

Testimony - ZTA 19-07
Presented on behalf of County Executive Marc Elrich
November 19, 2019

Thank you for the opportunity to testify. The County Executive is enthusiastic about technological advances and 5G technology. That is why he supported the County's important step last year to pass ZTA 18-02, which streamlined the use opportunities for the deployment of the smaller telecommunication towers in the commercial and our mixed use non-residential urban areas in the county. He believed it was important to act expeditiously in those areas where the demand will likely be greatest.

During the process of passing ZTA 18-02 and since, it became clear that we need to improve our administrative effectiveness and assure that public processes are fair and transparent. We also need to ensure leading-edge coverage, and also maximize neighborhood compatibility.

We need to improve participation in the Transmission Facility Coordinating Group (TFCG/Tower Committee), DPS inspections, and the interplay between the TFCG, DPS, and the Office of Zoning and Administrative Hearings (OZAH).

Moreover, since passage of ZTA 18-02, there have been important developments in the federal courts. Local communities won a victory in the DC Circuit when the court vacated the FCC Order exempting small cell applications from the National Environmental Protection Act (NEPA) and the National Historic Preservation Act requirements finding it was arbitrary and capricious. A major legal challenge to the FCC's Small Cell Order, *Sprint Corp. v FCC* is underway in the Court of Appeals for the Ninth Circuit. This appeal addresses issues central to small cell siting, including shot clocks, fees, and the definition of "effective prohibition" of service. The case also includes the challenge led by Montgomery County that the FCC should have first updated the RF emissions standards, which are more than 20 years old. ¹

Until the Ninth Circuit makes its decision, the resolution of these issues is uncertain. The Court's decision is not expected until mid-2020 at the earliest. To predicate zoning changes on FCC orders that are currently under review and pending in the Court of Appeals is not prudent.

Administrative Reforms Are Needed

The Transmission Facility Coordinating Group (known as the "Tower Committee") was created in 1995. After 24 years, it's time to update it. Improvements have been made within the current

¹ Our attorneys on the RF case have written an article that explains the lawsuit in clear language. <https://www.montgomerycountymd.gov/cable/Resources/Files/Towers/ZTAFiles/RF%20Appeal%20Summary%20from%20IMLA.pdf>

framework, but more is needed. Therefore, the County Executive has directed County agencies to provide him updated regulations as soon as possible to improve notice to residents, cover all of the County's costs, and ensure every new small cell deployment is inspected for compliance. In addition, he would also like to explore a tiered approach to small cell tower siting in the residential rights-of-way, which prioritizes locations on high-speed, high-volume roadways. He has also directed staff to work with technical experts, residents, agencies, and industry representatives to address these and other issues.

The County Executive urges the Council to wait on moving forward on the ZTA for residential zones while the litigation proceeds and the administrative procedures are improved.

Preserve the Conditional Use Process

The County Executive opposes the ZTA's provision (Sec. 3.5.2.C.2.c.) that removes certain requirements in the conditional use process exclusively for wireless facilities. The Conditional Use processes are integral to a determination of neighborhood compatibility—and this ZTA eliminates part of the conditional use process while still calling it Conditional Use. It eliminates the review by the Planning Director and report to the Hearing Examiner. The Planning Department staff reviews applications for conformity with approved master plans, existing County aesthetic, environmental, and zoning requirements. Eliminating the Planning Department review weakens OZAH's ability to ensure compliance with existing laws. These significant changes are neither consistent with County procedures nor required by FCC regulations.

We should continue to provide the opportunities that were expanded through ZTA 18-02 in commercial and other non-residential zones for replacement small cell poles. But we also owe it to taxpayers, including our business community and the wireless industry, to evaluate what has gone right and what may need improvement. And the Executive believes that we will have a better final product the more we involve residents.

In closing, I would reiterate:

1. Montgomery County has already facilitated small cell towers where demand is greatest - small cell towers are currently allowed in all urban and commercial areas.
2. The major issues from the FCC are currently under review at the 9th Circuit. This includes Montgomery County's case on RF emissions. If the court sides with local jurisdictions on any of these issues, ZTA 19-07 could lock us into a position that we do not need to be in.
3. Action is needed immediately on improving our administrative functions, and the County Executive has directed staff to present him with administrative improvements and to

work with residents, agencies, technical experts and industry representatives to address these issues now.

4. A ZTA for residential areas should consider a tiered approach.
5. The conditional use process should not be changed specific to telecommunication towers. ZTA 19-07 removes an important component of the conditional use process.

We all agree that improvements are needed, and the County Executive believes that together we can do this well: efficiently, sensibly, and in a manner that respects our residents and addresses our needs.