

ORIGINAL

IN THE SUPREME COURT OF OHIO

PETER BARUK, et al.

Appellants,

vs.

HERITAGE CLUB HOMEOWNERS' ASSOCIATION, et al.,

Appellees.

:  
: On Appeal from the Warren  
: County Court of Appeals,  
: Twelfth Appellate District  
:  
: Court of Appeals  
: Case No. CA2013-09-086  
:  
: 14-1220  
:

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS PETER AND ROSA BARUK

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TABLE OF CONTENTS

	<u>Page</u>
EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST .....	1
STATEMENT OF THE CASE AND FACTS .....	5
ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW .....	8
<u>Proposition of Law No. 1: A Court Is Not Permitted to Give Any Weight to an Enforcement Official’s Interpretation of a City’s Zoning Code When the Zoning Code Is Unambiguous.</u> .....	8
<u>Proposition of Law No. 2: A City’s Enforcement Officer Does Not Have the Discretionary Authority to Rewrite an Unambiguous Zoning Ordinance That Was Established by the City’s Legislature.</u> .....	13
CONCLUSION .....	15
CERTIFICATE OF SERVICE .....	16
APPENDIX	<u>Appendix Page</u>
Court of Appeals April 14, 2014 Opinion .....	A
Court of Appeals April 14, 2014 Judgment Entry .....	B
June 12, 2014 Entry Denying Baruk’s Application for Reconsideration .....	C

**EXPLANATION OF WHY THIS CASE IS A CASE OF  
PUBLIC OR GREAT GENERAL INTEREST**

This case presents two critical issues that impact the way that zoning laws are enforced in Ohio: (1) whether a court may consider a city's enforcement official's interpretation of a city's zoning ordinance when that interpretation contradicts the plain and unambiguous language of the city's zoning code and (2) whether a city's enforcement official has discretionary authority to rewrite a city's zoning code that was established by the city's legislature.

In this case, a divided court of appeals adopted a city's enforcement official's interpretation of a zoning ordinance even though that interpretation contradicts the plain and unambiguous language of the ordinance. *See* Court of Appeals' April 14, 2014 Opinion (the "Opinion") (attached as Ex. A in Appendix to this Memorandum) at ¶¶49-50. Although -- as the dissent points out -- there is no reasonable interpretation of the city's zoning ordinance such that the construction project at issue in the case would not be in violation, *id.* at ¶101, the majority held that the project did not violate the zoning ordinance because the city's enforcement department had "already determined that no violation of the Zoning Code exists." *Id.* at ¶49. In reaching its decision, the court of appeals provided no analysis of the actual language of the city's zoning ordinance, never found that the ordinance was ambiguous in any way, and never applied any of the mandatory rules for statutory interpretation. *See generally id.* at ¶¶38-54. The majority simply held that the city's enforcement official had the discretion to determine whether the construction project at issue was in violation of the city's zoning ordinance. *Id.* at ¶¶48-49.

This case is of great public interest because the court of appeals' decision jeopardizes the integrity of the traditional roles of the three branches of government with respect to the enactment and enforcement of zoning laws in Ohio. Pursuant to the majority's decision, a city's zoning enforcement officer, who is a member of the city's executive branch, has the discretion

and power to change, alter, and rewrite zoning ordinances that were promulgated by city council, the city's legislative branch of government. Accordingly, unless corrected by this Court, the majority's decision is now binding authority in the Twelfth District and persuasive authority elsewhere in Ohio for the proposition of law that enforcement officers of Ohio cities, townships, and counties not only have the power to enforce the zoning laws, but also have the ability to make zoning laws -- a role traditionally reserved for the elected members of the legislative branch. Thus, the majority's decision expands the traditional role of the executive branch and restricts the traditional role of the legislative branch of local government with respect to zoning laws in Ohio.

This radical change in the balance of power between these branches of local government will greatly impact countless people in Ohio, making this case one of great public interest. Unlike the legislative branch, zoning enforcement officers are not elected by the people, and therefore, are not directly accountable to the general public like those elected to serve on city council, a board of trustees, or other legislative branches of government. As a result, based on the majority's decision, residents of cities, townships, and counties with zoning laws will no longer have the ability to vote for those with the power to make and revise zoning laws. As such, if allowed to stand, this case will strip Ohio residents of direct control over their zoning laws and their local government.

This case is also of great public and general interest because the majority's decision undermines the transparency of local government. There is no requirement that enforcement officials publish their opinions or notify residents when they issue opinions with respect to zoning ordinances. Therefore, if unelected enforcement officials are permitted under Ohio law to disregard zoning laws and issue opinions that trump the statutory language as the appellate

majority held in this case, most people would not know when these decisions were issued, who made the decision, or why the decision was made.

Furthermore, this case is of great public and general interest because the appellate majority's opinion will have the effect of undermining the rule of law for residents in Ohio cities, townships, and counties with zoning laws. If zoning enforcement officials are not bound by the language contained in zoning ordinances when making enforcement decisions, no standard will exist for issuing decisions, which would lead to arbitrary and conflicting decisions. In addition, based on the majority's decision, people subject to zoning laws in Ohio will no longer have notice of zoning laws or any certainty as to how those laws will be enforced. After all, if a zoning enforcement official can override the plain and unambiguous language of an ordinance, then the published zoning laws will be subject to change without notice. This result will affect all kinds of people in Ohio in all kinds of situations and could even negatively impact the economy. For example, potential homebuyers in Ohio would likely be hesitant to purchase property without the certainty that the surrounding property owners are prohibited from violating the published zoning code in ways that could devalue their potential investment. Developers may refuse to purchase property because they could not rely on the plain language of the zoning laws to know exactly what they could build or construct on that property. Similarly, commercial property owners could no longer rely on the language in zoning ordinances to determine the permitted uses of their property. Simply put, upholding the plain and unambiguous language of the zoning laws creates certainty, uniformity, transparency, and accountability, and allowing employees in administrative enforcement departments to override that language would significantly impact all people in Ohio subject to these laws.

Of course, the law in Ohio is that courts must uphold the plain and unambiguous language of all statutes including local zoning ordinances. Ohio law does not permit courts to consider the enforcement officer's opinions given that the zoning code at issue in this case is unambiguous. *Kildow v. Indus. Comm'n of Ohio*, 128 Ohio St. 573, 581, 192 N.E. 873 (1934) (holding that "[a]dministrative practice does not avail to overcome a statute so plain in its commands as to leave nothing for construction"); *Morris v. Indus. Comm'n of Ohio*, 134 Ohio St. 380, 381-82, 17 N.E.2d 741 (1938); *Miller v. City of Cleveland* 8th Dist. Cuyahoga No. 36654, 1977 Ohio App. LEXIS 8782, \*14 (Dec. 29, 1977) (holding that "where a statute is clear and unambiguous on its face, courts may not refer to administrative construction as an aid to its interpretation"). Furthermore, as the Supreme Court of Ohio has held, it is a court's (and a zoning officer's) "duty to interpret, not rewrite, the law, as it is embodied in the city's zoning code", and no court "should nullify the zoning code, which has been written and adopted by the members of a city council, the duly-elected representatives of the people." *Leslie v. Toledo*, 66 Ohio St. 2d 488, 492, 423 N.E.2d 123 (1981). As a result, the court of appeals was required to enforce the plain and unambiguous language of the zoning ordinance and to hold that the city's enforcement officer did not have discretionary authority to issue an opinion that contradicted the language of that ordinance.

In order to restore the balance of power between the local branches of government, to avoid the negative impact that the court of appeals' decision will have on those residing in Ohio, and to bring the court of appeals' decision in line with well-settled Ohio law, this Court should hear this case and review the court of appeals' erroneous decision.

## STATEMENT OF THE CASE AND FACTS<sup>1</sup>

Defendants-Appellees Evans and Cathy Nwankwo (the “Nwankwos”) reside on a lot that is classified as R-2 residential property in the City of Mason and that is adjacent to a lot owned by Plaintiffs-Appellants Peter and Rosa Baruk (the “Baruks”). As homeowners residing in the City of Mason, the Nwankwos must comply with the City of Mason’s Zoning Code (the “Zoning Code”).

The Zoning Code provides that the minimum “side and rear” setbacks for “accessory structures” on property classified as R-2 is 15 feet. Mason Codified Ord. 1147.05. The Zoning Code defines an “accessory structure” as a:

A use or structure *constructed or installed on, above, or below the surface of a parcel*, which is located on the same lot as a principal use or structure and which is subordinate to or serves the principal use or structure, is subordinate in area to the principal use or structure, and is customarily incidental to the principal use or structure. **ACCESSORY USE** includes anything of a subordinate nature detached from a principal structure or use, such as *fences, walls, sheds, garages, parking places, decks, poles, poster panels and billboards*. **ACCESSORY USE** does not mean or include structures providing utility service to the parcel, such as gas, electric or water.

Mason Codified Ord. 1133.03 (emphasis added). Furthermore, the Zoning Code defines “structure” as:

anything constructed or erected, the intended use of which requires permanent or stationary location on the ground or which is attached to something having a permanent or stationary location on the ground including paved areas and signs.

Mason Codified Ord. 1133.150.

As part of a \$300,000 construction project, the Nwankwos constructed a large firepit area within 15 feet of the property line that they share with the Baruks. See Opinion at ¶100. The

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<sup>1</sup> All of the facts that are set forth in this Memorandum are undisputed.

firepit area rises 4 to 6 feet out of the ground,<sup>2</sup> is permanent, and was constructed by installing a concrete foundation, walls reinforced with rebar, pavers, large planters, lights, speakers, and a gas firepit. *See id.* at ¶¶99-100 (the dissent's characterization of the undisputed facts). Due to the location of the firepit area, people gathering around the firepit structure have a direct line of sight into the Baruks' home, and the Baruks now have an obstructed view of the golf course. In addition, the placement of the firepit structure directly on the property line that the Nwankwos share with the Baruks has caused significant drainage issues on the Baruks' property.<sup>3</sup> Due to these issues, the location of the firepit structure directly on the property line has negatively impacted the value of the Baruks' property and has made their property less marketable.<sup>4</sup>

The Baruks filed this lawsuit, asserting, among other things, statutory claims under Ohio R.C. §713.13 and City of Mason Codified Ordinance §1135.07, a claim for negligence *per se*, and a breach of contract claim. Each of these claims depended, at least in part, on the allegation that the Nwankwos' construction of the firepit area violated the 15-foot side setback requirement for R-2 property in the City of Mason's Zoning Code.

The Baruks and the Nwankwos each filed motions for summary judgment. The Baruks argued that they were entitled to summary judgment on the claims because the undisputed facts showed that the Nwankwos violated the plain and unambiguous language of the Zoning Code by constructing the firepit area, an accessory structure, within 15 feet of their property line. On the other hand, the Nwankwos argued that they did not violate the Zoning Code, relying solely on

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<sup>2</sup> This consists of concrete platform and steep elevated mounds that rise around 4 feet out of the ground with walls of 1 to 2 feet on top of that.

<sup>3</sup> Neither of the Appellants identified an expert to rebut the opinions of a civil engineer who submitted a report and affidavit regarding these facts.

<sup>4</sup> Neither of the Appellants submitted any expert testimony rebutting the opinions set forth in affidavits by an appraiser and realtor testifying to these facts.

the opinions of Mr. Nicholls, a building official at the City of Mason, who stated that “pavers/slabs/walks/patios were allowed in the zoning setbacks” and that the firepit area was not subject to the Zoning Code. The trial court agreed with the Nwankwos, denied the Baruks’ motion, and granted summary judgment in favor of the Nwankwos.

The court of appeals, over a dissent, affirmed the trial court’s decision, holding that “the firepit area at issue . . . does not violate the Zoning Code as a matter of law” because the Zoning Code does not regulate the firepit area that is at issue in this case. Opinion at ¶51. Even though the court of appeals never held (and could not hold) that the Zoning Code was ambiguous and – as the dissent pointed out – the opinion contradicted the plain language of the ordinance, the majority adopted Mr. Nicholls’ interpretation of the ordinance. Opinion at ¶¶48-54; *see also* Dissenting Opinion at ¶¶101-102 (stating that “there is no reasonable interpretation . . . pursuant to which the fire pit construction area would not constitute a ‘structure’ or ‘accessory structure’ as defined therein, so as to be subject to the applicable 15-foot-side-yard setback requirement”).

In response to the court of appeals’ decision, the Baruks requested that the court of appeals reconsider its decision, arguing that the court did not apply or even reference any of the rules of statutory interpretation when reaching its decision, improperly considered an administrative interpretation of the statute, and improperly revised the statute. The court of appeals, though, refused to reconsider the decision, stating:

**This court’s decision . . . was not based upon an interpretation of the Zoning Code.** Instead the majority decision was based upon a strict application of Civ.R. 56 and the Baruks’ failure to meet their reciprocal burden to submit evidence to refute the fact that construction projects such as the one undertaken by the Nwankwos are not regulated by the Mason City zoning or building code.

*See* June 12, 2014 Entry Denying the Baruks’ Application for Reconsideration (attached as Ex. C in Appendix) at 2 (emphasis added).

## ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

### **Proposition of Law No. 1: A Court Is Not Permitted to Give Any Weight to an Enforcement Official's Interpretation of a City's Zoning Code When the Zoning Code Is Unambiguous.**

The Supreme Court of Ohio has set forth very specific rules that each court must follow when interpreting a statute. This Court has held that “it is a cardinal rule of construction that where a statute is clear and unambiguous, there is ‘no occasion to resort to the other means of interpretation.’” *Celebrezze v. Bd. of Cnty. Comm’rs of Allen Cnty.*, 32 Ohio St. 3d 24, 27, 512 N.E.2d 332 (1987) (quoting *Slingluff v. Weaver*, 66 Ohio St. 621, 64 N.E. 574 (1902), ¶2 of syllabus). After all, “[i]t is not allowable to interpret what has no need of interpretation, and when the words have a definite and precise meaning, to go elsewhere in search of conjecture in order to restrict or extend the meaning.” *Slingluff*, 66 Ohio St. at 627. “A court is neither to insert words that were not used by the legislature nor to delete words that were used.” *Pratte v. Stewart*, 125 Ohio St. 3d 473, 482, 2010-Ohio-1860, 929 N.E.2d 415, ¶45. “It is only where there is some doubt as to the meaning or ambiguity in the language of a statute that the rules of construction may be employed.” *Celebrezze*, 32 Ohio St. 3d at 27. If the language of a statute is clear, courts are not permitted to consider “expert testimony” regarding the statute. *State v. Haney*, 4th Dist. Washington No. 85 CA 12, 1986 Ohio App. LEXIS 9036, \*3-\*4 (Oct. 22, 1986). Furthermore, it is “inappropriate” for a court to inquire into “the consequences of an interpretation” or “public policy . . . absent an initial finding that the language of the statute is, itself, capable of bearing more than one meaning.” *Dunbar v. State of Ohio*, 136 Ohio St. 3d 181, 2013-Ohio-2163, 992 N.E.2d 1111, ¶16 (2013). Moreover, under Ohio law, “where a statute is clear and unambiguous on its face, courts may not refer to administrative construction as an aid to its interpretation.” *Miller v. City of Cleveland*, 8th Dist. Cuyahoga No. 36654, 1977 Ohio App. LEXIS 8782, \*14 (Dec. 29, 1977); accord *Kildow v. Indus. Comm’n of Ohio*, 128

Ohio St. 573, 581, 192 N.E. 873 (1934) (holding that “[a]dministrative practice does not avail to overcome a statute so plain in its commands as to leave nothing for construction”); *Morris v. Indus. Comm’n of Ohio*, 134 Ohio St. 380, 381-82, 17 N.E.2d 741 (1938). As a result, if the language in the statute is unambiguous, the court’s inquiry must stop there. *Celebrezze*, 32 Ohio St. 3d at 27.

A court is not permitted to consider administrative construction of a statute, administrative practice, or administrative opinions when the statute is unambiguous. In *Morris*, the Supreme Court of Ohio reached this exact holding and explained that administrative actions or rules have “no application” when the statutory language is unambiguous. 134 Ohio St. at 381-82. The statute in that case stated that one entitled to workers’ compensation disability was not allowed to recover benefits “for the first week after the injury is received.” *Id.* at 381. In response to the appellee’s argument that he was entitled to the first week of benefits because the period of disability began more than one week after the injury, the Industrial Commission requested that the Supreme Court of Ohio give weight to its “long-established practice” of deducting “the first week of disability from any compensation paid to the injured employee, even where the disability began more than one week after the injury.” *Id.* This Court rejected the request, holding that administrative interpretation “has no application where the language of the statute is so plain and unequivocal as to admit of but one interpretation.” *Id.* at 381-82. This Court further explained that “[t]he unambiguous language of the statutory provisions granting compensation for disability must prevail over the long-continued practice of the commission” and that “[o]bviously an administrative body cannot gain a prescriptive right to violate plain and definite statutory enactments.” *Id.* at 382.

In *Stokes v. Brunner*, 120 Ohio St. 3d 250, 2008-Ohio-5392, this Court reached a similar result and refused to follow the Secretary of State’s advisory opinion when it was not supported by the plain language of the statute. *Id.* at ¶¶26-30. In *Brunner*, the Secretary of State issued an advisory opinion stating that boards of elections are not required to allow election observers during in-person early voting in advance of the general election. *Id.* at ¶¶2-5. This Court acknowledged that the Secretary of State is afforded a great deal of discretion with regard to issuing instructions and directives with respect to conducting elections, but refused to give any weight to the Secretary of State’s advisory opinion. *Id.* at ¶¶14, 29. The Court explained that the plain language of the election law did “not limit its application to election-day voting” and that the Court was not permitted to “add this requirement to the plain language of the statute.” *Id.* at ¶26.

Finally, in *Miller v. City of Cleveland*, the Eighth District Court of Appeals refused to consider a city’s past interpretation and practice when interpreting an ordinance regarding police officers’ vacation. 1977 Ohio App. LEXIS 8782, \*13. The city had a longstanding practice of awarding vacation to police officers based on total service even though the statute required that continuous service determine the amount of vacation each officer should receive. *Id.* at \*13. Even though the city’s practice had been in place for over 40 years, the appellate court refused to consider that evidence when interpreting the statute because it could not “ignore the obvious meaning of the law” and could not “validate an interpretation that thwarts the will of Council.” *Id.* The court further explained that “where a statute is clear and unambiguous on its face, courts may not refer to administrative construction as an aid to its interpretation” and that courts “must disregard” administrative practices that are contrary to law. *Id.* at \*14.

Accordingly, as demonstrated in *Morris*, *Brunner*, and *Miller*, rules of statutory interpretation prohibit a court from considering an administrative interpretation or application of a statute when a statute is unambiguous. However, in this case, the majority ignored the mandatory rules of statutory interpretation by considering and giving weight to evidence of the City's administrative action, interpretation, and practice even though the plain language of the Zoning Code is unambiguous.

The statutory language contained in the City of Mason's side setback requirements for R-2 property is unambiguous.<sup>5</sup> Section 1147.05 of the Zoning Code states that minimum "side and rear" setbacks for "accessory structures" on property classified as R-2 is 15 feet. Mason Codified Ord. 1147.05. Therefore, no "accessory structures" are allowed within 15 feet of the side property lines on R-2 property, and accordingly, whether the side setback requirements apply to the firepit structure and area will depend on whether the firepit structure falls within the definition of "accessory structure" as set forth in the Zoning Code.

Section 1133.03 of the Zoning Code defines an "accessory use or structure" as a:

*A use or structure constructed or installed on, above, or below the surface of a parcel, which is located on the same lot as a principal use or structure and which is subordinate to or serves the principal use or structure, is subordinate in area to the principal use or structure, and is customarily incidental to the principal use or structure. **ACCESSORY USE** includes anything of a subordinate nature detached from a principal structure or use, such as fences, walls, sheds, garages, parking places, decks, poles, poster panels and billboards. **ACCESSORY USE** does not mean or include structures providing utility service to the parcel, such as gas, electric or water.*

Mason Codified Ord. 1133.03 (*emphasis added*). Moreover, the Zoning Code defines a "structure" as:

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<sup>5</sup> It is important to note that the court of appeals did not hold in its April 14, 2014 opinion that the setback restrictions in the Zoning Code were ambiguous in any way.

Anything constructed or erected, the intended use of which requires permanent or stationary location on the ground or which is attached to something having a permanent or stationary location on the ground, including paved areas and signs.

Mason Codified Ord. 1133.150. Therefore, if the firepit area satisfies the definition of “structure” and it is “installed on, above, or below the surface” of the parcel, then it is an “accessory structure” and the 15-foot side setback requirements apply.

The firepit area satisfies the Zoning Code’s definition of “structure.” The undisputed evidence in the record shows that it was constructed in a permanent and stationary location. *See Mansour v. W. Chester*, 12th Dist. Butler No. CA 2009-03-073, 2009-Ohio-5641, ¶16 (holding that an above-ground pool is permanent). In fact, each individual component of the firepit area including the seat walls, pavers, light fixtures, and firepit itself all easily satisfy the Zoning Code’s definition of “structure.” *See Elsaesser v. City of Hamilton*, 61 Ohio App. 3d 641, 646-47, 573 N.E.2d 733 (12th Dist. 1990) (12th Dist.) (holding that crosses were “structures” under an identical definition and subject to the city’s setback requirements).

Moreover, because the firepit area was constructed on, above, and below the surface of the parcel and it is incidental to the Nwankwos’ residence, the primary structure on the parcel,<sup>6</sup> the firepit area also falls within the definition of “accessory structure” under the Zoning Code. Again, the same holds true for each of the components of the firepit area including the firepit, seat walls, pavers, planters, and light fixtures and for walks, slabs, and patios. Thus, the firepit area is an “accessory structure.” *See* Opinion at ¶101 (the dissent reaching this conclusion). As a result, the plain and unambiguous language of the setback restrictions for R-2 property in the

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<sup>6</sup> The primary structure is the Nwankwos’ home, and therefore, any other structure constructed on the property, such as the firepit area, would qualify as an accessory structure under the plain language of the Zoning Code. The primary structure is subject to similar setback restrictions. *See* Mason Codified Ord. §1147.05.

Zoning Code apply to the firepit area and other things like pavers, seat walls, patios, walks, and slabs of concrete.

Because the plain and unambiguous language of the Zoning Code shows that the side setback requirements for R-2 property in the City of Mason apply to the firepit area, the court of appeals was required to stop its inquiry there. *Celebrezze*, 32 Ohio St. 3d at 27. It was not allowed to resort to other means of interpretation and was not permitted to consider any other evidence. *Id.* It was not allowed to consider opinions from expert witnesses regarding the statute. *Haney*, 1986 Ohio App. LEXIS 9036, at \*3. It was not allowed to inquire into the consequences of the interpretation or the public policy behind the interpretation. *Dunbar v. State of Ohio*, 136 Ohio St. 3d at 186. Nor was it allowed to refer to administrative construction as an aid to its interpretation. *Brooks Equip. & Mfg. Co. v. Evatt*, 137 Ohio St. 125, 127, 28 N.E.2d 360 (1940) (holding that an administrative practice cannot prevail over the clear requirements of the statute); *Kildow*, 128 Ohio St. at 581 (same); *Morris*, 134 Ohio St. at 381-82; *Gruber v. Ohio Dep't of Human Servs.*, 98 Ohio App. 3d 72, 75, 647 N.E.2d 861 (5th Dist. 1994) (courts cannot defer to administrative interpretation when statute is unambiguous); *Miller*, 1977 Ohio App. LEXIS 8782 at \*14 . As a result, the court of appeals was not permitted to consider or give any weight to Mr. Nicholls' opinions, the City building department's enforcement practices, or any other evidence of the City's interpretation, and by doing so, the court of appeals violated the mandatory rules of statutory construction established and applied by this Court.

**Proposition of Law No. 2: A City's Enforcement Officer Does Not Have the Discretionary Authority to Rewrite an Unambiguous Zoning Ordinance That Was Established by the City's Legislature.**

Under Ohio law, a city's enforcement officer does not have discretionary authority to rewrite an unambiguous zoning ordinance. In fact, the Supreme Court of Ohio has instructed Ohio courts that they must uphold the integrity of the statutory language and that they cannot

rewrite the plain and unambiguous language of a zoning ordinance under any circumstance. It has directed that “[a] court is neither to insert words that were not used by the legislature nor to delete words that were used.” *Pratte*, 125 Ohio St. 3d at 482. Moreover, it has held that it is a court’s “duty to interpret, not rewrite, the law, as it is embodied in the city’s zoning code” and that no court “should nullify the zoning code, which has been written and adopted by the members of a city council, the duly-elected representatives of the people.” *Leslie v. Toledo*, 66 Ohio St. 2d at 492. As the Supreme Court has further explained, a “city’s zoning code should not be judicially amended simply because the judges of this court, or any court, would have made a different decision if they had been members of the city council” and “a reviewing court is not free to impose its judgment on the city council.” *Id.* Therefore, Ohio courts are not permitted to give opinions of an enforcement officer, or anyone else for that matter, any discretion when determining what is required under an unambiguous zoning law and certainly are not permitted to adopt an enforcement officer’s interpretation that conflicts with the plain and unambiguous language of the zoning code.

By adopting the opinions of an employee of the City’s building department in holding that the Zoning Code does not apply to “construction projects like” the firepit area, the appellate majority incorrectly gave discretion to the City’s interpretation of the Zoning Code, and in doing so, it rewrote the side setback restrictions set forth in the Zoning Code. Even though the plain language of the statute forbids “paved areas,” seat walls, permanent firepits, patios, and anything else that is permanently attached to the ground from being within 15 feet of side property lines, the court of appeals held that the statute excludes these things, effectively rewriting the Zoning Code’s definition of “accessory structure.” If Mason’s City Council had desired this result, it could have easily written the Zoning Code to expressly exclude each of these things from the

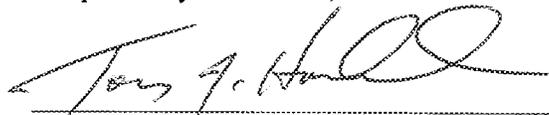
definition of “accessory structure” just as it did for “structures providing utility service to the parcel, such as gas, electric, or water.” Mason Codified Ord. 1133.03. It did not do so. *See id.* Instead, it used broad language that includes things like the firepit area and its structural components. *See id.* In accord with binding precedent, the court of appeals was required to apply this language as written even if it disagreed with what the language says or even if it believes that City Council may now disagree with that language. *Leslie*, 66 Ohio St. 2d at 492; *Celebrezze*, 32 Ohio St. 3d 24 at 27; *Slingluff*, 66 Ohio St. at 627. The plain language of the Zoning Code shows that the side setback requirements apply to the firepit area, and by reaching a contrary holding, the court of appeals improperly amended the Zoning Code. *See Leslie*, 66 Ohio St. 2d at 492; *see also Pratte*, 125 Ohio St. 3d at 483 (explaining that a court “would invade the province of the legislature and violate the separation of powers if it rewrote the statute”).

#### CONCLUSION

For the foregoing reasons, this case involves matters of public and great general interest, and the Appellants respectfully request that the Court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Dated: July 16, 2014

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been served via ordinary U.S. mail, postage prepaid, this 16th day of July, 2014.

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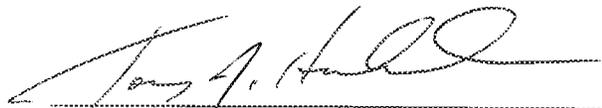
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# Appendix

# **Exhibit A**

APR 2014 ✓

COURT OF APPEALS  
WARREN COUNTY  
FILED

APR 14 2014

*James L. Spaeth*, Clerk  
LEBANON OHIO

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
WARREN COUNTY

PETER BARUK, et al.,

:

CASE NO. CA2013-09-086

Plaintiffs-Appellants,

:

OPINION

4/14/2014

- vs -

:

HERITAGE CLUB HOMEOWNERS'  
ASSOCIATION, et al.,

:

:

Defendants/Appellees.

:

CIVIL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS  
Case No. 12CV82577

Thompson Hine, LLP, Anthony J. Hornbach, 312 Walnut Street, 14th Floor, Cincinnati, Ohio 45202, for plaintiffs-appellants

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Patsfall, Yeager & Pflum, LLC, Susan M. Salyer and Stephen M. Yeager, 205 West Fourth Street, Suite 1280, Cincinnati, Ohio 45202, for defendants-appellees, Evans & Cathy Nwankwo

**S. POWELL, J.**

{¶ 1} Plaintiffs-appellants, Peter and Rosa Baruk, appeal from the decision of the

Warren County Court of Common Pleas granting summary judgment in favor of defendants-appellees, Evans and Cathy Nwankwo and the Heritage Club Homeowners' Association, on various issues regarding a backyard construction project on the Nwankwos' property. For the reasons outlined below, we affirm in part, reverse in part and remand for further proceedings.

### **Facts and Procedural History**

{¶ 2} The Baruks and the Nwankwos are next-door neighbors living in the Heritage Club Subdivision (Subdivision) located in the City of Mason (City), Warren County, Ohio. The Subdivision serves as a premier golf club community within the greater Cincinnati area. Both the Baruks and Nwankwos are members of the Heritage Club Homeowners' Association (Association), who reside on property abutting the Heritage Club Golf Course. It is undisputed that both the Baruks' and the Nwankwos' property is designated R-2 residential property by the City's Zoning Code (Zoning Code). The City is not a party to this action.

{¶ 3} As part of its responsibilities, the Association oversees the operation of a Design Review Committee (Committee). The Committee was established to review and approve building designs, exterior building or appearance alterations, building additions, site plans, and landscape plans, among others, within the Subdivision. In order to satisfy these responsibilities, the Association adopted an Architectural Design Guide (Design Guide). The Design Guide, which was developed to provide "broad guidelines for home construction," provides the design review guidelines, concepts, responsibilities and policies of the Committee. The Association has also established a Declaration of Covenants, Conditions, Restrictions, Easements and Liens (Declarations), to which it must adhere.

{¶ 4} On July 5, 2011, the Nwankwos filed an improvement application with the Committee seeking approval for the construction of an outdoor living space on their property. According to the submitted improvement application, the construction project was to consist of a "covered gazebo attached to house and additional landscaping." As part of their

improvement application, the Nwankwos also submitted composite drawings of the proposed backyard construction project that included an open paved area, lighting, and – at the heart of this dispute – a fire pit area. In addition to seeking approval from the Committee, the Nwankwos also requested a building permit from the City. After receiving approval for the construction project from both the City and the Committee, the Nwankwos entered into a construction contract with Artisan Remodeling, LLC (Artisan). As they are not required by either the Design Guide or the Zoning Code, the Nwankwos did not seek approval for the backyard construction project from any of their neighbors within the Subdivision.

{¶ 5} On January 12, 2012, shortly after Artisan began construction on the project, the Baruks sent an e-mail to Association president, William Partridge, expressing their concerns regarding the close proximity of the fire pit area to their own property. As part of this e-mail, the Baruks classified the area in question as a "raised patio/firepit." Upon learning of their concerns, Partridge and Joan Graham, the chairperson of the Committee, conducted a site visit to the Baruks' property. The site visit revealed modifications to the original improvement application that were not previously approved by the Committee. These modifications included the construction of the fire pit area in an area near the Baruks' property line.<sup>1</sup>

{¶ 6} On January 21, 2012, the Committee held a special meeting to discuss the Nwankwos' construction project. As a result of this meeting, the Committee ultimately determined that the Nwankwos' modifications to the original improvement application were in violation of the Design Guide because they had not been approved prior to the start of construction. According to the Design Guide, all "[p]roposed changes in plans following

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1. It should be noted that the original drawings submitted with the improvement application were not to scale and actually showed the fire pit area being constructed on the Baruks' property. The Committee, however, approved the improvement application after misinterpreting the submitted drawings in regards to the Baruks' property line.

approvals must be resubmitted in writing" to the Committee. The Committee also determined that the construction of the fire pit area encroached upon the Design Guide's 15-foot setback requirements.

{¶ 7} On January 23, 2012, the Committee sent a letter to the Nwankwos ordering them to cease any further construction until a new improvement application regarding the modifications to the original improvement application was submitted and approved by the Committee. The Committee also stated as part of this letter, the following:

The [Committee] noted the construction changes and modifications to the project that were not amended or approved by the [Committee]. Ultimately, the [Committee] determined that had the project plans been submitted with these modifications as the original plans, it would not have been approved. The basis for the denial would have been the failure to observe set back requirements as described in community design guidelines. This is a golf course lot and the set backs (per policy) are 15 feet from the side property lines and 30 feet from the back property line.

On January 30, 2012, the Committee sent a similar letter to Artisan that contained the same basic allegations. Per the Design Guide provisions, the Nwankwos appealed to the Association from the Committee's decision finding them to be in violation of the Design Guide.

{¶ 8} After the Nwankwos filed their appeal, the Association attempted to schedule a meeting between the Baruks and the Nwankwos to discuss their concerns regarding the construction project in hopes that they could come to a mutually-agreed-upon solution. The Baruks declined the Association's offer to meet. The Baruks, however, did meet with Partridge at a local restaurant, where they voiced their concerns regarding the close proximity of the fire pit area to their property. During this meeting, Partridge encouraged the Baruks to attend the Nwankwos' upcoming appeal hearing.

{¶ 9} On March 14, 2012, the Association held a hearing on the Nwankwos' appeal. It is undisputed that the Baruks attended the appeal hearing, but requested not to speak or

be asked any questions.

{¶ 10} On April 14, 2012, the Association issued a decision reversing the Committee's decision thus permitting the Nwankwos to complete the construction project and fire pit area. In reversing the Committee's decision, the Association determined that the fire pit area constituted a "patio" that was exempt from the Design Guide's 15-foot setback requirements.

As the Design Guide explicitly states:

**Decks, porches, wing walls and other items attached to the house are considered to be part of the house property and will not be allowed to encroach into side or rear yard setbacks, except as variations in the case of unique site characteristics, which the [Committee] may consider on a case-by-case basis. Patios, driveways, walks, etc., may usually encroach into setback areas.**

(Emphasis added.)

{¶ 11} However, in an apparent attempt to accommodate both parties, the Association ordered the Nwankwos to employ additional landscaping and berm construction to ensure privacy and conceal the disputed fire pit area from the Baruks' view. The Association also assessed the Nwankwos a penalty for their failure to have the modifications to the project approved by the Committee before construction began. The Nwankwos paid the assessment on April 17, 2012.

{¶ 12} After learning of the Association's decision, the Baruks requested their own appeal hearing, which was denied. The Baruks also contacted the City regarding the building permit issued for the construction project. In response to the Baruks' inquiry, the City sent an e-mail to Mrs. Baruk on April 20, 2012, that stated, in pertinent part, the following:

The patio and associated fire pit were not shown on the permit drawings that were submitted to the City from what I could see, as it would have not been required, due to these not being regulated by the City's zoning code.

Continuing, the City also stated as part of this exchange:

The fire pits that are typically associated with at-grade paver and or poured concrete patios, have not been regulated for zoning and or building code purposes (i.e. setbacks relative to property lines) for residential applications.

The April 20, 2012 e-mail was attached as an exhibit to Mrs. Baruk's deposition. Mrs. Baruk readily admits that she received this e-mail from the City. The Baruks, however, never took any action in response to the City's determination that the construction project was permitted.

{¶ 13} The backyard construction project, including the modified fire pit area and additional landscaping, was completed in June of 2012. According to the Nwankwos' deposition testimony, since its completion, the fire pit has been lit a maximum of four times, including once for the neighborhood Christmas party. In addition, the Nwankwos acknowledge that they have used the fire pit area sporadically for social gatherings, such as their daughter's high school graduation party, which have extended into the late evening hours. The Baruks, however, have never called the police or otherwise complained about these gatherings to the Association.

{¶ 14} On July 31, 2012, the Baruks filed suit against the Nwankwos and the Association, raising a variety of claims regarding the backyard construction project, and specifically the fire pit area. As part of their complaint, the Baruks argued the construction of the fire pit area violated the setback requirements of both the Zoning Code and the Design Guide. The Baruks also alleged claims of negligence, negligence per se, breach of contract, breach of fiduciary duty, as well as common law nuisance and trespass.

{¶ 15} After discovery had concluded, all parties filed motions for summary judgment. Included as part of the Nwankwos motion was an affidavit from Gregory Nicholls, the chief building official from the City, which referenced the fact that the City had informed the Baruks that "pavers/slabs/walks/patios on grade were allowed in the zoning setbacks" and that the Nwankwos construction of the fire pit "was not in violation of any of the City of Mason's

zoning ordinances." Again, although acknowledging that they had notice of the City's findings, it is undisputed that the Baruks never challenged the City's determination through a declaratory judgment, through an administrative appeal, or by joining the City as a necessary party to this action.

{¶ 16} In ruling on the parties' competing motions, the trial court issued a decision on July 26, 2013 that denied the Baruks' motion for partial summary judgment in its entirety, granted the Association's motion for summary judgment in its entirety, and granted in part and denied in part the Nwankwos' motion for summary judgment. In so holding, the trial court explicitly stated:

[W]e agree with the Nwankwos and the [Association] and conclude that the fire pit area falls within the definition of a patio. Concluding that this area is anything other than a patio would be an unreasonable stretch of the imagination.

As a result of the trial court's decision, the only causes of action to survive summary judgment were the Baruks' claims against the Nwankwos alleging common law trespass and nuisance.

{¶ 17} Following the trial court's decision, the Baruks filed a notice of voluntary dismissal, without prejudice, regarding their claims of common law trespass and nuisance against the Nwankwos. Although not explicit, this notice falls under the confines of Civ.R. 41(A) regarding voluntary dismissals and the effects thereof. The Baruks' notice of voluntary dismissal also stated that since "no other claims are pending in this action" as a result of the trial court's summary judgment decision, that decision was now rendered a final appealable order.

{¶ 18} Upon receiving the Baruks' notice of voluntary dismissal, the trial court issued an entry on September 6, 2013 styled "Final Judgment Entry" that stated, in pertinent part, the following:

In light of the fact that [the Baruks] have voluntarily dismissed the claims that survived summary judgment, there are no claims remaining for adjudication. Accordingly, this is a final judgment, and there is no just cause for delay.

The Baruks then filed a notice of appeal with this court, raising eight assignments of error for review. Neither the Nwankwos nor the Association filed a cross-appeal in this matter.

#### **Final Appealable Order**

{¶ 19} Although neither filed a cross-appeal, as part of their responsive briefs, both the Nwankwos and the Association claim this court lacks jurisdiction in this matter as the trial court's decision is not a final appealable order in light of the Baruks' voluntary dismissal, without prejudice, as outlined by the Ohio Supreme Court's decision in *Pattison v. W.W. Grainger, Inc.*, 120 Ohio St.3d 142, 2008-Ohio-5276. In response, the Baruks claim the issue of whether this court is faced with a final appealable order has been waived since neither party filed a notice of appeal from the trial court's decision, nor did they file any objection to the Baruks' voluntary dismissal before the trial court.

{¶ 20} Contrary to the Baruks' claim otherwise, it is well-established that if an order appealed from is not final and appealable, a court of appeals has no jurisdiction to rule on the appeal and must dismiss it, sua sponte, even if neither party has raised the issue. *Ossai-Charles v. Charles*, 188 Ohio App.3d 503, 2010-Ohio-3558, ¶ 12 (12th Dist.). In other words, "the lack of a final appealable order goes to the issue of subject matter jurisdiction which cannot be waived and may be raised sua sponte by an appellate court." *Galloway v. Firelands Local School Dist. Bd. of Edn.*, 9th Dist. Lorain No. 12CA010208, 2013-Ohio-4264, ¶ 6, citing *State ex rel. Wright v. Ohio Adult Parole Auth.*, 75 Ohio St.3d 82, 84 (1996). Therefore, although neither the Nwankwos nor the Association raised this issue previously, the Baruks' claim that this issue was waived on appeal is simply incorrect. Accordingly, before we are able to reach the merits of this appeal, we must first determine whether the

trial court's decision is a final appealable order.

{¶ 21} In *Pattison*, an employee brought two claims against his employer alleging age discrimination and wrongful termination. The trial court granted summary judgment to the employer on the age discrimination claim and the employee appealed. In ruling on the appeal, the Eighth District Court of Appeals dismissed the employee's appeal "for want of a final appealable order under Civ.R. 54(B) because the public policy claim remained extant." *Pattison v. W.W. Grainger, Inc.*, 8th Dist. Cuyahoga No. 88556, 2007-Ohio-3081, ¶ 2. The employee then filed a notice in the trial court, pursuant to Civ.R. 41(A)(1)(a), voluntarily dismissing his public policy claim without prejudice. A journal entry noting the public policy claim was dismissed was then filed by the trial court. The employee then filed a second notice of appeal from the trial court's summary judgment decision.

{¶ 22} In ruling on the new appeal, the Eighth District determined that while it ordinarily would have jurisdiction to rule on the matter, the appeal was nevertheless untimely. However, acknowledging that its decision finding jurisdiction was otherwise proper "conflicted with the near unanimity" of other appellate districts, the Eighth District certified the following conflict to the Ohio Supreme Court:

In a case where a plaintiff has asserted multiple claims against a single defendant and some of those claims have been ruled upon but not converted into a final order with Civ.R. 54(B), can the plaintiff create a final order by voluntarily dismissing pursuant to Civ.R. 41(A) the remaining claims asserted against that defendant?

*Pattison*, 2008-Ohio-5276 at ¶ 9-10.

{¶ 23} In answering the certified question in the negative, the Ohio Supreme Court stated the following:

We hold today that when a plaintiff has asserted multiple claims against one defendant, and some of those claims have been ruled upon but not converted into a final order through Civ.R. 54(B), the plaintiff may not create a final order by voluntarily

dismissing pursuant to Civ.R. 41(A) the remaining claims against the same defendant.

*Id.* at ¶ 1.

In so holding, the Ohio Supreme Court specifically stated:

To allow a partial Civ.R. 41(A) dismissal is potentially prejudicial to defendants. In cases in which all claims against a party are dismissed without prejudice, there still is the risk of the action being refiled, but the amount of potential litigation that a defendant is subjected to is the same. When an individual claim against a defendant is dismissed without prejudice, however, the defendant is forced to go through the appeal process and may perhaps still be subjected to the dismissed claim upon refiling. The defendant in that situation is vulnerable to an increased overall burden due to the Civ.R. 41 dismissal.

*Id.* at ¶ 20.

{¶ 24} The Ohio Supreme Court later upheld this ruling in *Dohme v. Eurand Am., Inc.*, 121 Ohio St.3d 277, 2009-Ohio-506, a case which it described as "indistinguishable from *Pattison*." *Id.* at ¶ 5. We also applied the rationale in *Pattison* to our own decision in *Welsh Dev. Co., Inc. v. Warren Cty. Regional Planning Comm.*, 12th Dist. Warren No. CA2008-02-026, 2009-Ohio-1158.

{¶ 25} This case, however, presents a slightly different factual scenario than the Ohio Supreme Court's decisions in *Pattison* and *Dohme*, as well as our own decision in *Welsh*. As noted above, after the trial court issued its decision regarding the parties various motions for summary judgment, the Baruks filed a notice of voluntary dismissal, presumably under Civ.R. 41(A), dismissing their common law trespass and nuisance claims against the Nwankwos without prejudice. The trial court then issued an entry incorporating its decision that specifically stated it was "a final judgment, and there is no just cause for delay." This is the same essential language necessary to create a final appealable order as found in Civ.R. 54(B). See, e.g., *Stealth Investigations, Inc. v. Mid-Western Auto Sales, Inc.*, 12th Dist. Butler No. CA2009-08-216, 2010-Ohio-327 (finding no final appealable order where the entry

contained no Civ.R. 54(B) language indicating no just reason for delay).

{¶ 26} Yet, although technically distinguishable due to the trial court's subsequent entry finding no just cause for delay, we find this case still creates the same potential prejudice to the Nwankwos that the Ohio Supreme Court was attempting to avoid with its decision in *Pattison*. Simply stated, because the voluntary dismissal in this case was without prejudice, there is still a risk that the Baruks will refile their common law claims alleging trespass and nuisance against the Nwankwos after this appeal is decided. Again, as stated in *Pattison*:

When an individual claim against a defendant is dismissed without prejudice, however, the defendant is forced to go through the appeal process and may perhaps still be subjected to the dismissed claim upon refiling. The defendant in that situation is vulnerable to an increased overall burden due to the Civ.R. 41 dismissal.

*Id.*, 2008-Ohio-5276 at ¶ 20.

{¶ 27} This case presents a markedly different set of facts than had the Baruks' remaining claims been dismissed with prejudice. See, e.g., *Groen v. Children's Hospital Medical Center*, 1st Dist. Hamilton No. C-100835, 2012-Ohio-2815 (finding trial court's decision granting summary judgment was a final appealable order regarding one claim from a multi-count complaint where appellant subsequently dismissed the remaining claim with prejudice). Furthermore, in light of the Ohio Supreme Court's decision in *Pattison*, it is now well-established that Civ.R. 41(A) "does not allow for the dismissal of a portion of the claims against a certain defendant." *GLA Water Mgt. v. Univ. of Toledo*, 196 Ohio App.3d 290, 2011-Ohio-5034, ¶ 17 (6th Dist.), quoting *Pattison*, 2008-Ohio-5276 at ¶ 18. Rather, according to *Pattison*, "the proper procedure for a plaintiff to dismiss fewer than all claims against a single defendant is to amend the complaint pursuant to Civ.R. 15(A)." *Id.* at ¶ 19.

{¶ 28} We find the Baruks' attempts to voluntarily dismiss only those claims that

survived summary judgment, i.e., their common law trespass and nuisance claims against the Nwankwos, was a nullity and those claims remain pending. See, e.g., *Perez Bar & Grill v. Schneider*, 9th Dist. Lorain No. 09CA009573, 2010-Ohio-1352, ¶ 7 (finding voluntary dismissal was a nullity and claims remain pending as Civ.R. 41(A) does not permit a party to dismiss anything less than all claims against any one party). This is true even where the parties agreed on the voluntary dismissal. See *Savage v. Cody-Ziegler, Inc.*, 4th Dist. Athens No. 06CA5, 2006-Ohio-2760, ¶ 35 ("Because Count II of Appellants' complaint could not be dismissed under Civ.R. 41(A), the 'Agreed Entry of Voluntary Dismissal' of that count is a nullity and Count II of the complaint remains pending.").

{¶ 29} Nevertheless, as noted above, the trial court in this case actually issued an entry incorporating its summary judgment decision that specifically stated it was "a final judgment, and there is no just cause for delay" under Civ.R. 54(B). As this court has stated previously, when an action involves multiple claims or multiple parties and the lower court's order does not dispose of all the claims against all the parties, absent an express certification under Civ.R. 54(B) that there is "no just reason for delay," the order is typically not final and appealable. *Curry v. Blanchester*, 12th Dist. Clinton Nos. CA2008-07-024 and CA2008-07-028, 2009-Ohio-1649, ¶ 21, citing *Jarrett v. Dayton Osteopathic Hosp., Inc.*, 20 Ohio St.3d 77 (1985), syllabus.

{¶ 30} For purposes of a Civ.R. 54(B) certification, the trial court must make a factual determination as to whether an interlocutory appeal is consistent with the interests of sound judicial administration. *Dywidag Sys. Internatl., USA., Inc. v. Ohio Dept. of Transp.*, 10th Dist. Franklin No. 10AP-270, 2010-Ohio-3211, ¶ 27, citing *Wisintainer v. Elcen Power Strut Co.*, 67 Ohio St.3d 352 (1993), paragraph one of the syllabus. However, "the phrase 'no just reason for delay' is not a mystical incantation which transforms a nonfinal order into a final appealable order." *Wisintainer* at 354; see also *Bell v. Turner*, 191 Ohio App.3d 49, 2010-

Ohio-4506, ¶ 11 (4th Dist.) (finding the trial court's use of the "magic language" of Civ.R. 54(B) does not, by itself, convert a final order into a final appealable order).

{¶ 31} After a thorough review of the record, we find the trial court intended this matter to be subject to review as a result of its inclusion of the Civ.R. 54(B) language indicating there was no just reason for delay. Our decision is supported by similar decisions issued by the Seventh and Ninth District Courts of Appeal. For instance, in *Kosut v. First Energy*, 7th Dist. Jefferson No. 12 JE 8, 2013-Ohio-2876, the Seventh District found the following:

Applying the above law to the case at hand, because Kosut attempted to dismiss all "remaining" claims against Harsco, she attempted to dismiss some, but not all, of her claims against Harsco. Hence, her Civ.R. 41(A) attempt was a nullity. Therefore, all of Kosut's claims against Harsco are still viable. Furthermore, because the trial court included the Civ.R. 54(B) language in its judgment entry granting summary judgment to Harsco on Kosut's retaliation and intentional infliction of emotional distress claims, this is a final, appealable order. Therefore, we have jurisdiction in this case over the claims relating to Harsco.

*Id.* at ¶ 23.

{¶ 32} The Ninth District Court of Appeals reached the same conclusion in *Foley v. Empire Die Casting Co., Inc.*, 9th Dist. Summit No. 24558, 2009-Ohio-5539. Specifically, as the Ninth District stated in *Foley*:

On March 10, 2008, Foley filed a notice of voluntary dismissal of count three, his personal claim alleging a violation of R.C. 1335.11. While the Ohio Supreme Court does not recognize a voluntary dismissal pursuant to Civ.R. 41(A) as an appropriate mechanism by which a party may dismiss fewer than all his claims against another party, \* \* \* this Court need not discuss the effect of Foley's notice in this case. Although count three remains pending, the trial court's judgment included the requisite language pursuant to Civ.R. 54(B) to confer upon this Court jurisdiction to consider the merits of the appeal.

(Internal citation omitted.) *Id.* at ¶ 4.

{¶ 33} In addition, as the Ninth District stated in *Ningard v. Shin-Etsu Silicones of Am.*,

*Inc.*, 9th Dist. Summit No. 24524, 2009-Ohio-3171:

In the instant case, the trial court used the Civ.R. 54(B) language. Despite Ningard's failed attempt to dismiss the remaining portion of her claims [under Civ.R. 41(A)], we conclude that the trial court has properly converted the judgment into a final order. However, we have consistently held that an order denying summary judgment is generally not a final, appealable order. Accordingly, Ningard could appeal to this Court regarding the claims upon which the trial court entered final judgment, i.e., the partial grant of Shin-Etsu's summary judgment.

*Id.* at ¶ 9; see also *Miller v. Foster*, 9th Dist. Summit Nos. 24186 and 24209, 2009-Ohio-2675, ¶ 10.

{¶ 34} Whether a court enters a judgment pursuant to Rule 54(B) is within its sound discretion. *Hawk v. American Electric Power Co.*, 3d Dist. Allen No. 1-04-01, 2004-Ohio-3549, ¶ 9, citing *Noble v. Colwell*, 44 Ohio St.3d 92 (1989). After a thorough review of the record, we find no abuse of discretion here. Therefore, although the Baruks' claims alleging common law trespass and nuisance remain pending, we nevertheless conclude that the trial court's decision regarding the parties' competing motions for summary judgment in this matter is a final appealable order subject to our review.

#### **Summary Judgment Standard of Review**

{¶ 35} Summary judgment is a procedural device used to terminate litigation when there are no issues in a case requiring a formal trial. *Roberts v. RMB Ents., Inc.*, 197 Ohio App.3d 435, 2011-Ohio-6223, ¶ 6 (12th Dist.). On appeal, a trial court's decision granting summary judgment is reviewed de novo. *Moody v. Pilot Travel Ctrs., L.L.C.*, 12th Dist. Butler No. CA2011-07-141, 2012-Ohio-1478, ¶ 7, citing *Burgess v. Tackas*, 125 Ohio App.3d 294, 296 (8th Dist.1998). In applying the de novo standard, the appellate court is required to "us[e] the same standard that the trial court should have used, and \* \* \* examine the evidence to determine whether as a matter of law no genuine issues exist for trial." *Bravard v. Curran*, 155 Ohio App.3d 713, 2004-Ohio-181, ¶ 9 (12th Dist.), quoting *Brewer v.*

*Cleveland Bd. of Edn.*, 122 Ohio App.3d 378, 383 (8th Dist.1997).

{¶ 36} Pursuant to Civ.R. 56, a trial court may grant summary judgment only when (1) there is no genuine issue of any material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) the evidence submitted can only lead reasonable minds to a conclusion that is adverse to the nonmoving party. *BAC Home Loans Servicing, L.P. v. Kolenich*, 194 Ohio App.3d 777, 2011-Ohio-3345, ¶ 17 (12th Dist.). The party moving for summary judgment bears the initial burden of demonstrating that no genuine issue of material fact exists. *Touhey v. Ed's Tree & Turf, L.L.C.*, 194 Ohio App.3d 800, 2011-Ohio-3432, ¶ 7 (12th Dist.), citing *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293 (1996).

{¶ 37} Once this burden is met, the nonmoving party must then present evidence to show that there is some issue of material fact yet remaining for the trial court to resolve. *Smedley v. Discount Drug Mart, Inc.*, 190 Ohio App.3d 684, 2010-Ohio-5665, ¶ 11 (12th Dist.). In determining whether a genuine issue of material fact exists, the evidence must be construed in the nonmoving party's favor. *Walters v. Middletown Properties Co.*, 12th Dist. Butler No. CA2001-10-249, 2002-Ohio-3730, ¶ 10. We are mindful of these principles in addressing the following assignments of error.

#### **Assignment of Error No. 1**

{¶ 38} THE TRIAL COURT ERRED BY GRANTING THE NWANKWOS' MOTION FOR SUMMARY JUDGMENT AND BY DENYING THE BARUKS' MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO THE BARUKS' STATUTORY CLAIM UNDER R.C. §713.13 AND §1135.08 OF THE CITY OF MASON'S ZONING CODE.

{¶ 39} In their first assignment of error, the Baruks claim the trial court erred by granting summary judgment to the Nwankwos because the construction of the fire pit area constitutes a violation of R.C. 713.13 and Section 1135.8 of the Zoning Code. We disagree.

{¶ 40} Pursuant to R.C. 713.13:

No person shall erect, construct, alter, repair, or maintain any building or structure or use any land in violation of any zoning ordinance or regulation enacted pursuant to sections 713.06 to 713.12, inclusive, of the Revised Code, or Section 3 of Article XVIII, Ohio Constitution. In the event of any such violation, or imminent threat thereof, the municipal corporation, or the owner of any contiguous or neighboring property who would be especially damaged by such violation, in addition to any other remedies provided by law, may institute a suit for injunction to prevent or terminate such violation.

Similarly, under Section 1135.8 of the Zoning Code:

No person shall locate, erect, construct, reconstruct, enlarge, change, maintain or use any building or land in violation of any of the provisions of this Zoning Ordinance, or any amendment or supplement thereto adopted by Council.

Should such a violation occur, Section 1135.7 of the Zoning Code provides:

In case any building is or is proposed to be located, erected, constructed, reconstructed, enlarged, changed, maintained or used, or any land is or is proposed to be used in violation of this Zoning Ordinance or any amendment or supplement thereto, Council, the Law Director, the Zoning Administrator of the City of Mason, or any adjacent or neighboring property owner who would be specially damaged by such violation may, in addition to other remedies provided by law, institute appropriate action or proceedings to prevent such unlawful location, erection, construction, reconstruction, alteration, conversion, maintenance, or use to restrain, correct or abate such violation; to prevent the occupancy of such building, structure or land, or to prevent any illegal act, conduct, business or use in or about such premises.

{¶ 41} Taken together, in order to bring a claim under either R.C. 713.13 or Section 1135.8 of the Zoning Code entitling them to an injunction against the Nwankwos, the Baruks must prove that they were "especially damaged" by the alleged zoning violation. See *Conkle v. S. Ohio Med. Ctr.*, 4th Dist. Scioto No. 04CA2973, 2005-Ohio-3965, ¶ 13. This "especial damage" standard requires less than the general "irreparable harm" standard. *Id.*; *Columbiana v. J & J Car Wash, Inc.*, 7th Dist. Columbiana No. 04 CO 20, 2005-Ohio-1336, ¶ 20. Nevertheless, setting aside the issue of whether the Baruks could establish that they

were "especially damaged," we find the undisputed evidence indicates the construction of the fire pit does not constitute a violation of the Zoning Code as a matter of law.

{¶ 42} As noted above, it is undisputed that the Baruks' and Nwankwos' respective properties are classified as R-2 residential property under the Zoning Code. As relevant here, Section 1147.5 of the Zoning Code provides a minimum 15-foot side and rear setbacks for "accessory structures" on property classified as R-2. As provided by Section 1133.3 of the Zoning Code, an "accessory use or structure" is defined as the following:

A use or structure constructed or installed on, above, or below the surface of a parcel, which is located on the same lot as a principal use or structure and which is subordinate to or serves the principal use or structure, is subordinate in area to the principal use or structure, and is customarily incidental to the principal use or structure. "Accessory use" includes anything of a subordinate nature detached from a principal structure or use, such as fences, walls, sheds, garages, parking places, decks, poles, poster panels, and billboards. "Accessory use" does not mean or include structures providing utility service to the parcel, such as gas, electric, or water.

Pursuant to Section 1133.150 of the Zoning Code, a "structure" is defined as:

Anything constructed or erected, the intended use of which requires permanent or stationary location on the ground or which is attached to something having a permanent or stationary location on the ground, including paved areas and signs.

{¶ 43} Based on these definitions, the Baruks claim the construction of the fire pit area constitutes a violation of the Zoning Code because it is an "accessory structure" that encroaches onto the 15-foot setback requirements. The Baruks' claim, however, is in direct conflict with the City's own determination that found no violation of the Zoning Code, as well as the City's decision to issue the Nwankwos a permit allowing for the construction. In fact, the City specifically addressed the Baruks' allegations as evidenced by the April 20, 2012 e-mail attached as an exhibit to Mrs. Baruk's deposition. As the City explicitly informed the Baruks as part of that e-mail prior to them filing suit in this matter:

The patio and associated fire pit were not shown on the permit drawings that were submitted to the City from what I could see, as it would have not been required, due to these not being regulated by the City's zoning code.

Continuing, the City also stated:

The fire pits that are typically associated with at-grade paver and or poured concrete patios, have not been regulated for zoning and or building code purposes (i.e. setbacks relative to property lines) for residential applications.

This determination was also contained in an affidavit from Gregory Nicholls, the chief building official with the City, which stated the City informed the Baruks that "pavers/slabs/walks/patios on grade were allowed in the zoning setbacks" and that the Nwankwos' construction of the fire pit area "was not in violation of any of the City of Mason's zoning ordinances."

{¶ 44} The Baruks disagree with the City's interpretation of the Zoning Code and administrative decision to issue the Nwankwos a building permit. However, it is undisputed that the Baruks never challenged the City's decisions through an administrative appeal or by joining the City as a necessary party in this action. "[T]he proper remedy was to appeal the administrative decision pursuant to R.C. 2506.01, not seek equitable relief pursuant to R.C. 713.13." *Murray Energy Corp. v. Pepper Pike*, 8th Dist. Cuyahoga No. 90420, 2008-Ohio-2818, ¶ 16; see also *Moore v. Middletown*, 133 Ohio St.3d 55, 2012-Ohio-3897, ¶ 35 (recognizing an administrative appeal or declaratory judgment as the "appropriate means to challenge a zoning resolution").

{¶ 45} Moreover, if the Baruks' goal was to obtain a court order compelling the City to enforce the Zoning Code, case law indicates that the proper way in which to do so is by a petition for a writ of mandamus. See *Throckmorton v. Hills Communities, Inc.*, 2d Dist. Greene No. 99CA89, 2000 WL 770554, \*3 (June 16, 2000) ("if Throckmorton's goal was to obtain a court order compelling Beaver creek to enforce the zoning code, the proper way in

which to do so is by a petition for a writ of mandamus"). Unfortunately, the Nwankwos failed to raise these issues as affirmative defenses. Nevertheless, after a thorough review of the record, which includes Nicholls' affidavit, the City's April 20, 2010 e-mail attached as an exhibit to Mrs. Baruk's deposition, and the fact that the City issued a permit for the project, we find the Nwankwos' construction project at issue here does not violate the Zoning Code as a matter of law.

{¶ 46} The Baruks, however, claim that Nicholls' affidavit evidencing the construction project did not constitute a Zoning Code violation is inadmissible evidence that must not be considered for summary judgment purposes. Pursuant to Civ.R. 56(E), affidavits submitted to support or oppose a summary judgment motion "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify as to the matters stated in the affidavit." Personal knowledge is defined as "'knowledge of the truth in regard to a particular fact or allegation, which is original, and does not depend on information or hearsay.'" *State ex rel. Varnau v. Wenninger*, 12th Dist. Brown No. CA2009-02-010, 2011-Ohio-3904, ¶ 8, quoting *Re v. Kessinger*, 12th Dist. Butler No. CA2007-02-044, 2008-Ohio-167, ¶ 32. "Information in affidavits that is not based on personal knowledge and does not fall under any of the permissible exceptions to the hearsay rule may be properly disregarded by the trial court when granting or denying summary judgment." *Ohio Receivables, L.L.C. v. Dallariva*, 10th Dist. Franklin No. 11AP-951, 2012-Ohio-3165, ¶ 16.

{¶ 47} In support of their claim that Nicholls' affidavit is inadmissible, the Baruks cite to the Second District Court of Appeals decision in *Witzmann v. Adam*, 2d Dist. Montgomery No. 23352, 2011-Ohio-379, which generally held "[a]n expert witness is not permitted to give an opinion relating to the law, and a trial court that allows such an opinion abuses its discretion." The issue in that case was whether the trial court erred by permitting the cross-

examination of an expert witness on the legal concepts of burden of proof, standard of care, and negligence in a medical malpractice case. In this case, however, the issue is whether Nicholls' affidavit is proper summary judgment evidence. As these cases address drastically different issues, we fail to see how the Second District's decision in *Witzmann* is applicable here.

{¶ 48} Nicholls' affidavit does not reference intricacies of the law or cumbersome legal concepts. Rather, Nicholls' affidavit merely provides the fact that the construction and placement of "pavers/slabs/walks/patios" are not regulated by the City for zoning or building code purposes. In making this determination, the City exercised its discretion in making a reasonable interpretation of its own Zoning Code. See *McDowell v. Gahanna*, 10th Dist. Franklin No. 08AP-1041, 2009-Ohio-6768, ¶ 22. Moreover, as Nicholls serves as the chief building official for the City, we find he is competent to submit an affidavit that includes this finding. Again, as Nicholls' affidavit specifically states, "[i]t is and continues to be the staff opinion of the City of Mason Building Department that the Nwankwos' addition was not in violation of any of the City of Mason zoning ordinances."

{¶ 49} As noted above, it is apparent that the Baruks disagree with this determination, as well as the City's decision to issue the Nwankwos a building permit for the construction project. Yet, as a clear reading of Nicholls' affidavit indicates, and based on the fact that the City actually issued a building permit in this matter, the City has already determined that no violation of the Zoning Code exists. Besides their own vague allegations regarding the proper interpretation and application of the Zoning Code, the Baruks have provided no evidence to refute the fact that construction projects like the one at issue here are not regulated by the City for zoning or building code purposes. See generally *Graber v. Henning*, 5th Dist. Stark No. 2004-CA-00201, 2005-Ohio-744, ¶ 31-33 (finding summary judgment was proper where appellant did not provide any evidence to combat affidavit of expert witness

providing opinion that appellee discharged his duties towards appellant in a legal malpractice claim). This is most likely due to the fact that such a strict application of the Zoning Code would also place the Baruks' own driveway, sidewalk, retaining wall, and basketball hoop in violation of the Zoning Code.<sup>2</sup>

{¶ 50} As noted above, once the Nwankwos met their burden on summary judgment, the Baruks as the nonmoving party were required to present evidence to show that there is some issue of material fact yet remaining for the trial court to resolve. Simply stated, "[a] motion for summary judgment forces the nonmoving party to produce evidence on any issue for which that party bears the burden of production at trial." *Wing v. Anchor Media, Ltd. of Texas*, 59 Ohio St.3d 108 (1991), paragraph three of the syllabus, citing *Celotex v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986). In light of the record submitted before this court, and based on a strict application of Civ.R. 56, we find the Baruks have failed their burden here.

{¶ 51} We believe the dissent has misinterpreted our holding in this matter. Our decision should not be construed to mean the Baruks are "stuck" with the City's interpretation of the Zoning Code. Nor should our decision be read to limit the rights of any owner of any contiguous or neighboring property who would be especially damaged from bringing a private cause of action under R.C. 713.13. Rather, we find the record before this court establishes the Nwankwos' construction of the fire pit area at issue here does not violate the Zoning Code as a matter of law. This is confirmed by the fact the City issued a building permit for the Nwankwos' construction project, as well as the uncontroverted evidence found in Nicholls' affidavit and the City's April 20, 2012 e-mail attached as an exhibit to Mrs. Baruk's deposition, that establishes construction projects like the one at issue here are simply not regulated by

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2. According to Mr. Baruk, the retaining wall on the side of his property is not, in fact, a retaining wall. Rather, as part of his sworn deposition testimony, Mr. Baruk testified the area in question was merely a set of "stacked landscaping blocks."

the City for zoning or building code purposes.

{¶ 52} Moreover, although statutorily permitted to bring a private cause of action under R.C. 713.13, we note that private enforcement by any alleged aggrieved resident within the City could result in no uniformity at all between this or any other provision within the Zoning Code. This is particularly true in this case considering the evidence properly submitted here. Again, the evidence in this case establishes that construction projects like the one at issue are not regulated by the City for zoning or building code purposes. This creates a uniform application of the Zoning Code throughout the City, not a piecemeal construction based on sporadic complaints from an allegedly aggrieved neighbor.

{¶ 53} Finally, we disagree with the dissent's assertion that our decision implicitly confers legislative power upon Nicholls in his role as chief zoning administrator merely because he does not issue permits for fire pit areas like that constructed in the Nwankwos' backyard. There is no dispute that neither the Zoning Code nor city council has ever granted Nicholls such powers. Moreover, if city council disagreed with his application of the Zoning Code, Nicholls surely would have been so directed or removed from his position with the City, neither of which has happened here. Rather, Nicholls' application of the Zoning Code was actually confirmed by the City.

{¶ 54} It bears repeating, this is a summary judgment decision that is reviewed by this court de novo, not an administrative appeal brought pursuant to R.C. Chapter 2506. As the parties are well aware, summary judgment is a procedural device used to terminate litigation when there are no issues in a case requiring a formal trial. Based on the facts and circumstances of this case, we find the record before us on summary judgment establishes no violation of the Zoning Code resulting from the construction project on the Nwankwos' property as a matter of law. Therefore, as we find no violation of the Zoning Code exists, the Baruks' were not entitled to any relief therefrom. Accordingly, the Baruks' first assignment of

error is overruled.

**Assignment of Error No. 2**

{¶ 55} THE TRIAL COURT ERRED BY GRANTING THE NWANKWOS' MOTION FOR SUMMARY JUDGMENT AND DENYING THE BARUKS' MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO THE BARUKS' NEGLIGENCE CLAIM.

{¶ 56} In their second assignment of error, the Baruks claim the trial court erred by granting summary judgment to the Nwankwos in regards to their claim alleging negligence per se resulting from the Nwankwos' alleged Zoning Code violation. However, in light of our finding no violation of the Zoning Code under the Baruks' first assignment of error, we likewise find no merit to the Baruks' second assignment of error. Accordingly, the Baruks' second assignment of error is overruled.

**Assignment of Error No. 3**

{¶ 57} THE TRIAL COURT ERRED BY GRANTING THE NWANKWOS' MOTION FOR SUMMARY JUDGMENT AND DENYING THE BARUKS' MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO THE BARUKS' BREACH OF CONTRACT CLAIMS ARISING FROM THE NWANKWOS' VIOLATIONS OF THE HOA'S SETBACK AND DRAINAGE RESTRICTIONS.

{¶ 58} In their third assignment of error, the Baruks claim the trial court erred by granting summary judgment to the Nwankwos in regards to their breach of contract claim because the construction of the fire pit area constitutes a violation of the Design Guide's setback requirements and drainage restrictions.

{¶ 59} It has long been recognized that persons have a fundamental right to contract freely with the expectation that the terms of the contract will be enforced. *Kitchen v. Lake Lorelei Property Owners' Assn. Inc.*, 12th Dist. Brown Nos. CA2001-10-016 and CA2001-10-018, 2002-Ohio-2797, ¶ 27, citing *The Bluffs of Wildwood Homeowners' Assn., Inc. v. Dinkel*,

96 Ohio App.3d 278, 282 (12th Dist.1994). "Declarations and bylaws of a homeowners association are contracts between the association and the purchasers." *Lisy v. Mayfair Estates Homeowners Assn.*, 9th Dist. Summit No. 25392, 2012-Ohio-68, ¶ 29. "To prove a breach of contract claim, a plaintiff must show 'the existence of a contract, performance by the plaintiff, breach by the defendant, and damage or loss to the plaintiff.'" *Discover Bank v. Poling*, 10th Dist. Franklin No. 04AP-1117, 2005-Ohio-1543, ¶ 17, quoting *Nilavar v. Osborn*, 137 Ohio App.3d 469, 483 (2d Dist.2000).

{¶ 60} The Baruks' breach of contract claim is based on the interpretation of a contract, in this case, the Design Guide. In reviewing a contract, the court's primary role is to ascertain and give effect to the intent of the parties. *O'Bannon Meadows Homeowners Assn., Inc. v. O'Bannon Properties, L.L.C.*, 12th Dist. Clermont No. CA2012-10-073, 2013-Ohio-2395, ¶ 19, citing *Hamilton Ins. Serv., Inc. v. Nationwide Ins. Cos.*, 86 Ohio St.3d 270, 273 (1999). In ascertaining the intent of the parties, the court must presume that the intent resides in the language the parties chose to employ in the agreement. *Towne Dev. Group, Ltd. v. Hutsepiller Contrs.*, 12th Dist. Butler No. CA2012-09-181, 2013-Ohio-4326, ¶ 17, citing *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth.*, 78 Ohio St.3d 353, 361 (1997).

{¶ 61} "A contract that is, by its terms, clear and unambiguous requires no interpretation or construction and will be given the effect called for by the plain language of the contract." *Cooper v. Chateau Estate Homes, L.L.C.*, 12th Dist. Warren No. CA2010-07-061, 2010-Ohio-5186, ¶ 12. In turn, common, undefined words appearing in a contract will be given their plain and ordinary meaning unless manifest absurdity results, or unless some other meaning is clearly evidenced from the face or overall contents of the agreement. *Deerfield Twp. v. Mason*, 12th Dist. Warren No. CA2011-12-138, 2013-Ohio-779, ¶ 16.

Setback Provisions of the Design Guide

{¶ 62} Initially, the Baruks claim the construction of the fire pit area violates the 15-foot setback provisions of the Design Guide. The trial court found no violation of the setback provisions contained in the Design Guide because the fire pit area constitutes a "patio" that is a permitted exception to the 15-foot setback requirements. As noted above, the Design Guide provides:

Decks, porches, wing walls and other items attached to the house are considered to be part of the house property and will not be allowed to encroach into side or rear yard setbacks, except as variations in the case of unique site characteristics, which the [Committee] may consider on a case-by-case basis. **Patios, driveways, walks, etc., may usually encroach into setback areas.**

(Emphasis added.)

The Design Guide does not further define what constitutes a "patio." Therefore, we must turn to the plain and ordinary meaning of the word for guidance.

{¶ 63} Pursuant to Merriam-Webster's Online: Dictionary and Thesaurus, a "patio" is "a flat area of ground that is covered with a hard material (such as bricks or concrete), is usually behind a house, and is used for sitting and relaxing." *Merriam-Webster's Online: Dictionary and Thesaurus*, <http://www.merriam-webster.com/dictionary/patio> (accessed March 3, 2014). The term "patio" has also been defined as "a recreation area adjoining a dwelling, often paved, and adapted esp. to outdoor dining." *Webster's Third New International Dictionary* (1993).

{¶ 64} Here, the fire pit area at issue consists of a flat circular concrete slab that measures approximately 20 feet in diameter that is surrounded by a low semi-circular "seat wall" standing approximately 18 inches high. At the center of the concrete slab is a circular gas fire pit. The entire area is connected to an outdoor living space that includes a screened-in gazebo that includes a kitchen and bar area. According to the Nwankwos' deposition

testimony, the fire pit has been lit a maximum of four times, including once for the neighborhood Christmas party. However, even when the fire pit was not lit, the fire pit area has been used sporadically for social gatherings, such as their daughter's graduation party, as well as other business functions.

{¶ 65} After a thorough review of the record, we agree with the trial court's decision finding the fire pit area at issue here constitutes a "patio" under the Design Guide. As the trial court found, "[c]oncluding that this area is anything other than a patio would be an unreasonable stretch of the imagination." This is particularly true given the Baruks' own characterization of the fire pit area as a "raised patio/firepit" in an e-mail to the Association first addressing their concerns with the project. Therefore, because the fire pit area constitutes a "patio" as that term is used in the Design Guide as a matter of law, it is a permitted exception to the Design Guide's 15-foot setback requirements.

{¶ 66} Nevertheless, the Baruks allege that even if the fire pit area does constitute a "patio," which it clearly does, its construction is nevertheless in violation of the Design Guide because it is enclosed by "walls." Under the Design Guide, "[w]alls and fences should be considered as an extension of the architecture of the residence." As a result, because "walls" are considered as an extension of the architecture of the residence, the Baruks allege that "homeowners in the Heritage Club are prohibited from constructing walls within the 15 feet of their side property lines."

{¶ 67} However, even assuming the Baruks interpretation of the Design Guide were true, the semi-circular "seat wall" that stands approximately 18 inches high simply cannot be consider a "wall" as that term is used in the Design Guide. The "seat wall" is just that, a sitting area that encompasses the fire pit area. Simply because the description of this sitting area uses the term "wall," does not make it a violation of the Design Guide. The Baruks' overly strict interpretation is improper and in no way indicates the intent behind the

restrictions for "walls and fences" as contained in the Design Guide. Therefore, the trial court properly concluded that the construction of the fire pit area did not violate the 15-foot setback provisions in the Design Guide. Accordingly, the Baruks' claim alleging a violation of the Design Guide's setback provisions is without merit and overruled.

Drainage Restrictions of the Design Guide

{¶ 68} Next, the Baruks claim the construction of the fire pit area violates the drainage restrictions contained in the Design Guide. In regards to drainage, the Design Guide provides, in pertinent part, the following:

Storm water, erosion and sedimentation must be controlled and handled properly during and after construction. Downstream adjacent property must receive and not impede the flow of storm water originating from upstream natural watersheds.

The Design Guide also specifically states that the determination of "environmental restrictions, drainage and grading requirements and all surface and subsurface soil conditions" is the homeowner's responsibility.

{¶ 69} As part of their deposition testimony, the Baruks claim that following the construction of the fire pit area, there is now standing water "constantly" on their property that damages their grass and makes it difficult for their landscapers to mow. As Mrs. Baruk testified:

Oftentimes they're not able to mow it. Sometimes they have to wait until we get a very big dry spell just to get it a little bit down, but they basically said they cannot mow my yard the way I would like them to.<sup>3</sup>

The Baruks also submitted an affidavit from Larry Jeffers, a professional civil engineer licensed in the state of Ohio, who averred that the construction project has caused surface

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3. We question whether the drainage requirements found in the Design Guide may be applied without limit after the construction is complete. This is especially true considering this restriction is found in a section of the Design Guide entitled "Preliminary Plans." However, that question is not currently before this court.

runoff that has adversely affected the Baruks' property.

{¶ 70} On the other hand, the Nwankwos testified that they were informed of drainage issues on the property in May of 2012, shortly before the construction project was completed. After being informed of the potential drainage issues, the Nwankwos hired a landscaper to install a French drain on the property. According to the Nwankwos, the installation of the French drain has solved any drainage issues that may have resulted from the construction project. Yet, even after the French drain was installed, the Nwankwos readily admit they have not conducted any investigation to determine whether the supposed drainage problems have been resolved.

{¶ 71} As can be seen, there is conflicting testimony regarding the alleged drainage issues on the Baruks' property. Based on this testimony, there remains an assortment of factual issues that must be resolved. These factual questions include, among others, whether there actually is a drainage issue on the Baruks' property, as well as the cause of any alleged drainage problem. Again, the Baruks claim that they have had drainage issues on their property since the completion of the fire pit area, whereas the Nwankwos claim that any drainage issues were remedied through their installation of a French drain. Therefore, as questions of material fact exist, we find the trial court erred in its decision finding the Nwankwos were entitled to judgment in their favor in regards to the Baruks' claims alleging a violation of the Design Guide's drainage restrictions. Accordingly, while the Baruks' third assignment of error is overruled in regards to their claim alleging the fire pit area violates the setback requirements of the Design Guide, this assignment of error is sustained in regards to the Baruks' claims alleging a violation of the Design Guide's drainage restrictions.

**Assignment of Error No. 4**

{¶ 72} THE TRIAL COURT ERRED BY GRANTING THE NWANKWOS' MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO THE BARUKS' BREACH OF

CONTRACT CLAIMS ARISING FROM VIOLATIONS OF THE NUISANCE PROVISIONS  
CONTAINED IN THE DECLARATIONS.

{¶ 73} In their fourth assignment of error, the Baruks claim the trial court erred by granting summary judgment to the Nwankwos in regards to their breach of contract claim based on an alleged violation of the nuisance provisions contained in the Declarations. We agree.

{¶ 74} Article IX, Section 9.3, Subsection F of the Declarations entitled "Nuisances" prohibits the following:

No portion of the Property shall be used, in whole or in part, for the storage of any property or thing that will cause it to appear to be in an unclean or untidy condition or that will be obnoxious to the eye; nor shall any substance, thing, or material be kept upon any portion of the Property that will emit foul or obnoxious odors or that will cause any noise or other condition that will or might disturb the peace, quiet, safety, comfort, or serenity of the occupants of surrounding property.

That section continues and provides:

No noxious, illegal or offensive activity shall be carried on upon any portion of the Property, nor shall anything be done thereon tending to cause embarrassment, discomfort, annoyance, or nuisance to any person using any portion of the Property. There shall not be maintained any plants or animals or device or thing of any sort whose activities or existence in any way is noxious, dangerous, unsightly, unpleasant, or of a nature as may diminish or destroy the enjoyment of the Property.

Pursuant to Article IX, Section 9.2, any person owning property within the Subdivision may enforce the covenants and restrictions contained in the Declarations by bringing an action at law or in equity against the offending party.

{¶ 75} In ruling on the parties' competing motions for summary judgment, the trial court determined the Nwankwos were entitled to summary judgment on this claim. However, the Baruks also brought a claim alleging common law nuisance. In ruling on the Baruks' common law nuisance claim, the trial court determined that questions of material fact remain

as to whether the Nwankwos' use of the property constituted a nuisance.

{¶ 76} We have already determined that the Baruks' claim alleging common law nuisance remains pending as their attempts to voluntarily dismiss this claim without prejudice under Civ.R. 41(A) was a nullity. As the trial court determined questions of material fact remained regarding the common law nuisance claim, we find questions of fact likewise remain as to whether the Nwankwos breached the nuisance provisions found in the Declarations. To hold otherwise would be inherently inconsistent with the record now before this court. Therefore, because questions of material fact remain as to whether the Nwankwos have violated the nuisance provisions contained in the Declarations, the Baruks' fourth assignment of error is sustained.

**Assignment of Error No. 5**

{¶ 77} THE TRIAL COURT ERRED BY GRANTING THE HOA'S MOTION FOR SUMMARY JUDGMENT AND DENYING THE BARUKS' MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO THE BARUKS' CLAIMS FOR BREACH OF FIDUCIARY DUTY ARISING FROM THE HOA'S FAILURE TO ENFORCE ITS SETBACK AND DRAINAGE RESTRICTIONS.

{¶ 78} In their fifth assignment of error, the Baruks claim the trial court erred by granting summary judgment to the Association in regards to their breach of fiduciary duty claim arising from the Association's alleged failure to enforce its setback and drainage restrictions found in the Design Guide.

{¶ 79} "A fiduciary relationship is one in which special confidence and trust is reposed in the integrity and fidelity of another and there is a resulting position of superiority or influence, acquired by virtue of this special trust." (Internal quotations omitted.) *Williams Creek Homeowners Assn. v. Zweifel*, 10th Dist. Franklin No. 07AP-689, 2008-Ohio-2434, ¶ 69, quoting *Belvedere Condominium Unit Owners' Assn. v. R.E. Roark Cos., Inc.*, 67 Ohio

St.3d 274, 282 (1993). To recover under a breach of fiduciary duty claim, "a party must show the existence of a fiduciary relationship, failure to comply with a duty accorded that relationship, and damages proximately caused by that failure." *Morgan v. Ramby*, 12th Dist. Warren Nos. CA2010-10-095 and CA2010-10-101, 2012-Ohio-763, ¶ 25.

{¶ 80} As part of its answer submitted in this matter, the Association admits it has a fiduciary relationship with its homeowners and that it has a fiduciary duty to enforce the provisions of the Design Guide. This was later confirmed by the deposition testimony of Partridge, the Association president, who specifically acknowledged that it was the Association's responsibility to enforce the Design Guide provisions. However, before there can be any recovery for an alleged breach of a fiduciary duty, it must first be conclusively established that the construction of the fire pit area on the Nwankwos' property actually does constitute a violation of the Design Guide.

{¶ 81} As noted above, the trial court properly concluded that the construction of the fire pit area did not violate the setback provisions in the Design Guide. However, questions of material fact remain as to whether the construction project has, in fact, resulted in a violation of the Design Guide's drainage restrictions. In turn, as there remain questions of material fact in regards to the Design Guide's drainage restrictions, whether the Association can ultimately be found to have breached its fiduciary duty in failing to enforce the drainage restrictions also presents questions of material fact, thereby precluding summary judgment in this matter. Therefore, because questions of material fact remain, the Baruks' fifth assignment of error is overruled as it relates to the setback requirements in the Design Guide, but sustained in regards to the Design Guide's drainage restrictions.

**Assignment of Error No. 6**

{¶ 82} THE TRIAL COURT ERRED BY GRANTING THE HOA'S MOTION FOR SUMMARY JUDGMENT AND DENYING THE BARUKS' MOTION FOR SUMMARY

JUDGMENT WITH RESPECT TO THE BARUKS' BREACH OF CONTRACT CLAIMS AGAINST THE HOA.

{¶ 83} In their sixth assignment of error, the Baruks claim the trial court erred by granting summary judgment to the Association in regards to their breach of contract claim arising from its alleged failure to enforce its setback and drainage restrictions found in the Design Guide. As the Baruks readily admit, this cause of action is essentially the same as that advanced under their breach of fiduciary duty claim discussed under their fifth assignment of error. Therefore, in light of our decision regarding the Baruks' fifth assignment of error, the Baruks' sixth assignment of error is likewise overruled as it relates to the setback requirements in the Design Guide, but sustained in regards to the Design Guide's drainage restrictions.

**Assignment of Error No. 7**

{¶ 84} THE TRIAL COURT ERRED BY GRANTING THE HOA'S MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO THE BARUKS' BREACH OF FIDUCIARY DUTY AND BREACH OF CONTRACT CLAIMS BASED ON ALLEGATIONS THAT THE NWANKWOS' VIOLATED THE NUISANCE PROVISIONS OF THE DECLARATIONS.

{¶ 85} In their seventh assignment of error, the Baruks claim the trial court erred by granting summary judgment to the Association in regards to their breach of fiduciary duty and breach of contract claim in regards to the nuisance provisions contained in the Declarations. Again, as discussed under the Baruks' fourth assignment of error, we find questions of material fact remain as to whether the Nwankwos breached the Declarations' nuisance provisions. Therefore, because questions of material fact remain, the Baruks' seventh assignment of error alleging breach of fiduciary duty and breach of contract for failing to enforce the Declarations' nuisance provisions is sustained.

**Assignment of Error No. 8**

{¶ 86} THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT IN FAVOR OF THE HOA ON THE BARUKS' CLAIMS SEEKING PUNITIVE DAMAGES.

{¶ 87} In their eighth assignment of error, the Baruks claim the trial court erred by granting summary judgment to the Association in regards to their request for punitive damages. "Punitive damages may be awarded for breach of fiduciary duty, as for other intentional torts, upon proof of actual or implied malice." *Burns v. Prudential Securities, Inc.*, 167 Ohio App.3d 809, 2006-Ohio-3550, ¶ 100 (3d Dist.). As questions of fact remain regarding the Baruks' breach of fiduciary duty claims, we find it was premature for the trial court to summarily dismiss their request for punitive damages in this matter. Therefore, while we believe the Baruks' will face a steep uphill battle in establishing actual or implied malice here, questions of material fact nevertheless remain, thereby precluding summary judgment on this claim. Accordingly, the Baruks' eighth assignment of error is sustained.

**Conclusion**

{¶ 88} In light of the foregoing, we find the Baruks' common law claims alleging nuisance and trespass remain pending despite their efforts to voluntarily dismiss such claims without prejudice under Civ.R. 41(A). In addition, we affirm the trial court's decision granting summary judgment to the Nwankwos on the Baruks' claims alleging a violation of the Zoning Code and negligence per se. We also affirm the trial court's decision granting summary judgment to the Nwankwos on the Baruks' claim alleging a violation of the setback provisions of the Design Guide. However, because questions of material fact remain, we reverse the trial court's decision granting summary judgment to the Nwankwos on the Baruks' claims alleging violations of the Design Guide's drainage restrictions and the Declarations' nuisance provisions.

{¶ 89} As a result of these findings, we likewise reverse the trial court's decision

granting summary judgment to the Association on the Baruks' claims alleging breach of fiduciary duty and breach of contract for their alleged failure to enforce the Design Guide's drainage restrictions and the Declarations' nuisance provisions. Finally, because the Baruks' claim alleging a breach of fiduciary duty remains viable, we reverse the trial court's decision as it relates to their claim for punitive damages.

{¶ 90} Judgment affirmed in part, reversed in part and remanded for further proceedings.

RINGLAND, P.J., concurs.

M. POWELL, J., dissents.

**M. POWELL, J., dissenting.**

{¶ 91} I concur with the majority in its resolution of the Baruks' third through eighth assignments of error. However, I disagree with the majority's view that the trial court properly granted summary judgment to the Nwankwos and properly dismissed the Baruks' claim that the Nwankwos' construction of the fire pit area violated the Zoning Code.

{¶ 92} The majority affirms the trial court's grant of summary judgment regarding the Baruks' Zoning Code violation claims against the Nwankwos on the grounds the Baruks failed to: (1) satisfy their burden of proof upon summary judgment; (2) contest the City's claim that it does not regulate construction, such as the fire pit construction here, pursuant to the Zoning Code; (3) join the City as a party to their lawsuit; and (4) compel the City to enforce the Zoning Code against the Nwankwos.

{¶ 93} The majority primarily bases its opinion upon the Baruks' failure to satisfy their burden of proof in opposing summary judgment regarding their Zoning Code claims. Presumably, the majority is asserting that the zoning administrator's affidavit and certain

email communications from the City to the Baruks that the fire pit construction is not regulated by the Zoning Code, were not rebutted or sufficiently otherwise challenged by the Baruks with a contrary affidavit or other Civ.R. 56(C) evidence, so as to raise genuine issues of material fact.

{¶ 94} The zoning administrator's affidavit and the email communications from the City to the Baruks variously asserted that, "patio and associated fire pit \* \* \* [are] not being regulated by the City's zoning code," "fire pits that are typically associated with at-grade paver and or poured concrete patios, have not been regulated for zoning or building code purposes (i.e. setbacks relative to property lines) for residential applications," and "pavers/slabs/walks/patios on grade were allowed in the zoning setbacks." The foregoing may be construed as a legal interpretation by the zoning administrator as to the import of the Zoning Code, a factual averment as to how the Zoning Code has been administered, or both.

{¶ 95} In considering whether the Baruks have satisfied their Civ.R. 56 burden of proof, the evidence before the trial court must be examined to determine whether, as a matter of law, the zoning administrator's interpretation of the Zoning Code is reasonable and entitled to the trial court's deference.

{¶ 96} Reference should first be made to the Zoning Code definitions of "structure" and "accessory structure," as such are subject to the 15 foot side-yard setback requirements for the R-2 zone in which the Baruks' and Nwankwos' property is located.

{¶ 97} To reiterate, the Zoning Code defines a "structure" as

Anything constructed or erected, the intended use of which requires *permanent or stationary location on the ground* or which is attached to something having a permanent or stationary location on the ground, *including paved areas* and signs.

(Emphasis added.)

{¶ 98} The Zoning Code defines "accessory use or structure" as

A use or structure constructed or *installed on, above, or below the surface of a parcel*, which is located on the same lot as a principal use or structure and which is subordinate to or serves the principal use or structure, is subordinate in area to the principal use or structure, and is customarily incidental to the principal use or structure. "Accessory use" includes anything of a subordinate nature detached from a principal structure or use, such as fences, walls, sheds, garages, parking places, decks, poles, poster panels and billboards. "Accessory use" does not mean or include structures providing utility service to the parcel, such as gas, electric or water.

(Emphasis added.)

{¶ 99} Reference should also be made to the undisputed evidence as to the nature of the fire pit construction. According to the trial court, the fire pit area construction

consists of a circular flat concrete slab with a diameter of approximately 20 feet. A circular gas fire pit is set within the concrete in the center. Surrounding the concrete slab is a low semi-circle wall used for seating, which is between 1-2 feet tall. The area is connected to the home and the rest of the outdoor living space by a continuous pour of concrete.

{¶ 100} The trial court further found that, "It is not disputed that this fire pit area is entirely within 15 feet of the property line separating the Nwankwos' and Baruks' lots."

{¶ 101} As set forth in the definitions, "structure" and "accessory structure" include "paved areas," with "permanent or stationary location on the ground," and "constructed or installed on, above or below the surface of a parcel."<sup>4</sup> Simply put, there is no reasonable interpretation of the Zoning Code pursuant to which the fire pit construction area would not constitute a "structure" or "accessory structure" as defined therein, so as to be subject to the applicable 15-foot-side-yard setback requirement. The City provided no explanation, much less a reasonable explanation, as to why this fire pit construction, a 20-foot-diameter area

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4. The majority discusses whether the affidavit of Gregory Nicholls, the City's chief building official (Nicholls is referred to in this dissent as the zoning administrator), which was attached to the Nwankwos' motion for summary judgment, is competent Civ.R. 56(C) evidence because it contains an opinion on a legal matter, i.e., whether the fire pit construction violates the Zoning Code. I do not disagree with the majority's analysis that this affidavit can be properly considered by the trial court on summary judgment. However, this does not mean that

paved in concrete with a permanent and stationary location on the ground and surrounded by a semi-circular "1-2 feet" high seating wall, would not be considered a "structure" or "accessory structure" or otherwise be exempt from regulation under the Zoning Code. In fact, neither the zoning administrator (in his affidavit, the emails, or otherwise) nor the majority claim that the fire pit construction is not a "structure" or an "accessory structure" as defined by the Zoning Code. Furthermore, the zoning administrator does not rely upon any provision of the Zoning Code to support his assertion that the fire pit construction is exempt from the side-yard setback regulations, and neither the Nwankwos nor the majority point to one. Rather, the City's claim that the fire pit construction is exempt from regulation is a bare assertion, perhaps practiced, but not supported by the language of the Zoning Code.

{¶ 102} A zoning administrator's interpretation of a zoning code is entitled to deference and should be upheld where the interpretation is reasonable. See *Franklinton Coalition v. Open Shelter, Inc.*, 13 Ohio App.3d 399 (10th Dist.1983). In support of this maxim, the majority cites *McDowell*, 2009-Ohio-6768, for the proposition that a zoning authority may "exercise its discretion in making a reasonable interpretation of its own Zoning Code." *McDowell* at ¶ 22. Notably, however, the *McDowell* court qualified its holding by observing that there was "no showing that the city's construction of the ordinance \* \* \* was arbitrary or unreasonable." *Id.* Here, the zoning administrator's interpretation that the fire pit construction was not subject to regulation by the Zoning Code is patently arbitrary and unreasonable.

{¶ 103} The majority observes that "the Baruks have provided no evidence to refute the fact that construction projects like the one at issue here *are not regulated by the City for zoning or building code purposes.*" (Emphasis added.) This finding suffers from two

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the trial court must accept Nicholls' conclusion on what is essentially a legal matter, and rejecting Nicholls' conclusion on such a matter does not involve an improper weighing of evidence or consideration of credibility.

deficiencies.

{¶ 104} First, it somewhat miscasts what was before the trial court on summary judgment. The issue is not whether there is a genuine issue of material fact as to whether the City is enforcing its Zoning Code but whether there is a genuine issue of material fact as to whether the Zoning Code was violated. As discussed more fully below, the zoning administrator is without authority to decline enforcement of the Zoning Code.

{¶ 105} Second, it fails to take into account the fact that the Zoning Code was before the trial court as evidence, as well as the undisputed evidence as to the nature of the fire pit construction and its location entirely within 15 feet of the Baruks' side-yard property line. "The wording of Civ.R. 56(C) makes it clear that a trial court must conscientiously examine all the evidence before it when ruling on a summary judgment motion." *Murphy v. Reynoldsburg*, 65 Ohio St. 3d 356, 359 (1992). Applying the law (i.e., the Zoning Code) to an undisputed set of facts (i.e., the fire pit construction within 15 feet of the Baruks' property line) is a purely legal exercise involving no resolution of disputed factual issues. Thus, rejection of the legal interpretations expressed in the zoning administrator's affidavit and the emails as being legally inconsistent with the terms of the Zoning Code, does not involve an improper weighing of evidence in considering a motion for summary judgment. Certainly, where Civ.R. 56(C) evidence contains assertions of legal matters, a trial court remains free to apply the law as it determines it to be, even when it is contrary to what may be asserted as the law in the evidentiary materials.

{¶ 106} The zoning administrator's affidavit and the emails might also be construed as factual averments as to how the City has administered its Zoning Code. *These documents* assert that the City has not regulated construction, such as the fire pit here, under the Zoning Code. Whether the City has, as a matter of fact and practice, not regulated such construction, does not mean that the Zoning Code does not provide for such regulation, nor

does it relieve the trial court of its duty to determine whether the Zoning Code provides for such regulation. Lack of municipal enforcement does not equate to lack of a violation. Otherwise, the private right of action granted by the General Assembly in R.C. 713.13 to specially damaged neighboring property owners to enjoin zoning violations would be a nullity. Here, the City has only asserted that it does not regulate this type of construction, and has so asserted without relying upon any provision of the Zoning Code which exempts it from regulation. Further, the City does not claim this type of construction does not constitute a "structure" or "accessory structure" as defined by the Zoning Code. Significantly, the Zoning Code denies to the zoning administrator and others charged with administration of the Zoning Code the power and discretion to decline to regulate that which the Zoning Code subjects to regulation. Section 1135.1 of the Zoning Code provides that:

*All \* \* \* officials and public employees of the city, vested with the duty and authority to issue permits or licenses, shall conform to the provisions of this Zoning Ordinance and shall not issue any permit or license for any use, building or purpose in conflict with the provisions of this Zoning Ordinance. Any permit or license issued in conflict with the provisions of this Zoning Ordinance, shall be null and void and shall be of no effect whatsoever.*

(Emphasis added.)

{¶ 107} The majority rightly points out that there may be practical reasons why construction such as that involved here is not regulated. However, accommodation of these concerns is best addressed by a text amendment to the Zoning Code rather than a failure of enforcement.

{¶ 108} Based upon the Zoning Code definitions of "structure" and "accessory structure" and the undisputed evidence of the nature and location of the fire pit construction, and notwithstanding the zoning administrator's affidavit and the emails, I believe the trial court erred in finding no genuine issues of material fact as to whether the fire pit construction is subject to the side-yard setback regulations applicable to the R-2 zone.

{¶ 109} The majority also suggests that the Baruks are somehow "stuck" with the zoning administrator's interpretation because they did not contest it and/or join the City as a party to this action.

{¶ 110} The majority cites *Moore*, 2012-Ohio-3897, in support of its allusion that the Baruks are bound by the zoning administrator's determination because they did not contest it by way of a declaratory judgment action or administrative appeal. First, R.C. 713.13 and Section 1135.7 of the Zoning Code grant a private right of action to a neighboring property owner, who is specially damaged by a zoning violation, to enjoin and abate the violation.<sup>5</sup> Notably, neither the statute nor the Zoning Code condition the exercise of this private right of action upon exhaustion of any other available remedy. *See Matter v. Rittinger*, 4th Dist. Ross No. 1385, 1988 WL 92408 (Aug. 26, 1988) (R.C. 713.13 is a special statute that may be availed of by any person coming within its terms regardless of other remedies available to him, including an administrative appeal). Additionally, if a municipality was intended to be a necessary party in a private action under R.C. 713.13, the General Assembly could have so provided but chose not to.

{¶ 111} Second, assuming the zoning administrator's communication to the Baruks that the fire pit construction was not regulated by the Zoning Code, gave the Baruks a right to appeal that determination to the City's Board of Zoning Appeals, the Nwankwos did not plead failure to exhaust administrative remedies as a defense. Failure to exhaust administrative remedies is an affirmative defense. *See Jones v. Chagrin Falls*, 77 Ohio St.3d 456 (1997); *Palmer v. Gray*, 12th Dist. Warren No. CA2011-04-034, 2011-Ohio-6796. The Nwankwos' failure to plead exhaustion as a defense constitutes a waiver and leaves the Baruks free to maintain this private action to enforce the Zoning Code. *See Marinich v. Lumpkin*, 12th Dist.

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5. The trial court's decision on summary judgment did not discuss whether the Baruks are a "specially damaged" neighboring property owner. I therefore assume this issue was not argued on summary judgment.

Warren No. CA2011-11-124, 2012-Ohio-4526.

{¶ 112} The majority also cites *Throckmorton*, 2000 WL 770554, for the proposition that the Baruks should have sought the issuance of a writ of a mandamus to compel the City to enforce its Zoning Code. Even so, in view of the private right of action provided by R.C. 713.13 and Section 1135.7 of the Zoning Code, it was unnecessary for them to do so and certainly not a prerequisite or prohibition to the maintenance of this private action.

{¶ 113} With respect and regard for my colleagues in the majority, I therefore dissent from their resolution of the first and second assignments of error, would reverse the trial court's grant of summary judgment to the Nwankwos with regard to the Baruks' claims that the fire pit construction violated the Zoning Code, and would remand for further proceedings relating to these causes of action.

# **Exhibit B**

✓ APR 2014  
COURT OF APPEALS  
WARREN COUNTY  
FILED

APR 14 2014

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO *James L. Spaeth, Clerk*  
WARREN COUNTY LEBANON OHIO

PETER BARUK, et al.,

Plaintiffs-Appellants,

- vs -

HERITAGE CLUB HOMEOWNERS'  
ASSOCIATION, et al.,

Defendants-Appellees.

CASE NO. CA2013-09-086

JUDGMENT ENTRY

12CV82577 ✓

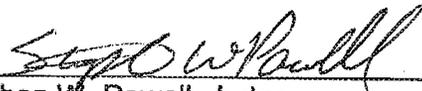
The assignments of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, affirmed in part and reversed in part and this cause is remanded for further proceedings according to law and consistent with the Opinion filed the same date as this Judgment Entry.

It is further ordered that a mandate be sent to the Warren County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be taxed 50% to appellants and 50% to appellees.



Robert P. Ringland, Presiding Judge



Stephen W. Powell, Judge

(Dissents)

Mike Powell, Judge

# **Exhibit C**

JUN 12 2014

IN THE COURT OF APPEALS OF WARREN COUNTY, OHIO  
*James L. Spain, Clerk*  
LEBANON OHIO

PETER BARUK, et al., : CASE NO. CA2013-09-086  
Appellants, : REGULAR CALENDAR  
vs. : ENTRY DENYING APPLICATION  
HERITAGE CLUB HOMEOWNERS' : FOR RECONSIDERATION AND  
ASSOCIATION, et al., : MOTION TO CERTIFY CONFLICT  
Appellees.

The above cause is before the court pursuant to an application for reconsideration filed by counsel for appellants, Peter and Rosa Baruk, on April 22, 2014; a motion to certify conflict filed by counsel for appellants on April 23, 2014; a memorandum in opposition to the motion to certify conflict filed by appellees, Evans and Cathy Nwankwo, on May 2, 2014; a memorandum in opposition to the motion to certify conflict filed by counsel for appellee, Heritage Club Homeowners' Association, on May 5, 2014; and reply memoranda in support of the application for reconsideration and motion to certify conflict filed by appellants on May 12, 2014.

When reviewing an application for reconsideration, this court determines whether the application calls the attention of the court to an obvious error in its decision, or raises an issue for consideration which was either not considered at all or was not fully considered by the court when it should have been. *Grabill v. Worthington Industries, Inc.*, 91 Ohio App.3d 469 (10th Dist.1993). An application for reconsideration is not designed for use in instances where a party simply disagrees with the conclusions reached and the logic used by an appellate court. *Jones v. Catholic Healthcare Partners, Inc.*, 7th Dist. Mahoning No. 11 MA 23, 2013-Ohio-3990.

In their application for reconsideration, the Baruks claim that this court must reconsider its decision on the first and second assignments of error, as well as a portion of the third assignment of error. Specifically, the Baruks claim that this court's majority opinion misapplied the rules of statutory construction by (1) considering evidence of the City of Mason's administrative action with respect to the city's zoning code, even though the code is unambiguous, and (2) rewriting the Zoning Code's setback requirements.

This court's decision, however, was not based upon an interpretation of the Zoning Code. Instead, the majority decision was based upon a strict application of Civ.R. 56 and the Baruks' failure to meet their reciprocal burden to submit evidence to refute the fact that construction projects such as the one undertaken by the Nwankwos are not regulated by the Mason City zoning or building code.

Although the Baruks disagree with this court's holding, an application for reconsideration is not designed for use under such circumstances. The Baruks have failed to call this court's attention to an obvious error in its decision, or raise an issue for consideration that was not considered at all or not fully considered when it should have been. The application for reconsideration is accordingly DENIED.

Courts of Appeal derive their authority to certify cases to the Supreme Court of Ohio from Section 3(B)(4), Article IV of the Ohio Constitution, which states whenever the judges of a court of appeal find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by another court of appeals of the state, the judges shall certify the record of the case to the

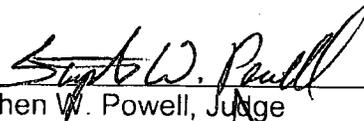
supreme court for review and final determination. For a conflict to warrant certification, it is not enough that reasoning expressed in the opinions of the two courts of appeal are inconsistent; the judgments of the two courts must be in conflict. *State v. Hankerson*, 52 Ohio App.3d 73, (2d Dist.1989).

The Baruks argue that this court's decision is in conflict with a decision by the Eighth District Court of Appeals, *Miller v. City of Cleveland*, 8th Dist. No. 36654, (Dec. 29, 1977), and a decision by the Fifth District Court of Appeals, *Gruber v. Ohio Dept. of Human Resources*, 98 Ohio App.3d 72 (5th Dist.1994). Both of these cases essentially hold that a court is not permitted to consider evidence of administrative construction to assist with interpreting a statute where the statute is unambiguous. However, as noted above, this court's decision was not based upon an interpretation of the Mason Zoning Code. Unlike the Eighth District's decision in *Miller* and the Fifth District's decision in *Gruber*, the decision in this matter was not based upon statutory interpretation, but upon strict application of Civ.R. 56. Therefore, the present decision is not in conflict with *Miller* or *Gruber*. The motion for certification is therefore DENIED.

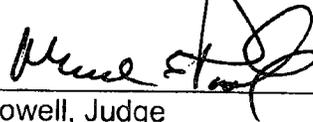
IT IS SO ORDERED.



Robert P. Ringland, Presiding Judge



Stephen W. Powell, Judge



Mike Powell, Judge