Circuit Court for Anne Arundel County
Case No. C-02-CV-16-001433

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 13

September Term, 2017

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ERIKA GARRETT, *ET AL*.

v.

CUNNINGHAM EXCAVATING, INC., *ET AL*.

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Eyler, Deborah, S.,*
Kehoe,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned)

JJ.

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Opinion by Kehoe, J.

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Filed: October 11, 2018

*Deborah S. Eyler, J., participated in the hearing and conference of this case while an active member of this Court; she participated in the adoption of this opinion as a specially assigned member of this Court.

Erika Garrett, together with ten like-minded individuals and two community associations, has appealed from a judgment of the Circuit Court of Anne Arundel County, the Honorable Ronald A. Silkworth presiding, affirming a decision by the County Board of Appeals of Anne Arundel County. The Board granted a temporal variance to Cunningham Excavating, Inc., allowing it to complete construction of a rubble landfill. The appellees are Cunningham, Anne Arundel County, and various entities who have some interest in the landfill project.[1] The appellants present two issues, which we have reworded:

> 1. Whether the holding of the Court of Appeals in *National Waste Managers, Inc. v. Forks of the Patuxent Improvement Association, Inc*., 453 Md. 423 (2017) requires this Court to vacate the Board's approval of the time variance because the record includes substantial evidence of construction of new development that occurred after Cunningham obtained its most recent variance?
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> 2. Whether the Board erred because it did not explain how granting a variance to extend the time to complete the rubblefill project would not substantially impair the appropriate use or development of adjacent property as required by § 3-1-207(e) of the Anne Arundel County Code?

We will affirm the judgment of the circuit court.

[1] These parties are Capitol Associates, LLC, JM Land Development Company, Tolson & Associates, LLC, Capitol Raceways Promotions, Inc. and Ventura Properties, Inc. By the time that the Board granted the variance at issue in this appeal, Tolson owned the property, and was proposing to operate the landfill.

## 1. Background

This story began in 1993, when the Anne Arundel County Board of Appeals granted the application of Cunningham Excavating, Inc. for a special exception to construct and operate a sand and gravel operation and a rubble landfill on a part of an 184 acre assemblage of properties located near Crofton. {RE 835} At the time the application was granted, the County Code provided that a special exception permit lapsed if the use was not completed and in operation within two years.[2] Construction could not begin, however, until the Maryland Department of the Environment ("MDE") granted a permit, and "obtaining such a permit can be a lengthy process that can take years to complete." *Nat'l Waste Managers, Inc. v. Forks of the Patuxent Improvement Ass'n, Inc*., 453 Md. 423, 429 (2017). An initial application by Cunningham was denied by MDE. In 2002, Tolson submitted its application to the MDE, and the agency granted the permit in 2014.[3]

The County's administrative agencies, i.e., County administrative hearing officers, and ultimately, the Board of Appeals, may grant a request to vary the provisions of the County Zoning Ordinance if "practical difficulties or unnecessary hardships prevent carrying out

[2] This limitation remains in effect for the project at issue in this appeal. *See* AACC § 18-2-101(b)(1) (stating that "an application for a special exception or variance filed on or before April 4, 2005 shall be governed by the law as it existed prior to May 12, 2005 for the special exception or variance as approved.").

[3] Cunningham had filed a prior application but it was denied by the MDE. {RE 828}

the strict letter of [the Zoning Ordinance], provided the spirit of law shall be observed, public safety secured, and substantial justice done." *See* AACC §§ 3-1-207 and 18-16-405.[4] Between 1999 and 2013, Cunningham and/or Tolson applied for and received four

[4] AACC § 8-16-405(c) permits an applicant to extend the lapse period by obtaining a variance. Section 3-1-207 sets out the standards for deciding variance applications. It states in pertinent part:

> (a) Generally. The Board of Appeals may vary or modify the provisions of Article 18 of this Code when it is alleged that practical difficulties or unnecessary hardships prevent carrying out the strict letter of that article, provided the spirit of law shall be observed, public safety secured, and substantial justice done. A variance may be granted only upon an affirmative finding that:
> (1) because of certain unique physical conditions, such as irregularity, narrowness or shallowness of lot size and shape, or exceptional topographical conditions peculiar to and inherent in the particular lot, there is no reasonable possibility of developing the lot in strict conformance with Article 18 of this Code; or
> (2) because of exceptional circumstances other than financial considerations, the grant of a variance is necessary to avoid practical difficulties or unnecessary hardship, and to enable the applicant to develop the lot.
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> * * *
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> (e) Required findings. A variance may not be granted under subsection (a) or (b) unless the Board finds that:
> (1) the variance is the minimum variance necessary to afford relief;
> (2) the granting of the variance will not:
> (i) alter the essential character of the neighborhood or district in which the lot is located;
> (ii) substantially impair the appropriate use or development of adjacent property;
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> * * *

The standards by which administrative hearing officers decide variance applications are found in a different section of the County Code but are substantively identical. *See* AACC § 18-16-305(a).

variances extending the time to complete the permitting process and put the landfill into operation. {RE 831} The last of these variances extended the completion date to December 12, 2014. {RE 833} The MDE issued a letter approving the project to Tolson on November 24, 2014.[5] Tolson began construction on the landfill shortly thereafter but it was clear that it would be unable to complete the project within the 18-day window between the MDE approval and the expiration of the extension granted in 2013. This brings us to the variance application that is the subject of the current appeal, namely, Tolson's application for a variance to extend the time to implement the special exception to December 31, 2015.

The application was initially considered by an administrative hearing officer. After a public hearing, the hearing officer granted the request for a variance. He found that the evidence supported Tolson's claim "that it ha[d] been hindered in going forward through no fault of its own, and that denying the extension would cause 'practical difficulties or unnecessary hardship' and prevent the applicant from developing the lot." {RE 836} The administrative hearing officer found that the variance was the minimum necessary to afford relief, and that "[t]he time extension will not alter the essential character of the neighborhood surrounding the subject property or substantially impair the appropriate use

[5] The property was originally owned by Cunningham Excavating, with Tolson & Associates stepping in to operate the landfill. Tolson subsequently purchased the property as well. {RE 981}

or development of adjacent property; those questions were answered in 1993 [when the special exception was granted]."

This decision was appealed to the Board of Appeals. The Board's hearing extended over six nights spread out over a period of six months. In an opinion dated March 28, 2016, the Board concluded that Tolson should be granted a variance for an additional twelve months to complete the project and bring the special exception into operation. {RE 999} After summarizing the extensive evidence presented to it during the course of the hearing, the Board addressed the variance criteria contained in AACC § 3-1-207. In pertinent part, the Board concluded:

(1) There were exceptional circumstances that that made a variance necessary for Tolson to develop its property in accordance with the special exception (AACC § 3-1-207(a)(2)). The Board characterized the MDE review and approval process as lengthy and complex. The Board concluded that Tolson "has been diligent in pursuing completion of the MDE process, and secured the required permit before the lapse of the most recent time extension." In making this finding, the Board found particularly credible the testimony of Larry Hosmer, a consulting engineer who had worked with Tolson throughout the MDE permitting process, and who had been admitted as an expert witness in the fields of landfill permitting, design and construction.

(2) The variance, which extended the date for completion of the project to March 28, 2017, was "the minimum necessary to afford relief" (AACC § 3-1-207(e)(1)). The Board

noted that Tolson began construction as soon as it received its permit from the MDE, that the project was substantially underway, and that no further extension would be necessary.

(3) The variance would not "alter the essential character of this neighborhood" (AACC § 3-1-207(e)(2)(i)). In making this finding, the Board relied on the testimony of Robert Konowal, a member of the County's planning staff. Konowal testified that there had been no new subdivision approved in the neighborhood of the project since the last variance had been granted in 2013. Konowal stated that development in the area had occurred pursuant to approvals granted before the date of the last variance. The Board concluded that "ongoing construction in the area is [a] result of previously approved developments that likely contemplated the ongoing application process of the landfill and the previously approved special exception."

(4) Granting a temporal variance to give Tolson an opportunity to complete the landfill project "will not substantially impair the appropriate use or development of adjacent properties (AACC § 3 1-207(e)(2)(ii)). As to this criterion, the Board found that:

> This special exception has been approved for a long time. Although some residents may not like a rubble landfill to be implemented on the parcel, the operation of such a landfill will not impair the use or development of adjacent properties with residences or any other lawful use. In fact, there is no operation that will occur as a result of a time variance since the rubble landfill operation would occur by virtue of the original special exception—not by a variance for time extension.

(5) Finally, granting a temporal variance would not be detrimental to the public welfare (AACC § 3-1-207(e)(2)(v)). The Board stated:

> As previously stated, no changes to the property will be made as a result of this variance for time extension. The special exception use has already been approved. Now that the MDE permit has been issued, the special exception will be implemented; however, the implementation of this special exception has been contemplated for a long time, since 1993, and any surrounding development since that time, presumably took that implementation into consideration. . . . Some residents may not like the operation of a landfill; however, the question before this Board is not about a popular use, but rather a permitted use. This Board does not have [the authority to revisit] the underlying special exception (or any associated variances) before it.[6]

Appellants sought judicial review of the Board's decision. The Circuit Court for Anne Arundel County affirmed the Board. This appeal followed.

## 2. The Standard of Review

The Court of Appeals summarized the appropriate standard of review in judicial review proceedings in *Kenwood Gardens Condominiums, Inc. v. Whalen Properties, LLC*:

> In reviewing the final decision of an administrative agency, such as the Board of Appeals, we look through the circuit court's and intermediate appellate court's decisions, although applying the same standards of review, and evaluate the decision of the agency. Our scope of review is narrow and is limited to determining whether there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law. We defer to the regulatory body's fact-finding and inferences, provided they are supported by evidence which a reasonable person could accept as adequately supporting a conclusion.

449 Md. 313 (2016) (Citations and quotation marks omitted.)

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[6] Two members of the Board of Appeals dissented. They stated that given the more than two decades that had passed since the special exception was granted, as well as changes that had occurred in the community, the application could not meet the variance standards and a more comprehensive review was necessary. {RE 1001}

Although "no deference is required to be given to the Board's conclusions of law, as issues of law are ultimately within the domain of the Judicial Branch, courts normally give some deference to the Board's interpretations of the laws it is authorized to administer." *National Waste Managers, Inc. v. Forks of the Patuxent Improvement Ass'n, Inc*., 453 Md. 423, 441 (2017) (citing *Kim v. Board of Physicians*, 423 Md. 523, 535, 32 A.3d 30 (2011)).

**3. Appellants' Contentions**

In their brief, appellants present two arguments as to why the Board's decision should be vacated and remanded for further proceedings. *First*, they assert that the Court of Appeals' analysis in *Forks of the Patuxent* requires us to vacate the Board's decision because the record includes substantial evidence of construction of new development that occurred after December 12, 2013, which was the date of the previous Board decision granting a variance. *Second,* they argue that the Board's decision was deficient as a matter of law because it did not address in detail the testimony of the owners of two neighboring properties who testified that the rubble landfill, if completed and placed in operation, would substantially impair the appropriate use or development of their properties. Neither contention is persuasive.

A.

As we have explained, AACC § 3-1-207(e)(2)(1) provides that the Board of Appeals may grant a variance only if it finds that the variance will not "alter the essential character of the neighborhood or district in which the lot is located[.]"

Appellants argue that the Board erred legally and factually when it found that granting the variance for the rubblefill would not alter the character of the neighborhood. They point out that construction had occurred in the neighborhood since the most recent prior variance was granted, and appellants contend that the Board did not take this development into account when reviewing the request for the variance. From this premise, they contend:

> No reported Maryland case directly addresses the question of whether, for the purpose of a variance, an approved development plan has the same impact on the character of a neighborhood as construction in accordance with that approved plan. However, [*Forks of the Patuxent*] stands for the proposition that the proper inquiry is whether the underlying special exception use is compatible with the actual existing neighborhood.

We read the Court's analysis in *Forks of the Patuxent* differently. In that case, the Court of Appeals addressed the appropriate framework for analyzing whether a temporal variance is appropriate (emphasis added):

> With respect to *the impact of the project on the neighborhood*, nearby property, or the public welfare, *all of that was resolved in 1993* when the special exceptions and setback variances were granted.
>
> * * *
>
> *It is not the function of a temporal variance to relitigate those findings.* Section 18–16–305, which applies to both substantive and temporal variances, is intended to assure that a variance will not alter the essential character of the neighborhood, substantially impair the appropriate use or

> development of adjacent property, or be detrimental to the public welfare. *With respect to temporal variances*—mere extensions of time, in this case to obtain permits necessary to implement what the special exceptions made permissible—*the focus is a narrow and forward-looking one.* It is merely *whether the requested extension of time* will alter the character of the neighborhood or substantially impair the appropriate use or development of adjacent property, or be detrimental to the public welfare**.**[6]
>
> [6] The Court of Special Appeals regarded § 3–1–207 as "intended to ensure that a variance for an extension of time should be granted only if the previously approved special exception use continues to be compatible with the surrounding area." We accept that statement with the caveat that it not be interpreted as permitting a re-litigation of previous findings regarding the nature of the proposed use or the neighborhood as it existed at *any* previous time. With respect to a temporal variance, § 3–1–207 is *forward-looking*: *what impact will the extension have*?

453 Md. at 444–45 (citation omitted; footnote included).

In short, deciding whether granting a temporal variance is warranted is not the same thing as deciding whether the underlying project is compatible with the surrounding neighborhood as it exists at the time of the hearing on the variance application. To the extent that compatibility between the proposed use and the existing neighborhood is relevant, the Board's analysis should focus solely on changes that occurred after the date of the most recent temporal variance. The Board recognized this distinction in its opinion.

Appellants point to a number of projects, ranging from individual houses to entire subdivisions, that have been constructed in the neighborhood after the last variance had been granted in 2013. However, the Board found that all of this construction occurred pursuant to projects were approved prior to the granting of the 2013 variance. Robert Konowal, the member of the County planning staff, testified to this effect, and appellants

do not challenge the accuracy of his statements. The Court's analysis in *Forks of the Patuxent* is clear that the Board's focus should be on the "narrow and forward-looking" question of whether an *extension of time*—not the operation of the special exception use after it is completed—would result in a change to the character of the neighborhood, substantially impair the appropriate use or development of neighboring properties, or otherwise harm the public welfare. The analytical approach taken by the Board in the present case was correct.

B.

The Board cannot grant a variance if doing so would substantially impair the appropriate use or development of adjacent property. *See* AACC § 3-l-207(e)(2)(ii).[7] Appellants argue that the Board's discussion of this factor was inadequate for two reasons.

[7] Anne Arundel County Code § 3-1-207(3) reads (italic emphasis added):

> (e) Required findings. A variance may not be granted under subsection (a) or (b) unless the Board finds that:
> (1) the variance is the minimum variance necessary to afford relief;
> (2) the granting of the variance will not:
> (i) alter the essential character of the neighborhood or district in which the lot is located;
> (ii) *substantially impair the appropriate use or development of adjacent property*;
> (iii) reduce forest cover in the limited and resource conservation areas of the critical area;
> (iv) be contrary to acceptable clearing and replanting practices required for development in the critical area or bog protection area; or
> (v) be detrimental to the public welfare.

First, they assert that the Board's analysis consisted of broad, conclusory statement, which failed to make its findings and conclusions clear. Second, appellants argue that there was a lack of evidence to support the Board's determination that there would be no impact to the use or development of adjacent properties. Neither of these assertions is persuasive, and we will address them in order.

The Court of Appeals addressed an argument similar appellants' first contention in *Critical Area Commission v. Moreland, LLC*, 418 Md. 111, 134 (2011). The Court's opinion in that judicial review proceeding is particularly instructive because the agency in *Moreland* was the Board and, as in the present case, the Board's opinion in *Moreland* consisted of a summary of all of the evidence presented to it followed by the Board's findings and conclusions. The Court explained that:

> When the Board of Appeals merely states conclusions, without pointing to the evidentiary bases for those conclusions, such findings are not amenable to meaningful judicial review and a remand is warranted. . . . In contrast, . . . when the Board of Appeals refers to evidence in the record in support of its findings, meaningful judicial review is possible. The present case falls within the ambit of the latter [category], because, in its determination that the Moreland variances should be denied, the Board explicitly summarized evidence presented by several witnesses supporting its conclusions, albeit in a separate section, enabling meaningful judicial review. That evidence, intellectually and logically, can be viewed only as bearing on what persuaded the Board to conclude as it did.

*Moreland* holds that an administrative agency satisfies its obligation to explain the basis of its decision when its decision enables "meaningful judicial review." Substance,

and not form, controls. The Board's findings in the present case are sufficiently detailed to permit meaningful judicial review.

Appellants' second argument is also unpersuasive. They contend that there was no evidence to support the Board's finding that the temporal variance would have no impact on the use or development of adjacent properties. Appellants rely on the testimony of three witnesses. Eleanor Johnson testified that the *operation* of the rubble landfill would negatively affect her family's ability to sell its property located near the landfill site. She did concede, however, that her family had recently sold a parcel and that a substantial home had been built on it. Doris Johnson, her niece, also testified that existing dust, noise and traffic made it difficult to sell the family properties and that the variance, if granted, would also affect the marketability of their property. Finally, John Nicholson testified that existing traffic, noise, and pollution, had affected the value of his property. Neither Eleanor Johnson nor Nicholson addressed whether a temporal variance would affect their properties. Doris Johnson did, albeit in passing,[8] but the Board was not bound to accept her testimony.

[8] Appellants rely on the following passage from the transcript to support their contention that there was evidence before the Board that granting an additional temporal variance would affect the use and development of surrounding properties:

[Board Member Dove]: [A]nd so it's your testimony that if we grant this time variance, the time extension, that your ability to sell the property will be made that much harder?

[Ms. Johnson]: Yeah.

[Board Member Dove]: Okay.

Later in its memorandum opinion, the Board of Appeals specifically addressed the issue in its Findings and Conclusion section (emphasis added):

> [W]e find that the variance for extension of time will not substantially impair the appropriate use or development of adjacent properties. This special exception has been approved for a long time. . . . *[T]here is no operation that will occur as a result of a time variance since the rubble landfill operation would occur by virtue of the original special exception – not by a variance for a time extension*.

{RE 997}

*Forks of the Patuxent* stands for three relevant propositions. The first is that the appropriate focus in a temporal variance proceeding is narrow and forward-looking, and consists primarily of identifying and assessing the negative effects, if any, of granting the variance. The second is that a hearing on a temporal variance is not an appropriate forum for relitigating the special exception proceeding that authorized the landfill in the first place. The third is that, to the extent that compatibility with the neighborhood is relevant, the zoning board's analysis is limited to changes in the neighborhood that occurred since the grant of the most recent temporal variance.

The Board focused its analysis on the appropriate criteria; its findings of fact were supported by substantial evidence in the record; and its written opinion was detailed enough

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[Ms. Johnson]: Absolutely.

for a reviewing court to understand the Board's reasoning. There is no basis for us to disturb the Board's decision.[9]

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

[9] Tolson presents an alternative argument, namely, that it didn't need a variance in the first place. It asserts that the outcome of this case is controlled by AACC § 18-16-405(a), which provides that a special exception does not lapse if (i) the applicant obtains a building permit within eighteen months of the date that the special exception is granted; and (ii) construction proceeds in accordance with the permit. Tolson points out it obtained the MDE permit before the last variance expired and has been diligently working on the project ever since. Therefore, no variance is necessary.

This short answer to this argument is that the Board did not base its decision on the notion that no variance was necessary; instead, the Board concluded that Tolson had proved that granting a variance was warranted. Accepting Tolson's argument would run afoul of the firmly established principle that "the reviewing court may only affirm an administrative agency's decision on the same grounds found by the agency[.]" *Dep't of Human Res. v. Thompson,* 103 Md. App. 175, 189 (1995).

Another difficulty is that Tolson's argument does not address AACC § 18-2-101(b)(1), which states that "an application for a special exception or variance filed on or before April 4, 2005 shall be governed by the law as it existed prior to May 12, 2005 for the special exception or variance as approved." In its Opinion, the Board stated that § 18-2-101(b)(1) applied to the special exception for the rubblefill and that, "the former Code states that an approval of a special exception is rescinded if the use is not completed and in operation within two years of the date of decision." Were we to consider Tolson's argument on its merits—and we are not for the reason stated in the previous paragraph—we would defer to the Board's interpretation of the County Zoning Ordinance. *See, e.g., Forks of the Patuxent,* 453 Md. at 441.