

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

CASE NUMBERS 2012-0300-V AND 2012-0301-V

NATIONAL WASTE MANAGERS, INC.

FOURTH ASSESSMENT DISTRICT

DATE HEARD: FEBRUARY 7, 2013

ORDERED BY:

DOUGLAS CLARK HOLLMANN
ADMINISTRATIVE HEARING OFFICER

PLANNER: JOHN R. FURY

DATE FILED: **FEBRUARY 21, 2013**

PLEADINGS

National Waste Managers, Inc., the applicant, seeks a variance (2012-0300-V) to allow an extension in the time required for the implementation and completion of previously approved special exception and variance for a rubble landfill and a variance (2012-0301-V) to allow an extension in time for the implementation and completion of a previously approved special exception for a sand and gravel operation on properties located along the south side of Patuxent Road, west of Bragers Road, Odenton.

PUBLIC NOTIFICATION

The hearing notice was posted on the County's web site in accordance with the County Code. The file contains the certification of mailing to community associations and interested persons. Each person designated in the application as owning land that is located within 175 feet of the property was notified by mail, sent to the address furnished with the application. Stephen Fleischman, vice-president of the applicant, testified that the property was posted for more than 14 days prior to the hearing and submitted a letter and exhibits to that effect. I find and conclude that there has been compliance with the notice requirements.

FINDINGS

A hearing was held on February 7, 2013, in which witnesses were sworn and the following evidence was presented with regard to the proposed variances requested by the applicant.

The Property

The applicant owns the subject properties, which are located along Patuxent Road in Odenton, Maryland. Tax Account No. 04-000-9005-1052 is identified in the records of the State Department of Assessments & Taxation (SDAT) as Parcel 241 in Block 7 on Tax Map 36 and consisting of 325.64 acres.¹ Because this parcel was granted a special exception for a rubble landfill, it will be referred to herein as the “Rubble Landfill Parcel.” The second parcel is identified as Tax Account No. 04-000-0445-2000. Because this parcel was granted a special exception for a sand and gravel operation, it will be referred to herein as the “Sand & Gravel Parcel.” The Sand & Gravel Parcel is smaller. The records of the SDAT identify it as Parcel 20 in Block 8, Tax Map 36 and consisting of 101.985 acres.²

As a condition for the granting of the requested relief in this case, the applicant and the County will need to clear up exactly what property is subject to the existing approvals. This information is not critical when a homeowner wants to add a shed in his back yard but where the applications cover more than 500

¹ The variance application listed the property reference as Parcel 2 in Block 8 on Tax Map 36 and that the property consists of 481.6 acres of land. This is a significant difference in acreage from the 325.64 acres in the SDAT records, even if the third parcel owned by the applicant on Patuxent Road, consisting of 8.924 acres, is added to the Rubble Landfill Parcel. The Findings & Recommendations of the Office of Planning & Zoning did not give the legal identity of the Rubble Landfill Parcel but adopted the applicant’s proffer in the variance application of 481.6 acres. The reference in the SDAT records to Block 7 appears to be an error as the applicant identifies the Rubble Landfill Parcel as being in Block 8 and the SDAT records identify the Sand & Gravel Parcel as being in Block 8.

² The Sand & Gravel Parcel was identified by the applicant as containing 107.99 acres, a difference within the range of many cases where a deed and the SDAT records are compared.

acres, and the permitted activity may be hazardous to the surrounding residents, more specificity is required.

The property is zoned RA Rural Agricultural District and is not located in the critical area.

The Proposed Work

The applicant seeks an extension in the time required for the implementation and completion of previously approved special exception and variance for a rubble landfill and a previously approved special exception for a sand and gravel operation.

The Anne Arundel County Code

Article 18, § 18-16-405(a) provides that a variance expires by operation of law unless a building permit is obtained within 18 months and construction proceeds in accordance with the permit. The applicant has been granted extensions in the past, the latest being by the Board of Appeals in Case Nos. BA-10-09V and BA 11-09V. The time period granted in those decisions would have expired on January 3, 2013. The applicant timely filed an application to extend the time periods for both projects.

The Variances Requested

The applicant seeks variances of two years to § 18-16-405 to complete a previously approved special exception and variance for a rubble landfill and a previously approved special exception for a sand and gravel operation.

The Evidence Submitted At The Hearing

John R. Fury, a planner with the Office of Planning and Zoning (OPZ), described the history of the applicant's efforts to obtain special exceptions and variances to build the Rubble Landfill Parcel and the Sand & Gravel Parcel. Approvals were given in 1993 and the applicant is still trying to get final permits from the State. OPZ believes that the applicant has shown that it has been diligently applying for the State permits and that to deny the requested extension would cause an unwarranted hardship. OPZ believes that a two-year extension would be appropriate.

The Department of Health reviewed the application and offered no objection.

Based upon the standards set forth in § 18-16-305 under which a variance may be granted, Mr. Fury testified that OPZ would recommend that the requested variances be approved.

The applicant was represented at the hearing by Suzanne Koster Henley, Esquire. Mr. Steven Fleischman, vice president of the applicant, recounted how the applicant's efforts to obtain the necessary approvals for the rubble landfill and the sand and gravel operation have taken almost twenty years. Extensions have been granted in the past. The need for further extensions to allow the application to continue have been caused by the time needed by the State to go through the process of determining whether to approve either or both of the two operations.

Edward Mansfield Dexter testified that he has been in an administrative position at the Maryland Department of the Environment (MDE) since 2001 and is familiar with the applicant's submittals to his agency. He described the five phases of approval and said that the applicant is in phase four in which the applicant and MDE work together to come up with a plan that MDE can approve. Mr. Dexter said that the applicant has replied in a prompt manner to MDE comments and has been working diligently toward meeting MDE's requirements. He thought a two year extension rather than an 18-month extension would be realistic given that the project will have to move into a public hearing and comment period known as phase five.

Veronica Elizabeth Foster of Golder & Associates in Mt. Laurel, New Jersey, testified that she has been involved in the applicant's proposals to MDE since March of 2011. She reiterated what Mr. Dexter testified to and submitted voluminous documents to show the work that has been done since the last extension was granted.

A number of people and organizations testified that enough time had been granted to the applicant and the extension should be denied. David Tibbets testified for the Greater Odenton Improvement Association, Inc., and said the application would not be granted today. Diana Lane testified that she lives within 1000 feet of the proposed sites and opposed granting the request for the same reasons. She didn't think the applicant had access to the site but presented no evidence to support that claim. Sue Meyer testified that she lives in Odenton and

spoke unofficially for the Patuxent River Association. She opposed granting the request because the applicant had taken too much time to get the required permits. The United States Department of the Interior, Fish and Wildlife Service sent in a letter signed by the Refuge Manager in opposition to granting any extensions because it would be in the interests of the citizens of Maryland to allow the area to remain in its existing condition.

There was no other testimony taken or exhibits received in the matter. The Hearing Officer did not visit the property.

DECISION

Requirements for Zoning Variances

§ 18-16-305 sets forth the requirements for granting a zoning variance. Subsection (a) reads, in part, as follows: a variance may be granted if the Administrative Hearing Officer finds that practical difficulties or unnecessary hardships prevent conformance with the strict letter of this article, provided the spirit of law is observed, public safety secured, and substantial justice done. A variance may be granted only if the Administrative Hearing Officer makes the following affirmative findings:

- (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 this article; 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.

The variance process for subsection (1) above is a two-step process. The first step requires a finding that special conditions or circumstances exist that are peculiar to the land or structure at issue which requires a finding that the property whereupon the structures are to be placed or use conducted is unique and unusual in a manner different from the nature of the surrounding properties. The second part of the test is whether the uniqueness and peculiarity of the property causes the zoning provisions to have a disproportionate impact upon the subject property causing the owner a practical difficulty or unnecessary hardship. “Uniqueness” requires that the subject property have an inherent characteristic not shared by other properties in the area. *Trinity Assembly of God of Baltimore City, Inc. v. People’s Counsel for Baltimore County*, 178 Md. App. 232, 941 A.2d 560 (2008); *Umerley v. People’s Counsel for Baltimore County*, 108 Md. App. 497, 672 A.2d 173 (1996); *North v. St. Mary’s County*, 99 Md. App. 502, 638 A.2d 1175 (1994), cert. denied, 336 Md. 224, 647 A.2d 444 (1994).

The variance process for subsection (2) - practical difficulties or unnecessary hardship - is simpler. A determination must be made 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.

Furthermore, whether a finding is made pursuant to subsection (1) or (2) above, a variance may not be granted unless the hearing officer also finds that: (1) the variance is the minimum variance necessary to afford relief; (2) the granting of the variance will not alter the essential character of the neighborhood or district in which the lot is located, (3) substantially impair the appropriate use or development of adjacent property, (4) reduce forest cover in the limited development and resource conservation areas of the critical area, (5) be contrary to acceptable clearing and replanting practices required for development in the critical area, or (6) be detrimental to the public welfare.

Findings - Zoning Variances

I find, based upon the evidence, 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 implement and complete the special exceptions and variances approved in earlier proceedings. Original approvals were given as early as 1993. Litigation brought by protestants prolonged the permitting process for years. The law regulating the applicant's proposal has changed many times in those intervening years, lengthening the process. The evidence is sufficient to show that the applicant has been diligently pursuing the State permits it needs to operate the permitted rubble landfill and sand and gravel operation.

The opposition is grounded on a belief that the applicant should not be allowed to develop the subject properties as a rubble landfill and as a sand &

gravel operation because to do so would be environmentally unsound. However, I am limited to examining whether the applicant has met the burden in § 18-16-305 to show that it has been prevented from going forward for reasons not attributable to its own conduct. I have no jurisdiction to revisit the original decisions and decide that what was granted then should be denied now. The applicant has shown sufficient grounds to allow an extension of time, in this case for two years, to obtain the final approvals it needs.

I further find that the requested variances are the minimum necessary to afford relief, that the granting of the variances will not alter the essential character of the neighborhood or district in which the lot is located, substantially impair the appropriate use or development of adjacent property, reduce forest cover in the limited development and resource conservation areas of the critical area, be contrary to acceptable clearing and replanting practices required for development in the critical area, or be detrimental to the public welfare.

ORDER

PURSUANT to the application of National Waste Managers, Inc., petitioning for a variance to allow an extension in the time required for the implementation and completion of previously approved special exception and variance for a rubble landfill and a variance to allow an extension in time for the implementation and completion of a previously approved special exception for a sand and gravel operation; and

PURSUANT to the notice, posting of the property, and public hearing and in accordance with the provisions of law, it is this **21st day of February, 2013**,

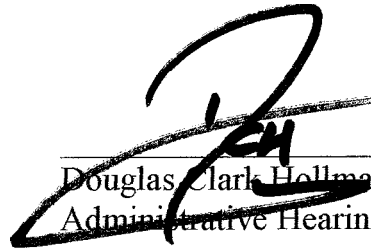
ORDERED, by the Administrative Hearing Officer of Anne Arundel County, that the applicant is **granted**:

1. A zoning variance of two (2) years from the date of this Order to the requirements of § 18-16-405 to implement and complete the previously approved special exception and variance for a rubble landfill in Case No. 2012-0300-V; and
2. A variance two (2) years from the date of this Order to the requirements of § 18-16-405 to implement and complete the previously approved special exception for a sand and gravel operation in Case No. 2012-0301-V.

The foregoing variances are subject to the following conditions:

- A. The applicant shall comply with any instructions and necessary approvals from the Permit Application Center and the Department of Health.
- B. The applicant shall comply with any instructions and necessary approvals from the Maryland Department of the Environment.
- C. The applicant shall identify with specificity, to the satisfaction of the Permit Application Center, the parcels of land that are the subject of the approvals granted in prior proceedings involving the applications for a rubble landfill and a sand and gravel operation before this Office, the Board of Appeals, and the Maryland courts.

D. This Order does not constitute a building permit. In order for the applicant to construct the structures permitted in this decision, they must apply for and obtain the necessary building permits, along with any other approvals required to perform the work described herein.



Douglas Clark Hollmann
Administrative Hearing Officer

NOTICE TO APPLICANT

Within thirty 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.

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

NATIONAL WASTE MANAGERS, INC.
AND CHESAPEAKE TERRACE

Petitioners

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BEFORE THE

COUNTY BOARD OF APPEALS

OF ANNE ARUNDEL COUNTY

CASE NO.: BA 12-13V, BA 13-13V
(2012-0300-V & 2012-0301-V)

Hearing Dates: June 6, 2013

August 14, 2013

August 15, 2013

October 15, 2013

MEMORANDUM OF OPINION

Summary of Pleadings

This is an appeal from a decision of the Administrative Hearing Officer. This appeal is taken from the conditional granting of a variance to allow an extension in the time required for the implementation and completion of a previously approved special exception and variance for a rubble landfill and an appeal of the conditional granting of a variance to allow an extension in the time for implementation and completion of a previously approved special exception for a sand and gravel operation, for property known as 515 Patuxent Road, Odenton.

Summary of Evidence

Mr. Stephen Fleischman, the Vice President of Chesapeake Terrace/National Waste Managers, Inc., submitted the deeds to the subject property, the variance applications and site plans. See, Petitioners' Exhibits 7 & 8. The property is an old, unreclaimed gravel pit and the Petitioners' intention is to reclaim the property and make it useable. The Petitioners had previously pursued permits; however, were unable to move forward due to ongoing litigation. When the Petitioners were able to move forward, the laws had changed and many of the plans had to be redone; which included additional studies, soil borings, etc. The project is currently in Phase III of the Maryland Department of the Environment ("MDE") application process where

the engineering has been completed¹. The project has been in Phase III since 2006. More recently, the Petitioners were required by MDE to perform an additional 12 months of soil borings and water tests. The property is surrounded by Patuxent Road, Conway Road, railroad tracks and Fort Meade. Mr. Fleischman has met with the consultants and MDE approximately three times in the last two years. The Petitioners have always responded to MDE promptly; however, MDE's responses take months. Mr. Fleischman explained that when an application is submitted to MDE, the agency reviews the submissions and issues comments to the applicant. When the Petitioners' consultants had questions regarding MDE comments, rather than respond to the letter sent by MDE, they would clarify the issue so they could get back to MDE with the proper information. In this case, a 13 page MDE comment letter resulted in a response from the Petitioners which consisted of nine, four inch thick binders full of technical information. It is his understanding that this project is the most complicated permit MDE has reviewed, which is why it is taking so long for the Petitioners to obtain approval.

Mr. Edward Dexter, the Administrator of the Solid Waste Program and Land Management at MDE, is a geologist by training. Mr. Dexter oversees two divisions, one is for compliance enforcement and the second is for permit review, monitoring data and closure of solid waste sites. He has been employed with MDE since February 1980. The laws regulating landfills provide that one cannot be operated or constructed without a permit from MDE. The permit process consists of five phases. Phase I is a basic information phase, consisting of an overview of what an applicant wants to do, where they want to do it, and for the submission of any other preliminary information. The information is sent to the relevant County, State and Federal agencies to see if there are any statutes or rules that would terminate the project outright; at which point, MDE would recommend that the applicant withdraw the application. When an

¹ The MDE process consists of five phases in the application process.

application is sent to the County, two questions are asked and the project cannot move forward unless affirmative responses are provided: Is the project in conformance with the County's 10 year Solid Waste Program? And, is it in conformance with Zoning Regulations? Phase II consists of the hydrogeologic investigation which requires borings to a certain depth below the proposed landfill cell to fully characterize the geologic formations which may be operative to withstand the weight, the movement of ground water onto other adjacent properties, the existence of ground water, and the saturation of geologic material that can affect stability. Once this phase is passed, the project can move to Phase III, which is the engineering and design phase. The design phase includes blueprints. In this case, the plans are fairly elaborate because the Petitioners will not open the entire landfill at once, but in phases. Landfills are generally opened in 5 to 15 acre parcels; this property consists of 100 acres. The plans have to describe the sequential nature in which the landfill will be built, access roads, what happens to the water when it is partially complete, monitoring features and more permanent structures. "Leachate" is liquid that falls through the waste and it may contain soluble pollutants. The applicants have to install a liner at the bottom of the landfill, and there is a system of pipes and gravel to collect the leachate over time. These two elements are of supreme importance because if built correctly the underlying ground water will be protected. The size of this project indicates that there will be a lot of water to manage. Maryland, on average, receives 43 inches of rain per year. A plastic liner must be installed and there are elements of the design that directs the water to different pumps. In this case, because the landfill is sloped, it is a complex design. The geology is also a factor in that the area consists of clay, sand and gravel. Some of this material may need to be removed to build the landfill. Additionally, there is a shallow zone sitting on top of the clay that creates an engineering issue. This area will be against the side of the liner and precautions need to be taken to prevent the liner from ripping. Water needs to be prevented from collecting at the

bottom of the landfill because it can create instability and distort the liner to the point where it will rip. The cells will be built sequentially. In other designs, all the water goes to one location and is very simple. This is a large site so it is taking a long time to engineer correctly these systems. It is not uncommon for MDE and the applicant(s) to have several exchanges over a period of time. Phase IV generally occurs after all the requirements of the statute are met and MDE performs its' requirements under the statute. For example, MDE reviews again the plans to ensure that regulations have not changed during the approval process, that all issues were addressed, and the documents are prepared to present the plan to the public. Next, a "Tentative Determination" is written indicating that MDE has tentatively approved the permit and notices are issued to members of the public and other interested individuals, including elected officials in the jurisdiction. The permit is also drafted, which is fairly lengthy, which describes the plans submitted, includes the differences between this plan and other landfills in the State, contains a section that is specific to rubble (which is different from industrial waste), and includes general provisions, such as if something breaks and has to be fixed in a certain amount of time, etc. Phase V is the Public Comment Phase that consists of a public hearing that is held as close to the site as possible, at night, in a location able to hold the expected number of attendees. Notifications are sent out, the hearing is held, testimony collected (oral and written), and then the Hearing Officer in charge of the division reviews that information. A Memorandum of Record is prepared by the Hearing Officer stating that the elements have been evaluated and that the applicant has met all of the regulatory and statutory requirements. The Memorandum also includes a summary of the comments received and if the recommendation needs to change based on the comments. The most frequent outcome is that a comment regarding an issue can be fixed and the tentative permit is altered to incorporate that item. The review process usually takes three years; however, if there is litigation involved, it can take longer. Mr. Dexter recalls that

MDE's review of this project stopped in 1993 and resumed in 2001. The rules for landfills were extensively changed in 1997. The changes added requirements to Phase II and these applicants needed to re-engineer the design. These applicants have been diligent in pursuing the project, but there were times when the project progressed slower than at other times. A new consultant was designated by the Petitioners prior to the grant of the last time extension. Due to the age of the earlier information, MDE is requiring additional hydrogeologic surveys, which take a minimum of one year. This includes additional wells and monthly samplings. Mr. Dexter attended the last hearing before the Board of Appeals and his staff has met in person with the Petitioners' new consultant a number of times over the last two years. He has personally emailed with the new consultant numerous times, had conference calls, and had a site visit to discuss technical aspects similar to problems encountered at another landfill. Mr. Dexter estimates that it would take 18 months after the completion of Phase III to complete the process. MDE has had correspondence with the Petitioners since the entry of Phase III. Mr. Dexter described the response time of MDE to applicant submissions and the response time of the applicant to MDE comments. The Petitioners took nine months to respond to one of MDE's comment letters. (See, Petitioners' Exhibits 11, 12 and 13). There were other communications between July and December 2012 addressing ways in which the Petitioners could adequately address MDE's concerns about the site, etc. Mr. Dexter feels that the Petitioners' new consultant understands MDE's concerns regarding this project and the requirements for approval. In his opinion, the Petitioners have been diligently pursuing this application during the last two years and have done the work required and provided the additional information requested. If the two year extension were granted, the MDE process could be completed. The last few submissions made by the Petitioners have been much more responsive than some of the previous ones. Phase III should be completed this year and then the rest of the project could be finished. The next phase could take

three months due to the requirements for notice, publication, additional time for the record to stay open (which could be extended), and time to review and respond to the public comments. The more people that attend the public hearing and the more comments received, the longer the review process takes. Upon cross-examination, Mr. Dexter reviewed a March 4, 2011 letter. Mr. Dexter testified that he expects that the applicants or their consultants knew about the requirement for a National Pollutant Discharge Elimination System permit, but MDE included the information as a reminder of the requirement. In regard to the amount of time this project has taken, Mr. Dexter stated that the application was stagnant for a period of time during litigation, but that it has been active for 12 years. It is infrequent that this process takes this long; however, there have been some applications that have taken longer due to litigation. MDE has no reason to delay intentionally the process. The review process can take months due to staffing issues and the relative priority of other projects. The additional studies that were conducted related to the ground water on site, the weight of the landfill, and the concern about the perched water zone. The Petitioners' first consultant did not adequately address MDE's issues with the project. In contrast, the Petitioners' new consultant seems to understand MDE's concerns and can address their issues. Mr. Dexter indicated that he has been involved in other landfill projects, but this one is very complicated and had to be redesigned in 1997. Some MDE comments can be minor, and others extensive. Sweeping changes require additional review time to ensure they are carried through the entire plan. As for the diligence of the Petitioners, he would characterize them as diligent (for the most part). In this case, the applicants must comply with the County's zoning decision. The County is responsible for enforcement of its decision, such as the access road. The access roads are not part of the State's regulatory authority. Mr. Dexter affirmed that applicants can make simultaneous requests with MDE and the County; however, the first part of the application process cannot proceed with MDE unless it is in

conformance with the County's 10 year Solid Waste Management Plan and the property has zoning and land use approval. There is no indication that MDE delayed processing the application, and he is not aware of any material delays caused by the Petitioners.

Ms. Veronica Foster, the Petitioners' expert in landfill design and team leader for this project, testified regarding the process of the MDE application. Ms. Foster provided a timeline of her involvement in the project. (See, Petitioners' Exhibit 15). She originally began working on this project in 2008 in a support capacity. She is now the team leader. Ms. Foster explained that the prior team leader retired and the team leadership was changed to Golder Associates (her firm) in January 2012. She explained the sequence of events regarding meetings with geotechnical engineers, discussions with MDE, and visits to other landfills that had unique, but similar issues to those experienced with the subject property/project. A revised submittal was prepared on March 22, 2012, for MDE. On July 19, 2012, MDE responded to the revised submittal with additional comments. Responses to those comments are still pending and a September 2012 meeting with MDE clarified some of the issues. MDE is requesting supplementations to field investigations, including additional boring holes, ground monitoring wells, and updated information regarding certain areas of the property. As such, 15 additional bore holes were created, 8 will be converted to ground water monitoring holes. Approval for those holes was granted on March 1, 2013. Following the creation of these holes, there is 12 months of monitoring that must occur to collect the data requested by MDE, which will update the 2004 geological data. There is concern regarding the bottom of the landfill. It must be three feet above the highest level of the ground water. Ms. Foster's team is preparing three reports that demonstrate that the requirement is met. The ground level reports will be completed in June 2014. Ms. Foster does not anticipate any changes to the design based on the additional samples and data requested by MDE. Since Ms. Foster began working on the project, they have been

diligently pursuing this application. She is unable to accelerate the 12 month monitoring of the new bore holes. The project has already received wetland and Soil Conservation Permits. Upon questioning, Ms. Foster indicated that MDE's letter dated March 4, 2011 raised 28 issues to be addressed. MDE's July 19, 2012 response prompted the supplemental field investigation based on MDE's conclusion that two reports were insufficient; this caused a delay in the project. Ms. Foster does not anticipate any further delays once the final reports are submitted in 2014. The July 19, 2012 letter cannot be responded to until such time as the 12 months of tests are completed, the data compiled, and the reports generated. Her team is working diligently to ensure accurate reports and they have communicated with MDE several times to ensure that the data being collected is what MDE is requesting. Ms. Foster's firm's involvement was previously limited to a gas extraction management system, technical specifications related to the soils for the liner and capping system, the development of the management system for the plant when the landfill is in operation, and the construction quality assurance plan for the testing procedures and protocols for a third party to assess the contractor's duties. As of January 2012, Ms. Foster's firm has become more involved in the project, including modifying the design per MDE and the Petitioners, as well as evaluating the hydrogeologic elements of the design. Ms. Foster provided testimony regarding the additional accesses outlined on the plan and what would be required to construct those access points. She concurred with Mr. Dexter's assessment that Phase III, IV and V would be completed within two years.

Ms. Sue Meyer, a Protestant and current President of the Forks of the Patuxent Improvement Association, testified that she has followed the progress of the development of the landfill since 1997. Regarding the Petitioners' needed land acquisitions to complete the project, she is unwilling to sell her land to them. She is concerned that the road leading to the landfill will not have the capacity to support the project.

Ms. Catherine Fleshman, a Protestant, stated that she has followed this project since the early 1990s. She opposes the installation of a landfill at the property and believes it will be an intrusion to the community. She concurs with Ms. Meyer and does not believe the roadway can support the landfill.

Ms. Diane Lane, a Protestant, states that the road leading to the landfill lacks capacity. The road barely supports the current traffic, and she is even more concerned due to the likely traffic impacts from a new, nearby residential development known as "Two Rivers." It is her understanding that the road cannot be widened because it is designated as a historic road.

Mr. Linton C. Pumphrey, the Protestants' expert civil engineer, testified that he has reviewed the County's file for this project from the last time extension to present. There are five stages to obtain an approval from MDE. The final phase involves a public hearing. His investigation revealed that the Phase III portion of the application began in June 2005, which consisted of the submittal of several binders. Based on his experience, he believes there are a number of off-site improvements that must be done and the project requires fee simple acquisitions of private property. These efforts will take time and may not be completed in the next two years. Further, from his review of the records, he questions the Petitioners' diligence. It will take approximately three years to obtain County building permits. There have been changes to FEMA flood plain maps and Site Development Plan laws that the Petitioners will have to address. On average, the County issues a grading permit within 18 months from application; therefore, he is doubtful that the request for a time extension of two years is sufficient.

Mr. John Fury, a planner with the Office of Planning and Zoning, explained that this case has a long history and this is the fourth time extension request. Mr. Fury submitted a staff report, copies of the variance applications, the deeds to the property, and a copy of the MDE

correspondence dated December 2012. (See, County's Exhibit 1). The project began in 1993 and the Petitioners began the MDE application process in the mid-1990s. The project was excluded from the County's Solid Waste Management Plan which resulted in several years of litigation. During that time, many laws managing landfills changed. The Office of Planning and Zoning recommends approval of the variance requests and believes that the exceptional circumstances factor is applicable in this matter. Denial of the requests would create an unwarranted hardship on the Petitioners. Mr. Fury explained that he believes the MDE application process is onerous and lengthy. The Petitioners are going to need to obtain permits from the County that will include Site Development Plan and stormwater management review. The laws have changed regarding those aspects of the process since 1993 and Mr. Fury is unsure if the project will be grandfathered. He believes that a new traffic impact study may be required during the Site Development Plan process. He concurs with Mr. Pumphrey's assessment that it will take approximately three years for the County's building permit and Site Development Plan process (possibly even four years due to the anticipated road improvements and extensive stormwater management). Upon questioning, Mr. Fury indicated that he recommended a two year time extension to the Petitioners as a means of consistency with prior extension requests. He considers the letter from MDE and Mr. Dexter to be evidence of the Petitioners' diligence in pursuing the application. In his opinion, some of the work could have been achieved faster, but he does not believe that those efforts would have changed the current situation or that the Petitioners would have received the approvals that are presently pending. Mr. Fury explained that the two year request was the preferred recommendation for the purposes of consistency. He believes the Petitioners will be before the Board again in two years requesting another extension and possibly in another four years. If the time extensions are not granted, the previously granted special exception and variances will expire and the Petitioners will have to start the process

again. The legal issues that confronted this project, as well as the MDE process, are out of the County's control and he believes that a denial would create a hardship.

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 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 Board has previously approved three time extensions related to the Petitioners' project in 2004, 2006 and 2011, each in two year increments. In order to be granted a variance, an applicant must meet the standards set forth in Section 3-1-207 of the Code. After reviewing the testimony and the exhibits, this Board failed to reach a majority decision to either grant or deny the Petitioners' requests. The vote is split evenly with two Board members voting to grant the variances and two members voting to deny. Since the Petitioners were unable to convince a majority of the Board, they have failed to meet their burden of persuasion; and, consequently, the variance must be denied. Both positions of the Board members and their reasoning therefor are presented herein.

Findings and Conclusions in Support of the Requested 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).

Alternatively, 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." We find that there are exceptional circumstances which prohibit the Petitioners from implementing the previously approved special exceptions and variance. When the Petitioners were previously before this Board, we found that the size and nature of this project constituted exceptional circumstances, since it extended the review time and process for MDE. Mr. Fleischman, Mr. Dexter, and Ms. Ferguson all explained that since the last hearing, the Petitioners have been required to implement additional tests and reports to complete Phases II and III of the 5-Phase MDE permitting process. Specifically, in a letter dated July 19, 2012, MDE requested updated hydrogeologic information which required additional boring holes that consist of 12 months of testing and data compilation prior to completion. Ms. Ferguson indicated that approval for the holes was granted on March 1, 2013. The completed reports should be submitted to MDE no later than June 2014. Ms. Ferguson does not anticipate any further changes to the design of the project based on the additional information being collected. Accelerating this testing period is not within the control of the Petitioners, and we find that this constitutes exceptional circumstances. This is an extensive process that requires several submittals and responses. The Petitioners have represented that once Phase III is completed, the remaining two phases will move swiftly. We find that the Petitioners have been diligent in

pursuing completion of the MDE permitting process, including communicating with MDE in a timely and frequent manner per the testimony of Mr. Dexter, Mr. Fleischman and Ms. Ferguson. The present situation is not within the control of the Petitioners and constitutes exceptional circumstances that warrant the granting of the time extension requests.

We also find that the requested variances to permit an additional extension of 2 years are the minimum necessary to afford relief to these applicants. See, id., Section 3-1-207(e)(1). Ms. Ferguson indicated that the additional information requested by MDE should be completed and supplied to MDE by June 2014. As such, she does not anticipate that there will be any changes to the design of the project. This will result in the completion of Phase II and III of the MDE permitting process. Ms. Ferguson does not anticipate any further delay in the project. Mr. Dexter anticipated that the remaining two phases would be completed within the requested 2 year time frame to finalize MDE approval. After the MDE permit is finalized, the Petitioners will have to begin the County permitting process. Mr. Fury indicated that he believes an additional extension may become necessary; however, the 2 year time extension request is in conformance with the pattern of history in this case and provides the County with a means of remaining updated on the MDE process. At this time, 2 years is, at least, 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(e)(2)(i). Based on the testimony of the Protestants, we find that the character of the neighborhood is that of mixed uses that range 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. 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 2 year extension will change the character of the neighborhood. The current variance does nothing more than give the Petitioners additional time to finalize State approval and obtain County permits. Therefore, we do not find that the time extension will alter the essential character of the neighborhood.

The variances for extension of time will not substantially impair the appropriate use or development of adjacent properties. See, id., Section 3-1-207(e)(2)(ii). As explained previously, the special exception and variances have been approved for many years. The need for the current request for 2 year time variances are a direct result of the MDE permitting process and their most recent request for additional information to be updated and supplied. 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.

We 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(e)(2)(iii) and (iv). This property is not within the Chesapeake Bay Critical Area or a bog protection area.

The time extension will not be detrimental to the public's welfare. See, id., Section 3-1-207(e)(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 finalize the MDE permit review process and perhaps initiate the County building/grading permit process. The variances merely permit the applicant to complete the application process. We believe that the extension of 2 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. We make 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.

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.

Findings and Conclusions in Support of the Denial of the Requested Variances

As stated by our counterparts, there are no physical conditions of the property that render it incapable of being developed in a timely manner pursuant to Section 3-1-207(a)(1); however, we do not find that there are exceptional circumstances that would create practical difficulties or unnecessary hardship for the Petitioners to develop the lot within the time frames previously granted by this Board. See, § 3-1-207(a)(2). As previously stated, this Board has granted three prior time extension requests to the Petitioners. The last time the Petitioners were before this Board, the representation was made that Phase III of the MDE permitting process was almost complete, and here we are again with the same representations being made. We do not find that the Petitioners have been diligently pursuing their application with MDE. Specifically, the Petitioners received a letter from MDE on March 3, 2011 raising 28 specific items. The Petitioners did not respond until over a year later on March 22, 2012. MDE responded on July 19, 2012 with a request to supplement data from 2004. The Petitioners did not meet with MDE until September 2012 and it took until March 1, 2013 to receive approvals to begin the process necessary for the Petitioners to supply MDE with the additional information requested. Further, there have been no efforts by the Petitioners to begin the permitting process with the County, which according to Mr. Dexter and Mr. Fury, can be simultaneously pursued by the Petitioners. This project will not be completed in the requested two year time frame and we do not find that the Petitioners have been diligently pursuing their application. Additionally, the Petitioners

admitted that their prior consultant was less than adequate. We believe that, as a result of their failure to hire diligent consultants, they are now before this Board for a fourth time requesting a time extension.

We do not find that the requested variances to permit an additional extension of 2 years are the minimum necessary to afford relief to these applicants. See, id., Section 3-1-207(e)(1). In total, this Board has granted the Petitioners 6 years of extensions to pursue this project. The MDE process has been pending since 1993, albeit there was a period of time where litigation and changes to the law delayed the process; however, the process actively resumed in 2001. Mr. Dexter explained that the process usually takes 3 years – this project is in year 12. Further, there was testimony from Ms. Ferguson, Mr. Dexter and Mr. Fury that 2 years will most likely be insufficient for the Petitioners' needs and will more than likely return to this Board for a fifth or sixth request while navigating the County's permitting process. We do not find that the requests are the minimum necessary to afford relief.

The granting of the requested variances to the time limits for the implementation and completion of previously approved special exceptions and the variance will alter the essential character of this neighborhood. See, id., Section 3-1-207(e)(2)(i). This community has been evolving and changing in the 20 years since the initial grant of the special exceptions and variances for this project. As such, this community has been actively awaiting the finalization of this project during that time frame and has diligently pursued the status of it (as evidenced by the repeat attendance of Protestant appeals to this Board). By allowing further time extensions, this project, which has no end in sight, will continue to burden this community and alter the essential character and development of the surrounding neighborhoods.

The variances for extension of time will substantially impair the appropriate use or development of adjacent properties. See, id., Section 3-1-207(e)(2)(ii). Again, this community has evolved for the past 20 years. The pending construction of a landfill on this property has

been a burden on the neighborhood for years and the community is justified in seeking an end date. The Petitioners lack of diligence in pursuing their applications has resulted in at least 12 years of repeated extensions for time. By allowing further extensions, the development of adjacent properties will continue to be affected as community members and developers of the area wonder whether or not they will eventually live near or adjacent to a landfill. We find that by granting the variance requests, the increased period of uncertainty will impair the appropriate use or development of adjacent properties.

This property is not within the Chesapeake Bay Critical Area or a bog protection area and we do not need to 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(e)(2)(iii) and (iv).

The time extension will be detrimental to the public's welfare. See, *id.*, Section 3-1-207(e)(2)(v). The extension of time is insufficient to allow the Petitioners to finalize the MDE permit review process. Further, the Petitioners are not applying for required County permits which will take 4 years to complete per Mr. Fury. By granting the variance requests, it will be detrimental to the public's welfare in that this community will continue to be held hostage by this application. The community has a right to expect finalization of a project that will have a significant impact.

Conclusion

The legal effect of the inability of the Board to reach a majority is that the Petitioners did not meet their burden of persuasion and the request for the variances for a time extension must be denied. When an appeal of this nature is before the Board, it is heard *de novo*, and the burden of proof and persuasion is placed upon the Petitioners. See, *Montgomery County Board of Appeals v. Walker*, 228 Md. 574, 180 A.2d 865 (1962), *Lohrmann v. Arundel Corp.*, 65 Md. App. 309, 500 A.2d 344 (1985). If a majority is not persuaded upon substantial evidence, the application must be denied. *Id.*

ORDER

For the reasons set forth in the foregoing Memorandum of Opinion, it is this 27th day of DEC., 2013, by the County Board of Appeals of Anne Arundel County, ORDERED, that the Petitioners' request for a variances for a 2 year time extension for the implementation and completion of a previously approved special exception and variances for a rubble landfill and a previously approved special exception for a sand and gravel operation are hereby **DENIED**.

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.

NOTICE: This Memorandum of Opinion does not constitute a building or grading permit. In order for the applicant to construct or retain any structures allowed by this opinion, or to perform or retain any grading allowed by this opinion, the applicant must apply for and obtain

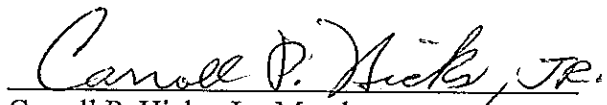
the necessary building or grading permit and any other approval that may be required to perform the work described herein.

COUNTY BOARD OF APPEALS
OF ANNE ARUNDEL COUNTY

VOTING TO GRANT:

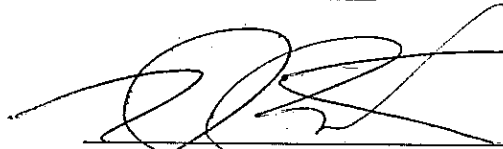


William C. Knight, III, Chairman



Carroll P. Hicks, Jr., Member

VOTING TO DENY:



W. Jay Breitenbach, Member



Doreen Strothman, Member

(John W. Boring, Vice Chairman, Robert R. Costa, III, Member, and William Moulden, Member, did not participate in this appeal.)