

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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Case No.A-6430

Case No. CBA-2197-B

PETITION OF THE HEIGHTS SCHOOL

OPINION OF THE BOARD

(Opinion Adopted April 9, 2014)

(Effective Date of Opinion: May 5, 2014)

Case no. A-6430 is an application, under Section 59-G-3.1 of the Montgomery County Zoning Ordinance, for a 10.75-foot variance from the front lot line setback required by Section 59-C-1.232(a). The Heights School seeks to construct dugouts at the first and third base lines of its baseball field; the third base line dugout would be located within 19.25 feet of the front lot line. The required setback is 30 feet. The school also seeks administrative modification of its special exception, Case No. CBA-2197-B, to allow the dugouts.

The Board of Appeals held a hearing on the application on Wednesday, April 9, 2014. Soo Lee-Cho, Esquire, appeared on behalf of The Heights School. She called Robert Dennis, a civil engineer, Dan Lively, the Athletic Director at The Heights, and Jerry Hadley, the Business Manager at the school, as witnesses.

The subject property is Block J Parcel EYE, Inverness Forest Subdivision, located at 10400 Seven Locks Road, Potomac, Maryland, 20854, in the R-90 Zone.

Decision of the Board:

Variance and Administrative
Modification **Granted**.

EVIDENCE PRESENTED

1. Robert Dennis testified as an expert in civil engineering. Mr. Dennis stated that the proposed dugout is subject to the 30-foot main and ancillary building setback rather than a 60-foot accessory structure setback.

2. Referring to Exhibit 12, Mr. Dennis testified that from east to west, the property has an average slope of 9.5 percent, which is steep for amenities such as driveways, parking and athletic fields. He noted that there are areas with steeper slopes of 15%. He pointed out the heavily wooded area in the northeast quadrant of the site and said that these constraints make the location chosen for the athletic fields the most feasible.

3. In response to a question, Mr. Dennis stated that a two percent grade is desired for athletic fields and the school's fields have been terraced to two percent grades, although the terrain had a seven percent slope before the fields were created.

4. Referring to Exhibit 4(b), Mr. Dennis described the areas on the site subject to a Category 1 Conservation Easement as "both the areas that are enclosed in the driveways...Conservation easements also run from the tennis courts all the way around the north and western property line, ..a separate smaller area in this vicinity here on the slope, and then there's a southern area adjacent to the stormwater management..." [Transcript, April 9, 2014, p. 15]. He stated that you cannot construct an athletic field in a forest conservation easement. In response to Board questions, Ms. Lee Cho stated that the forest conservation easements were imposed on the property as the school developed, and requested modifications in the 1980s, 1990s and 2004. She stated that the County sought to protect forest on site "wherever they could...consolidating the buildings to the northwest and allowing the fields on the southwest." [Transcript, p. 21]. Mr. Dennis stated that the forested areas are "original undisturbed forest". In response to a Board question as to whether original means 1860s or 1600s, Mr. Dennis said, "I would say 1600s." [Transcript, p. 21].

5. Mr. Dennis stated that there are existing benches on concrete slabs along the first and third base lines that are enclosed with chain link fencing, and that the proposed dugouts are designed to fit within the existing fencing. He stated that "the one along the third-base line is actually truncated on one end to fit within that fencing. So it is the minimum that they can propose." [Transcript, p. 16]. Referring to Exhibit 4(a), he stated further that the location of the third base dugout "is seven or eight feet higher in elevation than the roadway, and it's heavily screened from the roadway by ... evergreens, shrubbery and ornamental trees." [Transcript, p. 17].

6. Mr. Dennis stated that the requested variance will not impair the intent or integrity of the area master plan because "...the site has had a special exception for private school since 1967, and the athletic fields are part of the core facilities [are] needed to meet the programmatic needs of a school, and the structural

dugouts are an amenity that's associated with baseball fields at other private schools in the vicinity." [Transcript, p. 18].

7. In response to a Board question, referring to Exhibit 5(f), Mr. Dennis stated that the depicted confronting property across Seven Locks Road is 130 or 140 feet away.

8. Dan Lively stated that the primary reason for needing the dugouts is for the safety of the players, to protect them from foul balls, and from the elements. Referring to Exhibit 13, Mr. Lively discussed the trajectory of foul balls and their impact on other activities on the school property and on neighbors' properties. In addition he pointed out the safety hazard that would be created for outfielders if the baseball diamond were to be reoriented, because the outfielders would be facing into the setting sun.

9. Mr. Lively described the steep hill and short length of the right field and acknowledged that some schools are reluctant to play baseball on The Heights' field and stated, "so we had to make some significant changes and try to improve the overall field to keep teams coming to play." [Transcript, p. 26].

10. Referring to Exhibit 14, Mr. Lively explained that the dugouts will be constructed of stained wood and would be about nine and a half feet high.

11. Jerry Hadley testified that prior to the 1980s, the baseball field was located in the opposite corner, cattycorner to where it is now. In response to a Board question, he acknowledged that in that location, the third base dugout would not require a variance. Mr. Hadley further stated that when the field was in its former location there was a problem with foul balls going into Potomac Pond, where there is now a residential subdivision. He stated that there was a fence along the field, but that it was ineffective in containing the foul balls, and that returning the field to its former orientation would create a danger of balls being hit onto Seven Locks Road. He also stated that the former orientation of the field allowed the setting sun to affect fielders' eyes, contrary to the typical practice. He noted "When the field was in the southwest corner, the school was grades three through eight. The boys didn't have quite the oomph, if you will, but now we're playing with, you know, [high school] varsity teams that can hit the ball 200 to 300 feet very easily. So, to have the field in that corner now would be – really, the only way to do it would be to put a 40 to 50 foot fence along Seven Locks Road, in our opinion." [Transcript, p. 35]. The Board noted that such a fence would require a variance.

FINDINGS OF THE BOARD

Section 59-G-3.1. Authority – Board of Appeals

The Board of Appeals may grant petitions for variances as authorized in Section 59-A-4.11(b) upon proof by a preponderance of the evidence that:

- (a) By reason of exceptional narrowness, shallowness, shape, topographical conditions or other extraordinary situations or conditions peculiar to a specific parcel of property, the strict application of these regulations would result in peculiar or unusual practical difficulties to, or exceptional or undue hardship upon, the owner of such property;

The Board finds that the subject property contains extremely steep slopes that severely curtail the suitable locations for the baseball field, making its current location the only feasible one on the site. The Board further finds that the Conservation Easement areas further limit where development can occur. Based upon the testimony of Mr. Lively and Mr. Hadley, the Board finds that the baseball program is an important element of the school's athletic program, and that the current orientation of the baseball field furthers important safety goals for players, for neighboring properties and for travelers on Seven Locks Road. The Board finds that these conditions on the subject property combine to create peculiar conditions that necessitate the current location and orientation of the baseball field, and the dugouts.

The Board finds that not receiving the variance and either not being able to install the third base line dugout or being required to change the orientation of the baseball field would either leave players at risk from foul balls and subject to excessive exposure to the sun or to rain, or could create safety hazards that would require curtailment of this important part of the school's athletic program, which would pose a practical difficulty for the school.

- (b) Such variance is the minimum reasonably necessary to overcome the aforesaid exceptional conditions;

The Board finds that since the current orientation and location of the baseball diamond are necessitated by the constraints of this property, described under subsection (a), above, since the dugouts associated with a baseball diamond are located along the base lines and not on the actual field of play, since the proposed third base line dugout is proposed to be installed on an existing concrete pad and within an existing fence, and since that dugout has been diminished in size so that it will fit in that location, the requested variance to locate it is the minimum reasonably necessary.

- (c) Such variance can be granted without substantial impairment to the intent, purpose and integrity of the general plan or any duly adopted and approved area master plan affecting the subject property; and

The Board finds that The Heights School is an established special exception use which was found to be consistent with the applicable master plan when the special exception was approved. The variance supports a dugout needed to support an existing element of the school's athletic program, and in no way diminishes the use's master plan consistency.

- (d) Such variance will not be detrimental to the use and enjoyment of adjoining or neighboring properties. These provisions, however, shall not permit the board to grant any variance to any setback or yard requirements for property zoned for commercial or industrial purposes when such property abuts or immediately adjoins any property zoned for residential purposes unless such residential property is proposed for commercial or industrial use on an adopted master plan. These provisions shall not be construed to permit the board, under the guise of a variance, to authorize a use of land not otherwise permitted.

The Board finds that the proposed dugout will be screened from the confronting property across Seven Locks Road by established landscaping and will be constructed of materials that blend well with the surrounding vegetation, and thus will pose no detriment to the use and enjoyment of adjoining or neighboring properties. The Board further finds that maintaining the baseball field in its current orientation avoids the potential for errant balls to end up in neighboring residential yards or on Seven Locks Road.

Section 59-G-1.3(c)(1) of the Montgomery County Zoning Ordinance provides, pertaining to modification of special exceptions:

If the proposed modification is such that the terms or conditions could be modified without substantially changing the nature, character or intensity of the use and without substantially changing the effect on traffic or on the immediate neighborhood, the Board, without convening a public hearing to consider the proposed change, may modify the term or condition.

The Board finds that installation of the dugouts on existing concrete pads, within existing fencing, as an amenity for the ongoing baseball program, will not substantially change the nature, character or intensity of the use or its effect on traffic or on the immediate neighborhood.

Accordingly, on a motion by Catherine G. Titus, Chair, seconded by Stanley B. Boyd, with John H. Pentecost in agreement and David K. Perdue, Vice-Chair, and Carolyn J. Shawaker not in agreement, the requested variance of 10.75 feet from the front lot line is **granted**, subject to the following conditions:

1. The Applicant is bound by the testimony of its Witnesses and exhibits of record, to the extent that such testimony and evidence are identified in this Opinion;
2. Construction must be completed according to the plans entered in the record as Exhibit Nos. 3(a&b), 4(a-c), and 14.

On a motion by David K. Perdue, Vice-Chair, seconded by John H. Pentecost, with Carolyn J. Shawaker, Stanley B. Boyd and Catherine G. Titus, Chair, in agreement, the request to modify the special exception to allow installation of the dugouts is **granted**.

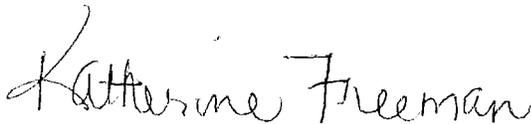
BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that all terms and conditions of the original special exception, together with any modifications granted by the Board of Appeals, remain in effect.

BE IT FURTHER RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled petition.



Catherine G. Titus
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 5th day of May, 2014.



Katherine Freeman
Executive Director

NOTE:

Regarding the variance:

See Section 59-A-4.53 of the Zoning Ordinance regarding the twelve (12) month period within which the variance granted by the Board must be exercised.

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure. It is each party's responsibility to participate in the Circuit Court action to protect their respective interests. In short, as a party you have a right to protect your interests in this matter by participating in the Circuit Court proceedings, and this right is unaffected by any participation by the County.

Regarding the Administrative Modification

Any party may, within fifteen (15) days of the date of the Board's Resolution, request a public hearing on the particular action taken by the Board. Such request shall be in writing, and shall specify the reasons for the request and the nature of the objections and/or relief desired. In the event that such request is received, the Board shall suspend its decision and conduct a public hearing to consider the action taken.

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure. It is each party's responsibility to participate in the Circuit Court action to protect their respective interests. In short, as a party you have a right to protect your interests in this matter by participating in the Circuit Court proceedings, and this right is unaffected by any participation by the County.

