ORIGINAL

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.

REPLY BRIEF OF APPELLANTS THE CLEVELAND CLINIC FOUNDATION AND FAIRVIEW HOSPITAL

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I. INTRODUCTION

The confused and confusing invocation of multiple standards of review in Appellee Board of Zoning Appeals, City of Cleveland's ("BZA") Merit Brief illustrates the need for this Court's guidance on the standard of review that applies at the trial and appellate court levels to a zoning board's interpretation of zoning restrictions. The Cleveland Clinic's proposition of law harmonizes this standard of review with the rules for interpreting ordinances that restrict property rights: "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." (Appellant's Merit Br. at 10.) Under this standard, which is well supported by Ohio law, the trial court correctly applied the "plain reading" of the Cleveland Zoning Code. The trial court's judgment reversing the BZA's denial of a permit for the Fairview Hospital helipad should be reinstated.

The BZA's two "responsive contentions" find no support in this Court's precedents and are tailored only to sustain the decision of the court below, not provide needed guidance to Ohio courts. The first repeats verbatim the language of R.C. 2506.04 and argues that appellate review under the statute is "limited to an abuse of discretion standard." (Appellee's Merit Br. at 6.) R.C. 2506.04, however, does not provide that courts are precluded from interpreting the meaning of

ordinances de novo. The duty of courts to determine the meaning of a statute leaves no room for deference to an administrative board's determination of what an unambiguous ordinance means. *See, e.g., Medical Mut. of Ohio v. Schlotterer*, 122 Ohio St.3d 181, 2009-Ohio-2496, ¶ 13 (an abuse-of-discretion standard is inappropriate when a court's judgment is based on an interpretation of the law). The BZA's contrary contention misreads *Henley v. Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142 (2000). *Henley* instructs that appellate review of "questions of law" under R.C. 2506.04 *includes* the question of whether a trial court abused its discretion. *Id.* at 148. *Henley* did not hold that appellate review is *limited* to whether a trial court abused its discretion, and this Court's independent analysis of Youngstown's zoning ordinance in *Henley* belies any such limitation. (*See* Appellant's Merit Br. 19-20.) In short, nothing in R.C. 2506.04 or *Henley* suggests that de novo review of a zoning board's interpretation of zoning restrictions is in any way improper.

The BZA's second responsive contention argues that while a court "ordinarily" must construe zoning restrictions in favor of a property owner, this rule of law does not apply where a court identifies "ambiguity" as to *which* zoning provision applies. (Appellee's Merit Br. at 7, 12.) But that contention begs the threshold question of whether a statute may be declared "ambiguous" where a court encounters difficulty in determining which subsection applies without "objectively and thoroughly examin[ing] the writing to attempt to ascertain its meaning." *State*

v. Porterfield, 106 Ohio St.3d 5, 2005-Ohio-3095, ¶ 11. It also fails to provide a principled basis for insulating such "ambiguity" from the rule of law in *Saunders v. Clark Cty. Zoning Dept.*, 66 Ohio St.2d 259 (1981) that zoning restrictions are construed in favor of the property owner. Even if the Zoning Code were ambiguous (and it is not), the absence of any restriction prohibiting helipads on hospitals in a Local Retail Business District means the Code must be construed to allow such a use.

II. ARGUMENT

A. Both Trial and Appellate Courts Review an Administrative Interpretation of a Zoning Ordinance De Novo.

The Cleveland Clinic demonstrated in its Merit Brief that the administrative construction of an ordinance is a pure question of law that should be reviewed de novo at the trial and appellate level. (*See* Appellant's Merit Br. at 11-12.) In response, the BZA argues that: 1) de novo review "does not take precedence over" the standard specified in R.C. 2506.04, which requires trial courts to determine whether a preponderance of substantial, reliable and probative evidence supports the agency's decision (Appellee's Merit Br. at 1, 7, 9, 13); and 2) an "appellate court's de novo review considers whether the trial court abused its discretion" (*id.* at 10). The fatal flaw in both arguments is that they conflate the standard of review that applies to pure questions of law (de novo) with the very different, deferential standards of review that apply to factual findings in administrative appeals.

The authorities relied upon by the BZA address the standards of review that apply to factual findings in administrative appeals governed by R.C. 2506.04, not the standard of review that applies to pure questions of law. *See, e.g., Kisil v. Sandusky*, 12 Ohio St.3d 30 (1984); *Dudukovich v. Lorain Metro. Hous. Auth.*, 58 Ohio St.2d 202 (1979). *Dudukovich* held that the trial court "must weigh the evidence in the record * * * to determine whether there exists a preponderance of reliable, probative and substantial evidence to support the agency decision." 58 Ohio St.2d at 206-07. *Kisil* clarified that trial courts, in undertaking this task, "must give due deference to the administrative resolution of evidentiary conflicts." 12 Ohio St.3d at 35 (emphasis added), quoting *Univ. of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 111 (1980). *Kisil* also held that appellate courts review the trial court's factual findings under an abuse of discretion standard. *Id.* at 34, fn. 4. In short, *Dudukovich* and *Kisil* stand for the propositions that trial courts owe due deference to administrative *factual findings*, and an abuse of discretion standard applies to appellate review of the trial court's factual findings. No such discretion exists concerning the interpretation of a zoning ordinance.

Nor does the de novo standard for pure questions of law conflict with R.C. 2506.04. In *Kisil* and *Dudukovich*, this Court harmonized the standard of review for factual findings in appeals under the Administrative Appellate Procedure Act (R.C. 2506.04) and appeals under the Administrative Procedure Act (R.C. 119.12). *See Dudukovich*, 58 Ohio St.2d at 207 (noting that the scope of a trial court's review

under R.C. 119.12 includes weighing evidence); *Kisil*, 12 Ohio St.3d at 34-35 (scope of review under R.C. 2506.04 "is consistent with" this Court's precedents "construe[ing] analogous R.C. 119.12 governing administrative appeals in R.C. Chapter 119"). Following that same path here requires application of a de novo standard of review to pure questions of law.

In *Ohio Historical Society v. State Employment Relations Board*, 66 Ohio St.3d 466 (1993), this Court addressed the standard of review for questions of law in R.C. Chapter 119 administrative appeals. *Ohio Historical Society* explained that administrative proceedings were similar to trials — while courts owe deference to administrative factual findings, courts construe the law on their own:

> 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. *To the extent that an agency's decision is based on construction of the state or federal Constitution, a statute, or case law, the common pleas court must undertake its R.C. 119.12 reviewing task completely independently.*

66 Ohio St.3d at 471 (emphasis added); *see also 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 (plurality opinion) (explaining that a common pleas court exercises independent judgment on pure questions of law). Such an independent analysis of the law is the hallmark of a de novo standard of review. *E.g., State v. Standen*, 137 Ohio App.3d 324, 2007-Ohio-5477, ¶ 7 (9th Dist.)

("A de novo review requires an independent review of the trial court's decision without any deference to the trial court's determination.").

Consistent with this Court's approach in *Kisil* and *Dudukovich*, de novo review of questions of law under R.C. 2506.04 harmonizes the standard for reviewing legal issues in R.C. Chapter 2506 and R.C. Chapter 119 appeals. Such de novo review is also consistent with this Court's zoning precedents, which interpret zoning ordinances without deference to any administrative interpretation. (*See* Appellant's Merit Br. at 19-20.) Finally, a de novo standard of review comports with the rulings of the First and Fourth Appellate Districts, as well as panels of the Second and Eighth Districts. *See Ware v. Fairfax Bd. of Zoning Appeals*, 164 Ohio App.3d 772, 2005-Ohio-6516, ¶ 5 ("We review issues of statutory interpretation de novo."); *Lamar Outdoor Advertising v. Dayton Bd. of Zoning Appeals*, 2d Dist. No. 18902, 2002-Ohio-3159, 2002 WL 1349600, at *2 (June 21, 2002) (explaining that, "regarding questions of law, our review is de novo"); *Taylor v. Circleville*, 4th Dist. No. 03CA8, 2003-Ohio-7166, ¶ 11 ("The interpretation of a zoning ordinance, however, presents a question of law that appellate courts review de novo."); *Moulagiannis v. Cleveland Bd. of Zoning Appeals*, 8th Dist. No. 84922, 2005-Ohio-2180, ¶ 10 (explaining that "interpretation of a city's ordinance presents a question of law that must be reviewed de novo.").

Contrary to the BZA's suggestion, this de novo review does not "consider[] whether the trial court abused its discretion." (Appellee's Merit Br. at 10.) Rather,

"[a]n appellate court's scope of review on issues of law is plenary, including the issue of whether the common pleas court applied the proper standard of review." *Bartchy*, 2008-Ohio-4826, ¶ 43. In short, under prevailing principles of administrative law, both the trial court and the court of appeals were required to analyze de novo the BZA's legal determination of which zoning provision applied. The Eighth District erred in finding that the trial court "abused its discretion" in determining the meaning of the Zoning Code de novo instead of deferring to the BZA. (Reconsidered Op., ¶¶ 12-13, Merit Br. Appx. 18.)

B. The Trial Court's De Novo Review Correctly Applied the Plain Meaning of the Cleveland Zoning Code.

The Eighth District also erred in declaring the Cleveland Zoning Code ambiguous and reversing the trial court's decision. The trial court properly analyzed "the pertinent zoning classifications at issue," ascertained and applied the "plain reading of the Code itself," and correctly concluded that Fairview Hospital was entitled to construct a helipad on its roof. (2/13/12 JE at 4-5, Merit Br. Appx. 42-43.)

Notably, the BZA does not defend the Eighth District's conclusion that the Cleveland Zoning Code is ambiguous. And it inconsistently claims that the trial court both did, and did not, find the Code to be ambiguous. *Compare* Appellee's Merit Br. at 8 ("The trial court found C.C.O. 343.01(b)(8) is susceptible to more than one interpretation and is, therefore, ambiguous.") *with id.* at 10 ("The trial court did

not find the ordinance to be ambiguous."). The latter interpretation of the trial court's ruling is correct. (*See* 2/13/12 JE at 4-5, Merit Br. Appx. 42-43.)

Instead of arguing that the Zoning Code is ambiguous, the BZA asserts that its own "reasoning process" in interpreting the Code was "sound," while the trial court's interpretation of the Code was "flawed." (Appellee's Merit Br. at 2, 18.) This argument misapprehends the de novo standard of review that applies to questions of statutory interpretation, which (as explained above) required the trial court to construe the law on its own. *Ohio Historical Soc.*, 66 Ohio St.3d at 471. The trial court properly conducted a de novo review by explaining and applying the plain meaning of the Cleveland Zoning Code. (2/13/12 JE at 4-5, Merit Br. Appx. 42-43.) Therefore, the trial court had no obligation to "explain[] why it dismissed the [BZA's] interpretation of the ordinance." (Appellee's Merit Br. at 9.)

Nor can the BZA show error in the trial court's ruling that, under "a plain reading of the Code itself, and following the exact language of the Code," hospitals and their accessory uses (including helipads) were "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.'" (2/13/12 JE at 5, Merit Br. Appx. 43.) The BZA argues that the trial court's logic is flawed because the "specific" provision addressing "accessory uses" in a Local Retail Business District, Section 343.01(b)(8), prevails over the "general" provision of Section 343.01(b)(1) — which incorporates as permitted uses in a Local Retail Business District those uses permitted in a Multi-

Family District, as regulated in that district. (Appellee's Merit Br. at 15.) But the BZA acknowledges this principle of statutory construction applies only when two provisions are "found to be irreconcilable[.]" (*Id.* at 14.) The oddity of finding an irreconcilable conflict in two subsections of the *same* zoning provision shows something is amiss in the BZA's argument. In fact, no conflict exists between a "specific" provision regulating "accessory uses" employed for the limited types of *additional* business uses authorized in a Local Retail Business District and a "general" provision incorporating Multi-Family District uses, as regulated in that district.

The flaw in the BZA's argument is that it ignores the pyramid-like structure of the Cleveland Zoning Code. (Appellant's Merit Br. at 2.) To implement this pyramid-like scheme at the Local Retail Business District level, Section 343.01(b)(1) incorporates as "permitted uses" in Local Retail Business Districts those "uses permitted in the Multi-Family District and as regulated in that district[.]" Cleveland Codified Ordinance 343.01(b)(1), Merit. Br. Appx. 58. In turn, Section 337.08(f) defines as a use *permitted* in a Multi-Family District those "[a]ccessory uses permitted in a Multi-Family District." *Id.* at 337.08(f), Merit Br. Appx. 55. Reading these two subsections together, since Multi-Family District "accessory uses" are uses *permitted* in that district, they are "permitted uses" in a Local Retail Business District — i.e., a "use[] permitted in the Multi-Family District" under Section 343.01(b)(1). *Id.* at 343.01(b)(1), Merit Br. Appx. 58.

In other words, the Zoning Code sensibly provides that a property owner who adopts a use permitted in both Multi-Family and Local Retail Business Districts (such as a hospital, museum or college use) may employ the same accessory uses in either district. Such an interpretation of Sections 343.01(b)(1) in no way conflicts with the "specific" "accessory use" provision in Section 343.01(b)(8). Rather, when read in pari materia (as the BZA concedes they must be, Appellee's Merit Br. at 14), the latter section merely specifies the limited types of accessory uses that may be employed for the additional business uses authorized in Local Retail Business Districts — such as restaurants, barber or beauty shops, dry cleaning, and any other similar "neighborhood store, shop or service[.]" *See* Cleveland Codified Ordinance 343.01(b)(2)(7), Merit Br. Appx. 58-59. Limiting "accessory uses" for such neighborhood stores to those "necessary [and] normally accessory to the limited types of neighborhood service use permitted under this division" makes eminent sense. *Id.*, Section 343.01(b)(8), Merit Br. Appx. 59. Thus, there is no conflict between Section 343.01(b)(1) and (b)(8); the Zoning Code provisions regulating Multi-Family Districts govern "accessory uses" that may be employed for uses permitted in Multi-Family Districts.

The BZA next argues that Section 337.08(f) "does not expressly list helipads, heliports or helicopters as a permitted accessory use in Multi-Family Districts." (Appellee's Merit Br. at 18.) That is true, but irrelevant. Section 337.23(a)(9) specifies that permitted "accessory uses" in a Multi-Family District include any

"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." Cleveland Codified Ordinance 337.23(a)(9), Merit Br. Appx. 57. And the BZA concedes the Zoning Code does "not expressly prohibit helipads [in] a Local Retail Business District." (Appellee's Merit Br. at 16.) The only remaining question, therefore, is whether a helipad is "customarily incident" to a hospital use.

The trial court found that a helipad qualified as an accessory use under this standard. (*See* 2/13/12 JE at 5, Merit Br. Appx. 43 ("The record before this Court establishes that the addition of a helipad is an accessory use and therefore permissible in the instant case.").) That finding is amply supported by the record, which demonstrated that Fairview Hospital is the only Cleveland hospital without a helipad, and one of the only Northeast Ohio hospitals without one. (R. 3, Tr. at 33, 44, Supp. 11, 22; R. 3, Tab 2, Ex. C., p. 12, Supp. 56.) The trial court's judgment reversing the BZA's denial of a permit for the construction of a helipad should be reinstated.[1]

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[1] In their Merit Brief, the BZA suggests that, "after all the appeals, a variance request is still available to the Clinic." (Appellee's Merit Br. at 4.) But the availability of a variance is beside the point. As this Court has recognized, unless the contemplated accessory use violates a specific zoning provision, "no variance is needed[.]" *Univ. Circle, Inc. v. Cleveland*, 56 Ohio St.2d 180, 185 (1978).

C. If the Zoning Code Were Ambiguous, Any Ambiguity Must Be Construed in the Cleveland Clinic's Favor.

The Cleveland Clinic's Merit Brief established that: 1) a judicial finding of ambiguity must be based on a *specific* ambiguity identified in a *particular* provision (Appellant's Merit Br. at 13-15); and 2) any such ambiguity in a zoning restriction must be strictly construed in favor of the property owner under the rule of law in *Saunders v. Clark Cty. Zoning Dept.*, 66 Ohio St.2d 259 (1981). (*See id.* at 15-20.) While the BZA does not defend the Eighth District's finding of ambiguity, it does argue that this Court should defer to the BZA's resolution of any ambiguity in the Zoning Code. (Appellee's Merit Br. at 11-13.) But even if this Court were to conclude that the Zoning Code is ambiguous, the BZA identifies no basis upon which this Court could or should limit *Saunders*.

First, the BZA argues that *Saunders* is distinguishable because it was a declaratory judgment action, not an administrative appeal. (Appellee's Merit Br. at 12.) The rule of law stated in *Saunders*, however, is not confined to declaratory judgment actions. Rather, it is written broadly to apply to *all* zoning decisions on the administrative *and* judicial level:

> *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.

Saunders, 66 Ohio St.2d at 261 (emphasis added). Were its rule of law limited to declaratory judgment actions, this Court would not have invoked the rule of strict construction in favor of the property owner in an administrative appeal from a ruling by the BZA. *See Univ. Circle, Inc. v. Cleveland*, 56 Ohio St.2d 180, 184-85 (1978) (explaining in administrative appeal from BZA resolution denying a requested variance that zoning ordinances "are ordinarily construed in favor of the property owner").

Second, the BZA parrots the distinction proffered by the Eighth District, which limits the rule of strict construction in favor of a property owner to ambiguities in a particular word — as opposed to an ambiguity in "which provision of the zoning code was applicable." (Appellee's Merit Br. at 12.) Yet the BZA offers no rationale for drawing such a distinction, which is untenable for the reasons explained in the Cleveland Clinic's Merit Brief. (*See* Appellant's Merit Br. at 18-20.)

There is no basis for deferring to administrative interpretations of ambiguous zoning ordinances that restrict the use of property. (Appellant's Merit Br. at 16-17.) The BZA does not respond to the point that such deference is inappropriate where, as here, the administrative body must strictly construe the ordinance and therefore lacks discretion when interpreting it. (*Id.* at 17.) The BZA also does not respond to the point that a court cannot defer to an administrative interpretation of a zoning ordinance that restricts the use of property when it has an independent obligation

to determine the meaning of the ordinance de novo, and, if it finds the ordinance ambiguous, to strictly construe it in favor of the property owner. (*Id.* at 16-17.)

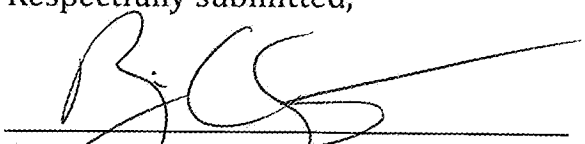
III. CONCLUSION

Time and again, this Court has emphasized that "[z]oning ordinances are in derogation of the common law" and "deprive a property owner of uses of land to which he would otherwise be entitled." *University Circle*, 56 Ohio St.2d at 184; *see also Saunders*, 66 Ohio St.2d at 261; *Terry v. Sperry*, 130 Ohio St.3d 125, 2011-Ohio-3364, ¶ 19. The question is not whether "City Council [or] the [BZA] saw the need to either amend the Zoning Code or grant a variance for helipads in a Local Retail Business District" (Appellee's Merit Br. at 20), but whether the Zoning Code clearly prohibits helipads on hospitals in a Local Retail Business District — even though the BZA acknowledges helipads are not mentioned in the Zoning Code, every other hospital in Cleveland has a helipad, and the availability of a helipad may mean the difference between life and death for certain patients in critical condition. (*See* R. 3, Tr. 31-35, 39-40, 44, 129; Supp. 9-13, 17-18, 22, 47.) The answer is "no."

The Zoning Code's plain language entitles the Cleveland Clinic to construct a helipad on the roof of Fairview Hospital. Even if the Zoning Code were ambiguous, however, the rule of law announced in *Saunders* would require that any such ambiguity be construed in the Cleveland Clinic's favor.

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,



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I hereby certify that a copy of the foregoing **Reply Brief of Appellants The Cleveland Clinic Foundation and Fairview Hospital** was sent by regular U.S. Mail, postage prepaid, this 28th day of October, 2013 to:

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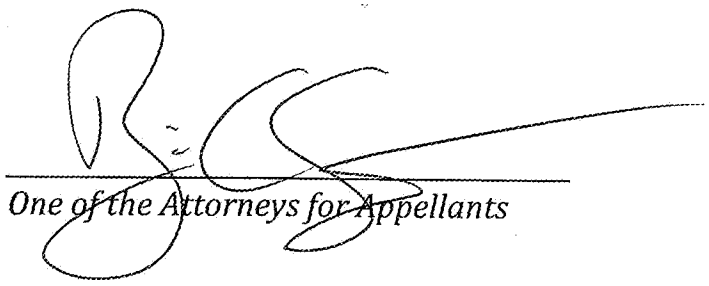

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