

**MEMORANDUM**

June 22, 2010

TO: Transportation, Infrastructure, Energy & Environment Committee

FROM: Jeff Zyontz,  Legislative Attorney

SUBJECT: Subdivision Regulation Amendment (SRA) 10-01; Public Utility Easements – Urban Roads; and Bill 17-10, Public Utility Easement – Urban Roads

SRA 10-01; Public Utility Easements – Urban Roads; and Bill 17-10, Public Utility Easement – Urban Roads, sponsored by Councilmember Elrich, were introduced on April 13, 2010.

Generally, the Planning Board requires a public utility easement (PUE) along the edge of the roadway right-of-way; the PUE is generally in the area between the sidewalk and the building. The easement gives utilities the right to access to their service lines. Buildings must be located outside of the easement areas. This suburban model of development is appropriate for most areas of the County; it is a problem in pedestrian-oriented areas where it is desirable for the building to be built next to the public sidewalk. Under permits issued by the Department of Permitting Services (DPS), public utilities are allowed in a Central Business District's public rights-of-way (ROWs).

It is not clear how utilities would be accommodated in urbanizing areas such as White Flint. The design guidelines call for buildings next to the sidewalk. DPS does not want utilities in the ROW unless it is the last resort.<sup>1</sup>

SRA 10-01 would allow appropriate building setbacks by prohibiting public utility easements along urban roads<sup>2</sup>. The Planning Board would have the authority to allow a public utility easement along an urban road

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<sup>1</sup> Utilities would be under brick, concrete, or asphalt. Major repairs require tearing up hard surfaces and disrupting pedestrians and motor vehicles. Given the cost, time, and inconvenience, utilities would also prefer to be in the right-of-way as a last resort.

<sup>2</sup> Under §49-32(c)(1) an "urban road" is "a road segment in or abutting a Metro Station Policy Area, Town Center Policy Area, or other urban area expressly identified in a Council resolution." The current Metro Station Policy Areas include: Shady Grove, White Flint, Twinbrook, Grosvenor, Bethesda CBD, Friendship Heights, Glenmont, Wheaton CBD, and Silver Spring CBD. Germantown Town Center is the only designated town center. The other areas identified as urban by resolution are: Clarksburg, Damascus, Olney, the North Bethesda Commercial/Mixed Use area, the Montgomery Hills Parking Lot District and the Flower/Piney/Arliss Commercial Areas.

if it finds that the resulting building setbacks are appropriate.<sup>3</sup> The SRA was introduced with a companion Bill. Bill 17-10 would **require** the Department of Transportation to allow public utilities to be located in the ROW of an urban road.

The Planning Board recommended approval of SRA 10-01 and Bill 17-10 with modifications. It recognized that placing utilities in ROWs should be an option but not a mandate. The Board recognized that the SRA would give it the authority to reject a PUE if it did not result in desirable building setbacks but also wanted flexibility to address streetscapes. The Planning Board recommendation was consistent with the Planning Staff recommendation.

On June 15, 2010 the Council held a public hearing. The County Executive expressed concern over **requiring** public utilities to be in the public ROW. Testimony pointed out that the Bill would limit the Executive Branch's discretion and its ability to coordinate issues through the permitting process. There was no other testimony. Staff learned that PEPCO favors the approval of the SRA and ZTA.

### Issues

Who should determine when public utilities should be allowed in the public right-of-way?

Currently, DPS has discretion to allow utilities in the public right-of-way. The Department issues permits when this discretion is exercised. The combination of the SRA and Bill would allow the Planning Board to force DPS to issue such permits. The Planning Board recommended allowing them the explicit authority to reject PUE on urban roads (after considering both setbacks and streetscape effects), but would not require DPS to include public utilities in the right-of-way. The Executive agreed with the substance of the Planning Board's recommendation. This combination would leave utilities in limbo if they received conflicting decisions.

Staff has no problem amending the SRA and Bill to state the order of location preferences outside and inside the ROW and the procedures for using the ROW<sup>4</sup>, but *staff believes that the Council should determine which agency has the final determination*. As introduced, the SRA and Bill give the Planning Board the authority to require DPS to allow utilities in ROWs. The Council could reverse those roles. If DPS can refuse utilities in ROWs, then the Planning Board needs to know that the utilities **MUST** be accommodated on private property.

If the Council agrees with allowing the possibility of a stalemate between departments, it has the following alternatives:

- 1) Do not adopt either SRA 10-01 or Bill 17-10. The status quo allows for conflicting decisions; or
- 2) a) Amend SRA 10-01 to require the Planning Board to reject a PUE in a public or private alley, or under private surface parking before rejecting any PUE outside of

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<sup>3</sup> The mandatory referral process under Article 28 includes the placement of public utilities.

<sup>4</sup> If no PUE along the street ROW locate utilities:

- 1) a private or public alley;
- 2) under private sidewalk;
- 3) under surface parking;
- 4) under the public sidewalk;
- 5) under the on-street parking lane; and as a last resort
- 6) under the roadway travel lanes.

DPS could allow work in the ROW by permit which could allocate the cost of repair to the utility

- the right-of-way; and
- b) Amend Bill 17-10 to:
- (i) change the “must” to “may”;
  - (ii) require utilities to be in a PUE, if a PUE exists, except if more space is needed and there are no prudent alternatives;
  - (iii) establish preferences for the location of utilities in the ROW; and
  - (iv) require permits for work in the right-of-way and to assign responsibilities.

<u>This packet contains:</u>	<u>Circle #</u>
SRA 10-01	1 – 2
Bill 17-10	3 – 5
Legislative Request Report	6
Planning Board and Staff recommendation	7 – 11
County Executive recommendation	12 – 13

Ordinance No.:  
Subdivision Regulation Amend. No.: 10-01  
Concerning: Public Utility Easements –  
Urban Roads  
Revised: 4/1/10; Draft No. 1  
Introduced: April 13, 2010  
Public Hearing:  
Adopted:  
Effective:

**COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND  
SITTING AS THE DISTRICT COUNCIL FOR THAT PORTION OF  
THE MARYLAND-WASHINGTON REGIONAL DISTRICT WITHIN  
MONTGOMERY COUNTY, MARYLAND**

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By: Councilmember Elrich

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**AN AMENDMENT** to the Subdivision Regulations to:

Prohibit public utility easement along urban roads under certain circumstances.

By amending

Montgomery County Code  
Chapter 50, Subdivision of Land  
Section 50-40, Public utilities

<b>Boldface</b>	<i>Heading or defined term.</i>
<u>Underlining</u>	<i>Added to existing law by original bill.</i>
[Single boldface brackets]	<i>Deleted from existing law by original bill.</i>
<u>Double underlining</u>	<i>Added by amendment.</i>
[[Double boldface brackets]]	<i>Deleted from existing law or the bill by amendment.</i>
* * *	<i>Existing law unaffected by bill.</i>

*ORDINANCE*

*The County Council for Montgomery County, Maryland, sitting as the District Council for that portion of the Maryland-Washington Regional District in Montgomery County, Maryland, approves the following ordinance:*



Bill No. 17-10  
Concerning: Public Utility Easement-  
Urban Roads  
Revised: 4-1-10 Draft No. 1  
Introduced: April 13, 2010  
Expires: October 13, 2011  
Enacted: \_\_\_\_\_  
Executive: \_\_\_\_\_  
Effective: \_\_\_\_\_  
Sunset Date: None  
Ch. \_\_\_\_\_, Laws of Mont. Co. \_\_\_\_\_

**COUNTY COUNCIL  
FOR MONTGOMERY COUNTY, MARYLAND**

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By: Councilmember Elrich

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**AN ACT to:**

(1) allow public utilities in the right-of-way of urban roads.

By amending

Montgomery County Code

Chapter 49, Road Code

Section 49-32. Design standards for types of roads.

**Boldface**

Underlining

[Single boldface brackets]

Double underlining

[[Double boldface brackets]]

\* \* \*

*Heading or defined term.*

*Added to existing law by original bill.*

*Deleted from existing law by original bill.*

*Added by amendment.*

*Deleted from existing law or the bill by amendment.*

*Existing law unaffected by bill.*

*The County Council for Montgomery County, Maryland approves the following Act:*

1 **Sec. 1. Section 49-32 is amended as follows:**

2 (a) The design standards adopted under this Article govern the construction or  
3 reconstruction of any County road except Rustic Roads and Exceptional Rustic  
4 Roads.

5 \* \* \*

6 (b) A limited segment of a County road may be designed to vary slightly from the  
7 applicable standards, criteria, or specifications, as necessary to adjust to site-  
8 specific conditions, as long as the road's typical cross-section and other  
9 attributes conform to the applicable standards, criteria, or specifications.

10 \* \* \*

11 (c) In this Article and the standards adopted under it:

12 (1) an 'urban' road is a road segment in or abutting a Metro Station Policy  
13 Area, Town Center Policy Area, or other urban area expressly identified  
14 in a Council resolution;

15 \* \* \*

16 (d) The minimum right-of-way for a road may be specified in the applicable  
17 master plan or sector plan for the area where the road is located.

18 \* \* \*

19 (g) Public utilities must be allowed in urban road rights-of-way.

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21 *Approved:*

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Nancy Floreen, President, County Council

Date

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24 *Approved:*

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Isiah Leggett, County Executive

Date

27 *This is a correct copy of Council action.*

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Linda M. Lauer, Clerk of the Council

Date

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## LEGISLATIVE REQUEST REPORT

Bill 17-10

### *Public Utility Easement – Urban Roads*

**DESCRIPTION:** This Bill would require the Department of Transportation to allow public utilities in urban roads.

**PROBLEM:** Public utility easements that abut urban roads can create undesirable building setbacks in urban areas.

**GOALS AND OBJECTIVES:** To allow public utilities to use the public right-of-way.

**COORDINATION:** Department of Transportation, Planning Board

**FISCAL IMPACT:** To be requested.

**ECONOMIC IMPACT:** To be requested.

**EVALUATION:** To be requested.

**EXPERIENCE ELSEWHERE:** Public utilities are in the public rights-of way in Central Business Districts.

**SOURCE OF INFORMATION:** Jeffrey L. Zyontz, Legislative Attorney, 240-777-7896

**APPLICATION WITHIN MUNICIPALITIES:** None.

**PENALTIES:** Not applicable



**MONTGOMERY COUNTY PLANNING BOARD**  
THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

OFFICE OF THE CHAIRMAN

**MONTGOMERY COUNTY PLANNING BOARD**

The Maryland-National Capital Park and Planning Commission

June 10, 2010

**TO:** The County Council for Montgomery County, Maryland, sitting as the District Council for the Maryland-Washington Regional District in Montgomery County, Maryland

**FROM:** Montgomery County Planning Board

**SUBJECT:** Subdivision Regulation Amendment No. 10-01 & Bill No. 17-10

**BOARD RECOMMENDATION**

The Montgomery County Planning Board of The Maryland–National Capital Park and Planning Commission reviewed Subdivision Regulation Amendment No. 10-01 & Bill No. 17-10 at its regular meeting on June 10, 2010. By a vote of 5:0, the Board recommends approval of the Subdivision Regulation Amendment & Bill with modifications.

The proposed Subdivision Regulations Amendment (SRA) adds a specific provision to Chapter 50 that will prevent the creation of a public utilities easement adjacent to certain road rights-of-way in urban areas, and the proposed Bill will add the requirement in Chapter 49 that public utilities must be allowed within these rights-of-way. Under Chapter 50 of the County Code (the “Subdivision Regulations”), Section 50-40(c), the Planning Board is prohibited from granting final approval of a record plat to subdivide land unless the subdivider of the land provides certificates or commitments from applicable utility companies or public agencies that arrangements have been made to ensure all public utilities will be provided. Over time, a practice has evolved to meet this requirement whereby a 10’ Public Utility Easement (PUE) is required to be created along road rights-of-way as part of the plat to ensure that a location is available for installation of gas, electric and telecommunication lines. The exceptions to this practice are road rights-of-way in Central Business Districts (CBDs) where utilities are permitted to be located in the rights-of-way.

Although these practices are not specifically required by the Subdivision Regulations or the Road Code (Chapter 49 of the County Code), they have become the recognized standards. However, in light of the recent master plans that envision higher densities in non-CBD urban areas with minimum building setbacks and streetscape standards along roads, it has become obvious that placing utilities within road rights-of-way should be an option for these areas as well.

The Board believes that the Department of Transportation, in the case of Chapter 49, should have the ability to modify proposed utility locations based on factors that could adversely impact public safety, pedestrian accessibility, or the placement of other existing and planned public facilities and appurtenances. As such the Board recommends adding language to proposed Section 49-32(g) to address this concern.

SRA 10-01 would not permit public utility easements along urban roads unless the Planning Board finds that the resulting building setbacks are appropriate. In determining the necessity for a public utility easement along an urban road, the Board believes that it should also factor the appropriateness of the resulting streetscape since streetscape design is also paramount along urban streets.

#### CERTIFICATION

This is to certify that the attached report is a true and correct copy of the technical staff report and the foregoing is the recommendation adopted by the Montgomery County Planning Board of The Maryland-National Capital Park and Planning Commission, at its regular meeting held in Silver Spring, Maryland, on Thursday, June 10, 2010.

  
Royce Hanson  
Chairman

RH: GR



**MONTGOMERY COUNTY PLANNING DEPARTMENT**  
 THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

MCPB  
 Item # 10  
 6/10/10

**DATE:** June 1, 2010  
**TO:** Montgomery County Planning Board  
**VIA:** Rose Krasnow, Chief, Development Review *Ret K*  
 Ralph Wilson, Zoning Supervisor *RDW*  
**FROM:** Greg Russ, Zoning Coordinator *GR*  
 Cathy Conlon, Subdivision Supervisor  
**REVIEW TYPE:** Subdivision Regulation Amendment & Chapter 49, Road Code  
**PURPOSE:** Generally amend the Subdivision Regulations to prohibit public utility easement along urban roads under certain circumstances.

**SUBDIVISION REGULATION AMENDMENT:** 10-01  
**ROAD CODE AMENDMENT (Chapter 49):** Bill 17-10  
**INTRODUCED BY:** Councilmember Elrich  
**INTRODUCED DATE:** April 13, 2010

**PLANNING BOARD REVIEW:** June 10, 2010  
**COUNCIL PUBLIC HEARING:** June 15, 2010; 1:30pm

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**STAFF RECOMMENDATION** Staff recommends approval of SRA 10-01 and Bill 17-10 with the following modifications:

- **SRA 10-01--** In determining the necessity for a public utility easement along an urban road, the Planning Board should also factor the appropriateness of the resulting streetscape (this is in conjunction with the existing proposal that factors in the resulting building setbacks)
- **Bill 17-10—**The bill should clearly state that the Department of Transportation has the authority to modify proposed utility locations based on factors that could adversely impact public safety, pedestrian accessibility, or the placement of other existing and planned public facilities and appurtenances.

**BACKGROUND/ANALYSIS**

Under Chapter 50 of the County Code (the “Subdivision Regulations”), Section 50-40(c), the Planning Board is prohibited from granting final approval of a record plat to subdivide land unless the subdivider of the land provides certificates or commitments from applicable utility companies or public agencies that arrangements have been made to ensure all public utilities will be provided. Over time, a practice has evolved to meet this requirement whereby a 10’ Public Utility Easement (PUE) is required to be created

along road rights-of-way as part of the plat to ensure that a location is available for installation of gas, electric and telecommunication lines. The exceptions to this practice are road rights-of-way in Central Business Districts (CBDs) where utilities are permitted to be located in the rights-of-way.

Although these practices are not specifically required by the Subdivision Regulations or the Road Code (Chapter 49 of the County Code), they have become the recognized standards. However, in light of the recent master plans that envision higher densities in non-CBD urban areas with minimum building setbacks and streetscape standards along roads, it has become obvious that placing utilities within road rights-of-way should be an option for these areas as well. The proposed Subdivision Regulations Amendment (SRA) adds a specific provision to Chapter 50 that will prevent the creation of a PUE adjacent to certain road rights-of-way in urban areas, and the proposed Bill will add the requirement in Chapter 49 that public utilities must be allowed within these rights-of-way.

Councilmember Elrich sponsored SRA 10-01 and Bill 17-10 as companion legislation to allow public utilities in the right-of way of an urban road (bill) and to allow appropriate setbacks along urban roads by prohibiting public utility easements along urban roads. The Planning Board would have the authority to allow a public utility easement along an urban road if it finds that the resulting building setbacks are appropriate. This legislation was introduced in response to a belief that public utility easements can create undesirable building setbacks in urban areas. Typically in urban areas, the desire is to establish building footprints closer to the street.

Section 49-32(c)(1) defines an "urban road" as a *road segment in or abutting a Metro Station Policy Area, Town Center Policy Area, or other urban area expressly identified in a Council resolution.* The current Metro Station Policy Areas include: Shady Grove, White Flint, Twinbrook, Grosvenor, Bethesda CBD, Friendship Heights, Glenmont, Wheaton CBD, and Silver Spring CBD. The town centers include: Clarksburg, Damascus, Olney, and Germantown. Other Road Code urban areas identified include the North Bethesda Commercial/Mixed Use area, the Montgomery Hills Parking Lot District and the Flower/Piney/Arliss Commercial Areas.

#### Analysis of Proposed Legislation

The proposed amendment to Chapter 49 would allow companies to locate utilities in urban road rights-of-way. Staff believes that, as with the proposed subdivision regulation amendment, the agency with delegated authority (in this case the Department of Transportation) should have the ability to modify proposed utility locations based on factors that could adversely impact public safety, pedestrian accessibility, or the placement of other existing and planned public facilities and appurtenances. Staff recommends adding language to proposed Section 49-32(g) to address this concern.

- (g) Public utilities must be allowed in urban road rights-of-way *unless the Director of Transportation finds that any of the following would be adversely affected: public safety; handicapped or other pedestrian accessibility; or the placement of*

*other existing and planned public facilities and appurtenances, including traffic control equipment, street trees, and stormwater management facilities.*

SRA 10-01 would not permit public utility easements along urban roads unless the Planning Board finds that the resulting building setbacks are appropriate. Staff believes that the amendment is reasonable since it provides the Board discretion in the placement of public utility easements on record plats based of the appropriateness of the resulting building setbacks. In determining the necessity for a public utility easement along an urban road, the Planning Board should also factor the appropriateness of the resulting streetscape since streetscapedesign is also paramount along urban streets. As recommended by staff, Section 50-40(b) would read as follows:

- (b) Unless the Planning Board determines that the resulting building setbacks **and streetscape** would be appropriate, a public utility easement on a record plat must not be required if the easement would abut an urban road as defined by Chapter 49 Section 32(c)(1).

CC/GR

Attachments

1. Proposed SRA No. 10-01 as modified by staff
2. Bill No. 17-10

Executive Branch Public Testimony on Bill 17-10 and SRA 10-01

The Executive Branch has concerns about proposed Bill 17-10 and SRA 10-01. This legislation follows a year and a half long, highly visible stakeholder process on Context Sensitive Road Design Standards that thoroughly addressed utility placement issues. The Bill and SRA are unnecessary and render meaningless productive stakeholder processes.

If enacted, the Bill and SRA could have significant unintended consequences, including increased expenses, greater potential for service disruption, greater interference with transportation uses while utilities are being installed, repaired or serviced, and/or wider rights-of-way.

The County currently allows utilities within the right-of-way in certain circumstances, but only after a thorough review of preferred alternative locations, and careful coordination with the other facilities that are placed in the right-of-way. As currently drafted, the legislation significantly impacts Executive Branch discretion and its ability to coordinate issues through the permitting process. Developers and utility companies will assert utilities *must be* in the public right-of-way as a matter of right. Logically, rights-of-way will be wider to accommodate what heretofore has been dedicated public utility easement area. The proposed legislation does not recognize nor address the space limitations that makes much more difficult, or unfeasible, the placement of other already mandated features such as Storm Water Management facilities, street trees, street lights, poles and cabinets in support of traffic signals, and street signs.

Although difficult to quantify, the proposed legislation has the several foreseeable potential fiscal impacts including:

1. More underground obstacles to work around when doing routine street maintenance, such as installing street signs, replacing storm sewers, and widening roads. Excavation within the right-of-way becomes more costly and risky due to the need to protect and work around them.
2. There is greater risk of a utility being cut when placed in the right-of-way. If utilities are located in a PUE, the utility companies are typically the only ones to dig in that area, whereas there are many other reasons to excavate in the right-of-way. Even the simple act of installing a traffic sign could cut through a utility line, and possible endanger the life of the worker installing the sign.
3. When a utility line is broken, there is inconvenience and other societal costs for disruption of services. This could be very dramatic in areas where very high densities are proposed, such as the TQD areas in White Flint.
4. Without widening rights-of-way as provided in the recently adopted Context Sensitive Road Design standards, the requirement for additional burdens within the right-of-way will reduce the availability of space for other environmentally

desirable and necessary road features, including trees and the increasing space needs for storm water management.

5. Without increasing the width of the public right-of-way, placement of utilities in the road right-of-way could very easily disrupt and inconvenience the provision of bus service, inconvenience pedestrians and bicyclists and impede the general traveling public during the times that utility lines are being installed or repaired.

If the legislation is to be enacted, we suggest that it be modified as follows:

1. Modify the language to say that utilities "may" be allowed in the right-of-way, provided that certain circumstances are met, including that there is no reasonable or feasible alternative to placing them in the public right-of-way.
2. Modify the language to state that utilities can only be installed in the right-of-way by permit issued by County, and in accordance with county standards.
3. If there is no opportunity for a PUE, we suggest the legislation prioritize the location of the utilities as follows, unless a detailed engineering study by the applicant demonstrates that a different order is preferable:
  - a. Located in a public or private alley (at the rear of the buildings), if any exist;
  - b. Located in the space between the right-of-way and building (yard, private sidewalk, etc.), if any;
  - c. Located under private surface parking outside of the right-of-way, if any;
  - d. Located under the public sidewalk within the right-of-way;
  - e. Located under the on-street parking within the right-of-way, if any;
  - f. Located under the roadway paving is the last resort.
4. Modify the language to require that for maintenance or repair of any utilities in the right-of-way, the utility must replace, at its sole cost, the affected surface and transition areas (streetscape, paving, etc.) to the condition that existed prior to making the repair of the utility, or better.
5. Modify the language to state that if PUEs are indicated on the record plat, utilities must be located within the PUE. In cases where the utility companies assert they do not have enough room within the PUE's, the utilities should demonstrate that there are not reasonable or prudent alternatives to the placement of utilities in the public right-of-way.

Executive staff is available to work with the Council on the matters raised by the proposed Bill and SRA. Thank you for your consideration.