

BOARD OF ZONING APPEAL  
FOR THE  
CITY OF CAMBRIDGE

GENERAL HEARING

THURSDAY, DECEMBER 17, 2015

7:00 p.m.

in

basement Level Conference Room  
Lombardi Building  
831 Massachusetts Avenue  
Cambridge, Massachusetts 02139

Constantine Alexander, Chair

Timothy Hughes, Acting Chair

Brendan Sullivan, Member

Janet Green, Member

Slater W. Anderson, Associate Member

Ranjit Singanayagam,  
Commissioner, Inspectional Services

Maria Pacheco, Zoning Secretary

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## PROCEEDINGS

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(7:00 p.m.)

(Sitting Members Case BZA-008842-2015: Constantine Alexander, Timothy Hughes, Brendan Sullivan, Janet Green, Slater W. Anderson.)

CONSTANTINE ALEXANDER: The Chair will call this meeting of the Zoning Board of Appeals to order. Before we start we have two cases on our agenda, a couple of statements to make.

The first is after notifying the Chair, any person may make a video or audio recording of our open sessions or may transmit the meeting through any medium subject to reasonable requirements that the Chair may impose as to the number, placement, and operation of equipment used so as to not interfere with the conduct of the meeting. At the beginning of the meeting the Chair will

inform other attendees at that meeting that a recording is being made. And I will inform the audience that a recording is being made. Someone has left their tape recorder there to record this meeting. And in addition, since we make a transcript of our meetings, our stenographer also records the meeting to assist herself when she has to prepare the actual transcript. So there are two recordings going on.

And the second statement I wanted to make is with regard to the recording by our stenographer, I ask that people in the audience don't have conversations among themselves while the hearing is going on because it interferes with her ability to hear and to record and that affects our transcript. So if you have things you

need to talk about, please step outside.

With that, without further adeu, the Chair is going to call case No. 008842, One Broadway. Bell Atlantic.

Is there anyone wishing to be heard on this matter? This is the appeal case. Both of our cases are Bell Atlantic this evening.

ATTORNEY MICHAEL GIAIMO: We're double teaming this one because Tim and I both do some of these cases and there's actually going to be a lot more of these 6409's as I think you're finding out so you can hear what we have to say and we'll be on the same page also.

I think you may be familiar with Section 6409.

CONSTANTINE ALEXANDER: Yes, we are.

ATTORNEY MICHAEL GIAIMO: I know Rick Sousa has been in at least once.

So it's a little bit of a difficult statute I think for zoning boards or for cities to figure out what to do with. In many communities it's handled at the building commissioner level or handled through some separate side process rather than a formal Zoning Board hearing. Here, we did talk with your building commissioner about the process, Ranjit.

CONSTANTINE ALEXANDER: He's right there.

ATTORNEY MICHAEL GIAIMO: Yeah, I know, he's right there. We talked a little bit about the process. We went in and met with him. He indicated that he would deny our request if we sent it to him and we would be entitled to appeal

your Board so that's what we did. And I know you're probably also getting advice from the city attorney.

And you've seen in our brief, we don't believe that this is a process that should go through a Special Permit process. So we've brought this to you on an appeal from the Building Commissioner's decision and we've also in the alternative have brought a Special Permit under the statute, Section 6409 and we've laid out our legal reasoning in that brief.

CONSTANTINE ALEXANDER: Right.

ATTORNEY MICHAEL GIAIMO: And we won't belabor that.

There are also I guess efficiencies to not have to -- efficiencies for us and efficiencies for you to not have to come before you every single time there's a

routine Section 6409 appeal and so we're hoping that --

CONSTANTINE ALEXANDER: Because every community, it seems to me, every community can decide how it wants to handle 6409 matters. There's nothing in the statute that I saw. Or if you have something or any order from the FCC that would contradict that.

So Cambridge has elected to say, you have to go through -- not the Building Inspectional Services, but you have to go through the Zoning Board of Appeals. And I, my assumption as a basis for that determination is not ours, it's the City Solicitor's office, is that generally telecommunication facilities erection maintains is held by our Zoning Board, under a Special Permit procedure.



Therefore, it makes sense, I guess, they believe to run even 6409 proceedings through the Board. Obviously to the extent that 6409 applies, we have to apply the 6409 standards and not the general standards of our Zoning Ordinance except to the extent that there may be mechanical things in the Zoning Ordinance that would require us to deal with as well with regard to 6409 such as is your client a licensed FCC carrier? That's one.

Have you satisfied the conditions -- well, that's actually part of 6409 anyway, of our prior grant of relief of One Broadway.

ATTORNEY MICHAEL GIAIMO: Right.

CONSTANTINE ALEXANDER: I thought I saw some others, but I'm not finding them right now.

ATTORNEY MICHAEL GIAIMO: And if we're in compliance with any conditions with the permit --

CONSTANTINE ALEXANDER: Well, we'll get to that.

I wanted to deal with the appeal as to why, what's the basis of your appeal given that, at least as far as I know, there's nothing in 6409 that prohibits Cambridge from requiring 6409 applications to go through our Zoning Board.

ATTORNEY MICHAEL GIAIMO: I don't disagree with you that there's nothing that prohibits it. I also don't think Cambridge has adopted that policy. You said you've gotten that from the City Solicitors office. Your Board is a Board of limited jurisdiction. So in your Zoning Ordinance it says what your Board

can do. You can hear Special Permits for certain uses that are indicated as Special Permit uses. This is not that because it's a special process. You can also hear appeals which is how we got in front of you. And I'm glad you can hear appeals, because I think it is right that your Board be allowed to rule on this and not just have it coming from the city attorney's office.

I would suggest that if the City decides that it wants to have your Board involved in all of these, and I would hope it doesn't, but if it does, you should adopt a formal procedure in some fashion either as a regulation or, you know, ideally as an ordinance which gives your Board the authority to hear these through a process that's not an appeal process.

And also the Special Permit process is not a good fit for all the reasons we've argued in that brief.

CONSTANTINE ALEXANDER: Well, a Special Permit per the Zoning Board, we can hear the Special Permit, it seems to me, and again, this is not my issue. It's the City's Solicitor's issue. We can grant a Special Permit under 6409. We don't need to have -- and when we do, if we're going to do that, we follow 6409 and the FCC order and take off the items that you have to satisfy to obtain relief. But that doesn't mean we shouldn't hear -- your appeal tonight, the appeal --

ATTORNEY MICHAEL GIAIMO: Yes.

CONSTANTINE ALEXANDER: -- is simply that we have no authority. The Commissioner was wrong in deciding that we

have -- you have to come before us for your 6409 relief. And I haven't heard anything yet that persuades me that that's wrong.

ATTORNEY MICHAEL GIAIMO: The appeal is based on you're not having Special Permit authority to hear this.

BRENDAN SULLIVAN: Do I understand --

ATTORNEY MICHAEL GIAIMO: -- under Zoning.

BRENDAN SULLIVAN: The 6409 would usurp the Special Permit process.

ATTORNEY MICHAEL GIAIMO: That's -- my argument is that 6409 usurp --

BRENDAN SULLIVAN: You either do one or the other.

ATTORNEY MICHAEL GIAIMO: We usurp

the Section 6409 would usurp the Special Permit process and the Special Permit procedures because they're inconsistent with. If you want to have another procedure by which all these applications come to you and you rule on them, I can't object to that. I would object to it on policy grounds, but I can't object to it on legal grounds. And I would also say that procedure has to be more efficient than your standard Zoning Special Permit process because you have a limited time window.

CONSTANTINE ALEXANDER: That's the procedure, isn't it?

ATTORNEY MICHAEL GIAIMO: That's procedure.

CONSTANTINE ALEXANDER: Our procedure is we don't go through the drill

under our Ordinance. We go through the drill of 6409.

ATTORNEY MICHAEL GIAIMO: And you scheduled your hearing in three weeks and we really appreciate that.

CONSTANTINE ALEXANDER: And then you grant a Special Permit under or pursuant to 6409, but at the end of the day it's the 6409 -- the same arguments and same issues that you would bring before the Building Inspector if City of Cambridge had decided not to have our Board act on it. And, again, it's nothing we're looking forward to doing.

ATTORNEY MICHAEL GIAIMO: I understand that.

CONSTANTINE ALEXANDER: But that's what the City Solicitor's office has told us.

ATTORNEY MICHAEL GIAIMO: And I mean I guess my other point would be I don't think the City has actually decided that. I think maybe your City Solicitor's office has decided that that would be a good way to do it. But I don't actually think you have any direction or authority from any legitimate source that creates the Zoning Board's authority which is your Ordinance, your City Council.

BRENDAN SULLIVAN: Yes, see the way I read it is that you come in for a modification or whatever you're doing. You go to the Commissioner and basically say here are these six items; check, check, check, check, check. We satisfy 6409. Hence, we can do whatever we basically give us our permit to go forward.



ATTORNEY MICHAEL GIAIMO: With that project, yes.

BRENDAN SULLIVAN: And that's it. And he either says yes, check, check, check, you have satisfied 6409. Hence, you don't have to come before us.

Now, if he has ruled that no, you don't satisfy 6409, then that then triggers a Special Permit application; is that correct?

ATTORNEY MICHAEL GIAIMO: Well, that is the exact process we followed. And I think if the Commissioner decided we didn't satisfy 6409, then we properly bring an appeal to your Board.

CONSTANTINE ALEXANDER: One correction to what you said, Brendan. If the Commissioner decided that they didn't satisfy 6409, their next step would

presumably be an appeal.

BRENDAN SULLIVAN: Either appeal or go directly to a Special Permit application. That's their option then.

ATTORNEY MICHAEL GIAIMO: Right. Or potentially go to court, also. I mean, I don't think that's been determined yet.

BRENDAN SULLIVAN: And flush it out, that's fine.

But, if you, if he rules that you don't satisfy 64 -- if he rules that you do satisfy rule 6409, that's it. Give me my permit, I'm out of here. You don't even have to come here on Thursday nights. If he rules that no, you don't satisfy 6409, then you have two options; either appeal that determination to us which you're doing, and also apply for a Special Permit. One or the other or both as

you're doing tonight.

Is that correct?

ATTORNEY MICHAEL GIAIMO: That's my understanding, also.

BRENDAN SULLIVAN: Okay.

ATTORNEY MICHAEL GIAIMO: And the process here, I don't believe and with all due respect to the Commissioner, I think he was probably wisely counselled by the City Solicitor because it's a new procedure, and I think the City Solicitor told him, unfortunately, no, you really shouldn't be reviewing this. In substance you should look to see whether the right things were filed that you should direct them to the Board of appeals. That's my impression from the letter we got.

CONSTANTINE ALEXANDER: That's my reading of the letter, too. I didn't

speak to the City --

ATTORNEY MICHAEL GIAIMO: Yeah. And so I would further argue just as a policy matter, there -- and in light of the purpose of this statute, and in light of the fact that you have more important things to do and we have more important things to do than hear these pretty simple upgrade type applications, I would hope that there's a way to set up a procedure where that check the box type process can be instituted at least in the first instance for these simple type applications.

BRENDAN SULLIVAN: We need to be consistent.

ATTORNEY MICHAEL GIAIMO: You know, if something more complicated comes up at the Board of Appeals, than that's

different.

CONSTANTINE ALEXANDER: On the other hand, until the City's Legal Department or some other city body tells us no, you're not involved in this anymore, they told us, yes, you have to get involved.

ATTORNEY MICHAEL GIAIMO: And that's how we ended up on appeal to the Board here tonight.

CONSTANTINE ALEXANDER: And that's why you're here with this case.

ATTORNEY MICHAEL GIAIMO: That's right.

CONSTANTINE ALEXANDER: And that's why we're hearing the case. So I always go back to the question before us, I don't know why we should reverse the Commissioner's decision given the fact

that there's nothing to support, the fact that we -- we have no role to play. The City has, through its Solicitor's office, decided we do have a role, this Board, has a role.

ATTORNEY MICHAEL GIAIMO: We're in a little bit of a paradox, because yes, the commission -- I mean, the City Solicitor decided the Commissioner has to send this to you. And our argument is that the Commissioner's perfectly capable of having made this decision on his own.

CONSTANTINE ALEXANDER: Yes.

ATTORNEY MICHAEL GIAIMO: So my response I guess to your question would be it doesn't belong here because the statute doesn't contemplate a protracted process or a Special Permit process, and the Commissioner is capable and actually is

the zoning enforcement officer, is the person you're supposed to send zoning questions to see whether a Special Permit, for example, is required and the City has not adopted a Special Permit process or any formal procedure. What the City Solicitor's office instructs you is not -- that doesn't give you your authority. It's an interpretation of what your authority is, but going behind that I would say there is nothing in your Ordinance that says this Board of Appeals has to sit to review determinations under Section 6409. Doesn't mean they can't but you haven't done that.

CONSTANTINE ALEXANDER: At the same token, there's nothing in the Ordinance that says, or anywhere that says that we can't do it. It's a -- I see it

as a jurisdiction or municipality by  
municipality decision. And this  
municipality has decided --

ATTORNEY MICHAEL GIAIMO: I do.  
The only place I think you and I are  
differing is whether the municipality has  
actually decided that or whether you've  
been instructed by your City Solicitor --

BRENDAN SULLIVAN: We have to have  
a good reason --

ATTORNEY MICHAEL GIAIMO: -- to do  
it that way.

BRENDAN SULLIVAN: -- to proceed  
the way we're proceeding. That's the way  
I read it.

TIMOTHY HUGHES: I need to get  
clear on one thing, so because of the City  
Solicitor's weighing in on this, you never  
reviewed the application and had the



opportunity to go through the checkmark?

RANJIT SINGANAYAGAM: I didn't do that, right.

ATTORNEY MICHAEL GIAIMO: That's right.

CONSTANTINE ALEXANDER: That's what we're going to do tonight presumably at some point.

ATTORNEY MICHAEL GIAIMO: Right. And so that's really the argument. And to the extent you want to call the Special Permit, that's different than saying it's a 40-A Special Permit, I hope, because I think for the reasons we put in our brief. The 40-A Special Permit process just doesn't fit with what this is supposed to be.

CONSTANTINE ALEXANDER: I think, unfortunately you did cite in your

advertisement, you cited the sections of not 40-A but Article 4 of our Zoning Ordinance which are the sections that deal with telecommunications facilities.

ATTORNEY MICHAEL GIAIMO: Special Permit.

CONSTANTINE ALEXANDER: An interesting question if you hadn't done that whether we would hear the case tonight, and you have a different view than I, but the Legal Department would say we can't hear the case. But I'm comfortable we can hear the case.

ATTORNEY MICHAEL GIAIMO: Good.

CONSTANTINE ALEXANDER: Not this case, the next one because you did cite those. And I think in the future, one thing that has to be done, the advertisements have to be for 6409 case

before the Zoning Board has to be sort of tweaked a bit so that it's clear that what it is we're doing, because it's not quite clear.

The Legal Department is of the opinion, right or wrong, is of the opinion is that you have to go through chapter -- Zoning Board mechanisms with regard to the Board of Appeals. We don't apply discretionary elements because of 6409, but you do go forward. Our review of 6409 is in the guise or through the process of a typical or a Special Permit application under our Ordinance.

That's -- and again, I'm not saying I agree with it, disagree with it. Other members of the Board may have views, I don't know, but that's way we've been told. We're good soldiers --

ATTORNEY MICHAEL GIAIMO: I understand and I think you're equally victims of that as we are. I understand that. And maybe that will be tested at some point, but I don't, you know --

TIMOTHY HUGHES: If we were to grant the appeal, wouldn't that kick it back to the Commissioner's office to have to do the check box thing?

ATTORNEY MICHAEL GIAIMO: It would.

CONSTANTINE ALEXANDER: But then you might have an issue with the Legal Department saying --

TIMOTHY HUGHES: I might have an issue with the Legal Department. I mean, I won't have an issue with them, because it's like I'm doing what I've been asked to do. Not by them. I was asked to sit

on the Board of Zoning Appeals and render an opinion based on facts as they're presented to me. Not, you know, be at the beckon call of the Legal Department if I don't agree with what they happen to be saying.

ATTORNEY MICHAEL GIAIMO: The interesting thing is this would be one instance if you disagreed with the Legal Department, you wouldn't get sued that's for sure. Most of the time I think if you go against their advice you at least have that risk. You know, this would be a way that the carriers would be very happy dealing in the first instance with the Commissioner's office. I don't know if the Commissioner wants to see all of these, but just to give you the sense of the magnitude, Tim and I know about from

our client, 13 or 14 more of these that are going to be coming down the pike just this year. I talked to Rick Sousa from T-Mobile, the numbers he talked about were similar. You got other carriers out there. You could spend a lot of time on these I think unnecessarily. 90 percent of these or some high percentage of these really don't have any public interest. They don't change the appearance. There may be some that do. This one's completely hidden from view and yet we're, you know, spending time talking about it.

CONSTANTINE ALEXANDER: Okay.

My only comment would be, and I'm sympathetic to what I think some of the sentiments we've been hearing, but if we do reverse, we grant the appeal, we reverse the decision and send it back

Ranjit's office, he's going to have to deal with -- he's going to be talking to the Legal Department saying you can't issue the Building Permit, and then we may get a legal opinion at that point. It strikes me the process is relatively easy to just go forward, dismiss the appeal, hear the case on its merits, make the same decision that presumably Ranjit would make, maybe not, and move on. It doesn't -- these cases shouldn't take that long, these 6409 cases. They're a pain in the rear end, I'll grant you that for this Board. But --

BRENDAN SULLIVAN: We're setting ourselves up for the future not necessarily for tonight it's really I what its.

TIMOTHY HUGHES: Right. Yes,

that's exactly what it's happening. This is going to stay in our lap unless we draw a line in the sand.

BRENDAN SULLIVAN: But I would uphold the Commissioner's decision because in reading all of the correspondence back and forth, I feel as though they don't meet all the requirements of 6409, so that they would then be required to go for a Special Permit in that they're altering a previous grant Special Permit, and that in altering part of the conditions, and when we impose a condition on the previous case for this, it was as per the application. Now the application has to do with the number, the size, the location, and all the other things that are submitted. Now, they're altering that. So I see it that there is an alteration to relief that was



granted prior.

CONSTANTINE ALEXANDER: Right.  
We're getting into the -- let's  
hold -- put it to the side.

BRENDAN SULLIVAN: That's my  
reason for saying that I think they fail,  
they're not totally clear on 6409.

CONSTANTINE ALEXANDER: Okay. You  
were just saying you would uphold -- you  
would deny their appeal?

BRENDAN SULLIVAN: Maybe for  
different reasons, but I would uphold the  
fact that they cannot, they're not clean  
on 6409.

TIMOTHY HUGHES: On this  
particular case?

BRENDAN SULLIVAN: On this  
particular case, correct.

ATTORNEY MICHAEL GIAIMO: I guess

we'll get to that later. We disagree and we can explain why -- I understand your logic, but I don't -- I think you're missing an aspect of that review that is very important --

BRENDAN SULLIVAN: That's fine.

ATTORNEY MICHAEL GIAIMO: -- and I guess we'll talk about that later.

CONSTANTINE ALEXANDER: Let's get to that case.

ATTORNEY MICHAEL GIAIMO: And I just wanted to mention one more thing in terms of Legal Department and, again, maybe this is arguing for a future case and trying to save you and us some time, but there are many municipalities in Massachusetts, very few of them are sending these through as a routine matter to the Board of Appeals. They have all

different kinds of processes, many of them are decided by the Building Commissioner. There's one town that makes you pay a fee and go to a Planning Board meeting and it's five minutes and they check the box. I think it's because they wanted the fee to be -- and I think they were candid about that. But most places are trying to simplify this review because it's a, you know, if it's doing what the federal statute intended, it's kind of categorizing more of a nuisance type application and leaving the more significant ones, particularly in a city where the installations are on buildings, leaving the more significant ones for the full Special Permit process.

BRENDAN SULLIVAN: What does Lexington do and Concord and Beacon Hill?

ATTORNEY MICHAEL GIAIMO: Boston has been reviewing these -- they took a little while to get to this point, but they are reviewing them in Inspectional Services and they're making rulings the same they would with a Building Permit.

BRENDAN SULLIVAN: I know other cities and towns, as you say, handle these at the administrative levels and you drive by those cities and towns and you see these God awful antennas all over the place. One thing we have always wrestled with is to try to make them the necessary evil, if you will, as palatable and as aesthetically pleasing as possible. So I think we have an important function albeit it is a torturous one but you go and drive through Watertown and it looks absolutely awful. Anyhow, that's an editorial.

ATTORNEY MICHAEL GIAIMO: I think the carriers have gotten the message with your Board with regard to stealth installations and try to come in from the start with, you know, a design.

BRENDAN SULLIVAN: It's been a long haul.

ATTORNEY MICHAEL GIAIMO: And Tim will get to the merits of this application. But that's exactly what was done here. All the changes are been done behind the stealthing that you've included as your conditions.

CONSTANTINE ALEXANDER: Hold that. We'll do that next.

Let's put this case to bed one way or another unless other people have questions they want to say? No?

Anyone in the audience have anything

to say?

(No Response.)

CONSTANTINE ALEXANDER: No one in the audience with comments. We have no letters not surprisingly.

So I will make a motion. The Chair moves that the appeal of the petitioner with regard to the decision of the Inspectional Services, Commissioner of the Inspectional Services be granted. This is granted which would mean that the case could bounce back to Ranjit's office and contrary to what our Legal Department would like us to do.

All those in favor of granting the appeal or -- what's the word I'm looking for?

ATTORNEY MICHAEL GIAIMO: Granting the appeal, reversing the decision.

CONSTANTINE ALEXANDER: Right.  
Reversing the decision of the Building  
Inspector, please say "Aye."

(No Response.)

CONSTANTINE ALEXANDER: There are  
no votes in favor. So the motion does not  
carry on the appeal.

I think for the record we have to  
state our reasons why we denied it. I  
would suggest the following, and members  
of the Board can chime in if they'd like.

I move that this Board has denied  
the petitioner's appeal because the  
petitioner has not demonstrated that the  
so-called Spectrum Act requires that a  
determination of the said Act be made by  
means of a Building Permit from the  
Inspectional Services Department.

Rather the City of Cambridge has

decided that determinations under said Act shall be made by Zoning Board of Appeals inasmuch as Cambridge's Zoning Ordinance generally requires that the erection and modification of telecommunication facilities be the subject of a Special Permit process before the Zoning Board of Appeals.

Thus it is appropriate that our Board, rather than the Inspectional Services Department determine by means of a Special Permit under our Ordinance whether approval under said Act is warranted.

All those in favor or modifications or suggestions? If not.

TIMOTHY HUGHES: I'm going to abstain from that vote, because I don't actually agree with that either. I mean,



I think -- I don't -- I can't vote for the appeal because I don't think Ranjit did anything wrong, but I do think he should be the one doing this, not us.

CONSTANTINE ALEXANDER: Okay.

Fair enough.

Take a vote.

All those in favor of the motion that I just read, please say "Aye."

(Aye.)

(Alexander, Sullivan, Green, Anderson.)

CONSTANTINE ALEXANDER: Four in favor and one abstention.

Appeal denied.

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(7:25 p.m.)

(Sitting Members Case BZA-008835-2015:  
Constantine Alexander, Timothy Hughes,  
Brendan Sullivan, Janet Green, Slater W.  
Anderson.)

CONSTANTINE ALEXANDER: The Chair  
will call case No. 008835. Again, One  
Broadway.

Mr. Twardowski.

ATTORNEY TIMOTHY TWARDOWSKI:  
Thank you, Mr. Chairman. Tim Twardowski  
from Robinson and Cole. I believe you  
should all have copies of a site plan.

CONSTANTINE ALEXANDER: Attached  
to your letter?

ATTORNEY TIMOTHY TWARDOWSKI: Yes.  
This was the site plan itself I think was  
attached.

CONSTANTINE ALEXANDER: And the  
photo simulations or photos I should say?

ATTORNEY TIMOTHY TWARDOWSKI:

That's correct. And the site plans themselves are located in the packet at tab 4 as well as a set of photo sims which are available in the same packet at tab 2C. And, again, as noted by the Chairman, this is an application for a Special Permit under Section 6409, the Spectrum Act, and this is for modification of an existing wireless facility that was approved by this Board. I think the actual decision was from March of 2014, and this is the location is One Broadway.

You may recall, and I guess I'll just kind of walk through using the sheet C-1 of the site plan as well as the photo sims. On this particular location the original approval was for three arrays of antennas. Looking at again sheet C-1 on

the left side of the page, this is the facade facing Third Street as referred to as a gamma sector antennas. And we have -- there are two stealth enclosures that are mounted inside of the columns, and inside of those enclosures are two existing antennas, behind the concrete columns we have remote radio heads. Above facing Canal Street we have a set of, it's a total of seven -- either six stealth enclosures in which we have located antennas and/or remote radio heads.

CONSTANTINE ALEXANDER: How many antennas can a 6409 FCC order have a limit on number of new antennas if I'm not mistaken?

ATTORNEY TIMOTHY TWARDOWSKI:  
There's no limit of 6409 as to the number of antennas. There is a limit in terms of

number of equipment cabinets.

CONSTANTINE ALEXANDER: Is that it? Okay.

ATTORNEY TIMOTHY TWARDOWSKI: In this case, so we have on our equipment cabinets are located inside the parking garage in a space, and that's where all of our telecommunications equipment cabinets are located. This application does not propose to add any new equipment cabinets.

The third sector, the third array of antennas is mounted on the roof of the parking garage. This is labelled on sheet C-1 as the beta sector antennas, and there we have four antennas as well as remote radio heads mounted inside the enclosures.

What this proposal would do essentially is replace on the beta sector two existing antennas with two new

antennas. I would also replace some existing radio heads with new radio heads. All of this would take place inside the existing enclosure.

The beta sector, I think these are shown in the photo sims on page -- on the last page referred to as photo 7. And you notice that the photos are actually listed or labelled as existing/proposed because of all the work is being done inside the stealth enclosures, it's going to look exactly the same before -- after the work is done as it is now. There will be no visible change to the facility. And the same is true for both of the other sectors. The only antennas that are being changed are the two that I mentioned on the beta sector.

The other two sectors we're not

adding or replacing any antennas. All we're doing is replacing some remote radio heads and on each sector we're adding one additional remote radio head. And again on the gamma sector the remote radio heads were going to go behind the existing concrete column. Same as existing group of radio heads. And on the Canal Street the alpha sector, the new radio heads will be located inside the existing stealth enclosures. And, again, as shown in the sims as well as the zoning drawings, the stealth enclosures are not changed. We're not changing them, expanding them, making them larger. They will be essentially lifted, replace the equipment, put the enclosure back on. So nothing will change visibly in terms of the actual facility itself.

Under Section 6409, and it's actually the regulations. Section 6409 I think we have the exact language in the statute itself. And let me -- if you've ever seen the statute, it's literally just this. It's a couple of paragraphs long, which essentially says that local governments cannot deny and must approve eligible facilities requests. Under 6409 what is an eligible facility's request? Essentially there's two types:

There's modifications of existing facilities, and then there's co-locations. In this particular case we're doing a modification to an existing.

So where the real meat of this lies is within the regulations that were adopted by the FCC. Those were adopted through a ruling in order that was issued



in October of last year. The specific rules as applied to Section 6409 went into effect on April 8th of this year. And the key thing for this Board's -- from this Board's perspective is the definition in the FCC regs as to what constitutes substantially changed. And that, this refers to the six criteria or points that Mr. Sullivan had mentioned previously. And I'll just go through those briefly.

CONSTANTINE ALEXANDER: Please. I was going to ask you to do that anyway.

ATTORNEY TIMOTHY TWARDOWSKI:  
Sure.

So the six criteria for substantial change, the first is, and this goes to the number of equipment cabinets. That it does not involve more than the standard number of equipment cabinets. Again, we

only have one equipment cabinet here.  
We're not proposing to add anymore.

CONSTANTINE ALEXANDER: What about the one that the -- you're not going to increase the height of the base station by more than ten percent. That's the first one on my list from the FCC order.

ATTORNEY TIMOTHY TWARDOWSKI: I think what you're looking at in the FCC order, the first one, increasing the height applies only to towers. For the base station there's a separate criteria that pertains to height. Essentially, I mean, when I say tower versus base station, a tower as defined by the regs is what you see, the last towers, the 150-foot towers out in the more rural areas. A base station is essentially everything else. It's, you know, antennas

mounted on a water tank or antennas  
mounted on a building or on the facade or  
the roof, which is what we're dealing  
here, this is a base station.

CONSTANTINE ALEXANDER: Okay. And  
you're not going to increase the base  
station --

ATTORNEY TIMOTHY TWARDOWSKI: No.

CONSTANTINE ALEXANDER: -- by more  
than ten percent? I just want to make  
sure we touch on all the requirements of  
the regulations.

ATTORNEY TIMOTHY TWARDOWSKI:  
That's correct.

CONSTANTINE ALEXANDER: Okay.  
That's your representation to us. And  
then your plans support that. That you're  
not going to increase by more than -- it's  
increase the height of the base station by

more than ten percent or ten feet  
whichever is greater.

ATTORNEY TIMOTHY TWARDOWSKI:

That's correct.

CONSTANTINE ALEXANDER: And you're  
satisfying --

ATTORNEY TIMOTHY TWARDOWSKI:

Right, that's correct.

The second one does not entail  
excavation or deployment outside of the  
current site. We're not excavating at  
all. All the work is done inside on the  
building and inside the existing  
enclosures.

Does not defeat concealment elements  
of the existing facility. This really  
gets to the stealth enclosures that were  
required by the Board through the original  
approval that exists today and remain in

their current form after the work is done.

And then this is the height provision. Does not -- the height of the building by more than ten percent or ten feet. We're not increasing the height at all.

Does not add any impertinences that would protrude by the edge of the building by more than six feet. We're not doing that.

CONSTANTINE ALEXANDER: You're not changing the enclosure, so therefore --

ATTORNEY TIMOTHY TWARDOWSKI:  
We're not.

CONSTANTINE ALEXANDER: What is there is there?

ATTORNEY TIMOTHY TWARDOWSKI: What is there is there, precisely.

And lastly complies with the

conditions imposed about the BZA decision, in the original BZA decision. And, again, this is reference decision 10517 contained three conditions:

The first that the work conform to the approved photo simulations. And I think the photo simulations that we've looked at this evening confirm that.

No. 2, that the work conform with the approved plans. And we've shown on the plans that are submitted that all the work is consistent with the original approved plans and, you know, essentially they're almost identical other than the notes identifying the additional and new equipment being proposed.

And then lastly that the equipment be removed and the building facade restored if Verizon Wireless ceases to

operate the facility for more than six months. Obviously we're here upgrading the facility, so we're not ceasing any work with the facility.

CONSTANTINE ALEXANDER: And you haven't ceased the use of the facilities since the time we granted the original Special Permit?

ATTORNEY TIMOTHY TWARDOWSKI:  
That's correct, we have not.

CONSTANTINE ALEXANDER: Okay.

ATTORNEY TIMOTHY TWARDOWSKI: And that essentially is the six criteria. So I think we're in compliance with all of those.

ATTORNEY MICHAEL GIAIMO: And I just wanted to add one point directly at Mr. Sullivan's comment before. It is true that these plans are not identical to the

plans you approved before, but the condition Tim read does not comply with the conditions associated with the siting approval. It says: However, that this limitation does not apply to any modification that is non-compliant only in a manner that would not exceed the thresholds identified in Section 1.400.1B7, 1 through 4 which are the first four. So we can depart from those plans as long as we aren't violating one of the other provisions.

BRENDAN SULLIVAN: Yes, I think our -- or my reading of that and our intent and why we cite that is that if you have a bad antenna, you know, that you're allowed to replace it in kind. You know, at that type of thing. That would be my feeling on that. I think that's maybe



what -- that's what I think, anyhow, that we're not going to let you, you know, keep a bad antenna there or something like that. So a modification, if that antenna which is emitting, you know, whatever, will you get a new technology, a new antenna, same size that will emit more, than my feeling is that, yeah, it would allow you to replace that in kind for, to improve the facility. But, and again, this is sort of a tough case to go to the mat on I'll be honest with you, you know. But -- and rethinking the previous one that we did on Arrow Street with Mr. Sousa, I think I was wrong -- I mean, I -- on that particular one in my vote on that one after rethinking it. So don't hold me on that one there, but I do think that any modifications to any plan and

specs that have been approved previously should be required to come back for, you know, an increase in facilities, even though this is probably as nice of an enclosure as we have ever seen. And, again, it's taken a lot of time and a lot of pushing and pulling to get to that point. So -- but I think on Arrow Street we saw an increase, and you see an increase. This is, again, a tough one do go to the mat on. Again, my feeling, again, going forward for future reference any modification for what we previously approved increase, even though you may not see it, still would require a Special Permit because we are modifying a previous Special Permit relief.

ATTORNEY MICHAEL GIAIMO: I do understand that. And just with all due

respect, that's not what the federal statute says. So I do understand under your Zoning Ordinance and under the practice that you've had with your Special Permits, that if we were going to modify plans, we would come into you for modification for Special Permit absent this federal requirement. But the federal requirement says if you've got a minor modification -- now, I don't know the facts of Mr. Sousa's application, but certainly this one, even though it's different, and I'm going to come in to you in a few weeks probably with an installation on the Boston Sand and Gravel Cement batch plan. On that one you approved certain antennas in certain locations. And some of those antennas are going to be moved, slid down a wall, one

moved from one side to the other, but it's the cement batch plan.

CONSTANTINE ALEXANDER: I think it's good that we're having this discussion as a prelude to the next one, but that's not the case before us tonight.

ATTORNEY MICHAEL GIAIMO: Tonight it's not. But I wanted to make this point that under this federal statute that your philosophy or interpretation of the Zoning really is not consistent with the way this statute is written in the regulations.

BRENDAN SULLIVAN: And, again, ten more seconds on Arrow Street what troubled me on that one was the yardstick. You know, the measuring, you know, slight, you know, not an -- by whose viewpoint, you know, so on and so forth.

ATTORNEY MICHAEL GIAIMO: And

that's why these regulations to the extent that they have standards, those are the ones they require you to go by.

BRENDAN SULLIVAN: Right.

ATTORNEY TIMOTHY TWARDOWSKI: And maybe it's helpful, maybe it's not, but, you know, keeping in mind, you know, the definition of eligible facilities request, as I noted before, it generally comes as modifications to existing sites. But it also encompasses co-locations. Easiest way to describe this is, and probably the context of a tower as opposed to a building like we're dealing with here. But if you have an existing tower, let's say it's in Concord, and on that tower you have two carriers with their antennas, their equipment located on the ground, if carrier No. 3 comes in and says I want to

put my antennas on that tower, become the third tower, I want my antennas on the tower, I want my equipment on the ground, that's covered by Section 6409, even though it's creating, not just expanding the total number of antennas, it's expanding the total number of facilities on the buildings. Obviously that's not what you guys typically deal with here, because I think just about all if not all of them.

CONSTANTINE ALEXANDER: I'm curious about that. We're getting ahead of ourselves. Let's deal with it when the time comes.

ATTORNEY TIMOTHY TWARDOWSKI: Just for context in terms of, you know, to the extent that the question is going from a total of four antennas in this array or

from two, from four to five or from two to three does that qualify under Section 6409? And our position is absolutely it does. Obviously we're not dealing with that now here.

CONSTANTINE ALEXANDER: Okay, but I'm not going to drop it.

6409 does have on the regulations that there is a, if you will, a concealment issue.

ATTORNEY TIMOTHY TWARDOWSKI:  
Correct.

CONSTANTINE ALEXANDER: And I think what Brendan would be getting at and that co-location, that would raise issues about concealment.

ATTORNEY MICHAEL GIAIMO: You had put concealment conditions on that, and we appreciate that particularly in Cambridge

as being a hot button for you and also something you've worked on before. So we're aware of that coming in.

CONSTANTINE ALEXANDER: We'll agree to disagree for now. Or at least that we know what the issues are going to be the next time you come before us.

ATTORNEY MICHAEL GIAIMO: I think that would be something we have discussions about in the future. But I don't disagree with you that we have to observe the concealment requirements.

CONSTANTINE ALEXANDER: Right, okay.

Any other comments or questions from members of the Board?

(No Response.)

CONSTANTINE ALEXANDER: I'll open it up to public testimony.



Mr. Hawkinson, do you have anything you want to say?

JOHN HAWKINSON: Not particularly, Mr. Chair. I guess I should inquire, was there a memo from the City Solicitor on this topic?

CONSTANTINE ALEXANDER: There is a memo to the Board, but it's an attorney/client privilege. It's a privileged communication. It's legal -- no, you can smile. It's legal advice to the Board and that legal advice is subject to the attorney/client privilege.

JOHN HAWKINSON: Let the record show that I'm smiling.

ATTORNEY MICHAEL GIAIMO: I'm glad somebody is.

CONSTANTINE ALEXANDER: That's

your -- that's it for you? Okay.

Anyone else?

(No Response.)

CONSTANTINE ALEXANDER: No one else wishes to be heard. There are no letters in the file. Ready for a vote or further discussion?

TIMOTHY HUGHES: I'm ready.

CONSTANTINE ALEXANDER: Okay. The Chair moves that the modification to its existing telecommunication facility at One Broadway proposed by the petitioner does not substantially change the physical dimension of such facility within the meaning of Section 6409(a) of the Middle Class Tax Relief Job Creation Act of 2012, also known as the Spectrum Act, because it will not defeat the existing concealment elements of the existing facility and,

therefore, the petitioner is entitled to the Special Permit it is seeking under said Act in our Zoning Ordinance provided that the petitioner comply with the following conditions:

That one, that the work proceed in accordance with the plans submitted by the petitioner and initialed by the Chair.

Two, that upon completion of the work, the physical appearance and impact of the proposed work will be consistent with the photo simulations submitted by the petitioner and initialled by the Chair.

Three, that the petitioner shall at all times maintain the proposed work so that its physical appearance and impact will remain consistent with the photo simulations previously referred to.

And then four, should the petitioner cease to maintain, cease to utilize the equipment approved tonight for a period of -- for a continuous period of six months or more, it shall promptly thereafter remove such equipment and return the building on which it is located to its prior condition and appearance to the extent reasonably practicable.

That's it. Any other conditions or modifications, suggestions? Ready for a vote?

All those in favor of granting the motion I just made please say "Aye."

(Aye.)

CONSTANTINE ALEXANDER: Five in favor. Motion granted. You have your Special Permit under 6409(a).

(Alexander, Hughes, Sullivan,

Green, Anderson.)

ATTORNEY MICHAEL GIAIMO: Thank you, Mr. Chairman.

ATTORNEY TIMOTHY TWARDOWSKI:  
Thank you.

BRENDAN SULLIVAN: Now I note that it was for the Job Creation Act if we were to streamline all of this.

ATTORNEY MICHAEL GIAIMO: It would just create different jobs.

BRENDAN SULLIVAN: They wouldn't need experienced attorneys to represent them.

CONSTANTINE ALEXANDER: This is part of the political deal to get stimulation.

ATTORNEY MICHAEL GIAIMO:  
Employing construction people rather than attorneys.

(Whereupon, at 7:45 p.m., the  
Zoning Board of Appeals  
Adjourned.)

\* \* \* \* \*

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**COMMONWEALTH OF MASSACHUSETTS  
BRISTOL, SS.**

I, Catherine Lawson Zelinski, a Certified Shorthand Reporter, the undersigned Notary Public, certify:

That the hearing herein before set forth is a true and accurate record of the proceedings.

**IN WITNESS WHEREOF**, I have hereunto set my hand this 21st day of December, 2015.



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Catherine L. Zelinski  
Notary Public  
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