IN THE CUYAHOGA COUNTY COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

RONALD J.H. O'LEARY, et al., Appellants vs. CITY OF CLEVELAND, et al., Appellees	Case No. CV-23-976612 (Consolidated with Case No. CV-23-976603) Judge Brian Mooney **LMM'S NOTICE OF CORRECTED TABLE OF CONTENTS AND TABLE OF AUTHORITIES**

Appellee Lutheran Metropolitan Ministry ("LMM"), by and through its undersigned counsel, hereby submits a corrected version of the table of contents and table of authorities for its Brief of Appellee Lutheran Metropolitan Ministry, filed yesterday, November 6, 2023. Due to a technical error, several page numbers were incorrectly numbered in the filed version of the table of contents and table of authorities, and the section heading "IV. THE RECORD SUPPORTS A SPECIAL PERMIT FOR THE PROPERTY" was omitted from the table of contents. The attached table of authorities also corrects citations to the Ohio Basic Building Code. All cited authorities and the substance of the brief remain the same.

Dated: November 7, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on November 7, 2023, a true and correct copy of the foregoing was filed electronically with the Clerk of Court through the Court's electronic filing system. Notice of this filing will be sent to all parties of record by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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IN THE CUYAHOGA COUNTY COURT OF COMMON PLEAS
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RONALD J.H. O'LEARY, et al., Appellants, vs. CITY OF CLEVELAND, OHIO BOARD OF ZONING APPEALS et al., Appellees.	)	**Case No. CV-23-976612** (Consolidated with Case No. CV-23-976603) Judge Brian Mooney

BRIEF OF APPELLEE LUTHERAN METROPOLITAN MINISTRY

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

RESPONSES TO ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: To grant a variance, C.C.O. 329.03(c) requires the BZA to find the conditions set forth in C.C.O. 329.03(b) are met. The BZA explicitly found that LMM satisfied all three conditions, concluding that "[l]ocal conditions and the evidence presented justify the BZA in granting relief from practical difficulty and unnecessary hardship caused by strict compliance with specific provisions of the zoning ordinances" and "[r]efusal of the variance would deprive the owner of substantial property rights and granting the appeal will not be contrary to the purpose and intent of the Zoning Code." Should the Court therefore affirm the BZA's decision?

ASSIGNMENT OF ERROR NO. 2: Since charitable institutions are permitted in the applicable zoning district under C.C.O. 337.02(g)(3)(G) and 337.03(b), LMM did not need a use variance and therefore was not required to prove unnecessary hardship. Should the Court affirm the BZA's decision granting a use variance where LMM nonetheless presented sufficient evidence establishing unnecessary hardship under C.C.O. 329.03(b)(1)?

ASSIGNMENT OF ERROR NO. 3: Because LMM did not need a use variance, it was not required to demonstrate that the property cannot be used for any permitted purpose. Regardless, LMM presented overwhelming evidence to the BZA that it used the property as a charitable institution under C.C.O. 337.02(g)(3)(G) and 337.03(b), and would suffer unnecessary hardship were the variance denied. Since LMM presented the required evidence, should the Court affirm the BZA's finding of an unnecessary hardship?

ASSIGNMENT OF ERROR NO. 4: LMM is a nonprofit organization and has used the property as a charitable institution. Should the Court affirm the BZA's finding of unnecessary hardship where LMM established that the denial of a variance would deprive it of its right to provide charitable services to homeless youth?

ASSIGNMENT OF ERROR NO. 5: LMM stepped into the shoes of Lutheran Family Services, which owned and used the property as a charitable institution long before the 1985 rezoning created the 30-feet setback nonconformity under C.C.O. 337.02(g)(3). Should the Court affirm the BZA's finding that LMM would be deprived of its substantial property rights without a variance where LMM intends to continue its historic use of the property as a charitable institution?

ASSIGNMENT OF ERROR NO. 6: C.C.O. 337.02(g) and 337.03(b) expressly permit non-residential uses, including charitable institutions, in two-family residential districts. LMM's use of the property is therefore consistent with the Zoning Code's purpose and intent. Should the Court therefore affirm the BZA'a decision to grant LMM a variance?

ASSIGNMENT OF ERROR NO. 7: LMM presented sufficient evidence establishing that all seven *Duncan v. Middlefield* factors weigh in favor of granting an area variance. The BZA also expressly found that LMM would suffer practical difficulty were the variance denied. Should this Court therefore affirm the BZA's decision granting the area variance?

STATEMENT OF THE CASE

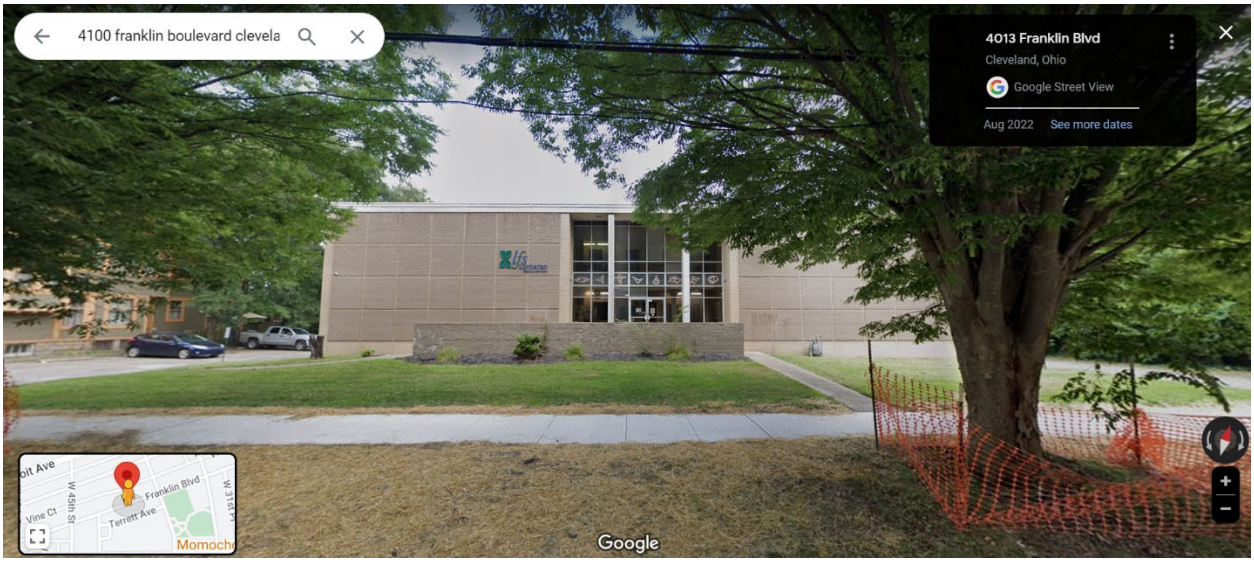
Lutheran Metropolitan Ministry ("LMM") owns the property and building located at 4100 Franklin Boulevard in Ohio City ("Property"). The Property has been used as a charitable institution providing charitable family and social services since it was built in 1965. LMM intends to continue to use the Property as a charitable institution to address a critical need: providing targeted services to homeless youth and supporting those at risk of becoming homeless. LMM submitted plans to the Zoning Administrator for renovations to the Property to optimize it for these intended services. Because the building is within 30 feet of an adjoining residential property on its eastern boundary, the Zoning Administrator decided that LMM required a variance or special permit from the City of Cleveland Board of Zoning Appeals ("BZA"). The BZA granted LMM a variance after reviewing substantial written evidence, including an expert report, and hearing testimony from those who both supported and opposed LMM's intended renovations. A neighboring property owner, Appellant Ronald O'Leary ("O'Leary"), appealed the BZA's decision to grant LMM a variance.

The BZA's decision was in no way "unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record," as it granted LMM a variance only after reviewing and considering the extensive factual and memorializing its findings that LMM met the conditions required by C.C.O. 329.03(b). Accordingly, this Court should affirm the BZA's decision to grant a variance that will allow LMM to meet the charitable needs of our community.

STATEMENT OF THE FACTS

I. BACKGROUND AND PROCEDURAL HISTORY

LMM is a non-profit organization that owns the Property at issue in this appeal: a building and land used as a charitable institution[1] since 1965 located at 4100 Franklin Boulevard in Cleveland. (Record Transmitted to Court of Common Pleas from Cleveland Board of Zoning Appeals, Case No. CV-23-976612 (Apr. 27, 2023) ("R.") at 73.)



The Property was used as a charitable institution long before O'Leary decided to buy the house next door, and it has been used as a charitable institution in the nearly twenty years since.[2] While Appellant prefers that LMM "sell the Property to a developer" for demolition and construction of luxury houses that "would sell quickly at a high price," (O'Leary Brief, at 23–

[1] The Eighth District Court of Appeals defines "charitable institution" as "[a]ny group of persons who band together for a charitable purpose and maintain headquarters for the purpose of dispensing charity to the needy . . . ." *Foley v. City of Cleveland*, 7 Ohio Law Abs. 116, 116 (Ohio Ct. App. 1929). LMM "is organized and formed for the exclusive purpose of engaging in charitable, religious, educational, social service and scientific activities within the meaning of § 501(c)(3) of the Internal Revenue Code." (R. at 58.) Under O.R.C. § 1716.01(A)(1), charitable organizations include "[a]ny person that is determined by the internal revenue service to be a tax exempt organization pursuant to section 501(c)(3) of the Internal Revenue Code."

[2] This Property was owned, and the building operated as a charitable institution, by Lutheran Family Services ("LFS") from 1965-2017, at which time LFS and LMM merged. (R. at 142.) References herein to LMM include LFS for the period before 2017.

24), he cannot credibly complain that LMM would prefer to use its Property in a manner more consistent with its charitable mission: to be a "Christian ministry of service" to "those who are oppressed, forgotten, and hurting."[3] Appellant's goal is simple: obstruct, delay, and interfere with LMM's charitable mission of serving the poor at this Property, particularly when "residential property values in Ohio City are extremely high." (O'Leary Brief, 32.) While Appellant's priorities are rooted in naked self-interest and property values, LMM has a different priorities for its Property.

LMM has provided charitable social and family services at the Property since 1965: services for children, youth, and families; adoption services and related family counseling; behavioral health services; individual and group counseling, education, and support; workforce education and training; benefits assistance; case management; and family events. (R. at 73.) LMM intends to continue its use of the Property as a charitable institution by partnering with A Place 4 Me and the Cuyahoga County Office of Homeless Services to operate the region's only facility providing targeted services to young people experiencing homelessness and housing instability. (*Id.*) The intended services include benefits assistance, case management, counseling, education, job placement assistance, and housing placement assistance. (*Id.*) These services are entirely consistent with LMM's charitable mission and its historic use of the Property. (*Id*.) A Place 4 Me has had clients coming to its offices without incident, before and after relocating to the Property on August 1, 2023.[4] (*See* R. at 207.) LMM's proposed

[3] https://www.lutheranmetro.org/who-we-are/about-us/ (last visited Oct 3, 2023).

[4] On June 9, 2023, a fire at the YWCA Greater Cleveland severely damaged the offices of A Place 4 Me, displacing its staff indefinitely. Smoke and water damage forced A Place 4 Me from its space at the YWCA. *See* LMM's Notice of Intent, or in the Alternative, Motion to Modify Stay filed on July 7, 2023. This Court held that LMM's "allowance for A Place 4 Me to conduct its operations from the Property at issue in this matter is consistent with the COO, the Property's permitted zoning use, and the Court ordered stay." *See* Order dated July 26, 2023.

renovations will enhance the Property for the most effective delivery of charitable services to those in need.

From a zoning perspective, Appellant ignores two facts of critical legal significance. First, providing charitable services has always been a permitted use in the zoning district where the Property is located. Before 1985, the Property was in a multifamily district that permitted "charitable institutions" if they were at least 15 feet from neighboring properties. *See* C.C.O. 337.08(e);[5] (R. at 383.) Since 1985, the Property has been in a two-family residential district, the regulations for which allow all uses permitted in one-family districts, including "charitable institutions not for correctional purposes" like LMM's use of the Property. *See* C.C.O. 337.03(b). The present nonconformity in the building's location only arose from the change in zoning in 1985 that increased the setback for charitable institutions in two-family district from 15 to 30 feet. *See* C.C.O. 337.02(g)(3)(G). LMM's proximity nonconformity is grandfathered. (R. at 136, 383.) Second, the Property's Certificate of Occupancy ("COO") explicitly allows the owner to use the building for charitable, social, and family services. (*See* R. at 170.)

In April 2022, LMM submitted plans to the City for interior and exterior building renovations, including adding a rear vestibule, patio, a new privacy fence, and repaving the parking lot. (R. at 56.) On May 13, 2022, the Zoning Administrator issued a Notice of Non-Conformance indicating that LMM needed to obtain a variance or special permit to continue its use of the building as a charitable institution based on the building's location within 30 feet from an adjoining residential property. (R. at 72.)

[5] All cited provisions of the Cleveland Codified Ordinances and Ohio Basic Building Code are attached as Exhibit A.

LMM appealed the Administrator's decision to the BZA, and alternatively requested the BZA to grant a variance or special permit. (R. at 56, 64.) A public hearing was held on February 6, 2023, at which time numerous supportive witnesses testified in favor of the variance, and LMM presented an expert report, written evidence supporting its request, and the testimony of multiple stakeholders. (*See* R. at 56–64; 73–74; 79–81; 134–47, 214–284, 315–40, 463–87, 489–578.)

At the conclusion of the hearing, the BZA unanimously approved (by a 4-0 vote) a variance subject to certain conditions. On March 13, 2023, the BZA ratified its decision to grant LMM a variance. (R. at 54–55.)

O'Leary filed his appeal of the BZA's decision to grant LMM a variance on March 16, 2023. (*See* Notice of Appeal, Case No. CV-23-976612.) Because Appellant cannot meet his burden to demonstrate that the BZA's decision was "unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record," this Court should deny his appeal.

II. EVIDENTIARY RECORD CONSIDERED BY THE BZA

The BZA held a public hearing on February 6, 2023, at which time it acknowledged reviewing the existing record of written materials submitted from both sides in advance of the hearing. (*See* R. at 222, Hearing Transcript ("Tr.") at p. 9:7–10.) The evidence considered by the BZA included:

1. LMM's long history of using the Property as a charitable institution and providing similar social services there.[6] (R. at 73.)

[6] (*See* R. at 73 ("There is a history of providing social services at the proposed site . . . The history includes services to children, youth and families: adoption services and related family counseling and supports; behavioral health services including counseling, education and support for individuals and groups; workforce education and training; youth parenting and other educational groups; benefits assistance and case management; and family events.

2. The Cleveland Landmarks Commission determination that LMM's proposal would "not adversely affect any significant historical or aesthetic feature of the property and [wa]s appropriate and consistent with the spirit and purposes of the Landmarks Commission." (R. at 81.)

3. The variety of existing uses at nearby properties on Franklin Boulevard, including commercial, multi-family, a youth hostel, and other charitable institutions, including a men's homeless shelter and short-term transitional housing. (R. at 135; R. at 145 (listing uses other than one- and two- family residences on Franklin Blvd.); *see also* R. at 224, Tr. at p. 11:3–24.) These properties include:

    a. St. Herman's House uses the property at **4410 Franklin** as a charitable institution with a mission "to shelter and support homeless men on the path to well-being and independence and meet the basic needs of people in our community."[7] The St. Herman's property provides year-round emergency shelter to 28 homeless men and "three meals a day, 365 days a year, to anyone in need," serving more than 33,000 meals a year at the property. *Id.* Homeless men also come to the property every day for free clothing, on-site case management, and toiletry kits "are handed out daily as needed." *Id.* Transitional housing is provided "three doors down from the main house" and is occupied by up to 12 men at a time. *Id.*

    b. The property at **3806 Franklin** operates commercially as the Stone Gables Inn, a boutique hotel that accommodates guests 24 hours a day, 365 days a year.[8] All guests have access to the property through a code provided by the hotel and may come and go as they please. *Id.*

    c. The property at **4308 Franklin** also operates commercially as Franklin Castle, monetizing its claim to be the "Most Haunted House in Ohio."[9] It is open to the public for paid tours during the day and offers multiple rooms available for overnight stays at the property. *Id.* Rooms "are often

. . . The [Property] will provide services targeted to young people ages 16-24 experiencing homelessness or who are housing unstable. The services provided within the facility . . . will remain consistent within a social services framework, including: basic needs, behavioral health services, benefits assistance, case management and counseling, education, job placement assistance, housing placement assistance and other related support.").)

[7] https://sainthermans.org/our-work/ (last visited Oct 3, 2023); (*see also* R. at 128).

[8] https://stonegablesinn.com/ (last visited Oct 3, 2023).

[9] https://thefranklincastle.com/stay-the-night-at-franklin-castle/ (last visited Oct 3, 2023).

reserved hundreds of days in advance – and booked up quickly." *Id*. at FAQ. Overnight guests at the property "may leave and come back to Franklin Castle whenever they want." (*Id.*)

d. The property at **3600 Franklin** operates commercially as Franklin Plaza, a nursing home with 178 certified beds.[10] (R. at 135.) It holds itself out as "[l]ocated in bustling Ohio City," and has a "secured dementia unit," hospice care, and "long-term and extended care" in which residents live in "private suites."[11]

e. St. Paul's Community Church UCC at **4427 Franklin Blvd** operates an "Outreach Center" that provides a food pantry, clothing ministry, and assistance with birth certificates and ID vouchers, medical assistance, a thrift store, and space for associated services provided by other organizations and groups.[12] (R. at 224; Tr. 11:16–18.)

4. Evidence of a "critical need" in the community for charitable services for young people experiencing, or at risk for, homelessness. (R. at 196.) The evidence showed that LMM would operate "the only center of its kind in Cuyahoga County focused exclusively on youth and young adults ages 16 to 24 who are experiencing homelessness or housing instability." (R. at 199.) The Cleveland Planning Department's neighborhood planner assigned to the area, Matt Moss, testified that homeless youth in Ohio City and in Cleveland need the services offered by LMM and that such services "are chronically under-resourced." (R. at 256–57.)

5. Professor Alan Weinstein[13] provided an expert report concluding that the BZA "should grant a variance allowing the 3.8% enlargement or expansion of the existing structure. The requested variance is minimal and does not bring the structure closer

[10] https://www.medicare.gov (last visited Oct 16, 2023).

[11] https://www.lhshealth.com/franklin-plaza/ (last visited Oct 3, 2023).

[12] https://www.stpaulscommunityucc.org/outreach (last visited Oct 16, 2023).

[13] Professor Weinstein holds a Masters in City Planning from the Massachusetts Institute of Technology and a law degree from the University of California-Berkeley. He was a tenured professor in both the College of Law and College of Urban Affairs at Cleveland State University ("CSU") until his retirement after thirty years as a faculty member in 2019.

to the adjoining properties." (R. at 145.) Professor Weinstein also stated that "the most critical criteria in Chapter 329 . . . relate to meeting 'a community need without adversely affecting the neighborhood' and ensuring that the character of the neighborhood will be preserved. . . . [T]he Two-Family zoning for this neighborhood allows a variety of both residential and non-residential uses and the current uses reflect that." *Id.* Professor Weinstein noted that "there are a large number of existing uses in the neighborhood that are more intensive than one or two family dwellings." *Id.* Professor Weinstein reiterated his opinions in live testimony at the BZA hearing. (*See* R. at 223–24, Tr. at pp. 10:11–25; 11:1–2.)

6. LMM's counsel explained that "[a] practical difficulty 'inheres in and is peculiar' to the Property" because of unique history and location, including the "impracticality of moving the Property or the neighboring building[.]" (*Id.*) "As such, strict application of the Code creates a practical difficulty not generally shared by other land or buildings in the same district." (*Id.*)
7. The COO issued in 2009 for the Property. The record established that LMM proposed a continuation of the charitable uses that have been available at the Property since 1965, such that "[d]enying the variance w[ould] deprive LMM of substantial property rights," and "granting the variance w[ould] not be contrary to the purpose and intent of the provisions of the Code [a]s best evidenced by the COO for the charitable and office use of the Property." (R. at 169.) Professor Weinstein testified similarly. (R. at 223–25.)
8. The lack of evidence of issues at the Property in the past. LMM's CEO, Maria Foschia, testified that LMM has never received a citation from the City related to its

maintenance and upkeep of the Property. (R. at 260, Tr. at p. 47:2–4.) Ms. Foschia also responded to each of the hypothetical concerns of loitering and public safety raised by opponents. She testified that: (1) the Property would provide security personnel on site trained in de-escalation techniques in a trauma informed manner (R. at 259, Tr. at p. 46:7–13); (2) the Property would have a "no weapons policy" (*Id*. at p. 46:13–14); (3) LMM would ensure all clients have a place to go after leaving the Property, providing them transportation or bus passes if needed (R. at 273, Tr. at 60:12–19); and (4) LMM would communicate with Cleveland's Second District Police to address any issues that may arise (*Id.* at p. 60:20-25 and R. at 274, Tr. at p. 61:1–3).

9. Letters from thirty Cleveland residents to the BZA supporting LMM's application for a variance or special permit. (*See* R. at 315–40, 463–87, 489–578.) Collectively, these letters conveyed to the BZA the essential need in the community to provide services to young people experiencing homelessness and housing insecurity. (*Id.*) The letters reinforced to the BZA that the Property was specifically chosen because of its location, accessibility to public transit, and proximity to other important resources in the community. (*Id.*)
10. The support of the Clinton-Franklin Block Club. (R. at 580.) At a meeting held on January 27, 2023, the Block Club voted 30-21 in support of the project. (*Id.*)
11. Professor Weinstein's report (R. at 138–46), which included a discussion of a special permit as an independent alternative to a variance. (R. at 143–45.)

The BZA also received written correspondence and heard testimony from others in opposition, much of which rested on unfounded assumptions about the prospective clients that

would receive services at the Property. This included repeated use of the word "radical" to describe LMM's proposal: a "radical changing use" for a "radically different population." (R. at 231, 234.)

Other objections included complaints about LMM's care for the Property (for which there was no support in the record), complaints that LMM was foregoing "best practices" by not operating in a retail or industrial area as opposed to a residential area, that LMM's building was not close enough to public transportation, and that LMM (a nonprofit) was somehow driven by greed as opposed to the best interests of the homeless youth it intends to serve.

Cleveland neighborhood planner Matt Moss voiced his skepticism of the opponents' various assertions:

> I think it's challenging and I would encourage the Board as much as I can to interrogate the concerns of harm and best practice and the demands for information and data from LMM and the Appellant and these negative externalities that you've heard referred to in the testimony that it's difficult I think to make a decision or have an informed opinion when those are inferred rather than clearly specified.

(R. at 257.) Mr. Moss specifically refuted the opponents' suggestion that a residential area was not appropriate for these services, noting "the fact that other services in Ohio are not located in a residential or areas like this that are considered safe, comforting, soothing to users of this service is not necessarily a standard that we should look to replicate here in Cleveland." (R. at 258.)

After considering and weighing all the evidence submitted before and during the hearing, the BZA issued its decision (R. at 54–55) granting LMM a variance ("Resolution"). The Resolution specifically noted the following evidence in the record:

- The Property is an "***existing legal non-conforming charitable institution***" in a two-family residential district.

- Professor Weinstein's testimony that the Property ***"will meet a community need without altering the character of the neighborhood as there are "far more" intense uses nearby***[.]"

- Professor Weinstein's testimony that the area around the Property is already service oriented, "including an 8 unit apartment building, a small boutique hotel, a youth hostel, an emergency shelter and an outreach center in the same block and across the street is a convalescent facility."

- Ms. Foschia's testimony that "***the specific location was picked as it is less intimidating to the clients than a retail or industrial area***. She stated that they will provide social services, parenting classes, bus passes, and similar services; they will help them find overnight accommodations off site. She said there will be security on site and there will be a 'no weapons' policy."

- Community member testimony that the building is appropriately sized and has ample parking.

- Cleveland City Planner testimony that "***the use will provide a service that is greatly needed and the location is ideal as it [is] very accessible by public transit.***"

- Thirty letters of support from members of the community.

(R. at 54) (emphases added).

After describing this relevant evidence, the BZA made several factual findings, including that "**[l]ocal conditions** and the **evidence presented** justify the BZA in granting relief from **practical difficulty** and **unnecessary hardship** caused by strict compliance with specific provisions of the zoning ordinances." (R. at 55) (emphasis added). Moreover, it found that "[r]efusal of the variance would **deprive the owner of substantial property rights** and granting the appeal will **not be contrary to the purpose and intent of the Zoning Code**." (*Id.*)

Contrary to Appellant's assertions, the BZA received and considered "substantial, reliable, and probative evidence in the record" far exceeding the preponderance standard to support the BZA decision to grant LMM a variance for the Property. This Court should affirm the BZA.

STANDARD OF REVIEW

R.C. § 2506.04 expressly authorizes the Court to affirm the BZA if, after a review of the complete record, the decision is supported by "the preponderance of substantial, reliable, and probative evidence." R.C. § 2506.04. It is well settled Ohio law that a board of zoning appeals is given wide latitude in deciding whether to grant or deny a variance. *See Schomaeker v. First Nat'l Bank*, 66 Ohio St. 2d 304, 309, 421 N.E.2d 530, 535 (1981) ("A zoning board or planning commission which is given the power to grant variances is vested with a wide discretion with which the courts will not interfere.").

It is also well-settled that in administrative proceedings, "the agency is the trier of fact, and decides issues of credibility." *Nuwin Realty, LLC v. City of Englewood*, 2017-Ohio-480, 84 N.E.3d 346, ¶ 73 (2d Dist.) (*citing Univ. of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 111, 407 N.E.2d 1265 (1980)). "Due to the nature of administrative review by common pleas courts," the court "should defer to the determination of the administrative body, which, as the factfinder, had the opportunity to observe the demeanor of the witnesses and weigh their credibility." *Id.* The BZA explicitly cited testimony it heard during the February 6, 2023 hearing from LMM's expert, LMM's Chief Executive Officer, others who testified both for and against. The BZA's decision to grant LMM a variance reflected the BZA's assessment of the weight and credibility of the testimony, which counsels in favor of deference to the BZA decision.

Moreover, whether a hardship exists to "justify the issuance of a variance is a question of fact to be determined by the zoning board." *Schomaeker*, 66 Ohio St. 2d 304 at 309. The BZA's decision has "a presumption of validity," and a complaining party has an affirmative burden to show that a zoning board acted improperly. *See Marino v. City of Cleveland*, No. 40575, 1980 WL 354601, at *5 (Ohio Ct. App. Mar. 20, 1980) ("The decision of the Board, a public body, is

accorded a presumption of validity and upon appeal of the decision under R.C. 2506, the burden is upon the appellants to show that the decision was erroneous.").

LAW AND ARGUMENT

Far more than a preponderance of the evidence in the record established that BZA's decision to grant LMM a variance complied with the factors in C.C.O. 329.03(b) and 359.01(a). Appellant has failed to meet his considerable burden to show that the BZA decision was unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record. Accordingly, the Court should affirm the BZA's decision.

C.C.O. 329.03(b) authorizes the BZA to grant a variance under the following conditions:

> (1) The practical difficulty or unnecessary hardship inheres in and is peculiar to the premises sought to be built upon or used because of physical size, shape or other characteristics of the premises or adjoining premises which differentiate it from other premises in the same district and create a difficulty or hardship caused by a strict application of the provisions of this Zoning Code not generally shared by other land or buildings in the same district;
>
> (2) Refusal of the variance appealed for will deprive the owner of substantial property rights; and
>
> (3) Granting of the variance appealed for will not be contrary to the purpose and intent of the provisions of this Zoning Code.

Ohio has two different types of variances: use and area. *See Schomaeker*, 66 Ohio St. 2d 304 at 307. A ***use variance*** allows "land uses for purposes other than those permitted in the district as prescribed in the relevant regulation." *Id.* In contrast, an ***area variance*** involves structural or lot restrictions on the property. *Id.* The Property at issue did not require a use variance, and the evidentiary record supported BZA's grant of an area variance for the Property, as set forth in more detail below.

I. THE PROPERTY DID NOT REQUIRE A USE VARIANCE.

LMM was not required to obtain a use variance to continue operating as a charitable institution at the Property. Therefore, Appellant's Assignment of Error Nos. 1, 2, 3, 4, 5, and 6, as applied to use variances under C.C.O. 329.03(b)-(c), are without merit. Indeed, the alleged nonconformity identified by the Zoning Administrator, and affirmed by the BZA, concerned the building's location within 30 feet of the adjoining residential property. This is not a "nonconforming use" as defined in the Zoning Code, but instead is nonconforming building location related to the 30-feet setback requirement.

Appellant is incorrect that the 1985 rezoning prohibited charitable institutional uses at the Property or somehow only allowed one-family and two-family residential uses on Franklin Boulevard. (O'Leary Brief, at 29). As described above, Sections 337.02(g)(3)(G) and 337.03(b) expressly permit the use of a property as a charitable institution in two-family residential districts. The COO issued by the City for the Property explicitly allows the very use intended by LMM: charitable, social, and family services. (*See* R. at 169–70).

Appellant cannot seriously argue that LMM's historic and intended use of the Property is anything other than as a charitable institution. The record is replete with evidence that the Property has been used as a charitable institution since 1965, and that LMM seeks to continue to do so. (*See* R. at 58, 73, 136.) Further, the Zoning Administrator described the building as an "existing legal non-conforming charitable institution." (R. at 72.) The BZA likewise acknowledged that LMM's use was an "existing legal non-conforming charitable institution." (*See* R. at 54.) O'Leary did not appeal these determinations.[14] Given the COO, the Zoning

[14] Appellant therefore has waived any such arguments. *See Tsakalos v. Kraus*, No. 68137, 1995 WL 558893, at *2 (Ohio Ct. App. Sept. 21, 1995) (holding appellant waived defense by not raising the defense in its brief to the trial court); *Mulhausen v. Ohio Couns., Soc. Worker & Marriage & Fam. Therapy Bd.*, 2007-Ohio-3917,

Administrator's and the BZA's acknowledgments, as well as the written submissions and testimony, there is no basis for Appellant to claim that the Property has not been used as a charitable institution as allowed in its two-family zoning district.[15] LMM therefore did not require a use variance.

The Ohio Supreme Court confirmed in an analogous case that this "is not a pure use variance" but "is merely an area variance." *See Kisil v. Sandusky*, 12 Ohio St. 3d 30, 31, 465 N.E.2d 848, 849 (1984) ("The conversion of appellant's property to a duplex would not need the approval of the commission but for the fact that the lot on which the residence is situated is below the minimum area and yard requirements contained in the city zoning provisions."). This Court should reject Appellant's attempt to frame his appeal through the inappropriate lens of "use." The only proper issue before this Court is whether Appellant has met his burden to show that the BZA erred in its assessment of factors relevant to an area variance, not a use variance.

II. THE BZA DID NOT ERR IN GRANTING LMM AN AREA VARIANCE.

LMM requested the BZA to grant an area variance so that it could move forward with its plan to make certain improvements to the Property, including adding a rear vestibule and patio,

¶ 14 ("It is well-settled that arguments not raised below cannot be raised for the first time on appeal. 'Below' includes issues not raised at the administrative level.").

[15] Relatedly, O'Leary's repeated characterization of the building's nonconformity as a business use based on the reference in the COO to the building's "B-Business occupancy classification" is disingenuous. (O'Leary Brief, at 7, 28, 32, 35.) The occupancy classification is a reference to the Ohio Basic Building Code ("OBC") and is germane only for purposes of the OBC regulations governing the construction of buildings. The OBC's purpose is "to establish uniform minimum requirements for the erection, construction, repair, alteration, and maintenance of buildings, including construction of industrialized units." OBC §101.3 (OAC § 4101:1-1-01). The OBC classifies buildings according to use and occupancy in order "*to organize and prescribe the appropriate features of construction and occupant safety requirements for buildings*…." OBC §301.1 (OAC § 4101:1-3-01) (italics in original). Those provisions were "***not established for compliance with any conditions of licensure which are outside the jurisdiction of this code.***" *Id.* (italics in original, emphasis added). The OBC classification has no bearing on, and is not an approval, of a particular use. Rather, the Zoning Code alone controls what uses are allowed in two-family districts. Appellant's argument does not change the record or the plain language of the Zoning Code: charitable institutions are permitted uses in two-family residential districts, and a use variance was not needed.

repaving the parking lot, and adding a privacy fence. (R. at 56.) These proposed changes relate exclusively to the scope of area variances. *See Schomaeker*, 66 Ohio St. 2d 304 at 307 ("Area variances do not involve uses, but rather structural or lot restrictions. An example of an area variance is relaxation of setback lines or height restrictions."). Appellant's Assignment of Error Nos. 1, 5, 6, and 7 capture elements of C.C.O. 329.03(b)-(c) that the BZA must find to grant an area variance. The BZA correctly found that LMM satisfied each element.

A. The *Duncan* Factors.

C.C.O. 329.03 governs the BZA's authority to grant area variances. Unlike use variances, an area variance needs to meet a "practical difficulty" standard, not "unnecessary hardship." *Kisil*, 12 Ohio St.3d 30 at 33 ("It is sufficient that the application [for an area variance] show practical difficulties."); *see also Phillips v. City of Westlake Bd. of Zoning Appeals*, 2009-Ohio-2489, ¶ 43; *Duncan v. Middlefield*, 23 Ohio St.3d 83, 86, 23 Ohio B. 212, 491 N.E.2d 692 (1986).

In *Duncan*, the Ohio Supreme Court enumerated seven factors that a BZA should consider when applying the practical difficulty test. *Id.* The *Duncan* factors are:

> (1) whether the property in question will yield a reasonable return or whether there can be any beneficial use of the property without the variance; (2) whether the variance is substantial; (3) whether the essential character of the neighborhood would be substantially altered or whether adjoining properties would suffer a substantial detriment as a result of the variance; (4) whether the variance would adversely affect the delivery of governmental services (*e.g.*, water, sewer, garbage); (5) whether the property owner purchased the property with knowledge of the zoning restriction; (6) whether the property owner's predicament feasibly can be obviated through some method other than a variance; (7) whether the spirit and intent behind the zoning requirement would be observed and substantial justice done by granting the variance.

23 Ohio St.3d at 86. These factors are non-exhaustive, and no single factor controls. *Vang v. City of Cleveland*, 8th Dist. Cuyahoga No. 106519, 2018-Ohio-3312, ¶ 7.

Furthermore, a zoning board's failure to mention the *Duncan* factors in deciding whether an area variance is appropriate does not preclude the Court from affirming the variance. *See Phillips*, 2009-Ohio-2489, ¶ 60 (affirming area variance even where "the BZA did not discuss every *Duncan* factor, nor did it mention *Duncan* explicitly").

B. Because The Evidence Resolves Each *Duncan* Factor In LMM's Favor, Assignment Of Error No. 7 Fails.

The evidence in the BZA record supports the conclusion that each *Duncan* factor weighs in LMM's favor. LMM addresses each factor in turn below.[16]

1. Whether the property in question will yield a reasonable return or whether there can be any beneficial use of the property without the variance.

The Ohio Supreme Court holds that the "key to the [practical difficulties] standard is whether the area zoning requirement, as applied to the property owner in question, is reasonable." *Duncan*, 23 Ohio St.3d 83 at 86 (emphasis added). As noted above, LMM is a charitable institution that has provided social services at the Property for decades. (R. at 136.) The non-profit context of LMM's ownership of the Property necessarily informs the analysis of the *Duncan* factors for an area variance.

As a nonprofit, LMM's ability to provide services needed by our community depends on the generosity of its donors. The outside funding that this project received was presented to the BZA at the hearing. (R. at 230; Tr. at 17:15-18:2.) That funding is critical to LMM's ability to operate at the Property. (*Id.*) The improvements to the Property permitted by the variance will enhance LMM's provision of charitable services at the Property from multiple perspectives, including its effectiveness, the advancement of its mission, and the safety of clients and

[16] The BZA considered the entire record before it, which is 856 pages long. (*See* R. at 1–856.) Contrary to O'Leary's suggestion, the record contains extensive evidence supporting the BZA's grant of the variance. For the sake of brevity, LMM does not address all points in favor of granting the variance, but this Court may decide the case based on the entirety of the record, as the BZA did.

neighbors. (R. at 196, 326–27; R. at 274, Tr. at p. 61:13–24.) The BZA may grant an area variance where denial of the variance would diminish the quality of a building for a particular use. *See Dyke v. City of Shaker Hts.*, 8th Dist. Cuyahoga No. 83010, 2004-Ohio-514, ¶ 14 (affirming BZA grant of an area variance where the Planning Director testified that "[t]here is no question there is an impact for the developer" where the denial of a variance would diminish the quality of the proposed building). Here, the record establishes that the denial of a variance would diminish the suitability of the Property to provide charitable services and would deprive LMM of a reasonable return on the Property in its charitable context.

2. Whether the variance is substantial.

Professor Weinstein noted that LMM's proposed changes to the Property would "neither expand or enlarge the portions of the structure . . . nor lessen the distance between the building and the neighboring property which is the basis for the building being a non-conforming structure." (R. at 141.) Professor Weinstein further noted that the square footage would increase by less than 4%. (*Id.*) Simply put, the requested area variance was not substantial by any measure.

Appellant admits that the proposed improvements will result in a "relatively small increase in the improved area of the Property." (O'Leary Brief, at 33.) His argument that the addition of a patio will impermissibly increase noise at the Property fails for two reasons. First, it attempts to impose artificial constraints on LMM's existing right to utilize the Property's outdoor space through the variance process. Appellant, LMM, and the rest of the neighboring property owners are all subject to the City's relevant noise ordinances, which underscores the irrelevance of a speculative increase in noise in the variance context. Second, the record demonstrates that the impact on neighboring properties of adding an outdoor patio would be minimal. A large parking lot currently separates the proposed patio from Appellant's property,

and the Property itself is between the other adjacent property and the patio. (*See* R. at 90.) To mitigate any potential effects from increased use of the Property's outdoor space, LMM plans to add a 6-foot privacy fence between the Property and Appellant's property. Moreover, unlike the other non-residential properties on Franklin Boulevard, LMM has proposed reasonably restricted hours of operation at the Property. (R. at 90, 74.) The record supports that the variance is not substantial. *See Dyke*, No. 83010, 2004-Ohio-514 at ¶ 59 (affirming the BZA's grant of a variance and finding that reducing the setback requirements from 100 to 35 feet and permitting a nonconforming building height and fence were not substantial). This factor weighs in favor of BZA's decision to grant a variance.

3. *Whether the essential character of the neighborhood would be substantially altered or whether adjoining properties would suffer a substantial detriment as a result of the variance.*

The record demonstrates that the proposed changes to the exterior of the Property are insignificant. Repaving the parking lot and adding a patio at the back of the building will not alter the character of the neighborhood, and these improvements will not cause a "substantial detriment" to any "adjoining properties," as detailed above. To the contrary, the BZA record contains expert testimony and letters from community members supporting the improvements as consistent with the character of the neighborhood. (*See* R. at 145, 334, 337.) The Cleveland Landmarks Commissions approved of the proposed improvements, finding that they "will not adversely affect any significant historical or aesthetic feature of the property and is appropriate and consistent with the spirit and purposes of the Landmarks Commission." (R. at 79–81; R. at 268–69; Tr. at pp. 55–56.)

An area variance does not alter the "essential character" of a neighborhood where the same or similar uses are common in the area. *Kisil*, 12 Ohio St.3d 30 at 33 (affirming grant of area variance approving conversion of a single-family home to a duplex where such use was

common in the neighborhood). In the Resolution granting the variance, the BZA relied on Professor Weinstein's testimony that the Property "will meet a community need without altering the character of the neighborhood as there are 'far more' intense uses nearby including an 8 unit apartment building, a small boutique hotel, a youth hostel, an emergency shelter and an outreach center in the same block and across the street is a convalescent facility." (R. at 10.) The Resolution also cites Professor Weinstein's testimony that "the area is already service oriented." (*Id.*)

Moreover, there is no evidence in the record that an area variance will result in a substantial detriment to the neighbors. Grasping at straws, appellant tries to use LMM's good faith offer to incorporate additional security measures at the Property against it. (O'Leary Brief, at 34.) This circular argument ignores that LMM offered to add those security measures in response to the specious concerns raised by opponents like Appellant, not because LMM expects security issues to occur. (*See* R. at 279; R. at 279–80, Tr. at pp. 66:18–25; 67:1–2.) This Court should reject Appellant's self-serving attempt to capitalize on LMM's offer to work with its neighbors.

The other asserted "substantial detriments" referenced in Appellant's brief (*i.e.*, trash and maintenance of the Property) are contradicted by the record. As Ms. Foschia testified, LMM has never been cited for a maintenance violation at the Property. (R. at 260, Tr. at p. 47:2–4.) A variance allowing LMM to further improve the Property will benefit the neighbors and the youth served at the Property. Accordingly, this factor also weighs in favor of a variance.

4. *Whether the variance would adversely affect the delivery of governmental services (e.g., water, sewer, garbage).*

There is no evidence in the record suggesting that LMM's requested area variance would affect the delivery of governmental services to the community. *See, e.g.*, *DiSanto Ents., Inc. v.*

Olmsted Twp., 8th Dist. Cuyahoga No. 90728, 2008-Ohio-6949, ¶ 27 (finding *Duncan* factor satisfied where there is no evidence in the record that the proposed changes would create special complicating conditions for the delivery of government services).

Appellant instead attempts to shoehorn into this factor unfounded *predictions* of increased criminal activity by clients served at the Property. (O'Leary's Brief, at 34–35.) This speculation is contradicted by the actual evidence in the record reflecting no instances of criminal activity by the client population. (R. at 207, 265–66; Tr. at pp. 52:24–25; 53:1–2) ("our experience with the population to be served" at the Property is "we haven't had any crime arise."); *See also* R. at 207 ("What is the expected impact on crime in the neighborhood? A Place 4 Me staff provide . . . services to young adults at the YWCA of Greater Cleveland office. That building has had no increase or impact in crime on account of the young people who access it for support.") Any suggestion that an area variance would adversely affect the ability of the Cleveland Division of Police to deliver services to the community is completely inconsistent with the record before the BZA. This Court should disregard Appellant's unsupported allegations about LMM's clients (R. at 266; Tr. at p. 53:19–23) and find that this factor weighs in favor of a variance.

5. *Whether the property owner purchased the property with knowledge of the zoning restriction.*

O'Leary wrongly suggests that LMM should be treated as a knowing purchaser of a property who later attempts to change its zoning restrictions. (O'Leary Brief, at 28.) This argument ignores the Ohio Revised Code and fundamental principles of property law which confirm that LMM stepped into the shoes of LFS with respect to the Property when the two entities merged in 2017. (R. at 38.)

O.R.C. § 1702.44(A)(3) states that upon merger of two entities, "the surviving or new entity possesses all assets and property of every description and every interest in the assets and property, wherever located, the rights, privileges, immunities, powers, franchises, and authority, of a public as well as of a private nature, of each constituent entity." R.C. § 1702.44(A)(3). Here, LMM was the surviving entity after the merger and effectively stands in LFS's shoes. *See Berardi v. Ohio Turnpike Commission*, 1 Ohio App. 2d 365, 370, 205 N.E.2d 23, 28 (Ohio Ct. App. 1965) (noting that an acquirer "'stands in the same shoes' as to the rights of the prior owner in the same property, thereby giving the subsequent owner the same rights and obligation as the original owner had in regard to the property.").

Regardless, in the area variance context, a "property owner is not denied the opportunity to establish practical difficulties . . . simply because he purchased the property with knowledge of the zoning restrictions." *Duncan*, 23 Ohio St.3d at 86. Accordingly, this factor weighs in favor of a variance.

6. Whether the property owner's predicament feasibly can be obviated through some method other than a variance.

The unique characteristics of the Property's structure, location, and history as a charitable institution make it ideally suited for LMM's purposes. The renovations allowed by the area variance are crucial to the optimal delivery of charitable services at the Property. In granting the variance, the BZA had the benefit of extensive evidence regarding the unique characteristics of the Property, including:

- Ms. Foschia's testimony that the "specific location . . . was picked as it is less intimidating to the clients than a retail or industrial area," and with the renovations, the Property will allow clients to "access food in the kitchen, clothing and personal hygiene items, wash clothes in the laundry room, shower, and take a break in the living room, dining room, or library." (*See* R. at 54, 73.)

- It will also provide a small computer lab for guests to use for various purposes (*e.g.*, job search, online education, virtual connections for services), as well as multiple charging pods. (*Id.*)

- The Property was the only one that met all six of the criteria used by the stakeholders that selected the location for the charitable services. (R. at 201.)

The BZA and this Court have held a variance is necessary before LMM can make the requested improvements to the Property. (*See* R. at 54; *LMM v. City of Cleveland*, Case No. 23-CV-976603, Order dated Sep. 13, 2023.) This predicament cannot be obviated without a variance. *See DiSanto Ents., Inc.*, 2008-Ohio-6949, ¶ 28 (finding factor satisfied where property owner made unsuccessful attempts to obtain permission from the city to make requested changes). Thus, this factor weighs in favor of a variance.

7. Whether the spirit and intent behind the zoning requirement would be observed and substantial justice done by granting the variance.

This factor largely mirrors the requirement under Section 329.03(b)(3) that the variance "not be contrary to the purpose and intent of the provisions of this Zoning Code," discussed below in Section III(D). Appellant relies on former Councilwoman Helen Smith's statements to argue that the variance is inconsistent with the spirit and intent of the zoning requirement. (O'Leary's Brief, at 35–36.) His argument fails for several reasons.

Since the Zoning Code expressly permits charitable institutions in two-family residential districts, the only reason that the Property is considered "nonconforming" is because the building is less than 30 feet from its eastern property line. (R. at 72.) The proposed improvements to the Property do not exacerbate this de minimis and preexisting area nonconformance, and therefore would not harm to the intent or spirit of the zoning laws. Rather, refusing a variance would unreasonably prevent LMM from using the Property as a charitable institution in furtherance of its mission and as permitted by the zoning laws. *See Duncan*, 23 Ohio St.3d 83 at 86 ("[A] property owner encounters 'practical difficulties' whenever an area zoning requirement (*e.g.*,

frontage, setback, height) unreasonably deprives him of a permitted use of his property."). Accordingly, this factor weighs in favor of granting the variance.

As set forth above, Appellant has failed to meet his burden to challenge the BZA's decision to issue a variance to LMM. The evidence in the record shows that LMM met the requirements of C.C.O. 329.03(b) and the *Duncan* factors for an area variance. This Court should uphold the BZA's decision to grant LMM a variance.

III. THE BZA DID NOT ERR IN GRANTING LMM A USE VARIANCE.

Appellant fails to meet his burden to challenge the BZA's decision even if this Court were to evaluate it as a use variance instead of an area variance. An applicant for a use variance must show that the restrictions of the current zoning ordinance create an "unnecessary hardship." *Kurtock v. Cleveland Bd. of Zoning Appeals*, 2017-Ohio-8890, ¶ 11. An objective review of the BZA record shows that LMM satisfies the standard in Section 329.03(b) and would support a use variance at the Property.

A. Because The BZA Expressly Found That LMM Met Each Section 329.03(B) Requirement, Assignment Of Error No. 1 Fails.

Appellant incorrectly asserts that the BZA failed to find that LMM met the three requirements of C.C.O. 329.03(b). (O'Leary Brief, at 16.) This is rebutted by the BZA's express findings in its Resolution:

> ***Local conditions*** *and* ***the evidence presented*** justify the Board in granting relief from ***practical difficulty*** and ***unnecessary hardship*** caused by strict compliance with specific provisions of the zoning ordinances. Refusal of the variance would ***deprive the owner of substantial property rights*** and granting the appeal will ***not be contrary to the purpose and intent of the Zoning Code***.

(R. at 55) (emphasis added). Despite Appellant's suggestion to the contrary, the BZA was not required to make additional findings to grant a variance. *See Kurtock*, 2017-Ohio-8890, ¶¶ 20–21 (affirming grant of use variance where BZA resolution stated "refusal of the variance w[ould]

create an unnecessary hardship" and "that without the variance, [appellee] will be deprived of substantial property rights and the variance is 'not contrary' to the purpose and intent of the [Z]oning [C]ode.").

The BZA considered the entire record, which supports its findings under Section 329.03(b). The evidence shows that LMM and the community would suffer unnecessary hardship without a variance. LMM has used the Property as a charitable institution for decades, providing the same types of services that it would provide with a variance. (R. at 58, 73, 136.) The BZA also considered significant evidence from LMM and supporters explaining that the Property itself was the best place for services that will address a critical community need. (*See* R. at 196, 199, 315–40, 463–87, 489–578.) It is self-evident that a charitable institution would suffer unnecessary hardship from a decision that precludes it from providing charitable services to the community. The record supports the BZA's determination of the same. (*See, e.g.*, R. at 63, 136.)

Appellant's reliance on *Consolidated Management, Inc. v. Cleveland*, 6 Ohio St. 3d 238, 242, 452 N.E.2d 1287, 1291 (1983) is misplaced. The Ohio Supreme Court reversed the grant of a use variance precisely because neither the BZA nor the lower courts set forth any evidence of unreasonable hardship to justify the variance. *Id.* at 1290. The same is not true here, as evidenced by the BZA Resolution and the voluminous factual record described herein.

Furthermore, "the function of a reviewing court is not to determine, in the first instance, whether there is an unreasonable hardship . . . to justify the BZA's grant of the variance." *Calta v. City of Highland Hts.*, No. 72469, 1998 WL 122367, at *2 (Ohio Ct. App. Mar. 19, 1998) (internal citations omitted). The BZA carefully weighed the evidence, written submissions, and

evaluated the credibility of witnesses before granting LMM a variance. This Court should not disturb its decision.

B. Because The Evidence Showed LMM Would Suffer Unnecessary Hardship Without A Variance, Assignments Of Error Nos. 2, 3, And 4 Fail.

Appellant's Assignments of Error Nos. 2, 3, and 4 all speak to whether LMM established that it would suffer unnecessary hardship if denied a variance. Each of these arguments miss the mark, as discussed below.

First, the evidence before the BZA demonstrated that the denial of a variance would deprive LMM of the ability to provide needed charitable services to homeless youths despite having used the Property to provide similar charitable services for decades. (*See* R. at 63, 73, 136, 196.) Stakeholders consistently testified that the Property's location is an essential component in the context of the effective delivery of social services and positive outcomes for its clients. (*See* R. at 236, Tr. at p. 23:19–22; R. at 238, Tr. at p. 25:13–16; R. at 263–64, Tr. at pp. 50:24–25; 51:1–14; *see also* R. at 199–202, 212.)

Second, Appellant concedes that the Property has operated as a "legal, prior, non-conforming ('grandfathered') use," but claims without justification that LMM's grandfathered use of the Property is limited to "an office building." (O'Leary Brief, at 23.) This argument does not hold up, ignoring that the Property has long been used as a charitable institution to provide social services to those in need, not merely as commercial office space. (*See* R. at 36 ("The 4100 Franklin Building has been used for offices **and charitable social and family services** since the mid-1960s.") (emphasis added).)

***Third*,** Appellant inexplicably argues that LMM will somehow profit from the proposed operations at the Property. (*See* O'Leary Brief, at 24–25.) To state the obvious, LMM is a non-profit organization. Without citing any evidence, Appellant nonetheless uses this baseless claim

to argue that LMM cannot establish an unnecessary hardship here because the Property can still be used for less profitable purposes. (*Id.*) Traditional business profit is not relevant in the context of a charitable institution, and any hypothetical economic benefit from LMM's alternative uses of Property would not preclude a finding of unnecessary hardship in this context.

Ohio courts have found unnecessary hardship in similar cases not addressed by Appellant. *See, e.g.*, *Schomaeker*, 66 Ohio St. 2d 304 at 306 (affirming use variance based on unnecessary hardship and allowing residential district property to be used as parking lot for customers and employees); *Marino*, 1980 WL 354601, at *5 (affirming grant of variance to build senior-living complex where proposed structure was designed to enhance neighborhood and would benefit entire community); *First N. Corp. v. Bd. of Zoning Appeals Olmsted Falls*, 2014-Ohio-487, ¶ 2, 8 N.E.3d 971, 974 (reversing refusal of variance where unrebutted evidence showed an unnecessary hardship because intended use of property was incompatible with existing zoning).

Fourth, the cases cited by Appellant in support of his use variance arguments are inapposite. (O'Leary Brief, at 16, 22, 24.) In the cases of *Kurutz v. City of Cleveland* and *Hampton House Mgt. Co. v. Brimfield Twp. Bd. of Zoning Appeals*, the proposed use of the property was expressly prohibited under the C.C.O., and "expressly excluded" from the district per a joint economic development agreement, respectively. *See* 2018-Ohio-2398, ¶ 11 (applicant sought variance for automobile sales in a district that specifically prohibited that use); 2007-Ohio-6410, ¶ 17. In contrast, the zoning laws permit charitable institutions in the Property's two-family district.

In *6957 Ridge Rd., L.L.C. v. City of Parma*, the applicant sought to rezone a single-family residential property for retail and commercial use even though the property was used as a

residence when he bought it. *See* 2013-Ohio-4028, ¶ 6. Here, LMM has never requested that the Property be rezoned (*see* R. at 56), and it has been used as a charitable institution for decades. (*See* R. at 36, 136; R. at 237, Tr. at p. 24:17–23; R. at 265, Tr. at p. 52:11–17.)

C. Because The Evidence Showed LMM Would Be Deprived Of Substantial Property Rights If Denied A Variance, Assignment Of Error No. 5 Fails.

The evidence before the BZA confirms its finding that denying LMM a variance would deprive it of substantial property rights by unduly limiting LMM's ability to utilize the Property as a charitable institution to provide services to mitigate youth homelessness. (*See, e.g.*, R. at 63; R. at 263–64, Tr. at pp. 50:24–25; 51:1–14.)

As discussed, Appellant suggests that LMM's merger with LFS means that LMM knew of zoning restrictions and cannot demonstrate deprivation of a substantial property right. (O'Leary Brief, at 28.) This argument fails equally in the use variance context. Appellant relies on two inapplicable cases: *Consol. Mgt., Inc. v. City of Cleveland*, 6 Ohio St.3d 238, 242, 452 N.E.2d 1287, 1291 (1983) and *1415 Kenilworth, LLC v. Cleveland*, 8th Dist. Cuyahoga No. 111249, 2023 WL 1458881, *8. In both cases, owners bought properties from sellers in arms-length transactions knowing that existing zoning precluded what they wanted to do with the properties. *Consol. Mgt., Inc.*, 6 Ohio St.3d at 242 ("appellees imposed the hardship upon themselves as they acquired an interest in the premises with knowledge of the zoning classification."); *1415 Kenilworth, LLC*, 2023 WL 1458881, *8 (finding that the owner had knowledge of the zoning restrictions when he purchased the property). Here, LMM continued to use the Property as it had been used by LFS after the merger. Moreover, LMM stands in the

shoes of the nonprofit with which it merged, not as an independent buyer who imposed a hardship upon itself.[17]

The record demonstrates that LMM has a right to use its Property as a charitable institution in full compliance with C.C.O. (*See* R. at 36 ("The prior non-conforming use is the same as the present application. The 4100 Franklin Building has been used for offices and charitable social and family services since the mid-1960s."). Denying LMM the ability to continue that use would deprive it of substantial property rights.

D. Because A Use Variance Would Not Be Contrary To The Purpose And Intent Of The Zoning Code, Assignment Of Error No. 6 Fails.

As explained above, LMM's current and proposed use of the Property as a charitable institution is consistent with the Zoning Code. (R. at 10, 72, 136.) The BZA repeatedly recognized that the Property is an "existing, legal non-conforming charitable institution," and Appellant has not appealed this determination. (R. at 10, 72.)

The Property has been used as a charitable institution since the 1960s, charitable institutions are expressly permitted in the district that she helped rezone, and there are several other non-residential uses in the neighborhood. (*See* R. at 135, 145 (listing other uses on Franklin Blvd.)); *see also* C.C.O. 337.02(g)(2) (authorizing recreation or community center buildings, orphanages, hospitals, homes for the aged or similar homes in two-family residential districts). Further, the 1985 rezoning of Franklin from multi-family to two-family residential did not prohibit charitable institutional uses on Franklin or at the Property. Likewise, the rezoning did not limit the neighborhood or Property to only one-family or two-family residential uses as Appellant suggests (*see* O'Leary Brief, at 23).

[17] Appellant fails to acknowledge the irony of his argument, having himself knowingly purchased a property next to a charitable institution. After having been neighbors for twenty years, he cannot credibly complain that LMM intends to continue using the Property as a charitable institution.

Appellant's argument to the contrary relies on the statement of former Councilwoman Helen Smith. (O'Leary Brief, at 28.) Ms. Smith's comments about the 1985 rezoning legislation do not control the analysis: "Whatever reasons the lawmaking power may have had in mind is no concern to the courts whose duty it is to give effect to the language used according to its fair import." *Akron Transp. Co. v. Glander*, 155 Ohio St. 471, 479–80, 99 N.E.2d 493, 497 (1951). Given the plain language of C.C.O. 337.02(g)(3)(G) and 337.03(b), which permits charitable institutions in two-family residential districts, the 1985 rezoning could not have intended to eliminate charitable and non-residential uses of properties in the district. *See Diller v. Diller*, 2023-Ohio-1508, ¶ 16, 171 Ohio St. 3d 99, 104, 215 N.E.3d 541, 545 ("We seek first to determine legislative intent from the plain language of a statute, . . . the general rule being that '[i]f the meaning of the statute is unambiguous and definite, it must be applied as written and no further interpretation is necessary.'") (internal citations omitted).

Ohio courts have 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." *Saunders v. Clark Cnty. Zoning Dept.*, 66 Ohio St. 2d 259, 261, 421 N.E.2d 152, 154 (1981). Appellant's attempt to impose limitations on LMM's use of the Property that do not exist should be rejected.

IV. THE RECORD SUPPORTS A SPECIAL PERMIT FOR THE PROPERTY.

Alternatively, the record supports the grant of a "special permit" for the Property. *See Nunamaker v. Bd. of Zoning Appeals*, 2 Ohio St. 3d 115, 118, 443 N.E.2d 172, 175 (1982) (noting that a special permit does not require a showing of practical difficulties or unnecessary hardship). The BZA may grant a special permit allowing a substitution or change in a non-conforming use if it "is no more harmful or objectionable than the previous nonconforming use in floor or other space occupied, in volume of trade or production, in kind of goods sold or

produced, in daily hours or other period of use, in the type or number of persons to occupy or to be attracted to the premises or in any other characteristic of the new use as compared with the previous use." The evidence supported the findings in the BZA Resolution (R. at 54–55) required by C.C.O. 359.01(a). This Court may "affirm, reverse, vacate, or modify [a BZA] order . . . or remand the cause to the officer or body appealed from with instructions to enter an order, adjudication, or decision consistent with the findings or opinion of the court." *See* O.R.C. § 2506.04. Should the Court find the BZA erred in granting LMM a variance for any reason, the Court should affirm the BZA's decision and modify the Resolution to issue a special permit allowing the requested improvements and continued delivery of charitable services at the Property.

CONCLUSION

Appellant has not met his significant burden to establish that the BZA decision to grant LMM's application for a variance was unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record. For the foregoing reasons, the Court should affirm the BZA's decision.

Dated: November 6, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on November 6, 2023, a true and correct copy of the foregoing was filed electronically with the Clerk of Court through the Court's electronic filing system. Notice of this filing will be sent to all parties of record by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/Madeline A. Clabough
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Counsel for Appellee
Lutheran Metropolitan Ministry

EXHIBIT A

Referenced Cleveland Code of Ordinances and Ohio Building Code Provisions

CITY OF CLEVELAND, OHIO

CODE OF ORDINANCES

Current through October 23, 2023

Published by:

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§ 329.03 Variance Powers

(a) *Conditions Requiring Variances.* Where there is practical difficulty or unnecessary hardship in the way of carrying out the strict letter of the provisions of this Zoning Code, the Board of Zoning Appeals shall have the power, in a specific case, to vary or modify the application of any such provisions in harmony with the general purpose and intent of this Zoning Code so that public health, safety, morals and general welfare may be safeguarded and substantial justice done.

(b) *Limitation of Variance Powers.* Such variance shall be limited to specific cases where:

(1) The practical difficulty or unnecessary hardship inheres in and is peculiar to the premises sought to be built upon or used because of physical size, shape or other characteristics of the premises or adjoining premises which differentiate it from other premises in the same district and create a difficulty or hardship caused by a strict application of the provisions of this Zoning Code not generally shared by other land or buildings in the same district;

(2) Refusal of the variance appealed for will deprive the owner of substantial property rights; and

(3) Granting of the variance appealed for will not be contrary to the purpose and intent of the provisions of this Zoning Code.

(c) *Data on Which Variance is Based.* When appealing for a variance, the appellant shall state and substantiate his or her claim that the three (3) conditions listed under division (b) of this section exist, and the Board shall make a finding on each of the three (3) conditions as they apply in each specific case as a prerequisite for the granting of the variance.

(d) *Variance from Use Regulations.*

(1) The Board may permit, in any use district, the extension of a building or use existing on the effective date of the use regulations of the area, into adjoining land in a more restricted district, which land was under the same ownership on the effective date, under such conditions as will safeguard the character of the more restricted district.

(2) The Board may permit the extension or enlargement of a building or use, or the erection of an additional building, upon premises lawfully occupied by such building or use on November 5, 1929, or lawfully occupied on the date of any amendment or supplement to the Zoning Code approved by the electorate on that date, or to this Zoning Code, creating a more restricted use district, and in which more restricted use district the building or use thereby became a nonconforming building or use, provided that such extension, enlargement or additional building shall not tend to perpetuate a nonconformity which otherwise might be discontinued at an earlier date.

(3) The Board may permit, in any use district, such modification of the use regulations as may be necessary to secure an appropriate development of a lot adjoining buildings or uses existing on the effective date of the use regulations and not conforming to such regulations, or adjoining a less restricted use district along a side lot line, provided that the use permitted by such modification shall not extend across any street or alley from such nonconforming uses or such less restricted use district, nor allow uses other than those listed in this Zoning Code as permitted in the use district next lower in order of restrictiveness to the district in which such lot is located.

(e) *Variance from Area, Yard and Court Regulations.*

(1) Notwithstanding the provisions of divisions (a), (b), and (c) of this section, the Board may permit such modification of the area

regulations or of regulations affecting yard or court dimensions as may be necessary to secure an appropriate improvement of an existing lot of record that is of such restricted area that it cannot be improved without such modification and, further, that such existing lot of record is located in an area characterized by yards, courts or lot areas of similar size or dimensions.

(2) The Board may permit such modification of the regulations affecting yard and court dimensions as may be necessary to permit the use of an existing building for a purpose for which such regulations require greater yards or courts than those existing on the premises, provided the Board determines that such existing yards or courts will provide adequate light and ventilation for the spaces lighted or ventilated thereby and will not tend to create an unhealthful or unsanitary condition under the proposed conditions of arrangement, use and occupancy.

(f) *Variance from Height Regulations.*

(1) The Board may permit the erection of an addition to an existing building to the same height above the grade level as such existing building where such addition is essential to the completion of such building as originally planned.

(2) The Board may permit the extension upward of a building existing on November 5, 1929, by the construction of additional stories above the height limit prescribed in this Zoning Code if the original plans approved by the Commissioner of Building and Housing provided for such additional stories and such building was actually designed and constructed to carry such additional stories.

(g) *Variance from Distance Regulations.* The Board may vary the required distance from property in a residence district specified in Sections 335.02 and 337.01 to 337.23, where such variance will not adversely affect the neighborhood, or the safety, health and general welfare of the occupants of the building, provided proper notice of the proposed variance has been given to the owners of the property on the same street and those in the same block within a distance of two hundred (200) feet from the premises of the proposed use, and a public hearing has been held.

(Ord. No. 2048-95. Passed 12-18-95, eff. 12-26-95)

§ 337.02 One-Family Districts

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

(a) Dwelling houses, each occupied by not more than one (1) family and not more than two (2) roomers or boarders;

(b) Playgrounds, parks;

(c) The extension of existing cemeteries;

(d) Railroad rights-of-way, not including switching, storage or freight yards or industrial sidings;

(e) Agricultural uses, subject to the regulations of Section 337.25 and Section 347.02;

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

(1) Churches and other places of worship, but not including funeral chapels or mortuary chapels;

(2) Telephone exchanges and static transformer stations, provided there is no public business office or any storage yard or storage building operated in connection therewith;

(3) Bus turn-around and layover areas operated by a public transit agency provided that no buildings other than a passenger shelter and restroom are located at each site, and provided, further, that any layover space accommodates no more than two (2) buses.

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

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

(2) Fire stations, police stations;

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

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

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

C. Day nurseries, kindergartens;

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

E. Orphanages;

F. Homes for the aged or similar homes;

G. Charitable institutions not for correctional purposes.

(4) The following buildings and uses, if located not less than fifty (50) feet from adjoining premises in a Residence District not used for a similar purpose, and subject to the review and approval of the Board of Zoning Appeals as stated above.

A. Municipal recreation buildings;

B. Municipal swimming pools;

(5) Crematories in existing cemeteries, provided they are not less than three hundred (300) feet from any boundary that abuts a Residence District, and subject to the review and approval of the Board of Zoning Appeals as stated above.

(h) A residential facility, as defined in Chapter 325 of this Zoning Code, for one (1) to five (5) unrelated persons, provided it is located not less than one thousand (1,000) feet from another residential facility. Residential facilities shall comply with area, height, yard and architectural compatibility requirements of this Zoning Code applicable to residences in One-Family Districts.

(Ord. No. 586-16. Passed 7-13-16, eff. 7-17-16)

§ 337.03 Two-Family District

In a Two-Family District the following buildings and uses are permitted:

(a) Dwelling houses, each occupied by not more than two (2) families and not more than two (2) roomers or boarders.

(b) All other uses permitted and as regulated in a One-Family District.

(c) The Board of Zoning Appeals, after public notice and public hearing, and upon prescribing proper safeguards to preserve the character of the neighborhood, may grant special permits for the remodeling of existing dwelling houses or the erection of row houses to provide for more than two (2) dwelling units but not more than six dwelling units in each building, provided that:

(1) The square feet of lot area to be allotted to each dwelling unit is in accordance with the area regulations included in Chapter 355;

(2) The dwelling units to be created will be not smaller than two (2) rooms and a bathroom;

(3) There will be no exterior evidence that a remodeled dwelling house is occupied by more than two (2) families, except such as may be permitted by the Board;

(4) The building when altered or erected and when occupied will conform to all the applicable provisions of the Building and Housing Codes and as the Commissioner of Building and the Commissioner of Housing so certify;

(5) Garage space or hard surfaced and drained parking space will be provided upon the premises for the cars of the families to be accommodated on the premises at the rate of not less than one (1) car per family.

(Ord. No. 740-67. Passed 5-22-67, eff. 5-23-67)

§ 337.08 Multi-Family District

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

(a) All uses permitted and as regulated in a Two-Family District;

(b) Row houses, apartment houses;

(c) Rooming houses, boarding houses, tourist homes;

(d) The following buildings or uses, if located not less than ten (10) feet from any adjoining premises in a Residence District not used for a similar purpose:

(1) Dormitories;

(2) Reserved;

(3) Lodges or social buildings and their grounds, except those a chief activity of which is one customarily carried on primarily for gain;

(4) Police stations, fire stations;

(5) Other public buildings or properties of a character not customarily conducted as a gainful business.

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

(1) Public libraries, public museums;

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

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

(4) Fraternity houses, sorority houses;

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

(6) Orphanages;

(7) Homes for the aged and similar homes;

(8) Charitable institutions not for correctional purposes.

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

(g) A residential facility, as defined in Chapter 325 of this Zoning Code, for six (6) to sixteen (16) persons may be permitted as a conditional use. The City Planning Commission shall approve a residential facility as a conditional use in a Multi-Family District only when the residential facility is located not less than one thousand (1,000) feet from another residential facility and only if the City Planning Commission determines that the conditional use meets the following zoning and architectural criteria:

(1) the architectural design and site layout of the home and the location, nature and height of any walls, screens, and fences are compatible with adjoining land uses and the residential character of the neighborhood, as may be specified in applicable Zoning Code regulations for Multi-Family Districts; and

(2) the use complies with all applicable yard, parking and sign regulations in this Zoning Code for Multi-Family Districts.

(Ord. No. 586-16. Passed 7-13-16, eff. 7-17-16)

§ 359.01 Existing Nonconforming Buildings and Uses

(a) Except as provided in Section 347.06 and Chapter 351, a use of building or land lawfully existing on the effective date of this Zoning Code or of any amendment or supplement thereto, or for which a permit has been lawfully issued, may be continued even though such use does not conform to the provisions of this Zoning Code for the use district in which it is located, but no enlargement or expansion shall be permitted except as a variance under the terms of Chapter 329, and no substitution or other change in such nonconforming use to other than a conforming use shall be permitted except by special permit from the Board of Zoning Appeals. Such special permit may be issued only if the Board finds after public hearing that such substitution or other charge is no more harmful or objectionable than the previous nonconforming use in floor or other space occupied, in volume of trade or production, in kind of goods sold or produced, in daily hours or other period of use, in the type or number of persons to occupy or to be attracted to the premises or in any other characteristic of the new use as compared with the previous use.

(b) The enactment of this Zoning Code shall not in any way affect the legality or previous orders requiring the discontinuance of nonconforming uses nor extend the time limit already established when existing nonconforming uses shall be discontinued.

(Ord. No. 845-62. Passed 4-27-64, eff. 4-27-64)

21. Bungee jumping and zip line structures, and miniature golf courses.

22. Retaining walls, bridges, walkways or site stairs ~~not~~ unless associated with ~~a building or building egress~~ or necessary for the building or the building egress to comply with the rules of the board.

23. Primitive transient lodging structures with only provisions for sleeping, with no building services equipment or piping, and not greater than 400 sq. ft. in area.

101.2.1 Appendices. *The content of the appendices to the Administrative Code is not adopted material but is approved by the board of building standards and provided as a reference for code users.*

101.3 Intent. *The purpose of this code is to establish uniform minimum requirements for the erection, construction, repair, alteration, and maintenance of buildings, including construction of industrialized units. Such requirements shall relate to the conservation of energy, safety, and sanitation of buildings for their intended use and occupancy with consideration for the following:*

1. ***Performance.*** *Establish such requirements, in terms of performance objectives for the use intended.*
2. ***Extent of use.*** *Permit to the fullest extent feasible, the use of materials and technical methods, devices, and improvements which tend to reduce the cost of construction without affecting minimum requirements for the health, safety, and security of the occupants of buildings without preferential treatment of types or classes of materials or products or methods of construction.*
3. ***Standardization.*** *To encourage, so far as may be practicable, the standardization of construction practices, methods, equipment, material and techniques, including methods employed to produce industrialized units.*

The rules of the board and proceedings shall be liberally construed in order to promote its purpose. When the building official finds that the proposed design is a reasonable interpretation of the provisions of this code, it shall be approved. Materials, equipment and devices approved by the building official pursuant to section 114 shall be constructed and installed in accordance with such approval.

101.4 Referenced codes. *The other codes listed in sections 101.4.1 to 101.4.7 and referenced elsewhere in this code shall be considered part of the requirements of this code to the prescribed extent of each such reference.*

101.4.1 Mechanical. *Chapters 4101:2-1 to 4101:2-15 of the Administrative Code, designated as the "Ohio Mechanical Code," shall apply to the*

4101:1-3-01 Use and occupancy classification.

[Comment: When a reference is made within this rule to a federal statutory provision, an industry consensus standard, or any other technical publication, the specific date and title of the publication as well as the name and address of the promulgating agency are listed in rule 4101:1-35-01 of the Administrative Code. The application of the referenced standards shall be limited and as prescribed in section 102.5 of rule 4101:1-1-01 of the Administrative Code.]

SECTION 301
GENERAL

301.1 Scope. The provisions of this chapter shall control the classification of all buildings and structures as to use and occupancy *and are established to organize and prescribe the appropriate features of construction and occupant safety requirements for buildings and are not established for compliance with any conditions of licensure which are outside the jurisdiction of this code.*
There may be other requirements owners may be required to meet as set forth by other licensing agencies such as the Ohio State Fire Marshal, Ohio Department of Health, the Ohio Department of Jobs and Family Services, Ohio Department of Mental Health and Addiction Services, Ohio Department of Developmental Disabilities, federal agencies, or other licensing authorities. Owners and designers should investigate these additional licensing agency requirements to ensure they are incorporated into the building design before submitting to the certified building department for plan approval.

SECTION 302
CLASSIFICATION

302.1 General. Structures or portions of structures shall be classified with respect to occupancy in one or more of the groups listed in this section. A room or space that is intended to be occupied at different times for different purposes shall comply with all of the requirements that are applicable to each of the purposes for which the room or space will be occupied. Structures with multiple occupancies or uses shall comply with Section 508. Where a structure is proposed for a purpose that is not specifically provided for in this code, such structure shall be classified in the group that the occupancy most nearly resembles, according to the fire safety and relative hazard involved.

1. Assembly (see Section 303): Groups A-1, A-2, A-3, A-4 and A-5.
2. Business (see Section 304): Group B.