

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

CASE NUMBERS 2005-0155-V AND 2005-0156-V

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

FOURTH ASSESSMENT DISTRICT

DATE HEARD: OCTOBER 27, 2005

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

ZONING ANALYST: **SUZANNE DIFFENDERFER**

DATE FILED: JANUARY 4th, 2006

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 further extensions 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. Applicant submitted Petitioner's Exhibit 4, the cover letter dated October 26, 2005 from J. A. Chisholm, PE, who is the Applicant's engineer. Mr. Chisholm identified the Exhibit 4 and testified that the signs were erected on the property as stated in his cover letter, that photographs of the signs were taken (copies of which are part of Exhibit 4), and that he made the additional site visits

described in his letter to confirm the signs were intact, in place and remained legible. 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 further 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 were appeals to the Circuit Court for Anne Arundel County and to the Court of Special Appeals of Maryland. 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. As that expiration date approached, the Applicant filed two applications for variances seeking to extend the time limit by two years. After those applications and variance were granted by this Temporary Administrative Hearing Officer, an appeal was filed to the Board of Appeals. The Board approved both extensions in an Order dated April 16, 2004, which granted the Applicant an additional two years for the

implementation and completion of the special exception to operate a sand and gravel mining operation and a rubble landfill, and granted a variance for an additional two years to the requirement that a building permit must be obtained within one year and construction completed within two years of the implementation and completion of these same operations.

The Memorandum of Opinion of the Board of Appeals in case numbers BA-62-03V and BA-63-03V dated April 16, 2004 describes the history of the Applicant's effort to establish the previously approved uses. In short, although the Applicant has proceeded diligently, the MDE permitting process has taken longer than anticipated. However, the phase III final approval was expected within days of the hearing on October 27, 2005.

From the testimony and letter dated October 27, 2005 (received as a "County Exhibit and as Petitioner's Exhibit 8") of Edward M. Dexter, Administrator of the Solid Waste Division of the Maryland Department of the Environment, and of Mark Schultz, the Applicant's hydrology and geology expert, I find that the Applicant has timely and diligently pursued the phase III approval by MDE. I find that there have been no gaps in the efforts of the Applicant to obtain MDE approval, and that the Applicant has been prompt in pursuing the MDE approvals and permit.

The organized opposition to these variance requests is represented by G. Macy Nelson, attorney at law. In short, there are three major arguments in opposition to the two variances to extend the time for implementation and completion of the special exceptions and variances. These are:

First, the special exception approval requires that the Applicant obtain a fee simple right-of-way that will allow access from one of the Applicant's sites to Conway Road. The

land is owned by Anne Arundel County and is under the control of the Department of Recreation and Parks. That department submitted a letter dated June 14, 2005 (part of "County Exhibit") stating that the department cannot and will not convey the land necessary for this right of way. The Protestants argue that since this condition cannot be fulfilled, the variances in this case should be denied on that basis. However, the uncertainty of obtaining the fee simple estate for the access road was not a basis to deny the special exceptions. See Halle Companies v. Crofton Civic Association, 339 Md. 131, 146, 661 A2d. 682, 690, (1995) where the Court of Appeals said:

Similarly, Halle must obtain a fee simple estate rather than an easement in the Conway Road access land before the landfill operations may proceed. That was explicably made a condition of the Board's grant of the exception and variance. The uncertainty of a prerequisite's occurrence is irrelevant if the Board is satisfied that once the prerequisite occurs, the approved activities would be appropriate.

In short, if the Applicant does not fulfill the condition, then it does not have the special exceptions and variances. That is an issue to be determined before the ultimate expiration of the special exceptions and variances, not as part of a request to extend the time limit for the implementation and completion of the special exceptions and variances.

Second, the Protestants focus on the sixty day time period the Applicant will require in order to prepare the next submission to MDE. The Protestants' argument is that the Applicant should have anticipated approval of phase III and been working diligently on the next submission to MDE so it could be submitted within days of receipt of the approval of phase III. First, this hearing officer finds that based upon the history of this case (as contained within prior approvals) and testimony at this hearing, any target date for any approval set by MDE has been an aspirational goal and not a deadline. This hearing officer

finds that it would have been pointless to prepare the submission for the next phase before knowing all of the conditions and details of the phase III approval. Further, in looking at the entire zoning approval process, which began in 1990, this possible sixty day “head start” is immaterial.

Third, the protestants’ contention is that the original analysis under Schultz v. Pritts, 291 Md. 1, 432 A.2d 1319 (1981) is now outdated and must be updated. This was also the central argument of those members of the public who spoke in opposition to these variances. In large part, the citizens and organizations in opposition to the variances to extend the approved special exceptions and approved variances testified to present day conditions would be impacted by the previously approved special exception uses. Their reasons were: inadequacies of roads, particularly local roads in the immediate vicinity of the Applicant’s sites, the intersection of Conaway Road with Maryland Route 3; the presence of other landfills in this immediate area; detrimental impact to the church on adjacent property that has been operating for 136 years; the concern for safety of children due to the 500 or 600 truck trips each day in the area; a lack of increase in property values in the immediate area as compared with other areas of Anne Arundel County; the impact this landfill would have on adjacent federal property such as Fort Meade and the National Security Agency; objection to a business use in a residential area; generalized opposition to any landfills; the negative impact on longtime residents, some of whom reside as close as 300 feet from the Applicant’s sites, with one of those residents being 90 years old; health issues arising out of potential contamination of well water; general health and safety issues related to the approved operations. In short, the special exceptions and variances have already been approved. The

issue before this temporary hearing officer is the request for the extension of time, not the re-approval of this special exception and variance applications.

The same issue was raised before the Board of Appeals in the 2003 appeal covered in its Memorandum of Opinion of April 16, 2004. As the Board of Appeals then said on page 9:

The focus here is only on the request for the two year extension of time to commence those uses

Thus, this hearing officer has the same obligation under the law that he had at the last extension request hearing in 2003:

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. [Page 5 of the June 2003 Opinion]

Therefore, under the law, this hearing officer is to focus on and consider only the requested extensions, not focus on or revisit the original approval of the special exceptions and variances. In short, the variance requests for extensions of time relate to one narrow issue (should there be or should there not be extensions), and does not involve revisiting the original approval.

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 has taken and will take 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 is taking many years, some relief is appropriate and is required as a matter of law. Based on the scope of this project and on past history, I find that the requested two year extensions are the minimum necessary to afford the Applicant relief.

With this in mind, and based on the prior findings of the final approval authorities and 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.

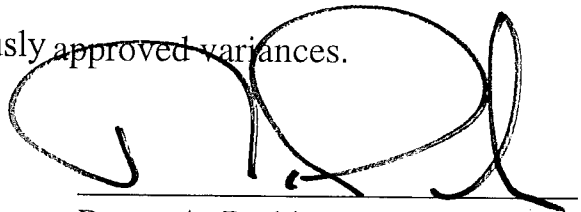
ORDER

(2005-155-V and 2005-156-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 4th day of January, 2006,

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.



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.

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

FINDINGS AND RECOMMENDATION
Office of Planning and Zoning
Anne Arundel County, Maryland

APPLICANT: Chesapeake Terrace
National Waste Managers, Inc.

ASSESSMENT DISTRICT: Fourth

CASE NUMBER: 2005-0155-V & 2005-0156-V **COUNCILMANIC DISTRICT:** Fourth

HEARING DATE: October 27, 2005

PREPARED BY: Suzanne Schappert
Planner III

REQUEST

The applicant is requesting variances to permit an extension in time for the implementation and completion of a 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 Small Area Planning Process for the Odenton area effective, June 21, 2004.

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.

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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. No permit has been issued at this time.

An extension in time for two (2) years was granted by the Board of Appeals on April 16, 2004 in Case Number BA 62-03V & BA 63-03V. This extension in time will end on April 16, 2006. The applicants are before the Administrative Hearing Officer requesting an additional two (2) years extension in time for the implementation and completion of a special exception to operate a sand and gravel mining operation and a rubble landfill.

As such, a variance of two (2) additional years in time is requested to implement and complete 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 Halle Companies dated June 15, 2005 that the applicant is currently in Phase III of the application review process and that the copies of the letter and the Phase III Report are being transmitted to all interested agencies for their review and comments.

Although the applicant has stated they have been diligently pursuing this project approval through the Department of the Environment since the original approval, a permit has not yet been issued.

The Health Department comment dated June 17, 2005 stated they reviewed the request and has no objections.

Soil Conservation comment dated May 24, 2005 stated they reviewed the request and the District has no objection to permit an extension in time.

The Dept. of Recreation and Parks commented in a memo dated June 14, 2005 that the entrance road is proposed within a County owned parcel and they have not been contacted regarding the proposed roadway and is strongly opposed to the construction of this road. They recommend the variances be denied until such time as a suitable alternative access to this facility is identified and permission of all impacted property owners is acquired.

The Development Division of the Office of Planning and Zoning reviewed the request and offered no objection.

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The Office of Planning and Zoning must note that although the access road is an issue, it is not an issue for a time extension.

Provided the applicant demonstrate they have diligently been pursuing the permit through the Maryland Department of the Environment, it would appear exceptional circumstances exist to warrant variance relief, and that 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 offer no objection to an additional two (2) year extension in time.

Suzanne Schappert

Suzanne Schappert, Planner III

10/26/05

Date

Lois Villemaire

Lois Villemaire, Planning Administrator

10/26/05

Date