



Montgomery  
County Council

**Committee:** PHED  
**Staff:** Livhu Ndou, Legislative Attorney  
Pamela Dunn, Senior Legislative Analyst  
**Purpose:** Final action – vote expected  
**Keywords:** #TelecommunicationsTowers

AGENDA ITEM #4D  
July 27, 2021  
**Action**

## 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 Toregas, 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.

Several amendments have been approved by the Council regarding height, preferential placement, pole proliferation, and tree loss minimization.

**This report contains:**

Council Staff Memorandum	Pages 1-4
ZTA 19-07	© 1-19
Council Staff June 29 <sup>th</sup> Memorandum	© 20-34
County Executive June 29 <sup>th</sup> Memorandum	© 35-37
Council Staff July 13 <sup>th</sup> Memorandum	© 38-57
County Executive July 13 <sup>th</sup> Memorandum	© 58-82
Councilmember Navarro Proposed Amendment	© 83
Councilmember Glass Proposal	© 84-85
Council President Hucker Proposed Amendment	© 86-88
Councilmember Katz Proposed Amendment	© 89-112
Planning Board Recommendation	© 113-115
Planning Staff Recommendation	© 116-122

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Action

**MEMORANDUM**

July 22, 2021

TO: County Council

FROM: Livhu Ndou, Legislative Attorney

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

PURPOSE: Action

**Introduction**

This memorandum will focus on the process laid out by ZTA 19-07 in its current form. Prior memoranda and attachments are included in this packet for reference.

**Background**

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

ZTA 19-07 would: allow certain telecommunications towers as a limited or conditional use in certain residential zones; revise the standards for telecommunications towers allowed as a limited or conditional use; revise the conditional use findings required for the replacement of a pre-existing pole; and generally amend the use requirements to address certain telecommunications towers.

A public hearing was held on November 19, 2019. Most of the public testimony was in opposition and expressed concerns about RF emissions, Planning Staff involvement, lack of notice and public participation, post-construction inspection, the Tower Committee, an increase in energy use, a reduction in property values, and the effect on minority communities. Testimony in support refuted the claims about health effects, generally supported ZTA 19-07 but expressed concern it was still too restrictive, and supported better broadband coverage in the County. The County Council has also received significant written testimony in the years since ZTA 19-07 was first introduced.

The Planning, Housing, and Economic Development (PHED) Committee had worksessions on January 23, 2020; February 10, 2021; and March 10, 2021. The PHED Committee recommended approval of ZTA 19-07 with several amendments at its March 10, 2021 worksession. Those amendments included

introducing a waiver and objection process for new poles and poles up to 50 feet in height; reducing the setback for a limited use to 30 feet; pole proliferation language; and notice requirements.

The full Council had worksessions on June 29, 2021; July 13, 2021; and July 20, 2021. The County Executive submitted proposed amendments. Those amendments and additional amendments submitted by Councilmembers were reviewed at the July 13<sup>th</sup> and July 20<sup>th</sup> worksessions.

Final action is scheduled for July 27, 2021.

## **Provisions of ZTA 19-07**

### ***Limited Use***

ZTA 19-07 will allow towers as a limited use if the tower would replace a pre-existing utility pole, streetlight pole, or site plan-approved parking lot light pole. 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* – In the Commercial/Residential, Industrial, and Employment zones, the tower must be at least 10 feet from an existing building. In the Agricultural, Rural Residential, and Residential zones the tower must be at least 30 feet from any building intended for human occupation.
- *Location* – A replacement tower must be within 2 feet of the base of the pre-existing pole and at the same distance from the curb line. It must also be outside of the roadway clear zone and located where it can allow for adequate sight distance. It must also comply with streetlight maintenance requirement.
- *Pole proliferation* – A replacement tower must be at least 150 feet from the nearest antenna occupied or controlled by the same carrier.
- *Preferential placement* – When choosing a replacement pole, it must replace pre-existing poles that are close to intersections, along non-front-facing sides of residential properties, abutting non-residential properties, and not in front of residential front doors. If these standards cannot be met, then the applicant must provide an affidavit stating that either permission from the pole owner could not be obtained or service could not be provided at an alternate location.
- *Removal* – 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 the replacement utility pole is installed. If a tower does not have a streetlight, the tower must be removed at the expense of the owner if not in use for longer than 12 months, and the Tower Committee must be notified within 30 days of the removal.
- *Height* – In the Commercial/Residential, Industrial, and Employment zones, the height of a pole is the height of the pole that is being replaced, or the height of the tallest streetlight pole within 50 feet, whichever is greater; and then plus 6 feet when abutting a right-of-way with a paved width of 65 feet or less; or plus 15 feet when abutting a right-of-way with a paved width of greater than 65 feet. In the Agricultural, Rural Residential, and Residential zones, the height is the height of the streetlight being replaced plus 6 feet when abutting a right-of-way with a paved 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 plus 15 feet when abutting a right-of-way with a paved width greater than 65 feet. For utility poles and parking lot light poles, the height of the replacement tower is the height of the pre-existing pole plus 10 feet.

- *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. The tower must include a replacement streetlight if the pre-existing pole had a streetlight. The design of a replacement tower in the public right-of-way must be approved by the Department of Transportation.
- *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.
- *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.

### ***Modified Conditional Use***

ZTA 19-07 has a modified conditional use process in order to meet the FCC’s shot clock. This modified conditional use process is for all applications for towers that are less than 30 feet from a building intended for human occupation. The setback is measured from the base of the support structure. 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.

The application must be reviewed by the Tower Committee, who must provide a recommendation. The Tower Committee must issue its recommendation within 20 days of accepting a complete application. Once that recommendation is received, the Planning Director must review the conditional use application for completeness only. This is not a substantive review. The Planning Director has 10 days to do this. The applicant must then file that recommendation with the Office of Zoning and Administrative Hearings (OZAH) at least 5 days before the public hearing. It must be no older than 90 days.

In the Agricultural, Rural Residential, and Residential zones, the application must include: property ownership or authorization; fees; 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 setback or reduces the height of the proposed tower.

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. The notice includes information about the filed application, including the hearing date, and notice that any changes to the hearing date or consolidation will be posted on OZAH’s website. A sign must also be posted at the site.

The Hearing Examiner may postpone the hearing for up to 30 days at the request of the applicant and must post notice of this change in hearing date on its website. In its review, the Hearing Examiner may request information from Planning Staff.

If the Hearing Examiner determines additional height and reduced setback are needed to provide service or will allow the tower to be located in a less visually obtrusive location, the Hearing Examiner may reduce the setback requirement or increase the height up to 50 feet. 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. The tower must be located to minimize its visual impact as compared to any alternative location where it could be located to provide service. Alternative locations are provided by the applicant with their initial application. ZTA 19-07 does not explicitly state that a resident, association, or the Hearing Examiner cannot provide an alternative location. But the Hearing Examiner must choose a location that both minimizes visual impact and provides service. The Hearing Examiner can require the tower be less visually obtrusive using screening, coloring, and other visual mitigation options, based on existing tree coverage and vegetation and the design and presence of other poles.

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 the initial application to be consolidated 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 Hearing Examiner may order consolidation if he or she finds that it will more fairly and efficiently resolve matters. If a motion to consolidate is granted, the applicant and opposition must include all proposed hearing exhibits with their pre-hearing statements. The Hearing Examiner will also have discretion over cross-examination and may limit the amount of time given to each party, but each side must be allowed equal time.

Appeals of the Hearing Examiner's decision go directly to Circuit Court, not the Board of Appeals.

### ***Waiver and Objection Process***

The waiver and objection process applies to all new poles and all requests for poles higher than allowed under the limited use standards. The maximum height allowed will be 50 feet. Of note, if a tower is less than 30 feet from a building intended for human occupation, even if it is new or taller than allowed under the limited use standards, it must go through the modified conditional use process described above. In addition, a new pole may only be constructed if there is no utility or streetlight pole within 150 feet of the proposed location that could be used as a pre-existing or replacement pole.

The height of a new streetlight or utility pole is calculated by measuring the height of the nearest pre-existing streetlight or utility pole 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 plus 15 feet when abutting a right-of-way with a paved section width greater than 65 feet. The applicant can also request a waiver for additional height, if necessary.

Appeals of the Hearing Examiner's decision go directly to Circuit Court, not the Board of Appeals.

Zoning Text Amendment No.: 19-07  
Concerning: Telecommunications  
Towers – Limited Use  
Draft No. & Date: 7 – 7/15/2021  
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**

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

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**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.*

## OPINION

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

ZTA 19-07 will 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 amend the use requirements to address certain telecommunications towers.

In its report to the Council, 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 Council’s public hearing was on November 19, 2019. Most of the public testimony was in opposition and expressed concerns about RF emissions, Planning Staff involvement, lack of notice and public participation, post-construction inspection, the Tower Committee, an increase in energy use, a reduction in property values, and the effect on minority communities. Testimony in support refuted the claims about health effects and supported better broadband coverage in the County. Some testimony was generally in support but expressed concern that it was still too restrictive in light of the FCC Order. The Council also received significant written testimony in the years between introduction of ZTA 19-07 and its adoption.

The Council referred the text amendment to the Planning, Housing, and Economic Development (PHED) Committee for review and recommendation. The PHED Committee held worksessions on January 23, 2020; February 10, 2021; and March 10, 2021. The PHED Committee recommended approval of ZTA 19-07 with several amendments. Those amendments were:

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

- 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); and
- 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).

The full Council had worksessions on June 29, 2021; July 13, 2021; and July 20, 2021. During the worksessions, the Council discussed but did not approve amendments proposed by Councilmember Katz and Council President Hucker that used a tier approach to setbacks based on speed limit and the type of road, respectively. The Council approved various amendments proposed by Councilmembers Friedson, Navarro, Reimer, and Rice. These amendments addressed tree loss minimization, pole proliferation, preferential placement, and height.

For these reasons, and because to approve this amendment will assist in the coordinated, comprehensive, adjusted, and systematic development of the Maryland-Washington Regional District located in Montgomery County, Zoning Text Amendment No. 19-07 will be approved as amended.

#### *ORDINANCE*

*The County Council for Montgomery County, Maryland, sitting as the District Council for that portion of the Maryland-Washington Regional District in Montgomery County, Maryland, approves the following ordinance:*

1 **Sec. 1. DIVISION 59-3.1 is amended as follows:**

2 **DIVISION 3.1. Use Table**

3 \* \* \*

4 **Section 3.1.6. Use Table**

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

6 Division 4.9.

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

- 34                   iii.    In the Agricultural, Rural Residential, and Residential  
35                   zones, the pre-existing pole and the replacement tower  
36                   must be at least ~~[[60]] 30 feet from any building intended~~  
37                   for human occupation, excluding any setback  
38                   encroachments allowed under Section 4.1.7.B.5.
- 39                   [i]iv. Antennas must comply with the Antenna Classification  
40                   Standard A under Section 59.3.5.2.C.1.b, be concealed  
41                   within an enclosure the same color as the pole, be  
42                   installed at a minimum height of 15 feet, and be installed  
43                   parallel with the tower.
- 44                   [ii]v. A replacement ~~[[The]]~~ tower must be located:
- 45                   (a)    within 2 feet of the base of a pre-existing pole and  
46                   at the same distance from the curb line, or edge of  
47                   travel lane in an open section, as the pre-existing  
48                   pole in a public right-of-way;
- 49                   [(b) at least 10 feet from an existing building;]
- 50                   [(c)](b)    outside of the roadway clear zone as  
51                   determined by the Department of Permitting  
52                   Services;
- 53                   [(d)](c)    in a manner that allows for adequate sight  
54                   distances as determined by the Department of  
55                   Permitting Services; ~~[[and]]~~
- 56                   [(e)](d)    in a manner that complies with streetlight  
57                   maintenance requirements as determined by the  
58                   Department of Transportation~~[[.]]~~;
- 59                   (e)    at least 150 feet from the nearest antenna occupied  
60                   or controlled by the same carrier; and

61 (f) whenever it is legally and technically feasible,  
62 replacement poles should replace pre-existing poles  
63 that are located closest to intersections, closest to  
64 property lines between dwellings, along the non-  
65 front-facing side of residential properties, or along  
66 abutting properties used for a non-residential  
67 purpose. In addition, the replacement towers must  
68 be at least 5 feet from the area between two parallel  
69 lines extending from the sides of a residential front  
70 door. If the applicant cannot meet the foregoing  
71 standards, the applicant must include in their  
72 application an affidavit proving that either  
73 permission from the pole owner cannot be obtained  
74 or service cannot be provided using a pole at an  
75 alternate location.

76 [iii]vi. A pre-existing streetlight or parking lot light pole must be  
77 removed within 10 business days after power is activated  
78 to the replacement tower, and a pre-existing utility pole  
79 must be removed within 180 days after a replacement  
80 utility pole is installed.

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

83 (a) in the Commercial/Residential, Industrial, and  
84 Employment zones, for streetlights, the height of  
85 the pole that is being replaced or the height of the  
86 tallest streetlight pole within 50 feet, whichever is  
87 greater:

- 88 (1) plus 6 feet when abutting a right-of-way  
89 with a paved section width of 65 feet or less;  
90 or  
91 (2) plus 15 feet when abutting a right-of-way  
92 with a paved section width greater than 65  
93 feet[.];

94 (b) in the Agricultural, Rural Residential, and  
95 Residential zones, for streetlights, the height of the  
96 pole that is being replaced:

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

- 102 (2) plus 15 feet when abutting a right-of-way  
103 with a paved section width greater than 65  
104 feet; and

105 ~~[(b)]~~(c) for utility poles and parking lot lights, the  
106 height of the pre-existing utility or parking lot light  
107 pole plus 10 feet.

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

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

113 [vii]x. Any equipment cabinet:

- 114 (a) must not exceed a maximum volume of 12 cubic  
115 feet;
- 116 (b) if used to support antennas on a replacement  
117 streetlight pole, must be installed in the  
118 Telecommunications Tower base or at ground  
119 level, unless this requirement is waived by the  
120 Department of Transportation;
- 121 (c) must be the same color or pattern as the pre-  
122 existing tower[, except as provided in Section  
123 59.3.5.2.C.2.b.vii(d)] , except as provided in  
124 Section 3.5.2.C.b.x(d); and
- 125 (d) may be a stealth design approved for safety by the  
126 Department of Transportation.
- 127 [viii]xi. The tower must include a replacement streetlight,  
128 if a streetlight existed on the pre-existing pole.
- 129 [ix]xii. The design of a replacement tower located in a  
130 public right-of-way, including the footer and the  
131 replacement streetlight, must be approved by the  
132 Department of Transportation.
- 133 [x]xiii. The noise level of any [fans] equipment must  
134 comply with Chapter 31B.
- 135 [xi]xiv. Signs or illumination [on the antennas or support  
136 structure], except a streetlight, on the antennas or support  
137 structure are prohibited unless required by the Federal  
138 Communications Commission or the County.
- 139 [xii]xv. The owner of the tower [or the antenna attached to  
140 the tower] must maintain [[their]] the tower[,]. The



141 owner of the antenna must maintain the [antennas,]  
142 antenna and equipment in a safe condition[,]. Both  
143 owners must remove graffiti[,] and repair damage [[from  
144 their]] to the facility.

145 [xiii] xvi. If a tower does not have a streetlight, the tower  
146 must be removed at the [cost] expense of the owner of  
147 the tower when the tower is no longer in use for more  
148 than 12 months. Any antenna and equipment must be  
149 removed at the [cost] expense of the owner of the  
150 antenna and equipment when the [antennas] antenna and  
151 equipment are no longer in use for more than 12 months.  
152 The [Telecommunications] Transmission [Facilities]  
153 Facility Coordinating Group must be notified within 30  
154 days of the removal.

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

162 i. Before the Hearing Examiner approves any conditional  
163 use for a Telecommunications Tower, the proposed  
164 facility must be reviewed by the [County] Transmission  
165 Facility Coordinating Group. The applicant for a  
166 conditional use must file a recommendation from the  
167 Transmission Facility Coordinating Group with the

168 Hearing Examiner at least 5 days before the date set for  
169 the public hearing. The recommendation must be no  
170 more than 90 days old when the conditional use  
171 application is accepted.

172 \* \* \*

173 d. In the Agricultural, Rural Residential, and Residential zones,  
174 where a Telecommunications Tower [[that is proposed to be  
175 less than 50 feet in height does not meet the limited use  
176 standards under Subsection 3.5.2.C.2.a]] is proposed to be less  
177 than 30 feet from any building intended for human occupation,  
178 excluding any setback encroachments allowed under Section  
179 4.1.7.B.5, it may be permitted by the Hearing Examiner as a  
180 conditional use without regard to Section 7.3.1 only if the  
181 following procedures and standards are satisfied:

- 182 i. An application must include:
- 183 (a) the subject property's ownership and, if the  
184 applicant is not the owner, authorization by the  
185 owner to file the application;
  - 186 (b) fees as approved by the District Council;
  - 187 (c) a statement of how the proposed development  
188 satisfies the criteria to grant the application;
  - 189 (d) a certified copy of the official zoning vicinity map  
190 showing the area within at least 1,000 feet  
191 surrounding the subject property;
  - 192 (e) a written description of operational features of the  
193 proposed use;

- 194 (f) plans showing existing buildings, structures,  
195 rights-of-way, tree coverage, vegetation, historic  
196 resources, and the location and design of  
197 streetlights, utilities, or parking lot poles within  
198 300 feet of the proposed location;
- 199 (g) a list of all property owners, homeowners  
200 associations, civic associations, condominium  
201 associations, and renter associations within 300  
202 feet of the proposed tower;
- 203 (h) plans showing height and architectural design of  
204 the tower and cabinets, including color materials,  
205 and any proposed landscaping and lighting;
- 206 (i) photograph simulations with a direct view of the  
207 tower and site from at least 3 directions;
- 208 (j) at least one alternative site that maximizes the  
209 setback from any building intended for human  
210 occupation or reduces the height of the proposed  
211 tower.
- 212 ii. Before the Hearing Examiner reviews any conditional  
213 use for a Telecommunications Tower, the proposed  
214 facility must be reviewed by the Transmission Facility  
215 Coordinating Group. The Transmission Facility  
216 Coordinating Group must [[declare whether the  
217 application is complete,]] verify the information in the  
218 draft application[[,]] and must issue a recommendation  
219 within 20 days of accepting a complete  
220 Telecommunications Tower application. The applicant

221 for a conditional use must file a complete copy of the  
222 recommendation from the Transmission Facility  
223 Coordinating Group with the Hearing Examiner at least  
224 [[30]] 5 days before the date set for the public hearing.  
225 The Transmission Facility Coordinating Group  
226 recommendation must have been made within 90 days of  
227 its submission to the Hearing Examiner.

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

234 [[iii]]iv. The Hearing Examiner must schedule a public  
235 hearing to begin within 30 days after the date a complete  
236 application is accepted by the Hearing Examiner.

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

- 245 (1) the filed application;  
246 (2) the hearing date; and

247 (3) information on changes to the hearing date  
248 or the consolidation found on the Office of  
249 Zoning and Administrative Hearing’s  
250 website.

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

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

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

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

265 ~~[[v]]~~vi. ~~[[a]]~~ The Telecommunications Tower must be at  
266 least 60 feet from any building intended for human  
267 occupation, excluding encroachments that are  
268 allowed under Section 4.1.7.B.5 and no taller than  
269 30 feet; or]]

270 ~~[[b]]~~ if]] If the Hearing Examiner determines that  
271 additional height and reduced setback are needed  
272 to provide service or a reduced setback or  
273 increased height will allow the support structure to

274 be located on the property in a less visually  
275 obtrusive location, the Hearing Examiner may  
276 reduce the setback requirement [[to at least 30  
277 feet]] or increase the height up to 50 feet. In  
278 making this determination, the Hearing Examiner  
279 must consider the height of the structure,  
280 topography, existing tree coverage and vegetation,  
281 proximity to nearby residential properties, and  
282 visibility from the street.

283 ~~[[vi]]~~vii. The Hearing Examiner may not approve a  
284 conditional use if the use abuts or confronts an individual  
285 resource or is in a historic district in the Master Plan for  
286 Historic Preservation.

287 ~~[[vii]]~~viii. The tower must be located to minimize its visual  
288 impact as compared to any alternative location where the  
289 tower could be located to provide service. Neither  
290 screening under Division 6.5 nor the procedures and  
291 standards under Section 7.3.1 are required. The Hearing  
292 Examiner may require the tower to be less visually  
293 obtrusive by use of screen, coloring, or other visual  
294 mitigation options, [[after the character of residential  
295 properties within 400 feet,]] based on existing tree  
296 coverage and vegetation[.]] and design and presence of  
297 streetlight, utility, or parking lot poles.

298 e. When multiple applications for Telecommunications Towers  
299 raise common questions of law or fact, the Hearing Examiner  
300 may order a joint hearing or consolidation of any or all of the

301 claims, issues, or actions. Any such order may be prompted by  
302 a motion from any party or at the Examiner's own initiative.  
303 The Hearing Examiner may enter an order regulating the  
304 proceeding to avoid unnecessary costs or delay. The following  
305 procedures for consolidated hearings govern:

- 306 i. All applications must be filed within 30 days of [[each  
307 other]] the initial application to be consolidated and be  
308 accompanied by a motion for consolidation.
- 309 ii. The proposed sites, starting at a chosen site, must be  
310 located such that no site is further than 3,000 feet from  
311 the chosen site in the application.
- 312 iii. The proposed sites must be located in the same zone,  
313 within the same Master Plan area, and in a neighborhood  
314 with similar building heights and setbacks.
- 315 iv. Each tower must be of the same or similar proposed  
316 height, structure, and characteristics.
- 317 v. A motion to consolidate must include a statement  
318 specifying the common issues of law and fact.
- 319 vi. The Hearing Examiner may order a consolidated hearing  
320 if the Examiner finds that a consolidated hearing will  
321 more fairly and efficiently resolve the matters at issue.
- 322 vii. If the motion to consolidate is granted, the applicant and  
323 opposition must include all proposed hearing exhibits  
324 with their pre-hearing statements.
- 325 viii. The Hearing Examiner has the discretion to require the  
326 designation of specific persons to conduct cross-  
327 examination on behalf of other individuals and to limit

328 the amount of time given for each party's case in chief.  
329 Each side must be allowed equal time.

330 f. Where a proposed Telecommunications Tower does not meet  
331 the limited use standards because it is taller than allowed under  
332 Section 3.5.2.C.2.b.vii or where there is no pre-existing or  
333 replacement pole so a new pole must be constructed, but  
334 otherwise meets the limited use standards under Section  
335 3.5.2.C.2.b, the applicant may request a waiver from the Office  
336 of Zoning and Administrative Hearings. The application must  
337 meet the requirements of Sections 3.5.2.c.2.d.1 and  
338 3.5.2.c.2.d.3.

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

343 ii. The applicant must notify by mail the municipality where  
344 the proposed tower will be located, as well as all property  
345 owners, homeowners associations, civic associations,  
346 condominium associations, and renter associations within  
347 300 feet of the proposed tower. Proof of when notice was  
348 mailed must be submitted to the Office of Zoning and  
349 Administrative Hearings. A sign that satisfies Section  
350 59.7.5 must also be posted at the site of the application at  
351 the same time.

352 iii. Upon receipt of notice of a waiver, the municipality, a  
353 property owner, homeowners association, civic  
354 association, condominium association, or renter



355 association within 300 feet of the proposed tower may  
356 file an objection and request a hearing with the Office of  
357 Zoning and Administrative Hearings. An objection must  
358 be filed within 20 days of when notice was mailed.

359 iv. If an objection is received, the Hearing Examiner must  
360 send notice of an adjudicatory hearing to the applicant  
361 and any aggrieved person who filed an objection within  
362 10 days after the objection is received and conduct any  
363 such hearing within 30 days of the date the objection is  
364 received. Waivers and objections may be consolidated  
365 under Section 3.5.2.c.2.e.5.

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

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

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

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

387 [[f]]g. Any party aggrieved by the Hearing Examiner’s decision may  
388 file a petition for judicial review under the Maryland rules  
389 within 15 days of the publication of the decision.

390 \* \* \*

391 **Sec. 3. Tree Loss Minimization.** The County Executive must include tree  
392 loss minimization language in all franchise and license agreements signed after the  
393 effective date of ZTA 19-07. Critical damage to the root zones of trees as well as  
394 excessive pruning should be avoided in the installation of telecommunications  
395 towers, regardless of whether they are installed on a new, pre-existing, or  
396 replacement pole.

397 \* \* \*

398 **Sec. ~~[[3]]4.~~ Effective date.** This ordinance becomes effective 20 days after  
399 the date of Council adoption.

400

401 This is a correct copy of Council action.

402

403

404 \_\_\_\_\_  
Selena Mendy Singleton, Esq.

405 Clerk of the Council

**Worksession**

**M E M O R A N D U M**

June 24, 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

**Available Attendees:**

The following attendees will be available for questions:

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, 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, Office of the 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)  
Dr. Costis Toregas, IT Adviser, County Council

**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. Straw votes are expected if no additional worksession is scheduled. Final action will be in July.

### **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.<sup>1</sup> 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.

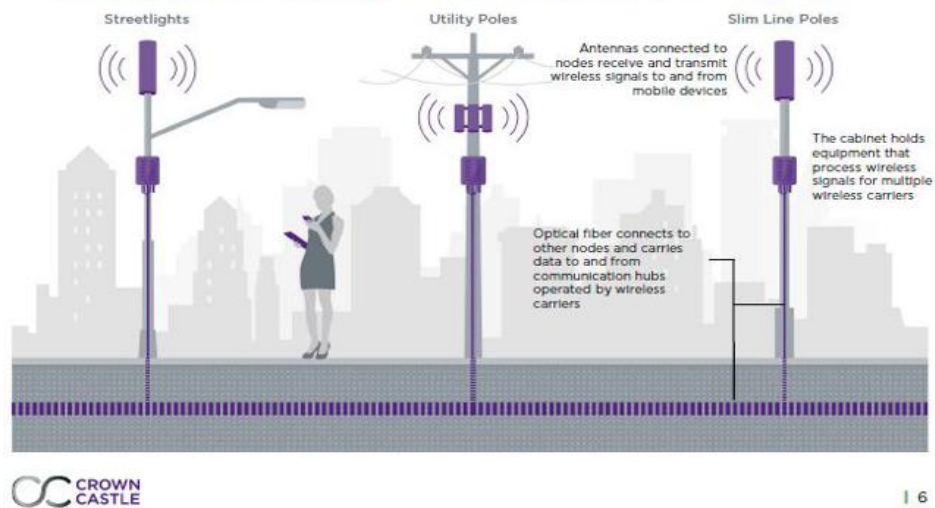
<sup>1</sup> This is not to be confused with the 5G wireless router that many people have in their homes. The 5G Wi-Fi router stands for 5Ghz (gigahertz) whereas 5G cellular, which stands for "5<sup>th</sup> generation", is the new system wireless carriers are installing.

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.

## What Are Small Cell Deployments?

Small cell deployments are complementary to towers, adding much needed coverage and capacity to urban and residential areas, venues, and anywhere large crowds gather



Source: Crown Castle.

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.

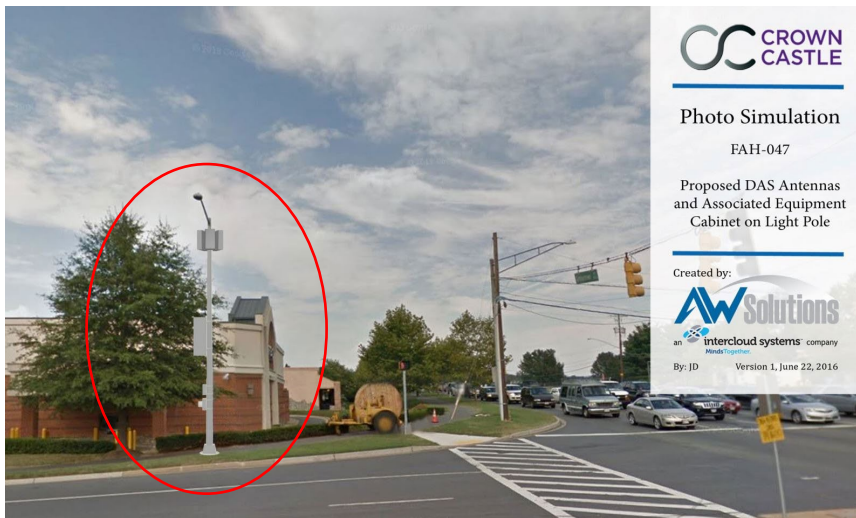


Photo simulation of a small cell antenna. Source: Crown Castle.



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.<sup>2</sup>

The overarching effect is that federal law bans states and local governments from “materially prohibiting” carriers from offering wireless service. The County 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 9<sup>th</sup> Circuit ruled on petitions filed by a coalition of local governments, including Montgomery County, challenging multiple FCC orders governing small cell telecommunications facilities. The 9<sup>th</sup> Circuit also ruled on the County’s separate petition, which argued that the FCC erred by not updating its regulations governing Radio Frequency (RF) emissions before issuing the small cell order.

The 9<sup>th</sup> 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

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

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 9<sup>th</sup> 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.

### ***Supreme Court Appeal***

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. No ruling has been issued yet. It is Council Staff’s opinion that this petition is not a reason to delay ZTA 19-07.

### **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
  - 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:<sup>3</sup>
  - 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.

<sup>3</sup> 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.

### 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

### ***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.<sup>4</sup> 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.

<sup>4</sup> In some jurisdictions, such as in Virginia, conditional use approval for a small cell pole is prohibited.

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 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.<sup>5</sup>

## ***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.

<sup>5</sup> 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 County Council to continue to work on ways of guaranteeing equitable coverage.



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  
Jason Sartori, Chief, Countywide Planning and Policy, Planning Department  
Benjamin Berbert, Planner Coordinator, Countywide Planning and Policy, Planning Department  
Lynn Robeson-Hannan, Director/Hearing Examiner, Office of Zoning and Administrative Hearings (OZAH)  
Derek Baumgardner, Hearing Examiner, Office of Zoning and Administrative Hearings (OZAH)  
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  
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, 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.

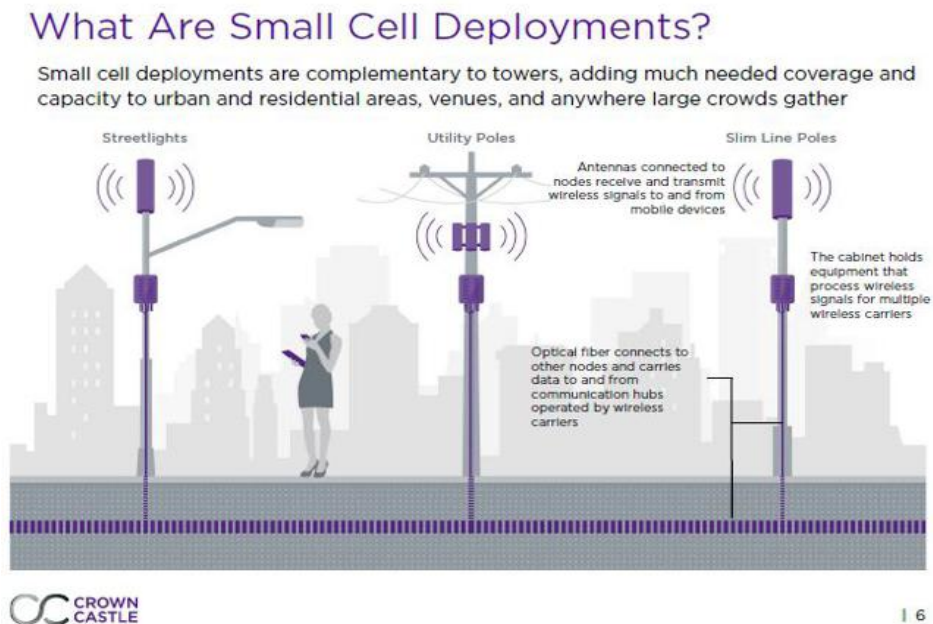
Second, the advancement and encouragement of technology has led to increases in mobile data demands and, with the resulting need to densify networks, 5G provides increased communication capacity and speed to users. The 2019 Annual Wireless Industry Survey found U.S. consumers used 82% more mobile data 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.<sup>1</sup> 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.

<sup>1</sup> 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 “5<sup>th</sup> 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.

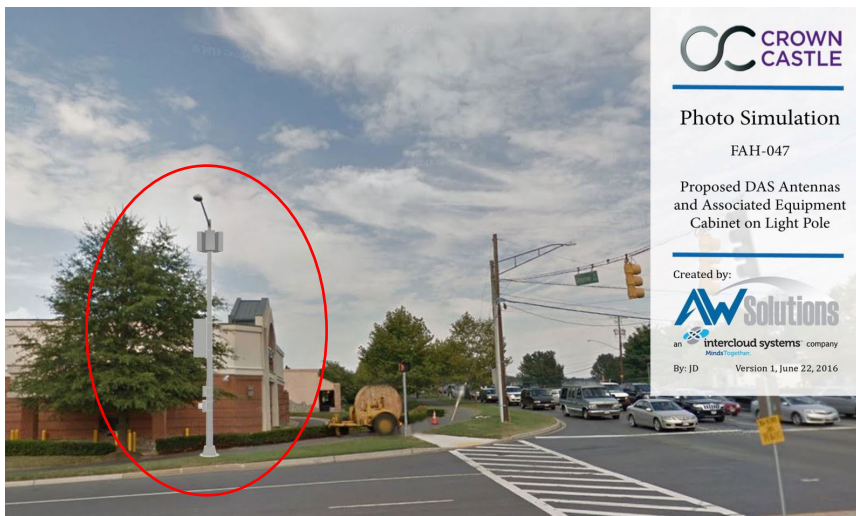


Photo simulation of a small cell antenna. Source: Crown Castle.





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.<sup>2</sup>

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 9<sup>th</sup> Circuit ruled on petitions filed by a coalition of local governments, including Montgomery County, challenging multiple FCC orders governing small cell telecommunications facilities. The 9<sup>th</sup> 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.

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

The 9<sup>th</sup> 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 9<sup>th</sup> 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.<sup>3</sup>

In *City of Eugene v. FCC*, before the U.S. Court of Appeals for the 6<sup>th</sup> Circuit, the issue was franchise fees.<sup>4</sup> 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

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

<sup>4</sup> 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:<sup>5</sup>
  - 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

<sup>5</sup> 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.<sup>6</sup> 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

<sup>6</sup> 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.<sup>7</sup>

## *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.

<sup>7</sup> 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 9<sup>th</sup> 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.



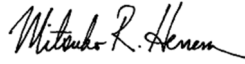


## OFFICE OF THE COUNTY EXECUTIVE

**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

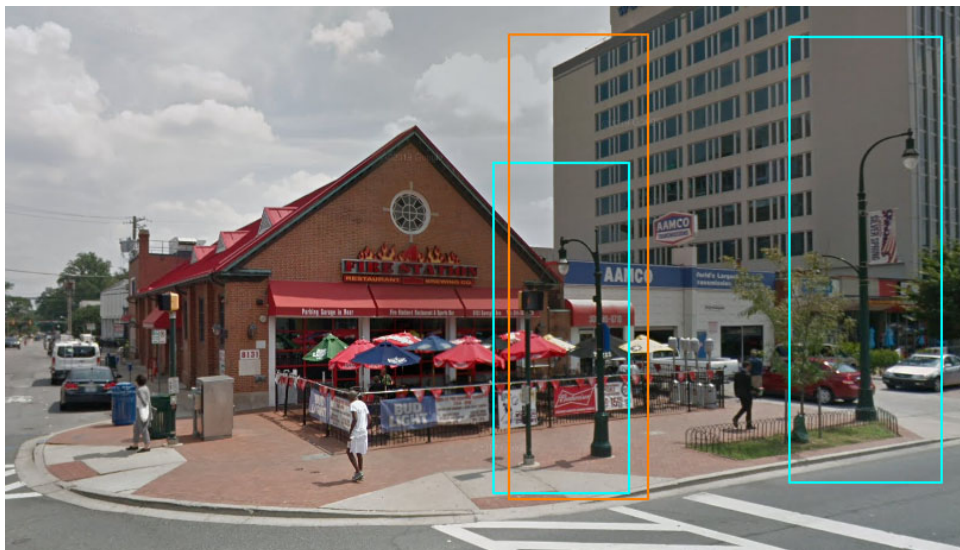
- Create separate height increases for Limited Use replacement poles in commercial and residential areas. Current height increase (6 feet when the road is 65 feet or less; 15 feet when the road is greater than 65 feet) would remain for Commercial/Residential, Industrial and Employment Zones.
- In Agricultural, 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](mailto: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 Toregas, 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**

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

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**AN AMENDMENT** to the Montgomery County Zoning Ordinance to:

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

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

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

**EXPLANATION:** **Boldface** indicates a Heading or a defined term.  
Underlining indicates text that is added to existing law by the original text amendment.  
**[Single boldface brackets]** indicate text that is deleted from existing law by original text amendment.  
Double underlining indicates text that is added to the text amendment by amendment.  
**[[Double boldface brackets]]** indicate text that is deleted from the text amendment by amendment.  
\* \* \* indicates existing law unaffected by the text amendment.

ORDINANCE

*The County Council for Montgomery County, Maryland, sitting as the District Council for that portion of the Maryland-Washington Regional District in Montgomery County, Maryland, approves the following ordinance:*

1 **Sec. 1. DIVISION 59-3.1 is amended as follows:**

2 **DIVISION 3.1. Use Table**

3 \* \* \*

4 **Section 3.1.6. Use Table**

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

6 Division 4.9.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

83 [iii] vi. A pre-existing streetlight or parking lot light pole  
84 must be removed within 10 business days after power is  
85 activated to the replacement tower, and a pre-existing  
86 utility pole must be removed within 180 days after a  
87 replacement utility pole is installed.

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- [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.

- 115 [vii] x. Any equipment cabinet:  
116 (a) must not exceed a maximum volume of 12 cubic  
117 feet;  
118 (b) if used to support antennas on a replacement  
119 streetlight pole, must be installed in the  
120 Telecommunications Tower base or at ground  
121 level, unless this requirement is waived by the  
122 Department of Transportation;  
123 (c) must be the same color or pattern as the pre-  
124 existing tower[, except as provided in Section  
125 59.3.5.2.C.2.b.vii(d)] 3.5.2.C.b.x(d); and  
126 (d) may be a stealth design approved for safety by the  
127 Department of Transportation.
- 128 [viii] xi. The tower must include a replacement streetlight,  
129 if a streetlight existed on the pre-existing pole.
- 130 [ix] xii. The design of a replacement tower located in a  
131 public right-of-way, including the footer and the  
132 replacement streetlight, must be approved by the  
133 Department of Transportation.
- 134 [x] xiii. The noise level of any [fans] equipment must  
135 comply with Chapter 31B.
- 136 [xi] xiv. Signs or illumination [on the antennas or support  
137 structure], except a streetlight, on the antennas or support  
138 structure are prohibited unless required by the Federal  
139 Communications Commission or the County.
- 140 [xii] xv. The owner of the tower [or the antenna attached to  
141 the tower] must maintain their tower[.]. The owner of the

142 antenna must maintain the [antennas,] antenna and  
143 equipment in a safe condition[,]. Both owners must  
144 remove graffiti[,] and repair damage from their facility.

145 [xiii] xvi. If a tower does not have a streetlight, the tower  
146 must be removed at the [cost] expense of the owner of  
147 the tower when the tower is no longer in use for more  
148 than 12 months. Any antenna and equipment must be  
149 removed at the [cost] expense of the owner of the  
150 antenna and equipment when the [antennas] antenna and  
151 equipment are no longer in use for more than 12 months.  
152 The [Telecommunications] Transmission [Facilities]  
153 Facility Coordinating Group must be notified within 30  
154 days of the removal.

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

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

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

172 \* \* \*

173 d. In the Agricultural, Rural Residential, and Residential zones,  
174 where a Telecommunications Tower **proposes to install**  
175 **replacement pole less than 50 feet in height and does not**  
176 **meet the conditions of Section 3.5.2.C.2.b because the**  
177 **proposed replacement pole is taller or the proposed setback**  
178 **is shorter than permitted as a Limited Use, or is proposed to**  
179 **be a new Telecommunications Tower less than 50 feet in**  
180 **height** [[that is proposed to be less than 50 feet in height does  
181 not meet the limited use standards under Subsection  
182 3.5.2.C.2.a]] **]]is proposed to be less than 30 feet from any**  
183 **building intended for human occupation, excluding any setback**  
184 **encroachments allowed under Section 4.1.7.B.5,]] it may be**  
185 **permitted by the Hearing Examiner as a conditional use without**  
186 **regard to Section 7.3.1 only if the following procedures and**  
187 **standards are satisfied:**

- 188 i. An application must include:
- 189 (a) the subject property's ownership and, if the  
190 applicant is not the owner, authorization by the  
191 owner to file the application;
  - 192 (b) fees as approved by the District Council;
  - 193 (c) a statement of how the proposed development  
194 satisfies the criteria to grant the application;

- 195 (d) a certified copy of the official zoning vicinity map  
196 showing the area within at least 1,000 feet  
197 surrounding the subject property;
- 198 (e) a written description of operational features of the  
199 proposed use;
- 200 (f) plans showing existing buildings, structures,  
201 rights-of-way, tree coverage, vegetation, historic  
202 resources, and the location and design of  
203 streetlights, utilities, or parking lot poles within  
204 ~~300 feet~~ **1,000 feet** of the proposed location;
- 205 (g) a list of all property owners, homeowners  
206 associations, civic associations, condominium  
207 associations, and renter associations within ~~300~~  
208 **1,000 feet** of the proposed tower;
- 209 (h) plans showing height and architectural design of  
210 the tower and cabinets, including color materials,  
211 and any proposed landscaping and lighting;
- 212 (i) photograph simulations with a direct view of the  
213 tower and site from at least 3 directions;
- 214 (j) at least one alternative site that maximizes the  
215 setback from any building intended for human  
216 occupation or reduces the height of the proposed  
217 tower.
- 218 ii. Before the Hearing Examiner reviews any conditional  
219 use for a Telecommunications Tower, the proposed  
220 facility must be reviewed by the Transmission Facility  
221 Coordinating Group. The Transmission Facility



222 Coordinating Group must [[declare whether the  
223 application is complete,]] verify the information in the  
224 draft application[[,]] and must issue a recommendation  
225 within 20 days of accepting a complete  
226 Telecommunications Tower application. The applicant  
227 for a conditional use must file a complete copy of the  
228 recommendation from the Transmission Facility  
229 Coordinating Group with the Hearing Examiner at least  
230 [[30]]5 days before the date set for the public hearing.  
231 The Transmission Facility Coordinating Group  
232 recommendation must have been made within 90 days of  
233 its submission to the Hearing Examiner.

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

240 iv. The Hearing Examiner must schedule a public hearing to  
241 begin within 30 days after the date a complete application  
242 is accepted by the Hearing Examiner.

243 (a) Within 10 days of when an application is accepted,  
244 the Office of Zoning and Administrative Hearings  
245 must notify the municipality where the proposed  
246 tower will be located, as well as all property  
247 owners **or occupants of rented properties,**  
248 homeowners associations, civic associations,

249 condominium associations, and renter associations  
250 within ~~[[300 feet]] 1,000 feet~~ of the application of:  
251 (1) the filed application;  
252 (2) the hearing date; and  
253 (3) information on changes to the hearing date  
254 or the consolidation found on the Office of  
255 Zoning and Administrative Hearing's  
256 website.

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

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

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

- 274 v. [[A]]The setback for a Telecommunications Tower must  
275 be [[set back, as]] measured from the base of the support  
276 structure.
- 277 vi. [(a) The Telecommunications Tower must be at least  
278 60 feet from any building intended for human  
279 occupation, excluding encroachments that are  
280 allowed under Section 4.1.7.B.5 and no taller than  
281 30 feet; or]]
- 282 [(b) if] **In making the following determinations, the**  
283 **Hearing Examiner must consider the height of**  
284 **the structure, topography, existing tree**  
285 **coverage and vegetation, proximity to nearby**  
286 **residential properties, and visibility from the**  
287 **street.**
- 288 **(a) If the Hearing Examiner determines that**  
289 **additional height and reduced setback are**  
290 **needed to provide service or a reduced**  
291 **setback or increased height will allow the**  
292 **support structure to be located on the**  
293 **property in a less visually obtrusive location,**  
294 **the Hearing Examiner may reduce the**  
295 **setback requirement, **to the distances stated****  
296 **below**[[to at least 30 feet]] or increase the  
297 **height up to 50 feet:]]**. In making this  
298 determination, the Hearing Examiner must  
299 consider the height of the structure,  
300 topography, existing tree coverage and

301 vegetation, proximity to nearby residential  
302 properties, and visibility from the street.]]

303 **(1) 10 feet when abutting a right-of-**  
304 **way with a speed limit greater than**  
305 **50 miles per hour;**

306 **(2) 30 feet when abutting a right-of-**  
307 **way with a speed limit at least 35**  
308 **miles per hour and no greater than**  
309 **50 miles per hour;**

310 **(3) 60 feet when abutting a right-of-**  
311 **way with a speed limit less than 35**  
312 **miles per hour.**

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

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

324 viii. The tower must be located to minimize its visual impact  
325 as compared to any alternative location where the tower  
326 could be located to provide service. Neither screening

327 under Division 6.5 nor the procedures and standards  
328 under Section 7.3.1 are required. The Hearing Examiner  
329 may require the tower to be less visually obtrusive by use  
330 of screen, coloring, or other visual mitigation options,  
331 [[after the character of residential properties within 400  
332 feet,]] based on existing tree coverage and vegetation,  
333 and design and presence of streetlight, utility, or parking  
334 lot poles.

335 e. When multiple applications for Telecommunications Towers  
336 raise common questions of law or fact, the Hearing Examiner  
337 may order a joint hearing or consolidation of any or all of the  
338 claims, issues, or actions. Any such order may be prompted by  
339 a motion from any party or at the Examiner's own initiative.  
340 The Hearing Examiner may enter an order regulating the  
341 proceeding to avoid unnecessary costs or delay. The following  
342 procedures for consolidated hearings govern:

343 i. **A motion for consolidation must be filed with all**  
344 **applications requesting to be consolidated. [[All**  
345 **applications must be filed within 30 days of each other**  
346 **and be accompanied by a motion for consolidation.]]**

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

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

- 353                    iv. Each tower must be of the same or similar proposed  
354                    height, structure, and characteristics.
- 355                    v. A motion to consolidate must include a statement  
356                    specifying the common issues of law and fact.
- 357                    vi. The Hearing Examiner may order a consolidated hearing  
358                    if the Examiner finds that a consolidated hearing will  
359                    more fairly and efficiently resolve the matters at issue.
- 360                    vii. If the motion to consolidate is granted, the applicant and  
361                    opposition must include all proposed hearing exhibits  
362                    with their pre-hearing statements.
- 363                    viii. The Hearing Examiner has the discretion to require the  
364                    designation of specific persons to conduct cross-  
365                    examination on behalf of other individuals and to limit  
366                    the amount of time given for each party's case in chief.  
367                    Each side must be allowed equal time.
- 368                    f. Where a proposed **new** Telecommunications Tower does not  
369                    meet the limited use standards because **[[it is taller than allowed**  
370                    under Section 3.5.2.C.2.b.vii or where**]]** there is no pre-existing  
371                    or replacement pole so a new pole must be constructed, but  
372                    **would** otherwise meets the limited use standards under Section  
373                    **3.5.2.C.2.b. if the new pole was replacing an existing pole,**  
374                    the applicant may request a waiver from the Office of Zoning  
375                    and Administrative Hearings. The application must meet the  
376                    requirements of Sections 3.5.2.c.2.d.1. and 3.5.2.c.2.d.3.
- 377                    i. A new pole may only be constructed if there is no utility  
378                    pole or streetlight pole within 150 feet of the proposed

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

381 ii. The applicant must notify by mail the municipality where  
382 the proposed tower will be located, as well as all property  
383 owners **or occupants of rented properties**, homeowners  
384 associations, civic associations, condominium  
385 associations, and renter associations within **[[300 feet]]**  
386 **1,000 feet** of the proposed tower. Proof of when notice  
387 was mailed must be submitted to the Office of Zoning  
388 and Administrative Hearings. A sign that satisfies  
389 Section 59.7.5 must also be posted at the site of the  
390 application at the same time. **The applicant must notify**  
391 **the Office of Zoning and Administrative Hearings by**  
392 **the following business day after notices are mailed,**  
393 **and the Office of Zoning and Administrative Hearings**  
394 **must post the notice of the request for waiver on its**  
395 **website within 2 business days of receipt of notice by**  
396 **the applicant.**

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

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**(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



432 height of the nearest pre-existing streetlight **||**or utility  
433 pole**|| plus 6 feet if nearest pre-existing streetlight pole**  
434 **is 20 feet or taller or not taller than 25 feet if the**  
435 **nearest pre-existing streetlight is less than 20 feet in**  
436 **height. **||**:**

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

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

441 **||g.** Any party aggrieved by the Hearing Examiner’s decision may  
442 file a petition for judicial review under the Maryland rules  
443 within 15 days of the publication of the decision.**||**

444  
445  
446

447 \* \* \*

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

450

451 This is a correct copy of Council action.

452

453

454 \_\_\_\_\_  
Selena Mendy Singleton, Esq.,

455 Clerk of the Council

456



**MONTGOMERY COUNTY COUNCIL**

**ROCKVILLE, MARYLAND**

**MEMORANDUM**

July 13, 2021

**TO:** Members of the County Council

**FROM:** Nancy Navarro, Chair, Government Operations & Fiscal Policy Committee

**SUBJECT:** Proposed amendment to Zoning Text Amendment 19-07, Telecommunications Towers – Limited Use

At today's worksession, I intend to propose the following amendment to the draft bill ZTA 19-07 in order to minimize negative effects to our county's tree canopy:

Sec. 3. Tree Loss Minimization. The County Executive must include tree loss minimization language in all franchise and license agreements signed after the effective date of ZTA 19-07. Critical damage to the root zones of trees as well as excessive pruning should be avoided in the installation of telecommunications towers, regardless of whether they are installed on a new, pre-existing, or replacement pole.

Residents have raised concerns about tree loss associated with the deployment of small cell towers. This amendment will allow us to provide more wireless connectivity in the County while maintaining our responsibility for environmental stewardship.

Please feel free to reach out to me if you have any questions or concerns about this amendment.

Copy to:  
Livhu Ndou, Legislative Attorney  
Pamela Dunn, Senior Legislative Analyst



**MONTGOMERY COUNTY COUNCIL**  
**ROCKVILLE, MARYLAND**

**EVAN GLASS**  
COUNCILMEMBER  
AT-LARGE

TRANSPORTATION & ENVIRONMENT COMMITTEE  
HEALTH AND HUMAN SERVICES COMMITTEE

**MEMORANDUM**

**TO:** Members of the County Council

**FROM:** Councilmember Evan Glass

**SUBJECT:** Proposed Working Group for Zoning Text Amendment 19-07

**DATE:** July 13, 2021

Two years after the introduction of Zoning Text Amendment (ZTA) 19-07, Council offices continue receiving a high volume of correspondence and questions from constituents throughout Montgomery County that warrant further clarification and technical assistance. I also believe it is important for us to examine the issue through a racial equity and social justice lens.

At today's worksession, I intend to propose that the Council appoint a working group to discuss ZTA 19-07 and to identify whether there are amendments that are agreeable to all participants. The working group would produce a memorandum or report by September 21, 2021 summarizing deliberations and addressing multiple issues, including outstanding community concerns and plans to expand 5G broadband access to priority area equity zipcodes.

**Proposed Working Group Structure**

Task/Scope

The County Council will appoint a working group by July 27, 2021. The working group will be tasked with discussing ZTA 19-07 and identifying whether there are amendments that are agreeable to all participants. The working group would produce a memorandum or report by September 21, 2021 summarizing deliberations and addressing multiple issues, including outstanding community concerns and plans to expand 5G broadband access to priority area equity zipcodes.

Membership

- Municipality Designees (2)
- Community Representatives (2)
- Racial Equity and Social Justice Committee Designees (2)
- County Council Designees (2)
- Industry Designees (2)

### Staffing

Staff support shall be provided by two County employees - designated by County Council.

### Leadership

Workgroup members will elect two co-chairs to form agendas and lead the meetings. Council staff will assist the workgroup.

### Documents for Deliberations

Stakeholder workgroup documents will be posted to a Google Drive folder accessible to the public.

### Public Comments

Members of the public are encouraged to provide recommended amendments and any supporting analysis for the workgroup to review by emailing the designated County Council staff members. Comments received will be shared with the Council in a staff memorandum.

Please reach out to me if you have any questions or concerns about this proposal.

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

## Council President Huckler Proposed Amendment

### 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.

## Council President Hucker Proposed Amendment

(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

## Council President Hucker Proposed Amendment

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:

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**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.

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## 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 29<sup>th</sup> 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 WITH~~out~~ 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, w~~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, 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 INCOMMODIOUS 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 INCOMMODIOUS 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 INCOMMODIOUS 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 13<sup>th</sup>, 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.



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

OFFICE OF THE CHAIR

November 18, 2019

**TO:** The County Council for Montgomery County, Maryland, sitting as the District Council for the Maryland-Washington Regional District in Montgomery County, Maryland

**FROM:** Montgomery County Planning Board

**SUBJECT:** Zoning Text Amendment No. 19-07

**BOARD RECOMMENDATION**

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

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

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

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

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



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

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

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

As proposed, ZTA 19-07:

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

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

#### **CERTIFICATION**

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



Carey Anderson  
Chair

CA:GR:aj



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

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**GR**

Gregory Russ, Planner Coordinator, FP&P, [gregory.russ@montgomeryplanning.org](mailto:gregory.russ@montgomeryplanning.org), 301-495-2174

**JKS**

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**Completed: 11/7/19**

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**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.<sup>1</sup> 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.

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<sup>1</sup> 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