CITY OF BALTIMORE
STEPHANIE RAWLINGS-BLAKE, Mayor

DEPARTMENT OF LAW
GEORGE A. NILSON, City Solicitor
101 City Hall
Baltimore, Maryland 21202

April 8, 2013

Honorable President and Members
of the City Council of Baltimore
Room 409, City Hall
100 N. Holliday Street
Baltimore, Maryland 21202

Attn: Karen Randle, Executive Secretary

Re: City Council Bill No. 13-0186 – Soliciting - Prohibited Places
Downtown Partnership Amendments

Dear President and City Council Members:

At the hearing on City Council Bill 13-0186, amendments to the bill were proposed by the Downtown Partnership. The amendments would expand the scope of the current solicitation law to prohibit soliciting from any person who is at a parking meter, whether a single-space or multi-space meter, standing in line at a theater, sporting venue, commercial establishment, or government office or engaging in outdoor dining, whether as part of a licensed outdoor food establishment or in the public right-of-way.

After, reviewing the most recent case law regarding restrictions of this type, the Law Department is concerned about the constitutionality of the amendment. In Berger v. City of Seattle, 569 F.3d 1029 (9th Cir. 2009), the constitutionality of a Seattle Center rule that prohibited all speech activity within 30 feet of prsons waiting in line for tickets or food or other goods or services, or to attend any Seattle Center event or attending or being in an audience at any Seattle Center event, or seated in any seating location where foods or beverages are consumed. This type of restriction is referred to as the "captive audience" scenario. Generally, the purpose is to protect individuals in these areas from having to listen to persons that wish to communicate with them. The Seattle Center is considered a park area. The court opined that in a public park a "captive audience" such as that described in the rule was not a protectable captive audience for constitutional purposes. Id. at 1054. "Only in narrow circumstances may a government restrain speech to protect such audiences. The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that a substantial privacy interests are being invaded in an essentially intolerable manner." Id. According to the Court, such substantial privacy interests include the psychological and physical welling of a person in a medical setting or the quiet enjoyment of a person in their residence. Such privacy interests do not exist for a person standing in line or eating outdoors in a public park. In addition, the Court found the rule unconstitutionally vague because solicitation boundaries change unpredictable depending on where a line ends or where diners happen to be

seated.

In 2011, the Supreme Court addressed a similar issue in one of the Westboro Baptist Church cases, Snyder v. Phelps, 131 S. Ct. 1207(2011). The case involved protesters not solicitation but did discuss the "captive audience" scenario. "In most circumstances, 'the Constitution does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, . . . the burden normally falls upon the viewer to avoid further bombardment of [his] sensibilities simply by averting [his] eyes.' *Erznoznik* v. *Jacksonville*, 422 U.S. 205, 210-211, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1975) (internal quotation marks omitted). As a result, '[t]he ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.' *Cohen* v. *California*, 403 U.S. 15, 21, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971). As a general matter, we have applied the captive audience doctrine only sparingly to protect unwilling listeners from protected speech. For example, we have upheld a statute allowing a homeowner to restrict the delivery of offensive mail to his home, see *Rowan* v. *Post Office Dept.*, 397 U.S. 728, 736-738, 90 S. Ct. 1484, 25 L. Ed. 2d 736 (1970), and an ordinance prohibiting picketing "before or about" any individual's residence, *Frisby*, 487 U.S., at 484-485, 108 S. Ct. 2495, 101 L. Ed. 2d 420."

Unlike the existing provisions of Art. 19, Sec. 47-4, there is no public safety purpose to the solicitation prohibitions in the amendment. The solicitation is not occurring where a person is particularly vulnerable or where there are safety concerns such as busy streets. If safety is an issue due to the nature of the behavior then the aggressive solicitation is likely occurring and Sec. 47-3 is applicable to curtail the behavior. The restrictions proposed in the amendment to City Council bill 13-0186 could be ruled unconstitutional for reasons similar to those articulated by the Court in Berger. There is simply no recognized substantial privacy interest in being free from listening to the speech of others when a person is standing in line or seated in the areas defined in the amendment. Like the areas in Berger, the areas in the amendment are likely to be public park areas in the Inner Harbor or streets and sidewalk areas both of which are considered public forums for First Amendment purposes. The Berger and Snyder cases are clear that persons is these areas are not captive audiences for First Amendment purposes and there is no substantial privacy interest in protecting person in these areas from communications from others.

Based on the constitutional concerns expressed above, the Law Department cannot approve the amendments for form and legal sufficiency.

Sincerely yours,

Elena R. DiPietro

Elena R. DiPietro
Chief Solicitor

cc: George A. Nilson, City Solicitor
Angela Gibson, City Council Liaison, Mayor's Office
Hilary Ruley
Victor Tervala