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July 27, 2011

Office of the Attorney General  
Maryland State Department of Education  
Attn: Jackie C. La Fiandra - State Board of Appeals  
200 St. Paul Place, 19th Floor  
Baltimore, Maryland 21202

**Re: Rock Creek Hills Citizens  
Association, *et al.*, Appellants  
v.  
Montgomery County Board of  
Education, Respondents**

**Response of the Rock Creek Hills Citizens  
Association, *et al.* to the Montgomery County  
Board of Education Motion to Dismiss, or in  
the Alternative, Motion for Summary  
Affirmance**

Dear Ms. La Fiandra:

This letter contains the response of the Rock Creek Hills Citizens Association, *et al.*'s (collectively RCHCA or the Appellants) to the Montgomery County Board of Education's (County Board)<sup>1</sup> Motion to Dismiss or, in the Alternative, Motion for Summary Affirmance (County Board Motions) dated July 14, 2011.<sup>2</sup> The County Board

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<sup>1</sup> RCHCA referred to the Montgomery County Board of Education as the "Local Board" in its prior pleadings. As a matter of courtesy, RCHCA uses here the phrase "County Board" as this is how the Montgomery County Board identifies itself.

<sup>2</sup> The County Board Motions also include a County Board Memorandum in Support Of Motion to Dismiss, or, in the Alternative, Motion for Summary Judgment (hereinafter Supporting Memorandum).

Motions were filed in response to the RCHCA Revised Complaint dated May 26, 2011, as supplemented on June 20, 2011, against the County Board, based upon several errors in the County Board's April 28, 2011 selection of the Rock Creek Hills Local Park as the site of new middle school for the B-CC Cluster.<sup>3</sup> The County Board's Supporting Memorandum contains extensive background facts that emphasize the undisputed need for a new middle school for the B-CC cluster. Appellants' complaint is not about such need; it is about how the site selection was made and the consequences of that decision.

To the extent the County Board seeks summary affirmance under COMAR 13A.01.05.03D, it is claiming that there is no need for an evidentiary hearing as there is no dispute as to any fact that would affect the outcome of the appeal in its favor. The motion is analogous to a motion to dismiss under Maryland Rule 2-322 for failure to state a claim on which relief can be granted. Such a motion is properly granted only if, after assuming the truth of the facts and allegations in the complaint, as well as all inferences that reasonably may be drawn from them, viewed in the light most favorable to Appellants, they are not entitled to relief. D'aoust v. Diamond, 197 Md. App. 195, 13 A.3d 43, 49 (2010). The County Board's "Statement of Facts" is filled with factual characterizations and inferences that are favorable to it, not Appellants, and thus, are in dispute. This is a classic example of trying to have it both ways — "use our facts and bar all fact-finding by the State Board." Appellants reject this approach and urge denial of the Motion.

The County Board seeks dismissal on the grounds that RCHCA and the individual Appellants lack standing to bring the appeal, and that in any event its action in selecting the Rock Creek Hills Local Park site was both legal and reasonable. Appellants disagree. Our response is organized around a four central topics: (1) the Appellants' standing; (2) the County Board's illegal and imprudent failure to consult with the Montgomery County Planning Board (Planning Board); (3) the arbitrary and capricious site selection process; and (4) the County Board's failure to provide the Appellants an adequate opportunity to express their concerns before making the site selection.<sup>4</sup>

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<sup>3</sup> The Revised Complaint was submitted by a letter dated May 26, 2011. RCHCA filed a Request to Supplement Complaint by letter dated June 20, 2011(hereinafter Supplement.)

<sup>4</sup> Because the exhibits supporting this response are not always the same order as in the Revised Complaint or the Supplement, the footnotes are organized as follows. The exhibits to this response are Ex. R-. If the exhibit was previously filed with the State Board in the Revised Complaint, the caption will read Ex. R-/C- with C-being the exhibit number of the Revised Complaint or its June 20 Supplement (R-/S-). Citations solely to a prior filing are so identified, as are the Attachments to the County Board Motions.

## **1. Under Basic Principles of Administrative Law, the Appellants Have Standing**

The County Board's standing argument is grounded incorrectly in the standing requirements for a judicial complaint. What is involved here is the administrative appeal of an administrative decision. Administrative procedures are governed by the liberal standards for standing stated in Sugarloaf Community Association v. Department of Environment.<sup>5</sup> Administrative standing is more liberal than judicial standing in order to provide interested citizens the opportunity to raise before an administrative body the very type of concerns that the County Board so casually characterizes in their Motions as anxieties.<sup>6</sup> Except for injunctive relief, which has particularly strict standards, judicial review is intended to assess specific past actions that have caused injury. Administrative process, however, recognizes that agencies routinely examine the possible consequences of future actions that the agency may take in the execution of its statutory obligations and mission.

Standing is therefore broadly afforded to interested citizens wishing to influence a pending agency action. This standing helps to ensure that the injuries that courts review only retrospectively are avoided in the first place. Thus, during the selection of a highway route, citizens appear at hearings to assert their concerns, such as loss of tree cover and possible congestion on adjoining roads. If there further administrative review is possible, the citizens whose concerns are rejected may take these concerns to the next level because of their prior participation in the administrative process. That is the situation here. It makes no sense to argue that to invoke further administrative, *i.e.*, non-judicial, review requires the concrete, particularized, actual or imminent injury required for judicial standing as it would make the administrative process, in effect, a nullity.

The County Board dismisses Appellant's claims as "alleged procedural irregularities," that lack any particulars as to how the Appellants "would be injured in a school were constructed on the site."<sup>7</sup> This argument, however, ignores the teaching of the Sugarloaf case that "standing to challenge governmental action and the merits of the challenge are separate and distinct issues."<sup>8</sup> As Montgomery County residents with legitimate, immediate, and concrete reasons to be concerned about the existence of a fair and even-handed process for deciding what property is acquired and turned into use as a

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<sup>5</sup> See Sugarloaf CA v. Dept. of Env., 344 Md. 271, 686 A.2d. 605, 616-19 (1996).

<sup>6</sup> Supporting Memorandum at 8-10.

<sup>7</sup> Id. at 9.

<sup>8</sup> 686 A.2d at 617.

public school, the Appellants are plainly “within the zone of interests to be protected or regulated” by proper execution of the County Board’s decision-making process.<sup>9</sup>

In any event, the Appellants’ grievances in this case go well beyond identifying insignificant procedural mistakes in the process leading to the County Board’s final decision to reclaim the Rock Creek Hills Local Park for use as a new middle school. A May 26, 2011 letter from Christopher Barclay, President of the County Board, to John M. Robinson concerning the instant complaint makes this finality clear, stating in part that:

On April 28, 2011, the Board of Education took the action that selected Rock Creek Hills Local Park property as the location of the new B-CC MS #2. Rock Creek Hills Local Park remains the only property deemed viable for use as a middle school by the Site Selection Committee, which review 10 candidate sites. Because there were no other choices to consider and this project needs to move forward, it was important for the Board of Education to make the decision on the Rock Creek Hills Local Park site at the April 28, 2011.<sup>10</sup>

Despite this admission, the County Board relies heavily on the letter’s reference to an ongoing feasibility study to assert this appeal is premature.<sup>11</sup> The letter states:

The feasibility study process will enable members of your community to become involved in the development of a range of ways to position the school on the site, have traffic concerns addressed, and find ways to limit the impact of the school on adjacent properties.<sup>12</sup>

Thus, there is no doubt the County Board had taken final action in selecting the Rock Creek Local Park site.<sup>13</sup> Construction on this site is treated as a foregone conclusion, as the letter expressly states that the purpose of the feasibility study is to develop a range of ways to position the school on the site. Mr. Barclay’s letter does not state that the feasibility study is intended as a review of whether the site selected is in fact suitable; it is

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<sup>9</sup> Id.

<sup>10</sup> Ex. R-1, Letter of Christopher Barclay, President Board of Education, dated May 26, 2011, to Mr. John M. Robinson, President, Rock Creek Hills Citizens Association at 1. (May 26 Barclay Letter) (emphasis added).

<sup>11</sup> Supporting Memorandum at 7-8, 10; Attachments 11-15. Appellants reply below.

<sup>12</sup> May 26 Barclay Letter at 2.

<sup>13</sup> *See also* Revised April 28 Resolution, Ex. R-2/C-6.

only to determine how to position the school on the site. If there was ever an indication that the Appellant's interests are now at issue, this is it, and any inference to the contrary must be rejected on the Motions before the Board.

Moreover, the Appellants' Revised Complaint reflects their concerns that the selection of the Rock Creek Hills Local Park will reduce recreational space, eliminate trees, and increase traffic.<sup>14</sup> As Mr. Barclay's letter acknowledges, these are inevitable consequences of the County Board's April 28, 2011 decision. They can be discerned from the more recent presentations by the County Board's staff as part of the feasibility study<sup>15</sup> and by comparing those presentations to the Rock Creek Hills Local Park in its current configuration.<sup>16</sup> Appellants' procedural claims therefore are undergirded by their reasonable grounds to disagree with President Barclay's statement that "Rock Creek Hills Local Park remains the only property deemed viable for use as a middle school . . . ." The Appellants have reasonably asserted in their Revised Complaint that the selection of Rock Creek Hills Park is the foreordained result of a site selection process that was procedurally flawed and arbitrary. Those failings include: (1) the makeup Site Selection Advisory Committee (SSAC); (2) the County Board's failure to consult with the Planning Board on site selection; and (3) the failure to conduct an adequate preliminary analysis of the environmental, social implications, and safety implications of selecting the Rock Creek Hills Local Park site. The end result has been that the Appellants were unable to present the arguments, issues, and challenges to erroneous staff conclusions that a responsible administrative body should have considered before making a decision affecting their substantial interests.

Finally, in a further flawed effort to buttress its standing arguments, the County Board makes much of the fact that Rock Creek Hills residents, including the undersigned, are participating in the ongoing feasibility study.<sup>17</sup> The County Board's argument is that the injuries with which the Appellants are concerned will be addressed by this feasibility study and therefore this appeal is premature. By this argument, the County Board again

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<sup>14</sup> Revised Complaint at 9-10, 11-12.

<sup>15</sup> Ex. R-3 contains copies of Alternatives 4, 5, and 6 presented by the County Board staff at the July 13, 2011 meeting for the feasibility study, as well as the current plat of the Rock Creek Hills Local Park. The originals are available on the County Board's web site at <http://www.montgomeryschoolsmd.org/departments/construction/projects/bms2.shtm>.

<sup>16</sup> See Ex. R-4/C-1, Site Selection Advisory Committee Recommendation for Bethesda-Chevy Chase Middle School #2 dated March 8, 2011 (SSAC Report) at 6, also Ex. 1 to the Revised Complaint. It is also Attachment 2 to the County Board Motions.

<sup>17</sup> Supporting Memorandum at 7-8, 10; County Attachments 11-15.

trades on inferences impermissibly favorable to it, and in so doing, puts the cart before the horse.

The Appellants are asserting that site selection process itself was flawed and that therefore the selection of the Rock Creek Hills Local Park was unreasonable. An unfair hearing is cured by another, fairer hearing, not by argument that just accepts the results of the unfair hearing and moves on. Moreover, the substance of the feasibility study is irrelevant to whether there has been a fair hearing leading to the triggering the study. In any event, the Rock Creek Hills residents' participation in the study in no way undermines their claims here. They have no meaningful choice but to participate in the study because the County Board is moving ahead full bore during the pendency of this appeal. Thus, the residents must take reasonable actions to mitigate any damage to their interests that may result if the County Board's selection of the Rock Creek Hills Local Park stands, as failure to do so would be both legally and practically imprudent. Indeed, for the County Board to imply that this necessary participation negates the Appellants' underlying concerns about the selection of the Rock Creek Hills Local Park as the site for a new middle school borders on the outrageous.

**2. The County Board Illegally and Imprudently Failed to Consult with the Planning Board.**

The Appellants' May 26 Revised Complaint asserted that the County Board's failure to consult with the Planning Board was imprudent. Based on further research, the Appellants filed their Supplement asserting that the County Board's consultation failure was not just imprudent; it was illegal. The County Board was required by statute to consult with the Planning Board before making a site selection. The Supplement cites §4-116 of the Education Article of the Annotated Code of Maryland,<sup>18</sup> and an October 27, 1999 Maryland Attorney General Opinion (84 Opinions Attorney General 65) that explicitly refers to this obligation. The County Board dismisses the Appellant's arguments by conflating this obligation with the County Board's separate Mandatory Referral obligation in relating to development of a particular site.<sup>19</sup> The County Board asserts that the Mandatory Referral to the Planning Board is premature because site plan review will be required once the feasibility study is completed. This later Planning Board consultation, however, simply is not relevant here; it will occur long after the feasibility study is completed and the project has moved on to a more detailed level of engineering and environmental review. As explained above, the County Board has made a final selection and is engaged only in an effort to figure out the best way to fit the proposed school into the selected site. It is the County Board's conceded failure to consult with the

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<sup>18</sup> Reproduced here as Ex. R-5/S-A.

<sup>19</sup> Supporting Memorandum at 13.

Planning Board before that final selection that violates §4-116(a) of the State Education Article. This provision could not state more clearly that the consultation under this section must involve asking the Planning Board's advice *prior* to choosing land for a school site. It makes no sense to incur the expense to develop a detailed site plan and then thereafter ask the local planning commission whether it thinks the site was appropriately selected. The statute will not bear such a convoluted construction of its language and purpose.

Conflating Mandatory Referral with the pre-site selection consultation mandated by § 4-116(a) is disingenuous in the extreme. To illustrate this point, the Appellants include here an example of a regular Mandatory Referral school development plan, the one for an addition to the Montgomery Knolls Elementary School. Ex. R-6 contains December 23, 2009 Planning Board staff report, MCPB Item #9B on the Planning Board's 1/7/10 agenda.<sup>20</sup> The County Board's site plan process started with a series of meetings with a Facilities Advisory Committee held from September 4, 2008 through January 14, 2009. The traffic study was not completed until November 2009 and the Planning Board review was held on January 7, 2010. The additional year required to appear before the Planning Board was needed to allow the County Board to prepare the information for an effective Mandatory Referral review. Plainly, this lengthy, site-specific process is far down the road from the type of consultation required by § 4-116(a).

However detailed and scrupulous a Mandatory Referral may prove to be, it is not a substitute for pre-site selection consultation with the Planning Board. Indeed, the County Board's attitude toward the site selection concerns articulated by Planning Board in its April 27, 2011 letter is remarkably dismissive of a sister State agency, one that is among the Nation's premier planning bodies. The County Board asserts that the Planning Board's statements that the site selection process was unfair are mere hearsay.<sup>21</sup> The Appellants ask that the State Board be more circumspect than the County Board and conduct a careful review the Planning Board's April 27, 2011 letter,<sup>22</sup> taking note in particular of the Planning Board's explanation of the consequences of the County Board's failure to responsibly consult with the Planning Board. These include: (1) that the County Board overlooked important social issues related to both the Rosemary Hills/Lyttonsville and Rock Creek Hills Local Park; (2) that the failure to consult is likely to lengthen or confuse the County Board's process; (3) that cost and other relevant

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<sup>20</sup> Ex. R-6, December 23, 2009 Memorandum to the Montgomery County Planning Board, ITEM 3 9B.

<sup>21</sup> Supporting Memorandum at 10.

<sup>22</sup> Ex. R-7/C-4, Letter of Francoise M. Carrier, Chair, Montgomery County Planning Board dated April 27, 2011, to Mr. Christopher S. Barclay, President Board of Education (Planning Board Letter).

information on the merits of the various sites was ignored [a matter of economic efficiency]; and (4) the failure of the County Board to inform itself of potential legal barriers to its ability to acquire the Rock Creek Hills Local Park site.<sup>23</sup>

Even if there were no §4-116(a) of the State Education Article, the County Board's failure to consult effectively with a sister agency that owned six of the ten sites the County Board staff reviewed would amount to administrative arrogance, if not dereliction.<sup>24</sup> The County Board did not make the SSAC Report available to the Planning Board until one week before the April 28, 2011 County Board meeting. The County Board thus provided the Planning Board even less time to respond than it gave the residents of Rock Creek Hills. An earlier consultation would have revealed quickly the difficulties with selecting any of the park-related sites and facilitated an effective search for more appropriate sites by providing "an opportunity to present cost and other data that would have made for a fair comparison among all the sites under consideration. . ." <sup>25</sup>

Instead, in order to meet its self-imposed deadlines, the County Board was forced to default to the one site it seemed easiest to acquire. It did so without regard to the fact that the Rock Creek Hills Local Park site consists of difficult terrain<sup>26</sup> (and therefore would be costly to develop). Moreover, by timely and reasonable consultation the County Board would have avoided the confusion and last-minute changes to the site selection process that occurred at the County Board's April 28, 2011 meeting.<sup>27</sup> The Rock Creek Hills community would have long since known that its interests were directly threatened and would have had an effective opportunity to participate. This participation would not have necessarily mooted any concerns on the substance of any County Board decision to select the Rock Creek Hills Local Park site, but certainly it would have avoided the notice and hearing issues now before the State Board. In short, County Board's failure to consult with the Planning Board not only violated State law; it also was a failure of administrative judgment that obviated a reasonable decision-making process.

### **3. The Site Selection was Arbitrary and Capricious.**

The Appellant's Revised Complaint asserted that the site selection was arbitrary and unreasonable. These assertions turned in part of the structure of the Site Selection

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<sup>23</sup> *Id.* at 3, 2, 2, and 2-3 respectively.

<sup>24</sup> Ex. R-7/C-4, Planning Board Letter at 2.

<sup>25</sup> *Id.* at 2.

<sup>26</sup> *See* Ex-R-4/C-1, SSAC Report at 6, 17; Revised Complaint at 9-10.

<sup>27</sup> *See* Revised Complaint at 7-9 and as discussed further below.



Advisory Committee (SSAC), the imprudence of the County Board and the SSAC in reviewing the Rock Creek Hills Local Park site, and the County Board's failure to consult with the Planning Board. The latter point has been addressed in detail in the previous section, but it bears repeating that the failure to comply with a statutory requirement undermines both the substance of the SSAC Report and the County Board's reliance on it. As such, the decision was arbitrary and capricious.

Appellants reiterate here that the makeup of the SSAC itself was unreasonable. The County Board's reply is that it followed Administrative Regulation FAA-RA by selecting representatives of the wider school community rather than focusing on just the communities having the two sites that were ultimately selected.<sup>28</sup> The County Board further asserts that there is no way to have known the Rosemary Hills/Lyttonsville or Rock Creek Hills Local Park would be selected as the two top alternatives at the beginning of the site selection process. These assertions miss the point. The fairness of the makeup of the SSAC is to be judged before the fact, not in light of results.

The cited regulation requires that, in forming the SSAC, the MPCS staff work with the Montgomery County Council of Parent Teachers Association and other members of the public school community, appropriate municipal and county agencies, and county government officials.<sup>29</sup> While the educational community was heavily involved, the SSAC did not include a single community representative other than those from three municipalities located in the lower portion of the cluster, even though, as Ex. R-8 displays,<sup>30</sup> seven of the ten possible sites were located north of East-West Highway and three of these were located east of Rock Creek Park. Despite this geographical disparity, the SSAC did not include (or ever seek comment from) a single residential community that would have been affected if any of those seven sites had been selected, two which were in the Rock Creek Hills area and two of which were in the Rosemary Hills area. There was ample opportunity to do so. The SSAC Report states:

To achieve SSAC objectives, staff compiled the best information available about land in the target area and presents this information to the SSAC.<sup>31</sup>

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<sup>28</sup> Supporting Memorandum at 10-11, citing Administrative Regulation FAA-RA (Board Attachment) at 14.

<sup>29</sup> Board Attachment 7, FAA-RA at 14.

<sup>30</sup> Ex. R-8 reproduces Exhibit C of the SSAC Report and marks the seven locations north of East West Highway.

<sup>31</sup> Ex. R-4/C-1, SSAC Report at 2.

It is inconceivable that, at the outset, the County Board staff did not know of the concentration of the sites above East-West Highway and that none of the community representatives came from this area. It was their staff that defined the set of schools to be considered. Thus, while the Appellants' Revised Brief focused on the exclusion of the two communities containing the local parks that became the two alternative middle school sites, our larger point is that there was never any effort to have a fair and representative distribution of civic communities within the SSAC. Again, the factual inferences must be drawn and viewed in the light most favorable to Appellants.

In any case, the County Board's response that the SSAC focuses on the wider school community misses the thrust of the Appellants' concern. Appellants are not arguing, as the County Board suggests, that the Appellants' community should have been the sole focus of the SSAC process. The point is that the exclusion of the civic communities located in the upper part of the B-CC cluster lead directly first to the concerns and opposition of the Rosemary Hills/Lyttonsville community at the March 28, 2011 and April 28, 2011 meetings, and then, to the concerns of the Rock Creek Hills community with the late change in choices. These two communities included four of the ten, or forty percent, of the sites reviewed by SSAC. Moreover, it was not only the Planning Board that stated the site selection process was unfair. The Rosemary Hills community also argued strongly at the April 28, 2011 hearing that the site selection process was arbitrary and unfair due to their lack of involvement and because important social concerns were never considered.<sup>32</sup>

Thus, even if the County Board can assert that it literally followed its regulations, the issue is whether the end result was fair and reasonable. The fact that the site selection process blew up completely on the day of the County Board's April 28, 2011 meeting and that both the County Executive<sup>33</sup> and the Planning Board<sup>34</sup> intervened at the last moment indicate decisively to the contrary. Inclusion of the civic communities most likely to be affected at the beginning of the SSAC process would have ameliorated these difficulties at the outset and permitted a reasonable approach to the complex problem of selecting an infill school site in a situation where the communities and agencies involved had conflicting interests. The County Board dismisses this point as irrelevant and unproven. Given the social and administrative realities present on this record demonstrate that its relevance and its truth are self-evident, particularly on a motion for summary affirmance.

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<sup>32</sup> See Remarks of Ms. Buchanan at 6:46 of Board Tape of the April 28, 2011, including the Rosemary Hills/Lyttonsville neighbors were "victims of negligence and due process."

<sup>33</sup> See Ex. R-9/C-5, Letter County Executive Isiah Leggett dated April 28, 2011, to Mr. Christopher S. Barclay, President Board of Education (County Executive Letter), *passim*.

<sup>34</sup> Ex. R-7/C-4, Planning Board Letter, *passim*.

Finally, the Appellants have pointed out that the County Board was imprudent because it failed to do more than a cursory review of the environmental, traffic, and other limitations involved in the Rock Creek Hills site. A closely related observation is that the County Board failed to make an adequate comparison under a consistent methodology of how well the other candidate sites held up on consideration of these issues. The County Board response is to proffer the classic straw-man argument: the Appellants cannot reasonably expect the County Board to make a feasibility study of all the candidate sites.

The Appellants, however, have no such expectation. As the County Board points out, several of the sites were clearly too small and some had compelling legal limitations. What the Appellants are suggesting is that the County Board failed to do just what the Planning Board, a state agency, said the County Board failed to do, specifically, to consider cost and other data that would have made for a fair comparison among all the sites under consideration. . .<sup>35</sup> Obviously, this consideration does not mean that all sites needed to have the same level of analysis. It does mean, however, that the County Board's approach must be more than remarkably superficial. The County Board did not even consult the Kensington Park Retirement Community, co-located with the park, even though one of its three buildings houses residents in high need of assistance. The Revised Complaint correctly characterizes the County Board's approach as negligent. Negligence in execution of an administrative responsibility can be arbitrary and capricious, as this situation well illustrates.

#### **4. The County Board Failed to Provide a Reasonable Opportunity for Comment.**

The Appellants' Revised Complaint asserts that the County Board failed to provide the residents of Rock Creek Hills a reasonable opportunity to comment on the County Board's selection of the Rock Creek Hills Local Park as the site for a new middle school. The County Board's first response is that the Appellants have no legal foundation for their position because the Appellants have not shown that the County Board violated any standards governing its meetings. Of course, given the absence of standards, this facile response is meaningless.

Appellants have diligently reviewed the Board of Education Handbook, and the only reference to the County Board's meeting procedures is on page 13, which states that "The public must be provided with adequate notice of the time and location of meetings."<sup>36</sup> There are no specific criteria in the Handbook for implementing this

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<sup>35</sup> *Id.* at 2.

<sup>36</sup> Ex. R-10, which contains the cover page of the Board of Education Handbook (Handbook) and page 13 thereof.

requirement. Rather, in its Supporting Memorandum, the County Board describes the meeting process as follows:

Draft agendas are posted on the County Board's home page in advance of meetings updated as new information becomes available. The final agenda is posted two or three days in advance. A press release containing the agenda is e-mailed to the media no later than the day before the meeting. Paper copies of the agenda and the draft resolutions are placed in the County Board meeting room at 4 p.m. the day before the meeting.<sup>37</sup>

The County Board does not dispute the Appellants' statement that the County Board resolution to select the Rock Creek Hills Local Park site did not become public until the afternoon of April 28, 2011 at approximately 2:00 p.m. Thus, on the morning of April 28, 2011, only the Rosemary Hills/Lyttonsville site was listed on a resolution to implement the County Board's April 28, 2011. In fact, this resolution was the only resolution available to any interested party under the School Board's meeting protocols on the evening of April 27, 2011, the date of the Planning Board's letter. As the County Board states, it appears that the April 28, 2011 afternoon change to the agenda was caused by the extremely dim prospects of selecting the Rosemary Hills/Lyttonsville site due to the opposition stated by the Planning Board's April 27, 2011 letter.<sup>38</sup>

Even though this last-minute change did not conform to the County Board's meeting protocols, the County Board's bottom line here is that there was no legal impediment to changing the County Board's agenda because that action did not violate a non-existent regulation or standard. The issue here, however, is whether the County Board's last-minute change was reasonable given its own protocols for notice to the public. The information regarding the change was not available until 2:00 p.m. on the day of the meeting and was not available to the public as a whole before then. For this reason several members of the County Board recognized that Rock Creek Hills had no effective notice that its local park would be selected as the site of new middle school. The County Executive, therefore, wisely urged the County Board not to act until the Rock Creek Hills community had a chance to express its views on the site selection issues,<sup>39</sup> advice which the County Board ignored.

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<sup>37</sup> Supporting Memorandum at 4-5.

<sup>38</sup> *Id.* at 6. It should be noted that this late arrival of the Planning Board's position was engendered by the County Board's own failure to comply with its statutory obligation to consult with the Planning Board.

<sup>39</sup> Ex. R-9/C-5, County Executive Letter, at 1-2.

The County Board makes several additional arguments in defending a muddled situation that was very much of its own making. First, County Board invokes another straw man, claiming that the Appellants appear to believe that they were entitled to some special notice. Appellants had no such expectations. Rather, the County Board simply failed to provide the Appellant's reasonable notice that the Rock Creek Hills Local Park would be the subject of the School Board's action given the information provided by final agenda and resolutions that were to provide notice to the general public as of 4 p.m. on the evening of April 27, 2011. Second, the County Board implies that if Appellants were afforded a hearing, that meeting would be the end of this matter, and, therefore, there is no need for this appeal to proceed.<sup>40</sup> This position presumes, erroneously, that the result of any hearing before the County Board would have been satisfactory to the Appellants and that there would have been no appeal on the merits of any site selection decision. The Appellants, however, have concerns with the instant site selection, not just County Board's failure to provide a full and fair opportunity to comment. The notion that the County Board could have avoided this appeal by providing the Appellants a hearing does not militate against the fact that the County Board did not provide an adequate opportunity for comment in the first place.<sup>41</sup>

Notwithstanding the forgoing, the County Board's argument that the Rock Creek Hills Civic Association had been notified two weeks before the April 28, 2011 meeting that the Rock Creek Hills Local Park was number two on the County Board's hit parade merits specific response. First, this awareness does not change the fact that the County Board did not follow its own protocols when it modified that resolution selecting the Rosemary Hills/Lyttonsville site at approximately 2:00 p.m. on the day the County Board made its site selection. Second, it cannot be assumed, as the County Board does, that two week's notice is sufficient for a local civic association to notify its citizens, convene a meeting, have a responsible democratic vote, and prepare for a County Board meeting. Under the RCHCA by-laws governing a matter of this magnitude, it is simply not possible to hold emergency meetings on four days, rather than ten days, notice. RCHCA is a voluntary civic association of members who need to take time away from their more immediate daily responsibilities to respond and participate on community-wide issues. Given the basic logistics involved, the most that could have been done would be just what Mr. Sam Statland requested at the April 28, 2011 meeting, that is give RCHCA a hearing.

In contrast, as the County Board admits, the Rosemary Hills/Lyttonsville community was aware of the Superintendent's recommendation to select their park as early as March 24, 2011, *i.e.*, even before the March 28, 2011 meeting that lead to the

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<sup>40</sup> County Motions at 2, n.1.

<sup>41</sup> See Ex. R-11, Letter of John M. Robinson dated May 18, 2011 to Christopher Barclay, President of the Board of Education, requesting among other things that the County Board delay its feasibility study and grant the Appellants a hearing.

postponement of the decision. That community had some four weeks to mobilize, to hold a meeting with the County Board staff, and to prepare an effective presentation. The delay in releasing the SSAC Report until April 13, 2011 left Rock Creek Hills only two weeks to respond--in a situation where its interests, as the clear secondary candidate by all rights did not appear to be immediately threatened. At bottom, the County Board is arguing that Rock Creek Hills should have mobilized in two weeks, one half the time practically afforded the Rosemary Hills/Lyttonsville community, and should have anticipated that: (1) the Planning Board would oppose the selection of either local park site; (2) the County Executive would support consideration of the Rock Creek Hills Local Park site; and (3) the County Board would violate its own meeting protocols, despite the fact that several of its own members recognized that Rock Creek Hills lacked effective notice. The situation Rock Creek Hills found itself was simply another example of the County Board's failure to have operated in a fair, responsible, and reasonable manner in dealing with a complex and intrusive site selection decision. The County Board's failure to give Rock Creek Hills an opportunity to prepare for and comment on the merits of selecting the Rock Creek Hills Local Park was arbitrary and unreasonable.<sup>42</sup>

### **Conclusion**

The County Board argues that the Appellants have not proven that the County Board's actions in selecting the Rock Creek Hills Local Park were illegal or unreasonable. But, it is uncontested that the County Board failed to comply with §4-116(a) of the State Education Article, which requires the County Board to consult with the Planning Board before selecting a school site. The County Board should be instructed to overcome this clear illegality, and no evidentiary hearing is necessary for such a ruling. The remand should be accompanied by a directive that the County Board engage in reasonable consultation with the Planning Board on cost and other factors involved in selecting any site involving park land.

Beyond that, the Appellants also claim that the County Board's decision to select the Rock Creek Hills Local Park as the site for a new middle school was arbitrary and capricious for several reasons. These include: (1) the makeup of the SSAC; (2) the County Board's failure to consult with Planning Board on cost and social issues involved in the various sites reviewed by the SSAC Report; (3) the County Board's imprudent failure to adequately address important social and safety issues involved in both the

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<sup>42</sup> The County Board also implies that the Rosemary Hills/Lyttonsville meeting of April 21, 2011 provided an opportunity for Rock Creek Hills to participate further in the site selection process. Rock Creek Hills had no notice of the meeting and is located some two miles away from Rosemary Hills on the other side of the Beltway. See Ex. R-6. In any event, since the Rock Creek Hills Local Park was the alternative to Rosemary Hills/Lyttonsville Local Park, it would have been completely inappropriate for Rock Creek Hills to seek to have its way at the Rosemary Hills/Lyttonsville meeting.

Rosemary Hills/Lyttonsville and Rock Creek Hills Local Park sites; and (4), the County Board's failure to provide the Appellants a reasonable opportunity for hearing and comment before making its April 28, 2011 site selection decision. These are additional reasons that the outcome of this appeal should be a remand by the State Board for the consideration of alternative sites by the County Board. Remand on this basis, however, will require the State Board to first conduct a *de novo* evidentiary hearing to assess the claims of the parties. The matter having been presented on a Motion for Summary Affirmance, where the facts and inferences must be construed in the light most favorable to Appellants, the State Board cannot simply rely on the County Board's factual assertions and inferences to affirm the County Board. A remand on this basis should also require the County Board to provide its own full and fair hearing on the site selection decision at issue here, including any additional site determinations that may result from the required consultation with the Planning Board.

Respectfully submitted,

/s/

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 27th day of July, 2011, I mailed a copy of the forgoing, postage prepaid, to: Judith S. Bresler, Esq., Carney, Kelehan, Bresler, Bennet & Scherr, LLP, 10715 Charter Drive, Suite 200, Columbia, MD 21044.

\_\_\_\_\_/s/\_\_\_\_\_  
John M. Robinson