

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)

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

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STATEMENT OF THE CASE

By its decision in National Waste Managers, Inc./Chesapeake Terrace v. Forks of the Patuxent Improvement Association, Inc., et al, 453 Md. 423, 162 A.3d 871, (2017), the Court of Appeals held that the denial of National Waste Managers' requests for temporal variances by a split decision of the Board of Appeals for Anne Arundel County dated December 27, 2013 was arbitrary and capricious. The Court of Appeals vacated the Board's action and remanded the case directing that the Board of Appeals:

“....address and resolve the relevant issue, which in 2013, when the decision was made, 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 National or adverse impact on the neighborhood or adjacent property warranting a rejection of extension as of the Board's decision in 2011. That of course, has *become more complicated by the passage of time and the effect of tolling. In some manner, the Board will have to take into account the impact of the requested extension beyond 2017.*” National Waste, supra, 453 Md. at 446. (Emphasis supplied).

The Board of Appeals for Anne Arundel County (hereinafter “Board), after a remand hearing held July 25, 2018, by its Supplemental Memorandum of Opinion dated October 19, 2018, addressed and resolved the “relevant issue” and granted the variance requests:

“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 Petitioner's 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 in that opinion. We further reject the findings of the two denying members as they were clearly erroneous in their findings and conclusions.” 2018 Board Memorandum, p. 3, E. 87.

Addressing the direction that, “in some manner”, the Board will have to take into “account the impact of the requested extension beyond 2017,” the Board “accounted” for such impact by applying the doctrine of tolling:

“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 the Order of the Board contained herein will extend the approval for an additional two years from the date hereof.” 2018 Board Memorandum, p. 3, E. 87.

The Forks of Patuxent Improvement Association (hereinafter “Forks”), filed a Petition for Judicial Review with the Circuit Court for Anne Arundel County. E. 95. After a hearing on the Petition, the Circuit Court on June 24, 2019, remanded the case to the Board noting:

“...while “this Court finds the Board’s treatment of the issue of tolling to be sound, nowhere in the Board’s Supplemental Opinion does it address the impact of the requested extension beyond 2017 on the character of the neighborhood, the appropriate use or development of adjacent property or the public welfare as the Court of Appeals directed it to do. Accordingly, the Court shall remand this case back to the Board so that it may address and articulate its findings as to these issues that the Court of Appeals directed it to consider.” E. 230.

The Court directed:

“ORDERED. That the Supplemental Memorandum of Opinion by the Anne Arundel County Board of Appeals, issued on October 19, 2018, is REMANDED to the Board of Appeals with instructions to comply with the remand instruction of the Court of Appeals and take into account the impact, if any, of the requested extension beyond 2017 on the character of the neighborhood, the appropriate use of development of adjacent property, and the public welfare.” Forks of the Patuxent Improvement Association, Inc. v.

National Waste Managers, Inc./Chesapeake Terrace. Circuit Court for Anne Arundel County, Case No. C-02-CV-18-003469, June 19, 2019, pp. 1-2. E. 229.

National Waste Managers (hereinafter “National”), in this appeal asserts that the Circuit Court erred in holding that the Board did not comply with this Court’s remand instruction, and that the Board had the discretion under the remand instruction, and the legal obligation under the Anne Arundel County Code, to account for the issue of impact “beyond 2017” by applying the doctrine of tolling.

QUESTION PRESENTED

DID THE BOARD COMPLY WITH THE COURT’S REMAND INSTRUCTIONS?

STATEMENT OF FACTS

A. Background.

The history of this case is set forth in the opinion of the Court of Appeals, National Waste Managers, Inc./Chesapeake Terrace v. Forks of Patuxent Improvement Association Inc., et al, 453, Md. 423 (2017) and is abbreviated and summarized from that history herein.

In December, 1993, Appellant, National Waste Managers (hereinafter “National”), was granted zoning approval, by way of special exception and variance, from the Anne Arundel County Board of Appeals after sixteen hearings and an on-site inspection, to establish a rubble landfill and sand and gravel operation on a 482-acre tract of land

located in the Odenton area of Anne Arundel County. Evidence in support of the request showed that the property had been mined during the preceding forty years and unreclaimed was likened to a moonscape, full of debris, containing ravines 30 – 45 feet deep, subject to erosion, with illegal dumping, target shooting, and hunting that regularly occurred on the property. National Waste, supra, 453 Md. at 426-427.

The Board concluded that National was capable of satisfying all the Anne Arundel County performance standards and adequate public facilities regulations and that the proposed operations would be no more objectionable with regard to noise, fumes, vibrations, or light to nearby properties than operations in permitted uses. The setback variances were necessary since the land was cratered to the property line as a result of previous mining operations and filling was necessary to reclaim those areas. 1993 Memorandum Opinion of Board cited to in National Waste, supra, 453 at 427.

County law required that the special exception use be implemented within two years of the approval. Anne Arundel County Code, § 18-16-405. State law, however, requires that National obtain a refuse disposal permit issued by the Maryland State Department of Environment (hereinafter “MDE”), in order to construct or operate a rubble landfill. Md. Code, Environmental Article, § 9-204(d). National has been actively pursuing that permit from MDE since its special exception for a rubble landfill and sand and gravel operation was first approved by the Anne Arundel County Board of Appeals in 1993. National Waste, supra, 453 Md. at 428-429.

The Court of Appeals addressed the effects of the dichotomy between the Maryland State permitting process and Anne Arundel County zoning regulations as follows:

“What has driven this case for the last 27 years is the confluence of (1) administrative and judicial litigation during a substantial part of that period, (2) a time-consuming process for obtaining State and county permits required in order to construct and operate the proposed facilities, (3) time limits under county zoning laws on obtaining those permits, and (4) extension and tolling provisions under county law.” National Waste, supra, 453 Md. at 427.

AA Code, § 18-16-405(a) provides 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.” Subsection (b) of that statute permits an applicant to file an application for a variance to extend that time, and subsection (c) provides that “the pendency of litigation may toll the time periods set forth in subsection (a) to the extent provided by law.” As the Court of Appeals explained:

“Section 18-16-405 thus speaks of, or refers to two kinds of variances -- a section (a) variance, which is substantive in nature, allowing something to be done that otherwise is impermissible, such as the variances granted to National from the setback requirements, and a temporal variance referred to in section (b), which merely extends a time requirement for obtaining necessary permits.” National Waste, supra, 453 Md. at 429.

At odds with County regulation is the Maryland State regulation, Md. Code, Environment Article, § 9-204(d), which requires a refuse disposal permit issued by MDE, a lengthy process that can take many years to complete, before a person may install a landfill or other refuse disposal system. Moreover, MDE regulations require

both county zoning approval and inclusion of a proposed facility in the relevant County Solid Waste Management Plan as a condition precedent to continuing evaluation and processing of a refuse disposal permit application. Md. Code, Environment Article, § 9-204.

Contemporaneous with the pursuit of the Board's original zoning approval of the special exception and variances for the rubble landfill, National had filed for and was pursuing the issuance of the MDE refuse disposal permit. After zoning approval for the rubble landfill was granted by the Board, amendments to Anne Arundel County's Solid Waste Management Plan, including the National project, were drafted by the County's Department of Public Works. The County Council removed this project from those amendments and the Solid Waste Management Plan, in "a determined effort, mostly by the county to overturn it and scuttle any prospect of the landfill or sand and gravel operations ever opening". National Waste, supra, 453 Md. at 429. Accordingly, MDE ceased processing the National application for a refuse disposal permit in 1994.

By its decision in National Waste Managers, Inc. v. Anne Arundel County, 135 Md. App. 583, 763 A. 2d 264 (2000), certiorari denied 363 Md. 659 (2001), the Court of Special Appeals held the County's action in removing the project from its Solid Waste Management Plan had been unlawful, and accordingly that the County statutory provision establishing the time within which the rubble landfill must be established was tolled as a matter of law, and did not begin to run until April 13, 2001, the date certiorari was denied. As a result of that wrong doing, review by MDE of the refuse disposal

permit application had been halted during the period 1994-2001, the entire course of litigation. National Waste, supra, 453 Md. at 429-430.

Prior to MDE resuming review of the disposal permit application after this period of litigation in mid-2001, in 1997 State regulations governing the approval of rubble landfill applications were revised to require that landfill liners and new hydrogeological studies be provided as part of the application process. National had to virtually start anew with its refuse disposal permit submittals. (Testimony of Edward Dexter, Administrator of the Solid Waste Management Program, MDE, cited in National Waste, supra, 453 at 430.) The Court of Appeals summarized Mr. Dexter's description of the five phase MDE review process for such permits as follows:

1. Phase I centers on gathering basic information, such as the project's intended objectives, location, etc. This phase also gathers and compiles existing data about the site. The MDE circulates this information to various local, State, and Federal agencies for review and comment and to determine whether the site is suitable for the intended use. See COMAR 26.04.07.14.

2. Phase II consists of a hydrogeological investigation. The applicant is required to identify and analyze groundwater and geological conditions on the site. This report is also sent to local, State and Federal agencies for review and comment. See COMAR 26.04.07.15.

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. See COMAR 26.04.07 et seq.

5. Phase V is the public comment state. 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. See COMAR 26.04.07 et seq.

Mr. Dexter described the MDE permit application review as an interactive process that requires multiple “back and forth” communications between the applicant and MDE. Mr. Dexter explained that rubble landfills are usually developed in 5 to 15 acre sites. The National project is much larger, consisting of 100 acres of proposed fill. The State MDE permit process could not be completed within the time required by the County zoning code.¹ National Waste, supra, 453 Md. at 432-433.

Because of the conflicting State and County regulations, National previously sought and obtained on three separate occasions, from the Anne Arundel County Board of Appeals, variances for extensions of the time period prescribed by County law within which to establish the rubble landfill.

Prior to the time the requirements under § 18-16-405(a) expired in 2003, National applied for an extension of time. In granting this extension on April 14, 2004, the Board, in its Memorandum and Opinion, recounted the testimony of Edward Dexter regarding

¹ County Code section 18-16-405 provides that a special exception or variance will expire by operation of law unless the applicant obtains a building permit within 18 months of granting of the use. That section also provides that the time period may be extended by variance or tolled by virtue of law. Previously, the Code provided for the expiration of a special exception if not implemented or completed and operational within two years of the grant of a special exception or variance. The original special exception approval authorized a rubble landfill and sand and gravel operation on the property and associated variances. The approvals are generally referred to herein as extension for the landfill.

new liner and hydrogeological requirements for refuse disposal permits requiring an additional minimum of three years to complete the permitting process. The Board also recognized the concerns of Protestants regarding traffic, air pollution, and increase in residences in the community. The Board concluded that there was no way National could obtain the necessary State approvals in time to comply with the zoning regulations, and that “the interaction of overlapping regulations has resulted in the exceptional circumstance to be suffered by [National].” The Board expressly rejected the protestants complaints (1) that National failed to show due diligence in processing the MDE permit, and (2) of an adverse impact on the neighborhood, concluding that the proposed request “will not substantially impair the appropriate use or development of adjacent properties”. National Waste, supra, 453 Md. at 431-432.

In April 2005, National requested a further two year extension. In its 2006 Opinion, the Board of Appeals discussed in further detail the five-phase process for obtaining an MDE waste disposal permit as set forth in COMAR 26.04.07 as well as the efforts National had made in pursuit of that process. Repeating much of what it had said in its 2004 Memorandum of Opinion, the Board again concluded that National’s “responses to the various requests and comments (by MDE) have been timely, particularly given the complexity and detail of the required information”, and that the use will not impair the use of adjacent properties. Given those conclusions, the Board granted a two-year extension commencing September 20, 2006, but added that, if

National failed to implement the special exception and variances within the two-year period, no further extensions would be granted. National Waste, supra, 453 Md. at 433.

National appealed this administrative condition to the Circuit Court and in May 2008, the Circuit Court vacated the restrictive provision as arbitrary, capricious, and an abuse of the Board's discretion. See Chesapeake Terrace, NWM v. Board of Appeals, Circuit Court Anne Arundel County, Case No. C-06-117596 AA. National Waste, supra, 453 Md. at 433.

National requested a third extension of time which was granted by the Board of Appeals on January 3, 2011. Here again, the Board 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 "the exceptional circumstances to be suffered by the applicants, something which is out of their hands". National Waste, supra, 453 Md. at 433-434.

Protestants complained again about lack of diligence on the part of National and increased traffic in the neighborhood. The Board found, as it had twice before, that National "ha[d] 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 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 approved, lawful special exception on this site. The approved use of this property as a sand and gravel operation and

rubble landfill is known within the community and, we believe, is 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.

Addressing the traffic issue, the Board expressly found that the protestants’ testimony not to be persuasive and iterated that the issue, in any event, was not on the impact of the special exception that allowed the landfill and sand and gravel operation, which already had been approved, but only on “whether a variance to permit a two year extension will change the character of the neighborhood.” The Board granted another two-year extension dating from January 3, 2011. National Waste, supra, 453 Md. at 434.

On each of these three occasions, the Board of Appeals as a whole, unanimously granted National’s variance requests. On each occasion, the Board found due diligence in pursuing the refuse disposal permit by National, and found that the extensions of time would not alter the essential character of the neighborhood or impair the use or development of adjacent properties or be detrimental to the public welfare. National Waste, supra, 453 Md. at 430-434.

National filed for a fourth two-year extension of time in December 2012. The Board in this proceeding consisted of only four members. Four hearings were held. The MDE Administrator of the Solid Waste Program for MDE, Edward Dexter, attributed the delay to the size of the project, describing the iterative back-and-forth between the State agency and National. He stated that National had been diligently pursuing the project. Based on evidence presented to the Board on December 27, 2013, the Board issued a

Memorandum of Opinion reciting a 2-2 “split vote” of the Board—two member voting to grant the variances and two members voting to deny. Accordingly, the Board concluded that the variance must be denied.” The findings of both the Supporting and Denying Board Members were set forth in the Board’s Memorandum. National Waste, supra, 453 Md. at 434-439.

The Supporting Members of the Board concluded, as the Board of Appeals had on three prior occasions, that exceptional circumstances prevented National from implementing the approved special exception and variances; that National had been diligent in pursuit of the MDE refuse disposal permit, and that the temporal variance would not substantially impair the appropriate use or development of adjacent properties or alter the essential character of the neighborhood. The Supporting Members concluded:

“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 extension of time will only finalize the MDE permit review process and perhaps initiate the county building/grading permit process. The variances merely permit the applicant to complete the application process. *We believe that the extension of 2 years for these applicants to implement and commence these uses will not be detrimental to the public’s welfare.* 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 variance. *We find only that these applicants deserve a time extension variance since they have not been afforded the opportunity to commence those uses, most recently due to the State’s lengthy (and proper) five phase approval procedure.* (Emphasis supplied). National Waste, supra, 453 Md. at 436.

The Denying Members did not find that there were exceptional circumstances that would create practical difficulties or unnecessary hardship to National to develop the property within the time frames previously granted by the Board. They ignored

testimony by Edward Dexter of MDE and John Fury of the County Office of Planning and Zoning, that National had been acting with diligence in their pursuit of a permit since the last variance extension, concluding that:

“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.” National Waste, supra, 453 Md. at 437.

National promptly sought judicial review. The Circuit Court for Anne Arundel County found that the Board’s action was based on the legal error of predicated their vote on the entire delay since 2001 and rejected the Opinion. On that basis, the Court vacated the Board’s decision and remanded the case for further proceedings. National Waste, supra, 453 Md. at 437.

The Forks filed an appeal. In Forks of the Patuxent v. National Waste Managers, 230 Md. App. 349 (2016), the Court of Special Appeals agreed that the 2-2 split vote was a denial, noted the diligence of National in pursuing the MDE permit, and remanded the case for consideration of changes to the surrounding neighborhood and compatibility therewith. National Waste, supra, 453 Md. at 437.

The Court of Appeals granted National’s Petition for Certiorari. The Court of Appeals concluded that the denial of National’s variance request was based upon a time period not properly before the Board of Appeals, focusing on the entire period from 1993 to present, and pre-dating the January 2011 extension previously granted by the Board, that:

“The issues of National’s diligence in pursuing the MDE permit and the impact of the project on the existing neighborhood, the development of other properties, and the general public welfare were raised first in the 1990-93 proceeding that led to the granting of the special exception and again in each of the extension proceedings in 2004, 2006, and 2008-11. In each of those proceedings, the Board considered the evidence present on those issues and concluded, as of those times, that National had diligently pursued its quest for MDE permit and that there would be no adverse impact on the neighborhood, the development of nearby properties, or the public welfare from allowing the project to proceed.” National Waste, supra, 453 Md. at 443.

With respect to lack of diligence because of delays in pursuing MDE permit, the Court of Appeals found the record void of evidentiary support, and ignoring un-contradicted testimony of the MDE Administrator, Edward Dexter, as well as National’s project manager. National Waste, supra, 453 Md. at 443-444.

Addressing the impact of the project on the neighborhood and public welfare, the Court of Appeals explained:

“It is not the function of a temporal variance to relitigate those findings. Section 18-16-405, which applies to both substantive and temporal variances, is intended to assure that a variance will not alter the essential character of the neighborhood, substantially impair the appropriate use or development of adjacent property, or be detrimental to the public welfare. With respect to temporal variances—mere extensions of time, in this case to obtain permits necessary to implement what the special exceptions made permissible—the focus is a narrow and forward-looking one. It is merely whether the requested extension of time will alter the character of the neighborhood or substantially impair the appropriate use or development of adjacent property, or be detrimental to the public welfare.” National Waste, supra, 453 Md. at 445.

The Court continued, that was not the focus of the Denying Members and they cited no evidence, because there was no evidence, as to how an extension would adversely impact

on the neighborhood or be detrimental to the public welfare. National Waste, supra, 453 Md. at 445.

The Court of Appeals remanded the case to the Board, directing that the Board:

“address and resolve the relevant issue, which in 2013 when the decision was made, what impact, if any the requested two year extension to 2015 would have on the character of the neighborhood, the appropriate use of development of adjacent property on the public welfare, accepting as a fact that there was no lack of diligence on the part of National or adverse impact on the neighborhood or adjacent property warranting a rejection of an extension as of the Board’s decision in 2011.” National Waste, supra, 453 Md. at 446.

On remand, the Board considered the decision of the Court of Appeals and the testimony and other evidence adduced at hearings held in the “split vote” action on June 6, 2013, August 14 and 15, 2013, and October 15, 2013 before the Board on this variance request. The Board on remand also considered the previously issued Memoranda and Orders of the Board dated 2004, 2006, and 2011, granting approval to prior extension requests which had been submitted as exhibits in this case, and arguments of counsel, and held a hearing on the remand issues on July 25, 2018. Thereafter, on October 19, 2018, the Board issued its Memorandum Order granting National the variance relief which it sought in this case. Supplemental Memorandum of Opinion of October 19, 2018, E. 85-94.

The Board of Appeals (hereinafter “Board”) in its Supplemental Memorandum of Opinion dated July 25, 2018 addressed and resolved the “relevant issue” and granted the variance requests:

“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 Petitioner’s 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 in that opinion. We further reject the findings of the two denying members as they were clearly erroneous in their findings and conclusions.” 2018 Board Memorandum, p. 3, E. 87.

Addressing the direction that, “in some manner”, the Board will have to “account for the impact of the requested extension beyond 2017,” the Board will have to take into “account” such impact by applying the doctrine of tolling:

“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 the Order of the Board contained herein will extend the approval for an additional two years from the date hereof.” 2018 Board Memorandum, p. 3. (Emphasis supplied) E. 87.

The Forks filed a Petition for Judicial Review with the Circuit Court for Anne Arundel County. After a hearing on the Petition, the Circuit Court on June 24, 2019, remanded the case to the Board noting:

“...while “this Court finds the Board’s treatment of the issue of tolling to be sound, nowhere in the Board’s Supplemental Opinion does it address the impact of the requested extension beyond 2017 on the character of the neighborhood, the appropriate use or development of adjacent property or the public welfare as the Court of Appeals directed it to do. Accordingly, the Court shall remand this case back to the Board so that it may address and articulate its findings as to these issues that the Court of Appeals directed it to consider.” E. 230.

The Court continued:

“ORDERED. That the Supplemental Memorandum of Opinion by the Anne Arundel County Board of Appeals, issued on October 19, 2018, is REMANDED to the Board of Appeals with instructions to comply with the remand instruction of the Court of Appeals and take into account the impact, if any, of the requested extension beyond 2017 on the character of the neighborhood, the appropriate use or development of adjacent property, and the public welfare.” Forks of the Patuxent Improvement Association, Inc. v. National Waste Managers, Inc./Chesapeake Terrace, *supra*, E. 229.

National asserts that the Circuit Court erred in holding that the Board did not comply with this Court’s remand instruction, and that the Board had the discretion under the remand instruction ,and obligation under the County Code, to account for the issue of impact “beyond 2017” by applying the doctrine of tolling. Accordingly, National noted its appeal of the Circuit Court’s remand orders to the Court of Special Appeals. E. 237-238.

STANDARD OF REVIEW

The State Judiciary’s role in reviewing an administrative agency’s adjudicatory decision is limited to determining if there is substantial evidence in the record as a whole to support an agency’s finding and conclusions; it is limited to determining if the administrative decision is premised upon an erroneous conclusion of law. Kim v. Maryland State Board of Physicians. 423 Md. 523, 535, 32A.3d 30 (2011).

ARGUMENT

THE BOARD OF APPEALS PROPERLY CONSTRUED THE COURT’S REMAND INSTRUCTIONS.

The present action arises out of the October 19, 2018 Supplemental Memorandum of Opinion and Order of the Board of Appeals, granting National Waste Managers, Inc./Chesapeake Terrace (hereinafter “National”) variances extending the time for the establishment of a landfill in the Crofton area of Anne Arundel County. The Forks of Patuxent Improvement Association, and various property owners, filed a Petition for Judicial Review of that administrative action in the Anne Arundel County Circuit Court. E. 85-94, E.95.

By its Order entered on June 24, 2019, the Circuit Court ordered, without otherwise addressing the merits of the case, that the case be remanded to the Board of Appeals, directing the Board to “comply with the remand instruction of the Court of Appeals and take into account the impact, if any, of the requested extension beyond 2017...” In so doing, the Court noted that “nowhere in the Supplemental Opinion does it address the impact of the requested extension beyond 2017.” (Circuit Court Order, page 2, fn 1), E. 230.

While this Court finds the Board’s treatment of the issues of tolling to be sound, nowhere in the Board’s supplemental opinion does it address the impact for the requested extension beyond 2017 on the character of the neighborhood, the appropriate use or development of adjacent property or the public welfares, as the Court of Appeals directed it to do. Accordingly this Court shall remand this case back to the Board so that it may address and articulate its findings as to these issues that the Court of Appeals directed it to consider. E. 230.

Respectfully, National submits that this conclusion is in error, and that the Board complied with this remand instruction and the Board's October 19, 2018 Supplemental Memorandum and Order should be affirmed. The remand instructions provide that the Board:

“....address and resolve the relevant issue, which in 2013, when the decision was made, 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 National or adverse impact on the neighborhood or adjacent property warranting a rejection of extension as of the Board's decision in 2011. That of course, has *become more complicated by the passage of time and the effect of tolling. In some manner, the Board will have to take into account the impact of the requested extension beyond 2017.*” National Waste, supra, 453 Md. at 446. (Emphasis supplied).

Thus, the Court of Appeals required only that the Board “*in some manner*” account for the impact of the extension request beyond 2017 and further instructed that the matter had become more complicated by the passage of time and the effect of tolling. National Waste, supra, 453 MD 423, at page 446 (2017). The instruction vested broad discretion in the Board. The instruction did not determine “how” the Board was to “account” or how far beyond 2017 the “accounting” was to proceed. The Court further contemplated that tolling must be considered and might be applied, noting that the matter before the Board was “complicated by the “passage of time and the effect of tolling.” National Waste, supra, 453 Md. at 445.

The Board addressed the issue, turned to the “passage of time” and “*accounted*” for the impact of the 2013-2015 extension request “beyond 2017” by employing the doctrine of tolling:

“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 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, ... 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.” Board decision, pp. 3-4, E. 87-88.

Given the Board’s expertise the administration of the zoning provisions of the County Code, its construction of the Court’s mandate should be given great weight. The Board’s interpretation reflects its expert knowledge of the County zoning and land development process. The expertise of the Board “in its own field” should be respected. *See, e.g. Smack v. Department Mental Hygiene*, 378 Md. 298, 313 n.7; *Fogle v. H&G Restaurant*, 337 Md. 441, 455 (1995). Its construction, should be given “considerable weight by reviewing courts, *Smack, supra*; *Lussier v. Md. Racing Commission* 343 Md. 681-697 (1996) and should not “be disregarded

except for the most compelling urgent reasons.” *Lanzaron v. Anne Arundel County*, 402 Md. 140, 153 (2007).

Moreover, the Court in *Kim v. Maryland State Board of Physicians*, 423 Md. 523 (2011) addressed the issue of the State Judiciary’s role in reviewing an administrative agency’s adjudicatory decision as follows:

[1] [2] [3] “it is well settled that the State Judiciary’s role in reviewing an administrative agency’s adjudicatory decision is limited; it ‘is limited to determining ... if the administrative decision is premised upon an erroneous conclusion of law.’” *Finucan v. Md. Bd. Of Physician Quality Assurance*, 380 Md. 577, 590, 846 A.2d 377, 384-85 (2004) (quoting *United Parcel Serv., Inc. v. People’s Counsel*, 336 Md. 569, 577, 650 A.2d 226, 230 (1994)) (citation omitted). “[A]n administrative agency’s interpretation and application of the statute which the agency administers should ordinarily be given considerable weight by reviewing courts.” *Md. Aviation Admin. V. Noland* 386 Md. 556, 572, 873 A.2d 1145, 1154 (2005) (quoting *Bd. Of Physician Quality Assurance v. Banks*, 354 Md. 59, 69, 729 A.2d 376, 381 (1991)).

The Court continued:

*536 [4] [5] [6] [7] [8] [9] The court’s review of the administrative agency’s factual findings “is limited to determining if there is substantial evidence in the record as a whole to support the agency’s findings and conclusions.” *Finucan*, 380 Md. at 590, 846, A.2d at 384-85 (quoting *United Parcel Serv.*, 336 Md. at 577, 650 A.2d at 230) (internal quotation mark omitted). We uphold the agency’s factual conclusion if “a reasoning mind could have reached” that conclusion. *Banks*, 354 Md. at 68, 729 A.2d at 380 (quoting *Bulluck v. Pelham Wood Apts.*, 283 Md. 505, 512, 390 A.2d 1119, 1123 (1978)) (internal quotation marks omitted). We defer to the agency’s fact-finding and drawing of inferences if they are supported by the record. A reviewing court ‘must review the agency’s decision in the light most favorable to it; ... the agency’s decision is prima facie correct and presumed valid, and ... it is the agency’s province to resolve conflicting evidence and to draw inferences from that evidence.’ *Id.*, 729 A.2d at 380-81 (quoting *CBS v. Comptroller*, 319 Md. 687, 698, 575, A.2d 324, 329 (1990)) (alterations in original) (citation omitted). *Kim* supra, 423 Md. at 535-536.

In this manner, the Courts are to accord deference to an agency's interpretation of its own regulations as was done here concerning tolling.

The Board further supported its conclusion that tolling was appropriate by citation to decisions of this Court and the Court of Special Appeals, See, e.g. National Waste Managers, Inc. v. Anne Arundel County, 135 Md. App 585 (2002), (applied tolling during the entire course of litigation for approval and permits for operation of a sand and gravel and rubble landfill operation for an almost ten year period of time); City of Bowie v. Prince George's County Planning Board of the Maryland National Capital Park and Planning Commission, 384 Md. 413 (2004) ("when 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 action is pending." Id., at 438-9).

In the case of Lanzaron v. Anne Arundel County, 402 Md. 140 (2007), this Court explained that,

We have long held that when a zoning decision has been made authorizing a particular action, which by Statute, must be taken by a certain time, that time, generally does begin (or continue) to run during a period in which opponents or other governmental agencies (or even in some cases—circumstance) have created conditions, such as permitting processes, appeals or other litigation that block the taking of the particular action: supra, 402 Md., at 151.

Unlike other uses, in which the County issues a permit that authorizes construction of the use to commence, construction of a landfill is contingent upon the State-issued refuse disposal system permit, i.e., the landfill permit, which is issued by the Maryland Department of the Environment. Until the landfill permit is issued, an applicant is

prohibited from beginning construction. See, Environment Article Section 9-204(h). Moreover, County permits to required of the landfill will not even be processed until the MDE permit has been issued.

Holding that such a process tolls the applicable special exception period is consistent with Lanzaron as well as other Maryland jurisprudence which recognize that, on a basic level, an applicant should be provided a fair opportunity to implement the approved use. See, e.g., National Waste Managers v. Anne Arundel County, 135 Md. App. 585, 608-09 (2000) (recognizing the general principle that governmental action or inaction can toll the implementation period); see also City of Bowie v. Prince George's County, 384 Md. 413, 437 (2004) (“The regulatory process is not designed to be a spider’s web, snaring on one who follows all the regulations and statutes, obtains all the necessary permits, and successfully defends a series of appeals, but then loses his right to proceed because the passage of time has caused the permits to expire.”)

In this case, the Board of Appeals relied on its statutory regulations regarding tolling and on previous case law regarding tolling in Maryland in reaching its decision to grant the extension of time in this case. The Board properly concluded that “tolling is appropriate by both code and case law” 2019. Board of Appeals Opinion, p. 4, E. 88. The Board is powerless to modify the existing statutory scheme of the Anne Arundel County Code and must apply County statutory tolling in an appropriate case.

The Board addressed the passage of time and thereby “accounted” for the period beyond 2017 by applying the doctrine of tolling, raised for its consideration by the Court

of Appeals, and by providing that its grant of the requested two year extension commence on the date of issuance of its October 19, 2018 Order, running through October 18, 2020. This application of the tolling doctrine is necessary to the Board's ability to determine the merits of appeals which would otherwise expire and become moot by virtue of the length of time required by litigation.

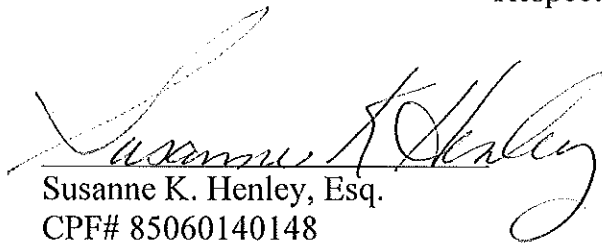
Given that this Court of Appeals specifically raised the issue of tolling for the Board's consideration on remand, and that the Board's power to apply the doctrine is authorized and compelled by statute, it is respectfully submitted that the Board has the discretion under the remand instruction to account for the impact of the request beyond 2017 by applying the doctrine of tolling.²

² Absent application of tolling, the expiration of a variance would become a moving target, and it would be possible for a variance to expire before the litigation was complete.

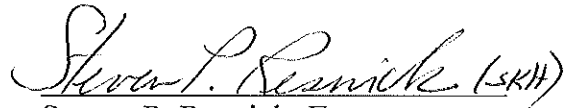
CONCLUSION

It is respectfully submitted that the Board complied with the remand instructions, of the Court of Appeals and National 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 19, 2018 be affirmed.³

Respectfully submitted,



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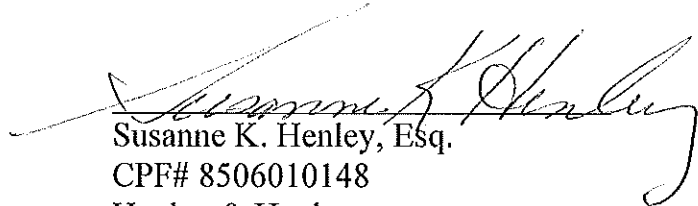


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³ While the Forks purported to seek a full judicial review of the Board's action (E. 95-98) it has raised no issue, in the Circuit Court, or any objection asserting that all or any portion of the Board's findings or conclusions were contrary to law or unsupported by the record as a whole. Consequently, National asserts that the Board's decision be affirmed. Alternatively, if the Court does not accept National's position, National requests that the case be reversed and remanded to the Circuit Court to conduct further proceedings not inconsistent with the opinion rendered herein.

**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 7,140 words, excluding the parts exempted from the word count by Md. Rule 8-503.



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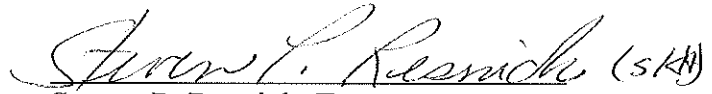
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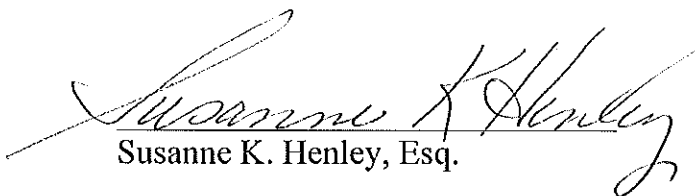
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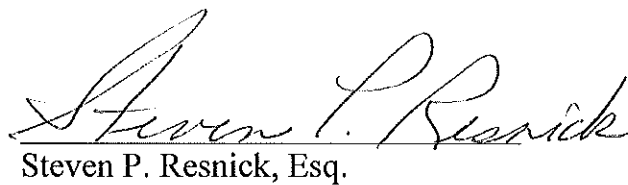
I HEREBY CERTIFY that on this 17 day of January, 2020, a copy of the foregoing Brief of Appellant, National Waste Managers, Inc./Chesapeake Terrace was electronically served via MDEC and by first class mail, postage prepaid to:

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