



Montgomery
County Council

Committee: PHED

Staff: Livhu Ndou, Legislative Attorney
Pamela Dunn, Senior Legislative Analyst

Purpose: To make preliminary decisions – straw vote
expected

Keywords: #TelecommunicationsTowers

AGENDA ITEM #3E

July 20, 2021

Worksession

SUBJECT

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

Lead Sponsor: Councilmember Riemer

Co-Sponsors: Councilmembers Albornoz and Rice

EXPECTED ATTENDEES

The following individuals will be available for questions:

Ehsan Motazed, Deputy Director, Department of Permitting Services (DPS)

Victor Salazar, Division Chief, Zoning, Well & Septic and Code Compliance, DPS

Mark Beall, Zoning Manager, Division of Zoning, Well & Septic and Code Compliance, DPS

Linda Kobylski, Chief, Land Development, DPS

Casey Anderson, Chair, Montgomery County Planning Board

Jason Sartori, Chief, Countywide Planning and Policy, Planning Department

Benjamin Berbert, Planner Coordinator, Countywide Planning and Policy, Planning Department

Derek Baumgardner, Hearing Examiner, Office of Zoning and Administrative Hearings

Mitsuko Herrera, Program Director, Office of Broadband Programs

Debbie Spielberg, Special Assistant, County Executive

Meredith Wellington, Land Use Planning Policy Analyst, Office of the County Executive

Marjorie L. Williams, Broadband, Cable & Franchise Division Manager, Department of Technology
& Enterprise Business Solutions (TEBS)

Gail Roper, Director, Technology and Enterprise Business Solutions (TEBS)

Cheryl Bishop, Senior Executive Administrative Aide, Department of Technology & Enterprise
Business Solutions (TEBS)

Joseph Webster, Chief Broadband Officer, Department of Technology & Enterprise Business
Solutions (TEBS)

Dr. Costis Torgas, IT Adviser, Montgomery County Council

COUNCIL DECISION POINTS & COMMITTEE RECOMMENDATION

The Planning, Housing, and Economic Development (PHED) Committee voted in favor of ZTA 19-07 at its March 10, 2021 worksession. The Committee made the following recommendations:

1. Reduce setback for a limited use from 60 feet to 30 feet (3-0).
2. Modified conditional use process for all poles under the 30-foot setback (3-0).
3. A “waiver and objection” process for a height up to 50 feet where other limited use setback requirements are met (3-0).

4. A “waiver and objection” process for all new poles (2-1).
5. Under the “waiver and objection” process, for notice to be sent to all property owners and civic associations within 300 feet; and for standing for objections to be limited to those within 300 feet (3-0).
6. Pole proliferation language: that a small wireless facility should not be located within 150 feet of a facility occupied or controlled by the same carrier (3-0).

DESCRIPTION/ISSUE

This is a proposed 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.

SUMMARY OF KEY DISCUSSION POINTS

The intent of ZTA 19-07 is to amend the Zoning Ordinance so that the small cell antenna provisions are in compliance with the FCC Small Cell Order. Among other things, that Order prohibits local governments from effectively prohibiting service and imposes a 90-day “shot clock” to review applications.

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. The replacement pole must be at least 30 feet from the nearest habitable building, with conditions for screening and design as well as height restrictions based on the width of the right-of-way.

For poles less than 30 feet from the nearest habitable building, ZTA 19-07 establishes a modified conditional use process that will require a public hearing while still meeting the shot clock. This modified conditional use process does not require recommendations from the Planning Staff or Planning Board, limits the findings of the Hearing Examiner, allows consolidated applications, eliminates the Board of Appeals, and reduces the notice requirement to 300 feet.

ZTA 19-07 also creates a waiver and objection process. This process applies to new poles where no existing pole exists within 150 feet. The waiver and objection process also applies to applications for poles higher than the limited use standards but under 50 feet tall. This waiver and objection process would provide a public hearing only where an objection is filed.

Today’s worksession is to discuss and move several amendments proposed by Councilmembers. These amendments include: removing the Tower Committee, amending the height standards in both residential and commercial areas, a tiered approach to setbacks based on the type of road, a tiered approach to setbacks based on the speed limit of the road, and other amendments regarding the conditional use process.

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Worksession

MEMORANDUM

July 16, 2021

TO: County Council

FROM: Livhu Ndou, Legislative Attorney
Pamela Dunn, Senior Legislative Analyst

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

PURPOSE: Worksession for ZTA 19-07

Expected Attendees

The following attendees will be available for questions:

Ehsan Motazedi, Deputy Director, Department of Permitting Services (DPS)
Victor Salazar, Division Chief, Zoning, Well & Septic and Code Compliance, Department of Permitting Services (DPS)
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Joseph Webster, Chief Broadband Officer, Department of Technology & Enterprise Business Solutions (TEBS)
Dr. Costis Toregas, IT Adviser, County Council

Introduction

Zoning Text Amendment (ZTA) 19-07, lead sponsor Councilmember Riemer, co-sponsors Councilmembers Alborno and Rice, was introduced on October 1, 2019. A public hearing was held on November 19, 2019. The Planning, Housing, and Economic Development (PHED) Committee had worksessions on January 23, 2020; February 10, 2021; and March 10, 2021.

The Council had its first worksession on June 29, 2021. A second worksession was held on July 13, 2021. At that worksession, the Council agreed to hold an additional worksession on July 20, 2021, to move any possible amendments.¹ Final action is tentatively scheduled for July 27, 2021.

This memorandum will focus on the amendments that were sponsored by Councilmembers between the July 13th and July 20th Council worksessions. For additional information on this ZTA, included in this packet are the July 13th staff memorandum, a July 13th memorandum from the County Executive, and a July 14th memorandum from Council Staff to the County Council in response to the County Executive's memorandum.

Proposed Amendments

Height Amendments

Councilmember Rice proposes two amendments to the height provisions.

First, the County Executive proposed an amendment where, in the Agricultural, Rural Residential, and Residential zones, the height of a replacement pole would be 25 feet if the height of the pole being replaced is less than 20 feet tall; and plus 6 feet more than the height of pole being replaced if the pole being replaced is 20 feet tall or more in height. While "plus 6 feet more than the height of pole being replaced if the pole being replaced is 20 feet tall or more in height" is too limited compared to the current ZTA's "plus 15 feet when abutting a right-of-way with a paved section width greater than 65 feet", the provision for poles under 20 feet will allow for a more reasonable height for the addition of antennas, and avoid unnecessarily triggering the waiver and objection process. Specifically, there are historic streetlights that are 14 feet tall. If they are at an intersection that is less than 65 feet wide, than plus 6 feet will only get them to 20 feet, which will usually be too short for an antenna. The proposed amendment reads:

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

¹ At the last worksession, Council Staff advised that the Council could not vote if the final version of the ZTA was not before them. Given the number of conflicting amendments proposed since that worksession, it will not be possible to have a final version of the ZTA for the July 20, 2021 worksession. Hence why action will be scheduled for a subsequent date.

- (1) plus 6 feet when abutting a right-of-way with a paved section width of 65 feet or less, or up to 25 feet where the height of the pole being replaced is less than 20 feet tall, whichever is greater; or
- (2) plus 15 feet when abutting a right-of-way with a paved section width greater than 65 feet.

The second proposed amendment changes the height of replacement poles in commercial areas. The amendment reads:

- (a) In the Commercial/Residential, Industrial, and Employment zones for streetlights, the height of the pole that is being replaced or the height of the tallest streetlight pole within 50 feet, whichever is greater:
 - (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.

In some areas, shorter poles may be located closer to intersections for aesthetic reasons. But small cell deployment is preferred at the intersection in order to increase coverage and reduce the number of towers that are necessary. This amendment would enable replacing a shorter pole with one only a few feet taller than a nearby taller pole. So, providers will be encouraged to increase the height of the shorter pole to be similar to the nearby tall pole; whereas now, a provider may choose to place the antenna on the taller pole, making it even taller, in order to avoid having to file a waiver.

Council Staff recommends approval of both of these amendments.

“Replacement” Tower

Councilmembers Riemer and Rice propose a minor amendment regarding the location of a tower. The amendment clarifies that this section of the ZTA applies to replacement towers. The amendment reads:

- [ii] iv. A replacement ~~[[The]]~~ tower must be located:...

Council Staff recommends approval of this amendment.

Preferential Placement

Councilmember Friedson proposes an amendment that encourages what is often termed “preferential placement.” This amendment encourages locating towers away from front doors, near intersections, and abutting non-residential uses where possible. It reads:

- (f) Whenever it is legally and technically feasible, the replacement poles should replace pre-existing poles that are located closest to intersections, closest to property lines between dwellings, along the non-front-facing side of residential properties, or abutting properties used for a non-residential purpose. In addition, the replacement towers must be at least 5

feet from the area between two parallel lines extending from the sides of a residential front door. If the applicant cannot meet the foregoing standards, the applicant must include in their application an affidavit proving that either permission from the pole owner cannot be obtained or service cannot be provided using a pole at an alternate location.

Due to the provision that the applicant must provide an affidavit to prove that an alternate location could not be chosen, Council Staff believes that this language does not run the risk of violating the FCC Order's effective prohibition standard. Therefore, Council Staff recommends approval of this amendment.

Removal of Tower Committee

Councilmembers Riemer and Rice propose an amendment to remove the Transmission Facility Coordinating Group, also known as the Tower Committee, from ZTA 19-07. The Tower Committee is responsible for the initial review of radio and telecommunications carrier applications. It is made up of representatives from the relevant land-owning and land-use agencies and reviews all telecommunications facilities and antenna siting requests. However, the Tower Committee was not established to be a body that hears public testimony. It is not a decision-making body, but rather, makes recommendations to the Hearing Examiner or DPS. The Tower Committee, made up of persons from different agencies, consults with engineers and providers to make its recommendation.

Much of the opposition to this ZTA includes feedback from residents that shows the powers of the Tower Committee are a source of confusion. By removing the Tower Committee from the ZTA, the County will be in a better position to address the community's concerns about its practices, and evaluate its role: including whether the Committee is needed, what it does, and what is expected of it. Removing this advisory body from the ZTA also streamlines the processing of these applications, saves the County money, and improves the ability to meet the shot clock. The Tower Committee was originally formed to review applications for macro towers, which are slowly becoming outdated technology. It was not designed to review small cell antenna applications, which are more frequent and are a different type of technology.

If this amendment is enacted, applicants will no longer be required to get a recommendation from the Tower Committee before applying for a permit with the Department of Permitting Services (DPS) or before applying for a conditional use with the Office of Zoning and Administrative Hearings (OZAH). However, along with this proposed amendment will be a provision that the Hearing Examiner will be able to request information from the Tower Committee, if additional engineering information is needed. In addition, under the current ZTA, if a tower does not have a streetlight then it must be removed by the owner if it has not been use for more than 12 months; and the owner must notify the Tower Committee of its removal within 30 days. This provision will remain in place.

This amendment has the support of the Tower Committee. However, DPS has expressed concerns with this amendment. Specifically, that as the gatekeeper for telecommunications applications, the Tower Committee reviews structural viability, advises applicants of additional approvals they may need, and confirms that the applicant has approvals from the power company and other departments. If the Tower Committee is removed from the ZTA, then these duties will become DPS'. DPS has expressed concern that if DPS finds that the applicant's plans are not approvable or need additional approval, then additional delays will prevent the County from meeting the shot clock.

Council Staff recommends approval of this amendment. Because the shot clock begins tolling at the time an application is submitted to the Tower Committee, Council Staff does not share DPS' concerns about the shot clock.

Tiered Approach 1

Council President Hucker requests that an amendment with a tiered approach based on the type of road be included in this packet for discussion on behalf of his constituents. That amendment is attached to this packet. His understanding is that this amendment will bring us into closer alignment with existing regulations in Howard County and Baltimore County. With this amendment, roads that are wider or have a higher speed limit would maintain the current ZTA's limited use standards with a setback of 30 feet. For narrower roads, the limited use standard would be 60 feet, but applicants could have a setback as low as 30 feet through the conditional use process.

The justification for this amendment is that it would "ensure members of the affected community, including municipal leaders, home owners associations, could ensure that placement of a much larger streetlight cell tower would not have adverse impacts by disrupting the canopy of a particular tree, creating safety hazards for bikes or pedestrians or by creating blind spots and other aesthetic issues."

Council Staff does not recommend approval of this amendment. First, the County is in the middle of developing a new approach to designing county roads, called the Complete Streets Design Guide. The results of this process could change the nature of road classification. Further, as discussed in prior Council Staff memorandums, a setback of 30 feet could greatly limit the deployment of small cell antennas in several neighborhoods, where streets are narrower than 30 feet. This was the reason the PHED Committee reduced the setback to 30 feet, with an ability to go below that through the conditional use process. As for tree canopies, the ZTA already says "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." And Councilmember Navarro introduced a nonbinding amendment on tree loss minimization, with the recommendation from Council Staff that further tree loss minimization could be addressed in a separate bill. As for blindspots and safety hazards, the majority of these antennas are being installed on replacement and pre-existing poles.

Tiered Approach 2

Councilmember Katz proposes a different tiered approach. That amendment is also attached to this packet. Under this approach, the setback is determined based on the speed limit of the road. Roads with speed limits greater than 50 mph would have a limited use setback of 30 feet that can be reduced to 10 feet through the conditional use process. Roads with speed limits between 35 to 50 mph would have a limited use setback of 45 feet that can be reduced to 30 feet through the conditional use process. And roads with speed limits under 35 mph would have a limited use setback of 75 feet that can be reduced to 60 feet through the conditional use process.

Council Staff does not recommend approval of this portion of the amendment. First, on many busy downtown streets in the County that could be considered "less residential", the speed limit is quite low.

For example, downtown Silver Spring. So, this amendment would have a much wider effect than just limiting the deployment of small cell antennas in “residential” versus “busy” areas. Second, as discussed above and in prior Council Staff memorandums, the PHED Committee reduced the setback based on GIS analysis, information about the width of streets in the County, and the ZTA’s intent to allow more small cell antennas.

This proposed amendment includes several additional provisions. First, provisions about design standards and compatibility. Council Staff notes that the ZTA already provides the Hearing Examiner with authority and guidance on concealment, and the limited use standards encourage stealth design measures. Second, it includes height provisions. Council Staff defers to the height amendments proposed in the earlier sections of this memorandum. As for the remaining provisions, such as findings the hearing examiner must make regarding compliance with federal guidelines, technology updates, and enforcement, as well as procedures regarding QR codes, telephonic notice of hearings, pre-registration, and opportunities to respond to motions, Council Staff notes that these are extensive and would not recommend approval of them without first discussing their feasibility with OZAH. In addition, further research would be needed to determine if, were all of these amendments to be put into place, the shot clock could be met *and* the cost of doing so would not be detrimental to the County. As a reminder, the FCC Order has restrictions on what the County can charge providers. And OZAH is a small department. So additional burdens placed on OZAH, including the time hearings take and additional procedure requirements, might have effects on cost that cannot be recouped.

This packet contains

ZTA 19-07	© 1-17
Planning Board Recommendation	© 18-20
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Councilmember Katz Proposed Amendment	© 85-112

Worksession

MEMORANDUM

July 8, 2021

TO: County Council

FROM: Livhu Ndou, Legislative Attorney
Pamela Dunn, Senior Legislative Analyst

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

PURPOSE: Worksession for ZTA 19-07

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Dr. Costis Toregas, IT Adviser, County Council

Addendums

The majority of this memorandum is identical to the one prepared by Council Staff for the June 29, 2021 worksession. Two additional sections have been added: 1) pending legal cases; and 2) a response to the County Executive's memorandum. Those sections are on pages 6 and 16, respectively.

Summary and Intent 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.

A public hearing was held on November 19, 2019. The Planning, Housing, and Economic Development (PHED) Committee had worksessions on January 23, 2020; February 10, 2021; and March 10, 2021. The Council had its first worksession on June 29, 2021. An additional worksession is scheduled for July 13, 2021, where straw votes are expected. Final action is tentatively scheduled for July 27, 2021.

Why now?

The reasons for this ZTA are two-fold. First, ZTA 19-07 updates current standards, bringing Montgomery County in compliance with federal orders. The County's current regulations for small cell antennas in the Agricultural, Rural Residential, and Residential zones likely do not comply with the FCC's Small Cell order. Those regulations are discussed in detail later in this memorandum. In addition, in recent years industry-sponsored bills have been brought before the General Assembly which specifically list Montgomery County as being a restrictive jurisdiction. Less permissive standards than surrounding jurisdictions decreases the County's desirability. And, from a legal perspective, if these bills were to move forward the state could impose rules on the County that are less favorable than this ZTA.

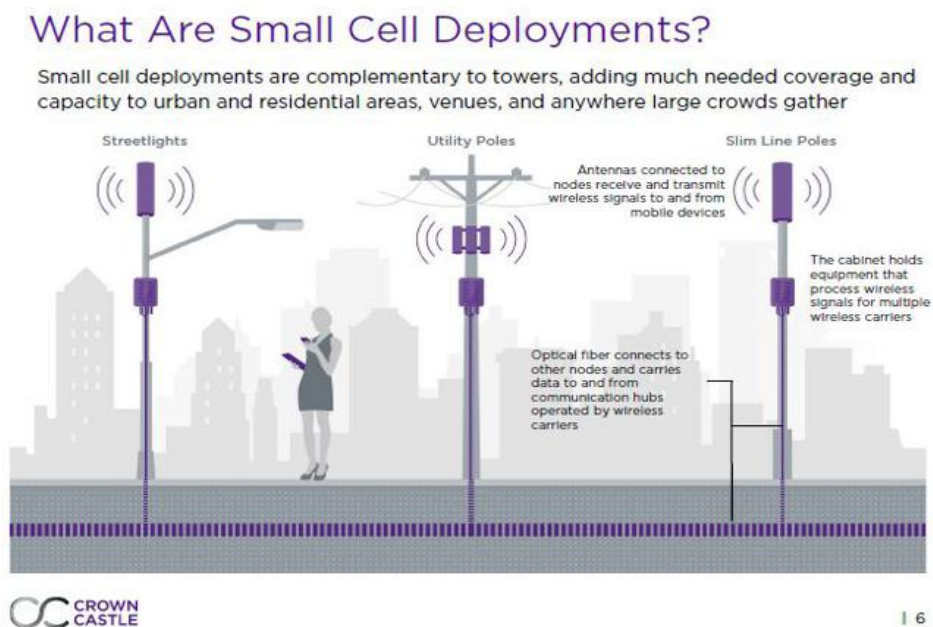
Second, the advancement and encouragement of technology has led to increases in mobile data demands and, with the resulting need to densify networks, 5G provides increased communication capacity and speed to users. The 2019 Annual Wireless Industry Survey found U.S. consumers used 82% more mobile data in 2018 compared to 2017, using a record 28.58 trillion megabytes (MB) of mobile data. Some of that rise is due to more devices being connected to mobile networks. The report found that there were 421.7 million mobile devices connected in 2018. That is an increase of 21.5 million devices compared to the year prior. Nearly half of those are smartphones, according to the report. The demand for more wireless capacity is coming from the bandwidth and speed required for mobile video, driverless cars, and connected

appliances. The FCC believes that greater capacity is needed to meet future demands. Wireless technology is rapidly changing to offer faster speeds, enhanced reliability, and expanded capabilities. The next generation of wireless technology, 5G, has dramatically more capacity than 4G. Telecommunications providers have indicated an interest in creating a 5G network in the County. A robust 5G network will contribute to County residents' quality of life by providing opportunities for innovation and advancement in health care, education, transportation, agriculture, entertainment, and other sectors. As stated by the sponsors of the ZTA, the County does not want to get left behind.

What is 5G?

Small cell towers, also known as 5G antennas, allow faster internet speed and more connectivity.¹ These lower-powered antennas serve a smaller area but with higher data volumes and are designed to operate at higher frequencies, so they can support faster downloads with more devices connected to the network. Unlike the large installations of previous cell towers, which could be as tall as 100 feet, 5G requires smaller equipment installed closer together and much closer to the ground. Unlike the macro towers, which were located on private property, small cell facilities tend to be located in public rights-of-way.

For installation, an antenna is installed either on top of or flush with a pole, usually a pre-existing streetlight or utility pole. The antenna receives and transmits wireless signals from wireless devices. A cabinet holds the equipment necessary to process the wireless signals for multiple wireless carriers. The cabinet can also be a separate box on the ground. Due to the weight of the installation, it is sometimes necessary for a replacement pole to be put up that may be taller than the original streetlight or utility pole.



Source: Crown Castle.

¹ This is not to be confused with the 5G wireless router that many people have in their homes. The 5G Wi-Fi router stands for 5Ghz (gigahertz) whereas 5G cellular, which stands for “5th generation”, is the new system wireless carriers are installing.

Wooden utility poles typically need to have at least an 11-inch base diameter to support wireless antennas and equipment. Some, but not all, utility poles need to be replaced to accommodate 5G antennas. All streetlight poles and most traffic signal poles will need to be replaced to accommodate the weight of antennas and equipment. For metal poles, the top of the pole would need to be 6 inches in diameter at a minimum. Typical pole diameters at the base are 8, 10, or 12 inches. Poles larger than 12 inches in diameter are concealment poles with equipment mounted internally in the pole instead of in a shroud or in a larger-based unit. In the absence of FCC preemption, County regulations control the design of poles. All replacement poles can be designed to mimic the original pole and still be structurally capable of supporting any proposed multi-carrier antenna and associated equipment.

Examples of small cell antennas:



A small cell tower along Key Highway in Baltimore. Source: Baltimore Sun.

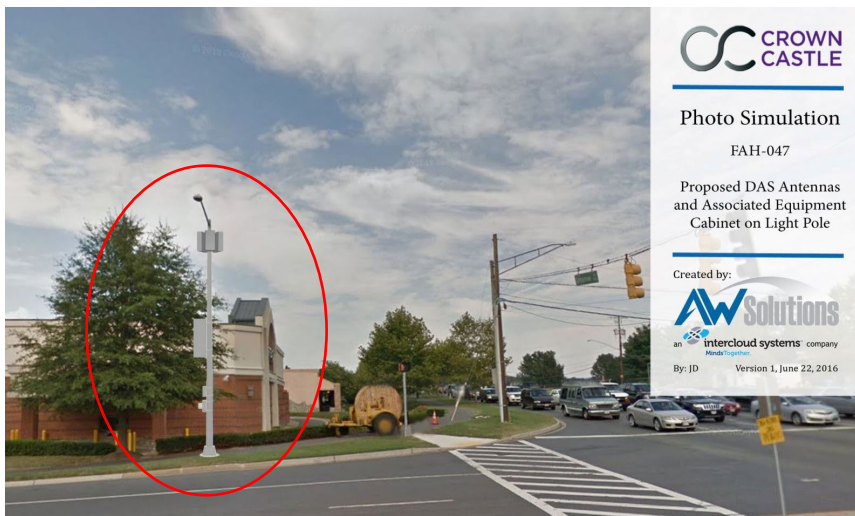


Photo simulation of a small cell antenna. Source: Crown Castle.



Existing small cell antenna in Rockville. Source: Bethesda Magazine.

Federal Guidelines

The Telecommunications Act of 1996 was enacted by Congress “to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.” Under the authority of that Act, the Federal Communications Commission (FCC) issued orders in 2018 to promote the installation of 5G. These orders are known as the “Small Cell Order”, “Moratoria Order”, and “One Touch Make-Ready Order”. The Small Cell Order places restrictions on the fees that local governments can charge for access to rights-of-way and on the aesthetic requirements that can be imposed on carriers. The Moratoria Order prohibits local governments from prohibiting deployment of 5G technology within a certain period of time, called the “shot clock”. And the One Touch Make-Ready Order gives construction crews authority to make all necessary changes to poles to make them ready for new antennas.²

The overarching effect is that federal law bans states and local governments from “materially prohibiting” carriers from offering wireless service. The Council first reviewed the restrictions on 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. But the Zoning Ordinance did not allow 5G towers in residentially-zoned areas except by conditional use approval, and the minimum setback from existing dwellings was 300 feet. As these restrictions do not meet the “shot clock” and likely prohibit deployment, revisions to the Zoning Ordinance are necessary.

Court of Appeals 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 Montgomery 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.

² The text of the order can be found here: <https://docs.fcc.gov/public/attachments/FCC-18-111A1.pdf>.

The 9th Circuit dismissed as moot the County’s petition. The bulk of the Court’s decision concerned the 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 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—often called the “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 must still seek an injunction. The County would have the opportunity to rebut the presumed statutory violation through that process.

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.”

Otherwise, the 9th Circuit upheld the FCC orders. First, the FCC order 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. Second, 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 are no more than \$270 per year.

More on the “Shot Clock”

Local governments must review all required permits within a federally-mandated time limit, also known as the “shot clock.” The shot clock is a 60-day approval for attachments to existing poles and 90 days for a new or replacement pole. The shot clock begins to run when an applicant: (1) takes the first procedural step in the application process, and (2) submits written documentation showing that the proposed modification is an eligible request. The FCC has clarified that this second criterion gives localities the opportunity to review the application and determine if the shot clock is triggered. The intent of ZTA 19-07 is to make sure the County abides by this shot clock.

Pending Legal Cases

A petition for writ of certiorari for *City of Portland, Oregon, et al., Petitioners v. Federal Communications Commission, et al.* was filed on the County’s behalf on March 22, 2021. The main issues in the petition

are whether the rental fees can be more than the cost, and what an “effective prohibition of service” is. That petition was denied on June 28, 2021.³

In *City of Eugene v. FCC*, before the U.S. Court of Appeals for the 6th Circuit, the issue was franchise fees.⁴ Oral argument was held on April 15, 2021. On May 26, 2021, the Court upheld most of the FCC’s order regarding fees.

City of Boston, Massachusetts, et al v. FCC, et al was filed on August 10, 2020 before the D.C. Circuit Court of Appeals. Oral arguments were heard on January 25, 2021. The appeal was filed by several cities and counties, including Montgomery County. The issue on appeal is the stealth and concealment obligations. It is currently on hold until August, as the FCC has requested additional time to reconsider its position. That appeal is being handled by outside counsel.

Public Hearing

A public hearing was held on November 19, 2019. Much of the public testimony was in opposition to ZTA 19-07, with some exceptions. Written testimony largely reflected the testimony heard during the hearing.

- The County Executive recommended deferring the consideration of ZTA 19-07 until the federal courts had considered the County’s challenges to FCC rules and until improvements were made in the County’s administration of antenna applications. The Executive also 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. In a follow-up letter, the City of Takoma Park opposed ZTA 19-07 because it would limit the City’s ability to be part of the planning and siting process, and because of concerns over oversight and inspections.
- The Mayor of Garrett Park requested that the Council work with municipalities before proceeding.
- Issues raised by other speakers included:
 - the negative health effects of radio frequency (RF) waves;
 - RF exposure would disproportionately burden minority communities;
 - a reduction in property values;
 - 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

³ The docket can be found here: <https://www.supremecourt.gov/docket/docketfiles/html/public/20-1354.html>.

⁴ Montgomery County was not a party to this appeal. Anne Arundel County was.

- a lack of need.
- Industry representatives questioned whether the proposed process in ZTA 19-07 would violate FCC shot clock rules and whether it would violate federal law by effectively prohibiting the deployment of 5G facilities in residential areas.
- Testimony in support refuted the claims of negative health effects and expressed the need for better coverage in the County.

PHED Committee Worksession

The PHED Committee made the following recommendations at its March 10, 2021 worksession:

1. Reduce setback for a limited use from 60 feet to 30 feet (3-0)
2. Modified conditional use process for all poles under the 30-foot setback (3-0)
3. A “waiver and objection” process for a height up to 50 feet where other limited use setback requirements are met (3-0)
4. A “waiver and objection” process for all new poles (2-1)
5. Under the “waiver and objection” process, for notice to be sent to all property owners and civic associations within 300 feet; and for standing for objections to be limited to those within 300 feet (3-0)
6. Pole proliferation language: that a small wireless facility should not be located within 150 feet of a facility occupied or controlled by the same carrier (3-0).

Detailed Review of ZTA 19-07

Limited Use

All limited use standards are purely objective criteria that do not have a public hearing. The Department of Permitting Services (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 has issued a permit. 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. A building permit appeal is not an opportunity to make a general objection to DPS action; it must be a violation of code standards.

ZTA 19-07 will allow towers as a limited use in the Agricultural, Rural Residential, and Residential zones if the tower would replace a pre-existing utility pole, streetlight pole, or site plan-approved parking lot light pole. The tower is allowed if the following standards are met:

- *Tower Committee* – The application must include a recommendation from the Transmission Facility Coordinating Group (TFCG, or “Tower Committee”).
- *Setbacks* – The pre-existing pole or replacement tower must be at least 30 feet from any building intended for human occupation.
- *Design standards* – Antennas must be concealed in an enclosure of the same color as the pole, installed at a minimum height of 15 feet, and installed parallel with the tower. The replacement

tower must be the same color as the pre-existing pole. The tower must have no exterior wiring; but on wooden or utility poles any exterior wiring must be enclosed in a shielded conduit.

- *Equipment cabinet* – Equipment cabinets must not exceed 12 cubic feet in volume and, if used to support antennas on a replacement streetlight pole, must be installed in the telecommunications tower base or at ground level. The equipment cabinet must be the same color or pattern as the pre-existing tower and may be a stealth design.
- *Illumination and Sound* – Signs or illumination are prohibited. The noise level must comply with County Code.
- *Location* – The tower must be within 2 feet of the base and, in a public right-of-way, at the same distance from the curb line or edge of travel lane in an open section as the pre-existing pole. The tower must be outside of the roadway clear zone and allow for adequate sight distances. The tower must be at least 150 feet from the nearest antenna by the same carrier.
- *Height* – The height of the tower, including any attached antennas and equipment, is as follows:⁵
 - Streetlights: the height of the pole 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
 - Utility poles and parking lot lights: the height of the pre-existing pole plus 10 feet.
- *Maintenance* – The owner of the tower must maintain the tower and the owner of the antenna must maintain the antenna. Both owners are responsible for removing graffiti and repairing any damage.

Neighboring Jurisdictions

While Montgomery County is not bound by other jurisdictions, looking to our neighbors can provide some guidance on the rest of the region's response to the FCC order. In addition to Virginia not allowing conditional uses for small cell antennas, other jurisdictions use a combination of limited use, tower committees, and franchise agreements. The following tables provide some of the setback and height requirements.

Setbacks

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

Height

Prince George's County	No higher than 50 feet or 10% higher than adjacent structures
Washington, D.C.	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

⁵ Regarding the typical height of a tower, a cobra streetlight pole is 25 feet high; a neighborhood streetlight is usually 14 feet high; and the height allowed by ZTA 19-07 is between 35 to 40 feet. For a height up to 50 feet, a waiver must be filed, as described in the waiver and objection section later in this memorandum.

Modified Conditional Use

The conditional use process has value when there is some subjective finding required. It also provides an opportunity for public hearing. Without this ZTA, 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.

The conditional use process in Montgomery County is a lengthy one. It requires recommendations from Planning Staff; recommendations from the Planning Board; a public hearing by the Hearing Examiner; and the ability to appeal to the Board of Appeals. The only time requirement is that the Hearing Examiner issue a decision within 30 days of the public hearing. The process can easily take anywhere from 6 months to 1 year, which far exceeds the 90-day shot clock.

The intent of ZTA 19-07 is to streamline the current process and avoid a prohibition of service.⁶ ZTA 19-07 also ensures that the County is in compliance with the shot clock by establishing a “modified conditional use process”. This modified process will shorten the timeline by:

- removing the requirement for Planning Staff and Planning Board recommendations;
- limiting the findings required by the Hearing Examiner to choosing the least visually obtrusive location;
- allowing consolidated applications;
- eliminating the Board of Appeals so that appeals go directly to the Circuit Court; and
- reducing the notice requirement to 300 feet.

The modified conditional use process in the Agricultural, Rural Residential, and Residential zones would be triggered for all pre-existing and replacement towers less than 30 feet from any building intended for human occupation, excluding any setback encroachments. GIS analysis indicated that a 30-foot setback was a more appropriate standard because it would provide the desired increase in antennas. A 30-foot setback is also much more in line with neighboring jurisdictions, which have setbacks as low as 10 feet from single-unit houses. Lastly, there are streets in Montgomery County that are less than 30 feet wide.

The list of application requirements is extensive, including: property ownership or authorization; a statement of how the proposed development satisfies the criteria to grant the application; a certified copy of the official zoning vicinity map showing an area of at least 1,000 feet from the subject property; a written description of the operational features of the use; plans showing existing buildings, structures, rights-of-way, tree coverage, vegetation, historic resources, and the location and design of the streetlights, utility poles, or parking lot poles within 300 feet of the proposed location; plans showing the height and architectural design of the tower and cabinets, including color materials and proposed landscaping and lighting; photograph simulations with a direct view of the tower and site from at least 3 directions; a list of all property owners, homeowners and civic associations, condominium associations, and renter associations within 300 feet of the proposed tower; and at least one alternative site that maximizes the

⁶ In some jurisdictions, such as in Virginia, conditional use approval for a small cell pole is prohibited.

setback or reduces the height of the proposed tower. The application must also be reviewed by the Tower Committee, who must provide a recommendation.

The Hearing Examiner will then provide notice of the hearing to the municipality where the proposed tower will be located, as well as to all property owners, homeowners and civic associations, condominium associations, and renter associations within 300 feet of the proposed tower. A sign must also be posted at the site. It should be noted that, under the current conditional use process, notice is sent to all property owners and civic associations within ½ mile (2,640 feet) of the proposed tower. However, a 50-foot pole would not be visible ½ mile away, so this requirement would be overly burdensome—hence the reduction to 300 feet.

The modified conditional use process eliminates the participation of the Planning Board and Planning Staff in order to meet the shot clock. However, Planning's participation can be requested by the Hearing Examiner. In addition, while the Tower Committee will initially review all applications for technical matters, conditional use applications have always been reviewed by the Planning Department to ensure they are complete before they are presented to the Hearing Examiner for scheduling and review. Since the Tower Committee is not practiced at this type of review, ZTA 19-07 does still require the Planning Director to review a conditional use application. The review is for completeness only and is not a substantive review of the application.

The Hearing Examiner's findings are limited. They must be limited in order to comply with the FCC order, which prevents the County from effectively prohibiting service. In addition, limited findings make meeting the shot clock feasible. The Hearing Examiner's primary directive is to minimize visual impact as compared to any alternative location where the tower could be located to improve service. This process is possible because the applicant must provide alternative locations with their initial application. The Hearing Examiner may require the use of screening, coloring, or other visual mitigation options, and can base this need on existing tree coverage and vegetation as well as the design and presence of nearby poles. Of note, amendments to ZTA 19-07 remove the term "after the character of residential properties" when describing the standards that the Hearing Examiner will be looking at. This was removed because the Hearing Examiner typically relies on the expert advice of the Planning Department to determine the "character" of the neighborhood since the Hearing Examiner cannot introduce evidence. Since the Planning Board and Planning Staff are no longer providing recommendations, this standard was inconsistent. In addition, since the findings are limited to what is least visually obtrusive, the character of the neighborhood standard has less weight than in other conditional use applications. However, the visually obtrusive standard does still ensure that aesthetics is considered, such as by allowing the Hearing Examiner to require screening, coloring, and other visual mitigation.

Lastly, applications for conditional use may be consolidated at the request of the applicant or by order of the Hearing Examiner. The Hearing Examiner is given discretion in regulating the proceedings to avoid unnecessary costs or delay. For example, the Hearing Examiner must consider the time it takes to send notice and schedule the hearing, so may need to deny a consolidation if filed late. In order to qualify for consolidation, applications must be filed within 30 days of each other and be located within 3,000 feet of each other. The proposed towers must also be of the same or similar proposed height, structure, and other characteristics; as well as located in the same zone, same Master Plan area, and neighborhoods with similar building heights and setbacks. The goal of this consolidation process is to reduce the burden on the Hearing Examiner to have multiple hearings on similar proposals, as well as to ensure the County does not struggle

to meet the shot clock. The Hearing Examiner will also have discretion over cross-examination and may limit the amount of time given to each party, as long as each side has equal time.

Waiver and Objection Process

The waiver and objection process is not a new one in Montgomery County. It is currently used for accessory dwelling units. It still allows for community input, but for those poles where there is no objection no public hearing will be triggered.

The FCC 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, Montgomery County can be found to have effectively prohibited service. The PHED Committee therefore recommended a waiver and objection process for towers that meet all the limited use standards except for the height. The Hearing Examiner may not approve an application higher than 50 feet.

In addition, ZTA 19-07 as introduced laid out the conditions for pre-existing and replacement poles but was silent on wholly new poles. While it is rare for a telecommunications provider to choose to construct a brand-new pole where none existed, due to both the time constraints and the higher cost of doing so, given the way 5G works there may be circumstances where there is no pre-existing or replacement pole available in a small enough area to provide service. The PHED Committee recommended the waiver and objection process for these new poles if all other limited use standards are met.

Notice of a request for waiver will be sent to the municipality where the proposed tower is located, as well as to all property owners, homeowners' associations, civic associations, condominium associations, and renter associations within 300 feet of the proposed tower. Any property owner, homeowners' association, civic association, condominium association, or renter association within 300 feet of the proposed tower would have standing to object and request a hearing. Waivers and objections can be consolidated for hearings, similar to the modified conditional use process. During the hearing and in its decision, the Hearing Examiner is limited to issues raised by a waiver or objection, as well as to all the standards that apply under the modified conditional use process: "determine whether the proposed location minimizes visual impact as compared to any alternative location where the new tower could be located to provide service"—in other words, to choose the less obtrusive location. If no objection is filed, then the waiver can be granted without a public hearing.

Proposed Councilmember Amendments

The following amendments were proposed after the last PHED worksession. Council Staff recommends the approval of both amendments.

Councilmember Friedson Amendment

To avoid the construction of new poles where a pre-existing pole exists or could be replaced, ZTA 19-07 takes certain measures. The waiver and objection section of ZTA 19-07 reads "where there is no pre-existing or replacement pole so a new pole must be constructed". To make clear that a new pole should

only be built if no other options are available, Councilmember Friedson is introducing an amendment that reads:

A new pole may only be constructed if there is no utility pole or streetlight pole within 150 feet of the proposed location that could be used as a pre-existing pole or replacement tower.

Councilmember Riemer Amendment

By creating a process for the approval of new poles, height standards needed to be set for those new poles. Councilmember Riemer is therefore introducing the following amendment:

The height of a new pole, including any attached antennas and equipment, must not be taller than the height of the nearest pre-existing streetlight or utility pole:

- (a) plus 6 feet when abutting a right-of-way with a paved section width of 65 feet or less; or
- (b) plus 15 feet when abutting a right-of-way with a paved section width greater than 65 feet.

This language ensures that new poles are consistent with neighboring poles, while providing for the additional height often required by antennas.

Additional Issues

Health Effects

Much of the opposition surrounding ZTA 19-07 concerns the health effects of radio frequency (RF) exposure. Under federal law, local jurisdictions are preempted from regulating telecommunications antennas because of health effects as long as those facilities are operating within FCC-determined power and RF ranges. In its appeal of the FCC order, the County challenged the FCC's failure to address RF emissions. In addition, the County and other jurisdictions asked the FCC to update and complete a 2013 evaluation of the existing RF safety standards. The FCC has refused to review its standards and has disagreed with concerns raised about RF emissions from 5G small cell antennas. The Court dismissed the County's challenge as moot, finding that the FCC's additional order considered RF exposure risks of 5G services. In addition, Congress has explicitly preempted the County from considering any regulations related to RF health issues:

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

47 U.S. Code §332(c)(7)(B)(iv)

Petitioning for judicial review to require an evaluation of environmental and health effects was the most the Council could do regarding regulating due to health issues. Congress delegated all considerations of health to the FCC. ZTA 19-07 changes neither the FCC's obligation to study health effects nor the limitations on the Council to not consider health effects.

The Tower Committee

Many questions have been raised regarding the role of the Transmission Facilities Coordination Group (TFCG), also referred to as the “Tower Committee”. Given the role of the Tower Committee in ZTA 19-07, it is appropriate to provide a brief overview of its role and limitations.

The Tower Committee is responsible for the initial review of radio and telecommunications carrier applications. The Tower Committee, which is within the Executive Branch, is made up of representatives from the relevant land-owning and land-use agencies and reviews all telecommunications facilities and antenna siting requests. The Tower Committee makes recommendations on the installation of radio and telecommunications infrastructure in Montgomery County. The Tower Committee has certain policy goals, including:

- promoting the appropriate location and co-location of transmission facilities to minimize adverse impact to the community and public facilities;
- to provide a forum for private carriers and public agencies to meet and reach consensus on sensible siting of transmission facilities; and
- to provide a centralized source for private providers, County agencies, and the public to obtain information regarding the siting process and the location and description of potential and current sites.

The Tower Committee was not established to be a body that hears public testimony. It does not make subjective findings; rather, it makes recommendations to the Hearing Examiner or DPS. It is open to the public but mailed notice of applications to nearby property owners is not required. To the extent that there are problems with the TFCG, those would most likely need to be addressed by a Bill concerning Section 2-58E of the County Code.

Co-Location, Pole Proliferation, and Preferential Placement

Co-location, proliferation, and preferential placement are discussed as ways to mitigate the negative impacts associated with 5G. Co-location is the siting of multiple facilities on the same structure, for example, placing multiple antennas on the same pre-existing utility pole. It can include siting multiple facilities from multiple providers in the same location. Proliferation, in the 5G context, is usually referring to the rapid increase in the number of poles and antennas. As discussed in the beginning of this memo, 5G requires more antennas placed close together. While often discussed negatively, proliferation is necessary for 5G to be effective.

First, ZTA 19-07 requires antennas to be placed at least 150 feet from the nearest antenna occupied or controlled by the same carrier. Second, Councilmember Friedson’s amendment would not allow new poles if there is a usable pre-existing or potential replacement pole within 150 feet of the proposed site. Third, the Hearing Examiner is tasked with making sure the tower minimizes visual impact as compared to any alternative location where the tower could be located. Lastly, the Tower Committee makes recommendations based on appropriate location and co-location.

Inspections

Testimony has been received regarding the lack of routine inspections for telecommunications facilities. ZTA 19-07 is silent as to inspections; routine inspections have not been required in the past, nor does ZTA 19-07 prohibit them. Applicants request inspections from DPS when construction is complete. Applicants also provide a third-party inspection report from registered and licensed engineers. DPS inspectors examine the right-of-way to make sure it was not damaged in the installation.

When a resident believes work was done that is not in compliance with the Zoning Ordinance, that complaint goes to DPS. DPS investigates and if not in compliance, a violation notice is issued. The property owner has 30 days to remedy the issue and receives a citation if they fail to do so. If the problem is still not remedied, the County pursues an abatement in court, which can lead to the tower being taken down.

Of note, a building permit is not required for a utility pole. However, a right-of-way permit is still required. A utility pole may be replaced because of general maintenance, increased electrical service needs, to accommodate cable service, or to accommodate an antenna. If the pole exists when an applicant applies for an electrical permit, the provision for an antenna attachment on an existing structure applies.⁷

Property Values

Evidence regarding the effect of small cell antennas on property values is inconclusive. In addition, it is unclear whether these studies included small cell antennas or focused exclusively on macro cell towers.

No effect:

- A 2018 Valbridge Property Advisors market study in Boston, Dallas, Phoenix, and Raleigh determined there was no measurable difference (defined as less than 1%) for homes within a .5 to 1-mile radius of a cell tower.
- In a 2015 Delaware case, a court found a cell tower did not impact surrounding property values.

Negative effect:

- A 2017 study in Alabama focused on visual effects and found that properties within .72 km of the closest tower (which was 2,632 feet) declined 2.46% on average compared to homes outside the tower visibility range.
- A 2018 Kentucky study found properties with a visible antenna 1,000 feet away sold for 1.82% less than a similar property 4,500 feet away.

Positive effect:

- An article in the National Real Estate Investor Quality concluded that quality cell phone coverage can have a significant impact on the desirability and value of a property.

⁷ The County also enters into franchise agreements with providers that may provide additional terms.

Racial Equity and Social Justice

ZTA 19-07 was introduced before Racial Equity and Social Justice (RESJ) impact statements were required from the Office of Legislative Oversight (OLO). However, some information is available regarding the impacts.

While public testimony expressed concern that these small cell antennas would be placed in minority communities, and therefore have negative equity impacts, the same can be said for positive impacts. The increase of small cell antennas in minority communities would provide those populations with better access. For example, for those who do not or cannot afford expensive broadband, 5G would provide better service. As an example, during the COVID-19 pandemic Montgomery County Public Schools issued hotspots to those without internet access. The situation highlighted the need for more wireless access in certain communities. The increase in 5G across the County, especially in areas where it is lacking, means a more equitable distribution of better and faster wireless access.

ZTA 19-07 does not, however, guarantee equitable access. As with all zoning provisions, ZTA 19-07 does not mandate where small cell antennas must be provided. Rather, it relaxes the requirements so that providers are encouraged to install small cell antennas throughout the County. From a technological standpoint, providers will likely install the small cell antennas where the extra capacity is most needed. Council Staff encourages the Council to continue to work on ways of guaranteeing equitable coverage.

County Executive's June 29, 2021 Memorandum

The County Executive submitted a memorandum on June 29, 2021. As it was submitted on the day of the first worksession, it was not included in the original packet. It has since been added as an addendum to the June 29, 2021 worksession packet as well as to this packet.

Much of the Executive's concerns and comments are already addressed earlier in this memo. However, Council Staff will address each point below:

1. *"The ZTA does not set any proposed minimum setback from a building; it is a limited use process up to 30 feet from the building and then it is a "modified conditional use" process for less than 30 feet setback."*

Yes, it is true that there is no minimum setback in the ZTA.

2. *"It is not clear what a modified conditional use process would look like. The Planning Board letter dated 11-18-19 includes some issues to be addressed, including the "extent of Planning Staff involvement in the expedited limited use and conditional use processes". ZTA 19-07 would remove the right of appeal to the Board of Appeals and require that it go straight to the courts. This is an expensive burden for residents."*

The modified conditional use process is explained on pages 9 through 11 of this memorandum. As explained in that section, the process had to be modified so that it could meet the shot clock. The alternative is to not have small cell antennas by conditional use at all, and instead only have limited use.

3. *“Allowing the Hearing Examiner to order a joint hearing or consolidation could be helpful but the Office of Zoning and Administrative Hearings (OZAH) believes (per the 11-18-19 letter from the Planning Board) that any consolidated applications should be filed on the same day. Additionally, further discussion could be useful for determining the amount of area that could be consolidated.”*

Requiring all consolidated applications to be filed on the same day would mean that an applicant who filed an application on day 5, whose application would otherwise qualify for consolidation, could not have the second application consolidated with the first. This would defeat the purpose of allowing consolidation.

ZTA 19-07 states that:

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.
(emphasis added)

This language gives the Hearing Examiner authority to regulate the proceedings, including how motions are consolidated. This means the Hearing Examiner may deny a motion for consolidation that is submitted on day 29.

The ZTA states that “no site is further than 3,000 feet from the chosen site in the application” and “must be located in the same zone, within the same Master Plan area, and in a neighborhood with similar building heights and setbacks”.

4. *“Residents have concerns about who can be a party of record.”*

As noted in the February 10, 2021 PHED Committee worksession memorandum:

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.”

5. *“Antenna attachments to existing and replacement utility poles are not covered by this ZTA. Although Section 59.3.5.2.C mentions replacement utility poles, it has been interpreted that utility*

poles – whether existing or replacement – are governed by Section 59.3.5.14.C ‘Antenna on Existing Structure’... The [January 21, 2020 staff] memo confirms that ZTA 19-07 does not amend this section and that therefore, it would ‘not affect the current law concerning the unlimited height of utility poles in their status as existing structures.’”

ZTA 19-07 concerns Telecommunications Towers (Section 3.5.2.c.), not Antenna on Existing Structures (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. Currently, the Department of Permitting Services issues right-of-way permits for all utility poles. It also issues construction and electrical permits for antenna attachments. ZTA 19-07 applies to all replacement telecommunications towers that are not installed when an applicant applies for an electrical permit.

If the Council wants to control the height of utility poles, a bill must be introduced that requires building permits for utility poles. However, if there is a desire to regulate utility poles, that is a larger conversation that is separate from the antenna issue since they are different uses. The height of utility poles has never been regulated, for the policy reason that their height is based on the need, particularly the need to provide electricity. In addition, treating a utility pole as a Telecommunications Tower could subject utility poles to unprecedented zoning regulation that may violate state and federal law. Lastly, for the safety of the workers and the public, there are safety standards for the placement of the antenna (specifically, the height from the wire).

6. *“The amendment to provide a minimum distance between poles with antennas ‘occupied or controlled by the same carrier’ is a good addition to limit the unnecessary proliferation of antennas. A similar provision should be added to Section 59.3.5.14.C.”*

Section 59.3.5.14.C. is the Section on “Antenna on Existing Structure”. While Council Staff agrees the limit on unnecessary proliferation is good, this proposed amendment would be to amend a section of the Zoning Ordinance not currently included in this ZTA. An “Antenna on Existing Structure” is defined as “one or more antennas attached to an existing support structure, including a building, a transmission tower, a monopole, a light pole, a utility pole, a water tank, a silo, a barn, a sign, or an overhead transmission line support structure. Antenna on Existing Structure includes related equipment.” Given how broad this definition is, the Council should consider whether that can be done in this same ZTA or would require a separate ZTA with its own introduction, public hearing, and Committee worksession.

7. *“The waiver and objection process proposed for certain height increases and for new poles is not one that gives sufficient notice and access for residents. Unless there is a specific objection, the waiver is allowed; a process is not required.”*

The waiver and objection process provides the same notice that is given in the modified conditional use process.

8. *“In order to minimize proliferation of unnecessary poles, new poles should be a conditional use process.”*

The PHED Committee voted 2-1 to have a waiver and objection process for new poles.

9. *“Additional stealth requirements may be appropriate for streetlights and utility poles. (If additional stealth requirements were included, Section 59.3.5.14.C would need to be amended also.)”*

Under ZTA 19-07, antennas must be concealed in an enclosure of the same color as the pole, installed at a minimum height of 15 feet, and installed parallel with the tower. The replacement tower must be the same color as the pre-existing pole. The tower must have no exterior wiring; but on wooden or utility poles any exterior wiring must be enclosed in a shielded conduit. In addition, the Hearing Examiner may require the use of screening, coloring, or other visual mitigation options, and can base this need on existing tree coverage and vegetation as well as the design and presence of nearby poles

The County Executive does not specify what additional stealth provisions should be included. As guidance for any additional stealth requirements, the 9th Circuit 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.”

10. *“A final permit should be conditional on testing for RF to determine whether the telecommunications tower is within the FCC’s RF standards for the general population.”*

ZTA 19-07 is currently silent as to testing. The FCC only requires RF testing under certain circumstances. The categorical exclusions are not exclusions from compliance but, rather, exclusions from performing routine evaluations to demonstrate compliance. Any testing requirements would need to be in accordance with FCC standards, since the Council may not consider the health effects of radiofrequency emissions.

11. *“Previously, my staff has mentioned a ‘tiered’ approach to siting of telecom towers and antenna attachments. I would like to propose a 3-tiered approach based on the allowed speed of the road: less than 35 mph; 35-50 mph; and greater than 50 mph. On roadways with speeds less than 35 mph, telecommunications towers would be allowed at 75 feet with a conditional use to 60 feet. This would allow attachments on approximately 31,000 streetlights at 75 feet and about another 6,000 at 60 feet. On roadways with 35-50 mph, telecommunication towers would be allowed at 45 feet with a conditional use to 30 feet, and on roadways with a speed greater than 50 mph, telecommunication towers would be allowed at 30 feet with conditional use to 10 feet.”*

First, as discussed earlier in this memorandum, a setback of 60 feet could be considered an effective prohibition of service based on the density of streetlights and utility poles in certain areas. The setbacks based on speed limit, as outlined by the County Executive, would effectively prohibit the installation of towers on residential streets, where speed limits are lowest but need may be highest. Second, Council Staff would strongly recommend reaching out to the Department of Transportation before using this approach.

12. *“I would also note that given that there are three separate companies – AT&T, Verizon and T-Mobile – that potentially want to install telecommunication towers in the millimeter spectrum, a*

discussion is needed about what that could look like in the neighborhoods. It could be three towers every 150 feet. It is not simply locating one tower as it has been portrayed.”

As stated earlier in this memorandum, 5G requires smaller equipment installed closer together. These lower-powered antennas serve a smaller area but with higher data volumes and are designed to operate at higher frequencies, so they can support faster downloads with more devices connected to the network.

13. *“Additionally, it is my understanding that municipalities have some concerns about their involvement and role in the process.*

“On a related issue, we are reviewing procedures and process of the Transmission Facility Coordinating Group (known as the Tower Committee) to provide for better public input and transparency. That review is not yet complete, but it is in process.

“My staff and I have talked with many residents and industry representatives, and we have found them to be knowledgeable and willing to help improve the process. I would like to propose that we convene a working group comprised of a diverse group of stakeholders, including industry, residents, municipalities and homeowner/tenant associations and/or non-profit organizations. Staff support would be provided by Executive and Council staff. The group would have a limited time – perhaps 75-90 days - to present written recommendations. I believe such a group would allow opportunity for a more complete discussion of these issues.”

Regarding input from the municipalities, stakeholders, residents, and associations, ZTA 19-07 was first introduced in October 2019. But that was not the first time that small cell antennas have been discussed in Montgomery County. A ZTA on small cell antennas was first introduced in 2016. Since that time, the following public hearings have occurred:

- 10/26/16 Town Hall meeting in Gaithersburg
- 6/14/17 Town Hall meeting in Rockville
- 9/18/17 Town Hall meeting in Downcounty
- 9/19/17 Town Hall meeting in Upcounty
- 10/9/17 Presentation to the Upcounty Citizens Advisory Board
- 10/23/17 Town Hall meeting in Rockville
- 9/25/18 Public Hearing on ZTA 18-11
- 11/19/19 Public Hearing on ZTA 19-07

In addition, there were three PHED Committee worksessions on ZTA 19-07, beginning in January 2020. At each of them, the County Executive was asked to submit a memorandum regarding various issues, including the operations of the Tower Committee.

Zoning Text Amendment No.: 19-07
Concerning: Telecommunications
Towers – Limited Use
Draft No. & Date: 5 – 6/22/2021
Introduced: October 1, 2019
Public Hearing: November 19, 2019
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	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	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 building permit application to the Department of
24 Permitting Services [[concerning]] for the construction of
25 a Telecommunications Tower must include a
26 recommendation from the Transmission Facility
27 Coordinating group issued within 90 days of the
28 submission of the building permit application.
- 29 ii. In the Commercial/Residential, Industrial, and
30 Employment zones, the pre-existing pole and the
31 replacement tower must be at least 10 feet from an
32 existing building, excluding any setback encroachments
33 allowed under Section 4.1.7.B.5.

iii. In the Agricultural, Rural Residential, and Residential zones, the pre-existing pole and the replacement tower must be at least ~~[[60]]~~ 30 feet from any building intended for human occupation, excluding any setback encroachments allowed under Section 4.1.7.B.5.

[i] iv. 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.

[ii] v. The tower must be located:

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

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

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

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

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

(e) at least 150 feet from the nearest antenna occupied or controlled by the same carrier.

- 61 [iii] vi. A pre-existing streetlight or parking lot light pole
62 must be removed within 10 business days after power is
63 activated to the replacement tower, and a pre-existing
64 utility pole must be removed within 180 days after a
65 replacement utility pole is installed.
- 66 [iv] vii. The height of the tower, including any attached
67 antennas and equipment, must not exceed:
- 68 (a) for streetlights, the height of the pole that is being
69 replaced:
- 70 (1) plus 6 feet when abutting a right-of-way
71 with a paved section width of 65 feet or less;
72 or
- 73 (2) plus 15 feet when abutting a right-of-way
74 with a paved section width greater than 65
75 feet.
- 76 (b) for utility poles and parking lot lights, the height of
77 the pre-existing utility or parking lot light pole plus
78 10 feet.
- 79 [v] viii. The tower must be the same color as the pre-
80 existing pole.
- 81 [vi.] ix. The tower must have no exterior wiring, except
82 that exterior wiring may be enclosed in shielded conduit
83 on wooden or utility poles.
- 84 [vii] x. Any equipment cabinet:
- 85 (a) must not exceed a maximum volume of 12 cubic
86 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 than 12 months. Any antenna and equipment must be removed at the [cost] expense of the owner of the antenna and equipment when the [antennas] antenna and equipment are no longer in use for more than 12 months. The [Telecommunications] Transmission [Facilities] Facility Coordinating Group must be notified within 30 days of the removal.

c. Where a Telecommunications Tower is allowed as a conditional use, it may be permitted by the Hearing Examiner under [Section 3.5.2.C.2.a, limited use standards, Section 7.3.1, Conditional Use,] either [[Subsection]] Section 3.5.2.C.2.d or [[Subsection]] Section 3.5.2.C.2.a, limited use standards. In addition, Section 7.3.1 and the following procedures and standards must be satisfied:

i. Before the Hearing Examiner approves any conditional use for a Telecommunications Tower, the proposed facility must be reviewed by the [County] Transmission Facility Coordinating Group. The applicant for a conditional use must file a recommendation from the Transmission Facility Coordinating Group with the Hearing Examiner at least 5 days before the date set for the public hearing. The recommendation must be no more than 90 days old when the conditional use application is accepted.

* * *

d. In the Agricultural, Rural Residential, and Residential zones, where a Telecommunications Tower [[that is proposed to be less than 50 feet in height does not meet the limited use standards under Subsection 3.5.2.C.2.a]] is proposed to be less than 30 feet from any building intended for human occupation, excluding any setback encroachments allowed under Section 4.1.7.B.5, 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, condominium associations, and renter associations within 300 feet of the proposed tower;
- (h) plans showing height and architectural design of the tower and cabinets, including color materials, and any proposed landscaping and lighting;
- (i) photograph simulations with a direct view of the tower and site from at least 3 directions;
- (j) at least one alternative site that maximizes the setback from any building intended for human occupation or reduces the height of the proposed tower.

ii. 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. The applicant for a conditional use must file a complete copy of the recommendation from the Transmission Facility Coordinating Group with the Hearing Examiner at least [[30]]5 days before the date set for the public hearing. The Transmission Facility Coordinating Group

recommendation must have been made within 90 days of its submission to the Hearing Examiner.

- iii. Upon receipt of the Transmission Facility Coordinating Group recommendation, the applicant must submit an initial application to the Planning Director for approval of completeness, under Section 7.3.1.B.3. The Planning Director must review the application for completeness within 10 days after receipt.
- iv. 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.

(a) Within 10 days of when an application is accepted, the Office of Zoning and Administrative Hearings must notify the municipality where the proposed tower will be located, as well as all property owners, homeowners associations, civic associations, condominium associations, and renter associations within 300 feet of the application of:

- (1) the filed application;
- (2) the hearing date; and
- (3) information on changes to the hearing date or the consolidation found on the Office of Zoning and Administrative Hearing's website.

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

(b) The Hearing Examiner may postpone the public hearing for up to 30 days at the request of the applicant, and must post notice on the website of the Office of Zoning and Administrative Hearings of any changes to the application, the application schedule, or consolidation of multiple applications.

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

v. [[A]]The setback for a Telecommunications Tower must be [[set back, as]] measured from the base of the support structure.

vi. [[a) The Telecommunications Tower must be at least 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]] 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 up to 50 feet. 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.

vii. 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.

viii. 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,]] based on 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.

- 276 ii. The proposed sites, starting at a chosen site, must be
277 located such that no site is further than 3,000 feet from
278 the chosen site in the application.
- 279 iii. The proposed sites must be located in the same zone,
280 within the same Master Plan area, and in a neighborhood
281 with similar building heights and setbacks.
- 282 iv. Each tower must be of the same or similar proposed
283 height, structure, and characteristics.
- 284 v. A motion to consolidate must include a statement
285 specifying the common issues of law and fact.
- 286 vi. The Hearing Examiner may order a consolidated hearing
287 if the Examiner finds that a consolidated hearing will
288 more fairly and efficiently resolve the matters at issue.
- 289 vii. If the motion to consolidate is granted, the applicant and
290 opposition must include all proposed hearing exhibits
291 with their pre-hearing statements.
- 292 viii. The Hearing Examiner has the discretion to require the
293 designation of specific persons to conduct cross-
294 examination on behalf of other individuals and to limit
295 the amount of time given for each party's case in chief.
296 Each side must be allowed equal time.
- 297 f. Where a proposed Telecommunications Tower does not meet
298 the limited use standards because it is taller than allowed under
299 Section 3.5.2.C.2.b.vii or where there is no pre-existing or
300 replacement pole so a new pole must be constructed, but
301 otherwise meets the limited use standards under Section
302 3.5.2.C.2.b., the applicant may request a waiver from the Office

of Zoning and Administrative Hearings. The application must meet the requirements of Sections 3.5.2.c.2.d.1. and 3.5.2.c.2.d.3.

- i. A new pole may only be constructed if there is no utility pole or streetlight pole within 150 feet of the proposed location that could be used as a pre-existing pole or replacement tower.
- ii. The applicant must notify by mail the municipality where the proposed tower will be located, as well as all property owners, homeowners associations, civic associations, condominium associations, and renter associations within 300 feet of the proposed tower. Proof of when notice was mailed must be submitted to the Office of Zoning and Administrative Hearings. A sign that satisfies Section 59.7.5 must also be posted at the site of the application at the same time.
- iii. Upon receipt of notice of a waiver, a property owner, homeowners association, civic association, condominium associations, and renter association within 300 feet of the proposed tower may file an objection and request a hearing with the Office of Zoning and Administrative Hearings. An objection must be filed within 20 days of when notice was mailed.
- iv. If an objection is received, the Hearing Examiner must send notice of an adjudicatory hearing to the applicant and any aggrieved person who filed an objection within 10 days after the objection is received and conduct any

330 such hearing within 30 days of the date the objection is
331 received. Waivers and objections may be consolidated
332 under Section 3.5.2.c.2.e.5.

333 v. The Hearing Examiner may only decide the issues raised
334 by the waiver or objection. The Hearing Examiner will
335 determine whether the proposed location minimizes
336 visual impact as compared to any alternative location
337 where the new tower could be located to provide service,
338 and consistent with the Hearing Examiner's authority
339 under Section 3.5.2.c.2.d. The maximum height allowed
340 is 50 feet.

341 vi. The Hearing Examiner must issue a decision within 10
342 days of the hearing. If no objection is filed, the Hearing
343 Examiner may issue a decision without a public hearing.

344 vii. The height of a new pole, including any attached
345 antennas and equipment, must not be taller than the
346 height of the nearest pre-existing streetlight or utility
347 pole:

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

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

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

355 * * *

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



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

	Setbacks	Pole Height
Montgomery County current	<p><u>AR,R,RC-limited</u> (not replacement): 300 feet</p> <p><u>C/R- limited</u> (replacement): 10 feet from existing building/within 2 feet of pre-existing pole base</p> <p><u>All Residential Zonesⁱ conditional</u> (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</p>	<p><u>AR, R, RC-limited</u> (not replacement): 179 feet maximum</p> <p><u>C/R- limited</u> (replacement):</p> <p>-<i>Streetlights</i>: the height of the pole being replaced:</p> <ol style="list-style-type: none"> 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 <p>-<i>Utility poles</i>: the height of the pre-existing pole plus 10 feet</p> <p><u>All Residential Zones^{iv}- conditional</u> (new and pre-existing): 135 feet maximum</p>
Montgomery County proposed	<p><u>All Residential Zones-limited</u> (replacement on pre-existing pole): at-least 60 feet from nearest habitable building</p> <p><u>All Residential Zones-conditional</u> 30 feet from a building</p>	<p><u>All Residential Zones-limited</u> (replacement on pre-existing pole):</p> <p>-<i>Streetlights</i>: the height of the pole being replaced:</p> <ol style="list-style-type: none"> 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 <p>-<i>Utility poles</i>: the height of the pre-existing pole plus 10 feet</p> <p><u>All Residential Zones-conditional</u> under 50 feet</p>
Prince George's County	<p><u>Public & Private Land</u>: one foot for every one foot in the height of the pole</p> <p>-Cannot be located within...^v</p> <ul style="list-style-type: none"> • 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 	<p><u>Public Land</u>: 199 feet maximum</p> <p><u>Private Land</u>: 100 feet maximum</p> <p>Co-located/Existing Pole: The new height cannot exceed 10 feet higher than the original pole height.</p> <p>Public ROW (protected area): Cannot exceed 30 feet</p> <p>Public ROW: Cannot exceed 50 feet or 10 feet greater than the tallest existing pole in the public ROW</p>
Washington D.C. ^{vi} ROW/Public	<p><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)</p>	<p><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.</p> <p><u>Wood Poles</u>: The height of any replacement wood pole including its antennae shall not exceed 50 feet.</p>

	<p>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</p>	
Fairfax, VA ^{vii}	<p><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*</p> <p><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)</p> <p><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)</p> <p><u>Replacement</u>: Assume the new pole must be in the exact same spot as preexisting pole</p> <p><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</p> <p><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</p>	<p><u>Co-located</u>: 12 feet maximum</p> <p><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.</p> <p><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.</p> <p><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.</p> <p><u>New Structures</u>: 50 feet maximum <u>Hub-Sites</u>: 12 feet maximum</p>

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} : <ul style="list-style-type: none"> • 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.
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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>

	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



OFFICE OF THE COUNTY EXECUTIVE

MEMORANDUM

June 29, 2021

TO: Tom Hucker, Council President

FROM: Marc Elrich, County Executive

SUBJECT: ZTA 19-07 and related zoning and other issues

I am writing to provide comments on ZTA 19-07 as amended by the PHED committee, propose some changes, and suggest a role for community engagement.

First, regarding concerns about ZTA 19-07, I have the following concerns and comments:

1. The ZTA does not set any proposed minimum setback from a building; it is a limited use process up to 30 feet from the building and then it is a “modified conditional use” process for less than 30 feet setback.
2. It is not clear what a modified conditional use process would look like. The Planning Board letter dated 11-18-19 includes some issues to be addressed, including the “extent of Planning Staff involvement in the expedited limited use and conditional use processes”. ZTA 19-07 would remove the right of appeal to the Board of Appeals and require that it go straight to the courts. This is an expensive burden for residents.
3. Allowing the Hearing Examiner to order a joint hearing or consolidation could be helpful but the Office of Zoning and Administrative Hearings (OZAH) believes (per the 11-18-19 letter from the Planning Board) that any consolidated applications should be filed on the same day. Additionally, further discussion could be useful for determining the amount of area that could be consolidated.
4. Residents have concerns about who can be a party of record. They have proposed that:
 - “Party of Record” means an Applicant or Respondent who appears at or is represented at an OZAH Hearing, and any other Person or Organization who presents oral testimony, comment, or argument at an OZAH Hearing.

- In a consolidated OZAH case, any person who has submitted written testimony to OZAH will automatically be a Party of Record.
5. Antenna attachments to existing and replacement utility poles are not covered by this ZTA. Although Section 59.3.5.2.C mentions replacement utility poles, it has been interpreted that utility poles – whether existing or replacement – are governed by Section 59.3.5.14.C “Antenna on Existing Structure”. The staff memo from Jan 21, 2020, explains,

“A pole may be replaced because of general maintenance, increased electrical service needs, to accommodate cable service, or to accommodate an antenna. If the pole exists when an applicant applies for an electrical permit, the provision for an antenna attachment on an existing structure applies (Section 59.3.5.14.C of the zoning code). 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).” (pg. 11)

The memo confirms that ZTA 19-07 does not amend this section and that therefore, it would “not affect the current law concerning the unlimited height of utility poles in their status as existing structures.”

6. The amendment to provide a minimum distance between poles with antennas “occupied or controlled by the same carrier” is a good addition to limit the unnecessary proliferation of antennas. A similar provision should be added to Section 59.3.5.14.C
7. The waiver and objection process proposed for certain height increases and for new poles is not one that gives sufficient notice and access for residents. Unless there is a specific objection, the waiver is allowed; a process is not required.
8. In order to minimize proliferation of unnecessary poles, new poles should be a conditional use process.
9. Additional stealth requirements may be appropriate for streetlights and utility poles. (If additional stealth requirements were included, Section 59.3.5.14.C would need to be amended also.)
10. A final permit should be conditional on testing for RF to determine whether the telecommunications tower is within the FCC’s RF standards for the general population.

Previously, my staff has mentioned a “tiered” approach to siting of telecom towers and antenna attachments. I would like to propose a 3-tiered approach based on the allowed speed of the road: less than 35 mph; 35-50 mph; and greater than 50 mph. On roadways with speeds less than 35 mph, telecommunications towers would be allowed at 75 feet with a conditional use to 60 feet. This would allow attachments on approximately 31,000 streetlights at 75 feet and about another 6,000 at 60 feet. On roadways with 35-50 mph, telecommunication towers would be allowed at 45 feet with a conditional use to 30 feet, and on roadways with a speed greater than 50 mph, telecommunication towers would be allowed at 30 feet with conditional use to 10 feet.

I would also note that given that there are three separate companies – AT&T, Verizon and T-Mobile - that potentially want to install telecommunication towers in the millimeter spectrum, a discussion is needed about what that could look like in the neighborhoods. It could be three towers every 150 feet. It is not simply locating one tower as it has been portrayed.

Additionally, it is my understanding that municipalities have some concerns about their involvement and role in the process.

On a related issue, we are reviewing procedures and process of the Transmission Facility Coordinating Group (known as the Tower Committee) to provide for better public input and transparency. That review is not yet complete, but it is in process.

My staff and I have talked with many residents and industry representatives, and we have found them to be knowledgeable and willing to help improve the process. I would like to propose that we convene a working group comprised of a diverse group of stakeholders, including industry, residents, municipalities and homeowner/tenant associations and/or non-profit organizations. Staff support would be provided by Executive and Council staff. The group would have a limited time – perhaps 75 -90 days - to present written recommendations. I believe such a group would allow opportunity for a more complete discussion of these issues.

ME/DS

CC: Mitra Pedoeem, Director, Department of Permitting Services
Victor Salazar, Division Chief, Zoning, Well & Septic and Code Compliance, DPS
Mark Beall, Zoning Manager, Division of Zoning, Well & Septic and Code Compliance, DPS
Linda Kobylski, Chief, Land Development, DPS
Mitsuko Herrera, Program Director, Office of Broadband Programs
Debbie Spielberg, Special Assistant, County Executive
Meredith Wellington, Land Use Planning Policy Analyst, Office of the County Executive
Clifford Royalty, Office of the County Attorney
Marjorie L. Williams, Broadband, Cable & Franchise Division Manager, Department of Technology & Enterprise Business Solutions (TEBS)
Livhu Ndou, Legislative Attorney, Montgomery County Council
Pamela Dunn, Senior Legislative Analyst, Montgomery County Council
Dr. Costis Toregas, IT Adviser, Montgomery County Council

Worksession

MEMORANDUM

July 8, 2021

TO: County Council

FROM: Livhu Ndou, Legislative Attorney
Pamela Dunn, Senior Legislative Analyst

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

PURPOSE: Worksession for ZTA 19-07

The following attendees will be available for questions:

Ehsan Motazedi, Deputy Director, Department of Permitting Services (DPS)
Victor Salazar, Division Chief, Zoning, Well & Septic and Code Compliance, Department of Permitting Services (DPS)
Mark Beall, Zoning Manager, Division of Zoning, Well & Septic and Code Compliance, Department of Permitting Services (DPS)
Linda Kobylski, Chief, Land Development, Department of Permitting Services (DPS)
Casey Anderson, Chair, Montgomery County Planning Board
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Mitsuko Herrera, Program Director, Office of Broadband Programs
Debbie Spielberg, Special Assistant, Office of the County Executive
Meredith Wellington, Land Use Planning Policy Analyst, Office of the County Executive
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Gail Roper, Director, Technology and Enterprise Business Solutions (TEBS)
Cheryl Bishop, Senior Executive Administrative Aide, Department of Technology & Enterprise Business Solutions (TEBS)
Joseph Webster, Chief Broadband Officer, Department of Technology & Enterprise Business Solutions (TEBS)
Dr. Costis Toregas, IT Adviser, County Council

Addendums

The majority of this memorandum is identical to the one prepared by Council Staff for the June 29, 2021 worksession. Two additional sections have been added: 1) pending legal cases; and 2) a response to the County Executive's memorandum. Those sections are on pages 6 and 16, respectively.

Summary and Intent 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.

A public hearing was held on November 19, 2019. The Planning, Housing, and Economic Development (PHED) Committee had worksessions on January 23, 2020; February 10, 2021; and March 10, 2021. The Council had its first worksession on June 29, 2021. An additional worksession is scheduled for July 13, 2021, where straw votes are expected. Final action is tentatively scheduled for July 27, 2021.

Why now?

The reasons for this ZTA are two-fold. First, ZTA 19-07 updates current standards, bringing Montgomery County in compliance with federal orders. The County's current regulations for small cell antennas in the Agricultural, Rural Residential, and Residential zones likely do not comply with the FCC's Small Cell order. Those regulations are discussed in detail later in this memorandum. In addition, in recent years industry-sponsored bills have been brought before the General Assembly which specifically list Montgomery County as being a restrictive jurisdiction. Less permissive standards than surrounding jurisdictions decreases the County's desirability. And, from a legal perspective, if these bills were to move forward the state could impose rules on the County that are less favorable than this ZTA.

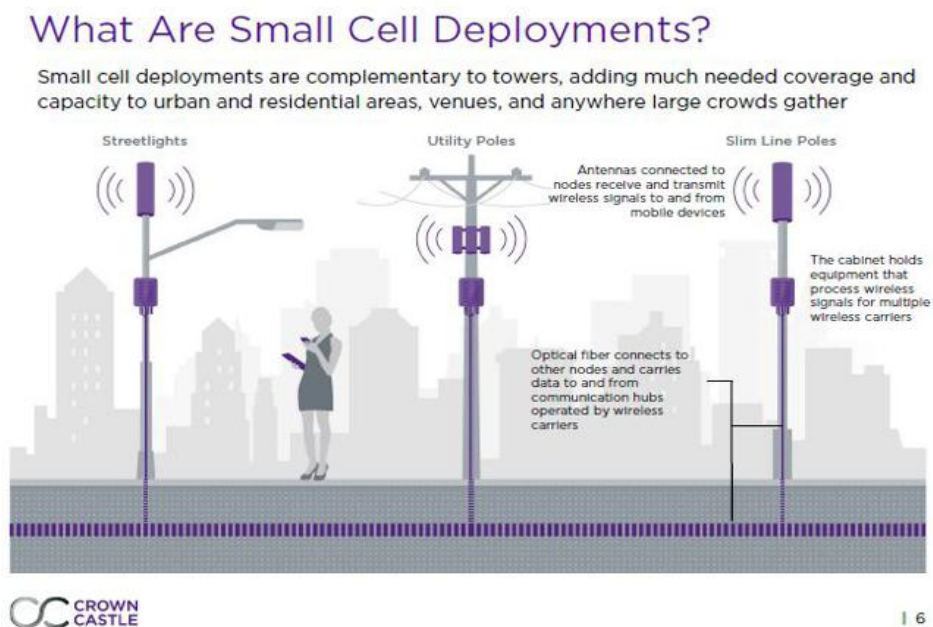
Second, the advancement and encouragement of technology has led to increases in mobile data demands and, with the resulting need to densify networks, 5G provides increased communication capacity and speed to users. The 2019 Annual Wireless Industry Survey found U.S. consumers used 82% more mobile data in 2018 compared to 2017, using a record 28.58 trillion megabytes (MB) of mobile data. Some of that rise is due to more devices being connected to mobile networks. The report found that there were 421.7 million mobile devices connected in 2018. That is an increase of 21.5 million devices compared to the year prior. Nearly half of those are smartphones, according to the report. The demand for more wireless capacity is coming from the bandwidth and speed required for mobile video, driverless cars, and connected

appliances. The FCC believes that greater capacity is needed to meet future demands. Wireless technology is rapidly changing to offer faster speeds, enhanced reliability, and expanded capabilities. The next generation of wireless technology, 5G, has dramatically more capacity than 4G. Telecommunications providers have indicated an interest in creating a 5G network in the County. A robust 5G network will contribute to County residents' quality of life by providing opportunities for innovation and advancement in health care, education, transportation, agriculture, entertainment, and other sectors. As stated by the sponsors of the ZTA, the County does not want to get left behind.

What is 5G?

Small cell towers, also known as 5G antennas, allow faster internet speed and more connectivity.¹ These lower-powered antennas serve a smaller area but with higher data volumes and are designed to operate at higher frequencies, so they can support faster downloads with more devices connected to the network. Unlike the large installations of previous cell towers, which could be as tall as 100 feet, 5G requires smaller equipment installed closer together and much closer to the ground. Unlike the macro towers, which were located on private property, small cell facilities tend to be located in public rights-of-way.

For installation, an antenna is installed either on top of or flush with a pole, usually a pre-existing streetlight or utility pole. The antenna receives and transmits wireless signals from wireless devices. A cabinet holds the equipment necessary to process the wireless signals for multiple wireless carriers. The cabinet can also be a separate box on the ground. Due to the weight of the installation, it is sometimes necessary for a replacement pole to be put up that may be taller than the original streetlight or utility pole.



Source: Crown Castle.

¹ This is not to be confused with the 5G wireless router that many people have in their homes. The 5G Wi-Fi router stands for 5Ghz (gigahertz) whereas 5G cellular, which stands for “5th generation”, is the new system wireless carriers are installing.

Wooden utility poles typically need to have at least an 11-inch base diameter to support wireless antennas and equipment. Some, but not all, utility poles need to be replaced to accommodate 5G antennas. All streetlight poles and most traffic signal poles will need to be replaced to accommodate the weight of antennas and equipment. For metal poles, the top of the pole would need to be 6 inches in diameter at a minimum. Typical pole diameters at the base are 8, 10, or 12 inches. Poles larger than 12 inches in diameter are concealment poles with equipment mounted internally in the pole instead of in a shroud or in a larger-based unit. In the absence of FCC preemption, County regulations control the design of poles. All replacement poles can be designed to mimic the original pole and still be structurally capable of supporting any proposed multi-carrier antenna and associated equipment.

Examples of small cell antennas:



A small cell tower along Key Highway in Baltimore. Source: Baltimore Sun.

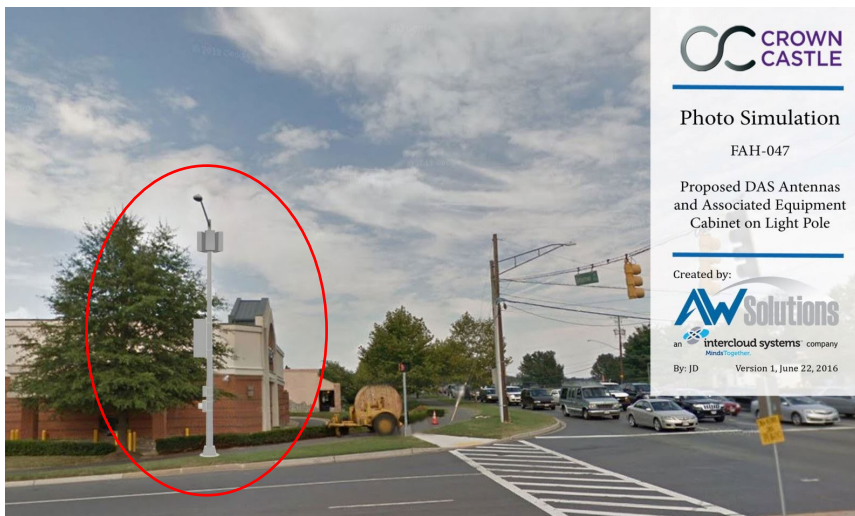


Photo simulation of a small cell antenna. Source: Crown Castle.



Existing small cell antenna in Rockville. Source: Bethesda Magazine.

Federal Guidelines

The Telecommunications Act of 1996 was enacted by Congress “to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.” Under the authority of that Act, the Federal Communications Commission (FCC) issued orders in 2018 to promote the installation of 5G. These orders are known as the “Small Cell Order”, “Moratoria Order”, and “One Touch Make-Ready Order”. The Small Cell Order places restrictions on the fees that local governments can charge for access to rights-of-way and on the aesthetic requirements that can be imposed on carriers. The Moratoria Order prohibits local governments from prohibiting deployment of 5G technology within a certain period of time, called the “shot clock”. And the One Touch Make-Ready Order gives construction crews authority to make all necessary changes to poles to make them ready for new antennas.²

The overarching effect is that federal law bans states and local governments from “materially prohibiting” carriers from offering wireless service. The Council first reviewed the restrictions on 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. But the Zoning Ordinance did not allow 5G towers in residentially-zoned areas except by conditional use approval, and the minimum setback from existing dwellings was 300 feet. As these restrictions do not meet the “shot clock” and likely prohibit deployment, revisions to the Zoning Ordinance are necessary.

Court of Appeals 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 Montgomery 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.

² The text of the order can be found here: <https://docs.fcc.gov/public/attachments/FCC-18-111A1.pdf>.

The 9th Circuit dismissed as moot the County's petition. The bulk of the Court's decision concerned the 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 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—often called the "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 must still seek an injunction. The County would have the opportunity to rebut the presumed statutory violation through that process.

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."

Otherwise, the 9th Circuit upheld the FCC orders. First, the FCC order 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. Second, 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 are no more than \$270 per year.

More on the "Shot Clock"

Local governments must review all required permits within a federally-mandated time limit, also known as the "shot clock." The shot clock is a 60-day approval for attachments to existing poles and 90 days for a new or replacement pole. The shot clock begins to run when an applicant: (1) takes the first procedural step in the application process, and (2) submits written documentation showing that the proposed modification is an eligible request. The FCC has clarified that this second criterion gives localities the opportunity to review the application and determine if the shot clock is triggered. The intent of ZTA 19-07 is to make sure the County abides by this shot clock.

Pending Legal Cases

A petition for writ of certiorari for *City of Portland, Oregon, et al., Petitioners v. Federal Communications Commission, et al.* was filed on the County's behalf on March 22, 2021. The main issues in the petition

are whether the rental fees can be more than the cost, and what an “effective prohibition of service” is. That petition was denied on June 28, 2021.³

In *City of Eugene v. FCC*, before the U.S. Court of Appeals for the 6th Circuit, the issue was franchise fees.⁴ Oral argument was held on April 15, 2021. On May 26, 2021, the Court upheld most of the FCC’s order regarding fees.

City of Boston, Massachusetts, et al v. FCC, et al was filed on August 10, 2020 before the D.C. Circuit Court of Appeals. Oral arguments were heard on January 25, 2021. The appeal was filed by several cities and counties, including Montgomery County. The issue on appeal is the stealth and concealment obligations. It is currently on hold until August, as the FCC has requested additional time to reconsider its position. That appeal is being handled by outside counsel.

Public Hearing

A public hearing was held on November 19, 2019. Much of the public testimony was in opposition to ZTA 19-07, with some exceptions. Written testimony largely reflected the testimony heard during the hearing.

- The County Executive recommended deferring the consideration of ZTA 19-07 until the federal courts had considered the County’s challenges to FCC rules and until improvements were made in the County’s administration of antenna applications. The Executive also 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. In a follow-up letter, the City of Takoma Park opposed ZTA 19-07 because it would limit the City’s ability to be part of the planning and siting process, and because of concerns over oversight and inspections.
- The Mayor of Garrett Park requested that the Council work with municipalities before proceeding.
- Issues raised by other speakers included:
 - the negative health effects of radio frequency (RF) waves;
 - RF exposure would disproportionately burden minority communities;
 - a reduction in property values;
 - 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

³ The docket can be found here: <https://www.supremecourt.gov/docket/docketfiles/html/public/20-1354.html>.

⁴ Montgomery County was not a party to this appeal. Anne Arundel County was.

- a lack of need.
- Industry representatives questioned whether the proposed process in ZTA 19-07 would violate FCC shot clock rules and whether it would violate federal law by effectively prohibiting the deployment of 5G facilities in residential areas.
- Testimony in support refuted the claims of negative health effects and expressed the need for better coverage in the County.

PHED Committee Worksession

The PHED Committee made the following recommendations at its March 10, 2021 worksession:

1. Reduce setback for a limited use from 60 feet to 30 feet (3-0)
2. Modified conditional use process for all poles under the 30-foot setback (3-0)
3. A “waiver and objection” process for a height up to 50 feet where other limited use setback requirements are met (3-0)
4. A “waiver and objection” process for all new poles (2-1)
5. Under the “waiver and objection” process, for notice to be sent to all property owners and civic associations within 300 feet; and for standing for objections to be limited to those within 300 feet (3-0)
6. Pole proliferation language: that a small wireless facility should not be located within 150 feet of a facility occupied or controlled by the same carrier (3-0).

Detailed Review of ZTA 19-07

Limited Use

All limited use standards are purely objective criteria that do not have a public hearing. The Department of Permitting Services (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 has issued a permit. 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. A building permit appeal is not an opportunity to make a general objection to DPS action; it must be a violation of code standards.

ZTA 19-07 will allow towers as a limited use in the Agricultural, Rural Residential, and Residential zones if the tower would replace a pre-existing utility pole, streetlight pole, or site plan-approved parking lot light pole. The tower is allowed if the following standards are met:

- *Tower Committee* – The application must include a recommendation from the Transmission Facility Coordinating Group (TFCG, or “Tower Committee”).
- *Setbacks* – The pre-existing pole or replacement tower must be at least 30 feet from any building intended for human occupation.
- *Design standards* – Antennas must be concealed in an enclosure of the same color as the pole, installed at a minimum height of 15 feet, and installed parallel with the tower. The replacement

tower must be the same color as the pre-existing pole. The tower must have no exterior wiring; but on wooden or utility poles any exterior wiring must be enclosed in a shielded conduit.

- *Equipment cabinet* – Equipment cabinets must not exceed 12 cubic feet in volume and, if used to support antennas on a replacement streetlight pole, must be installed in the telecommunications tower base or at ground level. The equipment cabinet must be the same color or pattern as the pre-existing tower and may be a stealth design.
- *Illumination and Sound* – Signs or illumination are prohibited. The noise level must comply with County Code.
- *Location* – The tower must be within 2 feet of the base and, in a public right-of-way, at the same distance from the curb line or edge of travel lane in an open section as the pre-existing pole. The tower must be outside of the roadway clear zone and allow for adequate sight distances. The tower must be at least 150 feet from the nearest antenna by the same carrier.
- *Height* – The height of the tower, including any attached antennas and equipment, is as follows:⁵
 - Streetlights: the height of the pole 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
 - Utility poles and parking lot lights: the height of the pre-existing pole plus 10 feet.
- *Maintenance* – The owner of the tower must maintain the tower and the owner of the antenna must maintain the antenna. Both owners are responsible for removing graffiti and repairing any damage.

Neighboring Jurisdictions

While Montgomery County is not bound by other jurisdictions, looking to our neighbors can provide some guidance on the rest of the region's response to the FCC order. In addition to Virginia not allowing conditional uses for small cell antennas, other jurisdictions use a combination of limited use, tower committees, and franchise agreements. The following tables provide some of the setback and height requirements.

Setbacks

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

Height

Prince George's County	No higher than 50 feet or 10% higher than adjacent structures
Washington, D.C.	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

⁵ Regarding the typical height of a tower, a cobra streetlight pole is 25 feet high; a neighborhood streetlight is usually 14 feet high; and the height allowed by ZTA 19-07 is between 35 to 40 feet. For a height up to 50 feet, a waiver must be filed, as described in the waiver and objection section later in this memorandum.

Modified Conditional Use

The conditional use process has value when there is some subjective finding required. It also provides an opportunity for public hearing. Without this ZTA, 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.

The conditional use process in Montgomery County is a lengthy one. It requires recommendations from Planning Staff; recommendations from the Planning Board; a public hearing by the Hearing Examiner; and the ability to appeal to the Board of Appeals. The only time requirement is that the Hearing Examiner issue a decision within 30 days of the public hearing. The process can easily take anywhere from 6 months to 1 year, which far exceeds the 90-day shot clock.

The intent of ZTA 19-07 is to streamline the current process and avoid a prohibition of service.⁶ ZTA 19-07 also ensures that the County is in compliance with the shot clock by establishing a “modified conditional use process”. This modified process will shorten the timeline by:

- removing the requirement for Planning Staff and Planning Board recommendations;
- limiting the findings required by the Hearing Examiner to choosing the least visually obtrusive location;
- allowing consolidated applications;
- eliminating the Board of Appeals so that appeals go directly to the Circuit Court; and
- reducing the notice requirement to 300 feet.

The modified conditional use process in the Agricultural, Rural Residential, and Residential zones would be triggered for all pre-existing and replacement towers less than 30 feet from any building intended for human occupation, excluding any setback encroachments. GIS analysis indicated that a 30-foot setback was a more appropriate standard because it would provide the desired increase in antennas. A 30-foot setback is also much more in line with neighboring jurisdictions, which have setbacks as low as 10 feet from single-unit houses. Lastly, there are streets in Montgomery County that are less than 30 feet wide.

The list of application requirements is extensive, including: property ownership or authorization; a statement of how the proposed development satisfies the criteria to grant the application; a certified copy of the official zoning vicinity map showing an area of at least 1,000 feet from the subject property; a written description of the operational features of the use; plans showing existing buildings, structures, rights-of-way, tree coverage, vegetation, historic resources, and the location and design of the streetlights, utility poles, or parking lot poles within 300 feet of the proposed location; plans showing the height and architectural design of the tower and cabinets, including color materials and proposed landscaping and lighting; photograph simulations with a direct view of the tower and site from at least 3 directions; a list of all property owners, homeowners and civic associations, condominium associations, and renter associations within 300 feet of the proposed tower; and at least one alternative site that maximizes the

⁶ In some jurisdictions, such as in Virginia, conditional use approval for a small cell pole is prohibited.

setback or reduces the height of the proposed tower. The application must also be reviewed by the Tower Committee, who must provide a recommendation.

The Hearing Examiner will then provide notice of the hearing to the municipality where the proposed tower will be located, as well as to all property owners, homeowners and civic associations, condominium associations, and renter associations within 300 feet of the proposed tower. A sign must also be posted at the site. It should be noted that, under the current conditional use process, notice is sent to all property owners and civic associations within ½ mile (2,640 feet) of the proposed tower. However, a 50-foot pole would not be visible ½ mile away, so this requirement would be overly burdensome—hence the reduction to 300 feet.

The modified conditional use process eliminates the participation of the Planning Board and Planning Staff in order to meet the shot clock. However, Planning's participation can be requested by the Hearing Examiner. In addition, while the Tower Committee will initially review all applications for technical matters, conditional use applications have always been reviewed by the Planning Department to ensure they are complete before they are presented to the Hearing Examiner for scheduling and review. Since the Tower Committee is not practiced at this type of review, ZTA 19-07 does still require the Planning Director to review a conditional use application. The review is for completeness only and is not a substantive review of the application.

The Hearing Examiner's findings are limited. They must be limited in order to comply with the FCC order, which prevents the County from effectively prohibiting service. In addition, limited findings make meeting the shot clock feasible. The Hearing Examiner's primary directive is to minimize visual impact as compared to any alternative location where the tower could be located to improve service. This process is possible because the applicant must provide alternative locations with their initial application. The Hearing Examiner may require the use of screening, coloring, or other visual mitigation options, and can base this need on existing tree coverage and vegetation as well as the design and presence of nearby poles. Of note, amendments to ZTA 19-07 remove the term "after the character of residential properties" when describing the standards that the Hearing Examiner will be looking at. This was removed because the Hearing Examiner typically relies on the expert advice of the Planning Department to determine the "character" of the neighborhood since the Hearing Examiner cannot introduce evidence. Since the Planning Board and Planning Staff are no longer providing recommendations, this standard was inconsistent. In addition, since the findings are limited to what is least visually obtrusive, the character of the neighborhood standard has less weight than in other conditional use applications. However, the visually obtrusive standard does still ensure that aesthetics is considered, such as by allowing the Hearing Examiner to require screening, coloring, and other visual mitigation.

Lastly, applications for conditional use may be consolidated at the request of the applicant or by order of the Hearing Examiner. The Hearing Examiner is given discretion in regulating the proceedings to avoid unnecessary costs or delay. For example, the Hearing Examiner must consider the time it takes to send notice and schedule the hearing, so may need to deny a consolidation if filed late. In order to qualify for consolidation, applications must be filed within 30 days of each other and be located within 3,000 feet of each other. The proposed towers must also be of the same or similar proposed height, structure, and other characteristics; as well as located in the same zone, same Master Plan area, and neighborhoods with similar building heights and setbacks. The goal of this consolidation process is to reduce the burden on the Hearing Examiner to have multiple hearings on similar proposals, as well as to ensure the County does not struggle

to meet the shot clock. The Hearing Examiner will also have discretion over cross-examination and may limit the amount of time given to each party, as long as each side has equal time.

Waiver and Objection Process

The waiver and objection process is not a new one in Montgomery County. It is currently used for accessory dwelling units. It still allows for community input, but for those poles where there is no objection no public hearing will be triggered.

The FCC 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, Montgomery County can be found to have effectively prohibited service. The PHED Committee therefore recommended a waiver and objection process for towers that meet all the limited use standards except for the height. The Hearing Examiner may not approve an application higher than 50 feet.

In addition, ZTA 19-07 as introduced laid out the conditions for pre-existing and replacement poles but was silent on wholly new poles. While it is rare for a telecommunications provider to choose to construct a brand-new pole where none existed, due to both the time constraints and the higher cost of doing so, given the way 5G works there may be circumstances where there is no pre-existing or replacement pole available in a small enough area to provide service. The PHED Committee recommended the waiver and objection process for these new poles if all other limited use standards are met.

Notice of a request for waiver will be sent to the municipality where the proposed tower is located, as well as to all property owners, homeowners' associations, civic associations, condominium associations, and renter associations within 300 feet of the proposed tower. Any property owner, homeowners' association, civic association, condominium association, or renter association within 300 feet of the proposed tower would have standing to object and request a hearing. Waivers and objections can be consolidated for hearings, similar to the modified conditional use process. During the hearing and in its decision, the Hearing Examiner is limited to issues raised by a waiver or objection, as well as to all the standards that apply under the modified conditional use process: "determine whether the proposed location minimizes visual impact as compared to any alternative location where the new tower could be located to provide service"—in other words, to choose the less obtrusive location. If no objection is filed, then the waiver can be granted without a public hearing.

Proposed Councilmember Amendments

The following amendments were proposed after the last PHED worksession. Council Staff recommends the approval of both amendments.

Councilmember Friedson Amendment

To avoid the construction of new poles where a pre-existing pole exists or could be replaced, ZTA 19-07 takes certain measures. The waiver and objection section of ZTA 19-07 reads "where there is no pre-existing or replacement pole so a new pole must be constructed". To make clear that a new pole should

only be built if no other options are available, Councilmember Friedson is introducing an amendment that reads:

A new pole may only be constructed if there is no utility pole or streetlight pole within 150 feet of the proposed location that could be used as a pre-existing pole or replacement tower.

Councilmember Riemer Amendment

By creating a process for the approval of new poles, height standards needed to be set for those new poles. Councilmember Riemer is therefore introducing the following amendment:

The height of a new pole, including any attached antennas and equipment, must not be taller than the height of the nearest pre-existing streetlight or utility pole:

- (a) plus 6 feet when abutting a right-of-way with a paved section width of 65 feet or less; or
- (b) plus 15 feet when abutting a right-of-way with a paved section width greater than 65 feet.

This language ensures that new poles are consistent with neighboring poles, while providing for the additional height often required by antennas.

Additional Issues

Health Effects

Much of the opposition surrounding ZTA 19-07 concerns the health effects of radio frequency (RF) exposure. Under federal law, local jurisdictions are preempted from regulating telecommunications antennas because of health effects as long as those facilities are operating within FCC-determined power and RF ranges. In its appeal of the FCC order, the County challenged the FCC's failure to address RF emissions. In addition, the County and other jurisdictions asked the FCC to update and complete a 2013 evaluation of the existing RF safety standards. The FCC has refused to review its standards and has disagreed with concerns raised about RF emissions from 5G small cell antennas. The Court dismissed the County's challenge as moot, finding that the FCC's additional order considered RF exposure risks of 5G services. In addition, Congress has explicitly preempted the County from considering any regulations related to RF health issues:

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

47 U.S. Code §332(c)(7)(B)(iv)

Petitioning for judicial review to require an evaluation of environmental and health effects was the most the Council could do regarding regulating due to health issues. Congress delegated all considerations of health to the FCC. ZTA 19-07 changes neither the FCC's obligation to study health effects nor the limitations on the Council to not consider health effects.

The Tower Committee

Many questions have been raised regarding the role of the Transmission Facilities Coordination Group (TFCG), also referred to as the “Tower Committee”. Given the role of the Tower Committee in ZTA 19-07, it is appropriate to provide a brief overview of its role and limitations.

The Tower Committee is responsible for the initial review of radio and telecommunications carrier applications. The Tower Committee, which is within the Executive Branch, is made up of representatives from the relevant land-owning and land-use agencies and reviews all telecommunications facilities and antenna siting requests. The Tower Committee makes recommendations on the installation of radio and telecommunications infrastructure in Montgomery County. The Tower Committee has certain policy goals, including:

- promoting the appropriate location and co-location of transmission facilities to minimize adverse impact to the community and public facilities;
- to provide a forum for private carriers and public agencies to meet and reach consensus on sensible siting of transmission facilities; and
- to provide a centralized source for private providers, County agencies, and the public to obtain information regarding the siting process and the location and description of potential and current sites.

The Tower Committee was not established to be a body that hears public testimony. It does not make subjective findings; rather, it makes recommendations to the Hearing Examiner or DPS. It is open to the public but mailed notice of applications to nearby property owners is not required. To the extent that there are problems with the TFCG, those would most likely need to be addressed by a Bill concerning Section 2-58E of the County Code.

Co-Location, Pole Proliferation, and Preferential Placement

Co-location, proliferation, and preferential placement are discussed as ways to mitigate the negative impacts associated with 5G. Co-location is the siting of multiple facilities on the same structure, for example, placing multiple antennas on the same pre-existing utility pole. It can include siting multiple facilities from multiple providers in the same location. Proliferation, in the 5G context, is usually referring to the rapid increase in the number of poles and antennas. As discussed in the beginning of this memo, 5G requires more antennas placed close together. While often discussed negatively, proliferation is necessary for 5G to be effective.

First, ZTA 19-07 requires antennas to be placed at least 150 feet from the nearest antenna occupied or controlled by the same carrier. Second, Councilmember Friedson’s amendment would not allow new poles if there is a usable pre-existing or potential replacement pole within 150 feet of the proposed site. Third, the Hearing Examiner is tasked with making sure the tower minimizes visual impact as compared to any alternative location where the tower could be located. Lastly, the Tower Committee makes recommendations based on appropriate location and co-location.

Inspections

Testimony has been received regarding the lack of routine inspections for telecommunications facilities. ZTA 19-07 is silent as to inspections; routine inspections have not been required in the past, nor does ZTA 19-07 prohibit them. Applicants request inspections from DPS when construction is complete. Applicants also provide a third-party inspection report from registered and licensed engineers. DPS inspectors examine the right-of-way to make sure it was not damaged in the installation.

When a resident believes work was done that is not in compliance with the Zoning Ordinance, that complaint goes to DPS. DPS investigates and if not in compliance, a violation notice is issued. The property owner has 30 days to remedy the issue and receives a citation if they fail to do so. If the problem is still not remedied, the County pursues an abatement in court, which can lead to the tower being taken down.

Of note, a building permit is not required for a utility pole. However, a right-of-way permit is still required. A utility pole may be replaced because of general maintenance, increased electrical service needs, to accommodate cable service, or to accommodate an antenna. If the pole exists when an applicant applies for an electrical permit, the provision for an antenna attachment on an existing structure applies.⁷

Property Values

Evidence regarding the effect of small cell antennas on property values is inconclusive. In addition, it is unclear whether these studies included small cell antennas or focused exclusively on macro cell towers.

No effect:

- A 2018 Valbridge Property Advisors market study in Boston, Dallas, Phoenix, and Raleigh determined there was no measurable difference (defined as less than 1%) for homes within a .5 to 1-mile radius of a cell tower.
- In a 2015 Delaware case, a court found a cell tower did not impact surrounding property values.

Negative effect:

- A 2017 study in Alabama focused on visual effects and found that properties within .72 km of the closest tower (which was 2,632 feet) declined 2.46% on average compared to homes outside the tower visibility range.
- A 2018 Kentucky study found properties with a visible antenna 1,000 feet away sold for 1.82% less than a similar property 4,500 feet away.

Positive effect:

- An article in the National Real Estate Investor Quality concluded that quality cell phone coverage can have a significant impact on the desirability and value of a property.

⁷ The County also enters into franchise agreements with providers that may provide additional terms.

Racial Equity and Social Justice

ZTA 19-07 was introduced before Racial Equity and Social Justice (RESJ) impact statements were required from the Office of Legislative Oversight (OLO). However, some information is available regarding the impacts.

While public testimony expressed concern that these small cell antennas would be placed in minority communities, and therefore have negative equity impacts, the same can be said for positive impacts. The increase of small cell antennas in minority communities would provide those populations with better access. For example, for those who do not or cannot afford expensive broadband, 5G would provide better service. As an example, during the COVID-19 pandemic Montgomery County Public Schools issued hotspots to those without internet access. The situation highlighted the need for more wireless access in certain communities. The increase in 5G across the County, especially in areas where it is lacking, means a more equitable distribution of better and faster wireless access.

ZTA 19-07 does not, however, guarantee equitable access. As with all zoning provisions, ZTA 19-07 does not mandate where small cell antennas must be provided. Rather, it relaxes the requirements so that providers are encouraged to install small cell antennas throughout the County. From a technological standpoint, providers will likely install the small cell antennas where the extra capacity is most needed. Council Staff encourages the Council to continue to work on ways of guaranteeing equitable coverage.

County Executive's June 29, 2021 Memorandum

The County Executive submitted a memorandum on June 29, 2021. As it was submitted on the day of the first worksession, it was not included in the original packet. It has since been added as an addendum to the June 29, 2021 worksession packet as well as to this packet.

Much of the Executive's concerns and comments are already addressed earlier in this memo. However, Council Staff will address each point below:

1. *"The ZTA does not set any proposed minimum setback from a building; it is a limited use process up to 30 feet from the building and then it is a "modified conditional use" process for less than 30 feet setback."*

Yes, it is true that there is no minimum setback in the ZTA.

2. *"It is not clear what a modified conditional use process would look like. The Planning Board letter dated 11-18-19 includes some issues to be addressed, including the "extent of Planning Staff involvement in the expedited limited use and conditional use processes". ZTA 19-07 would remove the right of appeal to the Board of Appeals and require that it go straight to the courts. This is an expensive burden for residents."*

The modified conditional use process is explained on pages 9 through 11 of this memorandum. As explained in that section, the process had to be modified so that it could meet the shot clock. The alternative is to not have small cell antennas by conditional use at all, and instead only have limited use.

3. *“Allowing the Hearing Examiner to order a joint hearing or consolidation could be helpful but the Office of Zoning and Administrative Hearings (OZAH) believes (per the 11-18-19 letter from the Planning Board) that any consolidated applications should be filed on the same day. Additionally, further discussion could be useful for determining the amount of area that could be consolidated.”*

Requiring all consolidated applications to be filed on the same day would mean that an applicant who filed an application on day 5, whose application would otherwise qualify for consolidation, could not have the second application consolidated with the first. This would defeat the purpose of allowing consolidation.

ZTA 19-07 states that:

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.
(emphasis added)

This language gives the Hearing Examiner authority to regulate the proceedings, including how motions are consolidated. This means the Hearing Examiner may deny a motion for consolidation that is submitted on day 29.

The ZTA states that “no site is further than 3,000 feet from the chosen site in the application” and “must be located in the same zone, within the same Master Plan area, and in a neighborhood with similar building heights and setbacks”.

4. *“Residents have concerns about who can be a party of record.”*

As noted in the February 10, 2021 PHED Committee worksession memorandum:

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.”

5. *“Antenna attachments to existing and replacement utility poles are not covered by this ZTA. Although Section 59.3.5.2.C mentions replacement utility poles, it has been interpreted that utility*

poles – whether existing or replacement – are governed by Section 59.3.5.14.C ‘Antenna on Existing Structure’... The [January 21, 2020 staff] memo confirms that ZTA 19-07 does not amend this section and that therefore, it would ‘not affect the current law concerning the unlimited height of utility poles in their status as existing structures.’”

ZTA 19-07 concerns Telecommunications Towers (Section 3.5.2.c.), not Antenna on Existing Structures (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. Currently, the Department of Permitting Services issues right-of-way permits for all utility poles. It also issues construction and electrical permits for antenna attachments. ZTA 19-07 applies to all replacement telecommunications towers that are not installed when an applicant applies for an electrical permit.

If the Council wants to control the height of utility poles, a bill must be introduced that requires building permits for utility poles. However, if there is a desire to regulate utility poles, that is a larger conversation that is separate from the antenna issue since they are different uses. The height of utility poles has never been regulated, for the policy reason that their height is based on the need, particularly the need to provide electricity. In addition, treating a utility pole as a Telecommunications Tower could subject utility poles to unprecedented zoning regulation that may violate state and federal law. Lastly, for the safety of the workers and the public, there are safety standards for the placement of the antenna (specifically, the height from the wire).

6. *“The amendment to provide a minimum distance between poles with antennas ‘occupied or controlled by the same carrier’ is a good addition to limit the unnecessary proliferation of antennas. A similar provision should be added to Section 59.3.5.14.C.”*

Section 59.3.5.14.C. is the Section on “Antenna on Existing Structure”. While Council Staff agrees the limit on unnecessary proliferation is good, this proposed amendment would be to amend a section of the Zoning Ordinance not currently included in this ZTA. An “Antenna on Existing Structure” is defined as “one or more antennas attached to an existing support structure, including a building, a transmission tower, a monopole, a light pole, a utility pole, a water tank, a silo, a barn, a sign, or an overhead transmission line support structure. Antenna on Existing Structure includes related equipment.” Given how broad this definition is, the Council should consider whether that can be done in this same ZTA or would require a separate ZTA with its own introduction, public hearing, and Committee worksession.

7. *“The waiver and objection process proposed for certain height increases and for new poles is not one that gives sufficient notice and access for residents. Unless there is a specific objection, the waiver is allowed; a process is not required.”*

The waiver and objection process provides the same notice that is given in the modified conditional use process.

8. *“In order to minimize proliferation of unnecessary poles, new poles should be a conditional use process.”*

The PHED Committee voted 2-1 to have a waiver and objection process for new poles.

9. *“Additional stealth requirements may be appropriate for streetlights and utility poles. (If additional stealth requirements were included, Section 59.3.5.14.C would need to be amended also.)”*

Under ZTA 19-07, antennas must be concealed in an enclosure of the same color as the pole, installed at a minimum height of 15 feet, and installed parallel with the tower. The replacement tower must be the same color as the pre-existing pole. The tower must have no exterior wiring; but on wooden or utility poles any exterior wiring must be enclosed in a shielded conduit. In addition, the Hearing Examiner may require the use of screening, coloring, or other visual mitigation options, and can base this need on existing tree coverage and vegetation as well as the design and presence of nearby poles

The County Executive does not specify what additional stealth provisions should be included. As guidance for any additional stealth requirements, the 9th Circuit 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.”

10. *“A final permit should be conditional on testing for RF to determine whether the telecommunications tower is within the FCC’s RF standards for the general population.”*

ZTA 19-07 is currently silent as to testing. The FCC only requires RF testing under certain circumstances. The categorical exclusions are not exclusions from compliance but, rather, exclusions from performing routine evaluations to demonstrate compliance. Any testing requirements would need to be in accordance with FCC standards, since the Council may not consider the health effects of radiofrequency emissions.

11. *“Previously, my staff has mentioned a ‘tiered’ approach to siting of telecom towers and antenna attachments. I would like to propose a 3-tiered approach based on the allowed speed of the road: less than 35 mph; 35-50 mph; and greater than 50 mph. On roadways with speeds less than 35 mph, telecommunications towers would be allowed at 75 feet with a conditional use to 60 feet. This would allow attachments on approximately 31,000 streetlights at 75 feet and about another 6,000 at 60 feet. On roadways with 35-50 mph, telecommunication towers would be allowed at 45 feet with a conditional use to 30 feet, and on roadways with a speed greater than 50 mph, telecommunication towers would be allowed at 30 feet with conditional use to 10 feet.”*

First, as discussed earlier in this memorandum, a setback of 60 feet could be considered an effective prohibition of service based on the density of streetlights and utility poles in certain areas. The setbacks based on speed limit, as outlined by the County Executive, would effectively prohibit the installation of towers on residential streets, where speed limits are lowest but need may be highest. Second, Council Staff would strongly recommend reaching out to the Department of Transportation before using this approach.

12. *“I would also note that given that there are three separate companies – AT&T, Verizon and T-Mobile – that potentially want to install telecommunication towers in the millimeter spectrum, a*

discussion is needed about what that could look like in the neighborhoods. It could be three towers every 150 feet. It is not simply locating one tower as it has been portrayed.”

As stated earlier in this memorandum, 5G requires smaller equipment installed closer together. These lower-powered antennas serve a smaller area but with higher data volumes and are designed to operate at higher frequencies, so they can support faster downloads with more devices connected to the network.

13. *“Additionally, it is my understanding that municipalities have some concerns about their involvement and role in the process.*

“On a related issue, we are reviewing procedures and process of the Transmission Facility Coordinating Group (known as the Tower Committee) to provide for better public input and transparency. That review is not yet complete, but it is in process.

“My staff and I have talked with many residents and industry representatives, and we have found them to be knowledgeable and willing to help improve the process. I would like to propose that we convene a working group comprised of a diverse group of stakeholders, including industry, residents, municipalities and homeowner/tenant associations and/or non-profit organizations. Staff support would be provided by Executive and Council staff. The group would have a limited time – perhaps 75-90 days - to present written recommendations. I believe such a group would allow opportunity for a more complete discussion of these issues.”

Regarding input from the municipalities, stakeholders, residents, and associations, ZTA 19-07 was first introduced in October 2019. But that was not the first time that small cell antennas have been discussed in Montgomery County. A ZTA on small cell antennas was first introduced in 2016. Since that time, the following public hearings have occurred:

- 10/26/16 Town Hall meeting in Gaithersburg
- 6/14/17 Town Hall meeting in Rockville
- 9/18/17 Town Hall meeting in Downcounty
- 9/19/17 Town Hall meeting in Upcounty
- 10/9/17 Presentation to the Upcounty Citizens Advisory Board
- 10/23/17 Town Hall meeting in Rockville
- 9/25/18 Public Hearing on ZTA 18-11
- 11/19/19 Public Hearing on ZTA 19-07

In addition, there were three PHED Committee worksessions on ZTA 19-07, beginning in January 2020. At each of them, the County Executive was asked to submit a memorandum regarding various issues, including the operations of the Tower Committee.

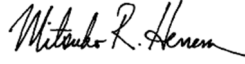


OFFICE OF THE COUNTY EXECUTIVE

Marc Elrich
County Executive

July 15, 2021

TO: Montgomery County Councilmembers

FR: Debbie Spielberg, Special Assistant to the County Executive
Office of the County Executive
Mitsuko R. Herrera, Policy, Planning and Special Projects, 
Office of Broadband Programs,
Department of Technology & Enterprise Business Solutions (TEBS)

RE: Executive Branch Amendments to ZTA 19-07

Attached are proposed amendments to ZTA 19-07 for consideration by the County Council. These amendments reflect some of the policy recommendations mentioned in the County Executive's memo dated June 29, 2021. For ease of review, amendments to the ZTA are attached in bold red font, using double underlines for new language and double brackets for deletions. Below is an explanation of the attached amendments

Conditional Use and Waiver and Objection Process

Page 10 Lines 174-184, Page 15 Lines 313-319 and Page 17 Lines 368-373

- In these areas, the Executive Branch proposes refinements to the Conditional Use and Waiver process.

PHED Committee Draft:

- In the current PHED committee draft with PHED amendments, ZTA 19-07 would allow in residential zones:
 - A Telecommunications Tower is allowed as a Limited Use up to 30 feet from a dwelling;
 - Conditional Use for any request to install a pole closer than 30 feet; and
 - A waiver process and objection process, where only property owners or community associations can object, would allow:
 - a pole is requested to be taller than allowed as Limited Use (up to 50 ft tall); or
 - a new pole is requested to be installed under conditions that would allow Limited Use for an existing or replacement pole; or
 - a new pole that does not meet Limited Use requirements other than the 30 foot setback.

Executive Branch Alternative:

- The Executive Branch proposes an alternative that in residential zones Conditional Use is the process for all poles that do not meet Limited Use standards. To explain:
 - Conditional Use, not waiver and objection, would be for **new** poles that do **not meet** other Limited Use standards.
 - Conditional Use, not waiver and objection, for height increases. Conditional use would not be limited just for closer setbacks.
- The waiver and objection process would remain for new poles that would otherwise have met Limited Use standards if they were replacement poles.

The Executive Branch proposes this because Conditional Use should apply where the Limited Use conditions are not met. The modified Conditional use in ZTA 19-07 eliminates multiple steps to speed up the process, and therefore, the Conditional process – not waiver and objection – should apply if exceptions to Limited Use are requested.

It should be noted that the Limited Use conditions in ZTA 19-07 are quite generous, and so it is likely that there will be little need to use the Conditional Use process. Thus, requiring the (modified) Conditional Use for increased height, smaller setbacks, and new poles should not be a large burden to industry.

Height, Setback Limits

3-Tiered Set Back Proposal

Page 5 Lines 40-46 and Page 15 Lines 303-312, and Page 10 Line 182-184

- For Limited Use, instead of the PHED committee's proposal to allow telecommunications towers up to 30 feet from a dwelling: 30 feet from dwelling when the road speed limit is greater than 50 mph, 45 feet when the speed limit is between 35 and 50 mph, and 75 feet when speed limit is less than 35 mph.
- For Conditional Use, instead of the PHED Committee's proposal to allow telecommunication towers right up to a building (0-foot no setback requirement): 10 feet from dwelling when the road speed limit is greater than 50 mph, 30 feet when the speed limit is between 35 and 50 mph, and 60 when speed limit is less than 35 mph.
- Delete provision in PHED Committee's version to allow setbacks of less than 30 feet. *Based on available information, it does not appear that applicants need to use streetlights or utility poles closer than 30 feet to dwellings to provide service.*

If Council does not support this amendment, we recommend at a minimum that the Limited Use Setback be 60 feet as in the introduced ZTA, not 30 feet as amended by PHED.

Page 6 Lines 69-82 and Lines 66 and 63

- Add requirements that replaced streetlight lights be closest to intersections, closest to property lines between dwellings, or in front of non-residential properties unless permission cannot be obtained from the pole owner or if another pole is needed to provide service.
- Replacement poles may not be in front of a residential front door ("at least 5 feet from the area between two parallel lines extending from the sides of a residential front door").

Page 7 Lines 90-93 and 100-107

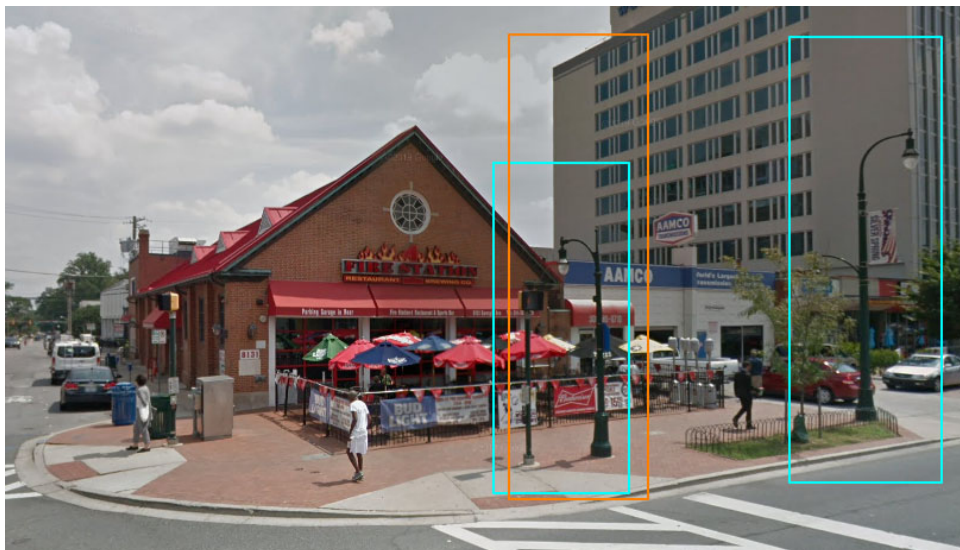
- Create separate height increases for Limited Use replacement poles in commercial and residential areas. Current height increase (6 feet when the road is 65 feet or less; 15 feet when the road is greater than 65 feet) would remain for Commercial/Residential, Industrial and Employment Zones.
- In Agricultural, Rural Residential, and Residential zone, the height of replacement streetlights would be 25 feet if the pole being replaced is less than 20 feet tall, or 6 feet more than the current height for replacement of pre-existing poles 20 feet or taller in height.

Page 20 Lines 432-436

- For this PHED amendment, Subsection vii states that for a Waiver request, new poles cannot be taller than the nearest pre-existing streetlight or utility pole plus 6 or 15 feet depending on the road width.
 - The Executive Branch proposes that new poles be no taller than only pre-existing streetlights plus a proposed height increase, deleting “or utility poles”. This is section is for the installation of new poles, but utility poles are generally not regulated by zoning requirements, and thus, this section is most likely to be used to install new streetlights, so the height limit should be tied to streetlights only, not utility poles.
 - The Executive Branch further proposes that new poles be no taller than 25 feet if the nearest streetlight pole is less than 20 feet tall, or no more than 6 feet more in height of the nearest pre-existing streetlights if the nearest pole is 20 feet or taller in height, for same reasons stated above.

Page 7 Lines 90-93

- In current law, in commercial areas, the replacement streetlight poles can be 6 or 15 feet taller (depending on road width) than the streetlight pole it replaces. The Executive Branch proposes in commercial areas that the replacement streetlight pole can be 6 or 15 feet taller than the tallest streetlight pole within 30 feet. *In some cases, shorter poles are located closest to intersections where for aesthetic and technical reasons, the small cell deployment is preferred. This change will enable replacing a shorter pole with one that is only a few feet taller than a nearby taller one that is not being replaced.*



Process and Minor Amendments

Page 16 Lines 343-346

- The Planning Board, see November 18, 2019 memo (Circle 25 of the Council packet), required consolidated applications and a motion to consolidate to be filed on the same date.

The current language in the ZTA 19-07 reads:

“All applications must be filed with 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.”

Page 19 Lines 405-06 and 411

- For the Waiver process, the Executive Branch proposes a compromise. PHED proposes that notice only be mailed to surrounding properties and community associations. The Executive Branch proposes that notice be mailed, and OZAH posts notice on its website within 2 business days. Any County resident may file an objection to the waiver, but the Hearing Examiner need only consider the objections from those within the surrounding mailed notice area to decide whether the Conditional Use hearing is waived or not.
 - If the Hearing Examiner opts to grant the waiver, those living outside the mailed notice distance cannot cause denial of the waiver.
 - If the Hearing Examiner rejects the Waiver request and requires a Conditional Use hearing because someone in the affected distance area objected to the Waiver, then people living outside the area may participate in the Conditional Use hearing. *This is similar to other OZAH proceedings where any member of the public can participate in a Conditional Use hearing.*

Page 20 Lines 433-436

- Restore the Board of Appeals step after the Hearing Examiner decision. The PHED Committee version would eliminate the ability to go to the Board of Appeals and would require the aggrieved party to go straight to Circuit Court. *Parties beyond sight and sound of Conditional Use proposed pole replacement or new pole may not have judicial standing to sue in court. Additionally, it is a much greater financial burden to appeal in Circuit Court. Furthermore, the number of conditional cases is likely to be quite low and it is important to preserve this part of the process.*

Page 13 Line 267

- The Hearing Examiner can postpone the Conditional Use hearing for 30 days at the request of the applicant in PHED draft; the Executive Branch proposes also allowing a postponement at the request of “other parties” in the proceeding as well.

Page 11 Lines 204 and 208, Page 13 Line 250, and Page 18 Line 386

- Expand OZAH notice from affected properties and associations within 300 feet of a proposed Conditional Use pole to 1,000 feet. *Current OZAH hearing notice is for the applicant to mail notice to adjoining and confronting property owners, and to*

municipalities and associations within a 1/2 mile. 1,000 feet is more likely to include all properties on a block where a proposed Conditional Use would occur.

Page 12 Line 247 and Page 18 Line 383

- OZAH Notice is provided to renters within the mailed notice distance as well as property owners.

Page 13 Lines 259-264 and Page 18 Lines 390-396

- OZAH must post notice of Conditional Use applications and Waiver requests on its websites within 2 business dates of mailing notices to affected areas. *OZAH's existing requirements to post information and filings on its website within 10 to 15 days does not match the revised accelerated process.*

Page 19 Lines 408-410

- Rather than the requirement that the Objection must be filed within 20 days of when notice is mailed, is the objection must be filed the later of 20 days of when notice is mailed by the applicant or posted by OZAH on its website.

Page 5 Line 52

- This is to clarify that this is for replacement towers.

If you have additional questions, please contact Mitsuko.Herrera@montgomerycountymd.gov or call 240-777-2928.

Attachment

cc: Marc Elrich, County Executive
Debbie Spielberg, Special Assistant to the County Executive
Ken Hartman-Espada, Director of Strategic Partnerships, Office of the County Executive (CEX)
Meredith Wellington, Land Use Planning Policy Analyst, CEX
Lynn Robeson Hannan, Director, Office of Zoning and Administrative Hearings (OZAH)
Derek Baumgardner, Hearing Examiner, OZAH
Mitra Pedoeem, Director, Department of Permitting Services
Victor Salazar, Division Chief, Zoning, Well & Septic and Code Compliance, DPS
Mark Beall, Zoning Manager, Division of Zoning, Well & Septic and Code Compliance, DPS
Linda Kobylski, Chief, Land Development, DPS
Gail M. Roper, Director and CIO, Dept. of Technology & Enterprise Business Solutions (TEBS)
Joe Webster, Chief Broadband Officer, TEBS, Office of Broadband Programs (OBP)
Mitsuko R. Herrera, TEBS, OBP
Marjorie L. Williams, Broadband, Cable & Franchise Division Manager, TEBS, OBP
Clifford Royalty, Office of the County Attorney
Livhu Ndou, Legislative Attorney, Montgomery County Council
Pamela Dunn, Senior Legislative Analyst, Montgomery County Council
Dr. Costis Torgas, IT Adviser, Montgomery County Council

Zoning Text Amendment No.: 19-07
Concerning: Telecommunications
Towers – Limited Use
Draft No. & Date: 5 – 6/22/2021
Introduced: October 1, 2019
Public Hearing: November 19, 2019
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	C	P	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	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

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

DIVISION 3.5. Commercial Uses

* * *

Section 3.5.2. Communication Facility

* * *

C. Telecommunications Tower

* * *

2. Use Standards

* * *

- b. [In the Commercial/Residential, Industrial, and Employment zones, where] Where 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, the tower is allowed if it satisfies the following standards:
 - i. Any building permit application to the Department of Permitting Services [[concerning]] for the construction of a Telecommunications Tower must include a recommendation from the Transmission Facility Coordinating group issued within 90 days of the submission of the building permit application.
 - ii. In the Commercial/Residential, Industrial, and Employment zones, the pre-existing pole and the replacement tower must be at least 10 feet from an existing building, excluding any setback encroachments allowed under Section 4.1.7.B.5.

iii. In the Agricultural, Rural Residential, and Residential zones, the pre-existing pole and the replacement tower must be at least ~~[[60]]~~ **[[30]] the following number of feet from any building intended for human occupation, excluding any setback encroachments allowed under Section 4.1.7.B.5**~~[[.]]~~:

(a) **30 feet when abutting a right-of-way with a speed limit greater than 50 miles per hour;**

(b) **45 feet when abutting a right-of-way with a speed limit at least 35 miles per hour and no greater than 50 miles per hour;**

(c) **75 feet when abutting a right-of-way with a speed limit less than 35 miles per hour.**

[i] iv. 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.

[ii] v. **A replacement** The tower must be located:

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

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

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

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

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

(e) at least 150 feet from the nearest antenna occupied or controlled by the same carrier~~[[.]];~~ **and**

(f) replacement of pre-existing streetlights or utility poles should replace pre-existing poles that are located closest to intersections, closest to property lines between dwellings, or are located on the non-front-facing side of residential properties, including greenways, properties used for a non-residential purpose whenever possible unless permission from the pole owner cannot be obtain or service cannot be provided by using a pole at an alternate location. The replacement towers must be at least 5 feet from the area between two parallel lines extending from the sides of a residential front door.

~~[iii]~~ vi. A pre-existing streetlight or parking lot light pole must be removed within 10 business days after power is 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) **In the Commercial/Residential, Industrial, and Employment zones** for streetlights, the height of the pole that is being **replaced or the height of the tallest streetlight pole within 50 feet:**

- (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) In the Agricultural, Rural Residential, and Residential zones, for streetlights:

(1) 25 feet where the height of the pole being replaced if less than 20 feet tall;

(2) plus 6 feet more than the height of pole being replaced if the pole being replaced is 20 feet tall or more in height.

~~[(b)]~~ **(c)** 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 than 12 months. Any antenna and equipment must be removed at the [cost] expense of the owner of the antenna and equipment when the [antennas] antenna and equipment are no longer in use for more than 12 months. The [Telecommunications] Transmission [Facilities] Facility Coordinating Group must be notified within 30 days of the removal.

c. Where a Telecommunications Tower is allowed as a conditional use, it may be permitted by the Hearing Examiner under [Section 3.5.2.C.2.a, limited use standards, Section 7.3.1, Conditional Use,] either [[Subsection]] Section 3.5.2.C.2.d or [[Subsection]] Section 3.5.2.C.2.a, limited use standards. In addition, Section 7.3.1 and the following procedures and standards must be satisfied:

i. Before the Hearing Examiner approves any conditional use for a Telecommunications Tower, the proposed facility must be reviewed by the [County] Transmission Facility Coordinating Group. The applicant for a conditional use must file a recommendation from the Transmission Facility Coordinating Group with the Hearing Examiner at least 5 days before the date set for

the public hearing. The recommendation must be no more than 90 days old when the conditional use application is accepted.

* * *

d. In the Agricultural, Rural Residential, and Residential zones,
where a Telecommunications Tower **proposes to install**
replacement pole less than 50 feet in height and does not
meet the conditions of Section 3.5.2.C.2.b because the
proposed replacement pole is taller or the proposed setback
is shorter than permitted as a Limited Use, or is proposed to
be a new Telecommunications Tower less than 50 feet in
height [[that is proposed to be less than 50 feet in height does
not meet the limited use standards under Subsection
3.5.2.C.2.a]] **]]**is proposed to be less than 30 feet from any
building intended for human occupation, excluding any setback
encroachments allowed under Section 4.1.7.B.5,]] 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~~ **1,000 feet** of the proposed location;
- (g) a list of all property owners, homeowners associations, civic associations, condominium associations, and renter associations within ~~300 feet~~ **1,000 feet** of the proposed tower;
- (h) plans showing height and architectural design of the tower and cabinets, including color materials, and any proposed landscaping and lighting;
- (i) photograph simulations with a direct view of the tower and site from at least 3 directions;
- (j) at least one alternative site that maximizes the setback from any building intended for human occupation or reduces the height of the proposed tower.

ii. 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. The applicant for a conditional use must file a complete copy of the recommendation from the Transmission Facility Coordinating Group with the Hearing Examiner at least [[30]]5 days before the date set for the public hearing. The Transmission Facility Coordinating Group recommendation must have been made within 90 days of its submission to the Hearing Examiner.

- iii. Upon receipt of the Transmission Facility Coordinating Group recommendation, the applicant must submit an initial application to the Planning Director for approval of completeness, under Section 7.3.1.B.3. The Planning Director must review the application for completeness within 10 days after receipt.
- iv. 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.
 - (a) Within 10 days of when an application is accepted, the Office of Zoning and Administrative Hearings must notify the municipality where the proposed tower will be located, as well as all property owners **or occupants of rented properties,** homeowners associations, civic associations,

condominium associations, and renter associations
within ~~300 feet~~ **1,000 feet** of the application of:

- (1) the filed application;
- (2) the hearing date; and
- (3) information on changes to the hearing date
or the consolidation found on the Office of
Zoning and Administrative Hearing's
website.

A sign that satisfies Section 59.7.5 must also be
posted at the site of the application at the same
time. **The Office of Zoning and Administrative**
Hearings must also post notice of the
acceptance of the application and the
information required under this subsection on
its website within 2 business days after an
application is accepted.

- (b) The Hearing Examiner may postpone the public
hearing for up to 30 days at the request of the
applicant **or the other parties.** and must post
notice on the website of the Office of Zoning and
Administrative Hearings of any changes to the
application, the application schedule, or
consolidation of multiple applications.

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

v. [[A]]The setback for a Telecommunications Tower must be [[set back, as]] measured from the base of the support structure.

vi. [(a) The Telecommunications Tower must be at least 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] **In making the following determinations, 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.**

(a) 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 the distances stated below**[[to at least 30 feet]] or increase the height up to 50 feet:]]. 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.]]

(1) 10 feet when abutting a right-of-way with a speed limit greater than 50 miles per hour;

(2) 30 feet when abutting a right-of-way with a speed limit at least 35 miles per hour and no greater than 50 miles per hour;

(3) 60 feet when abutting a right-of-way with a speed limit less than 35 miles per hour.

(b) Where there is no pre-existing or replacement pole so a new pole must be constructed, the Hearing Examiner may approve a new pole to be constructed only if there is no utility pole or streetlight pole within 30 feet of the proposed location that could be used as a pre-existing pole or replacement tower.

vii. 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.

viii. 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,]] based on 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. **A motion for consolidation must be filed with all**
applications requesting to be consolidated. [[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. Where a proposed **new** Telecommunications Tower does not meet the limited use standards because **[[it is taller than allowed under Section 3.5.2.C.2.b.vii or where]]** there is no pre-existing or replacement pole so a new pole must be constructed, but **would** otherwise meets the limited use standards under Section 3.5.2.C.2.b. **if the new pole was replacing an existing pole,** the applicant may request a waiver from the Office of Zoning and Administrative Hearings. The application must meet the requirements of Sections 3.5.2.c.2.d.1. and 3.5.2.c.2.d.3.
 - i. A new pole may only be constructed if there is no utility pole or streetlight pole within 150 feet of the proposed

location that could be used as a pre-existing pole or replacement tower.

ii. The applicant must notify by mail the municipality where the proposed tower will be located, as well as all property owners **or occupants of rented properties**, homeowners associations, civic associations, condominium associations, and renter associations within **[[300 feet]] 1,000 feet** of the proposed tower. Proof of when notice was mailed must be submitted to the Office of Zoning and Administrative Hearings. A sign that satisfies Section 59.7.5 must also be posted at the site of the application at the same time. **The applicant must notify the Office of Zoning and Administrative Hearings by the following business day after notices are mailed, and the Office of Zoning and Administrative Hearings must post the notice of the request for waiver on its website within 2 business days of receipt of notice by the applicant.**

iii. **Objection.**

(a) Upon receipt of notice of a waiver, a property owner, homeowners association, civic association, condominium associations, and renter association within **[[300 feet]] 1,000 feet** of the proposed tower may file an objection and request a hearing with the Office of Zoning and Administrative Hearings.

(b) Any resident of Montgomery County may also file an objection.

(c) An objection must be filed within 20 days of when notice was mailed or posted in the Office of Zoning and Administrative Hearings website, whichever is later.

iv. If an objection is received under Section 3.5.2.c.2.f.iii.a, the Hearing Examiner must send notice of an adjudicatory hearing to the applicant and any aggrieved person who filed an objection within 10 days after the objection is received and conduct any such hearing within 30 days of the date the objection is received. Waivers and objections may be consolidated under Section 3.5.2.c.2.e.5.

v. The Hearing Examiner may only decide the issues raised by the waiver or objection. The Hearing Examiner will determine whether the proposed location minimizes visual impact as compared to any alternative location where the new tower could be located to provide service, and consistent with the Hearing Examiner's authority under Section 3.5.2.c.2.d. The maximum height allowed is 50 feet.

vi. The Hearing Examiner must issue a decision within 10 days of the hearing. If no objection is filed, the Hearing Examiner may issue a decision without a public hearing.

vii. The height of a new pole, including any attached antennas and equipment, must not be taller than the

height of the nearest pre-existing streetlight or utility pole plus 6 feet if nearest pre-existing streetlight pole is 20 feet or taller or not taller than 25 feet if the nearest pre-existing streetlight is less than 20 feet in height. or:

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

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

g. 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. or

* * *

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

Amendment

The proposed amendment is a minor modification to the bill. In this amendment, in roads that are wider, or have higher speed traffic, the small cell tower deployment would remain 30 feet from a residence as a limited use as in the ZTA.

The roads that are much smaller, where automobiles must yield to each other, where pedestrian and bicycle activity is common, where there are block parties and children playing the streets would also have a setback of 30 feet, but they would go through a conditional use process. This would ensure members of the affected community, including municipal leaders, home owners associations, could ensure that placement of a much larger streetlight cell tower would not have adverse impacts by disrupting the canopy of a particular tree, creating safety hazards for bikes or pedestrians or by creating blind spots and other aesthetic issues. Also on these roads a cell tower could be installed as a limited use at a 60 feet setback.

Specifically roads with a limited use and 30 foot set back would be a Freeway, A controlled Major Highway, A Major Highway, A Parkway, An Arterial Road, A County Arterial, A Minor Arterial, A Business District, an Industrial Street, A Country Road,

Roads with a conditional use process and a 30 foot setback would be a Primary Residential Street, a Principal Secondary Residential Street, a Secondary Residential Street, a Tertiary Residential Street, A A Rustic Road, an Alley

The categorization of the streets is taken from the Chapter 49-31 of the County Code [Sec. 49-25. Complete streets policy and standards. \(amlegal.com\)](#). **Sec. 49-31. Classification of roads.**

(a) A Freeway is a road meant exclusively for through movement of vehicles at a high speed. Access must be limited to grade-separated interchanges.

(b) A Controlled Major Highway is a road meant exclusively for through movement of vehicles at a lower speed than a Freeway. Access must be limited to grade-separated interchanges or at-grade intersections with public roads.

(c) A Major Highway is a road meant nearly exclusively for through movement of vehicles at a moderate speed. Access must be primarily from grade-separated interchanges and at-grade intersections with public roads, although driveway access is acceptable in urban and denser suburban settings.

(d) A Parkway is a road meant exclusively for through movement of vehicles at a moderate speed. Access must be limited to grade-separated interchanges and at-grade intersections. Any truck with more than 4 wheels must not use a Parkway, except in an emergency or if the truck is engaged in Parkway maintenance.

(e) An Arterial is a road meant primarily for through movement of vehicles at a moderate speed, although some access to abutting property is expected.

(f) A Country Arterial is an Arterial, typically in the County's agricultural reserve.

(g) A Minor Arterial is a 2-lane Arterial meant nearly equally for through movement of vehicles and access to abutting property.

(h) A Business District Street is a road meant for circulation in commercial and mixed-use zones.

(i) An Industrial Street is a road meant for circulation in industrial zones.

A 30 foot setback with a conditional use process would be required for the following road types

(j) A Primary Residential Street is a road meant primarily for circulation in residential zones, although some through traffic is expected.

(k) A Country Road is a road that has the function of a Primary Residential Street, typically in the County's agricultural reserve.

(l) A Principal Secondary Residential Street is a Secondary Residential Street meant to carry somewhat more through traffic.

(m) A Secondary Residential Street is a road meant to provide access between a residential development with fewer than 200 dwelling units and one or more higher classification roads as defined in subsections (b) through (l).

(n) A Tertiary Residential Street is a road meant to provide direct access to a residential development with 75 or fewer dwelling units. A Tertiary Residential Street must not be built unless the Planning Board allows its use when the Board approves a preliminary subdivision plan or site plan.

(o) A Rustic Road or an Exceptional Rustic Road means a road classified as either under Article 8.

(p) An Alley is a right-of-way intended to provide secondary service access to the rear or side of lots or buildings and not intended for transporting through traffic. An alley may be used to provide primary vehicular access if the Planning Board and the Director of Transportation concur that the dimensions and specifications proposed in a project, preliminary subdivision , or site plan would provide adequate primary vehicular access. (Mont. Co. Code 1965, § 103-12; 1971 L.M.C., ch. 24, §§ 2, 3; 1987 L.M.C., ch. 9, § 1.; 1993 L.M.C., ch. 9, § 2; [2007 L.M.C., ch. 8](#), § 1; [2008 L.M.C., ch. 5](#), § 1.)

(a) A Freeway is a road meant exclusively for through movement of vehicles at a high speed. Access must be limited to grade-separated interchanges.

(b) A Controlled Major Highway is a road meant exclusively for through movement of vehicles at a lower speed than a Freeway. Access must be limited to grade-separated interchanges or at-grade intersections with public roads.

(c) A Major Highway is a road meant nearly exclusively for through movement of vehicles at a moderate speed. Access must be primarily from grade-separated interchanges and at-grade

intersections with public roads, although driveway access is acceptable in urban and denser suburban settings.

(d) A Parkway is a road meant exclusively for through movement of vehicles at a moderate speed. Access must be limited to grade-separated interchanges and at-grade intersections. Any truck with more than 4 wheels must not use a Parkway, except in an emergency or if the trust is engaged in Parkway maintenance.

(e) An Arterial is a road meant primarily for through movement of vehicles at a moderate speed, although some access to abutting property is expected.

(f) A Country Arterial is an Arterial, typically in the County's agricultural reserve.

(g) A Minor Arterial is a 2-lane Arterial meant nearly equally for through movement of vehicles and access to abutting property.

(h) A Business District Street is a road meant for circulation in commercial and mixed-use zones.

(i) An Industrial Street is a road meant for circulation in industrial zones.

(j) A Primary Residential Street is a road meant primarily for circulation in residential zones, although some through traffic is expected.

(k) A Country Road is a road that has the function of a Primary Residential Street, typically in the County's agricultural reserve.

(l) A Principal Secondary Residential Street is a Secondary Residential Street meant to carry somewhat more through traffic.

(m) A Secondary Residential Street is a road meant to provide access between a residential development with fewer than 200 dwelling units and one or more higher classification roads as defined in subsections (b) through (l).

(n) A Tertiary Residential Street is a road meant to provide direct access to a residential development with 75 or fewer dwelling units. A Tertiary Residential Street must not be built unless the Planning Board allows its use when the Board approves a preliminary subdivision plan or site plan.

Amendment to Add Fairness and Resident Protections to ZTA 19-07

Summary –

This Amendment provides for more fair and protective zoning standards and processing through a 3-Part Amendment to ZTA 19-07. These interdependent text changes improve: setback and height protections; the compressed Conditional Use hearing process; and the companion Waiver process.

EXPLANATION OF THIS AMENDMENT:

- **Highlighted SMALL CAPS** indicates text that this amendment adds.
- **Highlighted strike-through** indicates text that this amendment deletes. (Except when a very large passage is stricken, which is instead described within descriptive text, on page 4.)
- * * * indicates omitted existing law unaffected by this amendment.
- Plain text indicates existing law unaffected by this amendment

Explanations used in the ZTA:

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.

Amendment Part 1 - FAIR AND PROTECTIVE TIERED RESIDENTIAL SETBACKS

Rationale

At the November 19, 2019 Public Hearing on ZTA 19-07, residents and the Office of the County Executive presented testimony that advocated for a “tiered” approach to siting replacement-pole telecommunications towers where neighborhood streets and roads could be ranked the lowest “tier” and designated by zoning regulations to be the deployment locations of “last resort.” This strategy would instead encourage necessary deployments along higher speed and higher traffic-volume residentially-zoned roadways in the residentially zoned areas. Using a “tiered” approach is not a novel or unique approach. Residents have advocated for this strategy for years. And other local jurisdictions across the United States have been using “tiered” approaches in their rights-of-way for years.

Amendment Part 1 is informed by the County Executive’s June 29th memo to the County Council, which proposes a 3-tiered approach for prioritized siting of replacement-pole telecommunication towers in the residential zones. Tiers are based on the allowed speed of the roadway: greater than 50 mph; 35-50 mph; and less than 35 mph:

- Roadways with speeds greater than 50 mph provide a Limited Use setback of 30 feet, and the setback may be reduced through the Conditional Use hearing process to 10 feet;
- Roadways with speeds 35-50 mph provide a Limited Use setback of 45 feet, and the setback may be reduced through the Conditional Use hearing process to 30 feet; and
- For neighborhood streets and roads under 35 mph, a Limited Use setback of 75 feet is provided, and that setback may be reduced through the Conditional Use hearing process to 60 feet.

This Limited Use tiered setback standard for the replacement-pole telecommunications tower in the residential zones is regulated in 59-3.5.2.C.2.b. In addition, this amendment establishes reductions to the setbacks that are established through the Limited Use tiered setback standards, which may be granted through the Conditional Use process by the Hearing Examiner when needed and appropriate, and the amendment specifies the aforementioned setback reductions that the Hearing Examiner may apply. But, to be clear, the text in Amendment Part 1 that amends Conditional Use setback reductions relies upon Amendment Part 2, which is the text that establishes, defines, and clarifies the Expedited Conditional Use Hearing and Processing.

Amendment Part 1 also heeds the amendment advice provided by the County Executive's Office for more appropriate Limited Use tower height increases in the residential zones, and distinguishes those height limits from the height limits that the Council previously established for non-residential zones through ZTA 18-02. That text change is made to Section 3.5.2.C.2.b, and found beginning on line 66.

Beginning on Line 66 -

- [iv]vii. IN THE COMMERCIAL/RESIDENTIAL, INDUSTRIAL AND EMPLOYMENT ZONES, THE HEIGHT OF THE tower including any attached antennas and equipment, must not be taller than the height of the nearest pre-existing streetlight or utility pole: (a) plus 6 feet when abutting a right-of-way with a paved section width of 65 feet or less; or (b) plus 15 feet when abutting a right-of-way with a paved section width greater than 65 feet. IN THE AGRICULTURAL, RURAL RESIDENTIAL AND RESIDENTIAL ZONES, THE HEIGHT OF THE TOWER, INCLUDING ANY ATTACHED ANTENNAS AND EQUIPMENT, MUST NOT BE TALLER THAN: (A) 6 FEET TALLER THAN THE PRE-EXISTING POLE; OR (B) IF THE PRE-EXISTING POLE IS LESS THAN 20 FEET IN HEIGHT, THEN THE TOWER MUST NOT BE TALLER THAN 25 FEET.

Beginning on Line 34 -

- d. iii. In the Agricultural, Rural Residential, and Residential zones, the pre-existing pole and the replacement tower must be at least 30 feet MEASURED from any building intended for human occupation, excluding any setback encroachments allowed under Section 4.1.7.B.5.: AT LEAST A DISTANCE OF: 30 FEET, WHEN ALONG A ROADWAY THAT HAS A POSTED SPEED GREATER THAN 50 MPH; 45 FEET, WHEN ALONG A ROADWAY THAT HAS A POSTED SPEED BETWEEN 35 AND 50 MPH; AND 75 FEET WHEN ALONG A ROADWAY THAT HAS A POSTED SPEED OF LESS THAN 35 MPH OR WHEN THE SITE IS IN A PARKING LOT.

And then, incorporating the following into the Amendment (Part 2.) below, which amends the text that begins on Line 142

~~d.~~ In the Agricultural, Rural Residential, and Residential zones, where a Telecommunications Tower [[that is proposed to be less than 50 feet in height does not meet the limited use standards under Subsection 3.5.2.C.2.a]] is proposed to be less than THE DISTANCE ALLOWED BY THE LIMITED USE REGULATIONS FROM ANY BUILDING INTENDED FOR HUMAN OCCUPATION ~~the distance allowed by the limited use regulations, excluding any setback encroachments allowed under Section 4.1.7.B.5.~~ the Hearing Examiner, UPON A FINDING THAT IT IS NECESSARY AND APPROPRIATE AS A CONDITIONAL USE, PER THE EXPEDITED HEARING PROVISIONS IN SECTION 7.3.1, MAY REDUCE THE SETBACK TO THE DISTANCE FROM ANY BUILDING INTENDED FOR HUMAN OCCUPATION, ~~excluding any setback encroachments allowed under Section 4.1.7.B.5.;~~ PROVIDED THAT DISTANCE IS AT LEAST: **10 FEET**, WHEN ALONG A ROADWAY THAT HAS A POSTED SPEED GREATER THAN 50 MPH; **30 FEET**, WHEN ALONG A ROADWAY THAT HAS A POSTED SPEED BETWEEN 35 AND 50 MPH; AND **60 FEET** WHEN ALONG A ROADWAY THAT HAS A POSTED SPEED OF LESS THAN 35 MPH OR WHEN THE SITE IS IN A PARKING LOT.

Amendment Part 2 - **FAIR CONDITIONAL USE PROCESS**

Rationale

Fairness should not, and must not, be sacrificed for speed. Speed of processing is required by FCC shot clocks. Sponsors express interest in minimizing processing times to attract industry, too. However it is possible, and essential, for Montgomery County to have processes that are fair, and that are fast, too.

During discussion of ZTA 18-11, the prior proposed legislation on replacement-pole telecommunication towers in residential zones, Councilmembers were emphatic about approaching the regulatory processes with an “equity lens.” And the Council subsequently adopted and enhanced Racial Equity and Social Justice regulations.

Amendment Part 2 aims to level the playing field. It removes the assurance in the ZTA that the wireless industry applicant’s application will be granted as proposed, without substantial conditions. The Amendment also aims to diminish the favorable treatment of affluent residents and groups, particularly those represented by counsel, which gives them greater opportunities to participate than other affected residents. These text changes are provided to ensure that all affected residents, particularly vulnerable residents, would no longer be cut out of the discretionary processes and denied fair notice, status, standing, and more. And this text also removes the shackles that the ZTA places upon the Hearing Examiner’s authority, returning necessary and appropriate discretion. And it replaces what is clearly industry-infused language. Emblematic of this industry-infused language is the amended ZTA text (which ironically was added during the Pandemic) that regulates postponement of a Conditional Use hearing, which only authorizes the Hearing Examiner to postpone a hearing “for up to 30 days at the request of the applicant.” Thus, the ZTA does not permit the Hearing Examiner’s postponement on the basis of an emergency caused by a snowstorm, or a power outage, or even a pandemic; postponement is only allowed when sought by and in the interest of the wireless industry applicant.

Amendment Part 2 also recognizes the need to align with the Ninth Circuit’s *Small Cell Order* decision. That decision confirms that all regulatory processes operate in unison under the FCC shot clock provisions. As a result, amendments concerning the completeness review (which is generally limited by the shot clock to 10 days) are streamlined with regard to the Ninth Circuit’s Order, but are also re-crafted to improve public transparency. These amendments additionally incorporate and correct a previous attempt, many years ago, through [ZTA 15-09](#) to address the FCC shot clocks that govern “minor modifications,” which arguably *threw the baby out with the bathwater* and unnecessarily curtailed residents’ due process. The amendments respond to more recent FCC orders that have compressed shot clocks and expanded their reach and impact.

Amendment Part 2 replaces text in 59-3.5.2.C.2., regarding replacement-pole Telecommunication Towers standards, and it adds provisions in [59-7.3.1](#) - Conditional Use for the Expedited Hearing and Processing of the Conditional Use Application.

Amending Lines 142 – 150, and **STRIKING the remainder of the amended ZTA text**, and replacing it with the above amended conditional use setback standards in 59-3.5.2.C.2. (but preserving 297-303, which relate to the waiver process, for which related subsequent amendments follow in Amendment Part 3), and preserving Lines 251-253, the requirement that the towers not be conditionally approved in close proximity to historic locations. Then below, text follows for amended text to 59-7.3.1 Conditional Use standards - Expedited Conditional Use Hearing and Processes.

59-3.5.2.C.2.d.

IN THE AGRICULTURAL, RURAL RESIDENTIAL, AND RESIDENTIAL ZONES, WHERE A TELECOMMUNICATIONS TOWER [[THAT IS PROPOSED TO BE LESS THAN 50 FEET IN HEIGHT DOES NOT MEET THE LIMITED USE STANDARDS UNDER SUBSECTION 3.5.2.C.2.A]] IS PROPOSED TO BE LESS THAN 30 FEET FROM ANY BUILDING INTENDED FOR HUMAN OCCUPATION, EXCLUDING ANY SETBACK ENCROACHMENTS ALLOWED UNDER SECTION 4.1.7.B.5, IT MAY BE PERMITTED BY THE HEARING EXAMINER AS A CONDITIONAL USE without regard to Section 7.3.1, AS AMENDED FOR EXPEDITED HEARING AND PROCESSING, AND ONLY IF THE FOLLOWING PROCEDURES AND STANDARDS ARE SATISFIED :

Line 142

D. SETBACK . In the Agricultural, Rural Residential, and Residential zones, wWhere a Telecommunications Tower-[[that is proposed to be less than 50 feet in height does not meet the limited use standards under Subsection 3.5.2.C.2.a]] is proposed to be less than THE DISTANCE ALLOWED BY THE LIMITED USE REGULATIONS FROM ANY BUILDING INTENDED FOR HUMAN OCCUPATION the distance allowed by the limited use regulations, excluding any setback encroachments allowed under Section 4.1.7.B.5, the Hearing Examiner, UPON A FINDING THAT IT IS NECESSARY AND APPROPRIATE, THE HEARING EXAMINER MAY REDUCE THE SETBACK TO THE DISTANCE FROM ANY BUILDING INTENDED FOR HUMAN OCCUPATION, excluding any setback encroachments allowed under Section 4.1.7.B.5.: TO A DISTANCE THAT IS AT LEAST: **10 FEET**, WHEN ALONG A ROADWAY THAT HAS A POSTED SPEED GREATER THAN 50 MPH; **30 FEET**, WHEN ALONG A ROADWAY THAT HAS A POSTED SPEED BETWEEN 35 AND 50 MPH; AND **60 FEET** WHEN ALONG A ROADWAY THAT HAS A POSTED SPEED OF LESS THAN 35 MPH, OR WHEN NOT ALONG A ROADWAY.

- **HEIGHT.** IN A RESIDENTIAL ZONE, THE HEARING EXAMINER MAY AUTHORIZE NO MORE THAN A 5-FOOT INCREASE IN HEIGHT GREATER THAN THE INCREASE IN HEIGHT THAT IS ALLOWED THROUGH THE LIMITED USE REGULATIONS FOR A REPLACEMENT-POLE TELECOMMUNICATIONS TOWER, UPON A FINDING OF NEED AND APPROPRIATENESS FOR SUCH AN INCREASE IN HEIGHT.
- **OTHER DEVIATIONS.** THE HEARING EXAMINER MAY APPROVE OTHER DEVIATIONS FROM THE LIMITED USE STANDARDS, NOT SPECIFIED HEREIN, IN CIRCUMSTANCES WHERE THE HEARING EXAMINER FINDS SUCH DEVIATIONS ARE ESSENTIAL FOR REGULATORY COMPLIANCE AND THE HEARING EXAMINER FINDS THAT, AMONG THE ALTERNATIVES AVAILABLE, THE DEVIATION(S) IMPOSED WOULD BE THE LEAST INCONMODIOUS TO THE SURROUNDING COMMUNITY.
- **CONCEALED OR INTEGRATED FACILITY.** THE TELECOMMUNICATIONS TOWER SHALL BE DESIGNED, FABRICATED, AND SITED TO BE CONCEALED OR INTEGRATED TO THE GREATEST EXTENT POSSIBLE THAT IT IS NOT TECHNOLOGICALLY IMPRACTICABLE FOR THE APPLICANT UNDER THE FACTS AND CIRCUMSTANCES. HOWEVER, THE HEARING EXAMINER MAY APPROVE ALTERNATIVE CONCEALMENTS TO THE LIMITED USE CONCEALMENT REGULATIONS IF THE HEARING EXAMINER FINDS THAT THE ALTERNATIVE WOULD GENERALLY PROVIDE A SUPERIOR METHOD OF CONCEALMENT, OR FINDS THE ALTERNATIVE CONCEALMENTS IN THE SPECIFIC CIRCUMSTANCES WOULD MORE EFFECTIVELY MITIGATE ADVERSE EFFECTS UPON THE SURROUNDING NEIGHBORS AND PUBLIC AREAS.
- **COMPATIBILITY.** WHEN EVALUATING COMPATIBILITY, THE HEARING EXAMINER SHALL CONSIDER: THE DIMENSIONS OF THE TELECOMMUNICATION TOWER AND SITE, AND THE PROSPECTIVE BUILDOUTS, INCLUDING POSSIBLE SUBSEQUENT MODIFICATIONS AND CO-LOCATIONS, INCLUDING THE IMPACTS OF EXPANSIONS UNDER THE SPECTRUM ACT (6409(A)); AND SHALL ALSO CONSIDER THE TOPOGRAPHY, EXISTING VEGETATION, AND ENVIRONMENTAL FEATURES, THE NEARBY RESIDENTIAL PROPERTIES AND OTHER PROPERTIES UPON WHICH THERE ARE OTHER SENSITIVE USES, AND EFFECTS UPON THE STREET AND THE SURROUNDING NEIGHBORHOOD. THE HEARING EXAMINER MUST FIND THAT THE TELECOMMUNICATIONS TOWER, AS AUTHORIZED BY THE CONDITIONAL USE PERMIT, SATISFIES THE REQUIREMENTS THAT ARE ENUMERATED IN SEC. 7.3.1.E., AND THAT IT: A) UTILIZES THE SMALLEST FOOTPRINT REASONABLY POSSIBLE, GIVEN THE FACTS AND CIRCUMSTANCES; B) IS DESIGNED TO MINIMIZE THE OVERALL HEIGHT, MASS, AND SIZE OF THE ANTENNA, ASSOCIATED EQUIPMENT, AND ENCLOSURE, INCLUDING THE STRUCTURE; C) IS SCREENED OR CONCEALED TO SHIELD THE PUBLIC AND ADJOINING AND CONFRONTING PROPERTIES FROM DELETERIOUS VIEWS, NOISE, AND VIBRATIONS; D) WOULD NOT REQUIRE THE DIMINUTION OF LANDSCAPING OR TREE FOLIAGE; E) IS DESIGNED TO MINIMIZE ITS INCONMODIOUS IMPACTS; AND F) IS ARCHITECTURALLY COMPATIBLE WITH THE EXISTING SITE AND THE IMMEDIATE SURROUNDINGS AND DOES NOT ADVERSELY IMPACT HISTORIC STRUCTURES, PROPERTIES, OR ENVIRONMENTALLY SENSITIVE AREAS.

(Lines 251 – 253 preserved)

- vii. 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.

- **TFCG.** THE APPLICANT FOR A CONDITIONAL USE MUST FILE A RECOMMENDATION FROM THE TRANSMISSION FACILITIES COORDINATING GROUP WITH THE HEARING EXAMINER AT LEAST 5 DAYS BEFORE THE DATE SET FOR THE PUBLIC HEARING, WHICH FAVORABLY RECOMMENDS THE SITE AS PROPOSED BY THE APPLICANT, AND WHICH FAVORABLY RECOMMENDS ANY APPLICANT’S ALTERNATIVE PROPOSED SITES. THE RECOMMENDATION MUST BE NO MORE THAN 90 DAYS OLD

- FINDINGS. TESTIMONIES, EVIDENCE, AND INFORMATION PRESENTED BY ALL PARTIES, INCLUDING ALL PARTIES' PROPOSED ALTERNATIVES TO THE APPLICANT'S SITE MUST BE FAIRLY EVALUATED IN THE HEARING EXAMINER IN THE DECISION OF WHERE AND WHETHER THE CONDITIONAL USE SHOULD BE APPROVED.
- TECHNOLOGY UPDATES. A CONDITIONAL USE PERMIT, WHEN GRANTED, MUST BE CONDITIONED UPON ANY ANTENNA(S) AND ASSOCIATED EQUIPMENT BEING UPDATED BY THE PERMIT HOLDER WITH NEW TECHNOLOGY THAT IS LESS INCONVENIENT TO NEIGHBORS, THE NEIGHBORHOOD, AND THE COMMUNITY, WHEN THE NEW TECHNOLOGY BECOMES THE INDUSTRY STANDARD.
- COMPLIANCE AND ENFORCEMENT. PER SECTION 59-7.3.1.L., THE HEARING EXAMINER SHALL REQUIRE AN INSPECTION TO BE CONDUCTED ANNUALLY OR MORE FREQUENTLY BY DPS FOR ANY REPLACEMENT-POLE TELECOMMUNICATIONS TOWER THAT HAS BEEN GRANTED A CONDITIONAL USE. THE INSPECTION MUST INCLUDE DPS COMPLIANCE CHECKS AT THE PERMITTEE'S EXPENSE, TO CONFIRM THAT THE FACILITY REMAINS INSTALLED AND OPERATING AS THE HEARING EXAMINER'S CONDITIONAL USE PERMIT HAS APPROVED IT, INCLUDING THE RF RADIATION EXPOSURE LEVELS AND THE SPECIFIC CHANNELS, TRANSMISSION FREQUENCIES, AND TILTS THAT ARE PROVIDED IN THE RECORD.
- EFFECTIVE PROHIBITION CLAIM PROCESS. IN ORDER TO GRANT THE APPLICANT'S REQUEST FOR A CONDITIONAL USE PERMIT ON THE BASIS THAT FAILURE TO GRANT THE REQUEST WOULD CONSTITUTE AN EFFECTIVE PROHIBITION OF A WIRELESS SERVICE UNDER A GOVERNING FEDERAL OR STATE LAW, REGULATION, OR STANDARD, THE HEARING EXAMINER MUST:
 - MAKE A FINDING THAT FAILURE TO GRANT THE REQUEST WOULD CONSTITUTE AN EFFECTIVE PROHIBITION OF A WIRELESS SERVICE UNDER A GOVERNING FEDERAL OR STATE LAW, REGULATION, OR STANDARD;
 - EXPLAIN IN DETAIL THE FACTUAL AND LEGAL BASES FOR THAT CONCLUSION, AND ESTABLISH THAT THE SUPERSEDING LAW, REGULATION, OR STANDARD, AS IT IS WRITTEN, IS A TERM, CONDITION, AND OPERATIONAL RESTRICTION OF THE PERMIT; AND
 - REQUIRE THE CONDITIONAL USE PERMIT HOLDER TO IMMEDIATELY NOTIFY THE HEARING EXAMINER IN WRITING IF THE FEDERAL OR STATE STATUTORY OR REGULATORY REQUIREMENT THAT PROVIDED THE LEGAL BASIS FOR THE GRANT HAS SUBSEQUENTLY CHANGED OR BEEN ELIMINATED.
- **CONTINUED JURISDICTION.** ANY CONDITIONAL USE APPROVAL THAT THE HEARING EXAMINER GRANTS, IN ADDITION TO OTHER CONDITIONS, SHALL BE BOUND AND CONDITIONED UPON: TESTIMONY AND EXHIBITS OF RECORD, TESTIMONY OF ITS WITNESS; AND REPRESENTATIONS OF THE APPLICANT'S ATTORNEYS TO THE EXTENT THAT SUCH EVIDENCE AND REPRESENTATIONS ARE IDENTIFIED IN THE CONDITIONAL USE APPROVAL.

Section 7.3.1. Conditional Use

A. Applicability and Description

* * *

1. AN APPLICATION FOR A CONDITIONAL USE APPROVAL THAT CONCERNS A TELECOMMUNICATION TOWER REGULATED BY ZONING ORDINANCE 59-3.5.2.C., WHEN AUTHORIZATION IS PRE-EMPTED BY THE FCC THROUGH THE TIME RESTRICTION OF A SHOT-CLOCK OF 90 DAYS OR LESS FOR THE REGULATORY DECISION, MUST BE PROCESSED THROUGH AN EXPEDITED CONDITIONAL USE PROCESS.

* * *

B. Application Requirements

* * *

2. The applicant must submit the following for review:
 - a. application form and fees as approved by the District Council;
 - b. proof of ownership or authorization;
 - c. statement of how the proposed development satisfies the criteria to grant the application;
 - d. certified copy of official zoning vicinity map showing the area within at least 1,000 feet surrounding the subject property;
 - e. list of abutting and confronting property owners in the County tax records;
 - f. list of any civic, homeowners, and renters associations that are registered with the Planning Department and located within 1/2 mile of the site;
 - g. Traffic Statement or Study, accepted for review by the Planning Director;
 - h. map showing existing buildings, structures, circulation routes, significant natural features, historic resources, zoning, and legal descriptions on the proposed development site and within 500 feet of the perimeter boundary;
 - i. existing and proposed dry and wet utility plan if changes to these facilities are proposed;
 - j. written description of operational features of the proposed use;
 - k. if exterior changes are proposed, plans of the proposed development showing:
 - i. footprints, ground-floor layout, and heights of all buildings and structures;
 - ii. required open spaces and recreational amenities;
 - iii. layout of all sidewalks, trails, paths, roadways, parking, loading, and bicycle storage areas;
 - iv. rough grading;
 - v. landscaping and lighting;
 - vi. approved Natural Resources Inventory/Forest Stand Delineation, if required under Chapter 22A;
 - vii. Forest Conservation Plan application, if required under Chapter 22A, or an approved preliminary forest conservation plan; telecommunication tower applications must include an approved Forest Conservation Plan or a letter from the Planning Department confirming that a Forest Conservation Plan is not required under Chapter 22A;

- viii. Stormwater Management Concept or Water Quality Plan application, if required under Chapter 19 ; and
 - ix. supplementary documentation showing or describing how the application satisfies previous approvals and applicable requirements.
 - l. development program and inspection schedule detailing any construction phasing for the project; **and**
 - m. for a telecommunication tower application, photographic simulations of the tower and site seen from areas with a direct view of the tower, including a minimum of at least 3 directions; **AND**
 - N. **IF THE TELECOMMUNICATION TOWER APPLICATION IS FOR AN EXPEDITED HEARING THEN THE APPLICANT MUST:**
 - i. **ALSO LIST ALL RESIDENTIAL ADDRESSES WITHIN 300 FEET OF THE APPLICANT'S PROPOSED SITE AND EACH OF THE APPLICANT'S ALTERNATIVE PROPOSED SITES IN THE APPLICATION, AS AVAILABLE FROM THE DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS AND COUNTY TAX RECORDS; AND**
 - ii. **INCLUDE THE COMPLETE CONTENTS OF THE TFCG APPLICATION FOR THE SUBJECT SITE.**
 - iii. **NOT INCLUDE ALTERNATIVE PROPOSED SITES IN THE APPLICATION IF THE APPLICANT SEEKS A WAIVER FROM THE EXPEDITED HEARING.**
3. The applicant must submit an initial application to the Planning Director for approval of completeness. The Planning Director must review the application for completeness within 10 days after receipt. An application is incomplete if any required element is missing or is facially defective, e.g., a drawing that is not to scale or lacks proper signatures. The assessment of completeness must not address the merits of the application.
 4. The applicant must submit any required revisions to the Planning Director. The Planning Director must review the revised application for completeness within 10 days after receipt.
 5. After the Planning Director verifies that the application is complete, the applicant must file the final application with the Hearing Examiner, who will accept the application and establish a hearing date under Section 7.3.1.C. **., EXCEPT THE HEARING EXAMINER MUST SCHEDULE AN EXPEDITED PUBLIC HEARING TO BEGIN WITHIN 30 DAYS AFTER THE APPLICATION HAS BEEN DEEMED COMPLETE AND FILED BY THE APPLICANT WITH OZAH.**
 6. Public notice is required under Division 7.5., **HOWEVER,**
 - A. - **NOTICE OF AN APPLICATION FOR AN EXPEDITED CONDITIONAL USE HEARING IS AS FOLLOWS: NOTICE MUST BE EFFECTED WITHIN 2 DAYS TO UPON THE PLANNING DEPARTMENT'S RECEIPT OF THE INITIAL APPLICATION, WHICH, AS REFERENCED BELOW, MUST BE SUBMITTED TO BOTH TFCG AND THE PLANNING DEPARTMENT, IN FULL.**
 - NOTICE OF APPLICATION FOR HEARING - PLANNING DEPARTMENT, TFCG, AND OZAH (THE AGENCIES) MUST IMMEDIATELY EFFECT NOTICE, AFTER THE INITIAL APPLICATION IS SUBMITTED (WHICH MUST INCLUDE THE AGENCIES' RECEIPT OF THE FULL PAYMENTS OF THEIR RESPECTIVE FEES, OTHER THAN UNANTICIPATED COSTS) AS FOLLOWS:**
 - i. **WEBSITE NOTIFICATION –THE AGENCIES MUST POST THE COMPREHENSIVE APPLICATION(S) ON THEIR RESPECTIVE WEBSITES, WHICH MUST BE COORDINATED WITH EACH OTHER, AND REFERENCE EACH OTHER'S ASSIGNED APPLICATION NUMBERS/CASE NUMBERS;**

ii. MAILED NOTICE - ALL RESIDENTS SHALL BE SENT NOTICE IF THEY ARE LOCATED WITHIN 300 FEET OF THE PROPOSED SITE AND ANY APPLICANT'S ALTERNATE SITE;

iii. ORGANIZATIONS AND MUNICIPALITIES SPECIFIED MUST BE SENT NOTICE IF THEY ARE LOCATED WITHIN ½ MILE OF APPLICANT'S PROPOSED SITE AND ANY APPLICANT'S SUGGESTED ALTERNATE SITE(S);

iv. SIGNS – APPLICANT IS REQUIRED TO ERECT A SIGN AT THE APPLICATION SITE THAT IS REQUIRED, PER [59-7.5.2](#), AND, IN ADDITION:

1) THAT SIGN MUST ALSO BE POSTED AT ANY APPLICANT-SUGGESTED ALTERNATE SITE(S); AND

2) THERE MUST BE A QR CODE AFFIXED TO EACH SIGN BY OZAH, WHICH ALLOWS AFFECTED PARTIES AND PROSPECTIVE PARTIES TO ACCESS ALL DOCUMENTS AND UP-TO-DATE INFORMATION.

v. OPPORTUNITY FOR PRE-REGISTRATION – ALL OF THE NOTICES, WHETHER THEY ARE WEB POSTED, MAILED, OR ON SIGNS, MUST PROVIDE ALL THOSE AFFECTED THE OPPORTUNITY TO PRE-REGISTER WITH OZAH FOR THE HEARING. ALL PRE-REGISTRANTS SHALL:

1) RECEIVE E-MAIL, POSTAL, OR TELEPHONIC NOTIFICATION(S) OF THE SCHEDULED OZAH HEARING, AND ANY SCHEDULED HEARING CHANGES; AND

2) UPON PRE-REGISTRATION, HAVE THE STATUS TO FILE AND RESPOND TO MOTIONS IN ADVANCE OF THE HEARING.

B – NOTICE OF AN APPLICATION FOR A WAIVER OF THE EXPEDITED CONDITIONAL USE HEARING, THE PLANNING DEPARTMENT, TFCG, AND OZAH (THE AGENCIES) MUST EFFECT NOTICE WITHIN 2 DAYS, AFTER THE INITIAL APPLICATION IS SUBMITTED (WHICH MUST INCLUDE THE AGENCIES' RECEIPT OF THE FULL PAYMENTS OF THEIR RESPECTIVE FEES, OTHER THAN UNANTICIPATED COSTS) AS FOLLOWS:

vi. WEBSITE NOTIFICATION –THE AGENCIES MUST POST THE COMPREHENSIVE APPLICATION(S) ON THEIR RESPECTIVE WEBSITES, WHICH MUST BE COORDINATED WITH EACH OTHER, AND REFERENCE EACH OTHER'S ASSIGNED APPLICATION NUMBERS/CASE NUMBERS;

vii. MAILED NOTICE –

1) ALL RESIDENTS SHALL BE SENT NOTICE IF THEY ARE LOCATED WITHIN 300 FEET OF THE PROPOSED SITE;

2) ORGANIZATIONS AND MUNICIPALITIES SPECIFIED MUST BE SENT NOTICE IF THEY ARE LOCATED WITHIN ½ MILE OF APPLICANT'S PROPOSED SITE AND ANY APPLICANT'S SUGGESTED ALTERNATE SITE(S);

viii. SIGNS – APPLICANT IS REQUIRED TO ERECT A SIGN AT THE APPLICATION SITE THAT IS REQUIRED, PER [59-7.5.2](#), AND, IN ADDITION:

1) THAT SIGN MUST ALSO BE POSTED AT ANY APPLICANT-SUGGESTED ALTERNATE SITE(S); AND

2) THERE MUST BE A QR CODE AFFIXED TO EACH SIGN BY OZAH, WHICH ALLOWS AFFECTED PARTIES AND PROSPECTIVE PARTIES TO ACCESS ALL DOCUMENTS AND UP-TO-DATE INFORMATION.

ix. OPPORTUNITY FOR PRE-REGISTRATION – ALL OF THE NOTICES, WHETHER THEY ARE WEB

POSTED, MAILED, OR ON SIGNS, MUST PROVIDE ALL THOSE AFFECTED THE OPPORTUNITY TO OBJECT TO THE WAIVER AND TO PRE-REGISTER WITH OZAH FOR THE HEARING. ALL PRE-REGISTRANTS SHALL:

- 1) RECEIVE E-MAIL, POSTAL, OR TELEPHONIC NOTIFICATION(S) OF THE SCHEDULED OZAH HEARING, AND ANY SCHEDULED HEARING CHANGES; AND
- 2) UPON PRE-REGISTRATION, HAVE THE STATUS TO FILE AND RESPOND TO MOTIONS IN ADVANCE OF THE HEARING.

7. FOR AN EXPEDITED CONDITIONAL USE HEARING, THE APPLICANT MUST CONCURRENTLY SUBMIT THE INITIAL APPLICATION TO BOTH THE PLANNING DIRECTOR AND TO TRANSMISSION FACILITIES COORDINATION GROUP (TFCG). AN APPLICATION IS INCOMPLETE IF ANY ELEMENT THAT IS REQUIRED BY EITHER OZAH OR TFCG IS MISSING OR IS FACIALLY DEFECTIVE, E.G., A DRAWING THAT IS NOT TO SCALE OR LACKS PROPER SIGNATURES, OR THE RF DATA IS MISSING OR INACCURATE. THE ASSESSMENT OF COMPLETENESS MUST NOT ADDRESS THE MERITS OF THE APPLICATION.

- i. PLANNING DEPARTMENT MUST POST THE DOCUMENTS; DOCUMENT CHANGES, CORRESPONDENCE, AMENDMENTS, AND EACH DETERMINATION OF COMPLETENESS OR INCOMPLETENESS ON DAIC;
- ii. COMPREHENSIVE, COORDINATED NOTICES OF INCOMPLETENESS AND COMPLETENESS MUST BE TRANSMITTED TO APPLICANT AND RETAINED IN THE AGENCIES' FILE(S). PLANNING DEPARTMENT MUST VERIFY COMPLETENESS OF THE ZONING STANDARDS, ACCURACY OF INFORMATION, AND COMPLIANCE WITH, AMONG OTHER THINGS, AND REQUIREMENTS THAT ARE ARTICULATED IN THE ZONING ORDINANCE AND RELATED DPS AND DOT STANDARDS; AND TFCG MUST VERIFY COMPLETENESS WITH REQUIREMENTS ESTABLISHED IN MC-2.58E AND COMCOR 02.58E.
- iii. APPLICANT MUST CURE ALL DEFICIENCIES IDENTIFIED BY PLANNING DEPARTMENT AND TFCG WITHIN THE FCC SHOT-CLOCK TIME RESTRICTIONS, BEFORE APPLICATION IS DEEMED COMPREHENSIVELY COMPLETE;
- iv. PLANNING DEPARTMENT AND TFCG MAY ONLY ISSUE AN AFFIDAVIT OF COMPLETENESS ONLY IF THE APPLICANT HAS CURED ALL DEFICIENCIES WITHIN THE IMPOSED SHOT-CLOCK TIMEFRAME FOR DOING SO. AMENDMENTS TO THE APPLICATION THAT ARE FILED SUBSEQUENT TO THE AFFIDAVIT OF COMPLETENESS ARE PROHIBITED AND RENDER THE APPLICATION A NEW APPLICATION: SUBJECT TO: NEW SHOT-CLOCK; NEW FEES; NEW COMPLETENESS REVIEW; AND NEW PROCESSING

C. Hearing Date

1. The Hearing Examiner must schedule a public hearing to begin within 120 days after the date an application was accepted.
2. The Hearing Examiner may postpone the public hearing and must send notice to all parties of record of the new hearing date.
3. The Hearing Examiner may issue a subpoena to compel the attendance of witnesses at a public hearing and production of documents and administer an oath to any witness.

4. EXPEDITED HEARING – THE HEARING EXAMINER MUST SCHEDULE AN EXPEDITED PUBLIC HEARING TO BEGIN WITHIN 30 DAYS AFTER THE APPLICATION HAS BEEN DEEMED COMPLETE AND FILED BY THE APPLICANT WITH OZAH.

a. TRANSMISSION FACILITIES COORDINATION GROUP (TFCG) RECOMMENDATION - AT LEAST 5 DAYS PRIOR TO THE SCHEDULED HEARING, OZAH MUST RECEIVE FROM TFCG DOCUMENTATION OF A FAVORABLE RECOMMENDATION OR A FAVORABLE RECOMMENDATION WITH CONDITIONS THAT IS NO MORE THAN 90 DAYS OLD, WHICH IS FOR THE APPLICANT’S PROPOSED SITE AND ANY APPLICANT’S ALTERNATE SITES.

b. CONSOLIDATED REVIEW OF APPLICATIONS – THE HEARING EXAMINER MAY ISSUE AN ORDER FOR CONSOLIDATION OF REVIEW OF APPLICATIONS ONLY WHEN PROMPTED BY A MOTION FROM THE APPLICANT. BEFORE ORDERING CONSOLIDATION, THE HEARING EXAMINER MUST GIVE FAIR CONSIDERATION TO ANY CHALLENGES SUBMITTED BY PARTIES AND PRE-REGISTRANTS.

i. MOTION

- 1) THE MOTION FOR CONSOLIDATION REVIEW OF APPLICATION(S) MUST BE ACCOMPANIED BY AFFIDAVIT OF COMPLETENESS FOR EACH APPLICATION PROPOSED TO BE CONSOLIDATED FOR REVIEW;
- 2) THE HEARING EXAMINER MUST NOT ORDER MORE THAN 3 APPLICATIONS TO BE CONSOLIDATED INTO ONE EXPEDITED HEARING;
- 3) THE MOTION FOR CONSOLIDATION MUST BE ATTACHED TO ALL APPLICATIONS PROPOSED FOR CONSOLIDATIONS, AND ALL APPLICATIONS MUST BE FILED ON THE SAME DAY WITH OZAH.
- 4) ! SHOT CLOCK. THE MOTION FOR CONSOLIDATION IS A DEVIATION FROM THE EXPEDITED HEARING. THE MOTION REQUIRES THE HEARING EXAMINER’S ADDITIONAL PRE-HEARING REVIEW AND TIME, AND THE PROCESS MUST ALLOW FOR THE FAIR RESPONSES BY OTHERS. THEREFORE, THE SHOT CLOCK (FCC PROCESSING FOR THE APPLICATIONS) IS TOLLED FROM THE TIME THAT THE MOTION HAS BEEN FILED UNTIL THE HEARING EXAMINER HAS DELIVERED NOTICE OF THE DECISION ON CONSOLIDATION TO THE APPLICANT AND TO ALL PRE-REGISTRANTS AND HAS POSTED NOTICE OF THE DECISION ON OZAH’S AND COORDINATED WEBSITES.

5) **ELIGIBLE APPLICATIONS FOR CONSOLIDATION - WHEN MULTIPLE** APPLICATIONS FOR REPLACEMENT-POLE TELECOMMUNICATIONS TOWERS RAISE COMMON QUESTIONS OF LAW OR FACT, THE HEARING EXAMINER MAY GRANT THE APPLICANT’S MOTION IN AN EXPEDITED HEARING AND ORDER A JOINT HEARING FOR CONSOLIDATION OF THE CLAIMS, ISSUES, OR ACTIONS, PROVIDED THAT:

- ALL PROPOSED SITES MUST LOCATED IN THE APPROXIMATE CENTER OF THE SAME SUBMITTED MAP, WHICH IS REQUIRED FOR EACH APPLICATION, I.E., THE “CERTIFIED COPY OF OFFICIAL ZONING VICINITY MAP SHOWING THE HIGHLIGHTED SUBJECT PROPERTY AND THE AREA WITHIN AT LEAST 1,000 FEET SURROUNDING THE SUBJECT PROPERTY”;
- THE LINEAR DISTANCE BETWEEN APPLICATION SITES MUST NOT EXCEED 1,000 FEET;

- ALL OF THE APPLICANT’S ALTERNATIVE SITES MUST BE LOCATED ON THE SAME ZONING VICINITY MAP.
- ALL PROPOSED AND ALTERNATIVE 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.

6) **POSTPONEMENTS.** THE HEARING EXAMINER MAY POSTPONE THE PUBLIC HEARING WITH DUE REGARD FOR THE SHOT CLOCK CONSTRAINTS; AND WITHIN 2 DAYS THE HEARING EXAMINER MUST PROVIDE TELEPHONIC OR E-MAIL NOTICE OF THE POSTPONEMENT OF THE EXPEDITED HEARING AND THE NEW HEARING DATE TO ALL PARTIES OF RECORD AND PRE-REGISTRANTS AND MUST POST NOTICE OF THE POSTPONEMENT ON THE OZAH AND COORDINATED WEBSITES THAT ARE LINKED TO THE SIGN QR CODES.

7) APPLICATION FOR A WAIVER FROM EXPEDITED CONDITIONAL USE HEARING

- AN OBJECTION TO A PROPOSED WAIVER FROM EXPEDITED CONDITIONAL USE HEARING MUST BE FILED WITHIN 20 DAYS OF THE DATE THAT THE APPLICATION HAS BEEN FILED WITH OZAH.
- WHEN THERE IS NO OBJECTION TO AN APPLICATION FOR A WAIVER FROM A HEARING
- AN OBJECTION TO A WAIVER MUST:
 - REQUEST AN EXPEDITED CONDITIONAL USE HEARING;
 - BE FILED WRITING WITH OZAH; AND
 - SPECIFY THE REASON FOR THE REQUEST AND THE NATURE OF THE OBJECTION.
- IF A REQUEST FOR A HEARING IS RECEIVED, THE HEARING EXAMINER MUST SCHEDULE AN EXPEDITED CONDITIONAL USE HEARING TO COMMENCE WITHIN 20 DAYS FROM THE DEADLINE TO FILE THE OBJECTION TO THE WAIVER, TO CONSIDER THE OBJECTIONS IN THE CONTEXT OF THE CONDITIONAL USE STANDARDS.
- WITHIN 2 DAYS OF SCHEDULING THE HEARING, OZAH MUST PROVIDE THE APPLICANT AND ALL PRE-REGISTRANTS WITH TELEPHONIC OR E-MAIL NOTIFICATION OF THE SCHEDULED HEARING, AND POST NOTICE OF THE HEARING ON ITS AND OTHER WEBSITES LINKED TO THE NOTICE SIGN QR CODE.
- THE SCOPE OF THE HEARING MUST BE CIRCUMSCRIBED TO THE NATURE OF THE OBJECTIONS RAISED. THE HEARING EXAMINER MUST APPLY THIS SECTION AND SECTION 3.5.2.C.2.D. TO DETERMINE WHETHER: RELAXING THE STANDARD(S) FOR THE PROPOSED FACILITY IS INCONMODIOUS TO AFFECTED PARTIES AND IN CONFLICT WITH THE CONDITIONAL USE STANDARDS; WHETHER THERE ARE SUFFICIENT MITIGATING CONDITIONS THAT THE HEARING EXAMINER CAN IMPOSE; OR WHETHER THE PROPOSED TELECOMMUNICATION TOWER SATISFIES THE CONDITIONAL USE STANDARDS.

D. Review and Recommendation

1. Planning Director Review

- a. The Planning Director may provide a report and recommendation for review by the Planning Board at a public meeting or issue a report and recommendation directly to the Hearing Examiner. The Planning Director must provide a report and recommendation on a telecommunication tower application directly to the Hearing Examiner.
- b. If the Planning Director provides a report and recommendation to the Planning Board, the Planning Director must publish the report and recommendation a minimum of 10 days before the Planning Board public meeting.
- c. If the Planning Director provides a report and recommendation to the Hearing Examiner, the Planning Director must publish the report and recommendation a minimum of 10 days before the Hearing Examiner's public hearing.

2. Planning Board Review

- a. The Planning Board may consider the Planning Director's report and recommendation as a consent item on its agenda or hold a public meeting to consider the recommendation.
- b. The Planning Board must provide a recommendation on the application to the Hearing Examiner a minimum of 7 days before the Hearing Examiner's public hearing.

c. FOR AN EXPEDITED HEARING, THE HEARING EXAMINER MAY WAIVE OR MODIFY THE REQUIREMENTS FOR A PLANNING BOARD REVIEW.

3. Amendment of an Application

- a. An applicant may amend the application before the hearing if the Hearing Examiner approves a motion to amend after giving 10 days' notice to all parties entitled to original notice of filing. If an amendment would materially alter an applicant's proposal or evidence, the Hearing Examiner may postpone the hearing to a date that permits all interested parties adequate time to review the amendment.
- b. The applicant must forward a copy of any proposed amendment to the Planning Board. The Hearing Examiner must keep the record open for no more than 30 days to provide an opportunity for the Planning Board or its staff to comment. Within that time, the Planning Board or its staff must comment on the amendment or state that no additional review and comment are necessary.

c. FOR AN EXPEDITED HEARING, THE APPLICANT MUST NOT AMEND THE APPLICATION THAT HAS BEEN FILED. THE ONLY CHANGES PERMITTED TO THE APPLICATION AFTER IT HAS BEEN SUBMITTED ARE THE REQUESTED CHANGES BY PLANNING DEPARTMENT AND TFCG TO CURE AN INCOMPLETE APPLICATION.

4. Withdrawal of an Application

The Hearing Examiner or the Hearing Examiner's designee must send a notice to all parties entitled to notice of the hearing when an applicant withdraws an application for a conditional use.

E. Necessary Findings

1. To approve a conditional use application, the Hearing Examiner must find that the proposed development:
 - a. satisfies any applicable previous approval on the subject site or, if not, that the previous approval must be amended;
 - b. satisfies the requirements of the zone, use standards under Article 59-3, and to the extent the Hearing Examiner finds necessary to ensure compatibility, meets applicable general requirements under Article 59-6;
 - c. substantially conforms with the recommendations of the applicable master plan;
 - d. is harmonious with and will not alter the character of the surrounding neighborhood in a manner inconsistent with the plan;
 - e. 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; a conditional use application that substantially conforms with the recommendations of a master plan does not alter the nature of an area;
 - f. will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage, and other public facilities. If an approved adequate public facilities test is currently valid and the impact of the conditional use is equal to or less than what was approved, a new adequate public facilities test is not required. If an adequate public facilities test is required and:
 - i. if a preliminary subdivision plan is not filed concurrently or required subsequently, the Hearing Examiner must find that the proposed development will be served by adequate public services and facilities, including schools, police and fire protection, water, sanitary sewer, public roads, and storm drainage; or
 - ii. if a preliminary subdivision plan is filed concurrently or required subsequently, the Planning Board must find that the proposed development will be served by adequate public services and facilities, including schools, police and fire protection, water, sanitary sewer, public roads, and storm drainage; and
 - g. 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.
- 2. Any structure to be constructed, reconstructed, or altered under a conditional use in a Residential Detached zone must be compatible with the character of the residential neighborhood.
- 3. The fact that a proposed use satisfies all specific requirements to approve a conditional use does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require conditional use approval.
- 4. In evaluating the compatibility of an agricultural conditional use with surrounding Agricultural or Rural Residential zoned land, the Hearing Examiner must consider that the impact does not necessarily need to be controlled as stringently as if it were abutting a Residential zone.
- 5. * * *

* * *

F. Decision

1. Hearing Examiner

- a. The Hearing Examiner must issue a report and decision no later than 30 days after the close of the record of the public hearing. The decision may approve, approve with conditions, or deny the application. The Hearing Examiner may supplement the specific requirements of this Chapter with any other requirements necessary to protect nearby properties and the general neighborhood. The Hearing Examiner may by order extend the time to issue the report and decision.
- b. The Hearing Examiner must issue a notice, on the day the report and decision is issued, to the Board of Appeals, the applicant, and all parties of record that the report and decision has been issued and is available for review. The Hearing Examiner's report and decision is effective on the date issued, but will be stayed if appealed under Subsection c.
- c. Any party of record may appeal the Hearing Examiner's decision by filing a written request to present oral argument before the Board of Appeals within 10 days after the Office of Zoning and Administrative Hearings issues the Hearing Examiner's report and decision. The filing of such a request transfers jurisdiction over the matter while on appeal from the Hearing Examiner to the Board of Appeals.
 - i. A written request for an appeal and oral argument must be filed with the Board of Appeals and the Hearing Examiner, and must concisely identify the matters to be presented at the oral argument. A person requesting an appeal must send a copy of that request to the Hearing Examiner, the Board of Appeals, and all parties of record before the Hearing Examiner.

ii. Any party of record may, no later than 5 days after a request for an appeal and oral argument is filed, file a written opposition or request to participate in oral argument. An opposition to a request for an appeal and oral argument must be sent to the Board of Appeals and all parties as listed by the Hearing Examiner, and must be concise and limited to matters raised by the party who requested oral argument.

iii. The Board of Appeals may, in its discretion, grant or deny an oral argument request. If the Board of Appeals grants a request for oral argument, the argument must be limited to matters contained in the record compiled by the Hearing Examiner.

iv. Regardless of whether the Board of Appeals has elected to hear oral argument, the Board of Appeals must, under Section 7.3.1.F.2, approve or deny the appealed conditional use application or remand it to the Hearing Examiner for clarification or the taking of additional evidence, if appropriate.

v. A request for an appeal of the Hearing Examiner's decision stays the decision of the Hearing Examiner.

a. FOR AN EXPEDITED HEARING, THE HEARING EXAMINER MUST ISSUE A REPORT AND DECISION NO LATER THAN **10** DAYS AFTER THE CLOSE OF THE RECORD OF THE PUBLIC HEARING. THE HEARING EXAMINER'S DECISION MAY APPROVE, APPROVE WITH CONDITIONS, OR DENY THE APPLICATION. THE HEARING EXAMINER MAY SUPPLEMENT THE SPECIFIC REQUIREMENTS OF THIS CHAPTER WITH ANY OTHER REQUIREMENTS NECESSARY TO PROTECT NEARBY PROPERTIES AND THE GENERAL NEIGHBORHOOD. THE HEARING EXAMINER MAY BY ORDER EXTEND THE TIME TO ISSUE THE REPORT AND DECISION, BUT MUST BE COGNIZANT OF THE FCC SHOT CLOCK.

b. FOLLOWING AN EXPEDITED HEARING, ANY PARTY OF RECORD MAY ONLY APPEAL THE HEARING EXAMINER'S DECISION BY FILING A WRITTEN REQUEST TO PRESENT ORAL ARGUMENT BEFORE THE BOARD OF APPEALS ON AN **EXPEDITED BASIS** WITHIN 10 DAYS AFTER THE OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS ISSUES THE HEARING EXAMINER'S REPORT AND DECISION. THE FILING OF SUCH A REQUEST TRANSFERS JURISDICTION OVER THE MATTER WHILE ON APPEAL FROM THE HEARING EXAMINER TO THE BOARD OF APPEALS.

i. A WRITTEN REQUEST FOR AN APPEAL AND ORAL ARGUMENT ON AN EXPEDITED BASIS MUST BE FILED WITH THE BOARD OF APPEALS AND THE HEARING EXAMINER, AND MUST CONCISELY IDENTIFY THE MATTERS TO BE PRESENTED AT THE ORAL ARGUMENT. A PERSON REQUESTING AN **EXPEDITED BASIS** APPEAL MUST SEND A COPY OF THAT REQUEST TO THE HEARING EXAMINER, THE BOARD OF APPEALS, AND ALL PARTIES OF RECORD BEFORE THE HEARING EXAMINER.

ii. ANY PARTY OF RECORD MAY, NO LATER THAN 5 DAYS AFTER A REQUEST FOR AN APPEAL AND ORAL ARGUMENT IS FILED, FILE A WRITTEN OPPOSITION OR REQUEST TO PARTICIPATE IN ORAL ARGUMENT. AN OPPOSITION TO A REQUEST

FOR AN EXPEDITED BASIS APPEAL AND ORAL ARGUMENT MUST BE SENT TO THE BOARD OF APPEALS AND ALL PARTIES AS LISTED BY THE HEARING EXAMINER, AND MUST BE CONCISE AND LIMITED TO MATTERS RAISED BY THE PARTY WHO REQUESTED ORAL ARGUMENT.

iii. THE BOARD OF APPEALS MAY, IN ITS DISCRETION, GRANT OR DENY AN ORAL ARGUMENT REQUEST. IF THE BOARD OF APPEALS GRANTS A REQUEST FOR ORAL ARGUMENT, THE ARGUMENT MUST BE LIMITED TO MATTERS CONTAINED IN THE RECORD COMPILED BY THE HEARING EXAMINER.

iv. REGARDLESS OF WHETHER THE BOARD OF APPEALS HAS ELECTED TO HEAR ORAL ARGUMENT, THE BOARD OF APPEALS MUST, UNDER SECTION 7.3.1.F.2, APPROVE OR DENY THE **EXPEDITED BASIS** APPEALED CONDITIONAL USE APPLICATION; BUT THE BOARD OF APPEALS MUST NOT REMAND IT TO THE HEARING EXAMINER FOR CLARIFICATION OR THE TAKING OF ADDITIONAL EVIDENCE.

v. A REQUEST FOR AN APPEAL OF THE HEARING EXAMINER'S DECISION STAYS THE DECISION OF THE HEARING EXAMINER.

2. Board of Appeals

a. If the Board of Appeals is deciding the appeal of an application, it must make the necessary findings under Section 7.3.1.E and must:

i. vote in public session to approve, approve with conditions, or deny the application, or to remand the application to the Hearing Examiner for additional evidence or clarification. An affirmative vote of 4 members of the Board of Appeals is required to approve a conditional use when 5 members are present, otherwise an affirmative vote of 3 members is required. Any Board of Appeals member who votes on a conditional use and was not present for any portion of the oral argument must read and sign the transcript of that portion of the oral argument; and

ii. issue a resolution reflecting the Board of Appeals' decision no later than 30 days after voting on the matter, unless such time is extended by the Board of Appeals.

b. All matters decided under Section 7.3.1.F.2 must be decided on the basis of the evidence of record, but the Board of Appeals may decide any matter heard by the Hearing Examiner and presented to the Board of Appeals for decision solely on the basis of the Hearing Examiner's report and decision.

c. The Board of Appeals may supplement the specific requirements of this Chapter with any other requirements necessary to protect nearby properties and the general neighborhood.

d. IF THE BOARD OF APPEALS IS DECIDING AN APPEAL OF AN APPEAL OF AN APPLICATION FOR EXPEDITED HEARING, IT MUST PROCESS ITS DECISION COGNIZANT OF THE FCC SHOT CLOCK.

G. Appeal

Any party aggrieved by a decision of the Board of Appeals may, within 30 days after the Board of Appeals' action, file a petition for judicial review of the decision under the Land Use Article (Section 22-403).

H. Subsequent Actions

1. If the conditional use application is denied, a new application proposing substantially the same development for the same property may not be filed within 18 months after a final decision, unless the Hearing Examiner finds that the applicant provides material new facts that warrant reapplication.

2. Conforming Permits

DPS must not issue a sediment control permit, building permit, or use-and- occupancy permit for any building, structure, or improvement associated with a conditional use

- a. until the Hearing Examiner or Board of Appeals approves a conditional use; and
- b. unless any building, structure, or improvement satisfies the approved conditional use.

3. Permits Exempt from Conformance to Approved Conditional Uses

- a. On any property with an approved conditional use, DPS may, without a finding of conformance to the approved conditional use, issue a sediment control permit or building permit to:
 - i. construct an accessibility improvement;
 - ii. repair an existing structure without changing its height or footprint; or
 - iii. replace an existing structure to no more than the same footprint and height approved.
- b. DPS must submit a copy of any permit issued under Section 7.3.1.H.3 to the Hearing Examiner and the Board of Appeals for inclusion in the record of the conditional use.
- c. Any modification or improvement allowed under Section 7.3.1.H.3 does not require an amendment to the conditional use application.

I. Duration of Approval

1. A conditional use that is not established or has not obtained a building permit within 24 months from the date of the issuance of the decision or resolution expires, unless a longer period is established by the decision or resolution.
2. After the decision, the Board of Appeals or the Hearing Examiner may extend the time limit for a conditional use to be established or obtain a building permit if the evidence of record establishes that drawing of architectural plans, preparation of the land, or other factors involved in the particular use will delay the start of construction or the establishment of the use beyond the period of validity. An individual extension must not exceed 12 months. If the Board of Appeals or the Hearing Examiner grants an

extension, it must set a date by which the erection or alteration of the building must begin or the use must be established.

3. Development activities under Section 7.3.1 must satisfy the approved conditional use and any conditions, including operational restrictions.
4. The conditional use holder must notify the Board of Appeals or the Hearing Examiner of any change in land ownership or change in circumstances or conditions affecting the conditional use.

J. Recording Procedures

1. The Hearing Examiner or the Board of Appeals must maintain in their permanent files any conditional use application that they approve, along with any written decision.
2. A copy or notice of the decision of the Board of Appeals or Hearing Examiner on each conditional use application must be sent to the applicant, the Board of Appeals or Hearing Examiner, as appropriate, the Planning Board, DPS, the Department of Finance, and any other parties of record.
3. The Planning Director must indicate the decision on the official zoning map by use of an appropriate code number or symbol.

K. Amendments

1. Major Amendment

- a. A major amendment to a conditional use is one that changes the nature, character, or intensity of the conditional use to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected, when considered in combination with the underlying conditional use.
- b. An application for a major amendment to a conditional use must be filed with the Hearing Examiner, and it follows the same procedures, must meet the same criteria, and must satisfy the same requirements as the original conditional use application, except that:
 - i. the public hearing must be limited to consideration of the proposed modifications specified in the notice of public hearing and to those aspects of the conditional use that are directly related to those proposals; and
 - ii. the Hearing Examiner or, if the matter is appealed, the Board of Appeals, may require the underlying conditional use to satisfy the conditional use requirements of the applicable zone, to the extent necessary to avoid substantial adverse effects on the surrounding neighborhood.
- c. An application for an amendment to a special exception must be filed with the Board of Appeals, and it follows the procedures and criteria applicable to modifications of special exceptions as determined by the provisions of Section 59.7.7.1.B.

2. Minor Amendment

a. An application for a minor amendment to a conditional use must be filed with the Hearing Examiner, and it may be approved administratively by the Hearing Examiner. An application for a minor amendment to a special exception must be filed with the Board of Appeals, and it may be approved administratively by the Board of Appeals. A minor amendment to a conditional use is one that does not change the nature, character, or intensity of the conditional use to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected, when considered in combination with the underlying conditional use.

b. When a minor amendment is granted, the Board of Appeals or Hearing Examiner must send a copy of the resolution or decision, as applicable, to the applicant, the Board of Appeals or Hearing Examiner, as appropriate, the Planning Board, DPS, the Department of Finance, all parties entitled to notice at the time of the original filing, and current abutting and confronting property owners. Except for an amendment for a Telecommunications Tower, **WHEN THAT AMENDMENT IS GOVERNED BY THE FCC TIME RESTRICTION OF A SHOT-CLOCK LIMIT OF 60 DAYS OR LESS.** The resolution or decision, as applicable, must state that any party may request a public hearing on the Board of Appeals' or Hearing Examiner's action within 15 days after the resolution or decision is issued. The request for public hearing must be in writing, and must specify the reason for the request and the nature of the objection or relief desired. If a request for a hearing is received, the deciding body must suspend its administrative amendment and conduct a public hearing to consider whether the amendment substantially changes the nature, character, or intensity of the conditional use or its effect on the immediate neighborhood. If the Board of Appeals or Hearing Examiner determines that such impacts are likely, then the amendment application must be treated as a major amendment application. A decision of the Hearing Examiner may be appealed on the basis of the Hearing Examiner's record to the Board of Appeals. (11)

An application for A Any amendment to a Telecommunications Tower is also a minor amendment **THAT IS GOVERNED BY AN FCC SHOT CLOCK OF 60 DAYS OR LESS FOR THE DECISION MUST BE PROMINENTLY IDENTIFIED ON THE COVER PAGE OF THE AMENDMENT APPLICATION AS QUALIFYING FOR A THE FCC 6409 SHOT CLOCK PROVISIONS. AN AMENDMENT APPLICATION THAT QUALIFIES AS A 6409 APPLICATION FOLLOWS THE PROCESSES FOR MAJOR AND MINOR AMENDMENT, EXCEPT AN EXPEDITED HEARING MUST BE SCHEDULED WHENEVER A HEARING IS SCHEDULED.**

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L. Compliance and Enforcement

1. DPS and the Board of Appeals must establish a regular inspection program for conditional uses. DPS must perform the inspections according to the established schedule, and must perform additional inspections if DPS, the Board of Appeals, or the Hearing Examiner receive a complaint alleging failure to satisfy the terms or conditions of a conditional use. If a complaint is filed, DPS must inspect the premises of the

conditional use within 21 days after receiving the complaint, or more promptly if requested by the Board of Appeals or the Hearing Examiner, to determine the validity of the complaint.

2. If the inspection finds a violation of the terms or conditions of the conditional use, DPS must direct the conditional use holder to correct the violation. When the time to correct the violation expires, DPS must reinspect the premises. If the violation has not been corrected, DPS must file a report with the Board of Appeals or the Hearing Examiner describing the nature of the violation, the corrective action ordered by DPS, and the time allowed to correct the violation.
3. If DPS finds that no violation exists, it must report to the Hearing Examiner or Board of Appeals that the conditional use satisfies the terms and conditions of the conditional use approval.
4. If the Board of Appeals or the Hearing Examiner receives a written notice from DPS that the conditional use holder is violating the terms or conditions of a conditional use or the terms, conditions, or restrictions attached to the grant of any permit issued under the conditional use approval, the Board of Appeals or the Hearing Examiner must order the conditional use holder and the property owner to appear before the Board of Appeals or the Hearing Examiner to show cause why the conditional use should not be revoked.
5. The notice of a show cause hearing must be issued to the conditional use holder and the property owner by certified mail, return receipt requested. Notification must also be sent to DPS, and to any party who submitted a written complaint concerning the conditional use, and must:
 - a. include the nature of the alleged violations;
 - b. state that the hearing is limited to a consideration and a determination of the validity of the allegations; and
 - c. advise the conditional use holder and the property owner that failure to attend and participate in the hearing may result in revocation of the conditional use.
6. The Board of Appeals or the Hearing Examiner must conduct a show cause hearing limited to consideration of the issues identified in the notice of hearing. The Board of Appeals or the Hearing Examiner may reaffirm or revoke the conditional use or amend, add to, delete or modify the existing terms or conditions. The Board of Appeals or the Hearing Examiner must make a determination on the issues presented within 15 days after the close of record. The decision of the Board of Appeals or the Hearing Examiner must be by the adoption of a written resolution and copies of the resolution must be transmitted to the conditional use holder, the property owner, DPS, the Planning Director, and other relevant parties.
7. If DPS finds that a conditional use has been abandoned, DPS must forward written notice of its findings to the last recorded holder of the conditional use and to the property owner. The conditional use holder and property owner, within 60 days after the date of sending notice, must submit a written statement confirming the abandonment or challenging it and requesting that the use be continued.

- a. If the conditional use holder and the property owner acknowledge that the conditional use has been abandoned, DPS must notify the Board of Appeals or the Hearing Examiner, as appropriate. The Board of Appeals or Hearing Examiner must adopt and issue a written resolution finding the conditional use to have been abandoned and ordering it revoked.
 - b. If either the conditional use holder or the property owner challenges the abandonment and requests that the conditional use be continued, DPS must notify the Board of Appeals or the Hearing Examiner, as appropriate, and the Board of Appeals or Hearing Examiner must convene a public show cause hearing to determine whether or not the conditional use was abandoned and whether it should be revoked.
 - c. If neither the conditional use holder nor the property owner responds, DPS must notify the Board of Appeals or Hearing Examiner of its findings, and the Board of Appeals or Hearing Examiner, as appropriate must issue to the conditional use holder and the property owner an order to appear before them to show cause why the conditional use should not be revoked.
 - d. If neither the conditional use holder nor the property owner appears before the Board of Appeals or Hearing Examiner, as appropriate, to show cause why the conditional use should not be revoked, the deciding body must revoke the conditional use approval.
8. The Planning Director must note the revocation of any conditional use in the official zoning maps. (Legislative History: Ord. No. 18-08, § 26; Ord. No. 18-11, § 1; Ord. No. 18-25, §1.)

Amendment Part 3 – Fair Discretionary Waiver Process Authorizing Pre-Existing Replacement and New Pole Telecommunication Towers

At the Council's Worksession on July 13th, the Council unanimously voted to approve the ZTA waiver processes to authorize the extended heights of poles and to authorize entirely new (not pre-existing) poles. Amendment Part 3 recognizes and respects the general intentions of the Councilmembers, while seeking to align the standards and processes with the aforementioned fair Expedited Conditional Use Hearing process, and it also heeds some of the advice recommended text changes that were submitted by the County Executive's Office for the worksession.

Amendment Part 3 furthermore heeds the FCC requirements for shot clock processing and corrects timing mismatches in the ZTA. And like Amendment Part 2, it also aims to diminish the unfair advantage that the ZTA affords the applicant, and disparate favoritism that the ZTA provides toward affluent residents and groups, particularly those represented by counsel, and tries to provide fair opportunities for all affected residents to participate. Text changes expand opportunities for resident notice and participation, trying to ensure that the even the most vulnerable residents should not be cut out of the discretionary processes and not be denied fair notice, status, standing, and more. These added measures align with the other fairness measures added through Amendment Part 2.

Sec 3.5.2.C.2.d.

Where a proposed Telecommunications Tower does not meet the limited use standards because it is taller than allowed under 298 Section 3.5.2.C.2.b.vii or where there is no pre-existing or replacement pole so a new pole must be constructed, but otherwise meets the limited use standards under Section 3.5.2.C.2.b., the applicant may request a waiver THROUGH A WAIVER APPLICATION TO THE EXPEDITED CONDITIONAL USE HEARING from the Office of Zoning and Administrative Hearings. The application must meet the requirements of SECTION 7.3.1 AND SECTION 3.5.2.c.2.d.3

- i. A new pole may only be constructed if there is no utility pole or streetlight pole within 150 feet of the proposed location that could be used as a pre-existing pole or replacement tower
- ii. The applicant must notify by mail the municipality where the proposed tower will be located, as well as all property owners, homeowners associations, civic associations, condominium associations, and renter associations within 300 feet of the proposed tower. Proof of when notice was mailed must be submitted to the Office of Zoning and Administrative Hearings. A sign that satisfies Section 59.7.5 must also be posted at the site of the application at the same time.
- iii. Upon receipt of notice of a waiver, a property owner, homeowners association, civic association, condominium associations, and renter association within 300 feet of the proposed tower may file an objection and request a hearing with the Office of Zoning and Administrative Hearings. An objection must be filed within 20 days of when notice was mailed.

- iv. The Hearing Examiner must issue a decision within 10 days of the hearing. If no objection is filed, the Hearing Examiner may issue a decision without a public hearing
- v. If an objection is received, the Hearing Examiner must send notice of an adjudicatory hearing to the applicant and any aggrieved person who filed an objection within 10 days after the objection is received and conduct an such hearing within 30 days of the date the objection is received. Waivers and objections may be consolidated under Section 3.5.2.c.2.e.5.
- vi. The Hearing Examiner may only decide the issues raised by the waiver or objection. The Hearing Examiner will determine whether the proposed location minimizes visual impact as compared to any alternative location where the new tower could be located to provide service, and consistent with the Hearing Examiner's authority under Section 3.5.2.c.2.d. The maximum height allowed is 50 feet.

MEMORANDUM

July 14, 2021

TO: County Council

FROM: Livhu Ndou, Legislative Attorney

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

PURPOSE: Staff Report on County Executive’s July 13, 2021 Memorandum

The County Executive submitted a memorandum as well as an amended ZTA to the County Council on July 13, 2021. During a worksession that same day, the Council requested Staff Recommendations on each of the proposed changes. Those recommendations are outlined below.

A brief worksession to move additional amendments is scheduled for July 20, 2021. This will allow for a final version of the ZTA to be available for action on July 27, 2021. Council Staff recommends that all sponsored, proposed amendments be submitted by Thursday, July 15, 2021 at 12:00pm. This will allow sufficient time for the amendments to be included in the packet.

Changes Council Staff Recommends

Preferential Placement (pg. 2 of CE memo)

The Executive recommends adding the following language:

replacement of pre-existing streetlights or utility poles should replace pre-existing poles that are located closest to intersections, closest to property lines between dwellings, or are located on the non-front-facing side of residential properties, including greenways, properties used for a non-residential purpose whenever possible unless permission from the pole owner cannot be obtain or service cannot be provided by using a pole at an alternate location. The replacement towers must be at least 5 feet from the area between two parallel lines extending from the sides of a residential front door.

Often called “preferential placement” language, this amendment would encourage the location of towers at intersections, at the side and rear of residential properties, and away from direct line of sight of a front door. While Council Staff generally recommends approval of this amendment—minus some minor edits to reflect code language—it is important that any condition in a ZTA be enforceable. This provision does not state who would make the determination that “permission from the pole owner cannot be obtain[ed] or service cannot be provided by using a pole at an alternate location.” Council Staff recommends that, if this amendment were to move forward, the

burden be on the applicant to submit a signed affidavit proving that permission from the pole owner could not be obtained. Additionally, if this amendment is approved, DPS would have to determine whether service could be provided by using a pole at an alternate location.

Replacement Tower (pg. 5 of CE memo)

ZTA 19-07 includes provisions regarding the location of a tower. The Executive recommends that “the tower” be changed to “a replacement” tower. Council Staff recommends approval of this amendment.

[ii] v. A replacement The tower must be located:

Changes Council Staff Does Not Recommend

Height Waiver for Utility Poles (pg. 3 of CE memo)

The waiver and objection process in ZTA 19-07 is triggered when an application is filed for a new pole. Unlike replacement poles, new poles do not have an existing height. Therefore, an amendment was moved to require new poles to be the same height as the nearest pre-existing streetlight or utility pole, before the additional height that can be added to accommodate a small cell antenna. The Executive notes that utility poles are not generally regulated by zoning requirements, and so this section is most likely to be used to install new streetlights. Therefore, the Executive recommends the utility pole part of the provision be removed.

vii. The height of a new pole, including any attached antennas and equipment, must not be taller than the height of the nearest pre-existing streetlight [[or utility pole]]

Council Staff does not recommend approval of this amendment. First, this provision does not, as the Executive implies, regulate utility poles. Second, in some neighborhoods, particularly historic ones, streetlights can be relatively short. Lastly, applicants can still request a waiver for a height up to 50 feet, so the effect of this amendment would be minimal.

Standing to File an Objection (pg. 4 of CE memo)

The PHED Committee recommended notice and standing to file objections be limited to surrounding properties and associations within 300 feet of the proposed tower. The Executive proposes that notice of a waiver being filed be posted on the Office of Zoning and Administrative Hearings’ website within 2 business days, and that any resident be able to file an objection. Only those objections from persons and organizations within the mailed notice area would trigger a hearing. Then, any resident who objected can participate in the hearing.

Council Staff does not recommend approval of this amendment. First, OZAH’s hearings are usually open to the public and anyone can testify. However, the hearing examiner has broad authority to reject irrelevant testimony, such as dangers to health or devaluation of their property. Second, Councilmembers should also consider whether the benefits of having more residents

object and testify outweigh the benefits of having those within 300 feet of the proposed tower have more time to voice their concerns. Council Staff believes those most closely impacted by the pole should be provided a higher priority than others. Given the additional time and costs necessary to process more objections, Council Staff does not recommend approval of this amendment.

Requests for Postponement (pg. 4 of CE memo)

ZTA 19-07 allows the Hearing Examiner to postpone the hearing for up to 30 days at the request of the applicant. The Executive recommends granting the right to request a postponement to other parties as well. While this might seem like a minor change, it would result in an issue with the shot clock. Council Staff's legal opinion is that if the postponement is requested by the applicant, the County would be less likely to be found in violation of the shot clock, since it is the applicant/provider who has pushed the shot clock out of bounds. This argument would not hold up if it was another party that requested the postponement. Therefore, Council Staff does not recommend approval of this amendment.

Distance for Notice (pg. 4 of CE memo)

Under the current conditional use process, notice is sent to all property owners and civic associations within ½ mile (2,640 feet) of the proposed tower. However, a 50-foot pole would not be visible ½ mile away, so this requirement would be very burdensome. That is why the PHED Committee reduced the notice requirement to 300 feet. The Executive recommends 1,000 feet. Council Staff does not recommend approval of this amendment because 1,000 feet is still a very large area. As illustration, 1,000 feet is over 3 football fields. While a 50-foot pole is as tall as a three-story building, it is only a few feet wide and therefore even less visible.

Providing Renters Notice (pg. 5 of CE memo)

The Executive proposes notice be sent to renters, in addition to property owners. Council Staff understands the policy reason behind this suggestion. However, additional research is needed to determine whether this information could be easily obtained, since the burden is on the applicant to provide this information in their initial application. One recommendation would be to provide notice to each unit in a building, addressed to the "resident." Since multiple tenants could be on a lease, requiring notice per tenant would be a heavy burden on both the applicant and the hearing examiner.

Overall, Council Staff does not recommend approval of this amendment. Tenants are not permanent, whereas the pole would be. That is why tenant notice is not usually required in conditional use cases. This amendment is also further complicated when considering condominiums, where the unit might have an owner but also be rented out. Lastly, a sign is required to be posted at the proposed site, which would provide renters with notice.

As a reminder, the FCC Order has a limit on fees. So the issue is two-fold: 1) additional burdens on an applicant could lead to a provider arguing that the County has increased their costs to the extent that even if the fee is reasonable, the costs are exorbitant; and 2) increasing the number of

applications that become conditional use or waiver and objection increases the County's costs in terms of processing applications.

Posting Notice on OZAH's Website (pg. 5 of CE memo)

The Executive recommends that the ZTA make explicit that notice of the acceptance of a conditional use application, and the information that would typically be mailed to the property owners, municipality, and association be posted on OZAH's website. In typical conditional use cases, this information must be posted on OZAH's website within 10 to 15 days. To meet the shot clock, the Executive recommends this notice be posted within 2 business days after an application is accepted. Since OZAH has 10 days from when an application is accepted to notify the relevant parties, Council Staff does not recommend approval of this amendment.

The Executive also recommends that objections be filed not just within 20 days of when notice is mailed, but within 20 days of when notice is mailed or posted by OZAH on its website, whichever is later. As discussed above, Council Staff does not believe that residents who do not receive mailed notice should be given standing to file an objection. Therefore, Council Staff does not recommend approval of this amendment.

Modification to Conditional Use and Waiver Process (pgs. 1-2 of CE memo)

The PHED Committee recommended a conditional use process for all towers that are proposed to be less than 30 feet from a building intended for human occupation, and a waiver and objection process for towers higher than the limited use standard but under 50 feet. The Executive proposes a conditional use process not just for a setback less than 30 feet, but also for additional height up to 50 feet.

In the Agricultural, Rural Residential, and Residential zones, where a Telecommunications Tower **proposes to install replacement pole less than 50 feet in height and does not meet the conditions of Section 3.5.2.C.2.b because the proposed replacement pole is taller or the proposed setback is shorter than permitted as a Limited Use, or is proposed to be a new Telecommunications Tower less than 50 feet in height** [[that is proposed to be less than 50 feet in height does not meet the limited use standards under Subsection 3.5.2.C.2.a]] [[is proposed to be less than 30 feet from any building intended for human occupation, excluding any setback encroachments allowed under Section 4.1.7.B.5,]] it may be permitted by the Hearing Examiner as a conditional use...

Where a proposed **new** Telecommunications Tower does not meet the limited use standards because [[it is taller than allowed under Section 3.5.2.C.2.b.vii or where]] there is no pre-existing or replacement pole so a new pole must be constructed, but **would** otherwise meets the limited use standards under Section 3.5.2.C.2.b. **if the new pole was replacing an existing pole**, the applicant may request a waiver from the Office of Zoning and Administrative Hearings. The application must meet the requirements of Sections 3.5.2.c.2.d.1. and 3.5.2.c.2.d.3.

The FCC Order includes in its definition of “small wireless facilities” those facilities that are “mounted on structures 50 feet or less in height including their antennas.” It is for this reason that the PHED Committee chose to include additional height in the waiver and objection process. While the Executive states that this would not be a large burden to industry, under the waiver and objection process there is no hearing if no one objects. While the hearings themselves are similar, it is a lower burden for the industry to use a waiver and objection process. While Council Staff agrees that community concerns should be balanced with the industry’s, given concerns raised by industry representatives that not allowing a height under 50 feet violates the FCC Order, Council Staff believes a waiver and objection process for additional height would be more appropriate.

3-Tiered Setback Proposal (pg. 2 of CE memo)

The Executive proposes setbacks be determined based on the speed limit of the right-of-way. These setbacks would be:

- Limited Use
 - 30 feet from dwelling when speed limit is greater than 50 mph
 - 45 feet when speed limit is between 35-50 mph
 - 75 feet when speed limit is less than 35 mph
- Conditional Use
 - 10 feet from dwelling when speed limit is greater than 50 mph
 - 30 feet when speed limit is between 35-50 mph
 - 60 feet when speed limit is less than 35 mph

As discussed in the July 13, 2021 Council Staff memorandum, a setback of 60 feet could be considered an effective prohibition of service based on the density of streetlights and utility poles in certain areas. The setbacks based on speed limit, as outlined by the Executive, would effectively prohibit the installation of towers on residential streets, where speed limits are lowest but need may be highest. In addition, on many busy downtown streets in the County, the speed limit and setbacks for buildings are low.

It is unclear whether the Executive reached out to the Department of Transportation about this approach. However, Council Staff does not recommend this tiered approach. Careful consideration was given to the setbacks during the PHED Committee worksessions based on GIS analysis, information about the width of streets in the County, and the ZTA’s intent to allow more small cell antennas.

Height Limits (pgs. 2-3 of CE memo)

ZTA 19-07 establishes the same height increase regardless of the zone. That increase is 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. The Executive proposes different height standards for the Commercial/Residential, Industrial, and Employment zones than for the Agricultural, Rural Residential, and Residential zones.

- (b) In the Agricultural, Rural Residential, and Residential zones, for streetlights:**
- (1) 25 feet where the height of the pole being replaced is less than 20 feet tall;**
- (2) plus 6 feet more than the height of pole being replaced if the pole being replaced is 20 feet tall or more in height.**
- [(b)](c)** for utility poles and parking lot lights, the height of the pre-existing utility or parking lot light pole plus 10 feet.

This amendment allows a maximum height of 25 feet where the height of the pole being replaced is less than 20 feet tall; and plus 6 additional feet where the height of the pole being replaced is 20 feet tall or more. The issue with this amendment, as discussed above, is that the FCC defines small wireless facilities as those 50 feet or less and, as expressed by providers, not allowing up to 50 feet could lead to an effective prohibition under a strict interpretation of the FCC order. However, these are limited use standards. So, if an applicant were to request additional height, the waiver and objection process would be triggered. In this way, there would not be a violation of the FCC order. Council Staff has several concerns with this amendment. First, it would likely increase the number of applications that would then go through the waiver and objection process instead of limited use, which puts an additional burden on OZAH. Second, it could have a negative effect on co-location as the size of the pole would decrease.

Height of Replacement Poles in Commercial Areas (pg. 3 of CE memo)

Under both ZTA 19-07 as recommended by the PHED Committee and current law, the height of a replacement pole is 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. The Executive recommends that, in commercial areas, the height of the pole before the added height be the height of the pole being replaced or the height of the tallest streetlight pole within 50 feet. The justification for this amendment is that shorter poles are sometimes located closer to intersections for both aesthetic and technical reasons. This amendment would keep replacement poles at only a few feet taller than the nearest taller pole. The amendment reads:

- vii.** The height of the tower, including any attached antennas and equipment, must not exceed:
- (a) In the Commercial/Residential, Industrial, and Employment zones** for streetlights, the height of the pole that is being **replaced or the height of the tallest streetlight pole within 50 feet:**

First, Council Staff notes that the Executive's memo says the tallest streetlight pole within 30 feet, while the ZTA itself says the tallest streetlight pole within 50 feet. While Council Staff is not opposed to this amendment, the actual effect would be minimal. First, the language would have to be amended to read "the height of the pole that is being replaced or the height of the tallest streetlight pole within 50 feet, whichever is greater." Second, a waiver would still be possible, so this would place additional burdens in terms of requiring a hearing. Third, section (b) would have to be amended to provide the previously-established heights for the agricultural and residential zones.

Consolidation (pg. 4 of CE memo)

Under the current ZTA, applications for consolidation must be filed within 30 days of each other. The Executive, with the support of OZAH, proposes an amendment to require all applications for consolidation to be filed on the same date. As stated in Council Staff's July 13, 2021 memorandum, requiring all consolidated applications to be filed on the same day would mean that an applicant who filed an application on day 5, whose application would otherwise qualify for consolidation, could not have the second application consolidated with the first. This would defeat the purpose of allowing consolidation, which is efficiency.

Council Staff understands the concern about having to grant a request to consolidate on day 29. However, ZTA 19-07 states that:

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.*
(emphasis added)

This language gives the Hearing Examiner authority to regulate the proceedings, including how and if motions are consolidated. In other words, the Hearing Examiner may deny a motion for consolidation that is submitted on day 29. If ZTA 19-07 is enacted, OZAH will likely need to amend its rules of procedure. In doing so, this authority can be clarified. Therefore, Council Staff does not recommend approval of this amendment.

Board of Appeals (pg. 4 of CE memo)

The Executive recommends restoring the Board of Appeals' role in the hearing process. Council Staff does not recommend approval of this amendment. It was after much careful deliberation by the PHED Committee, Council Staff, OZAH, BOA, and the County Attorney's Office that the Board of Appeals was removed from the modified conditional use process. It was determined that without this modification, it would not be possible to meet the federally-mandated shot clock.