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August 16, 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**

**Request of the Rock Creek Hills Citizens  
Association, *et al.* to file a response to the  
Montgomery County Board of Education  
Surreply Dated August 10, 2011**

Dear Ms. La Fiandra:

This letter contains a request by the Rock Creek Hills Citizens Association, *et al.* (collectively RCHCA or the Appellants) to file a response to the Montgomery County Board of Education's (County Board)<sup>1</sup> Surreply dated August 10, 2011<sup>2</sup> pursuant to COMAR13A01.05.04A and COMAR 13A01.05.04E. The Appellants recognized that there have already been two rounds of filings in this proceeding and do not wish to burden the State Board with additional pleadings. However, the County Board's August 10 Surreply misconstrues some key facts on the issue of standing and contains new arguments on the matter of notice and the County Board's statutory requirement to

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<sup>1</sup> The Montgomery County Board of Education is referred to here as the County Board

<sup>2</sup> Hereinafter August 10 Surreply.

consult with the Montgomery County Planning Board (Planning Board) that merit a response. The Appellants are filing before the receipt of any letter from your office because the undersigned may be traveling at the time any such letter might be received and does not want to risk missing a filing deadline. Wherefore the Appellants request the State Board to accept this response and give full consideration to the following.

### **Standing**

The Appellants and the County Board disagree on the legal standard to apply to standing in this proceeding. The Appellants believe that more liberal standard of Sugarloaf Community Association v. Department of Environment is binding on the State Board since this involves an administrative proceeding.<sup>3</sup> However, even if one applies the County Board's asserted zoning law standard of adjoining, confronting, or nearby property owners, at least of the four individual appellants have standing. The Appellant's complaint dated May 26, 2011 states at 2 that the following residents are individual appellants in that complaint and directly adjoin the Rock Creek Hills Local Park: Mr. James J. Pekar, 9723 Kingston Road, Kensington, Md. 20895; Mr. David Kaplan, 3615 Saul Road, Kensington, Md., 20895; Ms. Cathy Fink, 9811 Haverhill Drive, Kensington, Md., and Mr. Pat Pugliese, 9819 Haverhill Drive, Kensington, Md. 20895. The approximate location of their houses is noted on the Google Map attached as Ex. D. While it would be more accurate to say that the named individuals are confronting landowners as each lives directly across a street that serves as a boundary to the Local Park, each meets the narrower standard the County Board urges here. In addition, Samuel Statland, Vice President of RCHCA, also an individual named appellant, lives approximately two blocks from the Local Park at 9805 East Bexhill Drive and entered an appearance at the April 28 meeting and requested a hearing, which was denied him.

In addition, each of the individual appellants is also a member of the Rock Creek Hills Citizens Association and it is certainly appropriate for RCHCA to file on their behalf and to participate in this litigation in that capacity. Moreover, the undersigned filed the May 26 complaint both as president of the RCHCA and as counsel to the Appellants to assure he could speak for the individual appellants in event there was a challenge to the standing of RCHCA, and he continues to speak for them here as in the other pleadings captioned Rock Creek Hills Citizens Association, et al. At bottom, it cannot be emphasized too strongly that construction of a new middle school on this site will deprive all Rock Creek Hills residents (a community of over 650 homes) of the existing park and recreational facilities and expose them to the visual and traffic impacts of that change. This change in the visual appearance and the loss of the existing recreational facilities will occur without regard to any mitigation that may flow from the current feasibility study. All RCHCA residents of this community are nearby property

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<sup>3</sup> See Sugarloaf CA v. Dept. of Env., 344 Md. 271, 686 A.2d. 605, 616-19 (1996).

owners and are not ones whose property is far removed from the site in question.<sup>4</sup> The Local Park is deeply embedded within the bulk of the Rock Creek Hills community.

Finally, the County Board does not contest that the County Board made a final decision to select the Local Park as the site for a new middle school at its April 28, 2011 meeting. The County Board also does not contest that it intends to proceed with the construction of this middle school as expeditiously as possible because it is essential to the well being of the B-CC Cluster.<sup>5</sup> Appellants recognize that the County Board's final decision to select the Local Park site will not result in impacts as quickly as a boundary or curriculum change. But one challenge here is to the legality and prudence of the site selection decision. It makes no sense to delay review of the decision until the County Board spends millions of dollars on detailed engineering and architectural plans and actually begins to clear and grade the Local Park at issue here. The State Board should act now to assure that the Local Park site selection was rationale and reasonable, to prevent the impact to the appellants and the Rock Creek Hills community that the County Board has itself knows will occur, and to avoid any unwise expenditures of public funds.

### **The Hearing Issue**

The County Board's August 10 Surreply argues that the Appellants had an adequate opportunity to comment on the proposed selection of Rock Creek Hills Local Park and at bottom that the Appellants' argument is basically one of fairness, not a failure of the County Board to meet minimum requirements of due process. Appellants will not repeat here the arguments regarding the fairness of the County Board's actions contained in their July 27, 2011 Response to the County Board's July 14, 2011 motions.<sup>6</sup> But it is reasonable to repeat that the County Board did not follow its own protocols when it changed the agenda in the afternoon of the April 28, 2011 meeting, a legal due process procedural issue that transcends the issue of whether the County Board unreasonably denied the Appellants an opportunity to present their concerns. Under those protocols all final resolutions are to be posted and available to the general public by 4 p.m. of the day before the meeting, which simply was not done. Finally, while Mr. Statland entered an appearance at the April 28 meeting as an officer of RCHCA, he had no authority to speak

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<sup>4</sup> The County Board cites an ALJ decision to support its position regarding the distance from the relevant site, but do not indicate if that decision was affirmed. ALJ decisions are not considered binding authority on the parent agency absent such affirmance.

<sup>5</sup> See Response of the Rock Creek Hills Citizens Association, *et al.* to the Montgomery County Board of Education Motion Dismiss, or in the Alternative, Motion for Summary Affirmance dated July 27, 2011(July 27 RCHCA Response) Ex. R-1.

<sup>6</sup> *Id.* 11-14.

on the merits of the site selection decision before a full meeting and vote by the RCHCA members. The matter was too important for an officer to speak prior to such a vote.

### **The Requirement to Consult the Planning Board**

The County Board makes two assertions regarding its statutory obligation to consult with the Montgomery County Planning Board.<sup>7</sup> The first is that a presence of a one Planning Board staff member on the Site Selection Advisory Community (SSAC) was adequate. Given the important policy issues and the fact that six of the ten potential sites involved park land, this argument is without merit. The statutory requirement is to consult with the Planning Board, not one of its employees, who in any event was not provided an adequate opportunity to participate<sup>8</sup> and was sworn to secrecy like all other members of the SSAC. The second is that the County Board consulted because it acknowledged and acted on certain aspects of Chair Carrier's April 27, 2011 letter to President Barclay. These assertions should be viewed in light of the dictionary definition of the word "consult." The transitory verb definition is (1) to seek information or instruction from: ask advice of; refer to: as in matters of health, consult your doctor; (2) keep in mind while acting or deciding; consider or show regard for.<sup>9</sup> The County Board argues for the latter even though the County Board only accepted the fact that the Rosemary Hills-Lyttonsville Local Park site was not available, and then selected the Rock Creek Hills Local Park site in clear disregard of the Planning Board's statement that selection of neither park was suitable for use as a public school site and that the site selection process was inappropriate.<sup>10</sup> Section 4-116(a)(1)(ii) of the State Education Code states that the County Board's obligation is to seek advice, which necessarily implies some type of affirmative analysis and discussion. Any such interaction was absent in the instant case. The Planning Board would certainly require a presentation and discussion at a meeting with a member vote prior to the County Board's action given the magnitude of the policy and program issues involved in any site selection decision and particularly one involving the in the transfer of park land for non-park use.<sup>11</sup> In any event, the State Board can simply request the Planning Board for its opinion of this matter. Given the Planning Board's April 27, 2011 letter, the likely answer is clear.

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<sup>7</sup> August 10 Surreply at 6-7.

<sup>8</sup> *Id.*, Ex. R-6/R-7 at 2.

<sup>9</sup> Webster New World Dictionary of the American Language, College Edition, World Publishing Company (1974) at 305.

<sup>10</sup> July 27 RCHCA Response, Ex. R-6/R-7 at 1, 2.

<sup>11</sup> The undersigned can attest to this probability as a former Planning Board Commissioner (October 2001 to July 2009) who was involved in several decisions involving the use of park land for highway and other public purposes, including schools.

**Conclusion**

For the reasons stated here and in their prior filings the Appellants request that the State Board remand this proceeding to the County Board with an immediate requirement for consultation with the Planning Board under section 4-116(a)(1)(ii) of the State Education Code and to provide the Appellants a hearing after proper notice according to the County Board's own notice protocols. The merits of the site selection may require an administrative hearing before the State Board but should be remanded to the County Board for the reconsideration of the reasonableness of the site selection at issue here.

Sincerely yours,  
/s/  
John M. Robinson

President, Rock Creek  
Hills Citizens Association

Counsel to the Appellants.

Phone: 240-997-4447  
301-949-5452

Affidavit of Counsel

My name is John M. Robinson and I am the counsel who signed the aforesaid pleading to the Maryland State Board of Education. I hereby certify and affirm to the best of my knowledge, information, and belief that the facts regarding the Appellant's standing and Planning Board procedure and practice stated therein are true and correct.

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John M. Robinson

This day of August 16, 2011, there appeared before me, a notary public for Montgomery County of the State of Maryland, John M. Robinson, who hereby stated and affirmed that the facts attested to in this affidavit are true and correct to his knowledge, information, and belief.

By \_\_\_\_\_

Notary Public

My Commission expires:

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 16th day of August, 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