



Committee: Directly to Council
Staff: Livhu Ndou, Legislative Attorney
Purpose: Final action – vote expected
Keywords: #SmallCell #TelecommunicationsTowers
#OZAHRules #5G

AGENDA ITEM #7B
January 25, 2022
Action

SUBJECT

Additions to the Office of Zoning and Administrative Hearings' Comprehensive Fee Schedule

EXPECTED ATTENDEES

Lynn Robeson Hannan, Director/Hearing Examiner, OZAH

COUNCIL DECISION POINTS & COMMITTEE RECOMMENDATION

N/A

DESCRIPTION/ISSUE

An amendment to the Office of Zoning and Administrative Hearings' (OZAH) Fee Schedule is necessary to implement ZTA 19-07, passed by the District Council on July 27, 2021.

SUMMARY OF KEY DISCUSSION POINTS

- The District Council adopted Zoning Text Amendment (ZTA) 19-07 on July 27, 2021.
- ZTA 19-07 established new procedures for conditional use and waiver applications and objections to waiver applications for telecommunications towers before the Office of Zoning and Administrative Hearings (OZAH).
- The procedures established were not part of OZAH's Local Map Amendment, Development Plan Amendment, Schematic Development Plan Amendment, and Floating Zone Plan Amendment Fee Schedule.
- Established fees are necessary to process applications efficiently, timely, and fairly.

This report contains:

Staff memo
OZAH Fees Resolution
OZAH Proposed Fee Schedule

Pages

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Worksession/Action

MEMORANDUM

January 20, 2022

TO: County Council

FROM: Livhu Ndou, Legislative Attorney

SUBJECT: Additions to the Office of Zoning and Administrative Hearings' Comprehensive Fee Schedule

Expected Participants

- Lynn Robeson Hannan, Director/Hearing Examiner, Office of Zoning and Administrative Hearings (OZAH)

Summary

The Office of Zoning and Administrative Hearings (OZAH) proposes an amendment to its Fee Schedule. The proposed amended fee schedule adds application fees for small cell Telecommunications Towers.

Zoning Text Amendment (ZTA) 19-07, Telecommunications Towers – Limited Use, was adopted by the County Council on July 27, 2021.¹ It created a modified conditional use process for telecommunications towers under a 30-foot setback, a “waiver and objection” process for telecommunications towers up to 50-feet in height, and a “waiver and objection” process for new towers. These changes require amendments to OZAH’s Fee Schedule.

Public Hearing

A public hearing was held on January 18, 2022. Two speakers testified in opposition. Speakers testified that the proposed fee does not cover OZAH’s costs. One speaker testified that due to staffing, cases would need to be reviewed by contract hearing examiners, who cost 5 times as

¹ The final staff packet for ZTA 19-07 can be found here:
https://www.montgomerycountymd.gov/council/Resources/Files/agenda/col/2021/20210727/20210727_4D.pdf.

much.² Testimony noted that 85-87% of OZAH's budget is covered by taxpayers. One speaker testified that the average cost of review of a telecommunications tower application is anywhere from \$27,000 to \$56,000. The speaker also testified that costs would be high because hundreds of applications are anticipated.³

Discussion

Calculation of OZAH's Fees

The additions to the fee schedule are:

Conditional Use	Filing Fee
Telecommunications Tower (§3.5.2.C.2.d)	\$2,600
Waiver⁴	Filing Fee
Telecommunication Tower (§3.5.2.C.2.f)	\$690

The application fee for a “small cell” Telecommunications Towers is \$2,600. This contrasts with the \$16,390 application fee for “tall” towers. “Tall” towers have more extensive criteria for approval as well as greater visual impact, as they can be over 100 feet tall and therefore seen for miles. Unlike the 5G applications, Planning Staff conducts a detailed review that can take several weeks. Planning Staff receives 25% of that fee. Then, the Hearing Examiner must conduct a hearing. These hearings often involve many individuals because the towers have such a large viewshed. The Hearing Examiner must make all the necessary findings of Section 7.3.1. of the Zoning Ordinance, including compatibility with the neighborhood, compliance with the master plan, adequate public facilities, and other findings. Hearings for these larger towers can take a full day, and in rare instances, take multiple days. This also means significant time must be spent on the Hearing Examiner's report and decision. Regarding the public testimony, the numbers cited by the speaker for the cost of processing an application were for a tall 4G tower, not the small cell 5G towers at issue. In addition, the cited application was an outlier compared to other applications, taking 5 full hearing days as opposed to an average of 1 full hearing day.

OZAH's fee revenues from conditional uses and local map amendments (LMA's) have never been intended to cover OZAH's full operating costs. For example, OZAH performs many functions, including conducting quasi-judicial hearings and issuing recommendations to other agencies, such as the Human Rights Commission. In addition, actual costs may be above the fees received in a fiscal year, as reflected in OZAH's annual reports. OZAH does not penalize applicants, or the

² This testimony is inaccurate. OZAH reports that contract hearing examiners charge approximately \$140.00/hour, which is reasonable for attorneys in private practice. The average hourly rate of full-time hearing examiners is \$100.00, including benefits.

³ A few years ago, in the early development of ZTA 19-07, there was an estimate that there would be hundreds of applications a year. However, Council Staff has found no evidence to support this high estimate. As of this date, OZAH has not received any applications that fall under the new procedures.

⁴ No fee will be charged to file an objection.

public, by shortening the hearing process because a case exceeds the workload anticipated for the average application.

The fees for telecommunications towers are intended to compensate employee time for processing the applications, as well as operational costs such as transcripts, postage, etc. The approval process for small cell telecommunications towers takes substantially less time due to requirements by the Federal Communications Commission (FCC).⁵ ZTA 19-07 shortened the conditional use process 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.

Since its tasks are more limited, the Planning Department receives 15% of the fee, rather than its usual 25%. In addition, in order to remove any barriers to public participation, no fee will be charged for objections to waivers.

The calculation of the fees is based on the estimated number of hours needed to complete a task and the employee's hourly rate including benefits. While the modified conditional use and the "waiver and objection" process are new, most of the tasks themselves are similar to those performed in traditional use cases, so reasonable estimates could be calculated. OZAH worked with Planning Department staff to determine these costs and fees. Fees also include the cost of transcription and postage. The cost of postage is a significant factor since notice must be sent to abutting and confronting homeowners, as well as homeowners', renters', civic, and condo associations and any municipality within a radius of 300 feet of the pole. Since the Hearing Examiner's findings will be more limited than traditional telecommunications towers, transcript fees are estimated based on a ½ day hearing rather than a full day.

Compliance with FCC Order

In *City of Portland v. United States*, the United States Court of Appeals for the 9th Circuit ruled on petitions filed by a coalition of local governments, including Montgomery County, challenging multiple FCC orders governing small cell telecommunications facilities.⁶ The Court upheld the FCC's restrictions on the amount local governments may charge for 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 (excluding poles) are no more than \$270 per year. The proposed fees of \$2,600 for a conditional use and \$690 for a waiver are substantially more than this "safe harbor". However, since the fees are based on actual costs, they are in compliance with the Order. In addition, the FCC Order states that fees

⁵ The FCC Small Cell Order can be found in full here: <https://docs.fcc.gov/public/attachments/FCC-18-111A1.pdf>

⁶ The *City of Portland v. United States* decision can be read in full here: <https://cdn.ca9.uscourts.gov/datastore/opinions/2020/08/12/18-72689.pdf>.

must be “no higher than the fees charged to similarly-situated competitors in similar situations.” As the fees are significantly lower than similar uses, due to the reduced staff time caused by a modified conditional use process and a waiver and objection process, this requirement is satisfied.

This packet contains:

OZAH Rules of Procedure resolution

© 1-2

OZAH Rules of Procedure Governing Certain Telecommunications Towers

© 3-10

Resolution No.: _____
Introduced: _____
Adopted: _____

**COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND
SITTING AS THE DISTRICT COUNCIL FOR THAT PORTION
OF THE MARYLAND-WASHINGTON REGIONAL DISTRICT
IN MONTGOMERY COUNTY**

Lead Sponsor: District Council at the Request of the Hearing Examiner

SUBJECT: Additions to the Office of Zoning and Administrative Hearings' Fee Schedule

Background

1. Section 59.6.5.A.1 of the 2014 Zoning Ordinance authorizes the District Council to establish filing fees, following a public hearing on reasonable notice, for matters to be decided by the Hearing Examiner or the District Council.
2. The District Council approved comprehensive revisions to the fee schedule for the Office of Zoning and Administrative Hearings (OZAH) on July 15, 2014 to implement the 2014 Zoning Ordinance (Zoning Text Amendment 13-04), which established new zones and new conditional uses (formerly "special exceptions"). These were amended again on April 21, 2015 (Resolution 18-291), August 2, 2016 (Resolution 18-601), and July 27, 2021 (Resolution 19-951) to include fees for additional conditional uses.
3. On July 17, 2021, the District Council adopted Zoning Text Amendment (ZTA) 19-07, which established a modified conditional use and a waiver process for certain new telecommunications towers.
4. The District Council introduced this resolution on _____, 2021, to establish fees to process applications for conditional uses and waivers for telecommunications towers allowed by ZTA 19-07.
5. The Council held a public hearing on this resolution on _____, 2021. The District Council finds that the attached revised Fee Schedule for the Office of Zoning and Administrative Hearings is consistent with the Montgomery County Code.

Action

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

The attached Fee Schedule is revised, effective _____, 2022, to add fees for conditional uses and waivers for certain telecommunications towers authorized under Section 3.5.2.C.2.d and 3.5.2.2.f of the Zoning Ordinance.

This is a correct copy of Council action.

Selena Mendy Singleton, Esq.
Clerk of the Council

**Local Map Amendment, Development Plan Amendment,
Schematic Development Plan Amendment, and Floating Zone
Plan Amendment Fee Schedule**

Zone Classification	Basic Fee for Designated Acreage or Less	Additional Fee Per Acre or Portion of Acre Above Designated Acreage
Residential, One-Family Detached Zones		
<i>AR, Agricultural Reserve (25 acres)</i>	\$790	\$190
<i>R, Rural (5 acres)</i>	790	190
<i>RC, Rural Cluster</i>	870	240
<i>RNC, Rural Neighborhood Cluster (5 acres)</i>	1,080	240
<i>Low-density Resid. & TDR (1 acre)</i>	2,710	490
<i>- RE-2, RE-2C and RE-1</i>	2,700	490
<i>- R-200, Residential--200</i>	4,230	490
<i>Medium-density Resid. & TDR (1 acre)</i>		
<i>- R-90, R-60 and R-40</i>	5,420	490
<i>Residential Detached Floating (RDF)</i>	7,150	620
Residential, One-Family Attached Zones		
<i>TLD, Townhouse Low Density (1 acre)</i>	6,500	490
<i>TMD, Townhouse Medium Density (1 acre)</i>	6,000	450
<i>THD, Townhouse High Density (1 acre)</i>	6,000	450
Residential, Multi-Family Zones		
<i>R-30, R-20, R-10, R-H</i>	6,000	500
<i>Apartment Floating (AF)</i>		
Commercial/Residential Zones		
<i>Commercial Residential Neighborhood (CRN) (1 ac.)</i>	7,800	620
<i>Commercial Residential Town (CRT) (1 acre)</i>	7,800	700
<i>Commercial Residential (CR) (1 acre)</i>	7,800	700
Employment Zones		
<i>General Retail (GR) (1 acre)</i>	7,800	700
<i>Neighborhood Retail (NR) (1 acre)</i>	7,800	700
<i>Life Sciences Center (LSC)</i>	19,670	950
<i>Employment Office (EO)</i>	7,800	700
Industrial Zones		
<i>Light Industrial (IL) (2 acres)</i>	9,540	840
<i>Moderate Industrial (IM) (2 acre)</i>	7,150	650

Zone Classification	Basic Fee for Designated Acreage or Less	Additional Fee Per Acre or Portion of Acre Above Designated Acreage
<i>Heavy Industrial (IH) (1 acre)</i>	7,800	840
<u>Residential Floating Zones</u>		
<i>Residential Detached Floating Zone (RDF) (2 acres)</i>	11,920	700
<i>Townhouse Floating Zone (TFZ) (1 acre)</i>	6,500	490
<i>Apartment Floating (AF) (2 acres)</i>	10,840	760
<u>Commercial/Residential Floating Zones</u>		
<i>Commercial Residential Neighborhood Floating (CRNF) (1 acre)</i>	7,800	620
<i>Commercial Residential Town Floating (CRTF) (1 acre)</i>	7,800	700
<i>Commercial Residential Floating (CRF) (1 acre)</i>	7,800	700
<u>Employment Floating Zones</u>		
<i>General Retail Floating (GRF) (1 acre)</i>	7,800	700
<i>Neighborhood Retail Floating (NRF)</i>	7,800	700
<i>Employment Office Floating (EOFF)</i>	19,670	950
<i>Life Sciences Center Floating (LSCF)</i>	19,670	950
<u>Industrial Floating Zones</u>		
<i>Light Industrial Floating (ILF) (2 acres)</i>	9,540	840
<i>Moderate Industrial Floating (IMF) (2 acre)</i>	7,150	650
<u>Amendment to Schematic Development Plan (SDPA) approved before October 30, 2014</u>	3,800	
<u>Amendment to Development Plan (DPA) Approved before October 30, 2014</u>		
– Initial Request	4,120	
– Supplemental fee if public hearing is conducted	4,170	
<u>Modifications to SDPAs and DPAs approved before October 30, 2014</u>	2,090	
<u>Major Amendments to Floating Zone Plans</u>	8,290	
<u>Fees for Application Signs</u>	200	
– Refunds for signs returned in usable condition	100	

Conditional Use Fee Schedule

Conditional Use	Filing Fee
<i>Agricultural Auction Facility (§3.2.1)</i>	13,110
<i>Agricultural Processing; includes milk plant, grain elevator, mulch and compost production, and agric. mfr. (§3.2.2)</i>	8,200
<i>Equestrian Facility (§3.2.4)</i>	
– <i>In a Residential Zone</i>	820
– <i>In An Agricultural Zone</i>	4,920
<i>Farm Supply, Machinery Sales, Storage, and Service (§3.2.5)</i>	4,920
<i>Nursery (Retail) (§3.2.7.A)</i>	8,200
<i>Nursery (Wholesale)(§3.2.7.B)</i>	8,200
<i>Slaughterhouse (§3.2.8)</i>	9,830
<i>Winery (§3.2.10)</i>	8,200
<i>Farm Airstrip, Helistop (§3.2.11.A)</i>	1,640
<i>Townhouse Living (§3.3.1.D.2.b)</i> or <i>Independent Living Facility for Seniors or Persons with Disabilities (§3.3.2.C)</i>	
– <i>Non-Profit --per unit</i>	160
– <i>--minimum</i>	1,310
– <i>--maximum</i>	9,830
– <i>Commercial—per unit</i>	160
– <i>--minimum</i>	9,830
– <i>--maximum</i>	24,620
<i>Personal Living Quarters (over 50 individual living units) (§3.3.2.D)</i>	4,100
<i>Residential Care Facility (9-16 persons)(§3.3.2.E)</i>	
– <i>Non-Profit</i>	1,310
– <i>For-Profit</i>	5,000

Conditional Use	Filing Fee
<i>Residential Care Facility (over 16 persons) (§3.3.2.E)</i>	
– 17-40 persons	
- Non-Profit	4,100
- For-Profit	16,390
– Over 40 persons	
- Non-Profit	16,390
- For-Profit	24,620
<i>Attached Accessory Apartment (§3.3.3.B)</i>	300
<i>Detached Accessory Apartment (§3.3.3.C)</i>	300
<i>Home Health Practitioner (Major Impact) (3.3.3.G)</i>	9,830
<i>Home Occupation (Major)(3.3.3.H)</i>	660
<i>Ambulance, Rescue Squad (Private) (§3.4.1)</i>	2,460
<i>Charitable, Philanthropic Institution (§3.4.2)</i>	8,190
<i>Group Day Care (9-12 persons) (includes children, the elderly, and persons with disabilities) (§3.4.4.D)</i>	490
<i>Day Care Center (13-30 persons) (Day care includes children under 17, elderly persons, and persons with disabilities) §3.4.4.</i>	1,190
<i>Day Care Center (over 30 persons)</i>	
– Non-Profit	4,100
– For Profit	4,920
<i>Educational Institution, Private (§3.4.5)</i>	
– Up to 10 students:	
– 11 to 40 students:	1,640
– Over 40 students:	4,100
	8,200
<i>Hospital (§3.4.6)</i>	18,030
<i>Private Club, Service Organization (§3.4.8)</i>	8,200
<i>Swimming Pool (Community) (§3.4.11)</i>	1,640

Conditional Use	Filing Fee
<i>Animal Boarding and Care (§3.5.1.B.1)</i>	
– Up to 10 animals	2,460
– Over 10 animals	4,100
<i>Veterinary Office/Hospital (§3.5.1.B.1)</i>	9,830
<i>Cable Communications System (§3.5.2.A)</i>	24,580
<i>Media Broadcast Tower (§3.5.2.B)</i>	24,620
<i>Telecommunications Tower (§3.5.2.C.2.c)</i> <i>Per tower or group of applications consolidated for public hearing</i>	16,390
<i>Telecommunications Tower (§3.5.2.C.2.d)</i>	2,600
<i>Country Inn (§3.5.3.A)</i>	10,000
<i>Cemetery (§3.5.4.A)</i>	16,390
<i>Crematory (§3.5.4.B.1)</i>	12,000
<i>Funeral Home, Undertaker (excludes crematory) (§3.5.4.C)</i>	9,830
<i>Landscape Contractor (§3.5.5)</i>	8,200
<i>Bed and Breakfast (§3.5.6.B)</i>	660
<i>Clinic (up to 4 medical practitioners) providing outpatient care (§3.5.7.A)</i>	9,830
<i>Clinic (more than 4 medical practitioners) (§3.5.7.B)</i>	9,830
<i>Office (§3.5.8.B)</i>	9,830
<i>Surface Parking for Commercial Uses in an Historic District (§3.5.9.D)</i>	
– Per space	660
– Maximum	1,310
<i>Campground (§3.5.10.B)</i>	16,390
<i>Conference Center (§3.5.10.C)</i>	24,580
<i>Golf Course, Country Club</i>	16,390

Conditional Use	Filing Fee
<i>Recreation and Entertainment Facility, Indoor (Capacity up to 1,000 persons)(§3.5.10.F): includes sport facilities, theaters, and dance clubs, but excludes indoor shooting ranges and health clubs and facilities.</i>	16,390
<i>Recreation and Entertainment Facility, Outdoor (Capacity up to 1,000 persons)(§3.5.10.G): includes driving range, group picnic, catering and recreation facilities; excludes indoor and shooting ranges and country club/golf courses</i>	16,390
<i>Recreation and Entertainment Facility, Major (Capacity over 1,000 persons)</i>	18,030
<i>Shooting Range (Indoor) (3.5.10.I)</i>	8,200
<i>Shooting Range (Outdoor) (§3.5.10.J)</i>	8,200
<i>Combination Retail</i>	
– <i>Per square foot</i>	9.80
<i>Retail/Service Establishment (120,001 square feet and over) §3.5.11.B)</i>	
– <i>Per Square Foot</i>	9.80
<i>Rural Antique Shop (§3.5.11.C)</i>	2,460
<i>Rural Country Market (§3.5.11.D)</i>	820
<i>Light Vehicle Sales and Rental (Outdoor) (§3.5.12.C)</i>	9,830
<i>Automobile Storage Lot (§3.5.13.A)</i>	4,920
<i>Car Wash (§3.5.13.B)</i>	9,830
<i>Filling Station (§3.5.13.C)</i>	16,390
<i>Repair (Major) (§3.5.13.D): Includes general vehicle repair and service, such as engine and transmission replacement or rebuild, body, and paint shops; does not include repair or services for commercial vehicles or heavy equipment</i>	9,830
<i>Repair (Minor) (§3.5.13.F):</i>	9,830

Conditional Use	Filing Fee
<i>Amateur Radio Facility (over 65 feet in height) (§3.5.14.B): any structure used for personal, non-commercial radio communications licensed by the Federal Communications Commission over 65 feet in height.</i>	20,320
<i>Drive-Thru (§3.5.14.E)</i>	16,390
<i>Helistop (§3.5.14.F): a designated area, either at ground level or elevated on a structure, used for the landing and takeoff of helicopters. Helistop includes a small fuel tank for a ground level facility and minor support facilities such as a small sheltered waiting or loading area, a small administrative office, and one permanent tie-down space. Helistop does not include major support facilities</i>	4,920
<i>Mining, Excavation (§3.6.5)</i>	16,390
<i>Helipad, Heliport (§3.6.6.B.2): A designated area that is used on a regular basis for the landing and take-off of rotorcraft. It includes support facilities such as refueling services, maintenance and cargo loading areas, tie-downs and hangars, administration offices and other appropriate terminal facilities.</i>	18,030
<i>Pipeline (above ground) (§3.6.7.C)</i>	24,620
<i>Public Utility Structure (§3.6.7.E)</i>	20,290
<i>Hazardous Material Storage (§3.6.8.B)</i>	16,390
<i>Self-Storage (§3.6.8.D)</i>	8,190
<i>Landfill, Incinerator, or Transfer Station (§3.6.9.A)</i>	16,390
<u><i>Solar Collection System (§3.7.2.B.2)</i></u>	
<u><i>-- Tract Area 50 acres or less</i></u>	<u>8,200</u>
<u><i>--Tract Area 51 acres or more</i></u>	<u>10,250</u>
<i>Conditional Use Amendments, Transfers and Extensions</i>	
<i>– Transfers or Extensions of Time</i>	240
<i>– Minor Amendments</i>	

Attachment to Resolution No. 21-xxx

Conditional Use	Filing Fee
○ <i>Without a Public Hearing</i>	10% of the prevailing fee with a minimum of \$540
– <i>Major Amendments</i>	
○ <i>Without new construction</i> ○ <i>With new construction</i>	25% of the prevailing application fee for the conditional use 50% of the prevailing application Fee for the conditional use
<i>Signs</i>	
– <i>Deposit</i>	200
– <i>Refund upon return of sign</i>	100

Waiver	Filing Fee
<i>Telecommunication Tower (§3.5.2.C.2.f)</i>	690