

**MINUTES OF THE ANDOVER TOWNSHIP LAND USE BOARD MEETING HELD
OCTOBER 1, 2013**

OPEN MEETING: Chairman O'Connell called the meeting to order at 7:30 p.m.

FLAG SALUTE: Chairman O'Connell led the flag salute.

ROLL CALL:

Diana Boyce – Present
Ellsworth Bensley, Jr. – Excused
Suzanne Howell – Present
Rick Melfi – Present
CeCe Pattison – Present
Christine Kretzmer – Present
Dolores Blackburn – Excused
Ken Roberts – Present
John O'Connell – Present
Paul Messerschmidt – Present
Richard Skewes – Present

PROFESSIONALS PRESENT: Richard Briigliodoro, Esq., and Joseph Golden, P.E., P.P., were present.

OPEN PUBLIC MEETINGS ACT NOTICE: Chairman O'Connell read the following statement: This is an open public meeting of the Andover Township Land Use Board. Notice of this meeting was given in accordance with the Open Public Meetings Act, Chapter 231, Public Law 85. The rules are generally as stated on the agenda.

RULES: Chairman O'Connell read the following rules: No new cases after 9:30 p.m. or testimony after 10:00 p.m. Comments from each member of the public are limited to 5 minutes during the public portion of the meeting. Transcript requests are to be in writing with check for 100% of costs. Material for the meeting is to be filed fourteen days before the next meeting once it has been heard for completeness. Individuals or members of a partnership must be present at the meeting or be represented by an attorney. Testimony is under oath. False testimony constitutes perjury.

MINUTES: A motion to approve the *Minutes of the Andover Township Land Use Board Meeting Held September 17, 2013* was made by Suzanne Howell and seconded by Christine Kretzmer. Ms. Howell noted two corrections. Roll Call: Suzanne Howell – yes; Rick Melfi – yes; CeCe Pattison – yes; Christine Kretzmer – yes; Ken Roberts – yes; Paul Messerschmidt – yes; Richard Skewes – yes. The motion carried.

RESOLUTIONS: There were no resolutions scheduled for review.

COMPLETENESS REVIEW: There were no matters scheduled.

HEARING: A-7-13-1 United Telephone Company of New Jersey, Inc., d/b/a Century Link, Use Variances, C Variances, Site Plan Waiver, Block 151 Lot 2: Board member Ken Roberts (Class I) stepped down. Richard Skewes and Rick Melfi signed certifications that they listened to the hearing and reviewed the exhibits of September 3, 2013.

Megan A. Ward, Esq., appeared on behalf of the Applicant. Craig S. Zimmermann, P.E., and Robert A. O'Connor, Jr., both previously sworn, appeared. Sabina Watson, P.E., Senior Project Engineer, was sworn, qualified, and accepted as an expert witness.

With reference to issues raised regarding notice and consent, Ms. Ward presented that the pole the Applicant would utilize to bring the lines to the switching station is on property owned by Sussex County. She agreed to provide consent to access the pole from the County noting the pole appears to be owned by the electric company. She presented there has been a joint pole agreement in place since the 1970's between the electric and phone company. Referencing the Municipal Land Use Law and case law, Ms. Ward stated notice did not have to be revised to include the County's property. Ms. Ward confirmed notice was given from the lot with the proposed easement. Richard Briigliodoro, Esq., referencing the Municipal Land Use Law, agreed. He stated the lot where the switching station is going to go is the subject of the hearing. Ms. Ward confirmed that the utility line would be run underground on Sussex County property.

Ms. Watson submitted Exhibit A-4, a colored Federal Emergency Management Agency map titled FIRM, Panel 0294E, Flood Insurance Rate Map, Sussex County, New Jersey (All Jurisdictions) Panel 294 of 426, Map Number 34037C0294E, Effective Date September 29, 2011. Referencing the map, she identified the location of the flood plain as being along the property to the south of the subject site and south of the existing wetlands delineation. She stated the easement area is 3' - 4' higher than the flood elevation at 583/584. Ms. Watson submitted Exhibit A-5, a colored map titled *Flood Plain Mapping, October 1, 2013*, Block 151, Lots 2, Township of Andover, Sussex County, New Jersey by CP Engineers & Architecture. She stated this plan illustrates the same information and relies on a combination of information from various sources. Paul Messerschmidt stated the map presented is the old FIRM map and said map does not apply anymore. He stated AE Zones have been expanded. Ms. Watson confirmed that easement and the access road to the easement were not in the AE Zone. She agreed to review the matter. Mr. O'Connor confirmed that the proposed cabinets would be located 4' high off the ground. Mr. Golden and Ms. Watson discussed elevations.

Mr. Golden provided the Board with information about New Jersey datum relative to flood information and stated he did not believe there was a problem.

With reference to the easement, Mr. Golden stated it was off by a degree. Ms. Watson agreed to revise the plan.

The Applicant submitted Exhibit A-6, a plan titled *Site Plan Exhibit, CenturyLink Telecommunication Improvements, Block 151, Lot 2, Township of Andover, New Jersey*, sheet No. C-02 revised 10/1/13, prepared by CP Engineers and Architecture. Referencing the exhibit, Ms. Watson identified the proposed easement's location, the improvements to be located within the easement, and the wetlands delineation on the County's property directly to the south of the subject property. She confirmed that wetland limits were established by Wander Ecological Associates, and she identified a 150' wetland transition area limit from the surveyed wetlands. The Applicant confirmed that concrete monuments would be placed to mark the utility easement, and a DEP permit application necessary for the installation had been prepared.

Referencing Exhibit A-6, Ms. Watson discussed the boundary description for the right-of-way of Old Stuckles Pond Road. She stated the survey could not determine that the right-of-way had been vacated and that it is still shown on the existing plan as an existing right-of-way. She stated the boundaries for the road are on the site property line and are approximately 15' towards the north from there to the edge of pavement.

Exhibit A-7, titled COMMUNICATION SYSTEM EASEMENT, was entered. Ms. Ward explained that this exhibit is the first page of a form of easement utilized by United Telephone for these types of easements. She confirmed the exhibit is substantially similar to the type of easement instrument that would be entered concerning Block 151 Lot 2.

With regard to trenching, Ms. Watson reviewed an underground conduit and wire detail on Exhibit A-6. She provided an overview of the system's design. Ms. Watson confirmed that the specific location of the system's design elements would be presented on an as built.

Mr. O'Connor, previously sworn, and Mr. Golden discussed the matter. Mr. O'Connor noted the telephone system would go one route and the electric would go up another pole. He confirmed that the plan would be revised to show same.

With reference to the orientation of the poles, Mr. Golden recommended the Board consider a variance for 6'. Ms. Ward noted that the Applicant would locate the equipment to prevent disturbing a large tree. Mr. O'Connor confirmed the lowest height of the poles would be 8'. Richard Briigliodoro, Esq., identified the front and side yard variances as follows: 1. He stated the required front yard setback is 40' from Rt. 206; and as the parking is in the front yard, the setback increases to 100'. He stated the application is to grant a variance for 6' from Old Stuckles Pond Road. 2. He stated the minimum side yard setback is 20', and the application is for a 6' setback.

With reference to the site plan waiver application, Mr. Golden stated he did not think any additional information was needed from the Applicant. He stated he wanted a plan to review preconstruction and approve. Ms. Ward stated the Applicant has shown all of the relevant information. Board members discussed the matter. Mr. Golden recommended the waiver conditioned upon receipt of a preconstruction plan substantially similar to Exhibit A-6, which would be subject to his approval. Richard Briigliodoro, Esq., reviewed the site plan waiver ordinance. An agreement was reached to use Exhibit A-6 and the amendments discussed on the record as the document to be provided to the Board engineer.

A motion to grant the site plan waiver conditioned upon the Applicant's submission of a variance preconstruction easement plan similar to Exhibit A-6 with the amendments and changes that were agreed to or provided to the engineer was made by Paul Messerschmidt and seconded by Rick Melfi. Chairman O'Connell opened the meeting to the public. No members of the public addressed the Board. The meeting was closed to the public. Roll Call: Diana Boyce – yes; Suzanne Howell – yes; Christine Kretzmer – yes; Rick Melfi – yes; Paul Messerschmidt – yes; Richard Skewes – yes; John O'Connell – yes. The motion carried.

With reference to the requested variances, Ms. Ward reviewed the attached legal memorandum dated July 22, 2013, which was previously submitted to the Board.

John O'Connell opened the meeting to the public. No members of the public addressed the Board. Chairman O'Connell closed the meeting to the public.

A motion to approve the D (1) Use Variance for a second use on the property, the D (3) Use Variance for the conditional use, and the two "C" Variances permitting no less than 6' from the front and side yard setbacks subject to the conditions and approval of the site plan exhibit was made by Paul Messerschmidt and seconded by Diana Boyce. Mr. Briigliodoro confirmed that the Applicant would be required to return to the Board if additional cabinets or poles were to be added. John O'Connell opened the meeting to the public. No members of the public addressed the Board on the matter. The meeting was closed to the public. Roll Call: Diana Boyce – yes; Suzanne Howell – yes; Rick Melfi – yes; Christine Kretzmer – yes; Paul Messerschmidt – yes; Richard Skewes – yes; John O'Connell – yes. The motion carried.

Chairman O'Connell called a break at 8:50 p.m. The meeting was called to order at 9:00 p.m.

PUBLIC PORTION: The meeting was opened to the public. No members of the public addressed the Board. The meeting was closed to the public.

OLD/NEW BUSINESS: Mr. Roberts provided an update on the planning subcommittee's efforts relative to drafting an alternative energy ordinance. He distributed sample ordinances for the Board's review. He asked Board members to consider their input for future discussion as the subcommittee is preparing a draft ordinance tailored to meet the preferences of the Township. Mr. Golden suggested that commercial solar farm development be reviewed. He asked if the Board wanted him to review the sample ordinances. Board members told Mr. Golden not to review the matter further. The matter was continued pending advisement of a date for the subcommittee's presentation of the draft.

VOUCHERS: There were no vouchers scheduled for review.

UPCOMING MEETINGS: Chairman O'Connell confirmed the October 15, 2013 and November 19, 2013 meeting dates.

EXECUTIVE SESSION: Chairman O'Connell motioned to enter executive session pursuant to N.J.S.A. 10:4-12, (s)b.1 at 9:20 p.m. All were in favor. The motion carried.

Chairman O'Connell called the meeting to order at 10:00 p.m.

ADJOURNMENT: Having no further business, a motion to adjourn was made by Paul Messerschmidt and seconded by Ken Roberts. The meeting concluded at 10:00 p.m.

Minutes respectfully submitted by:

/s/Anne-Marie Wilhelm
Anne-Marie Wilhelm
Land Use Administrator

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ANDOVER TOWNSHIP LAND USE/ZONING BOARD OF ADJUSTMENT LEGAL MEMORANDUM

APPLICANT: United Telephone Company of New Jersey, Inc. d/b/a CenturyLink
PREMISES: 473 Route 206 (Block 151, Lot 2)
ZONE: BA – Business Airport
APPLICATION: Use Variance, Bulk Variances (front & side yard setback) and Site Plan Waiver
DATE: July 22, 2013

UNITED TELEPHONE COMPANY OF NEW JERSEY, INC. doing business as CenturyLink ("Applicant" or "CenturyLink") is a public utility that provides telecommunication services in Andover Township ("Township") and surrounding municipalities in Sussex County. CenturyLink's franchise with the State requires that it provide telecommunication services in a timely manner whenever requested by a customer in the service area. New Jersey requires CenturyLink to employ prudent management and engineering practices, including the employment of reliable procedures for forecasting future demand for service, conduct studies and maintain records to have adequate facilities in place to meet service needs as they arise [N.J.A.C. 14:10-1.9(d)]. CenturyLink seeks permission to construct a digital telecommunications switching station on a small portion of 473 Route 206 (Block 151, Lot 2) (the "property") in the Township. This facility is necessary to maintain and expand the services available to CenturyLink's customers and has been strategically located based upon those needs. CenturyLink is in the process of obtaining an easement from the property owner, Vest In Land, LLC.

The property is 0.4612 acre in size and located in the Business Airport (BA zone) of the Township. It is a corner lot with frontage on U. S. Highway Route 206 and Old Stickles Pond Road. It is a developed property with a 2½ story building, paved parking and related improvements already in place. The Applicant seeks to construct a digital telecommunications

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switching station on a small portion of the property adjacent to Old Stickles Pond Road. The easement is projected to be 384 SF in size (roughly 15' x 25'). The equipment would be mounted between 2 utility poles. Attached is a photograph of existing installation with the same equipment that is located in Hampton Township. The equipment is locked, remotely monitored and CenturyLink employees need only be present occasionally.

The digital telecommunications equipment and would not require water, garbage, septic or emergency services, nor produce any nuisance elements (such as smoke, liquid or solid waste, noise audible beyond the site, vibration, heat, smoke, radiation, microwaves or glare). The equipment would not adversely affect the safe and comfortable enjoyment of this or neighboring properties. No lighting is to be constructed (work at the station would be performed during daylight hours except for emergencies) nor does CenturyLink propose any signs.

RELIEF REQUESTED

VARIANCES:

1. N.J.S.A. 40:55D-70(d)/USE. CenturyLink is a public utility and the proposed equipment for local telecommunications service is inherently beneficial under New Jersey's land use statutes and caselaw. Public utilities are defined as "essential services" in the Township Code and a conditional use in the BA zone, however, not all minimum requirements in the zone are met. A use variance is also required to the extent that the equipment is deemed to be an additional use on the property.

2. N.J.S.A. 40:55D-70(c)(2)/"BULK" variances:

a) **FRONT YARD** This is a corner lot with frontage on Route 206 and Old Stickles Pond Road. As a result of improvements made by Sussex County to the nearby intersection of Route 206 with Greendale Road and Stickles Pond Road, only the subject property and Block 151, Lot 18 are located on Old Stickles Pond Road. The proposed location of the utility poles

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and equipment is approximately 8' from the right-of-way for Old Stickles Pond Road whereas 100' is required in the BA zone; and

b) SIDE YARD - The utility poles and equipment would be located approximately 5' from the 7.8' side property line where 20' is required in the BA zone.

SITE PLAN WAIVER: This application is to mount digital telecommunication equipment between 2 utility poles on a portion of a 15' x 25' easement. It is an developed property with a 2½ story building, paved parking and related improvements already in existence. The switching station would not affect existing circulation, drainages, the relationship of buildings to each other and lighting. The impact on landscaping and buffering would be minimal, at best. For these reasons a waiver of site plan review and approval is appropriate under Code Section 131-5.

LEGAL ARGUMENT IN SUPPORT OF VARIANCE RELIEF:

The proposed facility is an inherently beneficial use. Attached as **Schedule A** is CenturyLink's legal argument in support of this application for a USE VARIANCE.

It is particularly important to recall that "inherently beneficial" uses presumptively satisfy the "positive criteria" required by the Municipal Land Use Law with regard to use variances, and the enhanced burden of proof relative to the "negative criteria" does not apply. Rather, the positive and negative criteria are to be balanced, and the relief granted absent substantial detriment to the public good.

"BULK" VARIANCES per N.J.S.A. 40:55D-70(c)(2) or c(1) The proposed Pole-mounted digital telecommunications equipment would promote the public welfare [40:55D-2(a)] and secure residents' safety [40:55D-2(b)] by continuing the availability, quality and dependability of telecommunication (telephone and data) service in the area.

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Installation of the proposed telecommunications equipment on this specific piece of property would advance the purposes of the Municipal Land Use Law even though there would be some deviance from the zoning ordinance,. The size and impact of the equipment is minimal compared to principal structures and other larger structures for which the setbacks are designed.

Under the unique circumstances presented by this application, a "flexible c" variance under N.J.S.A. 40:55D-70(c)(2) should be granted and would not cause substantial detriment to the public good; in fact, the public good would be furthered, and the benefits of the deviation would far outweigh any detriment. Variance relief in this matter would not substantially impair either the intent or the purpose of the zone plan and zoning ordinance.

The site must be readily accessible by CenturyLink personnel, which is crucial for routine maintenance and visits to initiate or restore service. Access to the equipment is particularly important during power outages and during severe weather, when there is more likely to be interruptions in service. It is sometimes necessary, like in the aftermath of "Superstorm Sandy" in 2012, to hook a portable generator to switching equipment to maintain telecommunication service when commercial power is lost, which is another very important reason for the proposed location.

Workers would mostly be at the unit during daylight/weekday business hours, except in case of emergency when lights mounted on a truck and/or flashlights would provide illumination (there is no lighting proposed for the installation). The equipment is located to minimize the area of land disturbance and the impact of the switching station.

The primary rationale for setbacks from property lines is to prevent overcrowding, to preserve open space and aesthetics, to allow for peaceful use and enjoyment of properties, and to reduce the impact of principal structures. The installation that CenturyLink proposes is minor and does not raise those concerns.

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WITNESSES:

At the time of hearing, CenturyLink intends to call the following to present testimony in support of the application:

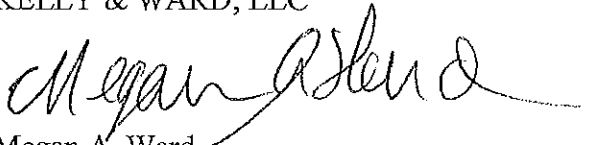
A) The testimony of Robert O'Connor, Jr., Senior Engineer for CenturyLink, would include the function and use of the equipment, how and why this site was selected, and how construction would be accomplished; and

B) The testimony of representatives of CP Engineering & Architecture would include zoning requirements in the district, the proposed construction and planning issues, among other things.

CONCLUSION

CenturyLink intends to continue to provide the necessary network for telecommunication services in the Township of Andover as it is required to do. This use of the property will not adversely affect the safe and comfortable use and enjoyment of the surrounding properties, nor will it adversely impact upon the design and intention of the Township's zoning ordinances. In fact, the proposed switching station, while minimal in size and impact upon the subject and neighboring properties, will significantly benefit the residents of Andover Township.

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Megan A. Ward

MAW:msm

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LEGAL ARGUMENT

Pursuant to *N.J.S.A. 48:2-13*, CenturyLink is a public utility that is governed and licensed by the Board of Public Utilities (BPU) of the State of New Jersey. Our legislature has given public utilities special status in consideration of the vital services that they provide. CenturyLink's tariff mandates that it provide telephone service within a reasonable time to all potential customers who request it. This switching station is required to enable CenturyLink to fulfill that obligation. CenturyLink cannot discriminate between users or types of use, and cannot arbitrarily deny service on the basis of the type of use or number of lines already in service by that customer.

This application by a public utility is for a use that inherently serves the public good. The New Jersey "Municipal Land Use Law" [*N.J.S.A. 40:55D-1 et seq.*] has been interpreted and supplemented by our courts in many reported opinions. There is an extensive body of case law whereby certain uses have been deemed to be "inherently beneficial" based upon the benefit conferred upon the municipality, its residents, and/or members of the public in general. In other words, the use serves the public good -- "the very nature of the use gives rise to special reasons for the grant of a use variance." *Kohl v. Mayor & Council of Fair Lawn*, 50 N.J. 268, 280 (1967). A use found to be inherently beneficial presumptively satisfies the "positive criteria" required for grant of a use variance under *N.J.S.A.40:55D-70(d)*. *Burbridge v. Mine Hill Twp.*, 117 N.J. 376 (1990).

N.J.S.A. 40:55D-70(d) also requires an applicant for a use variance to prove that the relief requested can be granted without substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance. The applicant must ordinarily satisfy the so-called "negative criteria" with an enhanced burden of proof. *Medici v. B.P.R. Co.*, 107 N.J. 1, 4 (1987). That enhanced burden, however, does not apply where the use has been found to be inherently beneficial. *Sica v. Bd. of Adj. of the Tp. of*

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Wall, 127 N.J. 152 (1992). Instead, the positive and negative criteria are to be balanced, and unless it is determined that there would be a substantial detriment to the public good, the relief is to be granted. Sica at 166.

In Yahnel v. Board of Adjustment, 79 N.J. Super. 509 (App. Div.), certif. denied 41 N.J. 116 (1963) the appellate division upheld a variance to construct a one-story brick and masonry building to be used for a telephone dial center (for housing/maintenance of equipment needed to provide dial tone service) in a residential zone. The Court noted that "improved telephonic communications are obviously a subject matter of high relationship to the welfare of the entire community." Yahnel at 518. Subsequently the Yahnel decision has been favorably cited on at least two (2) occasions by the Supreme Court. In Burbridge v. Mine Hill Tp., 117 N.J. 376, 392 (1990), the Court discussed favorable consideration of a use variance application as appropriate if the use inherently serves the public good, and included the Yahnel (telephone equipment in a residential zone) decision in its list. When discussing how the positive and negative criteria are to be balanced relative to inherently beneficial uses, the Supreme Court relied upon the Yahnel decision, and specifically included the telephone center in the list of uses recognized as "sufficiently beneficial to satisfy the positive criteria." Sica at 165. See also Alpine Tower v. Mayor & Council, 231 N.J. Super. 239 (App. Div. 1989); Kingwood v. Board of Adjustment, 272 N.J. Super. 498, 503 (Law Div. 1993); Nynex Mobile Comm. Co. v. Hazlet Tp., 276 N.J. Super. 598, 610 (App. Div. 1994). Even if telecommunication services by a public utility was not heretofore put in the category of "inherently beneficial uses" as a matter of law, the evidence that supports this application would necessarily lead this Board to conclude that the use proposed here by CenturyLink is inherently beneficial.

Taking the legal argument even one step further, CenturyLink would still be entitled to the relief requested even if the telecommunication use was not treated as an inherently beneficial use. There are more than sufficient "special reasons" to support a use variance under *N.J.S.A.*

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40:55D-70(d). "Special reasons" are those that arise from and further the purposes of our zoning laws, which are set forth in *N.J.S.A. 40:55D-2*. Certainly CenturyLink's application serves, for example, the first principle, to guide appropriate use and development of land to promote that public health, safety, morals and general welfare. A digital switching station, fed by fiber optic cable, provide telecommunications services that are faster, of superior quality, more dependable and less susceptible to interference or service interruption from outside influences, such as precipitation or electrical storms. This would additionally serve the second purpose of land use regulation, to secure safety from natural and manmade disasters. Interestingly, many of the cases that have recognized the vital importance of telecommunication have centered on wireless services. Telecommunication services (telephone and data) are so central to everyday life, so ingrained and so much a part of our culture that it is no longer discussed.

EXHIBIT A

