PREEMPTING ZONING

ASHIRA PELMAN OSTROW*

This Article argues that Process Preemption siting policies, which impose federal constraints on the local zoning process, prevent localities from excluding land use facilities, such as wind power infrastructure that is significant to achieving national renewable energy policy goals. Part II demonstrates that the cumulative impact of seemingly local land use decisions can result in the exclusion of undesirable land uses (and users) from an entire region, producing land use patterns that conflict with broader state and federal land use goals. Part III argues that Process Preemption promotes development of federally protected land use facilities by (1) compelling local authorities to consider national interests in their decision-making process; and (2) reducing the costs associated with obtaining local land use permits. Part IV argues that Process Preemption would promote the development of wind power because (1) its interjurisdictional framework allows the federal government to establish national land use priorities while preserving local authority over individual siting decisions; and (2) its procedural requirements increase the legitimacy, consistency, and ultimate public acceptance of controversial siting decisions. In addition, it is judicially enforceable. If a locality fails to issue siting permits in compliance with the federal requirements, the court will compel it to do so. The outcome in either case will be consistent with federal policy goals.

* Peter S. Kalikow Distinguished Professor of Real Estate and Land Use Law and Executive Director of the Wilbur F. Breslin Center for Real Estate Studies at the Maurice A. Deane School of Law at Hofstra University. The author wishes to thank Richard Briffault, Nestor Davidson, Alexandra Klass, Katrina Kuh, John Nolon, Erin Ryan, Alan Weinstein, Hannah Wiseman, and Michael Wolf, and the participants of the Local Autonomy and Energy Law Symposium at Florida State University College of Law, for their thoughtful comments and suggestions.

I. INTRODUCTION

Wind power capacity in the United States has grown exponentially over the past decade and is now the largest source of renewable energy in the country.[1] In its recent *Wind Vision* report, the Department of Energy ("DOE") outlines a plan to produce 35% of the nation's electricity from wind by 2050.[2] Achieving the DOE's goal will require a massive expansion of the wind power footprint and a new framework for wind power siting.[3]

In the United States, local governments are primarily charged with regulating the use of land.[4] Despite widespread support for wind energy, project proposals are often met with intense opposition at the local level.[5] All states, even those with centralized siting

---

1. U.S. ENERGY INFO. ADMIN., *Wind Explained: Electricity Generation from Wind*, https://www.eia.gov/energyexplained/wind/electricity-generation-from-wind.php (last visited Nov. 10, 2020); U.S. ENERGY INFO. ADMIN., https://www.eia.gov/energyexplained/us-energy-facts (last visited Nov. 10, 2020).

2. U.S. DEP'T OF ENERGY, WIND VISION: A NEW ERA FOR WIND POWER IN THE UNITED STATES xxiv (2018), https://www.energy.gov/sites/prod/files/WindVision_Report_final.pdf [hereinafter WIND VISION].

3. *Id.* (noting that achieving its goal will require "supporting and enhancing siting and permitting activities"). *See also,* Jesse Heibel & Jocelyn Durkay, *State Legislative Approaches to Wind Energy Facility Siting*, NAT'L CONF. OF STATE LEGISLATURES (Nov. 1, 2016), https://www.capitol.hawaii.gov/session2020/testimony/HB2188_TESTIMONY_EEP_02-04-20_.PDF.

4. Ashira Pelman Ostrow, *Process Preemption in Federal Siting Regimes*, 48 HARV. J. ON LEGIS. 289, 290 (2011) (explaining why local governments have been charged with regulating land); WILLIAM A. FISCHEL, LINCOLN INST. OF LAND POL'Y, *The Evolution of Zoning Since the 1980's The Persistence of Localism*, in PROPERTY IN LAND AND OTHER RESOURCES 259 (Cole & Ostrom, eds., 2012) ("Zoning has remained resolutely local despite (or perhaps because of) political and legal movements seeking to change it."); John R. Nolon, *Calming Troubled Waters: Local Solutions*, 44 VT. L. REV. 1, 57–62 (2019) (reviewing scholarship on the value of localism in land use regulation).

5. Patricia E. Salkin & Ashira Pelman Ostrow, *Cooperative Federalism and Wind: A New Framework for Achieving Sustainability*, 37 HOFSTRA L. REV. 1049, 1067–76 (2009) (describing local opposition to wind turbine siting). *See also* Joseph Rand & Ben Hoen, *Thirty Years of North American Wind Energy Acceptance Research: What Have We Learned?*, 29 ENERGY RSCH. & SOC. SCI. 135, 136–38 (2017) ("Despite broad public support for wind energy in general, local wind developments have been challenged by vocal opposition within host communities."); Maria A. Petrova, *From NIMBY to Acceptance: Toward a Novel Framework—VESPA—For Organizing and Interpreting Community Concerns*, 86 RENEWABLE ENERGY 1280, 1280 (2016) ("Despite the prevailing national support for renewable energy development, the installation of wind energy turbines at the local level is often met with

procedures, permit local property owners and land use officials to participate in the siting process.[6] Even where localities are not formally authorized to veto proposed projects, local opposition frequently functions as de facto veto authority.[7] In the aggregate, local opposition across multiple jurisdictions can prevent the expansion of the wind power footprint and the achievement of national renewable energy goals. [8]

Indeed, many regional problems, such as the lack of renewable energy infrastructure and affordable housing, environmental degradation, urban sprawl and persistent patterns of economic, and racial segregation, result from the cumulative impact of ostensibly local land use decisions.[9] The affordable housing crisis, which is attributable in large part to the cumulative impact of exclusionary local zoning laws, has prompted scholars and policymakers to call for state and federal intervention.[10]

---

resistance."); K. K. DuVivier & Thomas Witt, *NIMBY to Nope—or Yes?*, 38 CARDOZO L. REV. 1453, 1465 (2017) ("Siting has continued to be one of the most significant impediments to the growth of the industry."); Gary D. Taylor & Mark A. Wyckoff, *Intergovernmental Zoning Conflicts over Public Facilities Siting: A Model Framework for Standard State Acts*, 41 URB. L. 653, 659–60 (2009) (describing dynamics in siting public facilities).

6. Ashira Pelman Ostrow, *Grid Governance: The Role of A National Network Coordinator*, 35 CARDOZO L. REV. 1993, 2023 (2014) (analyzing the local role in siting energy infrastructure); Michael B. Gerrard, *Legal Pathways for a Massive Increase in Utility-Scale Renewable Generation Capacity,* 47 ENV'T L. REP. 10591, 10607 (2017) ("In 48 of the 50 states, local governments have significant control over the siting of commercial-scale wind facilities.") (citing ENV'T LAW INST., STATE ENABLING LEGISLATION FOR COMMERCIAL-SCALE WIND POWER SITING AND THE LOCAL GOVERNMENT ROLE (2011), https://www.eli.org/sites/default/files/eli-pubs/d21-02.pdf); Uma Outka, *The Renewable Energy Footprint*, 30 STAN. ENVTL. L.J. 241, 258 (2011) ("Virtually all of the statutes provide a mechanism for local involvement in the siting process and strive for consistency with local regulation . . . ."); Heibel & Durkay, *supra* note 3 (noting that state level siting often occurs in conjunction with local authorities).

7. Ostrow, *supra* note 6, at 2023.

8. Ashira Pelman Ostrow, *Land Law Federalism*, 61 EMORY L. J. 1397, 1408–18 (2012) (demonstrating that the cumulative impact of local land use decisions generates development patterns that conflict with national policy goals). *See also* WILLIAM A. FISCHEL, THE ECONOMICS OF ZONING LAWS: A PROPERTY RIGHTS APPROACH TO AMERICAN LAND USE CONTROLS 19 (1985) ("The notion that zoning is just a matter of local concern is incorrect when the cumulative effect of these regulations is considered."); DuVivier & Witt, *supra* note 5, at 1457 (noting that "[c]ollective NIMBY reactions have global consequences if all or a significant number of communities refuse to embrace wind power."); William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps,* 89 IOWA L. REV. 1, 10 (2003) (noting that viewed in the aggregate "[e]ven seemingly local activity such as home building patterns can generate much larger harms.").

9. Racial segregation is also the result of numerous federal programs that sought to protect property values in white suburban neighborhoods. For an illuminating account of the government role in racial segregation, see RICHARD ROTHSTEIN, THE COLOR OF LAW (2017).

10. John Infranca, *The New State Zoning: Land Use Preemption Amid a Housing Crisis*, 60 B.C. L. REV. 823, 829 (2019) (arguing that "the current housing crisis, and the effects of local land use policies on housing supply statewide, justify bold new forms of state intervention."); Anika Singh Lemar, *The Role of States in Liberalizing Land Use Regulations*, 97 N.C. L. REV. 293, 297–98 (2019) (arguing for state intervention in local zoning to increase

In fact, both the states and the federal government have at times intervened in zoning to prevent localities from restricting or excluding the targeted land use.[11] State level siting policies typically target group homes, family day care homes, manufactured housing, and small renewable energy infrastructure.[12] Federal siting policies, which are the focus of this Article, protect group homes, churches, and telecommunications infrastructure.[13]

Federal siting policies authorize *local* governments to make primary siting decisions, subject to *federal* constraints on the decision-making process. In effect, "Process Preemption"[14] facilitates siting by preempting the local decision-making *process,* rather than by displacing the local decision-makers. Process Preemption thus allows the federal government to establish national land use policies and local governments to tailor individual siting decisions to local conditions. Though this Article focuses on federal siting policies, Process Preemption could serve as a model for *state* siting reform.

Given the importance of wind power to national renewable energy goals, this Article argues for the adoption of a federal siting policy to facilitate the expansion of the wind power footprint.[15] Part II demonstrates that in the aggregate, local land use decisions that promote the welfare of the zoned community produce exclusionary land use patterns that conflict with state and federal land use goals. Part III demonstrates that federal preemption counterbalances the cumulative impact of local land use decisions by (1) compelling local regulators to consider national interests in their decision-making process; and (2) subsidizing development by reducing the costs associated with obtaining local land use permits.

Part IV identifies two critical features of Process Preemption that contribute to its effectiveness as a siting strategy. Specifically,

---

the supply of affordable housing); NAT'L LOW INCOME HOUS. COAL., *Solutions to the Affordable Housing Crisis* 1 (Aug. 15, 2019), https://nlihc.org/sites/default/files/Solutions-to-the-Affordable-Housing-Crisis.pdf (suggesting federal solutions to address the affordable housing crisis).

11. Ostrow, *supra* note 8, at 1408 (analyzing federal laws that account for the cumulative impact of local land use); Stewart E. Sterk, *Federal Land Use Intervention as Market Restoration*, 99 B.U. L. REV. 1577, 1580 (2019) (noting that "when land uses have a broader impact, state and federal governments sometimes superimpose their own regulations on those adopted by local government."); Lemar, *supra* note 10, at 304 (identifying "deregulatory" state policies that limit local siting authority of specific land uses); Ostrow, *supra* note 4, at 308–20 (analyzing federal policies aimed at siting nationally significant land use facilities).

12. Lemar, *supra* note 10, at 305–31.

13. Fair Housing Act of 1968, 42 U.S.C. §§ 3601-3619 (2012) (group homes); Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc (2012) (churches); Telecommunications Act of 1996, 47 U.S.C. § 332(c) (cell phone towers).

14. Ostrow, *supra* note 4, at 290.

15. *Id.* at 335–336; Salkin & Ostrow, *supra* note 5, at 1091–97.

this Part argues that: (1) its interjurisdictional framework balances federal and local land use concerns, enabling the federal government to establish national land use priorities while preserving local authority over context specific siting decisions; (2) its requirement that decisions be made within a reasonable period of time supported by substantial evidence contained in a written record, increase the legitimacy, consistency, and ultimate public acceptance of controversial siting decisions; and (3) its private right of action guarantees that the siting outcome will be consistent with the federal siting policy regardless of whether a municipality voluntarily complies or the court compels it to do so.

II. LOCALISM AND LAND USE

As zoning took hold in the mid-1920s, most state legislatures expressly delegated their land use regulatory authority to local governments.[16] States have since steadfastly refused to reclaim that authority, even though it soon became clear that excessive reliance on local regulation contributed to a variety of regional land use problems, such as urban sprawl and the persistent lack of affordable housing that result from the cumulative impact of local land use decisions.[17]

Where states do intervene in land use, they often do not eliminate local authority, but rather layer a state regulatory scheme

16. John R. Nolon, *In Praise of Parochialism: The Advent of Local Environmental Law*, 26 HARV. ENV'T. L. REV. 365, 366 (2002) (noting a "national understanding that the power to control the private use of land is a state prerogative, one that has been delegated, in most states, to local governments."); Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CAL. L. REV. 837, 839 (1983) ("Land use control in America has always been an intensely local area of the law.").

17. Ostrow, *supra* note 8, at 1437 ("The legal authority to regulate land derives, in the first instance, from the states' police power… states have always retained broad discretion to modify or reduce local land use authority but have generally refused to do so."); Sara C. Bronin, *The Quiet Revolution Revived: Sustainable Design, Land Use Regulation, and the States*, 93 MINN. L. REV. 231, 268 (2008) ("With the power to pass laws, which affect each locality, states have the power to reform the land use regulation system in a significant way to effect change on the wide scale. . . . Yet no state has demonstrated a willingness to change local land use laws to respond to the mounting evidence against conventional construction."); David L. Callies, *The Quiet Revolution Redux: How Selected Local Governments Have Fared*, 20 PACE ENV'T L. REV. 277, 296–97 (2002) (explaining that efforts to transfer zoning authority to states have failed); Shelley Ross Saxer, *Local Autonomy or Regionalism?: Sharing the Benefits and Burdens of Suburban Commercial Development*, 30 IND. L. REV. 659, 678 (1997) ("Th[e] shift in responsibility from local to state control has not yet occurred as predicted . . ."); Lemar, *supra* note 10, at 304 ("While economists and local law scholars are increasingly cognizant of the ways in which local overregulation stymies the national economy, local control continues to dominate our country's approach to land use policy.").

on top of local regulations.[18] Paradoxically, by increasing the number of studies, hearings and permits required to gain approval, state regulations provide even more opportunities for local governments to delay or prevent proposed development.[19]

This Part demonstrates that, in the aggregate, local land use decisions that promote the welfare of the zoned community generate development patterns that harm the region. Section A considers why local governments are primarily charged with land use regulation. Section B demonstrates that concentrating land use regulatory authority in local governments produces exclusionary zoning patterns that extend far beyond local jurisdictional boundaries. Section C argues that the federal government is uniquely situated to address land use problems that cross state and local boundaries.

A. Why Local Governments Regulate Land Use

While many areas of law once regulated by local governments have since been subsumed by the states or the federal government, land use law has retained much of its local character. That local governments have maintained their grip on land use regulation reflects the practical recognition that local governments have the greatest capacity to learn about local conditions and assess the impact of a proposed development on the land and its surroundings.[20]

---

18. Sterk, *supra* note 11, at 1589 (noting that state intervention typically involves "superimposing a state regulatory scheme atop the local regulatory structure, not by limiting local regulatory authority."); Lemar, *supra* note 10, at 295 ("State and federal interventions often supplement, rather than displace, local regulatory authority.").

19. Sterk, *supra* note 11, at 1588–89 (arguing that some states have "exacerbated the exclusion problem by mandating environmental reviews that expand the potential for local exclusion and generate additional delays."); Lemar, *supra* note 10, at 295 (observing that state interventions increase regulatory burdens).

20. Ostrow, *supra* note 8, at 1440–44; Ostrow, *supra* note 4, at 294–97; Sterk, *supra* note 11, at 1579 ("Local governments are in the best position to assess the impact new development will have on existing residents—in part because those residents are most likely to have a voice in local politics."); Eric T. Freyfogle, *The Particulars of Owning*, 25 ECOLOGY L.Q. 574, 580 (1999) ("Sensible land use decisions require knowledge of the land itself, in its many variations. . . . Local people typically know the land better than outsiders."); John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1218 (1995) (arguing that only local governments have the detailed local knowledge and resources necessary to administer programs implicating land use); Katrina Fischer Kuh, *Using Local Knowledge to Shrink the Individual Carbon Footprint*, 37 HOFSTRA L. REV. 923, 930 (2009) (noting that "one characteristic of an environmental problem that argues in favor of greater local involvement is when local information and values are important to achieving an efficient solution."); Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692, 1699–1700 (2001) (arguing that local governments are best suited to make siting decisions because they are familiar with local conditions).

Land use decisions cannot be made in the abstract. Whether a parcel of land should be developed for residential use, used to site a wind farm, or preserved for open space depends upon the context of the land—its geography, topography, demographics, and relationship to surrounding uses.[21] As the Supreme Court explained in *Village of Euclid v. Ambler Realty Co.*:

> [T]he question whether the power exists to forbid the erection of a building of a particular kind or for a particular use . . . is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality.[22]

Local and county governments are often the only levels of government that have the capacity to learn about 'the circumstances and the locality' and assess the appropriateness of a land use in the context of its location.

Thus, in upholding the constitutionality of zoning, the *Euclid* Court adopted a highly deferential approach to local judgments about the appropriate use of land, warning state and lower federal courts against substituting their judgments for those of the local community.[23] State courts have often expressed a similar sentiment. As the New Jersey Supreme Court remarked in an early zoning case, "local officials who are thoroughly familiar with their community's characteristics and interests and are the proper representatives of its people are undoubtedly the best equipped to pass initially on [zoning requests]."[24]

---

21. *See* RUTHERFORD H. PLATT, LAND USE AND SOCIETY: GEOGRAPHY, LAW, AND PUBLIC POLICY 419 (3d ed. 2004) (noting that the substance of "good" land use practices is "informed by the geographical context of the physical and socioeconomic systems in which land use operates" (emphasis omitted); Keith H. Hirokawa, *Property Pieces in Compensations Statutes: Law Eulogy for Oregon's Measure 37*, 38 ENV'TL. L. 1111, 1142 (2008) ("[T]he propriety of particular land uses is governed by their locational context . . ."); Daniel R. Mandelker & A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land use Law*, 24 URB. LAW. 1, 10 (1992) (noting that there are no "transcendent zoning values" that apply to all land use decisions).

22. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926).

23. *Id.* ("If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.").

24. Ward v. Scott, 105 A.2d 851, 855 (N.J. 1954); *see also* Leslie v. City of Toledo, 423 N.E.2d 123, 125 (Ohio 1981) ("It is better to leave the formulation and implementation of zoning policy to the city council, or other legislative body, which has not only the expertise and staff, but also, the constitutional responsibility to police this area effectively."); Oak Park Tr. & Sav. Bank v. Chicago, 438 N.E.2d 630, 635 (Ill. App. Ct. 1982) ("It is within the province of the local municipal body to determine the uses of property and establish zoning classifications.").

There is also a moral sense that land use decisions *should* be made by those who most directly bear the cost of the use.[25] A decision to site a waste treatment facility in a particular community will have a far greater impact on the aesthetics, property values, health and safety, and character of the sited community than on communities located further away.

The federal constitution recognizes that land use disputes involve geographically concentrated harms and geographically dispersed benefits. The government's decision to "take" private property for a public purpose concentrates the costs of the taking on a private property owner while spreading the benefits among the general public. The Fifth Amendment's just compensation requirement is intended to reduce that asymmetry. The Court has explained that the: "Fifth Amendment's guarantee [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[26] So too, in the siting context, the community that bears the cost of an undesirable land use should have some say in the process.

That is not to say, however, that the costs of land use are borne *solely* by the local community. To the contrary, as the next Section demonstrates, land use decisions impact the welfare of non-residents and the development of land well outside the boundaries of the local community.

B. Why Local Governments Exclude

It has long been observed that local governments use zoning regulations to promote the welfare of their own constituents, to the detriment (and exclusion) of outsiders.[27] In upholding the constitutionality of zoning in *Village of Euclid v. Ambler Realty Co.,* the Supreme Court dismissed the notion that a locality should take regional needs into consideration in devising its zoning ordinances. The Court maintained that "the village, though physically a suburb of Cleveland, is politically a separate municipality, with powers of its own and authority to govern itself as it sees fit."[28] *Euclid* affirmed

---

25. Ostrow, *supra* note 4, at 296–97; Ostrow, *supra* note 8, at 1425; Rose, *supra* note 16, at 911 (suggesting that land use decisions are made at the local level, in part, because these decisions are felt most deeply within the neighborhood).

26. Penn. Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123 (1978) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

27. Ostrow, *supra* note 8, at 1412; HERBERT WECHSLER, FOREWORD TO MODEL LAND DEV. CODE X (AM. L. INST. 1976) (noting local zoning "tends to disregard the greater interests of the regional community and in many instances fails to recognize and protect valid local needs").

28. Village of Euclid, 272 U.S. at 398.

the legal and political authority of each individual locality to pursue its own best interest, even at the expense of broader regional land use needs.

Traditional Euclidean zoning is premised on the notion that certain land uses should be insulated from other, less desirable, land uses. In upholding Euclid's zoning scheme, the Supreme Court validated a regulatory framework that idealized detached single-family housing and protected it from potentially disruptive uses (apartment houses) and users (poor people and racial minorities).[29] In the 1960s, the term "exclusionary zoning" was coined to describe the way in which traditional land use regulations systematically exclude low- and moderate-income persons from wealthy white suburban communities.[30] Today, local governments in cities and suburbs alike, use zoning to exclude all manners of undesirable land uses,[31] including affordable housing,[32] group homes for the disabled,[33] fast food restaurants, gasoline stations and strip clubs,[34] cell phone towers,[35] and distributed-renewable-energy facilities, such as backyard wind turbines and rooftop solar panels.[36]

---

29. *Id*, at 394.

30. Lawrence Gene Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767, 767 (1969); ROTHSTEIN, *supra* note 9, at 51–54; Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L. J. 385, 405–07 (1977).

31. Roderick M. Hills, Jr. & David Schleicher, *Planning an Affordable City*, 101 IOWA L. REV. 91, 93 (2015) ("[C]ities increasingly look like collections of exclusive suburbs, with neighborhoods filled with homeowners stopping the construction of needed commercial and residential development."); John Mangin, *The New Exclusionary Zoning*, 25 STAN. L. & POL'Y REV. 91, 100 (2014) (observing that the "new exclusionary zoning" is turning cities "into preserves for the wealthy."); Vicki Been, *City Nimbys*, 33 J. LAND USE & ENV'T L. 217, 221 (2018) (noting increased use of exclusionary zoning in cities).

32. Ostrow, *supra* note 8, at 1417.

33. *See* Peter W. Salsich, Jr., *Group Homes, Shelters and Congregate Housing: Deinstitutionalization Policies and the NIMBY Syndrome*, 21 REAL PROP. PROB. & TR. J. 413, 418 (1986) (noting local opposition to group homes for the elderly, the developmentally disabled, recovering drug addicts, and homeless shelters); MUNICIPAL RESEARCH AND SERVICES CENTER, *Group Homes: Overview*, (Apr. 2, 2021), http://mrsc.org/Home/Explore-Topics/Legal/Planning/Group-Homes.aspx ("Federal and state laws have attempted to address the discrimination these homes have experienced."); *See also* City of Edmonds v. Oxford House, Inc., 514 U.S. 725 (1995) (finding that the Fair Housing Act prohibits discrimination against group homes).

34. Sterk, *supra* note 11, at 1587 (noting that opposition is based on the perception that these unfavored uses will have an adverse impact on the character of the neighborhood).

35. Ostrow, *supra* note 4, at 317–21; Steven J. Eagle, *Wireless Telecommunications, Infrastructure Security, and the NIMBY Problem*, 54 CATH. U. L. REV. 445, 455–57 (2005) (describing NIMBY opposition to telecommunications towers). The Telecommunications Act Siting Policy addresses this concern, *see infra* Part IV.

36. *See* Salkin & Ostrow, *supra* note 5, at 1067–76 (describing local opposition to wind turbines); Sara C. Bronin, *Curbing Energy Sprawl with Microgrids*, 43 CONN. L. REV. 547, 571–72 (2010) (describing local opposition to wind and solar installations); Troy A. Rule, *Renewable Energy and the Neighbors*, 2010 UTAH L. REV. 1223, 1238–42 (2010) (discussing local opposition to distributed renewables).

Exclusionary zoning is the natural consequence of a political process that responds primarily to the interests of the zoned community.[37] Residents tend to oppose new development, fearing that such development might reduce the value of their homes or affect the character of the community.[38] According to Professor William Fischel's well-known "homevoter hypothesis:

> Homeowners, who are the most numerous and politically influential group within most localities, are guided by their concern for the value of their homes . . . and they will tend to choose those policies that preserve or increase the value of their homes.[39]

Homeowners seek to maintain not only the objective market value of their homes, but also the subjective *use value* of their homes and communities.[40] Factoring in the subjective use value of property can account for homeowners' desire to exclude minorities or other groups of neighbors considered to be undesirable, even where the economic benefit of excluding these groups from the community is unclear.[41]

---

37. Winter King & Jonathan Levine, *Smart Growth Meets the Neighbors*, 34 ECOLOGY L.Q. 1349, 1357–58 (2007) ("A local government's responsiveness to the desires of landowners within its jurisdiction is unsurprising given the representative nature of local government. City councils (and often planning commissions) are elected bodies, and are therefore unlikely to approve a project, much less a significant change in policy, in the face of significant opposition from the electorate."); John R. Nolon, *Champions of Change: Reinventing Democracy Through Land Law Reform*, 30 HARV. ENV'T L. REV. 1, 16 (2006) ("[A]t the local level, a certain dysfunction sets in because land use decision makers are elected, or are appointed by elected officials. As a result, those who live next to proposed developments . . . have influence and power because they are constituents of the decision-makers and they resist change."); Christopher Serkin, *Big Differences for Small Governments: Local Governments and the Takings Clause*, 81 N.Y.U. L. REV. 1624, 1646–48 (2006) (arguing that local politics are dominated by homeowners who have both the incentive and the means to exert political influence locally).

38. Ostrow, *supra* note 8, at 1467–68; Sterk, *supra* note 11, at 1586 ("Local residents tend to abhor change and fear that most new uses will make their neighborhoods worse.").

39. WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND USE POLICIES 4 (2001).

40. Ostrow, *supra* note 8, at 1468; Serkin, *supra* note 37, at 1656 ("An account that focuses exclusively on market values or risk aversion misses important interests like the commitment members of a community may have to preserving its character, independent of any effect on property values."); King & Levine, *supra* note 39, at 1362 n.56 (suggesting that residents oppose even property value enhancing development because "owners of older homes do not to [sic] want to be outdone by new development. . . . Even if their property values go up due to the new development, neighbors may still find it distasteful to feel like poor relations to the new residents."); D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255, 278–83 (2006) (describing psychological value of a home).

41. Serkin, *supra* note 37, at 1657.

Local opposition to undesirable land uses is often characterized as NIMBY,[42] an acronym for "Not In My Backyard."[43] While perhaps rational from the perspective of an individual homeowner and of the community, NIMBYism across multiple jurisdictions systematically excludes locally undesirable land uses and users, without regard for regional or national land use priorities. When the cumulative impact of local decisions generates significant extra-local harm, higher levels of government may be called on to constrain local zoning authority.

C. Why the Federal Government should Intervene

The federal government is uniquely positioned to address land use problems that cross state and local jurisdictional boundaries.[44] Indeed, the federal government's capacity to compel states to internalize the costs of their activities has historically been a key justification for federal environmental law.[45]

Compared with state and local governments, the federal government has a far greater capacity to pursue welfare policies that redistribute wealth. Specifically, the federal government has the distinctive luxury of drawing upon a "captured tax base" as

---

42. Despite the pervasiveness of its use, many scholars argue that the term does not capture the complexity of local opposition. *See* Rand & Hoen, *supra* note 5, at 138; Kate Burningham, *Using the Language of NIMBY: A Topic for Research, Not an Activity for Researchers*, 5 INT'L J. OF JUST. & SUSTAINABILITY 55 (2000).

43. Mangin, *supra* note 32, at 120 (NIMBY is a "pejorative term for groups opposed to an excessively wide-range of development in their neighborhoods or municipalities."); Sterk, *supra* note 11, at 1586 ("Local residents tend to abhor change and fear that most new uses will make their neighborhoods worse."). *See also* Michael Dear, *Understanding and Overcoming the NIMBY Syndrome*, 58 J. OF THE AM. PLAN. ASS'N 288, 289 (1992) ("NIMBY refers to the protectionist attitudes of and oppositional tactics adopted by community groups facing an unwelcome development in their neighbourhood . . . residents usually concede that these 'noxious' facilities are necessary, but not near their homes, hence the term 'not in my back yard'.").

44. Ostrow, *supra* note 11, at 1438–40 (analyzing the federal government's capacity to address multijurisdictional problems); Ostrow, *supra* note 6, at 2009–17 (2014) (assessing the relative institutional capacity of federal, state and local governments to regulate the development of multijurisdictional energy infrastructure networks); WILLIAM J. MALLETT, CONG. RSCH. SERV., R41068, METROPOLITAN TRANSPORTATION PLANNING 8 (2010) (noting, in the context of regional transportation planning, that local officials "will find it hard to make decisions that while good for the region may be detrimental to the interests of their home jurisdiction").

45. *See* Robert L. Glicksman & Richard E. Levy, *A Collective Action Perspective on Ceiling Preemption by Federal Environmental Regulation: The Case of Global Climate Change*, 102 NW. U. L. REV. 579, 593 (2008) (arguing that federal environmental regulation is most justified when collective action problems create incentives for states acting individually to regulate in ways that are contrary to the interests of the states as a collective); Kirsten H. Engel, *State Environmental Standard-Setting: Is There a "Race" and Is It "to the Bottom"?*, 48 HASTINGS L.J. 271 (1997) (presenting the classic "race-to-the-bottom" justification for federal environmental law).

well as a "facility for logrolling arrangements that tend to equalize power between representatives of affluent and poor districts."[46] Thus, the federal government is often in the best position to make fundamental policy choices about redistribution.[47]

The federal government is also less sensitive to the intrastate balance of power and is not bound to act within existing geopolitical boundaries.[48] That is not to say that local political units should be ignored—but rather that they should be considered in the context of the larger region. When the federal government addresses regional problems, it can create a platform for groups that might otherwise be excluded from the local land use process.[49]

Modern metropolitan regions span state and local boundaries, encompassing major cities, inner and outer rings of suburbs, edge cities, and unincorporated rural areas.[50] As the scale of the region continues to grow, state and local governments will increasingly lack the territorial jurisdiction and regulatory capacity to respond to complex metropolitan problems.[51] The federal government's distance from state and local politics allows it to approach the region as a whole and to engage alternative political majorities within the region.

---

46. Sheryll D. Cashin, *Federalism, Welfare Reform, and the Minority Poor: Accounting for the Tyranny of State Majorities*, 99 COLUM. L. REV. 552, 594 (2011).

47. Ostrow, *supra* note 4, at 306–07 (highlighting the relative capacity of the federal government to engage in the redistribution of wealth); Kirk J. Stark, *Fiscal Federalism and Tax Progressivity: Should the Federal Income Tax Encourage State and Local Redistribution?*, 51 UCLA L. REV. 1389, 1408–09 (2004) (noting that economists believe that redistribution should not occur at the state and local levels, but instead "at the most centralized level of government," because it leads to adverse migration of both rich and poor).

48. Ashira Pelman Ostrow, *Emerging Counties? Prospects for Regional Governance in the Wake of Municipal Dissolution*, 122 YALE L.J. ONLINE 187, 200 (2013).

49. *Id.* at 201; Nestor M. Davidson, *Fostering Regionalism: Comment on "The Promise and Perils of 'New Regionalist' Approaches to Sustainable Communities"*, 38 FORDHAM URB. L. J. 675, 679 (2011) ("The scale of federal involvement thus widens the range of official interests and provides a platform for alternative political majorities.").

50. The United States Office of Management and Budget OMB) has identified nearly 400 metropolitan statistical areas (MSAs) for the United States. *See* OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB BULL. NO. 20-01: REVISED DELINEATIONS OF METROPOLITAN STATISTICAL AREAS, MICROPOLITAN STATISTICAL AREAS, AND COMBINED STATISTICAL AREAS, AND GUIDANCE ON USES OF THE DELINEATIONS OF THESE AREAS 41–72 (2020), https://www.whitehouse.gov/wp-content/uploads/2020/03/Bulletin-20-01.pdf (finding that in 2019, the metropolitan area of New York-Newark-Jersey City had the biggest population); Robert E. Lang & Dawn Dhavale, *America's Megapolitan Areas*, LINCOLN INST. LAND POL'Y (2005), https://www.lincolninst.edu/publications/articles/americas-megapolitan-areas (identifying ten "megapolitan" areas encompassing multiple counties).

51. Ostrow, *supra* note 48, at 201.

III. LOCAL LAND AND NATIONAL MARKETS

Congress has the power under the Commerce Clause to regulate private land use activities that could, in the aggregate, have a substantial impact on interstate commerce.[52] This Part examines the impact of a federal siting policy on the local zoning process. Section A introduces the cumulative effects doctrine that underlies federal regulation of purely local land use activities that, in the aggregate, would have a substantial impact on interstate commerce. Section B argues that federal preemption of local zoning counterbalances the cumulative impact of exclusionary land use decisions by (1) requiring local authorities to consider national interests in their decision-making process; and (2) subsidizing development by reducing the costs associated with obtaining local land use permits.

To illustrate, under the FHA, municipalities are required to modify their zoning regulations to reasonably accommodate group homes for handicapped individuals. The Fair Housing Act thus (1) compels local governments to consider the federal interest in assuring adequate housing for handicapped persons; and (2) creates a subsidy for handicapped persons by reducing the need for such persons to obtain zoning related permits. In preempting the zoning process, Congress, in effect, determines that the protected land use is deserving of a subsidy and that the national interest in the protected land use should be weighed against the local interest in regulating development.

A. The Cumulative Effects Doctrine

Federal law has long been used to account for the cumulative impact of local land use decisions on national policy goals. In 1938, Congress passed the Agricultural Adjustment Act.[53] The Act was intended to drive up the price of wheat by strictly limiting the number of acres of land that could be used to grow wheat. Roscoe Filburn grew wheat on twice the number of acres permitted by the Act.[54] Filburn argued that Congress did not have the authority to

52. Wickard v. Filburn, 317 U.S. 111, 128–29 (1942)*;* Gonzales v. Raich, 545 U.S. 1, 22 (2005).

53. Agricultural Adjustment Act of 1938, Pub. L. No. 75-430, 52 Stat. 31 (codified as amended in scattered sections of 7 U.S.C.).

54. Wickard, 317 U.S. at 115.

regulate the excess wheat he produced because it was intended for private use and would never enter into the stream of commerce.[55]

In *Wickard v. Filburn*, the Supreme Court agreed that Filburn's excess wheat would have a negligible impact on interstate commerce but declined to evaluate this activity in isolation. Instead, the Court considered Filburn's activity as part of a larger economic enterprise and concluded that, in the aggregate, "his contribution, taken together with that of many others similarly situated," would have a substantial impact on interstate commerce.[56]

The cumulative effects doctrine recognizes that "a single activity that itself has no discernible effect on interstate commerce may still be regulated [federally] if the aggregate effect of that class of activity has a substantial impact on interstate commerce."[57] So, for example, Congress may regulate isolated, intrastate acts of discrimination,[58] entirely intrastate credit transactions,[59] surface mining on privately owned land,[60] and the consumption of homegrown medicinal marijuana,[61] if it determines that the cumulative impact of the regulated economic activity substantially interferes with a national market.

Federal permitting requirements under the Clean Water Act[62] (CWA) and Endangered Species Act[63] (ESA) restrict the development of privately owned property to protect natural resources that would otherwise be depleted by the cumulative impact of local development.[64] Section 404 of the CWA restricts the development of privately owned wetlands by

---

55. *Id.* at 114.

56. *Id.* at 127–29.

57. Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 191 F.3d 845, 850 (7th Cir. 1999), *rev'd on other grounds*, 531 U.S. 159 (2001); *accord* United States v. Darby, 312 U.S. 100, 119–20 (1941) (noting that Congress may regulate intrastate activity that has a "substantial effect" on interstate commerce). *See also* J.B. Ruhl & James Salzman, *Climate Change, Dead Zones, and Massive Problems in the Administrative State: A Guide for Whittling Away*, 98 CAL. L. REV. 59, 93 (2010) (describing the use of the cumulative effects doctrine in federal law).

58. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964); *id.* at 276 (Black, J., concurring) (considering the aggregate effect of local discriminatory acts on the interstate market); Ruhl & Salzman, *supra* note 57 (noting that employment discrimination cases often consider the cumulative effects of employment practices and employer statements).

59. Perez v. United States, 402 U.S. 146, 154 (1971).

60. Hodel v. Va. Surface Min. & Reclamation Ass'n., Inc., 452 U.S. 264, 281 (1981).

61. Gonzales, 545 U.S. at 22.

62. Clean Water Act of 1972 § 404, 33 U.S.C. § 1344.

63. Endangered Species Act of 1973 § 10(a), 16 U.S.C. § 1539(a)(1)(A)–(B) (2006).

64. *See* Katrina Fischer Kuh, *When Government Intrudes: Regulating Individual Behaviors That Harm the Environment*, 61 DUKE L.J. 1111, 1144 (2012) (noting that federal environmental laws "regulate individuals as property owners, effectively restricting their use of their property," so as to protect environmental resources).

requiring landowners to obtain federal permits from the U.S. Army Corps of Engineers to discharge dredge and fill materials into "waters of the United States."[65] The regulations state that "[m]ost wetlands constitute a productive and valuable public resource, the unnecessary alteration or destruction of which should be discouraged as contrary to the public interest."[66]

Section 9 of the ESA similarly prohibits activities affecting protected species and their habitats, even if privately owned, unless authorized by a permit from the Fish and Wildlife Service or the National Oceanic and Atmospheric Administration.[67] To obtain a permit under the ESA, developers must prepare habitat-conservation plans that include measures to mitigate the adverse impact of proposed development on endangered or threatened species.[68]

In administering the permitting process, federal environmental agencies consider the cumulative effect of individual land use choices on federal policy goals.[69] For example, in issuing federal permits under the CWA, the Army Corps of Engineers considers the cumulative impact of wetlands development.[70] Under the ESA, the U.S. Fish and Wildlife Service is required to determine whether a proposed action, "taken together with cumulative effects, is likely to jeopardize the continued existence of listed species."[71] Similarly, in administering the National Environmental Policy Act ("NEPA"), the Council on Environmental Quality is charged with assessing the cumulative impacts of proposed actions.[72]

---

65. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, sec. 2, § 404, 86 Stat. 816, 884 (codified as amended at 33 U.S.C. § 1344 (2006)); *see also* 33 U.S.C. § 1362(7) (defining "navigable waters" as "waters of the United States"); 33 C.F.R. § 320.4(a) (2011).

66. 33 C.F.R. § 320.4(b)(1).

67. Pub. L. No. 93-205, § 9, 87 Stat. 884, 893 (codified as amended at 16 U.S.C. § 1538).

68. 16 U.S.C. § 1539(a)(2)(A).

69. Ruhl & Salzman, *supra* note 57, at 93 (noting that federal regulations take cumulative impacts into consideration); Joseph H. Guth, *Cumulative Impacts: Death-Knell for Cost-Benefit Analysis in Environmental Decisions*, 11 BARRY L. REV. 23, 49–52 (2008) (discussing cumulative impacts in federal environmental legislation, including the Clean Air Act National Ambient Air Quality Standards, CWA water-quality standards, ESA, and federal cap-and-trade systems).

70. Ruhl & Salzman, *supra* note 57, at 95 (citing 33 U.S.C. § 1344(e)(1) (2006)); Kuh, *supra* note 64, at 1140 (noting that under the CWA, "individual property owners may be subject to controls on the use of their property that are designed to protect wetlands").

71. Marine Mammal Protection Act of 1972, 50 C.F.R. § 402.14(g)(4) (2003); *see also* Ruhl & Salzman, *supra* note 57, at 95 n. 152 ("The agency defines cumulative effects as 'those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area.'") (quoting Endangered Species Act of 1973, 50 C.F.R. § 402.02 (2008).

72. National Environmental Policy Act, 40 C.F.R. § 1508.25 (2004).

B. Federal Preemption and Local Zoning

Federal siting laws preempt local zoning requirements in order to facilitate siting federally protected land use facilities. The Telecommunications Act (TCA) prevents localities from unreasonably excluding telecommunications infrastructure;[73] the Religious Land Use and Institutionalized Persons Act (RLUIPA) prevents localities from discriminating against churches;[74] and the Fair Housing Act (FHA) requires localities to adjust their zoning regulations to accommodate group homes for handicapped persons.[75]

Federal preemption impacts the land use development process in two ways. First, federal preemption compels local governments to take national land use priorities into consideration. The TCA, for example, compels localities to consider the federal interest in developing a national telecommunications network by limiting local authority over cell phone tower siting.[76] Localities may not exclude cell phone towers, and must make siting decisions within a "reasonable period of time," and support them with "substantial evidence contained in a written record."[77]

Second, federal preemption subsidizes development of the targeted land use by reducing the cost of obtaining local permits and approvals.[78] Developers know that "securing the consent of local officials to a project with hostile neighbors is an arduous, expensive process that often requires community compensation, reductions in project size, and changes in design."[79] Federal preemption of local zoning requirements alters the dynamic between community and

---

73. Telecommunications Act of 1996, 47 U.S.C. § 332(c).

74. Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc.

75. Fair Housing Act, 42 U.S.C. §§ 3601-3619. *See* City of Edmonds v. Oxford House, Inc., 514 U.S. 725 (1995) (requiring local zoning officials to modify zoning regulations in order to reasonably accommodate disabled persons); *see also* Sterk, *supra* note 11, at 1592 (noting that reasonable accommodation claims have been most successful against zoning restrictions that prevent the use of existing homes as group homes for the disabled).

76. H.R. REP NO. 104-458, at 207–08 (explaining that the Siting Policy "preserves the authority of State and local governments over zoning and land use matters except in the limited circumstances set forth in the conference agreement.").

77. 47 U.S.C. § 332(c)(7)(B)(i)-(iii).

78. Ostrow, *supra* note 4, at 297–300; Lemar, *supra* note 10, at 295 (noting that state interventions that limit or prohibit local regulation decrease development costs); Michael B. Gerrard, *Fear and Loathing in the Siting of Hazardous and Radioactive Waste Facilities: A Comprehensive Approach to a Misperceived Crisis*, 68 TUL. L. REV. 1047, 1108 (1994) ("Removing a zoning restriction from a piece of land ordinarily provides a financial benefit to the property owner.").

79. Gerrard, *supra* note 78, at 1108; *See also*, Serkin, *supra* note 37, at 1652 ("Whether through bribes or extortion—exactions or threats to leave—special interest groups must still secure local homeowner approval or they will not find a responsive local government.").

developer. Federal preemption allows developers to focus on finding the most appropriate location, rather than the local permitting process.[80]

Moreover, where preemption overrides local concerns regarding facilities siting, the local community absorbs the external costs of the land use.[81] Cell phone towers, group homes, and churches, for instance, raise local concerns about property values, health and safety and community character. If developers do not internalize the negative externalities of siting these land uses, then the neighbors, in effect, subsidize the use.[82]

IV. PROCESS PREEMPTION IN FEDERAL SITING REGIMES

Process Preemption siting policies impose *federal* constraints on the *local* zoning process. The hybrid federal-local framework is consistent with modern theories of cooperative federalism that embrace layered and overlapping regulatory regimes, establishing a formal role for local governments in shaping and implementing national land use regulatory programs.[83] This Part maintains that Process Preemption furthers federal land use goals, first, because its interjurisdictional framework balances national land use priorities and local concerns; second, because its procedural requirements increase the legitimacy, consistency, and ultimate public acceptance of controversial siting decisions; and third, because judicial enforcement guarantees that the siting outcome is consistent with the federal siting policy.

---

80. Lemar, *supra* note 10, at 344 (noting that overriding the local zoning process allows developers to choose a location "without worrying about the costs and delays associated with local zoning battles").

81. Robert A. Bohrer, *Fear and Trembling in the Twentieth Century: Technological Risk, Uncertainty and Emotional Distress*, 1984 WIS. L. REV. 83, 111 (1984) (noting that denial of damages for emotional distress related to facilities siting represents a deliberate choice to subsidize the facility rather than require the developer to internalize the "psychic costs" of the facility).

82. Sterk, *supra* note 11, at 1599 ("[F]ederally protected land uses may impose external costs that federal law requires neighbors to accept."); Gerrard, *supra* note 78, at 1109 (describing economic subsidy in the context of hazardous waste facilities siting).

83. *See* Ostrow, *supra* note 8, at 1418–19. *See also, e.g.*, Erin Ryan, *Negotiating Federalism*, B.C. L. REV. 1, 4 (2011); Hari M. Osofsky & Hannah J. Wiseman, *Dynamic Energy Federalism*, 72 MD. L. REV. 773, 775 (2013); Michael C. Pollack, *Land Use Federalism's False Choice*, 68 ALA. L. REV. 707, 709–10 (2017); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 283–85 (2005).

A. Local Implementation of a Federal Siting Policy

Prior to the passage of the Telecommunications Act of 1996, telecommunications siting was hindered by inconsistent local permitting requirements and strong local opposition to cell phone towers.[84] To streamline the siting process, the House of Representatives considered a proposal that would have granted nearly exclusive siting authority over telecommunications towers to the Federal Communications Commission ("FCC").[85] In contrast, the corresponding Senate Bill did not address telecommunications siting at all, leaving siting entirely under local control. [86]

The House-Senate conference committee emerged with an innovative compromise, establishing a siting policy that impose *federal* constraints on the *local* zoning process. According to the committee report, the Siting Policy "preserves the authority of State and local governments over zoning and land use matters except in the limited circumstances set forth in the conference agreement."[87] In *Mobile S., LLC v. City of Roswell, Ga.*, the Supreme Court agreed, finding that "[t]he Act generally preserves 'the traditional authority of state and local governments to regulate the location, construction, and modification' of wireless communications facilities like cell phone towers, but imposes 'specific limitations' on that authority."[88]

Process Preemption recognizes that local implementation is critical to the success of a federal siting policy. Decades of siting studies confirm that local participation is critical to the success of any siting policy. Unilateral preemption of the siting process rarely succeeds and often increases opposition to future siting efforts. [89]

---

84. Salkin & Ostrow, *supra* note 5, at 1088 (describing NIMBY opposition to telecommunications towers); *see also* Susan Lorde Martin, *Wind Farms and NIMBYs: Generating Conflict, Reducing Litigation*, 20 FORDHAM ENV'T L. REV. 427, 433–34 (2010); Eagle, *supra* note 35, at 455–57.

85. *See* H.R. REP. NO. 104-204, at 25 (1995).

86. *See generally* S. 652, 104th Cong. (1995) (making no mention of telecommunications siting); Petersburg Cellular P'ship v. Bd. of Nottoway Cnty., 205 F.3d 688, 697–98 (4th Cir. 2000) (noting difference between the House version, which would have empowered the FCC to directly regulate the siting of towers, and the Senate version, which would have allowed local zoning officials to retain that authority).

87. H.R. REP NO. 104-458, at 207–08 (1996) (Conf. Rep.).

88. T-Mobile S., LLC v. City of Roswell, 574 U.S. 293, 300 (2015) (quoting *City of Rancho Palos Verdes, Cal. v. Abrams*, 544 U.S. 113, 115 (2005)).

89. Ostrow, *supra* note 5, at 323–24; *See also,* Richard C. Kearney, *Low-Level Radioactive Waste Management: Environmental Policy, Federalism, and New York*, 23 PUBLIUS: J. FEDERALISM 57, 63 (1993) (noting that unitary preemption of local authority invariably fails in the face of local opposition); Gerrard, *supra* note 78, at 1137, ("adamant, sustained citizen opposition, when backed by local government, almost always wins"); Gail

To gain local cooperation, the local community must be involved in the siting process, and local residents must feel that their concerns have been addressed. [90]

Process Preemption empowers local regulators to make primary siting decisions subject to federal constraints on the siting process. The federal standards preempt conflicting or inconsistent local regulations, but do not otherwise preempt state and local regulation of the targeted facility.[91] Instead, within the confines of the siting policy local officials remain free to tailor their siting decisions to local conditions.[92] As Part II explains, judgements regarding the appropriate use of land can only be made in the context of its location. Regulators must evaluate a proposed use of land in relation to its geography, topography, demographics, current use and relationship to surrounding uses. Land use is regulated at the local level precisely because local officials, who are part of the community and accountable to it, have the greatest capacity to learn about local conditions and assess the impact of proposed development in the context of its location.[93] Process Preemption preserves the traditional role of local officials in regulating the use of land.

Today, renewable energy faces many of the same challenges that faced telecommunications in the 1990s. As with cell phone towers, inconsistent local permitting requirements[94] and strong local opposition significantly impede the deployment of wind

---

Bingham & Daniel S. Miller, *Prospects for Resolving Hazardous Waste Siting Disputes Through Negotiation*, 17 NAT. RESOURCES LAW. 473, 477 (1984) (explaining that "[s]imply preempting local controls . . . is unlikely to resolve the siting dilemma because it does not address the causes of opposition.").

90. Rand & Hoen, *supra* note 5, at 142 (finding that "a more participatory, collaborative planning process may reduce conflict and promote positive community outcomes."); DON MUNTON, *INTRODUCTION: THE NIMBY PHENOMENON AND APPROACHES TO FACILITY SITING, IN* HAZARDOUS WASTE SITING AND DEMOCRATIC CHOICE 2 (1996) (noting that NIMBY opposition arises, in part, because the community feels excluded from the democratic process).

91. The TCA explicitly states that "[e]xcept as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. § 332; *See also* Robert B. Foster & Mitchell A. Carrel, *Patchwork Quilts, Bumblebees, and Scales: Cellular Networks and Land Use Under the Telecommunications Act of 1996*, 36 URB. LAW. 399, 400 (2004) (explaining that the TCA "does not completely preempt local zoning authority" but rather places restrictions on local discretion in the context of telecommunications facilities).

92. Jonathan H. Adler, *Judicial Federalism and the Future of Environmental Regulation*, 90 IOWA L. REV. 377, 384 (2005); Weiser, *supra* note 20, at 1698 (noting that cooperative federal programs promote diversity in order to allow states to tailor federal policies to local conditions).

93. *See supra* Part II.A.

94. Salkin & Ostrow, *supra* note 5, at 1065–67; DuVivier & Witt, *supra* note 5, at 1467 (noting that the diversity in wind regulations "defies easy classification").

power.[95] Process Preemption would facilitate wind power siting in accordance with federal renewable energy goals. At the same time, Process Preemption authorizes local regulators to participate in the siting process and tailor decisions to the local context. Understanding the local context is particularly important in the context of energy infrastructure. Local infrastructure needs vary widely, reflecting differences in market structure, fuel used for electricity generation, geography, climate conditions, and environmental preferences.[96] The characteristics of wind-rich locations vary just as widely.[97] As a result, best practices differ with regard to many of the most commonly contested issues, including noise abatement, setback requirements, environmental impacts, shadow flicker, aesthetics, and safety regulation.[98] Process Preemption permits local zoning officials to take all of these factors into consideration in assessing a proposed siting.

---

95. *See also* Dave Bangert, *Wind Farms Banned in Rural Tippecanoe County, as Environmentalists Grumble*, J. & COURIER (May 6, 2019, 4:39 PM), https://www.jconline.com/story/news/2019/05/06/wind-farms-banned-rural-tippecanoe-county-environmentalists-grumble/3660870002/; Deborah Shaar, *Sedgwick County Bans Large-Scale Commercial Wind Farms*, KMUW WITCHITA (Aug. 21, 2019), https://www.kmuw.org/post/sedgwick-county-bans-large-scale-commercial-wind-farms; David Boraks, *Senate Bill Would Ban Wind Farms in Some NC Counties*, WFAE CHARLOTTE (Mar. 27, 2019), https://www.wfae.org/post/senate-bill-would-ban-wind-farms-some-nc-counties#stream/0; Nick Hytrek, *Dakota County Considering Moratorium on Wind Farms*, SIOUX CITY J. (May 4, 2020), https://siouxcityjournal.com/news/local/govt-and-politics/dakota-county-considering-moratorium-on-wind-farms/article_2f4bde65-8b5b-5250-9777-59eb8dbd7e1d.html; Donnelle Eller, *Madison County OKs State's First Moratorium on Wind, Solar Development*, DES MOINES REG. (Oct. 8, 2019, 3:05 PM), https://www.desmoinesregister.com/story/money/business/2019/10/08/madison-county-oks-states-first-moratorium-wind-solar-development/3909970002 (reporting Iowa's first moratorium on new wind turbine installations); Jeff Platsky, *Contentious Meeting Leads to a Moratorium on Eastern Broome Wind Turbine Project*, PRESS CONNECTS (Aug. 14, 2019, 2:23 PM), https://www.pressconnects.com/story/news/local/2019/08/14/deposit-sanford-wind-turbine-project-stalled/2006740001 (reporting a 90 day moratorium on wind turbine development passed by the Town of Sanford, NY); Ecogen Wind LLC v. Town of Prattsburgh Town Bd., 978 N.Y.S.2d 485, 486–87 (N.Y. App. Div. 2013) (describing moratorium on wind turbine development); Zimmerman v. Bd. of Cnty. Comm'rs, 218 P.3d 400, 418 (Kan. 2009) (upholding a county-wide ban on commercial wind farms enacted in response to community concerns over the aesthetic impact on the county); Emerging Energies, LLP v. Manitowoc Cnty., 2009 WI App 56 (Wis. Ct. App. 2009) (reporting that a town enacted moratorium one month after energy company applied for conditional use permit to build a seven-turbine wind energy system).

96. Ostrow, *supra* note 6, at 2011-13 (detailing variations in state energy policies).

97. *See* OFFICE OF ENERGY EFFICIENCY & RENEWABLE ENERGY, *Wind Resource Assessment and Characterization*, https://www.energy.gov/eere/wind/wind-resource-assessment-and-characterization (last visited Jan. 6, 2020); Ronald H. Rosenburg, *Making Renewable Energy a Reality-Finding Ways to Site Wind Power Facilities*, 32 WM. & MARY ENV'T L. & POL'Y REV. 635, 638–39, 641, 674 (2008).

98. Salkin & Ostrow, *supra* note 5, at 1087.

B. Procedural Requirements for Zoning

Of the many factors that contribute to the success or failure of any particular siting effort, perhaps the single most crucial is the perceived legitimacy of the decision-making process.[99] Siting studies indicate that "a planning process perceived as 'fair' can lead to greater toleration of the outcome, even if it does not fully satisfy all stakeholders, whereas processes perceived as 'unfair' can result in conflict, damaged relationships, and divided communities."[100] Thus, local support depends, in large part, on the procedural legitimacy of the siting and planning process.[101]

The local zoning process often lacks the procedural safeguards that legitimize regulatory outcomes in other contexts. The Standard State Zoning Enabling Act, adopted by most states in the early part of the 20th century, did not establish uniform local procedures for administering zoning regulations.[102] As a result, zoning procedures vary widely across states and between localities. Procedural irregularities and inconsistencies call the outcome of the proceedings into question.[103] In 2008, the American Bar Association promulgated a Model Statute on Local Land Use Processes ("ABA Model Code") intended to establish uniform

---

99. *See* Jessica Mantel, *Procedural Safeguards for Agency Guidance: A Source of Legitimacy for the Administrative State*, 61 ADMIN. L. REV. 343, 377–79 (2009) (citing studies that "found that . . . individuals' judgments about the fairness of the government's decision-making process . . . [influence their] views on view of the legitimacy of government authorities"); Robert A. Mikos, *The Populist Safeguards of Federalism*, 68 OHIO ST. L.J. 1669, 1674 (2007) (noting that citizens "care about government processes, and not just the outcomes of those processes"); Rand & Hoen, *supra* note 5, at 136 (finding that "issues of fairness, participation, and trust during the development process influence acceptance").

100. Rand & Hoen, *supra* note 5, at 142.

101. *Id.* ("The processes around wind project planning and development significantly affect public response and acceptance."); Christiane Bohn & Christopher L. Lant, *Welcoming the Wind? Determinants of Wind Power Development Among U.S. States*, 61 PROF. GEOGR. 87 (2009) ("[T]he political process for siting wind farms has the greatest effect on a state's experience in developing wind energy."); M Mhairi Aitken, *Why We Still Don't Understand the Social Aspects of Wind Power: A Critique of Key Assumptions Within the Literature*, 38 ENERGY POL'Y 1834 (2010).

102. A STANDARD STATE ZONING ENABLING ACT (DEP'T OF COMM. 1924).

103. Ostrow, *supra* note 4, at 325–26; Ashira Pelman Ostrow, *Judicial Review of Local Land Use Decisions: Lessons from Rluipa*, 31 HARV. J.L. & PUB. POL'Y 717, 727 (2008) (arguing that the discretionary nature of zoning enables arbitrary and discriminatory decision-making); Edward Sullivan, *The Time for State and Local Governments to Consider the ABA Model Legislation for Land Use Procedures Is Now!*, ADMIN. & REG. L. NEWS 1, 11 (2009); Daniel R. Mandelker, *Model Legislation for Land Use Decisions*, 35 URB. LAW. 635, 639 (2003) (criticizing lack of procedural protections in land use decision-making); Rose, *supra* note 16, at 841 ("[s]ince the middle 1960's, legal scholars have complained that local land decisions can make a mockery of orderly and predictable planned development.").

and fair procedures for land use decision-making.[104] Procedural uniformity increases the consistency, legitimacy, and ultimate public acceptance of controversial local land use decisions, without dictating any particular result.

The TCA's Process Preemption approach increases the legitimacy of local siting decisions by imposing uniform federal procedural requirements on the decision-making process. Specifically, the TCA requires that siting decisions be made "within a reasonable period of time[;]" "supported by substantial evidence contained in a written record[;]" and subject to expedited federal judicial review.[105]

1. Decisions within a Reasonable Time

It has long been observed that zoning boards might delay action on a controversial application either in the hopes that substantial delay will increase costs for the developer and encourage abandonment of the project, or in order to extract concessions from the developer.[106] In the words of the Pennsylvania Supreme Court, "a board could effectively prevent the erection of needed structures through the simple process of luxurious lolling while spiders of inattention spin webs of indifference over pending public problems."[107]

Long delays in the zoning process call into question the motives of regulators and undermine the legitimacy of the final decision. The ABA Model Code explains that:

> [I]t is one of the fundamental elements of due process that a decision maker must come to a final decision within a reasonable period of time. Certainty is one of the goals of the

---

104. MODEL STATUTE ON LOCAL LAND USE PROCESSES (AM. BAR ASS'N. 2008), [hereinafter ABA MODEL CODE], *available at* http://codesproject.asu.edu/node/123]; For an earlier effort, see MODEL LAND DEVELOPMENT CODE (AM. L. INST. 1975) (providing procedural and planning reforms at the local level); *see also* Edward J. Sullivan & Carrie Richter, *Out of the Chaos: Towards a National System of Land use Procedures*, 34 URB. LAW. 449, 450–51 (2002) (recommending national reforms to land use decision-making procedures).

105. 47 U.S.C. § 332(c)(7)(B).

106. ABA MODEL CODE, *supra* note 104, at § 210 (noting that "a dilatory local government would have a strong incentive to do nothing with a controversial permit application."); *see also* Snyder-Westerlind Corp. v. Atl. Highlands, 341 A.2d 687, 689 (N.J. Super. Ct. App. Div. 1975) (observing that municipal officials may fail to act in order to discourage an applicant or because "an application presents a politically unpopular atmosphere"); Daniel R. Mandelker, *Litigating Land Use Cases in Federal Court: A Substantive Due Process Primer*, 55 REAL PROP. TR. & EST. L. J. 69, 72 (2020) ("In the land use process, governments can often act arbitrarily by blocking a project, delaying a project, or refusing to recognize a project approval.").

107. Humble Oil & Ref. Co. v. E. Lansdowne, 227 A.2d 664, 666 (Pa. 1967).

> land use decision-making process . . . and a failure by a local government to decide either way on a development permit application destroys certainty.[108]

The ABA Model Code, thus, sets time limits within which land use decisions must be made and requires the zoning board to refund application fees if these deadlines are missed.[109]

Under the Telecommunications Siting Policy, local zoning officials are required to act on siting applications within a reasonable time "taking into account the nature and scope of such request[s]."[110] Courts have held that local authorities failed to act within a reasonable period of time when they have unnecessarily kept applicants "tied up in the hearing process through invocation of state procedures, moratoria, or gimmicks."[111]

The reasonableness standard provides a basis for applicants to challenge indefinite, unjustified permitting delays. At the same time, the reasonableness standard does not compel local authorities to forgo a thorough investigation of the proposed application.[112] Instead, Congress intentionally chose a flexible "reasonable" time requirement to allow local authorities to consider the particular merits of each application in the context of its location.[113]

2. Decisions Contained in a Written Record

Zoning determinations frequently lack clear findings of fact and fail to explain the basis upon which they were made.[114] As a result, a reviewing court may not have the information necessary to serve

---

108. ABA MODEL CODE, *supra* note 104, at § 210 cmt. 1.

109. *Id.* at § 210.

110. 47 U.S.C. § 332(c)(7)(B)(ii).

111. Masterpage Commc'ns, Inc. v. Town of Olive, 418 F. Supp. 2d 66, 77 (N.D.N.Y. 2005); *see also* USCOC of Greater Mo., LLC v. City of Ferguson, 2007 WL 4218978, at *6 (E.D. Mo. 2007) (warning that local authorities should not transform the application process into a "self-perpetuating, endless odyssey").

112. New York SMSA Ltd. P'ship. v. Town of Riverhead Town Bd., 118 F. Supp. 2d 333, 341 (E.D.N.Y. 2000), *aff'd*, 45 F. App'x 24 (2d Cir. 2002) (finding that "the term 'reasonable' was no doubt used to allow local authorities the flexibility to consider each application on its individual merit" and that "what is reasonable will necessarily depend upon the nature and scope of each request").

113. In 2009, the FCC issued guidance on the reasonableness requirement, allowing localities 90 days to act on applications to place new antennas on existing towers and 150 days to act on other siting applications. Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(b), 24 FCC Rcd. 13994, ¶ 4 (2009). The Supreme Court has since upheld the FCC's interpretation. *See* Arlington v. FCC, 569 U.S. 290 (2013); T-Mobile S., LLC, 574 U.S. at 304–05.

114. Ostrow, *supra* note 4, at 329–331; PATRICIA E. SALKIN, AMERICAN LAW OF ZONING § § 40:1 (5th ed. 2008).

as a meaningful check on local discretion.[115] A public record of zoning decisions allows applicants, community members and courts to compare the outcomes of similar applications, to detect inconsistent or arbitrary results, and to hold decision-makers accountable.[116] Moreover, the very process of preparing a written explanation of their zoning decisions promotes more deliberative and rational decision-making.[117]

The ABA Model Code, thus, requires that decisions on land use permits be based upon and accompanied by a written statement containing, among other things: (1) "the facts relied upon in making the decision[;]" (2) the "regulations . . . relevant to the decision[;]" (3) responses to all related issues raised by the parties during the hearing; and (4) any other conditions that must be satisfied before a certificate of compliance can be issued.[118]

The Telecommunications Siting Policy similarly requires that zoning board denials of telecommunications siting applications be supported by substantial evidence contained in a written record.[119] In *T-Mobile South* v. *City of Roswell*, the Supreme Court upheld the TCA's writing requirement, explaining that without a written statement of reasons, it would be difficult for a reviewing court to determine whether the locality's denial complied with the Siting Policy.[120] The Court held that the writing explanation "need not be elaborate or even sophisticated," but rather "simply clear enough to enable judicial review."[121]

---

115. *See* SALKIN, *supra* note 114, at § 40:44 ("If the court's power to correct clear abuses of discretion is to be effectively exercised, the findings must disclose the facts upon which the board's determination rests.").

116. *See* Donald J. Kochan, *Constituencies and Contemporaneousness in Reason-Giving: Thoughts and Direction After T-Mobile*, 37 CARDOZO L. REV. 1, 30–34 (2015) (noting that reason-giving promotes rule-of-law values, increases governmental legitimacy, promotes public participation, and enables accountability); Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1278 (2009) (arguing that "public officials in a democracy can be held accountable by a requirement or expectation that they give reasoned explanations for their decisions"); Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1695 (1984) (arguing that "government behavior becomes constrained" if the government is forced to justify its conduct on the basis of some public value).

117. *See* Frederick Schauer, *Giving Reasons,* 47 STAN. L. REV. 633, 657–58 (1995) (noting that "the very time required to give reasons may reduce excess haste and thus produce better decisions" and that a "reason-giving mandate will also drive out illegitimate reasons when they are the only plausible explanation for particular outcomes."); Pollack, *supra* note 83, at 743 ("the process of gathering information, considering evidence, and giving articulable reasons produces more careful and fair decision-making.").

118. *See* ABA MODEL CODE, *supra* note 104, at § 204(4); *see also id.* § 204(4) cmt. 1 ("To avoid confusion about what has been decided, a reasoned decision based on findings of fact is an essential conclusion to the permit review process.").

119. 47 U.S.C. § 332(c)(7)(B)(iii).

120. T-Mobile S., LLC, 574 U.S. at 300–01.

121. *Id.*

The Court further emphasized the benefit of the writing requirement to the locality, noting that a simple written explanation allows the locality to "avoid prolonging the litigation—and adding expense to the taxpayers, the companies, and the legal system—while the parties argue about exactly what the sometimes voluminous record means."[122] To the extent that the locality satisfies the writing requirement it need not worry about the expense and hassle of having its decision overturned.[123]

3. Decisions Supported by Substantial Evidence

Judicial review of local land use decisions is notoriously deferential.[124] In *Village of Euclid v. Ambler Realty Co.*, the Supreme Court held that a zoning ordinance violates due process only if it is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[125] *Euclid*'s deferential approach reflects an early understanding of zoning as a legislative endeavor. The original advocates of zoning assumed that local legislatures would create a fixed plan of development and that zoning officials would have little discretion in implementing this legislative plan.[126]

Modern zoning ordinances, however, bear little resemblance to legislative plans of development. Instead, in most jurisdictions, standard zoning decisions are made through subjective, case-by-case assessments of the proposed use of the property. [127] In this

---

122. *Id.* at 303.

123. *Id.* at 303–04 (noting that if the locality satisfies the writing requirement, "the locality need not worry that, upon review of the record, a court will either find that it could not ascertain the locality's reasons or mistakenly ascribe to the locality a rationale that was not in fact the reason for the locality's denial").

124. *See* Ostrow, *supra* note 103, at 721–22 (describing origins and effects of judicial deference).

125. Village of Euclid, 272 U.S. at 388.

126. Ira Michael Heyman, *Legal Assaults on Municipal Land Use Regulation*, 5 URB. LAW. 1, 2 (1973) (identifying three key assumptions of original advocates, first, that segregating uses within a city would create a "quality urban environment"; second, that it would be possible to "formulate an intelligent, all-at-once decision to which the market would conform"; and third, that once the comprehensive plan was in place, zoning officials "would rarely change the rules."); *See also* Rose, *supra* note 16, at 839 (noting that at the outset of zoning, "[i]t was widely assumed that localities could indeed set their goals far in advance, that changes in land regulation would therefore seldom be necessary, and that citizens would not face fluctuations in the status of their own or their neighbors' land.").

127. Mandelker, *supra* note 106, at 81 ("Land use regulation is an inherently discretionary system, in which almost all land use projects require some form of discretionary review."); Erin Ryan, *Zoning, Taking, and Dealing: The Problems and Promise of Bargaining in Land Use Planning Conflicts,* 7 HARV. NEGOT. L. REV. 337, 349 (2002) (noting that land use decision-making has grown increasingly discretionary and "has shifted significantly from the planned toward the particularized, affording a more ad hoc response to individual development proposals.").

context, *Euclid's* deferential standard of review may not serve as a sufficient check on the local land use process.[128]

The Telecommunications Siting Policy subjects telecommunications siting decisions to a more rigorous standard of judicial review.[129] The policy requires local officials to support their zoning decisions with "substantial evidence" contained in a written record. The Second Circuit has explained the impact of the substantial evidence standard on telecommunications decisions as follows:

> Traditionally, the federal courts have taken an extremely deferential stance in reviewing local zoning decisions, limiting the scope of inquiry to the constitutionality of the zoning decision under a standard of rational review. Although Congress explicitly preserved local zoning authority in all other respects over the siting of wireless facilities, the method by which siting decisions are made is now subject to judicial oversight. Therefore, *denials subject to the TCA are reviewed by this court more closely than standard local zoning decisions*.[130]

Although the substantial evidence standard is less deferential than the arbitrary and capricious standard, it does not substitute local judgments with those of the judiciary. The Telecommunications Siting Policy sets out the degree of evidence needed to support the zoning decision, but the decision itself

---

128. Ostrow, *supra* note 103, at 733–34; Rose, *supra* note 16, at 842 (arguing that deferential judicial review of zoning decisions cannot effectively address the fairness claims of individual property owners whose interests are impacted by zoning decisions); Charles L. Siemon & Julie P. Kendig, *Judicial Review of Local Government Decisions: "Midnight in the Garden of Good and Evil"*, 20 NOVA L. REV. 707, 710 (1996) (arguing that deferential judicial review of zoning decisions "so badly imbalanced public and private interests in regard to the use of land that it is practically impossible to redress even outrageous abuses of the zoning power").

129. H.R. REP. NO. 104-458, at 208 (1996) ("[T]he phrase 'substantial evidence contained in a written record' is the traditional standard used for review of agency actions."). *T-Mobile S., LLC*, 574 U.S. at 301 (confirming that substantial evidence "is a 'term of art' in administrative law that describes how an administrative record is to be judged by a reviewing court"); Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951) ("substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."). *See also* Ronald M. Levin, *The Regulatory Accountability Act and the Future of Apa Revision*, 94 CHI.-KENT L. REV. 487, 536 (2019) (discussing proposals to clarify the meaning of substantial evidence).

130. Cellular Tel. Co. v. Town of Oyster Bay, 166 F.3d 490, 493 (2d Cir. 1999) (citations omitted) (emphasis added). *See also* Preferred Sites, LLC v. Troup Cnty., 296 F.3d 1210, 1219 (11th Cir. 2002) (finding that "substantial evidence" standard "requires courts to take a harder look than when reviewing under the arbitrary and capricious standard"); Bellsouth Mobility, Inc. v. Par. of Plaquemines, 40 F. Supp. 2d 372, 377 (E.D. La. 1999) (noting that "substantial evidence" is more strict than usual "arbitrary and capricious" standard).

must comply with substantive state and local law.[131] As the Ninth Circuit has explained, "[W]e must take applicable state and local regulations as we find them and evaluate the City decision's evidentiary support (or lack thereof) relative to those regulations."[132] Ultimately, the substantial evidence requirement imposes a heightened judicial check on zoning decisions while deferring to substantive state and local zoning regulations.

C. Access to Federal Court

The Telecommunications Siting Policy creates a private right of action, allowing persons aggrieved under the Act to take their claims to federal court and requiring the court to hear and decide the claim on an "expedited basis."[133] If the court determines that the municipality did not issue permits in accordance with the federal requirements, the court will compel it to do so.[134]. Judicial enforcement guarantees that the substantive siting outcome will be consistent with the federal policy.

Federal review is significant because land use disputes are typically heard in state court. Indeed, the federal judiciary goes to great lengths to avoid hearing land use cases, imposing numerous procedural barriers to block access to the federal courts,[135] including,

---

131. Ostrow, *supra* note 103, at 731–33; Eagle, *supra* note 35, at 477 (noting that "federal law specifies the degree or quantum of evidence needed to legitimize, under federal law, the exercise of legislative powers devolved upon local boards, under state law, to enforce substantive rights established by state law"); Martin, *supra* note 84, at 433–34 (citing cases holding that substantial evidence must be based on existing state and local law).

132. MetroPCS, Inc. v. City of San Francisco, 400 F.3d 715, 724 (9th Cir. 2005), *abrogated by T-Mobile S., LLC*, 574 U.S. at 293; *See also* T-Mobile Cent., LLC v. Unified Gov't of Wyandotte Cnty., 546 F.3d 1299, 1307 (10th Cir. 2008); USCOC of Greater Mo. v. City of Ferguson, 583 F.3d 1035, 1042 (8th Cir. 2009); U.S. Cellular Tel. of Greater Tulsa, LLC v. City of Broken Arrow, 340 F.3d 1122, 1133 (10th Cir. 2003); New Par v. City of Saginaw, 301 F.3d 390, 398 (6th Cir. 2002); Town of Amherst v. Omnipoint Commc'ns. Enters., Inc., 173 F.3d 9, 14 (1st Cir. 1999).

133. Telecommunications Act of 1996, 47 U.S.C § 332(c)(7)(B)(v). The ABA Model Code similarly requires expedited judicial review of land use decisions. *See* ABA MODEL CODE, *supra* note 104, at § 610.

134. SALKIN, *supra* note 114, § 25:7 ("Most courts have ruled that the proper remedy for a zoning authority's violation of the limitations in Section 332(c)(7) is an order compelling the local authority to issue the requested permit.").

135. Mandelker, *supra* note 106, at 76–101 (discussing "major hurdles that land use plaintiffs traditionally face when bringing a case in federal court"); STEVEN H. STEINGLASS, SECTION 1983 LITIGATION IN STATE COURTS § 6:16 (2010) (noting that "federal courts are often reluctant to hear land use cases and have relied on abstention, preclusion, and their discretion to limit access to federal court"); Gregory Overstreet, *The Ripeness Doctrine of the Taking Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go to Avoid Adjudicating Land Use Cases*, 10 J. LAND USE & ENV'T L. 91, 92 (1994).

> [A]n entitlement rule to dismiss a case when a municipality has the discretion to reject a land use project; a ripeness rule that requires an unnecessary final decision by a local government; a rule that substantive due process claims in land use cases must be brought under the takings clause; or a standard of judicial review that protects municipalities from judicial intervention.[136]

The Telecommunications Siting Policy establishes a federal forum for land use cases involving telecommunications siting, signaling the *national* implications of telecommunications siting decisions. Federal judges have an advantage in land use cases. Federal judges are appointed, and once confirmed by the Senate, enjoy life tenure. In contrast, most state judges are elected by the local population and serve for terms, rather than for life. Some studies have concluded that elected judges are more sensitive to local pressures and public opinion than federal judges.[137] Particularly in the context of siting disputes, federal judges, who are insulated from local politics and economic pressures, are more likely to assess the dispute from an objective perspective.[138]

V. CONCLUSION

Federal Process Preemption siting policies impose *federal* constraints on the *local* zoning process. The interjurisdictional framework strikes a balance in facilities siting by increasing regulatory consistency and predictability without sacrificing the ability of local officials to tailor broad land use policies to local conditions. Today, the federal government uses Process Preemption to facilitate the development of nationally significant land uses, including cell phone towers, churches, and group homes. This Article argues that Process Preemption would be similarly effective

---

136. Mandelker, *supra* note 106, at 75 (internal citations omitted).

137. David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 271 (2008) ("Elected judges are less independent than appointed judges in the sense that the public can vote them out of office if it does not like their decisions."); Alexander Tabarrok & Eric Helland, *Court Politics: The Political Economy of Tort Awards*, 42 J.L. & ECON. 157, 186 (1999) (finding that elected judges are more likely to redistribute wealth from out-of-state businesses to in-state plaintiffs); *Cf.* Jonathan Remy Nash*, Prejudging Judges*, 106 COLUM. L. REV. 2168, 2169–70 (2006) (arguing that judicial nominees may face more compelling pressure to speak out on controversial issues than do judicial candidates).

138. Burt Neuborne, *Parity Revisited: The Uses of A Judicial Forum of Excellence*, 44 DEPAUL L. REV. 797, 799 (1995) (arguing that "a relative institutional advantage for the plaintiff exists in federal court; an advantage resulting from a mix of political insulation, tradition, better resources and superior professional competence"); Mandelker, *supra* note 106, at 73 (arguing that "land use plaintiffs should have access to federal courts when they can claim that abusive governmental decisions violate substantive due process").

in supporting the development of other nationally significant land use facilities, such as wind turbines or affordable housing.