1997


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Recommended Citation
Available at: http://open.mitchellhamline.edu/wmlr/vol23/iss4/2

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I. INTRODUCTION

America's fast-paced and convenience-driven society demands immediate gratification. Advanced technology attempts to fulfill society's needs by providing new and improved communication mediums.¹ In particular, many Americans have entered the cellular superhighway hoping that it can keep pace with their ever-growing demands.²

Cellular telephone usage has become commonplace in American society. Since their inception and integration into mainstream America,³ cellular telephones have become astoundingly popular.⁴ The excitement over this portable communication device continues to escalate and shows no signs of abating.⁵ Because of this, the cellular superhighway perpetually expands both in capacity and geographical coverage.⁶

Convenience, however, has its price.⁷ The demand for portable

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¹ See Penney Gill, Buck Rogers, Businessperson: Hybrids Like Pager/Cell Phones, Carry 21st Century Promise, HOME FURNISHINGS NEWSPAPER, Jan. 1, 1996, at 1. Some examples of recently developed wireless communication devices include two-way communications products, voice-to-data transmission devices, pagers, wireless modems, and cellular phones. See id.

² See Nicholas Baran, Privatization of Telecommunications, MONTHLY REV., July 17, 1996, at 1 (discussing the great telecommunications opportunities the "information highway" promises to offer).


⁴ See Haya El Nasser, Crossed Signals: Cities Object to Cell Towers, USA TODAY, Nov. 14, 1996, at A3. The number of cellular phone subscribers has skyrocketed from 500,000 subscribers a mere 10 years ago to more than 38 million subscribers today. See id.

⁵ See Towering Controversies, GOVERNING, Feb. 1996, at 37, 37. It is reported that from mid-1994 to mid-1995, the demand for cellular phone service increased 58%. See id.

⁶ See Littlejohn, supra note 3, at 248.

⁷ See, e.g., Cheryl Martinis, Growth in Cell Phones Raises Towering Issue in
phone services has spurred the development of cellular towers that now dot the landscape.\(^8\) In 1983, fewer than 350 cellular sites existed in the United States.\(^9\) Today, over 19,000 sites exist,\(^10\) and industry figures suggest that by the year 2000, over 115,000 sites will be required to keep pace with the growing need.\(^11\) As a result, companies providing cellular phone services continually make numerous cellular siting proposals to state and local zoning boards.\(^12\) Typically, cellular providers select tower sites by balancing economic feasibility with sound coverage and quality reception.\(^13\) Municipal residents regularly object to the selected sites because of the perceived negative effects cellular towers have on their health, property values, quality of life, and surrounding environment.\(^14\) Local zoning boards face the nearly impossible task of balancing the conflicting interests of cellular providers and municipal residents. The location of cellular towers inevitably sparks heated and persistent controversy.\(^15\)

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\(^8\) See Towering Controversies, supra note 5, at 38. Cellular companies have a service area which is divided into units called "cells." See id. As the number of cellular users increases, the cells must be split into smaller units, and each unit requires the siting of a cellular communication facility. See id. The term "cellular tower" refers to the structure that houses the facilities that provide cellular or personal wireless services. See Littlejohn, supra note 3, at 248.


\(^10\) See id.

\(^11\) See Towering Controversies, supra note 5, at 37. Most cellular towers currently being built range from 150 to 250 feet tall. It is possible to understand the magnitude of the growing demand better by looking at it from another perspective: By the year 2000, there will be six cellular towers for each one presently standing. See id.

\(^12\) See Communication Law Reform: Hearings Before the Subcomm. on Telecomm. and Fin. of the Comm. on Commerce, 104th Cong. 190-91 (1995) [hereinafter Hearings]. Before constructing a cellular tower, a provider must first acquire a federal license and then convince local zoning authorities to approve a siting proposal. See id; see also Sprint Spectrum, L.P. v. City of Medina, 924 F. Supp. 1036, 1038 (W.D. Wash. 1996) (discussing the expected flurry of tower proposals as five cellular providers planned to site cellular towers in one locality); Charlie Chapple, Radio Tower Permits Are Put on Hold – Council: Proliferation Could Ruin Countryside, NEW ORLEANS TIMES-PICAYUNE, Nov. 23, 1996, at A1 (stating that the result of the Federal Communications Commission's issuance of several cellular licenses has been a "recent flood of requests" for tower siting permits); Michael Levy, Communities Struggle with the Wave of the Future, BUFFALO NEWS, Nov. 5, 1996, at A1 (discussing the local struggle in dealing with numerous applications for additional cellular towers).

\(^13\) See infra notes 22-28 and accompanying text.

\(^14\) See infra Part II.B. (discussing the reasons for opposition to cellular tower siting).

\(^15\) See Littlejohn, supra note 3, at 248.
Congress enacted the Telecommunications Act of 1996 to meet society's communication demands. This expansive piece of legislation seeks to benefit consumers by facilitating the development of the United States' technological infrastructure. The Act provides local zoning boards with guidance in solving problems that arise when considering cellular tower siting proposals. The cellular siting provisions in the Act attempt to balance the competing interests of municipal residents and cellular providers. These siting provisions, however, do not go far enough. They will not alleviate the conflict between municipal residents and cellular providers over cellular tower location. Consequently, protracted litigation between providers and municipalities over tower siting will persist because the Act fails to provide local zoning boards with a satisfactory means of addressing the deluge of tower proposals. This Note proposes an amendment to the Telecommunications Act that would give local zoning boards the ability to reduce conflict resulting from a cellular tower's siting.

Part II of this Note examines the competing interests of providers and municipal residents in determining the proper location for a cellular tower. Part III provides a procedural summary of the traditional zoning issues encountered in a cellular siting proposal. Part IV offers a historical framework to the cellular siting controversy by examining case law and discussing the inconsistent zoning standards courts employ. Part V summarizes and explains the cellular siting provisions of the Act. This Part also explains Congress' motivation for enacting each provision.

17. See Hearings, supra note 12, at 190. Jack Fields, the chairman of the Subcommittee on Telecommunications and Finance, discussed how the proposed Act intended to "unleash the investment of capital" to construct the technological infrastructure necessary to meet society's communications needs. See id.
18. See Telecommunications Act of 1996, 47 U.S.C.A. § 332(c)(7)(A)(B)(i)-(v) (West Supp. 1996); see also Littlejohn, supra note 3, at 248 (asserting that the development of cellular communication, a relatively new technology, has outpaced the ability of local governments to enact zoning ordinances to accommodate cellular towers).
19. See Littlejohn, supra note 3, at 263-64. Local zoning authorities face a challenging task in trying to balance municipal land use issues with the cellular needs of society. When local zoning authorities "fail to meet that challenge, however, developers of cellular communication systems inevitably will call upon the courts." Id. at 264.
20. See infra Part VII (discussing the benefits of collocation). See generally NYAL D. DEEMS & N. STEVENSON JENNETTE III, A PRACTICAL GUIDE TO WINNING LAND USE APPROVALS AND PERMITS § 1.04, at 1-37 to -38 (1996). A current trend shows that many communities have responded to developments like cellular siting by trying to exclude them. This results in litigation over exclusionary zoning. In the wake of such litigation, attempts have been made to restore the balance between the rights of property owners and developers and the need for land use regulation. See id.
Part VI of this Note critically analyzes the Act’s cellular siting provisions and considers how they affect the current dilemmas posed by tower siting. In particular, Part VI argues that the Act placed the burden of cellular siting on local governments while failing to equip them adequately to manage the development of the cellular infrastructure. In Part VII, this Note advocates the enactment of a collocation amendment to the Telecommunications Act. Collocation would reduce the need for cellular tower sites by requiring competing cellular providers to share the same tower when technologically feasible. The number of confrontations between residents opposing cellular tower sitings in their neighborhoods and cellular phone providers would diminish. Fewer towers would be constructed, yet cellular service would not suffer because collocation simply would require cellular providers better to maximize the use of already existing tower space. Consequently, a collocation amendment would promote municipal residents’ interests in slowing the growth of cellular tower sitings while satisfying cellular providers’ need to expand cellular coverage.

II. THE OPPONENTS: THE CELLULAR PROVIDERS VS. THE NIMBYs

A. The Cellular Providers

Cellular providers rely on two factors when deciding where to locate cellular towers. First, cellular providers determine site location based upon economic considerations. Erecting a cellular tower costs a tremendous amount of money. Consumer demand for immediate and ubiquitous cellular coverage increases the expense and therefore only exacerbates the business challenge and financial risks involved in tower construction. Consequently, cellular providers have a strong financial interest in constructing cellular towers where cellular coverage can be maximized. This financial challenge can become overwhelming when local zoning boards repeatedly deny site proposals. Ultimately, local regulations frustrate cellular providers’ ability to develop cellular infrastructure and adequately satisfy society’s need for cellular services.

Second, cellular providers base site proposals on tower designs that

22. In this Note, the term “cellular provider” is used interchangeably with cell providers, providers, service providers, and carriers. See id.
23. See Littlejohn, supra note 3, at 249.
24. See Hearings, supra note 12, at 191. The already “daunting” challenges posed by cellular siting “could become overwhelming if the industry becomes snared in a tangle of local regulations that impede entry, development and deployment of wireless services.” Id.
25. See Littlejohn, supra note 3, at 249.
are constructed to achieve quality reception.\textsuperscript{26} The strategic placement of cellular towers creates a network of cellular systems that transmit the signals for cellular phone reception.\textsuperscript{27} Because competition among cellular providers hinges upon "quality, price, and coverage area," creating an effective cellular system becomes crucial for each provider.\textsuperscript{28} As a result, cellular providers propose tower sites that will enable them to compete in the cellular market.

A cellular system in its early stages can use taller and more powerful towers.\textsuperscript{29} The use of such towers grants cellular providers some flexibility in determining a location acceptable to local zoning boards. In contrast, matured cellular systems, which typically exist in condensed urban locations, require the use of shorter and less powerful towers.\textsuperscript{30} This requirement limits the placement of a cellular tower to the area within a four-block radius of the tower's ideal location.\textsuperscript{31} Cellular tower siting therefore becomes critical in dense urban areas. Not surprisingly, metropolitan areas also require the greatest cellular development due to the increasing population of cellular users.\textsuperscript{32} Consequently, cellular providers turn to residential landowners willing to sell or lease space for the construction of cellular facilities.\textsuperscript{33}

B. The NIMBYs

Cellular providers apply to state or local authorities for zoning permits once a landowner offers to sell or lease space for a cellular facility. Residents living near the site often fight the cellular provider's proposal.\textsuperscript{34} These vocal opponents have been appropriately dubbed "NIMBYs," persons who possess a "Not In My Back Yard" mentality.\textsuperscript{35}

\textsuperscript{26} See id. at 249-50. Systematic designs often take the form of a hexagonal configuration, which requires that antenna sites be located no more than one-fourth of a cell radius from the ideal location of the center cell. Id.

\textsuperscript{27} See id.

\textsuperscript{28} Susan Lorde Martin, Communities and Telecommunications Corporations: Rethinking the Rules for Zoning Variances, 33 AM. BUS. L.J. 235, 245 (1995). Cellular providers seek to increase the number of cell sites in particular areas to improve quality and coverage. By doing so, cellular providers can challenge their competition for control of the cellular market. See id.

\textsuperscript{29} See Littlejohn, supra note 3, at 250.

\textsuperscript{30} See id.

\textsuperscript{31} See id.

\textsuperscript{32} See Hearings, supra note 12, at 191. Transmitters must be located in areas of exchange – where people live, work, and travel – or the system will not work. See id.

\textsuperscript{33} See Martin, supra note 28, at 250 (discussing the conflict of interest created by the financial interest of nearby landowners).

\textsuperscript{34} See Steward, supra note 9, at 78 (describing the war waged by citizens and municipal zoning boards against cellular providers seeking to build towers).

\textsuperscript{35} See id. A group of residents in Connecticut who do not want cell towers
The NIMBY theory encompasses a number of concerns and principles. One concern revolves around maintaining property values near proposed tower sitings. Residents often argue that cellular towers destroy the aesthetics of the neighborhood, resulting in falling property values. A second concern of NIMBYs focuses upon preserving the health of citizens who live near the proposed cellular tower. Some citizens allege that the electromagnetic fields emitted by cellular towers pose health risks to those living nearby. A third concern focuses on environmental preservation and maintaining "a less-commercial quality of life." The construction of a cellular tower requires the destruction of surrounding property, which scares the landscape and industrializes the area. A fourth NIMBY principle centers on battling big business, which NIMBYs see as being driven by nothing more than sheer greed. Municipal residents often believe the selected tower locations meet the needs of cellular providers, but fail to accommodate the community's best interests. Coupling cellular providers' and NIMBYs' conflicting interests with the growing demand for cellular service, it is no surprise that these opponents are perpetually waging bitter and protracted battles.

36. See Steward, supra note 9, at 78 (discussing the view that maintaining property values outweighs the benefits that cellular access confers to the community).
37. See Daniel R. Mandelker, Land Use Law 459-61 (3d ed. 1993). A majority of courts hold that aesthetics alone constitute a legitimate governmental purpose for regulating land use. See id. The United States Supreme Court has adopted the "aesthetics alone" standard, stating that "[i]t is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." Berman v. Parker, 348 U.S. 26, 33 (1954).
38. See Steward, supra note 9, at 78.
39. See Martin, supra note 28, at 241-44. Martin argues that even if fears about electromagnetic field ("EMF") radiation are unsubstantiated, the fear itself reduces the value of homes located near cellular towers. See id. (noting that Congress authorized a $65,000,000 research program to determine whether EMF is harmful to human health and that a final report will be received by the President on September 30, 1997). But cf. Telecommunications Act of 1996, 47 U.S.C.A. § 332(c)(7)(B)(iv) (West Supp. 1996) (stating that cellular towers meeting Federal Communication Commission safety and health guidelines cannot be challenged on the grounds that the tower siting will adversely affect local residents' health).
40. Martin, supra note 28, at 235.
41. See id. at 236.
42. See id.
As demand for cellular service escalates, cellular providers search for additional tower locations. Yet, most zoning ordinances do not specify where cellular towers may be located. Moreover, the recent development of cellular technology has simply outpaced the ability of local zoning boards to establish ordinances applicable to cellular siting. As a result, zoning boards must review their respective laws, balance the interests of their communities, and attempt to locate cellular towers at sites mutually beneficial to the provider and the municipality. The political power of local residents often influences this difficult balancing act, resulting in the rejection of tower proposals. Thus begins the battle between the cellular provider and the municipality.

A cellular provider has two options if its proposed site does not conform to the zoning ordinance, if such an ordinance exists. First, the provider may apply for a special exception. A special exception grants a provider a conditional or special use permit in a certain area if the terms of the ordinance are met. In many cases, however, zoning ordinances do not allow exceptions for cellular siting.

Second, when a zoning ordinance does not provide for an exception, a cellular provider may instead apply for a variance. Most courts require that applicants for a variance have a legal interest in the property. In recent years, however, some courts have allowed parties without a legal interest, but who are aggrieved or interested parties, to seek variances. A cellular provider initially must demonstrate that it falls within one of these categories if it hopes to erect a tower.

In contrast to an exception, which courts grant when the applicant

43. See Littlejohn, supra note 3, at 248.
44. See Hearings, supra note 12, at 191. Cellular providers charge that the local zoning board balance tilts in favor of communities, because zoning boards “try to force all wireless providers to place all facilities in a few designated locations within the community.” Id. They assert that transmitters must be located in areas of traffic in order for the system to work. See id. Conflict arises when the community’s property allocations do not satisfy the providers’ needs.
46. See id.
49. See id. at 168.
50. See id.
satisfies certain conditions, zoning boards issue variances when the applicant suffers a hardship that is "beyond the 'spirit of the ordinance'" and that causes "substantial injustice" to the applicant.51 The cellular provider typically carries the burden of proving the existence and extent of the hardship.52 Providers may seek either an area variance or a use variance.53 As can be expected, inconsistent applications of variance law abound due to the ambiguous and subjective nature of interpreting the hardship standard.54

In addition to wielding the power to deny variances and exceptions, a zoning board maintains another defense against cellular providers seeking tower sites. When faced with difficult decisions, a zoning board may issue a moratorium on siting proposals. A moratorium grants the board an extended period of time to analyze the proposal more carefully before deciding to grant or deny it.55 Cellular providers generally challenge moratoria because a delayed zoning decision inhibits a provider's business, resulting in lost income.56 If the zoning board denies the variance after the moratorium period expires, the cellular provider may contest the de-

51. Id.
53. See id. An area variance does not involve a use which the zoning ordinance prohibits, whereas a use variance permits land to be used in a manner that is ordinarily proscribed. See id.; 3 ROBERT M. ANDERSON, AMERICAN LAW OF ZONING §§ 18.06-.07 (2d ed. 1977). A zoning board will grant an area variance if the applicant shows that strict compliance with the zoning law will cause "practical difficulties." See Hoffman, 374 N.E.2d at 108; Wilcox v. Zoning Bd., 217 N.E.2d 633, 635 (N.Y. 1966); Village of Bronxville v. Francis, 135 N.E.2d 724, 725 (N.Y. 1956). By contrast, a zoning board will grant a use variance if the applicant can meet the heavier burden of showing unnecessary hardship. See Hoffman, 374 N.E.2d at 108. A use variance results in a greater deviation from the ordinance and likely will have a more adverse impact on the community; hence, there is a greater burden of proof on the applicant. See id.; National Merritt, Inc. v. Weist, 361 N.E.2d 1028, 1031 (N.Y. 1977).
54. See HAGMAN & JUERGENSMeyer, supra note 45, § 6.3, at 168. A number of reasons have been offered to explain the vast body of law variance and exception provisions generate. First, a grant or denial of an exception or variance often has drastic economic repercussions. Second, a multitude of administrative bodies apply substantially different rules when making zoning decisions. Third, the persons who sit on zoning boards may possess great political, economic, and practical sense, but lack technical expertise. Fourth, courts often invite a "judicial rehash of the issues involved" because they balk at deferring to the judgments of seemingly inadequate zoning boards. Id.
55. See, e.g., Sprint Spectrum, L.P. v. City of Medina, 924 F. Supp. 1036, 1039-40 (W.D. Wash. 1996). In Sprint Spectrum, the court regarded the moratorium as a short-term suspension of permit-issuing while the community gathered additional information. Id. at 1040. The court also held that a local government cannot be forced to make a decision on a rigid timetable in order to meet the economic needs of the cellular provider. Id.
56. See id. at 1038.
cision before the zoning board of appeals, if one exists. As a final resort, the provider can seek judicial review.

The procedures local zoning boards use when considering site proposals fail to address the conflicts that arise between municipal zoning boards and cellular providers operating on a national level. Standards for accepting and denying variances differ with each zoning board. Such inconsistencies compel cellular providers to challenge zoning decisions. State courts ultimately are forced to interpret various zoning ordinances when considering whether to affirm a board decision. Unfortunately, state courts, confronted with numerous ordinances, rulings, and policies, have not clarified the standards for granting or denying variances for cellular providers. Consequently, a number of standards have developed.

IV. THE WAR UP UNTIL THIS POINT: A BRIEF HISTORY LESSON

Cellular providers must apply to local zoning boards for either special exceptions or variances in order to construct cellular towers. Because of the subjective standards for variances and exceptions, local zoning authorities possess vast discretion to determine the fate of a cellular tower proposal. To meet zoning requirements and to avoid litigation, cellular providers argue that they provide an essential service to the community and, as a result, they should be deemed a public utility. This classification benefits cellular providers because courts give much deference to public utilities in zoning matters. The public utility standard requires a

57. See Hoffman, 374 N.E.2d at 108. The New York Court of Appeals asserted that a zoning board of appeals does have the power to issue a variance. See id.
58. See HAGMAN & JUERGENSMEYER, supra note 45, § 6.3, at 168.
59. See id.
60. See id. Before going to court, however, plaintiffs first must exhaust their administrative remedies. See id.
61. See supra notes 45-54 and accompanying text (discussing special exceptions and variances).
63. As part of a variance application, zoning boards have required applicants to show unnecessary hardship in conforming with the zoning ordinance. See Otto v. Steinhilber, 24 N.E.2d 851, 852-53 (N.Y. 1939). To establish unnecessary hardship, courts traditionally have required the applicant to show: 1) that the land cannot yield a reasonable return if it is used only for the purpose allowed by the ordinance; 2) that the circumstances that cause the hardship are unique to
cellular provider to demonstrate that its cellular tower would have only a "minimal" burden on the community. Thus, the cellular provider need not meet the "unnecessary hardship" standard applicable to non-utility variance applications. State courts, however, have not uniformly accepted this argument, resulting in inconsistency among differing jurisdictions. The following two subsections provide case studies of the two positions state courts typically take and illustrate the reasoning commonly applied.

A. Cellular Telephone Co. v. Rosenberg: Accepting the Public Utility Argument

In Cellular Telephone Co. v. Rosenberg, the cellular provider, Cellular One, informed the local planning board of Dobbs Ferry, New York, that it wanted to construct a cellular antenna on an existing water tower. The water tower was on the grounds of a nonprofit corporation licensed to treat and house neglected children. Cellular One asserted that building the land and not the general neighborhood; and 3) that the requested use will not change the character of the community. See id. at 853. However, when courts regard an entity as a public utility, a different standard applies. See Hoffman, 374 N.E.2d at 109. When a public utility applies for a variance, the unique circumstances surrounding the land may result simply from the particular needs of the utility, which inevitably create an impact on the neighborhood. Courts thus have elected to analyze the public necessity for the proposed use when determining whether to grant or deny the variance. See id. (stating that a court must consider the effect the denial of the variance will have on the utility's customers); Long Island Lighting Co. v. Griffin, 74 N.Y.S.2d 348, 349-50 (N.Y. App. Div. 1947).

a tower would allow it to provide greater reception and service to cellular users within the area. At the time, many gaps existed in the cellular provider's system, due to the large intervals between existing antennas. As a result, the quality of the connection and the reception suffered.

The proposed site was zoned as an educational district which did not permit cellular siting as a use. Therefore, Cellular One applied for a permit to begin installation. The planning board denied Cellular One's permit application because the chosen site was not zoned for cellular services. Shortly after the denial, Cellular One applied for a use variance. Cellular One explained that it selected the proposed site because of its natural elevation, the existing water tower, its location away from the city, and its proximity to highways. In addition, Cellular One argued that it was a public utility and was therefore entitled to a lower standard of review for the variance. The zoning board disagreed and denied the use variance, citing as controlling factors health concerns for nearby citizens and the lack of public utility status.

The court of appeals affirmed the trial court's finding that Cellular One was, in fact, a public utility for zoning purposes. According to both courts, Cellular One sufficiently possessed the characteristics outlined under the general definition of a public utility. The appellate court held

69. Id.
70. Id.
71. Id. Many of the calls in Cellular One's service area reportedly were interrupted or disconnected due to the lack of antennas. Interference, static, and cross-talk also were reported, rendering many calls inaudible. See id.
72. Id. at 992.
73. Rosenberg, 624 N.E.2d at 992.
74. Id.
75. Id.
76. Id. By using an existing water structure, Cellular One would not need to construct another tower for the antenna, which it contended would be spatially beneficial for the community. Id.
77. Id.
78. Id.
79. Rosenberg, 624 N.E.2d at 992. In denying the variance, the board asserted that Cellular One failed to prove that: (1) the land would not yield a reasonable return if used solely for the purpose allowed by the zoning statute; (2) the circumstances of Cellular One were unique and not related to the general condition of the neighborhood; (3) a public necessity existed for its service or that it was a public utility for zoning purposes; (4) health hazards did not exist; and (5) there were no alternate sites that would accommodate Cellular One's business. Id.
80. Id. at 993; see also 2 Anderson, supra note 53, § 12.32, at 568-69. A "public utility" has been defined as "[a] private business, often a monopoly, which provides services so essential to the public interest as to enjoy certain privileges such as eminent domain and be subject to such governmental regulation as fixing of rates, and standards of service." Id.
81. Rosenberg, 624 N.E.2d at 993. Characteristics of a public utility generally
that if the service is deemed "necessary" for the community, and if the burden on the community is minimal, then the variance should be granted. The appeals court concluded that Cellular One's proposal met both conditions. Thus, Cellular One successfully met the zoning criteria applied by local authorities because it qualified as a public utility.

B. Akron Cellular Telephone Co. v. City of Hudson Village: Rejecting the Public Utility Argument

In Hudson, Ohio, Cellular One, through Akron Cellular Telephone Company, proposed to construct a cellular tower on a site that did not meet the city's zoning ordinance. Rather than apply for a special exception or a variance, Cellular One sought an exemption from the zoning requirements by asserting that it was a public utility that provided an essential service to the community. The zoning inspector denied Cellular One's application for an exemption, reasoning that the provider did not qualify for public utility status and did not provide an essential service. The board of zoning and building appeals upheld the zoning inspector's
decision, as did the trial court upon appeal.88

The Ohio Court of Appeals agreed that Cellular One failed to provide an essential service and thus did not qualify as a public utility.89 The majority opinion specifically noted that Cellular One did not meet the essential service standard90 and did not possess eminent domain powers,91 two conditions necessary to qualify as a public utility under the applicable zoning ordinance.92 Even if Cellular One had successfully argued that it provided essential services, the lack of eminent domain powers prevented it from attaining public utility status.93 Thus, Cellular One was denied a zoning exemption because it failed to qualify as a public utility.94

88. Id.
89. Id. at *2. Like the trial court, the Ohio Court of Appeals concluded that the cellular provider did not satisfy the requisite elements to acquire public utility status. In addition, the court of appeals rejected the cellular provider’s contention that a state statute defined cellular telecommunications providers as public utilities with respect to municipal zoning regulations. Id.
90. Id. The court examined the relevant zoning code provision that provides a nonexclusive list of activities qualifying as essential services and that thus are exempt from zoning restrictions. Id. at *3. The list provided:

Essential services . . . would include services such as the erection, construction, alteration, or maintenance by public utilities or municipal or other governmental agencies, of underground and overhead gas, electrical, steam or water transmission or distribution systems, collection, communication, supply or disposal systems, including poles, wires, mains, drains, sewers, pipes, conduits, cables, fire alarm boxes, police call boxes, traffic signals, hydrants, and other similar equipment and accessories in connection therewith; reasonably necessary for the furnishing of adequate service by such public utilities or municipal or other governmental agencies or for the public health or safety or general welfare, but not including buildings.

91. Akhon Cellular, 1996 WL 577661, at *2. The trial court discerned, and the appellate court corroborated, that the essential services list was limited to the type of public utilities that have the power of eminent domain. The record failed to disclose any evidence that the cellular provider held the power of eminent domain. Id. at *4. In addition, the cell provider failed to allege that it did have such powers. Id.
92. Id. at *3.
93. Id. at *4.
94. The concurring opinion agreed that Cellular One was not exempt from the zoning ordinance because it did not possess the requisite eminent domain powers. See id. (Reece, J., concurring). However, the concurring opinion also stated that cellular providers may qualify as public utilities in cases where significant use and public need for expanded cellular services so dictate. The concurring opinion credited this possibility to the “advent of deregulation,” which has opened the door to regarding cellular providers as public utilities. The confluence concluded by warning that the court must balance the conflicting needs and rights associated with cellular siting:

The legislators, both state and local, must be mindful of the created need for services and the infringement upon individuals’ property rights
C. A Comparison of the Case Studies: Acceptance Versus Rejection of the Public Utility Argument

Rosenberg and Akron Cellular highlight the inconsistencies among various jurisdictions' zoning decisions. In both cases, Cellular One aimed to expand its cellular services by proposing additional cellular sites. Each court, however, subjected the proposals to different zoning standards. In Rosenberg, the New York Court of Appeals deemed Cellular One a public utility because its services were necessary and the burden the proposed siting posed to the community was minimal. By contrast, the Ohio Court of Appeals in Akron Cellular refused to identify Cellular One as a public utility because it did not provide an "essential service" and lacked eminent domain powers.

Such disparate standards place cellular providers in a difficult position. Cellular providers perform business operations on a national level by providing coverage to many, if not all, states. State and local zoning decisions, however, vary from state to state. A cellular provider like Cellular One may be regarded as a public utility in one jurisdiction and as a private enterprise somewhere else. This creates confusion and frustration for cellular providers attempting to meet society's cellular needs. Ultimately, these conflicting standards interrupt the development of a cellular provider's system and create significant economic challenges to the provider. In addition, the uncertainty prevents any calculated preparation to develop the cellular infrastructure. As the cases above demonstrate, cellular providers, uncertain and frustrated over jurisdictional inconsistency, commonly appeal zoning decisions. The resulting litigation and subsequent appeals only discourage cooperative efforts among cellular providers, zoning boards, and municipal residents.

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to provide those services. We want and need new and expanded services. We don’t want the mechanical apparatus, towers, in our back yards. The legislators must balance these conflicting needs and rights.

Id. at *5. Unfortunately, the concurring opinion failed to provide any guidance as to how to strike such a balance. See id.


96. See Hearings, supra note 12, at 191 (asserting that "undue costs" imposed by local zoning boards through restrictive zoning policies "shortchange their constituents who would be better served by regulators that encourage networks to flourish"); Phillip Rosario & Mark F. Kohler, Commentary, The Telecommunications Act of 1996: A State Perspective, 29 Conn. L. Rev. 331, 349 (1996) (stating that the amendments to the Telecommunications Act of 1996 sought to foster competition among cellular providers).
V. THE PROPOSED TRUCE: THE TELECOMMUNICATIONS ACT OF 1996

In 1996, Congress amended the Telecommunications Act to govern, monitor, and facilitate the technological development of telecommunications. Speciﬁcally, Congress responded to the evolution of modern communications by attempting to resolve the cellular siting conﬂicts that have surfaced. It amended the Act by preempting local governments' cellular siting authority to some extent. By doing so, Congress altered an area of regulation traditionally occupied by state and local governments.

The Act limits local and state zoning authorities' control over cellular tower siting. Simultaneously, it preserves the traditional authority of a state or local government "over decisions regarding the placement, construction, and modiﬁcation of personal wireless service facilities." The Act is not intended to abrogate local zoning authority over cellular siting; rather, it attempts to limit local authority in order to accomplish the national policies and standards of developing a competitive cellular infrastructure. The Act professes to balance local zoning authority and the needs of its residents with federal policy and the needs of cellular providers. The signiﬁcant provisions directed at local zoning requirements are discussed below.

97. This Note limits its analysis to the newly-enacted provision dealing with cellular antenna location. See 47 U.S.C.A. § 332(c)(7) (West Supp. 1996). The 1996 amendments address numerous telecommunication concerns and consequently raise issues beyond the scope of this Note. See generally id. §§ 151-614.

98. See id. § 332(c)(7)(A).

99. See Rosario & Kohler, supra note 96, at 347.

100. The portion of the Act limiting local zoning boards' control over cellular tower sitings contains ﬁve provisions. See 47 U.S.C.A. § 332(c)(7)(B)(i)-(v). The third provision requires local authorities to provide substantial evidence and written ﬁndings to support any decision to deny a cellular provider's request for a tower location. Id. § 332(c)(7)(B)(iii). Because courts applied this standard when reviewing zoning boards' decisions prior to the Act, this provision does not alter the duty imposed upon zoning boards when they issue ﬁndings on the placement of cellular towers. See, e.g., Clark v. Waupaca County Bd. of Adjustment, 519 N.W.2d 782, 784 (Wis. Ct. App. 1994) (applying the substantial evidence test to determine the appropriateness of ﬁndings on tower siting); see also H.R. CONF. REP. No. 104-458, at 207-09 (1996) (identifying the substantial evidence test as the standard for review of agency actions), reprinted in 1996 U.S.C.C.A.N. 121, 223. Consequently, this provision is not discussed in this Note.


102. See Rosario & Kohler, supra note 96, at 349.
A. Prohibiting Unreasonable Discrimination Among Cellular Providers

The first provision prohibits local authorities from unreasonably discriminating among competing cellular providers during the zoning process. The provision ensures that a state or local government will not unreasonably favor one competitor over another when making its siting decisions. Similarly, the provision prohibits local zoning authorities from enacting zoning laws that effectively banish cellular providers from an area. In other words, a municipality cannot enact zoning laws to prevent cellular towers from sprouting within its community. This provision has the most marked effect upon municipalities and their zoning laws. The municipality must deal with cellular providers, must accept cellular towers within its community, and must provide all cellular providers an equal opportunity to propose and possibly acquire tower sites.

A number of policy reasons support this provision. The congressional mandate prohibiting discrimination requires local authorities to consider the impact of their zoning decisions on the communications marketplace. In addition, much of the Act, and particularly this provision, expresses the need to stimulate competition. When signing the Act, President Clinton emphasized the imperative to lessen government restrictions on telecommunications providers in order to promote competition and private investment.

103. 47 U.S.C.A. § 332(c)(7)(B)(i). The Telecommunications Act now provides that “[t]he regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof – (I) shall not unreasonably discriminate among providers of functionally equivalent services; and (II) shall not prohibit or have the effect of prohibiting the provisions of personal wireless services.” Id.

104. See H.R. CONF. REP. No. 104-458, at 208 (1996), reprinted in 1996 U.S.C.C.A.N. 121, 222. The phrase “unreasonably discriminate among providers of functionally equivalent services” is intended to equip local authorities with the flexibility to treat differently those facilities that create different aesthetic, visual, or safety concerns. Id. at 208, 1996 U.S.C.C.A.N. at 222.

105. See id.

106. See id.

107. See Westel-Milwaukee Co. v. Walworth County, 556 N.W.2d 107, 109 (Wis. Ct. App. 1996). The Act does not strip a municipality of its zoning power. Rather, it intends to strike a balance between local zoning power and free competition by prohibiting local discrimination only if it is unreasonable. Id. (citing 47 U.S.C.A. § 332(c)(7)(B)(i)(I)).

108. See id.

109. See id.

110. See Statement by the President, The White House: Office of the Press Secretary (Feb. 12, 1996). After signing the Telecommunications Act of 1996, President Clinton stated:

This landmark legislation fulfills my Administration’s promise to reform our telecommunications laws in a manner that leads to competition and
by prohibiting siting discrimination, the Act attempts to facilitate competition because it ensures that the marketplace, rather than zoning boards, determines which cellular provider will serve the area.\textsuperscript{117}

B. Requiring Zoning Decisions to Be Made in a Reasonable Period of Time

The second key provision in the Act seeks to provide a smooth and unburdened hearing process for cellular providers.\textsuperscript{118} The provision essentially prevents a state or local authority from delaying the hearing process by requiring those authorities to make cellular zoning decisions within a reasonable period of time.\textsuperscript{114} This provision does not prevent local authorities from issuing moratoria, however.\textsuperscript{115} The provision also does not require local zoning authorities to provide preferential treatment to cellular providers; it only mandates that local authorities consider cellular site proposals within a period that is reasonable for zoning-related decision-making.\textsuperscript{116} In particular, local authorities must render cellular siting decisions that involve a zoning variance or a public hearing within the "usual period under such circumstances."\textsuperscript{117}

\begin{itemize}
\item private investment, promotes universal service and open access to information networks, and provides for flexible government regulation.\ldots
\item In the world of the mass media, this Act seeks to remove unnecessary regulation and open the way for freer markets.
\end{itemize}

\textit{Id.}

\textsuperscript{111} See id.


\textsuperscript{114} \textit{Id.} This provision states:
A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

\textit{Id.; see also} Sprint Spectrum, L.P. v. City of Medina, 924 F. Supp. 1036, 1040 (W.D. Wash. 1996) (ruling that the city of Medina's enforcement of a six-month moratorium to analyze site proposals did not violate this provision).

\textsuperscript{115} See, \textit{e.g.}, Sprint Spectrum, 924 F. Supp. at 1040 (upholding a city's decision to impose a moratorium on site proposals to allow the city to study, deliberate, and gather more information before making a decision to deny or accept a proposed cell site).


This provision comports with Congress' underlying policy of further developing the cellular infrastructure. Consumer demand for immediate and ubiquitous cellular service has presented a significant business challenge to cellular providers. This provision allows providers to maintain the pace of expansion by affording them protection from delayed zoning decisions. Ultimately, such protection prevents local governments from frustrating the development of a cellular infrastructure and impeding consumers' access to cellular services.

C. Limiting the Scope of Environmental and Health Objections to Tower Siting

Another important provision in the Act forbids local authorities from considering any possible environmental or health consequences that may result from cellular tower emissions. As noted previously, environmental and health effects from cellular emissions have been a primary source of local opposition to tower siting. Some providers contend that local emission regulations have been so stringent and unreasonable as effectively to prohibit cellular tower siting in many areas. This provision responds by precluding local authorities from regulating emissions while establishing a national emissions standard.

By prohibiting local zoning boards from denying site proposals for environmental reasons, Congress confiscated a powerful weapon from the residential and municipal arsenal. Municipalities no longer have

118. See Hearings, supra note 12, at 191 (explaining that this legislation intends to increase competition and facilitate the development of the cellular infrastructure). 119. See id. 120. See Westel-Milwaukee, 556 N.W.2d at 109. The court stated that Congress has "tried to stop local authorities from keeping wireless providers tied up in the hearing process" with this provision. Id. 121. See 47 U.S.C.A. § 332(c)(7)(B)(iv) (West Supp. 1996). The fourth clause provides that "[n]o 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 such facilities comply with the Commission's regulations concerning such emissions." Id. 122. See supra notes 39-40 and accompanying text. 123. See Hearings, supra note 12, at 191 (stating that local authorities develop cellular emissions regulations as a political response to the "unfounded claims of a few vocal constituents who wrongly assert that the emissions generated by cell sites pose a health risk"); see also supra note 39 and accompanying text. 124. See Martin, supra note 28, at 236. Professor Martin depicts the tactics that residents and zoning boards use against cellular providers wishing to erect cellular towers within that community. One primary weapon criticized by Martin is the argument that the health and safety of citizens must be preserved against possible EMF radiation from cellular towers. Id.
authority to make emissions considerations; rather, the Federal Communications Commission (FCC) will supply guidelines as to what constitutes acceptable emissions levels. Many environmentalists and residents have opposed, and will continue to oppose, this provision since they doubt FCC studies which conclude that cellular towers do not pose significant environmental and health risks. Until evidence conclusively shows that cellular tower emissions pose no health threat, this provision undoubtedly will generate a great deal of litigation.

D. Providing Expedited Judicial Review of Zoning Decisions

The final substantive provision of the Act affecting tower siting permits cellular providers to seek expedited judicial relief against a local authority. A provider can appeal a zoning decision to a state court or to the federal district court in which the proposed site is located. A party

126. See Martin, supra note 28, at 242. Martin asserts that studies on the effects of EMF on human health and the environment are not complete and therefore are unsubstantiated. Id. In 1992, the congressional research campaign for EMF study performed research and submitted a preliminary progress report on December 31, 1995. See id. A completed study and a final report will not be available until September 30, 1997. See id.; cf. Susan R. Poulter, Science and Toxic Torts: Is There a Rational Solution to the Problem of Causation?, 7 HIGH TECH. L.J. 189, 190 (1992). Poulter notes that the connection between cellular antennas and cancer is not completely substantiated. The primary evidence of causation that residents provide is that several persons who live near cellular antennas have been diagnosed with cancer. According to Poulter, such evidence is not statistically significant. Id.
127. See generally Cindy Sage & Joseph G. Johns, Electromagnetic Radiation: A Case for Relevance in Real Estate Transactions and Eminent Domain, 20 REAL EST. L.J. 193, 193 (1991). Sage and Johns argue that despite recent scientific studies, EMF remains an elusive factor in determining adverse health consequences. Id. According to the authors, such studies have failed to produce reliable results. Id. In addition, the public still fears that EMF can stimulate adverse health consequences. Id. Therefore, the authors assert that the lack of concrete scientific evidence regarding the health effects of EMF, coupled with public perception, indicate that the controversy over EMF has not dissipated. Id.
128. See 47 U.S.C.A. § 332(c)(7)(B)(v) (West Supp. 1996). This limitation provides that 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. Id.
may appeal if a local government's act or failure to act adversely affects it. This provision does not necessarily control the procedures of the local zoning entity as do the other three provisions discussed here. Instead, this provision controls the zoning process by enabling the cellular provider to seek an expedited determination of the local zoning board's action or inaction. This provision may encourage further litigation between cellular providers and local zoning authorities because cellular providers may find it easier to appeal zoning decisions.

Without question, the Act's detailed guidelines represent an attempt to quell the recurring turbulent relations between cellular providers and local residents. The Act attempts to strike a balance between local zoning power and development of the cellular infrastructure. However, a few cases already illustrate the unrelenting frustration and conflict over cellular siting, despite the newly-enacted provisions. As a result, it appears that the Act did not resolve the protracted cellular siting conflicts between cellular providers and municipalities.

VI. IS THE TRUCE OVER? SHORTCOMINGS OF THE TELECOMMUNICATIONS ACT OF 1996

In enacting legislation addressing cellular tower siting, Congress attempted to bring about a truce between cellular providers and municipalities by reconciling their respective interests. The Act protects municipal residents by preserving local siting authority; yet, the Act assists providers in developing a cellular infrastructure by promoting competition. Many...
view the legislation as a tremendous leap forward in telecommunications law because of the balancing act attempted by Congress.¹³⁵ It remains uncertain, however, whether the Act solves all the problems associated with cellular tower siting proposals. Instead, it appears that the Act may have exacerbated some problems. As a result, one commentator correctly dubbed the Telecommunications Act of 1996 the "lawyers' full employment act."¹³⁶

The Act pursues the urgent need to develop the cellular infrastructure by promoting competition.¹³⁷ Cellular providers have responded by inundating local zoning boards with tower proposals.¹³⁸ Only time will tell whether the Act will engender the competition necessary to establish the cellular infrastructure required to meet society's needs. In any event, the Act fails to provide local zoning authorities with an adequate means of managing the deluge of tower proposals. The burden of controlling the growth of the cellular infrastructure ultimately falls upon the local zoning boards. This only serves to overwhelm these agencies since they must accommodate cellular systems without sacrificing local land use needs. To make matters even worse, the Act purports to preserve local zoning authority, yet simultaneously undermines it by placing specific restrictions on the zoning board's authority. Unfortunately, the conflicts inherent in cellular siting are only exacerbated by these restrictions. A critique of the Act's limitations follows.

A. The Continuing Barrage of Proposals: Forcing the Acceptance of Cellular Towers

The first pertinent restriction prevents a local government from prohibiting cellular siting and from unreasonably discriminating among cellular providers.¹³⁹ This provision essentially forces a zoning authority to accept cellular towers into its community and to offer equal opportunities to the many competing providers.¹⁴⁰ As a result, the Act encourages each

Act state that Congress intended to respect local cellular siting authority. The Act then provides limitations on such authority to achieve the necessary balance between localities and providers. See id.


136. Id. at 520.

137. See id. at 543. The Act advances five principles. First, the Act encourages private investment on the "Information Superhighway." Second, the Act promotes and protects competition. Third, the Act opens access to the "Information Superhighway" for both consumers and service providers. Fourth, the Act preserves and enhances the concept of universal service. Fifth, the Act provides flexibility to regulators when immediate changes occur in technology and in the market. See id.

138. See supra note 12 and accompanying text.


140. See id.
provider to propose one or more cellular sites in an attempt to develop cellular systems that furnish reception and coverage superior to their competitors' systems.141

Though it enables the cellular infrastructure to grow, increased competition comes with a price. The competition leads to a mass of siting proposals that local zoning boards must process.142 Because they lack technical expertise in cellular siting, local zoning boards struggle to keep up with the deluge.143 As a result, zoning boards become further inundated with siting proposals. Congress simultaneously expects zoning authorities to balance society's cellular needs with local land use needs. Thus, while the provision results in additional siting proposals, it puts zoning boards in no better position to handle these proposals.

This provision ultimately compels a local zoning board to accept into its community an abundance of towers similarly constructed and performing the same function.144 Many local residents acknowledge the need for cellular progress but consider multiple towers unnecessary and unjustified.145 The competition fostered by the Act creates the potential of transforming some communities into "antenna farms."146 Local opposition to such a prospect likely will continue to surface. Thus, the provision only increases the tremendous burden of settling the conflicting siting interests that zoning authorities commonly encounter.


142. See, e.g., id. at 1037. The city of Medina, Washington is a small community of approximately 5000 residents. The city rests on the eastern shore of Lake Washington and is close to a major state highway and a floating bridge. Consequently, the community's geographical location has caused Medina to become a prime area for wireless telecommunications providers and has the potential to become an antenna farm. See id. Medina has received a flurry of applications for the issuance of special use permits for cellular tower erection. In fact, due to the increase in demand for wireless communication, five different wireless providers have expressed interest in constructing at least one facility in the city. See id. at 1038. The Sprint Spectrum court addressed the fact that companies like Sprint have entered the market more than ten years after other cellular providers and now wish to match the coverage of the existing providers. The court implied that as a result, companies like Sprint have inundated municipalities like Medina with applications for permits and variances. See id. at 1040.

143. See id. at 1039.

144. See id. at 1037. In Sprint Spectrum, five cellular providers sought to locate one or more cell sites in the community, and additional requests were expected. See id. at 1038; see also Michael Levy, Zoning Board to Take Lead on Tower Study, BUFFALO NEWS, Oct. 16, 1996, at B5. Levy writes that citizens generally do not oppose progress but do not like the idea of extra towers when another communications tower is just 1000 feet away from the proposed cell tower. As one citizen put it, "[O]ur neighborhood is going to look like a picket fence." Levy, supra, at B5.

145. See Levy, supra note 144, at B5.

146. See Sprint Spectrum, 924 F. Supp. at 1037.
B. The Reasonable Period Provision: Increasing the Pressure on Local Governments

A state or local government must provide a timely and efficient response to a provider's siting request.147 This provision of the Act attempts to provide a smooth and unburdened zoning process for a provider by limiting the time zoning boards may spend deliberating the decision.148 A provider desires an expeditious zoning decision to facilitate business and to prevent any delays that could allow a competitor to surpass the provider in coverage.149 Consequently, an expeditious zoning process can foster competition by placing all cellular providers on a more level playing field.

Despite its benefits to the cellular provider, an expedited cellular zoning process imposes a significant burden on local authorities. The Act's legislative history indicates that a zoning board must render a decision in the "usual period" of time when the siting request involves a variance or a public hearing.150 The siting of cellular towers, however, is not a "usual" zoning procedure.151 Therefore, the usual period of time for variances and public hearings is insufficient for local authorities to render a reasoned decision on tower siting proposals. The Act fails to accommodate the needs of local zoning boards, which deal with numerous proposals concerning an unexplored and complicated zoning issue.

In addition, the provision fails to define a "reasonable period of time."152 Because this provision has been in effect for a little over a year, no case law guides zoning boards in making this determination. Local zoning boards thus have a great deal of discretion in deciding what length of time is reasonable. The nature of the cellular zoning issue to date suggests that many interpretations will emerge. Consequently, cellular pro-

148. See Sprint Spectrum, 924 F. Supp. at 1040. Despite Sprint's argument to the contrary, the Sprint Spectrum court concluded that requiring action within a reasonable period of time does not force local governments onto a rigid timetable if the situation requires time for inspection, research, and deliberation. To hold that the six-month moratorium was not a reasonable period of time, in the court's view, would afford preferential treatment to the cellular provider. See id.
149. See id. Sprint argued that Medina's moratorium unreasonably discriminated against it in violation of the Act. Sprint also requested that it be placed in the same position as the earlier entrants. Although the Act requires expeditious determinations to promote competition, the court concluded that Medina cannot place Sprint in the same position as the earlier entrants. The Act simply does not go that far to promote competition. Id.
151. See generally supra Part III.
152. See 47 U.S.C.A. § 332(c)(7)(B)(ii). Few moratoria have been implemented for study and deliberation on cellular siting since the passage of the Telecommunications Act of 1996. Thus, there is little precedent to aid construction of the phrase, "a reasonable period of time." Id.
viders likely will challenge the varying moratoria periods they encounter because the differing time periods will appear to be based on arbitrary distinctions. At the same time, zoning boards will implement moratoria based on their interpretation of the standard, uncertain whether their decisions will spawn protracted litigation.

For example, in *Sprint Spectrum, L.P. v. City of Medina*, the court accepted six months as an appropriate moratorium on Sprint's zoning proposal. In *Sprint Spectrum*, the city of Medina, Washington, was reviewing a large number of applications for zoning permits. The numerous proposals suggest that Medina's situation was extraordinary and that the six-month period might not be a reasonable period of time for a municipality under less strenuous circumstances. An unduly long moratorium by a zoning board facing fewer proposals may represent a barrier or prohibi-


155. 924 F. Supp. at 1037.

156. Id.; see also *Medina Applies Another Hold on Cell Towers*, SEATTLE TIMES, Oct. 29, 1996, at B2 (reporting that residents asked Medina city officials to challenge that part of the Act which requires cities to accept cellular towers within their boundaries).

157. See Barrie Tabin, *NLC Champions Cities' Authority in Cell Tower Siting*, NATION'S CITIES WKLY., Feb. 24, 1997, at 1. The Cellular Communications Industry Association (CCIA) has filed a petition requesting the FCC to preempt the ability of local governments to institute brief moratoria over applications for tower siting permits. The National League of Cities (NLC) filed a response opposing the CCIA's petition. The NLC argued that the Telecommunications Act requires courts, not the FCC, to hear challenges to tower decisions. See id.
tion to siting cellular towers. Conversely, a zoning board may have fewer proposals to consider, but the board may regard those proposals as more complicated than other zoning issues. That situation may warrant the six-month moratorium established by Sprint Spectrum. In sum, Sprint Spectrum does not clarify the reasonable time standard, thus leaving zoning board moratoria open to challenge.

C. Environmental and Health Fears of Residents: Ignoring the Concerns?

The Act prohibits local authorities from regulating the location of a cellular tower on the basis of environmental and health effects, provided the proposed facilities comply with the FCC's regulations. In so doing, Congress established a uniform environmental standard that applies to cellular providers in every state. Cellular providers' siting proposals will no longer be denied based on arbitrary environmental findings. This reduces the time and effort needed to ascertain, comply with, or contest a local zoning board's unique environmental standard. Without this provision, a cellular provider would be subject to a wide range of environmental standards, which would be inefficient and costly.

At the same time, this provision divests municipalities of a significant defense against cellular tower construction. Local residents frequently cite environmental hazards when opposing cellular tower siting within their communities. The Act requires that the FCC standards be followed. Nevertheless, environmental concerns about cellular towers have not been totally disproved by FCC tests and standards. In fact, Congress does not expect the final research report on electromagnetic fields ("EMF") and their effects on human health to be completed until September 30, 1997. The Act fails to quell fears over EMF health risks and fails to address related concerns, such as diminished property values. As a result, local residents fearing the loss of property values will continue to pressure zoning boards to deny tower proposals, thereby slowing the zoning process. Thus, the provision fails to alleviate the existing conflict between local residents and cellular providers.

159. See id.
160. See supra notes 39, 126 and accompanying text.
161. See supra notes 39, 126 and accompanying text.
162. See Neighbors Opposed to the Tower v. Connection Siting Council, No. CV 960557602S, 1996 WL 409320, at *1 (Conn. Super. Ct. June 18, 1996). Defendant Springwich Cellular Limited Partnership was granted a certificate to construct a 180 foot cellular tower and associated equipment. On appeal, plaintiffs Neighbors Opposed to the Tower alleged that the construction of the tower lowered their property values and interfered with their right to enjoy their property. Id. at *2. The court did not rule on this issue, however, because the plaintiffs had failed to exhaust their administrative remedies before appealing. Id.
D. Providing Expedited Judicial Review: Facilitating Competition or Encouraging Litigation?

A cellular provider may pursue an expedited judicial hearing when dissatisfied with a zoning decision or when a zoning board has failed to act on a proposal. An expedited appeal process promotes competition by securing an immediate second determination for providers, who invest considerable time and expense in developing cellular tower siting proposals. Providing a judicial appeal from a delayed zoning decision also fosters competition by encouraging timely zoning decisions.

Expedited review ultimately undermines the authoritative power of zoning board decisions. Such a process merely invites cellular providers to bring suit when a zoning decision is delayed or is unfavorable. Because cellular providers base their site proposals on technological strategy and economic expense, a judicial appeal may seem the easier and more economical alternative to a provider when the zoning board has denied the original site proposal. For the zoning board, the appeals process can continue indefinitely as each provider seeks expedited judicial action. Thus, although the provision fosters competition among cellular providers, it leaves the zoning board virtually powerless and places the board in an indefinite zoning battle.

The Act successfully acknowledges consumer need by promoting competition. However, the Act’s failure to forge a reasonable truce in the cellular war counters such success. A collocation amendment would offer the reasonable truce lacking in the existing Act. In short, a collocation amendment would advance the need for developing a cellular infrastructure, but would also dissipate the existing conflicts and ease administrative strain on state and local zoning boards.

VII. CAN’T WE ALL JUST GET ALONG?
THE COLLOCATION ALTERNATIVE

The cellular industry has experienced tremendous growth in recent years as cellular phones have become an accepted communication medium. To satisfy the explosive demand for cellular service, cellular providers attempt to construct towers at a corresponding pace. Not surprisingly, consumer demand for universal cellular coverage has precipitated an influx of new cellular providers into metropolitan markets. With

164. See supra note 149 and accompanying text.
165. See supra notes 22-28 and accompanying text.
166. See El Nasser, supra note 4, at A3.
167. See supra notes 8-12 and accompanying text.
168. See Chuck Jones, Shared Cell Sites, CELLULAR BUS., Aug. 1993, at 18, 19. In the first 10 years of service, cellular providers distinguished themselves primar-
such expansion of cellular services, providers entering established markets must compete against existing and unwelcoming providers. As a result, the new providers search for tower locations that provide reception at a level competitive with or superior to existing providers. Cellular towers thus have begun to dot the landscape of America's cities. Therefore, the Act must strike a balance between fostering competition and controlling the growth of cellular towers. An amendment requiring collocation of cellular towers provides that necessary balance.

ily by covering a particular neighborhood. Such "territorial claims" yield large numbers of new customers for a cell provider. As a result, a single cellular site enabled a provider to monopolize a particular market and to generate a significant revenue statement on that market as well. Initial cellular siting was critical for cellular providers attempting to establish themselves in the cellular market, as such standing rarely was challenged by competing cell providers. See id.

The early days of cellular service provided cell siting on existing constructs, such as radio facilities, building rooftops and commercial or industrial areas along primary traffic routes. The process of siting these cellular facilities was lengthy and expensive due to "start-up learning curves, resource constraints, education of zoning and planning jurisdictions, federal or state regulations and, often, equipment delivery." Id. In addition, providers intended for these originating sites to serve a large diametric area, which allowed them flexibility in their site searches. Thus, such factors as land availability, lease/purchase economics, zoning constraints, and ground elevation were not critical problems in the early years of cellular siting. However, providing equivalent or superior coverage requires construction of new and numerous cellular towers. See id.

In contrast to the original cellular sites, the new sites promise higher quality and critical capacity. Possible locations for cellular sites are diminishing in number, ultimately reducing the providers' flexibility in determining a proposed location. See id.; see also Chapple, supra note 12, at A1 (asserting that "when it comes to radio towers for cellular telephones, federal deregulation means local proliferation"); Julie Carr Smyth, Telephone Industry Gets More Crowded, TIMES UNION (Albany, N.Y.), Nov. 20, 1996, at E1 (pointing out that the freedom afforded to cellular providers by the Act has precipitated an increase in cellular competition; the "providers of old," such as AT&T, MCI Communications Inc., Nynex Corp., and Sprint Communications Inc., have now entered each other's markets). As evidence of this potential proliferation, Chapple notes that the FCC has recently issued a number of new licenses for cellular telephone companies seeking to compete in the telecommunications market. As a result, these new companies are "moving quickly to erect towers." Chapple, supra note 12, at A1. According to the Erie County Planning Director, new players in the area, such as Sprint Spectrum, are attempting to develop in one year a cellular network that took existing providers, such as Cellular One, a decade to build. Such hurried attempts have created a "lot of the stress" on the area. Levy, supra note 12, at A1.

Territorial claim on a service area was a brief phenomenon. As society's need for cellular service escalated, so did competition. Emerging competitors soon attempted to match - and then attempted to exceed - the coverage area provided by existing cellular providers. See id.

See supra note 8 and accompanying text.
A. **Collocation Defined**

A collocation amendment to the Act would require competing cellular providers to share the same cellular tower when technologically feasible. Fortunately, “where sites are needed the most has never been a mystery,” so cellular providers intending to collocate generally would not encounter significant technological challenges. Collocation, however, does accommodate the needs of several cellular providers. Determining the precise location of a collocated cellular tower, therefore, could require some deference by state and local zoning authorities.

Collocation compels cellular providers to combine their siting efforts. As a result, providers must work with each other and must arrive at an agreement to govern their shared occupancy. A collocation agreement between cellular providers could take multiple forms. Specifically, collocating providers could structure the agreement as a lease, a sublease, or a license. Regardless of the form selected, the collocation agreement should address facility construction, operation, and maintenance, as well as any business concerns associated with collocation.

B. **Municipal Benefits**

Municipal residents would reap many benefits under a collocation plan. First, constructing only one tower shared by multiple providers would reduce local anxiety over aesthetic considerations. Collocation would quell local fears of cellular tower proliferation and the potential

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172. See Webster's Third New International Dictionary 446 (3d ed. 1986) (defining “collocate” as “to set or arrange in a place or position; . . . to set side by side”).

173. See Snyder, supra note 21, at 70. Collocation would not be feasible when it creates frequency interference, known as intermodulation, or where a gap in signal coverage exists. See id.

174. See Jones, supra note 168, at 20. Primary coverage areas are determined by geographic and market statistics. Also, consumer traffic data determine the number of channels needed for a particular site. Jones asserts that collocation implementation would be based on “logical factors of coverage market criteria and agreed upon between the carriers.” Id.

175. See Evans v. Shore Communications, 685 A.2d 454, 457 (Md. Ct. Spec. App. 1996). Shore Communications proposed to construct a cellular tower on which it intended to collocate multiple cellular providers. Shore Communications described the process of selecting a site to collocate as “very delicate” because it accommodates the various needs of the tower’s users. See id.

176. See Snyder, supra note 21, at 70. Under a lease agreement, the lessee gains the right to place its antenna on a tower or building that already hosts a number of antennas. Under a sublease agreement, the sublessee gains the right to place its antenna on a tower that already has been leased by a primary cellular provider. Under a license agreement, occupancy on the existing cellular tower is terminable at will. See id.

177. See id.
conversion of their communities into "antenna farms." 178 Second, collocation would minimize health concerns as fewer cellular towers would enter residential areas. Third, collocation would better serve the environment and promote a less-commercial quality of life. Fourth, local frustration directed at cellular providers would subside since fewer towers would result in less intrusion into the community. Eased frustration may encourage local zoning boards to apply "public utility" status to the teamed providers, a much lower and desired standard for providers.

C. Cellular Provider Benefits

A collocation requirement would provide a number of benefits for cellular providers as well. Cellular providers ultimately would save money under a collocation requirement. First, construction of a cellular tower requires significant funds. Providers currently spend a great deal of money simply duplicating other providers' siting efforts. 179 A shared effort would reduce the financial demands of erecting a cellular tower. Second, "frequency licensing, tower clearance approval[,] and local zoning permission" would no longer delay cellular providers. 180 Collocation would decrease the likelihood of delays that presently result from numerous tower zoning proposals. Cellular providers would avoid the frustration of zoning decisions that are based on constituent influence rather than zoning policies and regulations. 181 Third, collocation would allow providers to satisfy the needs of subscribers in a larger service area which, in turn, would boost revenue. 182

D. Zoning Board Benefits

A collocation requirement would ease the administrative strain on local zoning boards. Zoning boards have become inundated with proposals from cellular providers. As a result, zoning boards have been forced to delve into a new area of zoning without much guidance. As discussed previously, Congress, through the Act, has forced local authorities to deal

179. See Jones, supra note 168, at 19.
181. See DEEMS & JENNETTE, supra note 20, § 1.01[2], at 1-8. Local constituents often influence zoning board decisions. The fact that zoning boards often consider proposals in light of the "broader contexts of the community," rather than strictly applying zoning regulations and guidelines, further hinders the provider's cause. Thus, an application which appears to comply with the zoning regulations and procedures may be denied because its proposal is unpopular with constituents. See id.
182. See Goryance, supra note 180, at 24.
with cellular towers, but it has not equipped them with the means to control their growth. Zoning boards often react by issuing moratoria to battle the flood of tower proposals. A collocation requirement would simplify the administrative process for zoning boards by decreasing the number of proposals. A more efficient and cost-effective administrative process benefits the municipality and the cellular provider.

E. Development of the Cellular Infrastructure

Collocation can provide benefits to cellular providers, municipal residents, and zoning boards without abandoning the purpose of the Act. The Act seeks to encourage private investment, promote and protect competition, increase access to the “Information Superhighway,” promote universal service, and provide flexibility to regulators. Collocation would continue to encourage private investment. Collocation diminishes expense for cellular providers, and consequently, it would encourage investments that would not occur without the cost-efficiency of collocation. Collocation would continue to promote competition as providers would distinguish themselves by customer care, pricing, and enhanced services, rather than by coverage and reception accomplished only through duplicated cellular towers. Collocation would continue to provide access to information and universal service because the sites, though shared, would preserve premium coverage. Finally, collocation would not infringe upon regulation flexibility.

Requiring providers to collocate falls within the scope of authority of local governments. States maintain police power over land use regulation. Most states authorize local governments to exercise this power.

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184. See Symposium, supra note 135, at 543.
185. See supra Part VII.C.
186. See supra Part VII.D.
187. See id.
188. The Constitution mentions nothing about police power, but its exercise was reserved to the states through the Tenth Amendment. See U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”). Police power is defined as the “authority to regulate private activity, including the use and development of land, for the protection of the public health, safety and welfare.” Deems & Jennette, supra note 20, § 1.03[1], at 1-25.
189. See Deems & Jennette, supra note 20, § 1.02[1], at 1-13. Local governments do not possess inherent police power; only states have this power. There must be some type of legislation or constitutional delegation of authority from the state to the local government. Without a delegation of police power, local governments cannot regulate land use through zoning ordinances. Most local governments acquire their power to regulate land use from enabling legislation that designates the local government as the local land use authority. See id. § 1.03[2], at 1-28.
Local governments use their police power to prevent and resolve land use conflicts, a primary goal of zoning law. In so doing, local governments attempt to balance the competing interests of landowners and those intending to develop neighboring property. Some local governments have attempted to strike such a balance by encouraging collocation of cellular towers. The collocation of facilities historically has been viewed as a local zoning prerogative. Yet, attempts to encourage collocation generally have failed because of competition between cellular providers. Consequently, without government intervention, collocation remains a largely unexplored option.

The failure of local governments to require collocation contravenes the traditional notion that local governments govern and control land use. However, the federal government can preempt a state’s police power and exercise control over land use when the use is “important to the health, safety and general welfare of the nation as a whole.” The Act preempted local governments’ power to ban cellular towers within their communities. It also preempted local governments’ ability to deal with the “politically sensitive” issue of EMF radiation that allegedly emanates from cellular towers.

190. See id. § 1.01[1], at 1-3 to -4.
191. See id. § 1.01[1], at 1-3.
192. See Snyder, supra note 21, at 69. Snyder supports the collocation of cellular towers, arguing that local zoning boards have “made collocation an integral part of the antenna siting equation.” Id.
193. See id.
194. See, e.g., Sprint Spectrum, L.P. v. City of Medina, 924 F. Supp. 1036, 1038 (W.D. Wash. 1996) (“All efforts by the City [of Medina] to date to encourage co-location [sic] have been rejected by wireless providers.”); see also Tony Angelo, Brookfield to Get 2 Cellular Towers: Companies Were Unable to Work out Terms for Joint Use of One Tower, MILWAUKEE J. & SENTINEL, Oct. 14, 1996 (reporting that two cellular phone towers would be constructed instead of one because the competing companies could not agree on terms for sharing a tower owned by one of them); Levy, supra note 12, at A1 (reporting that a new city ordinance required cell providers to document attempts to collocate because cell providers competing for the same potential customers had not been friendly to the idea of collocation). The Cellular Telecommunications Industry Association has stated, “Companies are very aware of the resistance and they don’t come in to a community to make enemies. The first thing they’ll look for are existing water towers, tall buildings. Residential areas are the last choice.” El Nasser, supra note 4, at 3A.
195. See Steward, supra note 9, at 78, 82. According to Roy Moore, vice president of FWT, a manufacturer of cellular towers, “[Y]ou’re going to have two people together who don’t like each other and don’t want to talk to each other. Without government intervention, [collocation] won’t happen.” Id.
196. DEEMS & JENNETTE, supra note 20, § 1.03[2], at 1-28. Congress derives such power primarily from the Constitution’s interstate commerce clause. See id.
198. See id. § 332(c)(7)(B)(iv).
More significantly, Congress preempted local zoning power over wire communications, such as traditional wire phone use. Like the 1996 Act, wire collocation was implemented to foster competition and to provide greater access to information. The FCC contended that increased competition would also reduce prices for available services. Wire collocation requirements have passed constitutional muster and have not been regarded as a taking. As a result, many local zoning authorities have questioned why cellular providers cannot collocate their cellular towers just as wire providers have collocated electrical systems through shared utility poles. The collocation of wire services can serve as an effective model for the collocation of cellular services.

The competing interests of cellular providers and local residents and the proliferation of cellular towers necessitates a collocation amendment to the Act. More significantly, a collocation amendment would ease the administrative strain resulting from cellular providers' competition for new tower sites. Federal preemption is necessary because local governments have been unsuccessful at encouraging collocation themselves.

199. Telecommunications Act of 1996, 47 U.S.C.A. § 251(c)(4)(B)(6) (West Supp. 1996). The Act imposes a duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.


201. See Baynes, supra note 200, at 425.

202. See Leonard M. Baynes, Swerving to Avoid the “Takeings” and “Ultra Vires” Potholes on the Information Superhighway: Is the New York Collocations and Telecommunications Policy a Taking Under the New York Public Service Law?, 18 HASTINGS COMM. & ENT. L.J. 51, 79-81 (1995). Wire collocation does not diminish the value of the property to such a degree that it constitutes a taking. Telephone companies have argued that such regulation interferes with the landowner's investment-backed expectations. However, the relevant space is usually “spare, unused,” and the telephone company will receive rent for such space that would otherwise have been economically unproductive. Economic regulation has been regarded as “very routine” and is not unconstitutional unless the property is confiscated without any rational basis for doing so. See id.

203. See Jones, supra note 168, at 19 (arguing that collocation of cellular services should follow the path of collocated wire services).
With a collocation amendment, municipal residents would control the influx of cellular towers into their communities, and local governments would retain authority to make cellular tower siting decisions. Local governments likely would support such a preemption of their police power. In addition, collocation would provide administrative and financial benefits to cellular providers and would continue to promote the Act's goals.

VIII. CONCLUSION

The Telecommunications Act of 1996 promotes competition and the development of the cellular infrastructure necessary to satisfy society's communication needs. Competition for cellular tower sites, however, has come with a price: Cellular providers have inundated zoning boards with tower proposals. Zoning boards thus face the tremendous task of controlling the rapid growth of the cellular infrastructure. These boards must accommodate the demands of a competitive cellular system while maintaining effective local land use. The Act, however, failed to equip zoning authorities with the means to perform this required balancing act. As a result, the Act fails to solve and only exacerbates the conflicts inherent in cellular siting.

A collocation amendment for cellular siting would assist in balancing the competing interests of providers and municipalities, while easing the administrative burden on state and local zoning boards. Collocation would moderate the pace at which cellular towers would be constructed and would allay residents' fears that “antenna farms” will develop in their communities. Collocation would provide financial benefits to cellular providers while meeting the Act's goal of encouraging competition through services rather than coverage. Collocation also would generate fewer zoning proposals, resulting in more efficient, economical, and reasoned decisions.

The Act was expected to keep pace with society's accelerated communication needs, and it did. As American society clamors for swifter travel on the cellular superhighway, that speed must be limited to prevent any further collisions from taking place. The cellular superhighway, of course, is not built on peaceful ground.

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