



Agenda

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BOARD OF ADJUSTMENT
Tuesday, August 4, 2015 at 12:00 P.M.
200 Lincoln Ave. Santa Fe NM
City Council Conference Room

- A. ROLL CALL
- B. PLEDGE OF ALLEGIANCE
- C. APPROVAL OF AGENDA
- D. APPROVAL OF MINUTES: Minutes of July 7, 2015
- E. FINDINGS/CONCLUSIONS:
 - 1. Case #2013-116 & 2014-82. Cellular Phone Task Force
 - 2. Case #2015-62. 802 Canyon Road Special Use Permit.
- F. NEW BUSINESS (None)
- G. STAFF COMMUNICATIONS
- H. MATTERS FROM THE COMMISSION
- I. ADJOURNMENT

NOTES:

New Mexico law requires the following administrative procedures be followed by zoning boards conducting "quasi-judicial" hearings. In "quasi-judicial" hearing before zoning boards, all witnesses must be sworn in, under oath, prior to testimony and will be subject to cross-examination. Witnesses have the right to have an attorney present at the hearing. The zoning board will, in its discretion, grant or deny requests to postpone hearings. Persons with disabilities in need of accommodations, contact the City Clerk's office at 955-6520, five (5) working days prior to meeting date.

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BOARD OF ADJUSTMENT MEETING
Tuesday, August 4, 2015

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**MINUTES OF THE
CITY OF SANTA FE
BOARD OF ADJUSTMENT
City Councilors Conference Room
August 4, 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 12:00 noon, on August 4, 2015, in the City Councilors Conference Room, 200 Lincoln Avenue, Santa Fe, New Mexico.

B. ROLL CALL

Members Present

Gary Friedman, Chair
Colleen Dearing
Patricia Hawkins
Douglas Maahs
Donna Reynolds
Daniel H. Werwath

Members Excused

Rachel L. Winston, Vice-Chair

Others Present

Dan Esquibel, Staff
Zachary Shandler, Assistant City Attorney
Elizabeth Martin for Melessia Helberg, Stenographer

B. PLEDGE OF ALLEGIANCE

C. APPROVAL OF AGENDA

MOTION: Douglas Maahs moved, seconded by Daniel Werwath, to approve the Agenda, as presented.

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

D. APPROVAL OF MINUTES – JULY 7, 2015

MOTION : Douglas Maahs moved, seconded by Colleen Dearing, to approve the minutes of the meeting of July 7, 2015, as presented.

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

E. FINDINGS/CONCLUSIONS

A copy of the City of Santa Fe Board of Adjustment Findings of Fact and Conclusions of Law in Case No. 2013-116 and Case No. 2014-82, is incorporated herewith to these minutes as Exhibit "1."

A copy of a letter dated July 17, 2015, with attachment, to Kelley Brennan, City Attorney, from Arthur Firstenberg, is incorporated herewith to these minutes as Exhibit "2."

A copy of Neighborhood Appellant's Restated Findings of Fact and Conclusions of Law, in Case No. 2013-116 and 2014-83, submitted by Stephen Durkovich, is incorporated herewith to these minutes as Exhibit "3."

A copy of the City of Santa Fe Board of Adjustment Findings of Fact and Conclusions of Law in Case No. 2015-62, 802 Canyon Road Special Use Permit, is incorporated herewith to these minutes as Exhibit "4."

1. CASE #2013-116 & 2014-82 CELLULAR PHONE TASK FORCE.

Chair Friedman noted Arthur Firstenberg had proposed his own Findings of Fact and Conclusions of Law.

Zachary Shandler, Assistant City Attorney, said both documents go in the record, noting the side that doesn't prevail usually doesn't submit their own Findings of Fact and Conclusions of Law.

MOTION: Colleen Dearing moved, seconded by Douglas Maahs, to approve the Findings of Fact and Conclusions of Law in Case #2013-116 and 2014-82, Cellular Phone Task Force, as presented.

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

2. CASE #2015-62 802 CANYON ROAD SPECIAL USE PERMIT.

MOTION: Donna Reynolds moved, seconded by Patricia Hawkins, to approve the Findings of Fact and Conclusions of Law in Case #2015-62, 802 Canyon Road Special Use Permit, as presented.

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

Ms. Hawkins asked if we know when he will be opening the restaurant.

Chair Friedman said no.

Mr. Werwath said there is an Ethiopian restaurant that was in their competition this year that is going to open in Santa Fe in 1-2 weeks.

F. NEW BUSINESS

There was no new business.

G. STAFF COMMUNICATIONS

Mr. Shandler said there may be an upcoming meeting of the BOA, noting an appeal has been filed on the property at 818 Gonzales Road. He said staff is trying to resolve the matter prior to it coming before the Board of Adjustment. He said it is an appeal of building permit, noting it is an interesting building with terrain issues. He said the appeal was filed by a Mr. Fuller, an architect and another party.

Chair Friedman asked if it is Guy Fuller and Mr. Shandler said yes.

Mr. Friedman said he litigated a case on the property, and won't be able to participate on that case if it comes forward to the Board of Adjustment.

Mr. Werwath asked, when we get communications such as letters addressed to our homes from appellants, if there is a proper protocol to deal with that in terms of the implications of *ex parte* communications. He asked if we should send them back unopened. He said when he saw who the letter was from, he didn't open it.

Mr. Shandler said when you get a letter you can send it back to them unopened, or you can take it to the Case Manager, commenting both things are correct. He said when you get an email and you read the first line and it is on a case before the Board, you should forward it to the case manager in the case with an "old fashioned" letter.

Mr. Werwath said then he should forward it to Dan Esquibel and Mr. Shandler said that is correct.

Ms. Hawkins asked, with regard to the letter from Mr. Firstenberg, and the document from Stephen Durkovich, if there is anything in them that we need to pay attention to, commenting that both are very hard to read.

Mr. Shandler said, "Those documents... everything.... and the parties know to route everything through staff so it will be in the packet, with the idea that every member received the identical information. That is the proper protocol. Unfortunately, some people don't follow that protocol."

Ms. Dearing asked if perhaps there is some attempt to create an *ex parte* situation, so that they can have another cause for appeal.

Chair Friedman said, "You wouldn't want to respond, that's for sure."

Ms. Dearing said she understands, she is just wondering if there wasn't some sort of "method behind the madness."

Mr. Shandler said, "I think these particular letters are not a problem, because they are all cc'd to him. If I sent the letters to the Judge alone, then I'm in trouble. I send the letter to the Judge and I cc my opponents, then I'm going to be okay. It's just beyond the protocol but does not create an impermissible or an appealable issue."

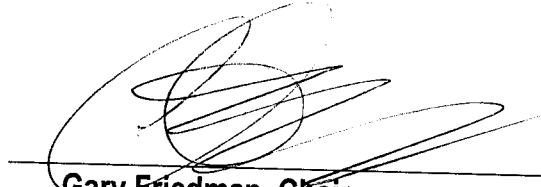
Mr. Werwath said, "Let the record reflect that that is not the way to win the hearts and minds of the Commission."

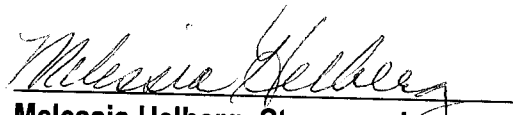
H. MATTERS FROM THE BOARD

There were no further matters from the Board.

I. ADJOURNMENT

There was no further business to come before the Board, and the meeting was adjourned at approximately 12:20 p.m.



Gary Friedman, Chair

Melessia Helberg, Stenographer

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;

Exhibit "1"

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:

Arthur Firstenberg

JUL 17 '15 10:44AM
CNO RECEIVED

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:

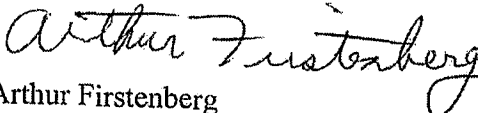
Pursuant to Section VIII(I) of Resolution No. 2011-24, "Procedures for Appeals Under Santa Fe City Code (SFCC) Section 14-3.17," I hereby submit the attached proposed Findings of Fact and Conclusions of Law in the above-referenced matters. I recommend that every member of the Board of Adjustment read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

Post Office Box 6216 · Santa Fe, NM 87502 · (505) 471-0129 · bearstar@fastmail.fm

Exhibit "2"

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

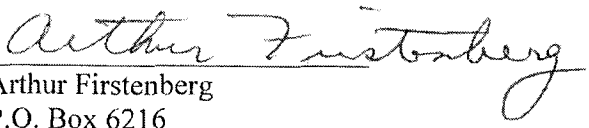
Date

APPROVED AS TO FORM:

Kelley Brennan, City Attorney

Date

Submitted by:


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

July 17, 2015

**BEFORE THE BOARD OF ADJUSTMENT
CITY OF SANTA FE, NEW MEXICO**

**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

**NEIGHBORHOOD APPELLANT'S RESTATED
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

AGUA FRIA NEIGHBORHOOD APPELLANTS

<u>Agua Fria</u> Melissa Adair 1408 Agua Fria	<u>Agua Fria</u> Georgette Romero 1414 ½ Agua Fria, A	<u>Silva Street</u> Geoff Banzhof 516 Silva Street	<u>Silva Street</u> Katherine Vigil 503 Silva St.
Agnes Alarid 1410 Agua Fria	Ingrid Soens-Dolan 1403 Agua Fria	Michael Chavez 515 Silva St.	Tuscany Wenger 516 Silva St.
Arthur Baca 1418 Agua Fria	Diane Stromberg 1427 Agua Fria	Evaristo Chavez 515 Silva St.	<u>Jiron Street</u> Grace Gallegos 618 Jiron St.
Sophia Baca 1418 Agua Fria	Ann Winkler 1414 Agua Fria	Catherine Copeland 522 Silva St.	Elizabeth Metoyer 618½ Jiron St.
Lucia Calderon 1408 Agua Fria	Todd Winkler 1414 Agua Fria	Duane Lopez 507 Silva St.	
Genevieve DeWing 1403 Agua Fria	<u>Baca Street</u> Benjamin J. Anaya 608 Baca Street	Ehben Reed 514 Silva St.	<u>Hickox Street</u> John Muller 1542 Hickox St.
Mazatl Galindo 1408 Agua Fria	Danette Martinez 612 Baca St.	Forrest Reed 514 Silva St.	Shirley Muller 1542 Hickox St
Orlando Hurtado 1403 Agua Fria	Margarita Martinez 612 Baca St.	Brad Schilling 519 Silva St.	Daniel Muller 1542 Hickox St.
Jose Martinez 1414 Agua Fria	Mary Trujillo 620 Baca St.	Kelly Schilling 519 Silva St.	<u>Tesuque Drive</u> Adam Lester 321 Teuque Dr.
Theresa Martinez 1404 Agua Fria	Patricia Trujillo 620 Baca St.	Cristal Vigil 513 Silva St.	
James McGuire 1206 Agua Fria	George Trujillo 620 Baca St.	Daniel Vigil 513 Silva St.	<u>Calle Quieta</u> Joan Ulibari 3002 Calle Quieta
Laura Moore 1403 Agua Fria		Debbie Vigil 513 Silva St.	

Exhibit "3"

Camino Porvenir

Julio Garcia
710 Camino Porvenir

Victor Anaya
703 Camino Porvenir

Cicilia Garcia
710 Camino Porvenir

Senda del Valle

Jose Lucero
1274 Senda del Valle

Mary Padilla
1274 Senda del Valle

Camino Santa Ana

Deborah Shapiro
619 Camino Santa
Ana

Camino McMillin

Zenon C. Stacy
1679 Camino
McMillin

**P.O. Box 28243,
Santa Fe, NM 87592**

Bernadette Romero
PO Box 28243

Black Canyon Rd.

John Simons
33 Black Canyon Rd.

Don Juan

Tomacita Sanchez
905 Don Juan

Vista Joya

Grant Kosh
469 Vista Joya

Colour de Lila

Darlene Varela
584 Colour de Lila

Bandolina Rd.

Connie Johnson
1200 Bandolina Rd

Valle Romero

Chris Chavez
208 Valle Romero

Airport Road

Charlie Elliott
6151 Airport Rd

Paseo de Peralta

Myshelle Valentine
1000 Paseo de Peralta

THE NEIGHBORHOOD'S SUBMISSION*

The Agua Fria Neighborhood submits its proposed Findings of Fact and Conclusions of Law for adoption by the Board of Adjustment (BOA). These findings and conclusions arise out of the hearings conducted on May 5, 2015 and July 7, 2015 on the appeals of the Land Use Director to issue Building Permits 13-2097 and 14-813 to John Malone and Verizon Wireless (Verizon) for a telecommunication facility at 1402 Agua Fria Street.

The Neighborhood submits its Findings and Conclusions separately from those submitted individually by Appellant Arthur Firstenberg whom the neighborhood had assumed was filing Findings and Conclusions on behalf of the neighborhood. Because of this fact and because of the City's obvious adversarial relationship with Mr. Firstenberg the Neighborhood is filing its own Findings and Conclusions at this time. While 13 days late, the Neighborhood's proposed Findings and Conclusions will nevertheless be on file 5 days in advance of the meeting at which the BOA must adopt its Findings and Conclusions.

The Neighborhood submits these Findings and Conclusions as the basis for an appeal that will be pursued by the appellants in the event that its Findings and Conclusions are not adopted by the Board of Adjustment.

* Throughout these findings, the Neighborhood appellants will be referred to as the "Neighbors" or the "Neighborhood". The Board of Adjustment will be referred to as the "BOA", the Federal Communication Commission as the "FCC", FCC maximums refers to the FCC's radiofrequency exposure limits, Verizon refers to "Verizon Wireless" and the City of Santa Fe's Land Use Department as the "City". Finally "Code Section" refers to the Code Section of City of Santa Fe Ordinances. "Director" refers to the City's Land Use Director. "RF" means radiofrequency radiation or radiofrequency emissions.

CITY OF SANTA FE ORDINANCES AND FEDERAL LAWS AT ISSUE

1. Code Section 14-6.2(E) requiring a permit for the operation of a telecommunications facility.
2. Code Section 14-6.2(E)(l)(i)(2001) encouraging the location of telecommunication facilities in non-residential areas.
3. Code Section 14-3-11(A)(3) relating to building permits issued for unauthorized uses.
4. Code Section 6.2(E)(l)(p)(2001) requiring the City in its administration of its telecommunications ordinance to ensure compliance with all federal regulatory requirements.
5. Code Section 14-6.2(E)(6)(b)(vii)(2001) requiring the applicant to provide a description of compliance with all applicable federal laws.
6. Code Section 14-6.2(E)(6)(b)(x)(3) requiring any permittee to submit a notarized certificate of compliance with the Federal Communications Commissions (FCC) RF exposure limits.
7. Code Section 14-3.17 (E)(l)(a) suspending upon appeal the validity of any permit decided upon by the Land Use Director.
8. 47 U.S.C. Section 332(c)(7)(B)(iv) providing that to the extent facilities comply with the regulations of the FCC concerning their RF emissions local governments may not regulate the placement of the facilities based on the alleged environmental effects of the RF emissions.
9. 47 U.S.C. Section 332(c)(7)(B)(iv) allowing state and local governments to regulate the placement of modification of telecommunication facilities on the basis of RF emissions when such emissions do not comply with the FCC's maximums.
10. Code Section 14-6.2 requiring compliance with FCC RF radiation exposure limits as a pre-condition to initiating the permitting process.
11. Code Section 14-6.2 (E)(l)(n)(2001) requiring the City in its administration of its telecommunication ordinance to gather information and provides remedies for the public health and safety impact of communication towers.
12. Code Section 14-3.17(H)(1), requiring all Land Use appeals to be conducted in accordance with administrative procedures to be adopted by resolution of the governing body, which procedure (Section VIII(H) of Resolution 2011-24) permits citizen participation in all pertinent issues and the cross-examination of any witnesses of the opposing party.
13. Code Section 14-3.17(F)(l), requiring all Land Use appeals to be heard at the next available regularly scheduled BOA meeting.

14. Code Section 14-1.3(A) purposes of Land Development is to implement a harmonious development of Santa Fe that will best promote health, safety and promote prosperity.

THE NEIGHBORHOOD'S REQUESTED FINDINGS OF FACT

1. The record before the BOA sets forth all action taken by the City of Santa Fe regarding the permitting of the Verizon telecommunication facility at 1402 Agua Fria.

2. In 2005, Verizon constructed a telecommunication facility at 1402 Agua Fria on a warehouse owned by John Malone a warehouse essentially the same height as the neighboring residences.

3. The warehouse was located on a single lot and zoned commercial while the immediately surrounding property is essentially zoned residential.

4. Verizon located six antennas on top of the existing building at 1402, which both received and beamed RF emissions or radiation

5. The height of the roof at 1402 Agua Fria is 19 feet tall, and the tallest antennae atop it only 7 feet higher.

6. A large generator, was also established next to the 1402 building, running 24 hours a day to provide the energy for the generation of the RF radiation waves.

7. The Neighbors all live and work within the residential neighborhood surrounding 1402 Agua Fria.

8. Neighbors Jose and Theresa Martinez live 50 feet to the south of 1402, Neighbor Mazatl Galindo lives next door at 1408, and another family lives 90 feet to the southwest at 1406 Agua Fria.

9. Telecommunication facilities are allowed to operate within the City of Santa Fe only upon receiving a permit from the City to do so, pursuant to a process outlined in Code Section 14-6.2(E).

10. Verizon did not apply for a permit for the telecommunications facility at 1402 Agua Fria or any structures on the roof, despite the fact that Code Section 14-6.2(E) SFCC requires a permit for any telecommunications facility.

11. Verizon instead applied only for an electronic equipment enclosure for wireless equipment at 1402 Agua Fria Street.

12. While the City informed Verizon in 2005 that it would have to apply separately for a permit for the antennae, Verizon never obtained the required permit.

13. In 2005 Verizon began to use the facility transmitting RF radiation at unmeasured and unmonitored levels from 2005 through the six antennae concealed inside two wooden enclosures on top of the roof at 1402 Agua Fria.

14. Verizon filed no document certifying compliance with the FCC's RF exposure limits with the City in 2005 or otherwise setting forth the amount, frequency or direction of the RF radiation broadcast from the antennae on its now ongoing telecommunications facility at 1402 Agua Fria.

15. The City's Land Use Director allowed Verizon's telecommunication facility to continue to transmit RF radiation without requiring proof that the RF levels were within the FCC maximums.

16. The City made no effort to enforce the need for a permit for Verizon's telecommunications facility or to stop its operation despite the fact that it would be emitting RF radiation in unmeasured amounts in the midst of an unsuspecting neighborhood all in direct violation of the City's telecommunication ordinance.

17. The City never informed the Neighborhood that a telecommunications facility broadcasting RF radiation had been installed at 1402 Agua Fria which would allow them to request suspension of its operation as an unpermitted use.

18. Not knowing of the existence of the telecommunications facility in their midst, the Neighbors were unable to move or otherwise protect themselves from the possibility of any adverse or deleterious effects on their health from the facility.

19. The Neighborhood did not know the maximum amount of RF emissions that would be transmitted from the antennae on the telecommunication facility at any point in time, at what level and angle the facility was transmitting the RF radiation, for how long, and with what consequence over time.

20. Verizon continued to operate its telecommunication transmission facility at 1402 Agua Fria St. throughout 2006, 2007, 2008, 2009, 2010, 2011 and 2012 transmitting RF emission throughout the neighborhood at a rate and intensity undocumented to the City, and unknown by the Neighborhood.

21. On September 30, 2013 Verizon applied for a building permit to add three antennas to "an existing telecommunication facility" which was the unpermitted telecommunications facility built without a permit in 2005.

22. Accompanying its 2013 antennae application, Verizon submitted an unnotarized Engineer's Certificate of Compliance for FCC maximums for the underlying, unpermitted telecommunications facility as configured in 2013 to the various points of the compass that it was broadcasting at that time.

23. Upon receiving the 2013 permit application for three additional antennas, the City did not suspend Verizon's operation of the facility given its unpermitted status or require Verizon to cease transmission from the facility until such time as a permit was granted.

24. The City instead granted Building Permit 2013-116 for the three additional antennae allowing Verizon to continue transmitting RF radiation from its unpermitted facility and to pay \$700.00 for its ongoing violation, a fee double the normal permit application fee.

25. On November 14, 2013, 50 (fifty) Neighbors appealed the Director's decision to grant the Building Permit No. 2013-116 to add antennas to an unpermitted telecommunications facility.

26. Although Code Section 14-3.17(E)(1)(a) suspends the validity of any permit pending its appeal the City allowed Verizon to continue to operate the facility and the transmission of RF radiation.

27. On April 25, 2014, nine (9) years after Verizon applied for a building permit for the 1402 Agua Fria telecommunications facility as configured in 2014.

28. Verizon's 2014 application contained no certification of any type that its operation was in compliance with FCC's maximums and the City Director did not require a notarized certificate of compliance as required under the ordinance.

29. The City at no time made any independent investigation into whether or not the RF emissions from the 1402 Verizon facility were exceeding the FCC's occupational and general public RF maximums.

30. The City Director nevertheless issued Building Permit 2014-82 on July 15, 2014.

31. On August 8, 2014, 20 (twenty) Neighbors appealed the decision to grant Building Permit 2014-82.

32. Again, although Code Section 14-3.17(E)(1)(a) suspends the validity of any permit pending its appeal the City allowed Verizon to continue to operate the facility and the transmission of RF radiation.

33. While Code Section 14-3.17(F)(1) requires Land Use appeals to be held at the next available BOA meeting, the appeal of the 2014 building permit was not scheduled until May 5, 2015 and Verizon's telecommunications facility continued to operate and emit RF radiation at unspecified levels and directions in the interim.

34. Both the 2013 and 2014 appeals were heard at the BOA meeting on May 5, 2015. However, Verizon submitted no notarized certification on that date that the RF emissions from the 1402 Agua Fria facility as configured in 2014 complied with the exposure limits established by the FCC maximums.

35. The only certification in the record on the day of the May 5th appeal, was Verizon's un-notarized Certificate for the telecommunications facility as configured in 2013.

36. The Neighbors however did submit an engineering assessment of the 1402 Agua Fria Street facility as configured in 2014, establishing that the facility was transmitting RF radiation in excess of the FCC maximums both as to the general public and occupational limits.

37. Absent any evidence at the May 5, 2015 BOA meeting that Verizon's telecommunication facility as configured in 2014 was within the FCC maximums and given the Neighbors' engineering report that it exceeded the FCC maximums, the Neighbors offered testimony about sickness and cancer resulting from the transmission of RF emissions at the telecommunication facility at 1402 Agua Fria Street to have the BOA deny Verizon's permit for its ongoing operation in their midst.

38. The BOA prohibited the offered testimony on the ground that it was precluded by the FCC's prohibition against the consideration of the health effects in siting or locating a telecommunications facility when the RF exposure does not exceed the FCC's established limits.

39. At the conclusion of the May 5, 2015 meeting, the BOA did not decide against the Verizon permits as was clearly required in the absence of any proof that the Verizon facility was operating within FCC's maximums and in light of the neighborhood's engineering statement that it was not.

40. Instead of concluding the matter with a decision against Verizon, the BOA continued the Appeal until July 7, 2015, suggesting Verizon submit the certification of compliance that it was lacking at the May 5th hearing, a lack that compelled its decision in favor of the Neighborhood on May 5.

41. The BOA then informed the Neighborhood that at the July 7th hearing no further evidence was permitted and no cross-examination would be permitted of the Verizon report or its engineer.

42. Verizon submitted an unnotarized engineering report in advance of the hearing July 7th.

43. The Verizon report while measuring the occupational RF radiation exposure did not measure the RF exposure limits on any of the adjoining residential properties addressed in the Neighbors' engineering report.

44. At the July 7, 2015 hearing, the BOA while allowing the Affidavit of Arthur Firstenberg challenging the Verizon calculations, denied Mr. Firstenberg and any other Neighbor the opportunity to cross-examine Verizon's engineer or point out its defects to the BOA or to cross-examine any other witness or to ask questions of the City's staff.

45. The BOA did not permit any cross-examination of the City's staff on July 7, 2015 after Verizon submitted its report.

46. The BOA closed the public hearing on July 7, 2015 without allowing further testimony from either the Neighborhood or Verizon.

47. From 2005 through July 7, 2015, the intensity, amount and the effect of the RF radiation being generated and transmitted throughout the neighborhood, could not be measured as to any Neighbor or household, a fact attributable to:

- A. Verizon's failure to meet its duty under the City code to prove such a compliance with FCC's RF Maximums as a precondition for its operation; and
- B. The Director's failure to demand such compliance as a precondition.

48. Because the facility at 1402 Agua Fria facility had been generating RF radiation since 2005 and Verizon had filed no notarized certificate setting forth that the facility was in compliance with the FCC maximums for transmission and no certificate of any kind between 2005 and 2013, there is no way to determine the amount of RF radiation any one of the neighbors received during that period of time or any time up until 2014.

49. Absent measured transmissions from the facility from the date it began operating in 2005, the Neighbors had no way of proving whether or not their intervening maladies were in fact the result of emissions in excess of the FCC guidelines.

CONCLUSIONS OF LAW

The Neighborhood asks that the Board of Adjustment adopt the following Conclusions of Law:

PERMITTING AND OPERATION OF A TELECOMMUNICATION FACILITY

2005

1. A City Land Use permit was a precondition to the operation of any telecommunication facility within the City of Santa Fe from 2005 to the current date.

2. Compliance with the FCC's maximums was a precondition to the operation of any telecommunications facility within the City of Santa Fe from 2005 to the current date.

3. Proof of compliance with the FCC's maximums is a precondition to the preclusion of the consideration of the health effects of a telecommunications facility in any state or local hearing or proceeding regarding the siting or the location of such a facility.

4. In 2005, Verizon constructed and began operation of a telecommunications facility in a warehouse at 1402 Agua Fria without a land use permit.

5. Verizon at no time in 2005 certified its facilities compliance with FCC maximums during its operation.

6. Verizon's construction and operation at the facility in 2005 without a permit was unlawful.

7. Verizon's concurrent operation of its telecommunications facility without first certifying compliance with FCC maximums was unlawful.

8. It was unlawful in 2005 for the City's Land Use Director not to have required a permit for Verizon's operation of the 1402 telecommunication facility after the Director learned of its existence and notified Verizon that it needed a permit for the use of its broadcasting antennae.

9. It was unlawful in 2005 for the City to have granted Verizon a permit for an equipment enclosure for the 1402 Agua Fria telecommunications facility because an equipment enclosure was not on the list of permitted uses.

2013

10. It was arbitrary, capricious, and in violation of the law for the Director to have entertained or granted Verizon's request for three additional antennae in 2013 absent any permit for the underlying telecommunications facility.

2014

11. The City was arbitrary, capricious, and in violation of law in allowing the Verizon telecommunications facility to continue to operate after the Neighborhood appealed the Director's decisions of 2013 and 2014.

12. It was arbitrary, capricious, and in violation of the law for the Director to have considered Verizon's 2014 permit application without requiring Verizon to submit the required notarized and granted Engineer's Certificate of Compliance with FCC maximums for the underlying telecommunications facility as configured in 2014 (number of aerals, angles of transmission etc.)

13. The Directors decision requiring Verizon to pay a \$700.00 fine in lieu of obtaining a valid and timely permit or ceasing operation until such time as it did was arbitrary and capricious and in violation of the law.

THE APPEAL

The May 5, 2015 Hearing

14. The City's decision granting Verizon's 2014 application cannot be upheld given the Neighborhood's Engineer's statement that the Verizon facility was not in compliance with FCC RF maximums

15. The City's decision granting Verizon's 2014 permit application cannot be upheld because Verizon presented no information at the May 5, 2015 appeal hearing meeting its burden of proof that the operation of its Agua Fria facility as configured in 2015 did not exceed FCC maximums.

16. The BOA is compelled to uphold the Neighborhood's appeal and overturn Verizon's requested permits given the absence of required notarized Engineer's Certificate of Agua Fria Telecommunications Compliance with FCC maximums as configured and the Neighborhood's Engineer's statement to the contrary.

July 7, 2015

17. The 2014 Verizon Certificate of Compliance submitted for the July 7, 2015 BOA hearing was not notarized as required by the Code and did not measure the RF emissions to any of the adjoining structures and thus did not address whether or not the facility met the FCC maximums relating to the general public as did the Neighbors' engineering compliance report showed.

18. Verizon's nonnotarized Certificate of Compliance submitted for the July 7, 2015, meeting untested by cross-examination is not reliable and does not meet Verizon's burden of proof as established by City Code.

19. Thus, at the conclusion of the July 7, 2015 appeal, Verizon had not sustained its burden of proof that its facility was in compliance with FCC maximums and the BOA must sustain the Neighborhood's appeal.

PROCEDURAL VIOLATIONS

20. While federal law provides to the extent telecommunications facilities comply with the regulations of the FCC concerning RF emissions, state and local government may not regulate placement or modification of such facilities as the basis of RF emissions (47 U.S.C. § 1332(c)(d)(7)(B)(iv)), this federal law nevertheless allows state and local governments to regulate the placement and modification of the telecommunications facility on the basis of RF emissions when such facilities do not comply with FCC Regulation.

21. Absent a current notarized engineer's certificate establishing that the Verizon facility at 1402 Agua Fria as configured was operating within the FCC maximums, the Neighborhood was entitled to offer testimony about adverse health effects from Verizon's operation of the facility, the BOA should have considered that testimony.

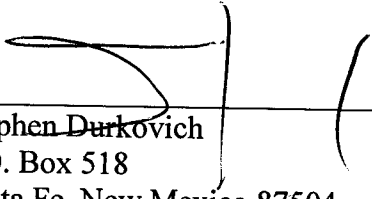
22. Cross-examination of the BOA of the author of Verizon's 2015 certificate of compliance as well as of any other of Verizon's witnesses or the City's staff was not permitted but in violation of 14-3.17 (H)(1).

23. The BOA's refusal to decide the Neighborhood Appeal based on the evidence before it on the May 5 appeal hearing and to instead delay it and instruct Verizon to prepare an engineering report that would meet Verizon's burden of proof at a future hearing date was arbitrary, capricious and in violation of due process of law.

24. Because the City provided no independent testimony of its own and had no in-house expertise on the operation of telecommunication facilities, it was overwhelmingly important that the City and the BOA administer all hearings on telecommunication facilities in such a manner as to gather as much information as possible for its decision.

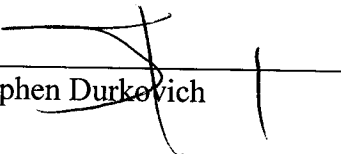
25. The BOA's procedural violations affected not just the rights of the Neighborhood to exercise their rights in the appeal, but also deprived the BOA of potential sources of information necessary for it to make an independent decision on an issue upon which it had no expertise on its own and was totally dependent upon the interplay of the process between the Neighborhood and Verizon to develop that information.

Respectfully submitted,



Stephen Durkovich
P.O. Box 518
Santa Fe, New Mexico 87504
(505) 986-1800
(505) 986-1602 (Facsimile)

I certify that on this day July 31, 2015, I delivered a copy of the Request for Findings to the Santa Fe City Attorney's Office at 200 Lincoln Avenue, and mailed a copy to: ; Verizon c/o Mark Williams at Sherman & Howard, LLC, 633 Seventeenth Street, Suite 3000, Denver, Colorado 80202-3622; and Arthur Firstenberg, 251 Barela, Santa Fe, NM 87501.



Stephen Durkovich

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

Case #2015-62

802 Canyon Road Special Use Permit
Owner's Name – Neema Sadeghi

THIS MATTER came before the Board of Adjustment (Board) for hearing on July 7, 2015 (Hearing) upon the application (Application) of Neema Sadeghi (Applicant).

The Application seeks a special use permit to operate a restaurant (Project) on property located at 802 Canyon Road (Property). The Property is zoned RAC (Residential Arts and Crafts – 21 dwelling units/acre).

After conducting a public hearing and having heard from staff and all interested persons, the Board hereby FINDS, as follows:

FINDINGS OF FACT

1. The Board heard reports from staff and received testimony and evidence from the Applicant and two members of the public interested in the matter.
2. Pursuant to Code §14-2.4(C)(2) the Board has the authority to hear and decide applications for special use permits as provided in Santa Fe City Code (Code).
3. Pursuant to Code §14-3.6(B) the Board has the authority to hear and decide applications for special use permits in accordance with applicable provisions of Code Chapter 14; to decide questions that are involved in determining whether special use permits should be granted; and to grant special use permits with such conditions and safeguards as appropriate under Code Chapter 14; or to deny special use permits when not in harmony with the intent and purpose of Code Chapter 14.
4. Pursuant to Code §14-6.1(C) Table 14-6.1-1, entitled "Table of Permitted Uses", full service restaurants are permitted Food and Beverages uses in RAC districts if reviewed and approved as special use permits in accordance with the review procedures of §14-3.6.
5. The Property is located in an RAC district.
6. Code Section 14-3.6(C) sets out the procedures to be followed prior to the grant by the Board of a special use permit, including:
 - (a) Approval of a site plan for the Project and other site development drawings necessary to demonstrate that the Project can be accomplished in conformance with applicable Code standards [Section 14-3.6(C)(1)];
 - (b) Submittal of an application indicating the Code section under which the special use permit is sought and stating the grounds on which it is requested [Section 14-3.6(C)(2)]; and

Exhibit "4"

- (c) That a special use permit is limited to the specific use and intensity granted, requiring a new or amended special use permit if the use is changed or intensified [Section 14-3.6(C)(3)].
- 7. Code Section 14-3.6(D)(1) sets out certain findings that the Board must make to grant a special use permit, including:
 - (a) That the Board has the authority to grant a special use permit for the Project [Section 14-3.6(D)(1)(a)];
 - (b) That granting a special use permit for the Project does not adversely affect the public interest [Section 14-3.6(D)(1)(a)]; and
 - (c) That the Project is compatible with and adaptable to adjacent properties and other properties in the vicinity of the Project [Section 14-3.6(D)(1)(c)].
- 8. Code Section 14-3.6(D)(2) authorizes the Board to specify conditions of approval for a special use permit to accomplish the proper development of the area and to implement the policies of the general plan.
- 9. Code Section 14-3.1(F)(2)(a)(viii) requires an ENN for special use permits and Code Section 14-3.1(F)(4)-(6) establishes procedures for the ENN, including:
 - (a) Compliance with the notice requirements of Code Section 14-3.1(H) [Section 14-3.1(F)(4)];
 - (b) Timing for the ENN meeting and the principles underlying its conduct [Section 14-3.1(F)(5)]; and
 - (c) Guidelines for the conduct of the ENN meeting [Section 14-3.1(F)(6)].
- 10. Notice was properly given in accordance with the notice requirements of Code Section 14-3.1(H)(1)(a)-(d).
- 11. An ENN meeting was held on June 11, 2015 at the Main Library at 145 Washington Avenue.
- 12. The ENN meeting was attended by the Applicant, City staff, and other interested parties, and the discussion followed the guidelines set out in Code Section 14-3.1(F)(6).
- 13. The Applicant submitted a site plan and an application indicating the Code section under which the special use permit was being sought and stating the grounds for the request.
- 14. Board staff provided the Board with a report (Staff Report) evaluating the factors relevant to the proposed special use permit and recommending approval by the Board of such special use permit.
- 15. Granting the special use permit for the Project will not adversely affect the public interest in that the restaurant use is consistent with previously approved and established uses the Property and is permitted with a special use permit in the RAC district; parking requirements are the same for a restaurant use as for a gallery use; existing parking is maintained as a nonconforming and the Project will not intensify parking requirements; and there is a city parking lot across the street.
- 16. The Project is compatible with and adaptable to adjacent properties and to other properties in the vicinity of the Project in that there are other food service establishments in the vicinity serving patrons of the art galleries that are found on Canyon Road, as well as residents who live on Canyon Road and the immediately adjacent neighborhood; the building the Project will occupy is an existing building in a style compatible with adjacent buildings and structures.

CONCLUSIONS OF LAW

Under the circumstances and given the evidence and testimony submitted during the hearing, the Commission CONCLUDES as follows:

1. The Board has the power and authority under Code §§14-2.4(C)(2) and 14-3.6(B) and Code §14-6.1(C) Table 14-6.1-1 to grant the special use permit applied for.
2. The special use permit was properly and sufficiently noticed via mail, publication, and posting of signs in accordance with Code requirements.
3. The ENN meeting complied with the requirements established under the Code.
4. The granting of the special use permit will not adversely affect the public interest.
5. The Project is compatible with and adaptable to adjacent properties and to other properties in the vicinity of the Project.
6. The special use permit granted herewith is granted for the specific use and intensity applied for, and no change of use or more intense use shall be allowed unless approved by the Board under a new or amended special use permit or as otherwise permitted by applicable Code.
7. The special use permit granted herewith shall expire if (a) it is not exercised within three (3) years of the date these Findings of Fact and Conclusions of Law are adopted by vote of the Board, subject to any right of the Applicant under applicable Code to request an extension of such time or (b) it ceases for any reason for a period of one hundred eighty (180) days.
8. The Board approves and grants the special use permit

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

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: