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BUILDING APPEALS, BOARD OF:

1. AGENCY WHICH CONDUCTS ADJUDICATION HEARING—WHERE DEPARTMENT OF STATE OR POLITICAL SUBDIVISION ISSUES ORDER TO ENFORCE PROVISION OF STATE BUILDING CODE OR RULE OR REGULATION—SECTION 3781.19, CHAPTERS 3781., 3783., 3785., 3787., 3789., 3791., RC.
2. BOARD HAS NO JURISDICTION TO REVIEW ORDER OF MUNICIPAL OR COUNTY AGENCY—MUNICIPAL OR COUNTY BUILDING CODE—DISTINGUISHED FROM STATE BUILDING CODE.
3. BOARD DOES NOT HAVE DIRECT APPELLATE JURISDICTION OVER RULES AND REGULATIONS ADOPTED BY BOARD OF BUILDING STANDARDS—HAS JURISDICTION TO REVIEW ORDER OF DEPARTMENT OF STATE OR ANY POLITICAL SUBDIVISION WHICH ATTEMPTS TO ENFORCE RULE OR REGULATION MADE BY BOARD OF BUILDING STANDARDS—SECTION 3781.10 RC.
4. BOARD HAS NO AUTHORITY TO FORMULATE OR ADOPT BUILDING RULES OR REGULATIONS.

SYLLABUS:

1. The Board of Building Appeals, created pursuant to Section 3781.19, Revised Code, is the agency which conducts the adjudication hearing where a department of the state or any political subdivision issues an order attempting to enforce any provision of the *state* building code or any rule or regulation made pursuant to the state building code, chapters 3781., 3783., 3785., 3787., 3789. and 3791.
2. The Board of Building Appeals has no jurisdiction to review an order of a municipal or county agency where that order attempts to enforce provisions of the *municipal* or county building code, as distinguished from provisions of the *state* building code and regulations made pursuant to the state building code.
3. The Board of Building Appeals does not have direct appellate jurisdiction over rules and regulations adopted by the Board of Building Standards pursuant to Section 3781.10, Revised Code; but it has jurisdiction to review an order of a department of the state or any political subdivision which attempts to enforce a rule or regulation made by the Board of Building Standards under Section 3781.10, Revised Code.
4. The Board of Building Appeals has no authority to formulate or adopt building rules or regulations.

Columbus, Ohio, March 22, 1956

Hon. William M. Sillins, Secretary, Ohio Board of Building Appeals
Columbus, Ohio

Dear Sir:

I have before me your request for my opinion which reads as follows:

“The 101st General Assembly enacted H. B. 580 which became effective October 5, 1955, dealing with building standards and creating the Board of Building Appeals. Section 3781.031, a part of this enactment, provides for the issuing of an adjudication order by the agency enforcing building regulations, with an appeal by means of an adjudication hearing under Sections 119.07 to 119.13, inclusive, of the Revised Code. Section 3781.19 provides that the Board of Building Appeals is the agency which shall conduct such adjudication hearing.

“The Board of Building Appeals wishes to determine the extent of its powers and duties and I have advised them that the law is clear that the jurisdiction of the Board of Building Appeals extends over orders written to enforce provisions of the Ohio Building Code, such Ohio Building Code being statutes enacted by the legislature and regulations adopted by the Board of Building Standards under authority granted by this same enactment. However, under Section 3781.01 of the Revised Code, municipal corporations may adopt their own building codes, not in conflict with the Ohio Building Code, and under Section 307.37

of the Revised Code, boards of county commissioners may also adopt building codes for their counties.

"The Ohio Board of Building Appeals then is requesting your informal opinion on the following questions:

"1. Does the Board of Building Appeals have appellate jurisdiction over rules and regulations adopted by the Board of Building Standards under Section 3781.10 (A) of the Revised Code.

"2. Does the Board of Building Appeals have appellate jurisdiction over rules and regulations adopted by the Board of Building Standards under Section 3781.10 (C) of the Revised Code, and does the Board of Building Appeals have original jurisdiction to adopt such rules and regulations relating to the declaration of equivalents as described in said section?

"3. Does the Board of Building Appeals have appellate jurisdiction in the case of an appeal by a party affected by an order of a county or municipal building department when that order enforces further and additional regulations not in conflict with the Ohio Building Code and adopted by the board of county commissioners for the county, under Section 307.37 of the Revised Code, or by the legislative authority of the municipal corporation under authority of Section 3781.01 of the Revised Code or adopted and enforced before September 13, 1911?"

The material portion of Section 3781.19, Revised Code, which became effective October 5, 1955, reads as follows:

"There is hereby established in the department of industrial relations a board of building appeals consisting of three members who shall be appointed by the governor with the advice and consent of the senate for four-year terms. * * * No member of the board of building standards shall be a member of the board of building appeals.

* * *

"In the *enforcement* by any department of the state or any political subdivision of Chapters 3781., 3783., 3785., 3787., 3789., and 3791. of the Revised Code and any rule or regulation made thereunder, such department is the agency referred to in sections 119.07, 119.08 and 119.10 of the Revised Code. The board of building appeals is the agency within the meaning of sections 119.09 to 119.13, inclusive, of the Revised Code which shall conduct the adjudication hearing referred to in such sections and required by section 3781.031 (3781.03.1) of the Revised Code.

"In addition to the provisions of Chapter 119, of the Revised Code, *the board of building appeals, as the agency conducting the*

adjudication hearing, shall have power to reverse or modify the order of the enforcing agency if it finds (1) that the order is contrary to, or to a fair interpretation or application of, chapters 3781., 3783., 3785., 3787., 3789., and 3791. of the Revised Code and any rule or regulation made thereunder, or (2) that a variance from the provisions of such chapters or any rule or regulation 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.” (Emphasis added.)

The board of building appeals is the body which conducts the adjudication hearing where a department or any political subdivision attempts to *enforce* the provisions of the Ohio building code.

Section 3781.031, Revised Code, to which reference is made in Section 3781.19, *supra*, reads in material part as follows:

“Before any *department or agency of the state or any political subdivision shall attempt to enforce the provisions of Chapters 3781., 3783., 3785., 3787., 3789., and 3791. of the Revised Code or any rules or regulations adopted pursuant thereto, by any remedy, civil or criminal, it shall issue an adjudication order within the meaning of sections 119.06 to 119.13 of the Revised Code and such order may be issued without prior hearing, but the agency shall proceed as required by, and the persons affected shall have the rights provided by, sections 119.07 to 119.13, inclusive, of the Revised Code. * * **

“Notwithstanding the provisions of Chapter 119. of the Revised Code relating to adjudication hearings and the proceedings thereon, a stenographic or mechanical record of the testimony and other evidence submitted shall be taken at the expense of the agency; a party adversely affected by an order issued following such adjudication hearing may appeal to the court of common pleas of the county in which he is a resident or in which the premises affected by such order is located; * * *”

(Emphasis added.)

Reading these two statutes together, it is obvious that the legislature contemplated the issuing of an order by an *enforcement agency*, specifying what appliances, additions or alterations to structures, plans, or procedures are necessary for the same to comply with Chapters 3781., 3783., 3785., 3787., 3789. and 3791 of the Revised Code. This order may be made without prior hearing, but before any attempt is made to enforce, by civil or criminal remedy, any provision contained in the building code. The next step is an adjudication hearing conducted by the *board of building appeals*, where the party adversely affected by the order objects to it

and requests a hearing. The board of building appeals will either affirm, modify, or reverse the order previously issued by the enforcement agency.

The statutes then provide for an appeal to the court of common pleas by any party adversely affected by an order issued following the hearing.

With this discussion in the background, I shall take up your three questions.

1. It is asked whether the Board of Building Appeals has appellate jurisdiction over rules and regulations adopted by the Board of Building Standards under Section 3781.10 (A) of the Revised Code.

It is unnecessary to quote Section 3781.10 (A), Revised Code. Suffice it to say that that section authorizes the Board of Building Standards to formulate and adopt regulations governing the erection, construction, repair, alteration, and maintenance of buildings subject to the Ohio building code, the requirements for materials to be used, and other requirements relating to the safety and sanitation of such buildings.

Therefore, the Board of Building Standards may make rules and regulations which further the provisions of the Ohio building code.

The power thus vested in the Board of Building Standards does not make that body an "enforcement" agency within the meaning of the statutes examined initially. Rather, the Board of Building Standards exercises what might be termed as "quasi-legislative" powers—powers to implement the broader legislative outline set forth in the Ohio building code itself.

Hence, there would be no "appeal" to the Board of Building Appeals from the mere adoption of a regulation or rule by the Board of Building Standards. There could be no "appeal" to that body until an enforcement agency of the state or of a political subdivision attempts to enforce the regulation or rule adopted by the Board of Building Standards. What, then, are the enforcement agencies?

Your attention is directed to Section 3781.03, Revised Code, which specifies the many departments and officers which have been granted enforcement powers. By way of example, the fire marshal or the fire chief of municipal corporations having fire departments or the fire chiefs of townships having fire departments shall enforce all provisions of Chapters 3781., 3783., 3785., 3787., 3789. and 3791. (the so-called "Ohio building

code”) relating to *fire* prevention. The chief of the division of workshops and factories, or the building inspector in cities or counties shall enforce all the provisions relating to construction of buildings.

Therefore, the Board of Building Appeals has jurisdiction to review an order of one of the enforcing agencies, which order is based upon a rule or regulation adopted by the Board of Building Standards pursuant to Section 3781.10 (A), Revised Code.

2. What I have just said applies with equal force to a rule or regulation adopted by the Board of Building Standards, pursuant to paragraph (C) of Section 3781.10, *supra*. That paragraph authorizes the board to determine that any particular fixture, device, material, system, or method of construction is equivalent to that described in any section of the Revised Code, having all due regard to safe and sanitary construction.

Here, again, there is no “appeal” as such from the mere declaration of an equivalent. If any attempt should be made by an enforcement agency to enforce such a rule or regulation, the Board of Building Appeals could entertain jurisdiction and conduct a hearing.

It is further asked whether the Board of Building Appeals has *original* jurisdiction to adopt such rules and regulations relating to the declaration of equivalents as described in Section 3781.10, *supra*.

As I understand the pertinent statutes, the function of the Board of Building Appeals is to conduct an adjudication hearing upon an order previously issued by an enforcement agency. It has the power to reverse or modify the order of the enforcing agency if it finds: (1) that the order is contrary to, or to a fair interpretation or application of the building code chapters and any rule or regulation made thereunder, or (2) that a variance from the provisions of such chapters or any rule or regulation 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.

I find no statutory authority under which the Board of Building Appeals might be said to have original jurisdiction to adopt rules and regulations relating to the declaration of equivalents as described in Section 3781.10, Revised Code. The only “rules” power granted to that body is the authority, under Section 3781.19, Revised Code, to adopt its own rules of *procedure* not inconsistent with Sections 3781.06 to 3781.18, inclusive, and Section 3781.04, Revised Code.

3. Your last question is whether the Board of Building Appeals has "appellate jurisdiction in the case of an appeal by a party affected by an order of a county or municipal building department when that order enforces further and additional regulations not in conflict with the Ohio building code and adopted by the board of county commissioners for the county, under Section 307.37 of the Revised Code, or by the legislative authority of a municipal corporation under authority of Section 3781.01, Revised Code, or adopted and enforced before September 13, 1911?"

The discussion relative to your first two questions is predicated upon a fact situation in which a governmental agency, either state or local, is attempting to enforce the so-called *state* building code, i.e., provisions of statute and regulations which are intended to apply throughout the entire state.

Section 3781.01, Revised Code, to which you refer, provides in pertinent part as follows:

"Chapters 3781., 3783., 3785., 3787., 3789., 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 chapter or with the rules and regulations of the board of building standards determining equivalents. Such chapters do not modify or repeal any portion of any building code adopted by a municipal corporation and in force on September 13, 1911, which is not in direct conflict with such chapters or with such rules and regulations."

This statute is but a formal legislative recognition of the principle that both the state and the municipalities may exercise basically the same police power, the only limitation being that the exercise of that power by a municipality shall not conflict with the general laws of the state.

Although the statute relative to the powers of the Board of Building Appeals speaks in terms of conducting a hearing upon orders of a political subdivision enforcing chapters of the code which includes chapter 3781., I must conclude that it was not the intention of the legislature to grant the Board of Building Appeals power to review an order of a municipality, which order purports to enforce a provision of the *municipal* building code. Section 3781.01, Revised Code, though literally a part of chapter 3781., is nevertheless a statute which has nothing at all to do with the rest of that chapter or the state building code.

In a purely local matter, where a municipal officer attempts to enforce

a provision of the municipal building code, there could be no jurisdiction in the State Board of Building Appeals to review the action thus taken. For that board to review such a matter, would amount to an unwarranted and unlawful interference with the municipality's "home rule" power.

With respect to counties, Section 307.37, Revised Code, authorizes the board of county commissioners to adopt regulations pertaining to the erection, construction, repair, etc. of buildings within the unincorporated portion of the county. Since *county* rules and regulations are adopted pursuant to Section 307.37, Revised Code, and *not* pursuant to chapter 3781., *supra*, it is obvious that Section 3781.031, Revised Code, would not embrace or include such "rules and regulations." The Board of Building Appeals, therefore, has no jurisdiction in this area.

Accordingly, it is my opinion that :

1. The Board of Building Appeals, created pursuant to Section 3781.19, Revised Code, is the agency which conducts the adjudication hearing where a department of the state or any political subdivision issues an order attempting to enforce any provision of the *state* building code, or any rule or regulation made pursuant to the state building code, chapters 3781., 3783., 3785., 3787., 3789. and 3791.

2. The Board of Building Appeals has no jurisdiction to review an order of a municipal or county agency where that order attempts to enforce provisions of the *municipal* or *county* building code, as distinguished from provisions of the *state* building code and regulations made pursuant to the state building code.

3. The Board of Building Appeals does not have direct appellate jurisdiction over rules and regulations adopted by the Board of Building Standards pursuant to Section 3781.10, Revised Code; but it has jurisdiction to review an order of a department of the state or any political subdivision which attempts to enforce a rule or regulation made by the Board of Building Standards under Section 3781.10, Revised Code.

4. The Board of Building Appeals has no authority to formulate or adopt building rules or regulations.

Respectfully,
C. WILLIAM O'NEILL
Attorney General