

MEMORANDUM OF LAW

SUBJECT: The authority of the state and local fire code to require existing building to be brought up to current fire and building code standards.

(A) THE PROVISIONS OF CHAPTERS 3781 AND 3791 OF THE REVISED CODE AND THE RULES AND REGULATIONS OF THE BOARD OF BUILDING STANDARDS SUPERSEDE CONFLICTING REQUIREMENTS OF THE STATE FIRE MARSHAL, COUNTIES, TOWNSHIPS, AND MUNICIPAL CORPORATIONS.

When Chapters 3781 and 3791 were enacted in 1955, the Ohio General Assembly recognized the possibility of conflict between the rules and regulations adopted by the Board of Building Standards to regulate the construction of buildings and related rules adopted by other state agencies and units of local government. To insure that the Board of Building Standards rules would be paramount over the others, the legislature adopted Sections 3781.11 and 3781.01 R.C. Section 3781.11 provided in part that:

The rules and regulations of the board of building standards shall supersede and govern any order, standard, rule or regulation of the department of commerce, division of fire marshal, the department of industrial relations and the division of workshops and factories therein, and the department of health, and counties and townships in all cases where such orders, standards, rules or regulations are in conflict with the rules and regulations of the board of building standards.

Likewise, Section 3781.01 R.C. provided that:

Chapters 3781. and 3791 of the Revised Code do not prevent the legislative authority of a municipal corporation from making further and additional

regulations, not in conflict with such chapters or with the rules and regulations of the board of building standards.

Together, Sections 3781.11 and 3781.01 R.C. clearly establish that the Board of Building Standards' rules are controlling when those rules conflict with rules, ordinances or resolutions adopted by another state agency, municipal corporation, county, or township.

Additionally, several courts have considered the issue of whether the rules of the Board of Building Standards supersede and govern those of the State Fire Marshal and local fire departments. In In re Milcrest Nursing Home, 59 Ohio App. 2d 116 (1978), the Court of Appeals for Union County held that the requirements by the Board of Building Standards that sprinkler systems be installed throughout nursing homes prevailed over similar requirements of the State Fire Marshal. The appellee, Milcrest Nursing Home, had its license to operate a nursing home revoked by the Director of Health because it violated Revised Code Section 3721.071. That section provided that the State Fire Marshal could adopt regulations pertaining to fire safety in homes which would augment fire safety regulations adopted by the Board of Building Standards and the Public Health Council. The court found that the Board of Building Standards had adopted uniform minimum standards by requiring that "a sprinkler system shall be installed and maintained throughout all nursing and rest homes," and that the State Fire Marshal had adopted requirements inconsistent with those of the Board. The court ruled that these apparent inconsistencies were resolved by state statutes, specifically Sections 3721.03 and 3781.11 R.C. After quoting Section 3781.11, the court continued:

Consequently, if there is a conflict between the regulation of the fire marshal with reference to installation of sprinkler systems, whatever those regulations happen to be, and the regulation of the Board of Building Standards that a "springler (sic) system shall be installed and maintained throughout all

nursing and rest homes," the regulation of the Board of Building Standards governs.

A similar decision was rendered by the Mahoning County Court of Common Pleas in Austintown Motel v. Ricker, (unreported 81CV 165, April 2, 1981). The plaintiff, Austintown Motel, had requested a mandatory injunction to require Roy M. Ricker, Fire Chief of the Austintown Township Fire Department, to issue a certificate of occupancy for motel units owned by plaintiff. Chief Ricker had refused to issue the occupancy permit on the basis that ABS plastic pipe installed in the units was a fire hazard. Plaintiffs had complied with the rules of the Ohio Board of Building Standards in the construction of their units, and Rule 4101:2-51-05 specifically permitted the use of ABS plastic pipe as an approved building material. The court ruled in favor of plaintiff and granted an injunction reasoning that:

Local authorities may enact police, sanitary and similar regulations which are not in conflict with general laws. R.C. Chapter 3781 and Chapter 3791 are general laws of the State of Ohio, and the Ohio State Building Code is an Ohio police regulation. Niehaus v. State, Ex Rel. Board of Education (1924), 111 O.S. 47; Bogen v. Clemmer (1932) 125 O.S. 186. Thus, the trustees and fire chief of Austintown Township are without power to adopt a building regulation which is in conflict with Chapter 3781 and Chapter 3791 and the Ohio State Building Code.

The court then applied the following test to determine if the township fire code provision was in conflict with general law:

...the test is whether the regulation permits or licenses that which the law forbids and vice versa. Lorain v. Thomasic (1979) 59 Ohio St. 2d 1; Village of Struthers v. Sokol (1923), 108 Ohio St. 263. In case of conflict, the rules and regulations of the Board of Building Standards shall prevail. R.C. 3781.11(D).

(Emphasis added)

The General Assembly and courts of Ohio have clearly determined that the rules of the Board of Building Standards govern when conflict arises between those rules and the rules and orders of other state and local governmental units.

(B) THE PROVISIONS OF THE OHIO BASIC BUILDING CODE MAY NOT BE RETROACTIVELY APPLIED TO EXISTING BUILDINGS UNLESS THE APPROPRIATE BUILDING OFFICIAL HAS DETERMINED THAT THERE IS A SERIOUS HEALTH OR SAFETY HAZARD.

In 1955, the Ohio General Assembly provided in two sections of the Revised Code that existing buildings could not be made to comply with new requirements of the state building code. Section 3781.12 R.C. provides that:

..No such rule, regulation, amendment, or annulment shall apply to any building the plans or drawings, specifications, and data of which have been approved prior to the time such rule, regulation, amendment, or annulment takes effect.

In 1979, the General Assembly amended Section 3791.04 R.C. which establishes a framework for the submission of plans for building construction. In amending this section, the legislature chose to retain language that showed that it was opposed to the retroactive application of building code provisions adopted pursuant to Chapters 3781 and 3791 R.C. The third paragraph of Section 3791.04 provides in part that:

...The board of building standards or the legislative authority of a municipal corporation, township, or county may adopt rules to provide for the approval by the department having jurisdiction of the plans for construction of a foundation or any other part of a building or structure before the complete plans and

specifications for the entire building or structure have been submitted. When any plans are approved by the department having jurisdiction, the structure and every particular thereof represented by those plans and disclosed therein shall, in the absence of fraud or a serious safety or sanitation hazard, be conclusively presumed to comply with Chapters 3781. and 3791. of the Revised Code and any rule issued pursuant thereto, if constructed, altered, or repaired in accordance with those plans and any such rule in effect at the time of approval. (Emphasis added)

The Board of Building Standards has adhered to the legislative intent by adopting Rules 4101:2-1-09(D) and 4101:2-1-13(A). Rule 4101:2-1-09 provides that "The OBBC applies to all buildings except as follows:"

(D) Buildings constructed in accordance with plans which have been approved prior to the effective date of OBBC;

Additionally, Paragraph (A) of Rule 4101:2-1-13 reflects the legislative intent to prohibit retroactive application of building code requirements by providing that:

Building and building service equipment shall be maintained so as to comply with OBBC, except that when a serious hazard does not exist, no change in construction and no additional facilities are required except as may be made necessary by a change of use under rule 4101:2-1-11 of the Administrative Code.

The Board has made a consistent effort since 1955 to adopt rules that do not regulate existing buildings unless there is a change of use and occupancy or the development of a serious health and safety hazard.

(C) PROVISIONS OF THE OHIO FIRE CODE RELATING TO FIRE

PROTECTION AND BUILDING SERVICE EQUIPMENT CONFLICT WITH
THE OHIO BASIC BUILDING CODE AND ARE NOT ENFORCEABLE
BY EITHER THE STATE MARSHAL OR LOCAL FIRE SERVICES.

The General Assembly provided in Section 3781.03 R.C. that

The fire marshal or fire chief of municipal corporations having fire departments or the fire chief of townships having fire departments shall enforce all provisions of Chapters 3781. and 3791. of the Revised Code relating to fire prevention. (Emphasis added)

By enacting that provision, the legislature intended to limit the jurisdiction of the state fire marshal and the local fire departments to preventive measures touching on safety operations in buildings. These preventive measures included the maintenance of fire-detection, fire-alarm, and fire-extinguishing equipment and systems, exit facilities, opening protectives, safety devices, good housekeeping practices and fire drills. Additionally, when the General Assembly authorized the State Fire Marshal's office to adopt a state fire code regulating all aspects of fire safety, it specifically enacted Section 3737.84(A)(2) providing that

The state fire code adopted pursuant to sections 3737.82 and 3737.83 of the Revised Code shall not contain any provision:

(2) Relating to structural building requirements covered by the Ohio building code;

The legislature by enacting Sections 3781.03 and 3737.84 clearly showed its preference for an administrative regulatory scheme contained in rules adopted by the Board of Building Standards to govern building construction in Ohio.

The State Fire Marshal's adoption of Rule 1301:7-7-04(G) of the Ohio Administrative Code (Ohio Fire Code Section F-406)

exceeded the statutory authority granted by Chapter 3737 R.G. as he has no authority to adopt rules applying to fire suppression systems for building service equipment. The Ohio Board of Building Standards is authorized to regulate building service equipment under Sections 3781.10(A) and (C) and 3781.11(C) of the Revised Code. Section 3781.11(C) specifically provides that

The rules and regulations of the board of building standards shall:

(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 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.

Further, Section 3781.11 provides that

The construction, alteration, erection, and 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 electric wiring therein shall conform to the statutes of this state or the rules and regulations adopted and promulgated by the board of building standards, and to provisions of local ordinances not inconsistent therewith.

The Board of Building Standards has defined building service equipment in Rule 4101:2-2-01 as the mechanical, electrical and elevator equipment including piping, wiring, fixtures and other accessories, which provide sanitation, lighting, heating, ventilation, fire fighting and

transportation facilities essential for the habitable occupancy of the building or structure for its designated use and occupancy. The Board has also adopted specific provisions which deal with automatic fire suppression systems in range hoods (see Articles 17 and 33 of the Ohio Basic Building Code; specifically, sections 1702.18, 1703.0, 1708.6, 1710.6 and M-312.2).

The State Fire Marshal's inspectors and those of the local fire departments have exceeded their authority in attempting to enforce Rule 1301:7-7-04(G) of the Ohio Fire Code because the rules of the State Fire Marshal and local fire departments must give way when they are in conflict with the rules of the Board of Building Standards. Moreover, as discussed above, fire authorities only have authority to enforce the fire prevention measures of the state building code and must notify the appropriate building department if they believe other provisions of the state building code have been violated. If the reported violation exists in an existing building, the owners of that building cannot be required to bring it up to code per Section 3781.12 R.C. (see discussion above) unless the building official having jurisdiction determines that there is a serious health, safety, or sanitation hazard as defined in Section 3781.06 R.C. However, the building official, and not the fire inspector, must make this determination per paragraph (2) of Section 3781.03 R.C. and issue an adjudication order to seek correction of the violation.