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October 14, 2024

Office of Planning and Zoning
Anne Arundel County
2664 Riva Road
Annapolis, Maryland 21401

Re: National Waste Manager, Inc./Chesapeake Terrace
Former Extension Request 2012-0300-V and 2012-0301-V

Dear Sir or Madam:

On behalf of National Waste Managers, Inc./Chesapeake Terrace (Applicant), I am writing to explain the request for variances to Anne Arundel County Code, Section 18-16-405 that requires a special exception to be implemented and operational within two years after an approval and the code requirement that county building permits be obtained and completed within two years.

The Applicant received approval of special exceptions and variances to allow a rubble landfill and sand and gravel operations for properties located in the Odenton area of Anne Arundel County proximate to Patuxent Road and Bragers Road, Case Numbers BA 120-90S, BA 26-91S and BA 27-91V, in 1993. The State of Maryland (State) requires a refuse disposal permit before this special exception use may be implemented. The State's permitting process takes many years to complete. It is an intensive geologic, hydrogeologic, and engineering five stage process involving submissions, responses requiring additional submissions, public hearings, all in order to protect public safety. The refuse disposal permit application process is nearing conclusion through the Maryland Department of Environment (MDE). The Applicant cannot submit and obtain review of the required Anne Arundel County (County) permits until the State refuse disposal permit has been issued. The Applicant cannot implement the use because necessary permits have not been issued due to of the lengthy State permit process.

The most recent previous extension of time on these special exceptions and variances for a period of two years was granted by the Board of Appeals for Anne Arundel County on December 1, 2022, Case Numbers BA 12-13V, BA 13-13V. (2012-0300-V and 2012-0301-V), Board of Appeals, Second Supplemental Memorandum, copy attached.

At this time, MDE has completed its review of the Phase III engineering and operations plans for the landfill, has completed its Phase IV internal review, and in late 2022 issued the draft Refuse Disposal Permit which it intends to approve based on the completed and approved exhaustive engineering and operations plans submitted by the Applicant. This draft permit was submitted to governmental agencies and scheduled for public comment and public hearing which was held on February 23, 2023 under Phase V of the review process.

MDE has reviewed public comments. On April 9, 2024, MDE exchanged with Applicant a list of concerns for which it was requesting additional response. Those additional responses were provided to them on May 4, 2024. MDE has not issued a determination on the prepared draft Final Permit on this project, despite repeated requests by the Applicant that MDE timely do so.

Accordingly, the Applicant is requesting an extension of three years' time to finalize the State permit process and obtain the required County permits. This Applicant continues to diligently pursue this special exception project.

Please contact me if you require any additional information. Since the previous planner on this project, Robert Konowal, is no longer with your office, please advise me of the name and contact information of the person assigned to this case. Thank you for your attention to this application.

Sincerely,



Susanne K. Henley

cc: Warren Halle

**RE: An Appeal from a Decision of the
Administrative Hearing Officer**

**NATIONAL WASTE MANAGERS, INC.
AND CHESAPEAKE TERRACE**

Petitioners

* BEFORE THE
*
* COUNTY BOARD OF APPEALS
*
* OF ANNE ARUNDEL COUNTY
*
* CASE NO.: BA 12-13V, BA 13-13V
* (2012-0300-V & 2012-0301-V)
*
* Hearing Dates¹: October 27, 2021
* January 25-27, 2022
* March 1-2, 2022
*

SECOND SUPPLEMENTAL MEMORANDUM OF OPINION

Summary of Pleadings

This matter is before this Board as a remand from Circuit Court of Anne Arundel County in Case No. C-02-CV-18-003469. This is an appeal of the conditional granting of a variance to allow an extension in the time required for the implementation and completion of a previously approved special exception and variance for a rubble landfill and an appeal of the conditional granting of a variance to allow an extension in the time for the implementation and completion of a previously approved special exception for a sand and gravel operation, for property known as 515 Patuxent Rd., Odenton.

Summary of Evidence

Mr. Paul Stratman, an expert registered professional engineer and professional geologist, has worked on 15 landfill projects. He has been involved with this landfill since April 2019. The site comprises approximately 480 acres and was formerly operated as a sand and gravel quarry. The remnants of that operation are still obvious. The landfill is going to cover about 114 acres. There are areas where the quarry operations removed the sand and gravel, and clay is exposed.

¹ Hearing dates on this matter also include, June 6, 2013, August 14-15, 2013, October 15, 2013 and July 25, 2018.

The Maryland Department of the Environment ("MDE") refuse disposal permit application has three key steps. Phase I is the general approval of the site. Phase II is the detailed evaluation, including the geology and the hydrogeology. Phase III is the detailed engineering portion, including grading plans and calculations. Once those are approved by MDE, the draft permit is issued. The public review process follows MDE review. He described the review process with MDE which was lengthened by additional geologic/hydrologic testing/review, the hiatus in review caused by litigation, and the impacts of COVID on the review. The landfill plan was revised to elevate the project's liner above the first groundwater zone to protect the integrity of the underground water system. In July 2020, the Phase III plan was submitted to MDE. He received comments a year later in July 2021. MDE had suspended review of the project for a portion of that year. He explained that the landfill is developed in lined cells of 4 to 13 acres. At any point in time there are a few cells open. The whole 114 acres is never fully open and exposed. The individual components, including the descriptions of how waste is handled and how the leachate collection operates, is driven by the State regulations. The specific design, the size of the cells, the sequencing of construction, those are up to the engineer to develop and to make sure that they are consistent with those regulations. The comment letter from MDE to National Waste Managers ("NWM"), dated July 27, 2021, included 108 comments. Mr. Stratman's team completed their responsive submission in five weeks. The closure plan is to cap the landfill. The cap is a composite that consists of a vegetative layer on the surface, about two feet of soil, including a layer that is topsoil or some sort of material to support vegetation, a drainage layer, a 40-mil geomembrane, which is an impervious cover, and then a two-foot final cover layer that is covering the top of the waste and represents the underside of the membrane. The purpose of the cover is to prevent direct contact with any materials that are disposed in the

landfill and to prevent the infiltration of precipitation and moisture into the waste itself. On questioning, Mr. Stratman described the access roads to the facility, including an access road from Conway Road to the east, an optional north entrance, and an optional south entrance. There is typically one main entrance with a backup or an emergency entrance.

Mr. Edward Dexter, an expert geologist in solid waste management and the Administrator of the Solid Waste Program for MDE, testified that he works on landfill permits and monitoring of operating landfills. Landfills are required to have groundwater and often soil gas monitoring programs. The landfills are also monitored under periodic unexpected inspections, at least monthly. With rubble landfills, MDE has taken a more aggressive stance towards them and they must have the same liner and collection system as a municipal waste or an industrial waste landfill. Mr. Dexter described the phases of review, and the way landfills are constructed. The permits are typically reviewed in 3-7 years. The witness explained the many starts and stops associated with the review of this landfill. The applicant has been responsive to the MDE requests on a continuing basis. There was a dispute for a while concerning the shallow ground on the western side. Finally, the applicant agreed to raise the elevation. So that changed the configuration of drainage for the area, and they had to redraw an entire blueprint and recalculate. He is not aware if the Petitioners provided any evidence that they have property rights to use the access from Conway Road. It is not something that MDE would have required; it's a requirement of the County. The time this project has taken has made things more difficult. There were reviewers that came and went so they would have to bring new people up to speed. The regulations have changed over time.

Mr. John Andrew Chisholm testified on behalf of the Petitioners. He worked for the Halle Company until he started his own firm and has worked with the Halle Company as a

consultant. He worked on this project for 32 years and was working on this project when it was originally submitted for the special exception. The property comprises approximately 480 acres, with 320 acres zoned RA and the remainder zoned Open Space. To the north, the property is primarily floodplain. The portions of the site to the south of Patuxent Road contain the remnants of previous sand and gravel and mining operations. The applicant has been pursuing the refuse disposal permit since 1993. The actual landfill design is not part of his expertise. They need to have the MDE permit in hand before they pursue access.

Mr. Jon Arason, the Petitioners' expert in land use planning and zoning, has visited the site a couple of times. He reviewed the special exception opinion from 1993 and he read the applicable Court cases. He described the neighborhood as a mix of uses from rural residential and industrial land uses to the modern, thriving Two Rivers development and heavily wooded areas on Patuxent Road. Based on his review of all the documents, multiple extensions of time have been needed because time keeps running out. It takes a lot of time to process permits before MDE and the changing regulations have required redesign. The County has also acted to stop MDE review. There has been no lack of diligence on the part of NWM to obtain MDE approval. The road and traffic issues were decided at the time of the special exception approval. This particular use has been part of the character of the neighborhood since its approval. It's hovering a foot or two above the land just waiting to get the final approval. The extension won't affect the character of the neighborhood. Any major decision on development in this area would have been made with the knowledge that there was an approved special exception for a landfill in the area. With respect to public welfare, the previous decisions said that a temporal variance will not have an adverse impact on public welfare. The decisions do not talk about traffic, or the entrance being required for the extension. This extension of time will have no impact on public welfare or

the character of the neighborhood. All the issues related to public welfare were addressed with the granting of the special exception. The extension of time does not create traffic. The extension of time does not create noise. The extension of time does not create odor. An applicant would not make road improvements to a road until the County processes the permits required for the use. Public welfare is typically road impacts, impacts on crime, public safety, schools, things that generally contribute to someone's quality of life. Traffic and wetlands are considerations in the special exception. The Board's original decision prohibited entry along Patuxent Road and required entry from the improved Conway Road. The public can review the conditions of approval and view that access will be on Conway Road. The Petitioners have fee simple access on Conway Road. On questioning from the County, he explained that if the access was at the west end of Conway Road by the church, approximately one additional mile of Conway Road would be improved. Mr. Arason described the truck traffic through Two Rivers now because of the development. The landfill will be operating for only 12 years and will, therefore, represent temporary land use in the community. The Petitioners could buy other properties along Conway Road. Halle has not done that because there is no final permit to operate the landfill.

Mr. Shep Tullier, the Protestants' expert in land planning, testified that he reviewed the County Code, relevant case law, the original 1993 Board of Appeals' decision and excerpts of transcripts from the 1993 hearing (Mr. Chisholm and Mr. Stephen Fleischman) in preparation for this hearing. He was trying to understand the applicants' position with respect to complying with the standards. The witness discussed the original case, and the access road issues on appeal immediately thereafter. In his opinion, the entrance from Conway Road was to protect the public's health, safety, and welfare. He described the ownership of the properties between the landfill property and Conway Road through the years. Currently, there is a parcel owned by the

Board of Education and an elementary school is planned. Dump trucks or tractor trailers accessing the landfill would not be in the public welfare. There is no other entrance that is allowed by the 1993 Board's decision. If there is a school operating, there would be no way NWM could operate using that property. Mr. Tullier urged the Board to deny the requested variance. He believes the variance would be contrary to the public's health, safety and welfare. Also, if the variance is granted, the character of the neighborhood is changed. Both Patuxent Road and Conway Road are scenic and historic roads. Those two roads are significant in the County's inventory of scenic and historic roads. Many things have changed since the applicant received approval in 1993. The Two Rivers community is new, and the comprehensive rezoning enabled the subdivision. The master plan was modified to allow sewer service for that development. There are a lot of facts that could not be known in 1993. Granting the variance when so much has changed created the potential for detriment to public welfare. It is his opinion that NWM does not have the ability to satisfy the conditions. If NWM gets additional time, they will continue to go through the rubble landfill permit process with hopes that MDE will grant final approval. However, without the ability to access the site, NWM has no business even if they have the rubble landfill disposal permit.

Ms. Catherine Fleshman testified on behalf of the Forks of the Patuxent Improvement Association. She has lived in the area all her life (75 years). She has appeared and testified in multiple hearings regarding this property over the years. This should be over. Mr. Halle, the original applicant, is a wealthy man and developer. If he had good engineers, they would have been able to acquire the property they need and the permits. When this all started, there were not a lot of homes in the area. That is not the case now. She does not see a landfill having a place in the area now.

Ms. Margaret Farrell has been a resident of Two Rivers since 2019. The new school is part of the future character of the neighborhood. If the Petitioners are granted an extension of time, she wonders whether the County would build the school or wait. The lack of a new school would impact the neighborhood. She was not aware of the landfill application in process. She is a career environmental engineer and a breast cancer survivor. Her family would not have purchased their home in Two Rivers if they had known about the potential landfill. The impact on public welfare is ongoing stress. She is also concerned with the value of homes, about the potential release of the asbestos fibers into the wind, and about potential liner failure.

Mr. Robert Konowal, a planner for the Office of Planning and Zoning, explained that he has been assigned to this case within the last six months. He reviewed the case file. The approved access for the project was designed to protect environmental features to the north and the then existing small residential community to the south. It was chosen to ensure that heavy commercial trucks do not traverse the center of the low-density residential neighborhood and that a shorter section of public road would be utilized. The residential community has grown since 2017 making the realization of the fee simple access more crucial so that the landfill does not alter the essential character of the neighborhood. It has become apparent that the applicant cannot secure the land needed. Therefore, the applicant cannot ensure that the use will not alter the essential character of the neighborhood and negatively impact the appropriate use or development of adjacent property and the public welfare. The lands necessary for a fee simple road have since passed from private parties to the County for a park and the Board of Education for a school. Over the past 25+ years, the applicant has repeatedly presented to the MDE plans showing access points that were not approved by the Board of Appeals' decision. The current submission to the MDE again shows three access points; two were not included in the original

decision. Given that the applicant has not demonstrated that they will be able to comply with the 1993 conditions, there is no practical purpose in proceeding further. It would be irresponsible to approve. There is no opportunity to modify the previous special exception use because it is no longer allowed in the Code. There are no exceptional circumstances that would warrant the requested relief. The applicant, by their own actions, or lack thereof, has lost the opportunity to develop the site for a rubble landfill, making any time extensions pointless. Any hardship at this point has been self-created. The Board of Education has submitted building and grading permit applications for a two-story elementary school. The rubble landfill permit must be issued to get the permits for access and building permits.

Mr. Richard Bock, a resident of the Two Rivers community, testified in opposition to the requested variance. In 1993, the neighborhood was zoned RA District and was comprised of about 125 residents. The neighborhood is now zoned R2 District and includes an additional 2,000 residents. He was unaware of the landfill when he bought his home. There is an operating landfill one mile from this project. Their way of life is threatened by this project. The extensions create unwarranted hardships and stress for the residents.

Mr. Bill Radlinski, a resident of Two Rivers and a member of the Two Rivers Landfill Opposition Committee, explained that the passage of time has resulted in monumental change in the neighborhood. The extension of time has consequences. He is concerned about traffic and believes that a special exception would not have been granted for the area as it looks today.

Ms. Cathleen Buckman is opposed and has lived in Two Rivers since 2017. She never saw any signs regarding the landfill when she was looking into Two Rivers. She would not have purchased a home in Two Rivers if she knew about the landfill. She estimates that there are about 4,000 people in Two Rivers. The area needs road updates and she is concerned that the

County will not address the road conditions while the landfill is pending. She also expressed her concerns about the landfill's impact on the historic value of the area, air quality, her health, and home values.

Ms. Judith Wagner has lived in Two Rivers since 2020 and was not aware of the landfill. She is concerned about the safety issues on Conway Road and the delays to improvements that the extension may impact. She is concerned the requested time extension may delay the construction of the school. This is all stressful and affects the health of the residents.

Mr. Richard Talbot testified in opposition to the request. He has a PhD in environmental engineering. He believes there are three requirements of the special exception that are not being met: height, slope, and operating hours. There is a lack of diligence in the Petitioners' design, and it is incorrect. He is opposed to the project even if the numbers are corrected.

Ms. Jeni Thomas has lived in Two Rivers since 2020. She never saw signs posted regarding the landfill. She works in residential real estate. She has never seen or imagined where an established residential neighborhood would have to endure a landfill being built in the community. The landfill will have a huge negative impact on home values. She read a study that home prices could drop as much as 12.9%. Their biggest investment is their home, and she cannot afford that type of loss. On questioning by the Board, she doesn't see home prices falling now, but if the extension is granted, she sees that happening.

Ms. Sharlee Fleshman, the current President of the Forks of Patuxent Improvement Association, testified in opposition to the request. She has lived on Meyers Station Road for over 14 years. The Forks of Patuxent community is 108 homes. Back in 1993, their community was the sole residential area. There is no reason to approve another time extension when NWM has no ability to fulfill the Conway Road access condition.

Mr. Nicholas Levandoski testified in opposition and is a resident of the Cascades portion of Two Rivers. He has children and one will attend the new school. He is concerned the time extension will delay the opening of the school.

Mr. Ed Riehl testified that the neighborhood has landfill fatigue. He agrees with the Petitioners that the Board of Appeals' 1993 decision did not explicitly state that there was one specific access on Conway Road. However, there is evidence regarding access through the several properties in question. He believes that NWM will be unable to comply with the 1993 Board decision. This Board can make this entire thing go away.

Mr. Mauricio Lainez, a community resident, is opposed to the request. The landfill would be in his front yard. The outcome of this request is very important to everyone. If the Petitioners are granted an additional two years it would be a dark cloud hanging over all Two Rivers residents. When he walks his son, he thinks about all the trucks going back and forth. He is worried about the kids at the bus stop and dump trucks. He moved into his house in April 2021 and knew nothing about the landfill.

Mr. Michael Djangali, an audience member, is opposed to the request. He is a teacher and concerned about the potential delays in building the school. By the time a school is built, it is usually already overpopulated. Larger classroom size affects kids negatively.

Ms. Christie Roberts, a resident of Two Rivers, testified in opposition. She believes that the variance is a waste of time and money because the project cannot meet the conditions of the 1993 decision. She works in an office right next to a landfill. The roads must be repaved regularly to deal with the constant stream of dump trucks. There is noise and traffic. These are all factors that the Board of Appeals took into consideration in 1993 when it limited access to the lower part of Conway Road.

Ms. Jan Randall, an audience member, is opposed to the request. She moved to Two Rivers from New Mexico to be near her children. She did her due diligence and there were no red flags. She was never told about the landfill. She is in her 70's and moving was very stressful. She doesn't want to move again and is worried that her home would decline in value. The uncertainty of it all gnaws at her daily. An extension would be two more years of worry and stress for her. The Petitioners have not done what was needed to complete the project. This is a case of big business treading on homeowners in the County.

Mr. John Chisholm testified on rebuttal as the representative for National Waste Managers. He presented the Board with a copy of the surface mining license.

Mr. Jon Arason was recalled for rebuttal on behalf of the Petitioners. The County's position has been a complete reversal of their consistent position from 1993 to 2013. Looking at the various staff reports, they consistently applied law and policy in their review and analysis of requests for extensions, under what must have been pressure from many administrations since 1993. The Office of Planning and Zoning has been consistent in finding extraordinary circumstance, exceptional hardship, and the access issue not being part of their consideration for a variance for temporal extension. The latest staff report is a complete reversal of that position. The question of access comes at the time of permitting. In the interim, the County has acquired lands that prevent the property owner from obtaining the fee simple driveway that was shown in 1993. Access A from 1993 would not have been doable under fee simple ownership because of the BGE right of way. It also crosses a County owned property, and the Department of Recreation and Parks has consistently objected to access across the B&A Trail. There is some discussion in the 1993 application about bringing in refuse by rail. The Petitioners have options. The temporal extension will have no impact because it does not create any activities. The only

obligation of NWM is to post for hearings, not to advise all prospective buyers that there is an approved special exception for the landfill. The approval for the landfill is in the public domain at the State and County levels.

All testimony was stenographically recorded and the recording is available to be used for the preparation of a written transcript of the proceedings.

Findings and Conclusion

The Petitioners require a variance to Anne Arundel County Code ("Code"), Section 18-16-405(a)-(b), which states,

(a) A variance or special exception that is not extended or tolled expires by operation of law unless the applicant within 18 months of the granting of the special exception (1) obtains a building permit or (2) files an application for subdivision. Thereafter, the special exception shall not expire so long as (1) construction proceeds in accordance with the permit or (2) a record plat is recorded among the land records pursuant to the application for subdivision, the applicant obtains a building permit within one year after recordation of the plat, and construction proceeds in accordance with the permit.

(b) In deciding an application for a special exception use, the Administrative Hearing Officer may extend the time periods set forth in subsection (a) for the use and any variance granted in connection with it when the application includes a phasing plan or sets forth facts that demonstrate other good cause why the time periods set forth in subsection (a) reasonably cannot be met.

Section 18-16-405 permits an applicant to file an application for a variance to extend the time periods set forth in subsection (a). The Petitioners have requested, and the Board has granted time extensions in 2004, 2006, and 2011.

On December 7, 2012, the Petitioners submitted their 4th variance application for a time extension. The Board of Appeals heard testimony and accepted evidence on June 6, 2013, August 14 and 15, 2013, and October 15, 2013. After a review of the testimony and evidence, on December 27, 2013, the Board issued a split decision to deny a two-year time extension

request, effectively denying the Petitioners' requests. A timely Petition for Judicial Review to the Circuit Court for Anne Arundel County, Maryland (hereinafter, "Circuit Court") was filed on January 2, 2014.

Following argument from the parties, the Circuit Court issued an Order and Memorandum Opinion on February 19, 2015, concluding that the matter was remanded to the Board of Appeals for further proceedings consistent with the reasons set forth in its Memorandum Opinion. A Motion to Alter and Amend Judgment and Response to the same was considered by the Circuit Court and denied on April 6, 2015. An appeal to the Court of Special Appeals was noted on May 5, 2015.

On October 25, 2016, the Court of Special Appeals vacated the judgment of the Circuit Court and remanded the matter to the Circuit Court for the purposes of remanding the matter to the Board of Appeals, consistent with the reported opinion of the Court of Special Appeals. See, *Forks of the Patuxent v. Nat'l Waste Mgrs*, 230 Md. App. 349 (2016). A Writ of Certiorari was filed and granted by the Court of Appeals on February 3, 2017. The Court of Appeals issued a reported opinion on June 21, 2017 (*Nat'l Waste Mgrs, Inc. v. Forks of the Patuxent Improv. Assoc.*, 453 Md. 423 (2017)) vacating the judgment of the Court of Special Appeals and remanding the matter with instructions to vacate the judgment of the Circuit Court, and remand to the Board of Appeals for further proceedings in conformance with the Court of Appeals' opinion. The Court of Appeals held that the split decision of the Board was a denial of the requested extension. However, the Court determined that the findings of the denying members of the Board regarding the Petitioners' diligence in pursuing the MDE and County permits were unsupported by substantial evidence, and were, thus, arbitrary and capricious; that the findings regarding whether the requested time extension was the minimum necessary to afford relief were legally erroneous; and, their findings regarding the impact of the extension on the surrounding

neighborhood and adjacent property were based on an erroneous standard. Further, the Court of Appeals directed the Board of Appeals to resolve whether, in 2013, "what impact, if any, the requested two-year extension to 2015 would have on the character of the neighborhood, the appropriate use or development of adjacent property, or the public welfare, accepting as fact that there was no lack of diligence on the part of [the Petitioners] or adverse impact on the neighborhood or adjacent property warranting a rejection of an extension as of the Board's decision in 2011."

On October 19, 2018, the Board issued its Supplemental Memorandum of Opinion granting the Petitioners' request for a two-year time extension. A timely appeal was filed, and on June 19, 2019, the Circuit Court remanded the Supplemental Decision to the Board of Appeals ordering same "to take into account the impact, if any, of the requested extension beyond 2017 on the character of the neighborhood, the appropriate use or development of adjacent property, and the public welfare." Said order was appealed by the Petitioners to the Court of Special Appeals. By Opinion dated October 2, 2020, the Court of Special Appeals 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 '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.

The Board of Appeals, having reviewed the evidence and testimony presented in 2013 and 2018 and having heard oral argument/testimony on October 27, 2021, January 25-27, 2022, and March 1-2, 2022, continues to find that the Petitioners' request for a two-year time extension should be granted. In keeping with the narrow direction of the Court, we examined whether the

extension variance will: (1) alter the essential character of the neighborhood, (2) substantially impair the appropriate use or development of adjacent properties, and (3) be detrimental to the public welfare.

As an initial matter, there was much discussion and testimony pertaining to the restrictive conditions in the original 1993 order, and whether the Petitioners can still meet condition 2.d., namely: "The access obtained to the site from Conway Road shall be through a fee-simple right-of-way, not through an easement." The testimony showed that the land to the east of the site toward Conway Road is not owned by the Petitioners. Some of the land is owned by the County and used as a park. Some of the land is owned by BGE, there are parcels of private property, and there is a new elementary school site owned by the Anne Arundel County Board of Education. The County and the Protestants asserted that it is impossible for the Petitioners to secure the land needed for the access required by Condition 2.d. The County's planner, Mr. Konowal, testified that it would be "irresponsible" to recommend a time extension when the use can never be implemented. The County urged this Board to deny the time extension against a backdrop of perceived futility and lack of viable path to full implementation of this special exception. The Protestants argued that due to the Petitioners' failure to obtain the property rights required for the mandated Conway Road access the time extension must be denied. The Petitioners' witnesses asserted, just as strongly, that fee simple access is available along Conway Road to the south of the site and left open the possibility of acquiring access to Conway Road through the tangle of land ownership to the east of the site, and/or operating by the railroad, which binds the site on the west. While the County may be correct that the Petitioners are "grasping at straws" by arguing that "it is not beyond the realm of possibility [they] may someday obtain title" to the County park property and the BOE school property" (County's Closing Memo, p.13.), the parties'

arguments on the road access are not germane to the matters before us. The Petitioners may never operate the special exception on this site, or they may gain all approvals necessary to meet Condition 2.d. Those matters are for another time, before another Board. Ultimately, however, our mandate here is quite narrow. The Board has only before it the questions of what, if any, negative effects an extension will have on the character of the neighborhood, the appropriate use and development of adjacent properties, and the public welfare. To those questions we now turn.

The instant request would grant the Petitioners additional time to obtain the necessary approvals from the Maryland Department of the Environment ("MDE") and the County. The rubble landfill cannot commence operations without those approvals. Thus, nothing happens on this site until MDE grants approval, and the County issues building and grading permits and the full panoply of permissions required for a project such as this. The grant of the Petitioners' request for an extension of time merely permits continuation of the status quo ante—nothing more, nothing less.

The Petitioners must show that the requested variance to the time limits for the implementation and completion of the previously approved special exception and variance will not alter "the essential character of the neighborhood." Anne Arundel County Code, § 3-1-207(e)(2)(i). We find that the existing circumstance, wherein no landfill use on this site since 1993 has occurred, would not negatively impact the character of the neighborhood. As described by Mr. Arason and others, this area of the County contains a mix of uses, including park land, a railroad, church, a planned school, commercial uses, residential subdivisions, and rural residential parcels. Continuing the static condition of Petitioners' properties, while further governmental reviews occur, will not change the character of this community. Indeed, the

proposed landfill has been part of this community since 1993 and the more recent development has been approved and accomplished under the inescapable pall of the instant project.²

Despite having no burden to do so, the Protestants and County argued and proffered evidence to support a contention that the time extension holds "this issue" over their heads and extends the uncertainty of whether the landfill will ever open. Perhaps so. But, even if true, it is unclear to this Board how these assertions alter the essential character of the neighborhood. The neighborhood will continue to have a mix of land uses and this unused parcel. The County argued that "[a]llowing [the Petitioners] to seek an alternative access other than the one approved would alter the essential character of the neighborhood." (County's Closing Memo, p.12.) This statement is nonsense. While *granting* the Petitioners alternative access *may* alter the essential character of the neighborhood, merely "seeking" alternative access does not.

In addressing the actual issue, potential alteration to the essential character of the neighborhood, the facts are as follows: (1) the character of the neighborhood is a mix of uses that range from rural residential to commercial resources for the community; (2) the Petitioners have an approved, lawful special exception on this site; and (3) the approved use of this property as a rubble landfill is, and has been, known within the community, and so, is part of the character of the community. Permitting an additional two-year extension will therefore not alter the character of the neighborhood in any manner whatsoever. The current extension variance does nothing more than give the Petitioners additional time to finalize State approval and obtain County permits, if the same are ever forthcoming. Therefore, we find that the time extension variance will not alter the essential character of the neighborhood.

² The Petitioners, in their closing remarks, chastised the County for failing to show how an *extension* of time would negatively affect the character of the neighborhood. However, we note that the County is under no burden of proof or persuasion. It is solely the burden of the Petitioners to carry the day.

Next, the Petitioners must show that the requested variance to the time limits for the implementation and completion of the previously approved special exception and variance will not substantially impair the appropriate use or development of adjacent properties. Anne Arundel County Code, § Section 3-1-207(e)(2)(ii). This site has been approved for use as a rubble landfill since 1993. In the intervening years, the community has been extensively developed around the Petitioners' property. The adjoining properties to the east are in County and Board of Education ownership. One parcel is used as a park and the other is now in the permitting process for a school. While we are sympathetic to the voices of the new residents in the Two Rivers community that their homebuilder failed to tell them that a rubble landfill was possible, the County was fully aware of the approved landfill and approved the developer's Two Rivers subdivision nonetheless.

The County argued that the variance would substantially impair the appropriate use or development of adjacent properties because "the substantial development that has occurred along Conway Road was undertaken with knowledge of the one and only access point for the landfill." (County's Closing Memo, p.12.) Here, again, the County steadfastly strives to put before the Board matters that are not within its purview. The access point is not at issue here, merely the time extension. It is unclear, and the County has failed to show, how said extension will impair the appropriate use or development of adjacent properties in any way, let alone substantially. On the contrary, and as has already been proven through multiple extensions over the years, the adjacent properties can continue to be used and developed without impairment during the extension period requested. We have ample history that the previous extensions did not substantially impair the appropriate use or development of adjacent properties. We find that the requested extension will not impair the appropriate use or development of adjacent properties.

Finally, the Petitioners must show that the requested variance to the time limits for the implementation and completion of the previously approved special exception and variance will

not be detrimental to the public welfare. Anne Arundel County Code § Section 3-1-207(e)(2)(v). The Protestants expressed various overarching concerns about how the time extension might affect future, unplanned traffic studies, potential, yet-to-be proposed improvements to Conway Road, and the underway school construction. However, these anxieties were not supported by any convincing data. Instead, since the County/Board of Education was aware of the Petitioners' plans when it purchased the land for the school, there is no reason to believe that the construction of the school will not proceed in its normal course without regard to the progress of the landfill. Indeed, the grading and building permit applications for the school were pending during the testimony portion of this appeal. It seems inconceivable that the County and the Board of Education would have proceeded with plans to develop a park and a school if the time extension had any negative consequences for the public welfare. Granting the time extension will not change traffic, impact water, or have any effect on public welfare. It will only provide time for the Petitioners to finalize the MDE permit review process and perhaps initiate the County building/grading permit process. We find that the extension of two years for the Petitioners to implement and commence these uses will not be detrimental to the public welfare. The original 1993 decision determined that these uses have public benefit and are needed. We offer no opinion on the relative merit of the underlying special exception, the conditions imposed therein, and associated variances. Here, we confine ourselves to only that narrow issue of whether the Petitioners are entitled to a time extension variance since, because of myriad reasons completely beyond their control, they have not been afforded the opportunity to receive a final determination of the required State/County permits for a rubble landfill.

While the Protestants and County encourage this Board to find that the Petitioners have not acted with diligence, such a finding (or even an analysis on this subject) directly contradicts the Court of Appeals' clear instruction that the Board "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. We

agree with the Petitioners that any finding to the contrary would thus invite reversible error. All arguments regarding the Petitioners' lack of diligence must be rejected.

The Court also directed the Board to consider the impact of tolling; that is, the effect that such an extension will have on the character of the neighborhood, the appropriate use or development of adjacent property, or the public welfare beyond the Court of Appeals' 2017 decision. Pursuant to this directive, the Board heard the parties' evidence and testimony as to conditions existent in the area through the Board's 2022 re-hearing. We also heard from any interested member of the general public, including residents *in situ* since 1993, along with homeowners from the recently developed Two Rivers community. After carefully considering the evidence thus presented, the Board gained much-needed clarity into the conditions well beyond 2017 and finds no impact arising from a grant of the time extension variance. Therefore, the Board intends this grant of the Petitioners' requested extension to run for two years from the date of this opinion.

Having carefully considered the exhaustive testimony presented over six days of hearings, this Board concludes that the extension of time will put not a single vehicle on the road, displace not one drop of water, create no noise, emit no fumes, and will have no impact on the community. Someday, far in the future, the actual landfill may create some impact, but the potential for impact was decided in 1993. Neither the County nor the Protestants will get a bite at that 1993 apple today.

ORDER

For the reasons set forth in the foregoing Memorandum of Opinion and this Supplemental Memorandum of Opinion, it is this 1st day of DEC., 2022, by the County Board of Appeals of Anne Arundel County, ORDERED, that the Petitioners' request for a variance for a two-year

extension of time for the implementation and completion of a previously approved special exception and a variance for a two-year extension for previously approved variances for a rubble landfill and for a sand and gravel operation is hereby **GRANTED**.

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

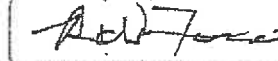
If this case is not appealed, exhibits must be claimed within 90 days of the date of this Order; otherwise, they will be discarded.

Any notice to this Board required under the Maryland Rules shall be addressed as follows: Anne Arundel County Board of Appeals, Arundel Center, P.O. Box 2700, Annapolis, Maryland 21404, ATTN: Deana L. Bussey, Clerk.

NOTICE: This Memorandum of Opinion does not constitute a building or grading permit and may be valid for a limited time period. In order for the applicant to construct or retain any structures allowed by this opinion, or to perform or retain any grading allowed by this opinion, the applicant must apply for and obtain the necessary building or grading permit and any other approval that may be required to perform the work described herein within the time allotted by law or regulation.

COUNTY BOARD OF APPEALS
OF ANNE ARUNDEL COUNTY

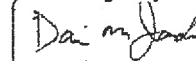
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Richard Forgo, Member

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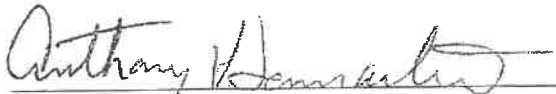
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Darrin Michael Jacobs, Member

*(John R. Fury, Member, and Maria K. Patterson,
Member, did not participate in this appeal.)*

CONCURRING

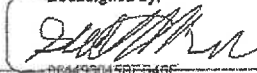
Nearly 30 years after I voted to deny the original special exception request, I find myself faced with a far different query now. With the passage of time, my review of the instant appeal has been narrowly focused by order of the Court. I have been ordered to determine only whether the extension of time will negatively impact the character of the neighborhood, the appropriate use or development of adjacent property, and the public welfare. Accordingly, I agree with my members on this Board, that the grant of a time extension will grant the Petitioners no use of this site. But rather, the grant of this extension will simply continue the status quo until the Petitioners receive further approval or fail. I have no crystal ball to consult to determine whether a rubble landfill will ever operate on the subject parcel; and it is not within the Court's carefully drawn question for me to do so now.


Anthony V. Lamartina, Chair

DISSENT

We find persuasive the arguments of the County and the Protestants that the request for additional time will negatively impact the character of the neighborhood and, most acutely, will impact the public health. We find no need to impose the pall of this doomed project on a community further and would deny the Petitioners' request for an extension of time.

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Scott MacMullan, Vice Chair

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Patsy Baker Blackshear, Member

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November 4, 2024

Office of Planning and Zoning
Anne Arundel County
2664 Riva Road
Annapolis, Maryland 21401

Re: National Waste Manager, Inc./Chesapeake Terrace
Former Extension Request 2012-0300-V and 2012-0301-V,
BA1213-V, BA13-13-V

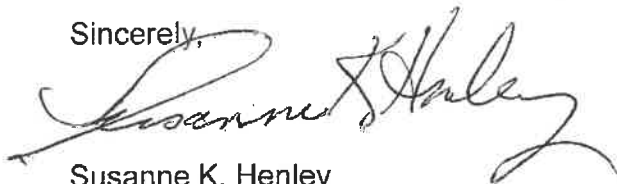
Dear Sir or Madam:

I was contacted on October 25, 2024 by Donnie in your office concerning application for extension of time to implement a special exception for a sand and gravel operation that I filed through electronic filing on October 14, 2024. Even though your staff member, Jennifer Lechner had advised undersigned by telephone on October 16, 2024, that only the single application was necessary on the extension of time, Donnie advised that an additional filing would be necessary because of the sand and gravel rubble landfill dual use of the property and that additional application fees would be due for the second application, but no additional sign fee since six had already been ordered.

I am therefore filing this second extension of time application per your request. Please consolidate these applications for your review and hearing process.

If there is anything else you require, please advise. I enclosed the same exhibits that were filed with the original request since this is the same application for the same project.

Sincerely,



Susanne K. Henley

cc: Warren Halle

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October 14, 2024

Office of Planning and Zoning
Anne Arundel County
2664 Riva Road
Annapolis, Maryland 21401

Re: National Waste Manager, Inc./Chesapeake Terrace
Former Extension Request 2012-0300-V and 2012-0301-V

Dear Sir or Madam:

On behalf of National Waste Managers, Inc./Chesapeake Terrace (Applicant), I am writing to explain the request for variances to Anne Arundel County Code, Section 18-16-405 that requires a special exception to be implemented and operational within two years after an approval and the code requirement that county building permits be obtained and completed within two years.

The Applicant received approval of special exceptions and variances to allow a rubble landfill and sand and gravel operations for properties located in the Odenton area of Anne Arundel County proximate to Patuxent Road and Bragers Road, Case Numbers BA 120-90S, BA 26-91S and BA 27-91V, in 1993. The State of Maryland (State) requires a refuse disposal permit before this special exception use may be implemented. The State's permitting process takes many years to complete. It is an intensive geologic, hydrogeologic, and engineering five stage process involving submissions, responses requiring additional submissions, public hearings, all in order to protect public safety. The refuse disposal permit application process is nearing conclusion through the Maryland Department of Environment (MDE). The Applicant cannot submit and obtain review of the required Anne Arundel County (County) permits until the State refuse disposal permit has been issued. The Applicant cannot implement the use because necessary permits have not been issued due to of the lengthy State permit process.

The most recent previous extension of time on these special exceptions and variances for a period of two years was granted by the Board of Appeals for Anne Arundel County on December 1, 2022, Case Numbers BA 12-13V, BA 13-13V. (2012-0300-V and 2012-0301-V), Board of Appeals, Second Supplemental Memorandum, copy attached.

At this time, MDE has completed its review of the Phase III engineering and operations plans for the landfill, has completed its Phase IV internal review, and in late 2022 issued the draft Refuse Disposal Permit which it intends to approve based on the completed and approved exhaustive engineering and operations plans submitted by the Applicant. This draft permit was submitted to governmental agencies and scheduled for public comment and public hearing which was held on February 23, 2023 under Phase V of the review process.

MDE has reviewed public comments. On April 9, 2024, MDE exchanged with Applicant a list of concerns for which it was requesting additional response. Those additional responses were provided to them on May 4, 2024. MDE has not issued a determination on the prepared draft Final Permit on this project, despite repeated requests by the Applicant that MDE timely do so.

Accordingly, the Applicant is requesting an extension of three years' time to finalize the State permit process and obtain the required County permits. This Applicant continues to diligently pursue this special exception project.

Please contact me if you require any additional information. Since the previous planner on this project, Robert Konowal, is no longer with your office, please advise me of the name and contact information of the person assigned to this case. Thank you for your attention to this application.

Sincerely,



Susanne K. Henley

cc: Warren Halle

RE: An Appeal from a Decision of the
Administrative Hearing Officer

NATIONAL WASTE MANAGERS, INC.
AND CHESAPEAKE TERRACE

Petitioners

* BEFORE THE
*
* COUNTY BOARD OF APPEALS
*
* OF ANNE ARUNDEL COUNTY
*
* CASE NO.: BA 12-13V, BA 13-13V
* (2012-0300-V & 2012-0301-V)
*
* Hearing Dates¹: October 27, 2021
* January 25-27, 2022
* March 1-2, 2022
*

SECOND SUPPLEMENTAL MEMORANDUM OF OPINION

Summary of Pleadings

This matter is before this Board as a remand from Circuit Court of Anne Arundel County in Case No. C-02-CV-18-003469. This is an appeal of the conditional granting of a variance to allow an extension in the time required for the implementation and completion of a previously approved special exception and variance for a rubble landfill and an appeal of the conditional granting of a variance to allow an extension in the time for the implementation and completion of a previously approved special exception for a sand and gravel operation, for property known as 515 Patuxent Rd., Odenton.

Summary of Evidence

Mr. Paul Stratman, an expert registered professional engineer and professional geologist, has worked on 15 landfill projects. He has been involved with this landfill since April 2019. The site comprises approximately 480 acres and was formerly operated as a sand and gravel quarry. The remnants of that operation are still obvious. The landfill is going to cover about 114 acres. There are areas where the quarry operations removed the sand and gravel, and clay is exposed.

¹ Hearing dates on this matter also include, June 6, 2013, August 14-15, 2013, October 15, 2013 and July 25, 2018.

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TRUE CERTIFIED

The Maryland Department of the Environment ("MDE") refuse disposal permit application has three key steps. Phase I is the general approval of the site. Phase II is the detailed evaluation, including the geology and the hydrogeology. Phase III is the detailed engineering portion, including grading plans and calculations. Once those are approved by MDE, the draft permit is issued. The public review process follows MDE review. He described the review process with MDE which was lengthened by additional geologic/hydrologic testing/review, the hiatus in review caused by litigation, and the impacts of COVID on the review. The landfill plan was revised to elevate the project's liner above the first groundwater zone to protect the integrity of the underground water system. In July 2020, the Phase III plan was submitted to MDE. He received comments a year later in July 2021. MDE had suspended review of the project for a portion of that year. He explained that the landfill is developed in lined cells of 4 to 13 acres. At any point in time there are a few cells open. The whole 114 acres is never fully open and exposed. The individual components, including the descriptions of how waste is handled and how the leachate collection operates, is driven by the State regulations. The specific design, the size of the cells, the sequencing of construction, those are up to the engineer to develop and to make sure that they are consistent with those regulations. The comment letter from MDE to National Waste Managers ("NWM"), dated July 27, 2021, included 108 comments. Mr. Stratman's team completed their responsive submission in five weeks. The closure plan is to cap the landfill. The cap is a composite that consists of a vegetative layer on the surface, about two feet of soil, including a layer that is topsoil or some sort of material to support vegetation, a drainage layer, a 40-mil geomembrane, which is an impervious cover, and then a two-foot final cover layer that is covering the top of the waste and represents the underside of the membrane. The purpose of the cover is to prevent direct contact with any materials that are disposed in the

landfill and to prevent the infiltration of precipitation and moisture into the waste itself. On questioning, Mr. Stratman described the access roads to the facility, including an access road from Conway Road to the east, an optional north entrance, and an optional south entrance. There is typically one main entrance with a backup or an emergency entrance.

Mr. Edward Dexter, an expert geologist in solid waste management and the Administrator of the Solid Waste Program for MDE, testified that he works on landfill permits and monitoring of operating landfills. Landfills are required to have groundwater and often soil gas monitoring programs. The landfills are also monitored under periodic unexpected inspections, at least monthly. With rubble landfills, MDE has taken a more aggressive stance towards them and they must have the same liner and collection system as a municipal waste or an industrial waste landfill. Mr. Dexter described the phases of review, and the way landfills are constructed. The permits are typically reviewed in 3-7 years. The witness explained the many starts and stops associated with the review of this landfill. The applicant has been responsive to the MDE requests on a continuing basis. There was a dispute for a while concerning the shallow ground on the western side. Finally, the applicant agreed to raise the elevation. So that changed the configuration of drainage for the area, and they had to redraw an entire blueprint and recalculate. He is not aware if the Petitioners provided any evidence that they have property rights to use the access from Conway Road. It is not something that MDE would have required; it's a requirement of the County. The time this project has taken has made things more difficult. There were reviewers that came and went so they would have to bring new people up to speed. The regulations have changed over time.

Mr. John Andrew Chisholm testified on behalf of the Petitioners. He worked for the Halle Company until he started his own firm and has worked with the Halle Company as a

consultant. He worked on this project for 32 years and was working on this project when it was originally submitted for the special exception. The property comprises approximately 480 acres, with 320 acres zoned RA and the remainder zoned Open Space. To the north, the property is primarily floodplain. The portions of the site to the south of Patuxent Road contain the remnants of previous sand and gravel and mining operations. The applicant has been pursuing the refuse disposal permit since 1993. The actual landfill design is not part of his expertise. They need to have the MDE permit in hand before they pursue access.

Mr. Jon Arason, the Petitioners' expert in land use planning and zoning, has visited the site a couple of times. He reviewed the special exception opinion from 1993 and he read the applicable Court cases. He described the neighborhood as a mix of uses from rural residential and industrial land uses to the modern, thriving Two Rivers development and heavily wooded areas on Patuxent Road. Based on his review of all the documents, multiple extensions of time have been needed because time keeps running out. It takes a lot of time to process permits before MDE and the changing regulations have required redesign. The County has also acted to stop MDE review. There has been no lack of diligence on the part of NWM to obtain MDE approval. The road and traffic issues were decided at the time of the special exception approval. This particular use has been part of the character of the neighborhood since its approval. It's hovering a foot or two above the land just waiting to get the final approval. The extension won't affect the character of the neighborhood. Any major decision on development in this area would have been made with the knowledge that there was an approved special exception for a landfill in the area. With respect to public welfare, the previous decisions said that a temporal variance will not have an adverse impact on public welfare. The decisions do not talk about traffic, or the entrance being required for the extension. This extension of time will have no impact on public welfare or

the character of the neighborhood. All the issues related to public welfare were addressed with the granting of the special exception. The extension of time does not create traffic. The extension of time does not create noise. The extension of time does not create odor. An applicant would not make road improvements to a road until the County processes the permits required for the use. Public welfare is typically road impacts, impacts on crime, public safety, schools, things that generally contribute to someone's quality of life. Traffic and wetlands are considerations in the special exception. The Board's original decision prohibited entry along Patuxent Road and required entry from the improved Conway Road. The public can review the conditions of approval and view that access will be on Conway Road. The Petitioners have fee simple access on Conway Road. On questioning from the County, he explained that if the access was at the west end of Conway Road by the church, approximately one additional mile of Conway Road would be improved. Mr. Arason described the truck traffic through Two Rivers now because of the development. The landfill will be operating for only 12 years and will, therefore, represent temporary land use in the community. The Petitioners could buy other properties along Conway Road. Halle has not done that because there is no final permit to operate the landfill.

Mr. Shep Tullier, the Protestants' expert in land planning, testified that he reviewed the County Code, relevant case law, the original 1993 Board of Appeals' decision and excerpts of transcripts from the 1993 hearing (Mr. Chisholm and Mr. Stephen Fleischman) in preparation for this hearing. He was trying to understand the applicants' position with respect to complying with the standards. The witness discussed the original case, and the access road issues on appeal immediately thereafter. In his opinion, the entrance from Conway Road was to protect the public's health, safety, and welfare. He described the ownership of the properties between the landfill property and Conway Road through the years. Currently, there is a parcel owned by the

Board of Education and an elementary school is planned. Dump trucks or tractor trailers accessing the landfill would not be in the public welfare. There is no other entrance that is allowed by the 1993 Board's decision. If there is a school operating, there would be no way NWM could operate using that property. Mr. Tullier urged the Board to deny the requested variance. He believes the variance would be contrary to the public's health, safety and welfare. Also, if the variance is granted, the character of the neighborhood is changed. Both Patuxent Road and Conway Road are scenic and historic roads. Those two roads are significant in the County's inventory of scenic and historic roads. Many things have changed since the applicant received approval in 1993. The Two Rivers community is new, and the comprehensive rezoning enabled the subdivision. The master plan was modified to allow sewer service for that development. There are a lot of facts that could not be known in 1993. Granting the variance when so much has changed created the potential for detriment to public welfare. It is his opinion that NWM does not have the ability to satisfy the conditions. If NWM gets additional time, they will continue to go through the rubble landfill permit process with hopes that MDE will grant final approval. However, without the ability to access the site, NWM has no business even if they have the rubble landfill disposal permit.

Ms. Catherine Fleshman testified on behalf of the Forks of the Patuxent Improvement Association. She has lived in the area all her life (75 years). She has appeared and testified in multiple hearings regarding this property over the years. This should be over. Mr. Halle, the original applicant, is a wealthy man and developer. If he had good engineers, they would have been able to acquire the property they need and the permits. When this all started, there were not a lot of homes in the area. That is not the case now. She does not see a landfill having a place in the area now.

Ms. Margaret Farrell has been a resident of Two Rivers since 2019. The new school is part of the future character of the neighborhood. If the Petitioners are granted an extension of time, she wonders whether the County would build the school or wait. The lack of a new school would impact the neighborhood. She was not aware of the landfill application in process. She is a career environmental engineer and a breast cancer survivor. Her family would not have purchased their home in Two Rivers if they had known about the potential landfill. The impact on public welfare is ongoing stress. She is also concerned with the value of homes, about the potential release of the asbestos fibers into the wind, and about potential liner failure.

Mr. Robert Konowal, a planner for the Office of Planning and Zoning, explained that he has been assigned to this case within the last six months. He reviewed the case file. The approved access for the project was designed to protect environmental features to the north and the then existing small residential community to the south. It was chosen to ensure that heavy commercial trucks do not traverse the center of the low-density residential neighborhood and that a shorter section of public road would be utilized. The residential community has grown since 2017 making the realization of the fee simple access more crucial so that the landfill does not alter the essential character of the neighborhood. It has become apparent that the applicant cannot secure the land needed. Therefore, the applicant cannot ensure that the use will not alter the essential character of the neighborhood and negatively impact the appropriate use or development of adjacent property and the public welfare. The lands necessary for a fee simple road have since passed from private parties to the County for a park and the Board of Education for a school. Over the past 25+ years, the applicant has repeatedly presented to the MDE plans showing access points that were not approved by the Board of Appeals' decision. The current submission to the MDE again shows three access points; two were not included in the original

decision. Given that the applicant has not demonstrated that they will be able to comply with the 1993 conditions, there is no practical purpose in proceeding further. It would be irresponsible to approve. There is no opportunity to modify the previous special exception use because it is no longer allowed in the Code. There are no exceptional circumstances that would warrant the requested relief. The applicant, by their own actions, or lack thereof, has lost the opportunity to develop the site for a rubble landfill, making any time extensions pointless. Any hardship at this point has been self-created. The Board of Education has submitted building and grading permit applications for a two-story elementary school. The rubble landfill permit must be issued to get the permits for access and building permits.

Mr. Richard Bock, a resident of the Two Rivers community, testified in opposition to the requested variance. In 1993, the neighborhood was zoned RA District and was comprised of about 125 residents. The neighborhood is now zoned R2 District and includes an additional 2,000 residents. He was unaware of the landfill when he bought his home. There is an operating landfill one mile from this project. Their way of life is threatened by this project. The extensions create unwarranted hardships and stress for the residents.

Mr. Bill Radlinski, a resident of Two Rivers and a member of the Two Rivers Landfill Opposition Committee, explained that the passage of time has resulted in monumental change in the neighborhood. The extension of time has consequences. He is concerned about traffic and believes that a special exception would not have been granted for the area as it looks today.

Ms. Cathleen Buckman is opposed and has lived in Two Rivers since 2017. She never saw any signs regarding the landfill when she was looking into Two Rivers. She would not have purchased a home in Two Rivers if she knew about the landfill. She estimates that there are about 4,000 people in Two Rivers. The area needs road updates and she is concerned that the

County will not address the road conditions while the landfill is pending. She also expressed her concerns about the landfill's impact on the historic value of the area, air quality, her health, and home values.

Ms. Judith Wagner has lived in Two Rivers since 2020 and was not aware of the landfill. She is concerned about the safety issues on Conway Road and the delays to improvements that the extension may impact. She is concerned the requested time extension may delay the construction of the school. This is all stressful and affects the health of the residents.

Mr. Richard Talbot testified in opposition to the request. He has a PhD in environmental engineering. He believes there are three requirements of the special exception that are not being met: height, slope, and operating hours. There is a lack of diligence in the Petitioners' design, and it is incorrect. He is opposed to the project even if the numbers are corrected.

Ms. Jeni Thomas has lived in Two Rivers since 2020. She never saw signs posted regarding the landfill. She works in residential real estate. She has never seen or imagined where an established residential neighborhood would have to endure a landfill being built in the community. The landfill will have a huge negative impact on home values. She read a study that home prices could drop as much as 12.9%. Their biggest investment is their home, and she cannot afford that type of loss. On questioning by the Board, she doesn't see home prices falling now, but if the extension is granted, she sees that happening.

Ms. Sharlee Fleshman, the current President of the Forks of Patuxent Improvement Association, testified in opposition to the request. She has lived on Meyers Station Road for over 14 years. The Forks of Patuxent community is 108 homes. Back in 1993, their community was the sole residential area. There is no reason to approve another time extension when NWM has no ability to fulfill the Conway Road access condition.

Mr. Nicholas Levandoski testified in opposition and is a resident of the Cascades portion of Two Rivers. He has children and one will attend the new school. He is concerned the time extension will delay the opening of the school.

Mr. Ed Riehl testified that the neighborhood has landfill fatigue. He agrees with the Petitioners that the Board of Appeals' 1993 decision did not explicitly state that there was one specific access on Conway Road. However, there is evidence regarding access through the several properties in question. He believes that NWM will be unable to comply with the 1993 Board decision. This Board can make this entire thing go away.

Mr. Mauricio Lainez, a community resident, is opposed to the request. The landfill would be in his front yard. The outcome of this request is very important to everyone. If the Petitioners are granted an additional two years it would be a dark cloud hanging over all Two Rivers residents. When he walks his son, he thinks about all the trucks going back and forth. He is worried about the kids at the bus stop and dump trucks. He moved into his house in April 2021 and knew nothing about the landfill.

Mr. Michael Djangali, an audience member, is opposed to the request. He is a teacher and concerned about the potential delays in building the school. By the time a school is built, it is usually already overpopulated. Larger classroom size affects kids negatively.

Ms. Christie Roberts, a resident of Two Rivers, testified in opposition. She believes that the variance is a waste of time and money because the project cannot meet the conditions of the 1993 decision. She works in an office right next to a landfill. The roads must be repaved regularly to deal with the constant stream of dump trucks. There is noise and traffic. These are all factors that the Board of Appeals took into consideration in 1993 when it limited access to the lower part of Conway Road.

Ms. Jan Randall, an audience member, is opposed to the request. She moved to Two Rivers from New Mexico to be near her children. She did her due diligence and there were no red flags. She was never told about the landfill. She is in her 70's and moving was very stressful. She doesn't want to move again and is worried that her home would decline in value. The uncertainty of it all gnaws at her daily. An extension would be two more years of worry and stress for her. The Petitioners have not done what was needed to complete the project. This is a case of big business treading on homeowners in the County.

Mr. John Chisholm testified on rebuttal as the representative for National Waste Managers. He presented the Board with a copy of the surface mining license.

Mr. Jon Arason was recalled for rebuttal on behalf of the Petitioners. The County's position has been a complete reversal of their consistent position from 1993 to 2013. Looking at the various staff reports, they consistently applied law and policy in their review and analysis of requests for extensions, under what must have been pressure from many administrations since 1993. The Office of Planning and Zoning has been consistent in finding extraordinary circumstance, exceptional hardship, and the access issue not being part of their consideration for a variance for temporal extension. The latest staff report is a complete reversal of that position. The question of access comes at the time of permitting. In the interim, the County has acquired lands that prevent the property owner from obtaining the fee simple driveway that was shown in 1993. Access A from 1993 would not have been doable under fee simple ownership because of the BGE right of way. It also crosses a County owned property, and the Department of Recreation and Parks has consistently objected to access across the B&A Trail. There is some discussion in the 1993 application about bringing in refuse by rail. The Petitioners have options. The temporal extension will have no impact because it does not create any activities. The only

obligation of NWM is to post for hearings, not to advise all prospective buyers that there is an approved special exception for the landfill. The approval for the landfill is in the public domain at the State and County levels.

All testimony was stenographically recorded and the recording is available to be used for the preparation of a written transcript of the proceedings.

Findings and Conclusion

The Petitioners require a variance to Anne Arundel County Code ("Code"), Section 18-16-405(a)-(b), which states,

(a) A variance or special exception that is not extended or tolled expires by operation of law unless the applicant within 18 months of the granting of the special exception (1) obtains a building permit or (2) files an application for subdivision. Thereafter, the special exception shall not expire so long as (1) construction proceeds in accordance with the permit or (2) a record plat is recorded among the land records pursuant to the application for subdivision, the applicant obtains a building permit within one year after recordation of the plat, and construction proceeds in accordance with the permit.

(b) In deciding an application for a special exception use, the Administrative Hearing Officer may extend the time periods set forth in subsection (a) for the use and any variance granted in connection with it when the application includes a phasing plan or sets forth facts that demonstrate other good cause why the time periods set forth in subsection (a) reasonably cannot be met.

Section 18-16-405 permits an applicant to file an application for a variance to extend the time periods set forth in subsection (a). The Petitioners have requested, and the Board has granted time extensions in 2004, 2006, and 2011.

On December 7, 2012, the Petitioners submitted their 4th variance application for a time extension. The Board of Appeals heard testimony and accepted evidence on June 6, 2013, August 14 and 15, 2013, and October 15, 2013. After a review of the testimony and evidence, on December 27, 2013, the Board issued a split decision to deny a two-year time extension

request, effectively denying the Petitioners' requests. A timely Petition for Judicial Review to the Circuit Court for Anne Arundel County, Maryland (hereinafter, "Circuit Court") was filed on January 2, 2014.

Following argument from the parties, the Circuit Court issued an Order and Memorandum Opinion on February 19, 2015, concluding that the matter was remanded to the Board of Appeals for further proceedings consistent with the reasons set forth in its Memorandum Opinion. A Motion to Alter and Amend Judgment and Response to the same was considered by the Circuit Court and denied on April 6, 2015. An appeal to the Court of Special Appeals was noted on May 5, 2015.

On October 25, 2016, the Court of Special Appeals vacated the judgment of the Circuit Court and remanded the matter to the Circuit Court for the purposes of remanding the matter to the Board of Appeals, consistent with the reported opinion of the Court of Special Appeals. See, *Forks of the Patuxent v. Nat'l Waste Mgrs*, 230 Md. App. 349 (2016). A Writ of Certiorari was filed and granted by the Court of Appeals on February 3, 2017. The Court of Appeals issued a reported opinion on June 21, 2017 (*Nat'l Waste Mgrs, Inc. v. Forks of the Patuxent Improv. Assoc.*, 453 Md. 423 (2017)) vacating the judgment of the Court of Special Appeals and remanding the matter with instructions to vacate the judgment of the Circuit Court, and remand to the Board of Appeals for further proceedings in conformance with the Court of Appeals' opinion. The Court of Appeals held that the split decision of the Board was a denial of the requested extension. However, the Court determined that the findings of the denying members of the Board regarding the Petitioners' diligence in pursuing the MDE and County permits were unsupported by substantial evidence, and were, thus, arbitrary and capricious; that the findings regarding whether the requested time extension was the minimum necessary to afford relief were legally erroneous; and, their findings regarding the impact of the extension on the surrounding

neighborhood and adjacent property were based on an erroneous standard. Further, the Court of Appeals directed the Board of Appeals to resolve whether, in 2013, "what impact, if any, the requested two-year extension to 2015 would have on the character of the neighborhood, the appropriate use or development of adjacent property, or the public welfare, accepting as fact that there was no lack of diligence on the part of [the Petitioners] or adverse impact on the neighborhood or adjacent property warranting a rejection of an extension as of the Board's decision in 2011."

On October 19, 2018, the Board issued its Supplemental Memorandum of Opinion granting the Petitioners' request for a two-year time extension. A timely appeal was filed, and on June 19, 2019, the Circuit Court remanded the Supplemental Decision to the Board of Appeals ordering same "to take into account the impact, if any, of the requested extension beyond 2017 on the character of the neighborhood, the appropriate use or development of adjacent property, and the public welfare." Said order was appealed by the Petitioners to the Court of Special Appeals. By Opinion dated October 2, 2020, the Court of Special Appeals 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 '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.

The Board of Appeals, having reviewed the evidence and testimony presented in 2013 and 2018 and having heard oral argument/testimony on October 27, 2021, January 25-27, 2022, and March 1-2, 2022, continues to find that the Petitioners' request for a two-year time extension should be granted. In keeping with the narrow direction of the Court, we examined whether the

extension variance will: (1) alter the essential character of the neighborhood, (2) substantially impair the appropriate use or development of adjacent properties, and (3) be detrimental to the public welfare.

As an initial matter, there was much discussion and testimony pertaining to the restrictive conditions in the original 1993 order, and whether the Petitioners can still meet condition 2.d., namely: "The access obtained to the site from Conway Road shall be through a fee-simple right-of-way, not through an easement." The testimony showed that the land to the east of the site toward Conway Road is not owned by the Petitioners. Some of the land is owned by the County and used as a park. Some of the land is owned by BGE, there are parcels of private property, and there is a new elementary school site owned by the Anne Arundel County Board of Education. The County and the Protestants asserted that it is impossible for the Petitioners to secure the land needed for the access required by Condition 2.d. The County's planner, Mr. Konowal, testified that it would be "irresponsible" to recommend a time extension when the use can never be implemented. The County urged this Board to deny the time extension against a backdrop of perceived futility and lack of viable path to full implementation of this special exception. The Protestants argued that due to the Petitioners' failure to obtain the property rights required for the mandated Conway Road access the time extension must be denied. The Petitioners' witnesses asserted, just as strongly, that fee simple access is available along Conway Road to the south of the site and left open the possibility of acquiring access to Conway Road through the tangle of land ownership to the east of the site, and/or operating by the railroad, which binds the site on the west. While the County may be correct that the Petitioners are "grasping at straws" by arguing that "it is not beyond the realm of possibility [they] may someday obtain title" to the County park property and the BOE school property" (County's Closing Memo, p.13.), the parties'

arguments on the road access are not germane to the matters before us. The Petitioners may never operate the special exception on this site, or they may gain all approvals necessary to meet Condition 2.d. Those matters are for another time, before another Board. Ultimately, however, our mandate here is quite narrow. The Board has only before it the questions of what, if any, negative effects an extension will have on the character of the neighborhood, the appropriate use and development of adjacent properties, and the public welfare. To those questions we now turn.

The instant request would grant the Petitioners additional time to obtain the necessary approvals from the Maryland Department of the Environment ("MDE") and the County. The rubble landfill cannot commence operations without those approvals. Thus, nothing happens on this site until MDE grants approval, and the County issues building and grading permits and the full panoply of permissions required for a project such as this. The grant of the Petitioners' request for an extension of time merely permits continuation of the status quo ante—nothing more, nothing less.

The Petitioners must show that the requested variance to the time limits for the implementation and completion of the previously approved special exception and variance will not alter "the essential character of the neighborhood." Anne Arundel County Code, § 3-1-207(e)(2)(i). We find that the existing circumstance, wherein no landfill use on this site since 1993 has occurred, would not negatively impact the character of the neighborhood. As described by Mr. Arason and others, this area of the County contains a mix of uses, including park land, a railroad, church, a planned school, commercial uses, residential subdivisions, and rural residential parcels. Continuing the static condition of Petitioners' properties, while further governmental reviews occur, will not change the character of this community. Indeed, the

proposed landfill has been part of this community since 1993 and the more recent development has been approved and accomplished under the inescapable pall of the instant project.²

Despite having no burden to do so, the Protestants and County argued and proffered evidence to support a contention that the time extension holds "this issue" over their heads and extends the uncertainty of whether the landfill will ever open. Perhaps so. But, even if true, it is unclear to this Board how these assertions alter the essential character of the neighborhood. The neighborhood will continue to have a mix of land uses and this unused parcel. The County argued that "[a]llowing [the Petitioners] to seek an alternative access other than the one approved would alter the essential character of the neighborhood." (County's Closing Memo, p.12.) This statement is nonsense. While *granting* the Petitioners alternative access *may* alter the essential character of the neighborhood, merely "seeking" alternative access does not.

In addressing the actual issue, potential alteration to the essential character of the neighborhood, the facts are as follows: (1) the character of the neighborhood is a mix of uses that range from rural residential to commercial resources for the community; (2) the Petitioners have an approved, lawful special exception on this site; and (3) the approved use of this property as a rubble landfill is, and has been, known within the community, and so, is part of the character of the community. Permitting an additional two-year extension will therefore not alter the character of the neighborhood in any manner whatsoever. The current extension variance does nothing more than give the Petitioners additional time to finalize State approval and obtain County permits, if the same are ever forthcoming. Therefore, we find that the time extension variance will not alter the essential character of the neighborhood.

² The Petitioners, in their closing remarks, chastised the County for failing to show how an *extension* of time would negatively affect the character of the neighborhood. However, we note that the County is under no burden of proof or persuasion. It is solely the burden of the Petitioners to carry the day.

Next, the Petitioners must show that the requested variance to the time limits for the implementation and completion of the previously approved special exception and variance will not substantially impair the appropriate use or development of adjacent properties. Anne Arundel County Code, § Section 3-1-207(e)(2)(ii). This site has been approved for use as a rubble landfill since 1993. In the intervening years, the community has been extensively developed around the Petitioners' property. The adjoining properties to the east are in County and Board of Education ownership. One parcel is used as a park and the other is now in the permitting process for a school. While we are sympathetic to the voices of the new residents in the Two Rivers community that their homebuilder failed to tell them that a rubble landfill was possible, the County was fully aware of the approved landfill and approved the developer's Two Rivers subdivision nonetheless.

The County argued that the variance would substantially impair the appropriate use or development of adjacent properties because "the substantial development that has occurred along Conway Road was undertaken with knowledge of the one and only access point for the landfill." (County's Closing Memo, p.12.) Here, again, the County steadfastly strives to put before the Board matters that are not within its purview. The access point is not at issue here, merely the time extension. It is unclear, and the County has failed to show, how said extension will impair the appropriate use or development of adjacent properties in any way, let alone substantially. On the contrary, and as has already been proven through multiple extensions over the years, the adjacent properties can continue to be used and developed without impairment during the extension period requested. We have ample history that the previous extensions did not substantially impair the appropriate use or development of adjacent properties. We find that the requested extension will not impair the appropriate use or development of adjacent properties.

Finally, the Petitioners must show that the requested variance to the time limits for the implementation and completion of the previously approved special exception and variance will

not be detrimental to the public welfare. Anne Arundel County Code § Section 3-1-207(e)(2)(v). The Protestants expressed various overarching concerns about how the time extension might affect future, unplanned traffic studies, potential, yet-to-be proposed improvements to Conway Road, and the underway school construction. However, these anxieties were not supported by any convincing data. Instead, since the County/Board of Education was aware of the Petitioners' plans when it purchased the land for the school, there is no reason to believe that the construction of the school will not proceed in its normal course without regard to the progress of the landfill. Indeed, the grading and building permit applications for the school were pending during the testimony portion of this appeal. It seems inconceivable that the County and the Board of Education would have proceeded with plans to develop a park and a school if the time extension had any negative consequences for the public welfare. Granting the time extension will not change traffic, impact water, or have any effect on public welfare. It will only provide time for the Petitioners to finalize the MDE permit review process and perhaps initiate the County building/grading permit process. We find that the extension of two years for the Petitioners to implement and commence these uses will not be detrimental to the public welfare. The original 1993 decision determined that these uses have public benefit and are needed. We offer no opinion on the relative merit of the underlying special exception, the conditions imposed therein, and associated variances. Here, we confine ourselves to only that narrow issue of whether the Petitioners are entitled to a time extension variance since, because of myriad reasons completely beyond their control, they have not been afforded the opportunity to receive a final determination of the required State/County permits for a rubble landfill.

While the Protestants and County encourage this Board to find that the Petitioners have not acted with diligence, such a finding (or even an analysis on this subject) directly contradicts the Court of Appeals' clear instruction that the Board "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. We

agree with the Petitioners that any finding to the contrary would thus invite reversible error. All arguments regarding the Petitioners' lack of diligence must be rejected.

The Court also directed the Board to consider the impact of tolling; that is, the effect that such an extension will have on the character of the neighborhood, the appropriate use or development of adjacent property, or the public welfare beyond the Court of Appeals' 2017 decision. Pursuant to this directive, the Board heard the parties' evidence and testimony as to conditions existent in the area through the Board's 2022 re-hearing. We also heard from any interested member of the general public, including residents *in situ* since 1993, along with homeowners from the recently developed Two Rivers community. After carefully considering the evidence thus presented, the Board gained much-needed clarity into the conditions well beyond 2017 and finds no impact arising from a grant of the time extension variance. Therefore, the Board intends this grant of the Petitioners' requested extension to run for two years from the date of this opinion.

Having carefully considered the exhaustive testimony presented over six days of hearings, this Board concludes that the extension of time will put not a single vehicle on the road, displace not one drop of water, create no noise, emit no fumes, and will have no impact on the community. Someday, far in the future, the actual landfill may create some impact, but the potential for impact was decided in 1993. Neither the County nor the Protestants will get a bite at that 1993 apple today.

ORDER

For the reasons set forth in the foregoing Memorandum of Opinion and this Supplemental Memorandum of Opinion, it is this 1st day of DEC., 2022, by the County Board of Appeals of Anne Arundel County, ORDERED, that the Petitioners' request for a variance for a two-year

extension of time for the implementation and completion of a previously approved special exception and a variance for a two-year extension for previously approved variances for a rubble landfill and for a sand and gravel operation is hereby **GRANTED**.

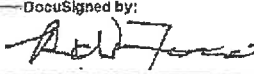
Any appeal from this decision must be in accordance with the provisions of Section 604 of the Charter of Anne Arundel County, Maryland.

If this case is not appealed, exhibits must be claimed within 90 days of the date of this Order; otherwise, they will be discarded.

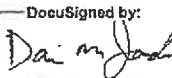
Any notice to this Board required under the Maryland Rules shall be addressed as follows: Anne Arundel County Board of Appeals, Arundel Center, P.O. Box 2700, Annapolis, Maryland 21404, ATTN: Deana L. Bussey, Clerk.

NOTICE: This Memorandum of Opinion does not constitute a building or grading permit and may be valid for a limited time period. In order for the applicant to construct or retain any structures allowed by this opinion, or to perform or retain any grading allowed by this opinion, the applicant must apply for and obtain the necessary building or grading permit and any other approval that may be required to perform the work described herein within the time allotted by law or regulation.

COUNTY BOARD OF APPEALS
OF ANNE ARUNDEL COUNTY

DocuSigned by:


Richard Forgo, Member


DocuSigned by:


Darrin Michael Jacobs, Member

*(John R. Fury, Member, and Maria K. Patterson,
Member, did not participate in this appeal.)*

CONCURRING

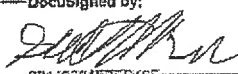
Nearly 30 years after I voted to deny the original special exception request, I find myself faced with a far different query now. With the passage of time, my review of the instant appeal has been narrowly focused by order of the Court. I have been ordered to determine only whether the extension of time will negatively impact the character of the neighborhood, the appropriate use or development of adjacent property, and the public welfare. Accordingly, I agree with my members on this Board, that the grant of a time extension will grant the Petitioners no use of this site. But rather, the grant of this extension will simply continue the status quo until the Petitioners receive further approval or fail. I have no crystal ball to consult to determine whether a rubble landfill will ever operate on the subject parcel; and it is not within the Court's carefully drawn question for me to do so now.



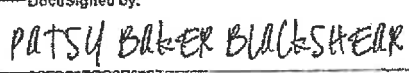
Anthony V. Lamartina, Chair

DISSENT

We find persuasive the arguments of the County and the Protestants that the request for additional time will negatively impact the character of the neighborhood and, most acutely, will impact the public health. We find no need to impose the pall of this doomed project on a community further and would deny the Petitioners' request for an extension of time.

DocuSigned by:


Scott MacMullan, Vice Chair

DocuSigned by:


Patsy Baker Blackshear, Member