

1993 - 0304

RE: An Appeal for Special
Exceptions and a Variance to
the Zoning Regulations

HALLE COMPANIES/CHESAPEAKE
TERRACE,

Petitioners

: BEFORE THE
:
: COUNTY BOARD OF APPEALS
:
: OF ANNE ARUNDEL COUNTY
:
: CASE NOS: BA 120-90S (Halle),
BA 26-91S/BA 27-91V
:
: (Chesapeake Terrace)
:
: Hearings: April 28, 1992;
May 6, 1992; June 22, 1992;
:
: June 24, 1992; July 15, 1992;
July 16, 1992; August 25, 1992;
:
: August 31, 1992; October 22;
1992, November 4, 1992;
:
: November 17, 1992; November 24,
1992; May 25, 1993; July 28,
:
: 1993; August 26, 1993;
September 8, 1993

MEMORANDUM OF OPINION

SUMMARY OF PLEADINGS

This is an appeal from the denial of two special exceptions and a variance: for the Halle Companies (BA 120-90S), this is an appeal from the denial of a special exception to permit a sand and gravel operation in an RA district on property comprising 107.99 acres, located 695 feet along the south side of Patuxent Road, 1500 feet west of Bragers Road, Odenton; for Chesapeake Terrace (BA 26-91S/BA 27-91V) these are appeals from the denial of a special exception to permit a rubble landfill in an RA district and from the denial of a variance to permit a landfill closer to a residential area and closer to a property line than allowed for property comprising 481.6 acres (including the 107.99 acres for BA 120-90S) located 4300 feet along the southwest side of Patuxent Road, 1500 west of Bragers Road, Odenton.

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this area has been completed, it will be a benefit to the community over the existing conditions. For the same reason, the Board finds that granting the variances will not substantially impair the appropriate use or development of adjacent property. Since all activity will take place on the Petitioners' property and it will be a matter of filling an eroding area, the eventual effect on the neighboring property will be positive. The Board does not need to address the Critical Area criteria for granting variances since the property is not located within the Critical Area.

ORDER

For the reasons set forth in the foregoing opinion, it is this 23rd day of December, 1993, by the County Board of Appeals of Anne Arundel County, ORDERED that the appeals are hereby granted as follows:

Special Exceptions

The special exceptions for a sand and gravel operation and rubble landfill operation are granted with the following conditions:

1. Patuxent Road shall not be used as an entrance to the operation.
2. Conway Road is to be used as the entrance to the operations, with the following conditions:

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a. A right turn lane shall be constructed on eastbound Conway Road at Maryland Route 3 to a minimum length of 500 feet.

b. From the intersection of Patuxent Road and Conway Road to the entrance of the site, the road shall be improved with 12 foot travel lanes and 8 foot shoulders improved to county standards (pursuant to Article 26, §3-202(d), Anne Arundel County Code) where the county right-of-way exists. Additionally, the Petitioners shall pursue a diligent course to obtain the right-of-way from private property owners where possible.

c. The road improvements on Conway Road from Route 3 to Patuxent Road shall be constructed before any rubble landfill or sand and gravel operation begins; road improvements from the intersection of Conway Road and Patuxent Road to the entrance of the site are to be completed within one year of the start of operations.

d. The access obtained to the site from Conway Road shall be through a fee-simple right-of-way, not through an easement.

3. The life of the landfill operation, from the beginning of waste collection to the final waste acceptance, shall be limited to 12 years.

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4. The hours of operation for both the rubble landfill and sand and gravel operations shall be limited to 7:00 a.m. to 5:00 p.m. Monday through Friday (no weekend hours).

5. The Petitioners are to notify all land owners within three-quarters of a mile that they can opt to have the Petitioners replace a shallow well at the Petitioners' expense prior to and up until 12 months after commencement of the operations. The Petitioners are to notify all property owners within three-quarters of a mile within 60 days after Board approval of the operations. Commencement is defined as the onset of operations to begin work on the landfill.

6. The granting of the special exceptions neither approves nor denies railroad operations to bring rubble fill to the site. If a rail operation is to be used, the Petitioners shall receive further approvals from the County and other monitoring agencies.

7. Fencing shall be erected around the active operations to a height of six feet with only one lockable gate.

Variances

A variance to Article 28, §12-242(b)(13) is granted, establishing a variance of 760 feet; a variance to Article 28, §12-242(b)(14)(viii) is granted, establishing a variance of 100 feet.

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Both variances are subject to the following condition:

1. The fill used in the area requiring the variance shall be that which must be used for construction of a berm pursuant to Bill 12-93, (§12-242(b)(14)(vi)1.a & b), which reads:

Each berm shall be constructed with acceptable fill material limited to:

a. Rock and similar irreducible materials such as concrete, non-refractory brick, and asphalt created as a result of construction activities, mining, or regrading projects without limit as to size, provided voids are not formed into which overlaying soils may be washed; and

b. Topsoil intermittently layered with non-organic soil.

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 60 days of the date of this Order; otherwise they will be discarded.

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

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COUNTY BOARD OF APPEALS
OF ANNE ARUNDEL COUNTY

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Barbara M. Hale, Member

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David M. Schafer, Member

(Joseph A. Johnson, Member,
did not participate in this
appeal.)

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DISSENT

The undersigned Board member dissents from the majority on the granting of the special exceptions and variances. I would vote to deny all of the appeals.

As to the special exceptions, I believe that both fail in terms of the general standards for granting a special exception, specifically with regard to §12-104(1), pertaining to the public health, safety and welfare; §12-104(3), pertaining to noise and fumes; and §12-104(4) pertaining to the requested use conflicting with an existing road.

My concerns which cause me to deny the special exceptions focus mainly on traffic issues: the adequacy of Conway Road, the amount of truck traffic with its attendant noise and fumes, and the inability of the existing road network to handle the traffic generated by the operations. Conway Road west of Patuxent Road is unquestionably a focus of concern. This portion of Conway Road is a winding country road with narrow lanes and narrow shoulders. The projected 300 to 600 truck trips per day (per the testimony of the Petitioners' expert) and the number of trucks on this section of Conway Road would definitely create a safety problem. One of the Protestants testified that there have been two fatal accidents which have already occurred on this road. The size of the trucks

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and the number of trips per day would certainly make this a health and safety issue.

With the number of trucks which will be required to carry the materials and the amount of noise, smoke and fumes created by the trucks, I believe these operations are more objectionable than permitted uses. Because the trucks will cause this situation the length of Conway Road, the noise and fumes are not limited to affecting only the most immediate neighbors surrounding the site.

In my opinion, the operations also will conflict with the existing road network. Petitioners' Exhibit No. 29 confirms that the intersection of Maryland Route 3 and Route 424 already has failing levels of background traffic for the morning peak and evening peak hours. I am not convinced from any testimony before the Board that the Petitioners can mitigate this problem to the extent that granting the special exceptions will not have an adverse impact on the intersection. County law requires the traffic to be above a "D" level of service; the critical lane analysis which was prepared does not indicate that the steps taken will raise the traffic above that level.

I also believe that the Petitioners have not met the burden of proof on the issue of need. There are other sand and gravel operations in this area of the county. Although there may be an

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overall need for sand and gravel materials, I do not believe there is sufficient need in the site area.

Addressing the specific criteria for a rubble landfill as found in Bill 12-93, specifically Section 12-242(b)(20), the access to the operation is to be provided from a collector road, an arterial road, or a major highway. However, Conway Road remains the problem. There is no question that from Route 3 to Patuxent Road, Conway Road meets the definition of a collector road. Although the General Development Plan map refers to the entire length of Conway Road as a collector road, the portion west of Patuxent Road does not meet the current county standards for a collector road. This was confirmed by the director of the Department of Public Works in a letter dated August 24, 1993 (County Exhibit No. 8). The on-site inspection of this property and the surrounding road network confirms for this Board member that this portion of Conway Road is inadequate. The law does not state that a road is sufficient if it has a potential of becoming a collector road; the road should now meet the current county standards for a collector road if it is to be used by the number of trucks with the number of trips which are projected. The failure of Conway Road to meet the collector road definition using current county standards is a further reason that these appeals must fail. This issue relates again to the general standards found in §12-

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104(1) and (4), pertaining to safety issues and conflict with the existing road network.

The Petitioners have also failed to meet requirements regarding noise, specifically, §12-242(b)(14)(iii) and (b)(14)(viii). Although I will address my remarks about §12-242(b)(14)(viii) during my discussion regarding the variances, (b)(14)(iii) requires that noise levels "shall be measured at the highest normally accessible location of each affected dwelling to a maximum height of 30 feet above grade." (emphasis added) The testimony of the Petitioners' acoustical engineer was that the Petitioners could meet this requirement; however, he stated that he used previous research available to him and did not make actual noise measurements at the site. I believe that this section of Bill 12-93 requires such site measurement, and thus has not been met.

As to the variances which the Board has also granted, I believe that they should also be denied. I agree with the County's argument that if the Petitioners would use clean fill to restore the damaged and eroding areas, there would be no need for a variance. Furthermore, the Board has chosen to consider the granting of the variance to also act as a variance to the requirement in Bill 12-93 that noise abatement activity be located 300 feet from any dwelling and 100 feet from the property line (§12-

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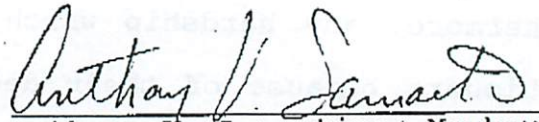
242(b)(14)(viii)). Since the Petitioners chose to use a berm as their noise abatement method, noise abatement activity will be within 200 feet of the closest residence. The Petitioners have not requested a variance to that Code section and I do not believe that the Board acted properly by using the requested variance to also grant the variance to setbacks for noise abatement activity. Furthermore, any hardship which exists was self-imposed by the Petitioners because of their decision as to where to place the noise abatement berm. In their attempt to meet §12-242(b)(14)(ii), which requires peak sound levels not to exceed 60 DBA and average sound levels not to exceed 55 DBA between 7:00 a.m. and 5:00 p.m., the Petitioners have encroached into the required 300 foot setback; therefore, the hardship created was self-imposed by the encroachment. I believe that the Petitioners did not produce any evidence to support the variance to the locational setbacks and the Board erred in granting this additional variance pertaining to noise abatement activity.

Although at the meeting which took place on October 4, 1993, I voted to grant the special exceptions and variances, I voiced at that time my concern about several issues and stated that I would make my final decision based on the language of the written opinion. The Board's opinion has not answered my concerns. It is not clear to me how much of Conway Road will be improved; the

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language in the condition urging the Petitioners to use "due diligence" to obtain privately owned right-of-way is not sufficient. I believe Conway Road should be improved to county standards the entire distance from the Patuxent Road intersection before these operations are permitted to begin.

For all of these reasons, I respectfully dissent from the majority opinion.


Anthony V. Lamartina, Member