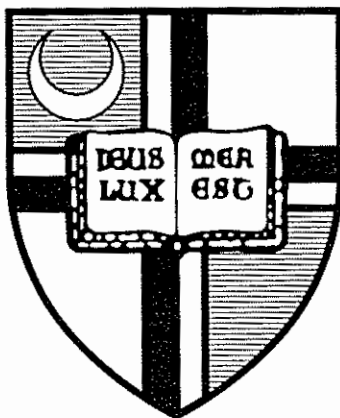


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## ARTICLE

Wireless Telecommunications, Infrastructure Security, and the NIMBY Problem

Steven J. Eagle

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# WIRELESS TELECOMMUNICATIONS, INFRASTRUCTURE SECURITY, AND THE NIMBY PROBLEM

*Steven J. Eagle\**

*This Article explores the clash between federal policies encouraging wireless communications services and the application of local land use regulations to the siting of telecommunications towers. It concludes that Congress's effort to strike a balance in the Telecommunications Act of 1996 between local concerns on one hand and national commerce and homeland security on the other, has proved vague in content and susceptible to procedural thickets that might make local parochialism impervious to challenge. The Article suggests statutory changes, including time limitations and the creation of presumptions and safe harbor rules, that might better balance infrastructure development needs with local autonomy.*

## I. INTRODUCTION

The Telecommunications Act of 1996 (the Act or TCA)<sup>1</sup> was the first comprehensive overhaul of national telecommunications policy in over sixty years, amending the Communications Act of 1934.<sup>2</sup> The TCA was intended to encourage low prices, the deployment of new technologies, and growth in telecommunications resulting from increased competition through deregulation.<sup>3</sup>

Section 704 of the TCA provided for a new "National Wireless Telecommunications Siting Policy" (section 704 or Siting Policy).<sup>4</sup> The Siting Policy is an important attempt to harmonize local autonomy in land use regulation and national commerce. The subsequent events of September 11, 2001 have brought into stark focus that telecommunications is a vital part of the Nation's critical infrastructure

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\* Professor of Law, George Mason University School of Law, Arlington, Virginia (seagle@gmu.edu). The author acknowledges with appreciation research support received from the Critical Infrastructure Protection Project of the National Center for Technology & Law, George Mason University School of Law.

1. Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 15, 18, and 47 U.S.C.).

2. Pub. L. No. 73-415, ch. 652, 48 Stat. 1064 (codified as amended in scattered sections of 15, 17, 18, and 47 U.S.C.A.).

3. See discussion *infra* Part V.A.

4. 47 U.S.C. § 332(c)(7) (2000). For the statutory text, see *infra* note 92.

for national security purposes.<sup>5</sup> Intensifying the importance of both the national commerce and the national security issues, reliance upon wireless telecommunications continues to grow rapidly.<sup>6</sup> Given these important national concerns, wireless communications tower siting and design decisions take on an importance beyond the more traditional tension between local government exercise of the police power to regulate land use and the private property rights of landowners which are protected under the Federal Constitution.

Section 704 attempts, within the context of legislation facilitating wireless communications growth, to respect the state and local authority over land use recognized by the Supreme Court almost eighty years ago in *Village of Euclid v. Ambler Realty Co.*<sup>7</sup> Indeed, the Siting Policy is entitled "Preservation of local zoning authority."<sup>8</sup> I argue that this effort has enjoyed only mixed success, and that this largely is attributable to the fact that the Act reflects some naïve assumptions about the nature of local land use regulation.<sup>9</sup> While regulation should be done at the lowest appropriate level of government, there are systemic reasons why municipalities might not perform that function well—especially when national economic development and security are factored in. The concluding sections of this Article suggest that the TCA should be amended to provide the practical balance between local and national interests that Congress might have intended.

## II. WIRELESS TELECOMMUNICATIONS—GROWTH AND DEREGULATION

### A. Federal Regulation of Wireless Communications

Invoking its powers under the Commerce Clause of the Constitution,<sup>10</sup> the Federal Government has regulated wireless communications since the Radio Act of 1927<sup>11</sup> declared governmental ownership of the radio frequency spectrum and preempted state laws that would interfere with its use.<sup>12</sup> The Communications Act of 1934, which replaced the Radio Act, provided for the establishment of the Federal Communications

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5. See discussion *infra* Part III.

6. See discussion *infra* Part II.B.

7. 272 U.S. 365 (1926).

8. 47 U.S.C. § 332(c)(7); see discussion *infra* Part V.

9. See discussion *infra* Part V.C.

10. U.S. CONST. art. I, § 8, cl. 3 ("The Congress Shall have Power . . . To regulate Commerce . . . among the several States . . .").

11. Pub. L. No. 69-632, ch. 169, 44 Stat. 1162 (repealed 1934).

12. *Id.*

Commission (FCC),<sup>13</sup> which in turn has undertaken to regulate developing communications media under a public interest standard.<sup>14</sup>

### B. Growth in Wireless Service

The Siting Policy employs the generic term "personal wireless services" (PWS) as a descriptor for wireless telephony, including cellular phone and Personal Communications Systems (PCS) phone service.<sup>15</sup> Originally employed for automobile phones in 1974, analogue systems were developed for more general use through the mid-1980s.<sup>16</sup> Thereafter, new digital phone services provided much clearer transmissions, with up to twenty times the number of calls that could be handled per channel.<sup>17</sup> The next generation of technology, PCS, permits both voice and data signals to be transmitted to individuals outdoors and indoors and could replace other services in fixed location and mobile markets.<sup>18</sup> However, PCS requires more advanced equipment.<sup>19</sup> Most notably for present purposes, its higher frequency transmissions require smaller cells<sup>20</sup> and, therefore, a multiplicity of cell towers.<sup>21</sup>

Cellular telephone service in the United States has grown at a phenomenal rate. According to a June 2003 FCC report, "[o]nce solely a business tool, wireless phones are now a mass-market consumer device. The overall wireless penetration rate (defined as the number of wireless subscribers divided by the total U.S. population) in the United States is now at 49 percent."<sup>22</sup>

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13. See 47 U.S.C. § 151 (2000).

14. See David W. Hughes, *When NIMBYs Attack: The Heights to Which Communities Will Climb to Prevent the Siting of Wireless Towers*, 23 J. CORP. L. 469, 474 (1998).

15. 47 U.S.C. § 332(c)(7)(C)(i) (2000). ("[T]he term 'personal wireless services' means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services . . .").

16. See Gregory Tan, Note, *Wading Through the Rhetoric of the Telecommunications Act of 1996: Uncertainty of Local Zoning Authority over Wireless Telecommunications Tower Siting*, 22 VT. L. REV. 461, 470 (1997).

17. See generally *id.* at 470-71 (explaining the technology of cellular systems).

18. See *id.* at 471-72.

19. *Id.*

20. *Id.* at 472.

21. See Jaymes D. Littlejohn, *The Impact of Land Use Regulation on Cellular Communications: Is Federal Preemption Warranted?*, 45 FED. COMM. L.J. 247, 249 (1993) (citing V. H. MacDonald, *The Cellular Concept*, 58 BELL SYS. TECH. J. 15, 20-22 (1979)).

22. *In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, 18 FCC REC. 14,783, ¶ 101, at 14,831 (2003) [hereinafter *Eighth Report*] (footnotes omitted), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-03-150A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-03-150A1.pdf).

Cellular service first was licensed by the FCC in 1983. By the end of 1994, there were more than twenty-four million subscribers, and cellular service was available to most Americans.<sup>23</sup> During the past twenty years, the number of wireless telephone subscribers has mushroomed. Starting from a base of some 92,000 subscribers at the end of 1984, the number exceeded 1.2 million by the end of 1987.<sup>24</sup> It grew to over eleven million by the end of 1992, to over fifty-five million by the end of 1997, and to over 109 million by the end of 2000.<sup>25</sup> By the end of 2003, it had reached almost 159 million.<sup>26</sup> According to the Cellular Telecommunications & Internet Association (CTIA) (the wireless telecommunications industry trade association), in October 2004 there were over 170,000,000 current U.S. wireless subscribers.<sup>27</sup> During 2002, the mobile telephone industry generated over \$76 billion in revenues.<sup>28</sup> This is not to say, however, that the wireless industry has surplus cash.<sup>29</sup>

In its *Triennial Report*, the FCC termed this growth in the number of mass market wireless subscriber lines "remarkable."<sup>30</sup> It added:

Over 90 percent of the United States population lives in counties served by three or more wireless operators; about two in five Americans now have a mobile phone. Prices for wireless service have steadily declined in recent years . . . . Notably, 3 to 5 percent of wireless customers use their wireless phone as their only phone.<sup>31</sup>

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23. FED. COMMUNICATIONS COMM'N, TRENDS IN TELEPHONE SERVICE 11-36 tbl.113 (2004), available at [http://www.fcc.gov/Bureaus/Common\\_Carrier/Reports/FCC-State\\_Link/IAD/trend504.pdf](http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/trend504.pdf).

24. *Id.*

25. *Id.*

26. *Id.*

27. See the Cellular Telecommunications & Internet Association's (CTIA) web site, Press Release, CTIA, Homeland Security Supported by Wireless Initiatives (May 28, 2004), at [http://www.ctia.org/news\\_media/press/body.cfm?record\\_id=1408](http://www.ctia.org/news_media/press/body.cfm?record_id=1408) (last visited Nov. 4, 2004), listing 171,128,825 subscribers as of November 4, 2004.

28. Press Release, FCC Adopts Annual Report on State of Competition in the Wireless Industry (June 26, 2003) 1, available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-235838A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-235838A1.pdf).

29. See Laura H. Phillips & Jason E. Friedrich, *Wireless: Can Regulatory "Business as Usual" Continue?*, COMM. LAW., Fall 2002, at 12, 12 (noting that billions of dollars in equity have gone to build out cellular systems and that the industry "is in a classic early stage and has yet to mature and produce the hoped-for financial payoff").

30. *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 18 FCC REC. 16,978, ¶ 53, at 17,017 (2003) [hereinafter *Triennial Review Order*], available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-03-36A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-03-36A1.pdf).

31. *Id.* (footnotes omitted).

Although in 2002 only two percent of subscribers had completely switched from landline to wireless telephone service,<sup>32</sup> wireless technology is becoming increasingly competitive with landline telephone service. Also, mobile data services have grown rapidly, growing from between two and 2.5 million subscribers in 2000 to between eight and ten million subscribers in 2001.<sup>33</sup> As "wireless technology continues to improve, wireless may become a more practical and attractive alternative to wireline for data services."<sup>34</sup> In confirmation of the increasing importance of wireless telephone service, the number of payphones in the United States has declined from over two million in 1997 to under 1.5 million in 2003.<sup>35</sup>

### III. WIRELESS COMMUNICATIONS AND HOMELAND SECURITY

#### A. A History of Concern About Security and Telecommunications

Interest in the role of telecommunications in protecting the security of the United States is not a new phenomenon. In 1982, President Ronald Reagan established the President's National Security Telecommunications Advisory Committee.<sup>36</sup> The Committee was given responsibility to provide "information and advice from the perspective of the telecommunications industry with respect to the implementation of Presidential Directive 53 (PD/NSC-53), National Security Telecommunications Policy."<sup>37</sup> The Federal Government long has been cognizant of the need to incorporate private facilities into emergency planning, including an early precursor of wireless services, citizens band radio.<sup>38</sup>

In 1996, President William J. Clinton issued Executive Order No. 13010, noting that "[c]ertain national infrastructures are so vital that their incapacity or destruction would have a debilitating impact on the defense or economic security of the United States. These critical infrastructures

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32. Colleen Bryan, Note, *Number Portability for Consumers: Taking Your Wireless Number with You*, 16 LOY. CONSUMER L. REV. 267, 283 (2004).

33. *Triennial Review Order*, *supra* note 30, n.185.

34. *Id.*

35. FED. COMMUNICATIONS COMM'N, *supra* note 23, at 7-8 tbl.7.6.

36. Exec. Order No. 12,382, 47 Fed. Reg. 40,531, § 1(a) (Sept. 13, 1982).

37. *Id.* § 2(a).

38. See Meeting Notice, 47 Fed. Reg. 3598, 3598 (Jan. 26, 1982) (outlining the Citizens Band Radio Communications Subcommittee's agenda to approve of the prototype plan, "'Citizens Band Radio Service Plan for the Support of Local Government During Emergencies'").

include telecommunications . . . .”<sup>39</sup> While telecommunications obviously is necessary for national defense, the Executive order also recognizes that it constitutes a crucial component of our civilian economy.

The “public safety and non-commercial uses of wireless capabilities have continued to grow. Public safety entities have attempted to improve their communications infrastructure to meet, among other needs, homeland security requirements and to respond to national or local emergencies.”<sup>40</sup> Furthermore, “[w]ireless phones have gained new prominence as a result of the critical role they played in reestablishing communications on September 11, 2001, and have moved to the forefront of national emergency planning, national security, and priority access regimes.”<sup>41</sup> The events of 9/11 also have reminded private businesses, as well as families, of the benefits of wireless communication in dealing with crisis situations.

#### B. *The Homeland Security Act and the Department of Homeland Security*

Some fourteen months after the devastating attacks against New York and Washington, Congress passed the Homeland Security Act of 2002 (HSA).<sup>42</sup> The HSA established the Department of Homeland Security (DHS).<sup>43</sup> “The primary mission of the Department is to . . . reduce the vulnerability of the United States to terrorism,” reduce damage that terrorist acts might cause, coordinate efforts to deal with natural and manmade crises, and “ensure that the overall economic security of the United States is not diminished . . . .”<sup>44</sup>

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39. Exec. Order No. 13,010, 61 Fed. Reg. 37,347, 37,347 (July 17, 1996); *id.* § 1 (establishing the President’s Commission on Critical Infrastructure Protection).

40. Richard E. Wiley & Rosemary C. Harold, *Communications Law 2003: Changes and Challenges*, in 21ST ANNUAL INSTITUTE ON TELECOMMUNICATIONS POLICY & REGULATION, 275, 316 (PLI Patents, Copyrights, Trademarks, & Literary Prop. Course, Handbook Series No. G0-015D, 2003), WL 773PLI/Pat 275.

41. Phillips & Friedrich, *supra* note 29, at 12.

42. Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended in scattered sections of 5, 6, 18, 44, and 49 U.S.C.A.).

43. 6 U.S.C.A. § 111(a) (West Supp. 2004). For a detailed analysis and critique of the functions of the Department of Homeland Security, see generally Recent Developments, *Department of Homeland Security*, 40 HARV. J. ON LEGIS. 513 (2003).

44. 6 U.S.C.A. § 111(b) (West Supp. 2004). Section 111(b) states:

(b) Mission

(1) In general

The primary mission of the Department is to—

(A) prevent terrorist attacks within the United States;

(B) reduce the vulnerability of the United States to terrorism;

(C) minimize the damage, and assist in the recovery, from terrorist attacks that do occur within the United States;

Among the functions assigned the DHS Office of Science and Technology is “[t]o carry out research, development, testing, evaluation, and cost-benefit analyses in fields that would improve the safety, effectiveness, and efficiency of law enforcement technologies used by Federal, State, and local law enforcement agencies, including, but not limited to . . . wire and wireless interoperable communication technologies.”<sup>45</sup>

A part of title II of the HSA, known as the Critical Infrastructure Information Act of 2002,<sup>46</sup> provides for the protection of voluntarily submitted information concerning critical infrastructure.<sup>47</sup> The term “critical infrastructure information” is defined as “information not customarily in the public domain and related to the security of critical infrastructure or protected systems” that relates to actual or potential threats, weaknesses, or operational problems.<sup>48</sup> Threats to critical infrastructure or protected systems include “the misuse of or unauthorized access to all types of communications and data transmission systems.”<sup>49</sup> Likewise, “protected systems” include a “communications network . . . or data in transmission.”<sup>50</sup> Such voluntarily shared information is exempted from Freedom of Information Act disclosure,<sup>51</sup> and, inter alia, from direct use by federal or state agencies in civil actions.<sup>52</sup>

The HSA was partly built upon earlier links between national preparedness and telecommunications. In 1984, President Ronald Reagan issued Executive Order No. 12472, establishing a National

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(D) carry out all functions of entities transferred to the Department, including by acting as a focal point regarding natural and manmade crises and emergency planning;

(E) ensure that the functions of the agencies and subdivisions within the Department that are not related directly to securing the homeland are not diminished or neglected except by a specific explicit Act of Congress;

(F) ensure that the overall economic security of the United States is not diminished by efforts, activities, and programs aimed at securing the homeland; and

(G) monitor connections between illegal drug trafficking and terrorism, coordinate efforts to sever such connections, and otherwise contribute to efforts to interdict illegal drug trafficking.

*Id.*

45. *Id.* § 162(b)(6)(E).

46. 6 U.S.C.A. §§ 131-134 (West Supp. 2004).

47. 6 U.S.C.A. § 133 (West Supp. 2004).

48. *Id.* § 131(3).

49. *Id.* § 131(3)(A).

50. *Id.* § 131(6)(B).

51. *Id.* § 133(a)(1)(A) (referring to the Freedom of Information Act, 5 U.S.C. § 552 (2000)).

52. *Id.* § 133(a)(1)(C).



Communications System (NCS).<sup>53</sup> The NCS was charged, inter alia, with responsiveness to “the national security and emergency preparedness needs of the President and the Federal departments, agencies and other entities, including telecommunications in support of national security leadership and continuity of government.”<sup>54</sup> Also, the NCS would work to ensure that the system was “capable of satisfying priority telecommunications requirements under all circumstances through use of commercial, government and privately owned telecommunications resources.”<sup>55</sup> The FCC has promulgated regulations for Priority Access Service for National Security and Emergency Preparedness.<sup>56</sup>

For national security as well as for commercial purposes, wireless telephony, data transmission, and the cyberinfrastructure are inextricably linked. Networked computers store and move vast amounts of financial and other business data and transactions. “The National Research Council noted more than a decade ago that ‘[t]hey control power delivery, communications, aviation, and financial services. They are used to store vital information, from medical records to business plans to criminal records.’”<sup>57</sup> Wireless communications services play an important and growing role in data transmission. In a 2003 report, the FCC published the estimate of an industry analyst that “11.9 million, or 8 percent, of the 141.8 [million] mobile telephone subscribers at the end of 2002 subscribed to some type of mobile Internet service.”<sup>58</sup> Furthermore, “[a]n additional 2.3 million consumers subscribed to mobile Internet services on data-only mobile devices at the end of 2002.”<sup>59</sup>

### C. Homeland Security Activities of the Wireless Telecommunications Industry

According to CTIA, industry efforts to support homeland security as of May 2004 included:

Many of the major wireless carriers have developed a fleet of COW’s or Cell Sites on Wheels. These systems are sent to areas in need to replace towers that may have been damaged or

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53. Exec. Order No. 12,472, 49 Fed. Reg. 13,471, § 1(a) (Apr. 5, 1984).

54. *Id.* § 1(c)(1).

55. *Id.* § 1(c)(2).

56. See, e.g., Priority Access Service (PAS) for National Security and Emergency Preparedness (NSEP), 47 C.F.R. pt. 64 app. B (2003).

57. Emily Fryc, *The Tragedy of the Cybercommons: Overcoming Fundamental Vulnerabilities to Critical Infrastructures in a Networked World*, 58 BUS. LAW. 349, 350 (2002) (alteration in original) (quoting NAT’L RESEARCH COUNCIL, COMPUTERS AT RISK: SAFE COMPUTING IN THE INFORMATION AGE 7 (1991)).

58. *Eighth Report*, *supra* note 22, ¶ 117, at 14,793 (citing LUIZ CARVALHO ET AL., MORGAN STANLEY, A LOOK AT WIRELESS DATA: DON’T SHORT SMS 3 (2003)).

59. *Id.*

destroyed. Other carriers have launched satellite versions of the smaller mobile sites—SatCOLTs—to help get networks back up and running after disasters. These sites can be up and running in a matter of hours to ensure communications continue during and after emergency situations.

Multiple wireless carriers are in the process of implementing a Priority Access program allowing government officials and first responders access to wireless networks in the event of an emergency. Under this system, wireless carriers allocate a certain amount of capacity for priority users during emergencies. Priority service does not terminate calls in progress—rather, as callers hang up, the switch designates a portion of the newly vacated voice channels to authorized priority users, who must dial in a feature code. Regardless of how high wireless usage surges, public safety officials will still be able to communicate in an emergency situation.

The Washington, D.C. area will soon be home to the Capital Wireless Integrated Network, a secure and powerful wireless network allowing officials from more than 40 local, state and federal agencies to communicate with each other using instant messaging on devices such as PCs, PDAs, and data-enabled mobile phones.<sup>60</sup>

#### IV. TOWER SITING AND THE NIMBY PROBLEM

##### A. *Tragedy of the Commons and the Anticommons*

Garrett Hardin, in his classic exposition of *The Tragedy of the Commons*, posited that everyone has a huge incentive to overexploit a common resource and fail to manage it prudently, since many others will do the same and will not be impressed by isolated examples of good stewardship.<sup>61</sup> The tragedy of the anticommons, on the other hand, is that so many individuals and groups might have property rights that

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60. Press Release, *supra* note 27.

61. Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243 (1968). However, Hardin actually was referring to an “open access regime,” where no one claims ownership rights, rather than to a “commons,” which is the collective property of a defined group. See David D. Haddock & Lynne Kiesling, *The Black Death and Property Rights*, 31 *J. LEG. STUD.* S545, S557 (2002). See generally, Henry E. Smith, *Semicommon Property Rights and Scattering in the Open Fields*, 29 *J. LEGAL STUD.* 131 (2000) (describing complex pattern of private and common land uses in medieval fields). True commons resources may be open access to group members but are private property to outsiders. Shi-Ling Hsu, *A Two-Dimensional Framework for Analyzing Property Rights Regimes*, 36 *U.C. DAVIS L. REV.* 813, 817 n.12 (2003).

include veto power over a resource so that it would be impractical or impossible for the resource to be economically developed.<sup>62</sup>

A significant problem facing the United States is that we have a national commons, dubbed a "cybercommons," comprised of data production, storage, and communications networks.<sup>63</sup> While the Internet is a substantial element of the cybercommons, Internet traffic increasingly is being conducted through wireless telecommunications.<sup>64</sup> The cybercommons has become an integral part of a much older commons—the common market that was one of the principal objects of the Framers when they created a nation that places great emphasis on the protection of interstate commerce from the parochial concerns of individual states. To a certain extent, owners of intellectual property and specialized resources in cyberspace band together to establish and police their own common areas within the overall cybercommons as is practical.<sup>65</sup>

In protecting the cybercommons and wireless telecommunications we face a collective problem. The costs of organizing and coordinating large numbers of individuals and organizations are great. Typically, the amount at stake for any single member is so small as to make organization utterly impractical. As the late Mancur Olson argued in his classic *The Logic of Collective Action*: "[U]nless the number of individuals in a group is quite small, or unless there is coercion or some other special device to make individuals act in their common interest, *rational, self-interested individuals will not act to achieve their common or group interests.*"<sup>66</sup>

While the majority of adult Americans now enjoy the benefits of wireless communications, that benefit is so diffused that it is difficult to entice individuals to expend time and resources to defend it. On the other hand, the seamless web of wireless communications is vulnerable to more parochial concerns. Wireless towers must grow in number and must be located in individual polities, often small and homogeneous suburban municipalities, that are in a practical position to block or hinder the national telecommunications network.

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62. See Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 622 (1998).

63. See generally Frye, *supra* note 57.

64. See *supra* notes 58-59 and accompanying text.

65. Frye, *supra* note 57, at 361-62 (describing private-sector efforts to protect cyberinfrastructure); see also Carol M. Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems*, 83 MINN. L. REV. 129, 155 (1998).

66. MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 2 (1971).

If we want to prevent a "tragedy of the cybercommons"<sup>67</sup> resulting from national security threats such as terrorism, we will require intervention by the HAS, other federal agencies, and collaborating state and local law enforcement units. In addition, however, the nurturing of a robust and growing telecommunications network protecting both the economy and national security requires that anticommons claims be held in check. This necessitates the development of governmental policies that do not unduly hinder private efforts to develop robust communications networks.

### B. The NIMBY Problem

The NIMBY (not in my back yard) syndrome reflects the fact that owner-occupied housing is the most valuable asset that the vast majority of people ever will own and their rational belief that deterioration in the neighborhood will affect its value.<sup>68</sup> This accounts for homeowners' exquisite interest in neighborhood change. According to Professor William Fischel, a Dartmouth land use economist and sometimes public servant:

NIMBYs show up at the zoning and planning board reviews, to which almost all developers of more-than-minor subdivisions must submit. If NIMBYs fail to reduce the scale and density of the project at these reviews, they often deploy alternative regulatory rationales, such as environmental impact statements, historic districts, aboriginal burial sites, agricultural preservation, wetlands, flood plains, access for the disabled and protection of (often unidentified) endangered species at other local, state and federal government forums, including courts of law. I have heard all of these arguments, and others too elaborately bizarre to list, in my ten years as a member of the Hanover, New Hampshire zoning board. And if NIMBYs fail in these efforts, they seek, often by direct democratic initiatives, to have the local zoning and planning regulations changed to make sure that similar developments do not happen again.<sup>69</sup>

NIMBYism also affects individuals' reactions to wireless towers.<sup>70</sup> The following anecdote is but one example:

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67. See generally Frye, *supra* note 57.

68. See William A. Fischel, *Voting, Risk Aversion, and the NIMBY Syndrome: A Comment on Robert Nelson's "Privatizing the Neighborhood,"* 7 GEO. MASON L. REV. 881, 881 (1999).

69. *Id.* at 881-82.

70. See Malcolm J. Tuesley, Note, *Not in My Backyard: The Siting of Wireless Communications Facilities*, 51 FED. COMM. L.J. 887, 897 (1999).

Henry county commissioners are working on plans to strengthen the county's ordinance governing sites for [wireless communications] towers.

"By and large, the towers are ugly, and people don't want them in their back yards," said Commissioner Brian Williams. "If folks would stay off their cell phones there would be no need for the towers," the commissioner said before he ended an interview using his cell phone.<sup>71</sup>

The following excerpt from a 1998 Fourth Circuit case involving the attempt by a church to lease some of its property for wireless towers gives some flavor of the circumstances that often underlie a permit denial:

Virginia Beach's Zoning Ordinance required the Church to secure a conditional use permit to allow AT & T and PrimeCo to build their towers. Accordingly, the Church filed an application with the City Planning Department, which, after making some modifications to appellees' proposal, recommended approval to the City Planning Commission. The Planning Commission then held a public hearing on January 8, 1997. Representatives of the companies and of the Church advocated approving the application, as did some commissioners and city officials, but numerous area residents spoke against approval, largely on the grounds that such a commercial use of the Church property was improper in a residential area and that the towers, even with various aesthetic modifications made by the companies, would be eyesores. One resident submitted a petition in opposition, with ninety signatures that he had collected in the day and a half prior to the hearing. At the conclusion of the hearing, the Planning Commission voted unanimously, with one abstention, to recommend that the City Council approve the application.

The City Council considered the application at its meeting on March 25, 1997. Having been provided with copies of the Planning Department's report, the transcript of the Planning Commission hearing, and the various application materials, the City Council also heard further testimony on the matter. Again, representatives of the companies and of the Church explained and supported the application; numerous area residents spoke, all of those not affiliated with the Church being opposed. One resident, Mr. Wayne Shank, presented petitions with over seven hundred signatures in opposition. The Council

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71. Peter Scott, *Communication Towers Follow the Growth*, ATLANTA J.-CONST., Dec. 28, 2000, at J15.

also appears to have had before it one shorter petition supporting the application and various letters to councilmen on the matter, both in support and in opposition. The only councilman to speak on the merits, Councilman William Harrison (who represents Little Neck), voiced his opposition in light of the testimony of area residents who did not think that improved service was worth the burden of having the towers looming over them.

The Council ultimately voted unanimously to deny the application . . . ."<sup>72</sup>

From the industry's point of view, NIMBYism presents a vexing addition to an elaborate regulatory process:

Imagine that you own a business in a service industry. Before you can operate this business, the federal government requires that you purchase an expensive license allowing you to conduct your business within a specific geographic area. In addition, before you can expand your infrastructure to improve and expand your services, you must receive approval from the local zoning board. When you apply to the local zoning board for a conditional use permit to site your new infrastructure, and you satisfy all of the board's requirements, they deny your application; local citizens groups have pressured this board to implement a moratorium against the expansion of businesses of your type. The basis for this moratorium is steeped in myth and unfounded community hysteria that your infrastructure causes cancer and birth defects, deflates adjacent property values, and the prevailing attitude that your business has already expanded enough within city limits. The board even hears testimony from an environmental group arguing that your industry regulations were written by a former Nazi thus making them illegal. This hypothetical scenario may sound far-fetched, but it occurs on a daily basis in the wireless telecommunications industry.<sup>73</sup>

### C. The Need for Congressional Action

In 1995, the U.S. House of Representatives passed House Bill 1555, the Communications Act of 1995.<sup>74</sup> The bill was designed to decrease the price and encourage the development of new telecommunications technologies through deregulation.<sup>75</sup> Section 107 would amend the

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72. AT & T Wireless PCS, Inc. v. City Council, 155 F.3d 423, 425 (4th Cir. 1998).

73. Hughes, *supra* note 14, at 470.

74. H.R. 1555, 104th Cong. (1995).

75. *Id.*

Communications Act of 1934 by adding a provision on facilities siting.<sup>76</sup>  
The House's intent was to provide federal standards for wireless

76. *Id.* § 107. Section 107 states:

(a) NATIONAL WIRELESS TELECOMMUNICATIONS SITING POLICY.—  
Section 332(c) of the Act (47 U.S.C. 332(c)) is amended by adding at the end the following new paragraph:

“(7) FACILITIES SITING POLICIES.—(A) Within 180 days after enactment of this paragraph, the Commission shall prescribe and make effective a policy regarding State and local regulation of the placement, construction, modification, or operation of facilities for the provision of commercial mobile services.

“(B) Pursuant to subchapter III of chapter 5, title 5, United States Code, the Commission shall establish a negotiated rulemaking committee to negotiate and develop a proposed policy to comply with the requirements of this paragraph. Such committee shall include representatives from State and local governments, affected industries, and public safety agencies. In negotiating and developing such a policy, the committee shall take into account—

“(i) the desirability of enhancing the coverage and quality of commercial mobile services and fostering competition in the provision of such services;

“(ii) the legitimate interests of State and local governments in matters of exclusively local concern;

“(iii) the effect of State and local regulation of facilities siting on interstate commerce; and

“(iv) the administrative costs to State and local governments of reviewing requests for authorization to locate facilities for the provision of commercial mobile services.

“(C) The policy prescribed pursuant to this paragraph shall ensure that—

“(i) regulation of the placement, construction, and modification of facilities for the provision of commercial mobile services by any State or local government or instrumentality thereof—

“(I) is reasonable, nondiscriminatory, and limited to the minimum necessary to accomplish the State or local government's legitimate purposes; and

“(II) does not prohibit or have the effect of precluding any commercial mobile service; and

“(ii) a State or local government or instrumentality thereof shall act on any request for authorization to locate, construct, modify, or operate facilities for the provision of commercial mobile services within a reasonable period of time after the request is fully filed with such government or instrumentality; and

“(iii) any decision by a State or local government or instrumentality thereof to deny a request for authorization to locate, construct, modify, or operate facilities for the provision of commercial mobile services shall be in writing and shall be supported by substantial evidence contained in a written record.

“(D) The policy prescribed pursuant to this paragraph shall provide that no State or local government or any instrumentality thereof may regulate the placement, construction, modification, or operation of such facilities on the basis of the environmental effects of radio frequency emissions, to the extent that such facilities comply with the Commission's regulations concerning such emissions.

communications tower siting, with some local input. In reporting out House Bill 1555, the Commerce Committee discussed why it believed such action necessary:

The Committee finds that current State and local requirements, siting and zoning decisions by non-federal units of government, have created an inconsistent and, at times, conflicting patchwork of requirements which will inhibit the deployment of Personal Communications Services (PCS) as well as the rebuilding of a digital technology-based cellular telecommunications network. The Committee believes it is in the national interest that uniform, consistent requirements, with adequate safeguards of the public health and safety, be established as soon as possible. Such requirements will ensure an appropriate balance in policy and will speed deployment and the availability of competitive wireless telecommunications services which ultimately will provide consumers with lower costs as well as with a greater range and options for such services.<sup>77</sup>

Notable among the House "Facilities Siting Policies" provisions was the establishment of a rulemaking committee that would develop policy. The committee would comprise the major interested groups, state and local officials, public safety agencies, and representatives from "affected industries," which presumably would include user groups as well as telecommunications providers.<sup>78</sup> On the one hand, this group would explicitly take into account the enhancement of wireless services and competition among providers,<sup>79</sup> and the effects of local regulation of siting on interstate commerce.<sup>80</sup> On the other hand, it would take into account "the legitimate interests of State and local governments in matters of exclusively local concern,"<sup>81</sup> as well as the administrative costs incurred by municipalities in processing facility location requests.<sup>82</sup> The policy would aim to ensure, inter alia, that local and state "regulation of the placement, construction, and modification of facilities" "is

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"(E) In accordance with subchapter III of chapter 5, title 5, United States Code, the Commission shall periodically establish a negotiated rulemaking committee to review the policy prescribed by the Commission under this paragraph and to recommend revisions to such policy."

*Id.* § 107(a).

77. H.R. REP. NO. 104-204, at 94 (1995), reprinted in 1996 U.S.C.C.A.N. 10, 61.

78. H.R. 1555, 104th Cong. § 107(a)(7)(B) (1995).

79. *Id.* § 107(a)(7)(B)(i).

80. *Id.* § 107(a)(7)(B)(iii).

81. *Id.* § 107(a)(7)(B)(ii).

82. *Id.* § 107(a)(7)(B)(iv).



reasonable, nondiscriminatory, and limited to the minimum necessary to accomplish the State or local government's legitimate purposes."<sup>83</sup>

House Bill 1555 also included a provision that the Federal Government make federal property, including rights of way and easements, available for wireless telecommunications facility siting to the greatest extent possible.<sup>84</sup> Finally, it provided that, on the basis of this deliberative process, and within 180 days after the siting policies were enacted, the FCC "shall prescribe and make effective a policy regarding State and local regulation of the placement, construction, modification, or operation of facilities for the provision of commercial mobile services."<sup>85</sup>

The House Commerce Committee was not unaware of the concerns that local officials had about federal intervention in land use regulation pertaining to towers. It declared:

The Committee recognizes that there are legitimate State and local concerns involved in regulating the siting of such facilities and believes the negotiated rulemaking committee should address those matters, such as aesthetic values and the costs associated with the use and maintenance of public rights-of-way. The intent of the Committee is that requirements resulting from the negotiated rulemaking committee's work and subsequent Commission rulemaking will allow construction of a CMRS network at a lower cost for siting and construction compatible with legitimate public health, safety and property protections while fully addressing the legitimate concerns of all affected parties and providing certainty for planning and building.<sup>86</sup>

The siting provisions of House Bill 1555 had considerable opposition in the House itself. Representative James Moran, whose proffered amendment was not permitted to come to a vote,<sup>87</sup> declared that there was

a real sleeper in this bill, and that is with regard to the siting of these control towers. There are about 20,000 of them around the country now. There are going to be about 100,000. Our amendment said on private property, if you try to site a commercial tower, then the people that own that property have a right to go to their local zoning board.

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83. *Id.* § 107(a)(7)(C)(i).

84. *Id.* § 107(c).

85. *Id.* § 107(a)(7)(A).

86. H.R. REP. NO. 104-204, at 94-95 (1995), reprinted in 1996 U.S.C.C.A.N. 10, 61.

87. See 141 CONG. REC. H8272 (daily ed. Aug. 2, 1995) (noting a 6-5 vote in the Rules Committee).

Of course they have the right. Imagine if somebody tries to put a 150 foot tower on your property, and you object, and they tell you, "Well, the Congress gave us the authority to put it on. It is a Federal law. It supersedes local zoning authority." That is the last thing we want to be doing.<sup>88</sup>

The Senate bill corresponding to House Bill 1555 had no provision respecting telecommunications siting.<sup>89</sup> The House-Senate conference produced the subsequently enacted version of the TCA. This version did contain a siting facilities provision, but it was considerably different from that adopted by the House.

The conference agreement creates a new section 704 which prevents Commission preemption of local and State land use decisions and preserves the authority of State and local governments over zoning and land use matters except in the limited circumstances set forth in the conference agreement.<sup>90</sup>

#### V. THE TELECOMMUNICATIONS ACT SITING POLICY ATTEMPTS A BALANCE OF RIGHTS

##### A. *The Telecommunications Act of 1996*

The TCA has been described by the U.S. Court of Appeals for the Second Circuit as "an omnibus overhaul of the federal regulation of communications companies, intended 'to provide for a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services . . . by opening all telecommunications markets to competition . . .'"<sup>91</sup>

The Siting Policy of the TCA is styled, "Preservation of local zoning authority."<sup>92</sup> State and local authority pertaining to "decisions regarding

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88. *Id.*

89. See S. 652, 104th Cong. (1995).

90. H.R. CONF. REP. NO. 104-458, at 207-08 (1996), reprinted in 1996 U.S.C.C.A.N. 124, 222.

91. *Sprint Spectrum, L.P. v. Willoth*, 176 F.3d 630, 637 (2d Cir. 1999) (quoting H.R. CONF. REP. NO. 104-458, at 113, reprinted in 1996 U.S.C.C.A.N. 124, 124).

92. 47 U.S.C. § 332(7) (2000).

(7) Preservation of local zoning authority

(A) General authority

Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) Limitations

the placement, construction, and modification of personal wireless service facilities” are constrained or affected only by the specific limitations contained in the siting paragraph.<sup>93</sup> Beyond those limitations, nothing in the Communications Act would limit or affect the authority of a state or local government or instrumentality thereof over decisions regarding the “placement, construction, and modification of personal

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(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.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission’s regulations concerning such emissions.

(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. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

(C) Definitions

For purposes of this paragraph—

(i) the term “personal wireless services” means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

(ii) the term “personal wireless service facilities” means facilities for the provision of personal wireless services; and

(iii) the term “unlicensed wireless service” means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v) of this title).

*Id.*

93. *Id.* § 332(c)(7).

wireless service facilities,” “except as provided in this [siting] paragraph.”<sup>94</sup>

While the House version would have cabined local discretion within negotiated policies established by the FCC, the Conference Committee attempted to temper such discretion primarily through the imposition of procedure. This is not to say that section 704 retains none of the bite of the FCC siting rules envisioned in the House version. “The TCA ‘effects substantive changes to the local zoning process . . . by preempting any local regulations, including zoning regulations, which conflict with its provisions.’”<sup>95</sup> Accordingly, local zoning measures are permissible only to the extent they do not interfere with the TCA.<sup>96</sup> The particular statutory language provides that, although the TCA preserves local zoning authority in all other respects over the siting of wireless facilities, “the method by which siting decisions are made is now subject to judicial oversight.”<sup>97</sup> Specifically, according to the language of the TCA, a denial of a request to build wireless facilities must be “in writing and supported by substantial evidence contained in a written record.”<sup>98</sup>

That said, preemptive exceptions to a contrary default rule do not augur for smooth implementation. The result of legislation that embodies “seemingly mutually exclusive propositions”<sup>99</sup> might better be described as a lack of clarity masquerading as simplicity. As the U.S. Court of Appeals for the Second Circuit has noted, the Siting Policy “fairly bristles with potential issues, from the proper allocation of the burden of proof through the available remedies for violation of the statute’s requirements.”<sup>100</sup>

Courts interpreting the Siting Policy have been cognizant of the need to balance its conflicting goals. Section 704 “works like a scale that . . . attempts to balance two objects of competing weight: on one arm sits the need to accelerate the deployment of telecommunications technology, while on the other arm rests the desire to preserve state and local control

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94. *Id.* § 332(c)(7)(A).

95. *SBA Communications, Inc. v. Zoning Comm’n*, 112 F. Supp. 2d 233, 236 (D. Conn. 2000) (quoting *Sprint Spectrum, L.P. v. Town of Easton*, 982 F. Supp. 47, 50 (D. Mass. 1997)).

96. *Sprint Spectrum*, 982 F. Supp. at 50.

97. *Sprint Spectrum, L.P. v. Willoth*, 176 F.3d 630, 637 (2d Cir. 1999) (quoting *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490 (2d Cir. 1999) (internal citation omitted)).

98. *Id.* (quoting 47 U.S.C. § 332(c)(7)(B)(iii)).

99. Kevin M. O’Neill, Note, *Wireless Facilities Are a Towering Problem: How Can Local Zoning Boards Make the Call Without Violating Section 704 of the Telecommunications Act of 1996?*, 40 WM. & MARY L. REV. 975, 985 (1999).

100. *Cellular Tel.*, 166 F.3d at 494.

over zoning matters.”<sup>101</sup> Similarly, it is “a deliberate compromise between two competing aims—to facilitate nationally the growth of wireless telephone service and to maintain substantial local control over siting of towers.”<sup>102</sup>

Putting it another way, in adopting the Siting Policy, Congress attempted to have the federal versus local regulatory conundrum decided both ways. Congressman Thomas Bliley, chairman of the Commerce Committee at the time of the TCA’s enactment, explained:

Nothing is in this bill that prevents a locality . . . from determining where a cellular pole should be located, but we do want to make sure that this technology is available across the country, that we do not allow a community to say we are not going to have any cellular pole in our locality. That is wrong. Nor are we going to say they can delay these people forever. But the location will be determined by the local governing body.<sup>103</sup>

#### B. Specific Siting Policy Provisions

Since section 704 operates not through affirmative federal rules, but rather through oversight of the operation of state and local land use decisions, its real significance must be gleaned from an examination of judicial review of specific provisions.

##### 1. Burden of Proof

Given that so many of the reasons why a tower application might be denied are subjective, or at least not easily quantifiable, establishing which party has the burden of proof is important in the determination. The Siting Policy contains no provision explicitly assigning the burden.

Courts are divided as to whether section 704 shifts the burden of proof to the government agency that denied the applicant’s siting request. In *Omnipoint Communications Enterprises, Inc. v. Town of Amherst*,<sup>104</sup> the court held that once the carrier has come forward with minimal information in support of its application, the Siting Policy “places the burden of proof to support any denial on the local government entity issuing the denial.”<sup>105</sup> Other courts have agreed.<sup>106</sup>

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101. *ATC Realty, LLC v. Town of Kingston*, 303 F.3d 91, 94 (1st Cir. 2002).

102. *Town of Amherst v. Omnipoint Communications Enters., Inc.*, 173 F.3d 9, 13 (1st Cir. 1999).

103. 141 CONG. REC. H8274 (daily ed. Aug. 2, 1995) (statement of Rep. Bliley).

104. 74 F. Supp. 2d 109 (D.N.H. 1998), *vacated and remanded by* 173 F.3d 9 (1st Cir. 1999).

105. *Id.* at 122.

In *Sprint Spectrum L.P. v. Town of Easton*,<sup>107</sup> the court explained that the burden is on the government “rather than burdening the applicant with producing substantial evidence supporting its approval.”<sup>108</sup> *Easton* added that “because the TCA ‘effectively preempts state law in several respects, including the burden of proof, . . . it is the Board’s burden to produce substantial evidence supporting its denial of plaintiff’s application.”<sup>109</sup>

Other courts have held that the burden is on the applicant. The reasoning in *Easton*, for instance, was attacked by a U.S. district court in Michigan in *New Par v. City of Saginaw*:<sup>110</sup>

This Court is not persuaded by [*Easton’s*] reasoning, nor can it find any justification for a burden-shifting requirement in the plain language of the Act, especially in light of the provision stating that “nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.”<sup>111</sup>

The U.S. Court of Appeals for the First Circuit ruled similarly in *Southwestern Bell Mobile Systems, Inc. v. Todd*,<sup>112</sup> where it said that there was nothing in the Act that would “support placing a burden upon the Board.”<sup>113</sup> Other courts have concurred.<sup>114</sup>

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106. See, e.g., *Laurence Wolf Capital Mgmt. Trust v. City of Ferndale*, 128 F. Supp. 2d 441, 446 (E.D. Mich. 2000), *aff’d in part and rev’d in part*, 61 Fed. Appx. 204 (6th Cir. 2003); *PrimeCo Pers. Communications, L.P. v. Vill. of Fox Lake*, 26 F. Supp. 2d 1052, 1064 (N.D. Ill. 1998); *Cellco P’ship v. Town Plan & Zoning Comm’n*, 3 F. Supp. 2d 178, 182 (D. Conn. 1998); *Smart SMR of N.Y., Inc. v. Zoning Comm’n*, 995 F. Supp. 52, 56 (D. Conn. 1998).

107. 982 F. Supp. 47 (D. Mass. 1997).

108. *Id.* at 49 (quoting *United States Cellular Corp. v. Bd. of Adjustment*, LACL No. CL 00070195 (Iowa Dist. Ct. for Polk County 1997)).

109. *Id.* at 52 (quoting *Cellular Corp.*, at 5).

110. 161 F. Supp. 2d 759 (E.D. Mich. 2001).

111. *Id.* at 768 n.1 (quoting 47 U.S.C. § 332(c)(7)(A)).

112. 244 F.3d 51 (1st Cir. 2001).

113. *Id.* at 63.

114. See, e.g., *MetroPCS, Inc. v. City of San Francisco*, 259 F. Supp. 2d 1004, 1009-10 (N.D. Cal. 2003) (holding that applicant had burden of proof to show that city planning commission’s denial of conditional use permit to allow mounting of antennas on parking garage roof was not based upon the substantial evidence on the record); see also *VoiceStream Minneapolis, Inc. v. St. Croix County*, 342 F.3d 818, 830-31 (7th Cir. 2003); *Am. Tower LP v. City of Huntsville*, 295 F.3d 1203, 1207-08 (11th Cir. 2002).

## 2. Discrimination Among Providers

Section 704's requirement that localities "shall not unreasonably discriminate among providers of functionally equivalent services"<sup>115</sup> prohibits denial of digital wireless communications service permits on the basis that satisfactory analogue service is already in place. In *AT & T Wireless PCS, Inc. v. City Council*,<sup>116</sup> the district court found a violation of the anti-discrimination requirement when the only basis in the record for the denial was one councilman's assertion that local residents "were satisfied with their current analog service and did not wish [for], or felt they needed, digital service."<sup>117</sup>

## 3. Prohibition of Wireless Services

The heart of the House-Senate compromise, embodied in section 704, is that states and localities can regulate the placement of wireless towers but cannot prohibit them.<sup>118</sup> This requirement is explicit,<sup>119</sup> but the courts have split on its meaning. The Fourth Circuit consistently has taken the position that "a telecommunications provider could not prevail in a challenge to an individual zoning decision absent a general ban or policy to reject all applications."<sup>120</sup> Furthermore, "[t]he burden for the carrier invoking *this* provision is a heavy one: to show from language or circumstances not just that this application has been rejected, but that further reasonable efforts are so likely to be fruitless that it is a waste of time to try."<sup>121</sup> Other courts have agreed.<sup>122</sup>

The First Circuit's approach, announced in *Town of Amherst v. Omnipoint Communications Enterprises*,<sup>123</sup> disparaged the town's assertion that the Act prohibited only "'general' bans."<sup>124</sup> "If the criteria [for permit approvals] or their administration effectively preclude towers

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115. 47 U.S.C. § 332(c)(7)(B)(i)(I) (2000).

116. 979 F. Supp. 416 (E.D. Va. 1997), *aff'd in part and rev'd in part*, 155 F.3d 423, 431 (4th Cir. 1998).

117. *Id.* at 425-26.

118. *See, e.g., supra* text accompanying note 103.

119. 47 U.S.C. § 332(c)(7)(B)(i)(II) (2000) (stating that state and local siting regulations "shall not prohibit or have the effect of prohibiting the provision of personal wireless services").

120. USCOC of Va. RSA #3, Inc. v. Montgomery County Bd. of Supervisors, 343 F.3d 262, 268 (4th Cir. 2003) (citing *AT & T Wireless*, 155 F.3d at 428-29).

121. *Id.* (quoting *360° Communications Co. v. Bd. of Supervisors*, 211 F.3d 79, 88 (4th Cir. 2000)).

122. *See, e.g., Cellco P'ship v. Town Plan & Zoning Comm'n*, 3 F. Supp. 2d 178, 184-85 (D. Conn. 1998); *AT & T Wireless Servs. of Fla., Inc. v. Orange County*, 982 F. Supp. 856, 860 (M.D. Fla. 1997).

123. 173 F.3d 9 (1st Cir. 1999).

124. *Id.* at 14.

no matter what the carrier does, they may amount to a ban 'in effect' even though substantial evidence will almost certainly exist for the denial."<sup>125</sup>

The Second Circuit propounded an "effects" test, in *Sprint Spectrum, L.P. v. Willoth*,<sup>126</sup> that stressed whether governmental acts constituted a refusal to permit service in a particular part of the municipality.<sup>127</sup>

[T]he plain focus of the statute is on whether it is possible for a user in a given remote location to reach a facility that can establish connections to the national telephone network . . . . In other words, local governments must allow service providers to fill gaps in the ability of wireless telephones to have access to land-lines . . . .

A local government may reject an application for construction of a wireless service facility in an under-served area without thereby prohibiting personal wireless services if the service gap can be closed by less intrusive means.<sup>128</sup>

However, *Willoth* added that holes in coverage that are "very limited in number or size" are treated as "*de minimis*."<sup>129</sup>

While the foregoing seemed sufficient to establish the contours of "gap" in terms of physical space, the Siting Policy is concerned with gaps in wireless service. Courts are split on whether "gap," in this context, means "gap in receiving service" or "gap in providing service."<sup>130</sup> Some, including the Third Circuit, have examined the gap from the customer's perspective.<sup>131</sup> The First Circuit has taken the provider's perspective.<sup>132</sup> Courts also are split on whether to take the perspective of the customer who otherwise would not be provided with a given technology.<sup>133</sup>

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125. *Id.*

126. 176 F.3d 630 (2d Cir. 1999).

127. See *APT Pittsburgh L.P. v. Penn Township Butler County*, 196 F.3d 469, 478-79 (3d Cir. 1999); *Willoth*, 176 F.3d at 639, 641-43; *Town of Amherst*, 173 F.3d at 14.

128. *Willoth*, 176 F.3d at 643.

129. *Id.* at 643-44 (giving as illustrations "the interiors of buildings in a sparsely populated rural area, or confined to a limited number of houses or spots as the area covered by buildings increases").

130. *Indep. Wireless One Corp. v. Town of Charlotte*, 242 F. Supp. 2d 409, 417-20 (D. Vt. 2003).

131. *Nextel W. Corp. v. Unity Township*, 282 F.3d 257, 265-66 (3d Cir. 2002); *SiteTech Group, Ltd. v. Bd. of Zoning Appeals*, 140 F. Supp. 2d 255, 257 (E.D.N.Y. 2001).

132. *Second Generation Props., LP v. Town of Pelham*, 313 F.3d 620, 634 (1st Cir. 2002).

133. *PCS II Corp. v. Extraterritorial Zoning Auth.*, 957 F. Supp. 1230, 1238 (D.N.M. 1997) (holding denial of permit to only provider of digital technology in specified area to constitute a prohibition where customers otherwise limited to analog service only); see also *Sprint Spectrum L.P. v. Jefferson County*, 968 F. Supp. 1457, 1468 (N.D. Ala. 1997).



In *VoiceStream Minneapolis, Inc. v. St. Croix County*,<sup>134</sup> the Seventh Circuit held that the applicant failed to meet its “heavy burden” of establishing that its proposal to build a 185-foot tower in a scenic river district was the only feasible plan for closing a gap in its coverage.<sup>135</sup> Although the county suggested several alternatives to the proposed site, the applicant did not investigate thoroughly the viability of the alternatives.<sup>136</sup>

This does not mean, however, that the potential availability of “alternative sites” which are neither actually available nor technically feasible will defeat an effective prohibition claim. In *Nextel Communications of the Mid-Atlantic, Inc. v. Town of Sudbury*,<sup>137</sup> the court concluded that the town “was in fact unwilling to issue [permits] for the only other sites which would conceivably have met Nextel’s coverage needs without requiring zoning relief.”<sup>138</sup> Unwillingness or hostility has factored in other prohibition cases as well.<sup>139</sup> The gravamen of these cases is ostensible cooperation masking prohibition. The First Circuit observed in *National Tower, LLC v. Plainville Zoning Board of Appeals*<sup>140</sup> that “[s]etting out criteria under the zoning law that no one could ever meet is an example of an effective prohibition.”<sup>141</sup>

While localities may not regulate so as to prohibit wireless communications service, they have no affirmative duty to lease municipal property for wireless communications towers, even if there is no practical alternative site. Propriety refusals to lease do not constitute regulatory or zoning prohibitions.<sup>142</sup>

#### 4. “Reasonable Period” for Consideration of Applications

The TCA provides that facilities siting requests must be acted upon “within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and

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*But see* *Iowa Wireless Servs., L.P. v. City of Moline*, 29 F. Supp. 2d 915, 923 (C.D. Ill. 1998).

134. 342 F.3d 818 (7th Cir. 2003).

135. *Id.* at 835.

136. *Id.*

137. No. Civ.A. 01-11754-DPW, 2003 WL 543383 (D. Mass. Feb. 26, 2003).

138. *Id.* at \*13 (noting statements by local officials that “the Selectmen see no need or desire to issue any more [permits]”).

139. *See, e.g., Omnipoint Holdings, Inc. v. Town of Westford*, 206 F. Supp. 2d 166, 172 (D. Mass. 2002) (noting that “fixed hostility” of Board suggests that further applications would be futile).

140. 297 F.3d 14 (1st Cir. 2002).

141. *Id.* at 23.

142. *Omnipoint Communications Enters., L.P. v. Township of Nether Providence*, 232 F. Supp. 2d 430, 435 (E.D. Pa. 2002).

scope of such request.”<sup>143</sup> In *Omnipoint*, the First Circuit chastised the locality that it must “face reality” and refrain from demanding and rejecting successive applications without enunciating a clear indication of its expectations.<sup>144</sup> “While prepared to tolerate some delay, Congress made clear in two different provisions that it expected expeditious resolution both by the local authorities and by courts called upon to enforce the federal limitations.”<sup>145</sup>

### 5. *Denials Shall Be in Writing*

The requirement of section 704 that the denial of a permit request “shall be in writing”<sup>146</sup> seems clear cut. Yet, even here there are complications. First, there is the problem of defining a permit “request.” In order to be entitled to the benefits of this provision, the applicant must have “supported its permit application with a ‘certain minimal amount of information.’”<sup>147</sup>

More fundamentally, in *Southwestern Bell Mobile Systems v. Todd*,<sup>148</sup> the U.S. Court of Appeals for the First Circuit considered the scope of judicial review with reference to the required written denial.<sup>149</sup> The opinion noted that “[s]ome courts have required that local authorities issue formal findings of fact and conclusions of law.”<sup>150</sup> On the other hand, some courts had found a written record of the meeting and a note that the application had been “denied” to suffice.<sup>151</sup> The First Circuit found that “[b]oth of these approaches seem flawed.”<sup>152</sup> *Todd* held that

143. 47 U.S.C. § 332(c)(7)(B)(ii) (2000).

144. 173 F.3d 9, 16-17 (1st Cir. 1999).

145. *Id.* at 17 n.8 (citing 47 U.S.C. §§ 332(c)(7)(B)(ii), (v); H.R. CONF. REP. No. 104-458, at 209 (1996)).

146. 47 U.S.C. § 332(c)(7)(B)(iii) (2000).

147. *SBA Communications, Inc. v. Zoning Comm'n*, 112 F. Supp. 2d 233, 236 (D. Conn. 2000) (quoting *Omnipoint Communications Enters. v. Town of Amherst*, 74 F. Supp. 2d 109, 122 (D.N.H. 1998)).

148. 244 F.3d 51 (1st Cir. 2001). In an extensive analysis, the Sixth Circuit found *Todd* “persuasive.” *New Par v. City of Saginaw*, 301 F.3d 390, 395 (6th Cir. 2002).

149. *Todd*, 244 F.3d at 59.

150. *Id.* (citing, inter alia, *Smart SMR of N.Y., Inc. v. Zoning Comm'n*, 995 F. Supp. 52, 56 (D. Conn. 1998) (citing *AT & T Wireless Servs. of Fla., Inc. v. Orange County*, 982 F. Supp. 856, 859 (M.D. Fla. 1997))).

151. *Id.* (citing *AT & T Wireless PCS, Inc. v. City Council*, 155 F.3d 423, 429 (4th Cir. 1998); *AT & T Wireless PCS, Inc. v. Winston-Salem Zoning Bd. of Adjustment*, 172 F.3d 307, 312-13 (4th Cir. 1999)).

152. *Id.* A noted regulatory takings lawyer has referred to such an analysis as “a *Goldilocks and the Three Bears* sort of critique.” Michael M. Berger, *Recent Takings and Eminent Domain Cases*, in 1 LAND USE INSTITUTE: PLANNING, EMINENT DOMAIN, AND COMPENSATION 221, 230 (1994) (emphasis added), available at WESTLAW, C930 ALL-ABA 221.

the Siting Policy “merely requires a written decision, in contrast to the Administrative Procedures Act and other sections of the TCA that explicitly require formal findings of fact and conclusions of law.”<sup>153</sup> Furthermore, “[p]assage of the TCA did not alter the reality that the local boards that administer the zoning laws are primarily staffed by laypeople. Though their decisions are now subject to review under the TCA, it is not realistic to expect highly detailed findings of fact and conclusions of law.”<sup>154</sup> Yet issuance of a denial giving “no reasons for a decision” coupled with the written record might be confusing, especially when the record contains assertions that might be attributable to the board or only to individual members.<sup>155</sup>

The TCA distinguishes between a written denial and a written record, thus indicating that the record cannot be a substitute for a separate denial.

We conclude, therefore, that the TCA requires local boards to issue a written denial separate from the written record. That written denial must contain a sufficient explanation of the reasons for the permit denial to allow a reviewing court to evaluate the evidence in the record supporting those reasons. We stress, however, that a meaningful review of the decision is not limited, as Southwestern Bell would have it, only to the facts specifically offered in the written decision. Again, such a requirement would place an unjustified premium on the ability of a lay board to write a decision.<sup>156</sup>

*Todd* leaves open two important questions. The first is why the dual requirements for a written denial and a written record preclude their incorporation into a single document. Second, what if the written denial contained no clear statement of reasons, but simply incorporated the written record that did contain a clear statement of reasons? Under these facts, a district court within the First Circuit held, in *Nextel*, that “[t]o reject the ZBA’s procedures on this ground would be a victory of form over substance.”<sup>157</sup>

#### 6. “Supported by Substantial Evidence”

The most substantive aspect of the Siting Policy is the requirement that denials of permit requests shall be “supported by substantial evidence contained in a written record.”<sup>158</sup> As the Eleventh Circuit noted in

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153. *Todd*, 244 F.3d at 59.

154. *Id.*

155. *Id.* at 60.

156. *Id.* (citation omitted).

157. No. Civ.A. 01-11754-DPW, 2003 WL 543383 at \*10 (D. Mass. Feb. 26, 2003).

158. 47 U.S.C. § 332(c)(7)(B)(iii) (2000).

*Preferred Sites, LLC v. Troup County*,<sup>159</sup> while section 704 “does not statutorily define the term ‘substantial evidence,’” the House-Senate Conference Committee expressly noted that it is meant to be “‘the traditional standard used for judicial review of agency actions.’”<sup>160</sup> But what standard is that?

“Judicial review of agency actions” most directly brings to mind actions of administrative agencies, hence administrative law. Applying the inference that Congress intends to use undefined terms of art in their established meaning,<sup>161</sup> many courts have presumed that Congress intended “substantial evidence” to “track” the meaning of that term under the Administrative Procedure Act (APA).<sup>162</sup> The APA requires review for “substantial evidence” in cases of adjudications and formal rulemaking by federal agencies.<sup>163</sup> Under this approach, “[d]enials of siting requests are subject to judicial oversight at a higher level of scrutiny than standard local zoning decisions in order to determine whether the denials were supported by substantial evidence.”<sup>164</sup>

Traditionally, the federal courts have taken an extremely deferential stance in reviewing local zoning decisions, limiting the scope of inquiry to the constitutionality of the zoning decision under a standard of rational review. Although Congress explicitly preserved local zoning authority in all other respects over the siting of wireless facilities . . . the method by which siting decisions are made is now subject to judicial oversight. Therefore, denials subject to the TCA are reviewed by this court more closely than standard local zoning decisions. Here, the issue is whether the denials were supported by substantial evidence.

. . . Substantial evidence . . . mean[s] less than a preponderance, but more than a scintilla of evidence. “It means

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159. 296 F.3d 1210, 1218 (11th Cir. 2002).

160. *Id.* (quoting H.R. CONF. REP. No. 104-458, at 208 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 223).

161. *Id.* (citing *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991) (analyzing “seaman,” undefined in the Jones Act)).

162. *Voice Stream PCS I, LLC v. City of Hillsboro*, 301 F. Supp. 2d 1251, 1256 (D. Or. 2004).

163. *See* 5 U.S.C. § 706(2)(E) (2000); *Ethyl Corp. v. EPA*, 541 F.2d 1, 37 n.79 (D.C. Cir. 1976).

164. *SBA Communications, Inc. v. Zoning Comm'n*, 112 F. Supp. 2d 233, 236 (D. Conn. 2000) (citing *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 493 (2d Cir. 1999)).

such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."<sup>165</sup>

Among the U.S. courts of appeals adopting an APA analysis are those for the First,<sup>166</sup> Second,<sup>167</sup> Third,<sup>168</sup> and Sixth<sup>169</sup> Circuits. Also employing this standard, the Eleventh Circuit noted in *Preferred Sites* that "[s]ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."<sup>170</sup> Furthermore, "[a]lthough the 'substantial evidence' standard is not as stringent as the preponderance of the evidence standard, it requires courts to take a harder look than when reviewing under the arbitrary and capricious standard."<sup>171</sup> In evaluating whether the standard is met, "a court should view the record in its entirety, including evidence unfavorable to the state or local government's decision."<sup>172</sup>

Another approach is that embodied in the U.S. Court of Appeals for the Fourth Circuit's opinion in *AT & T Wireless PCS, Inc. v. City Council*.<sup>173</sup> The wireless provider and a church claimed that the denial of a conditional use permit to construct two 135-foot towers on church land in a heavily forested residential area violated the Siting Policy.<sup>174</sup> The planning commission unanimously (with one abstention) voted to recommend approval of the permit after hearings, but the city council received a petition against it from 700 landowners and unanimously turned it down.<sup>175</sup> The Fourth Circuit held that the U.S. district court had been in error when it concluded that the city council's decision must include "findings of fact and an explanation of the decision."<sup>176</sup> While the Siting Policy demanded that decisions be in writing, that "cannot reasonably be inflated into a requirement of a 'statement of . . . findings

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165. *Cellular Tel.*, 166 F.3d at 493-94 (2d Cir. 1999) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951)) (citations omitted).

166. *Southwestern Bell Mobile Sys., Inc. v. Todd*, 244 F.3d 51, 58 (1st Cir. 2001).

167. *Cellular Tel.*, 166 F.3d at 494.

168. *Omnipoint Corp. v. Zoning Hearing Bd.*, 181 F.3d 403, 407-08 (3d Cir. 1999).

169. *Telespectrum, Inc. v. Pub. Serv. Comm'n*, 227 F.3d 414, 423 (6th Cir. 2000).

170. *Preferred Sites, LLC v. Troup County*, 296 F.3d 1210, 1218 (11th Cir. 2002) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

171. *Id.* (citing *Color Pigments Mfrs. Ass'n, Inc. v. OSHA*, 16 F.3d 1157, 1160 (11th Cir. 1994)).

172. *Id.* (citing *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 523 (1981)).

173. 155 F.3d 423 (4th Cir. 1998).

174. *Id.* at 424.

175. *Id.* at 425; see *supra* text accompanying note 72.

176. *AT & T Wireless*, 155 F.3d at 429.

and conclusions, and the reasons or basis therefor,” as the explicit requirements of the APA dictate.<sup>177</sup>

More fundamentally, however, the Fourth Circuit disagreed with the substantive view that the city council should be held to the same standard as an administrative agency. Instead, it adopted a “reasonable legislator” test:

The Virginia Beach City Council is a state legislative body, not a federal administrative agency. The “reasonable mind” of a legislator is not necessarily the same as the “reasonable mind” of a bureaucrat, and one should keep the distinction in mind when attempting to impose the “substantial evidence” standard onto the world of legislative decisions. It is not only proper but even expected that a legislature and its members will consider the *views of their constituents to be particularly compelling forms of evidence*, in zoning as in all other legislative matters. These views, if widely shared, will often trump those of bureaucrats or experts in the minds of reasonable legislators.

In light of these principles, the City Council’s decision clearly does not violate the “substantial evidence” requirement. . . . Appellees correctly point out that both the Planning Department and the Planning Commission recommended approval. In addition, appellees of course had numerous experts touting both the necessity and the minimal impact of towers at the Church. Such evidence surely would have justified a reasonable legislator in voting to approve the application, and may even amount to a preponderance of the evidence in favor of the application, but the repeated and widespread opposition of a majority of the citizens of Virginia Beach who voiced their views—at the Planning Commission hearing, through petitions, through letters, and at the City Council meeting—amounts to far more than a “mere scintilla” of evidence to persuade a reasonable mind to oppose the application. Indeed, we should wonder at a legislator who ignored such opposition. In all cases of this sort, those seeking to build will come armed with exhibits, experts, and evaluations. Appellees, by urging us to hold that such a predictable barrage mandates that local governments approve applications, effectively demand that we interpret the Act so as always to thwart average, nonexpert citizens; that is, to thwart democracy. The district court dismissed citizen opposition as “generalized concerns.” Congress, in refusing to abolish local authority over

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177. *Id.* at 429-30 (quoting 5 U.S.C. § 557(c)).

zoning of personal wireless services, categorically rejected this scornful approach.<sup>178</sup>

Going beyond the Fourth Circuit preference for local autonomy, Judge Paul Niemeyer's opinion in *Petersburg Cellular Partnership v. Board of Supervisors*<sup>179</sup> asserted that the Siting Policy "substantial evidence" test violates the Tenth Amendment.<sup>180</sup> Judge Niemeyer noted that the Supremacy Clause of the U.S. Constitution<sup>181</sup> requires state courts to apply federal law.<sup>182</sup> "But the requirement that state courts apply federal law is materially different from the proposition that state zoning boards use federally mandated standards in their legislative processes."<sup>183</sup> Furthermore, "the imposition of a federal standard on a local board confuses the electorate as to which governmental unit, federal or local, is to be accountable for a legislative decision made by the local board."<sup>184</sup> The Fourth Circuit view might dispel at least some of the concern of those commentators who thought that the Siting Policy might subsume all local autonomy.<sup>185</sup>

While the Fourth Circuit test and Judge Niemeyer's opinion stress local legislative autonomy, courts applying the APA "substantial evidence" test presume that local land use regulation is a quasi-judicial function. The Third Circuit quoted the Fourth Circuit's *AT & T Wireless* language celebrating legislative autonomy in *Omnipoint Corp. v. Zoning Hearing Board of Pine Grove Township*.<sup>186</sup> It continued by quoting approvingly from the Seventh Circuit's opinion in *Aegerter v. City of Delafield*<sup>187</sup> which, the Third Circuit said, "characterized zoning permit

178. *Id.* at 430-31 (emphasis added) (citation omitted).

179. 205 F.3d 688 (4th Cir. 2000).

180. *Id.* at 699-705.

181. U.S. CONST. art. VI, cl. 2.

182. 205 F.3d at 704.

183. *Id.*

184. *Id.* at 700.

185. See, e.g., Matthew N. McClure, *Working Through the Static: Is There Anything Left to Local Control in the Siting of Cellular and PCS Towers After the Telecommunications Act of 1996?*, 44 VILL. L. REV. 781, 786 (1999).

186. 181 F.3d 403, 408 (3d Cir. 1999). The quoted language is as follows:

The Virginia Beach City Council is a state legislative body, not a federal administrative agency . . . . It is not only proper but even expected that a legislature and its members will consider the views of their constituents to be particularly compelling forms of evidence, in zoning as in all other legislative matters. These views, if widely shared, will often trump those of bureaucrats or experts in the minds of reasonable legislators.

*Id.* (omission in original) (quoting *AT & T Wireless PCS, Inc. v. City Council*, 155 F.3d 423, 430 (4th Cir. 1998)). For a longer excerpt, see *supra* text accompanying note 178.

187. 174 F.3d 886 (7th Cir. 1999).

decisions as primarily administrative in nature.”<sup>188</sup> The Seventh Circuit had declared:

[T]rue as the *AT & T Wireless* observation may be about legislators, it overlooks the fact that municipal councils often wear several hats when they act. When they are passing ordinances or other laws, they are without a doubt legislators, but when they sit as an administrative body making decisions about zoning permits, they are like any other agency the state has created. We therefore apply the conventional substantial evidence standard to the case before us.<sup>189</sup>

For land use aficionados, the debate as to whether the authorization of wireless communications towers by local legislatures is quasi-judicial or legislative in nature is but one reflection of the controversy concerning the standards by which small-scale rezoning of any sort is to be adjudicated. Insofar as the U.S. Constitution is concerned, the comprehensive zoning of a community has been legislative in nature, and thus entitled to deference, since the seminal case of *Village of Euclid v. Ambler Realty Co.*<sup>190</sup> On the other extreme, the exaction of property in exchange for the issuance of development permits by local administrative agencies is subject to the requirement that the exaction be imposed upon an “individualized determination” that it is “roughly proportional” to the burden that would be imposed by the new land use.<sup>191</sup> The Supreme Court has shied away from imposing the same test on local legislative determinations, although it is not clear if there is any basis for a distinction between administrative and legislative determinations for Fifth Amendment Takings Clause purposes.<sup>192</sup> There is state precedent that legislative small-scale exactions violate the Takings Clause.<sup>193</sup>

The states, for the most part, have deemed all zoning, even small-scale rezoning, to be a legislative function.<sup>194</sup> However, some states, primarily out of a concern for the abuses generally associated with “spot zoning,” treat small-scale land use planning enactments as “quasi-judicial” or

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188. *Omnipoint*, 181 F.3d at 408.

189. *Aegerter*, 174 F.3d at 890.

190. 272 U.S. 365 (1926).

191. *Dolan v. City of Tigard*, 512 U.S. 374, 388-91 (1994).

192. See *Parking Ass'n of Ga. Inc. v. City of Atlanta*, 515 U.S. 1116, 1117-18 (1995) (mem.) (Thomas, J., dissenting from denial of certiorari).

193. *Amoco Oil Co. v. Vill. of Schaumburg*, 661 N.E.2d 380, 391-92 (Ill. App. Ct. 1995).

194. See, e.g., *Arnel Dev. Co. v. City of Costa Mesa*, 620 P.2d 565 (Cal. 1980); *Mahoney v. O'Shea Funeral Homes, Inc.*, 380 N.E.2d 297 (N.Y. 1978).



“administrative” under some circumstances. In *Fasano v. Board of Commissioners*,<sup>195</sup> the Supreme Court of Oregon declared:

[W]e feel we would be ignoring reality to rigidly view all zoning decisions by local governing bodies as legislative acts to be accorded a full presumption of validity and shielded from less than constitutional scrutiny by the theory of separation of powers. Local and small decision groups are simply not the equivalent in all respects of state and national legislatures. There is a growing judicial recognition of this fact of life:

‘It is not a part of the legislative function to grant permits, make special exceptions, or decide particular cases. Such activities are not legislative but administrative, quasi-judicial, or judicial in character. To place them in the hands of legislative bodies, whose acts as such are not judicially reviewable, is to open the door completely to arbitrary government.’<sup>196</sup>

Interestingly, even precedent within a given state might be torn between the desire to protect the almost-plenary authority on land use matters accorded local legislatures, on the one hand, and the graft and abuse often associated with spot zoning on the other. Virginia is a case in point. The Fourth Circuit, in establishing its “reasonable legislator” rule in *AT & T Wireless*, stressed the importance of the legislative function. Similarly, in his *Petersburg Cellular* opinion, Judge Niemeyer quoted the 1975 Virginia Supreme Court decision *City of Richmond v. Randall*,<sup>197</sup> which the Virginia Court subsequently reaffirmed,<sup>198</sup> stressing that “the courts have ‘no power to rezone land to any classification or to order a legislative body to do so.’”<sup>199</sup> At the very same time, there is a clear line of cases in Virginia prohibiting local legislatures from engaging in small-scale rezoning unless there is a demonstrable mistake in the original comprehensive zoning or a change in circumstances.<sup>200</sup>

“With respect to the validity of a piecemeal downzoning ordinance such as that here involved, we are of opinion that when an aggrieved landowner makes a prima facie showing that since enactment of the prior ordinance there has been no change

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195. 507 P.2d 23 (Or. 1973), *overruled on other grounds by* *Neuberger v. City of Portland*, 607 P.2d 722 (Or. 1980).

196. *Id.* at 26 (quoting *Ward v. Vill. of Skokie*, 186 N.E.2d 529, 533 (1962) (Klinybiel, J., concurring)).

197. 211 S.E.2d 56 (Va. 1975).

198. *Tran v. Gwinn*, 554 S.E.2d 63, 69 (Va. 2001) (citing *Randall*, 211 S.E.2d at 61 n.3).

199. *Petersburg Cellular P'ship v. Bd. of Supervisors*, 205 F.3d 685, 700 (4th Cir. 2000) (quoting *Randall*, 211 S.E.2d at 61).

200. See, e.g., *Seabrooke Partners v. City of Chesapeake*, 393 S.E.2d 191 (Va. 1990).

in circumstances substantially affecting the public health, safety, or welfare, the burden of going forward with evidence of such mistake, fraud, or changed circumstances shifts to the governing body. If the governing body produces evidence sufficient to make reasonableness fairly debatable, the ordinance must be sustained. If not, the ordinance is unreasonable and void."<sup>201</sup>

The import of these Virginia cases is that comprehensive zoning is the prerogative of the local legislature, whereas small-scale rezoning, often condemned as "spot zoning," will be more carefully reviewed by the courts. In a sense, the problem elucidated in Judge Niemeyer's opinion in *Petersburg Cellular*, asserting that the TCA "substantial evidence" test violates the Tenth Amendment,<sup>202</sup> is not unlike that wrestled with by some courts as to whether to apply the *Fasano* distinction,<sup>203</sup> permitting legislatures to act as legislatures most of the time, but insisting that they act as administrative tribunals at other times.<sup>204</sup>

The judicial split over the "substantial evidence" test is emblematic of the recursive character of the TCA siting provisions. Those circuits favoring the APA position have said that "[s]ubstantial evidence" review under the TCA does not create a substantive federal limitation upon local land use regulatory power."<sup>205</sup> Likewise, the substantive standard, to which the "substantial evidence" inquiry is directed, is taken from "established principles of state and local law."<sup>206</sup> Thus, federal law specifies the degree or quantum of evidence needed to legitimize, under federal law, the exercise of legislative powers devolved upon local boards, under state law, to enforce substantive rights established by state law.

The application of the APA test to section 704 has been criticized because its preference for formal fact finding and objective evidence "prevents a [local] board from balancing properly a proposed tower's potential harm and the utility of improved wireless service[s]."<sup>207</sup> In

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201. *Turner v. Bd. of County Supervisors*, 559 S.E.2d 683, 687 (Va. 2002) (quoting *Bd. of Supervisors v. Snell Constr. Corp.*, 202 S.E.2d 889, 893 (Va. 1974)).

202. *Petersburg Cellular*, 205 F.3d at 699-705.

203. See *supra* text accompanying note 196.

204. See, e.g., *Martin County v. Yusem*, 690 So. 2d 1288 (Fla. 1997); *Bd. of County Comm'rs v. Snyder*, 627 So. 2d 469 (Fla. 1993).

205. *Southwestern Bell Mobile Sys., Inc. v. Todd*, 244 F.3d 51, 58 (1st Cir. 2001).

206. *Preferred Sites, LLC v. Troup County*, 296 F.3d 1210, 1219 (11th Cir. 2002) (quoting *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 494 (2d Cir. 1999) (quoting *Cellular Tel. Co. v. Zoning Bd. of Adjustment*, 24 F. Supp. 2d 359, 366 (D.N.J. 1998))).

207. Christopher P. Terry, *On the Frontiers of Knowledge: A Flexible Substantial Evidence Standard of Review for Zoning Board Tower Siting Decisions*, 20 TEMP. ENVTL. L. & TECH. J. 147, 156 (2002).

addition to “[a]esthetics and potential effects on property values . . . not [being] easily reducible to empirical data,” it is argued, “courts applying the APA test preclude a board from relying on residents’ opinions in deciding whether to grant a tower siting permit.”<sup>208</sup>

The notion that the data of experts was to be preferred over the feelings of people was rejected by the Fourth Circuit in *AT & T Wireless PCS v. City Council*.<sup>209</sup> “Congress, in refusing to abolish local authority over zoning of personal wireless services, categorically rejected this scornful approach.”<sup>210</sup>

More broadly, the concern that data unfairly overcomes intuitions permeates the controversy over the employment of cost-benefit analysis, which has become a standard tool for discerning the efficacy of regulatory policy.<sup>211</sup> Some assert that the methodology of cost-benefit analysis is flawed because of problems involving: the incommensurability of different values; consequentialist ethics; appropriate discount rates (if any) for future enjoyment of resources; distributional issues, which center around whether willingness to pay is the appropriate proxy of demand; and measurement errors.<sup>212</sup> With respect to the environment, often raised in the tower siting context, deep ecologists have rejected the use of cost-benefit analysis in toto.<sup>213</sup>

Assertions about environmental values and the value of the environment are expressed with considerable conviction. Aesthetic and other claims based on the enjoyment of nature by present and future generations are not falsifiable, hence not scientific in nature,<sup>214</sup> and hence not amenable to rigorous judicial review. That notwithstanding, courts applying the APA approach have vindicated aesthetic objections to tower siting, even when the objections are not supported by declines in

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208. *Id.*

209. *AT & T Wireless PCS v. City Council*, 155 F.3d 423, 430 (4th Cir. 1998) (stating that legislators should “consider the views of their constituents to be particularly compelling forms of evidence”).

210. *Id.* at 431.

211. See, e.g., Jason Scott Johnston, *A Game Theoretic Analysis of Alternative Institutions for Regulatory Cost-Benefit Analysis*, 150 U. PA. L. REV. 1343, 1344-46, 1348 (2002) (discussing the growth of cost-benefit analysis).

212. See, e.g., Robert H. Frank, *Why Is Cost-Benefit Analysis So Controversial?*, in *COST-BENEFIT ANALYSIS 77*, 77-83 (Matthew D. Alder & Eric A. Posner eds., 2001) (discussing criticisms of cost-benefit analysis).

213. Edwin R. McCullough, *Through the Eye of a Needle: The Earth’s Hard Passage Back to Health*, 10(2) J. ENVTL. L. & LITIG. 389, 436-37 (1995) (“[I]f access to nature is a right, then cost-benefit analysis breaks down. In other words, there is no amount of money which can compensate for irreversible and irreparable damage to nature.”).

214. See KARL R. POPPER, *Science: Conjectures and Refutations*, in *CONJECTURES AND REFUTATIONS 33*, 33-59 (Harper & Row 1968) (1962).

market value.<sup>215</sup> It is sufficient that the decision seems grounded in objections to the particular tower.<sup>216</sup> On the other hand, courts have not been supportive of articulated negative views about towers in general or views that evidenced a misunderstanding of what the tower actually would look like.<sup>217</sup> Nor have the courts supported aesthetic objections that were demonstrably without substance.<sup>218</sup>

### 7. No Regulation Based on "Radio Frequency Emissions"

The Siting Policy prohibits states and localities from denying wireless tower siting permits for environmental reasons based on radio frequency emissions that comply with FCC standards.<sup>219</sup> The Siting Policy therefore precludes "health concerns from radio emissions."<sup>220</sup> Furthermore, local attempts to regulate the "operation" of wireless communications towers, based on emissions considerations, also are reasonably interpreted by the FCC to fall under the same prohibition.<sup>221</sup> While the Siting Policy emissions provision mentions "placement, construction, and modification," but not operations, it is only in the area of "placement, construction, and modification" that the TCA makes an exception to its general preference for plenary FCC rulemaking.<sup>222</sup> However, a public entity can refuse to license or otherwise permit the construction of a communications tower on its own property based on health concerns.<sup>223</sup> The denial then would be proprietary rather than regulatory in nature.<sup>224</sup>

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215. See, e.g., *Southwestern Bell Mobile Sys., Inc. v. Todd*, 244 F.3d 51, 58, 61 (1st Cir. 2001) (detailing the First Circuit's APA approach and holding that the TCA does not prevent local authorities from basing development decisions on aesthetics).

216. See, e.g., *id.* at 61.

217. See, e.g., *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 495-96 (2d Cir. 1999).

218. See *Omnipoint Corp. v. Zoning Hearing Bd.*, 181 F.3d 403, 405-06, 409 (3d Cir. 1999) (noting that 114-foot tower was surrounded by eighty to ninety-foot tall trees and would only be visible to neighbors 600 feet away).

219. 47 U.S.C. § 322(c)(7)(B)(iv) (2000). "No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions." *Id.*

220. *AT & T Wireless PCS, Inc. v. City Council*, 155 F.3d 423, 431 n.6 (4th Cir. 1998).

221. *Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 95-96 (2d Cir. 2000) (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.11, 844 (1984) (applying the required deferential review of agency construction of a statute that the agency is charged with administering)).

222. *Id.* at 96.

223. See *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 420-21 (2d Cir. 2002) (upholding a lease agreement in which a school district required Sprint to abide by emission standards stricter than the FCC's standards in order to place a tower on a school's roof).

224. See *id.* at 420-21.

### 8. Expedited Review and Relief

Section 704 provides that persons directly affected by state or local wireless tower permitting decisions, or failures to act, may seek expedited review in federal or state court.<sup>225</sup> It has been interpreted to vest U.S. district courts "with sufficient authority to grant . . . mandamus relief if such relief is warranted under the circumstances."<sup>226</sup> In light of the requirement for such expedition, courts finding for the telecommunications provider generally order the issuance of the requested permit rather than remand for additional proceedings. Such a remand "would simply further delay resolution of the issue."<sup>227</sup> There is a substantial split among the courts as to whether landowners and wireless providers may seek relief under the Federal Civil Rights Act (42 U.S.C. § 1983).<sup>228</sup> However, the TCA's provision of a right of action for wireless telephone providers denied permission to locate transmission towers in desired locations did not provide a right of action to persons aggrieved by a decision to allow towers.<sup>229</sup>

### C. Should the Williamson County Ripeness Rules Apply to Section 704 Cases?

#### 1. The Supreme Court's Williamson County Test

In the seminal case of *Williamson County Regional Planning Commission v. Hamilton Bank*,<sup>230</sup> the Supreme Court reviewed the claim

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225. 47 U.S.C. § 332(c)(7)(B)(v) (2000). The statute states:

(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. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) [environmental effects of radio frequency omissions] may petition the Commission for relief.

*Id.*

226. *Sprint Spectrum L.P. v. Jefferson County*, 968 F. Supp. 1457, 1463 (N.D. Ala. 1997) (quoting *Bellsouth Mobility, Inc. v. Gwinnett County*, 944 F. Supp. 923, 929 (N.D. Ga. 1996)).

227. *Primeco Pers. Communications, L.P. v. City of Mequon*, 242 F. Supp. 2d 567, 582 (E.D. Wis. 2003).

228. *See, e.g., id.* at 580-81 (no); *Qwest Corp. v. City of Santa Fe*, 224 F. Supp. 2d 1305, 1314-16 (D.N.M. 2002) (no); *Omnipoint Communications, Inc. v. City of White Plains*, 175 F. Supp. 2d 697, 707 (S.D.N.Y. 2001) (yes); *SBA Communications Inc. v. Zoning Comm'n*, 164 F. Supp. 2d 280, 294-95 (D. Conn. 2001) (yes).

229. *Mason v. O'Brien*, No. 1:01-CV-1556, 2002 WL 31972190, at \*2 (N.D.N.Y. Sept. 30, 2002).

230. 473 U.S. 172 (1985).

that denial of permits for residential development constituted a taking for which just compensation was required under the Fifth Amendment.<sup>231</sup> The Court held that the developer “has not shown that the [state] inverse condemnation procedure is unavailable or inadequate, and until it has utilized that procedure, its taking claim is premature.”<sup>232</sup>

The result of *Williamson County* has been that regulatory takings cases are subject to “a special ripeness doctrine applicable only to constitutional property rights claims.”<sup>233</sup> The *Williamson County* test has two prongs. The first provides that “a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.”<sup>234</sup> The second prong requires that the owner seek just compensation in state courts.<sup>235</sup>

## 2. Should *Williamson County* Apply to TCA Determinations?

Section 704 explicitly provides that aggrieved parties can challenge state and local wireless communications tower siting determinations in federal court.<sup>236</sup> Thus, it might seem that *Williamson County* is not a bar to federal judicial review. However, the right to sue is triggered by a “final action or failure to act.”<sup>237</sup> Therefore, the U.S. Court of Appeals for the Seventh Circuit recently determined in *Sprint Spectrum L.P. v. City of Carmel*<sup>238</sup> that the “final decision” prong of *Williamson County* is applicable to TCA siting challenges.<sup>239</sup>

In one sense, it is no surprise that the Seventh Circuit’s *Carmel* opinion discerns “no significant difference” between the evolution of the regulatory takings ripeness doctrine in *Williamson County* and its progeny and the application of the doctrine to telecommunications tower siting. As the court noted, Seventh Circuit precedent indeed has “read *Williamson* broadly,”<sup>240</sup> excepting from its purview only land use cases having equal protection claims involving fundamental rights, a suspect

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231. *Id.* at 175 & n.1; U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation”).

232. *Williamson County*, 473 U.S. at 197.

233. Timothy V. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 CAL. W. L. REV. 1, 2 (1992).

234. *Williamson County*, 473 U.S. at 186.

235. *Id.* at 194-95. The owner must “seek compensation through the procedures the State has provided for doing so.” *Id.* at 194.

236. 47 U.S.C. § 332(c)(7)(B)(v) (2000).

237. *Id.*

238. 361 F.3d 998 (7th Cir. 2004).

239. *Id.* at 1004.

240. *Id.* at 1002 (quoting *Forseth v. Vill. of Sussex*, 199 F.3d 363, 370 (7th Cir. 2000)).

class, or demonstrated governmental conduct impossible to reconcile with legitimate objectives.<sup>241</sup> Emblematic of its approach was the brush-off of one owner's claim that land use regulations violated the Fourteenth Amendment with the sentence: "This case presents a garden-variety zoning dispute dressed up in the trappings of constitutional law."<sup>242</sup>

Sprint, a national provider of wireless telephone services, sought to improve its service in the Indianapolis area by leasing the right to place an antenna on the land of Dr. Edwin Zamber, a city resident.<sup>243</sup> Carmel is just a stone's throw north of Indianapolis, and Zamber already had an existing 135-foot-high ham radio tower on his property which met Sprint's technical criteria.<sup>244</sup> Sprint received an improvement location permit from Carmel, allowing it to install low-profile antennae on the sides of Zamber's tower and to construct a ground-level equipment shelter.<sup>245</sup> A neighbor objected and Carmel revoked the permit on the grounds that the access road that Sprint was installing required an access easement and subdivision and primary plat amendments.<sup>246</sup> After a state court found Sprint's subdivision appeal timely, and after holding multiple hearings, the Board of Zoning Appeals (BZA) determined that a commercial antenna was not a permitted use in the residential district and that Sprint would have to obtain a special use permit as well as subdivision plat approval from the Plan Commission.<sup>247</sup> Sprint then sought mandamus and other relief in federal court claiming, inter alia, that the BZA's actions violated the Siting Policy since they were not supported by substantial evidence and unreasonably discriminated against Sprint.<sup>248</sup> The trial court, noting that Sprint still could apply for a special use permit, dismissed the case under the "final decision" rule of *Williamson County*.<sup>249</sup>

The Seventh Circuit began by noting that *Carmel* concerned one section 704 issue:

[W]hen is a land use decision a "final action" in order to create federal subject matter jurisdiction. Specifically, we must

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241. *Id.*

242. *Coniston Corp. v. Vill. of Hoffman Estates*, 844 F.2d 461, 467 (7th Cir. 1988) (holding that government rejection of an owner's site plan does not constitute deprivation of substantive or procedural due process).

243. *Sprint Spectrum*, 361 F.3d at 1000.

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.* at 1001.

examine whether the Act modifies the traditional analysis, enunciated in *Williamson County Regional Planning Commission v. Hamilton Bank*, for determining when a complaint challenging a local land use decision is ripe for federal adjudication.<sup>250</sup>

Section 704 provides that “an action can be brought in ‘any court of competent jurisdiction’ by ‘[a]ny person adversely affected by any final action or failure by a State or local government or any instrumentality thereof that is inconsistent with [§332(c)(7)].”<sup>251</sup> The court added that

“[t]he normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.” . . .

. . . [T]he existence of a case and controversy is a prerequisite for the exercise of federal judicial power [and that the ripeness] doctrine’s basic rationale “is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.”

Based on these principles, the Supreme Court has adopted [the *Williamson County*] specific ripeness requirements for cases challenging land use decisions. . . .

Noticeably, . . . with regard to challenges to land use decisions, “[t]his Circuit has read *Williamson* broadly . . .” . . .

. . . [W]e see no significant difference simply because Sprint’s claim arises from a statute rather than the Constitution.<sup>252</sup>

The Seventh Circuit recognized that the *Williamson County* ripeness rules are not the “more general” ripeness standards, nor are they the same as the specific ripeness standards specified by other statutes.<sup>253</sup> It grounded its decision to use the *Williamson County* rules in the TCA’s statutory provisions and legislative intent.

[A]lthough creating a federal cause of action, Congress explicitly ensured that the Act would not intrude upon the traditional authority of local governments over land use matters. As codified, § 332(c)(7) is entitled “Preservation of

250. *Id.* at 1000 (citing *Williamson County*, 473 U.S. 172 (1985)).

251. *Id.* at 1001 (alteration in original) (quoting 47 U.S.C. § 332(c)(7)(B)(v)).

252. *Id.* at 1001, 1002, 1003 (first and fifth alterations and fifth omission in original) (emphasis added) (citations omitted).

253. *Id.* at 1003.



local zoning authority.” That section expressly states that “[e]xcept as provided in this paragraph, nothing in [the] Act shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.”<sup>254</sup>

The court then noted that the original House provision would have allowed the FCC total authority over tower siting, but that the final bill, as the Conference Committee explained, “preserves the authority of State and local governments over zoning and land use matters except in the limited circumstances set forth in the conference agreement.”<sup>255</sup> Furthermore, the Conference Committee’s report defined “final action” as meaning “final administrative action at the State or local government level so that a party can commence action under the [Act] rather than waiting for the exhaustion of any independent State court remedy otherwise required.”<sup>256</sup>

Sprint asserted that reading *Williamson County* into the TCA “would create too many time-consuming procedural hurdles,” thus defeating the Act’s intent of encouraging the “rapid deployment” of wireless communications.<sup>257</sup> This intent is furthered by three other provisions of the Act: that local authorities act on siting requests within a “reasonable period of time,”<sup>258</sup> that providers must file claims under the Act within thirty days,<sup>259</sup> and that the federal courts hear such claims on an expedited basis.<sup>260</sup> Based on these provisions, Sprint urged that the TCA’s requirement for “final action” requires only that the service provider “obtain a definitive ruling from the local government solely on the issues presented to the local authorities.”<sup>261</sup>

The court disagreed, based upon its conclusion that Congress “did not intend to modify the traditional ripeness requirements for challenging local land use decisions” embodied in *Williamson County*. The court added that, while *Williamson County* requires that an owner “must exhaust all available state remedies for compensation prior to bringing a

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254. *Id.* (alterations in original) (citations omitted).

255. *Id.* (quoting H.R. CONF. REP. NO. 104-458, at 207 (1996), reprinted in 1996 U.S.C.C.A.N. 124, 221-22).

256. *Id.* at 1004 (quoting H.R. CONF. REP. NO. 104-458, at 9, reprinted in 1996 U.S.C.C.A.N. 124, 223).

257. *Id.* at 1003 (citing 47 U.S.C. § 309(j)(3)(A)).

258. *Id.* (citing 47 U.S.C. § 332(c)(7)(B)(ii)).

259. *Id.* (citing 47 U.S.C. § 332(c)(7)(B)(v)).

260. *Id.* (citing 47 U.S.C. § 332(c)(7)(B)(v)).

261. *Id.*

taking claim to federal court,"<sup>262</sup> the Conference Committee interpreted "final action" under the TCA siting provisions as meaning "final administrative action at the State or local government level so that a party can commence action under the [Act] rather than waiting for the exhaustion of any independent State court remedy otherwise required."<sup>263</sup> "This exercise," it added, "clearly teaches that Congress was aware of *Williamson County* and knew how to modify its holding when that is what it wanted to do."<sup>264</sup>

The second (state compensation) prong of *Williamson County* requires that the landowner litigate for compensation up through the state supreme court, if permitted to do so.<sup>265</sup> The reason is that "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation."<sup>266</sup> The first (finality) prong of *Williamson County* provides that "a claim that the application of government regulations effects a taking of a property interest is not ripe until *the government entity charged with implementing the regulations* has reached a final decision regarding the application of the regulations to the property at issue."<sup>267</sup> Although at least one state, California, requires judicial review of administrative determinations for finality ripeness,<sup>268</sup> it is not clear if that applies beyond inverse condemnation claims.

Read with this caveat in mind, the sparse language of the Conference Committee report could mean either that (1) Congress was precluding what generally would be the *expansion* of *Williamson County* to include state litigation of local land use decisions as well as local denials of compensation, or (2) that Congress was evincing its general concern that local land use decisions be expedited. The failure of the Conference Committee report to make explicit reference to *Williamson County* suggests that the second interpretation is more accurate.

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262. *Id.* at 1003-04 (citing *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 193-94 (1985)).

263. *Id.* (alteration in original) (quoting H.R. CONF. REP. NO. 104-458, at 9 (1996), reprinted in 1996 U.S.C.C.A.N. 124, 223).

264. *Id.* at 1004.

265. *Williamson County*, 473 U.S. at 194-95 & n.13 (1985); *id.* at 194 n.13 ("A second reason the taking claim is not yet ripe is that respondent did not seek compensation through the procedures the State has provided for doing so.").

266. *Id.* at 195.

267. *Id.* at 186 (emphasis added).

268. *Hensler v. City of Glendale*, 876 P.2d 1043, 1047 (Cal. 1994).

### 3. *The Convolution of Williamson County Subprongs*

The invocation of the beguiling word "finality" masks a multitude of complexities. First, it is not in the local land use regulator's interest to give the "final" determination that would satisfy the *Williamson County* finality requirement. As Justice Brennan noted in his seminal dissent in *San Diego Gas & Electric Co. v. City of San Diego*,<sup>269</sup> regulators employ delay as an administrative tool precisely to thwart development.<sup>270</sup> Second, given the multitude of incommensurate variables that enter into a planning decision, the very concept of a "final" determination that a specified quantity of development would be allowed is alien to the planning process:

What is supposedly needed is a "final" determination of what the regulator will allow the property owner to do on his land. As most planners will tell you, however, that is not a planner's job. The planner's job is to draw an abstract plan and then determine whether a specific development proposal meets its requirements. Anyone who thinks that he can get a planning agency to formally tell him what he CAN do on his land simply doesn't understand the planning process.<sup>271</sup>

Furthermore, in the face of the reluctance of officials to issue "final denials" in place of invitations to try and try again,<sup>272</sup> attempts to make operational the fuzzy concept of "finality" have become increasingly convoluted. In fact, in spite of its use of the term "premature" in *Williamson County*,<sup>273</sup> the Supreme Court has never definitively ruled that there is a right, after state adjudication, to federal review of Fifth Amendment takings claims.<sup>274</sup> Furthermore, the courts of appeals are divided as to whether the act of "ripening" a claim in state court itself

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269. 450 U.S. 621 (1981).

270. *Id.* at 655 n.22 (Brennan, J., dissenting) (noting that city attorneys were advised at a training program that, "IF ALL ELSE FAILS, MERELY AMEND THE REGULATION AND START OVER AGAIN").

271. Michael M. Berger, *Vindicating the Rights of Private Land Development in the Courts*, 32 URB. LAW. 941, 954 (2000).

272. *San Diego Gas & Elec.*, 450 U.S. at 655 n.22 (Brennan, J. dissenting).

273. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 197 (1985).

274. See, e.g., *Rainey Bros. Constr. Co. v. Memphis & Shelby County Bd. of Adjustment*, 528 U.S. 871 (1999) (denying certiorari on this issue, although petition filed by leading advocates for both landowners and municipalities); see also *Rainey Bros. Constr. v. Memphis & Shelby County Bd. of Adjustment*, No. 97-5897, 1999 WL 220128, at \*1, \*3 (6th Cir. Ap. 5, 1999) (per curiam) (unpublished table decision).

creates issue and claim preclusion so as to defeat any subsequent federal judicial review.<sup>275</sup> This issue now is before the Supreme Court.<sup>276</sup>

A development application under *Williamson County* must be “meaningful.”<sup>277</sup> The year after *Williamson County* was decided the Supreme Court, in *MacDonald, Sommer & Frates v. County of Yolo*,<sup>278</sup> declared:

It follows from the nature of a regulatory takings claim that an essential prerequisite to its assertion is a final and authoritative determination of the type and intensity of development legally permitted on the subject property. A court cannot determine whether a regulation has gone “too far” unless it knows how far the regulation goes.<sup>279</sup>

Referring to the developer’s permit application, the Court added in *MacDonald* that the “[r]ejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews.”<sup>280</sup> “The implication is not that future applications would be futile, but that a meaningful application has not yet been made.”<sup>281</sup> A wireless facilities siting application for a conditional use, variance, or other permit might, similarly, be rejected on the grounds that the tower is too tall, too stark in design, too close to incompatible uses, or otherwise so blatantly violative of local norms so as not to be “meaningful” under *Williamson County* and, hence, under the Siting Policy. The ex ante effect of the “meaningful” application requirement is that the applicant’s first proposal often is treated as the initial offer in a round of negotiations, and, necessarily, the applicant must submit it with that knowledge.

Some courts have required that the owner apply for a variance under all circumstances.<sup>282</sup> This is not a procedure apt to prove fruitful to

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275. Compare *San Remo Hotel L.P. v. San Francisco*, 364 F.3d 1088, 1090, 1098-99 (9th Cir. 2004) (barring subsequent federal review), and *Wilkinson v. Pitkin County Bd. of Comm’rs*, 142 F.3d 1319 (10th Cir. 1998) (same), with *Santini v. Conn. Hazardous Waste Mgmt. Serv.*, 342 F.3d 118 (2d Cir. 2003) (permitting subsequent federal review), and *Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299 (11th Cir. 1992) (same).

276. See *San Remo Hotel, L.P. v. City & County of San Francisco*, 125 S. Ct. 685 (2004) (granting certiorari on issue of “[i]s a Fifth Amendment Takings claim barred by issue preclusion on a judgment denying compensation solely under state law, which was rendered in a state court proceeding that was required to ripen the federal Takings claim,” Brief for Petitioner at i, available at 2005 WL 176427).

277. *Williamson County*, 473 U.S. at 195 n.14.

278. 477 U.S. 340 (1986).

279. *Id.* at 348.

280. *Id.* at 353 n.9.

281. *Id.* n.8.

282. See, e.g., *Lake Nacimiento Ranch Co. v. County of San Luis Obispo*, 841 F.2d 872, 877 (9th Cir. 1987).

applicants, however, since use variances require that the parcel be such that any owner would suffer unique hardship without relief and also that there would be no injury from the intended use to neighbors.<sup>283</sup>

One defense from onerous demands for multiple applications is the doctrine of "futility."<sup>284</sup> The Supreme Court recently defined "futility" in a practical sense in *Palazzolo v. Rhode Island*,<sup>285</sup> noting that "once . . . the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened."<sup>286</sup> Classic examples of futility tend to involve bad faith as well. In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,<sup>287</sup> the city demanded five complete site plans for a proposed development.<sup>288</sup> Each time the landowner complied with the city's articulated recommendations for change, the city refused to take "yes" for an answer and piled on new demands.<sup>289</sup> The patent incredulity with which the justices viewed the city's assurance that matters were complicated and that all applicants were treated in the manner as Del Monte Dunes undoubtedly played an important, if unarticulated, role in the Court's upholding a substantial award for the landowner.<sup>290</sup>

In *Town of Amherst v. Omnipoint Communications Enterprises, Inc.*,<sup>291</sup> the First Circuit chastised the locality that it must "face reality":

If the Board's position is that it can just sit back and deny all applications, that position in the end could, if maintained, prove fatal to the Board rather than Omnipoint. Under federal law, the town can control the siting of facilities but—as several Board members admitted—it cannot preclude wireless service altogether. Nor, in the face of a vigilant district court, can the

283. See, e.g., *Otto v. Steinhilber*, 24 N.E.2d 851, 854 (N.Y. 1939).

284. See, e.g., *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1575 (11th Cir. 1989) (concluding that parties essentially agreed that property could not be developed more extensively where city presented no evidence of development potential); *Herrington v. County of Sonoma*, 834 F.2d 1488, 1495 (9th Cir. 1987) (finding that preliminary ruling effectively precluding development made further pursuit of application futile).

285. 533 U.S. 606 (2001).

286. *Id.* at 620.

287. 526 U.S. 687 (1999) (requiring exhaustion of available postdeprivation remedies under U.S. law).

288. *Id.* at 695-96.

289. *Id.* at 695-98.

290. During oral argument, counsel for petitioner, George A. Yuhas, stated, "This case is not atypical in some respects. The city was faced with a complex decision it had to reconcile competing interests, sift through facts, and exercise its discretion and judgment, and it did so." Oral Argument at 4, *Del Monte Dunes* (No. 97-1235), available at 1998 WL 721087. Justice Scalia, referring to the number of complete applications the city required, each imposing additional demands, responded, "Five times." *Id.*

291. 173 F.3d 9 (1st Cir. 1999).

town exhaust applicants by requiring successive applications without giving any clue of what will do the trick.<sup>292</sup>

#### 4. *The Williamson County Rule and Expedited Review*

There is an extensive literature devoted to parsing the complexities of the *Williamson County* rule<sup>293</sup> and to whether federal takings questions should be decided in federal courts.<sup>294</sup> According to Professor Daniel R. Mandelker, "federal judges have distorted the Supreme Court's ripeness precedents to achieve an undeserved and unwarranted result: they avoid the vast majority of takings cases on their merits."<sup>295</sup> This provenance makes the *Williamson County* doctrine notably problematic where a statute mandates expedited review.

#### D. *Evaluating the TCA Siting Provisions*

The present TCA facilities siting provisions have led to "costly battles" between unhappy neighbors and citizens groups on the one hand, and landowners desirous of making beneficial utilization of their parcels and wireless service providers on the other.<sup>296</sup> The charge that the Siting Policy "is vague in its reach and implications and serves as the source for political, economic, and emotional turmoil for the wireless industry and communities alike"<sup>297</sup> does seem to be a "universal conclusion."<sup>298</sup> These

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292. *Id.* at 16-17.

293. See, e.g., Michael M. Berger & Gideon Kanner, *The Need for Takings Law Reform: A View from the Trenches—A Response to Taking Stock of the Takings Debate*, 38 SANTA CLARA L. REV. 837, 855, 857-76 (1998); Brian W. Blaesser, *Closing the Federal Courthouse Door on Property Owners: The Ripeness and Abstention Doctrines in Section 1983 Land Use Cases*, 2 HOFSTRA PROP. L.J. 73, 77-83 (1988); Gregory Overstreet, *The Ripeness Doctrine of the Taking Clause: A Survey of Decisions Showing Just How Far the Federal Courts Will Go To Avoid Adjudicating Land Use Cases*, 10 J. LAND USE & ENVTL. L. 91, 94-98 (1994).

294. See, e.g., John J. Delaney & Duane J. Desiderio, *Who Will Clean Up the "Ripeness Mess"?: A Call for Reform so Takings Plaintiffs Can Enter the Federal Courthouse*, 31 URB. LAW. 195, 201 (1999) (advocating congressional legislation easing the rules for jurisdiction of takings claims); Daniel R. Mandelker & Michael M. Berger, *A Plea to Allow the Federal Courts to Clarify the Law of Regulatory Takings*, 42 LAND USE L. & ZONING DIG. 3, 5 (1990) (arguing federal takings questions should be resolved in federal courts).

295. *Amendment to the Webb-Kenyon Act; and the Private Property Implementation Act of 1997: Hearing on H.R. 1063 and H.R. 1534 Before the Subcomm. on Courts & Intellectual Prop. of Comm. on the Judiciary*, 105th Cong. 67 (1998) (statement of Daniel Mandelker, Stamper Professor of Law, University of Washington).

296. Andrew B. Levy, Note, *If Not Here, Where?: Wireless Facility Siting and Section 332(c)(7) of the Telecommunications Act*, 8 CORNELL J.L. & PUB. POL'Y 389, 392-93 (1999).

297. Hughes, *supra* note 14, at 474.

298. Levy, *supra* note 295, at 392.

results flow from section 704's rhetorical attempt to have it both ways—to bridge the gap between NIMBY concerns and telecommunications infrastructure expansion with legislation that would have local rules and practices regulated by federal procedural devices.

## VI. BALANCING THE EQUITIES: NEW PRESUMPTIONS AND SAFE HARBOR RULES

### A. *The Need for Legislative Reform*

In large cities, there are a substantial number of tall structures upon or in which wireless communications antennae could be constructed. The local political landscape is varied as well, with the local legislature comprised of members who represent the interests of varied manufacturing, commercial, residential, and socioeconomic constituencies. In typical suburbs, however, the landscape is flatter, and the voting constituency consists almost entirely of homeowners who perceive that their property values would be adversely affected by cellular communications towers. Whether correct from any other perspective, the U.S. Court of Appeals for the Fourth Circuit's observation about local legislators rings true as a political statement: "[A] legislature and its members will consider the views of their constituents to be particularly compelling forms of evidence, in zoning as in all other legislative matters. These views, if widely shared, will often trump those of bureaucrats or experts in the minds of reasonable legislators."<sup>299</sup>

It is realistic to assume that NIMBY pressures will continue, and that they will retard the development of wireless communications services to a certain extent. There does not appear to be the political will, nor would it necessarily be advantageous, to have a comprehensively strict and preemptive federal statute regulating the development of wireless communications facilities. The failure to enact the House version of the facility siting provisions confirms this conclusion.<sup>300</sup>

Two vehicles seem most promising for furthering the growth of wireless telecommunications while protecting the interest of neighborhood residents. First, industry officials should strive for collocation of facilities and aesthetic design where practical. Local political leaders should realize that the interests of their constituents largely are aligned with broader goals of national commercial development and security. It is true, as an industry attorney put it, that

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299. *AT & T Wireless PCS, Inc. v. City Council*, 155 F.3d 423, 430 (4th Cir. 1998).

300. *See supra* text accompanying notes 75-90.

“both parties working together can solve many siting problems.”<sup>301</sup> “Short of extremely unpopular legislation pre-empting local moratoria against tower siting, only a cooperative effort by all parties will ensure that all interests are protected.”<sup>302</sup> The American Planning Association, among other groups, has done extensive work to try to locate such solutions.<sup>303</sup>

Second, however, the siting provisions of the TCA are too vague, confusing, and weak to be of much assistance.<sup>304</sup> The challenge is to devise amendments to the TCA that stop short of general preemption of local land use regulation of wireless towers, but go beyond federal controls that are procedural and that attempt to fasten themselves to the adaptable rulemaking of sometimes recalcitrant local legislators.

### *B. Suggestions for Statutory Reform of the TCA Siting Provisions*

#### *1. Burden Shifting*

As described earlier,<sup>305</sup> federal courts have split on whether the burden of proof with respect to the TCA’s limitations on local regulatory authority<sup>306</sup> falls upon the applicant or the municipality. A rule of statutory interpretation is to define exceptions to the general rule narrowly.<sup>307</sup> While one might perceive the “limitations” provision of 47 U.S.C. § 332(c)(7)(B) to be the exception to the “preservation of local authority” provisions of 47 U.S.C. § 332(c)(7), it is also true that the “preservation of local authority” itself is carved out from the more general provisions of the Communications Act.<sup>308</sup> Section 332(c)(7)(B) gives plenary authority to the FCC to regulate wireless

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301. Hughes, *supra* note 14, at 500.

302. *Id.* at 471.

303. For a list of sources on explaining and complying with the TCA, see AM. PLANNING ASS’N, AMENDING A TELECOMMUNICATIONS ORDINANCE, <http://www.planning.org/pas/telecommunications.htm> (lasted visited Nov. 5, 2004).

304. *See supra* text accompanying notes 296-98.

305. *See supra* text accompanying notes 104-14.

306. 47 U.S.C. § 332(c)(7)(B) (2000).

307. *See, e.g.,* Comm’r of Internal Revenue v. Clark, 489 U.S. 726, 739 (1989) (“In construing provisions . . . in which a general statement of policy is qualified by an exception, we usually read the exception narrowly in order to preserve the primary operation of the provision.”).

308. *See, e.g.,* 47 U.S.C. § 254(f) (2000) (“A State may adopt regulations not inconsistent with the [FCC’s] rules to preserve and advance universal service.”); Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 143 (“This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.”).



communications.<sup>309</sup> In other words, being the exception to the exception, the Siting Policy limitations on local authority reflect the general rule.

From a political and a practical perspective, Congress approached the question of statutory siting provisions not as one of subordinating one set of values to another, but rather one of harmonizing two conflicting sets of societal values. One, encapsulated in the Commerce Clause<sup>310</sup> and in the authority of Congress to provide for homeland security,<sup>311</sup> encourages wireless infrastructure development. The other, encapsulated in the concept of the Federal Government being one of enumerated powers and in the Tenth Amendment,<sup>312</sup> respects local autonomy.

Given that state and local governments have wide latitude in fashioning the substantive rules of land use regulation as they pertain to wireless communications towers, they should have the corresponding burden of demonstrating that their decisions are properly predicated on those rules. This proposition essentially is no different from that approved by the U.S. Supreme Court in *Del Monte Dunes* where the Court approved the use of jury determinations of whether “the city’s particular decision to deny Del Monte Dunes’ final development proposal was reasonably related to the city’s proffered justifications.”<sup>313</sup>

## 2. Limitations on Time for Action on Permit Applications

The Siting Policy provides that state and local governments must act upon wireless facilities siting permit applications “within a reasonable period of time.”<sup>314</sup> The Supreme Court was reluctant to draw rigid lines for the duration of development moratoria for Takings Clause purposes in its recent decision in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*.<sup>315</sup> However, the Court noted that a number of states have specific time limits for interim zoning ordinances ranging

309. 47 U.S.C. § 332(c)(7)(B).

310. U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States . . .”).

311. *Id.* cl. 1 (“The Congress shall have Power To . . . provide for the common Defence and general Welfare of the United States . . .”).

312. *Id.* amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

313. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 706 (1999).

314. 47 U.S.C. § 332(c)(7)(B)(ii) (2000).

315. 535 U.S. 302 (2002). See generally Charles V. Dumas III, Note, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency: The Supreme Court Reaffirms the Importance of Land-Use Planning and Wisely Refuses To Set Concrete Outer Limits*, 53 CATH. U. L. REV. 209, 236-37 (2003).

from six months to two years.<sup>316</sup> Furthermore, the Court noted that “[i]t may well be true that any moratorium that lasts for more than one year should be viewed with special skepticism.”<sup>317</sup>

The fact that some states already have statutory limitations pertaining to delays in issuing land use determinations strongly implies that flat durational requirements are consistent with the exercise of valid local police powers. Long delays in making determinations not only earn skepticism as to underlying motives with respect to the individual applications, but also lend doubt as to whether delays that ostensibly are for review of applications in fact are for discrimination among providers or for prohibitions on wireless service, both of which section 704 already prohibits.<sup>318</sup> Should Congress not want to impose absolute durational limitations on local review on the grounds that this would deprive municipalities of the ability to deal with unusual situations, it could temper the requirement by providing for an exception in the case of extraordinary circumstances, which the locality would have to justify under a “strong and convincing evidence” standard.<sup>319</sup>

As discussed earlier,<sup>320</sup> the total incorporation of the Takings Clause *Williamson County* doctrine into the TCA’s requirement that local land use regulators reach decisions “within a reasonable period of time after the request is duly filed”<sup>321</sup> seems extravagant given the need to balance against local autonomy the national goals of facilitating commerce and homeland security. The requirement that courts hear Siting Policy permit denial cases “on an expedited basis” attests to congressional concern about undue delay.<sup>322</sup> The effect of *Williamson County* is to facilitate delay by transposing its context from the consideration of the permit application by local regulators to whether the permit application is *meaningful* so as to be duly filed.

A good solution to this problem might be the incorporation within the TCA siting provisions of the substance of Florida’s innovative Bert J. Harris, Jr., Private Property Rights Protection Act.<sup>323</sup> Under that statute, government agencies are required to issue a written “ripeness decision identifying the allowable uses to which the subject property may be

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316. *Tahoe-Sierra*, 535 U.S. at 342 n.37.

317. *Id.* at 341.

318. 47 U.S.C. § 332(c)(7)(B)(i) (2000).

319. *Donohoe Constr. Co. v. Montgomery County Council*, 567 F.2d 603, 609 (4th Cir. 1977).

320. See *supra* text accompanying notes 293-95.

321. 47 U.S.C. § 332(c)(7)(B)(ii) (2000).

322. *Id.* § 332(c)(7)(B)(v).

323. FLA. STAT. ANN. § 70.001 (West 2004).

put."<sup>324</sup> In effect, the Bert J. Harris Act requires a locality to provide the information that the Supreme Court assumed *Williamson County* would result in the landowner being supplied—"a final decision regarding how it will be allowed to develop its property."<sup>325</sup>

The TCA could be amended to require not only that a landowner or wireless service provider receive a decision on a siting application within a specified time, but also that, at the applicant's election, a denial be accompanied by a statement enumerating the wireless facilities uses, if any, to which the property may be put. This would permit the applicant to file suit in a time frame consistent with Congress's existing mandate for judicial review "on an expedited basis."<sup>326</sup> It also would satisfy the Supreme Court's concerns in *Williamson County* that a court act with full knowledge of the facts.

### C. Safe Harbor Rules and Presumptions

Another approach towards amending the Siting Policy to achieve more balance is the increased use of statutory safe harbor rules. The existing provision ensuring that applicants can meet any legitimate state or local radio frequency emissions concern by complying with FCC emissions standards<sup>327</sup> is an example. Similar statutory rules could be put in place with respect to facilities to be located within existing structures or structures that primarily serve other functions.

Statutory presumptions could be enacted favoring towers and other wireless facilities located in areas zoned for industrial or commercial use, or along four- or six-lane or interstate highways. In areas zoned residential, presumptions might be keyed to such objective measures as ratios of tower height to the height of nearby structures, or the distance between the tower and the property line. If a permit application meets these statutory requirements, it could be overcome only through clear and convincing evidence.

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324. *Id.* § 70.001(5)(a). The statute states:

During the 180-day-notice period, [prior to the owner being permitted to file an action], each of the governmental entities . . . shall issue a written ripeness decision identifying the allowable uses to which the subject property may be put. The failure of the governmental entity to [comply shall] . . . operate as a ripeness decision that has been rejected by the property owner. The ripeness decision, as a matter of law, constitutes the last prerequisite to judicial review, and the matter shall be deemed ripe or final for the purposes of the judicial proceeding created by this section, notwithstanding the availability of other administrative remedies.

*Id.*

325. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 190 (1985).

326. 47 U.S.C. § 332(c)(7)(B)(v).

327. *Id.* § 332(c)(7)(B)(iv).

Another approach is modifying the TCA to provide wireless communications service providers treatment equal to existing public utilities. As an illustration, in New York the very stringent requirements otherwise applicable for landowners seeking a use variance<sup>328</sup> are subject to a "public utility" exception.<sup>329</sup> In *Cellular Telephone Co. v. Rosenberg*,<sup>330</sup> the New York Court of Appeals held that "a cellular telephone company is a 'public utility' [and that] . . . the construction of an antenna tower in a residential district to facilitate the supply of cellular telephone service is a 'public utility building' within the meaning of a zoning ordinance."<sup>331</sup>

While the political imperatives might militate against such an approach, the TCA could be amended to preempt wireless communications facilities from local land use regulation, while leaving state regulation substantially undisturbed. Already, a state's own immunity from local zoning laws may be shared with private firms licensed to construct communications towers on state land for use by wireless telecommunications providers.<sup>332</sup> State regulation of wireless towers would alleviate concerns about distant and obtrusive federal intervention, while reducing the jockeying that might occur among adjoining communities, each seeking to have the other provide service to a multi-jurisdictional area from its side of the boundary line.

Another modification to the TCA that would put wireless communications service providers on the same footing as other utilities is to require that they be treated as favorably as fiber-optic cable lines or other physical utility lines run along public rights of way. Although the use of government-owned land for wireless towers is somewhat different than the use of such areas for physical utility lines, electrical transmissions towers and above-ground amplifying or pumping stations suggest formulae for the equalization of access charges.

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328. *Otto v. Steinhilber*, 24 N.E.2d 851, 853 (N.Y. 1939) (requiring that "land cannot yield a reasonable return if used for [permissible] purpose[s]" and that "the plight of the owner is due to unique circumstances").

329. *In re Consol. Edison Co. of N.Y. v. Hoffman*, 374 N.E.2d 105, 111 (N.Y. 1978) ("Instead, the utility must show that modification is a public necessity in that it is required to render safe and adequate service . . . . [W]here the intrusion or burden on the community is minimal, the showing required by the utility should be correspondingly reduced.").

330. 624 N.E.2d 990 (N.Y. 1993).

331. *Id.* at 993.

332. *In re Crown Communication N.Y. v. Dept. of Transp.*, 765 N.Y.S.2d 898, 901 (N.Y. App. Div. 2003) (noting that "[t]he shared use of the towers is integral to the State plan of improving its own telecommunications infrastructure and furthers the State's goal of reducing the proliferation of towers").

## VII. CONCLUSION

In a thoughtful coda to one of its TCA facility siting decisions, the U.S. Court of Appeals for the First Circuit observed:

The statute's balance of local autonomy subject to federal limitations does not offer a single "cookie cutter" solution for diverse local situations, and it imposes an unusual burden on the courts. But Congress conceived that this course would produce (albeit at some cost and delay for the carriers) individual solutions best adapted to the needs and desires of particular communities. If this refreshing experiment in federalism does not work, Congress can always alter the law.<sup>333</sup>

The FCC noted in 2003 that "the increasing presence of cable and wireless-based telephone services as well as the advent of broadband services and other new telecommunications and information services has already worked changes in the industry to a far greater extent than could have been reasonably predicted in 1996."<sup>334</sup> While the wireless facility siting rules of the TCA have worked to a limited extent, their leitmotif of substantially deferential federal procedural checks engrafted upon state procedure, state substantive law, local ordinances, and most unrestrained local interpretation of those ordinances is not satisfactory. Similarly, the original House version of the facilities siting provisions, which imposed federal preemption, were unsatisfactory. The TCA should be amended along the lines suggested in this Article so as to achieve a better balance between commerce and homeland security and local autonomy.

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333. *Town of Amherst v. Omnipoint Communications Enters., Inc.*, 173 F.3d 9, 17 (1st Cir. 1999).

334. *Triennial Review Order*, *supra* note 30, ¶ 6, at 16,985.