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August 16, 2022

Leslie A. Haley, Town Clerk
Town of Newbury
12 Kent Way
Newbury, MA 01922

**Re: Newbury Annual Town Meeting of April 26, 2022 -- Case # 10535
Warrant Articles # 21 and 22 (Zoning)**

Dear Ms. Haley:

Articles 21 and 22 - We approve Articles 21 and 22 from the April 26, 2022 Newbury Annual Town Meeting. Our comments regarding Articles 21 and 22 are provided below.

Under Article 21 the Town voted to amend its zoning by-laws by deleting the existing text of Section 97-4.C "Wireless Communications Services Overlay District," and inserting a new Section 97-4.C, "Wireless Communications Facilities." The new Section 97-4.C includes subsection 97-4.C (A) (6) that allows small cell wireless facilities located outside of public ways by special permit. Under Article 22 the Town voted to amend Chapter 88, "Street, Sidewalks, and Commons," by adding a new Section 88-15, "Small Wireless Facilities in rights-of-ways." The new Section 88-15 allows small cell wireless facilities in public ways with the Select Board's approval. We approve Articles 21 and 22. However, the Town must apply the by-law amendments, including the new provisions that apply to small cell wireless facilities, consistent with state and federal law as provided in more detail below.

I. Federal Laws Applicable to Wireless Facilities and Small Cell Facilities

The federal Telecommunications Act of 1996, 47 U.S.C. § 332 (7) preserves state and municipal zoning authority to regulate personal wireless service facilities, subject to the following limitations:

1. Zoning regulations "shall not unreasonably discriminate among providers of functionally equivalent services." 47 U.S.C. §332 (c)(7) (B) (i) (I)
2. Zoning regulations "shall not prohibit or have the effect of prohibiting the provisions of personal wireless services." 47 U.S.C. § 332 (c) (7) (B) (i) (II).

3. The Zoning Authority “shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time.” 47 U.S.C. § 332 (c) (7) (B) (ii).
4. Any decision “to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.” 47 U.S.C. § 332 (c) (7) (B) (iii).
5. “No state or local government or instrumentality thereof may regulate the placement, construction and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [Federal Communications] Commission’s regulations concerning emissions.” 47 U.S.C. § 332 (c) (7) (B) (iv).

Further, 47 U.S.C. § 253, “Removals of Barriers to Entry” provides that “[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.” Section 253 (a).

In addition, Section 6409 of the Middle Class Tax Relief and Job Creation Act of 2012 requires that “[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.” (emphasis added). The Act defines “eligible facilities request” as any request for modification of an existing wireless tower or base station that involves: 1) collocation of new transmission equipment; 2) removal of transmission equipment; or 3) replacement of transmission equipment. The Act applies “[n]otwithstanding section 704 of the Telecommunications Act of 1996.” The Act’s requirement that a local government “may not deny, and shall approve, any eligible facilities request” means that a request for modification to an existing facility that does not substantially change the physical dimensions of the tower or base station must be approved. Such qualifying requests also cannot be subject to a discretionary special permit. The Town should consult with Town Counsel to ensure that the amendments adopted under Article 21 are applied consistent with 47 U.S.C. §§ 253 and 332.

As to small cell facilities, on September 26, 2018 the Federal Communications Commission (“FCC”) adopted a Declaratory Ruling and Third Report and Order (FCC 18-133) (“Ruling and Order”), pertaining specifically to small wireless facilities. Among other things, the Ruling and Order: (1) clarifies when a local requirement constitutes an effective prohibition on small wireless facilities; [Section III.A]; (2) establishes the standards and limits for fees and charges applicable to small wireless facilities; [Section III.B]; and (3) establishes the timeframes within which a municipality must act upon a small wireless facility provider’s application [Section IV.A].

In a decision issued August 12, 2020 by a three judge panel of the 9th Circuit Court of Appeals in the case of City of Portland et al vs. United States of America: Federal Communications Commission, 969 F. 3d 1020 (2020), the Court upheld much of a challenge to the FCC’s Ruling and Order.¹ Specifically, the 9th Circuit upheld the FCC’s fee limitations, the time periods in which local

¹ The 9th Circuit’s panel decision was appealed to the full 9th Circuit. On October 20, 2020, the en banc rehearing was denied. A certiorari petition was filed with the Supreme Court on March 26, 2021 (Docket No. 20-1354). On June 28, 2021, the Petition for Certiorari was denied by the Supreme Court.

governments must act on applications, and the FCC's authority under the Telecommunications Acts of 1996 to remove barriers that would have prevented a wireless service provider from accessing existing utility poles. Id. at 1039, 1043-1046. In addition, the 9th Circuit upheld the requirement that aesthetic regulations be reasonable but overturned the FCC's requirements that aesthetic regulation standards be objective and no more burdensome than those applied to other types of infrastructure. Id. at 1042-1043. The Town may wish to discuss with Town Counsel the application of the City of Portland decision to the amendments adopted under Articles 21 and 22.

II. State Law Applicable to Wireless Facilities and Small Cell Facilities

State law also establishes certain limitations on a municipality's authority to regulate wireless communications facilities and service providers. Under General Laws Chapter 40A, Section 3 wireless service providers may apply to the Department of Telecommunications and Cable for an exemption from local zoning requirements. If a telecommunication provider does not apply for or is not granted an exemption under c. 40A, § 3 it remains subject to local zoning requirements pertaining to cellular towers. See Building Comm'r of Franklin v. Dispatch Communications of New England, Inc., 48 Mass. App. Ct. 709, 722 (2000). The Town should consult with Town Counsel with any questions regarding the by-laws and the applicable requirements of state law, including G.L. c. 40A, § 3.

III. Conclusion

We approve the by-law amendments adopted under Articles 21 and 22. However, we encourage the Town to consult closely with Town Counsel to ensure that the by-law amendments are applied consistent with all federal and state laws, including, the FCC's Declaratory Ruling and Third Report and Order (FCC 18-133) and G.L. c. 40A, § 3.

Note: Pursuant to G.L. c. 40, § 32, neither general nor zoning by-laws take effect unless the Town has first satisfied the posting/publishing requirements of that statute. Once this statutory duty is fulfilled, (1) general by-laws and amendments take effect on the date these posting and publishing requirements are satisfied unless a later effective date is prescribed in the by-law, and (2) zoning by-laws and amendments are deemed to have taken effect from the date they were approved by the Town Meeting, unless a later effective date is prescribed in the by-law.

Very truly yours,

MAURA HEALEY
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FINAL ACTION CERTIFICATE

I, Leslie A. Haley, Town Clerk, Town of Newbury, hereby certify that the following is the final version of Article 21 passed at the Newbury Annual Town Meeting held on April 26, 2022:

A. *Wireless Communications Facilities.*

1. Purpose:
 - a) The purpose of this Zoning Bylaw is to establish regulations for the placement, construction and modification of Wireless Communications Facilities (WCF) through which Wireless Communications Services (WCS) may be provided while preserving and protecting the public health, safety and general welfare. Specifically, these WCF regulations have been created to:
 - (1) ***Protect the general public from hazards associated with WCFs;***
 - (2) ***Minimize visual impacts from WCFs;***
 - (3) ***Protect the scenic, historic, natural and human-made resources of the Town;***
 - (4) ***Protect property values;***
 - (5) ***Enable the provision of Personal Wireless Services (PWS) in a manner consistent with federal law;***
 - (6) ***Enable the town to enjoy the benefits of an effective wireless communications infrastructure.***
2. Tower Use Restrictions.
 - a) A Wireless Communications Tower District (WCTD) has been created to enable wireless communications services to operate on tower-mounted facilities. A Wireless Communications Tower (WCT) may be erected by special permit in the following locations:
 - (1) ***Business/Light Industrial District.***
 - b) ***New WCTs are allowed by Special Permit and site plan review and approval from the Planning Board in the WCTD, initially for the deployment of Personal Wireless Service Facilities (PWSF), pursuant to the Town of Newbury Zoning By-Laws and subject to the criteria and to site plan approval as set forth in this Zoning By-Law. Additional WCFs, including without limitation, PWSFs, may be added to lawfully existing WCTs through the Special Permit process and/or the Eligible Facilities Request process, as applicable. Approval of a new WCF is subject to the following determinations by the Planning Board:***
 - (1) ***The benefits to the Town outweigh any adverse effects of the proposed tower and facility in view of the particular characteristics of the site and its surroundings.***

- (2) The communications needs served by the proposed WCT are of substantial benefit to the Town;**
 - (3) Traffic flow and safety, including parking and loading are not significantly impacted;**
 - (4) The proposed WCT does not significantly impact the adequacy of utilities and other public services;**
 - (5) The proposed WCT does not significantly impact neighborhood character and natural environment, including, without limitation, aesthetics, visual blight and noise;**
 - (6) The proposed facility is consistent with the requirements of Site Plan Review set forth in §97-9;**
 - (7) Potential fiscal impacts, including impacts on Town services, tax base and employment are not detrimental;**
 - (8) Potential hazards due to radio frequency energy, operations (such as falling object risks), traffic and other relevant factors, are appropriately addressed.**
- c) A WCT may be erected only in the WCTD, subject to the following conditions:**
- (1) To the extent feasible, all PWS providers shall collocate their antennas on a single tower, unless limiting a tower's collocation capacity produces a demonstrably better result, singly and collectively, balancing the visual and other impacts of a single tall tower with the potential impacts of multiple shorter towers or other solutions to address the needs of providing service to an area of Town. Towers shall be designed to structurally accommodate the maximum technically practicable number of foreseeable users for their approved height;**
 - (2) New towers shall be considered only upon a finding by the Planning Board that existing or approved towers, or alternatives involving other i) existing structures or ii) placements of WCF antennas in the public way, cannot address the coverage needs with less overall impact;**
 - (3) Any new WCT shall be of the monopole type only and no lattice or guy-wire towers shall be permitted, unless the Planning Board finds an alternative design, including without limitation, disguised or camouflage design is an appropriate solution for the context of the site and surroundings.**
 - (4) The highest point of any tower or of any antenna or any component thereof or attachment thereto, with the exception of lightning rods and public safety antennas, shall not exceed whichever is greater: 65 feet above ground or such greater height necessary to provide adequate service based on a finding that the applicant has made a substantial showing of the need for the height and the lack of less impactful alternatives.**
 - (5) Finished grades shall not be distorted above the preexisting natural grades to achieve additional height.**

- (6) A WCT shall not be erected nearer to any property line than a distance equal to the vertical height of the WCT with appurtenances, measured at the mean finished grade of the tower base. Upon finding that a better result is obtained by reducing the setback by up to 50% of the height of the tower facility, the Planning Board may reduce this requirement.**
- (7) The area around a tower, including its communication equipment and shelters, shall be completely fenced for security to a height of six feet, and gated; and a sign shall be posted on or adjacent to all entry gates indicating the facility owner and a twenty-four-hour emergency telephone number. The Planning Board may waive this requirement if it finds the site design provides for the necessary security in another way.**

3. General Use Restrictions.

- a) WCFs are permitted in all districts subject to the following requirements, provided that new tower-based WCFs are further limited to the WCTD.**
- b) To the extent feasible, all utility interconnections to a WCF shall be via underground lines, except where existing overhead lines may be utilized. The Planning Board may waive this requirement upon a finding that the installation of new overhead lines is substantially not visible to adjacent properties.**
- c) Existing on-site vegetation shall be preserved to the maximum extent practicable.**
- d) The WCF shall minimize, to the extent feasible, adverse visual effects on the environment. The Planning Board may impose reasonable conditions to ensure this result, including concealments and mitigations such as: camouflage, screening, architectural design, height or other visibility limitations, and painting and lighting requirements or limitations.**
- e) Traffic associated with the WCF shall not adversely affect abutting ways.**
- f) The applicant shall obtain written, legally valid and binding authorization for the use of each facility site/structure from the owner(s) thereof.**
- g) Applicants shall demonstrate the proposed use, expanded to its projected maximum capacity, will be compliant with federal requirements regarding the limitation of human exposure to radio frequency energy.**
- h) Noise generated by any WCF, including auxiliary generators, shall not exceed 50 dBA at ground level at any non-residential property line and 35 dBA at any residential property line. The Planning Board may waive this restriction on a finding that the applicant demonstrated by professional technical analysis the noise generated by the facility is essentially inaudible to the public, based on the submittal requirements in Section 4. Generators may be excepted from this criterion, provided the Planning Board may require generator noise mitigation to minimize generator noise nuisance.**

- j) A WCF may be installed on an existing structure, provided the installation is compatible with the context of its surroundings. Such facilities will employ best practices to design a facility that does not appear visually objectionable, denigrate the historic or scenic fabric of the community, produce visual blight, obscure scenic or safety viewlines, or conflict with the character of its surroundings. The Planning Board may require such facilities to be concealed by architectural features consistent with the location, camouflaged by coloring and/or shape, and/or screened by vegetation or other construction. Camouflage/concealment solutions are preferred not only because they improve visual impacts, but also because they establish performance requirements for future collocators and for modifications under "Eligible Facilities Requests" criteria imposed under federal law. Under the federal Eligible Facilities Request criteria, a new WCF operator might be allowed by right to join a structure or building with an existing approved WCF, unless the existing WCF has been permitted with conditions that give the permit granting authority more control over future WCF collocators.*
 - j) Heights of existing structures, other than WCTs, may be increased by up to 12 feet for attachment of antennas and related hardware, subject to the visual impact and other criteria in this bylaw. Such heights may exceed the height limit for the zoning district.*
4. Submittal requirements.
- a) As part of any application for a special permit for a WCF, applicants shall determine whether the application is also subject to the Town of Newbury Site Plan Review regulations (Ch. 97 Art. IX, §97-9.A) Clause (4) Review Thresholds and include all material required for site plan review applications with the special permit application. When the special permit submission requirements overlap any site plan review submission requirements, a single submission addressing the overlapping requirements is acceptable. Notwithstanding the foregoing, all applications for a new WCT shall be considered Level II – Major Projects for the purposes of site plan review. Applicants that are required to comply with federal National Environmental Policy Act (NEPA) requirements shall submit their NEPA report with their application in support of their site plan review submission requirements. The Planning Board may waive any Site Plan Review submission requirements it deems not relevant to the application.*
 - b) Applicants for a new or modified WCT shall describe the capacity of any tower, including the number and types of antennas and associated equipment to be mounted on the tower, and the number of projected collocators that it can accommodate, and the basis for the calculation of tower capacity.*
 - c) The applicant for any WCF or WCT shall describe and show any accessory structures, equipment, utilities and other related development required to build and operate the facility.*
 - d) Applicants shall submit:
 - (1) The name and address of the applicant and all agents of the applicant and of all legal and beneficial owners of the site or sites proposed for a wireless communication facility, copies of**

all instruments, options, contracts or encumbrances affecting ownership of the site or sites;

- (2) A copy of the applicant's FCC license (and/or the licenses of any other WCF operators committed to using the facility, accompanied by evidence of such commitment);***
- (3) Applications for a new WCT shall include a PWS provider as co-applicant or evidence of a binding commitment by a PWS provider to occupy the WCT upon installation;***
- (4) An instrument executed by all persons or entities owning the property (site and structure, if the owners are different) proving that the applicant is authorized by them to make the application and agreeing to comply with provisions of this Zoning Bylaw;***
- (5) A statement signed by the applicant, on oath and under penalties of perjury, that all information included in the submittal is materially accurate, true, complete and verifiable. Inaccurate, misleading or false information shall be grounds for disapproval of the application or revocation of approval;***
- (6) Plans and other information identifying the site proposed, including:***
 - (a) A map at an appropriate scale (to be determined by the Planning Board), showing lot lines of the subject property and of all properties within 500 feet of the perimeter of the facility and showing the footprint of all buildings on all such properties;***
 - (b) Location on a copy of the Town Maps of the zoning district, including any overlay district, applicable to such properties;***
 - (c) The heights of all existing buildings and structures on such properties and the height of any proposed new structure on the subject property;***
 - (d) If a WCT is proposed: height of existing tree cover on such properties, specifying heights and principal species;***
 - (e) Plans and elevation drawings showing the design of the proposed facility, site development requirements, contours, grade changes, utilities, structures and fences, and environmental characteristics (such as wetlands and flood zones).***
- (7) Photographs depicting views of the proposed WCF from locations off the parcel. For WCT applications, the applicant shall be required to conduct a balloon/crane test at the location of a proposed tower or antenna to show its height and visibility.***

- (a) Such test shall be conducted two weeks prior to the public hearing and shall be advertised at the applicant's expense in a newspaper of general circulation in Newbury at least one week prior to the test.
- (b) Written notice of the test shall also be given to the owners of property within 300 feet of the proposed property.
- (c) A photosimulation report from a balloon/crane test, including report methodology, existing and simulated view photos, and map of photo locations. Photosimulation photographs shall be made with a focal length equivalent to a reference 35 mm film "full-frame" camera equipped with 50-55 mm focal length lens.
- (d) To improve efficiency, the Planning Board may delegate the oversight of a balloon test to staff, including determining whether a balloon test should occur prior to application or be left to the Planning Board's discretion in the hearing.
- (e) A complete description, including, but not limited to, data, drawings, catalogs, brochures, manufacturers' specifications, photographs and all other pertinent information relevant to the proposal describing antennas, equipment mounts and all other equipment and structures proposed for the site or related to the proposal; plus all of the information required by By-law.
- (f) Data as to noise, certified by an acoustical engineer, demonstrating compliance with the noise requirement in Section (3) above. Alternatively, the applicant may request a waiver of strict compliance with the noise requirement by providing a report from an acoustical engineer using quietest-hour 90th percentile background noise measurements of existing ambient noise and projections of the noise contribution of the proposed WCF to demonstrate the WCF noise will not be a nuisance to the community. The Planning Board may waive these submission requirements upon a finding that the general noise information submitted with the application is sufficient, which, for example, might apply to a proposed WCF with no noise-generating components or with indoor installation of equipment.
- (g) If the applicant intends to assert that non-approval of the requested special permit would constitute an effective prohibition of Personal Wireless Services under the Telecommunications Act of 1996, the applicant shall include substantial evidence demonstrating:
 - i) that there is a significant gap in service (coverage, for example),
 - ii) there are no better alternatives available, and
 - iii) if applicable, how a non-approval would materially inhibit the applicant's ability to provide Personal Wireless Services.

5. Review and action by the Planning Board. The Planning Board shall review and act upon an application for a special permit (and, when applicable, site plan review and approval) for a WCF in accordance with applicable provisions of MGL c. 40A, §§ 9 and 11; and in accordance with this Zoning By-Law; and:
 - a) Shall make such investigation as it deems appropriate to determine whether the application meets the requirements of § 97-4.C.(2) through § 97-4.C.(4);
 - b) May engage a radio frequency engineer, an acoustic engineer and such other professional consultants as it deems necessary to assist and advise it in its investigation and determination, whose services will be paid for by the applicant;
 - c) Shall require of each applicant and each holder of a special permit and site plan approval hereunder reasonable deposit for and reimbursement of all fees for the employment of appropriate consultants, which deposit shall be requested and held only for a specific inquiry by the Town in accordance with G.L. c. 44 sec. 53G;
 - d) Notice to parties in interest shall be given in accordance with the requirements under MGL Ch. 40A;
 - e) Shall render a written decision based on substantial evidence in the record within any statutory time limits established under state and federal law, including applicable tolling or extensions thereof.
6. Small Wireless Facilities Outside Rights-of-Way.

- a) The purpose and intent of this bylaw section is to permit regulation of the installation of Small Wireless Facilities outside of rights-of-way so as to respect the neighborhood characteristics in which they are proposed, consistent with the purposes set forth in § 97-4.C.(1) and with federal and state law.
 - b) All installations of Small Wireless Facilities outside of rights-of-way require a Special Permit. The Special Permit Granting Authority for Small Wireless Facilities outside rights-of-way is the Planning Board.
 - c) The Planning Board shall adopt and from time to time amend policies, rules, and regulations relative to the issuance of special permits under this Section §97-4.C.6. A copy of the policies, rules, and regulations shall be on file with the Town Clerk. Such rules shall prescribe the form, contents, style, and number for application forms, the fees collectible with the applications, the process by which the application will be reviewed, the design and location criteria for approval, the time within which the Planning Board will issue a decision, and requirements for recertification.
7. Monitoring and inspections.
- a) If a wireless communications facility is determined to be in violation of any of the provisions of the special permit and/or site plan approval or any other applicable law or regulation, the Planning Board shall cause to be served on the operator of the facility and the owner of the land on or from which the violation is caused notice of such violation.
 - b) The Building Commissioner and/or the Planning Board may, upon reasonable concern regarding compliance with specific performance requirements, require the permittee(s) to respond with proof of compliance and may engage the services of independent expert consultants to assess compliance or review the permittee's response. Permittees must respond in a timely way (within 24 hours for an indicated life-threatening emergency, otherwise 14 days for routine requests for response). Failure to respond in good faith or to pay reasonable fees for independent consultants may result in revocation of the special permit by the Planning Board or the occupancy/use permit by the Building Commissioner, as applicable.
8. Compliance and violations.
- a) Every WCF for which a special permit is granted hereunder shall continue at all times to comply with the provisions thereof and of this Zoning By-Law; and the holder of such special permit shall comply with requirements of the Planning Board in fulfillment of the provisions for monitoring herein.
 - b) Every WCF and every application for a special permit for such facility shall comply with all other applicable provisions of this Zoning By-Law, including, without limitation, requirements with respect to:
 - (1) ***The permit application;***
 - (2) ***Special permits;***
 - (3) ***Signs and exterior lighting;***
 - (4) ***Site plan approval for WCFs and for any other WCF that satisfies the criteria for site plan review and approval.***

9. Modifications and Eligible Facilities Requests.

a) Any modifications to an already approved WCF not defined as an Eligible Facilities Request defined herein, shall be made through the special permit/site plan review and approval process described above. Such modifications involving new permittees at existing permitted sites shall require an application for a new special permit. Such modifications of existing permitted facilities may be reviewed as an application for a special permit modification, if applicable. The foregoing apply also to Eligible Facilities Requests, to the extent as outlined in (b) below and to the extent allowed by law.

b) Request for Modification of Eligible Facilities.

(1) Submission Requirements. Applications for an Eligible Facilities Request shall be filed with the Building Commissioner. Applications shall contain information in sufficient detail, including without limitation site plans and drawings of existing and proposed conditions, to demonstrate the proposed modifications satisfy the following requirements:

- (a) The currently operating WCF is constructed and maintained in compliance with its existing permit(s), including but not limited to its dimensions and appearance as permitted;
- (b) Such information as is necessary to demonstrate that the modifications are within the limits established for Eligible Facilities Requests under federal law and such information as is necessary to demonstrate compliance with the existing permit to the extent it is not superseded by federal law, and applicable safety regulations including without limitation, building codes, noise and radio frequency energy exposure;
- (c) To render a determination on whether an application is an Eligible Facilities request, the Building Commissioner may require the applicant to provide documentation or information only to the extent reasonably related to determining whether the request meets the requirements of an Eligible Facilities Request. The Building Commissioner may not require an applicant that is asserting in writing that the application is an Eligible Facilities Request to submit any other documentation, including but not limited to documentation intended to illustrate the need for such wireless facilities or to justify the business decision to modify such wireless facilities.

c) Review process.

(1) The Building Commissioner shall conduct an initial review of the application to determine: 1) whether the application is a bona fide Eligible Facilities Request, and 2) whether the application is complete. The Building Commissioner shall notify the applicant within thirty (30) days of receipt of the application if the application is deemed incomplete and/or whether the application is not an Eligible Facilities Request or requires the determination of the Planning Board as to its eligibility. Such notice shall delineate all missing documents or information.

- (2) If the Building Commissioner determines that the facts of the application require the judgment of the Planning Board to determine whether an application is an Eligible Facilities Request (such as for interpreting whether a proposal qualitatively defeats the intent of a previously approved camouflage design), the Building Commissioner shall timely refer the application to the Planning Board for an opinion on whether the application qualifies as an Eligible Facilities Request. The Planning Board, or staff, if so delegated by the Planning Board, shall respond in a timely manner, being cognizant of the federal shot clock for Eligible Facilities Requests.**
- (3) If the application is determined to be an Eligible Facilities Request, and otherwise complies with applicable safety regulations, the Building Commissioner may not deny and shall approve the application, with such conditions as may be necessary to maintain safety code compliance.**
- (4) If the application is determined not to be an Eligible Facilities Request, the Building Commissioner shall provide the applicant with an explanation in writing.**
- (5) If an applicant that is aggrieved by the Building Commissioner failing to make a determination in favor of a claimed Eligible Facilities Request timely files an appeal with the Zoning Board of Appeals, the Zoning Board of Appeals shall conduct its appeal review. The Zoning Board of Appeals may consult with the Planning Board or staff, if so delegated by the Planning Board, who shall respond in a timely manner, being cognizant of the federal shot clock for Eligible Facilities Requests but shall not be required to do so.**
- (6) Approval. Within sixty (60) days of the filing of a bona fide Eligible Facilities Request, plus any time that may be excluded pursuant to a tolling for incompleteness or by agreement between the applicant and the Building Commissioner, the Building Commissioner shall complete the statutory review under building, electrical and other relevant safety codes. If the bona fide Eligible Facilities Request application is deemed compliant under statutory review, the Building Commissioner must approve the application.**
- (7) As of the date of adoption of this bylaw, federal regulations specified requirements for state/local government review of Eligible Facilities Requests. Those requirements in 47 CFR 1.6100(c) Review of applications, are included for reference, below. Section 1.6100(b) Definitions, is omitted here, as the Definitions herein are based on Section 1.6100(b). Section 1.6100(c) is reproduced below as guidance only, because the regulations can change and case-law can affect their interpretation:**

47 CFR 1.6100(c) Review of applications. A State or local government may not deny and shall approve any eligible facilities request for modification of an eligible support structure that does not substantially change the physical dimensions of such structure.

- (1) Documentation requirement for review. When an applicant asserts in writing that a request for modification is covered by this section, a State or local government may require the applicant to provide documentation or information only to the extent reasonably related to determining whether the request meets the requirements of this section. A State or local government may not require an applicant to submit any other documentation, including but not limited to documentation intended to illustrate the need for such wireless facilities or to justify the business decision to modify such wireless facilities.**
- (2) Timeframe for review. Within 60 days of the date on which an applicant submits a request seeking approval under this section, the State or local government shall approve the application unless it determines that the application is not covered by this section.**
- (3) Tolling of the timeframe for review. The 60-day period begins to run when the application is filed, and may be tolled only by mutual agreement or in cases where the reviewing State or local government determines that the application is incomplete. The timeframe for review is not tolled by a moratorium on the review of applications.
 - (i) To toll the timeframe for incompleteness, the reviewing State or local government must provide written notice to the applicant within 30 days of receipt of the application, clearly and specifically delineating all missing documents or information. Such delineated information is limited to documents or information meeting the standard under paragraph (c)(1) of this section.**
 - (ii) The timeframe for review begins running again when the applicant makes a supplemental submission in response to the State or local government's notice of incompleteness.**
 - (iii) Following a supplemental submission, the State or local government will have 10 days to notify the applicant that the supplemental submission did not provide the information identified in the original notice delineating missing information. The timeframe is tolled in the case of second or subsequent notices pursuant to the procedures identified in this paragraph (c)(3). Second or subsequent notices of incompleteness may not specify missing documents or information that were not delineated in the original notice of incompleteness.****

- (4) **Failure to act.** In the event the reviewing State or local government fails to approve or deny a request seeking approval under this section within the timeframe for review (accounting for any tolling), the request shall be deemed granted. The deemed grant does not become effective until the applicant notifies the applicable reviewing authority in writing after the review period has expired (accounting for any tolling) that the application has been deemed granted.
- (5) **Remedies.** Applicants and reviewing authorities may bring claims related to Section 6409(a) to any court of competent jurisdiction.

47 CFR 1.6100(c).

10. Removal.

- a) If a WCT is not substantially in commercial operation for a period of one year, it shall be removed, and the site shall be returned to its preexisting condition by the owner of the facility and/or by the owner of the property within 180 days of notice by the Town. As part of an application for any wireless communications tower, a plan shall be submitted detailing how the site will be returned to its preexisting condition, including planting of replacement trees, grading and removal of all structures and waste and any other work that may be required by the Planning Board.

11. Exemption.

- a) The following type of wireless communications facilities and towers are exempt from this Zoning Bylaw:
 - (1) ***Amateur radio towers and antennas used in accordance with the terms of any amateur radio service license issued by the FCC, provided that the tower is not used or licensed for any commercial purpose.***
 - (2) ***Wireless communications facilities constructed by the Town of Newbury for municipal public safety and operational communications purposes.***

12. Definitions:

- a) Base station. A structure or equipment at a fixed location that enables FCC-licensed or authorized wireless communications between user equipment and a communications network. The term does not encompass a tower as defined herein or any equipment associated with a tower.
 - (1) ***The term includes, but is not limited to, equipment associated with wireless communications services such as private, broadcast, and public safety services, as well as unlicensed wireless services and fixed wireless services such as microwave backhaul.***
 - (2) ***The term includes, but is not limited to, radio transceivers, antennas, coaxial or fiber-optic cable, regular and backup power supplies, and comparable equipment, regardless of technological configuration (including Distributed Antenna Systems and small-cell networks).***
 - (3) ***The term includes any structure other than a tower that, at the time the relevant application is filed, supports or houses equipment described in paragraphs (1) through (2) above that***

has been reviewed and approved under the applicable zoning or other regulatory process, even if the structure was not built for the sole or primary purpose of providing such support.

- (4) *The term does not include any structure that, at the time the application is filed, does not support or house equipment described in paragraphs (i) through (ii) above.
(Based on 47 CFR 1.6100)*

b) Eligible Facilities Request. Any request for modification of an existing tower or base station that does not substantially change the physical dimensions of such tower or base station, involving:

- (1) *Collocation of new transmission equipment on an eligible support structure;*
(2) *Removal of transmission equipment; or*
(3) *Replacement of transmission equipment.
(Based on 47 CFR 1.6100)*

c) Eligible support structure. Any tower or base station, provided that it is lawfully existing at the time the application is filed with the Town.
(Based on 47 CFR 1.6100)

d) Substantial change. A modification substantially changes the physical dimensions of an eligible support structure if it meets any of the following criteria:

- (1) *For towers other than towers in the public rights-of-way, it increases the height of the tower by more than 10% or by the height of one additional antenna array with separation from the nearest existing antenna not to exceed twenty feet, whichever is greater; for other eligible support structures, it increases the height of the structure by more than 10% or more than ten feet, whichever is greater;*

(a) Changes in height should be measured from the original support structure in cases where deployments are or will be separated horizontally, such as on buildings' rooftops; in other circumstances, changes in height should be measured from the dimensions of the tower or base station, inclusive of originally approved appurtenances and any modifications that were approved prior to the passage of the Spectrum Act.

- (2) *For towers other than towers in the public rights-of-way, it involves adding an appurtenance to the body of the tower that would protrude from the edge of the tower more than twenty feet, or more than the width of the tower structure at the level of the appurtenance, whichever is greater; for other eligible support structures, it involves adding an appurtenance to the body of the structure that would protrude from the edge of the structure by more than six feet;*

- (3) *For any eligible support structure, it involves installation of more than the standard number of new equipment cabinets for the technology involved, but not to exceed four cabinets; or, for towers in the public rights-of-way and base stations, it involves installation of any new equipment cabinets on the ground if there are no pre-existing ground cabinets associated with the structure, or else involves installation of ground*

cabinets that are more than 10% larger in height or overall volume than any other ground cabinets associated with the structure;

- (4) It entails any excavation or deployment outside the current site;***
- (5) It would defeat the concealment elements of the eligible support structure; or***
- (6) It does not comply with conditions associated with the siting approval of the construction or modification of the eligible support structure or base station equipment, provided however that this limitation does not apply to any modification that is non-compliant only in a manner that would not exceed the thresholds identified in 01) through 04) above.***

(Based on 47 CFR 1.6100)

- e) Tower or Wireless Communications Tower (WCT). Any structure built for the sole or primary purpose of supporting any FCC-licensed or -authorized antennas and their associated facilities, including structures that are constructed for wireless communications services including, but not limited to, private, broadcast, and public safety services, as well as unlicensed wireless services and fixed wireless services such as microwave backhaul, and the associated site.

(Based on 47 CFR 1.6100)

- f) Wireless Communications Facility (WCF). An installation of equipment belonging to one party that includes antennas, transmitters and/or receivers, other ancillary equipment, structural supports, enclosures, and utilities, that uses the radio frequency spectrum to communicate on one or more frequency bands.
- g) Personal Wireless Service (PWS). Commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services (47 USC 332(C)).
- h) Personal Wireless Service Facility (PWSF). A WCF for the provision of Personal Wireless Services;
- i) Small wireless facilities are facilities that meet each of the following conditions:

(1) The facilities:

- (a) Are mounted on structures 50 feet or less in height including their antennas (as defined by the FCC: an apparatus designed for the purpose of emitting radiofrequency (RF) radiation, to be operated or operating from a fixed location); or
- (b) Are mounted on structures no more than 10 percent taller than other adjacent structures; or
- (c) Do not extend existing structures on which they are located to a height of more than 50 feet or by more than 10 percent, whichever is greater;

- (2) Each antenna associated with the deployment, excluding associated antenna equipment (equipment, switches, wiring, cabling, power sources, shelters or cabinets associated with an antenna, located at the same fixed location as the antenna), is no more than three cubic feet in volume;***

- (3) All other wireless equipment associated with the structure, including the wireless equipment associated with the antenna and any pre-existing associated equipment on the structure, is no more than 28 cubic feet in volume;**
- (4) The facilities do not require antenna structure registration under FCC regulations; and**
- (5) The facilities do not result in human exposure to radiofrequency radiation in excess of the applicable safety standards.**

(Definition derived from 47 CFR §1.6002)

Or take any other action in relation thereto.

Town Clerk: Leslie A. Haley

Date: April 28, 2022



TOWN OF NEWBURY
TOWN CLERK
12 KENT WAY
NEWBURY MA 01922
(978-465-0862 Ext. 314/315)

FINAL ACTION CERTIFICATE

I, Leslie A. Haley, Town Clerk, Town of Newbury, hereby certify that the following is the final version of Article 22 passed at the Newbury Annual Town Meeting held on April 26, 2022:

ARTICLE 22. To see if the Town will vote to amend the Code of the Town of Newbury, Chapter 88, Streets, Sidewalks and Commons, by adopting a new Section 88-15, Small Wireless Facilities in rights-of-way, as follows: § 88-15 Small Wireless Facilities in rights-of-way.

- A. Small Wireless Facilities in Rights-of-Way: No person shall install or maintain a Small Wireless Facility in any public or private right-of-way unless first approved by the Select Board.
- B. Policies and Procedures: The Select Board shall adopt and from time to time amend policies, rules, and regulations relative to the issuance of special permits under this § 88-15. A copy of the policies, rules, and regulations shall be on file with the Town Clerk. Such rules shall prescribe the form, contents, style, and number for application forms, the fees collectible with the applications, the process by which the application will be reviewed, the design and location criteria for approval, the time within which the Board of Selectmen will issue a decision, and requirements for recertification.
- Or take any other action in relation thereto.

Town Clerk: Leslie A. Haley

Date: April 28, 2022

