

11/08/2019

AN ORDINANCE

of the City Council of the City of Berkley, Michigan
to Add New Article V, Small Cell Wireless Facilities, to Chapter 118, Telecommunications,
of the City of Berkley Code of Ordinances to Provide for the Regulation of Small Cell
Wireless Infrastructure and the Activities of Wireless Infrastructure Providers and
Wireless Services Providers Regarding the Placement and Siting of Wireless Facilities,
Support Structures, and Utility Pole Attachments.

THE CITY OF BERKLEY ORDAINS:

SECTION 1: New Article V shall be added to Chapter 118 of the Berkley City Code, as follows:

ARTICLE V. – SMALL CELL WIRELESS FACILITIES DEPLOYMENT

Sec. 118-01. – Title and purpose.

The purpose of this Article is to regulate small cell wireless infrastructure and the activities of wireless infrastructure providers and wireless service providers in regard to the placement and siting of “Small Cell” facilities.

Sec. 118-02. – Definitions.

- (a) “Act” means the Small Wireless Facilities Deployment Act, 2018 PA 365, MCL 460.1301 et seq, as 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 article.
- (d) “City pole” means a utility pole owned or operated by the City and located in the public right-of-way.
- (e) “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.
- (f) “Fee” means a City one-time per small cell site charge for application processing.
- (g) “Rate” means the City’s annual charge per site.

- (h) “Make-ready work” means work necessary to enable a City pole or utility pole to support collocation, which may include modification or replacement of utility poles or modification of lines.
- (i) “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.
- (j) “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:
 - (1) A private right-of-way;
 - (2) A limited access highway; or
 - (3) Land owned or controlled by a railroad as defined in section 109 of the Railroad Code of 1993, MCL 462.109.
- (k) “Small cell wireless facility” means a wireless facility that meets both of the following requirements:
 - (1) Each antenna is not more than 6 cubic feet in volume or, in the case of an antenna that has exposed elements, the antenna and all of its exposed elements would fit within an imaginary enclosure of not more than 6 cubic feet; and
 - (2) All other wireless equipment associated with the facility is cumulatively not more than 25 cubic feet in volume. 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.
- (l) “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.
- (m) “Wireless facility” means equipment at a fixed location that enables the provision of wireless services between user equipment and a communications network, including, but not limited to, radio transceivers, antennas, coaxial or fiber-optic cable, regular and backup power supplies, and comparable equipment, regardless of technological configuration. Wireless facility includes a small cell wireless facility. Wireless facility does not include coaxial or fiber-optic cable between utility poles or wireless support structures.
- (n) “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 article.

- (o) “Wireless services” means any services, provided using licensed or unlicensed spectrum, including the use of Wi-Fi, whether at a fixed location or mobile.
- (p) “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.
- (q) “Wireline backhaul facility” means a facility used to transport services by wire or fiber-optic cable from a wireless facility to a network.

Sec. 118-03. – Scope of authority.

- (a) Except as provided in this article or the Act, the City shall not prohibit, regulate, or charge for the collocation of small cell wireless facilities.
- (b) The approval of a small cell wireless facility under this article authorizes only the collocation of a small cell wireless facility and does not authorize either of the following:
 - (1) The provision of any services; or
 - (2) The installation, placement, modification, maintenance, or operation of a wireline in the ROW.

Sec. 118-04. – Small cell ROW access; permitted use; height; underground; downtown; residential districts.

- (a) 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.
- (b) The City 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.
- (c) The City shall not charge a wireless provider an annual rate more than:
 - (1) \$20.00 annually, unless subdivision (2) applies.
 - (2) \$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 article. This subdivision does not apply to the replacement of an existing utility pole.
- (d) 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 article or related agreements, which shall remain in effect for the duration of this article or the agreement.

- (e) Except as set forth in Section 118-05 or the Zoning Ordinance, 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 article and if:
 - (1) A utility pole in the ROW installed or modified on or after the effective date of this article shall not exceed 40 feet above ground level, unless a taller height is agreed to by the City; and
 - (2) A small cell wireless facility in the ROW installed or modified after the effective date of this article shall not extend more than 5 feet above a utility pole or wireless support structure on which the small cell wireless facility is collocated.
- (f) A proposed utility pole or other support structure that exceeds the height limits under subsection (e), is subject to zoning review.

Sec. 118-05. – Aesthetics limitations and requirements.

- (a) 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:
 - (1) The City has required all cable and utility facilities to place all their facilities underground;
 - (2) The City does not prohibit replacement of the City’s poles by a wireless provider in the designated area; and
 - (3) A wireless provider may apply for a waiver of the undergrounding requirements.
- (b) 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 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.
- (c) 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 the City 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.

- (1) Collocation including replacement of existing poles or support structures is strongly encouraged over the installation of additional new poles or support structures in the ROW.
 - (2) Placement of all equipment inside the pole or support structure is favored over placement outside the pole, including ground mountings.
 - (3) The smallest equipment, antennas and poles and support structures feasible is preferred.
 - (4) Camouflaging, stealth or concealment elements are preferred.
 - (5) Installations generally are favored in the following Districts in the following order of preference:
 - a. 1st Preference: Industrial
 - b. 2nd Preference: Commercial
 - c. 3rd Preference: Residential
 - d. 4th Preference: Underground commercial and then residential
 - e. 5th Preference: Environmentally sensitive areas including nature and wetland preservation sites
 - (6) Disagreements as between the provider and the City on specific aesthetics issues shall be addressed by the City Council upon timely written request of the provider. City staff and Council may consider incentives favoring installations in preferred districts.
- (d) 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 shall return the ROW to its prior condition. Following 60 days written notice, the City may make those repairs and charge the wireless provider the cost of the repairs.

Sec. 118-06. – Provider and City responsibilities; application information; shot clocks; tolling; deemed approved; basis for denial; resubmittal; batch applications; application fees; micro wireless facility exemption; alternate siting; decommissioning sites.

- (a) Except as otherwise provided in subsection (c) below, the provider/applicant shall seek a City 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:
- (1) In-kind contributions to the City are not permitted in lieu of rates and fees described above unless all parties voluntarily agree in furtherance of the interests of both.
 - (2) The provider shall provide all the information and documentation required by the City to enable the City to make an informed decision with regard to its criteria for authorizing ROW access including the following:
 - a. A certificate of compliance with FCC rules related to radio frequency emissions from a small cell wireless facility,
 - b. 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.
 - c. 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.
 - (3) Within 25 days after receiving an initial application, the City 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 (6).
 - (4) If the applicant makes a supplemental submission in response to the City's notice of incompleteness, the City 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.
 - (5) The City shall approve or deny the application and notify the applicant in writing within the following period of time after the application is received:

- a. 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:
 - b. Add 15 days if an application from another wireless provider was received within 1 week of the application in question.
 - c. Add 15 days if, a timely extension is requested.
 - d. New or Replacement 40' Pole and Limited Equipment: For an application for a new or replacement utility pole that meets the height requirements of subsection 118-04(e) and associated small cell facility, 90 days, subject to the following adjustments:
 - e. Add 15 days if an application from another wireless provider was received within 1 week of the application in question.
 - f. Add 15 days if, a timely extension is requested.
 - g. Deemed Approved: A completed application is considered to be approved if not timely acted upon by the City and, if the City receives a notice not less than 7 days before, the applicant may proceed with the work pursuant to this automatic approval.
- (6) Basis for Denial: The City may 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 subsection 118-04(e) if the proposed activity would do any of the following:
- a. Materially interfere with the safe operation of traffic control equipment.
 - b. Materially interfere with sight lines or clear zones for transportation or pedestrians.
 - c. Materially interfere with compliance with the Americans with Disabilities Act of 1990, or similar federal, state, or local standards regarding pedestrian access or movement.
 - d. Materially interfere with maintenance or full unobstructed use of public utility infrastructure under the jurisdiction of the City or other authority.
 - e. With respect to drainage infrastructure under the jurisdiction of the City or other authority, either of the following:
 - f. Materially interfere with maintenance or full unobstructed use of the drainage infrastructure as it was originally designed.

- g. Not be located a reasonable distance from the drainage infrastructure to ensure maintenance under the Drain Code of 1956, MCL 280.1 to 280.630, and access to the drainage infrastructure.
 - h. 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.
 - i. Fail to comply with all other applicable codes.
 - j. Fail to comply with section 118-05.
 - k. Fail to meet reasonable, objective, written stealth or concealment criteria for small cell wireless facilities applicable in a downtown or residential district or other designated area, as specified in an ordinance or otherwise and nondiscriminatory applied to all other occupants of the ROW, including electric utilities, incumbent or competitive local exchange carriers, fiber providers, cable television operators, and the City.
- (b) Reasons for Denial; Resubmission and 30 Day Shot Clock: If the completed application is denied, the notice under subdivision 118-06(a)(5) 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 City and resubmit the application within 30 days after the denial without paying an additional application fee. The City shall approve or deny the revised application within 30 days. The City shall limit its review of the revised application to the deficiencies cited in the denial.
- (c) 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 City may approve or deny 1 or more small cell wireless facilities included in such consolidated application.
- (d) Approval of an application authorizes the wireless provider to undertake the installation, collocation and maintenance of such facilities.
- (e) 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 colocated.
- (f) The City and an applicant may extend a time period under this subsection by mutual agreement.

- (1) 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; or
 - b. \$300.00 for each small cell wireless facility and a new utility pole to which it will be attached.
- (2) The City 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 article.
- (3) Micro Wireless Facility Exempt: The City 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.
- (4) Alternate Siting: Upon receipt of an application to place a new utility pole, the City may propose and the applicant shall use an alternate location within the ROW or on property or structures owned or controlled by the City within 75 feet of the applicants proposed location if reasonably achievable.
- (5) Decommissioning Sites: A wireless provider shall notify the City 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.
- (6) A provider shall obtain a permit for any work that will affect traffic patterns or obstruct vehicular or pedestrian traffic in the ROW.

Sec. 118-07. – Authority owned poles: rates; terms.

- (a) The City shall not enter into an exclusive arrangement with any person for the right to attach to City poles. A person who purchases, controls, or otherwise acquires a City pole is subject to the requirements of this section.
- (b) 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 City pole plus any rate charged for the use of the ROW under section 118-04.

- (c) 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 article or any related agreement, which shall remain in effect for the duration of this article or the agreement.
- (d) Within 90 days after receiving the first request to colocate a small cell wireless facility on a City pole, the City shall make available, through ordinance or otherwise, the rates, fees, and terms for the collocation of small cell wireless facilities on City poles. The rates, fees, and terms shall comply with all of the following:
 - (1) The rates, fees, and terms shall be nondiscriminatory, competitively neutral, and commercially reasonable and shall comply with this article and the Act;
 - (2) The City 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;
 - (3) The person owning or controlling the City pole shall not require more make-ready work than required to comply with law or industry standards; and
 - (4) Fees for make-ready work shall not do any of the following:
 - a. Include costs related to preexisting or prior damage or noncompliance unless the damage or noncompliance was caused by the applicant;
 - b. Include any unreasonable consultant fees or expenses; or
 - c. Exceed actual costs imposed on a nondiscriminatory basis.
- (e) This section does not require the City to install or maintain any specific City pole or to continue to install or maintain City poles in any location if the City 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 City poles with colocated small cell wireless facilities in place when the City makes a decision to eliminate aboveground poles of a particular type, the City shall do one of the following:
 - (1) Continue to maintain the City pole;
 - (2) Install and maintain a reasonable alternative pole or wireless support structure for the collocation of the small cell wireless facility;
 - (3) Offer to sell the pole to the wireless provider at a reasonable cost;
 - (4) Allow the wireless provider to install its own utility pole so it can maintain service from that location; or

- (5) Proceed as provided by an agreement between the City and the wireless provider.

Sec. 118-08. – No requirement to provide service.

This article does not require wireless facility deployment or regulate wireless services.

Sec. 118-09. – Appeals.

The applicant may appeal any City determinations related to this article to the City Council or the Oakland County Circuit Court.

Sec. 118-10. – Defense, indemnity and insurance.

All applicant wireless providers shall:

- (1) Defend, indemnify, and hold harmless the City and its elected and appointed officials, 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 City or its officers, agents, or employees; and
- (2) Obtain insurance naming the City 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 City's insurance coverage and limit requirements by self-insurance, conditioned upon providing to the City evidence demonstrating to the City's satisfaction the wireless provider's financial ability to meet the City'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. 118-11. – Bonding.

- (a) As a condition of a permit described in this article, 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 the City determines should be removed to protect public health, safety, or welfare, to repair the ROW as provided under subsection 118-05(d) 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 City of the noncompliance.

- (b) The City 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 City on behalf of a wireless provider.

Sec. 118-12. – 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. 118-13. – Electric costs.

A wireless provider is responsible for arranging and paying for the electricity used to operate a small cell wireless facility.

Sec. 118-14. – Investor-owned utilities.

- (a) This article 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 a cooperative electric utility.
- (b) This article 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 a cooperative electric utility with respect to its poles or conduits, similar structures, or equipment of any type.
- (c) Except for purposes of a wireless provider obtaining a permit to occupy a right-of-way, this ordinance does not affect an investor-owned utility whose rates are regulated by the MPSC. Notwithstanding any other provision of this article, 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. 118-15. – Authority reservation of rights.

This article is adopted 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 City 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 City also notes inconsistencies with the Michigan Constitution of 1963 including but not limited to Article VII Sections 22, 26, 29, 30, 31 and 34. Adoption of this article shall not be construed as a waiver of the City's right to engage in or otherwise support a legal 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 City reserves the right to amend and or repeal this article and to cancel all related agreements, policies and procedures undertaken in furtherance hereof.

SECTION 2: Severability Clause

Should any word, phrase, sentence, paragraph, or section of this Ordinance be held invalid or unconstitutional, the remaining provisions of this ordinance shall remain in full force and effect.

SECTION 3: Effective Date

This Ordinance shall become effective 30 days following the date of adoption.

SECTION 4: Publication

The City Council directs the City Clerk to publish a summary of this ordinance in compliance with Public Act 182 of 1991, as amended, and Section 6.5 of the Berkley City Charter.

Dan Terbrack
Mayor

Attest: _____
Victoria Mitchell
City Clerk