

THOMAS HEARN,

Appellants

v.

MONTGOMERY COUNTY
BOARD OF EDUCATION,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 09-20

OPINION

INTRODUCTION

This is an appeal of the Montgomery County Board of Education's (local board) decision to enter into an agreement with a private soccer club for preferred scheduling of games during non-school hours. The local board has filed a Motion to Dismiss and/or for Summary Affirmance. Appellant has submitted a reply to the local board's Motion, and a Cross-Motion for Summary Reversal. The local board has filed a response to Appellant's Cross-Motion.

FACTUAL BACKGROUND

In 2007, Montgomery County Public Schools ("MCPS") began work on a pilot project to install an artificial turf field in the new stadium being constructed at Richard Montgomery High School (RMHS). In January, 2008, the Superintendent of Schools informed the local board that the cost of installing such a field at RMHS would be approximately \$900,000. (Weast Memo, 1/8/08).

Montgomery Soccer Enterprises, LLC (MSE), a private soccer club, offered to contribute a lump sum of \$300,000 to help offset the initial cost of the field. In return, MSE requested preferred scheduling and use of the stadium field during non-school hours from February 15 to November 15 for a period of five years, with an option to renew the agreement for an additional five years. (*Id.*).

On January 8, 2008, the local board approved a pilot program to install an artificial turf field at RMHS contingent upon the Montgomery County Council's (the Council) acceptance of the \$300,000 contribution from MSE, the Council's transfer of certain funds from other capital improvement projects, the Council's appropriation of funds for the artificial turf installation, and the County Executive's willingness to recommend Council approval of the appropriation. (Local Board Resolution No. 6-08) On February 12, 2008, the County Executive recommended that the Council accept MSE's contribution. (Leggett Memo, 2/12/08).

The Council's education committee held several work-sessions and hearings on issues

related to the pilot program. During its review, the Council considered Appellant's contention that the local board lacked the legal authority to enter into an agreement with a private entity regarding the use of a public school facility. The Council's legislative attorney concluded that the local board has the authority to enter into such an agreement. (Drummer Memo, 3/7/08).

On March 18, 2008, the Council approved a resolution authorizing the special appropriation and a transfer of appropriation funds. (McGuire Memo, 3/14/08). MCPS, along with the Interagency Coordinating Board for Community Use of Public Facilities (ICB) negotiated an agreement with MSE for specified use of the artificial turf field in exchange for its \$300,000 contribution toward construction. On June 23, 2008, the local board authorized its President and the Superintendent to enter into the Richard Montgomery High School Stadium Field Agreement (Agreement) with MSE. (Local board Resolution 236-08) The parties signed the Agreement on July 15, 2008. The ICB also entered into a Facility Use Agreement with MSE. (Facility Use Agreement).

This appeal followed.

STANDARD OF REVIEW

Because this appeal involves a decision of the local board involving a local policy, the local board's decision is considered prima facie correct, and the State Board may not substitute its judgment for that of the local board unless the decision is arbitrary, unreasonable, or illegal. COMAR 13A.01.05.03E(1).

ANALYSIS

The Appellant contends that the local board lacked authority to enter into an agreement with MSE providing MSE with preferential use of school property that supersedes the general right of the community to use school property.

Several statutes govern the use of school property. Section 7-108 of the Education Article, Annotated Code of Maryland, encourages county boards to use public school facilities for community purposes. That statute contains a provision specific to Montgomery County which states in full:

In Montgomery County, nonschool use of school facilities for public and community purposes and the manner by which costs associated with such use are apportioned may be regulated by local law consistent with the use criteria set forth in §7-110 of this subtitle and not inconsistent with any other provisions of this article. The local law authorized by this subsection may provide for an interagency coordinating board and for the appointment of its members by Montgomery County. Membership may include the Superintendent of Schools, the President

of Montgomery College, the members of the Montgomery County Planning Board, and such other members as may be provided by the local law.

Md. Educ. Code Ann. §7-108(f).

Under §7-110(a) of the Education Article, when a local board allows non-school use of its facilities it may charge a reasonable fee for “heating, lighting, and janitorial services...” For commercial use of “surplus school space” a local board may charge “rent and recovery of capital costs.” Md. Educ. Code Ann. §7-110(a)(1) and (2).

The Appellant contends that the local board has violated §7-108 and §7-110 because the \$300,000 payment that MSE made toward construction of the artificial turf field is not a user fee in payment for heating, lighting or janitorial services and is not “rent and recovery of capital costs”. Rent, the Appellant argues, implies a leasehold interest and, he asserts, MSE has not acquired a leasehold interest in the field.

The local board argues that the payment is appropriate under §7-110(a)(2) because MSE’s use of the field would be at times that are surplus to the needs of RMHS. It also argues that the durable artificial turf makes possible more hours of use in comparison to a grass field, so it is in fact surplus space. Because it is surplus space, the local board argues, it can charge MSE for rent under §7-110(a)(2). The local board argues that the term “rent” does not necessarily imply a leasehold interest; it can be read to include the fees paid for a right to use property for a day or a portion of the day.

In our view, the \$300,000 received from MSE is similar to rental fees, which the local board is authorized to charge. It is charged for the right to use the property for a particular period of time. We agree with the reasoning of the local board that accepting the \$300,000 does not violate §§ 7-108 or 7-110.

Property held in Trust

Section 4-114 of the Education Article provides that all property “granted, conveyed, devised or bequeathed for the use of a particular public school or school system” shall be “held in trust for the benefit of the school or school system by the appropriate county board.” Md. Code Ann., Educ. §4-114(a) and (a)(1).

Appellant asserts that the Attorney General has concluded that a local school board, acting as trustee, lacks the authority to lease school property to a commercial venture unrelated to the school mission. 76 Op. Att’y. Gen 147 (1991) and 91 Op. Att’y. Gen. 33 (2006).

The local board contends that the instant case differs from the questions presented in the opinions cited by the Appellant. The opinions addressed issues of ground leases of school

property for long periods of time (20 years and 99 years), where the lessees would have constructed improvements on the school board's land, thus preventing further public use of that property. Here, the local board contends, there is no ground lease involved, and MCPS itself (not the lessee) is constructing the improvement, the field. Furthermore, MCPS will retain primary use of it, only providing joint use to MSE at times when the field is not needed for school use.

In a 1991 opinion, the Attorney General concluded that a local school board may enter into a lease of school property with a private entity, if the local board reasonably determines that the lease would "result in direct benefits to the board in the conduct of its educational responsibilities." 76 Op. Att'y Gen. 190.

The local board contends that, consistent with this opinion, its agreement with MSE provides a benefit to the high school and the local community by providing the availability of a state-of-the-art artificial turf athletic field. We agree.

To the extent that the agreements at issue in this case were considered lease agreements, we agree with the local board that the agreements do not violate §4-114.

ICB Guidelines

According to MCPS Regulation: Community Use of Public Schools, the Interagency Coordinating Board "is the policy board which governs the community use of schools and approves guidelines and procedures." The Community Use of Public Facilities Office (CUPF), among other administrative duties, issues field permits in accordance with ICB guidelines.

Appellant argues that, according to ICB guidelines, priority is given to non-profit Montgomery County-based leagues before any permits are given to for-profit groups. At schools where there is an adopt-a-field arrangement, priority is given to the group according to a preset agreement. The remaining time is allocated in accordance with CUPF procedures, where CUPF and MCPS enter into an agreement to outline the hours available for community use. Appellant argues that MCPS ignored these guidelines when entering into the agreement with MSE.


The local board argues that the ICB provision in question relates to non-school use of school fields, other than high school game fields. Since the RMHS field is, in fact, a high school game field, the provision is inapplicable in this case. Even if the ICB guidelines apply here, the local board contends, the agreement with MSE is very similar to an "adopt-a-field" arrangement. At schools where there is such an arrangement, scheduling priority is given to the group according to a pre-set agreement, and thus this agreement should be considered valid.

Appellant argues that the reason that current ICB guidelines relate only to fields that are not used for games, is because game fields need to be protected for use on game day. He contends that the artificial turf on the RMHS field can now tolerate higher use, and should therefore fall under the ICB guidelines for fields that do not require such protection.

We agree with the local board that the RMHS field is not covered by the ICB guidelines because it is a high school game field. The fact that it has artificial turf, in our view, does not make the ICB guidelines applicable.

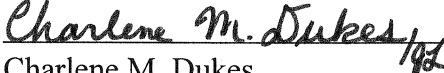
CONCLUSION

For all of the reasons stated herein, we affirm the decision of the local board authorizing the Agreement with MSE.


James H. DeGraffenreidt, Jr.
President

Blair G. Ewing*
Vice President


Dunbar Brooks


Charlene M. Dukes


Mary Kay Finan

Rosa M. Garcia*

Richard L. Goodall /gd
Richard L. Goodall

Karabelle Pizzigatti /gd
Karabelle Pizzigati

Donna Hill Staton /gd
Donna Hill Staton

Ivan C.A. Walks /gd
Ivan C.A. Walks

Kate Walsh /gd
Kate Walsh

June 23, 2009

* Both Blair G. Ewing and Rosa M. Garcia deliberated on the appeal but resigned from the State Board before this Opinion was issued.