

**RESOLUTION OF THE
MEMPHIS AND SHELBY COUNTY
LAND USE CONTROL BOARD**

WHEREAS, on December 27, 2016, C.C. Drayton and Andy Rotenstreich with Baker Donelson, PC, on behalf of American Tower Corporation (“Appellant”), filed an appeal with the Board of Adjustment appealing the decision of the Planning Director that modifications to three cell towers approved with flush mount antennae should be processed as major modifications with the Land Use Control Board. Major modifications are those revisions to approved land uses that require action by the Land Use Control Board; and

WHEREAS, this appeal, which has been styled as Case No. BOA 17-04 by the Memphis and Shelby County Office of Planning and Development (“OPD”), has been placed on the docket of the Board of Adjustment during its regular meeting scheduled for January 25, 2017; and

WHEREAS, the basis of the Planning Director’s opinion that modifications to towers with flush mount antennae be reviewed by the Land Use Control Board is rooted in Section 9.6.12C(1)(f) of the Memphis and Shelby County Unified Development Code (“UDC”), which states that such changes shall be processed as major modifications. This language was approved by the Land Use Control Board, Memphis City Council and Shelby County Board of Commissioners in 2015; and

WHEREAS, in 2012, Congress passed the Middle Class Tax Relief and Job Creation Act of 2012 (47 U.S.C. § 1455(a), Section 6409(a)) of which states that a local government may not deny modifications to existing cell towers that do not “substantially change” the physical dimensions of the tower; and

WHEREAS, in 2014, the Federal Communications Commission (“FCC”) issued its interpretation of the “substantially change” language of Section 6409(a) through [FCC Order 14-153](#); and

WHEREAS, Section 188 of [FCC Order 14-153](#) states that the addition of antennae that protrude 20 feet or less from the tower are not substantial changes to the tower unless such additions would “defeat the existing concealment elements of the tower;” and

WHEREAS, Section 200 of [FCC Order 14-153](#) states that those towers approved in a “stealth design” are those that conceal the antennae, but does not include those towers approved with flush mount antennae; and

WHEREAS, since May 12, 2016, the Land Use Control Board has reviewed and approved 20 requests to convert antennae protrusions that do not meet the UDC definition of “flush mount.” This includes 10 requests during its January 12, 2017, meeting.

NOW, THEREFORE, BE IT RESOLVED, the Land Use Control Board (“Board”) finds that a conflict exists between the UDC and federal administrative law; and

BE IT FURTHER RESOLVED, that the Board finds that this conflict should be resolved in favor of federal administrative law; and

BE IT FURTHER RESOLVED, that the Board finds its review of major modifications to those cell towers approved as flush mount during a public hearing(s) futile and unnecessary; and

BE IT FURTHER RESOLVED, that the Board endorses the Appellant’s appeal in Case BOA 17-04 and urges the Board of Adjustment to rule in favor of said Appellant;

BE IT FURTHER RESOLVED, that the Board requests that its Secretary deliver this resolution to the attention of the Board of Adjustment during its deliberation of Case BOA 17-04.

Jon McCreery, Chairman

Josh Whitehead, Secretary

Date