

BOARD OF EDUCATION OF HARFORD COUNTY

DECISION ON THE

**HOMESTEAD/WAKEFIELD ELEMENTARY SCHOOL REPLACEMENT PROJECT
TOWN OF BEL AIR'S PLANNING APPROVAL CONDITIONS
PROPOSED MACPHAIL ROAD CONNECTION**

April 25, 2022

Background Information:

As part of the FY 2022 capital improvement budget request, the Board of Education of Harford County requested local planning approval from the State and design funding from the County to replace Homestead/Wakefield Elementary School. The State Interagency Commission (IAC) for Public School Construction granted planning approval on May 27, 2021, and the County funded the required engineering, design, and construction administration services.

The current design is a \$82,568,334 project that will replace the over-capacity three-building elementary school with a new single elementary school building on the Wakefield Campus. The project has been planned for phased construction over three (3) fiscal years (FY22, FY23 and FY24), with funding provided by the County and State. In November of 2021, the IAC approved the project for the State portion of funding through the Built to Learn Act. The County has also committed to the local portion of Capital funding.

Through March of 2022, and prior to the submission to the Planning Commission for the Town of Bel Air, the project was on schedule and budget as necessary to start construction over the summer of 2022 and ready the new replacement HWES facility for occupancy at the opening of school in September of 2024.

Discussion:

As part of normal course of business, HCPS engaged and tasked consultants with the responsibility of providing architectural, engineering, and construction management related services that are needed for the construction of a new replacement building for HWES and the associated site improvements to the Bel Air campus situated inside of the Town of Bel Air. During the planning and design phases of the project, the project team engaged the Town of Bel Air's (Town) Department of Planning & Zoning (P&Z) to complete the plan review process as a prerequisite to obtaining Site Plan approval and the permits to build the replacement HWES facility. In doing so, the project team was made aware of the Town's desire to connect East MacPhail Road, which currently terminates at the intersection of Route 924, and West MacPhail Road, which currently terminates at the intersection of South Atwood Road, thus creating a connecting road across the Bel Air Campus.

During the plan review and approval process, the Town demanded that HCPS commit to the surplus of school property for the purpose of establishing this public road right-of-way that will allow a connecting road across the Bel Air Campus. For the project to receive planning approval, HCPS must design the road and associated stormwater management facilities and surplus the property for dedication to the Town. To resolve this matter, and to collaborate with the Town, the following was shared with the Town's P&Z, The Town Administrator, and with the Town's Planning Commission:

- 1) HCPS' position is that the proposed road extension and the placement of a public roadway on school property will present major consequences to the entire Bel Air Campus including the following:
 - It will jeopardize safe access to school grounds and facilities for students and staff.
 - It will reduce program space currently dedicated and used for educational purposes on a campus with two over-capacity school facilities located within the County's growth envelope.
 - It will restrict the future construction plans for Bel Air Middle School as proposed to address planned growth in the surrounding Bel Air area.
 - It will impose additional costs with funding designated for School construction.

- 2) HCPS cannot directly dedicate property to the Town because Local Education Agencies (LEAs) are not authorized to purchase or sell property. This responsibility rests with the County (Local) Government. This is a lengthy process involving multiple stakeholders that would negatively affect the project schedule and budget. The State required procedure for the transfer of public-school property requires the following steps:
 - LEA must determine that the property is no longer required for educational programs.
 - LEA must submit a request to the State to obtain State approval.
 - Board must approve prior to transferring property to the County Government.

Irrespective of HCPS' concerns raised and the information shared by HCPS, an agreement could not be reached, and on April 8, 2022, the Town Planning Commission sent a letter to Dr. Bulson which attached conditions to the approval of the HWES Site Plan and issuance of permits for demolition, grading, the construction of utilities, and final Use and Occupancy. The conditional approval requires HCPS to design the proposed road extension, and associated stormwater management facilities and reforestation to accommodate the road, and to transfer that property for the road and associated storm water management to the Town for the purpose of connecting East and West MacPhail Road. This conditional approval will prevent the planned occupancy of the HWES facility for September of 2024, and the delay will also increase the project budget.

Maryland courts have treated Boards of Education as state or county agencies, depending on the circumstances. Since the construction of school buildings is closely supervised by state law, a Board of Education is a State agency for purposes of the use of Board real property and the application of local land use restrictions. 87 Opinions of the Attorney General 119, 122 (2002). As

a State agency, the Board is not subject to local zoning regulations. *City of Baltimore v. State*, 281 Md. 217, 223-24 (1977). Therefore, the Commission's requirement that the Board dedicate a 50-foot right-of-way on this land for the Town of Bel Air to construct a public road as a condition to issuing a building permit for the construction of the replacement school facilities is beyond the Commission's authority regarding a State agency.

Maryland's Attorney General issued an opinion dealing with a zoning and planning issue between the Board of Education for Montgomery County and the City of Rockville in 87 Opinions of the Attorney General 119 (2002). (Exhibit A). In that matter, the Attorney General advised that while the plans for the development of the property were subject to review by the Rockville Planning Commission, the Board of Education for Montgomery County could overrule that decision by a recorded vote of at least two-thirds of its membership. 87 Opinions of the Attorney General at 124.

Superintendent's Recommendation:

The Superintendent does not recommend accepting the Town of Bel Air's April 8, 2022, decision requiring a public road right-of-way across the school site purpose of connecting East MacPhail Road to West MacPhail Road as a condition for issuance of a building permit. The Town's proposed road will serve no educational purpose. The property is currently being used for educational programs at Homestead/Wakefield Elementary and will be needed for the future Bel Air Middle School project.

PUBLIC SCHOOLS**ZONING AND PLANNING – COUNTY BOARD OF EDUCATION
CONSIDERED A STATE AGENCY FOR PURPOSES OF LOCAL
PLANNING, ZONING AND HISTORIC PRESERVATION**

August 14, 2002

Judith S. Bresler, Esquire
Michael S. Molinaro, Esquire

On behalf of your client, the Board of Education of Montgomery County (the “Board”), you have asked for our opinion whether real property owned by the Board and located within the boundaries of the City of Rockville is subject to the planning, zoning, and historic preservation authority of the City.

In our opinion, the Board is properly characterized as a State agency in connection with the ownership and use of its real property for school purposes. Accordingly, Board property is generally not subject to Rockville’s zoning, subdivision, and historic preservation ordinances. However, the City has some planning jurisdiction over all land within its boundaries, and in particular, has authority to review many public projects constructed within the City, including school projects of the Board. In addition, State law restricts the Board’s use, development, and disposition of school property.

I**Background**

The property giving rise to your request is the headquarters for the Montgomery County Public Schools, a 50-acre tract bordering on Maryland Route 355 (Rockville Pike) and Manakee Street in Rockville. The property currently contains the school system’s central office building, known as the Carver Educational Service Center (“CESC”). In the days before the integration of County schools, the site was the location of a high school for African American students, which was later dedicated to George Washington Carver. The original high school structure, built in 1949, underwent numerous renovations over the years to become what is now the CESC Building.

You advise that the Board has concluded that the CESC Building is inadequate to serve its long-term needs and therefore wishes to redevelop the property. You also report that the City of Rockville has attempted to restrict use and development of the Board's property and is seeking to designate the property as an historic site, in an effort to preserve the CESC Building.

II

Status of the Board as a State Agency

County boards of education are established by State law. Annotated Code of Maryland, Education Article ("ED"), §3-103. They operate under the general supervision of the State Board of Education and the State Superintendent of Schools, and are governed in major respects by State law. ED §§2-205, 2-303, 4-108. Thus, the Court of Appeals has stated that a county board of education is a State agency. *Chesapeake Charter, Inc. v. Anne Arundel County Board of Education*, 358 Md. 129, 136-37, 747 A.2d 625 (2000). See also *Board of Education of Prince George's County v. Prince George's County Educators' Association, Inc.*, 309 Md. 85, 96 n.3, 522 A.2d 931 (1987) (characterizing local boards as "state agencies and not agencies of the county government" for purposes of collective bargaining); *Montgomery County Education Association, Inc. v. Board of Education of Montgomery County*, 311 Md. 303, 317, 534 A.2d 980 (1987) (same); *McCarthy v. Board of Education of Anne Arundel County*, 280 Md. 634, 649-51, 374 A.2d 1135 (1977) (county council precluded from assigning additional duties to local board, a State agency); cf. *Barnes v. Anne Arundel County Board of Education*, 2001 WL 121962 (D. Md. 2001) (county board of education is an agent of the State entitled to Eleventh Amendment immunity); *Jones v. Frederick County Board of Education*, 689 F. Supp. 535, 537-38 (D. Md. 1988) (same).

On the other hand, county boards of education are locally oriented and, to some extent, locally funded. For some purposes, county boards of education are treated like local agencies. See e.g., *Chesapeake Charter, supra* (county board not subject to State procurement law); *Bernstein v. Board of Education of Prince George's County*, 245 Md. 464, 471, 226 A.2d 243 (1967) (local board is not a State agency subject to the State Administrative Procedure Act); 65 *Opinions of the Attorney General* 385, 390 (1980) (concluding that members of local board are "local officers" not eligible for State indemnification of judgments, attorney's fees, and costs).

The Court of Appeals recently summarized the status of a local school board:

County school boards are considered generally to be State agencies because (1) the public school system in Maryland is a comprehensive State-wide system, created by the General Assembly in conformance with the mandate in Article VIII, §1 of the Maryland Constitution to establish throughout the State a thorough and efficient system of free public schools, (2) the county boards were created by the General Assembly as an integral part of that State system, (3) their mission is therefore to carry out a State, not a county, function, and (4) they are subject to extensive supervision by the State Board of Education in virtually every aspect of their operations that affects educational policy or the administration of the public schools in the county. Although legally State agencies for those reasons, they are not normally regarded, for structural or budgetary purposes, as units within the Executive Branch of the State government.

Chesapeake Charter, 358 Md. at 136-37.

Given the nature of county school boards, Attorney General Sachs concluded that whether a local board of education is properly treated a State or local agency “depends on the context of the board authority or function in question.” 65 *Opinions of the Attorney General* 356, 358-59, 363 n.3 (1980). See also 87 *Opinions of the Attorney General* 17 (2002) (characterization of community college as State or local entity depends on context).

The context within which your question arises is the Board’s ownership and proposed use of its real property. State law comprehensively governs the acquisition, improvement, and disposition of the real property of a school system. For example, State law provides that the property of a local board of education is held in trust for the benefit of the school system. ED §4-114(a). Approval of the State Superintendent is a prerequisite to a local board’s acquisition or disposition of land, school sites, or buildings. ED §4-115(b)(1), (c). In addition, a local board may repair, improve, or build school buildings only with the approval of the

State Superintendent and in accordance with bylaws, rules, and regulations of the State Board of Education. ED §4-115(b)(2). *See also* ED §5-301(h)(1) (authority of Board of Public Works with respect to school construction and improvements). In our view, these provisions leave little doubt that the Board is a State agency for purposes of the use of Board real property and the application of local land use restrictions.

III

Analysis

A. *Application of Local Land Use Regulations*

1. General Principles

It is well established that the State and its agencies are not ordinarily subject to local zoning, subdivision, and other land use regulations. *Pan American Health Organization v. Montgomery County*, 338 Md. 214, 226, 657 A.2d 1163 (1995); *Board of Child Care v. Harker*, 316 Md. 683, 693, 561 A.2d 219 (1989); *City of Baltimore v. State*, 281 Md. 217, 223-24, 378 A.2d 1326 (1977); *City of Baltimore v. State Department of Health & Mental Hygiene*, 38 Md. App. 570, 574, 381 A.2d 1188 (1978). *See also* 85 *Opinions of the Attorney General* 114, 116-17 (2000). Similarly, although local historic preservation regulations may apply to certain local government land uses, *City of Annapolis v. Anne Arundel County*, 271 Md. 265, 316 A.2d 807 (1974), they have never been held binding on the State and its agencies. *See* 87 *Opinions of the Attorney General* 17, 21 (2002).

The State is bound by local land use provisions only to the extent that it has expressly or by clear implication agreed to be bound. *E.g.*, *City of Baltimore v. State*, *supra*, 281 Md. at 223-24. In this regard, the General Assembly has acknowledged the value of local comprehensive planning and has sometimes directed that State agencies respect, insofar as possible, local plans. *See, e.g.*, ED §4-116 (school sites to conform “as far as practicable” with local land use plans).

2. Mandatory Referral to Local Planning Agency

The State’s enabling laws for local land use regulation provide for the mandatory referral to local planning officials of public

development projects that might otherwise be exempt from local control. Annotated Code of Maryland, Article 66B, §3.08; *see also* Annotated Code of Maryland, Article 28, §7-112 (mandatory referral provision applicable within Maryland-Washington Regional District); 84 *Opinions of the Attorney General* 65 (1999).

The enabling statute applicable to municipal corporations, such as Rockville, provides that “if a local legislative body has adopted a whole plan or a plan for one or more geographic sections ... of the local jurisdiction, a ...street, square, park, or other public way, ground, or open space, or public building or structure ... may not be constructed or authorized ... until the location, character, and extent of the development has been submitted to and approved by the planning commission as consistent with the plan.” Article 66B, §3.08(a). The local planning commission is to “communicate its decision and the reasons for its decision to ... the body that has jurisdiction over the financing of the ... building.” Article 66B, §3.08(b)(1). However, the “body having jurisdiction” may overrule the planning commission’s decision by a recorded vote of at least two-thirds of its members. Article 66B, §3.08(b)(2).

3. Summary

Your inquiry involves the proposed development of real property that is located within the corporate limits of the City of Rockville, is owned by the Board, and is currently used for public school purposes. Rockville is a municipal corporation that is not included within the planning, zoning, and subdivision powers exercised by the Montgomery County District Council in the Maryland-Washington Regional District, Article 28, §7-105; rather, the City exercises land use powers under Article 66B.

Because the land in question is owned by a State agency and used for public purposes,¹ it is exempt from municipal land use

¹ If the land were leased to a private entity, the exemption from local land use regulation would apply only to the extent that it was used for a “public purpose.” *See City of Baltimore v. State Department of Health & Mental Hygiene, supra; Youngstown Cartage Co. v. North Point*

(continued...)

regulations. However, under Article 66B, §3.08, Board plans to construct any “public building or structure” – or to lay out any street, square, park, ground, or open space – must be submitted to the Rockville Planning Commission for its approval as consistent with the City plan. If the Board, as the body having jurisdiction over the financing of the project, does not agree with any decision of the Rockville Planning Commission, the Board may overrule that decision by a recorded vote of at least two-thirds of its membership.

B. Other State Law Restrictions on Development of Board Property

In addition to the mandatory referral requirements discussed above, State law places other restrictions on the use, development, or disposition of Board real property. As noted above, ED §4-114(a)(1) provides that school property is held in trust by the Board for the benefit of the school system. Thus, the Board has fiduciary obligations that restrict the use of the property. And under ED §4-115(b), the Board may improve or build school buildings, but only “[w]ith the approval of the State Superintendent” and only “if the plans conform to the bylaws, rules, and regulations of the State Board.”

ED §4-115(c) would govern the disposition of any portion of the site deemed, with the approval of the State Superintendent, to be surplus to school needs. That land would have to be transferred to the Montgomery County Council, to be used, sold, leased, or otherwise disposed of, except by gift, by the County Council. If State funding was used in the past for development of the property, any disposition might be subject to further restrictions fashioned by the Interagency Committee on School Construction or the Board of Public Works. See ED §5-301; 64 *Opinions of the Attorney General* 118 (1979).

¹ (...continued)

Peninsula Community Coordinating Council, 24 Md. App. 624, 630, 332 A.2d 718 (1975); 85 *Opinions of the Attorney General* 114 (2000); 74 *Opinions of the Attorney General* 221, 228-29 (1989).

Finally, should the property be listed in or eligible for the Maryland Register of Historic Properties, any capital project potentially affecting the property may be subject to the review and consultative process set out in Annotated Code of Maryland, Article 83B, §5-617. Under that law, the State unit responsible for the project would consult with the Maryland Historical Trust to determine whether the project would adversely affect the historic property and, if so, the State unit would be required to negotiate with the Trust on a plan to avoid, mitigate, or satisfactorily reduce the adverse effect.²

IV

Conclusion

In our opinion, if the Board develops the CESC site in Rockville for a public purpose, that development will not be subject to Rockville's zoning, subdivision, and historic preservation ordinances. However, the Board's plans will be subject to the mandatory referral process set out in Article 66B, §3.08. Moreover, the Board's development of the property will be subject to numerous State law controls.

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Robert N. McDonald
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Opinions & Advice

² The Board has apparently acknowledged that it may be subject to the Maryland Historical Trust consultative process.