No. 2013-0654

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.

MERIT BRIEF 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

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I. INTRODUCTION

This appeal illustrates the harm to a property owner's rights that arises when courts blindly defer to anomalous interpretations of zoning restrictions by local zoning boards. These restrictions deprive a property owner of lawful uses of its land and are strictly construed at both the administrative and judicial level. R.C. Chapter 2506 permits appeals from administrative decisions by local boards of zoning appeals applying these restrictions. The decision below deepened a split among Ohio appellate courts as to whether zoning boards' legal interpretations of zoning restrictions are reviewed de novo and without deference to the administrative interpretation.

This appeal gives this Court an opportunity to clarify the standard of review that applies in those appeals and confirm that appellate review of the interpretation of zoning restrictions is de novo and without deference to the board's interpretation. The duty to strictly construe zoning restrictions at the judicial level includes an obligation to limit their application only to circumstances where they clearly apply. Such an obligation leaves no room for deference to a zoning board's decision to apply an inapplicable zoning restriction. The court of common pleas applied a correct standard of review and properly interpreted the applicable zoning ordinance; a 2-1 majority of the Eighth District Court of Appeals erred in reversing its judgment. The judgment of the court of appeals should be reversed and the judgment of the court of common pleas reinstated.

II. STATEMENT OF FACTS

A. Statutory Background.

Fairview Hospital is in a Local Retail Business District. An understanding of the uses allowed for hospitals in these districts requires an understanding of the zoning ordinance as a whole: the meaning of a zoning provision is not determined "in isolation," but rather "from a reading of the provision taken in the context of the entire ordinance." *Univ. Circle, Inc. v. City of Cleveland*, 56 Ohio St.2d 180, 184 (1978). When read as a whole, it is clear that the Zoning Code does not limit hospital "accessory uses" to those permitted for local retail businesses; rather, in Local Retail Business Districts as in Multi-Family Districts, those "accessory uses" customarily incident to a hospital use are permitted uses.

The City's Zoning Code is pyramid-like in structure with the most restrictive Residential District at the top and the least restrictive Industrial District at the bottom. *See* Cleveland Codified Ordinance 335.01, Appx. 52 (dividing City "into seventeen (17) use districts which shall be known, in order of restrictions, beginning with the most restrictive as: Limited One-Family Districts; Two-Family Districts; *** Multi-Family Districts; *** Local Retail Business Districts; *** General Business Districts; Unrestricted Industry Districts"). Local Retail Business Districts fall roughly in the middle.

Certain core services, such as hospitals, schools and colleges, police and fire stations, public libraries and museums, orphanages and homes for the aged, are

permitted uses at nearly every level in this pyramid-like scheme. *See* Cleveland Codified Ordinance 337.01(a)(2), Appx. 53 (schools, libraries and museums permitted in Limited One-Family District under certain conditions); *id.* at 337.02(g), Appx. 54 (hospitals, police and fire stations, public libraries and museums, public and private schools and colleges, orphanages and homes for the aged permitted in One-Family District under certain conditions). The restrictions associated with these uses ease as the classification changes from Residential to Business District.

For instance, to use property for a hospital in a One-Family District, the owner must: 1) receive approval from the City's Board of Zoning Appeals (BZA) after public notice and hearing; 2) demonstrate that adequate yard space exists to preserve the character of the neighborhood; and 3) persuade the BZA that the use is appropriately located and designed and will meet a community need without adversely affecting the neighborhood. *See* Cleveland Codified Ordinance 337.02(g), Appx. 54. For hospital uses on property classified as Multi-Family District or below in the pyramid-like scheme, however, these restrictions disappear. A Multi-Family District restricts only the proximity of such a use to residential housing: hospitals must be "located not less than fifteen (15) feet from any adjoining premises in a Residence District not used for a similar purpose." *See id.* at 337.08(e)(5), Appx. 55.

Once property is classified as Multi-Family District, hospitals may employ accessory uses as "permitted uses." Cleveland Codified Ordinances 337.08(f), Appx. 55; 337.23(a)(9), Appx. 57. Section 337.08(f) adds as a *permitted* use in a Multi-

Family District all "[a]ccessory uses permitted in a Multi-Family District." *Id.* at 337.08(f), Appx. 55. An "[a]ccessory use" is "a subordinate use * * * customarily incident to and located on the same lot with the main use * * *." *Id.* at 325.02, Appx. 50.[1] Accessory uses permitted in a Multi-Family District include (among other things) "[a]ny * * * 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)(9), Appx. 57.

These same relaxed restrictions apply to a hospital, library, museum, or college located in a Local Retail Business District. None of these uses is expressly mentioned in Section 343.01 of the Zoning Code, which focuses primarily on defining the additional business uses permitted in a Local Retail Business District. *See* Cleveland Codified Ordinances 343.01(b)(2)-(7), Appx. 58-59. Such business uses 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.* In addition to permitting these local retail business uses, Section 343.01 also "incorporates" as "permitted uses" in a Local Retail Business District those uses permitted in a Multi-Family District:

> 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

[1] *See also* Cleveland Codified Ordinance 325.721, Appx. 51 (defining "use, accessory" as "[a] subordinate land use on the same lot or parcel as a Principal Use * * * and serving a purpose customarily incident to that of the Principal Use").

> 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.

Id. at 343.01(b)(1) (emphasis added), Appx. 58. Both hospitals and their accessory uses, therefore, are "permitted uses" in a Local Retail Business District.

B. Fairview Hospital

Founded in 1892, Fairview Hospital has served Cleveland's West Side for more than a century and is one of eight regional hospitals affiliated with the Cleveland Clinic.[2] In 1955, Fairview Hospital moved to a parcel of land located in the Kamm's Corner neighborhood on Lorain Avenue in Cleveland, Ohio, where it remains to this day. Initially, the front portion of this parcel was zoned Multi-Family District and the rear portion was zoned One-Family District. (*See* R. 3, Transcript of 1/31/11 City of Cleveland Board of Zoning Appeals Hearing ["Tr."], p. 5, Supp. 5.) It was rezoned entirely to Local Retail Business District in March 1964. (*Id.*)

Through the years, the BZA authorized several improvements to Fairview Hospital that reflected the needs of the broad Cleveland West Side community it serves. For instance, in 1975, the BZA authorized a seven-story accessory garage with approximately 700 parking spaces. (*See* R. 3, Tr., p. 6, Supp. 6.) In 1999, the BZA authorized an above-grade pedestrian bridge from a new patient-care facility to

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[2] 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, references to the "Cleveland Clinic" in this brief should be understood to encompass both entities.

an existing parking lot, concluding that such a bridge was "conducive to the continuing expansion of the hospital." (*See id.* at 7, Supp. 7.) And, in 2005, the BZA authorized an addition to an existing surgery center. (*Id.* at 7-8, Supp. 7-8.)

C. The Denial of a Permit for the Helipad.

In October 2010, to meet the growing needs of Cleveland's West Side, the Cleveland Clinic filed an application with the City's Department of Building and Housing, seeking a permit to: 1) build a 153,470 square foot, two-story addition to Fairview Hospital, including a 52-bed emergency department (first floor) and a 26-room intensive care unit (second floor); 2) renovate a parking lot; and 3) build a helipad on the roof of the two-story addition. (*See* R. 3, Tr. at 4, Supp. 4; R. 3, Tab 3, at Permit App., Supp. 57.) The City denied the application in its entirety in a November 2010 Notice of Non-Conformance, citing as the basis for rejecting the helipad the zoning provision specifying permitted "accessory uses" for local retail businesses that supply "limited types of neighborhood service[.]" (*See* Notice of Non-Conformance, Appx. 46, citing Cleveland Codified Ordinance 343.01(b)(8).)

The Cleveland Clinic appealed this determination to the BZA, which held a public hearing. During the hearing, the Cleveland Clinic established that a helipad is a subordinate use of land customarily incident to hospitals. (R. 3, Tr. at 31, 33, 35, 37, 39-40, 44, 123, 125, Supp. 9, 11, 13, 15, 17-18, 22, 41, 43.) Hospitals use helipads "to save lives." (*Id.* at Tr. 31, Supp. 9.) Fairview Hospital is the only

Cleveland hospital without a helipad, and one of the only hospitals in Northeast Ohio without one.[3] (*See id.* at 33, 44, Supp. 11, 22; R. 3, Tab 2, Ex. C., p. 12, Supp. 56.)

While various residents and public officials spoke in opposition to the helipad during the hearing, no one contested that hospitals customarily have one. (*E.g.,* R. 3, Tr. at 133, Supp. 51 ("Nobody is saying that hospitals shouldn't have a helicopter pad.").) Nor did anyone dispute that the helipad, if constructed, would save lives. (*Cf. id.* at 129, Supp. 47 (Director of City Planning acknowledges "it's very commonsense that a helipad would assist in the medical care here."). Rather, the opposition focused mainly on noise and other concerns that might have been relevant if the hospital were in a One-Family District (*see* p. 3, *supra*), but were irrelevant given its location in a Local Retail Business District. (*See id.* at 64, 80, 84, 88, 91, 116-119, Supp. 24, 26, 28, 30, 32, 34-37 (opposing helipad due to noise concerns and perceived adverse effects on surrounding neighborhood).)

Nevertheless, the BZA concluded that a helipad "is not authorized as of right" 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 resident locality," citing Cleveland Codified

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[3] Although Fairview Hospital uses ground transport where it can, certain critical care patients require helicopter transport. (*See* R. 3, Tr. 31, 39-41, 130-32, Supp. 9, 17-19, 48-50.) Currently, these patients are flown to a field in the Cleveland Metroparks and transported from there by ambulance to the hospital. (*Id.* at 32, 34-35, 39-40, Supp. 10, 12-13, 17-18.) Not only does this two-step process increase the length of transport, but the transfer from helicopter to ambulance also poses health risks to these patients. (*Id.*)

Ordinance Section 343.01(b)(8). (*See* 2/7/11 BZA Resolution, Appx. 45.) The BZA's decision did not analyze the Zoning Code provision expressly incorporating hospitals and their accessory uses as "permitted uses" in Local Retail Business Districts, Section 343.01(b)(1). (*See id.*) In the same decision, the BZA approved a variance for the two-story addition to Fairview Hospital's emergency department and intensive-care unit, as well as the renovated parking. (*Id.*)

D. The Administrative Appeal.

The Cleveland Clinic appealed the BZA's decision on the helipad under R.C. Chapter 2506, and the court of common pleas reversed. The common pleas court recognized its obligation "pursuant to R.C. 2506.04 to determine, as a matter of law, whether the agency correctly applied the law to the facts." (*See* 2/13/12 Journal Entry and Opinion ("JE") at 3, Appx. 41.) After analyzing "the pertinent zoning classifications at issue," the common pleas court held 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.'" (*Id.* at 4-5, Appx. 42-43.) Since the "record before this [court]" established that a helipad qualified as an "accessory use" in a Multi-Family District, it was "therefore permissible in the instant case." (JE at 5, Appx. 43.)

The City appealed to the Eighth District Court of Appeals, which reversed. The panel's October 4, 2012 opinion (the "Original Op.") held that the court of common pleas abused its discretion when it failed to defer to the BZA's

interpretation of the zoning ordinances. Although neither the Cleveland Clinic nor the City had argued that the Zoning Code was ambiguous, the panel discerned an unspecified ambiguity resulting from the "reasonable and, yet, different statutory positions taken by the BZA and the trial court." (Original Op., ¶ 18, Appx. 37.) From this finding of ambiguity, the panel leaped to the conclusion that, as a matter of law, the common pleas court was required to defer to the BZA's position. (*Id.* at ¶ 20, Appx. 37-38.)

The Cleveland Clinic timely applied for reconsideration and reconsideration en banc and moved to certify a conflict, arguing (among other things) 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 v. Clark Cty. Zoning Dept.*, 66 Ohio St.2d 259 (1981), which requires ambiguous property restrictions to be construed in favor of the owner.

The application for en banc consideration was denied. (*See* 11/16/12 JE, Appx. 26-27.) On December 20, 2012, however, the panel reconsidered and vacated its Original Opinion, substituting a 2-1 decision ("Reconsidered Op.") that again reversed the court of common pleas and held that the rule of law mandating construction in favor of the property owner applies only to ambiguities in "a particular word[.]" (Reconsidered Op. at ¶ 22, Appx. 22; 12/20/12 JE, Appx. 11.) Judge Boyle dissented, arguing that the unduly cramped version of strict

construction adopted by the majority was inconsistent with this Court's precedents. (Reconsidered Op., ¶¶ 28-29, Appx. 24-25.)

The Cleveland 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. 7; 3/14/13 JE, Appx. 5; 3/14/13 JE, Appx. 6.)

III. ARGUMENT IN SUPPORT OF PROPOSITION 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.)**

A 2-1 Eighth District majority ultimately determined that the court of common pleas "abused its discretion" by failing to defer to the BZA on the question of "which provision of the zoning code was applicable." (Reconsidered Op., ¶¶ 22-23, Appx. 22-23.) That determination flowed from an improper standard of review. Contrary to the majority's ruling, the pure question of law posed by interpretation of an ordinance should always be reviewed de novo. This de novo review should always encompass a judicial determination of *which* provision applies and, in the context of an appeal addressing a zoning ordinance, also require strict construction

of any ambiguous restriction on property use — not deference to the administrative construction.

In this case, the court of common pleas correctly conducted such a de novo review and properly concluded that the City's Zoning Code unambiguously authorizes the Cleveland Clinic to build a helipad on the addition to Fairview Hospital. Even if the Zoning Code were ambiguous, however, the result would be the same: any ambiguity would have to be construed in the Cleveland Clinic's favor because there is no zoning restriction that clearly prohibits helipads on hospitals in a Local Retail Business District. The judgment of the court of common pleas reversing the decision of the BZA should be reinstated.

A. The Statutory Interpretation of the BZA Is Reviewed De Novo.

This Court's precedents and the applicable statutes establish that courts review questions of statutory interpretation in administrative appeals de novo. R.C. Chapter 2506 governs appeals from final decisions issued by an agency of a political subdivision, such as a municipal zoning board. *See generally* R.C. 2506.01, Appx. 48; *Henley v. Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 147 (2000). R.C. 2506.04 specifies the applicable standards of review:

> If an appeal is taken in relation to a * * * decision covered by division (A) of section 2506.01 of the Revised Code, the court may find that the * * * 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.

As this language suggests, the common pleas court applies a different standard of review than the court of appeals. *Henley*, 90 Ohio St.3d at 147-48. While the common pleas court reviews "both factual and legal determinations," *Dudukovich v. Lorain Metro. Hous. Auth.*, 58 Ohio St.2d 202, 207 (1979), the court of appeals' review is limited to "questions of law." *Henley*, 90 Ohio St.3d at 147.

At both levels, however, an administrative statutory interpretation is reviewed de novo. *Henley* explains that "the application of [a statute] to the facts is a 'question of law' — '[a]n issue to be decided by the judge, concerning the application or interpretation of the law.'" 90 Ohio St.3d at 148. In administrative appeals as in other appeals, a judge decides this pure question of law de novo. *See Lang v. Dir., Ohio Dept. of Job & Family Serv.*, 134 Ohio St.3d 296, 2012-Ohio-5366, ¶ 12 ("A question of statutory construction presents an issue of law that we determine de novo on appeal."); *VFW Post 8586 v. Ohio Liquor Control Comm.*, 83 Ohio St.3d 79, 82 (1998) ("With respect to purely legal questions, however, the court is to exercise independent judgment."); *Bartchy v. State Bd. of Edn.*, 120 Ohio St.3d 205, 2008-Ohio-4826, ¶ 38 ("An agency adjudication is like a trial, and while the reviewing court must defer to the lower tribunal's findings of fact, it must construe the law on its own.") (plurality opinion), quoting *Ohio Historical Soc. v. State Emp. Relations Bd.*, 66 Ohio St.3d 466, 471 (1993).

B. Such De Novo Review Requires a Court to Determine the Applicable Zoning Provision.

De novo statutory interpretation in the administrative context as elsewhere requires an independent judicial determination of which ordinance applies. This Court's precedents make clear that a court's "first duty" when interpreting an ordinance is "to determine whether it is clear and unambiguous." *Sherwin-Williams Co. v. Dayton Freight Lines, Inc.*, 112 Ohio St.3d 52, 2006-Ohio-6498, ¶ 15. This duty applies with the same force in administrative appeals: as with other aids to interpretation, a court does not reach the question of whether to defer to an administrative interpretation *unless* it finds the ordinance ambiguous. R.C. 1.49(F), Appx. 47 (explaining that "*[i]f a statute is ambiguous*, the court, in determining the intention of the legislature, *may consider* * * * [t]he *administrative construction* of the statute") (emphasis added). That is because a "court, as well as the agency, must give effect to the unambiguously expressed intent of [the legislature]." *Lang*, 2012-Ohio-5366, ¶ 12, quoting *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

Here, the Eighth District majority correctly recognized that an ordinance is ambiguous if, and only if, "the *language* is susceptible to more than one reasonable interpretation." (Reconsidered Op. at ¶ 21, Appx. 21-22, emphasis added.) Yet the majority's ruling that the court of common pleas was required to give "due deference" to the BZA's "reasonable" application of an inapposite zoning restriction does not identify any "language" in any zoning restriction that is ambiguous. (*Id.* at

¶¶ 13-23, Appx. 18-23.) To the extent that the majority deferred to the BZA's interpretation without finding ambiguity in the language of any provision of the Zoning Code, the Eighth District erred in failing to discharge its "first duty" to determine whether the Code is clear and unambiguous. R.C. 1.49(F), Appx. 47; *Lang*, 2012-Ohio-5366, ¶ 12.

To the extent the opinion below can be construed as containing an implicit finding of ambiguity based on the presence of dueling interpretations of the Zoning Code that rely on different zoning provisions, it is inconsistent with this Court's recognition of a duty to examine a provision objectively and thoroughly before declaring it ambiguous:

> Some courts have reasoned that when multiple readings are possible, the provision is ambiguous. The problem with this approach is that it results in courts reading ambiguities into provisions, which creates confusion and uncertainty. When confronted with allegations of ambiguity, a court is to objectively and thoroughly examine the writing to attempt to ascertain its meaning. Only when a definitive meaning proves elusive should rules for construing ambiguous language be employed. Otherwise, allegations of ambiguity become self-fulfilling.

State v. Porterfield, 106 Ohio St.3d 5, 2005-Ohio-3095, ¶ 11 (citations omitted).

The plain import of this duty is that a court may declare an ordinance ambiguous only when thorough examination reveals a *specific* ambiguity in a *particular* provision. *See, e.g., Porterfield*, 2005-Ohio-3095, at ¶¶ 12-17 (phrase "this section" as used in R.C. 2953.08(D) not ambiguous when examined in context); *Lang*, 2012-Ohio-5366, at ¶¶ 13-14 (requirement of 19 U.S.C. 2318(a)(3)(B) that

federal assistance applicants be "at least 50 years of age" is ambiguous); *Bernard v. Unemp. Comp. Rev. Comm.*, Slip Opinion No. 2013-Ohio-3121, ¶¶ 10-21 (resolving ambiguity in definition of "remuneration" in R.C. 4141.01(H)(1)).

Instead of undertaking such a thorough examination, the Eighth District's original opinion merely identified the dueling interpretations of the Zoning Code offered by the parties and summarily concluded that the parties' "two reasonable and, yet, different statutory positions" created an unspecified ambiguity. (Original Op., ¶¶ 14-18, Appx. 35-37.) *If* the administrative deference adopted by the reconsidered opinion rests on the same finding of ambiguity, as the dissent assumes (*see* Reconsidered Op., ¶¶ 26-29, Appx. 23-25), *then* such a finding reflects a failure to undertake the thorough analysis required by *Porterfield*. *Porterfield*, 2005-Ohio-3095, at ¶ 11. In either case, the Eighth District failed to discharge its "first duty" to objectively and thoroughly examine the Zoning Code to determine if any particular zoning provision contained a specific ambiguity.

C. Such De Novo Review Requires a Court to Construe Any Ambiguity in the Zoning Ordinance in Favor of the Property Owner.

The Eighth District majority compounded this error by deferring to the BZA's interpretation of the Zoning Code. (Reconsidered Op., ¶¶ 19-20, Appx. 20-21.) *Saunders* reaffirmed the longstanding rule of law that "[r]estrictions 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." 66 Ohio St.2d at 261; *see also State ex rel. Moore Oil Co. v. Dauben*, 99 Ohio St. 406, syllabus (1919) (holding that 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"). This rule reflects the fact that zoning resolutions are in derogation of the common law and deprive the property owner of lawful uses of its land. *Saunders*, 66 Ohio St.2d at 261. It applies to "all zoning decisions, whether on an administrative or judicial level[.]" *Terry v. Sperry*, 130 Ohio St.3d 125, 2011-Ohio-3364, ¶ 19, quoting *Saunders*, 66 Ohio St.2d at 261.

Because zoning decisions at every level must strictly construe restrictions on property use, there is no room for deference to administrative interpretations of zoning ordinances — even where a particular provision of the Zoning Code contains a specific ambiguity.[4] The Eighth District incorrectly invoked administrative deference on the grounds that the BZA was "charged with the task of interpreting its own statute" and "has 'accumulated substantial expertise' and has been 'delegated [with] enforcement responsibility.'" (Reconsidered Op., ¶ 21, Appx. 21-22.) Some commentators reasonably question whether local administrative bodies possess such "substantial expertise." *See* Fenton & Moran, *Ohio Administrative Law*

[4] This case does not present the question of whether and to what extent a court may defer to factual findings made by a zoning board in determining whether to grant a variance. *Cf. Kisil v. City of Sandusky*, 12 Ohio St.3d 30 (1984) (outlining standards that apply to administrative appeals from factual findings made by a board of zoning appeals in denying a request for a variance).

Handbook & Agency Directory, Section 7:10 (2012-2013 Ed.) (administrative deference at the federal and state level is rooted in "the professionalization of the bureaucracies," but "[a]t the local level * * * this is not the case" and deference to local agency "decisions on questions of law becomes more problematic"). But even if they do possess it, deference remains incompatible with a rule of law that zoning restrictions must be strictly construed at the administrative *and* judicial level.

The Eighth District majority's citation to the United States Supreme Court's opinion in *Chevron*, *supra*, reveals the flaw in their approach. (Reconsidered Op., ¶ 21, Appx. 21-22.) *Chevron* explains that administrative deference based on a delegation of enforcement responsibility depends on an implied grant of authority to make policy in resolving statutory ambiguities. *See Chevron*, 467 U.S. at 843-44 (power of agency to administer a "program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress"). But, unlike other administrative agencies, boards of zoning appeals necessarily lack this authority because they have no discretion when interpreting ordinances. If there is a "gap" left in a zoning ordinance, *Saunders* requires the zoning board to strictly construe that restriction, which "cannot be extended to include limitations not therein clearly prescribed." 66 Ohio St.2d at 261. Since *Saunders* removes any discretion a zoning board might otherwise possess, there is no basis for deferring to a board's interpretation of law. *Cf. Bernard*, 2013-Ohio-3121, at ¶ 12 (administrative interpretation entitled to deference where there is no

established rule requiring interpretation in favor of the affected party). In short, a zoning administrator has no greater discretion under *Saunders* in choosing *which* ordinance to apply than in choosing *how* to apply it.

The Eighth District attempted to reconcile this line of authority with the principle of administrative deference by holding that a rule of strict construction applies only where "a particular word in a zoning ordinance is ambiguous[.]" (Reconsidered Op. at ¶ 22, Appx. 22.) But the Eighth District cited no authority supporting such a distinction. The rule of law in *Saunders* is broadly phrased and reflects concern for the rights of property owners in *all* statutory-interpretation questions. By teaching that a property restriction does not encompass limitations not clearly specified, *Saunders* requires a court to allow a property use *unless* it is clearly prohibited. This rule applies equally to attempts to enforce inapplicable zoning restrictions. *E.g., Ware v. Fairfax Bd. of Zoning Appeals*, 164 Ohio App.3d 772, 2005-Ohio-6516 (1st Dist.), ¶ 7 (reversing the board of zoning appeals' determination that a "daycare" is not a permitted use in an "E" zone where "the Fairfax zoning code does not clearly prohibit the operation of a daycare facility in an 'E' zone"). In short, the holding of *Saunders* applies to more than just ambiguous words.

Moreover, administrative deference cannot be reconciled with a court's obligation under *Saunders* to strictly construe property restrictions at the "*judicial* level." 66 Ohio St.2d at 261 (emphasis added); *Terry*, 2011-Ohio-3364, ¶ 19 (same).

As several courts have recognized, this obligation necessarily requires an independent analysis of the applicable zoning ordinance that limits property restrictions to those clearly stated and resolves any ambiguity in favor of the property owner. *Ware*, 2005-Ohio-6516, ¶¶ 5-9; *see also BP Oil Co. v. Dayton Bd. of Zoning Appeals*, 109 Ohio App.3d 423, 432-33 (2d Dist. 1996) (resolving ambiguity in term "upon the premises" in conditional use restriction in favor of the property owner); *Taylor v. City of Circleville*, 4th Dist. No. 03CA8, 2003-Ohio-7166, ¶¶ 11-18 (undertaking a de novo interpretation of the zoning code and holding "that the Board incorrectly interpreted the zoning ordinance"). Lower court decisions that defer to an administrative interpretation simply overlook this obligation and make no attempt to reconcile such deference with a court's obligation to strictly construe property restrictions at the judicial level. *E.g.*, *Glass City Academy, Inc. v. Toledo*, 179 Ohio App.3d 796, 2008-Ohio-6391, ¶ 18 (6th Dist.) (holding that courts are required to defer to administrative interpretations of zoning codes, but failing to mention the obligation to strictly construe zoning restrictions at the administrative level).

Finally, the deference required by the Eighth District's opinion is inconsistent with this Court's zoning precedents. Take *Henley* as an example. This Court did not defer to the local board of zoning appeals' determination that a general ban on dwelling units in accessory buildings was inapplicable to the use of a portion of the former convent as residential apartments. 90 Ohio St.3d at 144-45. Rather, it tackled that question as it would any other issue of statutory interpretation. This

Court examined the zoning ordinance as a whole (including a definition of "accessory use or building" appearing in a separate section of the ordinance), applied familiar canons of statutory interpretation, and concluded that the general ban on dwelling units in accessory buildings applied only "to structures in residential zones resembling those specifically enumerated in [the zoning code's definition of an "accessory building"] and not to the former convent at issue in this case." *Id.* at 150-51.

This Court's opinion in *University Circle, Inc. v. City of Cleveland*, 56 Ohio St.2d 180 (1978), is to the same effect. In that case, a property owner appealed the denial of a permit to build a parking lot. The City denied the permit on the grounds that the proposed use required a variance from a restriction on parking lots, and the BZA denied the request for a variance. On appeal, this Court did not defer to the BZA's determination that a variance was required. Rather, this Court's opinion carefully parsed the language of the relevant zoning provisions and concluded that the language of the section relied upon by the BZA "renders it inapplicable to appellant's property." 56 Ohio St.2d at 184-85.

D. The Judgment of the Court of Common Pleas Reflects a Proper De Novo Review of the Applicable Ordinances and Should Be Reinstated.

Therefore, instead of reversing the judgment of the court of common pleas, the court of appeals should have confirmed that its de novo review of the Cleveland Zoning Code was correct. The interpretation of the City's Zoning Code adopted by

the court of common pleas correctly reflects the absence of any zoning restriction that clearly prohibits helipads on hospitals in a Local Retail Business District.

A de novo review of the Zoning Code begins with Section 343.01(b)(1). That Section authorizes in a Local Retail Business District, "[e]xcept as otherwise provided in this Zoning Code, all uses permitted in the Multi-Family District and as regulated in that district[.]" Cleveland Codified Ordinance 343.01(b)(1), Appx. 58. There is no Zoning Code section that provides "otherwise" with respect to a helipad. During the BZA hearing, City Councilman Martin Keane (Ward 19) acknowledged that while other municipalities may have a "[h]elipad [o]rdinance," "we don't." (R. 3, Tr. at 116, Supp. 34.) Therefore, a helipad is a permitted use as of right if it is a "permitted use" in a Multi-Family District, which it plainly is.

Hospitals *and* their "accessory uses" are permitted uses in a Multi-Family District. Section 337.08 not only makes hospitals a "permitted" use in a Multi-Family District, but also specifies that permitted uses include all "[a]ccessory uses permitted in a Multi-Family District." Cleveland Codified Ordinances 337.08(e)(5), (f), Appx. 55. Section 337.23 defines the "accessory uses"[5] permitted in a Multi-Family District: such uses include (among other things) "[a]ny * * * accessory use customarily incident to a use authorized in a Residence District, except that no use

---

[5] The definitions of an "accessory use" add no additional hurdles relevant to this appeal. *E.g.,* Cleveland Codified Ordinances 325.02, Appx. 50 (defining "[a]ccessory use as "a subordinate use * * * customarily incident to and located on the same lot with the main use * * *"). The proposed helipad is not only on the "same lot" as Fairview Hospital, it will be right on top of it.

prohibited in a Local Retail Business District shall be permitted as an accessory use." *Id.* at 337.23(a)(9), Appx. 57. Because no zoning provision even addresses a helipad, the exception contained in the second clause is irrelevant.

A helipad is an accessory use "customarily incident" to the use of property as a hospital, and therefore a permitted use in a Local Retail Business District, *see* Cleveland Codified Ordinances 337.08(e)(5), (f), Appx. 55; 343.01(b)(1), Appx. 58. Undisputed evidence at the BZA hearing showed that Fairview Hospital is the only Cleveland hospital without a helipad, and one of the only hospitals in Northeast Ohio without one. (*See id.* at 33, 44, Supp. 11, 22; R. 3, Tab 2, Ex. C., p. 12, Supp. 56.) Its architect testified that he has worked "across the State of Ohio and across the country" and is "not aware of a hospital that I've worked on that does not have a helipad." (*Id.* at 44, Supp. 22.) No one refuted this testimony. Since virtually all hospitals have helipads, helipads plainly are customarily incident to the use of property as a hospital.

Because helipads are customarily incident to a hospital use, the court of common pleas correctly concluded that the Zoning Code's plain language entitled the Cleveland Clinic to construct a helipad on the roof of the addition to Fairview Hospital. *See* 2/13/12 JE at 5, Appx. 43; *see also* Cleveland Codified Ordinances 337.08(f), Appx. 55; 337.23(a)(9), Appx. 57; 343.01(b)(1), Appx. 58. At a minimum, however, even if the Zoning Code were ambiguous, the absence of any restriction prohibiting helipads on hospitals in a Local Retail Business District means the Code

must be strictly construed in a manner consistent with the judgment of the court of common pleas. *Saunders*, 66 Ohio St.2d at 261; *Terry*, 2011-Ohio-3364, ¶ 19. The judgment of the court of common pleas reversing the decision of the BZA should be reinstated.

IV. CONCLUSION

For all of the above reasons, the Cleveland Clinic respectfully requests that this Court reverse the judgment of the court of appeals and reinstate the judgment of the court of common pleas.

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

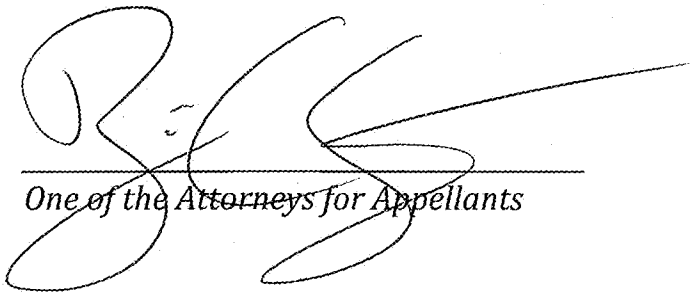
Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Merit Brief of Appellants The Cleveland Clinic Foundation and Fairview Hospital** was sent by regular U.S. Mail, postage prepaid, this 10th day of September, 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



One of the Attorneys for Appellants

025902.000201.1781893.1

APPENDIX

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.

NOTICE OF APPEAL 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

NOTICE OF APPEAL OF APPELLANTS

Appellants The Cleveland Clinic Foundation and Fairview Hospital hereby give notice of appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, journalized in Court of Appeals Case No. 98115 on December 20, 2012. An application for reconsideration and en banc consideration was timely filed on December 31, 2012. The application for consideration en banc was denied on February 7, 2013, and the application for reconsideration was denied on March 14, 2013.

Respectfully submitted,

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

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

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal 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
City Hall, Room 106
601 Lakeside Ave.
Cleveland, OH 44114

Attorney for Appellees

One of the Attorneys for Appellants

025902.000201.1677516.1

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. 461301

Date 03/14/13

Journal Entry

Second application by Appellees for reconsideration is denied.

Adm. Judge, MELODY J. STEWART, Concurs

Judge MARY J. BOYLE, Dissents

KENNETH A. ROCCO
Judge

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. 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

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.

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FEB X 7 2013

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By _____ Deputy

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

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[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

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[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.

COSTS MAILED TO COUNSEL FOR ALL PARTIES--COSTS TAXED

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.

Hollie L. Gallagher

Judge Hollie L. Gallagher

2/13/12

Date

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CLEVELAND BOARD OF ZONING APPEALS

CALENDAR NO. 10-261
18101 LORAIN AVENUE RESOLUTION FEBRUARY 7, 2011

WHEREAS, Fairview Hospital, Cleveland Clinic Foundation, (Appellants) appealed to erect a 153,470 square foot addition to an existing hospital and an accessory helipad on the building roof located on an acreage parcel in a Local Retail Business District and contrary to Section 357.07(a), the proposed addition is within the specific 15 foot setback line along Lorain Avenue; and subject to Section 343.01(b)(8) the addition of a helipad and helicopter transit accessory use requires a determination that it is an authorized use under the Zoning Code or satisfies the criteria to support a variance; and a comprehensive parking plan is necessary, showing the method for meeting the parking requirements under Section 349.04(d) for all uses of the facility for which parking is in the amount of one for each four beds, one for each three employees or doctors; and an additional 88 beds requires 22 additional off-street parking spaces plus added spaces for employees in the new addition and additional requirements that may exist for areas of the hospital considered "clinic, health or medical center" or satisfying the criteria for a variance there from; and,

WHEREAS, after public notice and written notice mailed to eighty-three directly affected property owners, a public hearing was held January 31, 2011, and Appellants asserted that they are eligible for a variance from the setback requirements, that their proposal satisfies the parking requirements, that helipad and helicopter transit accessory use is permitted as of right in the use district, and that no variance from the Zoning Code's parking requirements or use restrictions are necessary; and, .

WHEREAS, in the record of permit history for the property in question, evidence shows that an existing building encroaches within the specific 15 foot setback along Lorain Avenue, and pursuant to Section 329.04(c) this precedent establishes authority for this Board to grant a variance from the setback requirement; and local conditions including the topography and parcel shape create a unique hardship and practical difficulty for Appellants to comply with the setback requirement and denial of the setback variance will deprive substantial property rights; and granting the variance will not conflict with the purpose and intent of the Zoning Code, noting that even with the overhang, the encroachment is still 11 feet from the right-of- way; and,

WHEREAS, a Parking Plan submitted by the Appellants, pursuant to the adjudication notice issued November 10, 2010 by the Cleveland Department of Building and Housing, shows the construction of new parking spaces and a new parking garage which will satisfy or exceed the requirements of C.O.O. Section 349.04(d) and therefore satisfactory evidence shows that no parking variance is necessary if Appellants construct the new parking facilities in accordance with the Parking Plan; though there is ample evidence that a parking shortage currently exists and despite that the Parking Plan meets the letter of the law, the Appellants should continue to work with the community to resolve the apparent parking problems; and,

WHEREAS, the first construction for Fairview Hospital began in 1952 when the property was in split zoning between general retail and residential districts; and the current zoning for a Local Retail Business District has been in effect since 1964, and on several occasions this Board has granted variances necessary to accommodate growth of the hospital; and,

WHEREAS, C.O.O. 343.01(b)(8) allows accessory uses in Local Retail Business Districts that are "only to the extent necessary, accessory to the limited types of neighborhood service use 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 a Local Retail 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; 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 on the Fairview Hospital campus is merited and granted; and the Parking Plan satisfies 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.

Yeas: Dobbins, Donovan, Johnson, Shaver Washington
Nays:

Approved and adopted by the Board of Zoning Appeals February 7, 2011.

Jan Huber - Acting Secretary
Board of Zoning Appeals

CITY OF CLEVELAND
DEPARTMENT OF BUILDING AND HOUSING
ZONING REVIEW
NOTICE OF NON-CONFORMANCE

Examined By Richard M. Riccardi
November 10, 2010

Owner: Cleveland Clinic **Address: 9500 Euclid Avenue**

Location: 18101 Lorain Avenue

Zoning: Local Retail Business ***Area:*** C ***Height:*** 4

Application to erect 153,470 square foot addition to existing hospital and accessory helipad on roof denied due to the following:

Zoning Code	Text
357.07(a)	A specific building line, when indicated on the Zoning Map, shall be the setback line for that street frontage. Proposed project encroaches into specific 15 foot setback along Lorain Avenue.
343.01(b)(8)	Accessory uses in the Local Retail Business District are permitted only to the extent necessary normally accessory to the limited type of neighborhood service use permitted under this division. Addition of accessory use of helipad and helicopter transit requires BZA approval.
349.04(d)	Hospital use requires accessory off-street parking in the amount of one for each four beds, plus one for each three employees or doctors. Additional 88 beds requires minimum addition of 22 additional accessory off-street parking spaces, plus additional spaces for amount of employees for new 153,470 square foot addition. Additional requirements exist for parts of hospital considered "clinic, health, or medical center". Comprehensive parking plan showing all uses of facility and method of meeting parking requirements should be reviewed and approved by the Board of Zoning Appeals.

An appeal of this Notice of Non-Conformance may be made to the Cleveland Board of Zoning Appeals, Room 516 Cleveland City Hall, 601 Lakeside Avenue, Cleveland, Ohio 44114 pursuant to Section 329.04(d) of the Cleveland Zoning Code.

Richard M. Riccardi
Zoning Administrator

R.C. 1.49 Determining legislative intent.

If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters:

(A) The object sought to be attained;

(B) The circumstances under which the statute was enacted;

(C) The legislative history;

(D) The common law or former statutory provisions, including laws upon the same or similar subjects;

(E) The consequences of a particular construction;

(F) The administrative construction of the statute.

Effective Date: 01-03-1972

R.C. 2506.01 Appeal from decisions of agency of political subdivisions.

(A) Except as otherwise provided in sections 2506.05 to 2506.08 of the Revised Code, and except as modified by this section and sections 2506.02 to 2506.04 of the Revised Code, every final order, adjudication, or decision of any officer, tribunal, authority, board, bureau, commission, department, or other division of any political subdivision of the state may be reviewed by the court of common pleas of the county in which the principal office of the political subdivision is located as provided in Chapter 2505. of the Revised Code.

(B) The appeal provided in this section is in addition to any other remedy of appeal provided by law.

(C) As used in this chapter, "final order, adjudication, or decision" means an order, adjudication, or decision that determines rights, duties, privileges, benefits, or legal relationships of a person, but does not include any order, adjudication, or decision from which an appeal is granted by rule, ordinance, or statute to a higher administrative authority if a right to a hearing on such appeal is provided, or any order, adjudication, or decision that is issued preliminary to or as a result of a criminal proceeding.

Effective Date: 03-17-1987; 08-17-2006

R.C. 2506.04 Order, adjudication, or decision of court.

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. Consistent with its findings, the court may affirm, reverse, vacate, or modify the order, adjudication, or decision, or remand the cause to the officer or body appealed from with instructions to enter an order, adjudication, or decision consistent with the findings or opinion of the court. 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.

Effective Date: 03-17-1987; 08-17-2006

§ 325.02 Accessory Use or Building

"Accessory use" or "building" means a subordinate use or building customarily incident to and located on the same lot with the main use or building.

(Ord. No. 1105-57. Passed 4-14-58, eff. 4-15-58)

§ 325.721 Use, Accessory

A subordinate land use located on the same lot or parcel as a Principal Use (except as may be specifically permitted hereunder to be located on a separate lot) and serving a purpose customarily incidental to that of the Principal Use.

(Ord. No. 3077-A-89. Passed 6-17-91, eff. 7-27-91)

§ 335.01 Designation of Use Districts

The City is hereby divided into the Public Land Protective District and into seventeen (17) use districts which shall be known, in order of restrictiveness, beginning with the most restrictive as:

Limited One-Family Districts;

One-Family Districts;

Two-Family Districts;

Townhouse (RA) Districts;

Limited Multi-Family Districts;

Multi-Family Districts;

Downtown Residential (DR) Districts;

Residence-Office Districts;

Parking Districts;

Local Retail Business Districts;

Shopping Center Districts;

University (College) Retail Districts;

General Retail Business Districts;

Residence-Industry Districts;

Semi-Industry Districts;

General Industry Districts;

Unrestricted Industry Districts.

(Ord. No. 338-97. Passed 3-26-01, eff. 4-2-01)

§ 337.01 Limited One-Family Districts

(a) *Permitted Buildings and Uses.* In a Limited One-Family District the following buildings and uses are permitted:

(1) One-family dwelling houses and their accessory buildings and uses. Except as otherwise provided in this Zoning Code, no main building or premises in a Limited One-Family District shall hereafter be erected, altered, used, arranged or designed to be used, in whole or in part for other than a dwelling house occupied by not more than one (1) family;

(2) Schools, dormitories constructed or operated by an existing permitted school, libraries or museums and police protective facilities therefor, providing they are not conducted as a gainful business, places of worship, if permitted by the Board of Zoning Appeals after public notice and public hearing under appropriate safeguards and such special conditions as the Board deems necessary, and if in the judgment of the Board such uses and buildings are appropriately located and designed and will meet a community need without adversely affecting the neighborhood.

(b) Proximity *to Other Buildings.* Every dwelling house hereafter erected in a Limited One-Family District shall be not less than twenty (20) feet from any other main building in the District.

(Ord. No. 918-59. Passed 6-1-59, eff. 7-12-59)

§ 337.02 One-Family Districts

In a One-Family District, the following buildings and uses and their accessory buildings and uses are permitted:

* * *

(g) The following buildings and uses, if approved by the Board of Zoning Appeals after public notice and public hearing, and if adequate yard spaces and other safeguards to preserve the character of the neighborhood are provided, and if in the judgment of the Board such buildings and uses are appropriately located and designed and will meet a community need without adversely affecting the neighborhood:

(1) A temporary or permanent use of a building by a nonprofit organization for a dormitory, fraternity or sorority house, for the accommodation of those enrolled in or employed by an educational institution permitted in the District;

(2) Fire stations, police stations;

(3) The following buildings and uses, if located not less than thirty (30) feet from any adjoining premises in a Residence District not used for a similar purpose, and subject to the review and approval of the Board of Zoning Appeals as stated above:

A. Public libraries or museums, and public or private schools or colleges including accessory laboratories, provided such private schools or colleges are not conducted as a gainful business;

B. Recreation or community center buildings, parish houses and grounds for games and sports, except those of which a chief activity is one customarily carried on primarily for gain;

C. Day nurseries, kindergartens;

D. Hospitals, sanitariums, nursing, rest or convalescent homes, not primarily for contagious diseases nor for the care of drug or liquor patients, nor for the care of the insane or developmentally disabled;

E. Orphanages;

F. Homes for the aged or similar homes;

G. Charitable institutions not for correctional purposes.

(Ord. No. 814-10. Passed 10-4-10, eff. 11-3-10)

§ 337.08 Multi-Family District

Except as otherwise specifically provided in this Zoning Code, no building or premises in a Multi- Family District shall hereafter be erected, altered, used, arranged or designed to be used, in whole or in part for other than one (1) or more of the following specified uses:

* * *

(e) The following buildings and uses if located not less than fifteen (15) feet from any adjoining premises in a Residence District not used for a similar purpose:

(1) Public libraries, public museums;

(2) Public or private schools or colleges, including accessory laboratories, not conducted as a gainful business;

(3) Kindergartens, day nurseries, children's boarding homes;

(4) Fraternity houses, sorority houses;

(5) Hospitals, sanitariums, nursing, rest or convalescent homes, not primarily for contagious diseases nor for the care of epileptics or drug or liquor patients, nor for the care of the insane or feeble- minded;

(6) Orphanages;

(7) Homes for the aged and similar homes;

(8) Charitable institutions not for correctional purposes.

(f) Accessory uses permitted in a Multi-Family District.

(Ord. No. 457-09. Passed 6-1-09, eff. 6-5-09)

§ 337.23 Accessory Uses in Residence Districts

(a) *Permitted Accessory Uses.* The following accessory uses and buildings are permitted in a Residence District. Such permitted accessory buildings shall be located on the rear half of the lot, a minimum of eighteen (18) inches from all property lines and at least ten (10) feet from any main building on an adjoining lot in a Residence District. Accessory buildings shall not occupy more than forty percent (40%) of the area of the required rear yard and, in the case of a corner lot, shall be located back of any required setback or specific building line. For side street yard regulations consult Sections 357.05 to 357.07.

(1) Within a main building, the office of a surgeon, physician, clergyman, architect, engineer, attorney or similar professional person residing in such main building and employing in the office not more than one (1) nonresident office or laboratory assistant.

(2) Customary home occupation for gain carried on in the main building or in a rear building accessory thereto and requiring only customary home equipment; provided that no nonresident help is employed for that purpose, no trading in merchandise is carried on and no personal physical service is performed and, in a Limited One-Family District or in a One-Family District, no sign or other outward evidence of the occupation is displayed on the premises.

(3) Agricultural uses, subject to the regulations of Section 337.25 and Section 347.02 regarding the keeping of farm animals.

(4) Private incinerators for the burning of refuse and garbage produced on the same premises, provided that the construction is such as to assure immediate and complete combustion and freedom from offensive smoke, ash, unburned particles and odors, and a permit therefor is granted by the Commissioner of Environment.

(5) Fences and walls, as regulated in Chapter 358.

(6) Garages and parking spaces for the occupants of the premises and, when the premises are used for other than residence purposes, for their employees, patrons and guests.

A. In a Dwelling House District the floor area of a private garage erected as an accessory building shall not exceed six hundred fifty (650) square feet unless the lot area exceeds four thousand eight hundred (4,800) square feet in which event the floor area may be increased in the ratio of one (1) square foot for each twelve (12) square feet of additional lot area.

B. In Multi-Family Districts, garages and parking spaces erected or established as accessory uses shall be subject to the restrictions specified in Sections 343.19 to 343.21 and Chapter 349.

(7) Garage Sale or other Residential Property Sales, as defined in Section 676B.01(a), as long as they conform to the provisions in Chapter 676B.

(8) Signs permitted in accordance with the requirements of Chapter 350.

(9) 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.

(b) Accessory Building Erected Prior to Erection of Main Building. An accessory building may be erected prior to the construction of the main building only if:

(1) The accessory building is erected on the rear half of the lot;

(2) The accessory building is so placed as not to prevent the practicable and conforming location of the main building;

(3) The main building is completed within two (2) years from the date of issuance of the permit for the accessory building.

(Ord. No. 814-10. Passed 10-4-10, eff. 11-3-10)

§ 343.01 Local Retail Business District

(a) "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.

(b) Permitted Buildings and Uses. The following buildings 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 (1) 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;

(2) Retail business for local or neighborhood needs to the following limited extent:

A. The sale of baked goods, confectionery, dairy products, delicatessen, fruits, vegetables, groceries, meats;

B. The sale of dry goods and variety merchandise, excluding department stores;

C. The sale of men's and boy's furnishings, shoes, hats, women's ready-to-wear, furs, millinery, apparel, accessories;

D. The sale of china, floor covering, hardware, household appliances, radios, paint, wallpaper, materials and objects for interior decorating;

E. The sale of books, magazines and newspapers, including adult book stores subject to Section 347.07, cigars, drugs, flowers, gifts, music, photographic goods, sporting goods, stationery;

F. Eating places, lunch rooms, restaurants, cafeterias and places for the sale and consumption of soft drinks, juices, ice cream and beverages, but excluding buildings which provide entertainment or dancing and buildings in which beer and intoxicating liquor are sold for consumption on the premises, provided such building for the sale of beer or intoxicating liquor is within five hundred (500) feet of the boundary of a parcel of real estate having situated thereon a school, church, library, nonprofit recreational or community center building or public playground;

G. Service establishments: barber or beauty shops, custom tailors, laundry agencies, self- service laundries, hand laundries, shoe repair, ice stations and dry cleaning, pressing or tailoring shops in which not more than five (5) persons are engaged in such work or business at any one time, and in which only nonexplosive and nonflammable solvents are used and no work is done on the premises for retail outlets elsewhere and pet shops, provided noise and odors are effectively confined to the premises. As used in this division (b)(2)G., "pet shops" does not include businesses which board dogs and cats overnight or any pet hospital.

(3) Business offices: banks, real estate, insurance and other similar offices, and the offices of the architectural, clerical, engineering, legal, dental, medical or other established recognized professional, but excluding morticians, undertakers and funeral directors, in which only such personnel are employed as are customarily required for the practice of such business or profession;

(4) Automotive services: public parking garages and parking lots;

(5) Charitable institutions not for correctional purposes;

(6) Signs: permitted in accordance with the requirements of Chapter 350;

(7) Other main uses: any other neighborhood store, shop or service similar to the uses listed in this division in type of goods or services sold, in business hours, in the number of persons or cars to be attracted to the premises and in effect upon the adjoining Residence Districts;

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

(Ord. No. 729-09. Passed 7-1-09, eff. 7-8-09)