

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 1758

September Term, 2015

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BACK RIVER LLC, *et al.*

v.

ARNOLD JABLON, *et al.*

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Wright,  
Berger,  
Friedman,

JJ.

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Opinion by Friedman, J.

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Filed: December 2, 2016

\*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Judicial tolling is a narrow and disfavored doctrine, rarely invoked and even more rarely affirmed. Overreliance on judicial tolling can “turn a legislative judgment as to a filing deadline into judicial balancing of competing equities, conferring on the judicial branch broad discretion to ameliorate the stern commands of the legislative branch.” *Antar v. Mike Egan Ins. Agency, Inc.*, 209 Md. App. 336, 345 (2012). Despite this, however, judicial tolling remains part of our jurisprudence because sometimes it is necessary. This is one of those times.

This is the third appeal concerning a wireless communications tower in Baltimore County. Appellants Back River, Sprint, and others (“Back River”), appeal from the circuit court’s grant of summary judgment and an injunction in favor of Appellees Baltimore County and the Director of the County Department of Permits, Approvals, and Inspections, Arnold Jablon (“Baltimore County”), and present one question for our review: Whether the circuit court erred by applying judicial tolling to the three-year statute of limitations created by § 5-114 of the Courts and Judicial Proceedings Article (“CJ”) of the Maryland Code. Because we hold that judicial tolling properly applies to pause this limitations period, we affirm the circuit court.

### **FACTS<sup>1</sup>**

In October 2001, Back River filed a petition seeking a number of variances from setback line restrictions on commercially-zoned property to accommodate the construction

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<sup>1</sup> This factual recitation is derived from two sources: (1) Judge Arthur’s recitation of the facts in *Back River, LLC, et al. v. Baltimore County, et al.*, No. 2495, Sept. Term,

of a proposed cell tower. Specifically, Back River requested variances to permit non-compliance with a local zoning ordinance that required the tower to be set back 200 feet “from the residential zone line.” Baltimore County Zoning Regulations (BCZR) § 426.6.A.3.<sup>2</sup> The then-Zoning Commissioner for Baltimore County, Lawrence E. Schmidt,<sup>3</sup> granted the variances permitting Back River to build the tower, but required that Back River assume the risk that the variance could be overturned on appeal, and the tower could subsequently be determined to be illegal. On May 30, 2002, based on the granting of the variance, Back River obtained a building permit from Baltimore County, and began construction of the tower.

On May 14, 2003, the County Board of Appeals, in “*Back River I*,” rejected the variance request, thereby rendering the tower illegal. The circuit court affirmed the

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2013 (filed Dec. 30, 2014) (*Back River II*); and (2) Judge Glass’s summary of the case history in *Jablon, et al. v. Back River LLC, et al.*, Case No. 03-C-13-4768 (Cir. Ct. Balt. Cnty. Oct. 1, 2015) (*Back River III*) (stipulated facts for summary judgment).}

<sup>2</sup> The applicable provision of BCZR now provides that the structure must be “set back at least 200 feet from any other owner’s residential *property* line.” BCZR § 426.6.A.1 (emphasis added). The County Board of Appeals considered the variance request under the updated version of the statute, and the difference is immaterial in this case. *Back River, LLC, et al. v. Baltimore County, et al.*, No. 2495, Sept. Term, 2013 (filed Dec. 30, 2014).

<sup>3</sup> Mr. Schmidt switched teams and has represented Back River since the *Back River II* litigation. Baltimore County was aware that Mr. Schmidt was the Zoning Commissioner who initially approved Back River’s zoning request, but did not object to Mr. Schmidt’s representation of Back River in this case. We will assume that the requirements of Rule 1.11(a) of the Maryland Rules of Professional Conduct, regarding resolving conflicts of interest, were properly observed.

decision, and this Court affirmed the judgment in an unreported opinion: *Sprint PCS v. Baltimore County*, No. 47, Sept. Term, 2004 (filed Aug. 3, 2005).

After the denial of the variance was affirmed, and the tower was determined to be illegal, Back River sought to cure the setback deficiencies by acquiring land from the surrounding property owners. Back River successfully purchased portions of the adjoining properties to the north and west of the tower, but was unable to purchase any land to the south of the tower. Consequently, the tower still violated the setback line restrictions on its south side.

On May 9, 2008, Back River initiated “*Back River II*” when it filed a petition for a special hearing relating to the setback line restrictions of the property on which the cell tower was located. As described by Judge Arthur in this Court’s unreported opinion in *Back River, LLC, et al. v. Baltimore County, et al.*, No. 2495, Sept. Term, 2013 (filed Dec. 30, 2014):

[Back River] filed a petition for a special hearing to permit a transfer of the property zoned R.C. 20 (*i.e.*, the property that had been purchased from the two adjacent parcels) into the property zoned M.L.; the transfer, if approved would have had the effect of incorporating the newly-acquired property into the commercially-zoned property, thereby moving the “residential property line” farther away from the tower.

*Id.*<sup>4</sup> The parties agreed to a postponement of this request and the hearing was never rescheduled.

In November 2008, during the pendency of *Back River II*, the Baltimore County Department of Permits and Development Management issued a citation to Back River “for violations under [BCZR] § 426.6.A.1, failure to provide and maintain [a] 200 [foot] setback from another resident’s property line[.]” The parties refer to this as “*Back River IV*.”<sup>5</sup> In January 2009, *Back River IV* ended when the County’s Code Enforcement Hearing Officer issued a civil penalty in the amount of \$9,200 for the zoning violation, which Sprint paid on behalf of Back River.

On May 19, 2012, Back River filed an amended petition for a special hearing, reanimating *Back River II*, and asserting a new legal theory pursuant to which Back River argued that the existing cell tower was actually in compliance with the setback regulations. As explained by Judge Arthur in this Court’s unreported opinion in *Back River, LLC, et al. v. Baltimore County, et al.*, No. 2495, Sept. Term, 2013 (filed Dec. 30, 2014):

Sprint advanced the new theory that the location of the tower complied with [Baltimore County Zoning Regulation] § 426.6,

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<sup>4</sup> Although the exact nature of the May 9, 2008 filing by Back River is a point of contention between the parties in this case, under the law of the case doctrine, we hold that the filing was an extension of the litigation in *Back River I*—another attempt by Back River to make the tower legal.

<sup>5</sup> The parties have termed the civil citation proceedings as “*Back River IV*,” even though, chronologically, these civil citation proceedings took place well before the injunction proceedings of “*Back River III*.” We will follow this convention.

as it had been amended in 2002 to require that the tower be set back at least 200 feet from any other owner's residential property line. Sprint presented testimony that no residence was currently located on the residentially-zoned property 75 feet south of the tower. A witness for Sprint purported to opine that the zoning regulations require a 200-foot setback from an adjacent property line only if that property has actually been improved with a dwelling and is currently used as a residence.

*Id.* (quotation omitted). An administrative law judge ruled against Back River and held that the new petition was barred by the *res judicata* effect of the decision in *Back River I*. Back River appealed to the County Board of Appeals, which dismissed the case, also on *res judicata* grounds. The circuit court affirmed that decision, as did this Court in an unreported opinion: *Back River, LLC, et al. v. Baltimore County, et al.*, No. 2495, Sept. Term, 2013 (filed Dec. 30, 2014).

During the pendency of *Back River II*, Baltimore County filed the instant case, which the parties call "*Back River III*," on April 26, 2013, in the Circuit Court for Baltimore County. In *Back River III*, Baltimore County asked the circuit court to issue an injunction ordering Back River to either tear down the tower itself, or to allow the County to tear it down. The circuit court entered a stay in *Back River III* for the period during which *Back River II* was still being litigated. Once this Court issued its opinion in *Back River II*, however, the circuit court lifted the stay in *Back River III*. The parties then stipulated that there was no dispute of material fact, and submitted cross-motions for summary judgment. On September 29, 2015, the circuit court, relying on a theory of judicial tolling, granted Baltimore County's motion for summary judgment and issued an injunction requiring Back

River to remove the tower. The removal of the tower was stayed pending the outcome of this appeal.

### ANALYSIS

Back River argues that the injunction sought by Baltimore County to remove the cell tower is barred by the statute of limitations. The limitations period for prosecuting setback line restriction violations is specified by statute:

**§ 5-114. Setback line restrictions.**

\* \* \*

(b) *In general.* — (1) A person may not initiate an action or proceeding arising out of a failure of a building or structure to comply with a setback line restriction more than 3 years after the date on which the violation first occurred.

**(2) A governmental entity may not initiate an action or proceeding arising out of a failure of a building or structure to comply with a setback line restriction more than 3 years after the date on which the violation first occurred if the building or structure was constructed or reconstructed:**

**(i) In compliance with an otherwise valid building permit, except that the building permit wrongfully permitted the building or structure to violate a setback line restriction; or**

(ii) Under a valid building permit, and the building or structure failed to comply with a setback line restriction accurately reflected in the permit.

**(3) For purposes of paragraph (2)(i) of this subsection and notwithstanding any other provision**

**of State or local law to the contrary, a building permit that was otherwise validly issued, except that the permit wrongfully permitted the building or structure to violate a setback line restriction, shall be considered a valid building permit.**

(4) For purposes of paragraph (2) of this subsection, the date on which the violation first occurred shall be deemed to be the date on which the final building inspection was approved.

CJ § 5-114(b) (emphasis added). In sum, the statute of limitations contained in CJ § 5-114(b)(2)(i) prevents a local government, on notice of a setback line restriction violation through the filing of a valid building permit, from pursuing an action more than 3 years after the violation first occurred.

*First*, we will explain Back River's theory to apply the limitations period of CJ § 5-114(b)(2)(i) to this case. *Second*, we will describe the circuit court's ruling. *Third*, we will explain our views of CJ § 5-114(b)(2)(i) and how judicial tolling affects it.

### **I. Back River's Theory**

Back River sets forth a three-step argument to apply the limitations period of CJ § 5-114(b)(2)(i) to this case: (1) the tower was constructed under a valid building permit; (2) therefore, the statute of limitations ran 3 years from the date that the County Board of Appeals overturned the decision of the Zoning Board; or (3) alternatively, the statute of limitations ran 3 years from the date that this Court entered its decision in *Back River I*.



*First*, Back River contends, and the circuit court agreed, that the tower was constructed under a valid building permit. Specifically, Back River obtained a building permit after the Zoning Commissioner granted Back River’s request for a variance. Back River then constructed the tower under the building permit, based on the variance provided by the Zoning Commissioner. Although the County Board of Appeals later overturned the grant of the variance, making the tower illegal, Back River argues that that decision had no effect on the original validity of the *building permit* at the time it was issued. In the words of CJ § 5-114(b)(2)(i), the tower was built “[i]n compliance with an otherwise valid building permit, except that the building permit wrongfully permitted the tower to violate a setback line restriction,” once the Board of Appeals overturned the Zoning Commissioner’s decision to grant the variance. And, under CJ § 5-114(b)(3), “a building permit that was otherwise validly issued, except that the permit wrongfully permitted the building or structure to violate a setback line restriction, shall be considered a valid building permit.” Therefore, according to Back River, the building permit for the tower was valid.

*Second*, Back River argues that because the tower was constructed under a valid building permit, the three-year statute of limitations of CJ § 5-114(b)(2)(i) applies. Back River claims that the limitations period accrued on May 14, 2003, when the County Board of Appeals overturned the grant of the variance, thereby making the tower illegal. Because the next action in the *Back River* saga did not take place until 3 years after that—on May

14, 2006—Back River argues that Baltimore County is barred from obtaining an injunction to remove the tower.

*Third*, Back River argues that even assuming that the limitations period did not accrue until August 3, 2005, when this Court filed its decision in *Back River I* affirming the denial of the variance request, the statute of limitations still bars any injunction by Baltimore County. According to Back River, the action for an injunction brought in *Back River III* was instituted in 2012—far after the three-year window following the decision of this Court in *Back River I*, by which the tower was declared to be illegal. Therefore, according to Back River, Baltimore County is now barred from obtaining an injunction to remove the tower.

## **II. The Circuit Court’s Analysis**

While the circuit court agreed with Back River that the tower was built under a valid building permit, and, therefore, came under the ambit of the three-year statute of limitations of CJ § 5-114(b)(2)(i), the circuit court held that judicial tolling should be applied to stop the running of the limitations period throughout the pendency of all of the *Back River* cases—*Back River I*, *Back River II*, *Back River III*, and *Back River IV*.<sup>6</sup> Specifically, *Back*

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<sup>6</sup> Back River contends that the circuit court, in its written summary judgment opinion, contradicted itself as to whether the limitations period began after the decision of the County Board of Appeal, or after this Court’s decision in *Back River I*. The disputed sentence reads: “By this court’s calculation, the Plaintiffs’ claim accrued during *Back River I*, when the Baltimore County Board of Appeals first denied the variances and found the tower to be illegal in 2003.” *Jablon, et al. v. Back River LLC, et al.*, Case No. 03-C-13-4768, Mem. Op. at \*9 (Cir. Ct. Balt. Cnty. Oct. 1, 2015). This sentence seems to suggest

*River I* began on May 14, 2003—when the County Board of Appeals overturned the grant of the variance request by the Zoning Commissioner, and progressed until August 3, 2005—after this Court’s decision to affirm the denial of the variance. *Back River II* began on May 9, 2008—two years, nine months, and six days after this Court’s decision in *Back River I*. Then, *Back River III* and *Back River IV* both started while *Back River II* was still pending. Because there was not 3 years between any iteration of a *Back River* case, and because in its view this case satisfied the criteria for applying judicial tolling, the circuit court held that Baltimore County was not barred from securing an injunction to remove the tower.

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that the circuit court found that the limitations period started to run after the decision of the County Board of Appeal on May 14, 2003. The very next sentence of the opinion, however, calculates that *Back River II*, filed on May 9, 2008, began two years, nine months, and six days after the end of *Back River I*. The calculation leads to a finding by the circuit court that the limitations period began on August 3, 2005—after this Court’s decision in *Back River I*.

We think that *Back River* misunderstands the circuit court’s reasoning. The circuit court determined that even if the limitations period would normally begin when the County Board of Appeals overturned the grant of a variance by the Zoning Commissioner, judicial tolling could be applied throughout the pendency of all the *Back River* cases. *Id.* at \*7 (“The Court is convinced that, because of the interrelated nature of all [four *Back River*] cases, judicial policy would best be served in this case by tolling the statute of limitations for initiating an injunction while the matter of the legality of the tower was still being determined in separate, but highly related, cases.”). In the circuit court’s opinion, judicial tolling applies because litigation regarding the legality of the tower has been ongoing since the limitations period began in *Back River I*, and there was never a period of three years without a *Back River*-related filing. As we will explain below, we agree with this reasoning.

### III. Our Analysis

A trial court's grant of summary judgment is reviewed *de novo*. *Dashiell v. Meeks*, 396 Md. 149, 163 (2006). Once the appellate court determines that there is no genuine dispute of material fact, then the appellate court decides if the trial court was correct as a matter of law. *Rockwood Cas. Ins. Co. v. Uninsured Employers' Fund*, 385 Md. 99, 106 (2005). In this case, the parties stipulated to a joint statement of facts, and agreed that there was no dispute of any material fact. Therefore, we will review the circuit court's grant of summary judgment for legal error.

In reviewing the decision of the circuit court in applying judicial tolling to the statute of limitations for prosecution of a setback line restriction, it is necessary to examine: (1) whether the building permit, obtained based on the original grant of a variance by the Zoning Commissioner, was still valid once the County Board of Appeals overturned the variance; and (2) whether the circuit court properly extended judicial tolling in this case. Because we hold that the building permit was valid even after the County Board Appeals overturned the grant of a variance, and because judicial tolling can be properly applied to the statute of limitations in this case, we affirm the circuit court.

#### A. *Validity of the building permit*

The first layer of the analysis is to determine whether the circuit court was correct that the building permit was still valid once the County Board of Appeals overturned the conditional variance extended by the Zoning Commissioner. If the building permit was not

valid after the decision of the County Board of Appeals, then under the plain language of CJ § 5-114(b)(2)(i), cited above, the three-year statute of limitations simply does not apply. And if the three-year statute of limitations does not apply, then Baltimore County is free to pursue an injunction against Back River at any time.

We agree with the circuit court, however, that the building permit was still “validly issued” after the decision of the County Board of Appeals. Although Back River understood it was proceeding under the building permit at its own risk, and although the *de novo* decision by the County Board of Appeals overturned the original grant of the variance, at the time the building permit was issued, Back River had a variance to construct the tower. Once the variance was overturned, the *tower* became illegal, and Back River had to suffer the consequences that stemmed from the illegal tower—Baltimore County could move for civil fines or an injunction to remove the tower. But, the illegality of the *tower* did not affect the legality of the *building permit*, for the purposes of CJ § 5-114(b)(2)(i). As the statute states, a permit that wrongfully permitted a structure to violate a setback line restriction is still considered a validly issued building permit. CJ § 5-114(b)(3) (“[A] building permit that was otherwise validly issued, except that the permit wrongfully permitted the building or structure to violate a setback line restriction, shall be considered a valid building permit.”). Therefore, we hold that the circuit court was correct, the building permit was validly issued, and the three-year statute of limitations applied.

*B. Judicial Tolling*

Next, we must consider whether the circuit court properly applied judicial tolling to prevent the running of the three-year statute of limitations. According to the circuit court here, judicial tolling can be properly applied to stop the running of the limitations period throughout the pendency of all of the *Back River* cases—*Back River I*, *Back River II*, *Back River III*, and *Back River IV*—because there was not a 3 year gap between any episodes in the *Back River* litigation. Therefore, the circuit court held that Baltimore County was not barred from securing an injunction to remove the cell tower.

The doctrine of judicial tolling allows a court to suspend a statute of limitations in a particular case for important policy reasons, even when the legislature did not provide for any ability to pause the limitations period. *See Swam v. Upper Chesapeake Med. Ctr., Inc.*, 397 Md. 528 (2007) (applying judicial tolling when Plaintiff initially filed a claim against a medical center with the state Health Care Alternative Dispute Resolution Office, which was the incorrect forum for the claim); *Philip Morris USA, Inc. v. Christensen*, 394 Md. 227 (2006), *abrogated on other grounds*, 435 Md. 207 (2013) (applying judicial tolling for the putative class members on the causes of action asserted in the class action complaint).

In *Christensen*, the Court of Appeals set forth a two-part test to determine if judicial tolling is appropriate in a particular case:

[W]e will recognize a tolling exception to a statute of limitations if, and only if, the following two conditions are met:

(1) there is persuasive authority or persuasive policy considerations supporting the recognition of the tolling exception, and (2) recognizing the tolling exception is consistent with the generally recognized purposes for the enactment of statutes of limitations.

394 Md. at 238. In sum, judicial tolling is appropriate when there are persuasive policy considerations to support it, and when the application of judicial tolling comports with the purposes for the limitations statute. As we explain below, this case fits both of the *Christensen* requirements for the application of judicial tolling.

1. *Persuasive policy considerations*

In *Antar v. Mike Egan Ins. Agency, Inc.*, this Court described the narrowness of judicial tolling. 209 Md. App. 336, 341-65 (2012). This Court explained that judicial tolling is applied very rarely, and only when overarching policy considerations, involving more than the interests of individual litigants, are at stake. *Id.* But even under *Antar*, judicial tolling may be applied when a specific case presents the appropriate policy considerations. *Id.* at 361.

*Antar* weighed the competing policy concerns present in *Christensen* and *Swam*, and then compared those cases to the facts presented in *Antar*. *Antar* explained that in *Christensen*, the policy considerations behind class actions—judicial economy and efficiency in litigation—took precedence over the policies inherent in statutes of limitations. *Id.* at 360-61. Similarly, *Antar* explained that in *Swam*, the policy considerations behind the Health Claims Act—to be “over-inclusive as opposed to under-

inclusive in terms of covered claims”—prevailed over the policies integral to statutes of limitation. *Id.* at 361. This Court then held that similar predominant policy concerns were not implicated, under the specific facts presented in *Antar*, to toll the statute of limitations for filing a civil suit in Maryland while the same suit was being litigated in Pennsylvania. *Id.* (“In the present case, no policy concerns are in any way implicated.”). Although this Court declined to apply judicial tolling in *Antar*, our case presents the necessary persuasive policy considerations to support the recognition of judicial tolling. We therefore analyze the policy of the statute of limitations in CJ § 5-114(b)(2).

We believe that the chief policy consideration behind the limitations period of CJ § 5-114(b)(2) is to protect against complacency by the local government. In drafting CJ § 5-114(b)(2), the legislature balanced the competing public interest of ensuring compliance with setback line restrictions and the zoning code, against the private interest of providing a cut-off point for government action against an individual. The legislature determined that three years was the appropriate amount of time to provide for government action. The legislature also determined that the limitations period of CJ § 5-114(b)(2) only applies if the local government has notice of the setback line restriction violation by issuance of a building permit. The purpose of requiring the local government to have notice of the violation, before the limitations period begins to run, is twofold: (1) to prevent an individual from using the limitations period to skate by with an undetected setback line restriction violation; and (2) to prevent a local government that had notice of the violation,



and had not pursued any action on the violation for more than three years, from pursuing an action against a property owner many years later. If there has been active and ongoing litigation with a property owner regarding a particular potential setback line restriction violation, then the government has, by definition, not been complacent in its pursuit of the action. In our view, in such a case, the local government has complied with the aims of the legislature in CJ § 5-114(b)(2). We hold, therefore, that consistent with the policy considerations behind CJ § 5-114(b)(2), we should extend judicial tolling to the local government when the property owner has prolonged litigation regarding the legality of the potential setback line restriction violation for more than three years since the government received notice of the violation.<sup>7</sup>

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<sup>7</sup> In an analogous case, *Nat'l Waste Managers Inc. v. Anne Arundel Cnty.*, this Court recognized that a limitations period could be tolled by ongoing litigation. 135 Md. App. 585, 604-05 (2000). During the course of extensive litigation, National successfully obtained a special exception variance to operate a landfill. *Id.* at 591. Anne Arundel County's continued opposition to the special exception prevented National from obtaining the requisite permit from the Maryland Department of the Environment. *Id.* at 587. Consequently, under a provision of Anne Arundel County law, National's special exception approval expired before National was able to complete and operate the landfill. *Id.* at 602. This Court examined similar cases from other jurisdictions and tolled the two-year limitations period to complete and operate the landfill throughout the pendency of the ongoing litigation. *Id.* at 609-14. This Court recognized that judicial tolling is appropriate in specific cases where the party that benefits from the judicial tolling acted diligently in pursuing its remedies during the litigation process. *Id.* at 614. In the same vein in this case, the ongoing litigation regarding the legality of the cell tower, coupled with Baltimore County's diligence in pursuing its remedies, tolled the limitations period throughout the pendency of all of the *Back River* cases.

The history of CJ § 5-114(b)(2) provides support to our understanding of the policy considerations behind the limitations period. The three-year statute of limitations for prosecuting a violation of a setback line restriction was first enacted in 1989. As originally drafted, it included the limitations period for both a private individual and a governmental entity to bring an action in the same subsection. Acts of 1989, ch. 1729. In 1992, the legislature amended the statute to differentiate between an action brought by a private individual and one brought by a governmental entity. Specifically, under the amendments, a private individual has 3 years from the date the setback line violation first occurred to bring the action, while a governmental entity has 3 years from the date the setback line violation first occurred to bring the action *if the building was constructed under a validly issued building permit*. Acts of 1992, ch. 383. We think that the purpose of the amendment was to create a distinction based on the existence of notice to the government: the government is considered to have “known” about a potential setback line restriction violation when it issues a building permit. Thus, when the government does not know about a particular setback line restriction violation, the government does not have to do anything. But once the government knows about the violation (as proven by the existence of a validly-issued building permit), then the government must act. In this case, Baltimore County has not been complacent and has acted diligently, as evidenced by the drawn out litigation surrounding the cell tower.

The Back River cell tower has been the subject of continuous litigation for nearly 15 years. To review, in *Back River I*, the Zoning Commissioner approved the variance for the construction of the tower in 2001. Back River obtained a building permit based on the variance and began construction of the tower, at their own risk in 2002. The County Board of Appeals overturned the grant of the variance in 2003, and at that point the tower became illegal. The denial of the variance was affirmed by the circuit court, and eventually by this Court in 2005. Back River attempted to cure the setback line violation between 2005 and 2008 by acquiring land that bordered the tower. When this curative method proved to be ineffective, Back River tried a new legal theory in 2008, in *Back River II*. Eventually, this legal theory was denied on *res judicata* grounds by the County Board of Appeals, by the circuit court, and by this Court in 2014. Baltimore County successfully brought an enforcement action against Back River in 2009, in *Back River IV*. And, finally, *Back River III* began in 2013, when Baltimore County moved for an injunction to finally remove the illegal tower. The injunction proceedings were stayed until *Back River II* completed the lengthy adjudication of the legality of the tower. *Back River III* is now in this Court after the circuit court ruled for Baltimore County on a motion for summary judgment and entered the requested injunction. This is not a case of a local government asleep at the wheel and failing to address a setback line restriction violation until after the statute of limitations has long-passed. Rather, this is a case of a county that has been fighting for nearly 15 years against efforts to legalize the cell tower.

Back River also contends that applying judicial tolling in this case allows the county to postpone limitations indefinitely. According to Back River, reliance on the May 9, 2008 filing to pause the limitations period leads to an open-ended tolling of § 5-114(b)(2) until some undefined later time. To that effect, the Court of Appeals has cautioned that judicial tolling should not be applied to postpone the limitations period indefinitely. *Walko Corp. v. Burger Chef Sys., Inc.*, 281 Md. 207, 215 (1977) (reasoning that extending judicial tolling to pause the statute of limitations during the pendency of a motion for leave to intervene in another suit against the same defendant would permit the plaintiff to “effectively postpone the running of the statute [of limitations] for an indefinite period of time.”). Applying judicial tolling here, however, does not permit the county to indefinitely postpone the limitations period. Judicial tolling is, necessarily, applied retroactively. As explained above, we apply judicial tolling here because the county has actively, and diligently, pursued litigation against Back River regarding the cell tower. There was never a period of three years without a *Back River*-related filing. Consistent with the policy considerations behind CJ § 5-114(b)(2), Baltimore County has not been complacent in its pursuit of the action throughout the entire timeline of this case. Therefore, judicial tolling did not indefinitely postpone the limitations period, rather, the limitations period was postponed as long as the litigation continued in a diligent manner.

We hold, therefore, that the policy of insisting that local governments actively pursue claims of setback line restriction violations created by CJ § 5-114(b)(2) is advanced by applying judicial tolling in this case.

2. *Consistent with the purposes for statutes of limitation*

The second prong of the *Christensen* test requires that a proposed application of judicial tolling be consistent with the general purposes of statutes of limitations. One purpose of the limitations period “is to ensure fairness to defendants by encouraging promptness in bringing claims, thus avoiding problems that may stem from delay, such as loss of evidence, fading of memory, and disappearance of witnesses.” *Hecht v. Resolution Trust Corp.*, 333 Md. 324, 333 (1994). Additionally, “[s]tatutes of limitations ... are intended simultaneously to provide adequate time for diligent plaintiffs to file suit, to grant repose to defendants when plaintiffs have tarried for an unreasonable period of time, and to serve societal purposes, including judicial economy.” *Kumar v. Dhanda*, 426 Md. 185, 209 (2012) (citation and quotation omitted).

We hold that applying judicial tolling in this case is not inconsistent with the purpose of the statute of limitations, and therefore, that this case satisfies the second prong of the *Christensen* test. Issues “such as loss of evidence, fading of memory, and disappearance of witnesses,” simply do not apply in this case. Because the legality of the cell tower has been actively litigated since 2001, there is no concern for any loss of evidence or fading of memory. Moreover, all material facts have been agreed to by the

parties and are not in controversy. As explained above, Baltimore County’s actions throughout the last 15 years have met a level of “ordinary diligence,” and applying judicial tolling in this case would not permit Baltimore County to postpone the running of the limitations period for an indefinite period of time. *See Burger Chef*, 281 Md. at 215. It would be unfair to Baltimore County to require it to have filed a prophylactic pleading seeking an injunction to remove the tower in 2006—3 years after the tower was first declared illegal—when Back River was in the process of attempting to cure the setback violations and was mired in the process of unsuccessfully litigating the legality of the tower in various ways until 2014. Lastly, we think that judicial economy is best served by bringing an end to the illegal tower’s fifteen-year odyssey through the court system. The legality of the tower has been the subject of ongoing litigation since the limitations period began in *Back River I*, and there has never been a period of three years without a *Back River*-related filing. Therefore, an extension of judicial tolling in this case is consistent with the generally recognized purposes for the enactment of statutes of limitations.

Back River also attempts to limit *Swam* and *Christensen* to their facts—*Swam* as only applying judicial tolling when the party made an initial timely filing in the incorrect forum, and *Christensen* as only applying to class actions. We disagree. *Christensen*, and *Swam*’s citations to *Christensen*, set forth a two-pronged test to apply to all potential cases where judicial tolling may be appropriate. *Swam* and *Christensen* do not cabin the test to any particular set of facts. In holding that entering into mandatory, non-binding arbitration

did not toll the statute of limitations for a breach of contract claim, the Court of Appeals in *Kumar* did not object to the two-pronged test of *Christensen*. 426 Md. at 205-06. Rather, the *Kumar* Court held that the two-pronged test was not satisfied under the particular facts of the case. *Id.* at 204. Here, by contrast, this case satisfies both prongs of the *Christensen* test.

Because we hold that judicial tolling properly applies to the three-year statute of limitations for prosecution of a setback line restriction violation in this case, we affirm the ruling of the circuit court.<sup>8</sup>

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<sup>8</sup> Baltimore County raises a number of alternative grounds to affirm the judgment of the circuit court. Because we apply judicial tolling to pause the statute of limitations throughout the pendency of all of the *Back River* cases, we do not need to reach any of the alternative grounds raised by Baltimore County to affirm the circuit court’s grant of summary judgment. It bears mentioning, however, that in our view, the alternative grounds do not have merit. We will address each contention in turn.

*First*, Baltimore County argues that the special limitations period of CJ § 5-114(b)(2)(i) does not apply because the building permit was not validly issued once the County Board of Appeals overturned the variance granted by the Zoning Commissioner. As explained above, however, CJ § 5-114(b)(3) makes clear that a building permit is still considered to be “validly-issued” even when the underlying variance is subsequently overturned on appeal. Therefore, the special limitations period of CJ § 5-114(b)(2)(i) applies to the action brought by Baltimore County for an injunction.

*Second*, Baltimore County argues that CJ § 5-114(b)(2)(i) does not bar the action for an injunction because Baltimore County Code § 32-3-602 states that “each day [of the zoning violation] shall be considered a separate violation.” The special limitations period of CJ § 5-114(b)(2)(i), however, takes precedence over any provision of the Baltimore County Code. If the zoning violation begins anew each day, the three-year limitations period of CJ § 5-114(b)(2)(i) to prosecute a setback line restriction violation would never apply. That cannot be the rule. More importantly, CJ § 5-114(b)(4) expressly provides that “the date on which the violation *first occurred* shall be deemed to be the date on which the

**JUDGMENT OF THE CIRCUIT COURT  
FOR BALTIMORE COUNTY AFFIRMED.  
COSTS TO BE PAID BY APPELLANTS.**

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final building inspection was approved.” *Id.* (emphasis added). The statute expressly provides that the violation does not occur anew each day; therefore, the statute of limitations does not begin anew each day.

*Third*, Baltimore County argues that Back River is barred by *res judicata* from making a statute of limitations argument. There is nothing in the opinions from this Court in *Back River I* or *Back River II*, however, that would prevent Back River from defending an action for an injunction to remove the cell tower by employing the special statute of limitations of CJ § 5-114(b)(2)(i). Therefore, Back River would not be barred by *res judicata* from making a statute of limitations argument.