

2003-11
6/1/03

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

CASE NUMBERS 2003-0043-V AND 2003-0044-V

IN RE: CHESAPEAKE TERRACE/NATIONAL WASTE MANAGERS, INC.

FOURTH ASSESSMENT DISTRICT

DATE HEARD: APRIL 29, 2003

ORDERED BY: **ROGER A. PERKINS**, TEMPORARY ADMINISTRATIVE HEARING
OFFICER

ZONING ANALYST: **SUZANNE DIFFENDERFER**

DATE FILED: JUNE 3, 2003

PLEADINGS

The Applicant, Chesapeake Terrace/National Waste Managers, Inc., (hereinafter collectively referred to as "the Applicant"), seeks two variances. The applicant is requesting variances to permit an extension in time for the implementation and completion of previously approved special exceptions and previously approved variances for a rubble landfill and for a sand and gravel operation for properties located in the Odenton area.

The rubble landfill site is located on the southwest side of Patuxent Road, west of Bragers Road and consists of 481.6 acres. The sand and gravel site is located on the south side of Patuxent Road, west of Bragers Road and consists of 107.99 acres. The sites are designated as Parcels 20 & 117 in Block 08 on Tax Map 36.

The current RA-Agricultural Residential classification of the site was received as a result of the comprehensive zoning for the Fourth Assessment District, effective June 12, 1989.

PUBLIC NOTIFICATION

The cases were advertised in accordance with the County Code. The file contains the certifications of mailing to community associations and interested persons. Each person designated in the application as owning land that is located within 175' of each property was notified by mail, sent to the address furnished with the application. J. A. Chisholm, the Applicant's engineer, testified that the property was posted for more than 14 days prior to the hearing. Mr. Chisholm testified that signs were in place on three separate occasions following the initial posting. I find and conclude that the requirements of public notice have been satisfied.

FINDINGS AND CONCLUSIONS

The applicant has requested variances for both sites to extend the time for implementation and completion of the previously approved special exceptions and variances. Case Numbers-BA120-90S, BA26-91S and BA27-91V.

Section 12-107 of the Anne Arundel County Zoning Ordinance provides that a special exception is rescinded by operation of law if action to implement the use is not begun within one year after the decision of the approving authority and the use is not completed and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 after 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 and construction completed within two years.

Following the original approvals by the Anne Arundel County Board of Appeals, there was litigation. The Court of Special Appeals of Maryland ruled on this matter on December 6, 2000. The Court of Appeals of Maryland denied further appellate review on April 13, 2001. The date of the decision of the approving authority is April 13, 2001. The two year limit expired on April 13, 2003.

The project must be approved by the Maryland Department of the Environment (MDE), Solid Waste Program. From both the letter dated December 19, 2002, from Edward M. Dexter, Administrator of the Solid Waste Program (a County Exhibit), and Mr. Dexter's testimony, I find that the MDE permitting process for a rubble landfill takes at least three years. The applicant, through an attorney, reactivated the request to MDE for the approval of the rubble landfill on January 26, 2001, (Protestant's Exhibit B) before the final decision of

the approving authority. On March 29, 2001, MDE sent the applicant its list of comments that had to be addressed (Protestant's Exhibit C). The applicant, through its groundwater consultant, Mark Schultz, responded in detail to those comments in a letter dated January 9, 2002 (Protestant's Exhibit D). Based on the testimony of Mr. Dexter and Mr. Schultz, I find that MDE wanted one complete response to its list of comments, that MDE did not want piecemeal responses, and that the nine-plus months the applicant took to respond to the MDE comments is a reasonable time.

On August 5, 2002, MDE completed its review of the applicant's January 9, 2002, response and Mr. Dexter sent a letter to the applicant (Protestant's Exhibit A). On page two of that letter, MDE said that the applicant had failed to provide water level measurements for 12 consecutive months as required by COMAR 26.04.07.15A. Based on Mr. Dexter's testimony, I find that this was not a requirement at the time of the original submittal by the applicant to MDE, but arose from regulatory changes in 1997. The applicant's engineer was not aware of this new requirement. Upon receipt of the August 5 letter from MDE, the applicant disputed that water level readings had to be for 12 consecutive months. However, rather than contest this requirement, the applicant acquiesced to the requirement and began to collect the required data.

Mr. Dexter testified that the word "consecutive" does not appear in COMAR 26.04.07.15A. (which this hearing officer has verified from COMAR), but is an administrative interpretation of the regulation. Based the wording of COMAR 26.04.07.15A and on the evidence, which includes considering the massive amount of information and materials that the applicant must provide to MDE, I find that the failure to provide water

level readings for 12 consecutive months is understandable and excusable.

While both the applicant and MDE could more promptly respond to each other, based on the evidence I find that neither has been dilatory. I find that the applicant has pursued the implementation of the special exceptions and variances with reasonable diligence and has not received the permits and approvals despite due diligence. I do not find any “prolonged delays” (to use the Protestants’ words) by the applicant.

The Protestants argue that a variance to extend the time limitations to start and complete a variance or special exception cannot be extended by the variance process. However, Section 11-102.1 permits this hearing officer to “vary the provisions of this Article [28]” when certain findings are made. In the absence of any specific prohibition in Article 28, this hearing officer has the power to vary and extend these time limitations. Similar variances for extensions have been granted in the past.

The Protestants argue that this hearing officer must find that there have been no changes in circumstances since the original approval before extending the time limitations to complete the project. This is not a requirement of the zoning article. The Protestants have referred to this temporary hearing officer’s opinion in Case Number 1998-0423-V, Cunningham Excavation, Inc., and pointed to the comment that “there is no evidence that anything is different today than it was . . .” at the original special exception approval. There was no further discussion of this comment in the Cunningham opinion. The issue of whether anything is “different today” than it was at the time of approval is not a factor to consider in these variance requests.

With regard to the standards by which a variance may be granted as set forth under Section 11-102, this hearing officer finds as follows:

Based on the length of time that the MDE takes for its review and permitting process, exceptional circumstances exist to justify the requested variance relief. The variances are necessary to avoid practical difficulties and to enable the applicant to continue with the MDE permitting process and to develop its properties as allowed by law. Without the variances, the applicant would be unable to develop its properties as allowed by law.

The applicant requests variances of two additional years to implement the approved special exceptions and to complete the construction of the improvements allowed by the variances. Since the administrative approval from MDE takes a minimum of three years, some relief is appropriate, if not required as a matter of law. Based on the scope of this project, I find that the requested two year extensions are the minimum necessary to afford the applicant relief.

Many nearby residents and property owners spoke against the requested variances. All who spoke are opposed to the rubble landfill and the sand and gravel operation. These two projects were previously approved. The sole issue before this hearing officer is the approval of the extension requests – not a review of the entire project. I cannot revisit the previous approval. The issues of whether the rubble landfill and the sand and gravel operation will alter the essential character of the neighborhood and district in which the properties are located, will impair the appropriate use or development of adjacent property, and will be detrimental to the public welfare have already been decided by the approving authority.

With this in mind and based on the evidence, on the limited issue of the two-year extensions, I find as follows:

That the two-year extensions will not alter the essential character of the neighborhood and district in which the properties are located

That the two-year extensions will not impair the appropriate use or development of adjacent property.

That the two-year extensions will not be detrimental to the public welfare.

Upon review of the facts and circumstances, I find and conclude that the two-year extensions are appropriate and that the applicant is entitled to relief to the code.

ORDER

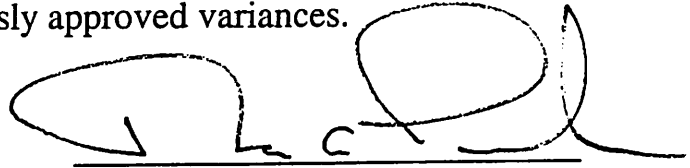
(2003-43-V and 2003-44-V)

PURSUANT to the applications of Chesapeake Terrace/National Waste Managers, Inc., petitioning for variances to extend the time to implement previously approved special exceptions for a rubble landfill and sand and gravel operation and to extend the time to complete the improvements allowed by previously approved variances; and

PURSUANT to the advertising, posting of the property, and public hearing and in accordance with the provisions of law, it is this 3rd day of June, 2003,

ORDERED, by the Temporary Administrative Hearing Officer of Anne Arundel County that the applicant is hereby **granted** an extension of two years

in which to complete and have in operation the previously approved special exceptions and **granted** an extension of two years in which to complete the improvements allowed by the previously approved variances.

A handwritten signature in black ink, appearing to read 'Roger A. Perkins', written over a horizontal line.

Roger A. Perkins
Temporary Administrative
Hearing Officer

NOTICE TO APPLICANT

Within thirty (30) days from the date of this Decision, any person, firm, corporation, or governmental agency having an interest therein and aggrieved thereby may file a Notice of Appeal with the County Board of Appeals.

Further, Section 11-102.2 of the Anne Arundel County Code states:

A variance granted under the provisions of this Article shall become void unless a building permit conforming to the plans for which the variance was granted is obtained within one year of the grant and construction is completed within two years of the grant.

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