

## **FEDERAL COURT RULES CIVIL RIGHTS DAMAGES AVAILABLE TO APPLICANTS WRONGFULLY DENIED PERMIT FOR TELECOMMUNICATION FACILITY**

Members of Vermont's zoning boards of appeal, development review boards, and other public boards created to review the siting of telecommunication facilities should be aware of a recent decision of the United States Court of Appeals for the Ninth Circuit Court, which granted § 1983 remedies to an aggrieved plaintiff for violations of the Telecommunications Act of 1996 (TCA). *Abrams v. City of Rancho Palos Verdes*, CV--09071-SVW (Jan. 15, 2004). Although the case is not binding in Vermont, it is important because it demonstrates that federal courts may apply additional damages, in addition to the remedies provided for by the TCA, against municipalities for alleged violations of the TCA.

This case arose when the plaintiff, a licensed amateur radio operator and provider of commercial, mobile radio services, sued the City of Rancho Palos Verdes, California, alleging that the City had violated his rights under the TCA when it denied his conditional use permit application to use an antenna on his property for commercial purposes. The plaintiff invoked § 1983 and sought declaratory relief, injunctive relief, damages, attorney fees, and costs. The Ninth Circuit Court of Appeals ruled in favor of the plaintiff and held that § 1983 remedies are available for violations of the TCA.

Section 1983 was enacted on April 20, 1871 as part of the Civil Rights Act of 1871 and provides individuals with a civil remedy for violations of federal law. Section 1983 provides "[E]very person who, under color of any statute, ordinance, regulation, custom, or usage...subjects, or causes to be subjected, any citizen of the United States...to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress..." 42 U.S.C. § 1983.

To obtain remedies pursuant to § 1983, a plaintiff must first establish entitlement to a federal statutory "right." Once a plaintiff meets this burden, a rebuttable presumption arises that the plaintiff is entitled to § 1983 remedies. In the present case, the court held that there is no question that the TCA grants enforceable statutory rights and that the plaintiff had established a rebuttable presumption he was entitled to § 1983 remedies. The burden then shifted to the defendant City to rebut the presumption by proving that Congress, either expressly or implicitly, intended to foreclose § 1983 remedies for violations of the TCA. Because there is no language in the TCA expressly stating that § 1983 remedies are not available, the court looked to whether Congress implicitly intended to foreclose § 1983 remedies for violations of the TCA. The defendant City was then required to prove that the TCA "contains a comprehensive remedial scheme, evincing Congress's intent to preclude remedies under § 1983." The court ruled that the City did not meet this burden and granted the plaintiff § 1983 remedies.

The TCA was, among other things, enacted to encourage the rapid deployment of new telecommunications technologies. To achieve this goal, the TCA requires that state and local governments support any denial of "a request to place, construct, or modify personal wireless service facilities...in writing...[with] substantial evidence contained in a written record." 47 U.S.C. § 332(c)(7)(B)(iii). The TCA also provides that "[A]ny person adversely affected by any final action or failure to act by a State or local

government or any instrumentality thereof that is inconsistent [with the TCA] may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction.” Aside from the procedural rights provided above, the TCA does not specifically provide for any types of remedies such as damages, injunctions, attorney’s fees, or costs.

Based on its interpretation of the above-referenced provision, the United States Court of Appeals for the Ninth Circuit Court ruled that the TCA does not contain a comprehensive remedial scheme” that “closes the door on § 1983 liability.” The court ruled the plaintiff was entitled to damages under § 1983, explaining that although the TCA “provides for a private right of action by allowing aggrieved plaintiffs the right to bring an action in any court of competent jurisdiction, and before the [Federal Communications] Commission...,” it does not provide any remedy beyond those procedural rights. *Abrams v. City of Rancho Palos Verdes*, CV--09071-SVW (Jan. 15, 2004). Therefore, the court concluded that Congress did not intend to foreclose § 1983 remedies, especially where the TCA contains no remedies at all.

The Second Circuit Court of Appeals, the decisions of which are binding in Vermont, has not yet had an opportunity to address this issue. However, the federal courts that have addressed it are not in agreement. For instance, the Third Circuit Court of Appeals has ruled the TCA does preclude § 1983 remedies, the opposite conclusion of the *Abrams* court, because the TCA’s short statute of limitations, expedited review, and judicial jurisdictional provisions provide a comprehensive remedial scheme. *Nextel Partners, Inc. v. Kingston Township*, 286 F. 3d 687 (3d Cir. 2002). In *Abrams*, the court declared the Third Circuit’s reasoning “flawed,” stating the relevant provisions in the TCA are merely *procedural*, rather than *remedial*, and do not foreclose § 1983 liability.

The significance of the Ninth Circuit’s decision cannot be understated, even here in the Second Circuit. The economic impact on municipalities may very well be significant if plaintiffs are entitled to § 1983 remedies for violations of the TCA. Section 1983 remedies include monetary damages, punitive damages, attorney’s fees, and costs. How this issue will play out in Vermont is unclear, and will be until the United States Supreme Court or the Second Court of Appeals has an opportunity to opine on the issue. Until then, municipalities must take care to ensure that all decisions regarding telecommunications facilities comply with the TCA or be ready to pay out significant monetary awards to parties aggrieved by their decisions.

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**VLCT News**, March 2004