

Julian Gresser — Counsel to 5G Free California — Comments at Topanga City Council Town Meeting — Evening March 9, 2022

- Thank you for the opportunity to offer these brief Comments on the proposed Ordinance, amending Title 22 of Los Angeles Planning and Zoning Code.
- First, I concur with President Carriel Carrier that the scheduling of the proposed public hearing on March 23 of the Planning Commission, whose recommendations the Board of Supervisors (BOS) will give heavy weight, is way too hasty. In fact, impulsive action and a failure to set a proper legal, scientific, and environmental foundation for consideration of Title 22 are the hallmark of this ill-conceived Ordinance.
- In a nutshell, the Ordinance will effectively codify the present illegal practice of bypassing over 30 years of a well-established and balanced Conditional Use Permit Registration system with an accelerated Ministerial Site Review of small cell and macro cell antennas installed on private property. This *de facto* practice is currently being challenged in the Los Angeles Superior Court in the case of [*Angela Sherick-Bright v. County of Los Angeles*](#). The ostensible justification for this precipitous rush to Ordinance is the FCC’s shot clock deadlines that aim to accelerate densification of small cell and macro towers antennas emitting Radio Frequency/Electromagnetic Field (RF/EMF) radiation in high and dangerous concentrations within residential communities. The clear intention of the proposed Ministerial Site Review Application process, which will effectively replace Conditional Use Permits on new facilities, is to eliminate due process protections for the Los Angeles County community — namely, timely prior notification and an opportunity to be heard in public hearings, which are guaranteed by the First and Fifth Amendments of the U.S. Constitution and Article I, Section 7 of the California Constitution.
- Let us all agree that many local authorities recognize that protecting the public’s constitutional rights to due process, and the health and wellbeing of communities are an important responsibility and priority. However, many local city councils and Boards of Supervisors are laboring under the false impression that “their hands are tied,” because they are being told and believe that the Telecommunications Act of 1996 preempts them from taking local protective action. This appears to be an unstated premise behind

the proposed [amendment to Title 22](#). However, there are many important exceptions and qualifications to this overbroad blanket premise. You are being misled if you are told otherwise.

- I will summarize by the following questions the blatant legal deficiencies in the proposed Ordinance which also point to effective remedies. Most if not all the defects can be cured, if sufficient time is made available to consider them, soberly:
- **Question # 1:** By what legal authority and on what constitutional grounds can the BOS bypass and strip away due process protections of prior notification and public hearings?
 - **Response:** Nowhere in the Telecommunications Act of 1996 is there authority to bypass and to violate the U.S. Constitution or the California Constitution guarantees of due process. To apply the doctrine of preemption as the Board of Supervisors is considering would be to establish the FCC as a supra-constitutional agency. It is not. The shot clock is an excuse. The Los Angeles Planning Authority simply doesn't want to bother to take the time to ensure an opportunity for the public to participate in a meaningful way. The fundamental First Amendment right of the public to be heard was reaffirmed in footnote #6 of the recently decided case of *Children's Health Defense v. FCC*.¹
- **Question # 2:** Where does it say in the 1996 Telecommunications Act that local communities can allow telecom purveyors to convert easements to property rights without just compensation to private property owners?
 - **Response:** The Telecommunications Act of 1996 contains no such provision. As vigorously argued in *Angela Sherick-Bright v. County of Los Angeles*, the practice is an unconstitutional taking, an inverse condemnation, in violation of the Fifth and Fourteenth Amendments.

¹ The Commission maintains that because local regulation of where these antennas are installed is preempted, there is no point in providing the local authorities or their citizens with notice of pending installations. But it does not follow that because citizens do not have a vote or a veto over the placement of an antenna on a neighbor's property, they are not entitled to know of the prospect. The First Amendment to the Constitution preserves the right of the people to petition the government for redress of grievances. See *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 577 (2011) ("The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." (citation omitted)); *Am. Bus Ass'n v. Rogoff*, 649 F.3d 734, 738 (D.C. Cir. 2011) ("The right 'extends to [petitioning] all departments of the Government,' including administrative agencies and courts." (alteration in original) (quoting *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972)); *Liberty Lobby, Inc. v. Pearson*, 390 F.2d 489, 491 (D.C. Cir. 1967) (Burger, J.) ("[E]very person or group engaged . . . in trying to persuade Congressional action is exercising the First Amendment right of petition."); 2 Joseph Story, *Commentaries on the Constitution* § 1894, at 619 (Thomas M. Cooley ed., 4th ed. 1873) (1833) (emphasizing the centrality of petitioning for redress of grievances in republican government).

- **Question # 3:** Has there been any determination, affirmative or negative, relating to the necessity of assessing the environmental impacts of this project through an EIS interagency consultative process under the California Environmental Quality Act (CEQA)? Has the BOS complied with its obligations under the federal National Environmental Policy Act (NEPA), including coordinating with other concerned federal agencies, recognizing that there is substantial federal involvement in Los Angeles County? (so-called NEPA “federal handle.”)
 - **Response:** We can find no evidence of any official finding or determination pursuant to a formal due process compliant process to reach a decision on this question. Certainly, the BOS and the Planning Department have not prepared a Comprehensive Programmatic Environmental Impact Statement (EIS) as these statutes require for a series of actions that will transform Los Angeles County, as the proposed Ordinance will allow. There has been no formal finding of consistency with the environmental and health protections in the Regional, Coastal, Santa Monica Mountains, and other existing plans.
 - **Fire Hazards:** Given its record of fire catastrophes, Los Angeles County is justifiably concerned with fire prevention and management. This area is well within the County’s authority, jurisdiction, and control. For example, what special protections does the Ordinance provide for fires resulting from combustion of terpenes in conifers? Scientific studies² document that continuous RF/EMF radiation exposure is closely tied with increased terpene production in conifers. Terpenes are a combustible organic compound. The Ordinance utterly ignores this risk which would need to be addressed in any CEQA/NEPA compliant EIS. There is no question that Los Angeles County has an absolute right to take reasonable protections for fire protection and management, which are certainly not preempted by the 1996 Telecommunications Act, and addressed in the present Los Angeles Fire Ordinance. Again, from the perspective of the First and Fifth Amendments noted above, is the Board of Supervisors seriously proposing to deny the public its right of timely notification and hearing before approving a program that will impose pervasive and intensifying fire risks?
- The contention that small cell and macro tower densification is essential for emergency response is bogus. As is well documented by the [Resolution of](#)

² E.g. see [“Influence of microwave frequency electromagnetic radiation on terpene emission and content in aromatic plants”](#)

[the International Association of Fire Fighters](#), there are far safer well-established alternatives to addressing major fire hazards than by amplifying them.

- **Question # 4:** What special dangers does the proposed amendments to Title 22 pose to public schools in Los Angeles County? How will the BOS reconcile and balance its statutory obligation to deliver safe learning environments for children and teachers in Los Angeles County? What special risks will RF/EMF radiation released from densifying small cell and macro towers around schools present to children, teachers, and staff?
 - **Response:** The scientific record is clear that children are especially vulnerable. The accelerated deployment of macro towers on school properties is today causing direct conflicts with school administrator's fiduciary responsibilities to deliver healthy and safe learning environments for children. (See: www.techsafeschools.org; [Environmental Health Trust - Children](#); [Tech Safe Schools Legal Advisory](#))
- **Question # 5:** What special dangers do the proposed amendments pose for airports in Los Angeles County? How can the BOS reconcile the serious conflicts with current FAA regulations?
 - **Response:** See: Complaint in *Angela Sherick-Bright v. County of Los Angeles*.
- **Question # 6:** The proposed amendment stipulates that it must comply with existing federal laws, which include: the Historic Preservation Act, the Endangered Species Act, the Americans with Disabilities Act, the Fair Housing Amendments Act, to name a few. None of these federal statutes are preempted by the 1996 Telecommunications Act. They are entitled to co-equal dignity and consideration. The BOS cannot override these federal statutes by some ministerial gimmick, simply because it doesn't want to take the time to devise a reasonable and balanced solution.
 - **Response:** The nationally protected, historic area of View Park is the focus in *Angela Sherick-Bright v. County of Los Angeles*. How many other protected areas exist in Los Angeles County? How many already disabled persons will be further impaired, and their fragile conditions jeopardized? What endangered species will be threatened? What will be the impact on economically challenged and minority communities within Los Angeles County? Federal laws prohibit the ministerial mayhem contemplated by this illegal Ordinance. These concerns cannot be

brushed aside by a provision buried in the Ordinance conceding, abstractly, that all federal, state, and local laws will be observed.

- **Question # 7:** What provision has been made for insurance for RF/EMF related harms? What consideration has been given to a bonding requirement, recognizing the hazards of RF/EMF radiation? What process is contemplated to coordinate with the Board of Health to report, investigate, and arrange for compensation of the thousands of victims of RF/EMF radiation exposure over the coming years? What provision is being made to deploy best available community wide radiation monitoring devices and methodologies, recognized by the National Spectrum Management Association, so that the Los Angeles County Health Department will even know the levels of RF/EMF radiation to which County communities are being exposed?
 - **Response:** None. No monitoring, no investigation, no compensation, no interest. It is called the “Public Pays Principle,” which the wireless providers are advocating must replace the well-established 1972 international OECD “Polluter Pays Principle.” For a note on the power of “mixed systems” of compensation and prevention, see www.bbilan.org)
- **Question # 8:** What potential liabilities will the BOS and Los Angeles County incur if Title 22 is passed without adequate consideration of the risks?
 - **Response:** The harms of proliferating and densifying small cell and macro towers in Los Angeles County are clear, foreseeable, measurable, and preventable. They are also uninsurable, because no reputable insurance company anywhere in the world will cover the risks of RF/EMF radiation harms. They are simply too great.
 - Under these conditions, at the very least the BOS has a fiduciary obligation to the community to address these risks, by inserting provisions in the Ordinance that require adequate insurance and indemnification and the posting of a substantial bond, which is a customary condition of other ultrahazardous activities.
- **Question # 9:** Why does the BOS not take the time to study carefully existing best ordinance practices, such as being implemented in Scarsdale, Malibu, Encinitas, and other local communities?
 - **Response:** Far preferable balanced alternatives consistent with the 1996 Telecommunications Act exist. The Planning Department and the BOS should study these templates and consider adopting them.

- The Planning Department and BOS are advised to take a bold and innovative additional step: that is seriously to consider providing incentives for a far superior broadband option: optical fiber to the premises (OFTP). Optical fiber broadband will accomplish the infrastructural goals of the proposed Ordinance, including bridging the Digital Divide, while optimizing the beneficial uses of wireless and minimizing its hazards. OFTP is faster, safer, private³, more cybersecure, lower latency, energy efficient, and climate change friendly. OFTP must be a serious option for consideration in the BOS' forthcoming NEPA/CEQA EIS. (See: Timothy Schoechle, [*Reinventing Wires: The Future of Landlines and Networks*](#))

Conclusion: Let us recognize that the present law and regulations pertaining to RF/EMF are in a state of flux. The FCC is claiming before the DC Circuit that the FDA, the principal health agency in the country, has adopted an Administrative Procedure Act (APA) compliant policy and regulations regarding RF/EMF safety and performance standards. But our legal team can find no evidence for these claims. Meanwhile, local communities like Los Angeles County are relying on these false claims and are placing their helpless populations under an Imminent Hazard. (See: [The Landmark FDA Case.](#))

The last thing one should do in chaos is to plunge more deeply. The precipitate haste by which Title 22 is being promoted provides a telltale clue to its overall character. President Carrier is wise in asking the BOS to pause and postpone; to think things through clearly and responsibly, especially given the long-term consequences; where necessary to consult with independent, uncompromised experts; to engage the public; and to prevent and correct an imminent folly. Los Angeles County and its Board of Supervisors will never regret taking the time at this critical juncture to discover the path of reasonable balance.

Thank you,

Julian Gresser, Counsel 5G Free California

³ Accelerating densification of small cell and macro towers raises serious unexamined questions regarding the encroachment on privacy protected under the CA Consumer Privacy Act. Many of these problems may be avoided under an OFTP framework. See webinar: [Citizen Rights and Remedies Under the Shadow of 5G Surveillance and Behavioral Modification.](#)