

Wireless Telecommunications, Infrastructure Security, and the NIMBY Problem

By 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 the “TCA”),¹ was the first comprehensive overhaul of national telecommunications policy in over 60 years, amending the Communications Act of 1934.² The TCA was intended to encourage low prices, the deployment of new technologies, and growth in telecommunications, resulting from increased competition through deregulation.³

Section 704 of the TCA provided for a new “National Wireless Telecommunications Siting Policy (“Section 704” or the “Siting Policy”).⁴ 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

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¹ Pub. L. 104-104, Feb. 8, 1996, 110 Stat. 56 (codified in scattered provisions of 47 U.S.C.).

² The TCA amended the Communications Act of 1934, 47 U.S.C. § 151, et. seq.

³ See discussion *infra* Part V.A.

⁴ Pub. L. 104-104 § 704 (codified at 47 U.S.C. § 332 (c)(7)). For the text, see *infra* note 88.

the Nation's critical infrastructure for national security purposes.⁵ Intensifying the importance of both the national commerce and national security issues, reliance upon wireless telecommunications continues to grow rapidly.⁶

Given these important national concerns, wireless communications tower siting and design decisions take on an importance that goes 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 80 years ago, in *Village of Euclid v. Ambler Realty Co.*⁷ Indeed, the Siting Policy is entitled "Preservation of local zoning authority."⁸ I argue that this effort has enjoyed only mixed success, and that this largely is attributable to the fact that Act reflects of some naïve assumptions about the nature of local land use regulation.⁹ 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 suggests that the TCA should be amended so as to provide the practical balance between local and national interests that Congress might have intended.

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.

II. WIRELESS TELECOMMUNICATIONS – GROWTH AND DEREGULATION

A. Federal Regulation of Wireless Communications

Invoking its powers under the Commerce Clause of the Constitution,¹⁰ the federal government has regulated wireless communications since the Radio Act of 1927¹¹ declared governmental ownership of the radio frequency spectrum and preempted state laws that would interfere with its use.¹² The Communications Act of 1934,¹³ which replaced the Radio Act, provided for the establishment of the Federal Communications Commission (FCC),¹⁴ which, in turn, has undertaken to regulation developing communications media under a public interest standard.¹⁵

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 PCS phone service.¹⁶ Originally employed for automobile phones in 1974, analogue systems were developed for more general use through the mid 1980s. Thereafter, new digital phone services provided much clearer

¹⁰ U.S. CONST. Art. I, § 8 (“The Congress Shall have Power . . . To regulate Commerce . . . among the several States . . .”).

¹¹ Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162 (codified at 47 U.S.C. § 119 (1927)).

¹² See 47 U.S.C. § 119.

¹³ Communications Act of 1934, Pub. L. No. 73-415, 48 Stat. 1064 (codified at 47 U.S.C. § 151 (1994)).

¹⁴ See 47 U.S.C. § 151 (1994).

¹⁵ 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).

¹⁶ 47 U.S.C. § 332(c)(7)(C)(i). (“the term ‘personal wireless services’ means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services”).

transmissions, with up to 20 times the number of calls that could be handled per channel.¹⁷ The next generation of technology, Personal Communications Systems (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. However, PCS requires more advanced equipment. Most notably for present purposes, its higher frequency transmissions require smaller cells¹⁸ and, therefore, a multiplicity of cell towers.¹⁹

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.”²⁰

Cellular service first was licensed by the Federal Communications Commission in 1983, and by the end of 1994, there were more than 22 million subscribers and cellular service was available to most Americans. During the past 20 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. It grew to over 11 million by the end of 1992, to over 55 million by the end of 1997, and to over 109 million by the end of 2000. By

¹⁷ See generally, Gregory Tan, Note, *Wading Through the Rhetoric of the Telecommunications Act of 1996: Uncertainty of Local Zoning Authority Over Wireless Telecommunications Tower*, 22 VT. L. REV. 461, 470-471 (1997) (explaining the technology of cellular systems).

¹⁸ See, *id.* at 471-472.

¹⁹ See Jaymes D. Littlejohn, *The Impact of Land Use Regulation on Cellular Communications: Is Federal Preemption Warranted?*, 45 FED. COMM. L.J.247 (1993) (citing V. H. MacDonald, *The Cellular Concept*, 58 BELL SYS. TECH. J. 15, 30 (1979)).

²⁰ 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, WT Docket No. 02-379, Eighth Report, FCC 03-150 (rel. Jul. 14, 2003), at para. 101 (available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-03-150A1.pdf).

the end of 2003, it had reached almost 159 million.²¹ According to CTIA, the wireless telecommunications industry trade association, in June 2004 there were almost 165,000,000 current U.S. wireless subscribers.²² During 2002, the mobile telephone industry generated over \$76 billion in revenues.²³ This is not to say, however, that the wireless industry has surplus cash.²⁴

In its Triennial Report, the FCC termed this growth in the number of mass market wireless subscriber lines “remarkable.” 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.²⁵

Although in 2002 fewer than two percent of subscribers had completely switched from landline to wireless telephone service, wireless technology is becoming increasingly competitive with landline telephone service.²⁶ Also, mobile data services have grown rapidly, growing from

²¹ F.C.C. Industry Analysis and Technology Division, Wireline Competition Bureau, *Trends in Telephone Service*, p. 11-3, Table 11-1 (“Measures of Mobile Wireless Telephone Subscribers), May 2004 (available at http://ftp.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/trend504.pdf) [hereafter 2004 Trends].

²² See the CITA web site, http://www.ctia.org/news_media/press/body.cfm?record_id=1408 (listing 164,955,300 subscribers when visited on June 13, 2004).

²³ *Id.* at para. 17.

²⁴ See Laura H. Phillips & Jason E. Friedrich, *Wireless: Can Regulatory “Business as Usual” Continue?* 20 COMM. LAW. 12, 12 (Fall 2002) (noting that billions of dollars in equity have gone to build out cellular systems and that the industry is in “a classic early state and has yet to mature and produce the hoped-for financial payoff.”)

²⁵ Review of 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, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, CC Dkt. Nos. 01-338; 96-98; 98-147, p. 40, para. 53 (Aug. 21, 2003) (available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-03-36A1.pdf) [hereinafter Triennial Review Order].

²⁶ Triennial Review Order at para. 228.

between 2 and 2.5 million subscribers in 2000 to between 8 and 10 million subscribers in 2001.²⁷ as “wireless technology continues to improve, wireless may become a more practical and attractive alternative to wireline for data services.” In confirmation of the increasing importance of wireless telephone service, the number of payphones in the U.S. has declined from over 2 million in 1997 to under 1.5 million in 2003.²⁸

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.²⁹ 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.”³⁰ 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.³¹

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 include telecommunications”³² While telecommunications obviously is

²⁷ *Id.* at para. 53 n.185.

²⁸ *2004 Trends* at p. 7-8, Table 7.6 (“Number of Payphones Over Time”).

²⁹ Exec. Order No. 12,382, 47 Fed. Reg. 40,531 (1982).

³⁰ *Id.* at § 2(a).

³¹ *See* 47 Fed. Reg. Doc. 82-1806 (1982) (FCC Notice treating, inter alia, approval of prototype plan for “Citizens Band Radio Service Plan for the Support of Local Government During Emergencies.”)

³² Exec. Order No. 13,010, 61 Fed. Reg. 37,347 (1996) (establishing the President’s Commission on Critical Infrastructure Protection).

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.”³³ 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.”³⁴ 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 Department of Homeland Security

Some 14 months after the devastating attacks against New York and Washington, Congress passed the Homeland Security Act of 2002 (“HSA”).³⁵ The HSA established the Department of Homeland Security (“DHS”).³⁶ “The primary mission of the Department includes reducing the vulnerability of the United States to terrorism, reducing damage that terrorist acts might cause, and coordinating efforts to deal with natural and manmade crises. At the same time, it should work to ensure that overall economic security is not diminished.”³⁷

³³ Richard E. Wiley & Rosemary C. Harold, *Communications Law 2003: Changes and Challenges*, 316 (773 PLI/Pat 275).

³⁴ Phillips & Friedrich, *supra* note 24, 12.

³⁵ Homeland Security Act of 2002, Pub.L. 107-296, 116 Stat. 2135 (codified as amended in scattered sections of 5, 6, 18, 44 & 49 U.S.C.A.).

³⁶ 6 U.S.C. § 111(a). For a detailed analysis and critique of the functions of DHS, see Jonathan Thessin, *Department of Homeland Security*, 40 HARV. J. ON LEGIS. 513 (2003).

³⁷ 6 U.S.C. § 111(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;

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.”³⁸

A part of Title II of the HSA, known as the “Critical Infrastructure Information Act of 2002,”³⁹ provides for the protection of voluntarily submitted information concerning critical infrastructure.⁴⁰ 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.⁴¹ Threats to critical infrastructure or protected systems includes “the misuse of or unauthorized access to all types of communications and data transmission systems.”⁴² Likewise, “protected systems” include a “communications network . . . or “data in transmission.”⁴³ Such voluntarily

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

(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.

³⁸ 6 U.S.C. § 162(b)(6)(E).

³⁹ Pub. L. 107-296, Title II, Subtitle B (§§ 211 to 215), Nov. 25, 2002, 116 Stat. 2150). *See* 6 U.S.C. § 101 (Note).

⁴⁰ 6 U.S.C § 131, Homeland Security Act of 2002, § 214.

⁴¹ 6 U.S.C. § 131(3).

⁴² *Id.* at § 131(3)(A).

⁴³ *Id.* at § 131(6)(B).

shared information is exempted from Freedom of Information Act disclosure,⁴⁴ and, inter alia, from direct use by federal or state agencies in civil actions.⁴⁵

The HSA was partly built upon earlier links between national preparedness and telecommunications. In 1984, President Ronald Reagan issued Executive Order 12472,⁴⁶ establishing a National Communications System (“NCS”). 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.”⁴⁷ 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.”⁴⁸ The FCC has promulgated regulations creating the Telecommunications Service Priority System.⁴⁹

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.’”⁵⁰ Wireless communications services play an important and

⁴⁴ *Id.* at § 133(a)(1)(A) (referring to FOIA, 5 U.S.C. § 552).

⁴⁵ *Id.* at § 133(a)(1)(C).

⁴⁶ Exec Order No. 12472, 49 Fed. Reg. 13,471 (1984).

⁴⁷ *Id.* § 1(c)(1).

⁴⁸ *Id.* § 1(c)(2).

⁴⁹ See, e.g., Priority Access Service (PAS) for National Security and Emergency Preparedness (NSEP), 47 C.F.R. Pt. 64, App. B.

⁵⁰ Emily Frye, *The Tragedy of the Cybercommons: Overcoming Fundamental Vulnerabilities to Critical Infrastructures in a Networked World*, 58 BUS. LAW. 349, 350 (2002) (quoting NAT’L RESEARCH COUNCIL, COMPUTERS AT RISK: SAFE COMPUTING IN THE INFORMATION AGE 7 (1991)).

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 phone subscribers at the end of 2002 subscribed to some type of mobile Internet service.”⁵¹ Furthermore, “[a]n additional 2.3 million consumers subscribed to mobile Internet services on data-only mobile devices at the end of 2002.”⁵²

C. Homeland Security Activities of Wireless Telecommunications Industry

According to CITA, the wireless telecommunications industry trade association, 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 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

⁵¹ 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, WT Docket No. 02-379, Eighth Report, FCC 03-150 (rel. Jul. 14, 2003), at para. 17 (available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-03-150A1.pdf) (quoting Luiz Carvalho, et al., *A Look at Wireless Data: Don’t Short SMS*, Morgan Stanley, Equity Research – Wireless Telecom Services, Mar. 2, 2003 at 3).

⁵² *Id.*

local, state and federal agencies to communicate with each other using instant messaging on devices such as PCs, PDAs, and data-enabled mobile phones.⁵³

IV. TOWER SITING AND THE NIMBY PROBLEM

A. *Tragedy of the Commons and the Anticommons*

Garrett Hardin,⁵⁴ 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.⁵⁵ The tragedy of the anticommons, on the other hand, is that so many individuals and groups might have property rights that include veto power over a resource so that it would be impractical or impossible for the resource to be economically developed.⁵⁶

A significant problem facing the United States is that we have a national commons, dubbed a “cybercommons,” that is comprised of data production, storage, and communications networks.⁵⁷ While the internet is a substantial element of the cybercommons, internet traffic increasingly is being conducted through wireless telecommunications.⁵⁸ The cybercommons has become an integral part of a much older commons—the common market that was one of the

⁵³ CTIA Public Affairs Press Release, *Homeland Security Supported by Wireless Initiatives*, May 28, 2004. Available at http://www.ctia.org/news_media/press/body.cfm?record_id=1408.

⁵⁴ Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243 (1968).

⁵⁵ 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*, *J. LEG. STUD.* 545, 557 (2002). See also, 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).

⁵⁶ See, Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 *HARV. L. REV.* 621 (1998).

⁵⁷ See Frey, *supra* note 50.

⁵⁸ See *supra* notes 51-52 and accompanying text.

principal objects of the Framers when they created a nation of which places great emphasis on the protection of interstate commerce from the parochial concerns of individual states.⁵⁹ 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.⁶⁰

In protecting the cybercommons and wireless telecommunications we face a collective problem. The costs of organizing and coordinating large numbers of individuals and organizations is 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*:⁶¹

[U]nless the number of individuals 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*.⁶²

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.

If we want to prevent a “tragedy of the cybercommons”⁶³ resulting from national security threats such as terrorism, we will require intervention by the HAS, other federal agencies, and

⁵⁹ QQ Need cite.

⁶⁰ *Id.* at 361-362 (describing private-sector efforts to protect cyberinfrastructure). *See also* Carol Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems*, 83 MINN. L. REV. 129, 155 (1998).

⁶¹ MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965).

⁶² *Id.* at 2 (emphasis in original).

⁶³ *See* Frey, *supra* note 50.

collaborating state and local law enforcement units. In addition, however, the nurturing of a robust and growing telecommunications network protecting the economy as well as 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.⁶⁴ 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.⁶⁵

NIMBYism also affects individuals’ reactions to wireless towers.⁶⁶ The following anecdote is but one example:

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

⁶⁴ 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).

⁶⁵ *Id* at 881-882.

⁶⁶ See Malcolm J. Tuesley, Note, *Not in My Backyard: The siting of Wireless Communications Facilities*, 51 FED. COMM. L.J. 887, 897 (1999).

“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.⁶⁷

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 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.

⁶⁷ Peter Scott, *Communication Towers Follow the Growth*, ATLANTA JOURNAL-CONSTITUTION, December 28, 2000, J15.

The Council ultimately voted unanimously to deny the application⁶⁸

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.⁶⁹

C. The Need for Congressional Action

In 1995, the U.S. House of Representatives passed H.R. 1555, the "Communications Act of 1995." The bill was designed to decrease the price and encourage the development of new telecommunications technologies through deregulation.⁷⁰ Section 107, would amend the Communications Act of 1934⁷¹ by adding a provision on "Facilities Siting Policies."⁷² The

⁶⁸ AT & T Wireless PCS, Inc. v. City Council of Virginia Beach 155 F.3d 423, 425 (4th Cir. 1998).

⁶⁹ 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, 470 (1998).

⁷⁰ H.R. 1555, 104th Cong. (1995).

⁷¹ 47 U.S.C. §§ 151-614.

⁷² Sec. 107. Facilities Siting; Radio Frequency Emission Standards.

(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:

House's intent was to provide federal standards for wireless communications tower siting, with some local input. In reporting out H.R. 1555, the Commerce Committee discussed why it believed such action necessary:

(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.

(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.'.

[Subsections (b) Radio Frequency Emissions and (c) Availability of [Federal] Property are omitted.]

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.⁷³

Notable among the House “Facilities Siting Policies” provisions were the establishment of a rulemaking committee that would develop policy and that 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.⁷⁴ This group would explicitly take into account, on the one hand, the enhancement of wireless services and competition among providers,⁷⁵ and the effects of local regulation of siting on interstate commerce.⁷⁶ On the other hand, it would take into account “the legitimate interests of State and local governments in matters of exclusively local concern,”⁷⁷ as well as the administrative costs incurred by municipalities in processing facility location requests.⁷⁸ The objects of the policy to be developed would ensure, inter alia, that local and state regulation of “the placement, construction, and modification of facilities” “is reasonable,

⁷³ H.R. REP. NO. 104-104(I), at 94 (1995) 1996 U.S.C.C.A.N. 10, 1995 WL 442504 (July 24, 1995).

⁷⁴ H.R. 1551 at § 107(a)(7)(B).

⁷⁵ *Id.* at § 107(a)(7)(B)(i).

⁷⁶ *Id.* at § 107(a)(7)(B)(iii).

⁷⁷ *Id.* at § 107(a)(7)(B)(ii).

⁷⁸ *Id.* at § 107(a)(7)(B)(iv).

nondiscriminatory, and limited to the minimum necessary to accomplish the State or local government's legitimate purposes."⁷⁹

H.R. 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.⁸⁰ 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."⁸¹

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.⁸²

The siting provisions of H.R. 1555 had considerable opposition in the House itself. Representative James Moran, whose proffered amendment was not permitted to come to a vote,⁸³ 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

⁷⁹ *Id.* at § 107(a)(7)(C)(i) and (C)(i)(I).

⁸⁰ *Id.* at § 107(c).

⁸¹ *Id.* at § 107(a)(7)(A).

⁸² H.R. Rep. 104-204(I), at 94-95, 1996 U.S.C.C.A.N. 10, 1995 WL 442504 (July 24, 1995).

⁸³ *See* 141 Cong. Rec. H8269-02, *H8272 (noting a 6-5 vote in the Rules Committee).

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.

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.⁸⁴

The Senate bill corresponding to H.R. 1555 had no provision respecting telecommunications siting. The House-Senate conference produced the subsequently enacted version of the TCA. This version did contain a siting facilities provision, but it was considerable 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.⁸⁵

V. THE TCA SITING POLICY ATTEMPTS A BALANCE OF RIGHTS

A. *The Telecommunications Act of 1996*

The Telecommunications Act of 1996 (TCA)⁸⁶ 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”⁸⁷

⁸⁴ 141 Cong. Rec. H8269-02, *H8275 (Aug. 2, 1995).

⁸⁵ H.R. CONF. REP. 104-458, 207-208 (1996).

⁸⁶ Pub. L. 104-104, Feb. 8, 1996, 110 Stat. 56 (codified in scattered provisions of 47 U.S.C.).

⁸⁷ *Sprint Spectrum, L.P. v. Craig Willoth*, 176 F.3d 630, 637 (2nd Cir. 1999)

The Siting Policy of the TCA is styled “Preservation of local zoning authority.”⁸⁸ State and local authority pertaining to “decisions regarding the placement, construction, and

⁸⁸ (a) NATIONAL WIRELESS TELECOMMUNICATIONS SITING POLICY.--Section 332(c) (47 U.S.C. 332(c)) is amended by adding at the end the following new paragraph:

(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

(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).

modification of personal wireless service facilities” are limited or affected only by the specific limitations contained in the siting paragraph.⁸⁹ 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 wireless service facilities,” “except as provided in this [siting] paragraph.”⁹⁰

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.’”⁹¹ Accordingly, local zoning measures are permissible only to the extent they do not interfere with the TCA.⁹² 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.”⁹³ 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.”⁹⁴

That said, preemptive exceptions to a contrary default rule do not augur for smooth implementation. The result of legislation that embodies “seemingly mutually exclusive

⁸⁹ 47 U.S.C. § 332(c)(7).

⁹⁰ *Id.* at § 332(c)(7)(A).

⁹¹ *SBA Communications, Inc. v. Zoning Comm’n of Town of Brookfield*, 112 F.Supp.2d 233 (D.Conn. 2000) (quoting *Sprint Spectrum L.P. v. Town of Easton*, 982 F.Supp. 47, 50 (D. Mass. 1997)).

⁹² *Sprint Spectrum L.P. v. Town of Easton*, 982 F.Supp. 47, 50 (D. Mass. 1997).

⁹³ *Sprint Spectrum, L.P. v. Craig Willoth*, 176 F.3d 630, 637 (2nd Cir. 1999) (citing § 332(c)(7)(A) of the Communications Act as revised by the TCA).

⁹⁴ *Id.* (citing § 332(c)(7)(B)(iii)).

propositions”⁹⁵ 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.”⁹⁶

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 to two objects of competing weight: on the 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 over land use matters.”⁹⁷ 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.”⁹⁸

Putting it another way, in adopting the Siting Policy, Congress attempted to have the federal vs. 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.⁹⁹

⁹⁵ 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, 984 (1999).

⁹⁶ *Cellular Telephone Co. v. Town of Oyster Bay*, 166 F.3d 490, 492 (2nd Cir. 1999).

⁹⁷ *ATC Realty, LLC v. Town of Kingston*, 303 F.3d 91, 94 (1st Cir. 2002).

⁹⁸ *Town of Amherst v. Omnipoint Communications Enters., Inc.*, 173 F.3d 9, 13 (1st Cir. 1999).

⁹⁹ 141 Cong. Rec. H8274 (daily ed. Aug. 2, 1995) (statement of Rep. Bliley).

B. Specific Siting Policy Provisions

Since Section 704 operate not through affirmative federal rules, but rather through oversight of the operation of state and local land use decisions, their 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*,¹⁰⁰ 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."¹⁰¹ Other courts have agreed.¹⁰²

In *Sprint Spectrum L.P. v. Town of Easton*,¹⁰³ the court explained that the burden is on the government "rather than burdening the applicant with producing substantial evidence supporting its approval."¹⁰⁴ *Easton* added that "because the TCA 'effectively preempts state law in several

¹⁰⁰ 74 F.Supp.2d 109 (D.N.H.1998).

¹⁰¹ *Id.* at 122.

¹⁰² *See, e.g.*, *Smart SMR of N.Y., Inc. v. Zoning Comm'n*, 995 F.Supp. 52, 56 (D. Conn. 1998); *Cellco Partnership v. Town Plan & Zoning Comm'n*, 3 F.Supp.2d 178, 182 (D. Conn. 1998); *PrimeCo Personal Communications L.P. v. Village of Fox Lake*, 26 F.Supp.2d 1052, 1064 (N.D. Ill. 1998); *Laurence Wolf Capital Management Trust v. City of Ferndale*, 128 F.Supp.2d 441 (E.D.Mich. 2000), *aff'd in part, rev'd in part*, 61 Fed.Appx. 204 (6th Cir. 2003).

¹⁰³ 982 F.Supp. 47 (D. Mass. 1997).

¹⁰⁴ *Id.* at 49 (citing *United States Cellular Corp. v. Board of Adjustment of City of Des Moines*, Polk County District Court, LACL No. CL 00070195 (Iowa Dist. Ct. for Polk County Jan. 2, 1997)).

respects, including the burden of proof, . . . it is the Board's burden to produce substantial evidence supporting its denial of plaintiff's application."¹⁰⁵

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*:¹⁰⁶

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."¹⁰⁷

The U.S. Court of Appeals for the First Circuit, ruled similarly in *Southwestern Bell Mobile System, Inc. v. Todd*,¹⁰⁸ where it said that there was nothing in the Act that would "support placing a burden upon the Board."¹⁰⁹ Other courts have concurred.¹¹⁰

2. Discrimination Among Providers

Section 704's requirement that localities "shall not unreasonably discriminate among providers of functionally equivalent services"¹¹¹ prohibits digital wireless communications service permit denials on the basis that satisfactory analogue service is already in place. In *AT &*

¹⁰⁵ *Id.* at 52 (quoting *United States Cellular Corp.*, at 5).

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

¹⁰⁷ *Id.* at 768 (citing 47 U.S.C. § 332(c)(7)(A)).

¹⁰⁸ 244 F.3d 51 (1st Cir. 2001).

¹⁰⁹ *Id.* at 63.

¹¹⁰ *See, e.g., MetroPCS, Inc. v. City of San Francisco*, 259 F.Supp.2d 1004 (N.D.Cal. 2003) (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, 830-831 (7th Cir. 2003); *American Tower LP v. City of Huntsville*, 295 F.3d 1203, 1207 (11th Cir.2002).

¹¹¹ 47 U.S.C. § 332(c)(7)(B)(i)(II).

T Wireless PCS, Inc. v. City Council of City of Virginia Beach,¹¹² the District Court found the anti-discrimination requirement violated 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.¹¹³

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.¹¹⁴ This requirement is explicit,¹¹⁵ 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."¹¹⁶ 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."¹¹⁷ Other courts have agreed.¹¹⁸

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

¹¹³ *Id.* at 425.

¹¹⁴ *See, e.g., supra* text accompanying note 99 (statement of Congressman Thomas Bliley).

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

¹¹⁶ *USCOC of Virginia RSA #3, Inc. v. Montgomery County Bd. of Supervisors*, 343 F.3d 262, 268 (4th Cir. 2003) (citing *AT&T Wireless PCS, Inc. v. City Council of Virginia Beach*, 155 F.3d 423, 428 (4th Cir. 1998)).

¹¹⁷ *Id.* (quoting *360° Communications Co. of Charlottesville v. Board of Supervisors of Albemarle County*, 211 F.3d 79, 88 (4th Cir. 2000)).

¹¹⁸ *See, e.g., Cellco Partnership v. Town Plan and Zoning Comm'n of the Town of Farmington*, 3 F.Supp.2d 178, 184-85 (D.Conn. 1998); *AT&T Wireless Services of Fla., Inc. v. Orange County*, 982 F.Supp. 856, 860 (M.D. Fla.1997).

The First Circuit's approach, announced in *Town of Amherst v. Omnipoint Communications Enterprises, Inc.*,¹¹⁹ disparaged the town's assertion that the Act prohibited only "'general' bans."¹²⁰ "If the criteria [for permit approvals] or their administration effectively preclude towers 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."¹²¹

The Second Circuit propounded an "effects" test, in *Sprint Spectrum, L.P. v. Willoth*,¹²² that stressed whether governmental acts constituted a refusal to permit service in a particular part of the municipality.¹²³

[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....¹²⁴

However, *Willoth* added that holes in coverage that are "very limited in number or size" are treated as *de minimis*.¹²⁵

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

¹¹⁹ 173 F.3d 9 (1st Cir. 1999).

¹²⁰ *Id.* at 14.

¹²¹ *Id.*

¹²² 176 F.3d 630 (2nd Cir. 1999).

¹²³ See *Town of Amherst v. Omnipoint Communications Enters., Inc.*, 173 F.3d 9, 14 (1st Cir. 1999); *Sprint Spectrum, L.P. v. Willoth*, 176 F.3d 630, 642-643 (2nd Cir. 1999); *APT Pittsburgh L.P. v. Penn Pp.*, 196 F.3d 469, 478-479 (3rd Cir. 1999).

¹²⁴ *Sprint Spectrum L.P. v. Willoth* 176 F.3d 630, 643 (2nd Cir. 1999).

¹²⁵ *Id.* at 643-644 (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").

whether “gap,” in this context, means “gap in receiving service,” or “gap in providing service.”¹²⁶ Some, including the Third Circuit, have examined the gap from the customer’s perspective.¹²⁷ First Circuit has taken the provider’s perspective.¹²⁸ Courts also are split on whether to take the perspective of the customer who otherwise would not be provided with a given technology.¹²⁹

In *VoiceStream Minneapolis, Inc. v. St. Croix County*,¹³⁰ 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 scenic river district was the only feasible plan for closing a gap in its coverage. Although several alternatives to the proposed site were suggested by the county, the applicant did not thoroughly investigate the viability of the alternatives.¹³¹

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 Mid-Atlantic, Inc. v. Town of Sudbury*,¹³² the court concluded that the town “was in fact unwilling” to issue permits for “the only other sites which would

¹²⁶ *Independent Wireless One Corp. v. Town of Charlotte*, 242 F.Supp.2d 409, 417-420 (D.Vt. 2003).

¹²⁷ *Nextel W. Corp. v. Unity Twp.*, 282 F.3d 257, 265-266 (3rd Cir. 2002); *SiteTech Group, Ltd. v. Bd. of Zoning Appeals of Town of Brookhaven*, 140 F.Supp.2d 255, 259 (E.D.N.Y. 2001).

¹²⁸ *Second Generation Properties, LP v. Town of Pelham*, 313 F.3d 620 (1st Cir. 2002).

¹²⁹ *Western PCS II Corp. v. Extraterritorial Zoning Authority*, 957 F.Supp. 1230 (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). *Accord*, *Sprint Spectrum L.P. v. Jefferson County*, 968 F.Supp. 1457, 1468 (N.D.Ala. 1997). *Contra*, *Iowa Wireless Services, L.P. v. City of Milne*, 29 F.Supp.2d 915, 923 (C.D.Ill. 1998).

¹³⁰ 342 F.3d 818 (7th Cir. 2003).

¹³¹ *VoiceStream Minneapolis, Inc. v. St. Croix County* 342 F.3d 818, *835 (C.A.7 (Wis.),2003)

¹³² No. Civ. A. 01-11754-DPW, 2003 WL 543383 (D. Mass. Feb. 26, 2003) (not reported in F.Supp.2d).

conceivably have met Nextel's coverage needs without requiring zoning relief."¹³³ Unwillingness or hostility have factored in other prohibition cases as well.¹³⁴ The gravamen of these cases is ostensible cooperation masking prohibition. The First Circuit observed, in *National Tower, LLC v. Plainville Zoning Bd. of Appeals*,¹³⁵ that "[s]etting out criteria under the zoning law that no one could ever meet is an example of effective prohibition."¹³⁶

While localities may not regulate so as to prohibit wireless communications service, they have not 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.¹³⁷

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 scope of such request."¹³⁸

In *Town of Amherst v. Omnipoint Communications Enterprises, Inc.*,¹³⁹ 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.¹⁴⁰ "While

¹³³ *Id.* at *13 (noting statements by local officials that "the Selectmen see no need or desire to issue any more [permits]").

¹³⁴ *See, e.g., Omnipoint Holdings 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).

¹³⁵ 297 F.3d 14 (1st Cir. 2002).

¹³⁶ *Id.* at 23.

¹³⁷ *Omnipoint Communications Enters., L.P. v. Township of Nether Providence*, 232 F.Supp.2d 430 (E.D. Pa. 2002).

¹³⁸ 47 U.S.C. § 332(c)(7)(B)(ii)

¹³⁹ 173 F.3d 9 (1st Cir. 1999).

¹⁴⁰ *Id.* at 16-17.

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.”¹⁴¹

5. Denials Shall be in Writing

The requirement of Section 704 that the denial of a permit request “shall be in writing”¹⁴² 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.’”¹⁴³

More fundamentally, in *Southwestern Bell Mobile System v. Todd*,¹⁴⁴ the U.S. Court of Appeals for the First Circuit considered the scope of judicial review with reference to the required written denial. The opinion noted that some courts had required that the local authorities issue formal findings of fact and conclusions of law.¹⁴⁵ 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.¹⁴⁶

¹⁴¹ *Id.* at 17 n.8 (citing to 47 U.S.C. §§ 332(c)(7)(B)(ii) and (B)(V), and to H.R. Conf. Rep. No. 104-458, at 209 (1996)).

¹⁴² 47 U.S.C. § 332(c)(7)(B)(iii).

¹⁴³ *SBA Communications, Inc. v. Zoning Comm’n of Town of Brookfield*, 112 F.Supp.2d 233, 236 (D.Conn. 2000) (quoting *Omnipoint Communications Enter., Inc. v. Town of Amherst*, 74 F.Supp.2d 109, 122 (D.N.H. 1998)).

¹⁴⁴ 244 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 (6th Cir. 2002).

¹⁴⁵ *Id.* at 59 (citing, inter alia, *Smart SMR of New York, Inc. v. The Zoning Commission of the Town of Stratford*, 995 F.Supp. 52, 56 (D.Conn. 1998); *AT&T Wireless Servs. of Florida, Inc. v. Orange County*, 982 F.Supp. 856, 859 (M.D.Fla. 1997)).

¹⁴⁶ *Id.* (citing *AT&T Wireless PCS, Inc. v. City Council of Virginia Beach*, 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)).

The First Circuit found that “[b]oth of these approaches seem flawed.”¹⁴⁷ *Todd* held that 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.”¹⁴⁸ 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.”¹⁴⁹ 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.¹⁵⁰ “The TCA distinguishes between a written denial and a written record, thus indicating that the record cannot be a substitute for a separate denial.”¹⁵¹

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.¹⁵²

Todd leaves open two important questions. The first is why the dual requirements for a written denial and a written record precludes their incorporation into a single document. 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

¹⁴⁷ *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*, C930 ALI-ABA 221, 230 (Aug. 17, 1994).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 60.

¹⁵¹ *Id.* (citing 47 U.S.C. § 332(c)(7)(B)(iii)).

First Circuit held, in *Nextel Communications of Mid-Atlantic, Inc. v. Town of Sudbury*, that “[t]o reject the ZBA’s procedures on this ground would be a victory of form over substance.”¹⁵³

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.”¹⁵⁴ As the Eleventh Circuit noted in *Preferred Sites, LLC v. Troup County*,¹⁵⁵ 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.’”¹⁵⁶ 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,¹⁵⁷ many courts have presumed that Congress intended “substantial evidence” to “track” the meaning of that term under the Administrative Procedure Act (APA).¹⁵⁸ The APA requires review for “substantial evidence” in cases of adjudications and formal rulemaking by federal agencies.¹⁵⁹ Under this approach, denials of siting requests are subject to judicial oversight at a higher level of scrutiny than standard local

¹⁵² *Id.*

¹⁵³ No. Civ.A. 01-11754-DPW, 2003 WL 543383 (D. Mass. Feb. 26, 2003).

¹⁵⁴ 47 U.S.C. § 332(c)(7)(B)(iii).

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

¹⁵⁶ *Id.* at 1218 (quoting H.R. Conf. Rep. 104-458, at 208, reprinted in 1996 U.S.C.C.A.N. 124, at 223).

¹⁵⁷ *Preferred Sites*, 296 F.3d at 1218 (citing *McDermott Int’l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991) (so analyzing “seaman,” undefined in Jones Act)).

¹⁵⁸ *Voice Stream PCS I, LLC v. City of Hillsboro*, 301 F.Supp.2d 1251, 1256 (D. Or. 2004).

¹⁵⁹ *See* 5 U.S.C. § 706(2)(E); *Ethyl Corp. v. EPA*, 541 F.2d 1, 37 n.79 (D.C. Cir.1976).

zoning decisions in order to determine whether the denials were supported by substantial evidence.¹⁶⁰

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” means less than a preponderance, but more than a mere scintilla of evidence. “It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”¹⁶¹

Among the U.S. Courts of Appeals adopting an APA analysis are those for the First,¹⁶² Second,¹⁶³ Third,¹⁶⁴ and Sixth¹⁶⁵ Circuits. Also employing this standard, the Eleventh Circuit noted in *Preferred Sites, LLC v. Troup County*¹⁶⁶ 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.”¹⁶⁷ 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

¹⁶⁰ *SBA Communications, Inc. v. Zoning Comm’n of Town of Brookfield*, 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)).

¹⁶¹ *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 493 (2d Cir. 1999) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (citations to *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981) and 47 U.S.C. §§ 332(c)(7)(A) and (B)(v) omitted).

¹⁶² *Southwestern Bell Mobile Systems, Inc. v. Todd*, 244 F.3d 51, 58 (1st Cir. 2001).

¹⁶³ *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 494 (2d Cir.1999).

¹⁶⁴ *Omnipoint Corp. v. Zoning Hearing Bd. of Pine Grove Twp.*, 181 F.3d 403, 407-408 (3rd Cir. 1999).

¹⁶⁵ *Telespectrum, Inc. v. Pub. Serv. Comm’n*, 227 F.3d 414, 423 (6th Cir.2000).

¹⁶⁶ *Preferred Sites, LLC v. Troup County*, 296 F.3d 1210 (11th Cir. 2002).

¹⁶⁷ *Id.* at 1218 (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

than when reviewing under the arbitrary and capricious standard.”¹⁶⁸ 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.”¹⁶⁹

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 of Virginia Beach*.¹⁷⁰ 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. 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.¹⁷¹ The Fourth Circuit held that the U.S. District Court had been in error when it when it concluded that the city counsel’s decision must include “findings of fact and an explanation of the decision.”¹⁷² While the Siting Policy demanded that decisions be in writing, that “cannot reasonably be inflated into a requirement of a ‘statement of ... findings and conclusions, and the reasons or basis therefor,’” as the explicit requirements of the APA dictate.¹⁷³

More fundamentally, however, the Fourth Circuit disagreed 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

¹⁶⁸ *Id.* (citing *Color Pigments Mfrs. Ass’n, Inc. v. OSHA*, 16 F.3d 1157, 1160 (11th Cir.1994)).

¹⁶⁹ *Id.* (citing *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 523 (1981)).

¹⁷⁰ 155 F.3d 423 (4th Cir. 1998).

¹⁷¹ *Id.* at 425. *See supra* text accompanying note 68.

¹⁷² *Id.* at 429.

¹⁷³ *Id.* at 429-430 (quoting 5 U.S.C. § 557(c)).

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 zoning of personal wireless services, categorically rejected this scornful approach.¹⁷⁴

Going beyond the Fourth Circuit preference for local autonomy, Judge Paul Niemeyer’s concurring opinion in *Petersburg Cellular Partnership v. Board of Supervisors of Nottoway County*¹⁷⁵ asserted that the Siting Policy “substantial evidence” test violates the Tenth Amendment.¹⁷⁶ Judge Niemeyer noted that the Supremacy clause of the U.S. Constitution¹⁷⁷ requires state courts to apply federal law.¹⁷⁸ “But the requirement that state courts apply federal law is materially different from the proposition that state zoning boards use federally mandated

¹⁷⁴ *Id.* at 430-431 (emphasis added).

¹⁷⁵ 205 F.3d 688 (4th Cir. 2000)

¹⁷⁶ *Id.* at 699-705 (Niemeyer, J., concurring).

¹⁷⁷ U.S. CONST. Art. VI, cl. 2.

standards in their *legislative* processes.”¹⁷⁹ 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.”¹⁸⁰ 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.¹⁸¹

While the Fourth Circuit test and Niemeyer concurrence 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*¹⁸² language celebrating legislative autonomy in *Omnipoint Corp. v. Zoning Hearing Board of Pine Grove Township*.¹⁸³ It continued by quoting approvingly from the Seventh Circuit’s opinion in *Aegerter v. City of Delafield*¹⁸⁴ which, the Third Circuit said, “characterized zoning permit decisions as primarily administrative in nature.”¹⁸⁵ 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

¹⁷⁸ 205 F.3d at 704 (Niemeyer, J., concurring).

¹⁷⁹ *Id.* (emphasis in original).

¹⁸⁰ *Id.* at 700 (Niemeyer, J., concurring).

¹⁸¹ See, e.g., Matthew N. McClure, Comment, *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).

¹⁸² *AT&T Wireless PCS, Inc. v. City Council of Virginia Beach*, 155 F.3d 423 (4th Cir. 1998). “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.* at 430. For a longer excerpt, see *supra* text accompanying note 174.

¹⁸³ 181 F.3d 403, 408 (3rd Cir. 1999).

¹⁸⁴ 174 F.3d 886 (7th Cir.1999).

¹⁸⁵ 181 F.3d at 408.

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.¹⁸⁶

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 *Euclid v. Ambler Realty Co.*¹⁸⁷ On the other extreme, the exaction of property in exchange for the issuance of development permits by local administrative agencies is subject to the requirements 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.¹⁸⁸ 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.¹⁸⁹ There is state precedent stating that legislative small-scale exactions violate the Takings Clause.¹⁹⁰

The states, for the most part, have deemed all zoning, even small-scale rezoning, to be a legislative function.¹⁹¹ However, some states, primarily out of concern with the abuses generally associated with “spot zoning,” treat small-scale land use planning enactments as “quasi-judicial”

¹⁸⁶ 174 F.3d at 889

¹⁸⁷ 272 U.S. 365 (1926).

¹⁸⁸ *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

¹⁸⁹ *See Parking Ass’n of Ga. v. City of Atlanta*, 515 U.S. 1116, 1116 (1995) (Thomas, J., dissenting from denial of certiorari).

¹⁹⁰ *Amoco Oil Co. v. Village of Schaumburg*, 661 N.E.2d 380 (Ill. App. 1995), *appeal denied*, 667 N.E.2d 1055 (Ill. 1996) (table).

¹⁹¹ *See, e.g., Arnel Dev. Co. v. City of Costa Mesa*, 620 P.2d 565 (Cal. 1980); *South Gwinett Venture v. Pruitt*, 491 F.2d 5 (5th Cir.); *Mahoney v. O’Shea Funeral Homes, Inc.*, 380 N.E.2d 297 (N.Y. 1978).

or “administrative” under some circumstances. In *Fasano v. Board of Commissioners of Washington County*,¹⁹² 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.” . . .

¹⁹³

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 germane case in point. The Fourth Circuit, in establishing its “reasonable legislator” rule in *AT&T Wireless PCS, Inc. v. City Council of Virginia Beach*,¹⁹⁴ stressed the importance of the legislative function. Similarly, in his concurring opinion in *Petersburg Cellular Partnership v. Board of Supervisors of Nottoway County*,¹⁹⁵ Judge Niemeyer quoted a 1975 Virginia Supreme Court decision in *City of Richmond v. Randall*,¹⁹⁶ which the Virginia court subsequently reaffirmed,¹⁹⁷ stressing that “the courts have ‘no power to rezone land to any classification or to

¹⁹² 507 P.2d 23 (Or. 1973), *disapproved of on other grounds*, *Neuberger v. City of Portland*, 607 P.2d 722 (Or. 1980); *superseded by statute*, *Menges v. Board of County Comm’rs of Jackson County*, 606 P.2d 681 (Ore. App. 1980).

¹⁹³ *Id.* at 26 (citations omitted).

¹⁹⁴ 155 F.3d 423 (4th Cir. 1998).

¹⁹⁵ 205 F.3d 688 (4th Cir. 2000)

¹⁹⁶ 554 S.E.2d 56 (Va. 1975).

¹⁹⁷ *Tran v. Gwinn*, 554 S.E.2d 63, 69 (Va. 2001) (citing *Randall*).

order a legislative body to do so.”¹⁹⁸ 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 change in circumstances.¹⁹⁹

“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 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. . . .”²⁰⁰

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 *Nottoway* concurrence,²⁰¹ asserting that the TCA “substantial evidence” test violates the Tenth Amendment,²⁰² is not unlike that wrestled with some courts as to whether to apply the *Fasano* distinction,²⁰³ permitting legislatures to act as legislatures most of the time, but insisting that they act as administrative tribunals at other. ²⁰⁴

The judicial split over the “substantial evidence” test is emblematic of the recursive character of the TCA siting provisions. Those Circuits favoring APA position have said that “[s]ubstantial evidence review under the TCA does not create a substantive federal limitation

¹⁹⁸ 205 F.3d at 700 (Niemeyer, J., concurring) (quoting *Randall*, 211 S.E.2d at 61).

¹⁹⁹ See, e.g., *Seabrooke Partners v. City of Chesapeake*, 393 S.E.2d 191 (Va. 1990);

²⁰⁰ *Turner v. Bd. of County Sup’rs of Pr. William County*, 559 S.E.2d 683, 687 (Va. 2002) (quoting *Board of Sup’rs of Fairfax County v. Snell*, 202 S.E.2d 889, 893 (Va. 1974)).

²⁰¹ *Petersburg Cellular Partnership v. Bd. of Sup’rs of Nottoway County*, 205 F.3d 688 (4th Cir. 2000).

²⁰² *Id.* at 699-705 (Niemeyer, J., concurring).

²⁰³ *Fasano v. Bd. of Comm’rs of Washington County*, 507 P.2d 23 (Or. 1973).

upon local land use regulatory power.”²⁰⁵ Likewise, the substantive standard, to which the “substantial evidence” inquiry is directed, is taken from “established principles of state and local law.”²⁰⁶ 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 substance 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 services.”²⁰⁷ In addition to aesthetics and potential effects on property values not being easily reducible to empirical data, the argument has it, “courts applying the APA test preclude a board from relying on residents’ opinions in deciding whether to grant a tower siting permit.”²⁰⁸

The notion that the data of experts was to be preferred over the feelings of people was rejected by the Fourth Circuit in the *AT & T Wireless Virginia Beach* case.²⁰⁹ “Congress, in refusing to abolish local authority over zoning of personal wireless services, categorically rejected this scornful approach.”²¹⁰

²⁰⁴ See, e.g., *Board of County Commissioners of Brevard County v. Snyder*, 627 So. 2d 469 (Fla. 1993); *Martin County v. Yusem*, 690 So.2d 1288 (Fla. 1997).

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

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 (2nd Cir. 1999), quoting in turn, (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).

²⁰⁸ *Id.*

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

²¹⁰ *Id.* at 431.

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.²¹¹ Some assert that the methodology of cost-benefit analysis is flawed because of problems involving the incommensurability of different values, including hedonic 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 survey and measurement errors.²¹² With respect to the environment, often raised in the tower citing context, deep ecologists have rejected the use of cost-benefit analysis in toto.²¹³

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,²¹⁴ 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 market value. It is sufficient that the decision seems grounded in objections to the particular tower.²¹⁵ On the other hand, courts have not been supportive of articulated negative views about towers in general or that evidenced a misunderstanding of what the tower actually

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 (2002) (discussing growth of cost-benefit analysis).

²¹² See generally, Robert H. Frank, *Why Is Cost-Benefit Analysis So Controversial?*, 29 J. LEGAL STUD. 913 (2000).

²¹³ Edwin R. McCullough, *Through the Eye of a Needle: The Earth's Hard Passage Back to Health*, 10 J. ENVT. L. & LITIG. 389 (1995) "If 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." *Id.* at 436-437.

²¹⁴ See KARL R. POPPER, *CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE* 33-59 (3d ed. 1969).

²¹⁵ *Southwestern Bell Mobile Systems, Inc. v. Todd*, 244 F.3d 51, 61 (1st Cir. 2001).

would look like.²¹⁶ Nor have the courts supported aesthetic objections that were demonstrably without substance.²¹⁷

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.²¹⁸ The Siting Policy therefore precludes “health concerns from radio emissions.”²¹⁹ Furthermore, local attempts to regulate the “operation” of wireless communications towers, based on emissions considerations, also were reasonably interpreted by the FCC to fall under the same prohibition.²²⁰ 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.²²¹ 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. The denial then would be proprietary rather than regulatory in nature.²²²

²¹⁶ Cellular Tel. Co. v. Town of Oyster Bay, 166 F.3d 490 (2nd Cir. 1999).

²¹⁷ See *Omnipoint Corp. v. Zoning Hearing Board of Pine Grove Township*, 181 F.3d 403, 406 (3rd Cir. 1999) (noting that 114-foot tower was surrounded by 80 to 90-foot tall trees and would only be visible to neighbors 600 feet away).

²¹⁸ 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.

²¹⁹ *AT & T Wireless PCS, Inc. v. City Council of City of Virginia Beach*, 155 F.3d 423, 431 n. 6 (4th Cir.1998).

²²⁰ *Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 95-96 (2nd Cir. 2000) (citing *Chevron U.S.A., Inc. V. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.11, 844 (1984) (requiring deferential review of agency construction of statute it is charged with administering).

²²¹ *Id.*

²²² See *Sprint Spectrum L.P. v. Mills*, 283 F.2d 404 (2nd Cir. 2002).

8. Expedited Review and Relief

Section 704 provides that persons directly affected by state or local wireless tower permitting decisions, or failure to act, may seek expedited review in federal or state court.²²³ 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.²²⁴ 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.”²²⁵ There is a substantial split among the courts as to whether landowners and wireless providers may seek relief under the federal Civil Rights Act (Section 1983).²²⁶

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 right of action to persons aggrieved by decision to allow towers.²²⁷

²²³ 47 U.S.C. § 332(c)(7)(B)(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.*

²²⁴ *Sprint Spectrum L.P. v. Jefferson County*, 968 F.Supp. 1457 (N.D. Ala. 1997).

²²⁵ *Primeco Personal Communications v. City of Mequon*, 242 F.Supp.2d 567, 582 (E.D. Wis. 2003).

²²⁶ *See, e.g., Omnipoint Communications, Inc. v. City of White Plains*, 175 F.Supp.2d 697, 707 (S.D.N.Y. 2001) (yes); *SBA Comm. Inc. v. Zoning Comm’n of the Town of Franklin*, 164 F.Supp.2d 280, 294-295 (D.Conn. 2001) (same); *Primeco Personal Communications v. City of Mequon*, 242 F.Supp.2d 567 (E.D. Wis. 2003) (no); *Quest Corp. v. City of Santa Fe, New Mexico*, 224 F.Supp.2d 1305 (D.N.M. 2002) (same).

²²⁷ *Mason v. O’Brien*, 2002 WL 31972190 (N.D.N.Y. 2002) (not reported in F.Supp.2d).

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*,²²⁸ the Supreme Court reviewed the claim that denial of permits for residential development constituted a taking for which just compensation was required under the Fifth Amendment.²²⁹ 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."²³⁰

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."²³¹ 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."²³² The second prong requires that the owner seek just compensation in state courts.²³³

²²⁸ 473 U.S. 172 (1985). *Williamson County* also contains a second test. here the property owner alleges that the governmental action constituted a taking.

²²⁹ U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation").

²³⁰ 473 U.S. at 197.

²³¹ Timothy V. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 CAL. W. L. REV. 1, 2 (1992).

²³² *Id.* at 186.

²³³ *Id.* at 194-195. The owner must "seek compensation through the procedures the State has provided for doing so."

1. Should Williamson County Apply to TCA Determinations ?

Section 704 explicitly provides that aggrieved parties can challenge state and local wireless communications tower siting determination in federal court.²³⁴ 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.”²³⁵ Therefore, the U.S. Court of Appeals for the Seventh Circuit recently determined, in *Sprint Spectrum L.P. v. City of Carmel*,²³⁶ that the “final decision” prong of *Williamson County* is applicable to TCA siting challenges.

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,”²³⁷ excepting from its purview only land use cases involving equal protection claims involving fundamental rights, a suspect class, or demonstrated governmental conduct impossible to reconcile with legitimate objectives.²³⁸ 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.”²³⁹

²³⁴ 47 U.S.C. § 332(c)(7)(B)(v) (“Any person adversely affected by any final action or failure to act by a State or local government . . . 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. . . .”)

²³⁵ *Id.*

²³⁶ 361 F.3d 998 (7th Cir. 2004).

²³⁷ *City of Carmel*, 361 F.3d at 1002 (quoting *Forseth v. Village of Sussex*, 199 F.3d 363, 370 (7th Cir.2000)).

²³⁸ *Id.*

²³⁹ *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 467 (7th Cir. 1988) (holding rejection of site plan not deprivation of substantive or procedural due process).

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. “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 requirements.”²⁴⁰ 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. 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.²⁴¹ After a state court found Sprint’s subdivision appeal timely, and having held multiple hearings, the Board of Zoning Appeals 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.²⁴² 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.²⁴³ 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*.²⁴⁴

The Seventh Circuit began by noting that *Carmel* concerned one Section 704 issue, “when is a land use decision a ‘final action’ in order to create federal subject matter jurisdiction. Specifically, we must 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.”²⁴⁵ Section 704

²⁴⁰ 361 F.3d at 1000.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.* at 1001.

²⁴⁵ *Id.* at 1000 (citing *Williamson County*, 473 U.S. 172 (1985)).

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)]”²⁴⁶ It 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.”²⁴⁷ The court added that “the existence of a case and controversy is a prerequisite for the exercise of federal judicial power” and that “[t]he [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.’”²⁴⁸

“Based on these principles, the Supreme Court has adopted [the *Williamson County*] specific ripeness requirements for cases challenging land use decisions.”²⁴⁹ “Noticeably,” the court added, “with regard to challenges to land use decisions, ‘[t]his Circuit has read *Williamson* broadly”²⁵⁰ “[W]e see no significant difference simply because Sprint’s claim arises from a statute rather than the Constitution.

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.²⁵¹ It grounded its decision to use the *Williamson County* rules in the TCA’s statutory provisions and legislative intent.

²⁴⁶ 47 U.S.C. § 332(c)(7)(B)(v) (brackets and emphasis by Seventh Circuit).

²⁴⁷ 361 F.3d at 1001 (quoting *Midlantic Nat’l Bank v. N.J. Dep’t of E.P.*, 474 U.S. 494, 501 (1986) (internal citation omitted)).

²⁴⁸ *Id.* at 1002 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967)).

²⁴⁹ *Id.*

²⁵⁰ *Id.* (quoting *Forseth v. Village of Sussex*, 199 F.3d 363, 370 (7th Cir.2000)).

²⁵¹ *Id.* at 1003.

. . . although 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 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.”²⁵²

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.²⁵³ 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.”²⁵⁴

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.²⁵⁵ This intent is furthered by three other provisions of the Act; that local authorities act on siting requests within a “reasonable period of time,”²⁵⁶ that providers must file claims under the Act within 30 days,²⁵⁷ and that the federal courts hear such claims on an expedited basis.²⁵⁸ Based on these, Sprint urged that the TCA’s requirement for

²⁵² *Id.*

²⁵³ *Id.* (quoting H.R. Conf. Rep. No. 104-458, at 207 (1996), reprinted in 1996 U.S.C.C.A.N. 124, 221-22).

²⁵⁴ *Id.* (quoting H.R. Conf. Rep. No. 104-458, at 9 (1996), reprinted in 1996 U.S.C.C.A.N. 124, 223.)

²⁵⁵ *Id.* (citing 47 U.S.C. § 309(j)(3)(A)).

²⁵⁶ *Id.* (citing 47 U.S.C. § 332(c)(7)(B)(ii)).

²⁵⁷ *Id.* (citing 47 U.S.C. § 332(c)(7)(B)(ii)).

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

“final action” requires only that the service provider “obtain a definitive ruling from the local government sole on the issues presented to the local authorities.”²⁵⁹

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*.²⁶⁰ The court added that, while *Williamson County* requires that an owner “must exhaust all available state remedies for compensation prior to bringing taking claim to federal court,”²⁶¹ 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.”²⁶² “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.”²⁶³

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.²⁶⁴ 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.”²⁶⁵ The first (finality) prong of *Williamson County* provides that “a claim that the application of government regulations effects a taking of a property interest

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.* at 1004 (citing *Williamson County*, 473 U.S. at 193-194).

²⁶² *Id.* (quoting H.R. Conf. Rep. No. 104-458, at 9 (1996), reprinted in 1996 U.S.C.C.A.N. 124, 223 (brackets by the court).

²⁶³ *Id.*

²⁶⁴ *Williamson County*, 473 U.S. 172, 194 (“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”).

²⁶⁵ *Id.* at 195.

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.”²⁶⁶ Although at least one state, California, requires judicial review of administrative determinations for finality ripeness,²⁶⁷ 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.

2. 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 Company v. City of San Diego*,²⁶⁸ regulators employ delay as an administrative tool precisely to thwart development.²⁶⁹ 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

²⁶⁶ *Id.* at 186 (emphasis added).

²⁶⁷ *Hensler v. City of Glendale*, 876 P.2d 1043 (Cal. 1994).

²⁶⁸ 450 U.S. 621, 655 (1981) (Brennan, J., dissenting).

²⁶⁹ *Id.* at 655 & n.22 (noting that city attorneys were advised at a training program that, “IF ALL ELSE FAILS, MERELY AMEND THE REGULATION AND START OVER AGAIN”) (capitalization in original).

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.²⁷⁰

Furthermore, in the face of the reluctance of officials to issue "final denials" in place of invitations to try and try again, 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*,²⁷¹ the Supreme Court has never definitively ruled that there is a right, after state adjudication, to federal review of Fifth Amendment takings claims.²⁷² Furthermore, the Courts of Appeals are divided as to whether the act of "ripening" a claim in state court itself creates issue and claim preclusion so as to defeat any subsequent federal judicial review.²⁷³

A development application under *Williamson County* must be "meaningful." The year after *Williamson County* was decided, the Supreme Court, in *MacDonald, Sommer & Frates v. Yolo County*,²⁷⁴ 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.²⁷⁵

²⁷⁰ Michael M. Berger, *Validating the Rights of Private Land Development in the Courts*, 32 URB. LAW. 941, 954 (2000) (emphasis in original).

²⁷¹ *Williamson County*, 473 U.S. 172, 197 (1985).

²⁷² See, e.g., *Rainey Bros. Construction Co. v. Memphis and 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).

²⁷³ See, e.g., *San Remo Hotel, L.P. v. City and County of San Francisco*, 364 F.3d 1088 (9th Cir. 2004) (barring subsequent federal review); *Wilkinson v. Pitkin County Bd. of Comm'rs*, 142 F.3d 1319 (10th Cir. 1998) (same); *Santini v. Connecticut Hazardous Waste Mgmt. Serv.*, 342 F.3d 118 (2d Cir. 2003) (permitting subsequent federal review); *Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299 (11th Cir. 1992) (same)).

²⁷⁴ 477 U.S. 340 (1986).

²⁷⁵ *Id.* at 348.

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."²⁷⁶ "The implication is not that future applications would be futile, but that a meaningful application has not yet been made."²⁷⁷ 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.²⁷⁸ This is not a procedure apt to prove fruitful to applicants, however, since use variances require that the parcel was such that any owner would suffer unique hardship without relief, and also that there would be no injury from the intended use to neighbors.²⁷⁹

One defense from onerous demands for multiple applications is the doctrine of "futility."²⁸⁰ The Supreme Court recently defined "futility" in a practical sense in *Palazzolo v. Rhode Island*,²⁸¹ noting that "once . . . the permissible uses of the property are known to a

²⁷⁶ *Id.* at 353 n.9.

²⁷⁷ *Id.* at 353 n.8.

²⁷⁸ *See, e.g.,* Lake Nacimiento Ranch Co. v. County of San Luis Obispo, 841 F.2d 872, 877 (9th Cir. 1988).

²⁷⁹ *See, e.g.,* Otto v. Steinhilber, 24 N.E.2d 851 (N.Y. 1939).

²⁸⁰ *See, e.g.,* Greenbriar v. City of Alabaster, 881 F.2d 1570 (11th Cir. 1989) (parties agreed that property could not be developed more extensively); Herrington v. County of Sonoma, 834 F.2d 1488 (9th Cir. 1987) (preliminary ruling having effect of precluding development made pursuit of application futile).

²⁸¹ 533 U.S. 606 (2001).

reasonable degree of certainty, a takings claim is likely to have ripened.”²⁸² Classic examples of futility tend to involve bad faith as well. In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,²⁸³ the city demanded five complete site plans for a proposed development. 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. 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.²⁸⁴

In *Town of Amherst v. Omnipoint Communications Enterprises, Inc.*,²⁸⁵ 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 town exhaust applicants by requiring successive applications without giving any clue of what will do the trick.²⁸⁶

²⁸² *Id.* at 620.

²⁸³ 526 U.S. 687, 721 (1999) (requirement of exhausting available postdeprivation remedies under United States law).

²⁸⁴ *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, Official Transcript, October 7, 1998, 1998 WL 721087. “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.” *Id.* at *3 (George A. Yuhas, for Petitioner). * * * “The Court [Justice Scalia, referring to the number of complete applications the city required, each imposing additional demands]: Five times.” *Id.*

²⁸⁵ 173 F.3d 9 (1st Cir. 1999).

²⁸⁶ *Id.* at 16-17.

3. The *Williamson County* Rule and Expedited Review

There is an extensive literature devoted to parsing the complexities of the *Williamson County* rule,²⁸⁷ and whether federal takings questions should be decided in federal courts.²⁸⁸ 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.”²⁸⁹

This provenance makes the *Williamson County* doctrine a 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.²⁹⁰ 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”²⁹¹ does seem

²⁸⁷ 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, 874-75 (1998); 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 (1994); 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 (1988).

²⁸⁸ 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 (1999) (arguing that Congress should pass 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 (1990) (arguing federal takings questions should be resolved in federal courts).

²⁸⁹ Testimony of Daniel R. Mandelker Before the House Judiciary Committee, Subcommittee on Courts and Intellectual Property, on H.R. 1534 (1998).

²⁹⁰ *Id.*

²⁹¹ 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).

to be a “universal conclusion.”²⁹² These results flow from Section 404’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 substantial 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, on the other hand, 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 or not 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.”²⁹³

It is realistic to assume that NIMBY pressures will continue, and that it 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.

²⁹² 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 -393 (1999) (quoting Hughes, *op. cit.*).

²⁹³ AT&T Wireless PCS, Inc. v. City Council of Virginia Beach, 155 F.3d 423, 430 (4th Cir. 1998).

The failure to enact the House version of the facility siting provisions into law cannot be undone.²⁹⁴

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 “both parties working together can solve many siting problems.”²⁹⁵ “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.”²⁹⁶ The American Planning Association, among other groups, has done extensive work to try to locate such solutions.²⁹⁷

On the other hand, however, the siting provisions of the TCA are too vague, confusing, and weak to be of much assistance.²⁹⁸ The challenge is to devise amendments to the TCA that stop short of general preemption of local land use regulation of wireless towers, but beyond federal controls that are procedural and that attempt to fasten themselves to the adaptable rulemaking of sometimes recalcitrant local legislators.

²⁹⁴ See *supra* text accompanying notes 70-85.

²⁹⁵ 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, 500 (1998).

²⁹⁶ *Id.* at 471.

²⁹⁷ See the APA Web Site, <http://www.planning.org/pas/telecommunications.htm>.

²⁹⁸ See *supra* text accompanying notes 290-292.

B. Suggestions for Statutory Reform of the TCA Siting Provisions

1. Burden Shifting

As described earlier,²⁹⁹ federal courts have been split on whether the burden of proof with respect to the TCA's limitations on local regulatory authority³⁰⁰ falls upon the applicant or the municipality. A rule of statutory interpretation is to define exceptions to the general rule narrowly.³⁰¹ 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.³⁰² That provision gives plenary authority to the FCC to regulate wireless communications.³⁰³ 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,³⁰⁴ and in the authority of Congress to provide for homeland security,³⁰⁵ encourages wireless infrastructure development. The other, encapsulated in the concept of the federal

²⁹⁹ See *supra* text accompanying notes 100-110.

³⁰⁰ 47 U.S.C. § 332(c)(7)(B).

³⁰¹ QQ Need cite.

³⁰² QQ Need cite.

³⁰³ QQ Need cite.

³⁰⁴ U.S. CONST. Art. I, § 8 (The Congress shall have Power "To regulate Commerce with foreign Nations, and among the several States. . .").

³⁰⁵ *Id.*, cl. 1 ("The Congress shall have Power To . . . provide for the common Defence and general Welfare of the United States . . .").

government being one of enumerated powers and in the Tenth Amendment,³⁰⁶ 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 *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,³⁰⁷ where the Court approved of 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.”³⁰⁸

1. 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”³⁰⁹ 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*.³¹⁰ However, the Court noted that a number of states have specific time limits for interim zoning ordinances ranging from six months to two years.³¹¹ 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.”³¹²

³⁰⁶ U.S. CONST. 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.”).

³⁰⁷ 526 U.S. 687 (1999).

³⁰⁸ *Id.* at 706.

³⁰⁹ 47 U.S.C. § 332(c)(7)(B)(ii).

³¹⁰ 535 U.S. 302 (2002).

³¹¹ *Id.* at 342 n.37.

³¹² *Id.* at 341.

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 prohibitions on wireless service, both of which Section 704 already prohibits.³¹³

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.³¹⁴

As discussed earlier,³¹⁵ the total incorporation of the Takings Clause *Williamson County* doctrine³¹⁶ into the TCA’s requirement that local land use regulators reach decisions within a “reasonable period of time after the request is duly filed”³¹⁷ 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.³¹⁸ 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.

³¹³ 47 U.S.C. § 332(c)(7)(B)(i).

³¹⁴ QQ Quote definition from similar provision in U.S.C.

³¹⁵ See *supra* text accompanying notes 287-289.

³¹⁶ *Williamson County Reg’l Plan. Comm’n v. Hamilton Bank*, 473 U.S. 172 (1985).

³¹⁷ 47 U.S.C. § 332(c)(7)(B)(ii).

³¹⁸ *Id.* § 332(c)(7)(B)(v).

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."³¹⁹ Under that statute, government agencies are required to issue a written "ripeness decision identifying the allowable uses to which the subject property may be put."³²⁰ In effect, the Bert J. Harris Act requires a locality to provide the information that the Supreme Court assumed that *Williamson County* would result in the landowner being supplied—"a final decision regarding how it will be allowed to develop its property."³²¹

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 that, at the applicant's election, a denial would have to 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."³²² 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

³¹⁹ FLA. STAT. ANN. § 70.001.

³²⁰ *Id.* § 70.001(5)(a). "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."

³²¹ *Williamson County*, 473 U.S. at 190.

³²² 47 U.S.C. § 332(c)(7)(B)(v).

emissions standards,³²³ 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.

1. Other Statutory Changes

Another approach is modification of the TCA to provide wireless communications service providers treatment equal of that of existing public utilities. As an illustration, in New York the very stringent requirements otherwise applicable for landowners seeking a use variance³²⁴ are subject to a “public utility” exception.³²⁵ In *Cellular Telephone Co. v. Rosenberg*,³²⁶ 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.”³²⁷

³²³ *Id.* § 332(c)(7)(B)(iv).

³²⁴ *Matter of Otto v. Steinhilber*, 24 N.E.2d 851, 853 (N.Y. 1939) (requiring that land cannot yield a reasonable return if used for permissible purposes and that the plight of the owner is due to unique circumstances).

³²⁵ *Matter of Consolidated Edison Co. of New York, Inc. v. Hoffman*, 374 N.E.2d 105 (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.” *Id.* at 111.

³²⁶ 624 N.E.2d 990 (N.Y. 1993).

³²⁷ *Id.* at 993.

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, which 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.³²⁸ State regulation of wireless towers would alleviate concerns about distant and obtrusive federal intervention, while at the same time 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 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.

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.³²⁹

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

³²⁸ *Crown Communication New York v. Dept. of Transp.*, 765 N.Y.S.2d 898, 901 (App. Div. 2003) (noting that "the 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").

³²⁹ *Town of Amherst v. Omnipoint Communications Enters., Inc.*, 173 F.3d 9, 17 (1st Cir. 1999).

telecommunications and information services has already worked changes in the industry to a far greater extent than could have been reasonably predicted in 1996.”³³⁰

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.

³³⁰ *Triennial Review Order*, p. 8 para. 6.