



# THE PLANNING & DEVELOPMENT DEPARTMENT APPEAL TO CITY PLANNING COMMISSION

Complete this form if you are appealing an **Administrative** decision to City Planning Commission.

### APPELLANT CONTACT INFORMATION:

Appellants Name: Vertical Bridge Holdings, LLC/Vertical Bridge Development, LLC Telephone: 561-945-6367  
Address: 750 Park of Commerce Drive, Suite 2W City Boca Raton  
State: FL Zip Code: 33487 E-mail: Dmarinberg@verticalbridge.com

### PROJECT INFORMATION:

Project Name: Wahsatch Ave Transit Mix U S-Ø 5068 CMRS  
Site Address: 444 E. Costilla Street, Colorado Springs, CO  
Type of Application being appealed: CMRS No. 2 (CMRS Development Plan (CM2))  
Include all file numbers associated with application: AR CM2 18-00636  
Project Planner's Name: Rachel Teixeira  
Hearing Date: \_\_\_\_\_ Item Number on Agenda: \_\_\_\_\_

### YOUR APPEAL SUBMITTAL SHOULD INCLUDE:

1. Completed Application
2. \$176 check payable to the City of Colorado Springs
3. Appeal Statement.
  - See page 2 for appeal statement requirements.

Submit all 3 items above to the **Land Use Review office (30 S Nevada, Suite 105, Colorado Springs, CO 80903)**. Appeals are accepted for 10 days after a decision has been made. Submittals must be received no later than 5pm on the due date of the appeal. Incomplete submittals and / or submittals received after 5pm or outside of the 10 day window will not be accepted. If the due date for the submittal falls on a weekend or federal holiday, the deadline is extended to the following business day.

If you would like additional assistance with this application or would like to speak with the neighborhood development outreach specialist, contact Katie Sunderlin at [sunderka@springsgov.com](mailto:sunderka@springsgov.com) (719) 385-5773.

### APPELLANT AUTHORIZATION:

The signature(s) below certifies that I (we) is(are) the authorized appellant and that the information provided on this form is in all respects true and accurate to the best of my (our) knowledge and belief. I(we) familiarized myself(ourselves) with the rules, regulations and procedures with respect to preparing and filing this petition. I agree that if this request is approved, it is issued on the representations made in this submittal, and any approval or subsequently issued building permit(s) or other type of permit(s) may be revoked without notice if there is a breach of representations or conditions of approval.

Signature of Appellant \_\_\_\_\_ Date 3/18/19  
Last Modified: 5/31/2018

**THE APPEAL STATEMENT SHOULD INCLUDE THE FOLLOWING**

- ☐ If you are appealing a decision made Administratively the following should be included in your appeal statement:
  1. Verbiage that includes justification of City Code 7.5.906.A.4
    - i. Identify the explicit ordinance provisions which are in dispute.
    - ii. Show that the administrative decision is incorrect because of one or more of the following:
      1. It was against the express language of this zoning ordinance, or
      2. It was against the express intent of this zoning ordinance, or
      3. It is unreasonable, or
      4. It is erroneous, or
      5. It is clearly contrary to law.
    - iii. Identify the benefits and adverse impacts created by the decision, describe the distribution of the benefits and impacts between the community and the appellant, and show that the burdens placed on the appellant outweigh the benefits accrued by the community.

**CITY AUTHORIZATION:**

Payment: \$ 176.00

Date Application Accepted: 3/18/19

Receipt No: 33287

Appeal Statement: \_\_\_\_\_

Intake Staff: Kayla Battles

Completed Form: \_\_\_\_\_

Assigned to: Rachel Teixeira



**SPARKSWILLSON**  
Borges Brandt & Johnson, P.C.

Robert M. Willson	Paul W. Hurcomb	Maxie J. Hohnstein
Kent H. Borges	Matthew A. Niznik	Renée S. Congdon
Ben Sparks	William J. Robers	Y.R. Hladkyj
Christopher M. Brandt	Steven R. Ogle	Randolph M. Karsh
Scott W. Johnson	Jessica L. Kyle	<i>R. Kenneth Sparks</i>
David P. Steigerwald	Audree R. McNichols	<i>1936 - 2007</i>

March 18, 2019

*Via email: [msmith@springsgov.com](mailto:msmith@springsgov.com)*

Marc Smith, Esq.  
Division Chief-Corporate Division  
Office of the City Attorney  
City of Colorado Springs  
30 S. Nevada Avenue, Suite 501  
Colorado Springs, CO 80903

Re: Vertical Bridge Application (AR CM2 18-00636) for Approval of Development Plan for CMRS (Monopine Cellular Tower) at Transit Mix Site (444 E. Costilla)

Dear Marc:

Enclosed please find a copy of the appeal filed today on behalf our client, Vertical Bridge Holdings, LLC, regarding the administrative decision issued by the City on March 7, 2019 denying the above-referenced application.

Please direct all communication on this matter to me.

Sincerely,

SPARKS WILLSON BORGES  
BRANDT & JOHNSON, P.C.

Renée Congdon

Encl.

cc. Ben Bolinger, Office of the City Attorney ([bbolinger@springsgov.com](mailto:bbolinger@springsgov.com))  
Bryan Cave Leighton Paisner, Christopher Blaesing (co-counsel)

### Appeal Statement

This statement is in support of the appeal of the Administrative Decision for Wahsatch Ave Transit Mix US-CO 5068 CMRS Plan Application (File Number AR CM2 18-00636) filed by Applicant, Vertical Bridge Holdings, LLC/Vertical Bridge Development, LLC (“Applicant”).<sup>1</sup>

On March 7, 2019, the City Planning Department issued an Administrative Decision (“Administrative Decision”) denying the Applicant’s application (File Number AR CM2 18-00636) (“Application”) for approval of a stealth commercial mobile radio service (CMRS) facility to be located at 444 E. Costilla Street, Colorado Springs, Colorado 80903, which is zoned M-2 Heavy Industrial.

Proposed CMRS facilities are reviewed under Chapter 7, Article 4, part 6 of the City Code. City Code section 7.4.603 provides that stealth freestanding CMRS facilities are principally permitted in the M-2 zoning district. The maximum height allowed in the M-2 zoning district is eighty feet (80’). City Code section 7.3.204. A stealth freestanding CMRS facility that is less than the maximum height of zone in a nonresidential zone is subject to administrative review in accordance with development plan application and review procedures of Chapter 7, Article 5, part 5. City Code section 7.4.604.

The Administrative Decision is against the express language of the City’s ordinances, against the express intent of the City’s ordinances, unreasonable, erroneous, and clearly contrary to law for the following reasons:

### Applicable Federal Law

The Federal Telecommunications Act of 1996 (“TCA”), 47 U.S.C. § 332, limits the decision-making authority of local government bodies regarding the placement of wireless communications facilities. While Congress expressly preserved local zoning authority over the construction of personal wireless service facilities when it enacted the TCA, it placed restriction on the authority of local governments in regulating the placement, construction, and modification of telecommunications facilities. 47 U.S.C. § 332(c)(7)(B)(i)-(v). The restriction that has the most bearing on this appeal is the requirement that any decision by a local government “to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.” 47 U.S.C. § 332(c)(7)(B)(iii). None of the bases for the denial in the Administrative Decision are supported by substantial evidence contained in the Administrative Decision.

### Shot-clock Violation

Under both federal law and Colorado law, municipalities have 150 days to issue a final decision regarding wireless communication tower applications. On February 27, 2019, Applicant voluntarily notified the City that the shot clock would soon expire on March 4, 2019. Applicant further voluntarily offered to enter into a tolling agreement to give City additional time to make a decision on the Application. While the City issued the Administrative Decision within the tolling period, it did not issue a *final* decision within that time. Accordingly, the City failed to meet the shot-clock imposed by both federal and state law. Accordingly, the City should “issue without further delay all necessary

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<sup>1</sup> Applicant is represented by legal counsel: Renee Congdon of Sparks Willson Borges Brandt & Johnson, P.C. During the Application process, Applicant was represented by a consultant, Julie Cocca of ATFAB Wireless Properties. Vertical Bridge Holdings, LLC and Vertical Bridge Development LLC are affiliated entities.

authorization” for the proposed tower. See FCC Ruling, Accelerating Wireless and Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, 83 FR 51867-01, at para. 57.

#### Building Mounted Versus Stealth Structures

The Administrative Decision finds that the Applicant failed to provide evidence that the Applicant adequately considered or evaluated a structure-mounted CMRS facility. However, the relevant City Code provision and the application form do not require the Applicant to provide such evidence and as such the failure to provide such evidence cannot be a basis for denying the Application.

The Administrative Decision relies on Section 7.4.607A as a basis for finding that the Applicant is required to provide evidence that the applicant adequately considered or evaluated existing structures and has found such existing structures to be “not technically or legally feasible.” Administrative Decision, page 1. Section 7.4.607A has to do with Site Selection and which sites a carrier should consider; it does not address what needs to be included in the application. Section 7.4.605B and the application itself address what needs to be included in the application and neither require an applicant to provide evidence that the applicant considered mounting its CMRS facility to an existing structure.

Section 7.4.605B3 states:

“If a new freestanding facility is proposed, evidence that the carrier has reasonably explored the use of wall, roof *or stealth* facilities within the search area and determined that said facilities are not feasible or appropriate and justification of the need for the proposed tower and height requested.” (emphasis added)

The application states that the application must include:

“[e]vidence that carrier has reasonably explored the use of wall, roof *or stealth* facilities within the search area and determined that said facilities are not feasible or appropriate.” (emphasis added)

The proposed facility is a stealth facility. The Applicant did not provide evidence that it explored the use of wall, roof, or stealth facilities and found them to not be feasible, because the Applicant found the stealth facility to be feasible and has proposed the use of a stealth facility.

Failure to provide information with the application that is not required by the applicable City Code provision or by the application itself is not an appropriate basis upon which to deny an application. As such the City’s reason for denying the application is in error.

#### Concealment and Camouflage

The City’s next reason for denying the Application is that the proposed CMRS facility is not substantially concealed or camouflaged “due to the extraordinary height relative to the surrounding structures and the lack of other large trees within the area” and because “the proposed facility will be prominently visible from multiple directions.” Administrative Decision, p.2. Section 7.4.608B(1) states that “Stealth freestanding facilities” should be designed to substantially conceal and camouflage the antennas and associated equipment and are typified by bell towers, flagpoles, parking lot light poles, clock towers, decorative architectural features, tree towers, etc.”

The City's reasoning fails for two reasons. First, the obligation to conceal and camouflage relates to the antenna and associated equipment, not to the entire CMRS facility. All of the stealth facility examples included in City Code section 7.4.608B(1) would be prominently visible from multiple directions, which means that under the City's line of reasoning no stealth facilities could ever be approved.

Second, the argument that there are no trees in the area and the facility is extraordinarily taller than all surrounding structures is false and not supported by substantial evidence. The proposed tower is eighty feet (80') tall, which is the maximum height allowed in the M-2 zoning district. The Administrative Decision claims that there are no other structures taller than sixty feet (60') in the site. The attached photo simulation showing what the site would look like with the proposed tower from the south looking north (Exhibit A-1), shows other trees that are taller than the sixty (60)-foot concrete batch plant (tree circled in red). The attached photo simulation showing what the site would look like with the proposed CMRS facility from the west looking east (Exhibit A-2) shows a pine tree that is close in height to the proposed facility. Those trees will continue to grow and eventually will be taller than the proposed facility. In addition, the aerial picture of the site (Exhibit B) shows that the entire western boundary of the property on which this proposed facility will sit is bordered by large trees. The proposed monopine CMRS facility will hardly be visible from the east looking west (Exhibits A-6 and A-7).

#### Architecturally Compatible

The City's next finding is that the proposed facility is not architecturally and visibly compatible with the surrounding area. City Code section 7.4.608B(3) states:

Facilities should be architecturally compatible with the adjacent buildings and land uses and integrated through design, materials, color, and location to blend in with the existing characteristics of the site to the maximum extent possible. The height, bulk and scale of a stealth CMRS facility should be compatible with the adjacent buildings and land uses.

The Administrative Decision finds that "the proposed location and design are disconnected from the context of the area" and that the height and scale of the facility combined with where it is situated on the site "will create a conspicuous and glaring intrusion into the public viewsheds from both the east and the west." Administrative Decision, p.2. This finding is false and not supported by substantial evidence. As stated above and as shown on the photo simulations, attached as Exhibits A-1 through A-7, the monopine facility would barely be visible from the east or from the west. Exhibit B shows that the entire western boundary of the site is covered with trees. In the photo simulations looking east and looking north there are trees in the viewshed. It is disingenuous for the City to claim that this facility that looks like a tree would be incompatible when there are other trees that are similar in height to the proposed facility already existing within the viewshed.

Although the Administrative Decision states that only photo-simulations looking west were ever provided, the Applicant provided photo simulations from multiple directions. Copies of those photo simulations are attached hereto as Exhibits A-1 through A-7.

#### Master Plan

The final reason the application was denied in the Administrative Decision arises out of the second development plan review criteria. The Development Plan Review Criteria are found in City Code section 7.5.502E. The Administrative Decision states that the application does not comply with the requirement that "[t]he development plan substantially complies with any City-adopted plans that are applicable to

the site, such as master plans, neighborhood plans, corridor plans, facilities plans, urban renewal plans, or design manuals.” City Code section 7.5.502E(2). The Administrative Decision states that the proposed site of the tower is not in substantial compliance with the Envision Shooks Run Facilities Master Plan (“FMP”), because the FMP calls for the future extension of Vermijo Avenue eastward and the proposed site obstructs the proposed extension.

The finding that the proposed facility is inconsistent with the FMP is false and not supported by substantial evidence. The FMP envisions public improvements on the proposed site of the CMRS facility, including the extension of Vermijo Avenue. FMP pp. 70-77. The FMP states that completion of the improvements in the FMP may take 50 years. FMP pp. 9, 12. Although the FMP envisions public improvements on private property, the public improvements in the FMP cannot be installed and maintained on private property against the wishes of the private property owner unless the City takes ownership of the property.

The owner of the site has leased the site to the Applicant for the purpose of installing the proposed CMRS facility. The owner of the site has not entered into contract with the City for the purpose of installing the public improvements discussed in the FMP on the property. If the City intends to install public improvements on private property, the City must obtain ownership of the property (either in the form of a fee interest or an easement) whether by agreement with the private property owner or by eminent domain. A CMRS facility will not prevent the City from acquiring an interest in the property for the purpose of installing public improvements. The City does not currently have any funds appropriated for the purpose of installing the public improvements. The City has not notified the owner of the property that the City intends to acquire the property or has in any other way indicated that it has a current intent to take ownership of the property for the purpose of installing the public improvements.

Preventing a private property owner from using its own private property, because the City may want to use it in the future for a public improvement that is not currently funded and is anticipated to occur at some unknown point within the next 50 years could be considered inverse condemnation.

Another City-approved plan that encompasses the property is the City’s comprehensive plan, PlanCOS which was finally adopted by City Council on January 22, 2019. The proposed CMRS facility substantially complies with the goals, policies and strategies of PlanCOS. PlanCOS states “where there is a discrepancy between [the FMP] and PlanCOS, the vision identified within PlanCOS should be considered in the use and application of [the FMP]. PlanCOS, p. 83.

The applicable goals, policies and strategies of PlanCOS are as follows:

The second goal of PlanCOS is to diversify the local economy by fostering a range of business types and sizes. Policy TE-2.B is to create a positive atmosphere for spinoffs, startups, and entrepreneurship. Strategy TE-2.B-1 is to support business growth in innovation, research, and development, and emerging technologies by being nimble and responsive in application and adaptation of City processes and requirements. Strategy TE-2.B-3 is to retain or modify plans and regulations to allow for a complementary mix of industrial and commercial uses, workforce training, and business services in locations identified for commercial and business development.

Policy TE-2.C is to enhance the physical environment by creating new amenities that help attract and retain new businesses and residents. Policy TE-2.D is to provide high-quality infrastructure and technology citywide. Strategy TE-2.D-2 is to enhance infrastructure, transportation, and communications

connectivity near major cultural, hospitality, and entertainment venues. Strategy TE-2-.D-3 is to collaborate with providers to expand internet capacity and speed throughout the city, including targeted development-ready sites.

Goal TE-5 is to become a Smart Cities leader. Strategy TE-5.B-3 is to continue to incorporate adaptive, secure state-of-the-art technology as a part of new and redeveloped facilities, infrastructure, and services throughout the City.

The Application is for a CMRS facility that would enhance cellular service in the downtown region of Colorado Springs. The site that was identified on the application arose out an investigation of multiple sites. It was the most appropriate and least obtrusive site for a cell tower, because of the zoning and existing use of the site. The site of the proposed facility is a concrete plant, which is zoned M-2 (heavy industrial). The concrete plant is an active plant and the owners of the plant have no intentions of selling the site or moving their business off the site. The site is near enough to downtown to enhance service in the downtown area and it is near enough to the Hillside neighborhood to enhance service to that neighborhood as well.

Allowing a CMRS facility on this site serves many of the goals and policies of the City's comprehensive plan. The strategies that are called for under the City's comprehensive plan were not implemented in the review of the application. The City was not nimble and responsive in its review of the application. The City's review and denial of the application is based on purported aesthetic concerns and the City's aspirations to possibly extend a roadway at some unknown point in the future. The City asked the Applicant to make changes to the application and to collaborate with other carriers, which the Applicant did, and in the end the City denied the application anyway for reasons that are not supported by substantial evidence.

In the Administrative Decision, the City states, without any scientific support to substantiate its claim, that the facility could be placed on a number of other buildings or structures "which could provide similar, or even better, service to the surrounding area." Such a statement does not indicate collaboration with providers. Instead it indicates that City planners believe they know more about cellular technology than the entities that are actually providing cellular service. If the City wants to be an industry leader in connectivity, it needs to allow those with expertise to make decisions based on their expertise. The City has the right to deny applications that do not conform to the applicable review criteria. However, the City does not have the right to deny an application without having evidence to support its claims relative to the review criteria.

#### Benefits and Adverse Impacts

The adverse impacts created by the Administrative Decision far outweigh any possible benefits. This Administrative Decision does not comply with federal law (TCA and the 5<sup>th</sup> Amendment). It does not comply with the City's recently-adopted comprehensive plan. It interferes with private property rights and the rights of individuals to enter into contracts. It discourages innovation and investment in the City, and it discourages collaboration with the City and with other providers to serve this region.

The Applicant has invested significant sums in selecting a site and designing a stealth CMRS facility that is technologically capable of providing the cellular service needed to serve the downtown region of the City while also providing for colocation for multiple providers. The Applicant has negotiated and contracted with the property owner to provide for the best possible location for the CMRS facility. The Applicant has chosen a site that has limited aesthetic values (concrete plant) and that has the most-



permissive zoning (M-2 Heavy Industrial). The denial of the Application is based solely on the City's desire for the site to be redeveloped into some other use at some undetermined time in the future.

The Administrative Decision discourages continued technological investment in this region. There are many areas in the United States that need enhanced cellular service and if the City makes it impossible to develop new facilities in this region, providers will invest in other markets that are more open to such investment. You cannot have a vibrant City without high quality cellular service.

Conclusion

For all of the reasons above, the City's Administrative Decision to deny the Application for the installation of a CMRS facility at the Transit Mix Site (444 E. Costilla) should be overturned.

# WAHSATCH AVE TRANSIT MIX

US-CO-5068

444 E. COSTILLA STREET COLORADO SPRINGS, CO 80901

**INFINIGY8**  
THE SOLUTIONS ARE ENDLESS

verticalbridge

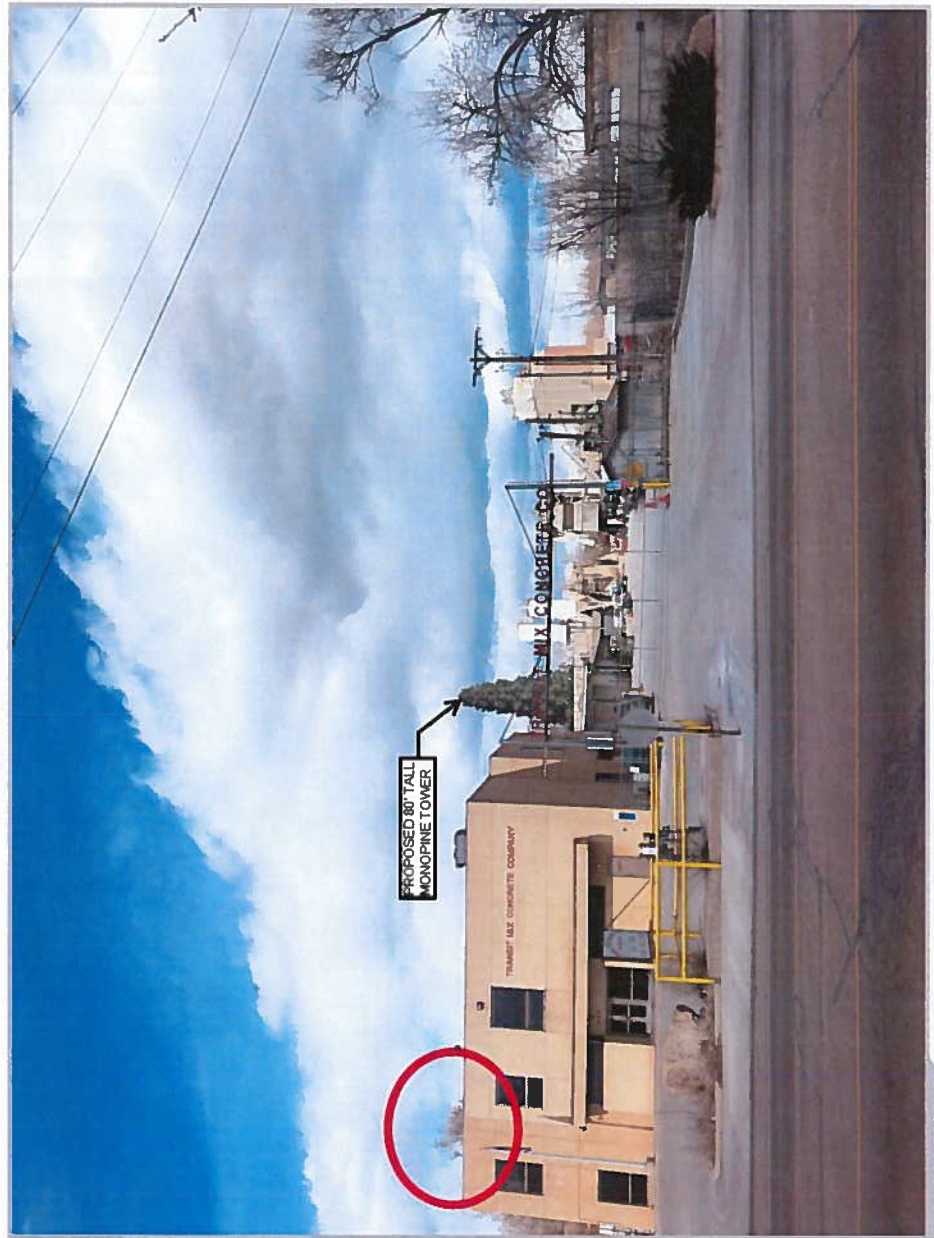
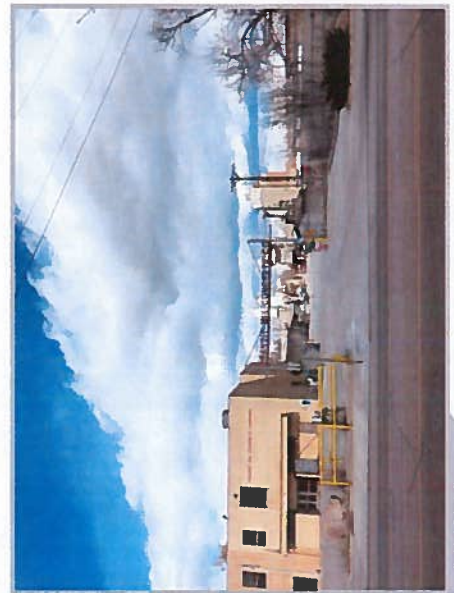


FIGURE 2

# WAHSATCH AVE TRANSIT MIX

U S - C O - 5 0 6 8

444 E. COSTILLA STREET COLORADO SPRINGS, CO 80901



FIGURE 2

# WAHSATCH AVE TRANSIT MIX

U S - C O - 5 0 6 8

444 E. COSTILLA STREET COLORADO SPRINGS, CO 80901

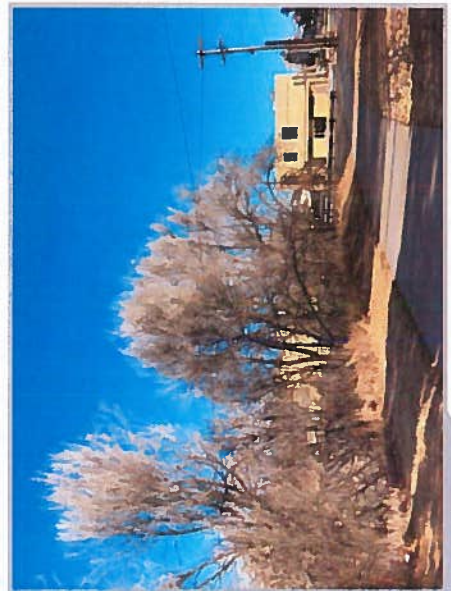
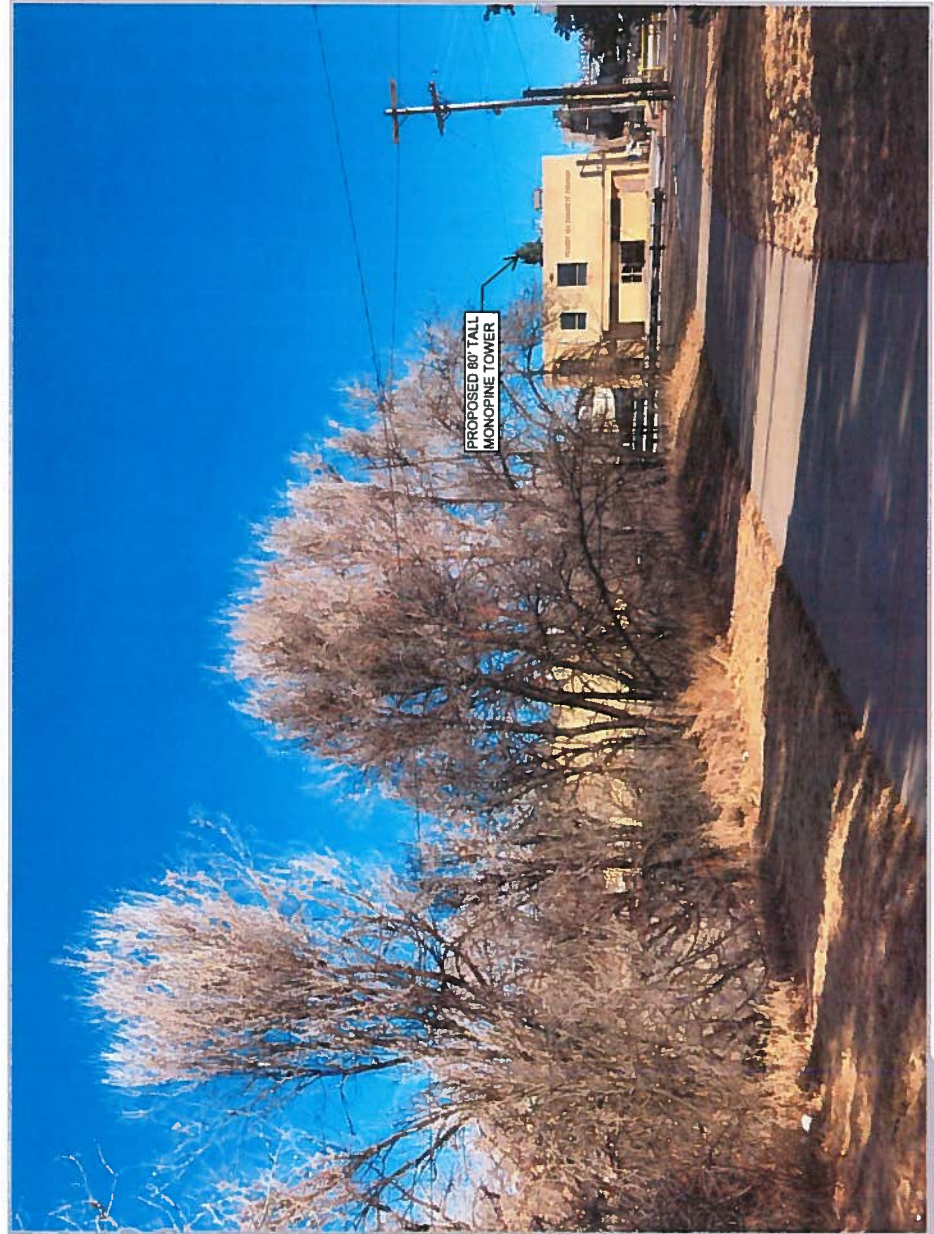


FIGURE 2

# WAHSATCH AVE TRANSIT MIX

U S - C O - 5 0 6 8

444 E. COSTILLA STREET COLORADO SPRINGS, CO 80901

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THE SOLUTIONS ARE ENDLESS

verticalbridge

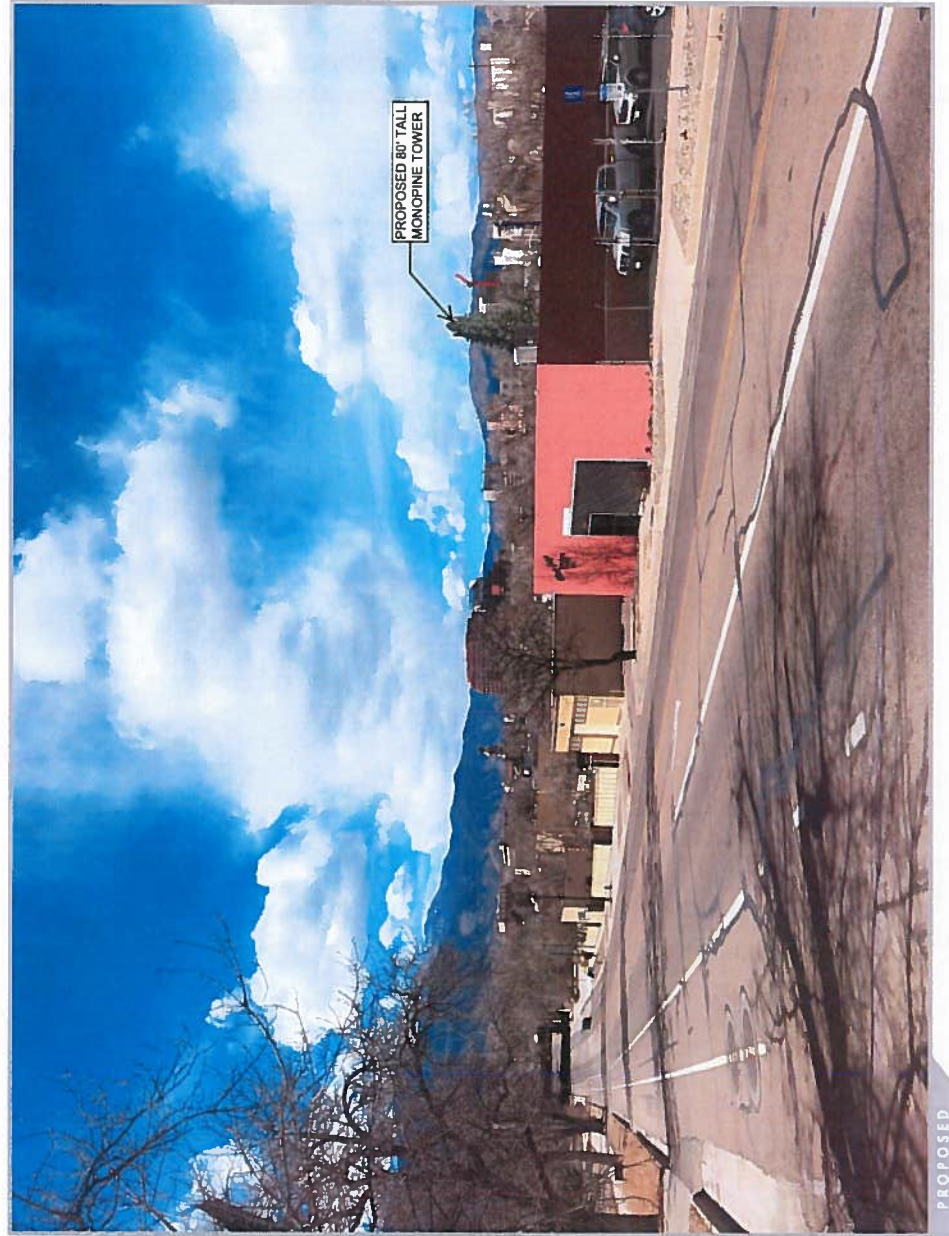


FIGURE 2

# WAHSATCH AVE TRANSIT MIX

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444 E. COSTILLA STREET COLORADO SPRINGS, CO 80901

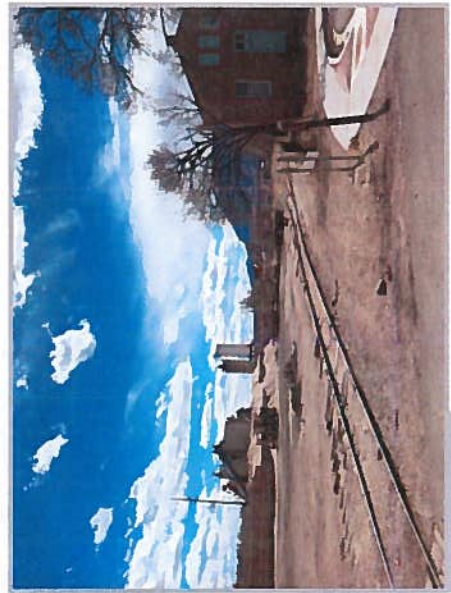
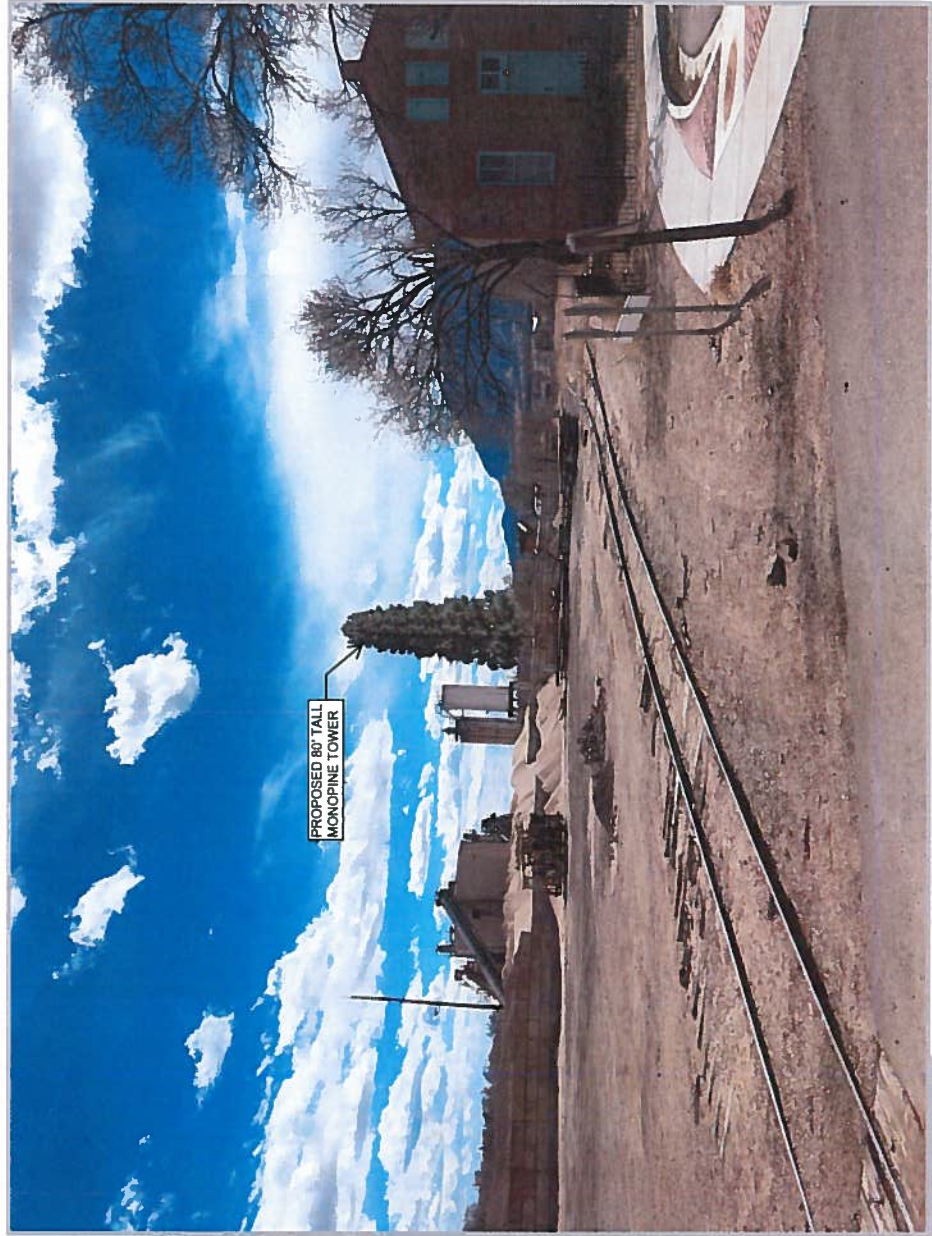
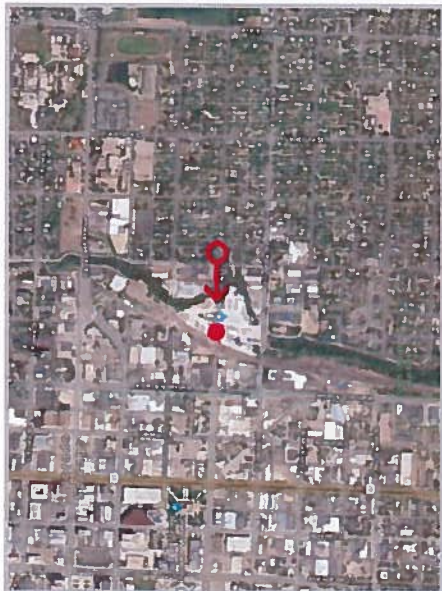


FIGURE 2

444 E COSTILLA STREET COLORADO SPRINGS, CO 80901

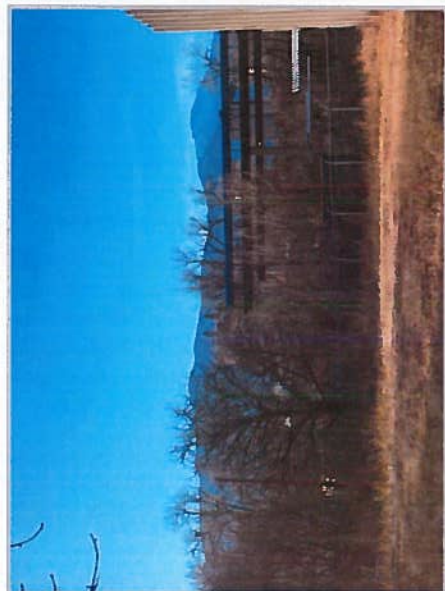


LOCATION

© 2018 Google Maps



PROPOSED



EXISTING

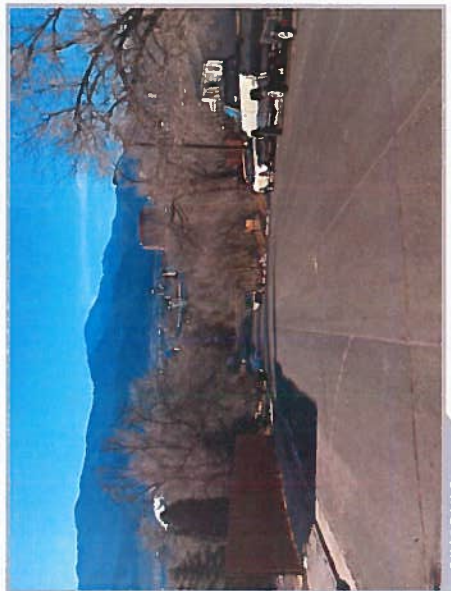
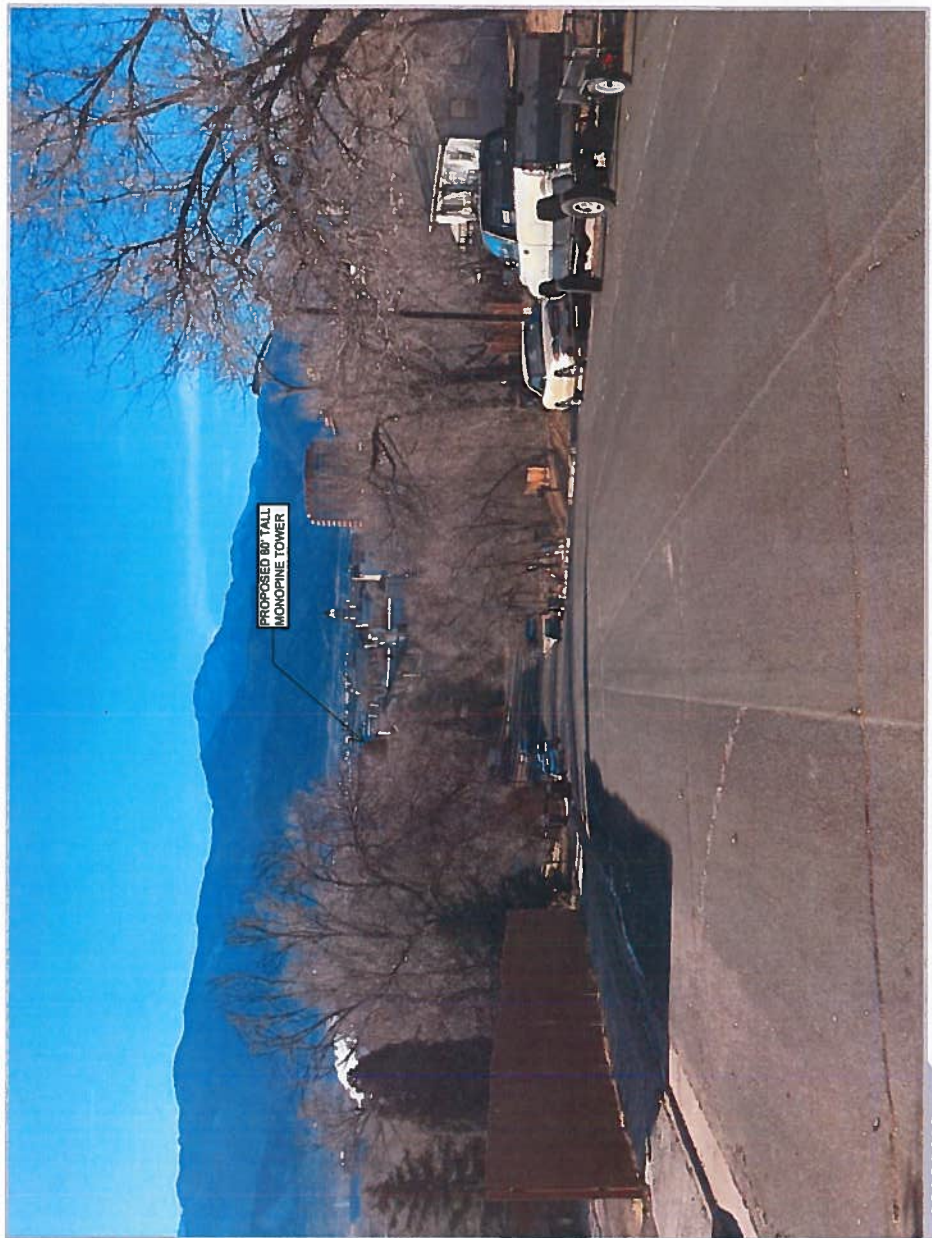
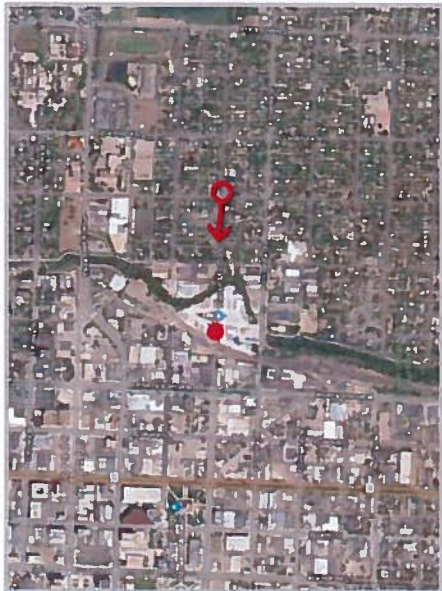
VIEW 2 | LOOKING WEST

**FIGURE 2**

# US-CO-5068

CSP MADRE

444 E COSTILLA STREET COLORADO SPRINGS, CO 80901



VIEW 1 | LOOKING WEST

FIGURE 2





Google Maps 444 E Costilla St



Imagery ©2019 Google, Map data ©2019 Google 200 ft



### 444 E Costilla St

Colorado Springs, CO 80903

- Directions
- Save
- Nearby
- Send to your phone
- Share

R5HM+HV Colorado Springs, Colorado

Photos



**At this location**

**Transit Mix Concrete Co**

3.0 ★★☆☆ (5)

Ready mix concrete supplier · 444 E Costilla St





**City of Colorado Springs  
Planning Department  
Fee Receipt**

[Return to Fee Calculator](#)

<b><u>Application</u></b>	<b><u>Department</u></b>	<b><u>Amount</u></b>	<b><u>Applicant</u></b>	<b><u>AnnexDisc</u></b>
Appeal of Administrative Decision	Land Use Review	\$176.00		
<b>Total Fees</b>		<b>\$176.00</b>		

<b>Intake Staff:</b>	Kayla Battles
<b>Date:</b>	3/18/2019
<b>Planner:</b>	Rachel Teixeira
<b>Receipt Number:</b>	33287
<b>Check Number:</b>	63002
<b>Amount:</b>	\$176.00
<b>Received From:</b>	Vertical Bridge Holdings - AR CM2 18-00636