

IN THE SUPREME COURT OF OHIO

CLEVELAND CLINIC FOUNDATION, et al.)	CASE NO.: 2013-0654
)	
Appellant,)	On Appeal from the Cuyahoga
)	County Court of Appeals,
v.)	Eighth District Court of Appeals
)	Case No.: 12 CV 98115
)	
BOARD OF ZONING APPEALS)	
CITY OF CLEVELAND,)	
)	
Appellee.)	

**APPELLEE BOARD OF ZONING APPEALS CITY OF CLEVELAND
MEMORANDUM IN RESPONSE TO APPELLANTS' MEMORANDUM IN SUPPORT
OF JURISDICTION**

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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; <i>Saunders v. Clark Cty. Zoning Dept.</i> , 66 Ohio St.2d 259 (1981), applied.]	4
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I. THIS CASE DOES NOT PRESENT ANY ISSUES OF PUBLIC OR GREAT GENERAL INTEREST

This case does not present an issue of public or great general interest because the Eighth District Court of Appeals (“Eighth District”) applied well-established law to the case-specific set of allegations in this case. The Appellant has failed to articulate relevant reasons why this Honorable Court should grant jurisdiction. In fact, further review of the Eighth District’s decision would be of no benefit beyond these parties. The Eighth District correctly reversed and remanded the decision of the Cuyahoga County Court of Common Pleas.

The well-known standard for granting discretionary appeals “is whether the cause presents a question of public or great interests as distinguished from questions of interest primarily to the parties.” *Williamson v. Rubich* (1960), 171 Ohio St. 253. The *Williamson* Court observed that “a party to litigation has a right to but one appellate of the case.” *Id.* At 253, 254. This case was reviewed by the Eighth District twice. The Clinic is simply dissatisfied with the outcome. The Clinic’s request for jurisdiction should be denied.

This case, contrary to the Clinic’s assertion, is not “an issue of first impression nor has it caused a clear split among and within Ohio’s appellate districts on an issue implicating fundamental property rights.” The Clinic alleges a conflict between the Eighth District Court of Appeals decision in the present case and the opinion of other appellate court in Ohio. The City maintains that no conflict exists amongst the other districts.

II. STATEMENT OF THE CASE AND FACTS

On October 26, 2010, a permit application was filed by the Clinic 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 Cleveland Clinic Foundation (“Clinic”) and is known as Fairview Hospital (“Fairview”).

On November 10, 2010, the Zoning Administrator for the City denied the Clinic's application permit. The Notice of Non-Conformance detailed the reasons for the denial. Specifically as it relates to the helipad, the Zoning Administrator determined that pursuant to Cleveland Codified Ordinance 343.01(b) (8), accessory uses in the Local Retail Business District are permitted only to the extent necessary accessory to the limited types of neighborhood service use permitted under this division. Addition of accessory use of helipad and helicopter transit requires Board of Zoning Appeals ("BZA" and "Board") approval.

The Clinic challenged the Notice of Non-Conformance to the Board. As it relates to the helipad, the Clinic asserted that the helipad was a permitted accessory use in a Local Retail Business District.

On January 31, 2011, the Board conducted a public hearing. The Clinic chose not to have an attorney represent them the hearing. Speaking on behalf of the Clinic at the Board hearing were hospital executives, architects, helicopter operators and medical staff. Although the Clinic provided testimony about the need for a helipad for the transport of critically ill and injured patients at Fairview Hospital, they never sought a variance from the zoning code to allow the use they sought. It must be noted that a variance requests is still an option available to the Clinic.

At the conclusion of the hearing, the Board determined that a helipad was not a permitted accessory use in a Local Retail Business District and therefore, the Building and Housing Department had not been arbitrary, capricious or unreasonable in denying their permit application for the helipad.

The Clinic filed an administrative appeal pursuant to Ohio Revised Code §2506 with the Cuyahoga Court of Common Pleas on March 2, 2011. The Common Pleas Court reversed the

decision of the Board of Zoning Appeals in a journal entry dated February 16, 2012. The Common Pleas Court opinion stated “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 therefore permissible in the City’s areas that are zoned “Local Retail Business District.” The Common Pleas Court failed to explain how the Board’s decision was unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record. The Common Pleas Court’s Order provided no analysis pursuant to R.C. 2506.04 for its decision to reverse the decision of the Cleveland Board of Zoning Appeals. The Court of Common Pleas merely gave a verbatim recitation of statutory language of the Cleveland Zoning Codes.

One March 19, 2012, the City filed an appeal to the Eighth District alleging an abuse of discretion by the Common Pleas Court. The Eighth District unanimously reversed and remanded the Common Pleas Court in its Journal Entry and Opinion dated October 4, 2012. The Eighth District’s decision stated in pertinent part “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.”

The Clinic filed an Application for En Banc Review and a Motion to certify Conflict to the Supreme Court; both were denied. Upon the Clinic’s Motion for Reconsideration, the Eighth District vacated the journal entry and opinion announced on October 4, 2012, and replaced it with the journal entry and opinion dated December 20, 2012. The opinion dated December 20, 2012 (a 2-1 decision) again reversed and remanded the Common Pleas Court’s decision. The Court held that “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. The Clinic's Second Motion for Reconsideration, En Banc Review and Motion to Certify Conflict to the Supreme Court were denied.

III. LAW AND ARGUMENTS IN OPPOSITION TO APPELLANT'S PROPOSITIONS OF LAW

A. Appellant's 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.]

In *Cincinnati Bell v. Glendale* (1975), 42 Ohio St.2d 368, the court held that the review by the trial court is set forth in R.C. 2506.04, which requires the court to examine the substantial, reliable and probative evidence on the whole record. The court also stated that although a hearing before the Court of Common Pleas pursuant to R.C. 2506.01 is not de novo, it often in fact resembles a de novo proceeding.

An appellate court's standard of review is more limited than that of the common pleas court. The court of appeals' standard of review is whether, as a matter of law, the decision of the common pleas court is not supported by a preponderance of reliable, probative, and substantial evidence. *Kisil v. Sandusky* (1984), 12 Ohio St.3d 30. *Kisil* went on to state "this statute [R.C. 2506.04] grants a more limited power to the court of appeals to 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. **Within the ambit of “questions of law” for appellate court review would be the abuse of discretion by the common pleas court.** In *Henley v. Youngstown Bd. of Zoning Appeals* (2000), 90 Ohio St.3d 142, the court held “an appellate court’s review is more limited – we simply review the trial court’s judgment for errors of law and abuses of discretion.” The Supreme Court of Ohio has determined that the standard of review for administrative agency appeals (pursuant to Ohio Revised Code §2506) is “whether or not the trial court abused its discretion.” 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. 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.* (1979), 58 Ohio St.2d 202, 207. The court, however, may not blatantly substitute its judgment for that of the agency, especially in areas of administrative expertise. *Id.* If there is a preponderance of reliable, probative and substantial evidence, the common-pleas court must affirm the agency decision. *Id.* In reviewing a decision of an administrative board, the common pleas court must assume that the decision is reasonable and valid. *Wade v. City of Cleveland* (8th Dist. 1982), 8 Ohio App.3d 176. In absence of evidence that the decision was an abuses of discretion, or an act in excess of the power of the board, or unreasonable under all the circumstances, the board’ decision will be upheld. *Id.*

The common pleas court never made a finding that the Board of Zoning Appeals decision was unconstitutional, illegal, arbitrary, capricious unreasonable, or unsupported by a preponderance of substantial, reliable, and probative evidence on the whole record.

In both of their Motions for Reconsideration and in their Memorandum for Jurisdiction, the Clinic continues to erroneously state the decision of the Eighth District as “when a zoning provision is ambiguous courts must, as a matter of law, defer to the interpretation of a board of zoning appeals and the holdings of prior panels holding the opposite.” The Eighth District’s opinion actually stated “[B]ecause 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. This Court held that the trial court failed to do so, and so it abused its discretion.”

The abuse of discretion by the trial court is that it failed “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.” The trial court found that C.C.O. 343.01(b)(8) is “susceptible to more than one interpretation and is, therefore, ambiguous. However, the common pleas court abused its discretion because it never explained why it dismissed the Board of Zoning Appeals interpretation of the ordinance. The trial court merely stated that a “plain reading” of the ordinance allowed helipads as a permitted accessory use in a Local Retail Business District.

It appears the Clinic is arguing that the Eighth District’s Opinion mandates “absolute” deference to the Board of Zoning Appeals where ambiguity exists in the zoning code. This is inaccurate. This Court specifically states “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.” Due deference required the trial court to give appropriate weight to the judgment of the Board of Zoning Appeals. 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.

The decision by the common pleas court is devoid of any explanation as to why the Board's decision was contrary to the requisite legal standard of review: whether the administrative agency's decision was unconstitutional, illegal, arbitrary, capricious unreasonable or unsupported by a preponderance of substantial, reliable, and probative evidence on the whole record. The common pleas court's "plain reading" of the code was inadequate given the legal standard by which the case must be reviewed. It is clear that common pleas court abused its discretion by not applying the correct standard of review when it rendered its decision. Because the common pleas court did not give proper "due" deference to the BZA's reasonable interpretation of their ordinance, it abused its discretion.

Not one of the "conflicting" decisions from the other districts cited by the Clinic conflicts with the issue at bar, to-wit: whether the trial court commits an abuse of discretion where due deference was not given to the administrative agency's interpretation of the ordinance. The Clinic's Memorandum for Jurisdiction is predicated in error and should also be denied. Cleveland Clinic Foundation has failed to demonstrate the existence of an actual conflict between the Eighth District's Opinion in the present case and those of other Ohio appellate districts.

When an ordinance is unambiguous and conveys a clear meaning, a court must only read and follow the words of the ordinance. In such a case, there is no need to apply the rules of construction. An ordinance is ambiguous when it is subject to various interpretations. Specifically, ambiguity exists if a reasonable person can find different meanings in the ordinance

and if good arguments can be made for either of two contrary positions. *Meeks v. Papadopulos* (1980), 62 Ohio St.2d 187.

The Eighth District in its December 20, 2012 opinion stated “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.” In other words, in reviewing questions of law, the appellate court considers whether the trial court abused its discretion.

The Clinic insists that the court of appeals did not apply a de novo review of the ordinance in this case. While it may not be labeled as a de novo review in the panel’s decision, questions of law involving the ordinance were reviewed by the panel. De Novo Review requires the appellate court to review the trial court’s conclusions regarding the application, interpretation, and construction of law. De novo review cannot be precisely defined, there is no precise formula. *Anderson v. City of Bessemer* (1985), 470 U.S. 564, 573.

The Clinic also argues that the Eighth District never addressed whether the trial court’s reading of Section 343.01 was correct. The Eighth District did not “improperly defer[red] to the BZA’s interpretation of Section 343.01 as argued by the Clinic. The panel addressed the trial court’s reading of Section 343.01 and found that the ordinance to be ambiguous contrary to the common pleas’ court’s finding. The panel did apply the proper standard of review. Its review led the panel to agree with the Board’s determination the ordinance did not allow a helipad as a permitted accessory use in a Local Retail Business District, and; thereby reversing the trial court’s decision.

The Clinic argues that the Eighth District by finding ambiguity did not follow the three rules of construction for resolving ambiguity created by conflicting zoning ordinances. First, the Clinic argues that the rule of courts must strictly construe ambiguous zoning provisions in favor of property owners which derives from the rule articulated by the Ohio Supreme Court in *Saunders v. Clark Cty. Zoning Dept.* (1981), 66 Ohio St.2d. 259.

There is no dispute on this rule. The December 20, 2012 opinion by this panel states 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 (*Oakwood v. Clark Oil & Refining Corp.*, 8th Dist. No. 53419, 1988 WL 18779 (Feb. 18, 1988)). The Panel distinguished this case from the holding in *Saunders*. The Eighth District found the issue in this case was which provision of the zoning code was applicable. The Eighth District determined 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.

The Clinic argues that the rule that a specific provision prevails over a general provision when irreconcilability between the two provisions creates ambiguity which leads to the "conclusion that the proposed helipad is a permitted use." It is a well-settled principle of statutory construction that when two statutes, one general and the other special, cover the same subject matter, the special provision is to be construed as an exception to the general statute which might otherwise apply. *Acme Eng. Co v. Jones* (1948), 150 Ohio St. 423, *State ex rel. Dublin Securities, Inc.* (1994), 68 Ohio St. 3d 426. The holding was later codified in Ohio Revised Code 1.51.

Specifically, the Clinic's position is the Ordinance 343.01(b)(1) ("...all uses permitted in the Multi-Family District and as regulated in that district...") is the specific provision that prevails over Ordinance 343.01(b)(8). Ordinance 343.01(b)(8) specifically addresses accessory uses (only to the extent necessary normally accessory to the limited types of neighborhood service use permitted under this division). The Clinic has always argued that a helipad was a permitted accessory use to the primary use as a hospital in a Local Retail Business District. Ordinance 343.01(b)(8) controls accessory uses in a Local Retail Business District. It is apparent that the intent of the City's legislature was to distinguish the types of accessory used that would be permitted in a Local Retail Business District. Ordinance 343.01(b)(8) codified that intent. It is clear that the specific provision of Ordinance 343.01(b)(8) prevails over the general provision or Ordinance 343.01(b)(1).

The Clinic has argued that the cardinal rule of construction against producing absurd results leads to the conclusion that the proposed helipad is a permitted use because it would be manifestly absurd to allow hospitals in a Local Retail Business District but to limit their accessory uses to the retail businesses for local or neighborhood needs listed in Section 343.01 (b)(2-5), which consists of such things as the sale of baked goods, confectionary, dry goods, china, men's hats, and books, as well as eating places, business offices, and automotive services."

In their Memorandum, the Clinic states "It is undisputed that property owners have the right to employ "accessory uses" customarily incident to a permitted use, that a hospital and its accessory uses are permitted uses in the zoning district where Fairview hospital is located, and that a helipad is customarily incident to the operations of a hospital." The City has consistently argued that the proposed helipad is not an accessory use to Fairview Hospital. The City

maintains that while having a helipad situated on the hospital's grounds may be desirable, it is not necessary for a hospital's primary operation. A hospital is an institution that provides medical, surgical or psychiatric care and treatment for the sick and injured. Necessary is defined as being essential, indispensable or requisite. While an engine is necessary for an automobile to operate; a hospital can function without a helipad. By the appellant's own admission, Fairview has existed and grown since 1892, without a helipad on the hospital site. In the same briefs, the City stated "Appellants cite Cleveland Codified Ordinances 325.02 and 325.723, which define accessory uses. While a structure may be recognized as a useful to a permitted principle use, it does not make it a permitted accessory use. In other words, a helipad may be useful to a hospital, but it is not a permitted accessory in a Local Retail Business District." (Emphasis added).

The Eighth District's December 20, 2012 decision stated "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."

The Clinic has not demonstrated that a conflict exists between the Eighth District Court of Appeals decision and the decisions of other appellate districts.

IV. CONCLUSION

The Clinic has not presented a case of public and great general interest for review by this Court nor are their arguments supported by the law governing the standard of review of administrative appeals under R.C. 2506.04. In this very fact specific case, judgment in favor of the Board of Zoning Appeals and the City of Cleveland does not signal a division among the

appellate districts as to the proper standard of review for administrative appeals. The Eighth District reversed the common pleas court's decision as an abuse of discretion because the trial court failed to adhere to its charge to determine whether the Board of Zoning Appeals' decision was unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record. Rather the Eighth District's judgment properly follows its own precedent and is consistent with not only the other appellate districts in Ohio but with the Ohio Supreme Court.

This matter was correctly decided and does not involve issues of Ohio law with any significant public or general interest. This Honorable Court is not a second appeals court and Appellant's request for jurisdiction should be denied. For the reasons addressed in this pleading, the Board of Zoning Appeals and the City of Cleveland respectfully requests that this Honorable Court decline to exercise jurisdiction in this case.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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