

BBS MEMO

Ohio Board of Building Standards

9 January 1993

2323 West Fifth Ave., Box 825, Columbus, Ohio 43216

Middleburg Heights vs Board of Building Standards

When discussing the Middleburg Heights case, now decided by the Ohio Supreme Court, several important factors must be considered. Some of the ramifications of and the cost for the citizens of Ohio are listed below:

1. The building codes are in place to assure the minimum conditions for safety and sanitation of buildings for the benefit of the public. This is accomplished by the compliance with building codes by any owner who wishes to build a building. Setting the "height of the hurdle" over which the owner must successfully jump to maintain adequate safety and sanitation is the question raised by the Middleburg Heights case. Middleburg Heights believes that it should be allowed to set the "height". The Board of Building Standard's concern was that if left to each local political subdivision, owners who wish to construct buildings would have to adjust their planning, design, and construction to accommodate multiple, often contradictory and inconsistent requirements. The costs of making these "adjustments" would be passed along to the people using these buildings. The Board believed that the most rational, safe, and effective approach was to maintain a uniform standard enforced throughout the state with an appeals method and a code change process built in. After stating in sections 3781.01¹, 3781.11, and other sections in the Revised Code that local ordinances are permitted which do not conflict with the OBBC, the Revised Code also required that a code change method be in place to provide a mechanism for the concerns of individuals and authorities to become part of the code. This provision is important because it assures the citizens of Ohio that no region of the state has a code provision from which the rest of the state would benefit nor another part of the state would be handicapped by provisions that may be unwise, driven by special interests, or are arbitrary.

2. Most local political subdivisions can not afford to maintain a pool of expertise on a par with the members and staff of Board of Building Standards² (BBS) to provide appropriate and state-of-the-art standards for safety and sanitation. To take advantage of additional expertise, the BBS, after public hearing assigning an effective date in July of 1979, voted to adopt a model code and to become part of a national model code process. Building Officials and Code Administrators International (BOCA), a nonprofit organization, develops and maintains the BOCA National Building Code, one of three model code organizations in the U.S. The choice was to gain access to historical and current national data on fire losses, structural failures, environmental issues, etc. By working with codes developed at a national level, Ohio shares information regarding solutions to safety and health/welfare problems with other states and has the benefit of accessing national fire protection expertise and new material development data.

The model code development process considers current statistics and past research using experts and committees to make recommendations and correlate proposed changes. This correlation is extremely important to eliminate conflicting provisions, provisions that may be cumulative, incompatible or inconsistent with the appropriate level of protection for the hazard expected.

3. Some Middleburg Heights ordinance provisions appear to be inappropriate and fail to correlate with other elements of the code. It also appears that no statistical, factual, or substantive data was ever presented to support why "The City had adopted ordinances to enhance local fire safety by establishing standards for the construction of garden appartments that are stricter than those set forth in the Ohio Basic Building Code." If there was a need for "enhancement" the citizens of Ohio should benefit from Middleburg Heights' insight into this need and the requisite code change should have been submitted, examined through the public hearing process, and if found to have merit, included in the OBBC. A review of the Middleburg Heights ordinance reveals that:

1. The building code establishes the requirements for fire protection of structural and other building elements (walls, floors/ceilings, exterior walls, openings, etc.) for necessary fire resistance. The fire hazard consistent with the building's use is considered in conjunction with performance of the construction materials, which have been tested during actual fires and fire tests. Middleburg Heights specifies a building material (masonry) which prohibits the use of other materials which could achieve

the required protection when exposed to fire. This is a beneficial ordinance for producers/suppliers of that material in Middleburg Heights but an owner has no choice of materials to meet the requirement when building in Middleburg Heights.

7. The ordinance requires that all openings shall have opening protectives (rated, automatic closing doors, fire shutters, etc.). This restrictive requirement is reserved in the OBBC for doors and windows located in firewalls (see OAC §4101:2-9-09, §909.3) and exterior walls in close proximity to other properties (see OAC §4101:2-9-06, Table 906.3, and OAC §4101:2-9-07).
- III. The fire protection, exit requirements, allowable building size, and construction material requirements established in the OBBC are based upon how the building is intended to be used. How it is to be used greatly affects how it must be designed to maintain a consistent level of safety for those occupying it. Buildings in which the primary occupants cannot be expected to respond to emergency situations are required by the OBBC to comply with provisions that account for this limitation. The High Hazard Use Group (OAC §4101:2-3-06) and Institutional Use Groups (I-2 hospitals and I-3 prisons, OAC §4101:2-3-07) are the only uses where, for instance, unprotected wood frame construction cannot be used to construct a building (OAC §4101:2-5-01, Table 510).

The nationally accepted practice of code development is based upon the associated hazard or levels of protection for those occupants most vulnerable. The Middleburg Heights' ordinance applies only to motels and apartment buildings and indicates that garages and other "high fire hazard occupancies" will be constructed in accordance with the OBBC. This means that the ordinance establishes code requirements more restrictive for hotels and apartments than those for hospitals, child day care centers, schools, night clubs, nursing homes, and theaters.

The cost for these additional requirements is either passed along to those who will use or to those who own the structure. The possibility also exists that the structure will simply not be built or it may be built in another less restrictive jurisdiction. Along with a project go the service potentially offered and the jobs it could provide for permanent employment, maintenance work, and construction. Higher costs or loss of services and jobs is the legacy of arbitrary and inconsistent building code requirements.

- IV. The ordinance may be the result of inadequate research, lack of code knowledge/concepts, or limited exposure to fire performance and fire history data. At best, it distorts deliberate and effective criteria for code development under the proposition that hotel, motel, and apartment building occupants need special protection beyond those in hospitals, child day care centers, schools, nursing homes, and theaters.

4. Middleburg Heights did not use the code change process built into the OBBC nor the code change process at the national level through BOCA for which it would be required to document and support the specific risk to life and safety it was trying to address.

Following the Supreme Court decision, some questions arise which impact upon the methods and means of code enforcement in Ohio. Hereafter the only single code enforced statewide may be in certified counties, townships, and non-certified areas. The functions of the Board as outlined in section 3781.10 of the Ohio Revised Code will not change. However, there are questions that arise:

Who will be the body charged with determining whether or not a local ordinance is more restrictive than the OBBC? The courts? Will there be a construction technology court to allow someone to make informed decisions? Is it possible for any ordinance to be considered "more restrictive" if arbitrary requirements are imposed which lack statistical evidence based on sound structural or fire protection principles ?

How will appeals be made and to what standard will they be decided? The Board of Building Appeals can grant variance to the OBBC not local ordinances "further and additional" to the OBBC. Who will correlate the differences between local ordinance and the OBBC to assure the Appeals Board that they are not acting in contradiction to "more restrictive" local requirements?

An interesting ramification of this decision is its impact on the use of industrialized units (IU) in Ohio. Because the Supreme Court held the Eastlake decision was correct and that the Revised Code requires their acceptance anywhere in Ohio, a political subdivision could not require that an IU be built to any other standard than the

than the OBBC. It seems that there is an apparent disadvantage for "stick built" construction if it must be built in compliance with the OBBC **and** any "more restrictive" local code requirements while an IU need only be built in compliance with the OBBC. Will contractors and owners feel it unfair that an apartment or motel built of industrialized units approved under the OBBC is acceptable in Middleburg Heights but site built construction must be built to "more restrictive" standards?

The Ohio Revised Code requires the certified individuals to complete not less than thirty hours of continuing building code education. To what standards will continuing education be conducted? The Board cannot grant credit for continuing education covering anything other than the OBBC.

The decision deals only with municipalities. Counties and townships are subdivisions of state government. How will certified county and township building departments with contracts for inspection services in various municipalities enforce the "more restrictive" municipal requirements while permitted only to enforce the OBBC alone outside those municipalities. How will adjudication orders be written?

If there is no forum for hearing the justifications for these "more restrictive" code provisions, could these provisions be used to discriminate against certain types of construction? Is it "more restrictive" or "less restrictive" to exclude new materials, methods, and systems? Could provisions benefit one party or group over another or one material over another? Can a "more restrictive" provision be changed from administration to administration or as the make-up of an administrative body changes? Who will monitor these changes and impacts? Will the influence of special interests be less felt on a local level ?

Does this decision add to the momentum to provide a uniform national building code developed by the federal government? It has already happened with manufactured housing, safety glazing, flood plain construction, and accessibility (ADA and FHAA) issues. The federal government has enacted laws that preempt state and local law. The local political subdivision, and ultimately its citizens, could then lose the appeals/change process it previously had under a uniform state code based upon one of the three model codes modified to conform to Ohio's law and needs.

Will Ohio be at a disadvantage when surrounding states maintain uniform building codes but Ohio has code revisions that vary from municipality to municipality?

The Board has been charged by law with the responsibility to:

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 the health, safety, and security of 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..." Section 3781.11(A)(3) ORC

The Board will continue to carry out this charge but the code will become a uniform minimum only. Decisions about additional requirements in excess of those minimums are to be left up to diverse groups or individuals who may never have participated in the code development process, may not have the technical training, or may never have read the building code to understand the reason, purpose, and interrelationship of its provisions.

We are not certain how these and other questions will be answered. A municipality's powers are now greatly expanded. The Supreme Court has changed the ground rules and we wait to see just what impact the decision will have. We trust, however, that there will not be a rush to subvert the system that has been developed since the almost unanimous testimony was heard in 1978 supporting the Board's adoption of a uniformly enforced model code.

¹ Section 3781.01 of the Revised Code states that, "Chapters 3781. and 3791. of the Revised Code do not prevent the legislative authority of a municipal corporation from making further and additional regulation, not in conflict with such chapters or with the rules and regulations of the board of building standards."

² The legislature required the board be composed of two architects, two engineers, one attorney, one fire service representative (our current chairman), one general contractor, one public member, one member representing industrialized unit manufacturers, one member from the Bureau of Workers Compensation, one member from the Department of Education, and one sanitary engineer from the Department of Health.