

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

CASE NUMBER 2016-0196-S

TOLSON & ASSOCIATES, LLC

SECOND ASSESSMENT DISTRICT

DATE HEARD: OCTOBER 6, 2016

ORDERED BY:

DOUGLAS CLARK HOLLMANN
ADMINISTRATIVE HEARING OFFICER

PLANNER: JOAN A. JENKINS

DATE FILED: NOVEMBER 7, 2016

PLEADINGS

Tolson & Associates, LLC, the applicant, seeks a special exception (2016-0196-S) to modify a previously approved special exception to allow the expansion of a sand and gravel operation on property located along the north side of Capital Raceway Road, north of MD Rt. 3, Gambrills.

PUBLIC NOTIFICATION

The hearing notice was posted on the County's website 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. Warren Rich, the applicant's attorney, submitted the affidavit of Chris McKenna indicating that the property was posted on September 21, 2016 (Applicant's Exhibit 1). I find and conclude that there has been compliance with the notice requirements.

FINDINGS

A hearing was held on October 6, 2016, in which witnesses were sworn and the following evidence was presented with regard to the proposed variance requested by the applicant.

The Property

The subject site is located 5,800 feet north of Maryland Route 3 at the northwest end of Capitol Raceway Road. The entire site has a total area of 263.25 acres and is shown on Parcels 9, 10 and 239 in Blocks 4, 5, 10, 11 on Tax Map 36.

The site is primarily zoned RA-Rural Agricultural, RLD-Residential Low Density, OS-Open Space, and R5-Residential Districts. The site is not located in the Chesapeake Bay Critical Area. The property is partially developed with an existing sand and gravel mining operation and a rubble landfill operation.

The Proposed Work

The applicant is seeking a special exception to modify the special exceptions granted in Case Nos. BA 65-92S, BA 66-92S, BA 68-92S and BA 69-92S to expand the mining area of an existing mine onto land surrounding and contiguous to the current mine as shown on County Exhibit 2. The existing mining area is shown in blue and green on the attached copy of Applicant's Exhibit 2; the proposed expansion is shown in green.

The Anne Arundel County Code

§ 18-11-113, *et seq.*, governs sand and gravel mines. All special exceptions are subject to the requirements of § 18-16-304(a).

The Evidence Submitted At The Hearing

Joan A. Jenkins, a Planner with the Office of Planning and Zoning (OPZ), testified in favor of granting the requested relief. A mining operation has been a long standing use for many years on this property. The subject application also relates to lands that have been the subject of previous Board of Appeals approved special exceptions to allow a rubble landfill in a previously mined area. The current application seeks to expand the current mining operation.

The Department of Health commented that they have no objection to the referenced special exception provided the facility operates in accordance with the requirements of the surface Mine Permit #78-SP-0087-C issued by the Maryland Department of the Environment.

The Anne Arundel Soil Conservation District reviewed the special exception and defers to OPZ.

The Development Division (Regional Team) commented that a Preliminary Plan and Site Development Plan shall be submitted for approval. All Code requirements, including Adequacy of Public Facilities (with emphasis on traffic and adequate outfall), must be addressed prior to Preliminary Plan, which should be addressed prior to the hearing. The proposed development is subject to Forest Conservation regulations. The proposed development requires a 100-foot stream buffer, which must be provided if the special exception is approved and the project moves on to plan review.

The Long Range Planning Division commented that the 2009 GDP does not contain specific recommendations for this site, but does designate the site as Rural Agricultural on the Land Use Plan. The site is within the rural area of the General Development Plan's Development Policy Map and is within Growth Tier 4. No comprehensive rezoning applications were filed for this property during the latest comprehensive zoning process. The GDP does establish a policy to "protect natural resources prior to, during, and after mining of sand and gravel deposits." Much of the proposed expansion area encroaches on a portion of the designated

greenway (the Patuxent Wildlife Refuge segment) as shown in the County's Greenways Master Plan. Review parties should ensure that there are adequate protections for environmental resources and mitigation measures for adverse impacts, including impacts to waterways traversing the site and the designated greenway area to be reduced by the proposed expansion area. The submittal cover letter mentions that berms and vegetation will provide buffers between surrounding land uses and the mining operation, but plans are unclear whether new berms and vegetation are proposed as buffering for the expanded operation. However, an existing berm is noted along the northeast periphery of the existing mine area.

With regard to the specific special exception requirements for clay and borrow pits and sand and gravel operations, Ms. Jenkins testified that OPZ submits the following findings:

(1) All vehicular access to the site shall be provided from a collector road, an arterial road, a freeway, or a local road that serves only industrially zoned or commercially zoned property between the facility entrance and the first intersecting collector road, arterial road, or freeway in all directions. The site has an existing access road, Capitol Raceway Road, and facility entrance on Capitol Raceway Road. Neither the access road nor facility entrance will change as a result of the requested expansion. There will be no change in traffic. In BA 127-05S, the Board of Appeals determined that this access road/entrance satisfied this

requirement. Capitol Raceway Road directly serves only commercially-zoned or industrially-zoned property between Route 3 and the facility entrance.

(2) The extraction and removal operation may not be noxious, offensive, or otherwise objectionable to surrounding land uses. This requirement is preempted by State law.

(3) All significant archaeological sites shall be identified and preserved under the supervision of the OPZ. This provision is preempted by State law.

There are no known archeological sites in the expansion area.

(4) The active operation shall be surrounded by fencing at least six feet high with gates to limit access to the area. Fencing already exists around the site.

(5) Space on the site shall be adequate so that trucks using the facility are not stopped or parked on a road right-of-way. The established site access on Capitol Raceway Road has demonstrated that it is adequate to satisfy this requirement. This access will not change. The site has ample space so trucks will not stop or park on a road right-of-way.

(6) Except in a W3 district, the use of machinery in the excavation area shall be limited to that necessary to extract, screen, wash, and transport materials generated onsite and all material shall be removed from the excavation area to a processing site for any additional processing. This provision is preempted by implication in State law.

(7) Except in a W3 district, a permanent legible sign approved by the OPZ measuring at least four feet by eight feet shall be posted and maintained along

each public road abutting the property or, if the property does not abut a public road, one or more signs posted in locations that can be seen by the public. The sign or signs shall state that the property has been approved for a clay and borrow pit or sand and gravel operation, the special exception case number, the applicant's name, and the name and telephone number of the operator. The applicant indicates it will satisfy this provision.

(8) Reclamation activity for a distance of 1,000 feet from undisturbed areas may not increase the site grade above the grade of the adjacent undisturbed areas. This provision is preempted by State law.

(9) Offsite materials brought to the site of an operation other than for construction of a berm or for reclamation shall be restricted to the processing site. The applicant indicates it will satisfy this provision.

(10) Except in a W3 district, the hours of operation in an excavation area shall be limited to 7:00 a.m. to 5:00 p.m. Monday through Saturday. The applicant indicates it will satisfy this provision.

(11) Additional rights-of-way for widening or extension of existing roads shall be dedicated and deeded, as appropriate, if requested by the Department of Public Works or the State Highway Administration. The applicant has indicated that no additional rights-of-way for widening or extension of existing roads will be necessary.

(12) County inspectors shall be allowed to enter onto the site during normal business hours to ensure compliance with the terms of any special

exception and the requirements of this section. The applicant indicates it will satisfy this provision.

(13) The operation shall be at least 1,000 feet from any dwelling other than a dwelling located on the site of the operation that is otherwise permitted by law, except that the operation is allowed within 1,000 feet of a dwelling if:

(i) the sound level at all lot lines does not exceed an average of 55 dBA and a peak of 65 dBA. The applicant indicates it will satisfy this provision.

(ii) the operation is totally obscured from the sight of the affected dwelling at the highest normally accessible location of the dwelling to a maximum height of 30 feet above grade but, during the times set forth in subsection (10), the operation shall be obscured to the extent practical. This provision is preempted by State law.

(iii) berms are used for sight obstruction and noise abatement to the extent feasible and, if not feasible, an acceptable alternative is provided. The berms are constructed with processed fill, consisting of rock and similar irreducible material that does not permit the formation of voids into which overlaying soils may be washed, and topsoil intermittently layered with non-organic soil. At least 12 inches of soil covers all rock or irreducible material that is larger than eight inches. And the berms are stabilized with suitable vegetation. This provision is preempted by State law.

(iv) the excavation does not exceed a depth of 50 feet below the existing surrounding grade with angle of repose maintained during the excavation and the site is graded or benched to ensure safety at all times. This provision is preempted by State law.

(v) the excavation and any noise abatement method are located at least 300 feet from the affected dwelling and at least 100 feet from the lot line, but the distance may be reduced if a temporary easement is obtained from the affected property owner and the easement for the permitted time frame is contained in the special exception and approved by the County Office of Law. This provision is preempted by State law.

(vi) stabilization of the excavation area is accomplished with a cover material capable of supporting long-lived vegetation. This provision is preempted by conflict with State law.

(vii) reclamation is performed simultaneously with the excavation operation and completed within two years after the excavation operation has ceased. This provision is preempted by State law, and

(viii) work ceases immediately for a violation of this subsection or any conditions imposed by the Administrative Hearing Officer and, if there are three violations in a 12-month period, the portion of the special exception that allows work in the 1,000-foot area shall be rescinded and all reclamation shall be completed within 12 months. This provision is preempted by State law.

(14) The facility may incorporate a processing site for the stockpiling and processing of material generated onsite and offsite if all of the following requirements are met.

(i) Except in a W3 district, the processing site shall be at least 50 acres. material generated offsite and used for processing with onsite material in any 12-month period may not exceed 45% of the material generated onsite in the same period; material generated offsite may be used only for blending with material generated onsite; the use of machinery shall be limited to that necessary in the production of finished sand and gravel products from materials allowed under this subsection; hours of operation shall be limited to 7:00 a.m. to 5:00 p.m. Monday through Saturday; the time frame for the operation of the processing site may not exceed 25 years; and a crusher or similar reduction equipment is prohibited. The applicant does not anticipate importing offsite material to the site.

(ii) All stationary equipment and stockpiles shall be located at least 1,000 feet from a dwelling other than an onsite dwelling and at least 300 feet from a road other than an internal road used exclusively for onsite operations. All stationary equipment exists as part of the ongoing mining operation and will remain in the same location. The expansion will utilize the same processing and facilities as the existing operation.

(iii) Weight scales shall be operational at all processing sites. The applicant has indicated that the existing weight scale will remain onsite thereby satisfying this requirement.

(15) A maximum time period for operation of the facility shall be established as part of the special exception approval and may not be renewed. This provision is preempted by State law.

(16) The site shall be cleared of litter and scattered refuse daily. This provision is preempted by State law.

(17) There shall be a 50-foot natural buffer between the operation and nontidal wetlands. This provision is preempted by State law.

(18) A facility located in an RA district shall be located on a road other than a scenic or historic rural road. Neither Capitol Raceway Road nor Route 3 are Scenic or Historic Rural roads and are not depicted on the County's "Scenic and Historic Rural Roads" map.

(19) Combustion ash, including bottom ash and fly ash, may not be used as fill in reclamation of a clay and borrow pit or a sand and gravel operation. This provision is preempted by State law.

As to the general special exception standards in § 18-16-304, Ms. Jenkins testified that OPZ has concluded that the proposal will not be detrimental to the public health, safety, or welfare as the expansion will operate in a substantially similar fashion and will use the same processing and facilities as the existing operation. Truck traffic will not increase as a result of the expansion. The facility

will be compatible with the appropriate and orderly development of the RA district. The processing facilities of the existing operation will be utilized for the expansion. The facility will be no more objectionable with regard to noise, fumes, vibration, or light than other permitted uses. The location is ideal due to its relative isolation and the ability to use an existing operation. The proposed use would not conflict with existing or programmed public uses as there are no public facilities, services, or schools in the immediate area. The impact to public roads is reasonable and will not be overly burdensome or detrimental. The proposed use has the written recommendation and comments of the Health Department and OPZ. The applicant must provide sufficient evidence at the hearing that demonstrates public need and market for the resources mined at the site. The use will be able to maintain adherence to the criteria for the specific use. There is no critical area on the site. The requirement that the applicant demonstrate the ability to comply with the requirements of the Landscape Manual is preempted by State Law.

Based upon the specific standards set forth under § 18-16-304 under which a special exception may be granted, Ms. Jenkins testified that OPZ recommends approval of the requested special exception to allow the expansion of the existing sand and gravel mining operation as shown on County Exhibit 2.

The applicant was represented at the hearing by Warren Rich, Esquire, and Peter Hershey, Esquire, who presented evidence through Kyle Murray of Chaney Enterprises, who has been involved in overseeing the ongoing mining operation

for four years, and through Timothy J. Martin of Bay Engineering, Inc., the applicant's engineers, that the proposal meets all applicable state and County laws. Scott Harvey was accepted as an expert witness as to noise and testified that the operation would meet all laws and regulations. Ken Schmid was accepted as an expert witness in traffic and testified that the expansion of the mining operation would have little or no impact on traffic nearby.

There was no opposition to the application. There were no other witnesses or evidence presented at the hearing. The Hearing Officer did not visit the subject property.

DECISION

This case concerns the same property the subject of a decision dated December 8, 1993 by the Board of Appeals in BA 65-92S, BA 66-92S, BA 68-92S and BA 69-92S which permitted a sand and gravel operation and a rubble landfill on the subject property. Subsequently, the applicant sought and obtained a variance from this Office in Case No. 1998-0423-V to extend the time to complete the permitting process and have the special exception in operation. That decision was appealed to the Board of Appeals in BA 70-99V, which was dismissed on January 30, 2009.

The applicant timely applied for an extension to complete the permitting process in Case No. 2010-0026-V, which was granted on March 23, 2010. The applicant again timely applied for an extension to complete the permitting process in Case No. 2012-0002-V, which was granted on March 1, 2012.

The law is settled that a special exception use is a use that the legislative body recognizes as compatible with permitted uses, subject to a public hearing to show compliance with the underlying standards. *Schultz v. Pritts*, 291 Md. 1 (1981); *Peoples Council for Baltimore County, et al v. Loyola College in Maryland*, in the Court of Appeals of Maryland 137, September Term 2007, (September 9, 2008).

The evidence, as set forth above, shows that the applicant has met, or will be able to meet, the requirements for a special exception for a sand and gravel mining operation found in § 18-11-113. It is of some weight that the applicant has been operating a sand and gravel operation under the special exceptions granted by the Board of Appeals over twenty years ago without any apparent problem.

The standards governing the grant of a special exception to are found in § 18-16-304 of the Code. I make the following affirmative findings:

- (1) The use will not be detrimental to the public health, safety, and welfare;
- (2) The location, nature, and height of each building, wall, and fence, the nature and extent of landscaping on the site, and the location, size, nature, and intensity of each phase of the use and its access roads will be compatible with the appropriate and orderly development of the district in which it is located;
- (3) Operations related to the use will be no more objectionable with regard to noise, fumes, vibration, or light to nearby properties than operations in other uses allowed under this article;

(4) The proposed use will not conflict with an existing or programmed public facility, public service, school, or road;

(5) The proposed use has the written recommendations and comments of the Department of Health and the Office of Planning and Zoning;

(6) The applicant has presented sufficient evidence of public need for the use;

(7) The applicant has presented sufficient evidence that the use will meet and be able to maintain adherence to the criteria for the specific use;

(8) The application will conform to the critical area criteria for sites located in the critical area; and

(9) The administrative site plan demonstrates the applicant's ability to comply with the requirements of the Landscape Manual.

For these reasons, I conclude that the applicant has complied with the requirements of § 18-16-304 to allow the requested modification.

ORDER

PURSUANT to the application of Tolson & Associates, LLC, petitioning for a special exception to modify a previously approved special exception to allow the expansion of a sand and gravel operation,

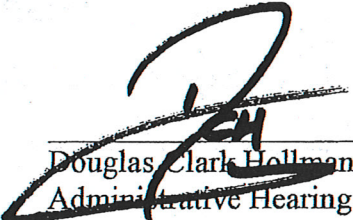
PURSUANT to the notice, posting of the property, and public hearing and in accordance with the provisions of law, it is this 7th day of November, 2016,

ORDERED, by the Administrative Hearing Officer of Anne Arundel County, that the applicant is hereby **granted** a special exception to modify the

previously approved special exceptions granted by the Board of Appeals in BA 65-92S, BA 66-92S, BA 68-92S and BA 69-92S to allow the expansion of a sand and gravel operation on property located along the north side of Capital Raceway Road, north of Route 3, Gambrells as shown on County Exhibit 2.

The special exception granted in this decision is subject to the following conditions:

1. All of the terms and conditions of the Order of the Board of Appeals of December 8, 1993 shall remain in full force and effect and are unaffected by this Order.
2. The provision of paragraphs number 3, 5, 11 and 12 of the Administrative Consent Order of January 31, 1997 between MDE on the one hand and James Cunningham and the former applicant on the other hand are incorporated by reference and made a part of this Order. The failure to comply with any of these conditions shall be a violation of this variance.
3. The applicant shall proceed promptly to obtain all approvals, shall proceed promptly to complete the special exception and shall proceed promptly to have the special exception in operation as soon as possible.



Douglas Clark Hollmann
Administrative Hearing Officer

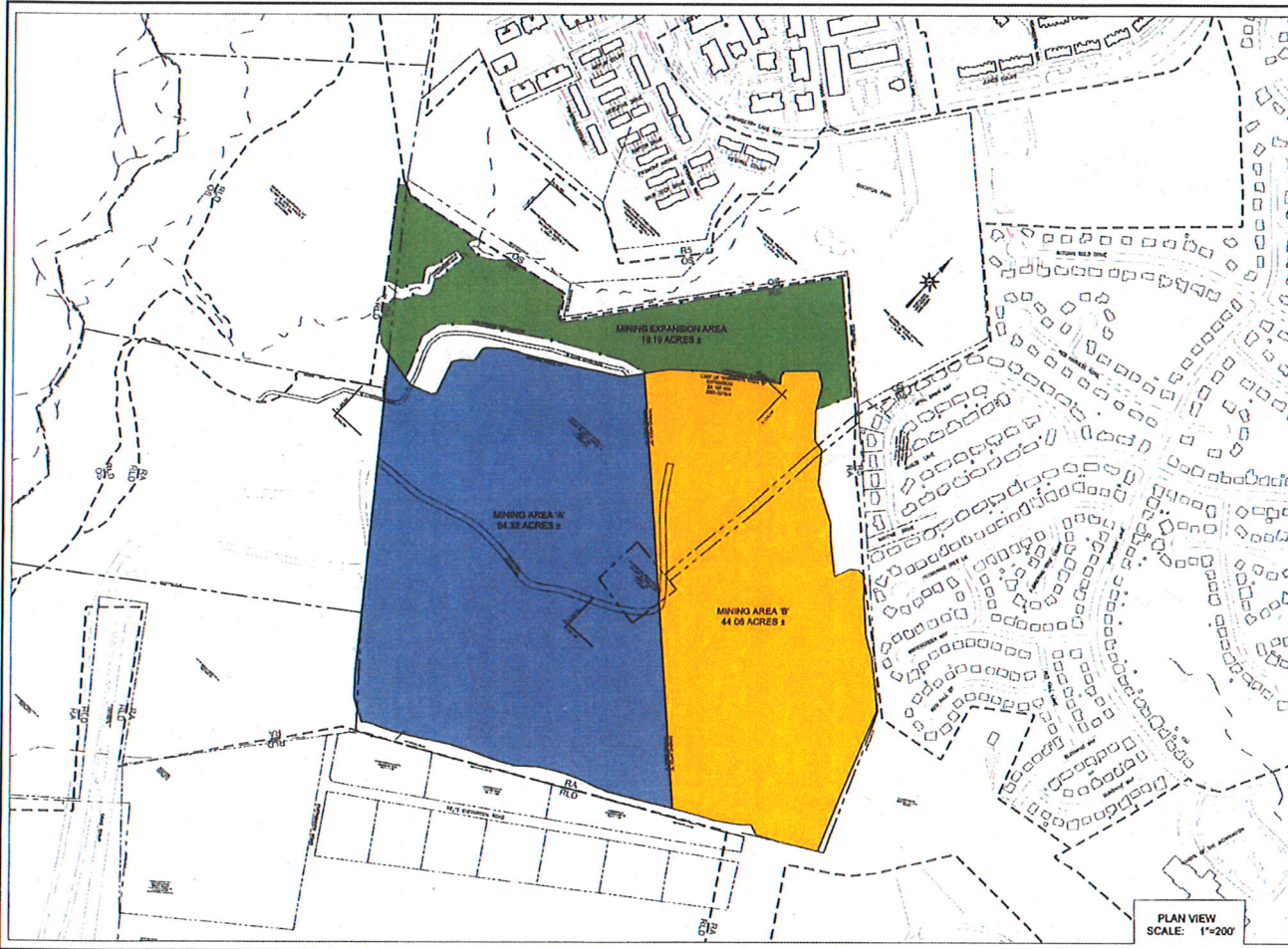
NOTICE TO APPLICANT

Any person, firm, corporation, or governmental agency having an interest in this Decision and aggrieved thereby may file a Notice of Appeal with the County Board of Appeals within thirty (30) days from the date of this Decision.

Further, § 18-16-405(a) provides that a special exception that is not extended or tolled **expires by operation of law** unless the applicant **within 18 months** of the granting of the variance or special exception (1) obtains a building permit or (2) files an application for subdivision. Thereafter, the special exception shall not expire so long as (1) construction proceeds in accordance with the permit or (2) a record plat is recorded among the land records pursuant to the application for subdivision, the applicant obtains a building permit within one year after recordation of the plat, and construction proceeds in accordance with the permit.

If this case is not appealed, exhibits must be claimed within 60 days of the date of this Order, otherwise they will be discarded.

PLOTTED: Sep 29, 2011 11:23AM
 INCLUDED: 00001 & 00002 154132 M&C-POM-Reg-154132 ES TOPOGRAPHY Map 154132 M&C-POM-Reg-154132



MINING AREAS EXHIBIT NAME: RESOURCE CONSERVATION GROUP LOCATION: CROFTON, MARYLAND TOWN MAP NO. BLOCKS & PARCELS 19.1.239 FOURTH DISTRICT JANE FARMER COUNTY	
Bay Engineering, Inc. 10000 Crofton Blvd Crofton, MD 21114 Phone: 410-286-1111 Fax: 410-286-1112 Email: info@bayeng.com	SHEET NO. 1 OF 1 DATE: 09/29/11 DRAWN BY: [Name] CHECKED BY: [Name] PROJECT NO.: [Number]