. The Public Utilities Commission ("PUC" or "Commission") has conferred on Crown Castle NG West a "certificate of public convenience and necessity" or "CPCN," which certifies Crown Castle NG West as a "competitive local exchange carrier" and a public utility under the constitutionally granted regulatory authority of the Commission. Because Crown Castle NG West is a telephone corporation, a public utility and a CLEC, it qualifies as a beneficiary of the PUC section 7901 statewide franchise right.

Crown Castle is a Pennsylvania corporation that owns, operates and constructs wireless telecommunications towers and facilities.

On or about August 22, 2012, the City adopted Ordinance "2012-302," otherwise entitled "An Ordinance of the City Council of Calabasas, California, Amending Section 17.12.050 of the Calabasas Municipal Code" (the "Ordinance"). The Ordinance, by its own terms, took effect 30 days after its adoption on August 22, 2012.

Crown owns and operates telephone facilities -- specifically, a distributed antenna system, with associated fiber optic cables, antenna nodes, fiber repeaters and other facilities — within the public right-of-way of the City. Crown's facilities currently are subject to City-issued permits which will expire in or around 2014. After expiration, the facilities have the potential to be subject to the Ordinance.

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[1]The Petition purports to include "causes of action" for "state preemption" and "federal preemption" along with declaratory relief and traditional mandamus. The first two are not causes of action, but rather the legal theories pursuant to which Petitioners seek relief. There are only two causes of action in the Petition: declaratory relief and traditional mandamus.

The Ordinance purports to vest the City with the full panoply of zoning and land use powers applicable to ordinary land use projects, including the power to require Crown to obtain a "wireless facilities permit" ("Permit"), which is the functional and legal equivalent of a conditional use permit ("CUP"). Like a CUP, issuance of a Permit is fully discretionary; and is subject to conditions of approval and public hearings. Because it is discretionary, the City has ultimate authority to deny a Permit application.

The Ordinance: (a) unlawfully assumes that a telephone corporation is not already in possession of a vested right to enter the public right-of-way free of municipal interference; (b) purports to confer what a telephone corporation, such as Crown, already possesses by virtue of a superior legislative grant; and (c) purports to interpose land use and zoning powers on telephone corporations such as Crown where such powers were never ceded to the local government.

These requirements: (a) exceed the City's carefully circumscribed time, place and manner controls, in violation of PUC section 7901; (b) impose discriminatory requirements on companies such as Crown in the public right-of-way in violation of PUC section 7901.1; and (c) collide with the well settled principle that the Federal Communications Commission ("FCC") has sole and exclusive and preemptive jurisdiction on matters of RF emissions.

In 2012, Congress enacted the Middle Class Tax Relief and Job Creation Act of 2012 (the "Tax Relief Act"). Section 6409 of the Tax Relief Act requires that local governments "may not deny and shall approve" collocations to -- and modifications of -- wireless towers and base stations that do not substantially change the physical dimensions of the wireless tower and/or base station. 47 U.S.C. §1455. The Tax Relief Act evidences a congressional intent to preclude discretionary approval authority for modification requests. The Ordinance contains no exception for modification requests, and subjects such requests to the same discretionary authority as other applications, in direct conflict with the Act.

Petitioners seek a declaration that the Ordinance is void *ab initio* as preempted by state and federal law, and writ relief directing the City to set aside and rescind the Ordinance.

B. Standard of Review

1. Mandamus

"A writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded by such inferior tribunal, corporation, board, or person." CCP §1085(a).

A traditional writ of mandate under CCP section 1085 is the method of compelling the performance of a legal, ministerial duty. Pomona Police Officers' Assn. v. City of Pomona, (1997) 58 Cal.App.4th 578, 583-84. Generally, mandamus will lie when (1) there is no plain, speedy, and adequate alternative remedy, (2) the respondent has a duty to perform, and (3) the petitioner has a clear and beneficial right to performance." Id. at 584 (internal citations omitted). Whether a statute imposes a ministerial duty for which mandamus is available, or a mere obligation to perform a discretionary function, is a question of statutory interpretation. AIDS Healthcare Foundation v. Los Angeles County Dept. of Public Health, (2011) 197 Cal.App.4th 693, 701.

No administrative record is required for traditional mandamus to compel performance of a ministerial duty or as an abuse of discretion.

2. Facial Challenge to a Statute

Because it addresses pure issues of law, a facial challenge to a municipal ordinance calls for a court's independent *de novo* review; there is no deference given to the local government that enacted the ordinance. *See, e.g.*, City of Watsonville v. State Dept. of Health Services, (2005) 133 Cal.App.4th 875, 882.

The standard for evaluating a facial challenge to a statute or ordinance "considers only the text of the measure itself, not its application to the particular circumstances of an individual." Sturgeon v. Bratton, (2009) 174 Cal.App.4th 1407, 1418. The petitioner cannot prevail by suggesting that in some future hypothetical situation problems may possibly arise as to the particular application of the statute. Rather, he or she must demonstrate that the law's provisions inevitably pose a present total and fatal conflict with applicable constitutional provisions (or other law). Tobe v. City of Santa Ana, (1995) 9 Cal.4th 1069, 1084. Under a facial challenge, the fact that the statute or ordinance "might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid...." Sanchez v. City of Modesto, (2006) 145 Cal.App.4th 660, 679. A facial challenge is the most difficult to successfully mount because the petitioner must show that "no set of circumstances exist" under which the law would be valid. American Civil Rights Foundation v. Berkeley Unified School District, (2009) 172 Cal.App.4th 207, 216.

C. Requests for Judicial Notice

Petitioners request the court to judicially notice: (1) Analysis of SB 621, California Senate Rules Committee, Office of Senate Floor Analyses (1994-95 Regular Session); (2) Senate Committee on Energy, Utilities and Communications, Analysis of SB 621; (3) Governor's Office of Planning and Research, Enrolled Bill Report on SB 621 (1995-1996 Regular Session); (4) Wireless Facilities Ordinance of the City of Manhattan Beach, CA; (5) Wireless Facilities Ordinance of the City of Rancho Palos Verdes, CA; and (6) Calabasas Municipal Code Chapter 17.02, Land Use Permit Requirements. The legislative history (Exs. A-C) is subject to judicial notice and the request is granted. Ev. Code §452(b). The ordinances of other cities (Exs. D-F), while generally subject to judicial notice, must also be relevant. They are not, and the request is denied.

In a supplemental filing, Petitioners also request the court to judicially notice a PUC Opinion Granting Request for Expanded Authority and Expedited Environmental Review and Ordering Further Enforcement Proceedings. The request is granted. Ev. Code §452(b).

The City requests the court to judicially notice: (1) City of Calabasas Municipal Code Section ("CMC") 17.12.050; (2) City of Calabasas Communications and Technology Commission Agenda Report, dated April 9, 2013; (3) City of Calabasas Community Development Department Notice of Decision and Approval, dated October 17, 2012; (4) City of Calabasas City Council Agenda Report, dated June 27, 2013; and (5) City of Calabasas Resolution No. 2013-1377, dated June 26, 2013. The City's request is granted as to Exhibit A. Ev. Code §452(b). Petitioners' objections to Exhibits B-D are sustained; these exhibits are

irrelevant to a facial challenge.

D. The Ordinance

On June 8, 2011, the City adopted Ordinance 2011-286U, which placed a moratorium on construction of wireless facilities in the City. The City adopted the moratorium to allow it "sufficient time to consider a comprehensive ordinance lawfully regulating the installation, augmentation, and relocation of Wireless Facilities in the City." Stipulated Compendium of Exhibits ("SCOE"), Ex. 1.

On June 27, 2012, the City adopted Ordinance 2012-295, which added all but section 17.12.050.A.6 of the Ordinance to the CMC. Ordinance 2012-295 took effect on July 27, 2012. SCOE, Ex. 4.

On August 22, 2012, the City adopted Ordinance 2012-302 (the "Ordinance"). By its own terms, the Ordinance took effect 30 days after its adoption, on September 21, 2012. The Ordinance re-adopted Ordinance 2012-295 in its entirety, and additionally added section 17.12.050.A.6 to the CMC. SCOE, Exs. 5, 6.

Crown submitted written comments on both Ordinance 2012-295 and the Ordinance on or before August 22, 2012. Representatives of Crown also appeared before the City of Calabasas City Council to present their comments on those ordinances on or before August 22, 2012.

The Ordinance declares the City's intent to regulate all uses of wireless communications in the City, including uses within the public rights of way, but only to the extent of the City's powers under applicable federal and state law.

The Ordinance establishes a process by which the City evaluates applications for a Permit, allowing new wireless facilities and modifications to existing facilities where the proposed facilities comply with applicable federal, state, and City requirements.

A Permit is required to install a new wireless telecommunications facility, or to expand or modify an existing facility. A Permit is also required to activate one or more new bands of cellular service which use a different connection standard. CMC §17.12.050.C.1.

The Ordinance requires Permit applicants to submit a detailed application, which must include a technical report demonstrating compliance with FCC regulations governing radio frequency emissions. CMC §17.12.050.C.2.a-e. The applicant must also pay a deposit for the City to have an independent technical expert prepare a report considering the wireless telecommunication facility's technical requirements including (i) the accuracy and completeness of submissions, (ii) the technical viability of alternative sites, (iii) whether the applicant meets FCC emissions standards and (iv) whether the applicant has adequately shown that the facility is the "least intrusive means" to close a "significant gap" in coverage. CMC §17.12.050.C.5.

A Permit may not be granted unless the applicant demonstrates that the facility is the "least intrusive means" to close a "significant gap" in the applicant's service coverage and that the facility's location complies with aesthetic, minimum setback and zoning requirements, including a hierarchy of preferred zones. CMC §§ 17.12.050.C.1; 17.12.050.C.3; 17.12.050.C.4.

To approve a Permit, the Communications and Technology Commission—the planning commission for Permits—must make this specific finding and likewise find that there is no more feasible location for the facility in a more highly "preferred zone." CMC §17.12.050.C.7. To

place a wireless facility in a public right-of-way, an applicant must show that the facility is for a telephone corporation's use. To this end, the applicant must provide a copy of its CPCN if it has one, or otherwise justify its claim to use the public right-of-way. CMC §17.12.050.E.2.

Unless otherwise exempted, in addition to the general requirements described above, the applicant must show that the proposed facility meets specific aesthetic standards, including limits on size and access to the rights of way. CMC §17.12.050.E.3.

In order to approve a Permit, the City must specifically find that the facility is designed to blend into the surrounding area and that it will not have an adverse impact on the use of the public right-of-way. CMC §17.12.050.E.4.

As of the date the Petition was filed, the City had not denied any application for a Permit to either Crown Castle or Crown Castle NG West.

E. Public Utilities Code

PUC section 7901 ("section 7901") provides: "Telegraph or telephone corporations may construct lines of telegraph or telephone lines along and upon any public road or highway, along or across any of the waters or lands within this State, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters."

PUC section 7901.1 ("section 7901.1 ") provides: "(a) It is the intent of the Legislature, consistent with Section 7901, that municipalities shall have the right to exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed. (b) The control, to be reasonable, shall, at a minimum, be applied to all entities in an equivalent manner. (c) Nothing in this section shall add to or subtract from any existing authority with respect to the imposition of fees by municipalities."

A "telephone company" is defined as an entity which controls, operates or manages a telephone line for compensation. PUC §234(a). A "telephone line" includes fixtures and personal property used to facilitate communication by telephone. PUC §233.

F. Analysis

1. State Preemption

Petitioners argue that the Ordinance is preempted on its face because it purports to grant a franchise which they already hold under section 7901.

a. Standing

The City argues that Petitioners lack standing to assert any right to challenge the Ordinance based on state preemption under section 7901.

Crown Castle owns and operates telephone facilities -- including, specifically, a "distributed antenna system" within the public right-of-way in the City. On April 12, 2007, the PUC issued a CPCN to Crown Castle's subsidiary, Next G Networks. By virtue of that issuance, Crown asserts that it is regulated by the PUC as a "telephone corporation" and a "public utility." Milone Decl., ¶¶1-3.

The City does not take issue with Petitioner Crown Castle NG West's claim that it is a

telephone corporation. Rather, the City argues that a telephone corporation may not construct in the public right-of-way "without having first obtained from the commission a certificate that the present or future public convenience and necessity require or will require such construction." PUC §1001. The City contends that Petitioners do not possess the required CPCN. While Crown subsidiary Next G Networks may have a CPCN,[2] that fact does not confer standing on Petitioners Crown Castle and Crown Castle NG West to assert a right under section 7901. *See* Williams Communications, LLC v. City of Riverside, (2003) 114 Cal.App.4th 642, 650 (plaintiff showed it was telephone company for purposes of section 7901 by letter stating it had CPCN, the Commission's CPCN decision, and city's stipulation that plaintiff was a carrier licensed as a type of telephone corporation).

Petitioners argue that whether they hold a CPCN is irrelevant to their facial challenge to the Ordinance, which focuses on the text of the measure and not their particular circumstances. Reply at 2.

Petitioners misunderstand the purpose of standing. "As a general rule, a party must be beneficially interested to seek a writ of mandate. The requirement that a petitioner be beneficially interested has been generally interpreted to mean that one may obtain the writ only if the person has some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large." Save the Plastic Bag Coalition v. City of Manhattan Beach, (2011) 52 Cal.4th 155, 165 (internal citations and punctuation omitted). The beneficial interest must be direct and substantial. Ibid.

In order to raise any challenge to the Ordinance, facial or applied, Petitioners must have a beneficial interest in the outcome. If Petitioners do not have the right to use the right-of-way because they are not a telephone company under section 7901, then they have no beneficial interest, and no standing, to make that challenge.

In reply, Petitioners rely on the rights of a subsidiary named Next G Networks of California, Inc., which was granted a CPCN in 2007 to operate a full facilities-based provider of local exchange services in the territories of Pacific Bell, Verizon, SureWest, and Citizens Telephone. *See* Suppl. RJN, Ex.A.

Unless NextG Networks of California, Inc. is a party, it is irrelevant that particular company has a CPCN. Petitioners do not show that NextG Networks of California, Inc. is a party to this lawsuit. Moreover, the CPCN that was granted stated that it would expire in 12 months if not exercised and also set an order to show cause against Next G Networks of California, Inc. to evaluate whether it violated its previous limited authority. Thus, it is not clear that even NextG Networks of California, Inc. has a current CPCN. Ibid.

Whether either Petitioner currently holds a CPCN is a material issue for preemption of the right-of-way under section 7901. In GTE Mobilnet of California Limited Partnership v. City and County of San Francisco, (2006 N.D. Cal.) 440 F.Supp. 1097, a federal district court evaluating section 7901 preemption of a local ordinance stated that the PUC no longer issues CPCNs to wireless carriers. Id. at 1105. The court cannot take judicial notice of facts stated in a published opinion. *See* Sosinsky v. Grant, (1992) 6 Cal.App.4th 1548, 1551. Nonetheless, this statement explains the importance of the CPCN issue; Petitioners cannot contend that they have a

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[2]The court overruled the City's objection to the evidence that Next G has a CPCN.

franchise in the right-of-way under 7901 unless one of them has a current CPCN, and there is reason to believe that wireless companies no longer are issued them.

Petitioners attempt to rely on City of Huntington Beach v. Public Utilities Commission, (2013) 214 Cal.App.4th 566, 569, n.2, 584-90, which stated that Crown Castle NG West, previously known as Next G Networks of California, Inc., is a telephone corporation for purposes of section 7901. Unfortunately for Petitioners, they cannot rely on the truth of the facts in an appellate decision. *See* Sosinsky v. Grant, *supra*, 6 Cal.App.4th at 1551.

While Next G Networks of California, Inc. may actually be Petitioner Crown Castle NG West, the court has no admissible evidence of this fact. The court also has no evidence that Next G Networks of California, Inc. has a current CPCN, only that a CPCN was issued for that entity in 2007.

b. State Law Preemption

Assuming *arguendo* Next G Networks of California, Inc. is Petitioner Crown Castle NG West, and Petitioners therefore do have standing for the state preemption claim, their state preemption claim must be denied on its merits.

Respondent City is a municipal corporation. As such, it may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws. Cal. Const., art. XI, §7. Often referred to as the police power, this constitutional authority of cities to adopt local ordinances is the power to govern. A city's police power is not a circumscribed prerogative, but "is elastic" and "capable of expansion to meet existing conditions of modern life." Miller v. Board of Public Works, (1925) 195 Cal.477, 485.

A city or county ordinance conflicts with the state's general law, and is void, if it duplicates or contradicts general law, or attempts to enter an area fully occupied by general law. O'Connell v. City of Stockton, (2007) 41 Cal.4th 1061, 1067. A local ordinance duplicates state law when it is coextensive with state law. Ibid. (Citations omitted.) A local ordinance contradicts state law when it is inimical to or cannot be reconciled with state law. Id. at 1068 (Citations omitted). A local ordinance enters a field fully occupied by state law either where the Legislature has expressly manifested an intent to occupy the legal area or where the state legislative scheme implies such an occupation of the field. Ibid. Where the Legislature has manifested the express or implied intent to occupy the field, local authority to regulate is lost. Ibid.

The Legislature's intent to impliedly occupy an area of law occurs when (1) the subject matter has been so fully and completely covered by general law as to clearly indicate it is a matter of state concern, (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate additional local action, and (3) the subject matter has been partially covered by general law, and the subject is of a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality. Ibid. The Legislature's intent is measured not alone by the statutory language, but also by the purpose and scope of the legislative scheme. Ibid.

When local government regulates an area over which it traditionally has exercised control, such as land use regulation, the courts will presume the local regulation is not preempted

absent a clear indication of preemptive intent. Id. at 1069 (Citation omitted).

(i). The City's Right to Regulate the Right-of-Way Is Limited

Petitioners engage in a lengthy, and largely undisputed, argument that the use of the right-of-way by telephone networks is a matter of statewide concern that evinces the Legislature's intent to occupy the field and preempt local ordinances that impose more than time, place, and manner restrictions on access to the right-of-way. *See* Mot. at 4-10.

This argument, and its undisputed principles of law, may be summarized as followed. The state has the original right in its sovereign capacity to control all public streets and highways, and therefore regulates the scope of a city's right to regulate its streets. *See* Western Union Telegraph Co. v. Hopkins, ("Hopkins") (1911) 160 Cal.106, 118). Any doubt about the parameters of a city's power must be resulted in favor of the state, not the municipality. Key System Transit Co. v. City of Oakland, (1932) 124 Cal.App. 733, 742. *See* Mot. at 5.

In enacting section 7901, the state withheld from municipalities the power to control access by telegraph and telephone companies to the right-of-way. *See* Hopkins, *supra*, 160 Cal. at 119 (predecessor statute to 7901 left nothing to be granted by municipality); Western Union Telegraph Co. v. City of Visalia, ("Visalia") (1906) 149 Cal. 744, 750-51 (city's fee for use of right-of-way was unlawful attempt to control access (grant a franchise), which company already had as a matter of right). Mot. at 6-7. The access of telephone companies to the right-of-way is a matter of statewide concern, and disastrous impacts on communication could result if cities were allowed to regulate telephone company access to streets. *See* Pacific Telephone & Telegraph Co. v. City and County of San Francisco, (1959) 51 Cal.2d 766, 776. Wireless telecommunications companies qualify as "telephone corporations" for purposes of section 7901. City of Huntington Beach, *supra*, 214 Cal.App.4th at 584-87. *See* Mot. at 10.

The state could delegate the grant of a franchise right to cities, but must clearly express that intent and did not do so for section 7901. City of Petaluma v. Pacific Telephone & Telegraph Co., 91955) 44 Cal.2d 284, 287. As a result, the right of access is a vested right "akin to a rule of property." Ibid. (citation omitted).

The state has delegated to cities the time, place, and manner of telephone company access in section 7901.1. As the text of section 7901.1 makes clear, the time, place, and manner regulation must be "reasonable," consistent with the right of access afforded by section 7901, and applied to all telephonic entities in an equivalent manner.[3]

(ii). Petitioners' Argument

From the above legal principles, Petitioners conclude that the state has withheld police powers over access and use of the streets by telephone companies, cities cannot purport to confer a grant of entry or use (franchise) on a telephone company to enter and use the streets, and an ordinance that purports to do so is void. Mot. at 10-11.

Petitioners argue that the Ordinance violates these principles because it purports to vest

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[3]Petitioners contend that, as a result, section 7901.1 is intended to govern only the accidents which occur during telephone company access to the right-of-way, and not the franchise of access itself. Mot. at 9-10.

the City with the full discretionary powers equivalent to a CUP, far exceeding the permissible time, place, and manner restriction permitted by law. *See* CMC §17.12.050(C)(7) (incorporating CUP standards of CMC section 17.62.060). In short, the Ordinance assumes that a telephone company's use of the right-of-way is not a preexisting right, and forces an applicant to approach the City "hat in hand" and ask for permission to use the right-of-way. This is the equivalent of a franchise (grant of use of public property) which is legally barred by section 7901. Mot. at 11.

Specifically, Petitioners note that the Ordinance requires a Permit regardless of whether the wireless facility is located on private property or the right-of-way (CMC §17.12.050(C)(1)), subjects all applications to conditions of approval (CMC §17.12.050(C)(6)), requires a public hearing on the Permit (CMC §17.12.050(C)(1)), and vests discretion in the planning commission to approve or disapprove the Permit (CMC §17.12.050(C)(7)), which may be denied if the applicant cannot demonstrate that the facility is necessary to close a "significant gap" in its coverage (CMC §17.12.)50(C)(7)(a)) or the applicant cannot demonstrate that no feasible and more appropriate alternative site exists for closing the significant gap in coverage (CMC §17.12.050(C)(7)(b)). Mot. at 12.

Petitioners contend that this discretionary approval for a Permit collides with the statewide franchise for telephone companies in the right-of-way, noting that a CUP confers a right to a use which did not exist before, a city has full discretion to deny a CUP application, and a discretionary threshold for a telephone corporation's entry into the right-of-way directly conflicts with the franchise in section 7901. Mot. at 13. A city cannot use "time, place, and manner" restrictions to override a telephone company's right of access, yet the Ordinance is a franchise ordinance to "its very fabric." Mot. at 13-14.

(iii). The City May Regulate Aesthetics Under Sprint PCS

Petitioners' argument is based on a flawed premise that any regulation of time, place, or manner of access to the right-of-way amounts to a "franchise" requirement.

Section 7901.1 permits a city to regulate telephone corporations' use of the public right-of-way to protect aesthetics and other uses. While section.7901 allows telephone companies to construct telephone lines within the right-of-way, they can do so only "in such manner and at such points as not to incommode the public use of the right of way." PUC §7901.

In Sprint PCS Assets, LLC. v. City of Palos Verdes Estates, ("Sprint PCS") (9th Cir. 2009) 583 F.3d 716 , Sprint applied for a permit to construct wireless telecommunications facilities in the city's public rights-of-way. The city granted eight permit applications but denied two others. Id. at 719. The city based its denial on a local ordinance providing that wireless facilities permit applications may be denied for "adverse aesthetic impacts arising from the proposed time, place, and manner of use of the public property." Id. at 720. Sprint filed suit, seeking a declaration that the city's decision violated various provisions of the Telecommunications Act of 1996 ("TCA"). Ibid.

The district court concluded that the city's decision was not supported by substantial evidence because California law prohibits the city from basing its decision on aesthetic considerations, thus violating 47 U.S.C. section 332(c)(7)(B)(iii) (requiring any decision to deny a request for a wireless facilities to be in writing and supported by substantial evidence). The district court also concluded that the city violated 47 U.S.C. sections 253 and 332(c)(7)(B)(i)(II)

by unlawfully prohibiting the provision of telecommunications service, finding that the City had prevented Sprint from closing a significant gap in its coverage. Ibid.

The Ninth Circuit reversed. It first noted that the city's authority to regulate aesthetics is contained within the broad police power accorded to local governments by the California Constitution. Therefore, the issue was not whether the PUC authorized the city to consider aesthetics in deciding whether to grant a wireless facilities application, but whether the PUC divested the city of that authority. Id. at 722. The court evaluated section 7901's language, which gave telecommunications companies the right to build wireless facilities in the public right-of-way "in such manner and at such points as not to incommode the public use...." The court looked to the common definition of "incommode" as meaning "to give inconvenience or distress," and had no difficulty finding that section 7901 permits aesthetics to be considered in evaluating a wireless facility permit in order to avoid the inconvenient, annoying, and discomforting effects of the facility. Id. at 723-24.

Nor did the city's consideration of aesthetics for the wireless facilities conflict with section 7901.1, which was added to the PUC in 1995 to "bolster the cities abilities with regard to construction management and to send a message to telephone corporations that cities have authority to manage their construction, without jeopardizing the telephone corporations' statewide franchise." Id. at 724. Since section 7901 did not divest cities of the authority to consider aesthetics, *a fortiori* section 7901.1 did not either. Ibid. Section 7901.1's use of the words "are accessed" did not affect this result; aesthetic regulations are "time, place, and manner" regulations and a company can "access" a public right-of-way in an aesthetically pleasing or displeasing manner. Id. at 725.

The court's conclusion did not permit cities to run roughshod over wireless facilities permit applications because the cities still must comply with the TCA. Under the TCA, a locality's denial of a wireless facilities permit application "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). "[A] locality can run afoul of the TCA's 'effective prohibition' clause if it prevents a wireless provider from closing a 'significant gap' in service coverage." Id. at 726 (citing MetroPCS, Inc. v. City and County of San Francisco, (9th Cir. 2005) 400 F.3d 715, 731). The effective prohibition inquiry involves two factors" (1) the showing of a significant gap in service coverage, and (2) some inquiry into the feasibility of alternative facilities or site locations. Ibid. (same citation). The court concluded that Sprint did not show the existence of a significant gap as a matter of law. Ibid.

In sum, Sprint PCS held that California law does not prohibit a city from taking into account aesthetic considerations in deciding whether to permit the development of wireless facilities within their jurisdiction. The ordinance permitted the city to deny an application for "adverse aesthetic impacts arising from the proposed time, place, and manner of use of the public property." 583 F.3d at 720. The court upheld the city's right to reject an application because one of the proposed facilities would have detracted from the residential character of the neighborhood and the other would not be compatible with the appearance of the main entrance to the city. Id. at 725-26.

(iv). Application to the Ordinance

The court is persuaded by the reasoning of Sprint PCS. Regulations designed to protect the public's use of the right-of-way and to account for their aesthetics are permissible. *See also* Sprint Telephony v. County of San Diego, (2006) 140 Cal.App.4th 748, 752 (section 7901 does not preempt local regulation of placement of telecommunications equipment in right-of-way).

The Ordinance does just that, permitting the City to consider aesthetics, location, and compatibility concerns in deciding upon applications for Permits in the public right-of-way. *See* CMC §§ 17.12.050(E)(4) (requiring findings that facility in the public right-of-way will have minimal visual impacts and will not adversely impact use of the rights of way), 17.12.050(C)(3) (establishing hierarchy of preferred zones for all facilities, with exemptions to ensure prevention of aesthetic impacts), 17.12.050(C)(4) (providing siting and aesthetic standards for all facilities), 17.12.050(E)(3) (providing additional aesthetic standards for facilities in the public rights of way). These regulations are plainly allowed, not prohibited, by sections 7901 and 7901.1 which evince no preemptive intent for issues of aesthetics over which local government has traditionally exercised control. Nothing in the Ordinance conflicts with section 7901 because it "prohibits what the statute commands or commands what the statute prohibits." *See* Sherwin-Williams Co. v. City of Los Angeles, (1993) 4 Cal.4th 893, 898-99 (ordinance requiring retailers to display spray paint in an area not accessible to the public did not conflict with statute restricting sale of spray paint to minors).

Without reference to Sprint PCS, Petitioners concede that the City can regulate aesthetics, but argue that a wholly discretionary CUP ordinance blind to the existence of a vested right of access to the right-of-way is unlawful. Mot. at 15, n.4. Petitioners suggest that the Ordinance could be lawful only if it provided for a ministerial review for aesthetics "that properly assumes the preexisting right of a telephone corporation to use its streets." Mot. at 2.

Petitioners cite no authority for this proposition, and the court is aware of none. The Ordinance, which does not have First Amendment implications or constitute a criminal sanction, is subject to facial challenge under the difficult and disfavored standard that no set of circumstances exists under which it would be valid. *See* Parker v. State of California, __ Cal.App.4th __ (Nov. 6, 2013) 2013 DJDAR 14901, 14905. These challenges are disfavored because they often rest on speculation and risk premature decision on barebone facts. Ibid. They also run contrary to principles of judicial restraint. Ibid. While a criminal law that accords broad discretion to law enforcement may be void as impermissibly vague because that discretion may be exercised arbitrarily or in a discriminatory manner (id. at 14906, 14911), no such rule applies in land use zoning.

As the City argues, every location for a wireless facility is unique in its placement in relation to the surrounding property. Acceptable aesthetics on a frontage street adjacent to a freeway in a commercial zone might not be acceptable on a tree-lined street in a residential zone. To suggest that the City may have no discretion in the evaluation of aesthetics is unworkable. The City must have discretion to regulate time, place, and manner of access into the right-of-way. Section 7901 grants only "a limited right ... to the extent necessary for the furnishing of services to the public." Los Angeles County v. Southern Cal. Tel. Co., (1948) 32 Cal.2d 378, 387. A permitting process concerning the aesthetics of that access is not incompatible with that limited right.

Certainly, the City's exercise of discretion in determining aesthetics can unduly restrict

the section 7901 franchise of a telephone company to build and use a wireless facility in the right-of-way. But this is an issue for an as-applied challenge, which seeks relief from a specific application of a facially valid statute or an injunction against future application of the statute in the allegedly impermissible manner it is shown to have been applied in the past. *See* Tobe v. City of Santa Ana, (1995) 9 Cal.4th 1069, 1084.

Contrary to Petitioners' argument, nothing in the Ordinance's requirement of discretionary approval for a Permit necessarily collides with the statewide franchise for telephone companies in the right-of-way. The mere fact that the City has a permitting process and accords itself discretion to grant and deny a Permit is not enough to run afoul of the section 7901 franchise. A deeper inquiry is required into how the discretion afforded the local governmental entity goes beyond that permitted under section 7901.1, and this inquiry is dependent on the particular circumstances of the applicant which can only be raised in an as-applied challenge.

It is certainly *possible* that the City will abuse its discretion in considering the aesthetics of WCFs by denying a Permit based on criteria unrelated to aesthetics, but it is not true that it *necessarily* do so. The City's decision to deny a Permit will be governed not only by the Ordinance, but also by the franchise provided in section 7901 and by federal law. As the Sprint PCS court noted, any conclusion that the consideration of aesthetics by a city will allow it to run roughshod over wireless facility permit applications is tempered by the fact that the city must have substantial evidence to support its decision denying a wireless facility permit, and the denial is still invalid if it operates as an impermissible limitation on the provision of wireless service. 583 F.3d at 725.

Petitioners also rely on Visalia, *supra*, 149 Cal. at 744, but that case does not aid them. *See* Mot. at 13-14. In Visalia, the California Supreme Court addressed an ordinance that purported to give a telegraph company a franchise to operate its lines within the city for poles and wires that previously had been erected by the company. 149 Cal. at 746. The Court acknowledged that if the ordinance was an attempt to grant a franchise to operate a telegraph line in the city, it would merely grant something which the company already had under state law. Id. at 751. The Court declined to interpret the ordinance as granting a "franchise." The company had the right to construct and operate its telegraph lines on city streets, but did not have the right to do so in a manner as to unreasonably obstruct and interfere with travel. Ibid. The city "had the authority, under its police power, to so regulate the manner of plaintiff's placing and maintaining its poles and wires as to prevent unreasonable obstruction of travel. Id. at 752. The Court interpreted the ordinance not as granting a franchise, but as a restriction and burden on a franchise already existing. Ibid.

Just the city in Visalia had police power authority to regulate the manner of placement of telegraph lines, the City in this case has authority to regulate the aesthetics, location, and compatibility of wireless facilities. In so doing, the City may impose a burden on a telephone company's section 7901 franchise to build and operate a telegraph line on city streets. Whether it abuses its discretion in evaluating the aesthetic criteria is a fact-dependent issue.[4]

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[4]The court need not consider the City's additional arguments that Petitioners cannot show that no set of circumstances exist under which the Ordinance can be valid because (1) it applies to wireless facilities outside the right-of-way, which is plainly lawful, and (2) the Ordinance's

(v). Discrimination

Petitioners argue that the Ordinance conflicts with section 7901 because it discriminates against wireless telephone corporations. They contend that the Ordinance conflicts with section 7901.1's requirement that the control of time, place, and manner must be reasonable and, to be reasonable, the control "shall, at a minimum, be applied to all entities in an equivalent manner." They contend that the Ordinance singles out wireless telephone corporations for "fully discretionary CUPs, while exempting other public utilities from the zoning code requirements." Mot. at 15.

Petitioners' argument assumes that all telephone companies which are entitled to use the right-of-way must be treated equally. Petitioners fail to provide any detailed disparate treatment analysis, and the court is left to assume that they are relying solely on the "all entities" language of section 7901.1. As the City argues, this language cannot mean that different types of communication service providers in the right-of-way must be treated equally. The plain language of section 7901.1 requires only that the "control" be equally applied. The control for a wireless company, which does not have telephone poles but does have wireless facilities, need not be the same as the control for a traditional landline telephone company. *See* GTE Mobilnet of California Ltd. Partnership v. City and County of San Francisco, (N.D. Cal. 2006) 440 F.Supp.2d 1097, 1106 (city regulation of wireless, but not landline providers, did not violate section 7901.1 because "equivalence" requirement must take into account the type of entity regulated).

2. Federal Law Preemption

Petitioners argue that the Ordinance is preempted under federal law because it seeks to regulate in the field of RF emissions. *See* 47 U.S.C. §§151, 301, 302, 303, and 332(c)(7)(B)(4). Petitioners also argue that the Ordinance is preempted by the Middle Class Tax Relief and Job Creation Act of 2012 ("Tax Relief Act").

a. The Field of RF Emissions

The supremacy clause of the United States Constitution establishes a constitutional choice-of-law rule, makes federal law paramount, and vests Congress with the power to preempt state laws. Viva! International Voice for Animals v. Adidas Promotional Retail Operations, Inc., ("Viva!") (2007) 41 Cal.4th 929, 935. There is a presumption against federal preemption in areas traditionally regulated by the states. Id. at 938. A local government's land use regulation is an area over which local governments traditionally have control. City of Claremont v. Kruse, (2009) 177 Cal.App.4th 1153, 1169. In such cases, "[w]e start with the assumption that the historic police powers of the States were not to be superseded by the [federal statute] unless that was the clear and manifest purpose of Congress." Viva!, *supra*, 41 Cal.4th at 938.

There are four types of federal preemption: express, conflict, obstacle, and field. Id. at 935. Express preemption occurs where Congress "define[s] explicitly the extent to which its

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1000 foot setback requirement from schools, residences, and parks contains an exception where a lesser setback is necessary to close a gap in the company's service and the wireless facility is the least intrusive means to do so. Opp. at 9-11.

enactments pre-empt state law." Ibid. (Citation omitted). Conflict preemption will be found when simultaneous compliance with both state and federal directives is impossible. Ibid. (Citation omitted). Obstacle preemption occurs when, under the circumstances of the case, the challenged state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Ibid. (Citation omitted). Finally, field preemption applies "where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for 'supplementary state regulation.'" Ibid. (Citation omitted).

Under the TCA (47 U.S.C. §151 *et seq.*), Congress authorized the FCC to license carriers of wireless telephone service on a competitive basis. 47 U.S.C. §332(c); Town of Amherst v. Omnipoint Communications, ("Town of Amherst") (1st Cir. 1999) 173 F.3d 9, 12. Although states are prohibited from regulating wireless provider fees, the statute preserves state and local authority over the placement and construction of facilities, subject to several limitations, including that the regulation not prohibit or have the effect of prohibiting wireless services. 47 U.S.C. §332(c)(7)(B); Town of Amherst, *supra*, 173 F.3d at 12. The federal statute leaves the control of RF emissions to the FCC:

> "No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions." 42 U.S.C. §332(c)(7)(B)(iv).

In Southwestern Bell Wireless, Inc. v. Johnson County Board of County Commissioners, (10th Cir. 1999) 199 F.3d 1185, a wireless provider applied for a CUP to construct a wireless communications tower. The application was approved conditioned on the tower not being operated in a manner that interfered with public safety communications. Id. at 1188-89. The court noted that the federal Communications Act of 1934, which applies to all interstate and foreign transmission of energy by radio, created a "unified and comprehensive regulatory system for the broadcasting industry." Id. at 1190-91 (Citation omitted). In a 1982 amendment, Congress gave the FCC the explicit authority to regulate home electronic equipment with the potential to cause RF interference, and such matters shall not be regulated by local or state law. Id. at 1191. Although the 1982 amendment address home electronic equipment, it demonstrated Congress' intent that the FCC have exclusive jurisdiction over RF interference complaints. Ibid. Subsequent FCC regulations showed its broad authority over RF interference issues, and the FCC has ruled that it has exclusive jurisdiction in challenges to local zoning ordinances or permit conditions that would regulate RF interference. Id. at 1192.

The court held that Congress intended federal regulation of RF interference issues to be so pervasive as to occupy the field. Thus, the local regulation was preempted and void. Ibid. *See also* New York SMSA Limited Partnership v. Town of Clarkstown, (2d Cir. 2010) 612 F.3d 97, 105 (federal law occupies the field of regulation of RF interference and of technical and operational aspects of wireless communications service); Freeman v. Burlington Broadcasters, Inc., (2d Cir. 2000) 204 F.3d 311, 315 (local condition for permit to construct radio tower that

defendants remedy RF interference was void because federal law preempted field of RF interference).

Because of the comprehensive federal regulation of all RF interference issues, state and local governments may not regulate personal wireless service facilities that conform to FCC guidelines on the basis of environmental effects of RF radiation. Cellular Phone TaskForce v. FCC, (2d Cir. 2000) 205 F.3d 82, 96 (rejecting 10th amendment challenge because state and local governments not required to approve anything).[5]

According to Petitioners, the Ordinance intrudes on the preempted area of RF emissions in two ways: (1) it purports to regulate the siting of wireless facilities on the basis of the environmental effects of RF emissions; and (2) it purports to authorize the City to monitor and enforce the FCC's RF regulations. Mot. at 17.

Under the TCA, the FCC licenses carriers to provide wireless telephone services on a competitive basis. Town of Amherst, *supra*, 173 F.3d at 12. The FCC has rules and guidelines to ensure compliance with its licensing requirements, including RF emissions. By licensing wireless networks, the FCC approves the levels of RF emitted by the network facilities.

As Petitioners correctly argue (Mot. at 18), the Ordinance stands in the way of the FCC guidelines by creating a competing approval process for the RF emissions by requiring actual testing to verify the basis for the FCC approval. The Ordinance requires submission of a FCC compliance report stating that the Permit applicant will comply with FCC RF emission standards and details about the projected RF exposure levels, analysis, and calculations. CMC §17.12.050(C)(2)(e). The applicant must retain a RF expert to review *inter alia* RF emission data and compliance. CMC §17.12.050(C)(5). The Permit will condition approval on preparation by a qualified engineer of an RF exposure report verifying that the facility is operating in conformance with RF exposure standards (CMC §17.12.050(C)(6)(b)), and on monitoring of compliance with RF exposure standards (CMC §17.12.050(C)(6)(f)).

It is true, as the City argues (Opp. at 6), that the TCA only prohibits cities from regulating RF emissions "to the extent that such facilities comply with the Commission's regulations concerning such emissions." 42 U.S.C. §332(c)(7)(B)(iv). The Ordinance does not regulate RF emissions and only purports to require applicants to demonstrate compliance with federal RF standards. From this, the City concludes that the Ordinance "is wholly consistent with the federal RF limitations because it incorporates those standards wholesale." Opp. at 6.

The City's attempt at ensuring that wireless facilities meet FFC standards is itself preempted regulation. Federal law has preempted the field of RF interference regulation (Freeman v. Burlington Broadcasters, Inc., (2d Cir. 2000) 204 F.3d 311, 320. This means that the scheme of federal regulation is sufficiently comprehensive that Congress "left no room" for supplementary state regulation. Viva!, *supra*, 41 Cal.4th at 938.

The City distinguishes between RF interference and RF emissions. Opp. at 8. The City is correct that there is a difference. A source emits RF, while one source can emit RF which interferes with another source. *See* Southwestern Bell, *supra*, 199 F.3d at 1888 (city ordinance

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[5]State and local governments remain free, however, to regulate the placement, construction, and modification of wireless service facilities. Ibid. (citing 47 U.S.C. §332(c)(7)(A)).

purported to regulate wireless facility interference with public safety communications).

The distinction is inmmaterial because both RF interference and RF emissions are the subject of federal preemption. The law is clear that the field of RF interference is preempted. *See* Id. at 1192-93 (discussing cases holding field preemption of RF interference issues). The legal issues concerning RF emissions are health-related, and federal law is prohibits state and local governments from regulating the health effects of RF radiation emitted by wireless service facilities that conform to FCC guidelines. *See, e.g.,* Cellular Phone TaskForce, *supra*, 205 F.3d at 96.

It is true that section 332(c)(7)(B)(iv) contains a limitation; it prohibits a municipality from regulating the placement, construction, and modification of wireless facilities on the basis of the environmental (health) effects of RF emissions *where such facilities comply with FCC regulations*. The Ordinance seizes on the latter clause to regulate RF emissions through testing and a compliance report on RF exposure, requiring an independent expert to review the RF emission data and compliance, and requiring the ongoing monitoring of RF emissions. But section 332(c)(7)(B)(iv) does not permit it to do so. Under that provision, a city has the limited power to make decisions regarding the placement, construction, and modification of wireless facilities, and could lawfully require proof that a Permit applicant has whatever certificate or license the FCC requires. But the regulation of a facility's planned or ongoing *operation* constitutes an unlawful supplemental regulation into an area of federal preemption. *See* Cellular Phone TaskForce, *supra*, 205 F.3d at 96. The City's requirements for reports and testing in order to independently check on compliance with FCC regulations is a preempted supplemental regulation of wireless service facility operation. *See* ibid.

The City relies on two cases, Arizona v. United States, ("Arizona") (2012) 132 S.Ct. 2492 and Elsworth v. Beech Aircraft Corp., ("Elsworth") (1984) 37 Cal.3d 540.

In Arizona, a state statute required police officers to ascertain the immigration status of persons stopped or detained. The Supreme Court disagreed with the assertion that the statute interfered with federal immigration policy, holding that the mere sharing of information between federal and state officers was not preempted. 132 S.Ct. at 2508. It further held that a facial constitutional challenge to the statute was unwarranted. Id. at 2509.

In Elsworth, the California Supreme Court considered application of the negligence *per se* doctrine to hold an aircraft manufacturer liable for defective design for violation of FAA standards even though the manufacturer had a FAA certificate stating that it met all applicable safety standards. 37 Cal.3 at 545. In rejecting the manufacturer's claim that the jury was required to accept the FAA certificate, the Court concluded that Congress intended to permit states to apply their own tort law against airplane manufacturers for defective design despite the fact that federal law may occupy the field of aircraft safety and certification. Id. at 549. The Court found no irreconcilable conflict with federal standards in applying California tort law. The jury verdict of airplane defect on the basis of negligence *per se* would have no effect on the FAA's power to certify aircraft (id. at 550), and allowing liability on this theory would not pose an obstacle to the federal regulatory scheme (ibid.). If anything, the state court inquiry into manufacturer compliance with FAA regulations would assist the FAA's policing effort. Ibid.

Neither case is persuasive authority for the Ordinance's supplemental regulation of RF emissions.

Arizona not only involved unique civil liberties issues of immigration, as Petitioners argue (Reply at 2-3), it concerned a state inquiry into immigration *status* not *compliance*, and by police officers, not the arrestee. There is a huge difference. The Ordinance does not seek to ensure that an applicant for a Permit has a pertinent FCC certificate -- which would be permitted -- it seeks to independently ensure that the applicant is in compliance, and remains in compliance, with FCC requirements. And this effort is not made through City inquiry or effort, but by compelling the applicant to retain an expert, perform testing, and prepare a report. This is preempted supplemental regulation.

Elsworth concerned an issue of tort liability, clearly an issue committed to the state and not preempted. The California Supreme Court applied that state tort law to conclude that an FAA certificate would not be conclusive evidence of compliance with federal standards of safety and design, and evidence on manufacturer compliance would be considered. Nothing about California's tort scheme and its inquiry into FAA compliance bears on the Ordinance's effort to evaluate an applicant's compliance with federal RF emission standards as a condition of issuing a Permit. The former was not in a field occupied by the federal government, while the latter is.

In short, the Ordinance's effort to "double check" whether an applicant is complying with FAA standards for RF emissions is supplemental regulation which is preempted. The court in N.Y. SMSA ltd. Partnership v. Town of Clarkstown, (2d Cir. 2010) 612 F.3d 97, 104, stated in holding that local ordinances setting a preference for certain wireless technologies under the guise of controlling visual and aesthetics were preempted: "[T]hey interfere with the federal government's regulation of technical and operational aspects of wireless communication technology, a field that is occupied by federal law." Similarly, the Ordinance interferes with the federal government's regulation of RF emissions.[6]

The Ordinance intrudes on the preempted area of RF emissions because it purports to authorize the City to monitor and enforce the FCC's RF regulations.

b. The Tax Relief Act

Petitioners contend that a portion of the Ordinance is in "actual conflict" with federal law, and is preempted. Conflict preemption exists where compliance with both federal and state regulation is a physical impossibility. Florida Lime & Avocado Growers, Inc. v. Paul, (1963) 373 U.S. 132, 142-43.

In 2012, Congress enacted the 2012 Middle Class Tax Relief and Job Creation Act ("Tax

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[6]As for Petitioners' contention that the Ordinance purports to regulate the siting of wireless facilities on the basis of the environmental effects of RF emissions, they merely note that the Ordinance forces applicants to locate facilities 1000 feet away from schools and homes (CMC §17.12.050(C)(4)(a)), and then argue that these setback requirements have no purpose other than to regulate siting of facilities on RF health grounds. Mot. at 18.

While 1000 feet is a considerable distance, the court cannot conclude as a matter of law that this siting requirement necessarily is due to preempted RF emissions and not legitimate aesthetic concerns. Although Petitioners argue in reply that a setback from a school must be based on the danger of RF emissions (Reply at 4), there is no reason that aesthetic issues cannot apply to a school.

Relief Act"). The Tax Relief Act covered a variety of issues. Title VI of the Tax Relief Act provides for the auction for commercial use of a particular segment of the electromagnetic spectrum owned by the federal government. 47 U.S.C.A. §1451(a), (b).

As part of Title VI, 47 U.S.C. section 1455 ("section 1455") mandates local approval of certain modifications to wireless telecommunications facilities:

> "[A] State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station." 47 U.S.C. §1455(a)(1).

An "eligible facilities request" is defined as "any request for modification of an existing wireless tower or base station that involves-- ¶(A) Collocation of new transmission equipment; ¶(B) - Removal of transmission equipment or ¶(C) Replacement of transmission equipment. 47 U.S.C. §1455(a)(2).

Petitioners contend that 47 U.S.C. section 1455 evidences a federal override of any local ordinance that would purport to allow discretionary denials of an "eligible facilities request." The Ordinance conflicts with this congressional mandate by purporting to authorize the City full discretion to approve or reject all modifications of wireless telecommunications facilities. *See* CMC §17.12.050(C)(1), (B)(4). In according this discretion, the Ordinance makes no exception for "eligible facilities requests" which must be approved ministerially under 47 U.S.C. section 1455(a)(1). Mot. at 19-20.

In effect, section 1455 requires a local municipality to approve a facilities modification where the transmission equipment merely is removed, replaced, or rearranged on site. The Ordinance applies to existing facilities which are "expanded," "modified" by the installation of additional, larger or more powerful antennas, or have "one or more new bands of service" activated. CMC §17.12.050(B)(4), (C)(1).

Petitioners make no showing that there is any overlap between the two provisions. That is, there is no showing that the Ordinance would apply to the mere removal or rearrangement of an existing facility. On a facial challenge, the City should be given the opportunity in the first instance to interpret and apply the Ordinance in a manner which does not conflict with section 1455.[7]

5. Severance

The Ordinance contains a severability clause, providing that if any portion is held to be "invalid or unconstitutional, such invalidity or unconstitutionality shall not affect the validity or constitutionality of the remaining portions [of the Ordinance.]" SCOE, Ex. 5, §6. As only the portions of the Ordinance which monitor and enforce the FCC's RF regulations are preempted,

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[7]The court does not agree with the City that a facial challenge will not lie under the Tax Relief Act because the Ordinance would apply to both new and existing wireless facilities. Opp. at 12. A facial challenge to a broad ranging ordinance may be made on the ground that it is necessarily unlawful for a specific class of applicants of which the petitioner is a member.

they may be severed from the remainder. *See* Rental Housing Ass'n of Northern Alameda county v. City of Oakland (2009) 171 Cal.App.4th 741, 770 (invalid provisions of city eviction ordinance were severable from the remainder such that ordinance was not void in its entirety). Petitioners do not contend otherwise.

G. Conclusion

The Petition for writ of mandate is granted in part. The portions of the Ordinance which monitor and enforce the FCC's regulation of RF emissions are declared void and ordered severed from the remainder. In all other respects, the Petition is denied.

Petitioners' counsel is ordered to prepare a proposed judgment and writ of mandate, serve them on counsel for the City for approval as to form, wait 10 days after service for any objections, meet and confer if there are objections, and then submit the proposed judgment and writ along with a declaration stating the existence/non-existence of any unresolved objections. An OSC re: judgment is set for December 12, 2013 at 9:30 a.m.