No. 22-1098

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

In re INDIAN PEAK PROPERTIES LLC,

Petitioner.

On Petition for Writ of Mandamus
to the Federal Communications Commission

RESPONDENT FEDERAL COMMUNICATIONS COMMISSION'S OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

The Federal Communications Commission respectfully opposes the petition for writ of mandamus seeking to compel immediate action on Indian Peak Properties LLC's petitions for declaratory ruling under the Commission's rule governing over-the-air reception devices. Indian Peak seeks an order requiring the agency "to (a) take action on [the] Petitions * * * within one week of" the Court's order "or (b) issue a [public notice] * * * intiat[ing]" a full proceeding under 47 C.F.R. § 1.4000(e). Pet. 1, 11.[1]

---

[1] Indian Peak describes the relief it seeks under the second option as "a letter to [Indian Peak] * * * declaring that a 'proceeding' was initiated * * * upon receipt of the Petitions," Pet. 1, 11, but the relevant Rule provides that any proceeding "is initiated pursuant to [47 C.F.R. §1.4000](d) or (e)" by "put[ting] [the petition] on public notice," 47 C.F.R. § 1.4000(a)(4) & (d)–(e).

On July 18, the FCC's Wireless Telecommunications Bureau and Media Bureau issued a *Letter Ruling* dismissing the underlying petitions for failure to sufficiently identify a dispute implicating the Rule at issue. *See* Letter from Garnet Hanley & Maria Mullarkey, FCC, to Toneata Martoccio, Counsel for Indian Peak (July 18, 2022) (*Letter Ruling*) (attached as Exhibit A). Because the agency has now acted in this matter and disposed of the underlying petitions, the petition for writ of mandamus is now moot, and in any event Indian Peak has not shown that the agency engaged in any egregious delay or that the extraordinary remedy of a writ of mandamus is appropriate. The petition for writ of mandamus should therefore be dismissed or denied.

BACKGROUND

A. Statutory And Regulatory Background

The FCC's rule governing over-the-air reception devices (Rule), 47 C.F.R. § 1.4000, preempts certain state or local restrictions on antennas that are used to receive either video programming or fixed-wireless communications services.[2] As amended, the Rule generally prohibits

---

[2] The Rule was originally adopted in response to Section 207 of the Telecommunications Act of 1996, which directed the FCC to "promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices (cont'd)

(subject to certain exceptions) "[a]ny restriction * * * that impairs the installation, maintenance, or use of" covered antennas or their supporting masts. *Id.* § 1.4000(a)(1). Generally, for an antenna to be covered by the Rule,

- the antenna user must "ha[ve] a direct or indirect ownership or leasehold interest in the property" where the antenna is installed, *id.* § 1.4000(a)(1), and
- the antenna must be used (A) "to receive direct broadcast satellite service * * * or to receive or transmit [non-broadcast wireless signals to or from a fixed customer location] via satellite," (B) "to receive video programming via multipoint distribution services * * * or to receive or transmit [non-broadcast wireless signals to or from a fixed customer location] other than via satellite," or (C) "to receive television broadcast signals," *id.* § 1.4000(a)(1)–(2).

---

designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services." Pub. L. No. 104-104, § 207, 110 Stat. 56, 114; *see Bldg. Owners & Managers Ass'n Int'l v. FCC*, 254 F.3d 89, 91–93 (2001). In 2000, the FCC extended the Rule to cover antennas used for other fixed-wireless communications as well. *See Promotion of Competitive Networks in Local Telecomms. Mkts.*, 15 FCC Rcd. 22983, 23025–38 ¶¶ 94–124 (2000).

In 2021, the Commission clarified and amended the Rule to specifically include "hub or relay antenna[s]," which "distribut[e] * * * fixed wireless services to multiple customer locations," if the antenna "serves a customer on whose premises it is located" and is limited to "fixed wireless services that are not classified as telecommunications services." *Id.* § 1.4000(a)(1)(ii)(A) & (a)(5); *see Children's Health Def. v. FCC*, 25 F.4th 1045, 1048 (D.C. Cir. 2022).

A restriction impermissibly "impairs" an antenna under the Rule if it "[u]nreasonably delays or prevents" or "[u]nreasonably increases the cost of" installing, maintaining, or using the antenna, or if it "[p]recludes reception or transmission of an acceptable quality signal." 47 C.F.R. § 1.4000(a)(3). The reasonableness of a restriction is assessed "in light of the cost of the equipment or services [at issue] and the * * * restriction's treatment of comparable devices." *Id.* § 1.4000(a)(4).

When a dispute implicating the Rule arises, parties may seek a ruling either from the Commission or from any "court of competent jurisdiction." 47 C.F.R. § 1.4000(e). To seek a ruling from the Commission, a party "must comply with the procedures in [47 C.F.R. § 1.4000](h)" by filing a petition for declaratory ruling and a supporting

affidavit setting forth "[a]ll allegations of fact" identifying a dispute implicating the Rule. *Id.* § 1.4000(e) & (h). If the Commission determines that a petition sufficiently identifies a potential violation of the Rule, it will initiate a proceeding by "put[ting] [the petition] on public notice" to solicit comments from other interested parties. *Id.* § 1.4000(e). "[I]f a proceeding is initiated" by the Commission, "the entity seeking to enforce the antenna restrictions in question must suspend all enforcement efforts pending completion of review," unless the restrictions "pertain[] to safety [or] historic preservation." *Id.* § 1.4000(a)(4).

B. Factual And Procedural Background

In December 2004, the City of Rancho Palos Verdes granted a conditional use permit to James A. Kay, Jr., authorizing him to install and operate five roof-mounted antennas on a single-family home on Indian Peak Road. *Letter Ruling* at 1 & n.2. Kay then transferred his interest in the property to Indian Peak Properties LLC, a limited liability company that is wholly owned by Kay. According to Indian Peak, no one currently resides at the property, which instead ostensibly "serves as a communications site and offices" for other entities associated with Kay. *Id.* at 4. Based on the limited record provided to the Commission, those

entities appear to be communications service providers whose business is to provide communications services to others, rather than the actual end-users of services provided over the antennas. *Id.* at 5–6. The record does not contain any information on who the ultimate users are, whether they have any interest in the property where the antennas are located, or how they receive and use fixed-wireless service at that location. *Ibid.*

Upon receiving a complaint in August 2014 about the number of antennas on the property, the City discovered that there were approximately 13 antennas and supporting masts installed on the roof. After extended negotiations to revise the conditional use permit were unsuccessful, the City revoked the permit in August 2018.[3] The following photograph shows the array of antennas on the rooftop when the City revoked the permit:[4]

---

[3] *See generally* Rancho Palos Verdes, Cal., Res. No. 2018-61 (Aug. 21, 2018) (attached as Exhibit C).

[4] This photograph is reproduced by the City in its Respondent's Brief at 25, *City of Rancho Palos Verdes v. Indian Peak Props., LLC*, Nos. B303638 & B305069 (Cal. Ct. App. filed May 26, 2021), *available at* 2021 WL 2395607.

In November 2018, the City filed a public-nuisance complaint against Indian Peak in Los Angeles Superior Court, and Indian Peak filed a parallel action against the City. Indian Peak did not seek an FCC determination at that time as to whether the City's actions violated the Rule governing over-the-air-reception devices; it instead chose to invoke the Rule as a federal-preemption defense in the state-court actions. In November 2019, the superior court entered summary judgment in favor of the City and rejected Indian Peak's defense.[5]

---

[5] Minute Order, *City of Rancho Palos Verdes v. Indian Peak Props., LLC*, No. 18STCV03781 (Cal. Super. Ct. Nov. 20, 2019) (attached as Exhibit D); *see also* Order Denying Petition for Writ of Mandate, (cont'd)

The following month, the City Council directed City staff "to proceed with abatement of the public nuisance."[6] Indian Peak again did not choose to seek an FCC determination then. It instead appealed the superior court's decision and pressed its defense under the Commission's Rule on appeal. One month later, in January 2020, it also filed a separate action in federal district court seeking a determination that the Rule bars the City from removing the antennas. The district court denied Indian Peak's request for a temporary restraining order under the Rule in February 2020.[7]

Not until April 2020, after first asserting the Commission's Rule as a defense in both state and federal court—and losing—did Indian Peak file with the FCC a petition for declaratory ruling, seeking a third bite at the apple. And while that petition was pending, Indian Peak continued simultaneously to pursue its arguments in federal and state court. The federal district court denied Indian Peak's second request for a temporary

---

Indian Peak Props., LLC v. City of Rancho Palos Verdes, No. 18STCP02913, slip op. at 8–9 (Cal. Super. Ct. Aug. 9, 2019) (attached as Exhibit E).

[6] Rancho Palos Verdes, Cal., Res. No. 2019-68 (Dec. 17, 2019) (attached as Exhibit F).

[7] Order Denying Appl. for TRO, *Indian Peak Props., LLC v. City of Rancho Palos Verdes*, No. CV 20-457 (C.D. Cal. Feb. 13, 2020) (attached as Exhibit G).

restraining order in April 2020, and in July 2020 it denied Indian Peak's motion for a preliminary injunction.[8] The California Court of Appeal affirmed the superior court's judgment in favor of the City—including the denial of Indian Peak's defense under the Commission's Rule—in November 2021.[9]

After losing its state-court appeal, Indian Peak submitted to the FCC a request for expedited action in December 2021 and a further request for expedited action in January 2022. FCC staff then issued a decision in April 2022 "dismiss[ing] the [p]etition without prejudice because it fail[ed] to provide sufficient information to support a showing that each antenna meets all of the criteria required for protection under the [Rule]." Letter from Garnet Hanly, FCC, to Toneata Martocchio, Counsel for Indian Peak (Apr. 22, 2022) (Pet'r Exh. 2); *see id.* at 2 (stating that the petition "fail[ed] to provide sufficient information * * * to

---

[8] Order Denying 2d Appl. for TRO, *Indian Peak Props., LLC v. City of Rancho Palos Verdes*, No. CV 20-457 (C.D. Cal. Apr. 17, 2020) (attached as Exhibit H); Order Denying Prelim. Inj., *Indian Peak Props., LLC v. City of Rancho Palos Verdes*, No. CV 20-457 (C.D. Cal. July 15, 2020) (attached as Exhibit I).

[9] *City of Rancho Palos Verdes v. Indian Peak Props., LLC*, No. B303638, 2021 WL 5316348, slip op. at 33–37 (Cal. Ct. App. Nov. 16, 2021) (attached as Exhibit J); *see also Indian Peak Props., LLC v. City of Rancho Palos Verdes*, No. B303325, 2021 WL 5316457 (Cal. Ct. App. Nov. 16, 2021) (denying appeal in the parallel action).

determine whether the antennas provide a service covered by the [Rule]"); *id.* at 3 (noting that the petition "fail[ed] to provide sufficient information demonstrating whether the antennas * * * serve a customer located on the premises * * * and if so, the identity of that customer").

On May 1, 2022, Indian Peak then filed the five new petitions for declaratory ruling at issue here, seeking determinations from the FCC that the City's efforts to restrict or remove the various antennas at issue are preempted by the Rule. *See* Pet'r Exhs. 3–7.[10] Barely a month later, on June 3, Indian Peak petitioned this Court for a writ of mandamus directing the agency to either (a) issue an immediate ruling on its petitions "within one week of the Court's Order and Writ" or (b) immediately initiate a full proceeding on the petitions under 47 C.F.R. § 1.4000(e). While those petitions for declaratory ruling were pending, and even after filing its mandamus petition, Indian Peak proceeded to file numerous letters and supplements asking the agency to consider new or additional information not contained in its original filings.[11]

---

[10] Photographs of the antennas at issue, submitted by Indian Peak in attachments to its petitions, are attached as Exhibit B.

[11] *Cf. Letter Ruling* at 2 (admonishing Indian Peak for "complicat[ing] [review] by * * * piecemeal submission of the facts, including two filings characterized as 'supplements'"); *see* Letter from Carl E. (cont'd)

C. The July 18 *Letter Ruling*

On July 18, FCC staff issued a *Letter Ruling* dismissing each of Indian Peak's petitions because they fail "to include allegations with sufficient detail, clarity, and accuracy * * * to identify * * * a dispute [that] implicates the [Rule]." *Letter Ruling* at 9.

The *Letter Ruling* explained that the first petition, which concerns an antenna used for satellite television service, "includes a letter from the City stating that it is not seeking to remove" that antenna, and Indian Peak "has not provided any information to the contrary." *Id.* at 3. The *Letter Ruling* thus dismissed this petition because it "fails to identify any actual controversy under the [Rule]" for the Commission to decide. *Ibid.*

The *Letter Ruling* found that the second, third, and fourth petitions, which concern antennas providing broadband internet service,[12] fail to

---

Kandutsch, Counsel for Indian Peak, to Garnet Hanly, FCC (May 5, 2022); Letter from Carl E. Kandutsch, Counsel for Indian Peak, to Garnet Hanly, FCC (May 8, 2022); Letter from Carl E. Kandutsch, Counsel for Indian Peak, to Garnet Hanly, FCC (May 16, 2022); Letter from Julian Gehman, Counsel for Indian Peak, to Marlene H. Dortch, FCC (May 26, 2022); Letter from Julian Gehman, Counsel for Indian Peak, to Marlene H. Dortch, FCC (July 5, 2022).

[12] The petitions contend that these three antennas, which provide service from three different broadband providers, are all needed for "back-up redundancy." *Letter Ruling* at 3 (quoting Indian Peak's filings). Indian Peak states that two of these antennas operate as "hub or relay" antennas, but that the third does not. *Id.* at 3–4.

make any showing that the antennas "serve[] a customer on [the] premises" (as is required for a hub or relay antenna), 47 C.F.R. § 1.4000(a)(5), or that there is a "user [who] has a direct or indirect ownership or leasehold interest in the property" (as is generally required), *id.* § 1.4000(a)(1). *See Letter Ruling* at 3–6. The only end-user who is clearly identified in the petitions is James Kay, but "[i]t is not evident from the Petitions whether James A. Kay qualifies as a user, since he does not claim to reside at the property or regularly use the service there." *Id.* at 6.

The petitions state that these antennas provide service to two other business entities linked to Kay, but based on the limited information provided, those entities appear to be communications service providers whose business is to provide communications service to others. *Id.* at 5–6. The *Letter Ruling* construed relevant Commission precedent to provide that intermediate service providers (as opposed to actual end-users) do not qualify as antenna users for purposes of the Rule. *Id.* at 5 & n.34. Apart from a brief and unexplained reference to (unspecified) "vendors or contractors" who might visit the property, the petitions "do not identify who the service providers' customers are" and "do[] not

identify any non-communications-service-provider user who regularly resides at or uses the premises." *Id.* at 6.

Since the petitions do not meaningfully identify the antennas' actual users, they also do not identify whether those users have any interest in the property where the antennas are located or how they receive and use fixed-wireless services at that location. The *Letter Ruling* therefore dismissed these petitions because they "fail to provide sufficient information regarding whether each antenna implicates the [Rule]." *Id.* at 3.

The fifth and final petition concerns two antennas that, according to the petition and accompanying affidavit, serve as "Cellular Rooftop Antennas for cellular phone connectivity" and are used "to distribute * * * Cellular service to customers located at the Property." *Id.* at 7 (quoting Indian Peak's filings). But the Rule at issue applies only to antennas used to provide service "to and/or from a *fixed* customer location," 47 C.F.R. § 1.4000(a)(2) (emphasis added), and the *Letter Ruling* found that the petition's "references to 'cellular service' raise questions regarding whether the antennas are being used to extend mobile service rather than for fixed service," *Letter Ruling* at 7. Although the petition states

in conclusory fashion that the antennas are used for fixed-wireless service, "cellular service" typically refers to mobile service, and neither the petition nor the supporting affidavit points to any facts indicating that the antennas instead provide a fixed-wireless service (let alone identifying any users of that service). *Ibid.* The *Letter Ruling* accordingly dismissed this petition because it failed to include any facts indicating that "each antenna supports the offering of a *fixed* wireless service (as opposed to a mobile service * * *)." *Letter Ruling* at 6.

D. Further Developments

The superior court recently issued an amended judgment ordering Indian Peak to remove all unpermitted antennas on the property. Pet'r Exh. 12.[13] At the same time, the court denied the City's request for authorization to enter the property and forcibly remove the antennas if Indian Peak fails to comply. *See id.* ¶ 4 (striking the requested authorization from the City's proposed judgment). And at the hearing on the City's proposed judgment, the court advised that its entry of judgment does not necessarily authorize the City to *enforce* the judgment or to take any particular action to compel Indian Peak to comply with

[13] Am. Judgment, *City of Rancho Palos Verdes v. Indian Peak Props., LLC*, No. 18STCV03781 (Cal. Super. Ct. June 29, 2022).

that judgment. Pet'r Exh. 9;[14] *see id.* at 2 ("[I]t appears to the Court that the Court can issue judgment. Whether or not the city can take any action might be a different question[.]"); *id.* at 21 ("That's a different issue[,] whether I sign the judgment [versus] whether [the City] can enforce it, * * * it's a different issue than whether I can sign the judgment.").

Earlier this week, on July 19, Indian Peak filed a petition for administrative reconsideration objecting to aspects of the *Letter Ruling*'s legal analysis. *See* Pet'r Exh. 13. The petition for reconsideration presents no new evidence of how the antennas are used to provide fixed service to end-users at the property where the antennas are located.

ARGUMENT

A writ of mandamus "is 'drastic'; it is available only in 'extraordinary situations'; it is hardly ever granted; those invoking the court's mandamus jurisdiction must have a 'clear and indisputable' right to relief; and even if the [petitioner] overcomes all these hurdles, whether mandamus relief should issue is discretionary." *In re Cheney*, 406 F.3d 723, 729 (D.C. Cir. 2005) (en banc). To obtain mandamus relief, "the

[14] 6/9/22 Hr'g Tr., *City of Rancho Palos Verdes v. Indian Peak Props., LLC*, No. 18STCV03781 (Cal. Super. Ct.).

petitioner must satisfy the burden of showing that [its] right to issuance of the writ is 'clear and indisputable.'" *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 381 (2004) (some internal quotation marks omitted). And "even if the [essential] prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Ibid.*

For claims of unreasonable delay, mandamus is available "only when the agency delay is egregious." *In re Monroe Commc'ns Corp.*, 840 F.2d 942, 945 (D.C. Cir. 1988). "Any discussion * * * must begin with the recognition that an administrative agency is entitled to considerable deference in establishing a timetable for completing its proceedings," *Cutler v. Hayes*, 818 F.2d 879, 896 (D.C. Cir. 1987), and courts "are properly hesitant to upset an agency's priorities by ordering it to expedite one specific action, and thus to give it precedence over others," *Sierra Club v. Thomas*, 828 F.2d 783, 797 (D.C. Cir. 1987). Accordingly, even "a finding that delay is unreasonable does not, alone, justify judicial intervention" except in the most extraordinary circumstances. *In re Barr Labs., Inc.*, 930 F.2d 72, 75 (D.C. Cir. 1991).

Mandamus plainly is not warranted here because Indian Peak has now received the relief sought in its mandamus petition, so the petition

is now moot. By its terms, the mandamus petition sought to compel the agency to promptly "take action on [its] petitions" for declaratory ruling. Pet. 1, 11. FCC staff, acting on delegated authority, have now done so by issuing the *Letter Order* dismissing each of those underlying petitions. Because the agency has "take[n] action" (Pet. 1, 11) on the underlying petitions, the petition for writ of mandamus is now moot. *See*, *e.g.*, *Am. Bird Conservancy v. FCC*, 516 F.3d 1027, 1030 (D.C. Cir. 2008) (mandamus petition seeking to compel FCC action was rendered moot by issuance of an order denying in part, dismissing in part, and deferring in part the underlying request); *In re Core Commc'ns, Inc.*, No. 03-1013, 2003 WL 21384522 (D.C. Cir. June 12, 2003) ("[T]he petition for writ of mandamus is moot" because the agency "has now ruled on petitioner's administrative complaint").[15]

---

[15] Even if the issue were not moot, Indian Peak has not shown that the time taken to decide this matter was unreasonable—much less egregious. Indian Peak sought action on five separate petitions, each accompanied by numerous technical and legal exhibits. *Cf. Sierra Club*, 828 F.2d at 798 (for matters presenting "complex scientific, technological, and policy questions," the agency "must be afforded the amount of time necessary to analyze such questions"). And as the agency has now explained, Indian Peak then "complicated" the agency's review through "piecemeal submission of the facts, including [in] two [subsequent] filings characterized as 'supplements'" introducing new information not contained in its original submissions. *Letter Ruling* at 2; *see supra* note 11.

Earlier this week, Indian Peak filed a petition for reconsideration of the *Letter Ruling*, *see* Pet'r Exh. 13, which the agency will review and address as appropriate under the Communications Act and its rules. *See* 47 U.S.C. § 405(a); 47 C.F.R. § 1.106. But that request for further administrative review does not alter the fact that this mandamus petition, which sought to compel agency action on the declaratory ruling petitions, is now moot. The petition for reconsideration disagrees with aspects of the agency's legal analysis, but there is no dispute that the agency has now *acted on* the underlying petitions; nor can Indian Peak claim that the agency has unreasonably delayed action on the subsequent petition for reconsideration filed just days ago (which, in any event, is not at issue in the current mandamus petition). *See*, *e.g.*, *In re NTCH, Inc.*, No. 18-1122 (D.C. Cir. Oct. 11, 2018) (denying mandamus petition in analogous circumstances); *In re Anda, Inc.*, No. 12-1145 (D.C. Cir. July 20, 2012) (similar).

Finally, although the issue is now moot, nothing supports Indian Peak's contention (Pet. 10–11) that the FCC should be required to initiate a proceeding as soon as any petition for declaratory ruling is received. The Rule sets forth various procedural and substantive requirements that any petition must comply with, and the agency may reasonably

decline to open a proceeding and seek public comment until after it has ascertained that the petition is not procedurally defective and that the information provided is sufficient to identify a dispute that implicates the Rule. *See Letter Ruling* at 9–10 ("[W]e will decline to initiate [a] proceeding" if the petition fails to "include allegations with sufficient detail, clarity, and accuracy * * * to identify whether a dispute implicates the [Rule]"); *see also* 47 U.S.C. § 154(j) ("The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice.").

CONCLUSION

The petition for writ of mandamus should be dismissed or denied.

Dated: July 22, 2022

Respectfully submitted,

/s/ *Scott M. Noveck*

P. Michele Ellison
General Counsel

Jacob M. Lewis
Deputy General Counsel

Sarah E. Citrin
Deputy Associate General Counsel

Scott M. Noveck
Counsel

FEDERAL COMMUNICATIONS COMMISSION
45 L Street NE
Washington, DC 20554
(202) 418-1740
fcclitigation@fcc.gov

CERTIFICATE OF COMPLIANCE

Certificate of Compliance With Type-Volume Limitation,
Typeface Requirements and Type Style Requirements

1. This document complies with the type-volume limit of Fed. R. App. P. 21(d) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and D.C. Circuit Rule 32(e)(1):

   ☒ this document contains 3,925 words, *or*

   ☐ this document uses a monospaced typeface and contains ____ lines of text.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

   ☒ this document has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Century Schoolbook, *or*

   ☐ this document has been prepared in a monospaced spaced typeface using _____ with _____.

/s/ *Scott M. Noveck*
Scott M. Noveck
Counsel for Respondent
Federal Communications Commission

Federal Communications Commission
Washington, D.C. 20554

July 18, 2022

Toneata Martocchio
Attorney at Law
15525 Cabrito Road
Van Nuys, CA 91406

Re: Petitions for Declaratory Ruling

Dear Ms. Martocchio:

This letter responds to five petitions for declaratory ruling (Petitions) submitted by Indian Peak Properties, LLC (Petitioner or Indian Peak Properties) on May 1, 2022,[1] seeking preemption under the rule governing over-the-air reception devices (OTARD) of a decision by the city of Rancho Palos Verdes, California (City) to revoke a conditional use permit for antennas on a building pursuant to the City's zoning ordinance.[2] Upon review of the Petitions, and for the reasons discussed below, we dismiss the Petitions without prejudice.

Background. The Petitions concern six antennas[3] on the roof of a single-family home located at 26708 Indian Peak Road, Rancho Palos Verdes, California. Petitioner filed these Petitions following a decision by the Competition and Infrastructure Policy Division of the Wireless Telecommunications Bureau (CIPD) on April 22, 2022, to dismiss a similar petition submitted by Petitioner concerning ten antennas at

[1] *See* Indian Peak Properties, Petition for Declaratory Ruling Under 47 CFR §1.4000 (filed May 1, 2022) (Petition 1); Indian Peak Properties and LT-WR LLC, Petition for Declaratory Ruling Under 47 CFR §1.4000 (filed May 1, 2022) (Petition 2); Indian Peak Properties and California Internet dba Geo-Links, Petition for Declaratory Ruling Under 47 CFR §1.4000 (filed May 1, 2022) (Petition 3); Indian Peak Properties and One Internet America, Petition for Declaratory Ruling Under 47 CFR §1.4000 (filed May 1, 2022) (Petition 4); Indian Peak Properties and Fisher Wireless, Petition for Declaratory Ruling Under 47 CFR §1.4000 (filed May 1, 2022) (Petition 5). We refer to all of these filings collectively as "Petitions." If a citation refers to "Petitions" with a page number, the page number for the citation is the same in all Petitions.

[2] *See* Petitions at 3. According to Petitioner, the Rancho Palos Verdes City Council adopted a resolution in December 2004 approving a conditional use permit for the placement of five UHF antennas on the roof of the house. Petitioner asserts that "[i]n subsequent years, some antennas were removed and other antennas were installed on the rooftop of the Property on the good faith assumption that the additional antennas did not require prior zoning approvals because they did not involve the erection of additional support structure and were mounted on the same Building as the UHF antennas that had been approved under . . . [the conditional use permit] and were smaller and lower in profile than the UHF antennas." *Id.* at 2. After the City was alerted to the unpermitted antennas in August 2014, and extended negotiations to revise the conditional use permit were unsuccessful, the City revoked the permit in August 2018. Rancho Palos Verdes, Cal., Res. No. 2018, attached to Letter from William W. Wynder, counsel to City of Rancho Palos Verdes, to Garnet Hanly, Chief of Competition and Infrastructure Policy Division, FCC Wireless Telecommunications Bureau (May 6, 2022), Ex. A (May 6 City Letter).

[3] Petitions 1-4 cover one antenna each (Antennas 1-4); Petition 5 covers two antennas that Petitioner refers to as a "pair" constituting "Antenna 5." *See, e.g.,* Petition 5 at 2, 4, 6-7. Each antenna must satisfy the OTARD rule's requirements, so we refer to this pair of antennas as Antennas 5 and 6 and examine them individually.

the same location.[4] CIPD dismissed that petition because it failed "to provide sufficient information to support a showing that each antenna meets all of the criteria required for protection under the OTARD rule."[5]

As is evident from the summary below, our review has been complicated by Petitioner's piecemeal submission of the facts, including two filings characterized as "supplements." In several respects, the information provided in the various filings is inconsistent, and even with two supplements, the purposes and uses of the majority of the antennas, which are critical to the applicability of the rule, remains unclear. Further, Petitioner's failure to include all relevant facts in its initial petitions and its subsequent, serial supplementation have delayed and complicated our review.[6] We expect any petition and accompanying affidavit to set forth all facts necessary to identify whether a dispute implicates the OTARD rule. The Petitioner submitted multiple supplements presenting new facts and arguments, without any justification for failing to provide this information from the outset, despite our having previously dismissed a similarly deficient filing. It is within our discretion to decline to consider such material; we need not decide this issue for the instant Petitions because, as we explain below, even though we consider the material in the additional filings in this instance, Petitioner has failed to provide the information required by the Commission's rule.

Summary of OTARD rule. The OTARD rule prohibits state and local regulators and private entities from imposing any restriction on the placement of certain types of antennas "on property within the exclusive use or control of the antenna user where the user has a direct or indirect ownership or leasehold interest in the property that impairs the installation, maintenance, or use of" antennas.[7] The rule applies to antennas that are used to: (1) "receive direct broadcast satellite service, including direct-to-home satellite service, or to receive or transmit fixed wireless signals via satellite, including a hub or relay antenna used to receive or transmit fixed wireless services that are not classified as telecommunications services[;]" (2) "receive video programming via multipoint distribution services, including multichannel multipoint distribution services, instructional television fixed services, and local multipoint distribution services, or to receive or transmit fixed wireless signals other than via satellite, including a hub or relay antenna used to receive or transmit fixed wireless services that are not classified as telecommunications services[;]" or (3) "receive TV broadcast signals."[8] The rule also applies to a "mast supporting an antenna" in one of the foregoing categories.[9] A restriction "impairs" if it "[u]nreasonably delays or prevents installation, maintenance, or use;" "[u]nreasonably increases the cost of installation, maintenance, or use;" or "[p]recludes reception or transmission of an acceptable quality signal."[10] "Fixed wireless signals" are

[4] Letter from Garnet Hanly, Chief, Competition and Infrastructure Policy Division, FCC Wireless Telecommunications Bureau, to Toneata Martocchio, Counsel to Indian Peak Properties (Apr. 22, 2022) (April 22 Letter).

[5] *Id.* at 2, 4.

[6] *Cf. Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941) ("We cannot allow the appellant to set [sic] back and hope that a decision will be in its favor and then, when it isn't, to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed.").

[7] 47 CFR § 1.4000(a).

[8] 47 CFR § 1.4000(a). Antennas in categories (1) and (2) must also meet size restrictions (with an exception for certain equipment located in Alaska, which is not relevant here). *See id.* § 1.4000(a)(1)(i)(B), (a)(1)(ii)(B).

[9] 47 CFR § 1.4000(a)(1)(iv).

[10] 47 CFR § 1.4000(a)(3).

defined to mean any "commercial, non-broadcast communications signals transmitted via wireless technology to and/or from a fixed customer location."[11] The term "hub or relay antenna" means "any antenna that is used to receive or transmit fixed wireless signals for the distribution of fixed wireless services to multiple customer locations as long as the antenna serves a customer on whose premises it is located, but excludes any hub or relay antenna that is used to provide any telecommunications services or services that are provided on a commingled basis with telecommunications services."[12] The rule permits those seeking protection under the rule to file petitions for declaratory ruling with the Commission under section 1.2 of its rules, and requires that "[a]ll allegations of fact . . . must be supported by affidavit of a person or persons with actual knowledge" of the facts alleged.[13]

Dismissal of Petition 1. We dismiss Petition 1 without prejudice because Indian Peak Properties has not made any showing that the City is seeking to enforce a restriction as to Antenna 1. The Petition includes a letter from the City stating that it is not seeking to remove Petitioner's "television satellite dish" antenna,[14] and Petitioner has not provided any information to the contrary. The petition thus fails to identify any actual controversy under the OTARD rule.

Dismissal of Petitions 2-4. For the reasons set forth below, we dismiss Petitions 2 through 4 without prejudice because they fail to provide sufficient information regarding whether each antenna implicates the OTARD rule.

Specifically, Petitions 2-4 state that each subject antenna provides broadband Internet service, including "back-up redundancy for performance of an array of vital functions . . . including, but not limited to providing television and telephone service, security alarm and camera operations, temperature control, and other monitoring functions."[15] The Petitions further state that the antennas are being "used to receive or transmit broadband-only fixed wireless signals providing high-speed Internet access to compatible devices throughout the Property"[16] and that James A. Kay and his companies, including Indian Peak Properties, "are the customers and primary users of the broadband service provided by" Antennas 2-4.[17] According to Petitioner, Antennas 3 and 4 are designed as hub or relay antennas and are used by Kay and Indian Peak Properties "for the distribution of broadband-only fixed wireless services."[18] Petitioner

[11] 47 CFR § 1.4000(a)(2). "Fixed wireless signals do not include, among other things, AM radio, FM radio, amateur ('HAM') radio, CB radio, and Digital Audio Radio Service (DARS) signals." *Id.*

[12] 47 CFR § 1.4000(a)(5).

[13] 47 CFR § 1.4000(h); *see also id.* §§ 1.2, 1.4000(e).

[14] Petition 1 at Exh. 5 (letter dated Nov. 19, 2021) (demanding removal of all antennas "except for the television satellite dish"). The record reflects that Antenna 1 is the only television satellite dish antenna that Petitioner has on the property. *See id.* at 3 (chart). Indian Peak Properties may file a new petition if the City seeks to impose or enforce a restriction on the placement of this antenna.

[15] Petition 2 at 9, Petition 3 at 10, Petition 4 at 9-10.

[16] Petitions 2-4 at 7.

[17] *See* Petitions 2-4 at 6. The Petitions refer variously to Indian Peak Properties alone, James A. Kay and Indian Peak Properties, and to James A. Kay's "businesses" as customers of the antenna services without specifying which businesses are using the services or for what purpose. *See, e.g.*, Petitions at 3 (chart), 6, 8, Exh. 1, Expert Witness Statement/Affidavit of Daniel W. Redmond, at 1 (Redmond Statement).

[18] Petition 3 at 8; Petition 4 at 8.

asserts that Antenna 2 is "used exclusively to bring Internet service to the property" and does not provide a hub or relay service.[19]

By letter dated May 26, 2022, Petitioner filed a "supplement" to the Petitions containing additional facts.[20] The May 26 Supplement states that "currently, no one lives there [at the property]," but that the "house has been rented to a succession of residential tenants" (although no details on the length, frequency, or recency of any such occupancy are provided).[21] The Supplement states that the property "serves as a communications site and offices."[22] The letter explains that "James Kay operates FCC licensee Comm Enterprises LLC from this location as well as others" and that "[s]pace is also leased inside the house to Fisher Wireless."[23] In a letter submitted on July 5, 2022, characterized as its "second supplement" to the petition, Petitioner states that Comm Enterprises LLC (Comm Enterprises) and Fisher Wireless are the users of Antennas 2-4.[24] The Petitions also state that Antennas 2-4 provide "connectivity for a number of vendors and contractors" when they are visiting the property, and to "any residential tenants who lease rooms in the house from time to time."[25]

The Petitions further state that Indian Peak Properties is in the "rental" business and that Indian Peak Properties leases space on its roof "to others."[26] But the May 26 Supplement also states, contrary to the Petitions, that "[t]here are no roof leases."[27] Although the Petitions provide agreements and supporting documentation that Indian Peak Properties is paying LT-WR, Geo-Links, and One Internet America for what appears to be provision of Internet service,[28] Petitioner's July 5 Supplement states that Comm

---

[19] Petition 2 at 7.

[20] Letter from Julian Gehman, Counsel to Indian Peak Properties LLC and James A. Kay, Jr., to Marlene H. Dortch, Secretary, Federal Communications Commission (May 26, 2022) (May 26 Supplement).

[21] *Id.* at 3. The letter states that, "[a]fter the City revoked the use permit" in 2018, "Petitioner[] moved four UHF antennas indoors to the second floor of the house." *Id.* It is unclear how the property could both serve as a residence and simultaneously host four rooftop antennas inside the dwelling.

[22] *Id.* It is similarly unclear how the single-family property could service simultaneously as a rental dwelling and as the offices for several companies.

[23] *Id.* Petitioner notes that "the house is highly desirable as a communications site" because it has a "direct line of sight to downtown Los Angeles and Mount Wilson," "[t]here is a paucity of commercial communications tower facilities in the Rancho Palos Verdes area," and "WISP and other radio services are difficult in this area due to fading caused by marine layer and inversion layer." *Id.*

[24] Letter from Julian Gehman, counsel to Indian Peak Properties, LLC and James A. Kay, Jr., to Marlene H. Dortch, Secretary, Federal Communications Commission at 3 (July 5, 2022) (July 5 Supplement).

[25] Petitions 2-4 at 6.

[26] Petitions 2-4, Exh.7 at 1 (Apr. 18, 2022 Rancho Palos Verdes Business License Application for Home Occupancy Businesses); Petitions 3-4 at 7 ("Mr. Kay and Indian Peak Properties have the exclusive right to access and use the entirety of the building's rooftop, *except where rooftop space is leased to others*.") (emphasis added).

[27] May 26 Supplement at 3 (stating that "Petitioners have unfettered access to and control of the entire roof").

[28] Petition 2 includes exhibits with copies of an Agreement for Internet services between James A. Kay, owner and manager of LT-WR and James A. Kay, owner of Indian Peak Properties, as well as invoices from LT-WR to Indian Peak Properties for the provision of "internet connection from private VLAN of 10MB." *See* Petition 2 at Exh. 6. Petition 3 includes exhibits with invoices from Geo-Links to Indian Peak Properties, and checks from Indian Peak Properties to Geo-Links for the provision of "ClearFiber DIA 5/5Mbps." *See* Petition 3 at Exh. 6. And Petition 4 includes exhibits with an agreement for Internet services between One Internet America and Indian Peak Properties,

Enterprises and Fisher Wireless are the users of the antennas owned by LT-WR, GeoLinks, and One Internet America.[29]

The July 5 supplement explains that, "[w]hen Fisher Wireless or Comm Enterprises staff are working from the house, uninterrupted Internet access allows them to monitor and check the status of their other stations that are similarly equipped with Internet access, and remotely control those stations."[30] The supplement further asserts that Comm Enterprises and Fisher Wireless need "uninterrupted Internet access" because it allows for "remote monitoring of power supply, HVAC and operational status of the transmitters and other communications equipment" so that they can "remotely troubleshoot and mitigate network service problems."[31] Finally, the supplement states that uninterrupted Internet access "allows remote monitoring and control of the equipment in the house," and "[r]edundancy of broadband access facilitates continued monitoring of the house in the event of vandalism to one or more of Antennas 2, 3 or 4" by hostile neighbors.[32]

Based on all of the information provided by Petitioner, it is not clear whether Antennas 2-4 are serving end users at the premises, as required for a dispute to implicate the OTARD rule.[33] When the Commission expanded the scope of the OTARD rule in 2021, it determined that the "rule will not treat service providers as 'antenna users.'"[34] In this case, the record indicates that users of Antennas 2-4 each appear to be communications service providers. Specifically, Petitioner indicates in its July 5 Supplement that Antennas 2-4 are used by two communications providers who hold FCC licenses, Comm Enterprises

---

invoices from One Internet America to Indian Peak Properties, and checks from Indian Peak Properties to One Internet America for the provision of "internet connection services of 50 Mb download / 50 Mb Upload capabilities." *See* Petition 4 at Exh. 6.

[29] *See* July 5 Supplement at 3.

[30] July 5 Supplement at 4.

[31] *Id.* The supplement includes a list of equipment used inside the residence to support communications operations. *Id.* at 2.

[32] *Id.* at 4. We note that Petitioner claims that Antennas 2-4 provide "backup/redundancy" and that Antennas 5 and 6 each provide the same service. Petition 2 at 9, Petition 3 at 10, Petition 4 at 10; July 5 Supplement at 3; Petition 5 at 7-8. For the reasons stated below, we need not address whether such use is protected by the OTARD rule. However, the rule applies by its terms only where the restriction "impairs . . . use," including as relevant here "[p]recluding reception of transmission of an acceptable quality signal." 47 CFR 1.4000(a)(3). *See also Stanley and Vera Holliday, Petition for Declaratory Ruling Under 47 CFR § 1.4000*, Memorandum Opinion and Order, 14 FCC Rcd 17167, 17171, para. 12 (CSB 1999) (stating that "the record in this proceeding does not contain sufficient information to enable us to determine whether it is necessary for Petitioners to maintain five television antennas and three satellite dish antennas in order to receive the video programming available in their viewing area") (internal citations omitted); *cf. Philip Wojckewiz*, *Petition for Declaratory Ruling Under 47 CFR § 1.4000*, Memorandum Opinion and Order, 18 FCC Rcd 19523, 19529, para. 17 (MB 2003) ("[A] restricting entity may not impose an arbitrary limit on the number of antennas a viewer may install, provided that they are necessary to receive the video programming available for reception in the viewer's viewing area.").

[33] 47 CFR § 1.4000(a)(5) (hub or relay antennas must "serve[] a customer on [the] premises"); *id.* § 1.4000(a)(1) (other antennas must serve "user[s] ha[ving] a direct or indirect ownership or leasehold interest in the property").

[34] *Updating the Commission's Rule for Over-the-Air Reception Devices*, WT Docket No. 19-71, Report and Order, 36 FCC Rcd. 537, 544 para. 20 (2021) (*OTARD Fixed Wireless R&O*).

and Fisher Wireless. Fisher Wireless leases space in the building and owns Antennas 5 and 6.[35] Further, Commission records indicate that James A. Kay has a 100% ownership interest in Comm Enterprises.[36] James A. Kay also owns Indian Peak Properties (the owner of the building) and LT-WR (the owner of Antenna 2). In addition, the Petitions state that James A. Kay and his "businesses," which include communications providers LT-WR and Comm Enterprises, use Antennas 2-4, and the Petition further characterizes Kay and his businesses as the "primary" users without indicating whether there are other, unidentified users, such as off-site customers of any of the "primary" users.[37]

It is not evident from the Petitions whether James A. Kay qualifies as a user, since he does not claim to reside at the property or regularly use the service there, and the other identified "primary" users are communications service providers. And insofar as Petitioner claims that Antennas 3-4 are "hub or relay" antennas, the only "customer" is Indian Peak Properties, which apparently makes the antenna services available exclusively to communications service providers (at least one of which appears to be under common ownership with Indian Peak Properties) and to devices that support the needs of communications service providers. The record does not identify any non-communications-service-provider user who regularly resides at or uses the premises, other than unspecified vendors or contractors whose activities presumably are associated with the communications businesses operating there.

Because the OTARD rule does not protect antennas where the user is a service provider, and the identified users of Antennas 2-4 are FCC licensees who appear to be service providers, we dismiss Petitions 2-4 without prejudice.

Dismissal of Petition 5. For the reasons set forth below, we dismiss Petition 5 without prejudice because it fails to make any showing that each antenna supports the offering of a *fixed* wireless service (as opposed to a mobile service, such as a commercial mobile service[38] or a personal wireless service[39]), as required for a dispute to implicate the OTARD rule.

---

[35] The Petitions do not state whether Antennas 2-4 serve the Fisher Wireless antennas at issue in Petition 5. The reference to Comm Enterprises and Fisher Wireless' operation of "transmitters" and "other stations" raises additional questions, including whether they are operating stations at the residence, and if so whether those stations are being operated with any of the antennas subject to any of the Petitions.

[36] *See, e.g.,* FCC, Universal Licensing System, File No. 0003484147, Ownership Disclosure Filing, https://wireless2.fcc.gov/ownerQryDetail/ownership-search-results-detail.htm?applId=4514200&viewAll=FRBDIH&reqPage=1&DIHROW=1&backpage=ownership-search-results-detail.htm&CFID=14982922&CFTOKEN=26884547&jsessionid=Qc2JvHXNfBDvzr34qhNkhGl2vnDvsXSNYDWnVnTLqLXRs2Bfn6hD!1289473429!1657231181337.

[37] *See, e.g.*, Petitions at 3 (chart), 6, 8, Exh. 1.

[38] 47 CFR § 20.3 (defining "commercial mobile radio service" in part as a "mobile service that is: (a) (1) provided for profit, *i.e.*, with the intent of receiving compensation or monetary gain; (2) [a]n interconnected service; and (3) [a]vailable to the public, or to such classes of eligible users as to be effectively available to a substantial portion of the public; or (b) [t]he functional equivalent of such a mobile service described in paragraph (a) of this definition.").

[39] 47 U.S.C. § 332(c)(7)(C)(i) (defining "personal wireless services" as "commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services."). Section 332(c)(7) preserves "the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." *See Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, Order on Reconsideration, 19 FCC Rcd 5637, 5643, para. 14 (2004). We note that Petitioner claimed in federal District Court in 2020 that at least one of the antennas subject to the City's removal action provided "personal wireless service" subject to preemption protection pursuant

The Petition alleges that Antennas 5 and 6 are "used to receive or transmit broadband-only fixed wireless signals," are "used exclusively to distribute the Cellular service to customers located at the Property," and that neither is "an Internet hub or relay antenna."[40] Petitioner also claims that these antennas "provide[] voice over Internet protocol and other Internet based service to the house to supplement the weak cellular service."[41] But the Petition does not allow us to determine whether Antennas 5 and 6 are "fixed wireless antennas" that are being used "to receive or transmit fixed wireless signals."[42]

Petitioner's references to "cellular service" raise questions regarding whether the antennas are being used to extend mobile service rather than for fixed service. The affidavit accompanying the Petition states only that the antennas are "Cellular Rooftop Antennas for cellular phone connectivity" and that they "will be used to transmit and/or receive voice and data services."[43] An affidavit attached to the First Supplement includes an attestation that "all facts" in the underlying Petitions are "true and correct," except, in pertinent part, "those facts already attested to by a separate affidavit,"[44] and does not cover this level of detail about the service provided, leaving it ambiguous which affidavit the Commission should rely on in determining whether Antennas 5 and 6 are within the scope of the OTARD rule. The Petition's allegations that the antennas receive or transmit broadband-only fixed wireless signals and are not hub or relay antennas "used to receive or transmit fixed wireless signals for the distribution of fixed wireless services to multiple customer locations"[45] are likewise unsupported in the expert affidavit.[46] If Antennas 5 or 6 are hub and relay antennas and they are providing telecommunications services or a service that is provided on a commingled basis with telecommunications services, then they would fall outside the

---

to 47 U.S.C. § 332(c)(7) because the city "unreasonably discriminated amongst providers, and effectively prohibited the provision of personal wireless services." First Amended Complaint for a Temporary Restraining Order, Injunctive, Declaratory Relief and Damages (42 U.S.C. § 1983); Request for Expedited Review; Demand for Jury Trial, at paras. 85-94, *Indian Peak Properties, LLC v. City of Rancho Palos Verdes*, Case No. 2:20-cv-00457 DSF (RZx) (C.D. Cal. Mar. 5, 2020), appended to May 6 City Letter from William W. Wynder, counsel to City of Rancho Palos Verdes, to Garnet Hanly, Chief of Competition and Infrastructure Policy Division, FCC Wireless Telecommunications Bureau (May 6, 2022), Ex. H at 148-50. We note that to the extent any hub or relay antennas on the building provide service covered by section 332(c)(7) of the Act, 47 U.S.C. § 332(c), they are not covered by the OTARD rule. *See OTARD Fixed Wireless R&O,* 36 FCC Rcd at 547-48, paras. 29-31.

[40] Petition 5 at 7-8 (while the Petition includes the article "the" in the sentence, it does not specify to which cellular service it is referring). The Petition also states that Antennas 5 and 6 are "not used to—and cannot—distribute fixed wireless Internet signals to multiple end-user locations." *Id.*

[41] July 5 Supplement at 4.

[42] 47 CFR § 1.4000(a)(1)(ii); *see also id.* at 1.4000(a)(2) (defining "fixed wireless signals" as "any commercial non-broadcast communications signals transmitted via wireless technology to and/or from a fixed customer location.").

[43] *See* Petition 5, Exh. 1.

[44] May 26 Supplement at Affidavit of James A. Kay, Jr.

[45] 47 CFR § 1.4000(a)(5) (defining "hub and relay antenna" for purposes of OTARD protection as "any antenna that is used to receive or transmit fixed wireless signals for the distribution of fixed wireless services to multiple customer locations as long as the antenna serves a customer on whose premises it is located, but excludes any hub or relay antenna that is used to provide any telecommunications services or services that are provided on a commingled basis with telecommunications services.").

[46] *See* Petition 5, Exh. 1. All facts alleged in a petition for declaratory ruling must be supported by a person with actual knowledge of the facts. 47 CFR § 1.4000(h).

OTARD rule's scope, and Petition 5 is deficient because it lacks information necessary to this determination.[47]

Initiation of a Proceeding. Petitioner requests that the Commission issue a declaration that "any action taken by the City to enforce" its decision to revoke a conditional use permit for antennas on the building while the Petitions are pending is suspended.[48] Petitioner argues that the filing of its petitions triggered section 1.4000(a)(4), which provides that, "if a proceeding is initiated," the "entity seeking to enforce the antenna restriction must suspend all enforcement efforts pending completion of review."[49]

Section 1.4000(e) characterizes OTARD petitions as petitions for declaratory ruling filed pursuant to section 1.2.[50] In adopting section 1.2, the Commission stated that it "intended to make the process for petitions for declaratory rulings 'similar' to that for petitions for rulemaking."[51] The rules applicable to petitions for rulemaking allow for dismissal without prejudice of petitions that are "moot, premature, repetitive, frivolous, or which do not warrant consideration by the Commission . . . ."[52] Consistent with section 1.2, the practice of the Commission's Bureaus has been to deny or dismiss other types of petitions for declaratory ruling, as well as OTARD petitions, without first putting them on public notice, in appropriate circumstances.[53] To be sure, section 1.2(b) of the Commission's rules states generally that the Commission's staff "should" docket and invite public comment on petitions for declaratory rulings, 47 CFR § 1.2(b). In enacting section 1.2(b), however, the Commission expressly recognized that there sometimes would be circumstances where those procedures should *not* be followed.[54] The instant Petitions and supplements thereto do not provide sufficient information for the Commission to determine whether the OTARD rule might apply to them and in fact raise questions about whether this is the case.

The OTARD rule does not provide that the mere filing of a petition for declaratory ruling seeking preemption of an antenna restriction is sufficient to warrant the extraordinary relief of suspending local enforcement efforts. That occurs only at such time as "as a proceeding is initiated" by the Commission.[55]

---

[47] 47 CFR § 1.4000(a)(5); 47 U.S.C. § 153(53) (defining telecommunications service as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used").

[48] *See* Petitions at 8-9.

[49] 47 CFR § 1.4000(a)(4).

[50] 47 CFR § 1.4000(e).

[51] *John F. Garziglia*, Letter, 28 FCC Rcd 4145, 4146 (MB 2013) (citation omitted).

[52] 47 CFR § 1.401(e).

[53] For example, the Media Bureau dismissed an OTARD petition for declaratory ruling filed by the Multifamily Broadband Council seeking preemption of Article 52 of the San Francisco Police Code prior to establishing a proceeding. The Media Bureau determined that the petitioner "ha[d] not established that it [was] entitled to relief under the OTARD rule." *Petition for Declaratory Ruling - Multifamily Broadband Council*, Letter Order, 32 FCC Rcd 3794, 3795-96 (MB 2017); *see John F. Garziglia*, 28 FCC Rcd at 4146 ("In stipulating that petitions for declaratory rulings 'should' rather than 'must' seek comment, the Commission has afforded bureaus and offices discretion to act without public notice in unusual circumstances.").

[54] *Amendment of Certain of the Commission's Part 1 Rules of Practice and Procedure and Part 0 Rules of Commission Organization*, Report and Order, 26 FCC Rcd 1594, 1597, para. 10 (2011).

[55] Petitioner seems to acknowledge this in its May 26 Supplement. *See* May 26 Supplement at 2 ("Petitioners request a very prompt review of whether each of the five Petitions is acceptable for filing . . . .").

Nothing in the OTARD rule supports Petitioner's suggestion that the agency must initiate a proceeding immediately whenever a petition for declaratory ruling is filed.[56] On the contrary, the rule includes procedural and substantive requirements that any petition must comply with, and the Commission may reasonably wait to open a proceeding and seek public comment until after it has determined that the petition is not procedurally defective and that the information provided is sufficient to identify a dispute that implicates the OTARD rule. A proceeding is initiated, and enforcement of an antenna restriction is suspended, when the appropriate Bureau issues notice in writing.

Specifically as to these parties, Petitioner has now filed two sets of petitions that fail to allege facts sufficient to demonstrate whether the antennas meet the requirements of the OTARD rule.[57] We dismissed the initial petition submitted by Indian Peak Properties on April 22, 2022, because it failed "to provide sufficient information to support a showing that each antenna meets all of the criteria required for protection under the OTARD rule."[58] And with the subsequent filing of five new petitions on May 1, 2022, Petitioner again failed to provide sufficient information that would warrant initiating a proceeding "to determine whether a particular restriction is permissible or prohibited" under the OTARD rule—*i.e.*, "allegations of fact" that provide sufficient detail necessary to support a claim that each antenna is entitled to protection from an "impairment" under the OTARD rule.[59]

We expect petitions seeking protection under the OTARD rule to include allegations with sufficient detail, clarity, and accuracy for the Commission to identify whether a dispute implicates the OTARD rule as discussed above. To the extent Petitions fail to do so, we will decline to initiate the proceeding contemplated by the Commission's rules.

Conclusion. Accordingly, we dismiss Petition 1 without prejudice due to the failure to make any showing that there is a present attempt to enforce a restriction, and we dismiss without prejudice Petitions 2, 3, 4, and 5 due to the Petitions' failure to identify facts that provide sufficient detail to demonstrate, as to each

[56] Petitions at 8-9.

[57] We note that counsel for the City Rancho Palos Verdes alleges that the filing of these petitions by Indian Peak Properties "are merely part of an ongoing effort to forestall and delay the enforcement of two California Court of Appeals decisions" and that the Petitioner is attempting to use the Commission "to prevent the lawful enforcement of no fewer than five (5) different court rulings." Email from William W. Wynder, Counsel to City of Rancho Palos Verde to Jacob Lewis, Acting Deputy General Counsel, FCC Office of General Counsel, at 1 (June 30, 2022).

[58] *See* April 22 Letter at 2-3.

[59] 47 CFR §§ 1.4000(e), (h).

antenna associated with the Petitions, a dispute that implicates the OTARD rule. This action is taken pursuant to authority delegated by the Federal Communications Commission, 47 U.S.C. § 155; 47 CFR §§ 0.61(f)(4), 0.131(a).

Sincerely,

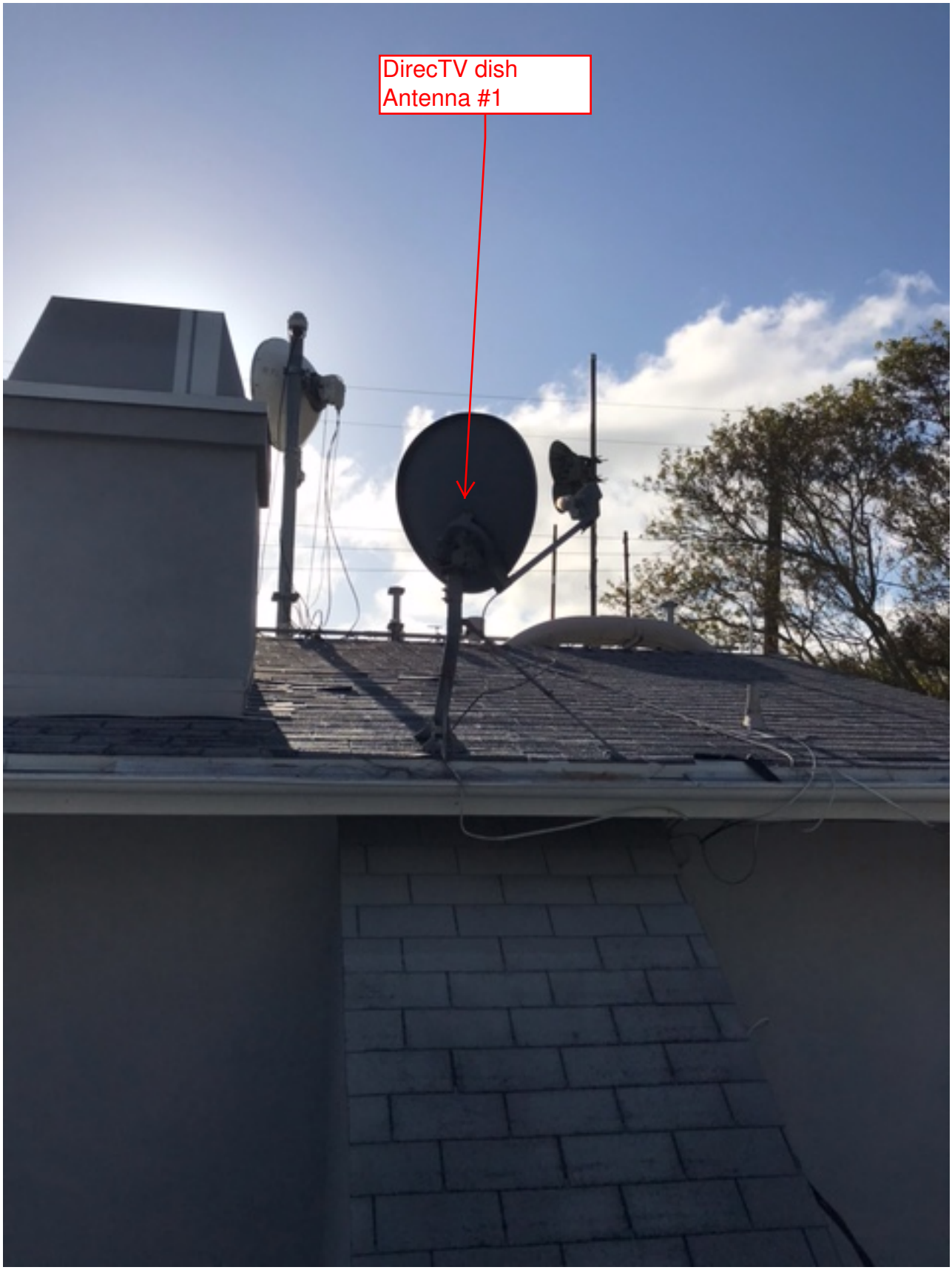
/s/ Garnet Hanly

Garnet Hanly
Chief
Competition & Infrastructure Policy Division
Wireless Telecommunications Bureau

/s/ Maria Mullarkey

Maria Mullarkey
Chief
Policy Division
Media Bureau

cc: Julian Gehman, Gehman Law PLLC
Angela M. Rossi, Bradley, Gmelick & Wellestein, LLP
William W. Wynder, Aleshire & Wynder, LLP
Alison S. Flowers, Aleshire & Wynder, LLP
Christy M. Lopez, Aleshire & Wynder, LLP


DirecTV dish
Antenna #1


LT-WR LLC
antenna
Antenna #2


Antenna #2


Geolinks antenna
Antenna #3


One Internet
America
Antenna # 4


Antennas #5

RESOLUTION NO. 2018-61

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF RANCHO PALOS VERDES REVOKING IN ITS ENTIRETY AND EFFECTIVE IMMEDIATELY CONDITIONAL USE PERMIT NO. 230 FOR THE INSTALLATION OF COMMERCIAL ANTENNAS AND RELATED SUPPORT STRUCTURES AT 26708 INDIAN PEAK ROAD.

WHEREAS, on June 21, 2001, the Applicant/Appellant, Mr. James A. Kay, Jr., submitted applications for Conditional Use Permit No. 230 and Environmental Assessment No. 744 for after-the-fact approval to establish the then-existing 5-masted, roof-mounted antennae and related support structures and equipment on the site for commercial use; and,

WHEREAS, on September 19, 2001, the applications for Conditional Use Permit No. 230 and Environmental Assessment No. 744 were deemed complete by Staff; and,

WHEREAS, pursuant to the provisions of the California Environmental Quality Act, Public Resources Code Sections 21000 *et seq.* ("CEQA"), the State's CEQA Guidelines, California Code of Regulations, Title 14, Section 15000 *et. seq.*, the City's Local CEQA Guidelines, and Government Code Section 65962.5(f) (Hazardous Waste and Substances Statement), Staff found no evidence that Conditional Use Permit No. 230 and Environmental Assessment No. 744 would not have a significant effect on the environment and, therefore, the proposed project was determined by Staff to be categorically exempt (Class 1, Section 15301); and,

WHEREAS, after the submittal of these applications on June 21, 2001, and while the Planning Commission was conducting the public hearings on this application, the Applicant installed at least twelve (12) additional vertical antenna masts with attached antennae onto the previously existing roof-mounted antenna support structure and array, including additional cables and conduits for the additional antennae; and on November 8, 2001, the Applicant submitted revised plans to the City depicting a total of twenty (20) vertical antenna masts with attached antennae on the roof-mounted antenna support structure and array; and,

WHEREAS, after notice issued pursuant to the requirements of the Rancho Palos Verdes Development Code, the Planning Commission held a duly noticed public hearing on October 23, 2001, November 13, 2001, and November 15, 2001, at which time all interested parties were given an opportunity to be heard and present evidence; and,

WHEREAS, the Planning Commission, on November 15, 2001, adopted P.C. Resolution No. 2001-43 conditionally approving the project; and,

WHEREAS, Mr. Kay timely appealed conditional approval by letter dated November 28, 2001, based on disagreement with "all conditions regulating the location, number and placement of antennas on the project site…."; and,

WHEREAS, after notice issued pursuant to the requirements of the Rancho Palos Verdes Development Code, the City Council held a duly noticed public hearing on February 19, 2002, March 19, 2002, March 25, 2002 and April 16, 2002, at which time all interested parties were given an opportunity to be heard and present evidence; and,

WHEREAS, the City Council, on April 16, 2002, adopted Resolution No. 2002-27, thereby denying the appeal, modifying certain conditions of approval and conditionally approving the project; and,

WHEREAS, on May 15, 2002, Mr. Kay filed suit against the City in Federal District Court in order to overturn the City's decision on the grounds, among other things, that it violated the Telecommunications Act of 1996; and,

WHEREAS, on July 14, 2004, the United States District Court for the Central District of California ruled in the case of *Kay v. Rancho Palos Verdes* and ordered the "City Council of the City of Rancho Palos Verdes to issue a new resolution allowing James A. Kay, Jr. to use his five (5) mast antenna structure for commercial purposes, subject to reasonable conditions"; and,

WHEREAS, the City revised the conditions of approval for Conditional Use Permit No. 230 to allow the commercial use of Mr. Kay's 5-mast, roof-mounted, antenna array, which existed at the time and was depicted on plans provided to the City of Rancho Palos Verdes with the original submittal of the application for Conditional Use Permit No. 230 on June 21, 2001; and,

WHEREAS, this matter was agendized for the City Council's review and consideration on October 5, 2004, and November 16, 2004, but on both occasions the matter was continued to a subsequent City Council meeting at Mr. Kay's request in order to allow his legal counsel to discuss additional proposed revisions to the conditions of approval for Conditional Use Permit No. 230 with the City Attorney; and,

WHEREAS, the City Council, on December 21, 2004, adopted Resolution No. 2004-109, thereby revising eight (8) conditions of approval for Conditional Use Permit No. 230 pursuant to the July 14, 2004, order of the United States District Court; and,

WHEREAS, Mr. Kay subsequently petitioned the United States District Court to vacate the conditions of approval imposed by Resolution No. 2004-109; and,

WHEREAS, on April 4, 2005, the United States District Court issued an order in response to Mr. Kay's petition, finding that the provisions of Condition No. 19 of Conditional Use Permit No. 230 requiring "that Mr. Kay maintain the property as his

primary residence [were] not reasonable," but also finding that all other conditions of approval imposed by Resolution No. 2004-109 were reasonable; and,

WHEREAS, after notice issued pursuant to the requirements of the Rancho Palos Verdes Development Code, on July 5, 2005, the City Council adopted Resolution No. 2005-75 revising the language for Condition No. 19 of Conditional Use Permit No. 230 thereby requiring that Mr. Kay complete necessary improvements to make the house habitable, including but not limited to, a functional kitchen and bathroom, and connections to utilities, along with weekly landscape and maintenance services; and,

WHEREAS, on November 28, 2014, the City issued Mr. Kay a Notice of Violation for the installation of unpermitted roof-mounted antennas resulting in a total of thirteen (13) roof-mounted antennae and support pole masts, well in excess of the five (5) City Council-approved, roof-mounted antennae and support pole masts. The City ordered the removal of all but the five (5) City Council-approved roof-mounted antennae and support pole masts from the roof, and requiring that the remaining five (5) City Council-approved, roof-mounted antennae and support pole masts comply with the City Council-adopted Conditions of Approval for Conditional Use Permit No. 230; and,

WHEREAS, on July 26, 2016, the City set a thirty (30) day period for compliance with the November 28, 2014, Notice of Violation. At the request of Mr. Kay, the City, in good faith, granted a time extension to this compliance deadline to October 28, 2016; and,

WHEREAS, on October 28, 2016, a Conditional Use Permit revision application (Planning Case No. ZON2016-00517) was submitted to the City requesting to legalize the unpermitted roof-mounted antennas; and,

WHEREAS, on November 23, 2016, the application was deemed incomplete for processing, and because the application originated from code enforcement action, the Applicant was given thirty (30) days, or until December 21, 2016, to submit the requested additional information in order continue processing the application; and,

WHEREAS, on March 21, 2017, the City received a letter from Mr. Kay's legal counsel, Mr. Nakasu, asserting that the application to revise Conditional Use Permit No. 230 with an after-the-fact amendment should be granted pursuant to RPVMC §17.76.020(A)(12)(b); and,

WHEREAS, on April 14, 2017, the City Attorney responded by outlining the City's position that, pursuant to Resolutions 2002-27, 2004-109, and 2005-75, the five (5) City Council-approved, roof-mounted antennae and support pole masts "refer only to the antennae and antenna array depicted in the plans submitted to the City on June 21, 2001, in photographs accompanying the application to revise CUP No. 230, and Environmental Assessment No. 744." Further, the City Attorney stated that any suggestion that additional antennae, support pole masts, and other structures were mere modifications not requiring City Council approval directly contravened the binding resolutions; and,

WHEREAS, on June 28, 2017, City Staff, the City Prosecutor, Mr. Nakasu, and Mr. Kay met to discuss this matter, at which time, Mr. Nakasu indicated that the antennae and support structures were "outdated" and "obsolete" and that they could be replaced with an alternative structure that would both address the telecommunications capacity needs, as well as the City's safety and aesthetic concerns with the current structures. Four months elapsed from the June 28, 2017, meeting, during this time, Mr. Kay did not make any further attempts to cure the application deficiencies in order to proceed with processing a revision to CUP No. 230, or to rectify the technological obsolescence of the existing structures; and,

WHEREAS, on October 19, 2017, Staff granted, in good faith, Mr. Kay additional time to submit the requested information in order for Mr. Kay to acquire a new permit expediter company; and,

WHEREAS, on October 23, 2017, the City Prosecutor sent a letter to Mr. Kay and Mr. Nakasu, the purpose of which was to summarize events subsequent to the June 28, 2017, meeting, to reiterate the deficiencies in the CUP No. 230 revision application, to discuss potential replacement of current, "obsolete," structures, and to discuss the potential for reinstating the Code Enforcement case, should the City's demands not be met; and,

WHEREAS, on December 13, 2017, City Staff, City Prosecutor, Mr. Nakasu, and Mr. Kay met, and at this meeting, Mr. Kay proposed alternative designs to replace the existing antennae, such as a faux monopole tree or new roof antennae on the rear yard-facing roof pitch, that would address the City's concerns and meet the needs of the commercial antennas. As a result, it was agreed that Mr. Kay would submit, by mid-January 2018, a concept drawing regarding a proposed alternative design for the City's initial review, followed by an application for the CUP on or before February 28, 2018. To date, the City has not received any information from Mr. Kay or his legal counsel; and,

WHEREAS, in accordance to RPVMC §17.60.080, if any of the conditions to the use or development are not maintained, then the Conditional Use Permit shall be null and void. Furthermore, the continued operation of a use requiring a Conditional Use Permit which is found to be noncompliant with any condition of a Conditional Use Permit shall constitute a violation of the Municipal Code; and,

WHEREAS, after notice issued pursuant to the requirements of the Rancho Palos Verdes Municipal Code, the City Council held a duly-noticed public hearing on August 21, 2018 to consider revoking Conditional Use Permit No. 230, at which time all interested parties were given an opportunity to be heard and present evidence.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF RANCHO PALOS VERDES DOES HEREBY FIND, DETERMINE, AND RESOLVE AS FOLLOWS:

Section 1: Having heard and considered the oral, written, and documentary evidence presented at the duly-noticed public hearing conducted by the City Council on August 21, 2018, the City Council makes the following findings:

A. The property located at 26708 Indian Peak Road, Rancho Palos Verdes, California, (the "Subject Property") is the subject of Conditional Use Permit No. 230 ("CUP No. 230"), as granted by the City Council in Resolution No. 2004-109, and as amended by Resolution No. 2005-75. The Applicant, Mr. James A. Kay, Jr., did not successfully challenge, within the time provided by law, Resolution No. 2005-75, and has from and after the adoption of Resolution No. 2005-75 (the "CUP Date") accepted the benefits of CUP No. 230.

B. CUP No. 230 required removal of all but five (5) of the existing eight-and-on-half-foot long masts and two of the television antennae from the roof, authorized a maximum of five (5) vertical masts, each with a height of eight and one-half (8 ½) feet, and not more than four (4) radiating per each mast.

C. Condition of Approval No. 2.d states in part, "Any additional exterior antennae, masts or other antenna and support structure(s) shall require further approval or modification of this conditional use permit."

D. Further, Condition of Approval No. 2 goes on to state that the Director is authorized to make only minor modifications to the approved plans and conditions of approval. "Otherwise, any substantive change, such as the enlargement, expansion or addition to, the exterior masts and antennae that this approval allows outside of the exiting residential structure shall require approval of a revision to Conditional Use Permit No. 230 by the City Council and shall require a new and separate environmental review."

E. The Subject Property has at various times from after the CUP Date had installed antennae and/or vertical masts on the roof as testified to by staff and depicted in photographic evidenced submitted into the Administrative Record. Such evidence discloses installation of as many as twelve (12) additional vertical masts (the "Additional Masts") over and above the five (5) permitted by CUP No. 230.

F. Mr. Kay has failed to provide any evidence that any permits of any kind (zoning, building, etc.) were obtained by him, directly or by an agent acting on his behalf, authorizing the construction of the Additional Masts. Written correspondence from his attorney admits such construction has occurred, does not contest to permits were obtained in advance, and has confirmed such by submitting an incomplete application for an "after-the-fact" permit for the Additional Masts.

G. City records fail to show any action by the City Council subsequent to Resolution No. 2005-75 modifying, amending, or otherwise affecting CUP No. 230 to allow installation of more than five (5) vertical masts on the Subject Property. Further, although the City Council finds it would not properly be the subject of a minor modification, staff has indicated that no application for a minor modification was approved by the Director to that effect.

H. The City staff has made various efforts to resolve these issues short of a revocation beginning in 2014. Despite numerous meetings, exchanges of correspondence, and opportunities to come into compliance with CUP No. 230 or, in the alternative, apply for a modification to CUP No. 230 to retroactively permit the Additional Masts, Mr. Kay has not diligently pursued any remedial opportunity and has continued to operate the unpermitted facilities while essentially "stringing along" the City.

I. Based upon all the evidence presented, and after hearing the arguments and testimony on behalf of Mr. Kay, the public, and City staff, the City Council finds the evidence of construction of the unpermitted Additional Masts to be essentially uncontested in that Mr. Kay has admitted they exist. The City Council finds that no permits of any kind (zoning or building) were obtained by Mr. Kay and therefore the construction of the Additional Masts was in violation of the Rancho Palos Verdes Municipal Code and the specific provisions of the Conditions of Approval relating to modification or expansion of the use of the antennae structure by the increase in the number of masts above the five (5) permitted by CUP No. 230.

J. The City Council further finds that the violation directly impacts surrounding properties due to the increased visual impact of commercial antennae which the limitation on the number of vertical masts was narrowly tailored to address, and that the Subject Property owner has repeatedly and knowingly violated the Conditions of Approval by the installation of the Additional Masts without any permits or other legally-required approvals, and subsequently has availed himself of numerous opportunities to come into compliance with the terms of CUP No. 230 such that revocation is the appropriate action and is necessary to protect the legitimate interests of the community.

Section 2: Based on the information included in the Staff Report, the testimony and evidence presented at the public hearings in the past before the Planning Commission and the City Council, the administrative records related to those prior proceedings, the Minutes and the other records of this proceeding on file with the City, the City Council of the City of Rancho Palos Verdes hereby revokes Conditional Use Permit No. 230, as amended, in its entirety.

PASSED, APPROVED, AND ADOPTED this 21st day of August 2018.

Mayor

Attest:

City Clerk

State of California)
County of Los Angeles) ss
City of Rancho Palos Verdes)

I, Emily Colborn, City Clerk of the City of Rancho Palos Verdes, hereby certify that the above Resolution No. 2018-61 was duly and regularly passed and adopted by the said City Council at a regular meeting thereof held on August 21, 2018.

City Clerk

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES
Civil Division
Central District, Stanley Mosk Courthouse, Department 71

18STCV03781
CITY OF RANCHO PALOS VERDES, A MNICIPAL CORPORATION vs INDIAN PEAK PROPERTIES, LLC, A NEVADA CORPORATION, et al.

November 20, 2019
11:56 AM

Judge: Honorable Monica Bachner
Judicial Assistant: A. Barton
Courtroom Assistant: None

CSR: None
ERM: None
Deputy Sheriff: None

APPEARANCES:

For Plaintiff(s): No Appearances

For Defendant(s): No Appearances

NATURE OF PROCEEDINGS:
Ruling on Submitted Matter

The Court, having taken the matter under submission on 10/29/2019, now rules as follows: Plaintiff City of Rancho Palos Verdes' motion for summary judgment against Defendant Indian Peak Properties, LLC is granted.

Plaintiff City of Rancho Palos Verdes ("Plaintiff") moves for summary judgment against Defendant Indian Peak Properties, LLC ("Defendant"). In the alternative, Plaintiff moves for summary adjudication of the 1st (public nuisance – operation of commercial antennae in violation of existing conditional use permit ("CUP") in violation of RPVMC §17.76.020(A)) [Issue No. 1], 2nd (public nuisance – operation of commercial antennae without a CUP in violation of RPVMC §17.76.020(A)) [Issue No. 2], and 3rd (public nuisance – Civil Code §3491) [Issue No. 3] causes of action in Plaintiff's first amended complaint ("FAC"). (Notice of Motion, pgs. 1-2; FAC.) (See C.C.P. §§437c(p)(1) and 437c(p)(2).) In its supplemental opposition, Defendant requests a stay of the action. The Court has considered the papers and arguments of counsel.

Requests for Judicial Notice and Evidentiary Objections

Plaintiff's 3/26/19 request for judicial notice is granted. However, the Court will not take judicial notice of the truth of the matters asserted in the Answer, City Council Resolutions, Meeting Minutes, Civil Minutes, Application for Revision, Notice of Public Hearing, Agenda, Agenda Report, and Meeting Minutes. (P-RJN, Exhs. B, C, D, E, F, G, H, I, K, L, L, N, O, P, Q, R, S, and T.)

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES
Civil Division
Central District, Stanley Mosk Courthouse, Department 71

18STCV03781
CITY OF RANCHO PALOS VERDES, A MNICIPAL CORPORATION vs INDIAN PEAK PROPERTIES, LLC, A NEVADA CORPORATION, et al.

November 20, 2019
11:56 AM

Judge: Honorable Monica Bachner
Judicial Assistant: A. Barton
Courtroom Assistant: None

CSR: None
ERM: None
Deputy Sheriff: None

Plaintiff's 8/16/19 request for judicial notice is granted. However, the Court will not take judicial notice of the truth of the matters asserted in the Order. (P-RJN, Exh. 1.)

Defendant's 10/15/19 request for judicial notice is granted. However, the Court will not take judicial notice of the truth of the matters asserted in the case. (D-RJN.)

Plaintiff's 10/24/19 request for judicial notice is granted. However, the Court will not take judicial notice of the truth of the matters asserted in the ruling. (P-RJN, Exh. A.)

Defendant's 8/13/19 evidentiary objections to the Declaration of Ara Mihranian are overruled as to Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, and 21.

Defendant's 8/13/19 evidentiary objections to the Declaration of Christy M. Lopez are overruled as to Nos. 1, 2, 3, 4, and 5.

Defendant's 8/13/19 evidentiary objections to the Declaration of E. Lee Afflerbach are overruled as to Nos. 1, 2, and 3.

Defendant's 8/13/19 evidentiary objections to the Declaration of Glen E. Tucker are overruled as to Nos. 1, 2, 3, 4, and 5.

Defendant's 8/27/19 evidentiary objection to Plaintiff's 8/16/19 request for judicial notice is moot given that Defendant objects to the Court taking judicial notice of the truth of the matter asserted within the Order given the Court's ruling on the request for judicial notice.

Plaintiff's 10/24/19 evidentiary objection to the Declaration of Bart Fisher is overruled as to No. 1. Plaintiff's evidentiary objection to the Declaration of Dawn Cushman is overruled as to No. 2.

Procedural Background

The hearing on the instant motion was originally set for June 11, 2019. On May 14, 2019, the parties entered a stipulation continuing the hearing to July 2, 2019 to allow for the deposition of Ara Mihranian ("Mihranian"). On June 24, 2019, the Court granted Defendant's ex parte application, continuing the hearing to August 27, 2019, on the grounds that Defendant had not prepared an opposition to the motion due to matters beyond Defendant's control, including the

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES
Civil Division
Central District, Stanley Mosk Courthouse, Department 71

18STCV03781
CITY OF RANCHO PALOS VERDES, A MNICIPAL CORPORATION vs INDIAN PEAK PROPERTIES, LLC, A NEVADA CORPORATION, et al.

November 20, 2019
11:56 AM

Judge: Honorable Monica Bachner
Judicial Assistant: A. Barton
Courtroom Assistant: None

CSR: None
ERM: None
Deputy Sheriff: None

departure of the attorney responsible for preparing the opposition from the firm. (Court's 6/24/19 Minute Order; See 6/21/19 Ex Parte Application.) On August 20, 2019, the Court denied Defendant's 8/13/19 ex parte application for a continuance, which was made on the grounds that an opposition could not be timely prepared, filed, or served due to factors beyond Defendant's control. (Court's 8/20/19 Minute Order.; See 8/13/19 Ex Parte Application.) On August 23, 2018, the Court continued the hearing to August 28, 2019. (8/23/19 Minute Order.) On August 28, 2019, the Court issued a ruling granting Defendant's request for a continuance and continuing the hearing to October 29, 2019. (Court's 8/28/19 Minute Order & Ruling.)

Prior to the hearing on the motion, Defendant filed a supplemental opposition and supporting documents and Plaintiff filed a supplemental reply. The Court will rely on the arguments raised in the supplemental filings in ruling on the motion. In addition, the Court notes that Plaintiff's Separate Statement of Material Facts sets forth the same 46 material facts in support of each of the three issues and renumbers those facts for each issue, for which Defendant's responses remain consistent between the three issues. For simplicity, the Court will refer to Nos. 1-46 in referencing Plaintiff's material facts as to any of the three issues.

On October 11, 2019, Defendant filed an appeal to the denial of Defendant's writ in the Mandamus Action. (See Mandamus Action, 10/17/19 Notice of Filing.) However, the fact the Mandamus ruling is on appeal and not final does not bar this Court from issuing its own ruling as to these issues.

The Court notes Defendant's assertion in opposition that a stay of the instant action is necessary pending further resolution of the claims in the related Mandamus Action. (Opposition, pg. 13.) Defendant argues that since the Mandamus Action seeks to void and vitiate the administrative actions taken by Plaintiff that resulted in the revocation of Defendant's CUP 230, which is the same CUP at issue in Plaintiff's nuisance claims, it is premature for the Court to decide Issues Nos. 1 and 2 (that Defendant is operating commercial antenna in violation of CUP 230 or without a CUP) while the Mandamus Action challenging Plaintiff's action is on appeal. (Opposition, pg. 14; Supp-Decl. of Cushman ¶¶4-7.) However, Defendant fails to argue how Issue 1 is implicated by the pending appeal in the Mandamus Action. Moreover, Defendant has not demonstrated how the Court's ruling on Issue No. 2, in consideration of the evidence before it, and in a manner that does not create a conflict with the ruling in the Mandamus Action would be premature. In reply, Plaintiff does not address the issue of the potential for conflicting rulings in light of the appeal of the Mandamus Action but asserts that there is no basis for staying this case because: (1) Defendant cannot seek affirmative relief of a stay through an opposition to a

motion; and (2) the Mandamus Action ruling upholding the revocation has not been stayed. (Reply, pg. 13.) Plaintiff is correct that Defendant improperly requests affirmative relief through an opposition. The Court notes Plaintiff appears to misconstrue Defendant's argument—Defendant does not seek a stay of the Mandamus Action or the administrative decision underlying the Mandamus Action, but of the instant action. (Reply, pgs. 13-14.) However, the Court declines to rule on Defendant's request for a stay of the action as the parties have not had the opportunity to fully brief the issues and present evidence in support and opposition of the affirmative request.

Background of Action

Plaintiff filed a complaint for public nuisance against Defendant and other named defendants on November 5, 2018. On February 13, 2019, Plaintiff filed its FAC, dismissing all other named defendants. Plaintiff's FAC is based on allegations that Defendant's installation and operation of commercial antennae at a property located at 26708 Indian Peak Road, Rancho Palos Verdes, California ("property") in violation of Ranch Palos Verdes Municipal Code ("RPVMC") §§ 17.76.020(A), and 1.08.010, and as such, constitutes a public nuisance and seeks an order enjoining Defendant from such conduct. (FAC ¶¶3-4; Prayer ¶6.) Plaintiffs argue they are entitled to summary judgment against Defendant on the grounds that there are no defenses to the causes of action, that there are no triable issues as to any material fact, and that Plaintiff is entitled to judgment as a matter of law. (Notice of Motion, pg. ii.)

The Court notes that Plaintiff's public nuisance causes of action are based on the theory that Defendant's conduct constitutes a nuisance per se; Plaintiff alleges that Defendant has violated various provisions of Plaintiff's municipal code that set forth what constitutes a public nuisance. Accordingly, Defendant's arguments and/or evidence in opposition as to whether Plaintiff submitted evidence supporting the elements of a public nuisance cause of action, such as balancing the harm against the benefit, are irrelevant. (See Opposition, pgs. 7-8.)

Issue No. 1: Public Nuisance – Violation of RPVMC §17.76.020(A) (Operation of Commercial Antenna Without an Approved CUP) (1st COA)

"[W]here the law expressly declares something to be a nuisance, then no inquiry beyond its existence need be made and, in this sense, its mere existence is said to be a nuisance per se. [Citation.] But, to rephrase the rule, to be considered a nuisance per se the object, substance, activity or circumstance at

issue must be expressly declared to be a nuisance by its very existence by some applicable law." (People v. ConAgra Grocery Products Co. (2017) 17 Cal.App.5th 51, 114.)

RPVMC §17.76.020(A), which governs commercial antennas, provides that the installation and/or operation of a commercial antenna shall require the submittal and approval of a CUP by the planning commission pursuant to Chapter 17.60. RPVMC §17.60.080, which governs failure to comply with a CUP, provides that, "if any conditions to the use [provided for via a CUP]... are not maintained, then the [CUP] shall be null and void. Continued operation of a use requiring a [CUP] after such [CUP]... is found [null and void] shall constitute a violation of this title."

RPVMC §1.08.010(D) provides that any violation of Plaintiff's Municipal Code constitutes a public nuisance. (See RPVMC §1.08.010(D)(1) ("[A]ny condition caused or permitted to exist in violation of any of the provisions of this code shall be deemed a public nuisance and may be abated as such at law or equity. Prior to seeking civil or equitable relief, the city shall provide the person responsible for the public nuisance with notice and a reasonable opportunity to cure.").)

To meet its burden in summary judgment/adjudication on the 1st cause of action, Plaintiff must submit evidence demonstrating that Defendant's conduct qualifies as continued operation of its commercial antennas after the CUP allowing Defendant's operation was found to be null and void as to Defendant's conduct and that Plaintiff provided Defendant with notice and a reasonable opportunity to cure.

Plaintiff submitted evidence suggesting Defendant violated its CUP and, as such, Defendant's conduct amounts to a public nuisance. Plaintiff submitted evidence that on June 21, 2001, James Kay ("Kay"), former owner of the property and president of Defendant, submitted an application for CUP 230 to Plaintiff for after-the-fact approval of a five-mast, roof-mounted commercial antenna that included related support structures then-existing on the Property ("Original Antenna Array"), which was conditionally approved on November 15, 2001. (USSF Nos. 3-4 ("USSF" refers to undisputed facts).) Kay appealed the conditions of the CUP 230 approval and following the City Council's denial of his appeal, filed suit in the United States District Court, Central District of California, challenging the conditions. (USSF Nos. 5-7.) On July 14, 2004, the District Court ruled in Kay's favor and ordered Plaintiff to issue a new resolution allowing Kay to use the Original Antenna Array subject to reasonable conditions. ([Disputed SSF ("D-SSF") No. 5] P-RJN, Exh. J.) The City Council thereafter adopted a resolution permitting operation of the Original Antenna Array and amending eight conditions for approval, one of which—the requirement that Kay maintain the property as his primary residence—the District Court found

was unreasonable, prompting the City Council to eliminate the requirement that Kay maintain the property as his primary residence from the conditions. ([D-SSF Nos. 9-11] P-RJN, Exhs. K, L, N, pg. 8.)

Plaintiff submitted evidence that in August 2014, it received a complaint regarding the high number of commercial antenna at the Property. ([D-SSF No. 13] Decl. of Mihranian ¶¶7-9, Exh. A.) Plaintiff submitted evidence that it inspected the Property on August 5, 2014 and determined additional commercial antenna beyond the Original Antenna Array permitted by CUP 230 had been installed without permits on the Property and in violation of CUP 230. ([D-SSF No. 14] Decl. of Mihranian ¶11, Exh. A.) Plaintiff submitted evidence that on August 15, 2014, it mailed Defendant a Notice of Violation Letter ("Notice") stating the Property was out of compliance with CUP 230 due to the apparent installation of more commercial antenna than permitted and requested Defendant comply with CUP 230 either by removing structures noncompliant with CUP 230 or by submitting an application requesting a revision to CUP 230 within 30 days. ([D-SSF No. 15] Decl. of Mihranian ¶12, Exh. B.) Plaintiff submitted evidence that on September 8, 2014, Defendant requested an extension to comply with the Notice and on September 30, 2014, Defendant informed Plaintiff that it intended to submit a revision application for CUP 230 and requested two more weeks for compliance. (USSF No. 16.) Plaintiff submitted evidence that the Property was inspected three times in October and November and on all occasions no changes had been made to the additional antenna. ([D-SSF No. 17] Decl. of Mihranian ¶14, Exh. A.) Plaintiff submitted evidence that on October 14, 2014, and then on October 28, 2014, it sent Defendant a Second Notice and Final Notice of Violation Letter ("Final Notice"). ([D-SSF No. 18] Decl. of Mihranian ¶15, Exhs. C, D.) Plaintiff submitted evidence that on December 26, 2014 it received a letter from Defendant objecting to the fee required to amend CUP 230 as a special tax. ([D-SSF No. 19] Decl. of Mihranian ¶16, Exh. E.)

Plaintiff submitted evidence that almost a year later, on October 21, 2015, Plaintiff's City Attorney's Office ("City Attorney") sent Defendant's counsel a letter requesting the Property be brought in compliance with CUP 230 or that Defendant submit an application to amend CUP 230. ([D-SSF No. 20] Decl. of Mihranian ¶17(a); Decl. of Lopez ¶2, Exh. A.) Plaintiff submitted evidence that from November 6, 2015 to July 26, 2016 the City Attorney and Defendant's counsel exchanged correspondence regarding Defendant's assertion that the property was compliant with CUP 230 since modifications had not been made in the past five years and Defendant's request to modify the existing CUP, as opposed for filing an application for revision, and Plaintiff's denial of that request, and Plaintiff's instruction that Defendant submit a proper application to revise the CUP 230 by August 26, 2016, which Plaintiff extended to

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES
Civil Division
Central District, Stanley Mosk Courthouse, Department 71

18STCV03781
CITY OF RANCHO PALOS VERDES, A MNICIPAL CORPORATION vs INDIAN PEAK PROPERTIES, LLC, A NEVADA CORPORATION, et al.

November 20, 2019
11:56 AM

Judge: Honorable Monica Bachner
Judicial Assistant: A. Barton
Courtroom Assistant: None

CSR: None
ERM: None
Deputy Sheriff: None

September 16, 2016 and then October 28, 2016, at Defendant's request. (See D-SSF Nos. 21-27.) Plaintiff submitted evidence that on October 28, 2016, Defendant submitted the application for revision ("Application"), that upon review, Plaintiff determined the Application was incomplete, and that on November 23, 2016, Plaintiff sent Defendant a letter notifying it of as much and summarizing the defects that needed to be corrected before the Application could be reviewed, and that the information curing such defects should be submitted no later than December 21, 2016. ([D-SSF Nos. 27-28] Decl. of Mihranian ¶¶18-19, Exhs. G, F; P-RJN, Exh. O.) Plaintiff submitted evidence that Defendant's counsel objected to the request for additional information and that no additional information was submitted by Defendant. ([D-SSF No. 29] Decl. of Mihranian ¶20, Decl. of Tucker ¶3, Exh. B.)

Plaintiff submitted evidence that from March 21, 2017 through December 13, 2017, Plaintiff and Defendant corresponded and met regarding: (1) Defendant's position that the Application should instead be considered an after-the-fact amendment; (2) Plaintiff's position that classifying Defendant's additional antennae as modifications contravened the binding Counsel Resolutions that such changes required Counsel approval; (3) Defendant's position that they could replace the existing antennae with new equipment; and (4) Defendant's position that the antennae could be moved and an alternative design could be used to address Plaintiff's safety concerns. (See D-SSF Nos. 30-34.) Plaintiff submitted evidence that it gave Defendant an extension to submit documentation in support of its proposed revised plans for the Application by February 28, 2018; however, Defendant did not submit additional materials to Plaintiff. (See D-SSF Nos. 34-35.)

Plaintiff submitted evidence that on August 21, 2018, Plaintiff's City Council ("City Council") held a noticed public hearing to consider the revocation of CUP 230, that Defendant did not appear or offer a defense, and that after consideration of the evidence, the City Council revoked CUP 230. ([D-SSF Nos. 36, 38] P-RJN, Exhs. P, Q, R, S, T; Decl. of Mihranian ¶27, Exh. J.) Plaintiff submitted evidence that the revocation of CUP 230 makes Defendant ineligible to apply for an amendment to the CUP, and that Plaintiff accordingly sent Defendant a Cease and Desist Letter demanding commercial antenna operations cease at the property on August 29, 2018, with which Defendant has not complied. ([D-SSF Nos. 39-40] Decl. of Tucker ¶7, Exh. F; Decl. of Mihranian ¶28, Exh. K.)

Plaintiff submitted evidence that an inspection of the Property revealed that the five approved self-supported antenna masts, each with four radiating antenna, approved by CUP 230 remain on the roof of the Property today, albeit in slightly different locations, and that 11 additional antenna masts have been added to the roof. ([D-SSF Nos. 41-43] Decl. of Afflerbach ¶¶2-18.) Plaintiff

submitted evidence that the 11 additional antenna masts have a different function from the 5 original masts in that they provide wireless internet service to provider signals. ([D-SSF No. 44] Decl. of Afflerbach ¶¶19-24.) Plaintiff submitted evidence that a 4-foot diameter microwave dish, designed to create communications link between two locations, has been installed since CUP 230 was issued. ([D-SSF No. 45] Decl. of Afflerbach ¶¶10, 23.) Plaintiff submitted evidence that the additional antennas are not consistent with CUP 230 and that they could not be considered modifications to the existing masts and antennas allowed by CUP 230. ([D-SSF No. 46] Decl. of Afflerbach ¶¶10, 20-21.)

Plaintiff's submitted evidence suggests the configuration of the antennas at the property was violative of CUP 230 and that Defendant's use of the property was therefore unpermitted by a CUP. Accordingly, Plaintiff's submitted evidence suggests CUP 230's application to the property with the additional antennae was null and void, since CUP 230 did not permit the use of such additional antenna. Plaintiff's evidence suggests Defendant violated Plaintiff's Municipal Code by continuing its use of the antennae without having a valid CUP for their use. Finally, Plaintiff's evidence suggests Plaintiff provided Defendant with notice that its violation constituted a public nuisance, and a reasonable opportunity to cure the violation.

Based on the foregoing, Plaintiff met its burden on summary judgment/adjudication. (C.C.P. §437c(p)(1).) Therefore, the burden shifts to Defendant to create a triable issue of material fact. Defendant failed to meet its burden.

Defendant argues that its installation of antenna in violation of CUP 230 is privileged since such antenna are federally protected and exempt from Plaintiff's enforcement pursuant to the Telecommunications Act of 1996 ("TCA"). (Opposition, pgs. 9-11.) The Court notes that the TCA, by its terms, does not prohibit a city from regulating personal wireless service facilities. (Reply, pg. 11; See 47 U.S.C. §332(c)(7)(A).) However, Defendant asserts that the its antenna use is privileged because the TCA does prevent local governments from unreasonably discriminating among providers of personal wireless services, and that in declaring Defendant violated its CUP, Plaintiff was unreasonably discriminating against Defendant. (Opposition, pg. 10.) Defendant argues this determination of a violation was discriminatory because Plaintiff made it after the alleged lodging of a single complaint without determining the function of the new services and because Plaintiff refused to adequately consider Defendant's argument of federal protection and instead pursued enforcement against Defendant. (Opposition, pg. 10.) However, as discussed below, Defendant did not submit evidence suggesting Plaintiff unreasonably discriminated against Defendant in determining that its additional commercial

antennas violated CUP 230.

Defendant disputes nearly all of Plaintiff's material facts with the same response, asserting that "[t]he additional antenna alleged to be in violation were protected under the [TCA] and were subject to protection due to ongoing negotiation and a pending application for modification of CUP 230, which was never denied or rejected. [Plaintiff's] 2014 enforcement of the CUP prohibition against 'any new antenna' on the subject property was improper, discriminatory, and invalid." (See Defendant's Response to SSF ("R-SSF") Nos. 13-15, 17-20, 22-35, 38-40-46.) Defendant's submitted evidence in support of this response is the following: (1) evidence that Defendant submitted a proposed revised application to Defendant that was never denied or rejected (Decl. of Kay ¶5); (2) AT&T's Application for CUP modification for its rooftop antennas (Decl. of Cushman ¶2, Defendant's Compendium of Evidence ("D-COE") Exh. 1); (3) excerpts of testimony from Ara Mihranian as an individual and as the PMK on behalf of Plaintiff (Decl. of Cushman ¶3, D-COE, Exh. 2: Mihranian Depo 66, 70-73, 84-87, 94-95, 100-103, 106-109, 140-142, 144, 146-149, 150-155, 156-157, 160-166, 167-170); (4) the Administrative Record prepared for the Mandamus Action (Decl. of Cushman ¶5, D-COE, Exh. 3, pg. 175-206); (5) a Notice of Errata reflecting the ruling in the Mandamus Action denying Defendant's writ cause of action (Decl. of Cushman ¶6, D-COE, Exh. 4); (6) Defendant's dismissal of the tort claims in the Mandamus Action to allow for an appeal of the ruling denying Defendant a writ and Defendant's Notice of Appeal (Decl. of Cushman ¶7, D-COE, Exhs. 5, 6.). However, Defendant does not explain how this evidence supports its assertion that Plaintiff's determination that Defendant violated CUP 230 was discriminatory. Moreover, the Court finds Defendant's evidence does not create a triable issue of fact as to whether Plaintiff's conduct toward Defendant was arbitrary or discriminatory such that the TCA would bar Plaintiff's right to regulate personal wireless services.

In support of its assertion that Plaintiff's enforcement has been arbitrary and discriminatory, Defendant submitted Mihranian's testimony indicating that Plaintiff took 11 years to consider the conditional use permit of Marymount College due to revisions the applicant requested during the process and that Marymount College's CUP was not revoked during that process. (D-COE, Exh. 2: Mihranian Depo pgs. 66-69.) However, this does not demonstrate that Plaintiff's failure to consider Defendant's revision application was discriminatory given evidence that Defendant's revision application was incomplete, whereas, Mihranian did not testify as to the completeness of Marymount's application, where instead, the delay appears to have arisen from revisions Marymount requested during the process that required updating the CUP. Defendant has not submitted evidence or an explanation as to how the revision applications submitted by

Marymount and Defendant are comparable such that evidence Plaintiff did not revoke Marymount's CUP while its application was being processed creates a triable issue of material fact as to whether Plaintiff acted discriminatorily toward Defendant. Moreover, a comparison of the time it took Plaintiff to consider the Marymount CUP as opposed to Defendant's does not demonstrate that Plaintiff's determination that Defendant violated the then existing CUP was arbitrary or discriminatory. Defendant has submitted no evidence contradicting Plaintiff's evidence that Defendant submitted its Revision Application in October 2016 and that, since that time, Plaintiff continued to communicate with Defendant in an effort to have Defendant properly supplement its incomplete application, but that Defendant ultimately failed to do so. Mihranian's testimony does not create a triable issue of material fact that Plaintiff was discriminatory toward Defendant in determining it had violated CUP 230.

Similarly, Defendant's evidence that its Revision Application was submitted and never rejected does not create a triable issue of material fact as whether Plaintiff's determinations were discriminatory against Defendant. First, Plaintiff submitted evidence suggesting Defendant submitted an incomplete revision application, and therefore, Plaintiff could not begin review of the application until it received further documentation from Defendant. Defendant submits no evidence suggesting its application for a modification to the CUP was complete or that it in fact sent the documents requested by Plaintiff in order to complete its application. Defendant's submission of an incomplete application, that Defendant never followed up on to complete, does not cure Defendant's actual violations of the CUP 230. (See Reply, pg. 8.) In addition, Plaintiff had no obligation to deny or reject Defendant's incomplete application, and as such, any evidence that Plaintiff did not do so does not create a triable issue of material fact as to evidence suggesting Defendant violated the CUP 230. (See Reply, pg. 9.) Finally, while Defendant argues it was not given a reasonable opportunity to cure, it submits no evidence creating a triable issue of material fact as to whether it was given a reasonable opportunity to cure. (Opposition, pg. 12.) The evidence submitted suggests that since notifying Defendant of its violation in August 2014, Plaintiff offered Defendant reasonable opportunities to cure and/or submit an application for revision of its CUP 230; however, Defendant failed to do so. (See Reply, pg. 11.)

Defendant also submitted evidence relating to a CUP Modification Application that AT&T submitted to Plaintiff in February 2011. (Decl. of Cushman ¶2, D-COE, Exh. 1.) It appears Defendant submits this evidence in support of its assertion that Plaintiff's enforcement of its municipal code against Defendant and Plaintiff's failure to consider Defendant's Revision Application was arbitrary and discriminatory. The evidence suggests that AT&T submitted an application for CUP modification that would modify existing AT&T screened rooftop antenna to

replace four-foot antennae with eight-foot antennae, among other changes. (Decl. of Cushman ¶2, D-COE, Exh. 1.) However, the evidence does not indicate whether the application was complete or whether Plaintiff ultimately granted the application to create a triable issue of fact as to whether Plaintiff's treatment of Defendant's application was discriminatory or arbitrary. As presented, the evidence only suggests that AT&T submitted a CUP modification application for a proposed project that would involve modifying antennae, a process that Plaintiff encouraged Defendant to proceed with, though Defendant ultimately did not submit a complete application. Also, the AT&T application involved a proposed project, which differs from Defendant's application which sought after-the fact approval of a modification. As such, Defendant's evidence of AT&T's application does not create a triable issue of material fact. Evidence that other entities have applied for CUP modifications does not create a triable issue of material fact as to whether Plaintiff was discriminatory or arbitrary in not considering Defendant's incomplete application.

Moreover, Defendant's submitted evidence supports Plaintiff's evidence suggesting that Defendant's operation of its commercial antennae violates the provisions of CUP 230. Defendant submitted a declaration in which Kay states that since the original CUP 230 was issued, he has "added antenna to the subject property" and goes on to explain the purposes of the "additional antenna added" as distinct from the original five antennae. (Decl. of Kay ¶¶3-4.) Accordingly, there is no triable issue of material fact that antennae were added to the property in violation of the provisions of CUP 230.

Defendant's argument that Plaintiff improperly relies on a theory of nuisance per se is without merit. (Opposition, pgs. 11-12.) First, Korean American Legal Advocacy Foundation v. City of Los Angeles (1994) 23 Cal.App.4th 376, 393, fn. 5, is inapposite. Next, a city may designate a violation of its municipal code as a public nuisance. (See Flahive v. City of Dana Point (1999) 72 Cal. App. 4th 241, 244.) Next, the uncontested evidence is that Plaintiff did not consent to Defendant's operation of the commercial antennae initially nor subsequently, to the extent it exceeded the scope provided for in the CUP 230. Also, Defendant's assertion that any violation was cured by an agreement that Defendant would submit an application to modify the CUP 230 is unsupported by any evidence. Finally, Defendant's argument that Plaintiff fails to establish any specific violation of the RPVMC is without merit. As discussed above, Plaintiff submitted evidence suggesting Defendant's operations violated provisions of the RPVMC requiring a CUP for commercial antennae operation.

During the hearing on the motion, Defendant argued that Plaintiff's position that the addition of

any antenna constitutes a violation of Code is discriminatory and arbitrary because the FCC and TCA distinguish between types of antennae and limiting personal wireless services makes Plaintiff's conduct arbitrary. However, the fact the FCC and TCA distinguish between types of antennae does not make Plaintiff's enforcement of its municipal code and consequential regulation of Defendant's personal wireless services arbitrary or discriminatory without some evidence suggesting that Plaintiff's enforcement action has been arbitrarily or discriminatorily carried out against Defendant. As discussed above, Plaintiff is entitled to regulate personal wireless services in a non-discriminatory manner and Defendant has not submitted evidence suggesting Plaintiff's enforcement has been discriminatory.

The Court notes that during the hearing, Defendant asserted that the Declaration of Bart Fisher ("Fisher") creates a triable issue of fact as to Issue No. 2 because it demonstrates that services will be affected by the revocation of CUP 230. While the evidence is more fully discussed in the following section addressing Plaintiff's revocation of the CUP, the Court finds this evidence does not create a triable issue of material fact as to whether Plaintiff's enforcement of its municipal code against Defendant was arbitrary or discriminatory for the purposes of Issue No. 1. As discussed below, evidence that certain users may not be able to provide coverage if Defendant is not permitted to operate its existing antennae does not create a triable issue of material fact as to whether Plaintiff acted discriminatorily or arbitrarily in determining that Defendant had violated its CUP.

Defendant also argued at the hearing that evidence Plaintiff did not follow its own custom and practice by not following up with Defendant prior to revoking the CUP 230 creates a triable issue of material fact as to whether the revocation was discriminatory and, as such, improper. As this evidence primarily pertains to Issue No. 2, it is fully discussed below. However, to the extent Defendant suggests it also creates a triable issue of material fact as to Issue No. 1, the Court finds it does not. Specifically, evidence that Plaintiff did not follow its own custom and practice in not following up with Defendant's Revision Application is irrelevant to whether Defendant's operation of its antennae prior to submitting the revision application violated the CUP. Moreover, as discussed below, the evidence submitted does not actually demonstrate that Plaintiff's conduct violated its custom and practice. The Court finds Defendant's evidence does not create a triable issue of material fact as to whether Plaintiff was discriminatory or arbitrary in determining that Defendant's operation violated its CUP.

Based on the foregoing, Plaintiff's motion for summary judgment is granted. In the alternative, and for appeal purposes only, Plaintiff's motion for summary adjudication is granted as to the 1st

cause of action.

Issue No. 2: Public Nuisance – Violation of RPVMC §17.76.020(A) (Operation of Commercial Antenna without an Approved CUP) (2nd COA)

Plaintiff's 2nd (public nuisance) cause of action is based upon the theory that Defendant's operation of commercial antennae without a valid CUP, due to the revocation of CUP 230 by Plaintiff's City Council, is in violation of Plaintiff's municipal code and constitutes a nuisance per se.

In addition to the nuisance per se case law and municipal codes referenced above, RPVMC §17.60.100, which governs revocation of a CUP provides that, "[a] [CUP] granted pursuant to this section may be… revoked… pursuant to [RPVMC] §17.86.060." RPVMC §17.86.060 provides that the City Council, "may, after following the same procedures utilized for approving such a [CUP], revoke… [the CUP] if… [t]he [CUP] is being or recently has been, exercised contrary to the terms or conditions of such [CUP]. No permit shall be revoked prior to providing a ten calendar day written notice to the holder of the permit and an opportunity to be heard before the officer or body considering revocation or suspension of the permit[, which in this case, is the City Council]."

As discussed above, Plaintiff submitted evidence suggesting that, as a result of Defendant's violation of CUP 230 governing the number and size of commercial antennae located at the property, Plaintiff held a duly-noticed public hearing to consider the possible revocation of CUP 230 and ultimately voted to revoke CUP 230 in its entirety. (See D-SSF Nos. 3-14, 42-46, 36-38.) In addition, Plaintiff submitted evidence that the City Attorney made a written demand that Defendant cease and desist operation of commercial antennae given Plaintiff's revocation of CUP 230; however, Defendant has failed and refused to comply with this order. (D-SSF Nos. 39, 40.)

Based on the foregoing, Plaintiff met its burden on summary judgment/adjudication. (C.C.P. §437c(p)(1).) Therefore, the burden shifts to Defendant to create a triable issue of material fact. Defendant failed to meet its burden.

Defendant argues that Plaintiff's revocation of CUP 230 unreasonably discriminated against Defendant. (Opposition, pg. 10.) However, this argument is unsupported by any evidence suggesting the revocation was carried out in a discriminatory manner against Defendant.

Defendant asserts that the revocation "violates the [TCA] because it has the effect of prohibiting [Defendant's] provision of personal wireless services." (Opposition, pg. 10.) However, as discussed above, a state or local entity is entitled to regulate personal wireless services and not be in violation of the TCA, so long as such regulation is not done in a discriminatory manner. Here, as with the 1st cause of action, Defendant has submitted no evidence suggesting Plaintiff's revocation of CUP 230 was done in a discriminatory manner so as to create a triable issue of material fact as to whether the CUP was properly revoked, and as such, whether Defendant's continued operation following the revocation of the CUP amounts to nuisance per se.

Defendant also argues that Plaintiff's revocation of CUP 230 "without following its custom and practice in further following up with applicants, without a rejection or denial of the CUP, without a Notice of a Nuisance or other procedure was not only improper but a violation of federal law." (Opposition, pg. 11.) Accordingly, it appears Defendant argues that Plaintiff's failure to follow up, failure to deny the CUP revision application, and failure to issue a Notice of Nuisance create triable issues of fact as to whether Plaintiff's subsequent revocation of the CUP was discriminatory and/or arbitrary.

Defendant argues that Mihranian's testimony supports its assertion that Plaintiff did not follow its custom and practice in further following up with Defendant prior to revoking Defendant's CUP. (Opposition, pg. 6; D-COE, Exh. 2 Mihranian Depo, 34-36 [pg. 70-72].) Mihranian testified that when an application is incomplete, Plaintiff sends the applicant a letter indicating as much and that, generally, an applicant will thereafter contact Plaintiff as soon as they get the letter to resolve the issue, but that when an applicant does not do so, Plaintiff issues another letter to the applicant saying that it has been six months and that there has been no activity on the project/application at issue, and asks the applicant to let Plaintiff know within 30 days if it still intends for Plaintiff to process the application. (D-COE, Exh. 2, Mihranian Depo 35:1-25.) Mihranian testified that when an applicant does not respond to a letter indicating an application's incompleteness and six months have passed, it is Plaintiff's custom and practice to send a letter asking the applicant if it is still interested in pursuing its revision and if the applicant does not respond to that letter, Plaintiff typically resends another letter. (D-COE, Exh. 2, Mihranian Depo 43:1-10.) However, Defendant submitted no evidence suggesting that Plaintiff's conduct in handling Defendant's Revision Application violated this custom and practice. As discussed above, Plaintiff submitted evidence that Defendant submitted its Revision Application in October 2016, that Plaintiff notified Defendant of the application's incompleteness in November 2016, that Defendant's counsel objected to the finding that the application was incomplete and that in March 2017, Defendant's counsel asserted that the changes to the antennae should be considered

amendments to the CUP as opposed to a full revision. (See D-SSF Nos. 28-30.) Plaintiff submitted evidence that in April 2017, it addressed Defendant's contention and explained why the changed use of the property required a revision to the CUP as opposed to an amendment. (See D-SSF No. 31.) Plaintiff submitted evidence that after meetings and negotiations in 2017, Defendant agreed to resubmit revised plans for CUP 230 by February 28, 2018, but that Defendant did not submit anything by that date, and as such, Plaintiff held a duly noticed City Council meeting to address CUP 230 on August 21, 2018. (See D-SSF Nos. 32-36.) The evidence suggests that Plaintiff followed its custom and practice by communicating with Defendant regarding the completeness of the application in November 2017 and thereafter communicating with Defendant to resolve the issue and obtain Defendant's supplemental materials so that Defendant's Revision Application would be complete.

To the extent Defendant disputes that Plaintiff did not again contact Defendant after Defendant failed to submit materials it had asserted it would submit prior to February 2018 before noticing the August 2018 City Council meeting, this conduct does not actually violate the custom and practice outlined by Mihranian. At that stage, Plaintiff had already followed up with Defendant multiple times, which is the custom and practice Mihranian describes. Mihranian does not testify as to whether it is Plaintiff's custom and practice to follow up after an applicant fails to submit supplemental information that it asserted it would submit. Accordingly, Defendant's evidence does not create a triable issue of material fact as to whether Plaintiff's conduct—either not considering the incomplete Revision Application or proceeding with the decision to revoke the CUP 230—was discriminatory. The submitted evidence suggests that given Defendant's failure to submit a complete application, Plaintiff proceeded with enforcement of its municipal code provisions against Defendant's conduct since it was in violation of its CUP 230, and since such violation of the CUP 230 entitled Plaintiff to consider revocation of the CUP 230.

Defendant submits no evidence creating a triable issue of material fact as to whether Plaintiff's revocation of CUP 230 was proper. In addition, Defendant does not dispute Plaintiff's submitted evidence that Defendant has continued operating its commercial antennae at the subject property.

During the hearing on the motion, Defendant asserted that the Declaration of Fisher creates a triable issue of fact as to Issue No. 2 because the declaration demonstrates that certain services will be affected by the revocation of CUP 230. Fisher declared that his business, Fisher Wireless Services, Inc. provides wireless services to end-user 2-way radio subscribers through Defendant's facility including security services, ambulance companies, school bus transportation operations, private patient transportation businesses, and other types of users. (Decl. of Fisher

¶3.) Fisher declared that if Defendant can no longer provide services, "the public will be harmed because these users will be significantly disadvantaged and will not be able to provide the important coverage they need to satisfy their business needs and public safety and public service needs." (Decl. of Fisher ¶3.)

As a preliminary matter, it appears that this evidence is addressing the balancing of public benefit to public detriment for a standard nuisance cause of action, not a nuisance per se cause of action. However, the Court does not balance the public benefit in a nuisance per se cause of action, and as such, this evidence is irrelevant. To the extent Defendant suggests this evidence creates a triable issue of fact as to whether Plaintiff's revocation of the CUP was discriminatory or arbitrary, as was suggested in the hearing, the Court finds this is also not the case. A declaration from Defendant's customer asserting that revoking Defendant's CUP would cause a decrease in that customer's ability to provide coverage for its own customers does not address whether or how Plaintiff's revocation (or enforcement of its municipal code) was discriminatory or arbitrary. Absent any evidence that Plaintiff otherwise has not revoked CUPs held by entities that provide radio services that benefit the public notwithstanding the CUP holder's violation of the terms of the CUP, Defendant's evidence that revocation of Defendant's CUP may cause harm to its customer does not create a triable issue of material fact as to whether Plaintiff's revocation was discriminatory or arbitrary. The Court finds Fisher's declaration does not create a triable issue of fact as to whether Plaintiff's revocation of the CUP was improper.

Based on the foregoing, Plaintiff's motion for summary judgment is granted. In the alternative, and for appeal purposes only, Plaintiff's motion for summary adjudication is granted as to the 2nd cause of action.

Issue No. 3: Public Nuisance under Civil Code §3479 (no defense to the cause of action) (3rd COA)

Plaintiff's 3rd (public nuisance) cause of action is based upon Defendant's alleged violations of the RPVMC, as described above, which Plaintiff, through its municipal code, determined constitute a public nuisance per se under Civil Code §3479. In moving for summary adjudication, Plaintiff argues that Defendant has no defenses to the determination that Defendant's conduct is a public nuisance under Civil Code §3479. The Court notes that this cause of action appears to be duplicative of Plaintiff's first and second causes of action, in that, provided that Plaintiff establishes Defendant's conduct is in violation of one or both of the referenced code sections, and that Defendant has no defenses, it has established nuisance per se.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES
Civil Division
Central District, Stanley Mosk Courthouse, Department 71

18STCV03781
CITY OF RANCHO PALOS VERDES, A MNICIPAL CORPORATION vs INDIAN PEAK PROPERTIES, LLC, A NEVADA CORPORATION, et al.

November 20, 2019
11:56 AM

Judge: Honorable Monica Bachner
Judicial Assistant: A. Barton
Courtroom Assistant: None

CSR: None
ERM: None
Deputy Sheriff: None

As such, it appears that if Plaintiff prevails on either of the first two causes of action, it also prevails on the instant cause of action.

As discussed above, Plaintiff submitted evidence suggesting Defendant violated various sections of the RPVMC in operating commercial antennae at the subject property in violation of its CUP and/or without a CUP. Plaintiff submitted evidence that Defendant continues to operate commercial antenna in violation of Plaintiff's municipal code making Defendant's conduct a nuisance per se.

Based on the foregoing, Plaintiff met its burden on summary judgment/adjudication. Therefore, the burden shifts to Defendant to create a triable issue of material fact. Defendant failed to meet its burden.

As discussed above, Defendant did not submit evidence creating a triable issue of material fact as to whether its conduct did not violate Plaintiff's municipal code sections that require a valid CUP for commercial antennae operation. Moreover, Defendant did not submit evidence suggesting it can assert any defenses to Plaintiff's finding that Defendant's conduct constituted a public nuisance.

Based on the foregoing, Plaintiff's motion for summary judgment is granted. In the alternative, and for appeal purposes only, Plaintiff's motion for summary adjudication is granted as to the 3rd cause of action.

The Clerk is to give notice.

The Court's written Ruling on Submitted Matter is signed and filed this date.

Certificate of Mailing is attached.

INDIAN PEAK PROPERTIES, LLC v. CITY OF RANCHO PALOS VERDES
Case Number: 18STCP02913
Hearing Date: August 9, 2019

ORDER DENYING PETITION FOR WRIT OF MANDATE

At issue in this writ petition is the decision of respondent Rancho Palos Verdes Planning Commission, on behalf of respondent City of Rancho Palos Verdes (City) (collectively Respondent), to revoke petitioner Indian Peak Properties, LLC's Conditional Use Permit No. 230 (CUP No. 230). Petitioner filed this petition for a writ of mandate pursuant to Code of Civil Procedure sections 1094.5 and 1085.[1] Petitioner seeks a court order setting aside Respondent's revocation of CUP No. 230.[2]

Respondent opposes the petition.

The Petition is DENIED.

STATEMENT OF THE CASE

In June 2001, Petitioner's predecessor in interest submitted an application to the City to obtain an after-the-fact conditional use permit to allow a roof-mounted antenna structure already installed and in use at the property located at 26708 Indian Peak Road (Property). (AR 188-225.) The conditional use permit application contained project plans depicting a roof-mounted horizontal antenna rack with five vertical antenna masts for the transmission of commercial and non-commercial communication signals. (AR 226-227.) The conditional use permit application process involved multiple hearings before the Planning Commission and an appeal to the City Council. Ultimately, the City Council approved CUP No. 230 for the use of a roof-mounted antenna structure with two vertical antenna masts. (AR 64-80, 228-454.)

After the City approved CUP No. 230, Petitioner's predecessor in interest initiated federal court litigation to challenging the terms of CUP No. 230; on July 14, 2004, the federal court ordered the City to issue a new resolution allowing the five-mast antenna structure that was depicted on the plans submitted with the June 2001 conditional use permit application. (AR 500-542.) In 2004 and 2005, to effectuate the federal court order, the City passed Resolution No. 2004-109, which revised CUP No. 230 to allow commercial use of the five-mast antenna structure, subject

[1] Petitioner's verified complaint and petition asserts two writ causes of action. Petitioner has abandoned its traditional writ claim here. Petitioner's fourth, fifth and sixth causes of action have been stayed pending resolution of its writ causes of action.
[2] For ease of reference, the court refers to the Planning Commission and the City as Respondent herein. The Planning Commission is a department within the City.

to certain conditions. (AR 549-680.) The conditions stated any divergence from the five-vertical antenna masts required City approval. (AR 61-63.)

Petitioner's predecessor in interest again initiated a federal court action challenging the City's conditions of approval. The federal court ruled, however, the conditions imposed by the City were reasonable, with the exception of a condition requiring Petitioner's predecessor in interest to make the Property his primary residence. (AR 777.) In light of that federal ruling, the City revised the condition to instead require the Property be habitable and in compliance with the Rancho Palos Verdes Municipal Code (RPVMC). (AR 44-53.)

About a decade later, in August 2014, the City received a complaint "regarding the number of antennas" installed on the roof of the Property. (AR 150.) The City inspected the Property and observed eleven vertical antenna masts on the roof, including the initial five antenna masts permitted by CUP No. 230. (AR 778.)

In response to the eleven vertical antenna masts on the roof of the Property, the City issued three notices to Petitioner requesting compliance with the conditions of CUP No. 230. Alternatively, the City suggested Petitioner submit an application for revision of CUP No. 230 to allow the unpermitted antennae to remain. (AR 778-787.) The City sent the notices on August 15, October 14 and October 28, 2014. (AR 778, 782, 785.) The August 15 notice advised if Petitioner failed to take action "further code enforcement action will occur." (AR 779.) The October 14 notice stated a reinspection of the Property and a review of the case would occur on October 28, 2014. (AR 782.) Finally, the October 28 notice warned:

> "A re-inspection of your property, and review of this case, will be conducted on November 5, 2014. If upon reinspection of your property the violations continue to exist, and the CUP revision application has not been submitted to the City, there will be no further notices. Referral to the City Attorney's office will follow in hopes of resolving the matter before legal action ensues." (AR 785.)

In response, Petitioner objected to certain factual allegations in the notices, the premise the Property was not then in compliance with CUP No. 230, and the fee required by the City to process a conditional use permit revision application. (AR 788-812.)

Nearly two years after the City's first notice to Petitioner requesting compliance with the conditions for CUP No. 230, on July 26, 2016, the City agreed to a reduced the required fee to review the revision application for the conditional use permit. (AR 813-814.) The City also agreed to limit the information required for Petitioner's revision application to only some of the information required under the RPVMC. (AR 813-814.) The City set a date of August 26, 2016 for either compliance with CUP No. 230's conditions or the submission of a revision application to modify CUP No. 230. (AR 814.)

On October 28, 2016, Petitioner submitted a revision application for CUP No. 230 (Revision Application). The City determined, however, the Revision Application was inadequate and sent

a letter to Petitioner on November 23, 2016 explaining its decision the Revision Application was incomplete. (AR 815-872.)

On June 28, 2017, the City, after meeting with Petitioner, agreed to suspend its enforcement actions against the Property if Petitioner proceeded with its Revision Application in good faith. (AR 888-892.) Four months later, Petitioner had submitted no additional information to the City. (AR 890.) In September 2017, when the City contacted Petitioner regarding the Revision Application and requesting the additional information necessary to support thed application, Petitioner requested more time. (AR 890.)

On December 13, 2017, the City again met with Petitioner regarding the Revision Application, and the parties agreed to deadline of February 28, 2018 for Petitioner's submission of the information necessary to process the Revision Application. (AR 893-895.) The "February deadline came [and] nothing was submitted to the City." (AR 152.)

Eight months later (and four years after the City's original request to comply with the conditions of CUP No. 230), on August 2, 2018, the City issued a Notice of Public Hearing to consider revoking CUP No. 230. (AR 18.) The notice stated the City was considering revocation of CUP No. 230 "because the Installation of unpermitted antennas exceeding the maximum of 5 Council-approved, roof-mounted antennae and support pole masts" constituted a violation of the conditions for CUP No. 230 as well as a violation of the RPVMC. (AR 18.)

On August 21, 2018, the City conducted a hearing on the revocation of CUP No. 230. (AR 141-183.) At the hearing, Petitioner requested a sixty-day continuance for Petitioner's newly retained counsel to prepare. (AR 159-162.) Petitioner's new counsel indicated she was prepared to work cooperatively with the City to resolve the issues. (AR 159.) The City deliberated and voted to revoke CUP No. 230 at the hearing. (AR 178-183.)

This writ petition ensued.

STANDARD OF REVIEW

Petitioner challenges Respondent's decision on the grounds Respondent denied Petition a fair hearing. Petitioner also contends Respondent's decision was arbitrary and capricious. Petitioner argues, ". . . once a conditional use permit is granted, the municipality is prohibited from taking the permit away either: (1) arbitrarily, for improper reasons; or (2) without appropriate procedural due process safeguards." (Opening Brief 12:26-28.)

Petitioner's Fair Hearing Claim:

Under Code of Civil Procedure section 1094.5, subdivision (b), the issues for review of an administrative decision are: whether the respondent has proceeded without jurisdiction, whether there was a fair trial, and whether there was a prejudicial abuse of discretion. An abuse of discretion is established if the respondent has not proceeded in the manner required

by law, the decision is not supported by the findings, or the findings are not supported by the evidence. (Code Civ. Proc. § 1094.5, subd. (b).)

The fair trial requirement "is equivalent to a prescription that there be a fair administrative hearing." (*Pomona College v. Superior Court (*1997*)* 45 Cal.App.4th 1716, 1730.) "Issues related to bias of the hearing officer or agency, the admission or exclusion of witnesses and evidence, and hearing procedures have all given rise to fair trial claims." (CEB, Cal. Administrative Mandamus (3rd ed. 2018) § 6.35 p. 6-30.)

Where the issue is whether a fair administrative hearing was conducted, the petitioner is entitled to an independent judicial determination of the issue. (*Sinaiko v. Superior Court* (2004) 122 Cal.App.4th 1133, 1141; *Pomona Valley Hospital Medical Center v. Superior Court* (1997) 55 Cal.App.4th 93, 101.) Therefore, the court must independently review the fairness of the administrative proceedings as a question of law. (*Rosenblit v. Superior Court* (1991) 231 Cal.App.3d 1434, 1438.)

Petitioner's Arbitrary and Capricious Claim:

"The grant or denial of a conditional use permit is an administrative or quasi-judicial act." (*Goat Hill Tavern v. City of Costa Mesa* (1992) 6 Cal.App.4th 1519, 1525.) Where no previous permit existed, the grant or denial is reviewed under the substantial evidence standard. (*Saad v. City of Berkeley* (1994) 24 Cal.App.4th 1206, 1213; *Smith v. County of Los Angeles* (1989) 211 Cal.App.3d 188, 199-200.)

The revocation of an *existing use permit,* however, generally constitutes a decision substantially affecting fundamental vested rights and, therefore, is reviewed independently by the trial court. (*Malibu Mountains Recreation, Inc. v. County of Los Angeles* (1998) 67 Cal.App.4th 359, 367-368.)

The record indicates the City granted CUP No. 230 in 2001, and Petitioner relies on the permit to operate its 20-year old business providing commercial and non-commercial radio, microwave and other communication signals to the Palos Verdes Peninsula. As such, revocation of this conditional use permit requires the court to review the record independently.[3] Given the circumstances here, the court finds Petitioner has a fundamental vested right in the conditional use permit such that the court is required to exercise its independent judgment on the evidence to determine whether the weight of the evidence supports the findings.

///

///

[3] The court does not find *Goat Hill Tavern v. City of Costa Mesa, supra,* 6 Cal.App.4th at 1519 requires a different standard of review in this case as suggested by Respondent.

ANALYSIS

Respondent Provided Petitioner A Fair Hearing:

Petitioner argues Respondent denied Petitioner due process when it denied Petitioner's request to continue the revocation hearing. Petitioner contends it was denied the opportunity to present a defense because Respondent unfairly elected not to continue the revocation hearing for 60 days.

To determine whether a hearing is fair, the court is required to consider the nature of the proceeding and the severity of the consequence involved. (*Boddie v. Connecticut* (1971) 401 U.S. 371, 378 ["[t]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings."]; *Mathews v. Eldridge* (1976) 424 U.S. 319, 334–334 [" '[d]ue process is flexible and calls for such procedural protections as the particular situation demands' "].)

On August 2, 2018, the City issued a Notice of Public Hearing to consider revocation of CUP No. 230 for August 21, 2018. (AR 18.) RPVMC section 17.86.060 states "[n]o permit shall be revoked prior to providing a ten calendar day written notice to the holder of the permit . . . ." (Fobi Deci., Ex. B.) Respondent held the hearing on August 21, 2018—19 calendar days after the City provided notice to Petitioner. (AR 18, 141-183.) Thus, as an initial matter, Respondent complied with its own ordinance and, in this case, provided Petitioner almost twice the time required by ordinance.[4]

At the hearing, Petitioner was represented by recently retained counsel—hired 16 days before the hearing. (AR 159.) Thus, Petitioner and its newly retained counsel had more than the ten days required by the RPVMC as notice for the revocation hearing.

Petitioner does not argue as a matter of law and due process that ten days' notice is procedurally deficient in providing a fair hearing. Instead, Petitioner's actual argument is Respondent abused its discretion under these facts when it denied Petitioner's request for continuance. Petitioner contends, "[w]hen the denial of a continuance has the practical effect of denying petitioner a fair hearing, the denial constitutes a prejudicial abuse of discretion, constituting reversible error."[5] (Opening Brief 16:22-23.)

[4] Petitioner has not suggested Respondent did not comply with its own policies and procedures. Thus, Petitioner does not assert a structural error in the revocation hearing process.

[5] In an action under Code of Civil Procedure section 1094.5, an agency abuses its discretion when it "has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (Code Civ. Proc. § 1094.5, subd. (b).) Thus, as Petitioner has not alleged a structural error, Petitioner must contend Respondent erred as a matter of law when it denied Petitioner a continuance.

In an analogous context—administrative proceedings governed by Government Code section 11524—the denial of the continuance is governed under an abuse of discretion standard. An agency abuses its discretion when the denial of the continuance amounts to a denial of due process. (See *Ring v. Smith* (1970) 5 Cal.App.3d 197, 201.)

Petitioner has cited no authority that required Respondent to continue the revocation hearing at its request. Thus, the question here is whether, under the circumstances, Respondent denied Petitioner a fair hearing or otherwise failed to proceed in the manner required by law when it denied the requested continuance.

Through the prism of independent judgment, the answer is no. Respondent neither denied Petitioner a fair hearing nor failed to proceed in the manner required by law.

Petitioner argues one of the grounds for good cause for continuance of a proceeding is the substitution of counsel. Petitioner relies on California Rules of Court, Rule 3.1332 to support its contention. Petitioner explains it hired new counsel three days after Respondent served it with the Notice to Revoke. Petitioner's new counsel thereafter obtained the services of a civil engineer who submitted to Respondent as much documentation as could be obtained before the revocation hearing on August 21, 2018.

Petitioner argues sixteen days was not enough time for this newly-hired counsel to become familiar with the decade long history of CUP No. 230, which included "years of prior federal litigation, let alone sufficient time to take the action necessary to secure witnesses, to marshal expert evidence or to mount the defense necessary to challenge Respondent's newly issued Notice to Revoke CUP 230." (Opening Brief 16:5-11.) Petitioner also suggests Respondent did not even consider the continuance request because the record shows the City Council did not discuss the continuance after it closed the public session and deliberated. (AR 178-183.)

The court finds Petitioner's position unpersuasive. While Petitioner focuses the court's attention on only the events that occurred after the issuance of the Notice to Revoke, the process due Petitioner necessarily turns on all the facts known to the City Council.

As argued by Respondent, the negotiations between Respondent and Petitioner about Petitioner's noncompliance had been going on for four years. The City provided Petitioner with numerous extensions to comply with the conditions of the permit or submit its Revision Application. (AR 778-814; see also 811, 814.) In fact, a councilmember specifically inquired of City staff how many extensions had been provided and the length of those extensions. (AR 158.) Staff advised the City Council there had been "enough" four or five-month extensions to run from November 2014 to February 2018. Thus, Petitioner had well more than 19 days to mount a defense.

The City also notes Petitioner had counsel for this matter, and Petitioner's counsel attended both a June 28 and December 13, 2017 meeting with City staff. (AR 888-895.) Petitioner provided no explanation to the City Council or this court as to why it retained new counsel

sixteen days before the revocation hearing. There was no evidence before the City Council Petitioner's change in counsel was outside of Petitioner's control.

At the hearing, Petitioner's counsel did not explain the necessity for the continuance to defend against the City's allegations.[6] Petitioner's counsel merely requested "another extension" for her client to "work with [her] office . . . on addressing these issues and working cooperatively with the City to come to some kind of resolution." (AR 159.) Petitioner's counsel stated Petitioner had not even retained a civil engineer until after it had hired counsel. (AR 159-160.) Petitioner's counsel also admitted Petitioner's prior counsel "did not engage in the cooperative process with City staff" and admitted Petitioner's prior counsel had "engage[d] in some delay in this matter . . . ." (AR 160.)

Moreover, Petitioner's counsel revealed Petitioner had no intention of removing "all of the antennas that have been placed on [the roof] since the issuance of the original conditional use permit . . ." even in the face of a revocation hearing. (AR 164.) Petitioner's counsel did concede Petitioner was "willing to work with the City in order to come to some kind of a resolution even if that involves removing some of the antennas." (AR 164.) It was clear from counsel's comments, however, the purpose of a 60-day continuance was not to defend against the City's allegations or to allow for compliance of CUP No. 230's terms; it was to continue to negotiate with the City.

In fact, there is no evidence to suggest that Petitioner suffered prejudiced as a result of the denial as Petitioner has presented no evidence or even argument of what it would have presented had the continuance been granted. (See *Doe v. University of Southern California* (2018) 28 Cal.App.5th 26, 40 [rejecting a fair hearing argument when the petitioner failed to show how the failure to review evidence until later in the proceeding prejudiced him]; see also *Doe v. Regents of University of California* (2016) 5 Cal.App.5th 1055, 1085-1093, [court analyzes whether restrictions on cross-examination of sexual assault victim "rendered the hearing unfair by prejudicing" the alleged perpetrator].) Petitioner's counsel did not indicate any purpose for the continuance of the hearing other than trying to work with the City to resolve the dispute. Petitioner's counsel did not identify, for example, any evidence it could not present on the revocation issue at the hearing because of limited preparation time. In fact, at the time of the hearing, Petitioner had presented its written opposition to the revocation and its defense was before the City Council. (AR 97.)

Finally, although the City did not expressly discuss a "continuance" in the closed session of the August 21, 2018 hearing, the City Council understood the request was before it. The City Attorney specifically advised the City Council the continuance request was before it. (AR 177-178.) During deliberations, some councilmembers noted their "100 percent" agreement with

[6] Petitioner's counsel did not suggest Petitioner was not violating the conditions of CUP No. 203. In fact, Petitioner's counsel conceded Petitioner was not in compliance with the conditions of the permit because he had added antenna "since the issuance of the original conditional use permit." (AR 164.)

City staff's report. (AR 179-182.) The staff report recommended denial of a continuance given the "numerous opportunities" Petitioner had been given "to correct the violation." (AR 5) The staff report suggested Petitioner had "chosen not to" correct the violation which was consistent with Petitioner's position at the revocation hearing. (AR 5.) In addition, the City Council had evidence before it Petitioner had amassed more antennas on the Property since the City began attempting to resolve the violation issues with Petitioner in 2014. (AR 174.)

Respondent's decision to deny Petitioner's request for a 60-day continuance did not deprive Petitioner of a fair hearing. Additionally, Respondent's decision was not arbitrary resulting in a denial of Petitioner's due process rights.

Respondents' Decision Was Not Unlawful or an Abuse of Discretion:

Petitioner argues Respondent's decision to revoke CUP No. 230 violated federal law and was not an abuse of discretion (i.e. arbitrary and capricious).

Respondent's Decision Did Not Violate Federal Law:

Petitioner argues the revocation of CUP No. 203 amounts to an unlawful imposition of restrictions on Plaintiff's ability to engage in its lawful business of providing commercial and non-commercial, signal communication services. Specifically, the Notice of Violation seeks the removal of satellite dish drum in violation of federal law (47 CFR § 1.4000, subdivision (a)(1)(i)-(iv)). Further, through its revocation, the City is seeking—as set forth in the Notice of Violation—the removal of a dish on the Property that is exempt from the permit process pursuant to RPVMC section 17.76.020, subdivision (B)(2).

The City seemingly concedes the satellite dish drum's use and placement is preempted by 47 CFR section 1.4000, which prohibits local land use restrictions that impair the installation, maintenance, or use of certain types of antennas, specifically direct broadcast satellite service, video programming services or television broadcast signals. (47 CFR § 1.4000, subd. (a)(1).)

he City persuasively argues, however, notwithstanding the satellite dish drum, Petitioner was required to comply with the conditions associated with CUP No. 230 and failed to do.

The court agrees: if the satellite dish drum was the sole basis for the City's finding Petitioner was not in compliance with the conditions of CUP No. 230, the writ petition would be granted. However, as the Notice of Violation recited, Petitioner violated the conditions of CUP No. 230 by having more than five vertical antennae on the roof; the City determined there were eleven vertical antenna masts on the roof, including the five antenna masts permitted by CUP No. 230. (AR 778.) As noted earlier, Petitioner's counsel conceded this issue at the hearing. (AR 164.)

The evidence in the record demonstrates Petitioner was in violation of the conditions associated with CUP No. 230, even though the court recognizes it may not consider the satellite dish drum as a "violation" of conditions. Thus, the decision to revoke CUP No. 230 does not

violate federal law. Respondent's evidence established the violations without regard to the satellite dish drum. Respondent's future enforcement actions, if any, are not before this court.

Respondent's Decision Was Not an Abuse of Discretion:

As an initial matter, the weight of the evidence supports Respondent's findings Petitioner violated the conditions associated with CUP No. 203. (AR 29, 32, 100, 101, 107, 149-152.) Petitioner has an affirmative obligation to demonstrate error. It did not do so.[7]

In its Opening Brief, Petitioner appears to suggest Respondent's decision that Petitioner's Revision Application was "incomplete" was an abuse of discretion. Petitioner argues it suffered prejudice from the City's representations that Petitioner was required to seek a modification to CUP No. 230.[8]

"A traditional writ of mandate under *Code of Civil Procedure section 1085* is a method for compelling a public entity to perform a legal and usually ministerial duty. [Citation.] The trial court reviews an administrative action pursuant to *Code of Civil Procedure section 1085* to determine whether the agency's action was arbitrary, capricious, or entirely lacking in evidentiary support, contrary to established public policy, unlawful, procedurally unfair, or whether the agency failed to follow the procedure and give the notices the law requires." (*Fry v. City of Los Angeles* (2016) 245 Cal.App.4th 539, 549.) "So long as a reasonable basis for such action exists, the motivating factors considered in reaching the decision are immaterial [citation] and supportive findings are not required." (*Stauffer Chemical Co. v. Air Resources Board* (1982) 128 Cal.App.3d 789, 794–795.)

"[I]t is petitioner's burden to establish that [the agency's] decision was arbitrary, capricious, entirely lacking in evidentiary support, unlawful, or procedurally unfair." (*American Coatings Assn. v. South Coast Air Quality Management Dist.* (2012) 54 Cal.4th 446, 460.) "The arbitrary and capricious standard of review employed under Code of Civil Procedure section 1085 is more deferential to agency decisionmaking than the substantial evidence standard." (*American Coatings Assn. v. South Coast Air Quality Management Dist.* (2012) 54 Cal.4th 446, 461.)

---

[7] Petitioner does not actually argue it did not have more than five vertical antennae on the Property. Petitioner's Opening Brief also does not argue Petitioner was in compliance with the terms of the conditional use permit. Instead, Petitioner contends additional satellite dish drums on the Property were not a violation of the conditions of CUP No. 230 based on federal law.

[8] This argument is problematic for two reasons. First, as noted by Respondent, Petitioner's claim may be foreclosed as it failed to exhaust its administrative remedies to challenge a finding of an incomplete application. (RPVMC § 17.80.050.) Second, it is unclear whether Petitioner's challenge here is asserted pursuant to Code of Civil Procedure section 1085 under a theory Respondent failed to comply with a ministerial duty. The court has nonetheless addressed it as a claim for traditional mandamus.

Here, Petitioner fails to develop this argument and provides no analysis as to why the City's decision that the Revision Application was "incomplete" was arbitrary or capricious.

Moreover, Petitioner failed to exhaust its administrative remedies. RPVMC section 17.80.050 states in relevant part:

> "[A]ny interested person may file an appeal of a director's decision with the planning commission; provided, the appeal is filed in writing within 15 calendar days after the notice of the director's decision is issued and the appropriate fee, as established by resolution of the city council, is paid. The appeal shall set forth the grounds for appeal and any specific action being requested by the appellant. The director's decision is final if not appealed to the planning commission within 15 calendar days."

As argued by Respondent, Petitioner has neither pleaded nor presented evidence it complied with this ordinance. Petitioner did not challenge Respondent's decision the Revision Application was "incomplete."

Instead, Petitioner suggests its failure to exhaust administrative remedies is excused because exhaustion would have been futile. Petitioner's citation to the record (AR 886) does not demonstrate what the City Council's decision would be on the question of the "completeness" or the request to modify CUP No. 230 generally. (*Jonathan Neil & Assoc., Inc. v. Jones* (2004) 33 Cal.4th 917, 936 ["The futility exception requires that the party invoking the exception 'can positively state that the [agency] has declared what its ruling will be on a particular case.'"].) The records states that while the City staff would recommend denying the request to modify CUP No. 230, "the City Council has the authority to accept the proposed application revisions should it choose to do so, and that the public hearing would allow appropriate evidence on such a question." (AR 886.) The letter to Petitioner also indicated that "it is appropriate for [Petitioner] to exhaust administrative remedies . . ." and any decision on the modification was for the City Council. (AR 886.)

The court cannot find on this record Respondent's findings and decision were an abuse of discretion or arbitrary and capricious.

CONCLUSION

Based on the foregoing, the petition (causes of action one, two and three) is DENIED. The matter is transferred to Department 1 for reassignment of the remaining causes of action. The stay as to the remaining causes of action is dissolved.

IT IS SO ORDERED.

August 9, 2019

Hon. Mitchell Beckloff, Judge

RESOLUTION NO. 2019-68

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF RANCHO PALOS VERDES DENYING THE APPEAL OF THE CITY'S NOTICE AND ORDER TO ABATE A PUBLIC NUISANCE AND ORDERING THE ABATEMENT OF THE PUBLIC NUISANCE EXISTING AT THE PROPERTY LOCATED AT 26708 INDIAN PEAK ROAD.

WHEREAS, Indian Peak Properties, LLC ("Indian Peak") was authorized to use a roof-mounted commercial antenna structure consisting of a maximum of five (5) vertical antenna masts, each which was not to exceed eight and one-half (8 ½) feet in height, and each with up to four (4) radiating elements affixed thereon, under Conditional Use Permit No. 230 ("CUP No. 230") as adopted by Resolution No. 2002-27, and amended by Resolution Nos. 2004-109 and 2005-75;

WHEREAS, CUP No. 230 required approval by the City Council for any enlargement, expansion or addition to the antenna structure as approved under the terms of CUP No. 230;

WHEREAS, Indian Peak violated the conditions of approval for CUP No. 230 by its use of at least eleven (11) roof-mounted vertical antenna masts without obtaining any prior approval from the City;

WHEREAS, the City issued Notices of Violation on August 15, 2015, October 14, 2014, and October 28, 2014 regarding Indian Peak's violation of the terms of CUP No. 230;

WHEREAS, the City required that Indian Peak either removal all of the unpermitted antenna from the roof, and ensure that the remaining antennas meet the requirements as described in CUP No. 230, or submit an application to the City to request a revision to CUP No. 230 to allow the existing unpermitted antennas to remain;

WHEREAS, on October 28, 2016, Indian Peak submitted an application for Revision of the Existing CUP No. 230 to the City for an after-the-fact approval of the unpermitted roof-mounted vertical antenna masts;

WHEREAS, on November 23, 2016, the City determined that Indian Peak's application for Revision of the Existing CUP No. 230 was incomplete, and sent a letter to Indian Peak requesting additional required information for the processing of the application;

WHEREAS, Indian Peak has not submitted any additional information for its application for Revision of the Existing CUP No. 230;

WHEREAS, Indian Peak continues to use at least eleven (11) roof-mounted vertical antenna on the property, well over the five (5) City Council-approved under CUP No. 230;

WHEREAS, in accordance with RPVMC § 17.60.080, if any of the conditions of a conditional use permit are violated, the conditional use permit shall be null and void, and any continued use in violation of the conditional use permit shall constitute a violation of the RPVMC, and thus a public nuisance pursuant to RPVMC § 1.08.010(D);

WHEREAS, on August 21, 2018, the City Council held a duly noticed public hearing in which City Council unanimously voted to revoke CUP No. 230 for ongoing violation of the terms of CUP No. 230 and the RPVMC;

WHEREAS, on August 29, 2018, the City Attorney's Officer sent Indian Peak a Cease and Desist letter demanding that all commercial antenna-related operations cease and that all roof-mounted commercial antennae and antenna structures, be removed from the property;

WHEREAS, on November 5, 2018, the City filed a complaint against Indian Peak in the Los Angeles Superior Court, Case No. 18STCV03781, alleging the existence of a public nuisance and seeking abatement of the public nuisance (Nuisance Case);

WHEREAS, on November 19, 2018, Indian Peak filed a separate lawsuit against the City the Los Angeles Superior Court, Case No. 18STCP02913, seeking damages and a writ of mandamus to overturn the City Council's revocation of CUP No. 230 as an abuse of discretion, a violation of Indian Peak due process rights, a taking of Indian Peaks property rights, and an illegal interference in Indian Peaks existing and potential business contracts (Writ Case);

WHEREAS, on May 23, 2019 the City issued a Stop Work Order and an Administrative Citation to Indian Peak for work being performed on the unpermitted roof-mounted antenna structure;

WHEREAS, on May 24, 2019, the City issued a second Administrative Citation to Indian Peak for continuing to perform work on the unpermitted roof-mounted antenna structure;

WHEREAS, on August 9, 2019, the Court in the Writ Case denied Indian Peaks abuse of discretion and due process claims, and on October 11, 2019, Indian Peak dismissed its takings and contract claims against the City, with the final judgment of the Court entered on December 12, 2019;

WHEREAS, on November 20, 2019, the Court in the Nuisance Case granted summary judgment in favor of the City, finding that a public nuisance exists on the

Property as a result of Indian Peaks actions, with the final judgment of the Court entered on December 5, 2019;

WHEREAS, in accordance with RPVMC § 8.24.080, when the City has determined that an unlawful condition constituting a public nuisance exists on a property, the City may take action to abate such public nuisance;

WHEREAS, on November 27, 2019, the City sent a Notice and Order to Abate a Public Nuisance to Indian Peak demanding the removal of all roof-mounted commercial antenna from the Property, and posted the Notice and Order on the property;

WHEREAS, on December 6, 2019, Indian Peak sent a Notice of Appeal challenging the City's Notice and Order to Abate a Public Nuisance, and requesting that the City Council stay the abatement demanded by the Notice and Order; and

WHEREAS, pursuant to RPVMC § 8.24.080(D), the City Council held an administrative hearing on Indian Peaks Notice of Appeal, at which time all interested parties were given an opportunity to be heard.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF RANCHO PALOS VERDES DOES HEREBY FIND, DETERMINE, AND RESOLVE AS FOLLOWS:

Section 1: Having heard and considered the appeal and evidence presented at the December 17, 2019 City Council meeting, the City Council makes the following findings:

A. The property located at 26708 Indian Peak Road, Rancho Palos Verdes, California, ("Subject Property") was the subject of Conditional Use Permit No. 230 (CUP No. 230), as granted by the City Council in Resolution No. 2002-27, and amended by Resolution Nos. 2004-109 and 2005-75.

B. The City Council's revocation of CUP No. 230 in the duly-noticed public hearing on August 21, 2018 for violation of the conditions of approval for CUP No. 230 was valid, as confirmed by the Court in its August 9, 2019 ruling in Los Angeles Superior Court Case No. 18STCP02913;

C. The continued use of the roof-mounted commercial antenna structure by Indian Peak after the valid revocation of CUP No. 230 constitutes a violation of the City's Municipal Code, and as such, a public nuisance, as confirmed by the Court in its November 20, 2019 order in Los Angeles Superior Court Case No. 18STCV03781;

D. The City's Notice and Order to Abate a Public Nuisance was properly delivered to Indian peak, and Indian Peak's Notice of Appeal of the Notice and Order was properly and timely filed with the City Clerk.

Section 2: Based on the information included in the Staff report and the appeal of the Notice and Order to Abate a Public Nuisance, the City Council of the City of Rancho Palos Verdes hereby denies the appeal of the Notice and Order to Abate a Public Nuisance, and orders Staff to proceed with abatement of the public nuisance existing on the Subject Property in accordance with the Notice and Order to Abate a Public Nuisance as given.

PASSED, APPROVED and ADOPTED this 17th day of December 2019.

John Cruikshank, Mayor

Attest:

Emily Colborn, City Clerk

State of California)
County of Los Angeles) ss
City of Rancho Palos Verdes)

I, Emily Colborn, City Clerk of the City of Rancho Palos Verdes, hereby certify that the above Resolution No. 2019-68 was duly and regularly passed and adopted by the said City Council at a regular meeting thereof held on December 17, 2019.

Emily Colborn, City Clerk

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

INDIAN PEAK PROPERTIES, LLC, et al., Plaintiffs, v. CITY OF RANCHO PALOS VERDES, et al., Defendants.	CV 20-457 DSF (Ex) Order DENYING Ex Parte Application for a Temporary Restraining Order (Dkt. No. 14)

Given Defendants' representation that "there is no current threat of removal of the antennas from the property," the Court finds that there is no exigency warranting ex parte relief.

The ex parte application is DENIED without prejudice to the filing of a regularly noticed motion for a preliminary injunction.

IT IS SO ORDERED.

Date: February 13, 2020

Dale S. Fischer
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

INDIAN PEAK PROPERTIES, LLC, et al., Plaintiffs, v. CITY OF RANCHO PALOS VERDES, et al., Defendants.	CV 20-457 DSF (Ex) Order DENYING Second Ex Parte Application for a Temporary Restraining Order (Dkt. No. 26)

Plaintiffs have filed an ex parte application for a temporary restraining order. Plaintiffs had previously filed an ex parte application for a TRO, but the Court found there was no exigency warranting ex parte relief. The first application was denied without prejudice to the filing of a regularly noticed motion for a preliminary injunction.

Plaintiffs argue that exigent circumstances now exist that support granting a TRO because Defendants have threatened to enter the relevant property to remove the antennas at issue at some point on or after April 20, 2020. This is unpersuasive. First, it is not at all clear that Defendants' violation letter is meant to threaten immediate removal of the antennas. See Cushman Decl. Ex. 12.[1] Second,

[1] The violation letter states that if Plaintiffs do not apply to legalize the antennas they "will have to be removed." The letter provides until April 20, 2020 to come into compliance with city ordinances and states that if Plaintiffs do not, "further Code Enforcement action will occur." While it is reasonable

eventual removal of the antennas has been threatened throughout the dispute between the parties. Plaintiffs fail to provide any explanation for why they failed to file a noticed motion for a preliminary injunction rather than wait until a purported exigency arose. Plaintiffs' own failure to file for an injunction in a normally noticed manner does not allow them to claim an emergency if Defendants predictably threaten to follow through on removing the antennas.

While the lack of excusable exigency is sufficient to deny the ex parte application, the Court is also not persuaded that Plaintiffs have a substantial likelihood of success on the merits. The Federal Communications Commission has consistently stated that the OTARD regulation at issue "applies only to antennas at the customer end of a wireless transmission" and generally excludes "hub or relay antennas used to transmit signals to and/or receive signals from multiple customer locations." In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets, FCC 00-366, ¶ 99. The FCC has stated that some hub or relay antennas fall within the OTARD regulation when a network is designed with a point-to-point or mesh configuration where customer antennas also forward signals to other customers. In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets, FCC 04-41, ¶¶16-18. But "in order to invoke the protections of the OTARD rule, the equipment *must be installed in order to serve the customer on such premises* . . . ." Id. (emphasis in original). It is clear from the declaration of James Kay that Plaintiffs are providing communications services to third-parties and are not customers passing on signals to other customers in a point-to-point or mesh configured network.

---

to assume that "further Code Enforcement action" would eventually result in removal of the antennas, the letter does not threaten removal on April 20.

The ex parte application is DENIED without prejudice to the filing of a regularly noticed motion for a preliminary injunction.

IT IS SO ORDERED.

Date: April 17, 2020

Dale S. Fischer
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

INDIAN PEAK PROPERTIES, LLC, et al., Plaintiffs, v. CITY OF RANCHO PALOS VERDES, et al., Defendants.	CV 20-457 DSF (Ex) Order DENYING Motion for Preliminary Injunction (Dkt. No. 48)

Plaintiffs move for a preliminary injunction barring Defendants from removing any antenna from the property at issue or even from entering the property. The Court deems this matter appropriate for decision without oral argument. See Fed. R. Civ. P. 78; Local Rule 7-15. The hearing set for July 20, 2020 is removed from the Court's calendar.

The Court previously denied two temporary restraining order applications. The first was denied for lack of exigency. The second was denied both for lack of exigency and for a failure to demonstrate a strong likelihood of success on the merits.

The present motion does little to improve Plaintiffs' position. As noted in the order denying the second TRO application, the Federal Communications Commission has consistently stated that the OTARD regulation at issue "applies only to antennas at the customer end of a

wireless transmission" and generally excludes "hub or relay antennas used to transmit signals to and/or receive signals from multiple customer locations." In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets, FCC 00-366, ¶ 99. The FCC has stated that some hub or relay antennas fall within the OTARD regulation when a network is designed with a point-to-point or mesh configuration where customer antennas also forward signals to other customers. In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets, FCC 04-41, ¶¶16-18. But "in order to invoke the protections of the OTARD rule, the equipment *must be installed in order to serve the customer on such premises* . . . ." Id. ¶ 17 (emphasis in original).

Plaintiffs now claim to be customers of the companies that are transmitting from the property's antennas. There are three categories of antennas at issue – the "LT-WR antenna," the "One Internet America antenna," and the "Geolinks antenna[s]."[1] For all three antennas, Plaintiffs claim that "[u]ntil recently, the agreement between Indian Peak and [company] was verbal and informal. The agreement recently was reduced to writing in order to bring clarification to the nature of the relationship and Indian Peak's use of the internet services as a customer of [company] at the Subject Property." See Kay Decl. ¶¶ 9, 13, 18.

There are several reasons why this does not change the Court's analysis. First, the whole claim is somewhat suspect given the circumstances, but the Court need not resolve such credibility issues here. More importantly, whether or not Indian Peak is technically allowed to use the internet services provided by One Internet America and Geolinks, it is obvious that on-site customer use is not the purpose of the antennas. Indian Peak does not appear to engage in any

[1] At least this is the Court's best impression. Both parties insist on discussing numerous antennas that do not appear at issue in this case. There appears to be no dispute that the DirecTV antenna on the property qualifies as an OTARD and no dispute that the antennas previously allowed by Defendants under CUP No. 230 are not OTARD.

activities on the site other than hosting the antenna array.[2] Even if it did, it strains credibility that Indian Peak would be a bona fide customer of *three* separate internet providers for whatever minimal activities that might occur at the property.

The FCC was clear that opening the OTARD regulation to certain point-to-point and mesh network configurations was not intended to open an enormous loophole for companies like Plaintiffs to run a hub site free from local zoning regulations. "[I]n order to invoke the protections of the OTARD rule, "the equipment *must be installed in order to serve the customer on such premises*, ..." FCC 04-41, ¶ 17 (emphasis in original). The use of "in order to" strongly implies that the primary use of the antenna and the reason for its installation must be for the service of the on-site customer. In another decision, the FCC found that an antenna fell within the OTARD rules specifically because the antenna owner "cannot be considered a carrier that is trying to circumvent section 332(c)(7) by locating a hub site on the premises of a customer." In the Matter of Continental Airlines, FCC 06-157, ¶ 21; see also id. ¶ 21 n.68 ("Unlike the targeted subjects of local zoning authorities, Continental's antenna is of a type commonly used by consumers, is located indoors, and is being used to provide service to the antenna user solely within the leased premises.").

Indian Peak is clearly – and fairly openly – attempting to circumvent the generally applicable rules by locating its hub site *on its own property* – not even an ordinary customer's – and then claiming to *also* be a customer. The available evidence strongly points to the conclusion that the OTARD rule does not apply to the One Internet America and Geolinks antennas at issue in this case and that the FCC did not intend for it to apply.

[2] It is unclear whether Indian Peak provides maintenance services to the antenna owners or solely rents space at the property for the antennas to be installed and maintained by their owners.

The LT-WR antenna may have a different use than the One Internet America and Geolinks antennas and could more likely qualify as an OTARD. Indian Peak claims that the LT-WR antenna solely transmits and receives point-to-point signals and those signals are not passed to any customer or point beyond the property.

However, even if this is the case, Plaintiffs have not shown any significant chance of irreparable harm that would warrant an injunction or any public interest in such an injunction. Defendants have repeatedly disclaimed any intention to remove the purportedly OTARD antennas during the pendency of this lawsuit. And even if the LT-WR antenna were to be removed, at most this might disrupt internet service to an unoccupied residential property. There is no evidence that this kind of harm would be significant and would not be compensable. In addition, given that no one is living at the property, any need for internet use at the property related to Indian Peak's operation that is provided by the LT-WR antenna would presumably be lessened if the other, non-OTARD antennas were also removed at the same time. The Court finds that potential interest of a hypothetical future residential tenant at the property in continued internet access through the LT-WR antenna is minimal given that a residential tenant is often expected to provide his own utilities, including internet service.

The motion for a preliminary injunction is DENIED. Plaintiffs have shown very little chance of success on the merits with respect to the One Internet America and Geolinks antennas. Planitiffs have shown a

greater chance of success on the merits with respect to the LT-WR antenna, but an insufficient likelihood of irreparable harm and little public interest in an injunction. [3]

IT IS SO ORDERED.

Date: July 15, 2020

Dale S. Fischer
United States District Judge

[3] The Court also notes that the relief requested by Plaintiffs is too broad and unsupported by their arguments, even if those arguments were persuasive. Even if there was a significant possibility that the antennas fell within the OTARD regulation and there could be significant irreparable harm, there is no reason to prevent Defendants from entering and inspecting the property, assuming that they are otherwise entitled to under applicable law.

Filed 11/16/21 City of Rancho Palos Verdes v. Indian Peak Properties CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

CITY OF RANCHO PALOS VERDES, Plaintiff and Respondent, v. INDIAN PEAK PROPERTIES, LLC, Defendant and Appellant.	B303638 (Los Angeles County Super. Ct. No. 18STCV03781)

APPEAL from a judgment and postjudgment order of the Superior Court of Los Angeles County, Monica Bachner, Judge. Reversed and remanded with directions.

Bradley & Gmelich, Barry A. Bradley and Dawn Cushman for Defendant and Appellant.

Aleshire & Wynder, William W. Wynder, June S. Ailin and Alison S. Flowers for Plaintiff and Respondent.

Indian Peak Properties, LLC appeals the judgment entered in favor of the City of Rancho Palos Verdes in the City's lawsuit to abate a public nuisance. Indian Peak contends the trial court in granting the City's motion for summary judgment misapplied the legal standard for proving a public nuisance and, in any event, triable issues of material fact exist as to the elements of each of the City's three nuisance causes of action and Indian Peak's defenses to them. Indian Peak also argues the court abused its discretion by failing to stay the City's nuisance action pending finality of the decision in Indian Peak's related mandamus action challenging the City's revocation of the conditional use permit authorizing Indian Peak to operate commercial antennae on a residential property. Finally, Indian Peak appeals the postjudgment order awarding the City attorney fees as the prevailing party in the action.

We agree the court erred in granting summary adjudication as to one of the three causes of action alleged in the City's amended complaint. Accordingly, we reverse the judgment with directions and reverse as premature the postjudgment order awarding attorney fees.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Indian Peak's Conditional Use Permit, Notice of Violation and Revocation*

The City has a municipal ordinance that regulates the installation and operation of commercial antennae. (Rancho Palos Verdes (RPV) Mun. Code, § 17.76.020, subd. (A).) Indian Peak is in the business of providing commercial and noncommercial radio communications.

On June 21, 2001 James Kay, Jr. (Indian Peak's principal and its predecessor in interest) applied for a conditional use permit authorizing the use for commercial purposes of what he described as preexisting noncommercial amateur antennae on the roof of residential property he owned on Indian Peak Road, Rancho Palos Verdes.[1] At that time there was a horizontal antenna rack mounted on the roof with five vertical antenna masts for the reception and transmission of radio and Internet signals; each mast had four radiating elements. There were also two television antennae on the roof.

The City issued the permit (CUP 230), which, after two proceedings in federal court, ultimately authorized the antenna array as configured in 2001. The resolutions concluding this phase of the parties' ongoing dispute required approval by the city council of an amendment to CUP 230 for any "future changes to the location or configuration or which increase the

---

[1] The evidence before the trial court on summary judgment concerning the controversy between Indian Peak and the City over Indian Peak's installation and operation of the antennae, which culminated in the revocation of Indian Peak's conditional use permit on August 21, 2018, was essentially identical to the evidence presented in support of and opposition to Indian Peak's petition for a writ of administrative mandamus, the subject of Indian Peak's appeal in *Indian Peak Properties, LLC v. City of Rancho Palos Verdes* (Nov. 16, 2021, B303325) [nonpub. opn.].) On July 15, 2021, although denying Indian Peak's motion to formally consolidate that appeal with this appeal from the judgment in the nuisance action, we advised the parties we would consider the two matters concurrently for purposes of decision. Accordingly, in this opinion we omit some of the history of the dispute, which is described in detail in our opinion in B303325.

number or the height of any approved antennae or element" of the original antenna array.

The City received a complaint in August 2014 (nine years after the final resolution modifying CUP 230) regarding the number of commercial antennae on the roof of the property. The City inspected the property and discovered there were now at least 11 vertical antennae (or antenna masts) and other equipment on the roof. On August 15, 2014 the City mailed Indian Peak a notice it was in violation of the provisions of CUP 230 and directed Indian Peak to "[r]emove all but five of the vertical antennae from the roof, and ensure the remaining five antennae meet the requirements as described" in CUP 230 or "[s]ubmit an application to the City, with the required fee, to request a revision to Conditional Use Permit No. 230 to allow the existing antennae to remain."

During the remainder of 2014 the City conducted additional inspections of the property, which confirmed that no changes had been made. A second notice of violation was sent on October 14, 2014, and a final notice on October 28, 2014. The last notice warned, if the violations continued to exist and no revision application was submitted, the matter would be referred to the city attorney's office. Counsel for Indian Peak asserted no revision to CUP 230 was required for the operation of the additional antennae.

Over the next three-plus years the City's attorneys and Indian Peak's counsel exchanged letters regarding the additional antennae, Indian Peak's obligation to comply with CUP 230 and the terms for an application to revise CUP 230. Of particular significance for the issues raised in the City's summary judgment motion, on May 5, 2016 Indian Peak's counsel proposed, as a

compromise, applying for a modification of CUP 230 under the expedited, "over-the-counter" review procedure provided in RPV Municipal Code section 17.76.020, subdivision (A)(12)(b), for new antennae on existing towers (with a $500 filing fee), with approval required only from the City's director of community development, rather than the full process for modification of a residential conditional use permit. In a July 26, 2016 response the City explained CUP 230 expressly required that any additions to the antenna array be approved by the city council or through a formal modification of the conditional use permit, so the expedited process could not be used. However, the City agreed to a lower fee for the application and authorized Indian Peak to submit with its application only the information required under the expedited process, rather than the more extensive information required for an amendment to a conditional use permit.

Indian Peak submitted an application for revision of CUP 230 on October 28, 2016. On November 23, 2016 City staff notified Indian Peak it had reviewed the application and "due to missing information and/or inconsistencies between the project plans and submitted application, it has been determined that the application is incomplete." City staff provided a detailed summary of the items that needed clarification or amplification and listed the additional information required. Counsel for Indian Peak objected to the request, insisting it had provided all the information required by the City's July 26, 2016 letter.

The matter remained unresolved. Indian Peak did not provide any additional information, and the City did not process the revision application. On August 2, 2018 the City issued a notice of public hearing to consider revocation of CUP 230

"because of the Installation of unpermitted antennas exceeding the maximum of 5 Council-approved, roof-mounted antennae and support pole masts." The hearing was scheduled for August 21, 2018.

Indian Peak retained new counsel, who requested an extension of time to respond to the notice and a continuance of the revocation hearing. The request was denied.

Indian Peak's counsel submitted a written response to the notice, which stated Indian Peak was willing to work with the City and requested an additional 60 days to provide the documentation required for its application to revise CUP 230. At the August 21, 2018 hearing Indian Peak's counsel explained that with additional time she expected Indian Peak would "work with the City as far as removing some of the antennas but not all of the antennas that have been placed on here since the issuance of the original conditional use permit." Following counsel's comments, a staff presentation and public testimony from four neighbors, the city council voted to adopt resolution no. 2018-61 revoking CUP 230 in its entirety, effective immediately.

2. *The City's Lawsuit To Abate a Public Nuisance and Indian Peak's Petition for Writ of Administrative Mandamus*

On August 29, 2018 the City sent Kay a cease-and-desist demand notice, explaining CUP 230 had been revoked because of the installation of unpermitted roof-mounted antennae and directed that "all antennae-related operations cease and desist, and that all roof-mounted antennas must be removed from the premises immediately." The notice warned that noncompliance would result in immediate enforcement action.

On November 5, 2018 the City filed its original complaint in this action, alleging the existence of a public nuisance and seeking its abatement. The complaint named as defendants Indian Peak, Lucky's Two Way Radio (a Nevada corporation) and Kay, and alleged three causes of action for public nuisance and a cause of action for violation of California's unfair competition law (Bus. & Prof. Code, § 17200 et seq.).

Indian Peak filed a complaint for damages and petition for writ of administrative mandamus pursuant to section 1094.5 on November 19, 2018. The writ causes of action sought to compel the City to set aside its resolution revoking CUP 230 and either hold a new public hearing providing Indian Peak with an adequate opportunity to present a defense or determine Indian Peak's application for a revision to CUP 230 on the merits. In support of the writ petition, Indian Peak argued it had been denied due process and deprived of a fair hearing because its counsel was not provided a reasonable opportunity to prepare and present a defense. It also argued the City's action in revoking CUP 230 was arbitrary and capricious because the restrictions imposed were prohibited (or preempted) by federal law and the City had failed to consider the merits of its application for a revision to CUP 230.

After Indian Peak demurred to the original complaint, the City on February 13, 2019 filed the operative first amended complaint to abate a public nuisance, which named only Indian Peak as a defendant. The first cause of action alleged Indian Peak maintained a public nuisance based on its installation and operation of commercial antennae in violation of CUP 230, which constituted a violation of the RPV Municipal Code. The second cause of action alleged Indian Peak maintained a public nuisance

based on its operation of commercial antennae without an approved conditional use permit, which violated a separate provision of the RPV Municipal Code. The third cause of action for maintaining a public nuisance, brought pursuant to Civil Code sections 3479 and 3480 (mislabeled as provisions of the Code of Civil Procedure), alleged the installation and operation of commercial antennae by Indian Peak on its property "are injurious to the public health, safety, and welfare and are so out of harmony with community standards and permissible land use to constitute a public nuisance and/or public nuisance per se." The City requested that Indian Peak be enjoined from installing or operating any unpermitted antennae and ordered to abate all conditions causing the nuisances described in the pleading. The first amended complaint also requested an order that Indian Peak pay all outstanding citations, fines and penalties and that the City recover its costs of suit, including reasonable attorney fees.

Indian Peak filed a verified answer on March 19, 2019.[2] Among its 19 affirmative defenses Indian Peak alleged the City had consented to its conduct and the operative complaint was preempted by federal law.

---

[2] Indian Peak's verified answer contained a lengthy "statement of facts," including, as paragraph KK, that, "[s]ince the City granted CUP No. 230, the only changes at the Subject Property were the number and type of antennas mounted on the horizontal support cross-arm. It is incorrect for the City to assert that vertical antenna masts, or elements on those masts are 'additional towers.' There is only one tower and one horizontal cross-arm support structure to which the vertical antenna masts are attached."

3. *The City's Motion for Summary Judgment; Indian Peak's Opposition and Request for a Stay of the Action*

On March 26, 2019, one week after Indian Peak answered the first amended complaint, the City moved for summary judgment or, in the alternative, for summary adjudication. As to its first two causes of action the City argued the evidence established Indian Peak installed and operated antennae not authorized by CUP 230, which violated RPV Municipal Code section 17.060.080 and constituted a nuisance per se under RPV Municipal Code section 1.08.010, subdivision (D), and continued to operate the antennae after CUP 230 was revoked, which violated RPV Municipal Code section 17.76.020, subdivision (A), and also constituted a nuisance per se. As to its third cause of action for maintaining a public nuisance in violation of Civil Code sections 3479 and 3480, the City argued the undisputed facts established Indian Peak's operation of the commercial antennae impaired the public's use and enjoyment of the surrounding properties.

As part of the evidence in support of its motion, the City submitted the declaration of E. Lee Afflerbach, a telecommunications engineer, whose company had been retained by the City's counsel to provide a technical review of the equipment authorized by CUP 230 and the equipment currently installed on Indian Peak's property and to opine whether the current equipment was the same as the equipment permitted by CUP 230, a modification of that equipment or an addition to it. In his declaration Afflerbach explained, "The five vertical antenna 'masts' on the property at the time CUP No. 230 was approved were vertical self-supporting antenna masts, each with four (4) radiating elements. The 'masts' did not have a separate

support structure. These antennas were designed to transmit and receive communication signals to and from hand-held and vehicle-mounted radios." According to Afflerbach, the original five antenna masts were still on the property's roof but had been moved to a slightly different position. "In addition to these self-supporting antenna masts, the property has eleven (11) additional antenna masts. Attached to these 11 additional masts are approximately fifteen (15) separate antennas. These antennas have different functionalities from the antennas affixed to the original five antenna masts. These antennas are designed to provide wireless internet service provider signals. In addition to these 11 antenna masts and 16 antennas, one (1) 4-foot-diameter microwave dish has also been installed on the property subsequent to the issuance of CUP No. 230. This dish is designed to create a communications link between two specific locations. None of these additional antennas is consistent with CUP No. 230, nor could the antennas be considered as modifications to the masts and antennas allowed by CUP No. 230."

Indian Peak filed an untimely opposition on June 21, 2019, which did not address the merits of the City's motion. Instead, after explaining that the attorney with responsibility for the case had unexpectedly left the law firm representing it, Indian Peak requested a stay of the proceedings pending resolution of Indian Peak's mandamus action or, alternatively, a continuance of the motion hearing for at least 50 days pursuant to Code of Civil

Procedure section 437c, subdivision (h),[3] because of the need for additional discovery to respond to the motion.[4]

Concurrently with its opposition memorandum Indian Peak filed an ex parte application pursuant to California Rules of Court, rule 3.1204 for an order staying the nuisance action or continuing the summary judgment hearing or, alternatively, for an order shortening time for the filing and hearing of a noticed motion seeking a stay or continuance. The City opposed the ex parte application. With respect to the requested stay of proceedings due to the pendency of Indian Peak's mandamus action, the City emphasized that two of its three nuisance causes of action did not depend on the revocation of CUP 230 and pointed out that Indian Peak had filed its mandamus petition and damage claims as an independent proceeding after the nuisance lawsuit was filed, rather than as a cross-complaint, and had made no effort to consolidate or relate the two actions. The trial court granted the application in part, continuing the summary judgment motion hearing eight weeks (to August 27, 2019).

On August 13, 2019 Indian Peak again applied ex parte to continue the summary judgment hearing, this time for an additional 45 days, to permit it to complete additional discovery necessary for it to prepare its opposition memorandum and "to determine and analyze what appears to be the adverse resolution

---

[3] Statutory references are to this code unless otherwise stated.

[4] The trial court had previously granted the parties' stipulated request to continue the hearing 21 days to allow Indian Peak to depose the City's director of community development.

of the Administrative Mandamus Hearing in the companion case pending between the parties."[5] The application, not heard until after Indian Peak had filed its opposition to the summary judgment motion, was denied as moot.[6]

In its supplemental opposition papers filed August 13, 2019 Indian Peak argued the City had failed to present evidence showing any condition on its property could be considered injurious to public health or adversely affecting the public's enjoyment of life or property. In addition, Indian Peak argued the City had not carried its burden of proof because it consented to the original installation of the antennae and authorized Indian Peak to submit a revision application concerning the additional antennae. Indian Peak also requested a continuance of the hearing because further discovery was required and the mandamus action was still pending.[7] Indian Peak filed objections

---

[5] On August 9, 2019, two court days before Indian Peak's application, the superior court had issued its 10-page ruling denying Indian Peak's petition for writ of administrative mandamus. Indian Peak noted in its application the ruling was neither a judgment nor a final appealable order (because Indian Peak's damage claims remained pending).

[6] The application could not be heard on August 13, 2019 in Department 71, where the City's nuisance case was pending, and was submitted instead to Department 72. Rather than rule on the merits, the court "on its own motion" continued the application to August 20, 2019 in Department 71—one week after Indian Peak's deadline for filing its opposition papers under section 437c, subdivision (b)(2).

[7] Requesting a continuance of the summary judgment hearing date, not a stay of the proceedings, Indian Peak asserted, "There is no existing Order in the Mandamus Action and no Order will become final for another 60 days, at the very least.

to numerous portions of the declarations submitted by the City in support of its motion, including Afflerbach's expert declaration. The City filed a reply memorandum supporting its motion and arguing further delay of the hearing was unjustified and the additional discovery sought by Indian Peak was unnecessary.

At the hearing on August 28, 2019 the court granted Indian Peak's request to continue the matter, setting a new hearing date of October 29, 2019. The court found persuasive Indian Peak's argument it needed certain additional discovery relating to its contention the City's code enforcement had been arbitrary, but rejected other arguments it advanced.

Indian Peak submitted a second supplemental opposition and supporting papers on October 16, 2019, which included a request for a stay because the now-final judgment in the mandamus action had been appealed to this court. In these opposition papers Indian Peak argued the City had acted arbitrarily and contrary to its custom and practice in revoking CUP 230 and asserted its installation of federally protected, exempt antennae was privileged. The City filed a supplemental reply, which, in addition to responding to the substantive points in Indian Peak's papers, argued a stay of an action could not be sought in an opposition memorandum and noted this court had denied Indian Peak's petition for a writ of supersedeas to stay the City's order revoking CUP 230 and related enforcement actions pending determination of the mandamus appeal.

The summary judgment hearing was held on October 29, 2019. The court provided a tentative ruling, heard argument and took the matter under submission. Ten days later (November 8,

---

Therefore, the lack of finality of the Mandamus Action compels a continuance of this hearing."

2019) Indian Peak filed a motion to abate and stay all proceedings pending the appeal in the mandamus action. The scheduled hearing date for the motion was March 3, 2020. The following week Indian Peak applied without statutory notice to stay the proceedings or, in the alternative, to specially set its noticed motion to abate and stay for some time in December 2019. On the same day the court denied the application without prejudice because it did not "meet the standards under California Rules of Court."

4. *The Trial Court's Order Granting Summary Judgment*

The trial court granted the City's motion for summary judgment in a 17-page ruling issued November 20, 2019. Addressing at the outset Indian Peak's request for a stay of the City's nuisance action pending an appellate decision in Indian Peak's mandamus action, the court stated Indian Peak had failed to demonstrate how the first cause of action for operating commercial antennae in violation of CUP 230 was implicated by Indian Peak's challenge to the revocation of CUP 230 or how a decision on the second cause of action based on the evidence before the court and in a manner that did not conflict with the superior court's denial of Indian Peak's petition would be premature. Nonetheless, the court declined to rule on the request because, by making it in its supplemental opposition papers, rather than a noticed motion, Indian Peak had not given the parties an opportunity to fully brief the issues and present evidence in support of and opposition to the proposed stay.

Turning to the merits of the City's motion,[8] as to the first cause of action, installation and operation of commercial antennae in violation of the existing conditional use permit, the court ruled the City had provided evidence (which the court summarized) that Indian Peak had violated the conditions of CUP 230, constituting a nuisance per se, and that Indian Peak, with the burden shifted to it, had failed to demonstrate a triable issue of material fact as to the elements of the City's case or any defense to it.[9] The court explained the federal Telecommunications Act of 1996 (TCA) (Pub.L. No. 104-104 (Feb. 8, 1996) 110 Stat. 56), which Indian Peak asserted exempted its installation of antennae from local enforcement action, does not preclude a city from regulating personal wireless service facilities. Instead, the court continued, it prohibits regulation that unreasonably discriminates among providers of personal wireless services or has the effect of prohibiting the provision of those services, citing title 47 United States Code section 332(c)(7). Although Indian Peak claimed the City had unreasonably discriminated against it by determining it had violated CUP 230 and initiating enforcement proceedings based on a single complaint and without determining the function of its

---

[8] The court overruled all of the multiple evidentiary objections filed by Indian Peak to the City's evidence and the two objections to Indian Peak's evidence filed by the City.

[9] The court added that Kay, in his declaration in opposition to the motion, admitted he had "'added antenna to the subject property'" since issuance of CUP 230 and had "explain[ed] the purposes of the 'additional antenna added' as distinct from the original five antennae. [Citation.] Accordingly, there is no triable issue of material fact that antennae were added to the property in violation of the provisions of CUP 230."

additional antennae, the court found that none of the evidence submitted by Indian Peak created a triable issue of fact as to whether the City's actions were discriminatory. Because the City had determined Indian Peak's revision application was incomplete, the court reasoned, neither the failure of the City to consider that application nor the length of time that revision applications were pending from other providers without initiation of enforcement action by the City constituted evidence of discrimination. Noting the City's first notice of violation was given in August 2014, four years prior to the revocation hearing, the court found Indian Peak had presented no evidence it was not provided a reasonable opportunity to cure its violations of the conditions of CUP 230.

The trial court also found Indian Peak had submitted no evidence the City consented to the operation of the commercial antennae, either by virtue of the provisions of the original conditional use permit or through the exchange of correspondence relating to submission of a revision application. Similarly, the court found there was no evidence the City had failed to follow its own custom and practice with respect to following up on the incomplete revision application, but that, even if it had, that failure was irrelevant to whether Indian Peak's operation of antennae violated the provisions of CUP 230.[10] And the

---

[10] Reviewing the evidence before it, the court explained the City had followed up with Indian Peak multiple times regarding its operation of additional antennae, the need for an amendment to CUP 230 and the information necessary for a revision application to be processed. There was no evidence the City's failure to contact Indian Peak after February 2018 when promised (and necessary) supplemental materials were not submitted violated its normal practice.

declaration submitted with Indian Peak's opposition indicating the provision of certain services would be adversely affected by the City's enforcement of its municipal code against Indian Peak did not demonstrate any discriminatory action by the City.[11]

As to the second cause of action, operation of commercial antennae without a valid conditional use permit, the City's evidence of the circumstances leading to the revocation of CUP 230 and Indian Peak's continued operation of the commercial antennae following that revocation and the City's notice to cease and desist constituted sufficient evidence of a nuisance per se. Again, the court found, Indian Peak failed to demonstrate a triable issue of fact regarding the elements of the cause of action or a defense to it. The same arguments and evidence regarding the City's purported discriminatory actions advanced in response to the first cause of action failed as to the second cause of action as well.

Finally, the court stated the City's third cause of action pursuant to Civil Code section 3479 was based on Indian Peak's

---

[11] Elaborating on this point when considering it in connection with the City's second cause of action, the court explained, "A declaration from Defendant's customer asserting that revoking Defendant's CUP would cause a decrease in that customer's ability to provide coverage for its own customers does not address whether or how Plaintiff's revocation (or enforcement of its municipal code) was discriminatory or arbitrary. Absent any evidence that Plaintiff otherwise has not revoked CUPs held by entities that provide radio services that benefit the public notwithstanding the CUP holder's violation of the terms of the CUP, Defendant's evidence that revocation of Defendant's CUP may cause harm to its customer does not create a triable issue of material fact as to whether Plaintiff's revocation was discriminatory or arbitrary."

alleged violations of the City's municipal code, as asserted in the first two causes of action, and thus "appears to be duplicative" of those causes of action "in that, provided that Plaintiff established Defendant's conduct is in violation of one or both of the referenced code sections, and that Defendant has no defenses, it has established nuisance per se. As such, it appears that if Plaintiff prevails on either of the first two causes of action, it also prevails on the instant cause of action."

The court granted the City's motion for summary judgment and, "for appeal purposes only," separately granted the motion for summary adjudication as to the first, second and third causes of action. Judgment was entered on December 5, 2019. Indian Peak filed a timely notice of appeal on January 13, 2020.

5. *The Postjudgment Award of Attorney Fees*

Following entry of judgment the City on December 18, 2019 moved for an award of $114,220 in attorney fees as the prevailing party in the action pursuant to Code of Civil Procedure section 1033.5, subdivision (a)(10)(B); Government Code section 38773.5, subdivision (b); and RPV Municipal Code section 1.08.10, subdivision (D)(3).[12] Indian Peak opposed the

---

[12] Code of Civil Procedure section 1033.5, subdivision (a)(10)(B), allows an award of attorney fees as costs when authorized by statute. Government Code section 38773.5, subdivision (b), authorizes a city, by ordinance, to provide for the recovery of attorney fees by the prevailing party in any action to abate a nuisance. RPV Municipal Code section 1.08.010, subdivision (D)(3), in turn, provides, "The prevailing party in any proceeding associated with a violation of the code, the abatement of a public nuisance, or where a violation of any provision of the code has been declared a public nuisance, shall be entitled to recovery of attorneys' fees incurred in any such proceeding, where the city has

motion, contending as a practical matter the City was not yet the prevailing party because the related mandamus action had not yet been finally determined. It also argued the City had not prevailed on the dismissed fourth cause of action in the original complaint (for unfair competition) and challenged the reasonableness of the fees requested, pointing to particular instances of duplicative work by lawyers and attorney time for the mandamus action that was billed to this case. It sought a reduction of fees requested (if any were awarded) of $24,316.50.

The court granted the motion, modestly reducing the amount requested, and awarded the City $107,791.50 in attorney fees.

On March 16, 2020 Indian Peak filed a timely notice of appeal from the postjudgment order. At Indian Peak's request we consolidated its January 13, 2020 and March 16, 2020 appeals.

DISCUSSION

1. *Standard of Review*

a. *Summary judgment*

A plaintiff may move for summary judgment "if it is contended . . . that there is no defense to the action or proceeding" (§ 437c, subd. (a)) and for summary adjudication of a cause of action "if the plaintiff asserts there is 'no defense' to that cause of action." (*Paramount Petroleum Corp. v. Superior Court* (2014) 227 Cal.App.4th 226, 241.) The plaintiff has carried his or her burden of showing there is no defense to a cause of action "if that party has proved each element to the cause of action entitling the

---

elected, at the initiation of that individual action or proceeding, to seek recovery of its own attorneys' fees."

party to judgment on the cause of action." (§ 473c, subd. (p)(1); see *Paramount Petroleum*, at pp. 239-240 ["a plaintiff can seek summary judgment by contending there is 'no defense' to the action, and it proves there is 'no defense' by establishing every element of its causes of action"].) The motion is properly granted only when "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (§ 473c, subd. (c).)

We review a grant of summary judgment de novo (*Samara v. Matar* (2018) 5 Cal.5th 322, 338) and, viewing the evidence in the light most favorable to the nonmoving party (*Regents of University of California v. Superior Court* (2018) 4 Cal.5th 607, 618), decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. (*Hampton v. County of San Diego* (2015) 62 Cal.4th 340, 347; *Schachter v. Citigroup, Inc.* (2009) 47 Cal.4th 610, 618.)

b. *Attorney fees*

We review the legal basis for an award of attorney fees de novo and the amount of fees awarded for abuse of discretion. (See *Mountain Air Enterprises, LLC v. Sundowner Towers, LLC* (2017) 3 Cal.5th 744, 751 ["'it is a discretionary trial court decision on the propriety or amount of statutory attorney fees to be awarded, but a determination of the legal basis for an attorney fee award is a question of law to be reviewed de novo'"]; *Orozco v. WPV San Jose, LLC* (2019) 36 Cal.App.5th 375, 406 [same]; see also *Galan v. Wolfriver Holding Corp.* (2008) 80 Cal.App.4th 1124 [the trial court has broad discretion to determine which party is a prevailing party within the meaning of statutes authorizing attorney fees].)

2. *Governing Law*

a. *Public nuisances (nuisances in fact)*

Civil Code section 3479 defines a nuisance as "[a]nything which is injurious to health, . . . or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property . . . ." Civil Code section 3480, in turn, provides, "A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal."[13]

"Unlike the private nuisance—tied to and designed to vindicate individual ownership interests in *land*—the 'common' or *public* nuisance emerged from distinctly different historical origins. The public nuisance doctrine is aimed at the protection and redress of *community* interests and, at least in theory, embodies a kind of collective ideal of civil life which the courts have vindicated by equitable remedies since the beginning of the 16th century." (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1103.) "Of course, not every interference with collective social interests constitutes a public nuisance. To qualify . . . the interference must be both *substantial* and *unreasonable*." (*Id.* at p. 1105.) "'It is substantial if it causes significant harm and unreasonable if its social utility is outweighed by the gravity of the harm inflicted.'" (*People v. ConAgra Grocery Products Co.* (2017) 17 Cal.App.5th 51, 112; accord, *County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 305; see CACI

---

[13] "Every nuisance not included in the definition of [Civil Code section 3480] is private." (Civ. Code, § 3481.)

No. 2020 [to establish a claim for public nuisance, the plaintiff must prove, among other elements, that the seriousness of the harm outweighs the social utility of the defendant's conduct].)

b. *Nuisance per se*

"The concept of a nuisance per se arises when a legislative body with appropriate jurisdiction, in the exercise of the police power, expressly declares a particular object or substance, activity, or circumstance, to be a nuisance. . . . [W]here the law expressly declares something to be a nuisance, then no inquiry beyond its existence need be made and in this sense its mere existence is said to be a nuisance per se." (*Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1206-1207; accord, *Urgent Care Medical Services v. City of Pasadena* (2018) 21 Cal.App.5th 1086, 1095 [""[n]uisances per se are so regarded because no proof is required, beyond the actual fact of their existence, to establish the nuisance""]; *City of Monterey v. Carrnshimba* (2013) 215 Cal.App.4th 1068, 1086 ["[a]n act or condition legislatively declared to be a public nuisance is "'a nuisance per se against which an injunction may issue without allegation or proof of irreparable injury'""].)

Government Code section 38771 provides, "By ordinance the city legislative body may declare what constitutes a nuisance." (See *City of Bakersfield v. Miller* (1966) 64 Cal.2d 93, 100 ["[c]ity legislative bodies are empowered by Government Code section 38771 to declare what constitutes a nuisance"]; *Clary v. City of Crescent City* (2017) 11 Cal.App.5th 274, 288-289.) The City in RPV Municipal Code section 1.08.010, subdivision (D)(1), has specified, "[A]ny condition caused or permitted to exist in violation of the provisions of this code shall be deemed a public nuisance and may be abated as such at law or

equity." As pertinent here, RPV Municipal Code section 17.76.020, subdivision (A), provides, "The installation and/or operation of a commercial antenna shall require the submittal and approval of a conditional use permit." Pursuant to RPV Municipal Code section 17.60.080, "[i]f any of the conditions to the use or development are not maintained, then the conditional use permit shall be null and void. Continued operation of a use requiring a conditional use permit after such conditional use permit expires or is found in noncompliance with any condition of a conditional use permit shall constitute a violation of this title."

3. *The Trial Court Did Not Abuse Its Discretion by Declining To Rule on Indian Peak's Procedurally Improper Request for a Stay*

Ignoring its own procedural failures, as well as the shortcomings of its argument on the merits, Indian Peak contends the trial court abused its discretion by not ruling on its request to stay the nuisance action pending final resolution of the mandamus proceedings, a request it included in its second supplemental opposition to the City's motion for summary judgment, filed October 16, 2019, rather than through a noticed motion. (Cf. *Bains v. Moores* (2009) 172 Cal.App.4th 445, 480 [trial court's denial of a motion for a stay reviewed for abuse of discretion].) In doing so, Indian Peak argues, the court improperly "elevate[d] form over substance."

The requirement of a properly noticed motion to seek affirmative relief, however, is not a mere technicality, but a fundamental procedural rule designed to protect the rights of the parties. As the trial court explained in declining to rule on the stay request, the inclusion of an affirmative request in opposition

papers filed less than two weeks before the continued summary judgment hearing deprived the City of a fair opportunity to respond with argument and evidence in opposition. (See *Austin v. Los Angeles Unified School Dist.* (2016) 244 Cal.App.4th 918, 930 [the requirements for a noticed motion in section 1010 are "intended to provide both the adverse party and the court with an adequate opportunity to address the issues presented"].) Requesting a stay in this belated and procedurally irregular manner was entirely unnecessary: Even putting aside that it was Indian Peak's decision not to file the mandamus action as a cross-complaint in the City's lawsuit or seek to have the two matters consolidated, Indian Peak could have moved for abatement or stay of the mandamus action as early as January 2019 when it demurred to the City's original nuisance complaint; yet it elected not to do so. When the trial court did not rule on Indian Peak's June 21, 2019 ex parte application for a stay of the case, granting instead its alternate request for a continuance of the hearing date to permit additional discovery, Indian Peak again chose not to file a noticed motion to obtain the relief it purportedly wanted. Then, when it filed its first supplemental opposition on August 13, 2019, Indian Peak asked the court to continue the hearing 60 days to permit the superior court's August 9, 2019 order denying the petition for writ of administrative mandamus to become final (and to permit additional discovery); it did not request a stay of the proceedings, either in its opposition papers or by separate motion. Having made these tactical decisions, Indian Peak cannot now complain of the consequences.

To be sure, section 437c, subdivision (h), as Indian Peak argues on appeal, authorizes the court to continue the summary

judgment hearing or "make any other order as may be just" if a party opposing the motion makes a sufficient showing in its opposition papers that "facts essential to justify opposition may exist but cannot, for reasons stated, be presented." Indian Peak's reliance on this section is doubly flawed. First, Indian Peak did not cite section 437c, subdivision (h), in its second supplemental opposition papers to support its request for a stay. (Indeed, in its original opposition papers, when it requested either a stay or a continuance of the hearing to conduct additional discovery, Indian Peak cited section 437c, subdivision (h), to support the latter request, but not the former.) Second, the stay was not sought because facts "may exist" that would support Indian Peak's opposition, the prerequisite for any order under section 437c, subdivision (h). Rather, Indian Peak simply hoped facts would develop in the future (a reversal on appeal) that would aid in its defense to the nuisance lawsuit. (Cf. *Bains v. Moores*, *supra*, 172 Cal.App.4th at pp. 485-486 [denying stay pending resolution of criminal proceedings to permit discovery from witnesses asserting their constitutional right not to incriminate themselves; plaintiffs "do not address the likelihood that the related criminal proceedings would be resolved within a reasonable period of time so as to allow plaintiffs to obtain such evidence"].)

In addition to being procedurally improper, Indian Peak's stay request was substantively deficient. As the trial court observed, Indian Peak failed to explain how the mandamus action challenging revocation of CUP 230 based on the City's purported failure to provide Indian Peak a fair hearing (by denying its newly retained counsel a continuance) and arbitrary action (revoking the conditional use permit while its revision

application was pending) could affect the first cause of action, which established a nuisance per se because Indian Peak had admittedly installed and operated commercial antennae not authorized by CUP 230. Whatever the appropriate exercise of discretion might have been in response to a properly noticed motion to stay the second cause of action, the trial court did not abuse its discretion when it declined to rule on Indian Peak's procedurally irregular request to stay the entire nuisance lawsuit.

4. *The City Established the Elements of Its First and Second Causes of Action but Not Its Third Cause of Action for Public Nuisance*

a. *The first and second causes of action*

The City presented evidence, including Afflerbach's expert declaration, establishing that Indian Peak had installed and operated commercial antennae in violation of the provisions of CUP 230 and the pertinent provisions of the RPV Municipal Code and continued to do so after CUP 230 was revoked in violation of other provisions of the Municipal Code. Indian Peak admitted it added antennae not authorized by CUP 230, yet nonetheless challenges the trial court's ruling its conduct established the affirmative elements of nuisance per se as alleged in the City's first and second causes of action. (Indian Peak also asserts defenses to the causes of action, which we address in the following section of our opinion.)

Indian Peak's argument is based on a fundamental misreading of the court of appeal's decision in *Clary v. City of Crescent City*, *supra*, 11 Cal.App.5th 274. As the *Clary* court explained, the Supreme Court in *City of Bakersfield v. Miller*, *supra*, 64 Cal.2d 93 held state laws more specific than Civil Code

section 3479 defining certain nuisances with greater particularity—there, a state housing regulation—do not define the limits of what may be declared a nuisance by municipal law under Government Code section 38771. However, the Supreme Court did not decide whether municipalities' power to declare nuisances applied only to specific conditions within the general areas of regulation enumerated in Civil Code section 3479 because the fire hazard addressed by the Bakersfield ordinance clearly fell within the definition of public nuisance in Civil Code section 3479. (*City of Bakersfield*, at p. 100.)

The court of appeal in *Clary* answered the question unresolved in *City of Bakersfield*, agreeing with *Golden Gate Water Ski Club v. County of Contra Costa* (2008) 165 Cal.App.4th 249, 255-256 that local governments have the "authority to impose and enforce land use regulations, through a nuisance ordinance or otherwise, without regard to whether the prohibited use falls within the Civil Code definition of nuisance." (*Clary v. City of Crescent City*, *supra*, 11 Cal.App.5th at p. 289.)[14] Thus, far from supporting Indian Peak's argument a local government's land use ordinance cannot be the basis for a nuisance per se determination and the municipality must demonstrate not only that its ordinance was violated but also that the prohibited

---

[14] The *Clary* court also held the overgrown vegetation defined as a nuisance by the weed abatement ordinance at issue in the case fell within the statutory definition of public nuisance in Civil Code section 3479. (*Clary v. City of Crescent City*, *supra*, 11 Cal.App.5th at p. 289.) Indian Peak mistakenly asserts this alternate basis for the decision vitiates the court's holding that Civil Code section 3479 does not limit the scope of a local government's authority to enforce land use regulations through nuisance law.

conduct at issue satisfied the elements of the statutory definition of public nuisance in Civil Code section 3479, including balancing the harmful effect of the defendant's conduct against its social utility, *Clary* holds precisely to the contrary. Nothing more than the fact of the violation's existence is necessary to establish a nuisance per se. (See *Urgent Care Medical Services v. City of Pasadena*, *supra*, 21 Cal.App.5th at p. 1095.) The trial court properly concluded the City had established the elements of its first two causes of action for nuisance per se. (See *Clary*, at p. 289 ["We agree with the City that *Golden Gate Water Ski Club* is dispositive here. There can be no doubt that the City's police powers are broad enough to encompass aesthetic concerns"].)

Indian Peak's objections to Afflerbach's expert declaration that none of the antennae added by Indian Peak was "consistent with CUP No. 230, nor could the antennas be considered as modifications to the masts and antennas allowed by CUP No. 230," even if they had been well-taken,[15] do not compel a

---

[15] Indian Peak objected the terms "consistent" and "modification" were vague and ambiguous and Afflerbach's opinion was irrelevant because it failed to prove a violation of CUP 230. Indian Peak also objected to two other portions of Afflerbach's declaration as argumentative and irrelevant because they failed to prove a violation of the City's municipal code. The trial court overruled the objections. On appeal Indian Peak argues its objections should have been sustained because Afflerbach's declaration failed to provide information sufficient to establish public nuisance and thus were "irrelevant, improper expert opinion, and speculative."

Whether evaluated de novo or under an abuse of discretion standard of review (see *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 535; *Orange County Water Dist. v. Sabic Innovative Plastics US, LLC* (2017) 14 Cal.App.5th 343, 368), the trial court did not err in

different result. It was undisputed, as Afflerbach established in portions of his declaration to which Indian Peak did not object and as Indian Peak admitted in its verified answer, that additional antennae not authorized by CUP 230 had been added to the antennae array on the roof of the residence on Indian Peak Road. Although Kay, in his declaration in opposition to the City's motion, asserted that "[m]any of the additional antenna" functioned as "wireless internet service providers, providing internet to the home and allow[ing] for the operation of internet at the Subject Property" and thus, in his lay opinion, did not qualify as "commercial radio services" subject to the City's regulation, he did not contend all the additional antennae fell into that category or were otherwise permissible without an amendment or revision to CUP 230.

b. *The third cause of action*

In its motion for summary judgment the City argued its third cause of action for public nuisance in violation of Civil Code sections 3479 and 3480 was predicated on the doctrine of nuisance per se and Indian Peak's violation of the provisions of

---

admitting this evidence. That an expert's opinion ultimately may not be persuasive on the issue for which it is proffered is not a proper ground for excluding his or her testimony. (See *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 772 [The trial court's role as gatekeeper "to exclude 'clearly invalid and unreliable' expert opinion" is not a decision on its persuasiveness. "The court must not weigh an opinion's probative value or substitute its own opinion for the expert's opinion. Rather, the court must simply determine whether the matter relied on can provide a reasonable basis for the opinion or whether that opinion is based on a leap of logic or conjecture"].)

CUP 230 and its continued operation of commercial antennae on the property after CUP 230 had been revoked. The same 46 material facts were asserted in support of the third cause of action as for the first two causes of action. Thus, it is not altogether surprising the trial court observed the third cause of action was duplicative of the first two.

A trial court when ruling on a motion for summary judgment is required to determine whether undisputed facts entitle the moving party to judgment as a matter of law based on the issues as framed by the pleadings, not by the moving party's motion papers. (See generally *Turner v. Anheuser-Busch* (1994) 7 Cal.4th 1238, 1252; *Jacobs v. Coldwell Banker Residential Brokerage Co.* (2017) 14 Cal.App.5th 438, 444.) As discussed, the City's third cause of action for public nuisance, although incorporating by reference the preceding paragraphs of the pleading and averring that Indian Peak's actions violated the RPV Municipal Code (without specification of any particular section), alleged, "The installation and operation of commercial antennae on the Property by the Defendant are injurious to the public health, safety, and welfare and are so out of harmony with community standards and permissible land use to constitute a public nuisance and/or public nuisance per se." That is, as set forth in the operative pleading, the City alleged a public nuisance within the meaning of the statutory definition in Civil Code section 3479—something in addition to, not duplicative of, its first two causes of action. Yet its evidence in support of summary judgment failed to address the elements of this cause of action, in no way demonstrating, for example, how large a portion of the relevant community was affected by the antenna array (notwithstanding the City's explanation it had one complaint in

2014 and four individuals testified in support of revoking CUP 230 at the public hearing), let alone establishing as an undisputed fact that the harm caused by Indian Peak's continued operation of the antennae outweighed the social benefit of its conduct.

In short, the trial court erred in granting summary adjudication in favor of the City on the third cause of action and, as a consequence, in granting the motion for summary judgment.

5. *Indian Peak Failed To Demonstrate Triable Issues of Fact Regarding Its Defenses of Invalidity of the City's Municipal Code Provisions, Federal Preemption and Consent*

Indian Peak argues on appeal the City's zoning ordinances on which the nuisance causes of action are based violate due process and the City's enforcement action is barred by federal preemption and consent. None of these purported defenses has merit.

a. *Due process*

Indian Peak did not argue in the trial court, as it does on appeal, that the City's ordinances violate due process by allowing arbitrary and irrational enforcement actions. The issue has been forfeited. (*Cabatit v. Sunnova Energy Corp.* (2020) 60 Cal.App.5th 317, 322 ["[i]f a party fails to raise an issue or theory in the trial court, we may deem consideration of that issue or theory forfeited on appeal"]; *Rancho Mirage Country Club Homeowners Assn. v. Hazelbaker* (2016) 2 Cal.App.5th 252, 264 ["[a]s a general rule, issues not raised in the trial court cannot be raised for the first time on appeal," internal quotation marks omitted]; accord, *People v. Covarrubias* (2016) 1 Cal.5th 838, 894.) Moreover, to the extent Indian Peak's constitutional

argument is directed to the process leading to revocation of CUP 230 (for example, that the City acted arbitrarily in determining Indian Peak's revision application was incomplete or in purportedly deviating from its usual practice in providing opportunities for those in violation of conditional use permits to cure the violations), those matters were properly raised, if at all, in the mandamus proceeding.

Indian Peak's additional contention the ordinances and their enforcement in this case lacked any substantial relationship to a legitimate governmental purpose (that is, to the protection of the public health or safety or general welfare) is simply a repackaged version of its argument that a local ordinance cannot define a nuisance per se unless the prohibited conduct satisfies the statutory definition of a public nuisance. As discussed, this purported limitation on the local police power is contrary to well-established law.

b. *Federal preemption*

The TCA prohibits state or local regulation of the placement, construction and modification of personal wireless service facilities[16] by any state or local government that unreasonably discriminates among providers of functionally equivalent services and state or local regulations that have the effect of prohibiting the provision of personal wireless services. (47 U.S.C. § 332(c)(7)(B)(i).)[17] Indian Peak asserted in the trial

---

16 "'[P]ersonal wireless services' means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services." (47 U.S.C. § 332(c)(7)(C)(i).)

17 In a statement that comes perilously close to violating counsel's ethical obligation of candor to this court (Rules Prof. Conduct, rule 3.3(a)(1) [a lawyer shall not knowingly make a false

court that the City's conduct in declaring a violation of CUP 230 and revoking CUP 230 based on the installation of exempt-from-regulation antennae unreasonably discriminated against Indian Peak and had the effect of prohibiting Indian Peak's provision of personal wireless services. On appeal, in addition to title 47 United States Code section 332(c)(7), Indian Peak cites for the first time in this case 47 Code of Federal Regulations part 1.4000, which prohibits restrictions that impair the installation, maintenance or operation of certain antennae used to receive or transmit fixed wireless signals, including direct-to-home satellite dishes that are less than one meter in diameter (the Over-the-Air-Reception Devices (OTARD) rule). Indian Peak

---

statement of fact or law to a tribunal]), in its opening brief Indian Peak, citing title 47 United States Code section 332(c)(7)(B)(i), incorrectly asserts that federal law "expressly prohibits municipalities' regulation of 'the placement, construction and modification of personal wireless service facilities.'" In fact, the limited restrictions on state and local regulation of personal wireless service facilities in that subdivision, summarized in the text, is part of a more general provision of the TCA concerning regulatory treatment of mobile services titled, "Preservation of local zoning authority," which states, "Except as provided in this paragraph, nothing in this Act shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." (47 U.S.C. § 332(c)(7)(A); see *Omnipoint Communications, Inc. v. City of Huntington Beach* (9th Cir. 2013) 738 F.3d 192, 195 ["§ 332(c)(7)(A) functions to preserve local land use authorities' legislative and adjudicative authority subject to certain substantive and procedural limitations"].) That is, only certain specific types of regulations are prohibited—those that discriminate or would effectively preclude any provision of wireless services.

argues there are triable issues of material fact as to whether the additional antennae it installed are "exempt" under federal law and whether the City's ordinances and enforcement actions in preventing the installation and continued operation of those antennae are preempted by federal law.

Specifically, Indian Peak contends the City's enforcement action violated federal law (or that it demonstrated the existence of triable issues of fact as to whether the abatement proceedings violated federal law) because the City never attempted to determine, through consulting with experts or otherwise, whether any of the roof-mounted antennae installed by Indian Peak were "exempt" from regulation. As discussed, however, under title 47 United States Code section 332(c)(7)(A) & (B), antennae for personal wireless services are not exempt from regulation, as Indian Peak misleadingly asserts; rather, local regulation may not discriminate among providers of personal wireless services or generally prohibit the provision of those services. Indian Peak failed to present any evidence that would establish a violation of those limitations as a defense to the City's nuisance action or explain why, in the absence of any such evidence, it was the City's responsibility (and not Indian Peak's) to investigate the nature and function of the antennae maintained by Indian Peak in violation of CUP 230 and evaluate their status under federal law.

Indian Peak argued in the trial court that the City's actions were discriminatory, citing the City's treatment of an application for a conditional use permit by Marymount College and an application for modification of a conditional use permit by AT&T. The trial court found the evidence insufficient to create a triable

issue of fact,[18] and Indian Peak does not repeat that contention on appeal. Similarly, although the City's abatement action may prevent Indian Peak from continuing to provide personal wireless services, at least until it complies with local zoning rules and obtains a new conditional use permit, Indian Peak presented no evidence the City's requirement that personal wireless service providers obtain conditional use permits before installing and maintaining commercial antennae on residential property effectively precluded the provision of personal wireless services within a significant portion of the City. (See, e.g., *Omnipoint Holdings, Inc. v. City of Cranston* (1st Cir. 2009) 586 F.3d 38, 48 ["[w]hen a carrier claims an individual denial is an effective prohibition, virtually all circuits require courts to (1) find a 'significant gap' in coverage exists in an area and (2) consider whether alternatives to the carrier's proposed solution to that gap mean that there is no effective prohibition"]; see also *Green Mt. Realty Corp. v. Leonard* (1st Cir. 2012) 688 F.3d 40, 57 ["while 'an individual denial is not automatically a forbidden prohibition . . . [,] we [cannot] rule out the possibility that—based on language or circumstances—some individual decisions could be shown to reflect, or represent, an effective prohibition on personal wireless service'"].)

---

[18] The trial court explained Indian Peak had submitted no evidence the Marymount application was comparable to Indian Peak's revision application, so that it was not possible to evaluate whether any purported differences in the review process were discriminatory. Similarly, Indian Peak presented no evidence whether the AT&T application was ever completed, let alone ultimately granted, again precluding any evaluation whether Indian Peak was the victim of discriminatory or arbitrary action by the City.

The OTARD rule, like title 47 United States Code section 332, does not "exempt" covered antennae from all local laws or regulations; rather, it prohibits restrictions or requirements that "impair"—that is, that unreasonably delay or prevent or unreasonably increase the cost of[19]—the installation, maintenance or operation of antennae used to receive video programming services, including direct-to-home satellite service, or to receive or transmit fixed wireless signals via satellite on property within the exclusive use or control of the antenna user. (See 47 C.F.R. § 1.4000(a)(1).) Indian Peak asserts its roof-mounted satellite dish antenna is exempt from any regulation under the OTARD rule and complains the trial court never mentioned this OTARD exemption. But Indian Peak never cited the OTARD rule in the trial court or contended it provided a defense to the City's nuisance action. Any reliance on that rule has been forfeited. (*Cabatit v. Sunnova Energy Corp.*, *supra*, 60 Cal.App.5th at p. 322; *Rancho Mirage Country Club Homeowners Assn. v. Hazelbaker*, *supra*, 2 Cal.App.5th at p. 264.)[20]

---

[19] The OTARD rule specifies "a law, regulation, or restriction impairs installation, maintenance, or use of an antenna if it: [¶] (i) Unreasonably delays or prevents installation, maintenance, or use; [¶] (ii) Unreasonably increases the cost of installation, maintenance, or use; or [¶] (iii) Precludes reception or transmission of an acceptable quality signal." (47 C.F.R. § 1.4000(a)(3).)

[20] Responding to the City's argument that Indian Peak had forfeited its OTARD arguments, Indian Peak insists in its reply brief that OTARD was raised in its second supplemental opposition memorandum. It was not. Indian Peak asserted its satellite dish antennae was exempt from regulation under

Even were the merits of its OTARD argument properly before this court, Indian Peak presented no evidence its satellite dish antenna came within the scope of the rule, which does not apply to antennae larger than one meter in diameter (47 C.F.R. § 1.4000(a)(1)(i)(B)), or that any of the other multiple antenna masts and antennae it had added to the roof of the property since 2005 were protected by the OTARD rule. Neither has it explained, much less cited authority for, the proposition essential to its argument that, when a collection of antennae includes both federally protected and unprotected items, requiring a conditional use permit for the entire array constitutes an unreasonable burden on the installation or maintenance of the protected antennae, which is all that the OTARD rule precludes.[21] In sum, Indian Peak failed to demonstrate a triable issue of fact existed as to its defense of federal preemption.

RPV Municipal Code section 17.76.020, subdivision (B)(2), but did not cite, let alone discuss, OTARD or 47 Code of Federal Regulations part 1.4000. Indian Peak did argue the roof-mounted satellite dish antenna was protected by 47 Code of Federal Regulations part 1.4000 in superior court in its papers supporting its request for a petition for writ of administrative mandamus.

[21] Even if one or more of Indian Peak's antennae were protected by the OTARD rule, there appears no reason the installation and maintenance of other, unprotected antennae in violation of a conditional use permit could not properly be found to be a nuisance per se. The extent of the ensuing injunction or order of abatement might be affected, but not the underlying nuisance determination. Indian Peak does not argue on appeal the scope of the injunction against it should be narrowed.

c. *Consent*

Consent can be a defense to a claim of nuisance (*Mangini v. Aerojet-General Corp.* (1991) 230 Cal.App.3d 1125, 1138), although not necessarily to an action for the abatement of a public nuisance. (*Id.* at p. 1139 ["we do not suggest that consent of an owner/lessor can impede the *abatement* of a public nuisance"]; accord, *Beck Development Co. v. Southern Pacific Transportation Co.*, *supra*, 44 Cal.App.4th at p. 1215; cf. *Hansen Bros. Enterprises, Inc. v. Board of Supervisors* (1996) 12 Cal.4th 533, 564 ["the county lacks the power to waive or consent to violation of the zoning law"].) In any event, Indian Peak's defense of consent fails as a factual matter.

Indian Peak's initial installation of its antenna array, although accomplished without prior consent, was ultimately approved with the issuance of CUP 230. But Indian Peak violated the provisions of CUP 230 by installing and maintaining additional commercial antennae, and the permit was revoked. There was no longer consent for Indian Peak's continuing operation of its original antennae, let alone for the new ones it had added.

Indian Peak does not dispute those basic facts, but contends any violation of CUP 230 was cured, and its operation of additional commercial antennae was pursuant to the City's "consent," because it submitted a revision application in accordance with the City's July 26, 2016 letter. Simply put, a pending application to revise the conditional use permit—asking for consent—is not consent. Moreover, this court in the companion mandamus appeal, *Indian Peak Properties, LLC v. City of Rancho Palos Verdes*, *supra*, B303325), held, because Indian Peak failed to exhaust available administrative remedies

to challenge the City's actions in determining the revision application was incomplete, the decision not to process the application did not in any way undermine the propriety of the decision to revoke CUP 230.

6. *Reversal of the Judgment Requires Reversal of the Postjudgment Award of Attorney Fees*

Our reversal of the judgment in favor of the City necessarily requires reversal of the postjudgment award of attorney fees to it as the prevailing party in the action. (See *Friends of the Hastain Trail v. Coldwater Development LLC* (2016) 1 Cal.App.5th 1013, 1037; *Samples v. Brown* (2007) 146 Cal.App.4th 787, 811; see also *Gillan v. City of San Marino* (2007) 147 Cal.App.4th 1033, 1053 [after a judgment is reversed on appeal, the issue of trial costs is "'set at large'"]; *Allen v. Smith* (2002) 94 Cal.App.4th 1270, 1284 [same].)

DISPOSITION

The judgment and postjudgment order are reversed. The cause is remanded with directions to the trial court to enter a new order denying the City's motion for summary judgment, granting the motion for summary adjudication as to the first and second causes of action and denying the motion for summary adjudication as to the third cause of action. The parties are to bear their own costs on appeal.

PERLUSS, P. J.

We concur:

SEGAL, J. IBARRA, J.*

* Judge of the Santa Clara Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.