

Arthur Firstenberg

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July 17, 2015

Kelley Brennan, City Attorney
City of Santa Fe
P.O. Box 909
Santa Fe, NM 87504-0909

Attention: Zachary Shandler, Assistant City Attorney

*Regarding: Land Use Cases No. 2013-116 and 2014-82
Appeals of Cellular Phone Task Force et al. regarding 1402 Agua Fria*

Dear Ms. Brennan:

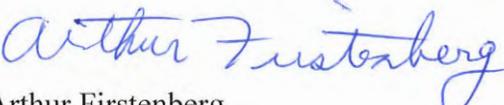
Pursuant to Section VIII(I) of Resolution No. 2011-24, "Procedures for Appeals Under Santa Fe City Code (SFCC) Section 14-3.17," I hereby submit the attached proposed Findings of Fact and Conclusions of Law in the above-referenced matters. I recommend that every member of the Board of Adjustment read them.

Given false statements by Verizon's lawyer, violations of due process, and Verizon's failure to produce a notarized certification of compliance with the FCC's radiation limits as required by Section 14-6.2(E)(6)(b)(x)(3) of the City Code, I respectfully point out that under Robert's Rules of Order, any member of the Board may make a motion to rescind a previous action. A motion to rescind the vote denying these appeals should be made at or before the next meeting of the Board.

The Board may not ignore a threat to human life. The FCC's radiation exposure limits are designed to protect against heating of the human body by more than one degree Celsius. The Board should be aware that if the brain is not regulated within a few tenths of a degree, health and life cannot be sustained.

I am proceeding pro se. The neighbors of 1402 Agua Fria asked Stephen Durkovich to argue their case at the July 7, 2015 continuation hearing because it was obvious to them that no matter how well I represented them, you were going to continue to ignore everything I said. They hoped you would give more respect to an attorney. The neighbors I spoke with afterwards regretted that decision.

Sincerely,



Arthur Firstenberg

cc: Mark Williams; Members of the Board of Adjustment

City of Santa Fe
Board of Adjustment
Findings of Fact and Conclusions of Law

Cases #2013-116 and #2014-82

Appellants' Names – Cellular Phone Task Force, et al.

Appellee's Name – Verizon Wireless

THIS MATTER came before the Board of Adjustment (“Board” or “BOA”) for hearing on May 5, 2015, continued on July 7, 2015, upon the appeal of Cellular Phone Task Force and sixty-five other parties from the decision of the Land Use Director (“Director”) to issue Building Permits #13-2097 and #14-813 to John Malone and Verizon Wireless (“Verizon”) for a telecommunications facility at 1402 Agua Fria Street.

The Appellants cite the following grounds for appeal:

1. Violation of Code Section 14-6.2(E), requiring a permit for the operation of a telecommunications facility;
2. Violation of Code Section 14-3.11(A)(3), issuance of a building permit for an unauthorized use;
3. Violation of Code Section 14-6.2(E)(5)(b), “Telecommunications facilities located on existing structures shall not exceed the height of the structure upon which the facility is located”;
4. Violation of Code Section 14-6.2(E)(4), requiring a public hearing before the Planning Commission for a height variance;
5. Violation of Code Section 14-6.2(E)(6)(b)(x)(3), requiring notarized certification of compliance with the Federal Communications Commission’s (“FCC’s”) radio frequency radiation exposure limits;
6. Violation of Code Section 14-6.2(E)(5)(j), requiring the applicant to allow co-location, and Code Section 14-6.2(E)(6)(b)(x)(1), requiring the applicant to submit a notarized certification stating that it will allow co-location or explaining why co-location is not technically feasible;
7. Non-disclosure of the existence of the telecommunications facility to neighbors who purchased homes nearby between 2005 and 2013;
8. Violation of Code Section 14-3.17(H)(1), stating that “Appeals shall be conducted in accordance with administrative procedures to be adopted by resolution of the governing body,” and violation of Section VIII(H) of Resolution No. 2011-24, establishing the order and procedures to be followed in appeals.

The Appellants generally assert violations of due process, harm to property values, emotional distress, and violation of any other rights they may have under New Mexico or federal law.

Specifically, the Appellants claim that the Verizon facility was built in 2005 without a zoning permit or a building permit, that it was concealed in two boxes that look like air conditioning units, and that the neighbors did not know it was there for eight years. They claim that people

who purchased homes near the facility between 2005 and 2013 were damaged by non-disclosure. They claim that Verizon's certification that it will allow co-location is fraudulent because co-location is technically impossible. They claim that the antennas and the boxes that contain them were not approved in 2005 and unlawfully exceed the height of the building they are on. And they claim that Verizon's non-notarized report certifying compliance with the FCC's radiation exposure limits is fraudulent, and that the facility exceeds the FCC's exposure limits for the General Public on the rooftop of 1402 Agua Fria and on three neighboring residential properties.

The Appellants also claim that they were denied due process in 2005 because of no notification and no public hearing; that a hearing was wrongly delayed for two years after they appealed in 2013; and that they were denied due process before the Board of Adjustment in 2015 because they were not permitted to cross-examine witnesses or question staff at the May 5, 2015 BOA meeting; were not permitted to cross-examine Verizon's witness on newly submitted evidence at the July 7, 2015 BOA meeting; that the public was not permitted to comment on the newly submitted evidence; and that the public hearing was wrongly closed before closing statements.

The record on the Appeals includes the following documents:

1. The Appellants' Verified Appeal Petitions;
2. Building Permit #5-553;
3. Building Permit #13-2097;
4. Building Permit #14-813;
5. Building Permit Application #5-553 for a 312 square foot "shelter to house electronic equipment for a wireless cell site";
6. Building Permit Application #13-2097 "Removing (3) existing panel antennas. Installing (6) new panel antennas";
7. Building Permit Application #14-813 for "Six new antenna installations";
8. Minutes of the February 11, 2015 Santa Fe City Council meeting;
9. Minutes of the May 5, 2015 BOA meeting;
10. Minutes of the July 7, 2015 BOA meeting;
11. Memorandum dated January 30, 2015 to the Members of the Governing Body from Zachary Shandler;
12. Memorandum dated April 10, 2015 to the members of the BOA from Zachary Shandler;
13. Advanced Testing Services, Inc. Radio Frequency Emissions Analysis Report, dated May 4, 2015;
14. Verizon Wireless Radio Frequency Exposure Post-Installation FCC Compliance Assessment, dated May 7, 2015;
15. Letter of Arthur Firstenberg regarding alleged due process violations, dated May 11, 2015;
16. Zachary Shandler's Response to Mr. Firstenberg's letter on due process violations;
17. Letter of Arthur Firstenberg, dated May 11, 2015, with attached photographs of the roof of 1402 Agua Fria Street;
18. Affidavit of Samuel Milham, M.D., M.P.H., dated June 24, 2015;
19. Affidavit of Arthur Firstenberg, dated July 7, 2015;
20. Photographs of three antennas protruding above the top of the antenna enclosures;

21. Documents submitted by Appellants at the May 4, 2015 and July 7, 2015 BOA hearings.

After conducting a public hearing and having heard from the Appellants, City staff and interested members of the public, the Board hereby FINDS, as follows:

FINDINGS OF FACT

1. In 2005, Verizon applied for, and was issued, a building permit for “an electronic equipment enclosure for a wireless facility,” measuring “312 square feet,” at 1402 Agua Fria Street.
2. The electronic equipment enclosure on the ground at 1402 Agua Fria Street measures 312 square feet.
3. Verizon did not apply for, and the City did not approve, a telecommunications facility or any structures on the roof at that location in 2005.
4. Verizon nevertheless installed a complete telecommunications facility consisting of electronic equipment within an electronic equipment enclosure on the ground, and 6 antennas hidden by two enclosures on the roof, and began operating them in 2005.
5. On September 30, 2013 Verizon applied for, and on October 30, 2013 the City issued, Building Permit #2013-116 to “add 3 antennas to an existing telecommunications facility.”
6. On November 14, 2013, 50 parties appealed the decision to grant Building Permit #2013-116 to add antennas to an unpermitted telecommunications facility.
7. The City found Verizon in violation, and required Verizon to apply for a permit for a telecommunications facility and pay a double fee because of the violation.
8. On April 25, 2014, Verizon applied for a building permit for a telecommunications facility at 1402 Agua Fria. The City granted Building Permit # 2014-82 on July 15, 2014.
9. On August 8, 2014, 20 parties appealed the decision to grant Building Permit # 2014-82.
10. The rooftop portion of the telecommunications facility as approved in 2014 consists of two antenna enclosures, each approximately 50 square feet, and 6 antennas. The antenna enclosures are 6 feet high, and the largest antennas are 7 feet high.
11. The height of the roof at 1402 Agua Fria Street is 19 feet. The height of the antennas is 26 feet.
12. Conflicting evidence was submitted to the Board of Adjustment as to whether the radio frequency (“RF”) emissions from the telecommunications facility comply with the exposure limits established by the FCC.

13. Verizon submitted a non-notarized, self-certified report, signed by its own CEO, Marvin Wessel, and a Verizon Field Engineer, Harry W. Young, stating that its facility is in compliance with Occupational RF exposure limits on the rooftop. The Appellants submitted an independent report by Advanced Testing Services, Inc., signed by its principal engineer, stating the Verizon facility is not in compliance with RF exposure limits for the General Public on the rooftop, and is also not in compliance on three neighboring residential properties.
14. The City Code requires applicants for telecommunications facilities to certify that they will allow co-location of antennas by other providers.
15. There was conflicting testimony as to whether co-location is possible at this location. Verizon submitted an affidavit stating that it will allow co-location on the rooftop. The Appellants stated that co-location is impossible because the facility is already over the FCC's limits for radiation exposure, and because multiple providers at rooftop height would interfere with one another.
16. Section VIII(H)(13) of the City's Appellate Procedures require that the public hearing be closed after the closing statements of the appellant(s) and appellee(s). Sections VIII(H)(5) and (6) require that each side be allowed to cross-examine the other side's witnesses, and to ask questions of City staff.
17. The Board closed the public hearing on May 5, 2015. Closing statements did not take place until July 7. Cross-examination of witness and questioning of City staff were not permitted.

CONCLUSIONS OF LAW

Under the circumstances and given the evidence and testimony submitted prior to and during the hearings, the Board CONCLUDES as follows:

1. The Board of Adjustment has the power and authority to hear and decide the matters that are the subjects of the appeals.
2. Federal law provides that to the extent telecommunications facilities comply with the regulations of the FCC concerning RF emissions, states and local governments may not regulate the placement or modification of such facilities on the basis of such emissions. 47 U.S.C. § 332(c)(7)(B)(iv).
3. States and local governments *may* regulate the placement or modification of telecommunications facilities on the basis of RF emissions when such facilities do *not* comply with the FCC's regulations.
4. The City Code expressly requires applicants to demonstrate compliance with the FCC's exposure limits by submitting written, notarized certification of such compliance.

5. Although Verizon did not submit written, notarized certification of compliance with the FCC's exposure limits for the General Public, and a report from an independent testing company concludes that Verizon's facility is not in compliance with such limits on the rooftop and on three neighboring residential properties, the Board nevertheless concludes that Verizon has not violated Code Section 14-6.2(E)(6)(b)(x)(3) and is not endangering the lives of the people who work on the roof and who live on the neighboring properties.
6. Although the height of the antenna enclosures exceeds the height of the building, and the height of the antennas exceeds the height of the antenna enclosures, the Board concludes there is no violation of the height limitations in the City Code.
7. Although with the existing number of antennas there is already a question as to compliance with the FCC's exposure limits, and although any additional antennas would have to be mounted on a tower to avoid interference, and although any tower more than 20 feet tall would not comply with the City Code's setback requirements, the Board concludes there is no violation of the co-location requirement.
8. Although Appellants have the right to cross-examine witnesses and question staff about alleged violations of the FCC's RF exposure limits, the City Code guarantees this right, and the Board denied this right, the Board concludes that Appellants have not been denied due process.
9. Considering all of the above, the Director's decisions to issue Building Permits #2013-116 and #2014-82 were based upon substantial evidence and were not arbitrary and capricious.
10. The appeals are therefore denied.

IT IS SO ORDERED ON THE _____ OF _____ 2015 BY THE BOARD OF ADJUSTMENT OF THE CITY OF SANTA FE.

Gary Friedman, Chair

Date

FIELD WITH THE CITY CLERK:

Yolanda Y. Vigil, City clerk

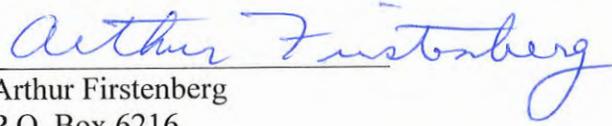
Date

APPROVED AS TO FORM:

Kelley Brennan, City Attorney

Date

Submitted by:

A handwritten signature in blue ink that reads "Arthur Firstenberg". The signature is written in a cursive style with a horizontal line underneath the name.

Arthur Firstenberg
P.O. Box 6216
Santa Fe, NM 87502
(505) 471-0129

July 17, 2015