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Superior Court of California
County of San Bernardino
Civil Division, Department S-32
303 West Third Street
San Bernardino, California 92415

FILED-Central District
SUPERIOR COURT
SAN BERNARDINO COUNTY

OCT - 1 2013 *pe*

By *Stephanie Chandler*
Deputy

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN BERNARDINO
SAN BERNARDINO DISTRICT

CITIZENS FOR THE PRESERVATION
OF RURAL LIVING,

Case No.: CIVDS 1213273

Plaintiffs,

RULING ON PETITION FOR WRIT OF
MANDATE

vs.

COUNTY OF SAN BERNARDINO

Defendants.

This matter came before the court for a hearing on Petitioner's Writ Petition. The court has reviewed and considered the briefs of the parties as well as the Oral Argument of counsel and issues its ruling as follows:

Factual and/or Procedural Context

Petitioner Citizens for the Preservation of Rural Living ("CPRL") filed a petition for writ of mandate under CCP §§ 1085 and 1094.5 and Public Resources Code §§ 21168 and 21168.5. (Petition ¶ 10.) CPRL brings this action to challenge the adoption of a Mitigated Negative Declaration ("MND"), approval of a Conditional Use Permit ("CUP"), and approval of major variance to the Fire Safety Overlay. The Project at issue involves

1 the construction of an unmanned 43-foot radio transmission tower (consisting of a 43-
2 foot monopole with four copper antennas attached), an equipment facility, and a parking
3 space. The Project Applicant is Lazer Broadcasting, Inc. ("Lazer").

4 As described in the Proposed Mitigated Negative Declaration and Initial Study,
5 the Project is located "in the steep foothills of the San Bernardino Mountains between
6 the City of Yucaipa and the community of Oak Glen." The site is located west of Pisgah
7 Peak Road, a private, unpaved road, approximately 1.5 miles north of its intersection
8 with Wildwood Canyon within the unincorporated portion of San Bernardino County and
9 the Oak Glen Planning area. The site is approximately 1.5 miles south of the San
10 Bernardino National Forest and west of Wildwood Canyon State Park. (AR 1:11:35.)

11 It is on a west facing slope below the ridgeline, which currently is vacant land.
12 However, a "mock-up" telephone pole was installed on the site to identify the location of
13 the proposed monopole and to represent its height. The entire parcel consists of steep
14 slopes greater than 30 percent and is dominated by dense mixed chaparral. (AR
15 1:11:35.)

16 As set forth in the Initial Study, the Project consists of the construction of an
17 unmanned, 43-foot tall monopole for radio broadcast. The pole is proposed on a
18 western facing slope approximately 227 feet below the ridgeline. Four copper antennas
19 will be attached to the side of the monopole in a due south or due west direction,
20 beginning approximately midway up the pole to within one foot below the top. The
21 antenna would extend approximately 4.5 feet out from the side of the pole and would
22 have an overall length of 21 feet. (AR 1:11:37.) As described in the Initial Study, the
23 Project also includes a 100-square foot equipment shelter, a parking space, and a six-
24 foot tall spiked wrought iron security fence around the equipment shelter. (AR 1:11:32,
25 37.) Because the Project site is located in Fire Safety Overlay District 1 (a high fire
26 hazard area), the Project also included a variance to reduce the fuel modification area
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1 from 100 feet to 30 feet around the equipment shelter.¹ As proposed, there would be a
2 30-foot brush thinning/clearance area around the equipment shelter, consisting of 10
3 feet of clearance and 30 feet of thinning. (AR 1:11:32; 3:55:1565.)

4 The radio broadcast tower originally was proposed in 2007 as a 140-foot radio
5 transmission tower located near the upper portions of the project site and a 250 square-
6 foot equipment shelter. That project also included a backup generator and a 500 gallon
7 fuel tank. The tower was reduced to 80 feet in height and located lower on the hill so as
8 not to be visible above the ridgeline. Underground electrical lines also were proposed.
9 Ultimately prior to a March 2009 hearing, after the Board of Supervisors declared an
10 intent to deny the project with prejudice following an appeal by CPRL of the Planning
11 Commission's conditional approval of the prior version of the project, Lazar sought to
12 withdraw the 2007 project application. (AR 1:23:534; 1:26:794-795.) The request was
13 denied and the Board granted the appeal and denied, with prejudice, the 2007
14 application. Therefore, the project could not be resubmitted for 12 months. (AR
15 1:23:534-535.)

16 The March 2009 findings from the Board's hearing for the original project stated
17 the Board found the proposed project was inadequate in terms of open space because
18 the project site was completely visible from portions of the Wildwood Canyon State
19 Park. In addition, construction of the radio tower project was found to be "contradictory
20 and detrimental to a primary goal of the State Park, which is to provide a pristine
21 wilderness experience to park visitors." Low-lying vegetation on the project site did not
22 provide "natural screening of the project to mitigate visual impacts for the users of the
23 Wildwood Canyon State Park." The 2007 project also was found not to comply with the
24 access requirements of the Fire Safety Overlay, because the only access to the site
25 was from Pisgah Peak Road, a narrow, unpaved road with grades greater than 14

26 _____
27 ¹ San Bernardino County Code of Ordinances § 82.13.030(a) defines "Fire Safety Area 1 (FS1)"
28 as including "areas within the mountains and valley foothills. It includes all the land generally within the
San Bernardino National Forest boundary and is characterized by areas with moderate and steep terrain
and moderate to heavy fuel loading contributing to high fire hazard conditions."

1 percent. The 2007 project also was found to be inconsistent with the goals, maps,
2 policies, and standards of the General Plan and Oak Glen Community Plan. (AR
3 1:27:798; 2:36:1341.)

4 In May 2010, Lazer filed a new application seeking a CUP to construct a free-
5 standing 43 foot lattice tower, a 100-foot square foot equipment shelter, and a parking
6 space. It also sought a major variance to reduce the required 100-foot perimeter fuel
7 modification area for fire protection to 30 feet. Lazer prosed 10 feet of clearing and 20
8 feet of thinning around the equipment shelter. (AR 1:23:533-535.)

9 For purposes of comparison, the current project was found 80 feet shorter and
10 the equipment shelter 150 square feet smaller. Unlike the prior application, a backup
11 generator and 500 gallon fuel tank were not part of the request. (AR 1:23:534-536.)
12 Around August 2010, Lazer installed a mock-up power pole to demonstrate the location
13 and visibility of the proposed tower. Lazer proposed to use this pole or a pole of the
14 same height and diameter to mount the necessary antennas to broadcast its signal.
15 (AR 1:20:220.) A temporary use permit for the mock-up pole later was obtained. (AR
16 3:89:1941-1946.) In addition, the equipment shelter was repositioned lower on the
17 slope in an effort to decrease visibility. (AR 1:20:220.)

18 On March 17, 2011, a Planning Commission staff report recommended denial of
19 the Project. The report noted that while the height of the tower was expected to have a
20 smaller visual impact than the proposed tower, the 43-foot tower as proposed would be
21 placed on a higher position on the Project site so that the top of the proposed tower
22 would be at the same elevation as the previously proposed tower. Impacted views from
23 the State Park and other properties were found to be similar. No new mitigation
24 measures presented to reduce the impacts on the environment with respect to
25 aesthetics. A fire safety issue also was noted. The report concluded denial of the CUP
26 rendered the requested variance moot.² (AR 1:23:536.)

27 _____
28 ² A staff report for a latter hearing stated such recommendation was "based on the findings of the
Board of Supervisors when the Original Project was considered and denied." (AR 1:20:224.)

1 It appears that around August 2010, the proposed project at issue went from
2 being a 43-foot lattice tower to being a monopole. (AR 1:20:220.) However, the March
3 2011 Planning Commission Staff Report, which recommended denial of the CUP and
4 major variance, described the project as a lattice tower. (AR 1:23:535.) An Interoffice
5 Memo from the Senior Planner to the Planning Commission noted that on March 24,
6 2011, the Planning Commission heard the presentation of a CUP. The Project hearing
7 was continued by the Planning Commission to May 5, 2011 at the request to the
8 applicant, so that revisions to the proposed Project could be provided. The proposed
9 Project was modified to replace the 43-foot lattice tower with a 43-foot wooden
10 monopole. (AR 1:21:530.)

11 At a May 5, 2011 hearing, the Planning Commission adopted an intent to
12 approve the Project (a monopole antenna), with directions to staff to complete the
13 required environmental analysis and to prepare findings for approval. (AR 1:20:220.)
14 The Planning Division contracted with Lilburn Corporation to prepare a visual impact
15 assessment. (AR 1:18:189.) A visual assessment dated October 2011, using the U.S.
16 Bureau of Land Management's ("BLM") visual resource management system as a basis
17 for the visual analysis was prepared. (AR 1:18:189; 3:69:1714-1749.)

18 In October 2011, a proposed mitigated negative declaration was issued. Issues
19 in which these impacts were found to be "less than significant impacts with mitigation
20 incorporated" included aesthetics, biological resources, geology and soils. All other
21 potential impacts studied were found to have no impact or to be less than significant.
22 (AR 1:11:31-83.)

23 Comments were received and further assessments were made. A Planning
24 Commission Staff Report for a Commission hearing on September 20, 2012,
25 recommended adoption of the MND and approval of the CUP and major variance. (AR
26 1:20:224.) Part of the attachments to the report included a "September 2012
27 Attachment to the Initial Study/MMD." (AR 1:20:224.) This Attachment noted that after
28

1 the circulation of the Initial Study/Mitigated Negative Declaration, the proposed project
2 was revised in response to comments. (1:20:299.)

3 The revisions included a change in the location of the equipment shelter and
4 proposed parking space, additional fencing around the monopole and clarification on
5 the amount of grading proposed. The fencing around the monopole was described as a
6 five-foot high wrought iron fence or a five-foot high, three-strand wire fence around the
7 monopole. (AR 3:55:1564.) These revisions were considered minor revisions to the
8 project as proposed and not to constitute a substantial revision as set forth in CEQA
9 Guidelines, § 15073.5.³ (AR 1:20:299-302; *see also* AR 1:6:9-13.) It also noted that
10 following the modifications, new site plans were provided to Lilburn Corporation for
11 further analysis to determine if the changes would result in additional impacts that could
12 be significant. On September 12, 2012, Lilburn issues a Scenic Report. In preparing
13 the report, Lilburn used a visual impact analysis of the U.S. Forest Service. The final
14 conclusion was that the Project would not have a significant impact on scenic
15 resources. (AR 1:20:302, 251-295; *see also* AR 1:6:12; 3:55:1561-1608.)

16 The Planning Commission conditionally approved the Project. (AR 1:18:189.)
17 CPRL appealed. At a hearing on November 27, 2012, the appeal of the CUP was
18 denied and the mitigated negative declaration was adopted. (AR 2:32:12821; 1:18:186;
19 1:19:197-202.)

20 On December 21, 2012, CPRL filed its petition for writ of mandate. It alleges the
21 following causes of action: (1) violation of CEQA related to the MND and initial study; (2)
22 the findings with respect to issuance of the CUP are not supported by substantial
23 evidence; and (3) the County violated the County Development Code with respect to fire
24 issues.

25 Through briefing, CPRL argues that substantial evidence in the record supports a
26 fair argument that the Project may have significant impacts on visual and recreation

27 _____
28 ³ State CEQA Guidelines, codified at title 14 of the Cal. Code of Regulations (hereinafter
"Guidelines, §).

1 impacts, land use, and fire safety.⁴ It also contends that the MND is inadequate in its
2 analysis of visual, land use, and fire safety impacts. CPRL asserts that the CUP
3 findings are not supported by substantial evidence. Finally, it argues the Project
4 violates the County Development Code.

5 In opposition briefing, real party in interest Lazer, joined by the County, argues
6 that a fair argument does not support the conclusion that the Project may have a
7 significant impact on the environment. They also contend that CPRL fails to identify
8 deficiencies in the County's analysis of potential visual impacts and that it
9 comprehensively analyzed land use and fire safety impacts.

10 In reply, CPRL argues that it has established a fair argument that the Project may
11 have a significant impact on the environment. In addition, the County's analysis of
12 potential visual impacts is deficient.

13 **Initial Study and MND Fair Argument Issues**

14 **Standard of Review**

15 "[I]f there is no substantial evidence of any net significant environmental effect in
16 light of revisions in the project that would mitigate any potentially significant effects, [an]
17 agency may adopt a mitigated negative declaration. [Citation.]" (*Citizens for*
18 *Responsible & Open Government v. City of Grand Terrace* (2008) 160 Cal. App. 4th
19 1323, 1332.) An MND is one in which "(1) the proposed conditions "avoid the effects or
20 mitigate the effects to a point where *clearly* no significant effect on the environment
21 would occur, and (2) there is *no substantial evidence* in light of the whole record before
22 the public agency that the project, as revised, may have a significant effect on the
23 environment." (§ 21064.5, italics added.) [Citations.]" (*Id.*)

24 _____
25 ⁴ Please Note: On July 3, 2013, CPRL filed an "Errata to Petitioner's Opening Brief," with the
26 declaration of Josh Chatten-Brown. In the declaration, attorney Chatten-Brown stated that at the time the
27 opening brief was filed, he used an index that County's counsel had sent to him regarding administrative
28 record page numbers. He stated that one week before Petitioner filed his opening brief, the County's
counsel sent him a revised Index. This altered the page numbers of the documents in the Administrative
Record. However, Attorney Chatten-Brown did not realize this error. It was not until the opposition brief,
when issues were raised about cited testimony not being on the pages cited in the Opening Brief, did he
discover the issue. With the Errata and declaration, Petitioner filed a Revised Opening Brief with the
citations corrected. The Court worked off the Revised Opening Brief.

1 Under CEQA and its Guidelines, if a project is not exempt and *may* cause a
2 significant effect on the environment,⁵ the lead agency must prepare an environmental
3 impact report ("EIR"). (Pub. Res. C. §§ 21100, 21151; Guidelines, § 15064(a)(1), (f)(1).)
4 Under the fair argument standard for judicial review of an agency's decision to adopt an
5 MND instead of an EIR, a court must require an EIR whenever substantial evidence⁶ in
6 the record supports a fair argument that a project may have a significant effect on the
7 environment. (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal. 3d 68, 75, 82.)

8 The fair argument standard sets a "low threshold" for preparation of an EIR. (*City*
9 *of Grand Terrace, supra*, 160 Cal. App. 4th at p. 1332; *Pocket Protectors v. City of*
10 *Sacramento* (2004) 124 Cal. App. 4th 903, 928.) There is no weighing competing
11 evidence in the record; an EIR will be required even if there is other substantial
12 evidence indicating no significant effect. (*Friends of "B" Street v. City of Hayward*
13 (1980) 106 Cal. App. 3d 988, 1001-1002.)

14 Finally, "[w]hile a fair argument of environmental impact must be based on
15 substantial evidence, mechanical application of this rule would defeat the purpose of
16 CEQA where the local agency has failed to undertake an adequate initial study. The
17 agency should not be allowed to hide behind its own failure to gather relevant data."
18 (*Sundstrom v. County of Mendocino* (1988) 202 Cal. App. 3d 296, 311.) "CEQA places
19 the burden of environmental investigation on government rather than the public. If the
20 local agency has failed to study an area of possible environmental impact, a fair
21 argument may be based on the limited facts in the record. Deficiencies in the record
22 may actually enlarge the scope of fair argument by lending a logical plausibility to a
23 wider range of inferences." (*Id.*)

24
25 ⁵ "Significant effect on the environment" is defined as "a substantial or potentially substantial
adverse change in the environment." (Pub. Res. C § 21068; Guidelines, § 15382.)

26 ⁶ "[S]ubstantial evidence includes fact, a reasonable assumption predicated upon fact, or expert
27 opinion supported by fact" and "not argument, speculation, unsubstantiated opinion or narrative, evidence
28 that is clearly inaccurate or erroneous, or evidence of social or economic impacts that do not contribute
to, or are not caused by, physical impacts on the environment." (Pub. Res. C § 21080(e); Guidelines, §
15384.)

1 **Visual and Recreational Impacts**

2 At issue is undeveloped mountain area adjacent to the Wildwood Canyon State
3 Park and San Bernardino National Forest. (AR 1:11:35.) With respect to Aesthetics,
4 the Initial Study found that the Project would have a less than significant effect with
5 mitigation incorporated on issues of whether the Project would have a substantial
6 adverse effect on a scenic vista or would substantially degrade the existing visual
7 character or quality of the site and its surroundings. (AR 1:11:40.) The Initial Study
8 found that the Project would be visible to some properties west of the project site,
9 including the eastern portions of Wildwood Canyon State Park, and partially obstructed
10 views from the southwest.

11 As discussed in the Initial Study, a visual assessment was prepared to evaluate
12 the Project. A “contrast rating” was performed from “the most critical viewpoints.” The
13 contrast rating process “include[s] four key elements including form, line, color, and
14 texture.” It also considered items such as relative size or scale and distance and basic
15 features, such as landform, vegetation, and structures. A rating system of four levels of
16 contrast was defined. Based on the “contrast rating” at five identified “key observation
17 points (‘KOPs’),” all within the Wildwood Canyon State Park, the visual assessment
18 determined the Project was not a significant visual impact. Nonetheless, the Initial
19 Study stated that to reduce the contrast of the Project-related form, line and color
20 mitigations measures would be implemented. (AR 1:11:40-44.)

21 It also was found that the proposed Project would not create a new source of
22 substantial light or glare that would adversely affect day or nighttime views in the area.
23 The assessment noted that the equipment shelter may have an exterior light for safety
24 purposes when the site is visited for maintenance after dark. (AR 1:11:40-43.)

25 The mitigation measures proposed included painting the monopole, antenna, and
26 equipment shelter olive green to blend with the surrounding vegetation, with a second
27 layer of paint to be “worked in a random patter in colors of deep olive, light sage, and
28 light brown to further mimic a generative pattern or camouflage effect.” As stated, “The

1 random pattern shall be applied in a stippling or sponging in manner to avoid sharp
2 lines.” Lazer also was required to vegetate the portion of the ridge in which the mock-
3 up pole currently occupies. During placement of the telephone pole, vegetation was
4 removed. The “scraped area, which appears in the form of a line down the slope, and
5 any other areas that may be disturbed during site development shall be revegetated at
6 the direction of a County-approved biologist before issuance of occupancy permits.”
7 Finally, Lazer was to submit a landscape plan for drought tolerant, fire resistive plants in
8 the ten foot, cleared, fuel modification area, which plan shall be approved by the
9 Planning Division and County Fire Department. (AR 1:11:44.)

10 CPRL argues that the Board rejected the prior project in 2009, because it was
11 “completely visible from portions of the Wildwood Canyon State Park,” and would be
12 “contradictory and detrimental to the primary goal of the State Park, which is to provide
13 a pristine wilderness experience to park visitors.” It contends that following Lazer’s
14 changes, described as “minor modifications,” in May 2011 County staff recommended
15 denial of the project, due to the Project’s visual impacts, citing AR 1:20:302 and AR
16 1:23:536. It argues that despite minor modifications to the Project, it would remain
17 completely visible from large portions of the State Park. It states that introduction of
18 these man-made industrial structures would be contradictory with the visual, open
19 space and wilderness values of the State Park. In addition, the MND fails to fully
20 mitigate the Project’s visual impacts.

21 The opposition asserts that it was not until the May 5, 2011 Planning
22 Commission hearing that the County Board of Supervisors directed staff to complete the
23 required environmental analysis to prepare findings for approval, citing AR 1:18:189.
24 The Initial Study and Proposed MND was released for public comment on October 28,
25 2011, citing AR 1:10:30. The Initial Study discusses a visual assessment report
26 prepared by Lilburn Corporation in October 2011, which included an evaluation of the
27 Project’s potential impacts on scenic resources and vistas, including the Wildwood
28 Canyon State Park. In addition, in September 2012, another visual study was

1 conducted, which fully evaluated the Project's potential impacts on scenic resources
2 from Wildwood Canyon State Park, citing AR 3:55:1561; 3:69:1714-1748. It was only
3 after these document were prepared and the Project "extensively revised" did the
4 Planning Commission and Board vote to approve it. It argues that contrary to CPRL's
5 assertions, proximity to the State Park and other scenic resources were considered in
6 determining the visual impacts of the Project. Approval was conditioned on the
7 monopole, antenna and equipment shelter being painted with a "camouflage" effect,
8 citing AR 1:7:24.

9 In reply Petitioner argues that Lazer's references to the "camouflage" painting
10 ignores that there is no camouflaging requirement for the fences surrounding the tower
11 and equipment building, citing AR 1:7:24. Therefore, it contends, such would remain
12 highly visible.

13 CPRL also argues that a fair argument exists that the Project may have
14 significant visual and recreation impacts when CPRL's photo simulation and residents'
15 testimony is considered. It contends that at the May 5, 2011 Planning Commission
16 hearing, it presented a photo simulation of the Project, including the proposed fence
17 around the tower and antenna facilities. (AR 1:20:438.) It contends that such photo
18 was prepared by a licensed architect and was based on a detailed project description as
19 of April 27, 2010.⁷ It argues that using an actual photograph taken from a hiking trail
20 near the eastern border of Wildwood Canyon State Park, the licensed architect
21 developed what he represented to be an accurate, to-scale rendering of the project,
22 citing AR 1:20:438. Petitioner contends that this photo simulation supports a fair
23 argument regarding the Project's significant visual impact. (AR 5:197:3369.)

24 The opposition argues that CPRL's photo simulation depicts a "glaring white
25 equipment shed raised on stilts above the ridgeline, a monopole with a highly reflective
26

27 ⁷ This project description included: (1) an equipment building surrounded by a six-foot tall security
28 fence, with 10 feet of complete vegetative clearing around the building, and 20 feet of vegetative thinning
beyond that; (2) the 43-foot monopole, with vegetative clearing as described above, plus a 6 foot tall
security fence around the monopole, and (3) a six-foot wide path cleared of all vegetation approximately
680 feet long, running for the equipment building down to the monopole. (AR 1:20:438-439.)

1 metal antenna affixed to its side, a swath of graded landscape leading from the shed to
2 the monopole, and a metallic metal fence.” It contends that the simulation appears to
3 be rendered from a vantage point looking down toward the monopole and yet the
4 fencing is depicted as though the viewer is standing in front of it. It argues that this
5 simulation also ignores that the Project was conditioned to require revegetation of “the
6 portion of the ridge in which the telephone pole currently occupies,” citing AR 1:7:27. In
7 addition, as conditioned by the County, the “monopole, antenna, and shed are to be
8 painted olive green to blend with surrounding vegetation, with a vegetative or
9 camouflage effect,” citing AR 1:7:24. Lazer also complains that the equipment shelter
10 is depicted as floating above the horizon on stilts. However, as proposed, the shelter
11 would be cut into the existing slope and recessed into the hillside. It also would be
12 engineered to retain earth between four to seven feet, citing AR 3:55:1564.

13 Petitioner’s reply asserts that the April 27, 2010 site plan used for the photo
14 simulations demonstrates that this is how Lazar proposed the project, citing AR
15 3:123:2316.⁸ It contends that this simulation was accurate as of the May 5, 2011
16 hearing. It also argues that this photo simulation shows the visibility of the Project from
17 a nearby hiking trail within Wildwood Canyon State Park. It asserts, without any citation
18 to the administrative record, that this photo when compared to those conducted for
19 Lazer demonstrates the severe visual impacts and the failure of Lazer’s visual studies to
20 adequately depict the Project’s visual impacts from hiking trails.

21 With respect to Lazer’s argument that the simulation does not incorporate
22 modifications to the Project required as a condition of approval, CPRL complains that
23 the Project has repeatedly been modified in small ways over the last six years that there
24 is no fixed project description. It contends that creating such a simulation is like hitting a
25 moving target. It asserts that Lazer fails to acknowledge that its visual analysis does
26 not include such conditions in its photo simulation, citing AR 3:55:1561-1608.

27 ⁸ Please Note: When this AR 3:123:2316 is reviewed, it is an illegible copy of the site plans and
28 notes dated April 27, 2010.

1 When reviewed, the Court did not find that CPRL's photo simulation to constitute
2 substantial evidence to support a fair argument that the Project may have a significant
3 effect on visual impacts. On March 12, 2011, Lazer presented a "'Revised' Project
4 Description." This revised description stated the pole either will be a neutral color that
5 blends with the surrounding topography or a non-metallic, weathered gray color. That
6 does not mean that the pole will not be seen. However, CPRL's picture represents the
7 pole as being brown. In addition, the Court agrees with Lazer that the equipment
8 shelter on stilts is not demonstrated to be accurate, so too is the issue regarding color,
9 which it depicted as white. (AR 3:82:1860-1865; AR 1:20:438-439.)

10 CPRL also contends that community members provided testimony of the pristine
11 scenic views from within the State Park and the visual impacts of the mock pole, citing
12 AR 5:204:3590; 5:200:3392; 1:11:42; 5:204:3594, 5:204:3467. CPRL contends that
13 such is substantial evidence supporting a fair argument that there may be significant
14 visual impacts.

15 As for the lay testimony, the opposition contends that only five references to the
16 administrative record are made and only one citation correctly identifies the quoted
17 public comment. It also contends that these comments appear to be taken from the
18 May 5, 2011 Planning Commission Hearing, before any environmental review of the
19 Project, visual studies, imposition of mandatory conditions of approval and mitigations
20 measure, and design feature modifications were imposed. Except for asserting that the
21 citations do not support the comments, Lazer's opposition on this issue basically asserts
22 that all comments were from May 2011, before the analysis that resulted in finding the
23 Project would not have significant impacts. As will be discussed, such is not
24 demonstrated.

25 The Court again notes that CPRL filed an Errata to correct citations in the
26 Opening Brief. CPRL asserts that four comment referenced inadvertently were
27 miscited. However, the initial Opening Brief also quoted large portions of the cited
28 language. It contends that Lazer could have readily located the citations but chose

1 instead, "to engage in gamesmanship." As for the argument that such comments were
2 from the May 2011 hearing, CPRL contends that these comments pertain to the visibility
3 of the existing test pole and the desire of members of the public to retain the pristine
4 nature of the State Park without interjection of industrial structures. It contends that
5 neither the Project's later modifications nor the studies undermine these comments.

6 Along the same lines, in a separate argument presented in the Opening Brief
7 regarding the adequacy of the MND, CPRL argues that the MND is inadequate because
8 it failed to provide an adequate analysis of visual impacts. It complains that Lazer's
9 photo simulations failed to include the Project's antennae, fence, and vegetation
10 removal and the report failed to analyze the antennae's reflectivity. It cites to a
11 comment from the State of California Department of Parks and Recreation regarding
12 concerns over the failure to include the antennae array in the photo simulations.

13 The opposition points out that the Project, as conditioned, requires the monopole,
14 antenna and equipment shelter to be painted to blend in with the surrounding
15 vegetation. In addition, it asserts that the equipment shelter would be cut into the
16 existing slope and recessed into the hillside. As for the photo simulations, it cites to the
17 2012 study in support of its contention that the photo simulations include all relevant
18 project features and different levels of fencing, citing AR 3:55:1582-1592.

19 In reply, CPRL contends that the 2012 visual study photos are not accurate. It
20 asserts the study's Viewpoint 1 shows the tower on the incorrect ridge, a significant
21 distance from the equipment building, AR 3:55:1583. Viewpoint 2, correctly identifies
22 the equipment building and pole as being located on the same ridge at a significantly
23 closer distance, AR 3:55:1583. It also argues that this discredits the accuracy of the
24 visual analysis. In addition, it contends that Lazer failed to respond to the State Park's
25 concern about the inadequacy of the analysis regarding the antennae array.

26 With respect to the antennae array, Petitioner fails to address the issue of it
27 being painted the camouflage effect. Nonetheless, the photo argument does have
28

1 merit, because there are photos in which it appears that the proposed tower is stated as
2 being on a different ridgeline.

3 CPRL also argues that a July 2008 visual study acknowledged the City of
4 Yucaipa's existing multi-purpose public trails, including three immediately adjacent to
5 the Project, with one ending at the boundary line between the Lazer parcel and the
6 State Park, citing AR 4:152:2799; AR 5:198:3376. It contends that a representative of
7 the Wildlands Conservancy also confirmed the presence of hiking trails that go up onto
8 Pisgah Peak, citing AR 5:202:3467. It asserts that the final visual study in September
9 2012, included three photo simulations from one-mile distance to the Project site, from
10 4,200 feet, and from 3,000 feet, AR 3:55:1580, but failed to provide any photo
11 simulation or analysis of the Project's visual impacts from hiking trails immediately
12 adjacent to the Project site.

13 The opposition contends that Petitioner is faulting the Report for failing to include
14 "outdated depictions of active trails within Wildwood Canyon State Park." It argues that
15 the September 2012 scenic report recognized the most current, active trails within the
16 Park and used such as the basis for its viewpoint analysis along trails closest to the
17 Project site, citing AR 3:55:1566. It contends that Petitioner has not presented any
18 evidence of accessible viewsheds closer to the Project site.

19 Petitioner contends that it provided a City of Yucaipa map showing three trails
20 marked as "Current Multi-Purpose Trail[s] open to public access" (AR 4:152:2799;
21 5:198:3376), which are located within several hundred feet of the Project's boundary. It
22 asserts that Lazer admitted in its July 2008 Supplemental Visual Analysis that the three
23 hiking trails at issue "are currently used by pedestrians, mountain bikers and
24 equestrians, as evidenced by the variety of tracks found on the trails," citing AR
25 4:152:2792. It contends that the October 2011 visual study shows large areas within
26 the State Park from which the Project would be visible confirming there are "accessible
27 viewsheds" from the three nearby trails, citing *cf* AR 3:69:1719 and AR 4:152:2799. It
28

1 contends that Lazer's claim these are "outdated depictions of active Trails" is
2 unsupported by any evidence.

3 CPRL also argues that the MND's finding of no significant visual impact stems
4 from the use of an incorrect baseline in Lazer's visual study. It contends that the
5 baseline for measuring impacts should have been the pristine land before the current
6 pole was installed and vegetative clearing took place. It asserts that use of an incorrect
7 baseline for assessing impacts of a proposed project is generally treated as a prejudicial
8 abuse of discretion, citing *Communities for a Better Environment v. South Coast Air*
9 *Quality Management Dist.* (2010) 48 Cal. 4th 310, 316, 321 and *Save our Peninsula*
10 *Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal. App. 4th 99, 119-128.
11 It argues that the initial study phase of CEQA review occurred in April 2008 and this
12 should have been used as the baseline. Instead, in August 2010, Lazer installed a
13 mock-up pole which resulted in degradation of the Project site. It contends that the
14 September 2012 visual study confirms that ground scraping and vegetation removal
15 occurred as a result of the placement of the monopole, citing AR 1:20:268. It also
16 contends that the description of scenic integrity included a recognition that "[t]wo major
17 components that contribute to the degree of deviation include the addition of structural
18 elements in the landscape and removal of vegetation," AR 1:20:266.⁹ It contends Lazer
19 also graded access from Pisgah Peak Road to the Project site of approximately 650
20 feet, citing AR 1:20:264, AR 3:58:1612. It contends that the 2012 visual study used the
21 existing landscape as a baseline, relying upon the environmental conditions after Lazer
22 conducted ground scraping vegetation removal and degraded the site, citing AR
23 1:20:266, 267, 276, and 288. From this, the report concluded the scenic integrity would
24 be considered moderate and there would be no significant impacts. However, the
25 correct baseline should have been an unaltered state.

26 Lazer argues that the 2012 Scenic Report identified five viewpoints, three
27 classified as having a "high" scenic integrity and two classified as "moderate. It
28

⁹ This quote actually appears on AR 1:20:292.

1 contends that there is no explanation as to why the three viewpoints would be classified
2 as having a "high" baseline of scenic integrity if an incorrect baseline was used,
3 referring to AR 3:55:1580. Lazer also asserts that as part of its description of the
4 Project site, the visual assessment mistakenly assumes grading occurred during the
5 installation of the monopole, citing 3:55:1573. It contends that pictures from July 2008
6 confirm that the ridge site was free of vegetative matter before Lazer's activities, citing
7 AR 4:152:2803-2804. However, such cannot be established because the pictures at AR
8 4:152:2803-2804 from July 2008 are not of very good quality and were taken at different
9 angles and distance from the pictures in the 2012 report. In addition, it appears that
10 CPRL is not referring to the ridgeline itself but to scraping that occurred around and
11 north of the pole when the mock-up was installed.

12 The reply points out that Lazer does not dispute it used the incorrect baseline. It
13 contends that Lazer's argument that three of the viewpoints are classified as having
14 "high" scenic integrity is incorrect. Instead, the cited portions of the report refer to
15 "scenic concern," an entirely different concept from "scenic integrity." It asserts that
16 "scenic concern" refers to the type of trail, classifying its use as "low" for low-use trails,
17 "moderate" for secondary trails, and "high" for primary recreational trails. It contends
18 the analysis being referred to was that three of the viewpoints are from primary
19 recreation trails, and thus have "high" scenic concern. (AR 3:55:1579-1580.) It argues
20 that "scenic integrity" is directed to Petitioner's baseline argument. It asserts when the
21 analysis is reviewed, none of the viewpoints are shown to have a "high scenic integrity"
22 (AR 3:55:1593), contending such was the result of the wrong baseline being used.

23 Petitioner also argues that the October 2011 analysis using the BLM method was
24 incorrect. It contends that the analysis correctly determined the Project site was a Class
25 I location, because it is adjacent to the State Park and visible from locations within the
26 Park and because the Park was formed to preserve the wilderness aspect of the area.
27 It asserts that the objective of Class I is to preserve the existing character of the
28 landscape and the level of change to the characteristic landscape should be very low

1 and must not attract attention. However, the analysis improperly attempted to show the
2 level of change to the landscape is "very low" using an incorrect baseline. Under the
3 BLM standard, the changes must not attract attention. (AR 1:11:42.) CPRL argues that
4 community members have testified the monopole already attracts attention and other
5 components of the Project have not yet been added. Therefore, the analysis is flawed.

6 Petitioner also asserts that the October 2011 report erroneously concluded that
7 the Project constitutes a "management activity." It contends that "management activity"
8 is defined as "a surface disturbing activity undertaken on landscape for the purpose of
9 harvesting, traversing, transporting, protecting, changing, replenishing, or otherwise
10 using recourses." (AR 1:20:437.) It argues that there is no support for the conclusion
11 that construction of an equipment building, tower, and antenna fall within the definition
12 of "management activity." It contends the October 2011 Impact Assessment incorrectly
13 concluded that "management activity" was applied to assess the visual change, citing
14 AR 3:69:1725. The Initial Study states, "The objective of Class I is to preserve the
15 existing character of the landscape. This class provides for natural ecological changes;
16 however, it does not preclude very limited management activity." (AR 1:11:42,
17 3:69:1726.)

18 Petitioner also argues that the Lazer report fails to perform a meaningful analysis
19 of the visual impacts. When considered, this argument really goes to the fair argument
20 issue, asserting that the analysis is flawed and does not support the conclusions. It also
21 contends that low-quality photographs were used. However, the report cited to, AR
22 4:152:2807, 2806, was a report prepared in July 2008. The Initial Study and MND relied
23 on the visual impact assessment conducted by Lilburn Corporation in October 2011.
24 (AR 1:11:40; AR 3:69:1714-1749.)

25 Based on the argument and a review of the record, that the Court is inclined to
26 grant the writ petition. There is sufficient evidence in the record to support a fair
27 argument that the Project may have significant environmental impacts regarding visual
28 impacts.

1 Public comment received included the following. At the May 5, 2011 hearing
2 members of the public commented as follows:

- 3 • From Dotty Potter: “[T]his is not just another piece of open land The
4 tangible peace and serenity of what is left of this undisturbed natural area
5 is not an obvious thing that you can upon arrival see with a single glance
6 or a snapshot of a camera, yet this area is every bit as precious to us, the
7 residents who frequent it as well as standing before the great coast of
8 Malibu or a stand of Giant Sequoias, it is the land that we love.” (AR
9 5:204:3590.)
- 10 • From Christine Mohler: “You may not be used to seeing it, I am not used
11 to seeing it, but now I am and I hate it. You go up there I see it, I ride my
12 horse up there, we hike in there, we can see it and it is troublesome....”¹⁰
13 (AR 5:204:3594.)

14 At the November 27, 2012 hearing, the following comment was received from
15 Christine Mohler, “I can see the tower site clearly from my home. We both can, I can
16 see it when I am driving, I can see it when I ride my horse, I can see it when I hike with
17 my children, I can see it when we are swimming in our backyard and I can see it when
18 we are barbequing and entertaining friends. I know there have been three studies
19 done, they all conclude that there is no visual impact to our beautiful hillsides, but I can
20 honestly tell you that is not true...”¹¹ (AR 5:202:3467.) Petitioner also cites to the
21 following comment from Gary Cash in an email dated November 25, 2012, in which he
22 states, “My friends, family and I frequently ride our horses on the trails in the park and
23 we enjoy the fact that it is free of the eye pollution so common in other recreational
24 venues.” (AR 5:200:3392.) Finally, Petitioner cites to 1:11:42, which is the Initial Study.

25 ¹⁰ It appears she is referring to the mock-up pole.

26 ¹¹ Comments in opposition of the Project at the November 2012 hearing also included those of
27 Dick Riddell, Mayor of Yucaipa. Although not cited in this portion of the brief, Petitioner refers to
28 comments made by Riddell at the May 2011 hearing. At that time, purportedly speaking on behalf of the
City of Yucaipa, he stated the Project is being opposed by the Wildlands Conservancy, the Yucaipa
Valley Conservancy, Crafton Hills Conservancy, supporters of the Wildwood Canyon State Park, Yucaipa
Open Space Community, the Yucaipa City Council and at last count letters and petitions containing
12,000 signatures. He commented on the splendor and natural beauty of the unblemished park. He
noted he had been working for over 20 years to preserve this space and it was inconceivable that anyone
would want to “sully this wonder of nature by installing a radio tower in full view of the valley below” and
the “scenic vista will be destroyed forever.” (AR 5:204:3582.) Although not cited to by Petitioner, in
Riddell’s November 2012 comments, he basically repeated this sentiment, noting citizen opposition to this
Project. (AR 5:202:3464-3465.)

1 It appears this citation is related to the comment regarding the October 2011 report
2 prepared by Lilburn Corporation that on horseback, the Project site can be viewed for a
3 greater amount of time.

4 Relevant personal observations of area residents on nontechnical subjects may
5 qualify as substantial evidence for a fair argument. (*Pocket Protectors, supra*, 124 Cal.
6 App. 4th at 928.) Any substantial negative effect of a project on view and other features
7 of beauty could constitute a significant environmental effect. (*Ocean View Estates*
8 *Homeowners Association, Inc. v. Montecito Water District* (2004) 116 Cal. App. 4th 396,
9 401.) Consideration of the overall aesthetic impact of the Project by its very nature is
10 subjective. Opinions that the project will not be aesthetically pleasing are not the
11 special purview of experts. Personal observations on such nontechnical issues can
12 constitute substantial evidence. (*Id.* at 402.)

13 Following comments, purported “minor modifications” to the proposed Project
14 occurred, which included a change in location for the equipment building and proposed
15 parking space, additional fencing around the monopole, and clarification of the amount
16 of grading proposed. These new site plans were resubmitted to Lilburn to determine if
17 the changes would result in additional impacts. An updated visual analysis was
18 prepared and once again it was determined that the Project would not have a significant
19 impact on scenic resources. The report found that “[a]lthough the Project site may be
20 visible to trail users in the Park, the analysis noted that trail users entering the Park
21 would experience a greater visual impact from existing utility poles and utility lines,
22 because of the number of poles and their heights.” Therefore, the adverse visual
23 effects were determined to be less than significant because of the scenic integrity of the
24 existing environment and the limited duration and visibility of Project views. (AR
25 1:18:190; AR 1:6:9-12.) However, the report fails to consider citizen comments
26 regarding the pristine nature of the view on the trails. The discussion of existing utility
27 poles and wires described as visible in the Park occur at the gated entrance to the trails,
28 not along the trails past the entrance.

1 Mitigation measures included painting the monopole, antenna, and equipment
2 shelter. Landscaping with drought tolerant fire-resistant plants in the ten-foot cleared
3 area also was required. With respect to the fence, the visual assessment noted that as
4 with the pole, the Proposed Project included painting it to the same specifications as the
5 pole. (AR 3:69:1721; see also 3:82:1861.) At that time, only a six-foot fence was
6 proposed around the equipment shelter. The September 2012 scenic resource report
7 noted the Project was revised to include a five-foot wrought-iron fence or five-foot high,
8 three strand wired fence around the monopole. This report only noted that the color of
9 the six-foot fence proposed around the equipment shelter would be finished with a non-
10 metallic neutral color. It also stated that fencing to be finished with a non-metallic,
11 neutral paint color. (AR 3:55:1564-1565.) However, it is unclear whether such applied
12 to the fence around the monopole and whether such would occur if the three-strand wire
13 fence was used. CPRL is correct that the conditions for mitigation and in the CUP only
14 require that the monopole, antenna and equipment shelter are to be painted with the
15 camouflage effect.¹² (AR 1:7:24.)

16 However, the Project site is on vacant, undeveloped land. It is situated in the
17 steep foothills of the San Bernardino Mountains. It is located within the Pisgah Peak
18 Open Space Area. To the west of the Project is the Wildwood Canyon State Park. (AR
19 1:11:35, 40.) As discussed in the October 2011 visual assessment, visual resources
20 classes are assigned through the inventory process. "Class I is assigned to those areas
21 where a management decision has been made previously to maintain a natural
22 landscape. This includes areas such as national wilderness areas, the wild section of
23 national wild and scenic rivers, and other congressionally and administratively designed

24
25 ¹² The CUP states as a condition:

26 39. Painting: The monopole, antenna and shed shall be painted olive green to blend with the
27 surrounding vegetation. In addition to this first layer of treatment, a second layer of paint shall
28 be worked in a random pattern in colors of deep olive, light sage and light brown to further
mimic a vegetative pattern or camouflage effect. The random pattern shall be applied in a
stippling or sponging in manner to avoid sharp lines. The applicant shall submit for review and
approval to County Planning suitable color 'paint chips' to blend the color of the proposed
structures into the prevailing color of the Predominate Viewing Background. [Mitigation
Measure AES-1] (AR 1:7:24.)

1 areas where decisions have been made to preserve a natural landscape.” (AR 1:11:41-
2 42.) Because the Project site is adjacent to a State park and visible from locations
3 within the Park, and because the Park was formed to preserve the wilderness aspects
4 of the area, the visual impacts were assessed under BLM Visual Resource Class I. (AR
5 1:11:42.) The report concluded that the proposed monopole and equipment shelter can
6 be seen but do not attract attention or distract from the scenic aspects of the area. (AR
7 1:11:42.)

8 When considered, citizen testimony and even the reports support a conclusion
9 that the project site and proposed monopole will be visible along portions of the trails
10 within the State Park. Citizen comments support a fair argument that this Project will
11 attract attention. In addition, as the visual assessment noted, “The primary viewshed for
12 hikers and equestrian users within the Park is northeast toward Pisgah Peak, as a
13 majority of the marked trails trend in this direction.” (AR 3:69:1722, 1:11:41.) The
14 facts remains that the Project site and monopole is visible from the State Park, which
15 contradicts the State Park’s goal of providing a pristine wildlife experience to users and
16 the objective of a BLM Class 1 area: to preserve the existing character of the
17 landscape. Citizen comments regarding aesthetic impacts supports a fair argument that
18 the Project will be visible from State Park trails and therefore, the Project may have a
19 significant adverse aesthetic impact.

20 In addition, CPRL’s baseline argument also is demonstrated. The September
21 2012 analysis states, “The Project Site’s current state exhibits the contrast of dark
22 vegetation against non-vegetated soil that was disturbed during prior field work
23 associated with the monopole demonstration installation.... The contrast between the
24 natural landforms and the liner lines of the monopole and non-vegetated ground is the
25 extent of the landscape alteration.” (AR 1:20:266.)

26 The definition of scenic integrity states it was determined by evaluating the
27 landscape based upon deviation or alterations of the existing landscape character. (AR
28 1:20:292.) In areas in which the visual concern was high, for example Viewpoint 3, the

1 analysis concluded that the soil disturbance that occurred during the placement of the
2 monopole is distinct as is the darkened, weathered pole. The report goes on to state,
3 "Due to the presence of past geological/field work activities, the scenic integrity for the
4 area would not substantially decrease and would remain moderate under the Project."
5 (AR 3:55:1586 (describing Viewpoint 3.) A later discussion states, "The existing scenic
6 integrity for the area (Moderate) would remain Moderate since previous geotechnical
7 field work created the dominant area that is void of vegetation and created an altered or
8 Moderate scenic integrity for the area." (AR 3:55:1600.) A prior description of the "field
9 work" was related to installation of the monopole. (AR 3:55:1575.)

10 Lazer does not provide any discussion as to why it is entitled to rely on the
11 landscape alterations it created as a baseline in order to support its findings. It appears
12 the proper baseline to have considered would have been the landscaping before the
13 "mock-up" monopole was installed. In addition, when one of the pictures that purports
14 to show Viewpoint 3 (AR 3:55:1588), with the monopole and equipment shelter, the
15 monopole is identifiable in the picture, lending support to CPRL's argument that the
16 Project will have a visual impact.

17 As for the trails analyzed, a fair argument is presented that the study did not
18 consider multi-use trails identified by the City of Yucaipa that are adjacent and close to
19 the Project site. When the Supplemental Analysis prepared in July 2008 is reviewed,
20 multi-purpose trails recognized by the City of Yucaipa as being within the Park area
21 were discussed. However, in the October 2011 and September 2012 analysis, no such
22 discussion is included. It is not clear why such discussion was omitted. Petitioner is
23 correct that there is no evidence that such trails are outdated or unused. Based on the
24 above, the Court will grant the writ petition on this issue.

25 Land Use Impacts

26 CPRL contends that land use impacts require analysis because substantial
27 evidence supports a fair argument that the proposed project may have growth inducing
28

1 impacts, may prevent expansion of Wildwood Canyon State Park, and violates the
2 development code regarding grading.

3 With respect to growth-inducing impacts, CPRL asserts that the Project may
4 have growth-inducing impacts, citing Guidelines, § 15126(d). It contends that members
5 of the public commented that approval of the tower at issue would lead to applications
6 for additional radio towers in the area surrounding the State Park and would make it
7 difficult to deny future similar applications, citing AR 5:204:3527, 204:3551, 204:2582-
8 2583, 202:3451. It asserts that such concern is justified considering Lazer has
9 demonstrated its desire to have multiple radio towers surrounding the State Park. It
10 contends that Lazer argued that one of its goals was to expand the State Park by
11 installing broadcast towers and that many have been implemented in many California
12 State Parks, citing AR 5:196:3365. It argues that photographs were provided by Lazer
13 of other state parks surrounded by multiple radio towers, citing AR 4:131:2525.¹³ It also
14 contends that Lazer specifically argued that the presence of another nearby tower
15 establishes a precedent for approval of this tower, citing AR 5:182:3106.

16 CPRL also contends that commenters noted that bringing electrical power to an
17 area over 1.25 miles long, along Pisgah Peak Road may be growth inducing. It argues
18 that with new electric lines provided by the project, the parcels along Pisgah Peak Road
19 now will be more easily developed, citing AR 4:138:2683, 2684. It also asserts that

20
21
22 ¹³ In support of this argument, CPRL also cites to an argument presented in Lazer's opposition to
23 Petitioner's Ex Parte Application for a Stay, in which Lazer argued that Petitioner has interfered with
24 Lazer's ability to develop other transmission poles. However, such evidence is outside the administrative
25 record and was not considered.
26
27
28

1 while the Initial Study indicates the developer "has offered" to provide an open space
2 easement to Wildwood Canyon Park and relinquish future development, citing AR
3 1:11:54, it contends the dedication of this easement is not listed as a mitigation
4 measure and therefore is unenforceable. However, the open space easement is listed
5 as a condition of approval, in the CUP and as a mitigation measure with respect to
6 biological resources. Under this condition, Lazer is required to deed restrict the unused
7 portion of the 38.12-acre parcel for passive use by visitors to the Wildwood Canyon
8 State Park. (AR 1:20:248; 1:7:27.)

9 CPRL argues that Conservation Policy OG/CO 1.2 of the Oak Glen Community
10 Plan states that the County will support and actively pursue expansion of the Wildwood
11 Canyon State Park, AR 5:188:3243. It contends that the Project is located directly
12 adjacent to the Park and as a result, may prevent the Park's expansion to include
13 Pisgah Peak, the most prominent scenic resource in the area. In a later argument it
14 also discusses the Oak Glen Community Plan, which provides "[t]he clean air, ambient
15 quiet, dark skies, abundant open space and wildlife are valued highly by residents as
16 well as by visitors who frequent the area," citing AR 5:188:3210. It discusses
17 Conservation Goal 1 (OG/CO 1) of the Oak Glen Community Plan, which establishes a
18 policy to "preserve the unique environmental features of Oak Glen, including native
19 wildlife, vegetation, and scenic vistas," AR 5:188:3236. It also discusses Plan Policy
20 OG/CO 1.1 that specifically recognizes Pisgah Peak and Wildwood Canyon State Park
21 as important open space areas," AR 5:188:3236.

22 It contends that the Project violates Development Code 83.08.040(b)(2), which
23 prohibits grading of building pads on parcels exceeding 40 percent in slope. It asserts
24 that all portions of the Project site, outside the roadway easement, including the
25 proposed equipment shelter exceed a 40 percent slope, citing AR 3:71:1758, 1761.
26 Therefore, a fair argument exists that the Project may have a significant impact on land
27 use.

28

1 CPRL also argues that the MND failed to analyze impacts in accordance with
2 relevant land use plans and policies. It argues that the only analysis of the Project's
3 consistency with these plans is the statement that the Project would develop a small
4 portion of the land and the developer has agreed to provide an open space easement to
5 the Wildwood Canyon Park and relinquish future development rights for the remaining
6 land around the project. It contends that none of the applicable Oak Glen Community
7 Plan, County General Plan Development Code, or Open Space Overlay provisions was
8 analyzed to determine consistency.

9 Lazer responds that the County correctly found that extension of electrical power
10 to the site will not result in significant growth inducement, because adjacent properties
11 will not be allowed any large development without a water purveyor, sewer services, or
12 natural gas. It does not cite to any evidence in the Administrative Record in support of
13 this contention. It argues that Petitioner's concerns regarding an "illusory open space
14 easement" and potentially growth inducing impacts are misplaced and do not constitute
15 a fair argument of potentially significant environmental impacts.

16 As for the argument that the Project may prevent expansion of Wildwood Canyon
17 State Park, because it is adjacent to the Park, Lazer contends that this argument is
18 absurd, particularly in light of the facts that Lazer has agreed to relinquish development
19 rights on the remaining area of the property, creating an open space easement, citing
20 AR 1:20:248.

21 With respect to County Development Code § 83.08.040(b)(2), Lazer contends
22 that Petitioner relies on an outdated engineering letter dated October 4, 2011 in support.
23 However, the actual site plans for the project, prepared in March or April 2012,
24 demonstrates that the small amount of grading required for the equipment shelter will
25 take place on a slope of less than 40 percent, citing AR 3:58:1612.

26 In reply, CPRL contends that Lazer has failed to dispute CPRL's argument that
27 "approval of the tower at issue in this case would lead to applications for additional radio
28 towers in the area surrounding the State Park and would make it difficult to deny future

1 similar applications.” It contends that Lazer’s reference to its agreement to relinquish
2 development rights on the remaining area of the property does not eliminate the fair
3 argument of growth-inducing impacts. It argues that the fact that local conservancies
4 have been working to purchase additional land to expand Wildwood Canyon State Park
5 from its current size of 850 acres to over 3,500 acres (AR 4:167:2951) confirms there is
6 a significant amount of other undeveloped land surrounding the Park. It asserts there is
7 nothing to preclude Lazer or another broadcast station from purchasing adjacent or a
8 nearby parcel for the purpose of establishing additional radio towers.

9 Both parties present arguments regarding the applicability of cases cited by
10 Petitioner, *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal. App.
11 4th 144, *Heninger v. Board of Supervisors* (1986) 186 Cal. App. 3d 601, and *City of*
12 *Antioch v. City Council* (1986) 187 Cal. App. 3d 1325.

13 “A “significant effect on the environment” is defined as “a substantial, or
14 potentially substantial, adverse change in any of the physical conditions within the area
15 affected by the project including land, air, water, minerals, flora, fauna, ambient noise,
16 and objects of historic or aesthetic significance. An economic or social change by itself
17 shall not be considered a significant effect on the environment.” [Citations.]’ (*Oro Fino*
18 *Gold Mining Corp. v. County of El Dorado* (1990) 225 Cal. App. 3d 872, 881 [274 Cal.
19 Rptr. 720].” (*Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.
20 App. 4th 144, 152.) With respect to growth-inducing impacts, a petitioner is required
21 only to demonstrate that the record contains substantial evidence sufficient to support a
22 fair argument that the project may have a significant grow-inducing effect.

23 In *Stanislaus Audubon*, the Court concluded that substantial evidence supported
24 a fair argument that a proposed country club may have a significant adverse growth-
25 inducing effect on the surrounding area and that the County avoided evaluation of this
26 impact by specifically deferring consideration thereof until the expected housing
27 developments were actually proposed. (*Id.* at 152-153.) The Court discussed that
28 much of the evidence of the potential growth-inducing impact of the proposed country

1 club was generated by the County itself. The Court noted that the initial study prepared
2 by the County's planning department unequivocally stated the proposed project may act
3 as a catalyst to residential development. Following completion of this initial study, the
4 planning commission notified the developer that it had made a preliminary finding the
5 project may have a significant effect on the environment. Areas of concern included
6 "growth inducement." However, in a revised study, the planning department reversed
7 its earlier position that growth-inducing effects of the project needed to be addressed,
8 recommending deferral of study of the potential additional development in the area
9 resulting from approval until such housing actually was proposed. (*Id.* at 153-154.)

10 The *Stanislaus Audubon* Court concluded that contrary to the developer's
11 assertion, the revised study did not conclude that the proposed project would not have a
12 growth-inducing impact. Instead, it stated approval of the proposed project may set a
13 precedent for growth not anticipated by the general plan and that staff recognized golf
14 courses often attract housing, but such can be evaluated as it is proposed. It also
15 discussed that the revised initial study did not "unring the bell" of the initial study that
16 was part of the record, especially when the revised study did not conclude that the
17 project would not be growth-inducing, but deferred such evaluation until such housing
18 development was proposed. The Court also discussed that at the hearing a planning
19 commission member had stated that "we are fooling ourselves if we don't think [the
20 project] is growth inducing..." The Court concluded that the member's opinion that the
21 project will be growth inducing is significant. The Court then went on to discuss other
22 evidence that supported a finding of growth inducing impacts. In addition it noted that
23 no mitigation measures were adopted to reduce the growth inducing effect to
24 insignificance. (*Id.* at 153-158.)

25 At issue in *City of Antioch* was the construction of a road and sewer project. The
26 Court concluded that construction of a roadway and utilities cannot be considered in
27 isolation from the development it presages. The Court concluded that the sole reason
28 to construct the road and sewer project was to provide a catalyst for further

1 development in the immediate area. It therefore concluded that such project should not
2 be allowed to proceed until significant environmental impacts are evaluated. (*City of*
3 *Antioch, supra*, 187 Cal. App. 3d at 1332-1336.) Finally, in *Heninger*, the Court
4 concluded that amendment of a septic tank ordinance by one lot owner to allow
5 alternative private disposal systems for single family residences could open the way for
6 development of other sites. (*Heninger, supra*, 186 Cal. App. 3d at 609.)

7 With respect to growth-inducing impacts, the evidence presented demonstrates
8 that Lazer has stated that its goal is to promote the expansion of its radio station
9 through the implementation of "a passive – not active" land use. It stated, "As a passive
10 land use – Broadcast Towers have been implemented in many CA State Parks." (AR
11 5:196:3365.) Lazer also presented evidence of such towers in other parks. (AR
12 4:131:2525.) In support of this Project (and the prior project), it also cited to an existing
13 199-foot tall radio tower on Pisgah Peak Road which it stated was visible from the Oak
14 Glen Scenic Roadway. (AR 3:121:2215; 4:131:2523; 5:182:3106.) In addition, public
15 comments were received expressing concern that the location would be made into a
16 "tower farm," such as similar to Mt. Wilson, Moreno Valley, and San Jacinto.¹⁴ (AR
17 5:202:3527, 202:3454,¹⁵ 204:3582-3583,¹⁶ 4:138:2684.) A resident testified at the May
18 2011 hearing that:

19 Our entire community is concerned that there is potential for this major project
20 to become a magnet for this type of development. We could end up with what
21 happened with the wildlands of Chino Hills, one tower was approved, they said
22 there would only be one tower, then they came back and said you have one
tower what's wrong with two, let's put two in, they came back again, you have

23 ¹⁴ It is worth pointing out that on the same page in which Lazer referred to another radio tower
24 being present, it also argued that the topography of the surrounding hills creates a natural "bowl" that
focuses the radio signal broadcast toward the target market in Hemet while eliminating potential radio
interference with other FM broadcasters in the Inland Empire. (AR 3:121:2215; see also AR 5:182:3106.)

25 ¹⁵ Petitioner incorrectly cited to AR 5:202:3451.

26 ¹⁶ This comment was from Dick Riddell, speaking on behalf of the City of Yucaipa and noting
27 objection to the Project. He stated, "The scenic vista will be destroyed forever. Moreover experience has
shown that if this tower is installed the surrounding hills will soon become a tower farm. It will be difficult
28 to deny future applications if this is approved...." (AR 5:204:3582-3583.)

1 two towers, let's put four in, go now and take a look at Chino Hills and see
2 what they have. It's a giant array of towers now. (AR 5:204:3587-3588.)¹⁷

3 This evidence supports a fair argument of the growth inducing impacts of this
4 Project.

5 The evidence also demonstrates that the Project, even as modified, still conflicts
6 with applicable land use policies. (*Pocket Protectors, supra*, 124 Cal. App. 4th at 929-
7 936.) With respect to the original proposal, the finding of the Board in 2009 was,
8 "Construction of the radio tower project will be contradictory and detrimental to a
9 primary goal of the State Park, which is to provide a pristine wilderness experience to
10 park visitors." The Board also found the proposed use and manner of development
11 were not consistent with the goals, maps, policies and standards of the General Plan
12 and Oak Glen Community Plan, specifically: (1) General Plan – Open Space Element
13 Goal LU2, to improve and preserve open space corridors through the Mountain Region;
14 and (2) Oak Glen Community Plan: Goal OG/CO 1 – preserve the unique environmental
15 features of Oak Glen including native wildlife, vegetation and scenic vistas, including
16 Policy OG/CO 1.1 which recognized important open space areas for wildlife movement
17 that included the Pisgah Peak and Wildwood Canyon State Park corridors. (AR
18 1:27:798-799.)

19 On this issue, the October 2011 Initial Study and MND stated:

20 The project will not conflict with any applicable land use plan, policy, or
21 regulation of an agency with jurisdiction over the project adopted for the
22 purpose of avoiding or mitigating an environmental effect. The project is
23 consistent with all applicable land use policies and regulations of the County
24 Code and General Plan, including the Oak Glen Community Plan. The project
25 complies with all hazard protection, resource preservation and land use
26 modifying Overlay District regulations. The proposed use is allowed within the
27 Official Land Use Zoning District, and is not prohibited by the Community Plan.

28 ¹⁷ The corrected Petitioner's Opening Brief incorrectly cited to this as being at AR 5:204:3551.

1 The project site is adjacent to the Wildwood Canyon State Park. The Oak Glen
2 Community Plan encourages the support and to actively pursue the expansion
3 of the park with cooperation with the Wildlands Conservancy and Yucaipa
4 Valley Conservancy. The proposed project would only develop approximately
5 425 sq. ft. of the 38.12 acre project site. Furthermore, the developer has
6 agreed to provide an open space easement to the Wildwood Canyon Park and
7 relinquish future development rights for the greater portion surrounding the
8 parcel, within the FCC guidelines and safety regulations. The Community Plan
9 does encourage utilities to be placed underground, which has been
10 implemented into the project design[.] (AR 1:11:66.)

11 However, no analysis is provided to support this conclusion in light of prior
12 findings that made reference to General Plan Goal LU2 and Oak Glen Community Plan
13 goals related to preserving and improving the open space corridor and scenic vistas
14 attached to the Wildwood Canyon State Park, including Pisgah Peak. The property at
15 issue is undeveloped land "in a pristine wilderness area." Given the prior findings, a fair
16 argument in support of an inconsistency still exists, even if the proposed Project would
17 "disturb only a small portion of the 38.12 acre parcel" and Lazer agrees to provide an
18 open space easement to the Park. Construction including a monopole, equipment
19 shelter, and fencing are proposed in the area intended to provide a "pristine wilderness
20 experience to park visitors." Substantial evidence supports a fair argument the Project
21 is inconsistent with the applicable General Plan and Oak Glen Community Plan policies.

22 Finally, with respect to CPRL's argument regarding the Project violating the
23 development code regarding grading, the letter from a Registered Professional
24 Engineer, dated October 4, 2011, does conclude that the proposed construction site is
25 in an area that has "a slope of about 40±% or greater." (AR 3:71:1758.) CPRL argues
26 that Lazer's reference to an undated "Grading and Drainage Plan" that includes one
27 arrow behind the equipment building with a notation, "Exist. Ground less than 40%"
28 does not refute the analysis conducted by an engineer who analyzed the Site Plan,
Grading and Drainage Plan and performed a field survey of the Project site. A fair
argument in support of the Project being on a slope greater than 40 percent, and thus in
violation of the Development Code, exists. The fact Lazer presents evidence to refute
this does not demonstrate that Petitioner's evidence from a Registered Professional

1 Engineer is not sufficient to support a fair argument. The evidence cited by Petitioner
2 supports the fair argument test.

3 **Fire Impacts**

4 CPRL contends the Project is located within County Fire Safety Area 1, as
5 designated in the General Plan, AR 1:11:32. It asserts that the County Development
6 Code characterizes these areas as having “moderate and steep terrain and moderate to
7 heavy fuel loading contributing to high fire hazard conditions.” (County Development
8 Code § 82.13.030(a).) It contends that the issue of fire hazard was raised, citing AR
9 1:23:617, AR 5:204:3583, AR 5:200:3405. It argues that the Project will increase the
10 risk of wildfire by adding a new source of electricity and a tower that could attract
11 lightning during storms, citing AR 2:33:1286. It contends that several fires in the area,
12 including the Sawtooth and Millard fires were started by lightning strikes, citing AR
13 2:33:1287, AR 1:23:617. It asserts that at the Planning Commission hearing, the
14 Deputy Fire Marshall stated that any tower that extends beyond ground level is a
15 potential target for lightning strikes, citing AR 2:33:1286. It contends that it provided
16 evidence of a fire in California that started on a radio tower and threatened the nearby
17 community citing AR 5:202:3469.¹⁸

18 CPRL also argues that the County Development Code requires that fire access
19 roads in the fire safety overlay be at least 20 feet wide and less than 14 percent in
20 grade to facilitate the transportation of fire department vehicles, citing County
21 Development Code § 82.13.060(e)(1). It asserts that the Project is served solely by
22 Pisgah Peak Road, an unpaved, narrow road that exceeds 14 percent in grade, citing
23 AR 1:11:32, AR 3:122:2311; AR 2:71:1758; AR 1:27:798. It contends that the Board
24 recognized the Project’s inadequate access when denying the Project in 2009, finding
25 “the site for the proposed use does not have adequate access ... in that the legal and
26 physical access is from Pisgah Peak Road, which is very narrow, unpaved and contains

27 _____
28 ¹⁸ This cited evidence is from a citizen who spoke at the hearing and states his son-in-law works for AT&T and puts up cell sites. The son-in-law told the citizen that a major fire in Los Angeles County in 2011 was caused by a wooden tower that fell over. It is not expert opinion regarding fire risk.

1 steep grades that are greater than 14%. Therefore, the Project does not comply with
2 the access requirement of the Fire Safety Overlay.” (AR 1:27:798.) It argues that the
3 County claims the current, steep access road is adequate because this is an unmanned
4 tower and fire crews would not travel to the Project site (AR 1:20:227); however, this
5 fails to recognize the potential for a fire that starts at the Project site to travel up Pisgah
6 Peak and into the communities of Oak Glen.

7 Finally, it contends that the MND failed to analyze inconsistencies with the
8 General Plan and fire safety impacts, presenting the same arguments as above.

9 In opposition, Lazer argues that the County Fire Department determined that the
10 requirements for access road and water supply are not applicable requirements for
11 unmanned structures that will not require evacuation or fire defense, citing AR 1:18:192.
12 It also contends that the Conditions of Approval require that the equipment building
13 have a multi-hour fire rating and a built-in fire suppression system that utilizes an inert
14 gas, citing AR 1:18:192. It contends that these Project design features will contain and
15 suppress a fire in the structure and result in less than significant fire safety impacts. It
16 also asserts that the County Fire Department determined that a 100-foot fuel
17 modification requirement was unnecessary because the equipment storage building has
18 an internal fire suppression system and such fuel modification perimeter would cause a
19 significant disruption of the natural vegetation, visual resources and open space.
20 Therefore, the fuel modification perimeter was reduced from 100 feet to 30 feet. (AR
21 1:18:192.)

22 As for the Deputy Fire Marshall’s testimony, Lazer contends that CPRL takes his
23 statement out of context and the Deputy Fire Marshall also stated that the conditions
24 that were set for fire protection “are adequate and the County Fire Department
25 considers the risk of fire to be minimal.” (AR 2:33:1286.) It argues that none of
26 Petitioner’s evidence gives rise to a fair argument that the Project may have a
27 significant impact on fire safety. It contends that the tower is wooden as opposed to
28 metal, the Fire Department endorsed a reduction in the fuel modification zone, and the

1 Fire Department also clarified that in the event of a fire, resources would be employed
2 near the communities of Oak Glen, not traversing fire roads to save the Project
3 structures.

4 CPRL argues in reply that County Development Code § 82.13.060(e)(1) provides
5 no exception for unmanned structures. It contends that under this Code, development
6 projects include buildings and other structures. Therefore, this section is applicable to
7 the Project and Lazer has not provided any argument to the contrary, aside from a claim
8 that the County Fire Department has interpreted it to be inapplicable to unmanned
9 structures. It contends this argument fails, because this code section requires adequate
10 vehicular access for firefighting vehicles for "[e]ach development project" in order to
11 contain a fire at the development perimeter and prevent the fire from spreading. It
12 contends that if Lazer wanted to proceed despite the Project's noncompliance with the
13 Development Code § 82.13.060, it should have sought a variance, as it did for the fuel
14 modification requirement.

15 In considering the issues presented, with respect to exposing people or
16 structures to a significant risk of loss, injury or death involving wildland fires, the Initial
17 Study found the Project to be less than significant. It stated:

18 The proposed project is located within the Fire Safety Area 1 Overlay District,
19 which is characterized by areas with moderate to steep terrain and moderate
20 to heavy fuel loading. The project does not include any habitable structures or
21 residences. The project will include a fuel modification plan which will thin the
22 vegetation within a 30 foot radius of the equipment shelter and monopole, and
23 clear all existing vegetation within 10 feet of the equipment shelter and
24 monopole.¹⁹ The shelter shall be a pre-fabricated structure, with fire
suppression mechanisms built-in. The walls are required to have a multi-hour
fire rating, and there will be an automated fire suppression system that utilizes
an inert gas to extinguish fire inside the shelter. (AR 1:11:62.)

25 ¹⁹ One of the aesthetic impact mitigation measures included submitting landscaping for drought
26 tolerant, fire resistive plants to be put in the ten-foot cleared, fuel mitigation area as approved by the
27 Planning Division and Fire Department. (AR 1:11:44.)
28

1 At the hearing before the Planning Commission in September 2012, the
2 discussion with the Fire Marshall that the parties refer to in favor of their respective
3 arguments was as follows:

4 **Chair Audrey Mathews:** Could you come and address the issues that were
5 presented by the community?

6 **Deputy Fire Marshall Mike Horton:** Good morning Madame Chair and
7 Commissioners, community. First I would like to start off with my name is Mike
8 Horton I am the Deputy Fire Marshall for San Bernardino County Fire
9 Department. And my office is at 620 South E Street in San Bernardino City.
10 First of all I would like to, on behalf of Chief Hartwig and the San Bernardino
11 County Fire Department I would like to let you know that we take fire safety
12 very seriously in the County and we take every measure to practice that, at
13 every opportunity. In regards to this case, we feel that the conditions that were
14 set for fire protection are adequate. There was a variance for the fuel
15 modification from 100 feet down to 30 feet, but in the former gentleman's
16 statement that road couldn't be used for Fire Department access anyway as it
17 sits now. We would not send any fire suppression units in that area to start or
18 to protect a structure but if there were fires involved in that structure then we
19 would need access to that point. That is why we conditioned it strongly for fire
20 protection system and a rated construction in that building. We think the
21 minimum, or the risk is minimum from a fire occurring in the structure and the
22 fuel modification is there to protect both the surrounding vegetation and to
23 protect the structure from a fire coming from the outside. As far as sending
24 manpower up there to protect that structure during a wildland fire, we would
25 never do that.

19 **Commissioner Ray Allard:** I was wondering do facilities of this type attract
20 lightning strikes?

21
22 **Deputy Fire Marshall Mike Horton:** You know any tower that extends beyond
23 the Earth's level would be an attractive place for a lightning strike to occur yes.
24 There are precautions they can take for lightning strikes to make sure that it's
25 protected to that degree. (AR 5:203:3512.)

25 The discussion then goes on to discuss issues regarding erosion following a fire.
26 When considered, the Fire Marshall's testimony on the fire safety issue is directed to the
27 equipment shelter. With respect to the monopole, there appears to be a fair argument
28 that such could increase the risk of lightning strikes. The Fire Marshall states that there

1 are precautions that could be taken for lightning strikes. However, there is no indication
2 that the Project as proposed includes such precautions or that such risk was evaluated.

3 Once again, “[i]f the local agency has failed to study an area of possible
4 environmental impact, a fair argument may be based on the limited facts in the record.”
5 (*Sundstrom, supra*, 202 Cal. App. 3d at p. 311.). Here, the record is not sufficient to
6 demonstrate that the fire impact with respect to lightning strikes was adequately
7 analyzed. A fair argument in support of increased fire issues is demonstrated.

8 As for the other argument regarding fire vehicle access and the 14 percent
9 grade, County Code § 82.13.060(e) provides:

10 (e) *Perimeter Access to Fuel Modified and Fire Hazard Areas.* Fire fighting
11 vehicles shall have adequate access into areas between fire hazardous areas
12 or fuel modified areas and the development perimeter, so that a wildland fire
13 can be contained at the development perimeter and prevented from spreading
14 to structures. Each development project shall provide adequate vehicular
15 access for fire fighting vehicles to the development perimeter of the project
16 along the portion of the development perimeter that is adjacent to either an
17 existing or proposed fuel modified area, or a fire hazard area. Provisions shall
18 be made and shall be required, where necessary, through conditions of
19 approval for the development project for the continual maintenance of the
20 areas intended to provide the access. **Perimeter access shall be provided,
21 through either of the following measures or through alternate measures
22 in compliance with § 82.13.090 (Alternate Hazard Protection Measures).**

23 (1) The provision of an existing or proposed road along the development
24 perimeter, or portion thereof that is exposed to a fire hazard or fuel modified
25 area, and which is accessible to firefighting equipment. The road shall be
26 capable of supporting fire-fighting equipment, shall be at least 20 feet in width,
27 and shall not exceed a grade of 14 percent. The conditions of approval for the
28 development project shall require provisions to ensure that the roadway will be
maintained, if it is not within the publicly maintained road system.

(2) Development projects shall provide access ways, at least 12 feet in width,
with a grade not to exceed 14 percent, and capable of supporting fire fighting
vehicles, between the development perimeter and proposed or existing
streets. Access ways shall be spaced at intervals of no more than an average
of 350 feet along each street. The conditions of approval for the development
project shall require specific provisions to ensure that access ways will remain
unobstructed and will be maintained. Where feasible, access ways may not
be paved and shall be designed so as not to detract from the visual quality of
the project. (Emphasis added.)

1 Petitioner's argument on this issue is not demonstrated. Petitioner fails to
2 discuss that County Code § 82.13.060(e) specifically provides that perimeter access
3 shall be provided through either the measures set forth in subdivision (e) or through
4 alternate measures in compliance with § 82.13.090 (Alternate Hazard Protection
5 Measures). Although not raised in the opposition, § 82.13.090 provides that the
6 purpose of the "Alternative Hazard Protection Measures" is to allow "greater design
7 flexibility than would otherwise be permitted to more efficiently and effectively achieve
8 the purposes of the FS Overlay" and such section is applicable to perimeter access to
9 fuel modified and fire hazard areas, § 82.13.060(e). (County Code § 82.13.090(a), (b).)

10 This section provides at subdivision (c):

11 (c) *Substitution of Alternative Measures for Standards and Requirements.*

12 (1) If alternative measures are proposed, the Fire Authority shall determine,
13 with specific consideration of the effect of the proposed alternative measures,
14 whether the proposed development project has adequate provisions for fuel
15 modification and management, including the ongoing maintenance of fuel
16 modified areas.

17 (2) If the Fire Authority makes a positive determination in compliance with
18 Subdivision (1), above, alternate measures may be substituted for the
19 established standards and requirements if the Department, with consideration
20 of the recommendation of the Fire Authority, finds and justifies all of the
21 following:

22 (A) The approved alternative measures meet the intent of, and serve the
23 same purpose as, the established standard or requirement.

24 (B) The approved alternative measures provide the same or a greater level of
25 protection or are as effective as the established standard or requirement.

26 (C) There are clear and substantial reasons for utilizing the alternative
27 measures because they provide for a more efficient and economic use of the
28 site, or provide for a superior physical design, and are consistent with the
intent of the FS Overlay.

 In light of Petitioner's failure to discuss this section and demonstrate that such is
not applicable to the Project at issue here, Petitioner's argument regarding fire vehicle
access is not demonstrated. Nonetheless, because a fair argument supports a finding
of increased fire risks as a result of the monopole and antenna, the Court will grant the
writ on this issue.

1 Conditional Use Permit and Major Variance


2 Petitioner asserts that the counties findings that the Project has adequate access
3 and is consistent with the general and community plans and conditions of approval
4 provide adequate protection are not supported by substantial evidence. It basically
5 repeats its arguments regarding the 14 percent grade with respect to fire vehicle
6 access, consistency with the applicable County General Plan and Oak Glen Community
7 Plan, and increased fire hazards. However, these issues already have been discussed
8 and several have been determined sufficient to grant the petition based on the CEQA
9 issues. Therefore, these issues will not be further analyzed for purpose of the CUP and
10 Major Variance, because a different standard of review applies – i.e. not the fair
11 argument standard that applies to Petitioner’s evidence but a substantial evidence
12 argument in favor of the County’s decision.

13 Finally, Petitioner argues that the Project violates the County Development Code
14 with respect to fire fighting vehicles having to have adequate access to the development
15 perimeter, citing County Development Code § 82.13.060(e). As previously discussed,
16 Petitioner does not adequately address the exception that appears to exist at §
17 82.13.090. Therefore, this argument will not be addressed any further.

18 DISPOSITION

19 Grant the writ petition to vacate approval of the subject mitigated negative
20 declaration, conditional use permit, and major variance. Require the County to
21 undertake an EIR on the proposed project. The stay of on-site construction activity
22 previously entered by this Court shall remain in effect pending further order of this
23 Court.

24 Dated this 1 of October 2013.

25
26 
27 _____
28 DONALD R. ALVAREZ
Judge of the Superior Court

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN BERNARDINO
SAN BERNARDINO DISTRICT, CIVIL DIVISION

TITLE OF CASE (ABBREVIATED): In the Matter of

CITIZENS FOR THE PRESERVATION OF RURAL LIVING
V
COUNTY OF SAN BERNARDINO

CASE NUMBER: CIVDS 1213273

DECLARATION OF SERVICE BY MAIL

My business address is: San Bernardino Superior Court, 303 West Third Street, San Bernardino, California 92415.

I hereby declare that I am a citizen of the United States, over the age of 18, employed in the above-named county, and not a party to nor interested in this proceeding. On 10-2-13, I deposited in the United States mail at San Bernardino, California, a sealed envelope (postage prepaid) which contained a true copy of the attached:

NAME OF DOCUMENT:

RULING ON PETITION FOR WRIT OF MANDATE

which was addressed as follows:

Name and Address of Persons Served:

Chatten-Brown & Carstens LLP
2200 Pacific Coast Highway, Suite 318
Hermosa Beach, CA 90254

Bart W. Brizzee
Deputy County Counsel
385 North Arrowhead Avenue, 4th Floor
San Bernardino, CA 92415-0140

Greg Ramirez
Myers, Widders, Gibson, Jones & Feingold
5425 Everglades Street
Ventura, CA 93003

Jennifer Guenther
Gresham Savage
550 East Hospitality Lane, Suite 300
San Bernardino, CA 92408

At the time of mailing this notice there was regular communication between the place of mailing and the place(s) to which this notice was addressed.

I declare under penalty of perjury the foregoing to be true and correct.

DATED Oct 2, 2013

by Alvina J Hollensbe
ALVINA J HOLLENSBE
Administrative Assistant II