

FEDERAL LAW PREEMPTS LOCAL CONTROL OVER RADIO FREQUENCY INTERFERENCE

The federal Second Circuit Court of Appeals recently decided that federal law preempts local regulation of radio frequency interference (RFI) from telecommunications towers. The case from Vermont was entitled *Freeman v. Burlington Broadcasters, Inc.*, No. 97-9141 (2d Cir., Feb. 23, 2000).

In 1986, radio station WIZN and the Charlotte Volunteer Fire & Rescue Services (CVFRS) received a permit from the Charlotte Zoning Board of Adjustment to build and use a telecommunications tower. The permit contained the condition that “any interference with reception in homes in the area because WIZN began broadcasting will be remedied by WIZN.” Eventually, Bell Atlantic NYNEX Mobile also became a user of the tower.

At some point, many Charlotte residents began experiencing serious RFI problems with their household electrical and electronic equipment. The Charlotte zoning administrator issued a notice of permit violation to the tower users in 1996. The users appealed to the zoning board of adjustment which held public hearings and concluded that WIZN had caused continuous and widespread RFI that had “impaired the ability of Charlotte residents to communicate, transact business, and experience the peaceful enjoyment of their homes and property.” Although the board of adjustment found a permit violation, it also concluded that it was without authority to enforce the permit condition, due to preemption by the federal government (i.e., the government’s complete occupation of the field of RFI regulation).

The homeowners and the Town of Charlotte appealed to the Environmental Court, but while that appeal was pending, the case was removed to federal District Court. At that point, the Town withdrew from the case. The District Court ruled that the Federal Communications Commission (FCC) has sole authority to regulate RFI, and the homeowners appealed to the Second Circuit. On several grounds, the Second Circuit ruled that federal law preempts state and local regulation of RFI. The Court analyzed the Federal Communications Act, FCC regulations, and the legislative history of the 1982 amendments to the Act, all of which supported the conclusion that Congress intended to grant exclusive authority to the FCC to regulate RFI. Even though Congress preserved some local zoning authority over the *placement* of telecommunications towers, the Court concluded that Congress did not repeal the FCC’s exclusive jurisdiction over RFI complaints. The Court therefore affirmed the Charlotte board of adjustment’s decision on the preemption issue.

The Court noted that its decision did not leave the homeowners without a remedy, because federal regulations place a continuing duty on WIZN to resolve RFI problems. It remains to be seen whether this will be an adequate remedy, and whether the FCC will take action if the problems cannot be resolved by WIZN.

Since Second Circuit decisions are binding on Vermont, the lesson of this case is clear: any local regulation that requires tower users to remedy interference problems is unenforceable. If you plan to adopt new telecommunication tower regulations, they should be drafted without such a requirement.