UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
THOMAS HOY AND
ELKE HOY

Plaintiffs,

VERIFIED COMPLAINT

-against-

THE INCORPORATED
VILLAGE OF BAYVILLE,
SPRINT SPECTRUM REALTY COMPANY, L.P.,
as Successor in Interest to SPRINT SPECTRUM, L.P., **JURY TRIAL DEMANDED**
NEXTEL OF NEW YORK d/b/a as NEXTEL
COMMUNICATIONS, OMNIPOINT FACILITIES
NETWORK 2, LLC, and NEW YORK SMSA LIMITED
PARTNERSHIP

Defendants.
----------X

Plaintiffs, by their attorneys, Campanelli & Associates, P.C., as and for their complaint respectfully allege as follows:

I NATURE OF THE ACTION

1. This is a civil action seeking a declaratory judgment, equitable relief, costs and attorneys fees, brought 28 U.S.C. §1331, 28 U.S.C. §2201-2202, 42 U.S.C. §1983 and 42 U.S.C. §1988, to redress violations of the plaintiffs' rights to due process as guaranteed under the 5th and 14th Amendments to the United States Constitution.

2. The plaintiffs seek to secure, among other things, a declaratory judgment from the Court declaring that the Telecommunications Act of 1996 (47 U.S.C. §151 et seq.) does not pre-empt the plaintiffs from securing the enforcement of their vested property rights arising under restrictive covenants within a deed.

3. This action concerns a parcel of real property which was donated to the defendant Incorporated Village of Bayville, and was deeded to same, subject to several explicit and affirmative restrictive covenants, which were made to run with the land.

4. A copy of such deed is annexed hereto as Exhibit "A."

5. The covenants contained within the deed explicitly provided that: (a) the property could never be put to any commercial use or used for a commercial enterprise, and (b) the property could never be put to any use which was found offensive, obnoxious and/or dangerous, "in any way, whatsoever" to property owners situated within one mile of the property.

6. The rights to enforce such covenants are property rights vested within the plaintiffs under the explicit provisions of the deed, and are property rights recognized under New York State Law.

7. In direct violation of those restrictive covenants, the defendant Village has granted licenses to the other defendants herein to use the property for a commercial enterprise, and to put the property to a purely commercial use, by causing the installation of an antenna farm, consisting of more than fifty (50) commercial cellular transmission antennas, which are owned by private companies, and have been installed upon the surface of a water tower on the property, for the commercial transmission and receipt of both microwaves and RF emissions.

8. In further violation of the restrictive covenants within the deed, the Village, as proprietor of the property, has also permitted the property to be used in a manner which is obnoxious, highly offensive, and (as apparently determined by the Village), potentially dangerous to the inhabitants of the Village.

9. Apparently possessed of a belief that there exists potentially harmful effects from the cumulative radiation emanating from more than fifty 50 antennas which have been clustered on the water tower, the Village had posted a warning sign on the property which states:

> "NOTICE: RF controlled area beyond this point.
> Radiofrequency (RF) emissions ***may exceed FCC standards for general public exposure***. Only authorized workers are permitted to enter."
> (Emphasis added.)

10. This excessive concentration of 50+ cellular transmission antennas, and the above-referenced sign, are situated a mere fifty (50) feet from Bayville's only elementary school.

11. With the antenna cluster being only fifty (50) feet away, the children who attend the Bayville elementary school, and their teachers and staff, are continuously subject to the cumulative Microwave and RF emissions of all of such fifty commercial cellular antennas on a daily basis.

12. Upon information and belief, as many as thirty (30%) percent of the teachers and employees at the Bayville Elementary School have been diagnosed with some form of cancer or leukemia.

13. According to a licensed health care professional, whose practice is in Bayville, the rate of cancer and/or leukemia diagnosis among the children of Bayville is three hundred and ninety eight (398%) percent higher than the state-wide average within the State of New York.

14. In 2002, the Second Circuit held that, "The Telecommunications Act does not preempt nonregulatory decisions of a local government entity or instrumentality acting in its proprietary capacity." Sprint Spectrum L.P. v. Mills, 283 F.3d 404 (2nd Cir. 2002).

15. In 2003, the Appellate Division, Second Department, of the New York State Supreme Court ruled that the Telecommunications Act of 1996 does not pre-empt the enforcement of restrictive covenants running with the land, in Chambers v. Old Stone Hill Road Associates, et al, 303 A.D.2d 536 (2003)

16. In 2007, four residents of Bayville commenced an action in the New York State Supreme Court, under CPLR Article 78, to challenge a decision by the Village to install police antennas on the water tower, citing the restrictive covenants in the deed described herein.

17. The current plaintiffs were not parties to that action, but learned of the action, only after it had been filed by persons other than themselves.

18. By decision dated August 10, 2008, the New York State Supreme Court, Nassau County dismissed the petition, premised upon a finding that (contrary to the 2003 ruling of the Appellate Division) the federal Telecommunications Act of 1996 pre-empted enforcement of the restrictive covenants in the deed, stating as follows:

> "The court determines that enforcement of the restrictive covenant would conflict with federal authority"

19. *See* Exhibit "B," at page 7, that being a true copy of the lower State Court's decision in the respective matter of Perrin v. Baville Village Board et al, Supreme Court, Nassau County, Index # 07-9468 (August 13, 2008).

20. Based upon the lower Court's 2007 decision, the defendant Village of Bayville now posits that the federal Telecommunications Act of 1996 pre-empts enforcement of the restrictive covenants in the deed.

21. As property owners who were not parties to the Perrin action, the plaintiffs seek a declaratory judgment, declaring that, contrary to the 2007 ruling from the New York State Supreme Court, Nassau County, the Telecommunications Act of 1996 does not pre-empt the enforcement of the plaintiffs' rights to enforce the covenants within the deed, which empower the plaintiffs to prevent the property from being used for a commercial enterprise, commercial purpose, or for a use which they find obnoxious, offensive and/or dangerous.

22. The plaintiffs seek to enforce their vested property rights under the restrictive covenant within the deed described herein above. They assert that the Village is committing two separate and distinct violations of the restrictive covenants by:

(a) causing the property to be used for commercial purpose, which is explicitly prohibited by the restrictive covenants, and

(b) employing the property in a manner which is deemed both obnoxious and offensive to the plaintiffs, which is also explicitly prohibited by the deed.

23. The plaintiffs herein do not assert a claim that the Telecommunications Act of 1996 is unconstitutional as written.

24. The plaintiffs assert that it is unconstitutional *as it is being applied* by the Village of Bayville as proprietors of the subject property, in that the Act does not preempt, and was not intended to preempt, the enforcement of private property rights expressly created within restrictive covenants within a deed.

25. To the extent that the Village is applying the Act in such manner, the plaintiffs are being deprived of their property rights without Due Process of law, in violation of the constraints of the 14th Amendment, and they are entitled to seek redress under 42 U.S.C. §1983.

26. Concomitantly, the plaintiffs also seek a declaratory judgment, declaring that (a) the Telecommunications Act of 1996 does not preempt enforcement of their property rights in the restrictive covenants, and (b) that as such, the Village exceeded its authority, as property owner, in granting licenses to the other defendants in violation of the restrictive covenants within.

27. The plaintiffs further seek an order enjoining the defendants from continuing their commercial and offensive use of the property, in violation of the deed.

II JURISDICTION AND VENUE

28. Jurisdiction of the court is invoked pursuant to 28 U.S.C. §1331 in that this is a civil action arising under the Constitution and laws of the United States.

29. Jurisdiction of the court is also invoked pursuant to 28 U.S.C. §1343(a)(3) and §1343(a)(4) to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States, and to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, and under 28 U.S.C. §1367 for ancillary claims under New York State law.

30. Plaintiffs seek declaratory relief pursuant to 28 U.S.C. §§ 2201(a) and 2202.

31. Plaintiffs seek permanent injunctive relief pursuant to Fed. R. Civ. P. 65.

32. The plaintiffs possess standing to commence and maintain this action, by virtue of their fee ownership of real property situated less than one mile from the subject property, thereby vesting them with the right to enforce the restrictive covenants described herein, as provided under the explicit terms of the deed and the covenants contained therein.

33. Plaintiffs seek reasonable attorney's fees as part of the costs authorized to the prevailing party in an action pursuant to 42 U.S.C. §1983, predicated upon 42 U.S.C. §1988 and 42 U.S.C. §2000.

34. Venue is proper in the Eastern District of New York, pursuant to 28 U.S.C. §1391(a) because a substantial part of the events or omissions giving rise to the claim occurred in Nassau County, New York, and the defendant's actual place of business and/or employ was within the Eastern District of New York.

III THE PARTIES

A The Plaintiffs

35. At all relevant times mentioned herein, plaintiff THOMAS HOY, was and still is an individual residing at 24 Cat Hollow Road, Bayville, County of Nassau, New York 11709.

36. At all relevant times mentioned herein, plaintiff ELKE HOY, was and still is an individual residing at 24 Cat Hollow Road, Bayville, County of Nassau, New York 11709.

37. At all relevant times mentioned herein, plaintiffs resided, and still reside, within one (1/4) quarter mile of a parcel of real property which was deeded to the defendant Village of Bayville, by Mona Williams, for the purposes of having it used as a public park, and as location for the installation of a water tower to be used for the benefit of the residents of Bayville.

B. The Defendants

38. Upon information and belief, at all relevant times mentioned herein, the defendant, THE VILLAGE OF BAYVILLE ("VILLAGE"), was and continues to be a municipal corporation duly organized and existing under the laws of the State of New York, with its principal place of business located at 34 School Street, Bayville, NY 11709.

39. At all times relative herein, the defendant SPRINT SPECTRUM REALTY COMPANY, L.P., as Successor in Interest to SPRINT SPECTRUM, L.P., ("SPRINT") was and continues to be a Delaware limited partnership having a principal place of business situated at 6391 Sprint Parkway, Overland Park, Kansas.

40. Upon information and belief, at all relevant times described herein, SPRINT was engaging in business within the State of New York, and owned, operated and maintained cellular and/or RF antennas which are situated within New York and the maintenance of which have given rise to the federal claims asserted herein.

41. Upon information and belief, at all times relative herein, the defendant NEXTEL OF NEW YORK d/b/a as NEXTEL COMMUNICATIONS ("NEXTEL") was and continues to be a Delaware Corporation, having a principal place of business situated at 1 North Broadway, White Plains, New York.

42. Upon information and belief, at all relevant times described herein, NEXTEL was engaging in business within the State of New York, and owned, operated and maintained cellular and/or RF antennas which are situated within New York and the maintenance of which have given rise to the federal claims asserted herein.

43. Upon information and belief, at all times relative herein, the defendant OMNIPOINT FACILITIES NETWORK 2, LLC ("OMNIPOINT") was and continues to be a limited liability company, and a wholly owned subsidiary of T-Mobile USA Inc, a Delaware corporation, having a principal place of business situated at 4 Sylvan Way, Parsippany, New Jersey.

44. Upon information and belief, at all relevant times described herein, OMNIPOINT was engaging in business within the State of New York, and owned, operated and maintained cellular and/or RF antennas which are situated within New York and the maintenance of which have given rise to the federal claims asserted herein.

45. Upon information and belief, at all times relative herein, the defendant NEW YORK SMSA LIMITED PARTNERSHIP ("SMSA") was and continues to be a Delaware Limited Partnership having a principal place of business situated at 2000 Corporate Drive, Orangeburg, New York.

46. Upon information and belief, at all relevant times described herein, SMSA was engaging in business within the State of New York, and owned, operated and maintained cellular and/or RF antennas which are situated within New York and the maintenance of which have given rise to the federal claims asserted herein.

IV THE FACTS

A. The Schoolhouse Road Property

47. This action concerns a parcel of real property situated on Schoolhouse Road, within the Incorporated Village of Bayville, New York, said parcel hereinafter referred to as the "Schoolhouse Road Property."

48. In 1950, the fee owner of the Schoolhouse Road Property, Mona Williams, granted and conveyed title to the Schoolhouse Road Property to the Incorporated Village of Bayville.

49. As explicitly set forth within the deed within which title to the property was conveyed to the Village, in consideration for such grant, the Village covenanted and agreed, for itself, its successors and assigns, that the Schoolhouse Road Property be held subject to the explicitly stated conditions that:

> "... no public amusements, concessions, vending, restaurants or other "*commercial enterprises*" shall be permitted thereon, and in addition, *no use of the premises shall be made or permitted which would be offensive, dangerous, or obnoxious to the owners or any owner (now or hereafter) of land within a radius of one mile of the premises whether by reasons of smoke, odor, fumes or any other use whatsoever offensive to such owners or owner of land.*"

50. As intended by the grantor, and as set forth within such deed, the restrictions set forth within same became covenants, running with the land, which vested property rights in the owners of properties situated within a one mile radius of the Schoolhouse Road Property.

51. The deed further explicitly provided that (a) a specified portion of the property was to be used as a "landscaped park," (b) a second specified portion of the property was to be used for municipal uses, subject to the restrictions set forth within paragraph "41" herein above, and (c) that a public water tank could be erected upon a specified area, again subject to the restrictions set forth within paragraph "41" herein above.

52. As expressly permitted under the deed, sometime after the Schoolhouse Road Property was deeded to the Village, the Village caused a public water tower to be constructed upon the property.

53. The water tower is situated approximately fifty (50) feet from the Bayville Elementary School, which is also situated on Schoolhouse Road.

54. In direct breach of the restrictive covenants which bind the Schoolhouse Road Property, and the plaintiffs' property rights regarding same, the Village of Bayville has granted licenses to the other defendants herein to operate a commercial enterprise upon the property, caused and permitted the property to be used for commercial purposes, and has caused and permitted the property to be used in a manner which is offensive, dangerous and obnoxious to the plaintiffs.

55. The Village has caused and permitted the property to be used as "an Antenna Farm" whereat the Village has caused and permitted to be installed upon the water tower on the Schoolhouse Road Property an excessive saturation of more than fifty (50) Cellular transmission antennas, each and every one of which emits RF radiation and/or microwave radiation in their day-to-day operation.

56. Those antenna are owned by, have been installed by, and are used by the commercial defendants joined herein, as commercial entities, for purely commercial purposes.

57. Each and every one of those antennas are owned, operated and maintained upon the water tower, as part of a commercial enterprise which is being operated for profit.

58. That Antenna Farm, and saturation of cellular antennas and their emissions of RF radiation and microwave radiation, are situated a scant fifty (50) feet from Bayville's only Elementary School, "the Bayville School."

59. According to a licensed health care practitioner, who maintains a medical office in Bayville, and treats Bayville residents, the rate of cancer and/or leukemia in the Village of Bayville is 398.2% higher than the rate of cancer and/or leukemia throughout New York State.

60. Upon information and belief, as many as 30% of the teachers and staff in the Bayville elementary school have been diagnosed with cancer or leukemia.

B. The Village has violated the restrictive covenants by permitting and/or causing both concessions and commercial enterprises to be maintained upon the Schoolhouse Road Property

61. The deed which conveyed the Schoolhouse Road property to the Village explicitly proscribed that:

> "No . . . *concessions*, vending, restaurants or other *commercial enterprises* shall be permitted [upon the premises conveyed to the Village]"

62. In direct violation of both facets of the restrictive covenant, the Village of Bayville, has granted, caused and/or permitted numerous concessions and commercial enterprises to be operated upon the premises, by granting private corporations the right to install and maintain more than 50 antenna transmitters and/or receivers, as part of commercial enterprises which are being operated for private profit.

63. More specifically, the Village granted each of the other defendants licenses to install upon the subject property: "antenna arrays," associated transmission lines, mounting apparatus, 24-hour, 365 day easements, one or more equipment housings, and wires, cables and necessary connections and equipment between the antenna arrays and equipment housings (See e.g. Exhibit "F" at pages 3-4, paragraph 1).

64. In granting such concessions and licenses to the other defendants herein, the defendant Village acted in a proprietary capacity, and not in a regulatory capacity.

65. By definition, a "concession" is (a) something conceded by a government or a controlling authority, as a grant of land, a privilege or a franchise, or (b) a space or privilege within certain premises for a subsidiary business or service.

66. The defendant Village of Bayville has granted precisely such a privilege by executing license agreements, granting commercial companies a "license" to install, maintain and operate, commercial cellular antenna, as part of a commercial business which is being operated for profit.

67. Contemporaneously, the defendant Village of Bayville has violated the restrictive covenant by causing and permitting a commercial enterprise to be operated upon the property.

68. By definition, a commercial enterprise is an operation which provides goods or services for the purpose of generating a profit, which is realized by the owners of such enterprise.

69. The defendant Village of Bayville has permitted the installation and operation of more than 50 antenna upon the water tower, to be employed there as part of a commercial enterprise, which encompasses the provision of cellular telephone services, for the purpose of generating a profit, which is realized by the companies which own and operate such antennas.

70. Given the forgoing, the defendant Village of Bayville has violated both facets of the restrictive covenant which proscribes against permitted concessions or commercial enterprises to be operated upon the premises.

71. The plaintiffs, Thomas Hoy and Elke Hoy, reside at, and are the fee owners of the real property situated at, 24 Cat Hollow Road, Bayville.

72. The plaintiffs' property is situated less than one mile from the Schoolhouse Road Property, and as such, the plaintiffs are possessed of a property right, under New York State Law, in the form of a right to enforce the restrictive covenants, described herein above.

73. To the extent that the defendant Village of Bayville has interpreted, or secured a State Court interpretation of The Telecommunications Act of 1996 as pre-empting the plaintiffs' property rights, the plaintiffs have standing to secure a declaratory judgment that the Act does not preempt enforcement of their property rights.

74. To the extent that the Act has been applied by the defendants to deprive the plaintiffs of such property rights, the plaintiffs have been deprived of such property rights without Due Process of Law, as guaranteed to the plaintiffs under the 14th Amendment, and the plaintiffs have standing to pursue redress for such deprivation, pursuant to 42 U.S.C. §1983.

C. The Village has violated the restrictive covenants by permitting and/or causing use of the property which is offensive and obnoxious to the plaintiffs, being the owners of property within one mile of the premises

75. As explicitly set forth within the deed within which title to the property was conveyed to the Village, in consideration for such grant, the Village covenanted and agreed, for itself, its successors and assigns, that the Schoolhouse Road Property be held subject to the explicitly stated conditions that:

> "... no public amusements, concessions, vending, restaurants or other "*commercial enterprises*" shall be permitted thereon, and in addition, *no use of the premises shall be made or permitted which would be offensive, dangerous, or obnoxious to the owners or any owner (now or hereafter) of land within a radius of one mile of the premises whether by reasons of smoke, odor, fumes or any other use whatsoever offensive to such owners or owner of land.*"

76. As intended by the grantor, and as set forth within such deed, the restrictions set forth within same became covenants, running with the land, which vested property rights to the owners of properties situated within a one mile radius of the Schoolhouse Road Property (*See* Exhibit "A" at paragraph 1), and a one mile radius of same (*Id*. at paragraph 2).

77. In direct violation of the restrictive covenants, by granting private corporations the right to install and maintain a saturation of more than 50 antenna transmitters and/or receivers upon the water tower, the Village of Bayville, has made and permitted a use of the Schoolhouse Road Property which is offensive, obnoxious and dangerous, or perceived of as dangerous, to the plaintiffs, who are the owners of land situated within one mile of the property.

78. In granting such concessions and licenses to the other defendants herein, the defendant Village acted in a proprietary capacity, and not in a regulatory capacity.

79. The restrictive covenants in the deed are specific and do not reflect terms of art used when drafting deeds.

80. Looking at the meaning and intentions of the drafter of the restrictive covenant, it is clear on its face that the plaintiffs are within the class of persons within whom the grantor intended to vest the right to enforce the covenant, and concomitantly to afford them against uses of the property which the plaintiffs found to be either (a) a commercial use, or (b) a use which the plaintiffs found to be offensive or obnoxious.

81. Each of the plaintiffs recognize the property's current use as commercial, and/or encompassing the operation of a "commercial enterprise" upon the property, and as such, each of the plaintiffs is vested with a right to secure enforcement of the restrictive covenant to prevent the continued use of the property for operation of such commercial enterprise.

82. Each of the plaintiffs find the use of the property as an antenna farm both offensive and obnoxious, in that the saturation of more than fifty (50) antennas upon the property is visually and aesthetically offensive, obnoxious and contrary to the character and appearance of their residence and is inconsistent with the general appearance of the residential neighborhood within which the plaintiffs' home is situated.

83. Each of the plaintiffs find the use of the property as an antenna farm both offensive and obnoxious, in that the saturation of more than fifty (50) antennas, and the acknowledgement by the defendant Village that the cumulative RF emissions emanating from those 50 plus antennas may exceed FCC standards for general public exposure.

84. Each of the plaintiffs find the use of the property as an antenna farm both offensive and obnoxious, in that, according to a local real estate broker, homes located near the antenna farm have been devalued 3 to 5 %, as a result of their proximity to the antenna farm, which has been confirmed by a finding that there is an inverse proportion to the amount of antennas on a cell phone tower and the value of the resale of the home.

D. The defendants were aware of the restrictive covenants, and entered agreements which explicitly provide that in the event that Village exceeded its authority by granting the commercial defendants a license to install and maintain RF antennas upon the subject parcel, the defendant Village has the contractual right to terminate such licenses and require that the antennas be removed

85. Upon information and belief, the defendant Village has entered written license agreements with defendants Sprint, Nextel, Omnipoint and SMSA, pursuant to which the Village granted each of the other respective defendants license to install and maintain RF antennas upon the property which is the subject of this action.

86. Upon information and belief, at the time such licensing agreements were entered, and at the time that the defendants installed antennas upon the subject property, each and every one of the defendants were affirmatively aware of the restrictive covenants set forth within the deed described herein, as well as the plaintiffs' right to secure enforcement of such restrictive covenants.

87. Upon information and belief, as a result of such knowledge, in entering such license agreements, and installing such antennas, the defendants caused the license agreements by and between them to explicitly provide that in the event that the granting of the license to install and maintain such antennas is, or was, "beyond the authority of the Village to permit," the Village retained, and still possesses the contractual right to terminate each of the license agreements and to require the removal of the antennas which have been installed upon the subject property.

88. Consistent with such right, the contractual agreements between the defendants explicitly provide that upon the cancellation of such licenses, by the Village, the Village may "cause" the other defendants to remove "any equipment" on the subject property "without any liability to the [Village]."

Sprint

89. Annexed hereto as Exhibit "C" is a copy of a license agreement by and between the Village and defendant Sprint.

90. Upon information and belief, at the time the defendant Village and defendant Sprint entered such agreement, *they affirmatively knew of the restrictive covenants described within this complaint*.

91. As a direct result of such knowledge, the defendants included a provision within the license agreement which provided that in the event that "it is determinated to be beyond the authority of the [Village]" to grant such license, the Village is entitled to cancel the license agreement, and Sprint must then remove its equipment from the subject premises "without any liability to the [Village]. *See* Exhibit "C" at page 8, paragraph 10(b).

Nextel

92. Annexed hereto as Exhibit "D" is a copy of a license agreement by and between the Village and defendant Nextel.

93. Upon information and belief, at the time the defendant Village and defendant Nextel entered such agreement, *they affirmatively knew of the restrictive covenants described within this complaint*.

94. As a direct result of such knowledge, the defendants included a provision within the license agreement which provided that in the event that "it is determinated to be beyond the authority of the [Village]" to grant such license, the Village is entitled to cancel the license agreement, and Nextel must then remove its equipment from the subject premises "without any liability to the [Village]. *See* Exhibit "D" at page 7, paragraph 10(b).

Omnipoint

95. Annexed hereto as Exhibit "E" is a copy of a license agreement by and between the Village and defendant Omnipoint.

96. Upon information and belief, at the time the defendant Village and defendant Omnipoint entered such agreement, *they affirmatively knew of the restrictive covenants described within this complaint*.

97. As a direct result of such knowledge, the defendants included a provision within the license agreement which provided that in the event that "it is determinated to be beyond the authority of the [Village]" to grant such license, the Village is entitled to cancel the license agreement, and Omnipoint must then remove its equipment from the subject premises "without any liability to the [Village]. *See* Exhibit "E" at page 8, paragraph 10(b).

SMSA

98. Annexed hereto as Exhibit "F" is a copy of a license agreement by and between the Village and defendant SMSA.

99. Under the terms of such license agreement, if it is determined that the Village did not have authority to enter such license agreement, SMSA is entitled to terminate the agreement. *See* Exhibit "E" at page 8-9, paragraph 14.

E. Conflicting New York State Court Opinions, and the Village's reliance upon same

100. In 2003, the Appellate Division, Second Department of the New York State Supreme Court ruled that the Telecommunications Act of 1996 does not pre-empt the enforcement of restrictive covenants running with the land Chambers v. Old Stone Hill Road Associates, et al, 303 A.D.2d 536 (2003)

101. In a decision diametrically opposed to the New York Appellate Courts' decision in Chambers, in 2008, the New York State Supreme Court, Nassau County, ruled that the Telecommunications Act of 1996 "did" pre-empt enforcement of the restrictive covenants described within the current action.

102. The plaintiffs herein were not parties to the lower court action, (Perrin described *supra*), nor were they aware that it had been commenced.

103. Based upon the 2007 holding of the New York State Supreme Court, in Nassau County, the defendant Village of Bayville has adopted the position that, as enacted by the U.S. Congress, the federal Telecommunications Act of 1996 (47 U.S.C. §151 et seq.) "pre-empts" enforcement of the restrictive covenants within the deed described herein.

104. Based upon such position, the defendant Village has continued to permit and authorize the installation and maintenance of the antenna farm described herein.

105. In permitting the property to be used for commercial enterprises, and in a manner which the plaintiffs find to be obnoxious, offensive and potentially dangerous, the Village has violated the restrictive covenants which continue to run with the land, and the plaintiffs are legally entitled to secure enforcement of same, through the instant action.-00

Count I

Declaratory Judgment

106. Plaintiffs repeat and reiterate the allegations set forth within paragraphs “1" through “105" with the same force and effect as if fully set forth at length herein.

107. As set forth herein above, the plaintiffs seek enforcement of restrictive covenants which were incorporated into the deed.

108. As enacted by the U.S. Congress, The Telecommunications Act of 1996 was not intended to pre-empt enforcement of private property rights in the form of restrictive covenants running with the land, nor was it intended to prevent municipalities from complying with such restrictive covenants when acting in a proprietary capacity, as opposed to acting in the capacity of a zoning or regulatory authority.

109. Since the Antenna Farm is being used by the defendants for commercial and not municipal purposes thereby the Village is acting in a proprietary manner, as opposed to a regulatory capacity, and as such, the defendant Village is not exempted from claims seeking enforcement of the restrictive covenants in the deed.

110. Defendant Village of Bayville is operating the water tower for a corporate purpose and as such is acting as a proprietor, with all of the same restrictions and covenants as are placed upon any other person holding title to the Schoolhouse Road Property.

111. As such, the plaintiffs are entitled to a declaratory judgment, declaring that the Telecommunications Act of 1996 does not pre-empt enforcement of their private property rights, in the form of their right to enforce the restrictive covenants described herein.

112. Since the Telecommunications Act of 1996 was not intended to pre-empt, and does not pre-empt, enforcement of such restrictive covenants, the plaintiffs are further entitled to a declaratory judgment that the defendant Village remains bound by the restrictive covenants contained within the deed which conveyed the subject property to the Village, and that the Village exceeded its authority by granting the remaining defendants licenses to use the property at issue for a commercial enterprise, and/or in a manner which is offensive and/or obnoxious to the plaintiffs.

113. The plaintiffs are further entitled to a declaratory judgment adjudging that the defendant Village's application of federal Telecommunications Act of 1996 is unconstitutional, *as it is being applied by the defendant Village*, to deprive the plaintiffs in a manner which Congress did not intend, and in a manner which deprives the plaintiffs of property rights, without due process, in violation of the constraints of the 14th Amendment.

114. An actual controversy exists because:

(a) the plaintiffs seek to enforce restrictive covenants which were incorporated into a deed for the purpose of affording them protections, and which constitute property rights clearly established, and enforceable, under New York State Law,

(b) the plaintiffs' position is supported by a ruling of the Appellate Division of The New York State Court, which ruled that the Telecommunications Act of 1996 <u>does not</u> preempt enforcement of such restrictive covenants,

(c) a lower state Court, The New York State Supreme Court, Nassau County, subsequently issued a diametrically opposing ruling, holding that the Telecommunications Act of 1996 does pre-empt enforcement of the restrictive covenants which were intended to benefit the plaintiffs, and

(d) based upon the lower Court's decision, the defendant Village is maintaining that enforcement of the restrictive covenants in favor of the plaintiffs is pre-empted by the Telecommunications Act of 1996.

Count II

Due Process Claim - 42 U.S.C. §1983

115. Plaintiffs repeat and reiterate the allegations set forth within paragraphs "1" through "114" with the same force and effect as if fully set forth at length herein.

116. As the fee owners of real property which is situated within one mile of the Schoolhouse Road Property, that being the same property which was conveyed to the Village via the deed annexed hereto as Exhibit "A," the plaintiffs are possessed of a property right, recognized under New York State Law, to secure the enforcement of the restrictive covenants contained within the deed, to prevent the use of the property in a manner which the plaintiffs find to be offensive, obnoxious and/or dangerous.

117. By having interpreted and applied the Telecommunications Act of 1996 (47 U.S.C. §151 et seq.) as *pre-empting* enforcement of the plaintiffs' property rights, the defendant Village has deprived the plaintiffs of such property rights, without due process of law, in violation of rights guaranteed to the plaintiffs under the 14th Amendment to the United States Constitution, and the Telecommunications Act of 1996 (47 U.S.C. §151 et seq.) is unconstitutional, *as it is being applied by* the defendant Village.

118. Having substantially interfered with and/or deprived the plaintiffs of both their property rights, and liberty interests in their right to secure enforcement of the restrictive covenants without having afforded the plaintiffs any opportunity at a meaningful time and meaningful manner within which to review the defendant Village's behavior, the defendant Village has violated the plaintiffs' right to procedural due process as guaranteed to the plaintiffs

under the Fourteenth Amendment of the U.S. Constitution.

119. The aforesaid defendants' violation of plaintiffs' due process rights were made under color of state law, which constitutes "state action" under 42 U.S.C. § 1983.

120. Defendants' deprivation of the plaintiffs' property rights under the due process clause of the Fourteenth Amendment to the United States Constitution is in violation of 42 U.S.C. § 1983.

PRAYER FOR RELIEF

WHEREFORE, the plaintiff respectfully demands the following relief:

Count I

Declaratory Judgment

1. That the Court grant declaratory relief, adjudging and declaring (a) that the Telecommunications Act of 1996 does not preempt enforcement of their property rights in the restrictive covenants, and (b) that the Telecommunications Act of 1996 is unconstitutional *as it is being applied* by the defendant Village of Bayville, (c) that the defendants' use of the property is in violation of the restrictive covenants within the deed, and (d) that the plaintiffs are possessed of the right to secure enforcement of such restrictive covenants; and

2. That the Court grant affirmative injunctive relief, directing the defendants to remove and/or cause the removal of all non-governmentally owned or operated antennas from the real property described within the deed which annexed to, and incorporated into, this complaint as Exhibit "A" hereof; and

3. That this Court grant such other and further relief as it deems just and appropriate; and

4. That this Court award the plaintiffs the costs of this action and reasonable attorney's fees.

Count II

Due Process Claim - 42 U.S.C. §1983

1. That this Court grant an award of compensatory damages against all defendants, jointly and severally, in such an amount proven at trial; and

2. That the Court grant affirmative injunctive relief, directing the defendants to remove and/or cause the removal of all non-governmentally owned or operated antennas from the real property described within the deed which annexed to, and incorporated into, this complaint as Exhibit "A" hereof; and

3. For an award of reasonable attorneys fees and costs pursuant to 42 U.S.C. §1988(b);

4. For an award for reimbursement of any and all expert fees incurred by the plaintiff, pursuant to 42 U.S.C. §1988(c); and

5. For such other and further relief as this court may deem just and proper.

Dated: January 8, 2010
Garden City, New York

CAMPANELLI & ASSOCIATES, P.C.
Attorneys for Plaintiff

By: _____
Andrew J. Campanelli, Esq. (AC 4014)

623 Stewart Avenue, Suite 203
Garden City, New York 11530
(516) 746-1600

VERIFICATION

STATE OF NEW YORK)
) ss.
COUNTY OF NASSAU)

THOMAS HOY, being duly sworn, deposes and states that I am the Plaintiff in this action and that the foregoing COMPLAINT is true to the best of my knowledge, except to those matters therein stated to be alleged upon information and belief and as to those matters I believe them to be true.

_____
THOMAS HOY

Sworn to before me on this
___ day of January, 2010

_____
Notary Public

VERIFICATION

STATE OF NEW YORK)
) ss.
COUNTY OF NASSAU)

ELKE HOY, being duly sworn, deposes and states that I am the Plaintiff in this action and that the foregoing COMPLAINT is true to the best of my knowledge, except to those matters therein stated to be alleged upon information and belief and as to those matters I believe them to be true.

_____
ELKE HOY

Sworn to before me on this
___ day of January, 2010

_____
Notary Public