

**IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION**

UPPER ARLINGTON CITY SCHOOL	:	
DISTRICT BOARD OF EDUCATION,	:	
	:	Case No. 20CVF-004102
Appellant,	:	
	:	JUDGE RUSSO
v.	:	
	:	
CITY OF UPPER ARLINGTON	:	
BUILDING DEPARTMENT,	:	
	:	
Appellee.	:	

**DECISION AND ENTRY GRANTING JOINT MOTION FOR SUMMARY
JUDGMENT (filed July 29, 2020)
AND
ORDER OF REMAND TO OHIO BOARD OF BUILDING APPEALS**

Russo, Judge

This is an administrative appeal of the June 10, 2020 Final Order issued by the Ohio State Board of Building Appeals in Case No. 20-0051. Appellant Upper Arlington City School District Board of Education’s (“School Board”) and Appellee City of Upper Arlington Building Department (“City”) jointly moved the Court for summary judgment on July 29, 2020. At the request of the Court, the joint motion was served on the Ohio Board of Building Appeals (“BBA”) via electronic mail and regular U.S. mail, postage prepaid. See Certificate of Service filed on July 31, 2020. The motion is now ripe for decision.

Statement Of The Case/Facts

The matter arises from the design and future construction of the School Board’s new Windermere Elementary School on the School Board’s real property located at 4101 Windermere Road, Upper Arlington, Ohio 43221. Part of the design for the new school

calls for single-occupant toilet rooms with floor-to-ceiling walls and solid, full-frame, lockable doors, identified for use by either sex.

On April 13, 2020, the City issued its Nonconformance (Partial) Approval [1] Adjudication Order No. 20-1220(1). The Adjudication Order provided in Item No. 13 that “where plumbing fixtures are required, separate facilities shall be provided for each sex.” The School Board appealed Item No. 13 of the Adjudication Order to the Ohio Board of Building Appeals, and the BBA conducted a remote adjudication hearing in accordance with R.C. 119 and R.C. 3781.031 on June 4, 2020.¹

At the hearing, the School Board argued that Adjudication Order No. 20-1220(1) of the City was contrary to a fair interpretation of the Building and Plumbing Code. Alternatively, the School Board argued, and the City agreed, that if the Adjudication Order was deemed by the BBA not to be contrary to the Code, then the School District should be granted a variance to allow use by either sex of the proposed single-user toilet rooms. Despite the agreement of the School Board and the City regarding the issuance of a variance, on June 10, 2020, the BBA in a contested 3-2 vote issued a Final Order that stated “[b]ased upon the evidence submitted and testimony, the Board upholds Item 13 of the adjudication order.” The Board of Building Appeals’ Final Order thus denied the variance request.

On June 24, 2020, the School Board filed a Notice of Appeal of the Final Order of the BBA and the Adjudication Order of the City with this Court. The City was named as

¹ If a county has a municipal or county board of appeals, the local appeals board conducts the adjudication hearing regarding enforcement of any provisions of the state building code. The Ohio Board of Building Appeals conducts the adjudication hearing in jurisdictions, such as Franklin County, that do not have a certified board or do not have contracts with a certified, local board. *See* R.C. 3781.19.

an Appellee, the Ohio Board of Building Appeals was not. On July 29, 2020, the School Board and City filed a joint motion for summary judgment requesting that the Court find that the School Board is entitled to a variance, based upon the Tenth District Court of Appeals' decision in *Ridenhour v. Ohio State Bd. of Bldg. Appeals*, unreported, 1984 Ohio App. LEXIS 11647, 10th Dist. Nos. 84AP-07& 84AP-34 (Nov. 13, 1984), which found that a trial court has the discretion to order the Ohio Board of Building Appeals to grant a variance. For the reasons discussed below, the Court **GRANTS** the joint and uncontested motion of the parties for summary judgment.

Discussion

A. The Court's Subject Matter Jurisdiction Over The Appeal

At the outset, the Court notes that this appeal is brought pursuant to R.C. 3781.031. R.C. 3781.19 provides specifically for the review of Ohio Board of Building Appeal decisions, stating that "any municipal or county officer, official municipal or county board, or person who was a party to the hearing before the [BBA] . . . may appeal directly to the court of common pleas pursuant to section 3781.031 of the Revised Code."

Although, the School District is appealing the Final Order of the Ohio Board of Building Appeals in addition to the City's Order, the BBA is not an appellee in this appeal. This is because Ohio's courts of appeal have held that the BBA is not a proper party to the action in a R.C. 3781.031 appeal. See *Kurtock v. Cleveland Board of Zoning Appeals*, 8th Dist. No. 100266, 2014-Ohio-1833, citing *Safest Neighborhood Assn. v. Athens Bd. of Zoning Appeals*, 4th Dist. Nos. 12CA32, 12CA 33, 12CA 34, 12CA35, 2013-Ohio-5610, ¶ 11. See also *Russell v. Dublin Planning & Zoning Comm.*, 10th Dist. No. 06AP-492, 2007-Ohio-489, ¶19 ("[a]n appeal to the court of common pleas from the order of the board of

zoning appeals which names the board of zoning appeals as the adverse party instead of the more technically correct zoning inspector or the municipality is still regarded as properly perfected and timely filed in the court of common pleas.”). *See also Gold Coast Realty, Inc. v. Bd. of Zoning App.* (1971), 26 Ohio St.2d 37, syllabus para. 1 (when appealing a decision of the zoning commission, that commission is not a property party-appellee. Instead “either the municipality or [a representative of the commission] is a party adverse to the appellant and necessary to the appeal.”).

Here, the record of proceedings on appeal establishes that the School Board timely filed its notice of appeal with the State Board of Building Appeals on June 24, 2020 via hand delivery as well as by electronic mail. R. p. 147 & 148. Thus, the School Board properly perfected its appeal, pursuant to R.C. 3781.031 and, as a result, this Court is vested with subject matter jurisdiction to hear the appeal, even though the BBA is not an appellee.

B. Standard Of Review

R.C. 3781.031 sets forth the standard of judicial review governing administrative appeals from the BBA. It provides, in part, that notwithstanding the provisions of R.C. 119, the Court is not confined to the record as certified to it by the BBA, but any party may produce additional evidence and the Court “shall hear the matter upon the record and additional evidence any party introduces.” R.C. 3781.031(D). R.C. 3781.031(D) further provides “[t]he court shall not affirm the agency’s order unless the preponderance of the evidence before it supports the reasonableness and lawfulness of the order and any rule of the board of building standards upon which the order is based in its application to the particular set of facts of circumstances involved in the appeal.” (emphasis added). As a

result, the function of a court of common pleas in a R.C. 3781.031 appeal differs substantially from that of appellate courts in other contexts, and the court's review of the evidence necessarily involves the exercise of a broad measure of discretion to determine whether the greater weight of the evidence supports the reasonableness and lawfulness of the BBA's action. *Sergakis v. Busch*, 10th Dist. No. 99AP-283, unreported, 1999 Ohio App. LEXIS 5467 at *3 (citing *Copeland Corp. v. Ohio Dept. of Indus. Relations, Div. of Factory and Bldg. Inspection*, 53 Ohio App.3d 23, 26, 557 N.E.2d 813 (3dDist.1988) and *Ridenhour, supra*); *84 Lumber Co. v. McMillen*, 10th Dist. No. 76AP-364, unreported, 1976 Ohio App. LEXIS 8165 at *5 (Dec. 14, 1975). See *Copeland, supra* at 26 ("under R.C. 119.12 and 3781.031, the common pleas court may properly enter an order contrary to that of the Board of Building Appeals.").

Regarding the issue of whether the BBA should have granted the School Board's request for a variance, the applicable standard is set forth in R.C. 3781.19. Under R.C. 3781.19, the BBA may grant a variance if it finds that "a variance from the provisions of such laws or any rule made thereunder, in the specific case will not be contrary to the public interest where a literal enforcement of such provisions will result in unnecessary hardship." As a result, if a preponderance of the evidence supports a finding that the variance would not be contrary to the public interest where a literal enforcement of the building code will result in unnecessary hardship, this Court may grant the parties' motion for summary judgment and may properly enter an order contrary to that of the BBA. Such a finding, however, must be based upon the additional finding that a preponderance of the evidence does not support the reasonableness and lawfulness of the BBA's Order.

Additionally, the Court must consider that standards for granting a summary judgment motion. The rules for granting a summary judgment pursuant to Civ. R. 56 mandate that the following be established: (1) that there is no genuine issue of any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion and, viewing the evidence most strongly in favor of the non-moving party, that conclusion is adverse to the non-moving party. *Bostic v. Connor*, 37 Ohio St.3d 144, 524 N.E.2d 881 (1988). Summary judgment will not be granted unless the movant sufficiently demonstrates the absence of any genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). Here, the parties agree and stipulate that there are no issues of material fact, they are jointly entitled to judgment as a matter of law, and reasonable minds can come to but one conclusion, which is that a variance should be issued.

C. The Parties Are Entitled To Summary Judgment

1. Additional Evidence Submitted By The Parties

As set forth in the Joint Motion for Summary Judgment, the parties produced additional evidence that the Court must consider in addition to the record certified by the BBA. These stipulations include the following:

1. Table 2902.1 of the Ohio Building Code does not differentiate between male and female for the required number of plumbing fixtures in education facilities, and the design at issue here meets the minimum number of required plumbing fixtures for an educational facility. Exh. A, Stip. #4.

2. The architect's design for the Windermere Elementary School, as approved by the School Board, calls for single-occupant toilet rooms with floor-to-ceiling walls and solid, full-frame, lockable doors, identified for use by either sex. The design further calls for a communal lavatory, which is typical in designs for elementary schools. Exh. A, Stip. #3.

3. The City's position statement to the BBA provided by Roger A. Eastep, the Chief Building Official for the City, stated the following, in part, regarding the proposed gender neutral single occupancy toilet room design: "[A]s the City of Upper Arlington Building Official I do not believe the [BBA's] action in approving this request will impact the safety of the building or its occupants. If the [BBA] does not approve this request, the City would further request clarity on the other buildings with a similar plan. Please allow this letter to serve as a notice that the Chief Building Official does not find approval of this request will result in safety hazard for this building or occupants." Exh. A, Stip. #9.

4. The International Code Council – the governing body for the International Building Code ("IBC") – has amended the IBC to expressly allow unisex single-user toilet rooms. Exh. A, Stip. #18.

5. The governing state agency, the Ohio Department of Commerce, has proposed these same modifications to the Code as well, although they had not yet made their way to codification. The modifications likely would have been codified by now if not for the COVID-19 pandemic. Exh. A, Stip. #19.

6. There was no testimony or evidence presented at the BBA hearing suggesting that utilization of single-occupant toilet rooms identified for use by either sex was against the public interest. Exh. A, Stip. #20.

7. It appears that the BBA simply found it was contrary to the public interest to allow elementary school boys and girls to share a sink for purposes of grooming. Exh. A, Stip. #21.

8. The City does not currently dispute and did not dispute at the BBA hearing that the School Board and the students would suffer an unnecessary hardship if a variance from the Code is not granted. Exh. A, Stip. #24.

9. The School District believes and testified at the BBA hearing that the School District's requested variance to permit the School District to utilize single-occupant toilet rooms identified for use by either sex is not against public interest and that enforcement of the Code provisions at issue will result in an unnecessary hardship. Exh. A, Stip. #31.

10. The City believes and testified that the School District's requested variance is not a public safety issue under the Code. Exh. A, Stip. #31.

These stipulations must be considered by the Court in addition to the testimony and evidence submitted at the adjudication hearing.

2. Unnecessary Hardship

As shown in the stipulated facts and the Joint Motion for Summary Judgment,

both the School Board and the City agree that the School Board and the students would suffer an unnecessary hardship if a variance is not granted. Both the School Board and the City agree that a variance should be issued.

In considering the evidence on appeal, the record shows and the parties have stipulated that the architect of record testified that the proposed bathroom configuration was selected for a number of reasons, with the primary reason being the ability of staff to monitor young children at the lavatories from the hallways to enhance safety of the students.²

The Superintendent testified in detail regarding the planning and design process for the proposed bathroom layout. Among other things, the School Board felt that the proposed bathroom design would best serve the School Board's goals, which include:³

- eliminating the inconvenience experienced by teachers in monitoring students when the separate-sex restroom facilities are not adjacent to each other;
- “potty parity” if the line for one sex is longer than the other;
- difficulty in assisting a disabled student of a different gender;
- increasing safety and privacy in order to minimize the opportunity for bullying and abuse in the restrooms; and
- avoiding the need to classify students based on gender in order to promote equality and to curtail reinforcement of negative stereotypes and other biases.

The Superintendent testified in significant detail regarding the planning process, and how the proposed changes to the Code, which the parties stipulate would have likely

² BBA Tran. at 10-11.

³ BBA Tran. at 22-26.

been implemented but for the COVID-19 pandemic, were taken under consideration during the planning process and as a way to essentially “future proof” the bathroom design.⁴

The City’s Chief Building Official also testified at the BBA adjudication hearing in support of the variance. He testified that, as a construction industry veteran, he felt there were no safety issues with the design of the building. He further testified that he felt it was appropriate to defer to the expertise of the Superintendent with respect to providing a safe learning environment for students that the proposed design would accomplish.⁵

Again, the City does not currently dispute and did not dispute at the BBA hearing that the School Board and the students would suffer an unnecessary hardship if a variance from the Code is not granted. Exh. A, Stip. #24. The City and School Board jointly request summary judgment in this appeal and jointly request that the Court order the BBA to issue a variance.

As a result, based upon a review of the record and given the above-evidence offered by stipulations, the Court finds that a preponderance of the evidence supports the Court’s finding that a literal enforcement of the Code as applied to the School District’s bathroom design will result in unnecessary hardship.

3. Public Interest

As established by stipulation #20, there was no testimony or evidence presented at the BBA hearing suggesting that utilization of single-occupant toilet rooms identified for use by either sex was against the public interest. Rather, the parties stipulated that it

⁴ BBA Tran. at 27-28.

⁵ BBA Tran. at 31-34.

appears the BBA simply found it was contrary to the public interest to allow elementary school boys and girls to share a sink for purposes of grooming. Exh. A, Stip. 21.

This finding was made by the BBA despite the uncontested testimony of Dr. Paul Imhoff, Superintendent of the Upper Arlington School District, that elementary schools almost always have communal sinks and washing stations in order to properly supervise the children, *Id.* #22, and the testimony of Jeanine Hummer, City Attorney, that the City found nothing in the Ohio Building Code discussing a person's ability to groom themselves in private as relating to whether the Ohio Building Code's safety requirements had been met. *Id.* #23. Additionally, at the hearing, the architect of record, Steve Dzurainin, testified that the proposed bathroom configuration was selected for a number of reasons, with the primary reason being the ability of staff to monitor young children at the lavatories from the hallways to enhance safety of the students. *Id.* #26.

Superintendent Dr. Paul Imhoff also testified in detail regarding the planning and design process for the proposed bathroom layout. That process included extensive discussions with teachers, staff, parents, and the community around the safety and well-being of the students. Dr. Imhoff testified that the community as well as the elected officials who represent it – the School Board – fully support the proposed bathroom layout. *Id.* #27.

Notably, the Southern District of Ohio, United States District Court has held that Title IX protects access to bathrooms. *See Board of Education of the Highland Local School District v. U.S. Department of Education*, 208 F.Supp.3d 850 (S.D. Ohio 2016). (access to a communal school bathroom is an education program or activity under Title IX). The School Board's proposed bathroom configuration in this appeal does not raise

any constitutional issues.

The International Code Council – the governing body for the International Building Code – has amended the International Building Code to expressly allow unisex single-user toilet rooms. Exh. A, Stip. #18. The governing Ohio agency, the Department of Commerce, has proposed these same exceptions to the Ohio Building Code, but they have not yet been codified. The two proposed exceptions state, in pertinent part:

5. Separate facilities shall not be required to be designated by sex where single-user toilet rooms are provided in accordance with Section 2902.1.2.

6. Separate facilities shall not be required where rooms having both water closets and lavatory fixtures are designated for use by both sexes and privacy for water closets are installed in accordance with Section 405.3.4 of the plumbing code [(also 1210.3.1 of the Ohio Building Code)]....

Consequently, based upon a review of the record and given the above-added evidence through stipulation, the Court finds that no evidence was presented at the BBA adjudication hearing suggesting utilization of single-occupant toilet rooms identified for use by either sex or allowing elementary school boys and girls to share a sink for purposes of grooming would be contrary to the public interest. Instead, the parties have stipulated and agreed that the School District's requested variance is not a public safety issue under the Code. *See Exh. A, Stip. #31.* Consequently, the Court finds that a preponderance of the evidence supports this Court's finding that a variance will not be contrary to the public interest where a literal enforcement of such provisions will result in unnecessary hardship.

Additionally, the Court finds that BBA's order was not supported by a preponderance of the evidence in accordance with R.C. 3781.031. The parties have

stipulated and agreed that the School District's requested variance is not a public safety issue under the Code. *See Exh. A, Stip. #31*. The parties have stipulated and agreed that the School Board and the students would suffer an unnecessary hardship if a variance is not granted. And, in filing their motion for summary judgment pursuant to R.C. 3781.031, the parties stipulate and agree the standards of R.C. 3781.031, namely that a preponderance of the evidence does not support the reasonableness and lawfulness of the BBA's Order, have been met.

In finding that the parties' Joint Motion for Summary Judgment should be granted and they are entitled to an order requiring the BBA to grant the variance requested, the Court relies upon the Tenth District's reasoning and holding in *Ridenhour v. Ohio State Bd. of Bldg. Appeals*, unreported, 10th Dist. Nos. 84AP-07 & 84AP-34, 1984 Ohio App. LEXIS 11647 (Nov. 13, 1984). *See also Copeland Corp. v. Ohio Dept. of Indus. Relations, Div. of Factory and Bldg. Inspection*, 53 Ohio App.3d 23, 26, 557 N.E.2d 813 (3dDist.1988) ("under R.C. 119.12 and 3781.031, the common pleas court may properly enter an order contrary to that of the Board of Building Appeals.").

In *Ridenhour*, the property owner brought an appeal after the issuance of an adjudication order finding the property owner was in violation of section 1702.8 of the Ohio Basic Building Code, requiring the installation of automatic sprinkler systems in a warehouse building. After reviewing the evidence, including prior inconsistent decisions of the BBA, this Court found that the property owner was entitled to a variance because the variance was not contrary to the public interest and enforcement of the regulation would result in an unnecessary hardship. The Tenth District affirmed, finding that it was not an abuse of this Court's discretion to determine that BBA's order was not supported

by a preponderance of the evidence in accordance with R.C. 3781.031, and “to order the board to grant the variances requested.” *Id.* at *8. This Court has made similar findings regarding the parties’ joint request for a variance.

Accordingly, after review and consideration, the Court finds as follows:

Appellant Upper Arlington City School District Board of Education’s and Appellee City of Upper Arlington Building Department’s Joint Motion for Summary Judgment is well-taken, and is hereby **GRANTED**.

The case is **REMANDED** to the Ohio Board of Building Appeals for the issuance of a variance consistent with this Order.

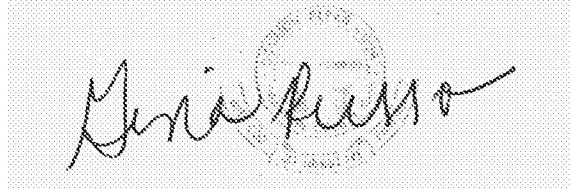
IT IS SO ORDERED.

Electronic Notification To:
Counsel of Record

Franklin County Court of Common Pleas

Date: 09-15-2020
Case Title: UPPER ARLINGTON CITY SCHOOL DIST BD OF E -VS- CITY OF
UPPER ARLINGTON BUILDING DEPT
Case Number: 20CV004102
Type: JUDGMENT ENTRY

It Is So Ordered.

A handwritten signature in cursive script, reading "Gina Russo", is written over a circular official seal. The seal is partially obscured by the signature and contains some illegible text around its perimeter.

/s/ Judge Gina Russo

Court Disposition

Case Number: 20CV004102

Case Style: UPPER ARLINGTON CITY SCHOOL DIST BD OF E -
VS- CITY OF UPPER ARLINGTON BUILDING DEPT

Final Appealable Order: Yes

Motion Tie Off Information:

1. Motion CMS Document Id: 20CV0041022020-07-2999980000

Document Title: 07-29-2020-MOTION FOR SUMMARY
JUDGMENT - PLAINTIFF: UPPER ARLINGTON CITY SCHOOL DIST
BD OF E

Disposition: MOTION GRANTED