



**JOHN DI BENE**  
General Attorney  
Legal Department

AT&T Services, Inc.  
2600 Camino Ramon  
Room 2W901  
San Ramon, CA 94583

925.543.1548 Phone  
925.867.3869 Fax  
[jdb@att.com](mailto:jdb@att.com)

May 4, 2012

***Via Electronic Mail***

Commissioner Leo Panian  
City Hall  
Planning & Zoning Commission  
1000 San Pablo Avenue  
Albany, CA 94706

Commissioner Peter Maass  
City Hall  
Planning & Zoning Commission  
1000 San Pablo Avenue  
Albany, CA 94706

Commissioner David Arkin  
City Hall  
Planning & Zoning Commission  
1000 San Pablo Avenue  
Albany, CA 94706

Commissioner Phillip Moss  
City Hall  
Planning & Zoning Commission  
1000 San Pablo Avenue  
Albany, CA 94706

Commissioner Stacy Eisenmann  
City Hall  
Planning & Zoning Commission  
1000 San Pablo Avenue  
Albany, CA 94706

***Re: AT&T Mobility's Application for a Cell Site on 1035 San Pablo Ave.***  
***Planning Application #08-038***

Dear Commissioners:

I write to ask the Planning Commission to reconsider its decision of April 24, 2012, denying the application of AT&T Mobility (“AT&T”), referenced above, to install a personal wireless service site consisting of nine panel antennas and related equipment at 1035 San Pablo Avenue. For the reasons explained below, AT&T believes that decision – resting primarily on the characterization of the large mechanical penthouse on the roof in such a way that it covers most of the space available for wireless facilities – was erroneous. The denial has the effect of prohibiting AT&T from providing personal wireless services in the city. The denial also highlights the city’s unreasonable discrimination in allowing one wireless carrier on the rooftop of this site while denying all others the opportunity to collocate there.

At the April 24, 2012 hearing, the Commission asked whether AT&T could consider an alternative where it removed all of its proposed equipment, including its antennas, off the rooftop. AT&T fully investigated all possible ways to work with the existing structures on and about the rooftop, and the myriad and assorted planning requirements in order to remove all of its facilities from the rooftop of the structure. In the end, AT&T was able to prepare yet one more alternative – option #3 – that minimizes the amount of equipment on the roof to the greatest extent feasible. The plans for this option are attached in Exhibit A to this letter. All equipment is either placed within the mechanical penthouse or on the parapet right by the antennas. All cables are routed along the parapets, not on the rooftop. The Southward- and Northward-facing antennas in this option are mounted on the Sprint penthouse wall and the parapet. All of those structures use absolutely zero rooftop space. However, AT&T's Eastward-facing antennas cannot be mounted on any other existing structure in order to meet the required setbacks and coverage requirements. In order to mount these antennas, they have to be mounted above the floor from the parapet with a 3 inch round post base that is well under 1 foot square that will support the approximately 8 foot by 2 foot antenna arrays. With this structure, AT&T will only add a 3 inch round post that is under 1 square foot to the rooftop; but it cannot build this site without placing that under 1 square foot mounting base on the rooftop. AT&T stands ready, willing, and able to build this site using this option #3, or options #1 or #2 presented at the last Commission meeting, or its original proposal.

In my letter of February 24, 2012, I detailed how AT&T has established that it has a significant gap in personal wireless service coverage in the area around 1035 San Pablo Avenue. I also explained how the record shows that the site at 1035 San Pablo Avenue is the least intrusive means by which AT&T can fill that gap. Proof of these two elements are sufficient to make out a *prima facie* case for federal preemption of local zoning regulation under the “prohibition of service” preemption in the Telecommunications Act of 1996 (the “Act”), 47 U.S.C. § 332(c)(7)(B)(i)(II). In my letter to City Attorney Labadie of April 18, 2012, which is in the record for these proceedings, I also explained how the nearly four years it has taken the city to consider this application has exceeded the “reasonable period of time” allowed for local review of an application to construct a cell site under the Act, 47 U.S.C. § 332(c)(7)(B)(ii). I will not repeat these arguments, except to note that the record evidence supporting these claims has only strengthened in the intervening weeks.

## **1. The Commission’s Inclusion Of The Mechanical Penthouse In The 10% Rooftop Calculation Was Erroneous.**

Notwithstanding the federal legal mandates, the Commission voted to deny AT&T’s application at the April 24, 2012 hearing because of a mechanical penthouse that covers 432 square feet of the rooftop at 1035 San Pablo Avenue. The Commission apparently concluded that this mechanical penthouse should be treated within the category of structures, like wireless facilities, that combined can cover only 10% of the building rooftop under Municipal Code Section 20.24.080(B). If this penthouse counts against the 10% rooftop coverage requirement, there is no other space on the rooftop that

can be used for wireless facilities (or any of the long list of enumerated structures). Specifically, according to the April 24, 2012 Staff Report, page 4, the rooftop is 4,786 square feet, which means that only 478.6 square feet is available at 1035 San Pablo for all Section 20.24.080(B) structures, including wireless facilities. Subtracting the 432 square feet of the mechanical penthouse leaves a mere 46.6 square feet to be used for all other Section 20.24.080(B) facilities, including all wireless facilities. The existing Sprint facility takes up an additional 265 square feet, which means that the mechanical penthouse and the Sprint facility together take up 14.6% of the rooftop. So, if the mechanical penthouse is counted towards the 10% rooftop coverage limit, then no available space remains for wireless facilities or any of the other structures enumerated under Section 20.24.080(B). The city's misinterpretation of this provision also makes it impossible for wireless service providers like AT&T to collocate on this site, which is contrary to the city's mandated preference for collocation under Section 20.20.100(E)(2)(a).

The Commission impliedly found that this mechanical penthouse should be treated as falling under the 10% rooftop coverage requirement of 20.24.080(B). AT&T believes it is an error to attempt to apply the 10% limitation to this structure, for a few reasons. First, the mechanical penthouse is not listed as one of the enumerated structures. Section 20.24.080(B) applies only to a very limited list of structures: "towers, spires, cupolas, chimneys, elevator penthouses, water tanks, monuments, flagpoles, theatre scenery storage structures, fire towers, and similar structures." AT&T submits that the mechanical penthouse/break room is nothing like these structures – as shown by its current use as a break room. Indeed, the current use of the space as a break room underscores the fact that it cannot count against the 10% rooftop footprint because Section 20.24.080(B) specifically provides that "no such structure shall be *used* for habitable space or advertising purposes" (emphasis added). Regardless of the legal status of such use, the record is unambiguous that this preexisting structure has been, and currently is, being actively and affirmatively used as habitable space as a break room. The fact that this one structure almost fills the entire 10% standard by itself is evidence that it is far larger than one would expect such structures to be. The only way the mechanical penthouse can be interpreted to apply to the limitation is as a "similar structure." The structure most similar in this list is an elevator penthouse, but, at 432 square feet, the mechanical penthouse/break room is much larger than the typical single-shaft elevator penthouse for a 40 foot building.

There is a good reason why the 10% rooftop coverage limitation is intended to apply to smaller structures. If it were intended to apply to larger structures, then one such structure could preclude placement of any additional structures above 6 feet high on the building. This mechanical penthouse is simply not that type of structure. This penthouse is much larger than the listed items, and it is not of the same character as any of the others. It was never intended to be used as any of the listed structures or in a similar manner, and it never has been used as any of the listed structures or in a similar manner. As such, the Commission should not attempt to include the mechanical penthouse in the 10% rooftop coverage limitation.

It is not clear at all that the mechanical penthouse fits within either of the two rooftop coverage limits under Section 20.24.080. Given that the mechanical penthouse/break room is not the size or sort of structure listed in Section 20.24.080(B), if either rooftop coverage calculation is to be applied, it would more logically fit within the 20% limit for mechanical appurtenances under Section 20.24.080(C) than under the 10% limit for enumerated structures in Section 20.24.080(B). If the Commission considers the original plans to determine the character of the penthouse, then it must be viewed as a location reserved for placement of mechanical appurtenances. And because the mechanical penthouse was constructed as part of the building when originally constructed in 1985, long before the zoning height limits were enacted, it is not relevant that it exceeds 6 feet in height. In short, for all these reasons, it is a plain error to apply the 10% rooftop coverage limitation to the mechanical penthouse structure.

## **2. Denying AT&T's Application Would Be Unreasonably Discriminatory.**

I also want to call your attention to another provision of the Telecommunications Act that would be implicated by the denial of AT&T's application – the one that prohibits unreasonable discrimination against one provider's network in favor of another, 47 U.S.C. § 332(c)(7)(B)(i)(I).

As you know, AT&T has investigated numerous sites to meet its coverage needs, and in the end identified the subject property as the only available and feasible solution to close its service coverage gap in the city. The city's own consultant agreed that it is a "logical" site. Section 20.20.100(E)(2)(a) of the city's code establishes a preference in favor of wireless sites that are collocated with existing wireless sites "whenever feasible." As discussed, Sprint has installed and operates wireless communication facilities on the roof of this very building. If the mechanical penthouse is considered to count under Section 20.24.080(B), Sprint's facility also exceeds the 10% rooftop limit.<sup>1</sup> AT&T submits that this entire factual pattern, taken as a whole, shows that it would be unreasonably discriminatory to allow Sprint to maintain a site on this particular rooftop in excess of the rooftop coverage requirements while denying AT&T the opportunity to collocate on the same rooftop. It would not be reasonable for the city to punish AT&T for seeking to collocate, and it would amount to discrimination between carriers of functionally equivalent services, which is prohibited by the Act, 47 U.S.C. § 332(c)(7)(B)(i)(I). Indeed, AT&T's proposal is stealthy whereas Sprint's facility is not, and AT&T's proposed facility would take up only about one-fourth of the square footage occupied by Sprint's facility. Because AT&T's proposal, as designed or consistent with one of the alternative designs, meets the city's numerous and burdensome requirements, and in particular would meet the city's screening and visual standards (unlike Sprint's

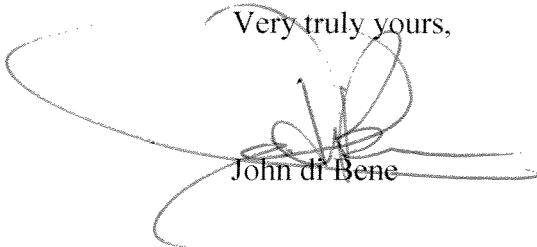
---

<sup>1</sup> Of course, Sprint's facilities were installed before the city enacted its roof coverage limits, but the point is that it could not have been built under the current code, and, as a result, no other Section 20.24.080(B) could ever be built on this roof if the mechanical penthouse is counted towards that 10% limit.

Planning Commission  
City of Albany, California  
May 4, 2012  
Page 5

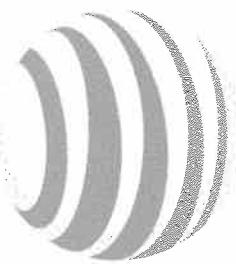
facilities), it would be unreasonable to discriminate against AT&T by denying the application.

AT&T urges the Commission to reverse its decision to deny its application and instead should grant the application with directions to implement either the original proposal or one of the three options AT&T has committed to build on the site.

Very truly yours,  
  
John di Bene

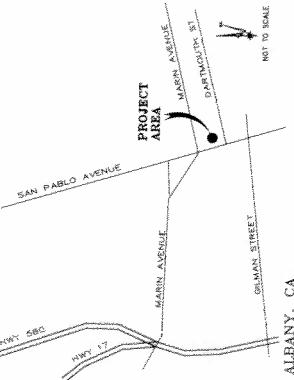
cc: Mr. Craig Labadie, Esq., City Attorney (w/encl.)  
Ms. Nicole Almaguer, City Clerk (w/encl.)  
Ms. Anne Hersh, City Planner (w/encl.)

## SEVERAL NOTES



**at&t** MARIN AVENUE  
CN4554

PROPRIETARY INFORMATION																																					
THE INFORMATION CONTAINED IN THIS SET OF DRAWINGS IS PROPRIETARY BY AT&T MOBILITY, INC. USE OR REPRODUCTION DISCLOSEMENT OF THE INFORMATION RELATES TO PEAK SITE COMM IS STRICTLY PROHIBITED.																																					
CLIENT:																																					
 																																					
PROJECT INFORMATION:	<b>MARIN AVENUE</b> 1035 SAN PABLO AVE ALBANY, CA 94706																																				
CURRENT ISSUE DATE:	5-2-08																																				
ISSUE DATE:																																					
ZONING DOCS																																					
<table border="1"> <thead> <tr> <th>REV</th> <th>DATE</th> <th>DESCRIPTION</th> <th>BY</th> </tr> </thead> <tbody> <tr> <td>7</td> <td>5-15-11</td> <td>REV 1035 ZONING DOCS</td> <td>TAP</td> </tr> <tr> <td>8</td> <td>5-27-11</td> <td>REV 1035 ZONING DOCS</td> <td>MR</td> </tr> <tr> <td>B</td> <td>B-15-11</td> <td>REV 1035 ZONING DOCS</td> <td>MR</td> </tr> <tr> <td>10</td> <td>10-11-11</td> <td>REV 1035 ZONING DOCS</td> <td>VRT</td> </tr> <tr> <td>11</td> <td>3-14-12</td> <td>REV LAYOUT SKETCH</td> <td>MR</td> </tr> <tr> <td>12</td> <td>4-27-12</td> <td>REV LAYOUT SKETCH</td> <td>MR</td> </tr> <tr> <td>13</td> <td>5-2-12</td> <td>REV LAYOUT SKETCH</td> <td>MR</td> </tr> <tr> <td>14</td> <td>5-3-12</td> <td>REV SIE LAYOUT</td> <td>MR</td> </tr> </tbody> </table>		REV	DATE	DESCRIPTION	BY	7	5-15-11	REV 1035 ZONING DOCS	TAP	8	5-27-11	REV 1035 ZONING DOCS	MR	B	B-15-11	REV 1035 ZONING DOCS	MR	10	10-11-11	REV 1035 ZONING DOCS	VRT	11	3-14-12	REV LAYOUT SKETCH	MR	12	4-27-12	REV LAYOUT SKETCH	MR	13	5-2-12	REV LAYOUT SKETCH	MR	14	5-3-12	REV SIE LAYOUT	MR
REV	DATE	DESCRIPTION	BY																																		
7	5-15-11	REV 1035 ZONING DOCS	TAP																																		
8	5-27-11	REV 1035 ZONING DOCS	MR																																		
B	B-15-11	REV 1035 ZONING DOCS	MR																																		
10	10-11-11	REV 1035 ZONING DOCS	VRT																																		
11	3-14-12	REV LAYOUT SKETCH	MR																																		
12	4-27-12	REV LAYOUT SKETCH	MR																																		
13	5-2-12	REV LAYOUT SKETCH	MR																																		
14	5-3-12	REV SIE LAYOUT	MR																																		
COORDINATING ENGINEER:																																					
<b>Peek Site - Com</b>  12820 Elkhart Ave, Suite 101 Alhambra, California 91802 Phone (562) 885-6160 E-Mail info@peeksitem.com																																					
DRAWN BY:																																					
CHAS#44	... VRT																																				
SHEET TITLE:																																					
TITLE SHEET																																					
SHEET NUMBER:	T-1																																				
REVISION:	0																																				

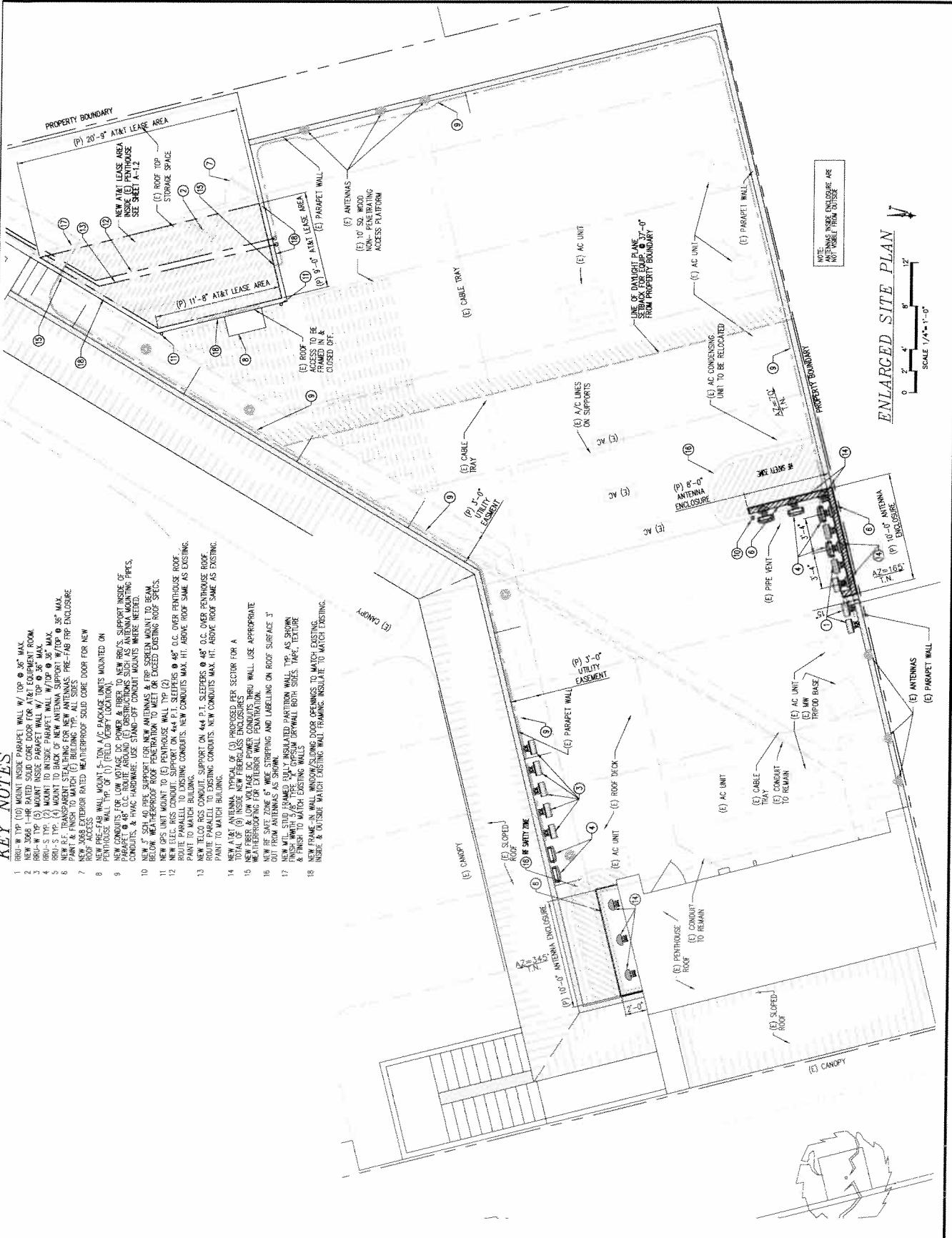




## KEY NOTES



PROPRIETARY INFORMATION THE INFORMATION CONTAINED IN THIS SET OF DRAWINGS IS PROPRIETARY TO NATURE, ANY USE, OR DISCLOSURE OTHER THAN THAT WHICH RELATES TO PEAK SITE-.COM IS STRICTLY PROHIBITED																																					
CLIENT:																																					
 <b>at&amp;t</b> 3851 NORTH FREEWAY BOULEVARD SACRAMENTO, CALIFORNIA 95834																																					
PROJECT INFORMATION:																																					
MARIN AVENUE	1025 MARIN AVENUE ALEXANDRIA, VA 22314																																				
CURRENT ISSUE DATE:	5-2-08																																				
ISSUE FOR:	ZONING DOCS																																				
<table border="1"> <thead> <tr> <th>REV</th> <th>DATE</th> <th>DESCRIPTION</th> <th>BY</th> </tr> </thead> <tbody> <tr> <td>7</td> <td>5-15-11</td> <td>REV 100% ZONING DOCS</td> <td>JAP</td> </tr> <tr> <td>8</td> <td>5-17-11</td> <td>REV 100% ZONING DOCS</td> <td>JMR</td> </tr> <tr> <td>9</td> <td>8-15-11</td> <td>REV 100% ZONING DOCS</td> <td>JMR</td> </tr> <tr> <td>10</td> <td>10-11-11</td> <td>REV 100% ZONING DOCS</td> <td>JMR</td> </tr> <tr> <td>11</td> <td>3-4-12</td> <td>REV LAWDY 36TH</td> <td>JMR</td> </tr> <tr> <td>12</td> <td>4-27-12</td> <td>REV LAWDY SKETCH</td> <td>JMR</td> </tr> <tr> <td>13</td> <td>5-2-12</td> <td>REV LAWDY SKETCH</td> <td>JMR</td> </tr> <tr> <td>14</td> <td>5-5-12</td> <td>REV SITE LAYOUT</td> <td>JMR</td> </tr> </tbody> </table>		REV	DATE	DESCRIPTION	BY	7	5-15-11	REV 100% ZONING DOCS	JAP	8	5-17-11	REV 100% ZONING DOCS	JMR	9	8-15-11	REV 100% ZONING DOCS	JMR	10	10-11-11	REV 100% ZONING DOCS	JMR	11	3-4-12	REV LAWDY 36TH	JMR	12	4-27-12	REV LAWDY SKETCH	JMR	13	5-2-12	REV LAWDY SKETCH	JMR	14	5-5-12	REV SITE LAYOUT	JMR
REV	DATE	DESCRIPTION	BY																																		
7	5-15-11	REV 100% ZONING DOCS	JAP																																		
8	5-17-11	REV 100% ZONING DOCS	JMR																																		
9	8-15-11	REV 100% ZONING DOCS	JMR																																		
10	10-11-11	REV 100% ZONING DOCS	JMR																																		
11	3-4-12	REV LAWDY 36TH	JMR																																		
12	4-27-12	REV LAWDY SKETCH	JMR																																		
13	5-2-12	REV LAWDY SKETCH	JMR																																		
14	5-5-12	REV SITE LAYOUT	JMR																																		
COORDINATING ENGINEER:																																					
<i>Peak Site-Com</i> 12825 Fairbank Ave, Suite 101  Auburn, California 95602 Phone (530) 885-6160 E-Mail: <a href="mailto:Info@peaksitecom.com">Info@peaksitecom.com</a>																																					
SEAL:																																					
																																					
SITE #:	OK	DRAWN BY:																																			
CR-4554	...	VRI																																			
SHEET #:		REVISION:																																			
<b>SITE PLAN</b>																																					
<b>A-1.1</b> <b>0</b>																																					



PROPRIETARY INFORMATION  
THE INFORMATION CONTAINED IN THIS  
SET OF DRAWINGS IS PROPRIETARY  
BY NATURE, ANY USE, OR  
DISCLOSURE OTHER THAN THAT WHICH  
RELATES TO THIS SITE-COM IS  
STRICTLY PROHIBITED



**MARIN AVENUE**  
1015 SAN PABLO AVE  
ALBANY, CA 94706  
PROJECT INFORMATION: 215-2222

5-2-08

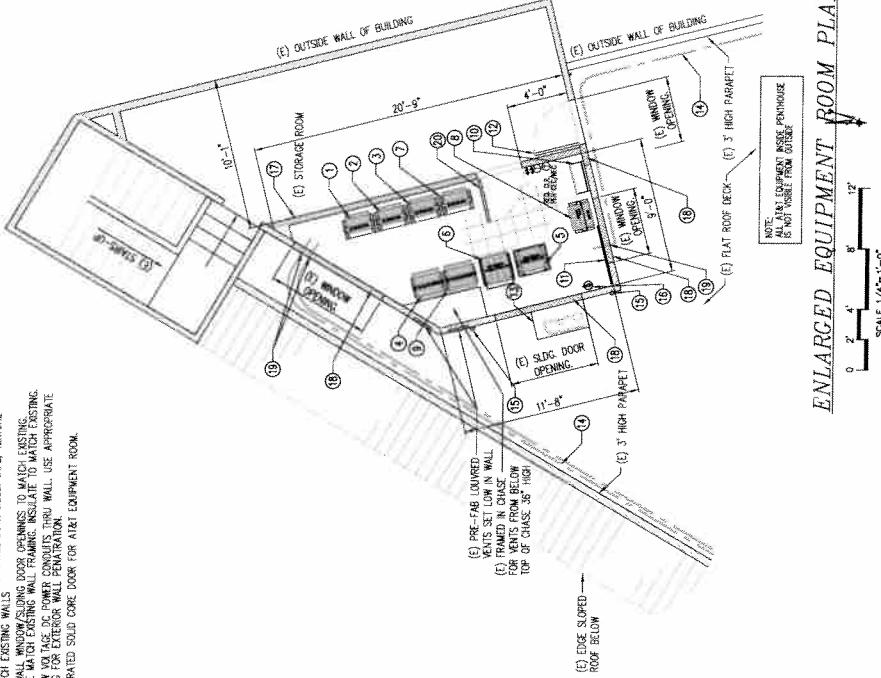
ZONING DOCS

REV	DATE	DESCRIPTION	BY
7	15-7-11	REV LOGO ZOMBIE 0005	JAF
8	5-2-12	REV LOGO ZOMBIE 0005	JAF
9	6-15-11	REV LOGO ZOMBIE 0005	JAF
10	10-11-11	REV LOGO ZOMBIE 0005	JAF
11	3-14-12	REV LAYOUT SKETCH	JAF
12	4-27-12	REV LAYOUT SKETCH	JAF
13	5-2-12	REV LAYOUT SKETCH	JAF
14	5-5-12	REV LAYOUT	JAF

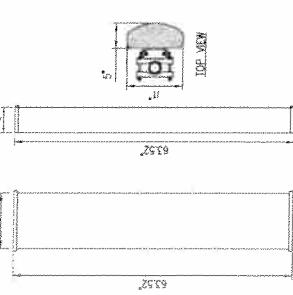
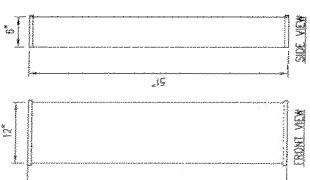
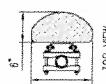
Peek Site-Com  
12852 Earhart Ave. Suite 101  
Auburn, California 95602  
Phone (530) 855-6100  
E-Mail info@peaksite.com

SITE #: CHK. DRAWN BY:  
CNS54 ... VRT  
E-SPEC SHEET DATE:

#### KEY NOTES



## ENLARGED EQUIPMENT ROOM PLAN



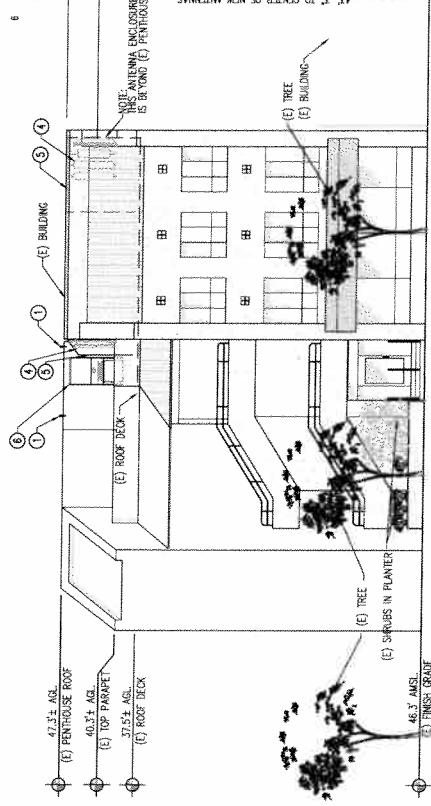
Y.P. ANTENNA DETAIL

PROPRIETARY INFORMATION	
THE INFORMATION CONTAINED IN THIS SET OF DRAWINGS IS PROPRIETARY TO AT&T. BY NATURE, ANY USE, OR DISCLOSURE OTHER THAN THAT WHICH RELATES TO PEEK SITE-COM IS STRICTLY PROHIBITED.	
CLIENT:	
PROJECT:	INFORMATION:
3851 NORTH FREEWAY BOULEVARD SACRAMENTO, CALIFORNIA 95834	
MARIN AVENUE 1000 SAN FRANCISCO AVE ALBANY, CA 94706	
CURRENT ISSUE DATE:	
5-2-08	
ISSUE FOR:	
ZONING DOCS	
REV. DATE:	DESCRIPTION:
7 5-15-11	REV 1056 ZONING DOCS
8 5-27-11	REV 1056 ZONING DOCS
9 6-15-11	REV 1056 ZONING DOCS
10 10-11-11	REV 1056 ZONING DOCS
11 3-14-12	REV LAYOUT SKETCH
12 4-27-12	REV LAYOUT SKETCH
13 5-1-12	REV LAYOUT SKETCH
14 5-1-12	REV SITE LAYOUT
COORDINATING ENGINEER:	
Peek Site - Com	
2852 Ehrhart Ave Suite 101 Auburn, California 95602 Phone (530) 985-6160 E-Mail: info@peeksitelcom.com	
SEAL:	
PROFESSIONAL ENGINEER REGISTRATION NO. C-2407 EXPIRATION DATE: 12/31/2010 STATE OF CALIFORNIA	
STR. #: (NAME):	CHK. #: (NAME):
(NAME):	DRAWN BY: (NAME):
SHEET TITLE: (NAME):	
REVISOR: (NAME):	
A-2 0	

#### KEY NOTES

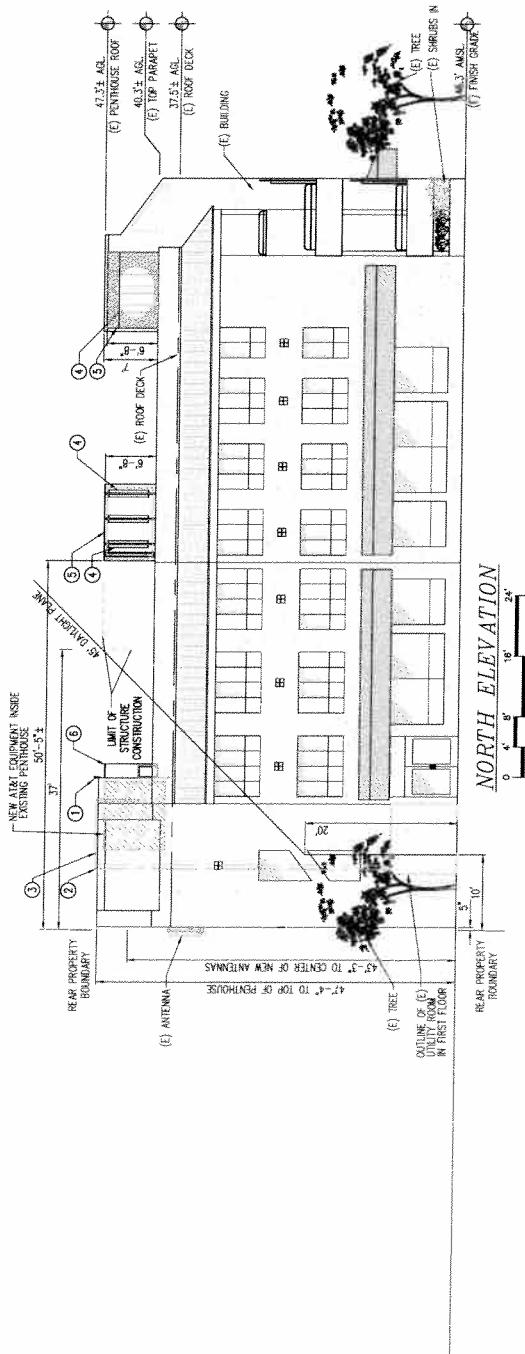
**NOTE:** ANTENNAS INSIDE ENCLOSURE ARE  
NOT VISIBLE FROM OUTSIDE

ANTENNAS/COAX SCHEDULE						
		DATE:				
SECTOR	ADJUST	MODEL	CONN SIZE	COAX & LENGTH	RAD CENTER	
SECTOR "A"	70°	P65-15-RLH+RR	16"	(4) 30'	43°-3°	
		RAD-7780.00	16"	(4) 30'	43°-3°	
SECTOR "B"	345°	P65-15-RLH+RR	16"	(6) 30'	43°-3°	
		RAD-7780.00	16"	(6) 30'	43°-3°	
SECTOR "C"	185°	P65-15-RLH+RR	16"	(4) 24'	43°-3°	
		RAD-7780.00	16"	(6) 24'	43°-3°	



WEST ELEVATION

4' 8' 16'



*NORTH ELEVATION*

10'-0"

