CITY OF BALTIMORE
SHEILA DIXON, Mayor

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

January 22, 2010

The Honorable President and
Members of the Baltimore
City Council
c/o Karen Randle, Executive Secretary
409 City Hall
Baltimore, MD 21202

RE: City Council Bill 09-0412 – Zoning – Cell Towers

Dear President and Members,

You have requested the advice of the Law Department regarding City Council Bill 09-0412. City Council Bill 412 requires that conditional use applications for antenna towers, microwave relay towers, and similar installations for communications transmission or receiving be referred to the Historical and Architectural Preservation Division of the Department of Planning ("HAP") to determine whether the installation will occur on a historic property and if so, whether such installation will have a negative impact on the property and whether the impact can be mitigated. HAP must then report its findings to the Zoning Board. The Planning Department has recommended an amendment to the bill which allows the Zoning Board to move forward should HAP fail to report its findings in a timely manner.

Bill 412 applies to antenna towers, microwave relay towers and "similar installations for communications transmission or receiving." This language encompasses several types of structures that are heavily regulated by Federal law. Cellular towers are regulated by the Telecommunications Act, of 1996 (47 U.S.C.A. §253 *et seq.*), and communications towers and antenna, including radio, satellite and television communications structures, are regulated by the Communications Act of 1934 (47 U.S.C.A. § 301 *et seq.*) and the Federal Communications Commission. If it was not the intent of the bill to include any of these structures, the Law Department recommends limiting the scope of the law with specific, express exceptions.

Telecommunications Act

Although the Federal Telecommunications Act heavily regulates cellular service, the law expressly preserves local zoning authority "regarding the placement, construction, and modification of personal wireless service facilities." 47 U.S.C.A. § 332(c)(7). The law limits local authority, however, by prohibiting unreasonable discrimination between "functionally equivalent services" and laws which have the effect of "prohibiting the provision of personal wireless services" in the City. 47 U.S.C.A. § 332 (c)(7)(B)(i). The law further requires that requests for authorization to construct,

place or modify such facilities be acted upon "within a reasonable amount of time" and denials of such requests must be in writing and supported by "substantial evidence." 47 U.S.C.A. § 332 (c)(7)(B)(ii), (iii).

Although Bill 412 arguably adds to the process of applying for a conditional use, it requires that HAP report to the Board within 45 days after the referral. This time limit would be further enforced by the Planning Department's recommendation of a failure to act amendment, which allows the Zoning Board to move forward if HAP fails to report within the time period allotted. Courts have held that the Telecommunications Act's "reasonable" time requirement prohibits the local authority from ignoring the request, but does not require that cellular providers be given speedy decisions or preferential treatment in the zoning process. *Illinois RSA No. 3, Inc. v. County of Peoria*, 963 F. Supp. 732 (C.D. Ill.1997). It requires only *action*, not approval. Generally speaking, the "generally applicable timeframes for zoning decision[s]" are considered reasonable. *Sprint Spectrum, L.P. v. City of Medina*, 924 F.Supp.1036, 1040 (W.D. Wash. 1996). Bill 412 requires action by HAP. For these reasons, Bill 412 could withstand a challenge on these grounds.

The other requirements of the Telecommunications Act are met by Bill 412. The law would not effectively prohibit wireless service in the City and would not discriminate among similar providers. On the contrary, Bill 412's requirement that HAP report on these applications would add to the evidence in the record, therefore increasing the likelihood that the Zoning Board's decisions are supported by "substantial evidence."

The Communications Act/FCC Regulation

The Federal Communications Commission heavily regulates communications towers, antenna and other similar structures and requires, as part of its licensure procedure, that applicants follow certain procedures to ascertain whether an installation or modification of a tower or antenna will impact properties that are eligible to be listed or currently listed in the National Register of Historic Places. 47 C.F.R. § 1.1307 *and see* 36 C.F.R. part 800. However, the argument that FCC regulation of radio and television communications has preempted all local zoning laws concerning the construction and location of these facilities has been rejected by the courts. 81 A.L.R. 3d 1086 *see also* 4 Rathkopf's The Law of Zoning and Planning § 79:17 (4th ed.) ("We are not here faced with a case where the FCC has taken explicit action to preempt state law ... [T]he extensive regulatory authority of the FCC, including the responsibility to license amateur radio operators, does not preempt state zoning height limits on radio antennas." quoting *Guschke v. City of Oklahoma City*, 763 F.2d 379 (10th Cir. 1985)).

Reasonable local regulation of amateur radio antenna is permitted under the FCC rules: "State and local regulation of a station antenna structure must not preclude amateur service communications. Rather, it must reasonably accommodate such communications and must constitute the minimum practicable regulation to accomplish the state or local authority's legitimate purpose." 47 C.F.R. § 97.15 (e) (*as quoted in* 4 Rathkopf's The Law of Zoning and Planning § 79:26 (4th ed.)). Bill 412 does not preclude amateur service and is a reasonable regulation to accomplish the legitimate goal of preserving historic properties.

Finally, Bill 412 applies to satellite antennas which receive and transmit communications. To avoid federal preemption, a local regulation of satellite antennas "must not differentiate between satellite [receive-only] antennas and other types of antenna facilities." 83 Am. Jur. 2d Zoning and Planning § 391, 47 C.F.R. § 25.104. Bill 412 does not violate this provision.

It should be noted that local regulation of satellite dish antenna of certain sizes is preempted by FCC rules.

Therefore, even though federal law heavily regulates these structures, City Council Bill 09-0412 is within the authority of the City Council. The Law Department, therefore, approves City Council Bill 09-0412 for form and legal sufficiency.

Sincerely yours,

Ashlea H. Brown
Assistant Solicitor

cc: Angela Gibson, City Council Liaison
George A. Nilson, City Solicitor
Elena R. DiPietro, Chief Solicitor
Hilary Ruley, Assistant Solicitor