

**TOWN OF DAVIE  
TOWN COUNCIL AGENDA REPORT**

**TO:** Mayor and Councilmembers

**FROM/PHONE:** Monroe D. Kiar, Town Attorney  
(954) 584-9770

**SUBJECT:** Ordinance

**TITLE OF AGENDA ITEM:**

An Ordinance of the Town of Davie, Florida Amending Ordinance No. 2001-35 to Provide That the Six Month Moratorium on the Acceptance of Applications for Wireless Telecommunications Towers and Antennas and on the Issuance of Permits and Approvals for the Construction of Wireless Telecommunications Towers Shall Not Apply to Applications Relating to the Placement of Wireless Telecommunications Antennas on Existing Wireless Telecommunications Towers; Providing for Exceptions; Setting Forth Expiration and Effective Dates.

**REPORT IN BRIEF:**

The Town adopted Ordinance No. 97-16 on March 16, 1997 implementing regulations regarding locations and criteria for commercial communication towers. Since that time, technological innovations and demands for such facilities has necessitated the need to revisit the Town's regulation. Further, good planning and concerns for the quality of life in the Town of Davie dictate a further review of locational criteria and associated standards concerned with the installation of such facilities. Section 2(b), Article VIII of the Florida Constitution, and Section 166.02, Florida Statutes, authorizes and requires the Town of Davie to protect the public health, safety and welfare and gives it the authority to exercise any power for a governmental purpose except when expressly prohibited by law. Section 163.202 of the Florida Statutes gives authority to the Town of Davie to enact land development regulations consistent with its adopted comprehensive plan. The Telecommunications Act of 1996 gives local governments authority over the placement, construction and modification of wireless communications towers and the Town has been cognizant of the needs for modern communications and for effective competition in the field and also, that the Town residents receive adequate wireless telecommunications services provided that the facilities are designed and located to minimize safety and aesthetic concern.

Recognizing that the Town Staff required a reasonable period of time to address the technical aspects of the telecommunications industry as they impact the land use decisions so that the Town Council can properly plan for and implement an efficient cost effective wireless communications services network that meets national and local goals and legislative mandates, the Town Council on July 3, 2001, adopted Ordinance No. 2001-35 to afford the Town Staff sufficient time to examine these issues and where necessary, revise the Town's regulations.

At the Town Council Meeting of September 6, 2001, the Town Council requested the Town Attorney's Office to research whether or not the adoption of an ordinance amending existing Ordinance No. 2001-35 to allow as a third exception to the moratorium, the placement of telecommunication antennas on existing towers (co-locations) would jeopardize the legal defensibility of the existing moratorium if challenged in federal court. The Town Attorney's Office has researched this issue and believes that the adoption of the amendment to permit the placement of telecommunication antennas on existing towers would not jeopardize the legal defensibility of the existing moratorium, but may even make the Ordinance more legally defensible. The Town Council further directed the Town Attorney's Office to prepare a proposed Ordinance amending existing Ordinance No. 2001-35 to permit co-location, if the Town Attorney's Office in its opinion, determined that such amendment would not jeopardize the existing moratorium. Accordingly, the attached proposed Ordinance amending Ordinance No. 2001-35 was prepared for placement on the Town Council Agenda.

**PREVIOUS ACTIONS:**

On March 19, 1997, the Town adopted Ordinance No. 97-16 implementing regulations regarding locations and criteria for commercial communications towers. On July 3, 2001, the Town of Davie adopted Ordinance No. 2001-35 imposing a six month moratorium on the acceptance of applications for wireless communications towers and antennas and on the issuance of permits and approvals for the construction of wireless telecommunications towers.

**CONCURRENCES:** N/A

**FISCAL IMPACT:** None

**RECOMMENDATIONS:** Motion to approve

**ATTACHMENTS:** Ordinance

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**MEMORANDUM**

DATE: September 14, 2001  
TO: Russell Muniz, Town Clerk  
CC: Tom Willi, Town Administrator  
Mayor and Councilmembers  
FROM: Monroe D. Kiar *[Signature]*  
RE: Control Number 010505  
Amendment to Moratorium on Telecommunications Towers (Co-Location)



Attached please find a proposed Ordinance amending Ordinance No. 2001-35 to provide that the six month moratorium on the acceptance of applications for wireless communications towers and antennas and on the issuance of permits and approvals for the construction of wireless communications towers be amended so as not to apply to applications relating to the placement of wireless telecommunication antennas on existing wireless communications towers. At its last Town Council Meeting, the Town Council requested that the Town Attorney's Office research whether such an amendment would jeopardize the legal defensibility of the existing moratorium on the acceptance of applications for new telecommunications towers. There is extensive conflicting law when interpreting the provisions of the Telecommunications Act of 1996 as amended through 2000 (47 U.S.C.A., Section 332). As indicated in my prior legal opinion of May 15, 2001, a number of cases have held that a moratorium on the erection of telecommunications towers may be upheld if relevant portions of the Statute are met. First, in regulating the placement, construction or modification of personal wireless facilities, state and local governments (and their instrumentalities) "shall not unreasonably discriminate among providers of functionally equivalent services." Second, local zoning regulations "shall not prohibit or have the effect of prohibiting the provision of personal wireless services." Third, state and local officials "are charged with a duty to act on applications for permits or variances regarding towers, poles or antennas within a reasonable period of time after the

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request is duly filed... taking into account the nature and scope of such request." Fourth, denials of such permits or variances "shall be in writing and supported by substantial evidence in a written record." Fifth, denials of such permits or variances cannot be based on "the environmental effect or radio frequency emissions" that comply with FCC regulations "concerning such emissions." 47 U.S.C.A. Section 332(7)(B)(i-v).

The moratorium adopted by the Town Council on July 3, 2001 was adopted to enable the Town to develop reasonable regulations regarding the placement of telecommunications towers and so the Town may study, deliberate and make decisions concerning the towers. There are cases that have held that a six month moratorium, such as the one adopted by the Town Council on July 3, 2001, is a reasonable period of time for the Town to make these evaluations and decisions. In my Memorandum of May 15, 2001, I set forth a brief review of some of the significant issues presented in a number of cases in this area. I listed a number of cases which upheld the institution of a moratorium, as well as a number of cases in which the governing body had violated the Telecommunications Act of 1996. Many courts have construed the Telecommunications Act of 1996 as expansive legislation designed primarily to increase competition in the telecommunications industry and have strictly construed the Act against municipalities whose regulations have the effect of prohibiting personal wireless services and competition in the telecommunications industry. I also pointed out in my prior legal opinion that the Town Council must be aware that although it is possible to impose a valid moratorium on the construction of telecommunications towers, that there is also a good likelihood that such a moratorium could result in a challenge to its validity brought by a provider of telecommunications services in Federal Court. In view of the further legal research conducted by the Town Attorney's Office, it is the Town Attorney's opinion that in view of the applicable law on this subject, the adoption of this amendment to Ordinance No. 2001-35 will narrow the application of the Moratorium Ordinance so that only new towers are prohibited rather than collocations on existing towers, and this will actually make the Moratorium Ordinance more legally defensible to a challenge in Federal Court.

The case of AT&T Wireless PCS, Inc. v. City of Virginia Beach, 155 Fed. 3d 423 (U.S. 4<sup>th</sup> Cir. Ct. App. 1998), a 4<sup>th</sup> Circuit Court of Appeals case, held that the City's denial of a church's application for a conditional use permit to construct communications towers for use by communications providers did not unreasonably discriminate against providers in violation of the Telecommunications Act. Even if the City discriminated, it did not do so unreasonably, as there was no evidence that the City had any intent to favor one company or a former service over another and opposition to the application was based on concerns of preserving neighborhood character and avoiding aesthetic blight. The court further held that the City Council's denial of the conditional permit to build a communications tower for use by a wireless communications service provider was supported by substantial evidence contained in a written record. The fact that the amendment to Ordinance No. 2001-35 amends the existing Ordinance to permit the placement of a wireless telecommunications antenna on an existing tower while continuing to prohibit during the moratorium, the acceptance of applications for the placement and construction of new telecommunications towers should not be viewed as unreasonably discriminating against providers in violation of the Telecommunications Act as long as the Town does not favor one company or service over another.

Further, in the AT&T Wireless PCS, Inc. v. City of Virginia Beach case, the court further stated at page 427 citing the Conference Report on the Telecommunications Act, "We note that the Conference Report cited by the District Court and both sides of this case, support this view. It condemns decisions that "unreasonably favor one competitor over another" but emphasizes the conferees' intent that the discrimination clause "will provide localities with the flexibility to treat facilities that create different visual, aesthetic or safety concerns differently to the extent permitted under generally applicable zoning requirements, even if those facilities provide functionally equivalent services." In short, the proposed amendment does not discriminate in favor of any particular carrier, but rather, seeks to address different visual, aesthetic and safety issues created by the erection of new towers versus co-location on existing towers.

Accordingly, will you please place the proposed Ordinance amending existing Ordinance No. 2001-35 on the earliest possible Town Council Agenda for first reading. Also attached, please find a proposed Town of Davie Town Council Agenda Report to accompany the proposed Ordinance amending existing Ordinance No. 2001-35.

MDK/gmv  
enclosures

ORDINANCE NO. \_\_\_\_\_

AN ORDINANCE OF THE TOWN OF DAVIE, FLORIDA AMENDING ORDINANCE NO. 2001-35 TO PROVIDE THAT THE SIX MONTH MORATORIUM ON THE ACCEPTANCE OF APPLICATIONS FOR WIRELESS TELECOMMUNICATION TOWERS SHALL NOT APPLY TO APPLICATIONS RELATING TO THE PLACEMENT OF WIRELESS TELECOMMUNICATION ANTENNAS ON EXISTING WIRELESS TELECOMMUNICATION TOWERS; PROVIDING FOR EXCEPTIONS; SETTING FORTH EXPIRATION AND EFFECTIVE DATES.

**WHEREAS**, on July 3, 2001, the Town of Davie adopted Ordinance No. 2001-35 imposing a six-month moratorium on the acceptances of applications for wireless telecommunication towers and antennas and on the issuance of permits and approval for the construction of wireless telecommunication towers; and

**WHEREAS**, the Town has determined that there are differences between the visual aesthetic and safety concerns relating to the installation of new telecommunication towers and those relating to the placement of telecommunication antennas on existing towers (i.e. co-locations), and that such differences establish a rational basis for exempting co-locations from the moratorium imposed by Ordinance No. 2001-35; and

**WHEREAS**, The Town has also determined that it will be in the public interest and not inconsistent with the purposes of the moratorium to allow continued placement of wireless telecommunication antennas on existing wireless telecommunications towers during the moratorium imposed by Ordinance No. 2001-35;

**NOW, THEREFORE, BE IT ORDAINED BY THE TOWN COUNCIL OF THE TOWN OF DAVIE, FLORIDA, THAT:**

**SECTION 1.** Section 2 of Ordinance No. 2001-35 is hereby amended to read as follows:

The following applications may be considered exemptions to the Ordinance:

1. Any complete application for a tower which was on file prior to the first reading of the Ordinance and which is subsequently determined by the Town Council to meet all applicable requirements on the Land Development Code;
1. Any tower which is determined by the Town Council to be necessary to any governmental utilities or emergency communications system;
1. Any application for the placement of a wireless telecommunication antenna on an existing tower, provided the placement of such antenna on the tower is otherwise in compliance with all applicable provisions of the Town of Davie Code of Ordinances.

**SECTION 2.** All ordinances or parts of ordinances in conflict herein are hereby repealed to the extent of such conflict.

**SECTION 3.** If any section, subsection, sentence, clause, phrase or portion of this Ordinance is for any reason, held invalid or unconstitutional by any Court of competent jurisdiction, then such portion shall be deemed a yseparate, distinct, and independent provision and such holding shall not effect the validity of the remaining portions of this Ordinance.

**SECTION 4.** This Ordinance shall take effect upon its passage and adoption.

**PASSED ON FIRST READING** this \_\_\_\_\_ day of \_\_\_\_\_, 2001.

**PASSED ON SECOND READING** this \_\_\_\_\_ day of \_\_\_\_\_, 2001.

\_\_\_\_\_  
MAYOR/COUNCILMEMBER

ATTEST:

\_\_\_\_\_  
TOWN CLERK

APPROVED THIS \_\_\_\_\_ day of \_\_\_\_\_, 2001.