

Katherine Katzin

Opposition to ZTA 22-01

Please vote no on ZTA 22-01 and cancel all action on it this fall. Instead, please allow the incoming Council to consider changes to the zoning code.

ZTA 22-01 threatens our health, homes, neighborhoods, trees, pedestrians, and due process.

No Legal Requirement for ZTA 22-01

There is no FCC or federal requirement, no plausible legal justification, for ZTA 22-01. It appears to be another gratuitous handout to the wireless industry at the expense of County residents. The Council has yet to respond substantively to the FCC's court loss in EHT et al. v. FCC (2021) and other recent case law such as Extenet v. Flower Hill (2022). (See <https://ehtrust.org/wp-content/uploads/Analysis-of-ExteNet-Sys.-v.-Village-of-Flower-Hill-by-Attorney-Robert-Berg-Legal-Advisor-the-Environmental-Health-Trust-2.pdf>) In the EHT case, a federal appeals court ruled that it was illegal for the FCC to rely upon FDA webpages in its decision-making, because FDA has not provided "factual bases" for its webpage. Why then does the Council believe that it can rely on these same webpages?

Assault on Equity and Social Justice

The Council's own staff, in its Racial Equity and Social Justice (RESJ) impact statement on ZTA 22-01, did not find that 22-01 would have a positive net impact on racial equity or social justice in the County. And that was after relying on a "report" that was "generously" supported by T-Mobile. At the same time, they noted that "if the reduced set back requirements for small cell towers authorized under ZTA 22-01 results in negative health outcomes, this in turn could widen health disparities by race and ethnicity." The statement did not even consider the social justice impacts of close proximity towers on vulnerable populations like pregnant people, young children whose brains are still developing, people with heart conditions, electro-sensitivity, and other conditions.

ZTA 22-01 will not close the Digital Divide. The RESJ impact statement makes false assertions based on wishful assumptions that low-income residents will receive funding for expensive 5G devices and services. But the financial support has not been allotted at levels that would make the devices and services accessible for all residents. (See [lifeline-breakdown-fact-sheet.pdf \(nclc.org\)](#))

Reducing setbacks from 60 to 30 feet is more harmful to people of lower income, who live on smaller lots, and whose children's bedrooms will be closer to the antennas.

Bad for the Climate and Trees

At a time when we should be working toward climate rescue, ZTA 22-01 will further increase tree loss, increase energy consumption, and harm vegetation, birds, and insects. The County cannot restrict PEPCO's removal of tree foliage in the rights-of-way and on private properties that are in close proximity to the taller replacement pole and re-attached electrical wires, for safety. Tree foliage in rights-of-way that presents line-of-sight obstructions for providers' antenna networks is also removed so that

antennas can communicate effectively with each other. Removing more than 25% of a tree is known to cause its death.

Foliage removal can result in loss of winter windbreaks, loss of summer shade, and increased energy consumption and bills, which are more impactful for residents with lower incomes. Tree loss contributes to heat island effects, which are associated with adverse health effects that are even more dire for people living without health insurance. Heat islands are also associated with increased levels of violence. Loss of tree foliage can also decrease residential property aesthetics and values and diminish the character of neighborhoods. (See [Volunteers Map Heat Islands In Montgomery County | DCist](#))

Dangerous for Pedestrians

Furthermore, as a result of proliferation of pole mounted wireless facilities residents can get stuck with multiple large ground mounted equipment boxes. These boxes block drivers' view of pedestrians and children playing or waiting at bus stops and obstruct stroller and wheelchair access to sidewalks. These effects are at complete odds with the County's focus on Vision Zero and pedestrian safety.

Hazardous Poles

Pole mounted wireless facilities near homes reduce their property value, which is bad for the financial well-being of residents and of the County as a whole.

Residents have no opportunity to comment or object to the right-of-way permits for antennas.

The County cannot restrict the height of the replacement utility poles for antenna attachments. Some replacement poles have already been approximately 70 feet tall! Residents get no notice of the installation of new, thicker and taller replacement poles for antennas. And the County cannot set time limits for the removal of old poles. So residents get stuck with double utility poles, which are hazardous and eyesores.

Vote NO

There's no legal requirement for the County to adopt ZTA 22-01. It poses harms to neighborhoods, homes, pedestrians, the tree canopy, and finances. Please vote no on ZTA 22-01 and allow the incoming Council to consider zoning changes.

Testimony Opposing ZTA 22-01

My name is Katherine Katzin. Thank you for giving me the opportunity to speak today. I am opposed to ZTA 22-01.

There is no FCC or federal requirement, no plausible legal justification, for ZTA 22-01.

Nowhere in federal law is it written that 30 foot setbacks are required over 60 foot setbacks.

- Montgomery County **is not and was not vulnerable to liability for “a lot of money”** if it failed to adopt these ZTAs, as some have claimed. The Supreme Court ruled in 2005 that localities cannot be fined or liable for money damages for failing to deploy a cell tower.¹
- During the deliberations for ZTA 19-07, the Council inaccurately characterized City of Portland v. FCC² with respect to the effective prohibition standard of wireless services.

o Re: Section 332, City of Portland did not address or alter municipalities' rights to determine location of towers. For this section, the Fourth Circuit (whose rulings govern in Maryland) has **defined effective prohibition as a total lack of coverage**, which is not our situation in Montgomery County, where **we already have extensive 4G and 5G coverage** (see Cellco v. Board of Supervisors of Fairfax County³).

- A recent case in the Second Circuit, **Extenet v. Flower Hill** found that **effective prohibition under sections 253 and 332 applied only to the ability of a wireless telephone to make phone calls to a landline**. Nothing more. The federal judge wrote: “it is **not** up to the FCC to construe the Act to say something it does **not** say.”⁴

Finally, ZTA 22-01 won't prevent proliferation of new poles. Pepco could install a new pole and then a few weeks later, wireless carriers claim it's an existing structure under 22-01.

Please vote no on ZTA 22-01 and allow the incoming Council to consider zoning changes.

References

1 <https://www.supremecourt.gov/opinions/04pdf/03-1601.pdf>

2 <https://cdn.ca9.uscourts.gov/datastore/opinions/2020/08/12/18-72689.pdf>

3 <https://cite.case.law/f-supp-3d/140/548/>

4 <https://ehtrust.org/wp-content/uploads/Analysis-of-ExteNet-Sys.-v.-Village-of-Flower-Hill-by-Attorney-Robert-Berg-Legal-Advisor-the-Environmental-Health-Trust-2.pdf>