

KENTUCKY DEPARTMENT OF EDUCATION

STAFF NOTE

Action/Consent Item:

Floyd County Forbearance Agreement Waiver (Attachments under separate cover)

Applicable Statute and Regulation:

KRS 156.160, 162.010, and 702 KAR 4:050

Action Question:

At the request of the Floyd County Board of Education, should the Kentucky Board of Education (KBE) waive the KBE regulatory requirement for forbearance agreements regarding the mineral rights associated with the surplus Kentucky Transportation Cabinet (KYTC) property adjoining the Stanley Allen property located on the north side of KY Route 680 in Floyd County, KY for the site of the proposed new high school?

History/Background:

Existing Policy. The current District Facility Plan, approved by the KBE in June 2011, notes in Priority 1.b.1 (New construction to replace inadequate spaces; expand existing or new buildings for educational purposes; consolidate schools; or replace deteriorated facilities) construction of a new 750-student high school located on a new site to be determined to accommodate the students from the South Floyd and Allen Central High Schools. The district has acquired the Stanley Allen property of approximately 153 acres with about 28 usable acres.

The district desires to acquire an adjacent site of approximately 16.73 acres. This tract has state roadway approved access. It was previously acquired by the Kentucky Transportation Cabinet (KYTC) for the construction of improvements to KY Route 680 and is now surplus to KYTC needs. This site provides access to the Stanley Allen property, which is the primary site for the new high school. The proposed site development plan indicates that the site will continue to provide this access and will not be used for the construction of buildings.

702 KAR 4:050 requires that local boards obtain fee simple title for school property. If mineral rights are not acquired and fee simple title is not available, forbearance agreements are required to ensure surface support; however, in general, when acquiring the right-of-way, KYTC only acquires surface title. For the owner of the mineral rights to conduct operations to remove the minerals requires an agreement with the owner of the surface rights to do so.

The district maintains that the extraction of minerals cannot be accomplished without the district's approval as the owner of the surface rights. A report from a mining consultant has been provided stating that there are no mineable merchantable coal reserves located on the property. The district's legal counsel also has indicated that forbearance agreements related to the oil and gas rights can be obtained; however, a lengthy process will be needed to acquire them. For construction of the new high school to proceed as scheduled, work on both properties needs to proceed concurrently.

KRS 156.160(2)(a) gives the state board the legal authority to grant a waiver from an existing regulation, if one of the following criteria is met:

The Kentucky Board of Education may approve the request when the school district or school has demonstrated circumstances that may include but are not limited to the following:

1. An alternative approach will achieve the same result required by the administrative regulation;
2. Implementation of the administrative regulation will cause a hardship on the school district or school or jeopardize the continuation or development of programs; or
3. There is a finding of good cause for the waiver.

Staff Recommendation and Rationale:

Based on the information provided by the local school district and local board counsel, KDE staff recommends approval by the KBE of the waiver request regarding forbearance agreements, based upon KRS 156.160(2)(a). Neither the KYTC nor the district will approve the use of the surface for the extraction of the minerals, which eliminates the immediate need for forbearance agreements; furthermore, an expert opinion has indicated that coal reserves are not mineable. The district is in the process of submitting other documentation required by 702 KAR 4:050 with the exception of the forbearance agreements. Forbearance agreements could be negotiated related to oil and gas; however, approval of the waiver request will allow construction to proceed.

Impact on Getting to Proficiency:

Good school facilities are a necessary component for academic success. A school's physical environment has an impact on student achievement, and the attitude of teachers and staff. The construction of the new high school will improve the instructional environment and favorably affect district progress toward reaching proficiency.

Contact Person:

Hiren Desai, Associate Commissioner
Office of Administration and Support
502/564-1976
Hiren.Desai@education.ky.gov



Kay Kennedy, Director
Division of District Support
502/564-3930
Kay.Kennedy@education.ky.gov

Commissioner of Education

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