

MEMORANDUM

March 5, 2021

TO: Planning, Housing, and Economic Development 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 #3 for ZTA 19-07

Expected Participants:

Ehsan Motazedi, Deputy Director, 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
Debbie Spielberg, Special Assistant, County Executive

Summary of ZTA 19-07

Zoning Text Amendment (ZTA) 19-07, lead sponsor Councilmember Riemer, co-sponsors Councilmembers Albornoz 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.

Prior Committee Worksession

At its second worksession on ZTA 19-07 on February 10, 2021, the Committee reviewed and discussed the prior staff report. Specifically, the Committee reviewed the standards in other jurisdictions; reviewed maps of where the towers are currently and how ZTA 19-07 would expand this number; received updates on the franchise and license agreements for towers in commercial areas from the County Executive; discussed technical aspects of where towers can be placed and how, from the Office of Broadband Programs; and heard alternative methods for shortening the conditional use process from the Office of Zoning and Administrative Hearings.

Considerable information has been provided by staff in the November 19, 2019 public hearing memorandum² and in the February 10, 2021 PHED worksession #2 memorandum.³ This memorandum attempts to address issues not already raised or resolved, in preparation for a straw vote.

A. Limited Use

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, for **building permits**, the required notice for construction of a structure for a limited use is on-site posting once DPS issues a permit.⁴ 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.⁵ However, a building permit appeal is not an opportunity to make a general objection to DPS action; it must be a violation of code standards.

¹ ZTA 19-07 does not change the requirement for a franchise agreement 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 https://www.montgomerycountymd.gov/council/Resources/Files/agenda/col/2019/20191119/20191119_7.pdf

³ https://www.montgomerycountymd.gov/council/Resources/Files/agenda/cm/2021/20210210/20210210_PHED2.pdf

⁴ Under Sec. 8-25, Permits. "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."

⁵ 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."

1. Setback

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 limits the pole location that may be approved as limited use. Currently: 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; and 33,368 poles have a setback of 60 feet or more.

Council Staff recommends a limited use distance of 30 feet. This would more closely mirror the standards in other jurisdictions. And GIS analysis shows that this will also provide the desired increase in the number of poles.

2. New Poles

The current ZTA reads “[w]here a Telecommunications Tower is allowed as a limited use and the tower would replace a pre-existing utility pole, streetlight pole, or site plan approved parking lot light pole...”, indicating that a *new* pole is not included in the limited use standards. And any tower that “does not meet the limited use standards” becomes a conditional use. In other words, as currently drafted, all new towers—even if they meet the setback and height requirements of a limited use—must go through the conditional use process. If the conditional use process is eliminated, the ZTA must be amended to account for what happens to these new poles. For example, new poles could be included in the limited use standards, but also made subject to a waiver and objection process.

Council Staff recommends that if the conditional use process is eliminated, new poles be subject to the limited use standards and a “waiver and objection” process. That process is discussed further below.

3. Height Under 50 Feet

The FCC small cell order defines small cell antennas as those that are on structures 50 feet or less in height. 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. 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.

To avoid violation of the FCC order, height could be based on the width of the street, with an option for the applicant to request a waiver of up to 50 feet in height.

Council Staff recommends the current height limits remain in place, with an option to request a waiver of up to fifty feet. The ability to request a waiver for up to fifty feet should avoid violation of the FCC order.

B. Conditional Use

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. ZTA 19-07 would not allow the Hearing Examiner to reject all poles in an application. The Hearing Examiner has a single finding: is location X better than location Y? This revised finding more likely avoids a prohibition of service.

The FCC requires that poles be approved within 90 days of the submission of a complete application. To meet this shot clock, the following has been proposed:

1. Notice
The current code requires notice to all property owners and civic associations within ½ mile of the conditional use application. A 50-foot pole would not be visible from ½ mile away. Notice would instead be provided to all within 300 feet.
2. Planning Board and Planning Staff Review and Recommendation
Planning staff participation would only be allowed at the request of the Hearing Examiner.
3. Findings
The Hearing Examiner’s findings are limited to whether location X is better than location Y. The least obtrusive pole must be approved.
4. Board of Appeals
Appeals of the Hearing Examiner’s decision would go directly to Circuit Court, skipping past the Board of Appeals.
5. Consolidated hearings
Consolidation of pole applications for applications filed within 30 days of each other would be allowed. Consolidation would only be allowed for poles in the same neighborhood where poles of similar height, structure, and characteristics are proposed.

Council Staff recommends that if the conditional use process is retained, the provisions outlined above be put into place. The above provisions would make it more likely that the FCC shot clock can be met.

C. Waivers and Objections

Under a “waiver and objection” process, notice would be provided regarding the proposed location (i.e., by a building permit application sign posted on the proposed site). When an “objection” is raised to the proposed location, the Hearing Examiner would hold a public hearing to determine the location with the least visual impact on the area, according to ZTA 19-07 standards. 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.

Council Staff recommends the “waiver and objection” process in place of the conditional use process. It would provide a more efficient review process such that any pole deemed unobjectionable would proceed to building permit. However, for any pole that raises concerns, the community has a

process to request review of a more favorable location. This process would also allow applicants to request a waiver from any reviewable standards (i.e., height). In short, this process is more streamlined than the conditional use procedure because it avoids delaying approval where there is no request for a waiver and no objection. Further, it allows the County to meet the FCC shot clock because appeals under such a process go directly to the Circuit Court.

This packet contains

ZTA 19-07

Planning Board testimony

Planning staff testimony

© number

© 1-14

© 15-17

© 18-24

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 Albornoz 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
* * *																												
COMMERCIAL																												
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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	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	L/C	L/C	L/C	L/C	L/C	L/C	L/C	L/C	L/C	L/C	L/C	L/C	L/C	L/C	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

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

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

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

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

69 or

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

73 (b) for utility poles and parking lot lights, the height of
74 the pre-existing utility or parking lot light pole plus
75 10 feet.

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

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

81 [vii] x. Any equipment cabinet:

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

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

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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

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

145 i. An application must include:

- 146 (a) the subject property's ownership and, if the
147 applicant is not the owner, authorization by the
148 owner to file the application;
- 149 (b) fees as approved by the District Council;
- 150 (c) a statement of how the proposed development
151 satisfies the criteria to grant the application;
- 152 (d) a certified copy of the official zoning vicinity map
153 showing the area within at least 1,000 feet
154 surrounding the subject property;
- 155 (e) a written description of operational features of the
156 proposed use;
- 157 (f) plans showing existing buildings, structures,
158 rights-of-way, tree coverage, vegetation, historic
159 resources, and the location and design of
160 streetlights, utilities, or parking lot poles within
161 300 feet of the proposed location;
- 162 (g) a list of all property owners, homeowners
163 associations, civic associations, condominiums,
164 and renter associations within 300 feet of the
165 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

218 occupation, excluding encroachments that are
219 allowed under Section 4.1.7.B.5 and no taller than
220 30 feet; or
221 (b) if the Hearing Examiner determines that additional
222 height and reduced setback are needed to provide
223 service or a reduced setback or increased height
224 will allow the support structure to be located on
225 the property in a less visually obtrusive location,
226 the Hearing Examiner may reduce the setback
227 requirement to at least 30 feet or increase the
228 height. In making this determination, the Hearing
229 Examiner must consider the height of the structure,
230 topography, existing tree coverage and vegetation,
231 proximity to nearby residential properties, and
232 visibility from the street.
233 vi. The Hearing Examiner may not approve a conditional
234 use if the use abuts or confronts an individual resource or
235 is in a historic district in the Master Plan for Historic
236 Preservation.
237 vii. The tower must be located to minimize its visual impact
238 as compared to any alternative location where the tower
239 could be located to provide service. Neither screening
240 under Division 6.5 nor the procedures and standards
241 under Section 7.3.1 are required. The Hearing Examiner
242 may require the tower to be less visually obtrusive by use
243 of screen, coloring, or other visual mitigation options,
244 after the character of residential properties within 400

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

247 e. When multiple applications for Telecommunications Towers
248 raise common questions of law or fact, the Hearing Examiner
249 may order a joint hearing or consolidation of any or all of the
250 claims, issues, or actions. Any such order may be prompted by
251 a motion from any party or at the Examiner's own initiative.
252 The Hearing Examiner may enter an order regulating the
253 proceeding to avoid unnecessary costs or delay. The following
254 procedures for consolidated hearings govern:

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

257 ii. The proposed sites, starting at a chosen site, must be
258 located such that no site is further than 3,000 feet from
259 the chosen site in the application.

260 iii. The proposed sites must be located in the same zone,
261 within the same Master Plan area, and in a neighborhood
262 with similar building heights and setbacks.

263 iv. Each tower must be of the same or similar proposed
264 height, structure, and characteristics.

265 v. A motion to consolidate must include a statement
266 specifying the common issues of law and fact.

267 vi. The Hearing Examiner may order a consolidated hearing
268 if the Examiner finds that a consolidated hearing will
269 more fairly and efficiently resolve the matters at issue.

- 270 vii. If the motion to consolidate is granted, the applicant and
271 opposition must include all proposed hearing exhibits
272 with their pre-hearing statements.
- 273 viii. The Hearing Examiner has the discretion to require the
274 designation of specific persons to conduct cross-
275 examination on behalf of other individuals and to limit
276 the amount of time given for each party's case in chief.
277 Each side must be allowed equal time.
- 278 f. Any party aggrieved by the Hearing Examiner's decision may
279 file a petition for judicial review under the Maryland rules
280 within 15 days of the publication of the decision.

281 * * *

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

284

285 This is a correct copy of Council action.

286

287

288 Selena Mendy Singleton, Esq.,
289 Clerk of the Council



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.



Carey Anderson
Chair

CA:GR:aj



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

DDR

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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