

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

Case No. 2013-116

Appellants – Cellular Phone Task Force, Arthur Firstenberg and fifty-one citizens

Case No. 2014-82

Appellants- Cellular Phone Task Force, Arthur Firstenberg and twenty-one citizens

THIS MATTER came before the Board of Adjustment of the City of Santa Fe for hearing on May 5, 2015 and July 7, 2015 upon the appeal (Appeal) by the Cellular Phone Task Force, Arthur Firstenberg and fifty-one citizens from the October 30, 2013 Decision of the Land Use Department to Issue a Building Permit #13-2097 and from 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.

The record on the Appeal (the Record) includes the following documents:

1. Memorandum dated April 10, 2015 for the May 5, 2015 Meeting of the Board of Adjustment from Zachary Shandler, Assistant City Attorney, regarding Case No. 2013-116, 2014-82 – Appeal of the Appellant from the Decision, with Exhibits A-H (City Attorney's Memorandum).
2. Appellants' Verified Appeal Petitions;
3. Building Permit #5-553;
4. Building Permit #13-2097;
5. Building Permit #14-813;
6. Minutes of the February 11, 2015 Santa Fe City Council meeting;
7. Minutes of the May 5, 2015 BOA meeting;
8. Minutes of July 7, 2015 BOA meeting;
9. Memorandum dated January 30, 2015 for the February 11, 2015 Meeting of the Governing Board from Zachary Shandler, Assistant City Attorney, regarding Case No. 2013-116, 2014-82 – Appeal of the Appellant from the Decision, with Exhibits A-G
10. Appellant's witness list, undated;
11. Appellant's Advanced Testing Services, Inc. Radio Frequency Emissions Analysis Report, dated May 4, 2015;
12. Letter of Arthur Firstenberg regarding alleged due process violations, dated May 11, 2015;
13. Letter of Mr. Firstenberg, dated May 11, 2015 with photographs of the roof of 1402 Agua Fria Street;
14. Response to Mr. Firstenberg from City Attorney's Office, dated June 23, 2015, with accompanying exhibits;
15. Affidavit of Samuel Milham, M.D., M.P.H., dated June 24, 2015;

16. Verizon's Wireless Radio Frequency Exposure Post-Installation FCC Compliance Assessment, submitted by cover letter dated June 24, 2015;
17. Affidavit of Mr. Firstenberg, dated July 7, 2015;
18. Photographs from Mr. Firstenberg of three antennas protruding above the top of the antenna enclosures, undated;
19. Appellant and Applicant's submittals and exhibits to the Board of Adjustment at the Hearings.

After conducting a public hearing (Hearing) and having reviewed the Record and heard from the City staff, the Appellant, the Applicant, residents of the neighborhood in which the Property is located and certain other interested members of the public, the Board hereby FINDS, as follows:

FINDINGS OF FACT

1. The Board reviewed the Record and heard the report of City staff and received testimony and evidence from the Appellant and the Applicant and their representatives and from members of the public interested in the matter.
2. Pursuant to Code §14-2.4(C)(1), the Board hears and decides appeals of final actions of the Land Use Director *de novo* after giving notice in accordance with the notice provisions of Code §14-3.1(H)(4).
3. Notice of the Appeal was properly given in accordance with the notice provisions of Code §14-3.1(H)(4).
4. Pursuant to Code § 14-2.2(G), the Board's Decision is a final action subject to appeal to the District Court to hear and decide the matter.
5. In 2005, the City of Santa Fe issued Building Permit No. 05-0553 (2005 BP) to Verizon for the construction of electronic equipment shelter.
6. The Property is zoned C-2 (General Commercial) and is improved with a one-story structure occupied by a business called "Absolute Flooring and Materials."
7. The 2005 Permit stated: "The permit is for the equipment shelter only—the antennas are not approved at this time—Separate permit is required."
8. Verizon did not apply for or receive a separate permit.
9. Verizon constructed a ground Equipment Shelter next to the Building and Equipment Shelters (a/k/a shrouds), box-like structures that are a few feet high, on the south (rear) portion of the Building roof.
10. Verizon placed six antennas within the two roof Equipment Shelters, presumably close to the time the roof Equipment Shelters were constructed.
11. In 2013, Verizon applied for a building permit to replace the original six antennas.
12. On October 30, 2013, the Land Use Department issued Building Permit No. 13-2097.
13. Shortly thereafter, Appellants advised the City that Verizon had not applied for or been issued a building permit for the installation of all of the 2005 installed items.
14. On November 14, 2013, Appellants filed the 2013 Verified Appeal Petition, asserting that portion of 2005 installation was done without a permit and without notice to the public.
15. On December 2, 2013, City staff wrote to Verizon stating that it needed to submit a new application for a building permit for the unpermitted installation.
16. Code § 14-6.2(E)(3)(iii) provides that that "new towers or antennas in C-2, I-1 and I-2 districts" trigger administrative review.

17. On December 2, 2013, City staff wrote to Verizon stating that the new application was subject to the “administrative review” process.
18. In accordance with standard practice, City Staff required Verizon to pay a double application fee.
19. Verizon re-applied and paid the double application fee.
20. In February and March 2014, Verizon, as part of the administrative review process, provided the required application submittals to City staff.
21. On March 26, 2014, City staff deemed the submittals to be complete.
22. On April 25, 2014, the application was logged into the system.
23. Shortly thereafter, Verizon posted a sign at the property.
24. On May 12, 2014, Verizon sent certified mail written notice (Notice) to property owners, tenants and registered neighborhood associations within 200 feet of the Property. The Notice included a site map. During this time, citizens were able to call and meet with City staff regarding the Application.
25. On July 15, 2014, the Land Use Department issued Building Permit No. 14-813 for the project.
26. On July 26, 2014, Verizon posted BP 14-813 on the Property, providing notice to interested parties of its issuance.
27. On August 8, 2014, Appellants filed the 2014 Verified Appeal Petition.
28. On February 11, 2015, the City Attorney’s Office asked the City Council to dismiss the two Appeals. It resulted in a 4-4 tie vote.
29. The matter was postponed to the February 25, 2015 meeting and then postponed to the March 11, 2015 meeting.
30. On March 11, 2015, the City Council voted again, and it resulted in a 4-4 tie vote, and thus the matter was sent to the Board of Adjustment as the body that hears appeals based on decisions from the Land Use Director’s decision to issue building permits.
31. In front of the Board, the Appellant’s first claim asserted that Code under the “Maximum Height” subsection provides that: “Telecommunications facilities located on existing structures shall not exceed the height of the structure upon which the facility is located.” SFCC 1987, § 14-6.2(E)(5)(b)
32. As stated in Finding of Fact #6, the property is in a C-2 district.
33. As stated in the City Attorney’s Memorandum, “Telecommunications facilities located on new structures shall not exceed the maximum height for buildings otherwise allowed as set forth in Chapter 14 with the *exception* that in C-2, I-1 and I-2 districts the height limit of telecommunications facilities shall be one hundred feet.” Code § 14-6.2(E)(5)(b) (emphasis added).
34. The telecommunications equipment is less than 100 feet.
35. Appellant’s second claim asserted that if there was a height violation, then a variance request was required.
36. As stated in the City Attorney’s Memorandum, since there is not a height violation, then there was no need to analyze whether a variance from the height requirements was required.
37. Appellant’s third claim asserted that the 2014 building permit was issued even though Verizon did not comply with a public process.

38. As stated in the City Attorney's Memorandum, Code § 14-6.2(E)(10) provides the three steps for public notice under the "administrative review" process and in 2014, Verizon, as provided in Findings of Fact #17-24, completed all these steps.
39. Appellant's fourth claim asserted that the 2014 building permit was issued even though Verizon did not comply with an Early Neighborhood Notification meeting requirement.
40. As stated in the City Attorney's Memorandum, the administrative review process does not require an Early Neighborhood Notification ("ENN") meeting.
41. Appellant's fifth claim asserted that the 2014 building permit was issued even though Verizon did not request a hearing in front of the Planning Commission meeting.
42. As stated in the City Attorney's Memorandum, the administrative review process does not require a Planning Commission meeting.
43. Appellant's sixth claim asserted that the 2014 building permit was issued even though the Land Use Department could have required the removal of unpermitted structures.
44. As stated in the City Attorney's Memorandum, the Land Use Department has a variety of penalties it can impose for non-compliance/unpermitted building and the most common is to require a submittal of a proper application and a requirement of a double application fee.
45. As stated in Finding of Fact #19, Verizon had to pay a double application fee.
46. During the Board's hearing, Appellant attempted to raise issues about the impact of Radio Frequency (RF) on human health.
47. As stated in the City Attorney's Memorandum, the courts are clear that Appellant cannot attempt to call or cross examine witnesses about the substance of documents governing RF emissions.
48. The Courts have written: "[F]ederal law provided (and still provides) that to the extent that the facilities comply with the regulations of the FCC concerning such emissions, state and local governments may not regulate the placement or modification of wireless facilities based on the alleged environmental effects of RF emissions." Arthur Firstenberg v. City of Santa Fe, AT & T Mobility Services, LLC, pp. 5-6, (D-101-CV-201004296) (10/30/13), affirmed by N.M. Ct. of Appeals (No. 33, 441) and cert. denied by N.M. Supreme Ct. (No. 35,157).
49. Verizon provided documentation of this compliance via its "Wireless Radio Frequency Exposure Post-Installation FCC Compliance Assessment" submitted by cover letter dated June 24, 2015.

CONCLUSIONS OF LAW

Under the circumstances and given the evidence and testimony submitted at the Hearing, the Governing Body hereby CONCLUDES:

In reaching the Decision, the Commission acted in accordance with law and in reliance on substantial evidence in the record before it.

**WHEREFORE, IT IS ORDERED ON THE _____ OF AUGUST 2015 BY THE
BOARD OF ADJUSTMENT OF THE CITY OF SANTA FE:**

The Appeal is denied.

Gary Friedman,
Chairperson

Date:

FILED WITH THE CITY CLERK:

Yolanda Y. Vigil
City Clerk

Date:

APPROVED AS TO FORM:

Zachary Shandler
Assistant City Attorney

Date: