



**Message from the Takoma Park City Attorney Regarding the Proposed City Code Amendments to Regulate the Installation of Cell Antennas and Support Structures in City Rights of Way**

November 8, 2018

**Legal Background**

Under the Telecommunications Act of 1996, Congress prohibits state or local regulations that “prohibit or have the effect of prohibiting the ability of an entity to provide . . . telecommunications service.” Various federal courts have interpreted the Act as prohibiting local regulations that ban or impose excessive costs, delays, and restrictions on the installation of cell antennas on private property and in public rights of way. On September 26, 2018, the Federal Communications Commission (“FCC”) issued an order providing an expansive interpretation of the Act’s limitations on local government authority. The FCC order goes into effect in January 2019, absent court intervention, but there are several pending lawsuits challenging the order.

Because federal law mandates that local governments allow cell antennas in public rights of way and restricts what local governments can charge for the use of their rights of way, the cell industry is likely to favor right of way installations over private property installations where they will have to pay market rates to property owners.

The Montgomery County Zoning Ordinance regulates cell antenna installations on private property in the City of Takoma Park, and the City does not have the authority to address that issue. However, the City has the authority to regulate on the topic within its rights of way.

**What are we trying to do?**

The City Code provisions regarding the installation of utility poles, wires, and pipes in City rights of way were adopted before the development of small, short range wireless antenna technology. Therefore, if the City receives an application to install new antennas or support structures in City rights of way, we are limited in the conditions and restrictions we can impose.

The ordinance under City Council consideration would put the City in the best position to handle applications to install cell antennas on existing utility poles and installing new antenna support poles in City rights of way in light of the limitations under existing federal law and the FCC order. (Existing local laws are not “grandfathered” under the FCC order, which is why the ordinance is designed to comply with the order.) The ordinance is drafted to maximize the City’s flexibility to impose additional requirements and restrictions on new installations via administrative regulation based on developments

in federal law, and the City can and will revise the ordinance if necessary to take advantage of expanded local authority.

The draft proposed ordinance encourages the use of existing utility poles and the placement of multiple carriers' antennas in the same location, requires that new cell facilities be designed and placed to minimize visual impact, prohibits interference with pedestrian traffic and vehicular sightlines, and mandates Americans with Disabilities Act compliance. The setback requirements (30 feet in residential zones and 10 feet in commercial and commercial/residential zones) are designed to avoid a de facto prohibition on the installation of new antennas, which would violate federal law.

Although the proposed amendments authorize fees for installation applications and recurring right of way use fees, federal law limits the City to charging fees sufficient to recover actual costs incurred by the City and, as interpreted by the FCC, less than the actual costs. Therefore, the generation of revenue is not the impetus for the ordinance. In addition, although the cell industry is touting the benefits to consumers of small cell technology, such as improved coverage and increased data speeds, the City has not heard from its constituents that there is a desire for this technology or seen evidence that there is a need for this technology and the City is not proposing this ordinance to facilitate the installation this new technology. Again, the goal is to maximize the City's control of the right of way to protect the interests of the public. Although the City is aware of and concerned about the health risks of exposure to cell antenna radiation, federal law establishes limitations on radiation exposure, and local government regulations that restrict cell antenna installations based on health concerns are prohibited.

### **Why are we in a hurry?**

The City is trying to enact the ordinance quickly for two reasons. First, as noted above, we do not have adequate regulations in place to address applications for new antennas. Cell carriers are rolling out new antenna technology, so the City could begin receiving applications at any time. When the applications arrive, we want to be able to control, to the extent possible, the location and appearance of new cell facilities and minimize the number of new poles, antenna mounts, and related equipment boxes installed in the right of way.

Second, the cell industry has been lobbying the Maryland General Assembly to enact legislation establishing industry friendly state-wide regulations that supersede local government authority to regulate cell antennas. The Maryland Municipal League and the Maryland Association of Counties have been urging local governments to enact cell antenna ordinances before the 2019 legislative session demonstrate that local governments are able to develop reasonable policies and that state legislation is unnecessary.