

SOUTH ARUNDEL
CITIZENS FOR
RESPONSIBLE
DEVELOPMENT
“SACReD”, ET AL.,

Appellant,

v.

ANNE ARUNDEL COUNTY
BOARD OF EDUCATION

Appellee.

BEFORE THE
MARYLAND
STATE BOARD
OF EDUCATION

Opinion No. 21-07

OPINION

INTRODUCTION

South Arundel Citizens for Responsible Development (“SACReD”) and various individuals (“Appellants”) file this appeal of three decisions made by the Anne Arundel County Board of Education (“local board”) regarding a cell tower project on the property of Shady Side Elementary School (“Shady Side”). The original appeal contests the local board’s May 20, 2020 decision to lift a previously imposed “pause” of the Shady Side cell tower project and to direct the superintendent to proceed with the project. It also contests the local board’s May 20, 2020 approval of a forest conservation easement (“FCE”). Appellants’ supplemental appeal challenges the local board’s execution of a site lease for the Shady Side cell tower on November 5, 2020. Appellants contend that the local board’s actions violate Education Art. §4-114(a)(1) which requires local boards to hold school property in trust for the benefit of the school or school system.

The local board filed a Motion to Dismiss in response to both the initial and supplemental appeals. Appellants responded and the local board replied. Appellants also filed a Motion to Strike the Motion to Dismiss. We consolidate the initial and supplemental appeals in this Opinion.

FACTUAL BACKGROUND

The Appellants in this case are SACReD, an incorporated environmental and community rights organization based in Deale, Maryland, and several individuals. Lisa T [REDACTED], Ginger H [REDACTED], and Linda N [REDACTED] have children that attend Shady Side Elementary School (“Shady Side”) in the southern part of Anne Arundel County. John E [REDACTED] and Priscila S [REDACTED] have children in the Shady Side attendance area and “reside on property across the road” from the proposed Shady Side cell phone tower location. (Appeal, pp. 2-3).

On June 20, 2012, the local board awarded a contract to Milestone Communications (“Milestone”) for a Telecommunications Leasing Master Agreement (“Master Agreement”). (R. 1-2).¹ Pursuant to that award, on July 23, 2012, the local board and Milestone executed the Master Agreement. (R. 3-21). The Master Agreement authorizes Milestone the right to lease a portion of Anne Arundel County Public Schools (“AACPS”) property to construct one or more telecommunication monopoles (“cell towers”), and to lease cell tower and ground space to telecommunications service providers. *Id.* In exchange, Milestone provides to the board \$25,000 per site and 40% of the gross revenues derived from the use, leasing or occupancy of the towers and facilities. *Id.*

The Agreement requires the local board to enter into site leases with Milestone for each site and requires Milestone to submit each proposed individual site lease to the local board for conceptual review in accordance with the contract terms, Policy FB and Regulation FB-RA. *Id.* The local board retains ultimate authority over lease location, duration, primacy of school-related activities, co-location, and other implementation details. *Id.* Once the local board gives final approval to a proposed site, AACPS is obligated to cooperate with Milestone in its efforts to secure governmental approvals for the project. *Id.*

Nineteen parties appealed the 2012 decision to the State Board maintaining that the decision to enter into the Master Agreement violated the local board’s obligation to hold school property in trust for the benefit of the school or school system under Education Art. §4-114(a)(1). The State Board affirmed the local board’s decision to enter into the Master Agreement with Milestone in *Murphy, et al. v. Anne Arundel County Bd. of Educ.*, MSBE Op. No. 15-36 (2015), finding the use of the property for the purposes set forth in the Master Agreement was consistent with the local board’s obligation to hold the land in trust. In so finding, the State Board balanced a variety of factors to determine the reasonableness of the Master Agreement and found that the substantial monetary consideration was a direct benefit to the school system. (*Id.* at 4).

On June 21, 2017, the local board and Milestone amended the Master Agreement and extended it for 5 years. Among other things, the amendment incorporated by reference local board Policy FB and Regulation FB-RA entitled Telecommunication Transmission Facilities. (R. 22-30). The purpose of Policy FB is “to facilitate access to [AACPS] property for the location of telecommunication transmission facilities to permit appropriate coverage for the safety and security of Anne Arundel County citizens, to advance instructional technology in schools and to obtain revenue for the benefit of [AACPS].” (R. 25). The amendment did not alter the other terms of the Master Agreement in any way that is significant to the issues raised in this appeal.

At its June 21, 2017 and September 6, 2017 meetings, the local board reviewed Milestone’s proposal to construct a cell tower at Shady Side, permitting the project to move forward for design and construction. (R. 53). Milestone moved forward in its efforts in the County permitting process for the project. (R. 31, 35-37, 53).

¹ The citations to the record denoted as R. __ refer to the record attached to the local board’s Motion to Dismiss.

At its meeting on December 5, 2018, the local board discussed the Shady Side lease project and directed that they revisit the matter at its next meeting. (R. 31, 35-37). On December 19, 2018, the local board voted to “pause” any further action by AACPS on the proposed cell phone tower at Shady Side to allow for additional review. (R. 36).

On May 20, 2020, the local board heard a presentation on sites other than Shady Side explored by the County, none of which were found to be viable. (R. 68). The local board also heard 84 public comments on the matter. After considering all of the information, the local board voted to lift the “pause” and direct the superintendent to proceed with the Shady Side project in accordance with the contract, policy and regulation. *Id.* The local board also approved entering into a forest conservation easement (“FCE”) required by County Code and the Maryland Conservation Act as part of the County’s grading permit approval process for the Shady Side cell tower. (R. 58-65, 68).

Appellants filed the initial appeal to the State Board on May 20, 2020 asking the State board to “determine that the cell tower serves no direct educational benefit and the proposed plan does not meet the trust requirements of Education Art. §4-114(a).” Appellants seek to have the State board reverse the local board’s decision to lift the pause on the project and to enter into the FCE.

While the appeal was pending, a development arose regarding the FCE. The FCE was required by County Code and the Maryland Conservation Act as part of the County’s grading permit approval process for the Shady Side cell tower. (Local Bd. Supp. Reply, Attach. A., Szachnowicz Affidavit). According to Alex L. Szachnowicz, the Chief Operating Officer, the County’s Office of Planning and Zoning withdrew the FCE requirement with regard to Milestone’s permit request and returned the deed to AACPS unrecorded. *Id.* Instead, the County had requested that Milestone plant additional trees by reforesting 13,058 square feet to meet the conditions of the previously requested modification. (Appellants’ Opposition to Supp. Reply, Ex. A).

On November 4, 2020, the local board entered into a site lease for the Shady Side tower. Thereafter, Appellants submitted a supplemental appeal to challenge the site lease as being in violation the local board’s duty to hold property in trust for the benefit of the school or school system under Education Art. §4-114(a). (Motion to Dismiss Supp. Appeal, Attach. B). The supplemental appeal asserts no new facts or legal issues other than adding the execution of the site lease to the appeal.

STANDARD OF REVIEW

This case involves quasi-legislative decisions of the local board. 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

The local board has filed a Motion to Dismiss the appeal. Appellants have filed a Motion to Strike the Local Board's motion. We address these matters below.

1. Motion to Strike Local Board's Motion to Dismiss

Appellants have filed a Motion to Strike the local board's Motion to Dismiss because it was filed 4 days late. Pursuant to COMAR 13A.01.05.03, the motion was originally due on July 20, 2020. Appellants agreed to a 3-day extension making the motion due on July 23. The local board submitted it on July 27.

We retain discretion to extend response deadlines at our own behest. COMAR 13A.01.05.04(B)(1). Unlike the 30-day deadline for filing a State Board appeal, which is immutable because it initiates the State Board's jurisdiction to decide a case, a deadline for filing a motion is not. Failure to timely respond to a motion does not deprive the State Board of jurisdiction. *See Denis C. and Ellen H. v. Montgomery County Bd. of Educ.*, MSBE Op. No. 13-12 (2013). We will allow the late submission in this case because it was the result of unanticipated events involving work absences and connectivity issues, and there is no prejudice to the Appellants who were able to fully respond.

2. Standing

The local board maintains that Appellants lack standing to bring this appeal. In order to have standing, an individual "must show some direct interest or 'injury in fact, economic or otherwise.'" *Milstein v. Montgomery County Bd. of Educ.*, MSBE Op. No. 15-25 (2015). Standing requires a demonstration that the individual is aggrieved by the decision such that the individual is personally and specifically affected in a way different from the public generally. *Kurth, et al. v. Montgomery County Bd. of Educ.*, MSBE Op. No. 11-38 (2011). An individual's status as a member of the community is insufficient to convey standing by itself. *Milstein v. Montgomery County Bd. of Educ.*, MSBE Op. No. 15-25 (2015).

A. Appellants Lisa T [REDACTED], Ginger H [REDACTED], and Linda N [REDACTED]

Appellants Lisa T [REDACTED], Ginger H [REDACTED], and Linda N [REDACTED] assert standing based on the fact that their children attend Shady Side. In a case such as this, attendance at the school does not per se establish standing. Appellants need to demonstrate a direct interest or injury. They have not done so here; they base their standing only on the fact that their children attend Shady Side. This case is dissimilar to the per se standing we have recognized in cases involving redistricting and school boundary decisions wherein the very nature of adding or subtracting students to the student population may impact various school programs and functions. Appellants have not alleged any facts to support that they were personally and specifically

aggrieved in a way different from the public generally. There is simply no explanation of how they are aggrieved by the cell tower project as parents of students at the school.

B. Appellants John E. [REDACTED] and Priscila S. [REDACTED]

Appellants John E. [REDACTED] and Priscila S. [REDACTED] assert standing by virtue of the fact that they have children in the Shady Side attendance area and they reside on property across the road from the proposed Shady Side cell tower location. Despite the local board's protestations, we interpret "across the road" to mean across the street from the Shady Side cell tower location. The State Board has looked to court decisions in the context of land use challenges as instructive in determining the standing of property owners related to decisions involving school property. *See Sartucci v. Montgomery County Bd. of Educ.*, MSBE Op. No 18-33 (2018); *Kurth v. Montgomery County Bd. of Educ.*, MSBE Op. No. 11-38 (2011). In *Bryniarski v. Montgomery County Bd. of Appeals*, 247 Md. 137, 144 (1967), the Court held that "[a]n adjoining, confronting or nearby property owner is deemed, prima facie, to be specially damaged and, therefore, a person aggrieved." *See also Ray v. Mayor & City Council of Baltimore*, 430 Md. 74, 82-83 (2013). Although we have not explicitly adopted this rule, we consider the status of an appellant as a landowner if it is relevant to the issue of standing. *See Sartucci v. Montgomery County Bd. of Educ.*, MSBE Op. No 18-33 (2018). It is relevant in a case such as this involving the building of a cell tower. Thus, we find that these Appellants have demonstrated sufficient interest different from the public generally to confer standing based the proximity of their residence across the street from the Shady Side cell tower site.

C. SACReD

SACReD asserts standing based on its qualifications as an environmental and community rights organization. With respect to organizational standing, a civic association can establish standing by demonstrating a direct interest or injury in fact in its own right or on behalf of its members. *See Rock Creek Hills Ass'n v. Montgomery County Bd. of Educ.*, MSBE Op. No. 12-49 (2012) and cases cited therein. SACReD is a non-profit, public interest organization dedicated to protecting South County against actions it views as inappropriate construction and development. (Opposition to Motion at 6). According to Michael Shay, President of SACReD, the organization's purpose "is to engage in research, education, and action to protect water quality, shorelines, creeks, ponds, wetlands, and natural habitat in the small communities along the western shore of the Chesapeake Bay in southern Anne Arundel County." The organization has been actively involved in ensuring responsible development on lands designated as Resource Conservation Area along Deep Cove Creek and Deep Creek, which share a common outlet to the Chesapeake Bay, and which includes the Shady Side project area. (Opposition to Motion to Dismiss, Shay Affidavit). Although SACReD's purpose is commendable, the organization's commitment and activities regarding such issues does not provide the type of standing required here. SACReD has not demonstrated that it is an aggrieved party. No action of the local board has impaired SACReD's ability to operate and function in order to carry out its mission.

3. Jurisdiction

The local board maintains that the State board lacks jurisdiction to review the appeal. The State Board has jurisdiction to review quasi-legislative decisions of local boards that focus on violations of State education law or policy under Education Art. §2-205. *See, e.g. Rock*

Creek Hills Ass'n v. Montgomery County Bd. of Educ., MSBE Op. No. 12-49 (2012); *Stanmore Family Limited Partnership v. Montgomery County Bd. of Educ.*, MSBE Op. No. 12-41 (2012). Education Art. §2-205 gives the State Board 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. This provision gives the State Board jurisdiction over this case because this appeal involves a direct challenge to a quasi-legislative decision of the local board arguing violations under the Education Article.

4. *Lift Pause and Site Lease*

Appellants seek to overturn as violating Education Art. §4-114(a) the local board's May 20, 2020 decision to lift the previously imposed December 2018 "pause" of the Shady Side cell tower project and direction to the superintendent to proceed and the local board's subsequent November 5, 2020 execution of a site lease for the Shady Side cell tower.

First, the decision to lift the pause and proceed with the project did not amount to a new decision regarding the cell tower project subject to a challenge based on a violation of §4-114(a). Rather, the local board's action amounted to procedural lifting of a stay that it had previously imposed while the County explored other sites thereby allowing the already approved process set forth in the Master Agreement and Amendment to continue. The local board did not make any new decision regarding disposition of property at that time.

Second, the local board maintains that the appeal of these matters based on a violation of Education Art. §4-114(a)(1) is really an appeal of the underlying purposes of the 2012 Master Agreement and 2017 Amendment, and that any such appeal had to have been made within 30 days of those decisions based on COMAR 13A.01.05.02(B). We agree with the local board.

The cell tower project and the Shady Side site lease emanate from the 2012 Master Agreement, and 2017 Amendment. The Master Agreement is a contract under seal setting forth enforceable rights and obligations on the part of both the local board and Milestone in a wide range of matters concerning the cell tower project including the purposes for which school property is to be used. It is the Master Agreement that gives Milestone the right to lease school property for the construction of the cell towers and facilities at each location, and to sublet the towers and facilities to telecommunications service providers. It is the Master Agreement that requires the execution of site leases with initial 10 years terms, with up to four 5-year extension terms. It is the Master Agreement that sets forth the payment terms. It is the Master Agreement that establishes the relationship with Milestone for the use of the property for the cell tower project, which is what is at issue here, even though the specific site locations are not identified therein.

The site lease flows from the explicit obligations set forth in the Master Agreement and was executed in furtherance of the underlying purpose for the use of the property as a function of the local board performing its obligations under the contract. We conclude, therefore, that even though not touted as such, this case is really a challenge to the underlying use of the property as established in the 2012 Master Agreement and 2017 Amendment, as the matters are inextricably intertwined. Thus, an appeal of the underlying purpose of the site lease, which is established by the 2012 Master Agreement and the 2017 Amendment, is untimely. Moreover, in *Murphy* this

Board has already determined that the underlying use of the property for the purposes of the cell tower project with Milestone does not violate §4-114(a)(1).

5. *Forest Conservation Easement*

The local board argues that the FCE issue is moot because the County withdrew the FCE requirement and returned the deed to AACPS unrecorded. Appellants respond that it is not moot because the local board did not vote to reverse its decision and the waiver of the FCE is a discretionary decision of Planning and Zoning. We agree with Appellants. A matter is moot when the case or controversy between the parties ceases to exist so that there is no longer a remedy that can be provided. *See Aaron R. v. Montgomery County Bd. of Educ.*, MSBE Op. No. 20-22 (2020). Although the FCE does not appear to be an issue at this time because Planning and Zoning waived the requirement, it is unclear from the appeal materials if the FCE could become an issue at some point in the future given that it was not rescinded by the local board. We therefore decline to dismiss the issue as moot. Further, based on the appeal submissions thus far, we do not find the FCE to be linked to the Master Agreement in the same way as the site lease so as to render it untimely. We will therefore proceed to have the parties brief the merits of the local board’s approval of the FCE.

CONCLUSION

For the reasons stated above, we deny the Appellants’ Motion to Strike, and find that Appellants John E [REDACTED] and Pricilla S [REDACTED] are the only Appellants with sufficient standing to participate as parties in this case. The appeal of the “lift pause” is not subject to a §4-114(a)(1) challenge and the appeal of the cell tower project under the site lease is untimely, and are dismissed. Further, the appeal of the FCE is not moot or untimely and will proceed with briefing on the merits.

Signatures on File:

Shawn D. Bartley

Gail H. Bates

Charles R. Dashiell, Jr.

Susan J. Getty

Vermelle D. Greene

Rose Maria Li

Rachel McCusker

Joan Mele-McCarthy

Lori Morrow

Warner I. Sumpter

Holly C. Wilcox

Absent:

Clarence C. Crawford, President

Dissent:

Jean C. Halle, Vice-President

February 23, 2021