IN THE SUPREME COURT OF OHIO

THE CITY OF MARIETTA, Plaintiff-Appellee, v. BOARD OF TRUSTEES FOR WASHINGTON COUNTY WOMAN'S HOME, *et al.*, Defendants-Appellants.	)	CASE NO. _____ On Appeal from the Court of Appeals, Fourth Appellate District, Washington County, Case No. 19CA23

MEMORANDUM IN SUPPORT OF JURISDICTION APPELLANTS BOARD OF TRUSTEES FOR WASHINGTON COUNTY WOMAN'S HOME, MARY ANTONS, ORIANA HOUSE, INC. AND JAMES J. LAWRENCE

STEPHEN W. FUNK (0058506)*
**Counsel of Record*
EMILY K. ANGLEWICZ (0083129)
Roetzel & Andress, LPA
222 South Main Street, Suite 400
Akron, Ohio 44308
(330) 376-2700 (telephone)
(330) 376-4577 (facsimile)
sfunk@ralaw.com; eanglewicz@ralaw.com

Counsel for Appellants Board of Trustees for Washington County Woman's Home, Mary Antons, Oriana House Inc., and James J. Lawrence

PAUL BERTRAM, III (0041285)*
**Counsel of Record*
Marietta City Law Director
259 Butler Street, Suite 200
Marietta, Ohio 45750
Telephone: (740) 373-4171
paulgbertram3@mariettaoh.net

Counsel for Appellee, City of Marietta

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EXPLANATION OF WHY THIS CASE PRESENTS ISSUES OF PUBLIC AND GREAT GENERAL INTEREST

This case presents two important legal issues of public and great general interest that impact private property rights relating to the continuation and substitution of nonconforming uses under Ohio law. In *Akron v. Klein,* 171 Ohio St. 207, 168 N.E.2d 564 (1960), over sixty years ago, this Court adopted a proposition of law that established that the lawful, nonconforming use of property may be continued upon a change in ownership or tenancy as a matter of right if the new proposed use is of the "same kind" as the prior, nonconforming use. *Id.* at paragraph six of syllabus In *Akron v. Klein*, however, this Court did not define what constitutes a change in use, and it has not accepted any cases over the past 60 years involving the substitution of nonconforming uses. As a result, one of the leading zoning treatises has determined that "[i]t is difficult to provide accurate guidance on how to handle change of a nonconforming use" because "[m]any Ohio court decisions are not clearly supportable or consistent." Pearlman, Kenneth, et al., *Ohio Planning and Zoning Law*, § 7:6 (2020 Ed.).

Given this uncertainty and lack of guidance, the Fourth District Court of Appeals was forced to write a 73-page opinion that relied primarily upon cases from Oklahoma, Connecticut, and New Jersey to determine the legal standards that should govern whether a proposed use constitutes a "continuation" or "change" in a nonconforming use. *See Marietta v. Washington Cty. Woman's Home Bd. of Trustees*, 4th Dist. Washington No. 19CA23, 2020-Ohio-5411, ¶ 92-136, pp. 43-67 (Oct. 26, 2020) ("Opinion"). Although the parties agreed that the proposed use (a residential treatment facility by Oriana House) was defined by the Marietta zoning ordinance as constituting the same type of use as the former Woman's Home, the Fourth District nevertheless examined a number of inapplicable cases from Ohio and three other states to develop and impose a ***new***, *common law* two-factor test for deciding this issue.

As discussed more fully below, however, the Fourth District's two-factor test wrongfully imposes a new, judicial standard upon nonconforming uses that has never been adopted by the Ohio Supreme Court. Indeed, if the Ohio judiciary were to adopt this new common law standard, it should be adopted by the Ohio Supreme Court based upon the proper interpretation of Ohio law, not the common law of other states. Moreover, because the regulation of nonconforming uses can vary from jurisdiction to jurisdiction, the relevant legal standard should not be based upon common law at all; it should be determined by the definitions and use categories set forth in the local zoning ordinances, rather than by the imposition of a single, common law judicial standard. Accordingly, given that this Court's opinion in *Akron v. Klein* does not establish any legal standards for determining what constitutes the "same kind" of use, this Court should accept jurisdiction over this appeal in order to determine the proper legal standards that should be followed in determining whether a proposed use constitutes a "continuation" or "change" in a nonconforming use.

Second, this case presents an equally important question of law that impacts the proper rules of construction that govern all municipal zoning ordinances and township zoning resolutions throughout the State of Ohio. In *Cleveland Clinic Found. v. Cleveland Bd. of Zoning Appeals*, 141 Ohio St.3d 318, 2014-Ohio-4809, 23 N.E.3d 1161, this Court held that "[z]oning ordinances are to be construed in favor of the property owner because they are in derogation of the common law and deprive the property owner of uses to which the owner would otherwise be entitled." *Id.* at ¶ 34 (citations omitted); *Terry v. Sperry*, 130 Ohio St.3d 125, 2011-Ohio-3364, 956 N.E.2d 276, ¶ 19. Thus, this Court has held that "restrictions imposed on the use of private property via ordinance, resolution, or statute must be strictly construed, and the scope of the restrictions cannot be extended to include limitations not clearly prescribed." *Id*.

This Court, however, has not expressly adopted this rule of construction in interpreting zoning ordinances relating to nonconforming uses. While the First and the Seventh Districts have applied this rule of construction in interpreting zoning ordinances for nonconforming uses, *Ehemann Real Estate, Inc. v. Anderson Twp. Zoning Comm.*, 1st Dist. Hamilton No. C-190002, 2020-Ohio-1091, ¶ 1, 18, 27; *Lamar Advertising v. Boardman Twp. Bd. of Zoning Appeals*, 7th Dist. Mahoning No. 08 MA 210, 2009-Ohio-6755, ¶ 1, 3, 28-29, 55-56, 65; the Second District (and now the Fourth District) have adopted a different rule of construction for nonconforming uses, which provides that such ordinances should be construed in accordance with "the intent of zoning ordinances 'to eliminate such nonconforming uses as rapidly as possible.'" (Opinion, pg. 40) (citing *Kettering v. Lamar Outdoor Advertising, Inc.*, 38 Ohio App.3d 16, 18, 525 N.E.2d 836 (2d Dist. 1987), and *Key-Ads, Inc. v. Dayton Bd. of Zoning Appeals*, 2014-Ohio-4951, 23 N.E.2d 266, ¶ 19 (2d Dist.)). As a result, the Fourth District has imposed a zoning restriction on Oriana House's lawful nonconforming use of the Property that was not "clearly prescribed" by the Marietta Zoning Ordinance itself. Accordingly, this Court should accept jurisdiction over this appeal in order to resolve this inter-district conflict and make clear that the rules of construction set forth in *Cleveland Clinic* and *Terry* apply to zoning ordinances regulating nonconforming uses.

Both of the foregoing questions of law present important legal issues of public and great general interest because every municipal zoning ordinance and township zoning resolution in the State of Ohio must adopt legal standards governing "the completion, restoration, reconstruction, extension, or substitution of nonconforming uses." *See* R.C. 713.15 and R.C. 519.19. Every municipality, county, and township in Ohio, therefore, has a strong interest in having the Ohio Supreme Court determine the proper legal standards governing the continuation or substitution of

nonconforming uses under *Akron v. Klein*, and in determining the proper rules of construction for zoning regulations that govern nonconforming uses. Indeed, while the language of zoning ordinances may vary from city to city, all municipalities have an interest in the relevant legal standards that govern nonconforming uses. Moreover, all property owners have a strong and compelling interest in ensuring that zoning restrictions cannot be imposed on the use of their private property unless "clearly prescribed," *even if* their proposed use is a continuation or change in a lawful nonconforming use. Accordingly, the Court should accept jurisdiction over both propositions of law in order to clarify and establish the legal standards that apply to the continuation and substitution of nonconforming uses.

STATEMENT OF THE CASE

A. Factual Background

This appeal presents two legal issues relating to the lawful, nonconforming use of a 16-bedroom residential home located at 812 S. Third Street in Marietta, Ohio, which is presently owned by the Board of Trustees for the Washington County Woman's Home and being leased to Oriana House, Inc. for a residential treatment facility under the terms of a real estate purchase agreement that has not yet closed. In this regard, it is undisputed that Section 1105.01 and Section 1135.04(e) of the Marietta Zoning Ordinance provide that the nonconforming use of a property may be continued as a matter of right upon a change of ownership or tenancy by obtaining a use and occupancy permit from the City Engineer. (Opinion, pp. 23-24). Moreover, Section 1105.03 provides that "[a]ny lawful nonconforming use of a building or land may be changed to another nonconforming use of the same classification *once as a matter of right*, provided that before any such change may occur the party desiring the same shall obtain a use and occupancy permit pursuant to Section 1135.04." (*Id.*) (emphasis added).

Here, the Parties have agreed that the zoning category that best defines the use of the property by the Woman's Home is set forth in Section 1113.02(g)(4) of the Marietta Zoning Ordinance because it is a "nonprofit institution with sleeping accommodations" that provided "not more than twenty-five percent of the floor area" for "central office purposes." (Compl. ¶ 18, Answer, ¶ 18). The Parties further agreed that Oriana House's use of the property is also defined by the Marietta Zoning Ordinance as a "nonprofit institution with sleeping accommodations" that provides "not more than twenty-five percent of the floor area" used for "central office purposes." (Compl. ¶ 18); (Affidavit of James Lawrence ¶ 2). Thus, Marietta has conceded that Oriana House's use of the Property falls within the "same use classification" as the Woman's Home for purpose of determining whether a "change" in nonconforming uses would be permitted under Section 1105.03 of the Zoning Ordinance. (Compl. ¶ 21).[1]

Given that Sections 1105.01 and 1105.03 expressly permit the "continuation" of a nonconforming use upon a change in ownership or tenancy, or a "change" in nonconforming uses "once as a matter of right," by obtaining a use and occupancy permit from the City Engineer, Oriana House properly applied for and obtained a use and occupancy permit from Marietta on October 5, 2018. (Compl. ¶ 22-23, Ex. B). Under Section 1135.07, in fact, the City Engineer has a mandatory duty to issue the use and occupancy permit if he or she "determines that an application for . . . [a] use and occupancy permit is in compliance with this Zoning Ordinance." *Id.* ("If the City Engineer determines that an application for a building or use and

[1] In this regard, Marietta's standards for authorizing a change in nonconforming uses in Section 1105.03 is significantly broader than the "same kind" standard discussed in *Klein* because it allows for the substitution of any nonconforming use "once as a matter of right" so long as the nonconforming uses fall within the same zoning use "classification." While both the Woman's Home and Oriana House are defined by the Marietta Zoning Ordinance as falling within the same category of use, the fact remains that Marietta's standard for the substitution of nonconforming uses would permit changes in different types or categories of nonconforming uses so long as they fall within the same zoning classification. (*Id.*)

occupancy permit is in compliance with the provisions of this Zoning Ordinance, he shall issue the appropriate permit") (emphasis added). Accordingly, once the City Engineer determined that Oriana House's application for a use and occupancy permit complied with the relevant zoning requirements for the continuation or change in nonconforming uses, he had a mandatory obligation to grant a use and occupancy permit for the proposed use as a matter of right. *Id*.

Indeed, once the City Engineer granted the use and occupancy permit to Oriana House on October 5, 2018, the City Engineer's decision was final unless a timely appeal was filed "within a reasonable time" under Section 1137.05 of the Zoning Ordinance. It is undisputed, however, that no appeal was ever filed within a reasonable time under Section 1137.05. Rather, over six months after Oriana House was granted a use and occupancy permit by the City Engineer, the City of Marietta Law Director filed a Complaint for Injunctive Relief on April 17, 2019, that sought to enjoin, under R.C. 713.13, Oriana House's use of the Property based solely upon the allegation that Oriana House was required to apply for a discretionary, special use permit from the Planning Commission *in addition* to the use and occupancy permit granted by the City Engineer under Section 1135.04. The Law Director's new argument, however, ignored the plain language of Sections 1105.01 and 1105.03, which expressly provides that a change in ownership or a change in nonconforming uses may be approved as a matter of right upon obtaining a use and occupancy permit from the City of Engineer.

B. The Lower Court's Opinion

In its 73-page opinion, the Fourth District reviewed and decided two (2) legal issues relating to the proposed use of the property by Oriana House: (1) whether Oriana House's use of the property constitutes a "continuation" of a lawful, nonconforming use under *Akron v. Klein*, and (2) even if it were a "change" in use, whether Defendants would have been permitted to

change non-conforming uses "once as a matter of right" upon obtaining an use and occupancy permit from the City Engineer, as provided by Section 1105.03, or whether Oriana House was required to obtain a special use permit from the Planning Commission. (Opinion, pg. 5-6).

Upon review, the Fourth District decided the second issue first, concluding that Oriana House was required to obtain a special use permit from the Planning Commission to effectuate a "change" in use, even though the language of Section 1105.03 did not impose such a requirement, but expressly permitted a "change" in nonconforming uses "once as a matter of right" upon obtaining a use and occupancy permit from the City Engineer. (Opinion, pp. 34-43). The Court of Appeals then analyzed whether Oriana House's use constituted a "change" or "continuation" in the prior, nonconforming use under the Supreme Court's decision in *Akron v. Klein*. (Opinion, pp. 43-67). With respect to this issue, the Fourth District reviewed other appellate court opinions in Ohio and several other states to develop its own two-factor test for determining whether a proposed use is a "continuation" or "change" in a prior, nonconforming use. (Opinion, pp. 43-67). The Fourth District then remanded the case for a trial on whether Oriana House's use of the Property constitutes a "continuation" or "change" in use based upon the two-factor test set forth on Pages 66-67 in its Opinion. (Opinion, pp. 66-72).

APPELLANTS' PROPOSITIONS OF LAW

I. Proposition of Law No. 1: A Lawful, Nonconforming Use May Be Continued Upon A Change In Ownership Or Tenancy As A Matter of Right If The New Owner's or New Tenant's Proposed Use Is Defined By The Applicable Zoning Ordinance As Being The Same Kind Of Use As The Prior, Nonconforming Use.

Appellants' first proposition of law asks this Court to determine the proper legal standards for deciding whether a lawful nonconforming use constitutes the "same kind" of use as a prior, nonconforming use under this Court's decision in *Akron v. Klein*, 171 Ohio St. 207, 168 N.E.2d 564 (1960). In *Akron v. Klein*, this Court established the legal principle that

nonconforming use status is not extinguished by change in ownership or tenancy and that, where, as here, a zoning ordinance provides for the "continuation" of nonconforming uses, the right to continue the lawful nonconforming use of the Property applies to the new proposed use of the property so long as it is of the "same kind" as the prior, nonconforming use. *Id.* at syllabus ¶ 6 ("Where a zoning ordinance provides that the lawful use of any land or premises existing at the time of its enactment may be continued as a nonconforming use, such ordinance continues the right to use land or premises in a residential-use district in a business of the same kind as, although it does not represent any continuation or part of, the particular business that was being conducted on such land or premises at the time of enactment of such zoning ordinance").

This well-established principle of zoning law is based upon the premise that nonconforming status attaches to the land itself, and that the owner has the right to continue a lawful, nonconforming use, even if the land is sold or leased to a third party. *See Beth Jacob Congreg. v. City of Huber Hts. Bd. of Zoning Appeals*, 2d Dist. Montgomery No. 16650, 1998 WL 125568, *4 (Mar. 20, 1998); *Amherst Twp. Bd. of Trustees v. Eschtruth*, 9th Dist. Lorain No. 3762, 1985 WL 10681, *2 (Apr. 17, 1985) (citing *Klein*). As one leading zoning treatise explains, if "[t]he owner of the land would be unable to sell all of his rights in the land and in the use thereof, and, being out of possession of the land, could not exercise the right to nonconforming use," then "[s]uch an inability to sell and convey the rights then appurtenant to the land would result in the uncompensated loss of the right to use the land in conformity . . and, in appropriate cases, the extent of the loss may be held as an unconstitutional 'taking' of property." Rathkopf, Arden H., *The Law of Zoning and Planning*, § 72:20 (4th ed. 2020).

In *Akron v. Klein*, however, this Court did not establish any legal standards for determining what constitutes a "continuation" or "change" in a nonconforming use, and over the

past 60 years, it has not decided any cases involving the continuation or substitution of nonconforming uses. As a result, the Fourth District was forced to examine numerous unreported appellate court cases and cases from other jurisdictions (Oklahoma, Connecticut, and New Jersey) in order to determine what legal standard should be applied. (Opinion, pp. 43-67). Most of the Ohio cases cited in the Fourth District's Opinion and some of the out-of-state cases, however, are clearly inapplicable because they did not involve a change in use, but instead involved the proposed expansion or extension of a nonconforming use, or the abandonment or reconstruction of a nonconfoming use.[2] Moreover, the cases relating to the substitution of nonconforming uses were actually based upon different and significantly more restrictive legislative standards than set forth in Section 1105.03 of the Marietta Zoning Ordinance.[3]

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[2] *See QRP Dayton Properties, LLC v. Jefferson Twp. Bd. of Zoning Appeals*, 2d Dist. Montgomery No. 25984, 2014-Ohio-2209 (whether nonconforming junk yard that sold salvaged automobile parts may be expanded to permit the sale of scrap metal); *Ledford v. Bd. of Zoning Appeals*, 171 Ohio App.3d 24, 2007-Ohio-1673, 869 N.E.2d 113, ¶ 38 (2d Dist.) (whether nonconforming towing and automobile parts retail business may be expanded to permit the construction of a new "automobile repair garage"); *Aluminum Smelting & Refining Co., Inc. v. Denmark Twp. Bd. of Zoning Appeals*, 11th Dist. Ashtabula No. 2001-A-0050, 2002-Ohio-6690 (whether landfill owner "abandoned" lawful nonconforming use); *City of Kettering v. Lamar Outdoor Advertising, Inc.*, 38 Ohio App.3d 16, 525 N.E.2d 836 (2d Dist. 1987) (whether sign company may reconstruct a nonconforming sign that was damaged); *Bowling Green v. Violet*, 6th Dist. No. 85-CR-B-311, 1986 WL 2682, *2 (Feb. 28, 1986) (whether landlord's nonconforming was enlarged or extended due to the increase in the number of tenants); *Hunziker v. Grande*, 8 Ohio App.3d 87, 456 N.E.2d 516 (8th Dist. 1982) (increase in proportion of retail sales did not constitute unlawful "extension" or "expansion" of nonconforming use); *Zachs v. Zoning Bd. of Appeals*, 589 A.2d 351, 353 (Conn. 1991) (deciding whether the addition of eight new antenna on telecommunications tower "expanded" the existing, nonconforming use); *State v. Wagner*, 81 N.J. Super. 206, 195 A.2d 241 (1963) (whether increase in number of tenants in apartment house was an "enlargement" or "extension" of nonconforming use).

[3] *See Triangle Fraternity v. City of Norman ex rel. Norman Bd. of Adjustment*, 63 P.3d 1, 3 (Okla. 2002) (city's zoning ordinance expressly provided that a nonconforming use may not be "[c]hanged to another nonconforming use"); *Fellowship House Ministries v. Zoning Board of Appeals of City of Groton*, No. CV960538805, 1997 WL 728917 (Ct. Super. Nov. 13, 1997) (zoning code authorized change in nonconforming use only if Planning and Zoning Commission determined that "the new use will have a lesser impact upon the surrounding area than the old

After conducting a lengthy review of the case law, the Fourth District then developed and adopted a new, common law standard that requires the trial court to examine two factors in determining whether a proposed use constitutes a "change or continuation" of a nonconforming use: (1) whether "the addition of items or activities fundamentally changes the nature of the use" and (2) whether "the succeeding use has a greater impact on the surrounding community than the preceding nonconforming use." *Id.* Thus, even though these two factors are not set forth in the Marietta Zoning Ordinance itself, the Fourth District has imposed this new judicial standard upon the parties in this case.

This is important because, if the Ohio judiciary is going to impose a judicial standard for determining whether there has been a continuation or change in a nonconforming use, then such a judicial standard should be adopted by the Ohio Supreme Court based upon its examination of Ohio law, not upon a review of conflicting appellate court opinions and the case law of other states. In fact, it is Appellants' position in their first Proposition of Law that the Fourth District should not have adopted a uniform judicial standard for deciding this issue. Rather, this issue should have been decided based upon the plain language of the Marietta Zoning Ordinance, which defined both uses as falling within the same category of use, *i.e.*, they are both defined as "nonprofit institutions with sleeping accommodations" that provide "not more than twenty-five percent of the floor area" for "central office purposes." (Opinion, pg. 25). It is the City of Marietta's Zoning Ordinance, therefore, that should be controlling in determining that Oriana House's use of the property constitutes a "continuation" of the "same kind" of use under both *Akron v. Klein* and Section 1105.01 of the Marietta Zoning Ordinance.

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one"); *Herres v. Harrison Twp. Bd. of Trustees*, 2d Dist. Montgomery No. 23668, 2010 WL 3292047, *4 (township zoning resolution required property owner to apply to the BZA to substitute a nonconforming use, which "shall not be of greater intensity and shall be more compatible with the neighborhood").

Indeed, if the City of Marietta had wanted to adopt the Fourth District's two-factor test for determining whether a use is a "continuation" or "change" in a nonconforming use, then it should have adopted this two-factor test in the Marietta Zoning Ordinance itself. It did not so, and it is not up to the courts to fill-in the gap by imposing standards that were not adopted by the municipality itself. In Ohio, in fact, the General Assembly specifically mandates that the legislative authority of all municipalities and townships must adopt legislative standards for the substitution of nonconforming uses. *See* R.C. 713.15 and 519.19. By so doing, the General Assembly ensures that all property owners in Ohio have advance notice about what specific zoning standards and requirements apply to the continuation and substitution of nonconforming uses. To the extent that Marietta's Zoning Ordinance does not define what constitutes a "continuation" or "change" in a nonconforming use, therefore, then the ambiguity created by this lack of a statutory definition should be construed in favor of the property owner, and should not be used to impose a two-factor judicial standard that is not "clearly prescribed" by the zoning ordinance itself. *Cleveland Clinic Found.*, 141 Ohio St.3d 318, 2014-Ohio-4809, 23 N.E.3d 1161, at ¶ 34; *Terry*, 130 Ohio St.3d 125, 2011-Ohio-3364, 956 N.E.2d 276, at ¶ 19.

Here, it is undisputed that Marietta's Zoning Ordinance does not define what constitutes the "continuation" or "change" in a nonconforming use. Moreover, while many cities or townships have adopted more restrictive standards for the substitution of nonconforming uses, the City of Marietta has actually adopted *extraordinarily liberal* standards for permitting the continuation and/or change of nonconforming uses as a matter of right. In *Herres v. Harrison Twp. Bd. of Trustees*, for example, the township zoning resolution authorized a change in nonconforming uses only if the Board of Zoning Appeals determined that the new use was not "of greater intensity" and was "more compatible with the neighborhood." *Id.*, 2010-Ohio-3909,

at ¶ 18. By contrast, Section 1105.03 of the Marietta Zoning Ordinance provides that the first change in use may be granted "once as a matter of right" by the City Engineer so long as it falls within the same "classification" as the prior nonconforming use. Moreover, Section 1105.03 provides that the Planning Commission's granting of a special exception only is required for "subsequent changes" after the first change in use and, in so doing, sets forth specific standards for obtaining such approval from the Planning Commission, which must find that the new use does "not materially adversely affect the health or safety of the proposed use and shall not be materially detrimental to the public welfare or injurious to property or improvements in such neighborhood." (*See* Opinion, pp. 23-24) (quoting Section 1105.03 of Marietta Zoning Ordinance). By imposing its own two-factor test, therefore, the Fourth District has imposed a judicially-created standard for nonconforming uses that was not legislatively adopted and clearly prescribed by the Marietta Zoning Ordinance itself.

In this regard, the proper resolution of this important legal issue affects more than the City of Marietta and the four Defendants in this case. By imposing its own two-factor standard on whether a use is a "continuation" or a "change" in a nonconforming use, the court of appeals has not only wrongfully imposed its own judicial standard upon the parties and all property owners in the City of Marietta; it has imposed its own judicial standard upon all cities, townships, and property owners in the Fourth District. Moreover, since this Court has not addressed this issue for sixty years since *Akron v. Klein*, and there is absence of clear guidance on this issue from the other appellate districts, the Fourth District's new precedent threatens to establish a new legal precedent that may be followed by other appellate districts and trial judges throughout the State of Ohio. Accordingly, in order to clarify its 60-year-old precedent in *Akron*

v. Klein and to determine the legal standards that should govern the continuation and substitution of nonconforming uses, this Court should accept jurisdiction over this appeal.

II. Proposition of Law No. 2: Zoning Ordinances Governing Nonconforming Uses Are Subject To The Same Rules Of Construction As All Other Zoning Ordinances, And Must Be Construed In Favor Of The Property Owner And Not Extended To Impose Restrictions That Are Not Clearly Prescribed.

As previously discussed, this Court has repeatedly held that "[z]oning ordinances are to be construed in favor of the property owner because they are in derogation of the common law and deprive the property owner of uses to which the owner would otherwise be entitled." *Cleveland Clinic Found.*, 141 Ohio St.3d 318, 2014-Ohio-4809, 23 N.E.3d 1161, at ¶ 34; *Terry*, 130 Ohio St.3d 125, 2011-Ohio-3364, 956 N.E.2d 276, at ¶ 19. This well-established rule of construction does not merely mean that zoning ordinances must be construed in favor of the property owner if they are ambiguous. Rather, it also means that the courts should not impose restrictions or limitations on the use of property unless they are "clearly prescribed" by the zoning ordinance itself. *Id.* Thus, as this Court explained in *Cleveland Clinic, supra*, the Supreme Court has "long held that restrictions imposed on the use of private property via ordinance, resolution, or statute must be strictly construed, and the scope of the restrictions cannot be extended to include limitations not clearly prescribed." *Id.*, citing *Saunders v. Clark Cty. Zoning Dept.*, 66 Ohio St.2d 259, 261, 421 N.E.2d 152 (1981).

This Court, however, has not expressly held that this rule of construction applies to zoning ordinances governing nonconforming uses.[4] While, as previously discussed, there are at least two appellate districts (the 1st and the 7th) that have followed this rule of construction in

[4] We note that this Court's opinion in *Boice v. Ottawa Hills*, 137 Ohio St.3d 412, 2013-Ohio-4769, 999 N.E.2d 649, cites this rule of construction in a case involving non-conforming lots, but the issue presented in that case involved the denial of a variance by the zoning commission under the "practical difficulties" standard. *Id.* at ¶ 10, 13-16.

interpreting zoning ordinances on nonconforming uses, the 2d (and now the 4th) have held that zoning ordinances governing nonconforming uses should be construed in a different manner because the "intent" of such ordinances "is to eliminate such nonconforming uses as rapidly as possible." (Opinion, pg. 40) (citing *Kettering*, 38 Ohio App.3d at 18, 525 N.E.2d 836). In so doing, the Fourth District explicitly rejected Appellants' argument that any ambiguity in Marietta's zoning ordinances should be construed in favor of the property owner, and imposed its own restrictions on the continuation or substitution of nonconforming uses, even though they were not "clearly prescribed" by Sections 1105.01 and 1105.03 of the Marietta Zoning Ordinance. (Opinion, pp. 40-41, 66-67).

There is no reason, however, why zoning ordinances governing the continuation and substitution of nonconforming uses should be construed any differently than any other type of zoning ordinance. All zoning ordinances impose restrictions on the use of private property, and thus a municipality's legislative authority should be required to adopt "clearly prescribed" standards if it wants to restrict or limit the continuation or substitution of nonconforming uses. Indeed, if the City of Marietta had wanted to require Planning Commission approval for the "first" change in nonconforming uses, then it could and should have "clearly prescribed" this zoning requirement in Chapter 1105 of the Zoning Ordinance, which set forth the zoning requirements for nonconforming uses. It did not do so. Instead, Section 1105.03 provides that the first change in use may be granted "as a matter of right" upon obtaining a use and occupancy permit from the City Engineer, and that Planning Commission approval is necessary only for "subsequent uses" based upon the legal standards set forth therein. Accordingly, by failing to follow the Supreme Court's rules of construction, the Fourth District has wrongfully imposed a zoning restriction upon Oriana House's use of the Property that is not "clearly prescribed" by

Sections 1105.01 and 1105.03 of the Marietta Zoning Ordinance, which are the operative provisions governing the continuation and substitution of nonconforming uses.

Again, this issue does not merely affect the City of Marietta and the four Defendants in this case. It affects the rules of construction that apply to *all* zoning ordinances and resolutions throughout the State of Ohio because, by statute, they all must prescribe regulations governing the substitution of nonconforming uses. *See* R.C. 713.15 and 519.19. There is presently an inter-district conflict on this issue that, unless resolved by the Ohio Supreme Court, would affect how all nonconforming use provisions are construed and interpreted throughout the State of Ohio. Accordingly, in order to resolve this inter-district conflict and make clear that this rule of construction applies to all zoning ordinances and resolutions, including the regulation of nonconforming uses, the Court should accept jurisdiction of this appeal.

CONCLUSION

For these reasons, the Court should accept jurisdiction over this appeal.

Respectfully submitted,

/s/ Stephen W. Funk
Stephen W. Funk (0058506)*
**Counsel of Record*
Emily K. Anglewicz (0083129)
ROETZEL & ANDRESS, LPA
222 South Main Street, Suite 400
Akron, Ohio 44308
(330) 376-2700 (telephone)
(330) 376-4577 (facsimile)
sfunk@ralaw.com; eanglewicz@ralaw.com

Counsel for Appellants
Board of Trustees for Washington County
Woman's Home, Mary Antons,
Oriana House Inc., and James J. Lawrence

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of December, 2020, a true and correct copy of the foregoing *Memorandum in Support of Jurisdiction* was served via electronic mail and via regular U.S. mail, postage pre-paid, upon the following counsel of record for the Appellee in this case:

Paul Bertram, III
Marietta City Law Director
259 Butler Street, Suite 200
Marietta, Ohio 45750
paulgbertram3@mariettaoh.net

Counsel for Appellee, City of Marietta

/s/ Stephen W. Funk
Stephen W. Funk