

1 APPEARANCES:

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6 On behalf of the Appellant,
7 Upper Arlington City School
8 District, Board of Education.

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1 Tuesday Afternoon Session,
2 April 26, 2022.

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4 CHAIRMAN SCHNEIDER: All right.

5 Allison, we're going to go on the record.

6 Okay. It's 3:20. The last matter
7 we have, case and/or matter, however you want
8 to refer to it, is a matter that has come to
9 us on a Remand from the Common Pleas Court
10 based on an Appellate Decision that did
11 essentially the same thing and some other
12 things to the Trial Court and the Trial Court
13 then issued an Order to us to enter a Variance
14 Order of this Board in accordance with the
15 Trial Court's Decision in the Court of
16 Appeals' mandates.

17 So let me read that. It's Case
18 No. 20-0051, CCP-20 AP576, CVF-004102. So
19 those would be, what, 20-0051, is that our
20 number?

21 MS. STEER: Yes.

22 CHAIRMAN SCHNEIDER: Okay. That's
23 the Board Building Appeals number. And then
24 is the CCP and the CVF, are those the Common

1 Pleas and the Appellate Court numbers?

2 It doesn't matter. We know what the case is.

3 MS. STEER: It is the Common

4 Pleas.

5 CHAIRMAN SCHNEIDER: Okay. Well,

6 that's who has issued the directive to us.

7 The Court of Appeals didn't issue the

8 directive to us, the Trial Court did. Okay.

9 That matter has been -- thank you. Yeah.

10 Okay. Now, this is -- the CPC, this is -- it

11 doesn't matter.

12 The Court of Appeals Case No. is

13 20 AP576 and the Common Pleas Court No. is the

14 20 CVF-4102, which would be the last one on

15 our docket, but in any event. Okay.

16 So, I think we had this up in

17 Ashland a month or two ago and we continued it

18 and I think we wanted to get some advice from

19 counsel and we did, but so in any event, but

20 the history, to the extent anybody needs to

21 know, is that this Board by a three to two

22 vote then upheld the Adjudication Order of the

23 Upper Arlington Building Authority Department.

24 I think Brad and I voted in favor of granting

1 the variance at that time.

2 The School Board took appeal to
3 that in the Trial Court, which was the next
4 avenue of relief. And then there was a
5 Summary Judgment Decision that was issued then
6 that indicated that our upholding the
7 Adjudication Order was wrong. I think that
8 was the way it was. But then there was a --
9 that Order was vacated by the then sitting
10 Judge.

11 That went up to the Court of
12 Appeals, which was the next place north and
13 the Court of Appeals said that the then Judge
14 Russo shouldn't have vacated her previous
15 Order, which indicated that we either abused
16 our discretion or whatever the issue was, and
17 that the variance should have been granted, so
18 that's what the Court of Appeals said.

19 So, new sitting Judge, who
20 receives the Court of Appeals Decision and
21 then issues an Order that was served on us
22 whenever -- I don't have that information in
23 front of me. It doesn't matter. We don't
24 need that, Susan. Which indicates that we

1 have to enter an Order of this Board that
2 would grant a variance to the Windermere
3 Elementary School in accordance with the
4 Judge's Decision. So that's where we are.

5 Russ, you're able to hear me,
6 correct?

7 MEMBER DEMAGALL: Yes.

8 CHAIRMAN SCHNEIDER: Okay. So
9 with respect to that, gentleman, what's your
10 pleasure. Paul, do you have some thoughts?

11 MEMBER BEEGAN: Yeah, if you
12 wouldn't mind, Mr. Chair. I do have a
13 statement I'd like to read.

14 CHAIRMAN SCHNEIDER: Please.

15 MEMBER BEEGAN: And if it please
16 the Chair, I'd like to have it submitted as
17 well, too, and become part of the record.

18 CHAIRMAN SCHNEIDER: Okay.

19 MEMBER BEEGAN: Thank you. I have
20 proudly served on the Ohio Board of Building
21 Appeals since 2013, and had been reappointed
22 as the Architect Member of this Board by both
23 the previous and current Governor of the State
24 of Ohio. My appointment was confirmed by the

1 Ohio Senate. I am the most Senior Member and
2 have been elected as the Vice Chair of the
3 Ohio Board of Building Appeals.

4 I take the duties and
5 responsibilities of my appointment to this
6 Board very seriously. When I consider cases
7 that come before this Board, I am duty-bound
8 by Section 3781.19 of the Ohio Revised Code,
9 which establishes the Ohio Building Board of
10 Building Appeals. In that section, it states
11 that "The Board of Building Appeals, as the
12 agency conducting an adjudication hearing, may
13 reverse or modify an Order of an enforcing
14 agency by a variance if the provisions of the
15 governing laws will not be contrary to public
16 interests, where literal enforcement of such
17 provisions will result in unnecessary
18 hardship." Additionally, as a Registered
19 Architect on this Board, I am duty-bound to
20 ensure that any variance considered by this
21 Board does not violate the health, safety or
22 welfare of the general public.

23 In this Case No. 20-0051 for the
24 Upper Arlington City School District, Board of

1 Education versus The City of Upper Arlington
2 Building Department, on June 10th, 2020, the
3 Ohio Board of Building Appeals voted to uphold
4 the Adjudication Order issued by the Building
5 Department. This Board determined that
6 literal enforcement of the governing laws
7 would not result in an unnecessary hardship
8 for the Upper Arlington City School District
9 Board of Education.

10 What the Upper Arlington City
11 School District Board of Education wanted to
12 do at the Windermere Elementary School was to
13 install only restroom facilities that would be
14 shared by both male and female sexes. The
15 testimony presented at the hearing indicated
16 that to the opinion of Paul Imhoff, the
17 Superintendent of the Upper Arlington Schools,
18 that quote, "gender neutral bathrooms are best
19 for all students," end quote, including,
20 paraphrasing from an article in Northwestern
21 Law Review that says, quote, "We don't need to
22 classify students based on gender," end quote.

23 The argument presented at the
24 hearing is that the 2018 version of the

1 International Building Code, which has not yet
2 been adopted by the State of Ohio, State of
3 Ohio Board Building Standards, would allow for
4 the presented restroom facilities design. The
5 argument was very misleading on several
6 counts.

7 First, the terminology is very
8 important to this matter. The terms gender
9 and sex are not interchangeable. Both the
10 International and Ohio Building Codes are
11 specific in the use of the term sex to
12 distinguish between male and female and not
13 the term gender. Gender classification or
14 identity is not a consideration of either
15 Building Code.

16 Second, the 2018 version of the
17 International Building Code does not outright
18 permit all restrooms to be unisex or for
19 argument gender neutral. The 2018 version of
20 the International Building Code would allow,
21 through an exception, to permit unisex
22 restroom facilities to count towards the
23 required plumbing fixture count. The 2018
24 version of the International Building Code and

1 the current Ohio Building Code would still
2 require restroom facilities to be divided by
3 sex. The new exception would not penalize a
4 building for providing unisex restroom
5 facilities. So in the new code, if adopted
6 outright, would still require separate sex
7 facilities but permit the inclusion of unisex
8 facilities. The argument presented for the
9 Windermere Elementary School is in effect
10 applying the exception of unisex restroom
11 facilities to all of the restroom facilities,
12 which I do not believe is the intention of the
13 Code.

14 Third, the assumption that the
15 2018 version of the International Building
16 Code would be adopted by the State of Ohio
17 Board Building Standards without modification
18 quite often, the Ohio Board Building Standards
19 modifies the International Building Code
20 before adoption, and I expect that this
21 particular Code Section is right for
22 modification, especially given this case and
23 in particular, its application to educational
24 buildings.

1 I completely understand that the
2 Upper Arlington City School District, Board of
3 Education wants to be able to provide unisex
4 or gender neutral restroom facilities for use
5 by the students and staff, and this provision
6 should be commended; however, the manner to
7 provide such facilities should not be applied
8 to all restrooms. And this point directly
9 relates to the unnecessary hardship for which
10 we considered this case. The Upper Arlington
11 City School District Board of Education could
12 provide unisex or gender neutral restroom
13 facilities, in addition to the restroom
14 facilities that are required to be divided by
15 male and female, by both the current Ohio
16 Building Code and the new 2018 version of the
17 International Building Code. And I believe if
18 this type of design was presented before the
19 Board, the variance would have been granted.

20 Another point of unnecessary
21 hardship must be stated. All other schools
22 constructed in the State of Ohio have divided
23 sex restroom facilities. The Windermere
24 Elementary School would be the only school in

1 the State to not provide required restroom
2 facilities separated by sex. As such, being
3 the exception is definitely not an unnecessary
4 hardship, and why this Board upheld the
5 Adjudication Order and did not grant the
6 variance.

7 One last point about the June 2020
8 hearing before the Ohio Board of Building
9 Appeals. The testimony provided was
10 misleading regarding the involvement of the
11 parents in the Upper Arlington School District
12 for this particular issue of having restroom
13 facilities shared by both male and female
14 students. The general involvement of parents
15 for voting for a tax levy to build new schools
16 and to serve on design committees does not
17 translate into a general approval of this
18 restroom design. I do not think the Upper
19 Arlington City School District Board of
20 Education adequately explained this restroom
21 design to the parents. They did not testify
22 that this issue was discussed with parents in
23 any meaningful way, nor that this particular
24 issue was reviewed and approved by parents.

1 The fact that a parent group tried to
2 intercede into the subsequent Joint Motion for
3 Summary Judgment emphasizes this opinion.

4 I feel I need to address the
5 decision granting the Joint Motion for Summary
6 Judgment, for I think the Motion was
7 misleading to the Franklin County Court of
8 Common Pleas. In particular, they filed
9 Exhibits A, Stipulations of Fact are not
10 factual and are really just stipulations of
11 opinion. And in some of the Stipulations,
12 they are misleading. Stipulation No. 3 is
13 misleading in that it states that "Communal
14 laboratories are a typical design for
15 elementary schools." Communal laboratories
16 are not typical in elementary schools.
17 Stipulation No. 4 is misleading stating that
18 "The Ohio Building Code does not differentiate
19 between male and female for the required
20 number of plumbing fixtures." It is true that
21 the Ohio Building Code does not provide the
22 minimum number of required plumbing fixtures
23 for each sex in educational facilities, but it
24 does require that separate facilities shall be

1 provided. Ohio Building Code Section 2902.2
2 states "Where plumbing fixtures are required,
3 separate facilities shall be provided for each
4 sex." One reading this stipulation might
5 infer that separate facilities are not
6 required in educational uses. Purposely not
7 including this portion of the Code as part of
8 this stipulation is misleading. Stipulation
9 No. 11 does not adequately describe how the
10 Ohio Board of Building Appeals considers
11 cases. As previously explained, a variance
12 may be granted if the provisions of the
13 governing laws will not be contrary to public
14 interest where literal enforcement of such
15 provisions will result in unnecessary
16 hardship. This stipulation is misleading by
17 stating that "A variance should be granted if
18 deemed not contrary to the Code." Most
19 important to our decision was that the literal
20 enforcement of the Code would not result in
21 unnecessary hardship. Stipulation No. 13 is a
22 misrepresentation of the decision by the Ohio
23 Board of Building Appeals. This Board did not
24 grant a variance because the Appellant failed

1 to make a justified case for unnecessary
2 hardship. The stipulation stated that "The
3 Ohio Board of Building Appeals' decision was
4 primarily because gender neutral bathrooms do
5 not comply with the Building Code." As stated
6 previously, gender classification is not a
7 consideration of the Code. Stipulation No. 18
8 is a gross mischaracterization of the
9 provisions of the International Building Code,
10 especially as it relates to this case. I
11 explained earlier that the 2018 version of the
12 International Building Code only permits, by
13 exception, the application of unisex restroom
14 facilities to be counted towards the overall
15 required a plumbing fixture count. The 2018
16 International Building Code will still require
17 that separate facilities shall be provided for
18 each sex. Stipulation No. 19 states that "The
19 Ohio Board of Building Standards will without
20 modification adopt the applicable provisions
21 of the 2018 version of the International
22 Building Code into the next version of Ohio
23 Building Code. This is not fact, and likely
24 the Ohio Building Code will be modified prior

1 to adoption. This stipulation also infers
2 that a variance would not have been required
3 if not for the delay of the Code adoption by
4 COVID-19 pandemic. Stipulation No. 24 is
5 misleading in that though the City did not
6 dispute an unnecessary hardship, it did not
7 testify to any determination of unnecessary
8 hardship. And on my rereading of the hearing
9 transcript, no testimony was given by either
10 the Appellant or the Appellee that students
11 would suffer an unnecessary hardship. The
12 inclusion that students would suffer an
13 unnecessary hardship was only part of the
14 appeal to the Franklin County Court of Common
15 Pleas, and in no part of the testimony
16 presented to this Board.

17 Nowhere within the Joint Motion
18 for Summary Judgment or the included
19 Stipulations were any facts included or an
20 argument provided for regarding unnecessary
21 hardship if a variance was not granted. All
22 it says is that the Upper Arlington City
23 School District, Board of Education believes
24 an unnecessary hardship exists and the City of

1 Upper Arlington Building Department does not
2 dispute. And this is the central issue for
3 which the Ohio Board of Building Appeals made
4 its decision and as it is required to do by
5 the Ohio Revised Code. So that the Franklin
6 County Court of Common Pleas accepted the
7 opinion that an unnecessary hardship exists if
8 a variance is not granted as fact without any
9 evidence or testimony is quite troubling to
10 me. Even with the misleading Stipulations in
11 the Joint Motion for Summary Judgment, I would
12 think that the Franklin County Court of Common
13 Pleas would want to understand the basis for
14 the Ohio Board of Building Appeals'
15 determination that an unnecessary hardship
16 does not exist before granting its own
17 judgment.

18 As such, it is my opinion that the
19 Franklin County Court of Common Pleas should
20 not have made judgment contrary to the
21 determination of the Ohio Board of Building
22 Appeals in this case. Personally, I do
23 believe that restroom facilities should be
24 provided for those students who might have

1 anxiety about choosing either a male or a
2 female restroom because of their own gender
3 identity. I do not believe that this anxiety
4 rises to the level of determining that a
5 student's health, safety or welfare are at
6 risk. The proper solution would be that
7 schools provide unisex toilet rooms that are
8 considered gender neutral, in addition to
9 restroom facilities that are separated by sex,
10 as is required by the Building Code. Forcing
11 all students into restroom facilities that are
12 shared by students of the opposite sex is not
13 a prudent solution, especially as these are
14 middle school students.

15 Additionally, I believe that
16 parents should have the right to determine
17 which restroom facilities are in a school that
18 their children should occupy. Parents should
19 solely make that determination, not the
20 students and definitely not any School Board
21 or a Superintendent.

22 And finally, I feel I need to
23 chastise the City of Arlington Building
24 Department. I understand that the Building

1 Department plans to grant their own variance
2 for the same type of restroom facilities in
3 other new school buildings in the district
4 instead of performing their duty as required
5 by the Ohio Revised Code, the Ohio Building
6 Code and the Ohio Board of Building Standards
7 to issue an Adjudication Order. Even if a
8 variance had been granted for Windermere
9 Elementary School, that variance would not be
10 applicable to other school buildings. Rulings
11 of the Ohio Board of Building Appeals are
12 applicable only to the building on the
13 Adjudication Order and do not set any
14 precedents or change any requirements of the
15 Building Code. The intentions of the City of
16 Arlington Building Department are clearly
17 stated in Stipulation No. 9 of the Joint
18 Motion for Summary Judgment regarding these
19 other schools. I also believe that the Upper
20 Arlington City School District Board of
21 Education and the City of Arlington are
22 complicit in this action to evade the
23 requirements of governing law and bypass the
24 Ohio Board of Building Appeals.

1 I intend to make formal complaint
2 to the Ohio Board Building Standards and the
3 Ohio School Board's Association.

4 For these reasons, I cannot in
5 good conscience and under oath to perform the
6 duties and responsibilities -- excuse me. It
7 is for these reasons I cannot in good
8 conscience and under oath, to perform the
9 duties and responsibilities as the Architect
10 Member and Vice Chair of the Ohio Board of
11 Building Appeals vote, to grant a variance for
12 this case. I understand that my vote is
13 contrary to the Remand from the Franklin
14 County Court of Common Pleas.

15 If the other Members of the Ohio
16 Board of Building Appeals intend to issue a
17 variance in compliance with the Order of the
18 Franklin County Court of Common Pleas, I would
19 kindly ask the Chair continue this case one
20 more time so that I may tender my resignation
21 from this Board to the Governor of the State
22 of Ohio prior to any such action.

23 CHAIRMAN SCHNEIDER: Okay. Well,
24 obviously, that was eloquent. I guess we've

1 got to see where we are. Let's go to the end
2 of that. Regardless of the other substance of
3 it, what Paul's -- I mean, Paul's been the
4 most valuable guy on this Board, there's no
5 question about that. He does the heavy
6 lifting and we don't want to lose him. But
7 he's indicated that out of some courtesy, and
8 as I understand it, that we kick the can one
9 more time to allow him to do what he just
10 said. If we're inclined to grant that, or to
11 comply with Judge Munson's Remand Order, you
12 know, it's an issue that I guess we're going
13 to have to make a determination on, but what's
14 in front of us and on our lap is her Order of
15 December 15th of last year that says based on
16 the Court of Appeals' Decision that vacates
17 Judge Russo's November 30, 2020 Decision
18 vacating the Summary Judgment and allowing the
19 intervention of Jane Doe and others, and she
20 denies the Motion to Vacate Summary Judgment
21 of the intervening Appellee Jane Doe and
22 grants the Joint Motion of Summary Judgment
23 that Judge Russo issued originally, and orders
24 that the case be remanded to the Ohio Board of

1 Building Appeals for issuance of a variance
2 consistent with Judge Russo's September 15th,
3 2020 Decision Granting Summary Judgment. I
4 paraphrased that so, I mean, that's what we're
5 -- we're under some sort of Court directive to
6 do that.

7 So let me start with Chip, where
8 are you on this, what do you want?

9 MEMBER WELCH: I would not vote to
10 reissue the -- or to issue the variance.

11 CHAIRMAN SCHNEIDER: Okay. If I
12 were to ask for a vote, I want to make sure
13 I'm clear, if were to ask for a vote on Judge
14 Munson's Remand, you would vote "nay"?

15 MEMBER WELCH: Correct.

16 CHAIRMAN SCHNEIDER: Okay. Paul,
17 you wouldn't vote? Well, let's see where we
18 are. Brad, where are you?

19 MEMBER SMITH: Well, since we're
20 remanded, I would uphold -- I would vote for
21 it because of the Remand, yes.

22 CHAIRMAN SCHNEIDER: And Russ,
23 hopefully Russ is still here. Russ, can you
24 hear us?

1 MEMBER DEMAGALL: Yeah, can you
2 hear me? I just had it muted.

3 CHAIRMAN SCHNEIDER: Yeah, we can
4 hear you. Have you been able to hear
5 everything that has transpired thus far?

6 MEMBER DEMAGALL: Yeah. The only
7 thing I didn't hear is Brad.

8 MEMBER SMITH: Oh. I would
9 support the Court Order, the Remand, that
10 provides the variance.

11 MEMBER DEMAGALL: Okay. Yeah, my
12 take on the whole thing is, like, the long and
13 short of it, I've never been so disappointed
14 in the law in my life, to be honest with you.
15 I mean, we're put on this Board to make
16 decisions and not be told what to do and how
17 to do it. And basically, what Paul said in a
18 nutshell, it made it through two Judges and I
19 just, I still to this day don't understand how
20 this all happened and how they can justify
21 putting it back on the Board and not making
22 the call themselves, which they have the right
23 to do it, if that's what they so choose. And
24 if they would have interviewed people and

1 found out that probably someone lied under
2 oath, either with us or in Court, if they
3 would have done their due diligence in my
4 opinion.

5 But after all that's said and
6 done, I would vote to uphold the Court Order
7 just for the simple fact of it's either that
8 or you resign from the Board if you choose not
9 to. I mean, it's just -- I don't agree with
10 it. I think that the Board did what they were
11 supposed to do and I think the Board still
12 does what they're supposed to do, but this is
13 ridiculous, but I would vote yes.

14 CHAIRMAN SCHNEIDER: Okay. And
15 look, I think it's pretty clear that this
16 isn't -- I don't think -- I don't view this
17 personally as a decision on the merits. I
18 know where I was on the original decision of
19 the Board, as was Brad. And then three of our
20 colleagues wanted to uphold the Adjudication
21 Order, but I don't view it as the merits now.
22 I view it as something that we have to do.

23 With that being said, you know, I
24 don't know that we need to do all this on the

1 record, but it sounds to me that -- how does
2 this work, Susan, if this were to be voted on,
3 I mean, and we're going to consider the
4 continuance request for a second, but nobody
5 wants him to resign, if this were to be --
6 like, how do you put our signatures on an
7 Order? I don't even --

8 MS. STEER: The Order just --

9 CHAIRMAN SCHNEIDER: Just assume
10 this was just like any other Order of the BBA.

11 MS. STEER: Well, this isn't going
12 to look like any other Order.

13 CHAIRMAN SCHNEIDER: It will show
14 "yeas" and "nays", right?

15 MS. STEER: It has --

16 CHAIRMAN SCHNEIDER: With the
17 checkmarks, right?

18 MS. STEER: You have to have a yes
19 or no vote from each Board Member -- or from
20 the Board.

21 CHAIRMAN SCHNEIDER: I mean, the
22 Order itself.

23 MS. STEER: Correct.

24 CHAIRMAN SCHNEIDER: I mean, the

1 record will show it, but the Order itself that
2 goes out that's available to the public, it
3 always shows -- you have checkmarks.

4 MS. STEER: You'll have each
5 Member's name and how they voted.

6 CHAIRMAN SCHNEIDER: Okay.

7 MS. STEER: Whether they abstained
8 or they were absent, whether they voted yes or
9 voted no, is how the Order would look.

10 CHAIRMAN SCHNEIDER: Okay. Well,
11 yeah, I mean, look, I'm a little reluctant to
12 turn this into something that is a perfuse
13 record in the sense that we go much further on
14 this. But if this were to be remanded on a
15 three to two basis today, as opposed to on a
16 three to something basis in the future, I
17 mean, do you still want it continued? And,
18 you know, I mean, I don't know want -- this is
19 maybe --

20 MEMBER BEEGAN: I think it's
21 pretty clear from my perspective, right, that
22 the duties and responsibilities of this Board
23 would be to do what's required of us and send
24 it back to the Court to say they did the wrong

1 thing. They did not look at the hardship
2 issue at all, nor was any of that evidence or
3 testimony provided in the Joint Motion for
4 Summary Judgment. Right. So a mistake has
5 been made. So I do not want to be part of the
6 Ohio Board Building Appeals in any way, shape,
7 or vote, yes or no vote in any way if you're
8 going to take --

9 CHAIRMAN SCHNEIDER: Okay. All
10 right. I got that.

11 MEMBER BEEGAN: If you're going to
12 take that action.

13 CHAIRMAN SCHNEIDER: Gotcha.
14 Gotcha. I mean, the problem we have is that
15 we've been reviewed, but we're not necessarily
16 empowered to review the Court of Appeals or
17 the Trial Court, notwithstanding our personal
18 beliefs. I mean, that's where we're -- you
19 know, that's the predicament we're in. But I
20 would -- look, I'd be willing just out, you
21 know, just out of collegial courtesy to
22 continue the matter to allow you to do what
23 you need to do so that if and when this is
24 brought up on remand, now in the future you're

1 not associated with it. I mean, that's what
2 you're saying, right?

3 MEMBER BEEGAN: That is correct.

4 CHAIRMAN SCHNEIDER: Not what any
5 of us wanted to hear, right, but certainly to
6 give you respect where you are.

7 Chip, you've got a law degree,
8 what do you think? Continue it?

9 MEMBER WELCH: So I'm going to
10 specifically address counsel, since he's
11 sitting here. And I realize you're -- this
12 isn't a called case or whatever. But I think
13 between the three attorneys sitting in this
14 room, based on the record that has --

15 CHAIRMAN SCHNEIDER: We have four
16 because we have Division counsel.

17 MEMBER WELCH: We have Division
18 Counsel, too. My apologies. In the least
19 offensive terms we can say that there was
20 probably a mischaracterization of what
21 transpired in the hearing here in 2020, and
22 probably in the strongest terms, it was a
23 fraud upon the Court in terms of what was
24 presented. Somewhere in between is an

1 accurate adjective to describe what transpired
2 in the Court of Common Pleas.

3 So, that being said, what I would
4 ask of counsel is, because we are not, this
5 Board and the AG's office and the Board of
6 Building Appeals is not a party to your case,
7 but that effectively ask Judge Munson to issue
8 the Order that you want, in terms of granting
9 your variance, because she has that authority.

10 CHAIRMAN SCHNEIDER: Let me ask
11 this question then.

12 MEMBER WELCH: Because in all
13 respects from a practical standpoint, what we
14 do doesn't make a hill of beans difference.
15 You already got your variance. You don't have
16 your Certificate of Occupancy, which raises
17 another issue about your Building Department,
18 not yours, but the City of Upper Arlington's
19 Building Department because they have granted
20 Certificate of Occupancies to other structures
21 or other buildings in the City that allegedly
22 don't follow the Building Code. So I'm asking
23 you from one attorney to another to alleviate
24 -- there is a way to alleviate the conundrum

1 facing, and conundrum is a nice way of putting
2 it, facing this Board, but for your client to
3 achieve what they want to achieve, or have
4 already achieved. So thank you.

5 CHAIRMAN SCHNEIDER: You are
6 sitting in the cheap seats to observe, but you
7 can enter your appearance, if you care to.

8 MR. KERSHAH: I would. Thank you.
9 Tarik Kershah on behalf of the Upper Arlington
10 City School District. I would first say, you
11 know, I think it's clear that, you know,
12 certain members of the Board have their
13 position. I don't think issuing a variance
14 that's ordered by a superior tribunal in
15 anyway, you know, reflects poorly on your
16 character and your position. But --

17 MEMBER BEEGAN: That has nothing
18 to do with it. It has everything to do with
19 the Court telling us that we did not do our
20 job properly, and we did do our job properly.

21 MR. KERSHAH: Understood. But it
22 is also part of your job, it's part of the
23 Board's statutory charge to comply with orders
24 of Superior Court. I mean, that's just the

1 bottom line. I'm not going to get in the back
2 and forth about whether or not what we
3 presented, in your sense was improper to the
4 Court, but I will say that the transcript of
5 the proceedings went to the Trial Court and
6 the Court of Appeals. They have the full
7 transcript. They were able to review it. So
8 whatever may have been, you know, in your
9 opinion characterized improperly, they could
10 have double checked it against the transcript
11 and I'm sure they did. So I don't think it's
12 a fair characterization.

13 MEMBER BEEGAN: I'm not sure that
14 they did. I can almost guarantee they didn't
15 because there's no mention of hardship in the
16 testimony or in the Joint Motion for Summary
17 Judgment. And that is the reason why we ruled
18 the way we did.

19 MR. KERSHAH: And I appreciate
20 that. But you also have to understand that
21 the school district went through the process.
22 They didn't just skip any steps. They went
23 through the proper process. They got their
24 Order. And I think the school district has

1 been, you know, reasonably patient having, you
2 know, received this Order back in February and
3 now we're almost into May and they still don't
4 have their variance that they're entitled to.
5 So, you know, again, I appreciate the Board's
6 position, but I would ask that, you know, the
7 Board comply with its statutory charge and
8 issue the variance.

9 CHAIRMAN SCHNEIDER: Hey, Russ,
10 were you able to hear Tarik?

11 MEMBER DEMAGALL: I was, yeah.

12 CHAIRMAN SCHNEIDER: Okay. All
13 right. I just wanted to make sure you were
14 still with us. Okay. Well, let me ask this
15 question. You know, one of the problems is
16 this case is terminated, right, terminated on
17 the Common Pleas docket?

18 MR. KERSHAH: And that would be
19 the other issue is, I don't believe we could
20 even, you know, reopen the case anyway at the
21 Court of Common Pleas.

22 MEMBER BEEGAN: I think we could
23 reopen it if we voted no and have it recalled
24 up on a contempt charge. I can guarantee it

1 would be in court.

2 CHAIRMAN SCHNEIDER: Well, yeah, I
3 mean, termination is a stamp and it gets it
4 off the reporting docket.

5 MEMBER WELCH: Pay your fee,
6 they'll reactivate anything.

7 CHAIRMAN SCHNEIDER: And won't be
8 -- it wouldn't be -- it might be a court cost,
9 I don't know. Well, let me ask this. Let me
10 ask this. To Paul, if the Trial Court went to
11 the effort of a one or two sentence Order that
12 essentially grants the variance in lieu of
13 this Board, what does that do with your
14 future?

15 MEMBER BEEGAN: That would be
16 fine. Again, if the Court wants to overrule
17 us, apparently they did, don't let them
18 overrule us, right, and grant the variance.
19 Right. Again, my biggest issue is the Order
20 that we somehow did our job wrong and to me,
21 that is incorrect. We did everything that we
22 were required to do, by all Judge standards,
23 that we have to us.

24 So, to answer your question,

1 right, if this was continued and counsel went
2 to the Judge and the Judge modified the Order
3 and removed the remand directive, I would
4 probably stay on this Board.

5 CHAIRMAN SCHNEIDER: Well, I mean,
6 that's a higher calling for a lot of reasons,
7 in terms of in the interest of transacting our
8 business, having you around. I can't
9 remember. Janine has left the City. Who is
10 the City Attorney?

11 MR. KERSHAH: It's Darren Jones.
12 I believe he's probably on. I don't know if
13 he is or not.

14 CHAIRMAN SCHNEIDER: Okay.

15 MR. KERSHAH: He's not.

16 CHAIRMAN SCHNEIDER: Not. Okay.
17 I would have recognized him and get his input,
18 if he was. But I'm just wondering whether or
19 not -- well, let me ask you this and this is
20 putting you on the spot a little bit because
21 you may not know, because I don't know and I
22 sit on this Board. But couldn't the Trial
23 Court -- do you think the Trial Court could
24 issue the Order that then the City of Upper

1 Arlington Building Department issues the
2 permit and the authorization based on the
3 variance in lieu of us?

4 MR. KERSHAH: I don't believe that
5 they could do that, no. I think that the
6 power solely lies with this Board to issue a
7 variance. And again, this proceeding is
8 closed. I mean, it's been resolved for a
9 while. Again, I don't think this is a
10 reflection on any opinion of this Board on,
11 you know, what's correct or wrong. This is an
12 Order. I mean, it's very clear that this
13 Board doesn't agree with, or at least some
14 members don't agree with the Order. This is
15 literally a procedural just stamp it, you've
16 been directed by the Court to do it.

17 MEMBER DEMAGALL: Can I say
18 something? This is Russ.

19 CHAIRMAN SCHNEIDER: Yeah.

20 MEMBER BEEGAN: If the Court
21 directed me to do anything else against the
22 law, I would not, so that's how I feel on
23 this.

24 CHAIRMAN SCHNEIDER: Okay. Go

1 ahead, Russ.

2 MEMBER DEMAGALL: In regards to
3 that comment, you know, that's all great and
4 fine, but our names are on there for the rest
5 of our lives. They're not going to know who
6 the attorney was. So it is very near and dear
7 to our hearts, as you heard Paul speak about
8 it.

9 CHAIRMAN SCHNEIDER: Right. I
10 mean, yeah, I hear you. I hear you on that.

11 MR. KERSHAH: I mean, I don't know
12 if this would help with it, if you put, you
13 know, under protest next to the name.
14 Whatever. At the end of the day, we just want
15 our variance issued.

16 CHAIRMAN SCHNEIDER: Well, we
17 could explore whether the Trial Court would do
18 essentially what Tarik is going to go back and
19 say it was our job. Right.

20 MEMBER WELCH: We have Division
21 Counsel here.

22 CHAIRMAN SCHNEIDER: Well, we
23 don't have Assistant AG.

24 MEMBER WELCH: And that's true,

1 sorry.

2 CHAIRMAN SCHNEIDER: Yeah, I
3 remember a Tenth District Court of Appeals
4 case that goes way back with a Dublin
5 Securities case and it dealt with in the
6 Commerce Department what the extent of
7 attorney/client privilege is among in-house
8 agency lawyers because they were trying to
9 call on the securities case in-house lawyers
10 -- the defense was trying to call in-house
11 lawyers up and it was a securities criminal
12 case. And it is limited where the AG is our
13 counsel.

14 MEMBER WELCH: Karl, let me ask
15 you a question. Why can't, if the School
16 Board and the City were so inclined, why can't
17 they submit an Agreed Amended Entry?

18 CHAIRMAN SCHNEIDER: Okay. But it
19 would say what?

20 MEMBER WELCH: That effectively
21 instead of remanding it, that the Judge issues
22 the, whatever language the City wants to cover
23 its position of saying, well, we can go ahead
24 and issue the variance based on -- or issue

1 the Certificate of Occupancy based on what the
2 Judge has said.

3 CHAIRMAN SCHNEIDER: Yeah, no one
4 is going to object to that.

5 MEMBER BEEGAN: No. It's an --
6 the City and the School Board have gone hand
7 in hand throughout this process so why can't
8 you submit an Agreed Entry?

9 CHAIRMAN SCHNEIDER: That
10 directs -- well, because -- all right. So the
11 City is a party, correct?

12 MEMBER WELCH: Right.

13 CHAIRMAN SCHNEIDER: And the
14 School Board is a party. And the parties
15 could submit a Proposed Agreed Entry that
16 Judge Munson signs that directs the City of
17 Upper Arlington to issue the variance, is that
18 what you're saying?

19 MEMBER BEEGAN: No. The City of
20 Upper Arlington couldn't issue a variance.

21 MEMBER WELCH: They can issue the
22 Certificate of Occupancy.

23 CHAIRMAN SCHNEIDER: I mean, the
24 Certificate of Occupancy. Thank you for

1 correcting, yeah.

2 MEMBER BEEGAN: They could issue a
3 Certificate of Occupancy, that would be
4 correct.

5 CHAIRMAN SCHNEIDER: Well, I think
6 the reality is that Judge Munson's Staff
7 Attorney, I mean, as a practical matter, even
8 though it's terminated, you know, a call to
9 the Staff Attorney would probably even result
10 in a ten-minute phone call with the Court or
11 short status conference might accomplish that.
12 But look, I feel like we're under a Court
13 Order that we -- I mean, I agree with Tarik in
14 that sense that, you know -- and you said it
15 as well, Chip, I mean, the water is over the
16 dam in the sense that the variance has
17 essentially been granted. Right?

18 MEMBER WELCH: Yes.

19 CHAIRMAN SCHNEIDER: They've got
20 their variance is the term you used. So the
21 issue is, out of deference to Paul, who has
22 served -- he's the longest serving member of
23 this Board and really is the heaviest lifter,
24 do we continue this and perhaps in the interim

1 get Judge Munson's audience, not we, but the
2 parties, we're not a party unless we were to
3 somehow be granted some sort of special status
4 for purposes of the status conference, and get
5 it done that way to save a valued Board
6 Member, or with the cast dye with what Russ
7 has told us and what Brad has indicated and
8 what I've said I would do, do we go ahead and
9 just move forward today? That's the question,
10 I think. And I think you've again made a
11 record for the School District.

12 So, Russ and/or Brad, well, and
13 Chip, I guess We haven't heard from you on
14 that either. Deliberate and conclude business
15 today or see if the parties can't seek an
16 audience with judgments?

17 MEMBER WELCH: I would prefer the
18 parties submit an Agreed Entry or seek a
19 meeting -- a teleconference with the Judge.

20 CHAIRMAN SCHNEIDER: Russ?

21 MEMBER SMITH: Can we force that?

22 CHAIRMAN SCHNEIDER: We can't
23 force it, no. It would just be a -- it would
24 be gratuitous on their part. I mean, the

1 School Board has won the case, you know, so it
2 would be gratuitous on the part of the School
3 Board. And maybe, you know, in cooperation
4 with the City, because even though the City
5 and the School Board are, you know, simpatico
6 at this point in time they can't ex parte the
7 Judge. They'd have to have the City Attorney
8 involved in that process. But I mean, I guess
9 that's where we are, right? I mean, I think
10 we're at moving forward or adjourning today
11 without concluding business and see what
12 happens, if anything, with Judge Munson in her
13 chambers. Those are the two options.

14 MEMBER BEEGAN: That's not true.
15 I mean, my request for continuance is only so
16 that I resign before you take action.

17 CHAIRMAN SCHNEIDER: Right. But
18 the hope would be that perhaps that audience
19 would happen before you actually -- I mean,
20 you tender your resignation, you tender
21 your -- I mean, it's effective immediately.

22 MEMBER BEEGAN: It's done. Yep.

23 CHAIRMAN SCHNEIDER: I mean, I
24 would think. I suppose the Governor wouldn't

1 have to accept it, right?

2 MEMBER SMITH: I mean, if there's
3 any chance we could keep Paul on the Board, I
4 would be all for it.

5 CHAIRMAN SCHNEIDER: Yeah, right.
6 Russ.

7 MEMBER BEEGAN: Don't go calling
8 the Governor now and telling him that you
9 won't accept my resignation now because that
10 would really throw things into a pickle. I
11 don't know if I could pray enough to get an
12 answer for that one.

13 CHAIRMAN SCHNEIDER: Russ, do you
14 want to adjourn, set this down -- it won't be
15 tomorrow, but what's our next date, you know?

16 MS. STEER: May 3rd.

17 CHAIRMAN SCHNEIDER: That's a
18 week.

19 MEMBER DEMAGALL: I mean, I
20 always, you know, kind of looked up to you and
21 Chip as attorneys and Paul with the experience
22 and time and what is -- I don't know what you
23 guys are feeling there, you know what I mean.
24 I obviously rather it go to the Judge and have

1 her, per se, do her job and let her override
2 it if she wants to and give them the variance.
3 I mean, instead of remanding it back to us and
4 taking our voice away. But I don't know the
5 feeling there and what you guys, you know,
6 besides I heard Chip and I absolutely, you
7 know, back that up, but I don't know, you know
8 where it's all at as far as, you know, if
9 there's an option of talking to the Judge or
10 not, but does Counsel there seems to think
11 that option or not or you know --

12 CHAIRMAN SCHNEIDER: Well, I'm not
13 real optimistic that the School Board's lawyer
14 thinks that that's a viable option, but you
15 know, agreed entries happen all the time,
16 particularly in State Court.

17 MEMBER DEMAGALL: I mean, is there
18 a chance to call the AG and ask him?

19 CHAIRMAN SCHNEIDER: The AG is not
20 a party. And we're not a party.

21 MEMBER DEMAGALL: Yeah.

22 CHAIRMAN SCHNEIDER: Well, see,
23 these are the problems. We're not allowed to
24 have these conversations behind closed doors.

1 MEMBER BEEGAN: Right.

2 CHAIRMAN SCHNEIDER: We have to do
3 this out in sunshine, which makes it kind of
4 awkward. Here's what I'm inclined to do -- I
5 don't know that I'm empowered.

6 MEMBER SMITH: Well, could you
7 facilitate this what we're talking about?

8 CHAIRMAN SCHNEIDER: Well, you're
9 putting him on the spot, but if you want to
10 answer that, I mean, that's -- right, you --

11 MEMBER SMITH: Not being an
12 attorney, you can ask these questions.

13 CHAIRMAN SCHNEIDER: Right. Well,
14 he's secure -- the variance is for all and
15 practical purposes, they've been prevailed
16 upon. They just don't have the piece of
17 paper, which is the occupancy permit. The
18 Judge has pushed this down to us, which is not
19 unusual, but it's unusual in this case because
20 of certain facts and circumstances.

21 MEMBER BEEGAN: Actually, it is
22 unusual. I mean, how long have you been on
23 the Board secretary, Susan?

24 CHAIRMAN SCHNEIDER: Right. Well,

1 I mean, it's not unusual to move it back down
2 to the original authority or jurisdiction.

3 What's unusual in this case is
4 that, unlike, you know, the Court of Appeals
5 that tells the Judge, you have to resentence
6 this defendant, the Judge doesn't want to do
7 it but he has to comply or she has to comply,
8 and they just do it because they're numb to it
9 because they get the Court of Appeals pushing
10 stuff down to them all the time. What's
11 unique about this, is that sort of the issues
12 that you've espoused. Which leads me to, if
13 I'm empowered to do this, I would say we
14 adjourn today, reconsider it May 3rd, and just
15 hope that the Bricker firm and the City
16 Attorney contact the Court.

17 You know, that might result in the
18 show cause, I mean, too contacting the Court.
19 You know, the Board has considered this -- has
20 called it twice and hasn't acted in accordance
21 with the Judge's decision. But you know, if
22 it spares you resigning, which is one pathway
23 -- or the only pathway to keeping you on the
24 Board, I would do that.

1 MEMBER WELCH: There's a second.

2 CHAIRMAN SCHNEIDER: What's the
3 second?

4 MEMBER WELCH: The City Building
5 Official can issue the C of O. He doesn't
6 have an Order from this Board granting the
7 variance, but he's got a Court Order.

8 CHAIRMAN SCHNEIDER: Okay. Here's
9 what we're going to do.

10 MEMBER BEEGAN: No, I mean, option
11 two we could vote to uphold the Order and then
12 get our day in Court, too, that way we can sit
13 behind closed doors, but then we're party now.

14 CHAIRMAN SCHNEIDER: You mean
15 to -- when you say uphold, do you mean to
16 uphold the Board's Order?

17 MEMBER BEEGAN: Yeah.

18 CHAIRMAN SCHNEIDER: As opposed to
19 the Court's Remand Order?

20 MEMBER BEEGAN: Yeah.

21 CHAIRMAN SCHNEIDER: But you don't
22 have three votes -- there's not three votes on
23 that right now. So again, doing this in
24 sunshine, it's awkward, but I would consider

1 kicking the can to May 3rd and seeing what
2 happens. And maybe -- did our AG reach out to
3 you, do you know?

4 MR. KERSHAH: I spoke with the AG
5 and she implied that the variance was getting
6 issued today, so I'm a little surprised.

7 CHAIRMAN SCHNEIDER: Okay.

8 MR. KERSHAH: But that's the most
9 recent.

10 CHAIRMAN SCHNEIDER: Okay.

11 MR. KERSHAH: And when I spoke to,
12 I emailed her and we had emailed
13 communication.

14 CHAIRMAN SCHNEIDER: No, had there
15 been any contact about getting an audience
16 with the Court; do you know?

17 MR. KERSHAH: No.

18 CHAIRMAN SCHNEIDER: Okay.

19 MR. KERSHAH: Well, not with me.

20 CHAIRMAN SCHNEIDER: Not with you.

21 And are you the person with the most hands on
22 the case?

23 MR. KERSHAH: For the record?

24 CHAIRMAN SCHNEIDER: This case?

1 MR. KERSHAH: Yeah.

2 CHAIRMAN SCHNEIDER: Yeah, that's
3 why I thought. Okay. Okay. Well, we'll see
4 -- you comfortable setting this for May 3rd
5 and seeing what transpires?

6 MEMBER BEEGAN: Yes. And again,
7 this is -- it is a little awkward, but you
8 know, just so that we have some type of
9 response or answer in enough time for me to be
10 able to take action so that the next time the
11 case is heard you guys can move, if necessary.

12 CHAIRMAN SCHNEIDER: What day the
13 3rd, Wednesday?

14 MS. STEER: A week from today.

15 CHAIRMAN SCHNEIDER: Today?

16 MS. STEER: Tuesday, May 3rd.

17 CHAIRMAN SCHNEIDER: Yeah, is it.

18 All right. Let's do that. You don't -- if
19 you want to appear by phone, if there's even a
20 need to appear, let's set it down for May 3rd.

21 MS. STEER: Is there a Motion?

22 CHAIRMAN SCHNEIDER: That's what I
23 said. Was I empowered to do it, I guess not.

24 All right. Is there a Motion to Continue

1 this particular case that's on our docket
2 under remand until May 3rd?

3 MEMBER WELCH: So moved.

4 CHAIRMAN SCHNEIDER: Is there a
5 second?

6 MEMBER SMITH: Second.

7 CHAIRMAN SCHNEIDER: All those in
8 favor say "aye".

9 ALL MEMBERS: "Aye".

10 CHAIRMAN SCHNEIDER: Any opposed?
11 Okay. All right. We stand adjourned on that.
12 Let's go off the record.

13 (Thereupon, the proceedings
14 adjourned at 4:13 p.m.)

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1 CERTIFICATE

2 The undersigned do hereby certify that
3 the foregoing proceedings were digitally
4 recorded, electronically transmitted, and
5 transcribed via audible playback, and that the
6 foregoing transcript of such proceedings is a
7 full, true and correct transcript of the
8 proceedings as so recorded.

9 IN WITNESS WHEREOF, I have hereunto set
10 my hand and affixed my seal of office at
11 Columbus, Ohio, on this 8th day of September
12 2022.

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