ANNE ARUNDEL COUNTY BOARD OF APPEALS

NATIONAL WASTE MANAGERS, INC. /
CHESAPEAKE TERRACE

CASE NO.: BA 12-13V and BA 13-13V

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MEMORANDUM ON REMAND TO THE BOARD OF APPEALS

The issue the Court of Special Appeals (hereinafter "**COSA**") has remanded for the Board of Appeals (hereinafter "**Board**") to decide is a narrow one, as well as one this Board has previously addressed in its first three extensions decision—specifically, "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" as articulated in Anne Arundel County Code §18-16-305(c). While the Board's 2018 decision (copy attached as Exhibit A) correctly recognized that the special exception had been tolled during litigation, COSA also found this analysis incomplete and remanded for the Board to determine the impact of any extension on the surrounding community beyond 2017. To assess that impact, National Waste Managers, Inc. (hereinafter, "**National**") believes it is appropriate for the Board to open the record in these proceedings to hear evidence and testimony on those issues.

The first three extensions granted by the Board all addressed these same issues in this same manner, taking evidence from National on the status of its application for a Maryland Department of Environment (hereinafter, "**MDE**") permit for a rubble landfill

operation and hearing from any protestants about the potential effects **an extension** may have on the neighborhood. As those decisions all recognized, National has been diligent in pursuing approval for its refuse disposal permit from the MDE with any delays caused by factors outside of National's control, including the general length of time required to complete that process, and unfortunately, the County's continued bad faith delay tactics. Moreover, the Board previously found the extension requests will not change or effect the character of the neighborhood, use of adjacent properties, or the public welfare, because a special exception has been approved for many years now and is well-known within the community.

What the COSA **did not** remand for further consideration are the merits or validity of the special exception itself. That ground has already been tread, and that issue has already been decided. Indeed, the Board's prior decisions recognize that the "focus here is not on the special exception and variance that were approved, but rather, on variances to permit a two-year extension", 2004 Board Memorandum, p. 9. In other words, the question is "whether a variance to permit a two-year extension will change the character of the neighborhood", not whether the rubble landfill operations approved in the special exception would. Id., p. 10 As the Board has recognized, "there is no operation that will occur as a result of a time variance", operations instead will occur as the result of the 1993 special exception. Id. p. 11. For this same reason, the access conditions in the special exception are beyond the scope of remand, and in any event must only be met by the time National commences operations.

This matter is on second remand to the Board on the request by National that is necessary for it to acquire a MDE refuse disposal permit. This permit is required by the State to open and operate its approved special exception on a 482+ acre parcel located in the Odenton area of Anne Arundel County. The MDE permit application is currently in the final stages of State mandated approval process. By its Supplemental Memorandum, dated October 19, 2018, this Board of Appeals granted National variances extending the time for an additional two years from the date of its Opinion, within which National must obtain its permit and implement its landfill use.

The Forks of Patuxent Improvement Association, Inc., et al, (hereinafter "**Forks**") petitioned for judicial review of the Board's 2018 Opinion to the Circuit Court for Anne Arundel County which ordered that the case be remanded to the Board. (Exhibit B attached) for the consideration of the effects of the extension of time on the neighborhood after 2017. National appealed the remand order to the Court of Special Appeals. The COSA, noting that the Board's Supplemental Opinion was "incomplete" (Exhibit C attached), affirmed the circuit court judgment ordering the remand for the limited purpose of consideration of the impact of the extension of time on vicinal properties after 2017.

By its email transmissions, this Board has requested that the parties file memoranda which "focus on what COSA has instructed the Board to do (the October 2, 2020 COSA Opinion) and the options the Board should take." Email from Board dated March 29, 2021.

As more fully set forth herein, National asserts that upon evidentiary hearing to be held on this remand, this Board address the impact, if any, of the requested extension of time "beyond 2017" and to adopt the findings and conclusions of its October 19, 2018 decision with the considerations newly addressed.

HISTORY OF CASE

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), (copy attached as Exhibit D), and is abbreviated and summarized from that controlling decision herein.

On December 23, 1993, Appellant, National Waste Managers, 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 un-reclaimed 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 in National Waste, supra, 453 Md. 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.

2. Phase II consists of a hydrogeological investigation. The applicant is required to identify and analyze groundwater and geological conditions on the site.

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.

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. During this phase, the MDE also drafts a proposed permit for the site.

5. Phase V is the public comment state. The MDE advertises and holds a hearing on the draft permit. 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.

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.

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[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 with 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

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 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

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associated variances. The approvals are generally referred to herein as extension for the landfill.

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 pursing 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 disregarded testimony by Edward Dexter of MDE and report 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 predicating 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, or 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. 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.

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.

The Board of Appeals (hereinafter "Board") in 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.

Addressing the direction that, "in some manner", the Board will have to "account for the impact of the requested extension beyond 2017," the Board took 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).

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, Exhibit B, 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."

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.

This ruling of the Circuit Court dated June 24, 2019, remanded the case for additional consideration with instructions to take into account the impact, if any, of the requested extension beyond 2017 on the character of the neighborhood, the appropriate or development use of adjacent property, and the public welfare.

National Waste Managers, Inc. appealed this second remand to the COSA, believing that the Board of Appeals met the Court of Appeal's remand instruction and had properly applied the concepts of tolling which covered the effects of the project on the neighborhood going forward. The Court of Special Appeals in National Waste Managers, Inc./Chesapeake Terrace v. Forks of the Patuxent Improvement Association, et al., No. 1327, September Term, 2019, filed October 2, 2020, unreported, re-opened the case stating that

"In conclusion, the analysis in the Board's supplemental decision is 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." P. 12. (Copy attached as Exhibit C.)

The appellate Court affirmed the decision of the Circuit Court and the case is now before the Board of Appeals for the consideration of the impact, if any, that this extension will have on the neighborhood beyond 2017.

INSTRUCTIONS TO THE BOARD/SUGGESTED BOARD ACTION

A. The Notice of Review is Limited.

By its decision in National Waste Managers, Inc./Chesapeake Terrace v. Forks of the Patuxent Improvement Association, 453, MD 423 (2017) the Court of Appeals held that the denial by the Board of Appeals of National's variance request for an extension of time to establish its landfill on December 27, 2013 Opinion was "arbitrary and capricious". The Court of Appeals ordered a remand, directing the Board to:

"address and resolve the relevant issue which in 2013, when the decision was made, what impact, if any, the requested two year extension of 2015 would have on the character of the neighborhood, the appropriate use or development of adjoining property, or 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 extension 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."

In response, this Board issued its October 19, 2018, Supplemental Memorandum of Opinion (hereinafter variously "Supplemental Memorandum), granting National Waste Managers/Chesapeake Terrace, an extension of time to establish its landfill.

The Forks of the Patuxent Improvement Association sought judicial review of the Supplemental Memorandum in the Circuit Court for Anne Arundel County. The Circuit Court ordered that the case be remanded to this Board:

> **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.*** (emphasis supplied)

The Circuit Court explained its order:

> ***"... nowhere in the Board's Supplemental Memorandum of 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, this Court shall remand the case to the Board so that it may address and articulate its findings as to these issues so that it may address its findings as to these issues that the Court of Appeals directed it to consider.** (emphasis supplied)

National appealed the Circuit Court remand order to the Court of Special Appeals. Concluding that "the analysis in the Board's Supplemental decision was "incomplete," COSA affirmed the Circuit Court's remand to the Board "to take into account the impact of the requested extension beyond 2017."

The Board must "address and resolve" the narrow issue presented by this remand. It must discern the impact, if any, that the requested extension would have upon vicinal

property beyond 2017. It must articulate its findings on these issues. As COSA instructs that the Board "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 such an extension will have on the character of the neighborhood, the appropriate use or development of adjacent property, or the public welfare." (Attached Exhibit C).

Accordingly, National asserts that on remand the record of these proceedings be opened for the admission of testimony and other evidence on the limited issue of the effect of the requested extension on the character of the neighborhood, the appropriate use and development of adjacent property and the public welfare beyond 2017. Such action is within the Board's authority and is appropriate to comply with the remand instructions as construed by the COSA. See, e.g., Eastern Outdoor Advertising v. Mayor and City Council of Baltimore, 146 Md. App. 283 (2002) and cases cited therein for the principle that in administrative proceedings, an administrative agency may reopen proceedings if further evidence is necessary and available to the basis for findings on material points, that evidence may be taken.

Further, the Court of Appeals in National Waste Managers, Inc. v. Forks of Patuxent Improvement Association 453 Md. 423, (2017) was instructive as to the considerations to be used in addressing the impact of the requested extension on the neighborhood beyond 2017. The Court stated as follows:

> With respect to the impact of the property on the neighborhood, nearby property, or the public welfare, all of that was resolved in 1993 when the special exceptions and set back variances were granted. The Board at that time, made the findings required under AA Code §18-16-304, including that the use would not be detrimental to the public health, safety,

and welfare, that the use would be no more objectionable with regard to noise, fumes, vibration, or light to nearby properties than operations in any other allowed uses, and that the use would not conflict with an existing or programmed public facility, public service, school, or road.

"It is not the function of a temporal variance to relitigate those findings. Section 18-16-305 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 and 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 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.

B. The Remand Instruction Does Not Envision Re-litigating the Propriety of the Special Exception.

The concept that the previously approved special exception use continues to be compatible with the surrounding area does not permit a re-litigation of previous findings regarding the nature of the proposed use or the neighborhood as it existed at any previous time. It is forward looking: what impact will the extension have?

The proper focus for the Board in an application of a temporal variance is "narrow and forward looking." It is merely whether the requested extension of time will alter the character of the neighborhood or substantially impair the appropriate use and development of adjacent property or be detrimental to the public welfare. National Waste, supra, 453 Md. at 445.

The special exception use is a part of the comprehensive zoning plan sharing the presumption that, as such, it is in the interest of the general welfare, and therefore, valid.

The special exception use is a valid zoning mechanism that delegates to an administrative board a limited authority to allow enumerated uses which the legislature has determined to be permissible absent any fact or circumstance negating the presumption. Schultz v Pruitt, 291 Md 1, at 11, 432 A.2d 1319 (1981). In this case that special exception use was approved by this Board as compatible with the neighborhood in 1993. That continuing compatibility with the neighborhood has been confirmed in each of the past three extensions of time granted in 2004, 2006, and 2011 extending into 2013. All matters were tolled by the pending of litigation until the date of the Court of Appeals decision in National Waste Managers, Inc. v. Forks of Patuxent, 453 Md 423 (2017). Thereafter, that Court instructed that the Board of Appeals would have to "In some manner take into account the impact of the requested variance beyond 2017." Id. at 446. The court has instructed that the decision be reopened for the limited purpose of consideration of the impact upon the neighborhood beyond 2017 of the requested extension of time.

As with the previous extension of time requests, this approved sand and gravel and rubble landfill use has been known within the community and is a part of the character of the community. Id. at 434. The Court of Appeals has instructed that this Board consider the impact of an additional extension of time beyond 2017. In order to address this concern, the applicant believes that the record of proceedings in this case established by the hearings on this fourth extension held on June 6, 2013, August 14, 2013, August 15, 2013, October 15, 2013, and July 25, 2018, and this Board's decision of October 19, 2018 be reopened for evidence

and testimony on the limited issue of the effect of the extension of time on the character of the neighborhood, the appropriate use and development of adjacent property or the public welfare beyond 2017, per the direction of the Circuit Court remand.

C. Options for the Board to Take

This Board should take the same process that it has in the past extensions of time in this case in considering this extension of time. The applicant intends to provide evidence that MDE has been processing the refuse disposal permit application and that it is nearing the final stages of design and operations review process to finalizing the permit application, and that the applicant continues to be diligent and cooperative in its pursuit of this permit. National will further present evidence that the requested variance for an extension of time is necessary to complete the permit application, and that the extension will not impact vicinal properties beyond 2017.

This rubble landfill facility continues to be a part of this neighborhood and has been since 1993 when the special exception was approved. The impacts on the neighborhood were considered at that time and were deemed to be compatible with the neighborhood. The facility is well known in the community. All development that has occurred since 1993 has occurred with full knowledge of this approved facility. These facts are established within the determinations of this Board when granting the three previous extensions of time and are a part of the record referenced by this Board in its October 19, 2018 Opinion granting this fourth

extension of time. It is the position of the applicant that an extension of time to implement a well-known use will have no impact on the community.

Should the protestants require time for additional evidence, it should be limited to focus on a forward-looking analysis by addressing how the extension may impact the neighborhood. This is not a re-litigation of the special exception approval.

CONCLUSION

Wherefore, the applicant respectfully requests that the record in this case be reopened for the limited purpose of the taking of evidence on the impact of the requested extension of time on the character of the neighborhood, the appropriate use and development of adjacent property, or the public welfare beyond 2017, so that this consideration can be assimilated and updated into its decision in this case dated October 19, 2018.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28 day of April, 2021 a copy of the foregoing Memorandum on Remand to the Board of Appeals was served via first class mail, postage prepaid to:

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EXHIBIT A

BOARD OF APPEALS

REMAND SUPPLEMENTAL DECISION

OCTOBER 19, 2018

RE: An Appeal From A Decision Of The Administrative Hearing Officer	*	BEFORE THE
	*	
	*	COUNTY BOARD OF APPEALS
	*	
	*	OF ANNE ARUNDEL COUNTY
NATIONAL WASTE MANAGERS, INC. AND CHESAPEAKE TERRACE	*	
	*	CASE NO.: BA 12-13V, BA 13-13V
	*	(2012-0300-V & 2012-0301-V)
Petitioners	*	
	*	Hearing Dates: June 6, 2013
	*	August 14, 2013
	*	August 15, 2013
	*	October 15, 2013
	*	July 25, 2018

SUPPLEMENTAL MEMORANDUM OF OPINION

Summary of Pleadings

This is an appeal from a decision of the Administrative Hearing Officer. This appeal is taken from the conditional granting of a variance to allow an extension in the time required for the implementation and completion of a previously approved special exception and variance for a rubble landfill and an appeal of the conditional granting of a variance to allow an extension in the time for implementation and completion of a previously approved special exception for a sand and gravel operation, for property known as 515 Patuxent Road, Odenton[1].

Findings and Conclusion

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

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

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

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

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

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

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

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

Turning first to the County Code, there are several sections thereof that are directly on point. Section 18-16-405(a) of the Code mandates that "[a] variance or special exception that is not extended or tolled expires by operation of law unless the applicant within 18 months of the granting of the variance or special exception (1) obtains a building permit or (2) files an application for subdivision." (emphasis added). Section 18-16-405(b) and (c) permit applicants to request extensions to subsection (a), as here. Section 18-16-405(d) provides specifically that "pendency of litigation may toll the time periods set forth in subsection (a) to the extent provided

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

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

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

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

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

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

ORDER

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

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

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

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

NOTICE: This Memorandum of Opinion does not constitute a building or grading permit and may be valid for a limited time period. In order for the applicant to construct or retain any structures allowed by this opinion, or to perform or retain any grading allowed by this opinion, the applicant must apply for and obtain the necessary building or grading permit and any other approval that may be required to perform the work described herein within the time allotted by law or regulation.

COUNTY BOARD OF APPEALS
OF ANNE ARUNDEL COUNTY

Richard Forgo, Chairman

J. Gary Middlebrooks, Vice Chairman

Patsy Blackshear Baker, Member

Paul Devlin, Member

Richard G. Hare, Member

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

DISSENT

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

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

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

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

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

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

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

S. Spencer Dove, Member

EXHIBIT B

CIRCUIT COURT

ORDER – JUDGE SILKWORTH

JUNE 24, 2019

FORKS OF THE PATUXENT IMPROVEMENT ASSOCIATION, INC., ET AL.	*	IN THE
	*	CIRCUIT COURT FOR
Petitioner	*	ANNE ARUNDEL COUNTY
v.	*	MARYLAND
NATIONAL WASTE MANAGERS, INC.	*	Case No.: C-02-CV-18-003469
Respondent		

* * * * * * * * * * * * * *

ORDER

This matter came before the Court on April 29, 2019, for a hearing on Petitioner's administrative appeal from a decision entitled Supplemental Memorandum of Opinion by the Anne Arundel County Board of Appeals, issued on October 19, 2018. The Court held the matter *sub curia*. Upon consideration of the oral and written arguments submitted, it is this 19th day of June 2019, by the Circuit Court for Anne Arundel County, hereby

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.[1]

06/24/19 CS

6/18/2019
Date

RONALD A. SILKWORTH, Judge
Circuit Court for Anne Arundel County

[1] Respondent National Waste Managers, Inc. ("National Waste") has been working towards developing a landfill on a certain 481-acre site in Odenton, Maryland, since 1990. For the past 25 years or so, the parties have been embroiled in contentious litigation involving numerous administrative hearings. In 2017, the case came before the Court of Appeals, *Nat'l Waste Managers, Inc. v. Forks of the Patuxent Improvement Ass'n, Inc.*, 453 Md. 423, 162 A.3d 874 (2017), which aptly summarized the history of these parties' ongoing conflict. As such, this Court shall only review the history of the case that is immediately relevant to the instant matter.

To build a landfill, National Waste needs a permit from the State and another from the county. For various reasons detailed in the Court of Appeals' 2017 opinion, since the case's inception, National Waste has received several variances extending the time for National Waste to complete the permit process with the State. In 2012, National Waste once again sought an extension of time to complete the State permit process. An Administrative Hearing Officer denied the request, and National Waste appealed to the Anne Arundel County Board of Appeals ("the Board"). On December 27, 2013, the Board issued a split decision, wherein half the four (4) sitting members voted to approve the extension, and the other half voted to deny it. When, as here, the Board reaches a split decision, the result is denial for the appealing party. National Waste again appealed, and the case eventually reached the Court of Appeals, where the Board's decision was reversed. *Nat'l Waste*, 453 Md. at 446, 162 A.3d at 887-88.

This matter came to the Anne Arundel County Board of Appeals ("the Board") on July 25, 2018, on remand from the Court of Appeals. *See Nat'l Waste Managers, Inc. v. Forks of the Patuxent Improvement Ass'n, Inc.*, 453 Md. 423, 446, 162 A.3d 874, 887–88 (2017). On remand, the Court of Appeals instructed the Board to:

> address and resolve the relevant issue which, in 2013, when the decision was made, was what the 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 [Waste] or adverse impact on the neighborhood or adjacent property warranting a rejection of an 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.

Nat'l Waste Managers, Inc., 453 Md. at 446, 162 A.3d at 887.

In its Supplemental Memorandum of Opinion issued on October 19, 2018, the Board approved and adopted the findings and reasoning of the two (2) members who voted to grant the extension and rejected, as clearly erroneous, those of the two (2) members who voted to deny it. The Board then turned to the issue of the impact of the further passage of time on the appeal. The Board reviewed and analyzed both the County Code and case law in considering whether tolling is appropriate. As to the County Code, the Board found that the plain language of § 18-16-405(c) clearly allowed for tolling during the "pendency of litigation." As to case law, the Board noted a "rare occurrence" in which the Court of Special Appeals had previously concluded that tolling is appropriate in a case involving National Waste and this very landfill. *See Nat'l Waste Managers, Inc. v. Anne Arundel Cty.*, 135 Md. App. 585 (2000). The Board pointed out that the Court of Appeals cited the Court of Special Appeals' 2000 *Nat'l Waste* opinion in *City of Bowie v. Prince George's Cty.*, 384 Md. 413, 439, 863 A.2d 976, 991(2004), where the Court of Appeals, in granting a similar variance, declared the following:

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

The Board found this reasoning compelling and, having already determined that the County Code permitted tolling during ongoing litigation, held that tolling is still appropriate despite the passage of time.

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, this Court shall remand this case back to the Board so that it may address and articulate its findings as to those issues that the Court of Appeals directed it to consider.

EXHIBIT C

COURT OF SPECIAL APPEALS

DECISION

OCTOBER 2, 2020

Circuit Court for Anne Arundel County
Case No. C-02-CV-18-003469

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1327

September Term, 2019

NATIONAL WASTE MANAGERS, INC., CHESAPEAKE TERRACE

v.

FORKS OF THE PATUXENT IMPROVEMENT ASSOCIATION, *ET AL.*

Kehoe,
Nazarian,
Leahy,

JJ.

Opinion by Kehoe, J.

Filed: October 2, 2020

Noted-remand to Board to comly with 6/24/2019 remand order

11/12/2020 1:25:19 PM

Judge Ronald A. Silkworth

*This is an unreported opinion, and it may not be cited in any paper, brief, motion or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. *See* Md. Rule 1-104.

Circuit Court for Anne Arundel County
Case No. C-02-CV-18-003469

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1327

September Term, 2019

NATIONAL WASTE MANAGERS, INC., CHESAPEAKE TERRACE

v.

FORKS OF THE PATUXENT IMPROVEMENT ASSOCIATION, *ET AL.*

Kehoe,
Nazarian,
Leahy,

JJ.

Opinion by Kehoe, J.

Filed: October 2, 2020

Noted-remand to Board to comly with 6/24/2019 remand order

11/12/2020 1:25:19 PM

Judge Ronald A. Silkworth

*This is an unreported opinion, and it may not be cited in any paper, brief, motion or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. *See* Md. Rule 1-104.

This is an appeal from a judgment of the Circuit Court for Anne Arundel County, the Honorable Ronald A. Silkworth, presiding, that reversed a decision of the Board of Appeals of Anne Arundel County and remanded the case to the Board for further proceedings. National Waste Managers, Inc., Chesapeake Terrace has appealed. The appellees are Forks of the Patuxent Improvement Association as well as several individuals. National presents one issue, which we have reworded slightly:

> Did the Board of Appeals comply with the remand instructions of the Court of Appeals in *National Waste Managers v. Forks of the Patuxent*, 453 Md. 423, 446 (2017) ("*National V*")?[1]

National asserts that the Board complied with the Court's instructions. The appellees argue that the Board did not. We will affirm the judgment of the circuit court.

Background

The prior history of this appeal and factual background of the parties' dispute is set out by the Court in *National V*, 453 Md. at 425–40, and there is no reason for us to repeat it in detail. We think that the following is sufficient for our purposes:

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[1] To distinguish the 2017 decision by the Court from: an unreported decision of this Court styled *National Waste Managers, Inc. v. Anne Arundel County*, No. 810, September Term, 1997, filed March 25, 1998 ("*National I*"); *Halle v. Crofton Civic Ass'n*, 339 Md. 131 (2000) ("*National II*"); *National Waste v. Anne Arundel County*, 135 Md. App. 585, 614 (2000), *cert. den.* 363 Md. 659 (2001) ("*National III*"); and *Forks of the Patuxent Improvement Ass'n v. Nat'l Waste Managers/Chesapeake Terrace*, 230 Md. App. 349, 355, (2016), *vacated* 453 Md. 423 (2017) ("*National IV*").

In 1990, National[2] applied for a special exception permit to mine sand and gravel and to build and operate a rubble landfill on a 481 acre tract of land owned by it near Odenton, Maryland. In 1993, the Board granted the application. The grant of the special exception was conditioned upon, among other things, National's obtaining the necessary environmental permits and approvals from the Maryland Department of the Environment.[3]

Opponents to the project filed a petition for judicial review. The Board's decision was eventually affirmed by the Court of Appeals. *Halle Companies v. Crofton Civic Association*, 331 Md. 131, 149 (1995) ("*National II*"). During the same period of time, the County attempted to amend its Solid Waste Management Plan to foil National's project. Eventually, these efforts came to naught. *See National V*, 483 Md. at 229–30.

The Anne Arundel County zoning ordinance provides that a special exception expires within eighteen months unless the applicant obtains a building permit. *See* Anne Arundel County Code ("AACC") § 18-16-405(a).[4] However, the same statute authorizes the Board

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[2] The application was filed by the Halle Companies and one of its subsidiaries, Chesapeake Terrace. *Halle v. Crofton Civic Ass'n*, 339 Md. at 134. It is unclear to us how National Waste Managers, Inc. came into the picture. We will refer to the applicants collectively as "National."

[3] The MDE's five-phase review process is summarized in *National V*, 453 Md. at 434–36.

[4] The County's zoning ordinance was recodified in 2005. In the pre-2005 version of the zoning ordinance, the expiration period was two years. *See National Waste Managers v. Anne Arundel County*, 135 Md. App. 585, 602–03 (2000) ("*National III*"). The provision of the prior zoning ordinance that corresponds to current AACC § 18-16-405 is former Art. 28 § 12-107. All references in this opinion are to the current version of the County Code.

to grant a variance to extend the expiration period. *See* § 18-16-405(c).[5] Also, § 18-16-405(d) states that pending litigation "may" toll the applicable deadline for performance "to the extent provided by law." In *National Waste v. Anne Arundel County*, 135 Md. App. 585, 614 (2000), *cert. den.* 363 Md. 659 (2001) ("*National III*"), this Court held that the

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[5] The County's variance criteria are set out in AACC § 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.

• • •

(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; [nor]

• • •

(v) be detrimental to the public welfare.

predecessor to what is now AACC § 18-16-405(d)'s tolling provision was applicable to National's application. Upon remand, the Board concluded that the tolling period ended on April 13, 2001. *National V*, 453 Md. at 430. Between 2004 and 2014, National applied three times for variances to extend the effective date of its special exception usually for a two-year period. Each of these applications were granted. *Id.* at 431–34 (describing each application). In 2011, the Board granted another extension which expired on January 2, 2013. *Id.* at 434. This brings us to the administrative decision that is before us.

In December 2012, National filed an application for a variance to extend its special exception for an additional two years. The application was heard by four of the seven members of the Board. On December 27, 2013, the Board issued its decision. Two members voted to grant the application and two to deny it. The Board concluded that its evenly divided vote effectively denied the application. National filed a petition for judicial review. The circuit court vacated the Board's decision and remanded the case to it for further proceedings. That judgment was appealed to this court, which vacated the circuit court's judgment and ordered that court to remand the case to the Board for proceedings consistent with our opinion. *See Forks of the Patuxent Improvement Ass'n v. Nat'l Waste Managers/Chesapeake Terrace*, 230 Md. App. 349, 355, (2016), *vacated* 453 Md. 423 (2017) ("*National IV*").

National filed a petition for a writ of certiorari, which was granted. 451 Md. 577 (2017). The Court of Appeals concluded that the Board's evenly divided decision

constituted a denial of the application and that the reasoning of the denying members was both legally flawed and was not based on substantial evidence. 453 Md. at 444–45. Additionally, the Court explained that the proper focus of the Board in an application for a temporal variance is "narrow and forward-looking. . . . 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 (footnote omitted).

After reaching these conclusions, the Court remanded the case to the Board for it:

> 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, 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. 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.

Id. at 446.

The Board held a supplementary hearing on July 25, 2018. At the beginning of the hearing, the chair of the Board informed counsel that the Board was planning to allocate

thirty minutes to each party for their counsel "to present their case to the Board." Counsel for both parties consented.[6]

For their part, National's lawyers asserted that the Board was bound by the record developed in the 2013 hearings, and there was nothing in the record to show that any change had occurred to the neighborhood surrounding the project since the grant of the last temporal variance in 2011. National's counsel told the Board that the record:

> won't support a denial because the Court of Appeals said that absent evidence of harm . . . it would be arbitrary and capricious to deny the permit.

In pertinent part, appellees' counsel made it clear to the Board that his clients' preference "would be for the Board to review the circumstances as they exist today with [regard to] the property." Counsel conceded that he had no specific recommendations to the Board as to how it should address the tolling issue other than that "perhaps you can request some assistance from the Board counsel in trying to figure out what in the world the Court of Appeals meant" in its instructions to the Board on remand.

On October 19, 2018, the Board issued a supplemental decision granting the temporal variance application. In its opinion, the majority of the Board stated that it had reviewed the "entire record of evidence and testimony presented in 2013, that it found the findings of the two Board members who voted to grant the application to be correct and that it "fully

[6] The lawyer representing the appellees at the hearing before the Board is not the same as their appellate counsel. Additionally, Anne Arundel County was represented by counsel but it took no position as to the merits of the hearing.

adopt[ed] their findings and conclusions as set forth in that opinion." As to the tolling issue, the majority stated (emphasis added):

> We now turn to the question of what effect the further passage of time 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 Court of Appeals' and Court of Special Appeals' opinions for guidance. We *conclude that the special exception and variances have been tolled* and that the Order of the Board contained herein will extend the approval date for an additional two years from the date hereof."

The Board based its conclusion on its consideration of: (i) AACC § 18-16-405(d) which states that the "pendency of litigation may toll" the time periods for an expiration of a special exception permit; (ii) the analyses of the Court of Appeals in *City of Bowie v. Prince George's County*, 384 Md. 413, 438–39 (2004), and this Court in *National Waste v. Anne Arundel County*, 135 Md. App. 585, 614 (2000), *cert. den.* 363 Md. 659 (2001). The Board interpreted the statute and the opinions as supporting National's request that its two-year variance should begin on the date of the Board's opinion, which was October 19, 2018.

As we have previously mentioned, appellees filed a petition for judicial review, and the circuit court vacated the Board's supplemental decision because the court concluded 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."

The standard of review

In a judicial review proceeding, the issue before an appellate court "is not whether the circuit court erred, but rather whether the administrative agency erred." *Bayly Crossing, LLC v. Consumer Protection Division*, 417 Md. 128, 136 (2010) (cleaned up). For that reason, we "look through" the circuit court's decision in order to "evaluate the decision of the agency" itself. *People's Counsel for Baltimore County v. Loyola College*, 406 Md. 54, 66 (2008). A court accepts an agency's factual findings if they are supported by substantial evidence, that is, if there is relevant evidence in the record that logically supports the agency's factual conclusions. *Bayly Crossing*, 417 Md. at 138-39. In contrast, a court reviews the agency's legal conclusions *de novo*. *Id.* at 137. "An agency's decision is to be reviewed in the light most favorable to it and is presumed to be valid." *Assateague Coastal Trust v. Schwalbach*, 448 Md. 112, 124 (2016) (citing *Chesapeake Bay Foundation v. DCW Dutchship, LLC*, 439 Md. 588, 611 (2014)).

Analysis

The parties' appellate contentions revolve around the Court of Appeals' instructions to the Board in *National V.* National asserts that the Board's interpretation of the Court of Appeals' instructions was correct and that the Court:

> 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. 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."

(Citations omitted.)

National points out that the Board's tolling analysis was based upon its interpretation of provisions of the County zoning ordinance as well as its interpretation of *City of Bowie v. Prince George's County*, 384 Md. 413, 438–39 (2004), and *National III*. Finally, National reminds us that "[g]iven 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."

Appellees present several arguments as to why the circuit court should be affirmed. The one that we think is dispositive is that the Board simply misinterpreted the Court's instructions.[7]

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[7] Appellees present two other contentions. One is that that complying with the Court's instructions necessarily requires a new hearing for the Board to take evidence on the effect of the pending application on the character of the neighborhood, the appropriate use or development of adjacent property or the public welfare "beyond 2017." Another is that the Board misinterpreted Maryland's tolling law.

The problem with our addressing either of these at this juncture is that it is not at all clear to us that they were presented to the circuit court in the judicial review proceeding. *See* Md. Rule 8-131(a) (With the exception of certain jurisdictional issues, "[o]rdinarily, the appellate court will not decide any . . . issue unless it plainly appears by the record to have been raised in or decided by the trial court.).

First, we reiterate the standard of review. Court orders—and we consider the Court's instructions to the Board in *National V* to be the equivalent of a formal order of a court—"are construed in the same manner as other written documents and contracts and if the language of the order is clear and unambiguous, the court will give effect to its plain, ordinary, and usual meaning, taking into account the context in which it is used." *Taylor v. Mandel*, 402 Md. 109, 155 (2007) (cleaned up). We review legal issues *de novo*. Therefore, and with all respect to its members, we will pay no deference to the Board's interpretation of the Court's instructions.

Second, we will focus on the problem that confronted the Board. The *National V* Court instructed the Board to undertake two tasks. The first was:

> to address and resolve the relevant issue which, in 2013, when the decision was what *impact*, if any, the requested two-year extension to 2015 would have *on the character of the neighborhood, the appropriate use or development of adjacent property, or the public welfare*, accepting as fact that there was no . . . adverse impact on the neighborhood or adjacent property warranting a rejection of an 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.

453 Md. at 446 (emphasis added).

The second task was: "In some manner, the Board will have to take into account the *impact* of the requested extension beyond 2017." (Emphasis added.) Considered in isolation, "impact" in the second sentence may seem ambiguous—impact on what? But *Taylor v. Mandel* instructs us to interpret judicial language in context. And, in context, the word "impact" in the second sentence of the Court's instructions can only have the same

meaning as "impact" has in the immediately preceding sentence, namely the effect of granting a variance "on the character of the neighborhood, the appropriate use or development of adjacent property, or the public welfare[.]"

In its supplemental decision, the Board stated (emphasis added):

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

The juxtaposition of the Court's instructions with the relevant part of the Board's supplemental decision illustrates the problem with the Board's analysis. The Board interpreted "impact" to mean the legal effect of the passage of time on National's application while the litigation arising out of the Board's erroneous 2013 denial of National's variance application worked its way through the courts. Another term for this concept is "tolling," and the Board concluded that tolling should apply. The Board's analysis stopped at that point.

To be sure, the Board's conclusion that National's variance and special exception should be tolled is consistent with our reading of *National V*. But the Court did not instruct the Board to consider *whether* tolling should apply. Rather, it instructed to the Board "to take into account the impact of the requested extension beyond 2017." And, as we have explained, we interpret "impact" in the final sentence of the Court's opinion to have exactly

the same meaning as "impact" in the immediately preceding sentence, namely, the effect that granting the application "would have on the character of the neighborhood, the appropriate use or development of adjacent property, or the public welfare" if the variance and special exception were extended "beyond 2017." And this is exactly what happened when the Board decided to "extend the approval for an additional two years" from the date of its October 19, 2019 supplemental decision.

In conclusion, the analysis in the Board's supplemental decision is 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 "on the character of the neighborhood, the appropriate use or development of adjacent property, or the public welfare[.]" These are the relevant statutory criteria for granting a variance in Anne Arundel County. *See* AACC § 18-16-305(c)(2). In any event, this is how we read the relevant parts of the Court's opinion in *National V.*

For these reasons, we affirm the judgment of the circuit court.

THE JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY IS AFFIRMED. APPELLANT TO PAY COSTS.

EXHIBIT D

COURT OF APPEALS

DECISION

JUNE 21, 2017

453 Md. 423
Court of Appeals of Maryland.

NATIONAL WASTE MANAGERS, INC., Chesapeake Terrace
v.
FORKS OF THE PATUXENT IMPROVEMENT ASSOCIATION, INC., et al.

No. 90, Sept. Term, 2016
|
June 21, 2017

Synopsis

Background: Landowner sought judicial review of county board of appeals' decision denying landowner's application for variance to extend time period for obtaining construction permits for landfill. The Circuit Court, Anne Arundel County, No. 02-C-14-184528, Paul G. Goetzke, J., vacated the board's decision. Association opposed to application appealed, and landowner cross-appealed. The Court of Special Appeals, 230 Md.App. 349, 148 A.3d 36, vacated and remanded. Landowner petitioned for certiorari.

Holdings: The Court of Appeals, Wilner, J., held that:

[1] board improperly determined that landowner had not been diligent in seeking state and county permits;

[2] possibility that two-year extension would not be sufficient to obtain permits was not basis for denial;

[3] preceding 20-year period during which landowner had sought permits was improper focus; and

[4] remand for determination of extension's impact on neighborhood, rather than outright reversal, was proper.

Vacated and remanded.

West Headnotes (9)

[1] **Administrative Law and Procedure** ⇨ Determination and disposition
Appeal and Error ⇨ Effect of divided court

When an appellate board is acting in an appellate capacity, viewing the issue before it on the record made in the lower tribunal, an even split affirms the decision of the lower tribunal, as is the case in a judicial setting; when the appellate body reviews the lower decision de novo, however, it is treated as if exercising original jurisdiction.

[2] **Administrative Law and Procedure** ⇨ Conclusions of law in general
Administrative Law and Procedure ⇨ Substantial evidence

Judicial review of a majority decision of an administrative agency is limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions and to determine if the administrative decision is based on an erroneous conclusion of law.

1 Cases that cite this headnote

[3] **Administrative Law and Procedure** ⇨ Reasonableness; rational basis
Administrative Law and Procedure ⇨ Substantial evidence

In examining the evidence on review of a majority decision of an administrative agency, the Court of Appeals defers to the agency's fact-finding and drawing of inferences if there is substantial evidence in the record as a whole sufficient to support those findings and inferences and determines whether, from that evidence, a reasoning mind reasonably could have reached the conclusions reached by the agency.

1 Cases that cite this headnote

[4] **Administrative Law and Procedure** ⇨ Relationship of agency with statute in general

Although no deference is required to be given to an administrative agency's conclusions of law, as issues of law are ultimately within the domain of the judicial branch, courts normally give some deference to the agency's interpretations of the laws it is authorized to administer.

3 Cases that cite this headnote

[5] **Zoning and Planning** ⇨ Matters or evidence considered

Court of Appeals would focus on the facts and conclusions of the two members of county board of appeals who voted to deny landowner's application for variance to extend time period for obtaining construction permits for landfill, where board's decision denying the application was evenly split and, therefore, was based on the denying members' votes.

1 Cases that cite this headnote

[6] **Zoning and Planning** ⇨ Landfills and waste disposal; junkyards

County board of appeals improperly determined that landowner had not been diligent in pursuing state and county permits for construction of landfill, as basis for denying issuance of new variance to extend the time period for obtaining permits; board improperly focused on a 12-year period during which landowner had obtained variances based on prior determinations that it had been diligent in seeking permits, determination that landowner had not been diligent in seeking county permit ignored testimony that county would not process a permit until state permit was issued, and board's determination of lack of diligence as to state permit ignored testimony that landowner had been diligent in seeking the permit.

[7] **Zoning and Planning** ⇨ Landfills and waste disposal; junkyards

Possibility that landowner would be unable to obtain state and county permits for construction of a landfill within two years was not a proper basis for county board of appeals' denial of a two-year extension for obtaining the permits as insufficient period of time under county code provision requiring that the board grant the minimum variance necessary; provision did not require grant of the maximum variance necessary, but required a variance that was minimally necessary, with the understanding that an applicant could request more time if needed.

[8] **Zoning and Planning** ⇨ Landfills and waste disposal; junkyards

County board of appeals improperly denied a two-year extension of time for landowner to obtain state and county permits for construction of landfill based on its view that 20 years had been enough time and that the community had changed and evolved; request for variance did not permit relitigation of prior finding that landowner's proposed use would not be detrimental to public health, safety, and welfare, but rather focus was confined to whether the requested two-year period would alter the character of the neighborhood or substantially impair the appropriate use or development of adjacent property or be detrimental to public welfare, and there was no evidence of how a two-year extension would have such effect.

2 Cases that cite this headnote

[9] **Zoning and Planning** ⇨ Directing further action by local authority

Remand for determination of whether landowner's request for two-year extension for seeking state and county permits for construction of landfill would have any impact on the character of the neighborhood, the appropriate use or development of adjacent property, or the public welfare, rather than outright reversal, was proper on appeal from county board of appeals' denial of the extension, where the denial was improperly based on board's view that 20 years been enough time, rather than on the impact the

particular two-year extension would have had, regarding which the board cited no evidence.

2 Cases that cite this headnote

**876 Circuit Court for Anne Arundel County, Case No. 02–C–14–184528, Paul G. Goetzke, Judge

Attorneys and Law Firms

Argued by Steven P. Resnick and Susanne K. Henley, Annapolis, MD, (Law Offices of Susanne K. Henley), on brief, for Petitioner

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Argued before: Barbera, C.J., Adkins, McDonald, Watts, Hotten, Getty, Alan M. Wilner (Senior Judge, Specially Assigned), JJ.

Wilner, J.

*426 BACKGROUND

The origin of this saga goes back to 1990, when petitioner (whom we shall refer to as 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. The parcel is located in an RA (Rural–Agricultural) zone in the Odenton area of Anne Arundel *427 County. Those operations are permitted by special exception in an RA zone. *See* Anne Arundel County Code, § 18–4–106 (hereafter AA Code).

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.

We begin with 1990, when a county Administrative Hearing Officer (AHO) denied National's request for special exceptions and an appeal was taken to the Anne Arundel County Board of Appeals. On December 23, 1993, after an on-site inspection and sixteen hearings spread over a three-year period, the Board of Appeals granted the special exceptions, along with two setback variances permitting the landfill to extend 760 feet closer to a residential area and 100 feet closer to a property line than otherwise was allowed. Evidence in support of the request, credited by the Board, showed that the property had been mined during the preceding 40 years and was likened to a moonscape, full of debris, containing ravines that were 30 to 45 feet deep, and subject to erosion. Illegal dumping, target shooting, and hunting regularly occurred on the property.

After commenting on the evidence, the Board concluded that, with the conditions it intended to impose, National was capable of meeting all of the performance standards required by law and had met its burden of showing the necessity for the two requested variances. The Board found, specifically, that the proposed operations "will be no more objectionable with regard to noise, fumes, vibration, or light to nearby properties than operations in permitted **877 uses." 1993 Memorandum of Opinion, at 30. With respect to the setback variances, the Board noted that, due to the previous mining operation, the land was cratered up to the property line and that the purpose of the variances was to permit petitioners to fill in those areas "so that the dangerous and eroding conditions no *428 longer exist." *Id.* at 31–32. The Board's Order limited the life of the landfill operation to 12 years, from the beginning of waste collection to the final waste acceptance.

The impact of several statutes becomes relevant at this point, although they will be discussed again later. The Anne Arundel County zoning law is contained in Article 18 of the AA Code. Section 18–16–304 sets forth criteria for granting special exceptions, and § 18–16–305 sets forth requirements and standards for granting variances. General standards for approving variances are contained also in § 3–1–207, which is part of the AA Code dealing with the Board of Appeals.

Subsections (a)(2) and (e) of that section are particularly relevant. Subsection (a)(2) provides:

> "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."

Subsection (e), as it pertains to this case, precludes the granting of a variance unless the Board 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."[1]

*429 AA Code, § 18–16–405(a) adds, in relevant part, 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 "[t]he pendency of litigation may toll the time periods set forth in subsection (a) to the extent provided by law." 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.

Bearing on that county ordinance is Md. Code, Environment Article, § 9–204(d), **878 which requires a refuse disposal permit issued by the Maryland Department of the Environment (MDE) before a person may install a landfill, or any other refuse disposal system. As we shall explain, obtaining such a permit can be a lengthy process that can take years to complete.

The Board's decision touched off a determined effort, mostly by the county, to overturn it and scuttle any prospect of the landfill or sand and gravel operation ever opening. Much of that effort was described by the Court of Special Appeals in *National Waste v. Anne Arundel*, 135 Md.App. 585, 763 A.2d 264 (2000), which we need not repeat. Suffice it to say that (1) the Board's decision was ultimately affirmed by this Court in *Halle v. Crofton Civic*, 339 Md. 131, 661 A.2d 682 (1995), (2) declaratory judgments and injunctions were issued against the county to halt its obfuscating tactics, and (3) twice the county was held in contempt for violating orders of the Circuit Court. *430 That aspect of the litigation came to an end when the Court of Special Appeals rejected the county's arguments in *National Waste, supra* and remanded the case to address other issues, and this Court denied the county's petition for *certiorari*. *See Anne Arundel County v. National Waste*, 363 Md. 659, 770 A.2d 167 (2001).

The Board found that the time requirements under § 18–16–405(a) were tolled due to the litigation and did not begin to run until April 13, 2001—nearly eight years after the Board had granted the special exceptions and setback variances—when this Court denied *certiorari*, and that the two-year time limit would extend to that day in 2003.

In January 2003, National applied for a two-year extension which, after a hearing, the Board granted on April 14, 2004. In its Memorandum of Opinion, the Board recounted testimony from the Administrator of MDE's Solid Waste Program regarding the approval process for a waste disposal permit, noting that new requirements had been established since 1993, including the requirement of liners and new hydrogeological studies. The Board recognized that there were protestants who expressed concerns regarding traffic, air pollution, and land use issues—matters that had been considered when the Board had approved the special exceptions—and that there were six times more homes in the community than there were in 1990.

After considering all of the evidence, the Board found that, as a result of the delay occasioned by the litigation, National

had "to begin the process nearly over again" and that it would take a minimum of three years to complete that process. 2004 Memorandum of Opinion, at 7. It added that there was no way National could obtain the necessary approvals in time to comply with the zoning regulations, and that "the interaction of the overlapping regulations has resulted in the exceptional circumstance to be suffered by [National]." *Id.* The Board expressly rejected the protestants' complaints (1) that National failed to show due diligence in pursuing the MDE permit, *431 and (2) of an adverse impact of the project on the neighborhood.

With respect to the first complaint, the Board found that "the applicants have diligently pursued the reactivation of the permit application for the rubble landfill with the State of Maryland" and that any delays in the process "have been caused by difficulties in obtaining governmental commentary on the application." *Id.* at 8. It noted in that regard a 14-month delay in the State's response to a submission by National. As to the impact on the neighborhood, the Board explained that the focus "is not on the special exceptions and variance that were approved" but only "on **879 variances to permit a two-year extension." *Id*, at 9. It added:

> "If there are many more homes in the community now, those homes have been constructed with full knowledge of the approved special exceptions for a sand and gravel/rubble landfill. There is nothing inherently improper regarding the location of a sand and gravel/rubble landfill near residences. In fact, the County Code expressly permits such uses in residential areas so long as a special exception has been granted."

Id.

The Board further found that the use of the property as a sand and gravel/landfill "will not substantially impair the appropriate use or development of adjacent properties." *Id.* Its ultimate conclusion was that National had presented adequate evidence to meet the criteria set forth in AA Code, § 3-1-207 to obtain the requested two-year variances.

In April 2005—a year before the existing extension period was to end—National requested a further two-year extension, which the AHO granted. An appeal was taken to the Board, which affirmed that decision and granted the extension. In its 2006 Memorandum of Opinion, the Board discussed in greater detail the five-phase process for obtaining an MDE waste disposal permit, which is set forth in COMAR 26.04.07, as well as the efforts National had made in pursuit of that permit.

*432 Phase 1 centers on gathering basic information regarding the project and the site. MDE circulates that information to Federal, State, and local agencies for review and comment, to determine whether the site is suitable for the intended use. As it had done in its 2004 Memorandum of Opinion, the Board noted the heightened standards adopted by MDE in 1997 that "required [National] to start over from scratch." 2006 Memorandum of Opinion, at 6. Phase 2 consists of a hydrogeological investigation. The applicant is required to identify and analyze groundwater and geological conditions at the site. That information also is circulated to Federal, State, and local agencies for review and comment. The Board found that, in February 2005, MDE approved National's submissions through Phase 2.

Phase 3 involves engineering design. It takes the information, especially the hydrogeological information from Phase 2, and designs a landfill with those considerations in mind. Phase 3 submissions were made in April 2005. Phase 4 is a review stage. MDE reviews all of the information from Phases 1 through 3 to ensure that all of the statutory and regulatory requirements have been met, prepares documents it will need to present to the public regarding the proposed permit, and drafts a proposed permit for the site. Finally, Phase 5 is for public comment. MDE advertises and holds a hearing on the draft permit and invites the public to submit comments. After all comments are received, MDE engages in a final review and then issues the proposed permit, issues it with modifications, or denies it.

As they had earlier, the protestants complained that National had not been diligent in pursuing the permit and that the project would have an adverse impact on the neighborhood, and, as *it* had earlier, the Board rejected those complaints. 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 have been timely, particularly given the complexity and detail of the required information" and that "[t]he use of this property as a sand and gravel/rubble landfill operation will not substantially impair the appropriate use or development of adjacent **880 properties." *433 *Id.* In further explanation of that conclusion, the Board observed:

> "As explained previously, these special exceptions have been approved for many years. The Zoning Regulations permit those special exceptions. The need for the now requested variances are the direct result of the review time for State approval for the operations. Although some of

the area residents may not like the use of the property as a sand and gravel or rubble landfill with a variance, there is nothing inherent in those operations that impair the use or development of adjacent properties with residences or any other lawful use."

Given those conclusions, the Board granted a two-year extension, to commence September 20, 2006, but added that, if National failed to implement and complete the special exceptions and variances within that two-year period, no further extensions would be granted. Aggrieved by that provision, National, in April 2008, sought judicial review and was successful in that effort. In May 2008, the Circuit Court found that provision to be arbitrary, capricious, and an abuse of the Board's discretion, and vacated it. *See Chesapeake Terrace NMW v. Board of Appeals* (Cir. Ct. Anne Arundel County, Case No. C–06–117596 AA).

National must have filed another request for extension, although we are unable to locate such a request in the record. Our assumption that such a request was made is supported by the fact that the AHO and the Board of Appeals granted it, although it took nearly three years for that to happen.[2] The proceeding before the Board was largely an updated replay of what had occurred twice before. National submitted a Phase 3 plan in April 2005, to which MDE responded in November 2006. A revised report, consisting of seven volumes, was *434 submitted to MDE in June 2008, to which MDE responded in February 2009. A response to that was submitted in April 2009, and that was under study by MDE.

The Administrator of the MDE Solid Waste Program indicated that it would take several months to complete the Phase 3 review, that Phase 4 would be a relatively quick in-house proceeding, and the public hearings and comment (Phase 5) would then commence. 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." 2011 Memorandum of Opinion, at 8, 9. 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."

Id. at 10.

Addressing the traffic issue, the Board expressly found the protestants' testimony **881 not to be persuasive and iterated that the issue, in any event, was not on 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." *Id.* The Board granted another two-year extension dating from January 3, 2011.

Finally, we come to what brings the case here—National's request for a fourth two-year extension filed in December 2012, the Board's effective denial of that request, and a *435 reversal of that decision and remand to the Board by the Circuit Court for Anne Arundel County and by the Court of Special Appeals, albeit with different instructions as to the standard the Board was to apply in reconsidering its decision.

The Board consists of seven members, and, in the four previous proceedings, at least six of the members sat on the case. This time, for whatever reason, only four members sat —in retrospect, at least, not a wise decision.[3] Four hearings were held—one in June 2013, two in August of that year, and one in October.

At the time, the MDE permit process was still stuck in Phase 3, where it had been since 2005, partly because MDE insisted on an additional twelve months of soil and water tests. The MDE Administrator of the Solid Waste Program—the same gentleman who had testified in the three prior proceedings—attributed the delay to the size of the project.[4] With respect to progress made since 2011, the Administrator stated that, in March of that year, MDE sent a letter to National raising a number of issues, to which National responded in March 2012. A response to National's submission was sent in July of 2012, and responses to that were submitted in December 2012 and February 2013. After describing this back-and-forth, the Administrator confirmed his earlier testimony that National had been diligent in pursuing the project and said that it had done the work required and provided the information requested. Specifically, he agreed that, since the last extension

in 2011, National had been "diligently pursuing this project." He stated that Phase 3 should be completed during 2013 and, if the requested extension were granted, "the MDE process could be completed." 2013 Memorandum of Opinion, at 5.

*436 A matter not thoroughly explored earlier surfaced, namely the attaining of *county* permits and approvals. A representative of the county Office of Planning and Zoning, which supported the proposed extension, pointed out that approval by county agencies of National's site development and storm water management plans would be necessary and that a new traffic study may be required, all of which could take up to four years. He opined that some of the work could have been done sooner but did not believe that those efforts would have changed the situation or that National would have received the necessary approvals that were then pending. Specifically, he testified that, if National had filed an application for a building permit, it would not have been processed until the MDE permit was issued.

On this evidence, two members of the Board concluded that National had been diligent in pursuing completion of the MDE permitting process, that the existing **882 situation was not within its control, and that it constituted exceptional circumstances that warranted granting the time extension. They also believed that a two-year extension was the minimum necessary to afford relief. They concluded as well that the extension "will not alter the character of this neighborhood" and "will not substantially impair the appropriate use or development of adjacent properties" and "will not be detrimental to the public welfare. 2013 Memorandum of Opinion, at 13, 14. They believed that "[n]o traffic will result from the grant of the time extension." *Id.* at 14.

The other two members found no exceptional circumstances that would warrant the extension. They concluded that National had not been diligently pursuing the MDE permit and had made no effort to begin the permitting process with the county, which they believed could have been pursued contemporaneously with seeking the MDE permit. Nor did they believe that a two-year extension was the minimum necessary to afford relief. That conclusion was based on the evidence that more than two years would be required.

*437 The denying members expressed concern as well that the requested variances would substantially impair the appropriate use or development of adjacent properties. In that regard, they stated:

> "The pending construction of a landfill on this property has been a burden on the neighborhood for years and the community is justified in seeking an end date. [National's] lack of diligence in pursuing their applications has resulted in at least 12 years of repeated extensions of time. 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."

Id. at 17.

Their ultimate conclusion was that, "[b]y granting the variance requests, it will be detrimental to the public's welfare in that this community will continue to be held hostage by this application. The community has a right to expect finalization of a project that will have a significant impact." *Id.*

Given the 2–2 split, the Board denied the requested variances. It reasoned that "[s]ince the Petitioners were unable to convince a majority of the Board, they have failed to meet their burden of persuasion; and, consequently, the variance must be denied." 2013 Memorandum of Opinion, at 11. With that decision, MDE once again stopped processing the permit application.

National promptly sought judicial review. In a Memorandum Opinion filed in February 2015, the Circuit Court for Anne Arundel County agreed that the 2–2 vote constituted a denial of the application by operation of law—the failure of National to meet its burden of persuasion. The court rejected several of National's arguments but found legal error in the two denying members basing their vote on the entire delay since 2001. The issue, the court held, was "whether, in light of existing circumstances, [National] required at least two years from that date to obtain a building permit" and that its "history of diligence (or lack thereof) is relevant only to the *438 extent that its cause(s) remain(s) uncorrected and is/are likely to impact [AA Code] Section 3–1–207 factors." On that basis, the court vacated the Board's decision and remanded the case for further proceedings consistent with its opinion.

That result was modified by the Court of Special Appeals. *Forks of the Patuxent v. Nat'l Waste Mgrs.*, 230 Md.App. 349, 148 A.3d 36 (2016). That Court agreed that the **883 2–2 vote had the legal effect of denying National's variance application. It viewed its standard of review to be a determination of "whether the Denying Members' decision was supported by a 'reasonable basis in fact' and was not arbitrary or capricious." *Id.* at 359, 148 A.3d 36. It noted the

two bases relied on by the denying members in concluding that National had not been diligent—delays in responding to MDE requests and failure to pursue the county permits —and found both of them erroneous. The Court noted that none of the evidence from the MDE Administrator, the county planning staff, or National's expert showing that National had been diligently pursuing the MDE permit was challenged and that, although National may have been lax in pursuing the county permits, there was no evidence that National could have obtained those permits had it been more diligent. A lack of diligence itself, the Court held, "is insufficient to conclude that National did not face an unnecessary hardship." *Id.* at 363, 148 A.3d 36.

The Court also rejected the denying members' conclusion that because more than two years would be required to obtain the MDE and county permits, a two-year extension would not be the minimum variance necessary That view, the Court said, turned the statutory standard "on its head"—that the issue was the *minimum* time necessary, not the maximum time.

With respect to whether another two-year extension would alter the essential character of the neighborhood, substantially impair the appropriate use or development of surrounding properties, or be detrimental to the public welfare, the Court disagreed with the views of both the approving and the denying members. The denying members based their conclusion on the entire 20–year delay and the uncertainty in the *439 community that has existed all during that period as to whether the project actually would proceed. The Court of Special Appeals responded that the fact that the application is pending, by itself, does not change the character of the community and, absent evidence that the uncertainty has affected property values, is not a sufficient basis to deny the application.

The approving members, the Court noted, were concerned about the propriety of re-litigating the 1993 grant of the special exceptions, but the Court concluded that the requirements in AA Code § 3–1–207 pertaining to the surrounding neighborhood, adjacent properties, and the public welfare "are intended to ensure that a variance for an extension of time should be granted only if the previously approved special exception use continued to be compatible with the surrounding area." *Forks of the Patuxent, supra,* 230 Md.App. at 370–71, 148 A.3d 36. At some point, the Court noted, "the disconnect between what is currently in the neighborhood and what had been in the neighborhood when the permit was granted will become significant enough that it will no longer be appropriate to continue the time for National to obtain its permits." *Id.* at 371, 148 A.3d 36.

The Court's ultimate conclusion was that, on remand, the Board must consider "whether there have been sufficient actual changes to the neighborhood surrounding the Project Site that occurred during or after *2001* to render National's special exception no longer compatible with the current established character of the neighborhood." *Id.*

Finally, the Court rejected National's argument, made in its cross-appeal, that the Board's effective rejection of the requested extension constitutes an "impermissible change of mind" from the prior decisions of the Board. The only basis for that conclusion was the Court's observation **884 that the cases cited by National stood for the proposition that if a zoning board *denies* an application, the principle of administrative *res judicata* precludes it from subsequently *granting* the application *440 absent a showing of changed circumstances, and that, in this case, the converse occurred.

We granted National's unopposed petition for *certiorari,* which raises three questions: (1) whether the Court of Special Appeals erred in construing the county variance statute and denying preclusive effect to prior adjudications by the Board; (2) whether it erred in remanding the case for consideration of whether the requested variance was necessary; and (3) whether it erred in failing to reverse outright the Board's decision and remand with instructions to grant the requested variance.

DISCUSSION

Nature and Effect of The Board's Decision

None of the parties dispute the conclusion of the Board, the Circuit Court, or the Court of Special Appeals that the even split among the four Board members constituted a rejection of National's variance request for a further extension of time. That is, of course, a threshold matter, and we agree with that conclusion. This Court has dealt several times with the effect to be given to an evenly-divided vote by a multi-member board or commission, but the best exposition of the law on that matter, after a full discussion of this Court's prior decisions, was given in *Lohrmann v. Arundel Corp.*, 65 Md.App. 309, 500 A.2d 344 (1985), which involved an even split by the very same board whose decision is now before us.[5] As pointed

out in *Lohrmann* and as is implicit from our earlier decisions, the effect to be given to an even split depends on whether the appellate body is acting *de novo* or in a truly appellate capacity.

[1] When an appellate board is acting in an appellate capacity, viewing the issue before it on the record made in the *441 lower tribunal, an even split affirms the decision of the lower tribunal, as is the case in a judicial setting. When the appellate body reviews the lower decision *de novo*, however, it is treated as if exercising original jurisdiction, and, in *Halle v. Crofton Civic*, *supra*, 339 Md. 131, 144, 661 A.2d 682, we regarded the Anne Arundel County Board of Appeals, when granting the special exceptions in this very case on review from a denial of those special exceptions by the AHO, as "exercis[ing] jurisdiction akin to original jurisdiction." It could consider evidence and issues not presented to the AHO and was free to draw its own conclusions from the evidence. The Board and the two lower courts were correct in holding that the even split meant simply that National had failed to satisfy its burden of persuasion, resulting in a denial of its request.

[2] Had a majority of the Board members (or all of them) voted to deny National's requests, we would apply the traditional standards of judicial review. Our role would be to determine (1) whether there is substantial evidence in the record as a whole to support the Board's findings and conclusions, and (2) whether its decision is premised on any erroneous conclusion of **885 law. *Prince George's Co. v. Zimmer Dev.*, 444 Md. 490, 573, 120 A.3d 677 (2015).

[3] [4] In examining the evidence, we would defer to the Board's fact-finding and drawing of inferences if there is substantial evidence in the record as a whole sufficient to support those findings and inferences and determine whether, from that evidence, a reasoning mind reasonably could have reached the conclusions reached by the Board. *Schlosser v. Uninsured Employers' Fund*, 414 Md. 195, 205, 994 A.2d 956 (2010). Although no deference is required to be given to the Board's conclusions of law, as issues of law are ultimately within the domain of the Judicial Branch, courts normally give some deference to the Board's interpretations of the laws it is authorized to administer. *Kim v. Board of Physicians*, 423 Md. 523, 535, 32 A.3d 30 (2011).

[5] In this instance, because the Board's denial was based entirely on the "no" votes of the two denying members, those *442 standards must be applied to the facts and conclusions made or drawn by *them*, based on the entire record—the same standards of review focused on *their* findings and conclusions, which were the dispositive ones. That is what the two lower courts did, and they were correct in doing so.

Whether the Court of Special Appeals Erred In Failing to Affirm the Decision of the Board or To Reverse It Outright

The crux of the dispute between the approving and denying members of the 2013 Board concerned the application of subsections § 3–1–207(a)(2) and (e) to the temporal variances, most particularly whether (1) "practical difficulties or unnecessary hardships prevent carrying out the strict letter" of Article 18, (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," (3) the requested variance was "the minimum variance necessary to afford relief," and (4) granting the variance will "not alter the essential character of the neighborhood," or "substantially impair the appropriate use or development of adjacent property," or "be detrimental to the public welfare."

As noted, the denying members based their decisions on two principal conclusions—first, that National had not been diligent in pursuing either the MDE or the county permits, and second, that too much time had elapsed since the special exceptions were granted in 1993, that the character of the neighborhood had changed since then—more houses and more traffic—and that the mere uncertainty over whether the project ever would proceed was a burden on the neighborhood. The finding regarding National's diligence implicates in particular the requirement in § 3–1–207(a)(2) that a variance be granted only upon an affirmative finding that the variance is necessary to avoid practical difficulties or unnecessary hardship and to enable the applicant to develop the lot. Their view was that National's lack of diligence in pursuing the required permits precludes a finding of unnecessary hardship—in effect, *443 the hardship cannot be self-created. The second basis implicates the requirements of § 3–1–207(e).

[6] It is clear from the pronouncements of the denying members that, with respect to their conclusion that National had not been diligent in pursuing the MDE and the county permits, they were focusing on the entire 12–year period from 2001, when the first extension was granted, to 2013, and their view of the impact of **886 the special exceptions on the

neighborhood and the public welfare focused on the even longer period from 1993 to 2013. That, in itself, was error, compounded by their misreading of the record regarding a particular delay in National's response to an MDE comment that they felt was relevant.

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 nearby properties, and the general public welfare were raised first in the 1990–93 proceeding that led to the granting of the special exceptions and again in each of the extension proceedings, in 2004, 2006, and 2008–11. In each of those proceedings, the Board considered the evidence presented on those issues and concluded, as of those times, that National had diligently pursued its quest for the 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.

Although complaining about the total delay since 2001, the denying members focused their finding of non-diligence on what had occurred since 2011. They pointed out that it took National a year to respond to the issues raised by MDE in March 2011, that in July 2012, MDE requested supplemental data but National did not meet with MDE until September of that year, and that "it took until March 1, 2013 to receive approvals to begin the process necessary for [National] to supply MDE with the additional information requested." As noted, they also complained about National's failure to pursue necessary county permits.

*444 With respect to the latter complaint, the denying members simply ignored the testimony of the county planning and zoning officer that, although National could have applied for a building permit, the application, if accepted, would not have been processed until the MDE permit was issued. There was no evidence contradicting that statement. If the county would not even begin processing a building permit application until an MDE permit was issued and the evidence showed that the issuance of an MDE permit was not likely for three years, it was wholly arbitrary and capricious for the denying members to base a lack of diligence on National's failure to apply for the county permit.

Finding a lack of diligence because of delays in pursuing the MDE permit is equally devoid of evidentiary support. It ignored entirely the uncontradicted testimony of the MDE Administrator as well as that of National's project manager that National had diligently pursued the permit both before and since 2011 and rested entirely on a one-year delay in formally responding to a comprehensive request for additional information, ignoring evidence of meetings and conversations between National and MDE personnel during that period.

[7] The denying members' view that, because more than two years would be required to obtain the MDE and county building permit, the requested extension was not the minimum variance necessary to afford relief, as the Court of Special Appeals pointed out, was just plain wrong, a complete misconstruction of the statute. They seemed to regard that requirement as the *maximum* variance necessary, where the clear intent of the statute was to grant only what was minimally necessary, understanding that, if it turned out that more time was needed, the applicant would have to come back before the AHO or the Board to request it.

[8] With respect to the impact of the project on the neighborhood, nearby property, or the public welfare, all of that was **887 resolved in 1993 when the special exceptions and setback variances were granted. The Board, at that time, made the findings required under AA Code, § 18–16–304, including that the use would not be detrimental to the public *445 health, safety, and welfare, that the use would be no more objectionable with regard to noise, fumes, vibration, or light to nearby properties than operations in other allowed uses, and that the use would not conflict with an existing or programmed public facility, public service, school, or road. As we observed, the Board had pointed out the dreadful condition of the property as it was then, and presumably, is now.

It is not the function of a temporal variance to relitigate those findings. Section 18–16–305, 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.[6]

That was not the focus of the denying members. Their only point was "enough is enough"—that the project had been pending for 20 years, that the community was changing and evolving over the 20–year period, and that there was "no end in sight." They cited no evidence, because there was no 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. In the absence of such evidence, their ultimate conclusions were arbitrary and capricious.

*446 [9] That does not require an outright reversal of the Board's rejection, however, 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, 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. 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.

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 **888 PROCEEDINGS IN CONFORMANCE WITH THIS OPINION; COSTS IN THIS COURT AND IN COURT OF SPECIAL APPEALS TO BE PAID BY RESPONDENTS.

All Citations

453 Md. 423, 162 A.3d 874

Footnotes

1 There is no conjunction following subsection (e)(1), at least in the on-line version of the AA Code. For purposes of this case, we presume, from the context of the statute, that the County Council intended subsections (e)(1) and (e)(2) to be conjunctive—that both findings have to be made to justify a variance.

2 The Board held hearings on June 23 and 24, 2009 and on October 14 and 21, 2010, and did not issue its decision until January 3, 2011. To say that the Board moved at a "snail's pace" throughout its various deliberations since 1990 would be an unfair aspersion on the mobility of the snail.

3 AA Code, § 3–104(d) permits the Board to sit in panels of fewer than six members, except in appeals from the AHO's grant or denial of an application for rezoning or critical area reclassification.

4 The Administrator stated that most landfills comprise five to fifteen acres; this one involves more than 100 acres.

5 *See Levy v. Seven Slade, Inc.*, 234 Md. 145, 198 A.2d 267 (1964); *Stocksdale v. Barnard*, 239 Md. 541, 212 A.2d 282 (1965); *Montgomery County v. Walker*, 228 Md. 574, 180 A.2d 865 (1962); *Gorin v. Board of Co. Comm'rs*, 244 Md. 106, 223 A.2d 237 (1966); and *cf. Howard County v. Great Oaks Apts.*, 315 Md. 218, 554 A.2d 348 (1989), citing *Lohrmann* but finding the issue moot.

6 The Court of Special Appeals regarded § 3–1–207 as "intended to ensure that a variance for an extension of time should be granted only if the previously approved special exception use continues to be compatible with the surrounding area." *Forks of the Patuxent, supra*, 230 Md.App. at 370–71, 148 A.3d 36. We accept that statement with the caveat that it not be interpreted as permitting a re-litigation of previous findings regarding the nature of the proposed use or the neighborhood as it existed at any previous time. With respect to a temporal variance, § 3–1–207 is forward-looking: what impact will *the extension* have?

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