

CITY OF BALTIMORE

STEPHANIE RAWLINGS-BLAKE, Mayor



DEPARTMENT OF LAW

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

January 7, 2013

The Honorable President and Members
of the Baltimore City Council
Attn: Karen Randle, Executive Secretary
Room 409, City Hall
100 N. Holliday Street
Baltimore, Maryland 21202



Re: City Council Bill 12-0170 - Wireless Telecommunications Antennae – Prohibited Contracts

Dear President and City Council Members:

The Law Department has reviewed City Council Bill 12-0170 for form and legal sufficiency. The bill prohibits contracts or other authorizations for the placement of a wireless telecommunications antenna on property that is owned or controlled by the City of Baltimore and used for the recreation, care, or education of children. The bill defines certain terms and becomes effective on the date of enactment.

The Law Department has three concerns with this bill. First, Section 704 of the 1996 Telecommunications Act provides that “No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent such facilities comply with the Commissions regulations concerning emissions.” This bill does not state that its regulations are based on concerns over the health or environmental effects of radio frequency emissions. In fact, the bill is silent as to why this regulation is needed. In order for the Law Department to approve the bill, no information, testimony or discussion on the health or environmental effects of wireless telecommunications, except those pertaining to the legal standards, can be entertained during the hearing or in any manner serve as the basis for adopting the ordinance.

Second, the above section of Federal Law contains this prohibition: a local government “shall not prohibit or have the effect of prohibiting the provision of personal wireless services.” Courts have interpreted the language to mean that, among other things, a local government cannot create “gaps” in wireless service. Our Fourth Circuit holds that “blanket prohibitions” and “general bans or policies” are prohibited under the law. *See At&T Wireless Pcs v. City Council of Va. Beach*, 155 F.3d 423, 428 (4th Cir. 1998). *T-Mobile Northeast LLC v. Fairfax County Bd. of Supervisors*, 672 F.3d 259 (4th Cir. Va. 2012) further explained this standard. It held that a policy or practice is a violation of the law when there is a “legally cognizable deficit in coverage amounting to an effective absence of coverage, and [there

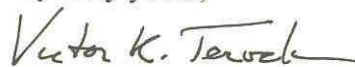
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exists] a lack of reasonable alternative sites to provide coverage.” *Id.* at 268. Thus, the Law Department’s concern is that a ban on wireless telecommunication antennae in areas affected by Council Bill 12-0170 may create “gaps” in service and therefore be in violation of the 1996 Telecommunications Act.

Third, the bill prohibits wireless telecommunication antennae on any school property “owned and controlled by the Mayor and City Council...” State law, however, does not empower the Mayor and City Council to control the facilities of Baltimore City Public Schools (“BCPS”). Control lies with the Baltimore City Board of School Commissioners. Md. EDUCATION Code Ann. § 4-306.1. The City is empowered to adopt ordinances to protect school buildings and property, Md. EDUCATION Code Ann. § 4-315, but the City’s legislative powers extend no further. Accordingly, the legislative intent of Council Bill 12-0170 must serve the purpose of protecting school facilities in order for the ordinance to be lawful.

In conclusion, since there is nothing on the face of Council Bill 12-0170 to suggest that it is a lawful exercise of legislative power, its lawfulness will depend on information adduced at its hearing. If the intent of the bill is to protect children from the effects of radio frequency emissions, it will be deemed unlawful. If the ban on antennae will create gaps in service, the bill will be deemed unlawful. If the bill does not aim to protect school facilities, the portion of the bill affecting BCPS will be deemed unlawful.

Very truly yours,



Victor K. Tervala
Assistant Solicitor

cc: George Nilson, City Solicitor
Angela C. Gibson, Mayor’s Legislative Liaison
Elena DiPietro, Chief Solicitor
Hilary Ruley, Assistant Solicitor
Ashlea Brown, Assistant Solicitor