APPENDIX A

IN THE COURT OF APPEALS

OF MARYLAND

No. 52

September Term, 2019

MARYLAND RECLAMATION ASSOCIATES, INC.

v.

HARFORD COUNTY, MARYLAND

Barbera, C.J.
McDonald
Watts
Hotten
Getty
Booth
Biran,

JJ.

Opinion by Booth, J.

Filed: April 24, 2020

This case requires us to examine a property owner's right to invoke the original jurisdiction of the courts by filing an inverse condemnation case pursuant to Article III, § 40 of the Maryland Constitution, where the constitutional claim was not raised during

the administrative agency proceeding before the Harford County Board of Appeals.

We consider these principles against the backdrop of 30 years of litigation between the parties. This is the fourth Court of Appeals case arising out of litigation between Maryland Reclamation Associates, Inc. ("MRA"), and Harford County, Maryland ("Harford County" or the "County"), in connection with MRA's efforts to construct and operate a rubble landfill on approximately 62 acres of land (the "Property") located on Gravel Hill Road, in Harford County. *See Md. Reclamation Assocs., Inc. v. Harford Cty.*, 342 Md. 476 (1996) ("*MRA II*");[1] *Md. Reclamation Assocs., Inc. v. Harford Cty.*, 382 Md. 348 (2004) ("*MRA III*"); *Md. Reclamation Assocs., Inc. v. Harford Cty.*, 414 Md. 1 (2010) ("*MRA IV*").

The earlier litigation between the parties concluded with this Court's 2010 opinion in *MRA IV*, which rejected all of MRA's substantive claims by upholding all the factual determinations and legal conclusions of the Harford County Board of Appeals (sometimes hereinafter referred to as the "Board"). *See MRA IV*, 414 Md. at 65. After losing on each substantive claim, including the constitutional and non-constitutional claims that were raised in the context of the administrative

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[1] We refer to our first opinion as *MRA II* because there was an initial appeal to the Court of Special Appeals. *See Holmes v. Md. Reclamation Assocs., Inc.*, 90 Md. App. 120 (1992), *cert. dismissed sub nom. Cty. Council of Harford Cty. v. Md. Reclamation Assocs., Inc.*, 328 Md. 229 (1992). The initial appeal has been referred to in our previous cases as "*MRA I*."

hearing and upheld by this Court, MRA filed a separate inverse condemnation case alleging that Harford County's actions constituted an unconstitutional taking of its Property in violation of Article III, § 40 of the Maryland Constitution. Over the decades of litigation, conspicuously absent from the constitutional claims asserted by MRA was any allegation that the application of zoning regulations—Bill 91-10—to its Property, and the denial of a variance, would deprive MRA of all beneficial use of the Property, thereby creating an unconstitutional taking without just compensation. We must determine whether, under our exhaustion of administrative remedies jurisprudence, a landowner may withhold a claim alleging an unconstitutional taking arising from the application of a zoning regulation from the administrative agency's consideration and present the claim to a jury in a separate action invoking the court's original jurisdiction.

For the reasons set forth more fully in this opinion, we hold that, under our abundance of case law applying the exhaustion of administrative remedies doctrine in the context of a constitutional takings claim arising from the application of a zoning regulation, the property owner must raise its takings claims within the administrative agency proceeding prior to seeking judicial review or filing a separate legal proceeding. Our case law firmly establishes that under the Express Powers Act, Md. Code (1974, 2013 Repl. Vol., 2019 Cum. Supp.), Local Government Article ("LG") § 10-101, *et. seq.*, the Harford County Board of Appeals had original jurisdiction to make the initial factual

determination of whether there were any other beneficial uses that could be made of the Property, and to grant relief in the form of a variance to avoid an unconstitutional taking, if MRA had, in fact, established that under the Harford County Code, there were no other beneficial uses that could have been made of the Property, other than a rubble landfill. By failing to raise these claims before the Board of Appeals, MRA did not exhaust its administrative remedies and dismissal of this case was required.

I. BACKGROUND AND LEGAL PROCEEDINGS

On February 19, 2013, MRA filed a Civil Complaint and Demand for Jury Trial in the Circuit Court for Harford County alleging one count, which it titled "Violations of Article III, Section 40 of the Maryland Constitution, Article 19 of the Maryland Declaration of Rights and Article 24 of the Maryland Declaration of Rights." Over two years later, on June 15, 2015, MRA filed an Amended Complaint for Inverse Condemnation and Demand for Jury Trial, again alleging one count for inverse condemnation titled "Violations of § 40 of Article III of the Maryland Constitution and Articles 19 and 24 of the Maryland Declaration of Rights."

The First Amended Complaint ("Complaint") recites the same facts and procedural history concerning MRA's attempt to obtain approvals to operate a rubble landfill on its property that were litigated by MRA in appellate proceedings before this Court. The facts

alleged in the Complaint—which formed the basis for the jury's $45 million plus verdict—were first summarized by Judge Eldridge on behalf of this Court in *MRA II*, 342 Md. at 480–87. We repeat those facts once again, as follows.

In August 1989, MRA contracted to purchase the Property. MRA intended to construct and operate a rubble landfill on the Property and began the process of obtaining a rubble landfill permit from the Maryland Department of the Environment ("MDE") pursuant to Maryland Code (1982, 1996 Repl. Vol), Environment Article §§ 9-204 through 9-210. *MRA II*, 342 Md. at 480.

MRA first requested that Harford County include the Property in Harford County's Solid Waste Management Plan ("SWMP") as a rubble landfill. *Id.* By a vote of 4-3, the Harford County Council (the "Council") amended its SWMP to include MRA's Property as a rubble landfill. The Property's inclusion in the Harford County SWMP, however, was made subject to 27 conditions, including a minimum landscape buffer of 200 feet. *Id.* On November 16, 1989, Harford County advised MDE that MRA's Property had been included in the County's SWMP as a rubble landfill site. *Id.*

MRA next sought approval for its rubble landfill permit from MDE. *Id.* On November 20, 1989, MRA received Phase I permit approval from MDE. *Id.* MRA then filed with MDE the necessary reports and studies for Phase II and Phase III approvals. *Id.*

MRA had entered into a contract to purchase the Property in August 1989, before its inclusion in the SWMP. *Id.* at 481. Allegedly relying on the Property's inclusion in the Plan, and on MDE's Phase I approval, MRA consummated the purchase on February 9, 1990, for $732,500. *Id.* The settlement occurred on the last possible day under the terms of the contract of sale. *Id.*

Four days after the settlement date, the newly appointed Harford County Council President and a Council member introduced County Resolution 4-90, which provided for the removal of the Property from the County's SWMP. *Id.* In the litigation that ensued over this legislation, the Court of Special Appeals held that Resolution 4-90 was invalid because it was preempted by the State's authority over solid waste management plans and the issuance of rubble landfill permits. *Id.* (citing *Holmes v. Md. Reclamation Assocs., Inc.*, 90 Md. App. 120, *cert. dismissed sub nom. Cty. Council of Harford Cty. v. Md. Reclamation Assocs., Inc.*, 328 Md. 229 (1992) ("*MRA I*")).

While the litigation over Resolution 4-90 was pending, in February 1991, Bill 91-10 was introduced by the Harford County Council as an emergency bill. *Id.* at 482. Bill 91-10 proposed to amend the requirements for a rubble landfill by increasing the minimum acreage requirements, buffer requirements, and height requirements. *Id.* The Bill, *inter alia*, would establish a minimum rubble fill size of 100 acres and a buffer zone of 1,000 feet. *Id.* After public hearings, the County Council passed the Bill in March 1991. *Id.*

In April 1991, Bill 91-16 was introduced by the Harford County Council. *Id.* This Bill authorized the County Council to remove a specific site from the County's SWMP if the site did not comply with certain zoning regulations, if a permit had not been issued by MDE within 18 months of the site being placed in the County's SWMP, or if the owner of the site had not placed the site in operation within the same 18-month period. *Id.* Bill 91-16 was also passed by the County Council. *Id.*

That same month, the President of the Harford County Council sent a letter to MDE enclosing a copy of enacted Bill 91-10 and advising the Department that the provisions of the Bill could call into question the status of sites which were in the process of obtaining rubble landfill permits. *Id.* at 483. MDE advised the County Council in May 1991 that if a permit were to be issued to MRA, such issuance would not authorize MRA to violate any local zoning or land use requirements. *Id.*

Also in May 1991, the County's Director of Planning sent a letter to MRA informing it of Bill 91-10, indicating that MRA's Property would apparently fail to meet the requirements of Bill 91-10, stating that MRA should submit documentation showing that the Property could meet the requirements of the zoning ordinances, and stating that, if the site could not meet such requirements, MRA would need a variance to operate a rubble landfill on the Property. *Id.* at 483–84. MRA did not file for a variance in response to the Director's May letter; however, MRA did file an "appeal"

to the Harford County Board of Appeals from the "administrative decision pursuant to Section 267-7E in a letter dated 5/2/91," requesting that the Board "review and reverse the decision of the Zoning Administrator interpreting that the standards of Council Bill 91-10 apply to the Applicant." *Id.* at 484. The "application" to the Board of Appeals asserted that Bill 91-10 was inapplicable to the Property and that, if it was applicable, it was invalid. *Id.*

In May 1991, Resolution 15-91 was introduced in the Harford County Council. *Id.* at 485. This resolution purported to interpret Harford County law and determine that the Property was not in compliance with the county law. *Id.* The resolution purported to remove the site from the County's SWMP. *Id.* The County Council passed Resolution 15-91 in June 1991. *Id.*

A. The Prequel—MRA II, MRA III, and MRA IV—A Procedural Labyrinth of Zoning History

This case is procedurally unique given the related, tortuous litigation history that preceded the instant matter, involving the same underlying zoning regulation—the enactment of Bill 91-10—and its application to MRA's Property. Because of the relationship between the earlier cases and our analysis and holding in this case, it is necessary to summarize this "prequel." As discussed in the ensuing chapters of the prequel, the very issues that were presented to the jury in this case were decided, or should have been decided,

in the proceedings before the Harford County Board of Appeals and were finally adjudicated by this Court in *MRA IV*.

Chapter 1 – MRA II

MRA filed a complaint in the Circuit Court for Harford County in June 1991, seeking a Declaratory Judgment and Injunctive Relief against Harford County and the Harford County Council. *Id.* MRA requested, *inter alia*, the following: (1) a declaration that Bills 91-10 and 91-16 and Resolution 15-91 were "null and void" as to MRA's Property; (2) an injunction preventing the County from enforcing Bills 91-10 and 91-16 and Resolution 15-91 against MRA; and (3) an injunction staying all further action on MRA's appeal to the Board of Appeals. *Id.* MRA advanced several legal theories to support its complaint for declaratory relief. *Id.*

In June 1991, the circuit court issued an interlocutory injunction preventing the enforcement of the local legislation against MRA. *Id.* The circuit court's order expressly authorized MDE to continue its processing of MRA's pending permit application. *Id.* The order also stayed the processing of MRA's administrative "appeal" of the Planning Director's "decision" contained in the Director's May 2, 1991 letter. *Id.* Finally, the interlocutory order prohibited MRA from commencing any construction without court approval. *Id.* at 485–86.

While the parties were litigating the matter in the circuit court, in February 1992, MDE issued to MRA a permit to operate a rubble landfill on its property. *Id.* at 486. The MDE permit was expressly conditioned upon compliance with local land use requirements. *Id.*

After considering cross-motions for summary judgment, in May 1994, the circuit court filed an opinion and judgment, "declaring that Harford County was entitled to enact new zoning laws that may prevent MRA from operating a rubble landfill, and that Bills 91-10 and 91-16 were not invalid on the grounds asserted by [MRA]." *Id.* The court declared that Resolution 15-91 was invalid on its face. *Id.* The circuit court determined that "the Harford County Council was acting as a legislative body when it passed the resolution" and that its passage "constituted an illegal attempt to interpret and apply the laws which the Council had previously enacted." *Id.* MRA filed an appeal to the Court of Special Appeals. *Id.* Before there were any further proceedings in that court, this Court issued a writ of *certiorari*. *Id.*

On appeal, MRA asserted state and federal constitutional challenges, as well as non-constitutional arguments. *Id.* at 486–87. Two of MRA's arguments were grounded upon the due process clauses of the Fourteenth Amendment of the United States Constitution and Article 24 of the Maryland Declaration of Rights. *Id.* at 487. The primary argument advanced by MRA was that "it had a 'constitutionally protectable property interest in the Harford County Solid Waste Management Plan' and had 'vested rights in the permit

process' . . . and that Harford County had 'retroactively' abrogated those rights in violation of due process principles." *Id.* MRA's second constitutional argument was that the two Harford County ordinances violated MRA's "substantive due process rights because the ordinances [were][] arbitrary and capricious and unreasonable." *Id.* (cleaned up). With respect to the two non-constitutional arguments, MRA: (1) urged the Court to adopt the doctrine of zoning estoppel and hold that Harford County is estopped from applying the ordinances to MRA's Property; and (2) argued that the two Harford County ordinances, as applied to MRA's Property, were preempted by the provisions of state law relating to solid waste disposal and the state permit issued to MRA. *Id.* at 488.

In *MRA II*, we explained that during oral argument, MRA's contentions were "clarified somewhat" with respect to any potential takings claims that MRA may have been asserting. *Id.* at 488–90. Notably, the Court clarified that MRA was *not* alleging in the context of this case that the ordinances were unconstitutional as applied to its Property. *Id.* at 489. Because the takings claim—and MRA's failure to raise this claim in *MRA II, MRA III*, and *MRA IV*—is significant and relevant to our exhaustion analysis in this case, we reiterate Judge Eldridge's summary and clarification of these matters as they appear in *MRA II*:

> Both in the circuit court and in its brief in this Court, [MRA] relied upon principles and cases relating to the question of whether particular governmental regulation of a landowner's use

of his property had gone so far as to constitute a "taking" of the property without just compensation in violation of the Fourteenth Amendment and the Just Compensation Clause of the Fifth Amendment and/or Article III, § 40 of the Constitution of Maryland. In light of this reliance, the Court inquired whether [MRA's] counsel was making a "takings" argument, and counsel stated that he was not. The following colloquy occurred:

> "THE COURT: Mr. Grieber [Attorney for [MRA]], are you . . . one thing I'm not sure about, are you making . . . in addition to a substantive due process argument, are you making a takings argument under the [Just Compensation] Clause of the Fifth Amendment, or . . .
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> Mr. GRIEBER: No, I am not, your Honor.
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> THE COURT: . . . under Article III, section 40, of the Maryland Constitution?
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> Mr. Grieber: No, I am not, Your Honor.
>
> THE COURT: Okay.
>
> MR. GRIEBER: That's, that's a viable option later should this Court not agree with me. But at this point in time, no, we are not."

> In addition, counsel for [MRA] confirmed that [MRA] was "not making a facial attack" upon the ordinances, but was "arguing that [they are] invalid as applied to" the . . . [P]roperty. Counsel for Harford County then argued that questions of validity as applied should initially be raised and decided in the appropriate administrative proceedings, and that [MRA] had failed to invoke and exhaust the administrative remedies available to it. [MRA's] counsel responded that, because the same persons who are members of the County Council are also members of the Board of Appeals in Harford County, it would be futile to invoke and exhaust administrative remedies.

Id. at 489 (footnotes omitted).

Prior to reaching the merits of MRA's substantive arguments, the Court explained that the "threshold issue in this case is whether, and to what extent, [MRA] was required to invoke and exhaust administrative remedies available under the Harford County Code and the Express Powers Act, Maryland Code . . . , Art. 25, § 5(U) (setting forth the jurisdiction and procedural requirements with respect to boards of appeals in chartered counties)." *Id.* at 490.

After discussing the applicable provisions of the Harford County Code and the Express Powers Act, we held that MRA had not exhausted its administrative remedies, including appealing the Zoning Administrator's ruling to the Board of Appeals, and applying to the Zoning Administrator for variances. *Id.* at 492. This Court then considered the consequence of MRA's

failure to exhaust its administrative remedies with respect to each legal argument. *Id.*

Concerning any due process claim arising from the United States Constitution, we explained that such an action, which would arise under 42 U.S.C. § 1983, would not be subject to the state law requirements that administrative remedies must first be exhausted. *Id.* We noted that the "Supreme Court has held that a plaintiff is entitled to maintain an action under 42 U.S.C. § 1983 in a state court without having exhausted available administrative remedies." *Id.* (citing *Felder v. Casey*, 487 U.S. 131, 146–47 (1988)). Although we determined that the federal constitutional claims were not subject to the exhaustion requirement, we held that any potential federal takings claims were not ripe for judicial consideration until MRA applied for a variance and received a final decision from the Board. *Id.* at 505.

Turning to the remaining claims arising under the state constitution, as well as MRA's non-constitutional claims, we held that the circuit court erred in considering the merits of MRA's claims. *Id.* at 497. We cited several of our cases for the holding that "[w]here a legislature has provided an administrative remedy for a particular matter, even without specifying that the administrative remedy is primary or exclusive, this Court has 'ordinarily construed the pertinent [legislative] enactments to require that the administrative remedy be first invoked and followed' before resort to the courts."

Id. at 492 (quoting *Bd. of Educ. for Dorchester Cty. v. Hubbard*, 305 Md. 774, 786 (1986)) (collecting cases).[2]

MRA argued that any exhaustion requirement under the circumstances would be futile because the Board of Appeals was comprised of the same members of the Harford County Council who opposed the rubble landfill on policy grounds. *Id.* at 495. We rejected MRA's contention, stating that "[t]his argument . . . furnishes no sound basis for a judicially created exception to the exhaustion requirement set forth in Art. 25A, § 25(U)." *Id.* We noted that in *Turf Valley Associates v. Zoning Board*, 262 Md. 632, 643–44 (1971), we "held that 'there is no fundamental barrier to conferring on the legislative branch of a chartered county the right to constitute itself a zoning body,' and to delegate to that zoning body both quasi-legislative and quasi-judicial zoning functions." *MRA II*, 342 Md. at 495–96. We also pointed out that in *Klein v. Colonial Pipeline Co.*, 285 Md. 76, 82–83 (1979), "this Court held that constituting the Harford County Council as the Harford County Board of Appeals was valid, and that

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[2] In describing the requirement for exhausting administrative remedies, we noted that we recognized a limited "constitutional" exception, where the exhaustion principle does not apply "where the constitutionality of a statute on its face is challenged, and where there exists a recognized declaratory judgment or equitable remedy." *Md. Reclamation Assocs., Inc. v. Harford Cty.*, 342 Md. 476, 494 (1996) ("*MRA II*") (quoting *Ins. Comm'r v. Equitable*, 339 Md. 595, 621 (1995)). We did not consider this exception because counsel for MRA conceded that it was not making a facial challenge to the ordinances. *Id.* at 495. Rather, all four of MRA's arguments related to the validity of the ordinances as applied to MRA's Property. *Id.*

the Harford County Board of Appeals was a board of appeals pursuant to [the Express Powers Act], and that the language of [the Act] expressly provides that a decision by the Harford County Board of Appeals is a prerequisite to an action in the circuit court." *MRA II*, 342 Md. at 496. We explained that that it would undermine the holdings in these cases to adopt MRA's reasoning "that the Harford County Board of Appeals can be bypassed whenever a case involves Harford County ordinances reflecting a policy which is arguably inconsistent with the plaintiff's position, simply because the members of the County Council also constitute the Board of Appeals." *Id.* We explained that:

> If [MRA] were to seek a decision or decisions by the Harford County Board of Appeals, the Board would be considering the issues raised by [MRA] in a quasi-judicial capacity, and its decision would be fully subject to judicial review in the Circuit Court for Harford County. If the Board of Appeals commits an error of law, if its rulings are arbitrary or capricious, or if critical factual findings are unsupported by substantial evidence, the Board's decision will be reversed. Nevertheless, under [the Express Powers Act], the Board's decision-making function cannot be circumvented.

Id. at 496–97.

We held that the circuit court below should not have considered the merits of MRA's state law and state constitutional challenges to the application of

Bills 91-10 and 91-16 to the Property and vacated the judgment of the circuit court. *Id.* at 497.

Chapter 2 – MRA III

Following *just one part* of this Court's directive in *MRA II*, MRA filed requests for an interpretation of Bills 91-10 and 91-16 from the Zoning Administrator. *MRA III*, 382 Md. at 350. After receiving unfavorable rulings, MRA appealed to the Board of Appeals. *Id.* However, MRA did not seek a variance from the strict application of the legislation which had been incorporated into the zoning provisions of the Harford County Code. *Id.* at 360. The Board, through its Hearing Examiner, conducted a hearing and issued a decision in April 2002 that the application of Bill 91-10 to the proposed rubble landfill did not violate federal, state, or local laws. *Id.* at 359. As summarized by Judge Harrell writing for this Court in *MRA III*, the Hearing Examiner's findings and conclusions underlying this decision were as follows:

1. Bill 91-10 applies to MRA's property on Gravel Hill Road.

2. The requirements of Bill 91-10 can be validly applied to MRA's property on Gravel Hill Road under the circumstances of this case and in light of the Environmental Article of the Maryland Code as well as other principles of Maryland law.

3. MRA's operation of a rubble landfill on its property at Gravel Hill Road pursuant to

its state permit will violate applicable Harford County Zoning law. . . . Moreover, the Hearing Examiner questions whether the permit issued to MRA by MDE is validly issued as it was based on misinformation provided to the State by MRA regarding the conformance of the property and use with Harford County Zoning law.

4. MRA cannot obtain a grading permit unless it can meet the requirements of Harford County Zoning law. *To the extent MRA does not meet specific standards it must seek a variance and obtain a variance from provisions with which it cannot comply.* MRA's reliance on site plan approvals that pre-date the enactment of Bill 91-10 is without merit.

5. MRA's operation of a rubble landfill on its property at Gravel Hill Road pursuant to its State-issued Refuse Disposal Permit No. 91-12-35-10-D and as renewed by Refuse Disposal Permit 1996-WRF-0517 will violate applicable Harford County zoning law.

6. Harford County is not prohibited by the principles of estoppel from applying the provisions of Harford County Bill 91-10 . . . to MRA's property and specifically, to MRA's operation of a rubble landfill on its property.

7. MRA's rubble landfill did not acquire vested rights in its use that would

> insulate it from the application of Bill 91-10 to that use. *It is the vested rights doctrine itself that allows a landowner to raise issues of constitutional protections. There is no constitutional infringement on the rights of MRA because a vested right was not established.* Applying the provisions of Bill 91-10 to MRA's Gravel Hill Road property is, therefore, not prohibited by the United States Constitution and/or the Maryland Declaration of Rights.
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> 8. Harford County is not preempted by the Environmental Article of the Maryland Code, particularly sections 9-201 et seq. and 9-501 et seq., from applying Bill 91-10 to MRA's Gravel Hill Road property.
>
> 9. MRA's operation of a rubble landfill on its Gravel Hill Road property is not a valid non-conforming use pursuant to Harford County Zoning Code.

MRA III, 382 Md. at 359–60 (emphasis added).

In June 2002, the Board of Appeals adopted the Hearing Examiner's decision. Thereafter, Harford County refused to issue MRA a grading permit or zoning certificate. *Id.* at 360. MRA did not file a request for a variance—either in response to the Board of Appeals' final decision, or on a parallel course to its request for interpretation by the Zoning Administrator to its nine questions presented. *Id.* at 361.

MRA filed a petition for judicial review to the Circuit Court for Harford County. *Id.* at 360. In October 2003, the circuit court affirmed the decision of the Board of Appeals, concluding that "all nine requests for interpretation were answered correctly . . . in accordance with the law, and based on substantial evidence, and the decision was also correct when it upheld the zoning administrator's denial of [MRA's] request for a zoning certificate." *Id.* at 357–58. MRA appealed to the Court of Special Appeals. *Id.* at 351. Prior to any proceedings before the Court of Special Appeals, we issued a writ of *certiorari. Id.*

Once again, we held that MRA had not exhausted its available administrative remedies. *Id.* at 361. We reiterated that "[a] fundamental precept of administrative law is the requirement that exclusive or primary administrative remedies ordinarily be exhausted before bringing an action in court." *Id.* at 361–62 (collecting cases). We explained that, "[e]ight years ago in *MRA II*, this Court *instructed* MRA that before it may obtain judicial review in the Circuit Court for Harford County of any adverse administrative decisions in this case, it must exhaust its available administrative remedies under the applicable laws." *Id.* at 363 (citing *MRA II*, 342 Md. at 497) (emphasis added). We stated our directive in *MRA II*, that "this Court identified the administrative remedies available to MRA: (1) request an interpretive ruling from the Zoning Administrator and, if that ruling were adverse to MRA's interests, appeal to the Board of Appeals; (2) if the Board of Appeals' decision was adverse to MRA, it should apply for

zoning variances or exceptions." *Id.* at 363 (citing *MRA II*, 324 Md. at 501).

MRA argued that the "proper application to its situation of the exhaustion of administrative remedies principle should permit a 'two-step process' by which it may pursue in turn judicial review of each discrete adverse administrative decision." *Id.* We rejected MRA's interpretation of the exhaustion requirements stating:

> MRA believes that this Court must decide the issues it advances in the present case and, if decided adversely to MRA's position, it retains "the option of seeking a variance from the application of Bill 91-10 and other Harford County regulations to its property." *We do not subscribe to this inefficient and piecemeal approach. Seeking zoning variances is not, as MRA contends, merely an "option."* The right to request zoning interpretations and a zoning certificate and, if denied, the right to seek variances are two parallel or successive remedies to be exhausted, not optional selections on an a la carte menu of administrative entrees from which MRA may select as it pleases.

Id. at 363–64 (emphasis added). We noted that "Judge Eldridge, speaking for this Court, pellucidly explained the doctrine of administrative remedies, as applied to the circumstances of this dispute, in *MRA II*. *As MRA appears not to have appreciated completely the directions of MRA II, we can only reiterate the reasoning here.*" *Id.* at 365 (emphasis added). Once again, we restated that:

> MRA's failure to exhaust administrative remedies, before bringing this judicial review action, *applies to the federal constitutional issues as well as state constitutional and non[-]constitutional issues*. . . . For the reasons extensively discussed in *MRA II, supra.*, 342 Md. at 497–506, . . . we hold that the federal constitutional issues raised by [MRA] also are not now ripe for judicial decision.

Id. at 366–67 (emphasis added).

We also explained the process whereby a circuit court should stay final consideration of the merits of one matter where the resolution of said matter may depend upon the exhaustion of administrative remedies:

> Under the circumstances, a stay by the Circuit Court of final consideration of the merits of this petition for judicial review is the correct disposition for the present, rather than dismissal of the petition. When a litigant is entitled to bring two separate legal proceedings in an effort to obtain relief in a particular matter, when the litigant institutes the first of those proceedings and the case is pending in a trial court, and when the trial court is unable to decide the merits of that case because of primary jurisdiction or exhaustion principles associated with the second proceeding, the trial court ordinarily should stay the first proceeding for a reasonable period of time. During that period, the litigant may pursue and obtain a final administrative decision in the second proceeding. If still aggrieved, the

> litigant will be able to file an action for judicial review in the second proceeding, and the trial court may hear the two cases together.

Id. at 367.

By the conclusion of *MRA II* and *MRA III*, several legal principles should have been clear. *First*, that MRA had to exhaust *all* its administrative remedies, including seeking a zoning variance from the application of Bill 91-10 prior to judicial review of the merits of any legal claims. *Second*, that the exhaustion requirement applied to MRA's constitutional and non-constitutional claims. In other words, before proceeding with any judicial review or filing a separate judicial proceeding asserting that Bill 91-10 was unconstitutional as applied to MRA's Property, *MRA had to apply for a zoning variance and raise any constitutional and non-constitutional claims within the administrative agency proceeding.*

Chapter 3 – MRA IV

In the final chapter of this prequel, once again, MRA proceeded to follow *just one part* of the Court's directives enunciated in *MRA II* and *MRA III*.

In May 2005, MRA finally requested from the Harford County Hearing Examiner several variances from the provisions of Bill 91-10, which had been incorporated into the Harford County Zoning Code. *MRA IV*, 414 Md. at 15. The variances sought were to permit:

- the disturbance of the 30-foot buffer yard;
- the disturbance within the 200-foot buffer from adjoining property lines;
- the operation of a rubble landfill on less than 100 acres;
- the operation of a landfill without satisfying the buffer requirement;
- the deposit of solid waste less than 500 feet from the flood plain district;
- the disturbance of the 1,000-foot buffer from a residential or institutional building;
- the use of a landfill within a Natural Resource District, to permit the disturbance of the Natural Resources District buffer, and to disturb the minimum 75-foot wetlands buffer in the Agricultural District;

Id.

Over the period of 10 months, the Hearing Examiner presided over 17 hearings, and heard testimony from MRA's 11 witnesses, eight of whom were experts; six experts offered by a group of individuals who live in the neighborhood surrounding the proposed rubble landfill and who were opposed to its development ("Opponents"); 16 residents from the community and parishioners of the St. James African Methodist Episcopal ("AME") Church; and the acting director of the Harford County Department of Planning and Zoning. *MRA IV*, 414 Md. at 16–17. The Hearing Examiner issued a 78-page decision dated February 28, 2007

recommending that the Board deny MRA's variance requests. *Id.*

Notably, although MRA applied for a variance and argued that it satisfied the variance standards under the Harford County Code, *it did not allege or assert before either the Hearing Examiner, or the Board of Appeals, that the application of Bill 91-10 to its Property, and the denial of a variance, would deprive MRA of all beneficial uses of the Property, thereby creating an unconstitutional taking of its Property without just compensation.*

The Hearing Examiner applied the variance factors under the Harford County Code[3] and, *inter alia*, made the following findings:

> The proposed rubble landfill has the potential of causing a great impact on the neighbors who reside on Gravel Hill Road, and on users of Gravel Hill Road.
>
> * * * *

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[3] Under the provisions of the Harford County Code, § 267-11(A), to obtain a variance from an applicable zoning provision of the Harford County Code, the applicant was required to demonstrate, and the Board was required to find, that:

> (1) By reason of the uniqueness of the property or topographical conditions, the literal enforcement of [the provisions of the Code] would result in practical difficulty or unreasonable hardship.
>
> (2) The variance will not be substantially detrimental to adjacent properties or will not materially impair the purpose of [the provisions of the Code] or the public interest.

[T]he disturbance of the 200-foot buffer during the rubble landfill operation would increase the disturbance to be seen and experienced by adjoining owners and residents. As a result, they would suffer an adverse impact.

* * * *

MRA's parcel is 55 acres in size. Section 267-40.1(A) requires that the site be at least 100 acres. Obviously, the Applicant will not have a rubble-fill regardless of the finding on the other variances, unless it is granted a variance to the 100-acre requirement. The variance requested is substantial, with the Applicant suggesting that an area of just slightly more than one-half of the minimum acreage requirement is sufficient for approval. . . . [T]he Applicant's argument in favor . . . is that[,] "[e]nlarging the site to 100 acres would serve no purpose and would be a practical difficulty." Again, no statutory or case authority exists which would justify the granting of a variance based on a perceived lack of need for the requirement for which the variance is requested. . . . Furthermore, the Applicant cannot allege a disproportionate impact of the 100 acres requirement upon it. All properties of less than 100 acres in size are similarly impacted by the prohibition against rubble-fills on parcels of less than that size. The Applicant is treated no differently

> than any other similarly situated property owner[s].

Id. at 16–21 (italics in original omitted).

With respect to the request for a variance to allow for the disturbance of the 1,000-foot buffer requirement from residential or institutional buildings, the Hearing Examiner noted that relaxing this requirement would have a severe impact upon the St. James AME Church and its congregation. *Id.* at 22. There was considerable testimony in the record before the Hearing Examiner that the St. James AME Church and its graveyard had significance to the African-American community. *Id.* at 19. The Hearing Examiner stated that, "[b]eing the final resting place of African[-]American soldiers who fought in the Civil War is itself a factor sufficient to mandate that the Church and its graveyard be given all possible protections to help preserve their historical significance and the prominent place they continue to play in the history of our County and State." *Id.* The Hearing Examiner found that MRA's operations, including the use of the trucks operating five-and-a-half days a week, would have an adverse impact on the historic church, its congregation, and the surrounding residential properties. *Id.* at 22.

MRA appealed the Hearing Examiner's decision to the Board. *Id.* at 23. On June 5, 2007, the Board voted 7-0 to deny the requested variances and adopted the Hearing Examiner's decision. *Id.*

MRA noted an appeal to the circuit court, which affirmed the findings of the Board of Appeals by order

filed on July 11, 2008. *Id.* With the denial of the variance in hand, MRA also renewed its 2003 appeal in the circuit court. *Id.* On September 3, 2008, the circuit court affirmed its October 2003 decision. *Id.* MRA filed an appeal of the denial of the variance and the circuit court's affirmance of its 2003 decision to the Court of Special Appeals. *Id.* Once again, on our own initiative, we granted *certiorari* on both matters. *Id.*

On appeal, Judge Adkins, writing for this Court, addressed separately MRA's claims related to the denial of the variance ("Case No. 143 Issues") and its substantive claims associated with the Zoning Administrator's determination, which were affirmed by the circuit court in its 2003 decision ("Case No. 144 Issues").

Case No. 143 Issues – Denial of the Variances

Consistent with the presentation of its testimony and argument below, MRA failed to argue that it was entitled to a variance from the provisions of the Harford County Code because the effect of a denial would constitute an unconstitutional taking of its Property without just compensation. Because the takings claim was not part of the case, this Court, in *MRA IV*, proceeded to determine only whether the Board erred in determining that MRA had not satisfied the requirements for a variance as set forth in Harford County Zoning Code, Chapter 267, Section 267-11(A). *Id.* at 24.

After reviewing the testimony and evidence presented to the Hearing Examiner, we held that the

Board did not err in finding that the requested variances would be substantially detrimental to adjacent properties. *Id.*

A. Proposed Rubble Landfill Adverse Impacts on St. James AME Church and its Historic Graveyard

Our analysis of the Board's denial of the variances began with the review of the variance factors under the Harford County Code, and the Hearing Examiner's application of the factors to the evidence presented at the hearings. *Id.* at 25. Under the Harford County Code, the Board's denial of MRA's requested variances "shall be upheld if the proposed rubble landfill will be 'substantially detrimental' to adjacent properties." *Id.* (citing Harford County Code, Chapter 267, § 267-11(A)(2)).[4] We concluded that the Board "did not err in denying the requested variances because there was sufficient evidence that MRA's proposed rubble landfill will 'adversely affect the public health, safety, and general welfare,' will 'jeopardize the lives or property of people living' [in the surrounding area] and result [in] 'dangerous traffic conditions' in the Gravel Hill and St. James communities." *Id.*

In finding substantial evidence to support the Board's findings, we noted that the Board had relied

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[4] The Harford County zoning regulations are set forth in Chapter 267 of the Harford County Code. For purposes of brevity, we omit additional Chapter references and shall cite only to the applicable section reference.

upon the expert testimony establishing the use of heavy equipment between the hours of 7:00 a.m. and 5:00 p.m., and the adverse impacts that the rubble landfill operation would have on the historic African-American church site, which lies 25 feet from the outer boundary of MRA's property. *Id.* at 26. The graveyard is a Harford County historic place because it serves as a resting place of soldiers who served in the United States Colored Troops ("U.S.C.T.") during the Civil War. *Id.* at 28. We pointed out that the Hearing Examiner's findings of fact referenced the testimony that was provided by Carl Westmoreland, an expert in the preservation of historic African-American sites, to discuss the potential adverse effect that the rubble landfill would have on the historic preservation of the St. James site. *Id.* at 26. Mr. Westmoreland testified that:

> The imposition or the activation of a dump site would create an industrial environment that would be in conflict with the 18th and 19th century environment that predominates at this point and would compromise the historical integrity and the cultural legitimacy of this community that has existed for over 150 years and that has attempted to function within the mores and the cultural traditions of Maryland.
>
> To me, when you arrive there, if you didn't know that it was a black church, it's just a little modest church. When you see the Civil War monuments, the only reason you know they're black is because it says USCT, but it's typical of what you would see in the Maryland

> landscape. And I think that's what people in Havre de Grace and in Gravel Hill have struggled for, to become part of the American mainstream and this documents their efforts.

Id. at 27.

The Opponents also presented the testimony of an expert archeologist, Dr. James Gibb, who testified concerning the potential adverse impacts that a rubble landfill would have on the Church and its historic cemetery. *Id.* at 28. Dr. Gibb, who holds a doctorate in anthropology, and had experience as an instructor in anthropology and archeology, "testified that dust will be permitted to blow onto the cemetery, which will destroy the historic setting of the cemetery. [Dr.] Gibb also testified that the slopes around the existing graves are stabilized with vegetation and that destabilizing the vegetation could be detrimental to the graves." *Id.*

MRA argued that the Board should have relied upon its archeological expert, Michael Clem, who "opined that the proposed rubble fill would not adversely affect the historic cemetery located on the Church property and that the 'graves will actually be better protected from erosional forces by filling.'" *Id.* at 29. We rejected MRA's argument, explaining that "when there are differing opinions of two well-qualified experts and a zoning issue is fairly debatable, then the County Board could 'quite properly' accept the opinion of one expert and not the other." *Id.* (citing *Dundalk Holding Co. v. Horn*, 266 Md. 280, 292 (1972)). We reiterated our previous holding "that '[c]ourts, under these

circumstances, should not substitute their judgment on a fairly debatable issue for that of the administrative body.'" *Id.* (quoting *Dundalk Holding Co.*, 266 Md. at 292). We explained that, "[t]he Board was in the best position to evaluate the credible position of these two experts and it was within its bailiwick to give greater weight to the appellee's expert's opinion." *Id.*

We also rejected MRA's contention that Dr. Gibb's testimony was "devoid of substantial supporting facts," noting that "he discussed the detrimental effects that would result from construction and operating the rubble fill":

> So in order to use that quarry again, it will have to be deforested. *You have to remove the trees before you can get the trucks in; and that's just logical. And that will be fairly extensive deforestation.*
>
> So that will affect the setting. And as far as physical effects on the site, we've got dust, which is unavoidable in cases where any kind of clearing goes on. And I presume . . . that problem will be exacerbated with trucks moving large quantities of rubble.
>
> So dust is going to affect the fabric of the building, the church. It may [affect] the gravestones too. I haven't really looked at it in those terms, *but the dust will affect the building. Dust gets into all the cracks and crevices. We've had a temperate winter, but sooner or later we're going to have a cold, wet winter. That dust, once it gets into the crevices, will absorb*

> *water. It will expand and contract and cause deterioration of the building.*

Id. at 30 (emphasis in original). We also pointed out that Dr. Gibb refuted Dr. Clem's testimony that the filling activities associated with the proposed rubble landfill would create a positive impact by a better view shed and grave protection:

> [Gibb]: In the present condition of the land, I would say no because you would have to clear those slopes before you can fill them. Right now the slopes down from the cemetery, the quarry face, have stabilized. They've revegetated. There must be 30, 40 years of growth there at least.

Id. at 31. Accordingly, we concluded "that there is sufficient evidence in the record to support the Board's finding that the rubble landfill activities will be 'substantially detrimental' to the St. James church and graveyard." *Id.*

B. Detrimental Impacts on the Health and Welfare of the People in the Gravel Hill Community.

In the proceedings before the Board, the Opponents averred that the rubble landfill would adversely affect the property in the surrounding area. *Id.* We described testimony before the Hearing Examiner, concluding that "[t]he evidence of decreased vegetation and increased diesel fumes is sufficient to support a finding that the rubble landfill would negatively affect

the health and welfare of the individuals in the surrounding area." *Id.* at 33. Concerning the testimony from 14 individuals who live or attend church in the area of Gravel Hill Road, we found the Opponents' characterization to be accurate: "[t]he individuals who testified explained how permitting a rubble landfill to operate in their community will interfere with the enjoyment of their homes and yards through the introduction of increased traffic, noise, dust, vermin, and general unpleasantness of having a landfill in close proximity to their homes." *Id.*

C. Traffic Conditions Along Gravel Hill Road.

Concerning traffic impacts, we commented that "[a]ccording to the parties' stipulation of facts, 'MRA anticipates that approximately 50 trucks per day will enter Gravel Hill Road[,]'" which, according to the County, represented "virtually a 50-fold increase from the non-existent [traffic] that presently exists on the road." *Id.* We noted that although MRA's traffic expert, Jeffrey Lawrence, testified that the increased truck traffic "would only add a 12.5 second increase to time spent at the traffic intersection and would not jeopardize the safety of the community[,]" Mr. Lawrence admitted that he did not know how many children lived along the road, did not know where and how many school buses stopped along the road, and testified that in reaching his conclusion, he did not take into consideration any activities that take place at the public park, St. James AME Church, or graveyard. *Id.* at 33–34.

From the testimony, we discerned that the "school bus issue—rather than the sheer number of vehicles passing through—. . . formed a key component of the hearing." *Id.* at 34. We commented that one resident testified that "four different school buses stop along Gravel Hill Road" at least twice a day, and that parents and grandparents testified that "they fear for the safety of their children crossing the street in light of the 50 additional trucks crossing their road." *Id.* at 34. We noted that MRA failed to address the child safety concerns, and we determined that "there was sufficient evidence to support the Board's findings and conclusion in favor of the Appellees." *Id.*

D. Conclusions with Respect to the Variance Standards.

In conclusion, we noted that the "Board rested its decision to deny all of these requested variances because [MRA] did not meet the second requirement of [the Harford County Code][ ] Section 267-11(A)(2) that each 'variance will not be substantially detrimental to adjacent properties.' " *Id.* We concluded "that there was sufficient evidence, with respect to each requested variance, to support the Board's conclusion." *Id.* Accordingly, we upheld the Board's denial of the variances. *Id.*

Case No. 144 Issues—Preemption, Constitutional Claims, and Estoppel Claims

In Case No. 144, MRA advanced several legal theories as to why, under the circumstances, Bill 91-10

could not be applied to the Property. *Id.* at 35. We summarize each argument presented by MRA in *MRA IV*, and our analysis and holdings, as follows.[5]

A. Preemption.

First, MRA contended that Harford County was preempted from enacting zoning laws that conflict with the state's comprehensive statutory scheme for permitting rubble landfills. *Id.* at 36–37. We rejected this contention, explaining that MRA's argument conflates zoning with permitting. *Id.* at 37–41. We explained that although state law gives the State government the authority to issue permits for rubble landfills, the Express Powers Act "clearly contemplates zoning as an activity that exists in a sphere separate from the operations of State level regulation." *Id.* at 38. We concluded that MRA's preemption argument failed because it did not account for the dual nature of the zoning and permitting processes. *Id.* at 40–41 (citing *Ad + Soil, Inc. v. Cty. Comm'rs of Queen Anne's Cty.*, 307 Md. 307 (1986)). We recognized that zoning and permitting "perform different functions and can occur in tandem and with different results." *Id.* at 44. We concluded that the "County's right to enact and enforce

[5] We have not summarized MRA's contentions that the rubble landfill use constituted a valid non-conforming use, that it was entitled to a grading permit, or that its 1989 site plan approval caused its rights to vest. These arguments were summarily discussed and rejected (*see Md. Reclamation Assocs. v. Harford Cty.*, 414 Md. 1, 63–64 (2010) ("*MRA IV*")) and are not germane to the issues presented in this case.

zoning regulations is not preempted by the state statute governing landfills." *Id.*

B. Constitutional Issues.

1. Vested Rights.

MRA contended that Harford County was precluded by the United States Constitution and 42 U.S.C. § 1983, and the Maryland Constitution and the Maryland Declaration of Rights, from applying county zoning regulations enacted or revised after MDE began processing Phase II of MRA's rubble landfill permit application for its Property. *Id.* at 35. MRA's contention rested on its argument that it had a vested right in its prior county zoning approval to proceed with Phases II and III of MDE's rubble landfill permitting process. *Id.* at 45–46.

Based upon the facts that were established in the record, we held that the Board applied the correct principles of law in determining that *MRA had not established a vested right to use its property for a rubble landfill* under the applicable zoning laws when the permitting process had commenced. *Id.* at 45–50. Writing for this Court, Judge Adkins noted that the Court has set forth a "clear standard for determining when a person has obtained a vested right in an existing zoning use:"

> Generally, in order to obtain a vested right in an existing zoning use that will be protected against a subsequent change in a zoning ordinance prohibiting that use, the owner must

> initially obtain a valid permit. Additionally, in reliance upon the valid permit, the owner must make a substantial beginning in construction and in committing the land to the permitted use before the change in zoning ordinance has occurred.

Id. at 44–45 (citing *Powell v. Calvert Cty.*, 368 Md. 400, 411–12 (2002)) (quoting *O'Donnell v. Bassler*, 289 Md. 501, 508 (1981)). MRA argued that it had a vested right to use its property for a rubble landfill because it: (1) "made a substantial change of position in relation to the land (i.e., it purchased the land after it received zoning and [SWMP] approval)"; (2) "made substantial expenditures (it spent over a million dollars in land acquisition, engineering and legal fees)"; and (3) "incurred substantial obligations [by] proceed[ing] with the engineering development plans for Phases II and III of the State's permitting process[]." *Id.* at 45.

We held that the Hearing Examiner correctly rejected MRA's contention that its previous expenditures created a vested right, and that the Examiner relied upon "clear Maryland precedent on the issue." *Id.* (citing *Ross v. Montgomery Cty.*, 252 Md. 497, 506–07 (1969) (holding that expenditures on architectural planning do not create vested rights) and *Cty. Council for Montgomery Cty. v. District Land Corp.*, 274 Md. 691, 707 (1975) (holding that one million dollars in expenditures and a valid building permit did not create a vested right in a previous zoning classification of the land at issue)).

We observed that MRA "attempts to carve out a new category of use that will grant it 'a vested right in a County zoning approval in the context of a State-controlled permitting process,'" which is in essence, a vested right in zoning approval. *Id.* Rejecting MRA's argument that it had a vested right in the zoning in effect at the time that it sought its initial permit, "[w]e follow[ed] many decades of Maryland law in holding that MRA needs more than a state permit and site plan approval in order to have a vested right." *Id.* at 46.

We concluded that the Hearing Examiner's findings, which were subsequently adopted by the Board, were supported by substantial evidence in the record, and both applied the correct principles of law to determine that MRA had no vested right to use its Property as a rubble landfill. *Id.* at 49–50.

2. Whether the Application of Bill 91-10 to MRA was Arbitrary and Capricious.

MRA contended that Bill 91-10 unfairly targeted MRA and that Harford County's application of Bill 91-10 to MRA was arbitrary and capricious. *Id.* at 50. We rejected this argument, holding that there was "sufficient evidence on the record to support the Board's factual findings under the 'substantial evidence' standard." *Id.* We noted that there were four other proposed landfill projects at the time Bill 91-10 passed, some of which were also negatively affected. *Id.* at 50–51. We observed that "the record is replete with

complaints of residents who lived near these [other] landfills. It is not surprising that the result of this public outcry was a tightening of the zoning laws with respect to rubble landfills." *Id.* at 51.

MRA argued that "because of the animus towards the proposed rubble landfill, the County singled out MRA's proposal when passing Bill 91-10 and point[ed] to testimony indicating that the County was poised to stop MRA in its efforts." *Id.* We pointed out that we had *previously rejected this argument* in *MRA II* and brought cases to MRA's attention regarding the motivation of legislators. *Id.* (citing *MRA II*, 342 Md. at 505 n.15). We reiterated that "'a judiciary must judge by results, not by the varied factors which may have determined legislators' votes. We cannot undertake a search for motive.'" *Id.* (quoting *Daniel v. Family Sec. Life Ins. Co.*, 336 U.S. 220, 224 (1949)). We also pointed out that: "It is well-settled that when the judiciary reviews a statute or other governmental enactment, either for validity or to determine the legal effect of the enactment in a particular situation, the judiciary is ordinarily not concerned with whatever may have motivated the legislative body or other governmental actor." *Id.* (quoting *Workers' Comp. Comm'n v. Driver*, 336 Md. 105, 118 (1994)). Based upon established case law, we repeated that "we shall not delve into the motives of legislators when there is ample evidence that Bill 91-10 was directed at landfills in general and was emergency legislation because of the great public concern over all of the proposed landfills at the time." *Id.*

C. Estoppel.

MRA argued that Harford County was estopped from applying Bill 91-10 to its Property, resting its argument both on principles of equitable estoppel and zoning estoppel. *Id.* at 52.

1. Equitable Estoppel.

Turning to MRA's equitable estoppel contention, we noted that in *Hill v. Cross Country Settlements, LLC*, 402 Md. 281, 309 (2007), we provided the general definition of equitable estoppel:

> Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse and who on his part acquires some corresponding right, either of property, of contract, or of remedy.

MRA IV, 414 Md. at 52. We observed that, although there are cases where estoppel may be applied to a municipal corporation, such "examples are scarce." *Id.* We further determined that MRA's reliance on *Rockville Fuel & Feed Co. v. City of Gaithersburg*, 266 Md. 117 (1972), was misplaced. *MRA IV*, 414 Md. at 52. We explained that the Court's primary analysis in that case was that the "doctrine of estoppel would appear

applicable to this case *only if . . . Plaintiff had a vested right. . . .*" *Id.* at 53 (quoting *Rockville Fuel*, 266 Md. at 135) (emphasis in original). Once again, we reiterated our vested rights holding that "with only a permit, land purchase, and engineering studies, *MRA has no vested rights in the property at issue.* As such, *Rockville Fuel* does not support the notion that the county is estopped under the circumstances of this case." *Id.* (emphasis added). We explained that *Rockville Fuel* did not stand for the proposition that "the mere purchase of land in reliance on existing zoning is itself sufficient to create an estoppel that would preclude a change in the zoning, regardless of whether the zoning authority knew of the landowner's plans. Indeed, . . . we consider such a proposition unwise." *Id.*

2. Zoning Estoppel.

MRA urged us to hold that specific principles of zoning estoppel applied thereby preventing Harford County from applying Bill 91-10 to its Property. *Id.* at 54. We noted that in *Sycamore Realty Co. v. People's Counsel of Baltimore County*, 344 Md. 57, 64 (1996), we acknowledged the application of the doctrine of zoning estoppel in some other states, without recognizing it in Maryland:

> A typical zoning estoppel scenario arises when the government issues a permit to a citizen that allows him or her to develop property in some way. Commonly, after the citizen has incurred some expense or has changed his or her position in reliance upon the permit,

> the property for which the permit was granted is rezoned so that the citizen's intended use is illegal. In such a situation, many courts allow the citizen to assert zoning estoppel as a defense to the government's attempt to enjoin the property use that violates the new zoning scheme.

The traditional, "black-letter" definition of zoning estoppel is:

> "A local government exercising its zoning powers will be estopped when a property owner,
>
> (1) relying in good faith,
>
> (2) upon some act or omission of the government,
>
> (3) has made such a substantial change in position or incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the rights which he ostensibly had acquired."

Id. at 54 (quoting David G. Heeter, *Zoning Estoppel: Application of the Principles of Equitable Estoppel and Vested Rights to Zoning Disputes*, 1971 Urb. Law Ann. 63, 66 (1971)).

Although we recognized that there may be a circumstance for which the application of zoning estoppel is warranted, we declined to adopt the doctrine in *MRA IV*:

We have not explicitly adopted the doctrine of zoning estoppel, but we recognize that as zoning and permitting processes become more complex, the need for such a doctrine grows. Today, land use is much more highly regulated than it was fifty years ago—environmental concerns abound, and vehicular traffic demands seem to mushroom every year. Thus, a property owner who seeks to build or develop may well incur sizable expenses for experts in engineering, various environmental fields, traffic flow, archeology, etc., before putting a spade into the ground. With increasing public appreciation for open space and environmental protection causing apprehension about new construction, the likelihood a developing landowner will face serious opposition is high. Indeed, a developer faces quite a tortured process. . . .

But we also cannot ignore a local government's responsibility to its residents, and thus, Maryland courts should not apply the doctrine casually. As open space disappears, and scientific knowledge about the adverse environmental impact from people's use of land grows, local governments struggle to balance the legitimate interests and rights of land owners wishing to develop against equally legitimate environmental and community concerns. Due to the delicacy of this balancing act, and the overriding need to protect the public, local government cannot always chart a steady course through the Scylla and Charybdis of these disparate interests. Land developers must understand that, to a

> *limited* extent, the local government will meander, and before they incur significant expense without final permitting, they must carefully assess the risk that the government will shift course. On the other hand, there may be situations in which the developer's good faith reliance on government action in the pre-construction stage is so extensive and expensive that zoning estoppel is an appropriate doctrine to apply.

Id. at 56–57 (emphasis in original).

Despite our recognition that there may be circumstances where we would apply the doctrine, we stopped "short of adopting zoning estoppel in this case as the facts set forth in this record do not support its application." *Id.* at 57–58. We noted that "[f]or decades Maryland has maintained a stricter stance than most states in protecting government's right to downzone in the face of planned construction." *Id.* at 57–58 (citing 9-52D Patrick J. Rohan & Eric Damian Kelly, *Zoning and Land Use Controls* § 52D.03 (2009)). We explained that "[a]lthough we may sometimes adopt a new principle of law in a case in which the facts do not fit the doctrine, the doctrine of equitable estoppel is so fact-specific that it would be imprudent to depart from this history before we are faced with a case presenting circumstances for its application." *Id.* at 58. We stated that "zoning estoppel must be applied, if at all, sparingly and with utmost caution. . . . Squaring with this cautious approach, we conclude that the burden of establishing the facts to support that theory must fall

on the person or entity claiming the benefit of the doctrine." *Id.*

Reviewing the facts in the record, we concluded that "zoning estoppel does not fit these facts because there was no substantial reliance by MRA." *Id.* We noted that "[u]nder the theory of zoning estoppel, if the developer '*has good reason to believe, before or while acting to his detriment, that the official's mind may soon change*, estoppel may not be justified.'" *Id.* (emphasis in original) (quoting Robert M. Rhodes, et al, *Vested Rights: Establishing Predictability in a Changing Regulatory System*, 13 Stetson L. Rev. 1, 4 (1983)). "At the heart of establishing 'good faith' is proof that the claimant lacked knowledge of those facts that would have put it on sufficient notice that it should not rely on the government action in question." *Id.* (citing Heeter, 1971 Urb. Law. Ann. at 77–82).

We determined that "[m]any facts were available to MRA at the time of its February 1990 purchase of the Property that should have alerted them to the real possibility that its plans for a rubble landfill would not come to fruition." *Id.* at 59. Specifically, we pointed out that, on November 14, 1989, when the County Council voted for the inclusion of the Property into the SWMP by a favorable vote of four council members, two members abstained because they felt that they had inadequate information, and one member abstained because his son was the president of MRA. *Id.* We noted that the inclusion in the SWMP "was achieved by a fragile majority, and MRA knew, as did the Council when it voted, that MRA had no permit from MDE and many

additional steps had to be taken before MRA could actually construct the rubble landfill." *Id.* We commented that "[i]nclusion of the Property in the County SWMP was a necessary, but not a sufficient step in the process of obtaining a state rubble fill permit from MDE." *Id.* Indeed, we noted that at the November 14 hearing, the Council President told MRA that "what we are doing tonight is approving a process. We are not exactly approving the landfill site. We are approving a step in a process." *Id.*

We pointed out that MRA's president acknowledged that at the public hearing before the Hearing Examiner "there was 'strong' public opposition to the rubble landfill by 'hundreds' of persons at the November 7 and 14, 1989 hearings." *Id.* We observed that the composition of the Council changed, and that these events occurred before MRA closed on its purchase on February 9, 1990. *Id.* We also noted that the Hearing Examiner found that the inclusion of the Property in the SWMP was debated further at a County Council meeting on February 6, 1990—three days prior to MRA's settlement. *Id.* at 60.

Additionally, we explained that "the closing on MRA's purchase of the Property is not the definitive mile-marker in a zoning estoppel analysis. Generally, purchase of land, by itself, is insufficient to constitute substantial reliance." *Id* at 60–61 (internal citations omitted). We reasoned that "[t]o hold otherwise would mean that a purchaser could lock in the zoning of any parcel simply by the act of purchasing property and asking for a permit." *Id.* at 61. We stated that:

> For us to decide that the good faith reliance element of zoning estoppel is established by proof that an entity purchases land for the purpose of constructing a highly controversial rubble landfill based on a vote by the County Council approving one step in the State permitting process, while knowing that the new membership of [the] County Council likely opposes that use, would disregard the caution with which we approach such a doctrine.

Id.

We concluded that MRA "must prove substantial reliance by something other than its purchase of the [Property]." *Id.* MRA attempted to do so by "focusing on the expenses it incurred for engineering fees during the period of its alleged good faith reliance." *Id.* We noted that "[a]lthough MRA asserts in its brief that, relying on the County's action, it 'proceeded to spend over a million dollars on the purchase of the property and on engineering fees[,]' it gives us no extract references to support this statement." *Id.* Specifically, we pointed out that the land purchase cost of $732,500 was insufficient to prove detrimental reliance, and that MRA "gives us no specifics about the balance of the alleged costs." *Id.* Indeed, we added that we had "searched the record extract ourselves," and could only definitely point to $25,000 that had been spent on engineering fees between August 1989 and November 20, 1989, and that the record "does not suggest, let alone prove, that the $25,000 was spent in reliance on the vote for inclusion in the SWMP at the November 14 hearing." *Id.* at 61–62.

We stated that:

> In short, all we glean from the record is that MRA closed on the land on February 6, 1990, after the [C]ouncil's November 14, 1989 vote to include the Property in the SWMP. There was insufficient evidence to show how much, if any, of the engineering fees were incurred after and in good faith reliance upon the results of the November 14 hearing. Bald allegations and general testimonial statements that MRA spent $300,000 on engineering fees are simply insufficient to meet MRA's burden to prove the fact and extent of its reliance on the County Council's action.

Id. at 63. Accordingly, we held that "MRA has failed to establish the necessary good faith reliance on the County Council's vote to include the Property in its SWMP either through purchase of the property or engineering expenses, or both." *Id.* Therefore, we concluded that "MRA has not proven zoning estoppel against the County according to the criteria used in states that have adopted that doctrine." *Id.*

The Epilogue to Our Prequel

To summarize our holdings in *MRA IV* on MRA's substantive claims, we held that: (1) Harford County was not preempted from enacting zoning laws addressing rubble landfills; (2) MRA did not have a constitutionally protected vested right to operate a rubble landfill based upon prior county zoning approval; (3) the application of Bill 91-10 to MRA's Property was not

arbitrary or capricious, and MRA did not have any substantive or procedural due process right in a rubble fill operation under the Maryland Constitution, the Maryland Declaration of Rights, or 42 U.S.C. § 1983; and (4) the County was not estopped from applying Bill 91-10 to MRA's Property because MRA had no vested right. Additionally, we declined to adopt the zoning estoppel doctrine, and further determined that, even if we were inclined to adopt the doctrine, MRA had not proven the zoning estoppel elements according to the criteria used in states that had adopted the doctrine. *MRA IV*, 414 Md. at 36–64. This Court also upheld the Board's denial of the variance requests, under the variance standards set forth in the Harford County Code. *Id.* at 24–35.

As first noted by Judge Eldridge in *MRA II*, conspicuously absent from the host of claims asserted by MRA was any claim that the application of Bill 91-10, and a denial of a variance to operate a landfill, would deprive MRA of all beneficial use of its Property, thereby creating an unconstitutional taking without just compensation in violation of § 40 of Article III of the Maryland Constitution. *MRA II*, 342 Md. at 489.

B. Proceedings in this Case

Almost six years after the denial of its variance by the Board of Appeals and over two-and-one-half years after this Court's decision in *MRA IV*, in February 2013, MRA filed suit against Harford County. The Complaint alleges a "cause of action for inverse

condemnation" arising from the County's actions precluding MRA from operating a landfill. MRA sought just compensation from a jury pursuant to Article III, § 40 of the Maryland Constitution, based upon "the deliberate actions of the County Council and the County which unlawfully deprived MRA of the beneficial use of its Property by precluding it from utilizing its MDE permit to operate a rubble landfill on its Property in Harford County."

A review of MRA's Complaint, and the testimony, evidence, and arguments presented to the jury over the course of a two-week trial, reflect that the building blocks of MRA's "takings" claim arise out of the same operative facts and legal arguments, *which this Court specifically rejected* in *MRA IV*. In a nutshell, MRA's "takings theory" is that: (1) MRA had a constitutionally protected right to operate a rubble landfill and the County's adoption of Bill 91-10 interfered with that right, thereby entitling MRA to compensation for its "investment-backed expectation to build a rubble fill on the property"; and (2) the County's actions in adopting Bill 91-10 were undertaken with an express intention to deprive MRA of its protected interest in operating a rubble landfill. Below, we point out a few examples of MRA's claims, testimony, and argument presented in this case that are in direct contrast with our express holdings in *MRA IV*.

MRA's Theory Submitted to the Jury was that Bill 91-10 was Arbitrary and Capricious

MRA alleged in its Complaint that Bill 91-10 was "made applicable to the Property for the purpose of depriving MRA of the beneficial use of its Property" and that the "County's actions over many years constituted arbitrary and capricious *post hoc* zoning changes specifically and intentionally targeted and aimed at MRA to prevent MRA from operating a rubble landfill on its Property."

MRA further alleged that the County violated its due process rights arising under the Maryland Constitution and the Maryland Declaration of Rights, asserting that:

> The County's actions and inactions . . . were outrageous, egregious, callous, irrational, arbitrary[,] capricious[,] and deliberately indifferent governmental acts in violation of the due process clauses of the Maryland Constitution and the Maryland Declaration of Rights, which assure MRA, as a property owner, the right to be free from arbitrary or irrational zoning and government actions.

At trial, MRA called its expert Robert Lynch, a former Harford County employee and a practicing attorney, to testify that in his view, he considered the adoption of Bill 91-10 as "targeting MRA." During closing arguments, counsel for MRA argued to the jury that the adoption of Bill 91-10 "was a devious scheme concocted by the County to make sure that [MRA's President,] Mr. Schaefer, and MRA would never have a

rubble fill on this property. But the County was careful. They were trying to cover it up. But we figured it out."

The allegations in MRA's Complaint, as well as testimony, and arguments presented at trial, which included its characterization of the County's application of Bill 91-10 to MRA's Property, and its assertions of improper legislative motives, were *unequivocally rejected by this Court* and were inconsistent with our holding in *MRA IV*. *MRA IV*, 414 Md. at 50–51 (upholding the Board's rejection of MRA's argument that the application of Bill 91-10 to MRA's Property was arbitrary and capricious, or was enacted to target MRA, noting that the record reflected that the Bill applied to several other rubble landfills in the County). We rejected—not once, but twice—MRA's argument that the County singled out MRA's Property when it passed Bill 91-10. *See MRA IV*, 414 Md. at 51 (noting that in *MRA II*, we brought cases to MRA's attention regarding the motivation of legislators and reiterated that this Court would not delve into the "motives of legislators when there is ample evidence that Bill 91-10 was directed at landfills in general . . . and the great public concern over all of the proposed landfills at that time."). Given our holding in *MRA IV*, it was improper for MRA to present evidence and argument that the application of Bill 91-10 was arbitrary or capricious, or that the County had "devious motives" and was engaged in a "cover up." However, this was the bread and butter of MRA's case.

MRA's Testimony and Arguments Related to a Vested or Constitutionally Protected Property Right to Operate a Rubble Landfill

Although MRA's Complaint does not use the phrase "vested right," MRA's takings theory was premised upon MRA having a vested right[6] or constitutionally protected interest in the operation of a rubble landfill. During closing, counsel for MRA repeatedly argued to the jury that MRA had presented "overwhelming [evidence] that we had a reasonable investment-backed expectation in this property to build and operate a rubble fill," and that the County interfered with that right by enacting Bill 91-10. These legal arguments directly contradict our holding in *MRA IV* that MRA did *not have* a vested right (*i.e.*, a constitutionally protected interest) in a rubble fill operation, thereby giving MRA a due process or takings claim arising from such a right.[7] *MRA IV*, 414 Md. at 44–50, 52–63.

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[6] A "vested right" has been described as

> the right to initiate or continue the establishment of a use or construction of a structure which, when completed, will be contrary to the restrictions or regulations of a recently enacted zoning ordinance. If a vested right to initiate the use or complete construction is found to exist, the use or structure will generally be allowed to continue as a protected nonconforming use.

4 *Rathkopf's The Law of Zoning and Planning* § 70:2 (4th ed. Rev. 2019) (hereinafter "*Rathkopf*").

[7] Throughout this case, MRA has combined two legally separate and distinct constitutional takings theories. *First*, MRA claimed that it had a legally compensable vested right to operate a rubble landfill under the Harford County Code arising from the Property's inclusion in the SWMP and its Phase I permit, and MRA's alleged reliance on those conditions when it acquired the

It was error for the circuit court to allow a jury to determine just compensation where this Court previously held that no such constitutionally protected right existed. *See Neifert v. Dep't of Env't*, 395 Md. 486, 522 (2006); 4 *Rathkopf's The Law of Zoning and Planning* § 70:3 (4th ed. Rev. 2019) ("*Rathkopf*") (explaining that "[w]hether a vested right exists under a particular state's law is often an important issue in court adjudication of constitutional due process and takings claims. *If a court finds under the facts of a particular case that a vested right does not exist, the plaintiff owner or developer may be held not to have secured under state law a 'property interest' protected by these constitutional guarantees*") (emphasis added).

With respect to the damages arising from the alleged unlawful taking of its Property, MRA was permitted, over the County's objection, to present

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Property and incurred additional professional expenses and fees in connection with permitting activities. *Second*, if MRA had no legally compensable or vested right to operate a rubble landfill, then MRA claims that the application of Bill 91-10 as applied to its Property denied it of all beneficial use, thereby entitling MRA to just compensation under Article III, § 40 of the Maryland Constitution. MRA's blending of these constitutional theories under a general takings umbrella was legally incorrect, given our holding in *MRA IV* that MRA had no vested or constitutionally protected interest in a rubble landfill operation. *See Neifert v. Dep't of Env't*, 395 Md. 486, 522 (2006) (explaining that "[i]n order to make a successful claim under the Takings Clause, appellants must first establish that they possess a constitutionally protected property interest"); Rathkopf § 70:3 (explaining that where no vested right is found to exist, dismissal of constitutional claims is appropriate). However, we will not address this point further, given our holding that MRA failed to exhaust its administrative remedies.

valuation testimony based entirely on the proposed landfill's projected revenues and capitalized profits, which MRA's expert asserted the landfill purportedly would have generated. MRA offered no expert testimony on the fair market value of the Property. As reflected on the verdict sheet, the jury found that "MRA's inability to operate a rubble landfill" was a "regulatory taking" and awarded MRA damages in the amount of $45,420,076.

Harford County filed an appeal to the Court of Special Appeals. On appeal, the intermediate appellate court held that MRA exhausted its administrative remedies, but that MRA's takings claim is barred by the statute of limitations because it was filed more than three years after it accrued on June 5, 2007, the date of the Board's final decision denying MRA's variance requests. *Harford Cty. v. Md. Reclamation Assocs., Inc.*, 242 Md. App. 123 (2019).

MRA petitioned for writ of *certiorari*, and Harford County filed a conditional cross-petition for writ of *certiorari*. *Md. Reclamation Assocs., Inc. v. Harford Cty.*, 466 Md. 309 (2019). We granted *certiorari* to consider the questions presented in the petition and conditional-cross petition, which we have reordered:

1. Should MRA's takings claim be dismissed based on MRA's failure to raise this constitutional issue in any administrative proceeding?

2. Is MRA's takings claim barred by the statute of limitations when it was filed

more than three years after the final administrative agency decision denying MRA's variance requests?

3. Did the Board's decision prohibiting a proposed rubble landfill to protect the public constitute a taking for which compensation is due?

4. Did the jury's damages award of more than $45 million as compensation for an unconstitutional taking contravene Maryland law when the damages are not the fair market value of MRA's Property but are, instead, the capitalized profits of a hypothetical business?

We answer question 1 in the affirmative. Given our holdings concerning question 1, we shall not reach questions 2 through 4.

II. DISCUSSION

A. Parties' Contentions[8]

The County argues that MRA's takings claim is subject to and barred by the same administrative exhaustion requirement which resulted in the dismissal of MRA's constitutional and non-constitutional claims in *MRA II* and *MRA III*. The County contends that under this Court's jurisprudence, including *MRA II* and *MRA III*, this Court has consistently taken the position that constitutional issues, including an allegation that

[8] Because we do not reach questions 2 through 4, we shall not discuss the parties' contentions related to those questions.

the application of statute or legislation is unconstitutional as applied to a particular property, must be raised and initially decided in the same statutorily prescribed administrative proceedings. The County asserts that, because MRA never raised its constitutional takings claims as part of the Board of Appeals' administrative proceeding, it failed to exhaust its administrative remedies and therefore cannot bring a separate action raising these arguments in this matter.

In response to the County's exhaustion argument, MRA contends that its takings claim was not subject to the exhaustion doctrine and argues that there is no case law which supports the proposition that a landowner must bring a takings claim for just compensation *in*, as opposed to *after*, an administrative proceeding.

B. Standard of Review

The issue presented involves a pure question of law. To determine whether the trial court's decision was legally correct, "we give no deference to the trial court findings and review the decision under a *de novo* standard of review." *Lamson v. Montgomery Cty.*, 460 Md. 349, 360 (2018). "Whether a plaintiff must exhaust administrative remedies prior to bringing suit . . . is a legal issue on which no deference is due to the lower court and which an appellate court may address even if a lower court did not." *Falls Road Cmty. Ass'n v. Baltimore Cty.*, 437 Md. 115, 134 (2014). Therefore, we

review the merits of the question presented concerning exhaustion of administrative remedies *de novo*.

C. Analysis

We shall first address the County's assertion that MRA failed to exhaust its administrative remedies because issues concerning primary jurisdiction and exhaustion are treated like jurisdictional questions. *Bd. of Educ. for Dorchester Cty. v. Hubbard*, 305 Md. 774, 787 (1986). Indeed, "[t]his Court has pointed out, time after time, that because of the important public policy involved, the Court will address *sua sponte* the related issues of primary jurisdiction, exhaustion of administrative remedies, [and] finality of administrative decisions. . . .". *Renaissance Centro Columbia, LLC v. Broida*, 421 Md. 474, 487 (2011).

The County alleges that MRA was required to raise its takings claim in an administrative proceeding before it could seek just compensation in the circuit court. For the reasons set forth herein, we agree.

Takings Claims—They Aren't All the Same

Article III, § 40 of the Maryland Constitution provides: "The General Assembly shall enact no Law authorizing private property, to be taken for public use, without just compensation, as agreed upon between the parties, or awarded by a Jury, being first paid or tendered to the party entitled to such compensation." Section 40 "has been determined to 'have the same

meaning and effect in reference to an exaction of property, and [ ] the decisions of the Supreme Court on the Fourteenth Amendment are practically direct authorities.'" *Litz v. Md. Dep't of Env't*, 446 Md. 254, 266 (2016) (footnote omitted) (quoting *Bureau of Mines v. George's Creek Coal & Land Co.*, 272 Md. 143, 156 (1974)). Although this constitutional provision covers eminent domain actions, it also applies to inverse condemnation claims. *Id.*

An inverse condemnation claim is "characterized as a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted." *Id.* (quoting *Coll. Bowl, Inc. v. Mayor & City Council of Baltimore*, 394 Md. 482 (2006) (additional citations omitted)). "Essentially, a plaintiff may 'recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency.'" *Id.* (quoting *Coll. Bowl, Inc.*, 394 Md. at 489).

An inverse condemnation claim may arise in a number of ways:

> [T]he denial by a governmental agency of access to one's property, regulatory actions that effectively deny an owner the physical or economically viable use of the property, conduct that causes a physical invasion of the property, hanging a credible and prolonged threat of condemnation over the property in a way that significantly diminishes its value, or . . .

> conduct that effectively forces an owner to sell.

Coll. Bowl, Inc., 394 Md. at 489 (citing *Amen v. City of Dearborn*, 718 F.2d 789 (6th Cir. 1983)).[9]

Because every governmental action underlying an asserted takings claim is not the same, it is critical that we analyze the takings claim within our jurisprudence specific to the type of government action that is alleged to create a constitutional taking. Here, MRA is asserting a non-possessory regulatory taking arising from the adoption and application of a zoning regulation. Accordingly, we examine MRA's takings claim under our case law specific to regulatory takings claims arising out of the application of zoning regulations.

Regulatory Takings Claims Arising from the Application of Zoning Regulations

The United States Supreme Court and this Court have repeatedly held that zoning regulations are a valid exercise of a government's police power so long as the limitations imposed are in the public interest and are substantially related to the health, safety, or general welfare of the community. *See*, *e.g.*, *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 125–26 (1978) ("[I]n instances in which a state tribunal reasonably concluded that 'the health, safety, morals, or

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[9] In addition to the above-described governmental conduct, we have held that an inverse condemnation claim may arise through governmental inaction in the face of an affirmative duty to act. *See Litz v. Dep't. of Env't*, 446 Md. 254, 273 (2016).

general welfare' would be promoted by prohibiting particular contemplated uses of land, [the Supreme Court] has upheld land-use regulations that destroyed or adversely affected recognized real property interests. . . . Zoning laws are, of course, the classic example, . . . which have been viewed as permissible governmental action even when prohibiting the most beneficial use of the property.") (citations omitted); *Casey v. Mayor & City Council of Rockville*, 400 Md. 259, 279 (2007) ("It is well-settled that the adoption and administration of zoning procedures are an exercise of police power delegated to specific individual political subdivisions and municipalities of the State."); *Anne Arundel Cty. Comm'rs v. Ward*, 186 Md. 330, 338 (1946) ("[Z]oning, in general, is a valid exercise of the police power.").

As part of the exercise of its police powers, it is appropriate for a local government to adopt comprehensive zoning regulations addressing, *inter alia*, the types of uses that it will permit in a particular zoning district, and bulk, size, area, and height restrictions to ensure compatibility of such proposed uses with the surrounding areas. Zoning matters, such as the adoption of a text amendment applicable to all properties within a zoning district, are legislative functions. *See White v. Spring*, 109 Md. App. 692, 697 (1996) (Cathell, J.), *cert. denied*, 343 Md. 680 (1996) ("The creation of zoning policy is a matter reserved for the legislative body of government; it is neither normally an administrative nor a judicial function."). Here, the specific exercise of police powers involved the Harford County

Council's legislative enactment of zoning regulations to govern rubble landfills.

Bill 91-10—A Valid Exercise of Police Powers

Bill 91-10 consisted of a text amendment to the Harford County Code, which established, among other things, a minimum parcel size of 100 acres for a property proposing to be used as a rubble landfill, and a 1,000-foot buffer from the nearest residence. The Bill applied uniformly to all rubble landfills in the County. In the Hearing Examiner's April 2002 decision, the Hearing Examiner stated that between 1988 and 1991, five rubble landfills were operational or in the planning stages in Harford County. The Hearing Examiner explained that the law was "modeled in large part on zoning legislation that had been enacted the prior year in Anne Arundel County." The Harford County Council had the authority to enact Bill 91-10, which constituted a valid exercise of its police powers.[10] In *MRA IV*, we upheld the County's right to enact Bill 91-10 and to apply it to MRA's Property. *MRA IV*, 414 Md. at 50–51. The legitimacy of Bill 91-10 having been established by this Court in *MRA IV*, and not subject to further judicial proceedings, we turn to whether MRA could maintain an independent takings claim arising from the application of Bill 91-10 to its Property.

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[10] In *Md. Reclamation Assocs., Inc. v. Harford Cty.*, 342 Md. 476, 489 (1996) ("*MRA II*"), we explained that MRA was not making a facial attack of Bill 91-10, and its arguments arose solely from the application of the Bill to its Property.

When Does the Exercise of Police Powers Go Too Far and Create a Regulatory Taking?

As we explained in *Casey v. Mayor & City Council of Rockville*, 400 Md. 259 (2007), "[the] exercise of the local legislature's police power [to adopt zoning regulation] is not absolute . . . and, if it goes too far, may constitute a regulatory taking of the land." *Id.* at 306 (citing *Penn. Cent. Transp. Co.*, 438 U.S. at 127 ("[A] use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose, or perhaps if it has an unduly harsh impact upon the owner's use of the property.")).

The difficulty arises in deciding whether a restriction is an exercise of the police power, or whether the governmental action constitutes an exercise of its eminent domain power. "What constitutes a 'taking of property' under the eminent domain power and what is a reasonable curtailment of the use and enjoyment of one's property not requiring payment of compensation depends upon the facts in each individual case." Stanley D. Abrams, *Guide to Maryland Zoning Decisions*, § 10.01 (5th ed. 2012). "It is an accurate statement to say that every restriction upon the use and enjoyment of property is a 'taking' to the extent of such restriction; but every 'taking' is not a 'taking' in a constitutional sense for which compensation need be paid." *City of Annapolis v. Waterman*, 357 Md. 484, 497

(2000) (citing *Stevens v. City of Salisbury*, 240 Md. 556, 562–63 (1965)).[11]

In *City of Baltimore v. Borinsky*, 239 Md. 611, 622 (1965), we summarized the applicable test for takings where zoning regulations are involved:

> The legal principles whose application determines whether or not the restrictions imposed by the zoning action on the property involved are an unconstitutional taking are well established. If the owner affirmatively demonstrates that the legislative or administrative determination deprives him of *all beneficial use of the property*, the action will be held unconstitutional. But the restrictions imposed must be such that the property cannot be used for any reasonable purpose. It is not enough for the property owners to show that the zoning action results in substantial loss or hardship.

(emphasis added); *see also Casey*, 400 Md. at 307 (collecting cases); *State v. Good Samaritan Hosp. of Md., Inc.*, 299 Md. 310, 324–25 (1984) ("For government restriction upon the use of property to constitute a 'taking' in the constitutional sense, so that compensation

[11] Of course, a takings claim only arises where there is a constitutionally protected property interest. *See Neifert*, 395 Md. at 522. Because this Court held in *MRA IV* that MRA did not have a constitutionally protected vested right to operate a rubble landfill, the only way MRA could have established a constitutional taking was to prove that the application of Bill 91-10 to its Property would deny MRA of all beneficial use of the Property. Because MRA never raised this issue in its decades of litigation, it was not considered by the Board or this Court.

must be paid, the restriction must be such that it essentially deprives the owner of all beneficial uses of the property."); *Pitsenberger v. Pitsenberger*, 287 Md. 20, 34 (1980) ("To constitute a taking in the constitutional sense . . . the state action must deprive the owner of all beneficial use of the property. . . . [I]t is not enough for the property owner to show that the state action causes substantial loss or hardship."); *Pallace v. Inter City Land Co.*, 239 Md. 549, 558 (1965) ("If an owner affirmatively demonstrates that the zoning action deprives him of all reasonable beneficial use of his property, the action will be held unconstitutional, *but the restriction upon the property imposed by the zoning action must be such that the property cannot be used for any purpose to which it is reasonabl[y] adapted.*") (emphasis added).

Stanley Abrams summarizes Maryland law governing takings claims arising from the application of zoning regulations and the precipitous hurdle which the property owner must overcome:

> The applicability of these principles with respect to judicial review of zoning decisions is now firmly established in Maryland. Simply stated, unless a physical taking has occurred, the contention by a property owner that the action of a local zoning authority is confiscatory and thereby constitutes an unconstitutional "taking" of his property will fail unless it can be demonstrated by substantial evidence that the governmental action, decision or requirement deprives him of *all beneficial use of the property and that the property*

> *cannot be used for any other reasonable purpose under its existing zoning.*

Abrams, *Guide to Maryland Zoning Decisions*, § 10.01 (emphasis added).

Applying our long-settled jurisprudence specific to takings claims arising from the application of zoning regulations, for MRA to assert a successful takings claim, MRA was required to prove that the application of Bill 91-10 to its Property deprives it of all beneficial use of the Property and that the Property cannot be used for any other purpose under the existing zoning established in the Harford County Code.

Having established the legal standard that MRA was required to satisfy for a successful takings claim, before we consider whether MRA had the right to present a takings claim to a jury, we must first answer a threshold question—who makes the initial factual determination that a rubble landfill is the only beneficial use that can be made of the Property under the zoning provisions in the Harford County Code? The Hearing Examiner and the Harford County Board of Appeals? Or a jury? Without a factual determination that there are no other beneficial uses that can be made of the Property aside from a rubble landfill under the Harford County Zoning Code, there can be no regulatory taking, and consequently, no right to a jury determination of damages under Article III, § 40 of the Maryland Constitution. Our analysis of this threshold issue takes us full circle to Chapter 1 of our prequel—*MRA II*, where this Court first explained the requirement

that MRA exhaust administrative remedies in connection with the application of Bill 91-10 to its Property.

The Exhaustion Doctrine Applies to All Constitutional Claims Arising from the Application of Zoning Legislation to Property

This case requires us to examine MRA's asserted right to bring a takings claim arising out of the application of a zoning regulation, in the context of our settled and long-standing jurisprudence developed over many decades that requires a litigant to exhaust his or her administrative remedies where the General Assembly has vested original jurisdiction with an administrative agency—in this instance, the Board of Appeals.

Generally, the doctrine of exhaustion of administrative remedies requires that, under circumstances where a party's claim "is enforceable initially by administrative action," the party must "fully pursue administrative procedures before obtaining limited judicial review." *Maryland-Nat'l Capital Park & Planning Comm'n v. Wash. Nat'l Arena*, 282 Md. 588, 602 (1978) (internal citations omitted); *see also Arroyo v. Bd. of Educ. of Howard Cty.*, 381 Md. 646, 661 (2004) (explaining that "[t]he exhaustion of administrative remedies doctrine requires that a party must exhaust statutorily prescribed administrative remedies . . . before the *resolution* of separate and *independent* judicial relief in the courts.") (emphasis in original).

As we explained in *MRA II*, 342 Md. at 494, Harford County is a chartered county, and therefore, is subject to the Express Powers Act, LG § 10-101, *et. seq.*[12] The Express Powers Act, in LG §§ 10-305 and 10-324, provides the zoning authority for all charter counties except Montgomery and Prince George's Counties.[13] Section 10-305 authorizes a charter county to establish a board of appeals and provides that a board of appeals shall have exclusive appellate jurisdiction over, *inter alia*, a variety of adjudicatory zoning matters. Specifically, under the Express Powers Act, LG § 10-305(b), the Legislature has given the chartered counties the authority to establish a board of appeals with

> original jurisdiction or jurisdiction to review the action of an administrative officer or unit of county government over matters arising under any law, ordinance, or regulation of the county council that concerns: (1) an

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[12] Given our volumes of jurisprudence explaining the Express Powers Act, particularly, our discussion of a board of appeals' exclusive appellate jurisdiction arising out of Article 25, § 5(U), it is worth noting that Md. Code (1974, 2013 Repl. Vol, 2019 Supp.), Local Government Article ("LG") § 10-305 was previously codified as Article 25, § 5(U). *See*, *e.g.*, *Holiday Point Marina Partners v. Anne Arundel Cty.*, 349 Md. 190, 198–99 (1998); *MRA II*, 342 Md. at 476, 491–92; *Prince George's Cty. v. Blumberg*, 288 Md. 275, 292–94 (1980). Article 25A, § 5(U) was re-codified without substantive change, in LG § 10-305. *See* 2013 Md. Laws, Chap. 119.

[13] The zoning authority to Montgomery and Prince George's Counties is set forth in the Maryland-Washington Regional District Act ("RDA"), previously codified in Article 28 of the Maryland Code, and codified now in Md. Code (2012, 2019 Supp.), Land Use Article ("LU") § 20-101, *et. seq*.

> application for a zoning variance or exception . . . ; (2) the issuance, renewal, denial, revocation, suspension, annulment, or modification of any license, permit, approval, exemption, waiver . . . , or other form of permission or of any adjudicatory order. . . .

When issuing its decision, the Board of Appeals is required to "file an opinion that shall include a statement of the facts found and the grounds for the decision." LG § 10-305(c). Any person aggrieved by that decision may seek judicial review by the circuit court for the respective county, with a further right to appeal the decision of the circuit court to the Court of Special Appeals. LG § 10-305(d).

Consistent with the authority granted by the Express Powers Act, Harford County has established the Harford County Board of Appeals. Harford County Code § 267-9. The Board is vested with the authority to, *inter alia*, "hear and decide any zoning case brought before the Board and to impose such conditions or limitations as may be necessary to protect the public health, safety, and welfare." Harford County Code § 269-9(B)(1). The Board "may employ Hearing Examiners to hear zoning cases within the jurisdiction of the Board." Harford County Code § 269-9(C). "The Hearing Examiner shall have the authority, duty and responsibility to render recommendations in all cases, subject to final approval of the Board." *Id.* Furthermore, "[p]roceedings before the Hearing Examiner and the Board shall be quasi-judicial in nature and conducted in accordance with the rules of procedure of the Board in

such a manner as to afford the parties due process of law." Harford County Code § 269-9(E). In accordance with the requirements of the Express Powers Act, "[t]he decision of the Board shall be in writing and shall specify findings of fact and conclusions of law." Harford County Code § 269-9(H).

We have repeatedly held in *MRA II*, 342 Md. at 492, and *MRA III*, 382 Md. at 363, as well as numerous other cases, that under the Express Powers Act, where a litigant is attempting to challenge, in a court proceeding, the application of a zoning regulation to his or her property, the litigant must first exhaust administrative remedies. *See*, *e.g.*, *Holiday Point Marina, v. Anne Arundel Cty.*, 349 Md. 190, 198–99 (1998); *Prince George's Cty. v. Blumberg*, 288 Md. 275, 292–294 (1980).

As we explained in *MRA II*, the application of Bill 91-10 to MRA's Property was subject to the exhaustion requirements under the Express Powers Act. *MRA II*, 342 Md. at 491. We held that prior to MRA filing a complaint in the circuit court seeking a declaratory judgment and injunctive relief against Harford County challenging the application of the Bill to its Property, it was required to seek a variance and to exhaust its administrative remedies before the Harford County Board of Appeals. *Id.* at 491–93. In connection with its variance request, we explained that: "under Maryland law, the Harford County Board of Appeals would be authorized and *required to consider any of the constitutional and other issues raised by [MRA] to the extent that those issues would be pertinent in the particular*

proceeding before the Board." *Id.* at 491–492 (emphasis added).

After this Court issued its *second directive* to MRA in *MRA III*, MRA finally applied for a variance. However, it did not present any evidence, nor did it make any legal argument before the Hearing Examiner or the Board of Appeals, that a failure to grant a variance would deprive it of all beneficial use of its Property, which would thereby entitle it to just compensation under Article III, § 40 of the Maryland Constitution.[14]

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[14] The only whiff of evidence that MRA presented during any administrative agency proceeding that comes close to a takings assertion came in the form of expert testimony from Robert S. Lynch, an attorney and former Director of Planning and Zoning in Harford County. Mr. Lynch did not testify in the variance proceeding—he testified in the 2001 hearing which challenged the Zoning Administrator's interpretation of Bill 91-10 and its application to MRA's property. During the hearing, Mr. Lynch testified that because of the Property's physical condition, which he described as "likening it to a moonscape," his opinion was that the Property would have to be reclaimed by utilizing it as a rubble landfill. Mr. Lynch testified that the Property "does not have any economically beneficial use other than as a landfill." This testimony was refuted by testimony of Arden McClune, a Harford County employee. As summarized in the Hearing Examiner's Decision dated April 2002, Ms. McClune testified that she believed there were many other permitted uses that could be made of the property, as well as additional uses that could be permitted by special exception. Ms. McClune testified that some of the other uses "could include: construction services and suppliers, open space, parkland, residential or institutional uses, golf and driving range, [and] shooting range." She "also disagreed with [Mr. Lynch's] earlier testimony that the [P]roperty needed to be reclaimed through rubble." Ms. McClune further testified that she "was in agreement with the affidavit of former Planning Director William Carroll that there were other types of uses that could be

This was a fatal flaw, which prevented any court from considering the matter further. We explain.

Under our zoning jurisprudence, few legal tenets have received greater acceptance than the principle that where a landowner alleges that the application of a zoning regulation to his or her property is invalid or unlawful, all constitutional and non-constitutional claims must be raised within the context of the administrative proceeding. *MRA III*, 382 Md. at 366; *MRA II*, 342 Md. at 490–92; *see also Prince George's Cty. v. Ray's Used Cars*, 398 Md. 632, 651 (2007) (dismissing a landowner's declaratory judgment action alleging constitutional violations arising from the application of a zoning regulation to its property on the ground that the landowner was required to invoke and exhaust its administrative remedies, explaining that "[n]ot only are administrative agencies fully competent to decide constitutional issues, but this Court has consistently held that exclusive or primary remedies must be pursued and exhausted, before resort to the courts,

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made of the MRA site." Although this testimony concerning alternative uses was provided at the initial administrative hearing, MRA never made a takings claim in that proceeding. Accordingly, neither the Zoning Administrator, Hearing Examiner nor the Board made any findings concerning a takings claim. *See Md. Reclamation Assocs., Inc. v. Harford Cty.*, 382 Md. 348, 357–68 (2004) ("*MRA III*") (summarizing the Hearing Examiner's nine findings and legal conclusions). Additionally, MRA never presented any evidence or legal argument during the variance proceeding that the denial of a variance would create an unlawful taking. Accordingly, the claim was not presented to the Hearing Examiner or the Board as part of the variance case, and therefore, was not considered by this Court in *MRA IV*.

in cases presenting constitutional issues."); *Holiday Point Marina*, 349 Md. at 199 ("This Court has consistently held over the past fifty years that the question of a zoning ordinance's validity, as applied to the property involved, is an appropriate issue for an administrative zoning agency."); *Ins. Comm'r v. Equitable Life Assurance Soc'y*, 339 Md. 596, 619 (1995) (explaining that "where a party is not challenging the validity of the statute as a whole, but is arguing that the statute as applied in a particular situation is unconstitutional, and where the legislature has provided an administrative remedy, this Court has regularly held that the constitutional issue must be raised and decided in the statutorily prescribed administrative and judicial review proceedings"); *Arnold v. Prince George's Cty.*, 270 Md. 285, 294–99 (1973) (requiring a property owner, asserting that a zoning ordinance was unconstitutional as applied to his property, to exhaust his administrative remedy); *Hartman v. Prince George's Cty.*, 264 Md. 320, 323–25 (1972) (reviewing numerous cases holding that constitutional arguments must be made in the statutorily prescribed administrative proceedings); *Gingell v. Bd. of Cty. Comm'rs*, 249 Md. 374, 376–77 (1968) (rejecting the plaintiff's argument that she need not exhaust her administrative remedy on the theory that only a court may declare the statute unconstitutional); *Mayor of Balt. v. Seabolt*, 210 Md. 199, 207 (1956) (holding that the zoning appeals board was authorized to grant "'exceptions' . . . by holding the [zoning] ordinance *pro tonto* invalid"); *Hoffman v. Mayor of Balt.*, 197 Md. 294, 305–06 (1951)

("Application for an 'exception' is an appropriate way to raise" the issue of whether a zoning ordinance is invalid).

Nor do our cases carve out any "takings exception" from the exhaustion requirement. In *Prince George's County v. Blumberg*, 288 Md. 275 (1980), this Court reversed a trial court's judgment entered against Prince George's County in favor of the property owners in the amount of $3.6 million because the property owners did not exhaust their administrative remedies under the Express Powers Act and the Prince George's County Code. *Id.* at 282–94. With respect to the property owners' claim that the exhaustion requirements did not apply to takings claims, we explained that: "*This Court has held on many occasions, when faced with a claim of an agency's unconstitutional taking of property, that such issues must still go through the administrative process, particularly when judicial review is provided.*" *Id.* at 293 (emphasis added) (citations omitted).

It is also clear from our jurisprudence concerning unconstitutional takings claims arising from the application of zoning regulations that the Board makes the initial factual determination of whether a property owner can use its property for any other beneficial use, not the courts. *See Poe v. City of Balt.*, 241 Md. 303, 311 (1966) (explaining that where a landowner is not attacking the constitutionality of a statute as a whole, but only its validity as applied to his property, "*the determination of the basic fact—whether the property can be used, under existing circumstances, for any*

reasonable purpose under the zoning classification—is left for primary determination to the expertise of the Board, with full right of appeal to the courts on the questions of law involved.") (emphasis added); *see also Gingell*, 249 Md. at 376 (affirming the dismissal a property owner's constitutional attack on an ordinance because the property owner failed to exhaust administrative remedies, explaining that one of "[t]he reasons for requiring exhaustion of administrative remedies before resorting to the courts are that it is within the expertise of the administrative agency involved to hear and consider the evidence brought before it and make findings as to the propriety of the action requested. . . ."); *Spaid v. Board of Cty. Comm'rs for Prince George's Cty.*, 259 Md. 369 (1970) (board making initial determination of takings claims arising from zoning regulation, subject to court's judicial review); *City of Balt. v. Borinsky* 239 Md. 611 (1965) (board making the initial determination on the property owner's takings claim, subject to court's judicial review). There are several reasons for this exhaustion requirement.

First, the types of uses that can be made of a property involve the application of local zoning regulations to a specific property. Each governmental jurisdiction with planning and zoning authority has the authority to adopt a zoning ordinance, which includes land uses permitted within a particular zoning district, as well as the authority to establish conditions applicable to the particular use designed to protect adjacent properties from potential adverse effects. Maryland appellate

courts have repeatedly held that "[i]n zoning matters, the zoning agency is considered to be the expert in the assessment of the evidence, not the court." *Bowman Grp. v. Moser*, 112 Md. App. 694, 698 (1996); *see also Gingell*, 249 Md. at 375 (noting that one reason for "requiring the exhaustion of administrative remedies before resorting to the courts [is] [ ] that it is within the expertise of the administrative agency involved to hear and consider the evidence brought before it and make findings as to the propriety of the action requested"); *Poe*, 241 Md. 307–08 (explaining that "[i]t is particularly within the expertise of an administrative body such as the Board to marshal and sift the evidence presented in a hearing upon an application for a special exception and to make an administrative finding as to whether . . . the application of the ordinance to the property involved deprives the owner of any reasonable use of it").

Second, the zoning administrative agency—not the court—is vested with the authority to grant the necessary relief on either constitutional or non-constitutional grounds. As discussed in more detail below, where the application of a zoning regulation will deny the landowner of all beneficial use of its property, the Board of Appeals has the authority to grant an administrative remedy in the form of a variance—a constitutional "relief valve"—to avoid a takings claim.

The Use of a Variance in Zoning Regulations—A Constitutional Relief Valve for Takings Claims

In the context of a validly enacted legislative zoning amendment, a variance is an essential tool that can be utilized to address a potential unconstitutional taking. "A variance refers to administrative relief which may be granted from the strict application of a particular development limitation in the zoning ordinance (i.e., setback, area and height limitations, etc.)." *Mayor & Council of Rockville v. Rylyns Enter., Inc.*, 372 Md. 514, 537 (2002) (quoting Stanley D. Abrams, *Guide to Maryland Zoning Decisions*, § 11.1 (3d ed. 1992)); *see also Rathkopf* § 58:1 ("A variance is the right to use or to build on land in any way prohibited by strict application of a zoning ordinance. It is permission given to a property owner to depart from the applicable zoning requirements by constructing or maintaining a building or structure or establishing or maintaining a use of land that otherwise would not be allowed.").[15]

Although different jurisdictions use slightly different standards for granting a variance, there is a common purpose behind allowing variances: The variance is a means of correcting occasional inequities that may

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[15] "A 'use' variance generally permits a land use other than the uses permitted in the particular zoning ordinance . . . while an 'area' variance generally excepts an applicant from area, height, density, setback or sideline restrictions." *Belvoir Farms Homeowners Ass'n, Inc. v. North*, 355 Md. 259, 275 n.10 (1999). Here, a rubble landfill is a permitted use in the AG (Agricultural) Zoning District. MRA was seeking an area variance for relief from the minimum parcel size and setback requirements.

be created under general Euclidean[16] zoning ordinances. Specifically, the variance is an administrative zoning tool that can act as a "safety valve" to avoid the application of an otherwise valid zoning regulation in a manner that could create an unconstitutional taking. *See*, *e.g.*, *Bacon v. Town of Enfield*, 840 A.2d 788, 799 (N.H. 2004) (Nadeau, J., dissenting) (noting that the variance standard "was designed to loosen the

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[16] For a thorough description of "Euclidean" zoning, *see County Council of Prince George's County v. Zimmer Development Co.*, 444 Md. 490, 511 (2015) (Harrell, J.) and *Mayor & Council of Rockville v. Rylyns Enterprises, Inc.*, 372 Md. 514, at 534–35 (2002) (Harrell, J.). As discussed in *Rylyns*, "Euclidean zoning is a fairly static and rigid form of zoning named after the basic zoning ordinances upheld in *Village of Euclid v. Ambler Realty Corp.*, 272 U.S. 365 [ ] (1926)." *Id.* at 534. We summarized the rationale behind Euclidean zoning in *Zimmer:*

> Early zoning ordinances sought to separate incompatible land uses through a method that would become known as "Euclidean" zoning. Under a Euclidean zoning scheme, a zoning authority divides geographically an area into use districts. Certain permitted uses are specified by local ordinance and allowed in particular geographic areas . . . and the zoning assigned to them are then recorded on an official zoning map. The number of classifications that are available to be applied within a district has increased exponentially since the early schemes, but Euclidean zoning remains a basic framework for implementation of land use controls at the local level. Euclidean Zoning aimed to provide stability and predictability in land use planning and zoning. . . . A school of thought evolved that the stability and predictability of Euclidean zoning amounted sometimes to undesirable rigidity.

444 Md. at 511–13 (cleaned up) (internal citations and paragraph breaks omitted). Special exceptions and variances give Euclidean zoning some flexibility. *Id.* at 513–14.

strictures which have made it essentially impossible for a [zoning agency] [], honoring the letter of the law . . . to afford the relief appropriate to avoid an unconstitutional application of an otherwise valid regulation") (internal citations omitted); *Mustang Run Wind Project, LLC v. Osage Cty. Bd. of Adjustment*, 387 P.3d 333 (Okla. 2016) ("A zoning variance . . . granted by a local government entity [is a] [] historic procedure[] designed to . . . act as a safety valve when applying a zoning regulation to prevent governmental restrictions from operating in such a manner that the burden on an individual landowner amounts to a taking.") (cleaned up); *Rathkopf* § 58:1 (explaining that the variance "is a kind of 'escape hatch' or 'safety valve' of zoning administration"); Jonathan E. Cohen, Comment, *A Constitutional Safety Valve: The Variance in Zoning and Land-Use Based Environmental Controls*, 22 B.C. Envtl. Aff. L. Rev. 307, 330 (1995) (explaining how the variance was originally conceived as a means to ensure the constitutionality of zoning ordinances adopted under traditional Euclidean zoning by operating as a "comprehensive zoning's constitutional 'safety valve'" where the application of a zoning regulation would impose an undue hardship on a landowner).

Likewise, this Court has held that a variance is an appropriate land use tool that can be applied by an administrative zoning agency to alleviate a constitutional violation arising out of the application of an otherwise valid zoning regulation. In *Holiday Point Marina*, we explained that under our exhaustion jurisprudence relating to assertions of governmental

takings arising out of zoning regulations, "[w]e have held that, if a restriction under a zoning ordinance cannot constitutionally or validly be applied, this is a proper ground for the administrative agency to grant an exception or a variance." 349 Md. at 199 (collecting cases).[17]

In *Belvoir Farms Homeowners Association v. North*, 355 Md. 259 (1999), we explained the difference in Maryland between the "unwarranted hardship" or "unreasonable hardship" variance standard used in local zoning codes[18] and the unconstitutional takings standard. *Id.* at 275–82. Writing for this Court, Judge Cathell undertook an extensive analysis of the variance tool in administrative zoning proceedings. *Id.* After examining the various judicial interpretations of the "unwarranted" or "unreasonable" hardship

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[17] A "special exception" is another land use tool "that adds flexibility to a comprehensive zoning scheme by serving as a 'middle ground' between permitted uses and prohibited uses in a particular zone." *People's Counsel for Balt. Cty. v. Loyola Coll.*, 406 Md. 54, 71 (2008).

[18] Different local zoning codes and ordinances adopt similar, but slightly different language when describing the "hardship" prong of the variance standard. In *Belvoir Farms Homeowners Association v. North*, 355 Md. 259, 275 (1999), we considered whether the "unwarranted hardship" standard required for a critical area variance was less restrictive than the "unnecessary hardship" or "undue hardship" standard generally applied to "use" variances. We determined that these terms were indistinguishable. *Id.* Similarly, for purposes of our discussion in this case, we find no substantive distinction between the "unwarranted hardship" standard described in *Belvoir Farms*, and the "unreasonable hardship" standard described in the Harford County Code, Chapter 267, § 267-11(A)(2).

standard adopted by other states in the application of their respective variance standards, we explained that "[a]uthorities throughout the country . . . define the unnecessary, unreasonable, unwarranted, or similarly-worded hardship standard to be either the denial of beneficial or reasonable use or the denial of all viable economic use, the unconstitutional taking standard." *Id.* at 281. We stated that "*[i]t is important to note here that the purpose of a variance is to protect the landowner's rights from the unconstitutional application of zoning law.*" *Id.* (emphasis added) (citations omitted). We explained, however, that the fact that "a variance may [] be granted in cases in which [the] application of a particular zoning ordinance would result in an unconstitutional taking of property" does not mean that a variance could not be used to grant relief where the applicable local zoning variance standard required proof of something less than an unconstitutional taking. *Id.*

We held that the "unwarranted hardship" standard, or similar standard, is less restrictive than the unconstitutional taking standard, and determined that the unwarranted hardship standard, and its similar manifestations, are equivalent to the "denial of reasonable and significant use of the property." *Id.* at 282. We also held that "whether a property owner has been denied reasonable and significant use of his property is a question of fact best addressed by the expertise of the Board of Appeals, not the courts." *Id.*

Our holding in *Belvoir Farms* is significant because although we held that the "unwarranted hardship" or similar standard is not as restrictive as the unconstitutional takings standard, we nonetheless reiterated that a variance is a device that may be used to alleviate an unconstitutional taking. 355 Md. at 281. In other words, simply because a board has the authority to grant a variance where the applicant proves *something less* than an unconstitutional taking under an "unwarranted hardship" or "unreasonable hardship" standard, it does not follow that a variance cannot be used to grant relief when the property owner proves a *greater hardship* consisting of an unconstitutional taking of property arising from the application of facially valid zoning regulation. *See*, *e.g.*, *Holiday Point Marina*, 349 Md. at 199 (collecting cases).

City of Baltimore v. Borinsky, 239 Md. 611 (1965), is instructive on the manner in which takings claims are presented to a board of appeals when a property owner asserts that the application of zoning regulations will deny him or her the right to any beneficial use of their property. In *Borinsky*, the property owner filed a special exception seeking to permit the construction of a warehouse on the property. *Id.* at 618. The property had been improved by the property owner's deceased parents by 53 garages, which were rented to neighbors for the storage of automobiles in the 1920s. *Id.* at 617. The property had fallen into disrepair. *Id.* at 618. The property was located in a residential zoning district, but was surrounded by commercial uses, with the exception of row houses

along one boundary. *Id.* As part of its application before the board of appeals, the property owner testified that the property could not be feasibly used for residential purposes. *Id.* at 618–19. The property owner called an architect, who testified that the irregularly shaped lot was not feasible for residential construction. *Id.* at 619. The property owner also presented a developer/real estate expert, who testified that it would be economically unsound to build houses on the lot, which was irregularly shaped, that the surrounding uses had been transformed from residential to commercial uses, and that in his opinion, "it would be 'most difficult' to secure financing for the construction of residential dwellings on the property." *Id.*

The board considered the property owner's takings arguments and denied the requested relief. *Id.* at 620. On appeal, this Court affirmed the board's decision. *Id.* at 627. We noted that "[t]he legal principles whose application determines whether or not the restrictions imposed by the zoning action on the property involved are an unconstitutional taking are well-established." *Id.* at 622. We reiterated the takings standard when the underlying governmental action involves the application of zoning regulations:

> If the owner affirmatively demonstrates that the legislative or administrative determination deprives him of all beneficial use of the property, the action will be held unconstitutional. But the restrictions imposed must be such that the property cannot be used for any reasonable purpose. It is not enough for the

> property owners to show that the zoning action results in substantial loss or hardship.

Id. (citations omitted).

This Court reviewed the testimony of the property owner's witnesses that, in their opinion, the property could not be used economically or feasibly for residential purposes. *Id.* However, we also recognized that the "facts adduced by the evidence must also be considered." *Id.* at 623. In evaluating the evidence, we observed that some of the garages on the property were being rented for storage of building materials and personal property. *Id.* This Court further noted that although many uses in the surrounding area were commercial, there were residential areas in the immediate proximity of the property. *Id.* We recognized that there were "material gaps" in the experts' testimony and reiterated that the burden is on the property owner to show that the "property cannot be used for any reasonable purpose." *Id.* We also explained that the property owner had not presented any evidence that the property could not be used for other permitted uses under the present zoning, such as an apartment building, church, or synagogue. *Id.* at 623–24.

We distinguished this case from other cases, where we found that the expert testimony presented to the board, did, in fact, support a conclusion that the zoning action constituted a taking. *Id.* at 24 (distinguishing *City of Balt. v. Sapero*, 230 Md. 291 (1962) (upholding a board's determination of a taking where the overwhelming commercialization of the area was

undisputed, including an adjacent service station and shopping area across from the lot), and *Frankel v. City of Balt.*, 223 Md. 97, 103 (1960) (upholding the board's determination of a taking where the expert opinion was supported by uncontroverted physical facts)). We explained that "when the expert opinion testimony was not supported by substantial factual evidence, we have held that general claims of economic unfeasibility are not sufficient to prove an unconstitutional taking." *Id.* Based upon our review of the evidence presented by the property owner, we held that "[o]n the record and the authorities, we find that the [landowner] has not sustained the burden of demonstrating that the present zoning of her property and the refusal of the Board to allow an exception constitute an unconstitutional taking." *Id.* at 625.

After considering and denying the property owner's takings claim, the Court proceeded to consider whether the Board erred in denying the requested exception under the standards set forth in the Baltimore City Zoning Ordinance. *Id.* at 625–27. We held that the question of whether to grant or deny the exception was fairly debatable, and that the Board's denial was not arbitrary, unreasonable, or discriminatory. *Id.* at 627. We held that the trial court erred in reversing the Board's action. *Id.*

Where a property owner asserts that the application of a zoning regulation will create a takings claim, *Borinsky* demonstrates how a landowner should present his or her evidence and legal arguments asserting an unconstitutional taking to the board of appeals, in

addition to presenting evidence on the variance or special exception standards adopted by the local jurisdiction. As part of the administrative agency proceeding, the landowner is required to submit evidence and testimony to satisfy his or her heavy burden that the application of the zoning regulation and the denial of a variance will deny the landowner all beneficial use of the property. This evidence will necessarily include "substantial factual evidence" that there are no other permitted uses that can be made of the property, instead of "general claims of economic unfeasibility" which we have held "are not sufficient to prove an unconstitutional taking." *Id.* at 624.

MRA claims that "no case has ever held that a landowner must bring its takings claim for just compensation *in* (as opposed to *after*) an administrative proceeding." MRA also argues that requiring MRA to present its takings evidence and arguments to the Board of Appeals will interfere with its constitutional right to a jury trial because the Hearing Examiner and Board of Appeals are not empowered to award just compensation. MRA contends that "only a jury may decide a takings claim under Article III, Section 40 of the Maryland Constitution." MRA's argument is inconsistent with our wealth of exhaustion jurisprudence, which conclusively establishes the following.

First, all constitutional claims arising out of the application of a zoning regulation must be exhausted at the administrative agency level before a court may consider the claims as part of a petition for judicial review or in a separate proceeding filed under the

original jurisdiction of the court. *See*, *e.g.*, *MRA III*, 382 Md. at 361; *Ray's Used Cars*, 398 Md. at 651 (collecting cases); *MRA II*, 342 Md. at 492; *Holiday Point Marina*, 349 Md. at 199–200 (collecting cases); *Equitable Life*, 339 Md. at 619; *Hartman*, 264 Md. at 323–25 (collecting cases). Our jurisprudence carves out no exception from this requirement for takings claims. To the contrary, our case law requires that takings claims be raised in the administrative proceeding. *See Blumberg*, 288 Md. at 293 (collecting cases).

Second, as part of the administrative proceeding, the administrative agency has original jurisdiction to make the initial determination of whether the application of a zoning regulation to a property, and the denial of a variance to permit the use, will deprive the property owner of all beneficial use of the property. *See*, *e.g.*, *Gingell*, 249 Md. at 375; *Poe*, 241 Md. at 311; *Borinsky*, 239 Md. at 622–25; *Bowman*, 112 Md. App. at 698.[19]

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[19] In rejecting the County's assertion that MRA had not exhausted its administrative remedies, the Court of Special Appeals relied upon *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 737 (1997). *See Md. Reclamation Assocs.*, 242 Md. App. at 144. The intermediate appellate court concluded that once MRA's variance request was denied, MRA's takings claim became "justiciable" and quoted *Suitum* for the proposition that a takings claim is justiciable once "the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations to the particular land in question." *Id.* (quoting *Suitum*, 520 U.S. at 737). The Court of Special Appeals concluded that the County's position was "final [] when the Board denied MRA's requested variances in June 2007." *Id.* at 145. We find *Suitum* to be inapposite to the exhaustion issue presented in this case. In *Suitum*, the "sole question [was][] whether the claim [was] ripe for

Third, where a property owner establishes before the administrative agency that the application of a zoning regulation will deprive the property owner of

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adjudication." *Id.* at 729. Ripeness and exhaustion of administrative remedies principles often overlap, but they are nonetheless distinct. *See Renaissance Centro Columbia, LLC v. Broida*, 421 Md. 474, 485–86 (2001); *MRA II*, 342 Md. at 502–06 (explaining the practical differences between exhaustion of administrative remedies and ripeness and concluding that a zoning ordinance does not deprive the landowner of any concrete property interests when the ordinance does not decide finally the permitted uses of a particular parcel of land). In *Suitum*, the property owner's takings claim arose from a planning agency's determination that her property was ineligible for development under development regulations, but she was entitled to receive Transferable Development Rights ("TDRs"). *Id.* at 731. The Supreme Court concluded that under *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), the property owner's takings claim was "final" because there was no question that the regulations applied to the property owner's property, and because the *agency had no discretion* concerning how the regulations would be applied. *Id.* at 739. The Court noted that the regulations in question did "not provide for the variances and exceptions of conventional land use schemes" *Id.* at 730, and that because the planning agency had no discretion as to how the regulations would be applied, the takings claim was final and ripe for adjudication. *Id.* at 739–40. Unlike the facts of *Suitum*, here, the Board had discretionary authority to grant a variance to alleviate a potentially unconstitutional taking. Moreover, under our exhaustion jurisprudence, the Board was required to make the initial determination of whether there were any other beneficial uses that could be make of the Property. *See Poe v. City of Balt.*, 241 Md. 303, 311 (1966). Although MRA sought a variance under the Harford County Code, it did not seek a variance to alleviate a takings claim, nor did it present evidence or argument that the denial of the variance would deprive it of all beneficial use of the Property. These claims were required to be presented to the Board. The Board was not able to consider these issues because MRA withheld these claims from the Board's consideration.

all beneficial use of its property, the administrative agency has the authority to grant relief in the form of a variance. *See Belvoir Farms*, 355 Md. at 281; *Holiday Point Marina*, 349 Md. at 199. If the administrative agency grants this relief and permits the use by granting a variance, the property owner no longer has a takings claim and the right to alternative relief in the form of just compensation.

Fourth, the fact that an administrative agency does not have the ability to award just compensation if a regulatory taking is established and relief in the form of a variance is not granted, does not negate the requirement that the landowner first address grievances through the Board of Appeals. *See Blumberg*, 288 Md. at 292–93 (explaining that the property owner's requirement to exhaust his administrative remedies was not excused where the Prince George's County Board of Appeals only had the ability to grant partial relief over the alleged county violation and did not have the power to grant relief over the landowner's assertion of error by the Washington Suburban Sanitary Commission); *Bits "N" Bytes Comput. Supplies, Inc. v. Chesapeake & Potomac Tel. Co.*, 97 Md. App. 557, 570 (1993) *overruled on other grounds by Bell Atl. of Md., Inc. v. Intercom Sys. Corp.*, 366 Md. 1, 28 (2001) (holding that the fact that the Public Service Commission was unable to grant money damages "does not necessarily mean that the agency lacks jurisdiction over the matter or that the administrative remedy need not be invoked and exhausted") (internal citations omitted).

Turning to MRA's argument that our above-described exhaustion jurisprudence is inconsistent with MRA's constitutional rights, MRA's contention overstates the scope of its right to a jury trial. Article III, § 40 of the Maryland Constitution (often referred to as the "Just Compensation Clause") provides that "[t]he General Assembly shall enact no Law authorizing private property to be taken for public use, without just compensation, as agreed upon by the parties, or awarded by a Jury, being first paid or tendered to the party entitled to such compensation." The constitutional right to a jury under the Just Compensation Clause consists of a *right to a jury determination of just compensation*, nothing more.

In *The Maryland State Constitution*, Judge Dan Friedman explains that in the context of a physical takings case arising under the Maryland Constitution, Article III, § 40, as well as takings claims arising under the Fifth Amendment of the United States Constitution, there are "four principal questions: (1) is there a 'taking'?; (2) is it 'property'?; (3) is the taking for 'public use'?; and (4) is 'just compensation paid'?" Dan Friedman, *The Maryland State Constitution*, at 181 (Oxford University Press 2011) (quoting Erwin Chemerinsky, *Constitutional Principles and Policies*, 504–05 (1997) (describing federal law)). Judge Friedman notes that "[u]nlike the first three issues, *which are decided by the court*, just compensation is a jury issue." *Id.* (emphasis added) (citing *J.L. Mathews, Inc. v. Md.-Nat'l Capital Park & Planning Comm'n*, 368 Md. 71, 88 (2002) ("In a condemnation case, a jury is

responsible for determining the amount of just compensation due to the property owner, while issues relating to other possible elements, such as the right to condemn, public purpose, or necessity, are exclusively for the judge.")).

Just as the only issue presented to a jury in a condemnation or physical takings case is the issue of just compensation *after* a judicial determination that a taking has occurred, the same principles control here. Applying our decades of exhaustion jurisprudence involving assertions of unconstitutional takings in the context of the application of zoning regulations, MRA had a constitutional right to a determination of *just compensation* by a jury under the Just Compensation Clause, Article III, § 40, *only after* MRA raised all its constitutional challenges to the application of a zoning regulation within the Board of Appeals proceeding, including the assertion that the denial of a variance will deny MRA of all beneficial use of its Property. In the context of a claim asserting an unconstitutional taking of property arising from the application of a zoning regulation, a court is only permitted to consider the claim after the zoning agency makes an initial factual determination of whether the property owner has been denied all beneficial use of its property.[20]

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[20] In its brief and at oral argument, MRA advanced a "procedural chaos" theory, asserting that if a court finally adjudicated all of MRA's claims as part of a judicial review proceeding, it could result in an unfair application of *res judicata* with respect to any separate takings claim filed under the court's original jurisdiction. MRA's theory is premised on its incorrect assumption that it

Finally, MRA argues that if the above sequence is followed, and MRA is required to submit its constitutional takings claim to the Board of Appeals as part of its exhaustion of administrative remedies, a takings claim arising from the application of a zoning regulation would never get to a jury. To be sure, such cases will be rare, given: (1) the very steep burden a landowner bears to demonstrate that application of a zoning regulation and associated denial of a variance to permit a particular use of a property will deny the landowner of all beneficial use of a property; and (2) the administrative agency's ability to grant relief in the form of a variance if an unconstitutional taking is established. However, as demonstrated below, it is possible.

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has a right to a jury determination of the factual question of whether a government taking has occurred. As set forth *supra*, in zoning regulations cases, the Board has original jurisdiction to make the initial factual determination of whether an unconstitutional taking has been established. Such a factual determination is not within the province of a jury. Accordingly, a circuit court's simultaneous consideration of a petition for judicial review and a takings claim will not lead to the improper application of *res judicata*, or otherwise interfere with a property owner's right to a jury determination of just compensation *after* a judicial determination of whether the property owner established a compensable taking before the Board of Appeals. *See City of Balt. v. Borinsky*, 239 Md. 611, 622 (1965).

The Application of the Exhaustion Doctrine to Constitutional Claims Arising from the Application of a Zoning Regulation—A Road Map

We demonstrate below the procedural path that MRA should have followed under our exhaustion jurisprudence, including our holdings in *MRA II* and *MRA III*, to highlight the correct means for challenging the application of Bill 91-10, against the complicated procedural morass created by MRA in its 30 years of litigation.

After Harford County adopted Bill 91-10, in 1991, MRA should have presented all its evidence and legal arguments to the Board of Appeals. In either parallel or successive proceedings before the Board, MRA could have: (1) appealed the Zoning Administrator's determination that Bill 91-10 applied to its property; and (2) applied for a variance, seeking relief from the provisions of Bill 91-10.[21] As part of either one parallel

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[21] This is precisely the format that Judge Harrell outlined in *MRA III*, when the Court rejected MRA's argument that exhaustion principles should permit a "two-step process" by which MRA "may pursue in turn judicial review of each discrete adverse decision." 382 Md. at 363. MRA argued that it should be permitted to have judicial review of the Zoning Administrator's decision, and, if it was adversely decided against MRA, then seek a variance. *Id.* We rejected this "inefficient and piecemeal approach." *Id.* We explained that the right to seek a zoning interpretation and zoning certificate from the Zoning Administrator, and, if denied, the right to seek a variance "are *two parallel or successive remedies* to be exhausted, not optional selections on an a la carte menu of administrative remedies from which MRA may select as it pleases. Once both administrative remedies are pursued to completion, MRA, if still feeling itself aggrieved, may pursue judicial review

or two successive proceedings before the Board, MRA could have raised *all* (instead of some of) its constitutional arguments before the Board of Appeals.

Once the Board denied MRA's claims and upheld the Zoning Administrator's determination, MRA should have then pursued its variance application, presenting evidence and arguments not only on the variance standards set forth in the Harford County Code, but also presenting its evidence and legal arguments on its constitutional takings claim—that the denial of a variance would deprive MRA of all beneficial use of its Property.

The Board of Appeals was the administrative agency charged with making the initial factual determination of whether there were other beneficial uses that could be made of MRA's Property under the Harford County Code, and whether the denial of the variances, would, in fact, create a condition under which there was no other beneficial use that could have been made of the Property under the zoning regulations. Utilizing its zoning expertise, the Hearing Examiner and Board would have been able to consider all of the evidence in the context of the applicable zoning regulations, and make findings of fact regarding what, if any, reasonable and beneficial uses could have been made of the Property other than a rubble landfill.

Had MRA presented substantial evidence to the Board that a variance was required because a rubble

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of the County agencies' adverse actions." *Id.* at 363–64 (emphasis added) (internal citations omitted).

landfill was the only beneficial use that could be made of its Property under the Harford County Code, and the Board agreed, the Board had the authority to grant relief from a potential unconstitutional taking by granting a variance to enable the Property to be used as a rubble landfill. In granting such relief, the Board also had the authority to establish any reasonable restrictions or conditions in connection with the use to mitigate any adverse impacts on surrounding properties. If the variance was granted on that basis, MRA would have been entitled to operate a rubble landfill, and it would not have been necessary for MRA to seek further judicial review.

If, on the other hand, the Board had made factual findings based upon substantial evidence that there were other beneficial and reasonable uses that could be made of the Property, and consequently, no taking had occurred, MRA would have had the right to appeal this determination to the circuit court, and ultimately, the appellate courts. *See Poe*, 241 Md. at 311. The court could then determine whether the Board's factual determinations were supported by substantial evidence, and whether the Board applied the correct legal standards, with the benefit of a fully developed record of the evidentiary hearing. *Id.*

If the court determined that there was substantial factual evidence of other beneficial uses that could be made of the Property under the Harford County Zoning Code, MRA would not have established a taking, and would not have been entitled to a determination by a jury on the issue of just compensation.

If, however, the court determined that MRA had satisfied its burden of demonstrating that there were no other beneficial uses that could be made of its Property under the Harford County Zoning Code, and that the application of Bill 91-10 would create a taking of MRA's Property, the court could reverse and remand the case to the Board with instructions that the Board consider granting a variance to allow the use. *See Belvoir Farms*, 355 Md. at 271–72 (explaining that "[o]rdinarily, courts cannot either grant or deny variances[,]" and in circumstances where the court would have the power to overrule the denial of a variance, "it would have to remand the matter to the agency for further consideration using the proper standard").

If the court remanded the case to the Board for consideration of the application of a variance after a judicial determination that MRA had established a taking, the variance could be granted. Utilizing its zoning expertise, the Board would have the ability to establish reasonable conditions to limit any adverse effects that the operation would have on adjacent or nearby properties. If the Board granted the variance relief to permit the Property's use as a rubble landfill, MRA would no longer have a takings claim for just compensation arising under Article III, § 40 of the Maryland Constitution.

If, however, the Board determined that the site is simply not suitable for a rubble landfill, and declined to grant the variance, MRA would then have the right to proceed with a jury determination of just compensation of its Property under the Just Compensation

Clause, Article III, § 40 of the Maryland Constitution. In other words, simply because the Board has the authority to alleviate what would otherwise be an unconstitutional taking by granting a variance, it is not required to grant it.

Indeed, there may be instances in which, when faced with a takings claim, a local jurisdiction reasonably determines that a particular land use creates such a conflict with adjacent uses or other legitimate land planning objectives, that it does not want to permit a land use through the application of a variance at that particular location. In such an instance—where a taking is established by the application of a zoning regulation (*i.e.* a factual determination is made that there is no other beneficial use that can be made of the property)—and the administrative agency declines to grant a variance for reasons such as competing land use conflicts, a governmental taking will have been established. The matter of just compensation can then be submitted to a jury under Article III, § 40 of the Maryland Constitution.[22]

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[22] Although we do not reach the statute of limitations question given our holding that MRA failed to exhaust its administrative remedies, we agree with the Court of Special Appeals' well-reasoned analysis on that issue. Specifically, we agree with the Court of Special Appeals that our holding in *Arroyo v. Board of Education of Howard County*, 381 Md. 646 (2004) controls. Had MRA presented its takings claim within the variance proceeding, under *Arroyo*, the three-year statute of limitations would have commenced from the date that the Board of Appeals issued its final decision denying MRA's variance in June 2007.

III. CONCLUSION

We hold that MRA failed to exhaust its administrative remedies by withholding its takings claim from consideration by the Board of Appeals when it applied for a variance from the strict application of Bill 91-10 to its Property. Under our exhaustion jurisprudence, all constitutional claims arising from the application of a zoning regulation to a property must be presented as part of the administrative agency proceeding. There is no exception to this requirement for takings claims. Under our established case law applicable to takings claims arising from the application of zoning regulation, the initial factual determination of whether there are additional beneficial uses that can be made under a zoning ordinance is made by the zoning administrative agency—the Board of Appeals in this case. The Board has the authority to grant relief in the form of a variance where the property owner can establish an unconstitutional taking arising from the application of the zoning regulation. It was error for MRA to circumvent the Board of Appeals' original jurisdiction by withholding its takings claim and presenting such a claim to a jury in a separate judicial proceeding. Because MRA had not exhausted its administrative remedies, the instant case should have been dismissed.

JUDGMENT OF THE COURT OF SPECIAL APPEALS IS AFFIRMED. COSTS IN THIS COURT AND IN THE COURT OF SPECIAL APPEALS TO BE PAID BY PETITIONER.

APPENDIX B

REPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 788

September Term, 2018

HARFORD COUNTY, MARYLAND

v.

MARYLAND RECLAMATION ASSOCIATES, INC.

Berger,
Nazarian,
Wells,

JJ.

Opinion by Berger, J.

Filed: August 1, 2019

The origin of this dispute dates back to 1990, when Maryland Reclamation Associates, Inc. ("MRA" or "Maryland Reclamation"), appellee, purchased sixty-two acres of land for the purpose of constructing and

operating a rubble landfill.[1] After MRA acquired the land, Harford County (the "County"), appellant, modified its zoning laws to disallow landowners – MRA included – from operating rubble landfills. For nearly three decades, MRA has fought the County's regulatory efforts in various administrative and judicial forums. The dispute now reaches the Maryland appellate courts for the fifth time.[2]

In this appeal, the County appeals from a verdict rendered by a jury in the Circuit Court for Harford County, in which MRA prevailed on its inverse condemnation claim and was awarded $45,420,076, representing just compensation in the amount of $30,845,553 plus $14,574,523 in interest. For the reasons explained herein, we reverse the judgment entered below, and remand the case for further proceedings consistent with this opinion.

After the County enacted zoning regulations that prohibited MRA from operating a rubble landfill, MRA sought several variances. If approved, the variances would have permitted MRA to proceed with its project.

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[1] A rubble landfill is a sanitary landfill that accepts only trees, land clearing, construction, and demolition debris. *See* Md. Code (1989, 2014 Repl. Vol.), § 9-210(c)(2) of the Environmental Article.

[2] *See Holmes v. Md. Reclamation Assocs., Inc.*, 90 Md. App. 120 (1992), *cert. dismissed sub nom. Cty. Council of Harford Cty. v. Md. Reclamation Assocs., Inc.*, 328 Md. 229 (1992) (*MRA I*); *Md. Reclamation Assocs., Inc. v. Harford Cty.*, 342 Md. 476 (1996) (*MRA II*); *Md. Reclamation Assocs., Inc. v. Harford Cty.*, 382 Md. 348 (2004) (*MRA III*); *Md. Reclamation Assocs., Inc. v. Harford Cty.*, 414 Md. 1 (2010) (*MRA IV*).

The Harford County Hearing Examiner denied MRA's requests, and in 2007, the Harford County Board of Appeals (the "Board of Appeals" or the "Board") affirmed the Hearing Examiner's decision by a unanimous vote. In *MRA IV*, 414 Md. 1 (2010), the most recent case between the parties, the Court of Appeals held, among other things, that the County was not estopped from amending its zoning laws, and that the County did not err in denying MRA's requests for variances.

On February 19, 2013, following *MRA IV*, MRA filed suit in the Circuit Court for Harford County, alleging that the County's actions constituted a regulatory taking in violation of the Maryland Constitution and the Maryland Declaration of Rights.[3] Thereafter, the County filed a motion to dismiss and a motion for summary judgment, arguing that MRA's inverse condemnation claim was barred by the statute of limitations. The County averred that MRA's claim accrued in June 2007, when the Board of Appeals voted 7-0 to deny MRA's requests for variances. The circuit court disagreed. In a memorandum opinion, Judge William O. Carr denied the County's motions, ruling that MRA's claim was timely because the claim accrued in

[3] MRA further pursued a *per se* takings claim pursuant to *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). That claim did not proceed to trial. The circuit court granted the County's motion for summary judgment, ruling that MRA could not succeed because the land still had a resale value. MRA filed a cross-appeal contending that the circuit court erred in granting the County's motion.

2010, when the Court of Appeals issued its opinion in *MRA IV*.

The case was then tried before a jury in April 2018. The jury ultimately found in favor of MRA on its takings claim and awarded damages in the amount of $45,420,076. This timely appeal followed.[4]

On appeal, the County poses six questions, which we set forth *verbatim*.

> 1. Should MRA's takings claim be dismissed based on MRA's failure to raise this constitutional issue in any administrative proceeding?
>
> 2. Is MRA's takings claim barred by the statute of limitations when it was filed more than three years after the final administrative agency decision denying MRA's variance requests?
>
> 3. Is MRA's takings claim barred by the final judgment in *MRA IV* under the doctrines of res judicata and collateral estoppel?
>
> 4. Did the Board's denial of MRA's variance requests to construct and operate a landfill constitute an unconstitutional taking

[4] In addition, Montgomery County filed an *amicus curiae* brief, urging us to reverse the judgment. Several other counties and municipalities signed the brief, including Cecil County, Prince George's County, Howard County, Carroll County, the City of Gaithersburg, the Mayor and Council of Rockville, the Mayor and Common Council of Westminster, the Maryland Municipal League, and the Maryland Association of Counties.

when MRA has no vested property right or interest with respect to such a use?

5. Did the Board's denial of variances to prevent public harm constitute a taking for which compensation is due?

6. Should the jury's award of more than $45 million in damages be reversed when MRA failed to present any evidence of the Property's fair market value?

In its cross-appeal, MRA presents an additional question, which we set forth *verbatim.*

> Did the Circuit Court err when it granted summary judgment on MRA's *per se* takings claim under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)?

We hold – as a matter of law – that MRA's inverse condemnation claim accrued in 2007, when the Board of Appeals denied MRA's requests for variances. As a result, MRA's claim is time-barred. We, therefore, reverse the judgment entered by the circuit court and remand the case for the entry of judgment in favor of the County.

BACKGROUND

This dispute concerns a sixty-two-acre plot of land in Harford County, Maryland. We draw from the Court of Appeals' comprehensive opinions in *MRA II, supra*, 342 Md. 476 (1996), and *MRA IV, supra*, 414 Md. 1

(2010), to summarize the history of the various administrative proceedings and earlier appeals.

> In August 1989, the plaintiff-appellant, Maryland Reclamation Associates, Inc., contracted to purchase property located adjacent to Gravel Hill Road in Harford County, Maryland. Maryland Reclamation intended to construct and operate a rubble landfill on this property; thus, it began the process of obtaining a rubble landfill permit from the Maryland Department of the Environment pursuant to Maryland Code (1982, 1996 Repl. Vol), §§ 9-204 through 9-210, §§ 9-501 through 9-521 of the Environment Article, and COMAR 26.03 through 26.04.
>
> Maryland Reclamation first requested that Harford County include the Gravel Hill Road property in Harford County's Solid Waste Management Plan as a rubble landfill. Thereafter, Harford County amended its Solid Waste Management Plan to include Maryland Reclamation's Gravel Hill Road site as a rubble landfill. The property's inclusion in the Harford County Solid Waste Management Plan, however, was made subject to twenty-seven conditions, including a minimum landscape buffer of 200 feet. On November 16, 1989, Harford County advised the Maryland Department of the Environment that Maryland Reclamation's Gravel Hill Road property had been included in the County's Solid Waste Management Plan as a rubble landfill site.

Maryland Reclamation next sought approval at the state government level from the Department of the Environment. On November 20, 1989, Maryland Reclamation received Phase I permit approval from the Department of the Environment. Maryland Reclamation then filed with the Department the necessary reports and studies for Phase II and Phase III approvals.

[M]aryland Reclamation had entered into a contract to purchase the property located adjacent to Gravel Hill Road in August 1989, before its inclusion in Harford County's Solid Waste Management Plan. Allegedly relying on the property's inclusion in Harford County's Solid Waste Management Plan and on the Department of the Environment's Phase I approval, Maryland Reclamation consummated the purchase of the Gravel Hill Road property on February 9, 1990, for $732,500. The settlement occurred on the last possible day under the terms of the contract of sale.

Four days after the settlement date, newly appointed Harford County Council President Jeffrey D. Wilson and Council Member Joanne Parrott introduced in the County Council Resolution 4-90, which provided for the removal of Maryland Reclamation's property from the County's Solid Waste Management Plan. [Footnote omitted.] In the litigation that ensued over this resolution, the Court of Special Appeals held that Resolution 4-90 was invalid because it was preempted by the State's authority over solid waste

management plans and the issuance of rubble landfill permits. [*MRA I*], 90 Md. App. 120, 600 A.2d 864, *cert. dismissed sub nom. County Council v. Md. Reclamation*, 328 Md. 229, 614 A.2d 78 (1992). [Footnote omitted.]

While the litigation over Resolution 4-90 was pending, Bill 91-10 was introduced in the Harford County Council, on February 12, 1991, as an emergency bill. Bill 91-10 proposed to amend the requirements for a rubble landfill by increasing the minimum acreage requirements, buffer requirements, and height requirements. The bill, inter alia, would establish a minimum rubble fill size of 100 acres and a buffer zone of 1000 feet. After public hearings, the County Council passed the bill on March 19, 1991, and the County Executive signed the bill into law on March 27, 1991. [Footnote omitted.]

On April 2, 1991, Bill 91-16 was introduced in the Harford County Council. This bill would authorize the County Council to remove a specific site from the County's Solid Waste Management Plan if the site does not comply with certain zoning ordinances, if a permit has not been issued by the State Department of the Environment within eighteen months of the site being placed in the County's Solid Waste Management Plan, or if the owner of the site has not placed the site in operation within the same eighteen month period. Bill 91-16 was passed by the County Council, signed into law by the County Executive on June 10, 1991, and is codified as

§ 109-8.4 of the Harford County Code. [Footnote omitted.]

The President of the Harford County Council, on April 25, 1991, sent a letter to the State Department of the Environment, enclosing a copy of enacted Bill 91-10, and advising the Department that the provisions of the bill could call into question the status of sites which were in the process of obtaining rubble landfill permits. On May 2, 1991, the Department of the Environment advised the County Council that if a permit were to be issued to Maryland Reclamation, such issuance would not authorize Maryland Reclamation to violate any local zoning or land-use requirements.

Also on May 2, 1991, the County's Director of Planning sent a letter to Maryland Reclamation informing it of Bill 91-10, indicating that Maryland Reclamation's property would apparently fail to meet the requirements of Bill 91-10, stating that Maryland Reclamation should submit documentation showing that the Gravel Hill Road site could meet the requirements of the zoning ordinances, and stating that, if the site could not meet such requirements, Maryland Reclamation would need a variance to operate a rubble landfill on the property. Maryland Reclamation did not submit any documents pursuant to the May 2, 1991, letter and did not file an application for a variance. [Footnote omitted.] Maryland Reclamation did file on May 21, 1991, an "appeal" to the Harford County Board of Appeals from

the "administrative decision pursuant to Section 267-7 E in a letter dated 5/2/91," requesting that the Board "review and reverse the decision of the Zoning Administrator interpreting that the standards of Council Bill 91-10 apply to the Applicant." The "application" to the Board of Appeals asserted that Bill 91-10 was inapplicable to the property and that, if it was applicable, it was invalid. [Footnote omitted.]

On May 14, 1991, Resolution 15-91 was introduced in the Harford County Council. This resolution purported to interpret Harford County law and determine that the Gravel Hill Road site was not in compliance with county law; the resolution went on to remove the site from the County's Solid Waste Management Plan. The County Council passed Resolution 15-91 on June 11, 1991. The resolution was apparently not submitted to the County Executive for his approval.

Maryland Reclamation on June 20, 1991, filed a complaint in the Circuit Court for Harford County, seeking a Declaratory Judgment and Injunctive Relief against Harford County and the Harford "County Council." Maryland Reclamation requested, inter alia, the following: (1) a declaration that Bills 91-10 and 91-16, as well as Resolution 15-91, are "null and void as to the Gravel Hill Site;" (2) an injunction preventing the County from enforcing Bills 91-10 and 91-16 and Resolution 15-91 against Maryland Reclamation; and (3) an injunction staying all further action on

Maryland Reclamation's "appeal" to the Board of Appeals. Maryland Reclamation advanced numerous legal theories to support its complaint for declaratory and injunctive relief.

The circuit court on June 28, 1991, issued an interlocutory injunction preventing enforcement of Bills 91-10, 91-16, and Resolution 15-91 against Maryland Reclamation. The order expressly allowed the Department of the Environment to continue its processing of Maryland Reclamation's pending permit application. The order also stayed the processing of Maryland Reclamation's administrative "appeal" from the Director of Planning's "decision" contained in the Director's May 2, 1991, letter. Finally, the interlocutory order prohibited Maryland Reclamation from starting any construction without court approval.

On February 28, 1992, the State Department of the Environment issued to Maryland Reclamation a permit to operate a rubble landfill on its property. The Department expressly conditioned the permit upon Maryland Reclamation's compliance with all local land-use requirements. [Footnote omitted.]

Upon cross-motions for summary judgment, the circuit court on May 19, 1994, filed an opinion and judgment, declaring that Harford County was entitled to enact new zoning laws that may prevent Maryland Reclamation from operating a rubble landfill, and that Bills 91-10 and 91-16 were not invalid on the

> grounds asserted by the plaintiff. The court, however, declared that Resolution 15-91 was invalid on its face. According to the circuit court, the Harford County Council was acting as a legislative body when it passed the resolution, and the passage of the resolution constituted an illegal attempt to interpret and apply the laws which the Council had previously enacted.
>
> Maryland Reclamation appealed to the Court of Special Appeals with respect to the circuit court's declaration that Bills 91-10 and 91-16 were not invalid. The County did not cross-appeal from the circuit court's declaration that Resolution 15-91 was invalid. Before any further proceedings in the intermediate appellate court, this Court issued a writ of certiorari.

MRA II, supra, 342 Md. at 480-86. Ultimately, the Court of Appeals held in *MRA II* that "MRA had not exhausted its administrative remedies, including appealing the Zoning Administrator's ruling to the Board of Appeals, and applying to the Zoning Administrator for variances." *MRA IV, supra*, 414 Md. at 12 (citing *MRA II, supra*, 342 Md. at 496-97).

> Thereafter MRA filed requests for interpretation with the Zoning Administrator, presenting nine issues. After receiving unfavorable rulings, MRA appealed to the Board of Appeals. The Board, through its Zoning Hearing Examiner, conducted a hearing and issued a decision dated April 2, 2002 that the application of Bill 91-10 to the proposed

rubble landfill did not violate federal, state, or local laws. As summarized by Judge Harrell in *MRA III*, the Hearing Examiner's findings and conclusions underlying this decision were as follows:

1. Bill 91-10 applies to MRA's property on Gravel Hill Road.

2. The requirements of Bill 91-10 can be validly applied to MRA's property on Gravel Hill road under the circumstances of this case and in light of the Environmental Article of the Maryland Code as well as other principles of Maryland law.

3. MRA's operation of a rubble landfill on its property at Gravel Hill Road pursuant to its state permit will violate applicable Harford County Zoning law, particularly Harford County Code §§ 267-40.1, 267-28C, 267-28D(4) and 267-41. Moreover, the Hearing Examiner questions whether the permit issued to MRA by MDE is validly issued as it was based on misinformation provided to the State by MRA regarding the conformance of the property and use with Harford County Zoning law.

4. MRA cannot obtain a grading permit unless it can meet the requirements of Harford County Zoning law. To the extent MRA does not meet specific standards it must seek a variance and obtain a variance from provisions with which it cannot comply. MRA's reliance on site plan

approvals that pre-date the enactment of Bill 91-10 is without merit.

5. MRA's operation of a rubble landfill on its property at Gravel Hill Road pursuant to its State-issued Refuse Disposal Permit No. 91-12-35-10-D and as renewed by Refuse Disposal Permit 1996-WRF-0517 will violate applicable Harford County zoning law.

6. Harford County is not prohibited by the principles of estoppel from applying the provisions of Harford County Bill 91-10 (section 267-40.1 of the Harford County Code) to MRA's property and specifically, to MRA's operation of a rubble landfill on its property.

7. MRA's rubble landfill did not acquire vested rights in its use that would insulate it from the application of Bill 91-10 to that use. It is the vested rights doctrine itself that allows a landowner to rais[e] issues of constitutional protections. There is no constitutional infringement on the rights of MRA because a vested right was not established. Applying the provisions of Bill 91-10 to MRA's Gravel Hill Road property is, therefore, not prohibited by the United State[s'] Constitution and/or the Maryland Declaration of Rights.

8. Harford County is not preempted by the Environmental Article of the Maryland Code, particularly sections 9-201 et seq.

and 9-501 et seq., from applying Bill 91-10 to MRA's Gravel Hill Road property.

9. MRA's operation of a rubble landfill on its Gravel Hill Road property is not a valid non-conforming use pursuant to Harford County Zoning Code.

MRA III, 382 Md. at 359-60, 855 A.2d at 357-58. After the issuance of the Hearing Examiner's decision, the following transpired:

> On 11 June 2002, the County Council, sitting as the Board of Appeals, adopted the Zoning Hearing Examiner's decision. Harford County, therefore, refused to issue to MRA a grading permit or zoning certificate for the proposed rubble landfill because of the strictures of Bill 91-10. Neither in response to the Board of Appeals's final decision, nor on a parallel course to its requests for interpretation or a zoning certificate, did MRA seek variances for relief from the requirements of Bill 91-10.
>
> On 21 June 2002, MRA . . . petition[ed] the Circuit Court for Harford County for judicial review of the Board of Appeals's decision. The Circuit Court affirmed the decision of the Board of Appeals on 22 October 2003. It concluded that "all nine requests for interpretation were answered correctly . . . in accordance with the law, and based on substantial evidence, and the decision was also correct when it upheld the zoning administrator's

> denial of Maryland Reclamations request for a zoning certificate."

MRA III, 382 Md. at 360-61, 855 A.2d at 358. On appeal to this Court, we held that MRA again had failed to exhaust its available administrative remedies because it had not requested variances from the Code requirements at issue. *Id.* at 363, 855 A.2d at 359-60.

On May 12, 2005 MRA requested the following variances to provisions of the Harford County Zoning Code ("HCC") before the zoning hearing examiner for Harford County ("Hearing Examiner"):

- Variance pursuant to Section 267-28C to permit the disturbance of the 30 foot buffer yard.
- Variance pursuant to Section 267-28D(4) to permit disturbance within the 200 foot buffer from adjoining property lines.
- Variance to Section 267-40.1A, B, C, and D to permit the operation of a rubble landfill on less than 100 acres.
- Variance to Section 267-40.1A, B, C and D to permit the operation of a landfill without satisfying the buffer requirement.
- Variance to Section 267-40.1A, B, C, and D to permit the deposit of solid waste less than 500 feet from the flood plain district.
- Variance to Section 267-40.1A, B, C, and D to permit the disturbance of the 1,000 foot buffer from a residential or institutional building.

- Variances to Section 267-41D(2)(c); (3)(b); (5)(e); and (6) to permit the use of a landfill within a Natural Resource District, to permit the disturbance of the Natural resources District buffer, and to disturb the minimum 75 foot wetlands buffer in the Agricultural District.

Over a span of 10 months, the Hearing Examiner, Robert F. Kahoe, Jr., presided over 17 nights of hearings, during which he heard testimony from 11 witnesses produced by MRA (eight of whom were experts); six experts offered by the Protestants; 16 residents from the community and members of St. James parish; and the acting director of the Harford County Department of Planning and Zoning. The Hearing Examiner issued a decision dated February 28, 2007 that denied several of MRA's requests.

* * *

MRA appealed the Hearing Examiner's decision to the Board. On June 5, 2007, the Board voted 7-0 to deny the requested variances to these sections of the Code, and adopted the Hearing Examiner's decision. MRA then noted an appeal to the Circuit Court for Harford County. The Circuit Court affirmed the findings of the Board of Appeals in an order filed on July 11, 2008.

MRA IV, supra, 414 Md. at 12-23.

Thereafter, MRA filed an additional petition for judicial review in the Circuit Court for Harford County.

In its petition, MRA asked the circuit court to reconsider its October 2003 decision, in which it affirmed the Board of Appeals' interpretation of Bill 91-10, i.e., that Bill 91-10 applied to MRA. On September 3, 2008, the circuit court affirmed its 2003 decision. MRA then appealed both the circuit court's affirmance of its 2003 decision, and the variance denials to this Court. The Court of Appeals granted certiorari before we could review either appeal.

In *MRA IV*, the Court first addressed whether there was sufficient evidence in the record to support the Board of Appeals' findings that "the requested variances would be substantially detrimental to adjacent properties" and "would negatively affect the health and welfare of the individuals in the surrounding area." 414 Md. at 24, 33-34. Ultimately, the Court held that the record contained sufficient evidence to support those findings, and as a result, affirmed the Board of Appeals' 2007 decision. *Id.* at 34.

The Court then considered MRA's argument that it should be permitted to proceed with its project to operate a rubble landfill, notwithstanding the applicable zoning regulations. *Id.* at 34-35. Primarily through the lens of zoning estoppel and preemption, the Court held that MRA is subject to the zoning regulations. As a result, MRA could not operate a rubble landfill on the property. *Id.* at 34-64.

Following the decision of the Court of Appeals in *MRA IV*, on February 19, 2013, MRA commenced this inverse condemnation action in the Circuit Court for

Harford County. In its complaint, as amended in June 2015, MRA alleged that the County's zoning laws interfered with MRA's "investment backed business expectations" to operate a rubble landfill on its property, and that such interference constituted a regulatory taking under Article III, Section 40 of the Maryland Constitution, and Articles 19 and 24 of the Maryland Declaration of Rights.

Thereafter, the County filed both a motion to dismiss and a motion for summary judgment, arguing that MRA's takings claim was time-barred because it accrued in 2007, when MRA's requests for variances were denied by the Board of Appeals. In the alternative, the County asserted that it was entitled to judgment as a matter of law on a *per se* takings claim brought under the Supreme Court's decision in *Lucas, supra*, 505 U.S. 1003. In a memorandum opinion, Judge William O. Carr ruled that MRA's claim was timely because it accrued in 2010, when the Court of Appeals issued *MRA IV*. Judge Carr reasoned:

> Irrespective of whether inverse condemnation is a continuing cause of action, this claim satisfies the three year statute of limitations because this court finds that the final decision issued by the Court of Appeals in *MRA IV* on March 11, 2010 was the final decision which foreclosed on any possibility of using the property in question for rubble fill. The Plaintiff filed this case on February 19, 2013 making the date of filing within the statute of limitations.

Nevertheless, Judge Carr ruled that MRA could not proceed on a *per se* takings claim because the property, at that time, retained a resale value.

Thereafter, the case was tried before a jury in April 2018. At trial, an expert witness testified on behalf of MRA that the value of the property decreased by approximately $30 million after the alleged taking. After deliberating, the jury found in favor of MRA on its inverse condemnation claim and awarded damages in the amount of $45,420,076. This amount accounted for $30,845,553 representing just compensation, plus $14,574,523 in interest. This timely appeal followed.

STANDARD OF REVIEW

The County challenges both the circuit court's denial of a motion to dismiss and a motion for summary judgment on the grounds that MRA failed to exhaust its administrative remedies and that its inverse condemnation claim is time-barred.[5] To the extent that these rulings were premised on purely legal issues, we apply the same standard of review. "As the Court of Appeals has explained, where an order involves an interpretation and application of Maryland constitutional, statutory or case law, our Court must determine whether the trial court's conclusions are 'legally

[5] Although the County raises additional arguments in this appeal that may be subject to differing standards of review, we decline to address the merits of these arguments because we reverse on statute of limitations grounds. Consequently, we need not address the additional standards of review.

correct[.]'" *Elec. Gen. Corp. v. Labonte*, 229 Md. App. 187, 196 (2016) (citations and quotations omitted), *aff'd*, 454 Md. 113 (2017).

To determine whether the trial court's decision was legally correct, "we give no deference to the trial court findings and review the decision under a *de novo* standard of review." *Lamson v. Montgomery County*, 460 Md. 349, 360 (2018). We, therefore, shall review the merits of the County's exhaustion of administrative remedies and statute of limitations arguments *de novo.* In doing so, we evaluate the record in the light most favorable to MRA as the non-moving party. *Schneider Elec. Bldgs. Critical Sys., Inc. v. W. Surety Co.*, 454 Md. 698, 705 (2017).

DISCUSSION

The County raises six arguments in this appeal. First, the County contends that the case should not have proceeded to trial because MRA failed to exhaust its administrative remedies. Second, the County argues that MRA's takings claim was filed outside the three-year limitations period because the County's last action taken against MRA was in 2007 and MRA filed its complaint in 2013. Third, the County maintains that MRA's claim is barred by *res judicata* and collateral estoppel. Fourth, and on the merits, the County asserts that MRA could not sufficiently allege an inverse condemnation claim because it did not have a vested property interest. Fifth, the County contends that the denial of MRA's requests for variances did not

amount to an unconstitutional taking because the variances were denied to prevent public harm. Sixth, the County avers that MRA failed to present evidence of the property's fair market value and that the jury verdict was, therefore, defective. Conversely, MRA argues in its cross-appeal that the circuit court erred in granting the County judgment as a matter of law on its *per se* takings claim.

I.

We address the County's assertion that MRA failed to exhaust its administrative remedies first because issues concerning primary jurisdiction and exhaustion are treated like jurisdictional questions. *Bd. of Educ. for Dorchester Cty. v. Hubbard*, 305 Md. 774, 787 (1986); *Priester v. Baltimore County*, 232 Md. App. 178, 190 (2017), *cert. denied*, 454 Md. 670. The County alleges that MRA was required to raise its inverse condemnation claim in an administrative proceeding before it could seek just compensation in the circuit court. Accordingly, the County argues that the circuit court should have dismissed the case. We disagree. As we shall explain, MRA adhered to the prescribed administrative procedure before filing its inverse condemnation claim in the circuit court.

"A fundamental precept of administrative law is the requirement that exclusive or primary administrative remedies ordinarily be exhausted before bringing an action in court." *MRA III, supra*, 382 Md. at 361. Administrative agencies have the first opportunity to

consider constitutional issues when "those issues would be pertinent in the particular proceeding before the [agency]." *MRA II, supra*, 342 Md. at 491-92. Accordingly, circuit courts are not "authorized to entertain [those] actions" when a party circumvents a prescribed administrative procedure. *Hubbard, supra*, 305 Md. at 787.

This generally holds true in inverse condemnation cases. *See Prince George's County v. Blumberg*, 288 Md. 275, 293 (1980). Indeed, the Court of Appeals "has held on many occasions, when faced with a claim of an agency's unconstitutional taking of property, that such issues must still go through the administrative process, particularly when judicial review is provided." *Id.* Moreover, it is "settled law on principle and authority that, absent most unusual circumstances, in zoning matters where there is full opportunity for a property owner to apply to the administrative agency for a special exception from the application of the general law to the particular property, with adequate provision for judicial review of the Board's action, the court will not take jurisdiction even though a constitutional issue is raised, until the administrative remedy has been exhausted." *Poe v. City of Baltimore*, 241 Md. 303, 311 (1966).

In our view, MRA did not fail to exhaust its administrative remedies. Indeed, MRA sought a ruling from the Harford County Hearing Examiner and the Board of Appeals that Bill 91-10 did not apply to MRA's property. When that failed, MRA appealed the Board of Appeals' decision to the circuit court, this Court, and the

Court of Appeals. Thereafter, MRA sought another administrative remedy by requesting variances so that it could operate a rubble landfill on its property notwithstanding Bill 91-10. Both the Harford County Hearing Examiner and the Board of Appeals denied the requested variances, and MRA again appealed to the courts. Ultimately, the Court of Appeals held in *MRA IV, supra* that the Board of Appeals did not err in denying the requests for variances. To the extent that an administrative remedy was available, MRA clearly pursued it.

Moreover, the County presents us with no authority compelling a party to bring a claim for just compensation in an administrative forum before resorting to the courts.[6] In short, MRA's takings claim became justiciable after MRA was denied the requested variances. To hold otherwise would contradict case law from the United States Supreme Court. *See Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 737 (1997) (observing that a takings claim is justiciable once "the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at

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[6] Were we to adopt the County's argument and hold that MRA had not exhausted its administrative remedies, it is unclear how a claim for just compensation could ever get to a jury. Indeed, administrative rulings are subject to a deferential standard of review. Accordingly, subjecting a just compensation claim to such a deferential standard would seem to conflict with "Article III, § 40 of the Maryland Constitution[, which] provides the landowner with the opportunity to have a jury award just compensation in [takings] cases." *Montgomery County v. Soleimanzadeh*, 436 Md. 377, 387 (2013).

issue to the particular land in question") (citation omitted). The County arrived at a "final, definitive position" when the Board denied MRA's requested variances in June 2007. We, therefore, hold that MRA exhausted its administrative remedies.

II.

We next address the County's contention that MRA's inverse condemnation claim is time-barred. The County argues that the circuit court erred in ruling that MRA's claim accrued after the Court of Appeals issued its opinion in *MRA IV, supra.* The circuit court denied the County's motion to dismiss and motion for summary judgment, and ruled that MRA's inverse condemnation claim was timely filed. The time period in which an inverse condemnation claim must be filed is dictated by the Maryland Code:

> A civil action at law shall be filed within three years from the date it accrues unless another provision of the Code provides a different period of time with which an action shall be commenced.

Md. Code (1973, 2013 Repl. Vol.), § 5-101 of the Courts and Judicial Proceedings Article ("CJ"). *See Electro-Nucleonics, Inc. v. Wash. Suburban Sanitary Comm'n*, 315 Md. 361, 374 (1989) (holding that CJ § 5-101 applies to inverse condemnation claims).

The rationale underlying the statute of limitations is well established:

> The adoption of statutes of limitation reflects a policy decision regarding what constitutes an adequate period of time for a person of reasonable diligence to pursue a claim. Such statutes are designed to balance the competing interests of each of the potential parties as well as the societal interests involved. Thus, one of the purposes of such statutes is to assure fairness to a potential defendant by providing a certain degree of repose. This is accomplished by encouraging promptness in prosecuting actions; suppressing stale or fraudulent claims; avoiding inconvenience that may stem from delay, such as loss of evidence, fading of memories, and disappearance of witnesses; and providing the ability to plan for the future without the uncertainty inherent in potential liability. Another basic purpose is to prevent unfairness to potential plaintiffs exercising reasonable diligence in pursuing a claim. Still another purpose is to promote judicial economy.

Poole v. Coakley & Williams Constr., Inc., 423 Md. 91, 130-31 (2011) (quoting *Pierce v. Johns-Manville Sales Corp.*, 296 Md. 656, 665 (1983)).

Accordingly, MRA had three years from the date its cause of action accrued to file a timely complaint. CJ § 5-101. We, therefore, must determine when MRA's inverse condemnation claim accrued. An inverse condemnation claim "accrues when the affected party knew or should have known of the unlawful action and its probable effect." *Duke St. Ltd. P'ship v. Bd. of Cty. Comm'rs of Calvert Cty.*, 112 Md. App. 37, 49 (1996)

(citing *Millison v. Wilzack*, 77 Md. App. 676, 685-86 (1989)). Although the statute of limitations does not begin until the plaintiff discovers her claim, "[t]his does not mean that the party need know all relevant facts, including the precise nature and amount of the economic impact." *Id.* Rather, we must determine "when all of [the] elements [of an inverse condemnation claim] have occurred . . . and when the plaintiff knows, or, through the exercise of due diligence, should have known . . . that they have occurred." *Millison, supra*, 77 Md. App. at 685.

"To state a claim for inverse condemnation, a plaintiff must allege facts showing ordinarily that the government action constituted a taking." *Litz v. Md. Dep't of Env't*, 446 Md. 254, 267 (2016). "Thus, an inverse condemnation cause of action, at minimum, requires a taking by a government entity, and regardless of what the plaintiff knows or should know, the statute of limitations on an inverse condemnation cause of action does not begin to run until a taking has occurred." *Litz v. Md. Dep't of Env't*, 434 Md. 623, 653 (2013). A taking may arise in several ways:

> [T]he denial by a governmental agency of access to one's property, regulatory actions that effectively deny an owner the physical or economically viable use of the property, conduct that causes a physical invasion of the property, hanging a credible and prolonged threat of condemnation over the property in a way that significantly diminishes its value, or, closer in point here, conduct that effectively forces an owner to sell.

Litz, supra, 446 Md. at 267 (quoting *Coll. Bowl, Inc. v. Mayor of Baltimore*, 394 Md. 482, 489 (2006)).

In its amended complaint, MRA alleges that the County – by enacting various laws and modifying its zoning regulations – unlawfully interfered with MRA's "investment backed business expectations associated with its Property and the rubble landfill permit previously issued" by the Maryland Department of the Environment (the "MDE"). *See* ¶ 55 of MRA's amended complaint. In short, MRA asserts that the County made it impossible to use the land for its intended purpose. MRA discovered the County's allegedly unlawful conduct no later than June 5, 2007, when the Board of Appeals voted unanimously to deny MRA's requests for variances. Without the variances, MRA could neither construct nor operate a rubble landfill on the property. Applying this logic, the County urges us to hold that the alleged taking occurred on June 5, 2007 and, therefore, the statute of limitations on MRA's inverse condemnation claim began to run on that date.

In support, the County cites *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985), *overruled on other grounds by Knick v. Township of Scott*, ___ U.S. ___, 139 S. Ct. 2162 (2019), for the proposition that a takings claim accrues when "the government entity charged with implementing the regulations has reached a final decision regarding the application of

the regulations to the property at issue."[7] The County further relies on the Court of Appeals' decision in *Arroyo v. Board of Education of Howard County*, 381 Md. 646, 672 (2004), which held that a plaintiff need not "obtain a final decision from the circuit court on judicial review before the administrative decision it reviewed can be considered a final administrative determination." Based on these cases, the County argues that the Board of Appeals' decision in 2007 to deny MRA's requests for variances constitutes the "final administrative decision" triggering the running of the statute of limitations in this case.

In response, MRA maintains that an inverse condemnation claim does not accrue until the taking becomes "permanent or stabilized." *See Litz, supra*, 434 Md. at 654. MRA contends that the alleged taking did not become permanent or stabilized until the Court of Appeals, in *MRA IV*, affirmed the Board's earlier decisions. Further, MRA relies on this Court's opinion in

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[7] On June 21, 2019 – two weeks after oral argument in the instant case – the United States Supreme Court overruled *Williamson*, in part. The Court held that a property owner need not seek just compensation in state court before bringing an inverse condemnation claim in federal court. *Knick*, 139 S. Ct. at 2179 ("The state-litigation requirement of *Williamson County* is overruled."). Nevertheless, the Court observed that the "finality requirement [set forth in *Williamson*] . . . is not at issue here." *Id.* at 2169. The Court further stated that *Williamson* "could have been resolved solely on the narrower and settled ground that no taking had occurred because the zoning board had not yet come to a final decision." *Id.* at 2174. The Court clearly noted that the finality requirement is "settled" and it, therefore, remains binding law.

Millison v. Wilzack, 77 Md. App. 676 (1989), for the proposition that inverse condemnation claims are unlike other actions against administrative agencies, because such claims do not accrue until disputed regulations are finally determined to be effective by a court. According to MRA, the County's reliance on *Arroyo, supra* is, therefore, misplaced. Finally, MRA asserts that even if *Arroyo* is applicable, the County's final administrative decision did not occur until July 2010, when the MDE declined to renew MRA's rubble landfill permit.

A. MRA's Inverse Condemnation Claim Accrued on the Date of the County's Final Administrative Decision.

To determine the accrual date of MRA's cause of action, we start with the principle that a constitutional claim against a government entity "is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson Cty. Reg'l Planning Comm'n, supra*, 473 U.S. at 186. "Finality . . . occurs in the administrative sense when 'the order or decision [disposes] of the case by deciding all question[s] of law and fact and leave[s] nothing further for the administrative body to decide.'" *Shaarei Tfiloh Congregation v. Mayor of Baltimore*, 237 Md. App. 102, 128 (2018) (quoting *Willis v. Montgomery County*, 415 Md. 523, 535 (2010)).

The County asserts that in June 2007, the Board of Appeals reached a final decision on whether MRA could operate a rubble landfill on the property at issue. The County contends that MRA's claim accrued in 2007 and that it was, therefore, immaterial that the Court of Appeals had not yet affirmed or reversed the Board's decision. We agree. Indeed, MRA has not presented us with any authority to support the proposition that an inverse condemnation claim is tolled or does not otherwise accrue until all judicial appeals have been exhausted.

The Court of Appeals was presented with a similar issue, albeit in a slightly different context, in *Arroyo, supra*, 381 Md. 646. In that case, an employee was terminated and subsequently challenged his termination through the prescribed administrative procedures in Howard County. *Id.* at 652-53. After the Maryland State Board of Education upheld the employee's termination in 1998, the employee petitioned for judicial review. *Id.* at 653. In 1999, the Circuit Court for Howard County affirmed the State Board's decision, and in 2000, we affirmed. *Id.* Two years later, the employee brought a civil suit against Howard County, alleging that he was wrongfully terminated. *Id.* In an attempt to evade the statute of limitations, the employee asserted that he did not have a cognizable claim until 2000, when judicial review was completed. *Id.* at 664-65.

The Court of Appeals disagreed. The Court specifically held that the employee's claim accrued when the State Board rendered its final decision, and not at the

time when judicial review of that final decision was completed. *Id.* at 671-72 ("It was the act of the State Board, in its affirmance of the County Board's decision to terminate petitioner from his employment, that was the final decision of the administrative agency[.]") (emphasis omitted). *See also Watson v. Dorsey*, 265 Md. 509 (1972) (holding that a legal malpractice claim accrued when the plaintiffs lost their case at trial, and not at the point in time when the trial court's decision was later affirmed on appeal); *Edwards v. Demedis*, 118 Md. App. 541, 557 (1997) (stating that it is "not consistent with Maryland law" to hold that a cause of action accrues only after "the resolution of any subsequent appeal").[8]

In our view, MRA's inverse condemnation claim accrued on June 5, 2007, when the Board of Appeals issued its final decision denying MRA's requests for variances. It was on that date that MRA discovered the alleged taking of its property. *See Coll. Bowl, Inc. v. Mayor of Baltimore*, 394 Md. 482, 489 (2006) (observing that a taking may arise when there are "regulatory actions that effectively deny an owner the physical or economically viable use of the property"). Although MRA appealed the Board's final decision to the circuit

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[8] Our research – thorough we trust – has found only one type of claim that accrues when judicial review is completed. *See*, *e.g.*, *Heron v. Strader*, 361 Md. 258, 265, 270 (2000) (holding that malicious prosecution claims, unlike claims of false arrest and false imprisonment, arise when the underlying criminal proceedings terminate because favorable termination is a required element). Inverse condemnation claims, by contrast, contain no such requirement.

court and ultimately the Court of Appeals, MRA's appeal did not delay the accrual of its claim. Indeed, the Court of Appeals explicitly rejected such a notion in *Arroyo, supra.* Critically, the Court of Appeals held in *Arroyo* that a claim against an administrative agency accrues when the agency – or some administrative review board – renders its final decision, and not at the time when judicial review of that final decision is completed. *Arroyo, supra*, 381 Md. at 671-72.

MRA endeavors to distinguish *Arroyo* by asserting that it involved an employment dispute and is inapplicable to takings cases. We disagree. Indeed, there is no language in the Court of Appeals' opinion expressly limiting its decision to employment cases. Notably, the Court of Appeals has cited *Arroyo* in other contexts, including land use cases. *See*, *e.g.*, *City of Bowie v. Prince George's County*, 384 Md. 413, 435 (2004) ("Our *Arroyo* holding, although involving very different facts, a different procedural situation, and directed to different legal doctrines, illustrates the trial court's need to remain cognizant of the running of a period for further action, be it judicial or administrative, during the pendency of judicial and administrative review processes.").

MRA further asserts that the County's reliance on *Arroyo* is misplaced because "the administrative procedure in *Arroyo* differs significantly from that provided by the Harford County Code." The Harford County Code provides that an "appeal stays all proceedings in furtherance of the action appealed." Harford Cty. Zoning Code, Chapter 267, § 267-9(J). According to MRA,

this provision establishes that the Board's June 2007 decision was automatically stayed, and as a result, not final. We disagree. Section 267-9(J) allegedly stayed any subsequent administrative actions or proceedings, but there were no additional administrative proceedings to stay. Indeed, on June 5, 2007, the Harford County Board of Appeals made its position clear: it would not allow MRA to operate a rubble landfill on its property. The County's decision was final as there was "nothing further for the agency to do." *Dorsey v. Bethel A.M.E. Church*, 375 Md. 59, 75 (2003) (citations, quotations, and emphasis omitted).

In the alternative, MRA asserts that even if *Arroyo* is applicable, the final administrative action did not occur until 2010, when the MDE declined to renew MRA's permit to operate a landfill. We disagree. Indeed, the MDE's decision was premised entirely on *MRA IV*, in which the Court of Appeals affirmed the Board's earlier denial of the variance requests. In short, the MDE's decision constitutes the "continuing effects of a single earlier act[,]" which is insufficient to delay the limitations period. *Mills v. Galyn Manor Homeowner's Ass'n, Inc.*, 239 Md. App. 663, 683 (2018) (citations and quotations omitted), *cert. granted on other grounds sub nom., Andrews & Lawrence Prof'l Servs., LLC v. Mills*, 463 Md. 523 (2019); *Duke St. Ltd. P'ship, supra*, 112 Md. App. at 48 ("While there may have been continuing ill effects from the original alleged violation, there was not a series of acts or course of conduct by appellee that would delay the accrual of a cause of action to a later date.") (emphasis omitted).

Moreover, we are not persuaded by MRA's reliance on *Millison v. Wilzack*, 77 Md. App. 676 (1989). According to MRA, this Court held in *Millison* that an inverse condemnation claim does not accrue until a court concludes that challenged regulations are effective. We disagree. In *Millison*, a landowner purchased property in 1966 with plans to subdivide the property. 77 Md. App. at 679. Thereafter, in 1972, the Maryland State Department of Health and Mental Hygiene (the "Department") promulgated regulations providing that "a preliminary plan would become null and void if a record plat or subdivision plan is not filed within six months of its approval." *Id.* For plans that were approved before 1972, however, landowners would have six months from the date the regulations were adopted to record their plans. *Id.*

After the landowner failed to file the plan within the prescribed six-month period, the Department sought a declaration that the landowner's untimely recorded subdivision plan was null and void. *Id.* The circuit court ruled that the regulations were inapplicable to the property and declared the subdivision plan valid. *Id.* at 680. On appeal, this Court reversed and held that the regulations applied to the property and that the circuit court should have declared the plan null and void. *Id.* (citing *Millison v. Sec. of Health & Mental Hygiene*, 32 Md. App. 165, 173-74 (1976)). As a result, the landowner's plan was expunged. *Id.*

In 1987, eleven years later, the landowner brought an inverse condemnation suit against the Department. *Id.* On appeal, this Court held that the landowner's

claim was time-barred because the complaint was filed more than three years after the alleged taking occurred. *Id.* at 688. This Court explained:

> There is, in this case, no question raised concerning when the regulations, which form the basis for appellant's claim that his property was taken, were promulgated or finally determined to be effective. Nor is there a question concerning when appellant became aware of the impact of the regulations upon his property. As to the former, the record is clear that the regulations were promulgated in 1972. They were finally determined to be effective in 1976, either when this Court's decision in *Millison I* was filed, the Court of Appeals having denied certiorari that same year, or when, pursuant to that Opinion, appellant's subdivision plan was expunged from the Land Records on August 2, 1976. Appellant does not argue here, as, indeed, he could not, that he was not aware, at least as early as August 2, 1976, of the effect of the regulations on his property.

Id. at 686.

In our view, *Millison* does not, as MRA argues, stand for the proposition that an inverse condemnation claim accrues only after judicial review is exhausted. Such a holding would contradict the Court of Appeals' more recent decision in *Arroyo, supra*, 381 Md. 646. More importantly, whether the claim accrued in 1972 – when the regulations were promulgated – or in 1976 – when the Court of Appeals denied certiorari – was

ultimately irrelevant. Indeed, the landowner sued in 1987 and both dates were well outside the three-year limitations period. As a result, our discussion of when the takings claim accrued was not essential to the disposition of the case. It, therefore, carries no binding effect. *See Smith v. Wakefield, LP*, 462 Md. 713, 720, 736 (2019) (observing that a general expression in an opinion, which is not essential to the disposition of the case – i.e., dictum – is not controlling in subsequent cases); *see also Kastigar v. United States*, 406 U.S. 441, 444-45 (1972) ("The broad language . . . relied upon by petitioners was unnecessary to the Court's decision, and cannot be considered binding authority."). We, therefore, hold that MRA's inverse condemnation claim accrued on June 5, 2007, when the Board of Appeals issued its final decision denying MRA's requests for variances.

Finally, we observe that our holding will not lead to the improbable scenario where an inverse condemnation claim does not become justiciable until after the statute of limitations has run. Notably, the Court of Appeals has quelled such a concern. Indeed, the Court has routinely observed that when a claim is not yet justiciable because of a pending administrative action or appeal, the circuit court should stay the case until the pending appeal is decided. *See Monarch Acad. Balt. Campus, Inc. v. Balt. City Bd. of Sch. Comm'rs*, 457 Md. 1, 13 (2017); *Powell v. Breslin*, 430 Md. 52, 67-70 (2013); *MRA III, supra*, 382 Md. at 362 (holding that when one case cannot be adjudicated because the other is

pending or on appeal, a stay of one proceeding is the appropriate course of action).

Accordingly, even if MRA's inverse condemnation claim was not yet ripe because of the pending appeal in *MRA IV*, MRA could have filed its claim within the limitations period to ensure that its claim was timely.[9] The circuit court, if necessary, could have then stayed the case to await the Court of Appeals' decision. *See*, *e.g.*, *Am. Home Assurance Co. v. Osbourn*, 47 Md. App. 73, 87 (1980) ("[A]ppellant could have filed his action . . . within the requisite three year time period and the action could have been stayed pending the outcome of the declaratory judgment suit."). Instead, MRA filed its claim nearly six years after it discovered the alleged taking. We, therefore, hold – as a matter of law – that MRA's claim is barred by the statute of limitations.

B. MRA's Inverse Condemnation Claim Became Permanent and Stabilized When the Board Issued its Final Decision.

To avoid the effect of the statute of limitations, MRA next argues that its inverse condemnation claim did not become "permanent or stabilized" until the Court of Appeals issued *MRA IV* in 2010. As discussed, *supra*, constitutional claims against administrative agencies ordinarily accrue when the agency renders a

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[9] It is noteworthy that MRA still had nearly three months to file its complaint after *MRA IV* was reported. Indeed, the Court issued *MRA IV* on March 11, 2010 and the limitations period did not close until June 5, 2010.

final administrative decision. *See Williamson Cty. Reg'l Planning Comm'n, supra*, 473 U.S. at 186. Nevertheless, MRA urges us to disregard this well-established principle by extending the Court of Appeals' narrowly tailored holding in *Litz, supra*, 434 Md. 623. MRA relies on *Litz* for the proposition that a regulatory taking cannot become "permanent or stabilized" until an agency's final decision is affirmed by a court. We disagree. Indeed, the *Litz* Court did not consider what effect, if any, a judicial appeal has on a regulatory takings claim.

In *Litz*, a landowner brought an inverse condemnation claim against the government, alleging that the government failed to remedy continuous sewage and wastewater discharges into a lake. 434 Md. at 631-33. Ultimately, the incessant pollution adversely affected the landowner's nearby property to the point that the property was foreclosed on years later. *Id.* at 633. In opposition, the government asserted that the landowner's claim was time-barred because the foreclosure occurred several years after the landowner discovered the pollution. *Id.* at 636. The trial court agreed and dismissed the case. *Id.*

On appeal, the landowner urged the Court of Appeals to reverse, arguing that the unconstitutional taking did not become permanent or stabilized until her property was sold at a foreclosure auction. *Id.* at 651. Based on the allegations in the complaint, the Court held that "a reasonable trier of fact could conclude that the final, complete taking of Litz's property occurred

[at the foreclosure sale], and is not time-barred by the three-year statutory period." *Id.* at 656.

In reaching its holding, the Court of Appeals noted that "[a] complete taking . . . [does not occur] and the statute of limitations does not begin to run until the taking becomes permanent or stabilized." 434 Md. at 654. In doing so, the Court cited *United States v. Dickinson*, 331 U.S. 745 (1947), in which the United States Supreme Court held that a taking is not complete "until the full extent of the taking could be ascertained." *Id.* (citing *Dickinson, supra*, 331 U.S. at 749). The *Litz* Court summarized *Dickinson* as follows:

> In [*Dickinson*], a cause of action was brought after the government built a dam that caused the water level in a river to rise over the course of several years, resulting in the flooding of Dickinson's property. [331 U.S. at 746-47.] The Supreme Court noted that "[t]he source of the entire claim—the overflow due to rises in the level of the river—is not a single event; it is continuous[, a]nd as there is nothing in reason, so there is nothing in legal doctrine, to preclude the law from meeting such a process by postponing suit until the situation becomes stabilized." [331 U.S. at 749.]
>
> The Supreme Court further clarified that "when the Government chooses not to condemn land but to bring about a taking by a continuing process of physical events, the owner is not required to resort either to piecemeal or to premature litigation to ascertain

> the just compensation for what is really 'taken.' " [331 U.S. at 749.]

Litz, supra, 434 Md. at 654-55.

The *Litz* Court then relied on case law from the United States Court of Appeals for the Federal Circuit, observing that the Federal Circuit "has illuminated the current state of the 'stabilization' concept[.]" *Id.* at 655. The Court provided the following quotation from the Federal Circuit's decision in *Boling v. United States*, 220 F.3d 1365 (Fed. Cir. 2000):

> [S]tablization occurs when it becomes clear that the gradual process set into motion by the government has effected a permanent taking, not when the process has ceased or when the entire extent of the damage is determined. Thus, during the time when it is uncertain whether the gradual process will result in a permanent taking, the plaintiff need not sue, but once it is clear that the process has resulted in a permanent taking and the extent of the damage is reasonably foreseeable, the claim accrues and the statute of limitations begins to run.

Litz, supra, 434 Md. at 655 (quoting *Boling, supra*, 220 F.3d at 1370-71).

Critically, however, the Federal Circuit has made clear that the rule announced by the Supreme Court in *Dickinson* is generally limited to gradual physical processes such as flooding. *See*, *e.g.*, *Mildenberger v. United States*, 643 F.3d 938, 945 (Fed. Cir. 2011) ("The stabilization doctrine recognizes that determining the exact

point of claim accrual is difficult when the property is taken by a gradual physical process rather than a discrete action undertaken by the Government such as a condemnation or regulation."); *Goodrich v. United States*, 434 F.3d 1329, 1334-36 (Fed. Cir. 2006) (holding that the "stabilization principle" is not applicable in regulatory takings actions because a regulatory takings claim accrues on the date of the agency's final regulatory decision); *Fallini v. United States*, 56 F.3d 1378, 1381 (Fed. Cir. 1995) (observing that the Supreme Court has "more or less limited [*Dickinson*] to the class of flooding cases to which it belonged") (citations and quotations omitted).[10] In *Fallini*, the Federal Circuit illustrated when regulatory takings claims accrue through the following hypothetical:

> If a landowner owns a parcel of beachfront property and the government enacts legislation demanding that the landowner allow others to walk along the shore, the government has effected a taking of an easement on the landowner's property.

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[10] MRA cites to the United States Supreme Court's decision in *Arkansas Game & Fish Commission v. United States*, 568 U.S. 23, 36 (2012), for the proposition that the stabilization principle applies to regulatory takings claims as well as physical takings. In that case, the Supreme Court was not tasked with determining when a takings claim accrues. Moreover, the Supreme Court did not discuss the stabilization principle. Rather, the Court rejected the government's plea to categorically exclude flooding cases from the Fifth Amendment, holding that there is "no solid grounding in precedent for setting flooding apart from all other government intrusions on property." 568 U.S. at 36.

* * *

> For purposes of claim accrual, such a taking occurs on the date of enactment of the legislation.

Fallini, supra, 56 F.3d at 1382-83. In short, in reviewing whether a regulatory takings claim is time-barred, the Federal Circuit – like the Court of Appeals in *Arroyo, supra*, 381 Md. 646 – looks to the date that an administrative agency renders a final decision. *Goodrich, supra*, 434 F.3d at 1336 ("Thus, we conclude that the issuance of a [record of decision] and final [environmental impact statement] is sufficient to constitute the taking and hence accrue a takings claim, regardless of when the consequences of the decisions contained therein are felt.").

Notably, our holding is consistent with the prevailing law across the country. *See*, *e.g.*, *Hacienda Valley Mobile Estates v. City of Morgan Hill*, 353 F.3d 651, 657 (9th Cir. 2003) (holding that an as-applied regulatory takings claim ripened when the agency rendered a final decision because "there [were] no further [administrative] procedures available to [the plaintiff] to challenge that decision short of resort to state courts for a writ of administrative mandamus"); *Wellswood Columbia, LLC v. Town of Hebron*, 171 A.3d 409, 421 (Conn. 2017) ("[T]he denial of a variance by a zoning board of appeals is considered a final decision by an initial decision maker, which is all that is required to establish finality in order to bring a takings claim, and that once the zoning board of appeals makes its decision, the regulatory activity is final for purposes of an

inverse condemnation claim[.]") (citations and quotations omitted); *Scott v. Sioux City*, 432 N.W.2d 144, 148 (Iowa 1988) ("Although damages for flooding and physical invasion can occur intermittently over the passage of time, in this case, the passage of the permanent ordinance had immediate adverse economic consequences for plaintiffs."); *Edwards Aquifer Auth. v. Bragg*, 421 S.W.3d 118, 135 (Tex. App. 2013) ("[A]n as-applied [regulatory takings] claim is not ripe until *the regulatory authority* has made a final decision regarding the application of the regulation to the property.") (emphasis added).

Accordingly, to the extent that the stabilization principle applies in regulatory takings actions, we hold that, under the circumstances of this case, the alleged taking of MRA's property occurred on June 5, 2007, when the Board of Appeals denied MRA's requests for variances. In our view, the alleged taking had clearly "stabilized" within the meaning of *Dickinson*, because, as of that date, it was abundantly clear that the County would not permit MRA to operate a rubble landfill. MRA's alleged damages may have been reduced if the Court in *MRA IV* reversed the Board's decision. Nevertheless, the mere fact that damages may fluctuate does not operate to delay the accrual date of MRA's claim. Indeed, for a takings claim to accrue, "[i]t is not necessary for the precise extent of the loss to be known[.]" *Duke St. Ltd. P'ship, supra*, 112 Md. App. at 48. We, therefore, hold that MRA's inverse condemnation claim accrued in 2007 and is time-barred.

In sum, the Harford County Board of Appeals rendered its final decision proscribing MRA from operating a rubble landfill on the property at issue on June 5, 2007, when it denied MRA's requests for variances. Consequently, MRA's inverse condemnation claim accrued on that date. Because MRA did not file its complaint until February 2013 – nearly six years later – its cause of action is barred by the statute of limitations.[11] The circuit court, therefore, erred in permitting the claim to proceed to trial.[12] Accordingly, we reverse MRA's judgment of $45,420,076 and remand the case for the circuit court to enter judgment in favor of the County.

We are well aware that we are vacating a significant judgment rendered against the County. Nevertheless, because the cause of action accrued in this case more than three years before MRA filed its inverse condemnation claim, the statute of limitations mandates that its judgment be reversed. Indeed, Maryland "courts are required to enforce the Statute of Limitations as adopted by the Legislature and have no authority to create an unauthorized exception[.]" *Sheng*

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[11] MRA's *per se* takings claim is time-barred for the same reasons.

[12] In light of our holding that MRA's inverse condemnation claim is time-barred, we need not consider either the County's alternative arguments for vacating the judgment or MRA's cross-appeal.

Bi v. Gibson, 205 Md. App. 263, 269 (2012) (citations omitted).

JUDGMENT OF THE CIRCUIT COURT FOR HARFORD COUNTY REVERSED. CASE REMANDED TO THAT COURT FOR ENTRY OF JUDGMENT IN FAVOR OF HARFORD COUNTY, MARYLAND. COSTS TO BE PAID BY APPELLEE.

APPENDIX C

MARYLAND RECLAMATION ASSOCIATES, INC.	*	**IN THE**
	*	**COURT OF APPEALS**
v.	*	
HARFORD COUNTY, MARYLAND	*	**OF MARYLAND**
	*	**COA-REG-0052-2019**
	*	**No. 52**
	*	**September Term, 2019**

ORDER

Upon consideration of the Motion for Reconsideration filed by Maryland Reclamation Associates, Inc. in the above-captioned case, it is this 11th day of May, 2020,

ORDERED, by the Court of Appeals of Maryland, that the Motion for Reconsideration be, and it is hereby, DENIED.

/s/ Mary Ellen Barbera
Chief Judge

APPENDIX D

MARYLAND RECLAMATION ASSOCIATES, INC.	*	IN THE
	*	CIRCUIT COURT
Plaintiff	*	FOR
v.	*	HARFORD
HARFORD COUNTY, MARYLAND	*	COUNTY
	*	CASE NO.
Defendant	*	12-C-13-509

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

MEMORANDUM OPINION

(Filed Mar. 9, 2018)

This case comes before the court on the Plaintiff's Motion to Establish Ultimate Fact by Collateral Estoppel and the Defendant's opposition to that motion. The original Motion to Establish the Ultimate Fact was filed on May 24, 2016. Subsequent motions requesting the same relief were filed by the Defendant on February 7, 2018 and February 26, 2018.

It is these motions that are now before the court.

PROCEDURAL HISTORY

On October 15, 2015 the Defendant filed a Motion for Summary Judgment and the Plaintiff filed its opposition. On May 24, 2016, the Defendant filed a Motion to Establish Ultimate Facts by Collateral Estoppel and the Plaintiff filed its opposition. This Court issued

a Memorandum Opinion and Order denying the motion to dismiss and for summary judgment. The Court did in its ruling, however, preclude the Plaintiff's claim for lost profit damages.

The parties were ordered into mediation and the trial date was continued. The mediation was unsuccessful and a new scheduling order was signed. The trial is scheduled for April 2, 2018. There are a bevy of motions in limine that are to be ruled on before the April 2, 2018 trial.

On January 9, 2018 the parties scheduled a stipulations hearing, to stipulate to material facts not in genuine dispute and to the genuineness of documents. That hearing was canceled due to inclement weather and is to be rescheduled.

On November 13, 2017 the Defendant filed a Motion Requesting Ruling of Unaddressed Issues of Law and the Plaintiff filed its opposition on November 21, 2017. On January 11, 2018 the Defendant then filed a Renewed Motion to Preclude the Testimony for R. Bruce Gamble or alternatively For Leave to Depose Gamble. The Plaintiff filed its opposition on January 24, 2018.

On February 7, 2018 the Defendant filed a motion for partial summary judgment based on the legal doctrine of res judicata, and statute of limitations. The Plaintiff filed a Motion to Strike, or in the alternative, opposition to the Defendant's motion. On February 26, 2018, the Defendant filed yet another motion for

summary judgment requesting a ruling that the zoning regulations at issue do not effect a total taking.

I. DISCUSSION

The doctrine of collateral estoppel and its close cousin res judicata were developed at common law. The doctrine of collateral estoppel or issue preclusion as it is sometimes referred to, is based upon the concept that when an issue of fact or law is actually litigated and decided by a valid and final judgment and the determination in question is essential to the judgment, that determination is conclusive in a subsequent action between the parties, whether on the same or a different claim. James v. State, 350 Md. 283, 711 A.2d 1319 (1998); Murray International v. Graham, 315 Md. 543, 555 A.2d 502 (1989).

The purpose of having both of these legal doctrines is to avoid the expense and vexation of multiple lawsuits, to conserve judicial resources and foster reliance on judicial actions by minimizing the possibility of inconsistent decision on the same issue. Murray International, *supra*. While closely akin, the doctrines of collateral estoppel and res judicata are distinct in both their form and function.

The doctrine of res judicata is applied in a second suit that is between the same parties and that is based on the same cause of action. If the first case has been brought to a conclusion, any judgment rendered on the merits is an absolute bar not only to all matters that were litigated in the earlier case but also all matters

that could have been litigated. The doctrine of collateral estopped is called into play when there is a second suit or dispute between the same parties and, even though the cause of action is different, any determination of fact that was actually litigated in the first case is conclusive in the second case. Garrity v. Maryland State Bd. of Plumbing, 447 Md. 359, 368, 135 A.3d 452, 458 (2016); Cosby v. Dept of Human Res., 425 Md. 629, 639, 42 A.3d 596, 602 (2012); MPC. Inc. v. Kenny, 279 Md. 29, 367 A.2d 46 (1977); Sterling v. Local 438, 207 Md. 132, 113 A.2d 389 (1955).

When the doctrine of collateral estoppel is invoked, facts or issued decided in the previous action are conclusive only if (1) identical to the facts and/or issues presented in the subsequent proceedings, and (2) the case involves the same parties. Under these considerations the earlier resolutions on findings of fact and the law are conclusive as to the issues between the parties. Bankers & Shippers Insurance Company of New York v. Electro Enterprises, Inc., 287 Md. 641, 415 A.2d 278 (1980); MPC Inc. v. Kenny, *supra*; Prescott v. Coppage, 266 Md. 563, 296 A.2d 150 (1972). Collateral estoppel is concerned with the implication of the resolution of issues between the parties in an earlier litigation in a different case and is based on the judicial policy that the losing litigant deserves no rematch after an issue has been resolved after it has been raised or should have been raised. Department of Human Resources v. Thompson, 103 Md. App. 175, 653 A.2d 1183 (1995).

The concept is based on the principle of judicial efficiency and fairness and provides that treating adjudicated facts as established protects parties and litigants from the burden of relitigating identical issues with the same party or a party in privity to prevent needless litigation. Garrity v. Maryland State Bd. of Plumbing, *supra.*

The Court of Appeals in the case of Colandrea v. Wild Lake Community Association, 361 Md. 371, 761 A.2d 899 (2000) reiterated that there is a four part test which must be satisfied in order for the doctrine of collateral estoppel to be applicable:

1. Was the issue decided in a prior adjudication identical to the one presented in the action in question

2. Was the party against whom the plea is asserted given a fair opportunity to be heard on the issue

3. Was the party against whom the plea is asserted a party in privity with the party in the prior adjudication

4. Was there a final judgment on the merits

It is conceded there are same parties and a final judgment on the merits as the collateral estoppel motion relies on County Council of Harford Co. v. Maryland Reclamation, 382 Md. 229, 614 A.2d 78 (1992); Maryland Reclamation Assocs., Inc. v. Harford Cty., 342 Md. 476, 677 A.2d 567 (1996); Maryland Reclamation Assocs., Inc. v. Harford Cty., Maryland, 382 Md. 348, 855 A.2d 351 (2004); Maryland Reclamation

Assocs., Inc. v. Harford Cty., 414 Md. 1, 994 A.2d 842 (2010). The issues previously litigated were made final on the merits by the Harford County Board of Appeals, affirmed by this court, and then reaffirmed by the Maryland Court of Appeals.

A. Identical Issues

It is the Plaintiff's position is that the Harford County Board of Appeals and Maryland Reclamation Assocs., Inc. v. Harford Cty., 414 Md. 1, 994 A.2d 842 (2010) (hereinafter referred to as "*MRA IV*") involved a due process analysis of whether Bill 91-10 was arbitrary and capricious and whether or not Bill 91-10 properly applied to the Gravel Hill property. The validity of Bill 91-10 was decided before the Zoning Hearing Examiner and affirmed by the Court of Appeals.

The Plaintiff relies on Lingle v. Chevron U.S.A., Inc. 544 U.S. 528, 540 (2005), which held that a due process analysis has no proper place in takings jurisprudence. The Plaintiff argues that the standard is different for a takings analysis because not only does the court determine the reasonableness of the government action but also the impact of the regulation on the property owner. Id. at 544 U.S. 538-9, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005). The Plaintiff contends that the issues as they relate to a regulatory taking are different, arguing pursuant to the holding in Lingle, *supra.* the issue in this case does not involve analysis of whether the underlying regulations are valid, and that the validity of the regulations is distinct from the

question whether a regulation has the effect of being a taking.

The issue presented in this case is a claim of a regulatory taking under Section 40 of Article III of the Maryland Constitution and Articles 19 and 24 of the Maryland Declaration of Rights. The case of Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978) sets forth factors to aid in the determination of whether the action was a regulation significant enough to be considered as a "taking." The Penn Central test is a balance of three factors: (1) the economic impact of the regulations on the property, (2) the extent to which the regulation interfered with Plaintiff's distinct investment-backed expectations, and (3) the character of the governmental actions. The takings analysis is distinguishable from the due process analysis because it looks to the factual assessments or the purposes of the government action and the economic effect on the landowner, taking into account the character of the government's action. Lingle, *supra*.

MRA IV was decided under a due process standard. In determining whether the regulation failed to serve a government objective, the court used the standard as to whether or not the objective was so arbitrary or irrational that it deprived the Plaintiff of its rights under due process. *MRA IV* found there were sufficient reasons for deeming Bill 91-10 emergency legislation because of the citizen concern and it was therefore found not be arbitrary or capricious.

It is Defendant's position that collateral estoppel is applicable to this case. They assert that although the earlier case involved different legal theories and causes of action, collateral estoppel is not concerned not with the legal consequences of a judgment, but with findings of ultimate fact that lay behind the judgment.

The Defendant seeks the following to be established as ultimate facts:

- the reasonableness of the government action and also the impact of the regulation on the property owner and the requirement that a rubble landfill be located on a property at least 100 acres in size does not have a disproportionately adverse impact on MRA because any landfill located in the agricultural zoning district would be subject to that same requirement;
- that the rubble landfill MRA proposed to construct and operate on the property has a high potential for adversely impacting the lives, well-being and property values of the residents in the area;
- that there was no good faith reliance by the Plaintiff on the County Council before deciding to purchase and operate a rubble landfill at the Gravel Hill site where 200 foot buffers are required to be established at the beginning of the project;
- MRA did not have a non-conforming use right to develop the property as a rubble land fill, i.e., the existing industrial waste permit to be operated on approximately (24) acres of the property did not

give MRA a right or expectation it would dispose rubble waste; and

- MRA has no vested right to construct and to operate a rubble landfill on the property.

The court will address each issue in turn.

1. Whether it may be established by ultimate fact the reasonableness of the government action and that there was no disproportionate adverse impact of the regulation

The Defendant argues that pursuant to a Penn Central analysis, the character of the government action was appropriate and within the purview of the zoning authority where that authority found an adverse public impact. That argument holds no weight since the Court in Penn Central, *supra.* reviewed the zoning board's analysis to determine whether or not it was a regulatory taking and found that the prior litigation concerned the *merits* of the government action and not its *nature.* The Plaintiff cites Wensmann Realty, Inc. v. City of Eagan, 734 N.W.2d 623, 639 (Minn. 2007), which held that the focus of the character of government action *inquiry is on the nature rather than the merit of the government action* and an important consideration is whether the burden of the regulation falls disproportionately on relatively few property owners.

This Court cannot say that the zoning regulations were reasonable as a matter of law pursuant to the decision in *MRA IV* because that case issued a final

judgment on the merits of a vested rights issue. The Court in Lingle v. Chevron, U.S.A. Inc., at 544 U.S. 528-9 (2005) found that the due process review of the regulation reveals nothing about the magnitude or character of the burden that a particular regulation imposes upon private property rights or how any regulatory burden is distributed among property owners. Magnitude and the character of the burden of a particular regulation that is imposed on private property rights is not totally resolved by a due process finding. In other words, a due process analysis assessing the vested rights of the Plaintiff is not fit to identify regulations whose effects are comparable to a government appropriation.

The only thing actually litigated in *MRA IV* was that the character of the government action was not arbitrary or capricious. It cannot be found as a matter of law via collateral estoppel that the government actions were or were not reasonable or that this was not a taking.

The Defendant also asks this court find that the impact of the regulation on the property owner and the requirement that a rubble landfill be located on a property at least 100 acres in size does not have a disproportionately adverse impact on MRA because any landfill located in the agricultural zoning district would be subject to that same requirement

There is no issue of how the regulations' burdens were apportioned. It was decided by the Harford County Board of Appeals. It was concluded in prior

litigation that the regulation had negative impacts on all landfill property located in the county. The Harford County Hearing Examiner found and the Court of Appeals affirmed:

> MRA cannot allege a disproportionate impact of the 100 acre size requirements upon it. All properties of less than 100 acres in size are similarly impacted by the prohibition against rubble landfills on parcels of less than that size. The applicant it treated no differently than any other similarly situated property owner.

MRA IV at 414 Md. 1, 33, 994 A.2d 842, 861 (2010).

The Board of Appeals Zoning Hearing Examiner found that the (100) acre requirement is not disproportionate because all properties of less than (100) acres are similarly impacted by the prohibited against rubble landfills on the parcels of less than that size and that MRA was treated no differently. The Zoning Hearing Examiner also found that the (1000) foot buffer requirement treated MRA no differently, and further found that traffic required a buffer that large and that otherwise there would be an adverse impact to the neighbors.

The impact of the regulation on the property owner and the requirement that a rubble landfill must be located on a property at least 100 acres in size may, for purposes of the litigation before this court, have a disproportionately adverse impact on MRA irrespective of the fact that landfills located in the agricultural

zoning district would be subject to that same requirement. Therefore while it can be established as ultimate fact that the (100) acres was applicable to all landowners under 91-10, that fact is not conclusive as a matter of law as it relates to the issues presented by this court.

2. Whether it may be established by ultimate fact that the rubble landfill has a high potential for adversely impacting the lives, well-being and property values of the residents in the area and that it was a nuisance to the community.

The Hearing Examiner issued a decision February 28, 2007 denying MRA's requests for a variance. In that decision the Hearing Examiner noted factual findings that a rubble landfill at the Gravel Hill site would have a detrimental effect on adjacent properties. There was also a finding that there was sufficient evidence that MRA's proposal would adversely affect the public health, safety and general welfare as resulting in dangerous traffic conditions. More particularly the hearing found that a community would be affected by dust, fumes and deforestation, and that a church of historical significance would be affected.

The Court of Appeals in *MRA IV* affirmed the Examiner and Board of Appeals determination that there was sufficient evidence presented with respect to each requested variance to support the conclusion that the landfill was substantially detrimental. The Defendant therefore argues that it may be established as ultimate

fact that the proposed landfill would have an adverse impact on the lives, well-being and property values of the residents in the area.

The Defendant request this court establish by collateral estoppel that a landfill on the site would constitute a nuisance. To sustain an action of nuisance a plaintiff must demonstrate that the defendant's interference with the plaintiff's property rights is both unreasonable and substantial in order to recover. Exxon Mobil Corp. v. Albright, 433 Md. 303, 409–11, 71 A.3d 30 (2013); Blue Ink, Ltd. v. Two Farms, Inc., 218 Md. App. 77, 92–93, 96 A.3d 810, 820 (2014). A finding of private nuisance requires a two-part analysis: (1) viewing the defendant's activity, was the interference unreasonable and substantial and (2) viewing the plaintiff's alleged harm, was the inconvenience or harm caused by the interference objectively reasonable. Blue Ink, Ltd. v. Two Farms, Inc., *supra.*

The issue of nuisance was not argued at the hearing or on appeal. Even though the Court found in *MRA IV* there was legally sufficient evidence to show the rubble landfill would be substantially detrimental, there was no inquiry as to whether the interference of the property was objectively reasonable. The County argues that there was a factual finding of the nuisance in the impact of a rubble landfill where the Zoning Hearing Examiner found an adverse impact on traffic, noise, dust, vermin and the general unpleasantness of having a landfill in close proximity to their homes etc. as was determined by the Zoning Hearing Examiner, and that, when the County Council enacted Bill 91-10

it did so for classic zoning considerations. *MRA IV*, 414 Md. 1, 33.

In the opinion of the court, however, this finding of the Court of Appeals that there was sufficient facts produced to justify the decision of the County Council and/or the Board of Appeals does not as a matter of law amount to a legal conclusion that the proposed landfill was determined to be a nuisance under the criteria set forth above.

3. Whether it may be established by ultimate fact that there was no good faith reliance before deciding to purchase and operate a rubble landfill

The Plaintiff contends that in *MRA IV* that the County was estopped from applying the new requirements in Bill 91-10 to the Gravel Hill property. *MRA IV* held against the Defendant's under their theory of zoning estoppel. *MRA IV* found that where the developer had good reason to believe before or while that the zoning would change, a finding for estoppel may not be justified. The Court of Appeals found that facts were available to MRA at the time of the February 1990 purchase that should have alerted MRA to the *possibility* that its plans for a rubble fill would not be successful.

In *MRA IV* the Plaintiff sought damages for lost expenses, arguing that it relied on the inclusion of the Gravel Hill property into the Harford County SWM plan. The Plaintiff further argues that this issue as decided in *MRA IV* went to the validity of the legislation

before the issue of inverse condemnation was ripe and that equitable estoppel analysis differs from the analysis set forth in Lucas and Penn Central.

Elements of equitable estoppel are (1) relying in good faith (2) upon some act/omission and (3) made such a substantial change in position or incurred extensive hardship and expense that it would be inequitable and unjust to destroy the rights acquired. Equitable estoppel requires that the voluntary conduct or representation constitute the source of the estopping party's detriment. Gregg Neck Yacht Club, Inc. v. Cty. Comm'rs of Kent Cty., 137 Md. App. 732, 773, 769 A.2d 982, 1006 (2001); Gould v. Transamerican Assoc., 224 Md. 285, 297, 167 A.2d 905 (1961); Liberty Mutual Ins. Co. v. American Auto. Ins. Co., 220 Md. 497, 501, 154 A.2d 826 (1959); Zimmerman v. Summers, 24 Md.App. 100, 120, 330 A.2d 722 (1975).

MRA IV found that in terms of getting approval for a rubble landfill, the Plaintiff did not rely in good faith on the action of the County Council because in February 1990, MRA should have known of the real possibility its final inclusion in the SWM plans might not come to fruition. *MRA IV* found that the vote initially included the Plaintiff in the SWM plan was attained by a "fragile majority" and just because it was included in the SWM plan was not a sufficient step in the reliance because the final approval of the site for a landfill also required zoning approval. *MRA IV* additionally found that the Plaintiff should have been more diligent to figure out the chances of operating in that locale, including community outreach. The Court

balanced the good faith reliance with the hardship and found that the Plaintiff had not incurred extensive hardship and expense.

MRA IV found that there was insufficient reliance in good faith where it was unknown whether the Plaintiff could procure all of the necessary approvals. The elements of equitable estoppel is a question of fact to be determined in each case. Gregg Neck Yacht Club, Inc., *supra*. Here, the issue of good faith reliance differs because the issue concerns whether there was taking of the property rather than a right to use the property. This court cannot find as a matter of law that there was a lack of good faith reliance and between the resolution of that issue as it may relate to the Plaintiff's claim should be left to the finder of fact.

4. MRA did not have a non-conforming use right to develop the property as a rubble land fill

MRA contended in *MRA IV* that the use of its property prior to the Board's ruling was a valid non-conforming use and therefore insulated MRA's planned landfill from further zoning regulation. The Court of Appeals found that MRA could not a claim non-conforming use status for the property at the time of 91-10's passage. *MRA IV* at 64.

MRA IV answered the question of whether the operation of the landfill with a State permit constituted a valid, non-conforming use under the Harford zoning Section 267-18. The Court held that MRA failed to

prove that its property was protected from re-zoning as a non-conforming use by failing to show that substantially all of the property was being used in permissible means before a zoning change was enacted. The existing industrial waste permit to be operated on approximately (24) acres of the property did not give MRA a right or expectation that it could also operate a rubble fill.

A non-conforming use was an identical issue established in the previous litigation and therefore it may be established as fact for purpose of this litigation.

5. MRA has no vested right to construct and to operate a rubble landfill on the property

As discussed above, the vested rights issue was addressed as a challenge to the validity of the regulations. As set forth above, the resolution of that issue is distinct from the question of whether a regulation effects a taking. The Takings Clause presupposes that the government acted in pursuit of a valid public purpose and expressly requires compensation where the government takes private property for public use. It does not bar the government from interfering with property rights, but rather requires compensation in the event of otherwise proper interference amounting to a taking where a regulation completely deprives a landowner of all economically beneficial or productive use of his land. Lingle v. Chevron, *supra.*

While it was established as fact that the Plaintiff has no vested right to operate a rubble landfill on the property, that fact is not conclusive as to the issue of whether there was a regulatory taking sufficient to allow the Plaintiff to receive damages from the Defendant.

B. Fair opportunity to be heard on the issues

An agency decision can have preclusive effect when that agency is performing the quasi-judicial functions and a court will grant an agency decision preclusive effect for purposes of collateral estoppel upon satisfaction of the three-part test arising from Exxon Corp. v. Fischer, 807 F.2d 842, 84506 (9th Cir. 1987). That test provides that an agency decision can have preclusive effect if: (1) the agency acted in judicial capacity; (2) the issue presented to the fact finder in the second proceeding was fully litigated before the agency and; (3) resolution of the issue was necessary to the agency's decision. Gerrity v. Maryland State Bd. of Plumbing, 447 Md. 359, 380 135 A.3d 452, 465 (2016). Neifert v. Department of Environment, 395 Md. 486, 910 A.2d 1100 (2006). When those elements are satisfied agency findings made in the course of the proceeding that are judicial in nature should be given the same preclusive effect as findings made by a court. Gerrity, *supra.* A preclusive effect is governed to the extent the case comports with principles of judicial economy and fairness. Gerrity v. Maryland State Bd. of Plumbing, 447 Md. 359, 376, 135 A.3d 452, 463 (2016).

The Court of Appeals in Gerrity, *supra.* found determinative in whether the first factor is satisfied was whether there is opportunity to conduct a hearing that allowed parties to present evidence and exhibits. The Plaintiff was given a fair opportunity to present evidence and to participate fully in all hearings. There is no allegation by the Plaintiff that there was different procedural opportunities in the two proceedings.

The second factor is satisfied where the issues to which the Board granted preclusive effect were actually litigated and determined in the Hearing. Gerrity, *supra.* The Court in Colandrea v. Wilde Lake Community Association, Inc. v. 361 Md. 371, 761 A.2d 899 (2000) found that decisions made by an administrative agency are given preclusive effect only where the agency was acting in quasi-judicial capacity, where the issue was actually litigated and where the resolution was necessary to the agencies decision. The third factor is satisfied where the finding of fact was necessary as a predicate the final order.

The Plaintiff contends that because the identical issues in the takings analysis was not fully heard, the Defendants are prevented from relief under collateral estoppel. The Defendant argues that it must not be the same exact issue because that would constitute res judicata because the facts argued during the Hearing were determinative to the action.

As set forth above, the issues before this court are different than the issues decided in *MRA IV.* The issues decided in *MRA IV*, while it did make findings of fact,

do not go to the ultimate issue currently before this court as a matter of law.

II. CONCLUSION

In the opinion of the court, as set forth above, the doctrine of collateral estoppel is not applicable to the issue in this case and should be denied. It should be clear, however, that this ruling does not mean that all of the facts and ruling of the Hearing Examiner, the Board of Appeals, or the Court of Appeals is in any way irrelevant or should not be presented in some form to the ultimate finder of fact for its consideration in resolving this case. Indeed, many of those findings would seem to be relevant in some way to the issue presented here. Whether and how those issues are presented should be left to the discretion of the trial judge.

The issue raised in the February 7, 2018 motion also requested summary judgment for reason the statute of limitation had run. That issue was raised on the original October 15, 2015 motion for summary judgment. The court issued its ruling denying relief on the basis of statute of limitations on January 31, 2017. The thirty day time period had run for this court to reconsider the previous order, this request must be denied.

The Defendant's January 11, 2018 Renewed Motion to Preclude the Testimony for R. Bruce Gamble is an issue pending as a motion in limine. (See Defendant's Motion in Limine to Strike Much of the Expert Testimony of R. Bruce Gamble). The January 11, 2018

request for leave to Depose Bruce Gamble is untimely where discovery was closed over a year ago.

/s/ WILLIAM O. CARR
WILLIAM O. CARR, JUDGE

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MARYLAND RECLAMATION ASSOCIATES, INC.	*	**IN THE**
	*	**CIRCUIT COURT**
Plaintiff	*	**FOR**
v.	*	**HARFORD**
HARFORD COUNTY, MARYLAND	*	**COUNTY**
	*	**CASE NO.**
Defendant	*	**12-C-13-509**

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

ORDER

It is this it is this 9th day of March, 2018, hereby **ORDERED**;

(1) the Defendant's May 24, 2016 Motion to Establish Ultimate Fact by Collateral Estoppel is **DENIED**;

(2) the Defendant's February 7, 2018 Motion for Partial Summary Judgment, Res Judicata, and Statute of Limitations is **DENIED** as moot;

(3) the Defendant's February 26, 2018 Motion for Summary Judgment Zoning Regulations at Issue Do Not Effect a Total Taking is **DENIED** as moot; and

(4) the Defendant's January 11, 2018 Request for Leave to Depose Bruce Gamble is **DENIED**.

It is further **ORDERED** that at the March 22, 2018 Pre-Trial Conference, counsel bring a list of witnesses and evidence to be presented at trial.

/s/ WILLIAM O. CARR
WILLIAM O. CARR, JUDGE

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APPENDIX E

MARYLAND RECLAMATION ASSOCIATES, INC.	*	IN THE
	*	CIRCUIT COURT
Plaintiff	*	FOR
v.	*	HARFORD
HARFORD COUNTY, MARYLAND	*	COUNTY
	*	CASE NO.
Defendant	*	12-C-13-509

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

MEMORANDUM OPINION

(Filed Jan. 31, 2017)

This case comes before the court on a Motion for Summary Judgment filed by the Defendant.

FACTUAL BACKGROUND

On August of 1989, Maryland Reclamation Associates, Inc. (hereinafter referred to as "the Plaintiff' or "MRA") entered into a contract to purchase property located on or adjacent to Gravel Hill Road in Harford County with the intent of constructing and operating a rubble landfill.

MRA began the process of obtaining a rubble landfill permit from the Maryland Department of the Environment (hereinafter referred to as "MDE"). As part of that process, MRA requested that the site be included

in the County's Solid Waste Management Plan (hereinafter referred to as "the SWM plan"). As a result of that request, Harford County (hereinafter referred to as "the Defendant" or "the County") amended its SWM plan to include the Gravel Hill Road site subject to (27) conditions, including but not limited to MRA providing a minimum landscape buffer of 200 feet. The (27) conditions were designed to mitigate any negative impact of the use of the property as a rubble landfill on the surrounding community.

On November 7, 1.989 the County Council conducted a hearing and on November 14, 1989, passed a motion including the Plaintiff's proposed site in the SWM plan. The Council's attorney had advised the Council that it must act on the matter before November 17, or MDE would treat MRA's request as having been approved.

MRA began the process of seeking a permit from MDE to construct and operate a rubble fill and on November 20, 1989, the Plaintiff received a Phase I approval. MRA subsequently filed additional reports and statements with MDE to obtain Phase II and Phase III approval.

As a result of the receipt of this preliminary approval for a rubble landfill permit, the Plaintiff and the sellers finalized the purchase of the Gravel Hill property on February 9, 1990 for the sum of $732,500, a purchase price below the appraised value of the property.

Subsequent to the purchase being finalized the wheels began to come off the cart, at least from MRA's perspective. On February 14, 1990 the newly appointed President of the County Council introduced Resolution 4-90 which would require that the Gravel Hill Road site be removed from the SWM plan. After public hearings were held on this proposed resolution, it was passed on May 8, 1990, by the four members of the Council who chose not to abstain or who were not otherwise disqualified from voting on the resolution and the Gravel Hill site was removed from the SWM plan.

Subsequently to the passage of Resolution 4-90 the President of the County Council wrote to MDE requesting that it delay consideration of any final approval of MRA's permit. MDE thereafter stopped processing MRA's application for a rubble landfill permit.

Feeling aggrieved by the action of the council, MRA filed suit in the Circuit Court for injunctive relief and a declaratory judgment to overturn the Council's decision. On October 10, 1990 the court granted a Motion for Summary Judgment in favor of MRA and effectively voided the May 8, 1990 resolution.

The individual property owners and the County Council appealed and the trial court's decision was affirmed by the Court in the case Holmes v. MRA, 90 Md. App. 120, 600 A.2d 864 (1992) (hereinafter referred to as "*MRA I*"). The Court of Special Appeals held that the Council's resolution to delete the plan because of groundwater considerations and other land use issues

was an impermissible invasion on the State's permit review prerogative. An attempt by the County Council to seek a review by the Court of Appeals was no granted on the grounds that the Council lacked standing to file an appeal of its own. County Council of Harford Co. v. Maryland Reclamation, 382 Md. 229, 614 A.2d 78 (1992).

While the *MRA I* litigation on Resolution 4-90 was still pending in the appellate system, the County Council introduced Bill 91-10 as emergency legislation. The purpose of this bill was to amend the requirements for rubble landfills by increasing the minimum acreage to 100 acres and to increase buffer zones from 200 to 1000 feet. The bill passed after a public hearing on March 19, 1991 and was signed into law on June 10, 1991 by the County Executive.

Bill 91-16 was also introduced to the Harford County Council on April 2, 1991. The purpose of this bill was to authorize the County Council to remove a specific site from the SWM plan if the site failed to comply with any ordinance if a permit had not been issued by MDE within 18 months of the site being placed in the SWM plan or where the owner had not placed the site in operation within the same 18 month period. Once again, the bill was passed by the County Council and was signed into law by the County Executive on June 10, 1991.

Even before Bill 91-16 was signed into law, a copy was sent to MDE calling into question the status of the various sites that were in the process of being

considered for rubble land fill permits. On April 25, 1991 the County sent a letter to MDE with a copy of Bill 91-10, advising MDE that the Bill would call into question any pending permits. On May 2, 1991 MDE advised the Council that if a permit were to be issued to MRA such issuance would not authorize MRA to violate any local zoning or land-use requirements.

On May 14, 1991 the County Council passed Resolution 15-91 which purported to interpret Harford County law and to find that the Gravel Hill Road site was not in compliance with the County law. That resolution effectively removed the Gravel Hill Road site from the SWM plan.

On May 2, 1991 the County sent a letter to MRA stating it failed to meet the requirements of Bill 91-10 and that MRA would need to apply for a variance to operate a rubble landfill on their property. Instead of filing for a variance, MRA filed an appeal to the Harford County Board of Appeals from the Planning Director's decision requesting that the Board review and reverse the decision of the Planning Administrator that the standards of Bill 91-10 applied to the applicant's site.

On June 20, 1991 MRA filed a complaint in the Harford County Circuit Court again seeking declaratory judgment and injunctive relief. In that complaint they requested that Bills 91-10, 91-16 and 15-91 be found null and void as they related to the MRA's Gravel Hill site and to enjoin the County from enforcing those resolutions and amendments.

An interlocutory injunction was issued by the court expressly allowing MDE to continue to process MRA's pending permit. On February 28, 1992 the MDE issued to MRA a permit to operate a rubble landfill on its property. MDE expressly stated, however, that the permit was conditioned upon MRA's compliance with all local land use requirements.

Cross motions for summary judgment were filed and on May 19, 1994 the Circuit Court held 91-10 and 91-16 were not invalid on the grounds asserted by MRA. The court ruled, however, 15-91 was invalid on its face. After the court's ruling, MRA filed an appeal. The issues MRA brought in *MRA II* were whether MRA had a constitutionally protectable property interest in the Harford County SWM plan and had vested rights in the permit process. The Court of Appeals at MRA v. Harford County, 342 Md. 476, 677 A.2d 567 (1996) (hereinafter referred to as "*MRA II*") held that MRA had failed to exhaust its administrative remedies because MRA had never applied for zoning or requested a variance or exception and therefore the issue was not ripe.

Pursuant to the suggestions made by the Court of Appeals, MRA filed an administrative appeal that requested an interpretation of the effect on the changes to the zoning ordinance from the Director of Planning. The questions asked by administrative appeal were as follows: (1) did 91-10 apply to MRA's property on Gravel Hill; (2) did 91-10 properly apply to MRA property under the circumstances and in light of the Environmental Code; (3) would the operation of the landfill

pursuant to its state permit be deemed to violate the Harford County Code; and (4) may MRA get a grading permit without having proper zoning. In December 1998, MRA made a second request for an interpretation of the zoning ordinance and applied for a zoning certificate to operate the landfill. MRA presented five questions as follows: (1) whether a permit would violate applicable Harford County zoning; (2) whether the County was permitted by estoppel from applying provisions relating to zoning; (3) whether applying 91-10 was prohibited by the Maryland Declaration of Rights; (4) whether Harford is preempted by State Environmental law and; (5) whether MRA's operation of landfill was a valid non-conforming use pursuant to the County's Zoning Code.

On February 22, 1999, the Zoning Administrator issued a letter stating that the 1991 amendments applied to MRA's proposal and denied zoning approval unless MRA obtained variances. Dissatisfied with what they considered to be unfavorable rulings, MRA. filed an administrative appeal to the Harford County Board of Appeals. On April 2, 2002 the Zoning Hearing Examiner issued an extensive written decision deciding 91-10 did not violate local, State or federal law.

On June 11, 2002 the County Council, sitting as the Harford County Board of Appeals held MRA must abide to existing zoning laws and that the County was not prohibited from applying the new ordinances to the property in question by principles of estoppel. The Board also found that MRA did not acquire vested rights and therefore no constitutional rights because a

vested right was not established. They also held that the action by the County was not preempted by State environmental laws and that the nibble fill was not a valid non-conforming use pursuant to the zoning code.

On October 22, 2003 MRA sought review of the Board's decision in the Circuit Court. The court affirmed the Board's decision and the dispute again went to the Court of Appeals, in MRA v. Harford County, 382 Md. 348, 855 A.2d 351 (2004) (hereinafter referred to as "*MRA III*"). The Court of Appeals once again did not address the issues, and found only that MRA had failed to exhaust its administrative remedies because it had not sought a variance from the Board of Appeals.

On May 12, 2005, MRA requested variances to the requirements established by Bill 9110 and hearings were held before the zoning hearing examiner for Harford County. MRA requested the following variances: (1) a variance to the 30ft buffer; (2) a variance to the 200ft buffer; (3) a variance to allow solid waste disposal; (4) a variance to the historic district buffer; (5) a variance to code requirement of no less than 100 acres for a nibble landfill; and (6) a variance from the 1000ft buffer.

Over a ten month span the Zoning Hearing Examiner presided over seventeen nights of hearings and heard the testimony of eleven witnesses. Eight experts were produced by MRA and six experts were presented from the County. He also heard the testimony of sixteen residents from the community and St. James Parish. On February 28, 2007, the Hearing Examiner

issued a report and recommendation that the variance requests be denied.

It goes without saying that MRA was dissatisfied with the Hearing Examiner's decision and appealed to the Board of Appeals. On June 5, 2007 the Board voted seven to zero to adopt the Hearing Examiner's findings and decision, effectively denying the requested variances. This decision was appealed to the Circuit Court for Harford County which affirmed the findings of the Board of Appeals in an order dated July 7, 2008.

MRA again appealed to the Court of Special Appeals and certiorari was granted by the Court of Appeals on its own initiative. In Maryland Reclamation Associates, Inc. v. Harford County, 414 Md. 1 (2010) (hereinafter referred to as "*MRA IV*") the Court held that the hearing provided sufficient evidence on the record to support the Board's finding that the rubble fill would have a detrimental effect on the public health, safety and general welfare and would jeopardize the lives of people living in the area and result in dangerous traffic conditions. The court cited the nearby historic graveyard's risk of dust and vibrations, that the diesel fumes and air pollution might affect the asthma in children, that the removal of the wooded area would make soil temperatures rise and increase erosion, and that traffic conditions would be affected.

After finding the Board's denial of the variance as reasonable, the court renewed and addressed the other issues presented in *MRA III*. The Court held the County's enactment of Bill 91-10 was not preempted by

the State because zoning is a sphere separate from State regulation and that while the County could not remove MRA from the SWM plan, Bill 91-10 involved classic zoning considerations.

The Court of Appeals in *MRA IV* also addressed constitutional issues that had been raised and found that MRA did not have a vested right in its prior County zoning approval to proceed with Phases II and II of the MDE permitting process and that the application of 91-10 was not arbitrary and capricious because there were sufficient reasons for the emergency legislation because of citizen concern.

The Court also did not grant relief under the doctrine of equitable estoppel, finding that MRA did not substantially rely in good faith because as early as February 1990, MRA should have known of the real possibility that its plans would not come to fruition and that the SWM plan was attained by a fragile majority. They found that the fact that MRA was included in the SWM plan was not a sufficient step in establishing reliance because, in good faith, the process required further zoning approval. The court also found no substantial change in position or that MRA had incurred extensive hardship and expense that it would be inequitable and unjust because while MRA asserted that it spent over one million in reliance on the County's approval, MRA did not specify any specific figures or sums.

The Court also found that MRA failed to prove that it had a property interest protected as a non-conforming use because of the failure to show that substantially all of the property was being used in permissible means before a zoning change was enacted.

With no more administrative remedies available to them this case was filed by MRA who now seeks compensation for the actions of the County relating to the use of its property.

PROCEDURAL BACKGROUND

This case was filed on February 19, 2013. The Plaintiff's complaint had one count, which alleges that the Defendant has violated Article III, Section 40 of the Maryland Constitution, Article 19 and 24 of the Maryland Declaration of Rights and Article 24 of the Maryland Declaration of Rights. The complaint is based on the Plaintiff's contention that the actions by the County have had the effect of depriving MRA of the beneficial use of their property and that the Plaintiff therefore has a claim for inverse condemnation.

On April 12, 2013, the Defendant filed a Motion to Dismiss arguing that the Plaintiff failed to file their complaint within the statute of limitations and that they had failed to state a claim of inverse condemnation or eminent domain. The Plaintiff submitted its opposition to that motion. On March 31, 2014 the court denied the Defendant's request to dismiss.

On April 9, 2014, the Defendant submitted a motion to bifurcate and on April 21, 2014 the Plaintiff submitted its opposition to that motion.

On April 15, 2015 the Plaintiff filed an amended complaint for inverse condemnation and a demand for jury trial and the Defendant filed an answer. On October 15, 2015, the Defendant filed a motion for summary judgment, of alternatively motion for partial summary judgment. The Plaintiff filed a response.

A motion for protective order and to establish ultimate facts by collateral estoppel was filed on behalf of the Defendant on May 24, 2016. An opposition was filed on the Plaintiffs behalf on June 8, 2016 and the Plaintiff's reply to the motion was filed on June 15, 2016. On July 8, 2016 the Defendant filed a sur-reply to which the Plaintiffs opposition was filed on July 25, 2016.

Numerous motions with regard to discovery were filed thereafter. The Defendant filed a motion to shorten time for MRA's response to the County's motion for additional time to take deposition and motion to compel discovery. The Plaintiff filed its opposition on August 19, 2016 where after the Defendant's sur-reply was filed on October 18, 2016.

This court ordered on August 11, 2016, that MRA shall have to the 19th day of August to response to the County's motion to compel.

On October 17, 2016 the County filed a motion for the return of a privileged document, alleging that

during a deposition, a privileged document was inadvertently disclosed. The Defendant filed its opposition November 2, 2016. On October 18, 2016, the Plaintiff filed a motion to compel designation and deposition of Defendant's corporate designee.

On October 19, 2016 counsel for the parties had a discussion in chambers. The Plaintiff agreed to appoint a corporate designee to be deposed. A bevy of discovery motions were filed, however, relating to changes after the October 31, 2016 discovery deadline regarding the County's supplements to its answers to interrogatories relating to the scope of the subject matter of certain fact witnesses who were named after the discovery deadline classified as expert witnesses.

The Plaintiff motion to strike the County's untimely disclosure of expert opinions or supplemental opinions and to preclude the expert testimony of Joseph Stevens, Daniel Pazdersky or Mark Gutberlet, or motion to compel expert discovery and for modification of the scheduling order as to the deadline for the MRA's expert rebuttal witness was filed on October 19, 2016 and on November 4, 2016, the Plaintiff filed its opposition.

On October 31, 2016, the County amended its interrogatories after the proposed end of discovery and on November 9, 2016 the Plaintiff filed a motion to strike the third supplemental answers to MRA's first set of interrogatories and preclude the testimony of persons and subject matter referenced therein. The Plaintiff filed a motion to strike Daniel Pazdersky's

11-04-2016 supplemental report and preclude testimony to that subject matter because it was provided after the deadline. The Defendant filed its opposition on November 23, 2016.

During this time, both parties filed letters with the court alleging the problems that have been encountered with the discovery. The parties were brought in for a conference on November 22, 2016 to discuss the discovery difficulties. The parties agreed to have Daniel Pazdersky, among others, be deposed as corporate designees.

The motions for return of a privileged document, to strike untimely disclosure and to preclude expert testimony, and a motion for protective order to preclude discovery on ultimate facts established by collateral estoppel remain outstanding.

The Defendant's motion for renewed summary judgment was filed November 14, 2016. On December 2, 2016, the Plaintiff's filed MRA's opposition to that motion. It is this motion that is now before the court.

STANDARD OF REVIEW

Maryland Rule 2-501 states in pertinent part:

> The court shall enter a judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law.

The purpose of the summary judgment procedure is not to try the case or to decide the factual disputes, but to decide whether there is an issue of fact, which is sufficiently material to be tried. Sadler v. Dimensions Healthcare Corp., 378 Md. 509, 534, 836 A.2d 655, 669-70 (2003) (citing Taylor v. NationsBank, 365 Md. 166, 173, 776 A.2d 645, 650 (2001) (quoting Jones v. Mid-Atlantic Funding, 362 Md. 661, 675, 766 A.2d 617, 624 (2001))). When a court is making its decision under Rule 2-501, it engages in a two-part legal analysis. See Hendrix v. Burns, 205 Md. App. 1, 18, 43 A.3d 415, 425-26 (2012), reconsideration denied (June 7, 2012); Jurgensen v. New Phoenix Atl. Condo. Council of Unit Owners, 380 Md. 106, 113-14, 843 A.2d 865 (2004). First, the court determines whether there is any genuine dispute of material fact. Hendrix, 205 Md. App. at 18, 43 A.3d at 425-26; Appiah v. Hall, 416 Md. 533, 546, 7 A.3d 536 (2010). A material fact is one, the decision about which, will affect the outcome of the claim. Debbas v. Nelson, 389 Md. 364, 373, 885 A.2d 802 (2005) (quoting Todd v. Mass Transit Admin., 373 Md. 149, 155, 816 A.2d 930 (2003)). A factual dispute relating to grounds upon which the decision is not rested is not a dispute with respect to a material fact and such dispute does not prevent the entry of summary judgment. O'Connor v. Baltimore County, 382 Md. 102, 110, 854 A.2d 1191, 1196 (2004) (quoting Lippert v. Jung, 366 Md. 221, 227, 783 A.2d 206, 209 (2001)). In other words, a material fact is a fact "necessary to resolve the controversy as a matter of law[.]" D'Aoust v. Diamond, 424 Md. 549, 575, 36 A.3d 941, 955-56 (2012) (quoting Lynx, Inc. v. Ordnance Products, Inc., 273 Md. 1, 8, 327 A.2d

502, 509 (1974)). The court is to make no findings of fact in granting or denying a motion for summary judgment. Hill v. Cross Country Settlements, LLC, 402 Md. 281, 294, 936 A.2d 343, 351 (2007). Additionally, the trial court will not determine any disputed facts, but rather will make a ruling simply as a matter of law. O'Connor, 382 Md. at 111, 854 A.2d at 1196. If there is a genuine dispute as to any material fact, summary judgment is improper. Cross Country Settlements, LLC, 402 Md. at 294, 936 A.2d at 351.

If, however, there is no genuine dispute of material fact, the court next moves to consider whether, on the undisputed material facts, the moving party is entitled to judgment on the claim as a matter of law. *See* 120 W. Fayette St., LLLP v. Mayor and City Council of Balt. City, 413 Md. 309, 328-29, 992 A.2d 459 (2010); Hill v. Knapp, 396 Md. 700, 711, 914 A.2d 1193 (2007); O'Connor, 382 Md. at 110-11, 854 A.2d 1191. If the answer to that question is yes, summary judgment should be granted. *See* Piscatelli v. Smith, 424 Md. 294, 35 A.3d 1140 (2012); 120 W. Fayette St., 413 Md. at 329, 992 A.2d at 471; Maryland State Bd. of Elections v. Libertarian Party of Maryland, 426 Md. 488, 505, 44 A.3d 1002, 1012 (2012).

The court views the facts, including all inferences, in the light most favorable to the party against whom summary judgment is sought. Sadler, 378 Md. at 536, 836 A.2d at 671. If the undisputed facts are susceptible to more than one inference, the party against whom inferences are to be drawn is entitled to the inferences most favorable to his contentions. Cross Country

Settlements, 402 Md. at 294, 936 A.2d at 351 (quoting Roland v. Lloyd E. Mitchell, Inc., 221 Md. 11, 14, 155 A.2d 691, 693 (1959) (citing White v. Friel, 210 Md. 274, 285, 123 A.2d 303, 308 (1956))). If the facts are subject to more than one inference, those inferences should be submitted to the trier of fact. *Id.;* Porter v. Gen. Boiler Casing Co., 284 Md. 402, 413, 396 A.2d 1090, 1096 (1979); Fenwick Motor Co. v. Fenwick, 258 Md. 134, 138, 265 A.2d 256, 258 (1970). Additionally, a moving party may not rely on unsupported conclusory statements to justify the grant of summary judgment. Cross Country Settlements, 402 Md. at 308, 936 A.2d at 359. Further, the failure to contradict facts recited in affidavits constitutes an admission of those facts for purposes of summary judgment. Mathis v. Hargrove, 166 Md. App. 286, 306, 888 A.2d 377, 389 (2005).

DISCUSSION

The issues to be determined are in order as discussed: (1) is the Plaintiff's case barred by the statute of limitations; (2) the Plaintiff's claim of inverse condemnation; (3) and the issue of appropriate damages.

I. STATUTE OF LIMITATIONS

A taking claim is ripe "once . . . the permissible uses of the property are known [by the court] to a reasonable degree of certainty." Palazzolo v. Rhode Island, 533 U.S. 606, 620, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001). To be ripe, a taking claim based on a permit denial must spring from a final decision. Williamson

County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985). Alternatively, a claimant can show its claim was ripe with sufficient evidence of the futility of further pursuit of a permit through the administrative process. MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 350 n. 7, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986). Cooley v. United States, 324 F.3d 1297, 1301-02 (Fed. Cir. 2003)

A final decision denying land use on the merits provides information that a regulation has deprived a landowner of all economically beneficial use of the property, or defeated the reasonable investment-backed expectations of the landowner to the extent that a taking has occurred. Palazzolo, 533 U.S. at 618, 121 S.Ct. 2448; Cooley v. United States, 324 F.3d 1297, 1302 (Fed. Cir. 2003); MacDonald, Sommer & Frates, 477 U.S. at 351, 106 S.Ct. 2561 (stating that the court must know the "nature and extent of permitted development" on the land in question to determine whether a taking claim is ripe for review). A denial is final when the applicant has no appeal mechanism available and the denial is based on an unchanging fact. Bayou des Families Dev. Corp. v. United States, 130 F.3d 1034, 1040 (Fed.Cir.1997).

In Palazzolo v. Rhode Island, *supra*, the court found that a landowner must give land use authority the opportunity to exercise its discretion, and once it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty,

a takings claim is likely to have ripened. The court found that "a landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of the challenged taking." Id.

The Court further held that where the land use dispute was ongoing for more than thirty years the Supreme Court held they would not place an expiration on a takings clause claim where the property was transferred with notice of the regulatory restrictions, stating the State may not evade the duty to pay compensation on that premise where a taking had occurred. Palazzolo, *supra.*

The Plaintiff cites Litz v. MDE, 434 Md. 623 (2013), which held that violations that are continuing in nature are not barred by the statute of limitations. In Litz the court held that, despite the property owners becoming informed that the pollution rendering the property valueless occurred in 1996, the statute of limitations did not begin to run until the property was foreclosed on in 2010. The Plaintiff argues that this is analogous to Litz, because that the final decision of *MRA IV* where they are contending the County rendered the property valueless was when the taking was final and when limitations began to run

Irrespective of whether inverse condemnation is a continuing cause of action, this claim satisfies the three year statute of limitations because this court finds that the final decision issued by the Court of Appeals in *MRA IV* on March 11, 2010 was the final

decision which foreclosed on any possibility of using the property in question for rubble fill. The Plaintiff filed this case on February 19, 2013 making the date of filing within the statute of limitations.

II. INVERSE CONDEMNATION

The Plaintiff brings this inverse condemnation claim contending that the Defendant effectively "took" the Gravel Hill property without just compensation in violation of its rights under Section 40 of Article III of the Maryland Constitution and Articles 19 and 24 of the Maryland Declaration of Rights.

The United States Supreme Court recognized in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922), that government regulation of private property may be so onerous that it has the effect and is tantamount to a direct appropriation and if that regulation goes too far it will be recognized as a taking. Regulatory actions will be deemed a *per se* taking for purposes of the Fifth Amendment where; (1) government requires an owner to suffer a permanent physical invasion or (2) the regulations completely deprive an owner of all economically beneficial use of his property. Lucas v. South Carolina Council, 505 U.S. 1003 (1992). Where the taking is not a *per se* complete deprivation of all beneficial use, a Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978) analysis is necessary to weigh factors to determine

whether the regulatory action is so significant to amount to a taking.

It is undisputed that the taking in this case was not a physical but a regulatory taking. The issue turns on the extent that the regulations had on the Plaintiff's property interest and whether there has been a complete taking under Lucas v. South Carolina Council, 505 U.S. 1003 (1992) or under Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978) where the regulatory taking is not complete but is substantial and that the character of the government conduct warrants compensation.

The Defendant argues that the Plaintiff is precluded from a takings analysis because it was established the Plaintiff did not have a vested right to use the property as a rubble fill because the Gravel Hill property could not comply with the 200 feet buffer requirement prior to the enactment of Bill 91-10. Despite case law to the contrary, the Defendant contends that the takings clause was not intended to compensate property owners for property rights they never had. The cases the Defendant cites in support of that point, however, still permit a takings analysis before making the determination of whether a taking had occurred.

The Defendant cites a number of cases including, Guggenheim v. City of Goleta, 638 F.3d 1111 (2010) which held that a rent control ordinance in effect long before the plaintiffs purchased the property was not a taking after making a takings analysis and finding the claim failed under the investment backed expectations

of a Penn analysis. Laurel Park Community LLC. V. City of Tumwater, 698 F.3d 1180 (2012) which held that land zoning that did not change the present state of the property, only the future price and use, failed due to an insufficient economic impact and reasonable investment backed expectations under factor one and two of the Penn analysis. Another case cited is Gove v. Zoning Board of Appeals of Chatham, 444 Mass. 754 (2005) held that inherited land that was found to be unfit for residential development before the land was inherited and sought to be sold lacked investment backed expectations under the Penn analysis.

The Defendant next asserts that the equal application of a zoning regulation assures that, in its uniform applicability, a taking can never occur and the character of the government action will always favor the government. No case law is cited by the Defendant exempting local zoning regulations from a takings analysis. While the third factor weighs in determining whether in fact a taking had occurred, it does not preclude a takings analysis, which is what it seems the Defendant is requesting this court do. The cases the Defendant cites actually support and do not totally preclude a takings analysis.

The Defendant also argues that because there was no vested right to the land use, as determined in *MRA IV.* there can be no taking.

Vested rights have no place in a takings analysis. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005). Even where there is no

vested right to the property, the courts are not prohibiting in making a takings analysis. In Ruckelshaus v. Monsanto Co., 467 U.S. 986, 104 S.Ct. 2862 (1984) the court held that property rights are protected and that property interests arise from an independent sources such as state and common law. In Palazzolo v. Rhode Island *supra*, the court held that the basis of a takings challenge is that the very enactment of the statute reduced the value of the property has effected a transfer of the property interest.

A vested right to the zoning is irrelevant to a taking or eminent domain proceeding where the party owns the property as issue and that property can no longer be used for reasonable purposes. It is undisputed that the Plaintiff owns the property on Gravel Hill Road and therefore a takings analysis may proceed.

A. Per se regulatory takings under *Lucas v. South Carolina Council*

In Lucas v. South Carolina Council, 505 U.S. 1003 (1992) the Supreme Court concluded that a land use regulation that denies a plaintiff all economically beneficial use of his property may constitutes a taking except to the extent that background principles of nuisance and property law independently restrict the owner's intended use of the property. Gove v. Zoning Board of Appeals of Chatham, 444 Mass. 754, 762-3, 831 N.E.2d 865, 872 (2005).

In Lucas, plaintiff bought two residential lots on a barrier island intending to build single family homes. At the time of the purchase the parcels were not subject to the State's coastal zoning building permit requirements. Shortly thereafter, however, the State legislature enacted the Beachfront Management Act, barring Plaintiff from erecting any permanent habitable structure on his parcels. The plaintiff paid $975,000 for two residential lots at a time when he was not legally obliged to obtain a permit in advance of development. The issue was whether the State deprived him of *all* economically valuable use of his property and therefore had effectuated a taking under the Fifth and Fourteenth Amendments. The Court in Lucas found that the State's exercise of its powers where they take *all* economically beneficial use of property, cannot be upheld without just compensation.

The Plaintiff argues that it is entitled to compensation under Lucas because the Defendant deprived it of *all* economically beneficial or productive use of the property. The Plaintiff further contends that even where it is unclear whether they were deprived of all viable use of the property, it is for a jury to decide whether there was a deprivation of all economically beneficial use.

The Plaintiff has proferred the testimony of Robert S. Lynch, who testified before the Zoning Hearing Examiner that in his opinion the property does not have any economically beneficial value for any use other than a rubble landfill because the extensive excavation on the property created a "moonscape" with

extreme changes in elevation which would not make it economically viable for MRA to undertake any other permitted use.

To be deprived of all beneficial use means that restrictions imposed must be such that the property cannot be used for *any* reasonable purpose. The property must be rendered valueless by the zoning action, leaving the property without beneficial uses. Governor of Maryland v. Exxon Corp., 279 Md. 410, 372 A.2d 237 (1977); Andrus v. Allard, 444 U.S. 51, 100 S.Ct. 318 (1979). A plaintiff must demonstrate that the challenged regulation leaves the property economically idle and that he retains no more than a token interest. Lucas 121 S. Ct. at 2446. There must be a permanent deprivation of all use as a whole not a mere temporary restriction that causes a diminution in value until the restriction is lifted. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002).

The Plaintiff argues that the holding in Lucas creates at a minimum a dispute of material fact as to whether there was a complete and total taking of the property by Bill 91-10.

It is undisputed the zoning ordinance at issue only relates to nibble landfills and that the property is still in an agricultural district to which there are (30) categories of permitted uses for such zoning. It is also apparently undisputed that the Plaintiff could deposit broken concrete and tree stumps from land clearing

activities on the 24.28 acres subject to an Industrial Waste Management Permit.

The issue is whether this is only a token interest. In the case of Gove v. Zoning Board of Appeals of Chatham, 444 Mass. 745, 631 N.E. 2d 865 (2005), the court held that the zoning on the property that prevents residential land use was not an absolute taking under Lucas because the plaintiff must demonstrate that the challenged regulations leaves the property economically idle. Because the property was still worth $23,000 it had a value that in itself was more than a token interest. In Gove the court also found that the property still allowed non-residential uses and uses by special permit which, by the plaintiff's admission, could have an income producing potential. Id. 444 Mass at 762.

In the case Palazzolo v. Rhode Island, 533 U.S. 606, 121 S.Ct. 2448 (2001) the Court denied a Lucas analysis because there was some value retained in the land. The court, however, remanded the case back to the lower court because the extent of the remaining value had not been determined and that the amount of development value remaining in the land was equally undetermined. The court held that while that finding did not preclude a takings argument under the Penn Central analysis, it did preclude a Lucas analysis.

It is undisputed the Gravel Hill property retains a resale value. It is also undisputed that there are other uses for the property.

For the reasons set forth above, this court does not find that Bill 91-10 destroyed *all* economic value of the

Plaintiff's property and therefore cannot constitute taking under the Lucas standard.

The Plaintiff will be barred from making an argument that it was deprived a per se taking under the Lucas standard. No jury instruction at trial will be permitted under such analysis.

B. Whether there was a regulatory taking under the *Penn Central* analysis

Regulatory taking challenges are governed by the standards set forth in Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978) The factors to be weighed are as follows: (1) the economic impact of the regulation on the claimant and; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; (3) weighed with the character of the government action.

The factors aim to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain. Whether a taking has occurred depends on the particular circumstances of the case, and it is essentially an ad hoc factual inquiry to be made by the court. United States v. Central Eureka Mining Co. 357 U.S. 155. Neifert v. Department of Environment, 395 Md. 486, 517-8 910 A.2d 1100, 1119 (2006); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 104 S.Ct. 2862 (1984); Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional, 525 U.S. 302, 122

S.Ct. 1465 (2002); Laurel Park Community LLC. V. City of Tumwater, 698 F.3d 1180 (2012).

The Penn Central framework eschews any set formula or mathematically precise variables for evaluating whether a regulatory taking has occurred, emphasizing important guideposts and careful examination for all the relevant considerations to determine whether there exists a compensable taking. Gove, 831 N.E. 2d at 872-3.

This court will deny the Defendant's motion for summary judgment for reasons set forth below. This court finds that as a matter of law there is a legally sufficient dispute as to whether there was a taking to permit a finder of fact deliberate this issue under Penn Central.

1. Economic impact to the landowner that constitutes a taking

The Defendant argues that no taking can be established under Penn Central analysis because there was no adverse economic impact on the property. They contend that the situation present here is analogous to Regan v. County of St. Louis, 211 S.W.3d 104, which held that there is no economic impact where there is merely a diminution in the value of property. That case involved a change in zoning after a landowner purchased property and whether the owner was prevented from his intended use where he bought the property for the purpose of building office spaces in-between residential communities. Due to complaints by homeowners,

the local councilmen introduced legislation to change the zoning from industrial to residential. That change no longer allowed Regan to develop office space on the property. The Court found no economic impact because diminution in property alone does not constitute a taking.

The Plaintiff, however, argues that the rubble landfill was the only economically viable use for the property in this case and that Regan is distinguishable because that regulation did not have a severe impact because it merely prevented landowner from developing the most beneficial use.

The Plaintiff in this case asserts there is no alternative economically viable use of the property other than as a rubble landfill because development of the property would require reclamation before it would be utilized for any alternative use and that expense would defeat the purpose. Additionally they assert that the mineral rights are depleted so mining the property is not possible.

The Defendant contends that Bill 91-10 did not have a drastic or significant economic impact on property because it did not prohibit other, existing uses of the property. They contend that there were other categories of landfill that the Plaintiff could have applied for because Bill 91-10 zoning regulations only related to the rubble fills.

The economic impact of a regulation must be significant because compensation is required only in cases where the value of the property was reduced

drastically. Rogin v. Bensalem Township., 616 F.2d 680, 682 (3d Cir. 1980). Additionally the court held that the change in land use from multi-purpose to only manufactured homes constituted a *small decrease in value* and that a *mere diminution* in property value cannot establish a taking. Laurel Park Community LLC v. City of Tumwater, 698 F.3d 1180 (2012). In the case Palazzolo v. Rhode Island, 533 U.S. 606, 121 S.Ct. 2448 (2001) there was uncertainty to the lands permitted use. Although it was undisputed that the parcel retained development value, the issue revolved around whether or not that value was sufficiently drastic. In Palazzolo the amount of $200,000 in development value remained, and the court found that the remaining value did not preclude a takings argument.

The Defendant also argues that the Plaintiff only attempted to build the largest landfill possible, seeking the most profitable use of the property. There is no economic impact where the regulations impact only potential profitability. The Penn Central case involved a designation of a building as a landmark under the Landmarks law which was owned by Penn Central Transportation. Penn Central entered into a lease to construct a 50 story office building over the terminal but the Landmark Commission rejected that plan as destructive to the historic and aesthetic feature of the property. The Court rejected a takings complaint because it found that the property in its present state was able to offer a reasonable return, and that while the property would be more valuable with the 50

storied office building in the superjacent airspace, there remained value in the historic landmark.

The court held that profitability is a speculation and is less compelling than other property interests. The court held that the denial of one traditional property right does not always amount to a taking where an owner possesses a full bundle of property rights, and the destruction of one strand of the bundle is not a taking. Penn Central, *supra.*

While the profitability of the property is not factored in finding whether there was an economic impact, the issue of whether there is another use for the property and whether the County foreclosed on a beneficial use of the property remains in dispute.

The amount of remaining value in the land is clearly disputed and therefore this court must look to the next Penn Central factor.

2. The extent to which the regulations interfered with the investment backed expectations

There was clearly an expectation on the Plaintiff's part to operate a rubble landfill, but that claim hinges on whether or not that expectation was reasonable. The Defendant argues the investment cannot be reasonable because the Plaintiff never secured land zoning approval or a final MDE permit and that the amendment to include the Plaintiff's property in the SWM plan at the October 11, 2989 meeting did not

include any approval of site plans nor did it address the final resolution all of the necessary zoning issues.

The Defendant's argument under this factor is simple. They contend that that no taking can be established under a Penn Central analysis because no reasonable investment backed expectation that the property could be developed as a rubble land fill existed since the Plaintiff knew it needed both a State permit and County zoning approval before operating a rubble landfill they also knew the local community was opposed to the rubble landfall at that property. They therefore argue that the Plaintiff could not have a reasonable investment backed expectation at the time the that they finalized the purchase of the property.

The Defendant cites Laurel Park Community, LLC v. City of Tumwater, 698 F.3d 1180 (2012) where the court held that despite the zoning laws previously allowing multi-development, there was no reasonable expectation that multiuse zoning would continue indefinitely. A simple showing that the plaintiff was denied the ability to exploit a property interest that they had believed was viable for development is untenable. The court held that because Laurel Park was using the land for manufactured home parks, the expectation for multipurpose use was speculative because the zoning did not affect that property's "primary expectation." Laurel Park, 698 F.3d 1180, 1190. The situation in the present case is unlike Laurel Park Community, LLC v. City of Tumwater, however, the expectation of the Plaintiff to operate a rubble landfill was not nearly as speculative.

The County argues the rubble landfill was a speculative possibility or an expectation similar to that found in the case of Guggenheim v. City of Goleta, 638 F.3d 1111 (2010). In Guggenheim the plaintiffs had already invested in the rent control mobile park and that to find that a rent control ordinance is a compensable taking would give the plaintiffs a windfall. The court in Guggenheim v. City of Goleta, found there can be no expectation for what one anticipates or looks forward to do but cannot do. The court in Guggenheim defined a "distinct investment backed expectation" as there being a reasonable probability rather than a "starry eyed hope of winning the jackpot if the law changes. Id. 638 F.3d 1180, 1120-1. Similar to Guggenheim, the Plaintiff in this case bought the property for a lesser sum because of limited uses and compensation under the takings clause will give the Plaintiff a windfall.

The inclusion of the Gravel Hill property into the SWM plan produced at least some limited expectation on the part of the Plaintiff but the fact remains that the Plaintiff had secured neither final zoning approval nor all of the necessary permits from MDE prior to finalizing the purchase of the property. The Defendant asserts that the Plaintiffs purchase of the Gravel Hill property was therefore a business gamble that the Plaintiff chose to take. There was a risk that final approval would not be obtained and the developer assumed those risks. They further argue that the operation of a rubble landfill was a "starry eyed hope," because the Plaintiff did not and could not secure all of the necessary approvals prior to Bill 91-10 and that

even without Bill 9110 the Plaintiff would have been required to provide a 200 foot buffer for the operation of the rubble landfill.

The Plaintiff refutes that characterization, providing evidence that it purchased the land with intent to develop the landfill in reasonable reliance on the representation and decision of County Director of Planning and because the property was included in the County's SWM plan.

It is undisputed that the inclusion of the Gravel Hill property in the SMW plan was secured before the purchase with the expectation of operating a rubble landfill. It is also undisputed that the Plaintiff purchased the property for the sum of $732,500, a purchase price below the appraised value of the property.

The Defendant argues that Gove v. Zoning Board of Appeals of Chatham, 444 Mass. 754, 831 N.E. 2d 865, supports their contention that there can be no reasonable investment found because the Plaintiff was never entitled to use the property in any particular way. In the Gove case the court found there was no reasonable expectation to develop the land residentially and that the takings clause was never intended to compensate property for property rights they never had. Id. at 765. The court went on to say, however, that where there is a bona fide purchaser for value who invested in land fit for development, only to see a novel regulation destroy the value of the interest, there may be a reasonable expectation. Gove v. Zoning Board of Appeals of Chatham, *supra.*

The Plaintiff contends there was a reasonable expectation to operate a landfill without the buffer requirement without first securing final zoning approval because the rubble landfill was included in the SWM plan, complete with (27) conditions addressing the community and zoning concerns. They also assert that the County Council was going to allow them to fill up to the line of the property without a buffer because there were preexisting holes which were already established.

The Plaintiff also argues that they had a reasonable investment backed expectation as evidenced by their investment in the property. The Plaintiff's made an effort to secure Phase I permitting from MDE, citing their engagement with an engineer firm to investigate zoning requirements, engaging with geo-technical associates to perform engineering work and engaging in an accounting firm to run projections on expected expenses and revenue for the rubble landfill operations.

The Plaintiff also argues that because the Defendant was aware of the investment backed expectations to build and operate the landfill, they assert that its investment was reasonable, citing testimony by the County Director of Planning acknowledging that the County was aware MRA expected to use the property as a rubble landfill.

The Plaintiff contends that it was the policy of the County to provide zoning approval early on in the MDE permit process to prevent the landowners from

expending resources only to have their zoning denied, which is exactly what happened here. The Plaintiff provides further evidence that the Phase I permit to MDE included a letter that confirmed MRA was included in the land use plan and that MRA secured a grading permit which was approved by the Department of Planning and Zoning.

The Defendant, however, continues to assert there was unreasonable reliance that final zoning approval would be granted because the Plaintiff was not in conformance with the existing zoning regulations related to rubble landfills because the property did not conform to the 200 foot buffer regulation. The (27) conditions addressed the 200 feet buffer requirement, and allowed a "landscape" buffer. These conditions were for the purpose of including MRA in the SWM plan despite the fact that the property had been mined up to the border of the property.

The issue is whether under the law, the (27) conditions that includes allowing a landscape buffer, the policy of the county for pro-private rubble landfills and early zoning approval policy of the County combined with the Gravel Hill site being included in the SWM plan and approval of a grading permit, created an investment backed expectation, that is sufficiently reasonable.

The Defendant presents another issue of whether in light of the public disfavor and in light of not having secured a zoning permit at the time they purchased the property that the investment was not made with

reasonable backed expectations. It remained clear that the MDE permit was contingent on zoning approval and the Plaintiff knew the community was opposed to the rubble landfill at the Gravel Hill site. This raises the question of whether it was unreasonable for the Plaintiff to expect that zoning would be granted. This necessitates further discussion.

Investment backed expectations are found to be reasonable where it is taken into account the power of a government to regulate in the public interest. Ruckelhaus v. Monsanto Co., 467 U.S. 986, 1005 (1984); Pace Resources Inc v. Shrewsbury Township, 808 F.2d 1023. The Defendant again cites Regan v. County of St. Louis, 211 S.W.3d 104 to support its contention that the Plaintiff's expectations were not reasonable. In that case the Court found that the commercial zoning was inconsistent with the development because of the residential nature of the surrounding neighborhood when paired with County's right to promote the general welfare, the court found that the landowner's expenditures were not reasonable. In the present case, however, the land was technically suitable for a rubble landfill.

The Court must evaluate the government's right to modify zoning to benefit the public because the government is permitted to introduce legislation for health, safety, morals or general welfare to promote the general welfare. Regan, *supra.* For an investment to be reasonable one must also take into account the right of the government to modify zoning ordinances and it can be unreasonable for a landowner to presume that the

zoning on his property will remain indefinitely. A public interest is typically one where both parties benefit from the government action. In Ruckelhaus v. Monsanto Co it was the public's right to be informed of chemical use of products and in City of St. Louis v. Union Quarry & Construction Co it was the mutual benefit of keeping Lake Tahoe's water pristine and clear. In the Penn Central case the court found the Landmarks law and the aesthetic feature of the property for the general public. The restrictions in each case were related to the general welfare and the law still allowed for reasonable beneficial use of the land or property.

Reasonableness requires a consideration of the regulations in place at the time the landowner acquires their property, the nature and extent of the existing and surrounding development compared to the proposed development sought by landowner, taking into account the governments right to modify by regulation for the benefit of the public and may change zoning when the health, safety, morals or general welfare would be promoted. Penn Central Transportation Co. v. New York City, *supra;* Palazzolo v. Rhode Island, 533 U.S. 606, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001).

As set forth above, while the land in question was included in the SWM plan, the Plaintiff did not have final zoning approval at the time it actually finalized the purchase and because of the communities' opposition it could reasonably be concluded it may not have been a reasonable investment because the zoning was not guaranteed.

At the time of purchase the Plaintiff knew the Gravel Hill property was surrounded by residential properties and three months prior to purchase knew that the neighbors opposed the operation of a rubble landfill with vigor. The Defendant further contends that the Plaintiff knew that none of the council members supporting the bill to amend the SWM plan returned to office. Nevertheless the Gravel Hill property was added to the County's SWM plan and the Plaintiff accepted (27) conditions to address the community's concern.

The Defendant relies on the Court of Appeals finding in *MRA IV.* which held that the Plaintiffs did not have a reasonable reliance. *MRA IV* at 51-63 held that under the theory of zoning estoppel, where the developer has good reason to believe before or while that the zoning would change, a finding of estoppel may not be justified. The Court found that facts were available to MRA at the time of the February 1990 purchase should have alerted MRA to the possibility that its plans for a rubble fill would not be successful.

MRA IV further found that the Plaintiff did not rely in good faith because in February 1990, MRA should have known of the real possibility its SWM plans would not come to fruition. The modification of the SWM plan was attained by a "fragile majority" and just because the property in question was included in that plan was not a sufficient step in the reliance because the process further required zoning. *MRA IV* additionally found that the Plaintiff should have used its due diligence to figure it out the chances of operating

in that locale. The Court balanced the good faith reliance with the hardship.

The standard for zoning estoppel is a cause of action in equity, which requires an extremely high standard to be granted relief. The court believes under the facts of this case there are insufficient facts to assert a claim for zoning estoppel, however, there are sufficient facts for a finder of fact to there existed a reasonable expectation for its investment in the property to operate as a rubble landfill.

3. The character of the government regulation

The third factor of the Penn Central test requires the court to examine the reasonableness of the government action and the impact of the regulation on the property owner. The purpose and importance of the public interest must be balanced that against the liberty interest in the private property. Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978). Where the government action merely affects property interests through some public program adjusting the benefits and burdens of economic life to promote the common good, that factor may be relevant in discerning whether a taking has occurred. *supra.*

The character of the government action in a zoning case where the zoning is applied equally is typically found to be in the public interest where the public and parties are equally benefited and burdened. The government generally cannot force some people to bear

public burdens which should be borne by the public as a whole. Laurel Park Community, LLC v. City of Tumwater, 698 F.3d 1180 (2012); Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005).

Zoning is a type of limited protection against harmful private land use that typically withstands taking analysis. In Gove v. Zoning Board of Appeals of Chatham, *supra*, for example, there was a legitimate government interest because there was a potential for flooding that would adversely affect the surrounding areas if the property was developed with residences. The land was at special risk for such flooding and multiple studies found that the risk of development was too great.

The Plaintiff disputes that Bill 91-10 was in the public interest. They contend that there was no evidence or study performed to justify the more stringent requirements for a rubble landfill that were related to that bill.

The Plaintiff also argues that because the proposed rubble landfill was going to be regulated by MDE, the agency that enforces regulations to avoid compromising public health and safety, it was assured that the property would not constitute a hazard. Nevertheless while it is undisputed that MDE would withhold issuing a final permit pursuant to final zoning approval by the County, whether or not modifying the zoning went against a reasonably backed investment based expectation is a dispute of fact.

Resolution 91-10 was an emergency bill and the public agitation together with the timing and statements by Council members speak to the fact that the Gravel Hill site could possibly be perceived as being targeted. The Plaintiff claims such conduct shows that the Defendant was acting in bad faith, especially since a mere four days after the purchase of the property was finalized, the County Council passed legislation to remove sites from the County SWM plan that do not meet the requirements under Bill 91-10.

The Supreme Court in the case Penn Central Transportation *supra* ultimately found that *even if there was a taking*, those rights mitigate whatever financial burdens the law has imposed and are taken into account when considering the impact of the regulation. It is less likely to be a taking where the restrictions are related to the general welfare. Penn Central additionally found that an action must be reasonably relating to the promotion of the general welfare and cannot be discriminatory or "spot zoning" that is where a property is arbitrarily singled out for less favorable treatment. All property owners must be uniquely burdened, not merely affect some property more than others.

The Defendant stresses that there can be no Penn Central taking because the zoning requirements under Bill 91-10 are borne by virtually every landowner in the County. They contend that the zoning applies to every property owner equally in districts where rubble landfills are permitted. All property owners are equally benefited and burdened by the terms of the

ordinance. That in and of itself, the Defendant asserts, is enough to preclude a finding that the regulation had the character of a taking.

The Defendant's strongest argument is that Bill 91-10 was directed at landfills in general and was in response to the great public concern over all of the proposed rubble landfills at the time. This is evidenced by Section 218 of Article II of the Harford County Charter, which states that bills introduced as emergencies affecting public health and safety or welfare shall be plainly designated as emergency bills.

The Board of Appeals Zoning Hearing Examiner found that the (100) acre requirement is not disproportionate because all properties of less than (100) acres are similarly impacted by the prohibition against rubble landfills on the parcels of less than that size and that MRA was treated no differently. Equally, the Board of Appeals Zoning Hearing Examiner found that the (1000) foot buffer requirement treated MRA no differently, holdings that traffic required a buffer that large and there would be an adverse impact to the neighbors.

With regard to how the regulations' burdens were apportioned, that issue it has been decided by the Harford County Board of Appeals and that decision has been affirmed by the Court of Appeals. It was concluded that the regulation had impacts on all landfill property located in the county. The Harford County Hearing Examiner found and the Court of Appeals affirmed:

> MRA cannot allege a disproportionate impact of the 100 acre size requirements upon it. All properties of less than 100 acres in size are similarly impacted by the prohibition against rubble landfills on parcels of less than that size. The applicant it treated no differently than any other similarly situated property owner.

Maryland Reclamation Assocs., Inc. v. Harford Cty., 414 Md. 1, 21, 994 A.2d 842, 854 (2010)

The impact of the regulation on the property owner and the requirement that a rubble landfill be located on a property at least 100 acres in size does not have a disproportionately adverse impact on MRA because any landfill located in the agricultural zoning district would be subject to that same requirement. It can be established, therefore, that the applicability to the (1000) acres to all landowners under 91-10, as ultimate fact.

As set forth above, the Hearing Examiner issued a decision February 28, 2007 denying MRA's requests due to factual findings that a rubble landfill at the Gravel Hill site would have a detrimental effect on adjacent properties, finding there was sufficient evidence that MRA's proposal would adversely affect the public health, safety and general welfare and would jeopardize the lives of people living in the area and result in dangerous traffic conditions in the community. More particularly the hearing found that a church of historical significance, the health and welfare of the

community, traffic conditions, would be adversely affected by dust, fumes and deforestation.

The Court of Appeals in *MRA IV* affirmed the Examiner and Board of Appeals determination that there was sufficient evidence, with respect to each requested variance, to support the conclusion that the landfill was substantially detrimental to the surrounding community.

This court must cede to the factual findings of the Hearing Examiner and the Board. The reasons for deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions are well established in the case Lingle v. Chevron, U.S.A. Inc., 544, 545 U.S. 528 (2005). The Court in Lingle held that it would not entertain a battle of experts and the testimony of economists who testified as to whether the regulations furthered a public interest. The court would not be required to make such a judicial determination and instead found the court must give deference to the legislators. Therefore giving full deference to the findings made by the appropriate legislative process, this court must find that the regulations furthered the public interest.

The nature of the government action remains. It is the Plaintiff's contention that the County Council introduced Bill 91-10 for the purpose of preventing them from operating a rubble landfill on the property. The Plaintiff's assert that this is shown by the fact that the Bill was enacted as an emergency measure so it would take effect before the MDE granted a zoning permit to

MRA. The Plaintiff contends this shows both that the County was acting in bad faith and applying regulations inconsistently to all landowners. More specifically, Resolution 4-90 and 15-90 were ruled invalid by the Court of Appeals because the resolutions specifically targeted the Gravel Hill site.

In support of this position the Plaintiff's cite the deposition testimony of James Vannoy, the draftsman of Bill 91-10, who stated that the Bill was submitted as emergency legislation for the purpose of preventing the Plaintiff from moving forward with the rubble landfill. The Defendant argues that statements of individual members of the County Council and employees have no bearing on the zoning code requirements effectuated by Bill 91-10.

As set forth above this court believes that a finder of fact could conclude that there was a taking. The court also believes, however, that the decision of the Court of Appeals in *MRA IV*, that the County Council's actions were reasonable to the promotion of the general welfare is binding on the parties of this case.

This court, however, will not go so far as to require the Plaintiff to assume all financial burden because, while in the public welfare, the regulations do not present a strong need as was presented in the cases above.

III. DAMAGES

Just compensation is referred to as the fair market value of the property at the time of the taking. The fair

market value of land is what a reasonable buyer would give who was willing but did not have to purchase and what a seller would be willing to take who was willing but did not have to sell. City of St. Louis v. Union Quarry & Construction Co. 394 S.W.2d 300 (1965).

The question is not what has the taker gained but what has the owner lost. Dep't of Transp. v. Kendricks, 148 Ga. App. 242, 250 S.E.2d 854 (1978). The issue of damages is a factual dispute that is proper for resolution by a jury. The jury, in arriving at just and adequate compensation, is not only authorized but required to consider the value which the thing taken has to the respective owners of the interests being condemned. A condemnees is responsible for compensation for the value of the land taken, and also for whatever damages result to the condemnees from the condemnation proceeding. Dep't of Transp. v. Kendricks, *supra*.

The Plaintiff argues that the law allows for consideration of the "best use" of the property and where property is unique the court may allow to the recovery of business losses that include the projected profit of operating the landfill.

The Plaintiff cites City of St. Louis v. Union Quarry & Construction Co. 394 S.W.2d 303 (Mo. 1965) which held that a abandoned quarry being used as a landfill site was unique and therefore profits derived from it and its use are the chief source of value and that there was sufficient evidence of such profits for determining the value of the property. That case involved the owners of rock quarry being used by its

owner as a private dump. The facts presented in that case were as follows;

> The owners obtained permits each year, and continued the operation as a private dump until the date of condemnation, June 27, 1962. They employed a manager, who kept books and complete records. A charge was made for dumping, $1 per truckload. Records for the 16 years preceding the taking show that an average of 20,000 truckloads of dirt and noncombustible material were dumped each year. Loads averaged 5 cubic yards. Landowners thus grossed $20,000 annually, on the average, from this operation. The quarry was only partially filled as of the date of the taking. Calculations show that as of that date it would have taken 625,000 cubic yards of material to fill the hole so as to make it level with surrounding land, taking into account the factor of compaction. Figuring that they were handling about 100,000 cubic yards per year of uncompacted rubbish the hole would have been filled, not considering compaction, in something over 6 years; with compaction, it would take 10 or 11 years.

City of St. Louis v. Union Quarry & Const. Co., *supra*, 303-04). The court reversed the lower court's decision because the trial court regarded the highest and best use of the property, ignoring and rejecting the evidence that the highest and best use of the 2.634 acres was filling up the quarry, the court reversed. Id.

The Plaintiff contends that like the property in the City of St. Louis case, the Gravel Hill site is a unique property with a landscape that is unique. In City of St. Louis, however, the facts that made the property unique were that it was already operating as a private landfill and after the government physically acquired that property, the compensation the trial court offered was for the property's best use valued as residential development although filling the remainder of the quarry was a far more profitable and therefore a better use. Different circumstances exist here because the entire Gravel Hill property had never been *operated* as a nibble land fill, making the damages requested by the Plaintiff more speculative.

The Plaintiff further makes the argument that because the profits are derived from its use and where the property is unique, an owner may recover business loss. The Plaintiff cites the Georgia case of Department of Transp. v. Kendricks, 148 Ga. App. 242, 250 S.E.2d 854 (1978) to support that argument. The court in Kendricks, held that a leaseholder in condemnation proceeding, who established loss of a tractor business in clear and positive terms totally separate from fee owner's property loss, could make a claim for compensation so long as it was not remote or speculative. In that case the party was recovering for the loss of his business, not the loss of the property. In this case the Plaintiff is making the same argument in asking to be compensated for the lost business that the property would produce.

In the Kendricks case the taking was not a regulatory taking but a real taking. More specifically the government obtained an easement which had the effect of hindering the plaintiff in that case's rented car dealership businesses because it obstructed the display of the dealerships. Potential customers could no longer see the inventory displayed from the road and because of which the taking lent itself to lost business profits.

Future damages must be established with reasonable certainty, and must not rest upon speculation or conjecture. Pierce v. Johns – Manville Sales Corp., 296 Md. 656, 666, 464 A.2d 1020 (1983). Future damages cannot be recovered if the future consequences upon which the damages are premised are merely possibilities. Pierce v. Johns-Manville Sales Corp., 296 Md. 656, 464 A.2d 1020 (1983). Sufficient probability exists when there is more evidence in favor of a proposition than there is against the proposition. Lewin Realty III, Inc. v. Brooks, 138 Md. App. 244, 279, 771 A.2d 446, 466 (2001), aff'd, 378 Md. 70, 835 A.2d 616 (2003) abrogated by Ruffin Hotel Corp. of Maryland v. Gasper, 418 Md. 594, 17 A.3d 676 (2011).

The rubble landfill was a proposal but not yet realized business and new businesses in themselves are considered speculative.

Operation of a rubble landfill is a new business and that that is, in itself, speculative. The Plaintiff was in the beginning stages of securing all of the necessary permits and permission to operate said facility. Even

had the County not taken any action at all, it remains speculative whether or not the Plaintiff would have secured MDE permit approval and all of the necessary existing zoning approvals. It is therefore the opinion of this court that on the Defendant's motion for summary judgment should be granted to the extent that the evidence presented produced to the Plaintiff's loss should be limited to the diminished value of the property.

This court will reserve for a jury to find not what has the taker gained but what has the owner lost with regard to the fair market value of the property.

IV. FACTS NOT IN DISPUTE

Under Maryland Rule 2-501(g) a court, in denying all or part of a party's Motion for Summary Judgment, may enter an order specifying issues not in dispute. The rule in question provides specifically as follows:

> (g) **Order specifying issues or facts not in dispute.** When a ruling on a motion for summary judgment does not dispose of the entire action and a trial is necessary, the court may enter an order specifying the issues or facts that are not in genuine dispute. The order controls the subsequent course of the action but may be modified by the court to prevent manifest injustice.

In the opinion of this court, a number of facts are not in dispute. They are as follows:

(1) In August of 1989, Maryland Reclamation Associates (hereinafter referred to as "MRA") entered

into a contract to purchase property located on or adjacent to Gravel Hill Road in Harford County.

(2) At the request of MRA on November 7, 1989, Harford County Council (hereinafter referred to as "the Council") conducted a hearing on November 14, 1989 and passed a motion that included the property in question as a proposed site in the County's Solid Waste Management Plan.

(3) On November 20, 1999, MRA received a Phase I approval for the construction and operation of a rubble fill from the Maryland Department of the Environment (hereinafter referred to as "MDE").

(4) On February 9, 1990, MRA finalized the purchase of the property from the owner and paid the sum of $732,500.00 for the property.

(5) On February 14, 1990, the President of the Harford County Council introduced Resolution 4-90 to require the property owned by MRA on Gravel Hill Road to be removed from the Solid Waste Management Plan.

(6) On May 8, 1990 four members of the Council voted on Resolution 4-90 and the MRA property was removed Solid Waste Management Plan.

(7) Bill 91-10 was introduced to the Council as emergency legislation. This bill amended requirements for rubble fills by increasing the minimum acreage to 100 acres and increasing the buffer zone from 200 feet to 1,000 feet.

(8) Bill 91-10 was passed by the Council on March 19, 1991 and signed into law on June 10, 1991 by the Harford County Executive.

(9) Bill 91-16 was introduced to the Council on April 2, 1991. This bill authorized the Council to remove a specific site from the Solid Waste Management Plan that did not comply with any ordinance if a permit had not been issued by MDE within 18 months of the site being placed in the Solid Waste Management Plan or the owner had not placed a site in operation within the same 18 month period. This bill was passed by the Council and was signed into law by the County Executive on June 10, 1991.

(10) On May 2, 1991, MDE advised the Council that if a permit was issued by MDE to operate a rubble fill such an issuance would not authorize MRA to violate any local zoning or land use requirements.

(11) Following a request by MRA for an interpretation of the effects of Bill 91-10 on MRA's property on Gravel Hill Road on February 22, 1991 the Zoning Administrator issued a letter stating that Bill 91-10 applied to MRA's proposal and denied zoning approval to operate a rubble fill on the property unless MRA obtained variances from the requirements of the zoning ordinance.

(12) An appeal was filed from that decision of the Zoning Administration and on April 2, 2002 the Zoning Hearing Examiner issued a written decision finding that Bill 91-10 did not violate local, state of federal law.

(13) On June 11, 2002, the Council sitting as the Harford County Board of Appeals held that MRA was required to abide by the existing zoning laws and that the County was not precluded from applying the requirements of Bill 91-10 to the property in question. The Board of Appeals also held that the rubble fill was not a valid non-conforming use under the terms of the zoning ordinance.

(14) On May 12, 2005, MRA requested variances to the requirements established by Bill 91-10. After holding hearings, on February 28, 2007 the Zoning Hearing Examiner issued a report and recommendation that the variance requests be denied.

(15) On June 5, 2007, the Council sitting as the Board of Appeals voted to adopt to adopt the Hearing Examiner's findings and recommendations and denied the request for variances.

Pursuant to the terms of the rule, the Court has made these findings of fact that are undisputed. It is noted that both the Plaintiff, and the Defendant have indicated an intention to attempt to show the reasons for the action taken by the Council in passing the various ordinances and resolutions. The Plaintiff will apparently attempt to show that the bills in question were specifically directed at their facility and that they have therefore be treated unfairly. The Defendant on the other hand will attempt to present testimony as to the reasons that the Council enacted the various measures in question and call various witnesses to justify those measures.

MRA IV also discussed and decided that it would not consider the motive of the legislator, stating that it is well-settled that when the judiciary reviews a statute or other governmental enactment, either for validity or to determine the legal effect of the enactment in a particular situation, the judiciary is ordinarily not concerned with whatever may have motivated the legislative body or other governmental actor. MRA IV would not allow discussion into the motives of legislators having decided that there is ample evidence that Bill 91-10 was directed at landfills in general and was emergency legislation because of the great public concern over all of the proposed landfills at the time. Maryland Reclamation Assocs., Inc. v. Harford Cty., 414 Md. 1, 51, 994 A.2d 842, 871-72 (2010).

While due process and a takings analysis' differ it is clear that when evaluating the legal effect of a law for any issue, including a case involving a taking, the court cannot consider the legislatures motive.

Both Maryland and Federal law are clear that such testimony would be inappropriate. The Court of Appeals in the case of Maher v. State, 15 Md. 376 held as long ago as 1859 that the motive of a legislative body in passing or ordinance could not play a role in the courts decision related to those laws. The Supreme Court of the United States in Daniel v. Family Security Life Insurance Company, 336 US 220, 69 S.Ct. 550, 93 L.Ed. 632 (1949), when confronted with the argument that various lobbyists had influenced a state legislature to enact the statute that was the subject of litigation, held that courts were not to search or determine

motive in passing that legislation but merely to judge the results. It is therefore clear that the testimony presented by either party concerning the character of the government action as it relates to motive for its enactment of the ordinances in question it is irrelevant and improper to be presented to the finder of fact.

CONCLUSION

This Court will hold that:

(1) the Defendant's Motion to Dismiss this case for failure of the Plaintiff to comply with the statute of limitations will be denied;

(2) to the extent that the Plaintiff's claim for inverse condemnation is based on the case of Lucas v. South Carolina Council, 505 US 103 (1992) the court will grant the Motion for Summary Judgment and find that as a matter of law there is insufficient evidence to justify a finding that there has been a complete taking;

(3) to the extent that the Plaintiff has filed a claim for inverse condemnation under the case of Penn Central Transportation Company v. New York City, 438 US 104 (1978) the Court will deny the Motion for Summary Judgment and believes that there are sufficient facts in dispute to have this matter submitted for resolution by the ultimate finder of fact;

(4) the Defendant's Motion for Summary Judgment will be granted to the extent that the Plaintiffs damages will be limited to only the diminished value of the property that is the subject of this litigation;

(5) the findings of fact made by this court pursuant to the terms of Rule 2-501(g) are binding on both parties.

/s/ William O. Carr
WILLIAM O. CARR, Judge

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MARYLAND RECLAMATION ASSOCIATES, INC.	*	**IN THE**
	*	**CIRCUIT COURT**
Plaintiff	*	**FOR**
v.	*	**HARFORD**
HARFORD COUNTY, MARYLAND	*	**COUNTY**
	*	**CASE NO.**
Defendant	*	**12-C-13-509**
	*	

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

ORDER

It is this it is this 3rd day of January, 2017, hereby ORDERED;

(1) the Defendant's Motion to Dismiss this case for failure of the Plaintiff to comply with the statute of limitations will be denied;

(2) to the extent that the Plaintiff's claim for inverse condemnation is based on the case of Lucas v. South Carolina Council, 505 US 103 (1992) the court will grant the Motion for Summary Judgment and find that as a matter of law there is insufficient evidence to justify a finding that there has been a complete taking;

(3) to the extent that the Plaintiff has filed a claim for inverse condemnation under the case of Penn Central Transportation Company v. New York City, 438 US 104 (1978) the Court will deny the Motion for Summary Judgment and believes that there are sufficient

facts in dispute to have this matter submitted for resolution by the ultimate finder of fact;

(4) the Defendant's Motion for Summary Judgment will be granted to the extent that the Plaintiff's damages will be limited to only the diminished value of the property that is the subject of this litigation.

(5) the findings of fact made by this court pursuant to the terms of Rule 2-501(g) are binding on both parties.

/s/ William O. Carr
WILLIAM O. CARR, Judge

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APPENDIX F

MARYLAND RECLAMATION ASSOCIATES, INC.	)	IN THE
vs.	)	COURT OF APPEALS
HARFORD COUNTY, MARYLAND	)	OF MARYLAND
	)	COA-REG-0052-2019
	)	No. 52
	)	SEPTEMBER TERM 2019

– -o0o- –

The excerpt of this hearing in the above-entitled matter was held on March 10, 2020, at 361 Rowe Boulevard in Annapolis, Maryland.

BEFORE:

THE HONORABLE MARY ELLEN BARBERA

Chief Judge

[2] APPEARANCE

ON BEHALF OF THE PETITIONER/CROSS-RESPONDENT:

ROSENBERG MARTIN GREENBERG, LLP

By: Andrew H. Baida, Esquire

25 South Charles Street, 21st Floor

Baltimore, Maryland 21201

(410)727-6600

[3] Tuesday, March 10, 2020

PROCEEDINGS

(Excerpt of the hearing transcribed

as requested by Counsel.)

– -oOo- –

THE COURT: Mr. Baida, I'm sorry to interrupt you.

MR. BAIDA: That's all right.

THE COURT: Is Mr. – what about Mr. Ingerman's point about res judicata? Is he correct that had – I mean, do you agree with him that if MRA had brought a constitutional takings claim into the administrative proceeding that the decision would have preclusive effect on the merits such that a jury couldn't consider it?

MR. BAIDA: Well, I think this – well, no, not necessarily that way. I think if MRA lost before the Board, as I said, it could have filed a petition for judicial review, seeking review of its take – of the Board's taking decision if there was no taking, and at the same time it could have filed this independent judicial action.

[4] The independent judicial action, by the way, only entitled MRA to a jury trial on the question of compensation, of just compensation. It did not entitle MRA to a jury trial on – whether there was, in fact, a taking. And we've cited a couple cases in our brief that s deal with that.

But if MRA takes a petition for judicial review, goes up the ladder, and at the end of the day, the court holds or upholds the Board's decision that it was no taking, that's conclusive. Yes, that is conclusive of its L takings claim.

(Whereupon, the excerpt of the hearing requested to be transcribed was concluded.)

[5] CERTIFICATE OF REPORTER

STATE OF MARYLAND

I, the undersigned, do hereby certify that I was authorized to and did stenographically transcribe to the best of my ability to hear and understand the audio file provided; and that the transcript is a true and correct record of my stenographic notes.

I further certify that I am not a relative, employee, attorney, or counsel of any of the parties, nor? am I a relative or employee of any of the parties' attorneys or counsel connected with the action, nor am I financially interested in the action.

_____

Nancy Dasovich
Certified Transcriptionist

APPENDIX G

MARYLAND RECLAMATION ASSOCIATES, INC. Plaintiff	*	IN THE CIRCUIT COURT FOR
v.	*	HARFORD
HARFORD COUNTY, MARYLAND Defendant	*	COUNTY CASE NO. 12-C-13-509

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

VERDICT SHEET

(Filed Apr. 17, 2018)

After consideration of the three (3) factors as described in the jury instructions, do you find that MRA's inability to operate a rubble landfill constitutes a regulatory taking of the property?

Yes (Y/N)

If you answered yes, please proceed to the next question . . .

What is the amount of just compensation you find?

$45,420,076 (please insert the amount)