

In the  
**Court of Special Appeals of Maryland**

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September Term, 2019  
No. 1327  
CSA-REG-1327-2019

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NATIONAL WASTE MANAGERS, INC./CHESAPEAKE TERRACE

Appellant

v.

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

Appellees

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On Appeal from the Circuit Court for Anne Arundel County, Maryland  
Case No. C-02-CV-18-003469  
(The Honorable Ronald A. Silkworth)

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**Brief of Appellees**

Forks of the Patuxent Improvement Association, Inc., Catherine Fleshman,  
Carmelina Fleming, Ulis Fleming, Samuel Travaglini, and Ronald Routzahn

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## Statement of the Case

As the Court of Appeals noted in *National Waste Managers, Inc. v. Forks of the Patuxent Improvement, Inc.*, “[t]he origin of this saga goes back to 1990” when Appellant National Waste Managers, Inc. (“National”) “sought zoning approval to construct and operate a rubble landfill on a 482-acre parcel and to conduct a sand and gravel operation on 108 acres of that same parcel,” which is located in the Odenton area of Anne Arundel County. 453 Md. 423, 426-27 (2017) (the “2017 Appeal”)<sup>1</sup>. By the time the Court of Appeals issued a decision in the 2017 Appeal, the project had dragged on for 27 years, due to a “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.” *Id.* at 426-27.

In 1993, National obtained special exceptions and setback variances for its proposed rubble landfill and sand and gravel operation. The Board’s Order specifically limited the lifespan (from the beginning of waste to collection to final waste acceptance) of the landfill to 12 years. *Id.* at 428. Since then, the time for

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<sup>1</sup> The MDE Administrator stated most landfills are approximately 5 – 15 acres in size, National’s proposed landfill is exponentially larger, over 100 acres. *Id.* at 435 n. 4.

National to complete its project was tolled until April 2001, the time of the culmination of protracted litigation between National and Anne Arundel County. *Id.* at 430. As the MDE rubble landfill permitting requirements changed extensively since National's 1993 zoning approvals, starting in 2003, the special exceptions were extended three times upon National's requests for temporal variances permitted under the Anne Arundel County Code. *Id.* at 430-33.

In 2012, National sought a fourth two-year extension, which was opposed by Appellee Forks of the Patuxent Improvement Association, Inc. and other individuals (collectively, the "Association"). At that time, National was still pursuing its Phase 3 (of five Phases) approval with MDE, which it had been seeking since April 2005. *Id.* at 435. At the hearing, the MDE Administrator of the Solid Waste Program stated that the delay in the Phase 3 MDE approval was due to the size of the landfill being much larger than most others. *Id.* There was also testimony about National's submissions to the MDE during the 2011 - 2013 timeframe. The Administrator opined that National had been diligent in pursuing the project, that Phase 3 review should be completed in 2013, and that the MDE process should be completed with the requested extension of two years [by 2015]. *Id.*

The Board of Appeals of Anne Arundel County's (the "Board") issued a split 2-2 decision on December 27, 2013, which effectively denied National's request. *Id.* at 436-37. This decision was the subject of the 2017 Appeal.

Following the Board's denial, National sought judicial review in the Circuit Court for Anne Arundel County<sup>2</sup>, which reversed the Board and remanded for further proceedings. *Id.* at 437. The Association noted an appeal to this Court, which also determined that the Board erred but substituted its reasoning for the Circuit Court's on remand. *Forks of the Patuxent v. Nat'l Waste Mgrs.*, 230 Md. App. 349 (2016).

The Court of Appeals granted National's petition for *certiorari*. *Nat'l Waste Managers v. Forks of the Patuxent*, 451 Md. 577 (2017). The Court of Appeals agreed with the Circuit Court and this Court that the matter needed to be remanded to the Board but substituted its own reasoning for that which was provided by the lower courts. The Court observed that the denying members of the Board did not cite any evidence "of how an extension to 2015 would alter the character of the neighborhood, impair the use or development of adjacent property, or be detrimental to the public welfare." *Nat'l Waste Mgrs.*, 453 Md. at 445. Although the Court found that the absence of such evidence rendered the denying members'

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<sup>2</sup> Hereinafter, all references to the "Circuit Court" are to the Circuit Court for Anne Arundel County.



conclusions arbitrary and capricious, it did “not require an outright reversal of the Board’s rejection. . . .” *Id.* at 446. Instead, the Court determined that the more appropriate resolution was a remand for the Board to consider

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 an extension as of the Board’s decision in 2011.

*Id.*

The Court recognized, however, that the Board’s proceedings on remand were “complicated by the passage of time and the effect of tolling” and that the “Board will have to take into account the impact of the requested extension beyond 2017.” *Id.* The Court’s mandate stated as follows:

**JUDGMENT OF COURT OF SPECIAL APPEALS VACATED;  
CASE REMANDED TO THAT COURT WITH INSTRUCTIONS  
TO VACATE JUDGMENT OF THE CIRCUIT COURT FOR ANNE  
ARUNDEL COUNTY AND INSTRUCT THAT COURT TO  
REMAND TO THE ANNE ARUNDEL COUNTY BOARD OF  
APPEALS FOR FURTHER PROCEEDINGS IN CONFORMANCE  
WITH THIS OPINION; COSTS IN THIS COURT AND IN COURT  
OF SPECIAL APPEALS TO BE PAID BY RESPONDENTS.**

*Id.*

Following the 2017 Appeal, this Court issued an Order on December 13, 2017, vacating the judgment of the Circuit Court with instructions for that court to remand the case to the Board “for further proceedings in conformance with the

opinion of the Court of Appeals.” Thereafter, the Circuit Court, on January 11, 2018, issued an order remanding the case to the Board for further proceedings consistent with the opinion issued in the 2017 Appeal.

The Board held a hearing on July 25, 2018, allotting each side 30 minutes to argue its case. (E. 26-84). Without any objection from National, the Board reviewed the matter on the record, which consisted solely of evidence that had been submitted *prior* to the Board’s 2013 decision. (E. 26-84). National did not offer nor attempt to offer any evidence concerning the time period following 2013. (E. 26-84).

The Board issued a Supplemental Memorandum Opinion on October 19, 2018, reversing its prior decision and granting National’s request for a variance for a two-year extension. Basing its decision on the “record of evidence and testimony presented in 2013,” the Board rejected the findings of the two Board members who had previously denied National’s request for an extension and adopted the findings and conclusions of the two Board members who were in favor of granting the request in the prior decision. (E. 87).

Turning to the impact of the extension moving forward, the Board focused solely on provisions of the Anne Arundel County Code that address tolling, concluding that the special exception and variances have been tolled and that the Board’s decision granting National’s request would be extended an additional two

years from the date of the decision. (E. 87). Despite there being no evidence submitted in the record subsequent to 2013, the Board concluded that the request was tolled because National “could not proceed toward development during the various appeals since the MDE would not process the application with litigation pending.” (E. 88). This, according to the Board, accounted for the impact of National’s request for an extension beyond 2017.

The Association filed a petition for review in the Circuit Court, arguing that there was insufficient evidence presented in the hearing before the Board. (E. 97). After a hearing, the Circuit Court entered an Order on June 24, 2019, finding that “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.” (E. 230). Accordingly, the Circuit Court ordered that the case be remanded to the Board 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.” (E. 229). National filed a motion to alter or amend, which the Circuit Court denied. (E. 231, 236). This appeal followed.

### **Questions Presented**

1. Did the Board fail to comply with the mandate of the Court of Appeals and thus err in granting National's request for an extension by not receiving nor citing any evidence regarding the impact of the requested extension beyond 2017?

2. Was the Board's finding that the special exception and variances had been tolled supported by substantial evidence in the record?

### **Statement of Facts**

National has provided this Court with a summary of the facts recited by the Court of Appeals in the 2017 Appeal, which facts were drawn from evidence submitted to the Board prior to December 2013. *Br. 3-15* (citing *Nat'l Waste Managers, Inc. v. Forks of the Patuxent Improvement Ass'n, Inc.*, 453 Md. 423 (2017)). The Association need not repeat the complete factual history of this case here, as this Court and the Court of Appeals has already done so. More importantly, because the record in this case contains no testimony or documentary evidence regarding facts occurring post-2013, there is nothing in the record that either party could cite to supplement the facts that were already laid out in this Court's prior opinion.

Because this appeal focuses on whether the Board complied with the mandate of the Court of Appeals, however, the Association will highlight the facts

that speak to that issue.

**A. In 2013, What Impact, If Any, Would the Requested Two-Year Extension to 2015 Have on the Character of the Neighborhood, the Appropriate Use or Development of Adjacent Property, or the Public Welfare?**

On remand, the Board reviewed the “entire record of evidence and testimony presented in 2013” and found that the two granting Board members from the 2013 decision were correct in their reasoning and fully adopted their findings and conclusions. (E. 87). Turning to the 2013 decision, the two granting Board members summarized the facts supporting their finding that the requested extension would not have a negative impact. (E.19-20).

**1. Impact on Character of Neighborhood**

In 2013, the two granting Board members found that the requested extension would *not* alter the essential character of the neighborhood. (E. 19). In support of this finding, the Board members relied on the “testimony of the Protestants,” and found that “the character of the neighborhood is that of mixed uses that range from rural residential to commercial resources for the Odenton community. . . . 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.” (E. 20).

**2. Impact on Appropriate Use or Development of Adjacent Property**

Noting that the special exception and variances had been approved for

many years, the two Board members found that the extension would not substantially impair the appropriate use or development of adjacent properties. (E. 20). They found that the adjacent properties could “continue to be used without impairment during the extension period requested.” (E. 20).

### **3. Impact on Public Welfare**

With regard to the public welfare, the Board members found that “[n]o traffic w[ould] result from the grant of the time extension”; and “[n]o impacts to water will result from the grant of the time extension.” (E. 20). As a result, they concluded that the extension would not be detrimental to the public welfare. (E. 20).

### **B. What Impact Will the Requested Extension Have Beyond 2017?**

On this issue, the Board did not rely on evidence beyond what had been submitted by the parties in 2013. (E. 85-94). The Board heard no evidence regarding the current status of the MDE rubble landfill permit application, nor the County approvals, including no evidence concerning National’s compliance with any of the specific conditions attached to the Special Exception approvals. (E. 26-84). The Board heard no evidence – nor did National proffer any – concerning facts touching upon the impact the requested extension would have beyond 2017. (E. 26-84). Instead, the Board purported to account for the impact of the requested extension beyond 2017 by applying the doctrine of tolling, finding that tolling was appropriate because National “could not proceed toward development during the

various appeals since the MDE would not process the application with litigation pending.” (E. 88).

In reaching its decision regarding tolling, the Board did not permit nor hear any new evidence regarding diligence on the part of National or whether the passage of time was accompanied by a change of conditions which would cause prejudice to the surrounding community. (E. 26-84). And the Board cited no evidence in the record supporting a finding on those matters. (E. 85-94).

And, when the Board raised issues that would be relevant on the issue of National’s diligence, National deflected. Notably, when the Board queried regarding the status of the access road to the landfill, National’s counsel contended that the access road was beyond the scope of the mandate in the case. (E. 43). National’s counsel further contended that it had not been finalized yet, and that National needed the two-year extension of time because “they’re not going to let us put a road in there until we have an MDE permit.” (E. 43). This, of course, obfuscated the most pertinent issue regarding the access road, which has nothing to do with National needing a two-year extension of time and everything to do with National’s diligence – whether National owned fee simple title to the land.

In *Halle Companies v. Crofton Civic Association*, the Court of Appeals reviewed the original 1993 Special Exception decision of the Board granting National’s request for alternate access to the landfill site from Conway Road. 339 Md. 131,

136 (1995). The Court affirmed the Board's Special Exception approval decision, including the condition imposed by the Board that National had to "obtain a fee simple estate rather than an easement in the Conway Road access land before the landfill operations may proceed." *Id.* at 148. National's required future ownership of the access road "was explicitly made a condition of the Board's grant of the exception and variance." *Id.*

Over two decades later, whether National has obtained fee simple title to the Conway Road access land weighs directly on the issue of National's diligence. That National may or may not need an MDE permit to build an access road is meaningless if National does not *own* the land on which the road is to sit. National's counsel's response to the Board's query was not evidence and it did not address the core issue regarding access: whether National even owned the land as required by the Board as a condition of its Special Exception zoning approval.

### **Standard of Review**

On appeal, this Court "reviews the agency's decision, not the circuit court's decision." *Long Green Valley Ass'n v. Prigel Family Creamery*, 206 Md. App. 264, 273 (2012). An agency's decision must be viewed "in the light most favorable to the agency," *Coscan Washington, Inc. v. Maryland-Nat'l Capital Park & Planning Comm'n*, 87 Md. App. 602, 626 (1991), because an agency has "expertise in a particular area." *Annapolis v. Annapolis Waterfront Co.*, 284 Md. 383, 395 (1979). Its decision,



therefore, is “prima facie correct” and carries with it a “presumption of validity.” *Coscan Washington, Inc.*, 87 Md. App. at 626.

When reviewing a zoning board’s decision, this Court applies a three-step process. *See Sterling Homes Corp. v. Anne Arundel Cty.*, 116 Md. App. 206, 216 (1997). First, this Court reviews the agency’s legal conclusions *de novo* and determines whether the agency correctly interpreted and applied the law. *Comptroller of the Treasury v. Johns Hopkins Univ.* 186 Md. App. 169, 181 (2009). In doing so, this Court gives “deference . . . [to] the legal conclusions of an . . . agency regarding . . . ordinances . . . [it] is tasked with administering,” *Marzullo v. Kahl*, 366 Md. 158, 172 (2001), and must affirm the agency’s decision unless it “is premised solely upon an erroneous conclusion of law.” *Hikmat v. Howard Cty.*, 148 Md. App. 502, 522 (2002). Second, this Court reviews whether the agency’s factual findings are supported by substantial evidence in the record. Substantial evidence exists if there is “relevant evidence [] a reasonable mind might accept as adequate to support a conclusion.” *Catonsville Nursing Home, Inc. v. Loveman*, 349 Md. 560, 569 (1998). It means “more than a ‘scintilla of evidence,’ such that a reasonable person could come to more than one conclusion.” *Wisniewski v. Department of Labor*, 117 Md. App. 506, 516–17 (1997) (citation omitted). Third, this Court determines whether the agency properly applied the law to the facts and decides “whether . . . a reasoning mind could reasonably have reached the conclusion reached by the

[agency], consistent with a proper application of the [controlling legal principles],” *Hikmat*, 148 Md. App. at 522-23. (brackets in original). Administrative agency decisions are not set aside unless the decision is arbitrary, illegal or capricious. *Mortimer v. Howard Research & Dev. Corp.*, 83 Md. App. 432, 441 (1990).

In *de novo* appeals before a Board of Appeals, the burden of persuasion and production falls on the applicant, which in this case, was National. *Lohrmann v. Arundel Corp.*, 65 Md. App. 309, 319 (1985).

## **Argument**

### **A. The Board’s Decision Should Be Vacated Because It Failed to Follow the Mandate of the Court of Appeals To Determine What Impact National’s Requested Extension Would Have Beyond 2017.**

#### **1. Summary of Applicable Law**

The Anne Arundel County zoning law is codified in Article 18 of the Anne Arundel County Code. Section 18-16-304 of the Code sets forth criteria for granting special exceptions, and Section 18-16-305 sets forth requirements and standards for granting variances. Standards regarding the approval of variances are also found in Section 3-1-207 of the Code. Section 3-1-207(a)(2) provides in relevant part:

The Board of Appeals may vary or modify the provisions of Article 18 of this Code when it is alleged that practical difficulties or unnecessary hardships prevent carrying out the strict letter of that article, provided the spirit of the law shall be observed, public safety secured, and 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.

The Board is precluded from granting a variance unless it finds:

- (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; [or]

\* \* \* \*

- (v) be detrimental to the public welfare.

§ 3-1-207(e).

Section 18-16-405(a) of the Code 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.” Under Section 18-16-405(b), an applicant may request a variance to extend that time, and Section 18-16-405(c) provides that “[t]he pendency of litigation may toll the time periods set forth in subsection (a) to the extent provided by law.” As noted by the Court of Appeals, “Section 18-16-405 thus speaks of, or refers to, two kinds of variances — a subsection (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 subsection (b), which merely extends a time requirement for obtaining necessary permits.”

*Nat'l Waste Mgrs.*, 453 Md. at 429.

## **2. The Holding and Mandate of the Court of Appeals**

The impetus for the Court's holding in the 2017 Appeal was its finding that the denying members of the Board failed to cite evidence that the requested extension would alter the character of the neighborhood, impair the appropriate use or development of adjacent property or be detrimental to the public welfare. *Nat'l Waste Mgrs.*, 453 Md. at 445. This error, however, did "not require outright reversal" of the Board's denial, but rather, "a remand to address and 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. . . ." *Id.* at 446 (emphasis added). Given that the Opinion was issued in 2017, the Court recognized that the Board's task "had become more complicated by the passage of time and the effect of tolling." *Id.* The Court further instructed that "the Board will have to take into account the *impact* of the requested extension beyond 2017." *Id.* (emphasis added).

In sum, the reason for sending the case back was the Board's previous failure to cite evidence regarding the impact of the requested extension; and the instructions on remand directed the Board to consider the issue of the impact of the requested extension from 2013 to 2015 *and* "beyond 2017." The Board also had

to determine the effect of tolling given the passage of time.

When using the phrase “impact of the requested extension,” the Court was referring to the impact the extension “would have on the character of the neighborhood, the appropriate use or development of adjacent property, or the public welfare.” *Id.* Making findings regarding the impact of an extension moving forward is a fundamental aspect of the Board’s analysis when considering a request for a temporal variance. As the Court noted, the function of temporal variances is not to relitigate findings regarding the impact of the *project*, but rather, the impact of the *extension*:

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.”

*Id.* at 445. The Court’s edict was clear: On remand, the Board needed first to consider what impact the extension would have in 2013, then consider the effect of tolling given the passage of time, and then, *looking forward*, what impact the requested extension would have “beyond 2017.”

### **3. The Board Failed to Comply with the Mandate of the Court of Appeals**

“No principle is better established than that a decision of the Court of Appeals once pronounced in any case is binding upon the Court below . . . , and

cannot be disregarded or called into question. It is the law of the case binding and conclusive upon the parties, not open to question or examination afterwards in the same case.” *Chayt v. Board of Zoning Appeals of Baltimore City*, 178 Md. 400, 402-03 (1940) (citation omitted). And “[i]f the construction and interpretation of an appellate court’s mandate is found to be not in accord with the intention of the appellate court, it is subject to review.” *Balducci v. Eberly*, 304 Md. 664, 674 (1985).

Despite the instructions of the Court of Appeals to determine the *impact* of the requested extension “beyond 2017,” on remand, the Board of Appeals focused its analysis “on the Anne Arundel County Code, which speaks directly to the issue of tolling,” and opinions of the Maryland appellate courts for guidance. (E. 87). Specifically, the Board reviewed Section 18-16-405 of the Code, which 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 granting the variance or special exception (1) obtains a building permit or (2) files an application for subdivision.” (E. 87) (citing §18-16-405(a)). The Board further noted that Section 18-6-405(b) and (c) permit applicants to request extensions of the time period set forth in subsection (a), as was done in this case; and Section 18-16-405(d) provides that “pendency of litigation may toll the time periods set forth in subsection (a) to the extent provided by law.” (E. 87).

The Board next turned to a decision of this Court, in a case involving

*National's* landfill, which addressed tolling. The Board noted that, in *National Waste Managers, Inc. v. Anne Arundel County*, 135 Md. App. 585 (2000), this Court held that the validity period for the special exception approval to operate National's landfill was tolled during the course of litigation challenging the approval and permits necessary to operate the landfill. (E. 88). That decision, the Board surmised, meant that National's request for a two-year extension was also tolled because National "could not proceed toward development during the various appeals since the MDE would not process the application with litigation pending." (E. 88). As a result, the Board concluded that it would grant National's request for a two-year time extension from the date of its order. (E. 88).

In reaching this conclusion, the Board misapplied the doctrine of tolling and failed to comply with the mandate of the Court of Appeals. The doctrine of tolling, as explicitly provided in the very provisions of the Code cited by the Board, only operates to toll the validity period after which time a variance or special exception may expire. See § 18-16-405(a) ("[a] variance or special exception that is not extended or tolled expires by operation of law unless the applicant within 18 months of granting the variance or special exception (1) obtains a building permit or (2) files an application for subdivision."); § 18-16-405(d) ("pendency of litigation may toll the time periods set forth in subsection (a) to the extent provided by law.").

The validity period for National's special exception and variances can thus be *tolled* during litigation upon an appropriate factual finding, supported by substantial evidence, that permits were held up as a result of the litigation, among other findings. *Nat'l Waste Mgrs.*, 135 Md. App. at 585. Tolling is thus inherently backward looking, i.e., did litigation delay the processing or issuance of another required approval? This was lacking in the Board's proceedings on remand, as there was no evidence presented regarding the status of the MDE permit application from 2013 - 2018 nor that the underlying litigation had caused the permit processing to be delayed, and if so, for what period of time.

The validity period can also be *extended* upon a finding that National has been diligent in pursuing its permits or approvals, it needs additional time to obtain its permits or approvals, and also meets the neighborhood impact criteria for temporal variances. *Nat'l Waste Mgrs.*, 453 Md. at 445. As the Court of Appeals acknowledged, temporal variance extensions are "forward looking" and the focus is "whether the requested extension 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." *Nat'l Waste Mgrs.*, 453 Md. at 445. This, too, requires evidence supporting the factors in favor of granting an extension, which was also completely lacking in the proceedings before the Board on remand.

Both tolling and temporal variances require a factual record. Tolling, under



the Anne Arundel County Code and in the context of the opinion of the Court of Appeals, does not apply to the temporal variance extension itself nor obviate the need of the Board to conduct a forward-looking review of the impact of the extension, a review which necessarily requires receiving evidence.

By invoking the doctrine of tolling, the Board did not address “the impact of the requested extension beyond 2017.” The Board cited no facts supported by substantial evidence in the record that an extension would not “alter the character of the neighborhood or substantially impair the appropriate use or development of adjacent property, or be detrimental to the public welfare.” *Nat’l Waste Mgrs.*, 453 Md. at 445. Accordingly, the Board did not comply with the mandate of the Court of Appeals. Further, the fact that the Board received no evidence and thus cited no facts to support a decision regarding whether the requested extension would have a negative impact beyond 2017, warrants an outright reversal or, at the very least, a remand for further proceedings as directed by the Circuit Court.

**B. The Board Erred in Applying the Doctrine of Tolling Because It Received and Cited No Evidence That Would Support Such a Finding.**

On remand, the Board failed to comply with the mandate of the Court of Appeals by supplanting an analysis of the impact of National’s requested extension beyond 2017 with a tolling analysis. Further, its tolling analysis was flawed.

## **1. There Was No Evidence in the Record Supporting the Application of the Doctrine of Tolling**

As the Board correctly noted, this Court has already provided an extensive opinion on the doctrine of tolling, which was issued in litigation involving this very same project. In *National Waste Managers, Inc. v. Anne Arundel County*, 135 Md. App. 585 (2000), this Court held that the validity period for special exception approval to operate the landfill was tolled during the course of litigation challenging the MDE approval and permits needed to operate the landfill because the MDE suspended processing National's permit application during this time frame. This was during a time when National and Anne Arundel County were embroiled in litigation regarding the underlying permits and special exceptions.

In so holding, this Court made clear that the doctrine of tolling was not something to be applied automatically in every single case, and that, "as a way of preventing misuse of the tolling principle," courts are "cautious to fashion a remedy with no greater breadth than necessary." *Id.* at 614 (quoting *Cardinale v. Ottawa Reg'l. Planning Comm'n*, 627 N.E.2d 611, 615 (Oh. App. 1993)). This Court found the reasoning of the *Cardinale* court eminently sound:

Recognizing that there are times when a developer might not proceed with due diligence, or that *passage of time* might "be accompanied by a change of conditions ... which would cause ... prejudice [to] a community," *id.*, that court declined to hold that a legal challenge "automatically extends the time for compliance with the conditions."

*Id.* (emphasis added). Legal challenges do not automatically extend the time for compliance, so the party seeking the benefit of the tolling doctrine must demonstrate that it has proceeded “with due diligence” and that the “passage of time” was not accompanied by a change of conditions which would cause prejudice to the community. *Id.* Thus, before applying the doctrine of tolling, the Board must receive evidence bearing upon these considerations. In this case, it received none.

Instead, the Board found that tolling applied in this case without any factual record regarding the time frame between 2013 and its hearing in 2018. National proffered no evidence supporting a finding that it had been acting with due diligence; it proffered no evidence there had been no change in conditions over the passage of time which would cause prejudice to the community. (E. 26-84). National did not even offer evidence regarding the status of its permits, as it had done in prior hearings before the Board, or that litigation had held up those permits.

To be clear, the burden of persuasion and production before the Board was on National, and not on the Association. *See Nat’l Waste Mgrs.*, 453 Md. at 441; *Lohrmann v. Arundel Corp.*, 65 Md. App. 309, 319 (1985) (“in this case the Board was exercising what amounts to original jurisdiction. It 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.’”). On remand, the burden was on National to present evidence that it had been unable to obtain permits as a result of the litigation, that it was proceeding with due diligence and that the passage of time was not accompanied with a change in conditions that would cause prejudice to the community. Referring only to the record that was created in 2013, without looking “beyond 2017” as required by the Court of Appeals, National did not and could not meet its burden of presenting evidence on those factual matters necessary to determine the applicability of tolling, in whole or in part, to the intervening period from 2013 to 2018 when the matter returned to the Board. The Board thus heard no evidence to support its finding that the doctrine of tolling applied up until the date of its hearing in July 2018 and its written decision in October 2018. (E. 26-84). It erred, not only in finding that tolling addressed the impact of the requested extension beyond 2017, but also in finding that tolling applied to the entire period from 2013 to October 2018.

**2. The Court of Appeals Did Not Give the Board Discretion to Apply the Doctrine of Tolling to Account For the Impact of National’s Request Beyond 2017**

National contends that the Court’s mandate gave the Board the discretion to apply the doctrine of tolling to account for the impact of the request beyond

2017. According to National, “[a]bsent 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.” *Br.* at 24. National further contends that “the Board’s power to apply the doctrine is authorized and compelled by statute.” *Id.* The Association submits that the Court’s mandate gave the Board no such discretion to apply the doctrine of tolling to account for the impact of the request beyond 2017, and that National’s alarm at the prospect of not applying tolling as it was in this case is unfounded. In addition, a proper reading of the Anne Arundel County Code also demonstrates that applying the doctrine of tolling to a request for temporal variance is not permitted by the statute.

The Court’s mandate directed that, “[i]n some manner, the Board will have to take into account the impact of the requested extension beyond 2017.” As stated above, the Court’s use of the term “impact” was not a coincidence; it specifically refers to the analysis required when a party seeks a temporal variance: will 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”? *Nat’l Waste Managers*, 453 Md. at 445. This forward-looking analysis cannot be conducted without receiving evidence concerning these issues. It also cannot be addressed by applying the doctrine of tolling (which also cannot be applied without receiving evidence).

To the extent tolling was applicable in this case, it was to address the passage of time between 2013 and when the case returned to the Board in 2018, as explicitly recognized by the Court of Appeals. *Id.* (noting that the Board’s analysis had “become more complicated by the passage of time and the effect of tolling.”). Applying the doctrine of tolling in *this* manner, based on a proper evidentiary record, would be appropriate and would address National’s concern about the expiration of a variance being a “moving target.” If the *evidence* supports it, the expiration of the special exception and variances may be tolled during the pendency of litigation, but the Board still must make a finding regarding the impact of the time extension moving *forward* once any applicable tolling period has terminated.

*Lanzaron v. Anne Arundel County*, 402 Md. 140 (2007), is instructive on this issue. In *Lanzaron*, which also concerned a request for a temporal variance before the Board, the Court of Appeals recognized that tolling may operate to delay the expiration of a special exception while a temporal variance is pending. *Id.* at 144 (noting that a September 10, 2004 request for an extension, “allowing for tolling,” was within one year of the date of the initial approvals becoming final.). The Court, although it was analyzing the authority of the Board to extend time limitations, noted that:

Additionally, 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 not begin (or continue) to run during a period in which opponents or other governmental agencies (or even in some cases—circumstances) have created conditions, such as permitting processes, appeals or other litigation, that block the taking of the particular action.

*Id.* at 151. This decision recognizes that, to the extent litigation or other circumstances prevents a party from taking action on a permit, tolling may apply to stop the clock from running out while those circumstances are present, and that once those circumstances are lifted, the Board may further extend the applicable time limitation by variance upon proper application of the law and findings supported by substantial evidence. The Court’s decision in the 2017 Appeal recognizes this, noting that the Board would have to address the passage of time and the effect of tolling, in addition to addressing the impact of the extension beyond 2017.

But, here, the Board applied the doctrine of tolling to the requested time extension itself, as opposed to the time remaining on the underlying special exception and variances. This was *not* authorized nor compelled by the Code. As referenced above, “Section 18-16-405 thus speaks of, or refers to, two kinds of variances—a subsection (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 subsection (b), which merely extends a time requirement for

obtaining necessary permits.” *Id.* at 429. Section 18-16-405(c) provides that “[t]he pendency of litigation may toll the time periods set forth in *subsection (a)* to the extent provided by law.” (emphasis added). In other words, the pendency of litigation may toll the time period applicable to the *substantive* variance provided in subsection (a), but it does not toll the *temporal* variance provided in subsection (b). The Board did *not* make a finding that tolling applied to the *substantive* variance, which *is* authorized by the statute; it instead found that National’s temporal variance “*request* has been tolled . . .” which is not authorized by statute. (E. 89) (emphasis added). This error was compounded by the fact that the Board did not receive any evidence concerning the time period of 2013 to 2018 and the effect of the litigation on National’s efforts to obtain their required MDE permit, for example, that could support any finding regarding tolling.

**C. To Benefit From the Doctrine of Tolling and to Obtain An Extension “Beyond 2017,” National Had to Present *Some* Evidence to the Board**

The application of the doctrine of tolling and the granting of temporal variances each must be supported by facts. Facts are drawn from evidence. And evidence most commonly comes in the form of testimony under oath and exhibits. National certainly knows this; it presented testimony and exhibits over several days of hearings before the Board back in 2013. Was National acting diligently? Was the two-year extension needed? Would the extension negatively impact the surrounding community? National had an answer for these questions and more



in the form of testimony and exhibits in 2013 but neither produced nor proffered such evidence in 2018.

What about from 2013 to 2017 and beyond as identified by the Court of Appeals? Did the appeals from the Board's decision cause National's permits to be delayed? Had National been acting diligently since 2013, including, for example, making any attempts to obtain fee simple title to the access road land required by the Board as a condition to the special exceptions issued over 20 years ago? If National, since 1993, has been unable to obtain the required fee simple title to the multiple parcels for the access road, what is the impact on the neighborhood? Had the passage of time created circumstances that would cause prejudice to the surrounding community? Moving *forward*, to 2017 and beyond, what impact would the time extension have on the neighborhood, the use or development of adjacent property, and the public welfare?

These questions cannot be answered in a vacuum. Their answers come from facts, which are drawn from evidence, which comes in the form of testimony and exhibits. Yet National, the party bearing the burden of production and persuasion, presented no evidence, and it raised no issue with the Board's desire to review this matter on a record of evidence that stopped in 2013.

The Board was provided no evidence and did not make any specific findings supported by substantial evidence concerning the applicability of tolling to the

period after 2013 and the effect of the ensuing litigation upon the ability of National to validate its special exception, i.e., process its MDE permit application. Similarly, the Board was provided no evidence and did not make any specific findings supported by substantial evidence<sup>3</sup> concerning National's need for a temporal variance after 2017, its continued due diligence and the impact of another time extension "on the character of the neighborhood or substantially impair the appropriate use or development of adjacent property, or be detrimental to the public welfare." As a result, the Board erred.

### **Conclusion**

For the foregoing reasons, this Court should vacate the judgment of the Circuit Court for Anne Arundel County and remand to that Court with instructions to vacate and reverse the judgment of the Board of Appeals for Anne Arundel County, or in the alternative, it should vacate the judgment of the Circuit Court for Anne Arundel County and remand to that Court with instructions to vacate the judgment of the Board of Appeals for Anne Arundel County and

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<sup>3</sup> National contends, in a footnote, that the Association raised no issue in the Circuit Court that the Board's findings were unsupported by the record as a whole. *Br.* at 25 n.3. The Board's decision should therefore be affirmed, according to National. *Id.* The Association, however, specifically argued that the evidence presented before the Board was insufficient. (E. 97). Given that, in this case, there was literally *no evidence* presented before the Board following 2013, the Association properly raised this issue, as evidenced by the fact that the Circuit Court had no difficulty determining that the Board failed to make proper findings dictated by the Court of Appeals.

remand to the Board with instructions to comply with the mandate of the Court of Appeals and hold a hearing wherein the parties may present evidence on the matters instructed by the Court of Appeals in *Nat'l Waste Managers, Inc. v. Forks of the Patuxent Improvement Ass'n, Inc.*, 453 Md. 423 (2017).

**Certification of Word Count and Compliance with Rule 8-112**

1. This brief contains 7273 words, excluding the parts of the brief exempted from the word count by Rule 8-503.

2. This brief complies with the font, spacing, and type size requirements stated in Rule 8-112.

/s/ Joseph F. Devlin  
Joseph F. Devlin

Dated: March 17, 2020

## Text of Relevant Statutes and Rules

### **Anne Arundel County Code § 18-16-304**

#### **§ 18-16-304. Special exceptions.**

(a) **Requirements.** A special exception use may be granted only if the Administrative Hearing Officer makes each of the following affirmative findings:

- (1) The use will not be detrimental to the public health, safety, or welfare;
- (2) The location, nature, and height of each building, wall, and fence, the nature and extent of landscaping on the site, and the location, size, nature, and intensity of each phase of the use and its access roads will be compatible with the appropriate and orderly development of the district in which it is located;
- (3) Operations related to the use will be no more objectionable with regard to noise, fumes, vibration, or light to nearby properties than operations in other uses allowed under this article;
- (4) The use at the location proposed will not have any adverse effects above and beyond those inherently associated with the use irrespective of its location within the zoning district;
- (5) The proposed use will not conflict with an existing or programmed public facility, public service, school, or road;
- (6) The proposed use has the written recommendations and comments of the Health Department and the Office of Planning and Zoning;
- (7) The proposed use is consistent with the County General Development Plan;
- (8) The applicant has presented sufficient evidence of public need for the use;
- (9) The applicant has presented sufficient evidence that the use will meet and be able to maintain adherence to the criteria for the specific use;
- (10) The application will conform to the critical area criteria for sites located in the critical area; and
- (11) The administrative site plan demonstrates the applicant's ability to comply with the requirements of the Landscape Manual.

(b) **Phasing of development.** If phasing of development is proposed for a use allowed by special exception and the Planning and Zoning Officer has approved a plan for phasing of development, the Administrative Hearing Officer may allow phasing pursuant to the approved plan as a condition of special exception approval.

(Bill No. 4-05; Bill No. 60-10; Bill No. 18-18)

#### **Anne Arundel County Code § 18-16-305**

##### **§ 18-16-305. Variances.**

(a) **Requirements for zoning variances.** The Administrative Hearing Officer may vary or modify the provisions of this article when it is alleged that practical difficulties or unnecessary hardships prevent conformance with the strict letter of this article, provided the spirit of law is observed, public safety secured, and substantial justice done. A variance may be granted only if the Administrative Hearing Officer makes the following affirmative findings:

(1) Because of certain unique physical conditions, such as irregularity, narrowness or shallowness of lot size and shape or exceptional topographical conditions peculiar to and inherent in the particular lot, there is no reasonable possibility of developing the lot in strict conformance with this article; or

(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.

(b) **Requirements for critical or bog protection area variances.** For a property located in the critical area or a bog protection area, a variance to the requirements of the County's critical area program or the bog protection program may be granted if the Administrative Hearing Officer makes the following affirmative findings:

(1) Because of certain unique physical conditions, such as exceptional topographical conditions peculiar to and inherent in the particular lot or irregularity, narrowness, or shallowness of lot size and shape, strict implementation of the County's critical area program or bog protection program would result in an unwarranted hardship, as that term is defined in the Natural Resources Article, § 8-1808, of the State Code, to the applicant;

(2) (i) A literal interpretation of COMAR, Title 27, Criteria for Local Critical Area Program Development or the County's critical area program and related ordinances will deprive the applicant of rights commonly enjoyed by other properties in similar areas as permitted in accordance with the provisions of the critical area program within the critical area of the County; or

(ii) The County's bog protection program will deprive the applicant of rights commonly enjoyed by other properties in similar areas within the bog protection area of the County;

(3) The granting of a variance will not confer on an applicant any special privilege that would be denied by COMAR, Title 27, the County's critical area program to other lands or structures within the County critical area, or the County's bog protection program to other lands or structures within a bog protection area;

(4) The variance request is not based on conditions or circumstances that are the result of actions by the applicant, including the commencement of development before an application for a variance was filed, and does not arise from any condition relating to land or building use on any neighboring property;

(5) The granting of a variance will not adversely affect water quality or adversely impact fish, wildlife, or plant habitat within the County's critical area or a bog protection area and will be in harmony with the general spirit and intent of the County's critical area program or bog protection program;

(6) The applicant for a variance to allow development in the 100-foot upland buffer has maximized the distance between the bog and each structure, taking into account natural features and the replacement of utilities, and has met the requirements of § 17-9-208 of this Code;

(7) The applicant, by competent and substantial evidence, has overcome the presumption contained in the Natural Resources Article, § 8-1808, of the State Code; and

(8) The applicant has evaluated and implemented site planning alternatives in accordance with § 18-16-201(c).

(c) **Requirements for all variances.** A variance may not be granted unless it is found that:

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

(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 development 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 a bog protection area; nor

(v) be detrimental to the public welfare.

**(d) Conditions for granting a variance in the critical area.**

(1) For a property with an outstanding violation, the granting of a variance under this subsection shall be conditioned on the applicant completing the following within 90 days of the date of decision, as applicable:

(i) obtaining an approved mitigation or restoration plan;

(ii) completing the abatement measures in accordance with the County critical area program; and

(iii) paying any civil fines assessed and finally adjudicated.

(2) Notwithstanding the provisions of subsection (d)(1), the Office of Planning and Zoning may extend the time for abatement to the next planting season because of adverse planting conditions. An applicant may also be granted a 180 day extension to satisfy the conditions of a variance upon timely application to the Planning and Zoning Officer and good cause shown.

(e) **Lapse.** Any critical area variance granted shall lapse by operation of law if the conditions are not satisfied within 90 days or as extended.

(f) **Parole Town Center Growth Management Area.** A variance to the provisions of the Parole Town Center Growth Management Area provisions of this Code may not be granted if the variance affects the maximum development potential or density of a site or the floor area ratio, building height, coverage, or open area requirements.

(g) **Odenton Growth Management Area Districts.** A variance may not be granted to the provisions of the Odenton Town Center Master Plan.

(Bill No. 4-05; Bill No. 69-07; Bill No. 90-09; Bill No. 93-12; Bill No. 76-13; Bill No. 20-16)

#### **Anne Arundel County Code § 18-16-405**

##### **§ 18-16-405. Time period after which variances and special exceptions are void.**

(a) **Expiration by operation of law.** 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. Thereafter, the variance or special exception shall not expire so long as (1) construction proceeds in accordance with the permit or (2) a record plat is recorded among the land records pursuant to the application for subdivision, the applicant obtains a building permit within one year after recordation of the plat, and construction proceeds in accordance with the permit.

(b) **Extension for phasing or other good cause.** In deciding an application for a special exception use, the Administrative Hearing Officer may extend the time periods set forth in subsection (a) for the use and any variance granted in connection with it when the application includes a phasing plan or sets forth facts that demonstrate other good cause why the time periods set forth in subsection (a) reasonably cannot be met.

(c) **Extension by variance.** An applicant may file an application for a variance to extend the time periods set forth in subsection (a).

(d) **Tolling.** The pendency of litigation may toll the time periods set forth in subsection (a) to the extent provided by law.

#### **Anne Arundel County Code § 3-1-207**

##### **§ 3-1-207. Standards for granting variance.**

(a) **Generally.** The Board of Appeals may vary or modify the provisions of Article 18 of this Code when it is alleged that practical difficulties or unnecessary hardships prevent carrying out the strict letter of that article,



provided the spirit of law shall be observed, public safety secured, and substantial justice done. A variance may be granted only upon an affirmative finding that:

(1) because of certain unique physical conditions, such as irregularity, narrowness or shallowness of lot size and shape, or exceptional topographical conditions peculiar to and inherent in the particular lot, there is no reasonable possibility of developing the lot in strict conformance with Article 18 of this Code; or

(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.

(b) **Variances in the critical area or a bog protection area.** For a property located in the critical area or a bog protection area, a variance to the requirements of the County critical area program or bog protection program may be granted only upon an affirmative written finding that:

(1) because of certain unique physical conditions, such as exceptional topographical conditions peculiar to and inherent in the particular lot, or irregularity, narrowness, or shallowness of lot size and shape, strict implementation of the County's critical area program would result in an unwarranted hardship, as that term is defined in the Natural Resources Article, § 8-1808, of the State Code, to the applicant;

(2) (i) a literal interpretation of COMAR, Title 27, Criteria for Local Critical Area Program Development, or the County critical area program and related ordinances will deprive the applicant of rights commonly enjoyed by other properties in similar areas, as permitted in accordance with the provisions of the critical area program, within the critical area; or

(ii) the County's bog protection program will deprive the applicant of rights commonly enjoyed by other properties in similar areas within the bog protection area of the County.

(3) the granting of a variance will not confer on an applicant any special privilege that would be denied by:

(i) COMAR, Title 27, or the County critical area program to other lands or structures within the County critical area; or

(ii) the County's bog protection program to other lands or structures within a bog protection area;

(4) that the variance request:

(i) is not based on conditions or circumstances that are the result of actions by the applicant, including the commencement of development activity before an application for a variance was filed; and

(ii) does not arise from any condition relating to land or building use on any neighboring property;

(5) that the granting of the variance:

(i) will not adversely affect water quality or adversely impact fish, wildlife, or plant habitat within the County's critical area or a bog protection area; and

(ii) will be in harmony with the general spirit and intent of the County critical area program or bog protection program;

(6) the applicant for a variance to allow development in the 100-foot upland buffer has maximized the distance between the bog and each structure, taking into account natural features and the replacement of utilities, and has met the requirements of § 17-9-208 of this Code; and

(7) the applicant, by competent and substantial evidence, has overcome the presumption contained in the Natural Resources Article, § 8-1808, of the State Code.

**(c) Conditions for granting a variance in the critical area.**

(1) For a property with an outstanding violation the granting of a variance in the critical area under subsection (b) shall be conditioned on the applicant completing the following within 90 days of the date of decision, as applicable:

(i) obtaining an approved mitigation or restoration plan;

(ii) completing the abatement measures in accordance with the County critical area program; and

(iii) paying any civil fines assessed and finally adjudicated.

(2) Notwithstanding the requirements of subsection (c)(1), the Office of Planning and Zoning may extend the time for abatement to the next planting

season because of adverse planting conditions. An applicant may also be granted a 180 day extension to satisfy the conditions of a variance upon timely application to the Planning and Zoning Officer and good cause shown.

(d) **Lapse.** Any critical area variance granted for a property with an outstanding violation shall lapse by operation of law if the conditions of subsection (c)(1) are not satisfied within 90 days or as extended.

(e) **Required findings.** A variance may not be granted under subsection (a) or (b) 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.

(f) **Restrictions relating to the Parole Town Center Growth Management Area.** A variance to the provisions of the Parole Town Center Growth Management Area Provisions of this Code may not be granted if the variance affects the maximum development potential or density of a site or the floor area ratio, building height, coverage, or open area requirements.

(g) **Restrictions relating to the Odenton Growth Management District.** A variance may not be granted to the provisions of the Odenton Town Center Master Plan.

(1985 Code, Art. 3, § 2-107) (Bill No. 61-93; Bill No. 12-00; Bill No. 105-01; Bill No. 69-03; Bill No. 65-04; Bill No. 4-05; Bill No. 69-07; Bill No. 93-12; Bill No. 18-18)

### Certificate of Service

I HEREBY CERTIFY that, on the 17<sup>th</sup> day of March, 2020, I served a copy of the Brief of Appellees electronically on all persons registered to receive service via MDEC in this appeal and two paper copies of the Brief of Appellees via first-class mail, postage prepaid, upon Appellant via its counsel of record:

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