

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

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In the Matter of the Application of:

**LOS ANGELES REGIONAL INTEROPERABLE
COMMUNICATIONS SYSTEM (LA-RICS)**

**MEMORANDUM
IN SUPPORT OF APPEAL**

Applications for
Minor Coastal Development Permit ("MCDP")
No. RPPL2019004996 and
Variance No. RPPL2019004997

Premises: 24480 W. Saddle Peak Rd.
Malibu, California 90265

APN: 4453-018-019

Zoning
District: R-C-20

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**MEMORANDUM IN SUPPORT OF APPEAL OF
SEPTEMBER 16, 2020 FINDINGS AND ORDER
OF THE REGIONAL PLANNING COMMISSION
APPROVING MCDP NO. RPPL2019004996 AND
VARIANCE NO. RPPL2019004997 FOR PROJECT
NO. 2019-002824-(3)**

Respectfully Submitted,

Ms. Elizabeth Barris
101 S. Topanga Cyn. Blvd, Unit #586
Topanga, California 90290 -2024

Table of Contents

Preliminary Statement..... 1

POINT I *LA-RICS* Has Failed To Proffer Probative Evidence Sufficient to Establish a Need For the Proposed Tower at the Location and Height Proposed, or That the Granting of its Application Would be Consistent With the Smart Planning Requirements of the General Plan and SMMLCP4

 A. *LA-RICS* Has Failed to Submit Probative Evidence to Establish The Need for The Proposed Tower at The Height and Location Proposed..... 6

 (i) The Applicable Evidentiary Standard 6

 (ii) *LA-RICS* Has Blatantly Failed to Meet its Burdens 6

 (iii) Hard Data and the Lack Thereof 8

 B. Verizon's and AT&T's Both Show Excellent Wireless Services at the Proposed Location 12

 C. *LA-RICS* has Wholly Failed to Established Why it Cannot Site a Tower at a Less Intrusive Alternative Location..... 13

POINT II The Commission's SMMLUP, Land Use Element, and SMMLIP Consistency Findings Were Incorrect as a Matter of Law or Fact and Should Be Reversed..... 15

 A. SMMLUP Policy CO-108, 109, 138, 110, 131, 136, 147, 152 and SMMLIP Findings 19, 21, 29, 31, 32, 38 15

 B. Land Use Element Policy LU-33, 38, 52-55..... 18

POINT III The Commission Should Not Have Granted *LA-RICS'* Application For a Coastal Variance As it Does Not Meet the Standards For Site Plan Approval 19

POINT IV To Comply With the Telecommunications Act of 1996 (TCA), *LA-RICS'* Application Should Be Denied in a Written Decision Which Cites the Evidence Provided Herewith 25

 A. The Written Decision Requirement 25

 B. The Substantial Evidence Requirement 25

Conclusion 26

Preliminary Statement

The Los Angeles Regional Interoperable Communications System (LA-RICS) Authority (hereinafter “LA-RICS” or “Permittee”) filed an application for Minor Coastal Development Permit (“MCDP”) No. RPPL2019004996 and Variance No. RPPL2019004997 in the matter of the Project No. 2019-002824-(3) (hereinafter the “Project Permits”), seeking to install two Eighteen (18) foot-tall¹ wireless communications facilities at 24480 W. Saddle Peak Road (APN 4453-018-019) within the Malibu Zoned District.

On September 16, 2020, the Los Angeles Department of Regional Planning Commission (the “Commission”) unanimously approved the Project Permits, a decision that violated both local policies and procedures, as well as established jurisprudence in the Ninth Circuit and the Telecommunications Act of 1996 (TCA). I, Elizabeth Barris, a resident of Topanga who challenged the application at the public hearing, submit this memorandum in support of appeal and asks to reverse the Commission's original findings and order.

The application is patently defective and should be rejected *in toto*. Among the most egregious deficiencies, LA-RICS has merely claimed that its towers would improve purported “emergency scenarios” and “emergency responders to aid in their day-to-day mission.” See LA-RICS RPC presentation dated September 16, 2020, p. 2. This is simply not the standard under the TCA, federal law in the Ninth Circuit, and local policies and procedures.

In any event, the purported emergency needs are, at best, vague and unspecified and, at worse, speculative or non-existent.

¹ By the *Permittee's* own admission, the height of the proposed towers is actually twenty three feet eight inches (23' 8") because the antennas on the Towers extend up to an additional five feet eight inches (5' 8") from the eighteen (18) foot-tall bases. See LA-RICS Response to LADRP Comments Dated February 19, 2020, p. 3.

Then, in its supplemental Coverage Analysis dated November 26, 2019, LA-RICS—in a complete and utter vacuum of indifference toward the TCA and twenty-four (24) years of established federal law—shockingly claims that it intends to provide “*overlapping, redundant coverage*” through its new cell tower installations. See Coverage Analysis Rev. 0, p. 1. In essence, *LA-RICS* has asked the Commission, and the Commission has agreed, to violate clearly established federal law, which prohibits the unnecessary proliferation² of wireless communications facilities, for the sole purpose of building two needless towers at the proposed location. Due to the voluminous amount of material in the record, it is my belief that the Commission might have inadvertently overlooked at this aspect while rendering its decision.

As set forth hereinbelow, *LA RICS* failed to meet its burden of proof and the Commission should have denied the application because, among other things:

- (a) *LA-RICS* has failed to establish that the proposed towers: (i) are actually necessary for the provision of personal wireless services within the Malibu area, (ii) are necessary to be built in what is essentially the most intrusive location possible since they are located above the ridgeline and extend over the maximum permitted height of eighteen (18) feet, or (iii) that the height proposed is the minimum height necessary to remedy whatever “gaps” in coverage which the *Permittee* claims to exist;

² Please note that the Santa Monica Mountain Local Coastal Program (SMMLCP) shares similar goals and policies with the Telecommunications Act of 1996. Specifically, the SMMLUP Policy LU-52 through LU-55 “encourage undergrounding of accessory equipment, co-locating, and clustering wireless telecommunication facilities and structures, wherever possible, to *help avert unnecessary proliferation of such facilities.*” As discussed in great detail herein, the two proposed towers are wholly unnecessary because LA-RICS aims to establish “redundant, overlapping coverage,” which is exactly what local policies and procedures expressly prohibit. These two towers will not remedy a significant gap in wireless services and, therefore, will cause an unnecessary proliferation of wireless facilities in the proposed area.

- (b) *LA-RICS* has failed to establish that it meets the requirements of the SMMLCP, and that granting the application would be consistent with smart planning requirements contained within the General Plan and SMMLCP;
- (c) *LA-RICS'* application does not meet the requirements of the SMMLUP, Land Use Element, and SMMLIP because the irresponsible placement of two towers at the proposed location would inflict substantial adverse aesthetic impact on scenic resources and vegetation; and
- (d) *LA-RICS'* application falls well short of meeting the requirements for a coastal variance.

POINT I

LA-RICS Has Failed To Proffer Probative Evidence Sufficient to Establish a Need For the Proposed Tower at the Location and Height Proposed, or That the Granting of its Application Would be Consistent With the Smart Planning Requirements of the General Plan and SMMLCP

The obvious intent behind the provisions of the Los Angeles County 2035 General Plan (the "General Plan") and Santa Monica Mountains Local Coastal Program ("SMMLCP")³ was to promote "smart planning" of wireless infrastructure within the Malibu area. Although there is an intention to expand wireless services, local governments clearly recognize the importance of "minimizing visual impacts through co-location and design." General Plan, Policy PS/F 6.3; SMMLCP CO-152, LU-3, LU-52, SMMLIP § 22.44.1330.

Smart planning involves the adoption of and enforcement of zoning provisions, which require that cell towers be *strategically placed*, so that they minimize the number of towers needed. Specifically, the goal is to saturate the County with complete wireless coverage (*i.e.*, they leave no gaps in wireless service), while contemporaneously avoiding any unnecessary adverse aesthetic or other impacts upon homes and communities situated in close proximity to such towers.

Entirely consistent with that intent, Policy PS/F 6.3 of the General Plan, SMMLCP LU-3, LU-52, and SMMLIP § 22.44.1330 were adopted as smart planning provisions, specifically enacted to regulate the "placement" of cell towers to minimize their potential negative impacts.

³ LA County divides Local Coastal Programs for each coastal zone area, creating a more tailored framework to regulate specific areas as part of the overall County General Plan. For the purpose of this appeal, the applicable local law is the SMMLCP, which consists of two parts: (1) a Land Use Plan (LUP), and (2) an Implementation Plan (LIP).

To enable them to determine if a proposed cell tower would be consistent with smart planning requirements, sophisticated regulating authorities require applicants to provide direct evidentiary proof of:

(a) the precise locations, size, and extent of any “*significant gaps*” in personal wireless services which are being provided by a specifically-identified wireless carrier, which provides personal wireless services within the respective jurisdiction, and

(b) the precise locations, size and extent of any geographic areas within which that identified wireless carrier suffers from a *capacity deficiency* in its coverage.

The reason that local authorities invariably require such information is because, without it, they are incapable of knowing: (a) if, and to what extent, a proposed tower will remedy any actual significant gaps or deficiencies which may exist, (b) if the proposed height for a tower is the minimum height needed to remedy such gaps, and (c) if the proposed placement is in such a poor location that it would actually require more towers to be built because the proposed tower did not actually cover the gaps in service that existed—thereby causing an unnecessary redundancy in cell towers within the area.

In the present case, *LA-RICS* has wholly failed to provide any hard data to establish that the proposed placement of its towers would, in any way, be consistent with local smart planning provisions. In fact, *LA-RICS* has not provided actual probative evidence to establish: (a) the *actual location of gaps* (or deficient capacity locations) in personal wireless services within the proposed area; and (b) why or how its proposed cell towers would be the best and/or least intrusive means of remedying those gaps.

A. LA-RICS Has Failed to Submit Probative Evidence to Establish The Need for The Proposed Tower at The Height and Location Proposed

(i) The Applicable Evidentiary Standard

Within the context of cell tower applications, such as the current one which has been filed by *LA-RICS* herein, the *Permittee* must prove that: (1) there are significant gaps in a specific wireless carrier's service; (2) some inquiry into the feasibility of alternative facilities or site locations" under the "least intrusive standard." T-Mobile USA, Inc. v. City of Anacortes, 572 F.3d 987, 995 (9th Cir. 2009).

As has been clearly enunciated by the Court in Anacortes, where a local zoning board denies a cell tower application, and even one reason given for the denial is based upon substantial evidence, the decision of the local zoning body cannot be disturbed by a federal court. Id.

Here, as discussed below, the Commission was in possession of substantial evidence to deny *LA-RICS'* deficient application and should not have granted the Project Permits.

(ii) LA-RICS Has Blatantly Failed To Meet Its Burdens

It is beyond argument that *LA-RICS* has failed to meet its burden of proving that: (a) as proposed, its towers would present a "minimal intrusion on the community," (b) its towers would remedy a significant gap in a specific wireless carrier's service and is the least intrusive means of remedy that purported gap in coverage, upon which a denial of its application would constitute a "prohibition of personal wireless services" within the meaning of 47 U.S.C.A. § 332(7)(B)(i)(II), (c) its proposed placement would minimize its "aesthetic intrusion" within the meaning of General Plan, Policy PS/F 6.3, SMMLIP § 22.44.1330 (C)(E)(F), and SMMLCP LU-3, LU-52.

As an initial evidentiary matter, glaringly absent from *LA-RICS'* application is any “*hard data,*” which could easily be submitted by the applicant, as *probative evidence* to establish that: (a) there is an actual Public Necessity for the towers being proposed, which (b) not only necessitates the installation of two new towers, but (c) requires they be built at the specifically chosen location (d) on the specifically chosen site (as opposed to being built upon alternative less-intrusive locations), and (e) contemporaneously requires that they be built at an elevation no lower than the height now being proposed by *LA-RICS,* which exceeds the maximum permitted height. See Fn. 1, *supra.*

The reason for *LA-RICS'* lack of hard data is crystal clear: there is simply no significant gap in wireless services in the proposed area. In the *Permittee's* own words, the whole purpose of this project is to create “*overlapping, redundant coverage*” in the event of potential catastrophes, such as fire hazards. See Coverage Analysis Rev. 0, p. 1. But the Telecommunications Act of 1996, the Ninth Circuit, and smart planning provisions enacted by the County of Los Angeles expressly prohibit this type of conduct.

The test articulated by the Ninth Circuit in Anacortes requires *LA-RICS* to demonstrate a significant gap in wireless services, meaning that the proposed installation should remedy actual dead spots. In the present case, although *LA-RICS* has sufficient wireless coverage for its operations, it has nonetheless decided to add two additional towers at the proposed location to create *redundant* coverage. This is ***an intentional violation of federal law***, which outlines the basic principles to regulate the placement and installation of wireless facility, as well as a violation of the SMMLUP Policy LU-52 through LU-55, which prohibits “***unnecessary proliferation of such facilities.***”

This statement alone warrants a denial of *LA-RICS'* application.

(iii) Hard Data and the Lack Thereof

The most accurate and least expensive evidence that can be used to establish the location, size and extent of both *gaps* in personal wireless services, and areas suffering from *capacity deficiencies*, are two specific forms of *hard data*: (a) actual drive test data, and (b) dropped call records.

Unlike “expert reports,” RF modeling and propagation maps, all of which are most often manipulated to reflect whatever the preparer wants them to show, *hard data*, such as drive test data and dropped call records, is straightforward and less likely to be subject to manipulation, unintentional error or inaccuracy.

Drive test data is simple and extremely inexpensive to obtain. It is generated through a simple drive test during which a recording device is attached to a cell phone. During a drive through the area at issue, the device records wireless signal strengths every few milliseconds. In doing so, it provides as many as several hundred thousand actual signal strength records, which directly evidence if there is a significant gap in wireless service, precisely where such gap is, and its geographic boundaries.

Dropped call records are even easier for a wireless carrier to provide. With the clicks of a few keystrokes, each carrier’s computer system can print out a precise record of all dropped calls for any period of time, at any geographic location, and the likelihood that someone would enter false data into a carrier’s computer system to materially alter that information is highly unlikely.

Both of these types of hard data typically do not the type of manipulation that is almost uniformly found in “*computer modeling*” by an applicant seeking zoning approval, within which the applicant creates of hypothetical “propagation maps,” or “expert interpretations” of

data (instead of the actual data), all of which are so easily manipulated that they are essentially rendered worthless as a form of probative evidence.

As reflected within the record in this case, *LA-RICS* has failed to provide a shred of hard data, or any actual evidence to establish the existence of any significant gap in any wireless coverage, or any capacity deficiency, which would necessitate the construction of the eighteen (18) foot-tall towers, which is the maximum height possible for this project. Nor has *LA-RICS* explained why it has failed to provide such hard data.

Instead of producing these forms of hard data, *LA-RICS* has provided what it purports to be Motorola Solutions SPN Coverage Maps that “suggest” that they are somehow based on relevant data.

A simple review of those coverages maps reflects that they contain no hard data, whatsoever, and by its own admission, all of its data and propagation maps have been manipulated by *LA-RICS*’ representatives.

LA-RICS’ blatant manipulation and unwillingness to provide actual hard data became even more evident after the Commission asked the following additional documents in its February 19, 2020 correspondence titled "Comments and Corrections for Saddle Peak LMR Project:"

Previous Comments from October 17, 2019

Coverage Map:

b) *This map shows broad coverage of the Project in relation with other LA-RICS sites. Provide two more maps; a) Map showing existing coverage without the Project, and b) Single Site coverage SPN.*

c) *Provide a brief Coverage Analysis. Why are two towers needed on this ridgeline, in this area? What does this particular site accomplish?*

The Commission immediately recognized that *LA-RICS'* initial application lacked crucial information in connection with the purported gaps in coverage and how, if any, these two towers would remedy such gaps.

Since then, however, *LA-RICS* refused to provide any hard data or supplement its evidentiary materials accordingly. The *Permittee* simply put forth a laundry list of baseless excuses and purposefully refused to articulate why it cannot provide the requested documents.

In response to the Commission's request to provide a detailed explanation about the need of two eighteen (18) foot-tall towers, *LA-RICS* simply claimed, *inter alia*, that this configuration "provides proper separation and placement of antennas" and "its new design can be shared with a co-locator in the future." See *LA-RICS Response to LADRP Comments, Project Narrative Rev. 3, pp. 2-3.* This is nothing more than a blatant attempt to circumvent the Commission's expressed request. Just because *LA-RICS'* original design was a 50' horizontal structure does not make the current design better or proper—let alone justify the need for two additional towers that, after taking into account their antennas, will elevate over eighteen (18) feet above the ridgeline. The bottom line is that *LA-RICS* has failed to demonstrate that there is a significant gap in wireless service at that precise location and that not one, but two towers are necessary to remedy such purported gap.

The Motorola SPN Coverage Maps and related charts submitted by *LA-RICS* on November 26, 2019 only supports its pre-determined conclusion that two towers are required for the project with unsubstantiated data. The maps and charts provided by *LA-RICS* lack probative value because they neither contain, nor accurately depict, actual hard data “conclusions.” A careful reading of *LA-RICS'* "evidentiary" material confirms that the charts and maps, which form the basis for *LA-RICS'* contention that both towers are indispensable at

this exact location, are nonsensical and void of probative value. As such, they bear virtually no probative evidentiary value because: (a) they are not verified on their face, (b) they *identify no source of the data* which was allegedly used to create the line which appears on the chart, (c) the line which is displayed is infinitely *easy to manipulate* in any way one wishes, (d) the purported “results” depicted in the chart can easily be manipulated by raising or lowering image on the page or falsifying the scale on the right, and (e) the use and accuracy of whatever data the chart is purported to represent is *impossible to verify*.

Here, the “charts and maps” show some purported gaps in coverage around the proposed site with no reliable source that can verify the information. What would have been more helpful, but is deliberately missing from the SPN Coverage Maps, is the actual number of emergency dropped calls in relation to the number of total calls. Even the Coverage Analysis report, submitted by LA-RICS on November 26, 2019, is completely silent about the *actual* number of dropped calls. The *Permittee*, instead, made sporadic, conclusory assertions throughout the entire report. By way of an example, LA-RICS mentions "large dead spots of radio coverage for the First Responders working in the area," but submits not a single document to validate this point.

Also glaringly absent from such report is a modicum of hard data from the actual carrier *Motorola*, showing *the cause* of dropped calls, if any. It also significant to note that a simple review of such charts reflects that several alleged gaps in coverage appear to be inconsistent with other major wireless carriers' own database, as addressed in subparagraph “B” below.

Alleged gaps in coverage without actual dropped call numbers or hard data of the actual recorded strengths of a carrier’s wireless signal at Saddle Peak do not, and cannot, prove a significant gap in a carrier’s wireless coverage. All the charts submitted by *LA-RICS* are

meaningless and should be disregarded in their entirety.

B. Verizon's and AT&T's Both Show
Excellent Wireless Services at the Proposed Location

Since *LA-RICS* has failed to submit reliable evidentiary material, other wireless carriers in the same geographic area can shed some light on the alleged gap in wireless services at the proposed location. As is a matter of public record, Verizon and AT&T, two major wireless carriers around the country, maintain online databases containing geographic data points that cumulatively form a geographic inventory of their current wireless coverage.

As maintained and operated by Verizon and AT&T, their database are linked to Verizon's and AT&T's websites and function as the data-source for an interactive function, which enables users to access Verizon's and AT&T's own data to ascertain both: (a) the existence of Verizon's and AT&T's wireless coverage at any specific geographic location, and (b) the level or quality of such coverage.

Verizon's and AT&T's interactive websites translate their actual coverage data to provide imagery whereby areas that are covered by: (a) Verizon's service are depicted in red and areas where Verizon has a lack (or gap) in coverage are depicted in white, and AT&T's service are depicted in dark or light blue and areas where AT&T has a lack (or gap) in coverage are depicted in white.

Exhibit "A," which is being submitted together with this Memorandum, is a true copy of a record obtained from Verizon's and AT&T's websites on September 22, 2020.

This Exhibit A depicts the specific geographic location at which *LA-RICS* seeks to install its proposed towers under the claim that *LA-RICS* "needs" such towers to remedy a significant gap in wireless services and large dead spots at such location.

As reflected within Exhibit "A," these two major carriers both claim that there is no

significant coverage gap in their wireless services at that precise location, or anywhere around or in close proximity to it.

Moreover, Exhibit “A” additionally shows that the quality and/or strength of *Verizon’s* 4G coverage at that location is “Excellent,” meaning that the capacity of *Verizon’s* coverage at that location is at the best level of its coverage.

It is significant to note that Exhibit “A” affirmatively indicates that such coverage data is current as of 9/22/2020, *see* the bottom right corner of Exhibit “A,” and the ledger on the bottom of the page confirms that its source was, in fact, the carriers' internet websites.

Given the information contained within Verizon’s and AT&T's own databases, it is virtually impossible for *LA-RICS* to claim significant gaps in wireless services or prove the actual need for not one, but two towers that will exceed the maximum permitted height of eighteen (18) feet.

C. *LA-RICS* has Wholly Failed to Establish Why it Cannot Site a Tower at a Less Intrusive Alternative Location

The Commission's original finding and order should also be reversed because *LA-RICS* has failed to establish that these two proposed towers are the least intrusive means to remedy its purported large dead spots.

It is respectfully submitted that *LA-RICS* did not perform a diligent and meaningful analysis of alternatives locations. The three alternatives locations are all located at the 24480 Saddle Peak Road complex, all in close proximity to one another. Clearly, *LA-RICS* has only one location in mind and has no intention, whatsoever, to explore other feasible alternative locations.

Even assuming, *arguendo*, that *LA-RICS'* alternative locations are valid proposals, the *Permittee* has nonetheless failed to make a *prima facie* showing that the proposed facility is the

least intrusive means of filling a significant gap. Anacortes, 572 F.3d at 998. The burden of proof did not shift to the locality to show that there are other potential alternatives because *LA-RICS* never attempted to prove that (a) there is a significant gap in wireless services, and (b) the three proposed locations are inadequate. Anacortes, 572 F.3d at 995.

For the sake of administrative economy, the significant gap analysis is identical to the one described in Point I, Subsections A and B above.

In a similar vein, *LA-RICS* also improperly rejected all three of them in its Project Narrative Rev. 3 with purely conclusory assertions. *LA-RICS* did not select the first site because it would need to construct a new access roadway and conduct extensive hillside slope grading. It is axiomatic that saving costs is not a valid reason to reject an alternative site. Similarly, alternative sites no. 2 and 3 were rejected for lack of real estate or Crown Castle's unwillingness to sell its current tower, but *LA-RICS* provided no physical evidence to support its contentions (*i.e.*, a rejected proposal, document reflecting an actual lack of real estate, etc.). This conduct is the quintessential illustration of a deliberate refusal to explore alternative sites and undertake a meaningful comparison.

In any event, having failed to show the exact location and extent of the actual gaps in wireless services within the proposed area, *LA-RICS* has failed to justify the installation of two towers, as opposed to a single tower of a substantially lower height.

Accordingly, the Commission's original findings and order should be reversed.

POINT II

The Commission's SMMLUP, Land Use Element, and SMMLIP Consistency Findings Were Incorrect as a Matter of Law or Fact and Should Be Reversed

As set forth herein below, *LA-RICS'* application does not meet the requirements in the SMMLUP, Land Use Element, and SMMLIP and, therefore, the Commission's overall Consistency Findings were clearly erroneous.

The SMMLUP and SMMLIP contain specific goals and policies in connection with projects within the Malibu area, including the installation and placement of wireless communications facilities. The Commission analyzed different goals and policies relating to *LA-RICS'* application, but ultimately reached incorrect determinations that are contrary to the evidence in the record.

- (a) SMMLUP Policy CO-108, 109, 138, 110, 131, 136, 147, 152 and SMMLIP Findings 19, 21, 29, 31, 32, 38

The first group of policies and goals analyzed by the Commission involved primarily adverse aesthetic impact to scenic resources and vegetation (Policy CO-108, 109, 138), visual impact (Policy CO-110, 131, 136, 147), specific considerations for wireless facilities (Policy CO-152), and other general considerations under SMMLIP.

The Commission's decision starts, once again, with an expressed reference to "needed coverage for the surrounding area." See LADRP September 16, 2020 Order, p. 10. As demonstrated above, this factual determination is clearly incorrect because *LA-RICS* stated the polar opposite on the record—*i.e.*, the facility will create "redundant, overlapping coverage." In a similar fashion, the Commission should have rejected *LA-RICS'* argument that the other proposed locations, which are also located at the Saddle Peak location, are not feasible

alternatives. The *Permittee* did not submit any probative documents to support this contention.

Even assuming a proposed gap exists and the proposed locations were not feasible, the Commission determined that it was impossible to place this facility below the ridgeline because it might impact H1-H2 habitat and, concomitantly, the siting "will not fulfill the LMR Project objective." *Id.* But the record simply contains no indication as to LA-RICS' *specific* objectives.

The *Permittee* made vague and generalized statements about purported emergency needs in the proposed area. However, *LA-RICS* purposefully failed to submit: (a) any sworn statements from Fire Departments or First and Secondary Emergency Responders in the area, attesting to the current status of their operations and related need to improve wireless communications services during their operations; (b) any hard data, either in the form of drive test data or dropped calls, that can accurately prove to the Commission *LA-RICS'* need for two towers at the proposed location; and (c) any documents from its prior applications at fire stations in LA County seven (7) years ago, which were ultimately denied for, upon information and belief, health concerns and failure to prove an actual need for these facilities.

Equally egregious is the Commission's position that, since other towers are present at the proposed location, two additional towers would not create an adverse aesthetic impact or visual impact. The fact that other towers are present does not weigh in favor of placing additional towers, which are *per se* incompatible with the surrounding natural mountains. Two additional towers, exceeding the maximum height permitted by the SMMLCP, would not likely become part of the scenic vista as the Commission seems to believe, even when allegedly clustered between other existing structures. Quite the contrary, adding more towers above the ridgeline will make the overall complex *stand out like a sore thumb* and *inflict substantial adverse aesthetic impact* on the area.

The order contains a glib blend of generalizations and misstatement of facts that call into question the accuracy of Commission's findings. First, the two towers are more than thirty percent (30%) higher than what LA-RICS depicts them to be. Because of the antennas, the overall project reaches twenty three feet eight inches (23' 8") in height. See Fn. 1, supra.

Second, if such towers were to be built, *LA-RICS* would be vested with the power to unilaterally increase the height of the towers to as much as thirty eight (38) feet, plus the additional antennas. The LADRP would be legally prohibited from stopping *LA-RICS* from doing so due to the constraints of the Middle-Class Tax Relief and Job Creation Act of 2012.

Section § 6409(a) of the Middle-Class Tax Relief and Job Creation Act of 2012 provides that, notwithstanding section 704 of the Telecommunications Act of 1996 or any other provision of law, a State or local government may not deny, and shall approve, any eligible request for a modification of an existing wireless facility or base station that does not substantially change the physical dimensions of such facility or base station. See 47 U.S.C. § 1455(a).

Under the FCC's reading and interpretation of § 6409(a) of the Act, local governments are prohibited from denying modifications to wireless facilities unless the modifications will "substantially change" the physical dimensions of the facility, pole or tower.

The FCC defines "substantial change" to include any modification that would increase the height of the facility by more than ten (10%) percent of the height of the tower, plus the height of an additional antenna, plus a distance of ten (10) feet to separate a new antenna from the pre-existing top antenna, up to a maximum height increase of twenty (20) feet.

Considering the even more substantial adverse impacts which an increase in the height of the cell tower to thirty-eight (38) feet would inflict upon the homes, communities nearby, scenic resources, and visual impact, the Commission's findings and order should be reversed and, therefore, *LA-RICS'* application should be denied.

Once again, this is especially true since, as set forth in Point I above, *LA-RICS* has not even established that the proposed towers are actually needed to remedy actual gaps in coverage, but they are being built for the purpose of creating "redundant, overlapping coverage."

(b) Land Use Element Policy LU-33, 38, 52-55

The Commission applied incorrectly the standards enunciated in Land Use element policy LU-33, 38, 52-55. One of the main goals of these provisions is to “encourage undergrounding of accessory equipment, co-locating, and clustering wireless telecommunication facilities and structures, wherever possible, to help avert unnecessary proliferation of such facilities.” This language does not take into account future co-location; rather, it encourages applicants to co-locate or adopt other measures *at the time of their application* to avert unnecessary proliferation of cell towers.

However, the Commission approved the Project Permits because "the Project is designed to support future co-location." Future considerations should play no part in the decision process. The Commission has an obligation to evaluate *this specific application* and *this specific Permittee's ability to co-locate* at the time of the application, including the feasibility of other alternative locations and extent of the purported gaps in coverage.

The record itself explains why the Commission should not rely on these speculative assertions. *LA-RICS* told the Commission that it cannot co-locate at the Saddle Peak Road

complex due to lack of real estate or, apparently, the inability of certain towers to meet newly enacted codes and regulations. Wireless technology has been evolving so rapidly that it is almost impossible to determine future needs. Therefore, not only did the Commission err in making said statement, but it failed to ask *LA-RICS* for supplemental materials that would explain why *LA-RICS* could not co-locate or could not undertake a meaningful comparison of alternative sites (*i.e.*, as discussed above, *LA-RICS* alternative sites are meaningless because they are all located in close proximity to each other at the Saddle Peak Road location).

POINT III

The Commission Should Not Have Granted
LA-RICS' Application for a Coastal Variance
As It Does Not Meet the Standards for Approval

The LADRP has broad discretion in granting or denying area variances, but discretion does not mean arbitrariness or mere thought; on the contrary, the Commission shall carefully evaluate the evidence presented and make a good faith determination under the applicable standards.

As detailed in SMMLIP § 22.44.1150(H), the threshold issue for the Commission is balancing the benefit to be realized by the *Permittee* against the detriment to the health, safety and general welfare of the neighborhood or community by such grant. In making such determination, the Commission shall approve a coastal variance only if *LA-RICS* demonstrates that:

- (a) because of special circumstances or exceptional characteristics applicable to the property, the strict application of the Code deprives such property of privileges enjoyed by other property in the vicinity and under identical zoning classification; and

(b) the adjustment authorized will not constitute a grant of special privilege inconsistent with the limitations upon other properties in the vicinity and zone in which the property is situated; and

(c) strict application of zoning regulations as they apply to such property will result in practical difficulties or unnecessary hardships inconsistent with the general purpose of such regulations and standards; and

(d) such adjustment will not be materially detrimental to the public health, safety or general welfare, or to the use, enjoyment or valuation of property of other persons located in the vicinity; and

(e) the granting of the variance will not be materially detrimental to coastal resources;

Here, none of the documents submitted by *LA-RICS* can possibly support the issuance of a coastal variance to build two cell towers within a protected zone of a mapped Significant Ridgeline. The County-wide LMR Project has absolutely no power, whatsoever, to supersede the Telecommunications Act of 1996, twenty-four (24) of precedents from the Ninth Circuit, and SMMLUP Policy LU-52 through LU-55 prohibiting the unnecessary proliferation of wireless facilities.” Although the County has an alleged need for improved emergency services, which remains completely unspecified and unsupported based on the documents introduced in the record, *LA-RICS* must still demonstrate that these two cell towers are the least intrusive means to remedy a significant gap in wireless services.

In sum, the Commission defined this project as a "major public safety resource," but has not cited a single, reliable document that stands for this proposition. The Commission relied exclusively on vague, conclusory, and unsubstantiated materials put forth by *LA-RICS*. When the Commission asked for supplemental materials, the *Permittee* consistently refused to address with sufficient specificity any issues raised during the proceeding. See, e.g., LADRP Comments and Corrections dated February 19, 2020, p. 2 (asking for a more detailed project narrative and

specific coverage questions, which *LA-RICS* intentionally circumvented during its application process).

Ms. Barris does not dispute the importance of emergency services within her community. The whole purpose of this appeal is to address *LA-RICS'* willful defiance of federal law by *deliberately, intentionally, and illegally* requesting to place two cell towers to create "redundant, overlapping coverage" in the area, which will cause the unnecessary proliferation of wireless facilities.

Furthermore, LA-RICS cannot plausibly demonstrate unnecessary hardship, which is a major component in a coastal variance. The Commission may only grant variances where an applicant meets the burden of demonstrating an unnecessary hardship. To establish unnecessary hardship, the *Permittee* must demonstrate, *inter alia*, "the natural condition or topography of the land places the landowner at a disadvantage vis-à-vis other landowners in the area, such as peculiarities of the size, shape or grade of the parcel." Committee to Save the Hollywoodland Specific Plan v. City of Los Angeles (2008), 161 Cal.App.4th at p. 1183, 74 Cal.Rptr.3d 665. The emphasis is on "disparities between properties, not treatment of the subject property's characteristics in the abstract." Topanga Assn. for a Scenic Community v. County of Los Angeles (1974) 11 Cal.3d at p. 520, 113 Cal.Rptr. 836, 522 P.2d 12.

Here, the lot contains no unique characteristics and, even so, the *Permittee* cannot prove that, without this variance, the property could not be developed or used for any other purposes. In addition, as demonstrated in the application, *LA-RICS* is not the owner of the property upon which it is seeking to construct the proposed wireless facility. Thus, it is unreasonable to determine that the *Permittee* will be deprived of any economic use or benefit from property it does not even own.

Even if the *Permittee* entered into a payment type agreement with the land owner and has no other use for the property, it has self-created the alleged hardship for the purpose of building two unnecessary towers that will only create redundancy in wireless services.

Lastly, the Commission indicated on the record the continuous threat of wildfire and how "fires have been historically proven to be one of the greatest threats to SMM coastal resources." See LADPR Findings and Order, September 16, 2020, p. 19, ¶ 45. But due to the speed at which such cell towers are being constructed in the United States, and a desire on the part of site developers to build them as cheaply as possible, quality control over the manufacture, construction, and maintenance of monopole cell towers is nearly non-existent.

Not surprisingly, structural failures of monopole cell towers and monopole fires occur far more often than the public is aware. Such failures and fires often result in a monopole cell tower collapsing to the ground, presenting a severe risk of property damage, injury or death.

The two most common causes of the failure and complete collapse of a monopole cell tower are baseplates failures (See Exhibits "B" and "C") and fires (See Exhibits "E" and "F"). Baseplate failures cause the entire tower to collapse⁴ and fires either cause the tower to "warp" or to collapse in a flaming heap.⁵

In addition to baseplate failures, monopole collapses are also caused by failures flanges, joints, and bolts.

⁴ To see dramatic images of a 165-foot tower having collapsed at a firehouse, crushing the Fire Chief's vehicle, go to www.firehouse.com/news/10530195/oswego-new-york-cellular-tower-crushes-chiefs-vehicle, or go to Google and search for "Oswego cell tower collapse."

⁵ To see videos of modern towers bursting into flames and/or burning to the ground, go to <http://www.youtube.com/watch?v=0cT5cXuyiYY&NR=1> or http://www.youtube.com/watch?v=y__NKVWrazg, or simply go to *Google*, and search for "cell tower burns."

The danger of such a collapse cannot be overstated. While deaths from cell tower collapse have been documented, most of the fatalities are workers who work on the towers, or emergency response personal who are injured or killed when responding to a cell tower collapse and/or fire.

Although it is not widely publicized, even brand new monopoles are known to fail in dramatic fashion, often going from being 165 feet “*tall*,” to 165 feet “*long*,” in a matter of seconds.

By way of example, annexed hereto as Exhibit “B” is a photograph of a new 165-foot cell tower which failed and collapsed, with the remains of the monopole landing more than half a football field from its base, crushing a Fire Chief’s vehicle in the process. Annexed hereto as Exhibit “C” is a mere sampling of images of collapses due to baseplate failure. Annexed hereto as Exhibit “D” is an article pertaining to an incident involving the death of several individuals resulting from the collapse of two cell towers. While the article indicates that two victims had been identified, a third victim who was killed in the collapse was a firefighter who had responded in an effort to provide emergency assistance to the workers.

Cell towers, such as the one being proposed by *LA-RICS*, are *by far* the most susceptible to fires and collapses due to fire. See Exhibits “E” and “F,” which respectively include a sampling of images and newspaper articles of monopoles that suffered catastrophic fires.

For at least the past decade, engineering firms have conducted thorough analyses of the causes of such failures and fires, and have proposed safer designs for monopole cell towers, but site developers generally do not avail themselves of the safer designs, simply because of cost. At https://www.towernx.com/downloads/Monopole_Structures_Current_Issues.pdf, one can view an engineering report which was completed by structural engineers. That report both clearly

documents instances both structural failures of, and fires on, monopole cell towers (with images), and provides recommended structural upgrades to prevent such failures and fires.

Consistent with other local governments, the SMMLCP was enacted for the explicitly stated purpose of regulating *the placement* of cell towers, and protecting and preserving the health and safety of the residents.

It is beyond argument that granting *LA-RICS'* application would violate the intent of SMMLCP because, as proposed by *LA-RICS*, its installation would actually expose them to the well-documented dangers presented above, including first and secondary emergency responders. As such, granting this coastal variance would be materially detrimental to the public health, safety and general welfare.

While the rest of the Country is actively enacting and enforcing ordinances to require strategic placements of cell towers to protect their citizens and the public from these catastrophes, it would behoove the Commission to deny a coastal variance, which would enable *LA-RICS* to build two towers in such close proximity to multiple residential properties (roughly 700 feet) in an area subject to fires and other natural catastrophes.

POINT IV

To Comply With the TCA, LA-RICS' Application Should Be Denied in a Written Decision Which Cites the Evidence Provided Herewith

The Telecommunications Act of 1996 requires that any decision denying an application to install a wireless facility: (a) be made in writing, and (b) be made based upon substantial evidence, which is discussed in the written decision. *See* 47 U.S.C.A. §332(c)(7)(B)(iii).

A. The Written Decision Requirement

To satisfy the requirement that the decision be in writing, a local government must issue a written denial which is separate from the written record of the proceeding, and the denial must contain a sufficient explanation of the reasons for the denial to allow a reviewing Court to evaluate the evidence in the record supporting those reasons. *See, e.g., MetroPCS v. City and County of San Francisco*, 400 F.3d 715 (2005).

B. The Substantial Evidence Requirement

To satisfy the requirement that the decision be based upon substantial evidence, the decision must be based upon such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. "Substantial evidence" means "less than a preponderance, but more than a scintilla."

Review under this standard is essentially deferential, such that Courts may neither engage in their own fact-finding nor supplant a local zoning board's reasonable determinations. *See, e.g., American Towers, Inc. v. Wilson County*, Slip Copy 59 Communications Reg. P & F 878 (U.S.D.C. M.D. Tennessee January 2, 2014)[3:10-CV 1596].

To ensure that the decision to revoke the Project Permits cannot be challenged under the Telecommunications Act of 1996, it is respectfully requested that you deny *LA-RICS'* application in a separate written decision, wherein you cite the evidence based upon which you made said determination.

Conclusion

In view of the foregoing, it is respectfully submitted that you reverse the Commission's September 16, 2020 Findings and Order, and deny *LA-RICS'* application for approval to build its proposed cell towers at the Saddle Peak Road location. In the alternative, I ask that you refer the matter back to the Commission for further proceedings.

Respectfully Submitted,

Elizabeth Barris