

**BOARD OF APPEALS  
for  
MONTGOMERY COUNTY**

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**Case No. CBA-2197-B**

**Case No. A-6568**

**PETITION OF THE HEIGHTS SCHOOL**

**RESOLUTION TO CONSOLIDATE CASES, GRANT VARIANCES,  
AND MODIFY SPECIAL EXCEPTION**

(Resolution Adopted June 13, 2018)

(Effective Date of Resolution: June 21, 2018)

Case No. A-6568 is an application, under Section 59-7.3.2 of the Montgomery County Zoning Ordinance, for two variances. The proposed construction of accessory structures (baseball dugout and netting system) requires a variance of 11.80 feet as it is within 18.20 feet of the front lot line. The required setback is thirty (30) feet, in accordance with Section 59-4.4.8.B.2 of the Zoning Ordinance. In addition, and in accordance with Section 59-4.4.8.B.2 of the Zoning Ordinance, the proposed construction of accessory structures requires a variance to be forward of the rear building line.<sup>1</sup> The school also seeks administrative modification of its special exception, Case No. CBA-2197-B, to allow the construction of the new dugouts and baseball netting system.

The Board of Appeals held a hearing on the application on Wednesday, June 13, 2018. Soo Lee-Cho, Esquire, appeared on behalf of the Heights School. She called Dan Lively, the Athletic Director at the Heights School, and Andrew Streagle, a Registered

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<sup>1</sup> At the hearing, counsel for the Heights School explained, and the School's expert witness testified, that it is the policy of the Department of Permitting Services (DPS) to apply the required setbacks for a main building to all structures on properties that are located on a "campus," and thus that the Board's reference to accessory structures, and in particular the Board's noticing of the need for a variance to locate accessory structures forward of the rear building line, was in error. The Board notes that its noticing of these variances was based on the DPS's building permit denial, in the record for Case No. A-6568 at Exhibit 6, which indicates that an 11.80 foot variance is needed because the proposed construction is within 18.20 feet of the front lot line, the required setback being 30.00 feet in accordance with Section 59-4.4.8.B.2, but also references "[t]he proposed construction of accessory structures forward of the rear building line." If DPS determines that a variance for the latter is not needed to allow this construction to proceed, it is free to disregard the Board's grant of this variance.

Landscape Architect with A. Morton Thomas and Associates, Inc., as witnesses. Mr. Streagle was accepted by the Board as an expert in landscape architecture.

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: Variances and Administrative  
Modification **Granted**.

## EVIDENCE PRESENTED

1. In a decision effective May 5, 2014, the Board of Appeals, in Case Nos. A-6430 and CBA-2197-B, granted the Heights School a variance of 10.75 feet from the required 30-foot front lot line setback along Seven Locks Road, as well as an administrative modification of the School's special exception, to allow the construction of a baseball dugout and protective netting system. Those structures were built and currently exist on the property. Since that time, per Ms. Lee-Cho's letter of June 5, 2018, submitted in connection with the administrative modification request in Case No. CBA-2197-B, "the School has undertaken significant improvements to both its Upper and Lower athletic fields, inclusive of a slight shifting of the backstop location for the baseball field resulting in the need to redo the dugouts and baseball netting system."

2. Petitioner's Statement, submitted by Ms. Lee-Cho in connection with variance Case No. A-6568, indicates that the Heights School's easternmost property line abuts Seven Locks Road and is subject to a 30-foot setback, in accordance with Section 59-4.4.8.B.2 of the Zoning Ordinance. The Statement indicates that "a new dugout with retaining wall and baseball pole/netting system is proposed to be installed that will encroach into the 30 foot front/street setback area by as much as 11.8 feet along the third base line of the baseball field and as such requires approval of a variance for its construction." See Exhibit 3(a). Exhibit 4(a) shows the proposed encroachment. Petitioner's Statement states that "[i]n 2014, the Board of Appeals granted the School a variance of 10.75 feet from the front setback standard in Case No. A-6430 to allow construction of the dugout that currently exists on the site. Since then, the School has undertaken significant improvements to both its athletic fields, inclusive of a slight shifting of the backstop location for the baseball field resulting in the need to redo the dugouts and baseball netting system." See Exhibit 3(a).

The Petitioner's Statement describes the reasons that the subject property is unique, noting in particular its topography:

The main academic and administrative buildings in the northwest corner and the gymnasium in the mid-section of the campus are located on the site's 'high points' in terms of elevation. To the south and west of these facilities, grades drop significantly into a stormwater management pond area ... to the east of the

gymnasium, the School has been able to accommodate two athletic fields by placing them in a 'terraced' configuration that works with the property's topography. The baseball diamond is located on the lower of the two terraced fields and is sited immediately adjacent to Seven Locks Road. As reflected by the topographic lines shown on the Existing Conditions Plan, there is a significant rise in elevation from Seven Locks Road to the baseball field, which measures between 8-11 feet at differing points along the frontage, as well as the 'terraced' upper field, which sits another 15-20 feet higher (at varying points) than the lower field.

See Exhibit 3(a). The Statement proceeds to describe the reasons that the baseball field had to be oriented the way it is, despite that orientation resulting in the field having a shallow right field, and concludes that this orientation "is the only feasible layout taking into consideration all necessary issues."

The Statement indicates that dugouts are not mere amenities but are necessary for player protection from balls and from the sun, and that they are commonly associated with baseball fields at schools throughout the area. It indicates that the materials and color scheme chosen for the dugout and retaining wall "will allow the structures to blend in and be compatible with existing vegetation on the site," and that existing trees along Seven Locks Road "will provide adequate screening of the dugout" along that road. Finally, it asserts that "the requested variance can be granted without substantial impairment to the integrity of the area master plan and will not be detrimental to the use and enjoyment of abutting or neighboring properties." See Exhibit 3(a).

3. Ms. Lee-Cho's letter of June 5, 2018, indicates that "a new dugout with retaining wall and baseball pole/netting system is proposed to be installed that will encroach into the 30 foot front/street setback area by as much as 11.8 feet along the third base line of the baseball field" and that "[e]ach dugout will occupy less than 400 square feet of area and will be no taller than 13 feet in height measured from grade to the highest point of the roof overhang." Her letter states that the School "would like to take advantage of this opportunity to put in place a more robust protective netting system to better ensure against injury and/or property damage." Ms. Lee-Cho asks that the consideration of the requested variances and administrative modification be consolidated before the Board, and that the school be allowed to pay the higher of the two fees. She asserts in her letter that the modification requested "does not substantially change the nature, character or intensity of the School's special exception use, will not negatively impact traffic in any way, will not otherwise adversely affect the surrounding neighborhood, and as such, can be approved administratively...."

4. Dan Lively, the School's Athletic Director, testified regarding the Lower Field Improvements Plan, in the record for variance Case No. A-6568 at Exhibit 12. Mr. Lively testified that the School's baseball diamond has a short right field, indicating that in the past, at a depth of approximately 180 feet, the "field" abruptly ended and the terrain sloped upward at a 45 degree angle to the School's Upper Field, causing many teams to refuse to play games at the School. He testified that the School has since replaced this hill with a padded retaining wall, allowing the School to extend the depth of right field to

approximately 220 feet. He testified that the School was trying to create as much space as possible in the right field area, since even with this improvement, their right field was still much shallower than a typical right field, which is over 300 feet deep. Mr. Lively testified that in connection with this change, the School has tried to make other improvements to the baseball field. He testified that the School has made a slight shift to the orientation of the field to address the addition of micro-bio-retention ponds and other drainage issues, and to make the field more level and more playable. He testified that in connection with this change, the School is seeking to improve the fencing and netting that surround the baseball field to offer better protection to the players, to the School's neighbors, and to cars travelling along Seven Locks Road. Mr. Lively used Exhibit 12 to explain where the new fencing and protective netting would be located, indicating that in order to better contain foul balls, the netting would be 30 feet high along the backstop and along Seven Locks Road, and that there would be a combined 20 feet of fence and netting along the back of the baseball field, also to contain balls. Mr. Lively testified that the School was seeking to relocate a batting tunnel to an area behind the fence to the rear of the field, and to relocate a 10' x 8' scoreboard to a location adjacent to the batting tunnel, as shown on Exhibit 12. When asked about the height of the scoreboard, he testified that the scoreboard would be positioned above the 10-foot fence but below the top of the netting.

Mr. Lively used Exhibits 5(a)-(c) from variance Case No. A-6568 to describe the requested dugouts, testifying that they were each slightly less than 400 square feet, that they would be constructed of concrete block, that they would be approximately 12' 6" in height at the front, and that they would have protective netting to protect the players. He testified that there was heavy planting along Seven Locks Road which would screen the view of the third base dugout. He testified that the School has made improvements to their Lower Field to make the playing area safer and to make it more closely reflect a standard baseball facility. He testified that the dugouts cover players' heads, improve safety, guard against inclement weather, and improve the overall feel of the playing area. In response to a Board question asking why the dugout could not be skewed to comport with the 10.75 foot variance granted in 2014, Mr. Lively testified that he believed the intent was to provide a uniform number of feet between the baseline and the dugout for the protection of fielders and catchers.

5. Andrew Streagle testified about his professional experience and credentials, and was accepted as an expert in landscape architecture. See Case No. A-6568, Exhibit 14. Mr. Streagle testified that he was familiar with the subject property. He testified that there is a 30 foot setback from the property's front lot line along Seven Locks Road. He stated that DPS has a policy that the Department applies to campus settings such as this one which requires that all accessory structures comply with the setbacks for the main building, which led counsel to assert that the School does not need a variance to locate the proposed structures forward of the rear building line.

Mr. Streagle testified that the subject property has exceptional topography. Referring to Exhibit 15 in Case No. A-6568 (the Site Slope exhibit), he testified that the school buildings are located in an elevated area located in the northwest of the property,

and that the property slopes downward to the northeast. He testified that the property has a lot of verticality, and that the playing fields, which are below the school buildings, are terraced to make them playable. See Exhibit 15. He testified that the west side of the campus is also steep, and is referred to as "the valley." In addition to challenging topography, Mr. Streagle testified that the property is encumbered with numerous Category 1 Forest Conservation Easements, which are shown with green outlining on Exhibit 16 in Case No. A-6568. He testified that those areas are not available for construction.

Mr. Streagle testified that in his professional opinion, there is no location for a baseball field on the subject property other than the location proposed, and that the variance relief requested is the minimum needed to overcome the topographical and environmental constraints of the subject property. He further testified that in his professional opinion, the variance relief requested could be granted without substantial impairment to the general plan or master plan, and that the proposed improvements would not have an adverse effect on neighboring property owners, but rather were intended to better protect those neighbors and passing motorists. He testified that athletic fields are part of the core facilities that most schools have.

In response to a Board question asking why the dugout could not be skewed to comport with the 10.75 foot variance granted in 2014, Mr. Streagle testified that the whole field would need to be rotated in order to maintain the proper proportions. Counsel then clarified that the backstop was placed first and is a fixed feature, and that the rest of the field was then laid out. In response to a Board question asking about the difference in elevation between Seven Locks Road and the baseball field, Mr. Streagle testified that the road is between 10 and 20 feet below the field, explaining that as one travels south, the road slopes downhill. He testified that there is landscaping along the road, and that passing motorists on Seven Locks Road would not necessarily be able to see much of the baseball field.

## **FINDINGS OF THE BOARD**

Based on the binding testimony of Mr. Lively and Mr. Streagle, and on the evidence of record, the Board finds that the requested variances can be granted. The variances comply with the applicable standards and requirements set forth in Section 59-7.3.2.E of the Montgomery County Zoning Ordinance, as follows:

1. *Section 59.7.3.2.E.2.a. one or more of the following unusual or extraordinary situations or conditions exist:*

*Section 59.7.3.2.E.2.a.i exceptional narrowness, shallowness, shape, topographical conditions, or other extraordinary conditions peculiar to a specific property;*

The Board adopts the findings it made in its May 5, 2014, Opinion regarding the physical characteristics of the subject property, namely that it 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, that Conservation Easement areas further limit where development can occur, 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 notes that its adoption of these findings is supported by the Petitioner's Statement, the testimony of Mr. Streagle, and Exhibits 15 and 16. Thus the Board finds, as it did in 2014, that these conditions constitute unusual or extraordinary circumstances peculiar to the subject property and necessitate the current location and orientation of the baseball field, dugouts, and protective netting.

2. *Section 59.7.3.2.E.2.b the special circumstances or conditions are not the result of actions by the applicant;*

The Board finds that the Petitioner is not responsible for the extremely steep slopes on this property or the environmentally sensitive areas that combine to severely limit the available locations for and orientation of the baseball field, accompanying dugouts, and protective netting.

3. *Section 59.7.3.2.E.2.c the requested variance is the minimum necessary to overcome the practical difficulties that full compliance with this Chapter would impose due to the unusual or extraordinary situations or conditions on the property;*

The Board adopts the finding it made in 2014 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. See Exhibit 3(a). The Board further finds that since the minor adjustment to the location of the baseball field was necessitated by efforts to address the topographical and drainage constraints of this property, as described above, and since the proposed protective netting and replacement dugout will be located less than one foot closer to Seven Locks Road than the current structures, such that they will now be located within 18.20 feet of the front lot line whereas they are currently located within 19.25 feet of the front lot line, that the requested variances are the minimum reasonably necessary to overcome the practical difficulties that full compliance with the Zoning Ordinance would entail.

4. *Section 59.7.3.2.E.2.d the variance can be granted without substantial impairment to the intent and integrity of the general plan and the applicable master plan;*

As it had in 2014, 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 variances would allow the replacement of an existing dugout and installation of a new protective netting system that are needed to support an existing element of the school's athletic program and in no way diminish the consistency of this special exception use with the Potomac Subregion Master Plan (2002). In addition, the Board notes that Mr. Streagle testified as an expert that the

requested variance relief can be granted without substantial impairment to the general plan or master plan, and that the Petitioner's Statement makes the same assertion. Accordingly, the Board finds that these variances can be granted without substantial impairment to the intent and integrity of that master plan.

5. *Section 59.7.3.2.E.2.e granting the variance will not be adverse to the use and enjoyment of abutting or confronting properties.*

Based on the Petitioner's Statement that the dugout will be colored to blend into surrounding vegetation, and that the view of the baseball field from Seven Locks Road is obscured by trees, and based on the expert testimony of Mr. Streagle, the Board finds that granting the requested variance relief will not be adverse to the use and enjoyment of abutting or confronting properties. The Board notes that the grant of the requested relief allows less than one foot of additional encroachment towards Seven Locks Road, for a use that is already established in this general location.

In addition, based on the binding testimony of Mr. Lively and Mr. Streagle, and on the evidence of record, the Board finds that the requested administrative modification of the special exception can be granted. Because Case No. CBA-2197-B was approved prior to October 30, 2014, under Section 59-7.7.1.B of the current Zoning Ordinance, this modification request must be reviewed under the standards and procedures in effect on October 29, 2014, unless the applicant requests otherwise. Section 59-G-1.3(c)(1) of the Montgomery County Zoning Ordinance (2004) 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 the proposed modification, to allow the improvements to the existing baseball field discussed herein and in Ms. Lee-Cho's letter of June 5, 2018, and shown on Exhibit 12 in Case No. A-6568 and the other exhibits of record in that case and Case No. CBA-2197-B, including the installation of new dugouts and a new protective netting system, the relocation of the batting tunnel, and the reinstallation of the scoreboard, 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 John H. Pentecost, Chair, seconded by Stanley B. Boyd, with Edwin S. Rosado, Vice Chair, Bruce Goldensohn, and Katherine Freeman in agreement:

**BE IT RESOLVED** by the Board of Appeals for Montgomery County, Maryland that Ms. Lee-Cho's request that the variances and administrative modification be consolidated


before the Board, and that the School be allowed to pay the higher of the two fees, is granted;

**BE IT FURTHER RESOLVED** by the Board of Appeals for Montgomery County, Maryland that requested variance of 11.80 feet from the front lot line, and the variance requested to be permitted to locate accessory structures forward of the rear building line (if needed), are **granted**, subject to the following conditions:

1. The Petitioner is bound by the testimony of its witnesses and by its exhibits of record; and
2. Construction must be completed according to the plans entered in the record of Case No. A-6568 as Exhibit Nos. 4, 5 and 12 (inclusive);

**BE IT FURTHER RESOLVED** by the Board of Appeals for Montgomery County, Maryland that the request to administratively modify this special exception as described herein and in Ms. Lee-Cho's letter of June 5, 2018, and shown on the attachments to that letter and on Exhibit 12 to Case No. A-6568, is granted, and

**BE IT FURTHER 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.

  
John H. Pentecost  
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book  
of the Board of Appeals for  
Montgomery County, Maryland  
this 21st day of June, 2018.

  
Barbara Jay  
Executive Director

**NOTE:**

Regarding the variance:

See Section 59-7.3.2.G.1 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. 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. 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.