

**RE: An Appeal From A Decision Of The
Administrative Hearing Officer**

**BEFORE THE
COUNTY BOARD OF APPEALS
OF ANNE ARUNDEL COUNTY**

**CHESAPEAKE TERRACE/NAT'L WASTE
MANAGERS**

**CASE NOS. BA 62-03V &
BA 63-03V**

Petitioners

**Hearing Date: October 30, 2003
December 9, 2003**

MEMORANDUM OF OPINION

Summary of Pleadings

BA 62-03V is taken from the granting of a variance to permit an extension in the time required for the implementation and completion of a previously approved variance and special exception for a rubble landfill, on property located 4,300 feet along the southwest side of Patuxent Road, 1,500 feet west of Bragers Road, Odenton. BA 63-03V is taken from the granting of a variance to permit an extension in the time required for the implementation and completion of a previously approved special exception for a sand and gravel operation on property located 695 feet along the south side of Patuxent Road, 1,500 feet west of Bragers Road, Odenton.

Summary of Evidence

Mr. Andy Chisholm, an expert civil engineer, testified that the property comprises 461 acres. He presented the Board with copies of the deeds to the property. The site is owned by National Waste Managers. He also presented the Board with the approved 1993 site plans for the rubble landfill. Mr. Chisholm explained that the applicant diligently pursued the State permits and had many meetings regarding the subject application. On questioning, the witness explained that Phase One of the application was completed prior to 2001. A portion of the review for Phase Two of the application was completed before 2001. During the processing

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before the Maryland Department of the Environment ("MDE"), there are three phases of review, then there is a public hearing.

Mr. Edward Dexter, Administrator of MDE's Solid Waste Program and an expert in solid waste management in Maryland, explained that MDE is in charge of solid waste management applications, including rubble landfills. Under Phase One of the review, twelve agencies examine an application. Therefore, the largest problems are identified. An applicant then determines whether they should resolve the issues or withdraw the application. As part of the Phase One review, the local government determines whether the rubble fill conforms with the County's Ten Year Solid Waste Management Plan. If the proposed landfill is not in the solid waste management plan, MDE does not waste its time on the application. The application will be reviewed by MDE once the landfill is included in the solid waste management plan. Mr. Dexter also described Phases Two and Three of the review. A three year time period is typical for the technical review of an application. Sometimes the time for an application stops due to litigation or county issues. Phase Four of the review is the last stage. If MDE stops working on a project, the department typically keeps the application materials. In this case, a letter was sent from the applicant (dated January 26, 2001) requesting the reactivation of the file. There are new regulations impacting this type of application at the present time. Liners are now required as well as new hydro-geologic studies. On March 29, 2001, Mr. Dexter sent a letter to the applicant telling them what needed to be done on the application. MDE had not yet received the County's Solid Waste Management Plan. They received the Solid Waste Management Plan, which included the subject property, in June 2001. Mr. Dexter also explained that the relocation of MDE impacted the time frame for review since the technical staff was involved in the move of the office. In August 2002, Mr. Dexter sent a letter to the applicant setting forth more measurements that needed to be conducted. Specifically, 12 consecutive monthly water level measurements were required. Those measurements have not yet been received from the

applicant by MDE. Once the water information is submitted, then MDE will take at least 60 days to review it. A meeting will then take place between MDE and the Petitioners as well as other reviewing agencies. The finalization of the review of the application would take at least one year before approval and at least one additional year if any appeals are taken. On questioning, Mr. Dexter explained that municipal landfill applications have required twelve months of hydrogeologic data since approximately 1989. In 1997, MDE adopted a comparable regulation for rubble landfills. When the project was placed on hold, Phases One, Two and part of Phase Three were retained at MDE. There are some issues to be resolved regarding Phase One. Phase Two is being reviewed at the present time. The change in the regulations resulted in the revision of this review to Phases One and Two. In April 1994, the Petitioners were in Phase Three of review. MDE would not pursue applications without the County's prior approval.

Mr. Milton McCarthy, an expert in natural resources, testified that he has been working on this project since 1989 with the development team. The wetlands permits are in place. Mr. Dexter sent him a letter on August 5, 2002. He sent a letter to the Department of Natural Resources in response to Mr. Dexter's letter on August 20, 2002. He received a response to his letter from the Department of Natural Resources on October 22, 2003. He has had numerous telephone conversations with the staff of the Department of Natural Resources in an effort to schedule a meeting. That meeting has not yet occurred. Several plant species need to be investigated, but the Department of Natural Resources does not want those surveys accomplished until the application is in Phase Three. The surveys must be done in May/June and August/September to fully investigate the plants.

Mr. Mark Schultz, an expert in geology and hydrogeology, testified that he has been working on the Chesapeake Terrace Project since 1989. Mr. Schultz explained that the geology of the site is very complex. He presented the Board with a chronology of the application for this rubble landfill. He conducted the Phase Two investigations in July and August of 1989. The

Phase Two application was submitted in March of 1990. Comments on the Phase Two report were not received until December 29, 1997 from the MDE. A response was filed in March 1998. MDE did not provide a response to that report until August 5, 2002. Mr. Schultz described the delays between MDE receiving information and forwarding it to the applicant for a response. The response from MDE dated August 5, 2002 was six pages in length and also included comments from other reviewing agencies. As part of those comments, MDE required the accumulation of 12 consecutive months of water levels in the monitoring wells. The applicant has previously supplied a years worth of monitoring; however, the measurements were not taken during one of those 12 months. In January, February and March of 2003, it was very difficult to access the site because of weather and the site's characteristics. The changes in the case officers, the COMAR regulations and the number of years over which this application has been pending have complicated the review. The complete hydrogeologic report including comprehensive responses to all comments, was submitted to the MDE by the applicant on December 5, 2003. Mr. Schultz believes that this situation is unique because the County halted the review process for seven years and, therefore, had a greater impact on the permit than the typical review time.

Eight Protestants were in the audience. They have concerns regarding traffic, air pollution and land use issues. In a proffer of their testimony, the Protestants indicated that there has been a change in circumstances in this community. The essential character of the neighborhood has changed. There are six times more homes within the community at the present time than there were when the application began. The original special exception was conditioned on a specific route of access.

Ms. Suzanne Diffenderfer, a planner with the Office of Planning and Zoning, presented the Board with the recommendation of her office. She recommended that the Board approve the request to vary the provisions of Section 12-107 of the Anne Arundel County Zoning

Regulations and extend the time frame for implementing a variance as required by Section 11-102.2(a).

All testimony was stenographically recorded and the recording is available to be used for the preparation of a written transcript of the proceedings.

Findings and Conclusions

In this appeal, the Petitioners are requesting the approval of variances to permit an extension of time for the implementation and completion of previously approved special exceptions and variances for a rubble landfill and for a sand and gravel operation. A special exception for the sand and gravel operation (BA 120-90S) and for a rubble landfill with variances (BA 26-91S and BA 27-91V) have been granted to these applicants. The variances were granted to permit the reclamation of a portion of the old sand and gravel pit that are within the setback restrictions for a sand and gravel use. Section 12-107 of the Anne Arundel County Code (the "Code"), Article 28, Zoning provides that a special exception is rescinded by application of law if action to implement the use is not begun within one year after the decision of the approving authority and the use is not completed and in operation within two years of the decision. Section 11-102.2(a) provides that a variance becomes void unless a building permit is obtained within one year of the grant of the variance and the construction completed within two years.

Following the original approvals of the special exception and variance, there was litigation regarding the exclusion of this facility from the County's Solid Waste Management Plan. The Court of Special Appeals of Maryland ruled on this matter on December 6, 2000 in favor of the Petitioner. The Court of Appeals denied further review on April 13, 2001. The time requirements of Sections 12-107 and 11-102.2(a) were stayed during the litigation. Therefore, the time requirements began to run as of April 13, 2001. The two year time limit expired on April 13, 2003. The variance applications currently before this Board were filed January 14,

2003. Thus, the applicant requires variances to the time restrictions in order to move forward under the previously approved special exception and variances.

In order to be granted a variance, an applicant must meet the standards set forth in Article 3, Section 2-107 of the County Code. Turning to each of these criteria separately, we find that the Petitioners are due relief to the time limit criteria for special exceptions and variance.

As a threshold matter, the applicant must show that the need for the requested variance is due to certain unique, physical conditions of the property such that there is no reasonable possibility of developing the lot in strict conformance with the regulation. In this case, there are no physical conditions of the property that render it incapable of being developed in a timely manner. See, id., Section 2-107(a)(1).

However, Section 2-107(a)(2) provides an alternative threshold where if an applicant can show that "because of exceptional circumstances other than financial considerations, the grant of a variance is necessary to avoid practical difficulties or unnecessary hardship, and to enable the applicant to develop such lot then a variance can be granted." In this case, there are serious exceptional circumstances, which prohibit the Petitioners from implementing the previously approved special exceptions and variance. Anne Arundel County regulates the land use issues as they relate to sand and gravel/rubble landfills, however, the State of Maryland through its Department of Environment also regulates the licensing and operation of such facilities. Mr. Edwin Dexter, the Administrator of the State's Solid Waste Program, explained in great detail the lengthy process by which the State reviews applications for a rubble landfill. The approval process requires extensive environmental and physical study of the site. The application and plans are submitted to the State, which then routes them to numerous commenting agencies. The process requires at least three years to complete. That process time can be extended by external factors such as litigation, which occurred in this case, and the failure of the rubble landfill to be included as part of the County's Solid Waste Management Plan, which also occurred here.

In this case, the special exceptions and variance were approved by the Board of Appeals on December 23, 1993. The applicants began the permit application process for the proposed rubble landfill with the Maryland Department of the Environment in 1990. From 1993 until April 13, 2001, legal issues arose between the applicants and Anne Arundel County. The Maryland Department of the Environment permit process was suspended during that time. Also during those years, new regulations were adopted regarding the requirements that must be met in order to gain approval of those landfill facilities. We find that following the conclusion of the litigation, the changes in the regulations governing the rubble landfill resulted in this applicant needing to begin the process nearly over again. Mr. Dexter of the MDE testified that this process would take a minimum of three years to complete. There is no way for the applicants to obtain the necessary approvals from MDE in time to comply with the Anne Arundel County Zoning Regulations. Therefore, this interaction of the overlapping regulations has resulted in the exceptional circumstance to be suffered by the applicants. If the applicants did not require the MDE permission to operate the rubble landfill, then there would be no need for the requested variances.

While the Protestants argue that the Petitioners fail to show due diligence during the processing of this application, we disagree. Mr. Dexter testified that once an application is determined to not be part of a County's Ten Year Solid Waste Management Plan that MDE halts work on the project pending the resolution of that issue. It is important for MDE to conserve its limited resources. Mr. Dexter explained that delays in project review also occurred since his technical staff was required to assist in the move of his department. These issues relative to MDE rules regarding processing, the move of the MDE office and the allocation of the MDE resources are beyond the control of the applicant for a rubble landfill permit. Even if the Petitioners had continued to supply MDE with information, the MDE would not have reviewed it.

Since the litigation between the applicants and the County stopped in 2001, the applicants were required by MDE to provide a 12 month consecutive well monitoring report (despite the previous existence of a one year consecutive well monitoring report with just one month missing). Therefore, at least an additional year was added to the process. Also, a plant species report was required to be made. Those plant species must be studied in May/June and August/September. There is no way to simply conduct the plant study at a time of the applicants' choosing. We also find from the chronology presented that the applicants have diligently pursued the reactivation of the permit application for the rubble landfill with the State of Maryland. If there had been delays in the process, those delays have been caused by difficulties in obtaining governmental commentary on the application (including a 14 month delay between a Petitioners' submission dated August 20, 2002 and the State's response on October 22, 2003). We believe that the applicants' responses to the various requests and comments have been timely, particularly given the complexity and detail of the required information.

We find that the requested variances to permit an additional extension of two years is the minimum necessary to afford relief to these applicants. See, id., Section 2-107(c)(1). The witness from the State of Maryland indicated that the processing of this application would take at least three years. Although these applicants are at least partially through the State process, we believe based on the testimony presented that significant delays are likely. The State has taken as long as 14 months to respond to an application submittal in this case. Neither the applicants nor we have any control over the ability of the State offices to respond in a more timely manner. If such time delays continue to occur, it is likely that these applicants will need more than two years to implement and commence operation of the approved use.

The granting of the requested variances to the time limits for the implementation and completion of previously approved special exceptions and the variance will not alter the essential

character of this neighborhood. See, id., Section 2-107(c)(2)(i). The Petitioners have an approved, lawful special exception on this site. The approved use of this property as a sand and gravel operation and a rubble landfill has been approved for many years and has been known within the community. Although the Protestants argue that since there are six times as many homes in the area than there were at the time the special exceptions were originally approved, we do not find this testimony persuasive that the requested extension of two years will alter the essential character of this neighborhood. Our focus here is not on the special exceptions and variance that were approved, but rather, on variances to permit a two year extension. If there are many more homes in the community now, those homes have been constructed with full knowledge of the approved special exceptions for a sand and gravel operation and rubble landfill. There is nothing inherently improper regarding the location of a sand and gravel/rubble landfill near residences. In fact, the County Code expressly permits such uses in residential areas so long as a special exception has been granted. The applicants have received special exceptions for these uses.

The use of this property as a sand and gravel/rubble landfill operation will not substantially impair the appropriate use or development of adjacent properties. See, id., Section 2-107(c)(2)(ii). As explained previously, these special exceptions have been approved for many years. The Zoning Regulations permits those special exceptions. The need for the now requested variances are a direct result of the review time for State approval for the operations. Although some of the area residents may not like the use of the property as a sand and gravel operation or rubble landfill with a variance, there is nothing inherent in those operations that impair the use or development of adjacent properties with residences or any other lawful use. The focus here is only on the request for a two year extension of time to commence those uses. Commencement of those uses cannot begin until the State process is complete. There is no way

for this applicant to complete that State process within the County timeframe for the implementation of special exceptions and variances.

This Board need not consider whether the clearing and replanting practices meet the requirements for development within the Chesapeake Bay Critical Area. See, id., Section 2-107(c)(2)(iii). This property is not within the Chesapeake Bay Critical Area.

We find that the use of the property as a sand and gravel operation and rubble landfill with a variance will not be detrimental to the public's welfare. See, id., Section 2-107(c)(2)(iv). Again, the focus here is not on the use as a sand and gravel operation or rubble landfill with a variance, but rather, an extension of two years to implement and commence those uses. This application was closely examined by the Board at the time of the original approvals. There were many conditions imposed on the special exceptions and variance. While some individuals may not like the use of the property for sand and gravel/rubble landfill operations, there is a public benefit to such facilities. We believe that the extension of two years for these applicants to implement and commence these uses will be in the public's welfare. These uses are needed. These uses have been approved by prior special exceptions and the applicants have not been afforded the opportunity to commence those uses due to the State's lengthy (and proper) approval procedure.

We find, therefore, that the applicants have presented adequate testimony to meet the criteria set forth in Section 2-107 to obtain variances of two years to the requirements of Section 12-107 of the Zoning Regulations that special exceptions be fully operational within two years and to the requirements of Section 11-102.2(a) that a building permit must be obtained within one year and construction completed within two years of the approval of a variance.

ORDER

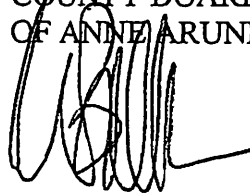
For the reasons set forth in the foregoing Memorandum of Opinion, it is this 15th day of April, 2004, by the County Board of Appeals of Anne Arundel County, ORDERED, that the Petitioners' request for a variance to permit an extension in time for the implementation and completion of special exceptions to operate a sand and gravel mining operation and a rubble landfill for an additional two years is hereby granted and a variance of two years to the requirement that a building permit must be obtained within one year and construction completed within two years is hereby granted. The decision of the Administrative Hearing Officer is hereby affirmed.

Any appeal from this decision must be in accordance with the provisions of Section 604 of the Charter of Anne Arundel County, Maryland.

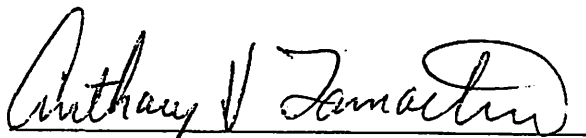
If this case is not appealed, exhibits must be claimed within 60 days of date of the expiration of the appeals period; otherwise, they will be discarded.

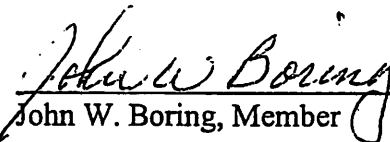
Any notice to this Board required under the Maryland Rules shall be addressed as follows: Anne Arundel County Board of Appeals, Arundel Center, P.O. Box 2700, Annapolis, Maryland 21404, ATTN: Mary M. Leavell, Clerk.

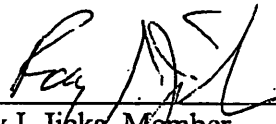
COUNTY BOARD OF APPEALS
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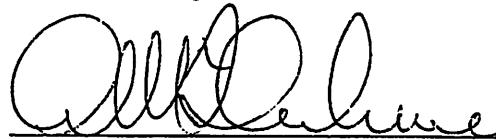



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