

**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
July 25, 2018**

SUPPLEMENTAL 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, Odenton¹.

Findings and Conclusion

This case has most recently been before the Board of Appeals for a de novo appeal of the above captioned request. The Board heard testimony and received evidence on June 6, August 14 and 15, and October 15, 2013, in support and in opposition to the request. After a review of the testimony and evidence, on December 27, 2013, the Board issued a split decision on the

¹ In 1993, the Board of Appeals granted the Petitioners special exceptions for a sand and gravel operation (BA 120-90S), and for a rubble landfill with variances (BA 26-91S and BA 27-91V). The Anne Arundel County Code ("Code") requires that building permits for special exceptions be obtained within 18 months. The Petitioners, as of the most recent hearing before the Board in 2013, had not applied for building permits. The Board had previously granted time extensions in 2004, 2006, and the most recent grant was in 2011 (Case Numbers BA 10-09V and 11-09V).

Petitioners' application for a two-year time extension, effectively denying the Petitioners' request. A timely Petition for Judicial Review to the Circuit Court for Anne Arundel County, Maryland was filed on January 2, 2014. On September 15, 2014, the Circuit Court for Anne Arundel County heard arguments from the parties and held the matter *sub curia*. The Circuit Court issued an Order and Memorandum Opinion on February 19, 2015, concluding that the matter was remanded to Board of Appeals for further proceedings consistent with the reasons set forth in its Memorandum Opinion. A Motion to Alter and Amend Judgment and a response to the same were considered by the Circuit Court, and denied, on April 6, 2015. An appeal was noted on May 5, 2015 to the Court of Special Appeals. On October 25, 2016 the Court of Special Appeals vacated the judgment of the Circuit Court and remanded the matter to the Circuit Court for the purposes of remanding the matter to the Board of Appeals, consistent with the reported opinion of the Court of Special Appeals. See, *Forks of the Patuxent v. Nat'l Waste Mgrs.*, 230 Md. App. 349 (2016). A Writ of Certiorari was issued by the Court of Appeals on February 3, 2017. The Court of Appeals issued a reported opinion on June 21, 2017 vacating the judgment of the Court of Special Appeals and remanding the matter to that Court with instructions to vacate the judgment of the Circuit Court for Anne Arundel County, and instruct that Court to remand to the Board of Appeals for further proceedings in conformance with the Court of Appeals' opinion.

The Court of Appeals held (and confirmed) that the split decision of the Board was a denial of the requested extension. However, the Court determined that the findings of the denying members of the Board were unsupported by substantial evidence as to the Petitioners' diligence in pursuing the MDE and County permits and, therefore, arbitrary and capricious. The Court of Appeals also ruled that the denying Board members' findings regarding whether the requested time extension was the minimum necessary to afford relief were legally erroneous, and their findings regarding the impact of the extension on the surrounding neighborhood and

adjacent property were based on an erroneous standard. The Court of Appeals directed the Board of Appeals to:

... resolve the relevant issue which, in 2013, when the decision was made, was what impact, if any, the requested two-year extension to 2015 would have on the character of the neighborhood, the appropriate use or development of adjacent property, or the public welfare, accepting as fact that there was no lack of diligence on the part of [the Petitioners] or adverse impact on the neighborhood or adjacent property warranting a rejection of an extension as of the Board's decision in 2011."

The Board of Appeals, having reviewed the entire record of evidence and testimony presented in 2013, and having heard oral argument on July 25, 2018, finds that the Petitioners' request for a two-year time extension should be granted. We find that the prior two granting Board members were correct in their reasoning in support of the variances and we fully adopt their findings and conclusions as set forth in that opinion. We further reject the findings of the two denying Board members as they were clearly erroneous in their findings and conclusions.

We turn now to the question of what effect the further passage of time has had on the instant appeal. For this analysis, we focused on the Anne Arundel County Code, which speaks directly to the issue of tolling, and on the Maryland Court of Appeals' and Court of Special Appeals' opinions for guidance. We conclude that the special exception and variances have been tolled and that the Order of the Board contained herein will extend the approval for an additional two years from the date hereof.

Turning first to the County Code, there are several sections thereof that are directly on point. Section 18-16-405(a) of the Code mandates that "[a] variance or 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." (emphasis added). Section 18-16-405(b) and (c) permit applicants to request extensions to subsection (a), as here. Section 18-16-405(d) provides specifically that "pendency of litigation may toll the time periods set forth in subsection (a) to the extent provided

by law.” (emphasis added). The plain language of these Code sections makes clear that tolling was contemplated by the County Council when the law was enacted.

In our review of the Court decisions, we have a rare occurrence. Here, the Court of Special Appeals has concluded that tolling is appropriate in *National Waste Managers, Inc. v. Anne Arundel County*, 135 Md. App. 585 (2000), a case involving this very landfill. In *National Waste*, the Court of Special Appeals held that the two-year validity period for the special exception approval to operate this exact landfill was tolled during the course and duration of the litigation challenging both the approval and the permits needed to operate the landfill. The Court analyzed cases from other states related to tolling in reaching its conclusion. The *National Waste* opinion, and the background of reasoning contained therein, was later cited by the Court of Appeals in *City of Bowie v. Prince George’s County Planning Board of the Maryland-National Capital Park and Planning Commission*, 384 Md. 413, at 438-9 (2004). There, the Court of Appeals concluded that “[w]hen a developer cannot proceed administratively because of litigation..., the time period within which an applicant ... must take further action ... is to be tolled during the time that litigation is pending.”

In this case, the Petitioners could not proceed toward development during the various appeals since the MDE would not process the application with litigation pending. Therefore, tolling is appropriate by both Code and caselaw. The tolling of the time constraints for implementing the variances and special exceptions preserves the applicants’ rights and, we concur with the words of the Court of Appeals in *City of Bowie v. Prince George’s Co., et al*:

We are confident that we have not occasioned any mischief because such a provision serves to protect the rights of the developer, while permitting a challenging party to proceed with its petition for judicial review, by avoiding a war of attrition, motive or effect. What we do is to avoid the mischief that could otherwise occur if litigation is used solely to cause administrative deadlines to be missed.

For these reasons, the Petitioners' request has been tolled since their original request for the subject variance, and we will grant a two-year time extension from the date of issuance of this Order.

We are not without sympathy, however, for the citizens in the surrounding community that live under the shadow of a future rubble landfill on the subject property, if, as and when such landfill may begin operation. This special exception was originally granted by this Board in 1993. The near constant litigation and protracted approval process, coupled with regulatory changes, have grossly extended the "life" of this rubblefill. Perhaps a mechanism could be provided, through legislation, so that the underlying approval could be re-examined to determine the current merit of the previously approved special exception and variances. While the Board's jurisdictional limits preclude development of a mechanism to address this inadvertent extension here, we can envision an appropriate legislative remedy arising elsewhere. Perhaps it is time...

ORDER

For the reasons set forth in the foregoing Memorandum of Opinion and this Supplemental Memorandum of Opinion, it is this 19th day of Oct, 2018, by the County Board of Appeals of Anne Arundel County, ORDERED, that the Petitioners' request for a variance for a two-year extension of time for the implementation and completion of a previously approved special exception and a variance for a two-year extension for previously approved variances for a rubble landfill and for a sand and gravel operation is hereby **GRANTED**.

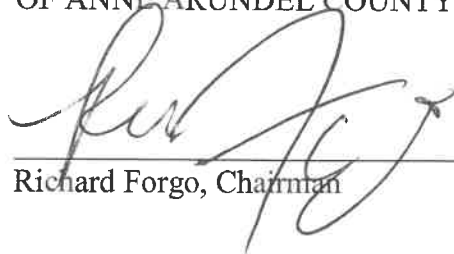
Any appeal from this decision must be in accordance with the provisions of Section 604 of the Charter of Anne Arundel County, Maryland.

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

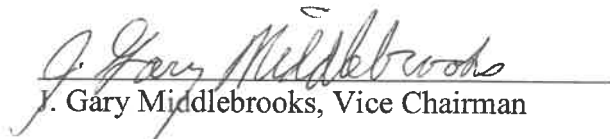
Any notice to this Board required under the Maryland Rules shall be addressed as follows: Anne Arundel County Board of Appeals, Arundel Center, P.O. Box 2700, Annapolis, Maryland 21404, ATTN: Deana L. Bussey, Clerk.

NOTICE: This Memorandum of Opinion does not constitute a building or grading permit and may be valid for a limited time period. 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 within the time allotted by law or regulation.

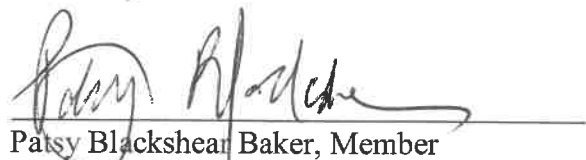
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OF ANNE ARUNDEL COUNTY



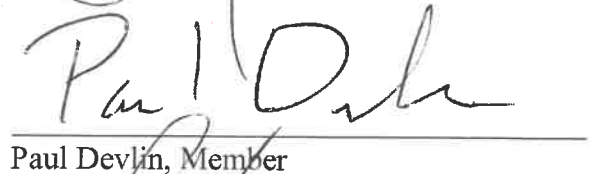
Richard Forgo, Chairman



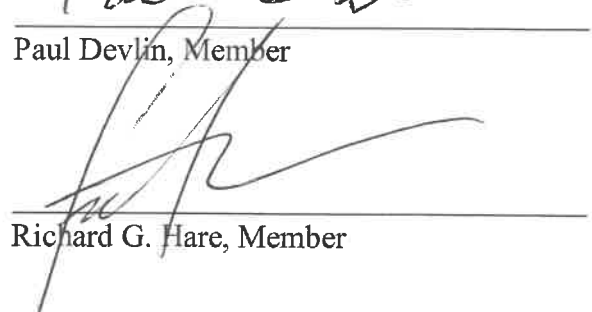
J. Gary Middlebrooks, Vice Chairman



Patsy Blackshear Baker, Member



Paul Devlin, Member



Richard G. Hare, Member

(W. Jay Breitenbach, Member, did not participate in this decision.)

DISSENT

Respectfully, I dissent from the opinion of the majority in this matter. The pending implementation of the special exception and variances to construct a landfill and a sand and gravel operation has been ongoing for 25 years. The community has experienced incredible growth over that time, including new commercial development and the expansion of residential areas. This, inherently, means that many thousands of individuals and families decided to relocate to western Anne Arundel County within the last decade, with particular impact on Odenton, Gambrills, Severn, and Crofton. The development of Piney Orchard and ongoing development of the Odenton Town Center continue to be the result of variables neither previously considered nor adequately addressed during the original special exception and variance hearings 25 years ago. This growth has been a driving force behind the development of County policy, such as education/school construction projects in West County, while creating challenges that must be addressed by both the State and County, such as the pressure placed on the area's transportation infrastructure.

What is most important to consider in this matter is that County and State development and growth policies have been met with remarkable success in the western Anne Arundel County region. However, success is fragile. The continued success of this region depends on both harmony and buy-in for the overall vision for the region between residents, businesses, policymakers and elected leaders. To ensure this, the County regularly undertakes the Comprehensive Zoning process - which is upon us again in the near future. If the passage of time can compel County review of local development and zoning priorities alongside its constituents, then the passage of time should certainly propel this application back for review during this process.

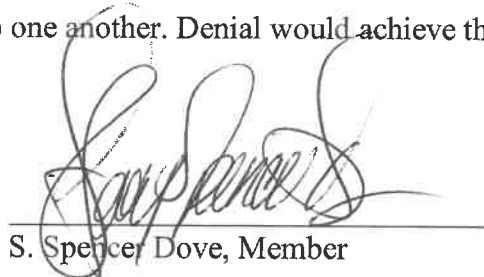
Respectfully, the Court of Appeals has failed to consider the impact that this amount of time has taken on residents of the community and the development of the Route 3 Corridor. I am concerned that the reality of time's impact on the criteria for both special exceptions and variances is so trivial in this case, yet the importance of time (such as in the form of statutes of limitations) is made law by our elected executives and legislators. These time restraints in law are actively enforced by the Judiciary. Indeed, even this Board of Appeals has in place through the County Code a strict 30-day deadline for individuals to file appeals, another example of the importance of time in our decisions.

Further extensions of time will, in some manner, alter the essential character of this neighborhood, if the special exception proceeds. The question is how? To ensure harmony with the immediate area and adherence to the County's present-day public policy with respect to zoning and development, it is incumbent upon the applicants to argue fully the merits of the case today, just as they did before the Board of Appeals 25 years ago. There exists no reason why the applicants cannot modernize their case while satisfying their burdens under applicable state and local laws, the likes of which have been amended by the Governor and General Assembly many times since the original applications were granted. The residents (who have decided to call western Anne Arundel County home) and the businesses (who decided to build upon the County's economic engine there) are, at the very least, owed the opportunity to participate in this application's consideration. As with any case, the application will either succeed or fail based on its own merits.

I share the Court of Appeals' desire to avoid "a war of attrition, motive or effect" while respecting the rights of both the developer and the presently established community. Litigation should not be "used solely to cause administrative deadlines to be missed." However, I am convinced, based on the record reviewed in preparation for the July 25, 2018 hearing, that State-

level policies - not the policies of the County or the actions of the challenging parties - are the primary contributors to the "mischief" the Court wishes to avoid. Respectfully, the State's inability to issue the appropriate licenses and approvals within the life of the County's duly-issued special exception and variances is by no fault of the County.

The specter that looms over this community deserves to be addressed, and with finality. I cannot find for the Petitioners in this matter because the merits of the special exception and variances deserve to be argued by current standards established under applicable law, just as the State evaluates the Petitioner's application under current State law. The rights of both the developer and the community must be held equal to one another. Denial would achieve that.



S. Spencer Dove, Member