

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

CHESAPEAKE TERRACE/NWM, INC.

Petitioners

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BEFORE THE

COUNTY BOARD OF APPEALS

OF ANNE ARUNDEL COUNTY

CASE NO.: BA 7-06V, BA 8-06V
(2005-0155-V, 2005-0156-V)

Hearing Dates: June 8, 2006
July 6, 2006

MEMORANDUM OF OPINION

Summary of Pleadings

This is an appeal from a decision of the Administrative Hearing Officer. This appeal is taken from the granting of 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. The rubble landfill is located 4,300' southwest of Patuxent Rd., 1,500' west of Bragers Rd., comprising 481.6 acres. The sand and gravel site is located 695' along the south side of Patuxent Rd., 1,500' west of Bragers Rd., Odenton, comprising 107.99 acres.

Summary of Evidence

Ms. Suzanne Schappert, Planner III, with the Office of Planning and Zoning (OPZ), testified that the Petitioners are requesting variances to permit an extension of time for the implementation and completion of previously approved variances and special exceptions for a rubble landfill and a sand and gravel operation. Under the Anne Arundel County Code (Code), in effect at the time of the original appeal, a special exception was rescinded by operation of law if action to implement the use had not commenced within one year of the approval decision and the use was not completed and operational within two years of the decision. See Code Article

28, Section 12-107 (1985). Similarly, a variance was void unless a building permit was obtained within one year of the approval and construction was completed within two years. See Code Article 28, Section 11-102.2 (1985). The Petitioners have been seeking project approval through the Maryland Department of Environment (MDE) since 1993. This Board granted a two-year extension on April 16, 2004. The Petitioners are requesting an additional two years for implementation and completion to operate a sand and gravel mining operation and a land fill. A hearing before the Administrative Hearing Officer (AHO) was held on the extension on October 27, 2005; the Petitioners' request was granted on January 4, 2006. A letter from MDE to the Petitioners, dated June 15, 2005, indicated that the Petitioners were in Phase III of the application review process. According to the Petitioners, they have been diligently pursuing project approval for the last thirteen years. Of the agencies that have reviewed the Petitioners' requested variances, the Department of Recreation and Parks (DRP) is the only one that recommended denial of the request. If the variances are not granted, the Petitioners will have to start the process from the beginning over again. Ms. Schappert stated that she believes that there were seventeen hearings before the Board between 1993 and 2001. The OPZ recommends approval of the two-year extension, provided the Petitioners can establish that they have been diligently pursuing approval.

Mr. Edward M. Dexter, Administrator of MDE's Solid Waste Program (SWP) and an expert in solid waste management in Maryland, explained that the SWP is responsible for the statewide permitting and inspection and monitoring of non-hazardous waste sites. There are six operable facilities and a number of closed facilities that SWP oversees. There is a five-phase process for landfill approval. Phase One is the initial application submitted by the applicant giving a basic description of the property and the proposal. The initial application is submitted to twelve various Federal, State and County agencies for review and comments. Once comments

have been reviewed, the applicant decides whether to withdraw the application or to resolve any issues that were discovered. Under Phase One the applicant is required to initiate a public informational meeting and get comments from County officials regarding (1) whether the proposal conforms with the 10-year solid waste master plan and (2) whether it conforms with zoning and land use. In 1997, State regulations governing landfills were changed requiring heightened standards. These heightened standards required the Petitioners to start over from scratch. Phase Two begins with an intensive geologic and hydrologic investigation of the property. The results are sent to several MDE geologists and eight other agencies for comment. The comments submitted to MDE raise issues that must be clarified by the applicant. Phase Two of the Petitioners' application was approved in February 2005. Phase Three is the engineering review. The Petitioners submitted an engineering report in April 2005, which included the blueprints, the operations manual and the closing plan. Phase Four is an internal MDE review of the application to date. The application is reviewed to ensure that all regulatory and technical issues have been resolved and to determine what permits are necessary for the site. Phase Five is the public comment phase when a hearing is held to allow the public to provide testimony regarding the site. An Administrative Hearing Officer (AHO) evaluates the evidence presented to determine whether a permit will be issued. It takes MDE three working years (not calendar years) to review a permit; County approvals are not included in that time period. Three to five years is a typical review period for a rubble landfill permit. There was at least one other case that has taken more than ten years to process. The Petitioners have been responding to information requests in a timely manner. They have been approved by MDE through Phase Two. Phase Three has some technical issues that will require additional information. Applicant diligence is not tracked by MDE.

Mr. Mark Schultz, an expert in hydrogeology, testified that he conducted the water study for Phase Two. He received the letter of Phase Two approval from MDE for the geology and hydrogeology reports on 2/23/05. Phase Three was submitted in April 2005. He has been involved in the project since the 1990's.

Mr. Milton McCarthy, an expert in natural resources, testified that he has been actively working on the project with the Department of Natural Resources (DNR). It was his job to address concerns regarding threatened and endangered species on the site.

Mr. Mike Armstrong of Sentry Engineering, testified that he has been working on this project since 1997. He has conducted development engineering for other landfills in the area. The stormwater management facility was approved by the Soil Conservation District (SCD) on 4/14/05. As of the date of the hearing, he has not received written comments from MDE.

Mr. Richard Klein, President of the Community and Environmental Division Service, testified that he was asked to access comments from documents regarding land surrounding the proposed landfill. There may be some issues arising out of neighboring historical property and with Bowie State University.

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 and for a rubble landfill with variances 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 16-405 of the Anne Arundel County Code (Code), Article 18, Zoning provides that

[a] variance or special exception expires by operation of law unless the applicant within one year of the granting of the variance or special exception (1) obtains a building permit or (2) files an application for subdivision. Thereafter, the variance or special exception shall not expire so long as (1) construction proceeds in accordance with the permit or (2) a record plat is recorded among the land records pursuant to the application for subdivision, the applicant obtains a building permit within one year after recordation of the plat, and construction proceeds in accordance with the permit. . . . an applicant may file for a variance to extend the time periods.

Code § 18-16-405(a). The Petitioners are requesting a variance to allow them an additional two years to implement the sand and gravel operation and for a rubble landfill.

The Petitioners require variances to the time restrictions in order to move forward under the previously approved special exception and variances. The variance applications currently before this Board were filed April 12, 2005. The previous extension expired on April 16, 2006. The Petitioners went before the Administrative Hearing Officer (AHO) on October 27, 2005 and were approved for their requested two-year extension on January 4, 2006.

In order to be granted a variance, an applicant must meet the standards set forth in Article 3, Section 2-107 of the 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 variances.

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.*, § 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 the lot." Here, there are numerous exceptional

ENTRANCE !!

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 (MDE) 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 *working* years to complete. That process time can be extended by external factors such as changes in the legislation and 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.

The applicants began the permit application process for the proposed rubble landfill with the MDE in 1990. From 1993 until April 13, 2001, legal issues arose between the applicants and Anne Arundel County. The MDE 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 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 the time frame necessary 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 failed 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 and focus only on applications with no external issues. These issues relative to MDE rules regarding processing 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 have 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' subdivision 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.*, § 2-107(c)(1). Mr. Dexter indicated that the processing of this application would take at least three years. Although these

applicants are at least partially through the State review process, we believe based on the testimony presented that significant delays have occurred throughout the review process. The State has taken as long as 14 months to respond to an application submittal in this case. Neither the applicants nor this Board have any control over the ability of the State agencies to respond in a more timely manner. With the approval through Phase Two, we believe that two additional years will be sufficient to implement and commence operation of the approved use. However, if the Petitioners fail to implement and commence operation of the approved use within the two years, they are prohibited from seeking an additional extension. The application process began in 1990 and we believe that 18 years is sufficient time to implement and commence operation.

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.*, § 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. Our focus here is not on the special exceptions and variance that were approved, but rather, on variances to permit a two year extension. There is nothing inherently improper regarding the location of a sand and gravel/rubble landfill near residences. In fact, the 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.*, § 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.

Because this property is not within the CA, this Board need not consider whether the clearing and replanting practices meet the requirements for development within the CA. *See, id.*, § 2-107(c)(2)(iii).

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.*, § 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 18-16-405 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 20th day of Sept., 2006, by the County Board of Appeals of Anne Arundel County, ORDERED, that the Petitioners' requested variance for a two-year 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 is hereby **GRANTED** with the following conditions:

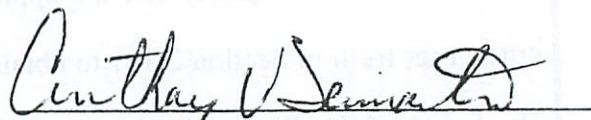
- 1) The two-year extension begins from the date of this decision; and
- 2) If the Petitioners fail to implement and complete the previously approved special exceptions and variances within the two years, they will not be permitted any further extensions.

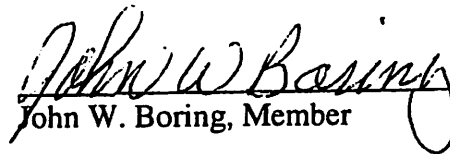
Any appeal from this decision must be in accordance with the provisions of Section 604 of the Charter of Anne Arundel County, Maryland.

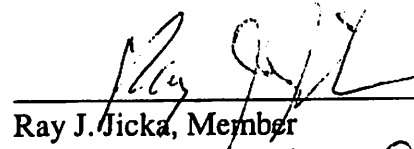
If this case is not appealed, exhibits must be claimed within 90 days of the date of this Order; otherwise, they will be discarded.


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.

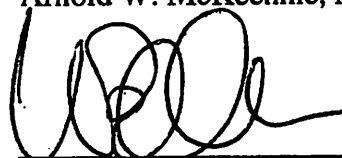
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(Michael Topper, Vice Chairman, did not participate in this appeal.)