IN THE MATTER OF:	*	**BEFORE THE**
NATIONAL WASTE MANAGERS/ CHESAPEAKE TERRACE	*	**BOARD OF APPEALS**
	*	**OF ANNE ARUNDEL COUNTY**
	*	**CASE NOS. BA 12-13V, BA 13-13V**

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

ANNE ARUNDEL COUNTY'S CLOSING MEMORANDUM

As requested by the Board of Appeals, Anne Arundel County, Maryland, by its undersigned attorney, submits this Closing Memorandum and states as follows:

RELEVANT BACKGROUND

This case is before this Board on a remand as directed by the Court of Special Appeals ("COSA") in *Nat'l Waste Managers, Inc. v. Forks of the Patuxent Improv. Assoc.*, No. 1327, Sept. Term, 2019, 2020 WL 5870525 (Md. October 2, 2020) ("*National VI*"). The instant remand involves the fourth request for a time extension variance for a special exception, which was originally approved by this Board in 1993 for a sand and gravel operation and rubble landfill on property owned by National Waste Managers and Chesapeake Terrace (collectively referred to as "NWM"). When the Board first heard the fourth request for the time extension in 2013, a split decision of two to two was issued, resulting in a denial of the time extension. NWM appealed that decision to the Circuit Court, and the Circuit Court ordered the matter to be remanded back to the Board. That decision was appealed to the COSA and a decision was issued. Thereafter, a petition for *certiorari* was granted by the Court of Appeals, and the case proceeded there.

In 2017, the Court of Appeals issued its 2017 decision, and the matter was remanded back to the Board. *Nat'l Waste Managers, Inc. v. Forks of the Patuxent Improv. Assoc.,* 453 Md. 423 (2017) ("*National V*"). The Court of Appeals directive in *National V* was for the Board to consider

and resolve the relevant issue, "which, in 2013, when the decision was made, was what impact, if any, the requested two-year extension to 2015 would have on the character of the neighborhood, the appropriate use or development of adjacent property, or the public welfare...." *Id.* at 446. The Court also recognized that issue had become more complicated by the passage of time and the effect of tolling, and that "[i]n some manner, the Board will have to take into account the impact of the requested extension beyond 2017." *Id.*

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

The Board's October 19, 2018 Decision was appealed to the Circuit Court. The Circuit Court entered an Order on June 19, 2019, finding the Board did not fully comply with the instructions of the Court of Appeals in the 2017 opinion. Specifically, the Circuit Court found the Board did not take into account the impact, if any, of the requested extension beyond 2017 on the character of the neighborhood, the appropriate use or development of the adjacent property, and the public welfare. The June 19, 2019 Circuit Court Order remanded the matter back to this Board. That Order was appealed to the COSA by NWM.

By Opinion dated October 2, 2020, in *National VI*, the COSA affirmed the Circuit Court and found the Board's supplemental decision was incomplete: "Having decided that tolling applies, and thus extending the approvals beyond 2017, the Board must 'take into account' the

[1] The County set forth no position at that hearing.

'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[.]" *Nat'l Waste Managers, Inc. v. Forks of the Patuxent Improv. Assoc.*, No. 1327, Sept. Term, 2019, 2020 WL 5870525 (Md. October 2, 2020) at *5.

This matter proceeded before the Board per that directive. Six nights of hearings were held on October 27, 2021, January 25, 26, 27, March 1 and 2, 2022.

FACTS

Despite NWM's protestations to the contrary, the actual approved location of the access to NWM's site, and the current status surrounding the same, is relevant to the time extension request and the determination of NWM's diligence as well as whether there is an impact on the character of the neighborhood, the appropriate use or development of adjacent property, or the public welfare.

The original special exception was granted by decision of this Board issued in 1993 (the "1993 Decision"). Pet. Ex. 1. Leading up to this decision, the Board was looking at two access proposals: "one which would route traffic on Conway Road to the site, and the second which would route traffic on Patuxent Road to the site." Pet. Ex. 1, p. 2 (setting forth testimony of J.A. Chisholm). The 1993 Decision included certain conditions:

1. Patuxent Road shall not be used as an entrance to the operation.
2. Conway Road is to be used as the entrance to the operations, with the following conditions:
   a. A right turn lane shall be constructed on eastbound Conway Road at Maryland Route 3 to a minimum length of 500 feet.
   b. From the intersection of Patuxent Road and Conway Road to the entrance of the site, the road shall be improved to county standards…where the county right-of-way exists. Additionally, the Petitioners shall pursue a diligent course to obtain the right-of-way from private property owners where possible.
   c. The road improvements on Conway Road from Route 3 to Patuxent Road shall be constructed before any rubble landfill or sand and gravel operation

begins; road improvements from the intersection of Conway Road and Patuxent Road to the entrance of the site are to be completed within one year of the start of operations.

d. The access obtained to the site from Conway Road shall be through a fee-simple right-of-way, not through an easement.

Id., pp. 34-35.

What was introduced before this Board during the latest hearings as Protestant Exhibit 15 is a three page document from the 1992 Board proceeding showing the access points the Board was considering. "Existing Conditions" is page 1, "Access Alternative A" is page 2, and "Access Alternative B" is page 3. Prot. Ex. 15. "Access Alternative A" shows a route to the NWM site off Conway Road, and "Access Alternative B" shows a route to the NWM site off Patuxent Road. *Id.* Hearing transcripts from 1992 were presented to the Board to confirm this was the exhibit introduced before the Board in 1992. Prot. Ex. 16, p. 44 (Chisholm 1992 testimony explaining the exhibit).

Mr. Chisholm reconfirmed his testimony from 1992 before the Board on January 26, 2021, and admitted that the East entrance on the maps provided by NWM to MDE is the same location as Access Alternative A, and that Protectant Exhibit 5 was the one presented before the Board in 1992. Jan. 26, 2021 Tr., pp. 23-24, 26-27. Additionally, NWM's engineer Paul Stratman, the County's witness Office of Planning and Zoning ("OPZ") Planner Rob Konowal, and Protestant's expert in land planning Shep Tullier, also confirmed that this location was the one and only approved access.

During the hearings leading up to the 1993 Decision, there was discussion of the specific location of the access and the need to purchase property, including the specific properties that needed to be purchased. Mr. Fleishman had testified that there are two owners of property on Conway Road, "and both have been in contact with the Petitioners. If the special exception is granted, the owners will grant [NWM] the necessary property to get access to the site." Pet. Ex.

1, p. 13. In 1992, Mr. Chisholm also testified that NWM had a verbal commitment and written commitment from each of the owners to sell the property to NWM. Pet Ex. 16, p. 143:13-19.

Those two properties were owned by Frank Stachitas and KMS Partnerships, or Piney Orchard, these two properties being separated by BGE power lines. *Id.*, p. 149:14-21. At that time, it was confirmed NWM had been in contact with BGE concerning crossing the right of way and the Stachitas deed indicated a right to cross the right of way. *Id.*, p. 150.

From 1992 to 2020, there is no evidence that NWM made any diligent attempts to purchase either property. The first and only evidence of any such effort was in 2021, when Mr. Chisholm inquired with the County Attorney Gregory Swain whether Halle could buy the property from the County. Prot. Ex. 14; *see also* Prot. Ex. 20. The answer from the County was no.

Testimony presented to the Board during the current hearings established what was referred to as the "KMS Partnership or Piney Orchard" property was conveyed to the County in 2004 and is now a park. Prot. Ex. 13.[2] What was the "Stachitas" property was conveyed by Stachitas Investments, LLC to the County by Deed dated March 26, 2020, and then subsequently by the County to the Board of Education of Anne Arundel County ("BOE") in late 2021. Prot. Exs. 17 & 18.[3] The Stachitas property will be the location of the new West County Elementary School, and as testified by Mr. Konowal as of March 1, 2022, the grading and building permits for the construction were pending.[4]

---

[2] In case there is any doubt, Mr. Chisholm referred to this property as "Parcel 21" in 1992 (Prot. Ex. 16, p. 150), and the intake sheet (last page) for the Deed conveying the property to the County further indicates Parcel 21 was one of the parcels conveyed. (Prot. Ex. 13)

[3] Similarly, to remove any doubt, Mr. Chisholm referred to the Stachitas property as "Parcel 29 on Tax Map 36" in 1992 (Prot. Ex. 16, p. 149), and the intake sheet for the Deed to the BOE confirms the property conveyed was Parcel "0029", Tax Map "0036". Prot. Ex. 18.

[4] The online County permit database indicates the grading permit (G02019034) was issued on May 2, 2022.

NWM's submittals to MDE show three potential access points. Prot. Ex. 9. More recently, "Access Alternative A" has been shown as the "approved" or "assumed" access. *Id.* Paul Stratman, the engineer handling the submissions on behalf of NWM acknowledged this was the only approved location of the access during his testimony before the Board. The map submitted to MDE indicates "Access Alternative A" to be the East entrance and the "assumed" entrance (page 1) and planned as the "main site entrance". *Id.* (pages 4 and 7 of Exhibit, Drawings 5 and 89, respectively, notes 14 and 15, respectively).

Furthermore, Mr. Stratman confirmed NWM can only use an access alternative to Access Alternative A if approved by the County. It is stipulated by NWM in the November 2021 various submittals to MDE that "Access Alternative A" (the East entrance) is the approved entrance:

> The main entrance is intended to be the East Entrance (Drawings 4 and 5) from Conway Road, as stipulated in the special exception issued by the County, … The Optional North and South Entrances, Drawings 89 and 90, respectively, are presented for approval in the permit but will only be constructed in the event that acquisition of the property, right-of-ways or easements required for the East Entrance is unsuccessful. NWM recognizes that the stipulation in the special exception must be changed or nullified before the optional entrances may be utilized.

Prot. Ex. 11b, pp. 3-4.

Before the Board, NWM set forth a position that the access to the NWM site could be "anywhere" off Conway Road. In particular, NWM focused on what was labeled on the large exhibit used as reference before the Board as the "South" entrance, which was also referred to as the "entrance by the church" during the proceedings. Not one witness, however, was able to testify that was established as an acceptable entrance location by the Board in 1993.

Jon Arason testified for NWM as an expert in land use. He confirmed that nowhere in the 1993 Decision did the Board provide an alternative access location other than Access Alternative A. Mr. Arason testified he is not aware of any discussion regarding the entrance by the church

being allowed, and confirmed that entry point would require vehicles going to the NWM location to travel a much longer path down Conway Road. An audience protestant (Mr. Talbot) confirmed that the distance to the entrance by the church was exactly two miles. Mar. 1, 2022 Tr., p. 122. Mr. Tullier also gave the opinion during his testimony that "Access Alternative A" was the shortest span of public road and was chosen because it would protect public safety and welfare.

The County's witness, OPZ Planner Rob Konowal, provided OPZ's Findings and Recommendations ("Findings") and testified the location of the approved access is apparent when reviewing the 1993 Decision, the transcript of the hearings, and the exhibits from the hearings. County Ex. 1. The exhibit showing "Access Alternative A" was attached to the Findings for reference. *Id.* In the Findings, Mr. Konowal pointed out the access location and fee simple requirement was chosen to ensure heavy commercial vehicles would not traverse the center of a residential neighborhood and would traverse a shorter section of Conway Road. *Id.*

OPZ recommended denial of the time extension. *Id.* The reasons for this recommendation included an explanation that since 2013, and even more so since 2017, it has become apparent that NWM cannot secure the land needed for the fee simple access. "As a consequence, [NWM] cannot ensure the use will not alter the essential character of neighborhood, negatively impact the appropriate use or development of adjacent properties and the public welfare." Mr. Konowal confirmed the lands necessary for the access to the site are now owned by the County for a park and the BOE for a school. OPZ also pointed out that NWM has repeatedly shown access points other than Alternative Access A in its applications to MDE, none of which were allowed under the 1993 Decision, indicating NWM has no intention of abiding by the conditions of the 1993 Decision.

An audience protestant, Ed Riehl, provided the Board documents that also confirmed NWM's longstanding understanding of the one and only access point. Prot. Ex. 22. This packet included a May 21, 1996 letter from the attorney for NWM requesting consideration of "an extension of the entrance to the sand and gravel rubble landfill facility *farther up Conway Road*" and reflects an understanding that any discussions "will not constitute a commitment by either party to approve an access different from that previously proposed." *Id.* (emphasis added). The map labeled as Enclosure 3 to that Exhibit shows the "Board Approved Access" and the new "Desired Access" as being located near the church. *Id.*

In addition, a number of audience Protestants testified before the Board in opposition to the time extension variance as well. Those audience members provided real-life testimony about the effects a time extension would have on their neighborhood and the public welfare.

ARGUMENT

I) The record before the Board establishes the time extension would have an adverse effect on the character of the neighborhood, the appropriate use or development of adjacent property, or the public welfare

Although NWM would like this Board to find that the issue of access is not relevant to the consideration of the time extension, it is. NWM misconstrues the reasons for the focus on access during the hearings. It is neither an attempt to re-litigate the terms of the special exception itself, nor an attempt to rescind, modify, or suspend the special exception. Simply put, access is relevant because if the Board determines that NWM cannot meet the access condition, then the time extension should be denied. No amount of time will allow NWM to implement the special exception. If the time extension were granted knowing full well that NWM can never implement the access condition of the special exception, the time extension itself would have an effect on the

character of the neighborhood, appropriate use or development of adjacent property, or the public welfare.

The Court of Appeals confirmed in 1995 the Board was authorized to impose the condition for the access location, including the requirement for fee simple ownership, and upheld the condition because "it is justifiable in terms relating to public health, safety, and welfare." *Halle Cos. v. Crofton Civic Ass'n,* 339 Md. 131, 147-49 (1995). "The Board here imposed a true condition, not an illusory one." *Id.* at 148.[5]

The 1993 Decision is clear that the one and only access point off of Conway Road is Access Alternative A. The Order is at the end of a 33 page decision, which informs the background and basis for the Order. It cannot be read in a vacuum. "Access Alternative A" depicts the specific location of the Conway Road access approved by the Board at that time. Prot. Ex. 15. Nothing in the 1993 Decision or in the recent hearings established that the access to the site could be "anywhere" on Conway Road.

The discussion in the 1993 Decision, as well as the exhibits and testimony at that time, all make it clear that the Board was looking at only one location on Conway Road when the decision was issued. In 1992, NWM asked the Board to consider the Conway or Patuxent Road alternatives, and specific locations for both were clearly depicted on drawings submitted to the Board at that time.[6] Additionally at that time, Mr. Chisholm and Mr. Fleishman both indicated that the preferred option was Alternative Access A. Pet Ex. 16, pp. 67:17-20; 90:15-17; 104:19-20 (Chisholm

[5] The Court of Appeals also acknowledged the Circuit Court below struggled with the fact that the property over which the access was required was not owned by NWM. *Halle* at 147. The Court confirmed the condition was appropriate, even if it could never be met: "The uncertainty of a prerequisite's occurrence is irrelevant if the Board is satisfied that, once that prerequisite occurs, the approved activities would be appropriate. *Id.* at 148.

[6] At that time, NWM asked for both to be approved as alternatives, but the Board rejected Patuxent Road as an option.

Testimony). This was because "it is a shorter run and affects few people." 1993 Decision, p. 13 (setting forth testimony of Steve Fleishman).[7]

NWM's submissions to MDE, and the testimony of Mr. Stratman on behalf of NWM, show that NWM acknowledged Alternative Access A is the "approved" access. Prot. Ex. 9 and 11b. Even a letter from NWM's counsel in 1996 confirms the understanding there was one access point and sought an alternative access. Prot. Ex. 22.

Despite all of this, NWM has tried to convince the Board the access can be "anywhere" on Conway Road. As set forth above, review of the 1993 Decision, evidence and testimony shows this is not the case. The Board should not punt on settling this issue once and for all.

Construing the 1993 Decision to allow access at the point labeled the "South" entrance on the map submitted to MDE (the entrance near the church) would fly in the face of the Board's rationale at that time. In that decision, the Board recognized (based on testimony from NWM representatives) that access off of Conway Road would have the least effect on the public road. Traveling down Conway Road to the church is two miles, versus a much shorter distance to the approved access location. It would be nonsensical to disregard that and to find that an access point that requires oversized vehicles to traverse two miles down Conway Road could be what was approved by the Board in 1993. Additionally, the conditions in the 1993 Decision require road widening of Conway Road, and accessing the site at the location by the church would require significant road improvements.

Mr. Arason confirmed as much during his testimony when he said it was "basic math" that Alternative Access A had much less impact on the public road than traversing down Conway Road to access the site by the church. Mr. Arason also confirmed that nowhere in the Board decision

[7] Mr. Chisholm also explained in 1992 that Access Alternative A was the desired access, in part because less public road is traversed.[7] Prot. Ex. 16, pp. 66-68.

was access by the church discussed. He agreed that only two access points were before the Board at that time. Mr. Tullier also confirmed that Access Alternative A is the only access point. He also testified that the BGE property was not an impediment to implement this access, as the deeds established a right of way over that property.

Even more importantly, if access from Conway Road by the church was authorized by the Board in 1993, there would have been no need for the condition that the properties be acquired in fee simple. The Board was clear that fee simple access was required. The properties needed for the access were discussed specifically and not in the abstract. Specific owners and property identifiers were discussed and NWM confirmed before the Board then that it needed to acquire those properties, and in fact represented that it was in the process of acquiring them in 1992. If the Board had authorized access by the church, where NWM already owned property abutting Conway Road, there would have been no reason to make fee simple ownership a requirement in the Order.[8]

It would be against the weight of the evidence for the Board to make any conclusion other than Access Alternative A is the only approved access. The Board can also find that NWM has not been diligent in attempting to obtain that property. It is undisputed that the properties over which the access is to traverse are now owned by the County for a park and the BOE for a school.

Once the Board confirms the access location and current ownership, it should find the request for time extension should be denied because the condition cannot be met. If the Board finds that NWM cannot obtain the property needed for the access and meet the condition of the 1993 Decision, then there is no reason for a further time extension. There is no practical purpose of a time extension for a use that can never come to fruition. Suppose, for the sake of argument,

[8] On this point, NWM argued that condition 2.b, which indicated that NWM was to obtain a right-of-way from private owners if possible applied to the fee simple access condition. The latter is set forth in condition 2.d and pertains to the access point itself. The condition in 2.b is with regard to the road widening on Conway Road itself.

the MDE representative had testified NWM would never get their waste disposal permit, then, this Board would deny the time extension because there is no longer any purpose for granting any additional time to implement the special exception. The access issue is the same. If NWM can never meet that condition, the use can never be initiated. No amount of time will give NWM the ability to meet the condition.

If this Board were to approve a time extension knowing the condition cannot be met, it would alter the essential character of the neighborhood and negatively impact adjacent properties. The time extension "holds" this issue over the heads of the adjacent neighbors and extends the uncertainty of whether the landfill will ever open, and a number of audience Protestants testified to this. Additionally, there is an impact on the neighborhood because the substantial development that has occurred along Conway Road was undertaken with knowledge of the one and only access point for the landfill.[9] If more time is given, the Board would be giving tacit approval to NWM to pursue an alternative access that was not approved and that would have new and unexpected impact on the surrounding neighborhood. Allowing NWM to seek an alternative access other than the one approved would alter the essential character of the neighborhood – an area that was developed knowing the location of the approved access. If the access cannot be implemented, granting a time extension is an exercise in futility and merely extends the inevitable. Frankly, it is a waste of time for all involved.

---

[9] NWM incorrectly argues the County's position is because of "recent development" in the area. That is not the case. The County is not arguing about the effect of the rubble landfill itself on the surrounding neighborhood, and has acknowledged those developments were approved and went forward with the knowledge of the impending landfill. If the developers did not know this, they should have known. The point is, however, that the developments would have gone forward based on the understanding of the access point of the possible future landfill. Changing that access point would have an effect on the neighborhood and public welfare. Mr. Tullier confirmed that the location of those developments appear to have been situated based on the only known access point to the NWM site. In proposing those developments, the "only information they could have gleaned" as to the future access point to the NWM site would have been based on the 1993 Decision and associated exhibits.

If there were any doubt the time extension itself would have an effect on the character of the neighborhood, appropriate use or development of adjacent property or public welfare, the Board need not look any further than the testimony from the audience members living in the surrounding area, who were all in opposition to the time extension. A number of the audience Protestants provided evidence as to the effect of the time extension (not the landfill itself) on the character of the neighborhood, appropriate use or development of adjacent property, or the public welfare. These included statements that granting a time extension makes the landfill seem like a possibility when it cannot be for the reasons discussed herein. Residents also expressed real concern about the time extension potentially affecting the timing on traffic studies or improvements to Conway Road; along with concerns about delays of the school construction. Lastly, residents also highlighted concerns with granting a time extension for something that will never come to fruition, showing it is not in the interest of public welfare to continue to approve a time extension. A time extension would allow NWM to continue moving forward when it is impossible for the landfill to ever be operated in compliance with the 1993 Decision.

NWM argues that it is not beyond the realm of possibility it may someday obtain title to the County park property and the BOE school property. At this point, NWM is just grasping at straws. The grading permit for the school has been issued, and construction is imminent. Additionally, the BOE is prohibited by State law from conveying property to a third party. State law and regulations require that the local BOE, with approval by the State Superintendent, transfer school property no longer needed for school purposes to the County government. Md. Code Ann. Educ., § 4-115(c); COMAR 14.39.02.23. When a new school is constructed on a property, there could be no finding it is "no longer needed for school purposes".

The County park property was purchased with program open space ("POS") money. Prot. Ex. 13. The POS program restricts the conversion or use of property acquired with such funding to anything but public recreation area or open space without State approval and without replacing the land of equivalent area and value.[10] *Id.*, p. 2.

Even if obtaining these properties were ever possible, this is where NWM's lack of diligence in pursuing that access should factor into the Board's decision. As a justification for a time extension variance, a party has to show they have been diligent in pursuing the necessary approvals to implement the special exception. At this point, it is not just about the diligence in attempting to obtain the MDE permit. The Board cannot ignore the fact almost 30 years have gone by since the 1993 Decision and NWM has not been diligent in its attempts to obtain the necessary property to access the site. They made an attempt to purchase the property from the County in 2021, and provided no evidence of any other attempts. Now, they have lost their chance.

While NWM is correct the ownership of the property is not necessary until it moves forward with the use, it ignores the fact there is no reason to defer to that point because it is now known the access will never be obtained. Even if true that fee simple ownership of the access may not be required until operations begin, the Board can rightfully consider whether it can *ever* be

---

[10] Maryland's Program Open Space is a State program pursuant to Title 5, Subtitle 9, of the Natural Resources Article of the Maryland Code. Md. Nat. Res. Code Ann. § 5-906(7) and (8(i)) provide the following:

> (7) Land acquired or developed under a State grant from Program Open Space may not be converted, without written approval of the Secretary, the Secretary of the Department of Budget and Management, and the Secretary of the Department of Planning from outdoor public recreation or open space use to any other use. Any conversion in land use may be approved only after the local governing body replaces the land with land of at least equivalent area and of equal recreation or open space value; and
>
> (8)(i) For any conversion of land acquired or developed under a State grant from Program Open Space as provided in paragraph (7) of this subsection, the appraised monetary value of the land proposed for acquisition shall be equal to or greater than the appraised monetary value of the land to be converted, under the proposed new use of the converted land.

obtained in the context of a time extension variance. It is condition precedent to implementing the use and has to be addressed at some point. The fact of the matter is if access cannot be obtained at the permit stage, there is no purpose of granting the time extension. There is no avenue short of a new special exception for NWM to pursue a different access point.[11] Granting a time extension to try to obtain title to the property needed for the access at this point is too little too late.

As Mr. Konowal testified, he found it would be "irresponsible" of OPZ to recommend a time extension when the use can never be implemented. Mar. 1, 2022 Tr., p. 62. The Board should find the same. A time extension is futile and there is no viable path to ever implement this special exception. The Board should deny the time extension variance.

II) NWM's arguments about OPZ's Findings and Recommendation and the 2021 Circuit Court Order are an attempt to deflect the Board from considering the real issues

The Board should ignore the points made by NWM on both of these issues and consider the actual issue before it.

a. The County's alleged "change in position" is irrelevant.

In its closing memorandum, NWM insinuates (yet again) the County provided the OPZ's Finding and Recommendations in an untimely fashion. This was already addressed in the context of NWM's request for subpoena and motion for postponement (which was denied). The County explained in its February 18, 2022 letter responding to the subpoena and motion that the document was in the process of being completed when it was requested. It was thereafter provided to NWM and the Protestants immediately upon completion.[12]

[11] There is no method set forth in the County Code by which NWM could seek revision of the conditions of its special exception. NWM would have to seek a new special exception.

[12] As this Board is aware, there is no pre-hearing discovery and there is no requirement that any documents be provided ahead of time.

NWM would like this Board to find that the County is somehow prohibited from changing a position that was taken 9 years ago. It is true the last recommendation of OPZ in 2013 was that the time extension be granted. A lot has changed from 2013 to the present. There is absolutely no requirement that the County's position remain the same, particularly when the circumstances change as drastically as they have here. It is worth pointing out that going back to 2004, the Department of Recreation and Parks recommended denial due to the existence of the park and the West B&A trail. *See* Pet. Ex. 3b, last page; Pet. Ex. 4b, p. 8; Pet. Ex. 5b, p. 6; Pet. Ex. 6b, last page.

OPZ's position and the basis therefore is well established and documented as stated in the Findings and Recommendation, in Mr. Konowal's testimony, and in this Memorandum. During his testimony, Mr. Konowal explained it was the change in circumstances that caused his recommendation to be different than the planner prior to him. While the County likely gave the benefit of the doubt that NWM would obtain the property needed for the access leading up to the reports submitted through 2013, it is now clear that is no longer the case, which led to the change in position. While lack of access may not have been a reason for OPZ to recommend denial in 2013 or prior, it is now.

In 2013, it was not apparent that NWM had not been making efforts to obtain the necessary properties for access to the site. At that point, it was not apparent that the chance to acquire them had been lost as it is now. The failure to obtain the access as of 2022 is clearly apparent. For the reasons discussed herein, it is relevant to the time extension. The circumstances have changed in 9 years and the County is not prohibited from a change in positon.

b. NWM's arguments about the 2021 Circuit Court Order, or any alleged contempt thereof are not issues appropriately before this Board

This Board has no jurisdiction over any alleged contempt of the 2021 Circuit Court Order. The County is vehemently opposing NWM's Petition for Contempt in the Circuit Court. The Board should not allow any of this to distract it from the issue at hand.

Additionally, NWM attaches a Circuit Court transcript and its filing in the Circuit Court to its memorandum, which is outside of the record before the Board. The Board should disregard those attachments, along with the subsequent letter from NWM's counsel dated April 22, 2022.

The County's presentation or position before this Board in no way violates that Order. That Order directs MDE to continue its review of NWM's permit application to operate the rubble landfill and declares the letters from County Executive Steuart Pittman and County Attorney Gregory Swain as unlawful and void. Pet. Ex. 12. It imposes no "gag order" against the County, and in no way, shape, or form, prohibits the County from fully addressing the time extension request before the Board. That Order does not restrict the County from taking a position on the time extension variance, and for the reasons set forth herein, that position is directly relevant to the issues that are properly before this Board.

NWM is attempting to argue that, during the course of the proceedings before the Board, the County is trying to circumvent the Court Order or § 18-16-404(a) of the Code. That section provides, in relevant part: "On motion of the County or an aggrieved party,...approval of an application for a...special exception shall be rescinded, suspended, or modified if the Administrative Hearing Officer determines, after a hearing, that...the use of the property deviates from the approved administrative site plan, an allowed use under the rezoning, or any conditions imposed."

The County is not seeking that the special exception be rescinded, suspended, or modified.

It is requesting the Board to deny the application for a time extension, and that is different. The County is not circumventing the Code or the Court Order in making that request. What is more, applying § 18-16-404 is premature at this stage. The relevant portion of that section applies if the "use" of a property deviates from a site plan or conditions imposed. There has been no allegation that the "use" of the property has been initiated, therefore, there is no action to be taken under this section. As this Board is aware, that Circuit Court Order is under appeal. One of the County's arguments in that appeal is the Court's reliance on § 18-16-404 was misplaced. Therefore, this is not a resolved issue and the Board should place no reliance on NWM's arguments on this point.

CONCLUSION

For the foregoing reasons, the County requests that this Board deny the time extension variance for the special exception originally approved by this Board in 1993 for a sand and gravel operation and rubble landfill on property owned by NWM.

Respectfully submitted,

/s/ Kelly Phillips Kenney

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of May, 2022, a copy of the foregoing Memorandum of Law was served via email and first class U.S. Mail to the following:

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

Attorneys for National Waste Managers, et al.

Joseph Devlin, Esq.
Sally Baldwin, Esq.
Council Baradel, Kosmerl & Nolan, P.A.
125 West St., Fourth Floor
Annapolis, Maryland 21401

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

/s/ Kelly Phillips Kenney
Kelly Phillips Kenney