

RESOLUTION NO. 2020-168

A RESOLUTION OF THE CITY COMMISSION OF THE CITY OF COCONUT CREEK, FLORIDA, AUTHORIZING AND DIRECTING THE CITY ATTORNEY, ON BEHALF OF THE CITY, TO ENGAGE THE SERVICES OF OUTSIDE COUNSEL TO FILE AN APPEAL REGARDING THE FEDERAL COMMUNICATIONS COMMISSION'S NEW DECLARATORY RULING UNDER WT DOCKET NUMBER 19-250, ENTITLED "IMPLEMENTATION OF STATE AND LOCAL GOVERNMENTS' OBLIGATION TO APPROVE CERTAIN WIRELESS FACILITY MODIFICATION REQUESTS UNDER SECTION 6409(a) OF THE SPECTRUM ACT OF 2012," AND TO JOIN THE COALITION OF CITIES AND COUNTIES NATIONWIDE SEEKING RELIEF FROM THE OVERREACHING AND BURDENSOME RULING ADOPTED THEREBY, IN ORDER TO PRESERVE THE CITY'S RIGHTS AND REMEDIES THEREUNDER; PROVIDING FOR SEVERABILITY; AND PROVIDING AN EFFECTIVE DATE.

WHEREAS, on June 9, 2020, the Federal Communications Commission ("FCC") issued a new Declaratory Ruling under WT Docket No. 19-250; RM-11849, "In the Matter of Implementation of State and Local Governments' Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012," for ease of reference these new rules are referred to herein as the "New Mandatory Approval Rules;" and

WHEREAS, the New Mandatory Approval Rules significantly undercut every local jurisdictions' authority over currently existing wireless infrastructure by setting a new standard for commencement of the 60-day review shot-clock, allowing an increase in facility height (beyond previously established thresholds), allowing an increase in the number of equipment cabinets under modifications deemed to be non-substantial, allowing such modifications to defeat concealment qualities, and offend previously established conditions under local governmental special land use approvals and the like; and

WHEREAS, cities, counties, and local government organizations across the nation, have once again joined together to address this existential threat to home rule

power and the FCC's overall endorsement of the telecommunications industry's agenda;
and

WHEREAS, the City Commission has already participated in this proceeding by filing two (2) separate comments for consideration by the FCC: first, its letter dated October 24, 2019, advocating broadly for the FCC's restraint in this arena; and second, its letter dated July 21, 2020, responding to the FCC's specific request for comments on an interpretation of the word "site" that would allow an automatic thirty (30) foot expansion of all facility ground compounds, see both attached as "Composite Exhibit A;" and

WHEREAS, if the FCC's New Mandatory Approval Rules are not challenged through an appeal, the City will have very little, if any, oversight and authority to analyze modifications to approximately fifteen (15) currently existing wireless facility sites located within the City; and

WHEREAS, there is reason to believe that the current climate now created through the FCC's action on these New Mandatory Approval Rules will bring about more litigation, rather than reconciliation of claimed ambiguities in the old rules; and

WHEREAS, several national law firms are working cooperatively to represent the interests of local governments with the goal of appealing the New Mandatory Approval Rules; and

WHEREAS, after conducting due diligence into the City's options for legal representation, the City Staff recommends Kenneth S. Fellman, Esq., of Kissinger and Fellman, P.C. (the "Firm"), located in Denver, Colorado, as a nationally recognized legal expert in both telecommunications law and local government law, and someone who is uniquely situated to be the best legal representative of the City; and

WHEREAS, the Firm also represents the City in its currently pending appeal of the FCC's 2018 Small Cell Preemption Order, authorized through Resolution No. 2018-257, and reaffirmed in Resolution No. 2019-094, wherein oral argument was held before

the United States Court of Appeals for the Ninth Circuit on February 10, 2020, and the City is awaiting the Court's opinion; and

WHEREAS, the Firm has offered to represent the City, as part of the coalition of cities, counties, and local government organizations nationwide, through the conclusion of the appeal process for a not-to-exceed \$2,500 flat fee, including costs, which is anticipated to include, at a minimum, the notice of appeal, initial brief, reply brief, various motions, and oral arguments; and

WHEREAS, the City Commission believes it is in the best interest of the residents of the City to pursue its legal remedies by engaging the services of outside counsel to file an appeal of the FCC's New Mandatory Approval Rules and join local jurisdictions across the nation in the fight to preserve its home rule powers.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COMMISSION OF THE CITY OF COCONUT CREEK, FLORIDA:

Section 1: That the foregoing "WHEREAS" clauses are hereby ratified and confirmed as being true and correct and are hereby made a specific part of this resolution. "Composite Exhibit A" is attached hereto and specifically made a part hereof.

Section 2: That the City Commission hereby authorizes and directs the City Attorney, or her designee, to engage the services of outside counsel to file an appeal of the New Mandatory Approval Rules, and naming the City as a party.

Section 3: That the City Manager, or designee, is hereby authorized to execute legal representation agreement(s) and any other necessary documents pertaining to the appeal, subject to review and approval by the City Attorney, to effectuate the intent of this resolution.

Section 4: That if any clause, section, other part or application of this resolution is held by any court of competent jurisdiction to be unconstitutional or invalid, in part or in application, it shall not affect the validity of the remaining portion or applications of this resolution.

Section 5: That this resolution shall be in full force and effect immediately upon its adoption.

Adopted this 27th day of August _____, 2020.

Louis Sarbone, Mayor

Attest:

Leslie Wallace May, City Clerk

Sarbone Aye

Rydell Aye

Tooley Aye

Belvedere Aye

Welch Aye

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FCC Order Appeal (Existing Facilities Rules)_Draft 8.7.2020.docx
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