

## IF NOT HERE, WHERE?: WIRELESS FACILITY SITING AND SECTION 332(c)(7) OF THE TELECOMMUNICATIONS ACT

When Congress enacted the Telecommunications Act of 1996 (the “1996 Act” or “Act”), it sought to balance a number of competing interests in an attempt to revolutionize the way that the government approaches telecommunications in the United States. The goal of the 1996 Act is a seamless telecommunications network linking communities together and providing “a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services . . . by opening all telecommunications markets to competition. . . .”<sup>1</sup> One of the problems facing Congress was rapidly evolving technology coupled with exponentially increasing demand for wireless personal communications services (“PCS”).<sup>2</sup> A rollout of competing telecommunications infrastructures,<sup>3</sup> specifically tower facilities, was required in order to permit telecommunications providers to satisfy the demand.

Providers use a “hexagonal cell structure” to maximize service coverage with the fewest number of towers, but have limited flexibility in where to place the towers.<sup>4</sup> This limitation is coupled with the fact that the new digital technology requires four times the number of transmis-

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<sup>1</sup> H.R. CONF. REP. NO. 104-458, at 206 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 124.

<sup>2</sup> *See* Dean J. Donatelli, Note, *Locating Cellular Telephone Facilities: How Should Communities Answer When Cellular Telephone Companies Call?*, 27 RUTGERS L.J. 447, 448 (1996) (discussing the rapid increase in demand and the dilemma that is created between meeting that demand and satisfying community concerns regarding aesthetics and property values); *see also* Nancy M. Palermo, Comment, *Progress Before Pleasure: Balancing the Competing Interests of Telecommunications Companies and Landowners in Cell Site Construction*, 16 TEMP. ENVTL. L. & TECH. J. 245, 245 (1998) (discussing the explosive growth in industry). Interestingly, some commentators argue that “both Congress and the Court . . . often use technological change either as a catalyst or as a pawn, and in both instances the connection to the past is at least as important as the aspiration to the future.” Monroe E. Price & John F. Duffy, *Technological Change and Doctrinal Persistence: Telecommunications Reform in Congress and the Court*, 97 COLUM. L. REV. 976, 981 (1997).

<sup>3</sup> *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, 470 (1998). Personal wireless facilities referenced in the Act, include transmitters, antenna structures and other types of installations. FEDERAL COMMUNICATIONS COMMISSION, Fact Sheet #2: National Wireless Facilities Siting Policies (Sept. 17, 1996). Personal communications services (“PCS”), includes a variety of services, such as digital voice, data and paging transmissions over the same spectrum. *See id.*

<sup>4</sup> *See* Hughes, *supra* note 3, at 484 (noting that the average cost to build a wireless tower site is approximately \$550,000).

sion towers as the older cellular technology, almost literally putting facilities in every backyard.<sup>5</sup> Congress aptly recognized that allowing wireless service providers to place a 150- to 250-foot tower in every city, town, and village could prove difficult. After all, these localities have increasingly become environmentally conscious and zealous in their zoning decisions, not to mention the sense that a community's political process may not be representative of the surrounding population or that certain interests may have co-opted the process entirely.<sup>6</sup>

How was Congress supposed to balance the rush to market competition and efficiency with communities' schizophrenic desire to take advantage of these new technologies, while also exerting control over tower siting decisions or even turning down the encroachment of towers in their backyards?<sup>7</sup> Unfortunately, rather than providing a solution, Congress gored itself on the horns of this dilemma by failing to satisfy any of the demands. The 1996 Act's provisions on tower siting are ambiguous and invite, rather than thwart, litigation. The Act puts providers, who have paid significant amounts for a license from the Federal Communications Commission ("FCC"), in the difficult position of having to negotiate hundreds of different local zoning rules with "an unclear statute, and no standard from the courts" for guidance as they try to compete with existing providers.<sup>8</sup> The 1996 Act's tower siting provisions also raise a number of issues regarding the interaction between local decision making and federal oversight. The Second Circuit recently noted in frustration that the "statute fairly bristles with potential issues."<sup>9</sup> Exacerbating the problem are courts' erroneous and misleading interpretations of the statute. When hearing section 332(c)(7) cases, many courts run

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<sup>5</sup> See Jeneba Jalloh, *Local Tower Siting Preemption: FCC Radio Frequency Guidelines are Solution for Removing Barriers to PCS Expansion*, 5 COMM.LAW CONSP. 113, 113 (1997) "Moving an antenna just a few feet can affect a PCS network ability to provide even coverage throughout the service area." *Id.* Because a location is likely to be appropriate for any companies providing similar wireless services in an area, some landowners express concern over "tower farms" growing in their neighborhoods. See Claire Levy, *Zoning for Cellular Towers Under Current Regulatory Conditions*, 27 COLO. LAW. 75, 75 (1998).

<sup>6</sup> See Jeffrey Silva, *Kennard Reaffirms Tower Siting Stance*, RCR RADIO COMM. REP., March 16, 1998; Daniel R. Mandelker & A. Dan Tarlock, *Two Cheers for Shifting the Presumption of Validity: A Reply to Professor Hopperton*, 24 B.C. ENVTL. AFF. L. REV. 103, 106 (1996); see also Gregory M. Kratofil, Jr., Note, *The Telecommunications Act of 1996 and Section 704: A "Boom" or "Bust" for the Mobile Telephone Industry*, 16 ST. LOUIS U. PUB. L. REV. 499, 517 ("Unfortunately, [zoning boards] all over the country have been actively discriminating against new cellular providers in the name of . . . NIMBYism.").

<sup>7</sup> See Susan Lorde Martin, *Communications Tower Sitings: The Telecommunications Act of 1996 and the Battle for Community Control*, 12 BERKELEY TECH. L.J. 483, 486 (1997) (noting that while cellular phones have become very popular since their introduction in 1983, most people are unwilling to ask for the best coverage "if the price is living next to, or within viewing distance of, a tower").

<sup>8</sup> Kratofil, *supra* note 6, at 514.

<sup>9</sup> Cellular Tel. Co. v. Town of Oyster Bay, 166 F.3d 490, 494 (2d Cir. 1999).

roughshod over traditional administrative law and federalism concerns, rather than heeding time-tested methods of judicial deference.

To effectuate this delicate balancing act, Congress included section 704, entitled "Preservation of Local Zoning Authority," in the 1996 Act, which added a new subsection (c)(7) to section 332 of the Communications Act of 1934:

- (A) General Authority. Except as provided in this paragraph, nothing in this 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.
- (B) Limitations
  - (i) The regulation of the placement, construction, and modification of personal wireless services 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 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.

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 regulations concerning such emissions.

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.<sup>10</sup>

Unfortunately, the universal conclusion has been that “[t]his new [subsection] is vague in its reach and implications and serves as the source for political, economic, and emotional turmoil for the wireless industry and communities alike.”<sup>11</sup> Disputes over tower siting arose immediately.<sup>12</sup> Providers, who had invested millions to garner the necessary licenses from the FCC,<sup>13</sup> pushed hard to install the necessary hardware.<sup>14</sup> In most areas, the result was acquiescence by the locality,<sup>15</sup> but in other areas citizens and providers have waged costly battles.<sup>16</sup> As

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<sup>10</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified* at 47 U.S.C. § 332(c)(7). While the Act was only enacted in February of 1996, the role of the federal government in communications in this country is founded in the Radio Act of 1927, which allowed the government to declare ownership of the radio frequency spectrum and preempt conflicting local regulations. *See* Hughes, *supra* note 3, at 472-73. The Radio Act was eventually replaced with the Communications Act of 1934, which created the Federal Communications Commission. *See id.* This was further amended by the 1996 Act. *See id.*

<sup>11</sup> Hughes, *supra* note 3, at 474; *see also* John M. Wilson, II, *Local Control Over the Siting of Cellular Towers*, 13 *MUN. L.* 1, 1 (1999) (noting that these provisions “have been litigated with sufficient frequency (and sometimes ferocity) that zoning officials could fairly wonder whether the exceptions might sometimes have begun to swallow the general rule preserving local zoning authority.”).

<sup>12</sup> *See* Sprint Spectrum v. City of Medina, 924 F. Supp. 1036 (W.D. Wash. 1996). The City of Medina enacted a moratorium on tower construction five days after the Telecommunications Act became effective. *See id.* at 1037. Sprint filed suit one month later, arguing that the moratorium violated the Act and would cause it to lose a significant amount of money. *See id.* The court held that the City’s conduct did not violate the Act nor should the Act be read as giving preferential treatment to the wireless industry in the processing of zoning applications. *See id.* at 1040.

<sup>13</sup> For example, in 1997, SprintCom purchased licenses in excess of \$123 million to provide personal wireless services in the Chicago area. *See* SprintCom v. Village of Mundelein, No. 98-CV-4451, 1998 U.S. Dist. LEXIS 20397, at \*1 (N.D. Ill. Dec. 23, 1998).

<sup>14</sup> *See* Roger P. Downes, *A Question of Balance*, WIRELESS REV., Dec. 1, 1998.

<sup>15</sup> *See* FCC, *Industry Groups Hammer Out Tower Siting Agreement*, COMM. TODAY, Aug. 6, 1998. The approximately 300 pending applications are only a small percentage of the 36,000 local government units in the country. *See id.*

<sup>16</sup> *See* Silva, *supra* note 6 (describing “war” being waged by citizens to preserve Buffalo Mountain, in Hardwick Vermont, which is on the town’s seal and on which a 150-foot telecommunications tower is proposed); *see also* John Sullivan, *Nice Neighborhood Ya Got Here. It’d Be A Shame If Something Was to . . . Happen to it*, MOBILE PHONE NEWS, September 21,

one PCS industry commentator noted, “[t]he wireless industry . . . in one bold stroke, . . . managed to make resistance to the wireless industry by whatever means necessary an act of patriotic heroism.”<sup>17</sup>

Part I of this Note discusses the Congressional preservation of local zoning powers in the amended section 332(c)(7). This provision has spawned considerable debate over whether the limitations on local zoning authority should be read narrowly, so as to reflect the presumed intent of the provision, or whether the limitations should be read broadly, thereby reflecting the intent to pave the way for the seamless telecommunications network that is the overall purpose of the Telecommunications Act.<sup>18</sup> This Note argues that the former interpretation should be adopted because zoning issues are inherently local and because Congress did not provide an express grant of broad powers or preemption. Ultimately, Congress should not have left it to the courts to resolve these disputes. Part II discusses how Congress exacerbated the problem by poorly drafting the relevant provisions. Part III addresses what remedy, in light of the Act’s silence on the issue, is appropriate for violations of the statutory provisions.

## I. THE ACT PRESERVES LOCAL AUTHORITY

The plain language of the Act preserves state and local zoning authority over the placement and construction of wireless communication facilities. Section 332(c)(7) is even entitled “Preservation of Local Zoning Authority.”<sup>19</sup> Courts have taken notice of the title, as well as the Act’s qualifying language that introduces this section of the Act.<sup>20</sup> The specific language unequivocally provides that, except for the specific procedural limitations included in section 332(c)(7)(B), “nothing in this Act shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.”<sup>21</sup> The ex-

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1998 (commenting on wireless providers’ strong arm tactics in installing towers). Sullivan relates how, in Brookhaven, PA., Bell Atlantic is suing the town for denying a permit to build a tower on land owned by a synagogue, and bringing civil rights charges against individual council members, in addition to sending threatening letters to everyone who spoke against the proposed tower site. *See id.* Sullivan quotes one woman as stating: “My husband and I are probably going to chain ourselves to the synagogue gate. It’s gone beyond just a cell phone issue. It’s gone to what I think this country should stand for.” *Id.*

<sup>17</sup> Sullivan, *supra* note 16.

<sup>18</sup> *See* H.R. CONF. REP. NO. 104-458, at 206 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 124.

<sup>19</sup> 47 U.S.C. § 332(c)(7) (1998).

<sup>20</sup> *See, e.g.,* *Cellco Partnership v. Russell*, No. 1:98CV23, 1998 U.S. Dist. Lexis 11639, at \*13 (W.D.N.C. June 24, 1998) (“The express reservation of local regulatory authority indicates an intent that the limitations on that power not be granted an overly expansive construction by the courts.”).

<sup>21</sup> 47 U.S.C. § 332(c)(7)(A).

press reservation of local regulatory authority indicates the Congressional intent that the limitation on local power not be granted an overly expansive construction by the courts.<sup>22</sup> Many of the courts reviewing a claim pursuant to this section have acknowledged this basic principle of statutory interpretation,<sup>23</sup> though some have forgotten it on the way to significantly limiting the zoning discretion of localities.

The legislative history of section 332(c)(7) also indicates that Congress rejected total federal preemption of tower siting.<sup>24</sup> The Conference Committee decided instead to only partially preempt local tower siting decisions as they relate to radio frequency ("RF") emissions.<sup>25</sup> In adopting the Act, Congress also expressly directed the FCC to terminate all rulemaking concerning preemption of local zoning authority, thereby precluding the Commission from intervening in zoning matters related to the placement and construction of communications towers.<sup>26</sup> Congress thus considered and rejected any attempt to federalize or replace local authority to site wireless communications facilities. While the courts have acknowledged that the Act only selectively preempts local authority,<sup>27</sup> constituencies outside the judiciary continue to argue in favor of federalization.

Wireless providers' claimed right to usurpation of local powers essentially rests on a single principle: because Congress, in the 1996 Act, intended to promote competition among wireless service providers, this general competitive goal overwhelms local land use regulation, including zoning and environmental assessment controls.<sup>28</sup> This position is con-

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<sup>22</sup> See, e.g., *Commissioner v. Clark*, 489 U.S. 726, 739-40 (1989) (when a general policy is qualified by an exception, the Court "usually read[s] the exception narrowly in order to preserve the primary operation of the [policy].").

<sup>23</sup> See *Cellco*, 1998 U.S. Dist. Lexis 11639, at \*13; see also *Omnipoint Communications, Inc. v. Zoning Hearing Bd.*, No. 1:CV-97-1589, 1998 U.S. Dist. LEXIS 3789 (M.D. Pa. March 24, 1998); *Sprint Spectrum v. City of Woburn*, 8 F. Supp. 2d 118 (D. Mass. 1998); *Sprint Spectrum, L.P. v. City of Medina*, 924 F. Supp. 1036 (W.D. Wash. 1996); *AT&T Wireless Serv. v. Orange County*, 928 F. Supp. 856, 860 (M.D. Fla. 1997); *AT&T Wireless PCS v. City Council of Virginia Beach*, 979 F. Supp. 416 (E.D. Va. 1997).

<sup>24</sup> See H.R. 1555, 103d Cong. § 107(a) (1995).

<sup>25</sup> See H.R. CONF. REP. NO. 104-458, at 206 (1996). The Act prohibits regulation of wireless towers "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." 47 U.S.C. § 332(c)(7)(B)(iv) (1998).

<sup>26</sup> See H.R. CONF. REP. NO. 104-458.

<sup>27</sup> See, e.g., *BellSouth Mobility, Inc. v. Gwinnett County*, 944 F. Supp. 923 (N.D. Ga. 1996).

<sup>28</sup> See, e.g., Brief for Plaintiff-Appellant at 24, *Sprint Spectrum, L.P. v. Willoth*, 996 F. Supp. 253 (W.D.N.Y. 1998) (citing preamble to Act); see also 141 CONG. REC. 149,954 (1996) (Representative Bliley stated that the Act reflects Congress' recognition that "full competition must be the end result of any attempts at telecommunications reform."). In a speech to telecommunications providers, the Chairman of the FCC, William Kennard, stated that "[c]ompetition is certainly the driving force in the wireless industry. . . . Wireless is the poster

trary to the plain language of the Act, its legislative history, and the traditional role of localities in land use and zoning matters. Even absent complete preemption, the issue is distilled to one of degree, of how much control over facility siting is reserved to the localities.

For example, the Personal Communications Industry Association ("PCIA") and others argue for imposition of federal preemption of local land use decisions by citing specific legislative decisions on federal preemption in other discrete areas of telecommunications policy and applying them to tower siting.<sup>29</sup> A reasoned interpretation of these other provisions, however, further establishes that Congress preserved local authority over the siting of wireless service facilities in section 332(c)(7).<sup>30</sup> Proponents cite section 253 and section 332(c)(3) of the Act, which govern the provision of services rather than the regulation of tower siting, in support of the argument that Congress indirectly preempted rather than preserved traditional zoning practices during local review of siting applications. Section 253 relates to prohibitions on the provision of telecommunications services.<sup>31</sup> Similarly, section 332(c)(3) relates to entry regulations concerning commercial or private mobile radio services.<sup>32</sup> Congress has authorized the FCC to preempt local regulations with regard to local statutes or regulations which, "prohibit the ability of an entity to provide . . . telecommunications *service*."<sup>33</sup> However, section 332(c)(7) of the Act expressly preserves local authority to make decisions regarding the siting of *facilities*.<sup>34</sup> While Congress did preempt state and local authority over rate or entry regulation on private land mobile service and commercial mobile services, it specifically authorized continued state and local regulation of the "terms and conditions" of such services, including facility siting issues (e.g., zoning).<sup>35</sup> The 1996 Act did not change the fact that local regulation of terms and conditions of service, including facility siting issues, was preserved in 1993. Congress' appreciation for a preservation of the distinction between "services" on the one hand and "facilities" on the other allows the introduction of competitive telecommunications services while maintain-

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child for competition." William Kennard, *Crossing into the Wireless Century* (visited Apr. 3, 1999) <<http://www.fcc.gov/Speeches/Kennard/spwek906.html>>.

<sup>29</sup> See PCIA Brief for Amicus Curiae for Appellant at 4-6, *Sprint Spectrum, L.P. v. Willoth*, No. 98-7442 (2d Cir. 1998).

<sup>30</sup> See *AT&T Wireless Serv. v. Orange County*, 928 F. Supp. 856, 861 (M.D. Fla. 1997) (finding that "it is clear that the Act was not intended to completely preempt the authority of local governments to regulate, to some extent, the placement and construction of cellular towers.").

<sup>31</sup> See 47 U.S.C. § 253 (1998).

<sup>32</sup> See 47 U.S.C. § 332(c)(3) (1998).

<sup>33</sup> *Id.* (emphasis added).

<sup>34</sup> See 47 U.S.C. § 332(c)(7).

<sup>35</sup> See H.R. REP. No. 103-111 (1993).

ing local control over the intrusion of physical facilities. FCC authority to license providers should not, therefore, by itself, be read as preempting local zoning regulations.<sup>36</sup> Congress did not intend for section 332(c)(7) to be superseded by “implication,” as proponents of preemption argue. Since Congress has not authorized the preemption of local regulations concerning the siting of facilities, wireless providers should not be permitted to bootstrap additional power based on these other provisions so as to achieve through judicial fiat what they could not gain through the legislative process.

Furthermore, land use issues are a local concern within the federalism framework because these issues frequently turn on “local variation[s] interpreted in local settings.”<sup>37</sup> There is also a desire to avoid disrupting local government or causing needless frictions between local and federal authorities.<sup>38</sup> State and local legislation and regulations may only be preempted in limited circumstances where Congress intended, and clearly signaled its intent, that federal law should cover the entire field of regulation. The federal preemption doctrine provides that federal law may preempt state or municipal law when Congress so states in explicit terms on the face of a statute, when federal legislation is so comprehensive in a given case so as to leave no room for supplemental state or local legislation, or when local law actually conflicts with federal law or congressional purposes or goals.<sup>39</sup> Not only has Congress refused to grant such power to wireless service providers in this instance, it has expressly preserved local zoning authority.

Wireless providers and other proponents are seeking support from the courts to empower private telecommunication providers to infringe on a traditional attribute of state sovereignty—land use regulation—without express legislative support. Instead, their argument is based upon the promise of competition that pervades the penumbra of the Act. The Supreme Court has noted that the regulation of land use is a function “traditionally performed by local government.”<sup>40</sup> Since there is no ex-

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<sup>36</sup> See Jaymes D. Littlejohn, *The Impact of Land Use Regulation on Cellular Communications: Is Federal Preemption Warranted?*, 45 FED. COMM. L.J. 247, 259 (1993). Another way to think about it is, “[w]here federal and state or local enactments overlap in their effects on non-governmental activities, the proper judicial approach is to reconcile the operation of both statutory schemes rather than hold one completely ineffectual.” 3 EDWARD H. ZIEGLER, RATHKOFF’S THE LAW OF ZONING AND PLANNING, § 31.05 (1998) cited in Littlejohn, *supra*.

<sup>37</sup> *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28 (1959) (discussing the local nexus of such issues in the context of eminent domain); see also *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994).

<sup>38</sup> See *Louisiana Power & Light Co.*, 360 U.S. at 28.

<sup>39</sup> See *International Paper Co. v. Ouellette*, 479 U.S. 481, 491 (1987) (citing *Hillsborough County v. Automated Medical Laboratories*, 471 U.S. 707, 713 (1985)).

<sup>40</sup> *Hess*, 513 U.S. at 30; see *supra* notes 35-36 and accompanying text. The opinions of other justices also supports this general proposition. For example, Justice Thomas, joined by Justices Scalia and Kennedy, noted in dissent that:

PLICIT statement or comprehensive regulatory scheme enacted by Congress that local decisions are to be preempted by the FCC or wireless providers in connection with local zoning and siting matters, it would be entirely inconsistent for a court to effectively grant extrastatutory preemptive rights to providers. Moreover, without Congressional authorization in the Act for companies to preempt local zoning laws, the providers' position violates the terms of the Act. Considering the ambiguity of the Act's provisions on this issue and the high stakes, it should not be surprising that the telecommunications industry is pushing the Act to its limits.

## II. POOR DRAFTING EXACERBATES THE PROBLEM

While the Act imposes three major limitations on local decision making,<sup>41</sup> only one has proven to be the providers' sword and the localities' burden. The Act provides that "[a]ny decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless services facilities shall be in writing and supported by substantial evidence contained in a written record."<sup>42</sup> The requirement that decisions be both in "in writing" and supported by "substantial evidence," incorporates elements of administrative law not necessarily found at the local level.<sup>43</sup> This is further exacerbated by the lack of guidance provided by Congress on what those terms actually mean.<sup>44</sup> Indeed, most of the cases turn on the court's interpretation of these standards.<sup>45</sup>

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It is obvious that land use—the subject of petitioner's zoning code—is an area traditionally regulated by the States rather than by Congress, and that land use regulation is one of the historic powers of the States. As we have stated, "zoning laws and their provisions . . . are peculiarly within the province of state and local legislative authorities."

City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 744 (1995) (citing *Wirth v. Seldin*, 422 U.S. 490, 508 n.18 (1975); *Hess*, 513 U.S. at 30; *FERC v. Mississippi*, 456 U.S. 742, 767 n.30 (1982) ("Regulation of land use is perhaps the quintessential state activity."); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974) (Marshall, J. dissenting) ("I am in full agreement with the majority that zoning . . . may indeed be the most essential function performed by local government.")).

<sup>41</sup> See *supra* note 10 and accompanying text.

<sup>42</sup> 47 U.S.C. § 332(c)(7)(B)(iii) (1998).

<sup>43</sup> See *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 495 (2d Cir. 1999) (noting the higher scrutiny the Act imposes above that ordinarily applied in judicial review of local land use decisions).

<sup>44</sup> While there is inevitable imprecision in language and limits upon human foresight and legislators cannot resolve all issues in advance, see Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed*, 3 VAND. L. REV. 395, 400 (1950), Congress did have the ability to contemplate the ensuing debate over this issue. See *id.*

<sup>45</sup> See, e.g., *Omnipoint Corp. v. Pine Grove Township*, 20 F. Supp. 2d 875 (E.D. Pa. 1998); *Cellco Partnership v. Farmington*, 3 F. Supp. 2d 178 (D. Conn. 1998); *Virginia Metronet, Inc. v. Bd. of Supervisors*, 984 F. Supp. 966 (E.D. Va. 1998); *AT&T Wireless PCS*

In addition to the above-mentioned limitations, section 332(c)(7) provides that localities shall not “unreasonably discriminate among providers of functionally equivalent services,” or “prohibit or have the effect of prohibiting the provision of wireless services,” and requires that localities act upon requests “within a reasonable period.”<sup>46</sup> While these provisions have also been litigated,<sup>47</sup> the “in writing and supported by substantial evidence” requirement has proven to be more troublesome and open to ongoing debate. Therefore, this note will only focus on the writing and evidence requirements.

As of this writing, three Circuits have issued decisions interpreting the “in writing and supported substantial evidence” requirement.<sup>48</sup> In the first, *AT&T Wireless PCS v. Virginia Beach*,<sup>49</sup> the Fourth Circuit reversed a fairly sweeping district court decision holding that the defendant had violated every procedural requirement of section 332(c)(7).<sup>50</sup> The Fourth Circuit’s decision recast the more strict standards of review used by many lower courts, holding instead that a more deferential standard of review is appropriate.<sup>51</sup> In the second case, *Cellular Telephone Co. v. Oyster Bay*,<sup>52</sup> the Second Circuit agonized over the appropriate statutory interpretation. In the end, the court neither adopted nor rejected the Fourth Circuit’s deferential approach, on its way to affirming summary

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Inc. v. City of Chamblee, 10 F. Supp. 2d 1326 (N.D. Ga. 1997); OPM-USA, Inc. v. Brevard County, 7 F. Supp. 2d 1316 (M.D. Fla. 1997); Illinois RSA No. 3 v. County of Peoria, 963 F. Supp. 732 (C.D. Ill. 1997); Western PCS II, Corp. v. Extraterritorial Zoning Authority, 957 F. Supp. 1230 (D.N.M. 1997); BellSouth Mobility v. Gwinnett County, 944 F. Supp. 923 (N.D. Ga. 1996).

<sup>46</sup> 47 U.S.C. § 332(c)(7)(B)(i)-(ii).

<sup>47</sup> See, e.g., *Sprint Spectrum, L.P. v. Easton*, 982 F. Supp. 47 (D. Mass. 1997) (finding that town unreasonably discriminated among providers); *Western PCS II*, 957 F. Supp. 1230 (involving claims alleging violations of all of the limitations).

<sup>48</sup> The First Circuit also has addressed the issue, but only in dicta. See *Town of Amherst v. Omnipoint Communications Enterprises, Inc.*, No. 98-2061, 1999 WL 174253 (1<sup>st</sup> Cir. March 30, 1999). The court reversed the trial court’s decision in favor of the plaintiff-provider, finding instead that the town had not effectively prohibited wireless services. See *id.* at \*5. The court went on to briefly discuss the question of substantial evidence and its relationship to other provisions of the Act, in anticipation of it arising on remand. See *id.* at \*7. The court noted that while the substantial evidence test “involves some deference but also . . . some bite,” Omnipoint’s chances for succeeding on this claim were limited. *Id.*

<sup>49</sup> 155 F.3d 423 (4th Cir. 1998).

<sup>50</sup> *AT&T Wireless PCS, Inc. v. Virginia Beach*, 979 F. Supp. 416 (E.D. Va. 1997) *rev’d*, 155 F.3d 423 (4th Cir. 1998).

<sup>51</sup> While most subsequent decisions have followed the Fourth Circuit’s analysis of the “in writing” requirement, courts have been more reluctant to adopt the more deferential substantial evidence standard. See, e.g., *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 495-96 (2d Cir. 1999); *Iowa Wireless Serv., L.P. v. City of Moline*, No. 98-4090, 1998 U.S. Dist. Lexis 19542 (C.D. Ill. Nov. 10, 1998); *Petersburg Cellular Partnership v. Bd. of Supervisors*, No. 3:98cv503, 1998 U.S. Dist. Lexis 19720 (E.D. Va. Dec. 14, 1998); cf. *SprintCom v. City of Cumming*, No. 2:98-CV-WCO, U.S. Dist. Lexis 18523 (N.D. Ga. Sept. 21, 1998).

<sup>52</sup> 166 F.3d 490 (2<sup>nd</sup> Cir. 1999).

judgment for the plaintiff-provider.<sup>53</sup> Finally, the Seventh Circuit, in *Aegerton v. City of Delafield*,<sup>54</sup> rejected the Fourth Circuit's parsing of the traditional substantial evidence standard, but nonetheless affirmed the district court's judgment in favor of the locality.<sup>55</sup>

#### A. IN WRITING

The Seventh Circuit noted that the Fourth Circuit broke sharply with prior district court decisions on the "in writing" requirement.<sup>56</sup> The district courts had generally held that a decision was not "in writing" if the locality relied on a post-appeal transcript of the proceedings or merely provided cursory explanation of their decision, on the theory that the requirement was necessary to "permit a reviewing court to ascertain the rationale behind a denial. . . ."<sup>57</sup> A decision must, therefore, include the reasons for denial, a written decision and a record of the proceedings.<sup>58</sup> Furthermore, the decision must be written by the "state or local government or instrumentality" that made the decision.<sup>59</sup>

The Fourth Circuit began its analysis noting that the clear language of the Act indicated that the "in writing" and "substantial evidence" limitations were clearly separate from one another.<sup>60</sup> It further held that the district court had erred in compelling localities to include findings of fact and explanations in their written decisions.<sup>61</sup> The Fourth Circuit supported this holding by distinguishing the language of the Administrative

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<sup>53</sup> See *id.*

<sup>54</sup> No. 98-2422, 1999 U.S. App. Lexis 7493, at \*7 (7th Cir. Apr. 19, 1999).

<sup>55</sup> See *id.* at \*16. The court also rejected the plaintiff-provider's argument that it had been unreasonably discriminated against. See *id.*

<sup>56</sup> This issue was not raised on appeal to the Second Circuit in *Cellular Tel. Co. v. Town of Oyster Bay* or to the Seventh Circuit in *Aegerton*.

<sup>57</sup> *Western PCS II, Corp. v. Extraterritorial Zoning Authority*, 957 F. Supp. 1230, 1236 (post-appeal transcript); see also *AT&T Wireless PCS, Inc. v. Winston-Salem*, 11 F. Supp. 2d 760, 764 (one-word rubber stamp denial); *Illinois RSA No. 3 v. County of Peoria*, 963 F. Supp. 732, 743 (post-appeal transcript).

<sup>58</sup> See *Primeco Personal Communications, L.P. v. Lake County*, No. 97-208-civ-oc-10b, 1998 WL 565036, \*8 (M.D. Fla. July 20, 1998); *Winston-Salem*, 11 F. Supp. 2d at 764; *Cellco Partnership v. Farmington*, 3 F. Supp. 2d 178, 184 (D. Conn. 1998); *Smart SMR v. Stratford*, 995 F. Supp. 52, 55-57 (D. Conn. 1998); *Illinois RSA No. 3*, 963 F. Supp. at 743; *Western PCS II*, 957 F. Supp. at 1236.

<sup>59</sup> See *Virginia Metronet, Inc. v. Bd. of Sup.*, 984 F. Supp. 966, 972 (E.D. Va. 1998) (finding that denial written by member of county planning staff, but not the Board of Supervisors, was inadequate).

<sup>60</sup> See *AT&T Wireless PCS, Inc. v. Virginia Beach*, 155 F.3d 423, 429 (4<sup>th</sup> Cir. 1998).

<sup>61</sup> See *id.*; see also *Winston-Salem*, 11 F. Supp. 2d at 764; *Virginia Metronet*, 984 F. Supp. at 972; *Illinois RSA No. 3*, 963 F. Supp. at 743. In a subsequent case, the District Court for the Middle District of Pennsylvania, in *Omnipoint Communications, Inc. v. City of Scranton*, No. 3:CV-97-0562, 1999 U.S. Dist. Lexis 1457 (M.D. Pa. Jan. 26, 1999), held that whether the Fourth Circuit's interpretation or the *Winston-Salem* court's reading of this provision is correct, the in writing requirement in that case had been satisfied. The basis of the court's holding was a letter sent to Omnipoint by the zoning board listing the reasons for the

Procedure Act (“APA”) and other sections of the Telecommunications Act with the language actually contained in section 332(c)(7)(B)(iii).<sup>62</sup> The court noted that the APA expressly states that all decisions in adjudications or formal rulemaking “shall include statements of . . . findings and conclusions, and the reasons or basis therefor. . . .”<sup>63</sup> Furthermore, section 252(e)(1) of the Telecommunications Act requires “written findings as to any deficiencies” of certain agreements and section 271(d)(3) requires the FCC to “state the basis for its approval or denial” of certain applications.<sup>64</sup> The court concluded, therefore, that Congress would have required findings and explanations in section 332(c)(7)(B)(iii) if it wanted them, but that it had refrained from doing so in the context of local decisions on wireless facility siting.<sup>65</sup> Thus, a “decision . . . in writing” necessarily encompasses the City Council’s submission of the minutes of its meetings and its affixing “DENIED” and the date of decision to the application.<sup>66</sup> The court also dismissed the idea that a broader reading of the “in writing” requirement is necessary for judicial review, so long as there is enough evidence in the record, finding instead, that the substantial evidence requirement more than satisfies this need.<sup>67</sup>

## B. SUPPORTED BY SUBSTANTIAL EVIDENCE

The term “substantial evidence” is found in cases<sup>68</sup> and statutes<sup>69</sup> on administrative law. The Act’s Conference Report provides little guidance on its application in this context, stating simply that “the phrase ‘substantial evidence contained in a written record’ is the traditional standard for judicial review of agency action.”<sup>70</sup> The substantial evidence standard enunciated by the Supreme Court for review of federal agency actions is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”<sup>71</sup>

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board’s decision and the findings of fact and conclusions of law prepared by the board’s attorney. *See id.* at \*21 n.9.

<sup>62</sup> *See Virginia Beach*, 155 F.3d at 429.

<sup>63</sup> *Id.* (citing 5 U.S.C. § 557(c)).

<sup>64</sup> *See id.*

<sup>65</sup> *See id.* (citing *Keene Co. v. United States*, 508 U.S. 200, 208 (1993)) (“[W]here Congress includes particular language in one § of a statute but omits it in another . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 430.

<sup>68</sup> *See, e.g., Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

<sup>69</sup> *See, e.g., 5 U.S.C. § 702* (1998).

<sup>70</sup> H.R. CONF. REP. NO. 104-458 (1996).

<sup>71</sup> *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Courts hearing cases brought under § 332(c)(7) have adopted this standard. *See, e.g., Cellular Tel. Co. v. Ho-Ho-Kus*, 24 F. Supp. 2d 359, 365 (D.N.J. 1998).

What that phrase actually means is not so clear in the context of an Act that significantly preserves local authority and also creates federal judicial review of a local quasi-legislative decision. Congressional adoption of the federal standard in this context ignores the fact that local and federal governments differ substantially, both in terms of demographic and socioeconomic factors and in terms of how the relevant interest groups “organize, their strength in the bargaining process, their ability to demand political recognition, and the government settings in which they operate. . . .”<sup>72</sup> Some commentators argue that these factors combine to make local governments more susceptible to freezing out certain interest groups, which, they argue, compels broadening the scope of judicial inquiry.<sup>73</sup> Adoption of the substantial evidence standard, rather than the lesser “arbitrary and capricious” test, however, demonstrates that Congress wanted some form of heightened scrutiny, but left the courts with the task of deciding exactly what level of review is appropriate.<sup>74</sup>

The Fourth Circuit posited that the “reasonable mind” is a legislator’s, which affects the type of evidence that can be considered.<sup>75</sup> The court noted that the Virginia Beach City Council is a state legislative body, not a federal administrative agency, and that the reasonable mind of a bureaucrat necessarily differs from that of a legislator.<sup>76</sup> It is, therefore, proper for constituent views to play a more significant role “in zoning as in all other legislative matters.”<sup>77</sup> This is consistent with the court’s overall more deferential reading of the Act’s preservation of local substantive control.

In *Cellular Telephone Co. v. Town of Oyster Bay*,<sup>78</sup> the Second Circuit threw up its hands in disgust at the ambiguous provisions of the

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<sup>72</sup> Mandelker & Tarlock, *supra* note 6, at 105.

<sup>73</sup> *See id.* (discussing John Hart Ely’s theory on judicial review and arguing that though it has its detractors, Ely’s “focus on political process failure . . . is especially relevant to local governments. . . .”).

<sup>74</sup> As part of a running debate on exactly this question, Mandelker and Tarlock admit that, on a sub-constitutional level, this is an “almost intractable question.” Mandelker & Tarlock, *supra* note 6, at 107. They, however, argue that “heightened or hard-look judicial review only works if there is a background standard” or theory as to the ideal land-use plan, which of course does not exist. *Id.* at 108. Instead of heightened scrutiny, they argue that there should no longer be a presumption of validity, but that the burden should be placed on the locality to justify its decision. *See id.* at 107. In contrast, Robert Hopperton argues that a presumption shift is a doctrinal dead end and fails to address the real issue. *See* Robert Hopperton, *The Presumption of Validity in American Land-Use Law: A Substitute for Analysis, A Source of Significant Confusion*, 23 B.C. ENVTL. AFF. L. REV. 301 (1996).

<sup>75</sup> *See* AT&T Wireless PCS, Inc. v. Virginia Beach, 155 F.3d 423, 430 (4th Cir. 1998).

<sup>76</sup> *See id.*

<sup>77</sup> *Id.* The court went to hold that while the plaintiff’s application may amount to a preponderance of evidence in favor of approval, the “repeated and widespread opposition of a majority of the citizens of Virginia Beach . . . amounts to far more than a ‘mere scintilla’ of evidence to persuade a reasonable mind to oppose the application.” *Id.* at 431.

<sup>78</sup> 166 F.3d 490 (2d Cir. 1999).

Act and held that, regardless of which standard applied, it had not been satisfied in this case.<sup>79</sup> The court acknowledged that, while federal courts have historically given “extremely deferential” review to local zoning decisions<sup>80</sup> and Congress “explicitly preserved local zoning authority,” the express provision for judicial review required the court to look “more closely [at denials subject to the Act] than at standard local zoning decisions.”<sup>81</sup> The court explained that the substantial evidence test is, nonetheless, a deferential standard<sup>82</sup> and that “local and state zoning laws govern the weight to be given the evidence.”<sup>83</sup>

In wending its way through this thicket of poorly-defined standards, the court first found that because cellular telephone companies are public utilities in New York, applications for variances are judged by a different standard than that ordinarily applied in reviewing a zoning decision.<sup>84</sup> The court also noted that under New York law, aesthetics is a valid ground upon which a locality may base its decision.<sup>85</sup> Applying a “closer look/public utility” analysis, the court held that the unsubstantiated concerns voiced by only some citizens at the public hearings, regarding aesthetic and property value issues, were inadequate to support a finding of substantial evidence underlying the Board’s decision.<sup>86</sup> The

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<sup>79</sup> See *id.* at 497.

<sup>80</sup> Daniel R. Mandelker and A. Dan Tarlock, explain that:

zoning was originally justified as the application of scientific policy for the betterment of the community, and proponents counseled judicial deference to local governments. This deference was supported both by the Jeffersonian faith in local institutions and the progressive vision that planning experts could control the excesses of popular democracy.

*Supra* note 6, at 111.

<sup>81</sup> *Cellular Tel. Co.*, 166 F.3d at 493.

<sup>82</sup> See *id.* at 494.

<sup>83</sup> *Id.*

<sup>84</sup> See *id.* (citing *Cellular Tel. Co. v. Rosenberg*, 82 N.Y.2d 364, 371, 604 N.Y.S.2d 895, 624 N.E.2d 990 (1993)). Public utilities must show “a need for its facilities and whether the needs of the broader public would be served by granting the variance,” rather than the general “unnecessary hardship” standard. *Id.* (citing *Suffolk Outdoor Advertising Co. v. Hulse*, 43 N.Y.2d 483, 490 (1977)). The court fails to mention that this standard is interpreted as not granting carte blanche authority to a utility or as giving a utility the power to “place a facility wherever it chooses within the community.” *Matter of Consolidated Edison v. Hoffman*, 43 N.Y.2d 598, 610 (1979), cited in *Sprint Spectrum, L.P. v. Willoth*, 996 F. Supp. 253, 257 (W.D.N.Y. 1998) (affirming zoning board’s rejection of Sprint’s petition).

<sup>85</sup> See *id.* (citing *Suffolk Outdoor Advertising*, 43 N.Y.2d at 490).

<sup>86</sup> See *id.* at 495-96; *Omnipoint Corp. v. Pine Grove*, 20 F. Supp. 2d 875 (E.D. Pa. 1998) (holding that citizen protestors had failed to establish their objections with a sufficiently high degree of probability); *Sprint Spectrum, L.P. v. Town of North Stonington*, 12 F. Supp. 2d 247, 253 (D. Conn. 1998) (citing Connecticut court decisions for the premise that “conclusion by laypersons as to the effect from the granting of [a] special use permit, without supporting evidence or facts, is insufficient to support the denial of the special use permit.”); see also *Iowa Wireless Services, L.P. v. City of Moline*, No. 98-4090, 1998 U.S. Dist. Lexis 19542 (C.D. Ill. Nov. 10, 1998) (holding that citizens’ concerns were too generalized to be substantial); *BellSouth Mobility v. Gwinnett County*, 944 F. Supp. 923, 928 (followed in *Omnipoint*).

Second Circuit acknowledged the existence of disagreement among the courts on the weight to be accorded citizen views, but concluded that the evidence before the court was not substantial under any of the competing standards.<sup>87</sup>

In contrast to the ambiguity cited by the Second Circuit panel and the more deferential quasi-legislative standard adopted by the Fourth Circuit, the Seventh Circuit in *Aegerter v. City of Delafield*<sup>88</sup> held that there was no reason to unnecessarily complicate the statute by “attempting to subdivide any of these categories [of judicial review] even further.”<sup>89</sup> The court noted that the locality had relied on a pre-existing plan addressing tower siting, the aesthetics of the proposed tower, and its impact on property values in the area.<sup>90</sup> The court reasoned that, ultimately, Congress had envisioned that localities would make decisions like this and that safeguards included in section 332(c)(7) protect the federal interests at stake.<sup>91</sup> The court also addressed the Fourth Circuit’s distinction between the reasonable mind of a legislator versus that of a bureaucrat, which compelled that court to adopt a more deferential application of the substantial evidence standard.<sup>92</sup> The court was skeptical whether judges can actually “apply more than a few standards of review.”<sup>93</sup> The court also noted that local boards “often wear several hats when they act,” so characterizing them as legislators is a misnomer.<sup>94</sup> Instead, they are more akin to an administrative agency, and therefore the court should just apply the “conventional substantial evidence standard.”<sup>95</sup> The court’s statement provides little guidance because it begs the question of what the conventional test is, which, as some commentators argue, varies depending on the context.<sup>96</sup>

In a case arising in the time between the above-mentioned Second and Fourth Circuit Court cases, the District Court for the Northern District of Georgia, in *SprintCom, Inc. v. City of Cumming*,<sup>97</sup> held that the city’s denial was not supported by substantial evidence. This case is an example of the other end of the spectrum from the Fourth Circuit in ap-

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<sup>87</sup> See *Cellular Tel. Co.*, 166 F.3d at 495 (comparing *Omnipoint Corp.*, 20 F. Supp. 2d at 880, with *Virginia Beach*, 155 F.3d at 430). No. 98-2422, 1999 U.S. App. LEXIS (7<sup>th</sup> Cir. April 19, 1999).

<sup>88</sup> No. 98-2422, 1999 U.S.App. LEXIS (7<sup>th</sup> Cir. April 19, 1999).

<sup>89</sup> *Id.* at \*7.

<sup>90</sup> See *id.* at \*10.

<sup>91</sup> See *id.* at \*10-11.

<sup>92</sup> See *id.* at \*7.

<sup>93</sup> *Id.* at \*8.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* (noting that “[w]hen they are passing ordinances or other laws, they are without a doubt legislators, but when they sit as an administrative body making decisions about zoning permits, they are like any other agency the state has created.”).

<sup>96</sup> See STRAUSS, *infra* note 99.

<sup>97</sup> No. 2-98-CV-95-WCO, 1998 U.S. Dist. Lexis 18523 (N.D. Ga. Sept. 21, 1998).

plying the substantial evidence test. The court not only rewrote the City's zoning ordinance,<sup>98</sup> but also rejected additional evidence properly considered by the zoning board by reading the Act's procedural limitations into proceedings preliminary to the Board's actual decision.<sup>99</sup> This seems to go further than even the closer look analysis advocated by the Second Circuit. In contrast, the District Court for the Western District of Michigan, in *Century Cellunet of Southern Michigan, Inc. v. City of Ferrysburg*, took a more deferential approach.<sup>100</sup> The court granted summary judgment for the defendant upon finding that (1) the City's decision that the provider failed to document its assertions regarding the unreasonable risk of the tower failing was supported by substantial evidence, and (2) the City's finding that the City was so small that such a tall tower would necessarily fail to be in harmony with the existing area was supported by substantial evidence.<sup>101</sup>

"Although [the substantial evidence] standard is understood as being 'highly deferential,' it has been applied with varying degrees of deference in different contexts."<sup>102</sup> Judicial review of zoning decisions is filled with pitfalls for the unwary, including inquiry into legislative motives and "the lack of clear entitlements to any given outcome."<sup>103</sup> Furthermore, the concerns regarding the extent and appropriateness of judicial review are heightened when applied on a sub-constitutional basis

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<sup>98</sup> *See id.* at \*13. The City zoning ordinance excepted noncommercial towers from height limitations, but the court held that, because the City could "make no justifiable distinction between commercial towers such as the one planned by SprintCom and noncommercial towers as those exempt from the height restriction," denial on these grounds was insubstantial. *Id.*

<sup>99</sup> *See id.* The court held that because citizen objections and recommendations of denial from the Planning and Zoning Commission, upon which the Board based its decision, did not state the reasons for their position, denial on these grounds was insubstantial. *See id.*

<sup>100</sup> 993 F. Supp. 1072 (W.D. Mich. 1997).

<sup>101</sup> *See id.* at 1077.

<sup>102</sup> PETER L. STRAUSS ET AL., *GELLHORN AND BYSE'S ADMINISTRATIVE LAW* 529 (9th ed. 1995) (citing Sidney Shapiro & Richard Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051, 1065 (1995), who attribute the shifting nature of the standard to outcome-oriented judicial incentives). *But see* Richard J. Pierce, Jr., *Legislative Reform of Judicial Review of Agency Actions*, 44 DUKE L.J. 1110 (1995). Pierce argues that the standard "is well understood, and the results of its application are easy to predict in the vast majority of cases," as well as it "being unusually durable and relatively impervious to manipulation." *Id.* at 1114. Interestingly, Pierce acknowledges that the substantial evidence test has been distorted when dealing with "unusually politically charged contexts," such as the labor battles of the 1950s and the Social Security Administration disability decisions of the 1980s. *Id.* at 1115. The federalism concerns and battles for local control that are the subtext of the fight over tower siting are hardly any less virulent. It should not, therefore, be surprising to see the courts struggling with the substantial evidence test in this context.

<sup>103</sup> Mandelker & Tarlock, *supra* note 6, at 111 (arguing that naked heightened judicial review, without a change in the burden, "directly exposes courts to these traps").

across sovereign lines.<sup>104</sup> The local decisions in these cases are highly politicized affairs that involve a multitude of interests; ranging from the providers who have spent millions of dollars to acquire licensing rights, to neighbors living near the proposed tower site, to cell phone users both living in the area and those just passing through, to advocates for development. The charged nature of these decisions may be precisely the reason why Congress probably provided for judicial review. Nonetheless, the local nature and immediacy of the decision, as distinguished from a federal or even state administrative decision, should compel courts to undertake a truly deferential reading of the substantial evidence standard. Although Congress expressly provided a federal overlay on local zoning decisions regarding the siting of telecommunications facilities, the separation of powers concerns that run throughout federal administrative law are of equal concern in this context.<sup>105</sup> It is these concerns that the courts should implicitly consider when reading the substantial evidence requirement.

The choice is ultimately about allocating power and “power exercised by someone other than its designated possessor is power abused.”<sup>106</sup> Zoning boards are personifications of the distinction between politics and the law that Justice Holmes noted almost eighty-five years ago, that in a complex society people are protected “by their power, immediate or remote, over those who make the rule. . . .”<sup>107</sup> The intellectual underpinnings of the doctrine of separation of powers nonetheless recognizes that, while “dependence on the people is, no doubt, the primary control on the government,” experience has taught that precautions must be taken to prevent tyranny, promote the rule of law, and control against arbitrary government.<sup>108</sup> The Act could, therefore, be read as equalizing the immediate power of the local citizens who may capture

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<sup>104</sup> See Peter L. Strauss, *Revisiting Overton Park: Political and Judicial Controls Over Administrative Actions Affecting the Community*, 39 UCLA L. REV. 1251 (1992) (“[J]udges should recognize the potential workability of political controls over administrative action when interpreting statutes that structure the resolution of essentially political disputes.”).

<sup>105</sup> See John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 617 (1996). The Court’s decision in *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), reflects the constitutional preference for decision making by politically accountable agencies rather than the more insulated judiciary. See *id.* at 865-66. After all, the Framers considered the accountability of the legislature as a major safeguard of liberty under the Constitution. See Manning, *supra*, at 634 n.119 (citing GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, 543 (1969)).

<sup>106</sup> Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 466 (1989). This is not to say that judicial review is anathema to the proper allocation of zoning authority. After all, “representative democracy, if unaccompanied by an effective separation of power, insufficiently protect[s] liberty.” Manning, *supra* note 105, at 640.

<sup>107</sup> *Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915).

<sup>108</sup> Manning, *supra* note 105, at 640, 646.

control of the zoning board and the telecommunications provider who is generally considered the interloper.<sup>109</sup> Judicial review has long been seen as a means of empowering underrepresented or outside groups whose voices would not otherwise be heard.<sup>110</sup> While claims of inequity by the provider community may be true to an extent, the Act's procedural limitations may actually be an example of provider capture of Congress.<sup>111</sup> The Act imposes standards not previously found in local decision making.<sup>112</sup> Further, the requirement of expeditious review of applications gives a distinct advantage to the providers who have the experience, research and money necessary to pursue their goals in the new, highly competitive world of personal wireless communications. The telecommunications providers are a strong and active constituency that needs little protection. Annual revenues in the industry exceed \$750 billion per year,<sup>113</sup> with more than \$27 billion attributable to the cellular industry alone,<sup>114</sup> and there is tremendous pressure for further expansion. The wireless industry anticipates further penetration of U.S. households even beyond the fifty million people who are already users.<sup>115</sup> The combination of a less-deferential review with the judiciary's inclination to generously grant mandamus or injunctions<sup>116</sup> is inconsistent with the express preservation of local control provided by Congress. While zoning boards, like judges, are generally not elected entities, they differ from the judiciary in that they are answerable to the political branches. Therefore, if the judiciary substitutes its judgment for that of local officials, who are arguably better "positioned to determine how to effectuate the needs and

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<sup>109</sup> See Daniel R. Mandelker & A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land-Use Law*, 24 URB. L. 1, 36 (1992). Mandelker and Tarlock note that while interest groups may sometimes capture the process it is important to distinguish this from the fluid pluralist political process in which coalitions rightfully may form and dissolve. *Id.*

<sup>110</sup> See Strauss, *supra* note 104, at 1259 (discussing John Hart Ely's *Democracy and Distrust* (1980), and Judge Warren Burger's comment in *United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966)).

<sup>111</sup> Some have likened the background and enactment of the Telecommunications Act of 1996 to the era of federal giveaways to the railroads in the 19th Century, which was "the last time a newly-subdued continent was parceled out to Robber Barons." Eben Moglen, *The Invisible Barbecue*, 97 COLUM. L. REV. 945, 946 & n.1 (1997).

<sup>112</sup> See *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490 (2d Cir. 1999).

<sup>113</sup> See Hughes, *supra* note 3, at 472.

<sup>114</sup> See *U.S. Wireless Subscribership Rose by More than 11 Million in 1997 CTIA Survey Says*, PCS WEEK, Apr. 8, 1998.

<sup>115</sup> See Hughes, *supra* note 3; see also *U.S. Wireless Subscribership Rose by More than 11 Million in 1997 CTIA Survey Says*, PCS WEEK, Apr. 8, 1998.

<sup>116</sup> See *infra* Part III.

concerns of their citizens,"<sup>117</sup> even this "secondary link to the electorate is lost."<sup>118</sup>

### III. WHAT IS THE APPROPRIATE REMEDY?

The Act permits plaintiff-providers to appeal facility siting decisions by local zoning boards in federal district court, but the Act and its legislative history are silent as to the proper remedy.<sup>119</sup> In nearly all the cases decided to date, if the provider establishes a violation of one of the provisions of section 332(c)(7), the court has granted a writ of mandamus to compel the locality to approve the permit or use variance sought.<sup>120</sup> This is despite the fact that courts have historically been hesitant to encroach upon the quasi-legislative prerogatives of local zoning boards.<sup>121</sup> In light of the explicit rejection of federal preemption and the additional significant federalism issues involved in the federal review of local zoning decisions, this practice raises significant concerns that the courts' willingness to issue a writ is a misreading of the Act and contrary to Congressional intent. Professor Manning argues that "if a court must assign meaning to an . . . agency-regulating statute in the face of legislative indeterminacy, it should presume, absent a clear indication to the contrary, that the statute opts for arrangements that best conform to the basic structural commitments of our constitutional scheme."<sup>122</sup> Under the circumstances, federal judges directing the actions of local zoning boards flies in the face of this sensible default rule.

Under the Act, Congress certainly intended to grant the reviewing federal courts jurisdiction to somehow issue binding remedies as part and parcel of their authority to review. Otherwise, their decisions would merely be advisory in nature and unconstitutional. At a minimum, therefore, federal courts reviewing violations of the Act's procedural limitations can be assumed to have the power to vacate and/or remand a cause of action upon reviewing a local decision. Sometimes, however, this is clearly insufficient to protect the rights of a provider under the Act. For instance, if a zoning board improperly refuses to issue the variance

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<sup>117</sup> Palermo, *supra* note 2, at 258.

<sup>118</sup> Farina, *supra* note 106, at 466 (discussing the underlying premises of the Supreme Court's analysis in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)).

<sup>119</sup> See 47 U.S.C. § 332(c)(7)(B)(v) (1998). Strikingly, this should be compared with the FCC's enabling statute, which specifies the substantive standard for judicial review of actions brought under § 402, stating that a Court of Appeals may "make and enter . . . a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency." 28 U.S.C. § 2349(a) (1998).

<sup>120</sup> See *infra* notes 112-127 and accompanying text.

<sup>121</sup> See KENNETH YOUNG, *ANDERSON'S AMERICAN LAW OF ZONING* § 27.39 (4th ed. 1996).

<sup>122</sup> Manning, *supra* note 105, at 637.

sought, Congress presumably envisioned that the provider would receive some kind of affirmative relief from the federal courts. In less clear cut cases, the remaining questions are: (1) what is the appropriate affirmative remedy that is most consistent with Congressional intent underlying section 332(c)(7), and (2) when should that remedy be applied.

The above assumes that plaintiff-providers pursue affirmative relief directly under the Act. An alternative, discussed only briefly here, is to seek such relief under section 1983.<sup>123</sup> The Supreme Court has held that section 1983 is sometimes available to enforce violations of federal statutes.<sup>124</sup> While providers have already begun adding section 1983 claims to their filings, relief has been limited to attorney's fees, and any equitable relief granted is attributed to section 332(c)(7).<sup>125</sup> In addition, the Court's doctrine in this area is so complicated that it is unclear whether plaintiffs adopting such an argument would be successful.

Mandamus is an extraordinary remedy that allows a court to compel another branch of government to act in a particular way. In light of the extraordinary nature of mandamus, the significant federalism concerns inherent in the nature of the judicial review provided by the Act, and Congress' failure to provide a clear statement of the proper remedy, courts must look elsewhere for guidance. One source of congressional and judicial experience can be found in the cases arising under section 706(1) of the Administrative Procedure Act (APA).<sup>126</sup> At a minimum, when determining the type and scope of remedy to provide, the courts should contemplate the impact of those well-informed views. This note will first detail the current mandamus practice as it has been developed

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<sup>123</sup> See Civil Rights Act, 42 U.S.C. § 1983 (1998).

<sup>124</sup> See *Maine v. Thiboutot*, 448 U.S. 1 (1980). "[I]n order to seek redress through § 1983, . . . a plaintiff must assert the violation of a federal right, not merely a violation of federal law." *Blessing v. Firestone*, 520 U.S. 329, 339-40 (1997). The Court has developed a three-part test to determine whether a particular statutory provision rises to the level of a federal right. See *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989). While courts construing § 332(c)(7) have agreed that it creates a federal right, there is disagreement over whether the Act impliedly forecloses private enforcement as a "comprehensive enforcement scheme," as described in *Blessing*. 520 U.S. at 341-42; compare *National Telecommunications Advisors, Inc. v. City of Chicopee*, 16 F. Supp. 2d 117, 122 (D. Mass. 1998) ("a § 1983 action is not available to obtain a remedy for violation of the TCA. . . .") with *Omnipoint Communications Enter., L.P. v. Chadds Ford Township*, No. 98-3299, 1998 U.S. Dist. Lexis 17403, at \*20 (E.D. Pa. Oct. 30, 1998) (distinguishing *National Telecommunications Advisors* and noting that the Supreme Court has only twice found a remedial scheme sufficiently comprehensive to preclude a § 1983 claim); *APT Minneapolis, Inc. v. City of Maplewood*, No. 97-2082, 1998 U.S. Dist. Lexis 14613, at \*21 (D. Minn. Aug. 12, 1998) (collecting other consistent cases).

<sup>125</sup> See *Omnipoint Communications Enter.*, 1998 U.S. Dist. Lexis 17403, at \*26; *APT Minneapolis*, 1998 U.S. Dist. Lexis 14613, at \*20; *National Telecommunication Advisors*, 16 F. Supp. 2d 117; *Cellco Partnership v. Farmington*, 3 F. Supp. 2d 178, 186 (D. Conn. 1998); *Sprint Spectrum, L.P. v. Town of Easton*, 982 F. Supp. 47, 53 (D. Mass. 1997).

<sup>126</sup> See 5 U.S.C. § 706(1) (1998).

by courts under section 332(c)(7) and then discuss how and why the courts should look to the APA for guidance.

#### A. CURRENT MANDAMUS PRACTICE UNDER THE ACT

Mandamus is an extraordinary remedy.<sup>127</sup> Traditionally, the power of the courts to grant such relief was predicated on a distinction between ministerial and discretionary duties.<sup>128</sup> As the doctrine has developed, however, the dispute centers around the scope of the delegated power, determined by asking whether the defendant's actions were consistent with the Act and the underlying congressional purpose.<sup>129</sup> Inverting its traditional status as an exceptional remedy available only in unusual circumstances, courts construing section 332(c)(7) have elevated mandamus to the standard remedy whenever the defendant-zoning board fails to meet any of the procedural burdens of the Act. For example, despite satisfying all of the other requirements of the Act, the district court in *Cellco Partnership v. Town of Farmington*, granted the plaintiff's request for equitable relief based solely on the board failing to formally request certain information from Cellco and not adequately explaining its deci-

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<sup>127</sup> See, e.g., *Roberts v. United States Dist. Court for the Northern Dist. of California*, 339 U.S. 844 (1950); *Brockington v. Rhodes*, 396 U.S. 41 (1969). For example, in the context of writs compelling a lower court to act, the Supreme Court has recognized that:

[o]nly exceptional circumstances, amounting to a judicial usurpation of power, will justify the invocation of this extraordinary remedy. The reasons for this Court's chary authorization of mandamus as an extraordinary remedy have often been explained. . . . A judicial readiness to issue the writ of mandamus in anything less than an extraordinary situation would "run the real risk of defeating the very policies sought to be furthered by that judgment of Congress." In order to insure that the writ will issue only in extraordinary circumstances, this Court has required that a party seeking issuance have no other adequate means to attain the relief he desires, and that he satisfy the "burden of showing that [his] right to issuance of the writ is 'clear and indisputable.'" In short, our cases have answered the question as to the availability of mandamus in situations such as this with the refrain: "What never? Well, hardly ever!"

*Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35-36 (1980) (citations omitted).

<sup>128</sup> The Supreme Court explains that:

Mandamus is employed to compel the performance, when refused, of a ministerial duty, this being its chief use. It is also employed to compel action, when refused, in matters involving judgment and discretion, but not to direct exercise of judgment or discretion in a particular way, nor to direct the retraction or reversal of action already taken in the exercise of either.

*Wilbur v. United States*, 281 U.S. 206, 218 (1930), cited in *Mandamus in Administrative Actions: Current Approaches*, 1973 DUKE L.J. 207, 207 (1973). For a history of the use of mandamus, see Note, *Mandatory Injunctions as Substitutes for Writs of Mandamus in the Federal District Courts: A Study in Procedural Manipulation*, 38 COLUM. L. REV. 903 (1938).

<sup>129</sup> See Clark Byse & Joseph V. Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 HARV. L. REV. 308, 333 (1967).

sion.<sup>130</sup> This is not only an improper application of traditional mandamus practice in local zoning decisions, but its hair-trigger application undermines the intent of the Act by effectively preempting local zoning authority over wireless facility siting.<sup>131</sup> In fact, Congress expressly stated that providers should not expect preferential treatment.<sup>132</sup>

Three early decisions on the issue are consistently cited by later courts as authority for when mandamus is appropriate for violations of section 332(c)(7).<sup>133</sup> In all three cases, the courts held that because the Act requires that district courts “shall hear and decide such action on an expedited basis”<sup>134</sup> and considering the conference report’s exhortation to the courts to “act expeditiously in deciding such cases,”<sup>135</sup> mandamus is the appropriate relief when the record supports approval of the provider’s application.<sup>136</sup> Conversely, remand is considered inappropriate because it necessarily results in additional delays.<sup>137</sup> Interestingly, the first court to speak to this issue, the District Court for the Northern District of Georgia, in *Bell South Mobility*, merely cited a 1988 Supreme Court of Georgia decision in support of its holding.<sup>138</sup> In that case, the district court held that since the zoning board’s denial was an act of discretion lacking articulable, objective grounds for support, the plaintiff had a clear right to issuance of the permit and writ of mandamus from the court.<sup>139</sup> Subsequent courts have not examined the underlying premises

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<sup>130</sup> 3 F. Supp. 2d 178, 182-84. The court’s decision is not even tied to the *BellSouth Mobility* standard, in which plaintiffs must nonetheless demonstrate a clear legal right to the variance in order for equitable relief to be granted. See *infra* notes 125-130 and accompanying text.

<sup>131</sup> See *supra* Part I.

<sup>132</sup> See H.R. CONF. REP. NO. 104-455, 104th Cong., at 208 (1996).

<sup>133</sup> See *Western PCS II, Corp. v. Extraterritorial Zoning Authority*, 957 F. Supp. 1230 (D.N.M. 1997); *Illinois RSA, No. 3 v. Peoria*, 963 F. Supp. 732 (C.D. Ill. 1997); *BellSouth Mobility v. Gwinnett County*, 944 F. Supp. 923 (N.D. Ga. 1996). Ignored by subsequent courts is that the court in *Illinois RSA, No. 3*, actually issued an injunction, see 963 F. Supp. at 747, rather than a writ.

<sup>134</sup> *Illinois RSA, No.3*, 963 F. Supp. at 747; *Western PCS II*, 957 F. Supp. at 25; *BellSouth Mobility*, 944 F. Supp. at 929.

<sup>135</sup> *supra* note 121, at § 27.39.

<sup>136</sup> See *id.*

<sup>137</sup> See, e.g., *Illinois RSA, No. 3*, 963 F. Supp. at 747 (“The County had its chance to produce substantial evidence to support its position, and it did not do so. No reason exists to send this case back to that body.”); *Virginia Metronet, Inc. v. Bd. of Supervisors*, 984 F. Supp. 966, 977 (E.D. Va. 1998) (“Remand would simply further delay the resolution of this issue.”).

<sup>138</sup> See *Bell South Mobility*, 944 F. Supp. at 928 (citing *Fulton County v. Bartenfeld*, 363 S.E.2d 555 (1988), which held that because the applicant “complied with all objective conditions,” had a “clear legal right to issuance of the permit,” and since the board’s denial lacked any “objective ground of support,” a writ of mandamus ordering approval of the application was appropriate).

<sup>139</sup> See *id.* at 771.

of the district court's decision<sup>140</sup>—whether Georgia mandamus practice differs from other states' laws<sup>141</sup>—and they have interpreted the holding to permit mandamus only based on a finding that the board's decision lacks support of substantial evidence or even merely that the plaintiff has won on the merits.<sup>142</sup> Neither of these interpretations is actually consistent with the *BellSouth Mobility* mandamus analysis, which limited the grant of mandamus to instances where the plaintiff has a clear legal right to the permit or variance sought.<sup>143</sup>

To date, there are only three cases that have challenged these assumptions and held that mandamus is not the appropriate remedy for violations of section 332(c)(7). In *AT&T Wireless Services v. Orange County*, Judge Baker concluded that not only had there been no finding by any local authority that AT&T's application complied with code requirements, but also that the retention of local authority contemplated in the Act would be thwarted by issuing a writ of mandamus.<sup>144</sup> Judge Castillo, in *Primeco Personal Communications, L.P. v. Village of Fox Lake*, though not citing Judge Baker's earlier holding, came to a similar conclusion in denying mandamus and rejecting Primeco's assumption that it was entitled to mandamus relief merely because it had prevailed on the merits.<sup>145</sup> Judge Castillo also noted that there is a presumption against mandamus because of the unsettled nature of the law in this area and, therefore, remand was appropriate.<sup>146</sup> In a subsequent decision in the same case, Judge Castillo reiterated that the zoning board was dealing with "a new law startling in its departure from traditional notions of local

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<sup>140</sup> *But see* *SprintCom, Inc. v. City of Cumming*, No. 2:98-CV-95-WCO, 1998 U.S. Dist. Lexis 18523, at \*18 (N.D. Ga. Sept. 21, 1998) (finding mandamus relief appropriate). The court held that neither *BellSouth* nor *AT&T Wireless Services v. Orange County*, see discussion *supra* note 107 and accompanying text, were on point because although no local authority had at any time approved plaintiff's application, the denials were made without explanation.

<sup>141</sup> See R. Perry Sentell, Jr., *Local Government Law*, 48 *MERCER L. REV.* 421, 436 n.126 (1996) (suggesting overuse of mandamus practice in Georgia). For additional analysis of the overuse of mandamus practice in Georgia, see R. PERRY SENTELL, JR., *Miscasting Mandamus in Georgia Local Government Law* (1988).

<sup>142</sup> See, e.g., *AT&T Wireless PCS, Inc. v. Winston-Salem*, 11 F. Supp. 2d 760 (M.D.N.C. 1998) (granting mandamus because zoning board violated the Act); *APT Minneapolis, Inc. v. City of Maplewood*, No. 97-2082, 1998 U.S. Dist. Lexis 14613 (D. Minn. Aug. 12, 1998) (granting mandamus because board's decision not supported by substantial evidence); *Virginia Metronet*, 984 F. Supp. 966 (holding that mandamus is the appropriate remedy because defendant could have, but did not, provide substantial evidence in the record). Sara Evans argues that these early cases establish a solid justification and analysis for granting a writ of mandamus. See Sara A. Evans, Note, *Wireless Service Providers v. Zoning Commissions: Preservation of State and Local Zoning Authority Under the Telecommunications Act of 1996*, 32 *GA. L. REV.* 965, 1000-02 (1998).

<sup>143</sup> See *supra* notes 125-26 and accompanying text.

<sup>144</sup> 982 F. Supp. at 861.

<sup>145</sup> 26 F. Supp. 2d 1052, 1066 (N.D. Ill. 1998) (granting summary judgment for plaintiff on defendant's failure to provide a written decision supported by substantial evidence).

<sup>146</sup> See *id.*

authority over zoning decisions,” as well as a lack of experience “with federal agency procedures” and inconsistent guidance from the courts.<sup>147</sup> In light of the strict time limit the court had placed on the board to re-evaluate Primeco’s petition on remand and expedited hearing by the district court, remand is the appropriate remedy because it “incorporate[s] Congress’ concerns regarding timeliness.”<sup>148</sup>

In *Omnipoint Corp. v. Pine Grove*, the District Court for the Eastern District of Pennsylvania granted summary judgment for the plaintiff-provider, finding that generalized citizen concerns were insubstantial.<sup>149</sup> However, in considering the appropriate remedy the court converted plaintiff’s request for a writ into an injunction, citing Rule 81(b) of the Federal Rules of Civil Procedure, which abolishes the writ of mandamus.<sup>150</sup> This decision was the first to recognize that while state courts may have unlimited mandamus power, the power of the federal courts to issue writs has been proscribed.<sup>151</sup> None of the other courts to have considered the appropriate relief for violations of section 332(c)(7) have considered the limits on mandamus jurisdiction. This failure begs the question of how, absent clear and unambiguous direction from Congress,

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<sup>147</sup> *Primeco Personal Communications, L.P. v. Village of Fox Lake*, No. 97-C-8023, 1999 U.S. Dist. Lexis 3309, at \*4 (N.D. Ill. March 12, 1999).

<sup>148</sup> *Id.* at \*6.

<sup>149</sup> 20 F. Supp. 2d 875 (1998) (noting the speculative nature of the concerns voiced and that Pennsylvania law does not permit economic or aesthetic considerations as a basis for denial).

<sup>150</sup> *See id.* Similarly, in other cases, conversion of a petition, rather than dismissal of the case, is permitted to avoid an otherwise harsh result. *See Heine v. Arkansas State University*, 972 F. Supp. 1175, 1181 (1997) (citing *Olson v. Hart*, 965 F.2d 940 (10th Cir. 1992) and holding that it may construe plaintiff’s pleading as requesting injunctive and declaratory relief). The willingness of the courts to construe requests for mandamus as such flows from the rejection of formalistic pleading rules and the merger of law and equity. *See Stern v. South Chester Tube Co.*, 390 U.S. 606 (1968) (holding that the relief sought was not mandamus but was equitable relief, and that, therefore, the district court had jurisdiction to grant relief under its traditional equity power).

<sup>151</sup> Notwithstanding Rule 81(b), Congress has preserved some power in the courts. For example, the Federal Mandamus and Venue Act of 1962 provides that “district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.” 28 U.S.C. § 1361 (1998) (emphasis added). The Mandamus and Venue Act on its face is inapplicable to a local zoning board, which is neither an officer/employee of the United States nor is it a federal agency. Similarly, the All Writs Act only preserves the courts’ ability to “issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” 28 U.S.C. § 1651(a) (1998); *see also* 32 AM JUR. 2D § 408 (discussing interaction between mandamus practice, the All Writs Act and FRCP 81(b)). Federal courts, therefore, have “no general jurisdiction to issue writs of mandamus where that is the only relief sought.” 32 AM JUR. 2D § 408 (1998) (citing *Shelton v. Randolph*, 373 F. Supp. 448 (W.D. Va. 1974); *Haggard v. Tennessee*, 421 F.2d 1384 (6th Cir. 1970)). Even assuming that § 332(c)(7)(B)(v) places federal courts in a proper supervisory role so as to theoretically bring the jurisdictional enforcement mechanism of the All Writs Act into play, § 1361 limits the use of such orders to federal officers and agencies. *See Harris v. Dep’t of Corrections*, 426 F. Supp. 350 (W.D. Okla. 1977).

the courts have managed to assume such power.<sup>152</sup> Ultimately, however, the distinction may be irrelevant because the difference between mandamus and an affirmative injunction is academic,<sup>153</sup> and the remedies are interchangeable.<sup>154</sup>

Notwithstanding these problems, the line of cases following *BellSouth Mobility* reflect a misreading of the Act. First, the Act does not contemplate preemption of local zoning authority over wireless facility siting decisions,<sup>155</sup> which is effectively what granting mandamus on such broad grounds provides.<sup>156</sup> Second, the language cited by the courts only compels expedited review, but not necessarily a final decision, especially when read in the context of clear legislative intent to preserve local zoning authority. The Act does permit district courts to “hear and decide such action[s] on an expedited basis,”<sup>157</sup> which is reiterated in the Act’s legislative history.<sup>158</sup> It does not, however, direct courts to necessarily grant final relief.<sup>159</sup> Contrary to the courts’ assertions, remand neither frustrates the intent of the Act nor compels issuance of a writ.<sup>160</sup> Remand is, in fact, consistent with the Act’s preservation of local authority. If the delay is arguably one of ameliorating permissible local concerns—e.g. aesthetics and property values and not RF-related health issues<sup>161</sup>—granting an order in the nature of mandamus to direct the exercise of discretion left to the zoning board is inappropriate and unduly inflates the judiciary’s statutory role in such decisions.<sup>162</sup> Furthermore, in state land use practice, remand is even appropriate “where a board denied relief on ultra vires grounds [or] . . . applied an erroneous standard. . . .”<sup>163</sup> A decision by the zoning board using its discretionary powers is, therefore, the preferred means of resolving the issue. By providing additional procedural protections to providers making their way through the zoning approval process, Congress affirmatively sustained local substantive

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<sup>152</sup> Contrast § 332(c)(7)’s silence with § 706(1) of the Administrative Procedure Act. See discussion *infra* note 156-176. .

<sup>153</sup> See *Fulton County v. Bartenfield*, 363 S.E.2d 555 (1998) (upholding a writ of mandamus ordering approval of an permit application).

<sup>154</sup> See Note, *supra* note 128, at 908.

<sup>155</sup> See *supra* notes 19-40 and accompanying text.

<sup>156</sup> See *supra* Part III.

<sup>157</sup> 47 U.S.C. § 332(c)(7)(B)(v) (1998).

<sup>158</sup> See H.R. CONF. REP. NO. 104-458, at 208 (1996).

<sup>159</sup> Cf. *BellSouth Mobility*, 944 F. Supp. at 929 (holding that the Act’s intent is “to provide aggrieved parties full relief on an expedited basis”).

<sup>160</sup> See *AT&T Wireless Services v. Orange County*, 982 F. Supp. 856, 861 (M.D. Fla. 1997) (distinguishing cases and holding that remand is appropriate remedy).

<sup>161</sup> Local regulation on the basis of RF environmental effects is preempted by 47 U.S.C. § 332(c)(7)(B)(iv).

<sup>162</sup> See Carol R. Miaskoff, Note, *Judicial Review of Agency Delay and Inaction Under Section 706(1) of the Administrative Procedure Act*, 55 GEO. WASH. L. REV. 635, 643 (1987).

<sup>163</sup> YOUNG, *supra* note 121, § 27.39.

law.<sup>164</sup> This policy decision is, however, vetoed when the courts are so willing to order zoning boards to take particular action. Of course, a zoning board that entirely flouts the Act's procedural limitations and threatens to never approve an application for a wireless facility invites extraordinary judicial intervention by grant of affirmative equitable relief.<sup>165</sup> What is most important to consider in these cases is whether the local board is shown to owe plaintiff a clear, plainly defined (rather than merely discretionary) duty to issue the permit or variance, and that there is no alternative adequate remedy available.<sup>166</sup> Due to the need to show a clear legal duty and the hesitancy to override discretionary authority, the availability of mandamus, or even injunctive relief, should necessarily vary according to the extent to which each locality delegates discretionary authority to its zoning boards. However, this consideration is not found in any of the decisions rendered so far. Because of the cross-sovereign relationship between the federal court system and a local zoning board, courts should hesitate to order approval of a variance even when the plaintiff has demonstrated that it has met all of the requirements. At the very least, reviewing courts should expressly analyze these issues rather than render the off-the-cuff orders issued to date.<sup>167</sup>

#### B. ADMINISTRATIVE PROCEDURE ACT

Although the APA is, by definition, not applicable,<sup>168</sup> it can serve by analogy as a valuable guidepost in maintaining the delicate balance between federal procedural requirements and local substantive law.<sup>169</sup> The APA is a good example of Congress acknowledging the federalism concerns inherent in judicial review of agency decisions, which concerns were expressly (though not entirely unambiguously) addressed in the Act's remedial provisions. Section 706 provides that a reviewing court

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<sup>164</sup> See *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 494 (2d Cir. 1999) (finding that "the TCA does not 'affect or encroach upon the substantive standards to be applied under established principles of state and local law.'").

<sup>165</sup> See *YOUNG*, *supra* note 121, § 28.05; see also *Western PCS II v. Extraterritorial Zoning Authority*, 957 F. Supp. 1230, 1239 (D.N.M. 1997) ("The Court is concerned that should it simply remand this matter to the EZA it will simply find alternative 'reasons' for a denial, rather than basing its decision on the record before it."). In *Western PCS II*, the court found that the zoning board's decision had the effect of prohibiting wireless services, nor was it in writing or supported by "any indicia" of substantial evidence. See 957 F. Supp. at 1236-38.

<sup>166</sup> See 13 A.L.R. FED. 145 (1998) (collecting cases).

<sup>167</sup> See, e.g., *Cellular Tel. Co.*, 166 F.3d at 497 (holding that, although the Act does not specify a remedy, trial court's mandamus is affirmed "[g]iven the weight of authority").

<sup>168</sup> See 5 U.S.C. § 551(1) (1998) (defining the term "agency" within the APA, as "each authority of the Government of the United States . . ." and, therefore, not inclusive of a local zoning board).

<sup>169</sup> "The Act . . . settles long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest. . . ." *Wong Yang Sung v. McGrath*, 339 U.S. 33, 40 (1950).

shall “compel agency action unlawfully withheld or unreasonably delayed; and . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . unsupported by substantial evidence. . . .”<sup>170</sup> The APA thus considers orders compelling action *and* remand to be appropriate remedies under certain circumstances.<sup>171</sup> The relationship of mandamus and the APA is closely analogous. In adopting the APA’s standards, Congress sanctioned the historical practice of issuing writs of mandamus or injunctions to compel agency action.<sup>172</sup> However, even from the beginning, Congress was concerned about authorizing “judicial interference in the administrative process by directing agencies to reach specific results,” because of the detrimental impact this could have on the separation of powers.<sup>173</sup> The APA’s ambiguous reference to “compel[ing] agency action,” is grounded in a court’s power to grant writs of mandamus and injunctive relief under section 706, which is predicated on the Federal Mandamus and Venue Act and the All Writs Act.<sup>174</sup> As previously discussed, these Acts would not reach federal court review of a local zoning decision even if the APA did apply.<sup>175</sup>

District courts reviewing claims under section 332(c)(7) should, nonetheless, find the cases decided under section 706 instructive in analyzing the issue of unreasonable delay and in allaying concerns over frustrating the overarching intent of the Telecommunications Act.<sup>176</sup> For example, in *Health Systems Agency v. Norman*, the Tenth Circuit held that the agency was not in compliance with the statutory program.<sup>177</sup> The court found that this lack of compliance amounted to “agency action unlawfully withheld” and used its power under section 706(1) to facilitate implementation of the statutory scheme.<sup>178</sup> Most importantly, the

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<sup>170</sup> 5 U.S.C. § 706(1), (2)(E).

<sup>171</sup> See Miaskoff, *supra* note 162, at 637 n.9. Miaskoff argues that, unlike the potential harm to the doctrine of separation of powers posed by § 706(1)’s authority to compel action, the power to set aside under paragraph (2) represents far less of a threat. See *id.*

<sup>172</sup> See Miaskoff, *supra* note 162, at 635. The *United States Department of Justice, Attorney General’s Manual on the Administrative Procedure Act (1947)*, states that § 706(1) “appears to be a particularized restatement of mandamus practice.” *Id.* at 108, cited in Miaskoff, *supra* note 162, at 637 n.17.

<sup>173</sup> See Miaskoff, *supra* note 162, at 637; see *id.* at 639 n.37 (citing *Carpet, Linoleum & Resilient Tile Layers, Local 419 v. Brown*, 656 F.2d 564, 566 (10th Cir. 1981)).

<sup>174</sup> See 28 U.S.C. §§ 1361, 1651(a) (1998).

<sup>175</sup> See discussion *supra* note 127-132.

<sup>176</sup> See, e.g., *Petersburg Cellular Partnership v. Nottoway County*, No. 3:98cv503, 1998 U.S. Dist. Lexis 19720 (E.D. Va. Dec. 14, 1998).

<sup>177</sup> 589 F.2d 486 (10th Cir. 1978).

<sup>178</sup> *Id.* The court held that the agency had abused its discretion in waiving the plaintiff’s late application for designation as a Health Systems Agency under the National Health Planning and Resources Development Act. See *id.* at 488. The court found that the agency’s actions were “flatly contrary” to its policies, for which it had failed to provide any justification, and that the agency had failed to consider the Act’s clear support for increasing competition and consumer involvement in the health planning process. *Id.* at 490-92.

district courts need to look at what remedy was ultimately provided in these APA-related cases. In the above case, the Tenth Circuit compelled the agency to accept the plaintiff's application,<sup>179</sup> but it did not order the agency to approve the application. In declining to order approval of the application, the court respected the separation of power principles underlying federal administrative mandamus practice,<sup>180</sup> which are analogous to the principles that should guide federal courts in their review of local zoning decisions. Instead, the courts have historically chosen to instruct "agencies to explain or reconsider their decisions not to act."<sup>181</sup>

Courts contemplating issuing a writ or order under section 332(c)(7) also cite the extra time that remand entails and note that such delays in approving applications may be unreasonable.<sup>182</sup> Under section 706(1), the courts have adopted a multi-factor balancing test that conveys the "hexagonal contours" of the considerations necessary to determine whether an agency's delay is in fact unreasonable.<sup>183</sup> Whether the duty to resolve proceedings without unreasonable delay is inherent in any regulatory statute,<sup>184</sup> or express as in the instant statute, agencies are nonetheless afforded "considerable deference in establishing a timetable for completing [their] proceedings."<sup>185</sup> On the other hand, agencies must consider that excessive delays may undermine public confidence, foster uncertainty for the parties involved, thwart the right to judicial review or cripple the statutory scheme.<sup>186</sup> The *TRAC* court cited several factors to consider when assessing the reasonability of a delay:

- (1) the agency's pace of decision must follow a "rule of reason;"
- (2) the agency's enabling statute may provide a timetable to give substance to this "rule of reason;"
- (3) delays are less tolerable when human health and welfare are at stake than when commercial concerns are involved;
- (4) expediting delayed agency action should not adversely affect the agency's ability to act on proceedings of a higher or competing priority;
- (5) the nature and extent of the interests prejudiced by delay should be con-

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<sup>179</sup> See *id.* at 492.

<sup>180</sup> See Miaskoff, *supra* note 162, at 647. Miaskoff argues that the court appropriately demurred on the plaintiff's request to rule on the merits of the case and in avoiding taking control of the substantive administrative discretion left to the agency. See *id.*

<sup>181</sup> Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 507, 563-65 (1985).

<sup>182</sup> See *supra* notes 116-121 and accompanying text.

<sup>183</sup> Telecommunications Research & Action Center (*TRAC*) v. FCC, 750 F.2d 70, 80 (D.C. Cir. 1984).

<sup>184</sup> See Miaskoff, *supra* note 162, at 651.

<sup>185</sup> Cutler v. Hayes, 818 F.2d 879, 897 (D.C. Cir. 1987) (explaining *TRAC*).

<sup>186</sup> See *id.* (collecting cases).

sidered; and (6) impropriety is not essential to a finding of unreasonable delay.<sup>187</sup>

No district courts contemplating remedial action under section 332(c)(7) have considered adopting these factors, instead choosing to rely on state land use decisions and/or the holdings of prior courts.<sup>188</sup> The courts frequently also overlook Congress' stated expectation that tower permit applications are still subject to generally applicable timeframes for local review.<sup>189</sup>

In cases arising under section 332(c)(7), nothing but commercial interests are at stake, for which lengthy delays are generally considered acceptable under the APA.<sup>190</sup> For every case that considers the effect on statutory intent and addresses concerns that the locality will never seriously consider the application,<sup>191</sup> there is a case that conclusively determines that remand would simply "serve no useful purpose."<sup>192</sup> This haphazard approach raises questions as to whether Congress' intent is being effectuated. The hesitancy reflected in the section 706(1) cases discussed above reflects a real concern for separation of powers and the maintenance of agencies' administrative independence. Section 332(c)(7) cases should also display heightened sensitivity to these issues, especially given the federalism concerns implicated by the inter-sovereign review established under the Act.

## CONCLUSION

While some argue that unimpeded "nationwide distribution of information, competitive prices, and the increasing development of more service helps all of us,"<sup>193</sup> the historical respect held for the preservation of

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<sup>187</sup> Miaskoff, *supra* note 162, at 652 (citing *TRAC*, 750 F.2d at 80).

<sup>188</sup> See *supra* Part III (discussing cases).

<sup>189</sup> See H.R. CONF. REP. NO. 104-458, 104th Cong., at 208 (1996).

<sup>190</sup> See Miaskoff, *supra* note 162, at 655 (citing *MCI Telecommunications Corp. v. FCC*, 627 F.2d 322 (D.C. Cir. 1980) (holding that delay in evaluating tariff only became unreasonable after a delay of four years), and *Potomac Electric Power Co. v. ICC*, 702 F.2d 1026 (10th Cir. 1983), (holding that a nine-year delay in approving train rates was unreasonable)).

<sup>191</sup> See *Western PCS II Corp. v. Santa Fe*, 957 F. Supp. 1230 (D.N. Mex. 1997).

<sup>192</sup> *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 497 (2d Cir. 1999). The Second Circuit came to this conclusion and affirmed the order compelling issuance of "the special permits and any other permits" necessary to construct the facility, despite the fact that the plaintiff had not yet completed the necessary filings ordinarily reviewed by the town. *Id.*

<sup>193</sup> Kratofil, *supra* note 6, at 516; see also *Aegerter v. City of Delafield*, No. 98-2422, 1999 U.S. App. Lexis 7493, \*16 (7th Cir. Apr. 19, 1999) (noting that "[s]ome may disagree with Congress' decision to leave so much authority in the hands of state and local governments to affect the placement of the physical infrastructure of an important part of the nation's evolving telecommunications network"); Littlejohn, *supra* note 36, at 260 ("The scope of the federal interest involved—the economic and general welfare of the country—is broad indeed. When local zoning regulation prevents construction of a cell site, that local regulation should be preempted.").

local control and decision making is not one that should be overrun so quickly. I do not advocate a harsh anti-federalist view, nor do I advocate a rejection of dazzling new technologies. The approach chosen by Congress “does not offer a single ‘cookie cutter’ solution for diverse local situations, and it imposes an unusual burden on the courts.”<sup>194</sup> In doing so, this approach exacerbates the conflict, ignores the significant federalism concerns discussed above, and makes ideologues of all the players. The FCC and a frustrated wireless industry have realized what Congress did not: local zoning is akin to a third-rail of the growing federalism debate in this country. As such, in August 1998, wireless providers and local governments came to an agreement, mediated by the FCC’s Local and State Government Advisory Committee (“LSGAC”), that incorporates some of the alternative solutions that Congress should have adopted in the bill itself, or at least directed the FCC to promulgate regulations on.<sup>195</sup> The agreement includes two initiatives that establish guidelines for facilities siting implementation and, most importantly, establishes an informal dispute resolution process that permits the protagonists to work together for a solution.<sup>196</sup> While these are critical steps toward resolving the disputes, the agreement is non-binding and, considering the risks and awards at stake, is unlikely to be the panacea desired by the FCC and other parties. Additionally, as the First Circuit recognized, while “Congress conceived that [section 332(c)(7)] would produce . . . individual solutions best adapted to the needs and desires of particular communities, if this refreshing experiment in federalism does not work, Congress can always alter the law.”<sup>197</sup>

Recognizing the impact of a massive telecommunications roll-out, Congress tried to strike a balance between the future of communications and the historical and recently rejuvenated sense of community that has become increasingly important in the encroaching ether of global, mobile, keystroke telecommunications. By providing only skeletal guidance and federal review of local zoning decisions,<sup>198</sup> Congress left the judiciary to sift through the various and oft conflicting policies underlying the federalism debate that come to a head in regulating the location of wireless facilities. Left to their own devices, the courts have largely become

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<sup>194</sup> *Town of Amherst v. Omnipoint Communications Enterprises*, No. 98-2061, 1999 WL 174253, at \*8 (1st Cir. March 30, 1999).

<sup>195</sup> See *Chairman William E. Kennard Announces Historic Agreement By Local and State Governments and Wireless Industries on Facilities Siting Issues*, FCC Press Release (Aug. 5, 1998) <<http://www.fcc.gov>>.

<sup>196</sup> See *id.*

<sup>197</sup> *Town of Amherst*, No. 98-2061, 1999 WL 174253, at \*8.

<sup>198</sup> Some commentators argue that legislative clarification by Congress is the best route to follow. See, e.g., Martin, *supra* note 7, at 500.

a federal zoning board by usurping power from the local communities that they have been charged to protect.

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