ANNE ARUNDEL COUNTY BOARD OF APPEALS

NATIONAL WASTE MANAGERS, INC./
CHESAPEAKE TERRACE

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

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REPLY MEMORANDUM

National Waste Managers, Inc. ("**National**") hereby submits to the Board of Appeals ("**Board**") this reply memorandum in the above-captioned matter.

Introduction

National has been forced to beat back legal challenge after legal challenge concerning the Chesapeake Terrace Landfill for decades—literally 30 years. Although this Board granted National a special exception over Anne Arundel County's strenuous objection, the County has refused to take "No" for an answer. Since 1993—yes, 1993—the County has done anything and everything to try to make sure National never breaks ground on the landfill, even when that meant being held in contempt. Make no mistake, it is only because of those legal challenges, many of which were (and remain) baseless, that National is here seeking a fourth extension that has been pending, astoundingly, for ***nine*** years. And even now, Respondents' opposition to National's extension request amounts to relitigating the underlying merits of National's special exception and otherwise raises issues beyond the Board's narrow inquiry on remand.

What is most alarming about the County's instant opposition is that, at bottom, it invites the Board to establish a dangerous and disorderly precedent—a precedent whereby a party (here, the County) who initially, albeit unsuccessfully, mounted a vehement opposition to a special

exception is encouraged to thereafter take any and all steps to tie up a new property owner in endless litigation with the goal of running out the clock until the point in time the Board either relents or decides that the surrounding area has changed to a degree that it reverses its decision and strips a property owner of its duly-awarded rights. That cannot, and should not, be the result from this (or any) fair and just legal process. Indeed, the last time the County tried to run out the clock through meritless legal challenges, the Court of Special Appeals held that National's special exception was tolled while the lawsuits were resolved. *Nat'l Waste Managers, Inc. v. Anne Arundel Cnty.*, 135 Md. App. 585, 604–05, 763 A.2d 264, 275 (2000).

Put simply, granting National's request for an extension does nothing more than maintain the status quo, giving National additional time to obtain approval from the Maryland Department of the Environment ("**MDE**") as a result of the County's unlawful actions that have gummed up this process for decades. Even today, and once again, the County is trying to use delay tactics to get its way. When examined closely, however, the County has no cogent legal argument. Based on the undisputed record, the County has failed to show how an ***extension*** of time would negatively affect the character of the neighborhood, the appropriate use and development of adjacent properties, or the public welfare. *See Nat'l Waste Managers, Inc. v. Forks of the Patuxent Improvement Ass'n*, 2020 WL 5870525, at *5 (Md. Ct. Spec. App. Oct. 2, 2020). If anything, the County's position is entirely upside down: the County argues that, because the surrounding area has continued to develop—successfully—despite prior extensions, this Board should now shut National down. That, however, is not a reason to end the special exception, nor does it purport to even address the applicable standard, which mandates a showing of negative effects, not positive ones. Instead, it demonstrates that an approved and future landfill has ***not*** harmed development of the community, which has continued apace notwithstanding the special exception.

Sensing the dearth of evidence of a negative impact on the community, Respondents retreat to speculating about the purported "future" impossibility of National constructing an access road over County-owned land. As an initial matter, the access road issue is not before this Board as a procedural matter, because the issue was never raised before the Administrative Hearing Officer. *See Halle Co. v. Crofton Civic Ass'n*, 339 Md. 131, 141, 661 A.2d 682, 687 (1995). As it relates to the substance, the access road need not traverse any County-owned parcels per the express conditions of the special exception. And regardless, the County does not possess a crystal ball that can peer into the future and determine whether the County will ever sell the land to National. Indeed, the County had the chance to make a showing that National could never obtain the land the County says it must obtain (beyond its mere say-so), yet it passed on that opportunity. More importantly, the County has not made that case here, in part because it is proceeding under the incorrect provision of the County Code—§ 18-16-305 (for extensions), rather than § 18-16-404 (for modification or rescission of special exceptions)—which deprives National of crucial due process protections. Finding for the County under these circumstances, on this instant record before the Board, will create ambiguous precedent that any aggrieved party can speculate about "future" compliance over any particular condition as a basis to rescind a special exception.

National respectfully submits that the Board should reject the County's latest efforts and grant the requested extension, thereby maintaining the status quo that affords National the time to obtain predicate approval from MDE.

Argument

The Unrebutted Evidence Shows the Extension Will Not Negatively Affect the Character of the Neighborhood, the Use and Development of Adjacent Properties, or the Public Welfare

Although Respondents raise a broad array of irrelevant considerations, the Board's inquiry on remand remains narrow: whether an extension of time—*i.e.*, maintaining the status quo—will

negatively affect the character of the neighborhood, the appropriate use and development of adjacent properties, or the public welfare. *See Nat'l Waste Managers*, 2020 WL 5870525 at *5. As even the County has acknowledged, this inquiry focuses on the ***extension***, rather than the underlying exception or landfill itself. *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." (emphasis added)).

National's opening brief described at length the evidence demonstrating that an extension will have no such negative effects. Apr. 11, 2022 National Waste Managers, Inc. Post-Hearing Mem. ("**National Mem.**") at 9–12. Respondents offer nothing in response. They offer no rebuttal to the testimony of Jon Arason that an extension will not adversely affect the character of the neighborhood, the use and development of adjacent properties, or the public welfare. *See* National Mem. Attachment A (Jan. 26, 2022 Hr'g Tr.) at 71:24–73:23. Respondents do not deny that, as Mr. Arason testified and the record plainly shows, the area 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. Nor do they dispute testimony that the rubble landfill (to remediate the current "moonscape") has been and continues to be a part of the neighborhood for nearly ***30 years***, such that development in the surrounding area since 1993 has been done eyes wide open, both for 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. Nor has the County put on any evidence relevant to the governing standard for this proceeding—for example, by suggesting home values will decline, community growth will be stunted, or the public welfare or adjacent properties will be adversely affected.

In essence, Respondents argue the opposite: ***because*** the surrounding area has flourished—including the development of what the County claims will be a future school—the Board should deny National's request. But that only serves to demonstrate that the landfill, and any extension to develop the landfill, will have no such negative effects. This use has not, does not, and will not affect the use and development of adjacent properties. *See, e.g.*, *id.* at 72:17–72:21. As National noted before, "The extension of time does not put one vehicle on the road, makes no noise, and creates no run-off." National Mem. at 11. The Court of Appeals made clear that, absent any evidence of harm, which Respondents have not shown, the record will not support a denial. *See Nat'l Waste Managers, Inc. v. Forks of the Patuxent Improvement Ass'n, Inc.*, 453 Md. 423, 445, 162 A.3d 874, 887 (2017).

Respondents' "impossibility" argument (addressed further below) also undermines any notion that an extension will harm the public welfare. *See* May 13, 2022 Forks of the Patuxent Post-Hearing Mem. ("**Forks Mem.**") at 1. Setting aside the fact that the access road is not in fact impossible and that any harm to the surrounding area is unsubstantiated, Respondents' positions are contradictory and incoherent. An event that will never come to pass will, by definition, have ***no*** impact on the community. If satisfying the special exception conditions was truly impossible (which it is not), granting the extension would have no effect on the prosperity of the surrounding neighborhood. By insisting both that the special exception is impossible ***and*** that an extension will harm the community, Respondents' arguments veer into absurdity, betray desperation, and prove once again that Respondents will stop at nothing, regardless of legality or common sense, to usurp the Board's authority and undo its 1993 decision.

National Has Been Diligent

Unable to cite evidence that an extension will have any negative effects, Respondents encourage this Board to find that National "has not acted with diligence." Forks Mem. at 11; *see, e.g.*, *id.* at 1, 10–12; May 16, 2022 Anne Arundel County Closing Mem. ("**County Mem.**") at 5, 11, 14. That argument, however, directly contradicts the Court of Appeals' clear instruction to this Board that, on remand, it "accept[] as fact that there was no lack of diligence on the part of National." *Nat'l Waste Managers*, 453 Md. at 446, 162 A.3d at 887. Any finding to the contrary would thus invite reversible error, and threatens to waste more time with another remand. *See Nat'l Waste Managers*, 2020 WL 5870525 at *4 (reversing the Board's earlier decision in this proceeding when it "misinterpreted the Court's instructions"). For this reason alone, all of the Respondents' diligence arguments should be rejected.

Respondents attempt to skirt the Court of Appeals' instructions by claiming that National's supposed "failure to diligently pursue the required permits" and obtain property would somehow "negatively impact the public welfare." Forks Mem. at 1. In so doing, Respondents improperly conflate diligence with the public welfare. However, Maryland law makes clear that these are separate inquiries with separate requirements that need to be treated and addressed separately. As the Court of Appeals explained, "National's diligence implicates in particular the requirement in ***§ 3–1–207(a)(2)*** that a variance be granted only upon an affirmative finding that the variance is necessary to avoid practical difficulties or unnecessary hardship." *See Nat'l Waste Managers*, 453 Md. at 442, 162 A.3d at 885 (emphasis added). By contrast, arguing the variance would "alter the essential character of the neighborhood," or "substantially impair the appropriate use or development of adjacent property," or "be detrimental to the public welfare" would "implicate[] the requirements of ***§ 3–1–207(e)***." *Id* at 442–43, 162 A.3d at 885 (emphasis added). Thus, the

Court of Appeals foreclosed any diligence arguments under § 3–1–207(a)(2), and Respondents cannot shoehorn arguments about diligence under the "public welfare" heading of § 3–1–207(e).

Even if the Court of Appeals had not foreclosed the question, the record amply establishes that National has been diligent. Respondents do not address the unrebutted testimony of Paul Stratman and Edward Dexter plainly showing that National and MDE are finishing the final steps to approve the refuse disposal permit application. National Mem. Attachment B (Oct. 27, 2021 Hr'g Tr.) at 60:5–83:3 (Stratman); National Mem. Attachment C (Jan. 25, 2022 Hr'g Tr.) at 30:25–59:9 (Dexter). MDE has issued a Draft Approval of the Technical Design and has already held one public hearing, so the process is almost complete. *See* National Mem. Attachment D (Mar. 2, 2022 Email from P. Stratman). Thus, entirely consistent with the Court of Appeals' instructions, National has been diligently pursuing the steps necessary to begin operation of the landfill.

The core of the Respondents' argument is that National's decision not to purchase the County-owned parcels for the access road shows a lack of diligence. Forks Mem. at 1, 12; County Mem. at 5, 11, 14. Yet, (and as discussed at greater length below), the access road condition is not properly before this Board, and the special exception does not mandate access over the County-owned land in any event.

Regardless, Respondents fail to show any lack of diligence in purchasing the land. The special exception does not specify ***any*** timeframe for building an access road other than the beginning of operations. Pet'r Ex. 1, Doc. 1 ("**Special Exception**") at 34 ("Conway Road is to be used as the entrance to the operations . . . ."). Because there is no deadline, National had (and has) every right to determine when and how it will seek to satisfy this particular condition. That is especially true where, as here, MDE's review was long and uncertain because of the complex engineering issues involved and myriad technical unknowns, and the County was literally breaking

the law to stop the landfill at all costs. Further, Respondents fail to explain what "diligence" would even look like. To be sufficiently "diligent," did National need to purchase the land within two years of the special exception, when the Court of Appeals rejected the County's first challenge? Within four years, when the Circuit Court held the County in contempt? When exactly? In the absence of any Board-ordered deadline, drawing such *post hoc* lines would be wholly arbitrary, requiring reversal on appeal. *See Nat'l Waste Managers*, 453 Md. at 445, 162 A.3d at 887 (vacating this Board's 2013 2-2 denial because the denial votes "were arbitrary and capricious").

Finally, Forks' argument that National has not been diligent because its Surface Mining Permit has lapsed, Forks Mem. at 11–12, is a red herring. National possesses a current Surface Mining License to perform sand and gravel operations and can readily obtain a renewed permit for this particular location (if even required by MDE) well within the time that it will take to obtain County permits and complete road improvements necessary before any operations begin on the approved special exception uses. *See* MDE, *Mining FAQ*, https://mde.maryland.gov/programs/land/mining/pages/miningfaq.aspx ("The average turn-around time for a new Surface Mining Permit is Seven (7) Months."). The fact that the prior permit lapsed is thus irrelevant and in no way indicates any lack of diligence.

The Access Road Issue is Not Before the Board

Sensing that their other arguments on public welfare and diligence are nonstarters, Respondents retreat to the access road condition, spending the bulk of their papers arguing that it is somehow impossible for National to construct a permissible entrance to the landfill. In doing so, Respondents whistle past National's ***dispositive*** argument that the issue is beyond the Board's purview. Respondents offer ***no*** response to National's argument that the Board lacks jurisdiction to consider the access road issue in the current posture. National Mem. at 13–14; *see Halle*, 339

Md. at 141, 661 A.2d at 687. As the Court of Appeals explained in prior proceedings related to this development, "a board of appeals cannot review actions which were not appealed specifically" from administrative officials' decision below. *Halle*, 339 Md. at 141, 661 A.2d at 687. Because the access road requirement was never argued before the Administrative Hearing Officer in 2013, much less raised during the last ***eight*** years, there is no underlying decision on the access road that the Board can properly review. That jurisdictional defect alone decides the issue. The present proceeding is merely a continuation of National's extension request from 2013, so the issues before this Board are limited to those first raised in 2013—and, indeed, have been subsequently narrowed after rounds of appeals and the Court of Appeals' instructions on remand.

Although Respondents insist otherwise, their arguments belie an attempt to "re-litigate the terms of the special exception" and "rescind, modify, or suspend the special exception." County Mem. at 8. Although they claim their argument bears on whether the exception will "have an effect on the character of the neighborhood, appropriate use or development of adjacent property, or the public welfare"—which is the standard for extension proceedings under § 18-16-305—Respondents focus on National's purported ability to satisfy the special condition's exceptions, which is the touchstone inquiry for proceedings under § 18-16-404. *See* Anne Arundel Cnty. Code § 18-16-404 ("On motion of the County . . . 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 . . . ***any conditions imposed***.") (emphasis added). Indeed, the Anne Arundel Circuit Court held, in a case brought by National against the County, that the proper avenue to raise the supposed "impossibility" of complying with the access road condition is under Anne Arundel County Code § 18-16-404, not this proceeding under § 18-16-305. *See* Pet'r Ex. 1, Doc. 12 at 8.

The distinction matters. 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 can avoid any need to call witnesses to prove impossibility, and has sidestepped making its case like it did before the Anne Arundel Circuit Court. *See* National Mem. Attachment E (Apr. 19, 2021 Hr'g Tr.) at 50:11–51:15. This procedural posture also allows Respondents to skirt their burden to prove how the special exception's conditions mandated a particular access road, how to make sense of the Board's decision to leave open the possibility of a rail entrance, or why the 1993 dissent was convinced no particular entrance was required.

Moreover, the County itself has repeatedly recognized that the access road issue is not relevant to these extension proceedings. The County does not deny that it has always taken the position that the relevant inquiry when considering a time variance is the effect of the time variance—and not the underlying use—on the essential character of the neighborhood, adjacent property, or public welfare. Nor does a request for extension of time allow the County or others to superimpose additional conditions on the previously granted special exception. In each of these prior considerations by the County and the Board of Appeals, the access and entrance to the landfill operations have never been treated as a topic for consideration by either the County or Board on a request for extension of time to implement this special exception use. *See* Pet'r Ex. 1, Docs. 3B, 4B, 5B, 6B (prior recommendations from the Office of Planning and Zoning); Pet'r Ex. 1, Docs. 3A, 4A, 5A, 6A (prior decisions of the Board). Notably, in each instance, the land was owned by a third party, and there was never any indication that it would be imminently sold to National.

That is because the County, which regulates the road and access issues, will address those issues as part of the county permit process only after National has first acquired a refuse disposal

permit from MDE. The County's own witness in this very proceeding acknowledged that an MDE refuse disposal permit is a ***prerequisite*** to the county permit process and construction. *See* National Mem. Attachment G (Mar. 1, 2022 Hr'g Tr.) at 62:18–63:12; *see also* Pet'r Ex. 32 (Aug. 15, 2013 Hr'g Tr.) at 83:1–84:22, 94:7–95:18 (testimony of John Fury); Pet'r Ex. 1, Doc 6B (June 6, 2013 Office of Planning and Zoning recommendation) at 3.

In 2013, at the start of this extension proceeding, John Fury submitted a recommendation and testified on behalf of the Office of Planning and Zoning that National has been diligently pursuing the MDE permit and that the County adopted its prior position that the extension should be granted for an additional two years provided that the applicant demonstrates diligent pursuit of the MDE permit. *See* Pet'r Ex. 1, Doc 6B at 8; Pet'r Ex. 32 (Aug. 15, 2013 Hr'g Tr.) at 70:18–70:25, 78:17–79:23. Mr. Fury went on to explain that the access road and property acquisition for road improvements are not a part of the consideration for an extension of time to implement the approved special exception since the County will not consider those issues unless and until the final MDE refuse disposal permit is issued. *See* Pet'r Ex. 32 (Aug. 15, 2013 Hr'g Tr.) at 83:1–84:22. The access and roads are part of the County's regulated permit process which can only be addressed after the permit is final. *See id.* at 83:1–84:22, 94:7–95:18; Pet'r Ex. 1, Doc 6B at 3; *see also* National Mem. Attachment G (Mar. 1, 2022 Hr'g Tr.) at 62:18–63:12.

Again, in each of the prior extensions, the County expressed this same position that the access road and road improvements were not a proper consideration for an extension of time until the MDE permit is issued. *Cf. Dashiell v. Meeks*, 396 Md. 149, 170, 913 A.2d 10, 22 (2006) ("It may accordingly be laid down as a broad proposition that one who, without mistake induced by the opposite party, has taken a particular position deliberately in the course of litigation, must act consistently with it; one cannot play fast and loose.") (quoting *Kramer v. Globe Brewing Co.*, 175

Md. 461, 469, 2 A.2d 634, 637 (1938)). Yet here, Respondents take the position that, in this same case on remand of the fourth extension request, the road access and land acquisition conditions somehow compel a denial of the extension of time request. Respondents' argument boils down to conjecture, urging the Board to preemptively deny National's request based on predictions about future county permitting proceedings regardless of the fact that the MDE permit has not yet been issued.

This is an about-face on the County's consistent position over 20 years that access and land acquisition are not a consideration for an extension of time since those issues cannot be addressed by the County until an MDE permit is issued and that so long as the applicant continues to diligently pursue the State permit, extensions of time to implement the use should be granted. In this latest hearing, the County presented its position through Robert Konowal, Planner with the Office of Planning and Zoning, who was unable to explain the reversal of the County's position on this subject. *See* National Mem. Attachment G (Mar. 1, 2022 Hr'g Tr.) at 44:22–45:23. The Board should reject the inexplicable about-face.

The Access Condition is Not Futile or "Impossible"

Even if the issue were properly before the Board, Respondents are simply wrong that the access road must take a particular route from Conway Road—let alone traverse property now owned by the County. Although Respondents point to diagrams that were submitted to the Board and MDE at various times, none of them change the actual language of the special exception that the Board adopted. "[A]ll statutory interpretation begins, and usually ends, with the statutory text itself, for the legislative intent of a statute primarily reveals itself through the statute's very words." *Stanley v. State*, 390 Md. 175, 185, 887 A.2d 1078, 1084 (2005) (quoting *Price v. State*, 378 Md. 378, 387, 835 A.2d 1221, 1226 (2003)). For that reason, "[a] court may neither add nor delete

language so as to reflect an intent not evidenced in the plain and unambiguous language of the statute; nor may it construe the statute with forced or subtle interpretations that limit or extend its application." *Id.* (quoting *Price v. State*, 378 Md. at 387, 835 A.2d at 1226). The plain text of the special exception mandates that "Patuxent Road shall not be used as an entrance to the operation" and that "Conway Road is to be used as the entrance to the operations" without specifying ***where*** on Conway the access point should be located; it simply refers to the road as a whole. *See* Special Exception at 34.

Lest there be any doubt, the dissent from the 1993 decision objected ***precisely because*** the special exception did not specify a particular route from Conway Road. The dissent noted he had initially "voted to grant the special exceptions and variances" after considering the evidence submitted to the Board but "voiced at that time [his] concern about several issues," including needed improvements on Conway Road. *Id.* at 43. He therefore announced that he "would make [his] final decision based on the language of the written opinion." *Id.* The written opinion ultimately mandated road improvements "[f]rom the intersection of Patuxent Road and Conway Road to the entrance of the site." *Id.* at 35. The dissent then objected that "it [was] not clear to [him] how much of Conway Road will be improved" based on this language. *Id.* at 43.

The dissent's objection makes two points clear. First, the special exception's conditions should be interpreted ***not*** by examining the parties' arguments and evidence, but rather by the Board's "final decision" as reflected in "the language of the written opinion." *Id.* Second, the dissent's objection that it was "not clear . . . how much of Conway Road will be improved," *id.*, shows that the written opinion did not specify an entrance. The opinion required road improvements "[f]rom the intersection of Patuxent Road and Conway Road to the entrance of the site." *Id.* at 35. But the "intersection of Patuxent Road and Conway Road," *id.*, is readily

identifiable. It therefore follows that "the entrance of the site" was never specified, according to the dissent's (correct) understanding, or else it would be "clear" how much of Conway Road to improve. *Id.* In sum, the contemporaneous understanding of the dissenting Board member only further proves that National's interpretation is correct.

Again, National does not deny that two possible entrances were shown on diagrams presented in 1993 to the Board. These diagrams were considered by the Board, but neither were specifically mandated. Instead, the Board's 1993 decision simply specified that Patuxent Road shall not be used as an entrance to the operations and that Conway Road is to be used as the entrance. The Board did not specify where the entrance was to be located on Conway Road to the site, as the dissent specifically pointed out.

Respondents fail to rebut the fatal flaws in their interpretation of the access road condition. The access route shown in the diagram traversed property owned in 1993 by the County under its Open Space and recreational program, which (Respondents insist) renders it impossible for National to acquire. But if the special exception required National to obtain supposedly unobtainable property, then the Board granted a nullity. The "rules of statutory construction require us to avoid construing a statute in a way which would lead to absurd results," and the Board "should reject a proposed statutory interpretation if its consequences are inconsistent with common sense." *Blandon v. State*, 304 Md. 316, 319, 498 A.2d 1195, 1196 (1985). Here, requiring National to satisfy impossible conditions is both "absurd" and "inconsistent with common sense," and should be rejected for that reason. *Id.*

Respondents likewise fail to explain why the Board chose not to foreclose access by rail but expressly suggested it as a possible alternative access (though it would require additional permits). If access were limited in the way Respondents insist, then the rail entrance would also

be impossible to implement. This "absurd result[]" also forecloses Respondents' interpretation. *Id.* Instead, the Board's decision to "neither approve[] nor den[y] railroad operations," but rather leave the option open for future consideration, Special Exception at 36, underscores that the Board has understood from the outset that this process would take some time and circumstances could change, and thus some measure of flexibility would be necessary. The plain language of the access road condition similarly contemplates some measure of flexibility, and it should not be interpreted some 30 years later to the contrary. At bottom, Respondents' arguments simply prove that they will twist and turn in any direction—even if it leads to absurdity—just to prevent this landfill from opening. The Board should not reward this outrageous approach.

Simply underlining the word "the" does not change the result. Forks is incorrect to say the language "Conway Road is to be used as ***the*** entrance" (in the 1993 Special Exception) and "***the*** Conway Road access land" (in *Halle*) somehow require one and only one entrance from Conway Road. *See* Forks Mem. at 2, 4 (emphasis added). In specifying that "Conway Road is to be used as ***the*** entrance," the special exception's use of the definite article "the" only serves to clarify that Conway Road (as opposed to Patuxent Road) would be used as the entrance, but does not specify ***where*** on Conway Road the access point should be situated. *See* Special Exception at 34. Similarly, the language in *Halle* refers to the fee simple requirement—with no commentary on the entrance's positioning. *See Halle,* 339 Md. at 145, 147–49, 661 A.2d at 688–91. In neither instance does the definite article "the" impose any conditions on the access point beyond the fee simple requirement and its presence somewhere on Conway Road.

The magically superimposed access restrictions that Respondents argue simply do not exist. Nor is there a timeline for the access road improvements other than before operations begin.

Even if National were required to construct an access road over County-owned property, Respondents still have not established that it is impossible for National to comply. Respondents overlook the fact that there simply 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.

Respondents are thus left to argue, incorrectly, that purchasing the land will be impossible as a factual matter based on nothing more than conjecture. But no County official possesses a "crystal ball" to divine the future. *See* National Mem. Attachment G (Mar. 1, 2022 Hr'g Tr.) at 36:25–37:2. The time for compliance is when the landfill goes into operation, and there remain opportunities for National to acquire the land. Respondents do not deny that the County remains free to change its mind if National makes a sufficiently lucrative offer, new County leadership changes direction, or the Board of Education reconsiders building a school so close to an abandoned mine. Respondents cannot deny that these remain real possibilities, or seriously claim that they possess a "crystal ball" to divine the future. *Id.*

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

Date: June 2, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 3-101, I hereby certify that on the June 2, 2022, I served the foregoing on the following:

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