**CHARTER TOWNSHIP OF AUSABLE**

**IOSCO COUNTY, MICHIGAN**

**ORDINANCE # 121**

**AN ORDINANCE TO ESTABLISH REQUIREMENTS, STANDARDS, AND REGULATIONS FOR ACCESS TO AND USE OF PUBLIC RIGHTS-OF-WAY FOR SMALL CELL WIRELESS FACILITIES; TO PROTECT THE PUBLIC HEALTH, SAFETY, AND GENERAL WELFARE; TO PROVIDE PENALTIES FOR VIOLATION OF THIS ORDINANCE; TO PROVIDE FOR SEVERABILITY; AND TO PROVIDE AN EFFECTIVE DATE.**

**THE CHARTER TOWNSHIP OF AUSABLE ORDAINS:**

**SECTION I. PURPOSE.**

This ordinance is adopted pursuant to the Charter Township of AuSable’s constitutional and proprietary rights and interests in public rights-of-way located within the Township and the reasonable control thereof under Article VII, Section 29 of the Michigan Constitution of 1963 and other applicable laws, and is adopted in response to new and differing state and federal regulations, including Michigan Public Act No. 365 of 2018 (MCL 460.1301 – 460.1339; the Small Wireless Communications Facilities Deployment Act), 47 USC 1455, Rules adopted by the Federal Communications Commission (FCC) as 47 CFR 1.40001 (now 47 CFR 1.6100) and 47 CFR 1.6001 – 1.6003, the FCC’s Declaratory Ruling and Third Report and Order in FCC 18-133, and other pertinent state and federal statutes, regulations, rules, and decisions; to help maintain the appearance of the community for Township residents and visitors; and to protect the public health, safety, and general welfare. This ordinance is adopted for the purpose of complying with those state and federal statutes, regulations, rules, and decisions by providing for and regulating access to and ongoing use of public rights-of-way for small cell wireless facilities. In doing so, the Charter Township of AuSable wishes to ensure the reasonable and fair control and management of public rights-of-way, support new technology, and avoid interference with right-of-way use. The reader of this Ordinance is strongly encouraged to simultaneously read Michigan Public Act No. 365 of 2018 as many subtleties exist in that Act which are not included in this Ordinance.

**SECTION II. DEFINITIONS.**

As used in this ordinance, the following words and phrases have the indicated meanings:

**Applicant** means a wireless provider that applies for a permit or approval for wireless facilities, a wireless support structure, or utility pole in a public right-of-way.

**Authority** means the Charter Township of AuSable.

**Authority pole** means a utility pole owned or operated by the Authority and located in the right-of-way.

**Collocation** or **collocate** means to install, mount, maintain, modify, operate, or replace wireless facilities on or adjacent to a wireless support structure or utility pole, but does not include make-ready work or the installation of a new wireless support structure or new utility pole.

**FCC** means the Federal Communications Commission.

**Micro wireless facility** means a small 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.

**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, whether owned, controlled by, or under the jurisdiction of the Authority, the county of Iosco, the state of Michigan, or the federal government, but does not include a private right-of-way, limited access highway, land owned or controlled by a railroad, and railroad infrastructure.

**Small cell wireless facility** means a wireless facility that meets each of the following requirements:

(A) Each antenna is enclosed or would fit within an enclosure of 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.

(B) 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 and cut-off switches, and vertical cable runs for the connection of power and other services.

**Utility pole** means a pole or similar structure that is or may be used in whole or in part for cable or wireline communications service, electric distribution, lighting, traffic control, signage, or a similar function, or a pole or similar structure that meets the height requirements in Section 13(5) of the Michigan Public Act No. 365 of 2018 (MCL 460.1301 – 460.1339; the Small Cell Wireless Communications Facilities Deployment Act—hereinafter referred to as “the Act”) and is designed to support small cell wireless facilities. Utility pole does not include a sign pole less than 15 feet in height above ground.

**Wireless facility or facilities** 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 any of the following: (i) the structure or improvements on, under, or within which the equipment is collocated, (ii) a wireline backhaul facility, (iii) coaxial or fiber-optic cable between utility poles or wireless support structures or that otherwise is not immediately adjacent to or directly associated with a particular antenna.

**Wireless infrastructure provider** means any person, including a person authorized to provide telecommunications services in this state but not including a wireless service provider, that builds or installs wireless communications transmission equipment, wireless facilities, or wireless support structures and who, when filing an application with the Authority under the Act, provides written authorization to perform the work on behalf of a wireless services provider.

**Wireless provider** means a wireless infrastructure provider or a wireless services provider. Wireless provider does not include an investor-owned utility whose rates are regulated by the Michigan Public Services Commission.

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

**Wireless services provider** means a person or entity that provides wireless service.

**Wireless support structure** means a freestanding structure designed to support or capable of supporting small wireless facilities. Wireless support structure does not include a utility pole.

**Wireline backhaul facility** means a facility used to transport services by wire or fiber-optic cable from a wireless facility to a network.

**SECTION III. RATES. (Also see the Act, which designates rate and fee caps.)**

The Authority shall charge a wireless provider an annual rate for each utility pole and wireless support structure in the ROW in the Charter Township of AuSable on which the wireless provider has collocated a small cell wireless facility in amounts as established by Township Board of Trustees resolution and as allowed by the Act. A higher rate shall be charged for utility poles and wireless support structures that are erected by or on behalf of the wireless provider on or after the effective date of the Act. The application fee as of 2019 is $200 per collocation on existing poles and $300 per collocation on new or replacement poles, regardless of who conducts or when such replacement occurs. Rates are $20/pole/year for use of existing or replacement poles and $125/year for use of new poles. See the Act, Sections 15(2)(n)(3) and 13(3). Every 5 years after the effective date of the Act, the maximum rates shall be increased by 10% and rounded to the nearest dollar.

**SECTION IV. UNDERGROUND DESIGNATED AREAS.**

The Authority shall have the power to prohibit above-ground installations in a designated area if that designated area has required undergrounded infrastructure at least 90 days before any application. In doing so, the Authority shall make available to the public such designated areas and shall not prohibit replacement of existing Authority poles. The Authority shall also provide for a waiver process if no technically feasible structures exist in the designated area or may allow placement on other vertical structures, where available, commensurate with other structures in the area.

**SECTION V. DESIGN AND CONCEALMENT MEASURES FOR HISTORIC DISTRICTS, DOWNTOWN DISTRICTS, AND RESIDENTIAL ZONING DISTRICTS.**

The Authority may adopt design and concealment measures for historic districts, downtown districts, and residential zoning districts. A wireless provider must adhere to written, objective, reasonable, technically feasible, nondiscriminatory, and technologically and competitively neutral design and concealment measures which may be adopted from time to time by the Authority. The Authority may grant wireless providers special access and waivers of certain requirements in industrial and similar zoning districts. The Authority bars wireless facilities and related support structures of any kind on US Highway 23 (“Main Street”). The Authority will assist wireless providers in locating facilities off but adjacent to Main Street in order to accommodate established wireless provider preferences.

**SECTION VI. PERMIT REQUIRED.**

(A) A permit is required 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.

(B) Applicants shall submit:

(1) Information and documentation that the Authority determines is necessary to make a decision with regard to the criteria in Section 15(2)(i) of the Act. Also See Section XI of this Ordinance below.

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

(3) If the proposed activity will occur within a shared ROW or a ROW that overlaps another ROW, a wireless provider shall provide to each affected authority or municipality to which an application for the activity is not submitted notification of the wireless provider’s intent to locate a small cell wireless facility within the ROW.

(4) Satisfactory proof of other necessary permits, permit applications, or easements, to ensure all necessary permissions for the proposed activity are obtained.

(C) The application shall be processed in compliance with the Act. See specific timelines in the Act, Section 15(2)(h), (i)—generally, 60 days for approval or potential for a deemed approved finding.

**SECTION VII. SPACING REQUIREMENTS FOR GROUND-MOUNTED EQUIPMENT AND NEW UTILITY POLES.**

A wireless provider shall not place a new utility pole or ground-mounted equipment within any distance of another utility pole or ground-mounted equipment that would be in violation of any applicable laws, regulations, rules, decisions, or ordinances, nor closer than 500 feet from another utility pole or ground mounted equipment. The Authority has the ability to waive separation distance requirements if the Authority finds that it is necessary, for example, so as not to be prohibitive to the deployment of wireless services.

**SECTION VIII. TIME TO COMPLETION.**

Pursuant to Section 15(2)(l) of the Act, within 1 year after a permit is granted, a wireless provider shall complete collocation of a small cell wireless facility that is to be operational for use by a wireless services provider, unless the Authority and the applicant agree to extend this period or the delay is caused by the lack of commercial power or communications facilities at the site. If the wireless provider fails to complete the collocation within the applicable time, the permit shall be void, and the wireless provider may reapply for a permit. A permittee may voluntarily request that a permit be terminated.

**SECTION IX. NO PERMIT REQUIRED IN CERTAIN INSTANCES.**

The Authority shall not require a permit or any other approval or require fees or rates for any of the following:

1. The replacement of a small cell wireless facility with a small cell wireless facility that is not larger or heavier, in compliance with applicable codes.
2. Routine maintenance of a small cell wireless facility, utility pole, or wireless support structure.
3. The installation, placement, maintenance, operation, or replacement of a micro wireless facility that is suspended on cables strung between utility poles or wireless support structures in compliance with applicable codes.

**SECTION X. APPLICATION DENIAL.**

An application shall be denied if the proposed activity does any of the following:

1. Materially interferes with the safe operation of traffic control equipment.
2. Materially interferes with sight lines or clear zones for transportation or pedestrians.
3. Materially interferes with compliance with the American with Disabilities Act of 1990, Public Law 101-336, or similar federal, state, or local standards regarding pedestrian access or movement.
4. Materially interferes with maintenance or full unobstructed use of public utility infrastructure under the jurisdiction of the Authority.
5. Materially interferes with maintenance or full unobstructed use of the drainage infrastructure as it was originally designed.
6. Not 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 drainage infrastructure.
7. Fails to comply with spacing requirements as defined in this ordinance that apply to the location of ground-mounted equipment and new utility poles.
8. Fails to comply with applicable state and federal codes, statutes, regulations, rules, and decisions.
9. Fails to comply with Section 13(7) or (8) of the Act.

(10) Fails to meet stealth or concealment criteria for small cell wireless facilities as defined in this ordinance or by the Authority’s published standards.

**SECTION XI. PERMIT REVOCATION.**

The Authority may revoke a permit, upon 30 days’ notice and an opportunity to cure, if the permitted small call wireless facilities and any associated utility pole is in such a state as to meet the criteria for permit denial of this ordinance.

**SECTION XII. ALTERNATE LOCATION.**

After receipt of an application to place a new utility pole, the Authority may propose an alternate location within the ROW or on property or structures owned or controlled by the Authority within 75 feet of the proposed location to either place the new utility pole or collocate on an existing structure. The applicant shall use the alternate location if able to do so on reasonable terms and conditions and the alternate location does not impose unreasonable technical limits or significant additional costs.

**SECTION XIII. DISCONTINUANCE.**

Before discontinuing its use of a small cell wireless facility, utility pole, or wireless support structure, a wireless provider shall promptly notify the Authority in writing. 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 preinstallation 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 the discontinuance of the use and/or upon the removal of the small cell wireless facility.

**SECTION XIV. OTHER PERMITS.**

A wireless provider shall obtain applicable permits for work that will unreasonably affect traffic patterns or obstruct vehicular or pedestrian traffic in a ROW.

**SECTION XV. AUTHORITY POLES.**

The rate for the collocation of small cell wireless facilities on Authority poles shall be in an amount as established by Township Board of Trustees resolution and as allowed by the Act. Every 5 years after the effective date of the Act, the rate shall be increased by 10% and rounded to the nearest dollar. The rate for the collocation of small cell wireless facilities on Authority poles is in addition to any rate charged for the use of the ROW. See the Act, Sections 19-21 regarding rates, fees, and make ready charges for Authority-owned poles.

**SECTION XVI. EXISTENCE OF AUTHORITY POLES.**

The Authority is not required to install or maintain any specific Authority pole or to continue to install or maintain Authority poles in any location if the Authority make a nondiscriminatory decision to eliminate above-ground poles of a particular type generally, such as electric utility poles, in a designated area of its geographic jurisdiction.

**SECTION XVII. HOLD HARMLESS; INSURANCE.**

Any permit hereunder or zoning approval given shall require the wireless provider to do the following with respect to a small cell wireless facility, a wireless support structure, or a utility pole:

1. Defend, indemnify, and hold harmless the Authority and 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, its contractors, its subcontractors, and the officers, agents, or employees of any of these.
2. Obtain insurance naming the Authority and 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. To the extent it self-insures, a wireless provider is not required to name additional insureds under this subsection. To the extent a wireless provider elects to self-insure, the wireless provider shall provide to the Authority evidence demonstrating, to the Authority’s satisfaction, the wireless provider’s financial ability to meet the Authority’s insurance coverage limit requirements.

**SECTION XVIII. BOND REQUIREMENTS.**

If deemed appropriate for a particular installation, the Authority may require a bond not to exceed $1,000 per installation for small cell wireless facilities:

(1) For the removal of abandoned or improperly maintained small cell wireless facilities, including those that the Authority determines should be removed to protect public health, safety, or welfare.

(2) To repair the ROW.

1. 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.

**SECTION XIX. GENERAL.**

1. A small cell wireless facility for which a permit is issued shall be labeled and promptly updated with the name of the wireless provider, emergency contact telephone number, and information that identifies the small cell wireless facility and its location.
2. A wireless provider is responsible for arranging and paying for the electricity used to operate a small cell wireless facility.
3. A utility pole in the ROW installed or modified on or after the effective date of the Act shall not exceed 40 feet above ground level.
4. The Authority may require a wireless provider to repair all damage to the ROW directly 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 functional equivalent before the damage. If the wireless provider fails to make the repairs required by the Authority within 60 days after written notice, the Authority may make those repairs and charge the wireless provider the reasonable, documented costs of the repairs.

**SECTION XX. VIOLATIONS AND PENALTIES.**

(A) Any person or organization who violates any of the provisions of this ordinance shall be responsible for a municipal civil infraction, as defined by Section 113 of the Revised Judicature Act of 1961, being Michigan Public Act 236 of 1961, as amended (“Public Act 236”).

(B) The Charter Township of AuSable Superintendent, the Charter Township of AuSable Ordinance Enforcement Officer, the Charter Township of AuSable Department of Public Works Manager, and Charter Township of AuSable officials and employees as may be authorized by the Charter Township of AuSable Board of Trustees are authorized to administer and enforce this ordinance and issue municipal civil infraction citations.

(C) A municipal civil infraction action may be commenced upon the issuance by an authorized local official directing the defendant to appear in court.

(D) Failure of the defendant to appear within the time specified on a citation or at the time scheduled for a hearing or appearance is a misdemeanor punishable by up to ninety (90) days in jail and/or up to a $500.00 fine, plus costs of prosecution, and can result in the entry of a default judgment against the defendant on the municipal civil infraction.

(E) A defendant found responsible by the judge or magistrate for a violation of this ordinance shall pay a fine not to exceed $500.00, plus costs not to exceed $500.00, which are not limited to the costs taxable in ordinary civil actions and may include all expenses, direct and indirect, to which the Township has been put in connection with the municipal civil infraction, up to the entry of judgment. Except as otherwise provided by law, costs shall be payable to the general fund of the Township.

(F) In addition to ordering a defendant to pay a civil fine and costs, the court may issue and enforce any judgment, writ, or order (including but not limited to injunctive relief) necessary to enforce this ordinance, in accordance with Section 8302 of Public Act 236.

(G) If a defendant fails to comply with an order or judgment issued pursuant to Section 8727 of Public Act 236 within the time prescribed by the court, the court may proceed under Sections 8302, 8729, and 8731 of Public Act 236, as applicable.

(H) Each day on which any violation of this ordinance continues constitutes a separate offense, and the offender shall be subject to the applicable fine, costs, penalties, and sanctions for each separate offense.

(I) In addition to any remedies available at law, the Township may bring an action for an injunction or other process against a defendant to restrain, prevent, or abate any violation of this ordinance.

**SECTION XXI. EFFECTIVE DATE.**

This ordinance shall become effective immediately upon its publication as required by law.

**SECTION XXII. PUBLICATION; RECORDATION; AUTHENTICATION.**

This ordinance shall be published once, in full, in a newspaper of general circulation within the boundaries of the Township, and qualified under state law to publish legal notices, within 30 days after its adoption; this ordinance shall be recorded in the record of ordinances book of the Township; and the Township Supervisor and the Township Clerk shall authenticate this ordinance by placing his or her official signature upon this ordinance.

**SECTION XXIII. SEVERABILITY.**

The provisions of this ordinance are hereby declared to be severable, and if any clause, sentence, word, section, or provision is hereafter declared void or unenforceable for any reason by any court of competent jurisdiction, it shall not affect the remainder of this ordinance, which shall continue in full force and effect.

**SECTION XXIV. RESERVATION OF RIGHTS.**

Reservation of Rights: 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 Rulings referenced above. In the event of any interpretations, including Judicial, Legislative or Administrative, contrary to the Michigan Public Acts and/or FCC Rulings 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.

**CERTIFICATION**

I hereby certify that the foregoing constitutes a true and complete copy of an ordinance duly adopted by the Charter Township of AuSable Board of Trustees at a regular meeting held on the \_\_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, \_\_\_\_\_\_\_\_.

I further certify that the following Board members were present at the meeting: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, and that the following Board members were absent:

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.

I further certify that the Board member \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ moved for adoption of the ordinance, and the motion was supported by the Board member \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.

I further certify that the following Board members voted upon roll call vote for the adoption of the ordinance: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, and the following Board members voted against the adoption of the ordinance: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.

Adopted and approved this \_\_\_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, \_\_\_\_\_\_, by the Charter Township of AuSable Board of Trustees.

The Township Supervisor declared this ordinance adopted.

Dated: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Kevin Beliveau

Charter Township of AuSable Supervisor

Dated: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Kelly Graham

Charter Township of AuSable Clerk