

# So, what if telecom sues the County? Exactly, so what?

*The courts say that there are no damage remedies!*

**Contrary to Council's belief**, a telecom company can NOT sue a local jurisdiction for damages for violating the Telecommunications Act (TCA). In **City of Rancho Palos Verdes v. Abrams, 544 U.S. 113 (2005) Docket no. 03-1601**, the Supreme Court held the following:

## Council

*unless we liberalize  
our siting rules,  
we are vulnerable  
to a legal challenge*

## Courts

*there is not a shred  
of evidence  
in the  
legislative history  
suggesting  
that ... Congress  
intended plaintiffs  
to ... recover  
damages and  
attorney's fees*

- that *"the TCA by providing a judicial remedy different from (42 U.S.C.) §1983 in §332(c)(7) itself precluded resort to (42 U.S.C.) §1983,"* to enforce violations of §332
- that *"to permit §1983 actions . . . would undermine the compromise between purely federal and purely local . . . policies that the statute reflects"* as per Justice Breyer, joined by Justices O'Connor, Souter, and Ginsburg concurring
- that *"there is not a shred of evidence in the legislative history suggesting that . . . Congress intended plaintiffs to be able to recover damages and attorney's fees"* [emphasis added] pointed out by Justice Stevens, writing alone, that this is the meaning of the quasi administrative nature of review under §332
- that *"the fact that awards of damages and attorney's fees could have potentially disastrous consequences for the likely defendants in most private actions under the TCA"* [emphasis added] further stressed by Justice Stevens along with his concurrence and expression of the former points

In the district case of **Abrams v. City of Rancho Palos Verdes, 354 F.3d 1094 (9th Cir. 2004)**, prior to the above Supreme Court ruling, *"the District Court held that §332(c)(7)(B)(v) provided the exclusive remedy for the City's actions and, accordingly, ordered the City to grant respondent's application for a conditional-use permit, but refused respondent's request for damages under (42 U.S.C.) §1983."* The Court cited and explained cases from the Third, Ninth, and Eleventh Circuits. The decision presented the Third Circuit's reasoning [as] flawed and contrary in several respects and stated that the Ninth Circuit never answered the comprehensive remedial scheme question. Persuaded by the Eleventh Circuit's reasoning, the Court ultimately determined that *"the TCA contains procedural, [but] no remedial provisions, let alone a comprehensive remedial scheme."* [emphasis added]

*so what?*

In between the Ninth Circuit district court and the Supreme Court in **Abrams v. City of Rancho Palos Verdes 354 F.3d 1094 (9th Cir. 2004)**, the Ninth Circuit Court of Appeals disagreed with the district court's conclusion that Congress intended the TCA to provide a comprehensive remedial scheme, thus barring additional remedies under §1983. Instead, the Court held that §1983 remedies are available because the TCA doesn't contain a comprehensive remedial scheme. The Court expressed the TCA's language as provid[ing] no support for the theory that Congress expressly foreclosed §1983 the question further narrow[ing] to whether Congress impliedly foreclosed §1983 remedies. The Court decided that the City must prove that through the remedies Congress provided in the TCA, it intended to "close the door on §1983 liability" hold[ing] that the City ha[d] not met this burden. Ultimately, the Court reversed and remanded to the district court.

## Council

*tak[ing] no action at all...  
puts the county at legal  
risk and force*

## Courts

*to permit plaintiffs  
to assert TCA claims  
under §1983  
would upset  
the balance of interests  
incorporated  
in §332(c)(7)*

Since the 2005 Supreme Court ruling, the **Ninth Circuit** is the only circuit court that **has squarely addressed the lack of availability of damages under the TCA**. In **Kay v. Lucky's Two Way Radio Corp. 504 F 3d 803 Ninth Circuit Court of Appeals, 2007**, the district court held in Kay's favor on his TCA claim, but did not explicitly grant him a remedy under the TCA consistent with the aforementioned decision of the Supreme Court.

### *Even if telecom gets an Order, it's just for a permit.*

Even if a telecom company wins a lawsuit against a local jurisdiction and gets an Order to issue a permit, here's additional case evidence that the company is **NOT allowed to get attorney fees**.

In **PrimeCo Personal Communications Ltd. Partnership dba Verizon Wireless v. City of Mequon 242 F.Supp.2d 567 (Jan. 2003) No.01-C-1205**, a Wisconsin district court "found that *to permit plaintiffs to assert TCA claims under §1983 would upset the balance of interests incorporated in the statute, particularly if TCA plaintiffs were able to recover attorneys' fees*". *Id.* at 695. The court found that Congress could not have intended this result because TCA plaintiffs were often large corporations, whereas TCA defendants were typically municipalities, often small ones. *Id.* The court further stated that *to allow TCA plaintiffs to recover attorneys' fees might well unnecessarily increase the federal burden on local land-use regulation beyond that intended by Congress. Id.*" [emphasis added]

Eleven months later in **PrimeCo Personal Communications Ltd. Partnership dba Verizon Wireless v. City of Mequon (Dec. 2003) No.03-1514, 03-1548**, the Seventh Circuit Court of Appeals found that "the general rule in America (the "American Rule," as it is known) is that the *prevailing party, whether plaintiff or defendant, is not entitled to an award of attorneys' fees*. Verizon wants us to hold that any time Congress creates a right that is against

*here's what.*

state or local officials or agencies, §1983, and its companion, §1988, come in the door and the American rule goes out the window. No such purpose can be attributed to Congress. *Section 1988* codifies the *Civil Rights Attorney's Fees Awards Act of 1976\** enacted in recognition that civil rights suits normally pit individuals, often socially marginal, unpopular, and impecunious, against well-funded public officers in cases whose social and political significance may dwarf the monetary stakes, which may be meager. These circumstances argue for awarding attorneys' fees in such cases, especially to prevailing plaintiffs, and that tilt has been ratified in the judicial interpretation of §1988. The Telecommunications Act, in contrast to the federal civil rights statutes, creates rights in **telecommunications enterprises**, which are usually substantial corporations, such as Verizon. They *have the wherewithal to finance their own litigation* without the boost given by fee-shifting statutes, and it would make *no sense to carve an exception for cases in which [telecoms] find themselves opposed not by other large corporations but by small towns, such as Mequon, population 21,000, with a planning commission some of whose members double as aldermen.*" [emphasis added]

\*codified in 42 U.S.C. § 1988(b) often referred to as "Section 1988"

### *In sum, there's a lack of damage remedies.*

The following cannot be over emphasized about damage remedies

- that §332 of the TCA does not specify damage remedies available to successful litigants
- that Congress did not intend to create damage remedies.

Instead, **47 U.S.C. §332(c)(7)**, captioned "[p]reservation of local zoning authority," was *intended to minimize federal interference with State and local land use decisions*. Thus, local governments are immune from damages and §1983 claims cannot be brought [by telecoms] for violations of §332 [against local governments].

### *At stake are the actual legal power and authority of Montgomery County government.*

Councilmembers must stop spewing forth false narratives about exactly what the TCA and the precedential court decisions have actually affirmed and held. By ignoring and /or misrepresenting THE LAW, Councilmembers continue to act and enact without proper regard to THE LAW. Council must **stand down in full force against non-protective zoning — and stand up in full force for THE LAW**. Councilmembers must reckon with their having no business abandoning their own powers preserved to them by Congress as elected officials, wiping out 20+ years of federal judges' decisions and precedents, or allowing telecom and the FCC to strip the County of its power and authority in regulating local zoning.

**All hyperlinks appear in this color.** Council comments in pull quotes can be heard as stated by former Council president Hucker [here](#) and published as stated by Councilmember Friedson [here](#).

*concept, research, editing & design  
by eyemind concepts*

# *now what?*

## **Council**

*by approving this ZTA,  
we are fulfilling require-  
ments of federal law*

## **Courts**

*preservation of  
local zoning authority,  
in §332(c)(7)  
was intended  
to minimize  
federal interference  
with State and local  
land use decisions*