

STATE OF RHODE ISLAND
AND
PROVIDENCE PLANTATIONS

COMMISSIONER OF
EDUCATION

MELISSA PATTAVINA, et al.

v.

NEWPORT SCHOOL COMMITTEE

DECISION

Held: The Petitioners have demonstrated that floor plans for the Pell Elementary School do not meet the space allowance guidelines for the cafeteria or gymnasium as required by RIDE's School Construction Regulations (5/24/07). There is no evidence that the Board of Regents has approved a "Space Allowance Exception" for this project pursuant to Section 1.06-5 of the Regulations. The School Committee, in conjunction with RIDE's School Construction Office, must determine whether the space allowances for the cafeteria and gymnasium will be adjusted or whether the Committee must present a request for a space allowance exception to the Board of Regents. The other contentions of the Petitioners have not been proven by a preponderance of the evidence. These allegations include: that there was insufficient public input in the selection of a design for the Pell School; that safety issues are created by a bridge from the second floor and by the placement of an access road near the play area. The Petitioners' requests to invalidate the Memorandum of Agreement committing state housing aid for this project to Newport and to require a redesign of the Pell School are denied.

DATE: December 07, 2011

Travel of the Case:

The Petitioners, a group of concerned Newport citizens, submitted a petition to Commissioner Deborah A. Gist on February 15, 2011. At that time they sought the Commissioner's intervention in the proposed construction of a new elementary school in Newport. Specifically, they requested that the Newport School Committee be required to address numerous design flaws in the approved project, to solicit the services of a new architect and to engage in a meaningful design review process. The School Committee filed a Motion to Dismiss to which the Petitioners objected, and on May 26, 2011 the Commissioner ruled that the Petitioners had standing to bring an appeal that focused on issues arising under RIDE's School Construction Regulations (5/24/07). The Commissioner also indicated that the claims and supporting facts that had been raised had little likelihood of success. The Petitioners were allowed to proceed to present proof of their claims, which they did¹ on June 21, 2011, August 9, 2011 and August 16, 2011. Closing arguments were submitted in writing, and reply briefs were also filed. The record in this case closed on October 21, 2011. The decision has been expedited because of the effect the ruling in this appeal may have on the progress of construction of the new school.

ISSUES

- Do the dimensions of the cafeteria and gymnasium as shown on floor plans submitted to RIDE provide the square footage for these spaces that is required under the School Construction Regulations?
- Does the design of the Pell Elementary School, with its inclusion of a bridge for emergency egress from the second floor and its location of an access road for deliveries that runs alongside the lower school play area, pose unnecessary hazards to the safety of students?
- Does the fact that schematic designs submitted to RIDE during Stage II of the approval process did not show a bridge for emergency egress invalidate the Board of Regents' approval of the project and/or invalidate the Memorandum of Agreement by which school housing aid was committed to Newport for this project?

¹ The Petitioners were represented by an attorney during the preliminary proceedings on the Motion to Dismiss. They proceeded without counsel on the merits of their claims.

- Did the School Committee’s contract with HMFH architects lead to improper professional procedures and ultimately to inadequate design services?
- Did the School Committee violate the School Construction Regulations by failing to have a Commissioning Agent retained to represent it throughout all phases of the design process and by securing the services of a company that was not authorized to do business in the state of Rhode Island?
- Did the public process for school construction meet minimum standards required by the Regulations and state law?

Findings of Relevant Facts:

- On April 1, 2010 the Rhode Island Department of Elementary and Secondary Education received a “Stage II Necessity of School Construction Application” from the Newport School District. Resp. Ex. E. Section 7 of the Stage II Application contained Schematic Design Documents prepared by HMFH Architects that showed a proposed “airplane” design for a new elementary school. Other documentation in the Stage II Application indicated that the school would house approximately 842 students in grades Pre-K through 4, would consist of 122,017 square feet² and would have a projected cost of \$38,999,970. Resp. Ex. D.
- RIDE reviewed the district’s Stage II Application and on April 16, 2010 RIDE’s School Construction Coordinator, Joseph P. daSilva, wrote to Superintendent John H. Ambrogi to request additional information. Mr. daSilva also wrote that certain adjustments to the application were “critical to the approval and ultimate success of this project”. He suggested that the district adjust the educational program to reflect higher classroom capacities so that efficiencies could produce a smaller, more cost-efficient facility. He noted RIDE’s recommendation that the district proceed with a more compact design that would be constructed within the limits of the school property (rather than require the re-routing of Dexter Street). Resp. Ex. E.
- Superintendent Ambrogi supplemented Newport’s Stage II Application on April 30, 2010. Included in the submission to Mr. daSilva were revised schematic design plans for a more compact “T” shaped school consisting of 110,463 square feet on a site plan that did not

² This is the total square footage indicated on the schematic design documents.

require the relocation of Dexter Street. The total projected cost was reduced to \$33,264,280. Resp. Ex. F.

- The materials provided by Superintendent Ambrogi on April 30, 2010 also indicated that the Newport School Committee had voted to approve the issuance of a request for proposal for a Commissioning Agent and that the firm ultimately selected would be brought on board immediately after the successful passage of the bond referendum for the new school. Resp. Ex. F.
- After RIDE's school construction staff had reviewed the supplementary material with the design team and school administration, Mr. daSilva wrote to Dr. Ambrogi on May 20, 2010 to indicate that RIDE would be recommending that the Board of Regents approve the Stage II Application, with the following overall adjustments:
 1. The total project size for the new elementary school on the Sullivan School site reduced to 100,000 square feet.
 2. The project budget eligible for housing aid will be no more than thirty (\$30,000,000) million dollars.
- Newport's school construction application was approved by the Board of Regents on June 3, 2010. A Memorandum of Agreement between the district and RIDE was entered into on July 9, 2010, setting forth the dollar authorization (budget agreement) not to exceed \$30,000,000; scope of the project (construction of a new 100,000- square foot elementary school at the existing Sullivan School site to serve approximately 840 students); and timelines (begin the design process promptly upon passage of the bond referendum, with substantial completion and certificate of occupancy no later than June of 2013). Resp. Ex. H and N.
- A bond referendum for financing of the approved project was approved by Newport voters. Resp. Ex. M.
- The School Committee secured the services of a Commissioning Agent, Strategic Building Solutions, LLC in December of 2010. Tr. Vol. I pp. 284-285. Strategic Building Solutions' certificate of authority to conduct business in Rhode Island had been revoked by the Secretary of State on November 8, 2010, Pet. Ex.15, and was thereafter reinstated by the Secretary of State on August 11, 2011. Resp. Ex. R.

- After a series of public meetings were held after approval of the bond referendum, the Newport School Committee voted on February 15, 2011 to submit a “Stage III” schematic design using double loaded corridors for the upper and lower schools, a “T” shape design, with centrally located common core elements as presented by HMFH architects and as recommended by the Pell Building Committee on February 14, 2011. Tr.pp. 435, 501-502, 562, 571 Pet. Ex. 1; Resp. Ex. I and S. The School Committee also voted at its February 15, 2011 meeting to approve a construction schedule calling for demolition of the building (the Sullivan School) at the construction site during the summer of 2011 and a construction completion date of no later than March 31, 2013.
- If construction of the Pell School starts in November of 2011, the school should be complete, with a certificate of occupancy issued no later than the end of June, 2013. Tr. pp. 538-539. School construction projects typically require a minimum of eighteen (18) months. Tr. p.609. If the project is not completed by the end of June, 2013, the approved project will not be in compliance with the district’s Memorandum of Agreement and, as a result, the district could be ineligible for school housing aid reimbursement altogether or see an anticipated \$1,000,000.00 in reimbursement for the “year of completion” deferred to the subsequent fiscal year. Tr. pp. 573-574, 611; Resp. Ex.H.
- The schematic design documents³ submitted to RIDE pursuant to the School Committee’s February 15, 2011 vote and the design development documents submitted to RIDE on June 23, 2011 call for a bridge that leads from the second floor horizontally at a slight angle out to high ground over the play space for the lower school. The bridge provides a means of fire egress at grade for first grade students whose classrooms will be on the second floor and is required by applicable life safety codes. The design also calls for a service road providing access to the rear of the school for deliveries and fire access. A portion of the service road is adjacent to the lower school play area. Pet. Ex.17; Tr. pp. 279, 364-372, 445-449.
- By letter dated May 23, 2011 RIDE acknowledged receipt of Newport’s Schematic Design documents for the Claiborne Pell Elementary School. In the same letter, Mr. Joseph daSilva, RIDE’s School Construction Coordinator/Architectural Design Reviewer, indicated that RIDE

³ The actual schematic design documents submitted pursuant to the February 15, 2011 vote of the School Committee were not submitted into evidence. Testimony with respect to the bridge and service road was based on the design development review documentation dated June 23, 2011 (Pet. Ex.17). A bridge was not shown on the schematic design submitted with the district’s Stage II Application in March of 2010. Tr. p. 532; Resp. Ex. D;

had conducted a review of the documents and found that the design documents were in compliance with the regulations and in alignment with the Regents' approval. Resp. Ex. J.

- By letter of Mr. daSilva to Superintendent Ambrogi dated August 10, 2011, RIDE acknowledged receipt of Newport's Design Development set for the Claiborne Pell Elementary School. In the same letter, Mr. daSilva indicated that RIDE had conducted a review of the documents and found that they were in compliance with the regulations and in alignment with the Regents' approval. Resp. Ex. P.
- As shown on the Design Development set dated June 23, 2011, the size of the cafeteria is 4,710 square feet and the size of the gymnasium is 5,610 square feet. When the storage and office space adjacent to the gym are included in the calculation of its square footage, the size of the gym increases to 6,060 square feet. Pet. Ex.17. On floor plans Mr. daSilva has reviewed and approved, the dimensions of the cafeteria are shown as 4,712 square feet. Tr. pp. 624-628.

Positions of the Parties

The Petitioners:

The Petitioners ask that the Commissioner review the record compiled in this case and require "design remedies" that will ensure that the Pell Elementary School meets RIDE's School Construction Regulations, the requirements of the site, and the needs of Newport's educational program. They submit that the design documents that are in evidence and the testimony they have presented in this case show that the approved design has serious flaws that will render the school unsafe, overcrowded and unable to support the basic education program for elementary students of the district. This situation results from inadequate architectural services and the School Committee's failure to consider input from the community in making its design decisions. Essentially, the Petitioners argue that as the district focused on constructing a single new elementary school (rather than three) to replace the existing five that are in need of major repairs and code-required upgrades, it needed architectural services that were different from those it had initially contracted for. The contract that Newport had entered into in 2007 with HMFH Architects, Inc. for architectural services did not evolve in a way that provided it with "viable design alternatives" to address

the issues that arose as the School Committee made decisions on the design for a large new elementary school at the Sullivan School site.

The Petitioners contend that there is no reason why first grade students should be placed on the second floor of the new school. This is unnecessary and requires the construction of a bridge that creates an “egregious risk” for students and for children who live near the school site. Similarly, the placement of a service road that encircles a play area for young children is unsafe, exposes students to vehicle emissions and is not cost efficient because it will result in the overbuilding of a required fire lane. When elements of the design became apparent and community concerns were raised, design decisions were not tested by alternative designs offered by the architect. In defending its selected design for the school, the School Committee has produced insufficient evidence to rebut these safety concerns. Moreover, testimony from the chair of the School Committee that the bridge poses little probability of risk was not supported by any form of quantitative analysis.

The Petitioners point to the delayed introduction of the bridge into the design plans submitted for RIDE and Board of Regents’ approval. The schematic design initially submitted in March of 2010 as part of the district’s Stage II Application did not show a bridge. There is no evidence that RIDE’s School Construction Coordinator, Joseph daSilva, knew of the bridge when the design was modified at RIDE’s suggestion to be a smaller, less costly facility and RIDE notified the district on May 20, 2010 that it would recommend approval of the Stage II Application⁴ to the Board of Regents. The Memorandum of Agreement between RIDE and the Newport School Committee does not provide approval for a bridge, such as the Committee now intends to build as part of its ill-advised design for the project.

Design development documents prepared by the district on June 23, 2011(Petitioners’ Ex.17) and floor plans submitted to RIDE indicate that the proposed school will not conform to the space allowance guidelines set forth in Section 1.06-3. The gymnasium will be 5,610 square feet, a size that will be inadequate to support the functional use of that space and falls

⁴ RIDE conditioned its approval on two additional adjustments to the district’s Stage II Application- reduction in the total project size to 100,000 square feet and a reduced project budget of no more than \$30 million dollars.

short of the required 6,300 square feet. The cafeteria's size also fails to conform to the space allowance guidelines in the School Construction Regulations. Section 1.06-3 requires two lunch sessions, with 15 square feet allocated for one-half of the planned enrollment of the school (842 students). The 4,710 square foot representation of the cafeteria's size is therefore clearly much less than the 6,315 that is required by the Regulations. The 4,710 square foot size that was deemed to be adequate, according to the testimony of RIDE's School Construction Coordinator, is actually based upon an incorrect dimensional reporting of the cafeteria's size by the district's architects because after a deduction of square footage is made for passageways required by the fire code, the actual size of the cafeteria is only 3,346 square feet. A cafeteria of this size will require four (4) separate lunch sessions. As a result, the Pell School will have a noisy "dining commons" for a large portion of the school day and the activity there will interrupt the learning environment of the school. The dimensions of this space do not meet the space standards of the School Construction Regulations and this will impair the school's conformity with the requirement that students have a focused learning environment per the BEP (Basic Education Program Regulations of the Board of Regents). Mr. daSilva's finding that the cafeteria's size was adequate was due to his reliance on a misrepresentation of the cafeteria's size and in any event the Regulations require that one-half, not one fourth, of the students be accommodated in the cafeteria in each of two lunch seatings.

Other steps taken by the Newport School Committee as it moved forward after the bond referendum in November of 2010 have conflicted with the School Construction Regulations. When it finally contracted for the services of a Commissioning Agent in December of 2010, this was well after schematic designs for the school had been developed and submitted to RIDE. Section 1.09-2 of the SCR requires that the Commissioning Agent be secured prior to the design phase of the project. The company retained to provide Commissioning Agent services, Strategic Building Solutions, LLC, was not authorized to conduct business in the state of Rhode Island because on November 8, 2010, the Secretary of State had revoked its authority to do so. Thus, the Petitioners submit that this company was hired illegally and its contract with the School Committee is invalid. The input provided to the district as a result of this illegal contract has contributed to an ill-advised, accelerated construction schedule and undermined the project's compliance with RIDE's regulations during the design process. On August 11, 2011, the time this company became authorized to

work in Rhode Island, the district had completed the design development phase and was already in the process of preparing construction documents. These statutory and regulatory violations have had a negative impact on the Pell School project and can be addressed only by a revisiting the school's design.

Underlying the flaws in design that the Petitioners contend exist is what they argue to be "irregularities in the contractual relationship between the Newport School District and HMFH Architects that impeded good architectural practice." (Brief at pages 8-9) One of the Petitioners, James Asbel, who served as the architect on the Ad-Hoc School Building Committee (appointed in 2007) and then on the later-formed Construction Advisory Committee (from which he resigned in early 2010) testified at length with respect to the shortcomings of the district's contract for architectural services with HMFH Architects, Inc. He described the contract with HMFH as "highly problematic" in that it was not explicit enough about what was included in "basic services" so that the architect would be required to justify design decisions by presenting alternative designs for the School Committee's consideration. The Petitioners submit that Mr. Asbel's testimony establishes that HMFH refused to provide "basic services" normally required under an architect's contract without charging additional fees and as a result alternative designs were not developed and provided to the School Committee. Consequently, its design decisions do not reflect good architectural practice. The contract with HMFH was especially disadvantageous to the School Committee when it sought to reduce the size and cost of the project in the early months of 2010 when the Committee submitted a Stage II Application requesting approval from RIDE for a \$39 million school construction project. The Petitioners cite the testimony of the chair of the Committee that a process of "value engineering" (HMFH working with RIDE) was used to reduce the cost, rather than consideration of alternative configurations HMFH should have provided at that time.

Finally, the Petitioners note that there was limited and ineffective opportunity for public input into the school construction process after March of 2009. They argue that between March of 2009 and the fall of 2010 not a single forum explicitly designed to record public opinion was held outside of regularly-scheduled School Committee meetings. Renewed attempts at public input occurred after the passage of the bond referendum, but after

two failed attempts to hold effective public meetings, a meeting that was well-attended actually restricted comment on the only site design available. Just as this meeting concluded, in a separate room the Pell Building Committee voted to approve the existing design for the school. As a result, there has been no open debate and discussion of alternative designs for the Pell School. This violates R.I.G.L. 16-2-9.1 that requires that school committees accept and encourage a variety of opinions from and communication with all parts of the community.

In light of the facts in this record, the Petitioners request as a remedy that the Memorandum of Agreement to provide state funding for this project be revoked until such time as the Newport School Committee has corrected the serious design flaws and regulatory violations that exist. The Petitioners request that RIDE re-open its review of the Stage II Application to provide oversight of such review by the highest level of its administration and to draw upon independent expertise beyond its immediate staff in doing so. The submission of revised design development documents should be required and reviewed to ensure that the unsafe design elements as identified in this record have been eliminated. While this remedy may delay the project, the Petitioners submit that if construction starts in March of 2012, it could be completed by July 2013 with a September 2013⁵ occupancy.⁶ This schedule will maintain the district's eligibility for school housing aid reimbursement from the state.

Newport School Committee:

Counsel for the Newport School Committee submits that the Pell School construction project has proceeded through the various stages of planning and project development in conformity with RIDE's School Construction Regulations and in accordance with the terms of the Memorandum of Agreement signed by members of the School Committee and the Superintendent on July 9, 2010. The issue of compliance with the School Construction Regulations is conclusively established by the letters of approval sent by RIDE at each stage of this lengthy process. Since February of 2009 when Newport submitted a Stage I Application on behalf of the district up through August 10, 2011 when it received written

⁵ The Petitioners' reference to a September 2012 occupancy at page 3 of their Reply Brief must be a typographical error.

⁶ The Reply Brief of the Petitioners indicates a fact not in the record in this matter, i.e., that a delay of construction has already resulted from the need to re-design the project because recent construction bids were twenty percent (20%) over construction cost estimates.

notice that RIDE had approved the Design Development set for the Pell School, Newport has relied on each letter of approval from RIDE as an indicator that it could then move to the next step. Each of the design approval letters (written by the School Construction Coordinator Joseph daSilva) indicated that RIDE had reviewed the design documents submitted for the Pell School and found them to be in compliance with the Regulations and in alignment with the Regents' approval, thereby authorizing the district to move to the next stage of the process.

The letter sent to Superintendent John H. Ambrogi by Mr. daSilva on August 10, 2011 confirmed that the design development documents comply with the Regulations and are in alignment with the Regents' approval of the project. The design development set includes design features (pedestrian bridge and the service road) as well as floor plans and educational program specifications. In addition to his previous determinations that the Pell School's proposed design and space allowances comply with the Regulations, Mr. daSilva testified on August 16, 2011 that the project was and is in complete compliance with the Department of Education's Regulations for school construction.

The purported inadequate size of the cafeteria is a non-issue. Mr. daSilva of RIDE testified that the size of the cafeteria depicted on the floor plans submitted with the design development set that he approved on August 10, 2011 is 4,712 square feet. A cafeteria of this size is fully compliant with the Regulations. The School Committee emphasizes that Mr. daSilva was not asked about whether different measurements of the cafeteria result from "passageways" that the Petitioners contend are misleadingly included in the cafeteria's dimensions. The committee implicitly argues that if he were asked about whether the cafeteria actually had smaller functional dimensions than those indicated, he would not have agreed with the Petitioners' contentions in this regard. Mr. daSilva also testified that he had no concerns with respect to the safety of the bridge and that any concerns that he may have had with respect to the service road have been worked out. Counsel notes in his brief that this project has one hundred percent (100%) design development review approval. In addition, testimony of the chair of the School Committee (an engineer) and the architect who designed the school were consistent that the bridge and service road are code compliant and do not pose

undue hazards to children. There is no reason why the Commissioner should order that these design features be eliminated from the project's design and site plan.

The construction schedule set by the School Committee is both reasonable and necessary. Again, Mr. daSilva's testimony supports the Committee's arguments. He testified that the minimum length of time for completion of a project of this size is eighteen (18) months. Although it is true that the project will span two winter seasons, during the second winter the project will be enclosed. In order for the Pell School to be completed within the time frame set by the Board of Regents and in compliance with the Memorandum of Agreement, construction must begin in November 2011. Funding of the project through the school housing aid program is committed to Newport only if the project proceeds according to the terms of the Memorandum of Agreement. The Memorandum of Agreement requires that a certificate of occupancy be issued by the end of June, 2013. If the Commissioner were to order a re-design of the project, it will not be possible for the project to be completed within the required time frame, and the district could lose its ability to get reimbursement from the state, according to Mr. daSilva's testimony.

There is no basis in the record for the Commissioner to intervene to order any of the relief that the Petitioners have requested. All aspects of the project have been approved. The public has been involved in the school construction process all along, providing input that was received at many public meetings of the School Committee both before and after decisions regarding the design of the Pell School were made. One of the Petitioners addressed the Committee at length regarding his concerns on February 2, 2011 and again at the June 23, 2011 meeting of the Committee. The School Committee has heard the Petitioners' concerns about the specific design elements (the bridge and the service road) and simply does not share those concerns.

The architects utilized by the Committee for design of the Pell School were selected after a highly competitive process. HMFH Architects is nationally-recognized in the field of school construction and has an excellent track record in Newport.⁷ According to Mr. daSilva,

⁷ HMFH Architects, Inc. successfully completed construction of the new middle school in Newport, Thompson Middle School, which came in on time and under budget.

whose specialty is high-performance school design, the work of the district’s architect is “exemplary”. The School Committee notes that the Petitioners are led by an architect who was not selected for this project and whose alternative design preference failed to generate much “traction”. Other members of the Petitioners’ group would have preferred small, local elementary schools over the single, larger facility that the School Committee ultimately decided to construct, hence, underscoring their efforts to stall or scuttle this project. They “grasp at straws” to find illegalities, such as claiming that the Architect’s contract was improper and that it did not result in HMFH providing sound architectural services to the Newport School Committee. The temporary revocation of the registration of the district’s Commissioning Agent (due to a delayed filing with the Secretary of State’s office) is a de minimis lapse that the Petitioners strain to identify as a violation of law justifying the Commissioner’s intervention.

A review of the evidence provides no basis for the Commissioner’s intervention. Prior decisions of the Commissioner are cited to establish the strict parameters that constrain the Commissioner from interfering, absent a substantial violation of education law, regulation, or state education policy. The record in this matter contains no evidence of violations of law or regulation that would warrant such action. Moreover, there is a strong need to bring this project to completion and proceed according to a schedule that will ensure state reimbursement for the project to the City of Newport.

For the foregoing reasons, the School Committee requests that the Petitioners’ appeal be denied and dismissed.

DECISION

The current physical condition of Newport’s elementary schools is such that there is an urgent need for repairs and upgrades to make them code compliant and capable of providing a twenty-first century learning environment for Newport students. The district placed on the record evidence concerning the “long and winding road” and “years of effort and years of public debate and input” that preceded the 2010 bond referendum. It has been over a year since Newport voters approved the referendum to finance the construction of a new

elementary school. Since that time, Newport school officials and HMFH architects have diligently followed the “Design And Review Process” described in the School Construction Regulations (Section 1.09). At the time of hearing, construction bidding documents were being prepared. As the “clock ticks” on completion of a new school in compliance with the June 2013 deadline imposed by the Memorandum of Agreement with RIDE, there is a tendency to view any attempt to compel a reconsideration of decisions made by the School Committee as an attempt to “scuttle” the project. The Petitioners have raised their arguments in what we believe is good faith and based on their belief that different decisions would better serve their community. The Commissioner’s appeal process has remained open to provide them with the opportunity to prove their claims. An expedited review of the evidence has been undertaken to ensure that the Commissioner’s review does not impede the construction process. The need for a timely decision has constrained an extended discussion of the many issues the Petitioners have raised in their appeal.

As our findings of fact indicate, the proposed size of the gymnasium of the Pell School, when measured to include the adjacent storeroom and office space⁸, is 6,060 square feet. According to the evidence, the Regulations require a 6,300 square foot gymnasium, inclusive of storage and office space as a standard size for a school of 600 students. Additional students do not require a larger gym, but rather a need for additional “stations” and in this case that station is a health education classroom. Thus, taking the regulatory provision (1.06-3) together with the testimony of the School Committee’s architect, the proposed gymnasium does not meet the 6,300 square feet space allowance guideline for new elementary schools. There is no evidence that the Board of Regents has approved a “Space Allowance Exception” as Section 1.06-5 of the Regulations indicates they must if the proposed space diverges from the guidelines. The Regulations also require that if the Regents approve a space allowance exception, they must make a written determination that special circumstances exist and that the deviation is consistent with providing adequate, safe, cost-effective, and programmatically sound school facilities. There is no such written determination of the Board of Regents included in the record of this case.

⁸ The School Construction Regulations in Section 1.06-3 indicate that gym space includes “storage and office”.

As our findings of fact also indicate, the dimensions of the cafeteria are 4,710⁹ square feet. This size will require three lunch seatings for the school's 840-projected students with an allocated 15 square feet per student. Section 1.06-3 of RIDE's School Construction Regulations provides that for an enrollment of 600 students the cafeteria must accommodate one-half (1/2) of the planned enrollment with 15 square feet per student. The Regulations do not specifically address the required size of a cafeteria for an elementary school in which the enrollment exceeds 600 students. The Regulations do, as the Petitioners have argued, create an inference that two lunch periods are the standard for new elementary schools. The Pell School's proposed cafeteria size will not accommodate two-lunch periods. There is testimony from the School Construction Coordinator that he found the cafeteria space compliant with the Regulations by referring to the size, layout and "a whole host of elements". (Tr. p.625) Although a third lunch period may be one of the permitted "elements" to which he was referring, he did not elaborate in his testimony. Mr. daSilva's testimony does not rebut the inference that the space allowance guidelines were intended to create a standard number of lunch periods in a school and the inference that two, rather than three, lunch periods are the standard for cafeterias in new elementary schools. As with the proposed gymnasium, there is also no evidence that the Regents have approved a space allowance exception for the proposed Pell School cafeteria.

The allegations of the Petitioners that the pedestrian bridge and the service road that form part of the approved design are unsafe were not proven by a preponderance of the evidence. The weight of the evidence is that these design elements are safe, that they do not pose health or safety hazards to students or staff,¹⁰ and that they will ensure that the facility complies with all applicable code provisions. The fact that both of these design elements were discernable only in drawings submitted **after** the Memorandum of Agreement was in place does not render it invalid. There is no evidence that the approval of the Board of Regents was conditioned upon the specific schematic design submitted by the district with its

⁹ The claim that the dimensions of the cafeteria were misleading and that the cafeteria's actual functional size was 3,346 square feet was contradicted by Mr. daSilva's testimony that he had confirmed its size of 4,712 square feet.

¹⁰ The Petitioners claimed that testimony of the bridge being safe was not supported by quantitative analysis. We must note that the testimony of Mr. Asbel pointing to the bridge as creating an unnecessary hazard and posing a risk to children's safety was similarly not supported by quantitative analysis. The district's architect, Laura Wernick, and RIDE's School Construction Coordinator/Architectural Design Reviewer, Mr. daSilva, both testified that these design elements were safe. Mr. Asbel's testimony as to the hazards he foresaw was simply outweighed by their credible testimony to the contrary.

Stage II Application or the modified schematic design that was included in the supplement to the Application submitted to RIDE on April 30, 2010. Section 1.09-1 of the Regulations clearly identifies a “Design Review” process in which RIDE conducts an architectural and technical peer review of each Approved Project at three separate design phases. The Regulations taken as a whole clearly place the function of design approval with RIDE, rather than with the Board of Regents. Letters from RIDE’s School Construction Coordinator confirm that RIDE approved the schematic and design development documents, and that the design development set clearly showed the proposed pedestrian bridge and service access road.

Thus, the Petitioners’ request that the Memorandum of Agreement be invalidated because of the submission of incomplete or misleading design documents is not substantiated by the evidence.

We find no evidentiary support for the claim that HMFH “repeatedly refused to provide basic services normally required of an architect in standard practice without demanding fees for additional services” (testimony of Mr. Asbel cited in the Petitioners’ memo at page 9). The Petitioners did present testimony to this effect and focused much of their case on perceived shortcomings of both the architectural contract and the professional services of HMFH Architects, Inc. Testimony from the superintendent and the chair of the School Committee, however, indicated no dissatisfaction with either the contract or the services provided by HMFH Architects. On cross-examination, the chair of the School Committee, Patrick Kelley, refused to agree with the assertion that in January of 2010 the School Committee had requested alternative designs from its architect (to reduce the cost of the projected \$39 million project) and that the architect failed to produce them. Mr. Kelley testified that the School Committee requested HMFH to “seek options to reduce the cost” of the facility and that the architects then worked with RIDE on a process of “value engineering” to do so. He did agree that HMFH did not provide alternative designs at that time, but this is not evidence of “repeated refusals” of HMFH to comply with requests by the Newport School Committee to produce alternative designs for the Pell School.

The contract for Commissioning Agent services entered into by the School Committee with Strategic Building Solutions, LLC (SBS) is claimed to be illegal. The Petitioners submitted uncontradicted evidence that at the time SBS was hired by the Committee, in December of 2010, the Secretary of State had revoked its certificate of authority to do business in Rhode Island. Similarly uncontradicted is SBS' reinstatement to good standing by the Secretary of State on August 11, 2011. According to R.I.G.L. 7-16-43, this reinstatement is retroactive to the date of revocation, November 8, 2010. Absent additional proof, these events do not create a reason on which to invalidate the School Committee's contract with SBS. There is also no evidence that the construction schedule for the Pell School is misguidedly accelerated because of SBS' input, or otherwise. We find that the construction schedule is a function of the time constraints placed upon completion of the project by the Memorandum of Agreement. We would point out that the construction management expert of the Petitioners, who testified as to his preference for breaking ground after the winter (in March or April), would have completion of the project take place as late as June or July of 2013. (Tr. pp. 347-348) This would create a distinct possibility that the conditions in the Memorandum of Agreement for state funding for project would not be met. The earlier schedule for the project's completion in March 2013 is more prudent.

The Petitioners have correctly pointed out that the School Construction Regulations require that the services of the Commissioning Agent be in place prior to the "design phase of the project". Evidently, the School Committee sought, and received, some relaxation of this provision from RIDE. The supplemental documentation requested by RIDE on April 16, 2010 included a request that the district "(p)rovide documentation of procurement or intent to procure a Commissioning Agent per RIDE 1.09-2..." Dr. Ambrogi forwarded in response an RFP for Commissioning Agent services approved by the School Committee at its meeting of April 29, 2010. His April 22, 2010 letter to Mr. daSilva noted that the Commissioning Agent would be brought on board immediately after the successful passage of the bond referendum. We find, based on these circumstances, that the violation of the Regulations that occurred was de minimis and not a sufficient basis on which to grant the relief requested by the Petitioners.

The process followed by the Newport School Committee in making its design decisions included sufficient public input, as attested to by Superintendent Ambrogi, Laura

Wernick of HMFH Architects and as documented in Respondents Ex. S. Numerous public meetings were held at which the subject of a design for the school was discussed. It is true, as the Petitioners contend at page 14 of their brief, that none of the meetings or public forums provided the opportunity to openly debate and discuss the pros and cons of alternative designs. However, there is nothing in the law that requires this. There is evidence that members of the public, including some of the Petitioners, utilized the opportunity at these various public meetings to present the concerns that they had with respect to the design that was ultimately selected by the School Committee. There is no evidence that the School Committee violated R.I.G.L. 16-2-9.1 (4). School law simply does not require the extensive public engagement that the Petitioners envision as part of the school construction process.

For the foregoing reasons, the Petitioners' appeal is granted in part and denied in part. As indicated above and based on the record, the size of the proposed gymnasium and cafeteria should be reviewed by RIDE and any necessary space allowance guideline exceptions presented to the Board of Regents in accordance with Section 1.06-5 of the School Construction Regulations. This should occur as soon as possible so as not to delay the timely completion of the construction of the Pell School. The remedies requested by the Petitioners are hereby denied.

For the Commissioner,

Kathleen S. Murray

Deborah A. Gist, Commissioner

December 07, 2011

Date