

NATIONAL WASTE MANAGERS, INC. *
CHESAPEAKE TERRACE

* BEFORE THE
* ANNE ARUNDEL COUNTY

* BOARD OF APPEALS

* Case No.: BA 12-13V and 13-13V

RESPONDENTS' MEMORANDUM

Respondents Forks of the Patuxent Improvement Association, Inc. and individuals Catherine Fleshman, Carmelina and Ulis Fleming, Sam Travaglini and William Routzahn file the following Memorandum pertaining to the scope of issues and necessity for additional evidence on remand from the Court of Special Appeal's October 2, 2020 decision in *National Waste Managers, Inc. v. Forks of the Patuxent Improvement Association*, et al., attached hereto as Exhibit A.

A. Background Procedure

As the Court of Appeals noted in 2017 in *National Waste Managers, Inc. v. Forks of the Patuxent Improvement, Inc.* “[t]he origin of this saga goes back to 1990” when Appellant National Waste Managers, Inc. (“National”) “sought zoning approval to construct and operate a rubble landfill on a 482-acre parcel and to conduct a sand and gravel operation on 108 acres of that same parcel,” which is located in the Odenton area of Anne Arundel County. *Forks*, 453 Md. 423, 426-27 (2017) (the 2017 Court of Appeals decision referred to in this Memorandum as the “2017 Appeal”). By the time the Court of Appeals issued a decision in the 2017 Appeal, the project had dragged on from the time of the Special Exception approval in 1993 for 27 years, due to a “confluence of (1) administrative and judicial litigation during a substantial part of that period, (2) a time- consuming process for obtaining State and county permits required in order to construct

and operate the proposed facilities, (3) time limits under county zoning laws on obtaining those permits, and (4) extension and tolling provisions under county law.” *Id.* at 426-27.

In 1993, National obtained special exceptions and setback variances for its proposed rubble landfill, and sand and gravel, operation. The subsequent time extension variances to extend the validity of the two special exceptions have proceeded in tandem. The special exceptions were extended three times upon National’s requests for temporal variances for both the rubble landfill and sand and gravel pit.

B. Fourth and Fifth Variance Applications

National has sought a fourth set of variances for special exception time extensions which are the subject of this Memorandum, and a fifth set of variance extensions is currently pending, but stayed indefinitely, before the Anne Arundel County Administrative Hearing Officer. If the fourth set of variance time extensions is denied, there will be no reason for the Administrative Hearing Officer to hear the requested fifth set of temporal variances.

The subject fourth set of variance extensions commenced almost ten years ago. In 2012, National sought a fourth two-year set of extensions for the proposed rubble landfill and surface mining operations, which was opposed by Respondent Forks of the Patuxent Improvement Association, Inc. and other individuals (collectively, the “Association”). At that time, with regard to the rubble landfill, National was still pursuing its Phase 3 (of five Phases) approval with MDE, which it had been seeking since April 2005. At the 2012 Board hearing on the fourth set of variance applications, the MDE Administrator of the Solid Waste Program, Ed Dexter, stated that the delay in the Phase 3 MDE approval was due to the size of the landfill being much larger than most others.¹ *Forks*, 453 Md. at 435 - 436. The Court of Appeals noted that Mr. Dexter had also

¹ The MDE Administrator stated most landfills are approximately 5 – 15 acres in size, National’s proposed landfill

testified at all three of the prior temporal variance hearings. There was also evidence presented before the Board about National's submissions to the MDE during the 2011 – 2013 timeframe. The Administrator opined at the Board evidentiary hearing that National had been diligent in pursuing the project, that MDE's Phase 3 review for the rubble landfill should be completed in 2013, and that the MDE process should be completed with the requested extension of two years [by 2015]. *Id.*

This Board issued a split 2-2 decision on December 27, 2013, which effectively denied National's fourth temporal variance requests. *Id.* at 436-37. Following the Board's denial, National sought judicial review in the Circuit Court for Anne Arundel County which reversed the Board and remanded for further proceedings. *Id.* at 437. The Association noted an appeal to the Court of Special Appeals, which also determined that the Board erred but substituted its reasoning for the Circuit Court's on remand. *Forks of the Patuxent v. Nat'l Waste Mgrs.*, 230 Md. App. 349 (2016).

On further appeal, the Court of Appeals agreed with the Circuit Court and the Court of Special Appeals that the matter needed to be remanded to the Board but substituted its own reasoning for that which was provided by the lower courts. The Court of Appeals summarized the evidence that was presented by National in each of the three previous pre-2013 temporal variance hearings before the Board. The Court of Appeals stated:

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 proceedings 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

is exponentially larger, over 100 acres. *Id.* at 435 n. 4.

to proceed....With respect to temporal variances... the focus is a narrow and forward looking one. It is merely whether the requested extension of time will alter the character of the neighborhood or substantially impair the appropriate use or development of adjacent property, or be detrimental to the public welfare.” *Id.* at 443 - 445. (emphasis supplied.)

The Court of Appeals at footnote 6 on this point in the 2017 Appeal decision further stated “The Court of Special Appeals regarded [Anne Arundel County Code] 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. 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?” (internal citations omitted.)

The Court of Appeals observed that the denying members of the Board in 2013 did not cite any evidence “of how an extension to 2015 would alter the character of the neighborhood, impair the use or development of adjacent property, or be detrimental to the public welfare.” *Forks.*, 453 Md. at 445. Although the Court found that the absence of such evidence rendered the denying members’ conclusions arbitrary and capricious, it did “not require an outright reversal of the Board’s [2013] rejection. . . .” *Id.* at 446. Instead, the Court determined that the more appropriate resolution was a remand for the Board to consider what impact, if any, the requested two-year extension to 2015 would have on the character of the neighborhood, the appropriate use or development of adjacent property, or the public welfare, accepting as fact that there was no lack of diligence on the part of National or adverse impact on the neighborhood or adjacent property warranting a rejection of an extension as of the Board’s decision in 2011. *Id.* (emphasis supplied.)

The Court recognized, however, that the Board's proceedings on remand were "complicated by the passage of time and the effect of tolling" and that the "Board will have to take into account the impact of the requested extension beyond 2017." *Id.*

This Board held a remand hearing on July 25, 2018, allotting each side 30 minutes to argue its case. Without any objection from National, the Board reviewed the matter based on the 2013 record, which consisted solely of evidence that had been submitted *prior* to the Board's 2013 decision. National did not offer any evidence concerning the time period following 2013, despite bearing the burden of proof and production that it has satisfied all the elements in the Code to prove it is entitled the requested variances.

This Board issued a Supplemental Memorandum Opinion on October 19, 2018, Exhibit B, reversing its 2013 decision and granting National's request for temporal variances for two-year extensions. Basing its decision on the record of evidence and testimony presented in 2013, the Board rejected the [2013] findings of the two Board members who had previously denied National's request for an extension and adopted the [2013] findings and conclusions of the two Board members who were in favor of granting the request in the prior decision. The 2018 Board found that the special exception and variances have been tolled and that the Board's decision granting National's requests would be extended an additional two years from October, 2018. Despite there being no evidence submitted in the record subsequent to 2013, the Board in 2018 concluded that the requests were tolled because National "could not proceed toward development during the various appeals since the MDE would not process the application with litigation pending."²

² This statement is no longer factually correct as the MDE re-commenced its rubble landfill permit application review sometime in or around 2019. The MDE issued National's Phase II approval in the summer of 2020 and was in mid review of its Phase III application in the fall of 2020 when it stopped processing due to correspondence from Anne Arundel County. National Waste is currently suing the MDE and Anne Arundel County in the Circuit Court

The Association appealed, and the Circuit Court entered an Order on June 24, 2019, finding that “nowhere in the Board’s supplemental opinion does it address the impact of the requested extension beyond 2017 on the character of the neighborhood, the appropriate use or development of adjacent property, or the public welfare, as the Court of Appeals directed it to do.” Exhibit C. Accordingly, the Circuit Court ordered that the case be remanded to the Board with instructions to “comply with the remand instruction of the Court of Appeals and take into account the impact, if any, of the requested extension beyond 2017 on the character of the neighborhood, the appropriate use of development of adjacent property, and the public welfare.” National elected to appeal the Circuit Court’s 2019 decision instead of returning to the Board on the Circuit Court’s 2019 remand order.

C. Court of Special Appeals 2020 Decision and Remand Order

The Court of Special Appeals, by decision dated October 2, 2020, affirmed the Circuit Court’s decision which reversed and vacated the Board’s 2018 decision³ and remanded the case to the Board. The Court of Special Appeals in its 2020 Decision clearly explained the reasons why the Board’s 2018 Decision was not complete and what supplemental actions are required, stating:

“But the Court [of Appeals in 2017] 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

for Anne Arundel County in Case No. C-02-CV-20-002291 to compel the MDE to immediately resume processing its rubble landfill permit application - before this Board of Appeals even determines whether to grant the requested fourth set of temporal variances. Summary judgment arguments were heard in the Circuit Court on April 19, 2021, and as of this writing, the Circuit Court has not issued its decision.

³ See pages 1 and 7 of the Court of Special Appeal’s October 2, 2020 Opinion, Exhibit A.

approval for an additional two years' from the date of its October 19, 2018 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 [have] '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 Section 18-16-305(c)(2). In any event, this is how we read the relevant portions of the Court's opinion in *National V.*" Court of Special Appeals Decision, Exhibit A, pages 11 – 12.

This Board still has not properly determined whether to grant the fourth set of temporal variances. The Board's 2013 and follow up 2018 decisions on the requested fourth temporal variances have both been vacated on review by appellate courts and remanded to the Board for further proceedings. National's 1993 special exceptions and setback variance expire automatically by operation of law under the County Code 18-16-405, unless National proves it is entitled to temporal variances to the Code's automatic expirations. Each time National sought its first three temporal variances, the Board held an evidentiary hearing with live testimony on issues including National's diligence with its State permitting process and impacts to the character of the neighborhood, public welfare and the like. To date, no evidence has been submitted to the Board for the fourth requested sets of temporal variances from 2017 forward. The current factual record for the fourth set of temporal variances ends in 2013. Updated facts are required for the Board to assess whether the special exception use continues to be compatible with the surrounding area, including the impacts the fourth temporal variances, if granted, will have on the current neighborhood, to the appropriate use or development of adjacent property and to the public welfare for the 2017 – current timeframe, looking forward. This point is beyond dispute as both the Circuit Court and Court of Special Appeals found the Board's 2018 Decision on remand from the Court of Appeals 2017 decision insufficient, and, reversed and vacated it.

The facts to be considered include, but are not limited to: questions of National's diligence in pursuing its State permits and whether National has satisfied all the conditions of its special exception approvals, particularly the status of National's required acquisition of fee simple title to the one permitted access route upon which the underlying special exception approvals were granted. Given the factual representations and arguments National has recently (within the last year) made in the public record to both the MDE in its rubble landfill Phases II and III permit application documents and to the Circuit Court in its lawsuit against Anne Arundel County and the MDE in Case No. C-02-CV-20-002291 pertaining to its zoning approval status, there are current changes in facts and circumstances which have arisen since the Board decision in 2013 on these issues. The current set of facts looking forward is directly relevant to the Board's required analysis of neighborhood impact, impact upon the use or development of nearby properties, and impact to the public welfare, in determining whether to grant the requested fourth set of temporal variances.

At the hearing, factual testimony will show National has recently represented to both the MDE in its rubble landfill permit application documents and to the Circuit Court that it may have other "optional" landfill access routes, presumably through the Two Rivers neighborhood and next to a church and/or on Patuxent Road. Anne Arundel County has acquired fee simple title to significant portions of the one access route National is authorized to use for the rubble landfill to build a County school and/or recreational facility and has stated in affidavits filed recently with the Circuit Court case that it will not sell the land to National. National has only one authorized access route per their special exception approvals and must acquire fee simple title to it to satisfy the public welfare requirement of its special exception approval. This issue was conclusively and extensively discussed by the Court of Appeals in 1995 in *Halle*.

The bulk of the Court of Appeal's opinion on in *Halle Companies v. Crofton Civic Association*, 339 Md. 131, 140 - 141 (1995) is devoted to an analysis of this very issue, i.e., the authority of the Board to impose a specific road access condition, including requiring acquisition of fee simple title, in order to protect the public welfare in determining whether to grant a special exception. The Court of Appeals in *Halle* stated that in granting a special exception, "the Board is justified in limiting the exception in such a way as to mitigate the effect on the neighboring property and the community at large. Both a variance and a special exception authorize uses which otherwise would not be permitted. Having been given the power to authorize such unusual uses, the Board must also have the power to limit those uses to protect the public health, safety and welfare of the community." *Id.* (internal citations omitted.) The Court of Appeals further stated explicitly in *Halle* that: "The Board is free to set any conditions that fall within the range of its statutory authority. If any of those conditions require action by someone other than the applicant itself, it is up to that applicant to get whatever agreements or guarantees it needs. The Board here imposed a true condition, not an illusory one. Contrary to the circuit court's conclusion, the condition imposed "does in fact restrict Halle's use of the property. We shall uphold that condition, as it is justifiable in terms relating to the public health, safety and welfare." *Id.* at 148. (emphasis supplied, internal citations omitted.)

Current facts regarding the status of satisfaction of the road access title condition, and its impact on the temporal variance standards must be evaluated by the Board. The status of National's compliance with the condition is of significant impact to the use and development of nearby properties, the neighborhood and the public welfare. Whether National has satisfied the fee simple title to the one road access condition, and if not, whether there is any reasonable expectation that it will do so in a reasonable amount of time given that Anne Arundel County

intends to build a school and/or public recreational facility on the land National knew since 1993 it needed to acquire, is also of significant import to the issue of impacts of a fourth temporal variance looking forward. These issues and others are part of the factual determinations the Board must make in order to assess the forward looking impact of the temporal variances requested on the neighborhood, the appropriate use and development of nearby property, and the public welfare. The Board cannot analyze these issues without current facts, looking forward, drawn from evidence presented at a public hearing.


Counsel for National recognized this issue when it wrote to this Board and the Anne Arundel County Administrative Hearing Officer on November 20, 2020 requesting procedural clarification because its fourth and fifth sets of temporal variance requests were pending simultaneously before the two different administrative tribunals. In that letter, counsel for National stated “just recently, however, on October 2, 2020, the Court of Special Appeals issued a decision, remanding NWM’s fourth requested extension to the Board of Appeals so it could take additional evidence on the impact of the extension of time on the vicinal properties.” (emphasis supplied.) It appears National agrees that this Board must take additional evidence for the fourth set of requested temporal variances.

If the Petitioner presents no new facts and rests its fourth temporal variance application, again, as it did in 2018, on a stale factual record of permit diligence, road access status, neighborhood impact and impact to public welfare ending in 2012/2013, the requested fourth temporal variances should simply be denied. Under these circumstances, the Special Exceptions and setback variances will be deemed expired by operation of law, for Petitioner's failing to meet its burden of proof of such impacts beyond 2017 as mandated by the Court of Appeals. The only way that the Board can comply with the 2017 mandate of the Court of Appeals, the 2019 decision of the Circuit Court, and, most recently, the 2020 decision of the Court of Special Appeals, is by taking evidence concerning the impacts, if any, of the requested fourth temporal variances on the character of the neighborhood, the appropriate use or development of adjacent property, and the public welfare from 2017 forward and making a new decision on the fourth temporal variance based upon that evidence.

Respectfully submitted,

COUNCIL, BARADEL
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28th day of April, 2021, a copy of the foregoing Respondents' Memorandum_ was e-mailed and/or mailed first class, postage prepaid, upon:

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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

*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.

EXHIBIT A

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*”)?¹¹

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:

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*”).

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In 1990, National² 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 I*"). 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

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 IIP*”), this Court held that the

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.

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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

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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.

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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

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.).

— Unreported Opinion —

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

— Unreported Opinion —

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.**

RE: An Appeal From A Decision Of The
Administrative Hearing Officer

NATIONAL WASTE MANAGERS, INC.
AND CHESAPEAKE TERRACE

Petitioners

* BEFORE THE

* COUNTY BOARD OF APPEALS

* OF ANNE ARUNDEL COUNTY

* CASE NO.: BA 12-13V, BA 13-13V
* (2012-0300-V & 2012-0301-V)

* 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, Odenton¹.

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.

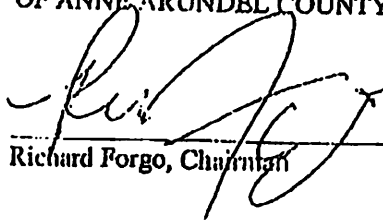
Any appeal from this decision must be in accordance with the provisions of Section 604 of the Charter of Anne Arundel County, Maryland.

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



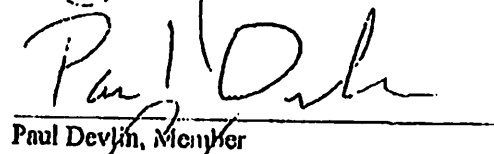
Richard Forgo, Chairman



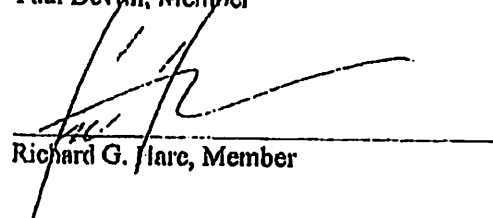
Gary Middlebrooks, Vice Chairman



Patsy Blackshear Baker, Member



Paul Devlin, Member



Richard G. Hare, Member

*(W. Jay Brettenbach, 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.

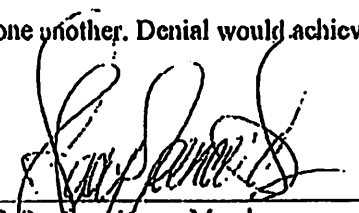
Respectfully, the Court of Appeals has failed to consider the impact that this amount of time has taken on residents of the community and the development of the Route 3 Corridor. I am concerned that the reality of time's impact on the criteria for both special exceptions and variances is so trivial in 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

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

Petitioner

v.

NATIONAL WASTE MANAGERS, INC.

Respondent

IN THE

CIRCUIT COURT FOR

ANNE ARUNDEL COUNTY

MARYLAND

Case No.: C-02-CV-18-003469

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

6/19/2019
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.

06/24/19 CS

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 § 18-16-103(e) 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.