

# ANDERSON KREIGER

## PRIVILEGED AND CONFIDENTIAL MEMORANDUM

To: Elizabeth Hughes, Town Planner  
From: Mina Makarious and Kristen Gagalís  
Re: Wireless Zoning Bylaw Review and Proposed Revisions  
Date: November 14, 2025

The Planning Board is considering revisions to Zoning Bylaw Section 7.8 – Personal Wireless Communications Facilities (the “Current Bylaw”) in order to reduce barriers to entry by wireless communications carriers to the Town given the need for increased cell service. This project aligns with Select Board Goal I.B. - Cell Service, which also aims to address this issue.

We have prepared this memorandum for the Planning Board’s review and discussion at its November 2025 meeting, outlining a potential strategy for replacing the Current Bylaw with language more appropriate for the Town’s current wireless needs. The goal of this memorandum is not to answer all of the possible questions about what that final bylaw might look like, but rather to guide its drafting and further development.

### **I. Shifting the Zoning Paradigm**

The Current Bylaw was written during a time of immense proliferation of wireless infrastructure around the country and corresponding concern about the effects of that infrastructure on the natural and built environment. Accordingly, the Current Bylaw was designed to *limit* the number of personal wireless communication facilities (“Facilities”) in the Town. It focused largely on minimizing their impacts, rather than *encouraging* service. This is evident from the purpose section, 7.8.1, which states:

The purpose of this section is to establish a district within the Town in which personal wireless communication facilities may be provided, to regulate their impacts and to accommodate their location and use in a manner which: (a) protects the visual, aesthetic, scenic, historic, environmental and natural or man-made resources of the Town; (b) encourages the use of existing structures and towers; (c) protects property values; (d) minimizes the total number and height of towers...

The Current Bylaw accomplished these purposes in part by imposing permissible, but somewhat stringent, requirements on applicants seeking to install Facilities in the Town. Most notably, the Current Bylaw included provisions that require an applicant to eliminate the possibility that it could provide adequate cellular coverage utilizing other Facilities outside the Town. If they could not, the Current Bylaw requires applicants to seek locations in “overlay districts” in the Town as the first option, subject to a handful of additional provisions that further limit where

Facilities could be located. The result is a significant limitation on the number of available sites that an applicant could identify to seek to fill coverage gaps.

Provisions implementing this paradigm include the following provisions of the Current Bylaw:

- 7.8.4.2(e): New towers may not exceed the *minimum* height necessary to provide adequate coverage for the Facilities proposed for use on the tower.
- 7.8.4.2(f): If primary coverage from the proposed Facility (greater than 50%) is outside the Town of Concord, the permit may be denied unless the Applicant can show it is unable to locate within the Town if the Town is the community primarily receiving service from the proposed facility.
- 7.8.4.2(j): No new tower for a Facility may be located within one thousand feet of childcare facilities and schools, single-family detached dwellings, structures in a Historic District, vernal pools, and habitats of any endangered wildlife or plant species. Note that many of these areas are already protected under the jurisdiction of other bodies (e.g., the Natural Resources Commission or the Historic Districts Commission)
- 7.8.4.2(k): New Facilities in or on an existing, suitable, non-residential structure or tower for which an occupancy permit was issued as of January 1, 2000 must be located at least: 500 feet from habitable structures and 300 feet from any structure in a Historic District.
- 7.8.4.2(m): Facilities must be located so as to provide adequate coverage and adequate capacity with the fewest number of base stations, towers and antenna arrays that are technically feasible.

Further, an applicant seeking relief from any of these requirements is currently required to demonstrate its need for such relief and provide the Board with “a written statement describing why the requested relief is in the best interest of the *Town*”, rather than service to its customers or potential customers. Current Bylaw, § 7.8.4.5 (emphasis added).

These types of requirements, as explained below, may be unenforceable in particular circumstances and preempted by federal law, which expressly permits wireless carriers to override local zoning to close coverage gaps. An applicant could ignore these requirements today and argue their lack of enforceability to the Town. However, the presence of these provisions is not helpful to the Town’s goals of promoting additional coverage. Applicants reviewing the Current Bylaw may be discouraged from pursuing the siting of Facilities in Town due to the seeming aversion to them, or the effort involved to cite them.

Below we suggest a proposed path forward that reorients the Bylaw to not only come into compliance with applicable federal law, but to encourage the appropriate siting of Facilities in Town to close existing wireless coverage gap.

## **II. Recommended Changes to Maintain Compliance with Federal Law**

The Current Bylaw contains several provisions that should be eliminated, regardless of any other changes, because they would likely be unenforceable if challenged.

The first of those provisions is Zoning Bylaw § 7.8.4.2(l), which ranks various locations for a personal wireless communication system in order of preference, and § 7.8.4.1(e), which requires an applicant to document its decision not to place its Facility in a designated overlay district. Under 47 U.S.C. § 332(c)(7)(B)(i)(II), municipalities cannot adopt policies that prohibit or have the effect of prohibiting the provision of personal wireless services. An applicant could argue that the Current Bylaw's §§ 7.8.4.2(l) and 7.8.4.1(e) prevent providers from filling a significant gap in their coverage, thereby effectively prohibiting the provision of wireless services in that geographic area. Although these provisions do not fully prohibit the placement of a Facility, the stated preference for certain locations leaves that point unclear. Removing these provisions would more effectively bring the bylaw into compliance with federal law, as well as signaling to applicants that they are welcomed to provide additional coverage in the Town.

Finally, the Current Bylaw's provisions requiring a special permit for certain minor changes to an existing Facility, such as co-locating an antenna on an existing tower, changing out equipment, and minimally changing the height of a tower, are also likely unenforceable. In 2012, Congress passed the "Spectrum Act" to further the development of a nationwide wireless network and further reduced local control over Facility siting. Under Section 6409 of the 2012 Spectrum Act, "a state or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station," including requests to "collocat[e] new transmission equipment." Accordingly, provisions requiring a discretionary special permit for such changes would likely be unenforceable. Moreover, they do not further the Town's goals of promoting solutions to gaps in cellular coverage

## **III. Additional Changes to Promote Additional Coverage**

In addition to the two provisions above, we would recommend several other high level changes to make the Town's bylaws a tool to encourage, rather than discourage, cellular service.

- (1) *Differentiate between applications to add antennas versus applications for new towers, which would allow desirable as-of-right actions by right*

As discussed above, certain actions are not only required to be permitted as-of-right under federal law, but should also be as-of-right under the paradigm of encouraging wireless providers to close the Town's coverage gap by reasonable means. Accordingly, under a redesigned bylaw, wireless providers that wish to co-locate a new antenna on an existing tower, swap out old equipment, etc. should be able to do so via a non-discretionary building permit.

- (2) *Allow Facilities Subject to Site Plan Review, Rather than Subject to a Special Permit.*

The Current Bylaw requires a Special Permit for all Facilities in the Town, whether they are on standalone towers or on existing buildings. It also requires applicants to take extensive steps to

demonstrate why a Facility cannot be located within an overlay district as a prerequisite to being located anywhere else. This process has the advantage of providing for robust public review of these Facilities, but the significant amount of information needed to apply for and obtain a Special Permit can create a burden for wireless carriers looking to increase service in the Town. There is also a suggestion that the current Special Permit criteria are too stringent in some cases, and vague in others, which further discourages applications.

Rather than continuing to require applicants to obtain a special permit, we would suggest utilizing site plan review as the primary manner to site Facilities. This would be preferable for a number of reasons. As described above, there are certain categories of uses the Town may want to encourage: for example, co-locating antennas on existing Facilities or placing them out of sight in steeples, cupolas and other existing structures. Requiring applicants to comply with location/siting requirements for these uses is redundant and unnecessary, since implementing these uses requires no new structures to be built.

*(3) Utilizing Conditions in Site Plan Review, Rather than Waivers from Requirements, to Address Site Conditions.*

Where there is nevertheless a special concern about a particular location, however, those site-specific concerns can be addressed through reasonable conditions on site-plan review in a more appropriately tailored way. This would also have the advantage of significantly simplifying the bylaw by removing many, if not all, of the design and other siting criteria in the Current Bylaw and leaving a few basic ones that are likely to matter for all Facilities such as a reasonable height limitations, camouflaging and screening requirements, and safety “fall” zones for towers (see § 7.8.4.2(a) of the Current Bylaw).

It would also remove the need for limitations on Facilities in particularly sensitive areas such as historic districts or near wetland areas. Placement of Facilities in those areas would still likely trigger review by other bodies and the conditions of their decisions can be incorporated into the site plan review as enforceable conditions of zoning as well, with more sensitivity to particular locations and circumstances.

*(4) Limiting the Use of Special Permits for Facilities of a Certain Size or in Certain Locations.*

The Town could, alternatively, require special permit for new *towers* or for Facilities in particularly sensitive locations, while utilizing site plan review for all other Facilities. This option would also preserve the public hearing for applicants proposing a new tower, providing the transparency desired for larger projects and putting a greater burden on applicants to justify such Facilities.