

Dear Council President Albornoz and Members of the County Council,

I am opposed to ZTA 22-01.

Please add this to the official testimony for opposition to ZTA-2201.

I urge you and the entire Council to cancel all action on ZTA 22-01 this fall. Instead, allow the incoming Council to consider changes to the zoning code.

Last summer while Montgomery County residents were trying to survive a pandemic, Mr. Riemer's PHED Committee added radical amendments to their ZTA 19-07 offering up incredible handouts and concessions just to benefit wireless corporations (and ignoring opposition testimony of dozens of residents). Those amendments included lopsided procedures and low-ball fees for conditional use hearings.

There is no FCC or federal requirement, no plausible legal justification, for ZTA 22-01. ZTA 22-01's purpose is yet another gratuitous handout to the wireless industry.

The Montgomery County Council needs to stop reciting pro-wireless bias narratives that rubber-stamp and cheerlead the interests of telecom corporations. What is preempted is an actual moratorium that's specific to wireless — for which Montgomery County is NOT GUILTY!

What the County's attorneys continue to advise Councilmembers cannot be squared with what the FCC told the Supreme Court! The **FCC never concluded that every limitation on any covered service is effectively prohibitory** — and told that to the Supreme Court! In addition, the FCC stated that ***“[n]othing in the Small Cell Order suggests that wireless carriers may “construct any and all towers,” or small cells, that they “deem [...] necessary” in their “business judgment.”*** In addition, the Commission did not conclude that every limitation on any covered service is effectively prohibitory. See the DETAILS of what a Montgomery County resident researched and presented as to why it is wrong to construe that the small cell order implies that localities may never constrain a carrier's preferences.

https://drive.google.com/file/d/1_M410pm3umwW99oG7duUecbw8BvGOJsq/view?usp=sharing

The County is recklessly and fecklessly devoted to giving maximum locations to wireless facilities AS IF doing so is law — all the while falsely alleging legal consequences when, in fact, ***“there is not a shred of evidence in the legislative history suggesting that . . . Congress intended plaintiffs to be able to recover damages and attorney's fees.”*** See the DETAILS of what a resident researched and presented about the history of City of Rancho Palos Verdes v. Abrams all the way up to the Supreme Court. Review this comprehensive look at why a telecom company can NOT sue a local jurisdiction for damages. Enforcing violations of **§332(c)(7) would undermine the policies that the Telecommunications Act (TCA) reflects!** Researched by a Montgomery County resident:

<https://drive.google.com/file/d/16ADxPEmDZAdQy6yAUUJbfZYXLuXts91Z/view?usp=sharing>

Additionally reflective of the TCA is that streaming videos, viewing online movies, sending/receiving emails, browsing the Internet, and engaging in tele-medicine are NOT part of “personal wireless service” or even a telecommunications service and the preemptive provisions in 47 U.S.C. 253 and 332(c)(7). The Telecommunications Act's **(TCA) 47 U.S.C. 253 and 332(c)(7) do not apply to these aforementioned services in isolation.**

A coverage gap analysis is all about voice service — NOT any perceived need to expand the aforementioned data services. Coverage required is for outdoor, wireless phone calls (which require up to “5 bars” of telecommunication service). As per the FCC itself, coverage is **“outdoors and stationary. It is not meant to reflect where service is available when a user is indoors or in a moving vehicle.”** –

– <https://www.fcc.gov/BroadbandData/MobileMaps/mobile-map>

WHY is it that the following has not dawned on the Montgomery County Council — that it's **exceedingly unlikely** that the US Congress in 1996 intended for the US population to be sickened, injured, and die from the profoundly deleterious effects of RF/EMF 24/7/365 where we live, work, and play **in order to** allow the wireless industry to maximize its profits???

The Council's own staff, in its Racial Equity and Social Justice 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. (Please see additional racial equity information in the addendum.)

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)¹. 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? In addition to threatening residents' health and promoting inequity, ZTA 22-01 will further increase tree loss, harms to vegetation, birds, and insects as a result of proliferation of pole mounted wireless facilities.

I urge the entire Council to rescind ZTA 19-07 and to press FCC (in light of FCC's court loss in EHT et al. v. FCC), based on a thorough review of ALL the science, to issue a well-reasoned explanation for new exposure limits that are truly protective; AND I urge the entire Council to cancel all action on ZTA 22-01.

Sincerely,

V Bailey

Silver Spring, MD

¹ **ExteNet v Flower Hill is a treasure trove of case cites of all of the case law that Council has ignored.** This New York District Court's decision from late July will undoubtedly be influential to other circuit courts.

ExteNet Sys. v. Vill. of Flower Hill, No. 19-CV-5588-FB-VMS (E.D.N.Y. Jul. 29, 2022) —

<https://casetext.com/case/extenet-sys-v-vill-of-flower-hill>

The District Court affirmed the following:

>>> that the lack of a gap in coverage is relevant here and can constitute substantial evidence justifying denial of a permit

>>> that the FCC's 2018 [small cell] ruling exceeds the scope of the TCA that only covers the provision of wireless telephone service access to a telephone network because the TCA requires an application for a wireless facility be the least intrusive means for closing a significant gap in a remote user's ability to reach a cell site that provides **access to land-lines**

>>> that because the TCA is not in question — that there's no small cell entitlement to which to legally give deference — as per one of the most-cited cases on the basic standards of review of agency statutory interpretation; by not substituting its own construction of the [plain statutory language of the TCA] and the phrase, “personal wireless services” — the Court affirmed that the [TCA] is not in question

>>> that even though ExteNet focused on the lack of need for improved 4G LTE coverage — and that **improved capacity and speed** are desirable (and, no doubt, profitable) goals in the age of smartphones — they **are not protected by the Act**

In asserting the above, the District Court's decision reveals a volume of former decisions and precedents with case law that is quite clear — IF IT'S READ:

>>>> “... the FCC's [small cell] ruling is [NOT] entitled to deference under *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) [because] Chevron deference applies only when the [TCA] statute in question is silent or ambiguous [or in question]. Although the Second Circuit found the phrase “personal wireless services” “opaque,” it ultimately relied on “[t]he plain statutory language” [of the TCA] to define it. Therefore, the **phrase was not ambiguous.**” — citing *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) — as per <https://casetext.com/case/chevron-inc-v-natural-resources-defense-council-inc-american-iron-and-steel-institute-v-natural-resources-defense-council-inc-ruckelshaus-v-natural-resources-defense-council-inc>

>>>> “A gap in 4G coverage does not establish that the target area is underserved by voice cellular telephone service.” — as per *Crown Castle NG East LLC v. Town of Hempstead*, 2018 WL 6605857, at *9 (E.D.N.Y. Dec. 17, 2018) — <https://casetext.com/case/crown-castle-ng-e-llc-v-town-of-hempstead-1>

>>>> “We hold only that the Act's ban on prohibiting personal wireless services precludes denying an application for a facility that is the least intrusive means for closing a significant gap in a remote user's ability to reach a cell site that provides access to land-lines.” — as per *Willoth*, 176 F.3d at 643 — <https://casetext.com/case/sprint-spectrum-v-willoth#p643>

which means

>>>> “. . . local governments must allow service providers to fill gaps in the ability of wireless telephones to have access to land-lines” — as per *Sprint Spectrum L.P. v. Willoth*, 176 F.3d 630 (2d Cir. 1999) — <https://casetext.com/case/sprint-spectrum-v-willoth>

>>>> “It is not up to the FCC to construe the [Act] to say something it does not say, nor up to the Court to find broadband communication encompassed by the law.” — as per Clear Wireless LLC v. Bldg. Dep’t of Vill. of Lynbrook, 2012 WL 826749, at *9 (E.D.N.Y. Mar. 8, 2012) — <https://casetext.com/case/clear-wireless-llc-v-bldg-dept-of-the-village-of-lynbrook#p9>

>>>> “If the Court finds that even one reason given for the denial is supported by substantial evidence, the decision of the local zoning body cannot be disturbed.” — as per T-Mobile Ne. LLC v. Town of Islip, 893 F.Supp.2d 338, 355 (E.D.N.Y. 2012 - <https://casetext.com/case/tmobile-ne-llc-v-town-of-islip#p355>

>>>> [The TCA] “strikes a balance between two competing aims — to facilitate nationally the growth of wireless telephone service and to maintain substantial local control over siting of towers.” — as per Omnipoint Communications v. White Plains, 430 F.3d 529 (2d Cir. 2005) — <https://casetext.com/case/omnipoint-communications-v-white-plains#p531>

>>>> “The [1996 Telecommunications] Act provides ... that “[n]othing in this section affects the authority of a State or local government to manage the public rights-of-way . . . , on a competitively neutral and nondiscriminatory basis[.]” — as per the preemptive effect of the TCA's 47 U.S.C. § 253(a) — <https://casetext.com/statute/united-states-code/title-47-telecommunications/chapter-5-wire-or-radio-communication/subchapter-ii-common-carriers/part-ii-development-of-competitive-markets/section-253-removal-of-barriers-to-entry>

Addendum:

The below slides are excerpted from a report by Montgomery County Residents. The entire report can be found here: <https://techwisemocomd.org/2022/09/05/project-wtf-no-to-zta-22-01/>

ZTA 22-01 DOES NOT PROVIDE RACIAL EQUITY AND SOCIAL JUSTICE*

ZTA 22-01 takes aim at the rights-of-ways in residential zones that abut homes that are on smaller lots and have shorter setbacks.

Persons of color and persons of low and modest incomes live in these homes with greater frequency than the County population at large.

*According to Chris Cihlar Ph.D., Director, Office of Legislative Oversight, his office conducted a Racial Equity and Social Justice evaluation that culminated in a neutral statement concerning Racial Equity and Social Justice impacts of ZTA 22-01. OLO evaluated the merits of 5G for that Statement; OLO did not evaluate the impacts of the ZTA's setback reduction.

Continues...

ZTA 22-01 MOST INJURES THE PERSONS AND COMMUNITIES THAT RACIAL EQUITY AND SOCIAL JUSTICE LEGISLATION AIMS TO PROTECT

Persons of color and residents with lower-incomes are particularly at risk for the adverse effects of ZTA 22-01. They tend to live in affected areas more frequently than the County population at large, in homes on smaller parcels and with shorter front foot setbacks. Where the ZTA 22-01 setback reductions apply in neighborhood rights-of-way, State and federal laws are triggered that concern utility installations for attachments, and that pre-empt County regulatory protection.

- FCC “Make Ready” rules require the County to issue a right-of-way permit for a larger-girth, taller replacement pole. Pole authorizations are often issued months in advance of when the applications for the wireless antenna facility applications are submitted and reviewed. This can leave residents with thicker and taller replaced poles, even when the wireless applications are later rejected, withdrawn, or placed on indefinite hold.
- The County cannot restrict the height of the replacement utility poles for antenna attachments. Some replacement poles have already been approximately 70 feet tall!
- The County cannot set time limits for the removal of the pre-existing utility poles, when the new thicker and taller poles are installed. As a result, the old poles can languish next to the replacement poles for years, resulting in double poles, which are hazardous and eyesores.
- The County cannot restrict PEPCO’s tree foliage removal, done for safety when poles and electrical wires are increased in height. Tree foliage is also removed when it impedes antennas’ “line of sight” transmission. But foliage removal, particularly when aggressive, can deleteriously impact residents’ immediate comfort, health, finances, well-being, and the removal can have longer-term adverse impacts upon properties and neighborhoods.

9/5/2022

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HOTTEST AREAS ARE OFTEN LOW INCOME COMMUNITIES AND COMMUNITIES WHERE MORE RESIDENTS OF COLOR LIVE*

Tree foliage removal poses disparate and significant adverse impacts of ZTA 22-01 upon residents who are persons of color and residents with lower incomes. And the consequences of these adverse disparate impacts can include diminished health, comfort, and excessive utility bills.

Foliage is removed from trees in the rights-of-way and on private properties that are in close proximity to the replacement taller 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.

Foliage removal can result in loss of winter windbreaks, loss in summer shade, loss of tree canopy, and it can contribute to heat island effects, too. Loss of tree foliage can also adversely affect residential property aesthetics and diminish the character of the neighborhood.

* See: [Volunteers Map Heat Islands In Montgomery County](#)

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