

Local Government Guide
to the
Application of the Florida E911 Statute to
Wireless Site Development

Provided to local governments by:

Sprint-Nextel and Verizon Wireless

Through

Laura B. Belflower, P.A.

Local Government Guide to the Application of the Florida E911 Statute to Wireless Site Development

The provisions of section 365.172(11)¹, Florida Statutes, were significantly revised in the 2005 legislative session. The following is an analysis of how the statute provisions apply to the local government review and permitting of wireless sites. The analysis is grouped by the types of site development activities, with a general applicability introduction. The major sections of the statute at issue are subsections 365.172(12) and the applicable definitions in subsection 365.172(3). References to “the statute” in this analysis will be to these two subsections. A copy of both subsections, in full, is attached as Attachment “A.”

Applicability

Which Wireless Facilities Are Addressed By the Statute

The statute addresses the regulation of the placement, construction, or modification of all wireless communications facilities. Under the statute, a wireless communications facility² is any equipment or facility used to provide commercial mobile radio service,³ including antennae, towers, equipment enclosures, cabling, antenna brackets, and other such equipment. In this analysis, these facilities are referred to as “wireless facilities.”

The statute also addresses activities of wireless “providers.” Under the statute, a “wireless provider”⁴ is a person or entity that provides “service” and either is subject to the requirements of a FCC order⁵ to provide wireless 911⁶ or E911⁷ services or who elects to provide wireless 911 or E911 services in this state.⁸

Although the statute is under the E911 section of the statutes, there does not have to be proof that the specific wireless communications facility provides E911 service. The statute recognizes that wireless facilities are part of a network and that E911 services are provided

¹ With subsequent changes to section 365.172, subsection (11) was renumbered to subsection (12). All subsequent references in this document to the previous subsection (11) will be to subsection (12).

² §365.172(3)(dd).

³ (z) “Service” means “commercial mobile radio service” as provided under ss. 3(27) and 332(d) of the Federal Telecommunications Act of 1996, 47 U.S.C., ss. 151 et seq. , and the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, August 10, 1993, 107 Stat. 312. The term “service” includes the term “wireless” and service provided by any wireless real-time two-way wire communication device, including radio-telephone communications used in cellular telephone service; personal communications service; or the functional or competitive equivalent of a radio-telephone communications line used in cellular telephone service, a personal communications service, or a network radio access line. The term does not include wireless providers that offer mainly dispatch service in a more localized, noncellular configuration; providers offering only data, one-way, or stored-voice services on an interconnected basis; providers of air-to-ground services; or public coast stations.”

⁴ §365.172(3)(v).

⁵ §365.172(3)(t).

⁶ §365.172(3)(ee).

⁷ §365.172(3)(i).

⁸ The statute addresses all entities that place, construct or modify the wireless facilities used to provide commercial mobile radio services, but those entities that provides “service,” but not E911 services, do not qualify for the statutory provisions addressing “providers.” This may be a distinction without a material difference, however, because the federal requirements of the Telecommunication Act of 1996 (47 C.F.R. 332(c)(7)(B)(i)(I)) prevent local governments from discriminating against functionally equivalent providers of personal wireless services.

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through the whole network, rather than individual parts. The intent statement of the statute makes clear that E911 and the wireless network are tied together; a reliable E911 system can only exist if there are reliable wireless systems.⁹

What Government Entities and What Actions of Those Entities Must Meet the Statute

The statute applies to the actions of “local governments.” Although the term “local government” has a broad meaning for section 365.172, as a whole¹⁰, for the wireless placement section, the definition is narrower. In this section “local government” only means municipalities or counties and any department or agency of a municipality or county.¹¹ The term “local government” does not, however, include any airport authority or other entity that controls an airport¹², even if it is owned or controlled by a municipality or county.¹³

The statute only controls the regulatory activities of a local government, such as zoning, building permit reviews, and other permitting activities. It does not control a local government's actions as the owner of any property or structure on which a wireless facility is, or is proposed to be, located. A local government may not, however, use its regulatory authority to promote or force the use of the property it owns to avoid compliance with or in a way that is inconsistent with the statute.¹⁴

Collocations

The statute takes the position that collocations are encouraged.¹⁵ Under the statute, a “collocation” is “when a second or subsequent wireless provider uses an existing structure to locate a second or subsequent antennae.”¹⁶

One change from the previous wording of the statute clarifies that a collocation on a tower, or other structure, does not mean that all parts of the collocation have to be located on the structure; the equipment may be located on the ground and still be a collocation under the statute.¹⁷ Additionally, the tower or other structure may be nonconforming to the local government's current regulations (as long as it met the applicable requirements when it was built) and still accept collocations.¹⁸ If the collocation meets the criteria of the statute, and is not

⁹ “To balance the public need for reliable E911 services through reliable wireless systems and the public interest served by governmental zoning and land development regulations . . .” §365.172(12) introductory paragraph.

¹⁰ §365.172(3)(p) “Local government” means any municipality, county, or political subdivision or agency of a municipality, county, or political subdivision.”

¹¹ §365.172(12), introductory paragraph.

¹² §330.27(2) “Airport” means an area of land or water used for, or intended to be used for, landing and takeoff of aircraft, including appurtenant areas, buildings, facilities, or rights-of-way necessary to facilitate such use or intended use.”

¹³ §365.172(12), introductory paragraph.

¹⁴ Id.

¹⁵ “Collocation among wireless providers is encouraged by the state.” §365.172(12)(a).

¹⁶ §365.172(3)(g).

¹⁷ The definition of collocation states that the term includes the “ground, platform, or roof installation of equipment enclosures, cabinets, or buildings, and cables, brackets, and other equipment associated with the location and operation of the antennae.” §365.172(3)(g).

¹⁸ §§365.172(12)(a)1.a. and (12)(a)3.

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in the “all other collocations” category discussed below, it is not considered a “modification” to an existing structure¹⁹

Collocations are divided, in the statute, into four groups: collocations on existing towers that meet certain criteria, collocations on non-tower structures that meet certain criteria, collocations that meet some, but not all, of the criteria, and all other collocations.

Collocation on existing towers

Collocations on towers are supposed to be quickly and easily achieved. To clarify the provisions of section 365.172(12)(a) adopted in 2003 and as part of a compromise with the representatives of the Florida League of Cities and Florida Association of Counties, it was agreed that towers²⁰ are approved for the supporting of antennas and they should, therefore, be allowed to be fully utilized for that purpose. Therefore, if a collocation request to place antennas on a tower meets all of the three listed criteria, it is to be reviewed through no more than a building permit review and on a more expedited schedule.

The three listed criteria²¹ are

- 1) the collocation does not increase the height of the tower, measured to the highest point of any part of the tower or any existing antenna attached to the tower;
- 2) the collocation does not increase the ground equipment compound area approved in the latest applicable site plan; and
- 3) all parts of the collocation meet whatever design and configuration requirements were applicable to the first antenna approved on the tower, and, if relevant, those applied to the tower itself.

The first two criteria are fairly straight forward. The third may require investigation to see what conditions were put on the tower approval and/or what the regulations (land development code) in place at the time the tower was approved required.

Only the design and configuration requirements of the time apply.²² This means that conditions that require collocations to go through more involved reviews or regulations that limit the number of collocations²³ do not apply.

If these three criteria are met, the collocation application is only subject to a building permit review.²⁴ Under the statute, a “building permit review” is defined as “a review for compliance with building construction standards adopted by the local government under chapter

¹⁹ §365.172(12)(a)3.

²⁰ "Tower" is defined in the statute to mean “any structure designed primarily to support a wireless provider's antennae.” §365.172(3)(cc).

²¹ §365.172(12)(a)1.a..

²² “Such regulations may include the design and aesthetic requirements, but not procedural requirements ... of the local government's land development regulations in effect at the time the initial antennae placement was approved.” §365.172(12)(a)1.a.(III).

²³ §365.172(12)(a)1.c.

²⁴ §365.172(12)(a)1.a.

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553 [Florida Statutes] and does not include a review for compliance with [the local government's] land development regulations.”²⁵ The regulations of the local governments that typically regulate wireless facilities are considered land development regulations²⁶ under the statute, whether they are adopted as part of the local land development code or as a free-standing ordinance.

Therefore, a collocation on an existing tower that meets the three criteria bypasses any site plan or zoning review process and goes straight to building permit review. The only zoning type review allowed is a review to determine compliance with the three criteria, which must be done as part of the building permit review, not as a separate process. The local government cannot bring in the land development regulation provisions into the building permit review. The building permit review cannot be subjected to any procedural requirements, or any other provisions, of the land development regulations or to a public hearing.²⁷

In summary, collocations on towers that do not increase the existing height, do not increase the approved compound, and are of a design and configuration consistent with the design and aesthetic requirements that applied when the first antenna on the tower was approved are to be reviewed through no more than a building permit review.

Collocations that meet these criteria are also to be reviewed on an expedited schedule. The statute provides that properly completed applications for collocations that meet these criteria are to be granted or denied within the normal timeframes for building permit reviews, but in no case longer than 45 business days.²⁸ If the application is not granted or denied in that timeframe, the application is deemed to be automatically approved.²⁹

There are limitations and qualifications on the timeframe and the automatic approval, but the intention is that collocations are not to be held up in review. The full process, timeframes and waivers are described below in “Review Timeframes” under “Ordinance Requirements and Review Limitations.”

Collocations on existing non-tower structures that are not “historic.”

Collocations on existing structures that are not towers and are not “historic”³⁰ are also supposed to be quickly and easily achieved, but are subject to slightly more review. The basic difference from those on towers is that collocations on non-historic, non-tower structures must also meet the current land development regulations design and location requirements that are in

²⁵ §365.172(3)(f).

²⁶ “Land development regulations” means any ordinance enacted by a local government for the regulation of any aspect of development, including an ordinance governing zoning, subdivisions, landscaping, tree protection, or signs, the local government's comprehensive plan, or any other ordinance concerning any aspect of the development of land. The term does not include any building construction standard adopted under and in compliance with chapter 553.” §365.172(3)(n).

²⁷ §365.172(12)(a)1.a.

²⁸ §365.172(12)(d)1.

²⁹ §365.172(12)(d)3.b.

³⁰ Structures that have not been “officially designated as a historic building, historic structure, historic site, historic object, or historic district through a federal, state, or local designation program.” §365.172(3)(m).

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the local government's land development regulations at the time of the collocation application³¹ and they are subject to an administrative review for compliance with those requirements.³²

For these collocations there are four applicable criteria:³³

- 1) the collocation does not increase the height of the existing structure, measured to the highest point of any part of the structure or any existing antenna attached to the structure;
- 2) the collocation does not increase the ground equipment compound area, if any, approved in the latest applicable site plan;
- 3) all parts of the collocation are of a design and configuration consistent with whatever structural, locational, or aesthetic design requirements are in the local government's land development regulations at the time of the application; and
- 4) all parts of the collocation meet whatever design and configuration requirements were applicable to the first antenna approved on the tower, that do not conflict with 3), and, if relevant, those applied to the tower itself.

Provisions 1) and 2) are the same as for collocations on towers. Provisions 3) and 4) are a bit more involved. Provision 3) says that the collocation must be consistent with any applicable structural, aesthetic or location-on-the-structure requirements in the local government's current land development regulations. Provision 4) says that all parts of the collocation must meet whatever requirements were applicable to the first antenna approved on the tower, and, if relevant, those applied to the tower itself, unless they conflict with the provisions under 3). In other words, the collocation must be consistent with the current code requirements (provision 3) and be consistent with requirements on first the antenna that do no conflict with current code requirements (provision 4). This will usually mean that the more restrictive requirement will control, but not always.

Collocations on non-tower structures that meet the criteria are subject to no more than a building permit review and a minimal administrative review as is necessary to confirm compliance with these provisions. The administrative review should be minimal and cannot include a public hearing.³⁴

The same definitions of "building permit review" and "land development regulations" discussed above for collocations on towers also apply to these collocations. The provision prohibiting conditions that require collocations to go through more involved reviews or regulations that limit the number of collocations³⁵ also applies to these collocations. Collocations on non-historic, non-tower structures that meet the criteria are also to be heard on the same expedited schedule as those on towers – no more than 45 business days, but, as discussed below in "Review Timeframes," if the review process requires two distinct application steps, each application has a separate 45 day timeframe.

³¹ §365.172(12)(a)1.b.(III).

³² §365.172(12)(a)1.b.

³³ §365.172(12)(a)1.b.(I) – (IV).

³⁴ §365.172(12)(a)1.b.

³⁵ §365.172(12)(a)1.c.

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In summary, collocations on non-historic, non-tower structures that do not increase the existing height, do not increase the approved ground compound, and are of a design and configuration consistent with the design and aesthetic requirements of the current code and the requirements in place at the time of the first antenna placement on the structure, are to be reviewed through no more than a simple administrative process, to confirm the requirements are met, and a building permit review.

Collocations That Only Meet Some of the Criteria

If a collocation on a tower or a non-historic structure meets some of the applicable criteria, but not all, the part of the collocation that meets the requirements are to be reviewed in accordance with the requirements summarized above and the part that does not is to be reviewed through whatever requirements and process would apply to a first antenna placement on that type of structure.³⁶ By way of example, if a collocated antenna to be placed on a tower will be taller than the existing antenna or tower height, but all other parts of the collocation meet the applicable criteria, then only a building permit review is required to place the equipment shelter, run the cable and authorize the placement of a new antenna on the tower. The fact that the antenna will be taller, however, is subject to whatever review and whatever standards the local government requires for increases in height, including, potentially, a public hearing review. Only the implications of the height increase can be reviewed, however, not whether the antenna needs to be there, whether landscaping would now be required around the compound, or anything else that is not related to the increase in height. The shorter collocation timeframes would also not apply to the height increase evaluation.

The exception to the potential of a public hearing review for not meeting the criteria is for an expansion of a ground compound. A collocation that meets all of the other applicable criteria, but requires an increase in the compound size by no more than the greater of 400 cumulative square feet or 50 percent of the original compound size, must meet the current design, aesthetic and locational standards, but cannot trigger more than an administrative and building permit review.³⁷ Such a compound increase cannot trigger a public hearing review.

All Other Collocations

“Historic” collocations or any other collocation that does not fall into the other groups must meet whatever the current requirements are under the local government’s land development regulations for a first antenna placement.³⁸

Modifications To Or Replacement Of Towers

The statute³⁹ provides that no more than an administrative review and building permit review is required for structural modifications to an existing tower to allow collocation or for

³⁶ §365.172(12)(a)1.d.

³⁷ Id.

³⁸ §365.172(12)(a)2.

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replacement of the tower, even if the tower is nonconforming, as long as the following parameters are met:

- 1) the overall height of the tower is not increased; and
- 2) if the change involves the replacement of the existing tower, the replacement tower is a monopole tower or, if the existing tower is a camouflaged tower, the replacement tower is a like-camouflaged tower.

Raw Land Sites And First Antenna Placements Under The Statute

Wireless Service/Wireless Facilities in Residential Areas

One provision of the statute addresses a major concern in some areas – providing service to residential areas. The statute⁴⁰ provides that a local government may draft or implement its regulations to exclude wireless facilities from a residential area or residential zoning district, but only if such exclusion does not constitute an actual or effective prohibition of an applicant’s provision of service in that residential area or zoning district. This means that a local government can draft its regulations to prohibit wireless facilities in residential zoning districts or to make placing a wireless facility in residential areas very difficult, but such restrictions cannot actually prohibit or have the end effective of prohibiting the particular provider from providing its service to those areas. It is important to note that what cannot be prohibited is that provider’s service, not just any service. This means that even if other providers are able to reach a residential area with their services, if the applicant provider cannot, it constitutes a prohibition of service for that provider.

If the provider can prove to the local government that the provider cannot reasonably provide its service to a residential area from outside that area, such as from surrounding commercial or industrial areas, the statute provides that the municipality or county and the provider must work together to find an appropriate location for a wireless facility of an appropriate design within the residential area or zone.⁴¹ The local government may required the provider pay for reasonable costs incurred in the cooperative effort and the statutory review timeframes do not apply to the cooperative effort.

Setbacks and Separations

The statute provides that setbacks or distance separations required for a tower, such as setback distances from residential zoning or tower to tower separations, may not exceed the minimum necessary to satisfy the structural or aesthetic reason the requirement was created.⁴² This provision is intended to, first, require that a local government have a reason for the setbacks and separations they impose; something they are trying to achieve in applying the restriction. Secondly, the restriction cannot be more than the minimum necessary to achieve the objective of the restriction.

³⁹ §365.172(12)(a)5

⁴⁰ §365.172(12)(b)3.

⁴¹ Id.

⁴² §365.172(12)(b)2.

Ordinance Requirements and Review Limitations

No Proof of Compliance With Federal Regulations

One provision that has been law since 2003, is the restriction⁴³ that a local government may not require providers to prove that their facilities comply with federal regulations. The only exception, which was added in 2005, is that the local government can require evidence of compliance with the applicable FAA air navigation hazard requirements.⁴⁴ The local government can also require the provider to provide evidence that they have an FCC license or other spectrum authorization for the area. If the local government has any concern that federal requirements are not being met, they may ask the FCC for information of the provider's compliance, but cannot require the information from the provider.

This provision recognizes that the local governments have no role in ensuring compliance with federal requirements and cannot make their local decisions or take action based on whether they feel the wireless facility meets those requirements. This provision, coupled with the requirement that all reviews must be based on land development and zoning issues, discussed below, means that local governments must focus their review on the relevant local issues and not on issues outside of their authority.

Regulations and Reviews Limited To Land Development and Zoning Issues

The statute crystallized a concept that has likely been the case since the amendment of the federal Telecommunications Act in 1996, but is now formalized – local governments' authority in reviewing wireless facilities is limited to addressing only land development and zoning issues.⁴⁵ The statute provides that a local government's land development regulations and construction regulations, as well as the local government's review of specific applications for the placement, construction or modification of wireless facilities, cannot address a wireless provider's business decisions about when and where to provide its service, cannot require proof of customers' complaints or dropped calls, evidence of capacity or interference issues or other service need or quality issues. The provider can volunteer the information in making its case, but the local government cannot demand the information and cannot deny an application because it was not provided.

The only time that information about the provider's designed service⁴⁶ can be requested is when it is relevant to a land development or zoning issue. The statute provides three examples of when this information might be requested: 1) as evidence that no existing structure can reasonably be used for the antennae placement, instead of the construction of a new tower 2) as evidence that residential area cannot be served from outside the residential area and 3) as

⁴³ §365.172(12)(c).

⁴⁴ This does not mean that an FAA approval is required for each site; a qualified expert's statement of the facility's compliance with the FAA regulations would be sufficient.

⁴⁵ §365.172(12)(b)1.

⁴⁶ “‘Designed service’ means the configuration and manner of deployment of service the wireless provider has designed for an area as part of its network.” §365.172(3)(h).

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evidence that the proposed height of a new tower or initial antennae placement or a proposed height increase of a modified tower, replacement tower, or collocation is necessary to provide the provider's designed service.⁴⁷ There may be other land development or zoning issues that could justify the provision of information about the provider's service design, but the local government must make the connection between the information and such an issue before it can be part of the review.

This provision is based on a similar concept as the prohibition of proof of compliance with federal regulations discussed above – the federal government has pre-emptive authority over almost all aspects of wireless facilities, leaving the local governments only with their traditional zoning authority over wireless facilities – coupled with the concept that businesses should not have to justify their business decisions. This provision does not limit the land development and zoning issues local government's may consider, including aesthetics, but requires that the local government's ordinances for, and reviews of, wireless facilities only be limited to those issues.⁴⁸

Building Code Type Regulations

A portion of the statute that most often will be addressed in ordinance drafting, but may have application on a site by site basis, is a provision⁴⁹ that prevents local governments from imposing building code type requirements on wireless facilities that are not adopted in the local government's building code and are not applicable to all other similar structures. This does not mean that the local government cannot impose design requirements such as designing the tower for collocation or as a camouflaged structure, but they may not hold wireless facilities to higher construction standards than other similar structures. This provision means that, by way of an example, a local government cannot require through its land development code that a wireless facility meet higher wind load requirements than are adopted in that local's government's building code or that commercial wireless facilities must meet EIA/TIA requirements that are not adopted as part of the building code. Under the statute, if a structural or construction building code type provision is not adopted in the local government's building code and is not applicable to all such structures (e.g. government owned as well as private towers), it cannot be applied to wireless facilities.

Expert Review

The statute does not prevent local governments from hiring consultants or experts to assist the local government in the review of applications for wireless facilities, and charging the applicant for such reviews, but does place limits. The first is that the review has to be tied to land

⁴⁷ §365.172(12)(b)1.

⁴⁸ This provision also has significant relevance in jurisdictions whose regulations favor property owned by the local government, or other governments, over privately owned properties, such as only allowing towers or other wireless facilities on government properties or putting government owned property as a "priority" site whose non-use must be justified. Designating priorities or appropriateness of sites by ownership is not basing decisions on land development or zoning issues, and, therefore, cannot be sustained. This point is substantiated by the list of some of the applicable land development or zoning issues in the statute, which includes "land use based location priorities," not ownership based location priorities.

⁴⁹ §365.172(12)(b)5.

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development or zoning issues, as discussed above; a consultant cannot do on behalf of the local government what the local government cannot do itself. Secondly, unless the local government is willing to shoulder the cost of the consultant itself, the consultant or expert retained must be one that “conduct[s] code compliance review[s] for the local government.”⁵⁰ This means that the consultant’s or expert’s review must be only to evaluate whether the application complies with the terms of the adopted code.

Reasonable Fees

The statute also addresses fees. The statute provides⁵¹ that a local government can charge a fee for the review of an application for a wireless facility, but 1) the fee must be reasonable and 2) the fee must be similar to what is charged to other applicants seeking similar types of review for other uses. By way of an example, if a local government charges an application fee of \$500 for the review of all other uses that require a special exception, the fee for a special exception for a wireless facility must be similar, i.e. not significantly different. The local government can also charge a fee for an expert’s or consultant’s review, as discussed above, but the fee is limited to specifically identified, reasonable, expenses actually incurred in the review.⁵² The application fee must be consistent with other fees in the jurisdiction and the consultant’s fee must be tied to actual costs of the review and be reasonable.

The statute does allow local governments to require a reasonable surety for the removal of abandoned wireless facilities.⁵³ The surety can only be for the removal of abandoned facilities and is not a general bond, such as is imposed by some local governments to ensure general compliance with its ordinance. By implication, local governments are not authorized by the statute to require other forms of surety or insurance, not connected with ensuring removal of abandoned facilities.

Review Timeframes

The version of the statute passed in 2003 had significant review timeframes, which have been further clarified in the 2005 version. Simply stated, the statute requires local governments to review and act on collocations that meet the specified criteria within no more than 45 business days after the application has been found to be complete and ready for review or the application is considered approved.⁵⁴ For all other types of wireless facilities, the timeframe is no more than 90 business days; after which the application is considered approved.⁵⁵

The statute provides⁵⁶ that, starting the day an application for review of a wireless facility is received by the local government, the local government has up to 20 business days to determine if the application submitted is complete for review, in compliance with the local

⁵⁰ §365.172(12)(b)4.

⁵¹ Id.

⁵² Id.

⁵³ Id.

⁵⁴ §§365.172(12)(d)1. and 3.b.

⁵⁵ §§365.172(12)(d)2. and 3.b.

⁵⁶ §365.172(12)(d)3.a.

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government's regulations. If the application is not complete, the local government must, within the 20 business days, so advise the applicant, in writing, indicating with specificity any deficiencies that need to be cured to make the application complete. If the local government does not notify the applicant in writing of such deficiencies, the application is deemed complete and ready for review.

If the local government advises the applicant that the application is not complete, the applicant may resubmit additional or revised materials to make the application complete. There is no timeframe established in the statute within which the applicant has to resubmit the materials, but the statute recognizes that the local government may establish reasonable timeframes for the resubmissions or the application will be considered withdrawn or closed.⁵⁷ When the curative materials are resubmitted, the review for completeness timeframe of 20 business days begins again. This notice of incompleteness and re-submittals may continue until the application is deemed complete or the locally adopted re-submittal timeframes have been exhausted.

If the respective review and action timeframes of 45 or 90 business days are not met by the local government, the application is deemed automatically approved and the applicant may proceed with the placing of the facility. It should be noted that the timeframes run independently for each application filed.⁵⁸ Therefore, if the subject review process takes multiple sequential steps involving a separate application in each step, each application has a separate review timeframe. By way of example, if a new tower requires a special exception review, an administrative site plan review and then a building permit review, each of those three steps are independent in both achieving application completeness and in the time the local government has to review the application. This point should not be relevant to collocations on towers reviewed under the 45 day timeframe because there should be only one application – for a building permit review – for these facilities, thereby preserving the expedited process for collocations.

Given that each review timeframe is independent, the failure of a local government to meet one timeframes, such as the special exception timeframe in the above example, does not mean that the following steps can be omitted and the facility placed immediately. The statute provides that “the applicant may proceed with placement of the facilities” For multiple step review processes, this should probably be read to mean the applicant may proceed with the remainder of the process necessary to place the facility.

There are two specific exceptions to the review timeframes, one of which applies to the 90 day timeframe and one of which applies to both timeframes. For the 90 day timeframe, the time may be extended to the extent necessary if the normal review process for all similar types of reviews puts a review by the jurisdiction's governing body (e.g. Board of County Commissioners or City Council) outside of the timeframe.⁵⁹ In such a case, the governing body must hear the application at its next regularly scheduled meeting or the application is considered automatically approved. By way of an example, if a county's Special Exception process for all uses, not just

⁵⁷ Id.

⁵⁸ §§365.172(12)(d)1. and 2. provide that the “local government shall grant or deny each properly completed application” within the respective timeframes. (emphasis added)

⁵⁹ §365.172(12)(d)3.b.

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wireless facilities, takes more than 90 business days for the final hearing before the Board of County Commissioners, an application for a Special Exception for a wireless facility can similarly extend beyond the 90 day limit. Unlike what may be the case for other uses, however, the Board of County Commissioners must hear the application for the wireless facility at the next scheduled Board meeting after the 90 business day timeframe or the application is considered approved. This exception only applies to review processes ultimately heard by the governing body at the end of the normal review process.

The second specific exception to the review timeframes is a waiver, either voluntary or because of a declared emergency.⁶⁰ A local government can request, but not require, a waiver of the timeframes by the applicant. To be effective, such a waiver must be voluntarily agreed to by the applicant and the local government. The local government can also require a one-time waiver per application in the case of a declared local, state, or federal emergency that directly affects the administration of all permitting activities of the local government. This required waiver should be viewed more as a tolling of the review timeframes during the time of a declared emergency that suspends all permitting activities than a waiver of the timeframe.

It would also be reasonable to construe the statute as allowing, after a finding that the application is complete and is in the review process, a tolling of the review timeframe during the time after the local government has provided comments to the applicant, on changes that are needed to make an application consistent with all the applicable regulations or are suggested as appropriate to receive a favorable recommendation or decision, and the time when the applicant responds to the comments. This would be consistent with the process for findings of completeness and would prevent the requirement of a “new” application every time the local government has comments on an application.

Maintenance and Repair

The statute⁶¹ provides that non-tower wireless facilities may be replaced or modified through no more than a building permit review if the replacement or modification results in a wireless facility that, if visible from the ground level of surrounding properties, cannot be readily discerned as different in size, type or appearance or is not visible from surrounding properties. This would allow antenna change-outs and equipment upgrades with no extraordinary review. If such a change does not trigger the local government’s requirements of a building permit, even that cannot be required. Whether the change is visible and readily discerned is up to the local government, but must be a decision reasonably made.

If the replacement or modification is visible and is discernibly different, the change may be able to be classified as a collocation and be subject to only the reviews allowed for collocations. If the change does not qualify as a collocation, it will probably be subject to whatever applicable review process the local government indicates in its regulations.

⁶⁰ §365.172(12)(d)3.c.

⁶¹ §365.172(12)(e).

Guide to the E911 Statute

Provided By **Sprint-Nextel** and **Verizon Wireless**

As to towers, it should be noted that almost all collocations cannot be considered a modification to an existing tower or an impermissible modification of a nonconforming tower.⁶² Additionally, towers, including nonconforming towers, may be structurally modified to permit collocation, or even replaced, whether for collocation or not, through no more than an administrative and building permit review, if certain requirements are met.⁶³

Use of State Owned Lands For Wireless Facilities

The 2003 version of the statute provided for the development of a process to make state owned lands, other than those controlled by the Florida Department of Transportation, available for wireless facilities. The language is virtually unchanged in the 2005 version of the statute.⁶⁴ The Florida Division of Management Services has prepared rules to implement this provision, which went into effect April of 2005. The rules can be found at Chapter 60H-9, Florida Administrative Code.

Expedited Review of Appeals

Any appeals on decisions by local governments on wireless facilities, beyond the administrative appeals within the local government, and any action filed based on an action or failure to act under the statute are to be heard on an expedited basis.⁶⁵ This brings the provision for expedited review found for federal actions on wireless facilities to a state level.

Effective Date

The statute went into effect July 1, 2005.

⁶² §365.172(12)(a)3.

⁶³ “[I]f the overall height of the tower is not increased and, if a replacement, the replacement tower is a monopole tower or, if the existing tower is a camouflaged tower, the replacement tower is a like-camouflaged tower.” §365.172(12)(a)5.

⁶⁴ §365.172(12)(e).

⁶⁵ §365.172(12)(g).

Attachment "A"

Pertinent Parts of the Florida E911 Statute

365.172 Wireless emergency telephone number "E911."--

(3) DEFINITIONS. -- Only as used in this section and ss. 365.173 and 365.174, the term:

(a) "Active prepaid wireless telephone" means a prepaid wireless telephone that has been used by the customer during the month to complete a telephone call for which the customer's card or balance was decremented.

(b) "Answering point" means the public safety agency that receives incoming 911 calls and dispatches appropriate public safety agencies to respond to the calls.

(c) "Automatic location identification" means the capability of the E911 service which enables the automatic display of information that defines the approximate geographic location of the wireless telephone used to place a 911 call.

(d) "Automatic number identification" means the capability of the E911 service which enables the automatic display of the 10-digit service number used to place a 911 call.

(e) "Board" means the board of directors of the Wireless 911 Board.

(f) "Building-permit review" means a review for compliance with building construction standards adopted by the local government under chapter 553 and does not include a review for compliance with land development regulations.

(g) "Collocation" means the situation when a second or subsequent wireless provider uses an existing structure to locate a second or subsequent antennae. The term includes the ground, platform, or roof installation of equipment enclosures, cabinets, or buildings, and cables, brackets, and other equipment associated with the location and operation of the antennae.

(h) "Designed service" means the configuration and manner of deployment of service the wireless provider has designed for an area as part of its network.

(i) "E911" is the designation for a wireless enhanced 911 system or wireless enhanced 911 service that is an emergency telephone system or service that provides a subscriber with wireless 911 service and, in addition, directs 911 calls to appropriate public safety answering points by selective routing based on the geographical location from which the call originated, or as otherwise provided in the state plan under s. 365.171, and that provides for automatic number identification and automatic location-identification features in accordance with the requirements of the order.

(j) "Existing structure" means a structure that exists at the time an application for permission to place antennae on a structure is filed with a local government. The term includes any structure that can structurally support the attachment of antennae in compliance with applicable codes.

(k) "Fee" means the E911 fee imposed under subsection (8).

(l) "Fund" means the Wireless Emergency Telephone System Fund established in s. 365.173 and maintained under this section for the purpose of recovering the costs associated with providing 911 service or E911 service, including the costs of implementing the order.

(m) "Historic building, structure, site, object, or district" means any building, structure, site, object, or district that has been officially designated as a historic building, historic structure, historic site, historic object, or historic district through a federal, state, or local designation program.

(n) "Land development regulations" means any ordinance enacted by a local government for the regulation of any aspect of development, including an ordinance governing zoning, subdivisions, landscaping, tree protection, or signs, the local government's comprehensive plan, or any other ordinance concerning any aspect of the development of land. The term does not include any building construction standard adopted under and in compliance with chapter 553.

(o) "Local exchange carrier" means a "competitive local exchange telecommunications company" or a "local exchange telecommunications company" as defined in s. 364.02.

(p) "Local government" means any municipality, county, or political subdivision or agency of a municipality, county, or political subdivision.

(q) "Medium county" means any county that has a population of 75,000 or more but less than 750,000.

(r) "Mobile telephone number" or "MTN" means the telephone number assigned to a wireless telephone at the time of initial activation.

(s) "Office" means the State Technology Office.

(t) "Order" means:

1. The following orders and rules of the Federal Communications Commission issued in FCC Docket No. 94-102:

a. Order adopted on June 12, 1996, with an effective date of October 1, 1996, the amendments to s. 20.03 and the creation of s. 20.18 of Title 47 of the Code of Federal Regulations adopted by the Federal Communications Commission pursuant to such order.

b. Memorandum and Order No. FCC 97-402 adopted on December 23, 1997.

c. Order No. FCC DA 98-2323 adopted on November 13, 1998.

d. Order No. FCC 98-345 adopted December 31, 1998.

2. Orders and rules subsequently adopted by the Federal Communications Commission relating to the provision of wireless 911 services.

(u) "Prepaid wireless telephone service" means wireless telephone service that is activated in advance by payment for a finite dollar amount of service or for a finite set of minutes that terminate either upon use by a customer and delivery by the wireless provider of an agreed-upon amount of service corresponding to the total dollar amount paid in advance or within a certain period of time following the initial purchase or activation, unless additional payments are made.

(v) "Provider" or "wireless provider" means a person or entity who provides service and either:

1. Is subject to the requirements of the order; or

2. Elects to provide wireless 911 service or E911 service in this state.

(w) "Public agency" means the state and any municipality, county, municipal corporation, or other governmental entity, public district, or public authority located in whole or in part within this state which provides, or has authority to provide, firefighting, law enforcement, ambulance, medical, or other emergency services.

(x) "Public safety agency" means a functional division of a public agency which provides firefighting, law enforcement, medical, or other emergency services.

(y) "Rural county" means any county that has a population of fewer than 75,000.

(z) "Service" means "commercial mobile radio service" as provided under ss. 3(27) and 332(d) of the Federal Telecommunications Act of 1996, 47 U.S.C., ss. 151 et seq., and the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, August 10, 1993, 107 Stat. 312. The term "service" includes the term "wireless" and service provided by any wireless real-time two-way wire communication device, including radio-telephone communications used in cellular telephone service; personal communications service; or the functional or competitive equivalent of a radio-telephone communications line used in cellular telephone service, a personal communications service, or a network radio access line. The term does not include wireless providers that offer mainly dispatch service in a more localized, noncellular configuration; providers offering only data, one-way, or stored-voice services on an interconnected basis; providers of air-to-ground services; or public coast stations.

(aa) "Service number" means the unique 10-digit wireless telephone number assigned to a service subscriber.

(bb) "Sufficient positive balance" means a dollar amount greater than or equal to the monthly wireless surcharge amount.

(cc) "Tower" means any structure designed primarily to support a wireless provider's antennae.

(dd) "Wireless communications facility" means any equipment or facility used to provide service and may include, but is not limited to, antennae, towers, equipment enclosures, cabling, antenna brackets, and other such equipment. Placing a wireless communications facility on an existing structure does not cause the existing structure to become a wireless communications facility.

(ee) "Wireless 911 system" or "wireless 911 service" means an emergency telephone system or service that provides a subscriber with the ability to reach an answering point by dialing the digits "911." A wireless 911 system is complementary to a wired 911 system as provided for in s. 365.171.

(12) FACILITATING E911 SERVICE IMPLEMENTATION. -- To balance the public need for reliable E911 services through reliable wireless systems and the public interest served by governmental zoning and land development regulations and notwithstanding any other law or local ordinance to the contrary, the following standards shall apply to a local government's actions, as a regulatory body, in the regulation of the placement, construction, or modification of a wireless communications facility. This subsection shall not, however, be construed to waive or alter the provisions of ss. 286.011 or 286.0115. For the purposes of this subsection only, "local government" shall mean any municipality or county and any agency of a municipality or county only. The term "local government" does not, however, include any airport, as defined by s. 330.27(2), even if it is owned or controlled by or through a municipality, county, or agency of a municipality or county. Further, notwithstanding anything in this section to the contrary, this subsection does not apply to or control a local government's actions as a property or structure owner in the use of any property or structure owned by such entity for the placement, construction, or modification of wireless communications facilities. In the use of property or structures owned by the local government, however, a local government may not use its regulatory authority so as to avoid compliance with, or in a manner that does not advance, the provisions of this subsection.

(a) Collocation among wireless providers is encouraged by the state.

1. a. Collocations on towers, including nonconforming towers, that meet the requirements in sub-sub-subparagraphs (I), (II), and (III), are subject to only building-permit review, which may include a review for compliance with this subparagraph. Such collocations are not subject to any design or placement requirements of the local government's land development regulations in effect at the time of the collocation that are more restrictive than those in effect at the time of the initial antennae placement approval, to any other portion of the land development regulations, or to public hearing review. This sub-subparagraph shall not preclude a public hearing for any appeal of the decision on the collocation application.

(I) The collocation does not increase the height of the tower to which the antennae are to be attached, measured to the highest point of any part of the tower or any existing antenna attached to the tower;

(II) The collocation does not increase the ground space area, commonly known as the compound, approved in the site plan for equipment enclosures and ancillary facilities; and

(III) The collocation consists of antennae, equipment enclosures, and ancillary facilities that are of a design and configuration consistent with all applicable regulations, restrictions, or conditions, if any, applied to the initial antennae placed on the tower and to its accompanying equipment enclosures and ancillary facilities and, if applicable, applied to the tower supporting the antennae. Such regulations may include the design and aesthetic requirements, but not procedural requirements, other than those authorized by this section, of the local government's land development regulations in effect at the time the initial antennae placement was approved.

b. Except for a historic building, structure, site, object, or district, or a tower included in sub-subparagraph a., collocations on all other existing structures that meet the requirements in sub-sub-subparagraphs (I)-(IV) shall be subject to no more than building-permit review, and an administrative review for compliance with this subparagraph. Such collocations are not subject to any portion of the local government's land development regulations not addressed herein, or to public hearing review. This sub-subparagraph shall not preclude a public hearing for any appeal of the decision on the collocation application.

(I) The collocation does not increase the height of the existing structure to which the antennae are to be attached, measured to the highest point of any part of the structure or any existing antenna attached to the structure;

(II) The collocation does not increase the ground space area, otherwise known as the compound, if any, approved in the site plan for equipment enclosures and ancillary facilities;

(III) The collocation consists of antennae, equipment enclosures, and ancillary facilities that are of a design and configuration consistent with any applicable structural or aesthetic design requirements and any requirements for location on the structure, but not prohibitions or restrictions on the placement of additional collocations on the existing structure or procedural requirements, other than those authorized by this section, of the local government's land development regulations in effect at the time of the collocation application; and

(IV) The collocation consists of antennae, equipment enclosures, and ancillary facilities that are of a design and configuration consistent with all applicable restrictions or conditions, if any, that do not conflict with sub-sub-subparagraph (III) and were applied to the initial antennae placed on the structure and to its accompanying equipment

enclosures and ancillary facilities and, if applicable, applied to the structure supporting the antennae.

c. Regulations, restrictions, conditions, or permits of the local government, acting in its regulatory capacity, that limit the number of collocations or require review processes inconsistent with this subsection shall not apply to collocations addressed in this subparagraph.

d. If only a portion of the collocation does not meet the requirements of this subparagraph, such as an increase in the height of the proposed antennae over the existing structure height or a proposal to expand the ground space approved in the site plan for the equipment enclosure, where all other portions of the collocation meet the requirements of this subparagraph, that portion of the collocation only may be reviewed under the local government's regulations applicable to an initial placement of that portion of the facility, including, but not limited to, its land development regulations, and within the review timeframes of subparagraph (d)2., and the rest of the collocation shall be reviewed in accordance with this subparagraph. A collocation proposal under this subparagraph that increases the ground space area, otherwise known as the compound, approved in the original site plan for equipment enclosures and ancillary facilities by no more than a cumulative amount of 400 square feet or 50 percent of the original compound size, whichever is greater, shall, however, require no more than administrative review for compliance with the local government's regulations, including, but not limited to, land development regulations review, and building-permit review, with no public hearing review. This sub-subparagraph shall not preclude a public hearing for any appeal of the decision on the collocation application.

2. If a collocation does not meet the requirements of subparagraph 1., the local government may review the application under the local government's regulations, including, but not limited to, land development regulations, applicable to the placement of an initial antennae and its accompanying equipment enclosure and ancillary facilities.

3. If a collocation meets the requirements of subparagraph 1., the collocation shall not be considered a modification to an existing structure or an impermissible modification of a nonconforming structure.

4. The owner of the existing tower on which the proposed antennae are to be collocated shall remain responsible for compliance with any applicable condition or requirement of a permit or agreement, or any applicable condition or requirement of the land development regulations to which the existing tower had to comply at the time the tower was permitted, including any aesthetic requirements, provided the condition or requirement is not inconsistent with this paragraph.

5. An existing tower, including a nonconforming tower, may be structurally modified in order to permit collocation or may be replaced through no more than administrative review and building- permit review, and is not subject to public hearing review, if the overall height of the tower is not increased and, if a replacement, the replacement tower is a monopole tower or, if the existing tower is a camouflaged tower, the replacement tower is a like-camouflaged tower. This subparagraph shall not preclude a public hearing for any appeal of the decision on the application.

(b) 1. A local government's land development and construction regulations for wireless communications facilities and the local government's review of an application for the placement, construction, or modification of a wireless communications facility shall only address land development or zoning issues. In such local government regulations or review, the local

government may not require information on or evaluate a wireless provider's business decisions about its service, customer demand for its service, or quality of its service to or from a particular area or site, unless the wireless provider voluntarily offers this information to the local government. In such local government regulations or review, a local government may not require information on or evaluate the wireless provider's designed service unless the information or materials are directly related to an identified land development or zoning issue or unless the wireless provider voluntarily offers the information. Information or materials directly related to an identified land development or zoning issue may include, but are not limited to, evidence that no existing structure can reasonably be used for the antennae placement instead of the construction of a new tower, that residential areas cannot be served from outside the residential area, as addressed in subparagraph 3., or that the proposed height of a new tower or initial antennae placement or a proposed height increase of a modified tower, replacement tower, or collocation is necessary to provide the provider's designed service. Nothing in this paragraph shall limit the local government from reviewing any applicable land development or zoning issue addressed in its adopted regulations that do not conflict with this section, including, but not limited to, aesthetics, landscaping, land use based location priorities, structural design, and setbacks.

2. Any setback or distance separation required of a tower may not exceed the minimum distance necessary, as determined by the local government, to satisfy the structural safety or aesthetic concerns that are to be protected by the setback or distance separation.

3. A local government may exclude the placement of wireless communications facilities in a residential area or residential zoning district but only in a manner that does not constitute an actual or effective prohibition of the provider's service in that residential area or zoning district. If a wireless provider demonstrates to the satisfaction of the local government that the provider cannot reasonably provide its service to the residential area or zone from outside the residential area or zone, the municipality or county and provider shall cooperate to determine an appropriate location for a wireless communications facility of an appropriate design within the residential area or zone. The local government may require that the wireless provider reimburse the reasonable costs incurred by the local government for this cooperative determination. An application for such cooperative determination shall not be considered an application under paragraph (11)(d).

4. A local government may impose a reasonable fee on applications to place, construct, or modify a wireless communications facility only if a similar fee is imposed on applicants seeking other similar types of zoning, land use, or building-permit review. A local government may impose fees for the review of applications for wireless communications facilities by consultants or experts who conduct code compliance review for the local government but any fee is limited to specifically identified reasonable expenses incurred in the review. A local government may impose reasonable surety requirements to ensure the removal of wireless communications facilities that are no longer being used.

5. A local government may impose design requirements, such as requirements for designing towers to support collocation or aesthetic requirements, except as otherwise limited in this section, but shall not impose or require information on compliance with building code type standards for the construction or modification of wireless communications facilities beyond those adopted by the local government under chapter 553 and that apply to all similar types of construction.

(c) Local governments may not require wireless providers to provide evidence of a wireless communications facility's compliance with federal regulations, except evidence of compliance with applicable Federal Aviation Administration requirements under 14 C.F.R. s. 77, as amended, and evidence of proper Federal Communications Commission licensure, or other evidence of Federal Communications Commission authorized spectrum use, but may request the Federal Communications Commission to provide information as to a wireless provider's compliance with federal regulations, as authorized by federal law.

(d) 1. A local government shall grant or deny each properly completed application for a collocation under subparagraph (11)(a)1. based on the application's compliance with the local government's applicable regulations, as provided for in subparagraph (11)(a)1. and consistent with this subsection, and within the normal timeframe for a similar building-permit review but in no case later than 45 business days after the date the application is determined to be properly completed in accordance with this paragraph.

2. A local government shall grant or deny each properly completed application for any other wireless communications facility based on the application's compliance with the local government's applicable regulations, including but not limited to land development regulations, consistent with this subsection and within the normal timeframe for a similar type review but in no case later than 90 business days after the date the application is determined to be properly completed in accordance with this paragraph.

3. a. An application is deemed submitted or resubmitted on the date the application is received by the local government. If the local government does not notify the applicant in writing that the application is not completed in compliance with the local government's regulations within 20 business days after the date the application is initially submitted or additional information resubmitted, the application is deemed, for administrative purposes only, to be properly completed and properly submitted. However, the determination shall not be deemed as an approval of the application. If the application is not completed in compliance with the local government's regulations, the local government shall so notify the applicant in writing and the notification must indicate with specificity any deficiencies in the required documents or deficiencies in the content of the required documents which, if cured, make the application properly completed. Upon resubmission of information to cure the stated deficiencies, the local government shall notify the applicant, in writing, within the normal timeframes of review, but in no case longer than 20 business days after the additional information is submitted, of any remaining deficiencies that must be cured. Deficiencies in document type or content not specified by the local government do not make the application incomplete. Notwithstanding this sub-subparagraph, if a specified deficiency is not properly cured when the applicant resubmits its application to comply with the notice of deficiencies, the local government may continue to request the information until such time as the specified deficiency is cured. The local government may establish reasonable timeframes within which the required information to cure the application deficiency is to be provided or the application will be considered withdrawn or closed.

b. If the local government fails to grant or deny a properly completed application for a wireless communications facility within the timeframes set forth in this paragraph, the application shall be deemed automatically approved and the applicant may proceed with placement of the facilities without interference or penalty. The timeframes specified in subparagraph 2. may be extended only to the extent that the application has not been granted or denied because the local government's procedures generally applicable to all other

similar types of applications require action by the governing body and such action has not taken place within the timeframes specified in subparagraph 2. Under such circumstances, the local government must act to either grant or deny the application at its next regularly scheduled meeting or, otherwise, the application is deemed to be automatically approved.

c. To be effective, a waiver of the timeframes set forth in this paragraph must be voluntarily agreed to by the applicant and the local government. A local government may request, but not require, a waiver of the timeframes by the applicant, except that, with respect to a specific application, a one-time waiver may be required in the case of a declared local, state, or federal emergency that directly affects the administration of all permitting activities of the local government.

(e) The replacement of or modification to a wireless communications facility, except a tower, that results in a wireless communications facility not readily discernibly different in size, type, and appearance when viewed from ground level from surrounding properties, and the replacement or modification of equipment that is not visible from surrounding properties, all as reasonably determined by the local government, are subject to no more than applicable building-permit review.

(f) Any other law to the contrary notwithstanding, the Department of Management Services shall negotiate, in the name of the state, leases for wireless communications facilities that provide access to state government-owned property not acquired for transportation purposes, and the Department of Transportation shall negotiate, in the name of the state, leases for wireless communications facilities that provide access to property acquired for state rights-of-way. On property acquired for transportation purposes, leases shall be granted in accordance with s. 337.251. On other state government-owned property, leases shall be granted on a space available, first-come, first-served basis. Payments required by state government under a lease must be reasonable and must reflect the market rate for the use of the state government-owned property. The Department of Management Services and the Department of Transportation are authorized to adopt rules for the terms and conditions and granting of any such leases.

(g) If any person adversely affected by any action or failure to act or regulation or requirement of a local government in the review or regulation of the wireless communication facilities files an appeal or brings an appropriate action in a court or venue of competent jurisdiction, following the exhaustion of all administrative remedies, the matter shall be considered on an expedited basis.

This act shall take effect July 1, 2005.