Date: October 20, 2020
Subject:

********DO NOT REPLY/RESPOND TO THIS EMAIL ADDRESS******
RESPONSES SHOULD BE EMAILED TO THE COMMITTEE DIRECTLY AT: tworiversLOC@gmail.com.

Note: This is an update on the Landfill from the small group of homeowners who volunteer with the Two Rivers Residents - Landfill Opposition Group (TRR-LOG). Please do not reply to Comsource.

Since the last email from the TRR-LOG regarding the proposed Chesapeake Terrace Rubble Landfill (CTRL), there have been four significant events regarding the ongoing permitting process.

For those of you who are new to Two Rivers, a brief background on CTRL. National Waste Managers (NWM) has been trying for 30 years to get the State & Anne Arundel County (AAC) permits to begin construction of a massive rubble landfill to the north of Two Rivers. (see the attached aerial sketch).

Through the years, there have been numerous AAC hearings & Board of Appeals (BOA) decisions. In addition, the MD courts (Circuit & Court of Special Appeals [COSA]) have also weighed in on the permitting disputes & legal arguments.

Now for the new news:

I. On 10/2/2020, the MD COSA issued an opinion regarding NWM v Forks of the Patuxent Improvement Association (FOTPIA). (see attached COSA Opinion 10-2-2020). Essentially, COSA sided with FOTPIA's position. When the AAC BOA restarted the two-year permit clock in their 10/19/2018 decision, the BOA failed to comply with directions from a 2017 COSA opinion. Specifically, the BOA did not consider how restarting the permit clock would:

(1) Alter the essential character of the neighborhood,
(2) Substantially impair the appropriate use or development of adjacent property, and
(3) Be detrimental to the public welfare.

The TRR-LOG expects that the BOA will fully address these three issues in their future public hearings & decisions.

II. AAC attorney Gregory J Swain sent a letter to MD's Assistant Attorney General Matthew Standeven on 10/20/2020. (see attached letter)

In this letter, AAC is requesting that the Attorney General's office direct the MD Dept of the Environment (MDE) to stop processing & deny the state permit application. NWM is not in compliance with AAC Zoning conditions since NWM has been unable to acquire the property for the only BOA approved access that was set forth in the BOA's Special Exceptions in 1993. (AAC bought this property on Conway Rd in April 2020 from one of the Two Rivers Developers & is planning to build an elementary school.)

III. As of 5 PM yesterday, October 19th, the two-year permit clock has stopped and MDE has stopped processing the permit application, once again.

IV. As expected, NWM has formally submitted a Variance Application to AAC Planning & Zoning to request that the permit clock be restarted for a two-year period. Under AAC Regulations, this Variance Application will be reviewed using the Administrative Hearing process which will include public notices & hearings. In the past, this process has typically taken several months before the Administrative Hearing Officer (AHO) will issue a decision. This decision can then be appealed to the BOA.

We expect that the the AHO & BOA will deny the Variance Application based on full consideration of the COSA impact issues. However, whatever decision is made, the aggrieved party will undoubtedly appeal the decision to the MD Circuit Court & then the MD COSA.

The TRR-LOG will keep you informed when the public notices are issued and the public hearings are scheduled. At that time, we will encourage you to contact representatives with a campaign of emails & letters.

TRR-LOG will continue to work with FOTPIA and other landfill opposition groups to develop the arguments for the BOAs and Courts.

For more information you are welcome to look at the TRR-LOG document database at https://ourtworivers.com/index.html
or **email the committee at**tworiversLOC@gmail.com.

On behalf of the TRR-LOG,
Ed Riehl
Watershed Village
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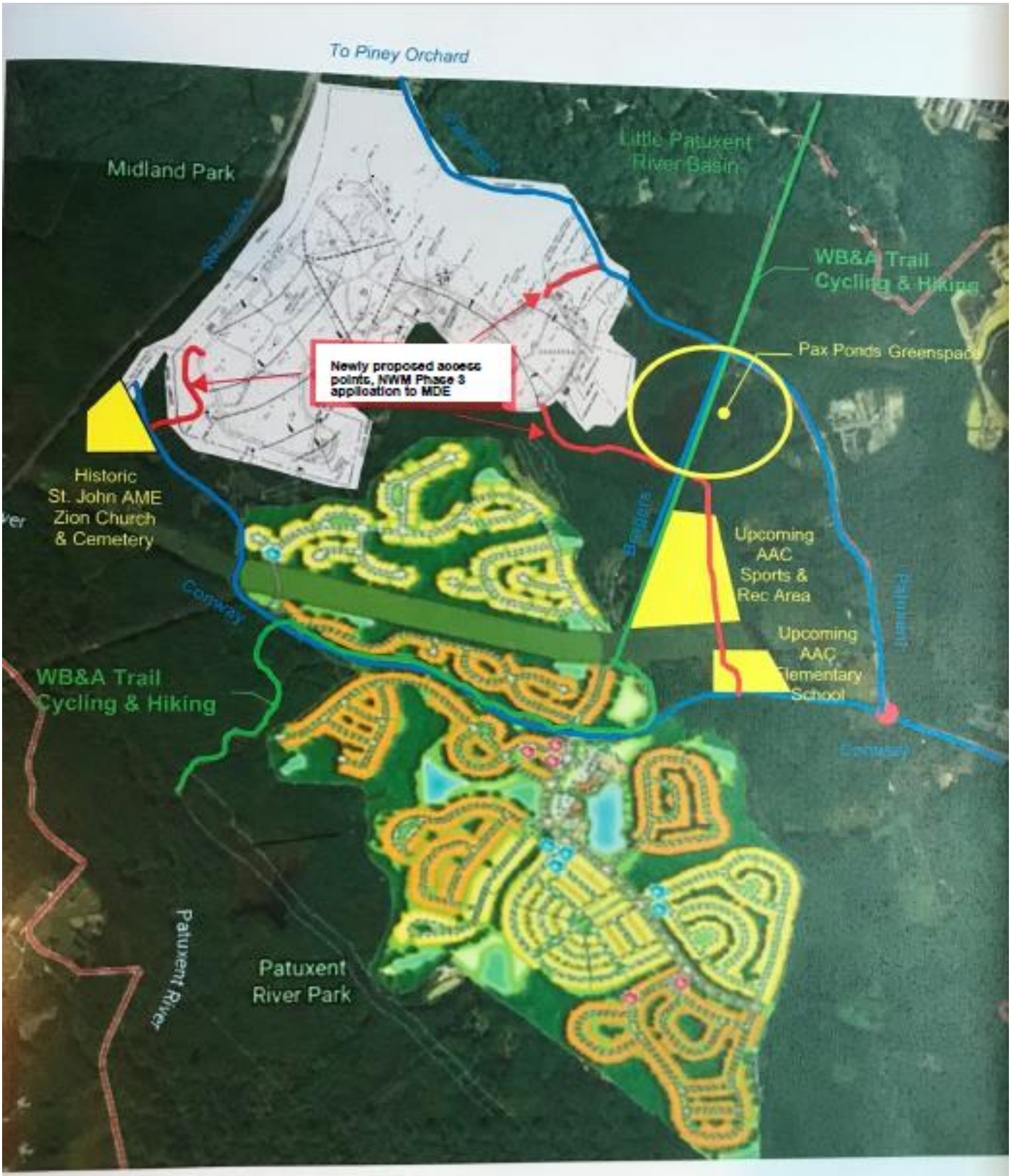
309-838-6650



Location of (Proposed) Chesapeake Terrace Landfill shown in relation to Two Rivers, Patuxent River watershed, St. John AME Zion Church and cemetery, WB&A Trail.

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

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1327

September Term, 2019

NATIONAL WASTE MANAGERS, INC.,
CHESAPEAKE TERRACE

v.

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

Kehoe,
Nazarian,
Leahy,

JJ.

Opinion by Kehoe, J.

Filed: October 2, 2020

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

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

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

Background

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

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

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

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

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

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

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

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

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

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[5] The County's variance criteria are set out in AACC § 18-16-305:

§ 18-16-305. Variances.

(a) Requirements for zoning variances. The Administrative Hearing Officer may vary or modify the provisions of this article when it is alleged that practical difficulties or unnecessary hardships prevent conformance with the strict letter of this article, provided the spirit of law is observed, public safety secured, and substantial justice done. A variance may be granted only if the Administrative Hearing Officer makes the following affirmative findings:

(1) Because of certain unique physical conditions, such as irregularity, narrowness or shallowness of lot size and shape or exceptional topographical conditions peculiar to and inherent in the particular lot, there is no reasonable possibility of developing the lot in strict conformance with this article; or

(2) Because of exceptional circumstances other than financial considerations, the grant of a variance is necessary to avoid practical difficulties or unnecessary hardship and to enable the applicant to develop the lot.

• • •

(c) Requirements for all variances. A variance may not be granted unless it is found that:

(1) the variance is the minimum variance necessary to afford relief; and

(2) the granting of the variance will not:

(i) alter the essential character of the neighborhood or district in which the lot is located;

(ii) substantially impair the appropriate use or development of adjacent property; [nor]

• • •

(v) be detrimental to the public welfare.

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

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

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

constituted a denial of the application and that the reasoning of the denying members was both legally flawed and was not based on substantial evidence. 453 Md. at 444–45. Additionally, the Court explained that the proper focus of the Board in an application for a temporal variance is "narrow and forward-looking. . . . It is merely whether the requested extension of time will alter the character of the neighborhood or substantially impair the appropriate use or development of adjacent property, or be detrimental to the public welfare." *Id.* at 445 (footnote omitted).

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

> to address and resolve the relevant issue which, in 2013, when the decision was made, was what impact, if any, the requested two-year extension to 2015 would have on the character of the neighborhood, the appropriate use or development of adjacent property, or the public welfare, accepting as fact that there was no lack of diligence on the part of National or adverse impact on the neighborhood or adjacent property warranting a rejection of an extension as of the Board's decision in 2011. That, of course, has become more complicated by the passage of time and the effect of tolling. In some manner, the Board will have to take into account the impact of the requested extension beyond 2017.

Id. at 446.

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

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

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

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

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

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

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

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

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

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

As we have previously mentioned, appellees filed a petition for judicial review, and the circuit court vacated the Board's supplemental decision because the court concluded that "nowhere in the Board's supplemental opinion does it address the impact of the requested extension beyond 2017 on the character of the neighborhood, the appropriate use or development of adjacent property, or the public welfare, as the Court of Appeals directed it to do."

The standard of review

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

Analysis

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

> required only that the Board "in some manner" account for the impact of the extension request beyond 2017 and further instructed that the matter had become more complicated by the passage of time and the effect of tolling. The instruction vested broad discretion in the Board. The instruction did not determine "how" the Board was to "account" or how far beyond 2017 the "accounting" was to proceed. The Court further contemplated that tolling

> must be considered and might be applied, noting that the matter before the Board was "complicated by the passage of time and the effect of tolling."

(Citations omitted.)

National points out that the Board's tolling analysis was based upon its interpretation of provisions of the County zoning ordinance as well as its interpretation of *City of Bowie v. Prince George's County*, 384 Md. 413, 438–39 (2004), and *National III*. Finally, National reminds us that "[g]iven the Board's expertise the administration of the zoning provisions of the County Code, its construction of the Court's mandate should be given great weight. The Board's interpretation reflects its expert knowledge of the County zoning and land development process. The expertise of the Board in its own field should be respected."

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

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

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

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

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

> to address and resolve the relevant issue which, in 2013, when the decision was what *impact*, if any, the requested two-year extension to 2015 would have *on the character of the neighborhood, the appropriate use or development of adjacent property, or the public welfare*, accepting as fact that there was no . . . adverse impact on the neighborhood or adjacent property warranting a rejection of an extension as of the Board's decision in 2011. That, of course, has become more complicated by the passage of time and the effect of tolling.

453 Md. at 446 (emphasis added).

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

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

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

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

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

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

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

In conclusion, the analysis in the Board's supplemental decision is incomplete. Having decided that tolling applies, and thus extending the approvals beyond 2017, the Board must "take into account" the "impact" of tolling, that is, the effect that such an extension will "on the character of the neighborhood, the appropriate use or development of adjacent property, or the public welfare[.]" These are the relevant statutory criteria for granting a variance in Anne Arundel County. *See* AACC § 18-16-305(c)(2). In any event, this is how we read the relevant parts of the Court's opinion in *National V*.

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

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

ANNE ARUNDEL COUNTY
MARYLAND
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October 2, 2020

Matthew Standeven, Esq.
Assistant Attorney General
Office of the Attorney General
Via email only: matthew.standeven@maryland.gov

Re: Chesapeake Terrace Solid Waste Facility

Dear Mr. Standeven:

I am writing regarding the pending refuse disposal permit application for the Chesapeake Terrace Rubble Landfill.

Under § 9-210 of the *Environment* Article of the State Code, a prerequisite to processing a permit application beyond Phase 1 is a confirmation from the local jurisdiction that the site meets all applicable zoning and land use requirements; specifically:

> (3) The county has completed its review of the proposed refuse disposal system, and has provided to the Department a written statement that the refuse disposal system:
>
> (i) Meets all applicable county zoning and land use requirements; and
>
> (ii) Is in conformity with the county solid waste plan.

Md. Code Ann., *Environment* Article, § 9-210(a)(3). While the site is in conformity with the County's Solid Waste Management Plan, the site still does not meet all applicable County zoning requirements. The use was allowed by special exception in 1992 and the decision granting the special exception required the Applicant to acquire fee simple ownership of the access road. On June 20, 2001, the County Office of Planning and Zoning wrote to MDE advised that the zoning compliance was conditioned on the applicant securing specified fee simple access to the site, and nineteen years later (28 years after the grant of the SE) this condition has still not been satisfied. For this reason the site does not have the necessary zoning approval. I also note that property the County purchased this year for use as a school or recreational site includes the property that would have been necessary to satisfy the access condition of the special exception approval for the Chesapeake Terrace site. A copy of County Council Resolution 3-20 approving

that purchase is attached to this letter.

By clear mandate of State law, the Applicant's failure to satisfy zoning requirements should have stopped the review process:

> (b) Upon completion of the requirements of subsection (a)(1) and (2) of this section, the Department shall cease processing the permit application until the requirements of subsection (a)(3) [zoning approval] of this section are met.

Md. Code Ann., *Environment* Article, § 9-210(b). Despite this statutory mandate, the Applicant was allowed to complete Phase II and move into Phase III of the permit process. That is contrary to State law and improper in light of the failure of the applicant to obtain full zoning approval.

MDE has indicated that a letter from Deputy County Attorney Hamilton Tyler from the County Office of Law in November 2018 constituted affirmation of County zoning approval. That is absolutely incorrect and not at all what was conveyed. The referenced letter, which I attach to this communication, was to advise MDE that the County Board of Appeals had recently granted a variance to the applicant to extend the time to implement the special exception. Mr. Tyler goes on to say that a recent County Bill, 21-14, removed rubble landfills as a special exception use in residential districts, and that:

> because Chesapeake Terrace had already obtained its special exception prior to the passage of Bill 21-14, its proposed landfill is grandfathered and, therefore, permissible under applicable zoning laws.

Plainly, Mr. Tyler was advising that Bill 21-14 would not retroactively outlaw this proposed rubble landfill, and was not making any statement that the project had full zoning approval. Furthermore, Mr. Tyler has no authority to grant any type of zoning approval (that authority rests with the County Planning and Zoning Officer), and clearly did not do so here.

This letter is to request that, at a minimum, MDE follow State law and cease processing this permit application until the statutory zoning prerequisite is satisfied. Furthermore, in light of the applicant's continued failure to satisfy the zoning condition regarding access, the application should be denied. It is simply not fair to the public to allow the application to proceed under these circumstances.

I thank you for your attention to this important matter.

Sincerely,

Gregory J. Swain
County Attorney