



Agenda

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BOARD OF ADJUSTMENT
Wednesday January 19, 2011 at 7:00 P.M.
200 Lincoln Ave. Santa Fe NM
City Council Chambers

- A. ROLL CALL
- B. PLEDGE OF ALLEGIANCE
- C. APPROVAL OF AGENDA
- D. APPROVAL OF MINUTES: December 21, 2010 minutes
- E. FINDINGS/CONCLUSIONS: None
- F. OLD BUSINESS: None
- G. NEW BUSINESS

- 1. **Case #2010-190.** 1200 Old Pecos Trail Special Exception. New Cingular PCS, LLC, d.b.a. AT&T applicant, Basham & Basham PC agents, request a Special Exception for a Telecommunication Facility with a waiver to allow 53 foot height where 34 feet is allowed in the R-1 district pursuant to 14-6.2(E). The property is zoned R-1 and located with the Historic Review Overlay District. (Dan Esquibel, case manager)

- H. BUSINESS FROM THE FLOOR
- I. STAFF COMMUNICATIONS
- J. MATTERS FROM THE COMMISSION
- K. 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.

**SUMMARY INDEX
OF THE BOARD OF ADJUSTMENT MEETING
Wednesday, January 19, 2011**

<u>ITEM</u>	<u>ACTION</u>	<u>PAGE</u>
CALL TO ORDER AND ROLL CALL	Quorum	1
APPROVAL OF AGENDA	Approved [amended]	1
APPROVAL OF MINUTES – DECEMBER 21, 2010	Approved	2
FINDINGS/CONCLUSIONS	None	2
OLD BUSINESS	None	2
<u>NEW BUSINESS</u>		
CASE 2010- 190. 1200 OLD PECOS TRAIL SPECIAL EXCEPTION. NEW CINGULAR PCS, LLC, D/B/A AT&T APPLICANT, BASHAM & BASHAM, PC, AGENTS, REQUEST A SPECIAL EXCEPTION FOR A TELECOMMUNICATION FACILITY WITH A WAIVER TO ALLOW 53 FOOT HEIGHT WHERE 34 FEET IS ALLOWED IN THE R-1 DISTRICT, PURSUANT TO 14-6.2(E). THE PROPERTY IS ZONED 4-1 AND LOCATED WITHIN THE HISTORIC REVIEW OVERLAY DISTRICT	Denied	2-30
BUSINESS FROM THE FLOOR	None	30
STAFF COMMUNICATIONS	None	30
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ADJOURNMENT		31

**MINUTES OF THE MEETING OF THE
BOARD OF ADJUSTMENT
CITY HALL COUNCIL CHAMBERS
SANTA FE, NEW MEXICO
Wednesday, January 19, 2011**

A. CALL TO ORDER AND ROLL CALL

A regular meeting of the City of Santa Fe Board of Adjustment was called to order by James Brack, Chair, at approximately 7:00 p.m., on Wednesday, January 19, 2011, in the Council Chambers, City Hall, Santa Fe, New Mexico.

MEMBERS PRESENT:

James A. Brack, Chair
Peter Komis
Alexandra G. Ladd
Susan E. Rooney

MEMBERS EXCUSED:

Gary Friedman, Vice-Chair
Monica Montoya
Rachel L. Winston

OTHERS PRESENT:

Tamara Baer, Planning Manager, Current Planning Division
Kelley Brennan, Assistant City Attorney
Melessia Helberg, Stenographer

There was a quorum of the membership in attendance for conducting official business.

Chair Brack asked everyone in attendance who has a cell phone with them to please turn them off during the meeting.

B. PLEDGE OF ALLEGIANCE

C. APPROVAL OF AGENDA

MOTION: Peter Komis moved, seconded by Susan Rooney, to approve the agenda as presented.

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

D. APPROVAL OF MINUTES – DECEMBER 21, 2010

MOTION: Peter Komis moved, seconded by Susan Rooney, to approve the minutes of the meeting of December 21, 2010, as presented.

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

E. FINDINGS/CONCLUSIONS

There were no Findings/Conclusions for approval.

F. OLD BUSINESS

There was no Old Business.

G. NEW BUSINESS

1. **CASE 2010- 190. 1200 OLD PECOS TRAIL SPECIAL EXCEPTION. NEW CINGULAR PCS, LLC, D/B/A AT&T APPLICANT, BASHAM & BASHAM, PC, AGENTS, REQUEST A SPECIAL EXCEPTION FOR A TELECOMMUNICATION FACILITY WITH A WAIVER TO ALLOW 53 FOOT HEIGHT WHERE 34 FEET IS ALLOWED IN THE R-1 DISTRICT, PURSUANT TO 14-6.2(E). THE PROPERTY IS ZONED 4-1 AND LOCATED WITHIN THE HISTORIC REVIEW OVERLAY DISTRICT. (DAN ESQUIBEL, CASE MANAGER)**

A Memorandum prepared January 13, 2001, for the January 19, 2011 Board of Adjustment meeting, with attachments, to the Board of Adjustment, from Tamara Baer, Planning Manager, Current Planning Division, is incorporated herewith to these minutes as Exhibit "1."

A copy of a letter dated January 14, 2011, to the members of the Board of Adjustment, from Arthur Firstenberg, regarding Public hearing, January 19, 2010, 1200 Old Pecos Trail Special Exception for AT&T, entered for the record by Arthur Firstenberg, is incorporated herewith to these minutes as Exhibit "2."

An aerial photograph of the subject site, entered for the record by staff, is incorporated herewith to these minutes as Exhibit "3."

A packet of emailed communications in support of the application, entered for the record by Dwayne Caraway, AT&T, is incorporated herewith to these minutes as Exhibit "4."

A copy of the "Resubmission of the amended plat of Santa Fe Holding Company's Subdivision No. 1 of the Lovato Grant and Galisteo Subdivision No. 1," entered for the record by Peter Dwyer, is incorporated herewith to these minutes as Exhibit "5."

A copy of "January 19, 2011 Presentation to the City," by Paul D'Arcy, St. John's Methodist Church, submitted for the record by Paul D'Arcy, is incorporated herewith to these minutes as Exhibit "6."

A computer generated "photo simulation of the proposed 49 ft. steeple, north elevation, entered for the record by Paul D'Arcy is incorporated herewith to these minutes as Exhibit "7."

A copy of Arthur Firstenberg's statement for the record, entered for the record by Arthur Firstenberg, is incorporated herewith to these minutes as Exhibit "8."

A copy of Dr. Felicia N. Trujillo's statement for the record, entered for the record by Dr. Trujillo, is incorporated herewith to these minutes as Exhibit "9."

A copy of a letter dated January 17, 2011, with attachments, to the Members of the Board of Adjustment, from Felicia N. Trujillo, entered for the record by Dr. Trujillo, is incorporated herewith to these minutes as Exhibit "10."

A letter dated January 19, 2011, from Amber Miller to Stefanie Beninato, submitted for the record by Stefanie Beninato, is incorporated herewith to these minutes as Exhibit "11."

A statement for the record from David Stupin, entered for the record by David Stupin, is incorporated herewith to these minutes as Exhibit "12."

A statement for the record by Howard Bleicher, entered for the record by Howard Bleicher, is incorporated herewith to these minutes as Exhibit "13." [*Stenographer's note: The statement given to me by Mr. Bleicher, to be entered for the record appears to be missing one or more pages.*]

A copy of "Brief review of some neurobehavioral toxicological effects of cell phone (microwave) transmission," entered for the record by Raymond Singer, Ph.D., is incorporated herewith to these minutes as Exhibit "14."

A letter dated January 19, 2011, to the Board of Adjustment, from Katie Singer, entered for the record by Andrew Plyatt, is incorporated herewith to these minutes as Exhibit "15."

A copy of an article from *IAFF Firefighters* regarding Health, Safety & Medicine, entered for the record by Ronald Dancer, is incorporated herewith to these minutes as Exhibit "16."

Two CD's entered for the record by Ronald Dance, of Dr. Charles Teo, an Australian neurosurgeon talking about brain cancer, are incorporated herewith to these minutes as Exhibit "17."

A copy of Mary Layne's statement for the record, also containing a statement for the record from Virginia J. Miller, entered for the record by Mary Layne, is incorporated herewith to these minutes as Exhibit "18."

Copies of six (6) color photographs taken of the meeting notice on Marcy Street, taken by Joni Arens, entered for the record by Joni Arens, are incorporated herewith to these minutes as Exhibit "19."

A packet of information regarding an environmental assessment, entered for the record by Elena Benton, is incorporated herewith to these minutes as Exhibit "20."

A copy of Press Release No. 200, dated May 17, 2010, from the International Agency for Research on Cancer of the World Health Organization, submitted for the record by Paul D'Arcy, is incorporated herewith to these minutes as Exhibit "21."

A copy of "Leukemia & Lymphoma Society – Leukemia Facts and Statistics," with attachment, entered for the record by Paul D'Arcy, is incorporated herewith to the minutes as Exhibit "22."

A copy of a flyer, "St. John's Methodist Church: AT&T Plans to Hide a Cell Tower in the Chimney," entered for the record by Paul D'Arcy, is incorporated herewith to these minutes as Exhibit "23."

A copy of "International Association of Fire Fighters Oppose Cell Towers/Antenna on Fire Stations," entered for the record by an unknown person prior to the start of the meeting, is incorporated herewith to these minutes as Exhibit "24."

Staff was sworn

Staff Report

The staff report was presented by Tamara Baer, Planning Manager, Current Planning Division, which is contained in Exhibit "1. Please see Exhibit "1" for the text of this presentation.

Ms. Baer noted there is a mistake in the Staff Report: the entirety of the Telecommunications Ordinance, 14-6.2(E) is attached to the Report as Exhibit B and not Exhibit A. She noted that Exhibit C is the Applicant's submittal.

Ms. Baer said there is a specific requirement that the Applicant has to comply with the City's Noise Ordinance and Applicant. Ms. Baer would like to add an additional condition of approval that the installation is required to comply with the City's Noise Ordinance.

Ms. Baer said there are additional requirements which will be addressed by the Historic Design Review Board which aren't part of today's discussion.

Ms. Baer stressed, per Section 14-6.2(6)(a)(vii), that denial of an application under this section "shall explicitly state the grounds for the denial."

Staff recommendation: Pursuant to 14-6.2(E), Special Exception approval criteria and subject to the conditions outlined in this report, staff recommends approval of this application and waiver.

Questions from the Board

There were no questions from the Board at this time.

Public Hearing

Presentation by the Applicant

[Melessia Helberg, Board Stenographer, noted that it has been the practice of the Board in the past to not swear members of the Bar.]

Peter Dwyer, Esq., Basham & Basham, P.C, 2205 Miguel Chavez Road, said he represents the Applicant in this matter. Mr. Dwyer said he will be brief and stay at a level that will accommodate a reasonable review of the issues in the time we have. He said he doesn't know if there will be restraints on the number of people speaking.

Mr. Dwyer said this is an application for a wireless telecommunication antenna facility. It is a series of antennas which are concealed behind a facade on an existing chimney structure which does function as a chimney for St. John's Methodist Church at the corner of Old Pecos Trail and Cordova. The technology used in this wireless application is line of sight technology, and the reason height is needed is to get a line of site between the antenna site and the users which are wireless device users. The frequency used is regulated by the FCC which is a separate issue the FCC has addressed through federal regulation which is managed comprehensively.

Mr. Dwyer said underground alternatives have been proposed at times, but this is not an underground technology. It isn't a fiberoptic network that can be run through tubes under the ground and requires that it be in open air above the ground to transmit from those antennas to the wireless devices. There are choices to be made about how to provide coverage, and the City Code has chosen tower alternatives as a preferred alternative to building new towers. The Code is clearly conceived to try to mitigate the impact of having too many towers in Santa Fe. He believes it is the intent of the Code and the wish of the Council and the community to not have new towers, and to use these stealth sites. Mr. Dwyer said they're trying to address the demand for coverage while mitigating the impacts of tower proliferation.

Mr. Dwyer said the specific information is in the packet. He said the site was reviewed by field review, noting under Item O on page 12 of the application materials there is a document called Coverage Maps Before and After which shows the problem they are trying to address. He said the oval is the coverage area, and the red dots show where there is coverage and the white dots where there is a lack of

coverage. He said the point of the application is to increase coverage to provide service to people in the area at a heightened level. He said the provider looks at existing structures to avoid building a new tower, and there are no known towers inside the search area, so cosighting on a tower is not an alternative. The next best thing is then to do a tower alternative.

Mr. Dwyer said this is in an R-1 Historical District so the opportunities are limited, because there are very few high structures in this district and the reason this site was chosen. He said other sites were considered but were too low. He said Mr. Caraway can talk about what we do in looking at alternative sites before coming to the conclusion that the St. John's Church site is the one that is needed. He said they looked at the Children's Museum. He said they tried to do what the Code provided. Mr. Dwyer noted that in historical districts, traditionally churches have been used because churches have steeples and are tall.

Mr. Dwyer said noise will not be an issue, noting the proposed utility site already has cabinets which provide acoustic noise suppression, noting there is information in the packet about the noise level when the fans are on for the utilities. In addition, a block wall is proposed to be built around the site which also would ameliorate the noise impacts, and the noise provisions of City Code require the applicant to meet those noise levels within 3 feet of the property line. He said by the time it gets to the property line this will reduce the noise level.

Mr. Dwyer noted that the Applicant agrees with all staff conditions of approval, including those regarding noise level. Mr. Dwyer said 40 emails were received in support of this Application and address their desire for a high level of service to avoid disconnections, dropped calls and poor services – they want to be able to use this new technology. He said they received 2 emails from people who did not support the application, noting one said not to add more cell sites but didn't give a reason and the other cited health concerns and requested the facilities be placed underground. However, the technology won't work if it is put underground.

Mr. Dwyer said people want and expect this coverage after paying for the service, and this is what they are trying to accomplish. He said some people at the ENN expressed concerns that we had another impact on the community. However, the applicant is trying to achieve coverage within the zone which seems to him a good thing. He believes they should be able to provide service to people who pay for the coverage, commenting this is mandated by the FCC.

Mr. Dwyer said people expect this service in all areas of the City and the north and east part of the City is no different. There is a difference in geography, and this area is almost entirely historic districts. However, that is not reason to deny the application under the Code. The Code allows these facilities in all zones, you just have to demonstrate the need, and he believes the application shows that. He said isn't feasible to have all cell towers in the south part of the City to serve this area. It won't work technologically, and would deprive people in the northeast of service, so it isn't an option which is viable.

Mr. Dwyer said the City's Telecommunication Ordinance recognizes the need for these facilities and permits them in all Districts because it is understood this is something people want and need, there needs to be a way to deliver the service and it can't be possible to achieve. He said there are photos showing what it looked like before and how it will look after. He said the façade structure is at the level of

the existing wall. It is the same color and to the naked eye it won't be discernable that this is an antenna site. He said the Code is encouraging us to avoid the kind of towers that are downtown, and the reason for this application. He said if people are really opposed to the stealth antennas, construction of a tower could be done, but that would have a vivid visual impact on the people in the community. He said people would become very concerned about the esthetics of another tower downtown. He said this "puts our best foot forward," and what we can do to comply with Code and meet the goals of not building an unsightly tower downtown.

Mr. Dwyer said the applicant meets the Code, and the application should be reviewed on the Code criteria. He said at the ENN a number of concerns were expressed that aren't addressed by Code. He urged the Board to focus on the Code and make a determination as to whether the application meets the Code requirements, which he believes is the proper process. He believes the application should be approved because it complies with the Code and meets the goal of the Code to mitigate the visual impact on the community of the demand for communication facilities. He said this has minimal visual impact on the community in that the antennas can't be seen.

Mr. Dwyer said the Applicant agrees to abide by the conditions of approval, and is willing to do landscaping or other ameliorating work on the site which is deemed appropriate by the Board to address Code issues including making sure it's not unsightly. Mr. Dwyer said the Applicant has done the best it can. He encouraged the Board to think about the Code's goal which is to have these things, but have them in the best possible esthetically pleasing manner, and to recognize they have achieved those goals in the application.

Mr. Dwyer suggested that they finish their presentation and stand for questions at the end when some of the questions from the audience can be addressed.

Chair Brack asked Mr. Dwyer if he is aware of the 6th condition which was added this evening which is compliance with the City's Noise Ordinance.

Mr. Dwyer said yes..

Dwayne Caraway, AT&T, was sworn. Mr. Caraway said the application submitted is true and correct. Mr. Caraway entered, for the record, the 40 emails which were received in support of the application [Exhibit "4."]. Mr. Caraway said the application meets Code requirements which is demonstrated in the Application.

Scott September, Senior Site Acquisition manager for AT&T, Phoenix, Arizona, was sworn. Mr. September thanked the Board for entertaining the application this evening.

Commissioner Komis said, then the way this will be designed, if approved, is that the mechanism will be inside the chimney so it can't be seen, and asked if this will diminish the on-site engineering.

Mr. September said the technology which allows them to hide and conceal the antenna elements is an RF neutral material which can be textured and painted to match other similar building materials around it.

Commissioner Komis said Mr. Dwyer mentioned that we don't want all these cell towers in the south part of town because it wouldn't work for this part of town. He said the State put a huge tower on La Bajada Hill. He asked if they contacted the State about placing this on top of the State Capitol and then it wouldn't be necessary to go through the City.

Mr. Dwyer said the State Capitol isn't in the search ring for this site, and it would be too far to be used. He said a whole series of sites is needed. The dilemma proposed by the technology is that you need a lot of sites.

Commissioner Komis said people in the capitol area still won't have service if this is approved.

Mr. Dwyer said they should, although that's not the application being considered this evening. He said the State Capitol just got some new service.

Mr. September said the Capitol just received an indoor distributed antenna system to provide service inside the building and just outside the building. He said the focus coverage is an in-building coverage solution. He said over the past few years, with the introduction of the iPhone and other smart phones, AT&T has experienced a 5,000% increase in data usage in the past 3 years. Each cell site can accommodate only a finite number of users at one time. When a cell site becomes saturated with users, the users experience dropped calls, noting the user may have moved into a coverage site that couldn't accept another call and too far away from the cell site on which you were talking. He said AT&T is trying to alleviate that problem by adding additional cell sites to accommodate the capacity.

Commissioner Komis said he didn't receive any protest emails except the two here this evening which are in the Board packet. He asked if those mentioned by Mr. Caraway, came from the Don Gaspar Neighborhood Association, noting he is President of that Association.

Mr. Dwyer said he doesn't know, because they were sent by text message, and these are mentioned because there were 2 negative responses, along with the 40 in favor.

Mr. Dwyer said in terms of the multiple sites on the south side of town, a number of sites are required. He noted the Annual Plan is in the packet which shows the applications they will be bringing forward to try to improve coverage City-wide. He said this one site won't solve all their programs. He said multiple sites are needed and this can be done through collocation or using stealth technology and putting them on existing infrastructure which is the preferred alternative under City Code.

Commissioner Komis said there is a warranty deed on page 5 of the application. He asked the reason it was included, and if it is an example of the people contacted, noting he may have to recuse himself. The warranty deed is for a property across the street which was sold by the United Methodist Church.

Mr. Dwyer said when he did the legal lot of record for the Planning and Land Use Staff, it turned out that the legal description on that deed is not for the property in this case. He said as a part of the pre-application process, the applicant must demonstrate that they have a legal lot of record, and he took the deed to the County Courthouse and asked them to research the subdivision plat showing that property. He said that property is across the street and is not the property in this case. He said that deed is irrelevant, noting he did provide a legal lot of record to staff's satisfaction, noting it is a 1935-1936 plat of a subdivision in the area of the Church before the Church existed. He said this is for the purpose of establishing when the lot came into being, noting it predates the Land Use Code of the City.

Responding to Commissioner Komis, Mr. Dwyer said the deed in the packet is irrelevant to this case. What is relevant is that the applicant has a legal lot of record, which he can provide as well as the plat of survey on this lot. Mr. Dwyer showed this document to Commissioner Komis and the members of the Board.

Commissioner Komis said then he does not have to recuse himself from this case, and asked Mr. Dwyer to enter this document into the record, which Mr. Dwyer did [Exhibit "5"].

Ms. Baer said the requirement for a legal lot of record is to show that the Applicant is authorized to do anything on the property. Additionally, the City requires the owner to give a written authorization to the applicant to do the construction, noting that is also in the packet.

Disclosure by Commissioner Ladd

Commissioner Alexandra Ladd said she would like to disclose for the public record prior to the Public Hearing, that she was asked to recuse herself because her husband is an attorney involved in a wi-fi case which some of the people here are following actively or are involved in. She said, "I want to go on the record to emphasize the fact that my decision making on this Board is solely focused on the land use aspects of this case and whether this application meets the City's Land Use Code as I feel that is the role of this Board, and the intent of the Code and how the Code has been applied, and not regarding the issues that may in fact be relevant to that legal case in question."

Speaking in Favor of the Request

Paul D'Arcy representing the landlord, St. John's United Methodist Church, was sworn. Mr. D'Arcy said he is a Trustee and member of St. John's United Methodist Church. Mr. D'Arcy presented his statement for the record on behalf of St. John's Methodist Church, in support of the Application. Please see Exhibit "6" for specifics of this presentation.

Chair Brack asked Mr. D'Arcy to provide the Stenographer a copy of the color photograph, which Mr. D'Arcy did [Exhibit "7"].

Commissioner Rooney asked if the Church received monetary compensation for the siting of the antennas.

Mr. D'arcy said this is correct, and the amount is nominal because the Church is a 501(c)(3) organization. He said the funds received by the Church, are put into outreach and maintenance. Responding to Commissioner Rooney, Mr. D'Arcy said there was a one-time payment of \$5,000, to cover the costs of attorneys, and there is a rental fee of \$1,500 per month.

Speaking in Opposition to the Request

Chair Brack said each person is given two minutes to speak, and asked the speakers not to be repetitive.

All those speaking were sworn en masse with the exception of the last 2 speakers who were sworn individually.

Arthur Firstenberg [previously sworn]. Mr. Firstenberg said he was the person who asked Commissioner Ladd to recuse herself, noting he is affected by the cell tower at St. John's Methodist Church. He said Alexandra Ladd's husband represents the neighbor who has a cell tower by his house, and would suggest she has a conflict of interest on any matters having to do with health and disability.

Arthur Firstenberg read his statement into the record in opposition to the request. Please see Exhibit "8" for the text of this presentation.

Dr. Felicia Trujillo [previously sworn]. Dr. Trujillo read her statement into the record in opposition to this request. Please see Exhibit "9" for the text of Dr. Trujillo's statement.

Jill Edelman [previously sworn]. Ms. Edelman said she is a parent and resident in the neighborhood about a block from St. John's, noting her children are age 6 and 11. They are members of the Children's Museum and purposely moved to this area because of its proximity to the children's museum. She and her husband make their living by building custom adobe homes, and therefore are highly interested in the integrity and beauty of the City, and protecting the homes of the City, especially in the Historic District. Her main concern is about the unknown health effects on the children, and there are hundreds of children that don't have a voice and couldn't attend this evening. She is not interested in dropped calls, but is very interested in the possibility of dropped children. She isn't concerned about the noise from the equipment from St. John's. She is interested in hearing the noise from these children 30-40 years in the future.

Lee Lewin and her mother Betty Lewin [previously sworn]. Lee Lewin said she and her mother are neighbors of the Church at their family home immediately west, and share a property line,

noting her address is 408 Madrid Lane. She said they live within "spitting distance," of the proposed shed to house the equipment, and within "shouting distance" of the tower. She said, "We call this home. It is the center of family. It is our family home and each one of us is in danger from the proposed special exception. We love our home and we value our health. Some people might say, if you don't like what's happening, you can also sell. This means converting our home from a family center to a real estate commodity. As real estate, our home will be devalued by the close proximity of this tower. If we were to decide to sell, we would have to disclose the tower and that issue alone would seriously compromise the value of our property." Ms. Lewin said they are compromised and their property is compromised. She said "you" are the stewards of the health and safety of our community, and asked the Board to deny the special exception, to protect the community.

Stefanie Beninato [previously sworn] said she will be speaking for herself, and presenting a letter for Amber Miller. She is sorry Ms. Winston isn't here, because she will be speaking to the primacy of the Telecommunications Act. Ms. Beninato said, "And again, I remind you that there has to be a balance between all of the existing laws. They each have to be effective, and to me it's not so much the Americans with Disabilities Act that we're looking at, we're looking at the 14th Amendment. And there's absolutely nothing that says a federal law will take primacy over the 14th Amendment, and so are afforded equal protection. People affected with this disability, an electromagnetic disability, are asking for equal protection under the law. Maybe it's not such a bad thing that east and west doesn't get this kind of cell service because they have a place in our City to go and live that is not affected by cell phone service. What you're being asked to do here is a special exception, and it's not something that they can demand of us, and so they need to meet all the requirements. Again, I would remind you, and I am sorry Ms. Winston isn't here, because it's not just about approving the law. You are the Board and look at laws and can interpret the law differently from what any attorney interprets it, because it is an issue that you think needs to be addressed. What is changed by exactly this kind of action by boards, is saying we understand that the majority is doing this [inaudible]... protect the public because we need to do something different here, and you are absolutely right in doing that."

Ms. Beninato continued, "The other thing is there is no plan. The City when they passed the Telecommunications Act said there would be a plan. There has yet to be a plan put in place and I'm asking you not to approve this until the City has a plan for this, so we know [inaudible] for the good of the public."

Ms. Beninato presented a letter she said she was given by Amber Miller. Ms. Beninato said Ms. Miller is strongly opposed to this request, and has asked Ms. Beninato to represent her. Ms. Beninato entered Amber Miller's letter for the record [Exhibit "11"], noting Ms. Miller didn't provide her address. Ms. Beninato summarized portions of the letter, and read Ms. Miller's summary into the record, noting Ms. Miller says, "In short, the staff is either incompetent to review telecommunication applications or their interest is not the welfare of the City." Please see Exhibit "11" for the complete text of Ms. Miller's letter.

Monica Steinhoff Ofrio [previously sworn]. Ms. Ofrio said the City created a Task Force, and she has tried to attend meetings but "it was not there" and asked if the Task Force was dismissed, and wants an answer to that. She said she is a survivor of Nazi Germany, and she said she will never not tell the truth about something she thinks is important. She said for us not to be able to talk about health issues is like Nazi Germany and is ridiculous. She said the Nazis said the gas chambers were fine. Ms. O'Frio said, "This is like creating a microwave oven across the entire earth. We have global warming. It makes the air drier, it's bad for the trees as well as the human beings." Ms. Ofrio said she no longer goes to the Children's museum because she gets sick after an hour and a half because of iPads and cell phones, noting she is raising her grandchildren and the Children's Museum was different 20 years ago. She said if you allow a tower next to it, it will make things worse. She said the large number of iPads and cell phones being used increases the effect at the Children's Museum. She has 3 male grandchildren and 1 female grandchild, noting 3 have genetic problems which has never happened before. The mother talked on her cell phone for hours during her pregnancy. The air belongs to everybody and just because the frequencies are invisible, so is the radiation from nuclear bombs, and "we know by now it is very dangerous, and time will show us that the cancer rates.... She said she can't walk in her neighborhood because of the cell tower downtown.

David Stupin, [previously sworn]. Mr. Stupin read his statement into the record in opposition to this request, including quotes from articles in Pathophysiology. Please see Exhibit "12" for the specific text of his statement. He asked the members of the audience who agree with him that they will not visit the neighboring business, Children's Museum, Armory for the Arts Theater or the CCA art space, if this application is approved. He asked that the record reflect that "I would guess that about half the people here raised their hands."

Dr. Howard Bleicher [previously sworn]. Dr. Bleicher said he lives ½ mile from St. John's Church. He said, "I want to object highly to the discriminatory attitude that the Board has shown toward those for the application and those who are against the application. There was no time limit put on any of the people who talked for the application, and yet all of us are given only a two-minute limit. That is discriminatory and it shows an attitude that you're already made up your minds perhaps."

Chair Brack said, "No. I've only made up my mind that I can give you two minutes."

Dr. Bleicher read his statement of opposition to this request into the record. Please see Exhibit "13," for specifics Dr. Bleicher's statement. [Stenographer's note: The statement entered for the record appears to be missing one or more pages.]

Commissioner Komis asked the Chair if he would give everyone an additional minute to speak, and asked the rest of the Board if that would be all right.

Chair Brack said he will stick with two minutes for each person to speak.

Sarah Baca, La Tierra [previously sworn]. Ms. Baca said she objects to the antenna at St. John's Methodist Church, and the placement of a microwave emitting equipment shed next to the playground. She said, "Aside to the zoning rules of the City of Santa Fe, there is fact of far greater import, and the doctor just addressed that, the scientifically proven risk to children's health from immense exposure, and repeated exposure. And frankly, from being a mother I would say we could put children into the category of handicapped, disabled on this subject because of the thickness of their skull bones. A child's skull is far thinner than that of an adult. Did you know that it takes one hour for a child's brain cells to recover from microwave exposure during a one-minute cell phone call of a person standing next to that child. This is scientific fact. So, when a mother talks on a cell phone and the kid is playing at her feet on the kitchen floor, that child is getting one hour of exposure from a one-minute call of hers. St. John's is not an industrial building, nor an experimental laboratory. It is a church with a child care center. What kind of child care will that be. My son died from cancer at 29 years old. I know what it's like to lose a child, because I've kind of surmised that it had been growing since he was 15, and was environmental. Listen to what it is like. *The first joy of my mother heart was born in a spirit found only there; dawn broke, the baby cried filling his lungs with earth's precious air; he laughed and danced and ran uphill, till the angel of death said time to kill; the days dragged along, our pain gutted all; cries rang out in the hospital halls; then one day he looked at the sky, and with staccato breath took time to die; my prayer had been answered, he went gently to sleep; the lord to receive him and left us to weep.* Please do not risk our Santa Fe children."

Raymond Singer [previously sworn]. Mr. Singer said he is a Doctor of Psychology, and is a neuropsychologist, neurotoxicologist, and has served as an expert witness in toxicological litigation in jurisdictions all across the United State. He has been looking into the matter of microwave sickness from cell phone transmissions, and believes it is a serious problem, and would like to share some of the studies he found. [Please see Exhibit "14" for the text of Dr. Singer's "Brief review of some neurobehavioral toxicological effects of cell phone (microwave) transmissions]." Dr. Singer said he would say that significant scientific research has found that cell phone radiation can affect psychological and neuropsychological function in many people.

Andrew Plyatt, Camino San Patricio [previously sworn], said he had surgery two days ago, but attended this evening because this issue is so important to him. He said he is speaking on behalf of himself and his partner Katie Singer. Mr. Plyatt read a letter into the record from **himself and Katie Singer**, expressing opposition to this request. Please see Exhibit "15," for the complete text of this letter.

John McPhee said he has been asked not to mention his employer for fear it will be construed as a policy of my employer. I am here because there is no policy, it is a regulatory vacuum, and there is no health standard. He is sorry to see "us" pitted against the Methodist Church and Congress is to blame. The Methodist Church is a fine and wonderful community member who has been offered "an extraordinary level of liability involved, and who will be presented with a level of liability they can't imagine." He said the radio tower is a nightmare that the City regards as a mistake and slipped through the regulatory process which is another concerns we have with all of these tower locations and how to stop upgrades. He said

72% of industry studies indicate a health hazard it's pretty clear. The Unitarian Church has taken away its antennas because of protests from the public. He has great concerns with the Baptist Church, which has more than 18 antennas on its property, and fears for their liability on behalf of the Children. Switzerland, for example, is setting up safety zones for children, and is now 100 times more stringent than the United States. It would be ridiculous if it wasn't so tragic, the differentiation between science and what we're doing here. The telecommunications companies would be good partners if they would move forward and go underground with broadband/fiberoptics. It's much faster, much more secure from hacking, and as we move forward it's much safer.

Leah Morton [previously sworn], said she is a physician practicing in Santa Fe. [Dr. Morton's statement here is inaudible]. "As a physician, I believe it is obscene that we are talking about antennas in a church tower." [Dr. Morton's statement here is inaudible].

Ronald Dance [previously sworn] said he takes offense as being characterized as someone from a group of anti-cell phone people. He is a member of the human race. He said the IAFF newsletter cites more than 250 articles in 2004 with the conclusion that there should be absolutely no cell phone towers attached anywhere in the United States [Exhibit "16"]. He said this isn't a small group of protestors, it is a group of professionals who looked at this issue and decided that it was completely inappropriate to have these until they are proven to be safe. He said this is a group that we have to listen to. He provided copies of a video by Dr. Charles Teo who is a well known neurosurgeon in Australia and he talks about brain cancer and does surgery to remove these cancers that have been created by this technology, and it is very recent, and asked the Board members to view this video [Exhibit "17"].

Mary Layne [previously sworn], said she is the President, temporarily, of the Santa Fe Alliance for Public Health and Safety, because the previous President Virginia Miller is ill. Ms. Lang read Ms. Miller's statement in opposition to the cell towers and 12 powerful antennas into the record. Please see Exhibit "18" for the text of this statement.

Mary Layne said she has been listening to what has been said and doesn't want to add any more numbers and anger, and said she is happy you [the Board] volunteer your time to help the City. She said we are here because we feel strongly about Santa Fe. She is asking for guidance from everyone, saying she believes in guardian angels. She is asking that the angels of all of us make an effort to work together for some resolution of the issues with which we are faced, noting she believes we can make peace with this. She said "you guys" could be on our side, and learn how all of telecommunications systems could do better and we could work together. She is sorry "you" might be feeling some bad vibes from all of us. She said we have to come together, this is so angry. And so, it falls on the shoulders of "you" 4 strong people. She asked them to please follow their heart.

Azon Krezelovsky [previously sworn], said he doesn't live in the District but his children go to school within 200 yards of the proposed tower and spend 40 hours a week there, many hundreds of hours a year. He said his children would be near the proposed tower. He said he doesn't necessarily agree with any tactics the Church faced and he doesn't want to discredit all the good work the Church does, but he

disagrees with installing this. He sees that there is a lot of disagreement with these towers going up to improve the network. He said he has a Masters Degree in Environmental Studies from the University of Pennsylvania, and he spent a lot of time looking at endocrine disruptors, which is a different issue, but similarly not necessarily regulated by the Clean Water Act yet, but probably will be in the future. He thinks the City has a responsibility to think about these things, the future and long-term effects when they can. He said this is an opportunity to do so, to think about the long term effects on the public, the citizens, the property of those citizens, so please be thinking about this when you make your decision. There is a lot of science that people have been throwing around. He said one very fascinating bit of science he came across on Google Scholar today was that if you compare industry studies versus chair academics, that industry studies favor cell phone towers and use ten times more than the ones not funded by the industry, which is a case similar to tobacco, and other issues where there's lots of money involved, and there's lots of money involved here and that is driving a lot of this. He said he personally uses wireless devices, but he doesn't want to live near a tower, noting that you can turn off personal wireless devices, while you can't turn off living near a tower and spending hundreds of hours a year there. He asked the Board please to consider this.

Joni Arens [previously sworn], said she is the Executive Director of Concerned Citizens for Nuclear Safety. She is able to do her work without a cell phone or mobile electronic devices. Her question is about the legitimacy of this public meeting given the problems with the signage for the ENN. Ms. Arens approached the Committee to show them photos she took on her cell phone of the sign on Marcy Street giving notice of this meeting, and the fact that the sign was on Marcy Street which runs south to north, and the fact that the sign was parallel to the road, and in some sense facing the wrong way on a one-way street. She requested that the record be kept open so she can email the photos for the record this evening or tomorrow morning.

Chair Brack said that would be fine.

Ms. Arens said, "So, Mr. Chair, what I'm showing is this photo that was advertising the Early Neighborhood Notification at the Chavez Center with regard to all of the towers. And I have a series of photos showing the problems with the sign and showing the one-way street and the fact that the sign is actually parallel. Now, I have addressed these issues with staff in the past.... yes there's the sign.... I was not able to attend that meeting."

Commissioner Komis noted this is on Marcy Street, and Ms. Arens said this was the notification for all of these meetings.

Chair Brack asked staff to clarify where the notification was placed.

Ms. Baer said notice was given on each of the locations, and if the location was on two streets, there would have been two signs. She said 5 locations originally were advertised for that particular ENN meeting, one of which was pulled because there was a problem with the notice, the sign was not properly located. Ms. Baer said she never heard that there was a problem with the notice at this location.

Chair Brack asked Ms. Arens to provide the photographs via email, and requested that the applicant address this issue for him [Exhibit "20"].

Ms. Helberg said Ms. Arens can email the photos to her for the record, and she will print them for the record, and email them to Ms. Baer and Ms. Brennan.

Ms. Arens said the CCNS office is located southeast of the radio tower, and they would request in the interest of future applications, that this application be denied for public health reasons as well as constitutional issues as well 14th amendment issues for equal protection."

Commissioner Komis asked Ms. Arens if her office is located near the Methodist Church or on Marcy Street.

Ms. Arens said it is on Marcy Street, but they've been concerned about this for many years, in terms of coming before the Historical Design Board with respect to the exemptions for the radio tower as far back as 2005, 2004 time period, when AT&T brought forward applications to add additional towers to the radio tower.

Nicholas Thompson [previously sworn] said he is retired, living here in Santa Fe. He is not here to speak in favor or against. He asked if it is in order to ask a question of the proponents.

Chair Brack said Mr. Thompson can ask the question and he will have them answer it.

Mr. Thompson asked, "To what degree does your applying for this have to do with dropped calls while people are moving in automobiles."

Mr. Dwyer said the exhibit he was pointing out to the Board, which is in the packet which shows where the coverage is lacking in the oval that is around the Church area, and there are white spots in it, so it's really trying to get coverage in the white spots. He said it isn't *per se* for the motoring public, it is for coverage in the zone more generally. He said people could be standing on the sidewalk, or in their homes, reiterating that the whole zone has gaps in coverage.

Mr. Thompson said, "You're not going to be able to answer my question. To the extent that it is because people are losing calls while they are driving in that area, isn't it the case that it is illegal in Santa Fe to use a cell phone while driving."

Chair Brack said, "We will give you that. Please continue."

Mr. Thompson said that was his question.

Chair Brack said, "I'm not arguing. I'm saying you are correct, it is illegal."

Donna Fishbein [previously sworn], said she lives next to the Unitarian Church. She said, "I don't know if anybody saw that 'King's speech,' but I feel like that tonight, having a microphone here and speaking not to anyone in particular, but to the room. And hearing this gentleman that came before me speak directly to you sir, and ask a question seemed like a much more reasonable, a much more productive approach to the issue, where we can sit together and with different points of view, listen with respect, rather than laugh with scorn when someone says something that offends us. We can sit together, and from that, I feel a solution that will not necessarily satisfy me or satisfy you, but would be born of both our differences and the things we are commonly concerned about. I feel like that is a better forum to address an issue like this. And it makes me said that I have to stand in a line either for or against to speak."

Chair Brack noted that there are speakers in line who haven't been sworn and asked Ms. Helberg to do so. Ms. Helberg swore everyone not previously sworn en masse.

Elena Benton [previously sworn], said she is an engineer with more than 25 years experience in communications in the U.S. and around the world. She would like to ask, politely, that a decision not be made tonight and give the permit more time. Ms. Benton said, "I've gone over the application and notice it doesn't have an environmental assessment in it, which generally is given to cities. Further, the FCC, and I have part of the documents, the local government document, [inaudible] No. 65 the FCC encourages. I am looking at the specifications for the antenna and the FCC requires an environmental assessment to be filed with the City. The City has spent countless hours putting this all together, but it's just this part that the applicant hasn't put in. And I think for the general plan [inaudible] good work on this one time to review a document that wasn't given to them. Ms. Benton provided copies of Section 65 [Exhibit "20"]. She said for Historic, the applicant is required by the FCC to provide an environmental assessment regarding Historic, and recommended the City get a copy of that environmental assessment.

Deborah Cornwell [previously sworn], said she doesn't want to repeat all the things people have said, and evidence has been presented from a scientific point of view, medical and various other things. She said she lives a few blocks from the Church and doesn't want the radiation waves going through her house. She said "Your only job is to see whether the application fits the Code. But I would ask you to think about what you swore at the beginning of this meeting, first of all, Liberty and Justice for all. What about all these people who have testified that they don't want this. How are they getting liberty and justice. And also, 'the whole truth and nothing but the truth.' So much evidence has been presented tonight, even if we're not sure about, even if it is questionable, it seems to me that the words 'nothing but the truth' has to be looked at. So, even if there is a question about it, you should consider it."

Bill Fishbein, Barcelona Lane [previously sworn], said he lives not far from St. John's. He said he sympathizes with the Board's position, that this is a very complex issue. The Telecom Act of 1996, was written to make it simple, number one, to make it easy for you to make a quick decision, because they said so. He said this isn't the case. He said, "To make this decision, the Board has tremendous weight on its shoulders, and before it is made it is necessary to have exhaustive research done, and an understanding, by independent organizations, not by the telecommunications company, not by the [inaudible], but by an

independent organizations so that you know, clearly, in your own heart what decision you're making. And until you know that, you simply can't vote yes on this. Only when you know in your heart that you can, is when you can make that vote. If it takes six months, it'll take six months. If it is going to take six years, it should take six years. You can't make this decision until you know 100%."

Julie Tambourine [previously sworn]. Ms. Tambourine said she runs a crisis team for people with disabilities. People are already homeless due to the radiation from microwave antennas. She is disturbed with the testimony that the Church is willing to accept 3 deaths in 100,000. She takes issue that the Church is willing to accept any deaths. She asked who is going to stand up to the Church. [Ms. Tambourine's statement here is inaudible]. She asked if we are going to allow these effects or are we going to protect the welfare of everyone. She said every person in this room should answer this question.

Betsy Millard was sworn. Ms. Millard said, "Given all of the preparation and legal advice, etc., the Church has gone through, it has obviously anticipated tremendous public opposition. Of course, there is tremendous opposition, because more people are becoming aware of how dangerous these cell antennas are, as we've heard tonight. How can a Church be willing to subject its members, especially the children, to the dangers of cell radiation. It's all about money, clearly. And it's money for the Church, money for the telecom, money for the politicians. I want to ask you, please do not let Santa Fe become any more inundated that it already is with cell antennas if you can possibly help it. This issue is the next tobacco, or DDT or asbestos liability-ridden wave of lawsuits guaranteed, given the results of the research that's been done by various people all over the world. And I would hate to see the City get into any more lawsuits than it already has been. A friend of mine has four friends who have all died of brain tumors in the last two years, and these are all men who spent a tremendous amount of time on cell phones because of their work. And I just want to add, too, my daughter was diagnosed last year at the age of 27 with cancer. Heaven knows why. More and more young people are being diagnosed with cancer these days. My daughter was a cell phone user, unfortunately since 16 or 17, very much against my wishes. But I really think you have to take these health issues very very seriously, and I do think the Church is opening itself to liability and I think it's hardly worth it for \$18,000 per year and a \$5,000 up-front payment, to subject itself to the liability for coming down the road."

Hope Caya, Eldorado, was sworn. She thanked the Board for what it does for the community. She said she is a wifi and iPhone user, but she would drop it all because she is concerned about "the addition we have to this dangerous thing." She said none of the people here are profiting from the cell tower not going up, and all the people in favor of the cell tower happening are profiting.

Paul D'Arcy asked to speak again

Chair Brack asked Mr. D'Arcy specifically what he is going to address.

Mr. D'Arcy said he would like to enter into evidence two studies. One on leukemia and lymphoma [Exhibit "21"] and the other from the International Agency for Research on Cancer which is a subsidiary of the World Health Organization [Exhibit "22"]. He said this is all he wanted to do.

The public testimony portion of the public hearing was closed

Chair Brack said Mr. Dwyer would like to address some questions which were raised.

Mr. Dwyer said the applicant is seeking approval for the application and is trying to follow the City's process, and don't want to be treated differently from anybody else. However, they are different in that they are seeking to have the application approved and have to present information in that format. He was glad to hear what people had to say, commenting he is familiar with some of it through the ENN transcripts. He said they are trying to follow the rules made by the City and the application process the City has on the books. He said he can tell that some people don't feel that application process is what they think it should be. However, from his perspective, if the City has rules, and it presents them with application materials and requirements, that is what he will do because that is what he is supposed to. He said they have tried to address the rules given them by the City, if those don't meet the needs of the people speaking, he is sorry, but he is trying to follow the Code. He said the staff won't accept the application if the applicant doesn't meet Code requirements.

Mr. Dwyer said, in terms of answering questions on the ENN process, he said there was a group ENN done for 5 different sites, but this is not one of the sites where there was a problem. There is another site that they just recently had to renotice because the ENN was done for that site, but the notices were not posted properly. He said that ENN is being redone on January 24, 2011, which is a Monday, reiterating that this hearing isn't related to that site. It is a different site.

Chair Brack asked where the notice was posted for the group ENN meeting for all 5 sites.

Unidentified person for Applicant said it was posted on each location as directed by staff, and as Mr. Dwyer said in one location we failed to post the sign correctly, so that site was withdrawn and is being redone. He said the signs for all the other sites were posted as directed by staff, sometimes 2-3 signs, depending on the location.

Chair Brack asked staff to verify this information.

Ms. Baer said staff typically requires, for a corner lot, that two signs be posted so that one is visible from each public way. She has had no communication about any problems at this site. However, she can't personally verify that because she wasn't involved at that time. She said if any problems are brought to her attention, in terms of notice, they would require that the ENN be rescheduled and renoticed.

Chair Brack said the photos shown to the Board of the notice on Marcy Street, was not in relation to this application.

Mr. Dwyer said notices for this site would be on this site. He said the ENN was very well attended and this meeting was well intended, and he believes notice was effective and they've done a good job of getting the word out that this is a public hearing and that the public is welcome to attend and speak, and he believes they've done that.

Chair Brack said an issue was raised with regard to the environmental study.

Mr. Dwyer said that isn't a requirement, noting that there are several lists in the packet of things which are required to be submitted, and those were provided. He said they always are willing to provide copies of supplemental information which is available through the FCC and otherwise. He said one of the conditions of approval in the Staff Report is that the applicant, subsequent to the hearing, will provide GIS compatible data for them to log the sites so they can prepare a map. He said if people would like additional information, such as this, of the record, it could be supplemented down the line.

Mr. Dwyer said the difficulty for the Applicant is that the concerns that you have heard tonight are not the Code concerns. Those are the concerns for the industry as a whole, and with the technology. He said they try to follow the Code in filing the application, and by giving you the information you requested and not giving information which wasn't requested. He said there is some reticence to start going down this path toward providing information which the staff has told us "no that's not what they're looking for," because the Board of Adjustment typically looks at things such as sound, light, setback, these kinds of dimensional criteria. He said they will do this if requested, reiterating this is heading down a path the staff has directed us not to provide at this point because they're not in Code.

Chair Brack said then staff has not requested an environmental study.

Ms. Baer said this is correct, noting it is not a requirement of the Code.

Chair Brack asked if an environmental study was done.

Mr. Dwyer said there isn't a site specific environmental study for this particular site and the impacts. However, there are FCC compliance documents which are filed to prove and demonstrate to the FCC that we meet the myriad FCC regulations, and they can provide copies of some of those documents. He said staff has decided those are FCC related issues that we need to comply with, but there is another regulatory body that requires us to meet their standards and they have done that. He said if people now want to start crossing over and say they want to make that a Board of Adjustment issue, that would have to be your decision. He said they are trying to comply with what the Board requires, not the other way around.

Commissioner Rooney said the Telecom Act of 1996 doesn't take health into concern, why would we want an environmental study. She said, "We're worried here about people, not prairie dogs."

Mr. Dwyer reiterated the application is seeking Board of Adjustment approval for a tower alternative, and his understanding and reading of the Code is what is desired is for us to mitigate the esthetic impacts which has been the focus of their investigation. He said he knows this doesn't address

the concerns said by people this evening, but nevertheless that is what the Code tells us to do, so they try to put forward the best application, to mitigate impacts to the maximum extent possible.

Commissioner Rooney said she understands his position. She said, "You're following the Code of the City. The problem is a lot of people don't want these towers. You have 15 more applications coming up."

Mr. Dwyer said this is true of them and other applicants as well.

Commissioner Rooney said, "I understand and I don't believe it belongs before the Board of Adjustment frankly. I think it belongs on a ballot for the City so that people that live in Santa Fe have the right to vote – do we want this in our community or do we not. A lot of other communities have said no – we don't want cell towers here. And they have been upheld in higher courts. But, we're being brought these cases here, and it really is almost kind of unfair, I think, to put this before the Board of Adjustment. Yes, you're going to build a tower, you're going to cover it up, it's going to look nice. Great. But, the concerns of the community are what kind of effect it will have on the health of the community. You know, the Church representative, he said something very interesting tonight. He said he had contacted all the major cancer centers in this City, or in this country rather, and he named them off. My husband did his training at Sloan-Kettering. He wouldn't live anywhere near a cell tower, and he's an oncologist, and I can tell you there are a lot of oncologists that feel exactly the same way. So where they may provide wi-fi for their patients in the hospital itself, I don't think they would have built the hospital right next to a cell tower in any place, of the places you mentioned. And there are studies coming out of each and every one of those institutions that talks about EMF radiation. You know, I'm not saying one side's right, one side's wrong. I really don't know. I don't think anybody knows, but I don't see why we would want to err on the wrong side of this situation when we're dealing with where the cell towers are going via the children that are there every day, 40 hours a week."

Mr. Dwyer said, "I would just like to point out that if the City Council were to entertain changing its process, I'm sure we would be involved in tandem and would do what we could to provide technical support and assistance. If the City Council decided it wasn't a good thing for the Board of Adjustment to make these decisions, that would be their decision. But, I wouldn't presume to say what the City Council wants to do on that. I know they have Chapter 14 rewrites pending presently, and they have a comprehensive review process for that. So, we'll follow the laws that the City adopts, but that's really a City Council decision, and I just don't think we can fairly.... we as the applicant need to have a process put before us and be instructed 'this is what you need to do,' and then we will give you a fair review. And when that's done, that's what we'll follow. So, if the City would like to do it differently in the future, if that's your feeling, we're not against it. We just feel that this is the process we were given, so this is what we're doing."

Commissioner Komis asked Ms. Baer if she is the case manager on this case, or if it is Mr. Esquibel.

Ms. Baer said she wrote the staff report, and she is the case manager.

Commissioner Komis asked if the applicant is required to show compliance with the FCC regulations in this application, and if they have done so, can she show him where it is in the packet.

Ms. Baer said the Applicant is required to certify that they have met the requirements of the FCC. The City is not in a position to verify that, because it does not have the technical expertise to do so. She said the Code requires that the Applicant shall provide a certified statement that they have complied with the regulations of the FCC. She said this has been done, and Mr. Dwyer will point out where in the packet this can be found.

Mr. Dwyer said they provided supplemental affidavits from Dwayne Caraway in which he testifies that we have met all of the application requirements, including the FCC compliance. And prior to that, they provided a letter which says they comply with federal regulations.

Ms. Baer said she believes that is in Exhibit C, Item h, page 10.

Mr. Dwyer said they submitted a letter to the City and he can provide a copy of that letter if it isn't in the packet. He said he could ask Dwayne Caraway, right now, who is still under oath under the pain and penalty of perjury, to state for the record that the Applicant is in compliance with federal regulations. He said there was some inquiry by staff about doing a deeper analysis of that, and it was determined that those matters already are regulated by the FCC and the Applicant needed to make an affirmative statement that, "Yes, we do comply with federal regulations." He reiterated that he would be happy to have Mr. Caraway do that right now. He said sworn testimony is as good as it gets.

Chair Brack asked Mr. Dwyer to go ahead and do this.

Dwayne Caraway said, "I provided a sworn, notarized statement, that we meet all the FCC requirements, and I believe in addition to that, that we provided a signed statement from Todd Daoust, who is the Real Estate Construction Manager with AT&T."

Commissioner Komis asked, "Mr. Caraway are you stating now that you did not include that, or you negligently didn't include that in your letter, your affidavit, and now you're putting it in the record now?"

Mr. Dwyer said, "No. He said in this mike right now, that we comply with the federal regulations. That is sworn testimony that you didn't have. He said the Code doesn't say anything about that at all. It says we do have to provide a letter as to specific Code requirements which we do meet. This is an additional requirement that is being interpreted as part of the existing Code, because the existing Code does make all reference to, all applicants have to comply with federal law. That's what I'm saying. We always need to comply with the law, all laws, not just federal law."

Commissioner Komis said, "Well, I'm just talking about our Code, and I'm kind of confused with what Ms. Baer told me, who is the case manager on the project, that we don't have the technology here at the City to see if these FCC requirements are made [met?], but we require that as part of the application process. And this wasn't met, but now he can swear it in testimony. Am I correct?"

Mr. Dwyer said, "No. I don't agree with that. This was met. We have met all application requirements and we met all federal requirements as well. I think we've really tried to comply with the City's Code and that is not the issue here tonight. And I'm sorry that we can't address some of these other issues that are being raised, but that's beyond our power. We have tried to comply with your Code. We have given you the application. It has been reviewed. We did... anytime staff... we had a meeting with staff where we sat down and asked if there is anything else you need, and they gave us stuff that they wanted. We provided them additional information. We've gone as far as we can go in providing you with the information you requested and giving you a complete application. And, I'm telling you right now, we do comply with the federal law, it's true. It's just.... I think the problem is that the issues that are being raised... the problem is there are people in this room...."

Commissioner Komis asked, "What issues are you talking about."

Mr. Dwyer said, "Oh, a lot of the health issues that were raised in tonight's meeting."

Commissioner Komis said, "I didn't ask a single health question."

Mr. Dwyer said, "No. They were raised by other people in this room."

Commissioner Komis said, "I didn't. I was just asking you about specific Code. I'm just concerned about this particular issue."

Chair Brack said, "Could I ask staff for clarification with Mr. Komis's question?"

Ms. Baer said, "If I could, I would like to read into the record the section of the Code that specifies what's required, and that would be 14-6.2E(3)(h) and it's under Franchises, Leases, Certificates of Public Conveyance, Licenses and other contracts for use of real property:

'Owners and/or operators of towers or antennas shall certify in writing that all franchises, leases and other contracts, if any, for use of real property required by the PUC, FCC, FAA, or any other regulatory body for the construction and/or operation of the telecommunications system in the City have been obtained.'

And so, our interpretation of that actually is the authorization for construction by the owner of the property. Now, I'm sorry I'm not being as clear as I want to be on this. So, there is a letter of authorization from the Methodist Church stating that they're allowed to proceed with building on this property. The issue of FCC compliance, our interpretation of that has been that it is up to the Applicant to comply with all FCC and any other regulations. And so the burden of proof of that is on them and not on the City to confirm or verify that."

Commissioner Komis said, "Right near here, the other section I want to speak about, I think I'll just go back a couple of pages, 14-6.2E(1)(n), and it specifically requires the City to provide remedies for the public health and safety impacts of telecommunication towers. Was that addressed... was that overruled somehow."

Ms. Baer said that has been addressed generally by the City, and Ms. Brennan... [Ms. Baer was interrupted here by Commissioner Komis].

Commissioner Komis asked if was addressed by the applicant.

Ms. Baer said it was not addressed on a case-by-case bases, it was addressed more generally than that, and said Ms. Brennan can explain that.

Ms. Brennan said, "As you know, there is federal law to the effect that no State or local government or instrumentality thereof may regulate the placement, construction and modification of personal wireless facilities on the basis of radiofrequency emissions, to the extent that such facilities comply with the Commission's regulations concerning such a mission. And I've also advised you at a prior meeting that your authority lies within the jurisdiction granted by statute to the City which is then passed on from the Governing Body to the Board of Adjustment, and that's expressed in Code."

Ms. Brennan continued, "And I will say that in February of 2010, the City of Santa Fe passed a Resolution urging the U.S. Congress, the President and Executive Branch members to require the Federal Communications Commission to reassess the health impacts of radiofrequency emissions, and to actively seek and support federal legislation that would give local governments greater flexibility with regard to the placement of wireless communications facilities. The letter was forwarded to the Federal Communications Commission by the White House, and the Federal Communications Commission responded and they explained the policies on health. I can make copies of this letter and make it available to you and on the record."

Commissioner Komis said, "We're reaching a breakthrough here and I would like you to continue."

Ms. Brennan said the letter provided:

"The FCC has no authority to change provisions of the Telecommunications Act of 1996, which places a limited restriction on the ability of local governments to establish limits for human exposure to radiofrequency energy that are more restrictive than those established by the FCC. Changes in federal law are within the purview of the Congress. We know, however, that Congress preserves the local governments considerable flexibility to regulate the placement of wireless facilities in response to esthetics and to other safety concerns.

The policy of the FCC, with respect to environmental RF emission was developed to ensure that FCC regulated transmitters do not expose the public or workers to levels of RF energy that are considered by experts on human health and safety to be potentially harmful. Since the FCC is not a health and safety agency itself, we must defer to other organizations and agencies with respect to the biological research necessary to assess the health impact of RF emissions and to determine what levels are safe. In 1996, the Commission adopted its current guidelines for human exposure to RF energy, based on recommendations from the U.S. Environmental Protection Agency, the Food and Drug

Administration and other federal health and safety agencies. These recommendations, in turn, derived from guidelines issued in the United States by the Institute of Electric and Electronic Engineers, Inc., IEEE, and the National Council on Radiation Protection and Measurement, NCRP. The IEEE and NCRP had commissioned highly experienced and knowledgeable scientists and engineers to evaluate scientific published studies, including studies of the health status of persons exposed to RF radiation to establish safe levels for human exposure to RF energy.

Since 1996, the FCC, in cooperation with federal health and safety agencies has continually monitored international exposure standards development and biological effects research that could impact FCC policy or exposure limits for RF energy. In the intervening years, there have been new exposure limits created and revisions have been made to the existing standards, but these changes have been slight and are not practically significant with respect to exposure from environmental sources, such as wireless base stations.

We recognize the controversy based on reported non-thermal, biological effects of RF energy, and understand the concerns of the City of Santa Fe. However, this so-called microwave debate existed long before the 1996 adoption of updated limits by the FCC and was considered by the EPA at that time in its recommendations to the FCC to use the NCRP criteria. The NCRP carefully reviewed the nonthermal biological effects research and set conservative safety factors for exposure as a consequence. The FCC relies upon the opinions of expert health and safety agencies and organizations and has not received any suggestions that changes are necessary. It appears that recent research in this area has not been considered adequate to revise the bases for international exposure limits.

We also recognize that some countries have set precautionary limits below those necessary to protect against known adverse effects. These limits have generally been set at levels rarely exceeded in the general environment, and applied only to wireless transmitters that can easily meet the limits, and thus have little impact on actual environmental exposure levels which, as a practical matter tend to be far below the established international limit.

In summary, we believe that our RF safety program has maintained a position of continuing reassessment of the health impact of RF emissions, and the steps that we have taken fully safeguard the public from any harmful biological effect that has been scientifically established while appropriately encouraging the introduction of new and innovative wireless and broadband technologies for the benefit of consumers and business. Nevertheless, we remain committed to maintain a vigilance in this important area of concern. I appreciate your interest in this matter."

Ms. Brennan said, "This is a reflection of the interest that the City has taken in addressing remedies. The Council voted to contact its Congress people as well as addressing a letter to the White house."

Commissioner Komis said, "Then based on the Code, then you are talking about RF energy and emissions. Is the applicant supposed to, in his application, provide us with what RF emissions and energy emissions will be emitted from that particular tower, and has the Applicant... has the Applicant complied with that."

Ms. Brennan said, "That would be a matter for the FCC and it's not...."

Commissioner Komis said, "Then the Applicant does not have to tell us that the RF energy or emissions from that tower..."

Ms. Brennan said, "I think the Applicant has provided that information, the technical information, yes, and it's in the packet."

Commissioner Komis said, "He's not required to.."

Ms. Brennan said, "It's in the packet."

Commissioner Komis said, "Well, if you could show me in the packet... Mr. Dwyer can you show me in the packet where the RF energy emissions are."

Mr. Dwyer said, "I don't believe we did provide them, because I think we were specifically... we are willing to provide whatever information is requested, but because of the fact that the FCC takes the position that it's federally preempted, it didn't seem like particularly useful information. Because, what they're saying in that letter to the City of Santa Fe is, 'That's for us to decide.' "

Ms. Brennan said, "Excuse me, I thought they provided some technical specifications, but it was a misunderstanding of the question."

Mr. Dwyer said, "That doesn't mean we wouldn't provide the information. We're willing to provide information. What we just need is a clear application process, and I would just encourage you to understand that we have followed the application process and that we shouldn't be held to any standard other than the same as any other applicant, which is, if you request information, we'll give it to you. But, if you don't request it and it's not required, then we won't give it to you. And yeah... I just... we're happy to work with the staff, the community. We'd be happy to do more work in the community if that was helpful. But, it's kind of a situation where we're following your Code. We're following a bunch of other federal requirements and laws to the best of our ability. And all we ask is for our application to be treated the same as anybody else's, and when you review our application, that you tell us, 'This is what we want.' And we give it to you, and we've completed our application."

Chair Brack asked, "Can you tell me how many applications you have pending currently."

Mr. Dwyer said, "Yes, there's 12 site in the current annual plan... it's in your packet, and it shows where the sites are and it identifies what the nature of the application is, and you know we're happy to work in the community as well, if that would help."

Chair Brack said, "It probably would help, and I would do that just because I'm a good company."

Mr. Dwyer said, "Well, we did the big ENN and you know, we've tried to do other things as well. Obviously, the difficulty would be that some of the issues people want remedied, I think that the remedy lies elsewhere."

Ms. Brennan said, "I wanted to clarify to the Board, that what I was thinking of was the specifications that they provided relating to noise levels, which are within the purview of the Board."

Chair Brack asked if there were further questions, and there were none. Chair Brack said, "Okay. Can I have a motion."

There was some question from an unidentified member of the audience as to whether or not a quorum of the Board of Adjustment is in attendance.

Chair Brack said, "I have a quorum

VERBATIM TRANSCRIPTION OF MOTION/VOTING

CMR. LADD: I'll move to approve the application on the basis of...

UNIDENTIFIED: We can't hear you.

CMR. LADD: I know, but I'll move to approve the application based on what we've heard from the applicant which is that they've complied with the process, they've met all the Code requirements, everything has been followed to the T, and we're here to evaluate that much of this. And, unfortunately we.. I don't think it's fair to the Applicant, and I also think it's not fair to the people to have concerns in this audience, because I personally don't have the expertise to respond to those concerns. And I... so maybe this process is flawed, but this is not that place to change the process at this point tonight.

CHAIR BRACK: Do I have a second. I'll second that. Any further discussion. Could I have a roll call.

MS. HELBERG: Chairman Brack.

CHAIR BRACK: Pass.

MS. HELBERG: Peter Komis.

CMR. KOMIS: No.

MS. HELBERG: Alexandra Ladd.

CMR. LADD: Yes.

MS. HELBERG: And Susan Rooney.

CMR. ROONEY: No.

MS. HELBERG: Mr. Chair the Motion fails for lack of a majority vote.

CHAIR BRACK: Please people. I apologize, I'm a little tired, it's late. Do I have an alternative motion.

CMR. KOMIS: I move for denial of Case #2010-190. I feel that the applicant didn't specifically answer Section 14-6.2(E)(1)(n). I find that he did not specifically provide remedies for the public health and safety impacts of communication towers as provided in City Code.

CHAIR BRACK: Do I have a second.

CMR. ROONEY: Second.

CHAIR BRACK: Discussion.

CMR. LADD: Yes. That's not the list of the requirements for the application though now. That's the purpose behind the telecommunication policy of the City. Am I reading that correctly. That's not the applicant's burden. It's the City's burden to uphold its own public policy. And that language, also, I might add, as a planner, that's a pretty common planning jargon that's behind a lot of planning policy. Jargon is the wrong word, because it's something important to the planning profession, but, you know, in other words it's not necessarily specific to each individual case that comes forward.

CMR. KOMIS: I can further add that, based on this section, I think this section is important. That's why it's in our Code. And we are basing our decisions... our decisions can be based on this because it's in the Code. You know, I don't have the gift of eloquence and speech like you do, because you've been trained and you're an attorney, and I really appreciate that, and I really appreciate that you here...

CMR. LADD: I'm a planner.

CMR. KOMIS: Oh, you're a planner. I thought you were an attorney, I'm sorry, but you speak really well. But I think these are requirements that we need to have before us, and had we had these requirements before us, I probably would have voted the

other way, like I did last week with the same applicant. So, it goes on a case-by-case basis for me, and I believe that's part of the requirements of this Board, is for us to look at it on a case-by-case basis. We don't have an environmental assessment as required by the FCC as well. And, I mean, I'm not looking at FCC regulations, but that's part of the... the FCC requires that assessment, and I didn't see that. So, that's why I'm voting for denial at this time. It doesn't mean that this applicant can't come back before us or appeal it to City Council and get it overturned. I'm sure they have the capability of doing that, so it's not set in stone that this denial is going to be permanent, if it passes, you know.

MS. BRENNAN: Chair Brack, I would reiterate that the purposes of the ordinance are not provisions that the applicant is required to meet. So, Mr. Komis has stated another reason. Is that correct. The Code specifically requires that the reasons for denial be stated.

CMR. KOMIS: Yes I did. I said I felt they didn't comply with Section 14-16.2(E)(1)(n), and that was it. I don't want to complicate it further. I had a motion and second on that, and that would be it.

CHAIR BRACK: Do I have any further discussion. Could I have a roll call please.

MS. HELBERG: Yes. Chairman Brack

CHAIR BRACK: Pass.

MS. HELBERG: Peter Komis.

CMR. KOMIS: Yes.

MS. HELBERG: Alexandra Ladd.

CMR. LADD: No.

MS. HELBERG: Susan Rooney.

CMR. ROONEY: Yes.

MS. HELBERG: Chairman Brack.

CHAIR BRACK: Pass.

MS. HELBERG: Mr. Chairman, the motion fails for lack of a majority vote.

CHAIR BRACK: I'm sorry.

MS. HELBERG: Did you say no.

CHAIR BRACK: I said I passed. Do I have to vote.

MS. HELBERG: Uh...you don't, but I need to determine if it goes with the majority, so in essence you have voted yes to deny. Is that correct. We have two yeses, one no and one pass.

MS. BRENNAN: I don't believe the Chairman votes unless, and this is by Ordinance, unless it affects the outcome. The same. The motion passes. There is a requirement the majority of the quorum carries.

MS. HELBERG: Okay, Mr. Chair the motion passes.

END OF VERBATIM TRANSCRIPT

Chairman Brack advised the Applicant that the Board has rejected their application and they can pursue this to the City Council. He said, "I wanted to send my thanks to the audience for their patience during the process with me, and with the Board."

H. BUSINESS FROM THE FLOOR

There was no business from the floor.

I. STAFF COMMUNICATIONS

There were no communications from the floor.

J. MATTERS FROM THE COMMISSION

Commissioner Komis said he hopes that everyone had a happy New Year. He said, "Even though we disagree on matters, I respect each and every one of you, and it's an honor working with each and every one. I really mean that from the bottom of my heart. I learn so much for each and every one of you. And I wish the other two girls were here because it probably would have been a different outcome, number one. But, number two, it's intellectually stimulating and I think we learn from each other, and we all know we're here as volunteers and respected members of the Community. So, I really really appreciate you. I honestly do."

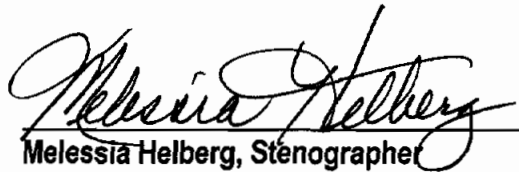
K. ADJOURNMENT

There was no further business to come before the Board.

MOTION: Commissioner Komis moved, seconded by Commissioner Rooney, to adjourn the meeting.

VOTE: The Motion was approved unanimously on a voice vote, and the meeting was adjourned at approximately 10:00 p.m.

James A. Brack, Chair



Melessia Helberg, Stenographer