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MEMORANDUM

TO: **City of Beacon City Council**

FROM: **Keane & Beane, P.C.**

RE: **Wireless Telecommunication Local Law**

DATE: **February 1, 2019**

On August 6, 2018, the City Council adopted Local Law 13-2018 to create Section 223-26.4 of the Code of the City of Beacon to regulate small cell wireless facilities. This local law specifically established policies and procedures for the deployment and installation of small cell wireless telecommunication facilities in the City of Beacon.

Existing Section 223-24.5 of the Code of the City of Beacon regulates all other wireless telecommunication facilities not specifically addressed by the provisions of Local Law 13-2018. Section 223-24.5 requires certain wireless telecommunication facilities to obtain a special use permit from the City Council. The provisions of Section 223-24.5 have not been updated since 2002. As they exist now, the provisions set forth in Section 223-24.5 conflict with Local Law 13-2018 and the Federal Communications Commission's adopted *Declaratory Ruling and Third Report and Order*.

Please note that the Local Law has been expanded to amend the following Sections of the City of Beacon Code in addition to Section 223-24.5, Wireless Telecommunication Services Facilities.

- Section 223-25.A., Site Development Plan Approval.
- Section 223-26.4., Small Cell Wireless Telecommunications Facilities, Subsection B(6), C(4), C(5), E and F.
- Section 223-63., Definitions.

This memorandum explains the revisions made to the proposed Local Law concerning Wireless Telecommunication Services Facilities.

Purpose of the Wireless Telecommunication Local Law

The proposed amendments to Section 223-24.5 eliminate any conflict with the provisions of Local Law 13-2018. Specifically, the proposed local law makes it clear that wireless telecommunication facilities that obtain small cell permits from the Planning Board are exempt from the special permit application process and requirements set forth in Section 223-24.5.

Certain small cell facilities will require special use permit approval if the small cell facility falls within Section 223-26.4.B. The proposed Local Law amending Section 223-24.5 creates a special use permit approval process designed to regulate both small cell facilities and telecommunication towers.

Wireless Infrastructure Order

On September 26, 2018, the Federal Communications Commission ("FCC") adopted the *Declaratory Ruling and Third Report and Order* (the "Wireless Infrastructure Order"). In the Wireless Infrastructure Order, the FCC concluded that a state or local regulation constitutes an illegal effective prohibition of a wireless facility if it "materially limits or inhibits the ability of any competition or potential competitor to compete in a fair and balanced legal and regulatory environment." The FCC advises that a state or local legal regulation will have the effect of prohibiting wireless telecommunication services where such regulation materially inhibits a provider's ability to engage in any of a variety of activities related to its provision of a covered service, including but not limited to, filling a coverage gap, densifying a wireless network, introducing new services or otherwise improving service capabilities.

Amendments to Prior Draft Concerning Section 223-24.5

Our office has updated the attached local law concerning Wireless Telecommunication Services Facilities to incorporate the revisions suggested by the City of Beacon Planning Board in its memorandum dated January 8, 2019 and to address requirements adopted by the FCC in its Wireless Infrastructure Order. Please note, the Dutchess County Planning Department reviewed the local law and indicated it to be a matter of local concern. The County did not provide any additional comments.

Specifically, the updated Local Law sets forth different locational priorities for small cell facilities and non-small cell wireless telecommunication service facilities. The updated Local Law makes it clear that wireless telecommunication facilities are permitted in all zoning districts; however an applicant must provide a detailed explanation as to why a site of higher priority was not selected. The locational priorities have been updated and reorganized to better address the City's goals.

In addition, our office removed the requirement set forth in Section 223-24.5.R(2), that applicants must demonstrate that there is a compelling public need for the wireless telecommunication facility. The FCC has concluded that there is a compelling need to deploy small cell facilities to ensure that the United States remains the leader in advanced wireless services and wireless technology. Under the Wireless Infrastructure Order, municipalities may not prohibit wireless telecommunication services if a provider is filling a coverage gap, densifying a wireless network, introducing new services or improving service capabilities.

Please note that all the special use permit application requirements have been moved from Subsection R to Subsection D. We believe it is important that such requirements appear earlier in Section 223-24.5 to make it more clear to a potential applicant what materials they must submit to the City. To create a more complete application, we have also added several new application requirements, specifically adding the requirements listed in Sections 223-24.5.D(2)(a),(b),(e) and (f).

Site Development Plan Approval for Small Cell Wireless Telecommunication Facilities

Section 223-25 of the City Code has been amended to exempt small cell wireless telecommunication service facilities from requirements of site development plan approval. An applicant for both a small cell permit and a wireless telecommunication facility special use permit is required to submit a site development plan. While formal site plan review by the Planning Board pursuant to Section 223-25 is not required for small cell wireless telecommunication facilities, the Planning Board or the City Council is required to perform a thorough review of the application materials and assess project specific impacts. Under both Section 223-24.5 and Section 223-26.4 the Planning Board or the City Council will review and consider the submitted site plan and application materials so that the proposed development will have a harmonious relationship with the existing or permitted development of contiguous land and adjacent neighborhoods.

Furthermore, every application for a small cell wireless telecommunication facility before the City Council for special use permit approval shall be referred to the Planning Board for report and recommendation thereon before the public hearing.

We believe these changes will improve the City's review of small cell wireless telecommunication facilities and improve the procedural process for obtaining a small cell permit or a special use permit.

Amendments Concerning Section 223-26.4

The following changes were made to Section 223-26.4 to respond to the FCC's Wireless Infrastructure Order. Section 223-26.4 was adopted before the Wireless Infrastructure Order was issued.

- Section 223-26.4.B(6): This Section currently requires an application for a small cell wireless facility to obtain a special use permit from the City Council if the applicant proposes to install equipment on a pole, located at an elevation less than 15 feet from the ground. In light of our review of several recent small cell wireless facility applications, our office believes that 15 feet is difficult for applicants to meet. We believe that an 8 foot requirement may be more practical.

- Section 223-26.4.C(4): To create a more complete small cell application, we have added several new application requirements, specifically adding the requirements listed in Sections 223-26.4.C(4)(a),(b),(e), (f) and (i). These provisions are also included in Section 223-24.5.

- Section 223-26.4.C(5): Our office has deleted the reference to application fees. Such fees will be adopted by resolution and set forth in the City of Beacon Fee Schedule. We have added new language to address the required application fee and right-of-way fee.

- Section 223-26.4.E. Our office has deleted the reference to specific fees because, as stated above, such fees will be adopted by resolution and set forth in the City of Beacon Fee Schedule. We have added a new Section E to address structural and safety inspections.

- Section 223-26.4.F(1)(a): Our office has amended this Section to state new small cell facilities shall not be located in the Historic District and Landmark Overlay Zone, unless the applicant demonstrates to the Planning Board's satisfaction that the selected site is necessary to provide wireless services, including but not limited to, filling a gap in coverage, densifying a wireless network, introducing a new service or otherwise improving service capabilities. This language is used by the FCC in the Wireless Infrastructure Order.

Amendments Concerning Section 223-63

We have updated the definition of small cell wireless telecommunications facility to mimic the definition adopted and codified by the FCC. We have also added a definition for antenna equipment. This definition also mimics the definition adopted and codified by the FCC.

Please let us know if you have any questions or comments.

Ecc: Anthony Ruggiero, City Administrator
Dave Buckley, Building Inspector
John Clarke, City Planner