

OPINION NO. 82-048**Syllabus:**

The Board of Building Standards may adopt, in accordance with R.C. 3781.111(F), rules setting forth exceptions to the Board's general rules and standards regarding the provision of access for the handicapped to buildings for which plans are submitted under R.C. 3791.04. The Board of Building Standards, however, has no authority to delegate its rulemaking power with regards to the exceptions permitted under R.C. 3781.111(F) to an agency charged with the responsibility of enforcing the rules and standards for the provision of access for the handicapped to places of public accommodation.

To: Frank W. King, Chairman, Board of Building Standards, Department of Industrial Relations, Columbus, Ohio
By: William J. Brown, Attorney General, July 2, 1982

I have before me your request for an opinion regarding the authority of the Board of Building Standards to make and promulgate rules pursuant to R.C. 3781.111(F). In particular you ask:

- 1) Does Section 3781.111(F) of the Revised Code give the Board of Building Standards authority to adopt rules which exempt, based upon substantially disproportionate cost, use or size, certain types of building construction from compliance with provisions of the

Administrative Code establishing requirements providing access to buildings for the physically handicapped?

2) If the Board of Building Standards does have authority to adopt rules granting such exemptions, can the Board of Building Standards delegate that authority to the enforcement agency (i.e., Division of Factory and Building Inspection of the Ohio Department of Industrial Relations or a local building department certified pursuant to Section 3781.10(E) of the Revised Code) to determine substantially disproportionate cost, use, or size and exempt certain types of building construction from compliance with requirements providing access to buildings for the physically handicapped?

In addressing the first question it is necessary to consider R.C. 3781.111 which provides in part:

(A) In addition to the powers conferred by any other section of the Revised Code, the board of building standards shall adopt standards and rules to facilitate the reasonable access and use by all handicapped persons for all buildings and the facilities thereof for which plans are submitted for approval under section 3791.04 of the Revised Code.

. . . .

(F) No rule shall be adopted pursuant to this section where the cost of accommodating the handicapped would be substantially disproportionate to the total cost, use or size of such place of public accommodation. (Emphasis added.)

In construing this statute, I must be guided by two basic principles of statutory construction. First, that every part of a statute's language is to be given effect. R.C. 1.47(B); Scott v. Reinier, 58 Ohio St. 2d 67, 388 N.E.2d 1226 (1979); Carter v. Youngstown, 146 Ohio St. 203, 65 N.E.2d 63 (1946). Second, "[i]n statutory construction, . . . the word 'shall' shall be construed as mandatory unless there appears a clear and unequivocal legislative intent that [it] receive a construction other than [its] ordinary usage." Dorrian v. Scioto Conservancy Dist., 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971) (paragraph one, syllabus).

Employing these guidelines, I must conclude that the Board of Building Standards is required by R.C. 3781.111(A) to establish standards and rules to facilitate the access of handicapped persons to buildings for which plans are submitted under R.C. 3791.04, but this mandate is limited by R.C. 3781.111(F), which prohibits the Board of Building Standards from making any rule regarding the provision of access for the handicapped to places of public accommodation where the cost of providing such access is disproportionate to the total cost, use, or size of the building. As a practical matter it seems that the Board has at least two options for ensuring that it complies with both R.C. 3781.111(A) and (F). It could either draw all rules very narrowly to fit within the limitation of R.C. 3781.111(F), or it could establish as part of its rules and standards a set of exceptions to the application of such rules and standards. See Jewett v. Valley Ry. Co., 34 Ohio St. 601, 608 (1878) ("[w]here authority is given to do a specified thing, but the precise mode of performing it is not prescribed, the presumption is that the legislature intended the party might perform it in a reasonable manner").

Thus, for the reasons set out above, it is my opinion that R.C. 3781.111(F) permits the Board of Building Standards to adopt exemptions to its rules and standards regarding access for the handicapped to buildings for which plans are submitted under R.C. 3791.04, where the cost of accommodating the handicapped would be substantially disproportionate to the total cost, use or size of certain types of buildings.

As to whether the Board of Building Standards has authority to delegate this rulemaking power, two considerations suggest that it cannot. First, the Board of Building Standards, as an administrative agency created by statute, has only those powers specifically granted it by statute. New Bremen v. Public Utilities

Commission, 103 Ohio St. 23, 132 N.E. 162 (1921); 1979 Op. Att'y Gen. No. 79-067. While R.C. 3781.111 authorizes the Board of Building Standards to adopt rules regarding the provision of access for the handicapped to places of public accommodation, nothing in R.C. 3781.111, or any other section of the Revised Code, permits the Board to delegate the rulemaking power. As rulemaking requires that the members of the Board of Building Standards exercise judgment and discretion, they are prohibited from delegating this power, absent statutory authority to the contrary. Kelley v. Cincinnati, 7 Ohio N.P. 360 (C.P. Hamilton County 1900); see Op. No. 79-067; 1977 Op. Att'y Gen. No. 77-064.

Second, as an "agency" for the purpose of R.C. Chapter 119, the Board of Building Standards must comply with the procedures set out in R.C. 119.01 to R.C. 119.13 when it establishes rules. See R.C. 119.01(A) (" '[a]gency' means. . .any official, board, or commission having authority to promulgate rules. . .in. . .the department of industrial relations"); R.C. 119.02. I note that R.C. 119.03 imposes certain mandatory duties on an agency, in this instance the Board of Building Standards, when it sets out to adopt rules. For example, R.C. 119.03(A) requires "[r]easonable public notice shall be given at least thirty days prior to the date set for a hearing, in the manner and form and for the length of time as the agency determines" (emphasis added). R.C. 119.03(C) states that "the agency shall conduct a public hearing," and goes on to state that "[t]he agency shall pass upon the admissibility of evidence" at that hearing. R.C. 119.03 does not authorize an agency to delegate its rulemaking duties, and insofar as the discharge of those duties involve the exercise of judgment and discretion, those duties may not be delegated. Kelley. Further, any attempt by an agency to delegate its rulemaking power could result in a rule which would be invalid by operation of R.C. 119.02, which states that "the failure of any agency to comply with such procedure [set out in R.C. 119.01 to R.C. 119.13] shall invalidate any rule. . .adopted."

For the above reasons, I must conclude that the Board of Building Standards does not have authority to delegate to an enforcement agency its powers to adopt rules establishing exceptions to the Board's rules and standards for the provision of access for the handicapped to places of public accommodation.

Accordingly, it is my opinion, and you are advised, that the Board of Building Standards may adopt, in accordance with R.C. 3781.111(F), rules setting forth exceptions to the Board's general rules and standards regarding the provision of access for the handicapped to buildings for which plans are submitted under R.C. 3791.04. The Board of Building Standards, however, has no authority to delegate its rulemaking power with regards to the exceptions permitted under R.C. 3781.111(F) to an agency charged with the responsibility of enforcing the rules and standards for the provision of access for the handicapped to places of public accommodation.