JANIS SARTUCCI, ET AL.

Appellant

v.

MONTGOMERY COUNTY BOARD OF EDUCATION,

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 12-15

OPINION

INTRODUCTION

This is an appeal of the local board's decision to grant easements onto six local school properties to a telecommunications company. The Appellants are residents and parents of Montgomery County. The local board has filed a Motion to Dismiss, arguing that the Appellants lack standing, fail to state a cognizable claim, file an untimely appeal, and are not entitled to the relief sought. The Appellants filed a Response to the local board's Motion, to which the local board has submitted a Reply.

FACTUAL BACKGROUND

At its meeting on June 16, 2011, the Montgomery County Board of Education ("local board") approved consent agenda items which included the grant of utility easements for the following schools:

Capt. James E. Daly Elementary School
Albert Einstein High School
Col. Zadok Magruder High School
Springbrook High School
Watkins Mill High School
Wheaton High School

(Appeal, Ex. A; Local Bd. Ex. 1.)

In a memorandum to the local board, the then-superintendent noted that each easement was originally granted following a Lease Agreement with local utility and telecommunications companies to allow those companies to construct, restore and maintain telecommunications

monopoles or towers on the respective school properties. (*Id.*) The lease agreements which precipitated the easements were negotiated and executed between 2005 and 2008:

School	Date of Lease Agreement
Einstein High School	June 2005
Daly Elementary School	August 2006
Magruder High School	May 2006
Springbrook High School	June 2008 (T-Mobile)
Watkins Mill High School	November 2008
Springbrook High School[1]	July 2010 (Clear Wireless)

(Appeal, Ex. C.)

The local board's Policy ECN, *Telecommunications Transmission Facilities*, provided the criteria by which the local board evaluates and decides whether to grant requests to place private telecommunications transmissions facilities on local board owned property. (Appeal, Ex. B.) Based on the criteria set forth in the policy, the superintendent is authorized to decide whether to approve such requests and negotiate the most favorable terms. (*Id.* at 3.) In accordance with that policy, the superintendent recommended, and the local board approved, the easements for the six schools as consent agenda items at the local board's June 16, 2011 meeting.

This appeal to the State Board followed.

STANDARD OF REVIEW

Decisions of a local board involving a local policy or a controversy and dispute regarding the rules and regulations of the local board shall be considered prima facie correct. The State Board will not substitute its judgment for that of the local board unless the decision is arbitrary, unreasonable or illegal. COMAR 13A.01.05.05A.

LEGAL ANALYSIS

In their appeal to the State Board, the Appellants request that the State Board declare the easements and the underlying lease agreements for the six schools null and void. The Appellants argue that the local board does not have authority under State law to lease public school land to private entities and that the local board violated Policy ECN in the placement of each telecommunications transmission facility. The Appellants also argue that Policy ECN is defective by requiring approval of outside agencies for the placement of telecommunications transmission facilities without consent of the local board. Last, the Appellants contend that the local superintendent does not have authority to sign leases for telecommunications transmission facilities on behalf of the local board.

[1] Wheaton High School was the remaining school for which the local board granted an easement at its June meeting, but the Appellants did not include a copy of the underlying lease for the school.

The local board contends that the appeal should be dismissed because the Appellants lack standing to challenge its decision. The local board also argues that to the extent the Appellants attempt to "bootstrap" the lease agreements executed between 2005 and 2008 to the grant of easements at the June 2011 meeting, those challenges are untimely and should be dismissed. Finally, the local board argues that it has the authority and discretion under State law to grant easements to utility and telecommunications companies onto its property, and that its exercise of that discretion complies with the mandates of the federal Telecommunications Act of 1996.

Before turning to the merits of the Appellants' arguments, we will first address the issue of standing. The State Board has consistently required a person seeking review of an administrative decision to demonstrate that she would be "aggrieved by the final decision. In order to be an aggrieved party, a person ordinarily must have an interest such that [she] is personally and specifically affected [by the agency's final decision] in a way that is different from the general population." *Krista Kurth et al. v. Montgomery County Bd. of Educ.*, MSBE Op. No. 11-38 (2011) at 5, citing *Sugarloaf Citizens' Ass'n v. Dep't of Env't,* 344 Md. 271, 287-88 (1996).

The State Board has held that the lesser standard of showing a "generalized interest" is sufficient to establish administrative standing before the local boards, where citizens can assert their positions on the pending issues. *Kurth* at 4. Even if Appellants maintain standing before the local board, however, "that does not automatically confer standing at further levels of review", where the Appellants must demonstrate some direct interest or injury in fact that is different from a generalized interest in the subject matter of the case. *Id.* at 5, citing *Bryniarski, v. Montgomery County Bd. of Appeals,* 247 Md. 137, 144 (1967).

In this case, each easement and lease agreement regarding the respective schools were distinct contractual commitments made by the local board. Therefore, we will individually address the Appellants' standing to challenge each easement.

Daly Elementary School

The Appellants state that they are "interested County residents and parents residing in Montgomery county". (Appeal at 2.) The Appellants assert standing to challenge the local board's easement and lease agreement regarding Daly Elementary School on grounds that Ms. Kerchaert lives within $1/10^{th}$ of a mile (approximately 600 feet) of the school and has children who previously attended the school. (App. Response at 2.)

The Appellants state that Ms. Kerchaert's property value has been negatively impacted by the cell towers on the school property. As proof of Ms. Kerchaert's economic injury, the Appellants included a redacted copy of an order from the Property Tax Assessment Appeal Board for Montgomery County, which states the "probability of neighboring cell tower also affects [property] value negatively." (Response, Ex. E). The Appellants argue that because Ms. Kerchaert has standing, "the State Board need not inquire as to the other Appellants' standing". (Response at 8.)

Based on our review of the record, Ms. Kerchaert's claim of standing is not established by a preponderance of the evidence. The property tax assessment order that purports to demonstrate the decline in Ms. Kerchaert's property value has been redacted of all identifying information, including the property owner's name, address, case number and property valuation. (Response, Ex. E). Thus, there is no way to determine if Ms. Kerchaert suffered any economic injury in fact due to the local board's decision.

In addition, assuming without deciding that the property tax assessment order satisfactorily identifies Ms. Kerchaert as the property owner whose land declined in value due to the cell tower on the adjacent school property, the local board decision being appealed is the June 16, 2011 grant of an easement on Daly Elementary School property, not the erection of the cell tower. The property tax assessment order does not mention any negative effect that the local board easement has had on Ms. Kerchaert's property. Thus, in our view, Ms. Kerchaert has not established a direct injury in fact, economic or otherwise, beyond her generalized interest in the subject matter of this case. *See Sartucci v. Montgomery County Bd. of Educ.*, MSBE Op. No. 10-31 at 8-9 (2010) (finding the Appellant lacked standing because she did not demonstrate direct harm over the absence of contract language regarding student privacy issues, security issues and the contractual conflict with the State's education reform efforts).

The remaining Appellants relied on Ms. Kerchaert's purported standing as their own, citing *Chesapeake Bay Foundation, Inc. v. Clickner*, 192 Md. App. 172 (2010), for the notion that once standing is established for one appellant the State Board need not inquire as to the standing of the remaining appellants. Because we have determined that Ms. Kerchaert lacks standing, we need not address that argument.

Appellants have not pled or produced additional evidence that demonstrates they have been adversely affected by the local board's easement to establish standing in their own right. The Appellants do not claim to live within proximity of Daly Elementary School. Indeed, based on the addresses of record for this appeal, the Appellants do not live within the vicinity of the school and share neither the same city name nor zip code as the school. Thus, our view is that none of the Appellants have established standing by a preponderance of the evidence to challenge the local board's grant of an easement onto Daly Elementary School property.

Remaining Five High Schools

The local board granted easements to five other high schools at its June 16, 2011 meeting. The Appellants maintain that as to those schools they meet the more lenient standard for "administrative standing" to challenge the local board's decision. The Appellants ask that the State Board "reexamine its use of the restrictive judiciary standing requirements" which they assert is implicitly called into question by the holding of *Chesapeake Bay Found'n, Inc. v. Clickner,* 192 Md.App. 172 (2010). (Response at 9-10.)

Chesapeake Bay Found'n addressed standing in a land use appeal before a local zoning board. The court recognized the long standing requirement, as articulated in *Bryniarski v. Montgomery Co.*, 247 Md. 137 (1967), that a party show "aggrievement" as a requirement for

standing in a land use appeal. While adjoining, confronting or nearby property owners are considered *prima facie* aggrieved, property owners far removed from the land at issue are ordinarily not considered aggrieved. Instead, those far removed property owners must allege and prove by competent evidence the fact that their "personal and property rights are specially and adversely affected by the action". *Id.* at 185-86, *citing Bryniarski*. The court ultimately held that the zoning board erred in focusing exclusively on property rights, while not considering the other personal rights which the Appellants argued were adversely affected by the zoning board's decion. *Id.* at 188.

In our view, the Appellants mischaracterize the court's holding in *Chesapeake Bay Found'n*. The holding underscores the importance of a reviewing body's consideration of both personal and property rights that may be impacted beyond those of the generalized population. The holding does not remove the requirement that appellants show they have been aggrieved in the land use appeal. Nor does it provide that appellants may meet a "lesser" administrative standing in order to maintain a land use appeal.

Significantly, even if appellants had administrative standing before the local board, standing in that arena does not automatically confer standing at further levels of review. As the State Board recently reiterated:

> As the Court of Appeals has explained, for a person to maintain an action for review of an administrative decision, the person must be a party to the administrative proceedings and be aggrieved by the final decision. In order to be an aggrieved party, a person ordinarily must have an interest such that he is personally and specifically affected by the agency's final decision in a way different from the general public.

Id. at 5, citing *Sugarloaf Citizens' Ass'n v. Dep't of Env't*, 344 Md. 271, 287-88 (1996) (internal quotations omitted).

Applying these factors to this case, the Appellants could aver generalized, administrative standing before the local board as "interested County residents and parents residing in Montgomery county". (Appeal at 2.) However, in appealing the local board's decision, the Appellants are required to show by preponderance of the evidence that they are personally and specifically aggrieved by the local board's decision.

The Appellants do not present evidence that they have adjoining, confronting or nearby properties within proximity of the high schools. Nor do they adduce any other evidence that their personal rights or interests have been adversely affected by the local board's decision. For these reasons, our view is that the Appellants lack standing to challenge the local board's grant of easements on the high school properties.

Alternatively, the Appellants argue that because the "easements at the five high schools raise the same issues as the easement at Daly Elementary School", the State Board should

exercise its broad visitatorial powers, as in *Sartucci v. Montgomery County Bd. of Educ.*, MSBE Op. No. 10-31 (June 28, 2010), to declare the unlawful easements and leases null and void.

The Appellants' reliance on the *Sartucci* holding is misplaced because the State Board's exercise of its broad visitatorial power in that case did "not present the Appellant with standing to present this issue for review". (*Id.* at 9.) Rather, *Sartucci* involved troubling educational policy decisions made the local board which could have had statewide implications by negatively impacting the collaborative process needed to transition all school systems to the Common Core Standards. (*Id.* at 9-11.) The State Board chose to exercise its broad visitatorial power due to the potential statewide impact of the local board's educational policy.

The local board policy decision at issue here is dissimilar. In this case, each easement is granted for a particular public school property. The State Board need not exercise its broad visitatorial power simply to confer standing on plaintiffs who lack it, or to address an issue that does not have potential statewide implications.

Timeliness

Throughout their pleadings, the Appellants have merged the local board's decision granting easements on June 16, 2011 with the underlying leases which permitted telecommunications companies to erect cell towers on school properties. The Appellants seek to have the State Board declare the leases null and void.

As stated earlier, each lease agreement was evaluated, negotiated and executed independently for each school. The local board's lease agreement granting access to the schools were executed on the following dates:

School	Date of Lease Agreement
Einstein High School	June 2005
Daly Elementary School	August 2006
Magruder High School	May 2006
Springbrook High School	June 2008 (T-Mobile)
Watkins Mill High School	November 2008
Springbrook High School[2]	July 2010 (Clear Wireless)

(Appeal, Ex. C). Thus, assuming the Appellants had standing to appeal the local board's decision to execute a particular lease, the appeal would have been due to the State Board within 30 days of the date of the order or opinion reflecting the local board's decision. COMAR 13A.01.05.02B(1).

[2] Wheaton High School was the remaining school for which the local board granted an easement at its June meeting, but the Appellants did not include a copy of the underlying lease for the school.

The Appellants did not appeal the local board's execution of any of the aforementioned leases within 30 days of the local board's action. Indeed, this appeal is filed almost two years after the most recent lease for Springbrook High School, which was executed in July 2010.

Time limitations are generally mandatory and will not be overlooked except in extraordinary circumstances such as fraud or lack of notice of the decision. *See Scott v. Bd. of Educ. of Prince George's County*, 3 Op. MSBE 139 (1983). The Appellants have not cited any extraordinary circumstances that warrant excusing their untimely challenge to the local board's execution of any of the leases. Therefore, any claims regarding the local board's execution of lease agreements should be dismissed as untimely.

CONCLUSION

For these reasons, we dismiss the case for lack of standing and untimeliness, and affirm the decision of the Montgomery County Board of Education.

James H. DeGraffenreidt, Jr.
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May 22, 2012