

The Bad, The Very Bad, and The Very, Very Ugly

Dissecting the 2017 Zoning Text Amendment (ZTA) for “smaller antennas on street light poles and at lower height buildings.”

By Sue Present

Last year, ZTA 16-05 proposed revised standards for smaller antennas on poles in the public rights-of-way. But after strong pushback from residents, the ZTA did not move toward passage.¹

Then early this year, the Department of Technology Services identified “updating County wireless siting zoning and regulations, and creation of national model 5G ordinances” as a top FY-18 priority. Staff reported that the Department of Technology services was “working with other departments, and soliciting public input, to create a CE (County Executive) proposal to update the TFCG (Tower Committee) application process and zoning requirements to address small cell deployment.”²

Initially scheduled for April, the County held its Wireless Technology Community Meeting on June 14, 2017, at which it introduced plans for a new ZTA. Shortly thereafter, the meeting’s slideshow was posted, and later a 2017 ZTA that “would amend zoning rules related to deployment of smaller antennas on street light poles and lower height buildings,” was posted, too.

The 2017 ZTA is arguably worse, not better, than the 2016 ZTA. Problems that residents raised last year remain in the 2017 ZTA. The 2017 version is broader legislation that would eliminate or reduce more resident protections and standards. The draft that is being circulated is rough: It lacks organization, clarity, and it is somewhat disconnected from the June 14th materials and presentations, and the companion ZTA Summary. It is obviously a work in progress, so there may be forthcoming improvements. But there is a lot to be concerned about. Here are some key points:

- **It is sneaky!** The County has continually identified this ZTA as addressing “smaller antennas on street light poles and at lower height buildings.” But it actually **eliminates the 300-foot residential setback for both small and for large cell towers in residential zones.** **The legislation expands the threat of large cell towers being erected in close proximity to single-family homes throughout the County.**³ Additionally and contrary to the County’s Summary, the ZTA expands the various residential zones that would be available for a large (macro) cell tower to be sited on an abutting Employment zone property, where the required property line setback is one-half foot for every foot of height.⁴ The proposed legislation should comport with the County’s stated intent, by establishing specific standards and opportunities that are tailored to lower height antennas and “microtowers” with smaller antennas.
- **It changes antenna attachments and smaller towers to Limited Uses.** Last year, the 2016 ZTA proposed changing the status of poles and wireless antennas in the public rights-of-way to Limited Uses from their current status of either Prohibited Uses or Conditional Uses.⁵ The 2017 ZTA again proposes the change to Limited Use status for the antenna attachments to poles in residential public rights-of-way and the *hardened* replacement poles with new antennas/antenna enclosures and related equipment in public rights-of-way that abut

¹ See Montgomery County Forum on Small Cell Towers (taped on 10/26/16), http://montgomerycountymd.granicus.com/MediaPlayer.php?view_id=169&clip_id=12500 .

² See Montgomery County Council GO Committee Meeting (Feb. 9, 2017), Item 4, http://montgomerycountymd.granicus.com/MediaPlayer.php?view_id=169&clip_id=12799 .

³ Threats referenced to single-family homes throughout this article may also apply to other sensitive uses. For information on “sensitive uses” see S. Present, *Preparing for oDAS and Small Cell Facilities*, Montgomery County Civic Federation (MCCF) Meeting (June 12, 2017), slide 20, <http://montgomerycivic.org/files/Sue%20Present%20Small%20Cell%20MCCF%2020170612.ppsx> .

⁴ References in this article to single-family homes/residences generally apply to detached dwellings as well as duplexes and townhomes.

⁵ For details on how Conditional Uses differ from Limited Uses see S. Present, *County Changes in Regulatory Reviews for Cell Towers*, MCCF Civic Federation News (January 2017), <http://montgomerycivic.org/files/CFN201701.pdf> .

residential zones (though not for entirely new poles in the rights-of-way).⁶ But in addition, the 2017 ZTA expands Limited Use status to antennas attached to lower-height buildings or on replacement poles that are on properties in residential zones or are in neighborhoods that abut single-family residences.

Applications with Limited Use status receive Department of Permitting Services (DPS) administrative reviews after a review and recommendation by the Tower Committee. The affected public receives no notice of the applications or of Tower Committee meeting reviews. The Tower Committee prohibits members of the public from having a voice in the review process, even to point out an applicant's errors, even to identify potential hazards.⁷

- **It expands and expedites antenna attachment opportunities on streetlight poles.** For the subdivisions where the utility distribution lines are underground, the ZTA establishes an antenna on an existing streetlight pole or on a replacement to the existing pole as a Limited Use, regardless of the setback from the abutting residential property. This ZTA also increases the size standards for the antennas that may be attached to poles, and it now includes some volumetric standards for antenna enclosures and for the related (often large) pole-attached or ground-mounted equipment.

Streetlights need to be what the industry calls *hardened* to support many of the industry's wireless antennas and equipment. This generally involves replacing the existing pole with one that is stronger.⁸ The 2017 ZTA provides standards for these replacement poles, establishing them as a type of cell tower installation. In 2016, to avoid clutter, it was the Planning Board's recommendation that the County establish separation distances between antennas attached to poles in the public rights-of-way. However, the 2017 ZTA provides no separation distance between antennas or antenna enclosures in the public rights-of-way, whether on the same pole or on different poles. The replacement pole is required to be located in the approximate location as the prior pole. The new pole may be increased in height: the particular increase in height varies with venue, with wider roads having standards for taller poles. There are no size restrictions for the new pole girth/diameter.

Some single-family homes along wider roads are in close proximity to the streetlight poles. Streetlights get relocated closer to homes when the roads need to be expanded and/or pedestrian/bikeways are added.⁹ One way to mitigate the threats posed by antennas attached to poles in close proximity to dwellings could be to require a replacement pole that abuts a single-family residence to be located parallel to the prior pole but in the road median (or cul-de-sac when either of these mid-road options exist), rather than at the approximate pole location.¹⁰ Of course, this would entail construction costs and disruptions. But moving poles to the center of the roadway would create the greater setbacks that residents prefer, provide improved transmission to both sides of wider roadways that the industry seeks, and would arguably reduce the transmission distance and required pole height.

- **It expands rights to antenna attachments on low-height private structures and buildings in and abutting residential zones.** With no off-site dwelling setback, cell towers can replace parking lot light poles on a private property that abuts a single-family residence. To meet Limited Use standards, the cell tower must be installed at

⁶ The references in this article to residential zones are intended to include all Rural Residential, Residential, Townhouse, Commercial/Residential, and PUD zones.

⁷ For further details see S. Present, *The Tower Committee—What it Does and Doesn't Do (Pt. 1)*, MCCF Civic Federation News (March 2017), pp 7 – 11 and S. Present, *The Tower Committee—What it Does and Doesn't Do (Pt. 2)*, MCCF Civic Federation News (April 2017), pp. 9 – 16, <http://montgomerycivic.org/files/CFN201704.pdf>

⁸ See supra note 3, slide 12.

⁹ Link to examples of DOT road widening for bikeways. <http://www.montgomerycountymd.gov/DOT-DTE/BikeWays/index.html>

¹⁰ Restoring residential setbacks would certainly provide broader protections.

the approximate location of the pole it replaces and be no more than 10 feet greater in height than the prior pole. There are no size limits to the tower's girth, and there are no limits on the number of antennas or antenna enclosure attachments.

- **It eliminates the setback from single-family dwellings and reduces the minimum-height standards for the antennas and antenna enclosures attached to buildings in or adjacent to residential neighborhoods as Limited Uses.** Here again, antennas and enclosures are permitted in unlimited numbers. Some attachments, such as the 4-ft × 4-ft box antenna enclosures, could defeat the intent of the design regulations, which control bulk and scale to provide good aesthetics and community compatibility of buildings. A series of antennas, enclosures, or their façades could give the appearance of an increase of a half story or more in height.¹¹ The façades could also drastically change a building's form, shape, transparency, and compatibility with the neighborhood.¹² And, in close proximity to a single-family home, the attachments could also obstruct a residential viewshed, natural light, and access to passive solar energy.

The Zoning Ordinance lacks sufficient standards to require that antennas and enclosures be unobtrusively incorporated into the buildings' architecture.¹³ Other local governments do better, and they also ensure that modifications to the façade take into consideration the scale, symmetry, and design of the structure and minimize the addition of bulk and clutter to a building.¹⁴

- **The ZTA disregards the provisions and effects of the federal Spectrum Act.** According to an advisory paper issued by the County's outside counsel that assisted with the preparation of this ZTA, the Spectrum Act treats a complete replacement of a pole as a new (cell tower) facility.¹⁵ Generally, as a result, a new pole in the right-of-way may be modified or expanded by co-location. It may increase up to 10 feet in height, and antenna extensions may increase in width by 6 feet. On private property height and extensions may both increase by 20 feet.

The Spectrum Act impacts both small and large cell towers. A 40-foot tower can increase to 60 feet; an 80-foot tower can increase to 100 feet. So, instead of eliminating the 300-foot off-site dwelling setback, that setback should be restored to protect residents, and it should be expanded to 320 feet to accommodate for the effects of the Spectrum Act.

- **It expands opportunities to attach antennas to utility distribution poles.** Many utility distribution poles, as is the case with the aforementioned streetlights, have been located in close proximity to single-family homes. Older public rights-of-way have likely experienced more modernization activities than have the rights-of-way in areas with underground utilities. And this has, no doubt, led to greater numbers of utility poles that have been relocated in close proximity to homes. The 2017 ZTA that authorizes antenna attachments to these poles as Limited Uses threatens those homes where utility poles are in close proximity.

¹¹ Sec. 4.1.7.C.3(a) of the Zoning Ordinance permits 25% of a roof to be used for antenna-related purposes, see *infra* note 12.

¹² See County Zoning Ordinance Section 4.1.7.D,

[http://library.amlegal.com/nxt/gateway.dll/Maryland/montzon2014/chapter59montgomerycountyzoningordinance/article59-4developmentstandardsforeuclid?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:montgomeryco_md_mc\\$anc=JD_4.1.7](http://library.amlegal.com/nxt/gateway.dll/Maryland/montzon2014/chapter59montgomerycountyzoningordinance/article59-4developmentstandardsforeuclid?f=templates$fn=default.htm$3.0$vid=amlegal:montgomeryco_md_mc$anc=JD_4.1.7) and County Zoning Ordinance Section 4.1.8,

[http://library.amlegal.com/nxt/gateway.dll/Maryland/montzon2014/chapter59montgomerycountyzoningordinance/article59-4developmentstandardsforeuclid?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:montgomeryco_md_mc\\$anc=JD_4.1.8](http://library.amlegal.com/nxt/gateway.dll/Maryland/montzon2014/chapter59montgomerycountyzoningordinance/article59-4developmentstandardsforeuclid?f=templates$fn=default.htm$3.0$vid=amlegal:montgomeryco_md_mc$anc=JD_4.1.8).

¹³ City of San Diego Wireless Communication Facility Guidelines (Jan.4, 2016), pp. 10 -11,

<https://www.sandiego.gov/sites/default/files/legacy/development-services/pdf/industry/telecomguide.pdf>.

¹⁴ *Id.* *passim*.

¹⁵ County of Ventura (CA) Planning Commission Hearing (Feb. 5, 2015), Ex. 11,

<http://vcrma.org/planning/pdf/ordinances/wireless/Exhibit-11-Section-6409-a-Implementation.pdf>.

The ZTA Summary explains that there is a preliminary agreement with PEPCO to place limits upon the replacement of utility pole heights and to limit replacement pole height increases to one time for a change in utility pole height that would be to accommodate an antenna attachment. County materials discuss establishing new setbacks, too. And, though the ZTA requires the old pole be removed within 10 days after a replacement pole is added, this is also identified as a point of discussion and agreement. An agreement with PEPCO may prove to provide creative solutions. But in light of PEPCO's lackluster compliance with existing agreements, some skepticism is in order.¹⁶

Experts disagree about whether and to what extent wireless providers have rights to attach antennas to utility poles in the utility rights-of-way or easements that are within private land, including the properties that abut single-family homes. And the ZTA, having eliminated residential setbacks and expanded opportunities for siting and attachment on properties abutting residences, arguably expands the threat for antenna attachments to utility poles that abut single-family homes.

- **Safety Issues.** This ZTA imposes a variety of safety concerns that must be addressed.
 - Antenna attachments to poles in the public rights-of-way can and have in the past caused serious and even disastrous consequences for communities.¹⁷
 - A small child could be unsafely obscured from vehicular traffic and/or oncoming traffic could unsafely be obscured from a small child's view if ground-mounted equipment would be placed at the bases of poles that replace streetlights in the public rights-of-way.
 - The elimination of setbacks and the reductions of standards, which allow antennas/enclosures on light poles and low buildings on private properties next to single-family homes could threaten the safety of the neighboring residential occupants.¹⁸
 - Whether in the Zoning Ordinance or concurrent legislation, regulations are needed to keep workers/contractors, emergency responders, and civilians safe. On-site shut-offs to power-down all antennas should be required to protect workers and contractors who maintain private buildings and grounds, and to protect emergency responders and civilians when collisions take down poles with antennas in parking lots or along the public rights-of-ways.
 - Concurrent DOT legislation should require breakaway poles in public rights-of-way and all parking lots when the weights of antenna attachments and equipment would create an impact hazard. The County should include breakaway pole standards to its MOU/agreement with PEPCO, too.

- **Other Companion Measures** should be addressed concurrently with the ZTA.
 - **DOT Streetlight and Roadway Standards.** The standard for a Limited Use should specify incorporating all equipment inside an appropriately configured DOT pole, unless the provider can demonstrate technological incompatibility.¹⁹

¹⁶ For example, the County entered into an MOU with PEPCO and attaches to its distribution poles, in 2013, for the cooperation and prompt removal of double poles. See Council GO/T&E Committees Meeting, "Agreement in Principle for the Removal of Poles" (June 27, 2013), http://www.montgomerycountymd.gov/COUNCIL/Resources/Files/agenda/cm/2013/130627/20130627_GOTE1.pdf.

¹⁷ *re :Streamlining Deployment of Small Cell Infrastructure*, WT Docket No. 16-421; Comments of Sue Present (Jan. 17, 2017), pp. 1 -4, https://ecfsapi.fcc.gov/file/101160867025032/FCC_comments_WT16421_sPresent.pdf.

¹⁸ Excerpts referenced from YouTube series: *Caution to Workers (Pt. 1)* https://www.youtube.com/watch?v=w_5truC-Res; *Caution to Workers (Pt. 2)*, <https://www.youtube.com/watch?v=HhOBRgvDAW8>; and *Caution to Workers (Pt. 3)*, <https://www.youtube.com/watch?v=sR4eWEvY8eQ>, T. Scarato, *5G, Wireless, and Health*, MCCF Meeting (June 12, 2017).

¹⁹ The County's ZTA Summary discusses "leveraging" DOT requirements to use County streetlights manufactured with ventilation for equipment in the base.

DOT should also collaborate with HOAs, Community Associations, Business Districts, etc. to limit the adverse impacts of DAS and small cell antennas and equipment in public rights-of-way, and upon abutting private properties and neighborhoods.²⁰

- **Public Information Access and Due Process.** The Tower Committee has committed to developing mapping and data tools to publicly track and report applications and existing facilities. It also plans to update application regulations so that applications will be: submitted digitally/on-line; include proof of authorization to use the proposed properties; and required to be resubmitted with new application fees if determined to be incomplete or substantially changed after filing. However, history suggests that the Tower Committee’s planned changes do not always come to timely fruition.²¹ And much more still needs to be done so that the Tower Committee’s processes become fair, transparent, and accessible to the public.²²
- **The ZTA undermines good planning and zoning.** This ZTA seems to have been proposed for the benefit of the industry rather than for promoting health, public safety, and general welfare and/or other stated purposes of the Zoning Ordinance.²³
 - **The need for “most-preferred” locations and “sensitive use” designations.** This ZTA blurs the distinctions between the industrial and commercial zones where more intense uses are permitted, and the agricultural and residential zones that permit less intensive uses. It has removed some standards, reduced others, and eliminated access to the Conditional Use review process that provides residents with notice and a voice in the process. Following what some other governments do. The ZTA should include a stated hierarchy of locations for micro cell towers and antennas, from “most preferred” to “least preferred.” Only those locations that are designated “most preferred” should be Limited Uses.²⁴ To qualify for a lesser preferred location, the applicant would be required to demonstrate having explored in good faith and found no “most preferred” locations to satisfy the applicant’s technical requirements. A lesser preferred location review would involve public input. Some local governments also identify sensitive uses in the lesser/least preferred locations. For one local government, “Sensitive uses means any residential use, public or private school, day care, playground, or retirement facility.”²⁵
 - **Three-year reviews.** The County wants to review this legislation every three years for needed changes. No! Each time the County has passed a ZTA to amend antenna attachments and/or cell tower legislation, it has reduced protections to residents and property owners and provided benefits to the industry.

The rationale provided for three-year reviews is that manufacturers of antennas and components “will continue to make more compact and robust equipment.” However, well-crafted legislation is flexible and anticipates change. Here again, we can borrow from other local governments’ legislation, and require: 1) “the smallest, least visually intrusive antennas, components, and other necessary equipment; and 2) “all reasonable means to conceal or minimize the visual impacts of the wireless facility through

²⁰ See supra note 3, slide 13.

²¹ See supra note 3, slide 17.

²² For further details see supra note 3, slides 16 – 18, and supra note 7.

²³ See County Zoning Ordinance Sec. 59-1.2.1,

[http://library.amlegal.com/nxt/gateway.dll/Maryland/montzon2014/chapter59montgomerycountyzoningordinance/article59-1generalzoningordinanceprovisi?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:montgomeryco_md_mc\\$anc=JD_1.2.1](http://library.amlegal.com/nxt/gateway.dll/Maryland/montzon2014/chapter59montgomerycountyzoningordinance/article59-1generalzoningordinanceprovisi?f=templates$fn=default.htm$3.0$vid=amlegal:montgomeryco_md_mc$anc=JD_1.2.1)

The County’s Summary identifies the number-one goal of the ZTA to be, “address the community’s interest in having access to robust mobile broadband services and the evolving technical needs of the wireless industry.”

²⁴ See supra note 13, p. 4.

²⁵ See supra note 3, slide 20.

integration. Integration with existing structures or among other existing uses shall be accomplished through the use of architecture, landscape, and siting solutions. Each application for a wireless facility is evaluated based on the proposed design, location, permits required, and other site-specific characteristics. Architecture, landscape, and siting solutions are all used in evaluating wireless facility applications. Use landscape architecture to improve views of the wireless facility as seen from the public right-of-way and neighboring properties by screening, buffering, and blending wireless facility with the surrounding environment.”²⁶

- **The ZTA fails to address the longstanding problem of getting inactive antennas removed.** Inactive antennas occupy needed transmission space and create clutter. The ZTA can require inactive antennas to be removed.²⁷ Another solution used by some local governments is to limit the lifespan of the permits issued for wireless communications facilities to 10 years. Permit expirations serve multiple purposes. Upon expiration the facility must be removed, or, for the permit to be renewed, the provider must demonstrate the facility’s compliance with regulations, including that it: 1) has active antennas, 2) has technology that meets updated standards, and 3) is not a nonconforming use (such as due to Spectrum Act expansions).²⁸
- **The Zoning Ordinance should treat wireless infrastructure developers and other developers consistently.** The ZTA grants added benefits to these developers: expedited reviews, greater siting opportunities, and permission to use more obtrusive facilities. And it allows these developers carte blanche to place their installations not where the public need is great(est), but instead where the wireless infrastructure developers’ investment will yield the highest return. The benefits provided to these developers diminish the safety, property values, and enjoyment of County neighborhoods. But beyond the detriments posed to the residents, property owners, and the public at large, it is reasonable to ask why nothing is expected from these wireless infrastructure developers in return.²⁹

Also, the County’s June presentation materials seem to suggest that post-construction inspections have not been universally conducted. Apparently, not all wireless facilities have been built in accordance with the commitments to the County.³⁰

Last September, when the PHED Committee was discussing ZTA 16-05, Councilmember George Leventhal asked what other jurisdictions were doing to grapple with drastic increases in applications to deploy wireless communication facilities.³¹ As is demonstrated herein, some local governments are ahead of Montgomery County. It seems reasonable to expect our County to draw upon the good work of other local governments. But it also seems reasonable to expect legislation to be infused with our County’s expertise and creativity. We deserve better – much better – than what has been proposed as the 2017 ZTA.

²⁶ See supra note 13, p. 5.

²⁷ Supra note 3, slides 6 – 10.

²⁸ Supra note 15.

²⁹ For more information on this subject see: S. Present, *More on Wireless Facility Applications: The Right to Site*, MCCF Civic Fed News (February 2017), p. 6, <http://montgomerycivic.org/files/CFN201702.pdf> . See also *re: Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17 – 79; *re: Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17 – 84, Reply Comments of Sue Present (Jul. 17, 2017), p. 1, https://ecfsapi.fcc.gov/file/10718778129203/replycomments_SUEPRESENT_17_79_17_84.pdf .

³⁰ See M. Herrera, Wireless Technology Community Meeting (June 14, 2017), slide/page 12, <http://montgomerycivic.org/files/5G%20Community%20Meeting%202017%20v3.pdf> .

³¹ See supra note 3, slide 20.