

## 2022 Election: Montgomery County, MD

### County Council Candidate Pledge Regarding Wireless Facilities

#### CONTEXT

- Montgomery County's public rights-of-way are uniquely valuable public resources, closely linked with the character, civic identity, and natural beauty of all County neighborhoods, including those with single-family and multifamily homes.
- The County authorizes wireless carriers to make additions and modifications to infrastructure and to construct and operate wireless facilities in these public rights-of-way, on school campuses, and on top of residential and other buildings.
- Transparency and active engagement with residents are integral to ensuring the safety of these activities, the preservation of residential neighborhoods, and compliance with applicable requirements.
- The passage of zoning text amendments (ZTA) 18-02<sup>1</sup> and 19-07<sup>2</sup> has severely restricted residents' rights and dramatically reduced setbacks and other protections that, taken together, will increase adverse impacts, such as needless proliferation of obtrusive or incommodious wireless facilities.

#### **PLEDGE: If elected, I pledge, to the fullest extent of my powers in office, to prioritize the interests of County residents by:**

- **Co-sponsoring** Council action to immediately halt implementation of ZTA 19-07 and return the zoning code to the provisions in place prior to the adoption of 19-07 on July 27, 2021.
- **Opposing** the proposed ZTA 22-01<sup>3</sup>, which would worsen the impacts of ZTA 19-07.
- **Convening** a working group of residents and other stakeholders that will present recommendations to the Council for updating zoning, regulations, and fees for wireless facilities in the County. A majority of the working group will be residents, independent health and environmental-science experts, and qualified outside legal counsel with expertise in protecting residents' interests and the County's autonomy over zoning in light of federal law. County executive branch would provide technical and staff support.
- **Co-sponsoring** regulatory improvements based upon input from the working group that will minimize, to the extent possible, adverse impacts of wireless facilities and infrastructure.
- **Requiring** proposals related to wireless facilities undergo environmental impact assessment.
- **Supporting** policies that ensure wireless facilities do not violate County requirements.

I affirmatively sign the foregoing pledge to residents of Montgomery County. I have received a copy of the attached background information.

## Background Information

### Zoning Text Amendments relating to “small” wireless facilities

- On July 27, 2021, the Council approved Zoning Text Amendment (ZTA) 19-07, which enables deployment of telecommunications towers in County rights-of-way in residential and agricultural zones. These zones include most single-family homes and many (if not most) multifamily dwellings in the County.
- On May 15, 2018, the Council approved ZTA 18-02, which allowed similar deployments in commercial and mixed commercial/residential zones, with the placement of towers just 10 feet from existing buildings (including homes and schools).
- Montgomery County was not required to adopt these ZTAs in order to comply with federal law:
  - Montgomery County is not and was not vulnerable to liability for “a lot of money” if it failed to adopt these ZTAs, as some have claimed. The Supreme Court ruled in 2005 that localities cannot be fined or liable for money damages for failing to deploy a cell tower.<sup>4</sup>
  - The attached comparison table summarizes key areas in which 19-07 is more permissive, with towers much closer to homes, than FCC guidelines.
- Both of these ZTAs were passed without input from the Office of the People’s Counsel (OPC), a required step to amend the zoning code.<sup>5</sup> OPC was created to “protect the public interest” in zoning matters.<sup>6</sup> The Council had previously defunded OPC and voted again on May 11, 2022 to withhold funding.<sup>7</sup>

### Recent federal court decisions regarding FCC

- On August 13, 2021, the U.S. Court of Appeals for the D.C. Circuit ruled in favor of *Environmental Health Trust et al.*<sup>8</sup>, as follows:
  - The Federal Communications Commission (FCC) violated federal law (the Administrative Procedures Act, or APA) by failing to provide a “reasoned explanation” for deciding that its wireless radiation exposure limits do not need updating, even though these limits have not been reviewed since 1996.
  - The Food and Drug Administration (FDA) has not provided an “articulation of the factual... bases” for its conclusions, which “represent[s] a failure by the FDA”, and therefore the FCC cannot rely upon FDA webpage FAQs on cell phone safety.
  - All other expert agencies in the federal government have been silent on the question of safety, and “silence does not even indicate whether the expert agencies... considered any of the evidence”.
  - The Court ordered FCC to “provide a reasoned explanation for its decision” and to address the impacts of RF radiation on children and the environment. FCC has not yet complied with this order.
- Additional background regarding the *EH Trust* decision:
  - Petitioners submitted over 11,000 pages of scientific evidence indicating health effects of wireless radiation exposure at levels below FCC’s current limits.
  - FCC is required to set exposure limits to protect public health, but it is not a health agency and relies on other expert agencies’ analyses (which have not been done).
  - FDA acknowledges that it has not made any determination about the safety of cell towers.<sup>9,10</sup>
- Title 47 Section 332 of the US Code<sup>11</sup> says local governments may not “regulate the placement” of cell towers based on environmental effects of radiofrequency emissions, which is based on the

premise that the FCC complies with environmental protection law before it seeks to preempt local zoning authority.

- However, in 2019 the U.S. Court of Appeals for the D.C. Circuit in the *Keetoowah* case found that FCC violated federal law (the APA) by failing to justify its assertion that “small cell” wireless facilities “pose little to no environmental risk”.<sup>12</sup> The court held that the FCC acted in an arbitrary and capricious manner and that FCC’s “public interest analysis did not meet the standard of reasoned decisionmaking.” Although almost three years have passed since that decision, we are not aware of FCC having provided any analysis of the environmental effects of small cell networks or of their cumulative effects.
- Wireless carriers have asserted that “environmental effects” includes “health effects”, however this has not been tested in court. Courts have issued decisions based on “potential” health effects or “concerns” about health effects, but not on imminent or actual effects.<sup>13</sup> There is an open legal question about this assertion.<sup>14</sup>

### **Wireless facilities’ regulatory compliance in the County**

- The County has been approving wireless transmission facilities on rooftops of multifamily residential buildings since at least 1996, as far back as its public database is available. Many of these multifamily homes provide relatively affordable housing in our high-priced County.
- Residents have brought to the attention of the County’s Transmission Facilities Coordination Group (also known as the Tower Committee) errors in many applications for wireless facilities. For example, in 2020, residents pointed out to the Committee an apparent pattern of errors relating to the underreporting of expected levels of exposure to wireless radiation. This pattern affected at least 25 sites, including nine residential buildings and two County high schools.<sup>15</sup> All had been favorably recommended by the Committee before the errors were discovered, requiring the Committee to seek corrections and re-consideration.
- Applicants’ own estimates often predict that their antennae on top of residential buildings will generate levels of exposure to wireless radiation in certain areas atop the building and/or over the sides that will exceed federal exposure limits for the general public, sometimes by dozens of times.<sup>16</sup> In one example, the maximum anticipated level of exposure in one area on the rooftop was predicted to be as high as 114 times FCC limits.<sup>17</sup>
- The Tower Committee does not include any resident representatives, nor are residents permitted to speak at its meetings.
- The County currently has no policy or procedure to ensure that, after installation, wireless facilities – whether in rights-of-way, on school property, on private property, or on buildings – comply with County requirements and do not exceed FCC exposure limits, even when applications anticipate exceeding those limits.

**Comparison between FCC guidelines and recent zoning changes adopted by the Council  
For Residential and Agricultural Zones**

<b>Topic</b>	<b>Description</b>	<b>FCC guideline</b>	<b>ZTA 19-07 &lt; 30 feet from homes<sup>18</sup></b>	<b>ZTA 19-07 ≥ 30 feet from homes<sup>19</sup></b>
Setbacks	Minimum distance from a dwelling (previously 300 feet)	<ul style="list-style-type: none"> <li>No requirement or specific guidance</li> </ul>	<ul style="list-style-type: none"> <li>Allowed</li> </ul>	<ul style="list-style-type: none"> <li>Allowed</li> </ul>
Shot clock	Number of days to process an application to install a small cell tower	<ul style="list-style-type: none"> <li>90 days, or longer if needed<sup>20</sup></li> </ul>	<ul style="list-style-type: none"> <li>90 days</li> </ul>	<ul style="list-style-type: none"> <li>90 days</li> </ul>
Notice	Whether notice of an application is sent to nearby residents	<ul style="list-style-type: none"> <li>Allowed</li> </ul>	<ul style="list-style-type: none"> <li>Sent to property owners within 300 feet</li> </ul>	<ul style="list-style-type: none"> <li>Eliminated</li> </ul>
Hearing process	Administrative hearing to consider applications and hearing examiner autonomy	<ul style="list-style-type: none"> <li>Permitted at any distance</li> </ul>	<ul style="list-style-type: none"> <li>Eliminated hearing examiner ability to reject an application</li> </ul>	<ul style="list-style-type: none"> <li>Eliminated</li> </ul>
Appeals	Ability for residents to appeal a hearing decision	<ul style="list-style-type: none"> <li>Allowed</li> </ul>	<ul style="list-style-type: none"> <li>Eliminated</li> </ul>	<ul style="list-style-type: none"> <li>Eliminated</li> </ul>
Measurement	Ensuring compliance with FCC radiofrequency exposure limits	<ul style="list-style-type: none"> <li>Allowed</li> </ul>	<ul style="list-style-type: none"> <li>None</li> </ul>	<ul style="list-style-type: none"> <li>None</li> </ul>
Fees	Amount County may charge the applicant for use of the County right-of-way <sup>21</sup>	<ul style="list-style-type: none"> <li>Can recover all costs</li> </ul>	<ul style="list-style-type: none"> <li>\$2600</li> </ul>	<ul style="list-style-type: none"> <li>\$690</li> </ul>
Aesthetics	Ability of Counties to specify the visual look of cell towers	<ul style="list-style-type: none"> <li>Allowed</li> </ul>	<ul style="list-style-type: none"> <li>Hearing examiner minimal latitude</li> </ul>	<ul style="list-style-type: none"> <li>Same color as pole</li> </ul>
Antenna size	Maximum size of a “small cell” antenna, less than 50 feet from the ground	<ul style="list-style-type: none"> <li>3 cubic feet</li> </ul>		<ul style="list-style-type: none"> <li>6 cubic feet</li> </ul>
Liability	Antenna owner responsible for liability arising from its deployment	<ul style="list-style-type: none"> <li>Allowed</li> </ul>		<ul style="list-style-type: none"> <li>No requirement</li> </ul>

Note: Table above summarizes the changes enacted by ZTA 19-07, which amended the zoning code section 59-3.5.2; this summary does not capture all aspects of a complex zoning code, nor does it reflect the applicability of section 59-3.5.14, which is the subject of a proposed ZTA 22-01 (see endnote 3).

## References

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- <sup>1</sup> [https://www.montgomerycountymd.gov/COUNCIL/Resources/Files/zta/2018/20180515\\_18-44.pdf](https://www.montgomerycountymd.gov/COUNCIL/Resources/Files/zta/2018/20180515_18-44.pdf)
- <sup>2</sup> [https://www.montgomerycountymd.gov/COUNCIL/Resources/Files/zta/2019/20210727\\_19-17.pdf](https://www.montgomerycountymd.gov/COUNCIL/Resources/Files/zta/2019/20210727_19-17.pdf)
- <sup>3</sup> [https://www.montgomerycountymd.gov/council/Resources/Files/agenda/col/2022/20220215/20220215\\_3C.pdf](https://www.montgomerycountymd.gov/council/Resources/Files/agenda/col/2022/20220215/20220215_3C.pdf)
- <sup>4</sup> <https://www.supremecourt.gov/opinions/04pdf/03-1601.pdf>
- <sup>5</sup> See Zoning Ordinance, Appendix B, section 2(a)  
[https://codelibrary.amlegal.com/codes/montgomerycounty/latest/montgomeryco\\_md\\_zone2014/0-0-0-64694](https://codelibrary.amlegal.com/codes/montgomerycounty/latest/montgomeryco_md_zone2014/0-0-0-64694)
- <sup>6</sup> [https://codelibrary.amlegal.com/codes/montgomerycounty/latest/montgomeryco\\_md/0-0-0-1897](https://codelibrary.amlegal.com/codes/montgomerycounty/latest/montgomeryco_md/0-0-0-1897)
- <sup>7</sup> PHED Committee recommended withholding OPC funding:  
[https://www.montgomerycountymd.gov/council/Resources/Files/agenda/col/2022/20220511/20220511\\_36.pdf](https://www.montgomerycountymd.gov/council/Resources/Files/agenda/col/2022/20220511/20220511_36.pdf)  
Full Council adopted this recommendation without discussion:  
<https://www.youtube.com/watch?v=hrdi8QFDKK4>  
Recommendation shown on the summary for that Council meeting:  
<https://www.montgomerycountymd.gov/COUNCIL/Resources/Files/agenda/col/2022/20220511/summary-20220511.pdf>
- <sup>8</sup> [https://www.cadc.uscourts.gov/internet/opinions.nsf/FB976465BF00F8BD85258730004EFDF7/\\$file/20-1025-1910111.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/FB976465BF00F8BD85258730004EFDF7/$file/20-1025-1910111.pdf)
- <sup>9</sup> See letter dated January 11, 2022, from FDA Center for Devices and Radiological Health  
[https://ehtrust.org/wp-content/uploads/FCC\\_FDA-Communications-FCC-Lawyer-and-Mother-on-Cell-Tower-Radiation-.pdf](https://ehtrust.org/wp-content/uploads/FCC_FDA-Communications-FCC-Lawyer-and-Mother-on-Cell-Tower-Radiation-.pdf)
- <sup>10</sup> See public comments by local resident groups regarding Montgomery County's reliance on FDA statements:  
<https://www.regulations.gov/comment/FDA-2021-P-1347-0732>
- <sup>11</sup> <https://www.law.cornell.edu/uscode/text/47/332>
- <sup>12</sup> <https://docs.fcc.gov/public/attachments/DOC-359025A1.pdf>  
This paragraph has been updated from an earlier version.
- <sup>13</sup> Maryland is located in the Fourth Circuit of the federal appeals courts. This court has ruled against using "potential" health effects, or "concerns" about health effects as a basis for rejecting a permit; however that does not preclude placement decisions based upon actual health effects, known harms, or imminent harms.  
<https://www.courtlistener.com/opinion/626095/t-mobile-northeast-llc-v-city-of-newport-news/>
- <sup>14</sup> [https://www.supremecourt.gov/DocketPDF/21/21-629/196710/20211025140205639\\_Santa%20Fe%20Alliance%20Petition.pdf](https://www.supremecourt.gov/DocketPDF/21/21-629/196710/20211025140205639_Santa%20Fe%20Alliance%20Petition.pdf)
- <sup>15</sup> <https://techwisemocomd.org/wp-content/uploads/2021/01/Why-Did-25-Wireless-Applications-with-Errors-Pass-MoCo-Tower-Committee-Review-Red3.pdf>
- <sup>16</sup> See County tower database for examples: [https://montgomerycountymd.gov/cable/Towers/database\\_towers.html](https://montgomerycountymd.gov/cable/Towers/database_towers.html)
- <sup>17</sup> See page 124  
<https://montgomerycountytfcg.s3.amazonaws.com/Applications/MC2020031117+Application.pdf>
- <sup>18</sup> "Conditional use" refers to permits that require public notice and a zoning hearing. ZTA 19-07 changed this setback from 300 feet to less than 30 feet.
- <sup>19</sup> "Limited use" refers to permits that may be issued without notice and without a zoning hearing. ZTA 19-07 reduced this setback from 300 feet to 30 feet or greater from any building intended for human occupation.
- <sup>20</sup> See page 54  
<https://cdn.ca9.uscourts.gov/datastore/opinions/2020/08/12/18-72689.pdf>
- <sup>21</sup> Localities may charge fees to recover their costs. FCC established a "safe harbor", meaning any fees at or below this amount are automatically presumed lawful without having to estimate costs. Prior to 19-07, the fee was \$16,390 per application (see pdf page 7)  
[https://apps.montgomerycountymd.gov/ccllms/DownloadFilePage?FileName=8356\\_1\\_5209\\_Resolution\\_18-601\\_Adopted\\_20160913.pdf](https://apps.montgomerycountymd.gov/ccllms/DownloadFilePage?FileName=8356_1_5209_Resolution_18-601_Adopted_20160913.pdf)