2016-01

REPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 361

September Term, 2015

FORKS OF THE PATUXENT IMPROVEMENT ASSOCIATION, INC., ET AL.

v.

NATIONAL WASTE MANAGERS/ CHESAPEAKE TERRACE

Krauser, C. J.,
Kehoe,
Leahy,

JJ.

Opinion by Kehoe, J.

Filed: October 25, 2016

The Association[1] appealed the court's judgment and poses one issue, which we have re-worded:

> Did the Board's evenly-divided 2-2 vote constitute a denial of National's application for a variance?

National filed a cross-appeal and presents three questions, which we have consolidated and re-phrased:

> Did the circuit court err in vacating and remanding the Board of Appeals' decision rather than reversing the Board's decision and ordering the Board to approve the variance application?

As we will explain, we agree with the circuit court's conclusions that the case must be remanded but see the relevant legal issues somewhat differently than did the circuit court and the members of the Board. Therefore, we will vacate the court's judgment and remand this case for further proceedings consistent with this opinion.

Background

National owns a 481-acre tract of land in Anne Arundel County (the "Project Site"). In 1993, National applied for and received a special exception and variances from the Board to construct and operate a rubble landfill and a sand and gravel operation on the Project Site. The Board's approval was affirmed by the Court of Appeals in *Halle v. Crofton Civic Ass'n.*, 339 Md. 131 (1995). After obtaining the zoning approval, National had 18 months to obtain a construction permit for the project; if it failed to do so, the

[1] Several individuals, Ulis Fleming, Catherine Fleshman, Robert Fleshman, Sr., Diana Lane, Gregory Lane, Andrew Meyer, Sue Ellen Meyer, Michael Murphy, Stacy Murphy, Ann Marie Thomas, and Leon Thomas, also appealed the court's judgment. We gather that they are members of the Association.

3. Phase III entails engineering design. This phase takes all of the information gathered, especially the hydrogeological information from Phase II, and designs a landfill with these considerations in mind. *See* COMAR 26.04.07.16.

4. Phase IV is a review stage. The MDE uses this period to review all the information from Phases I–III to ensure that all of the statutory and regulatory requirements have been met. It then begins to prepare any and all documents it will need to present to the public on the proposed permit. During this phase, the MDE also drafts a proposed permit for the site.

5. Phase V is the public comment stage. The MDE advertises and holds a hearing on the draft permit and invites the public to submit comments on the proposal. After the public comments are received, the MDE engages in a final review, and then either issues the permit as is, issues it with modifications, or denies the permit.

National began this process in 1991, in conjunction with its then-pending application for a special exception. In 1994, however, the MDE suspended review because the County had amended its Solid Waste Management Plan to omit any reference to the Project Site.[3] Litigation between National and the County on the amendment culminated in National's favor by means of an unreported decision of a panel of this Court in *National Waste Managers, Inc. v. Anne Arundel County*, No. 810, September Term, 1997, filed March 25, 1998 ("*National I*"). The County then took the position that National's special exception permit had lapsed pursuant to a prior version of what is now County Code § 18-16-405. This resulted in another lawsuit, which was also finally resolved in National's favor by our decision in *National Waste Managers, Inc. v. Anne*

[3] MDE may not issue a permit for a proposed landfill unless the project is consistent with the county's Solid Waste Management Plan. *See* Environmental Law Article § 9-201(a)(3)(ii).

after a public hearing. The County Code provides that aggrieved persons may appeal an AHO's decision to the Board, which conducts its own *de novo* proceeding. County Code § 18-16-402. Appellants filed such an appeal.

The Board's hearing in this case began on June 6, 2013 and was completed on October 15th of that year. The Board issued an evenly divided 2-2 decision on December 27, 2013. The Approving Members voted to grant the application and the Denying Members voted to deny it. After summarizing the evidence presented to the Board, and explaining the differing conclusions that each group drew from that evidence, the Board concluded:

> The legal effect of the inability of the Board to reach a majority is that [National] did not meet [its] burden of persuasion and the request for variances for time extension must be denied. When an appeal of this nature is placed before the Board, it is heard *de novo,* and the burden of proof and persuasion is placed upon [National]. 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.*

National filed a petition for judicial review of the Board's decision in the circuit court. It presented a variety of arguments to the circuit court, but only two of them are relevant to the current appeal: (1) whether the Board's evenly-divided vote had the legal effect of denying National's application; and (2) whether the Denying Members applied the correct legal standard in assessing the evidence. On the first issue, the circuit court concluded that the Board's 2-2 vote constituted a denial of the application. However, on the second issue, the court concluded that the Denying Members relied on an erroneous legal standard. Thus, the court vacated the Board's decision and remanded the case for

Lohrmann was not a judicial review proceeding but rather was an appeal from a declaratory judgment to the effect that an evenly-divided decision of the Anne Arundel County Board of Appeals left the decision of the administrative hearing officer in effect. *Id.* at 311–12. In our analysis, we began by noting that, pursuant to the County's charter, the Board of Appeals exercises original *de novo* jurisdiction over all matters that come before it. *Id.*[6] We concluded that, because the Board was exercising original jurisdiction:

> [i]t was as though the zoning officer had made no decision. In that situation, [the applicant] had the same burden it had before the zoning officer—"the burden of proof (including the burden of going forward with the evidence and the burden of persuasion) of all questions of fact." [County Code] § 13-341.2(a) . . . . *The evenly-divided Board decision demonstrates that it did not meet that burden. Accordingly, the effect of the Board's action was to deny [the applicant's] request for a special exception.*

Lohrmann, 65 Md. App. at 319–20 (citation omitted, emphasis added).

In its cross-appeal, National asserts that *Lohrmann* is not controlling because "the Court of Appeals on two occasions addressed cases involving 'split votes' in *de novo* appeals to Boards of Appeal, from decisions of zoning hearing officers." National cites *Levy v. Seven Slade, Inc.*, 234 Md. 145 (1964) and *Stocksdale v. Barnard*, 239 Md. 541 (1965), in support of this proposition. National concedes, however, that the *Lohrmann* Court distinguished both *Levy* and *Stocksdale* because in neither case "was an issue raised as to the effect of a split decision on a *de novo* administrative appeal. No doubt for that

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[6] Section 603 of the County Charter provides, in pertinent part, that "[a]ll decisions by the County Board of Appeals shall be made after notice and hearing de novo upon the issues before said Board."

substantial justice done. A variance may be granted only upon an affirmative finding that:

* * * *

(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.

* * * *

(e) Required findings. A variance may not be granted under subsection (a) or (b)[7] unless the Board finds that:

(1) the variance is the minimum variance necessary to afford relief;

(2) the granting of the variance will not:

(i) alter the essential character of the neighborhood or district in which the lot is located;

(ii) substantially impair the appropriate use or development of adjacent property;

(iii) reduce forest cover in the limited and resource conservation areas of the critical area;

(iv) be contrary to acceptable clearing and replanting practices required for development in the critical area or bog protection area; or

(v) be detrimental to the public welfare.[8]

As the applicant, National "has the burden of proof, including the burden of going forward with the production of evidence and the burden of persuasion, on all questions of fact." County Code § 18-16-301.

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[7] Subsection (b) sets out criteria for variances from the County's critical area and bog protection program.

[8] The parties do not dispute that the Board has the authority to grant a time variance. *See Lanzaron v. Anne Arundel County*, 402 Md. 140, 143 (2007) ("We hold that the variance power at issue in this case authorized the Board to issue time variances, and that under the language used here, the general variance power found in Article 3 reaches all provisions in Article 28 of the Anne Arundel County Code (the Zoning Code) except where the general power is restricted by specific language limiting the general variance power.").

Diligence

On January 3, 2011, the Board granted a variance which allowed National two additional years, that is, until January 3, 2013, to obtain the necessary permits. The Denying Members concluded that National failed to demonstrate that it would suffer unnecessary hardship because it had failed to diligently pursue its approvals in this period. The evidence before the Board was mixed.

At the hearing, National called Edward Dexter, the chief of MDE's landfill review program, as a witness. Dexter testified that the period of time MDE took to review landfill applications varied, "but usually . . . three to seven [years] is typical." Although his testimony was guarded as to the specifics, Dexter indicated that a previous environmental consultant hired by National to coordinate its application process had not been entirely satisfactory but that National had hired a different consultant shortly after the Board granted the 2011 variance.

Veronica Foster, a registered civil engineer who is the current "team leader" for National's efforts to obtain the MDE permits, testified that the prior team leader retired in 2011 "for a number of reasons, including his health." A letter dated December 20, 2012 from Dexter to National's counsel stated that "[o]ver the last year, . . . National has been actively pursuing this application." Foster took charge of the project in January, 2012. Additionally, Dexter testified that National had, "generally speaking," been diligent in pursuing approval since 2001. With regard to the past two years, Dexter further testified that National had "been aggressively pursuing" the project.

under County Code § 3-1-207(a)(2). A lack of diligence in itself is insufficient to conclude that National did not face an unnecessary hardship. A lack of diligence is relevant only if National could have obtained the permits within the 2011–2013 time period if it had acted diligently. The Denying Members did not address this issue.

The Minimum Variance Necessary

The Denying Members concluded that a variance for an additional two years was not the minimum variance necessary to grant relief to National. They reasoned that, if the past is an accurate predictor of the future, National will have neither MDE nor final County approval within two years. Therefore, they reasoned, the application failed to satisfy County Code § 3-1-207(e)(1)'s requirement that the Board grant only the minimum variance necessary to afford relief to the applicant. We disagree with the Denying Members' interpretation of the "minimum variance necessary" requirement and with their application of that statutory standard to the evidence in this case.

We will start with the evidence. Dexter, the MDE official supervising the review of National's application, testified that he anticipated that the MDE would complete its Phase III review in calendar year 2013,[9] and all of the remaining phases within two years. Veronica Foster, National's land fill design expert and the team leader for the project, agreed. Linton Pumphrey, the Association's expert, testified that the project also required additional permitting from the County and that the County process would take

[10] The record indicates that Phase III is the most complex and time-consuming stage of MDE's review process.

Site. This is not the proper frame of analysis, and thus the Denying Members' denial of the variance based on the "minimum necessary" criterion was error.

The Essential Character of the Neighborhood / Impairing the Use and Development of Surrounding Properties / Detrimental to the Public Welfare

The Denying Members concluded that granting "the requested variances to the time limits for the implementation and completion" of the landfill project "will alter the essential character of this neighborhood,"[10] "will substantially impair the appropriate use or development of surrounding properties,"[11] and will therefore be "detrimental to the public welfare."[12] Their reasoning for each conclusion was essentially the same (emphasis added):

> This community has been evolving and changing in the 20 years since the initial grant of the special exceptions and the variances for this project. As such, the *community has been actively awaiting* the finalization of this project during that time frame and diligently pursued [its] status[.] 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.
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> * * * *
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> 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.*
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> * * * *
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> The time extension will be detrimental to the public welfare.

As we understand the Denying Members' analysis, they concluded that:

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[10] Section 3-1-207(e)(2)(i).

[11] Section 3-1-207(e)(2)(ii).

[12] Section 3-1-207(e)(2)(v).

County Council has authorized the Board to extend the time frame for obtaining permits through the variance process. *Anderson* was a special exception case and this appeal involves a variance, and we recognize that the statutory criteria are somewhat different. Nonetheless, *Anderson's* underlying logic remains pertinent. We conclude that uncertainty created by National's pending application among neighboring property owners is not, by itself, a sufficient basis to deny the variance.

However, we do not agree with the Approving Members' reasoning as to the statutory criterion that the variance must not "alter the essential character of the neighborhood." The Approving Members concluded that it was inappropriate to consider whether the proposed use will adversely impact the surrounding neighborhood (emphasis added, citation omitted):

> The granting of the requested variance to the time limits . . . will not alter the essential character of this neighborhood. [W]e find that the character of the neighborhood is that of mixed uses that range from rural residential to commercial resources in 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 the rubble land fill . . . 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 that give 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.
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> *The time extension will not be detrimental to the public's welfare. 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 variances merely permit the applicant to complete the application process. . . . 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.*

> they may be located . . . . That is why the uses are designated special exception uses, not permitted uses. The inherent effects notwithstanding, the legislative determination necessarily is that the uses conceptually are compatible in the particular zone with otherwise permitted uses and with surrounding zones and uses already in place, *provided that, at a given location, adduced evidence does not convince the body to whom the power to grant or deny individual applications is given that actual incompatibility would occur.*

The critical importance of compatibility between existing uses and the proposed use is certainly reflected in Anne Arundel County's variance criteria. An incompatible project will "alter the essential character of the neighborhood . . . in which the lot is located,"[13] and will "substantially impair the appropriate use and development of the surrounding property."[14]

The reasoning of the Board when it granted National's special exception application in 1993 conformed to this principle. The judicial review proceeding arising out of the Board's grant of National's special exception and variance application in 1993 culminated in *Halle v. Crofton Civic Association*, 339 Md. 131 (1995). In its opinion affirming the Board's decision, the Court commented:

> After three months of deliberation, an on-site visit by the members of the Board to the property, and a review of the record taken as a whole—consisting of more than 2,000 pages of transcribed testimony and voluminous documents—the Board determined that the landfill would advance the public welfare of the County. It recognized the need for the landfill, *concluded that its location was well suited to the use, and determined that the special exception and variance proposals would benefit the vicinal community* by reclaiming and restoring previously mined ravines and properties "cratered" up to the property line.

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[13] BCC § 3-1-207(e)(2)(i).

[14] BCC § 3-1-207(e)(2)(ii).

County. *See National II*, 135 Md. App. at 614. Therefore, the 20 year time-frame used by the Denying Members was inappropriate.

On remand, as part of its analysis of the statutory criteria[15] contained in § 3-1-207(e), the Board must consider whether there have been sufficient actual changes to the neighborhood surrounding the Project Site that occurred during or after 2001 to render National's special exception no longer compatible with the current established character of the neighborhood.

III.

In its cross-appeal, National argues that the Board's decision constitutes an "impermissible change of mind" from the prior decisions of the Board. We do not agree.

The cases cited by National—*Gerachis v. Montgomery County Board of Appeals*, 261 Md. 153, 156 (1971); *Whittle v. Board of Zoning Appeals*, 211 Md. 36, 49–50

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[15] County Code Section 3-1-207(e) states in pertinent part:

> (e) Required findings. A variance may not be granted . . . unless the Board finds that:
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> (1) the variance is the minimum variance necessary to afford relief;
>
> (2) the granting of the variance will not:
>
> (i) *alter the essential character of the neighborhood or district in which the lot is located;*
>
> (ii) *substantially impair the appropriate use or development of adjacent property*;
>
> (iii) reduce forest cover in the limited and resource conservation areas of the critical area;
>
> (iv) be contrary to acceptable clearing and replanting practices required for development in the critical area or bog protection area; or
>
> (v) *be detrimental to the public welfare.*

(2) The relevant period to measure National's diligence or lack thereof is 2011–2013, which was the extension period granted by the Board's most recent variance. Furthermore, a finding of a lack of diligence is insufficient to deny a variance; the Board must also find that the lack of diligence caused an undue delay in MDE's review process.

(3) National's requested relief in the variance application, namely, that the Board allow it two additional years to obtain all required permits, did not violate the "minimum variance necessary" restriction of County Code § 3-1-207. The Denying Members' conclusion to the contrary was legally erroneous.

(4) Both the Denying Members and the Approving Members used incorrect legal analyses to determine whether granting the variance application would change the essential character of the neighborhood, impair the use and development of surrounding properties or otherwise be detrimental to the public welfare. The proper frame of analysis must take into account whether the special exception remains compatible with the surrounding area as the area has changed since 2001.

THE JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY IS VACATED AND THIS CASE IS REMANDED TO IT IN ORDER FOR THE CIRCUIT COURT TO REMAND THIS CASE TO THE BOARD FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. APPELLEE TO PAY COSTS.