

LYNN NASH, et al.

Appellant,

v.

MONTGOMERY COUNTY
BOARD OF EDUCATION
(II) and (III)

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 21-35

OPINION

INTRODUCTION

Lynn Nash and other appellants have filed two appeals of certain local board actions related to the location and construction of a new elementary school in a portion of Kelley Park in the City of Gaithersburg. Each appeal is described below. The local board has moved to dismiss both appeals. The Appellants responded to the local board's motions to dismiss in one appeal, only.

FACTUAL BACKGROUND

Each of the *Nash* cases is related to a school site selection transition in March 2018, which was the culmination of a four-year process. Specifically, during the 2014-2015 school year, the Montgomery County Public Schools ("MCPS") conducted a school capacity study for the Gaithersburg Cluster of elementary schools. This capacity study concluded that a new elementary school was needed to respond to increased enrollment in the cluster.

On April 19, 2016, the local board approved construction of an addition at Gaithersburg Elementary. However, a feasibility study subsequently demonstrated this was not a viable option for a number of reasons.

On August 31, 2017, in response to the need for a new elementary building and the challenges of building an addition at Gaithersburg Elementary, the local board authorized the formation of a Site Selection Advisory Committee to identify potential sites for the new elementary school. The Committee subsequently published a report on January 11, 2018. In this report, the Committee indicated that it reviewed 14 sites, and excluded five sites from consideration. It recommended construction of a new elementary school on Kelley Park, property owned by the City of Gaithersburg. The Committee believed that the Kelley Park site offered "the best range of site characteristic, including access, cost, availability, location, and consistency with LEED™ criteria."

On February 26, 2018, the Superintendent recommended approval of various school selection sites across the district, including the Kelley Park site.

On March 8, 2018, a public hearing on Facilities and Boundaries was held in part to discuss the Kelley Park site selection. Two of the Appellants, Ms. Nash and Ms. Junium (through her husband) provided testimony at this hearing.

On March 22, 2018, the Superintendent recommended selection of the City of Gaithersburg–owned Kelley Park site as the next elementary school in the Gaithersburg Cluster. The board approved the Superintendent’s site selection recommendation.

Two years later, on April 21, 2020, the Superintendent recommended approval of a resolution that would authorize him to execute the Property Transfer Agreement with the City of Gaithersburg for 5.71 acres of Kelley Park for purposes of constructing a new elementary school. The local board approved his recommendation.

Several appeals have grown out of the site selection process.

A. *Nash I* (Property Transfer Agreement)

On May 20, 2020, Appellants appealed an April 21, 2020, local board resolution authorizing the Superintendent of Schools to execute a Property Transfer Agreement with the City for 5.71 acres of Kelley Park for the new elementary school. Appellants amended their appeal and the amended appeal alleged that the local board action:

- failed to comply with administrative procedures under the Interagency Commission on School Construction;
- failed to comply with the site selection process of §4-116 of the *Education Article* and violated the State Constitution by “gifting” certain amenities to the City that were not for educational purposes; and
- unlawfully gave the Superintendent authority to expend funds to purchase the parcel.

Lynn Nash, et al. v. Montgomery County Bd. of Educ., (Nash I), MSBE Op. No. 20-41, p.3, (October 27, 2020). With respect to each of these issues, the State Board Opinion in *Nash I*, at pages 3-5, held that:

- it had no jurisdiction over allegations that the local board failed to comply with administrative procedures of the Interagency Commission on School Construction because its jurisdiction to review quasi-legislative decisions of local boards of education under §2-205 of the Education Article was “limited to deciding only whether the local board’s decision violated State education law, or statewide educational policy;”
- allegations regarding site selection and the local board’s compliance with §4-116 were time barred and Appellants failed to submit any evidence to support their contention that there was

no educational purpose for constructing the amenities because they benefited the community as well as the school system; and

- the land agreement that triggered the *Nash I* appeal specified that the land was being conveyed free of charge so there was no expenditure of funds for purchase of the property by the Superintendent.

B. *Nash I* Revisited (Request for Reconsideration of *Nash I*)

On November 27, 2020, Appellants filed a Request for Reconsideration of Opinion No. 20-41, arguing that reconsideration was necessary because the State Board did not understand the facts and, for reasons cited in a November 19, 2020, local board resolution, the time-frame for the school's boundary study was altered.

On February 23, 2021, the State Board issued Opinion No. 21-06 denying the request for reconsideration "because there was no mistake or error of law, nor have facts material to the issues been discovered subsequent to the decision." *Lynn Nash, et al. v. Montgomery County Board of Education*, MSBE Op. No. 21-06, p.2, (February 23, 2021). In this opinion, the State Board addressed some of the issues that were decided in its original opinion, No. 20-41. Specifically, it stated:

- "The State Board found that the amenities ...served to benefit MCPS and to establish a school at the Kelley Park site," and
- "[Therefore,] any funds used ...served an educational purpose" (Emphasis supplied). *Id.* at 1.

C. *Nash II* (Acceptance of Deed)

On January 4, 2021, Appellants appealed a December 3, 2020, local board resolution authorizing the local board president and the Superintendent to "accept a deed for approximately 5.72 acres, at no cost, from the City of Gaithersburg."

In *Nash II*, Appellants have alleged that the local board action was:

- "not a sound educational decision as it diverts MCPS Operating Budget funds to gifts for the City of Gaithersburg;
- "an unreasonable resolution as it states that the Deed acceptance is at no cost," and
- "a fraudulent representation of the conveyance as the Deed acceptance requires expenditure of over \$1,000,000 in exchange for receipt of the Deed." (Emphasis supplied). *Nash II*, p. 1.

The local board has moved to dismiss *Nash II* because the facts and issues decided in *Nash I* preclude re-litigation of the same facts and issues in *Nash II*. The local board asserts that accepting the deed to the elementary school site (*Nash II*) is part of a series of transactions

implementing the selection and building of the new school, as was the Property Transfer Agreement that was the subject of *Nash I* and a prerequisite to conveyance of the deed.

D. *Nash III* (Field Use Agreement)

On February 10, 2021, Appellants appealed a January 12, 2021, local board resolution authorizing “the president of the Board of Education and the City of Gaithersburg [to] execute a Field Use Agreement for the shared use of the City of Gaithersburg-owned artificial turf field at the future Gaithersburg Cluster Elementary School #8.” (Appeal, p.1). In support of their Appeal, Appellants allege that:

- “the alleged Field Use Agreement diverts Montgomery County Public Schools Operating Budget educational dollars to the expenditure of amenities for the City of Gaithersburg;”
- the authority given to the Superintendent to approve contracts under §4-205 of the Education Article does not give “the power to fund, contract for, develop or construct amenities on land not owned by the county board” or to “expend” education funds for non-education gifts to other entities.”

(Appeal, p.2.)

Appellants also object to the local board’s authorization for its president and the Superintendent to execute a Field Use Agreement because all of the provisions were not finalized. Therefore, they assert that the authorization “seeks to bind the Board of Education to expend over \$1 million in public school Operating Budget funds” and fund items that will be owned by the City of Gaithersburg and have no relationship to the construction of an elementary school.” *Id.* They assert in this appeal that the resolution regarding an agreement for joint use of the field “is nothing more than a sham transaction that would allow the superintendent . . . to expend an unspecified amount of operating budget funding on gifts for the City of Gaithersburg.” *Id.*

Appellants also object to the “whereas” clauses which refer to items directly related to construction and use of the field rather than all of the items referenced in the Property Transfer Agreement, such as “off-site easements” and a “tot lot,” asking whether there are “other costs secretly being inserted into the Field Use Agreement after the board of Education’s January 21th vote?” (Appeal, p.3)

STANDARD OF REVIEW

The jurisdiction of the State Board to review local board resolutions, such as those challenged in the *Nash* series of appeals is limited.

When a quasi-legislative decision is appealed, [] the jurisdiction to hear the case usually will rest on §2-205. Under §2-205(e), the State Board is given the power to determine the true intent and meaning

of the State education law and to decide all cases and controversies that arise under the state education statute and the state Board rules and regulations.

* * *

Thus, in an appeal challenging a quasi-legislative decision of a local board our jurisdiction is limited to deciding only whether the local board's decision violated State education law, regulation or a statewide educational policy. In addition, consistent with our jurisdiction, we apply a standard of review that focuses solely on whether the local board's decision violates State education law.

Nash I, Opinion No. 20-41, pp. 3-4

We have previously explained that when this Board reviews quasi-legislative decisions of local boards, we will decide only whether the local board acted within the legal boundaries of State or federal law, and will not substitute our judgment for that of the local board "as to the wisdom of the administrative action." *Citizens for Responsible Curriculum v. Montgomery County Board of Education*, MSBE Op. No. 07-30 (2007) (citing *Weiner v. Maryland Insurance Administration*, 337 Md. 181, 190 (1995)).

Nash I, Opinion No. 20-41, p. 2.

LEGAL ANALYSIS

Appellants have adopted a strategy to challenge each step of the process of implementing the local board's decision in March 22, 2018, selecting the Kelley Park parcel as the site for a new elementary school. *Nash I* attacked the subsequent Property Transfer Agreement. *Nash II* attacks the local board's Acceptance of Deed. *Nash III* attacks the Field Use Agreement. In each attack, the Appellants explain that the Kelley Park parcel was to be free of charge but that the local board will ultimately pay for related improvements and amenities to the Park. Thus, they assert, land transfer was not free of charge. The State Board resolved that issue in *Nash I*. We stated:

"Appellants argue that the local board's April 21, 2020 resolution is illegal because the land agreement violates Article VIII, §3 of the Maryland Constitution which reads, "The School Fund of the State shall be kept inviolate, and appropriated only to the purpose of Education." The land agreement sets forth the various responsibilities of the local board and the City related to the transfer of the Kelley Park parcel to MCPS to be used as a school site. Portions of the land agreement require MCPS to provide amenities in the form of an athletic field, a tot-lot, and new walking path connections that will be used by MCPS as well as the greater community. Appellants argue that this amounts to illegal gifts to the

City of Gaithersburg. The fact that the amenities will be also be enjoyed by the community at large does not negate the fact the amenities serve to benefit MCPS and serve to establish a school at the Kelley Park site. Any other use is ancillary to that. Appellants have submitted no evidence to demonstrate these amenities do not serve an educational purpose. As such, we find no violation of the Maryland Constitution.

* * *

Appellants attempt to argue that the resolution is illegal because the local superintendent lacked the authority to expend school funds for the purchase of the Kelley Park parcel under Education Art. §4-205(d). That provision states that “[a] contract made by a county board is not valid without the written approval of the county superintendent.” Appellant’s line of reasoning regarding the applicability of this provision here is hard to follow. Regardless, the land agreement specifies that the conveyance of ownership of the parcel is free of charge. As no funds were exchanged in the agreement, this argument lacks merit.

(*Nash I*, at 4-5).

Because the same issues are raised in *Nash II* and *III*, the decision in *Nash I* is “*res judicata*” as to *Nash II* and *Nash III*. The doctrine of *res judicata* “extinguishes the [Appellants’] claim...including all rights...to remedies...with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose...” See, e.g., *Colandrea v. Wilde Lake Community Ass’n, Inc., et al.*, 361 Md. 371, 389 (2000).

In addition to the “transaction test” for determining what constitutes the same claim for *res judicata* purposes, courts also look to the evidence used to support the claims. In *Kent County Bd. of Educ. v. Billbrough*, 30 Md. 487, 493 (1987), the Court of Appeals said the following:

Courts elsewhere have applied a variety of tests in determining whether two causes of action are the same for purposes of invoking *res judicata*. The measure which seems to find favor with most courts, and one which have applied, is whether the same evidentiary facts would sustain both actions. (citations omitted).

In *Nash I*, the State Board found the only issue that fell within its original jurisdictional authority under §2-205 of the Education Article involved Appellants’ argument that aspects of the school’s construction were, in effect, gifts to the City of Gaithersburg, serving no educational purpose, and as such violated State law. In *Nash I*, the State Board concluded that the amenities in the form of an athletic field and tot lot to be built on park land adjacent to the school site and other items to be jointly used by the school system and the community did not negate the fact that it had educational benefit or that conveyance of ownership of the school site was free of charge. In Opinion No. 21-06, denying Appellants’ request to reconsider *Nash I*, the State Board reiterated its finding that funds spent on the items, referred to an amenities, that were the subject

of a land use agreement served an educational purpose and were not gifts that Appellants had argued violated State law.

In *Nash II*, now before the State Board, Appellants again argue that various features of the school's construction, identified in the Property Transfer Agreement, are gifts provided in payment for the site being deeded by the City of Gaithersburg to the local board. The triggering event for *Nash II*, however, was not authorization for the Property Transfer Agreement as in *Nash I*, but acceptance of the deed to the school site. Appellants saw acceptance of the deed as an opportunity to re-litigate their position, presented in *Nash I*, that the local board was "paying" for the school site with illegal gifts of the amenities that were subject of the Property Transfer Agreement. Despite the State Board's prior decision finding, as mentioned in the land agreement, that "the conveyance of ownership of the parcel is free of charge," Appellants seek to re-litigate that same point, seizing on the factual representation that the land is being conveyed at "no cost" to argue that accepting the deed "perpetrates a fraud on the public by misrepresenting the Deed transfer." (*Nash II*, p. 3).

As stated by the Court of Appeals in the *Wilde Lake* case cited above, *res judicata* extinguishes "all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions." (emphasis supplied). In their first appeal, Appellants asked the State Board to stop construction of a school on the Kelley Park site and direct the local board to "complete a new Site Selection process." (*Nash I*, p. 13). In their second appeal, Appellants ask the State Board to stop construction of a school on the Kelley Park site by revoking the local board's acceptance of the deed to the new school site. (*Nash II*, p. 3). As to *Nash II*, it is barred by the doctrine of *res judicata*. We reach the same conclusion as to *Nash III*.

The only State education law Appellants allege was violated by the local board's resolution authorizing eventual execution of a Field Use Agreement between the school system and the City of Gaithersburg is §4-205, involving a local superintendent's authority to approve contracts. This precise issue was decided in *Nash I*.

Appellants attempt to argue that the resolution is illegal because the local superintendent lack the authority to expend school funds for the purchase of the Kelley Park parcel under Education Art. §4-205(d). That provision states that "[a] contract made by county board is not valid without the written approval of the county superintendent." Appellant's line of reasoning regarding the applicability of this provision here is hard to follow. Regardless, the land agreement specifies that the conveyance of ownership of the parcel is free of charge. As no funds were exchanges in the agreement, this argument lacks merit.

The same argument presented in *Nash I* is being made in the instant appeal.

Moreover, even if expenditures set forth in the Property Transfer Agreement were referenced in the Field Use Agreement, the State Board has already determined that the

expenditures were not gifts, had an educational purpose and provided a benefit to the school and school system.

In short, *Nash I*, *Nash I Revisited*, *Nash II*, and *Nash III* all boil down to whether the agreements between the local board and the City of Gaithersburg involving construction features, sometimes referred to as amenities, that benefit the school system, the City of Gaithersburg, and the public at large, involved illegal “gifts” by the local board to the City. The State Board has answered that question in the negative, twice. Appellants cannot use each step in the process of constructing Gaithersburg Elementary School #8 as an occasion to file an appeal raising the same legal issue or issues previously decided.

CONCLUSION

For all the reasons stated, the appeals filed in *Nash II* and *Nash III* are dismissed.

Signatures on File:

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May 25, 2021