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THE FEDS

THE NATIONAL ZONING NANNY

Prodded by industry, Washington is starting to meddle in matters that used to be purely local.

By Jonathan Walters

In its more meddlesome moments, Congress has been accused by some local governments of trying to act as the nation's "city council", dabbling in the minutia of issues from law enforcement to environment that are best left up to communities to handle themselves.

Those complaints have died down a bit in recent years as Devolution Fever has replaced Potomac Fever as Capitol Hill's infection of choice. But lately, Congress--which has been crowing about pushing authority down to the state and local level where it more appropriately belongs--has been evincing a weird penchant for being something worse than the nation's city council: It has decided to be its planning and zoning board.

Right now, this relapse of arrogance is on display in two very closely related policy areas. The first has to do with the siting of broadcast towers, as the cellular phone and high-resolution-television industries scramble to develop the infrastructure each needs to keep America glued to the phone and the tube. That infrastructure includes significant numbers of broadcast towers to be liberally salted on the hilltops and across the flatlands of America.

The second area of congressional meddling involves the legal process that must be pursued by developers and other private petitioners who challenge the decisions of local zoning and planning boards. Currently, petitioners who feel aggrieved must start in local or state Court and work their way up. But HR 1534, backed by the National Association of Home Builders and passed by the U.S. House at the end of last year's legislative session, would nullify this particular piece of state and local authority. It would allow developers to bypass the lower courts altogether and go directly to federal court.

And so, with the fight over unfunded mandates only recently considered won, community interests now find themselves in a new broad-based battle with Congress over the wholesale federal preemption of state and local authority in land use and land use planning.

It was easy to see the broadcast tower wars coming. The seeds were sown with the passage of the Federal Communications Act of 1996, when a Congress at its cutest--or sleepest--included two provisions that even the most amateur analyst knew were asking for trouble. The first declares that nothing in the law is meant to preempt local zoning and planning authority. Sounds good. The problem is that a subsequent provision in the law says that neither state nor local governments can ultimately do anything to prevent communications companies from achieving their goal of statewide or interstate coverage.

Localities, being the creative and resilient creatures that they are, responded to the contradictory message in a logical way: Knowing that they couldn't ban towers outright, they started using their zoning powers to steer

placement and construction in a way that was kindest to the local health, safety and general welfare--not to mention topography. In many cases, that meant asking companies to prove that they had investigated all options for sites that were as non-invasive as possible. Some communities even asked that new towers be made to look like trees or farm silos if neither co-location nor relocation were viable options.

The communications industry played along, but only for a short while. After meeting resistance from dozens of localities over the siting of towers, the industry took a more expeditious route: It asked the Federal Communications Commission to gin up new rules that in essence make local zoning and planning decisions on towers subject to direct FCC review and reversal. The FCC, which is vying for the decade's intergovernmental chutzpah award, went right along, cranking out the rules and then opening them up for public comment.

Which is when it heard from the Thistle Hill Neighborhood Alliance in Cabot, Vermont. The Alliance happened to be in the midst of fighting a 120-foot broadcast tower [fact error - 185-foot cell tower] that NYNEX wants to plunk down on a hilltop heretofore dominated by 40-foot sugar maples. The residents of Cabot vowed not to roll over for NYNEX or the feds. They started making lots of noise.

At that point, the FCC started hearing from a few other Vermonters, including U.S. Senators Patrick Leahy and James Jeffords, who sent the wireless communications industry ballistic by introducing a bill to block the industry-backed FCC land grab. Vermont Governor Howard Dean, who has never been one to mince words when it comes to protecting either states' rights or Vermont's rural character, has written the White House, but prefers to frame the issue as typical of a preemption-happy Republican Congress. "It's just another example of this Congress being two-faced about devolution and states' rights," says Dean, who vows to take the FCC fight to the U.S. Supreme Court if he has to. The Vermont congressional delegation has unanimously asked the FCC to suspend all rule-making on tower sites for at least a year, rather than deciding this month, as the agency appeared willing to do.

Actually, there are more important questions involved here than whether the FCC--and the communications industry--get to tell state and local governments what to do with their land. If Washington decides it's going to be the last word on tower siting, then states and localities can certainly expect the National Association of Home Builders to be back with a vengeance in the next legislative session to push HR 1534, the all-purpose planning and zoning preemption. And given Congress' reappearing weakness for restoring bureaucrats in Washington to preeminence over state and local governments, the home builders will have every reason to be quite confident.

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