

LYNN NASH, et al.

Appellant,

v.

MONTGOMERY COUNTY
BOARD OF EDUCATION

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 20-41

OPINION

INTRODUCTION

Lynn Nash and various individuals¹ (“Appellants”) file this appeal of the decision made by the Montgomery County Board of Education (“local board”) on April 21, 2020 to authorize the local superintendent to execute a property transfer agreement with the City of Gaithersburg to convey ownership to the local board a portion of land in Kelley Park for construction of a new elementary school. Appellants are homeowners in subdivisions adjacent to Kelley Park. They contend the decision by the board was arbitrary, unreasonable and illegal because there was limited public notice and comment, flaws in the site selection process, and various issues with the property transfer agreement. The local board filed a Motion to Dismiss the appeal. Appellants responded and the local board replied.

FACTUAL BACKGROUND

During the 2014-2015 school year, the Montgomery County Public Schools (“MCPS”) conducted a school capacity study for the Gaithersburg Cluster of elementary schools. This capacity study concluded that a new elementary school was needed to respond to increased enrollment in the cluster. (Appeal, Enc. 3).

On April 19, 2016, the local board approved construction of an addition at Gaithersburg Elementary School. However, a feasibility study subsequently demonstrated this was not a viable option for a number of reasons. (Appeal, Enc. 1).

On August 31, 2017, in response to the need for a new elementary building and the challenges of building an addition at Gaithersburg Elementary, the local board authorized the formation of a Site Selection Advisory Committee (“SSAC”) to identify potential sites for the new elementary school. (Appeal, Enc. 1). The SSAC had 21 members, including representation from MCPS, the City of Gaithersburg, Montgomery County Government, Mayor of the Town of Washington Grove, the NAACP-MC, and the MCCPTA. (MTD, Ex. A).

¹ Appellants also include David Andersen, Beth F. Junium, Stephen Kaufman, Christine Rumney, Dena Saunders, Jeannie Shenk, and Rhonda Thiessen.

The SSAC met on November 14, 2017 and December 5, 2017. It subsequently published a report on January 11, 2018. In this report, the SSAC indicated that it reviewed 14 sites, and excluded five sites from consideration during its second meeting. The SSAC ultimately recommended construction of a new elementary school on Kelley Park, property owned by the City of Gaithersburg. The SSAC believed that the Kelley Park site offered “the best range of site characteristic, including access, cost, availability, location, and consistency with LEED™ criteria.” (MTD, Ex. A).

On February 26, 2018, Superintendent Jack Smith submitted a memo to the local board recommending its approval of various school selection sites across the district, including the Kelley Park site. (Reply, Ex. A).

On March 8, 2018, a public hearing on Facilities and Boundaries was held in part to discuss the Kelley Park site selection. Two of the Appellants, Ms. Nash and Ms. Junium (through her husband) provided testimony at this hearing. (Reply, Ex. B).

On March 22, 2018, Superintendent Smith submitted a follow-up memo to the local board recommending its approval of the City of Gaithersburg-owned Kelley Park site as the next elementary school in the Gaithersburg Cluster. The board approved the Superintendent’s recommendation. (Reply, Ex. C).

On April 21, 2020, Superintendent Smith recommended to the local board approval of a resolution that would authorize him to execute the property transfer agreement with the City of Gaithersburg for 5.71 acres of Kelley Park for purposes of constructing a new elementary school. The local board voted and approved his recommendation. (Reply, Ex. D).

Appellants filed this appeal to the State Board on May 22, 2020.

STANDARD OF REVIEW

This case involves the local board's policy decision related to the property transfer for construction of a new elementary school in the Gaithersburg Cluster. This decision occurred after a long quasi-legislative review process. We have previously explained that when this Board reviews quasi-legislative decisions of local boards, we will decide only whether the local board acted within the legal boundaries of State or federal law, and will not substitute our judgment for that of the local board "as to the wisdom of the administrative action." *Citizens for a Responsible Curriculum v. Montgomery County Board of Education*, MSBE Op. No. 07-30 (2007) (citing *Weiner v. Maryland Insurance Administration*, 337 Md. 181,190 (1995)).

When the State Board explains the true intent and meaning of State education law and State Board rules and regulations, we exercise our independent judgment on the law's meaning and effect. COMAR 13A.01.05.06(E).

LEGAL ANALYSIS

Appellants filed this appeal of the local board’s resolution to grant the local superintendent authority to execute a property transfer agreement with the City of Gaithersburg for a parcel of Kelley Park. Appellants contend that the local board’s decision was arbitrary as a

“reasoning mind could not have reasonably reached the conclusion the local board or local superintendent reached.” (Appeal, p. 5). Appellants list a number of concerns to support their contention, including issues with the school population size; the site selection process; alleged failures to comply with MCPS Policy FAA – Educational Facilities Planning; issues with a traffic study and environmental impact; and lack of parity with other MCPS communities. Appellants also argue the local board’s decision was illegal because the local board did not have a draft copy of the property transfer agreement before it took action on April 21, 2020.

In response, the local board filed a motion to dismiss the appeal on the basis that this Board does not have jurisdiction over the appeal. The local board argues that our review of the local board’s decision is pursuant to Education Art. §2-205(e), which limits our consideration to whether the local board's decision violated State education law, regulation or a statewide education policy. The local board argues that Appellants fail to articulate a State education law or statewide education policy, but instead rely solely on local policies and regulations, which are outside the purview of this Board. Before deciding the local board’s motion to dismiss, we must deal with a preliminary matter.

Amended Appeal

Appellants in responding to the local board’s motion to dismiss raise new bases for their appeal. Appellants argue that this Board has jurisdiction over the appeal under our visitorial power; that the local board failed to comply with administrative procedures under the Interagency Commission on School Construction; the local board failed to comply with Education Art. §4-116, governing school site selections; the local board violated the State Constitution by “gifting” amenities to the City of Gaithersburg that are not for educational purposes; and that the local superintendent was not authorized to expend funds to purchase the parcel of Kelley Park.

As the local board points out in its reply, the Appellants’ response functionally serves as an amended appeal due to the new bases for the appeal. However, Appellants did not formally request leave to amend their appeal as required under COMAR 13A.01.05.04(A)(2). Given that the local board noted the irregularity and provided rebuttals accordingly, we do not believe the local board is unfairly prejudiced by allowing the Appellants’ reply, and we will consider the new arguments. We will also consider the local board’s rebuttals, including the argument that certain claims made by the Appellants regarding the site selection decision in March 2018 are time-barred.

Jurisdiction under Education Article §2-205(e)

Two parts of the State statute establish the State Board's jurisdiction to hear and decide cases. They are Education Art. §4-205 and §2-205. Section 4-205 establishes the State Board's authority to hear and decide appeals from decisions of local superintendents which were appealed to and decided by the local board. An appeal based on §4-205 jurisdiction is usually an appeal of a quasi-judicial decision of a local board. See *Sartucci v. Montgomery County Bd. of Education*, MSBE Op. No. 10-31 (2010).

When a quasi-legislative decision is appealed, however, the jurisdiction to hear the case usually will rest on §2-205. Under §2-205(e), the State Board is given the power to determine

the true intent and meaning of State education law and to decide all cases and controversies that arise under the State education statute and State Board rules and regulations.

Section 2-205 was intended by the General Assembly as a grant of "original jurisdiction" to the State Board allowing an appellant a direct appeal to the Board "without the need to exhaust any lower administrative remedies." *See Board of Educ. for Dorchester County v. Hubbard*, 305 Md. 774,789 (1986); *Board of Educ. Of Garrett County v. Lendo*, 295 Md. 55, 65-66 (1982). As the Court of Appeals has explained in dicta, the category of cases heard under §2-205 "deal primarily with statewide issues (i.e. statutes or bylaws applicable to all county boards of education)" *Id.* at 65; *see also, Strother v. Board of Educ. of Howard County*, 96 Md. App. 99, 113-114 (1993). That statute defines the contours of our authority. Specifically, the law confines matters subject to review under §2-205 to those involving State education law, regulations, or a policy that implicates State education law or regulations on a statewide basis.

Thus, in an appeal challenging a quasi-legislative decision of a local board our jurisdiction is limited to deciding only whether the local board's decision violated State education law, regulation or a statewide education policy. In addition, consistent with our jurisdiction, we apply a standard of review that focuses solely on whether the local board's decision violates State education law.

Other than the claims we discuss below, we find we do not have jurisdiction under Education Art. §2-205(e) over the following issues because they do not involve State education law or policy: concerns with the school population size; alleged failures to comply with MCPS Policy FAA – Educational Facilities Planning; issues with a traffic study and environmental impact; lack of parity with other MCPS communities; and that the local board failed to comply with administrative procedures under the Interagency Commission on School Construction.

Time-barred Claims

The local board argues that Appellants' claims regarding the site selection process and compliance with Education Art. §4-116, *School Site Selections by Board*, are time-barred. We concur. Under State regulation, appeals to the State Board must be "filed within 30 calendar days of the decision of the local board." COMAR 13A.01.05.02(B)(1)(a). The site selection process for the Kelley Park parcel, including the public hearing and notice, took place between February and March of 2018. The local board voted to approve the Kelley Park site for the new elementary school on March 22, 2018. Any appeal of the site selection decision, including claims of deficiencies during the site selection process, had to be filed with the State Board within 30 days of that decision. Appellants filed their appeal to the State Board on May 20, 2020, over two years from the date the appeal was due. The April 21, 2020 local board decision was limited to giving the local superintendent approval to execute the land agreement with the City of Gaithersburg; it did not revisit the selection of the Kelley Park site which was already final. Thus, this appeal is limited to considerations involving the local board's authorization of the superintendent to execute the land agreement.

State Constitutional Claim

Appellants argue that the local board's April 21, 2020 resolution is illegal because the land agreement violates Article VIII, §3 of the Maryland Constitution which reads, "The School

Fund of the State shall be kept inviolate, and appropriated only to the purposes of Education.” The land agreement sets forth the various responsibilities of the local board and the City related to the transfer of the Kelley Park parcel to MCPS to be used as a school site. Portions of the land agreement require MCPS to provide amenities in the form of an athletic field, a tot-lot, and new walking path connections that will be used by MCPS as well as the greater community.² Appellants argue that this amounts to illegal gifts to the City of Gaithersburg. The fact that the amenities will be also be enjoyed by the community at large does not negate the fact that the amenities serve to benefit MCPS and serve to establish a school at the Kelley Park site. Any other use is ancillary to that. Appellants have submitted no evidence to demonstrate these amenities do not serve an educational purpose. As such, we find no violation of the Maryland Constitution.

Superintendent’s Authority to Expend School Funds

Appellants attempt to argue that the resolution is illegal because the local superintendent lacked the authority to expend school funds for the purchase of the Kelley Park parcel under Education Art. §4-205(d). That provision states that “[a] contract made by a county board is not valid without the written approval of the county superintendent.” Appellant’s line of reasoning regarding the applicability of this provision here is hard to follow. Regardless, the land agreement specifies that the conveyance of ownership of the parcel is free of charge. As no funds were exchanged in the agreement, this argument lacks merit.

CONCLUSION

For all the aforementioned reasons, we dismiss Appellants’ claims and do not find a violation of State education law or policy. We affirm the decision of the local board.

Signatures on File:

Clarence C. Crawford
President

Gail H. Bates

Charles R. Dashiell, Jr.

Vermelle D. Greene

Rachel McCusker

² The land agreement requires for an athletic field and tot-lot to be built on land adjacent to the school property, and dictates the responsibilities of the local board and the City of Gaithersburg in jointly developing and overseeing the amenities, including creation of a joint use agreement.

Lori Morrow

Warner I. Sumpter

Abstain:

Jean C. Halle
Vice-President

Rose Maria Li

Dissent:

Shawn D. Bartley

Susan J. Getty

Joan Mele-McCarthy

Holly C. Wilcox

October 27, 2020