



AGENDA

Wednesday, December 13, 2023: 5:30 PM
Board of Adjustment

C. Michael Haney Community Room, Southern Pines Police Department, 450 W. Pennsylvania Avenue

1. CALL TO ORDER

2. APPROVAL OF MINUTES

a. July 12, 2023 Regular Meeting

3. PUBLIC HEARING

a. A-02-23 Request for a Variance from UDO Sec. 4.15.5(A)

Applicant: Connect Holding II LLC dba Brightspeed

4. UNFINISHED BUSINESS

5. NEW BUSINESS

6. PUBLIC COMMENTS

7. ADJOURNMENT

Meetings/work sessions of the Southern Pines Town Council are now available on the Town's [YouTube channel](#). Video of the Town Council meetings will be live streamed on the channel for viewing either during the meetings or after they have concluded. Please note, the video is provided only for the purposes of viewing the meetings; public comments or questions are not accepted via the live stream. To receive notifications when new content is published, please "subscribe" to the Town's channel at <https://bit.ly/3hXx2Qk>

MINUTES
Town of Southern Pines Board of Adjustment
Regular Meeting
July 12, 2023 at 5:30 PM

The regular meeting of the Town of Southern Pines Board of Adjustment was held on Thursday, July 12, 2023, at 5:30 PM in the C. Michael Haney Room of the Southern Pines Police Department, 450 W. Pennsylvania Avenue, Southern Pines, North Carolina.

Robert Thompson, John McInerney, Mike Martin and Steve Kastner were present.

B.J. Grieve, Planning Director, Alaina Mallette, Senior Planner, and Cindy Williams, Secretary to the Board, were also present.

Chair Thompson called the meeting to order at 5:30.

APPROVAL OF MINUTES

Steve Kaster made a motion, which was seconded by John McInerney, to approve the Minutes of the May 5, 2022 meeting with the noted corrections. The motion carried by a 4-0 vote.

PUBLIC HEARING

A-01-23: Variance for 280 Shaw Avenue; Applicant: Vineland Properties, LLC (Mr. Paul Trevarrow)

Mike Martin made a motion, which was seconded by Steve Kastner, to open the public hearing. The motion carried by a 4-0 vote.

Senior Planner Alaina Mallette stated that the property is located in the General Business (GB) district and the Highway Corridor Overlay district (HCO) that encompasses the entire parcel. Mr. Trevarrow met with the Technical Review Committee on May 16, 2023 regarding a preliminary plan for development of the .3 ac. parcel. It became clear to Planning staff at that meeting that a variance would be needed so staff recommended that the applicant submit a variance request to the Board of Adjustment.

A 40-foot vegetated buffer in the highway yard facing US Highway 1, a 50-foot parking setback and a 75-foot building setback are required in the HCO, and a 20-foot buffer on the side of the property that is adjacent to a single-family residence as required for a parcel that is zoned General Business that is adjacent to a single-family residence.

The applicant requested a reduction in the 40-foot landscape buffer, the 75-foot building setback, the 50-foot parking setback and relief from “other provisions of the Ordinance which would cause the proposed site plan to be non-compliant.” A reduction in the minimum number of required parking spaces was also request and was granted administratively by Planning staff. Staff recommended a 20-foot vegetated buffer as opposed to 40-foot buffer; a minimum building setback of 20 feet as opposed to 75 feet; and a 35-foot parking setback as opposed to 50 feet.

Mr. McInerney asked if the 20-foot landscape buffer would have to be undisturbed.

Ms. Mallette responded that the Board could require that the buffer be undisturbed and the dense mature growth maintained.

Mr. Grieve entered the staff report into the record as Exhibit A and the Power Point presentation as Exhibit B.

Mr. Kastner inquired about the applicant’s fifth request regarding relief from other provisions of the Ordinance.

Ms. Mallette responded that request was too general and would leave too many provisions of the UDO open to subjective interpretation.

Chair Thompson questioned whether the 40-foot landscape buffer was within the 75-foot building setback and Ms. Mallette confirmed that both are measured from the same lot line.

Chair Thompson asked if there were other ways to go back and increase the landscape and highway buffers.

Ms. Mallette responded that staff came up with the values by looking at the proposed design the applicant had submitted with the application and those values aligned with the development that was being proposed.

Mr. Grieve stated that staff had reviewed the applicant’s proposed concept plan for a very modest commercial land use and therefore staff designated it as reducing the regulatory requirements to that which would be the minimum necessary to alleviate a hardship.

Chair Thompson responded that as he understood it, if the request was denied then nothing reasonable could be built on the property.

Mr. Grieve provided his background to qualify as an expert witness and stated that in his opinion all of the regulatory layers combined would deny all reasonable use of the property.

Mr. Martin inquired about the intent of the HCO landscape buffer.

Mr. Grieve responded by reading UDO §3.6.5 HCO – Highway Corridor Overlay:

The HCO district is established to place special land Development controls on land adjacent to major highway corridors to protect the natural and environmental features that constitute important physical, aesthetic, recreational and economic assets to the community. This overlay district is established to

(1) Prevent unsightly conditions that may destroy or detract from the natural character, beauty and condition;

(2) Establish standards as may be necessary to accomplish the objective;

(3) Minimize potential safety hazards that may exist along the roadways in the Town; and

(4) Ensure that Development is consistent with the historic character of the Town's natural and built environments.

Mr. McInerney asked if the property was large enough to handle a septic tank and a brief discussion regarding that issue ensued.

Mr. McInerney asked Mr. Treverrow if he was good with the 20' landscape buffer next to the residential structure and Mr. Trevarrow confirmed.

Mr. Trevarrow stated that he understood the Board not granting his request for relief from other provisions of the Ordinance as it was overbroad.

Mike Martin made a motion, which was seconded by Steve Kastner, to close the public hearing. The motion carried by a 4-0 vote.

Steve Kastner made a motion, which was seconded by John McInerney, to adopt Attachment 1 of the staff report as the Findings of Fact regarding proposed variance A-01-23 considering that they reflect the Board's determination of contested facts based on the applicable standards and criteria. The motion carried by a 4-0 vote.

Steve Kastner made a motion, which was seconded by Mike Martin, to approve variance request A-01-23 for relief from 1) the 40-foot landscape buffer to a minimum of 20 feet in the highway yard; (2) the 75-foot building setback to a minimum of 20 feet in the highway yard; and 3) the 50- foot parking setback to a minimum of 35 feet in the highway yard (of the Urban Village HCO development standards in UDO Exhibit 3-13 and Exhibit 4-3) with the following additional conditions:

- a. The applicant maintains a 20-foot undisturbed landscape buffer along the highway yard lot lines (i.e., the westernmost lot lines adjacent to US Highway 1); and
- b. The applicant maintains a 20-foot landscape buffer with the adjacent single-family residence. The motion carried by a 4-0 vote.

Mike Martin made a motion, which was seconded by Steve Kastner, to adjourn the meeting. The motion carried by a vote of 4-0.

The meeting adjourned at 6:30 PM.

Respectfully submitted:

Cindy Williams
Secretary to the Board

DRAFT

Agenda Item

To: Board of Adjustment

Via: BJ Grieve, Planning Director

From: James Michel, PE, Town Engineer/Asst. Public Works Director

Subject: A-02-23, Variance Request for Underground Utilities, Applicant Connect Holding II, LLC dba Brightspeed;

Date: December 13, 2023

I. SUMMARY OF VARIANCE

Brightspeed currently provides internet and phone service in the Southern Pines area following the acquisition of Centurylink’s copper network. Brightspeed is interested in expanding high speed internet through the installation of new fiber optic cables throughout Southern Pines and within Town rights-of-ways (ROW). Brightspeed has been in contact with Town staff about obtaining a Construction in Town ROW permit for the installation of the new lines, though no submittal for the permit has occurred to date. Through these discussions Town staff determined that Brightspeed intended to install the new facilities by two different methods depending on the state of the existing copper line installations. Brightspeed’s desire is to install the new fiber optic underground where the existing facilities are already underground. Where the existing lines are aerial, or attached to poles, the new fiber lines would be overlashed to the existing copper lines and continue to be aerial lines. Based on the existing networks, this would result in a 47% underground installation and 53% aerial installation. Brightspeed also requested that any new service, in areas that have aerial lines, to be installed for new customers as aerial lines even if there is no existing aerial service.

Staff has informed the applicant, pursuant to **UDO §4.15.5(A)**, that all new lines shall be installed underground. The applicant is requesting a variance from this provision so that they can move forward with their project as planned. This could result in a about 53% of the proposed lines being installed underground where the existing lines are currently aerial. It should be noted that the Town is enforcing this ordinance only within Town rights-of-ways and is not attempting to apply the ordinance to NCDOT or private roads.

II. PROJECT INFORMATION

A. Property Owner

Town of Southern Pines (Public Rights-of-Way)

B. Applicant and Authorized Agent

Connect Holding II, LLC

Dbas Brightspeed

c/o Steven Brewer

PO Box 2159

Fayetteville, NC 28301

III. STAFF REVIEW

A. Application Review Dates

- Variance Application Submitted: November 3, 2023
- Application Deemed Complete: November 13, 2023
- Legal Notices of Board of Adjustment Evidentiary Hearing
 - Posted On-site: November 17, 2023
 - Published: N/A for variances, but was published in *The Pilot* on November 29 and December 6, 2023
- Board of Adjustment Evidentiary Hearing: December 13, 2023

B. Process and Standards for Review

The procedures for review and approval of a variance, per UDO §2.22, establish a process and standards for the Board of Adjustment to vary certain UDO regulations when an applicant demonstrates that the criteria described below justify relief from the strict application of the regulations in the UDO.

Per UDO §2.22.5, the Board of Adjustment shall hold an evidentiary hearing and may approve, conditionally approve, or deny the application based on criteria in UDO §2.22.6, described below. The Board of Adjustment may impose conditions that are reasonably related to the variance. The procedures for conducting an evidentiary hearing are found in UDO §2.14.

Before granting a variance, the Board of Adjustment must take a separate vote with at least four-fifths of the Board in agreement on each of the findings based on the criteria in UDO §2.22.6. Conversely, a motion to deny a variance may be made on the basis that any one or more of the criteria are not satisfied or that the application is incomplete, and must be supported by more than one-fifth of the Board (excluding vacant seats). A motion to make an affirmative or negative finding on any criteria should include a statement of the specific reasons (i.e., findings of fact) supporting the motion. See [Staff Report Section V](#) and Attachment 1.

C. Criteria for Review

Per UDO §2.22.6, the Board of Adjustment shall focus on the applicable standards and determine whether sufficient evidence has been provided to prove:

- A. Unnecessary hardship would result from the strict application of the ordinance. It shall not be necessary to demonstrate that, in the absence of the variance, no reasonable use can be made of the property;
- B. The hardship results from conditions that are peculiar to the property, such as location, size or topography. Hardships resulting from personal circumstances, as well as hardships resulting from conditions that are common to the neighborhood or the general public may not be the basis for granting a variance. A variance may be granted when necessary and appropriate to make a reasonable accommodation under the Federal Fair Housing Act for a person with a disability;
- C. The hardship did not result from actions taken by the applicant or the property owner. The act of purchasing property with knowledge that circumstances exist that may justify granting a variance shall not be regarded as a self-created hardship; and
- D. The requested variance is consistent with the spirit, purpose and intent of the ordinance, such that public safety is secured, and substantial justice is achieved.

D. General Staff Comments

In item A of the applicant's description of the Variance Criteria, Brightspeed are claiming a hardship in that the company would be at a disadvantage to other existing networks. The existing Cable TV networks operate using a coax system which has an existing higher capacity than the copper phone lines can provide. Cable companies operating a network in Southern Pines do not have to perform a mass network upgrade to be able to provide modern high-speed internet service.

During discussion with the applicant, they have also indicated that the requirement to underground all of the lines would not meet their internal financial modeling requirements. There is currently an ongoing fiber optic installation following the Town's ordinance with a 100% underground installation. The project owner is a new high-speed internet provider that does not have the benefit of an existing customer base.

The applicant misstated in item C of their description of the Variance Criteria that the subject ordinance was enacted recently due to the 2021 snow storm. The ordinance was originally passed on December 12, 1989 and then subsequently retained when the ordinance was combined with other land use ordinances when the UDO was created in 2013. The 2021 snow storm is an excellent example of why the ordinance is important as many customers lost services due to damage from ice and vegetation that could have been avoided with an underground utility system.

The 2040 Comprehensive Plan was recently adopted and included policy recommendations reaffirming the current ordinance:

Policy 3.17: Within Statutory Limits, Install all Utilities Underground in New Development, and Continue Efforts to Move Existing Overhead Utilities Underground

The Town of Southern Pines Unified Development Ordinance should require all new utility lines and service be provided underground and that any major project that involves existing overhead utility services relocate them underground. The town should also be proactive with implementing measures to move all existing overhead utilities underground.

In addition to underground systems being more resilient to storm damage, those systems are also more resilient to other human and environmental damage. Several times per year aerial lines are damaged by vehicles or dead trees/branches that will disturb service and/or block roadways. In one recent incident, a power line and pole were damaged by an accident and blocked off W. Illinois Avenue for 2 weeks. In another incident an overhead telecom line was pulled down by a tractor trailer and blocked Pennsylvania Extension for about a week. There have been numerous instances over the years of abandoned lines and services that blocked roads, ultimately forcing Town staff to remove the lines as no entity would take responsibility for the line.

Underground utility systems provide a better community aesthetic as there are no overhead lines that vines and vegetation that can grow around and become unsightly. They also do not require regular tree trimming that is often left in a less than desirable state. Tree trimming issues are less prevalent with telecom facilities, telecom facilities make up most of the overgrown vegetation issues throughout Town. It is also a common occurrence for abandoned lines to remain in place and/or be left loosely hanging from poles. Utilities have a history of not addressing these unsightly vestige facilities.

The spirit of the ordinance is founded in the above issues that are addressed when utilities are placed underground. The applicant's proposed concessions would only address the Town's concerns as it relates to roadway crossings, and the other concerns would remain unaddressed. It is noted that the applicant has stated that they will be better about ongoing maintenance to alleviate vegetation and abandoned line concerns, but Staff's historical experience with the telecom industry is not favorable in support of this verbal commitment.

E. Outside Agency Comments

A request for comment was emailed to representatives from the Regional Land Use Advisory Commission (RLUAC), North Carolina Department of Transportation (NCDOT), U.S. Fish and Wildlife Service, the Moore County Airport, and representatives of the Town of Southern Pines on November 17, 2023. On November 17, 2023 NCDOT responded to say they have no comment. On November 20, 2023 RLUAC responded saying that they have no comments on the request.

IV. ATTACHMENTS

The following materials are provided as attachments to this staff report:

1. Draft Written Decision and Findings of Fact
2. UDO §4.15.5
3. §160D-705. Quasi-judicial zoning decisions
4. Brightspeed’s variance application

V. BOARD OF ADJUSTMENT ACTIONS

The Board of Adjustment may choose one of the following motions or any alternative they wish.

I move to:

1. Adopt “Attachment 1” of the staff report as our Findings of Fact regarding the proposed variance A-02-23 considering that they reflect the Board’s determination of contested facts based on the applicable standards and criteria.
2. Adopt “Attachment 1” of the staff report as our Findings of Fact regarding the proposed variance A-02-23 with the following changes

The Board of Adjustment could make one of the following motions for any alternative they wish.

I move to:

1. **Deny** the variance request A-02-23; OR
2. **Approve** the variance request A-02-23 for relief from the standard in UDO Exhibit 4.15.5(A) **with the following additional conditions:**
 - a. The applicant shall be limited to aerial installation only in areas where there are existing aerial lines;
 - b. All new service lines shall be installed underground;
 - c. All roadway crossings shall be installed underground; OR
3. **Approve** the variance request A-02-23 for relief from the standard in UDO 4.15.5(A);

ATTACHMENT 1

Draft Board of Adjustment Findings of Fact Variance Application A-02-23

Finding of Fact #1

The Board of Adjustment finds that the application is **complete** and that the facts submitted are relevant to the case because the request for a variance has met the specified submittal requirements as required in the Town of Southern Pines Unified Development Ordinance (UDO) Appendices, the applicants provided an Addendum to their variance application addressing each of the criteria for a variance, and the addendum was prepared by Mr. Steven Brewer, the Director of Government Affairs with Brightspeed, the applicant seeking the variance. Furthermore, evidence provided at the evidentiary hearing was sworn testimony provided by a qualified expert witness.

Finding of Fact #2

The Board of Adjustment finds that the variance request does not comply with UDO §2.22.6 Criteria for a Variance, Criteria A-D, in that...

- (A) *Unnecessary hardship would result from the strict application of the ordinance. It shall not be necessary to demonstrate that, in the absence of the variance, no reasonable use can be made of the property.*

The application does not comply with §2.22.6(A) Criteria for a variance because a hardship created by a competitive disadvantage due to cost, as alleged by the applicant, is not relevant to the statutory criteria. Financial hardship does not qualify as a property hardship.

- (B) *The hardship results from conditions that are peculiar to the property, such as location, size or topography. Hardships resulting from personal circumstances, as well as hardships resulting from conditions that are common to the Neighborhood or the general public may not be the basis for granting a variance. A variance may be granted when necessary and appropriate to make a reasonable accommodation under the Federal Fair Housing Act for a person with a disability.*

The application does not comply with §2.22.6(B) Criteria for a variance because no information was provided describing conditions that are peculiar to the property, which in this case is public rights of way throughout Southern Pines.

- (C) *The hardship did not result from actions taken by the Applicant or the property owner. The act of purchasing property with knowledge that circumstances exist that may justify granting a variance shall not be regarded as a self-created hardship.*

The application does not comply with §2.22.6(C) Criteria for a variance because the claimed hardship is based upon the applicant's internal financial requirements.

- (D) *The requested variance is consistent with the spirit, purpose and intent of the ordinance, such that public safety is secured, and substantial justice is achieved.*

The application does not comply with §2.22.6(D) Criteria for a variance because the proposed installation methodologies including partially underground and partially

aboveground as determined by the applicant would only address a portion of the public welfare and safety concerns that the ordinance is intended to support and correct.

Finding of Fact #3

The Board of Adjustment finds that based on the evidence regarding this proposal in the record—including the December 13, 2023 Board of Adjustment meeting—the application **does not meet** all of Criteria A through D as set out in §2.22.6 of the Unified Development Ordinance (UDO).

4.15. UTILITIES

4.15.1. Utility Ownership and Easement Rights

In any case in which a Developer installs or causes the installation of water, sewer, electrical power, telephone, natural gas or cable television facilities and intends that such facilities shall be owned, operated or maintained by a public utility or any entity other than the Developer, the Developer shall transfer to such utility or entity the necessary ownership or easement rights to enable the utility or entity to operate and maintain such facilities. In addition, the Developer, in accordance with section 4.15.6, shall dedicate sufficient easement rights to accommodate the extension of utility facilities which will serve adjacent or nearby Developments. Easement rights transferred to the Town under this section shall include provisions for the optional use of hiking, bicycling and pedestrian activities within the easement.

4.15.2. Public Lighting Requirements

See section 4.8.7.

4.15.3. Electric Power

Every Principal Use and every Lot within a Subdivision shall have available to it a source of electric power adequate to accommodate the reasonable needs of such use and every Lot within such Subdivision. Compliance with this requirement shall be determined as follows:

- (A) If the use is not a Subdivision and is located on a Lot that is served by an existing power line and the use can be served by a simple connection to such power line (as opposed to a more complex distribution system, such as would be required in an apartment complex or Shopping Center), then no further certification is needed.
- (B) If the use is a Subdivision or is not located on a Lot served by an existing power line or a substantial internal distribution system will be necessary, then the electric utility service provider must review the proposed plans and certify to the Town that it can provide service that

is adequate to meet the needs of the proposed use and every Lot within the proposed Subdivision.

4.15.4. Telecommunications Service

Every Principal Use and every Lot within a Subdivision must have available to it a telecommunications service cable adequate to accommodate the reasonable needs of such use and every Lot within such Subdivision. For purposes of this section, telecommunications services include telephone and cable services for telephone, television and internet access. Compliance with this requirement shall be determined as follows:

- (A) If the use is not a Subdivision and is located on a Lot that is served by an existing telecommunications line and the use can be served by a simple connection to such telecommunications lines (as opposed to a more complex distribution system, such as would be required in an apartment complex or Shopping Center), then no further certification is necessary.
- (B) If the use is a Subdivision or is not located on a Lot served by an existing telecommunications lines or a substantial internal distribution system will be necessary, then the applicable telecommunications utility providers must review the proposed plans and certify to the Town that it can provide service that is adequate to meet the needs of the proposed use and every Lot within the proposed Subdivision.

4.15.5. Underground Utilities

- (A) All new electric power lines (not to include transformers or enclosures containing electrical equipment including, but not limited to, switches, meters or capacitors which may be pad mounted), telephone, gas distribution and cable television lines in Subdivisions constructed after the effective date of this ordinance shall be placed underground in accordance with the specifications and policies of the respective utility service providers and located in accordance with Appendix B.

(Ord. #1871, 8-24-20; Ord. #1890, 1-6-21)

- (B) Whenever an un-subdivided Development is hereafter constructed on a Lot that is undeveloped on the effective date of this chapter, then all electric power, telephone, gas distribution and cable television lines installed to serve the Development that are located on the Development site outside of a previously existing public street Right-of-Way shall be placed underground in accordance with the specifications and policies of the respective utility companies.

4.15.6. Utilities to Be Consistent with Internal and External Development

- (A) Whenever it can reasonably be anticipated that utility facilities constructed in one Development will be extended to serve other adjacent or nearby Developments, such utility facilities (e.g., water or sewer lines) shall be located and constructed so that extensions can be made conveniently and without undue burden or expense or unnecessary duplication of service as determined by the Town of Southern Pines. The dedication of requisite utility easements and/or the construction of utility facilities may be required, as determined necessary by the Town of Southern Pines, to accommodate utility service to adjacent or nearby properties.
- (B) All utility facilities shall be constructed in such a manner as to minimize interference with pedestrian or vehicular traffic and to facilitate maintenance without undue damage to improvements or facilities located within the Development.

4.15.7. As-Built Drawings Required

Whenever a Developer installs or causes to be installed any utility line in any public right of way, the Developer shall, as soon as practicable after installation is complete and before acceptance of any water or sewer line, furnish the Town with a mylar reproducible copy and one print copy of a drawing that shows the exact location of such utility lines. Such drawings must be verified as accurate by the utility service provider. Manholes, valves and other utility system features shall be located using GPS and the

data shall be provided in digital form pursuant to the requirements for Engineering Plan applications. Compliance with this requirement shall be a condition of the continued validity of the permit authorizing such Development.

4.15.8. Fire Hydrants

- (A) Every Development (subdivided or un-subdivided) that is served by a public water system shall include a system of fire hydrants sufficient to provide adequate fire protection for the Buildings located or intended to be located within such Development.
- (B) The presumption established by this ordinance is that to satisfy the standard set forth in Subsection (a), fire hydrants must be located so that all parts of every Building within the Development may be served by a hydrant by laying not more than five-hundred (500) feet of hose connected to such hydrant. However, the fire chief may authorize or require a deviation from this standard if, in his professional opinion, another arrangement more satisfactorily complies with the standard set forth in paragraph (A).
- (C) The fire chief shall determine the color and precise location of all fire hydrants, subject to the other provisions of this section. In general, fire hydrants shall be placed six (6) feet behind the curb line of publicly dedicated streets that have curb and gutter.
- (D) The fire chief shall determine the design standards of all hydrants based on fire flow needs. Unless otherwise specified by the fire chief, all hydrants shall have two 2-½ inch hose connections and one 4-½ inch hose connection. The 2-½ inch hose connections shall be located at least 21-½ inches from the ground level. All hydrant threads shall be national standard threads.
- (E) Clear Space around Hydrants. A 3-foot (914 mm) clear space shall be maintained around the circumference of fire hydrants except as otherwise required or approved.

§ 160D-705. Quasi-judicial zoning decisions.

(a) Provisions of Ordinance. – The zoning or unified development ordinance may provide that the board of adjustment, planning board, or governing board hear and decide quasi-judicial zoning decisions. The board shall follow quasi-judicial procedures as specified in G.S. 160D-406 when making any quasi-judicial decision.

(b) Appeals. – Except as otherwise provided by this Chapter, the board of adjustment shall hear and decide appeals from administrative decisions regarding administration and enforcement of the zoning regulation or unified development ordinance and may hear appeals arising out of any other ordinance that regulates land use or development. The provisions of G.S. 160D-405 and G.S. 160D-406 are applicable to these appeals.

(c) Special Use Permits. – The regulations may provide that the board of adjustment, planning board, or governing board hear and decide special use permits in accordance with principles, conditions, safeguards, and procedures specified in the regulations. Reasonable and appropriate conditions and safeguards may be imposed upon these permits. Where appropriate, such conditions may include requirements that street and utility rights-of-way be dedicated to the public and that provision be made for recreational space and facilities. Conditions and safeguards imposed under this subsection shall not include requirements for which the local government does not have authority under statute to regulate nor requirements for which the courts have held to be unenforceable if imposed directly by the local government, including, without limitation, taxes, impact fees, building design elements within the scope of G.S. 160D-702(b), driveway-related improvements in excess of those allowed in G.S. 136-18(29) and G.S. 160A-307, or other unauthorized limitations on the development or use of land.

The regulations may provide that defined minor modifications to special use permits that do not involve a change in uses permitted or the density of overall development permitted may be reviewed and approved administratively. Any other modification or revocation of a special use permit shall follow the same process for approval as is applicable to the approval of a special use permit. If multiple parcels of land are subject to a special use permit, the owners of individual parcels may apply for permit modification so long as the modification would not result in other properties failing to meet the terms of the special use permit or regulations. Any modifications approved apply only to those properties whose owners apply for the modification. The regulation may require that special use permits be recorded with the register of deeds.

(d) Variances. – When unnecessary hardships would result from carrying out the strict letter of a zoning regulation, the board of adjustment shall vary any of the provisions of the zoning regulation upon a showing of all of the following:

- (1) Unnecessary hardship would result from the strict application of the regulation. It is not necessary to demonstrate that, in the absence of the variance, no reasonable use can be made of the property.
- (2) The hardship results from conditions that are peculiar to the property, such as location, size, or topography. Hardships resulting from personal circumstances, as well as hardships resulting from conditions that are common to the neighborhood or the general public, may not be the basis for granting a variance. A variance may be granted when necessary and appropriate to make a reasonable accommodation under the Federal Fair Housing Act for a person with a disability.
- (3) The hardship did not result from actions taken by the applicant or the property owner. The act of purchasing property with knowledge that circumstances exist that may justify the granting of a variance is not a self-created hardship.
- (4) The requested variance is consistent with the spirit, purpose, and intent of the regulation, such that public safety is secured and substantial justice is achieved.

No change in permitted uses may be authorized by variance. Appropriate conditions may be imposed on any variance, provided that the conditions are reasonably related to the variance. Any other development regulation that regulates land use or development may provide for variances from the provisions of those ordinances consistent with the provisions of this subsection. (2019-111, s. 2.4; 2020-3, s. 4.33(a); 2020-25, ss. 17, 50(b), 51(a), (b), (d).)



Board of Adjustment Hearing Request

REQUIRED APPLICATION MATERIALS:

- ✓ **Application fee** in the amount of \$500.00.
- ✓ **Completed Application** requesting a **variance** or an **appeal of an order or determination made by an administrative official** signed by the applicant. Please do not leave anything blank and make sure all of the information provided is correct.
- N/A **List of Adjacent Property Owners:** Please list all properties that are that are within two hundred (200) feet of the outermost boundaries of the subject property (**not counting streets, railroads or other transportation corridors**). Attach additional pages if needed. No fewer than ten (10) property owners shall be notified by mail.
- N/A **Appointment of Agent**, if applicable, signed by the property owner and the agent.
- N/A **Deed** copy, if applicable, to provide proof of ownership and property boundaries.
- ✓ **Purpose of request:** Please provide additional text and/or maps to demonstrate consistency with the criteria listed in **UDO §2.22.6** for variance or in **§2.23.7** for an appeal. The list of criteria for each type of request is attached.
- ✓ **Electronic copy (PDF) of all application materials** submitted to plan@southernpines.net.

REVIEW AND APPROVAL:

1. **Staff review:** Planning staff will review the application and notify the applicant if additional materials are needed.
2. **Public hearing:** The Board of Adjustment shall conduct a public hearing and approve, conditionally approve or deny the application based on all applicable criteria. (Please refer to the **Application Processing Timeline** to determine the hearing date.) The applicant or a representative of the applicant is expected to attend all meetings and be prepared to answer questions concerning the request. The absence of the applicant or representative is sufficient grounds to warrant a deferral of action by the Board of Adjustment.
3. **Decision of the Board:** The applicant will be notified of the Board's decision in writing within thirty (30) days of the public hearing.

PLANNING DEPARTMENT
TOWN OF SOUTHERN PINES
801 SW SERVICE ROAD, SOUTHERN PINES, NC 28387
plan@southernpines.net (910) 692-4003 www.southernpines.net



Variance or Appeal Application

Fee: \$500.00 Date Received: _____ Case No.: A-____-_____

TO THE TOWN OF SOUTHERN PINES BOARD OF ADJUSTMENT:

I, the undersigned, do hereby make application for your consideration of the following request:

- Variance** (complete Section A below)
- Appeal of order or determination made by an administrative official** (complete Section B below)
- Zoning Map Interpretation**

Subject Property:

Street Address: Town of Southern Pines

PIN: _____ Parcel ID: _____

Site Size: _____ Lot Frontage: _____ Lot Depth: _____ Zoning District: _____

The property is located on the _____ side of _____ (Street/Avenue) between _____ (Street/Avenue) and _____ (Street/Avenue).

Project Information:

Street Address: Town of Southern Pines

PIN: _____ Parcel ID: _____

Site Size: _____ Zoning: _____

Applicant:

Name(s): Connect Holding II LLC dba Brightspeed - Attention: Steven Brewer

Email: steven.k.brewer@brightspeed.com Phone: 919-696-5700

Mailing Address: PO Box 2159, Fayetteville, NC 28301-2159

Authorized Agent, if different from Applicant:

Name(s): N/A

Email: _____ Phone: _____

Mailing Address: _____

Legal Property Owner(s), if different from Applicant:

Name(s): N/A

Email: _____ Phone: _____

Mailing Address: _____

1/12/22

SECTION A – VARIANCE

1. The requirement of the Town’s Unified Development Ordinance from which a variance is being sought is the provision of Section 4.15.5.(A) of the Unified Development Ordinance that states as follows:
See attached Addendum A
_____.
2. The property that is the subject of this application fails to meet the requirements in following way:
Brightspeed is seeking to upgrade its existing copper network to fiber and wishes to place these facilities on existing pole lines.
_____.
3. A written narrative addressing **UDO §2.22.6 Criteria (A) through (D)** is attached to this application.
See attached Addendum B

SECTION B – APPEAL OF ORDER OR DETERMINATION

1. The name and title of the administrative official who made the order or determination:
Name: N/A Title: _____
2. The order or determination that is the subject of this appeal: _____
_____.
3. Describe the manner in which you contend the order or determination was erroneous:

_____.
4. If you are not the owner of the property that was subject to the order or determination, describe the basis for concluding that you are financially harmed in a manner different from the harm suffered by the general public. _____
_____.

Date: 11/1/2023

Steven K Brewer
Applicant

UDO §2.22. Variance

§2.22.1. Purpose and Applicability

The Board of Adjustment shall have the power to vary the certain UDO regulations when the Applicant demonstrates that the criteria in this section justify relief from the strict application of the regulations in this UDO. No change in permitted uses may be authorized by variance.

§2.22.6. Criteria

A variance may be granted by the Board of Adjustment if it finds that:

- (A) Unnecessary hardship would result from the strict application of the ordinance. It shall not be necessary to demonstrate that, in the absence of the variance, no reasonable use can be made of the property.
- (B) The hardship results from conditions that are peculiar to the property, such as location, size or topography. Hardships resulting from personal circumstances, as well as hardships resulting from conditions that are common to the neighborhood or the general public may not be the basis for granting a variance.
- (C) The hardship did not result from actions taken by the applicant or the property owner. The act of purchasing property with knowledge that circumstances exist that may justify granting a variance shall not be regarded as a self-created hardship.
- (D) The requested variance is consistent with the spirit, purpose and intent of the ordinance, such that public safety is secured, and substantial justice is achieved.

UDO §2.23. Appeals

§2.23.1 Purpose and Applicability

Any person, including any officer or agency of the Town, aggrieved by a final Development Approval relating to an application for Development approval by the Planning Director or other member of the Town's administration, may appeal such Development Approval to the Board of Adjustment in the manner provided in this section. Should any person be aggrieved by any decision of the Board of Adjustment, they shall have the right to appeal same to the Circuit Court of Moore County, North Carolina, in the manner prescribed by law.

§2.23.7. Criteria

In evaluating an Appeal, the Board of Adjustment shall determine whether the action being appealed:

- (A) Was made based on correct interpretation of the UDO and other applicable regulations; and
- (B) Reflected the correct response to the application that was approved, denied or conditionally approved.

Please reference UDO §2.22 and §2.23 (www.southernpinesudo.org) for additional information.

Addendum A.

4.15.5. Underground Utilities (A) All new electric power lines (not to include transformers or enclosures containing electrical equipment including, but not limited to, switches, meters or capacitors which may be pad mounted), telephone, gas distribution and cable television lines in Subdivisions constructed after the effective date of this ordinance shall be placed underground in accordance with the specifications and policies of the respective utility service providers and located in accordance with Appendix B

Addendum B.

Brightspeed Application for Variance to UDO 4.14.5 (A)

UDO 2.22.6 Criteria

- (A) **Unnecessary Hardships** – Brightspeed is currently seeking to upgrade its existing copper network to a fiber optic network. Doing so will allow Brightspeed to deliver state of the art broadband connectivity to the citizens of Southern Pines. The upgrade will deliver fiber to the premises by the same means that the existing copper network is deployed, i.e., aerial on existing poles lines and underground in locations where a pole line does not currently exist. Current plans have approximately 53% of the upgrade being aerial and 47% being underground. Furthermore, failure to grant the variance will place Brightspeed at a distinct disadvantage when competing against the incumbent Cable Television provider who also provisions broadband services in the community and utilizes existing utility poles.
- (B) **Hardship Conditions** – Brightspeed acquired local assets to include the existing copper network from Lumen (which did business in Southern Pines as CenturyLink) on October 2, 2022. The existing Southern Pines copper network is not capable of provisioning broadband services which meet the FCC’s definition of broadband at 100/20 meg. Brightspeed desires to upgrade the copper network with a fiber optic network that will initially bring broadband services to the citizens of Southern Pines at speeds up to 1-gig symmetrical. In the future, Brightspeed plans to increase those speeds to 2-gig symmetrical. Ultimately, Brightspeed believes that it can provision speeds of up to 10-gig symmetrical on the planned upgrade.
- (C) **Hardship Did Not Result from Brightspeed Actions** – Brightspeed understands that the ordinance to which it is seeking variance was enacted due to an ice storm in the community a few years ago. The community further experienced situations where lines were down across the road for an extended period and therefore enacted this ordinance to prevent this situation in the future. Since acquiring these assets, Brightspeed has hired four additional employees specific to the Southern Pines community. Currently Brightspeed has an impressive mean time to repair of 1 day. Brightspeed is also willing to upgrade facilities by placing the fiber network parallel to streets and will agree to go underground when needing to cross streets. The willingness to go underground when needing to cross streets should alleviate concerns that were the primary driver of enacting the ordinance to which Brightspeed is appealing. Furthermore, Brightspeed is willing to provide community officials with contact information so that any concerns can be escalated and resolved in a timely manner.
- (D) **Variance is Consistent with Spirit of Ordinance-** As stated (C) just above, *“Brightspeed is also willing to upgrade facilities by placing the fiber network parallel to streets and will agree to go underground when needing to cross streets. The willingness to go underground when needing to cross streets should alleviate concerns that were the primary driver of enacting the ordinance to which Brightspeed is appealing.”* Brightspeed is also willing to provide community officials with a means to address any such concerns as quickly as possible. Brightspeed has hired additional personnel that were simply not in place during the aforementioned ice storm when the assets were owned by a different provider. It should also be noted, that Brightspeed is not seeking to deploy any new utility poles. It mere seeks to upgrade services utilizing the existing utility pole infrastructure.