

2004-03

**BOARD OF APPEALS OF
ANNE ARUNDEL COUNTY**

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

CASE NUMBERS:
BA 62-93V and BA 63-03V

HEARING DATES:
OCTOBER 30, 2003 and DECEMBER 9, 2003

**CLOSING STATEMENT OF
CHESAPEAKE TERRACE/NATIONAL WASTE MANAGERS, INC.**

SUBMITTED BY:

Susanne Koster Henley
47 West Street
Annapolis, Maryland 21401
(410) 280-0530

**ANNE ARUNDEL COUNTY
RECEIVED**

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OFFICE PLANNING & ZONING

This is an appeal from the approval of two variances granted to Chesapeake Terrace/National Waste Managers, Inc., (hereinafter "Chesapeake Terrace"), which permit an extension of 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 on property located in the Odenton area.

Pursuant to decision of this Board of Appeals granted December 23, 1993, Chesapeake Terrace holds special exception approval for a sand and gravel operation, BA 120-90S, and for a rubble landfill with variances, BA 26-91S and BA 27-91V. (Exhibit 1) The purpose for the 1993 variance is to allow the reclamation of cratered portions of the old sand and gravel pit that are within set back restrictions for these uses.

Section 12-107 of the Anne Arundel County Zoning Ordinance provides that a special exception is rescinded by operation of law if action to implement the use is not begun within one year after the decision of the approving authority and the use is not completed and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

Section 11-102.1 permits the Board of Appeals to “vary the provisions of Article [28]” when certain findings are made where a variance is necessary to avoid practical difficulties and unnecessary hardship.

Following the original approvals by the Anne Arundel County Board of Appeals, there was litigation related to action by Anne Arundel County to exclude this approved facility from its Solid Waste Management Plan. The Court of Special Appeals of Maryland ruled on this matter on December 6, 2000 in favor of Chesapeake Terrace. (Exhibit 4) The Court of Appeals denied further appellate review on April 13, 2001. (Exhibit 4) The time requirements of Sections 12-107 and 11-102.2(a) were stayed during the litigation process and began to run April 13, 2001. The two-year limit expired on April 13, 2003. The current variance applications were filed January 14, 2003.

While Anne Arundel County regulates the use of land areas for purposes of sand and gravel and rubble landfill facilities, the State through the Maryland Department of the Environment (hereinafter “MDE”), Solid Waste Program, also regulates the operation of such facilities. Mr. Edwin Dexter, Administrator, Solid Waste Program, gave testimony detailing the State’s five-step process for obtaining approval of a rubble landfill facility. The approval process requires extensive geologic, hydrogeologic, wetlands, environmental and operations studies, permits, and plans to assure the State that the proposed facility at the site selected will not

have adverse impact on the environment. Mr. Dexter testified that this five-step process requires a minimum of three years or more and up to four years to complete. Mr. Dexter had previously, on December 19, 2002, mailed correspondence to the Anne Arundel Office of Planning and Zoning in which he explained that the permit process for rubble landfills generally consumes up to 36 months, which may be extended by external factors. Copy of December 19, 2002 correspondence attached as Exhibit "A".

While the applicant began its pursuit of approval by MDE in the early 1990's, this effort was frustrated when a seven and a half year legal hiatus was superimposed on the effort when Anne Arundel County excluded improperly this facility from its Solid Waste Management Plan. To further complicate matters, during this hiatus, in 1997, the MDE significantly modified its requirements for hydrogeologic studies for landfill approvals and requirements for operations of the facilities. When the legal issues finally resolved on April 13, 2001, Chesapeake Terrace had to start over with the hydrogeologic studies, including a twelve-month consecutive well monitoring provision, and readdress the operations of the facility in accord with the new regulations.

Mark Schultz, expert witness in the field of geology and hydrogeology, testified that he had been interacting with MDE on a regular basis and had been timely filing responses to requests for additional information from MDE. Because

of the extended time over which this project was under consideration by the agency, multiple different reviewers had been assigned to this project. The MDE was short on staff, and the Department relocated its physical plant during the time it has been processing this approval request. Mr. Schultz expressed concerns about the length of time that lapsed between his filing of information reports and responses from the MDE. Based on his testimony, it is obvious that Mr. Schultz at all times diligently pursued approvals for this facility and in fact filed the final Phase II hydrogeological report shortly before the December hearing date in this case. A timeline of his activities on this project with the MDE was presented at hearing as exhibit number 10.

Milton McCarthy, environmental expert, reported that he has filed wetlands reports, has obtained Army Corps of Engineers permits related to the wetlands, and has responded to the endangered species concerns. Mr. McCarthy also expressed concerns about the length of time that it took for MDE workers to respond to his filings, noting that he had just recently received comments from the agency to a report he had filed more than one year earlier.

Suzanne Diffenderfer, representative of the Anne Arundel County Office of Planning and Zoning, testified that based on the explanation of the extended three plus year permitting process of the MDE, exceptional circumstances exist to warrant the variance relief. She continued to state the variance is necessary to

avoid practical difficulty to enable the applicant to continue with the permitting process and to state that the variance requested in this case of two years is the minimum necessary to afford relief. The Office of Planning and Zoning recommended approval to an additional two-year extension of time on the variance request. Copy of findings and recommendation attached as Exhibit "B".

Based on the length of time that the MDE takes for its review and permitting process, three to four years, there are clearly exceptional circumstances that compel the granting of the requested variances for additional time to implement previously approved sand and gravel and rubble landfill with variance operations. Indeed the dual sand and gravel and rubble landfill uses are impossible of performance without variances to the general time limit constraints of the Anne Arundel County Code on special exceptions and variances, given the State regulation of these facilities.

The State of Maryland has preempted the regulations of such facilities from local legislation that conflict with its permitting requirements. Maryland Appellate decisions have held that the State regulatory schemes for solid waste and for sewage sludge impliedly preempt various types of local legislation. Days Cove Reclamation Company v. Queen Anne's County, Maryland, (2002); Holmes v. Maryland Reclamation Associates, Inc., 90 Md.App. 120, 600 A.2d 864, cert. Granted, 327 Md 55, 607 a.2d 564, and cert. dismissed, 328 Md 229, 614 A.2d 78

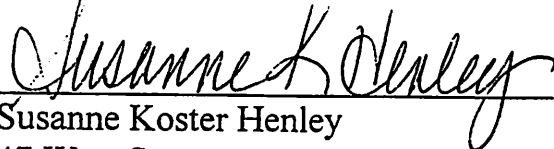
(1992). In these cases, the Court held that the State of Maryland legislature intended for the State to occupy the field of landfill regulation and permit issuing process, including the scientific environmental aspects of landfill operations. While the County may regulate other aspects such as planning and zoning, such regulations are invalid if they invade on the State's permit review prerogative. In this case, a County imposed two-year limit to become operational conflicts with a minimum three-year requirement for Maryland State permitting of rubble landfills. This is a regulation that improperly invades on the State's permit review process and is preempted. Unless a variance is granted, the regulation is invalid as applied to this facility.

While the Protestants have commented on traffic, need, and environmental concerns, these are all issues dealt with at the hearings on the original special exceptions approvals and are not at issue before this Board. The purpose for the stringent State regulation of these facilities is to assure the citizens that their environments will be protected and will not adversely impacted. These State regulations have the full compliance of the applicant.

The only issue before this Board is whether Chesapeake Terrace should be granted the variances to the two year requirement to implement a previously approved special exception and complete improvements allowed by a previously approved variance. It is impossible to comply with these time constraints if one is

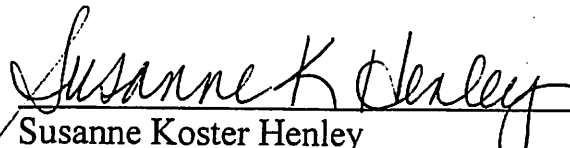
to comply with MDE permitting process. Chesapeake Terrace should not be penalized for compliance with State regulations on rubble landfills that conflict with general County time constraints applicable to special exception and variance generally.

WHEREFORE, Chesapeake Terrace/National Waste Managers, Inc., respectfully requests that the Board grant the variances of two years to the requirements of Section 12-107 that special exceptions be fully operational within two years, and requirements of Section 11-102.2(a) that building permit and construction be completed within two years of their approval.


Susanne Koster Henley
47 West Street
Annapolis, Maryland 21401
(410) 280-0530

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of January, 2004, a copy of the foregoing Closing Argument was mailed, postage pre-paid to: Macy G. Nelson, 401 Washington Ave., Suite 803, Towson, Maryland 21204; and, courtesy copy to Suzanne Diffenderfer, Office of Planning and Zoning, Heritage Office Complex, 2664 Riva Road, Annapolis, Maryland 21401.


Susanne Koster Henley

MARYLAND DEPARTMENT OF THE ENVIRONMENT
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11A

Parris N. Glendening
Governor

Richard F. Pecora
Secretary

Kathleen Kennedy Townsend
Lt. Governor

Merrilyn Zaw-Mon
Deputy Secretary

December 19, 2002

Ms. Susan Diffenderfer
Office of Planning and Zoning
Heritage Office Complex
2664 Riva Road
Annapolis MD 21401

Dear Ms. Diffenderfer:

This letter is directed to you at the request of representatives of National Waste Managers, Inc., which has applied to the Maryland Department of the Environment (the "Department") for a Refuse Disposal Permit for the proposed Chesapeake Terrace Rubble Landfill. Mr. Steven Fleischman, Vice President of the Halle Companies that represents the applicant, informed this office that you wanted to be apprised of the current status of this application.

At present, this is an active application that is currently in Phase II of our application review process. The permit process for rubble landfills generally consumes up to 36 months, which may be extended by external factors such as local approval processes and appeals, as has already occurred in this instance. Phase II includes the submission of detailed geologic, hydrologic, and other environmental descriptions of the proposed landfill property.

The applicant has submitted an update Phase II report, and we recently provided them with a list of comments for additional work before Phase II can be considered to be complete. The actual engineering design and operation plans that are the subject of Phase III, is the next step. Following that, we will hold a public hearing and reach a final determination concerning the issuance of the permit, which is subject to an appeals process.

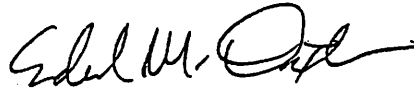
At this time we cannot predict the amount of time that the permit process will take. We anticipate that it will take several months for the applicant to provide the additional Phase II data that we have requested. It is likely to take at least a year, or longer before a final determination is rendered in this case.

"Together We Can Clean Up"

Ms. Susan Diffenderfer
Page two

I hope this meets your needs. Any questions concerning this matter may be directed to me at (410) 537-3318, or via "e-mail" at edexter@mde.state.md.us.

Sincerely,

A handwritten signature in black ink, appearing to read "Ed M. Dexter", with a stylized flourish at the end.

Edward M. Dexter, Administrator
Solid Waste Program

EMD:emd:jd

cc: Mr. Steven Fleischman
Mr. Richard W. Collins

"B"

FINDINGS AND RECOMMENDATION

**Office of Planning and Zoning
Anne Arundel County, Maryland**

**APPLICANT: Chesapeake Terrace
National Waste Managers, Inc.**

ASSESSMENT DISTRICT: Fourth

**CASE NUMBER: 2003-43-V & 2003-44-V
Board of Appeals BA 62-03V & 63-03V**

COUNCILMANIC DISTRICT: Fourth

**HEARING DATE: April 29, 2003
Board of Appeals October 30, 2003
December 9, 2003**

**PREPARED BY: Suzanne Diffenderfer
Planner III**

REQUEST

The applicant is requesting variances to permit an extension in time for the implementation and completion of previously approved special exceptions and variances for a rubble landfill and a sand and gravel operation for property located in the Odenton area.

LOCATION AND DESCRIPTION

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.

APPLICANT'S PROPOSAL

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.

REQUESTED VARIANCE

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.

The Court of Special Appeals ruled on this matter on December 6, 2000, and the Court of Appeals denied appellate review on April 13, 2001. The applicants, Chesapeake Terrace/National Waste Managers, Inc. has been pursuing this project approval through the Maryland Department of the Environment since the original approval in 1993. However, the State permitting process takes a minimum of three (3) years and at times longer to complete. No permit has been issued at this time.

As such, a variance of two (2) additional years in time is requested to implement the approved special exception.

RECOMMENDATION

With regard to the standards by which a variance may be granted as set forth under Section 11-102, the Office would offer the following:

The Maryland Department of the Environment indicated in a letter to the Office of Planning and Zoning dated December 19, 2002 that the applicant is currently in Phase II of the application review process and that the process for rubble landfills generally consumes up to 36 months, which can be extended by external factors such as local approval processes and appeals, which has occurred in this instance.

The applicant has submitted an updated Phase II report which is still under review and Phase III is the next step requiring engineering design and operation plans. MDE indicated they cannot predict the amount of time that the permit process will take. It was noted it is likely to take at least a year, or longer before final determination is rendered in this case.

The Agency comments have not changed since the prior hearing in April:

The Health Dept. stated additional information on the location and type of sewage disposal and water supply will be needed.

Soil Conservation requires an approved sediment and erosion control plan prior to construction. The Dept. of Recreation and Parks commented on access and screening which are not subject of this variance request. These comments would be considered during permit review.

Based on the explanation of the Maryland Department of the Environment, exceptional circumstances exist to warrant variance relief. The variance is necessary to avoid a practical difficulty to enable the applicant to continue with the permitting process. The variance requested in this instance is the minimum necessary to afford relief.

Accordingly, the Office of Planning and Zoning would recommend approval to an additional two (2) year extension in time.