To: Honorable Mayor and
   Members of the City Council and
   City Manager

From: Manuela Albuquerque, City Attorney

Re: PREEMPTION OF LOCAL REGULATION BASED ON HEALTH EFFECTS
   OF RADIO FREQUENCY EMISSIONS UNDER THE
   TELECOMMUNICATIONS ACT OF 1996

ISSUE PRESENTED

The City Council has previously been advised a number of occasions that that federal law
preempts local governments from regulating wireless telecommunication facilities based
on concerns about the health effects of radio frequency (RF) emissions.

Most recently, it has asked that the City Attorney list all of the cases decided under this
preemption provision.

This memorandum reiterates our most recent advice, and briefly discusses the cases that
address this issue.

SHORT ANSWER

Local governments, including Berkeley are completely preempted from regulating
wireless telecommunication facilities based on concerns about the health effects of radio
frequency emissions.

BACKGROUND

In December 2000, the Council adopted by urgency ordinance a 45-day moratorium on
the approval of new wireless telecommunications facilities throughout Berkeley. The
Council subsequently extended the moratorium through December 31st of that year.
During 2001, staff drafted, and the Planning Commission considered, a more comprehensive and detailed ordinance regulating wireless telecommunication facilities. In November 2001, the Planning Commission recommended approval of that ordinance, with various amendments. The Council adopted that ordinance in December 2001, and it is codified as Chapter 23C.17 of the Berkeley Municipal Code.

**DISCUSSION**

The Telecommunications Act of 1996, (“TCA”; 47 U.S.C. §332(c)) generally preserves local zoning authority over wireless telecommunications antennas for personal wireless service:

> Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(47 U.S.C. 332(c)(7)(A).)

However the TCA also limits this authority in a number of significant respects. Specifically, it 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 that such facilities comply with the [Federal Communication] Commission’s regulations concerning such emissions.

(47 U.S.C. 332(c)(7)(B)(iv).)

The courts have been quite clear that this language means what it says, and that local regulation of personal telecommunication services on the basis of health effects of RF emissions is preempted. (Cellular Phone Taskforce v. F.C.C. (2nd Cir. 2000) 205 F.3d 82, cert. denied, 531 U.S. 1070, 121 S.Ct. 758, 148 L.Ed.2d 661; Telespectrum, Inc. v. Public Service Commission of Kentucky (6th Cir. 2000) 227 F.3d 414.)

It has been suggested that the U.S. Supreme Court’s recent decision in City of Rancho Palos Verdes v. Abrams (2005) 544 U.S. 113, 161 L.Ed.2d 316, 125 S.Ct. 1453, somehow increases the City’s leeway to regulate on the basis of concerns about the health effects of RF emissions. This is incorrect. Abrams merely held that violation of the TCA did not constitute a denial of civil rights under 42 U.S.C. § 1983 for which damages and attorneys’ fees were available. It did not give local governments any greater substantive powers under the TCA, and in fact arose out a case in which a city’s denial of a use permit was invalidated under Section 332.
Accordingly, the City may not impose any limitations or restrictions on the establishment or location of wireless telecommunication facilities based on concerns about the health effects of radio frequency (RF) emissions.

In response to the Council’s request for additional case authority, we digest below a number of cases decided under Section 332.


AT&T filed suit under Section 332 alleging that the city had unlawfully denied its application for a Conditional Use Permit (CUP) for a cell antenna site. The court ruled that the denial of AT&T’s application for permit was not supported by substantial evidence and was impermissibly based on concern over health effects of radio frequency emissions. The court “conclude[d] that concern over the decrease in property values may not be considered as substantial evidence if the fear of property value depreciation is based on concern over the health effects caused by RF emissions. Thus, direct or indirect concerns over the health effects of RF emissions may not serve as substantial evidence to support the denial of an application.” (Id. at 1159.)

The court further noted that Congress intended this federal preemption:

> The conferees intend section 332(c)(7)(B)(iv) to prevent a State or local government or its instrumentalities from basing the regulation of the placement, construction, or modification of CMS facilities directly or indirectly on the environmental effects of radio frequency emissions if those facilities comply with the Commission's regulations...H.R. Conference Report No. 104-458, 201 (1996)

(Id.)


The plaintiff challenged a county’s denial of its application for a special use permit to build a cellular telephone transmission tower in violation of § 704 the Telecommunications Act of 1996. The court rejected the county’s concerns about possible health effects of the proposed tower since the county could not consider potential health effects of Plaintiff's proposed cell site under 47 U.S.C. § 332(c)(7)(B)(iv) and ordered the county to grant the special use permit.


The court agreed with the city’s position that 47 U.S.C.S. § 332(c)(7)(B)(iv) “prevents the denial of a permit on the sole basis that the facility would cause negative environmental effects.” (Id. at 924.)

SBA challenged a town’s denial of special permits to construct a wireless telecommunication facility. In rejecting citizens’ concerns about adverse health concerns, the court rejected the citizens’ testimony at the public hearings as generalized concerns about the possibility of adverse health effects from radio frequency emissions emanating from the proposed cell site.


Telespectrum applied to the Public Service Commission of Kentucky for a Certificate of Public Convenience and Necessity to construct a 199-foot tall wireless telecommunications tower in Carter County, Kentucky. Two individuals who lived about 412 feet from the proposed site complained because of health dangers from exposure to waves emitted from the tower. After a public hearing, the commission denied the application. The U.S. Court of Appeals for the Sixth Circuit affirmed the District Court’s decision that the commission’s decision was unsupported by substantial evidence. It stated that “we recognize that concerns of health risks due to the emissions may not constitute substantial evidence in support of denial by statutory rule, as no state or local government or instrumentality thereof may regulate the construction of personal wireless facilities ‘on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission’s regulations concerning such emissions.’” 47 U.S.C. § 332(c)(7)(B)(iv). (Id. at 424.)


Sprint Spectrum applied for a special permit to erect a 143-foot tall monopole for wireless personal communication services. The town denied the application, then passed a nine-month moratorium on new telecommunications antenna facilities precluding the company from submitting an application. The court held that the town’s grounds for denial were not supported by substantial evidence because it had based its denial on the “effect on property values that an unfounded fear of [radio frequency] emissions could have.” (Id. at 13.) The court ruled that the town had therefore violated the TCA by basing its decision on the effects of radio frequency emissions, contrary to Section 332(c)(7)(B)(iv), which was intended to prohibit the commission from “basing the regulation of the placement … [of the monopole] directly or indirectly on the environmental effects of radio frequency emissions.” (Id.)
Petitioners appealed from two final opinions and orders in which the FCC promulgated guidelines for health and safety standards of radio frequency ("RF") radiation and "retained the exclusive ability to regulate the relevant radio facility operations." (Id. at 87.) Pursuant to its rulemaking authority, the FCC has issued an interpretive ruling preempting state and local governments from regulating, personal wireless service facilities that comply with FCC regulations based on RF emissions. (Id. at 95-96.) Petitioners claimed that the "FCC’s interpretation is contrary to plain congressional intent." (Id.) The court rejected the petitioners’ arguments, recognizing that “[t]he FCC has broad preemption authority under the Telecommunications Act.” Thus, “[§]ection 332(c)(7)(B)(iv) does not amount to clear congressional intent to permit state and local governments to regulate the operation of such facilities. The FCC’s interpretation is therefore entitled to deference and, because the FCC's interpretation is reasonable, we are bound to accept it.” (Id; emphasis added.)


The Massachusetts district court noted that “in general, the Federal Communications Commission has broad preemption authority under the Telecommunications Act, particularly with respect to attempts by a state or locality to regulate wireless services on the basis of perceived environmental effects of radio frequency emissions. 47 U.S.C. § 332(c)(7)(B)” (Id. at 40.)

9. **Cellular Tel. Co. v. Town of Oyster Bay** (2nd Cir. 1999) 166 F.3rd 490

The defendant town denied plaintiff’s petitions for two cell sites, and plaintiff sued. The district court granted summary judgment for plaintiff, holding that the permit denials violated the Telecommunications Act of 1996. The U.S. Court of Appeals for the Second Circuit affirmed the injunction requiring town to issue special use permits to applicant was proper because the town’s denial of the permits was clearly based on concerns over the environmental effects of radio frequency emissions, in violation of the Telecommunications Act. The court noted that it considers the terms “environmental effects” and “health concerns” to be interchangeable. (Id. at 494 fn.3.)


The plaintiff challenged the township’s denial of its application to build a cell tower and imposition of a moratorium on such facilities. The court ruled for the plaintiff and issued an injunction, because even though the moratorium was based in part on aesthetic concerns, it was also based in part on potential adverse health effects. The court stated that “[t]he record also contains numerous references regarding the possible adverse health
effects of the proposed tower. However, numerous courts have concluded that § 332(c)(7)(B)(iv) precludes consideration of such concerns and thus cannot constitute substantial evidence.” (Id. at 42.)


The district court ordered the zoning board to grant the plaintiffs’ application to build a cell tower because it had violated the Telecommunications Act by considering the health effects of radio frequency emissions. It stated that “[e]ven if such purported health effects were based on scientific evidence, which they are not, this court is not permitted to consider evidence of supposed ill health effects of radio frequency emissions pursuant to the TCA…” (Id. at 880, fn.7.)


Plaintiff, a provider of cellular telephone service, challenged the city’s denial of a variance to allow the placement of a cellular telephone tower. The court ruled for the plaintiff. It noted that one neighbor had expressed concern at public hearings about electromagnetic emissions and that the plaintiff’s engineer had stated that the antennae’s emissions would be well below FCC standards, and then stated: “Congress has expressly prohibited local authorities from denying permits to construct telecommunications towers ‘on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [FCC]’s regulations concerning such emissions.’ 47 U.S.C. § 332(c)(7)(B)(iv).” (Id. at 770.)


The plaintiff alleged that defendant county violated the Telecommunications Act of 1996 by denying its application for a special use permit to construct a broadcast tower in the county. Although it upheld the county’s decision, the court noted: “Some citizens mentioned health concerns in opposing the tower; however, these concerns are precluded by the Act. 47 U.S.C. § 332(c)(7)(B)(iv).” (Id. at 15.)


Petitioner applied for conditional use permits from San Juan County to build two cellular facilities on San Juan Island and two on Lopez Island. The county denied these requests, and petitioners filed suit alleging a violation of the Telecommunications Act of 1996. The court remanded the case to the county in part because it had improperly based its decision on environmental concerns. The court stated:

The Court also concludes that remand is appropriate because the members of the Board relied upon evidence which could not be considered in making their
decision as a matter of law. The Board based its decision in part on the “vehement opposition” of residents and property owners and in part on fears of reduced property values, n6 see Finding Nos. 2 & 5, both of which flowed from concerns about the health effects of radio frequency emissions from the cellular facilities. As reflected in the Telecommunications Act, Congress has determined that facilities that comply with applicable Federal Communications Commission (“FCC”) regulations do not pose a health risk and cannot be a basis for denying a permit. 47 U.S.C § 332(c) (7) (B) (IV). Although the Board’s Finding No. 7 acknowledged that “it has been decided by the Federal Government that the proposed use will not cause significant adverse impacts on the human or natural environments,” it is not possible for the Court to know whether or to what extent the Board relied on testimony or other evidence about these possible adverse impacts in reaching its decision. Remand is appropriate for the Board to explain what it did rely upon so that the Court can be assured that it did not rely upon concerns related to radio frequency emissions.

(Id. at 1131.)


Plaintiffs, filed suit under the Telecommunications Act of 1996 after defendant county denied their application for a permit to build a cellular tower. The court ruled that the decision was not supported by substantial evidence because it was based on expressed health concerns about being exposed to microwave emissions. (Id. at 926.)


Plaintiff sued the city, the city under the Telecommunications Act of 1996 because city denied two applications to install panel antennas located on rooftops. The court restated the general rule that:

[H]ealth concerns expressed by residents cannot constitute substantial evidence. See 47 U.S.C. § 332(c)(7)(B)(iv) (“No . . . local government . . . 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 that such facilities comply with the Commission's regulations concerning such emissions.”).

(Id. at 341.)

17. MetroPCS, Inc. v. City & County of San Francisco (9th Cir 2004) 400 F.3rd 715

In a comprehensive opinion that resolved a number of issues that had remained unresolved in the Ninth Circuit, the court went out of its way to make clear that “[t]he TCA provides that localities may not base zoning decisions on concerns over radio
frequency emissions if the proposed wireless facility complies with FCC emissions requirements…” (Id. at 736.)


After upholding the city’s denial of a conditional use permit to erect communications towers in a residential area of Virginia Beach, the court nevertheless restated the rule: “A few citizens did mention health concerns from radio emissions, a concern the Act precludes, 47 U.S.C. 332(c)(7)(B)(iv)…” (Id. at 431. fn.6.)

cc: City Clerk
Index: V.A.; V.B.1., V.B.3.