

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

**CHESAPEAKE TERRACE/ NATIONAL
WASTE MANAGERS, INC.**

Petitioners

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BEFORE THE

COUNTY BOARD OF APPEALS

OF ANNE ARUNDEL COUNTY

**CASE NO.: BA 10-09V & 11-09V
(2008-0294-V & 2008-0295-V)**

**Hearing Date: June 23 & 24, 2009
October 14 & 21, 2010**

MEMORANDUM OF OPINION

Summary of Pleadings

These are appeals from decisions of the Administrative Hearing Officer. These appeals are taken from the granting of variances to permit further extensions in time for the implementation and completion of previously approved variances and special exceptions for a rubble landfill and sand and gravel operation for properties located 4300' along the southwest side of Patuxent Road and 1500' west of Brager Road, as well as 695' along the south side of Patuxent Road 1500' west of Brager Road, Odenton.

Summary of Evidence

(Testimony from 6/23/2009) Mr. Edward Dexter, an Administrator of the Solid Waste Program for the Maryland Department of the Environment (MDE), testified that there are five phases for approving a rubble landfill; phases one to three deal with engineering and technical aspects of the project, phase four is the internal review for compliance with regulations and the law, and phase five is for public comment. From 1994 to 2001, the MDE suspended processing of this landfill because it was not approved for a special exception and was not included in the county's solid waste management plan in 2001, it was reactivated. The Petitioners submitted their phase three plan on April 14, 2006. On November 27, 2006, a 13 page initial comment

letter regarding the phase three report was released to the applicant. The Petitioners' revised report was dated June 6, 2008. There was some back and forth between the MDE and the Petitioners and a delay occurred, which Mr. Dexter attributed to some staffing issues at MDE. The department issued its next comment letter in February, 2009. On April 28, 2009, the Petitioner submitted an Addendum to its plan. The agency is currently reviewing plans and anticipates scheduling a public hearing later this year. There are a number of structural issues that they are addressing, including layers that may slip.

(Testimony from October, 2010 begins) Mr. Mike Armstrong, who is familiar with the Chesapeake Terrace project and is a civil engineer, testified that he has worked on the Chesapeake Terrace project for the last three years. In April 2005, the Petitioners' first phase three report was submitted to the MDE. The first comments from MDE were dated November 2006. The response to those comments required the services of geotechnical, wetlands, geology and groundwater modeling professionals. The phase three resubmittal (comprising seven volumes) by the Petitioners was delivered to MDE in June 2008. It took months to create the drawings and obtain the data for the June 2008 submittal. The MDE comments thereon were received on April 28, 2009. On August 2, 2010, an addendum was submitted. Presently, Mr. Armstrong has been working full time on this project and has done so since 2009, diligently pursuing comments from MDE; the most recent update being August 2, 2010. Upon questioning, Mr. Armstrong indicated that it takes generally five years to obtain approval for this type of project.

Mr. Stephen Fleischman, the vice president of Chesapeake Terrace, testified that the company acquired the land in two deeds, one portion in 1989 and the other in 1952. Site plans for the project were developed in 1990 and December 2002. Mr. Fleischman has been involved in this project since its inception and feels that all the experts he has engaged for the project have

been diligently working on the project. A meeting with MDE is planned to discuss the approval of phase three.

Mr. Edward Dexter was recalled to testify. The Petitioners have submitted substantial plans for consideration by MDE. He believes that it will be several months before phase three will be completed. Phase three has several different plans that come together as one. This project is one of the larger landfills in the State and is taking a large amount of resources to complete. Once phase three is complete, there is a relatively quick, in-house review of the plans (phase four). Then, phase five, the public comment and public hearing phase will begin. Finally, MDE makes its recommendation; most applications are approved with amendments.

Ms. Diana Lane, a Protestant, stated that this process has been ongoing since 1991. Since that time, the large Piney Orchard development has been constructed and a large project called "Two Rivers" is proposed. Ms. Lane feels that the proposed rubble land fill would be detrimental to public welfare by placing more large trucks on the area roadways and potential impacts to nearby wells and wetlands.

Ms. Ann Marie Thomas, a Protestant, also testified that she had concerns for traffic safety and feels that Route 3 is failing.

Reverend Wilmer Frazier, a Protestant and Pastor of St. John AME Zion Church on Conway Road, testified that the church is located directly across the street from the proposed entrance to the rubble land fill. The church has been in existence since 1929, although was not always located at its present location. With the increased population of the congregation, Reverend Frazier is concerned with the traffic and the dangers to the children that play in the area. The parking lot of the church is very close to the road and near the vehicular access point of the rubble fill.

Ms. Cathy Fleshman, a Protestant and an area resident, testified that she has been involved with the hearings for this project since 1989. Ms. Fleshman feels that extensive development has been done in this area and that the roadways in the area cannot accommodate the traffic that has increased since these developments took place. The landfill will not be compatible with the traffic problems already posed.

Ms. Stacy Murphy, a Protestant who has lived in the area for 11 years, testified that the edge of the landfill is very close to where her home is located. Since 2000, traffic has increased, including tractor trailer trucks, the noise level and vibrations therefrom impacting her home, as well as vehicles hitting the utility pole every few months. Ms. Murphy wants the extensions stopped and the entire project denied. Upon questioning, Ms. Murphy indicated that she purchased her home after the landfill was approved and is aware of the 1,000 foot buffer with landscaping and screening conditions imposed by the prior special exception and variance approvals.

Mr. Michael Murphy, a Protestant and resident of the area, testified that he travels Route 3 every couple of days and Conway Street every day. Mr. Murphy feels that the traffic has increased substantially in the last 11 years.

Mr. John Fury, a planner with the Office of Planning and Zoning, testified that he found that the Petitioners have been diligent in their efforts to acquire approval from the MDE and that, considering the length of time the State takes to review these matters, the request for a variance should be approved. The rubble landfill is located on the southwest side of Patuxent Road and consists of 481.6 acres, and the sand and gravel site consists of 107.99 acres. The subject property is currently zoned RA – Rural Agricultural district. The requested variances are for both sites to extend time for the implementation and completion of previously approved special exceptions and variances (case nos. BA 120-90S, BA 26-91S, BA 27-91V, BA 62-03V, BA 7-

06V and BA 8-06V). The applicant is requesting a two year extension to implement and complete the approved special exceptions and variances. This project has had previous extensions granted by the Board in 2004 and 2006. The Board's approval of a special exception on September 20, 2006 was appealed to the Circuit Court and was vacated, in part, regarding the conditions placed on the Petitioners that if the special exception is not implemented in the allotted time frame, that further extensions would not be granted. The extension from the September 20, 2006 decision expired on September 20, 2008; thus, the applicants have returned for a further extension. The applicant has been pursuing approval from the MDE since the original special exception and variance approvals were given in 1993. The process takes at least three years. The Petitioner cannot implement the special exception and variances until the MDE issues a permit.

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 Conclusion

In 1993, the Board of Appeals granted the Petitioners a special exception for a sand and gravel operation (BA 120-90S) and for a rubble landfill with variances (BA 26-91S and BA 27-91V). The variances were granted to permit the reclamation of a portion of an abandoned sand and gravel pit that are within the more current property line setback restrictions for a sand and gravel use. Section 18-16-405 of the Anne Arundel County Code (the "Code"), provides that a special exception or variance is rescinded by application of law unless the applicant obtains a building permit within 18 months. To date, the Petitioners have not received building permits for the sand and gravel/rubble landfill use. In this appeal, the Petitioners are requesting the approval of variances to permit an extension of time for the implementation and completion of the previously approved special exception and variances.

This case has a long history. After the Board's initial grant of the request in 1993, the case was appealed to the Circuit Court and Court of Special Appeals. While certiorari was requested, the Court of Appeals denied the request. MDE suspended all processing of the application during the pendency of the various appeals. During this same period, many of the requirements governing the uses were revised at the State level and the Petitioners reworked their submission to the State of Maryland.

At the local level, the Petitioners requested and received variances in 2004 to permit a two year extension of time in case nos. BA 62-03V and BA 63-03V. In 2006, the Board granted variances for an additional two year time extension (BA 7-06V and BA 8-06V). The Board's 2006 decision conditioned the grant of the variances on there being no further extensions permitted. On appeal, the Circuit Court for Anne Arundel County vacated the Board's imposed condition. Hence, the applicants are currently before the Board to seek approval for a third extension to the time restrictions.

In order to be granted a variance, an applicant must meet the standards set forth in Section 3-1-207 of the County 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., Section 3-1-207 (a)(1).

However, Section 3-1-207 (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 such lot then a variance can be granted." In this case, we again

find that there are exceptional circumstances other than financial considerations, 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) regulates the licensing and operation of such facilities. Mr. Edward 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—including, geology, groundwater, wetlands and other environmental factors. The application and plans are submitted to the State, which then routes them to numerous commenting agencies. At least three years are required to complete the process. That minimum process time can be extended by external factors as well as internal factors, such as change of employment and vacant positions of individuals who are needed to review and process the application through MDE. Mr. Dexter explained that this rubble landfill is one of the largest in the State. Size alone extends the review time and the management of the MDE resources to process not only this large application, but all other applications pending before Mr. Dexter's department.

Additionally, the review process before MDE is not simply the analysis of an application and then approval or denial. The review process is an iterative one where an applicant submits much information over five phases of review. These Petitioners are currently in phase three of the review process (the longest phase) that requires several submittals and resulted in this case in several, substantive comment letters by MDE. These comment letters are not simple undertakings and the responses thereto require additional, expert analysis. For example, MDE may find information in an applicant's submittal that leads to requests for additional scientific data that requires multi-month sampling. The applicant cannot simply fix a problem in an application, the applicant must perform tests and provide the analysis of the samples by experts.

Mr. Dexter of the MDE testified that the processing of an application before MDE would take a minimum of three years to complete. This site is one of the largest in the State of Maryland and, therefore, atypical. If MDE permission were not required to operate the sand and gravel/rubble landfill, then there would be no need for the requested variances. However, there is no way for the applicants to obtain the necessary approvals from MDE (three year minimum) in time (18 months) to comply with the Anne Arundel County regulations. Therefore, this interaction of the overlapping regulations has, in part, resulted in the exceptional circumstance to be suffered by the applicants, something of which is out of their hands.

Admittedly, this application has been pending before MDE for many years. The Protestants voice concern that this undesirable (in their eyes) operation has been pending since 1991. The Petitioners argue that their application has been pending only since 2005, when the phase three application was submitted to MDE. We find the Petitioners' argument relative to their timing and diligence to be more persuasive. This Board is convinced that the Petitioners have been diligent in pursuing completion of the MDE process, including having a full time civil engineer, Mr. Armstrong, on the project. As Ms. Henley noted in her closing argument, this is an iterative process. An applicant must submit information. Then the agency reviews and responds with comments. The applicant must then address the said comments and resubmit. More than one submission is necessary, as described by Mr. Armstrong. Also the applicant is a scientific endeavor with multiple disciplines working toward the submission, as further described by Mr. Armstrong and Mr. Fleischman. The science of the process requires data gathering and testing over time. Months between applicant submissions are reasonable given the sophistication of the process.

While the Protestants argue that the Petitioners failed to show due diligence during the processing of this application, we disagree. Mr. Dexter testified that it is important for MDE to

conserve its limited human and other resources, especially for a project this large. Mr. Dexter explained that some delays in project review occurred since there were changes and vacancies in positions with his department. 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. The Petitioners have continued to supply MDE with information and communicated with them on a frequent and diligent basis. 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., Section 3-1-207(c)(1). Mr. Dexter from the State of Maryland indicated that the processing of this application takes at least three years. This project is in phase three and Mr. Dexter is hopeful that it can move to phase four within the next few months. Phase four was described by Mr. Dexter as an in house review. Phase five may take a year or more since multiple public hearings are likely. MDE staff will then digest the public comments, revisit the application and make further recommendations.

Although these applicants are at least partially through the State process, we believe, based on Mr. Dexter's testimony, that delays are still likely. Neither the applicants nor we have any control over the ability of the State offices to respond quickly. Additionally, MDE is charged with the duty to review fully these applications. We are certain that no one, especially the Protestants, desires that MDE give short shrift to such a complex project. Also, phase five involves a public hearing, resulting staff comments and amendments per Mr. Dexter. He described the final approval from MDE within two years as "doable"—hardly a firm endorsement of two years as a maximum. We remain hopeful that the Petitioners will not have to reapply for further extensions. Given the remaining phases of this review, followed by the

County's own permit process, two years is no more than the minimum relief necessary to these Petitioners.

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., Section 3-1-207(c)(2)(i). The land use in the immediate proximity of the site is low density residential per the testimony of Ms. Lane and Reverend Frazier. However, Route 3 is near the site and heavily traveled as described by Ms. Thomas. The large, mixed use development of Piney Orchard is part of this community and another large residential community, Two Rivers, may be constructed. We find that the character of the neighborhood is that of mixed use that ranges from rural residential to commercial resources for the Odenton community. 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 is known within the community and, we believe, is part of the character of the community. The rubble fill will heal a large, old mining scar on the subject property. The land is currently not in use by the community, save a few trespassers who dump trash.

Although the Protestants argue that there is noticeable increased traffic due to increased development in the area (i.e. Piney Orchard) since the special exception was originally approved, we do not find this testimony persuasive that the requested extension of two years will alter the essential character of this neighborhood. Our focus here is not on the special exception for a rubble land fill and sand and gravel mine and variances that were approved, but rather, on whether a variance to permit a two year extension will change the character of the neighborhood. If there is more traffic due to development in the area, that traffic does not persuade us to conclude that a variance for an extension of time will change this neighborhood from a mix of uses to something else. As for arguments that truck traffic may increase following operation of the site, those arguments were dealt in the original special exception and variance requests. The

Traffic
can still
be addressed

current variance does nothing more than give the Petitioners more time to obtain State approval and a County building permit. This variance does not guaranty that the Petitioners will ever operate their desired facility.

time variance

The variance for extension of time will not substantially impair the appropriate use or development of adjacent properties. See, id., Section 3-1-207(c)(2)(ii). As explained previously, this special exception and variances have been approved for many years. The need for the current request for two year time variances are a direct result of the iterative process of comments and review time for State approval (or denial) for the operations. Although some of the area residents may not like the degree of traffic in the area, time extension variances, will not impair the use or development of adjacent properties with residences or any other lawful use. There is no operation that will occur as a result of a time variance – the sand and gravel/rubble landfill operation would occur by virtue of the Board's 1993 decision. The adjacent properties can continue to be used without impairment during the extension period requested.

*What about later!
Can argue this.*

This Board need not consider whether the forest cover will be reduced or whether clearing and replanting practices meet the requirements for development within the Chesapeake Bay Critical Area or a bog protection area. See, id., Section 3-1-207(c)(2)(iii) and (iv). This property is not within the Chesapeake Bay Critical Area or a bog protection area.

The time extension variance will not be detrimental to the public's welfare. See, id., Section 3-1-207(c)(2)(v). No traffic will result from the grant of the time extension. No impacts to water will result from the grant of the time extension. The extension of time will only permit full MDE review (and perhaps County building/grading permit review). The MDE may or may not grant the requested licenses and permits. The variances will merely permit the applicant to complete the application process—there is no guaranty that a sand and gravel/rubble landfill will ever operate on this site. In fact, the Protestants argued that the Petitioners are unable to meet

no guarantee that landfill will be built

key:
do not
meet
access
requirements

certain access road conditions originally imposed on this special exception and variances thereto in 1993. If true, the Petitioners' attempts at approval could ultimately fail.

This is not a case of whether the sand and gravel operation/ rubble landfill is a popular land use. It is, however, a permitted land use. While some individuals may not like the traffic in the area and are worried about potential impact from a sand and gravel/rubble landfill operation, this case involves only a two year time extension in which to obtain permits. We believe that the extension of two years for these applicants to implement and commence these uses will not be detrimental to the public's welfare. The original 1993 decision, determined that these uses have public benefit and are needed. This Board makes no decision on the merit of the underlying special exception and associated variances. We find only that these applicants deserve a time extension variance since they have not been afforded the opportunity to commence those uses, most recently due to the State's lengthy (and proper) five phase approval procedure.

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We find, therefore, that the applicants have presented persuasive testimony to meet the criteria set forth in Section 3-1-207 to obtain variances of two years to the requirements of Section 18-16-405 of the Code. The Petitioners may never operate a sand and gravel/rubble landfill on this site, but these variances give them two more years to go through the process.

ORDER

For the reasons set forth in the foregoing Memorandum of Opinion, it is this 3rd day of JANUARY, 2011, by the County Board of Appeals of Anne Arundel County, ORDERED, that the Petitioners' request for variances to permit a further two (2) year extension in time for the implementation and completion of previously approved variances and a special exception for a rubble landfill and sand and gravel operation are hereby **GRANTED**.


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

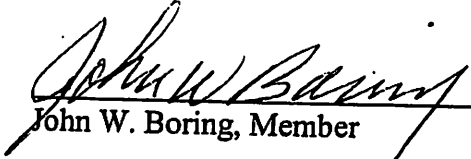
If this case is not appealed, exhibits must be claimed within 90 days of the date of this Order; otherwise, they will be discarded.

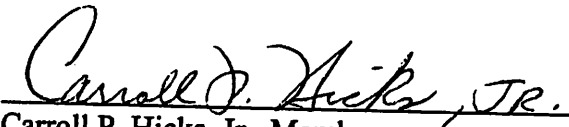
Any notice to this Board required under the Maryland Rules shall be addressed as follows: Anne Arundel County Board of Appeals, Arundel Center, P.O. Box 2700, Annapolis, Maryland 21404, ATTN: Deana L. Gibbs, Clerk.

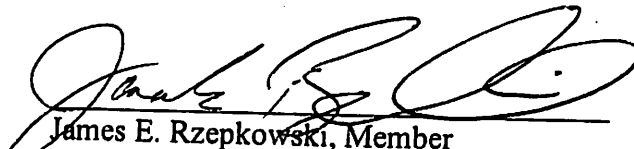
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OF ANNE ARUNDEL COUNTY


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(William Moulden, Member, did not participate in this appeal. Andrew C. Pruski, former Member, participated in, but, resigned prior to completion of the appeal.)

C O P Y
TRUE CERTIFIED