

MEMORANDUM

February 5, 2021

TO: PHED Committee

FROM: Livhu Ndou, Legislative Attorney
Pamela Dunn, Senior Legislative Analyst
Nicole Rodriguez-Hernandez, Legislative Analyst

SUBJECT: Zoning Text Amendment 19-07, Telecommunications Towers – Limited Use

PURPOSE: Worksession #2

Expected Participants:

Ehsan Motazedi, Chief, Zoning and Site Plan Enforcement, Department of Permitting Services (DPS)
Linda Kobylski, Chief, Land Development, DPS
Ben Berbert, Zoning Coordinator, Planning Department
Dan Sanayi, Department of Transportation
Mitsuko Herrera, Program Director, Office of Broadband Programs

Prior Committee Worksession

At its first worksession on ZTA 19-07 on January 23, 2020, the sense of the Committee was to wait for the 9th Circuit Court of Appeals to rule on the County's petition to force the Federal Communications Commission (FCC) to evaluate the health effects of 5G radio frequency emissions.

Court of Appeals August decision

In *City of Portland v. United States*, the United States Court of Appeals for the 9th Circuit ruled on petitions filed by a coalition of local governments, including the County, challenging multiple FCC orders governing small cell telecommunications facilities. The 9th Circuit also ruled on the County's separate petition, which argued that the FCC erred by not updating its regulations governing Radio Frequency (RF) emissions before issuing the small cell order.

The 9th Circuit dismissed (as moot) the County's petition. The bulk of the Court's decision concerned FCC orders relating to the installation and management of small cell facilities, including the manner in

which local governments can regulate small cell facilities and the amount that local governments may charge for the use of the right of way. The 9th Circuit mostly upheld the FCC orders.

Regarding the regulation of aesthetics, the Court overruled the FCC requirement that all facilities receive identical treatment because the underlying statute allows different regulatory treatment among types of providers, so long as such treatment does not “unreasonably discriminate among providers of functionally equivalent services.”

The Court found that “aesthetics requirements are not preempted if they are (1) reasonable, (2) no more burdensome than those applied to other types of infrastructure deployments, and (3) objective and published in advance.” To qualify as a “reasonable” aesthetic requirement, an ordinance must be both “technically feasible and reasonably directed to avoiding or remedying the intangible public harm of unsightly or out-of-character deployments.”

The Court allowed a lowered standard for determining when a local government has effectively prohibited the deployment of small cell facilities. The Court held that a local regulation that “materially inhibits” deployment was sufficient to be an effective prohibition.

The Court also reduced the time limits (shot-clock) imposed on local government’s review and approval of facilities. The Court did hold that the failure to comply with the shot-clock does not result in an automatic approval. If the County misses a deadline, the applicant still must seek an injunction. The County would have the opportunity to rebut the presumed statutory violation through that process.

The FCC order also prevented owners and operators of utility poles from discriminatorily denying or delaying 5G and broadband service providers access to the poles. The Court sustained this aspect of the FCC order.

The Court upheld the FCC’s restrictions on the amount local governments may charge for the use of the right of way. Fees are permissible only if they are a “reasonable approximation of the state or local government’s costs” of processing applications and managing the rights-of-way. Fees are presumptively lawful if application fees are no more than \$500, and recurring fees for each wireless facility (excluding poles) are no more than \$270 per year.

The lead sponsor of ZTA 19-07 wishes to proceed with the Committee’s deliberation.

Summary of ZTA 19-07

Zoning Text Amendment (ZTA) 19-07, lead sponsor Councilmember Riemer, co-sponsors Councilmembers Alborno and Rice, was introduced on October 1, 2019. ZTA 19-07 would:

- allow certain telecommunications towers as a limited or conditional use in certain residential zones;
- revise the standards for telecommunications towers allowed as a limited or conditional use;
- revise the conditional use findings required for the replacement of a pre-existing pole; and
- generally amend use requirements to address certain telecommunications towers.

The ZTA would allow poles with antennas as a limited use in residential zones where the pole would replace a pre-existing utility pole, streetlight pole, or site plan-approved parking lot light pole.¹ ZTA 19-07 would also amend the conditional use standards in residential zones for poles that are under 50 feet and do not meet the limited use standards, and the ZTA would allow for batching of conditional use applications.

The intent of this ZTA is for the County to set its own standards for telecommunications towers; otherwise, the County could be preempted with less favorable standards by the Maryland General Assembly. In addition, the sponsors of ZTA 19-07 believe that a robust 5G network will contribute to County residents' quality of life (economic development, education, healthcare, transportation, etc.) and do not want the County to be left behind.

Public Hearing

The Council conducted a public hearing on November 19, 2019. The Executive recommended deferring the consideration of ZTA 19-07 until the federal courts consider the County's challenges to Federal Communication Commission (FCC) rules and improvements are made in the County's administration of antenna applications. In any event, the Executive opposed changes to the conditional use process for antennas that included removing Planning staff application reviews.

The Planning Board recommended approval of ZTA 19-07 with amendments to increase Planning staff involvement, clarification of volume and height measurements, and the timing of applications for consolidated processing.

The Town of Somerset opposed ZTA 19-07 as a sweeping change that would eviscerate the opportunity for Planning staff review. The City of Takoma Park expressed concern with ZTA 19-07 and preferred a code more along the lines adopted by the City.²

Most speakers opposed ZTA 19-07. Some speakers were opposed due to the negative health effects of radio frequency waves. This included a claim that radio frequency (RF) exposure would disproportionately burden minority communities. Some speakers were opposed because of a reduction in property values. Other issues raised by opponents included the lack of public notice of limited uses, the lack of coordination between DPS and the Tower Committee, the lack of experience with small cell antennas in commercial areas, the lack of post-construction inspections in the current process, a conditional use process that lacked meaningful public participation, an increase in energy use, and a lack of need.

There were speakers in favor of ZTA 19-07 in some form. Industry representatives questioned whether the proposed process in ZTA 19-07 would violate FCC shot clock rules (established timeframes within

¹ ZTA 19-07 does not change the requirement for a franchise agreement in order to have private facilities in the public right-of-way. Under 59.3.5.14.C, except for single-unit housing, antennas are allowed on existing structures as a limited use in residential zones. DOT has not done a survey of existing traffic signals to determine if a small cell antenna can be mounted on them. All antennas on streetlights could only be accommodated on new replacement poles. Existing traffic signals and streetlight poles were not designed to accommodate additional weight. Existing wooden utility poles may be able to accommodate the weight of small cell antennas without replacement, but safety-related separation requirements mean the pole must be replaced with a taller pole.

² The objective design standards that the City requires: 1) compliance with County zoning; 2) a public meeting once the application is complete; 3) a finding that the pole is in the least-visible location; 4) a finding that the pole does not create an overconcentration of facilities; and 5) City-conducted test for RF compliance with FCC standards.

which State and local governments must complete their reviews of the wireless tower deployment) or if it would violate federal law by effectively prohibiting the deployment of 5G facilities in residential areas.

The emails received by the Council were unevenly split between those favoring approval and those opposed. Those opposed mostly cited negative health effects. The second reason for opposition was reduced property values. The Mayor of Garrett Park requested that the Council work with municipalities before proceeding. On January 16, the Council received comments from the Town of Chevy Chase concerning conditional use procedures.

Testimony essentially asked 3 complex questions:

- 1) Should the Council approve ZTA 19-07 in any form?
- 2) Should small cell towers be allowed in residential zones as a limited use?
- 3) Should the procedures and standards for a conditional use be changed for small cell towers?

This memorandum attempts to address issues raised. Staff provided considerable information in the November 19, 2019 public hearing memorandum. That information is repeated only when it addresses an issue raised in the public hearing.

D) Should small cell antennas be allowed as a limited use in residential zones?

Limited Use

The ZTA would allow towers as a limited use if the tower would replace a pre-existing utility pole, streetlight pole, or site plan-approved parking lot light pole.

Given that the County may not prohibit the deployment of antennas (or so restrict their deployment that it has the effect of prohibiting them) and does not allow antennas on single-unit houses, the question becomes: under what, if there are any, objective standards should antennas be allowed?

All limited use standards are purely objective criteria that do not ever have a public hearing. DPS determines if the criteria have been met at the time of building permit. Generally, on permits **for buildings**, the required notice for a limited use is on-site posting once DPS issued a permit.³ If the issuance of a building permit is appealed, it then goes to the Board of Appeals and a hearing is held to determine if DPS's approval or denial satisfied the standard for zoning and building permits.⁴ A building permit appeal is not an opportunity to make a general objection to DPS action; it must be a violation of code standards. The conditional use process has value when there is some subjective finding (such as "compatibility") required by zoning. Under Virginia State law, conditional use approval for a small cell pole is prohibited.

³ Sec. 8-25. Permits.

(g) Posting of permits and site plans. The building permit or a true copy thereof and a copy of the building or other plans covered by the permit shall be kept on the site of operations open to inspection by the department, fire or police officials, in the course of their duties, during the entire time the work is in progress and until its completion.

⁴ Under Sec. 8-23, Appeals. "Any person aggrieved by the issuance, denial, renewal, amendment, suspension, or revocation of a permit, or the issuance or revocation of a stop work order, under this Chapter may appeal to the County Board of Appeals within 30 days after the permit is issued, denied, renewed, amended, suspended, or revoked or the stop work order is issued or revoked." A person may be aggrieved for the purpose of this provision if they have substantial interest in the outcome. That is generally limited to the applicant or a property owner within sight of the project for which the permit is being sought. Generally, the only notice of a building permit is on site posting.

II) If small cell antennas are allowed as a limited use in residential zones, under what standard should small cell antennas be allowed?

A) Setbacks

ZTA 19-07 would allow a small cell antenna that replaces a streetlight as a limited use if there are prescribed setbacks. Under ZTA 19-07, the replacement pole must be at least 60 feet from any building intended for human occupation, excluding any setback encroachments to be allowed as a limited use. A setback requirement dramatically limits the pole location that may be approved as limited use (and conversely might expand the number of places a conditional use is required). Other surrounding jurisdictions allow antennas that are closer to single-unit houses:

Prince George's County	30 feet from a house, 150 feet from a school
DC	10 feet from a building
Fairfax County	10 feet from a right-of-way line
Arlington County	None (wherever a utility pole or streetlight exists)

ZTA 19-07 would allow a 60-foot setback reduced to 30 feet with conditional use approval. The issue at conditional use approval is only which alternative location is better.

The less the required setback, the more poles that would be allowed as a limited use:

- 9,383 poles have less than a 30-foot setback from a building;
- 18,839 poles have a setback between 30 feet and 45 feet;
- 13,596 poles have a setback between 45 and 60 feet;
- 33,368 poles have a setback 60 feet or more.

B) Height

Under the current zoning ordinance, the height of the tower, including any attached antennas and equipment, must not exceed:

- (1) for streetlights, the height of the pole that is being replaced:
 - plus 6 feet when abutting a right-of-way with a paved section width of 65 feet or less; or
 - plus 15 feet when abutting a right-of-way with a paved section width greater than 65 feet.
- (2) for parking lot lights, the height of the pre-existing parking lot light pole plus 10 feet.⁵

Prince George's County	No higher than 50 feet or 10% higher than adjacent structures
DC	The greater of 10% increase or 36 feet
Fairfax County	15 feet higher than the original pole
Arlington County	6 feet higher than the original pole but no higher than 35 feet

One industry representative suggested that unless the height limit is 50 feet, it may result in a regulation that prohibits service under the FCC order.

⁵ The regulation of utility poles follows.

C) Design Standards

The City of Takoma Park commented on design standards. ZTA 19-07 **includes** the following design standards:

- The design of a replacement tower located in a public right-of-way, including the footer and the replacement streetlight, must be approved by the Department of Transportation.
- The antenna must be concealed within an enclosure the same color as the pole and be installed parallel with the tower. Equipment may be of stealth design approved for safety by the Department of Transportation.
- The tower must be the same color as the pre-existing pole.
- The tower must have no visible exterior wiring, except that exterior wiring may be enclosed in shielded conduit on wooden or utility poles.

If any other design standards are desired, ZTA 19-07 must be amended. There were no alternatives suggested, except for not allowing a pole in residential zones under any circumstances.

ZTA 19-07 would retain the maximum volume of equipment to 12 cubic feet. At least one wireless provider indicated that this is a workable volume. Another wireless service provider noted that a small cell facility defined by the FCC allowed for 28 cubic feet of equipment. That service provider requested a change in the maximum volume to 28 cubic feet.

III) Conditional use - reducing the time for conditional use reviews

Currently, all telecommunications towers in residential zones, without regard to the height of the tower, may only be approved as a conditional use. The conditional use standards require the tower to be set back from dwellings one foot for every foot in height or 300 feet, whichever is greater. A location must exist on the subject property where that setback can be met, but then may be located elsewhere on the site with a reduced setback if the alternative location is visually less obtrusive. ZTA 19-07 would not allow the Hearing Examiner to reject all poles in an application. The least obtrusive pole must be approved.

The FCC small cell order defines small cell antennas as those that are on structures 50 feet or less in height.⁶ The FCC requires that such new poles be approved within 90 days (shot clock) of the submission of a complete application. The presumption of an application not approved in that time is that the delay effectively prohibits service. The current process for conditional use approval will always take longer than 90 days from the date of application. The intent of ZTA 19-07 is to streamline the current process and avoid a prohibition of service. It does this by reducing the time for a decision and the issues that require a decision.

The alternative to amending the conditional use process is to allow all small cell antennas as a limited use. This is required by State law in Virginia. Assuming the Council wants a conditional use process, the following material is relevant.

The current code requires notice of the recommendations from Planning staff, the recommendations of the Planning Board, a public hearing by the Hearing Examiner, and the ability to appeal to the Board of Appeals. The current conditional use process has only one time requirement: the Hearing Examiner's

⁶These lower height antennas are poles, not the traditional latticework tower.

report must be issued within 30 days of the closing of the public hearing record. The process can easily take 6 months to a year. The FCC allows a 60-day approval for attachments to existing poles and 90 days for new (replacement) poles. The sponsors intended to allow for a noticed public hearing with a report and finding by the Hearing Examiner within the FCC's shot clock. The ZTA accomplishes this objective by:

- removing the requirement for Planning staff and Planning Board recommendations;
- limiting the findings required by the Hearing Examiner (less visually intrusive than other locations);
- allowing consolidated applications;
- allowing appeals directly to the Circuit Court;
- reducing the notice requirement (all property owners, homeowners' associations, civic associations, condominiums, and renter associations within 300 feet of the proposed tower).

Public testimony objected to all these changes from the current conditional use process. An alternative process that both had a likelihood of meeting the FCC shot clock and avoided a denial of wireless service was not suggested in testimony.

A) Notice

Poles allowed in the amended conditional use process would likely be less than 50 feet tall. The current code requires notice to all property owners and civic associations within 1/2 mile (2,640 feet) of the conditional use application. A 50-foot pole would not be visible from 1/2 mile away. If antennas were placed every 300 feet in a neighborhood, a homeowner would get multiple notices of poles. A cobra streetlight pole is 25 feet high; a neighborhood streetlight is generally 14 feet high. The height allowed by ZTA 19-07 (which does not change the height of utility poles) is between 35 and 40 feet. In the opinion of the sponsors, the current noticing requirement appears to be excessive.

Staff comment: Multiple notices to the same property owner should not be required when small cell antennas are proposed for a neighborhood. A single notice should be sufficient to inform owners of what is occurring.

B) Planning Board and Planning staff role

The Executive and Planning Board made unspecific comments about the role of the Planning Board and Planning staff. A specific alternative to the current process or the process proposed by ZTA 19-07 was not offered. Currently, all conditional use applications require a Planning staff report and Planning Board recommendations. The change (to only allow Planning staff participation at the request of a Hearing Examiner) was recommended by the sponsor to reduce the time required for review.

C) Limiting the findings required

Generally, to approve a conditional use, the Hearing Examiner is required (in part) to find that the application:

- substantially conforms with the recommendations of the applicable master plan;
- is **harmonious** with and will not alter the character of the surrounding neighborhood in a manner inconsistent with the plan;

- will not, when evaluated in conjunction with existing and approved conditional uses in any neighboring Residential Detached zone, increase the number, intensity, or scope of conditional uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area;
- will not cause undue harm to the neighborhood as a result of a non-inherent adverse effect alone or the combination of an inherent and a non-inherent adverse effect in any of the following categories:
 - i. the use, peaceful enjoyment, economic value or development potential of abutting and confronting properties or the general neighborhood;
 - ii. traffic, noise, odors, dust, illumination, or a lack of parking; or
 - iii. the health, safety, or welfare of neighboring residents, visitors, or employees;
- is **compatible** with the character of the residential neighborhood.

The findings are appropriate for some conditional uses, but the sponsors thought that they were not appropriate for small cell antennas. The reason to require a conditional use for anything is that the use is generally compatible in the zone but may be incompatible at some locations. If a small cell is not harmonious or compatible in one neighborhood, it could still be in any other neighborhood. Under ZTA 19-07, the Hearing Examiner has a single finding: is location X better than location Y? The revised finding more likely avoids a prohibition of service.

D) Consolidated Hearings

ZTA 19-07 would allow consolidation of pole applications for applications filed within 30 days of each other. (Consolidation would be allowed for poles in the same neighborhood where poles of similar height, structure, and characteristics are proposed.) The Hearing Examiner suggested changes to ZTA 19-07 to allow for applicant-initiated consolidation only when applications are made. Industry representatives requested the opportunity to consolidate more applications.

The Town of Chevy Chase noted the following problem with the Office of Hearing Examiner's (OZAH's) Rule of Procedure to participate in a motion to consolidate applications (where the motion is granted before the public hearing):

We believe the definition of “party of record” in OZAH Rule 3.1 should be amended to include “individuals and organizations testifying at an OZAH public hearing; those who have filed a written notice indicating their intention to testify; those who have filed a motion or opposition to motion; and those who have requested and been approved by the Hearing Examiner to be parties of record....”

OZAH's Land Use Rules of Procedure already permit persons to file or oppose motions before the public hearing when they are not parties of record. The Hearing Examiner does not agree with the Town's recommendation:

OZAH's Rules distinguish between “parties of record” and “participants” to streamline the hearing process without compromising the rights of residents. Participants are those who submit written comments to OZAH prior to the public hearing or who do not wish to testify at the public hearing. In contested cases, OZAH may receive literally hundreds of written submissions from residents before the hearing. If all are treated as parties, OZAH is required to coordinate hearing dates, postponements, motions, and copy communications with all of those individuals. Residents who

have been designated parties have administrative burdens as well, as they may not communicate with OZAH without copying all parties and must respond to motions.

IV) Alternative to Conditional Use: “Waiver” and “Objection”

Alternatively, an “objection” and “waiver” process like that of accessory dwelling units could be implemented.⁷ Notice would be provided regarding the proposed location. When an “objection” is raised to the proposed location, the Hearing Examiner would have a public hearing to determine the location with the least visual impact on the area, according to ZTA 19-07 standards. Since the provider would be required to provide alternative locations at the Tower Committee, these alternatives would be available for the Hearing Examiner before an objection is even filed.

License applicants could also apply for waivers from the Zoning Ordinance standards. This could be used for all standards that the Hearing Examiner may change or review, such as the height of the pole in certain circumstances.

A waiver and objection process would be more streamlined than the conditional use procedures, while allowing community input *and* meeting the terms of the shot clock. For those proposed poles where there is no community objection and no request for a waiver, no Hearing Examiner review would be triggered.

V) Other Issues

A) Radio Frequency (RF) Testing

Takoma Park is requiring annual RF testing around each antenna to determine if it is operating within RF power and frequency ranges allowed by the FCC. ZTA 19-07 does not have that requirement.

The FCC only requires RF testing under certain circumstances.⁸ The categorical exclusions are not exclusions from compliance but, rather, exclusions from performing routine evaluations to demonstrate compliance.

B) Fees

Currently, conditional use application fees for telecommunications towers are more than \$16,000. The fee was based on experience with macro-towers. The Hearing Examiner does not have much experience with smaller, 5G antennas. The Hearing Examiner has no experience with the process proposed by ZTA 19-07. Fees are established by Council resolution. The FCC order limits fees to actual costs or \$500. At some point in the near future, it would be appropriate to have different fees for any tower that uses a new process.

C) Utility Poles

Under Chapter 8-1(d)3(C), a building permit is not required for any utility pole. A pole may be replaced because of general maintenance, increased electrical service needs, to accommodate cable service, or to accommodate an antenna. The provision for an antenna attachment on an existing structure applies

⁷ Montgomery County Code, §29-26.

⁸ FCC Office of Engineering and Technology, Bulletin 65.

(Section 59.3.5.14.C of the Zoning Code) to all poles owned and used by a public utility. There is NO height limit for antennas on existing structures. There IS a required 60-foot antenna setback from any dwelling (Section 59.3.5.14.C.2.e.iii).

As introduced, ZTA 19-07 concerns Telecommunications Towers (Section 3.5.2.c). As introduced, it would not amend Antenna on Existing Structure (Section 59.3.5.14.C). It does not affect the current law concerning the unlimited height of utility poles in their status as existing structures. ZTA 19-07 applies to all replacement telecommunications towers and replacement utility poles that are no longer owned or used by a utility company.

If the Council wants to control the height of utility poles, a Bill is required to issue building permits for utility poles. There may be an easier approach that does not require a Bill. Antenna on Existing Structure is a separate provision in zoning that can be amended. (References to utility pole height in ZTA 19-07 should be deleted unless the provision for Antenna on Existing Structure is amended.)

The Department of Permitting Services issues right-of-way permits for all utility poles. It also issues construction and electrical permits for antenna attachments. DPS staff will be available to describe its process for dealing with utility poles and antenna attachments on some of those poles.

This packet contains

ZTA 19-07

Detailed table of requirements in other jurisdictions

Planning Board testimony

Planning staff testimony

DPS process for utility poles

© number

1-14

15-17

18-20

21-27

28

Zoning Text Amendment No.: 19-07
Concerning: Telecommunications
Towers – Limited Use
Draft No. & Date: 2 – 10/21/19
Introduced: October 1, 2019
Public Hearing:
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**

Lead Sponsor: Councilmember Riemer
Co-Sponsors: Councilmembers Alborno and Rice

AN AMENDMENT to the Montgomery County Zoning Ordinance to:

- allow certain telecommunications towers as a limited or conditional use in certain residential zones;
- revise the standards for telecommunications towers allowed as a limited or conditional use;
- revise the conditional use findings required for the replacement of a pre-existing pole; and
- generally amend use requirements to address certain telecommunications towers.

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

DIVISION 3.1. “Use Table”
Section 3.1.6. “Use Table”
DIVISION 3.5. “Commercial Uses”
Section 3.5.2. “Communication Facility”
DIVISION 7.3. “Regulatory Approvals”
Section 7.3.1. “Conditional Use”

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 text that 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.

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 59-3.1 is amended as follows:**

2 **DIVISION 3.1. Use Table**

3 * * *

4 **Section 3.1.6. Use Table**

5 The following Use Table identifies uses allowed in each zone. Uses may be modified in Overlay zones under

6 Division 4.9.

USE OR USE GROUP	Definitions and Standards	Ag	Rural Residential			Residential														Commercial/ Residential			Employment				Industrial		
		Residential Detached							Residential Townhouse			Residential Multi-Unit																	
		AR	R	RC	RNC	RE-2	RE-2C	RE-1	R-200	R-90	R-60	R-40	TLD	TMD	THD	R-30	R-20	R-10	CRN	CRT	CR	GR	NR	LSC	EOF	IL	IM	IH	
* * *																													
COMMERCIAL																													
* * *																													
Communication Facility	3.5.2																												
Cable Communications System	3.5.2.A	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	P	C	C	C	C		
Media Broadcast Tower	3.5.2.B	C	C	C		C	C	C	C	C	C	C				C	C	C				C		L	C	C	C	P	
Telecommunications Tower	3.5.2.C	L/C	L/C	L/C	<u>L/C</u>	<u>L/C</u>	<u>L/C</u>	<u>L/C</u>	<u>L/C</u>	<u>L/C</u>	<u>L/C</u>	<u>L/C</u>	<u>L/C</u>	<u>L/C</u>	<u>L/C</u>	<u>L/C</u>	<u>L/C</u>	<u>L/C</u>	L	L	L	L/C	L/C	L	L/C	L	L	L	

7 **Key:** P = Permitted Use L = Limited Use C = Conditional Use Blank Cell = Use Not Allowed

8 **Sec. 2. DIVISION 59-3.5 is amended as follows:**

9 **DIVISION 3.5. Commercial Uses**

10 * * *

11 **Section 3.5.2. Communication Facility**

12 * * *

13 C. Telecommunications Tower

14 * * *

15 2. Use Standards

16 * * *

17 b. [In the Commercial/Residential, Industrial, and Employment
18 zones, where] Where a Telecommunications Tower is allowed
19 as a limited use and the tower would replace a pre-existing
20 utility pole, streetlight pole, or site plan approved parking lot
21 light pole, the tower is allowed if it satisfies the following
22 standards:

23 i. Any permit application to the Department of Permitting
24 Services concerning a Telecommunications Tower must
25 include a recommendation from the Transmission
26 Facility Coordinating group issued within 90 days of the
27 submission of the permit application.

28 ii. In the Commercial/Residential, Industrial, and
29 Employment zones, the pre-existing pole and the
30 replacement tower must be at least 10 feet from an
31 existing building, excluding any setback encroachments
32 allowed under Section 4.1.7.B.5.

33 iii. In the Agricultural, Rural Residential, and Residential
34 zones, the pre-existing pole and the replacement tower

35 must be at least 60 feet from any building intended for
36 human occupation, excluding any setback encroachments
37 allowed under Section 4.1.7.B.5.

38 [i] iv. Antennas must comply with the Antenna Classification
39 Standard A under Section 59.3.5.2.C.1.b, be concealed
40 within an enclosure the same color as the pole, be
41 installed at a minimum height of 15 feet, and be installed
42 parallel with the tower.

43 [ii] v. The tower must be located:

44 (a) within 2 feet of the base of a pre-existing pole and
45 at the same distance from the curb line, or edge of
46 travel lane in an open section, as the pre-existing
47 pole in a public right-of-way;

48 [(b) at least 10 feet from an existing building;]

49 [(c)] (b) outside of the roadway clear zone as
50 determined by the Department of Permitting
51 Services;

52 [(d)] (c) in a manner that allows for adequate sight
53 distances as determined by the Department of
54 Permitting Services; and

55 [(e)] (d) in a manner that complies with streetlight
56 maintenance requirements as determined by the
57 Department of Transportation.

58 [iii] vi. A pre-existing streetlight or parking lot light pole
59 must be removed within 10 business days after power is
60 activated to the replacement tower, and a pre-existing

utility pole must be removed within 180 days after a replacement utility pole is installed.

[iv] vii. The height of the tower, including any attached antennas and equipment, must not exceed:

(a) for streetlights, the height of the pole that is being replaced:

(1) plus 6 feet when abutting a right-of-way with a paved section width of 65 feet or less; or

(2) plus 15 feet when abutting a right-of-way with a paved section width greater than 65 feet.

(b) for utility poles and parking lot lights, the height of the pre-existing utility or parking lot light pole plus 10 feet.

[v] viii. The tower must be the same color as the pre-existing pole.

[vi.] ix. The tower must have no exterior wiring, except that exterior wiring may be enclosed in shielded conduit on wooden or utility poles.

[vii] x. Any equipment cabinet:

(a) must not exceed a maximum volume of 12 cubic feet;

(b) if used to support antennas on a replacement streetlight pole, must be installed in the Telecommunications Tower base or at ground

level, unless this requirement is waived by the
Department of Transportation;

(c) must be the same color or pattern as the pre-
existing tower[, except as provided in Section
59.3.5.2.C.2.b.vii(d)] 3.5.2.C.b.x(d); and

(d) may be a stealth design approved for safety by the
Department of Transportation.

[viii] xi. The tower must include a replacement streetlight,
if a streetlight existed on the pre-existing pole.

[ix] xii. The design of a replacement tower located in a
public right-of-way, including the footer and the
replacement streetlight, must be approved by the
Department of Transportation.

[x] xiii. The noise level of any [fans] equipment must
comply with Chapter 31B.

[xi] xiv. Signs or illumination [on the antennas or support
structure], except a streetlight, on the antennas or support
structure are prohibited unless required by the Federal
Communications Commission or the County.

[xii] xv. The owner of the tower [or the antenna attached to
the tower] must maintain their tower[,]. The owner of the
antenna must maintain the [antennas,] antenna and
equipment in a safe condition[,]. Both owners must
remove graffiti[,] and repair damage from their facility.

[xiii] xvi. If a tower does not have a streetlight, the tower
must be removed at the [cost] expense of the owner of
the tower when the tower is no longer in use for more

114 than 12 months. Any antenna and equipment must be
115 removed at the [cost] expense of the owner of the
116 antenna and equipment when the [antennas] antenna and
117 equipment are no longer in use for more than 12 months.
118 The [Telecommunications] Transmission [Facilities]
119 Facility Coordinating Group must be notified within 30
120 days of the removal.

- 121 c. Where a Telecommunications Tower is allowed as a conditional
122 use, it may be permitted by the Hearing Examiner under
123 [Section 3.5.2.C.2.a, limited use standards, Section 7.3.1,
124 Conditional Use,] either Subsection 3.5.2.C.2.d or Subsection
125 3.5.2.C.2.a, limited use standards. In addition, Section 7.3.1
126 and the following procedures and standards must be satisfied:
- 127 i. Before the Hearing Examiner approves any conditional
128 use for a Telecommunications Tower, the proposed
129 facility must be reviewed by the [County] Transmission
130 Facility Coordinating Group. The applicant for a
131 conditional use must file a recommendation from the
132 Transmission Facility Coordinating Group with the
133 Hearing Examiner at least 5 days before the date set for
134 the public hearing. The recommendation must be no
135 more than 90 days old when the conditional use
136 application is accepted.

137 * * *

- 138 d. In the Agricultural, Rural Residential, and Residential zones,
139 where a Telecommunications Tower that is proposed to be less
140 than 50 feet in height does not meet the limited use standards

under Subsection 3.5.2.C.2.a, it may be permitted by the
Hearing Examiner as a conditional use without regard to
Section 7.3.1 only if the following procedures and standards are
satisfied:

i. An application must include:

- (a) the subject property's ownership and, if the
applicant is not the owner, authorization by the
owner to file the application;
- (b) fees as approved by the District Council;
- (c) a statement of how the proposed development
satisfies the criteria to grant the application;
- (d) a certified copy of the official zoning vicinity map
showing the area within at least 1,000 feet
surrounding the subject property;
- (e) a written description of operational features of the
proposed use;
- (f) plans showing existing buildings, structures,
rights-of-way, tree coverage, vegetation, historic
resources, and the location and design of
streetlights, utilities, or parking lot poles within
300 feet of the proposed location;
- (g) a list of all property owners, homeowners
associations, civic associations, condominiums,
and renter associations within 300 feet of the
proposed tower;

166 (h) plans showing height and architectural design of
167 the tower and cabinets, including color materials,
168 and any proposed landscaping and lighting;

169 (i) photograph simulations with a direct view of the
170 tower and site from at least 3 directions;

171 (j) at least one alternative site that maximizes the
172 setback from any building intended for human
173 occupation or reduces the height of the proposed
174 tower.

175 ii. Before the Hearing Examiner reviews any conditional
176 use for a Telecommunications Tower, the proposed
177 facility must be reviewed by the Transmission Facility
178 Coordinating Group. The Transmission Facility
179 Coordinating Group must declare whether the application
180 is complete, verify the information in the draft
181 application, and must issue a recommendation within 20
182 days of accepting a complete Telecommunications Tower
183 application. The applicant for a conditional use must file
184 a complete copy of the recommendation from the
185 Transmission Facility Coordinating Group with the
186 Hearing Examiner at least 30 days before the date set for
187 the public hearing. The Transmission Facility
188 Coordinating Group recommendation must have been
189 made within 90 days of its submission to the Hearing
190 Examiner.

191 iii. The Hearing Examiner must schedule a public hearing to
192 begin within 30 days after the date a complete application
193 is accepted by the Hearing Examiner.

194 (a) Within 10 days of when an application is accepted,
195 the Office of Zoning and Administrative Hearings
196 must notify all property owners within 300 feet of
197 the application of:

198 (1) the filed application;

199 (2) the hearing date; and

200 (3) information on changes to the hearing date
201 or the consolidation found on the Office of
202 Zoning and Administrative Hearing's
203 website.

204 A sign that satisfies Section 59.7.5 must also be
205 posted at the site of the application at the same
206 time.

207 (b) The Hearing Examiner may postpone the public
208 hearing and must post notice on the website of the
209 Office of Zoning and Administrative Hearings of
210 any changes to the application, the application
211 schedule, or consolidation of multiple applications.

212 (c) The Hearing Examiner may request information
213 from Planning Department Staff.

214 iv. A Telecommunications Tower must be set back, as
215 measured from the base of the support structure.

216 v. (a) The Telecommunications Tower must be at least
217 60 feet from any building intended for human

occupation, excluding encroachments that are
allowed under Section 4.1.7.B.5 and no taller than
30 feet; or

(b) if the Hearing Examiner determines that additional
height and reduced setback are needed to provide
service or a reduced setback or increased height
will allow the support structure to be located on
the property in a less visually obtrusive location,
the Hearing Examiner may reduce the setback
requirement to at least 30 feet or increase the
height. In making this determination, the Hearing
Examiner must consider the height of the structure,
topography, existing tree coverage and vegetation,
proximity to nearby residential properties, and
visibility from the street.

vi. The Hearing Examiner may not approve a conditional
use if the use abuts or confronts an individual resource or
is in a historic district in the Master Plan for Historic
Preservation.

vii. The tower must be located to minimize its visual impact
as compared to any alternative location where the tower
could be located to provide service. Neither screening
under Division 6.5 nor the procedures and standards
under Section 7.3.1 are required. The Hearing Examiner
may require the tower to be less visually obtrusive by use
of screen, coloring, or other visual mitigation options,
after the character of residential properties within 400

feet, existing tree coverage and vegetation, and design
and presence of streetlight, utility, or parking lot poles.

- e. When multiple applications for Telecommunications Towers
raise common questions of law or fact, the Hearing Examiner
may order a joint hearing or consolidation of any or all of the
claims, issues, or actions. Any such order may be prompted by
a motion from any party or at the Examiner's own initiative.
The Hearing Examiner may enter an order regulating the
proceeding to avoid unnecessary costs or delay. The following
procedures for consolidated hearings govern:
- i. All applications must be filed within 30 days of each
other and be accompanied by a motion for consolidation.
 - ii. The proposed sites, starting at a chosen site, must be
located such that no site is further than 3,000 feet from
the chosen site in the application.
 - iii. The proposed sites must be located in the same zone,
within the same Master Plan area, and in a neighborhood
with similar building heights and setbacks.
 - iv. Each tower must be of the same or similar proposed
height, structure, and characteristics.
 - v. A motion to consolidate must include a statement
specifying the common issues of law and fact.
 - vi. The Hearing Examiner may order a consolidated hearing
if the Examiner finds that a consolidated hearing will
more fairly and efficiently resolve the matters at issue.

vii. If the motion to consolidate is granted, the applicant and opposition must include all proposed hearing exhibits with their pre-hearing statements.

viii. The Hearing Examiner has the discretion to require the designation of specific persons to conduct cross-examination on behalf of other individuals and to limit the amount of time given for each party's case in chief. Each side must be allowed equal time.

f. Any party aggrieved by the Hearing Examiner's decision may file a petition for judicial review under the Maryland rules within 15 days of the publication of the decision.

* * *

Sec. 3. Effective date. This ordinance becomes effective 20 days after the date of Council adoption.

This is a correct copy of Council action.

Selena Mendy Singleton, Esq.,
Clerk of the Council

	Setbacks	Pole Height
Montgomery County current	<u>AR,R,RC-limited</u> (not replacement): 300 feet <u>C/R- limited</u> (replacement): 10 feet from existing building/within 2 feet of pre-existing pole base <u>All Residential Zonesⁱ</u> conditional (new and pre-existing): a distance of one foot for every foot of height or 300 feet from an existing dwelling (whichever is a greater setback)ⁱⁱ	<u>AR, R, RC-limited</u> (not replacement): 179 feet maximum <u>C/R- limited</u> (replacement): -<i>Streetlights</i>: the height of the pole being replaced: 1) plus 6 feet when abutting a ROWⁱⁱⁱ with paved section width of 65 feet or less 2) plus 15 feet when abutting a ROW with a paved section width greater than 65 feet -<i>Utility poles</i>: the height of the pre-existing pole plus 10 feet <u>All Residential Zones^{iv}</u>– conditional (new and pre-existing): 135 feet maximum
Montgomery County proposed	<u>All Residential Zones-limited</u> (replacement on pre-existing pole): at-least 60 feet from nearest habitable building <u>All Residential Zones-conditional</u> 30 feet from a building	<u>All Residential Zones-limited</u> (replacement on pre-existing pole): -<i>Streetlights</i>: the height of the pole being replaced: 1) plus 6 feet when abutting a ROW with paved section width of 65 feet or less 2) plus 15 feet when abutting a ROW with a paved section width greater than 65 feet -<i>Utility poles</i>: the height of the pre-existing pole plus 10 feet <u>All Residential Zones-conditional</u> under 50 feet
Prince George's County	<u>Public & Private Land</u>: one foot for every one foot in the height of the pole -Cannot be located within...^v • 150 of the nearest small wireless facility controlled by the same "Person" • 15 feet of an existing tree • 30 feet from a residential dwelling unit unless a study deems more distance is required related to radio frequency radiation • 3 feet, 6 inches from the curb or 6 feet from the end of the paved section of the roadway if no curb exists when in a public ROW • 250 feet of an elementary/secondary institution	<u>Public Land</u>: 199 feet maximum <u>Private Land</u>: 100 feet maximum Co-located/Existing Pole: The new height cannot exceed 10 feet higher than the original pole height. Public ROW (protected area): Cannot exceed 30 feet Public ROW: Cannot exceed 50 feet or 10 feet greater than the tallest existing pole in the public ROW
Washington D.C. ^{vi} ROW/Public	<u>New or Existing Pole</u>: Small cell infrastructure shall not be installed on an existing or new pole within a 10' setback from all existing buildings or building lines (i.e. property line, building restriction line, or additional setback required by zoning)	<u>Existing Poles</u>: Any attachment, including antenna(e), to an existing pole shall not extend the existing pole to a height of more than 36 feet or by more than 10 percent, whichever is greater. <u>Wood Poles</u>: The height of any replacement wood pole including its antennae shall not exceed 50 feet.

	Small Cell infrastructure is not permitted to be installed on: Medians and traffic islands; bridges, tunnels, overpasses and elevated roadways; Twin-Twenty or Washington Upright poles, or others; all sidewalks and rights-of-way immediately adjacent to Federal property or Federal reservations; and avenues and streets on the Federal Core Interest Area Map that do not designate small cell infrastructure locations	
Fairfax, VA ^{vii}	<u>Co-located^{viii}</u>: If in utility transmission easement or street ROW, it must be located a minimum of 10 feet from the utility transmission easement or ROW line. Otherwise, it must meet minimum yard requirements of the specific zoning district^x <u>R-12, R-16, R-20: Permitted Use, Setback</u>: All other structures (1) Front yard: Controlled by a 25° angle of bulk plane, but not less than 20 feet (2) Side yard: Controlled by a 25° angle of bulk plane, but not less than 10 feet (3) Rear yard: Controlled by a 25° angle of bulk plane, but not less than 25 feet (FAR .70) <u>R-30: Permitted Use, Setback</u>: All structures (1) Front yard: Controlled by a 25° angle of bulk plane, but not less than 20 feet (2) Side yard: Controlled by a 25° angle of bulk plane, but not less than 10 feet (3) Rear yard: Controlled by a 25° angle of bulk plane, but not less than 25 feet (FAR: 1.0) <u>Replacement</u>: Assume the new pole must be in the exact same spot as preexisting pole <u>New Structures</u>: Single-family zones, <u>not</u> located on a major thoroughfare= no less than 300 feet All other areas: no less than 100 feet From an existing or permitted utility distribution or transmission pole <u>Hub-Sites^x</u>: If in utility transmission easement or street ROW, it must be located a minimum of 20 feet from the utility transmission easement or ROW line	<u>Co-located</u>: 12 feet maximum <u>Replacement-Single Family Dwelling Zones</u>: If <i>located on a major thoroughfare</i>, maximum height equals 80 feet. If the existing pole is higher than 80 feet, then the new pole cannot be more than 15 feet taller than the original. If <i>not located on a major thoroughfare</i> the new pole cannot be more than 15 feet higher than the existing pole. <u>Replacement-Multi-Family Dwelling Zones</u>: If the buildings are 35 feet or less in height, then the entire height of the pole must not exceed 100 feet. If the original pole exceeds 100 feet, then the replacement cannot be more than 15 feet higher than the existing pole. <u>Replacement- All Other Instances</u>: The entire height of the pole must not exceed 100 feet. If the original pole exceeds 100 feet, then the replacement cannot be more than 15 feet higher than the existing pole. <u>New Structures</u>: 50 feet maximum <u>Hub-Sites</u>: 12 feet maximum

Arlington, VAⁱ	All small cell facilities must be placed on an existing privately-owned utility poles and structures in the right-of-way, and County owned light poles.	Height restrictions are based on the type of pole the small wireless facility will be placed on. ^{xii} Some examples include ^{xiii} : • 35 feet maximum (including small wireless facility) • 26 feet maximum (including small wireless facility) The small wireless facility should not exceed 6 feet higher than the pole.
----------------------------------	---	---

ⁱ AR,R,RC,RNC,RE-2,RE-2C,RE-1,R-200,R-90,R-60,R-40

ⁱⁱ The Hearing Examiner may reduce the setback to no less than one foot for every foot in height if evidence indicates that the reduced setback will allow the support structure to be located on the property in a less visually-intrusive location. – Jeff Zyontz November 19, 2019 Public Hearing Staff Packet pg. 8
https://www.montgomerycountymd.gov/council/Resources/Files/agenda/col/2019/20191119/20191119_7.pdf

ⁱⁱⁱ Right-of-Way

^{iv} Unless it can be demonstrated that additional height up to 179 feet is needed for service, collocation, or public safety communication purposes. At the completion of construction, before the support structure may be used to transmit any signal, and before the final inspection required by the building permit, the applicant must certify to DPS that the height and location of the support structure conforms with the height and location of the support structure on the building permit.

^v Prince George's County CB-058-2019 on Small Wireless Facilities <https://princegeorgescountymd.legistar.com/LegislationDetail.aspx?ID=4144226&GUID=A73DBCBE-5AED-408B-86B2-88298DD721C0&Options=ID|Text|&Search=CB-58-2019>

^{vi} Small Cell Design Guidelines, 2019

https://ddot.dc.gov/sites/default/files/dc/sites/ddot/page_content/attachments/Final%20Third%20Version%20of%20the%20Small%20Cell%20Guidelines.pdf

^{vii} Ground-mounted equipment has different restrictions based on specific zones and locations. Please see 7-8 of Fairfax County Zoning Ordinance 19-480
<https://www.fairfaxcounty.gov/planning-development/sites/planning-development/files/assets/documents/zoning%20ordinance/adopted%20amendments/zo19480.pdf>

^{viii} Co-location includes antenna and equipment is placed on an existing utility or light pole.

^{ix} Fairfax minimum yard requirements for residential zones, R-12 (pg. 3-77) R-16 (pg. 3-83), R-20 (pg. 3-89), R-30 (pg. 3-95) : <https://www.fairfaxcounty.gov/planning-development/sites/planning-development/files/assets/documents/zoning/zoning%20ordinance/art03.pdf>

^x A hub site as defined by the Fairfax County Zoning Ordinance pertains to an equipment cabinet or structure that serves a wireless facility system when there are no antennas located on the same lot as the equipment cabinet or structure.

^{xi} Amended and enacted Chapter 22 (Street Development and Construction) Section 22-8.2 for Arlington County, VA Effective August 1, 2019

https://arlington.granicus.com/MetaViewer.php?view_id=2&clip_id=3656&meta_id=188150 Chapter 22 full text: https://arlingtonva.s3.amazonaws.com/wp-content/uploads/sites/22/2019/08/Ch-22_STREET-DEVELOPMENT-AND-CONSTRUCTION_per-Board-Report_Final.pdf

^{xii} Arlington, VA Department of Transportation Lighting Standards & Specifications Updates <https://transportation.arlingtonva.us/streets/street-lights/lighting-standards-specifications-updates/>

^{xiii} Arlington, VA Department of Transportation Small Cell Wireless Facility Pole Drawings <https://arlingtonva.s3.amazonaws.com/wp-content/uploads/sites/19/2019/10/Small-Cell-Wireless-Facility-SWF-Pole-Drawings.pdf>



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

OFFICE OF THE CHAIR

November 18, 2019

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 No. 19-07

BOARD RECOMMENDATION

The Montgomery County Planning Board of The Maryland-National Capital Park and Planning Commission reviewed Zoning Text Amendment No. 19-07 (ZTA 19-07) at its regular meeting on November 14, 2019. By a vote of 5:0, the Planning Board provides the following comments on ZTA 19-07 to allow certain telecommunications towers as a limited or conditional use in certain residential zones; revise the standards for telecommunications towers allowed as a limited or conditional use; revise the conditional use findings required for the replacement of a pre-existing pole; and generally amend use requirements to address certain telecommunications towers.

The Board believes that ZTA 19-07 strikes a balance in addressing the community's interest in having increased access to mobile broadband services and the evolving technical needs of the wireless industry while also working to protect the community's interest in managing commercial use of public property and maintaining attractive and safe roads and neighborhoods.

The Board believes that adding a requirement and expedited process for conditional use approval for replacement poles that do not meet the limited use standards makes sense, given that retrofitting them with small cell technology can be more difficult when also trying to establish compatibility with neighborhoods, especially in areas with underground utilities.

The Board further recommends that the following comments/questions be addressed during the PHED Committee worksession on ZTA 19-07 (as detailed in the staff report):

- The extent of Planning Staff involvement in the expedited limited use and conditional use processes.
- The Hearing Examiner's concerns regarding the proposed language that allows consolidation of applications filed up to 29 days apart. OZAH believes that any consolidated applications should be filed on the same day.
- Clarification on the maximum size (volume) of a small cell antenna to be located on a replacement or existing streetlight, utility or site plan approved parking lot light pole. There appears to be inconsistency between the current Zoning Code maximum and the FCC allowance.

- Clarification of existing Zoning Code language on how the minimum installation height (of 15 feet) of an antenna on a pole should be measured. The Board suggests that the measurement be made from the base of the antenna.

ZTA 18-02 (adopted May 15, 2018), amended the Zoning Ordinance to allow replacement of pre-existing streetlights, utility poles and site plan-approved parking lot lights in the Commercial/Residential, Employment and Industrial zones.

ZTA 18-11 was proposed to allow replacement of these same types of pre-existing poles in the Agricultural, Rural Residential and Residential zones as a Limited Use if the pre-existing pole is at least 22 feet tall and 30 feet from a house, or as Conditional Use if the pre-existing pole is shorter than 22 feet and at least 30 feet from a house. The Hearing Examiner would need to find that the tower is compatible with nearby residential property and is located to minimize its visual impact. To meet federal shot clocks, the Hearing Examiner's decision would be made final action by the County, by removing the right to appeal the Hearing Examiner's decision to the Board of Appeals. Appeal to the Circuit Court would still be permitted. ZTA 18-11 was not enacted by the previous Council.

As proposed, ZTA 19-07:

- Allows poles with antennas as a limited use in residential zones where the pole for the antenna would replace a pre-existing utility pole, streetlight pole, or site plan-approved parking lot light pole;
- Requires that any permit application to the Department of Permitting Services concerning a Telecommunications Tower include a recommendation from the Transmission Facility Coordinating (TFCG) group issued within 90 days of the submission of the permit application;
- Requires, in the Agricultural, Rural Residential, and Residential zones, the pre-existing pole and the replacement tower to be at least 60 feet from the nearest habitable building;
- Limits the height of a replacement structure to 6 additional feet for streetlights, when abutting a right-of-way with a paved section width of 65 feet or less, or 15 additional feet for streetlights when abutting a right-of-way with a paved section width greater than 65 feet. Additional height for utility poles and parking lot light poles would be limited to 10 feet;
- Amends the conditional use standards for poles in Agricultural, Rural Residential, and Residential zones proposed to be less than 50 feet in height that do not meet the limited use standards;
- Requires that any conditional use for a Telecommunications Tower be reviewed by the TFCG before being reviewed by the Hearing Examiner. The TFCG must declare whether the application is complete, verify the information in the draft application, and must issue a recommendation within 20 days of accepting a complete Telecommunications Tower application;
- Requires that the Telecommunications Tower under a conditional use application be at least 60 feet from any building intended for human occupation and no taller than 30 feet;

- Allows the Hearing Examiner to reduce the setback requirement to a minimum of 30 feet or increase the height above 30 feet if needed to provide service or if a reduced setback or increased height will allow the support structure to be located on the property in a less visually obtrusive location;
- Requires the tower to be located to minimize its visual impact as compared to any alternative location where the tower could be located to provide service;
- Requires that appeals of the Hearing Examiner's decisions go straight to the Circuit Court;
- Requires that the Hearing Examiner schedule a public hearing to begin within 30 days after the date a complete application is accepted by the Hearing Examiner; and
- Allows for batching applications when those applications are in the same neighborhood and have similar issues.

CERTIFICATION

This is to certify that the attached report is a true and correct copy of the technical staff report and the foregoing is the recommendation adopted by the Montgomery County Planning Board of The Maryland-National Capital Park and Planning Commission, at its regular meeting held in Silver Spring, Maryland, on Thursday, November 14, 2019.



Corey Anderson
Chair

CA:GR:aj



Zoning Text Amendment (ZTA) No. 19-07, Telecommunications Towers – Limited & Conditional Use

DDR

Gregory Russ, Planner Coordinator, FP&P, gregory.russ@montgomeryplanning.org, 301-495-2174

JKS

Jason Sartori, Chief, FP&P, jason.sartori@montgomeryplanning.org, 301-495-2172

Completed: 11/7/19

Description

ZTA No. 19-07 amends the Montgomery County Zoning Ordinance to allow certain telecommunications towers as a limited or conditional use in certain residential zones; revise the standards for telecommunications towers allowed as a limited or conditional use; revise the conditional use findings required for the replacement of a pre-existing pole; and generally amend use requirements to address certain telecommunications towers.

Summary

Staff recommends the following comments on ZTA No. 19-07 to allow certain telecommunications towers as a limited or conditional use in certain residential zones; revise the standards for telecommunications towers allowed as a limited or conditional use; revise the conditional use findings required for the replacement of a pre-existing pole; and generally amend use requirements to address certain telecommunications towers.

Staff believes that ZTA 19-07 strikes a balance in addressing the community's interest in having increased access to mobile broadband services and the evolving technical needs of the wireless industry while also working to protect the community's interest in managing commercial use of public property and maintaining attractive and safe roads and neighborhoods.

Staff believes that adding a requirement and expedited process for conditional use approval for replacement poles that do not meet the limited use standards makes sense, given that retrofitting them with small cell technology can be more difficult when also trying to establish compatibility with neighborhoods, especially in areas with underground utilities.

Staff further recommends that the following comments/questions be addressed during PHED Committee worksession on ZTA 19-07 (as detailed in the staff report):

- The extent of Planning Staff involvement in the expedited limited use and conditional use processes.
- The Hearing Examiner's concerns regarding the proposed language that allows consolidation of applications filed up to 29 days apart. OZAH believes that these applications should be filed on the same day.

- Clarification on the maximum size (volume) of a small cell antenna to be located on a replacement or existing streetlight, utility or site plan approved parking lot light pole. There appears to be inconsistency between the current Zoning Code maximum and the FCC allowance.
- Clarification of existing Zoning Code language on how the minimum installation height (of 15 feet) of an antenna on a pole should be measured. Staff suggests that the measurement should be made from the base of the antenna.
- Minor plain language clarifications.

Background/Analysis

ZTA 18-02 (adopted May 15, 2018), amended the Zoning Ordinance to allow replacement of pre-existing streetlights, utility poles and site plan-approved parking lot lights in the Commercial/Residential, Employment and Industrial zones.

ZTA 18-11 was proposed to allow replacement of these same types of pre-existing poles in the Agricultural, Rural Residential and Residential zones as a Limited Use if the pre-existing pole is at least 22 feet tall and 30 feet from a house, or as Conditional Use if the pre-existing pole is shorter than 22 feet and at least 30 feet from a house. The Hearing Examiner would need to find that the tower is compatible with nearby residential property and is located to minimize its visual impact. To meet federal shot clocks, the Hearing Examiner's decision would be made final action by the County, by removing the right to appeal the Hearing Examiner's decision to the Board of Appeals. Appeal to the Circuit Court would still be permitted. **ZTA 18-11 was not enacted by the previous Council.**

ZTA 19-07 was introduced on October 1, 2019. Below is an excerpt from the Council Staff report introducing the ZTA:

Wireless technology is rapidly changing to offer faster speeds, enhanced reliability, and expanded capabilities. The Federal Communications Commission (FCC) believes that greater capacity is needed to meet future demands. The next generation of wireless technology has dramatically more capacity than what is in use today.

Wireless networks will increasingly take advantage of millimeter wave spectrum above 24 GHz. That spectrum can carry a lot of information, but the signal travels a short distance. The technology requires many antennas that are closer to the device that is sending and receiving information. While today's technology relies on relatively few but tall macro towers, tomorrow's technology (5G) will also make use of many more, shorter antennas.

As stated above, the previous Council reviewed the restrictions of 5G towers in 2018. By approving ZTA 18-02, the Council allowed deployment of 5G antennas in mixed-use and non-residential zones with reduced setbacks. The zoning code does not allow 5G towers in residentially-zoned areas except by conditional use approval (In the conditional use process, a minimum 300-foot setback from existing dwellings is required.). The previous Council also took on the question of allowing a limited use in residential zones in the fall of 2018 (ZTA 18-11) with a 30-foot setback. Ultimately, the Council did not support shorter cell towers as a limited use in residential zones.

In the opinion of the sponsors, the opportunities for innovation and advancement in health care, education, transportation, agriculture, entertainment, and many other sectors should not be understated. As wireless technologies increasingly help power the County's economy and

undoubtedly contribute to County residents' quality of life, the sponsors of ZTA 19-07 do not want the County to be left behind.

The sponsors of ZTA 19-07 believe that the proposed ZTA strikes the right balance. It ensures that the industry is incentivized to use poles that are 60 feet or more from a building. When the setback distance is between 60 and 30 feet, residents will continue to have a voice in the process to argue that there are less obtrusive locations.

The sponsors are concerned about preemption efforts by the FCC and possibly the Maryland General Assembly. This ZTA is an opportunity for the County to set its own standards. In the opinion of the sponsors, if the Council does not act, federal or state rules will be imposed on the County, and those rules will be less favorable than what this ZTA would achieve (The County filed petitions for judicial review of several FCC orders that, as of the date of this memorandum, the court has not acted on.).

As proposed, ZTA 19-07 **does not change the requirements for telecommunications towers that are not replacing a pre-existing utility pole, streetlight pole, or site plan approved parking lot light pole.**¹ However, the ZTA adds to or modifies the telecommunication provisions as discussed below (Planning staff supports these proposed changes, with modifications as indicated):

REPLACEMENT POLES AS LIMITED USE IN RESIDENTIAL AREAS (Streetlight, Utility, and Parking Lot Light Poles)

- ZTA 19-07 would allow poles with antennas as a limited use in residential zones where the pole for the antenna would replace a pre-existing utility pole, streetlight pole, or site plan-approved parking lot light pole.
 - Any permit application to the Department of Permitting Services concerning a Telecommunications Tower (including non-residential zones) must include a recommendation from the Transmission Facility Coordinating group issued within 90 days of the submission of the permit application. *(lines 23-27)*
 - In the Agricultural, Rural Residential, and Residential zones, the pre-existing pole and the replacement tower must be at least 60 feet from the nearest habitable building. In 2018, the characteristics of emerging 5G and small cell technology required that antennas be located closer to mobile devices, and thus closer to residences and businesses. In ZTA 18-02, the County approved allowing the smallest class of antennas to be located on poles at least 10 feet from buildings in commercial areas. *(lines 33-37)*
 - The height of a replacement structure would be limited to 6 additional feet for streetlights, when abutting a right-of-way with a paved section width of 65 feet or less, or 15 additional feet for streetlights when abutting a right-of-way with a paved section width greater than 65 feet. Additional height for utility poles and parking lot light poles would be limited to 10 feet.

¹ In residential areas, these macro towers continue to require a 300-foot setback, conditional use approval, and that an Office of Zoning and Administrative Hearing (OZAH) Hearing Examiner's approval may be appealed to the Board of Appeals.

However, additional minimum height would be permitted to comply with the National Electric Safety Code. (lines 63-75)

REPLACEMENT POLES AS A CONDITIONAL USE IN RESIDENTIAL AREAS (lines 138-246)

- ZTA 19-07 would amend the conditional use standards for poles in Agricultural, Rural Residential, and Residential zones proposed to be less than 50 feet in height that do not meet the limited use standards.
 - Before the Hearing Examiner reviews any conditional use for a Telecommunications Tower, the proposed facility must be reviewed by the Transmission Facility Coordinating Group. The Transmission Facility Coordinating Group must declare whether the application is complete, verify the information in the draft application, and must issue a recommendation within 20 days of accepting a complete Telecommunications Tower application. (lines 175-190)
 - The Telecommunications Tower must be at least 60 feet from any building intended for human occupation and no taller than 30 feet. (lines 216-220)
 - If the Hearing Examiner determines that additional height above the limited use standards and reduced setback are needed to provide service or that a reduced setback or increased height will allow the support structure to be located on the property in a less visually obtrusive location, the Hearing Examiner may reduce the setback requirement to a minimum of 30 feet or increase the height above 30 feet. Under all circumstances, the setback must be at least 30 feet from a building. (lines 221-232)
 - The tower must be located to minimize its visual impact as compared to any alternative location where the tower could be located to provide service. (lines 237-239)
 - ZTA 19-07 includes a revision to the conditional use process to allow for a decision to be made within 90 days, which is an FCC shot clock requirement for new poles. Reducing the processing time requires that appeals of the Hearing Examiner's decisions go straight to the Circuit Court. (lines 278-280)
 - The Hearing Examiner must schedule a public hearing to begin within 30 days after the date a complete application is accepted by the Hearing Examiner. Within that time frame, the Hearing Examiner may request information from Planning Department Staff. (lines 212-213) ***Planning Staff believes that this requirement needs clarification. What information may be requested from Planning Department staff? In what form would this information be, i.e., staff report, staff memo, graphics? What is the expected turnaround time for staff to accomplish this task if the Hearing Examiner is requesting information concerning consolidated cases or is on an expedited hearing schedule?***

MULTIPLE APPLICATIONS FOR TELECOMMUNICATIONS TOWERS (lines 247-277)

- ZTA 19-07 would also allow for batching applications when those applications are in the same neighborhood and have similar issues.
 - All applications must be filed within 30 days of each other and be accompanied by a motion for consolidation. (lines 255-256) The Hearing Examiner's Office believes that the ability to consolidate applications filed 29 days apart should be eliminated. The current proposal will

create logistical problems for OZAH staff, as they will have to rearrange hearings already scheduled with potentially many parties (including civic associations and individuals) to get a new date. They will also have to manage the scheduling of transcription services, update the website, and do multiple mailings when they could have done one mailing for the applications that are consolidated. As such, the ZTA should require the Motion for Consolidation to be filed at the same time the applications to be consolidated are filed.

The current language in the ZTA 19-07 reads:

"All applications must be filed within 30 days of each other and be accompanied by a motion for consolidation."

OZAH recommends changing that language to read:

"All applications for Telecommunications Tower conditional uses that the Applicant seeks to have consolidated must be filed on the same date and be accompanied by a motion for consolidation."

Planning staff supports the change recommended by OZAH.

- The proposed sites to be consolidated, starting at a chosen site, must be located such that no site is further than 3,000 feet from the chosen site in the application.
- The proposed sites must be located in the same zone, within the same Master Plan area, and in a neighborhood with similar building heights and setbacks.
- Each tower must be of the same or similar proposed height, structure, and characteristics.

OTHER CHANGES AND CLARIFICATIONS

- Section 3.5.2.C.2.b.iv (Telecommunication Use Standard- lines 38-42 of the ZTA) states for antennas on a replacement pole:

Antennas must comply with the Antenna Classification Standard A under Section 59.3.5.2.C.1.b, be concealed within an enclosure the same color as the pole, be installed at a minimum height of 15 feet, and be installed parallel with the tower.

Although this language is existing language that is not proposed to be modified as part of ZTA 19-07, staff believes that clarifications could be warranted. The maximum antenna size under Standard A exceeds the requirement established by the Federal Communications Commission (FCC) which limits the antenna to 3 cubic feet in volume (Standard A allows a maximum volume of 6 cubic feet). Also, installation is typically from the center of the antenna. Under Standard A the base of the antenna could technically be at a height under 13 feet. Staff suggests that the minimum installation height of 15 feet be clarified to be measured from the base of the antenna.

- Lines 106-110 read as follows:

xv. The owner of the tower [or the antenna attached to the tower] must maintain their tower[.]. The owner of the antenna must maintain the [antennas,] antenna and equipment in a safe condition[.]. Both owners must remove graffiti[,] and repair damage from their respective facility.

Staff recommends a minor plain language clarification (double underlined language above) to make clear the responsibilities of both owners (tower and antenna).

Conclusion

Staff believes that ZTA 19-07 strikes a balance in addressing the community's interest in having increased access to mobile broadband services and the evolving technical needs of the wireless industry while also working to protect the community's interest in managing commercial use of public property and maintaining attractive and safe roads and neighborhoods. Adding a requirement and expedited process for conditional use approval for replacement poles that do not meet the limited use standards makes sense, given that retrofitting them with small cell technology can be more difficult when also trying to establish compatibility with neighborhoods, especially in areas with underground utilities. Staff further recommends that the following comments/questions be addressed during the PHED Committee worksession on ZTA 19-07 (as detailed in the staff report):

- The extent of Planning Staff involvement in the expedited limited use and conditional use processes.
- The Hearing Examiner's concerns regarding the proposed language that allows consolidation of applications filed up to 29 days apart. OZAH believes that these applications should be filed on the same day.
- Clarification on the maximum size (volume) of a small cell antenna to be located on a replacement or existing streetlight, utility or site plan approved parking lot light pole. There appears to be inconsistency between the current Zoning Code maximum and the FCC allowance.
- Clarification of existing Zoning Code language on how the minimum installation height (of 15 feet) of an antenna on a pole should be measured. Staff suggests that the measurement should be made from the base of the antenna.
- Minor plain language clarifications.

Attachments

1. ZTA No. 19-07 as introduced

	New Utility Pole NOT RELATED TO WIRELESS	New Utility Pole for Maintenance	Replacement Utility Pole RELATED TO WIRELESS	Wireless attachment to a Utility Pole in ROW	New Wireless Structure (Pole) in ROW	Wireless on Private Property
Details	Definition: PEPCO	Definition: PEPCO (or other utility) Maintenance (Double Poling)	Definition: Installing a new pole specifically to accommodate a new antenna	Definition: Mobilitie (or other Telecommunications Franchisee) places equipment on existing utility pole	Commercial Building permit for structure Definition: new DOT street light, stealth structure,	Commercial Building permit for structure Definition: rooftop antenna, private street light, stealth structure
	Transmit power	Transmit power	Related to Wireless			
	12 month expiration	12 month expiration (double poling) 180 days to move equipment and switch all other carriers; removing double pole.	12 month expiration (double poling) 180 days to move equipment and switch all other carriers; removing double pole.			
PERMIT TYPE	Right of Way Permit	Right of Way Permit	Right of Way Permit	Three Permits Required: COMBUILD (Install/Wireless) Right of Way (Install/Wireless) Electrical (Install/Wireless)	Three Permits Required: COMBUILD (Install/Wireless) Right of Way (Install/Wireless) Electrical (Install/Wireless)	Two Permits Required: COMBUILD (Install/Wireless) Electrical (Install/Wireless)
Work Type/Use Code	INSTALL / PUBUTL * Check box for new pole	INSTALL / PUBUTL * Check box for new pole	INSTALL / PUBUTL * Check box for Pole to Accommodate Wireless	INSTALL / WIRELESS for all three permit types	INSTALL / WIRELESS for all three permit types	INSTALL / WIRELESS for both permit types
Reviews	Utility Review	Utility Review	Utility Review	Structural1 Review	Structural1 Review	Structural1 Review
	Traffic Control	Traffic Control	Traffic Control	Electrical	Electrical	Electrical
			Zoning/Wireless	Zoning/Wireless Review	Zoning/Wireless Review	Architectural (only if mounted on bldg)
				Subdivision Development Review (related ROW permit req.)	Subdivision Development Review (related ROW permit req.)	Life Safety (only if mounted on bldg)
				Roadside Tree Review	Roadside Tree Review	Zoning/Wireless Review
					DOT Review if new DOT street light	
Submittal Req	Standard submittal	Standard submittal	Tower Committee Recommendation	Tower Committee Recommendation	Tower Committee Recommendation	Tower Committee Recommendation
					DOT Approval (plans and/or letter uploaded to ePlans) if new DOT street light	
Inspections	Performed by ROW inspector	Performed by ROW inspector	Performed by ROW inspector	Wireless provider must provide certifications related to structural integrity, ZTA requirements and photo of equipment installed. Performed by Zoning Inspector and/or Electrical Inspector?	Wireless provider must provide certifications related to structural integrity, ZTA requirements and photo of equipment installed. Performed by Zoning inspector and/or Electrical Inspector?	Wireless provider must provide certifications related to structural integrity, ZTA requirements and photo of equipment installed. Performed by Zoning Inspector and/or Commercial Bldg/Electrical Inspector?
	Inspection - 251	Inspections - 251, 951	Inspections - 251, 951	Inspection - 251	Inspection - 251	Inspection - 251
		Inspection - Removal of Original Pole	Inspection - Removal of Original Pole			
		Need to establish mechanisms to confirm that within 180 days of start of work that all work is completed	Need to establish mechanisms to confirm that within 180 days of start of work that all work is completed			
Reports	Expire letter to applicant	Expire letter to applicant	Expire letter to applicant	TBD - Commercial Building	TBD - Commercial Building	TBD - Commercial Building
	Expire report for inspection	Expire report for inspection	Expire report for inspection	TBD - Zoning	TBD - Zoning	TBD - Zoning
			TFCG report - Longitude/Latitude, Utility Pole#, Total Height, Distance to Nearest Bldg, TC App#, TBD	TFCG report - Longitude/Latitude, Utility Pole#, Total Height, Distance to Nearest Bldg, TC App#, TBD	TFCG report - Longitude/Latitude, Utility Pole#, Total Height, Distance to Nearest Bldg, TC App#, TBD	TFCG report - Longitude/Latitude, Utility Pole#, Total Height, Distance to Nearest Bldg, TC App#, TBD