

M E M O R A N D U M



TO: Frank W. King, Chairman, Board of Building Standards

FROM: Rodney B. Teague, Assistant Attorney General

DATE: October 30, 1979

SUBJECT: Oral Request For Informal Opinion Made At The Board Meeting
Of October 5, 1979

ISSUE PRESENTED

Can the Board of Building Standards waive its statutory jurisdiction over three prototype one-family industrialized units and permit such units to be erected without a rule promulgated by the Board determining such industrialized units are in compliance with the standards set by R.C. 3781.06?

FACTUAL BACKGROUND

The writer understands from the discussion at the Board's conference meeting the following facts. The industrialized units are not now authorized to be constructed in Ohio by a rule of this Board. Construction plans for these industrialized units have not been reviewed and investigated by the Board's staff or the Department of Industrial Relations. The industrialized units are experimental and are to be used to evaluate certain energy saving designs in an Ohio winter. The manufacturer desires to install the industrialized units prior to the onset of the 1979-1980 winter. The industrialized units will not be occupied by families. The manufacturer has requested the Board of Building Standards to waive the requirement of R.C. 3781.10 and 3781.12 that industrialized units be approved by rule.

STATUTORY BACKGROUND

R.C. 3781.10(A) states in pertinent part:

The Board of Building Standards shall:

(A) Formulate and adopt rules governing the erection, construction, repair, alteration... of all buildings or classes of buildings specified in Section 3781.06 of the Revised Code... the construction of industrialized units, the installation of equipment and the

standards or requirements for materials to be used therewith. ...The rules shall be the lawfull minimum requirements specified for such buildings or industrialized units, ...the rules shall be acceptable as complete lawful alternatives to the requirements specified for such buildings or industrialized units in any section of the Revised Code. ...

R.C. 3781.10(C) states in part:

Determine by rule on its own motion or on application made through sections 3781.12... of the Revised Code, and after thorough testing and evaluation that any particular fixture, device, material, process of manufacture, manufactured unit or component, method of manufacture, systems or method of construction which is described in such section of the Revised Code is permitted by law... and no department, officer, board, or commision of the state other than the board of building standards or the board of building appeals shall permit the use of any fixture, device, material, method of manufacture, newly designed product, system, or method of construction at variance with what is described in any rule adopted or authorization issued by the board of building standards or in any section of the Revised Code. ...

R.C. 3781.12 states in part:

Any person may petition the board of building standards to adopt ... a rule ... pursuant to Section 3781.10 of the Revised Code, or to permit the use of any particular fixture, device, material, system, method of manufacture, product of manufacturing process, or method or manner of construction or installation which complies with the performance standards adopted pursuant to Section 3781.11 of the Revised Code, as regards to the purposes declared in Section 3781.06 of the Revised Code, of fixtures, devices, materials, systems, or methods of construction, manufacture or installation described in any section of the Revised Code relating to said purposes, where the use is permitted by law. Upon petition the board shall cause to be conducted such testing and evaluation as the board may determine desirable of any fixture, device, material, system, assembly or product of a manufacturing process, or method or manner of construction or installation sought to be used under the

rules... adopted by the board by virtue of Section 3781.10 of the Revised Code. ...The issuance of the authorization for the use of the materials or assemblages described in the petition shall constitute approval for their use anywhere in Ohio. ...

R.C. 3781.11 states in part:

The rules ... of the board of building standards shall:

(A) Provide uniform minimum standards and requirements for construction and construction materials, including the construction of industrialized units, to make buildings safe and sanitary as defined in Section 3781.06 of the Revised Code; ...

(C) Permit to the fullest extent feasible, the use of materials and technical methods, devices and improvements, including the use of industrialized units which tend to reduce the cost of construction and erection without affecting minimum requirements for the health, safety, and security for the occupants or users of buildings or industrialized units and without preferential treatment of types or classes of materials or products or methods of construction; ...

The construction, alteration, erection, and the repair of buildings including industrialized units, and the materials and devices of any kind used in connection therewith and the heating and ventilating thereof and the plumbing and electrical wiring therein shall conform to the statutes of this state or the rules... adopted and promulgated by the board of building standards...

DISCUSSION

The above statutory scheme requires that an industrialized unit, (assemblage), be investigated and examined by the Board of Building Standards. The purpose of the investigation to determine whether the industrialized unit meets the minimum requirements of the rules of the Board, (Ohio Basic Building Code). These minimum requirements are designed to insure the industrialized unit is safe and sanitary as those terms are defined in R.C. 3781.06 for use in Ohio.

The manufacturer is asking the Board to waive the statutorily required determination that these particular industrialized units

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are safe and sanitary for use in Ohio. In R.C. 3781.10(C) the Board can permit a variance from its rules. This variance would be a waiver. But, the variance could only come after "...thorough testing and evaluation...having regard to its safe and sanitary erection, use..." Thus a variance to a specific rule of the Board can be granted after an examination reveals the industrialized unit does not conform to the rule, but the nonconformance of the industrialized unit does not impair its safe and sanitary use.

While the Board can waive the application of a specific rule in a particular case, it cannot waive the statute requiring the Board to examine the industrialized unit to determine if it should waive the rule.

Heid v. Hartline (1946), 79 Ohio App. 323 is an analogous case in which an administrative body attempted to waive a statutory requirement for the exercise of its power. The court deciding the matter at 79 Ohio App. 326 held:

When such a word, [shall], is employed in the granting of the power and authority to an administrative body for the doing of the certain acts, and the rights and interest of the public hinge upon the performance by that body of certain directed requirements, compliance with such legislative direction is mandatory. Performance of such legislative requirements is in fact the foundation of such body's power and authority to exercise jurisdiction over the subject matter on which the body presumes to act. If this were not true then such body might as well be given carte blanche authority to exercise the power delegated in such fashion as it may deem expedient. This the General Assembly did not do.

Any power the Board has to waive requirements comes from R.C. 3781.10(C), supra. In that statute the General Assembly granted only the ability to waive the application of a rule. The General Assembly did not grant to this Board the power to waive application of a statute to a particular industrialized unit.

CONCLUSION

It is the writers opinion, and the Board of Building Standards through its chairman is advised that the General Assembly did not

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grant to the Board of Building Standards the power to waive the submittal of an industrialized unit to the Board by appropriate means such as plans, etc. for investigation and examination to determine if an industrialized unit met the minimum safety and sanitation standards stated in R.C. 3781.06 when the General Assembly enacted R.C. 3781.10(C).

Further, the Board has the power under R.C. 3781.10(C) to grant a variance to a rule of the Board after investigation and examination reveals that a particular industrialized unit though not in literal compliance with a rule of the Board meets the minimum safety and sanitation standards stated in R.C. 3781.06.

Finally, you are advised the above opinion is solely an opinion of the writer and does not reflect an opinion of the Attorney General or his Office.

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