

**DISTRICT COUNCIL FOR PRINCE GEORGE'S COUNTY, MARYLAND  
OFFICE OF THE ZONING HEARING EXAMINER**

**ERR-272**

**DECISION**

Application: Validation of CG Permit No. 6658-2015-1  
Issued in Error  
Applicant: CenturyLink, Inc./Alan Ganey  
Opposition: None  
Hearing Dates: October 3, 2018 and October 11, 2018  
Hearing Examiner: Maurene Epps McNeil  
Recommendation: Approval

**NATURE OF PROCEEDINGS**

- (1) ERR-272 is a request for validation of CG Permit No. 6658-2015-01, issued in error, to construct an underground telecommunications vault on 4,372-square-feet of a 3.36-acre site, in the R-R (Rural Residential) Zone, and identified as 11700 Prospect Hill Road, Glen Dale, Maryland.
- (2) No one appeared in opposition to the request at the hearings held by this Examiner.

**FINDINGS OF FACT**

- (1) Applicant CenturyLink requests validation of Permit No. 6658-2015-01 issued in error on March 2, 2016. (Exhibit 3; October 11, 2018 T. 4-5) This permit allowed CenturyLink to construct an underground telecommunications vault<sup>1</sup> on property owned by Alan Ganey and leased to CenturyLink. Applicant's lease of Mr. Ganey's property is approximately \$24,000 per year, subject to a 3% increase "each subsequent anniversary." (Exhibit 17)
- (2) The telecommunications vault is described on the permit application as an underground CEV ("controlled environmental vault"] vault and fiber optic cable and conduit and pad for generator. (Exhibit 6(b); October 11, 2018 T. 30) The underground portion is a large concrete room similar to telecommunications buildings located above ground but more secure. (October 11. 2018, T. 36)

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<sup>1</sup> Quest Government Services, Inc. is the owner of the telecommunications vault, and Applicant is responsible for the operation/provision/maintenance of the telecommunication services. (Exhibit 6, p. 21; October 11, 2018 T. 15)

(3) Applicant filed the instant request after receipt of the following information from the Department of Permitting, Inspections and Enforcement (“DPIE”):

It has come to the attention of the Department of Permitting, Inspections and Enforcement that on February 23, 2015 a permit to build an underground CEV vault and fiber optic cable and conduit was applied for under permit number 6658-2015 for your property located at 11700 Prospect Hill Road, Glenn Dale, Maryland. This application was processed, reviewed and subsequently issued a permit on March 2, 2016. However, this permit was issued in error, since it was processed as a “CG” application and not as a “CGU” application, which requires review and approval by the Maryland-National Capitol Park & Planning Commission for zoning requirements. As a result, this permit will be revoked in accordance with Prince George’s County Code, Sec 4-112. Administration; Section 105.6(c), Suspension or Revocation and Reissuance of Permits, which states the Director or the Director’s designee is authorized to suspend or revoke a permit issued under the provisions of this Code as follows: (1) whenever the permit is issued in error, (2) incorrectly, (3) inaccurately, (4) in an incomplete manner, (5) for any reason that is necessary to maintain the health, safety and welfare of the public, (6) in violations of any ordinance, regulation or any of the provisions of this Code, and (7) the Director or the Director’s designee, in consultation with the Police Department and the Fire/EMS Department, shall have the authority to deny, suspend, or revoke any application or permit under the provisions of this Division and upon a violation of this Division.

To obtain a permit for this work, submit a Mandatory Referral Application, if regulated by the Public Service Commission, or pursue a Validation of Permit Issued in Error pursuant to Section 27-258 of the Prince George’s County Zoning Ordinance....

(Exhibit 4)

(4) Applicant submitted a photograph of the above-ground portion of the use on the subject property. (Exhibit 22(b)) Applicant also submitted a “Lot stakeout and Building Location Survey” that shows all existing improvements on the entire property owned by Mr. Ganey. (Exhibit 7)

(5) The Applicant prepared a Grading, Erosion and Sediment Control Plan, and a Construction Excavation Plan prior to construction. (Exhibits 8 (a)-(d)) A third party inspection was conducted and Applicant was required to address certain engineering and fire safety issues. (Exhibit 6, pp. 6-21) All of the issues were addressed since the County ultimately issued the permit with an “01” – a notation that indicates the permit was revised.

(6) Applicant only disturbed approximately 4,981 square feet of the site (to build on 4,372-square feet) to construct the underground telecommunication vault, generator pad, electrical riser units, and gravel access drives off of Hillmeade Road. (Exhibit 6, pp. 34 and 37). Since that disturbance was less than 5,000 square feet Applicant is not required to provide stormwater management. (Exhibit 6, p. 37; Prince George’s County Code, Section 32-174 (a)(3)). For the same reason, it is exempt from the requirements of the Woodland and Wildlife Habitat Conservation Ordinance. (Exhibit 6, p. 34)

(7) Jackie Shrives, Applicant's Senior Lead Engineer for Strategic Planning, explained that Century Link "is the largest traditional local telephone company following AT&T" and also operates a large, national fiber optic telecommunications network. (October 11, 2018 T. 9-10) He further stated that Applicant installed the telecommunications vault on Mr. Ganey's property after the issuance of CG Permit No. 6658-2015-01. The use has been continuance since its installation. (October 11, 2018 T.20)

(8) Applicant's sole customer (for services provided at this site) is the federal government. The location was chosen because: the government needed service in that area; the subject property is adjacent to the Amtrak right-of-way; and, Applicant's "national fiber backbone is... located on the Amtrak Rail System." (October 11, 2018 T. 37-38)

(9) Applicant has expended approximately \$ 1,000,000 in reliance on the permit for various items, including: engineering cost and the replacement of a fire control system cylinder (\$546,672); purchase and installation of a generator (\$42,316); and, fiber construction subcontractor, labor and materials (\$329,484). (Exhibit 18)

(10) Maintenance is required "irregularly twice a month and anytime there's an alarm" due to electronic failure. (October 11, 2018 T. 36-37)

(11) Mr. Shriver testified that he is unaware of any appeals, controversies or fraud occurring at the time of the permit's issuance, and was indeed surprised when he learned that the permit was issued in error:

[W]e were somewhat surprised when... working with our consultants and the process we had been through to that date, we had received approval and sign off all the drawings and applications and we were expecting a final release on our permit to close out the file....

We had an extensive exchange of drawings and data with the county, clearly showing what the facility was, what we intended to do with it. Several iterations of drawing submissions and then revisions back from the county. So they intimately involved step by step with the process and what our intent was for that site....

[W]e thought we applied for the correct permit.... We were taking what we thought was the direction from the county based on our employees and our contractors talking with them, that what we were doing was the correct process....

(October 11, 2018 T.32-33,46-47)

(12) CenturyLink Communications, LLC has been issued a certificate of good standing to transact business in the State of Maryland. (Exhibit 19) Applicant "CenturyLink Communications, LLC" applied for the permit at issue on February 23, 2015. (Exhibit 6, p. 2). However, CG Permit No. 6658-2015-01 was issued to Century Link, Inc., "the ultimate holding company at the top of the Century Link pyramid." (October 11, 2018, T. 6) Applicant believes it was an error on the part of DPIE to have issued the permit in that name and asks that the permit be validated in the proper name of CenturyLink Communications, LLC.

### APPLICABLE LAW

(1) The Application can be approved if it satisfies the applicable provisions of Section 27-244 and all of Section 27-258 of the Zoning Ordinance. Section 27-244 of the Zoning Ordinance provides as follows:

Sec. 27-244. - Certification.

(a) **In general.**

(1) A nonconforming use may only continue if a use and occupancy permit identifying the use as nonconforming is issued after the Planning Board (or its authorized representative) or the District Council certifies that the use is nonconforming is not illegal (except as provided for in Section 27-246 and Subdivision 2 of this Division). Any person making use of or relying upon the certification that is violating or has violated any conditions thereof, or that the use for which the certification was granted is being, or has been exercised contrary to the terms or conditions of such approval shall be grounds for revocation proceedings in accordance with this Code.

(b) **Application for use and occupancy permit.**

(1) The applicant shall file for a use and occupancy permit in accordance with Division 7 of this Part.

(2) Along with the application and accompanying plans, the applicant shall provide the following:

(A) Documentary evidence, such as tax records, business records, public utility installation or payment records, and sworn affidavits, showing the commencing date and continuous existence of the nonconforming use;

(B) Evidence that the nonconforming use has not ceased to operate for more than one hundred eighty (180) consecutive calendar days between the time the use became nonconforming and the date when the application is submitted, or that conditions of nonoperation for more than one hundred eighty (180) consecutive calendar days were beyond the applicant's and/or owner's control, were for the purpose of correcting Code violations, or were due to the seasonal nature of the use;

- (C) Specific data showing:
    - (i) The exact nature, size, and location of the building, structure, and use;
    - (ii) A legal description of the property; and
    - (iii) The precise location and limits of the use on the property and within any building it occupies;
  - (D) A copy of a valid use and occupancy permit issued for the use prior to the date upon which it became a nonconforming use, if the applicant possesses one.
  - (E) In the case of outdoor advertising signs, the requirements of Section 27-244(b)(2)(B) are not applicable. Documentary evidence, including, but not limited to deeds, tax records, business records, approved plats or development plans, permits, public utility installation or payment records, photographs, and sworn affidavits, showing that the outdoor advertising sign was constructed prior to and has operated continuously since January 1, 2002.
- (c) **Notice.**
- (1) Notice of the proposed application shall be provided by the applicant in accordance with Section 27-125.01 of this Subtitle.
  - (2) The following notice provisions shall not apply to uses that, with the exception of parking in accordance with Section 27-549, occur solely within an enclosed building.
  - (3) The Planning Board shall post the property with a durable sign(s) within ten (10) days of acceptance of the application and accompanying documentation. The signs(s) shall provide notice of the application; the nature of the nonconforming use for which the permit is sought; a date, at least twenty (20) days after posting, by which written comments and/or supporting documentary evidence relating to the commencing date and continuity of such use, and/or a request for public hearing from a party of interest will be received; and instructions for obtaining additional information. Requirements regarding posting fees, the number, and the location of signs shall conform to the requirements set forth in Subsection (f), below.
- (d) **Administrative review.**
- (1) Except for outdoor advertising signs, if a copy of a valid use and occupancy permit is submitted with the application, where applicable a request is not submitted for the Planning Board to conduct a public hearing, and, based on the documentary evidence presented, the Planning Board's authorized representative is satisfied as to the commencing date and continuity of the nonconforming use, the representative shall recommend certification of the use as nonconforming for the purpose of issuing a new use and occupancy permit identifying the use as nonconforming, upon finding, within the administrative record for the application, that the use to be certified as nonconforming has no outstanding Code violations with the Department of Permitting, Inspections, and Enforcement regarding the property other than failure to have a use and occupancy permit. This recommendation shall not be made prior to the specified date on which written comments and/or requests for public hearing are accepted.
  - (2) For outdoor advertising signs, if satisfactory documentary evidence described in Section 27-244(b)(2)(E) is received, the Planning Board's authorized

representative shall recommend certification of the use as nonconforming for the purpose of issuing applicable permits and certifying the use as nonconforming. This recommendation shall not be made prior to the specified date on which written comments and/or requests for public hearing are accepted.

- (3) Following a recommendation of certification of the use as nonconforming, the Planning Board's authorized representative shall notify the District Council of the recommendation. Electronic notice of the recommendation for certification shall also be made by the Planning Board's authorized representative not later than seven (7) calendar days after the date of the recommendation. The Planning Director shall also publish the development activity report on the Planning Department's website.
  - (4) If the District Council does not elect to review the recommendation within thirty (30) days of receipt of the recommendation as authorized by Subsection (e), below, the representative shall certify the use as nonconforming.
  - (5) Subsections (3) and (4), above, and Subsection (e), below, shall not apply to uses that, with the exception of parking in accordance with Section 27-549, occur solely within an enclosed building.
- (e) **District Council review.**
- (1) The District Council may, on its own motion, vote to review the Planning Board representative's recommendation, for the purpose of determining whether the use should be certified as nonconforming, within thirty (30) days of receipt of the recommendation.
  - (2) If the District Council decides to review the proposed certification, the Clerk of the Council shall notify the Planning Board of the Council's decision. Within seven (7) calendar days after receiving this notice, the Planning Board shall transmit to the Council all materials submitted to it in connection with the application.
  - (3) The Zoning Hearing Examiner shall conduct a public hearing on the application. The Zoning Hearing Examiner shall make the same findings required for Administrative review or approval by Planning Board required in this Section, as well as any other applicable prescriptions regulating the proposed use specified within any other applicable Subtitle of this Code.
  - (4) The Zoning Hearing Examiner shall file a written recommendation with the District Council within thirty (30) days after the close of the hearing record.
  - (5) Any person of record may appeal the recommendation of the Zoning Hearing Examiner within fifteen (15) days of the filing of the Zoning Hearing Examiner's recommendation with the District Council. If appealed, all persons of record may testify before the District Council.
  - (6) Persons arguing shall adhere to the District Council's Rules of Procedure, and argument shall be limited to thirty (30) minutes for each side, and to the record of the hearing.
  - (7) The District Council shall affirm the certification only if it finds that a nonconforming use exists and has continuously operated, and upon finding, within the administrative record for the application, that the use to be certified as nonconforming has no outstanding Code violations with the Department of Permitting, Inspections, and Enforcement regarding the property, other than failure to have a use and occupancy permit.

- (8) The District Council shall make its decision within forty-five (45) days from the filing of the Zoning Hearing Examiner's recommendation. Failure of the Council to take action within this time shall constitute a decision to certify the use.
- (f) **Planning Board review.**
  - (1) Required hearing.
    - (A) If a copy of a valid use and occupancy permit is not submitted with the application, if the documentary evidence submitted is not satisfactory to the Planning Board's authorized representative to prove the commencing date or continuity of the use, or if a public hearing has been requested by any party of interest challenging the commencing date and/or continuity of the use, the Planning Board shall conduct a public hearing on the application for the purpose of determining whether the use should be certified as nonconforming.
  - (2) Application for certification.
    - (A) Whenever the Planning Board will hold a hearing on a certification of the use as nonconforming, the applicant shall complete the appropriate form provided by the Planning Board.
  - (3) At least seven (7) calendar days prior to the public hearing, the Planning Board shall send written notice of the date, time, and place of the hearing to the applicant and to all persons of record.
  - (4) Planning Board action.
    - (A) The Planning Board may decide to either grant or deny certification of the use as nonconforming. If it decides to certify that a nonconforming use actually exists and has continuously operated and upon finding, within the administrative record for the application, that the use to be certified as nonconforming has no outstanding Code violations with the Department of Permitting, Inspections, and Enforcement regarding the property, other than failure to have a use and occupancy permit.
    - (B) The recommendation of the Planning Board shall be in the form of a resolution adopted at a regularly scheduled public meeting. The resolution shall set forth findings of fact and conclusions of law in support of the Planning Board's recommendation.
    - (C) The Planning Board shall send a copy of the resolution to all persons of record.
  - (5) District Council election to review; Appeal of Planning Board's recommendation.
    - (A) The recommendation of the Planning Board may be appealed by any person of record to the District Council by filing an appeal with the Clerk of the Council. In addition, and notwithstanding any appeal of the Planning Board's recommendation filed by a person of record, the District Council may, on its own motion, vote to review the Planning Board's recommendation for the purpose of making a final decision as to whether the use should be certified as nonconforming.
    - (B) The appeal shall be filed, or District Council vote to review the Planning Board recommendation shall occur, within thirty (30) calendar days after the resolution of the Planning Board was mailed. If no appeal is filed, and the District Council does not elect to review the recommendation of Planning Board within thirty (30) calendar days after the resolution of the Planning Board is

mailed, the Planning Board's recommendation shall become the final decision as to the application to certify the use as nonconforming.

- (C) Before the District Council makes a decision on the application, it shall hold a public hearing.
- (D) The Council may decide to affirm, reverse, or modify the recommendation of the Planning Board. The decision of the Council shall be based on the record made before the Planning Board. No new evidence shall be entered into the record of the case unless it is remanded to the Planning Board and a rehearing is ordered.
- (g) **Applicability.**
  - (1) This Section shall not apply to nonconforming buildings or structures occupied by conforming uses. (See Section 27-243.03.)

(2) Section 27-258 of the Zoning Ordinance provides as follows:

Sec. 27-258. - Validation of permit issued in error.

(a) **Authorization.**

- (1) A building, use and occupancy, or absent a use and occupancy permit, a valid apartment license, or sign permit issued in error may be validated by the District Council in accordance with this Section.

(b) **Application.**

- (1) An application for the validation shall be filed with the Department of Permitting, Inspections, and Enforcement.
- (2) The application form shall be provided by the Department of Permitting, Inspections, and Enforcement and shall contain the information which the Director of that Department deems is necessary to meet the provisions of this Section.
- (3) Along with the application, the applicant shall submit the following:
  - (A) A statement listing the names and the business and residential addresses of all individuals having at least a five percent (5%) financial interest in the subject property;
  - (B) If any owner is a corporation, a statement listing the officers of the corporation, their business and residential addresses, and the date on which they assumed their respective offices. The statement shall also list the current Board of Directors, their business and residential addresses, and the dates of each Director's term. An owner that is a corporation listed on a national stock exchange shall be exempt from the requirement to provide residential addresses of its officers and directors;
  - (C) If the owner is a corporation (except one listed on a national stock exchange), a statement containing the names and residential addresses of those individuals owning at least five percent (5%) of the shares of any class of corporate security (including stocks and serial maturity bonds);
- (4) For the purposes of (A), (B), and (C) above, the term "owner" shall include not only the owner of record, but also any contract purchaser.

(c) **Transmittal.**



- (1) The application and accompanying material shall be forwarded by the Department of Permitting, Inspections, and Enforcement to the Office of the Zoning Hearing Examiner.
- (d) **Zoning Hearing Examiner hearing procedures.**
- (1) The Zoning Hearing Examiner shall conduct a public hearing on the matter in accordance with Part 3, Division 1, Subdivision 2 of this Subtitle.
  - (2) The Zoning Hearing Examiner shall review the application for conformance with subsection (g) of this Section.
- (e) **Notice of public hearing.**
- (1) The Zoning Hearing Examiner shall designate a date for the public hearing and shall notify the applicant of the date.
  - (2) The Clerk of the Council (or the office of the Zoning Hearing Examiner) shall publish a notice of the hearing at least thirty (30) days prior to the hearing date, at least one (1) time in the County newspapers of record.
  - (3) The notice shall contain:
    - (A) The date, time, and place of the hearing;
    - (B) A description and location of the property; and
    - (C) A description of the nature of the request.
- (f) **District Council hearing (oral argument) procedures.**
- (1) The District Council shall decide upon the application, in accordance with the procedures for oral argument and Council hearings contained in Part 3, Division 1, Subdivision 3 of this Subtitle.
- (g) **Criteria for approval.**
- (1) The District Council shall only approve the application if:
    - (A) No fraud or misrepresentation had been practiced in obtaining the permit;
    - (B) If, at the time of the permit's issuance, no appeal or controversy regarding its issuance was pending before any body;
    - (C) The applicant has acted in good faith, expending funds or incurring obligations in reliance on the permit; and
    - (D) The application meets the criteria of Section 27-244 of this Subtitle; and
    - (E) The validation will not be against the public interest.
- (h) **Status as a nonconforming use.**
- (1) Any building, structure, or use for which a permit issued in error has been validated by the Council shall be deemed a nonconforming building or structure, or a certified nonconforming use, unless otherwise specified by the Council when it validates the permit. The nonconforming building or structure, or certified nonconforming use, shall be subject to all of the provisions of Division 6 of this Part.

### CONCLUSIONS OF LAW

(1) Applicant's counsel contends that the Application satisfies Section 27-244 and Section 27-258 of the Zoning Ordinance. I agree with Applicant's position for the following reasons.

(2) Most of the provisions in Section 27-244 simply cannot be retrofitted to address this request. Requests to validate permits issued in error ("ERRs") are not nonconforming uses; rather they are uses that do not comply with all of the regulations for the particular zone in which the land is located, but have been issued a permit that allows them to operate. Since ERRs involve uses that were not legal at the time of the issuance of the permit/license there is no documentary evidence "showing the commencing date and continuous existence of the nonconforming use", and the Planning Board or District Council cannot certify that the use "is not illegal". (Sections 27-244 (a) and (b))

(3) Section 27-244 (c)'s requirement that notice of the Application be provided in accordance with Section 27-125.01 of the Zoning Ordinance requires the applicant to send "an informational mailing to all adjoining property owners, including owners whose properties lie directly across a street, alley or stream" and "notice of application filing to every person of record in a previous zoning, site plan or other application [not at issue in this case]...." An applicant would not know that he needs to apply for a permit issued in error until he learns from DPIE that an error occurred, and therefore cannot meet these pre-application notice requirements. Sufficient notice was provided as soon as Applicant became aware that a new Use and Occupancy permit would not be issued and that Applicant would need to file a request for Validation of Permit Issued in Error – the property was posted (as required in Section 27-244(c)(3), but for 30 days, not 10), and notice of the hearing was inserted in the applicable newspapers of record. There is no administrative review of the request by the Planning Director, nor is there a hearing by the Planning Board. (Sections 27-244 (d) and (f))

(4) The instant Application is in accordance with Section 27-258(a) of the Zoning Ordinance, since the request is to validate a CG (commercial grading) permit. (Section 27-258 (a))

(5) The record reveals that no fraud or misrepresentation was practiced in obtaining the permit, as noted by Mr. Shrives sworn testimony, and as reasonably inferred by the lack of testimony to the contrary. (Section 27-258(g)(1)(A))

(6) There is no evidence that any appeal or controversy regarding the issuance of the permit was pending before any administrative body at the time of its issuance. (Section 27-258(g)(1)(B))

(7) The Applicant has acted in good faith, expending nearly One Million Dollars in reliance on this permit after many meetings with various County agencies, submittal of

plans and documents, and requested revisions thereto. (Section 27-258 (g)(1)(C))

(8) The Application meets the spirit of the applicable provisions of Section 27-258 (g)(1)(D), as noted above.

(9) Finally, the validation will not be against the public interest as the instant Application validates a mostly underground unmanned use, less than 5,000-square-feet in total, that was constructed nearly three years ago in an inobtrusive area of a residentially-zoned lot near an Amtrak right-of-way, which provides a much-needed service to the federal government, that does not detract from the residential character of the surrounding area. (Section 27-258 (g)(1)(E))

### **RECOMMENDATION**

It is recommended that the District Council validate CG Permit No. 6658-2015-01 (Exhibit 3) constricted in accordance with the "Grading and E&S Control Plan" (Exhibit 8 (a)-(c)), and that the name of the Permit Applicant be "CenturyLink Communications, LLC". The underground telecommunications vault and above-ground facilities shall be declared to be a Certified Non-Conforming Use.