

**PROTEC Draft “Simple” Small Cell Ordinance Drawn in Strict Compliance with 2018 PA 365 and 366
Aesthetics Amendments 4/22/2019
Format Edits 11/21/2019 – 3/9/2020**

A note Re: The 8/12/2020 US 9th Cir Opinion striking FCC Orders aesthetics rules appears at Sec 13(6)

***Editor’s Note:** This draft “Simple” Small Cell Ordinance is designed for those communities wishing to strictly codify the Michigan Small Cell related Acts but also adopt an ordinance which does not itemize all the detail included in the Act. A simplification of an overly complex and poorly written statute is provided as best we are able. A reservation of rights provision is provided and added at the end. An aesthetics sub sec has been added at Sec 14(9)*

Close attention should be paid to 2018 PA 365 and 366 as the intricacies of the language employed there will matter in the interpretation of this ordinance.

Your community may also wish to compare language contained in the FCC Small Cell rules which differ from the State Acts and, where favorable, adopt the FCC language in place of the State Act language. (See PROTEC’s Small Cell Law Summary and Comparison Chart) For example, the permissible fees and rates under the State Acts are less than those referenced in the FCC rules and the FCC rules leave open the possibility of conducting cost studies which may allow for even greater application fees. Another important distinction is that while the State law deems applications not timely acted upon as “deemed approved,” the FCC does not take this harsh position. HOWEVER, while good arguments exist that the FCC rules preempt such state laws, the FCC went out of its way at the outset of its 3rd Report and Order, to state that (despite using the term “preempt” over 100 times throughout the rest of the order) it was not seeking to preempt (favorable industry language) state laws such as adopted here in Michigan. So, adopting the FCC language, though very defensible, may invite an industry challenge.

And, there are obviously many more changes one might consider under our State Constitution etc., but that work is beyond the scope of this effort.

We have generally followed the numbering utilized in the Act, including its use of odd numbered sections only, with the following exceptions:

- *Statutory Sections 5, 7 and 9 have been absorbed into Sec 3.*
- *Sec 13 sub section 9 is heavily modified from the statute.*
- *Sec 17 Zoning, has been separated and moved to the end as a separate amendment to a “zoning” ordinance “Zoning”.*
- *We have omitted sections 21 and 23 pertaining solely to municipal electric.*
- *Sec 41 “reservation of rights” is entirely new.*

-Mike Watza & Mike Fisher on behalf of PROTEC

AN ORDINANCE to provide for the regulation of small cell wireless infrastructure by City/Township/Village of _____, referred to herein alternatively as the “authority”, of the activities of wireless infrastructure providers and wireless services providers regarding the siting of certain wireless facilities.

Sec. 1. TITLE AND PURPOSE

(1) This ordinance shall be known and may be cited as the “small wireless communications facilities deployment ordinance”.

(2) The purpose of the ordinance is to regulate the siting of “Small Cell” facilities.

Sec. 3. DEFINITIONS: (Sec’s 5, 7 and 9 of the statute have been consolidated into this unified definition section) As used in this ordinance:

- (a) “Act” means the small wireless facilities act, 2018 PA 365, MCL 460.1301, et seq, as the same may be amended from time to time.
- (b) “Antenna” means communications equipment that transmits or receives electromagnetic radio frequency signals used in the provision of wireless services.
- (c) “Applicant” means a wireless provider or wireless infrastructure provider that submits an application described in this ordinance.
- (d) “Authority”, unless the context implies otherwise, means the City/Twp/Village of _____, to the extent authorized by law to make legislative, quasi-judicial, or administrative decisions concerning an application described in this ordinance.
- (e) “Authority pole” means a utility pole owned or operated by an authority and located in the ROW.

(f) “Colocate” means to install, mount, maintain, modify, operate, or replace wireless facilities on or adjacent to a wireless support structure or utility pole. “Collocation” has a corresponding meaning.

(g) “Fee” means an authority one-time per small cell site charge for application processing.

(h) “Rate” means an authority annual charge per site

(i) “Historic district” means an officially designated historic

j) “Make-ready work” means work necessary to enable an authority pole or utility pole to support collocation, which may include modification or replacement of utility poles or modification of lines.

(k) “Micro wireless facility” means a small cell wireless facility that is not more than 24 inches in length, 15 inches in width, and 12 inches in height and that does not have an exterior antenna more than 11 inches in length.

(l) “Public right-of-way” or “ROW” means the area on, below, or above a public roadway, highway, street, alley, bridge, sidewalk, or utility easement dedicated for compatible uses. Public right-of-way does not include any of the following:

(i) A private right-of-way.

(ii) A limited access highway.

(iii) Land owned or controlled by a railroad as defined in section 109 of the railroad code of 1993, 1993 PA 354, MCL 462.109.

(m) “Small cell wireless facility” means a wireless facility that meets both of the following requirements:

(i) Each antenna is not more than 6 cubic feet in volume

(ii) All other wireless equipment associated with the facility is cumulatively not more than 25 cubic feet in volume. Except -The following types of associated ancillary equipment are not included in the calculation of equipment volume: electric meters, concealment elements, telecommunications demarcation boxes, grounding equipment, power transfer switches, cut-off switches, and vertical cable runs for the connection of power and other services.

(n) “Utility pole” means a pole or similar structure that is or may be used to support small cell wireless facilities. Utility pole does not include a sign pole less than 15 feet in height above ground.

(o) “Wireless facility” means wireless equipment, including, radio transceivers, antennas, coaxial or fiber-optic cable, regular and backup power supplies, and comparable equipment, regardless of technological configuration. Wireless facility does not include coaxial or fiber-optic cable between utility poles or wireless support structures.

(p) “Wireless provider” is a regulated provider of telecommunications services and a “wireless infrastructure provider” is an installer of wireless equipment at small cell sites and, both terms are interchangeable terms for purposes of this ordinance.

(q) “Wireless services” means any services, provided using licensed or unlicensed spectrum, including the use of Wi-Fi, whether at a fixed location or mobile.

(r) “Wireless support structure” means a freestanding structure designed to support or capable of supporting small cell wireless facilities. Wireless support structure does not include a utility pole.

(s) “Wireline backhaul facility” means a facility used to transport services by wire or fiber-optic cable from a wireless facility to a network.

Sec. 11. SCOPE OF AUTHORITY

(1) Except as provided in this ordinance or the Act, the Authority shall not prohibit, regulate, or charge for the collocation of small cell wireless facilities.

(2) The approval of a small cell wireless facility under this ordinance authorizes only the collocation of a small cell wireless facility and does not authorize either of the following:

(a) The provision of any services.

(b) The installation, placement, modification, maintenance, or operation of a wireline in the ROW.

Sec. 13. SMALL CELL ROW ACCESS; PERMITTED USE; HEIGHT; UNDERGROUND, DOWNTOWN, RESIDENTIAL AND HISTORIC DISTRICTS:

(1) This section applies only to activities of a wireless provider within the public right-of-way for the deployment of small cell wireless facilities and associated new or modified utility poles.

(2) The Authority shall not enter into an exclusive arrangement with any person for use of the ROW for the construction, operation, or maintenance of utility poles or the collocation of small cell wireless facilities.

(3) The Authority shall not charge a wireless provider an annual rate more than:

(a) \$20.00 annually, unless subdivision (b) applies.

(b) \$125.00 annually, if a new utility pole or wireless support structure was erected at a new site by or on behalf of the wireless provider on or after the effective date of this act. This subdivision does not apply to the replacement of an existing utility pole

(4) All greater rates and fees in current agreements shall be modified within **90 days** of application receipt, so as not to exceed the fees provided here, except for new small cell dedicated utility poles installed and operational in the ROW before the effective date of this ordinance or related agreements, which shall remain in effect for the duration of the ordinance or agreement.

(5) Except as set forth in Sec 15 or 17, and as limited in this section, small cell siting is a permitted use and not subject to zoning regulation if it complies with all other sections of this ordinance and if:

(a) A utility pole in the ROW installed or modified on or after the effective date of this ordinance shall not exceed 40 feet above ground level, unless a taller height is agreed to by the Authority.

(b) A small cell wireless facility in the ROW installed or modified after the effective date of this ordinance shall not extend more than 5 feet above a utility pole or wireless support structure on which the small cell wireless facility is colocated.

(6) A proposed utility pole or other support structure that exceeds the height limits under subsection (5), is subject to zoning review.

AESTHETICS LIMITATIONS AND REQUIREMENTS (Sec 13 sub-sections 7, 8 and 9 heavily modified from statute.) Pursuant to *City of Portland v. United States*, 969 F.3d 1020, 2020 WL 4669906 (9th Cir., 2020) reversing portions of the FCC Small Cell Orders concerning Aesthetics: *“aesthetic regulations. The panel held that to the extent that provision required small cell facilities to be treated in the same manner as other types of communications services, the regulation was contrary to the congressional directive that allowed different regulatory treatment among types of providers, so long as such treatment did not “unreasonably discriminate among providers of functionally equivalent services.” 47 U.S.C. § 332(c)(7)(B)(i)(I). The panel also held that the FCC’s requirement that all aesthetic criteria must be “objective” lacked a reasoned explanation.” Opinion summary at p. 20 Accordingly the FCC Order now permits Local Community regulation of small cells on a “reasonable” and nondiscriminatory standard and apparently allows individual communities to regulate based at least to some extent upon their own subjective needs. HOWEVER: The 9th Cir Opinion does not address or directly impact Michigan’s PA 365 on which this Model Ordinance is based. This note is provided for context and, to make the reader aware that there is compelling case law in place which may be persuasive in an appeal of PA 365 or similar proceedings.*

(7) **Undergrounding:** A wireless provider shall comply with reasonable and nondiscriminatory requirements [including concealment measures] that do not prohibit communications service providers from installing structures on or above ground in the ROW in an area designated solely for underground or buried cable and utility facilities, if:

(a) The Authority has required all cable and utility facilities, to place all their facilities underground and,

(b) The Authority does not prohibit replacement of the Authority’s poles by a wireless provider in the designated area.

(c) A wireless provider may apply for a waiver of the undergrounding requirements.

(8) **Historic, Downtown and Residential Districts:** A wireless provider shall comply with written, objective requirements for reasonable, technically feasible, nondiscriminatory, and technologically neutral designs or concealment measures in a historic district, downtown district, or residential zoning district. Such requirement shall not have the effect of prohibiting any wireless provider’s technology. Any such design or concealment measures are not included in size restrictions in the definition of small wireless facility in section 7.

(9) **Aesthetics Requirements: Wireless Providers shall install, modify, collocate or otherwise provide all wireless facilities, equipment, poles, support structures and all other related wireless objects in a manner, size and appearance that is consistent and in conformity with the existing requirements and existing practices in fact, pertaining to such districts as defined by the applicable ordinances, rules and codes of this community and the applicable rules and laws of this State, in such fashion as to create the least negative impact on the district as possible. Such accommodations may include use of similar height, materials, color, design, number and appearance of other similar structures utilized by other occupiers of the Rights of Way and public spaces.**

(a.) Collocation including replacement of existing poles or support structures is strongly encouraged over the installation of additional new poles or support structures in the Right of Way. This, due to travel safety concerns.

(b.) Placement of all equipment inside the pole or support structure is favored over placement outside the pole, including ground mountings.

- (c.) **Smallest equipment, antennas and poles and support structures feasible is preferred.**
- (d.) **Camouflaging, stealth or concealment elements are preferred.**
- (e.) **Installations generally are favored in the following Districts in the following order of preference:**

1st Preference: Industrial

2nd Preference: Commercial

3rd Preference: Residential

4th Preference: Underground commercial and then residential

5th Preference: Historic

6th Preference: Environmentally sensitive areas including nature and wetland preservation sites

(b.) Disagreements as between the provider and community on specific aesthetics issues shall be addressed by the Council upon timely written request of the provider. Staff and council may consider incentives favoring installations in preferred districts.

(Aesthetics Amendments 4/22/2019)

(10) All wireless providers shall repair all damage to the ROW caused by the activities of the wireless provider while occupying, constructing, installing, mounting, maintaining, modifying, operating, or replacing small cell wireless facilities, utility poles, or wireless support structures in the ROW and, to return the ROW to its original condition. Following **60 days'** written notice, the Authority may make those repairs and charge the wireless provider the cost of the repairs.

Sec. 15. PROVIDER AND AUTHORITY RESPONSIBILITIES; APPLICATION INFORMATION; SHOT CLOCKS; TOLLING; DEEMED APPROVED; BASIS FOR DENIAL; RESUBMITTAL; BATCH APPLICATIONS; APPLICATION FEES; MICRO WIRELESS FACILITY EXEMPTION; ALTERNATE SITING; DECOMMISSIONING SITES:

(1) This section applies to activities of a wireless provider within the public right-of-way.

(2) Except as otherwise provided in subsection (5) below, the provider/applicant shall seek an Authority ROW access permit to collocate a small cell wireless facility or install, modify, or replace a utility pole on which a small cell wireless facility will be collocated as required of all ROW users. The processing of an application for such a permit is subject to all of the following:

(a) In-kind contributions to the Authority are not permitted in lieu of rates and fees described above **[unless all parties voluntarily agree in furtherance of the interests of both.]**

(b) The provider shall provide all the information and documentation required by the authority to enable the authority to make an informed decision with regard to its criteria for authorizing ROW access including the following:

(i) A certificate of compliance with FCC rules related to radio frequency emissions from a small cell wireless facility,

(ii) Proof of notification to every other affected authority and all necessary permits, permit applications, or easements to ensure all necessary permissions for the proposed activity are obtained.

(iii) An attestation that the small cell wireless facilities will be operational for use by a wireless services provider within 1 year after the permit issuance date. Failure to abide by this term shall result in termination of any permit issued in reliance on such attestation.

(c) Within 25 days after receiving an initial application, the Authority shall notify the applicant in writing whether the application is complete. If incomplete, the notice will delineate all missing documents or information. The notice **tolls the running of the time for approving or denying an application under subdivision (h).**

(d) If the applicant makes a supplemental submission in response to the authority's notice of incompleteness, the authority will so notify the applicant in writing within 10 days, delineating the previously requested and missing documents or information. The time period for approval or denial is tolled in the case of second or subsequent notices under the procedures identified in subdivision (d).

(e) The Authority shall approve or deny the application and notify the applicant in writing within the following period of time after the application is received:

(i) **Collocation Shot Clock:** For an application for the collocation of small cell wireless facilities on a utility pole, **60 days**, subject to the following adjustments:

(A) **Add 15 days** if an application from another wireless provider was received within 1 week of the application in question.

(B) **Add 15 days** if, a timely extension is requested.

(ii) **New or Replacement 40' Pole and Limited Equipment:** For an application for a new or replacement utility pole that meets the height requirements of section 13(5)(a) and associated small cell facility, **90 days**, subject to the following adjustments:

(A) **Add 15 days** if an application from another wireless provider was received within 1 week of the application in question.

(B) **Add 15 days** if, a timely extension is requested.

(C) **Deemed Approved:** A completed application is considered to be approved if not timely acted upon by the authority and, if the authority receives a notice not less than 7 days before, the applicant may proceed with the work pursuant to this automatic approval.

(i) **Basis for Denial:** The Authority may [shall] deny a completed application for a proposed collocation of a small cell wireless facility or installation, modification, or replacement of a utility pole that meets the height requirements in section 13(5)(a) if the proposed activity would do any of the following:

(i) Materially interfere with the safe operation of traffic control equipment.

(ii) Materially interfere with sight lines or clear zones for transportation or pedestrians.

(iii) Materially interfere with compliance with the Americans with Disabilities Ordinance of 1990, Public Law 101-336, or similar federal, state, or local standards regarding pedestrian access or movement.

(iv) Materially interfere with maintenance or full unobstructed use of public utility infrastructure under the jurisdiction of an authority.

(v) With respect to drainage infrastructure under the jurisdiction of an authority, either of the following:

(A) Materially interfere with maintenance or full unobstructed use of the drainage infrastructure as it was originally designed.

(B) Not be located a reasonable distance from the drainage infrastructure to ensure maintenance under the drain code of 1956, 1956 PA 40, MCL 280.1 to 280.630, and access to the drainage infrastructure.

(vi) Fail to comply with reasonable, nondiscriminatory, written spacing requirements of general applicability adopted by ordinance or otherwise that apply to the location of ground-mounted equipment and new utility poles and that do not prevent a wireless provider from serving any location.

(vii) Fail to comply with all other applicable codes.

(viii) Fail to comply with section 13(7) or (8).

(ix) Fail to meet reasonable, objective, written stealth or concealment criteria for small cell wireless facilities applicable in a historic district or other designated area, as specified in an ordinance or otherwise and nondiscriminarily applied to all other occupants of the ROW, including electric utilities, incumbent or competitive local exchange carriers, fiber providers, cable television operators, and the authority.

(j) **Reasons for Denial; Resubmission and 30 Day Shot Clock:** If the completed application is denied, the notice under subdivision (h) shall explain the reasons for the denial and, if applicable, cite the specific provisions of applicable codes on which the denial is based. The applicant may cure the deficiencies identified by the authority and resubmit the application within 30 days after the denial without paying an additional application fee. The authority shall approve or deny the revised application within **30 days**. The Authority shall limit its review of the revised application to the deficiencies cited in the denial.

(k) **Batch Applications:** An applicant may file an application and receive a single permit for the collocation of up to 20 substantially similar small cell wireless installations. The Authority may approve or deny 1 or more small cell wireless facilities included in such consolidated application.

(l) Approval of an application authorizes the wireless provider to undertake the installation, collocation and maintenance of such facilities.

(m) The Authority shall not institute a moratorium on filing, receiving, or processing applications or issuing permits for the collocation of small cell wireless facilities or the installation, modification, or replacement of utility poles on which small cell wireless facilities will be collocated.

(o) The authority and an applicant may extend a time period under this subsection by mutual agreement.

(3) **Application Fee** for a permit under subsection (2) shall not exceed the lesser of the following:

(a) **\$200.00** for each small cell wireless facility alone.

(b) **\$300.00** for each small cell wireless facility **and a new utility pole** to which it will be attached.

(4) The Authority may revoke a permit, upon 30 days' notice and an opportunity to cure, if the permitted small cell wireless facilities and any associated utility pole fail to meet the requirements of this ordinance.

(5) **Micro Wireless Facility Exempt:** The Authority shall not require a permit or any other approval or require fees or rates for ordinance compliant replacement, maintenance or operation of a small cell wireless facility or ordinance compliant installation, replacement, maintenance or operation of a **micro wireless facility** that is suspended on cables strung between utility poles or wireless support structures in compliance with applicable codes.

(6) **Alternate Siting:** Upon receipt of an application to place a **new utility pole**, the Authority may propose and the applicant shall use an alternate location within the ROW or on property or structures owned or controlled by an authority within 75 feet of the applicants proposed location if reasonably achievable.

(7) **Decommissioning Sites:** An authority shall notify the authority in writing before discontinuing use of a small cell wireless facility, utility pole, or wireless support structure. The notice shall specify when and how the wireless provider intends to remove the small cell wireless facility, utility pole, or wireless support structure. The wireless provider shall return the property to its pre-installation condition. If the wireless provider does not complete the removal within 45 days after the discontinuance of use, the authority may complete the removal and assess the costs of removal against the wireless provider. A permit under this section for a small cell wireless facility expires upon removal of the small cell wireless facility.

(8) A provider shall obtain a permit for any work that will affect traffic patterns or obstruct vehicular or pedestrian traffic in the ROW.

Sec 17: Zoning: (See Zoning Ordinance following this Ordinance)

Sec. 19. Authority owned Poles: Rates; Terms:

(1) The Authority shall not enter into an exclusive arrangement with any person for the right to attach to authority poles. A person who purchases, controls, or otherwise acquires an authority pole is subject to the requirements of this section.

(2) **Rate:** The rate for the collocation of small cell wireless facilities on authority poles shall be nondiscriminatory regardless of the services provided by the collocating person. The rate shall not exceed **\$30.00 per year** per authority pole plus any rate charged for the use of the ROW under section 13.

(3) All greater rates and fees in current agreements shall be modified within **90 days** of application receipt, so as not to exceed the fees provided here, except with respect to wireless facilities on authority poles installed and operational before the effective date of this ordinance or any related agreement, which shall remain in effect for the duration of the ordinance or agreement

(4) Within **90 days** after receiving the first request to collocate a small cell wireless facility on an authority pole, the authority shall make available, through ordinance or otherwise, the rates, fees, and terms for the collocation of small cell wireless facilities on the authority poles. The rates, fees, and terms shall comply with all of the following:

(a) The rates, fees, and terms shall be nondiscriminatory, competitively neutral, and commercially reasonable and shall comply with this act.

(b) The Authority shall provide a good-faith estimate for any make-ready work within 60 days after receipt of a complete application. Make-ready work shall be completed within 60 days of written acceptance of the good-faith estimate by the applicant.

(c) The person owning or controlling the authority pole shall not require more make-ready work than required to comply with law or industry standards.

(d) Fees for make-ready work shall not do any of the following:

(i) Include costs related to preexisting or prior damage or noncompliance unless the damage or noncompliance was caused by the applicant.

(ii) Include any unreasonable consultant fees or expenses.

(iii) Exceed actual costs imposed on a nondiscriminatory basis.

(5) This section does not require an authority to install or maintain any specific authority pole or to continue to install or maintain authority poles in any location if the authority makes a nondiscriminatory decision to eliminate aboveground poles of a particular type generally, such as electric utility poles, in a designated area of its geographic jurisdiction. For authority poles with collocated small cell wireless facilities in place when an authority makes a decision to eliminate aboveground poles of a particular type, the authority shall do 1 of the following:

(a) Continue to maintain the authority pole.

(b) Install and maintain a reasonable alternative pole or wireless support structure for the collocation of the small cell wireless facility.

(c) Offer to sell the pole to the wireless provider at a reasonable cost.

- (d) Allow the wireless provider to install its own utility pole so it can maintain service from that location.
- (e) Proceed as provided by an agreement between the authority and the wireless provider.

Sec's. 21 and 23. Municipally Owned Electric Utility – [omitted].

Sec. 25. Higher Education Campus Exempt: The authority does not have jurisdiction or authority small cell wireless facilities located upon a campus of an institution of higher education, other than to enforce applicable codes.

Sec 25a. No Provider Requirement of Service: This ordinance does not require wireless facility deployment or regulate wireless services.

Sec. 27. Appeals: The applicant may appeal any authority determinations related to this ordinance to the highest elected body of the authority or, the circuit court in the judicial circuit where the authority is located.

Sec. 29. Defense, Indemnity and Insurance: All applicant wireless providers shall:

(a) Defend, indemnify, and hold harmless the authority its officers, agents, and employees against any claims, demands, damages, lawsuits, judgments, costs, liens, losses, expenses, and attorney fees resulting from the installation, construction, repair, replacement, operation, or maintenance of any wireless facilities, wireless support structures, or utility poles to the extent caused by the applicant and all entities acting on its behalf including but not limited to its contractors, its subcontractors, and the officers, employees, or agents of any of these, except as to liabilities or losses due to or caused by the sole negligence of the authority or its officers, agents, or employees.

(b) Obtain insurance naming the authority and those acting on its behalf including but not limited to its officers, agents, and employees as additional insureds against any claims, demands, damages, lawsuits, judgments, costs, liens, losses, expenses, and attorney fees. A wireless provider may meet all or a portion of the authority's insurance coverage and limit requirements by self-insurance, conditioned upon providing to the authority, evidence demonstrating, to the authority's satisfaction, the wireless provider's financial ability to meet the authority's insurance coverage and limit requirements throughout the life of the provider's use of the ROW. To the extent it self-insures, a wireless provider is not required to name additional insureds under this section.

Sec. 31. Reduced Fees: The authority may establish a fee or rate less than the maximum specified in section 13(3), 15(3), 17(4), or 19(2), subject to other requirements of this act.

Sec. 33. Bonding:

(1) As a condition of a permit described in this act, the wireless provider shall provide a \$1,000 bond per site, for the purpose of providing for the removal of abandoned or improperly maintained small cell wireless facilities, including those that an authority determines should be removed to protect public health, safety, or welfare, to repair the ROW as provided under section 13(10) and, to recoup rates or fees that have not been paid by a wireless provider in more than 12 months, if the wireless provider has received 60-day advance notice from the authority of the noncompliance.

(2) The authority shall not require a cash bond, unless the wireless provider has failed to obtain or maintain a bond required under this section or the surety has defaulted or failed to perform on a bond given to the authority on behalf of a wireless provider.

Sec. 35. Labelling: A small cell wireless facility for which a permit is issued shall be labeled with the name of the wireless provider, emergency contact telephone number, and information that identifies the small cell wireless facility and its location.

Sec. 37. Electric Costs: A wireless provider is responsible for arranging and paying for the electricity used to operate a small cell wireless facility.

Sec. 39. Investor Owned Utilities:

(1) This ordinance [except to the extent the authority seeks to hold all utilities occupying the ROW to the same requirements and obligations as imposed upon wireless providers consistent with 2018 PA 365] does not add to, replace, or supersede any law regarding poles or conduits, similar structures, or equipment of any type owned or controlled by an investor-owned utility whose rates are regulated by the MPSC, an affiliated transmission company, an independent transmission company, or, except as provided in section 7(e), a cooperative electric utility.

(2) This ordinance [except to the extent the authority seeks to hold all utilities occupying the ROW to the same requirements and obligations as imposed upon wireless providers consistent with 2018 PA 365] does not impose or otherwise affect any rights, controls, or contractual obligations of an investor-owned utility whose rates are regulated by the MPSC, an affiliated transmission company, an independent transmission company or, except as provided in section 7(e), a cooperative electric utility with respect to its poles or conduits, similar structures, or equipment of any type.

(3) Except for purposes of a wireless provider obtaining a permit to occupy a right-of-way, [and to the extent the authority seeks to hold all utilities occupying the ROW to the same requirements and obligations as imposed upon wireless providers consistent with 2018 PA 365] this ordinance does not affect an investor-owned utility whose rates are regulated by the MPSC. Notwithstanding any other provision of this act, pursuant to and consistent with section 6g of 1980 PA 470, MCL 460.6g, the MPSC has sole jurisdiction over attachment of wireless facilities on the poles, conduits, and similar structures or equipment of any type or kind owned or controlled by an investor-owned utility whose rates are regulated by the MPSC.

[Sec. 41. Authority Reservation of Rights: (Added) This ordinance is enacted in compliance with Michigan 2018 PA 365; MCL 460.1301 and 2018 PA 366; MCL 125.3205(1)(c) as amended and MCL 125.3514(10). However, the authority takes specific note of inconsistencies as between these State Acts and certain potentially preemptive FCC Rulings concerning “Small Cells” known as the “Moratoria Order”; FCC 3rd Report and Order and Declaratory Ruling of 8/13/2018 FCC 18-111 <https://docs.fcc.gov/public/attachments/FCC-18-111A1.pdf> and “Small Cell Order”; FCC Declaratory Ruling and 3rd Report and Order of 9/27/2018 FCC 18-133 <https://docs.fcc.gov/public/attachments/FCC-18-133A1.pdf> .

The authority also notes inconsistencies with the Michigan Constitution of 1963 including but not limited to Article VII Sections 22, 26, 29, 30, 31 and 34. Enacting this ordinance does not preclude the authority from engaging in or otherwise supporting a judicial or other challenge to either the State Acts or FCC rules referenced above. In the event of any interpretations, including Judicial, Legislative or Administrative, contrary to the Michigan Public Acts and/or FCC rules referenced above, the authority specifically reserves the right to amend and or terminate this ordinance and all related agreements, policies and procedures undertaken in furtherance hereof.]

This ordinance shall take immediate effect.

ZONING AMENDMENTS:

There are three changes in 2018 PA 365 and 366 which affect zoning. Two are included in 2018 PA 366, which amends the State ZEA to include the provisions of the Small Cell Act (PA 365) into the ZEA. This change occurs at MCL 125.3205(1)(c). PA 366 also amends MCL 125.3514 by adding sec (10) to the 2012 Amendment which addresses Macro towers only.

It may be appropriate therefor to include those changes in your zoning ordinance if those sections of the ZEA are presently included in your zoning ordinance.

2018 PA 366 Amends the ZEA twice as follows (IN CAPS)

1. ZEA at MCL 125.3205(1)(c) as amended

“(1) A zoning ordinance is subject to all of the following:

(c) *THE SMALL WIRELESS COMMUNICATIONS FACILITIES DEPLOYMENT ACT.*”

2. ZEA at MCL 125.3514(10) as amended

“(10) *THIS SECTION DOES NOT APPLY TO AN ACTIVITY OR USE THAT IS REGULATED BY THE SMALL CELL WIRELESS COMMUNICATIONS FACILITIES DEPLOYMENT ACT.*”

3. The 3rd amendment affecting zoning is sec 17 of PA 365, included below. It is the section of the small cell act that addresses zoning. It could be included in the small cell ordinance since it does refer to other sections of the small cell ordinance. It could therefore also be included or at least referenced in your zoning ordinance.

Sec. 17. Zoning: In the ROW for Non Permitted Uses and, Outside the ROW

(1) The activities set forth in section 15(5) are exempt from zoning review. Subsections (2) to (4) below, apply to zoning reviews for the following activities that are subject to zoning review and approval, that are not a permitted use under section 13(5), and that take place within **or outside the public right-of-way**:

(a) The modification of existing or installation of new small cell wireless facilities.

(b) The modification of existing or installation of new wireless support structures used for such small cell wireless facilities.

(2) The processing of an application for a zoning approval is subject to all of the following requirements:

(a) Within **30 days** after receiving an application under this section, an authority shall notify the applicant in writing whether the application is complete. If the application is incomplete, the notice shall clearly and specifically delineate all missing documents or information. The **notice tolls the running of the 30-day period**.

(b) The running of the time period tolled under subdivision (a) resumes when the applicant makes a supplemental submission in response to the authority's notice of incompleteness. If the applicant makes a supplemental submission in response to the authority's notice of incompleteness, the authority will so notify the applicant in writing within 10 days, delineating the previously requested and missing documents or information. The time period may be tolled in the case of second or subsequent notices under the procedures identified in subdivision (a).

(c) **Modification of Support Structure or Collocation or Installation of Wireless Facilities Shot Clock 90 Days – New Support Structure Shot Clock 150 Days; Modification by Agreement; Deemed Approved:** The authority shall approve or deny the application and notify the applicant in writing within **90 days** after an application for a modification of a wireless support structure or installation of a small cell wireless facility is received or **150 days** after an application for a new wireless support structure is received.

i. The time period for approval may be extended by mutual agreement between the applicant and authority.

ii. If the authority fails to comply with this subdivision, the application is considered to be approved subject to the condition that the applicant provide the authority not less than 15 days' advance written notice that the applicant will be proceeding with the work pursuant to this automatic approval.

(d) The authority may [**shall**] deny an application if all of the following apply:

(i) The denial is supported by substantial evidence contained in a written record that is publicly released contemporaneously.

(ii) There is a reasonable basis for the denial.

(iii) The denial would not discriminate against the applicant with respect to the placement of the facilities of other wireless providers.

(3) An authority's review of an application for a zoning approval is subject to all of the following requirements:

(a) **Applicant Presumed Reasonable:** An applicant's business decision on the type and location of small cell wireless facilities, wireless support structures, or technology to be used is presumed to be reasonable. This presumption does not apply with respect to the height of wireless facilities or wireless support structures. An authority may consider the height of such structures in its zoning review, but shall not discriminate between the applicant and other communications service providers.

(b) An authority shall not evaluate or require an applicant to submit information about an applicant's business decisions with respect to any of the following:

(i) The **need** for a wireless support structure or small cell wireless facilities.

(ii) The applicant's **service, customer demand** for the service, or the quality of service.

(c) Any requirements regarding the appearance of facilities, including those relating to materials used or arranging, screening, or landscaping, shall be reasonable.

(d) Any spacing, setback, or fall zone requirement shall be substantially similar to a spacing, setback, or fall zone requirement imposed on other types of commercial structures of a similar height.

(4) **Application Fees:** An application fee for a zoning approval shall not exceed the following:

(a) \$1,000.00 for a new wireless support structure or modification of an existing wireless support structure.

(b) \$500.00 for a new small cell wireless facility or modification of an existing small cell wireless facility.

(5) All zoning approval is void if the provider fails to commence construction within 1 year of the grant of same. The wireless provider may reapply for a zoning approval.

(5a) A wireless provider may voluntarily request that a zoning approval be terminated.

(6) The authority shall not institute a moratorium on either of the following:

(a) Filing, receiving, or processing applications for zoning approval.

(b) Issuing approvals for installations that are not a permitted use.

(7) The authority may **[shall]** revoke a zoning approval, upon 30 days' notice and an opportunity to cure, if the permitted small cell wireless facilities and any associated wireless support structure fail to meet the requirements of the approval, applicable codes, or applicable zoning requirements.

This ordinance shall take immediate effect.



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