IN THE

COURT OF SPECIAL APPEALS

OF MARYLAND

SEPTEMBER TERM, 2020

NO. 1327

CSA-REG-2019

NATIONAL WASTE MANAGERS, INC./CHESAPEAKE TERRACE

APPELLANT

v.

FORKS OF THE PATUXENT IMPROVEMENT ASSOCIATION, INC., et al.

APPELLEE

Appeal From the Circuit Court for Anne Arundel County
(The Honorable Ronald A. Silkworth, Judge)

REPLY BRIEF OF APPELLANT NATIONAL WASTE MANAGERS, INC./CHESAPEAKE TERRACE

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REPLY BRIEF

As is readily apparent from National's Brief and the Brief of the Forks, the parties differ as to the scope of the mandate of the Court of Appeals, and are in opposition on the question of whether that mandate gave the Board discretion to satisfy those remand instructions as set forth in its Supplemental Memorandum and order.

Noticeably, the Forks fails to acknowledge that it has ***no***t filed a Cross-Appeal in this case, and ignores the limitations upon its arguments and the relief which it seeks, which are imposed by its failure to do so.

The issues raised by the Forks in its brief are largely foreclosed by its failure to file a Cross-Appeal or to raise those issues before the Board of Appeals and the Circuit Court. Additionally, Appellants submit that Appellee has erred in its statement of the record before the Board of Appeals.

FACTS PERTINENT TO REPLY ISSUES

Despite the fact that the special exception for a sand and gravel and rubble landfill operation was granted by the Anne Arundel County Board of Appeals in 1993, the Maryland Department of Environment (hereinafter, MDE) ceased processing National's solid waste disposal permit application because the County wrongfully declined to include its facility in its 1994 Solid Waste Management Plan. As stated by the Court of Appeals of the ensuing litigation brought by National;

"The Board's decision touched off a determined effort, mostly by the County, to scuttle any prospect of the landfill or sand and gravel operation ever opening. Much of that effort was described by the Court of Special Appeals in National Waste v. Anne Arundel, 135 Md. App. 585, 763 A.2d 264 (2000) which we need not repeat. Suffice it to say that (1) the Board's decision was ultimately affirmed in Halle v. Crofton Civic, 339 Md. 131, 661 A.2d 682 (1995), (2) declaratory judgments and injunctions were issued against the County to halt its obfuscating tactics and, (3) twice the County was held in contempt for violating orders of the Circuit Court. That aspect of the litigation came to an end when the Court of Special Appeals rejected the County's arguments in National Waste, supra, and remanded the case to address the issues and this Court denied the County's Petition for Certiorari. See Anne Arundel County v. National Waste, 363 Md. 659, 770 A.2d 167 (2001).

The Board found that the time requirements under Section 18-16-405(a) were tolled due to the litigation and did not begin to run until April 13, 2001- nearly eight years after the Board had granted the special exceptions and setback variances when this Court denied certiorari, and that the two-year time limit would extend to that day in 2003." National Waste Managers, Inc. v. Forks of the Patuxent, 453 Md. 423, 429-430, 162 A.3d 874 (2017).

At the conclusion of this protracted litigation in 2001, the Appellant immediately requested that the MDE begin processing its permit application. Because of ensuing intermittent changes in landfill regulations, including hydrogeologic, engineering, and liner requirements, and the significant passage of time, the Appellant was required to virtually begin the process again. National Waste, supra, 453 Md. at 430.

The regulation that governs the authority of MDE to proceed in processing a permit is set forth in Maryland Environment Article, § 9-210. The pertinent provisions are as follows.

Md. Environment Code Ann. § 9-210

§ 9-210. Landfill systems -- Prerequisites for issuance of permit

(a) In general. Subject to the provisions of subsection (b) of this section, the Secretary may not Issue a permit to install, materially alter, or materially extend a refuse disposal system regulated under § 9-204(a) of this subtitle until the requirements set forth in this subsection are met:

***

(3) The county has completed its review of the proposed refuse disposal system, and has provided to the Department a written statement that the refuse disposal system:

(i) meets all applicable county zoning and land use requirement; and
(ii) is in conformity with the county solid waste plan.

(b) Completion of requirements. Upon completion of the requirements of subsection (a)(1) and (2) of this section, the Department shall cease processing the permit application until the requirements of subsection (a)(3) of this section are met. (Emphasis Supplied).

These regulations operated to halt the MDE processing of National's permit application in 1993 when the County declined to include the facility in its 1994 Solid Waste Management Plan (§9-210 (a) (3)(ii) and §9-210 (b), for the duration of litigation until the §9-210 (a) (3) requirements were met in 2001.

Because the MDE state permitting process is an arduous, iterative, five phase process involving complex geographic, hydrogeologic, and engineering studies, MDE's review of National's permit application has required significantly more time than the two years allotted by County zoning regulations. As a result, National returned to the Anne Arundel County Board of Appeals on four occasions, each time requesting variance of two years to the County time restrictions for the implementation of the special exception and variance approvals. At the County's request the Appellant limited the extension

requests to a two-year period of time. Fury, Rep. App. 33, 34. Three extensions were granted by the Board of Appeals; the first on April 14, 2004, the second on September 20, 2006, and the third on January 3, 2011, each for a period of two years from the date of the favorable decision, irrespective of the application date. In each of these cases, the Board of Appeals reported on the extensive MDE permit application process for landfill operations, concluding that the interaction of conflicting overlapping of County regulations and State permit process had resulted in "exceptional circumstances to be suffered by the applicants, something which is out of their hands." National Waste, supra, 453 Md. at 433-434. The Board of Appeals found in all three granting decisions, that National "had been diligent in pursuing completion of the MDE process" and that it had "continued to supply MDE with information and communicated with them on a frequent and diligent basis." National Waste, supra, 453 Md. at 434. With respect to the community, the Board of Appeals in 2011 stated;

> "We find that the character of the neighborhood is that of mixed use that ranges from rural residential to commercial resources for the Odenton community. [National has] an approval, lawful special exception on this site. The approved use of sand and gravel operation and rubble landfill is known within the community, and we believe, is a part of the character of the community. The rubble fill will heal a large, old mining scar on the subject property. The land is currently not in use by the community save a few trespassers who dump trash." National Waste, supra, 453 Md. at 434.

The applicant sought a fourth extension filed in December 2012, seeking an extension for the period 2013-2015.

During the pendency of these three granted variance extensions and the administrative consideration of the fourth application, MDE continued processing the refuse disposal permit. At each of the hearings on these four requests for extensions of time, including in 2013, Edward Dexter, Administrator of the Solid Waste Program for MDE, testified and described the five phase permitting process, described the complexity of this proposed facility as the largest such project ever handled by his office, and described the diligence of this applicant in working with his professional staff and engineers in obtaining the necessary permit. Rep. App. 2-24. He further testified that he believed the permitting process could be finished within the two-year extension being requested at the time of the 2013 hearing. Dexter, Rep. App. 12, 24.

Edward Dexter explained to the Board of Appeals that

> "One of the most important things is in the statute we have to send the application to the County and ask the County two questions which have bearing on this case. The first is *** we send it to the County and cannot even go forward at all with the application process until we get two affirmative answers from the County government. Is it in conformance with the ten year solid waste master plan, and is it in –in conformance with zoning and land use and as – as this happened in this case, *once there was litigation we might as well just say – we're not going to, you know, expend our resources reviewing an application that might become moot because of County action.* (Emphasis Supplied). Dexter, Rep. App. 2.

Administrator Dexter again described the permitting process and explained that MDE does not get involved with roads, need for the facility or life expectancy of the facility as these are County concerns. He again stated that MDE does not get involved or stay

involved until MDE receives confirmative comments from the County that the proposed facility met all County applicable zoning and land use requirements. Dexter, Rep. App. 26, 27.

At a continuation hearing August 15, 2013, John Fury, an employee of the Anne Arundel County Office of Planning and Zoning, reviewed the tortured history of this case, and testified that the County believed that the extension should be granted. He continued that the MDE process was just one part of the puzzle; there are county permits including a site development plan, storm water management plan, building permit, and traffic impact study that would be required by Planning and Zoning before site development occurs. Fury, Rep. App. 29-32. Mr. Fury confirmed that the County specifically requested that the applicant limit itself to a two year extension of time which was consistent with the prior extension requirements and that the applicant complied with that request. Fury, Rep. App. 33, 34. The MDE permit process is out of the County's control. Fury, Rep. App. 37. This project has been in the solid waste management plan for a long time and the county basically considers it an existing facility. Fury, Rep. App. 39. The County would not accept or process applications for required County permits of the facility until and unless the project had MDE approval and permit. Fury, Rep. App. 42. The applicant has been diligently pursuing this approval. Fury, Rep. App. 37-42. The three previous extensions of time, including the period of MDE suspension of activity between 1993 and 2011, have all been "bootstrapped" onto the original special

exception. "So it's all tolled up until now and subject to what happens here." Fury, Rep. App. 35. On behalf of the Anne Arundel County Office of Planning and Zoning, John Fury recommended that the Board of Appeals approve the extension of time. Fury, Rep. App. 36.

Despite the testimony of Edward Dexter of MDE and John Fury of the County Office of Planning and Zoning, cautioning the Board of Appeals that further consideration of this project by MDE was singularly dependent on their affirmative vote, the Board of Appeals, by split decision on December 27, 2013, voted with two of the Board members in favor of the extension, and two voting to deny the extension. The result of the "split vote" was a denial of the extension request. National Waste, supra, 453 at 439.

As a result of this denial on December 27, 2013, MDE ceased processing National's permit application in compliance with the directives of Maryland Environment Code Ann., § 9-210(b), because as the requested extension had been denied and the time period granted by the third extension request had expired. The project no longer met all applicable County zoning requirements.

During this MDE hiatus in processing the Appellant's permit application, there ensued a series of appeals of the Board's decision through the Courts and Court of Appeals which resulted in the decision on December 13, 2017, that vacated previous

Court decisions and remanded the case to the Board of Appeals for further action. National Waste, supra, 453 Md. 423.

The Board of Appeals determined that it would proceed on the remand of the December 2012 request for an extension of time based on the record of evidence presented during the 2013 multiple hearings, the previous documents presented, previous decisions of the Board of Appeals, and oral arguments of counsel. A decision of the Board of Appeals granting the extension of time requested in the 2012 application for the 2013-2015 time period issued on October 19, 2018, E. 85-94, ending the period of MDE's hiatus on the processing of the MDE permit pursuant to Environment Code § 9-210. The Board extended the time for implementing the facility for a period of two years from the date of its decision, until October 19, 2020. The is the same process had been followed by the Board of Appeals in its three previous decisions; 2004, 2006, and 2011, where the extension of time was granted for two years from the date of its favorable ruling. The Board of Appeals' 2018 decision enabled MDE to move forward under Code Section 9-210 to continue to process the permit application.

The Forks of the Patuxent, filed a Petition for Judicial Review of the Board's 2018 Memorandum of Opinion and order in the Circuit Court. After a hearing, the Circuit Court on June 19, 2019, remanded the case to the Board of Appeals, E. 229-230, for further action to comply with the remand instructions of the Board of Appeals. National, believing that the Board's action met the remand instructions of the Board of Appeals and

that the Circuit Court erred in remanding the case has appealed the judgment of the Circuit Court to this Court.

The Forks did not file a Cross-Appeal.

ARGUMENT

A. THE FORKS' FAILURE TO FILE A CROSS- APPEAL PRECLUDES IT FROM SEEKING AFFIRMATIVE RELIEF AND FROM ARGUING THAT THE RECORD DID NOT PROVIDE SUFFICIENT EVIDENCE TO SUPPORT THE BOARD'S DECISION.

A party to a trial court proceeding

> "is not entitled to seek direct appellate review and reversal of a trial court's judgment unless he has filed a valid, timely, order of appeal. Joseph H. Munson v. Secretary of State, 294 Md. 160, 167, 448 A.2d 935 (1982) and cases cited therein.

See also, Geier vs. Maryland State Board of Physicians, 223, Md. App. 404, 116 A.3d 1026 and cases cited therein at 427-430 (2017).

If a timely cross-appeal is not filed, the court can only review those issues properly raised by the appellant. Kunda Morse, 229 Md. App. 295, 299, 145 A.3d 51 (2016), citing Maxwell v. Ingerman, 107 Md. App. 677, 681, 670 A.2d 959 (1996). The failure of the Forks to file a cross appeal precludes it from seeking affirmative relief and limits the issues which it may pursue in this case. See e.g., Darby v. Marley Cooling Tower Co. et. al., 190 Md. App. 736, 989 A.2d 1221 (2010); Archers Glen Partners, Inc. et. al. v. Garner, 176 Md. App 292 (2002), affirmed 405 Md. 43 (2007). Having failed to

Cross Appeal, the Forks may not seek reversal of the Board's action, or assert as a basis for such reversal that the record did not support the Board's order.

In Archers Glen, the Planning Board for the National Capital Park and Planning Commission approved Archer's preliminary subdivision plans. After an appeal to this Court, which resulted in a remand, the Board affirmed its prior approval. Opponents then filed a petition for judicial review of the Planning Board's "re-approval" in the Circuit Court for Prince George's County. The Circuit Court remanded the matter to the Planning Board for further proceedings. The developer and the Planning Board appealed that remand Order to this Court. Noting that the issue raised by Appellants is whether the Circuit Court erred in remanding the case to the Board, or "more accurately" whether "further findings are necessary," the Court addressed the contention of the citizen/appellees that the evidence in the case was legally insufficient to sustain the Planning Board' findings.

This Court made clear that a cross appeal was necessary to raise that issue:

> "Generally, a party in a proceeding in circuit court must file a timely notice of appeal to seek appellate review of the circuit court's judgment. When a party loses on an issue in circuit court but receives a favorable judgment on another ground, the party as appellee, and without noting a cross appeal, may contend that the judgment be affirmed...In the case before us the circuit court's decision was remand for further findings, *Appellees' argument on appeal, that the evidence is legally insufficient to sustain the Planning Board's conclusion ... does not constitute a ground for affirmance. Thus a cross appeal was necessary to raise that issue."* Archers Glen, *supra, 176 Md. App. at 326, note 1. (Emphasis Supplied)*

In its brief, the Forks, asserts relief including the "outright reversal" or "vacating" of the Board's action. Such action hardly constitutes an "affirmance" of either the Circuit Court judgment or the Board's action. "A cross-appeal was necessary to raise that issue."., [1] Moreover, the only argument raised by National in its brief, is whether the Board complied with the remand instructions. The issue presented is whether further findings are required," Archers Glen, supra. If further findings are not required, National submits that the Board's action be affirmed. If such findings are required, the case must be returned to the Board. Given the lack of a Cross-Appeal, the Forks may not attack the underlying Board action.

B. THE BOARD PROPERLY APPLIED THE LAW OF TOLLING.

Where a land use approval must be implemented within a statutory period, it is well established that litigation contesting the validity of the *approval itself* will toll the running of the period. This rule reflects that a *final* approval must be reached before the period will begin to run. See, e.g. Lanzaron v. Anne Arundel County 402 Md. 140, 935 A.2d 689 (2007) and cases therein with approval, including Nutter v. City of Baltimore, 230 Md. 6, 185 A.2d 360 (1962). See, also, section 18-16-405(a) (the period runs unless "extended or tolled")

[1] I Additionally National reiterates that virtually none of the arguments presented in the Forks' brief were raised before the Board or the circuit court. (E.36-48, 213-229). Before the Board, the Forks stated that its "preference" was for the Board to look at existing circumstances by undertaking a site visit. In its memorandum in support of its Petition for Judicial Review, the Forks stated only that the evidence did not meet the standard of a "full judicial review" and in the Circuit Court argued only that it wanted a judicial review by the court taking evidence. At no point before the Board, in its filings, or before did it "argue" insufficiency of the evidence. Having failed to do so, it may not raise such issues now. Md. Rule 8-131. See Parham v. Dept of Labor, 189 Md. App. 604 (2009).

Additionally, the law is clear that when a developer cannot proceed administratively because of litigation, the time period within which the applicant must take further action is tolled. See National Waste Managers v. Anne Arundel County, 135 Md. App. 583, 763 A.2d 264 (2000); City of Bowie v. PG County Planning Board of the MNC Commission, 384 Md. 413, 863 A.2d 976 (2004), Board Supplemental Memorandum E. 88. Nevertheless, the Forks attacks the Board's finding that "[i]n this case the Petitioners could not proceed toward development during the various appeals since the MDE would not process the application with litigation pending," asserting that the finding is not supported by the record. The Forks is in error.

The record is replete with the history of this litigation. The variances seeking an extension of the time within which National's landfill must be established were denied by split vote on December 27, 2013. At that point National's project no longer met all applicable County zoning and land use requirements, and MDE *was required by law to cease processing National's rubble fill land application. See,* MD. Envir. Article § 9-210 (a)(3)(b). MDE processing started again after the project came into compliance with local zoning and land use regulations by virtue of the Board's October 19, 2018 Supplemental Opinion, granting the temporal variance at issue.

As noted by National at the July 25, 2018 hearing, "the Board came down with its refusal or its 2/2 split vote, and MDE suspended operations." E. 44. Moreover, MDE's history of ceasing review because of a change in zoning status is noted in National Waste Managers v. AAC, supra, 135 Md. App. 583. Additionally, Edward Dexter, director of

MDE's Department of Solid Waste Management testified before the Board in these proceedings that MDE would not expend its resources reviewing an application that might become moot by litigation. Dexter, Rep. App. 2.

The Board properly applied the doctrine of tolling.

C. THE BOARD PROPERLY EXERCISED ITS DISCRETION IN APPLYING THE REMAND INSTRUCTIONS OF THE COURT OF APPEALS.

The Court of Appeals instructed the Board to consider what impact, *if any*, the requested two-year variance to 2015 would have upon vicinal properties and, considering the passage of time and the effect of tolling, to take into account the impact of the request "beyond 2017." This is precisely what the Board has done.

In granting the variance to 2015, the Board reviewed the entire record of the case, including oral arguments, four days of testimony and documentary evidence, and all prior decisions of the Board regarding the proposed landfill. It also considered the arguments of counsel at the July 25, 2018 hearing. The findings which the Board adopted in its Supplemental Opinion properly focused on the temporal variance request itself. Those findings recognized that the extension requested would have no impact upon vicinal properties-e.g. that no traffic, impacts to water or other impacts would result from the extension of time. E. 20". The Forks did not contest the granting of the variance to 2015 before the Board at its July 25, 2018 hearing, in the Circuit Court, or in its brief herein.

In remanding the case to the Board, the Court of Appeals made clear that the record did not contain any evidence that the variance request would have any impact on vicinal properties. The Court further made clear, that a denial of the variance request on such a record would be arbitrary and capricious. Yet, the Forks neither objected to the hearing proceeding on the record, nor did it proffer any impact upon vicinal properties before the Board, "beyond 2017" or otherwise. Indeed, it has made no such proffer before the Circuit Court or in its Brief.

The Board properly granted the requested variance for the period 2013-2015, and found that there would be no adverse impact from that request upon vicinal properties. Given its approval of the requested variance, it properly considered and applied the doctrine of tolling, as required by the County Code, to take into account impact "beyond 2017", providing that the two-year temporal variance request would commence on October 20, 2018, and run through October 19, 2020.

The Board properly exercised its discretion and complied with the remand instructions of the Court of Appeals.

CONCLUSION

For the foregoing reasons, the Appellant respectfully submits that the Board of Appeals complied with the remand instructions of the Court of Appeals and Appellant requests that the Circuit Court's Order be reversed and that the Supplemental

Memorandum of Opinion and Order of the Board of Appeals dated October 18, 2018 be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13 day of April, 2020, a copy of the foregoing Reply Brief of Appellant, National Waste Managers, Inc./Chesapeake Terrace was electronically served via MDEC and by first class mail, postage prepaid to:

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CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH MD RULE 8-112

This Brief complies with the font, line spacing, and margin requirements of Md. Rule 8-112 and contains 3,873 words, excluding the parts exempted from the word count by Md. Rule 8-503.

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