

# CARLTON FIELDS

ATTORNEYS AT LAW

## JULY 2005 TELECOM AND TECHNOLOGY LITIGATION UPDATE

### **ELEVENTH CIRCUIT AFFIRMS VILLAGE OF WELLINGTON'S DECISION TO DENY CELLULAR COMPANY A PERMIT TO BUILD A FACILITY WITHIN ITS COMMUNITY**

***Michael Linet, Inc. v. Village of Wellington, 2005 WL 1058938 (11th Cir. May 6, 2005).***

Plaintiff applied to the Village of Wellington, Florida for a permit to build a 120 foot flagpole with a cellular communications antenna concealed inside. The Village of Wellington denied Plaintiff's permit application after a hearing where local residents raised concerns regarding the impact the pole would have on property values and on nearby non-commercial air traffic. The residents also raised safety concerns regarding the pole's proximity to a middle school.

Plaintiff appealed the decision to the United States District Court for the Southern District of Florida. Plaintiff alleged violations of the Telecommunications Act of 1996, 47 U.S.C. § 332, and 42 U.S.C. § 1983. The District Court dismissed the section 1983 claim holding that the Telecommunications Act provided a comprehensive statutory scheme designed to redress the plaintiff's grievance. Plaintiff amended its complaint to add a state due process claim. The District Court granted summary judgment on both the Telecommunications Act claim and the state due process claim holding that the Village of Wellington had not violated the Telecommunications Act and that plaintiff's state due process claim was untimely.

Plaintiff appealed. The main issues on appeal were 1) whether a violation of the Telecommunications Act can give rise to a section 1983 claim, 2) whether the Village of Wellington's permit was denied supported by substantial evidence, and 3) whether the Village of Wellington unreasonably discriminated by allowing another cellular provider to build on another site.

The Eleventh Circuit affirmed in all respects. On plaintiff's first argument, the Eleventh Circuit held that based on the Supreme Court's decision in *City of Rancho Palos Verdes, Cal. v. Abrams*, - - U.S. - -, 125 S. Ct. 1453, - - L. Ed. 2d - - (2005), a violation of the Telecommunications Act does not give rise to a section 1983 claim. The Eleventh Circuit reasoned that section 1983 is not an avenue of relief for every time a state actor violates federal law and that the Telecommunications Act is not designed to coexist with an alternative remedy under section 1983.

On plaintiff's second argument, the Eleventh Circuit held that the Village of Wellington's decision was supported by substantial evidence because, while mere aesthetic concerns were not

enough, aesthetic concerns coupled with evidence of an adverse impact on property values and safety concerns because of the pole's proximity to a middle school were sufficient to support the decision. Additionally, plaintiff failed to prove that an alternate location was unavailable or unfeasible. As to plaintiff's third argument, the Eleventh Circuit held that plaintiff failed to show that the Village of Wellington's decision was unreasonably discriminatory just because it permitted another cellular company to build a tower in another location.

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For more information call Thomas A. Dye at (561) 659-7070 or Daniel C. Johnson at (407) 849-0300, Co-Chairs of Carlton Fields, P.A.'s Telecommunications and Technology Litigation Practice Group, or visit [www.carltonfields.com](http://www.carltonfields.com).