10 minute appeal

Dear Planning Commissioners,

My name is Tim Richards. I'm a local business owner and property owner at 531 Summit Drive, where I live with my wife and two children. We moved to Bonny Doon seeking a peaceful rural place to raise our kids in nature.

I represent Bonny Doon Residents for Responsible Cell Coverage. We're working to meet our region's needs for cell coverage without adversely impacting property owners and taxpayers in our community.

We're in favor of cell coverage for Bonny Doon, and we're against the construction of the unnecessary tower proposed at 186 Summit Drive in the middle of our neighborhood.

I'm grateful for you hearing the continuance of our appeal today.

The biggest reason for granting our appeal is that The Findings for the Proposed Height Exception for a tower at 140 feet Cannot be Made.

In accordance with the County Code, "All towers shall be designed to be the shortest height technically feasible to minimize visual impacts…." (County Code § 13.10.660(G)(1).)

The maximum facility height allowed in the Rural Residential Zone District is 75 feet high for free-standing structures. The exception that is being requested here nearly doubles the height which makes a mockery of the height limitation. It is so enormously out of scale with what was envisioned to the point that the exception completely abrogates any sense of limitation on height in a residential setting.

Exceptions to these height limitations are permitted, but have limitations in the county code:

"Any applications for facilities of a height more than the allowed height for facilities in each zone district per subsection (G)(1) of this section must include a written justification proving the need for a facility of that height and comply with subsections (C)(4)(a) and (b) of this section." (County Code § 13.10.660(G)(2).)

Subsections (C)(4)(a) and (b) state as follows:

(a) The proposed facility eliminates or substantially reduces one or more significant gaps in the applicant carrier's network; and

(b) The proposed facility is located on the least visually obtrusive site and least visually obtrusive portion of the site, where the applicant provides substantial evidence that it chose the best solution for the community after a meaningful comparison of alternative sites and designs, including but not limited to considering less sensitive sites, alternative system designs, alternative tower designs, placement of antennas on existing structures, and other viable, technically feasible, and environmentally (i.e., visually) equivalent or superior potential alternatives."

The Planning Commission needs to make both of these findings.

Notably, the County must review the evidence and make its own independent judgment about the accuracy of the evidence. It cannot defer its responsibilities to the applicant.

As to subsection (a), the proposed facility fails to eliminate or substantially reduce the coverage gap for two reasons:

1) There is no coverage gap. According to AT&T's own publicly available website data, there is both 4G and 5G coverage at the proposed tower site, and half our neighborhood has those in addition to 5G+ coverage, which is the highest level of coverage that they offer.

AT&T is telling the truth - there is service in our entire neighborhood, which is easy to verify in real life by making phone calls, sending text messages, and even participating in video calls, all of which the Summit Drive neighborhood residents do all the time.

The commission would do well to believe AT&T's coverage maps.

2) As of today, areas of Bonny Doon outside the Summit Drive neighborhood that lack cell service from terrestrial cell towers are already covered by AT&T's satellite service.

If you have AT&T and happen to be in an area of Bonny Doon without terrestrial cell service or WiFi, AT&T's satellite service will work with standard smartphones, including the iPhone 14 and later models. In most cases, any GSM-compatible smartphone will work.

AT&T is working with AST SpaceMobile to provide voice, data, text, and video services in remote locations. This is already happening real time in Bonny Doon.

AT&T isn't the only carrier to provide satellite coverage for its subscribers in Bonny Doon. On Sunday during the superbowl, T-mobile announced that it was launching free satellite service nationwide until July for their own customers as well as customers of all other mobile service providers.

The simple fact of the matter is that Bonny Doon is no longer an area that has coverage gaps, because cell towers are now in the sky in the form of satellites. Anywhere in Bonny Doon that can see the sky no longer has coverage gaps.

As to subsection (b), the proposed facility is not located on the least visually obtrusive site for two reasons:

1) No one has acknowledged that satellite cell service meets the requirements called out by the county code as a "viable, technically feasible, and environmentally (i.e., visually) equivalent or superior potential alternative."

It would be technically impossible to cover all of Bonny Doon in terrestrial-based cell coverage even if you built dozens of cell towers due to the complex topography of our region. For this reason, satellite cell service is a technically and visually superior alternative to terrestrial cell towers that already exists throughout our remote mountainous region.

2) As to other terrestrial cell tower sites that are better choices for the community, we asked the Planning Commission for an independent alternative site analysis of the existing 150 ft tower at 125 Patrick Road, but this request was not granted. The applicant provided its own alternative site analysis, which predictably found that the alternative site that our entire neighborhood supports for collocation at 125 Patrick Road is not viable.

As we have stated before, propagation maps are inherently unreliable and are often used to show whatever the creator wants them to show. This is why we requested an independent alternative site analysis at 125 Patrick Road.

Notwithstanding the biased nature of propagation maps that are produced by applicants, when we look at the applicant's comparison of the existing 150 ft tower located at 125 Patrick Rd, it provided indistinguishably different coverage to the proposed tower at 186 Summit Drive. The former site is therefore the least obtrusive

option for the neighborhood by virtue of relying on an existing tower on the margin of our neighborhood, rather than building a second massive tower smack dab in the middle of our neighborhood.

Because the proposed 140 ft tower satisfies neither subsections A nor B of the county code, the findings cannot be made to grant the height exception.

There is an even bigger height problem with the application: if approved at 140 ft, the tower would automatically be eligible under federal law to extend an additional 20 ft higher to a total of 160 ft.

It's not a question of whether the applicant would do this, but when, because the applicant has stated numerous times on public record that they would prefer a height above 140 ft.

This would put the tower above the treeline of the summit and would maximize visual impacts on the neighborhood and surrounding region. The visual impacts of this have not been analyzed either by digital mockups or a demonstration tower.

The tower at 160 ft would be 20 ft higher than the shortest height technically feasible to minimize visual impacts, which violates the requirements of the county code necessary to grant the height exemption to begin with. Therefore, the maximum height of the tower approved by the county should not exceed 120 ft.

The Mitigated Negative Declaration found in the CEQA analysis does not address this foreseeable consequence, and under federal law the County cannot limit the applicant's right to go an additional 20 feet higher once the tower is constructed. Therefore, the CEQA analysis is fatally flawed and a full Environmental Impact Report is required.

For all of the reasons we stated here and in our appeal, I respectfully request that you grant our appeal and deny the application.

Because there are no findings for denial in your packet, I am providing for your consideration portions of the findings in your packet that would need to be changed to support denial.

We've had our lawyer prepare two versions for your convenience, one with redlines based on the findings in your packet and one without.

Thank you for hearing and carefully considering our appeal.

Five minute rebuttal:

The applicant can use the AT&T data, but the AT&T data publicly shows that there is service. The wireless carrier AT&T has not certified this gap, only CTI. Why has CTI provided a purported AT&T gap in coverage privately, but AT&T stated no gap publicly?

It's unclear why there is a discrepancy between the publicly available data and the private data that CTI has brandished that is clearly in opposition to publicly available information. I maintain that AT&T is not being deceitful in its marketing practices - our entire neighborhood enjoys cell service every day.

In any case, the applicant has not replied to the clear obvious availability of satellite service throughout the region. Under federal law, the TCA does not discriminate between the type of cell coverage provided between terrestrial and satellite cell towers. It does not say that you need both terrestrial and satellite coverage. That's because the TCA was passed in 1996 before satellite cell towers existed. But it would also be absurd to require double coverage from both terrestrial and satellite sources.

It would be unreasonable to say that cell coverage is any different or better from terrestrial towers vs satellite towers. There is no satellite coverage gap for AT&T or any other carriers thanks to this game-changing new technology that obviates the need for terrestrial towers in remote mountainous regions like ours.

These satellite towers have no visual impacts to our neighborhood, and give our neighborhood and the rest of Bonny Doon. Satellite coverage was not analyzed as part of the drive test data, nor any of the propagation maps showing. Satellite is a currently available technology that everyone in the room can sign up for right now. Simply visit: https://www.t-mobile.com/coverage/satellite-phone-service

Property values aren't an environmental impact under CEQA, but they are a real financial impact to local residents. There is no need for this tower and any of its associated financial or visual impacts because our neighborhood enjoys cell service from both terrestrial and satellite. Bonny Doon needs no more cell towers anywhere thanks to the superior technical coverage provided throughout the region.

To reply to slight inaccuracies of the staff - as the appellant, I did not originally receive notice from the staff of the circulation of the MND for public comment. The MND was

extended until February 5 after I inquired. But the staff report went out early afternoon on February 5th, well before the time to comment expired.

Nevertheless, I did comment on February fifth that the MND does not consider a tower going to 160 feet as permitted by the Telecommunications Act and that it preempts the County's ability to stop a higher tower, which is completely foreseeable.

The applicant could not and would not need to apply for a 20 ft height extension, because the county has no ability to stop such an extension. Neither the county nor the neighbors would have any say to a 20 ft extension on top of any tower built.

Therefore, the CEQA finding is flawed and requires an EIR. Both of our lawyers have confirmed that the 20 ft height extension is possible, as well as Ariel when the code was changing in the middle of our application over the Christmas holiday with no one talking to us.

The Patrick Rd tower is already visible from Empire Grade, but only if you stop your car, get out, and look WAY up the hill. This is how all the photos were taken. From the perspective of drivers on the road, it's NOT visible unless you do this, given the steep grade of the hill up to the tower in relation to where the road is. Natural car vantage points don't go up that high from inside the vehicle anywhere on that stretch. Therefore, the idea that the tower would be more visible with a height extension is a red herring argument.

Regardless, it's a moot point because there is no gap in coverage due to AT&T's own coverage map, the experience of residents in our neighborhood who enjoy cell coverage daily, and the breakthrough advent of satellite cell coverage that coats the entirety of Bonny Doon at this very moment, available for free to everyone. Therefore, the proposed 140 ft tower satisfies neither subsections A nor B.

It's a common misconception that counties are powerless to deny wireless applications. At the last PC hearing, Commissioner Shepherd asked what the county can actually do. The answer is that they can deny wireless proposals in accordance with the federal TCA with a written decision based upon substantial evidence, which we have provided.

Please review the findings for denial, and please consider making our suggested edits.

Thank you for your consideration.

2 minute rebuttal:

Dear Commissioners,

The 150 ft tower at 125 Patrick Rd burned down in the 2020 CZU wildfires. Unfortunately, terrestrial towers are unreliable in wildfire prone areas like ours because they go up in flames.

They also would not stand up to a tornado like the one we had last month in Scotts Valley, and would be likely to be damaged in the gale-force 90 MPH+ winds we have on the summit.

Satellites, however, are unaffected by these earth-based calamities and offer a more reliable option for ensuring public safety during disasters.

I hope you can appreciate after hearing the testimonies of our neighborhood just how hard we've had it here in the Summit Drive neighborhood and in Bonny Doon in general.

40% of our Summit Dr neighborhood burned to the ground in August of 2020, and many of us are still rebuilding, or trying to rebuild and getting a hard time with stringent rebuilding codes imposed by the county. Many neighbors left because they couldn't make it work. It's been a hard, expensive, emotionally challenging time for us.

Unfortunately, since 2020 we've also been fighting this proposed cell tower at 186 Summit Drive in the middle of our neighborhood at a time when we have no emotional or financial resources or bandwidth.

We were initially protected from this tower being a possibility by the county code, which had a setback of 750 ft, but then, right after Christmas, the code was changed overnight with the stroke of a pen to a 20 ft setback, without our input, mid-application for this project.

Despite the legal guidance provided to the county by public interest firm Green Fire Law, the county did not adopt the codes that would protect unincorporated areas like Bonny Doon from having monstrous cell towers right next to homes.

Why does the county accommodate private development with friendly code changes mid-application, without notifying the residents who are actively engaged in opposing it? Then simultaneously make it incredibly difficult for residents to rebuild their homes after a wildfire?

My family hopes to rebuild a house on our property and make this our forever home. However, if the tower is built, my family and I will be forced to relocate.

I implore you to please amend the findings as we submitted to support denial.

I want to remind you that we included a list of almost 30 residents in the Summit Drive neighborhood who signed the memorandum in opposition I sent you beyond those who were able to attend and comment today.

Thank you.

WIRELESS COMMUNICATION FACILITY USE PERMIT FINDINGS

Revise subsection B. on page 171-172 of Commission packet as follows:

B) For sites located in one of the prohibited and/or restricted areas set forth in SCCC 13.10.660(C), that the applicant has provided documentation to enable the decisionmaking body to make the findings in SCCC 13.10.660(C)(4)(a) and (b).

This finding cannot be made~~., in that the site is not proposed within a prohibited area or restricted area.~~ The parcel is zoned RR (Rural Residential) and only the CA, R-1, RM, RB, and MH zone districts are prohibited zone districts.

~~The wireless regulations require new facilities to be co-located onto existing facilities, base stations, or utility poles, unless there is no existing facility that would provide substantially similar coverage and the proposed facility is visually screened, camouflaged, or otherwise integrated into the surrounding character of the forested setting.~~

~~The applicant proposes to replace the existing co-location telecommunications facility, i.e., facilities constructed for the purpose of supporting two or more antennas by separate carriers on the same tower, with another co-location telecommunications facility on site, providing AT&T 171 EXHIBIT 4Hwireless communication service and FirstNet emergency communications as well as additional locations on the facility for other carriers~~.

~~Notwithstanding~~However, the applicant's ~~provided an~~ alternative analysis and propagation maps noting that there are no other locations that will substantially fill the gap in coverage is not supported by substantial evidence. Coverage maps provided by AT&T on its website show no coverage gaps in the area contradicts the assertions in the applicant's claims of gaps in coverage. Therefore, since there are no coverage gaps, the Planning Commission cannot find that "The proposed facility eliminates or substantially reduces one or more significant gaps in the applicant carrier's network" as provided in SCCC section 13.101660(c)(4)(a).

~~The applicant has provided an RF report, prepared by Hammett and Edison, dated July 6, 2021, confirming compliance with the FCC wireless standards. As required, the project is conditioned to provide post-installation RF emissions testing prior to unattended operations of the facility to demonstrate actual compliance with the FCC OET Bulletin 65 RF emissions safety rules for general population/uncontrolled RF exposure in all sectors.~~

~~The project is conditioned to comply with the Communications Act of 1934, as amended by the Telecommunications Act of 1996, applicable regulations, orders, and decisions of the FCC and CPUC and applicable State law.~~

Revise subsection (C) on page 172 of Commission packet as follows:

(C) That the subject property upon which the wireless communications facility is to be built is in compliance with all rules and regulations pertaining to zoning uses, subdivisions and any other applicable provisions of this title and that all zoning violation abatement costs, if any, have been paid.

This finding cannot be made~~., in that the proposed WCF is an allowed use within the RR (Rural Residential) Zone District and complies with the district setbacks.~~

A maximum of 75-foot maximum height is allowed in the residential zone district unless a Height Exception is sought, including written justification providing the need for a facility of that height. The height of the applicant's facility is proposed at 140 feet. Moreover, under the federal Telecommunications Act, co-location up to an additional 20 feet in height could result in the tower being 160 feet high after the wireless facility is erected.

~~The applicant's written justification identifies that:~~

~~The center line for AT&T was selected to allow for the best possible option to fill the significant gap in coverage.~~

~~The selected site height will allow additional wireless carriers to also place equipment on the tower for colocation. The antennas are needed to be above the "tree line" to provide the most coverage (especially E911 and FirstNet) to the Bonny Doon area.~~

Required Height Exception findings include a finding that "~~are provided below:~~

The proposed facility eliminates or substantially reduces one or more significant gaps in the applicant carrier's network."~~; and~~ SCCC section 13.101660(c)(4)(a).

The applicant (AT&T) has submitted propagation maps purporting to show that there are no other locations that will substantially fill the gap in coverage. Coverage maps provided by AT&T on its website show no coverage gaps in the area contradicts the assertions in the applicant's claims of gaps in coverage. Therefore, the Planning Commission cannot find that "The proposed facility eliminates or substantially reduces one or more significant gaps in the applicant carrier's network" as provided in SCCC section 13.101660(c)(4)(a).~~The applicant (AT&T) has identified a significant gap in their coverage in this area as noted in their project propagation statement.~~

> ~~Pursuant to the definition of "Significant gap" in the wireless regulations, a significant gap is "a gap in a wireless provider's own wireless services that is significant as certified by the wireless carrier".~~
>
> ~~(b) The proposed facility is located on the least visually obtrusive site and least visually obtrusive portion of the site, where the applicant provides substantial evidence that it chose the best solution for the community after a meaningful comparison of alternative sites and designs, including but not limited to considering less sensitive sites, alternative system designs, alternative tower designs, placement of antennas on existing structures, and other viable, technically feasible, and environmentally (i.e., visually) equivalent or superior potential alternatives.~~
>
> ~~The applicant provided an alternative analysis noting that no other alternative site is available to substantially fill the identified gap, including microcell sites, which are incapable of filling the gap due to a line-of-sight requirement to fill the gap in coverage. The existing WCF co-location sites, including Patrick Road and Robles Drive, identified in the area are not capable of filling the gap due to the significant distance from the service area or lack of interest in leasing by PG&E. The subject property contains an existing communication facility on site since 1969 that is located in the dense forest and~~

~~provides the least obtrusive means of providing the applicant's coverage by largely screening the proposed replacement colocation facility within the forest canopy, camouflaging the monopine as a pine tree, and otherwise providing landscape screening for understory views from adjacent residences and additional a trees to screen the top of the tree canopy from ground level to the maximum extent feasible. A maximum height of 140 feet (with 130foot antenna centerline) is the lowest height capable of substantially filling the wireless coverage gap as determined by the alternative analysis; and therefore, the least obtrusive height.~~

~~There are no zoning violations on the subject property.~~

DEVELOPMENT PERMIT FINDINGS

Revise subsection 2 on pages 174-175 of the Commission packet as follows:

2. That the proposed location of the project and the conditions under which it would be operated or maintained will be consistent with all pertinent County ordinances and the purpose of the zone district in which the site is located.

This finding cannot be made. ~~, in that the proposed location of the improvements and the conditions under which it would be operated or maintained will be consistent with all pertinent County ordinances and the purpose of the RR (Residential Residential) zone district in that the proposed use is allowed in the district and site improvements meet zone district required setbacks. Replacement fencing is conditioned to meet the setback requirements and to provide wood materials.~~

The project exceeds the 75-foot height limit established by the wireless regulations by nearly two-fold. Moreover, under the federal Telecommunications Act, co-location up to an additional 20 feet in height could result in the tower being 160 feet high after the wireless facility is erected. Height Exception findings are required when a WCF project exceeds the maximum 75-foot height allowed in the wireless regulations. Height Exception findings are included in the wireless findings, attached and cannot be made. ~~Furthermore, the project complies with Section 13.10.661 et al for wireless telecommunications facilities within Rural Residential zone districts, including setbacks to adjoining residentially zoned property.~~

Revise subsection 3 on page 175 of the Commission packet as follows:

3. That the proposed use is consistent with all elements of the County General Plan and with any specific plan which has been adopted for the area.

This finding cannot be made., ~~in that t~~ The proposed wireless facility is not consistent with the use and density requirements specified for the Rural Residential (R-R) land use designation in the County General Plan given that the height of the facility exceeds 75 feet by nearly two-fold and the findings for a height exception cannot be made.

~~The proposed wireless project will not adversely impact the light, solar opportunities, air, and/or open space available to other structures or properties and meets current site and development standards for the zone district.~~

The proposed wireless project will not be compatible with adjacent property uses and the character of the neighborhood as specified in General Plan Policy 8.5.2 (commercial compatibility with other uses) as a proposed wireless facility will be 140 feet in height in a single-family residential neighborhood. Moreover, under the federal Telecommunications Act, co-location up to an additional 20 feet in height could result in the tower being a total of 160 feet high after the wireless facility is installed. ~~faux mono-pine tree, and antennas and equipment, are designed to be camouflaged as a pine tree within an existing forest to minimize visual views of the project on the surrounding rural residential area. In addition, the project includes landscaping to screen views from adjacent residential properties with views through the forest understory and from ground level views across the top of the forest canopy. Furthermore, all existing unsightly dish, antennas, and antenna scaffold equipment are proposed to be removed. The project is conditioned to require the replacement of the proposed six-foot chain link fence (with barbed wire) with an eight-foot solid board fence.~~

~~Although the site is in proximity of a designated Scenic Road, Empire Grade, the proposed project is not visible from this road or any other scenic road as identified in visual simulations and is otherwise not located within any designated visual resources, environmentally sensitive habitat resources (as defined in the Santa Cruz County General Plan/LCP Sections 5.1, 5.10, and 8.6.6.), and/or other significant County resources, including agricultural, open space, and community character resources. The project is not located within a special community or town plan. The proposed project complies with the noise standards of the General Plan.~~

Revise subsection 5 on page 176 of the Commission packet as follows:

5. That the proposed project will complement and harmonize with the existing and proposed land uses in the vicinity and will be compatible with the physical design aspects, land use intensities, and dwelling unit densities of the neighborhood.

This finding cannot be made,. ~~in that t~~The proposed project is in a rural area with single-family homes and the height of the facility will be a minimum of 140 feet in height. Moreover, under the federal Telecommunications Act, co-location up to an additional 20 feet in height could result in the tower being 160 feet high after the wireless facility is erected. Therefore, the proposed project would not complement and harmonize with existing and proposed land uses in the vicinity and will not comply with physical design aspects of the neighborhood. ~~forested area and as designed and conditioned, the proposed project would meet the WCF ordinance objective~~

~~to be least visually obtrusive to the maximum extent feasible while also substantially filling the gap in coverage.~~

~~In particular, the project includes removal of existing unsightly improvements on site, is designed as a monopine to blend the WCF into the forest, proposes materials and colors to blend the proposed faux monopine, including proposed landscape to minimize views from adjacent properties. The project is also conditioned to replace the proposed six-foot-tall chain link fence with an 8-foot solid board fence (without barbed wire) so that the proposed fencing is more compatible with the natural condition of the forested site.~~

Revise subsection 6. on page 176 of the Commission packet as follows:

6. The proposed development project is consistent with the Design Standards and Guidelines (sections 13.11.070 through 13.11.076), and any other applicable requirements of this chapter.

This finding cannot be made. ~~, in that t~~The proposed improvements will not be of an appropriate scale and type of design with respect to existing and surrounding properties given that the height of the wireless facility will be 140 feet in height. Moreover, under the federal Telecommunications Act, co-location up to an additional 20 feet in height could result in the tower being 160 feet high after the wireless facility is erected. ~~that will be least visually obtrusive to surrounding properties and open space in the surrounding area by provision of a mono-pine tree, which will camouflage the facility from surrounding properties within the forest. Fencing is conditioned to be 8-foot solid board fencing instead of the proposed chain link fencing, which will be more appropriate to the rural area.~~

WIRELESS COMMUNICATION FACILITY USE PERMIT FINDINGS

Revise subsection B. on page 171-172 of Commission packet as follows:

B) For sites located in one of the prohibited and/or restricted areas set forth in SCCC 13.10.660(C), that the applicant has provided documentation to enable the decisionmaking body to make the findings in SCCC 13.10.660(C)(4)(a) and (b).

This finding cannot be made. The parcel is zoned RR (Rural Residential) and only the CA, R-1, RM, RB, and MH zone districts are prohibited zone districts. However, the applicant's alternative analysis and propagation maps noting that there are no other locations that will substantially fill the gap in coverage is not supported by substantial evidence. Coverage maps provided by AT&T on its website show no coverage gaps in the area contradicts the assertions in the applicant's claims of gaps in coverage. Therefore, since there are no coverage gaps, the Planning Commission cannot find that "The proposed facility eliminates or substantially reduces one or more significant gaps in the applicant carrier's network" as provided in SCCC section 13.101660(c)(4)(a).

Revise subsection (C) on page 172 of Commission packet as follows:

(C) That the subject property upon which the wireless communications facility is to be built is in compliance with all rules and regulations pertaining to zoning uses, subdivisions and any other applicable provisions of this title and that all zoning violation abatement costs, if any, have been paid.

This finding cannot be made. A maximum of 75-foot maximum height is allowed in the residential zone district unless a Height Exception is sought, including written justification providing the need for a facility of that height. The height of the applicant's facility is proposed at 140 feet. Moreover, under the federal Telecommunications Act, co-location up to an additional 20 feet in height could result in the tower being 160 feet high after the wireless facility is erected.

Required Height Exception findings include a finding that "The proposed facility eliminates or substantially reduces one or more significant gaps in the applicant carrier's network." SCCC section 13.101660(c)(4)(a).The applicant (AT&T) has submitted propagation maps purporting to show that there are no other locations that will substantially fill the gap in coverage. Coverage maps provided by AT&T on its website show no coverage gaps in the area contradicts the assertions in the applicant's claims of gaps in coverage. Therefore, the Planning Commission cannot find that "The proposed facility eliminates or substantially reduces one or more significant gaps in the applicant carrier's network" as provided in SCCC section 13.101660(c)(4)(a).

DEVELOPMENT PERMIT FINDINGS

Revise subsection 2 on pages 174-175 of the Commission packet as follows:

2. That the proposed location of the project and the conditions under which it would be operated or maintained will be consistent with all pertinent County ordinances and the purpose of the zone district in which the site is located.

This finding cannot be made. The project exceeds the 75-foot height limit established by the wireless regulations by nearly two-fold. Moreover, under the federal Telecommunications Act, co-location up to an additional 20 feet in height could result in the tower being 160 feet high after the wireless facility is erected. Height Exception findings are required when a WCF project exceeds the maximum 75-foot height allowed in the wireless regulations. Height Exception findings are included in the wireless findings, attached and cannot be made.

Revise subsection 3 on page 175 of the Commission packet as follows:

3. That the proposed use is consistent with all elements of the County General Plan and with any specific plan which has been adopted for the area.

This finding cannot be made. The proposed wireless facility is not consistent with the use and density requirements specified for the Rural Residential (R-R) land use designation in the County General Plan given that the height of the facility exceeds 75 feet by nearly two-fold and the findings for a height exception cannot be made.

The proposed wireless project will not be compatible with adjacent property uses and the character of the neighborhood as specified in General Plan Policy 8.5.2 (commercial compatibility with other uses) as a proposed wireless facility will be 140 feet in height in a single-family residential neighborhood. Moreover, under the federal Telecommunications Act, co-location up to an additional 20 feet in height could result in the tower being a total of 160 feet high after the wireless facility is installed.

Subsection 5 on page 176 of the Commission packet as follows:

5. That the proposed project will complement and harmonize with the existing and proposed land uses in the vicinity and will be compatible with the physical design aspects, land use intensities, and dwelling unit densities of the neighborhood.

This finding cannot be made. The proposed project is in a rural area with single-family homes and the height of the facility will be a minimum of 140 feet in height. Moreover, under the federal Telecommunications Act, co-location up to an additional 20 feet in height could result in the tower being 160 feet high after the wireless facility is erected. Therefore, the proposed project would not complement and harmonize with existing and proposed land uses in the vicinity and will not comply with physical design aspects of the neighborhood.

Revise subsection 6. on page 176 of the Commission packet as follows:

6. The proposed development project is consistent with the Design Standards and Guidelines (sections 13.11.070 through 13.11.076), and any other applicable requirements of this chapter.

This finding cannot be made. The proposed improvements will not be of an appropriate scale and type of design with respect to existing and surrounding properties given that the height of the wireless facility will be 140 feet in height. Moreover, under the federal Telecommunications Act, co-location up to an additional 20 feet in height could result in the tower being 160 feet high after the wireless facility is erected.

COUNTY OF SANTA CRUZ
STATE OF CALIFORNIA
----------X
In the Matter of the Application of:

DELTA GROUP ENGINEERING and
CTI TOWERS

for a Conditional Use Permit and Variances

Premises: 186 Summit Drive, Santa Cruz, CA 95060

Application Nos.: 221049, REV221042, REV221043

Parcel No.: 080-062-02
----------X

MEMORANDUM IN OPPOSITION

Respectfully Submitted,

Tim Richards – 531 Summit Drive
Chelsea Brady – 531 Summit Drive
Rodney Cahill – 120 Summit Drive
Julie Cahill – 120 Summit Drive
Brian Smith – 125 Summit Drive
Naomi Murphy – 125 Summit Drive
JoAnn Pullen – 405 Summit Drive
William Pullen – 405 Summit Drive
Jerry Jenkins – 219 Summit Drive
Alexis Jenkins - 219 Summit Drive
Mary Coyle – 250 Upper Summit Drive
Andy Fox – 250 Upper Summit Drive
Deborah Richards – 531 Summit Drive
Mark Richards – 531 Summit Drive
Sara Blackstorm Atton - 305 Summit Drive
Bob Atton - 305 Summit Drive
Allison Pullen - 405 Summit Drive
Bill Pullen - 405 Summit Drive
Leif Holtermann - 714 Summit Drive
Christian Harris - 93 Summit Drive

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Preliminary Statement

Delta Group Engineering/CTI Towers (hereinafter "*CTI*") has filed an application for a Special Use Permit to install a one hundred fifty foot (15 story high) wireless communication facility ("WCF") to be located on the property known as 186 Summit Drive, Santa Cruz, CA. In addition, *CTI* seeks an exception for height requirements in order to accommodate its proposed one hundred fifty foot WCF.

This Memorandum is submitted in opposition to *CTI's* application.

As set forth below, *CTI's* application should be denied because:

(a) *CTI* has failed to establish that granting the application would be consistent with smart planning requirements of the Santa Cruz County Code (the "Code");

(b) granting the application would violate both the Code and the legislative intent of the Code;

(c) the applicant has failed to establish that the proposed facility: (i) is actually necessary for the provision of personal wireless services within the City or (ii) that it is necessary that the facility be built at the proposed site;

(d) the irresponsible placement of the proposed facility would inflict upon the nearby homes and community the precise types of adverse impacts which the Code was enacted to prevent.

As such, we respectfully submit that *CTI's* application be denied in a manner that does not violate the Telecommunications Act of 1996.

POINT I

Granting *CTI* Permission to Construct a Wireless Telecommunications Facility at the Location It Proposes Would Violate Both the Requirements Under the Code and the Legislative Intent Based Upon Which Those Requirements Were Enacted by the County

As set forth below, *CTI's* application should be denied because granting the application would violate the *requirements* of the Code as well as the *legislative intent* behind those requirements.

As is explicitly set forth within its text, the very purpose for which the County enacted Chapter 13.10.660 *et seq*. of its Code (which deals specifically with Wireless Telecommunications Facilities) was, among other things, to "assure, by the regulation of siting of wireless communications facilities, that the integrity and nature of residential, rural, commercial, and industrial areas are protected from the indiscriminate proliferation of wireless communication facilities…" and "to locate and design wireless communication towers/facilities so as to minimize negative impacts, such as, but not limited to, visual impacts, agricultural and open space land resource impacts, impacts to the community and aesthetic character of the built and natural environment, attractive nuisance, noise, falling objects, and the general safety, welfare and quality of life of the community."[1]

Further, §13.10.661 requires that "[a]ll wireless communications facilities … are subject to Level V review (Zoning Administrator public hearing pursuant to Chapter 18.10 SCCC)..." and pursuant to § 13.10.661(A), "shall be subject to a commercial development permit … [and] a building permit will be required for construction of new wireless communication facilities."

[1] *See* §13.10.660 (A) of the Santa Cruz County Code.

As set forth below, and as established by the admissible evidence being submitted herewith, if the County were to issue *CTI* a permit, the irresponsible placement of a wireless telecommunications facility at the location proposed would inflict upon the nearby homes and residential community the precise types of adverse impacts which Chapter 13.10.660 *et seq.* of the Code was specifically enacted to prevent.

A. *CTI's* Application Does Not Comply With the Requirements of Chapter 13.10 of the Municipal Code

A review of the record reflects that *CTI's* application must be denied because such application and all of its supporting submissions wholly fail to establish compliance with the requirements and limitations of Chapter 13.10 of the Code regarding wireless telecommunication facilities.

As set forth above, the express purpose of Chapter 13.10 of the Code is, among other things, to protect the "integrity and nature" of residential areas from the "indiscriminate proliferation of wireless communication facilities." In furtherance of this purpose, the Code contains a list of Restricted Areas in which "[n]on-co-located wireless communication facilities are discouraged." Among them is the Rural Residential (RR) Zoning District.[2]

Applicants seeking to build a new wireless communication facility in one of the restricted zoning districts, such as the RR Zoning District at issue here, must prove that:

(a) The proposed wireless communication facility would eliminate or substantially reduce one or more significant gaps in the applicant carrier's network; and

(b) There are no viable, technically feasible, and environmentally (e.g. visually) equivalent or superior potential alternatives (i.e., sites and/or facility types and/or designs) outside the prohibited and restricted areas … that could eliminate or substantially reduce said significant gaps.[3]

[2] *See* § 13.10.661(C)(1)
[3] *See* § 13.10.661(C)(3)

CTI's application fails to meet the above requirements. Moreover, *CTI* has failed to provide a shred of ***probative evidence*** to establish that the proposed wireless telecommunications facility is actually necessary in order to provide personal wireless service in the community or that the facility is not injurious to the community, such that a denial of its application would constitute an "effective prohibition" of personal wireless services.

(i) *CTI's* Irresponsible Placement of Its Proposed Wireless Facility Will Inflict Substantial Adverse Impacts Upon the Aesthetics and Character of the Area

The proposed wireless facility will inflict dramatic and wholly unnecessary adverse impacts upon the area's aesthetics and character. Recognizing the likely adverse aesthetic impacts which an irresponsibly placed wireless telecommunications facility would inflict upon nearby homes and residential communities, the County focused extensively on aesthetic impacts when enacting its Code, specifically §13.10, where the majority of the County's intent was to minimize, if not wholly avoid, any negative adverse aesthetic impacts on neighboring properties.

Specifically, § 13.10.661(F) requires that wireless communication facilities *shall be sited* in the least visually obtrusive location that is technically feasible, unless such site selection leads to other resource impacts that make such a site the more environmentally damaging location overall." § 13.10.661(G) encourages "co-location of new wireless communication facilities into/onto existing wireless communication facilities and/or existing telecommunication towers … if it does not create *significant visual impacts.*" (Emphasis added.)

Here, however, *CTI's* application blatantly disregards the aesthetic concerns expressed in the Code. The proposed facility will be directly in the line of sight of numerous adjacent properties, thereby creating an extremely displeasing aesthetic. The proposed placement of this

facility violates the Code because it is not in any way being placed in a location that would minimize the aesthetic impact on the community. This means that *CTI* has failed to comply with both the requirements and intent of the Code.

There doesn't appear to be even the slightest attempt by *CTI* to place the facility in a location where the adverse aesthetic impact on the community is minimal. Moreover, *CTI* didn't bother to present to the County any data demonstrating that the proposed facility is even necessary, let alone that the proposed location is the best possible location to remedy any gap in coverage *CTI* is claiming exists.

Furthermore, federal courts around the country, including the United States Court of Appeals for the Ninth Circuit, have held that significant or unnecessary adverse aesthetic impacts are proper legal grounds upon which a local government may deny a zoning application seeking approval for the construction of a wireless telecommunication facility. For example, the United States Court of Appeals for the Ninth Circuit determined that "California law, as predicted by the district court, does not prohibit local governments from taking into account aesthetic considerations in deciding whether to permit the development of wireless telecommunications facilities (WCFs) within their jurisdictions." *Sprint PCS Assets, L.L.C. v. City of Palos Verdes Ests.*, 583 F.3d 716 (9th Cir. 2009).

In *Palos Verdes Ests*., the Court reasoned "that the proposed WCFs would adversely affect its aesthetic makeup was supported by 'substantial evidence' under the Telecommunications Act, where the city council reviewed propagation maps and mock-ups of the proposed WCFs and a report that detailed the aesthetic values at stake, and had the benefit of public comments and an oral presentation from the provider's personnel." *Id*.

"[T]he City may consider a number of factors including the height of the proposed tower, the proximity of the tower to residential structures, the nature of uses on adjacent and nearby properties, the surrounding topography, and the surrounding tree coverage and foliage. We, and other courts, have held that *these are legitimate concerns for a locality*." *T-Mobile USA, Inc. v. City of Anacortes*, 572 F.3d 987, 994 (9th Cir. 2009) (emphasis added). *See also, Sprint Telephony PCS, L.P. v. Cty. of San Diego*, 543 F.3d 571, 580 (9th Cir. 2008) (stating that the zoning board may consider "other valid public goals such as safety and aesthetics"); *T-Mobile Cent., LLC v. Unified Gov't of Wyandotte County, Kan.,* 546 F.3d 1299, 1312 (10th Cir.2008) (noting that "aesthetics can be a valid ground for local zoning decisions"); and *Cellular Tel. Co. v. Town of Oyster Bay,* 166 F.3d 490, 494 (2d Cir.1999) (recognizing that "aesthetic concerns can be a valid basis for zoning decisions").

Additionally, as is set forth below, *CTI* has failed to provide a shred of *probative evidence* to establish that the wireless communications facility is not injurious to the neighborhood and is actually necessary to provide personal wireless coverage in the area.

(ii) Evidence of the Actual Adverse Aesthetic Impacts Which the Proposed Facility Would Inflict Upon the Nearby Homes

As logic would dictate, the persons who are best suited to accurately assess the nature and extent of the adverse aesthetic impacts, which an irresponsibly placed wireless telecommunication facility would inflict upon homes in close proximity to the proposed facility, are the homeowners themselves.

Consistent with this logic, the United States Court of Appeals for the Second Circuit has recognized that when a local government is considering a wireless facility application, it should

accept, as direct evidence of the adverse aesthetic impacts that a proposed facility would inflict upon nearby homes, statements and letters from the actual homeowners, since they are in the best position to know and understand the actual extent of the impact they stand to suffer. *See, e.g., Omnipoint Communications Inc. v. The City of White Plains*, 430 F.3d 529 (2d Cir. 2005).

Federal courts have consistently held that adverse aesthetic impacts are a valid basis upon which to deny proposed wireless facilities applications. *Id. See also, American Tower Corp. v. City of San Diego,* 763 F.3d 1035, 1055-56 (9th Cir. 2014); and *T-Mobile U.S.A., Inc. v. City of Anacortes,* 572 F.3d 987, 995 (9th Cir. 2009).

Annexed collectively hereto as **Exhibit "A"** are letters from homeowners whose homes are situated adjacent to, and/or in close proximity to, the site upon which *CTI* seeks to install its proposed wireless telecommunications facility.

Within each of those letters, the homeowners personally detail the adverse aesthetic impacts that the proposed facility would inflict upon their respective homes. They have provided detailed and compelling descriptions of the dramatic adverse impacts their properties would suffer if the proposed installation of a wireless telecommunication facility were permitted to proceed.

Detailed descriptions of the adverse aesthetic impacts which *CTI's* proposed facility would inflict upon adjacent, adjoining, and nearby homes include letters from:

Tim Richards – 531 Summit Srive
Chelsea Brady – 531 Summit Drive
Rodney Cahill – 120 Summit Drive
Julie Cahill – 120 Summit Drive
Brian Smith – 125 Summit Drive
Naomi Murphy – 125 Summit Drive
JoAnn Pullen – 405 Summit Drive
William Pullen – 405 Summit Drive

Jerry and Alexis Jenkins – 219 Summit Drive
Mary Coyle – 250 Upper Summit Drive
Andy Fox – 250 Upper Summit Drive
Deborah Richards – 531 Summit Drive
Mark Richards – 531 Summit Drive
The Blackstorm Atton Household – 305 Summit Drive
Allison and Bill Pullen - 405 Summit Drive
Leif Holtermann - 714 Summit Drive
Christian Harris - 93 Summit Drive

Significantly, as is set forth above, all of the adverse aesthetic impacts the proposed wireless facilities would inflict upon these homes are entirely unnecessary because *CTI* does not need the proposed facility in order to provide wireless services within the County.

The specific and detailed impacts described by the adjacent and nearby property owners constitute "*substantial evidence*" of the adverse aesthetic impacts they stand to suffer because they are *not* limited to "generalized concerns" but instead contain *specific*, detailed descriptions of how the proposed facility would dominate the views from their bedroom windows, living rooms, kitchens, front yards, decks, bathrooms, front yards, backyards, and "from all over" their properties, and "from every angle" therefrom.

As detailed therein, the substantial adverse aesthetic impacts the proposed wireless facility's irresponsible placement would inflict upon the nearby homes are the precise type of injurious impacts that the Code was specifically enacted to prevent.

Accordingly, *CTI's* application should be denied in its entirety.

(iii) *CTI's* Visual Assessment is Inherently Defective and Should be Disregarded Entirely

Although CTI attempts to convince the County that the installation of the proposed wireless facility *would not* inflict a severe adverse aesthetic impact upon the adjacent homes, *CTI* has failed to submit any meaningful or accurate visual impact analysis.

As is undoubtedly known to *CTI*, the visual impact analysis presented is inherently defective because it does not serve the purpose for which it has been purportedly offered – to provide the County with a clear visual image of the *actual* aesthetic impacts that the proposed installation will inflict upon the nearby homes and residential community.

Not surprisingly, applicants often seek to disingenuously minimize the visual impact depictions by ***deliberately omitting*** from any such photo simulations, any images ***actually taken from*** the nearby homes that would sustain the most severe adverse aesthetic impacts.

In *Omnipoint Communications Inc. v. The City of White Plains,* 430 F3d 529 (2nd Cir. 2005), the United States Court of Appeals for the Second Circuit explicitly ruled that where a proponent of a wireless facility presents visual impact depictions wherein they "omit" any images from the actual perspectives of the homes which are in closest proximity to the proposed installation, such presentations are inherently defective, and should be disregarded by the respective government entity that received it.

As was explicitly stated by the federal court: "the Board was free to discount Omnipoint's study because it was conducted in a defective manner. . . ***the observation points were limited to locations accessible to the public roads, and no observations were made from the residents' backyards much less from their second story windows***" *Id.*

It is clear from the record that *CTI* has failed to submit a meaningful visual impact analysis. *CTI* does not include a single image taken from *any* of the nearby homes that will sustain the most severe adverse aesthetic impacts from the installation of the wireless facility, which *CTI* seeks to construct in such close proximity to those homes.

This, of course, includes a complete absence of any photographic images taken by CTI from any of the homes belonging to the homeowners whose adverse aesthetic impact letters are collectively annexed hereto as Exhibit "A."

Instead, it contains only photos taken from public roads, from perspectives selected to minimize the appearance of the adverse aesthetic impact, and it in no way accurately depicts the images those homeowners will see, each and every time they look out their bedroom, kitchen, or living room window, or sit in their backyard.

This is the exact type of "presentation" which the federal court explicitly ruled to be defective, and not worthy of consideration in *Omnipoint*.

As such, in accord with the federal court's holding in *Omnipoint*, *CTI's* visual impact analysis should be recognized as inherently defective and disregarded in its entirety.

(iv) The Proposed Installation Will Inflict Substantial and Wholly Unnecessary Losses in the Values of Adjacent and Nearby Residential Properties

In addition to the adverse impacts upon the aesthetics and residential character of the area at issue, such an irresponsibly placed wireless facility in such close proximity to nearby residential homes would inflict upon such homes a severe adverse impact upon the actual value of those residential properties. This is common sense, as aesthetics is an important factor in any homebuyer's decision to buy a home.

As established by the evidence submitted herewith, if *CTI* is permitted to install the wireless facility it proposes in such close proximity to nearby homes, it would inflict upon those homes, dramatic losses in property value and the homeowners would suffer significant losses in the values of their residential properties.

It is a common misconception that a reviewing authority, like the Santa Cruz County Planning Department, may not consider property values when making its determination on wireless telecommunications facility applications. This is not true and is contrary to established precedent in the federal courts. *See Omnipoint, supra.*

Across the entire United States, both real estate appraisers[4] and real estate brokers have rendered professional opinions that simply support what common sense dictates. When wireless facilities are installed unnecessarily close to residential homes, such homes suffer material losses in value, typically ranging from 5% to 20%.[5] In the worst cases, facilities built near existing homes have caused the homes to be rendered wholly unsaleable.[6]

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[4] *See e.g.* a February 22, 2012 article discussing a NJ appraiser's analysis wherein he concluded that the installation of a Wireless Facility in close proximity to a home had reduced the value of the home by more than 10%, go to http://bridgewater.patch.com/articles/appraiser-t-mobile-cell-tower-will-affect-property-values

[5] In a series of three professional studies conducted between 1984 and 2004, one set of experts determined that the installation of a Wireless Facility in close proximity to a residential home reduced the value of the home by anywhere from 1% to 20%. These studies were as follows:

The Bond and Hue - *Proximate Impact Study* - The Bond and Hue study conducted in 2004 involved the analysis of 9,514 residential home sales in 10 suburbs. The study reflected that close proximity to a Wireless Facility reduced price by 15% on average.

The Bond and Wang - *Transaction Based Market Study*

The Bond and Wang study involved the analysis of 4,283 residential home sales in 4 suburbs between 1984 and 2002. The study reflected that close proximity to a Wireless Facility reduced the price between 20.7% and 21%.

The Bond and Beamish - *Opinion Survey Study*

The Bond and Beamish study involved surveying whether people who lived within 100' of a Wireless Facility would have to reduce the sales price of their home. 38% said they would reduce the price by more than 20%, 38% said they would reduce the price by only 1%-9%, and 24% said they would reduce their sale price by 10%-19%.

[6] Under FHA regulations, no FHA (federally guaranteed) loan can be approved for the purchase of any home which is situated within the fall zone of a Wireless Facility. *See* HUD FHA HOC Reference Guide Chapter 1 - hazards and nuisances. As a result, there are cases across the country within which: (a) a homeowner purchased a home, (b) a Wireless Facility was thereafter built in close proximity to it, and (c) as a result of same, the homeowners could not sell their home, because any buyer who sought to buy it could not obtain an FHA guaranteed loan. *See, e.g.* October 2, 2012 Article ". . .Cell Tower is Real Estate Roadblock" at http://www.wfaa.com/news/consumer/Ellis-County-Couple--Cell-tower-making-it-impossible-to-sell-home--172366931.html.

As set forth above, federal courts have acknowledged that it is perfectly proper for a local zoning authority to consider as direct evidence of the reduction in property values that an irresponsibly-placed wireless facility would inflict upon nearby homes, the professional opinions of licensed real estate brokers (as opposed to appraisers) who provide their *professional* opinions as to the adverse impact upon property values that would be caused by the installation of the proposed wireless facility. *See Omnipoint Communications Inc. v. The City of White Plains,* 430 F3d 529 (2nd Cir. 2005). This is especially true when they possess years of real estate sales experience within the community and the specific geographic area at issue. The oft-repeated claim by applicants that letters from local, professional realtors are merely "personal" opinions is nonsense. The opinions expressed by these realtors are based on their *professional* experiences over the course of many years of interactions with prospective home buyers.

As evidence of the adverse impact that the proposed facility would have upon the property values of the homes that would be adjacent and/or in close proximity to it, annexed hereto as **Exhibit "B"** are letters setting forth the *professional* opinions of licensed real estate professionals, who are familiar with the specific real estate market at issue, that the installation of the proposed facility would cause property values of the affected homes to be reduced by fifteen to twenty-two percent (10% to 20%) (or more), and would make those homes more difficult to sell, even at reduced purchase prices.

Given the significant reductions in property values that the proposed installation would inflict upon the nearby homes, the granting of *CTI's* application would inflict upon the residential neighborhood the very type of injurious impacts that the Code was intended to prevent. Accordingly, *CTI's* application should be denied.

POINT II

§ 6409(a) of the Middle-Class Tax Relief and Job Creation Act of 2012 Would Allow *CTI* to Increase the Height of the Proposed Facility Without Further or Prior Zoning Approval

As substantial as the adverse impacts upon the nearby homes and communities would be if the proposed facility were constructed as currently proposed, *CTI* could later unilaterally choose to increase the height of the facility by as much as twenty (20) feet. The County would be legally prohibited from stopping them from doing so due to the constraints of the Middle-Class Tax Relief and Job Creation Act of 2012.

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

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

The FCC defines "substantial change" to include any modification that would increase the height of the facility by more than ten (10%) percent or by more than "the height of one additional antenna with separation from the nearest existing antenna not to exceed 20 feet, *whichever is greater*." (Emphasis added.)

Simply stated, under the FCC's regulation, if this facility were to be built on existing or entirely new poles, *CTI,* at any time thereafter, could unilaterally increase the height of any such

facility by as much as an additional twenty (20) feet, and there would be no way for the County to prevent such an occurrence.

Considering the even more extreme adverse impacts which an increase in the height of the facilities would inflict upon the homes and communities nearby, *CTI's* application should be denied, especially since, as set forth above, *CTI* doesn't actually *need* the proposed facility in the first place.

POINT III

CTI Has Failed to Proffer Probative Evidence Sufficient to Establish a Need for the Proposed Wireless Facility at the Location Proposed, or That the Granting of Its Application Would Be Consistent With the Smart Planning Requirements of the County Code

The apparent intent behind the provisions of the County Code, specifically Chapter 13.10.660 *et seq.* of the Code, which deals with Wireless Telecommunication Facilities, was to promote "smart planning" of wireless infrastructure within the County.

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

Entirely consistent with that intent, §13.10.661 states that "All wireless communication facilities shall comply with all applicable goals, objectives and policies of the General Plan…" Further, §13.10.661(A) sets forth the requirement that "all new wireless communication facilities shall be subject to a commercial development permit…" § 18.10.230(A) then sets forth the

required findings for a development permit. Specifically, the approving body must find:

> (1) That the proposed location of the project and the conditions under which it would be operated or maintained will not be detrimental to the health, safety, or welfare of persons residing or working in the neighborhood or the general public, and will not result in inefficient or wasteful use of energy, and will not be *materially injurious* to properties or improvements in the vicinity.
>
> (2) That the proposed location of the project and the conditions under which it would be operated or maintained will be consistent with all pertinent County ordinances and the purpose of the zone district in which the site is located.
>
> (3) That the proposed use is consistent with all elements of the County General Plan and with any specific plan which has been adopted for the area.
>
> (4) That the proposed use will not overload utilities, and will not generate more than the acceptable level of traffic on the streets in the vicinity.
>
> (5) That the proposed project *will complement and harmonize with the existing and proposed land uses in the vicinity,* and will be *compatible with the physical design aspects,* land use intensities, and dwelling unit densities of the neighborhood.

In order to determine if a proposed wireless telecommunications facility would be consistent with smart planning requirements, and would meet the requirements for approval, sophisticated municipal boards require wireless carriers and/or site developers to provide direct evidentiary proof of:

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

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

The reason that local zoning boards invariably require such information is that without it, the boards are incapable of knowing: (a) if, and to what extent a proposed facility will remedy any actual gaps or deficiencies which may exist, and (b) if the proposed placement is in such a

poor location that it would all but require that more facilities be built because the proposed facility did not fully cover the gaps in service which actually existed, thereby causing an unnecessary redundancy in wireless facilities within the municipality.

In the present case, *CTI* has wholly failed to provide any hard data to establish that the proposed placement of its facility would, in any way, be consistent with smart planning. By virtue of same, it has failed to provide actual probative evidence to establish: (a) the *actual location of* gaps (or deficient capacity locations) in personal wireless services within the County, and (b) why or how their proposed facility would be the best and/or least intrusive means of remedying those gaps. Moreover, as will be further discussed below, *CTI* failed to present any hard data and, as such, has failed to present any useful data at all.

A. The Applicable Evidentiary Standard

To the extent that applicants seeking to build wireless facilities seek to have their applications reviewed as public utilities, they must meet the "Public Necessity" standard established in *Consolidated Edison Co. v. Hoffman,* 43 N.Y.2d 598 (1978). As such, the applicant must prove that the new wireless telecommunication facility it proposes is "a public necessity that is required to render safe and adequate service" and that there are compelling reasons why their proposed installation location is more feasible than at other locations. *See also, T-Mobile Northeast LLC v. Town of Islip*, 893 F.Supp.2d. 338 (2012).

Within the context of zoning applications, such as the current application which has been filed by *CTI* herein, the applicant is required to prove [1] that there are ***significant*** gaps[7] in a its

[7] It should be noted that establishing *a* gap in wireless services is *not* enough to prove the need for a wireless facility; rather, the applicant must prove that "a significant gap" in wireless service coverage exists at the proposed location. *See, e.g., Omnipoint Holdings, Inc. v. City of Cranston*, 586 F.3d 38, 50 (1st Cir. 2009); *MetroPCS, Inc. v.*

own wireless service, [2] that the location of the proposed facility will remedy those gaps, and [3] that the facility presents a "minimal intrusion on the community." *Id*.

More importantly, the Ninth Circuit has set forth the following requirements, which all applicants seeking to install wireless facilities must prove. The test articulated by the Ninth Circuit requires *CTI* to demonstrate that (i) the proposed facility is required in order to close a significant gap in service coverage; (ii) that the proposed facility is the least intrusive means of remedying the significant gap in service coverage, and (iii) some inquiry as to why the proposed facility is the only feasible alternative. *See Am. Tower Corp. v. City of San Diego*, 763 F.3d 1035 (9th Cir. 2014).

Specifically, the United States Court of Appeals for the Ninth Circuit states in *Am. Tower Corp. v. City of San Diego*, "[w]hen determining whether a locality has effectively prevented a wireless services provider from closing a significant gap in service coverage, as would violate the Federal Telecommunications Act (TCA), some inquiry is required regarding the feasibility of alternative facilities or site locations, and a least intrusive means standard is applied, which requires that the provider show that the manner in which it proposes to fill the significant gap in services is the least intrusive on the values that the denial sought to serve." *Id*. *See also, T-Mobile USA, Inc. v. City of Anacortes*, 572 F.3d 987 (9th Cir. 2009).

City and County of San Francisco, 400 F.3d 715, 731 (9th Cir.2005). Here, *CTI* failed to proffer substantial evidence that a gap in wireless services exists—let alone that this purported gap is "significant" within the meaning of the TCA and established federal jurisprudence.

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B. *CTI* Has Failed To Submit Any Probative Evidence To Establish the Need For the Proposed Facility At the Height and Location Proposed

CTI has failed to meet its burden of proving that: (a) its proposed facility is a Public Necessity, (b) as proposed, its facility would present a minimal intrusion on the community, (c) its proposed placement would minimize its aesthetic intrusion within the meaning of the applicable sections of the County Code, and (d) the denial of its applications would constitute a "prohibition of personal wireless services" within the meaning of 47 U.S.C.A. §332(7)(B)(i)(II).

Glaringly absent from *CTI's* application is any "*hard data,"* which could easily be submitted by the applicant, as *probative evidence* to establish that: (a) there is an actual Public Necessity for the facility being proposed, which (b) necessitates the installation of a new facility, (c) requires it to be built at the specifically chosen location, and (d) on the specifically chosen site (as opposed to being built upon alternative, less-intrusive locations).

Thus, *CTI* has failed to prove that the proposed location is the best possible location to remedy a significant gap in personal wireless service because no significant gap in service even exists.

Without any data whatsoever, it is impossible for the County to comply with the smart planning requirements set forth in its own Code and General Plan. Furthermore, without any data, the County cannot ascertain that the proposed location is the least intrusive means of providing personal wireless service to the community because they have no idea where any possible significant gaps may or may not exist. It would be entirely irresponsible and illogical for the County to grant applications for the installation of wireless telecommunications facilities without even knowing where such facilities are actually needed.

(i) FCC and California Public Utilities Commission

Recently, both the FCC and the California Public Utilities Commission have recognized the ***absolute need*** for hard data rather than the commonly submitted propagation maps, which can easily be manipulated to exaggerate need and significant gaps.

As is discussed within the FCC's July 17, 2020, proposed order, FCC-20-94, "[i]n this section, we propose requiring mobile providers to submit a statistically valid sample of on-the-ground data (*i.e.*, both mobile and stationary drive-test data) as an additional method to verify mobile providers' coverage maps."[8] The FCC defines drive tests as "tests analyzing network coverage for mobile services in a given area, i.e., measurements taken from vehicles traveling on roads in the area."[9] Further within the FCC's proposed order, several commenting entities also agree that drive test data is the best way to ascertain the most reliable data. For example: (i) "City of New York, California PUC, and Connected Nation have asserted that on-the-ground data, such as drive-test data, are critical to verifying services providers' coverage data…;"[10] (ii) California PUC asserted that 'drive tests [are] the most effective measure of actual mobile broadband service speeds';"[11] and (iii) "CTIA, which opposed the mandatory submission of on-the-ground data, nonetheless acknowledged that their data 'may be a useful resource to help validate propagation data…'"[12]

[8] *See* page 44 paragraph 104 of proposed order FCC-20-94.
[9] *See* page 44 fn. 298 of proposed order FCC-20-94.
[10] *See* page 45 fn. 306 of proposed order FCC-20-94.
[11] *Id*.
[12] *Id*.

California PUC has additionally stated that "the data and mapping outputs of propagation-based models will not result in accurate representation of actual wireless coverage" and that based on its experience, "drive tests are required to capture fully accurate data for mobile wireless service areas."[13]

Moreover, proposed order FCC-20-94, on page 45, paragraph 105, discusses provider data. Specifically, the FCC states:

> *"The Mobility Fund Phase II Investigation Staff Report*, however, found that drive testing can play an important role in auditing, verifying, and investigating the accuracy of mobile broadband coverage maps submitted to the Commission. The *Mobility Fund Phase II Investigation Staff Report* recommended that the Commission require providers to "submit sufficient actual speed test data sampling that verifies the accuracy of the propagation model used to generate the coverage maps. *Actual speed test data is critical to validating the models used to generate the maps.*"
>
> (Emphasis added.)

Most importantly, on August 18, 2020, the FCC issued a final rule in which the FCC found that requiring providers to submit detailed data about their propagation models will help the FCC verify the accuracy of the models. Specifically, 47 CFR §1.7004(c)(2)(i)(D) requires "[a]ffirmation that the coverage model has been validated and calibrated at least one time using on-the-ground testing and/or other real-world measurements completed by the provider or its vendor."

The mandate requiring more accurate coverage maps has been set forth by Congress. "As a result, the U.S. in March passed a new version of a bill designed to improve the accuracy of broadband coverage maps."[14] "The Broadband Deployment Accuracy and Technological

[13] https://arstechnica.com/tech-policy/2020/08/att-t-mobile-fight-fcc-plan-to-test-whether-they-lie-about-cell-coverage/
[14] https://www.cnet.com/news/t-mobile-and-at-t-dont-want-to-drive-test-their-coverage-claims/

Availability (DATA) Act requires the FCC to collect more detailed information on where coverage is provided and to 'establish a process to verify the accuracy of such data, and more.'"[15]

"The project – required by Congress under the Broadband DATA Act – is an effort to improve the FCC's current broadband maps. Those maps, supplied by the operators themselves, have been widely criticized as inaccurate."[16]

If the FCC requires further validation and more accurate coverage models, there is no reason Sant Cruz County should not do the same. For the foregoing reasons, dropped call records and drive test data are both relevant and necessary.

(ii) Hard Data and the Lack Thereof

Across the entire United States, applicants seeking approvals to install wireless facilities provide local governments with *hard data,* as both: (a) actual evidence that the facility they seek to build is actually necessary and (b) actual evidence that granting their application would be consistent with smart planning requirements.

The most accurate and least expensive evidence used to establish the location, size, and extent of both *significant gaps* in personal wireless services, and areas suffering from *capacity deficiencies*, are two specific forms of *hard data*, which consist of: (a) dropped call records and (b) actual drive test data. Both local governments and federal courts in California consider hard data in order to ascertain whether or not a significant gap in wireless coverage exists at that exact location.

[15] *Id*.
[16] https://www.lightreading.com/test-and-measurement/CTI-t-mobile-atandt-balk-at-drive-testing-their-networks/d/d-id/763329

In fact, unlike "expert reports," RF modeling and propagation maps, all of which are often manipulated to reflect whatever the preparer wants them to show, *hard data* is straightforward and less likely to be subject to manipulation, unintentional error, or inaccuracy.

Dropped call records are generated by a carrier's computer systems. They are typically extremely accurate because they are generated by a computer that already possesses all of the data pertaining to dropped calls, including the number, date, time, and location of all dropped calls experienced by a wireless carrier at any geographic location and for any chronological period.

With the ease of a few keystrokes, each carrier's system can print out a precise record of all dropped calls for any period of time, at any geographic location. It is highly unlikely that someone could enter false data into a carrier's computer system to materially alter that information.

In a similar vein, actual drive test data does not typically lend itself to the type of manipulation that is almost uniformly found in "computer modeling," the creation of hypothetical propagation maps, or "expert interpretations" of actual data, all of which are so subjective and easily manipulated that they are essentially rendered worthless as a form of probative evidence.

Actual *raw* drive test data consists of actual records of a carrier's wireless signal's actual recorded strengths at precise geographic locations.

As reflected in the record, *CTI* has not provided either of these forms of *hard data* as probative evidence, nor has it presented any form of data whatsoever, despite being in possession of such data.

(iii) *CTI's* Provided Analysis Regarding AT&T's Wireless Coverage is Contradicted By AT&T's Own Actual Coverage Data

CTI's application states that it has a lease agreement with AT&T for AT&T to use the proposed tower for its wireless service. But AT&T's own data contradicts *CTI's* claim that a coverage gap exists in AT&T's service in the Bonny Doon area. As is a matter of public record, AT&T maintains an internet website at the internet domain address of http://www.att.com. In conjunction with its ownership and operation of that website, AT&T maintains a database that contains geographic data points that cumulatively form a geographic inventory of AT&T's *actual current* coverage for its wireless services.

As maintained and operated by AT&T, that database is linked to AT&T website at https://www.att.com/maps/wireless-coverage.html and functions as the data-source for an interactive function, which enables users to access AT&T's own data to ascertain both: (a) the existence of AT&T's wireless coverage at any specific geographic location, and (b) the level, or quality of such coverage.

AT&T's interactive website translates AT&T's *actual coverage data* to provide imagery whereby areas that are covered by AT&T's service are depicted in shades of blue, including 5G+, 5G and 4G.

The website further translates the data from AT&T's database to specify the *actual* coverage at any specific geographic location. **Exhibit "C,"** which is being submitted together

with this Memorandum, is a true copy of a record obtained from AT&T's website[17] on October 13, 2023. The proposed location is circled in red.

This Exhibit is AT&T's own depiction of its actual wireless coverage at 186 Summit Drive, Santa Cruz California, that being the specific geographic location at which *CTI* seeks to install its proposed facility under the claim that AT&T "needs" such facility to remedy a gap in its personal wireless service at and around such location.

As shown in **Exhibit "C,"** AT&T's own data reflects that there is no coverage gap *at all* in AT&T's service, including 5G, at that precise location or anywhere around or in close proximity to it. To the extent that *CTI* claims that the data available on AT&T's website is not accurate, it demonstrates how easily data can be manipulated to suit a particular purpose – when selling its service to the consuming public, the coverage is excellent, but when selling a proposed tower to a municipality, the coverage is almost non-existent. Only the hard data on which the representations are based can resolve the discrepancy. But neither *CTI* nor AT&T will provide it, claiming that it is proprietary information they cannot share with the public.

CTI's submissions are entirely devoid of any hard data or probative evidence that establishes that AT&T *needs* the proposed facility. AT&T's data affirmatively contradicts what *CTI* states in its application. As such, *CTI* has wholly failed to "demonstrate and prove" that *CTI's* proposed facility is necessary for it to provide personal wireless services within the City.

For the foregoing reasons, *CTI's* application should be denied.

[17] https://www.att.com/maps/wireless-coverage.html

POINT IV

CTI's Application Must Be Denied Because the Proposed Location Will Be at a Heightened Risk of Fire

Monopoles, such as the one being proposed by *CTI,* are, *by far*, the most susceptible to fires and collapse due to fire. *See* Exhibit "D," which includes a sampling of images of monopoles that suffered fires. *At least* once per month, a monopole cell tower somewhere in the U.S will experience a fire, and an unspecified number of them will, thereafter, collapse in a flaming heap.

The most notorious example was a monopole cell tower in Wellesley, MA, which erupted into flames on a main thoroughfare, and the entire tower proceeded to collapse in flames. Meanwhile, hundreds of drivers drove past it.[18]

Exhibit "D" is just a small sampling of well-documented monopole cell tower fires. Given the already high risk of fire in Santa Cruz County, the above situations should be considered in connection with the health and safety, and material injury to property concerns expressed in the County Code in connection with wireless telecommunication facilities.

POINT V

To Comply With the TCA, *CTI*'s Application Should Be Denied in a Written Decision Which Cites the Evidence Provided Herewith

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

[18] To watch a color video of that event, simply follow this link:
https://youtu.be/0cTcXuyiYY?si=u6D7aoBy_5GWfZXG
A more recent example from 2021 in Gulf Shores, Alabama can be viewed here:
https://youtu.be/7EN3Z4C8550?si=x9RvjGeGLN6GhtYb

A. The Written Decision Requirement

To satisfy the requirement that the decision be in writing, a local government must issue a written denial which is separate from the written record of the proceeding, and the denial must contain a sufficient explanation of the reasons for the denial to allow a reviewing court to evaluate the evidence in the record supporting those reasons. *See, e.g., MetroPCS v. City and County of San Francisco,* 400 F.3d 715, 721 (9th Cir. 2005).

B. The Substantial Evidence Requirement

To satisfy the requirement that the decision be based upon substantial evidence, the decision must be based upon such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. "Substantial evidence" means "less than a preponderance, but more than a scintilla." *Id.* at 725.

Review under this standard is essentially deferential, such that Courts may neither engage in their own fact-finding nor supplant a local zoning board's reasonable determinations. *Id.*

To ensure that a legal challenge to the County's decision under the Telecommunications Act of 1996 will not succeed, it is respectfully requested that the County deny *CTI's* application in a written decision wherein the County cites the substantial evidence submitted herewith (and profound lack of evidence from the applicant in support of its proposed tower) upon which it based its determination.

C. The Non-Risks of Litigation

All too often, representatives of wireless carriers and/or site developers like *CTI* seek to intimidate local zoning officials with either open or veiled threats of litigation. These threats of litigation under the TCA are, for the most part, more bark than bite.

This is because, even if the applicant files a federal action against the County and wins, the Telecommunications Act of 1996 does not entitle the applicant to recover compensatory damages or attorneys' fees, even when they get creative and try to characterize their cases as claims under 42 U.S.C. §1983.[19]

This means that if the applicant sues the County and wins, the County does not pay anything in damages or the applicant's attorneys' fees under the TCA. Typically the only expense incurred by the local government is its own attorneys' fees. Since federal law mandates that TCA cases proceed on an "expedited" basis, such cases typically last only months rather than years.

As a result of the brevity and relative simplicity of such cases, the attorneys' fees incurred by a local government are typically quite small, compared to virtually any other type of federal litigation—as long as the local government's counsel does not try to "maximize" its billing in the case.

[19] *See City of Rancho Palos Verdes v. Abrams*, 125 S.Ct 1453 (2005), *Network Towers LLC v. Town of Hagerstown*, 2002 WL 1364156 (2002), *Kay v. City of Rancho Palos Verdes*, 504 F.3d 803 (9th Cir 2007*), Nextel Partners Inc. v. Kingston Township*, 286 F.3d 687 (3rd Cir 2002).

Conclusion

In view of the foregoing, it is respectfully submitted that *CTI*'s application for a Development Permit be denied in its entirety.

Dated: Santa Cruz, California
October 13, 2023

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