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March 24, 2022

City of Powder Springs
Community Development Department
4488 Pineview Drive
Powder Springs, Georgia 30127

Re: Variance Request Application ("**Application**") by MC New Macland Properties, LLC ("**Applicant**") with respect to 3215 New Macland Road, Powder Springs, Georgia, Parcel Number 19072500270 ("**Property**")

AMENDED AND RESTATED NOTICE OF INTENT

Ladies and Gentlemen:

This law firm has the pleasure of representing Applicant with respect to the Application. Applicant respectfully submits for the City's consideration the Application, the approval of which will result in the City's issuance of a variance to allow the existing communication tower and ancillary improvements associated therewith (collectively, the "**Existing Tower**"), to remain and be considered legal and conforming.¹

Background Information on the Property

The Property is an approximately 0.0826 acre (approximately 3,598 square feet) parcel zoned CRC. The Property was the subject of rezoning and special use applications in 2017 known as PZ17-0008, PZ17-0009 and PZ17-011 (collectively, the "**Tower Applications**"), the approval of which allowed for the construction, operation and maintenance of the Existing Tower. At the time of approval, there were some 21 conditions of approval required. Concurrent variances were approved with the Tower Applications in 2017 including UDC Sections 4-415(b) and (c) to reduce setback to residential property lines from 300 feet to 259.9 feet, to reduce the ten-foot wide landscape buffer requirement to 7.5 feet in one area, and to allow existing vegetation to serve as a buffer. See *PZ 17 – 011*. The Existing Tower was constructed in accordance with all conditions, as evidenced by the City's issuance of a certificate of occupancy for the Existing

¹ This Application is being filed in response to condition Number 4 of City rezoning case number PZ21-045, approved on January 18, 2022 by the City (the "**Neighboring Application**"). Applicant objects to the constitutionality of the City's taking action or purporting to do so on its Property when it was not part of the Neighboring Application. Nevertheless, Applicant files this Application to ensure that the Existing Tower will be considered a legal, conforming use as it is currently sited on the Property.

Tower in 2018, a copy of which is attached.

At the time of the Tower Applications, the Property was leased to the then applicant and tower developer and was part of a larger parcel that was approximately 4.3 acres (the “**Parent Parcel**”). Accordingly, when the special use for the Existing Tower was approved, setbacks were measured not from the leasehold property lines, but from the Parent Parcel property lines. See *UDC, Section 4-415.*² Applicant’s predecessor and the Parent Parcel owners merged the leasehold interest into a sale of the Property, effectively subdividing the Property from the Parent Parcel and, in doing so, unwittingly created a nonconforming lot.

Variance Request

As a result of the transfer of the Property from the predecessor Parent Parcel Owner to Owner, the City has determined that the Existing Tower violates the “placement restrictions” of UDC Section 4-415(b). Because the Existing Tower occupies the Property as a principal use, it now must meet the minimum lot size and setback requirements of the CRC zoning district. In the CRC zoning district, the minimum lot size is 20,000 square feet, the minimum lot frontage is 100 feet, the minimum front setback is 40 feet, the minimum side setback is 15 feet, and the minimum rear setback is 40 feet. See *UDC, Article 2, Table 2-4.*

UDC Section 4-415(b) also requires that towers be placed at least 300 feet from any residential zoning district. The Neighboring Application has caused the centerline of the Existing Tower to be within 30 feet of the new PUD-R zoning, without notice or discussion with the Applicant.

Accordingly, Applicant seeks the following variances:

1. Reduce lot size from 20,000 square feet to 3,600 square feet;
2. Reduce lot frontage requirement from 100 feet to 20 feet (achieved by access easement);
3. Reduce the following setbacks as follows:
 - a. Front setback from 40 feet to 30 feet³;

² Applicant objects to the provisions of the Division II-A of the Unified Development Code relating to towers and wireless telecommunications facilities and, particularly, to setback requirements being dictated by real estate interest (leasehold verses owned) as they are arbitrary and capricious and without any reasonable relationship to the objective of setback requirements.

³ The centerline of the Existing Tower monopole is essentially in the center of the Property, which is 60 feet by 60 feet square. This means that the center of the monopole is approximately 30 feet from all property lines, and depending on how staff determines what is the front or rear setback, the centerline of the tower is approximately 30 feet away. Taking into account the circumference of the tower, this is a conservative estimate to allow the tower to remain where it is but provide for a setback for the principal use.

- b. Rear setback from 40 feet to 30 feet; and,
- c. 300-foot tower setback from residential zoning district to 30 feet on each of the northeast, north and south property lines (adjacent to the newly PUD-R zoned property).

The variances requested are to allow the Existing Tower to remain and, presumably to allow the development of the Parent Parcel and other property that was included in the Neighboring Application.⁴ **These variances will not result in a physical expansion or other change to the Existing Tower or to the Property.**

Filing Requirements

The UDC set forth the requirements applicable to the submission of a variance application. In satisfaction of these requirements, Applicant hereby submits the following documents:

- 1. Application (UDC, Sec. 14-23(b));
- 2. Legal description of the Property (UDC, Sec. 14-23(c));
- 3. Survey plat of the Property and site plan (UDC, Sec. 14-23(d) & (f));
- 4. this Notice of Intent (UDC, Sec. 14-23(e));
- 5. Written Analysis (UDC, Sec. 14-23(g));
- 6. Campaign Contribution Disclosures;
- 7. Property Owner Authorization;
- 8. Copies of the Limited Warranty Deed and Easement;
- 9. Zoning Drawings (Survey, Site, Facility Elevation and other Plans);
- 10. Application Fee in the amount of \$1,800.00.

The Application and accompanying documents support Applicant's request for approval of the variances to allow the Existing Tower to remain a legal, conforming use of the Property.⁵ Applicant respectfully requests approval of the Application.

⁴ Applicant objects to the Neighboring Application and to any action that is taken by a developer pursuant thereto that impacts the Existing Tower, access thereto or Applicant's property rights.

⁵ Applicant notifies the City of its constitutional concerns. If the City denies the Application in whole or in part, then the Property does not have a reasonable economic use under the Zoning Ordinance. Furthermore, the Telecommunications Act of 1996, codified at 47 U.S.C. § 332(c) (the "1996 TCA") was intended to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." *Preamble to 1996 TCA*. The primary mechanisms used by the 1996 TCA to "promote competition and reduce regulation" are prohibitions against local regulations that (i) "unreasonably discriminate among providers of functionally equivalent services" or (ii) "prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. § 332(c)(7)(B). Also, section 253 of the 1996 TCA provides that "no State or local statute or regulation ...may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." Mayor and City Council may violate the 1996 TCA on all three grounds if the Application is denied.

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We are happy to answer any questions or provide any information that the Department may have with regard to the Application.

Very truly yours,

PARKER POE ADAMS & BERNSTEIN LLP

By:



Ellen W. Smith

Nevertheless, Applicant remains optimistic that Mayor and City Council's consideration of the Application will be conducted in a constitutional and legal manner.