

Action

**MEMORANDUM**

June 18, 2010

TO: County Council

FROM: Jeffrey L. Zyontz,  Legislative Attorney

SUBJECT: Action - Zoning Text Amendment 10-05,  
Special Exceptions Procedures – Telecommunications Facilities

**PHED recommendation:** On June 14, 2010 the Committee (3-0) recommended approval of ZTA 10-05 with amendments to:

- 1) allow a maximum of 90 days between the Transmission Facility Coordinating Group recommendation and the application for a special exception;
- 2) require the recommendations of the Transmission Facility Coordinating Group to be submitted to the record of the application at least 5 days before the date set for the public hearing on the special exception; and
- 3) reference the exemption provisions of the forest conservation law (Chapter 22A-5).

The Committee believes that requiring more information with an application for a telecommunications facility special exception will aid in timely decision making. An approved forest conservation plan (or proof that the facility is exempt from the forest conservation requirements) will remove uncertainty in the special exception process. The Committee was satisfied that the opportunity for public notice and participation in the special exception process is adequate. In addition, the Committee concluded that the issue of the need for the telecommunications facility would be adequately addressed by the Board of Appeals.

**Background**

The Council introduced Zoning Text Amendment (ZTA) 10-05, sponsored by Councilmember Trachtenberg, on April 6, 2010. This ZTA is a response to a declaratory ruling released by the Federal Communications Commission (FCC) on November 18, 2009. In that so-called “shot clock” ruling, the FCC determined that localities must decide zoning applications for telecommunications facilities within 90 days (for co-locations) or 150 days (for other siting applications). The ZTA would require additional

information before the Board of Appeals accepts an application and would shorten the period of review of special exception petitions for telecommunications facilities.<sup>1</sup>

The approval of ZTA 10-05 would:

- increase the number of required copies of all special exception petitions;
- require a special exception petition for a telecommunications facility to include an approved preliminary forest conservation plan and photographic simulations;
- remove the requirement that the Planning Board make a finding about the need for the telecommunications facility; and
- generally amend the provisions related to special exception applications and telecommunications facilities.

On May 6, before the Council's May 11 public hearing on ZTA 10-05, staff briefed the Committee on the background leading to the ZTA's introduction. The Committee took no action.

The Planning Board and Planning Staff recommended approval of ZTA 10-05 as introduced. The Planning Board's hearing did not persuade the Board to recommend any other changes to ZTA 10-05.

The Council held a public hearing on ZTA 10-05 on May 11, 2010 at 1:30. The Hearing Examiner supported ZTA 10-05 as introduced. Representatives of T-Mobile suggested that a special exception application should be allowed to proceed at the same time as a forest conservation application and that the approval of the special exception should be allowed on the condition of the forest conservation plan approval.

The Council received correspondence on this matter in addition to oral testimony. A resident was concerned about: 1) ensuring the accuracy of telecommunications facility applications; 2) reducing opportunities for public participation; 3) the possibility that any change to the current process is unnecessary until the results of the FCC's reconsideration and on-going litigation are known; and 4) the possibility that the ZTA sets the stage for overwhelming the resources available to review telecommunications applications. Other testimony also addressed the health effects of radio frequency emissions.

The Board of Appeals supported ZTA 10-05. The Board members believe that the special exception process affords a significant opportunity for public participation, even with the proposed changes to the process. They do not view the continuing litigation on the shot clock to be a reason for inaction.

## **Issues**

*Should the Council act before the courts decide shot clock litigation and before the FCC's reconsideration is resolved?*

The FCC ruling is in effect until it is changed by the FCC's reconsideration or until it is overturned by litigation. If a local government fails to act within the shot clock timeframes, an applicant for a telecommunications facility may bring an action in court. The ZTA would help reduce the time necessary to reach a conclusion on special exception applications for telecommunications facilities and

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<sup>1</sup> See the Planning Board Staff report on © 7 for the approval process before and after ZTA 10-05.

would thereby reduce the possibility of litigation. The pending challenges to the shot clock do not grant immunity to local governments from litigation by telecommunications facility applicants.<sup>2</sup>

Staff recommends proceeding with ZTA 10-05.

*Should the notice requirements for telecommunications special exceptions be changed?*

Within 3 days of filing a special exception application, the applicant must erect a sign on their property. Notification to adjoining and confronting property owners, any local citizens association, and any municipality or special taxing district for all special exceptions is required within 7 days of the application filing. The Board of Appeals did not recommend changes to the notice provisions.

The Committee did not recommend changes to the notification requirements.

*Should the ZTA be amended to: 1) require a pre-filing conference; 2) provide standards for completeness; 3) require the Planning Board to hold a hearing on whether the application is complete; and 4) require a single application for the Tower Committee and the Special Exception?*

- 1) Neither the Board of Appeals nor the Planning staff has suggested that a pre-filing conference would be helpful. Applicants file special exception applications at their own risk.
- 2) The application requirements are detailed in §59-A-4.22. The ZTA requires more information with the application. The Board of Appeals staff is responsible for determining whether the application is complete. The Board of Appeals has not complained about the specificity of the current requirements. Planning Staff did not recommend taking over the responsibility for assuring complete special exception applications in the course of reviewing ZTA 10-05.
- 3) Even if Planning Staff took over the responsibility for determining whether a special exception application was complete by virtue of a legislative change, it is an administrative function that would not be the subject of a public hearing.
- 4) The data and findings required by the Tower Committee and the special exception are different. The applications have different fees. An applicant may currently choose to get a determination by the Tower Committee before paying for special exception filing fees. A single application would remove an applicant's options.

The Committee did not recommend procedural changes to ZTA 10-05.

*Should the Council require 8 copies of the special exception application?*

Planning Staff believes that increasing the number of copies filed would save time. The reviewing divisions within the Planning Department currently require 4 more copies of special exception

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<sup>2</sup> Testimony suggested an acknowledgement in the ordinance that it was changed due to the shot clock. Staff does not believe that is warranted; such an acknowledgment would be superfluous. The legislative history of ZTA 10-05 makes the association clear. Similarly, it unnecessary to specify that any particular action, such as modifying the special exception, is a waiver of the shot clock. If the modification is for the purpose of getting approval, the shot clock would be moot. If the County's action were delayed by the applicant, that delay would be raised as a defense by the County.

applications than it receives.<sup>3</sup> Requiring more copies of the application would reduce the staff time required to make copies. This new requirement would apply to all special exception applications.

Requiring more copies of the application would be an additional burden on applicants.

The Committee recommended ZTA 10-05 as introduced.

*Should a telecommunications special exception application include an approved preliminary forest conservation plan?*

All special exception applications are currently required to provide preliminary forest conservation plans, not an approved forest conservation plan. Requiring an approved plan with the application will reduce uncertainty about forest conservation law requirements concerning the proposed location of the cell tower within the site. The alternative to an approved plan provided in ZTA 10-05 is confirmation that a forest conservation plan is not required. This is not an additional burden for telecommunications applicants; it only changes the order of approvals.<sup>4</sup> It will help the timely processing of telecommunications facility special exceptions.<sup>5</sup>

T-Mobile recommends allowing a special exception application with a filed forest conservation plan. In their view, the Board of Appeals could conditionally approve the special exception subject to an approved forest conservation plan. This recommendation is inconsistent with the requirement for the Board of Appeals to find that granting the special exception:

Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.<sup>6</sup>

If a special exception is subject to Chapter 22A, the Board must consider the preliminary forest conservation plan required by that Chapter when approving the special exception application and must not approve a special exception that conflicts with the preliminary forest conservation plan.<sup>7</sup>

Without making that affirmative finding, the Board of Appeals may not grant the special exception. Locating the tower is fundamental to making a positive finding. It may not be possible for the Board to make that finding without knowing that the location is consistent with an approved forest conservation plan.<sup>8</sup>

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<sup>3</sup> The paperless office is a future aspiration; it is not a current reality.

<sup>4</sup> §59-G-1.23(d) "...the Board...must not approve a special exception that conflicts with a preliminary forest conservation plan."

<sup>5</sup> T-mobile representatives believe that the forest conservation process requires an inordinate amount of time. Planning Staff found cases where the delay was caused by the applicant's inaction.

<sup>6</sup> §59-G-1.21(a)(5); however, as described herein, federal law has preempted the consideration of health effects.

<sup>7</sup> §59-G-1.23(d).

<sup>8</sup> See *Concerned Citizens v. Constellation-Potomac, L.L.C.*, 122 Md. App. 700 (1998); the Board of Appeals may not conditionally approve a special exception when the subject of the condition concerns a finding by the Board of Appeals necessary for approval. The Court of Special Appeals included the following dicta:

If the Board concluded that Constellation's evolved landscaping plan did not satisfy the minimum requirements of the Zoning Ordinance for approval of a special exception, the Board either should have denied the petition, or, pursuant to section 59-A-4.24, requested Constellation to revise its petition before closing the record. The Board

Staff recommends approval of ZTA 10-05 as introduced.

*Should the Council remove the requirement for a separate determination of "need" by the Planning Board?*

Processing a telecommunications facility special exception is currently delayed by requiring the Planning Board to make an independent finding of need.<sup>9</sup> Scheduling items on the Planning Board agenda adds time. The Planning Board requires that staff reports be on their website 2 weeks before the Board votes on a special exception. The facts provided by the Tower Committee to the Planning Board are known to the Board of Appeals. Allowing the Board of Appeals to make an independent find of the need is sufficient. The public will still have an opportunity to comment at the Hearing Examiner's hearing. That opportunity includes the right to cross-examine witnesses, which is not available at the Planning Board. Generally, the Planning Board is only advisory on special exceptions. The Board of Appeals is authorized to make the final decision. The Planning Board recommended deleting the requirement for it to find "need".

The ZTA does not prevent the Planning Board from holding a public hearing when necessary. If the application affects parkland the Board may choose to hold a hearing; however, ZTA 10-05 would not require a Board hearing.

The Committee recommended ZTA 10-05 as introduced concerning the removal of the requirement for a Planning Board finding of "need".

*Should the time between the Tower Committee's recommendation and the application for a telecommunications facility special exception be amended?*

The ZTA would require an applicant to file a special exception petition within 30 days of the Tower Committee's approval recommendation. Currently, the applicant must file within one year of the Tower

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did neither. Instead, the muddled approach to framing Condition No. 5 begs the question. The question needing to be answered before a special exception may be approved (if one accepts the statutory premise that, in Montgomery County according to section 59-A-2.2(b) of its Zoning Ordinance, the requirements set forth in the Ordinance "are declared to be the minimum requirements for the protection of health, morals, safety and general welfare of the public") is: What landscaping plan will satisfy the threshold requirements of the ordinance in order to justify approval of the petition.

Condition 5 was:

The holder of the special exception will submit a revised landscaping and lighting plan to the Board of Appeals. The plan will reflect discussions with the neighbors on Fawsett [sic] Road, and modifications to improve the buffering and screening of the building. The plan should reflect additional evergreen screening and deciduous plants both within the setback area and the public right-of-way along MacArthur Boulevard and Falls Road, if permitted by the County, the State and/or the Army Corps of Engineers. The plan should also reflect additional evergreen screening along the northern and eastern property lines adjacent to the parking and building area.

Technical staff will have participated in these discussions and will have reviewed and approved the plan. After the Board reviews and accepts the revised plan in a worksession, the holder of the special exception will submit one copy to the Zoning Supervisor in the Department of Permitting Services. All plant material must be installed according to plan and maintained and replaced as necessary.

<sup>9</sup> The "Tower Committee" was established to make technical findings in an administrative manner. It was never established to be an open venue for public participation. Its role is to give the Board of Appeals technical data.

Committee's report. The purpose of this change is to ensure that the Board of Appeal's review is close enough in time to the Tower Committee's review to reasonably assume that conditions on the ground have not changed. T-Mobile proposed that the Council change the 30 day limit to 90 days. The Hearing Examiner did not object to this proposed change.

Testimony took note that ZTA 10-05 did not require submittal of the Tower Committee's report at least 5 days before the Public Hearing on the Special Exception. This would parallel the requirement for the Planning Board's recommendations.

The Committee recommended amending ZTA 10-05 to allow 90 days between the Tower Committee's approval and the special exception petition and to require the Tower Committee's recommendation at least 5 days before the public hearing on the special exception.<sup>10</sup>

*Should cell tower special exceptions address health affects?*

Current law

Although the health effects of all types of electromagnetic radiation are the subject of research and inconsistent conclusions<sup>11</sup>, Congress preempted the County from using the environmental effects of radio frequencies as a consideration in siting cell towers. The Telecommunications Act of 1996 requires the United States Federal Government to control human exposure to RF/MW radiation. In particular, Section 704 of the Act states that:

"No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions."<sup>12</sup>

Testimony argued that environmental effects are different from the health effects of radio frequency emissions and, therefore, Congress did not preempt the County from considering health effects. Other testimony suggested that preempting a locality's consideration of health effects was unconstitutional. These opinions conflict with the intent of Congress.<sup>13</sup> European countries have different standards for

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<sup>10</sup> Currently, the Tower Committee's recommendation must be reviewed by the Board of Appeals before it makes its decision, but the Tower Commission's findings are not required when the special exception application is filed.

<sup>11</sup> "Considering the very low exposure levels and research results collected to date, there is no convincing scientific evidence that the weak RF signals from base stations and wireless networks cause adverse health effects." The World Health Organization, 2005.

"Cellular phone towers, like cellular phones themselves, are a relatively new technology, and we do not yet have full information on health effects. In particular, not enough time has elapsed to permit epidemiologic studies. There are some theoretical reasons why cellular phone towers would not be expected to increase cancer risk, and animal studies of RF have not suggested a risk of cancer." American Cancer Society, 2006

A 2008 paper co-written by David Carpenter, Director of the Institute for Health and the Environment at the University of Albany, concluded there is ample reason to be concerned about cell tower emissions and recommended new federal standards for emissions. Effects, Carpenter said, include death of brain neurons, premature aging, memory loss, retarded learning, headaches, fatigue, sleep disorders and cancers.

<sup>12</sup> 47 U.S.C. §332(c)(7)(B)(iv).

<sup>13</sup> "The [Commerce] Committee has received substantial evidence that local zoning decisions, while responsive to local concern about the potential effects of radio frequency emission levels, are at times not supported by scientific and medical evidence. A high quality national wireless telecommunications network cannot exist if each of its component [sic] must meet

the allowable strength of radio frequency emissions. Some localities have asked Congress to allow states to determine the health effects of cell towers.<sup>14</sup> These facts do affect Congressional preemption.

### Schools

Testimony sited a particular concern for siting cell towers on school property. The Board of Education owns school sites. It is a state agency that is not governed by zoning controls.<sup>15</sup> Cell towers on school sites must adhere to the mandatory referral process, which is advisory.<sup>16</sup> Action that would generically affect all school sites would need to be in the form of a change to state law or the voluntary policy of the Board of Education.

### Preemption

It would take an act of Congress to un-do an act of Congress or litigation. Congress is unlikely to change its desire for operable cell phone networks. Litigation would be costly, time-consuming, and would likely not have an outcome favorable to the County's authority.

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different RF standards in each community. The Committee believes the [FCC] rulemaking on this issue (ET Docket 93-62) should contain adequate, appropriate and necessary levels of protection to the public, and needs to be completed expeditiously." H. Rep. No. 104-204, at 95 (1995).

<sup>14</sup>Staff has no expertise in the areas of epidemiology or electromagnetic radiation; however, such expertise is not required to determine the status of the law.

<sup>15</sup> Pan American Health Organization v. Montgomery County, 889 F. Supp. 234(1994); the State of Maryland is not subject to local zoning authority because the state enabling act does not clearly and indisputably manifest such an intention.

<sup>16</sup> Maryland Code Article 28 §7-112:

...no road, park, or other public way or ground, no public (including federal) buildings or structures, and no public utility, whether publicly or privately owned, shall be located, constructed, or authorized in the regional district until and unless the proposed location, character, grade, and extent thereof has been submitted to and approved by the Commission. In case of disapproval, the Commission shall communicate its reasons to the State, federal, county, municipal, or district board, body, or official proposing to locate, construct, or authorize such public way, ground, building, structure, or utility. Thereupon the board, body, or official in its discretion may overrule the disapproval and proceed....

Zoning Text Amendment No.: 10-05  
Concerning: Special Exceptions Procedures –  
Telecommunications Facilities  
Draft No. & Date: 2 - 6/15/10  
Introduced: April 6, 2010  
Public Hearing: May 11, 2010  
Adopted:  
Effective:  
Ordinance No.:

**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 Trachtenberg

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**AN AMENDMENT** to the Montgomery County Zoning Ordinance to:

- increase the number of required copies of a special exception petition;
- require a special exception petition for a telecommunications facility to include an approved preliminary forest conservation plan and photographic simulations;
- remove the requirement that the Planning Board make a finding of need as to telecommunications facilities; and
- generally amend the provisions related to special exception procedures and telecommunications facilities.

By amending the following sections of the Montgomery County Zoning Ordinance, Chapter 59 of the Montgomery County Code:

DIVISION 59-A-4 COUNTY BOARD OF APPEALS

Section 59-A-4.2 Petitions for Special Exceptions and Variances

DIVISION 59-G-2 SPECIAL EXCEPTIONS—STANDARDS AND REQUIREMENTS

Section 59-G-2.58 Telecommunications facility.

**EXPLANATION:** ***Boldface** indicates a Heading or a defined term.*

*Underlining indicates text that is added to existing law by the original text amendment.*

*[Single boldface brackets] indicate that text is deleted from existing law by original text amendment.*

*Double underlining indicates text that is added to the text amendment by amendment.*

*[[Double boldface brackets]] indicate text that is deleted from the text amendment by amendment.*

*\* \* \* indicates existing law unaffected by the text amendment.*

## OPINION

Zoning Text Amendment No. 10-05, sponsored by Councilmember Trachtenberg, was introduced on April 6, 2010. This ZTA is a response to a declaratory ruling released by the Federal Communications Commission (FCC) on November 18, 2009. In that so-called "shot clock" ruling, the FCC determined that localities must decide zoning applications for telecommunications facilities within 90 days (for co-locations) or 150 days (for other siting applications). The ZTA would require additional information before the Board of Appeals accepts an application and would shorten the period of review of special exception petitions for telecommunications facilities.

The Montgomery County Planning Board, in its report to the Council, recommended that the text amendment be approved as introduced.

The Council held a public hearing on ZTA 10-05 on May 11, 2010. The Hearing Examiner supported ZTA 10-05 as introduced. Representatives of T-Mobile suggested that a special exception application should be allowed to proceed at the same time as a forest conservation application and that the approval of the special exception should be allowed on the condition of the forest conservation plan approval.

The Council received correspondence on this matter in addition to oral testimony. A resident was concerned about: 1) ensuring the accuracy of telecommunications facility applications; 2) reducing opportunities for public participation; 3) the possibility that any change to the current process is unnecessary until the results of the FCC's reconsideration and on-going litigation are known; and 4) the possibility that the ZTA sets the stage for overwhelming the resources available to review telecommunications applications. Other testimony also addressed the health effects of radio frequency emissions.

The Board of Appeals supported ZTA 10-05. The Board members believe that the special exception process affords a significant opportunity for public participation, even with the proposed changes to the process. They do not view the continuing litigation on the shot clock to be a reason for inaction.

The Council referred the text amendment to the Planning, Housing, and Economic Development Committee for review and recommendation.

The Planning, Housing, and Economic Development Committee held a worksession on May 6, 2010 to review the amendment. On June 14, 2010 the Committee (3-0) recommended approval of ZTA 10-05 with amendments to:

- 1) allow a maximum of 90 days between the Transmission Facility Coordinating Group recommendation and the application for a special exception;
- 2) require the recommendations of the Transmission Facility Coordinating Group to be submitted to the record of the application at least 5 days before the date set for the public hearing on the special exception; and
- 3) reference the exemption provisions of the forest conservation law (Chapter 22A-5).

The Committee believed that requiring more information with an application for a telecommunications facility special exception will aid in timely decision making. An approved forest conservation plan (or proof that the facility is exempt from the forest conservation requirements) will remove uncertainty in the special exception process. The Committee was satisfied that the opportunity for public notice and participation in the special exception process is adequate. In addition, the Committee concluded that the issue of the need for the telecommunications facility would be adequately addressed by the Board of Appeals.

The District Council reviewed Zoning Text Amendment No. 10-05 at a worksession held on June 22, 2010 and agreed with the recommendations of the Planning, Housing, and Economic Development Committee.

For these reasons, and because to approve this amendment will assist in the coordinated, comprehensive, adjusted, and systematic development of the Maryland-Washington Regional District located in Montgomery County, Zoning Text Amendment No. 10-05 will be approved as amended.

#### *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:*

1           **Sec. 1. DIVISION 59-A-4 is amended as follows:**

2       \*    \*    \*

3       **59-A-4.2. Petitions for special exceptions and variances.**

4       \*    \*    \*

5       **59-A-4.22. Data to accompany petition for special exception.**

6       (a)   Each petition for special exception must be accompanied at the time of its  
7           filing by [4] 8 copies of a statement that includes:

- 8           (1)   Survey plats or other accurate drawings showing boundaries,  
9                dimensions, area, topography and frontage of the property involved,  
10              as well as the location and dimensions of all structures existing and  
11              proposed to be erected, and the distances of such structures from the  
12              nearest property lines.
- 13          (2)   Plans, architectural drawings, photographs, elevations, specifications,  
14              or other detailed information depicting fully the exterior appearance  
15              of existing and proposed construction, including signs, involved in the  
16              petition. This requirement may be satisfied by site plan documents  
17              which comply with the requirements of section 59-D-3.2, as provided  
18              in subsection (b)(2).
- 19          (3)   A statement explaining in detail how the special exception would be  
20              operated, including hours of operation, number of anticipated  
21              employees, occupants and clientele, equipment involved, and any  
22              special conditions or limits which the applicant proposes.
- 23          (4)   Complete information concerning the size, type, and location of any  
24              existing and proposed trees, landscaping and screening, and exterior  
25              illumination. This requirement may be satisfied by site plan

- 26 documents which comply with the requirements of section 59-D-3.2,  
27 as provided in subsection (b)(2).
- 28 (5) Certified copy of official zoning vicinity map of 1000-foot radius  
29 surrounding the subject property and other information to indicate the  
30 general conditions of use and existing improvements on adjoining and  
31 confronting properties, along with a list of those adjoining and  
32 confronting property owners in the county tax records who are entitled  
33 to notice of the filing under subsection 59-A-4.46.
- 34 (6) If the applicant is not the owner of the property involved, the lease,  
35 rental agreement, or contract to purchase by which the applicant's  
36 legal right to prosecute the petition is established.
- 37 (7) Applicable master plan maps reflecting proposed land use, zoning,  
38 and transportation, together with any other portions of the applicable  
39 master plan which the applicant considers relevant.
- 40 (8) Except a petition for a telecommunications facility, [A] a preliminary  
41 forest conservation plan prepared under Chapter 22A or a  
42 confirmation that the inventory is not required under Chapter 22A-5. [,  
43 and]
- 44 (9) [an] An approved natural resources inventory prepared in accordance  
45 with the technical manual adopted by the Planning Board or a  
46 confirmation that the inventory is not required under Chapter 22A-5 [,  
47 and in addition:
- 48 (i) Other natural features, such as rock outcroppings and scenic  
49 views; and
- 50 (ii) Historic buildings and structures].
- 51 [(9)] (10) A preliminary or final water quality plan if the property is  
52 located in a special protection area subject to Chapter 19.

53 [(10)] (11) All additional exhibits which the applicant intends to introduce.

54 [(11)] (12) A summary of what the applicant expects to prove, including  
55 the names of applicant's witnesses, summaries of the testimonies of  
56 expert witnesses, and the estimated time required for presentation of  
57 the applicant's case.

58 (13) If the petition is for a telecommunications facility:

59 (A) an approved preliminary forest conservation plan prepared  
60 under Chapter 22A or a confirmation that the plan is not  
61 required under Chapter 22A-5; and

62 (B) photographic simulations of the tower and site, including  
63 equipment areas at the base, as seen from at least three  
64 directions, including from adjacent and confronting properties.

65

66 \* \* \*

67 **Sec. 2. DIVISION 59-G-2 is amended as follows:**

68 **59-G-2. SPECIAL EXCEPTIONS—STANDARDS AND REQUIREMENTS.**

69 \* \* \*

70 **59-G-2.58 Telecommunications facility.**

71 (a) Any telecommunications facility must satisfy the following standards:

72 (1) A support structure must be set back from the property line as follows:

73 [a.] (A) In agricultural and residential zones, a distance of one  
74 foot from the property line for every foot of height of the  
75 support structure.

76 [b.] (B) In commercial and industrial zones, a distance of one-  
77 half foot from the property line for every foot of height of the

78 support structure from a property line separating the subject site  
79 from commercial or industrial zoned properties, and one foot  
80 for every foot of height of the support structure from residential  
81 or agricultural zoned properties.

82 [c.] (C) The setback from a property line is measured from the  
83 base of the support structure to the perimeter property line.

84 [d.] (D) The Board of Appeals may reduce the setback  
85 requirement to not less than the building setback of the  
86 applicable zone if: (i) the applicant requests a reduction; and  
87 (ii) evidence indicates that a support structure can be located on  
88 the property in a less visually obtrusive location after  
89 considering the height of the structure, topography, existing  
90 vegetation, adjoining and nearby residential properties, if any,  
91 and visibility from the street.

92 (2) A support structure must be set back from any off-site dwelling as  
93 follows:

94 [a.] (A) In agricultural and residential zones, a distance of 300  
95 feet.

96 [b.] (B) In all other zones, one foot for every foot in height.

97 [c.] (C) The setback is measured from the base of the support  
98 structure to the base of the nearest off-site dwelling.

99 [d.] (D) The Board of Appeals may reduce the setback the  
100 agricultural [an] and residential zones to a distance of one foot  
101 from an off-site residential building for every foot of height of  
102 the support structure if: (i) the applicant requests a reduction;  
103 and (ii) evidence indicates that a support structure can be  
104 located in a less visually obtrusive location after considering the

105 height of the structure, topography, existing vegetation,  
106 adjoining and nearby residential properties, and visibility from  
107 the street.

108 (3) The support structure and antenna must not exceed 155 feet in height,  
109 unless it can be demonstrated that additional height up to 199 feet is  
110 needed for service, collocation, or public safety communication  
111 purposes. At the completion of construction, before the support  
112 structure may be used to transmit any signal, and before the final  
113 inspection pursuant to the building permit, the applicant must certify  
114 to the Department of Permitting Services that the height and location  
115 of the support structure is in conformance with the height and location  
116 of the support structure as authorized in the building permit.

117 (4) The support structure must be sited to minimize its visual impact. The  
118 Board may require the support structure to be less visually obtrusive  
119 by use of screening, coloring, stealth design, or other visual mitigation  
120 options, after considering the height of the structure, topography,  
121 existing vegetation and environmental features, and adjoining and  
122 nearby residential properties. The support structure and any related  
123 equipment buildings or cabinets must be surrounded by landscaping  
124 or other screening options that provide a screen of at least 6 feet in  
125 height.

126 (5) The property owner must be an applicant for the special exception for  
127 each support structure. A modification of a telecommunications  
128 facility special exception is not required for a change to any use  
129 within the special exception area not directly related to the special  
130 exception grant. A support structure must be constructed to hold no  
131 less than 3 telecommunications carriers. The Board may approve a

- 132 support structure holding less than 3 telecommunications carriers if:  
133 [1)] (A) requested by the applicant and a determination is made that  
134 collocation at the site is not essential to the public interest; and [2)]  
135 (B) the Board decides that construction of a lower support structure  
136 with fewer telecommunications carriers will promote community  
137 compatibility. The equipment compound must have sufficient area to  
138 accommodate equipment sheds or cabinets associated with the  
139 [telecommunication] telecommunications facility for all the carriers.
- 140 (6) No signs or illumination are permitted on the antennas or support  
141 structure unless required by the Federal Communications  
142 Commission, the Federal Aviation Administration, or the County.
- 143 (7) Every freestanding support structure must be removed at the cost of  
144 the owner of the telecommunications facility when the  
145 telecommunications facility is no longer in use by any  
146 telecommunications carrier for more than 12 months.
- 147 (8) All support structures must be identified by a sign no larger than 2  
148 square feet affixed to the support structure or any equipment building.  
149 The sign must identify the owner and the maintenance service  
150 provider of the support structure or any attached antenna and provide  
151 the telephone number of a person to contact regarding the structure.  
152 The sign must be updated and the Board of Appeals notified within 10  
153 days of any change in ownership.
- 154 (9) Outdoor storage of equipment or other items is prohibited.
- 155 (10) Each owner of the telecommunications facility is responsible for  
156 maintaining the telecommunications facility[, ] in a safe condition.
- 157 (11) The applicants for the special exception must file with the Board of  
158 Appeals a recommendation from the Transmission Facility

159 Coordinating Group regarding the telecommunications facility. The  
160 recommendation must be no more than [one year] ~~[[30]]~~ 90 days old,  
161 except that a recommendation issued within one year before {date of  
162 adoption} must be accepted for one year from the date of issuance.  
163 The recommendation of the Transmission Facility Coordinating  
164 Group must be submitted to the Board at least 5 days before the date  
165 set for the public hearing.

166 (12) [Prior to the Board granting any special exception for a  
167 telecommunications facility, the proposed facility must be reviewed  
168 by the County Transmission Facility Coordinating Group.] The Board  
169 [and Planning Board] must make a separate, independent finding as to  
170 need and location of the facility. The applicant must submit evidence  
171 sufficient to demonstrate the need for the proposed facility.

172 \* \* \*

173 Sec. 3. Effective date. This ordinance takes effect on the date of Council  
174 adoption.

175

176 This is a correct copy of Council action.

177

178

179 \_\_\_\_\_  
Linda M. Lauer, Clerk of the Council



**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

May 6, 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: Zoning Text Amendment 10-05

**BOARD RECOMMENDATION**

The Montgomery County Planning Board of The Maryland-National Capital Park and Planning Commission reviewed Zoning Text Amendment 10-05 at its regular meeting on May 6, 2010. By a vote of 4-0, with Commissioner Alfandre absent, the Board recommended approval of the text amendment as introduced.

The primary purpose of the text amendment is to streamline the telecommunications facility special exception review process in light of a recently released declaratory ruling by the Federal Communications Commission. The FCC Ruling requires telecommunications facility special exception reviews to be completed within 150 days. In an effort to reduce the existing review process to under 150 days, the text amendment proposes the following changes: (1) requires the applicant to submit eight copies of all submission materials at filing; (2) requires the applicant to submit photographic simulations of the proposed site from at least three angles; (3) requires an approved preliminary forest conservation plan at filing; (4) requires the applicant to submit a Tower Committee recommendation that is no more than 30 days old; and (5) eliminates the requirement that the Planning Board make a separate, independent finding as to need and location of the proposed telecommunications facility.

The proposed text amendment and FCC Ruling were fully discussed by the Board. The Board agreed with technical staff that the number of special exception copies be increased from four to eight; that a telecommunication facility special exception application include an approved preliminary forest conservation plan and photographic simulations at filing; and that the current requirement that the Planning

(1)

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Board make a separate, independent determination of need be removed from the zoning code. The Board was not convinced by the public testimony to recommend that a telecommunications facility special exception be filed concurrently with the Tower Committee filing. The Board believes these reviews should be considered separate processes for purposes of the FCC Ruling and that the 150-day period should not begin until the special exception application is determined to be complete. The Board concluded that the proposed text amendment is a reasonable approach in attempting to bring the County into compliance with the FCC ruling.

A copy of the technical staff report is attached.

A handwritten signature in cursive script, reading "Royce Hanson", written over a horizontal line.

Royce Hanson  
Chairman



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

MCPB  
Item #  
5/06/10

April 30, 2010

MEMORANDUM

TO: Montgomery County Planning Board

FROM: Damon B. Orobona, Senior Zoning Analyst *Damon*

VIA: Rose Krasnow, Chief of Development Review  
Ralph Wilson, Supervisor of Zoning *RW*  
Greg Russ, Zoning Coordinator *GR*

SUBJECT: ZTA 10-05; Amendment to Telecommunications Facility Special Exception Process in response to FCC Declaratory Ruling.

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*Summary.* Staff supports Zoning Text Amendment (ZTA) 10-05 as introduced. ZTA 10-05 was introduced by Councilmember Trachtenberg on April 6, 2010, for the purpose of updating the zoning ordinance in light of a recent Federal Communications Commission (FCC) Declaratory Ruling that places exacting time limitations on local zoning authorities in reviewing telecommunications facility applications.

The FCC Ruling effectively limits the County's review of a telecommunication facility special exception to 150 days. In response to the significantly reduced review period, County agency representatives developed a conceptual approach that generally allots a 30-day review to the Transmission Facilities Coordinating Group (Tower Committee), a 90-day review to the Planning Commission, and a 30-day period for both the Office of Zoning and Administrative Hearings (Hearing Examiner) and Board of Appeals' public hearings.

The primary goal of the ZTA is to streamline the telecommunications facility special exception review process. To do this, the ZTA amends the review process in the following ways: (1) requires the applicant to submit eight copies of all submission materials at filing; (2) requires the applicant to submit photographic simulations of the proposed site from at least three angles; (3) requires an approved forest conservation plan at filing; (4) requires the applicant to submit a Tower Committee recommendation that is no more than 30 days old; and (5) eliminates the requirement that the Planning Board make a separate, independent finding as to need and location of the proposed telecommunications facility.

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Under the ZTA, the Board will no longer be required to make a need finding as part of the special exception process. The intent is for the Board to review only those telecommunications facilities affecting agency-owned parkland. Staff supports the proposed procedural modifications as a reasonable approach to bring the County's telecommunications facility review process into compliance with the strict FCC 150-day time limitation.

*FCC Declaratory Ruling.* Two separate events prompted the FCC to revisit the federal statute<sup>1</sup> that controls local zoning approvals for wireless telecommunications facilities. In 2008, a collection of wireless providers petitioned the FCC to clarify the timeframes that local zoning authorities must act within regarding siting requests. The wireless providers alleged that the telecommunications facility application process often faces lengthy and unreasonable delays around the United States. In furthering the allegations, Maryland was cited as an example where the typical application process has gone from approximately two months to nine months over the past four years, and the DC Metro area was cited as going from about six months to more than a year over the past five years. Subsequent to the wireless providers' allegations, Congress enacted the *American Recovery and Reinvestment Act of 2009*, which, in part, directed the FCC to devise a national broadband plan that will ensure every American has access to broadband service. The Recovery and Reinvestment Act places additional pressures on the FCC to ensure a sufficient wireless network is in place in the coming years.

In response to these events, the FCC adopted Declaratory Ruling 09-99 on November 18, 2009, which promotes wireless and broadband services by reducing delays in the construction of wireless telecommunications facilities. The Ruling sets a specific timeframe for local authorities reviewing wireless siting applications: all reviews must be completed within 90 days for collocations, and 150 days for all other applications.<sup>2</sup> Although the FCC states that it is not the Ruling's intent to give preferential treatment to the wireless service industry in the processing of zoning requests, Montgomery County will have to alter its typical special exception process to accommodate the newly imposed 150-day limit for telecommunications facility applications.

*Existing Telecommunications Facility Review in Montgomery County.* Montgomery County typically treats applications for telecommunication facilities as special exceptions.<sup>3</sup> Generally speaking, special exceptions in the County go through an extensive review process, with a public hearing before the Planning Board, a quasi-

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<sup>1</sup> 47 U.S.C. §332(c)(7).

<sup>2</sup> The Ruling states that if a local zoning authority exceeds these time limitations, there has been a failure to act, which gives the applicant the right to pursue judicial relief. If the applicant pursues judicial relief, the court will not automatically issue an injunction granting the application, but will instead hear and decide the application on an expedited basis.

<sup>3</sup> Although telecommunications facilities are allowed by-right in certain zones and can also be treated as a Mandatory Referral in certain circumstances.

judicial proceeding before the Hearing Examiner, and an action item before the Board of Appeals.

A telecommunications facility special exception is even more cumbersome than the typical special exception. In addition to the usual three-tiered review process, the ordinance also requires a telecommunications facility to be reviewed by the Tower Committee, a group established by Executive Regulation that determines whether there is a need for wireless coverage at a specific location.<sup>4</sup> Because *four* separate public sessions are currently conducted during the telecommunications facility special exception process, it is not expected that the County can continue its current review process and comply with the new 150-day FCC time limitation.

*County Response to FCC Ruling.* In response to the FCC Ruling, an informal cell tower working group met to discuss how to best process telecommunications facility requests within the 150-day timeframe established by the FCC. The working group looked at ways of paring down the process to 150 days or less. The general approach taken was to substantially cut back on the review time typically allocated to each reviewing agency. The idea was to allot approximately 30 days for the Tower Committee to review whether there is a need for cellular coverage in the area, about 90 days for the Planning Department's land use and regulatory analysis, and another 30 days or so for both the Hearing Examiner's and Board of Appeals' public hearings.

Specifically, the ZTA proposes that all special exception applicants submit eight copies of all required materials at filing. This requirement will help streamline the review process by requiring sufficient copies to distribute to various agencies at the time of filing. The ZTA also requires a telecommunications facility applicant to submit photographic simulations of the proposed installation from at least three angles, including adjacent and confronting properties. Generally, these simulations are requested by staff anyway, so requiring the simulations at filing will help minimize delays caused by resubmissions. The ZTA also requires an approved forest conservation plan at the time the applicant files for a telecommunications facility. This requirement avoids potential delays that could extend governmental review beyond 150 days. Additionally, the ZTA requires the telecommunications facility applicant to submit a Tower Committee recommendation that is no more than 30 days old. The current standard requires a Tower Committee recommendation that is not older than one year. Reducing the requirement to 30 days or less shortens total review time, as the 150-day FCC clock starts ticking as the Tower Committee begins its review. Shortening the requirement to 30 days also helps avoid outdated Tower Committee recommendations. Finally, the ZTA eliminates the requirement that the Planning Board must make a separate, independent finding as to the need and location of the proposed telecommunications facility.<sup>5</sup>

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<sup>4</sup> §59-G-2.58(a)(12).

<sup>5</sup> This requirement is currently codified at §59-G-2.58(a)(12).

Legislative history shows that the requirement for the Planning Board to make an independent finding of need separate from that of the Tower Committee was included by the Council as part of the 2002 rewrite of the special exception regulations. The reason cited was that the Tower Committee does not issue notice nor allow formal public participation during its assessment of the telecommunications facility application.

The Planning Board's current practice has been to address need and location only when raised as an issue by staff or during the Board's public hearing, which rarely is the case. Eliminating the independent need finding allows the Board the discretion to review only applications it has a particular concern about, such as a telecommunications facility proposed on Commission-owned land, and brings the review time more in line with the FCC Ruling.<sup>6</sup>

Historic preservation staff recommends adding a requirement to the ZTA that an application for a telecommunications facility special exception include an approved historic area work permit or a determination that the proposed facility does not constitute a substantial alteration as defined in Chapter 24A.<sup>7</sup> Consideration was given to a similar proposal by the informal working group that reviewed the FCC Ruling, but was not recommended so as not to extend the 150-day FCC period beyond the Tower Committee process and special exception process. Any historic preservation issues would be addressed as they now are, outside the special exception process.

With the proposed procedural changes, it appears possible to take a telecommunications facility review from approximately 190 days to around 130 days. A side-by-side comparison of the existing process to the proposed process is shown on the following page.

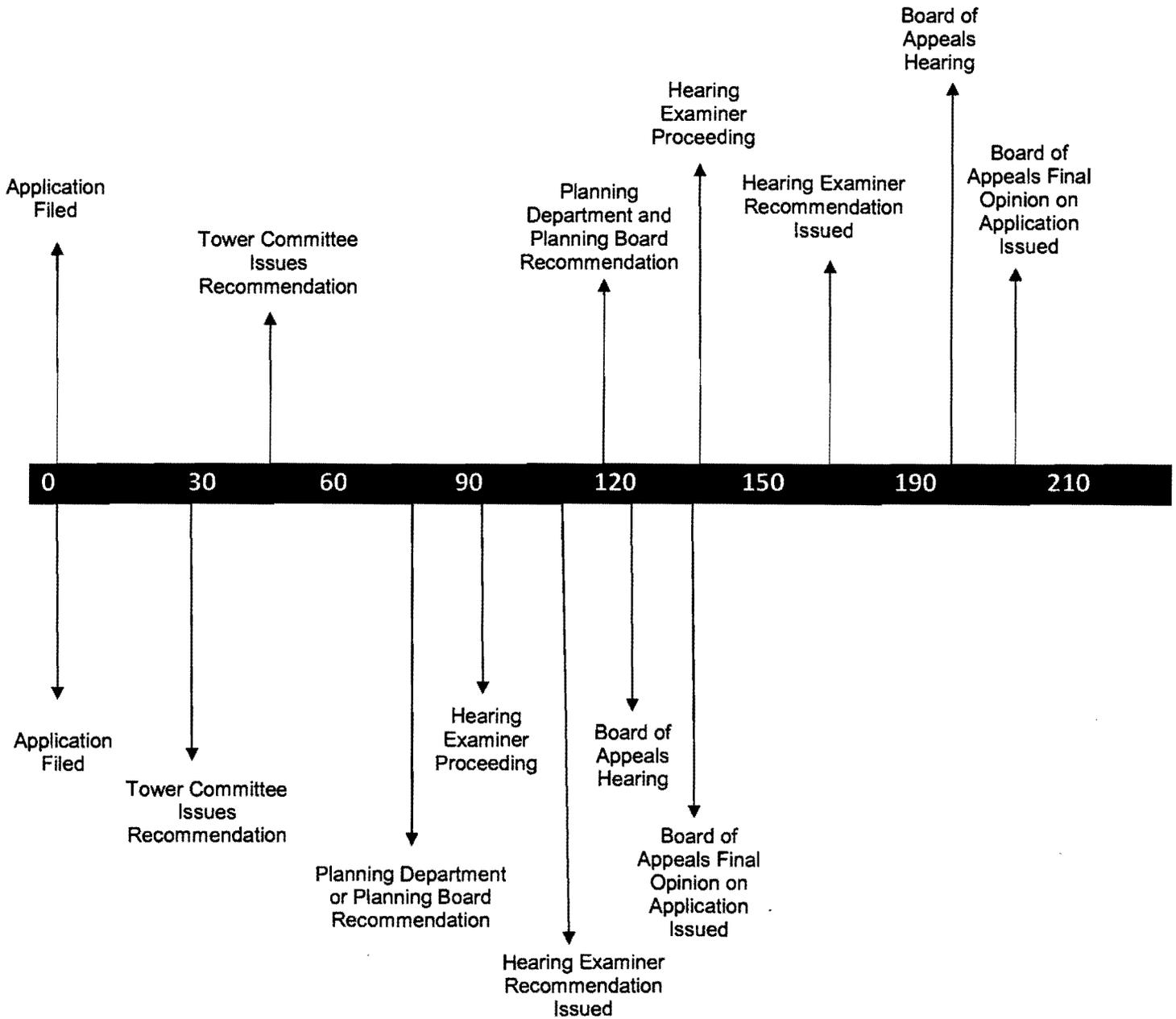
The ZTA is scheduled to be heard by the County Council on May 11, 2010. A copy of the ZTA as introduced is attached.

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<sup>6</sup> The Planning Board is not required to review special exception applications, though the Commission generally follows the policy to bring all special exceptions before the Board except accessory apartment applications. §59-A-4.128.

<sup>7</sup> See Historic Preservation interoffice memorandum at attachment 2.

### Existing Process in Days



### Proposed Process in Days

Sue Present

1000 La Grande Road  
Silver Spring, MD 20903  
suepresent@comcast.net voice/fax: 240-331-9155

May 27, 2010

The Honorable Mike Knapp  
Chairman, PHED Committee  
Montgomery County Council  
Stella V. Werner Building  
100 Maryland Avenue  
Rockville, MD

Dear Mr. Chairman:

Thank you for the opportunity to submit comments regarding proposed Zoning Text Amendment 10-05. I appreciate the time and attention that the Committee is giving to the ZTA. Based upon my review, significant changes are necessary before the passage of this legislation.

❖ *A Preliminary Legislative Matter*

On May 6, 2010, the Montgomery County Planning Board held its Hearing on the proposed Zoning Text Amendment. The Board received testimony at the hearing from TFCG (Tower Committee) Representative Mitsuko (Mitzi) Herrera. Ms. Herrera provided enlightening and important information to the Planning Board concerning underlying barriers to siting. The Tower Committee expects 18 Special Exception Petitions for telecommunications facilities to be filed this year. For the most part, these petitions come from carriers seeking to build new cell sites because of inadequate spaces to co-locate on existing structures. However, Ms. Herrera pegs the dearth of co-location space to one problem: Abandoned or unused antennas are not being removed and are consuming needed, valuable co-location spaces at existing telecommunications sites in Montgomery County.

It seems obvious that correction of this single problem, freeing existing cell sites in the County of abandoned/unused antennas, could do much more to expedite telecommunications facility sitings than the proposed ZTA. Since co-locations generally pose fewer adverse impacts upon the surrounding properties and people than do new facilities, this act of freeing up space would be highly beneficial for people throughout the County. Providing improved co-location opportunities could also reduce potential Board of Appeals delays for various other types of special exceptions petitions, petitions for variances, and other matters that come before the Board — delays created by the expedited processing of special exception petitions for telecommunications facilities to ensure decisions within the time limits specified by the FCC Declaratory Ruling.

A brief on-line search reveals that many jurisdictions across the U.S. require the removal of both abandoned telecommunications facilities and abandoned antennas. Currently, Montgomery County's Zoning Ordinance 59-G-2.58(a)(7) requires abandoned/unused telecommunications facilities to be removed but does not address abandoned antennas.<sup>1</sup>

There is a pressing need for Montgomery County to amend the Zoning Ordinance to require the removal of abandoned or unused antennas. For a carrier to occupy transmission space for an extended period of time without usage shows this transmission space is not needed by that carrier. Transmission space *hoarding* is contrary to the intent for which any carrier would have been granted County approval to occupy transmission space, and contrary to the intent of the legislation and regulations that authorize co-location privileges. Furthermore, the electrical cables and components that connect the abandoned or unused antennas may present fire hazards for the active transmission facility and for the surrounding public.

Ms. Herrera presented the perspective to the Planning Board that the proposed legislation did not need to move forward quite so quickly. Based upon Ms. Herrera's testimony regarding the need to remove abandoned or unused antennas to create transmission space, it would seem as if the proposed ZTA might be putting the proverbial *cart before the horse*.

#### **Recommended Solution:**

**Amend 59-G-2.58(a)(7) to Expand Co-Location Opportunities.** As a first and immediate step, the Section of the Zoning Ordinance that currently requires the removal of abandoned or unused telecommunication facilities should be amended to also require the removal of any antennas that have been determined by the County to be abandoned or unused.

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<sup>1</sup> Although it provides more time than 59-G-2.58(a)(7) does for the removal of abandoned towers, and likely more time than would be advisable for new County legislation that would require the removal of an abandoned antenna, one example of such legislation can be found in Monroe, NC (see below). The text of that legislation or legislation from other jurisdictions that prohibit abandoned antennas can serve as a template for Montgomery County to use in developing an amendment to 59-G-2.58(a)(7).

*Abandonment.* Whenever a tower, antenna, or related equipment ceases to be in active operation for more than 180 days, it shall be removed. The City Council may grant a one time extension equal to 180 days whenever it finds that such an extension will not compromise the public health, safety, or welfare and that such extension is not solely for the purpose of delaying the cost of removing the tower. The owner of the tower shall be responsible for the removal of an abandoned antenna or related equipment. The owner of the property and the owner of the tower shall be jointly and severally responsible for the removal of an abandoned tower. Whenever a tower or antenna are abandoned, the owner of the tower shall notify the City Department of Planning and Development within 30 days immediately following abandonment.  
(<http://www.monroenc.org/PlanDev/UnifiedDevelopmentOrdinance.pdf>)

❖ *Discussion of Proposed Zoning Text Amendment 10-05*

I also testified before the Planning Board last month. My testimony similarly suggested it might be better to hold off on adopting legislation that responds to the FCC's Declaratory Ruling. However, the crux of my opposition to ZTA 10-05 is that it *misses the mark*. Contrary to its intent, this legislation would adversely affect the County's local authority to approve the location of cell sites and it would detrimentally impact the People of Montgomery County.

**The Proposed Zoning Text Amendment Contains Three Major Flaws:**

- 1) **It diminishes what are already inadequate opportunities for public participation and access to information;**
- 2) **It fails to provide sufficient mechanisms for ensuring applications or petitions are complete and correct, or to check for accuracy of modifications made throughout the review/approval process; and**
- 3) **It lacks clear and comprehensive application/petition filing requirements, and it is void of guidance and review mechanisms to ensure compliance.**

The following information explains my findings about the flaws in this legislation. It then goes on to provide suggested revisions that would remedy the problems with the proposed legislation.

The documents that introduce ZTA 10-05 discuss the need to revise the County's processes to ensure that determinations take place within a 150-day time limit for applications for new structures and within a 90-day time limit for applications for co-locations, in order to comply with the recent FCC's Declaratory Ruling. **Absent from these introductory statements, and apparently overlooked when preparing the ZTA, is the FCC requirement that any determinations regarding an application's incompleteness must be made within the first 30 days after filing.**<sup>2</sup> So long as a determination would occur during the first 30 days, the *Clock* would stop if the application was found incomplete or inaccurate, and the *Clock* would not start again until the application was determined to be complete and accurate. However, after 30 days have tolled, even if an omission or error would be found, the County could not stop the *Clock*.

**Unless the Application and Petition are filed simultaneously, it is impossible for the Tower Committee Application and the Special Exception Petition to be fairly reviewed for errors and omissions during the first 30 days of the telecommunications facility siting request period.** The County Attorney has interpreted the cell site application review and determination activities, which are administered by the Tower Committee, the Planning Board and its Staff, the Office of Zoning and Administrative Hearings, and the Board of Appeals, to comprise one, singular process.<sup>3</sup> This interpretation is consistent with the County's interpretation of its processing time in the Reply Comments provided to the FCC.<sup>4</sup>

<sup>2</sup> See paragraphs 52 and 53 of FCC Declaratory Ruling

<sup>3</sup>Memorandum to the County Council from OZAH Director Françoise Carrier. 6 April 2010, p.3, <[http://www.montgomerycountymd.gov/content/council/pdf/agenda/cm/2010/100429/20100429\\_PHED3.pdf](http://www.montgomerycountymd.gov/content/council/pdf/agenda/cm/2010/100429/20100429_PHED3.pdf)>

<sup>4</sup> Montgomery County's Reply Comments to the FCC: In the Matter of A National Broadband Plan for Our Future, Reply Comments of Montgomery County, Maryland. GN Docket No. 09-51, 21 July 2009, pp. 8-9 [http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=7019917716](http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=7019917716)

The way the proposed legislation is crafted, the first 30 days of this process are expected to be totally consumed by the Tower Committee's processing of the Tower Committee Application; and that first 30 days would entirely precede the filing of the Special Exception Petition. Since the proposed legislation retains the Zoning Ordinance requirement for the Special Exception Petition to include the Tower Committee's Recommendation, the legislation essentially bars any opportunity for evaluation of the Special Exception Petition until after the Tower Committee's review has concluded and a Tower Committee Recommendation has been made.

The notion that this legislation might foreclose the County's opportunity and the Public's opportunity to review applications and petitions for accuracy and completeness is outrageous! I have personally witnessed a wide variety of Special Exception Petition errors. Without identifying any specific cases I can state that many errors have first come to light during Special Exception Petition hearings, including but not limited to:

- A compound inadequate to accommodate co-locators;
- References to trees (*screening*) that did not exist;
- Erroneous and inadequate measurements of the setbacks to off-site residences;
- A *to-scale* elevation plan that depicted the girth of the monopole as deceptively slimmer than its measurements; and even
- Engineers' plans that provided the wrong location for the monopole.

Carriers make errors when they file their Tower Committee Applications, too. The neighbors in the area of Walt Whitman High School identified a series of errors almost one year after the application was filed with the Tower Committee. The neighbors reported the carrier had made false representations of the proposed cell site's location, the pole diameter, and had obscured the adverse visual impact that would be experienced with the selected stealth design.<sup>5</sup>

The determination that errors are problematic in telecommunications applications is this County's perspective, itself. Montgomery County documented this problem of errors to the FCC in its Reply Comments last year. It told the FCC that applications often omit important information and *contain obvious errors, inaccurate or illegible plans and exhibits, or contradictory information*.<sup>6</sup> With the newly imposed FCC time constraints, to find all the errors in some cell site applications and petitions may, to coin a phrase, *Take a Village*. It should certainly involve affected and interested members of the public in the process.

<sup>5</sup> Fraudulent Simulation, Alliance of Neighbors of Walt Whitman High School, 13 March 2010, <[http://2.bp.blogspot.com/\\_nPfuj9JAYY/S5yLa5eMNCI/AAAAAAAAAKI/zZFLOpFEWQk/s1600-h/Annotated+Photosimulation.png](http://2.bp.blogspot.com/_nPfuj9JAYY/S5yLa5eMNCI/AAAAAAAAAKI/zZFLOpFEWQk/s1600-h/Annotated+Photosimulation.png)>

<sup>6</sup> Montgomery County's Reply Comments to the FCC: In the Matter of A National Broadband Plan for Our Future, Reply Comments of Montgomery County, Maryland. GN Docket No. 09-51, 21 July 2009, p.11, [http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=7019917716](http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=7019917716)

**The proposed legislation also does not address a carrier-applicant's modifications to the special exception petition.**

It is not unusual for modifications to occur well after filing. Modifications can occur for a variety of reasons, including responses to recommendations from the Tower Committee or other County bodies, requests received from affected neighbors, revelations that the petition contains errors or omissions, and at the direction of the Board of Appeals, per 59-A-4.24. The zoning ordinance is clearly not designed to restrict the review of modifications to an initial submission period, as is intended by the FCC Ruling. It is nevertheless essential to ensure that modifications to an application have not created new errors or omissions.

**The proposed legislation contains insufficient requirements for standards of completeness. And the legislation does not establish mechanisms to promote filing complete applications and petitions.**

The determination of completeness should be based upon the contents of a comprehensive application/petition form referenced in the zoning legislation, and published on the County website and elsewhere.<sup>7</sup> Applicants should receive guidance from staff. And completeness should also be based upon any additional written instructions that are furnished to the applicant in pre-filing conference(s) with Planning Board Staff and TFCG Staff, and/or during the initial application/petition review period.

TFCG Representative Herrera told the Planning Board that the Tower Committee is working to streamline its review activities, with the goal of completing the Tower Committee Application process within 30 days. Based upon her statements, there do not appear to be any changes forthcoming to improve what are currently meager opportunities for public access and participation. Compared to the Planning Board, far less sunlight shines upon the Tower Committee's activities and records. Affected members of the public are not served notice of applications filed with the Tower Committee, nor are they provided notice of germane Tower Committee agenda issues.

The Tower Committee classifies key application documents as *proprietary and confidential* (or it permits the applicants to identify application documents as such). Yet, the applicants will, later, routinely de-classify some of these documents, to demonstrate *need* in their Special Exception cases. Thus, carriers are gaming the system, taking advantage of what are currently separate filing times for the Tower Committee Application versus the Special Exception Petition, and strategically classifying and de-classifying their documents as "*proprietary and confidential*" to benefit their cases.

As a result of the public's limited access, even in those rare circumstances where the public does become aware of applications filed with the Tower Committee, members of the public must rely upon the Tower Committee and its staff to verify the accuracy and completeness of a TFCG application. Members of the public in attendance at a Tower Committee Meeting are at a severe disadvantage to try to challenge or even weigh a carrier's assertions for such common matters as what the adverse visual impacts to surrounding residents would be of a particular proposed telecommunications facility, and whether and how it would be advisable to camouflage it.

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<sup>7</sup> It is wise to identify the basic requirements in the legislation, itself. Finer details belong in a separate document.

Although other agencies must make *independent findings of need*, those independent findings rely upon the Tower Committee's groundwork. A favorable recommendation from the Tower Committee *streamlines the process because many of the issues often raised before the agencies with final authority over an application will already have been addressed in the recommendation.*<sup>8</sup>

**Planning Board Hearings Provide an Important Public Access Function.** The Planning Board's function of making an independent finding of *need* has provided the public the benefits of public access to information through notices and public input through hearings. Legislation that seeks to remove unnecessary redundancies in the zoning legislation and streamline the process must also sensitively retain and reshape those functions that make the process fair and good. It is possible for the Planning Board's Hearing function to be preserved to thereby continue to provide Public Access and Input, yet be reshaped to help streamline the telecommunications facilities siting process. This accomplishment would benefit all concerned.

#### **Recommended Solutions for ZTA 10-05:**

Clearly, there are severe problems with the proposed Zoning Text Amendment. But these problems are not insurmountable; I'm optimistic that they can be fixed. The following solutions would mitigate the problems that I have identified with the ZTA. Some of these fixes would even provide the added benefit of enhancing the existing safeguards in the Zoning Ordinance for the People of Montgomery County.

1. **Adopt a Concurrent Process for the Tower Committee Application and Special Exception Petition that Relies Upon One Form and One Filing.** Require one form for any telecommunications facility siting to be submitted for the TFCG Application and, where needed, for the Special Exception Petition, too. Provide for a singular, simultaneous filing of the form for all purposes needed. The comprehensive form that is used by Napa County, CA, *Telecommunication Facilities Use Permit/Site Plan Approval Application Packet*, provides an excellent template for this purpose. It is well organized, thorough, and easy to follow. A form like this could have the added benefit of reducing County expenses and increasing County revenues.<sup>9</sup> This form was provided to me by Napa County with good wishes and permission for Montgomery County to adapt it for use.<sup>10</sup> It is attached.

<sup>8</sup> Montgomery County's Reply Comments to the FCC: In the Matter of A National Broadband Plan for Our Future, Reply Comments of Montgomery County, Maryland. GN Docket No. 09-51, 21 July 2009, p. 9, [http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=7019917716](http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=7019917716).

<sup>9</sup>Using a comprehensive form like Napa County's, and distributing copies of the completed forms to all affected agencies, could increase revenue collections and reduce expenses. Had a form like this been in use in the past, Montgomery County would have likely collected **hundreds of thousands of dollars of what are now uncollected fees and un-assessed/unpaid property taxes.**

<sup>10</sup> According to Napa County staff, the documents in the Napa County application are accessible to the public. There are not "proprietary and confidential" issues. However, if a Montgomery County applicant would need to shield some of the documents required by the form it would certainly be possible to redact them, just as carriers now redact leases that are filed. A requirement for concurrent filing would require the carrier to make a decision about what would be accessible to the Public and what would be shielded from the Public at filing.

2. **Provide Standards for Completeness Through the Required Contents of the Comprehensive Application/Petition Form.** The determination of completeness should be based, in part, upon the contents of the comprehensive application form, which should be referenced in the Zoning Ordinance, and published and accessible on the County website and elsewhere.

As proposed, the ZTA specifically adds a requirement for *photographic simulations as seen from at least three directions, including from adjacent and confronting properties*, to be included. If the specific requirement for photographic simulations is to remain in the ZTA then please use the better language that is contained in the Napa County form: *Photo-Simulation(s) Showing Site From At Least The 3 Most Severely Impacted Locations With An[d] Without The Proposed Facility (on 8" x 10" or larger color photographs).*

3. **Update the Provisions for Notification of Affected Residents.** Upon the carrier's filing of the Comprehensive Application/Petition, the notice provisions should require affected residents be notified about how and where to access the relevant record(s) and about all upcoming reviews.
4. **Modify the deadline by which the Tower Committee Recommendation must be added to the record, per 59-G-2.58 (11).**<sup>11</sup> Require that the TFCG Recommendation must be entered into the record of the Special Exception Case no less than 5 days before the Hearing, which would be consistent with the requirement for the Planning Board Report, per 59-A-4.128.
5. **Require Pre-Filing Conferences between the Carrier and Staff from the Planning Board and the Tower Committee.** The conference(s) would be designed to alert the carrier to potential deficiencies prior to filing, and to provide the carrier with guidance to ensure a successful filing.<sup>12</sup>
6. **Revise the Planning Board Hearing Function.** Give the Planning Board the new function of providing an initial Review Hearing, for the purpose of determining within the first 30 days after filing whether the request for a Special Exception is complete. The determination of completeness should be based upon the contents of the comprehensive application/petition form referenced in the zoning legislation, and published on the County website and elsewhere. Completeness should also be based upon any additional written instructions that have been provided to the applicant in any pre-filing conference(s) with Planning Board Staff and TFCG Staff, and/or during the initial application/petition review period.

<sup>11</sup> The current legislation makes the Recommendation a precursor to filing a Petition.

<sup>12</sup> This provision is similar to the pre-application review process that was recommended in a ZTA, in 2008, by the Planning Board's Development Review Staff, as referenced in a Memorandum to the County Council that Summarizes the PHED Committee's Recommendations concerning the FY 2010 Operating Budget for the Office of Zoning and Administrative Hearings, 29 April 2009, p.3, <[http://www.montgomerycountymd.gov/content/council/pdf/agenda/col/2009/090505/20090505\\_12.pdf](http://www.montgomerycountymd.gov/content/council/pdf/agenda/col/2009/090505/20090505_12.pdf)>

The aforementioned clearly defined requirements in the application/petition form and the opportunities to confer with Staff should prevent confusion that would lead to a carrier submitting an incomplete form. However, it is possible that the Planning Board's Review Hearing might find the filing to be incomplete due to one or more of the following general submission deficiencies:

- i. Failure to provide important preliminary technical data and information.
- ii. Presentation of incorrect or questionable data and information considered pertinent to deliberations.
- iii. An assortment or multitude of minor errors and omissions that depict an unprofessional plan.

The purpose of the Review Hearing would be solely for the Planning Board to determine that the submission petitioning a Special Exception is complete and completely accurate. So long as this process would take place during the first 30 days, the *Shot Clock* would stop ticking if the submission was found incomplete or inaccurate, and it would not resume ticking until the submission was determined to be complete and accurate. However, after 30 days have tolled, even if a deficiency would be found in the submission, the County could not stop the *Clock*. By ensuring accuracy and completeness this Planning Board Review Hearing would streamline the subsequent land use processes. This would benefit all concerned.

Concurrent with the Review Hearing by the Planning Board, the Tower Committee Staff would review the application for completeness and accuracy before the Tower Committee would consider the application and make its recommendation. Therefore, both review periods for accuracy and completeness would take place within the first 30 days after filing.

7. **Establish a Modification Waiver Provision.** After 30 days have tolled since the petition's filing, if a carrier-applicant is to modify a request for a special exception then the carrier and the County should jointly consent to extending the time period for a decision beyond the FCC *Shot-Clock* time limit. The purpose of the Modification Waiver would be to provide the opportunity for the proposed modification(s) to receive adequate review for accuracy.<sup>13</sup>

As previously mentioned, there is an immediate need for a revision to the Zoning Ordinance that would address abandoned antennas. This would reduce the need for requests for new telecommunications facilities and calm the pressures to process the incoming large volume of Special Exception Petitions. If adoption of that revision would not precede the adoption of the proposed Zoning Text Amendment, as a separate matter, then I would recommend that it, too, be incorporated into the Zoning Text Amendment:

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<sup>13</sup> See paragraphs 49 of FCC Declaratory Ruling

8. **Amend 59-G-2.58(a)(7) to Expand Co-Location Opportunities.** The Section of the Zoning Ordinance that currently requires the removal of abandoned or unused telecommunication facilities should be amended to also require the removal of any antennas that have been determined by the County to be abandoned or unused.

There is one final recommended change to the proposed legislation that I offer:

9. **Acknowledge the FCC's Declaratory Ruling and the Potential Impacts upon County Operations.** The County Council has taken recent budgetary steps to mitigate the impact of the FCC's Declaratory Ruling. However, there may still be Board of Appeals delays for other types of special exception petitions, petitions for variances, and other matters that come before the Board, which would result because of the expedited processing of the special exception petitions for telecommunications facilities. The legislation should articulate that Special Exception Petitions for telecommunications facilities may need to be expedited in order to comply with the FCC's Declaratory Ruling. Simply letting local residents know that the County is responding to this mandate could prevent misunderstandings and hostility.

In Summary, I urge the PHED Committee to take the first and immediate step of requiring the removal of abandoned or unused antennas:

- o Expand Co-Location Opportunities on Existing Structures.

This would prevent the adverse impacts upon surrounding people and property that are so often associated with new telecommunications facilities. Moreover, it would alleviate the impending pressures on the County's processing systems, and it would reduce the urgency to precipitously revise the Zoning Text Amendment that is under consideration.

Zoning Text Amendment 10-05 may be intended to respond to the FCC's Declaratory Ruling, but it is inadequately crafted to accomplish that task. Moreover, the proposed ZTA would reduce the fair treatment of affected and interested residents and it would present administrative complications. Furthermore, the strict timeframes that have been imposed upon the County's decision-making functions through the FCC's Declaratory Ruling will likely *increase the risk of serious harm to the public*, as was anticipated by the County in its Reply Comments to the FCC.<sup>14</sup> Unfortunately, the proposed Zoning Text Amendment has exacerbated, not mitigated, these risks of harm.

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<sup>14</sup> Montgomery County's Reply Comments to the FCC: In the Matter of A National Broadband Plan for Our Future, Reply Comments of Montgomery County, Maryland. GN Docket No. 09-51, 21 July 2009, p. 15, [http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=7019917716](http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=7019917716)

The recommended improvements herein to the proposed legislation would:

- Preserve and Expand Public Access and Opportunities for Participation by Affected and Interested Residents;
- Establish Clear Standards for Carriers to Meet upon Filing;
- Provide Review Systems to Ensure Complete Submissions within the Limited Timeframes Permitted by the FCC's Declaratory Ruling; and
- Apprise Residents that, in Accordance with the FCC's Declaratory Ruling, the County is Expediting the Processing of Telecommunications Facilities Siting Requests.

I therefore urge the PHED Committee's leadership in shaping these recommended improvements into a revised Zoning Text Amendment, which this Committee would shepherd through successful passage by the County Council. Please let me know if I can be of assistance to the Committee in this regard. Thank you for your consideration.

Respectfully submitted,



Sue Present

Attachment: Napa County Comprehensive Form - *Telecommunication Facilities Use Permit/Site Plan Approval Application Packet*

cc: Honorable Nancy Floreen  
Honorable Marc Elrich  
Jeff Zyontz, Legislative Analyst

ZTA 10-05

WAK  
CC  
JZ

Guthrie, Lynn

From: Angela Flynn [angelaflynn80@msn.com]  
Sent: Tuesday, May 11, 2010 10:07 AM  
To: Montgomery County Council; Andrew's Office, Councilmember  
Subject: Testimony on ZTA 10-05

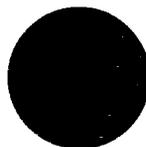
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May 11, 2010

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Regarding: ZTA 10-05

Dear County Council,

This testimony regards proposed amendments to our Cell Tower Siting ordinance (ZTA 10-05), which are in response to the FCC Shot Clock ruling.

There are some issues with the amendments that must be addressed.

The amendments may not be necessary:

The FCC Shot Clock Ruling is under reconsideration and is being challenged in the US Court of Appeals, Fifth Circuit, by the City of Arlington, Texas, along with interveners from several jurisdictions across the US, including Fairfax County, Virginia.

If the City of Arlington, Texas prevails in the Fifth Circuit then the County's zoning authority will be preserved. Either action could render the proposed Zoning Text Amendment unnecessary.

I request that the proposed amendments be held until the court challenge by the City of Arlington, Texas is settled.

**The amendments do not require the application to be complete before the Shot Clock starts ticking.**

Paragraphs 52 and 53 of the FCC Ruling discuss the need for carriers' applications to be complete. The Ruling requires any determinations regarding incompleteness of applications to be made within the first 30 days after filing.

Montgomery County documented this problem to the FCC in its Reply Comments last year. It told the FCC that applications often omit important information and "contain obvious errors, inaccurate or illegible plans and exhibits, or contradictory information." and that "it is hard to believe that restricting local discretion or imposing strict time frames on local action will not increase the risk of serious harm to the public." (Please see attachments and below for the recent errors found in the T-Mobile application for the Walt Whitman High School site.)

*I request that upon the submission of a Special Exception Petition for a Telecommunications Facility,*

(18)

5/11/2010

*the Planning Board hold a Review Hearing for the purpose of determining completeness and accuracy and that the "Shot Clock" would stop ticking if the application was found incomplete or inaccurate, and would not resume ticking until the application submitted was determined to be complete and accurate.*

**The proposed legislation would reduce public input, and also public access.**

The Planning Board's previous function of holding public hearings on Special Exception Petitions for telecommunications facilities has been beneficial in providing public access to information. The proposed condensed processing times may foreclose opportunities for members of the public to identify application errors or omissions that would refute the carrier's proposal for a cell tower siting.

The Tower Committee categorizes many of the documents contained in each telecommunications application as "proprietary and confidential", even though some of these documents will later appear in the Special Exception Petition. As a result, a member of the public has little if any access to the information about a proposed site during the Tower Committee's review process.

The process could be totally consumed by the Tower Committee's processing of the Tower Committee Application as the first 30 days could precede the filing of the Special Exception Petition. The proposed legislation has retained the requirement for the Special Exception Petition to contain the Tower Committee's recommendation, thus eliminating any opportunity for evaluation of the Special Exception Petition until after the Tower Committee's process has concluded and a Tower Committee Recommendation has been made.

*I request that the public be given ample opportunity for input regarding tower siting. This should include: That all residences and businesses within 1,000 feet of a proposed site be notified by the carrier of an application prior to the application being filed; that the time clock for an application be delayed until the public has full access to records of the application and the opportunity to petition the Planning Board at the Review Hearing; and that the public's First Amendment rights are upheld by providing an opportunity for the public to address health concerns of proposed antennas.*

**This legislation sets the stage for overwhelming the existing systems and frustrating the public.**

Currently there are numerous carriers in the county. If they were all to file for special exceptions for multiple sites the County would be overwhelmed and would not be able to investigate the petitions adequately in the time frame of the Shot Clock.

*I request that limits be set regarding facility special exception petitions to one active filed special exception petition for a new facility and one active co-location petition, per carrier.*

Submitted by:

Angela Flynn  
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Bethesda, MD 20816  
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Reference

In the Matter of A National Broadband Plan for Our Future, Reply Comments of Montgomery County, Maryland.  
GN Docket No. 09-51, 21 July 2009,  
[http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=7019917716](http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=7019917716)

(19)

CELL TOWERS AND WIRELESS COMMUNICATIONS – LIVING WITH RADIOFREQUENCY RADIATION  
<http://www.scribd.com/doc/24352550/Cell-Tower-Rpt>

## Alliance of Neighbors of Walt Whitman High School

Welcome. This site was created in order to give Kenwood Park residents, other Whitman neighbors, and you, the viewer, as much information as possible about T-Mobile's proposal to erect a cellular tower between the athletic fields at Walt Whitman High School in Bethesda, Maryland. WE ARE CONSTANTLY UPDATING THIS SITE. Please feel free to contact us at [googabh@gmail.com](mailto:googabh@gmail.com) with any questions or comments.



The yellow marker shows the proposed location of the Cell Tower. The photo also shows the close proximity to surrounding homes.



20

## INTRODUCING.....Online Chat and or Video Conferencing....Go to strip below...



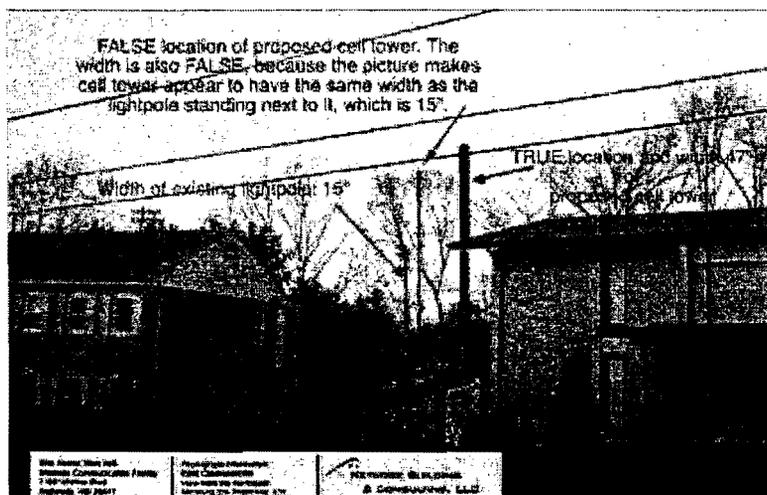
**Saturday, March 13, 2010**

### FRAUDULENT PHOTOSIMULATION

T-Mobile's photosimulation is a fraud. The cell tower's location is false, its width is false, and the present light pole has been doctored:

1. The photosimulation shows a false location for the proposed cell tower. Rather than superimposing the proposed cell tower over the light pole that T-Mobile intends to replace, the proposed cell tower is shown set further back and further to the left, so that it appears lower and better hidden by trees.
2. The photosimulation has been doctored. The image of the light pole that T-Mobile intends to replace has been smudged to make it less obvious that the simulated cell tower is shown at a false location.
3. The photosimulation shows a false width for the proposed cell tower. It makes the proposed cell tower appear as if it had the same width as the existing light poles. In fact, with a diameter of 47 inches, the proposed cell tower is more than three times as wide as the existing light poles, which have a diameter of 15 inches.

To access a larger version of this photo, click on photo.



To access T-Mobile's original photosimulation, please click this [link](#).

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Hotmail has tools for the New Busy. Search, chat and e-mail from your inbox. [Learn more.](#)

(21)

**SUPPORT TIMELY ROLL-OUT OF  
ADVANCED BROADBAND AND OTHER WIRELESS SERVICES  
SPECIAL EXCEPTION PROCEDURES – TELECOMMUNICATIONS FACILITIES  
“SHOT CLOCK”**

*The County Council is considering Zoning Text Amendment 10-05 to align with the federally-mandated time frame in which local governments must act on a personal wireless service facility siting application.*

*T-Mobile wishes to work in partnership with Montgomery County and Park & Planning to fashion an efficient process in the spirit of the “Shot Clock” ruling without changing the application requirements.*

- **ZTA 10-05 was drafted to comply with the Federal Communications Commission’s November 2009 declaratory ruling.**
  - The declaratory ruling was designed to aid in the rapid deployment of next generation wireless services, while preserving local government control over traditional zoning and land use policies.
  - Clarifies state or local government requirement to act on personal wireless service facility siting applications within a “reasonable period of time.”
    - collocation applications must be acted on within 90 days
    - applications other than collocations must be acted on within 150 days
- **While ZTA 10-05 does an excellent job of applying the Shot Clock to the Special Exception process, it does not take into account the significant amount of time associated with the entire process.**
  - New telecom facilities must undergo a pre-Special Exception filing environmental review at MNCPPC for Natural Resources Inventory and preliminary Forest Conservation Plan.
  - Environmental reviews take from four to six months, which is not factored into the ZTA.
- **Creating a Shot Clock that does not take the entire application process into account runs counter to the spirit of the FCC’s declaratory ruling.**
  - The FCC stated that its declaratory ruling, “...promotes the deployment of broadband and other wireless services by reducing delays in the construction and improvement of wireless networks.”
  - FCC Chairman Genachowski stated, “There is evidence that in certain jurisdictions the tower siting process is getting longer, even as the need for more towers and for timely decisions is growing.”
- **T-Mobile does not wish to eliminate or weaken the environmental review processes.**
  - We are not seeking changes in the actual requirements.
  - We are suggesting that environmental reviews be conducted concurrent with the Special Exception application process at the Board of Appeals so that the process moves forward in a timely manner.
- **T-Mobile respects the County’s review policies and procedures.**
  - The amendments simply allow two processes to run simultaneously, in the spirit of the FCC Shot Clock, without changing application requirements.
- **Montgomery County is the only area jurisdiction that requires environmental approvals prior to filing for a special exception.**
  - Other jurisdictions such as Howard, Baltimore, Anne Arundel and Harford counties all conduct environmental reviews during and/or after special exceptions are granted.