

# Brickyard Coalition

*Preserving our Neighborhood*

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BY EMAIL & HAND DELIVERY

December 12, 2011

Honorable Roger Berliner  
President, Montgomery County Council  
100 Maryland Avenue  
Rockville, MD 20850

Dear Mr. Berliner:

One of the most important duties of the Montgomery County Council is to exercise oversight over land use and programs to ensure efficiency and effectiveness as well as full compliance with the law. Consistent with these responsibilities, the umbrella citizens groups for the Brickyard community respectfully request that our County Council take immediate and aggressive action to investigate the Brickyard lease recently granted by the Board of Education (BOE) to the County to be used for private ball fields, such investigation to include, but not be limited to, a public hearing at which all interested parties may provide testimony.

We believe that the County Executive's unilateral actions regarding the Brickyard public property violates the spirit and language of the Potomac Master Plan as well as County, State and Federal laws and regulations. We also believe that unless it acts now, the Council risks ceding important land use authority to the Executive that properly rests with the Council. Not only will this set a dangerous precedent and put all communities in the County at great risk, but it may subject the County to multimillion dollar monetary damages.

This letter will outline the basis for our conclusions. We hope that it will spur the Council to reclaim its proper role in land use decisions, and to stop the Executive from damaging the county's reputation for transparency and openness as well as careful, comprehensive land use deliberation.

## **Statement of Facts**

- On March 23, 2009, the Board of Directors of Montgomery County Soccer, Inc. (MSI) approved the sum of \$350,000 for lobbyists and other professionals to facilitate the securing of land to be used for premium quality fields in private public partnership with local governments.<sup>1</sup>

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<sup>1</sup> MSI Board of Director minutes of March 23, 2009.

- MSI stated that “it should be viewed that this significant expenditure is in place of land acquisition costs, but at a fraction of the cost of what we would otherwise have to spend to secure land.”<sup>2</sup>
- On November 10, 2009, Ike Leggett, Montgomery County Executive, first secretly wrote to the BOE regarding leasing the Brickyard public property for ball fields.<sup>3</sup>
- On December 23, 2009, Patricia O’Neill, then President of BOE, secretly replied to Ike Leggett stating that staff meetings between BOE and the County had been scheduled to discuss the proposed Brickyard lease.<sup>4</sup>
- On January 31, 2010, Montgomery Soccer, Inc. (MSI) states they are “working closely with our professional consultant . . . on a public-private partnership proposal with the county government and MCPS”.<sup>5</sup>
- In March-April of 2010, MSI representatives secretly met with Ike Leggett. MSI states “positive discussions were conducted and points of contact were provided to help MSI continue to pursue future development opportunities.”<sup>6</sup>
- On May 12, 2010 Superintendent Weast sent a confidential memorandum to the BOE members, stating that agreement to lease the Brickyard public property to the County had been reached at a staff level and that “staff will proceed with drafting of a lease and staff is scheduled to discuss this matter during the BOE meeting on June 8, 2010, in closed session.”<sup>7</sup>
- On June 8, 2010, the BOE considers the proposed Brickyard lease in an illegal closed session.<sup>8</sup>
- By June 15, 2010 MSI knew that a deal had been agreed to and stated they are “prepared to develop and submit a bid for soccer field development at GXS and Brickyard when RFP’s are requested by the County.”<sup>9</sup> Yet, the public did not find out that the BOE intended to enter into a lease of the Brickyard Property with the County until March 3, 2011—nine months later.

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<sup>2</sup> MSI Board of Director minutes of March 23, 2009.

<sup>3</sup> Letter of November 10, 2009, from Ike Leggett to Shirley Brandman, President of BOE.

<sup>4</sup> Letter from Patricia O’Neill, President of BOE to Ike Leggett dated December 23, 2009.

<sup>5</sup> MSI Board of Directors Meeting Minutes of January 31, 2010

<sup>6</sup> MSI Executive Committee Minutes of April 13, 2010.

<sup>7</sup> Weast confidential memorandum to the BOE members of May 12, 2010. This memorandum was not made public until June of 2011 after a Maryland Public Information Request.

<sup>8</sup> See Open Meetings Compliance Board Opinion of June 27, 2011. The OMA Board has twice found the Board of Education to be in violation of the Open Meetings Act in regard to the Brickyard property.

<sup>9</sup> MSI Executive Committee Minutes of June 15, 2010

- On March 8, 2011 the BOE voted<sup>10</sup> to lease the property for private ball fields without a public hearing to determine the best use of the property, without competitive bidding, and without advertising the availability of the property.

### **Lack of Advertising or Competitive Bid for Brickyard Public Property**

The BOE, as Trustees of the Brickyard public property, had a fiduciary duty to obtain the best financial return for the BOE consistent with the statutory requirement that the use be for the benefit of the school system.<sup>11</sup> For the past thirty years, the BOE has periodically advertised the availability of this property to the public and leased it through competitive bidding. In contrast, the 10 year lease of the property to the County was negotiated in secret without permitting any other person or group to compete for the property. We believe the BOE had a fiduciary duty to advertise the availability of the Brickyard public property to obtain the best financial terms for the BOE consistent with its statutory duties of an appropriate educational benefit. For example, the BOE could have considered using this property to meet its obligations of the new state *No Child Left Inside* requirement. Making a unilateral and largely secret decision to lease this multimillion dollar property to the County for private ball fields does not meet this requirement and sets a horrible precedent in our County.

This is especially true in light of the fact that the BOE took unprecedented action in changing the land use to a soccer complex without undertaking any evaluation of the range of alternative uses, the educational benefits from them or the harm and damage this project would cause to the Brickyard community. This public property is held for a future middle school; not a commercial soccer complex. This improper change of land use subjects the BOE to legal liability, such as a multimillion dollar damage claim from abutting and community residents for loss of property value and other damages.

While the Coalition believes it was a breach of the Trustees' fiduciary duties to enter into the Brickyard lease without advertising and competitive bidding, it is also clearly a very bad precedent. For example, what public property is next on the BOE list for disposal? How much money is the Council willing to provide BOE to defend their multiple violations of the Open Meetings Act? What other multimillion dollar BOE property is the Council going to permit the BOE to dispose of without competitive bid?

### **Brickyard Lease is a Disguised Surplusing of the Property**

For very important public policy and legal reasons, the State education law only authorizes the BOE to dispose of surplus school property with strict conditions. In particular, state law<sup>12</sup> provides that “[i]f, with the approval of the State Superintendent, a county board [of education] finds that any land, school site, or building no longer is needed for school purposes, it shall inform the county commissioners or county council of the county board's determination under this subparagraph”.

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<sup>10</sup> Two board members voted against the proposed lease and a third voted to delay the vote and then voted in favor of the lease.

<sup>11</sup> Education Article 4-114 requires that school property be used for “the benefit of the school system” and is at the center of the pending appeal to the State Board of Education.

<sup>12</sup> Annotated Code of Maryland, Education Article (“ED”) §4-115(c)(1).

That the BOE determined it no longer needed the Brickyard public property for school purposes is found in the BOE Resolution to lease the property and again in the Brickyard lease. However, the BOE never notified the County Council that the property was no longer needed for school purposes--as required by law. Upon receipt of the above notice, the County Council has 30 days to inform the BOE of the need that will be of benefit to the County. Otherwise, the BOE must make the property available to existing Charter Schools. The BOE also failed to make the property available to existing Charter Schools.

While the Brickyard lease to the County provides for an initial ten year term, it also has a holdover provision that allows the lease to continue in perpetuity, with the right to redeem the property in the future for school purposes with two years notice. Thus, the Brickyard lease is a disposition or surplusing of school property that failed to follow applicable laws and regulations.

The rationale for the surplusing requirement is to ensure that public property is not disposed of by the Board of Education without the County Council being given a significant role in its future use. The novel and unprecedented lease arrangement dreamed up by the County Executive is an attempt to circumvent that requirement. The County Council should investigate these actions to correct this effort to usurp its authority to ensure that such land use decisions are made in an accountable fashion as required by law.

### **Proposed Use of Brickyard Public Property Not in Conformance with Master Plan**

The County Executive and his staff have claimed that the terms of the 2002 Potomac Master Plan support their unilateral decision to attempt to have soccer fields built on the Brickyard Middle School site. It is clear from the plain language and history of the Master Plan, this is simply false. If the County Executive is successful in making this indefensible end run around the Master Plan, then no county master plan is safe from being circumvented by the County.

The local community provided a significant amount of testimony in 2001 pointing out that this 20 acre site was not appropriate for County recreational park status because it was on a narrow local road in the middle of a quiet community with no access to public transportation. Subsequently, the final approved and adopted *2002 Potomac Subregion Master Plan* recognized these facts, and states "All school sites not otherwise recommended in this Plan for environmental conservation should be considered for other public uses, including park land, if they are declared as surplus." The plan goes on to note that the Brickyard site could be developed as a local park with ball fields, and that the appropriate use should be determined based on an evaluation of other uses identified in the plan."

It is important to note that the term "local park" has a very specific meaning in Montgomery County: it is defined as a mixed use park serving local needs, that could include multiple elements such as a playground, open fields, basketball and/or tennis courts, ball field, nature trail, and picnic facilities, but is not intended to support only multiple ball fields.

The Master Plan clearly requires an evaluation process to determine the best use of the Brickyard site if the site is declared surplus. The County Executive is attempting to avoid the express terms and conditions of the Master Plan by leasing the site from the Board of Education, and then unilaterally deciding that soccer fields are the best use.

By encouraging the BOE to bypass the surplusing requirement, the County Executive has sought to bring about a change of land use that contradicts the outcome of the 2001 master planning process and the Master Plan itself. This is just plain wrong, and makes a sham of the entire master plan process. A Council investigation is needed to ensure compliance with the Master Plan.

### **ICB versus Private Administration of Ball Fields**

The BOE has argued that MD. Education Article 7-108 provides legal authority for the BOE to enter into the Brickyard lease.<sup>13</sup> If this BOE argument is valid, then the proposed use is governed by Montgomery County's School Facilities Utilization Act, as set out in Chapter 44 of the County Code. As such, it is clear that the BOE lease to the County skipped various steps that Chapter 44 requires for "activities conducted under this Article." These include:

- the Interagency Coordinating Board (ICB) did not "review and propose modifications" to the contract "negotiated between the County and Montgomery County Public Schools" (Sec 44-3)
- the Director of the Community Use of Public Facilities (CUPF) was not asked to "administer the programs and activities" that would be carried out pursuant to the lease (Sec 44-4(a))
- the Director was not asked to "schedule the use of school facilities (Sec 44-4(e)(2))
- the Director was not asked to "generally coordinate logistical, financial and related aspects" of the use "provided in contractual or other arrangements between the county government and the board of education" (Sec 44-4(e)(4)).
- the facilities will not be open to the public as required by Article 7-108 and Chapter 44.

The net effect of the Brickyard lease is to convert the BOE public property to private use. If it is determined that BOE has the legal ability to enter into the Brickyard lease, then it follows that the ball fields must be open to the public as required by Ed Article 7-108 and the fields administered by the ICB.

### **Equal Access Provisions**

When the Board of Education voted to lease the Brickyard public property to the County for use as private ball fields for the benefit of MSI or some other soccer entity, the BOE failed to consider possible use by other equally qualified youth groups, such as the Girl Scouts, the Boy Scouts, the Future Farmers of America, Boy's and Girl's Club, Big Brothers and Sisters, the Little League, et cetera. While this decision by the BOE is arbitrary and unfair, it also opens a huge potential legal liability for the BOE. Allowing a community group to use the property for soccer fields creates a limited and/or open forum and the BOE must then comply with a number of Federal education statutes and regulations.

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<sup>13</sup> The characterization of the Brickyard Road site as a school facility under 7-108 is contested by those appealing the BOE decision.

The Boy Scouts of America Equal Access<sup>14</sup> Act (“Act”) and other similar regulations require public schools to provide a local group/troop/club officially affiliated with the Boy Scouts or the other covered groups listed above equal access to benefits and services on pain of losing federal funding. The access must be “on terms that are no less favorable than the most favorable terms provided to one or more outside youth or community groups.” The BOE is a covered entity pursuant to the Act. While the Act recognizes that BOE may not always have the independent authority to make decisions concerning the use of school premises or facilities and that other entities may be responsible for making those decisions; the BOE is still responsible for compliance with the Act. Covered entities must comply with the equal access and nondiscrimination requirements notwithstanding any other provision of law, including State or local law.

If the BOE is found to have violated this statute, it could lead to the loss of all Federal funding for the Montgomery County Public schools. That appears to us to be a huge unacceptable risk for the students and taxpayers of Montgomery County, particularly in exchange for just \$1500 of income per year. The Coalition has been advised that a request for equal access to the Brickyard public property on terms equal to that of the County will be forthcoming at the proper time from one or more of these covered groups. It would seem to us that the only fair way for the BOE to meet this requirement is to equally divide the Brickyard public property among all the interested community groups with each paying their pro rata yearly rental.

Additionally, Congress passed the Support Our Scouts Act of 2005 which makes clear that the Congress regards the Boy Scouts and the above organizations to be youth organizations that should be treated the same as any other youth organization (such as MSI) by the Montgomery County government. The Support Our Scouts Act also prohibits State or local governments that receive Federal Community Development Block Grant (“CDBG”) funds from discriminating against Boy Scouts in government forums or denying Boy Scouts access to facilities equal to that provided other groups. If a State or local government fails to comply, HUD may terminate the CDBG funds the County receives. A violation of this statute puts the millions of dollars that Montgomery County receives from HUD at risk.

### **Conclusion**

The facts outlined above demonstrate that the County Executive secretly encouraged the BOE into an unlawful arrangement with potentially severe adverse financial consequences to the County if the arrangement is allowed to stand. While the BOE has been found to have repeatedly violated the Open Meetings Act regarding this specific matter, it is clear from the correspondence beginning with Leggett’s letter of November 9, 2009, that the County Executive was the driving force behind the decision to keep this whole process secret from the County Council and the citizens of the County. This raises concerns about the transparency of County operations that the Council needs to investigate and address.

The rationale for the surplusing requirement is to ensure that public school property is not disposed of by the Board of Education without the input and oversight of the County Council to ensure its future use in conformance with the Master Plan and other applicable laws, rules and

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<sup>14</sup> Complete list of covered organizations is found in US Code, Title 36, Subtitle II, Part B, and includes, but not limited to, Big Brothers, Big Sisters, Boy Scouts, Boys & Girls Clubs of America, Future Farmers of America, Girl Scouts & Little League baseball.

regulations. The County Executive's and BOE's secret planning and lease arrangement dreamed up by the County Executive is no more than an attempt to circumvent those requirements.

Another troubling fact is the disclosed inside knowledge of MSI, a private corporation, of each step taken over two years by the County and the BOE in the secret negotiations regarding the Brickyard public property. While the County Executive and the BOE went to great lengths to make sure that the County Council and the County citizens had no knowledge of their secret planning, a private organization was provided with opportunities for input and kept informed during the otherwise secret process. Taken together with other facts, this leads to the inescapable conclusion that the entire process for the Brickyard public property may have been improperly influenced and tainted.

The County Council should investigate to correct this blatant effort to bypass its role in ensuring that such land use decisions are made in a public and accountable fashion for the reasons set forth herein. The County Council should not allow any private organization, corporation or group to convert a multimillion dollar public property to their own private use through a nonpublic, secret process designed to ensure that the Council and citizens had no knowledge or input.

The citizens of Montgomery County deserve to know what role was played in this process by the lobbying expenditure commissioned by the leadership of MSI with the avowed purpose of saving on land acquisition costs. The citizens of Montgomery County deserve to know whether there have been breaches of applicable ethical rules by any of the public officials involved. And the citizens of Montgomery County deserve to have their voice -- and that of their County Council -- in sensitive land use decisions respected. For all these reasons, an immediate and thorough investigation by the County Council is imperative.

Thank you for your consideration of this matter. We will be contacting your offices to schedule a meeting to discuss this letter and these issues in more detail. In the meantime, please feel free to contact any of the signers below by email at [brickyardcoalition@gmail.com](mailto:brickyardcoalition@gmail.com) if you have questions or suggestions.

Sincerely,

*Curtis B. Wore*

Brickyard Coalition

*Ginny Barnes*

West Montgomery Citizens Association, Inc.

*Keith Williams*

Civic Association of River Falls

CC: Montgomery County Council Members