

SUMMARY INDEX
 BOARD OF ADJUSTMENT MEETING
 Tuesday, July 7, 2015

<u>ITEM</u>	<u>ACTION</u>	<u>PAGE</u>
CALL TO ORDER AND ROLL CALL	Quorum	1
APPROVAL OF AGENDA	Approved	1
ELECTION OF OFFICERS (BOA CHAIR, VICE CHAIR AND SECRETARY)	Election	2
APPROVAL OF MINUTES – JUNE 2, 2015	Approved	2
FINDINGS/CONCLUSIONS	None	2
 <u>OLD BUSINESS</u>		
<u>CASE #2013-116 & 2014-82. CELLULAR PHONE TASK FORCE. ARTHUR FIRSTENBERG AND FIFTY-ONE CITIZENS FROM THE OCTOBER 30, 2013 APPEAL OF THE DECISION OF THE LAND USE DEPARTMENT TO ISSUE A BUILDING PERMIT #13-2097 AND THE CELLULAR PHONE TASK FORCE. ARTHUR FIRSTENBERG AND TWENTY-ONE CITIZENS APPEAL THE JULY 15, 2014 DECISION OF THE LAND USE DEPARTMENT TO ISSUE A BUILDING PERMIT #14-813 TO JOHN MALONE AND VERIZON WIRELESS REGARDING REPLACEMENT OF TELECOMMUNICATIONS ANTENNAS AT 1402 AGUA FRIA</u>	Appeal denied	2-17
 <u>NEW BUSINESS</u>		
<u>CASE #2015-62. 802 CANYON ROAD SPECIAL USE PERMIT. NEEMA SADEGHI REQUESTS SPECIAL USE PERMIT TO ALLOT A RESTAURANT USE. THE PROPERTY IS ZONED RAC (RESIDENTIAL ARTS AND CRAFTS)</u>	Approved w/staff conditions	17-19
STAFF COMMUNICATIONS	Information/discussion	19
MATTERS FROM THE BOARD	Information/discussion	20
ADJOURNMENT		20

**MINUTES OF THE
CITY OF SANTA FE
BOARD OF ADJUSTMENT
City Council Chambers
July 7, 2015**

A. CALL TO ORDER

A regular meeting of the City of Santa Fe Board of Adjustment was called to order by Gary Friedman, Chair, at approximately 6:00 p.m., on Tuesday, July 7, 2015, in the City Council Chambers, 200 Lincoln Avenue, Santa Fe, New Mexico.

B. ROLL CALL

Members Present

Gary Friedman, Chair
Rachel L. Winston, Vice-Chair
Colleen Dearing
Patricia Hawkins
Douglas Maahs
Donna Reynolds

Members Excused

Daniel H. Werwath

Others Present

Lisa Martinez, Director, Land Use Department-
Dan Esquibel, Current Planning
Noah Berke, Current Planning
Zachary Shandler, Assistant City Attorney
Melessia Helberg, Stenographer

B. PLEDGE OF ALLEGIANCE

C. APPROVAL OF AGENDA

MOTION: Colleen Dearing moved, seconded by Douglas Maahs, to approve the Agenda, as presented.

VOTE: The motion was approved unanimously on a voice vote.

D. ELECTION OF OFFICERS (BOA CHAIR, VICE CHAIR AND SECRETARY)

MOTION: Colleen Dearing moved, seconded by Douglas Maahs, to elect Daniel Werwath as Secretary of the Board of Adjustment for the ensuing year.

VOTE: The motion was approved unanimously on a voice vote.

MOTION: Douglas Maahs moved, seconded by Patricia Hawkins, to reelect Rachel Winston, as Vice-Chair of the Board of Adjustment for the ensuing year.

VOTE: The motion was approved unanimously on a voice vote.

MOTION: Patricia Hawkins moved, seconded by Rachel Winston, to reelect Gary Friedman as Chair of the Board of Adjustment for the ensuing year.

VOTE: The motion was approved unanimously on a voice vote.

E. APPROVAL OF MINUTES – JUNE 2, 2015

MOTION: Douglas Maahs moved, seconded by Colleen Dearing, to approve the minutes of the meeting of June 2, 2015, as presented.

VOTE: The motion was approved unanimously on a voice vote.

E. FINDINGS/CONCLUSIONS: NONE.

F. OLD BUSINESS

1. **CASE #2013-116 & 2014-82. CELLULAR PHONE TASK FORCE. ARTHUR FIRSTENBERG AND FIFTY-ONE CITIZENS FROM THE OCTOBER 30, 2013 APPEAL THE DECISION OF THE LAND USE DEPARTMENT TO ISSUE A BUILDING PERMIT #13-2097 AND THE CELLULAR PHONE TASK FORCE. ARTHUR FIRSTENBERG AND TWENTY-ONE CITIZENS APPEAL THE JULY 15, 2014 DECISION OF THE LAND USE DEPARTMENT TO ISSUE A BUILDING PERMIT #14-813 TO JOHN MALONE AND VERIZON WIRELESS REGARDING REPLACEMENT OF TELECOMMUNICATIONS ANTENNAS AT 1402 AGUA FRIA. *Postponed from May 5, 2015 BOA Meeting.* (Consolidated for appeal, Zachary Shandler, Case Manager.)**

A Memorandum dated June 23, 2015 for the July 7, 2015 Meeting of the Board of Adjustment, with attachments, to Members of the Board of Adjustment, from Zachary Shandler, Assistant City Attorney, is incorporated herewith to these minutes as Exhibit "1."

A letter dated June 24, 2015, with attached updated Radio Frequency Exposure Post-Installation FCC Compliance Assessment, sent via email, to Zachary Shandler, Assistant City Attorney, from Mark W. Williams, Sherman and Howard, regarding Verizon Wireless Site: NM4 Silva, 1401 Agua Fria Street, Santa Fe, NM 87505, is incorporated herewith to these minutes as Exhibit "2."

A letter dated May 11, 2015, to the Board of Adjustment and Zachary Shandler, Assistant City Attorney, from Arthur Firstenberg, regarding Land Use Cases No. 2013-116 and 2014-82, Appeals of Cellular Phone Task Force et al regarding 1402 Agua Fria, is incorporated herewith to these minutes as Exhibit "3."

An Affidavit of Arthur Firstenberg, *In the matter of the application of Verizon Wireless for a Telecommunications Facility at 1402 Agua Fria Street*, Land Use Cases No. 2013-116 and 2014-83, notarized on July 7, 2015, with attachments, entered for the record by Arthur Firstenberg, is incorporated herewith to these minutes as Exhibit "4."

A document from ATSI, entered for the record by Arthur Firstenberg, is incorporated herewith to these minutes as Exhibit "5."

A document headed *696-900/1710-2170MHz*, Amphenol Antenna Solutions, entered for the record by Arthur Firstenberg, is incorporated herewith to these minutes as Exhibit "6."

A *Verizon Transmitter Timeline*, entered for the record by Arthur Firstenberg, is incorporated herewith to these minutes as Exhibit "7."

A document with a heading of *2013 FCC Compliance Assessment*, entered for the record by Arthur Firstenberg, is incorporated herewith to these minutes as Exhibit "8."

A document with a heading *Verizon Agua Fria Neighborhood*, with attachment, entered for the record by Arthur Firstenberg, is incorporated herewith to these minutes as Exhibit "9."

A copy of *Legal Requirements*, entered for the record by Arthur Firstenberg, is incorporated herewith to these minutes as Exhibit "10."

A copy of Section 704 of the Telecommunications Act, entered for the record by Arthur Firstenberg, is incorporated herewith to these minutes as Exhibit "11."

A copy of *Points of Appeal* entered for the record by Arthur Firstenberg, is incorporated herewith to these minutes as Exhibit "12."

Chair Friedman asked Mr. Esquibel if he would like to lead off with respect to this case.

Mr. Esquibel said no, Zachary Shandler is the case planner for the appeal.

Chair Friedman asked Mr. Shandler if he has anything to start off with, with respect to the case.

Mr. Shandler said no.

Chair Friedman said, "This case was called, I wasn't present for that hearing, I apologize, but Rachel Winston led that hearing. I know there was a lot of public comment and opportunity for people to speak, with respect to the issue, on both sides, and then we closed the public comment of the case at the conclusion of that hearing. And what I would like to do though, with respect to this matter, is we have to finish it up, obviously a vote has to be taken by the Board of Adjustment, but I also would like to allow each side to be able to have their representative, their counsel do a closing statement with respect to their position. And I understand Mr. Durkovich is representing the Appellant, correct sir."

Mr. Durkovich said that is correct.

Chair Friedman said he will start with Mr. Durkovich and then have the attorney for Verizon speak on behalf of Verizon, and asked if that is okay and Mr. Durkovich said that is okay. He said following these presentations, he will allow Zachary Shandler, counsel for the City, to speak if he would like.

Chair Friedman gave each person 15-20 minutes to address the issues

Chair Friedman said he wants each side to have the opportunity to address the issues, but he is taking no new testimony with respect to this, as counsel will understand, a closing statement which is a summation of the issues.

Presentation by Appellant

Mr. Durkovich presented information using enlarged drawings of the documents entered for the record by Arthur Firstenberg.

Steven Durkovich, Attorney for Appellant, office at 534 Old Santa Fe Trail, and home address 1607 Camino Cruz Blanca. Mr. Durkovich said, "The first thing I would like to do, is first you were kind enough to inform both of us about what the rules were beforehand, and it's perfectly acceptable."

Mr. Durkovich said, "If the Chairman could give me a little nudge when I get to 12 minutes and then another nudge when I get to 15, I'll try to keep it within that period."

Chair Friedman asked Ms. Helberg to let him know in 12 to 15 minutes.

Ms. Helberg said Mr. Esquibel is doing the timing and he can do that.

Mr. Durkovich said, "The first thing, my understanding is, is that the Board has accepted the Affidavit of Arthur Firstenberg as submitted [Exhibit "4"]."

Chair Friedman said he is okay with submitting that as part of the record.

Mr. Durkovich said, "So what I would like to do, is I would like proceed as if that is a part of the record, which it is, and then I'm just going to go."

Chair Friedman said that is okay.

Mr. Durkovich said, "First again, thank you for the opportunity to be here, and for the opportunity to talk on this subject. One of the nice things about being an attorney is you get to learn about new things, and you get to talk about new things, and this is kind of a new thing for me."

Mr. Durkovich said, "By way of background, I'm an attorney and I don't have any immediate experience with electromagnetic waves of this frequency. In other words, I have some experience with ionizing radiation. I don't have any experience with non-ionizing radiation, but I think I understand the principles. Sometime back, I was counsel for 3-4 years to a number of people who were injured at St. Joseph's Hospital in Albuquerque because of radiation overdoses. And in that capacity, I got some sort of an acquaintance with how this works."

Mr. Durkovich continued, "And what I would like to begin with, is to start talking about, again, what the issue is in front of the committee. This is for the Board of Adjustment in making a decision about *[inaudible]* within the Agua Fria neighborhood. Usually, the issue in this kind of case is someone doesn't want someone as a neighbor because they are undesirable in terms of how they act. Or there is a business that has undesirable characteristics. And what is different about this is the thing that is at issue, which are the electromagnetic waves, this is the microwave emitted. They aren't anything that anybody can see. In other words, the neighborhood doesn't know about them, so they're not disagreeable, because again someone doesn't like the way they're acting in terms of the disability to them. But it's because it's of the inherently dangerous nature of these waves. An analogy in the law is there is a different set of standards that apply when you put an inherently dangerous animal or property onto your property. You are held to a higher standard when you place, like say a tiger, a body of water, a bear, anything like that. There is a heightened responsibility and you're held strictly liable under the law."

Mr. Durkovich continued, "It is our contention here that the same sort of principles apply because what you have here is an inherently dangerous process going on. And that this is inherently dangerous there can be no argument, no argument, that these electromagnetic waves of these frequencies, they can cause injury and they do cause injury. And the only question is a question of proximity and that's how close you are to them, the duration of your exposure and the intensity of the waves that are being emanated. That you will most certainly suffer injury. Now the injury that is acknowledged by everyone, and that's why there are FCC maximums that are applied to this, the injuries that are caused and that everyone knows about are thermal injuries. And thermal injuries are more or less immediate. In other words you're going to learn about the more or less immediately, and that's one category. Okay."

Mr. Durkovich continued, "But then there is a whole different category of injuries, and those are delayed injuries. Now by way of example, if you talk about ionizing radiation and the kind of stuff you're familiar with, that's X-rays, that sort of thing. X-rays can cause immediate thermal injuries, but they also cause delayed injuries. And initially, when we exploded the bomb over Hiroshima, all we knew about was that a bunch of people, again, there was going to be a bomb, the heat was going to be intense and people were going to die as the result of that. And again, tons of people died of thermal injuries."

Mr. Durkovich continued, "What we didn't know at the time is, in fact, there are delayed injuries that occur as a cause of the radiation. And so, even though the bomb was exploded in 1945, it wasn't until the 1960's that we began to learn that there were cancers that were being caused as a consequence of that. And it wasn't until the 1970's that we learned that there were birth defects that were arising. And since then, there is a whole host of other problems that have occurred to the people who were involved in the Hiroshima blasts, immune system problems, and all sorts of things."

Mr. Durkovich continued, "Now my point in this, is the only reason we know that information is, subject to the dropping of the bomb on Hiroshima, the people in Hiroshima have been the subject of something called the Hiroshima study since then. And they come out with decennial, every 10 years, additions to what has happened. And they were able to follow a defined population, and you knew pretty much where everyone was at the time of the blast, and they are able to calculate the amount of radiation that they received. And so it's over time that we have learned that the problems aren't just the immediate problems of thermal injury, but there are delayed problems, and there are delayed problems caused by the effect of the ionizing radiation on their various tissues."

Mr. Durkovich continued, "Now. The difficulty with this radio wave radiation we are talking about is microwave radiation. There has been no such study. And while the thermal injuries, that's acknowledged, there's no way of knowing scientifically in any immediate sense what the delayed effects are. And that's because of the fact that there's no way to have a study. Usually, double blind studies are set up where you have two cohorts, two different sets of people, and one group gets something and the other group doesn't get it. And over a period of time, you compare what the results are. But there's no way that anyone is ever going to be able to get that information on this type of radiation, because no one is willing to sit still and be under these things for a prolonged period of time as the test subject. In other words, they would be the test subject if they're the ones who aren't subject to it, but no one is willing to volunteer for a 2 year period, a 20 year period, or a 30 year period to be within a close proximity of these towers. So that's the essential issue. We have something, and again it's this microwave transmission that will, in fact, cause thermal injuries. And the FCC has set forth numbers at which they say it will cause injury. That's established. Okay we don't know anything other than the thermal, but it those things that people are concerned about."

Mr. Durkovich continued, "Now. One of the issues tonight is there's been a ruling, okay, that the only thing that will be considered is the thermal issue. In other words, anything that is over the FCC maximum. Okay. So, let's consider that right now. In the setting of the maximums, the FCC has set maximums, and these have been set according to the regulatory process. In other words, it's not totally scientific. There's scientific information that go forward, and then the interest groups argue back and forth and they adopt a standard. While they've adopted a standard, and there are two standards. And one

standard is for, let me just put this up.... One standard is for occupational exposure. And there's another standard and it's for public exposure. And the difference between the occupational exposure and the public exposure is this. The limits for the public exposure are five times more stringent than the limits for the occupational exposure. And the reason for that is the people who are exposed to this kind of radiation, this is the employees of the company. It's all an issue of awareness. They are aware there's a problem, they are not in the full time, and when they are exposed to it, they know the dangers, and they can limit their exposure to it."

Mr. Durkovich continued, "The reason why the FCC says that there are limits for the public, is because the public is unaware of the dangers. The public can't see these things. They can't measure them. They don't have any feel, I mean. And in this case, the neighborhood never even had any idea for a period of essentially 5 years that there were in fact antennas that were beaming this information out. And this is something worth talking about now. Even had they heard that there were antennas on top of 1302, that wouldn't have meant much to them because of the fact that most people think..."

Mr. Esquibel said, "10 minutes."

Mr. Durkovich said, "10 minutes left, or I've gone 10 minutes."

Mr. Esquibel said, "10 minutes left."

Mr. Durkovich said, "Okay, thank you very much. The public ordinarily thinks of antennas as receiving signals. The antenna in this particular instance, okay, it does both. It receives signals and information, but it also beams out all of the energy that is at issue here. And again, there were 6 that were applied for, and in fact there are 9, there are 9 that are there. But, even had the public known about 9, it wouldn't mean anything because they don't understand that these antennas aren't receiving things, they're beaming out the radiation that can cause injury to them. So it's all a matter of awareness, and again, this is why we're here."

Mr. Durkovich continued, "The employees and Verizon have always been aware that the antennas that they put up, that they are emitting radiation that can cause thermal injury, for which the FCC has defined limits. They have always known that, okay."

Mr. Durkovich continued, "There's a history. And here's the history. The history is in 2005, Verizon applied for an equipment enclosure, and they didn't apply for a permit on an antenna enclosure, even though they were putting in antennae. Had they applied for the antennae enclosure, there would have been a public hearing required. So they made no application for that, and instead, again, they applied for an equipment enclosure and they got a permit. And at the same time after they got that permit, they put the antennae on top of the roof, this is in the enclosure, and there was no permit application. The City, at that time, was informed that this permit is for equipment enclosure only, and antennas must be applied for separately, but notwithstanding that fact, Verizon made no application. And so Verizon installed it and it started beaming again these microwave transmissions out and the neighborhood was totally unaware of it. And there was no way for them to be aware of it, because again, the whole danger here is that they can't see it. You don't know what's going on."

Mr. Durkovich continued, "In 2013, Verizon asked to add 3 more antennas to the existing 6 and there was a permit application, and that's when the City issued the permit and the neighborhood appealed. And since then, it's been operating with 9 antennae, and even the antennae have been changed slightly, in that some of them, one antenna can broadcast at two separate bands, in other words, so you have 2 frequencies going out with a single antenna. All of that has been happening. There was no hearing after the initial appeal, and then Verizon reapplied for the entire facility, the City issued the permit and the neighborhood appealed again."

Mr. Durkovich continued, "Now what should have been an absolute prerequisite for their application, this is Verizon's application, is an initial assessment like the one you just got, stating we are putting in these antennae, and here's what the maximums are under the FCC, and here's our determinations right now as to how much they are emitting from each sector. They never did that, okay. And so what has happened here, we're kind of in the odd position is that the City Council is getting this at the end of the application process. In other words, you're finding out what these things actually put out. And the way that arose is, in the appeal process, this is the last appeal, is the neighborhood hired their own expert and you have that before you, that's ATSI. Okay, and what ATSI said is that, in fact, they were in violation of the FCC maximums with respect to their entire rooftop and this is for the employees who were working there. And then they also said that over.... this is as to height, that they were also in excess of what the permitted requirements were in the adjoining properties. And so it was a result of what the neighborhood did, that Verizon said we're going to submit our own compliance report and that's what you have now."

Mr. Durkovich continued, "The problem with the compliance report that Verizon has submitted, and you've gotten since the last hearing is that all that it covers, is it just covers the rooftop of its own facility, and there are no measurements as to what it is over the other houses in the immediate area. And in fact, if you read the ATSI report, which is an independent report, it is in excess of what the appropriate limits are under the FCC requirements. In other words they haven't met the measure to begin with, and then it's more serious for this property, this at 1404 which is the metal roof, because the metal roof acts as a reflector and a magnifier. So what it does, is it jacks up what the facilities are, and it also rebounds it inside. Now a question comes up and you say, well who cares if, at roof level, it's over the FCC requirements because no one is going to be up on the roof. Well there will be people on the roof from time to time. Number two, what it means is anyone in the adjoining area, they're never going to be able to build a two-story home. If they wanted to add a facility up top, they're not going to be able to do it."

Mr. Durkovich continued, "And the point is, is what we have shown, that the neighborhood is shown, is that the level is in excess, both of the occupational limits, for the employees, and it's also in excess of what is acceptable for the public, and this is the public that doesn't know. And the thing I want to emphasize is the Public is absolutely at risk because there's no way you can dodge this stuff. There's no way you know what the intensity is of these rays at any one time, because they are a function of how busy, how many calls are coming out at any one time. So everyone is at risk for the thermal requirement. And again, no one really knows what can happen otherwise, this is otherwise than thermal injury because there

has been no scientifically established testing and likely there won't be and there can't be. Okay. And this is what puts the people at risk in this neighborhood. Now there have been some 60 people who have said, we don't want this in the neighborhood. It is because of their concern about what happens and the fact that they can't see it. "

Mr. Durkovich continued, "What's the relevance to this body, to the Board of Adjustment. Here's the relevance to the Board of Adjustment of all this. As a body, it seems to me that this is an extremely difficult topic to kind of get your arms around. It's because of the fact that it doesn't treat the usual thing that's involved in zoning issues. That's usually a business practice or a personal practice, something like that. And this is absolutely an esoteric area of science. And to my knowledge, the City staff doesn't have any independent expert who can independently assess this data on their own. Okay. In other words, they don't know. And so the body, this body, your body is peculiarly dependent up this hearing process that's going on right now. In other words, you're dependent on Verizon to give you all the pertinent information and you're dependent on the neighborhood to get every bit of information that you can get so you can decide that."

Mr. Durkovich continued, "And so in that context, there has been a bunch of due process issues that have been raised. In other words, there hasn't been a right to cross examine. Certain information again can't be presented, that sort of business. My thought that what the Board of Adjustment might want to consider is this. Is that again, given the fact that we don't have staff that can give us independent expertise on it, and we're dependent on both sides, let's have both sides tell us all they can tell us, okay, because this is a tough thing. And insofar as limiting the testimony, and again, I know how long these things go and I know how much chaff you get with the wheat in each one of these things. Nonetheless, again, I think it's something that what you want to do is solicit as much information as you can to determine whether or not you should permit this."

Mr. Durkovich continued, "And so, let's talk about again, what are the points on appeal and what are the issues. And again, let me just summarize."

Chair Friedman asked Mr. Durkovich to wrap-up his presentation soon, noting the time has expired, although he is willing to give him a little additional time. Chair Friedman told Mr. Durkovich that he can have an additional 5-10 minutes.

Mr. Durkovich said, "So, here's the point, is number one. This is why you should grant the neighbors' appeal is they never ever appropriately again made a permit application. And usually, in any other zoning matter, you have to do that as a prerequisite. Again, this is an inherently dangerous process. They alone knew how dangerous it was, and they ignored the requirements for the period of time that we're talking about, okay. They did that, and then the second thing is, to begin with, they never gave a submission of compliance with the FCC maximums to begin with. And then since then, we have proven that they have not complied with the existing FCC maximums. Now you're going to say there's conflicting evidence on that, and there is conflicting evidence. But here's the way you resolve that, I think, is number one, the neighborhood, they submitted a calculation of an independent testing laboratory. It's not owned by the neighborhood, the neighborhood has no interest in it."

Mr. Durkovich continued, "And what they did, is not only did they do the testing, but they gave the formulas and said here's the way we come up with the numbers, okay. We're telling you how we came up with the numbers. And in response to that, Verizon submitted their own testing, and Verizon hasn't given you their own numbers, their own calculations."

Mr. Durkovich continued, "Then the second thing, and this is why I would urge you to look at Mr. Firstenberg's Affidavit. He takes the calculations that they made for their own rooftop on 1402, and he demonstrates why they are wrong. And so we're not just saying they're wrong, he says this is why, and he goes through it. And then he has his calculations verified by Vincent Cardenas who is the Engineer who did the ATSI study to begin with and who is in Vancouver now. So what you have is you have clear evidence of the fact that they are in violation as to their own employees up here, this is number one, and again, they made no calculations to the neighborhood and that's why we're here."

Mr. Durkovich continued, "And most importantly, the only thing that the neighborhood has in this circumstance to protect them from what's going on here is you. Because you're the only ones that can say, again, it's safe or it's not safe, based on the evidence. And so I think you have a peculiar role, and it's a hard role because of the fact that you don't know all this stuff. But again, given the information that we have given you, I think it's clear that they are in violation. And what are the consequences of that. The consequences of that are this, in the event you say all right, we're not giving you a permit, it's not like Verizon's going to go out of business. All Verizon has to do is find another location where they're not in the middle of a housing area and/or put a tower that goes way up high, and they have the means to do either one of these things. The neighborhood, in the event the neighborhood is decided against, the neighbors have no real alternative. They have to move if they have the means to move, okay. But Verizon can easily move, and again, Verizon was the one who moved in and didn't satisfy the legal prerequisites to begin with."

Mr. Durkovich continued, "So I think, and I might be over-simplifying things, I think it's a fairly simple decision. Verizon didn't make its initial application as it should. It has never had a valid permit even though it was approved on two separate occasions because of the fact it's been appealed. And it has been transmitting since 2005 in violation of the rules."

Mr. Durkovich continued, "So what we would ask you, again, is to look at the evidence, look at the information we presented to you, and then just allow Verizon, and you can give them 3 months or 2 months to find another location where they can erect a tower that's high enough so it doesn't threaten the surrounding people, or find a locale that accomplishes that. Or if they can't find either of those, it's unfortunate, but you can't put the people in this neighborhood at risk because of what they're doing. And thank you for your time."

Presentation by Appellee

Mark Williams, Attorney for Verizon Wireless, said, "Good evening and thank you very much for letting us present before you. My name is Mark Williams, I represent Verizon Wireless. And with me today are Kathy Lang, Verizon Wireless, Tom Navares and Mark Wessel who is an IAAA engineer who created the report, and I'm going to talk about the report."

Mr. Williams presented information referring to several of the enlarged drawings of the documents entered for the record by Arthur Firstenberg.

Mr. Williams continued, "Mr. Durkovich mentioned that this is a difficult decision for you. We are positive that it's really a fairly simple decision for you, because the issue before you this evening on the appeal is whether we have complied with the Code, and whether we provided the certification that was required. And in both of those instances, the answer is yes. Verizon Wireless also has the ability to stay at its facility because it followed the process. We said at the last hearing that, in fact, in 2005, the company was required to obtain its own permit for the antennas. Didn't do it. Don't have an explanation for it. We were wrong. We owned up to that at that hearing. And as a result of that, we filed our application again, and as we are allowed to do under the Santa Fe Code, we are entitled to have an administrative review, which was done. In addition, there was notice that was provided to the neighbors, pursuant to the Code, and nobody objected. So we complied with those aspects of the Code. In addition, we were also required to pay a fine, which we did. And therefore, we have the right to stay there under the Code. We complied with that process that's laid out by the City and we're allowed to stay there."

Mr. Williams continued, "I'm going to talk about the certifications and the reports you have, and I will let you know that there really is no conflict. Because, one that was prepared by Verizon Wireless by an independent engineer is a certification that meets your Code with actual measurements. And the one that was prepared by ATSI is a theoretical one that has no measurements that were actually made. No on site inspection. It doesn't comply with your Code one bit. And, as your Attorney has very clearly indicated to you in his Memorandum to you, both at the last meeting and at this meeting, under Federal law when the site is in compliance, and our report shows it's in compliance, then you may not consider evidence of the health effect of UF in your ruling."

Mr. Williams continued, "Now the reason we've done that, is because, as the court cases which Mr. Firstenberg has been a part of have indicated, the FCC has made its own studies and its own decision that if it's within those limits which are fairly low, that they are safe. And the report we prepared and was filed with you, both the previous one and the most recent one, demonstrate that the site is in compliance. And so, from that standpoint, the FCC is the one that determines that and preempts these issues and makes it easy to you to decide, because you have a certified report, I'm going to talk about in a minute, that demonstrates this site is in compliance."

Mr. Williams continued, "I am going to address Mr. Durkovich's presentation and points more toward the end of my comments."

Mr. Williams continued, "But this evening, what we have is the very narrow issues I've just talked about. Have we, did we comply with the Code. Yes. Did we pay our penalty. Yes. Did we follow the process. Yes. And therefore, as a result, under your Code, we are entitled to remain on the site and the appeal should be denied."

Mr. Williams continued, "I want to give you a little more detail about this site. The site is in a commercial zone, zoned C-2. And as Mr. Shandler indicated in his comments, the height limit is up to 100 feet, this is at 22 and some odd-feet. So the site itself is compliant with the Code for the commercial district. The site is concealed, and it's never been concealed from anybody. The fact that there were building permits for the shelter were public. Nothing has been concealed by anybody. But there is an ethos in the Santa Fe Code which asks that, when possible, wireless facilities be concealed and shrouded to keep the esthetic nature of the City. And so, in fact, this complies with that. The telecommunications portion of the Code also says that the City encourages innovation in telecommunication. By having this site is allows us all, all citizens to use their devices. And we have more and more and more and more devices and fewer land lines that we rely on every day, and importantly, emergency service provides rely on, on a daily basis."

Mr. Williams continued, "Now, Mr. Durkovich has said that, and Mr. Firstenberg also indicated, that there are 9 antennas. The fact is, there's only 6 antennas up there. Period, end of story. There's always been 6 antennas. There were plans Mr. Firstenberg offered you last time that showed 9 antennas. But the fact is, there were 6 antennas to begin with and there's 6 antennas sitting there today. No more. So part of their report and part of the basis of their appeal is flawed on that very issue."

Mr. Williams continued, "And, at the last hearing, as the minutes of the last hearing demonstrated, and I'm paraphrasing, and certainly the minutes will correct me, '*Mr. Esquibel noted that the antennas comply with the height location in Code.*' So you have, not only our evidence, but evidence from your staff that demonstrates that."

Mr. Williams continued, "Let me talk about these reports. At the last hearing, this Board asked that Verizon Wireless submit an updated report for your review. That's precisely what the minutes say. And so we prepared this report which you have before you and I hope you have it in color...I'm told you do have it in color. The yellow that I have on this is my chicken scratch, so you don't have that on yours. But this is a certification. It was prepared by Mr. Russell who is a member of the Institute of Electrical and Electronic Engineers, an international body. He is also a member of the International Committee of Electromagnetic safety, and is on a committee within that organization on radio-frequency safety. So you have somebody who knows what he's talking about when he prepared this document."

Mr. Williams continued, "And I want to contrast the two, if I may, before you. The Code provision notes that we are to provide the certification of a qualified independent party, based on the inspection of the approved telecommunications facilities, that they remain in compliance with radio-frequency emissions by the FCC. So, we have an independent person who is on two of the most important boards in the world, and we have a report issued, A Radio-frequency Exposure Post-Installation FCC Compliance Assessment prepared and issued by someone who is on two of the most important boards in the world on this topic."

Mr. Williams continued, "Now it's important to note, that on the last page it's certified. When we get to the ATSI, you will note that it's not certified. And the next very important thing is that actual field measurements were made. So Mr. Russell went out and actually made field measures with this contraption which is on page 14 of the report, which determines the survey methodology. So he actually went out and inspected it, in accordance with your Code. This is the exact same unit that is used by the FCC, it's the identical one that is used in order to determine what the actual frequencies are there. So you have someone who is independent, who went out and actually did measurements and gave you a report."

Mr. Williams continued, "And before I go further on this, let me just talk about this ATSI report. First of all there is no certification of this report. Number two, on the very last page, Mr. Cardenas makes no conclusion that it does exceed it, he says it may exceed it. But here's the important thing. It says, '*Analysis was conducted using information provided to ATSI via email from Kelly Shelling and Arthur Firstenberg,*' which have no idea what that is. So the gentleman did not go to the site at all to make any type of measurements to give you any sort of comparison. So there's really no evidence in conflict, because the report that was prepared by ATSI is not even valid for these purposes. It's not evidence that you should consider, because it wouldn't even be admissible in a court of law. Whereas this is something that would be admissible."

Mr. Williams continued, "So let me talk through this. The FCC Compliance Assessment on the first page at the bottom, in the summary notes, '*Compliance Status – in Compliance.*' And it shows the Verizon max MPE measured occupational is 70%. That's the actual, that's what he measured when he went out there. Let me walk you through this. One of the important things that the ATSI did, it measured the peak theoretical value, and I'm going to go through more specifics in a minutes. What this report prepared by Mr. Russell did were the spacial averages of the actual measurements. And what you have here, on page 6 are actually measurements that showing in green areas, going on to the next page, are below the general population MPE."

Mr. Williams continued, "So one of the other critical mistakes that was made in the presentation, factually, and I like to go on facts, not theory, which is what is in the ATSI Report is that there was no ground level plotting. Well in fact, on page 7, you have both rooftop plots and you have ground level plots. And what this shows is, is the vast majority is green or within the percentage compliance for the MPO established by the FCC. So whatever is on the roof and disburse out is in compliance. And this report also demonstrates that the entire site is compliant, not just here, but going out as well. So if it's compliant here, it's going to be compliant outside. The report also notes what signage is on the roof. There were some comments about that."

Mr. Williams continued, "Let me talk about some of the issues in this ATSI report, which further demonstrates it is not a valid report and not something you should consider. As I indicated, it's not certified. Not done with any inspections. There was no visit. There was no actual field measurement, there's no backup data. So therefore, not only does it not comply with the Santa Fe Code, it doesn't comply with the FCC Code or the OETC standards that were referred to. It's all theoretical. It also contains, from our perspective, and this is fact, but it's inflammatory, it contains some typographical errors in their use. On page 10, it suggests to you that these sites are operating at 80,000 watts which is just simply not true. It should be 80,000 milliwatts, which means that it is at 80 watts. But that is incorrect. In

addition, the ratio that was used by Mr. Cardenas included rooftop reflection coefficient of 2.56. There is, in bringing this up folks, is if you look in the OET Bulletin 65, which is the FCC one, it says that is used for FM radio. And what this would do is distort the calculations that he has here. In addition, under the OET Bulletin 65, it says that you don't add or overlap the frequencies and the percentages. And that's what he's done here."

Mr. Williams continued, "Mr. Firstenberg, and I just got this Affidavit right now, just like I got this thing at the last minute at the last one. Mr. Firstenberg, with all due respect, is not an engineer. And while he can do calculations, neither he nor Mr. Cardenas made actual measurements. The important thing that you have here is you have, and let me tie this back, is what the FCC said, is that if it's in compliance and you have a certification, you have a report that says it is, you can rely on that, and that you do not then look at the health effects of electromagnetic frequency. So therefore, this is done for you and makes your decision easier...."

Mr. Esquibel advised Mr. Williams he has 10 minutes left.

Mr. Williams said, "I'm probably not going to use it, but thank you sir. I appreciate it."

Mr. Williams continued, ".....as I indicated, because of the incorrect use of the formulas. And he has a number of boards here. Mr. Durkovich pointed this board out and various other calculations that were used. Here's the one that has an incorrect usage of the 2.56 coefficient that applies to FM Radio, according to the OET Bulletin. In addition, the report uses multiple beams, 6 beams, when there are actually only 3 sectors. This is also something that the OET Bulletin says is incorrect. The point being here is that the ATSI report is not evidence that you should consider. What you should consider is the report that was filed and prepared by Verizon Wireless's independent engineer that says, on the front of it, that it is in compliance. And that's what you require under you Code. Verizon Wireless has complied with the Code in terms of getting the application, it has complied with getting the permit, it's complied with paying the penalty it should have paid and it's also complied with having the certification done for you."

Mr. Williams continued, "There was an additional Affidavit from a gentleman I don't know, Mr. Millman, who we also assert that you should not consider whatsoever, including Mr. Firstenberg's, because it doesn't have any basis in actual measurement. The Millman Affidavit is based upon the ATSI report, and as I have demonstrated to you it is not a valid report, and therefore should not be considered at all."

Mr. Williams continued, "Let me address certain of Mr. Durkovich's points, and then let me be done. Mr. Durkovich had a discussion about thermal versus delayed injuries. As I indicated, because the site is compliant, based on the report that Verizon Wireless has supplied you by the independent engineer, you are not to consider the health effects of radio-frequency. I have demonstrated to you that the report deals with both the occupational and the general population. It deals with the occupational, and what it does, with the calculations at the back of his report..."

Chair Friedman advised Mr. Williams he has 5 minutes left for his presentation.

Mr. Williams said, "Thank you sir."

Mr. Williams continued, "The back of his report has these calculations. I'm not going to ask you to go through these calculations, because again, what has happened is the FCC has done this work for you. It has its experts and that's why the standard was set by the FCC and that's why Congress enacted Section 332 and, a portion of it which says that you are not to consider the health effects. So this work has already been done for you in this process."

Mr. Williams continued, "Mr. Durkovich also indicated that there was no ground level measurement. The report, if you look on the page, has both rooftop and ground, and shows in the green area that all is in compliance."

Mr. Williams continued, "So let's talk about the last point he made, which is the due process issue. The process that was set forth by the Code was that we had to get a building permit, we didn't do it. We acknowledged that mistake. We came back, applied, received it via administrative approval, complied with the Code as both Mr. Shandler and the staff have indicated we have done. We were assessed a penalty. We're paid that. So we too have the right to be on this location which is approved by the City of Santa Fe."

Mr. Williams continued, "No further cross-examination need be made because the very limited fact is, are we compliant now. Yes. Did we file a certificate from an FCC engineer that shows we are compliant with FCC regs. The answer is yes. And the report that they've given you does not satisfy those criteria and needs to be dismissed. So what we ask you to do is to deny this appeal and let Verizon Wireless continue. Thank you very much. I appreciate your time."

Chair Friedman asked Mr. Shandler if he has anything he would like to say in submission.

Zachary Shandler, Assistant City Attorney, said, "Yes, Mr. Chair. I have four points in closing."

Chair Friedman said, "Thank you."

Mr. Shandler said, "Number one, Verizon admitted they failed to get a building permit in 2006. The Land Use Department administrative penalty, the double fee against Verizon. Then the Land Use Department required Verizon to go through the public notice process with signs, posters and mailings and public input to the Land Use staff to properly obtain a permit, and that process was completed."

Mr. Shandler continued, "Number two, I just want to preserve for the record, I don't want to object, but just preserve for the record the submittal of late evidence. The appearing party knows how to submit timely evidence, and in fact, in this packet they submitted some 10 days in advance, so I just want to preserve that objection for the record."

Mr. Shandler continued, "Three. Let me read the Code on certification: *'The applicant shall provide to the Land Use Director the certification of a qualified independent party(s) that, based on an inspection of an approved telecommunication facility(s) their structural integrity remains intact and they remain in compliance with the radio-frequency exposure limits set out in 47 CFR 1.310 Table 1A and B.'*

That's what the City Council has as the requirement, an independent party, and they submit this certification document and that's what you have in your packet today. Mr. Durkovich said well there's no expertise on staff to independently review that, and that's why the City Council has made it as the certification document of this qualified, independent party. Mr. Durkovich has said, the only thing the citizens can do is get upset at the City, but I think that's an unfair contention. I think they can go to the City Council and they can try to change this provision if they're unhappy. They could protest at the site. It's a landlord/tenant relationship. If that's how the community feels, they can talk to the landlord about that, but it's not that they're powerless because this Board won't or can't do anything."

Mr. Shandler continued, "My final point, as Mr. Durkovich said, 'There is certain sort of information that can't be presented.' And that's an understated way of saying, the courts have ruled you can't factor in the allegation of effect or telecommunications or cell signals on people. You may not like that ruling. You may be sympathetic to the people who testified about their illnesses. You may have your own personal beliefs, but as a Board member, you must follow the law. In my June Memo, I cite to the District Court ruling that stated, *'Even if the City Code was construed to require the City to regulate wireless facilities on the basis of the alleged impact of RF emissions on the health of the petitioner and others, it would expressly conflict with and be preempted by federal law.'* That's the District Court Ruling, Arthur Firstenberg versus City of Santa Fe. So the appealing party knows the case. It was appealed to the Court of Appeals. He lost. He asked the State Supreme Court to hear the case. They refused. So this is a powerful board. A very powerful board. But you're not more powerful than the State's ruling court. And so you need to follow the law, and you cannot factor in the allegations of telecommunication matters and RF in your ruling. Thank you."

Chair Friedman said, "So the matter ends with the summations. Thank you. I want to thank all..."

Mr. Durkovich asked to speak.

Chair Friedman said, "No, we're done with the closing statements. Thank you."

Mr. Durkovich said, "I just want to withdraw two issues."

Chair Friedman said, "Okay. Go right ahead."

Mr. Durkovich was speaking from the audience and Ms. Helberg asked him to come to the podium microphone and give his remarks for the record.

Mr. Durkovich said, "We are withdrawing our appeal of the height issue. And we are also withdrawing our appeal on the co-applicant issue. So, all the appeal deals with is again, is that they haven't complied with the requirements about the FCC maximums. In other words, they haven't hit that. And then the due process issues that we talked about. So the final two things you don't have to consider and we withdraw. Thank you."

Chair Friedman said, "The matter is now before this Board. First of all does the Board have any questions for staff, and there were none. Chair Friedman asked the pleasure of the Board.

MOTION: Rachel Winston moved, seconded by Patricia Hawkins, regarding Case #2013-116 and 2014-82....."

Mr. Firstenberg interrupted Ms. Winston saying, "I'm not withdrawing those appeal items."

Chair Friedman said, "A matter of order, we heard what you have to say, if you don't mind sitting down now. Thank you for your comment."

Mr. Firstenberg said, "For the record, we are not withdrawing any of our points of appeal."

Chair Friedman said, "We've corrected that for the record now. Thank you. What's the pleasure of the Board."

MOTION: Rachel Winston moved, seconded by Patricia Hawkins, regarding Case #2013-116 and 2014-82, consolidated appeal of the decision of the Land Use Department to issue Building Permit #13-2097 and Building Permit #14-813, to John Malone and Verizon Wireless regarding the replacement of telecommunications antennas at 1402 Agua Fria, to deny the appeal and affirm the decision of the Land Use Department to issue Building Permit #13-2097 and Building Permit #14-813.

VOTE: The motion was approved unanimously on a voice vote.

Chair Friedman said, "The appeal is denied, for the record. Thank you very much folks for being here. I know it's an emotional and contentious issue for you. I appreciate your thoughts on the matter, and counsel, thank you for your comments this evening. We're going to take a break before the next case, just a 5 minute break, folks."

Break 7:05 p.m. to 7:25 p.m.

H. NEW BUSINESS

CASE #2015-62. 802 CANYON ROAD SPECIAL USE PERMIT. NEEMA SADEGHI REQUESTS SPECIAL USE PERMIT TO ALLOT A RESTAURANT USE. THE PROPERTY IS ZONED RAC (RESIDENTIAL ARTS AND CRAFTS). (NOAH BERKE, CASE MANAGER.)

A Memorandum dated June 30, 2015 for the July 7, 2015 Meeting, to the Board of Adjustment, from Noah Berke, Senior Planner, Current Planning Division, in this matter, is incorporated herewith to these minutes as Exhibit "13."

A copy of *Tenant Improvements for Milad Persian Bistro, 802 Canyon Road, Santa Fe, New Mexico*, is incorporated herewith to these minutes by reference and is on file in, and copies can be obtained from, the City of Santa Fe Land Use Department.

Noah Berke presented information regarding this case. Please see Exhibit "13," for specifics of this presentation.

Chair Friedman asked, "So if you're facing El Farol, this is the building to the right."

Mr. Berke said, "This is the building to the right. This is on the corner of Camino del Monte Sol and Canyon Road."

Chair Friedman asked if the parking is on Camino del Monte Sol, and Mr. Berke said, "It is."

Public Hearing

Presentation by the Applicant

All those presenting and speaking to this case were sworn en masse

Neema Sadeghi, owner, was sworn. Mr. Sadeghi said, "I am currently renting 802 Canyon Road for, hopefully, to be able to open a restaurant. I do not plan on having any live entertainment, and all of the improvements that are being done to the building will be in ADA compliance to make the bathrooms handicapped approved, and basically, following all the Codes that are required. Currently, the building already has a brick oven inside, there's the grease trap, there's a hood in there. The previous tenants just dry-walled everything over. However, all of the structures for the kitchen remain."

Mr. Sadeghi continued, "The Vigil family has been renting this place since the 60's as a restaurant and a gallery. And all I would like to request is the special use permit for the parking to legally nonconform, so I can use the space for a restaurant basically."

Chair Friedman asked Mr. Sadeghi if he has anything further to add.

Mr. Sadeghi said, "My hours are probably going to be from 11:00 a.m. to 10:00 p.m., and then 11:00 a.m. to 11:00 p.m. on the weekends, if possible. And I'm only going to be serving beer and wine, that's in accordance with selling at least 60% of food."

Chair Friedman noted the patio in front of the restaurant.

Mr. Sadeghi said, "There is a patio in the front and there is a patio in the rear, and those only will be used, weather permitting as well."

Speaking to the Request

Marilyn Bane, 622½ Canyon Road, previously sworn, said she is a neighbor and one of the two people at the ENN meeting. She said, "I would like to ask you to approve this. I think it will be an addition to Canyon Road. And since there is a City Parking Lot directly opposite, it seems to me that the benefit and the ability for people to park in addition to the spaces that are allocated for him, would be helpful, and Canyon Road can use it. I would very much appreciate it if we could welcome him. I should also say, I am the President of the Historic Neighborhood Association, and that is our position."

Chair Friedman thanked her for her service and for her comments.

Stefanie Beninato, P.O. Box 1601, Santa Fe, previously sworn, said "I would also ask that you approve this Special Use Permit so the restaurant can reopen or can reopen as a restaurant. It has been a restaurant for a very long time. And I don't think really the parking is an issue because of the City Parking Lot across the street. I think having someone who is brave enough in this economic climate to start a restaurant, that they should be encouraged, and that vacant things on Canyon Road really do not serve our community. Thank you very much."

Chair Friedman asked if the Board members have questions for the Applicant or staff, and there were none.

The Public Testimony Portion of the Public Hearing was Closed

MOTION: Douglas Maahs moved, seconded by Colleen Dearing, regarding Case #2015-62, requesting a Special Use Permit allowing for restaurant use at 802 Canyon Road, located with the RAC Zoning District, to approve the Applicant's request, incorporating Staff Finding of Fact and Conclusions of Law.

VOTE: The motion was approved unanimously on a voice vote.

I. STAFF COMMUNICATIONS

The staff had no communications.

Lisa Martinez, Director, Land Use Department, said she enjoyed her first meeting of the Board of Adjustment, and thanked them for all of the good information and good work, and for serving on this important Board.

Chair Friedman thanked her for attending.

J. MATTERS FROM THE BOARD

Ms. Winston congratulated Chair Friedman on his reelection.

I. ADJOURNMENT

There was no further business to come before the Board, and the meeting was adjourned at approximately 7:35 p.m.

Gary Friedman, Chair


Melessia Helberg, Stenographer