

KRISTA KURTH, ET AL.,

Appellant

v.

MONTGOMERY COUNTY BOARD OF
EDUCATION,

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 11-38

OPINION

INTRODUCTION

This is a consolidated appeal of the decision of the Montgomery County Board of Education (local board) to lease an area of land known as the Brickyard Road Site to Montgomery County to be developed and used as ball fields. The appeal was filed by various Montgomery County citizens residing in Potomac near the Brickyard Road Site. The local board filed Motions to Dismiss the appeal for untimeliness as to some of the Appellants and lack of standing as to the remaining Appellants. Some of the Appellants have responded to the Motions. The local board has replied.

FACTUAL BACKGROUND

The Brickyard Road Site is a possible future school site consisting of a 20-acre parcel of land located on Brickyard Road in Potomac, Maryland. Appellants Nicholas Maravell and his wife, Victoria Cowles, reside on Horseshoe Lane in Potomac, which is a property adjacent to the 20 acre parcel of land. The other Appellants claim to live in the nearby vicinity.

Mr. Maravell is the owner of Nick's Organic Farm, L.L.C. In 1980, Nick's Organic Farm began leasing the Brickyard Road Site from Montgomery County Public Schools (MCPS) for agricultural purposes, and began operating an organic farm on the property. Over a thirty year period, MCPS consecutively leased the property to Nick's Organic Farm. Although MCPS would periodically put the lease out for bid, Nick's Organic Farm always prevailed as the successful bidder and was granted the lease. All of the leases were structured as one year leases with two to four annual options to renew. The leases provided that the site was subject to recall by MCPS on 90 days notice if needed for school construction, school purposes, or if it was declared as surplus property no longer needed by MCPS in which case it would be conveyed to the County.

The most recent lease between Nick's Organic Farm and MCPS commenced on March 23, 2006. That lease was for an initial one year term, with Nick's Organic Farm having four additional one year options, all of which it exercised. The last option period expired on March 22, 2011. (Appeal, Ex. 1).

In 2004, the County Executive asked the local board to surplus the Brickyard Road Site. At that time, the local board deferred disposition of the site until alternative middle school sites in the nearby Churchill, Whitman, and Wooton clusters could be evaluated. (Appeal, Ex. 10, Board Meeting Minutes, 3/22/04).

In November 2009, the County Executive requested that MCPS lease the Brickyard Road Site to the County to "be minimally developed to use for ball fields with minimal structural changes so that if necessary, it [could] be quickly reclaimed by MCPS." (Appeal, Ex. 2).

Thereafter, MCPS staff met several times with County staff to explore how a lease could be structured so that the site could be retrieved for school construction on short notice, if needed. MCPS staff briefed the local board on the issue in May and June of 2010. (Appeal, Ex. 4).

In early March 2011, school officials informed Mr. Maravell and Nick's Organic Farm that the property would not be rebid after the current lease expired on March 23, 2011. Instead, the local Superintendent proposed that the local board lease the property to the County to be used for ball fields. Appellants and others living near the Brickyard Road Site wrote letters and emails, and appeared at the local board's March 8, 2011 meeting to express their viewpoints.

On March 8, 2011, after discussing the Superintendent's proposal and various proposed amendments, the local board adopted the following resolution at its meeting:

WHEREAS, Montgomery County is interested in constructing more ball fields to provide additional recreational facilities for Montgomery County residents and has identified the future Brickyard Middle School site, located on Brickyard Road in Potomac, Maryland, as a location for ball field construction; and

WHEREAS, Montgomery County has requested a land lease of the 20-acre site that would include a term of 10 years with the option to reclaim the site should it be needed for school construction purposes; and

WHEREAS, Montgomery County will be responsible for notifying the community, obtaining all required permits, developing and maintaining the ball fields, and paying an annual rent of \$1,500; now therefore be it

Resolved, That the president of the Board of Education and the superintendent of schools be authorized to execute a Land Lease Agreement with Montgomery County for construction of ball fields at the future Brickyard Middle School site; and be it further

Resolved, that Nick's Organic Farm be allowed to plan and harvest during the 2011 season through January 1, 2012, via a sublease with the county executive, and during which time the county executive will work with the community and solicit requests for proposals for grass ball fields; and be it further

Resolved, That Montgomery County Public Schools must be able to reclaim the property for school needs based on the sole determination by the Board of Education by giving two years' notice.

(Local Bd. Motion, Board Meeting Minutes 3/8/11).

The County describes the project as follows:

The Brickyard Road Soccer Fields project is proposed to consist of grading and development of existing corn fields to develop up to four soccer fields. The project will consist of private development, maintenance and operation of soccer fields and construction and maintenance of adequate onsite parking. Development of the project will include design and construction of soccer fields, parking, Stormwater Management, site improvements and other requirements. . . .

(Local Bd. Reply to Opposition, Ex. A). The fields will be natural turf fields and there will be no lighting or sound system. *Id.*

This appeal to the State Board followed. In total, the State Board received 41 separate appeals of this matter. Two of the Appellants have withdrawn from the case. As to the remaining Appellants, the local board seeks to dismiss 7 for untimely filing and seeks to dismiss all remaining Appellants for lack of standing.

MOTION TO DISMISS

Untimeliness

The local board argues that the following Appellants should be dismissed from the case because they failed to timely file their appeals to the State Board: Shahram and Fahimeh Bagheri, Anh and Tom Sawyer, Monica Han, Gerald Katz, the Shuman Family, Chhaya Rao, and Jean Canada.¹

COMAR 13A.01.05.02B(1) provides that an appeal to the State Board "shall be taken within 30 calendar days of the decision of the local board" and that the "30 days run from the later of the date of the order or the opinion reflecting the decision." An appeal is deemed

¹ The local board also claims that Madhulika Jinsi untimely filed her appeal to the State Board. Ms. Jinsi has withdrawn her appeal and is no longer an Appellant in this case.

transmitted within the limitations period if it has been delivered to the State Board or deposited in the United States mail, as registered or certified, before the expiration of the time period. COMAR 13A.01.05.02B(3). The State Board has strictly applied this rule of law, dismissing appeals that have been filed a mere one day late based on untimeliness. *See Schwalm v. Board of Educ. of Montgomery County*, 7 Op. MSBE 1326 (1998); *Friedman v. Board of Educ. of Montgomery County*, 7 Op. MSBE 1260 (1998); *Duckett v. Board of Educ. of Montgomery County*, 7 Op. MSBE 620 (1997).

The local board rendered its decision in this matter on March 8, 2011. (Mtn. to Dismiss, Ex. 3, Board Meeting Minutes, 3/8/11). The appeal should have been filed with the State Board by April 7, 2011. The Appellants named above did not file their appeals until April 8, 2011 or later.

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. Board of Educ. of Prince George's County*, 3 Op. MSBE 139 (1983). The Appellants have not provided any extraordinary circumstances that would excuse the late filing. We therefore dismiss them from the case for untimely filing.

Standing

The local board argues that the remaining Appellants lack standing to bring this appeal because they have not shown any direct interest or injury in fact different from that of the general public resulting from the local board's decision to lease the Brickyard Road site to the County to establish ball fields. The Appellants maintain, however, that they have satisfied the requirements of administrative standing and may appeal this matter to the State Board.

The Court of Appeals has recognized that a "generalized interest" in an issue before an administrative agency is sufficient to establish standing before the agency. Under administrative law principles, "the format for proceedings before administrative agencies is intentionally designed to be informal so as to encourage citizen participation . . . [a]bsent a reasonable agency or other regulation providing for a more formal method of becoming a party, anyone clearly identifying himself to the agency, thereby becomes a party to the proceeding." *Sugarloaf Citizens' Ass'n v. Dep't. of Env't*, 344 Md. 271, 286-87 (1996). For example, testifying at a public hearing asserting opposition; submitting one's name as a protestant; identifying oneself on the agency record as a party confers administrative standing and establishes a person as a party before the administrative agency. *Id.* at 287 (citing cases).

In this case, the administrative agency at which those administrative standing principles would apply is the local board. It is before that board that persons like the Appellants could assert their positions on approving the contract at issue here. Mr. Maravell claims to have done just that by testifying on behalf of himself and Nick's Organic Farm at the local board's March 8, meeting. Ms. Cowels claims to have testified at the meeting as well. (Maravel Response at 3-4). Various other Appellants also claim to have testified before the local board at that meeting, and also claim to have protested at the meeting in a show of united opposition to the proposed action.

Even if we find that the Appellants had administrative standing before the local board, that does not automatically confer standing at further levels of review. 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.” *Id.* at 287. 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 288.

The State Board has used that same reasoning in a long line of cases considering the issue of standing. We have established that an Appellant before this Board must demonstrate some injury or harm different from a generalized interest in the subject matter of the case. The Board has said:

[T]he general rule on standing is that “for an individual to have standing . . . he must show some direct interest or ‘injury in fact, economic or otherwise’.” See *Schwalm v. Montgomery County Board of Education*, MSBE Opinion No. 00-10 (February 23, 2000); *Vera v. Board of Education of Montgomery County*, 7 Op. MSBE 251 (1996); *Way v. Howard County Board of Education*, 5 Op. MSBE 349 (1989). This showing of a direct interest or injury in fact requires that the individual be personally and specifically affected in a way different from the public generally and is, therefore, aggrieved by the final decision of the administrative agency. See *Bryniarski v. Montgomery County Bd. of Appeals*, 247 Md. 137, 144 (1967).

Sartucci v. Montgomery County Bd. of Educ., MSBE Op. No. 10-31 (2010).

Appellants base their standing on allegations that they are within the circle of adjoining, confronting, or nearby property owners who will be adversely affected by the use of the property by the County government for ball fields. Specifically, Mr. Maravell and Ms. Cowles claim standing based on their status as the owners of property adjoining the Brickyard Road Site.² Other Appellants maintain that they are nearby property owners. Appellants claim that the proposed use will significantly increase traffic, increase noise in the area, affect access to residences, increase congestion, decrease safety, and decrease property values. Appellants also express concerns about water runoff from the impervious surfaces associated with the required parking spaces and access roads and the effect of chemicals used to grow turf for the fields on water in the area.

² Mr. Maravell owns Nick’s Organic Farm and Nick’s Organic Farm leased the property from MCPS. Although Nick’s Organic Farm had operated on the Brickyard Road Site for many years, the lease between Nick’s Organic Farm and MCPS ended on March 22, 2011. Thus, the fact that Nick’s Organic Farm would no longer be able to use the land for farming is not a direct interest or injury because that was the legal bargain made between Nick’s Organic Farm and the school system.

The local board argues that while being an adjoining or nearby property owner with these types of concerns may be sufficient to confer standing on the Appellants in an administrative review of a land use matter involving the property at issue, it does not do so in an appeal of the local board's decision to lease the property to the County. We recognize that the cases relied on by the Appellants to establish the standing of adjoining or nearby property owners are actions for judicial review of administrative land use decisions. In those types of cases, "an adjoining, confronting or nearby property owner is deemed, *prima facie*, . . . a person aggrieved" under standing principles. *Sugarloaf Citizens' Ass'n v. Dep't of Env't*, 344 Md. at 297; *Bryniarski v. Montgomery Co.*, 247 Md. at 145; *Town of Somerset v. Montgomery County Board of Appeals*, 245 Md. 52 (1966). While we need not adopt the land use rule, nothing precludes this Board from considering the status of a landowner if it is relevant to the issue of standing in an appeal to the State Board.

Here, the local board voted to lease the property to the County for the purpose of constructing and operating ball fields. Thus, the County's use of the property is intertwined with the local board's decision to lease. It cannot seriously be denied that the construction and operation of ball fields on the property will have some tangible effect on the residences in the immediate vicinity of the property, in particular, with regard to increased traffic and noise. The fact that the remaining Appellants own land either adjoining or in close proximity to the Brickyard Road Site leads to the inescapable conclusion that these land owners would suffer an injury in fact different from the public generally. We find, therefore, that the remaining Appellants have standing to bring this appeal.

Forum

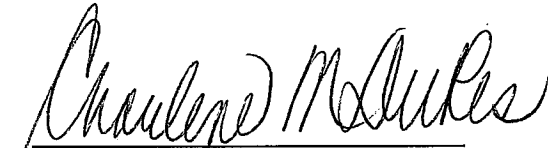
The local board also suggests that the State Board is not the appropriate forum to hear the concerns raised by the Appellants because the concerns relate to the proposed use of the property by the County, not to the decision to lease the land, and there are other processes available for review of land use matters. While we have found that the Appellants have standing to bring this appeal based on their status as adjoining landowners, the issues raised in the appeal are not land use matters. For example, some of the Appellants' arguments consist of claims that the local board's decision violated the local board's own policies and procedures, that it violated provisions of the Education Article, and that it violated the Appellants' due process rights. Such claims are appropriate for State Board review.

CONCLUSION

We dismiss from this case the Appellants who failed to timely file their appeals to the State Board. As to the remaining Appellants, because we find that they satisfy the standing

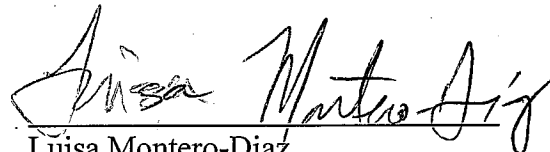
requirements, and because the State Board is the appropriate forum for review, this case may proceed on the merits. All the remaining Appellants continue as parties to the case. The parties will receive notification regarding the briefing process.


James H. DeGraffenreidt, Jr.
President

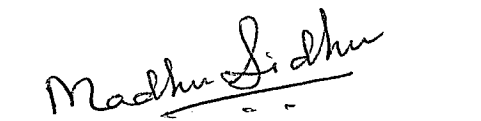

Charlene M. Dukes
Vice President

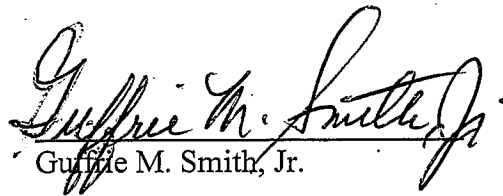
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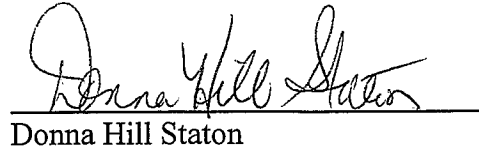
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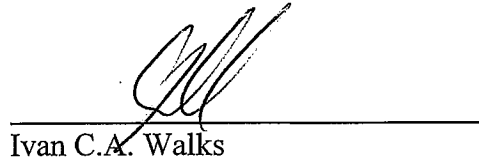

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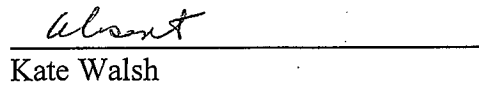
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August 30, 2011