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1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 **ARTHUR FIRSTENBERG,**

3 Petitioner-Appellant,

4 v.

No. 33,441

5 **CITY OF SANTA FE, a municipality,**
6 **and AT&T MOBILITY SERVICES, LLC,**

7 Respondents-Appellees.

8 **APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY**
9 **Sarah M. Singleton, District Judge**

10 Arthur Firstenberg
11 Santa Fe, NM

12 Pro Se Appellant

13 City of Santa Fe
14 Marcos D. Martinez
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16 for Appellee City of Santa Fe

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3 for Appellee AT&T Mobility Services, LLC

4 **MEMORANDUM OPINION**

5 **SUTIN, Judge.**

6 {1} Petitioner Arthur Firstenberg filed a petition for a writ of mandamus seeking
7 enforcement of a provision of the Santa Fe City Code (the Code) that Petitioner
8 interpreted to require AT&T Mobility Services, LLC (AT&T) to apply for a special
9 exception from the City of Santa Fe’s Board of Adjustment before broadcasting “3G”
10 signals instead of “2G” signals from its Santa Fe base stations. After issuing an
11 alternative writ of mandamus, requiring the City of Santa Fe (the City) to either
12 commence enforcement proceedings against AT&T or to show cause why it had not
13 done so, and after considering Petitioner’s and the City’s (joined by AT&T) respective
14 arguments, the district court denied the petition. Petitioner appeals the district court’s
15 decision to deny his petition for a writ of mandamus, raising a number of arguments
16 in support of his request that this Court reverse the district court’s decision.

17 {2} We hold that Petitioner failed to meet the mandamus requirement of
18 demonstrating that the City had a clear-cut mandatory duty to require AT&T to apply
19 for a new special exception before emitting 3G signals from its Santa Fe base towers,
20 and we affirm the district court’s denial of his petition. Because we resolve

1 Petitioner’s appeal on that basis, we do not consider Petitioner’s various federal
2 statutory and constitutional arguments by which he attempts to support his argument
3 regarding the City’s duty. Additionally, we reject Petitioner’s argument that the
4 district court’s decision was marred by unethical judicial conduct that resulted in a due
5 process violation.

6 **BACKGROUND**

7 {3} Petitioner sought a writ of mandamus requiring the City to enforce the then-
8 effective version of the Code, Santa Fe, N.M, City Code ch. 14, art. 14, § 14-
9 3.6(B)(4)(b) (2001, amended 2011)¹. The at-issue ordinance, Chapter 14, Article 14,
10 constitutes the City’s “Comprehensive Land Development Ordinance” that applies “to
11 all land, buildings[,] and other structures, and their uses, located within the corporate
12 limits of Santa Fe[.]” *See* Santa Fe, N.M., City Code § 14-1 (2011) (editor’s note);
13 § 14-1.6 (emphasis omitted). Chapter 14 of the Code is governed by a “general plan”
14 that is “the basic policy guide for the administration of Chapter 14[,]” and the general

15 ¹ Section 14-3.6(B)(4)(b) (2001) and other related provisions of the Code have
16 since been modified. Although some modifications were made prior to the district
17 court’s decision in this matter, neither party argued below nor do they argue on appeal
18 that the modifications render Petitioner’s appeal moot. As did the district court, we
19 limit our discussion to the then-applicable Code provisions. *See State ex rel. Edwards*
20 *v. City of Clovis*, 1980-NMSC-039, ¶¶ 5-7, 94 N.M. 136, 607 P.2d 1154 (stating that
21 “a [c]ity cannot, by enacting an ordinance, affect or change what would be the result
22 of a pending [mandamus] action . . . based upon valid ordinances existing at the time
23 of the application [for a writ of mandamus]”).

1 plan “serves as the statement of goals, recommendations[,] and policies guiding the
2 development of the [City’s] physical environment[.]” Santa Fe, N.M., City Code
3 § 14-1.3(A) (emphasis omitted); § 14-1.5 (emphasis omitted).

4 {4} Chapter 14 of the Code contains specific regulations governing the physical
5 placement and the physical appearance of telecommunication facilities. *See* Santa Fe,
6 N.M., City Code § 14-6.1(E) (2001, amended 2011). Under the at-issue version of the
7 Code, when a telecommunications company, such as AT&T, sought to place a
8 telecommunication facility in a physical location not specifically authorized in
9 Chapter 14, it was required to seek a “special exception” from the Board of
10 Adjustment for such placement. *See* § 14-6.1(E)(6)(a)(i) (2001). AT&T acquired an
11 unspecified number of special exceptions pursuant to which it operated “cellular
12 phone base stations” within the City.

13 {5} When Petitioner filed his petition for a writ of mandamus in December 2010,
14 Section 14-3.6(B)(4)(b) (2001) provided:

15 The special exceptions listed in this chapter, when granted, are
16 considered granted for a specific use and intensity, any change of use or
17 more intense use shall be allowed only if such change is approved by the
18 Board of Adjustment under a special exception.

19 {6} In his petition, Petitioner asserted that the cellular phone base stations that
20 AT&T operated within the City pursuant to special exceptions emitted a 2G (second
21 generation) signal until November 15, 2010, on which date AT&T began emitting 3G

1 (third generation) signals from those base stations. According to Petitioner, the result
2 of AT&T switching from 2G to 3G signals was a vast increase in “the bandwidth of
3 their radio emissions, as well as” an increase in the “average strength of their radio
4 emissions and their capacity to handle voice and data traffic from cell phones and
5 Smart Phones in Santa Fe.” Petitioner argued that “[i]ncreasing the radio emissions
6 and capacity of base stations constitutes a change in the intensity of use” that required
7 the City to apply for a new special exception under Section 14-3.6(B)(4)(b) (2001).
8 Petitioner argued further that owing to his disability (electromagnetic
9 hypersensitivity), which requires him to avoid exposure to radio-frequency radiation
10 from cell phones, cell towers, and other sources, he was beneficially interested in the
11 enforcement of Section 14-3.6(B)(4)(b) (2001).

12 {7} Prior to filing his petition for a writ of mandamus, Petitioner attended a
13 November 17, 2010, public hearing before the City’s Board of Adjustment (the Board)
14 pertaining to AT&T’s request to perform maintenance and repair at two of its base
15 stations. Although the maintenance and repair at issue in the public hearing was
16 unrelated to AT&T’s switch from 2G to 3G (which had occurred two days prior to the
17 public hearing), Petitioner and others, who also suffer from electromagnetic
18 hypersensitivity, attended the hearing and raised the 2G-to-3G issue as it related to
19 their disability in an effort to persuade the City to require AT&T to apply for a new

1 special exception for its switch to 3G. Petitioner and his fellow sufferers were
2 unsuccessful in their presentation to the Board, however, because the Board concluded
3 that it lacked “jurisdiction” to consider objections to an increase in radio-frequency
4 emissions.

5 {8} Following that hearing, Petitioner filed his petition for a writ of mandamus. In
6 his petition, Petitioner claimed that mandamus was appropriate because he had “no
7 plain, speedy[,] and adequate remedy in the ordinary [course] of law” to enforce what
8 he interpreted as the City’s “duty” to require AT&T to request a special exception
9 pursuant to Section 14-3.6(B)(4)(b) (2001) before emitting 3G signals. *See* NMSA
10 1978, § 44-2-5 (1915) (stating that a writ of mandamus “shall not issue in any case
11 where there is a plain, speedy[,] and adequate remedy in the ordinary course of law”).

12 {9} The district court issued an alternative writ of mandamus, requiring the City to
13 either require AT&T to “discontinue its 3G broadcasts within the City . . . within
14 [thirty] days” and require it to submit an application for a special exception “for each
15 base station from which it propose[d] to broadcast [3G] signals,” or that the City
16 “show cause . . . why it ha[d] not done so.”² Having considered the parties’ respective

16 ² After the district court issued its alternative writ of mandamus, AT&T removed the
17 case to federal court alleging federal question jurisdiction. The United States District Court
18 granted AT&T’s motion to dismiss Petitioner’s petition, but the Tenth Circuit Court of
19 Appeals reversed that dismissal on the basis of a lack of federal jurisdiction over a claim that
20 arose under a city ordinance. *See Firstenberg v. City of Santa Fe*, 696 F.3d 1018, 1019-21
21 (10th Cir. 2012). The matter was remanded to the district court, the proceedings in which

1 arguments in response to its alternative writ of mandamus, the district court concluded
2 that Section 14-3.6(B)(4)(b) (2001) was not violated by AT&T's switch from 2G to
3 3G signals without first obtaining a special exception; accordingly, the district court
4 denied the petition. While the district court concluded that "Petitioner's claim must
5 be rejected" for the foregoing reason, it went further and found that Petitioner's claim
6 was preempted by federal law, that Petitioner's argument related to the Americans
7 with Disabilities Act failed to state a claim, that Petitioner's equal protection argument
8 failed to establish that his right to equal protection was violated, and that Petitioner
9 had not been denied due process.

10 {10} On appeal from the district court's decision, Petitioner argues that it was
11 unnecessary and improper for the district court, in resolving the mandamus issue, to
12 have reached the issues implicating federal law; he nevertheless addresses the court's
13 rulings, arguing that the court erred in each of its determinations. Because we
14 conclude that the district court properly denied Petitioner's petition for a writ of
15 mandamus based on the conclusion that Section 14-3.6(B)(4)(b) (2001) was not

16 are the subject of this appeal. We do not further address the federal proceedings in this
17 Opinion.

1 violated by AT&T’s switch from 2G to 3G, which issue resolves the mandamus issue
2 before us, we do not consider Petitioner’s remaining arguments³.

3 **DISCUSSION**

4 {11} We review the district court’s decision to deny a petition for a writ of
5 mandamus for an abuse of discretion. *See FastBucks of Roswell, N.M., LLC v. King*,
6 2013-NMCA-008, ¶ 7, 294 P.3d 1287 (“While mandamus procedure is technical in
7 nature and closely regulated by statute, the writ is an extraordinary remedy, and
8 district courts retain discretion when ruling on the propriety of issuing the writ in any
9 given case.” (alteration, internal quotation marks, and citations omitted)). A district
10 court decision that is based on a misapprehension of a law (or an ordinance),
11 constitutes an abuse of discretion. *See Parkview Cmty. Ditch Ass’n v. Peper*, 2014-
12 NMCA-049, ¶ 23, 323 P.3d 939; *see also City of Albuquerque v. Ryon*, 1987-NMSC-
13 121, ¶ 6, 106 N.M. 600, 747 P.2d 246 (recognizing that a city ordinance that is
14 promulgated pursuant to statutory authority has the “force of law”). Because the

18 ³ Petitioner’s remaining arguments relate to whether, pursuant to various
19 federal laws, the City of Santa Fe must regulate the emission of radio-frequency
20 waves. Petitioner’s petition seeking a writ of mandamus was based only on the
16 limited question whether a particular provision of the Code in fact regulates radio-
17 frequency emissions. Our conclusion that it does not resolves the mandamus issue.
18 The broader issue whether, in accord with federal law, the City must or should
19 regulate radio-frequency emissions has no bearing on the sole question in this appeal,
20 which is whether the Code, as written, regulates those emissions.

1 mandamus action concerned a city ordinance, this Court, as well as the district court,
2 must give deference to the city’s interpretation of its own ordinance. *See Hyde v. Taos*
3 *Mun.-Cnty. Zoning Auth.*, 1991-NMCA-114, ¶ 3, 113 N.M. 29, 822 P.2d 126.

4 {12} “In order for mandamus to issue, the act to be compelled must be ministerial,
5 constituting a nondiscretionary duty which the respondent is required to perform.”
6 *Hart v. City of Albuquerque*, 1999-NMCA-043, ¶ 17, 126 N.M. 753, 975 P.2d 366
7 (alteration, internal quotation marks, and citation omitted). A nondiscretionary
8 ministerial duty is one that the respondent is “required to perform by direction of
9 law[.]” *Id.* (internal quotation marks and citation omitted). In the absence of a “clear-
10 cut mandatory duty” to perform the at-issue action, a writ of mandamus is not
11 appropriate. *See State ex rel. Whitehead v. Vescovi-Dial*, 1997-NMCA-126, ¶ 4, 124
12 N.M. 375, 950 P.2d 818.

13 {13} Because Petitioner seeks reversal of the district court’s decision denying his
14 petition for a writ of mandamus, the issue in this case boils down to whether AT&T
15 violated the applicable version of Section 14-3.6(B)(4)(b) (2001) by emitting 3G
16 instead of 2G signals without first obtaining a new special exception from the Board.
17 If so, reversal is in order. If not, the district court properly denied Petitioner’s petition
18 for a writ of mandamus.

1 {14} The district court’s finding that AT&T’s emission of 3G signals from its Santa
2 Fe base stations did not violate Section 14-3.6(B)(4)(b) was based on two grounds.
3 First, the court found that Petitioner “failed to identify anything in AT&T’s existing
4 special exceptions that limited AT&T’s use of its wireless equipment to 2G signals.”
5 Second, the district court gave deference to and agreed “with the City’s interpretation
6 of its Code, under which the level of [radio-frequency] emissions from wireless
7 telecommunications facilities are not an aspect of the ‘intensity’ of land use regulated
8 by the City under the Code.” We consider each of the district court’s findings in turn.

9 {15} Petitioner does not attack the district court’s finding that the special exceptions
10 pursuant to which AT&T operated its Santa Fe base stations did not limit AT&T to
11 emitting a 2G signal. Nor, on this record, could he reasonably do so. As stated by the
12 district court, “the only evidence in the record regarding permitted levels of [radio-
13 frequency] emissions” is from a 2008 memorandum to the Board from Daniel
14 Esquibel, Land Use Planner Senior. Mr. Esquibel recommended approving AT&T’s
15 requested special exception subject to the condition, among others, that “following the
16 construction of the facility [AT&T] shall provide certified documentation . . . that the
17 telecommunication facility has been inspected for compliance with all [Federal
18 Communications Commission (FCC)] existing [radio-frequency] emissions standards
19 including but not limited to limiting human exposure to radio[-]frequency energy and

1 structural integrity.” The Board’s approval of the 2008 special exception did not
2 qualify its approval by placing a limit on or even mentioning radio-frequency
3 emissions, nor did it mention the terms “2G” or “second generation.”

4 {16} In sum, the only apparent limitation on AT&T’s radio-frequency emissions
5 anticipated in the special exception was that AT&T must comply with FCC standards.
6 Petitioner did not argue below nor does he argue on appeal that AT&T’s radio-
7 frequency emissions fail to comply with FCC standards. In the absence of any record
8 evidence indicating that AT&T’s special exception was otherwise limited to any
9 “intensity” of radio-frequency emissions and in the absence of any indication that the
10 special exception limited AT&T to emission of a 2G signal, Petitioner’s argument
11 that AT&T exceeded its authorization under the 2008 or any other special exception
12 is unavailing.

13 {17} Petitioner also argues that the district court’s conclusion that radio-frequency
14 emissions are not regulated by the Code was “clearly erroneous.” We disagree. The
15 Code does not reflect that the Board or the City had a clear-cut mandatory duty to
16 regulate radio-frequency emissions. *Vescovi-Dial*, 1997-NMCA-126, ¶4 (stating that
17 mandamus is not appropriate unless there is a “clear-cut mandatory duty” to perform
18 the at-issue action). While Petitioner has attempted to demonstrate otherwise by
19 relying on pieced-together selections of text from various provisions of the Code and

1 employing false logic to attempt to persuade this Court that a special exception is a
2 permit to emit a specific amount of radio-frequency radiation, we are not persuaded.

3 {18} Section 14-6.2(E) of the applicable version of the Code, governing
4 “Telecommunication Facilities” reflects that the Code regulated the construction,
5 placement, and physical characteristics of towers and antennas. *See* Santa Fe, N.M,
6 City Code § 14-6.2(E)(3) (2001, amended 2011) (stating the general requirements of
7 the telecommunications ordinances pertaining, among other things, to the lot size,
8 aesthetics, lighting, building and safety codes, sign placement, property maintenance,
9 landscaping, and dimensions of the towers or antennas). Notably absent from these
10 provisions was any stated limit on or even any mention of the term “radio-frequency.”

11 *Id.*

12 {19} Likewise, the Code’s provisions related specifically to “special exceptions” did
13 not purport to govern, regulate, or in any way limit the intensity of radio-frequency
14 emissions. *See generally* § 14-6.2(E)(6) (2001). Rather, the obvious purpose of a
15 special exception was to ensure that telecommunication towers and antennas that were
16 constructed in zoning districts, where they were otherwise not permitted, were
17 constructed pursuant to the Board’s approval and pursuant to certain physical,
18 geographic, and aesthetic specifications. *See, e.g.,* § 14-6.2(E)(6)(a)(i) (2001) (stating
19 that “[a] special exception shall be required for the construction and placement of all

1 towers and antenna in all zoning districts unless said construction or placement is
2 otherwise permitted or administratively approved”); § 14-6.2(E)(6)(a)(iii) (2001)
3 (stating the height specifications in certain zoning districts); § 14-6.2(E)(6)(a)(ix),
4 (xi), (xii) (2001) (governing placement of telecommunications equipment within
5 historical districts and governing the fencing, walls, and landscaping requirements).

6 {20} In sum, the Code’s provisions governing telecommunication facilities,
7 generally, and special exceptions, specifically, do not demonstrate that the Code
8 purported to regulate radio-frequency emissions in any manner, including their
9 “intensity.” Under these circumstances, we conclude that it is appropriate to defer to
10 the City’s conclusion that “nothing in the Code required the City to regulate AT&T’s
11 alleged increase in [radio-frequency] emissions from its existing facilities.” Because
12 the district court reached the same conclusion when it found that radio-frequency
13 “emissions are not regulated under [the Code’s] provisions[,]” we agree with the
14 district court’s determination in that regard.

15 {21} We conclude that the district court did not abuse its discretion by denying
16 Petitioner’s petition for a writ of mandamus. Petitioner failed to demonstrate that
17 AT&T’s special exception limited its emission of radio-frequency radiation to a
18 specific level or that AT&T exceeded any such limit by emitting a 3G instead of a 2G
19 signal from its Santa Fe base stations. Furthermore, the relevant provisions of the

1 Code comport with the City’s interpretation of them, leading us to conclude that the
2 City’s interpretation deserves this Court’s and the district court’s deference. *See*
3 *Hyde*, 1991-NMCA-114, ¶¶ 3, 5 (stating that deference is owed to a city’s
4 interpretation of its own ordinance, provided that it is reasonable). Because Petitioner
5 has failed to demonstrate that the City had a “clear-cut mandatory duty” to require
6 AT&T to obtain a new special exception before emitting 3G signals, the writ of
7 mandamus was properly denied. *Viscovi-Dial*, 1997-NMCA-126, ¶ 4 (stating the
8 standard by which the propriety of granting a writ of mandamus is measured).

9 {22} Finally, we address Petitioner’s argument that “the district court violated
10 judicial ethics and due process by adopting verbatim the arguments in [the City’s and
11 AT&T’s] ex parte brief.” Without providing any citations to the record in support of
12 his argument, Petitioner claims that the district court requested the parties to submit
13 a “round of briefing, styled as ‘proposed decisions,’ and adopted as its opinion the
14 brief of [the City and AT&T], which was submitted ex parte.” *See* Rule 12-213(A)(4)
15 NMRA (requiring an appellant to provide record proper citations in support of each
16 argument). Petitioner claims that, as a result, his right to due process was violated,
17 and he argues further that this alone is a basis for reversal. We disagree.

18 {23} The City and AT&T argue that, as a matter of inadvertence, it failed to serve
19 Petitioner with a copy of its proposed decision until the day after it was submitted to

1 the district court. Petitioner concedes that he received that copy, and in his reply brief,
2 he concedes that he was not prejudiced by the “ex parte submission[.]” Rather, he
3 argues that he was prejudiced by the district court’s “almost . . . verbatim” adoption
4 of the City’s and AT&T’s proposed decision that caused the prejudice.

5 {24} Absent a showing that the district court “abdicated its judicial responsibility[.]”
6 its adoption of a party’s proposed findings of fact and conclusions of law does not
7 constitute error. *Empire W. Cos. v. Albuquerque Testing Labs., Inc.*, 1990-NMSC-
8 096, ¶ 25, 110 N.M. 790, 800 P.2d 725. Petitioner does not demonstrate that the
9 district court abdicated its decision-making responsibility in this case. Furthermore,
10 the record belies Petitioner’s assertion that the district court adopted the City’s and
11 AT&T’s proposed decision verbatim. Instead, the record reveals that while the district
12 court incorporated portions of the proposed decision in its order, the order was
13 formulated by the district court and was ultimately the product of the court’s
14 independent decision-making process. Petitioner fails to demonstrate that he was
15 prejudiced by the district court’s reliance on the City’s and AT&T’s proposed
16 decision, and his mere assertion of prejudice is insufficient to garner reversal. *See In*
17 *re Convisser*, 2010-NMSC-037, ¶ 24, 148 N.M. 732, 242 P.3d 299 (recognizing that
18 a mere assertion of prejudice, without demonstrating how the result would have been
19 different but for the alleged error, is not a showing of prejudice).

1 **CONCLUSION**

2 {25} We affirm.

3 {26} **IT IS SO ORDERED.**

4

5

JONATHAN B. SUTIN, Judge

6 **WE CONCUR:**

7

MICHAEL D. BUSTAMANTE, Judge

9

10 **CYNTHIA A. FRY, Judge**