No. 13-0654

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO
CASE NO. CA-12-98115

CLEVELAND CLINIC FOUNDATION, *et al.*,

Appellants,

v.

BOARD OF ZONING APPEALS, *et al.*,

Appellees.

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS THE CLEVELAND CLINIC FOUNDATION AND FAIRVIEW HOSPITAL

Carolyn M. Downey (0064371)
Assistant Director of Law
City of Cleveland Law Department
City Hall, Room 106
601 Lakeside Ave.
Cleveland, OH 44114
Tel: 216.664.3567
Fax: 216.420.8291
E-mail: cdowney@city.cleveland.oh.us

Attorney for Appellees

Irene C. Keyse-Walker (0013143)
(COUNSEL OF RECORD)
Benjamin C. Sassé (0072856)
TUCKER ELLIS LLP
925 Euclid Avenue, Suite 1150
Cleveland, OH 44115-1414
Tel: 216.592.5000
Fax: 216.592.5009
E-mail: ikeyse-walker@tuckerellis.com
benjamin.sasse@tuckerellis.com

Attorneys for Appellants

Sheldon Berns (0000140)
Timothy J. Duff (0046764)
Gary F. Werner (0070591)
BERNS OCKNER & GREENBERGER, LLC
37 Park, Suite 200
3733 Park East Drive
Beachwood, Ohio 44122-4334
Tel: 216.831.8838
Fax: 216.464.4489
E-mail: sberns@bernsockner.com
tduff@bernsockner.com
gwerner@bernsockner.com

Attorneys for Appellants

TABLE OF CONTENTS

Page

APPENDIX **Appx. Page**

Appx. Page

I. EXPLANATION OF WHY THIS IS A CASE OF PUBLIC AND GREAT GENERAL INTEREST

This appeal presents an issue of first impression that has caused a clear split among and within Ohio's appellate districts on an issue implicating fundamental property rights: What is the proper standard of review for appeals from zoning board orders that restrict property use? The reconsidered, split appellate decision issued in this case presents this Court with the opportunity to resolve the split and establish a uniform standard of review, by answering the following questions:

- This Court has repeatedly held that questions of law, including interpretations of statutes and ordinances, are subject to de novo review. Does R.C. 2506.04 replace that standard with one that requires judicial deference to a zoning board's interpretation of property restrictions in municipal ordinances?

- It is well established that an ambiguous restriction in a statute or ordinance regulating property use is to be construed in favor of the property owner. *See Saunders v. Clark Cty. Zoning Dept.*, 66 Ohio St.2d 259 (1981). Does that strict construction apply to alleged ambiguities regarding *which* ordinance applies to the property owner, as well as to alleged ambiguities in the "words" of the applicable ordinance?

This appeal arises out of the Cleveland Clinic's application for a permit to construct a helipad on the roof of an addition to Fairview Hospital, as part of an expansion of its emergency department and intensive care unit.[1] It is undisputed that property owners have the right to employ "accessory uses" customarily

[1] Appellant The Cleveland Clinic Foundation d/b/a "Cleveland Clinic" is an Ohio non-profit corporation. It is the sole member of Appellant Fairview Hospital, which also is an Ohio non-profit corporation. For ease in reference, the two separate entities are referred to as the "Cleveland Clinic" in this memorandum.

incident to a permitted use, that a hospital and its accessory uses are permitted uses in the zoning district where Fairview Hospital is located, and that a helipad is customarily incident to the operations of a hospital. The City of Cleveland's Zoning Administrator nevertheless denied the application and its Board of Zoning Appeals affirmed – not because the helipad is not incident (and indeed essential) to hospital operations, but because they concluded that the only permitted "accessory uses" available to the hospital were those associated with *operating local retail establishments for the benefit of local residents.* The Cleveland Clinic appealed to the Cuyahoga County Court of Common Pleas, which reversed, based on a "plain reading" of the zoning ordinances that entitled hospitals to accessory uses customarily incident *to the operations of a hospital.*

In the City's ensuing appeal to the Eighth District Court of Appeals, no party argued that the applicable zoning ordinances were ambiguous. Nevertheless, a panel of the Eighth District found ambiguity and concluded that the common pleas court exceeded its statutory scope of review by failing to "defer" to the administrative interpretation of this newfound ambiguity. (*See* 10/4/12 Appellate Opinion ("Original Op.") at ¶ 20, Appx. 33-34.) When the Cleveland Clinic moved for reconsideration based on the rule of *Saunders* that ambiguous restrictions on property use must be construed in favor of the owner, the panel substituted a new 2-1 decision acknowledging this rule but limiting it to ambiguous "words." (*See* 12/20/12 Appellate Opinion ("App. Op.") at ¶ 22, Appx. 18.) In other words,

according to the panel, courts must defer to an administrative resolution of the legal question of *which* ordinance applies — a ruling that preserved the panel's conclusion that Fairview Hospital is limited to those accessory uses incident to a local retail establishment. This novel limitation of *Saunders* provoked a dissent, which argued *Saunders* could not be so limited and any ambiguity should be resolved in the Cleveland Clinic's favor.

The source of the panel's error is R.C. 2506.04, which sets forth the standard of review for administrative orders. That statute plainly allows for judicial review of legal determinations by administrative bodies. Common pleas courts may hold evidentiary hearings and "may find" an administrative order to be "unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record." *Id.* While appellate review is "more limited," it still includes a review of the common pleas court's judgment "on questions of law." *Henley v. City of Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 147, 2000-Ohio-493, quoting *Kisil v. Sandusky*, 12 Ohio St.3d 30, 34 (1984) (emphasis omitted). Yet the question of how these standards apply to legal determinations of administrative bodies in zoning appeals has resulted in considerable confusion.

The decision below deepens an existing conflict within and among Ohio's appellate districts as to whether zoning boards' legal interpretations of zoning ordinances are reviewed de novo and without deference to the administrative

interpretation. *Compare* App. Op. at ¶ 22 *with Moulagiannis v. City of Cleveland Bd. of Zoning Appeals*, 8th Dist. No. 84922, 2005-Ohio-2180, ¶ 10 ("Though courts of appeals have a limited scope of review on R.C. 2506 appeals, interpretation of a city's ordinance presents a question of law that must be reviewed de novo."); *see also JP Morgan Chase Bank, Inc. v. Dublin*, 10th Dist. No. 10AP-965, 2011-Ohio-3823, ¶ 11 (the Sixth and Second Districts "presume valid" administrative interpretations of zoning codes, while decisions of the First, Fourth, and Eighth Districts review such interpretations "de novo"). Absent guidance from this Court, property owners are at the mercy of conflicting standards, even within the same district. *Compare, e.g., Lamar Outside Advertising, Inc. v. City of Dayton Bd. of Zoning Appeals*, 2d Dist. No. 18902, 2002-Ohio-3159 (applying de novo standard of review "regarding questions of law" in R.C. Chapter 2506 administrative appeal) *with Lamar Outdoor Advertising, Inc. v. City of Dayton Bd. of Zoning Appeals*, 2d Dist. No. 20158, 2004-Ohio-4796, ¶ 6 (zoning board's interpretation of zoning code "will be upheld if it is a reasonable interpretation").

Here, critical operations at Fairview Hospital — including the expeditious transport of critically ill and injured patients requiring emergency treatment — were unlawfully restricted by an anomalous administrative interpretation of a zoning ordinance. Then, after the common pleas court applied the "plain" (and common sense) interpretation that a hospital may employ accessory uses customarily incident to the operations *of a hospital*, the court of appeals reinstated

the fundamentally flawed administration interpretation. The court below chastised the trial court for applying the "plain language" of the ordinance instead of "deferring" to the zoning board's anomalous construction, then misinterpreted its own "more limited" standard of review of legal questions by: (1) creating a non-existent ambiguity; and (2) resolving that ambiguity in favor of a restriction on the use of private property.

The second step conflicts with well-settled precedents of this Court. For nearly a century, this Court has adhered to a rule of law that "[s]tatutes or ordinances * * * which impose restrictions upon the use * * * of private property, will be strictly construed, and their scope cannot be extended to include limitations not therein clearly prescribed; exemptions from such restrictive provisions are for like reasons liberally construed." *State ex rel. Moore Oil Co. v. Dauben*, 99 Ohio St. 406, syllabus (1919); *see also Saunders*, 66 Ohio St.2d at 261; *Terry v. Sperry*, 130 Ohio St.3d 125, 2011-Ohio-3364, ¶ 19. This "elementary principle" applies to "[a]ll zoning decisions, *whether on an administrative or judicial level*[.]" *Sperry*, 2011-Ohio-3364, ¶ 19, quoting *Saunders*, 66 Ohio St.2d at 261. A rule of law that requires courts to defer to administrative interpretations of property restrictions is flatly inconsistent with an "elementary principle" that requires strict construction of those restrictions *at the judicial level.*

It is no answer to say, as the panel did below, that the rule of strict construction will apply where "a particular word in a zoning ordinance is

ambiguous[.]" (App. Op. at ¶ 22, Appx. 18.) Nothing in this Court's jurisprudence supports a distinction between ambiguities in a "word" and the interpretive issues that arise when two provisions seemingly conflict. Rather, a rule of law teaching that restrictions on property use are "strictly construed" while exemptions are "liberally construed" is equally applicable to judicial efforts to harmonize seemingly conflicting zoning ordinances.

At bottom, the decision below gives administrative bodies the power to decide, on a case-by-case basis, which zoning ordinance applies to which property — without any meaningful review of whether that decision is correct. Such unfettered discretion is inconsistent with a scope of review that plainly includes "questions of law" and the elementary principal that all restrictions on property use must be strictly construed in favor of the property owner at the judicial level. This Court should accept jurisdiction to resolve the confusion over the appropriate standard for reviewing legal determinations by zoning boards.

II. STATEMENT OF THE CASE AND FACTS

A. The Relevant Statutory Scheme.

An understanding of the rulings in this case requires some legal context. The City of Cleveland's Zoning Code permits a variety of uses in residential and local business districts that can and do serve persons outside the neighborhood where they are located. In Multi-Family Districts, permitted property uses include (among other things) public museums, public or private schools or colleges, children's

boarding homes, orphanages, homes for the aged and hospitals. *See* Cleveland Codified Ordinances 337.08(e)(1)-(8). Permitted property uses also include accessory uses permitted in a Multi-Family District. *See id.* at 337.08(f). These same uses also are permitted in a Local Retail District, which "borrows" the uses permitted in a Multi-Family District. *See id.* at 343.01(b)(1).

Fairview Hospital is located in a Cleveland Local Retail District. Because Local Retail Districts allow uses permitted in a Multi-Family District (*id.*), and because a hospital is a permitted use in a Multi-Family District (*id.* at 337.08(e)(5)), Fairview Hospital is a permitted use in its Cleveland Local Retail District, where it has operated since the area was zoned a Local Retail District in 1964.

To determine the nature of accessory uses that are permitted uses for a hospital in a Local Retail District, one must look to the Multi-Family District ordinance — Section 343.01(b)(1) expressly permits in a Local Retail District "all uses permitted in the Multi-Family District *and as regulated in that district*[.]" Cleveland Codified Ordinances 343.01(b)(1) (emphasis added). The Multi-Family District ordinance designates as a permitted use those "[a]ccessory uses permitted in a Multi-Family District." *Id.* at 337.08(f). Such accessory uses are regulated by Section 337.23(a).[2] That Section includes a broad "catch-all" category crafted to

[2] An "accessory use," is "a subordinate use * * * customarily incident to and located on the same lot with the main use * * *." Cleveland Codified Ordinances 325.02; *see also id.* at 325.721 (defining "use, accessory" as "[a] subordinate land use on the

apply in both Multi-Family and Local Retail Districts: A landowner in a Multi-Family District may employ "any other accessory use *customarily incident* to a use authorized in a Residence District except that no use prohibited in a Local Retail Business District shall be permitted as an accessory use." *Id.* at 337.23(a)(10) (emphasis added). Since a hospital is "a use authorized in a Residence District," Fairview Hospital is entitled to employ any accessory use "customarily incident" to the operation *of a hospital.* The only exception — a "use" prohibited in a Local Retail District — does not apply, because no zoning ordinance prohibits helipads in Local Retail Districts.

The flawed decision below cited a different ordinance as the source of the alleged ambiguity, Cleveland Codified Ordinances 343.01(b)(2)-(8). Section 343.01(b)(2) provides that, in addition to other uses permitted in a Local Retail District, such a district also may include "[r]etail business for local or neighborhood needs." These may include the sale of baked goods, dry goods, books, magazines or newspapers, as well as restaurants, barber or beauty shops, dry cleaning, banks and any other similar "neighborhood store, shop or service[.]" *Id.* at 343.01(b)(2)-(7). For these additional uses, the zoning ordinance includes a different restriction on "accessory uses," which permits such uses "only to the extent normally accessory to the limited types of the neighborhood service permitted under this division." *Id.* at

---

same lot or parcel as a Principal Use * * * and serving a purpose customarily incident to that of the Principal Use").

343.01(b)(8). According to the administrator and zoning board, the restriction in (b)(8) limited Fairview Hospital's accessory uses to the "limited types of neighborhood services" associated with a "neighborhood store, shop or service."

B. Proceedings Below.

The proceedings below were initiated by the Cleveland Clinic's application to the City of Cleveland for a building permit that included a proposed helipad on the roof of an addition to Fairview Hospital that expands its emergency department and intensive care unit. The Zoning Administrator denied the request for a helipad due to "non-conformance," citing the zoning ordinance specifying permitted "accessory uses" for local retail businesses (Section 343.01(b)(8)). The Cleveland Clinic appealed this determination to the Board of Zoning Appeals (BZA), which held a public hearing.

During the hearing, the Cleveland Clinic established that helipads are accessory uses customarily incident to hospitals. The evidence showed Fairview Hospital is the only hospital in Cleveland without a helipad, and one of the only hospitals in Northeast Ohio without one. While a variety of residents and public officials gave *other* reasons for opposing the helipad, no one contested that hospitals customarily have one. Nor did anyone dispute that the helipad, if constructed, would save lives. Nevertheless, the BZA took the position that a helipad "is not authorized as of right" because it was not "normally required for the daily local retail business needs of the resident locality," again citing Section 343.01(b)(8).

The Cleveland Clinic appealed under R.C. Chapter 2506, and the court of common pleas reversed. The common pleas court ruled that "hospitals and their accessory uses are expressly permitted in the City's Multi-Family District, and are therefore permissible in the City's areas that are zoned 'Local Retail Business District.'" (*See* 2/13/12 Journal Entry and Opinion ("JE") at 5, Appx. 39.) Since the helipad qualified as an "accessory use" in a Multi-Family District, it was "therefore permissible in the instant case." (JE at 5, Appx. 39.)

The City appealed to the Eighth Appellate District, which reversed. The panel's October 4, 2012 opinion (the "Original Opinion") held that the court of common pleas abused its discretion when it failed to defer to the BZA's interpretation of the zoning ordinances. The panel discerned an unspecified ambiguity between the "reasonable and, yet, different statutory positions taken by the BZA and the trial court" and concluded that, as a matter of law, the common pleas court was required to defer to the BZA's position. (Orig. Op., ¶ 20, Appx. 33-34.)

The Cleveland Clinic timely applied for reconsideration and consideration *en banc*, arguing that the Original Opinion contained clear errors of law in: 1) finding the applicable ordinance ambiguous; and 2) ruling that the court was required to defer to the BZA, notwithstanding Eighth District precedent to the contrary and this Court's rule of law in *Saunders* that ambiguities in property restrictions are

construed in favor of the owner.[3] The application for *en banc* consideration was denied. (*See* 11/16/12 JE, Appx. 22-23.) On December 20, 2012, however, the panel reconsidered and vacated its Original Opinion, substituting a 2-1 decision ("Reconsidered Opinion") that again reversed the court of common pleas and limited *Saunders* to ambiguities in "a particular word [.]" (App. Op. at ¶ 22, Appx. 18; 12/20/12 JE, Appx. 5.) Judge Boyle dissented, arguing that the unduly cramped version of strict construction adopted by the majority was inconsistent with this Court's precedents. (App. Op., ¶¶ 28-29, Appx. 20-21.)

The Clinic's timely applications and motions for reconsideration, consideration en banc and certification of a conflict, based on the new rule of law established in the Reconsidered Opinion, were denied, with two judges voting for reconsideration en banc. (*See* 2/7/13 JE, Appx. 3-4; 3/14/13 JE, Appx. 1; 3/14/13 JE, Appx. 2.)

---

[3] The Clinic also filed a motion to certify a conflict, which was denied. (*See* 12/20/12 JE, Appx. 6.)

III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1:

> **When a property owner appeals an administrative order restricting property use, the standard of review in R.C. 2506.04 must be applied in a manner consistent with the rule of law that legal questions are reviewed de novo, restrictions on the use of property by ordinance or statute cannot be extended to include limitations not clearly prescribed, and any ambiguity must be resolved in favor of the property owner. (R.C. 2506.04; *Saunders v. Clark Cty. Zoning Dept.*, 66 Ohio St.2d 259 (1981), applied.)**

R.C. 2506.04 provides the scope of review in an administrative appeal under R.C. Chapter 2506:

> If an appeal is taken in relation to a final order, adjudication, or decision covered by division (A) of section 2506.01 of the Revised Code, the court may find that the order, adjudication, or decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record. * * * The judgment of the court may be appealed by any party on questions of law as provided in the Rules of Appellate Procedure and, to the extent not in conflict with those rules, Chapter 2505 of the Revised Code.

R.C. 2506.04 requires courts of common pleas reviewing administrative orders to make "both factual and legal determinations." *Dudukovich v. Lorain Metro. Hous. Auth.*, 58 Ohio St.2d 202, 207 (1979). In an appeal to the court of appeals under R.C. 2506.04, the court of appeals conducts a review "more limited in scope" that includes only questions of law. *Henley v. City of Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 147, 2000-Ohio-493. Such questions in administrative

appeals are issues "to be decided by the judge, concerning the application or interpretation of the law." *Henley*, 90 Ohio St.3d at 148.

That judges decide questions of law touching on the meaning of statues and ordinances de novo remains a fundamental jurisprudential principle. *E.g. Riedel v. Consol. Rail Corp.*, 125 Ohio St.3d 358, 2010-Ohio-1926, ¶ 6 ("Because this case 'requires the interpretation of statutory authority, which is a question of law, our review is de novo.'"). This principle should apply equally to administrative appeals of orders restricting property use. De novo review is essential to ensure faithful application at the judicial level of the "elementary principle" that restrictions on property use are strictly construed. *See Sperry*, 2011-Ohio-3364, ¶ 19; *Saunders*, 66 Ohio St.2d at 261.

The deference afforded in the decision below not only is out-of-step with this elementary principle of law, but also conflicts with settled notions of the proper role of deference in administrative law. The panel's citation to *Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837 (1984), illustrates the flaws in its approach. (*See* App. Op. at ¶ 21, Appx. 17-18.) *Chevron* deference applies only where a legislature delegates authority to an administrative body to administer a legislative program that "necessarily requires the formulation of policy and the making of rules to fill any gap left" by the legislature. *See id.* at 843. Yet no section of the City's zoning ordinances purports to give the BZA this gap-filling power, and any attempt by the BZA to exercise such a power would conflict with the rule that

restrictions on property use "cannot be extended to include limitations not * * * clearly prescribed" by statute. *State ex rel. Moore Oil Co.*, 99 Ohio St. 406, syllabus.

A straightforward application of a de novo standard of review requires reinstatement of the common pleas court's judgment. As the common pleas court properly found, the proposed helipad is a permitted use for a hospital under the City's Zoning Code — either in a Multi-Family District, or the Local Retail District in which Fairview Hospital sits.

IV. CONCLUSION

For all of the above reasons, this Court should accept jurisdiction, confirm that courts must review de novo legal determinations by administrative bodies that restrict the use of property, reverse the judgment of the court of appeals, and reinstate the decision of the trial court.

Respectfully submitted,

Sheldon Berns (0000140)
Timothy J. Duff (0046764)
Gary F. Werner (0070591)
BERNS OCKNER & GREENBERGER, LLC
37 Park, Suite 200
3733 Park East Drive
Beachwood, Ohio 44122-4334
Tel: 216.831.8838
Fax: 216.464.4489
E-mail: sberns@bernsockner.com
tduff@bernsockner.com
gwerner@bernsockner.com

Irene C. Keyse-Walker (0013143)
(COUNSEL OF RECORD)
Benjamin C. Sassé (0072856)
TUCKER ELLIS LLP
925 Euclid Avenue, Suite 1150
Cleveland, OH 44115-1414
Tel: 216.592.5000
Fax: 216.592.5009
E-mail: ikeyse-walker@tuckerellis.com
benjamin.sasse@tuckerellis.com

Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Memorandum in Support of Jurisdiction of Appellants The Cleveland Clinic Foundation and Fairview Hospital** was sent by regular U.S. Mail, postage prepaid, this 25th day of April, 2013 to:

Carolyn M. Downey
Assistant Director of Law
City of Cleveland Law Department
City Hall, Room 106
601 Lakeside Ave.
Cleveland, OH 44114

Attorney for Appellees

Eileen C. Keyse-Walker

One of the Attorneys for Appellants

025902.000201.1672752.1

APPENDIX

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Andrea Rocco, Clerk of Courts

CLEVELAND CLINIC FOUNDATION, ET AL.

Appellee

COA NO.	LOWER COURT NO.
98115	CP CV-749791

COMMON PLEAS COURT

-vs-

BD. OF ZONING APPEALS CITY OF CLEVE.

Appellant

MOTION NO. 461301

Date 03/14/13

Journal Entry

Second application by Appellees for reconsideration is denied.

RECEIVED FOR FILING

MAR 14 2013

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By _____ Deputy

CA12098115

78509790

Adm. Judge, MELODY J. STEWART, Concurs

Judge MARY J. BOYLE, Dissents

KENNETH A. ROCCO
Judge

VOL 0766 PG 0732

Appx. 1

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Andrea Rocco, Clerk of Courts

CLEVELAND CLINIC FOUNDATION, ET AL.

Appellee

COA NO.	LOWER COURT NO.
98115	CP CV-749791

COMMON PLEAS COURT

-vs-

BD. OF ZONING APPEALS CITY OF CLEVE.

Appellant

MOTION NO. 461303

Date 03/14/13

Journal Entry

Second application by Appellees to certfiy conflict to the Ohio Supreme Court is denied.

Adm. Judge, MELODY J. STEWART, Concurs

Judge MARY J. BOYLE, Dissents

KENNETH A. ROCCO
Judge

Appx. 2

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Andrea Rocco, Clerk of Courts

CLEVELAND CLINIC FOUNDATION, ET AL.

Appellee

COA NO. 98115 | LOWER COURT NO. CP CV-749791

COMMON PLEAS COURT

-vs-

BD. OF ZONING APPEALS CITY OF CLEVE.

Appellant

MOTION NO. 461302

Date 02/07/13

Journal Entry

Second application by Appellees for en banc consideration is denied. See separate journal entry of this same date.

RECEIVED FOR FILING

FEB X 7 2013

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By _____ Deputy

MELODY J. STEWART
Administrative Judge

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Andrea Rocco, Clerk of Courts

Cleveland Clinic Foundation, et al.

Appellees

COA NO. 98115 | LOWER COURT NO. CP CV-749791

COMMON PLEAS COURT

-vs-

Bd. of Zoning Appeals, City of Cleveland

Appellant

MOTION NO. 461302

Date 02/07/2013

Journal Entry

This matter is before the court on appellant's application for en banc consideration. Pursuant to App.R. 26, Loc.App.R. 26, and *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672, we are obligated to resolve conflicts between two or more decisions of this court on any issue that is dispositive of the case in which the application is filed.

App.R. 26(A)(2)(c) provides that en banc consideration may be granted after a decision on reconsideration "if an intra-district conflict first arises as a result of that judgment." The principles of law that appellee claims to be in conflict with other decisions of this district were not new to the opinion on reconsideration, so the alleged intra-district conflict did not first arise as a result of the judgment on reconsideration. Accordingly, appellee's en banc application is denied.

MELODY J. STEWART, ADMINISTRATIVE JUDGE

Concurring:

PATRICIA A. BLACKMON, J.
FRANK D. CELEBREZZE, JR., J.,
EILEEN A. GALLAGHER, J.,
EILEEN T. GALLAGHER, J.
LARRY A. JONES, J.,
KATHLEEN ANN KEOUGH, J.,
MARY EILEEN KILBANE, J.,
TIM MCCORMACK, J., and
KENNETH A. ROCCO, J.

Dissenting:

MARY J. BOYLE, J., and
SEAN C. GALLAGHER, J.

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

CLEVELAND CLINIC FOUNDATION, ET AL.

Appellee

COA NO. 98115

LOWER COURT NO. CP CV-749791

COMMON PLEAS COURT

-vs-

BD. OF ZONING APPEALS CITY OF CLEVE.

Appellant

MOTION NO. 459361

Date 12/20/12

Journal Entry

Motion by Appellees for reconsideration is granted. Sua sponte the journal entry and opinion announced by this court on October 4, 2012, 2012-Ohio-4602, is hereby vacated and replaced with the journal entry and opinion dated December 20, 2012.

FILED AND JOURNALIZED
PER APP.R. 22(C)

DEC 20 2012

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

Presiding Judge MARY J. BOYLE, Concurs

Judge JAMES J. SWEENEY, Concurs

Judge KENNETH A. ROCCO

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

CLEVELAND CLINIC FOUNDATION, ET AL.

Appellee

COA NO. 98115 | LOWER COURT NO. CP CV-749791

COMMON PLEAS COURT

-vs-

BD. OF ZONING APPEALS CITY OF CLEVE.

Appellant

MOTION NO. 459363

RECEIVED FOR FILING
DEC 20 2012
GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

Date 12/20/12

Journal Entry

We deny the Cleveland Clinic Foundation's ("the Clinic") Motion to Certify Conflict to the Ohio Supreme Court, as we find no conflict between our decision and that of another court of appeals. First, our decision to reverse the trial court is based primarily on the fact that the trial court's decision was conclusory, as it failed to explain how the Board of Zoning Appeals' ("BZA") decision was unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record. There is no conflict between this legal conclusion and any of the cases cited by the Clinic. Moreover, in our subsequent opinion, we clarified that:

In cases where a particular word in a zoning ordinance is ambiguous, we have determined that the meaning of the word should be construed in favor of the landowner. See e.g., Village of Oakwood v. Clark Oil & Refining Corp., 8th Dist. No. 53419 (Feb. 18, 1988) (construing "financial office" in favor of landowner). But in this case, the issue is which provision of the zoning code was applicable. Where the BZA reasonably relies on a code provision, it's determination should hold so long as its decision is not unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record.

In the cases cited by the Clinic, the ambiguity in issue pertained to the meaning of a term or phrase within the code, not to which section of the zoning code applies. Accordingly, there is no conflict to certify.

Presiding Judge MARY J. BOYLE, DISSENTS

Judge JAMES J. SWEENEY, Concurs

Judge KENNETH A. ROCCO

DEC 20 2012

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

CLEVELAND CLINIC FOUNDATION, ET AL.

Appellee

COA NO. 98115

LOWER COURT NO. CP CV-749791

COMMON PLEAS COURT

-vs-

BD. OF ZONING APPEALS CITY OF CLEVE.

Appellant

MOTION NO. 460875

Date 12/20/12

Journal Entry

Reversed and remanded.>

Kenneth A. Rocco, J., and James J. Sweeney, J., concur; Mary J. Boyle, P.J., dissents (See attached opinion).

FILED AND JOURNALIZED
PER APP.R. 22(C)

DEC 20 2012

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

Presiding Judge MARY J. BOYLE, DISSENTS

Judge JAMES J. SWEENEY, Concurs

Judge KENNETH A. ROCCO

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 98115

CLEVELAND CLINIC FOUNDATION, ET AL.

PLAINTIFFS-APPELLEES

vs.

BOARD OF ZONING APPEALS, CITY OF CLEVELAND

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-749791

BEFORE: Rocco, J., Boyle, P.J., and Sweeney, J.

RELEASED AND JOURNALIZED: December 20, 2012

ATTORNEYS FOR APPELLANT

Barbara Langhenry, Interim Director of Law
Carolyn M. Downey, Assistant Law Director
City of Cleveland
601 Lakeside Avenue, Room 106
Cleveland, OH 44114

ATTORNEYS FOR APPELLEES

Sheldon Berns
Timothy J. Duff
Gary F. Werner
Berns, Ockner & Greenberger
3733 Park East Drive
Suite 200
Beachwood, OH 44122

David Sherriff
The Cleveland Clinic Foundation
3050 Science Park Drive AC/321
Beachwood, OH 44122

ON RECONSIDERATION[1]

KENNETH A. ROCCO, J.:

{¶1} Pursuant to App.R. 26(A)(1)(a), appellee, Cleveland Clinic Foundation ("the Clinic"), has filed an application for reconsideration of this court's decision in *Cleveland Clinic Found. v. Bd. of Zoning Appeals, City of Cleveland*, 8th Dist. No. 12 CA 98115, 2012-Ohio-4602. The Board of Zoning Appeals, City of Cleveland ("BZA") has filed a memorandum in opposition to the Clinic's application.

{¶2} Under App.R. 26(A)(1)(a), the general test for whether to grant a motion for reconsideration "'is whether the motion * * * calls to the attention of the court an obvious error in its decision or raises an issue for our consideration that was either not considered at all or was not fully considered by [the court] when it should have been.'" *State v. Dunbar*, 8th Dist. No. 87317, 2007-Ohio-3261, ¶ 182, quoting *Matthews v. Matthews*, 5 Ohio App.3d 140, 143, 450 N.E.2d 278 (10th Dist. 1982).

{¶3} Although we grant the Clinic's motion for reconsideration, upon reconsideration, our decision to reverse the trial court's final judgment remains unchanged. We take this opportunity to further explain a number of points

---

[1]The original decision in this appeal, *Cleveland Clinic Found. v. Bd. of Zoning Appeals, City of Cleveland*, 8th Dist. No. 98115, 2012-Ohio-4602, released October 4, 2012, is hereby vacated. This opinion, issued upon reconsideration, is the court's journalized decision in this appeal. *See* App.R.22(c); *see also* S.Ct.Prac.R. 2.2(A)(1).

made in our earlier decision. Accordingly, for clarification purposes we have made some modifications to our earlier opinion. We vacate the earlier opinion, and issue this opinion in its place.

{¶4} In this administrative appeal involving Cleveland's Zoning Code and a proposed helipad, the defendant-appellant BZA appeals the trial court's final judgment in favor of plaintiff-appellee the Clinic. We conclude that the trial court abused its discretion in reversing the BZA's decision, and so we reverse the trial court's final judgment.

{¶5} On October 26, 2010, the Clinic filed an application with the City of Cleveland's Department of Building and Housing ("City") for the property located at 18101 Lorain Avenue. The property is owned by the Clinic and is known as Fairview Hospital ("Fairview"). Fairview is located on the west side of Cleveland in the Kamm's Corners neighborhood. The application sought approval for three proposed construction projects, one of which was to build a helipad on the roof of a two-story building.[2]

{¶6} On November 10, 2010, the City's Zoning Administrator denied the Clinic's application, determining that Fairview is located in a Local Retail

---

[2]The other proposed projects were the construction of a two-story addition to an existing building, and the removal and reconstruction of a new parking lot with new landscaping. The Zoning Administrator denied the Clinic's application for these projects as well, but the Clinic was able to obtain variances from the BZA. On appeal, the parties only contest the legality of the proposed helipad construction project.

Business District, and that under the City's zoning code, the proposed helipad was a prohibited use for a Local Retail Business District.

{¶7} The Clinic appealed to the BZA arguing that the helipad was a permitted accessory use in a Local Retail Business District. On January 31, 2011, the BZA conducted a hearing and determined that a helipad was not a permitted accessory use in a Local Retail Business District. Accordingly, the BZA held that the Zoning Administrator was not arbitrary, capricious, or unreasonable in denying the application to construct the helipad. The BZA memorialized its decision in a Resolution dated February 7, 2011 ("BZA Resolution").

{¶8} The Clinic filed an administrative appeal in the court of common pleas. In a Journal Entry and Opinion ("J.E.") the court reversed the BZA's decision and concluded that a helipad was a permitted accessory use in a Local Retail Business District. The BZA filed a notice of appeal and set forth four assignments of error for our review:

> **I. The Common Pleas Court erred when it determined that the standard of review for an appeal of an administrative body's decision is abuse of discretion.**
>
> **II. The Common Pleas Court abused its discretion by substituting its judgment for that of the administrative agency, the Board of Zoning Appeals.**
>
> **III. The Common Pleas Court abused its discretion where the court exceeded its review authority by making a**

judicial finding that a helipad was a permitted accessory use in a Local Retail Business District.

IV. The Common Pleas Court abused its discretion when it usurped the authority of the City of Cleveland's legislature to determine and balance the zoning needs of its community in relation to public health, morals, welfare or public safety when it made a judicial finding that a helipad was a permitted accessory use in a Local Retail Business District contrary to the City of Cleveland Zoning Codes.

{¶9} We conclude that the trial court abused its discretion in reversing the BZA's Resolution and we reverse the trial court's final judgment. All four assignments of error are considered together, as the analysis involved is interrelated.

{¶10} R.C. 2506.01 provides that an appeal from an order from any board of a political subdivision is made to the court of common pleas. In reviewing an appeal of an administrative decision, the decision should stand unless "the court find[s] that the order, adjudication, or decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record."[3] R.C. 2506.04.

{¶11} A trial court should not overrule an agency decision when it is supported by a preponderance of reliable and substantial evidence. *Dudukovich*

---

[3]The trial court's order mistakenly stated that it was to review the BZA decision for an abuse of discretion.

v. Lorain Metro. Hous. Auth., 58 Ohio St.2d 202, 207, 389 N.E.2d 1113 (1979). The court cannot blatantly substitute its judgment for that of the agency, especially in areas of administrative expertise. *Id.*

{¶12} Our review in an R.C. 2506.04 appeal is "'more limited in scope.'" *Cleveland Parking Violations Bur. v. Barnes*, 8th Dist. No. 94502, 2010-Ohio-6164, ¶ 7, quoting *Kisil v. Sandusky*, 12 Ohio St.3d 30, 34, 465 N.E.2d 848 (1984). We "'review the judgment of the common pleas court only on 'questions of law,' which does not include the same extensive power to weigh "the preponderance of substantial, reliable and probative evidence," as is granted to the common pleas court.'" *Id.*, quoting, *Kisil* at fn. 4. Our review is constrained, therefore, to determining whether "the lower court abused its discretion in finding that the administrative order was [not] supported by reliable, probative, and substantial evidence." *Id.*, citing *Wolstein v. Pepper Pike City Council*, 156 Ohio App.3d 20, 2004-Ohio-361, 804 N.E.2d 75 (8th Dist.).

{¶13} In reversing the BZA, the trial court determined that the ordinance was unambiguous and that under the plain meaning of the ordinance, a helipad was a permissible accessory use. We disagree. The BZA reasonably interpreted the ordinance, and its decision was not unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record.

{¶14} Fairview is located in an area zoned as a Local Retail Business District. Under the Cleveland Codified Ordinances ("C.C.O."), a Local Retail Business District is defined as "a business district in which such uses are permitted as are normally required for the daily local retail business needs *of the residents of the locality only*." C.C.O. 343.01(a) (emphasis added). Under C.C.O. 343.01(b)(1), "[e]xcept as otherwise provided in this Zoning Code, all uses permitted in the Multi-Family District and as regulated in that District" are permitted uses in the Local Retail Business District. Under C.C.O. 337.08, hospitals are included in the list of permitted uses in a Multi-Family District, as are "[a]ccessory uses permitted in a Multi-Family District." C.C.O. 337.08(e)(5), (f).

{¶15} Because hospitals are expressly permitted in a Multi-Family District, they are also permitted in a Local Retail Business District. Helipads are not expressly permitted in a Multi-Family District, so a helipad is permissible only if it is an accessory use permitted in a Multi-Family District.

{¶16} Permissible accessory uses are those "use[s] customarily incident to a use authorized in a Residence District except that no use prohibited in a Local Retail Business District shall be permitted as an accessory use." C.C.O. 337.23(a)(9).

{¶17} Accordingly, for a helipad to qualify as a permissible accessory use, a helipad must be customarily incident to a hospital and it must be found that

a helipad is not a prohibited use in a Local Retail Business District. Under C.C.O. 343.01(b)(8), accessory uses are permitted "only to the extent necessary normally accessory to the limited types of neighborhood service use permitted under this division." C.C.O. 343.01(b)(8).

{¶18} Relying on C.C.O. 343.01(b)(8), the BZA reasonably found that under the zoning statute, a helipad was not a permissible accessory use in a Local Retail Business District, "because those uses that the Zoning Code characterizes as retail businesses for local or neighborhood needs would not involve a heliport as normally required for the daily local retail business needs of the residents of the locality * * *." BZA Resolution.

{¶19} In reversing the BZA decision, the trial court determined that there was no statutory ambiguity; it could resolve the conflict between the parties through a "plain reading of the Code itself, and [by] following the exact language of the Code." J.E. at 5. Relying on C.C.O. 343.01(b)(1), the trial court determined that because a hospital is a permitted use in a Multi-Family District, then it is also a permitted use in a Local Retail Business District. Without citing to any record evidence, the court then concluded that a helipad is "customarily incident to" a hospital, and that, therefore, a helipad is a permitted accessory use in a Local Retail Business District.

{¶20} The trial court does not explain why the BZA's reliance on C.C.O. 343.01(b)(8) was unconstitutional, illegal, arbitrary, capricious, unreasonable,

or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record. The trial court simply dismissed the BZA's reliance on this provision and stated that "[d]espite this argument, it is clear from a plain reading of the Code that it allows: (1) all buildings and uses in a 'Multi-Family' District as permitted in a 'Local Retail Business District;' and (2) the addition of a helipad is classified as an accessory use * * *." J.E. at 5. The trial court concludes that the answer is "clear," and proceeds to apply C.C.O. 343.01(b)(1), but it fails to explain how the BZA erred in applying and relying on C.C.O. 343.01(b)(8). Furthermore, to the extent that C.C.O. 343.01(b)(1) does apply, the trial court does not point to any record evidence to support it's conclusion that a helipad is "customarily incident to" a hospital.

{¶21} When an agency is charged with the task of interpreting its own statute, courts must give due deference to those interpretations, as the agency has "'accumulated substantial expertise'" and has been "'delegated [with] enforcement responsibility.'" *Luscre-Miles v. Ohio Dept. of Edn.*, 11th Dist. No. 2008-P-0048, 2008-Ohio-6781, ¶ 24, quoting *Shell v. Ohio Veterinary Med. Licensing Bd.*, 105 Ohio St.3d 420, 2005-Ohio-2423, 827 N.E.2d 766, ¶ 34. The United States Supreme Court has held that "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc.*, 467

U.S. 837, 843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). The statute is ambiguous if the language is susceptible to more than one reasonable interpretation. *Cleveland Parking Violations Bur.*, 2010-Ohio-6164, ¶ 20. In contrast, if the statute's language is plain and unambiguous, the agency or court should not apply rules of statutory interpretation. *Id.* at ¶ 19.

{¶22} In cases where a particular word in a zoning ordinance is ambiguous, we have determined that the meaning of the word should be construed in favor of the landowner. *See, e.g., Oakwood v. Clark Oil & Refining Corp.*, 8th Dist. No. 53419, 1988 WL 18779 (Feb. 18, 1988) (construing "financial office" in favor of landowner). But in this case, the issue is which provision of the zoning code was applicable. Where the BZA reasonably relies on a code provision, its determination should hold so long as its decision is not unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record.

{¶23} As discussed above, the BZA reasonably relied on C.C.O. 343.01(b)(8) and the evidence in the record. The BZA concluded that a helipad was not "normally required for the daily local retail business needs of the resident locality only," and that, therefore, a helipad was not "an accessory use as of right in a Local Retail Business District." BZA Resolution. The trial court

abused its discretion in determining that the administrative order was not supported by reliable, probative, and substantial evidence.

{¶24} The trial court's order is reversed. On remand, the trial court is ordered to reinstate the BZA's Resolution.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KENNETH A. ROCCO, JUDGE

JAMES J. SWEENEY, J., CONCURS;
MARY J. BOYLE, P.J., DISSENTS
(See attached opinion)

MARY J. BOYLE, P.J., DISSENTING:

{¶25} I respectfully dissent. I would grant the Clinic's motion for reconsideration and affirm the trial court.

{¶26} In this court's original decision, released on October 4, 2012, we reversed the trial court, which had reversed the Board of Zoning Appeals' resolution because we determined that "the zoning ordinance was ambiguous

and the trial court was required to defer to the BZA's reasonable interpretation of the ordinance."

{¶27} In its motion for reconsideration, the Clinic argues that the opinion contained an obvious error because under long-standing Ohio law, when a zoning provision is ambiguous, courts must strictly construe it in favor of the property owner. The Clinic cites to *Saunders v. Clark Cty. Zoning Dept.*, 66 Ohio St.2d 259, 261, 421 N.E.2d 152 (1981), which held:

> All zoning decisions, whether on an administrative or judicial level, should be based on the following elementary principles which underlie real property law. Zoning resolutions are in derogation of the common law and deprive a property owner of certain uses of his land to which he would otherwise be lawfully entitled. Therefore, such resolutions are ordinarily construed in favor of the property owner. Restrictions on the use of real property by ordinance, resolution or statute must be strictly construed, and the scope of the restrictions cannot be extended to include limitations not clearly prescribed.

(Internal citations omitted.)

{¶28} The majority recognizes the long-standing precedent that ambiguous zoning ordinances should be construed in favor of the property owner, but then distinguishes this case by stating that here, "the issue is which provision of the zoning code was applicable." I disagree. As we stated in our October 4, 2012 opinion, "[t]hese two reasonable and, yet, different statutory positions taken by the BZA and the trial court make clear that the ordinance is susceptible to more than one interpretation and is therefore, ambiguous."

{¶29} Therefore, in light of the Clinic's motion and upon further reflection, I would affirm the trial court's judgment reversing the BZA's resolution because it is my view that this court must strictly construe the ambiguous zoning ordinances in favor of the property owner — the Clinic.

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

CLEVELAND CLINIC FOUNDATION ETAL

Appellee

COA NO. 98115 | LOWER COURT NO. CP CV-749791

COMMON PLEAS COURT

-vs-

BD. OF ZONING APPEALS CITY OF CLEVE.

Appellant

MOTION NO. 459362

Date 11/16/12

Journal Entry

Application by Appellees for en banc consideration is denied. See separate journal entry of this same date.

RECEIVED FOR FILING

NOV 16 2012
GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

Judge MELODY J. STEWART, Concurs

Administrative Judge
PATRICIA A. BLACKMON

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

CLEVELAND CLINIC FOUNDATION, ET AL.

Appellees

-vs-

BOARD OF ZONING APPEALS, CITY OF CLEVELAND

Appellant

COA NO. 98115
LOWER COURT NO. CP CV-749719
COMMON PLEAS COURT

MOTION NO. 459362

Date 11/16/2012

Journal Entry

This matter is before the court on appellees' application for en banc consideration. Pursuant to App.R. 26, Loc.App.R. 26, and *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672, we are obligated to resolve conflicts between two or more decisions of this court on any issue that is dispositive of the case in which the application is filed.

The appellees contend that the panel's holding that the court must give due deference to the Board of Zoning Appeals' interpretation of ambiguous zoning ordinances is in conflict with the proposition that zoning regulations should be construed in favor of the property owner. The principle that zoning regulations should be construed in favor of the property owner has been adopted by the Ohio Supreme Court. *Saunders v. Clark Cty. Zoning Bd.*, 66 Ohio St.2d 259, 421 N.E.2d 152 (1981). To the extent that there is any conflict, appellees assert an error in the panel's opinion, not an intradistrict conflict. Therefore, appellees' application for en banc consideration is denied.

Patricia A. Blackmon

PATRICIA A. BLACKMON, ADMINISTRATIVE JUDGE

Concurring:

MARY J. BOYLE, J.,
FRANK D. CELEBREZZE, JR., J.,
COLLEEN CONWAY COONEY, J.,
EILEEN A. GALLAGHER, J.,
LARRY A. JONES, J.,
KATHLEEN ANN KEOUGH, J.,
MARY EILEEN KILBANE, J.,
KENNETH A. ROCCO, J.,
MELODY J. STEWART, J., and
JAMES J. SWEENEY, J.

RECEIVED FOR FILING

NOV 16 2012

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

Dissenting:

SEAN C. GALLAGHER, J.

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 98115

CLEVELAND CLINIC FOUNDATION, ET AL.

PLAINTIFFS-APPELLEES

vs.

BOARD OF ZONING APPEALS, CITY OF CLEVELAND

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-749791

BEFORE: Rocco, J., Boyle, P.J., and Sweeney, J.

RELEASED AND JOURNALIZED: October 4, 2012

ATTORNEYS FOR APPELLANT

Barbara Langhenry, Interim Director of Law
Carolyn M. Downey, Assistant Law Director
City of Cleveland
601 Lakeside Avenue, Room 106
Cleveland, OH 44114

ATTORNEYS FOR APPELLEE

Sheldon Berns
Timothy J. Duff
Gary F. Werner
Berns, Ockner & Greenberger
3733 Park East Drive
Suite 200
Beachwood, OH 44122

David Sherriff
The Cleveland Clinic Foundation
3050 Science Park Drive AC/321
Beachwood, OH 44122

KENNETH A. ROCCO, J.:

{¶1} In this administrative appeal involving Cleveland's Zoning Code and a proposed helipad, the defendant-appellant Board of Zoning Appeals, City of Cleveland ("BZA") appeals the trial court's final judgment in favor of plaintiff-appellee Cleveland Clinic Foundation ("Clinic"). We conclude that the trial court abused its discretion in reversing the BZA's decision, and so we reverse the trial court's final judgment.

{¶2} On October 26, 2010, the Clinic filed an application with the City of Cleveland's Department of Building and Housing ("City") for the property located at 18101 Lorain Avenue. The property is owned by the Clinic and is known as Fairview Hospital ("Fairview"). Fairview is located on the west side of Cleveland in the Kamm's Corners neighborhood. The application sought approval for three proposed construction projects, one of which was to build a helipad on the roof of a two-story building.[1]

{¶3} On November 10, 2010, the City's Zoning Administrator denied the Clinic's application and determined that Fairview is located in a Local Retail Business District, and that under the City's zoning code, the proposed helipad was a prohibited use for a Local Retail Business District.

---

[1]The other proposed projects were the construction of a two-story addition to an existing building, and the removal and reconstruction of a new parking lot with new landscaping. The Zoning Administrator denied the Clinic's application for these projects as well, but the Clinic was able to obtain variances from the BZA. On appeal, the parties only contest the legality of the proposed helipad construction project.

{¶4} The Clinic appealed to the BZA arguing that the helipad was a permitted accessory use in a Local Retail Business District. On January 31, 2011, the BZA conducted a hearing and determined that a helipad was not a permitted accessory use in a Local Retail Business District. Accordingly, the BZA held that the Zoning Administrator was not arbitrary, capricious, or unreasonable in denying the application to construct the helipad. The BZA memorialized its decision in a Resolution dated February 7, 2011 ("BZA Resolution").

{¶5} The Clinic filed an administrative appeal in the court of common pleas. In a Journal Entry and Opinion ("J.E.") the court reversed the BZA's decision and concluded that a helipad was a permitted accessory use in a Local Retail Business District. The BZA filed a notice of appeal and set forth four assignments of error for our review:

> **I. The Common Pleas Court erred when it determined that the standard of review for an appeal of an administrative body's decision is abuse of discretion.**
>
> **II. The Common Pleas Court abused its discretion by substituting its judgment for that of the administrative agency, the Board of Zoning Appeals.**
>
> **III. The Common Pleas Court abused its discretion where the court exceeded its review authority by making a judicial finding that a helipad was a permitted accessory use in a Local Retail Business District.**
>
> **IV. The Common Pleas Court abused its discretion when it usurped the authority of the City of Cleveland's**

legislature to determine and balance the zoning needs of its community in relation to public health, morals, welfare or public safety when it made a judicial finding that a helipad was a permitted accessory use in a Local Retail Business District contrary to the City of Cleveland Zoning Codes.

{¶6} We conclude that the trial court abused its discretion in reversing the BZA's Resolution, because the zoning ordinance was ambiguous and the trial court was required to defer to the BZA's reasonable interpretation of the ordinance. Accordingly, we reverse the trial court's final judgment.

{¶7} All four assignments of error are considered together, as the analysis involved is interrelated.

A. Standards of Review

{¶8} R.C. 2506.01 provides that an appeal from an order from any board of a political subdivision is made to the court of common pleas. In reviewing an appeal of an administrative decision, "the court may find that the order, adjudication, or decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record." R.C. 2506.04.

{¶9} A trial court should not overrule an agency decision when it is supported by a preponderance of reliable and substantial evidence. *Dudukovich v. Lorain Metro. Hous. Auth.*, 58 Ohio St.2d 202, 207, 389 N.E.2d 1113 (1979). The court cannot blatantly substitute its judgment for that of the agency, especially in areas of administrative expertise. *Id.*

{¶10} Our review in an R.C. 2506.04 appeal is "'more limited in scope.'" *Cleveland Parking Violations Bur. v. Barnes*, 8th Dist. No. 94502, 2010-Ohio-6164, ¶ 7, quoting *Kisil v. Sandusky*, 12 Ohio St.3d 30, 34, 465 N.E.2d 848 (1984). We "'review the judgment of the common pleas court only on "questions of law," which does not include the same extensive power to weigh "the preponderance of substantial, reliable and probative evidence," as is granted to the common pleas court.'" *Id.*, quoting, *Kisil* at fn. 4. Our review is constrained, therefore, to determining whether "the lower court abused its discretion in finding that the administrative order was [not] supported by reliable, probative, and substantial evidence." *Id.*, citing *Wolstein v. Pepper Pike City Council*, 156 Ohio App.3d 20, 2004-Ohio-361, 804 N.E.2d 75 (8th Dist.).

{¶11} When an agency is charged with the task of interpreting its own statute, courts must give due deference to those interpretations, as the agency has "'accumulated substantial expertise'" and has been "'delegated [with] enforcement responsibility.'" *Luscre-Miles v. Ohio Dept. of Edn.*, No. 2008-P-0048, 2008-Ohio-6781, ¶ 24, quoting *Shell v. Ohio Veterinary Med. Licensing Bd.*, 105 Ohio St.3d 420, 2005-Ohio-2423, 827 N.E.2d 766, ¶ 34. The United States Supreme Court has held that "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct.

2778, 81 L.Ed.2d 694 (1984). The statute is ambiguous if the language is susceptible to more than one reasonable interpretation. *Cleveland Parking Violations Bur.*, 2010-Ohio-6164, ¶ 20. In contrast, if the statute's language is plain and unambiguous, the agency or court should not apply rules of statutory interpretation. *Id.* at ¶ 19.

{¶12} Applying these standards to the instant case, if the ordinance at issue is ambiguous, the trial court was required, as a matter of law, to give due deference to the BZA's determination of whether a helipad was a permissible accessory use. In reversing the BZA's determination, the trial court determined that the ordinance was unambiguous and that under the plain meaning of the ordinance, a helipad was a permissible accessory use under the ordinance. We disagree, as the ordinance is susceptible to more than one meaning, and is, therefore, ambiguous. The trial court was required to defer to the BZA's reasonable interpretation; because the trial court did not give proper deference, it abused its discretion. In order to make clear the ambiguity, we separately discuss the competing statutory interpretations.

B. Competing Statutory Interpretations

{¶13} Fairview is located in an area zoned as a Local Retail Business District. Under the Cleveland Codified Ordinances ("C.C.O."), a Local Retail Business District is defined as "a business district in which such uses are

permitted as are normally required for the daily local retail business needs *of the residents of the locality only*." C.C.O. 343.01(a) (emphasis added.)

1. Trial Court/Clinic's Interpretation

{¶14} Under C.C.O. 343.01(b)(1), "all uses permitted in the Multi-Family District and as regulated in that District" are permitted uses in the Local Retail Business District. Under C.C.O. 337.08, hospitals are included in the list of permitted uses in a Multi-Family District, as are "[a]ccessory uses permitted in a Multi-Family District." C.C.O. 337.08(e)(5), (f). Permissible accessory uses for a hospital are those "use[s] customarily incident to a use authorized in a Residence District except that no use prohibited in a Local Retail Business District shall be permitted as an accessory use." C.C.O. 337.23(a)(10).

{¶15} The trial court determined that there was no statutory ambiguity; it could resolve the conflict between the parties through a "plain reading of the Code itself, and [by] following the exact language of the Code." J.E. at 5. Relying on C.C.O. 343.01(b)(1), the trial court determined that because a hospital is a permitted use in a Multi-Family District, then it is also a permitted use in a Local Retail Business District. The court then determined (and the Clinic agrees) that a helipad is "customarily incident to" a hospital, and that, therefore, a helipad is a permitted accessory use in a Local Retail Business District.

2. BZA/City's Interpretation

{¶16} In contrast, the BZA relied on C.C.O. 343.01(b)(8) and upheld the Zoning Administrator's determination that a helipad is prohibited in a Local Retail Business District. C.C.O. 343.01(b)(2) sets forth various uses that qualify as retail business for local or neighborhood needs in a Local Retail Business District. These uses include a variety of retail establishments, eating establishments, service establishments, business offices, automotive services, parking garages, charitable institutions, and signs. Accessory uses are also permitted under C.C.O. 343.01(b)(8), but "only to the extent necessary normally accessory to the limited types of neighborhood service use permitted under this division." C.C.O. 343.01(b)(8).

{¶17} Relying on C.C.O. 343(b)(8).01, the BZA found that under the zoning statute, a helipad was not a permissible accessory in a Local Retail Business District. Specifically, the BZA determined that the evidence set forth that a helipad was not "normally required for the daily local retail business needs of the resident locality only," and so a helipad was not "an accessory use as of right in a Local Retail Business District."[2] BZA Resolution.

---

[2]It bears repeating here that a Local Retail Business District is defined as "a business district in which such uses are permitted as are normally required for the daily local retail business needs *of the residents of the locality only*." C.C.O. 343.01(a) (Emphasis added.)

C. The Ordinance is Ambiguous

{¶18} These two reasonable and, yet, different statutory positions taken by the BZA and the trial court make clear that the ordinance is susceptible to more than one interpretation and is, therefore, ambiguous. In fact, the trial court's journal entry and opinion highlights the ambiguity.

{¶19} The opinion refers to the City's argument that C.C.O. 343.01(b)(8) applies, and that accessory uses are authorized "only to the extent necessary normally accessory to the limited types of neighborhood service use permitted under this division." Without explanation, the trial court dismissed this interpretation, stating that "[d]espite this argument, it is clear from a plain reading of the Code that it allows: (1) all building and uses in a 'Multi-Family' District as permitted in a 'Local Retail Business District;' and (2) the addition of a helipad is classified as an accessory use * * *." J.E. at 5. The trial court concludes that the answer is "clear," and proceeds to apply C.C.O. 343.01(b)(1), but it fails to explain how the BZA's determination, that C.C.O. 343.01(b)(8) applies, is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record.

{¶20} Because the ordinance is ambiguous, the trial court was required, as a matter of law, to give due deference to the BZA's interpretation of the

ordinance. The trial court failed to do so, and so it abused its discretion in reversing the BZA's decision.[3]

{¶21} The trial court's order is reversed. On remand, the trial court is ordered to reinstate the BZA's Resolution.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KENNETH A. ROCCO, JUDGE

JAMES J. SWEENEY, J., CONCURS;
MARY J. BOYLE, P.J., CONCURS IN
JUDGMENT ONLY

[3]The Clinic is free to petition the Cleveland City Council to amend the zoning code if it wants to continue to pursue the helipad project. The legislative branch is in the best position to weigh the competing interests at stake in drafting zoning laws for the city.

IN THE COURT OF COMMON PLEAS

CUYAHOGA COUNTY

THE CLEVELAND CLINIC	)	CASE NO. 749791
FOUNDATION, ET AL.	)	
	)	JUDGE HOLLIE L GALLAGHER
Appellants	)	
	)	JOURNAL ENTRY AND OPINION
V.	)	
BOARD OF ZONING APPEALS,	)	
CITY OF CLEVELAND, OHIO, ET AL.	)	
	)	
Apellees	)	

The current appeal is before this Court following the City Of Cleveland Zoning Board's determination that Fairview Hospitals' addition of a helipad to an approved hospital addition is not a "permitted use" under the City's Zoning Code. The Cleveland Clinic Foundation has appealed the Board's ruling and the matter is currently before this Court on appeal. For the reasons that follow, this Court reverses the decision of the Board of Zoning Appeals and finds that the proposed helipad is a permitted accessory use in a Local Retail Business District.

I. Facts

The record reveals that on October 26, 2010, the Cleveland Clinic Foundation (hereafter "CCF") sought a building permit from the City of Cleveland's Department of Building and Housing for the construction of an addition to its Fairview Hospital Location. The hospital itself is located in an area zoned as "Local Retail Business District" and the permit was for a 153,470 square foot addition to the hospital facility. Specifically, the CCF sought approval for three construction projects:

(1) A two story addition to the existing hospital building consisting of a first floor addition of a 52-bed emergency department, and a second floor addition to be used as a 26-bed intensive care unit.

(2) The removal and reconstruction of a new parking lot with landscaping; and

(3) The construction of a helipad on the roof of the 2-story addition.

On November 10, 2010, the CCF's request was denied due to "non-conformance." Specifically, the City's Zoning Administrator cited to three areas of non-conformance: Zoning Code sections 357.07(a), 343.01(b)(8), and 349.04(d).

On December 10, 2011, The CCF appealed and contested the three items listed in the Notice of Non-Conformance. Consequently, the CCF sought a variance for the parking and setback issues, and wholly challenged the notice as it related to the helipad.

A public hearing was held on January 31, 2011. The Board granted the variance for the setback issues and determined that the amended parking plans were acceptable. However, the Board determined that the helipad was not a permitted accessory use in a Local Retail Business District. The Zoning Administrator found that the "[a]ddition of accessory use of helipad and helicopter transit require[d] BZA approval" because "[a]ccessory uses in the Local Retail Business District are permitted only to the extent necessary normally [sic] accessory to the limited type of neighborhood service use permitted under this division." More specifically, the Board found that,

> "WHEREAS, C.O.O. 343.01(b)(8) allows accessory uses in Local Retail Business Districts that are "only to the extent necessary to the limited types of neighborhood service uses permitted under this division," and Section 343.01(b)(2) characterizes various uses that are retail business for local or neighborhood needs; and,
>
> WHEREAS, an accessory use of a heliport is not authorized as of right in Local Retail Business Districts because those uses that the Zoning Code characterizes as retail businesses for local or neighborhood needs would not involve a heliport as normally required for the daily local retail business needs of the residents of the locality; now therefore,
>
> BE IT RESOLVED by the City of Cleveland Board of Zoning Appeals that after consideration of the relevant evidence presented at the hearing, a variance from the specific setback along Lorain

Avenue for the proposed two story new construction of the Fairview Hospital campus is merited and granted; and the Parking Plan satisfied the off-street parking requirements of Section 349.04(d) and under Section 343.01, a helipad and helicopter transit is not an accessory use authorized as of right in a Local Retail Business District."

On February 7, 2011, the Board ratified their decisions and on March 2, 2011, the CCF filed an appeal pursuant to R.C. Sect. 2506. This matter is before this Court on the CCF's appeal.

I. Standard of Review

An appeal of an administrative body's decision is reviewed for abuse of discretion. *Sturdivant v. Toledo Board of Education* (2004), 157 Ohio App.3d 401. A reviewing Court is charged with the obligation, pursuant to R.C. 2506.04, to determine, as a matter of law, whether the agency correctly applied the law to the facts. *Sturdivant*, supra at 408.

R.C. Chapter 2506 governs appeals of decisions by agencies of political subdivisions. See, *White v. Summit Cty.*, 9th Dist. No. 22398, 2005-Ohio-5192. The standards of review applied by the trial court and the appellate court in a R.C. 2506 administrative appeal are distinct. *Langan v. Bd. of Zoning Appeals*, 9th Dist. No. 05CA008640, 2005-Ohio-4542; see, also, *Henley v. Youngstown Bd. of Zoning Appeals* (2000), 90 Ohio St.3d 142, 147. The trial court considers the entire record before it and "determines whether the administrative order is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence." Id. R.C. 2506.04 empowers the court of common pleas to "affirm, reverse, vacate, or modify the order, * * * or remand the cause to the officer or body appealed from with instructions to enter an order, * * * consistent with the findings or opinion of the court."

II. Analysis

The question now before this Court is whether a helipad is a permitted accessory use to a hospital in a Local Retail Business District. In that vein, the CCF has raised one assignment of error which alleges:

> **"The Board of Zoning Appeals erred when it determined that Fairview Hospital's proposed helipad is not a permitted use in a Local Retail Business District."**

First and foremost, it is necessary to analyze the pertinent zoning classifications at issue. A review of the record indicates that the area at issue is zoned and classified as a "Local Retail Business District." Under Zoning Code Section 343.01(a). this is defined as follows:

> **"'Local Retail District'" means a business district in which such uses are permitted as are normally required for the daily local retail business needs of the residents of the locality only."**

Section 343.01(b)(1) further outlines the types of businesses permitted in a Local Retail Business District and states:

> **"(b) Permitted Buildings and Uses. The following building and uses are permitted in a Local Retail Business District; and no buildings or premises shall hereafter be erected, altered, used, arranged or designed to be used, in whole or in part for other than one or more of the following specified uses:**
>
> **(1) Except as otherwise provided in this Zoning Code. all uses permitted in the Multi-Family District and as regulated in that district, except that "kindergartens, day nurseries and children's boarding homes" shall be permitted without the requirement for a specified setback from an adjoining premises in a Residence District not used for a similar purpose."**

While there is no dispute that the land in questions is zoned "Local Retail Business District," a simple review of the language contained in 343.01(b)(1) of the Code, shows that this section specifically allows all building and uses in a "Multi-Family District" as permissible in a "Local Retail Business District."

Specific to this case and as argued by the CCF, under Zoning Code Sections 337.08(e)(5) and (f), both hospitals and their accessory uses are listed as "permitted" uses in Multi-Family Districts. Moreover, section 325.723 of the Zoning Code defines, "use, Principal" as "[t]he main use of a lot or parcel as distinguished from an ***Accessory Use***." (Emphasis added).

Accessory Use, however, is defined in Chapter 325 of the Zoning Code in two ways: Section 325.02 defines "Accessory Use or Building" as "a subordinate use or building customarily incident to and located on the same lot with the main use or building," and Section 325.721 defines, "Use, Accessory" as "[a] subordinate land use located on the same lot or parcel as a Principal Use...and serving a purpose customarily incidental to that of a Principal Use."

The City argues that Section 343.01(b)(8) bars the CCF's addition of a helipad by providing that:

> **"(8) Accessory uses, only to the extent necessary normally accessory to the limited types of neighborhood service use permitted under this division."**

Despite this argument, it is clear from a plain reading of the Code that it allows: (1) all building and uses in a "Multi-Family District" as permitted in a "Local Retail Business District;" and (2) the addition of a helipad is classified as an accessory use as permitted under 325.721 or 325.02.

III. Conclusion

In Sum, a plain reading of the Code itself, and following the exact language of the Code, hospitals and their accessory uses are expressly permitted in the City's Multi-Family District, and are therefore permissible in the City's areas that are zoned "Local Retail Business District." The record before this Court establishes that the addition of a helipad is an accessory use and therefore permissible in the instant case.

For the reasons as outlined above, the Court finds that the Board's decision was not supported by the preponderance of substantial, reliable and probative evidence and the decision is hereby reversed. Final.

Judge Hollie L. Gallagher

2/13/12
Date

RECEIVED FOR FILING
FEB 16 2012
GERALDINE FUERST, CLERK
BY _____ DEP.