

# Testimony of Sue Present

## OPPOSING Two OZAH Resolutions: Resolution on OZAH Fees

and

## Resolution on Rules for Applications for Small Cell Telecommunications Towers Conditional Use and Objection Cases and Waivers

President Albornoz and Members of the County Council. My name is Sue Present. I come before you to ask you to vote to reject both of the OZAH Resolutions, out of fairness to Montgomery County residents, taxpayers, and the public at large.

The Council should reject these OZAH Resolutions because:

- **The Fees do not cover the costs, and would require residents/taxpayers to subsidize them;**
- **The Rules block affected residents from fair participation, and impede fair consideration of their concerns; and**
- **These Rules undermine our Racial Equity and Social Justice principles.**

After these Resolutions were introduced, I requested information from OZAH concerning its history of actual expenses. Specifically, I asked for OZAH's average telecommunications tower costs per case. And I also requested OZAH's expenses in three cases that I was familiar with and that I anticipated would represent its high, low, and mid-range cost cases.<sup>1</sup> OZAH was unable to provide me with the average telecom case expenses that I requested. And of the expense information on the three cases requested, OZAH was only able to provide me with partial information on one of the telecom tower cases, CU-T-17-01, which was the case that I had expected to show mid-range case costs.

The information that OZAH provided in response to my request nevertheless makes it abundantly clear that the conditional use fees in the OZAH Resolution come nowhere close to covering OZAH's costs, and they shortchange OZAH and residents/taxpayers.

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<sup>1</sup> Respectively the cases that I requested were OZAH No. 08-06 (Board of Appeals Case No. S-2709), OZAH No. 08-27 (Board of Appeals Case No. S-2729), and OZAH Case No. CU-T-17-01.

- With OZAH's limited in-house personnel and tight deadlines, cases would often need to be assigned to contract hearing examiners. Extrapolating from the contract hearing examiner's expenses in case CU-T-17-01, for a one-day hearing, it would cost over five times this small cell conditional use fee.<sup>2</sup> And that doesn't include OZAH's staff and administrative costs.<sup>3</sup>
- Also, extrapolating from expenses documented in the transcription invoices, in case CU-T-17-01, the transcription costs in a conditional use case alone would likely eat up over half of the small cell conditional use fee that is received by OZAH.<sup>4</sup>

The new consolidated fee — *which is added in the Fee Schedule, but not underlined in the Resolution* — alters the fee for consolidated tall telecom tower conditional use applications (Sec. 3.5.2.C.2.c) and is also much too low. The costs to OZAH for a single typical tall telecom tower case are more than four times what it receives in fees, and resident taxpayers are stuck covering the difference.<sup>5</sup> The Council should not authorize residents' / taxpayers' funds to subsidize the wireless industry at all!

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<sup>2</sup> It is folly for the Staff Memo on Fees to describe OZAH's calculations of the conditional use case fee as "reasonable estimates." OZAH has apparently overlooked critical variables in the process of reaching estimates for the costs of these cases and establishing the fees. For example, assumptions that hearings would be wrapped up in a half day neglect to adequately factor the agency costs and burdens, including:

- a) These cases represent an increased workload for the Hearing Examiner, who would be without the aid of the Planning Department Staff Technical Report, which is a resource that Hearing Examiners routinely rely upon in tall telecom tower cases and other OZAH cases, both during the hearing and when preparing the Hearing Examiner's Report, as a clear and organized factual road map and for technical guidance; and
- b) Each application is required, per [Rule 5.1.2.1](#), to include the applicant's proposed tower site, and it must include one or more alternate tower sites.
  - For these applications, the Hearing Examiner must consider and evaluate not just one telecom tower site, but at least two, and perhaps three, four, or more sites; and
  - The affected persons and bodies who are required to receive notice and the case decision, which as the Staff Memo points out is likely an expansive number of affected persons and bodies compared to a traditional tall telecom tower case and other conditional use cases, not fewer.

It is unreasonable to expect an average case of this nature to require less than one full hearing day.

<sup>3</sup> OZAH Contract Hearing Examiner's Invoices from case CU-T-17-01 are attached.

<sup>4</sup> The median one-day transcription fee in case CU-T-17-01 and the pre-hearing transcription fee in that case, including OZAH's late fees (because all of the transcription invoices were paid late) totaled \$ 1,553.88 (invoices attached). But the [OZAH Fee Resolution](#) establishes a small cell conditional use fee of \$ 2,600.00. And the [OZAH Rules Resolution, Rule 5.1.1.4](#) in essence distributes 85% of that fee to OZAH, which amounts to \$2,210.00.

<sup>5</sup> OZAH provided me a document that was prepared in 2018 by former OZAH Director Martin Grossman, entitled "The Basis for OZAH's Fees, in General, and Specifically for Telecommunications Tower Conditional Use

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County experts have established that [there are additional costs associated with consolidated reviews of applications](#) for small cell towers. So I must preemptively address wrongheaded thoughts about a fee for consolidated small cell tower conditional use applications. That consolidated fee must be realistically calculated to cover OZAH's incurred costs. A consolidated application fee that is identical to a single application fee obviously shifts more of OZAH's costs to resident taxpayers. And, as I present herein, the proposed OZAH fee for a small cell conditional use case is grossly inadequate and would not cover OZAH's costs in even a singular application case.

No information is provided in the Staff Memos or in the Fee Resolution itself to explain or justify the \$690 waiver fee. And nothing explains how the Planning Department's share of the waiver fee, which per [Rule 5.1.1.4.](#), a meager \$103.50, is supposed to fully support Planning's Intake and also its Verification for determination of Completeness, which is required by Rule 5.1.2.1.2.<sup>6</sup>

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Applications; and Analysis of the Possibility of Reduced Fees for Consolidated Applications Seeking Conditional Uses for DAS Small Cell Towers.” This memorandum asserts and documents that the actual costs for a tall telecom case are significantly higher than the tall telecom conditional use fee. The memo also identifies OZAH case CU-T-17-01 (not by its case number, but by his descriptions, “the single case of that type we have had since the 2014 Zoning Ordinance went into effect” and the case used a contract Hearing Examiner) as the case by which to measure the tall telecom conditional use costs (attached). The memo tallies some of the actual costs and estimates other costs to arrive at the “Total Review Costs per Case” of \$23,375.00. However, the invoices provided by OZAH for the Hearing Examiner show that the costs were misrepresented and undercounted, and that transcript fees were not included. Adjusting for those costs, would bring the Grossman Total Review Costs per Case to \$56,541.70 for a 2018 Total Review Cost per Case rate. But that total relies upon 2015 wage rates for the Planning Department and 2018 wage rates for OZAH personnel and contractors. We know that OZAH's wage rates have increased since 2018 (see the attached OZAH FY22 Budget Sheets). And based upon the suggestions in the Grossman memo that contract Hearing Examiner rates are on par with internal Hearing Examiner rates, it is reasonable to anticipate that contract Hearing Examiner rates have increased to keep pace with OZAH wage rates.

<sup>6</sup> Per Rule [5.1.2.1.](#), both the Conditional Use application and the Waiver application must include all items that are listed in Section 3.5.2.C.2.d.i of the Zoning Ordinance. There is no explanation of why the Fee Resolution sets a Conditional Use Fee that provides the Planning Department \$390 (its 15% cut) to perform that application Intake and Completeness Review, but sets the Waiver Fee that provides the Planning Department \$103.50 (again, its 15% cut) to essentially perform the same Intake and Verification of Completeness Determination tasks. And the 2018 document by former OZAH Director Martin Grossman, “The Basis for OZAH's Fees, in General, and Specifically for Telecommunications Tower Conditional Use Applications; and Analysis of the Possibility of Reduced Fees for Consolidated Applications Seeking Conditional Uses for DAS Small Cell Towers,” which includes 2015 Planning Department wage rates and hourly expectations for application intake, provides further reason for to be skeptical about the Planning Department's Waiver Fee share. The \$103.50 amount would barely be sufficient, if at all, to even cover the Planning Department's clerical/paraprofessional application Intake costs. Yet, more Planning Department time can be expected for the Completeness Review than for Intake. And there would be a higher wage rate for the professional Planning Staff that conduct the Completeness Review, too.

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Furthermore, nothing explains how OZAH's remaining share of the waiver fee, which is \$586.50, covers OZAH's costs.<sup>7</sup>

OZAH doesn't track staff costs per case or type.<sup>8</sup> But during last year's February 10th PHED Committee worksession on ZTA 19-07, OZAH's Director disclosed that over 85% of its budgeted expenses are subsidized by taxpayers.

These Rules distribute an additional 10% share of the total fee to OZAH. But with fees so unreasonably low, that added amount is de minimis and does not compensate for the fee inadequacies that result in burdens to resident taxpayers.<sup>9</sup>

And these Rules exacerbate problems that already unfairly disadvantage Participants who are barred from: making prehearing motions, weighing in on Applicants' and other Parties' motions, and more. A Participant attains Party (i.e., "Party of Record") status at the hearing when they testify. But Participants are excluded at critical pre-hearing junctures.<sup>10</sup> Even persons who have filed objections to waivers are not entitled to Party status before the hearing.<sup>11</sup>

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<sup>7</sup> In accordance with [Rule 5.1.2.1](#) and Section 3.5.2.C.2.d.i of the Zoning Ordinance, the Waiver Application must include at least one alternate site. As a result, if there are no objections, then it is upon the Hearing Examiner, and without the benefit of the Planning Department's Technical Staff Report, to issue a decision that evaluates the applicant's proposed and alternate sites. [OZAH's Mission Statement](#) commits to conducting administrative matters that will result in thorough and balanced decisions that serve the public interest. But applying the hourly rate of \$213.30 for the OZAH Director to prepare the waiver decision, and recognizing that there would be at least some staff costs associated with a waiver application too, the waiver fee seems inadequate to support the intended activities and OZAH's mission. (The OZAH Director's rate is applied here for efficiency. Though slightly higher than the Hearing Examiner rate, the added time/cost for the Director's review and sign-off on the decision is bypassed.)

<sup>8</sup> In OZAH's e-mail replies to my request for information, Administrative Specialist Sara Behanna explained that "OZAH does not have records that report the 'all-encompassing incurred expenses' of processing individual conditional uses and special exceptions," on 12/17/21, and Director Lynn Robeson Hannon reinforced this message on 12/22/21, explaining that "OZAH will not have records of the full cost of processing these cases because the costs are intended to cover Staff and Hearing Examiner time and we do not track this on a case-by-case basis."

<sup>9</sup> [Rule 5.1.1.4](#) reduces the share that is provided to the Planning Department through [Rule 1.3 of OZAH's Land Use Rules](#) from 25% to 15%.

<sup>10</sup> See [Rule 7.3](#)

<sup>11</sup> To ban a person who has filed an objection to a waiver application from Party status seems particularly unfair. In the [OZAH Rules of Procedure for Agency Referral and Accessory Dwelling Unit Cases](#), once a person has filed an objection to a waiver they are entitled to Party status, per [Rule 1.4](#).

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Consider circumstances in the previously referenced OZAH case, CU-T-17-01. A cell tower was proposed on a property surrounded by four subdivisions: three with single-family detached homes; and one with more modest townhomes. Several residents of the detached homes joined together, retained counsel, and attained Party status.<sup>12</sup>

Then, following guidance that the townhome residents acquired from OZAH on pursuing Party status, four townhome residents submitted requests, each seeking Party status: one of them was elderly; and three were Asian-Americans, whose first and dominant language was not English. In addition, three townhome residents filed motions for dismissal, asserting and documenting that the application was not timely filed.

The Hearing Examiner denied all four residents' requests for Party status as insufficient, and also denied all of the residents' motions for dismissal because, not having Party status, the residents were not eligible to file motions.<sup>13</sup>

Throughout the hearing, the residents of all four subdivisions remained united in opposition to the tower. And that application was denied.<sup>14</sup> By contrast, the Hearing Examiner must by and large approve (not deny) small cell tower conditional use and objection applications. And these applications must include a proposed site *and* at least one alternate site, which can sow discord by pitting neighbors affected by the proposed site against neighbors affected by alternate sites.<sup>15</sup>

Legal representation requires resources that some affected neighbors might have, but others will not. And for neighbors lacking the resources for Party status — neighbors who are more likely to be people of color — these Rules disadvantage them.<sup>16</sup>

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<sup>12</sup> See [Hearing Examiner's Report: OZAH CU-T-17-01, Application of Cellco Partnership and East Gate Recreation Association, Mar. 7, 2018](#), Pages 5 – 6

<sup>13</sup> *Id.*, Page 7

<sup>14</sup> *Id.*; [Board of Appeals Worksession Minutes, Item 11, appeal denied, April 11, 2018](#)

<sup>15</sup> See [Rule 5.1.2.1](#)

<sup>16</sup> See [Montgomery County Racial Equity and Social Justice Act](#)

And these Rules instruct the Hearing Examiner, when deciding on consolidation, to apply the standard that “will result in judicial economy and fairness to the parties.”<sup>17</sup> Participants don't matter.

**Please vote down these OZAH Resolutions and require fees and rules that treat residents, taxpayers, and the public at large fairly.**

**Thank you.**

Attachments:

- OZAH Case CU-T-17-01 Contract Hearing Examiner's Invoices (TCM Invoices\_Redacted ALL.pdf)
- OZAH Case CU-T-17-01 Transcription Invoices (Transcript Invoice Cellco Case.pdf)
- Grossman, Martin L., 2018, “The Basis for OZAH's Fees, in General, and Specifically for Telecommunications Tower Conditional Use Applications; and Analysis of the Possibility of Reduced Fees for Consolidated Applications Seeking Conditional Uses for DAS Small Cell Towers.”  
(Basis for OZAH Fees for Possible Fee Redux for Consolidated DAS CU Applications.pdf)
- OZAH FY22 Budget Sheets (Budget Sheets Combined\_OZAH.pdf)

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<sup>17</sup> See [Rule 7.2.3](#)