

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

UPPER ARLINGTON CITY SCHOOL	:	Case No. 20CV004102
DISTRICT BOARD OF EDUCATION,	:	
	:	
Appellant,	:	Judge Gina R. Russo
	:	
v.	:	
	:	
CITY OF UPPER ARLINGTON	:	
BUILDING DEPARTMENT,	:	
	:	
Appellee.	:	

STIPULATIONS OF FACT

Appellant, Upper Arlington City School District Board of Education (the "School Board" or "Appellant"), and Appellee, City of Upper Arlington Building Department (the "City" or "Appellee"), by and through counsel, hereby stipulate to the following:

1. This matter arises from the design and future construction of the School Board's new Windermere Elementary School (the "School") on the School Board's real property located at 4101 Windermere Road, Upper Arlington, Ohio 43221.
2. The School Board procured Moody Nolan as architect of record for design of the School.
3. Among other things, Moody Nolan's design for the 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.
4. Table 2902.1 of the Ohio Building Code ("OBC) does not differentiate between

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male and female for the required number of plumbing fixtures in educational facilities, and the design at issue here meets the minimum number of required plumbing fixtures for an educational facility.

5. On April 13, 2020, Appellee issued its Nonconformance (Partial) Approval [1] adjudication order ("Adjudication Order") (a copy of which is attached as Exhibit A-1).

6. Among other things, the Adjudication Order provided in Item No. 13 that "where plumbing fixtures are required, separate facilities shall be provided for each sex."

7. The School Board appealed Item No. 13 of the Adjudication Order to the Ohio Board of Building Appeals ("BBA") and the appeal was assigned Case Number 20-0051.

8. The BBA held a remote hearing on June 4, 2020.

9. Prior to the hearing and in response to a request from the BBA, both the School Board and the City provided position statements. Notably, the City's position statement 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 notice that the Chief Building Official does not find approval of this request will result in safety hazard for this building or occupants.

10. At the BBA hearing, the School Board argued that the Adjudication Order is contrary to a fair interpretation or application of the Building Code and Plumbing Code (collectively the "Code").

11. Alternatively, the School Board argued at the BBA hearing that if the Adjudication Order is deemed not to be contrary to the Code, then a variance from the Code should be granted, as the variance would not be contrary to the public interest and is warranted to avoid unnecessary

hardship.

12. At the conclusion of the hearing, the five-member BBA upheld Item No. 13 of the Adjudication Order by a vote of 3 to 2.

13. The BBA implicitly found that the gender-neutral bathrooms at issue do not comply with the Code because the toilet rooms are not separately labeled for each sex.

14. The BBA further denied the School Board's request for a variance to allow use by either sex in this specific instance.

15. Thereafter, the BBA issued its Final Order, dated June 10, 2020, in Case Number 20-0051 ("Final Order") (a copy of which is attached hereto as Exhibit A-2).

16. On June 18, 2020, the School Board submitted an unopposed Request for Reconsideration to the BBA (a copy of which is attached hereto as Exhibit A-3).

17. Unfortunately, because the BBA's next regularly scheduled meeting was after the appeal deadline to this Court, the BBA did not consider the Request for Reconsideration prior to the School Board's filing of the Notice of Administrative Appeal in this matter.

18. 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.

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

20. Significantly, 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.

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21. Rather, 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.

22. In response, the Superintendent of the Upper Arlington City School District, Dr. Paul Imhoff, testified that elementary schools almost always have communal sinks and washing stations as a matter of practice in order to properly supervise the children.

23. This point was further supported by Upper Arlington City Attorney, Jeanine Hummer, who testified that the City's analysis of the building code found nothing discussing a person's ability to groom themselves in private as relating to whether the building code's safety requirements had been met.

24. 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.

25. Moreover, the School Board presented testimony in favor of the variance from each of the witnesses, including testimony by the architect of record (Steve Dzurainin of Moody Nolan), the Superintendent of Schools (Dr. Paul Imhoff), the Chief Building Official for the City of Upper Arlington (Roger A. Eastep), and the Upper Arlington City Attorney (Jeanine Hummer).

26. Specifically, 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.

27. Superintendent Dr. Paul Imhoff 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.

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Imhoff also testified that the community as well as the elected officials who represent them—the School Board—fully support the proposed bathroom layout.

28. Dr. Imhoff also testified to his experience as a 30-year educator, that he had taken part in building projects for two other school districts prior to this School project, and how the School Board felt that the proposed bathroom design would best serve the School Board's goals, which include:

- 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.

29. Dr. Imhoff also testified regarding how the Ohio Department of Commerce's proposed changes to the Code were taken under consideration during the planning process and as a way to essentially future proof the bathroom design.

30. The City's Chief Building Official, Roger A. Eastep, testified that, as a construction industry veteran with over 40 years of experience who had reviewed over a billion dollars in construction including many schools, 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 Dr. Imhoff with respect to providing a safe learning environment for students including the proposed bathroom layout.

31. In light of the foregoing, the School District believes and testified at the BBA

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hearing that the School's District 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. The City believes and testified that the School's District requested variance is not a public safety issue under the Code.

Respectfully submitted,

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CERTIFICATE OF SERVICE

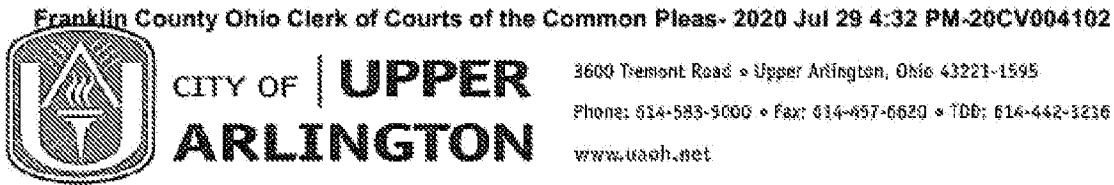
The undersigned hereby certifies that a copy of foregoing STIPULATIONS OF FACT was electronically filed on July 29, 2020 using the Court's e-Filing System. Notice of this filing will be sent to all registered parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

The undersigned also hereby certifies that a copy of foregoing STIPULATIONS OF FACT was served upon the following by email or regular U.S. mail, postage prepaid, this 29th day of July, 2020:

City of Upper Arlington Building Department (via mail)
3600 Tremont Road
Upper Arlington, Ohio 43221

Jeanine Hummer, City Attorney (via email)
City of Upper Arlington
jhummer@uaoh.net

/s/ Tarik M. Kershah
Tarik M. Kershah



April 13, 2020

[1] NONCONFORMANCE (PARTIAL) APPROVAL [1]

THIS IS NOT A PERMIT, IT IS A REVIEW RESPONSE

Interior Alterations

RE: Windermere Elementary School 4101 Windermere Rd. Upper Arlington, Ohio 43221	APPLICANT: Steve Dzurani 614-280-1485 NUMBER: 20-1220(1)
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Plans are sealed by Curtis Moody, Ohio Registered Architect #7066, Katherine Miller (civil) Ohio Registered Engineer #E-82869, Ian Pfefferle (structural) Ohio Registered Engineer #E-73568, Daniel Edwartoski (HVAC, plumbing) Ohio Registered Engineer #E-76218, Stanley Kmonk (electrical) Ohio Registered Engineer #E-51379, to comply with OBC §106.2.

Plans reviewed for compliances with 2017 Ohio Building Code based on the following criteria:

USE GROUP: E	AREA: 73,922 area of work
CONSTRUCTION TYPE: IIB	OCCUPANCY: 1993
ASHRAE 90.1 2010: Comcheck, envelope, mechanical	SPRINKLERS: Yes
IECC 2012:	FIRE ALARM: Yes

DEFERRED SUBMITTALS:

- Sprinklers (separate application)
- Fire Alarms (separate application)
- Bleachers
- Emergency Responder Radio Coverage
- Kitchen exhaust hood
- Kitchen exhaust hood suppression (separate application)

SPECIAL INSPECTIONS:

- | | |
|------------------|------------------|
| Steel fabricator | Structural steel |
| Soils | Concrete |
| Masonry | |

PART I

Pursuant to OBC §105.1.4 & 107.6 "Non-Compliance", Building Department may hereby issue
 ~ NONCONFORMANCE (PARTIAL) PLAN APPROVAL ~

ATTENTION:

Per OBC §105 & 107.6; applicant must submit revised plans, details, addenda or other data to show evidence of compliance with items noted herein, or Building Official may revoke the Plan Approval.

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DUE TO VIOLATIONS OF THE OHIO BUILDING CODE (OBC), BUILDING DEPARTMENT IS ABLE TO ISSUE ONLY A NONCONFORMANCE/PARTIAL PLAN APPROVAL WITHOUT THE ADDITIONAL INFORMATION OR CORRECTIONS INDICATED BELOW. THIS LETTER IS NOT A DISAPPROVAL OF THE PLANS, BUT IS A REQUEST FOR CLARIFICATION &/OR MODIFICATION OF THE FOLLOWING ITEMS.

THE FOLLOWING ITEMS ARE NOT APPROVED AND MUST BE RESUBMITTED:

Note: LETTER RESPONSE stating compliance or agreement to corrections is not acceptable.

- 106.1.1 Information on construction documents.** Construction documents shall be dimensioned and drawn upon suitable material. . . . Construction documents shall be coordinated and of sufficient clarity to indicate the location, nature and extent of the work proposed and show in detail that it will conform to the provisions of this code. Construction documents, adequate for the scope of the project, shall include information necessary to determine compliance with the building, mechanical, plumbing, fire, electrical, energy, and fuel gas codes such as:

(3) **Floor plans.** Building configuration layout drawings with all walls and partitions shown including: plans of full or partial basements and full or partial attics and penthouses, grade elevations at the building perimeter, and references to other details and elevations. Floor plans must show all relevant information such as door swings, stairs and ramps, windows, shafts, all portions of the means of egress, plumbing fixtures, built-in fixtures, special equipment, vertical transportation, etc., and shall be sufficiently dimensioned to describe all relevant space sizes. Spaces shall be identified by appropriate code appellations (an "auditorium" may not be identified as a "meeting room" if its attributes indicate that it is an auditorium). The construction documents shall designate the number of occupants to be accommodated on every floor, and in all rooms and spaces;

Comment a: Please clarify intent of roof area with storefront door A169 off of corridor. Is this strictly maintenance or will there ever be used by staff and children?

Comment b: Hardware groups on door schedule go to 65 but the hardware groups in the spec (addendum #1) go to 61. Supply missing hardware specs.

Comment c: Submit deferred submittal plans noted in bold above on the first page. A final plan approval will not be issued until all submittals are approved.

- 916.1 EMERGENCY RESPONDER RADIO COVERAGE:** General. Emergency responder radio coverage shall be provided in all new buildings in accordance with Section 510 of the fire code.

Comment: Contact the Fire Department to establish requirements. Provide documentation that this is being addressed or correspondence from the Fire Department this will not be required.

- 1006.2.1 Egress based on occupant load and common path of egress travel distance.** Two exits or exit access doorways from any space shall be provided where the design occupant load or the common path of egress travel distance exceeds the values listed in Table 1006.2.1.

Comment: For E use group 2 exits are required for an occupant load over 50. Several classrooms not an occupant load over 50 which only have a single exit. If you intend to request a reduced occupant load per **1004.1 Design occupant load**, make that a specific request noting the rooms in the chart on G00-02 WN. All rooms with a reduced occupant load approved shall be noted to be posted with that occupant load.

Nonconformance (partial) Approval
City of Upper Arlington, Ohio

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4. **1010.1.10 Panic and fire exit hardware.** Where an exit access doorway is provided from an electrical equipment workspace, the door shall be equipped with panic hardware or fire exit hardware as required in Articles 110.26(C)(3), 110.31(A)(4), and 110.33(A)(3) of NFPA 70.

Comment: Provide panic hardware on doors to the electrical room B140 (hardware set 62 not included) as noted above.

5. **ANSI 307.2 Protrusion Limits.** Objects with leading edges more than 27 inches (685 mm) and not more than 80 inches (2030 mm) above the floor shall protrude 4 inches (100 mm) maximum horizontally into the circulation path.

Comment: Fire extinguishers (4A spec'd) will likely project out more than 4". The gym shows these as face mounted extinguishers.

6. **1011.11 Handrails.** Stairways shall have handrails on each side and shall comply with Section 1014. Where glass is used to provide the handrail, the handrail shall also comply with Section 2407.

Comment: Provide handrail both sides of stair 1, detail 2/A41.01 and

7. **1013.4 Raised character and braille exit signs.** A sign stating EXIT in visual characters, raised characters and braille and complying with Chapter 11 shall be provided adjacent to each door to an area of refuge, an exterior area for assisted rescue, an exit stairway or ramp, an exit passageway and the exit discharge.

Comment: Provide tactile signs as noted above. Show locations on plan. See ANSI 703.3.11 for location requirements. Note that the sign is on the latch side of a door or right side of double doors.

8. **1029.1.1 Bleachers.** Bleachers, grandstands and folding and telescopic seating, that are not building elements, shall comply with Chapters 1-4 of ICC 300-12.

Comment: Drawings were not provided to review. The specifications call out criteria, but I need the actual drawings of what is to be constructed to review

9. **1109.4 Kitchens and kitchenettes.** Where kitchens and kitchenettes are provided in accessible spaces or rooms, they shall be accessible.

ANSI 606.3 Height. The front of lavatories and sinks shall be 34 inches (865 mm) maximum above the floor, measured to the higher of the rim or counter surface.

Comment: Counter height to be 34" in rooms such as B108, A161, B200 and B127.

10. **1109.2.2 Water closet compartment.** Where water closet compartments are provided in a toilet room or bathing room, at least 5 percent of the total number of compartments shall be wheelchair accessible. Where the combined total water closet compartments and urinals provided in a toilet room or bathing room is six or more, at least 5 percent of the total number of compartments shall be ambulatory accessible, provided in addition to the wheelchair accessible compartment.

ANSI 604.10.1 General (ambulatory stall). Ambulatory accessible compartments shall comply with Section 604.10.

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Comment: If the separate restroom issue is appealed and granted then where there is 2 unisex restrooms adjacent to each other they will be considered one restroom and if the total fixtures is 6 or more they will need an ambulatory stall. Show compliance of stall with 604.10.2 (size), 604.10.3 (doors) & 604.10.4 (grab bars).

11. 1301.1.1 Criteria. Buildings shall be designed and constructed in accordance with the applicable provisions of the "International Energy Conservation Code" or the requirements of "ASHRAE 90.1" listed in Chapter 35 of this code except as modified in Sections 1301.2 and 1301.3.

Comment a: Submit documentation to show compliance with the energy code, **ASHRAE 90.1-2010**. To include interior and exterior lighting. Be sure to address the light reduction requirement, day lighting (ASHRAE 9.4.1.4). Note that only one: ASHRAE or IECC can be used, you cannot mix so it must be ASHRAE 90.1 per the envelope and mechanical submittal.

Comment b: The Envelope Comcheck shows that it failed by 5%.

12. 1804.4 Site grading. The ground immediately adjacent to the foundation shall be sloped away from the building at a slope of not less than one unit vertical in 20 units horizontal (5-percent slope) for a minimum distance of 10 feet (3048 mm) measured perpendicular to the face of the wall. If physical obstructions or lot lines prohibit 10 feet (3048 mm) of horizontal distance, a 5-percent slope shall be provided to an approved alternative method of diverting water away from the foundation. Swales used for this purpose shall be sloped a minimum of 2 percent where located within 10 feet (3048 mm) of the building foundation. Impervious surfaces within 10 feet (3048 mm) of the building foundation shall be sloped a minimum of 2 percent away from the building.

Comment: The grading plan shall indicate the grades to show compliance.

13. 2902.2 Separate facilities. Where plumbing fixtures are required, separate facilities shall be provided for each sex.

Comment: Provide separate restrooms for each sex. These shall be labeled on the plans and correct signs provided.

14. OMC 403.2 Outdoor air required. The minimum outdoor airflow rate shall be determined in accordance with Section 403.3.

Exception: *The registered design professional may use ASHRAE 62.1 or ASHRAE 62.2, as applicable, as an alternative engineered ventilation system design provided that the registered design professional demonstrates compliance with all applicable sections of the ASHRAE standard.*

OMC 403.3.1.1.1.1 Breathing zone outdoor airflow. The outdoor airflow rate required in the breathing zone (V_{bz}) of the occupiable space or spaces in a zone shall be determined in accordance with Equation 4-1.

(Equation 4-1) $V_{bz} = R_p P_z + R_a A_z$ where:

A_z = Zone floor area: the net occupiable floor area of the space or spaces in the zone.

P_z = Zone population: the number of people in the space or spaces in the zone.

R_p = People outdoor air rate: the outdoor airflow rate required per person from Table

403.3.1.1.

R_a = Area outdoor air rate: the outdoor airflow rate required per unit area from Table 403.3.1.1

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Comment: Provide outdoor air calculations. The outdoor air required is based on 2 components, people outdoor airflow and area outdoor airflow. Show the rooms served by each unit separately.

15. OMC 506.3 Ducts serving Type I hoods. Type I exhaust ducts shall be independent of all other exhaust systems except as provided in Section 506.3.5. Commercial kitchen duct systems serving Type I hoods shall be designed, constructed and installed in accordance with Sections 506.3.1 through 506.3.13.3.

Comment: Provide sealed drawings showing complete information on kitchen hood exhaust duct to show compliance with Sections 506.3.1 through 506.3.13.3, which includes dimensions, material, velocity, cleanout details, slope, joints, section from hood to exhaust fan, etc. If this is included on a typical hood drawing it will need to project specific and be sealed. Only the hood itself is not required to be sealed. Provide complete information on exhaust duct.

Provide sealed drawings showing complete information on kitchen hood exhaust duct to show compliance with Sections:

506.3.1.1 Grease duct materials.

506.3.2 Joints, seams and penetrations of grease ducts.

506.3.4 Air velocity.

506.3.7 Prevention of grease accumulation in grease ducts (slope). OK

506.3.8 Grease duct cleanouts and openings (location, size, detail). (4 doors noted, not sized, located or detailed)

16. OMC 506.3.6 Grease duct clearances. Where enclosures are not required, grease duct systems and exhaust equipment serving a Type I hood shall have a clearance to combustible construction of not less than 18 inches (457 mm), and shall have a clearance to noncombustible construction and gypsum wallboard attached to noncombustible structures of not less than 3 inches (76 mm).

Comment: The clearance shall include the surfaces perpendicular to the duct for a distance of 18". This would include the ceiling a distance of 18" from the duct. **The required clearance applies to the roof insulation.** Provide the distance or use a duct wrap. Provide technical data on any proposed duct wrap. This is a long horizontal duct run. Show section showing vertical clearance to roof insulation and acoustic ceiling. Note for clearance (unless duct wrap) to all combustible pipes, conduits, wiring etc.

17. 506.3.9 Grease duct horizontal cleanouts. 506.3.9 Grease duct horizontal cleanouts. Cleanouts serving horizontal sections of grease ducts shall:

1. Be spaced not more than 20 feet (6096 mm) apart.
2. Be located not more than 10 feet (3048 mm) from changes in direction that are greater than 45 degrees (0.79 rad).
3. Be located on the bottom only where other locations are not available and shall be provided with internal damming of the opening such that grease will flow past the opening without pooling. Bottom cleanouts and openings shall be approved for the application and installed liquid tight.
4. Not be closer than 1 inch (25 mm) from the edges of the duct.
5. Have opening dimensions of not less than 12 inches by 12 inches (305 mm by 305 mm). Where such dimensions preclude installation, the opening shall be not less than 12 inches (305 mm) on one side and shall be large enough to provide access for cleaning and maintenance.
6. Shall be located at grease reservoirs.

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Comment: Drawings to show compliance.

18. OMC 506.5.3 Exhaust fan mounting. Up-blast fans serving Type I hoods and installed in a vertical or horizontal position shall be hinged, supplied with a flexible weatherproof electrical cable to permit inspection and cleaning and shall be equipped with a means of restraint to limit the swing of the fan on its hinge. The ductwork shall extend not less than **18 inches (457 mm)** above the roof surface.

Comment: Show compliance with the above, 12" noted.

19. 507.1 General. Commercial kitchen exhaust hoods shall comply with the requirements of this section. Hoods shall be Type I or II and shall be designed to capture and confine cooking vapors and residues. A Type I or Type II hood shall be installed at or above all commercial cooking appliances in accordance with Sections 507.2 and 507.3. Where any cooking appliance under a single hood requires a Type I hood, a Type I hood shall be installed. Where a Type II hood is required, a Type I or Type II hood shall be installed. Where a Type I hood is installed, the installation of the entire system, including the hood, ducts, exhaust equipment and makeup air system shall comply with the requirements of Sections 506, 507, 508 and 509.

Exceptions:

1. Factory-built commercial exhaust hoods that are listed and labeled in accordance with UL 710, and installed in accordance with Section 304.1, shall not be required to comply with Sections 507.1.5, 507.2.3, 507.2.5, 507.2.8, 507.3.1, 507.3.3, 507.4 and 507.5.

Comment: Provide drawing of hood noting size. The hoods shall be UL 710 listed. The installation conditions shall be listed on the hood and field verified to comply with the actual installation.

20. OMC 507.2.6 Clearances for Type I hood. A Type I hood shall be installed with a clearance to combustibles of not less than **18 inches (457 mm)**.

Exception: Clearance shall not be required from gypsum wallboard or 1/2inch (12.7 mm) or thicker cementitious wallboard attached to noncombustible structures provided that a smooth, cleanable, nonabsorbent and **noncombustible** material is installed between the hood and the gypsum or cementitious wallboard over an area extending not less than 18 inches (457 mm) in all directions from the hood.

Comment a: This includes ceiling tile (ACT -03) or surface which must be noncombustible per ASTM E 136 (not ASTM E 84). If the core complies with ASTM E-136 (document) the surface covering, flame spread<50, would be limited to 0.125" per OBC 703.5.2 which needs to be documented.

Comment b: The wall behind the hood is noted as FRP in the finish plan. Document the FRP complies with ASTM E-136

21. OMC 508.1 Commercial kitchen makeup air. Makeup air shall be supplied during the operation of commercial kitchen exhaust systems that are provided for commercial cooking appliances. The amount of makeup air supplied to the building from all sources shall be approximately equal to the amount of exhaust air for all exhaust systems for the building. The makeup air shall not reduce the effectiveness of the exhaust system. Makeup air shall be provided by gravity or mechanical means or both. Mechanical makeup air systems shall be automatically controlled to start and operate simultaneously with the exhaust system. Makeup air intake opening locations shall comply with Section 401.4.

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Comment: Show calculations of air balance for hood. The makeup air for the hood to be from units serving the area connected to the area the hood is located. Those units must be interlocked to automatically start and operate simultaneously with the exhaust system. This includes the RTU making up the difference between the exhaust fans and the makeup air unit. Noting to run the RTU continuously does not meet this requirement.

22. OMC SECTION 509 FIRE SUPPRESSION SYSTEMS

509.1 Where required. Commercial cooking appliances required by Section 507.2.1 to have a Type I hood shall be provided with an approved automatic fire suppression system complying with the *building code*.

Comment: Provide hood fire suppression drawings when available. Designer to sign drawings per 106.2.1 exception or UL300 system with full manual provided. This requires a separate application.

23. 904.12.1 (Hood fire suppression) Manual system operation.

A manual actuation device shall be located at or near a means of egress from the cooking area a minimum of 10 feet (3048 mm) and a maximum of 20 feet (6096 mm) from the kitchen exhaust system. The manual actuation device shall be installed not more than 48 inches (1200 mm) or less than 42 inches (1067 mm) above the floor and shall clearly identify the hazard protected. The manual actuation shall require a maximum force of 40 pounds (178 N) and a maximum movement of 14 inches (356 mm) to actuate the fire suppression system.

Comment: Shown less than 10' Sheet FS2.1, note mounting height.

24. NEC 210.8(B) Other Than Dwelling Units. All 125-volt, single phase, 15- and 20-ampere receptacles installed in the locations specified in (1) through (5) shall have ground-fault circuit-interrupter protection for personnel:

(5) Sinks — where receptacles are installed within 1.8 m (6 ft) of the outside edge of the sink.

Comment: Outlets within 6 ft of sinks to be GFI and all general outlets in the kitchen. Room B137 circuit KI-3 2 outlets within 6' of sink.

HOLDER OF THIS NONCONFORMANCE (PARTIAL) PLAN APPROVAL IS FURTHER NOTIFIED HE MAY PROCEED ONLY TO THE POINT FOR WHICH APPROVAL HAS BEEN GIVEN AT HIS OWN RISK, AND WITHOUT ASSURANCE THAT APPROVAL FOR THE ENTIRE BUILDING OR STRUCTURE WILL BE GRANTED.

ABOVE ITEMS ARE NOT NECESSARILY THE ONLY ITEMS NOT IN COMPLIANCE WITH THE OBC. ADDITIONAL ITEMS MAY BE FOUND UPON FURTHER REVIEW OF THE REQUESTED INFORMATION. OMISSION OF REFERENCE TO ANY PROVISION SHALL NOT NULLIFY ANY REQUIREMENT NOR EXEMPT ANY STRUCTURE FROM SUCH REQUIREMENT OF THE OHIO BUILDING CODE. REVIEW IS BASED SOLELY UPON INFORMATION CONTAINED WITHIN THE SUBMITTED DRAWINGS & RELATED DOCUMENTS

IN ORDER TO EXPEDITE THE REVIEW, THE FOLLOWING SHOULD BE OBSERVED:
(Failure to do so may lengthen review time +/or plans may be returned.)

- Drawings should only be new, revised plan sets submitted directly to City of Upper Arlington - Building Dept;
- Circle all plans changes in colored pencil or pen upon plan resubmission and mark item number referenced;
- Note in a companion letter the action taken -- reference to each plan review comment;
- Attach a copy of the original Correction Letter to your response;
- All changes per addendum are to be noted on plans - a letter merely agreeing to comply is not satisfactory.

Once corrections are made, submit two (2) identical complete sets of revised plans to the City of Upper Arlington for review

Nonconformance (partial) Approval
City of Upper Arlington, Ohio

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Windermere Elementary School
20-1220 (1)
[20-XXXX_SPR]

PART II

In accordance with OBC §105.1.4, the Building Department is hereby issuing this
~ **NONCONFORMANCE – (PARTIAL) - PLAN APPROVAL** ~

Listed below are items not clearly in compliance with provisions of the Ohio Building Code (OBC). These items, if any, shall be brought into full compliance with OBC as a condition of the issuance of this partial plan approval.

They do not need to be shown on the revised resubmitted sets. If not these items will be repeated on the approval letter.

A. OMC 507.6 Performance test. A performance test shall be conducted upon completion and before final approval of the installation of a ventilation system serving commercial cooking appliances. The test shall verify the rate of exhaust airflow required by Section 507.5, makeup airflow required by Section 508 and proper operation as specified in this chapter. The permit holder shall furnish the necessary test equipment and devices required to perform the tests.

Comment: This item will be on the final approval letter, response not necessary.

B. OMC 507.6.1 Capture and containment test. The permit holder shall verify capture and containment performance of the exhaust system. This field test shall be conducted with all appliances under the hood at operating temperatures, with all sources of outdoor air providing makeup air for the hood operating and with all sources of recirculated air providing conditioning for the space in which the hood is located operating. Capture and containment shall be verified visually by observing smoke or steam produced by actual or simulated cooking, such as with smoke candles, smoke puffers, and similar means.

Comment: This item will be on the final approval letter, response not necessary.

C. OMC 506.3.2.5 Grease duct test. Prior to the use or concealment of any portion of a grease duct system, a leakage test shall be performed. Ducts shall be considered to be concealed where installed in shafts or covered by coatings or wraps that prevent the ductwork from being visually inspected on all sides. The permit holder shall be responsible to provide the necessary equipment and perform the grease duct leakage test. A light test shall be performed to determine that all welded and brazed joints are liquid tight.

A light test shall be performed by passing a lamp having a power rating of not less than 100 watts through the entire section of ductwork to be tested. The lamp shall be open so as to emit light equally in all directions perpendicular to the duct walls. A test shall be performed for the entire duct system, including the hood-to-duct connection. The duct work shall be permitted to be tested in sections, provided that every joint is tested. For listed factory-built grease ducts, this test shall be limited to duct joints assembled in the field and shall exclude factory welds.

Comment: Test to be conducted prior to installation of duct wrap. This item will be on the final approval letter, response not necessary.

<p>Documents: Per OBC §107.7, (1) set of approved construction documents shall be kept at the site of the work, along with manufacturer's installation instructions & product information, and shall be available for use & reference by the building official at all times while such work is in progress.</p>
<p>Placard: Per OBC §1004.3, every room or space that is a place of assembly or education shall have approved occupant load posted in a conspicuous space, near main exit from the room or space. Assembly rooms or spaces which have multiple uses shall be posted for <u>all</u> such uses. All signs shall be furnished by Owner and be of legible, permanent design. If lost, removed or defaced, they shall be immediately replaced.</p>

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Windermere Elementary School
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[20-XXXX_SPM]

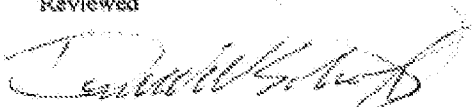
Heating: Heating equipment shall be installed in accordance with underwriters approval, manufacturer's recommendation, good engineering practice and the Ohio Mechanical Code and the International Fuel Gas Code.
Plumbing: Plumbing was reviewed for fixture compliance and general piping. Plumbing equipment shall be installed in accordance with manufacturer's recommendation, good engineering practices and the Ohio Plumbing Code.
Electric: All electrical work shall comply with requirements of OBC 2701 / NFPA-70 (NEC) and is subject to the approval of the field inspector.
Fire Extinguishers: (OBC 906) Portable fire extinguishers shall be provided in occupancies and locations as required by the Fire Prevention Code.

Start of construction indicates acceptance of all the above noted conditions. This review does not preclude the necessity to conform to provisions which may have been omitted or overlooked in the review process, but which are requirements of the code. Ultimate responsibility for legal compliance with the Standards of Safety rest with the registered design professional, tenant, and the owner. Plan Approval will be valid only upon receipt of one signed copy of this addendum by the City's Building Department.

ADJUDICATION ORDER: In accordance with §119.09 to §119.13 of the revised code, as required by §3781.031 of the revised code, you have the right to appeal items in this letter to the state board of building appeals if requested within 30 days from the mailing date of this adjudication order. You have the right to be represented by counsel, present arguments, either oral or in writing, present evidence and examine witnesses appearing for or against you to request an appeal:

Send a written request listing items to be appealed and relief sought, with a check or money order for \$200.00 made payable to "Treasurer, State of Ohio", and a copy of this order to the address below. Send additional copy of all data to the City of Upper Arlington Building Official at the address below:

State of Ohio Department of Commerce Division of Industrial Compliance Board of Building Appeals 6608 Tussing Road - PO Box 4009 Reynoldsburg, Ohio 43068-9009 Phone: 614-644-2616	Roger A. Eastep, Building Official City of Upper Arlington 3600 Tremont Road Upper Arlington, OH 43221-1595
---	--

Reviewed

Donald W. Schofield; Plans Examiner
614-371-4431

Signed

Roger A. Eastep; Chief Building Official
Upper Arlington, Ohio

Signed _____
Date _____
Print Name & Title as Signed _____

- Date _____
- Architect
 - Engineer
 - Owner
 - Contractor

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**BEFORE THE BOARD OF BUILDING APPEALS
STATE OF OHIO**

Upper Arlington City Schools
1950 North Mallway Drive
Upper Arlington, OH 43221

Appellant

CASE NO. 20-0091

-VS-

FINAL ORDER

Roger A. Eastep, Building Official
City of Upper Arlington Building Department
3600 Tremont Road
Upper Arlington, OH 43221-1595

Appellee

This matter came up for hearing on Thursday, June 4, 2020 on an appeal from Adjudication Order No. 20-1220(1), dated April 13, 2020, issued by the City of Upper Arlington Building Department. Said adjudication order involved the premises known as Windermere Elementary School, 4101 Windermere Road, Upper Arlington, Ohio.

Based on evidence adduced by, and representations of the Appellant and the Appellee, the Appellant appealed Item 13 of the adjudication order.

Based upon the evidence submitted and testimony, the Board upholds Item 13 of the adjudication order.

VOTING RECORD				BY THE MEMBERS OF THE BOARD
YES	NO	ABSTAIN	ABSENT	
	X			Karl H. Schneider, Attorney
X				Paul R. Beegan, Architect
X				Neil J. Giering, Pipefitter
	X			Bradley J. Smith, Engineer
X				Porter R. Welch, Firefighter

Any party desiring to appeal shall file a Notice of Appeal with the Board of Building Appeals, 6606 Tussing Road, Reynoldsburg, Ohio 43068 setting forth the order appealed from and stating that the agency's order is not supported by reliable, probative, and substantial evidence and is not in accordance with law. The notice of appeal may, but need not, set forth the specific grounds of the party's appeal beyond the statement that the agency's order is not supported by reliable, probative, and substantial evidence and is not in accordance with law. The Notice of Appeal shall also be filed by the appellant with the Court of Common Pleas of the county in which he is a resident or in which the premises affected by this order is located. Such notices of appeal shall be filed within fifteen (15) days after the mailing of the notice of the Board of Building Appeals Order as provided in Section 119.12 of the Ohio Revised Code.

CERTIFICATION

EXHIBIT A-2

The State of Ohio,
County of Franklin, SS

I, the undersigned Executive Secretary for the Board of Building Appeals, hereby certify that the foregoing is a true

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and exact reproduction of the original Order of the Board of Building Appeals entered on its journal, on the 10th day of June 2020.



Susan R. Steer
Susan R. Steer
Executive Secretary

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Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215
Office: 614.227.2300
www.bricker.com

Christopher McCloskey
Direct Dial: 614.227.2385
cmccloskey@bricker.com

June 18, 2020

State of Ohio Department of Commerce
Division of Industrial Compliance
Ohio Board of Building Appeals
6606 Tussing Road – P.O. Box 4009
Reynoldsburg, OH 43068-9009
Attn: Susan R. Steer, Executive Secretary
Via Email: susan.steer@com.state.oh.us

Re: **REQUEST FOR RECONSIDERATION**
*Upper Arlington City Schools v. Roger A. Eastep, Building Official City of
Upper Arlington Building Department; BBA Case No. 20-0051*

Dear Ms. Steer:

I am writing on behalf of the Upper Arlington City School District Board of Education ("School Board") to respectfully request that the Board of Building Appeals ("BBA") reconsider its decision and Final Order upholding Item 13 of Adjudication Order No. 20-1220(1). This request is being made under the authority of *Diltz v. Crouch*, 173 Ohio St. 367 (1962). The City of Upper Arlington does not oppose this Request for Reconsideration.

Specifically, in this matter, the School Board's design calls for single-occupant toilet rooms with floor-to-ceiling walls and solid, full-frame, lockable doors, identified for use by either sex. The BBA implicitly found that the bathrooms at issue do not comply with OBC 2902 because they are not separate facilities provided for each sex, and further denied the School District's request for a variance to allow use by either sex in this specific instance. The School District is asking the BBA to reconsider its decision, solely to the extent it denied the requested variance.¹

A. Standard for Granting a Variance

Under O.R.C. 3781.19, the BBA may grant a variance if it finds that "a variance

¹ The School District is not stipulating or otherwise agreeing that the BBA's determination that the bathrooms don't comply with 2902.2 and 2902.1.2 is correct. Rather, the School District is reserving its objections to those findings for appeal if necessary.

Bricker & Eckler
ATTORNEYS AT LAW

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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.*" (Emphasis added.) Thus, the BBA must first determine whether the variance is contrary to the public interest and then whether the order will give rise to an unnecessary hardship. Here, the requested variance is not against public interest and enforcement of the provisions at issue will result in an unnecessary hardship.

1. Public Interest

a. Federal Courts

Here, the School Board is attempting to install single-occupant toilet rooms identified for use by either sex. While there are a number of reasons the School Board desires this proposed bathroom configuration (discussed below), one major consideration is avoiding the need to classify students based on gender in order to promote equality and to curtail reinforcement of negative stereotypes and other biases. A variance request based on this issue alone is not contrary to public interest, as a matter of law. On Monday of this week, June 15, 2020, the Supreme Court of the United States made that clear in *Bostock v. Clayton County*, 590 U.S. ____ (2020), stating:

Ours is a society of written laws. Judges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations. In Title VII, Congress adopted broad language making it illegal for an employer to rely on an employee's sex when deciding to fire that employee. We do not hesitate to recognize today a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law.

Slip Opinion at *33. Thus, gay and transgender individuals are protected under Title VII.

Further, an Ohio federal court has held that Title IX protects transgender students in Ohio public schools, *Board of Education of the Highland Local School District v. U.S. Department of Education*, 208 F.Supp.3d 850 (2016), stating:

[A]ccess to a communal school bathroom constitutes an 'aid, benefit[], or service[]' or a 'right, privilege, advantage, or opportunity.' Access to the bathroom is thus an education program or activity under Title IX.

Id. at 865.



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[T]he Court turns to the third element of a Title IX discrimination claim: whether the discrimination has harmed Jane [the student]. Some issues in this case are difficult, but determining whether Jane has been harmed from the School District's policy is not one of them. Testimony from Joyce Doe [the parent] and Jane herself indicates that Jane feels stigmatized and isolated when she is forced to use a separate bathroom and otherwise not treated as a girl.

Id. at 870-71.

Amici from school districts in twenty states around the country ... provide further support for the Court's conclusion that Highland cannot show that allowing a transgender girl to use the girls' restroom would compromise anyone's privacy interests. When they adopted inclusive policies permitting transgender students to use bathrooms and locker rooms that correspond with their gender identity, all of these school districts wrestled with the same privacy concerns that Highland now asserts and, in fact, at least one of the districts was investigated by OCR for non-compliance with Title IX before ultimately reaching a Resolution Agreement with the agency. The school administrators agreed that although some parents opposed the policies at the outset, no disruptions in restrooms had ensued nor were there any complaints about specific violations of privacy.

Id. at 875.

[T]he Court finds no merit in Third-Party Defendants' argument that other students would be harmed by allowing Jane to use the bathroom consistent with her gender identity, as other students already do. The balance of equities tips especially sharply in Jane's favor because the injunction she seeks is narrowly tailored to permit her to use the girls' restroom and does not even implicate locker rooms or overnight accommodations at the middle- and high school levels. *Moreover, 'it is always in the public interest to prevent the violation of a party's constitutional rights.'* [...] Similarly, *'the overriding public interest lay[s] in the firm enforcement of Title IX.'*

Id. at 878 (citations omitted) (emphasis added).

The proposed bathroom configuration at issue here eliminates the scenario at issue in *Highland* altogether—no student will need to identify a gender prior to using the restroom facility, because all bathrooms are single occupant and open to any student, regardless of their gender identity. Thus, as a matter of law, the proposed bathroom



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configuration is firmly within the public interest.

b. International Code Council

In further support of the public interest component, as discussed at the hearing, the International Code Council—the governing body for the International Building Code—recognizes all of the foregoing issues and has adopted two additional exceptions to IBC 2902 in order to make clear that the intent is to provide an option for unisex single-user toilet rooms. Moreover, the governing state agency, the Ohio Department of Commerce, has proposed these same exceptions to the OBC as well, although they have not yet made their way to codification. 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 OBC)]....

These proposed changes demonstrate the ICC's intent to clarify that single-user toilet rooms may be designated for use by either sex.

c. Testimony at the Hearing

There was no testimony or evidence presented at the hearing in opposition to the public interest element. Rather, it appears, based on the video transcript of the proceedings, 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.² In response, the Superintendent of the School District, Dr. Paul Imhoff, testified that elementary schools almost always have communal sinks and washing stations as a matter of practice in order to properly supervise the children.³ This point was further supported by City Attorney, Jeanine Hummer, who testified that the City's analysis of the building code found nothing discussing a person's ability to groom themselves in private as relating to whether the building code's safety requirements had been met.⁴

² June 4, 2020 Video Transcript at 1:36:47 – 1:37:24.

³ *Id.*

⁴ June 4, 2020 Video Transcript at 1:37:40 – 1:38:10.



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Moreover, discussions between BBA members regarding grooming were not just limited to the School District's hearing. References to the School District's case were made in an earlier case the same morning of the hearing, Case No. 20-0046, concerning Hot Dog Tony's Restaurant in Sandusky, Ohio. BBA members discussed the School Board's case and compared it to the Hot Dog Tony's case. Statements were made by BBA members regarding out-of-court discussions held with friends, with one BBA member stating: "I have actually talked this over with some woman friends of mine, and they are, they see real issues with this—not having any privacy in a restroom as far as the lavatory." That Board member went on to state he would consider supporting a variance in the Hot Dog Tony's case, but not another case, which appeared to be in reference to the Upper Arlington proceeding.⁵

In addition to being contrary to federal law discussed above, these discussions raise significant procedural concerns. Hearsay testimony was taken from unidentified witnesses and used to sway the opinions of BBA members during the hearing, and there was no other corroborating evidence presented by any of the witnesses at the hearing in furtherance of the hearsay testimony. Further, the School Board was not given any prior notice of the intention to rely upon this hearsay testimony during the hearing, nor the opportunity to cross-examine these unidentified witnesses or to present countervailing testimony. Because the close 3-2 decision of the BBA denying the variance was predicated on what the record shows to be, in some respects, an improper basis, the School Board is requesting that this matter be reconsidered by the BBA so that the School Board can have an opportunity present public interest testimony to refute the hearsay testimony.

2. Unnecessary Hardship

At the hearing, it was not disputed by The City of Upper Arlington that the School Board and the students would suffer an unnecessary hardship if a variance was not granted. Moreover, the School Board presented extensive testimony from each of the witnesses, including testimony by the architect of record, Steve Dzurainin of Moody Nolan, the Superintendent of Schools, Dr. Paul Imhoff, Chief Building Official for the City of Upper Arlington, Roger A. Eastep, and Upper Arlington City Attorney, Jeanine Hummer. All of whom testified in favor of the variance.

Specifically, 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

⁵ June 4, 2020 Video Transcript at 53:00:00 – 54:43:00.



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enhance safety of the students.⁶

Upper Arlington Superintendent, Dr. Paul Imhoff, 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, and that the community supports it and the elected officials who represent them—the Board of Education—fully support it. Dr. Imhoff also testified to his experience as a 30-year educator, that he had taken part in building projects for two other school districts prior to the Upper Arlington project, and how the School Board felt that that the proposed bathroom design would best serve the School Board's goals, which include:

- 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.⁷

Dr. Imhoff also went into significant detail regarding the planning process, and how the proposed changes to the building code, which would have likely 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.⁸

Dr. Imhoff's testimony was not contradicted by the opposing party, Chief Building Official, Roger A. Eastep, who also testified in support of the variance. Mr. Eastep testified that, as a construction industry veteran with over 40 years of experience who had reviewed over a billion dollars in construction, including many schools, 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 Dr. Imhoff with respect to providing a safe learning

⁶ June 4, 2020 Video Transcript at 1:24:55 – 1:27:45; 1:31:18.

⁷ June 4, 2020 Video Transcript at 1:36:00 – 1:36:45; 1:41:36 – 1:47:18.

⁸ *Id.*



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environment for students that the proposed design would accomplish.⁹

Moreover, based on a review of the video transcript, it does not appear that the BBA disputed the hardship issue. Rather, it appears the BBA's determination was based on public interest, as noted above.

C. Conclusion

In light of the foregoing, the School Board requests that the BBA reconsider its position and grant the variance, or at a minimum, allow for an additional hearing so that the School Board can put on additional public interest evidence, especially in light of the unnecessary hardship that would be faced by the School Board and the students.

The School Board additionally respectfully requests that the BBA consider this request at its next opportunity, as the School Board intends to appeal this matter to the Court of Common Pleas, and we will need to advise the School Board as to how this matter will proceed at its next public meeting on June 24, 2020. If the BBA does reconsider its decision and grant the requested variance, then an appeal would be unnecessary.

Very truly yours,

BRICKER & ECKLER LLP

Christopher L. McCloskey

- cc: Paul Imhoff, Superintendent
- Andrew Geistfeld, Treasurer
- Christopher Potts, COO
- Steve Dzurainin, Moody Nolan
- Roger A. Eastep, Chief Building Official
- Jeanine Hummer, City Attorney

⁹ June 4, 2020 Video Transcript at 1:52:00 – 1:53:27.