IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OMNIPOINT COMMUNICATIONS ENTERPRISES, L.P.	:	CIVIL ACTION
Plaintiff,	:	
v.	:	
ZONING HEARING BOARD OF CHADDS FORD TOWNSHIP,	:	
Defendant.	:	NO. 98-3299

M E M O R A N D U M

Padova, J. **October 28, 1998**

Plaintiff, Omnipoint Communications Enterprises, brings this action against the Zoning Hearing Board of Chadds Ford Township for violation of the Federal Telecommunications Act, 47 U.S.C.A. § 332(c)(West Supp. 1998). Before the Court is Defendant's Motion to Dismiss in their entirety Count I (violation of the Federal Telecommunications Act of 1996) and Count II (violation of the Civil Rights Act, 42 U.S.C.A. § 1983 (West Supp. 1998)) of Plaintiff's Complaint. For the reasons that follow, the Court will deny Defendant's Motion.

I. BACKGROUND

Omnipoint Communications Enterprises ("Omnipoint") provides digital personal communications services ("PCS") over a network of wireless telecommunications facilities, pursuant to a license

from the Federal Communications Commission. (Pl.'s Compl. ¶ 5.) Portable telephones using PCS digital technology operate by means of the transmission of a very low power radio signal between telephones and Omnipoint antennas, which are mounted on towers, poles, buildings, and other structures. (Id. ¶ 7.) The antennas feed the signal to electronic radio devices housed in equipment cabinets located near the antenna, where the signal is connected to an ordinary telephone line and then routed anywhere in the world. (Id.) An array of antennas, together with their equipment cabinets, is known as a "cell site." (Id.) Because of the low power of the signal, the distance from the cell site to a PCS telephone has to be short, about one and one-half miles. (Id.) This area, between the PCS telephone and the cell site is referred to as the base station area or "cell." (Id.) In order to provide continuous service to a PCS user, there must be a continuous overlapping series of cells which are generally arranged in a honeycombed grid pattern. (Id. ¶ 8.)

Omnipoint needed to erect a telecommunications tower in Chadds Ford Township to provide digital PCS service to Chadds Ford and the surrounding areas. (Id. ¶ 10.) At the time of its application, the Zoning Ordinance of Chadds Ford did not provide for or permit telecommunications towers anywhere in the township. (Id. ¶ 14.) Therefore, Omnipoint filed a variance application with the Zoning Hearing Board ("Zoning Board" or "Board"). (Id.

¶ 11.) At the time of this application, Chadds Ford had advertised a proposed amendment to the Zoning Ordinance ("Pending Ordinance") permitting telecommunications towers in a limited area of the township. (Id. ¶ 15.) Omnipoint's proposed location for its tower was outside of this limited area, and was therefore not permitted under the then existing Zoning Ordinance or the Pending Ordinance. (Id. ¶ 16.)

On April 18, 1998, the Zoning Hearing Board convened a hearing at which Omnipoint allegedly presented uncontested testimony establishing that (a) the proposed telecommunications tower met all relevant criteria and was compatible with the standards of Section 12.95 of the Zoning Ordinance, relating to variance applications; (b) the proposed telecommunications tower was necessary to create an overlapping network of cells and to provide personal wireless service to a substantial portion of the Township; and, (c) no zoning districts where such telecommunications towers were permitted without a variance application (per the Pending Ordinance) were close enough to the cell to provide a viable alternative location. (Id. ¶¶ 17-18.)

In a notice dated May 26, 1998, Omnipoint was advised that the Zoning Hearing Board denied its application.[1] (Id. ¶ 19.)

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[1] In its Complaint, Plaintiff refers to the correspondence it received from the Zoning Hearing Board as a "notice." (Pl.'s Compl. ¶¶ 19-20.) The actual document is entitled "DECISION." (Pl.'s Compl. Ex. D.)

The reasons listed for the denial were (a) that Omnipoint failed to meet its burden of proof under Section 12.95 of the Zoning Ordinance; (b) that the Pending Ordinance provided adequate areas for telecommunications towers; and, (c) that Omnipoint had not sought areas within that location for a tower and therefore did not comply with the Pending Ordinance. (Id. Ex. D.)

In Count I, Omnipoint alleges that the Zoning Board's denial of its application violates Section 704 of the Telecommunications Act of 1996 ("the Act" or "TCA"), 47 U.S.C.A. § 332(c)(7)(B)(i)(II), because it has the effect of prohibiting the provision of personal wireless services. Plaintiff also alleges that the Zoning Board's decision violates the Act because it is not supported by substantial evidence contained in a written record. 47 U.S.C.A. § 332(c)(7)(B)(iii).[2]

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[2] The Act, 47 U.S.C.A. § 332(c)(7)(B), provides in relevant part:

> (B) Limitations
>
> (i) the regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof--
>
> (I) shall not unreasonably discriminate among providers of functionally equivalent services; and
>
> (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.
>
> . . .
>
> (iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless services facilities

Omnipoint requests the court issue a writ of mandamus and enter preliminary and permanent injunctions directing the Zoning Board to grant its application so it may install the telecommunications tower.

In Count II, Omnipoint alleges that because the Zoning Hearing Board acted under color of state law when it violated Omnipoint's rights under the Act, Omnipoint is entitled to an award of damages and attorney's fees under the Civil Rights Act, 42 U.S.C.A. § 1983.[3]

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shall be in writing and supported by substantial evidence contained in a written record.

. . .

(v) Any 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 this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. . .

Id.

[3] Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof 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.A. § 1983.

II. STANDARD OF REVIEW

A claim may be dismissed under Federal Rule of Civil Procedure 12(b)(6) only if the plaintiff can prove no set of facts in support of the claim that would entitle her to relief. ALA, Inc. v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994). The reviewing court must consider only those facts alleged in the complaint and accept all of the allegations as true. Id.; see also Rocks v. Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989) (holding that in deciding a motion to dismiss for failure to state a claim, the court must "accept as true all allegations in the complaint and all reasonable inferences that can be drawn therefrom, and view them in the light most favorable to the nonmoving party").

III. DISCUSSION

A. The Telecommunications Act

The Telecommunications Act of 1996, 47 U.S.C.A. §§ 151 et seq., was enacted to "encourage the rapid deployment of new telecommunications technologies." National Telecommunication Advisors, Inc. v. City of Chicopee, No. Civ.97-30229-MAP, 1998 WL 472395, at *3 (D. Mass. Aug. 11, 1998) (quoting Reno v. American Civil Liberties Union, -- U.S. --, 117 S. Ct. 2329, 2337 (1997). "With this act, Congress has tried to stop local authorities from keeping wireless providers tied up in the hearing process."

Sprint Spectrum v. Town of Easton, 982 F. Supp. 47, 49 (D. Mass. 1997). The TCA in effect preempts any local regulations which conflict with its provisions. Id. Section 332(c)(7) of the Act limits the ability of a state or local authority to apply zoning regulations to wireless telecommunications, and accordingly, local zoning measures are permissible only to the extent that they do not interfere with the TCA. Id.

B. Count I: Violation of Telecommunications Act

Defendant contends that Count I should be dismissed because it is time barred by the Telecommunications Act. Defendant claims that because the Zoning Hearing Board denied Plaintiff's variance application on May 26, 1998 and Plaintiff did not file its Complaint in this matter until June 26, 1998, Plaintiff has not timely filed the action within the thirty day period prescribed by the Act. 47 U.S.C.A. § 332(c)(7)(B)(v).

In its Opposition to Defendant's Motion to Dismiss ("Opposition"), Plaintiff asserts that the complaint was timely filed, as it has thirty days from any "final action or failure to act by a State or local government or instrumentality thereof." Id. (emphasis provided). It argues that since the courts have not directly addressed what constitutes a "final action" under the Act, applicable state law governing local zoning board

decisions should apply.[4] Under such applicable state law, the Zoning Hearing Board's decision to deny Omnipoint's variance application was not ripe for appeal, and therefore not a final action under the Act, until service of the decision by mailing or hand-delivery upon Plaintiff. Plaintiff asserts that service was completed on May 27, 1998, the date on which the decision was mailed and therefore Plaintiff's complaint was timely filed.[5]

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[4] The legislative history of the act explains that:

> the term "final action". . . means final administrative action at the State or local government level so that a party can commence action under the subparagraph rather than waiting for the exhaustion of any independent State court remedy otherwise required.

H.R.Conf. No. 104-458, 104th Congress, 2d Sess. 208 (1996).

[5] In deciding a motion to dismiss, the district court generally considers only the allegations of the complaint, exhibits attached to the complaint, and matters of public record. If other documents are presented, the court converts the motion to one for summary judgment. Pension Ben. Guar. Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196 (3d Cir. 1993), cert. denied, 510 U.S. 1042 (1994). There are, however, exceptions to this general rule. See, Pension Ben. Guar. Corp., 998 F.2d at 1196 (holding that a district court may consider "an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document."); Cortec Indus. v. Sum Holding L.P., 949 F.2d 42, 48 (3d Cir. 1991), cert. denied, 503 U.S. 960 (1992)(explaining that "the problem that arises when a court reviews statements extraneous to a complaint generally is the lack of notice to the plaintiff that they may be so considered; it is for that reason--requiring notice so that the party against whom the motion to dismiss is made may respond--that Rule 12(b)(6) motions are ordinarily converted into summary judgment motions.")

In the instant case, Plaintiff attached to its Opposition to Defendant's Motion to Dismiss ("Opposition") a letter from Defendant's attorney at the time of the Zoning Board's denial

In Pennsylvania, zoning hearing boards are governed by the Municipalities Planning Code, Pa. Stat. Ann. tit. 53, § 10901, et seq. (West 1997 and Supp. 1998) ("MPC"). The MPC requires that in every case zoning hearing boards must render a written decision or make written findings within 45 days after the last hearing before the board. Pa. Stat. Ann. tit. 53, § 10908(9). If the board fails to render a decision within the period directed by the MPC, "the decision shall be deemed to have been rendered in favor of the applicant unless the applicant has agreed in writing or on the record to an extension of time." Id. "A copy of the final decision or. . . of the findings shall be delivered to the applicant personally or mailed to him not later

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Plaintiff's variance application. (Pl.'s Opp. Ex. 1.) The letter was mailed together with the Zoning Board's decision to deny Plaintiff's application; the decision was attached to Plaintiff's Complaint. (Pl.'s Compl. Ex. 4.) The letter, dated May 27, 1998, documents the date on which the Zoning Board's decision was mailed to Plaintiff. The letter is information of which Defendant had actual notice; indeed, it was information in Defendant's possession. Furthermore, additional discovery by either party is not made necessary by the Court's considering the document. Finally, neither party challenges the authenticity of the document or argues that it is disadvantaged by the Court's considering the letter Plaintiff attached to its Opposition. Under these circumstances, "the necessity of translating a Rule 12(b)(6) motion into one under Rule 56 is largely dissipated." Cortec, 949 F.2d at 48. The Court will therefore continue to treat Defendant's Motion as one to dismiss, despite the additional document that Plaintiff introduces in its Opposition.

than the day following its date." Pa. Stat. Ann. tit. 53, § 10908(10). Pa. Stat. Ann. tit. 53, § 11002-A provides that,

> [a]ll appeals from all land use decisions rendered pursuant to [53 P.S. § 10901 et seq.] shall be. . . filed within 30 days after entry of the decision as provided in 42 Pa.C.S. § 5572(relating to time of entry of order). . .

Id. 42 Pa. Cons. Stat. Ann. § 5572 (West 1981) explains that "[t]he date of service of an order of a government unit, which shall be the date of mailing if service is by mail, shall be deemed the date of entry of the order. . ." Id. Accordingly, Plaintiff's time for appeal did not begin to run until the decision was served, i.e., placed in the mail, which was on May 27, 1998. The Complaint was filed on June 26, 1998, thirty days after service, and within the applicable time period prescribed by the Act.

Furthermore, Pennsylvania case law holds that the appeal period does not begin to run until the decision is served upon the applicant. Tierny v. Upper Makefield Township, 564 A.2d 621 (Pa. Commw. 1995); Border v. Zoning Hearing Board of Easton, 460 A.2d 918 (Pa. Commw. 1983). In Border, the court held that a notice of decision was insufficient to commence the period for appeal, and that the zoning board's order was not entered "until its findings of fact, discussion and conclusions of law--in other

words, its formal decision and order--were served upon the [applicant]. . .” Id. at 920.[6]

For the foregoing reasons the Court finds that Plaintiff’s Complaint was timely filed, and Defendant’s Motion to Dismiss Count I is denied.

C. Count II: Violation of the Civil Rights Act

Omnipoint claims that the Zoning Board acted under color of state law when it violated the Telecommunications Act. It asserts that this violation gives rise to an action for damages and attorney’s fees pursuant to 42 U.S.C.A. § 1983. In Maine v. Thiboutot, 448 U.S. 1 (1980), the Supreme Court held that, at least in some circumstances, section 1983 is available to enforce violations of federal statutes and that section 1983 remedies are not limited to statutes enacted pursuant to the civil rights or equal protection provisions of the Constitution. Id. at 6.

The United States Court of Appeals for the Third Circuit (“Third Circuit”) has emphasized that Thiboutot “does not stand for the broad proposition that section 1983 provides a cause of action for any violation of any federal law.” West Virginia University Hospitals, Inc. v. Casey (“WVUH”), 885 F.2d 11 (3d

[6] Based on the holding in Border, as Plaintiff contends, the May 26, 1998, “Decision” of the Zoning Hearing Board would not have been considered sufficient to commence the appeal period under the MPC, as that decision did not contain the Board’s findings of fact and conclusions of law.

Cir. 1989). In order for a cause of action under section 1983 to exist for the violation of a federal statute, two requirements must be met. First, the federal law must create private rights enforceable under section 1983. Id. (citing Penhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981)). In other words, the plaintiff must assert the violation of a federal right, not merely a federal law. Blessing v. Freestone, 520 U.S. 329, 117 S. Ct. 1353, 1359 (1997) (citing Golden State Transit Corp. v. Los Angeles, 493 U.S. 103 (1989)). Second, and stated negatively, the federal law must not reflect a congressional intent to foreclose private enforcement. WVUH, 885 F.2d at 18 (citing, Middlesex Cty. Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981)). As the Supreme Court explained in Blessing, "Congress may do so expressly, by forbidding recourse to § 1983 in the statute itself, or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." 117 S. Ct. at 1360 (citing Livadas v. Bradshaw, 512 U.S. 107, 133 (1994)).

This inquiry involves a shifting burden of proof. Plaintiff has the burden of demonstrating that the federal statute in question, here the Telecommunications Act, creates an individual right. Blessing, 117 S. Ct. at 1360. If Plaintiff so demonstrates, a rebuttable presumption is raised that the right is enforceable under section 1983. Id. The burden is then on

Defendant to establish "by express provision or other specific evidence from the statute itself that Congress intended to foreclose such private enforcement." Wright v City of Roanoke Redevelopment and Housing Authority, 479 U.S. 418, 423 (1987). Furthermore, a reviewing court should not "'lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy' for the deprivation of a federally secured right." Id. at 423-24 (quoting Smith v. Robinson, 468 U.S. 992, 1012 (1994)).

i. Does the Act Create a Federal Right?

The Court's initial inquiry is whether or not the Telecommunications Act creates a federal right. The Supreme Court explained that in determining whether a particular statutory provision gives rise to a federal right, the Court looks at three factors.

> First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so vague and amorphous that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory rather than precatory terms.

Blessing, 117 S. Ct. at 1359(internal citations omitted).

Regarding the first factor, clearly the Act was intended to benefit the plaintiff Omnipoint. The primary purpose of the Act was to reduce regulation to facilitate the deployment of new

telecommunication technologies, such as wireless digital PCS. The Act imposes requirements upon state and local authorities with regard to applications for the construction of personal wireless facilities. 47 U.S.C.A. § 332(c)(7). Omnipoint submitted a variance application to construct such a facility, and the Zoning Hearing Board was bound by the requirements of the Act in considering its application. Because Omnipoint is the type of plaintiff that the Act intended to benefit, requirement one is satisfied.

Regarding requirement two, the Act gives the courts the power to review decisions of the local zoning authorities on an expedited basis. 47 U.S.C.A. § 332(c)(7)(B)(v). By giving courts this power of review, Congress clearly believed that the interests protected by the TCA were not "so vague and amorphous" that their enforcment would be beyond judicial competence. Therefore, the second factor is satisfied.

Finally, the plain language of the Act is couched in mandatory terms. It requires that the state and local authorities shall not prohibit the provision of wireless services and further requires the decisions of such authorities to be in writing and supported by substantial evidence. Hence, the third requirement is also satisfied.

Having found that Plaintiff's burden is satisfied in that the Act creates a federal right, the Court now turns to the

question of whether Defendant has shown that Congress intended to foreclose a section 1983 action.

iii. Does the Act provide a Comprehensive Enforcement Mechanism?

Defendant argues that Plaintiff's Section 1983 claim should be dismissed because "[u]nder the Telecommunications Act of 1996, Congress created a remedial scheme that is sufficiently comprehensive to imply an intent to preclude enforcement under Section 1983." (Def's Mot. at 4.) In support of its argument, Defendant points to the language of the Act, which states that a party adversely affected by the decision of a State or local government may commence an action in any court of competent jurisdiction. 47 U.S.C.A. § 332(c)(7)(B)(v). The statute further provides that the court shall hear and decide such actions on an expedited basis. Id. Defendant asserts that because Congress provided for a private judicial remedy, this evidences its intent to supplant a section 1983 remedy.

Defendant concedes "that District Courts in Connecticut and Massachusetts have held that a Section 1983 claim is available when the Court finds a violation of the Federal Telecommunications Act." (Def's Mot. at 4.) Sprint Spectrum L.P. v. Town of Easton, 982 F. Supp. 47, 53 (D. Mass. 1997)("Plaintiff correctly alleges that Defendant violated the Civil Rights Act, 42 U.S.C.A. § 1983, by denying Plaintiff its

rights under the TCA [Telecommunications Act]."); Cellco Partnership v. Town Plan and Zoning Commission of Town of Farmington, 3 F. Supp.2d 178 (D. Conn. 1998)(holding that a local zoning board acts under color of state law in reviewing a zoning applications and therefore a denial of application in violation of the Telecommunications Act supports Section 1983 claim).[7] However, Defendant asks this Court to hold that the comprehensive remedial mechanism provided for in the Act implies a Congressional intent to foreclose a section 1983 remedy.

The most comprehensive analysis of the viability of a section 1983 claim based on a violation of the Telecommunications Act comes from a District of Massachusetts decision not cited by Defendant. In National Telecommunication Advisors, No. Civ.97-30229-MAP, 1998 WL 472395, at *3 (D. Mass. Aug. 11, 1998), the district court disagreed with the its holding in Sprint Spectrum, and held that a section 1983 action is not available for violation of the Telecommunications Act because of the comprehensive remedial scheme provided in the Act.

Notwithstanding the decision of the Massachusetts district court in National Telecommunication Advisors, this Court does not

[7] Additionally, the District Court of Minnesota has adopted the holdings and rational of the Massachusetts and Connecticut courts, and has held that a section 1983 claim is viable for a violation of the Telecommunications Act. APT Minneapolis, Inc. v. City of Maplewood, No. Civ.97-2082(JRT/RLE), 1998 WL 634224 (D. Minn. Aug. 12, 1998).

find that the remedial scheme of the Telecommunications Act of 1996 is sufficiently comprehensive to imply that Congress intended to foreclose a remedy under section 1983.

Congress may evidence its intent to supplant a section 1983 remedy in two ways. "Congress may do so expressly, by forbidding recourse to § 1983 in the statute itself, or impliedly, by creating a comprehensive enforcement scheme [within the statute itself] that is incompatible with individual enforcement under § 1983." Blessing, 117 S. Ct. at 1360. Nothing in the language of the Act itself expressly precludes an action under section 1983, therefore, the relevant question is whether Congress impliedly foreclosed such actions.

In a series of cases, beginning with Middlesex County Sewerage Authority v. National Sea Clammers Ass'n, 453 U.S. 1 (1981), the Supreme Court has provided guidance as to when a federal statute's remedial scheme is sufficiently comprehensive to infer Congressional intent to supplant a section 1983 remedy. Significantly, "[o]nly twice [has the Court] found a remedial scheme sufficiently comprehensive to supplant § 1983: in Sea Clammers, [453 U.S. 1], and Smith v. Robinson, 468 U.S. 992 (1984)." Blessing, 117 S. Ct. at 1362.

In Sea Clammers, the Court found that the Federal Water Pollution Control Act ("FWPCA") and the Marine Protection, Research, and Sanctuaries Act of 1972 ("MPRSA") provided

comprehensive remedial schemes that evidenced Congressional intent to supplant remedies available under section 1983. The Court described the enforcement provisions as "unusually elaborate". Sea Clammers, 453 U.S. at 13. "The FWPCA, for example, authorizes the EPA Administrator to respond to violations of the Act with compliance orders and civil suits." Id. The Act further provides for the Administrator to seek civil and criminal penalties under FWPCA. Also, FWPCA includes a provision for "'any interested person' to seek judicial review in the United States courts of appeals of various particular actions by the Administrator." Id. at 14 (internal citations omitted). The MPRSA contains nearly identical enforcement mechanisms providing for the "assessment of civil penalties by the Administrator, criminal penalties, suits for injunctive relief by the Attorney General and permit suspensions or revocations." Id. at 14 n. 24 (internal citations omitted). Both statutes are further supplemented by express citizen-suit provisions which authorize private persons to sue for injunctions to enforce these statutes. Id. at 14.

The Court held that in view of these elaborate enforcement provisions it could not "be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under [those Acts]." Id. The Court noted that the existence of the express remedies contained in FWPCA and

MPRSA demonstrated "not only that Congress intended to foreclose implied private actions but also that it intended to supplant any remedy that otherwise would be available under § 1983." Id. at 21.

In Smith v. Robinson, 468 U.S. 992 (1984), the Court held that "the review scheme in the Education for All Handicapped Children Act [("EHA")] [which] permitted aggrieved individuals to invoke 'carefully tailored' local administrative procedures followed by federal judicial review," was sufficiently comprehensive to supplant any section 1983 remedy. Blessing, 117 S. Ct. at 1362-63. The Court reasoned that "allowing a plaintiff to circumvent the [EHA's] administrative remedies would be inconsistent with Congress' carefully tailored scheme which itself allowed private parties to seek remedies for violating federal law." Wright v. City of Roanoke Redevelopment and Housing Authority, 479 U.S. 418 (1987). The Court made note of the comprehensive nature of the procedures and guarantees set out in the EHA.

> [T]he Act establishes an elaborate procedural mechanism to protect the rights of handicapped children. The procedures not only ensure that hearings conducted by the State are fair and adequate. They also effect Congress' intent that each child's individual educational needs be worked out through a process that begins on the local level and includes ongoing parental involvement, detailed procedural safeguards, and a right to judicial review.

Robinson, 468 U.S. at 1010-1011. The Court reasoned that, given this elaborate procedural mechanism, Congress clearly intended parents of handicapped children to make use of this administrative scheme rather than the broad provisions of section 1983.

By contrast, in Blessing, 117 S. Ct. at 1363, the Court found that the remedial scheme in Title IV of the Social Security Act, was not comprehensive enough to evidence Congressional intent to supplant section 1983. The court explained that the enforcement scheme was far more limited than those in Sea Clammers and Smith, in that "Title IV-D contains no private remedy -- either judicial or administrative -- through which aggrieved persons can seek redress." Blessing, 117 S. Ct. at 1363.

The Massachusetts district court in National Telecommunication Advisors, in finding the remedial scheme of the Telecommunications Act sufficiently comprehensive to supplant § 1983, relied heavily on the fact that the Act explicitly provides for judicial review of a zoning board decision on an expedited basis.

> [T]he statute provides a clear, detailed process that allows for quick and complete remedies for individuals improperly denied permission to erect a personal wireless communication tower. Given this carefully drafted provision, and the absence of contrary congressional intent, it is manifest that Congress provided precisely the remedies it considered appropriate when drafting the TCA. . . [T]his case

> bears a strong resemblance to Smith and Sea Clammers [in that] a private cause of action and expedited judicial review is mandated. . . The significance of this private remedial mechanism was underlined in the Supreme Court's Blessing decision, where the Court justified the recognition of a § 1983 remedy by noting the absence of any private right of action under Title IV.

National Telecommunication Advisors, No. Civ.97-30229-MAP, 1998 WL 472395, at *6 (D. Mass. Aug. 11, 1998).

Taken to its limit, the district court's reading of Blessing in National Telecommunication Advisors suggests that any statutory remedial scheme that provides a mechanism for judicial relief would render the scheme sufficiently comprehensive to infer Congressional intent to foreclose reliance on § 1983. This Court disagrees with that reading. It does not necessarily follow from the fact that the Court in Blessing "justified the recognition of a § 1983 remedy by noting the absence of any private right of action under Title IV", National Telecommunication Advisors, No. Civ.97-30229-MAP, 1998 WL 472395, at *6 (D. Mass. Aug. 11, 1998), that wherever Congress has supplied an avenue for judicial review it intended to foreclose a cause of action under section 1983. The provision for appeals of local zoning board decisions in the TCA is in no way comparable to the elaborate remedial schemes involved in Sea Clammers and Robinson. The Supreme Court explains in Blessing that, in finding the remedial scheme sufficiently comprehensive in Sea Clammers, it "emphasized that several provisions of the Act

authorized private persons to initiate enforcement actions. . . and found it hard to believe that Congress intended to preserve the § 1983 right of action when it created so many specific statutory remedies, including the two citizen-suit provisions." Blessing, 117 S. Ct. at 1362(internal citations omitted)(emphasis provided).

Furthermore, it cannot be said that "the statutory framework [of the TCA is] such that '[a]llowing a plaintiff' to bring a § 1983 action 'would be inconsistent with Congress' carefully tailored scheme.'" Golden State, 110 S. Ct. at 449, citing Smith v. Robinson, 468 U.S. at 1012. There is no indication in the legislative history that Congress intended to foreclose reliance on section 1983. The legislative history of the Act explains only that § 332(c)(7)(B)(v) "provides a mechanism for judicial relief from zoning decisions that fail to comply with the provision of this section." H.R.Conf. No. 104-458, 104th Congress, 2d Sess. 208 (1996). It further states "that the courts shall have exclusive jurisdiction over all other disputes arising under this section." Id.

Finally, this Court's holding is consistent with the Third Circuit's interpretation of the Sea Clammers doctrine. In Johnson v. Orr, 780 F.2d 386 (3d Cir. 1986), the Third Circuit held that section 1983 claims were not supplanted by the remedial scheme of the 1968 National Guard Technicians Act, 32 U.S.C.A. §

709. The Court of Appeals noted that there was no evidence in the legislative history that Congress was crafting a comprehensive remedial scheme intended to preclude other remedies available to plaintiff technicians. Id. at 394. The Court of Appeals further explained that the statutes in cases such as Sea Clammers,

> represented Congress' effort to deal with a pressing national problem in a comprehensive manner. The statutes were voluminous and detailed. They had particular provisions explaining the remedies available to classes of plaintiffs, and detailing the circumstances under which aggrieved parties could pursue their rights in state or federal courts.

Id. at 394-95. By contrast, the statute at issue in Orr merely clarified an internal administrative procedure by which discharged employees could pursue their grievances. Id. Finally, the Third Circuit noted that its decision adhered to the policy of judicial deference set forth in the Sea Clammers line of cases, "i.e., ruling out certain remedies only when it can be clearly inferred that Congress intended their preemption." Id. Adhering to this policy of judicial deference, in the absence of any indication from Congress to the contrary, this Court will allow Plaintiff to proceed under section 1983.

For the foregoing reasons, Defendant's Motion to Dismiss Count Two of Plaintiff's Complaint is denied.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OMNIPOINT COMMUNICATIONS ENTERPRISES, L.P.	:	CIVIL ACTION
Plaintiff,	:	
v.	:	
ZONING HEARING BOARD OF CHADDS FORD TOWNSHIP,	:	
Defendant.	:	NO. 98-3299

O R D E R

AND NOW, this 28th day of October, 1998, upon consideration of Defendant's Motion to Dismiss pursuant to Rule 12(b)(6) (Doc. No. 5) and all responses and replies thereto, **IT IS HEREBY ORDERED** that Defendant's Motion is **DENIED**.

BY THE COURT:

_____
John R. Padova, J.