

IN THE MATTER OF:

**NATIONAL WASTE MANAGERS/
CHESAPEAKE TERRACE**

*** BEFORE THE**

*** BOARD OF APPEALS**

*** OF ANNE ARUNDEL COUNTY**

*** CASE NOS. BA 12-13V, BA 13-13V**

*** * * * ***

MEMORANDUM OF LAW

As requested by the Board of Appeals, Anne Arundel County, Maryland, by its undersigned attorney, submits this Memorandum of Law setting forth its legal position on the issues to be considered by this Board on remand and states as follows:

RELEVANT BACKGROUND

This case is before this Board on a remand as directed by the Court of Special Appeals (“COSA”) in *National Waste Managers v. Forks of the Patuxent*, No. 1327 (Unreported, October 2, 2020) (*National VI*). This case has a long history, which will not be set forth in full herein. The background can be found in *National Waste Managers v. Forks of the Patuxent*, 453 Md. 423 (2017) (“*National V*”), as supplemented by *National VI*, pp. 2-7.

The instant remand involves the fourth request for a time extension variance for a special exception, which was originally approved by this Board in 1993 for a sand and gravel operation and rubble landfill on property owned by National Waste Managers and Chesapeake Terrace (collectively referred to as “NWM”). When the Board first heard the fourth request for the time extension in 2013, a split decision of two to two was issued, resulting in a denial of the time extension. NWM appealed that decision to the Circuit Court, and the Circuit Court ordered the matter to be remanded back to the Board. That decision was appealed to the COSA and a decision was issued. Thereafter, a petition for *certiorari* was granted by the Court of Appeals, and the case proceeded there.

In 2017, the Court of Appeals issued its 2017 decision (*National V*), and the matter was remanded back to the Board. The Court of Appeals directive in *National V* was for the Board to consider 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....” 453 Md. at 446. The Court also recognized that issue had become more complicated by the passage of time and the effect of tolling, and that “[i]n some manner, the Board will have to take into account the impact of the requested extension beyond 2017.” *Id.*

In July 2018, the Board heard legal argument from the parties,¹ and subsequently issued a decision on October 19, 2018, finding that the time extension should be granted for an additional two years, based on the evidence from the record in 2013. In addressing the passage of time issue, the Board relied on tolling and determined that NWM’s request has been tolled since their original request for a time variance, and granted a two year time extension from the date of issuance of the Order (through October 19, 2020). Oct. 19, 2018 Mem., pp. 3-4.

The Board’s October 19, 2018 decision was appealed to the Circuit Court. The Circuit Court entered an Order on June 19, 2019, finding the Board did not fully comply with the instructions of the Court of Appeals in the 2017 opinion (*National V*, 453 Md. 423). Specifically, the Circuit Court found that the Board did not 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 the adjacent property, and the public welfare. The June 19, 2019 Circuit Court decision remanded the matter back to this Board. That decision was appealed to the COSA by NWM.

¹ The County set forth no position at that hearing.

By Opinion dated October 2, 2020 in *National VI*, the COSA affirmed the Circuit Court and found that the Board's supplemental decision was incomplete: "Having decided that tolling applies, and thus extending the approvals beyond 2017, the Board must 'take into account' the 'impact' of tolling, that is, the effect that such an extension will [have] 'on the character of the neighborhood, the appropriate use or development of adjacent property, or the public welfare.'" Slip op., p. 12. This matter is now before this Board per that directive, and the Board has requested the parties file legal memoranda setting forth their position on the directive of COSA.

ARGUMENT

The COSA has directed the Board to determine the impact of any time extension beyond 2017 on the character of the neighborhood, the appropriate use or development of the adjacent property, or the public welfare. *National VI*, pp. 11-12. According to the COSA, these are the relevant variance factors as set forth in § 18-16-305(c)(2) of the County Code that were not appropriately considered by the Board.

The only way for the Board to determine what "impact" the time extension would have is to conduct an evidentiary hearing and allow participation from the parties and members of the public who choose to participate. The last time the Board took evidence was in 2013, nearly eight years ago. That evidence cannot be the basis of any determination as to the impact relevant to a time period beyond that.

Although this remand is technically a continuation of the 2013 case, it is clear that the passage of time has resulted in the need for the Board to take additional evidence. The only way for the Board to take into account the impact of the passage of time and comply with COSA's directive, is to update the evidence from the 2013 record. Certainly, the Board needs to hear any relevant updates and current testimony that may affect its determination on the relevant factors.

There is no other way the Board can consider the impact of the time extension as directed by the COSA. It appears to be an impossible task based solely on the 2013 record, and the Board's findings based on that record alone have already been found deficient by the appellate court.

Looking at the prior decisions on the earlier time extension variances considered by this Board in 2004, 2006, 2011, and 2013, the Board engaged in the same exact type of evidentiary hearings. *See* prior Board Decisions; *see also National V*, 453 Md. at 430-37 (discussing evidence that was the basis of the 2004, 2006, 2011, and 2013 decisions). Each time, the Board considered evidence from the Petitioner, Protestants, and the County in order to determine whether the time variance could be granted in accordance with the Code.

That type of evidence would be appropriate again, so that the Board can make adequate findings as to the impact of the time extension. While the COSA did not specifically state additional evidence should be taken, that appears to be the only logical conclusion. COSA found that what the Board did in 2018 was not as instructed by the Court of Appeals, because the Board only determined the "legal effect" of the passage of time on NWM's application. Slip Op., p. 11. The COSA did not appear to take issue with the Board's finding that tolling applied, but found that the Board made no findings as to the impact of tolling and the extension beyond 2017. "Having found that tolling applies, and thus extending the approvals beyond 2017, the Board must 'take into account' the 'impact' of tolling". Slip. Op., p. 12. The Board has already made a legal determination on the issue, now it must make a factual one, and to do so requires additional evidence.

To be clear, the purpose of a further evidentiary hearing is not to relitigate the project itself or the impact of the *project* on the neighborhood, nearby property, or public welfare, as the Court of Appeals in *National V* found that was resolved in 1993. The Board's focus should be whether

the requested *time extension* will alter the character of the neighborhood, impair use or development of the adjacent property, or be detrimental to the public welfare. *National V*, 453 Md. at 445; *National VI*, p. 12.

CONCLUSION

For the foregoing reasons, it is the recommendation of the County that this Board conduct an evidentiary hearing in order to comply with the directive of the Court of Special Appeals.

Respectfully submitted,

/s/ Kelly Phillips Kenney
Kelly Phillips Kenney
Supervising County Attorney
Anne Arundel County Office of Law
Heritage Office Complex
2660 Riva Road, 4th Floor
Annapolis, Maryland 21401
410-222-7888

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of April, 2021, a copy of the foregoing Memorandum of Law was served via email and first class U.S. Mail to the following:

Susanne K. Henley, Esq.
Henley & Henley
47 West Street
Annapolis, Maryland 21401

Steven P. Resnick, Esq.
Law Office of Steven P. Resnick
156 South Street
Annapolis, Maryland 21401

Attorneys for National Waste Managers, et al.

Joseph Devlin, Esq.
Ana Henry, Esq.
Coucil Baradel, Kosmerl & Nolan, P.A.
125 West St., Fourth Floor
Annapolis, Maryland 21401

Attorneys for Forks of the Patuxent Improvement Association, et al.

/s/ Kelly Phillips Kenney

Kelly Phillips Kenney