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COMMENTS:

as requested

CHESAPEAKE TERRACE NMW, INC.,*

IN THE CIRCUIT COURT

Petitioner

FOR

v.

ANNE ARUNDEL COUNTY

**BOARD OF APPEALS OF
ANNE ARUNDEL COUNTY,**

Respondent

Case No. C-06-117596 AA

MEMORANDUM OPINION

On April 28, 2008, this case came before the Court on Chesapeake Terrace NMW, Inc.'s ("Chesapeake") petition for judicial review of the decision of the County Board of Appeals of Anne Arundel (the "Board") granting a variance extending for two years the time by which Chesapeake must implement and complete previously approved special exceptions and variances for a rubble landfill and for a sand and gravel operation in Odenton, Maryland. Specifically, Chesapeake challenges the Board's proviso that if Chesapeake "fail[s] to implement and complete the previously approved special exceptions and variances within two years, they will not be permitted any further extensions." Both parties appeared with counsel and arguments were presented. Having considered the pleadings, papers, memoranda, administrative record and arguments of counsel, we have entered the Order filed concurrently with this Memorandum Opinion for reasons we state herein.

I. BACKGROUND

On December 23, 1993, Chesapeake received a special exception for the sand and gravel operation and for a rubble landfill with variances at the Odenton property from the Anne Arundel County Board of Appeals.

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"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 such uses. Former 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 of 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 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). [Chesapeake is] requesting a variance to allow them an additional two years to implement the sand and gravel operation and for a rubble landfill.

[Chesapeake] require[s] 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. [Chesapeake] went before the Administrative Hearing Officer (AHO) on October 27, 2005 and were approved for their requested two-year extension on January 4, 2006." Board's Memorandum of Opinion, 4-5.

The Anne Arundel County Code ("Code") in effect at that time, provided that, if action to implement the special exception use was not commenced within one year of the approval decision and the use was not completed and operational within two years of the approval, the exception was automatically rescinded. The Code also provided that a variance was void unless a building permit was obtained within one year of the approval and construction was completed within two years. The County has the right to approve the zoning of rubble landfills and once that is done, the State

regulates the permitting, licensing and operation of the facilities. The permitting process is extensive and involves numerous levels of review and hearings which extend over several years.

In 2004, Chesapeake applied for time extensions, in the form of a variance, to complete the State permitting process because the Code's requirement that the special exceptions use must be operational within two years was impossible for it to perform due to the State licensing and permitting procedures. The Board granted a two year extension on April 16, 2004. Chesapeake then requested an additional two year extension which was granted and expired on April 16, 2006. On April 12, 2005, Chesapeake filed the variance applications which are before this Court.

The Board held hearings on June 8 and July 6, 2006. On September 20, 2006, the Board granted variances to permit further extensions in time of an additional two years for the implementation and completion of the approved special exceptions and a variance for a rubble landfill and a sand and gravel operation to Chesapeake. However, the Board also imposed the condition that if Chesapeake fails to implement and complete the previously approved special exceptions and variances within the two years, Chesapeake will not be granted any further exceptions.

Chesapeake appeals from that condition.

II. STANDARD OF REVIEW

Decisions of administrative agencies are *prima facie* correct and, on appeal, must be viewed in the light most favorable to the agency. Bd. of Educ., Montgomery Co. v. Paynter, 303 Md. 22, 35-36 (1985); see also, Bullock v. Pelham Wood Apts., 283 Md. 505, 511-13 (1978). Accordingly, "the reviewing court should not substitute its judgment for the *expertise* of those persons who

constitute the administrative agency from which the appeal is taken.” Paynter, 303 Md. at 35 (emphasis in original).

In reviewing administrative agency decisions, factual findings by the agency are binding upon the reviewing court, “if supported by substantial evidence in the record.” Bd. of Appeals v. Baltimore, 72 Md. App. 427, 431 (1987). In determining whether there is substantial evidence to support an administrative decision, the court determines if there is evidence from which a reasonable person might have reached the conclusion of the administrative body. Eger v. Stone, 253 Md. 533, 542 (1969). If so, the Court cannot substitute its judgment for that of the agency, even if the Court might have reached a different conclusion. Id.

III. ISSUE

The issue presented by this appeal is whether the Board may extend the time by which a property owner must implement a special exception on the condition that the applicant received no further extensions?

IV. DISCUSSION

At the hearing, Chesapeake testified that it has diligently pursued County and State approval of this project for 13 years and that without the extension before us, they will have to start the process from the beginning. Suzanne Schappert, a Planner III with the Anne Arundel County Office of Planning and Zoning (“OPZ”) testified that she believes the Board had conducted 17 hearings on this application from 1993 until 2001. The OPZ recommended approving the two year extension provided Chesapeake can demonstrate it was diligently pursuing approval.

Edward Dexter, an administrator at the Maryland Department of the Environment (MDE), testified that the State Waste Program controls non-hazardous waste sites, including rubble landfills.

Mr. Dexter testified that there is a five step approval process which he described in detail. It takes MDE three working years (as opposed to calendar years) to review a permit; County approvals are not included in that calculation. Mr. Dexter indicated that MDE approval typically takes three to five years and that at least one other case had taken more than ten years to process. Mr. Dexter testified that Chesapeake has responded to all information requests in a timely manner and has been approved by MDE through the second review step. In April, 2005, Chesapeake submitted its paperwork for the third stage of review. On June 15, 2005, MDE informed Chesapeake that the Department had begun that review process, which Mr. Dexter described as including technical issues.

In its September 20, 2006 Memorandum of Opinion, now before us, the Board found that several exceptional circumstances existed that precluded Chesapeake from implementing the previously approved exceptions and variances. Those circumstances included changes in legislation and State regulations, as well as the lengthy approval process for rubble landfills. The Board found that Chesapeake's responses to the several requests were timely, especially considering the complexity and detail of the required information. The Board held that the "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 [Chesapeake] fail[s] to implement and complete the previously approved special exceptions and variances within the two years, they will not be permitted any further extensions."

Chesapeake argues that the no-further-extensions condition is arbitrary and illegal because the vagaries of the State approval process determines the date on which the rubble landfill use may

begin. Therefore, Chesapeake contends, it cannot control the date on which it will be able to implement the special exceptions and variances. Chesapeake also argues that the Board has no power to preclude a party from seeking an extension to a zoning permit. Article 3 § 2-107(a) of the Code Code provides that:

(a) The Board of Appeals may vary or modify the provisions of Article 18 of this Code when it is alleged that practical difficulties or unnecessary hardships prevent carrying out the strict letter of that article, provided the spirit of the law shall be observed, public safety secured, and substantial justice done. A variance may be granted only upon an affirmative finding that:

- (1) because of certain unique physical conditions, such as irregularity, narrowness or shallowness of lot size and shape, or exceptional topographical conditions peculiar to and inherent in the particular lot, there is no reasonable possibility of developing the lot in strict conformance with Article 18 of this Code; or
- (2) 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.

Chesapeake states that, under the language of that statute, the Board can condition the granting of a variance only to protect the safety, health and welfare of the community. Chesapeake points out that on two prior occasions the Board found that this special exception is in the best interests of the public and that the no-further-extensions provision has no bearing on the health, safety or welfare of the community.

Supporting Chesapeake's appeal, the County argues that the Board's condition denies Chesapeake the right to apply for a future variance and that it is arbitrary and capricious. The County argues that to grant an extension and foreclosing any further extensions, "is for the Board to pre-judge [a future] application before it has even been made and with no facts having been presented on the application."

In opposition to Chesapeake's appeal, Robert Buckler, Melvin Contee, Minion Contee, Kathy DeHaas, Mr. Elliott, Uless R. Fleming, J.C. Fleming, Cathy Fleshman, John Hitchcock, Diane and Gregory Lane, Buzz and Sally Meyer, Robert and Barbara Meyer, Stacy and Michael Murphy, Robert Queen, Bessie Queen, Albert Rollins, Ann Marie Thomas, Leon Truesdale, and Bonita and Philip Truesdale (Collectively, "Citizens") argue that the Board properly considered the practical difficulties Chesapeake faced but reasonably concluded that Chesapeake had taken too long to exercise its rights under the permit and variances. Moreover, Citizens argue, by accepting the extension, Chesapeake cannot challenge its terms. Finally, they contend that by precluding future extensions, the Board protects the community interest by ensuring orderly planning, promoting diligence, preventing abuse of the variance process and decreasing the likelihood that a special exception will become stale.

V. APPLICATION

Article Three, Section 1-207 of the Anne Arundel County Code sets forth the Board's Authority to extend the duration of Chesapeake's special exception permit and variances. That provision provides that:

(a) The Board of Appeals may vary or modify the provisions of Article 18 of this Code when it is alleged that practical difficulties or unnecessary hardships prevent carrying out the strict letter of that article, provided the spirit of the law shall be observed, public safety secured, and substantial justice done. A variance may be granted only upon an affirmative finding that:

(1) because of certain unique physical conditions, such as irregularity, narrowness or shallowness of lot size and shape, or exceptional topographical conditions peculiar to and inherent in the particular lot, there is no reasonable possibility of developing the lot in strict conformance with Article 18 of this Code; or

(2) 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.

* * * *

(c) A variance may not be granted under subsection (a) or (b) unless the Board finds that:

- (1) the variance is the minimum variance necessary to afford relief;
- (2) the granting of the variance will not:
 - (i) alter the essential character of the neighborhood or district in which the lot is located;
 - (ii) substantially impair the appropriate use or development of adjacent property;
 - (iii) reduce forest cover in the limited and resource conservation areas of the critical area;
 - (iv) be contrary to acceptable clearing and replanting practices required for development in the critical area or bog protection area;or
- (v) be detrimental to the public welfare.

While the Board can impose conditions on a variance, those conditions must be appropriate and reasonable. Montgomery County v. Mossburg, 228 Md. 555 (1962). The conditions must be intended to protect the health, safety and welfare of the community and not be arbitrary or capricious. See, Halle Cos. v. Crofton Civic Ass'n, 339 Md. 131, at 140-141. Once a special exception is granted, as long as the property owner pursues it in good faith, it is arbitrary for a board of appeals to subsequently refuse to permit the property owner to continue, absent a showing that the basis for the original special exception no longer exists. See, Rathkopf's The Law of Zoning and Planning, § 58:24. By foreclosing future extensions, the Board has effectively denied Chesapeake any opportunity to complete the project should it seek to do so without having found that such would be detrimental to the public welfare or contrary to the health, safety or welfare of the community.

While we recognize that the Board enjoys wide discretion in considering a request to extend a conditional use permit, that discretion may not be exercised arbitrarily. By precluding future extensions without the benefit of an application or testimony, the Board has effectively exercised its discretion to deny a request that was not then before it. Under those circumstances it was not

possible for the Board to make the mandatory statutory determination relevant to decision; that is, whether such an extension would be in the best interests of the community or the public welfare. As a result, the Board's decision to preclude further extensions was arbitrary and capricious. *See, Bergmann v. Board of Regents of University System of Maryland*, 167 Md. App. 237, 283 (2006) (when the fact to be proven is regarding future plans, there is a substantial risk that a administrative decision-maker will not be constrained by statutory requirements and will ignore relevant considerations which may result in an arbitrary decision).

Chesapeake enjoys a statutory right to request an extension to its conditional uses and variances. While we note that the Board is not obliged to grant any such request, any decision not to do so must be based on facts presented to the Board when the request is made. We note that Chesapeake's prior requests for extensions were based on matters beyond its control; that is, the State permitting process. Moreover, there has been no suggestion that any of those requests were made for an improper purpose. Indeed, the Board has granted them. By precluding all future extension requests, the Board has implicitly found, without hearing testimony, that *any* extension to the conditional use permits and variances is contrary to the public interest. In doing so, the Board abused its discretion and made an arbitrary and capricious decision.

V. CONCLUSION

For the reasons set forth above, we have entered the Order with this Memorandum Opinion vacating the limitation imposed on the most recent two-year extension. We will otherwise affirm the Board's decision.

Signature page follows

Dated: May 27, 2008



PAUL GARVEY GOETZKE, Associate Judge
Circuit Court for Anne Arundel County

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