

PERMIT APPEAL
of
Development Exception Denial and Use Permit Condition
(V06-012 and CP06-021)

to
The City of San Jose, City Council

by
The Applicant, Crown Castle USA

October 12, 2006

I. INTRODUCTION

The Applicant, Crown Castle USA, (“Crown Castle”), owner of the monopole, hereby submits this Permit Appeal Brief in support of its proposed Development Exception (File No. VO6-012), and corresponding conditions in its Use Permit (File No. CP06-021), to allow its existing wireless telecommunications monopole at 1632 Tully Road (Parcel Number 670-02-061) to remain at 80-feet in height.

On September 27, 2006, the City of San Jose Planning Commission (the “Commission”) denied Crown Castle’s request for a 15-foot exception to the 65-foot maximum height restriction, but granted a Use Permit on the condition that Crown Castle reduce the monopole to 65-feet.¹ Crown Castle appeals this decision on the basis that denial of the Development Exception is inconsistent with the City of San Jose’s zoning regulations (the “City”) and wireless policy, as well as City’s recent approval of a collocation by a telecommunications carrier.²

II. BRIEF HISTORY OF THE SITE

A brief history of the site at issue is as follows: A 45-foot monopole was originally approved by the City in 1990. In 1994, the Planning Commission found the pole complied with City Council’s Land Use Policy (No. 6-20) for Wireless Communication Facilities, and approved a height increase to 80-feet. The Commission noted that the 80-foot pole would be “compatible with the surrounding commercial uses” and that “there are no alternative sites available.” (Resolution No. 94-57). Those findings were reiterated in 1996 when the Planning Commission unanimously approved a five-year extension to the existing permit. In August of 2001, following

¹ The Commission’s Decision Letter dated October 2, 2006 and attachments refer only to the Development Exception (File No. V06-012) or the “Variance.” However, the Commission also heard and affirmed Staff’s recommendations regarding Crown Castle’s Conditional Use Permit (CP06-021). Although the Permit was granted, Crown Castle takes issue with the Conditions of Approval stemming from the denial of its Development Exception, that require Crown Castle to reduce its monopole to 65-feet in height and 18 inches in baseline diameter (from its existing 23 inches in diameter).

² Based on the Commission’s comments at the hearing, Crown Castle believes that the Commission would prefer that City Council exercise its authority to review the Exception as the legislative body ultimately responsible for balancing the tension between height requirements and City’s telecommunications policy, particularly in light of the fact that this longstanding facility was previously permitted to operate at 80-feet.

acquisition of rights to the monopole, Crown Castle submitted an application to renew the Conditional Use Permit. Crown Castle's application was subsequently withdrawn after a dispute arose concerning the nature and extent of the renewal requirements. After further meetings with Staff, Crown Castle re-submitted its application, which application is the subject of this Appeal.

III. DE NOVO REVIEW ON APPEAL

City of San Jose Zoning Ordinance Title 20.100.280, Section 2 dictates that City Council's review of the Appeal shall be *de novo*. Thus, City Council shall review the facts and issues of this matter anew. Although the Municipal Code allows the Commission to grant certain permits without requiring City Council's approval, the Commission serves as an advisory body to City Council, which serves at the appellate body for those decisions.

IV. ISSUES ON APPEAL

Crown Castle requests that City Council overturn the Commission's decision, and grant the Development Exception. Crown Castle submits that the Commission's decision is inconsistent with the City's zoning regulations and policies, including the City's intent to minimize visual impact. Crown Castle further submits that the Commission erred in its finding that granting the Development Exception will impair the utility or value of the adjacent property or general welfare of the neighborhood, and will further impair the integrity and character of the zoning district. These findings were adopted by the Commission despite the fact that no material evidence was submitted by Staff or the public supporting these conclusions.

A. Zoning Regulations.

A Development Exception may be granted to allow for the 80-foot monopole to remain if two findings can be made. Pursuant to Zoning Ordinance 20.100.1320, a Development Exception may be granted if it will not impair (a) the utility or value of adjacent property or the general welfare of the neighborhood, and (b) the integrity and character of the zoning district in which the subject property is situated.

In denying the Development Exception, the Planning Commission affirmed the findings in the Staff Report that the 15-foot Development Exception would impair both of the above factors.³

Regarding the first requirement, the Commission affirmed Staff's assertion that the 80-foot monopole is "highly visible" from residential areas. However, neither the report, nor the Commission cited any evidence supporting this contention. To the contrary, in the 16 years that this monopole has been in existence, there has never been any record of any complaints from residents or businesses, nor did a single person speak out against the monopole at the public hearing, or submit a written objection to the project.

³ Crown Castle also objects to the finding set forth in page 1 of Resolution No. 05-128 which asserts that the Commission gave all persons "full opportunity to be heard and to present evidence and testimony respecting the matter". Crown Castle's and T-Mobile's requests for additional time to make adequate presentation were denied at the hearing of September 27, 2006, thereby preventing a full disposition on the merits.

Further, although Staff and the Commission asserted that the monopole impairs the “integrity” and “character” of the commercial zoning district, Staff provided no evidence that the difference between 65-feet and 80-feet impairs the integrity or character of the commercial area. In fact, Staff provided no evidence as to what constitutes an impairment of integrity or character, nor did they address this critical factor during the course of the Commission’s proceedings.

The Commission’s subjective assessment of the Development Exception criteria can be attributed to its deference to City Council regarding issues of height restrictions and wireless communications policy – as was noted by the Commission’s comments during the September 27 hearing. Thus, Crown Castle respectfully requests that City Council review these criteria as they apply to the telecommunications site at issue, and review the evidence submitted by Crown Castle which support the factors qualifying for the Exception requested here.

As evident from review of Exhibits 1 through 4, (attached hereto) granting a Development Exception is appropriate here. The parcel map (EXHIBIT 1) and road map (EXHIBIT 2) show that the site is located on the border between parking lots for a strip-mall and a United Postal Service near Highway 101, in a busy commercial area unaffected by the insubstantial 15-foot difference in pole height. Photographs of the existing site (EXHIBIT 3) further show that, contrary to Staff’s assertion, the monopole is not “highly visible”, particularly when considering the “slim line” proposals depicted by the photo simulations in EXHIBIT 4. In fact, the monopole is barely visible to the nearest residential areas – and the monopole appears to be level with nearby light poles and palm trees lining Tully Road.

Therefore, maintaining the monopole at its present height cannot reasonably be deemed to impair the surrounding area.

B. Policy 6-20.

City Council’s Land Use Policy (No. 6-20) for Wireless Communications Facilities emphasizes the importance of wireless facilities to the City. Stressing the intent to minimize visual impact potentially caused by such facilities, Policy 6-20 states that collocation of carriers shall be undertaken whenever possible.

Crown Castle acknowledges City Council’s desire to minimize visual impacts potentially caused by telecommunications sites as set forth in Policy No. 6-20. However, the Commission’s denial of Crown Castle’s Development Exception conflicts with such policy by effectively discouraging collocation, which in turn, increases visual impact.

Here, T-Mobile, Cingular, and Modeo desire to collocate onto Crown Castle’s site, a proposal which supports City Council’s policy of reducing impacts. Such plans, however, are contingent on the monopole remaining at its present height. (See proposed collocation depicted in the attached photo simulations and zoning drawings identified as EXHIBITS 4 and 5). Should the monopole be reduced to 65-feet, it is likely that T-Mobile and Cingular will need to construct additional monopoles in the proximate area. This conclusion is supported by the Alternative Site Analysis submitted with Crown’s CUP application, which concludes there are no satisfactory

structures on buildings in this search ring area that can provide the inherent height required to provide adequate wireless service. (See EXHIBIT 6).

Thus, by eliminating 15 feet at the Tully Road monopole, the potential for unwanted, additional impacts becomes self-evident. Wireless carriers who cannot collocate onto the existing facility will be forced to build additional installations in order to bring the same level of wireless service to the area, or provide lesser service to the detriment of the community. In contrast, by allowing the minimal Development Exception requested for this longstanding facility, the City can avoid the potential for increased visual impact caused by multiple sites in the area, and at the same time, obtain the benefits of bringing additional and enhanced wireless services to the community.

Policy 6-20 further declares that San Jose “should have a high level of wireless service available to its residents and businesses in order to meet increasing demands for new and better services” and that the City has a “strong interest in achieving and maintaining a high level of service and substantial competition among service providers.” Since 1996, the Tully Road area has experienced significant growth, producing an even greater demand for wireless services. Crown Castle’s application supports this policy by seeking to bring additional, enhanced wireless services to the area.

In short, granting a Development Exception for the purpose of collocation, (rather requiring installation of additional sites), supports City Council’s desire for premium wireless services, and at the same time, meets the goal of reducing visual impact by allowing collocation onto existing facilities whenever feasible. Taking these competing factors into account, Crown Castle should be allowed the minimal 15 foot Exception requested here, particularly where the monopole has existed at this height for 12 years without incident or complaint. Crown Castle submits that a 15-foot Exception will cause substantially less impact than the prospect of having to construct additional wireless facilities.

C. City’s Approval of T-Mobile Collocation.

Finally, City Council should grant Crown Castle’s Development Exception because the Planning Commission’s denial contradicts the City’s approval of T-Mobile’s collocation project. On September 23, 2005, the City of San Jose granted T-Mobile Permit Number AD05-980, approving of its collocation onto Crown Castle’s monopole. At the Planning Commission hearing on Crown Castle’s Applications, T-Mobile’s representative Toriana Henderson and legal counsel Steve Ledoux testified that T-Mobile has already relied on that approval by making plans to collocate. If the Development Exception is denied by City Council, T-Mobile will either be forced to collocate at a height insufficient to meet its wireless needs, or it will seek out other locations for a monopole. Such alternatives are unfair to T-Mobile and are inconsistent with the City’s wireless policy.

V. CONCLUSIONS

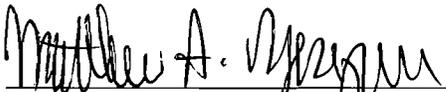
The City has provided a Development Exception process for certain cases where strict adherence to the zoning ordinance and Council policies would result in unintended, negative land use outcomes. Development Exceptions can be granted on a case-by-case basis for projects that meet the two findings, previously referenced herein.

Crown Castle's Tully Road application clearly meets these two findings. The monopole has been in existence for 16 years, including 12 years at its current height. During all these years, the City has no record of public objections to the site, nor did Staff or the Commission offer evidence to the contrary at the September 27, 2006 public hearing.

The Commission's adherence to the letter of the height regulation is inconsistent with the City's Development Exception provisions, its wireless policies and its past decisions. This Appeal provides the opportunity for the City of San Jose to correctly implement its policy where the Commission was reluctant to do so absent City Council's guidance.

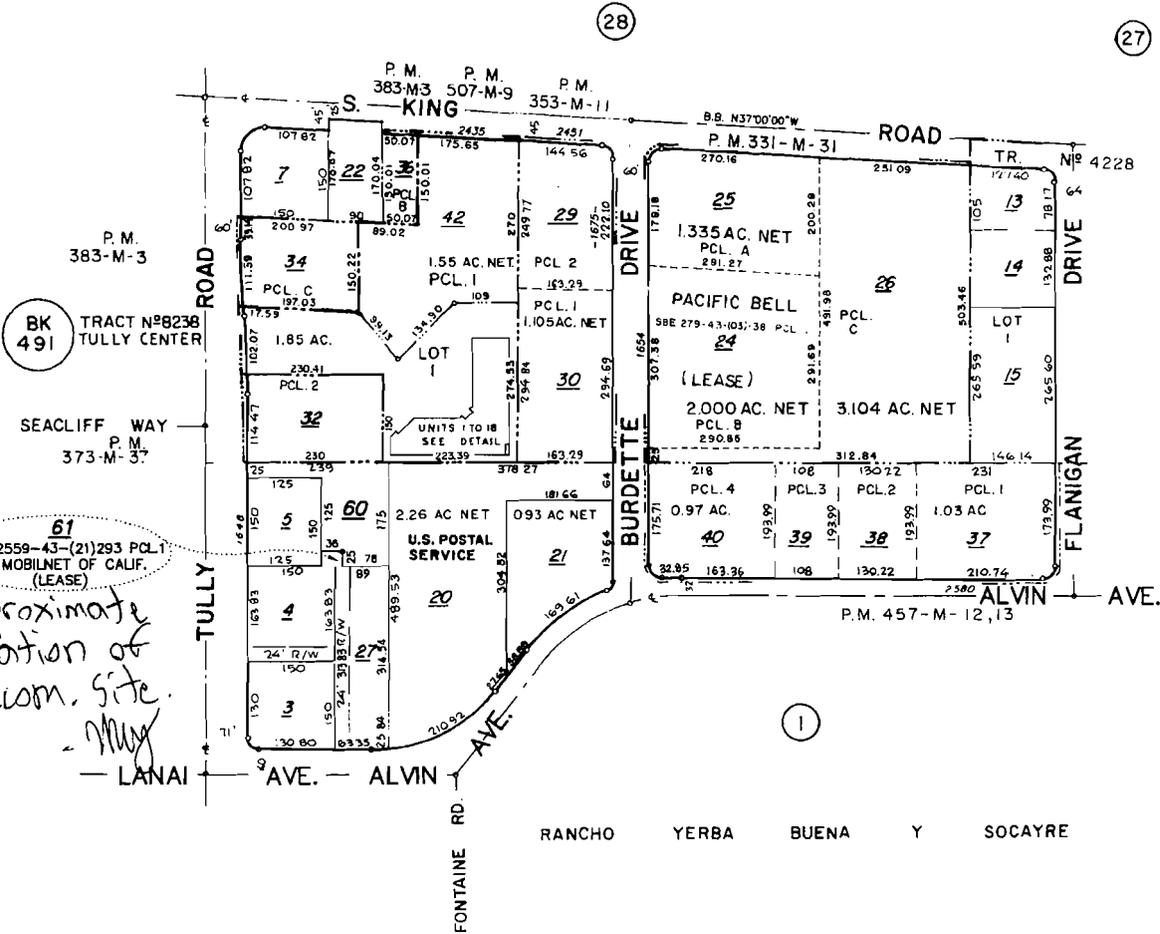
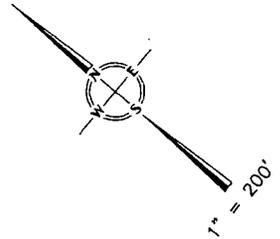
Crown Castle asks City Council to evaluate this telecommunications site in light of the City's regulatory intent and expressed policies that warrant a minor 15-foot height exception. Accordingly, Crown Castle requests City Council to grant its Appeal, overturn the Commission's decision, and approve its proposed Development Exception.

Respectfully Submitted,

BY: 
MATTHEW S. YERGOVICH
FMHC Corporation
(For the Applicant Crown Castle USA)

DATED: October 12, 2006

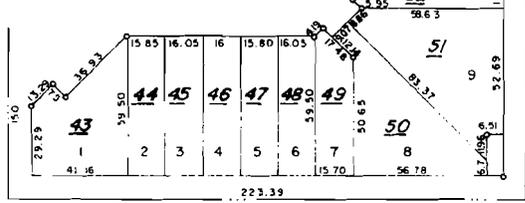
EXHIBIT 1



61
S.B.E. 2559-43-(21)293 PCL. 1
GTE MOBILNET OF CALIF.
(LEASE)
*Approximate location of telecom. site.
- May

33

TRACT No 8238
TULLY CENTER
CONDOMINIUM PLAN
DETAIL 1" = 50'



59	50
59	18
58	17
57	16
56	15
55	14
54	12
53	11
52	10
51	9
50	8
49	7
48	6
47	5
46	4
45	3
44	2
43	1

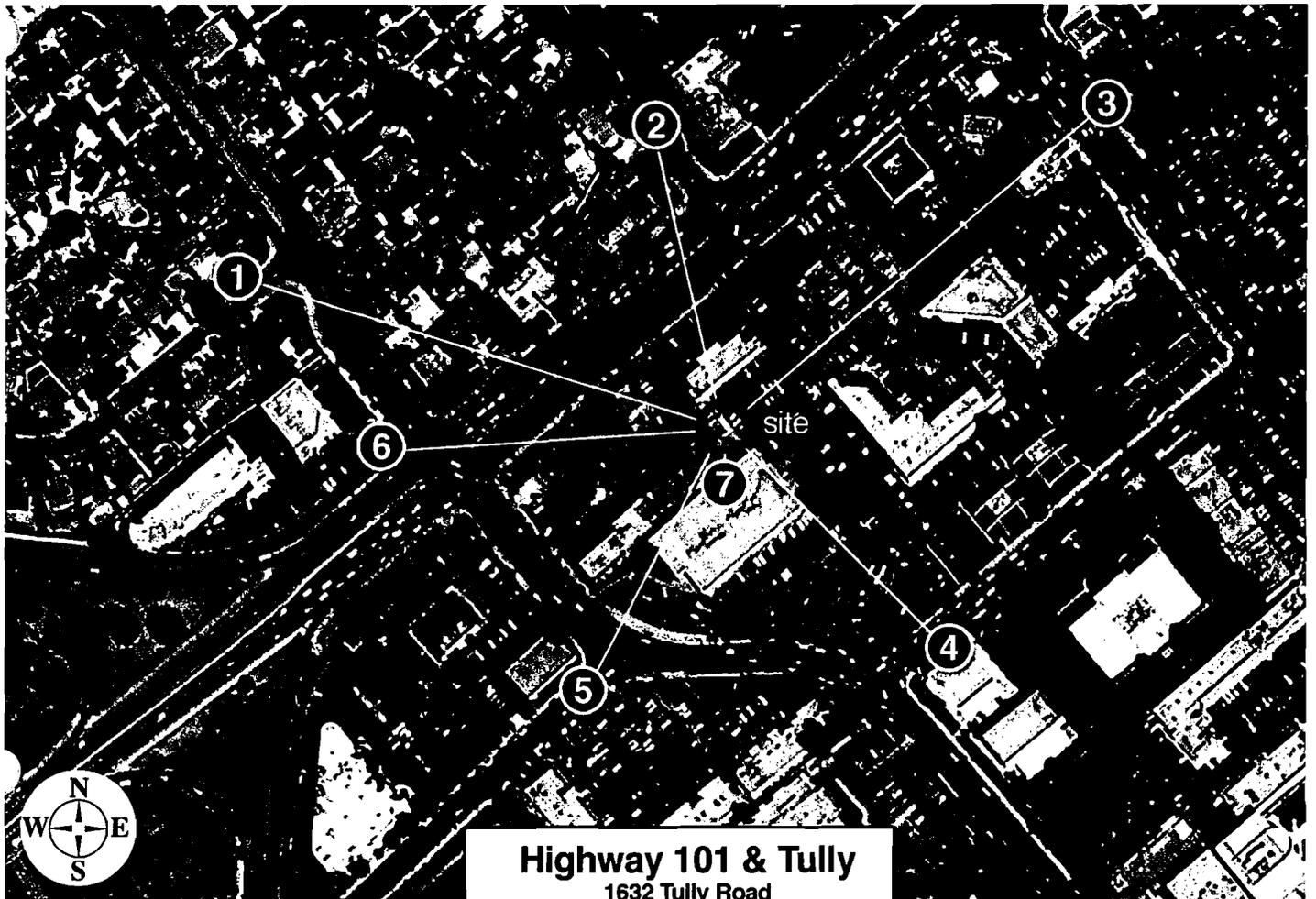
EXHIBIT 2

0 300m
900ft

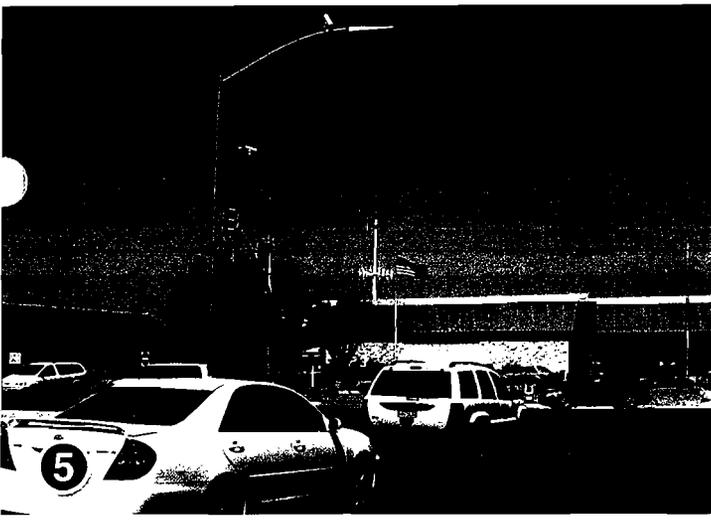
Rold-Hillview
Airport



EXHIBIT 3

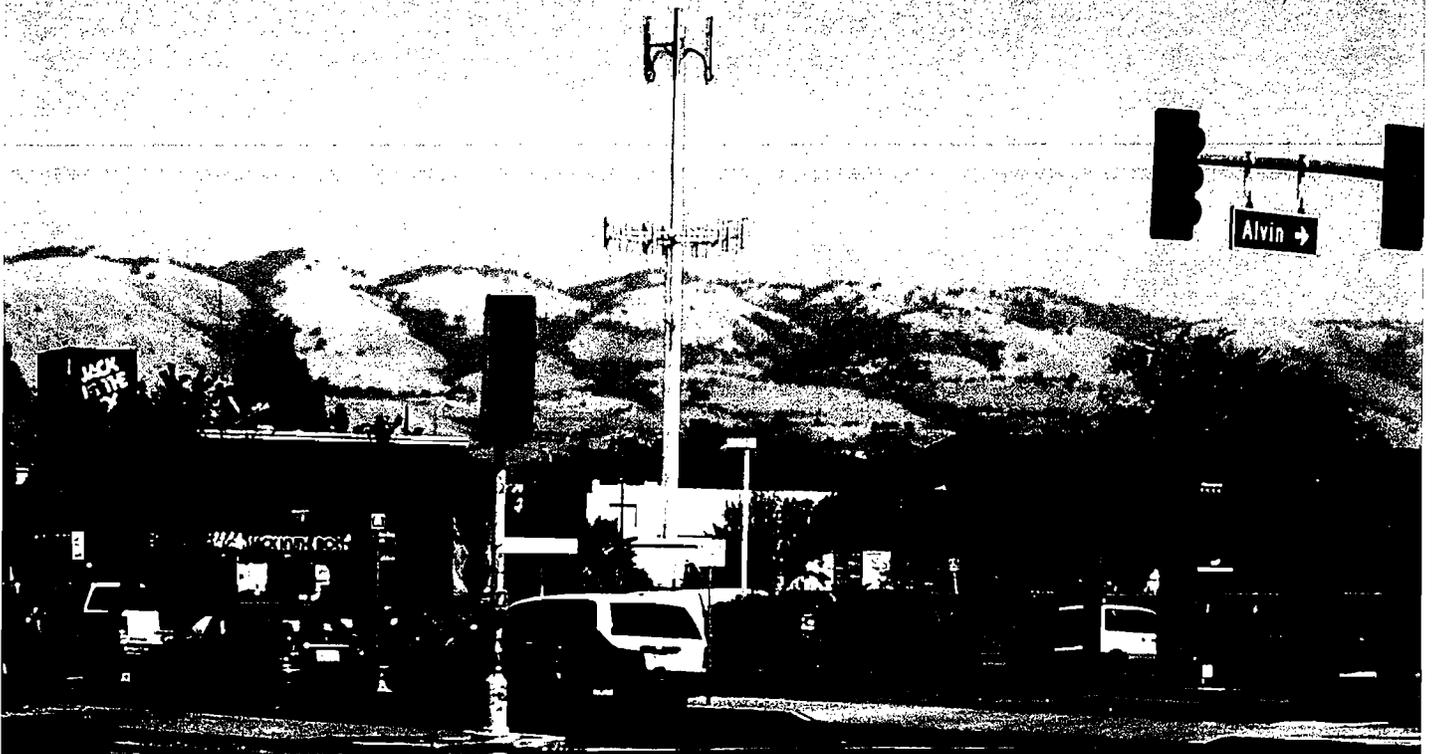


Highway 101 & Tully
1632 Tully Road
San Jose, CA
Site # 815022



Highway 101 & Tully
1632 Tully Road
San Jose, CA
Site # 815022

EXHIBIT 4



Existing

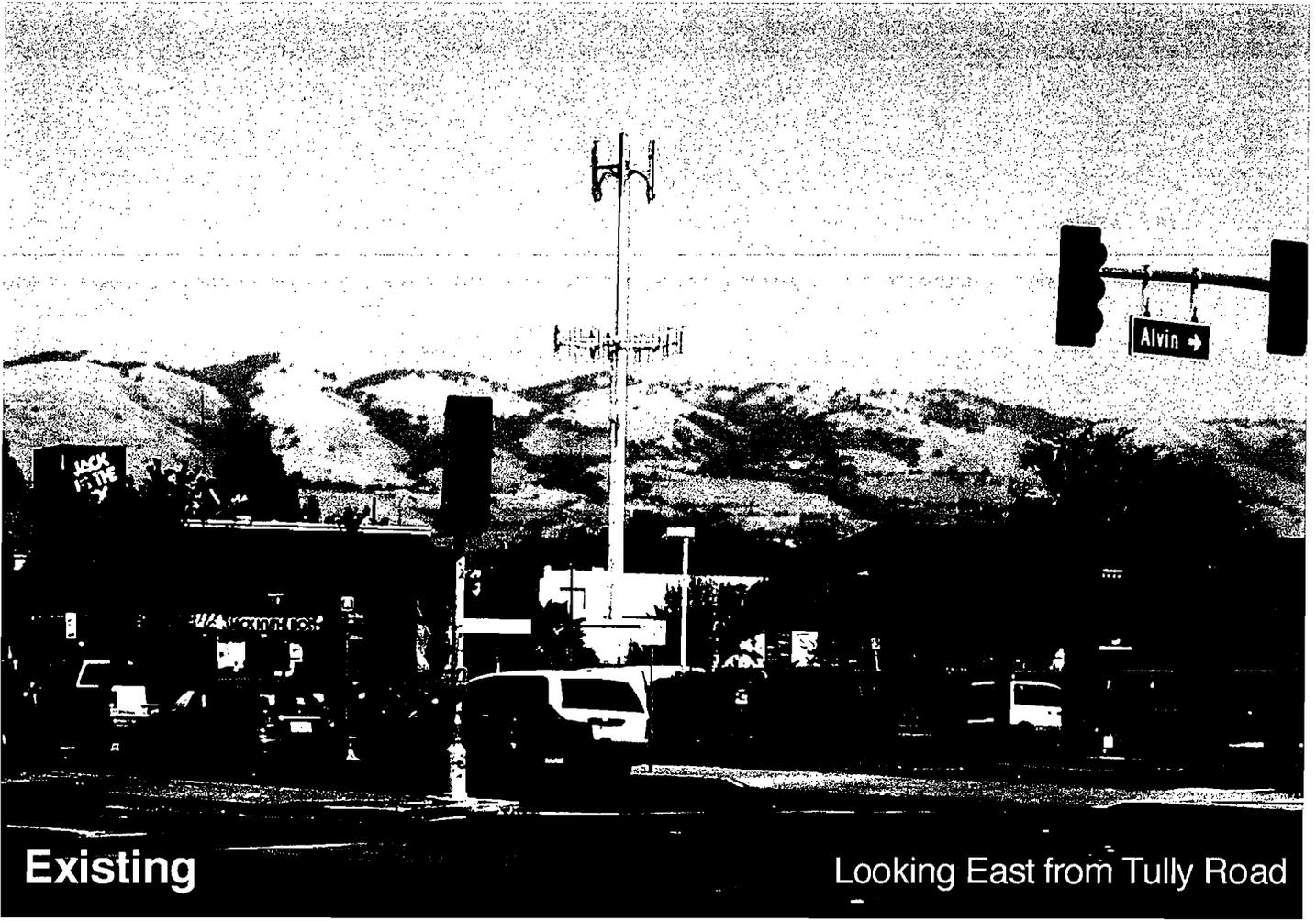
Looking East from Tully Road



Proposed

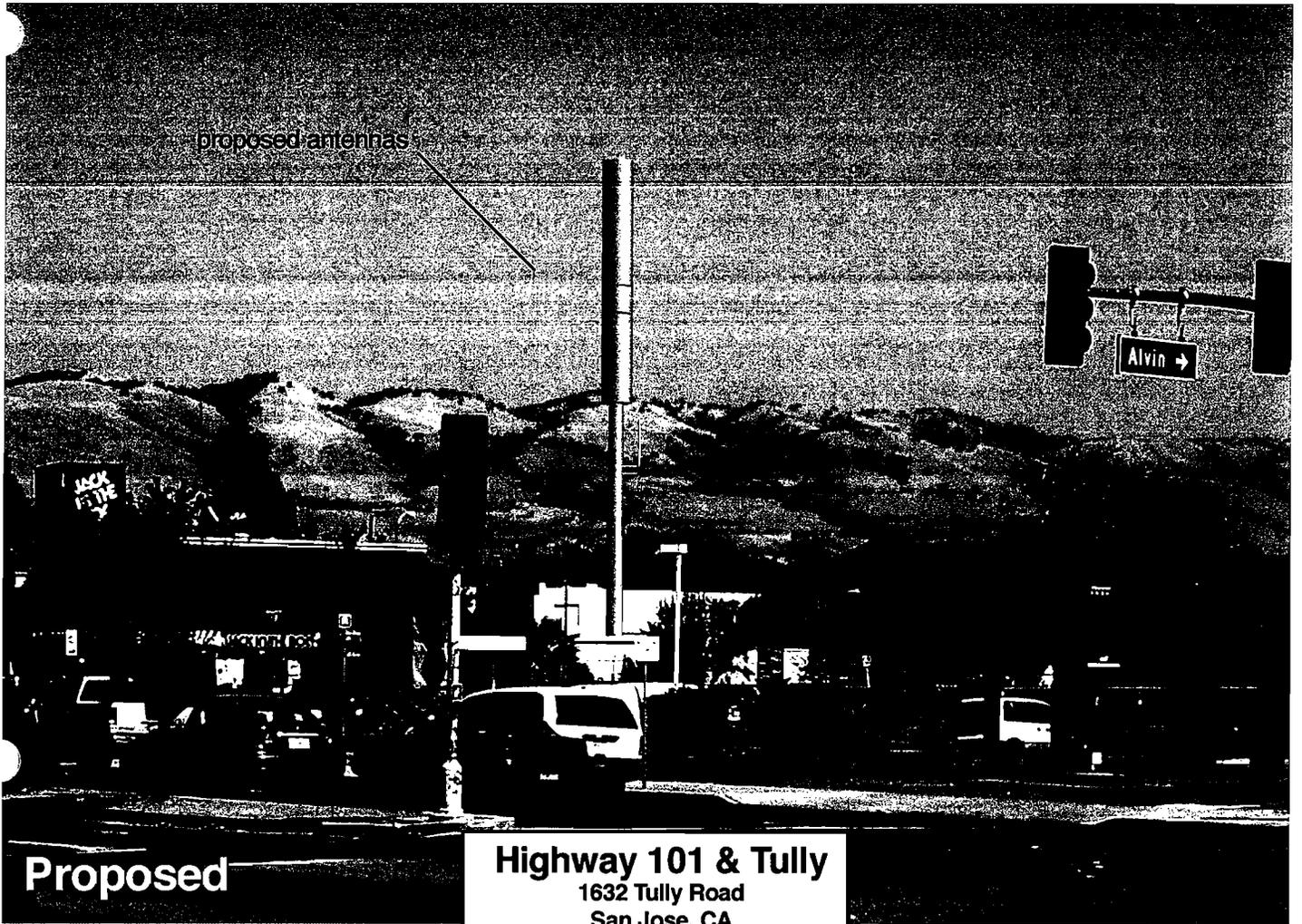
Highway 101 & Tully

1632 Tully Road
San Jose, CA
Site # 815022



Existing

Looking East from Tully Road



proposed antennas

Proposed

Highway 101 & Tully

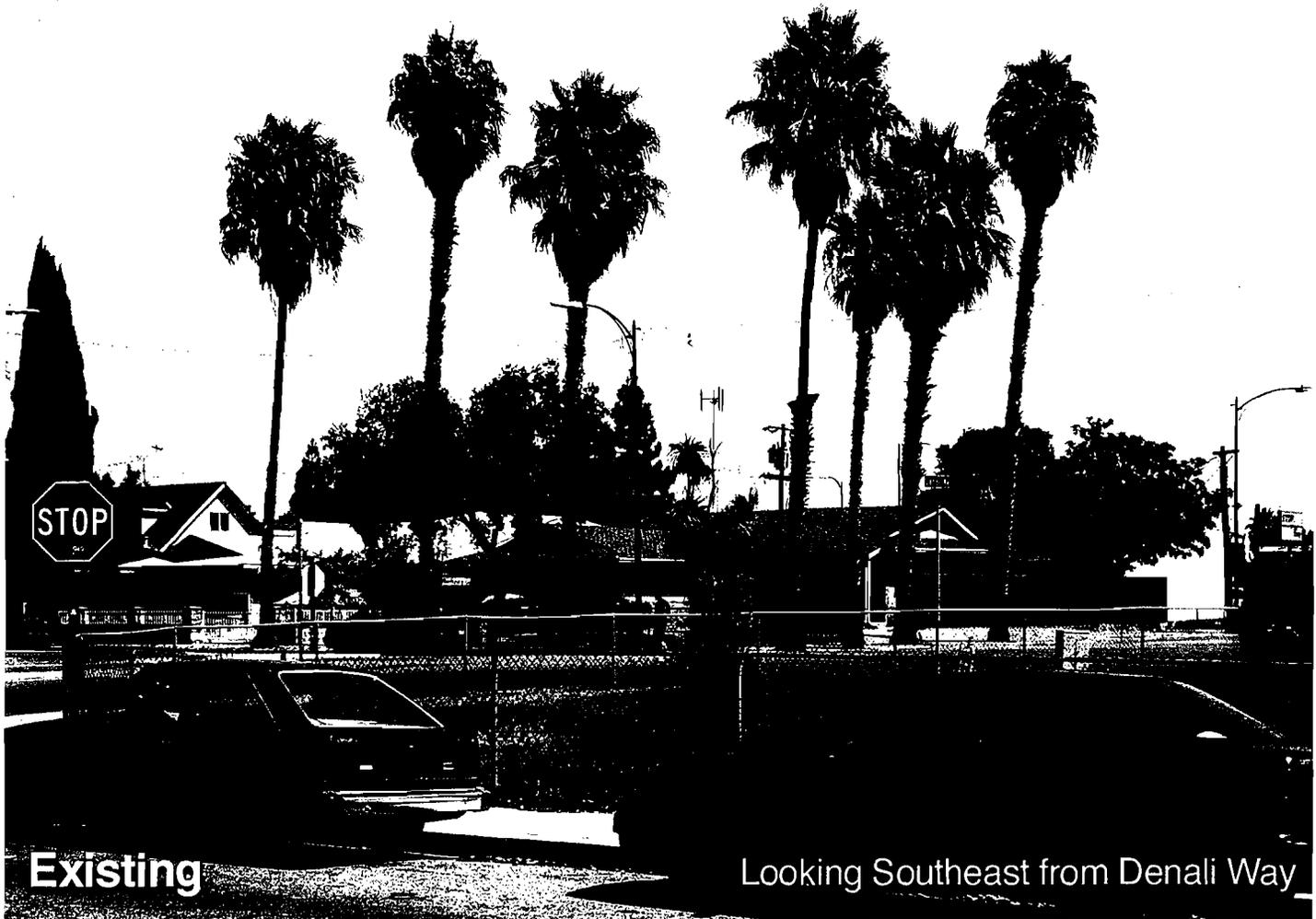
1632 Tully Road

San Jose, CA

Site # 815022

Highway 101 & Tully
1632 Tully Road
San Jose, CA
Site # 815022





Existing

Looking Southeast from Denali Way



proposed antennas

Proposed

Highway 101 & Tully
1632 Tully Road
San Jose, CA
Site # 815022

EXHIBIT 5



8801 OWENS DRIVE
PLEASANTON, CA 94588
TEL: (916) 837-6000
FAX: (916) 730-1254



1632 TULLY ROAD, SAN JOSE, CA 95128
PHONE: (415) 937-3300 FAX: (415) 937-3304

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SPACE RESERVED FOR PROFESSIONAL SEAL

REVISION NO.	DESCRIPTION	BY	DATE

DRAWN BY: DL
CHECKED BY: GJS
DATE DRAWN: 09/07/09
SMITHCO JOB #: 47-002

SITE NAME: HIGHWAY 101 (a.k.a. Tully)
SITE #: PS# 815022

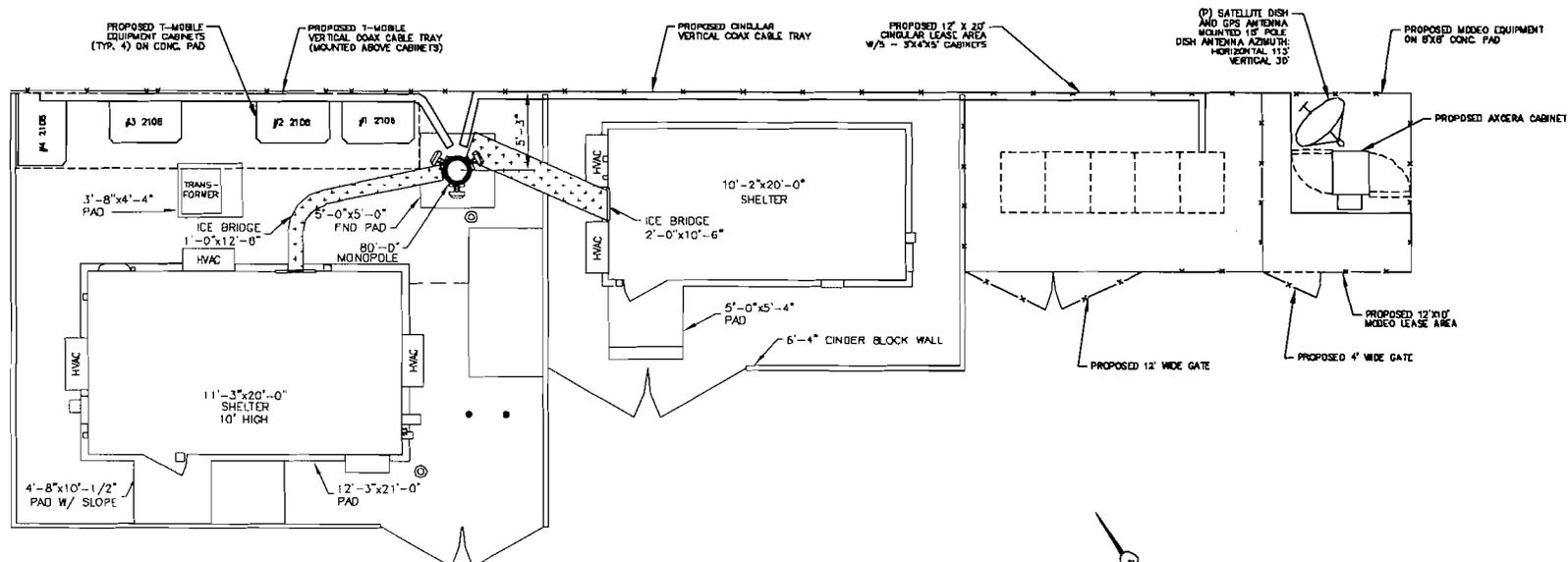
SITE ADDRESS: 1632 TULLY ROAD, SAN JOSE, CA. 95121

COUNTY OF SANTA CLARA
SHEET TITLE

SITE PLAN

SHEET

A-1



SITE PLAN

1" = 16' (for 11' x 17' plot)
1" = 8' (for 22' x 34' plot)



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SPACE RESERVED FOR PROFESSIONAL SEAL

REVISION NO.	DESCRIPTION	BY	DATE
△			
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DRAWN BY: DL
 CHECKED BY: GJS
 DATE DRAWN: 06/07/09
 SHEET/JOB #: 47-082

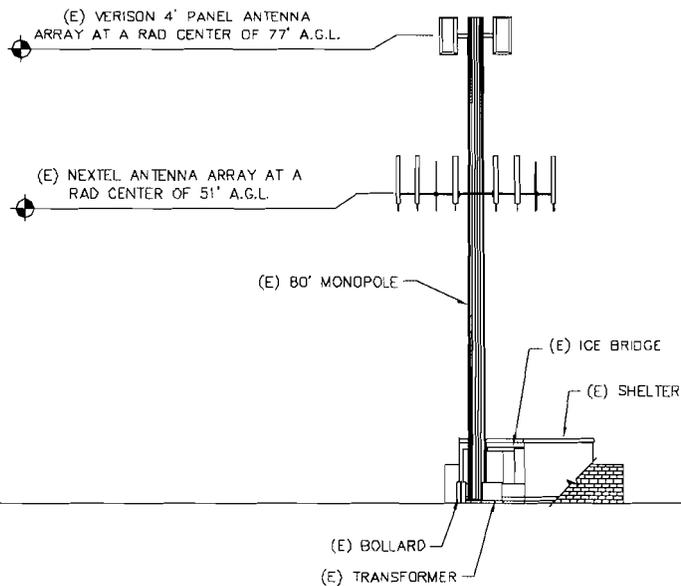
SITE NAME
HIGHWAY 101
 (a.k.a. Tully)
 SITE #
PS# 815022

SITE ADDRESS
1632 TULLY ROAD
SAN JOSE, CA. 95121

COUNTY OF SANTA CLARA
 SHEET TITLE
WEST ELEVATION VIEWS

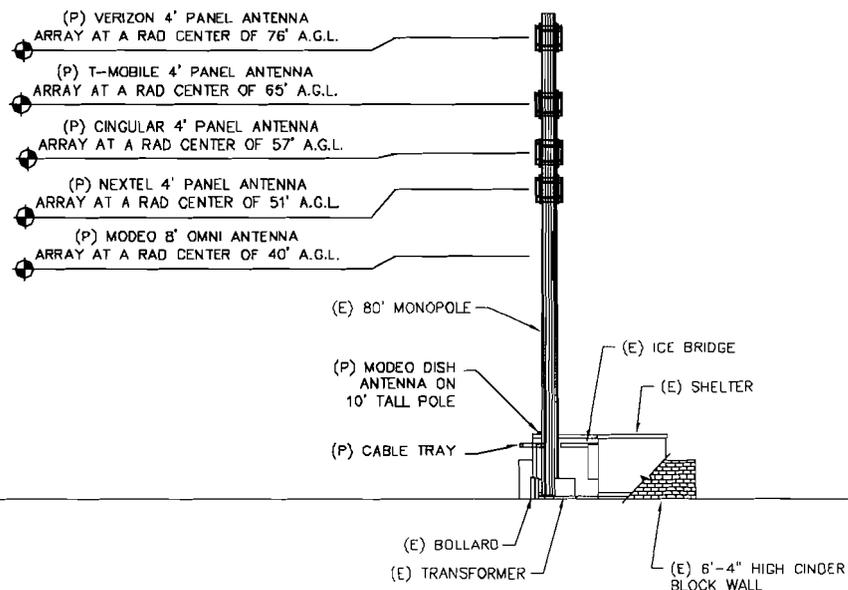
SHEET

A-2



EXISTING WEST ELEVATION

1" = 40' (for 11' x 17' plot)
 1" = 20' (for 22' x 34' plot)



PROPOSED WEST ELEVATION

1" = 20' (for 11' x 17' plot)
 1" = 10' (for 22' x 34' plot)



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SPACE RESERVED FOR PROFESSIONAL SEAL

REVISION NO.	DESCRIPTION	BY	DATE

DRAWN BY:	DL
CHECKED BY:	GLS
DATE DRAWN:	09/07/08
SMITHCO JOB #:	47-082

SITE NAME
HIGHWAY 101
 (a.k.a. Tully)
 SITE #
PS# 815022

SITE ADDRESS
1632 TULLY ROAD
SAN JOSE, CA. 95121

COUNTY OF SANTA CLARA

SHEET TITLE
SOUTH ELEVATION VIEWS

SHEET

A-3

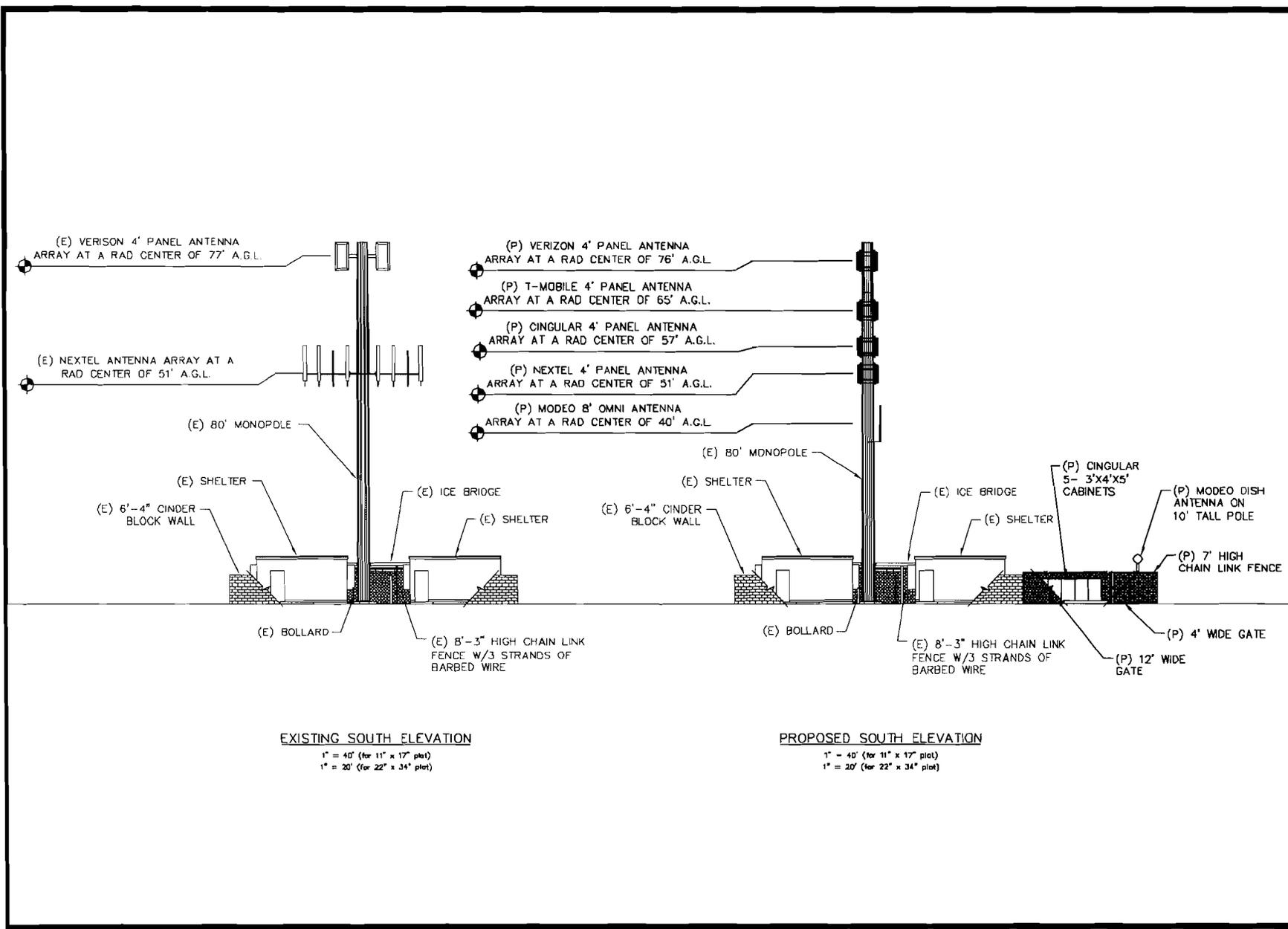


EXHIBIT 6

**ALTERNATIVE SITE ANALYSIS
CROWN CASTLE WIRELESS FACILITY
VERIZON WIRELESS AND NEXTEL COMMUNICATIONS
APN: 670-02-004
1632 Tully Rd.
San Jose , CA 95122-2532**

The following alternative site analysis is provided to give information to the City of San Jose regarding the availability of alternate collocations or building rooftops for installation and operation of Verizon and Nextel wireless facilities in the area of 1632 Tully Rd., San Jose, CA

The Tully Road site is located within a CG Commercial Zone and has been operational since 1990. In 1996 the City of San Jose allowed an increase in height to eighty (80') feet. The City's decision was based on proven needs for wireless services at the Tully Road location. The City also supported the favorable opportunities for co-location at the Tully Road site. From that time forward, various wireless carriers have been and continue to be highly interested in the Tully Road site. Such interest is based on the advantageous height and location of the monopole. The Tully Road facility is now an integral component of two highly developed wireless networks (Nextel Communications and Verizon).

For both Nextel and Verizon, the Tully Road site operates on line-of-site connectivity to near-by hand-off sites owned and operated each carrier. Required sites in a search ring are based on computer generated coverage maps which enhance and complete the Radio Frequency (RF) design. Coverage needs are identified through drive tests conducted by RF engineers. Such tests are conducted by driving local streets and highways using computer equipment that plot the signal strength received at various intervals within a specific area. Results of the test data indicate the locations of good, weak or nonexistent signals and are used to achieve the objective of providing better service to an area that has poor or marginal signal strength.

Sites are designed in a honeycomb pattern of contiguous rings. This type of pattern prevents "holes" in the system that can create problems such as signal interference and dropped calls. Therefore, a decision to relocate a facility within the established RF design could have a negative impact on performance and delivery of services to wireless customers.

The primary objective of the Tully Road site is to provide network coverage north and south along Highway 101, then east on Tully Road to Quimby Road including service to nearby residences and business areas. The challenge in identifying alternate locations for the Tully Road site is dependant upon various factors. Not only is height, ground space and availability of utilities important, but in this case the site must fulfill the distinct technological requirements specific to Verizon, Nextel and other interested wireless carriers.

Following is a description of the properties which were reviewed as alternate locations to the Tully Road site.

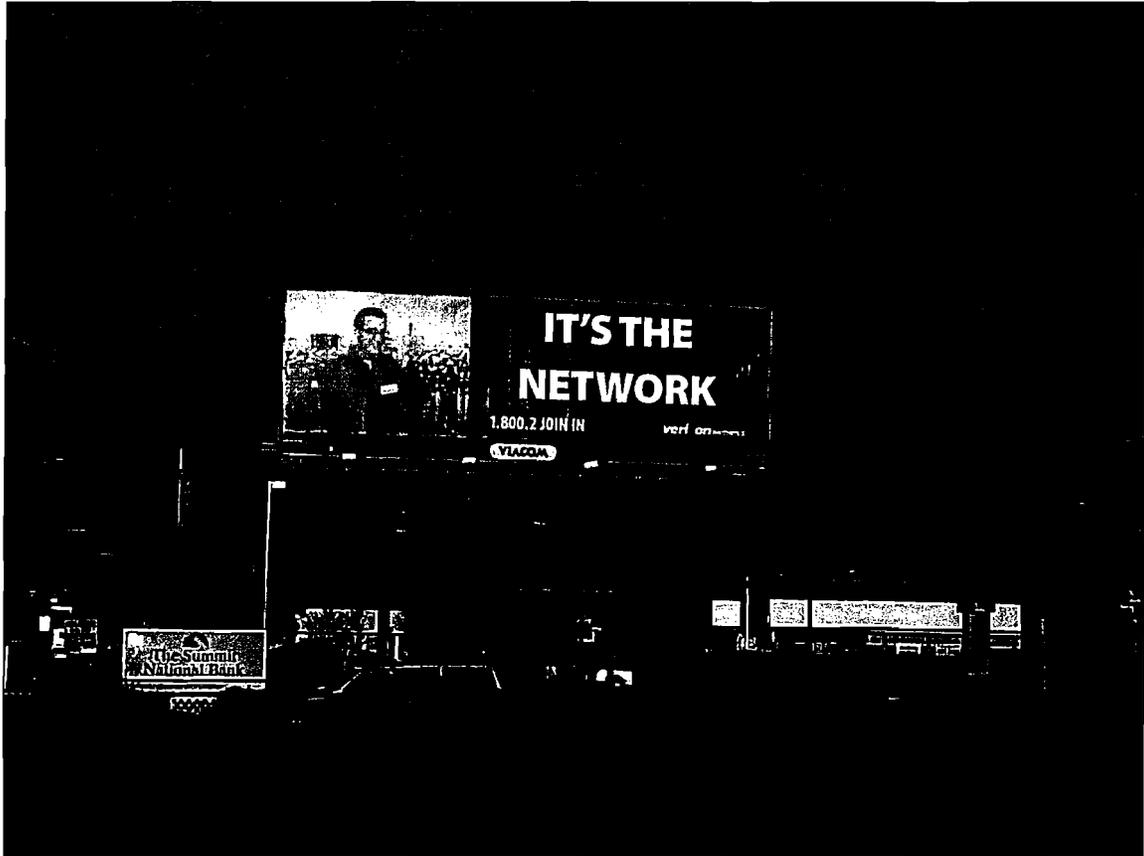
PHOTOGRAPH NO. 1



TULLY ROAD SHOPPING MALL

Tully Road Shopping Mall is located on Tully Road between King Road and Quimby Road to the Northeast of the existing Tully Road site. The buildings shown above are typical of the commercial development in the area which is primarily single story buildings. Generally, the heights of these commercial buildings are less than forty (40') and therefore fail to provide the height required to maintain the signal coverage needed by Verizon and Nextel.

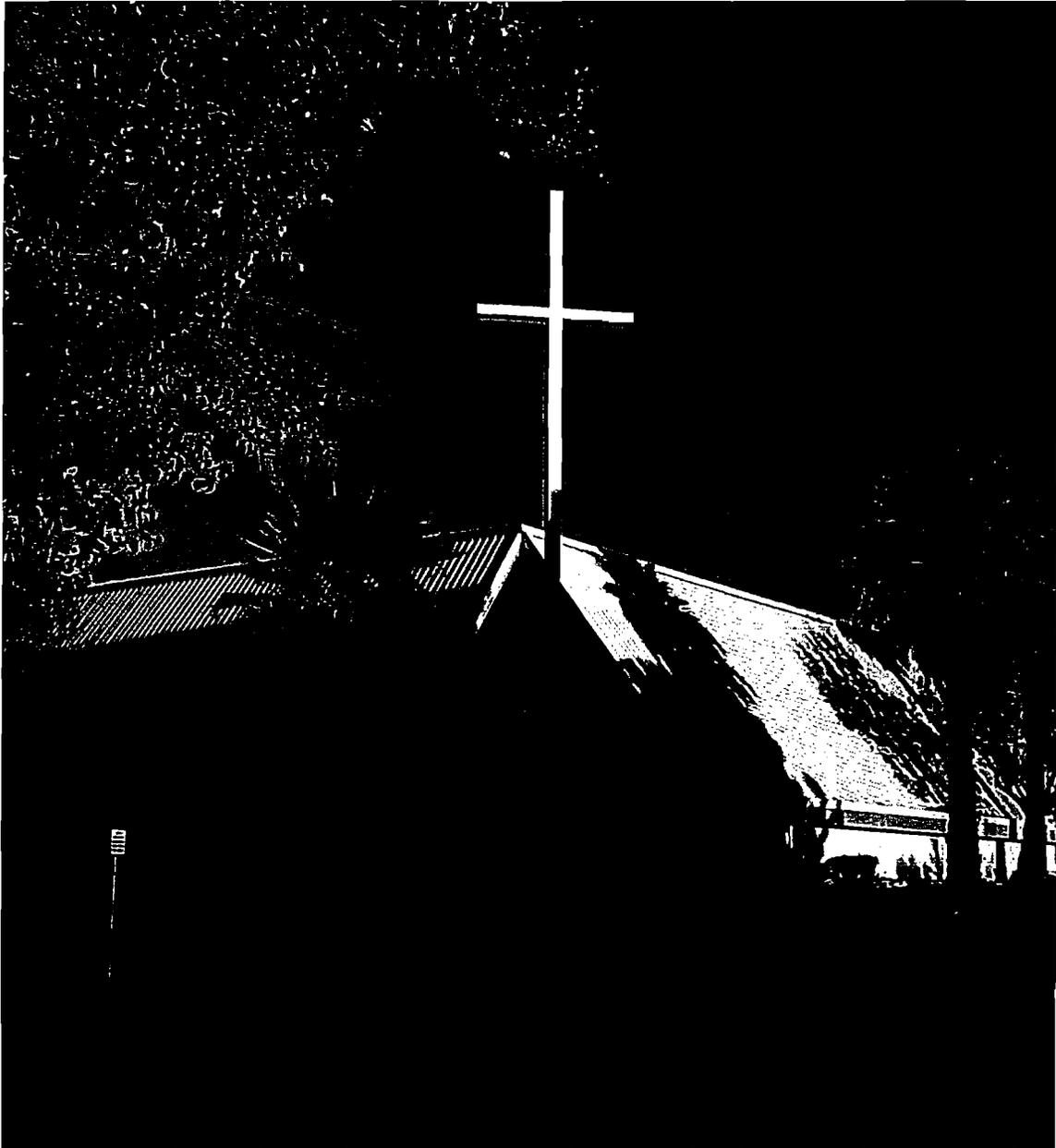
PHOTOGRAPH NO. 2



BILLBOARD SIGN
1648 Tully Rd.

The billboard shown above is approximately fifty (50) yards east of the Tully Road site. In certain situations, it is possible to use billboards to stealth wireless antennas. However, in this case, the billboard is located on the property line of two commercial parcels. This site lacks any sort of ground space for Verizon and Nextel equipment shelters. The billboard is taller than the commercial stores, but lacks the space and structural integrity to accommodate the needs of Verizon and Nextel. In addition, signal loss would result from the lower height of this billboard sign.

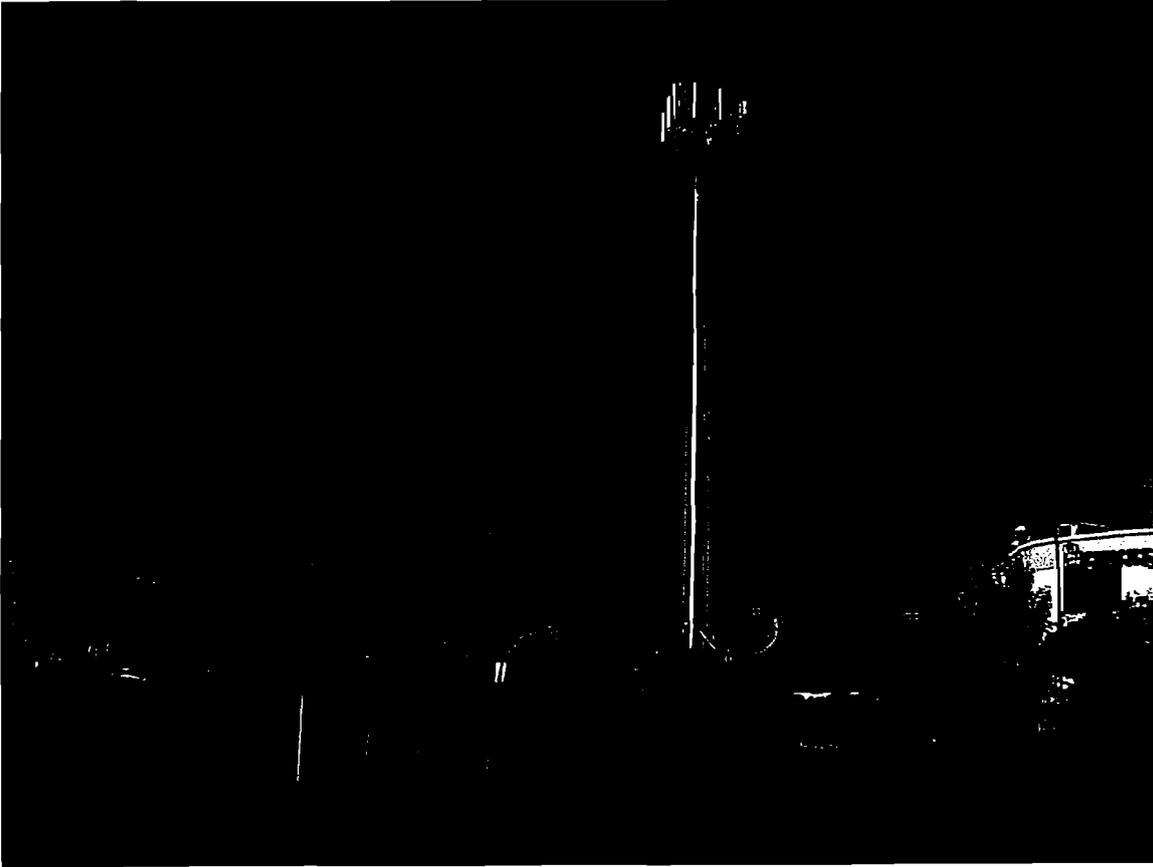
PHOTOGRAPH NO. 3



Tafatolu Congregational Church of Samoa
Intersection of Alvin and Fontaine
Southeast of the Tully Road Site

Stealth of wireless facilities can be accomplished by designing around existing structures such as the church steeple shown above. However, ground space for equipment is not available. There has been no response from the church to inquiries made by the carriers to lease space from the church.

PHOTOGRAPH NO. 4



Chucky Cheese Factory
2445 Fontaine
Next to Highway 101, West of the Tully Road Site

Additional ground space for the Nextel and Verizon equipment shelters is not available at this site. The only space is the parking lot which serves the customers of this restaurant. This site is also at the westerly edge of the coverage objective.

PHOTOGRAPH NO. 5



SEARS STORE
East Ridge Shopping Mall

The Sears store is outside the search ring. The rooftop of the building does not provide the height required to meet the RF coverage objectives. Verizon and Nextel already operate sites which cover the mall and immediate surrounding areas. A survey of the property failed to identify ground space for equipment shelters and associated facilities.

CONCLUSION

The primary RF objective of the Tully Road site is to provide network coverage north and south along Highway 101, then east on Tully Road to Quimby Road including service to nearby residences and business areas. The challenge in identifying alternate locations for the Tully Road site is dependant upon various factors. Not only is height, ground space and availability of utilities important, but in this case the site must fulfill the distinct technological requirements specific to Verizon, Nextel and other interested wireless carriers.

Based on the Alternative Site Analysis, the Tully Road site is the best location for the continued provision of wireless services in the search ring. Along with other important factors, the height required to deliver satisfactory signal coverage cannot be provided by any of the alternate candidates discussed above.