

ANNE ARUNDEL COUNTY BOARD OF APPEALS

NATIONAL WASTE MANAGERS, INC./
CHESAPEAKE TERRACE

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

BOARD OF APPEALS
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POST-HEARING MEMORANDUM

National Waste Managers, Inc. (“National”) hereby submits to the Board of Appeals (“Board”) this post-hearing memorandum in the above-captioned matter.

Introduction

The Court of Special Appeals has instructed the Board to answer the narrow question of what, if any, negative effects from 2017 forward an extension will have on the character of the neighborhood, the appropriate use and development of adjacent properties, and the public welfare. When the Board previously split 2-2 on this question in 2013 (thereby denying an extension), the Court of Appeals reversed, holding that the two denial votes were “arbitrary and capricious” because “there was no evidence[] of how” the requested *extension* “would alter the character of the neighborhood, impair the use or development of adjacent property, or be detrimental to the public welfare.” *Nat’l Waste Managers, Inc. v. Forks of the Patuxent Improvement Ass’n, Inc.*, 453 Md. 423, 445, 162 A.3d 874, 887 (2017) (submitted as Pet’r Ex. 1, Doc. 8).

Once again, the record before the Board contains “no evidence” that an extension will have negative effects along any of these dimensions. To the contrary, National’s witnesses testified that this extension of time will have no adverse effects on the character of the neighborhood, the use and development of adjacent properties, or the public welfare. Indeed, the extension will not put

a single vehicle on the road, displace one drop of water, create any noise, or emit any fumes. The extension at bottom, and just like the ones that were previously granted, will simply allow National to move forward with the Maryland Department of the Environment (“**MDE**”) permitting process and, if and when that is granted, take other relevant, subsequent steps to open the Chesapeake Terrace Landfill (“**Landfill**”). The County and the Protestants fail to offer any evidence to the contrary.

Instead, the County and the Protestants argue that an extension should be denied because of recent development in the area and because it has somehow become impossible for National to satisfy the access road condition of the special exception. Those arguments, however, are entirely beyond the scope of the Board’s current review. Or, to put it more succinctly, the County and Protestants seek to re-litigate the terms of the special exception itself. But this matter has not been referred to this Board to define, interpret, modify, reconsider, or enforce the terms of the special exceptions that was granted in 1993. The Board has been instructed to consider the effects of the requested *extension*—not the special exception itself. And all the development cited by the County has occurred with full knowledge that the special exception has been granted.

The access condition is also an issue for another day. Indeed, the County previously *agreed* for almost twenty years that the condition is irrelevant to an extension proceeding—before suddenly reversing itself just last month. Raising the access condition in this proceeding also violates the Anne Arundel Circuit Court’s recent ruling, which held that such issues must be raised in proceedings under Anne Arundel County Code § 18-16-404. By ignoring the proper procedure, the County has sidestepped important protections to which National is entitled while raising the prospect that it is direct violation, and therefore (once again) in contempt of court given Judge Trunnell’s May 26, 2021 Order. *See* Pet’r Ex. 1, Doc. 12. In any event, the County has failed to

show that the access road condition is somehow impossible to satisfy. The County is simply incorrect that the special exception requires the access road to run through the parcels that it now owns. Even if it did, the County failed to offer proof that National could never acquire the requisite land—only conjecture that the County would never sell the land to National no matter what, in an apparent admission of bad faith.

For the reasons specified, this Board should grant National its requested extension.

Background

Special Exception and Extension Requests

This case came back before the Board on remand as directed by the Court of Special Appeals in *Nat'l Waste Managers v. Forks of the Patuxent Improvement Ass'n*, 2020 WL 5870525 (Md. Ct. Spec. App. Oct. 2, 2020) (submitted as Pet'r Ex. 1, Doc. 11).¹ The remand relates to a special exception originally approved by this Board in 1993 for a sand and gravel operation and rubble landfill on property owned by National Waste Managers and Chesapeake Terrace.

In granting the special exception, this Board found that National “presented sufficient evidence of public need for the proposed uses.” Pet'r Ex. 1, Doc. 1 at 31. Importantly, the Board determined that this use would not adversely affect the character or development of the neighborhood; would not conflict with existing or programmed public facilities, public service, schools, or roads; and would be no more detrimental to public welfare or be no more objectional with regard to noise, fumes, vibrations, or light to nearby properties than other allowed uses. *See id.* at 30–34.

¹ Additional background concerning this decades-long development can be found in *Nat'l Waste Managers, Inc. v. Forks of the Patuxent Improvement Ass'n, Inc.*, 453 Md. 423, 162 A.3d 874 (2017).

Since the special exception was granted, National has encountered numerous delays—first from bad-faith stonewalling by Anne Arundel County (“**County**”), which resulted in a rare and extraordinary court order that held the County in contempt for its obstructionist conduct, *see Nat’l Waste Managers, Inc. v. Anne Arundel Cty.*, 135 Md. App. 585, 594–95, 763 A.2d 264, 269 (2000) (submitted as Pet’r Ex. 1, Doc. 2), and then from the lengthy review of National’s state refuse disposal permit by the Maryland Department of the Environment (“**MDE**”), which, of course, is a pre-requisite to county permitting and implementation of this use in Maryland. As a result, National had to seek and obtain several variances from the Board to extend the time to implement the special exception. This Board granted the first two-year extension on April 14, 2004, followed by a second two-year extension on September 20, 2006, and a third extension on January 3, 2011. *See* Pet’r Ex. 1, Docs. 3A, 4A, 5A. In each instance, the Board found that National had been diligent in working with MDE to complete the process.

This remand concerns a fourth request for a time extension variance for the special exception, which was first heard by the Board in 2013. At the conclusion of related hearings, the Board reached a 2-2 vote decision on December 27, 2013, which was treated as an effective denial of the extension request. *See* Pet’r Ex. 1, Doc. 6A. National appealed that decision to the Circuit Court, which ordered that National’s request be remanded back to the Board. That decision was consequently appealed to the Court of Special Appeals and then was heard by the Court of Appeals after a petition for *certiorari* was granted. The Court of Appeals issued a decision in 2017 in *Nat’l Waste Managers, Inc. v. Forks of the Patuxent Improvement Ass’n, Inc.*, 453 Md. 423, 162 A.3d 874 (2017).

The Court of Appeals remanded the case back to this Board and directed the Board to resolve the following issue: “in 2013, when the decision was made, . . . what impact, if any, the

requested two-year extension to 2015 would have on the character of the neighborhood, the appropriate use or development of adjacent property, or the public welfare.” *Id.* at 446. The Court of Appeals did not instruct the Board to define, interpret, modify, reconsider, or enforce the terms of the special exception that was granted in 1993, clarifying that “[i]t is not the function of a temporal variance to relitigate those findings.” *Id.* at 447. The Court of Appeals also made the finding that “there was no lack of diligence on the part of National” in pursuing the permitting process. *Id.* at 446.

In July 2018, following this decision, the Board heard legal argument from the parties and issued a decision, granting the fourth extension request, on October 19, 2018. Pet’r Ex. 1, Doc. 9. The Board indicated that National’s request had been tolled since the original request for a time variance. *See id.* at 3–4. That decision was appealed to the Circuit Court, which on June 19, 2019 remanded the Board’s decision because the Board did not address the impact of the extension, if any, on the character of the neighborhood beyond 2017. *See* Pet’r Ex. 1, Doc. 10. The Court of Special Appeals affirmed the Circuit Court’s remand back to the Board for additional limited consideration as to the impact, if any, of the requested extension beyond 2017 on the character of the neighborhood, the appropriate use or development of the adjacent property, and the public welfare. *Nat’l Waste Managers*, 2020 WL 5870525, at *4. In doing so, the Court of Special Appeals tracked the variance factors put forward in § 18-16-305(c)(2); the opinion indicated that this Board is to “‘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[.]” *Id.* at *5.

Present Proceedings

Following the remand from the Court, this Board held hearings on whether to grant the fourth extension to the special exception. These hearings occurred on October 27, 2021, January 25–27, 2022, and March 1–2, 2022. These hearings have been held pursuant to Anne Arundel Cty. Code § 18-16-305, the specific, on-point code provision that addresses the issuance of variance to extend the time period for the already-granted special exception. Importantly, this Board’s recent hearings are *not* being held pursuant to Anne Arundel County Code §18-16-404, which is a very different provision, with different procedural requirements, that addresses modification to or rescission of a special exception. Indeed, the County’s pre-hearing memorandum to the Board stated specifically and concretely that the “purpose of further evidentiary hearing [was] is not to relitigate the project itself or the impact of the project on the neighborhood [The] focus should be whether the requested time extension will alter the character of the neighborhood.” *See* Apr. 28, 2021 County Mem. of Law at 4–5.

As part of these proceedings, it was not until February 22, 2022 that the County finally shared the recommendation of the Office of Planning and Zoning with National, *after* the first two sets of hearings had been held by the Board and *after* National had presented its affirmative case for an extension before the Board. Despite previously acknowledging National’s diligence in pursuing the required permitting process, the revised recommendation in this same case stated that, because National “has not demonstrated they will be able to comply with the conditions of the special exception approval, there is no practical purpose in proceeding further with these applications.” County Ex. 1 at 2 (Feb. 22, 2022 Findings and Recommendation from Office of Planning and Zoning). Ultimately the recommendation was denial of the extension based on the Planning & Zoning Office’s remarkable, forward-looking assertion that National would never be

able to comply with the access condition and therefore would implement a design that would alter the character of the neighborhood. *Id.* (“Approval of a time extension . . . for a rubble landfill that can no longer be served by a fee simple access road as prescribed by the Board of Appeals in their original decision will alter the essential character of the neighborhood.”).

Parallel Court Proceedings

While the question of the fourth extension made its way through the courts, National also initiated a mandamus action against the County in December 2020, as this Board is well aware. National’s legal action was necessitated by the County’s ongoing campaign of obstructionism, this time taking the form of two letters that attempted to circumvent the Board’s authority by raising the access road issue and demanding that MDE halt review of National’s permit. *See* Pet’r Ex. 11 at 4–8 (August 31, 2020 letter from S. Pittman and October 2, 2020 letter from G. Swain). In those letters, the County argued that the special exception was no longer valid because the access road had become “impossible” to construct—*i.e.*, the County made a determination that, in its view, National could never comply with the terms of the special exception.

After extensive briefing and argument, the Anne Arundel Circuit Court rejected the County’s unlawful incursion, holding that the County’s letters violated National’s due process rights and ordering MDE to continue its review. Pet’r Ex. 1, Doc. 12 at 11. In its May 26, 2021 Memorandum Opinion and accompanying order, the court made clear that the proper avenue to raise the “impossibility” of the access road was through proceedings under Anne Arundel County Code, Administrative Hearings § 18-16-404, the relevant (and only) provision that relates to suspending, modifying, or rescinding a special exception. *Id.* at 8. By attempting to nullify the special exception through their correspondence to MDE and the Assistant Attorney General, the court recognized that the County’s attempt “to circumvent the processes of the Board

overstepped the bounds of their authority and violated the due process rights of [National].” *Id.* The Court required that “any issues concerning the relevancy, applicability, or conformity of the special exception should be brought before the Board using the proper procedures as set forth in the Anne Arundel County Code.” *Id.* at 11.

Standard

Under Anne Arundel County Code § 18-16-405, “[a]n applicant may file an application for a variance to extend the time” to implement a special exception. Anne Arundel County Code §§ 18-16-305 and 3-1-207 set forth the “standards for granting variances.” *Nat’l Waste Managers*, 453 Md. at 428, 162 A.3d at 877. Under these provisions, “[a] variance may not be granted unless it is found that,” among other things, “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.” Anne Arundel County Code § 18-16-305(c); *see also* Anne Arundel County Code § 3-1-207(e) (similar). In 2020, the Court of Special Appeals remanded National’s extension request with instructions for the Board to consider these factors for the timeframe “beyond 2017.” *Nat’l Waste Managers*, 2020 WL 5870525, at *5.

Crucially, the Court of Appeals previously pointed to these factors when it reversed this Board’s 2-2 split decision to deny an extension in 2014. The court held that the two denial votes were “arbitrary and capricious” because “there was no evidence[] of how” the requested *extension* “would alter the character of the neighborhood, impair the use or development of adjacent property, or be detrimental to the public welfare.” *Nat’l Waste Managers*, 453 Md. at 445, 162 A.3d at 887.

Argument

The Court of Special Appeals has remanded this matter to the Board to determine, what, if any, effect National's requested extension will have on the character of the neighborhood, the appropriate use and development of adjacent properties, and the public welfare. *See Nat'l Waste Managers*, 2020 WL 5870525, at *5. When the Board previously split 2-2 on this question, the Court of Appeals overturned the two votes against the extension, finding that "their ultimate conclusions were arbitrary and capricious" as "[t]hey 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." *Nat'l Waste Managers*, 453 Md. at 445, 162 A.3d at 887.

The Board has not been instructed to define, interpret, modify, reconsider, or enforce the terms of the special exception that was granted in 1993. The effects of the special exception itself were resolved in 1993, where this Board determined that this use would not adversely affect the character or development of the neighborhood; would not conflict with existing or programmed public facilities, public service, schools, or roads; and would be no more detrimental to public welfare or be no more objectional with regard to noise, fumes, vibrations, or light to nearby properties than other allowed uses. "It is not the function of a temporal variance to relitigate those findings," as the Court of Appeals also made clear when reversing the Board's previous denial. *Nat'l Waste Managers*, 453 Md. at 445, 162 A.3d at 887.

No Evidence Of Negative Effects

Accordingly, this Board should consider the effects of only the ***extension***, rather than the use itself, on the character of the neighborhood, the development of adjacent properties, and the public welfare. Lest there be any doubt, the County acknowledged the limited nature of the remand proceedings before the Board, noting in its memorandum of law submitted to the Board last April

that the Board’s review was necessarily limited to the impact of any time extension on the community. *See* Apr. 28, 2021, County Mem. of Law at 4–5 (“To be clear, the purpose of a further evidentiary hearing is *not to relitigate the project itself* or the impact of the *project* on the neighborhood [The Board’s] focus should be whether the requested *time extension* will alter the character of the neighborhood.” (first emphasis added, second and third emphasis in the original)).

On each factor, the record before the Board is unmistakable. After five separate days of hearings, including the testimony of numerous witnesses, neither the County, nor the Association, nor any of the Protestants offered any evidence that any negative impacts will result from the extension.

Per the un rebutted testimony of Jon Arason, the former Director of Zoning for Annapolis and National’s expert in land use and planning, the requested extension will not adversely affect the character of the neighborhood, the use and development of adjacent properties, or the public welfare. *See* Jan. 26, 2022 Hr’g Tr. at 71:24–73:23 (attached hereto as Attachment A). As Mr. Arason testified and the record plainly shows, the extension of time will have *no* effect on the character of the neighborhood. The neighborhood is that of mixed use, rural residential and commercial to serve the needs of the Odenton community. *See, e.g., id.* at 56:10–57:8. Indeed, Anne Arundel County’s plans for a rubble landfill (to remediate the current “moonscape”) has been and continues to be a part of the neighborhood since 1993, meaning that any and all development in the surrounding area since 1993 has been done with full knowledge, both by the County and the relevant developers, of this previously approved use, including the Piney Orchard and Two Rivers residential developments. *See, e.g., id.* at 63:5–64:18.

Moreover, this use has not, does not, and will not, affect the use and development of adjacent properties. *See, e.g., id.* at 72:17–21. Indeed, adjacent properties *have* been developed (and expanded) with full knowledge of the special exception. And development in the area knowing of this prior approved use and proposed development continues. There is no evidence whatsoever that development has stunted, and certainly not that it is coming to a halt. Nor has the County or the Protestants provided any analysis of the extension’s effect on property values, traffic levels, or anything else, the upshot being that all parties understand that an *extension of time* will have no adverse effect on the public welfare. The extension of time does not put one vehicle on the road, makes no noise, and creates no run-off. The extension of time only allows the applicant to implement what the special exception has made permissible and public to everyone involved.

In sum:

- The extension of time does not cause a change to the character of the neighborhood.
- This use has been a part of the neighborhood since 1993—mixed use, residential and commercial—to serve the Odenton neighborhood.
- All development since 1993 has been done with knowledge by the County and the applicant of this fully approved use.
- The extension has not harmed the use and development of neighboring properties. The uses continue to be approved and applications are pending even with knowledge of this pre-existing facility.
- There is no evidence that an extension of time will cause harm to the public welfare.
- The extension of time puts not one vehicle on the road.
- The extension of time displaces not one drop of water.
- The extension of time does not make noise or create fumes to make a danger to the public.
- All issues related to the public welfare were considered at the time of the original approval of this use.

The Court of Appeals has already said that the record will not support a denial if there is no showing of evidence of harm, of which there has been none. *See Nat'l Waste Managers*, 453 Md. at 445, 162 A.3d at 887. Accordingly, this Board should grant the requested time extension.

National Has Been Diligent

Additionally, National has amply proven that it has been diligent in collaborating with MDE to finalize the refuse disposal permit process. This permit is a prerequisite to any County permitting of this special exception use. And in its 2017 remand, the Court of Appeals instructed the Board to consider an extension's future impact while "accepting as fact that there was no lack of diligence on the part of National". *Id.*, 453 Md. at 446, 162 A.3d at 887. That instruction alone should be the end of the inquiry (regardless of the County's attempt to disregard this instruction and attack National's diligence during the recent hearings).

For the avoidance of doubt, however, the un rebutted testimony of Paul Stratman, the engineer for design and operations of the site, and Edward Dexter, the director of Solid Waste Division of MDE, makes plain that National has been actively working with MDE engineers to finalize the refuse disposal permit application and is in the final steps of completing that process. Oct. 27, 2022 Hr'g Tr. at 60:5-83:3 (attached hereto as Attachment B) (Stratman); Jan. 25, 2022 Hr'g Tr. at 30:25-59:9 (attached hereto as Attachment C) (Dexter). MDE has issued a Draft Approval of the Technical Design for the development and is scheduling public hearings on the permit after a period for public notice and comments. *See* Mar. 2, 2022 Email from P. Stratman (attached hereto as Attachment D).

The Protestants' and the County's Arguments for Denial Lack Merit

Neither the Association nor the County have offered any evidence to the contrary. Instead, they argue that an extension should be denied because of recent development in the area (which

has been the case for decades) and because of the access road issue. Those issues, however, are beyond the scope of the Board's instructions on remand. Indeed, these arguments effectively seek to relitigate the special exception itself, setting aside that the County and Association are merely recycling stale arguments that the Board has already considered and rejected in granting prior extensions. What is more, the County's and Association's arguments run directly contrary to the Court of Appeals' clear instructions, and invites reversible error that will further delay these years-long proceedings.

Denying an extension based on the access road issue runs contrary to nearly twenty years of proceedings before this Board as well as the County's prior position. This basic point has been reinforced by each of the County's prior recommendations from 2003, 2006, 2009, and 2013, *see* Pet'r Ex. 1, Docs. 3B, 4B, 5B, 6B; the testimony of Office of Planning and Zoning officer John Fury from June 6, 2013, *see* Pet'r Ex. 32; and each of the prior decisions of this Board, *see* Pet'r Ex. 1, Docs. 3A, 4A, 5A, 6A. Contrary to the County's and the Association's position, the Board cannot rewrite the 1993 special exception by imposing an artificial deadline on the access road.

To be sure, and as National acknowledges, the access road may become relevant during the County's permitting process—which National is unable to begin until MDE finishes its review. So while the access road may become an issue in the future, it is not an issue before the Board at this time. Making it an issue today, under the wrong procedural posture (*see infra* pages 14–15), also creates the perverse incentive to encourage the County (or any party that initially objected to a special exception granted by this Board) to throw up every conceivable road block, tying an applicant up in decades of litigation, until this Board or an applicant backs down.

Moreover, it bears noting that the Board lacks jurisdiction to consider the access road issue in the current posture. The access road requirement was never argued before the administrative

hearing officer. Accordingly, there is no underlying decision on the access road that is properly on appeal before the Board for consideration.

The County Is In Contempt of Court

By raising the access road during this proceeding, the County has, in National's view, violated Judge Trunnell's May 26, 2021 Order, Pet'r Ex. 1, Doc. 12, that is still valid and controlling. As the Board is well aware, last year National and the County litigated this very issue of the appropriate method for the County to raise its argument that it is now impossible for National to comply with the access road condition of the special exception. That lawsuit came about because the County had attempted an end-run around the procedures described in the County Code for the rescission or modification of a special exception, *see* Anne Arundel Cty. Code § 18-16-404, by sending two letters from the County Executive and the County Attorney to MDE asserting it was now impossible for National to comply with the special exception and demanding that MDE halt its review of National's application.

The Circuit Court rejected the County's unlawful actions, holding that the letters violated National's due process rights and were null and void, and ordering MDE to continue its review. *See* Pet'r Ex. 1, Doc. 12 at 10–11. In that order, the court made crystal clear to all parties involved that the proper avenue to raise whether the special exception should be modified or rescinded because it was now "impossible" to comply with the access road condition was through proceedings under Anne Arundel County Code § 18-16-404. *See id.* at 8, 11.

Instead of following the appropriate process under § 18-16-404, the County has again decided to "skirt the due process rights" of National, *id.* at 10, by raising impossibility and challenging the validity of National's special exception in this proceeding, which occurs under an entirely different provision of the County Code, § 18-16-305. Section 18-16-305 places the burden

of persuasion on National and therefore does not provide the same procedural protections as § 18-16-404. So by raising its arguments under § 18-16-305 instead, the County violates the Court's order and attempts an end-run around the procedural protections prescribed by the County Code.

For example, § 18-16-404 would require the County to put up witnesses, such as school board members, giving National an opportunity for cross-examination. This maneuver by the County comes as no surprise: Judge Trunnell offered the County an opportunity to prove up its claims of impossibility during the parties' litigation proceedings, but the County declined, suggesting the issues was one for the Board to decide, albeit under the proper procedure. Apr. 19, 2021 Hr'g Tr. at 50:11–51:15 (attached hereto as Attachment E). Raising its argument under § 18-16-404 would also force the County to reckon with the Board's 1993 special exception and establish how the special exception's conditions mandated a precise access road, why that was required, why the Board's decision contemplated using rail or a different entrance, and so on. But by raising these arguments in the context of a § 18-16-305 proceeding, the County has side-stepped these procedures to National's detriment—contrary to the clear instructions by this Court.

It is National's firm view that the County has defied the Court's order and subjected itself to contempt (as it did 1997). Accordingly, National has filed a motion for an order to show cause why the County should not be held in contempt. *See Petition for Order to Show Cause Why Respondents-Defendants Should Not Be Held in Contempt*, Case Nos. C-02-CV-20-002284 and C-02-CV-20-002291 (Anne Arundel Cir. Ct. April 11, 2022) (attached hereto as Attachment F). In the meantime, this Board should not allow the County to use it as a pawn in its efforts to avoid proper procedures and court orders, to the detriment of National and its due process rights.

The County Has Not Established That It Is Impossible to Comply with the Special Exception

Should the Board nevertheless consider National's compliance with the access road condition in connection with these proceedings (and it should not), the County and the Association still have not established that it is impossible for National to comply with the terms of the special exception and thus they cannot use that as a basis for denying National's request for an extension of time. At bottom, the County failed to offer proof during the hearings that it is actually impossible for National to comply with the access road condition when Landfill operations begin, consistent with the terms of the exception, only conjecture based on current circumstances. First, there is no legal prohibition that would definitively prevent National from acquiring the land for the access road at the time the Landfill would go into operation and the County cites none.

Second, the County has not established as a factual matter that it is actually impossible for National to meet the access road condition. Robert Konowal's testimony and the Planning & Zoning Office's recommendation, on which the County relies, is that the land off Conway Road was purchased by the County and has now been passed on to the Anne Arundel County Board of Education for potential use as the site of a new school. Mar. 1, 2022 Hr'g Tr. at 10:17–22 (attached hereto as Attachment G); County Ex. 1 at 3. But the text of the special exception does not require the access route to traverse this property. It simply requires that Conway Road be used as an entrance, and National currently owns property that could be used as an entrance further west on Conway Road. The special exception also contemplates access by rail, further undermining the County's position. And indeed, if the County were correct, then the route required by the special exception would have been impossible *from day one*. That is because, in 1993, the route urged by the County crossed the WB&A Trail—which, the County also argues, forecloses the possibility of constructing an access road. So if the Board were to adopt the County's interpretation, there

would have been no viable route from the very beginning. But the Board clearly did not intend to grant a nullity in providing a special exception to National, thereby sending National on a course to sink millions upon millions into a project that was never going to begin operation. Put simply, the County's interpretation should be rejected.

Even under the County's reading, an access road is still not impossible. Contrary to Mr. Konowal's testimony, National has not "already hit the end." Attachment G at 11:23. The time for compliance with the access road condition is when the Landfill goes into operation, not now. Despite the County's attempt to short circuit that timeline, National is not currently out of compliance with the special exception and there are still any number of circumstances in which National might acquire the requisite land. The County might change its mind, for example, if National makes an offer for the land that is too good for the County or Board of Education to refuse; new County officials may get elected or appointed who are less hostile to the Landfill, recognizing the critical need it fills for the County while putting to good use otherwise unusable land; or the Board of Education might decide against putting a school next to an abandoned mine that has been described as a "moonscape." The point is not that any of these things will happen. It is that they could happen. As Mr. Konowal testified, he does not have a "crystal ball" that tells him what will happen when it actually comes time for the Landfill to begin operations. *Id.* at 36:25–37:2. Thus granting this extension of time is not a pointless exercise.

The County's arguments concerning planned developments fare no better. Although the County vaguely argues that an extension would affect planned developments in the area, *see, e.g., id.* at 10:1–7; County Ex. 1 at 2, it does not tie its arguments to new developments in any of the years in question, from 2017 to 2020. The County cannot offer evidence that the extension disrupted post-2017 plans because there are none—most of the planned developments were

underway before 2017. Accordingly, the County's arguments concerning these previously-planned developments do not bear on an extension *post*-2017, but rather seek to relitigate the merits of the special exception itself, which the Court of Special Appeals has expressly forbidden. *Nat'l Waste Managers*, 453 Md. at 445 ("It is not the function of a temporal variance to relitigate those findings."). As for the 2020 purchase of land for a school, that purchase was made with full knowledge that there would be a landfill in the mixed-use area and is itself proof that the Landfill did not, and does not, have any negative impact on development in the area. If anything, it demonstrates in part that the County took steps to purchase certain parcels of land to prevent National from ever opening the Landfill.

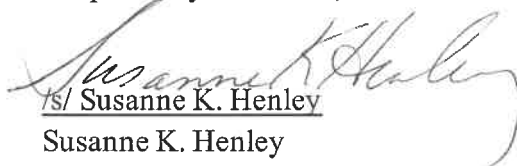
Finally, during the hearing, several Protestants objected that they were not made aware of the Landfill when they purchased their homes in the area. *See, e.g.*, Attachment G at 80:9-11, 94:5-6, 102:9-11, 122:1-3, 125:25-126:5, 153:1-6. To be sure, National understands their frustration. Why certain Protestants were not told about the Landfill (but told about gun ranges and race tracks) when they purchased their homes is an open question and cause for concern. But that information was not for National to share, and the blame does not lay at National's feet. Regardless, these objections do not bear on the extension request before the Board. National's intent to develop the Landfill has been well known for over 30 years now and National has fulfilled all of its obligations to publicize its effort to develop the Landfill. As alluded to above, it is not National's obligation to inform each potential new homebuyer about the Landfill, nor would it even be in a position to do so. To the extent any homebuyers were misled or never told about the Landfill, they may be able to pursue other avenues to air and resolve those grievances. Indeed, several of the developers have been present at the Board's hearings throughout the years, and one

even used to work for National. But to the extent Protestants' grievances are aimed at National, they are, respectfully, misdirected.

WHEREFORE National prays that the Board grant the requested time variance to the special exception.

Date: April 11, 2022, 2021

Respectfully submitted,


/s/ Susanne K. Henley
Susanne K. Henley

HENLEY & HENLEY

Susanne K. Henley
47 West Street
Annapolis, MD 21401
Telephone: (410) 280-0530
skh@henleylaw.net

Counsel for National Waste Managers, Inc.

CERTIFICATE OF SERVICE

Pursuant to Rule 3-101, I hereby certify that on the April 11, 2022, I served the foregoing
on the following:

Joseph Devlin
Council, Baradel, Kosmerly & Nolan, P.A.
P.O. Box 2289
125 West Street
Annapolis, Maryland 21401

Kelly Kenney
Anne Arundel County Office of Law
2660 Riva Road, 4th Floor
Annapolis, Maryland 21401

/s/ Susanne K. Henley
Susanne K. Henley