

2009-07

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

CASE NUMBERS 2008-0294-V AND 2008-0295-V

CHESAPEAKE TERRACE/NATIONAL WASTE MANAGERS, INC.

FOURTH ASSESSMENT DISTRICT

DATE HEARD: DECEMBER 16, 2008

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

PLANNER: **JOHN FURY**

DATE FILED: JANUARY 15th, 2009

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.

This is the Applicant's third request for extensions in time for the implementation and completion of these previously approved special exceptions and previously approved variances for the proposed rubble landfill and for the proposed sand and gravel operation.

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. The file reflects that

three of the envelopes were returned to the Office of Administrative Hearings, for two of the envelopes, the addresses were determined to be the addresses shown on records, one envelop was remailed, and that one was again returned. The Applicant submitted Petitioner's Exhibit 6, which consists of a cover letter dated December 16, 2008 from J. Chisholm, Professional Engineer, and three photographs showing three sets of two signs posted at three separate locations on the property. Mr. Chisholm in both his letter of December 16 that is part of Petitioner's Exhibit 6 and in his testimony verifies that he personally visited both sites the day the signs were erected and on four dates in December. He verified that the signs were in place, were intact and the information on the signs was 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 variances 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. There was no appeal to the Circuit Court in the decision of the Board of Appeals dated April 16, 2004. In short, although the Applicant proceeded diligently, the MDE permitting process took longer than anticipated.

Thereafter, on April 12, 2005, the Applicants filed for their second extensions, which were heard and granted by this Temporary Administrative Hearing Officer. On appeal, the variances were granted by the Board of Appeals with a condition that this second extension would be the final extension. The Applicant appealed to the Circuit Court for Anne Arundel County (Case No. 02-C-06-117596). The Circuit Court (Judge Paul Garvey Goetzke) struck

the condition that these were the final extensions, and otherwise affirmed the decision of the Board of Appeals.

As in the two previous extension hearings, Edward M. Dexter, Administrator of the Solid Waste Division of the Maryland Department of the Environment, testified to the efforts of the Applicant to obtain the necessary MDE approval and testified to the timetable of his division to review phase III of the application to approve Phase III. The efforts of Mr. Dexter's division have been hampered or delayed by a lack of personnel to review the Applicant's application. During this entire process, Mr. Dexter testified that the Applicant has been "very responsive" to requests for information and has been "diligent." He says that whenever there are e-mail communications between his office and the Applicant, the Applicant "consistently" provides a prompt response.

Mike Armstrong is a Registered Professional Engineer with Century Engineering, Inc. in Hunt Valley, Maryland. Mr. Armstrong has a Bachelor of Science in civil engineering and has 29 years of experience. He has five professional engineering licenses in Maryland and other jurisdictions.

Mr. Armstrong described the approval process by MDE beginning in April 2005 and continuing to date. In April 2005, the Applicant's proposal consisted of two large volumes of materials. As the approval process has continued, these two large volumes have grown to seven large volumes of materials as the Applicant responded to requests from MDE for information and for documents. Mr. Armstrong testified that since April 2005 the Applicant has been in "diligent pursuit" of its permits. He made mention of one detailed response by the Applicant to MDE, which consisted of a 26-page letter that he described as "not typical."

After the Applicant completed his presentation, this Hearing Officer asked for testimony and comments from persons who wanted their views to be known.

Mike Murphy of 977 Patuxent Road testified as a member of the Patuxent Improvement Association. He referred to this as being a “renewal” of the approval. He opposes the project, whether it is “an extension” or a “renewal,” based on the vehicle traffic that the project will generate. He is also concerned about pollution generated by both the proposed use and by the increased traffic created by the proposed use.

Stacy Murphy of 977 Patuxent Road opposes the extensions on the ground that the Applicant should have completed the project in two years. She questioned why implementing the project should take “so long.” This Hearing Officer interpreted her testimony to mean that the Applicant is not proceeding diligently.

Russell “Buz” Meyer of 1553 Meyer Station Road has lived in the immediate area for more than 30 years. The Applicant’s property is located in an area of land between two rivers which eventually flow together. He said that each of the rivers has endangered fish. This project would create disturbances and pollution that would affect wild life that lives in the area. He opposes the extension.

Angela Howard of 2811 5th Avenue lives the vicinity of the Applicant’s parcels. She opposes the use of tax dollars to support this project.

Melvin and Minion Contee reside at 545 Collins Avenue and are longtime residents of this area. They noted that the St. John AME Zion Church is located in the vicinity of the Applicant’s parcels. On this ground and other grounds, they oppose the extension.

Jennifer Veres lives at 2743 Conway Road. She said that many children live in houses on the roads that will be used by the heavy truck traffic accessing the rubble landfill and the sand and gravel operation. She is concerned about the safety of the residents as a result of the increased traffic generated by this proposed use. She does not want a “landfill in her backyard” and opposes the extension.

Other persons were present for the entire hearing. This Hearing Officer encouraged them to speak and give comments about the extension requests. No additional persons chose to speak.

Based on the testimony of Edward M. Dexter, Administrator of the Solid Waste Division of the Maryland Department of the Environment, and of Mike Armstrong of Century Engineering, Inc., I find that the Applicant has timely and diligently pursued the approvals by MDE. I find that that there have been no gaps in the efforts of the Applicant to obtain MDE approval, and that the Applicant has been prompt in responding to requests from MDE and in pursuing the MDE approvals and permit.

This is the third time that these requests for extension have been heard by this Temporary Administrative Hearing Officer, the first two of which were heard on appeal and granted by the Board of Appeals. As the Board of Appeals said on page 9 of its Memorandum of Opinion of April 16, 2004:

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

The obligations of this Temporary Hearing Officer are the same in this third request as they were in the first extension request 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]”

As before, this hearing officer is to focus on and consider only the requested extensions, not to focus on or revisit the original approval of the special exceptions and variances. In short, consideration of the variance requests for extensions of time relates 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 (which keeps getting longer and longer) that 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 required MDE permitting process and to develop its properties as allowed by law. The applicant has no control over the work schedules of MDE and the Solid Waste Division. 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, 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 and testimony presented at the hearing on December 16, 2008, 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.

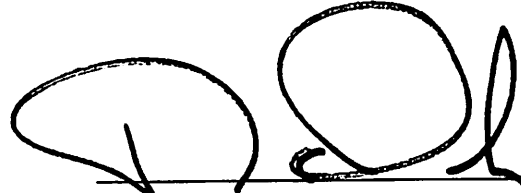
ORDER
(2008-0294-V and 2008-295-V)

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 15th day of January, 2009,

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*

*[This Temporary Administrative Hearing Officer was appointed by the previous Administrative Hearing Officer to hear these two cases (2008-0294-V and 2008-295-V). The previous Administrative Hearing Officer left office, and the present Administrative Hearing Officer was appointed and took office. Thereafter the present Administrative Hearing Officer appointed this hearing officer as Temporary Administrative Hearing Officer to complete this written Decision and Order.]

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