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CITY OF CLEVELAND — CA 25 114852

vs.

Judge:

SHAKER HEIGHTS APARTMENTS OWNER LLC

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IN THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO

CITY OF CLEVELAND	)	CASE NO. CA-25-114852
	)	CA-25-114853
Plaintiff-Appellee,	)	CA-25-114854
	)	
vs.	)	Trial Court No. 2023-CRB-007888
	)	2023-CRB-007891
SHAKER HEIGHTS APARTMENTS OWNER,	)	2023-CRB-007893
	)	
Defendant-Appellant.	)	

CITY OF CLEVELAND'S APPELLATE BRIEF
ORAL ARGUMENT REQUESTED

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IV. The Trial Court Erred When it Fined Defendant in Excess of the Maximum Fine Allowable for First Degree Misdemeanors.

RESTATEMENT OF APPELLANT' ISSUES TO BE PRESENTED FOR REVIEW

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5. Is the Receivership Provision and Receivership Order an excessive condition of community control unwarranted by law? (Assignment of Error NO.3)
6. Did the Trial Court err when it fined Defendant $10,000 on one First Degree Misdemeanor for each Complaint when the maximum allowable fine was $5,000? (Assignment of Error No. 5)

I. STATEMENT OF FACTS AND OF THE CASE

These three consolidated appellate cases concern three criminal cases brought by the City of Cleveland against Shaker Heights Apartments Owner in the Cleveland Municipal Court that have been combined for this appeal. The trial-court cases are 2023-CRB-00788 that deals with the elevators at 12600 Shaker Blvd., Cleveland, Ohio; 2023-CRB-007891 that deals with the elevators at 12500 Shaker Blvd., Cleveland, Ohio; and 2023-CRB-007893 that deals with the elevators at 12701 Shaker Blvd., Cleveland, Ohio. All three cases deal with violation notices issued by Cleveland's Building and Housing Department regarding the elevators at all three addresses. The violation notices are basically, if not completely identical.

The violation notices that are attached to the Complaints and to the Sentencing Judgment Entries all stem from August 8, 2023 inspections of the property by Building and Housing Elevator Inspector Kenneth Eaton. Item 6 of the Record. During that inspection Inspector Eaton observed various violations of the City's Elevator Code found in C.C.O 3141. On August 9, 2023 for the case ending in 7891 and on August 10, 2023, the City of Cleveland issued violations notices regarding the violations that Inspector Eaton observed at all three properties. *Id.* The violation notices notified Shaker Heights Apartments Owner of the observed violations that included information about the owner's responsibilities regarding the maintenance and certification of the elevators as well as specific violations regarding the actual operation of the elevators, including cleaning oil and grease from the car top, replacing hoist cables, installing a self-closing door, a self-locking machine-room door, providing sufficient permanent lighting in machine room, emptying drip pans in machine room, removing all material not specifically used for elevator maintenance or operation from machine room, installing class C fire extinguishers in each room, keeping the pits clean and dry, performing a capacity load test, and adding braille

lettering to elevator doors. *Id.* The violation notices gave Shaker Heights Apartments Owner until September 9, 2023 to comply. *Id.* When Shaker Heights Apartments Owner failed to comply with all three of the violation notices, the City of Cleveland filed the Complaints in these three matter, one for each property, on October 3, 2023. *Id.* The Complaint in the case ending in 7891 alleged three first-degree-misdemeanor counts. The remaining two Complaints alleged 2 first-degree-misdemeanor counts.

On April 19, 2024, Shaker Heights Apartments Owner filed a Motion to Suppress the Evidence. The City filed its response on May 23, 2024. The trial court held a hearing on the Motion to Suppress on August 8, 2024. Inspector Eaton testified. On September 9, 2024, the trial court issued a Judgment Entry denying the Motion to Suppress that was journalized on September 11, 2024. Item 29 of the Record. The trial court, based on its interpretation of the credibility of the witness, found that the search at issue was consensual as an employee permitted Inspector Eaton to enter the premises and the machine room was unlocked. *Id.* at pages 2 and 3. Additionally, the trial court, after argument from both sides, found that, even if there were no consent, the search was proper as a warrantless administrative search.

On December 4, 2024, Shaker Heights Apartments Owner withdrew their not-guilty pleas and entered no-contest pleas to all the charges in all three Complaints; the trial court found them guilty on all three Complaints. The trial court ordered a pre-sentence investigation. On January 23, 2025, following the presentation of the pre-sentence investigation, the trial court sentenced Shaker Heights Apartments Owner on all three cases. The Judgment Entry and Order was dated January 29, 2025, but not journalized until February 20, 2025. Item 33 of the Record. The trial court stayed the $15,000 fine in the case ending in 7891 and stayed the $10,000 fine in the remaining cases as well as imposed a three-year term of community control in all three cases.

The terms of community control included a prohibition of the sale of the properties without prior approval of the trial court, the closure of a large amount of violation notices that were discovered by the Chief Housing Court Specialist, the placement of all rents in a rent-escrow account to make repairs, to submit a contract with a certified and bonded elevator company to make the required repairs, and other items that Shaker Heights Apartments Owner is bound to do by the City's laws, including obtaining lead-safe certificates, obtaining the proper rental registrations, and maintaining the building free of graffiti, junk and debris, and cutting the grass and vegetation. *Id.*

On or about February 25, 2025, Shaker Heights Apartments Owner filed its Notices of Appeals in these three cases. On April 9, 2025, this Court granted Shaker Heights Apartments Owner's Motion for a Stay, except that the portions of the Sentence regarding the elevator repairs were not stayed. On July 1, 2025, Shaker Heights Apartments Owner filed its Appellate Brief. The City of Cleveland's Appellate Brief is due on August 11, 2025.

II. LAW AND ARGUMENT

A. Standard of Review

While considering a motion to suppress, the trial court assumes the trier-of-fact role; thus, it is in the best position to resolve factual questions and evaluate the credibility of witnesses. *Strongsville v. Patel* (8th Dist. Nos. 84736, 84749, 84750, 84751, 84752, 84753, 84754) 2005-Ohio-620, ¶6, citing *State v. Mills* (1992), 62 Ohio St.3d 357, 366, 582 N.E.2d 972. Therefore, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. Id, citing *State v. Fanning* (1982), 1 Ohio St.3d 19, 437 N.E.2d 583. Accepting the facts as true, the appellate court must then independently determine, without

deference to the trial court's conclusion, whether the facts satisfy the applicable legal standard. *Id.*, *State v. McNamara* (1997), 124 Ohio App.3d 706, 707 N.E.2d 359.

A trial court's imposition of community control under RC 2929.25 is reviewed for an abuse of discretion. *Cleveland v. Grunt*, 2018-Ohio-4109, 112 N.E.3d 973, ¶5 (8th Dist.) An appellate court's role in the review of a trial court is only to determine if the trial court has abused its discretion. Absent an abuse of discretion, a court of appeals must affirm the trial court's judgment. *Rohde v. Farmer* (1970), 23 Ohio St.3d 82, 262 N.E.2d 685. In 1925, the Ohio Supreme Court defined an abuse of discretion as "discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence." *State v. Ferranto* (1925), 112 Ohio St. 667, 676, 148 N.E. 362. In more recent years, the Ohio Supreme Court has held "the term of abuse of discretion connotes more than error of law or judgment, it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140; *Pembaur v. Leis* (1982), 1 Ohio St.3d 89, 437 N.E. 1199; *Calderon v Sharkey* (1982), 70 Ohio St.2d 218, 219-220, 436 N.E.2d 1008; *State v. Adams* (1980), 62 Ohio St.3d 151, 157, 404 N.E.3d 144. Even more recently, the Ohio Supreme Court has stated that abuse of discretion, "implies not merely error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency." J*ohnson v. Abdullah*, 166 Ohio St.3d 427, 2021-Ohio-3304, 187 N.E.3d 463, ¶35, quoting Black's Law Dictionary 11 (2d Ed. 1910).Only with respect to questions of law does the Court have plenary review. *Univ. Hosp. of Cincinnati College of Medicine v. State Emp. Relations Bd.* (1992), 62 Ohio St.3d 339, 587 N.E.2d 835. Therefore, this Court is limited to determining if the trial court abused its discretion when it imposed the terms of community control.

B. The Trial Court Properly Found That the Inspector Obtained Consent to Search the Elevators and That Consent Was Not In Fact Necessary as Elevators Being a Closely Regulated Industry, a Warrantless Search was Appropriate.

i. The Trial Court Properly Found that the Inspector Obtained Consent to Search the Elevators.

Consent is a widely recognized exception to the warrant requirement for a search. *See Schnekloth v. Bustamonte*, 412 U.S. 218, 242-243 (1973) and *Cleveland v. Berger*, (1993), 91 Ohio App.3d 102, 631 N.E.2d 1085 (8th Dist.), citing *State ex rel Holcomb v. Wurst* (1989), 63 Ohio App.3d 629, 579 N.E.2d 746, motion to certify overruled (1989), 47 Ohio St.3d 711, 548 N.E. 242. The trial court, as the finder of fact in the motion to suppress hearing found that the inspector obtained consent from an employee.

At the suppression hearing, after observing testimony from Inspector Ken Eaton and considering the totality of circumstances, the trial court found that the defendant consented to the elevator inspection. It was determined that a maintenance employee who was working at the premises, apparently mopping and cleaning up, consented to the search when Inspector Eaton presented himself. Although Inspector Eaton may not have been able to recall every detail from a routine search that occurred months ago, the trial court was evidently confident that he was credible and followed his stated normal procedure of identifying himself as a Cleveland elevator inspector who was there to inspect the elevator, and that the employee thereby consented voluntarily.

The lower court's decision on the facts of a suppression hearing must be upheld unless it is clearly erroneous. *United States v. Avery*, 137 F.3d 343, 348 (6th Cir.1997). This is a high standard of deference because the reviewing court does not have access to all the impressions,

context, body language, and myriad other signals that are available to the trier of fact. *State v. Cowans*, 87 Ohio St.3d 68, 84, 717 N.E.2d 298 (1999).

Shaker Heights Apartments Owner suggests that the instant record does not have enough competent, credible evidence to support the trial court's ruling, pointing to a dissenting opinion that actually argues to uphold a trial court's finding of fact. Appellant's Brief citing *State v. Azeen,* 163 Ohio St.3d 447, 170 N.E.2 864, 2021-Ohio-1735 ¶ 60-62. In *Azeen*, the lower court was assessing a 29-year-old plea agreement of attempted murder, making inferences from the record to decide whether that plea (which would have been negotiated off the record) was sufficiently negotiated to bar further prosecution almost three decades later. *Id.* at ¶ 4-15.

Here, the trial court observed a witness subject to direct and cross examination at a hearing, about events within the last year or so, amongst other evidence (and the lower court issued a detailed ruling, filed Sept. 11, 2024). The facts are nowhere near analogous. Furthermore, even if one disagrees with the lower court's assessment, the clearly erroneous standard "plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573–74 (1985). Accordingly, this Court should follow precedent and find that the lower court's decision was not clearly erroneous, and thus as a matter of law consent was given and the elevator search was valid. Therefore, evidence from the search should not be suppressed. This Court has addressed this issue in a similar case. In *Cleveland v. Berger*, (1993), 91 Ohio App.3d 102, 631 N.E.2d 1085 (8th Dist.), citing *State ex rel Holcomb v. Wurst* (1989), 63 Ohio App.3d 629, 579 N.E.2d 746, motion to certify overruled (1989), 47 Ohio St.3d 711, 548 N.E. 242, this Court found an inspector obtained consent from a custodian.

In *Cleveland v. Berger*, an inspector obtained consent from a person whom people identified as the custodian and who then admitted he was the custodian. Later, the defendant claimed that the person who allowed the inspection was not an attorney. This Court stated, however, that, under the circumstances, the inspector was reasonable in her belief that she had been given consent and that consent to search is valid if it is obtained from a person with sufficient authority over the property to give consent, or at least from a person reasonably believed to have such authority. *Id.* at 107, citing *White Fabricating Co. v. United States* (C.A. 6, 1990), 903 F.2d 404. This Court thus found that the inspector had a reasonable belief that the custodian was authorized to consent to the inspection; therefore the search proceeded under valid consent. *Id.*

Here, the trial court determined from the testimony the same thing: that Inspector Eaton had a reasonable belief that the person mopping the floor and picking up trash had sufficient authority to consent to the search. Shaker Heights Apartments Owner, unlike the Defendant in *Cleveland v. Berger* did not present any evidence to the contrary.

While considering a motion to suppress, the trial court assumes the trier-of-fact role; thus, it is in the best position to resolve factual questions and evaluate the credibility of witnesses. *Strongsville v. Patel* (8th Dist. Nos. 84736, 84749, 84750, 84751, 84752, 84753, 84754) 2005-Ohio-620, ¶6, citing *State v. Mills* (1992), 62 Ohio St.3d 357, 366, 582 N.E.2d 972. Therefore, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. Id, citing *State v. Fanning* (1982), 1 Ohio St.3d 19, 437 N.E.2d 583. Accepting the facts as true, the appellate court must then independently determine, without deference to the trial court's conclusion, whether the facts satisfy the applicable legal standard. *Id.*, *State v. McNamara* (1997), 124 Ohio App.3d 706, 707 N.E.2d 359.

In addition to reviewing the facts for clear error, the appellate court reviews de novo the question of whether the authority to consent existed. *United States v. Sheckles,* 996 F.3d 330, 347 (6th Cir. 2021). Here, the question is whether a maintenance technician had the authority to consent to the elevator search in a commercial property. This Court should find that such authority existed.

A review of case law shows that the owner's expectation of privacy and the circumstances in which the owner shared authority over the property with the consenting third-party (here, its employee) are both important considerations. On the first point, a key distinction is that employees can generally authorize searches of commercial property, but they face much tougher scrutiny for searches of residences or private dwellings, where the owner's expectation of privacy is much higher. Compare *United States v. Lang*, 717 F. App'x 523, 542 (6th Cir. 2017) (nurse-practitioner employee at medical clinic could consent to search), *and Anderson v. Lingenfelter*, No. 5:12-CV-71, 2013 WL 3864600, 6 (W.D.Ky. 2013) (teenage employees at pizza shop could consent to search); *with Anderson v. Lingenfelter*, No. 5:12-CV-71, 2013 WL 3864600, 6 (W.D.Ky. 2013) (employee handyman could not consent to search of employer's house, particularly after consent previously denied by owner—case cited in Appellant's Brief), *and United States v. Corral*, 339 F.Supp.2d 781, 791-792 (W.D. Texas 2004) (part-time employee could not consent to search of employer's home). *See also Stoner v. State of Cal.*, 376 U.S. 483, 487-488 (1964) (hotel employee could not consent to search of guest's room). In the instant case, the employee authorized a search of commercial property (elevators and mechanical rooms), not a residence.

Also, here the apartment owner had significant notice of regular elevator inspections (at least every six months under CCO 3141), lowering the owner's expectation of privacy and

making it reasonable to believe that maintenance personnel had the responsibility and thus authority to fully handle such inspections. *See Farinacci v. City of Garfield Heights*, 461 F. App'x 447, (6th Cir. 2012) (mortgage gave notice of lender's authority to enter premises to make repairs, and thus employee of contractor—acting on behalf of owner-lender—had authority to consent to search by city code inspectors.)

The second important factor is the circumstance of the shared authority over the owner's property. Here, the employee was observed cleaning the property. Thus, it was reasonable for Inspector Eaton to believe the maintenance technician had the apparent authority to sign off on a periodic elevator inspection, as it was the employee's job to take care of the property. "An employee, who concededly has a legal right to use the business premises, clothed with the apparent indices of control may consent to a warrantless search of the premises." *United States v. Grigsby*, 367 F. Supp. 900, 902 (E.D. Ky. 1973) (employee was sole occupant of property used to store owner's items; thus, he had authority to allow search of those items). If Inspector Eaton had run across the accountant or an employed driver, for example, the circumstance of the search would be different. But under the facts here, the employee appeared to have the relevant authority. *See Sheckles,* 996 F.3d at 347 (apparent authority is sufficient for consent under the 4th Amendment).

Further, when an owner shares control of property with a third-party, the owner assumes the risk that the employee or other relation will allow inspection of that property. *Frazier v. Cupp*, 394 U.S. 731, 740 (1969) (shared duffel bag assumed risk of consent); *United States v. Morgan*, 435 F.3d 660, 663-664 (6th Cir. 2006) (wife who shared use of husband's computer could consent to search); *Grigsby* at 902. Similarly, employing maintenance and cleaning crews runs the same risk of third-party consent to inspection.

Therefore, because the lower court's ruling on voluntary consent was not clearly erroneous, and the employee had the authority to consent to the search as a matter of law, this Court should find that the employee's consent to the elevator search was valid under the 4th Amendment. Accordingly, evidence from the search should not be suppressed.

Furthermore, in light of this Court's decision in *Cleveland v. Berger*, and the other case law addressed above, the City states that there is competent, credible evidence to support the trial court's finding, while sitting as the trier of fact and the best able to resolve factual questions and evaluate the credibility of the witness. Furthermore, accepting the facts as true, the trial court's conclusion that the employee had the authority to give consent meets the standard addressed in *Cleveland v. Berger*: that the inspector had a reasonable belief that the custodian was authorized to consent to the inspection. Therefore, the trial court was correct in overruling Shaker Heights Apartments Owner's Motion to Suppress. Additionally as discussed above, Cleveland's warrantless scheme regarding elevator operations are constitutionally valid. Consequently, this Court must overrule Shaker Heights Apartments Owner's First Assignment of Error.

ii. **The City's Warrantless Search Scheme Regarding Elevator Operations is Constitutionally valid.**

Reasonableness is the touchstone for whether a warrantless government search is permissible under the 4th Amendment. *Brigham City, Utah v. Stuart* 547 W.S. 398, 403 (2006) and *Camara v. Municipal Court and County of San Francisco*, 387 W.W. 523, 539 (1967).

As such, a reviewing court has the responsibility to evaluate the merits of a particular search individually, in context. *See v. City of Seattle*, 387 U.S. 541, 545-546, (1967). Here this Court should find that the warrantless elevator search in question, as authorized by the scheme laid out

in Cleveland Codified Ordinance 3141, was perfectly reasonable. Furthermore, as will be shown, the elevator search was permissible under at least two lines of analysis in the relevant case.

In *Camera* and *See*, which were both decided on the same day and should be read in concert, the U.S. Supreme Court clearly stated that its holdings were not calling into question—wholesale—the multitude of inspection regimes that are used to enforce municipal codes; rather, the validity of a regime shall be determined by case-specific review:

> We do not in any way imply that business premises may not reasonably be inspected in many more situations than private homes, no do we question such accepted regulatory techniques as licensing programs which require inspections prior to operating a business or marketing a product. Any constitutional challenge to such programs can only be resolved, as many have in the past, on a case-by-case basis under the general Fourth Amendment standard of reasonableness.

See at 545-46.

Those cases have not been overturned; in fact, they are cited often and thus the quoted point still holds.

The inspection scheme of C.C.O. 3141 calls for two kinds of inspections. First, there are inspections of the installation and repair of elevators, done through a permitting process. These are searches without a warrant, but the searches are arranged by the property owner, who thereby gives consent, but, in a way, since the government requires the inspections before permits can be closed, there could be a forced nature to the consent. The government requires the elevator owners to allow the search or face potential fines and criminal prosecution. See C.C.O. 3103.99 and C.C.O. 3104.

Such requirements are not unique to elevators; there are many regulations—as the U.S. Supreme Court recognized in *See*—that require such compliance. *See* at 545 to 546. Furthermore, these types of requirements are not even unique to businesses, as residences must

be inspected for HVAC, plumbing, and electrical compliance upon installation and repair, for example C.C.O. 3131, 3133, and 3137. Therefore, although the appellant incorrectly claims the opposite throughout its argument on this topic, the government is allowed to require owners—even homeowners—to allow a limited search and pay a fee to use their own property. It is the circumstances of the particular search in question that determines constitutionality as the *See* Court broadly recognized. *See* at 545 to 546.

The second type of inspections under C.C.O. 3141 are periodic elevator inspections, which can be at least every six months. Periodic inspections are required to maintain certification (e.g., annual load safety testing is required by the elevator code), and they can be used for complaint-driven inspections (e.g., tenant-reported breakdowns). These inspections are analogous to periodic fume-hood inspections in commercial kitchens that are required under the Fire Code and can be annual, semi-annual, quarterly, and even monthly depending on the type of kitchen. C.C.O. 381.06, C.C0.3101.06 and NFPA 96 (National Fire Protection Association Standards). An important difference, however, is that under C.C.O. 3141, the City has a right to conduct warrantless searches of elevators without consent, in addition to inspections arranged by the owner, who thus gives consent by arranging for it.

It is the context of elevator regulation that demonstrates why warrantless administrative searches are reasonable under *Camara* and *See*. First, unlike with a leaky faucet or broken furnace, an unsafe elevator can be impossible to detect to its users but can cause immediate death (if, for example, thinning cables break). Furthermore, high-rise buildings with inoperable elevators are a health and safety risk for occupants. Therefore, the need for routine elevator searches as described is obvious and extremely important.

Second, while the need for tight regulation of elevators is readily apparent, it must also be conceded this puts a very significant burden on the government. As a practical matter, every elevator must be inspected for installation, repair, and general maintenance, on periodic schedule and on complaints of malfunction. It is a considerable burden that makes the option of warrantless searches reasonable.

Third, elevator searches are quite limited in scope, being a relatively low intrusion on the owner's privacy. While commercial property owners have a significant expectation of privacy, it is much lower than that for homeowner's. *See* at 545-546. Additionally, warrantless elevator inspections are much less intrusive for apartment owners compared to warrantless kitchen inspections for restaurant owners. Shutting down the kitchen (or at least the oven and grills) for inspection is basically shutting down a restaurant, whereas the impact of elevator testing is negligible on the bottom line of apartment owners.

Furthermore, warrantless elevator searches are again a pragmatic necessity, as compared to warrantless kitchen inspections. Apartment employees are often absent from the premises and hard to reach, being lightly staffed and having offsite offices, or just not being available; and, critically, apartment owners don't have the same economic incentive to fix their elevators that kitchen owners have to repair their ovens, grills, and hoods. A restaurant owner always wants to keep its kitchen fully operational, and it has multiple employees on site that can be easily reached for arranging an inspection.

On the whole, warrantless elevator inspections are minimal intrusions—in the event they are needed—on apartment owners that serve a critical health and safety benefit in return, which makes the searches reasonable under the 4th Amendment.

Shaker Heights Apartments Owner states that warrantless searches of elevators under C.C.O. 3141 are unconstitutional because of *Sokolov v. Village of Freeport*, 52 N.Y.2d 341 (1981) and *Baker v. City of Portsmouth* S.D. Ohio No. 1:14cv512, 2015 U.S. Dist. Lexis 132759 (Sept. 30, 2015), Appellant's Brief 13-17. The regulations in those cases, however, are quite different than the elevator regulation here.

In *Sokolov*, the ordinance authorized "forced" consent searches for a multitude of building regulations concerning maintenance and sanitation, without suspicion of violations. *Sokolov* at 343-344. It allowed a very broad search, well beyond a limited search of elevators and beyond inspections for certification items such as HVAC and electrical systems. Cleveland does not require such intrusive searches for rental property; inspections by the Cleveland Building Department or Health Department for maintenance and sanitation require consent or a search warrant after suspicion of violation. C.C.O. 365, 3101, 3103, 203, 209, and 367. In *Baker*, the ordinance similarly allowed a broad-based "forced" inspection regime of rental property (eighty codes dealing with exterior, interior, mechanicals, bathrooms, etc.) that bears no relation to the operation of Cleveland ordinances currently in place. *Baker* at 2.

In a different manner, Shaker Heights Apartments Owner claims that C.C.O.3141 is unconstitutional because it doesn't provide for pre-compliance review, citing *City of Los Angeles, Calif. v. Patel,* 576 U.S. 409 (2015), Appellant's Brief 13-17. The holding in *Patel*, however, did not overrule *Camara* and See, which affirmed the right of governments to use a variety of administrative searches, especially on businesses, subject to a case-by-case review of reasonableness. See at 545-546.

Specifically, *Patel* held that: "Section 41.49(3)(a) is facially unconstitutional because it fails to provide hotel operators with an opportunity for pre-compliance review." *Patel* at 410.

The ordinance concerned searches of hotel records, and the court held for that specific ordinance pre-compliance review was necessary. The court then suggested using subpoenas as the review method. Id at 423. Thus, *Patel* did not hold that all administrative search regimes must have the option of pre-compliance review, such as those previously discussed in See, or the searches covered by *New York v. Burger* that will be discussed below. Furthermore, the items to be searched in Patel were hotel records that are readily susceptible to a subpoena. Elevators, of course, are not.

In *New York v. Burger*, 482 U.S. 691 (1987), the United States Supreme Court provided a framework for analyzing the constitutionality of warrantless administrative searches of closely regulated businesses. As explained below, C.C.O 3141 passes the *Burger* test comfortably.

The first part of the *Burger* test is determining whether the commercial activity in question is closely regulated by the government. Id at 691. As the U.S. Supreme Court explained, by virtue of engaging in a closely-regulated industry, there is such a reduced expectation of privacy that the government does not need a warrant to inspect. Id at 699, citing *Marshall v. Barlow's Inc.*, 436 U.S. 307, 313 (1978) ('no reasonable expectation of privacy could exist for a proprietor over the stock of such an enterprises.)

Cleveland has statutory authority to regulate elevators, granted through Ohio Revised Code 4101.19 under home rule, O.R.C. 715.26. The Ohio Administrative Code 4101:5-1-03 (A) also excludes municipal corporations "such as the City of Cleveland", acknowledging the City's right to promulgate its own rules. ORC 4101.19 has been in effect since March 1, 1953, and references and August 1, 1939 Amendment to Article XVIII, Section 3 of the Ohio Constitution that recognized that municipal corporations have the right to adopt police regulations providing

for the regular inspection of elevators. CCO 3141 is, therefore, the authority on elevator regulation in the City of Cleveland.

C.C.O. 3141 incorporates the Ohio Elevator Code through reference. OAC 4101:05. This rule also carves out an exception for municipal corporations, such as Cincinnati and Cleveland, which are authorized to adopt their own regulations for the regular inspection of elevators. Id.

The City of Cleveland is authorized to conduct periodic inspections under Ohio law. O.R.C. 4104.19, C.C.O. 3141.14, which also incorporates the relevant provisions of the Ohio Elevator Code and Ohio Revised Code, outlines the required inspection schedule and subject matter: "All elevators, amusement devices and special equipment shall be tested by the owner in the presence of the Commissioner, or his or her authorized representative, at least once every six (6) months, and all such devices shall be inspected by the Commissioner or his or her authorized representative at the time of testing." CCO 3141.14(a)

The operation of elevators within the city of Cleveland is a closely regulated activity. Elevators are depended upon by the public and scrupulously regulated, both federally (See Americans with Disabilities Act, 410.1) and by other ces and states alike (see, e.g. ORC 4105.01-4105.21; Rules of the City of New York 1030-2; Conn. Gen. Stat. Ch. 538 Sections 29-191—29-200). The City has developed a chapter of its building code to deal with elevators specifically (See CCO 3141), as authorized by the State of Ohio under Home Rule ORC 715.26. This is not a recent expansion of the law; Ohio has allowed the City to make its own ordinances and regulations for elevator inspections since 1939, and the Revised Code officially deferred all inspections to the City in 1953.

While the U.S. Supreme Court recognizes only four industries as closely regulated per se (See *City of Los Angeles v. Patel*, 576 U.S. 409 (2015)), other courts have defined industries and

activities as closely regulated for the purposes of a statutory, periodic inspection. Examples include food service (*Players, Inc. v. City of New York*, 371 F.Supp.2d 522, 537 (S.D.N.Y 2005)), pharmacies, (*Stone v. Stow*, (1992), 64 Ohio St.3d 156, 593 N.E.2d 294), facilities with liquor licenses (*Amvets Post 711 v. Rutter*, 863 F.Supp.2d 670 (N.D. Ohio 2012), auto repair *People v. Vaughn*, 344 Mich. App. 539, 1 N.W.3d 414 (2022)), dog kenneling (*State v. Warren*, 395 Mont. 15, 439 P.3d 357 (2019)), deer breeding (*Anderton v. Texas Parks and Wildlife Dept*, 605 Fed. Appx. 339 (5th Cir. 2015), and massage centers (*Kilgore v. City of South El Monte*, 3 F.4th 1186 (9th Cir. 2021). Another example of a closely regulated activity within a less tightly regulated industry is cigarette sales in convenience stores (*United States v. Hamad*, 809 F.3d 898 (7th Cir. 2016)). While none of these relate directly to elevators, they do show that courts consider industries beyond the four designated by the Supreme Court.

Here, it is elevators, and the offering of elevator services, within apartments that are closely regulated—not the providing of apartments for residences on a whole. *Burger* states: "[the] expectation of privacy in commercial premises…is particularly attenuated in commercial property employed in 'closely regulated' industries." *Burger* at 700. In other words, the commercial property that is closely regulated is the elevator and mechanical room, which is being employed by landlords (and whoever else uses elevators for commercial gain) to provide elevator services to tenants in return for pay. Contrary to what the appellant claims, it is not the entire rental business that is closely regulated.

In *Colonnade Catering Corp. v. U.S*, 397 U.S. 72, 77 (1978), the Supreme Court did not hold that the entire food and beverage industry was closely regulated. Rather, it referred to the narrower liquor industry, and the storage of liquor within those food and beverage companies. Likewise, in *United States v. Biswell*, 406 U.S. 311, 317 (1972), the holding did not apply to all

merchants of second hand goods. Instead, it referred to firearms and firearm stocks of pawnbrokers that were licensed to deal in those goods. As with liquor and firearms, here, it is the elevators themselves that are subject to invasive regulation by the government. This, in the case at bar, it is not the entire rental industry that is closely regulated. Indeed, renting is beside the point as there are thousands of landlords with commercial property (multi-family buildings and houses) without elevators and there are thousands of buildings with elevators (factories, hospitals, for example) that are unrelated to the rental industry but subject to elevator regulation.

Having established that it is the elevator operation that is subject to the *Burger* test, there is no question that elevators are indeed closely regulated. Just as the regulation in *Burger* demonstrated that vehicle dismantling is a closely regulated business, the regulation here—C.C.O. 3141—is also extensive and proves that elevators are a closely regulated business. Under the *Burger* regulation, an automobile junkyard owner must be certified, prominently post the certificate, and the owner is subject to criminal and civil penalties for noncompliance. Furthermore, the owners must maintain transaction records that are subject to review by police, and regulation of automobile junkyards is extensive in other jurisdictions outside New York regulation. *Burger* at 703-704.

Similarly, under C.C.O. 3141, elevator owners must obtain a certificate of operation by applying for a permit, paying a fee, and satisfying the requirements of building and elevator codes; they must post the certificate conspicuously in the elevator car; and they are subject to both criminal and civil penalties for noncompliance. C.C.O.3103.25 and 3103.99 authorize criminal penalties and C.O.O. 3104.02 authorizes civil fines. Additionally, elevators in Cleveland must be inspected at least every six months under C.C.O. 3141.14. Furthermore, the Building Commissioner must issue certificates of inspection for code compliance and prepare

reports subject to public review of accidents and damage concerning elevators. C.C.O. 3141.16 and 3141.13. Consequently, elevators are a closely-regulated industry.

Cleveland's administrative warrantless scheme also meets *Burger*'s test that there must be a substantial government interest involved. Public safety is a critical government interest and one that the appellant obviously omits, attempting to minimize this vital point. As with the regulation of Fire arms (prevention of violence, crime, and illegal trafficking, *U.S. v. Biswell* 406 U.S. 311, 315 (197), liquor (preventing tax fraud, *Colonnade* at 73), automobile junkyards (preventing auto-theft, *Burger* at 708), mines, (health and safety, *Donovan v. Dewey*, 452 U.S. 594, 602 (1981), C.C.O. 3141 advances a substantial government interest: protecting people's health and safety by ensuring the safe operation and proper maintenance of elevators.

There are serious risks to occupants of buildings that do not have working elevators, particularly in high-rise buildings with many tenants. Individuals living on the second floor and above may be denied vital care by first responders in the event of a health emergency. Disabled residents may not be able to traverse the stairway or may do so at risk of considerable personal injury, essentially trapping residents in their homes. For residents that may have left the building, for groceries or a doctor appointment, for example, they would be unable to return to their higher-story units if the elevators were not working.

There are other safety concerns as well. Police may need to use the elevator to help protect victims or apprehend offenders. It is also a serious fire hazard for a high-rise building to be occupied without a working elevator. In summation, there are many circumstances in which a stairwell may be blocked and failure to have a working elevator becomes a life-threatening risk for occupants.

Burger also requires that the warrantless inspection scheme is necessary to further the regulatory scheme. Warrantless searches of elevators are necessary to achieve the goals of the regulatory scheme provided in C.C.O. 3141. In particular, the ordinance requires that all elevators in Cleveland be inspected every six months. C.C.O. 3141.14. This is a significant, aggressive objective, which the City of Cleveland evidently believes is necessary to safeguard the inherent risk of elevators.

In the *Burger* line of cases, it is true that on the question of being necessary to further the regulatory scheme, the element of surprise that warrantless searches provide has been a prominent topic. Specifically, the consideration that warrantless inspections advance the cause of effective discovery and deterring of bad behavior (getting a warrant would allow mine operators to correct hazards, *Donovan* at 603; time to hide firearms, *Biswell* at 316). And, one could argue here, that while inspection surprise can help motivate owners to fix broken or deteriorating elevators, it is not central to the regulatory scheme of C.C.O. 3141.

On the other hand, warrantless searches of elevators are essential for meeting the requirement of inspecting every elevator in the Cleveland at least once every six months, and simultaneously doing all the non-routine inspections for breakdowns and citizen complaints. In other words, the basic construction of the regulatory scheme in C.C.O. 3141 depends on inspection efficiency.

The question of warrantless searches being necessary to advance efficiency was considered in *Marshall v. Barlow's Inc.*, 436 U.S. 307, 317-319, fn 13 (1978). In that case, the government argued that warrantless searches were permissible for essentially all interstate business subject to OSHA. Id. at 313-314. The government's argument did not survive scrutiny. But the circumstances in *Marshall* are different than those in this case. The OSHA statute

governing workplace safety did not require bi-annual inspections of every affected business. But, spot inspections on a sample of businesses is not enough for elevator safety under C.C.O. 3141. Rather, every elevator must be inspected. Furthermore, elevator inspections are very limited in scope, whereas OSHA covers a multitude of hazards and safety concerns, in practically all businesses with employees, and in the entire work area of those employees. *Marshall* at 307, 333. In short, elevators are much more tightly regulated than workplace conditions under OHSA.

Efficiency is the critical to the implementation of C.C.O. 3141. Thus, the warrant exception is necessary to further the purpose of the regulatory scheme. Such a finding would be consistent with the ruling in *Marshall*, which stated that while the warrant exception didn't apply to the facts and law of OSHA, it applies elsewhere: "The reasonableness of a warrantless search, however, will depend upon the specific enforcement needs and privacy guarantees of each statute." *Id.* at 321.

Finally, to satisfy the *Burger* test, the regulation in question must provide a "constitutionally adequate substitute for a warrant." *Burger* at 703. This means two things. First, the regulation must be "sufficiently comprehensive and defined" such that it provides adequate notice to owners that there property will be subject to "periodic inspections undertaken for specific purposes". *Id.* Here, C.C.O. 3141 satisfies this by explaining—among other things—that all elevators need to be certified upon installation or after alteration, inspected at least twice annually, and have their ropes re-shackled on a defined schedule, all to achieve the "safe operation and proper maintenance" of elevators. C.C.O. 3141.

Second, the time, place, and scope of the search must be limited to restrain the discretion of the inspectors. *Burger* at 703. Here, in C.C.O.3141, the inspections are limited to: normal business hours, as those are the hours that inspectors work; in all buildings with elevators;

periodically but at least every six months; and to the elevator and mechanical rooms—as no authority is given to search offices, apartments, conference rooms, the surrounding property grounds, or any other part of the premises.

By comparison, warrantless inspections schemes have been upheld for the entire premises of any gun dealer, during normal business hours (without a periodic limitation) and for any records, firearms, and ammunition (*Biswell* at 311); any records or vehicles on the premises of all vehicle-dismantling enterprises, during normal business hours (*Burger* at 711-712); and mines can be inspected at least four times annually for underground mines or at least twice annually for surface mines, plus needed follow-up inspections for all mines, without advance notice by any person (*Donovan* at 594). Thus, the periodic-inspection scheme in C.C.O. 3141 provides adequate notice under the Burger test.

Consequently, the City of Cleveland provided sufficient evidence to the trial court that its warrantless search scheme regarding the closely-regulated elevator operation met the requirements of *New York v Burger*. Thus, the trial court did not abuse its discretion when it so found and this Court should equally find that Cleveland's elevator scheme does not require a warrant and is constitutionally valid.

C. The Trial Court Correctly Imposed Community-Control Sanctions on Shaker Heights Apartments Owner under O.R.C. 2929.27(C) and in Accordance with This Court's Consistent Holdings.

Shaker Heights Apartments Owner cites *State v. Nite Clubs of Ohio* (7th Dist. No. 03 MA 20), 2004-Ohio-4989 for its assertion that a corporate defendant cannot be placed on community control because they cannot be jailed. This Court has consistently upheld impositions of community control on corporate defendants, however. Indeed, the only case found explicitly mentioning and disagreeing with *Nite Club*s is *Willowick Building Department v. Shoregate*

Towers NS, LLC, (11th Dist. NO. 2024-L-027), 20024-Ohio-5650, in which the Lake County Court of Appeals relied on this Court's analysis in *Cleveland v. Pentagon Realty, LLC*, 2019-Ohio-3775, 133 N.E.3d 580 (8th Dist.).

In *Pentagon Realty*, this Court stated that the primary goal in building-and-housing-code-violation cases is to correct the property into compliance with all building codes, rather than punish the defendant for misconduct. Id, at ¶9, citing *Cleveland v. Schornstein Holdings, LLC*, 2016-Ohio-7479, 73 N.E.3d 889, ¶19, (8th Dist.), citing Go Invest Wisely, LLC, 8th Dist. Nos. 95172,95173,95174,95176,and 98177, 2011-Ohio-3047, ¶20; *Lakewood v. Krebs*, 150 Ohio Misc.2d 1, 2018-Ohio-7083, 901 N.E.2d 885, ¶19. To achieve this goal, trial courts have broad discretion in fashioning a sentence to determine the most effective means to establish compliance. *Id*, ¶10, citing *Shornstein Holding, LLC*. Thus, unless a specific sanction is required or prohibited by law, a trial court may impose any sanction or combination of sanctions, including fines, jail time, and community control sanctions for a maximum of five years. *Id,* citing *N. Olmsted v. Rock*, (8th Dist. No. 105566), 2019-Ohio-1084, ¶32.

O.R.C. 2929.27(C) provides: "...the court imposing a sentence for a misdemeanor, other than a minor misdemeanor, upon an offender who is not required to serve a mandatory jail term may impose any other sanction that is intended to discourage the offender or other persons from committing a similar offense if the sanction is reasonably related to the overriding purposes and principles of misdemeanor sentencing." *Cleveland v. City Redevelopment, LLC* (8th Dist. No. 113651), 2024-Ohio-5313; *Cleveland v. U.S. Bank, N.A.*, 2016-Ohio-7402, 72 N.E.3d 1123 (8th Dist.), ¶8. Consequently, the trial court can impose a non-financial sanction on a corporate defendant because O.R.C 2929.27(C) authorizes the imposition of community-control sanctions when there is no mandatory jail term.

If this Court were to change its previous holdings on this matter, the City and the Housing Court's ability to compel compliance with the City's Codes would be greatly hampered. No longer could the trial court fashion community-control terms that are tailored to bring the property in compliance without resorting to a forceful punitive financial sanction. If community-control sanctions were found not to apply to corporations, which own a substantial amount of Cleveland's buildings, the Housing Court would likely need to impose harsher financial sanctions. This runs afoul of this Court's oft-stated proviso that the primary goal in building-and-housing-code-violation cases is to correct the property into compliance with all building codes, rather than punish the defendant for misconduct. *Cleveland v. Pentagon Realty, LLC*, 2019-Ohio-3775, 133 N.E.3d 580 (8th Dist.), at ¶9, citing *Cleveland v. Schornstein Holdings, LLC*, 2016-Ohio-7479, 73 N.E.3d 889, ¶19, (8th Dist.), citing Go Invest Wisely, LLC, 8th Dist. Nos. 95172,95173,95174,95176,and 98177, 2011-Ohio-3047, ¶20; *Lakewood v. Krebs*, 150 Ohio Misc.2d 1, 2018-Ohio-7083, 901 N.E.2d 885, ¶19. Therefore, the City urges this Court to uphold its previous holdings that permit the Housing Court to impose community-control sanctions other than financial sanctions on corporate defendants in accordance with O.R.C. 2929.27(C) and to overrule Shaker Heights Apartments Owner's Second Assignment of Error.

D. The Trial Court Did Not Impose Community-Control Terms That Are Too Overbroad as the Terms Further the Goals of Community Control and Impose Terms That Must Be Followed as a Matter of Law Anyway.

Shaker Heights Apartments Owner argues that the community-control terms are overbroad and do not meet the requirements of community control. The City states, however, that the community-control terms imposed by the trial court advance the goals of community control: the need to change the offender's behavior, the need to rehabilitate the offender, and the desire to make restitution to the victim and or the public, as well as the goal of compelling

compliance that is singular to Housing-Court cases. Additionally, many, if not all, of the imposed terms are things that Shaker Heights Apartments Owner are obligated to do anyway under the City's Codes.

O.R.C. 2929.22 describes the steps a trial court must undertake when imposing a misdemeanor sentence. O.R.C. 2929.25 describes the procedure for imposing misdemeanor community-control sanctions. O.R.C. 2929.25 does not explicitly require the trial court to consider any particular factors. Rather, O.R.C. 2929.22(B)(1) requires the trial court to consider the following factors when determining the appropriate sentence for a misdemeanor:

(a) The nature and circumstances of the offense or offenses;

(b) Whether the circumstances regarding the offender and the offense or offenses indicate that the offender has a history of persistent criminal activity and that the offender's character and condition reveal a substantial risk that the offender will commit another offense;

(c) Whether the circumstances regarding the offender and the offense or offenses indicate that the offender's history, character, and condition reveal a substantial risk that the offender will be a danger to others and that the offender's conduct has been characterized by a pattern of repetitive, compulsive, or aggressive behavior with heedless indifference to the consequences;

(d) Whether the victim's youth, age, disability, or other factor made the victim particularly vulnerable to the offense or made the impact of the offense more serious;

(e) Whether the offender is likely to commit future crimes in general, in addition to the circumstances described in (B)(1)(b) and (c) of this section;

(f) Whether the offender has an emotional, mental, or physical condition that is traceable to the offender's service in the armed forces of the United States and that was a contributing factor in the offender's commission of the offense or offenses;

(g) The offender's military service record.

Following a misdemeanor conviction, the trial court may impose community residential sanctions, nonresidential sanctions, financial sanctions, and any other conditions that it considers appropriate. *State v. Preston-Glenn*, 10th Dist. No. 09AP-02, 2009-Ohio 6771, ¶40, citing R.C. 2929.25(A)(1)(a). The trial court has broad discretion to impose other conditions on an offender as part of the community-control sanctions and this imposition will not be reversed absent an abuse of discretion. *Id.*, citing *State v. Hause*, 12th Dist. No. CA2009-05-063, 2009-Ohio-548; *State v. Talty*, 103 Ohio St3d 177, 2004-Ohio-4888, ¶10.

The trial court's broad discretion is not limited, however. *Id.*, citing *State v. Stewart*, 10th Dist. No. 04AP-761, 2005-Ohio-987, ¶7. The conditions imposed must not be so overbroad as to impinge on the offender's liberty, and must reasonably relate to the goals of community control—rehabilitation, administering justice, and ensuring good behavior. *Id.*, citing *State v. Talty*, 103 Ohio St.3d 177, 2004-Ohio-4888, ¶12,13; *State v. Jones* (1990), 49 Ohio St.3d 51, 52, 550 N.E.2d 469. In determining whether a condition advances these goals, courts should consider whether the condition reasonably relates to rehabilitating the offender, has some relationship to the offense, and relates to future criminality and serves the ends of community control. *Id.*, citing *State v. Jones* (1990), 49 Ohio St.3d 51, 53, 550 N.E.2d 469.

This Court has held that the overriding purposes of misdemeanor sentencing are to protect the public from future crime by the offender and others and to punish the offender.

Cleveland v. Pentagon Realty, L.L.C., 8th Dist. No. 108146, 2019-Ohio-3775, 133 N.E.3d 580, ¶8. To achieve these purposes, the sentencing court shall consider the need to change the offender's behavior, the need to rehabilitate the offender, and the desire to make restitution to the victim and or the public. *Id.*, quoting *Cleveland v. Go Invest Wisely, L.L.C.* 8th Dist. Nos. 95172, 95173, 95174, 95175, 95176, and 95177, 2011-Ohio-3047, ¶8, quoting *State v. Downie*, 2009-Ohio-4643, 183 Ohio App.3d 665, 918 N.E.2d 218, (7th Dist.), ¶45, citing *In re Slusser*, 2000-Ohio-1734, 140 Ohio App.3d 480, 487, 748. N.E.2d 105 (3rd. Dist).

In *Cleveland v. Schornstein Holdings*, 8th Dist. No. 103471, 2016-Ohio-7479, 73 N.E. 3 889, this Court recognized the malignant effect that a poorly maintained dwelling has on its neighboring community. *Id.*, at ¶18. Further, overall housing values in the neighborhood can decline drastically if even one property is poorly maintained. *Id.* And, "a poorly maintained property can also create a trend of neglect, leading to a downward spiral in the community. *Id.*, quoting *Lakewood v. Krebs*, 150 Ohio Misc.2d 1, 2008-Ohio-7083, 901 N.E.2d 885, ¶28. Thus, in cases involving building, housing, or health code violations, the primary goal is to bring the property into compliance—rather than punish the defendant for the misconduct. *Id.* at ¶19, citing *Cleveland v. Go Invest Wisely, L.L.C.* 8th Dist., Nos. 95172, 95173, 95174, 95175, 95176, and 95177, 2011-Ohio-3047, citing *Lakewood v. Krebs*, 150 Ohio Misc.2d 1, 2008-Ohio-7083, 901 N.E.2d 885 at ¶19. In order to achieve that goal, the Housing Court is vested with broad authority to fashion an appropriate punishment to compel compliance. *Cleveland v. Schornstein Holdings*, 8th Dist. No. 103471, 2016-Ohio-7479, 73 N.E. 3 889, ¶19.

The trial court's imposition of the gift, sale, or transfer prohibition furthers the above-discussed goals of community control: the need to change the offender's behavior, the need to

rehabilitate the offender, and the desire to make restitution to the victim and or the public, as well as the goal of compelling compliance that is singular to Housing-Court cases.

The prohibition addresses the need to change the offender's behavior by maintaining the trial court's supervision over Shaker Heights Apartment Owner's property to ensure that it is maintained within all of Cleveland's Codes. The trial court's ability to maintain that supervision would be frustrated if Shaker Heights Apartment Owner were able to give, sell, or transfer its property without any prior approval.

This prohibition would also further the goal of rehabilitating Shaker Heights Apartment Owner by requiring it to correct the violations and maintain its multi-unit properties violation free; thus, making it a responsible owner. Allowing Shaker Heights Apartment Owner to shirk that duty by giving, selling, or transferring the property defeats the goal of rehabilitation.

The prohibition also helps to make restitution to the victims, which, in this matter, are the tenants and neighbors of the properties, specifically, and all of the citizens of Cleveland and its visitors, generally. By requiring that Shaker Heights Apartment Owner not give, sell, or transfer these properties without approval, the victims are guaranteed that the trial court will maintain supervision of these properties while Shaker Heights Apartment Owner is still on community control. To allow Shaker Heights Apartment Owner to give, sell, or transfer the property would not protect these victims as a new buyer might not maintain those properties and the trial court would not be able to force them to do so.

Likewise, the prohibition order imposed in the sentence as a term of community control furthers the goal of compelling compliance because it allows the trial court to supervise Shaker Heights Apartment Owner's property. That purpose would be thwarted if Shaker Heights

Apartment Owner could sell its properties without correcting them to a buyer over whom the trial court does not have jurisdiction.

Consequently, the gift, sale, or transfer prohibition meets the *Jones* test as it furthers the purposes of community control generally, as they pertain to all defendants, and specifically, as they pertain to housing-court defendants. Furthermore, this Court has already upheld the imposition of community-control conditions that included the requirement to obtain permission from the trial court before transferring the property. *Cleveland v. GIG6, LLC*, 8th Dist. No. 110124, 2021-Ohio-2684, ¶23.

In *Cleveland v. City Redevelopment, LLC*, 8th Dist. No. 113651, 2024-Ohio-5213, this Court recently determined that this Court's no-sale prohibition did not apply, based specifically on the facts in that case, when the defendant purchased a dilapidated house in the city and completely renovated it despite years of alleged delay by the City's Landmark Commission and was in full compliance at sentencing. *Id.* at ¶12 Thus, *City Redevelopment* is limited to the situation where the property was purchased in a dilapidated condition, the results were accomplished despite bureaucratic delay, and the violations were corrected before sentencing. Similarly, this Court found that the no-sale prohibition imposed on other properties did not share a relationship with the underlying offenses charged in that case. *Id.* at ¶10.

The prohibition against giving, selling, or transferring the Shaker Heights Apartment Owner's property meets the goals of community control. *City Redevelopment* is not on point as the properties at issue were not in compliance at the time of sentencing and there were no bureaucratic delays. Therefore, the trial court did not abuse its discretion when it imposed the prohibition against giving, selling, or transferring the property.

Likewise, the other community-control terms, despite Shaker Heights Apartments Owner's assertion to the contrary, relate to the need to change the offender's behavior, the need to rehabilitate the offender, and the desire to make restitution to the victim and or the public. Furthermore, all of these terms are things that Shaker Heights Apartments Owner are obligated to do under the law, which the Sentencing Order makes clear by stating that Shaker Heights Apartments Owner is obligated to maintain all its properties in Cleveland in good repair and in compliance with local codes.

A great deal of the items that needed to be corrected were discussed by the Chief Housing Court Specialist during his pre-sentence investigation, include correcting a large amount of violation notices, obtaining lead-safe certificates, obtaining the appropriate rental registrations, hiring a contractor to the fix the elevators, keeping the areas clean of junk and debris, obtaining a façade certificate. Besides having already having to comply with these terms as they are requirements of Cleveland's codes, the requirements help to change Shaker Heights Apartments Owner's behavior by bringing them in compliance with all of the City's Codes. Furthermore, the requirements help to rehabilitate Shaker Heights Apartments Owner so that they would not be subject to any further criminal actions if the required items are not corrected. Finally, a correction of the required items redounds to the benefit of the tenants and neighbors of the buildings, who, for this matter, can be considered to be the victims.

Consequently, the community-control terms, albeit extensive, are not overbroad because they relate to the need to change the offender's behavior, the need to rehabilitate the offender, and the desire to make restitution to the victim and or the public. Furthermore, in *Cleveland v. GIG6, LLC*, (8th Dist. No. 110124) 2021-Ohio2684, this Court stated that similar community-terms were acceptable because the owner's property was inarguably subject to all applicable

codes or laws and the record reflected that the trial court's goal was to bring the property into compliance in a timely and efficient manner. *Id.* at ¶17. Again, the community-control terms are all things that Shaker Heights Apartments Owner is obligated to do under the City's Codes. Thus, since they are obligated to follow the City's Codes, the community-control terms are not overbroad. Consequently, the trial court did not abuse its discretion when it imposed them.

Shaker Heights Apartments Owner asserts that the Cleveland Municipal Housing Court is a court of limited jurisdiction and does not have authority to create a rent-escrow account or a receivership. The state's statutes and this Court's previous decisions refute that assertion, however.

O.R.C. 1901.181(A)(1) establishes what causes are exclusively reserved for the Housing Court, which are:

> Except as otherwise provided in this division and division (A)(2) of this section and subject to division (B) of this section, if a municipal court has a housing or environmental division, the division has exclusive jurisdiction within the territory of the court in any civil action to enforce any local building, housing, air pollution, sanitation, health, fire, zoning, or safety code, ordinance, or regulation applicable to premises used or intended for use as a place of human habitation, buildings, structures, or any other real property subject to any such code, ordinance, or regulation and, except in the environmental division of the Franklin county municipal court, in any civil action commenced pursuant to Chapter 1923. Or 5321. Or sections 5303.03 to 5303.07 of the Revised Code. Except as otherwise provided in division (A)(2) of this section and subject to section1901.20 of the Revised Code and to division (B) of this section, the housing or environmental division of a municipal court has exclusive jurisdiction within the territory of the court in any criminal action for a violation of any local building, housing, air pollution, sanitation, health, fire, zoning, or safety code, ordinance, or regulation applicable to premises used or intended for use as a place of human habitation, buildings, structures, or any other real property subject to any such code, ordinance, or regulation. Except as otherwise provided in division (A)(2) of this section and subject to division (B) of this section, the housing or environmental division of a municipal court has exclusive jurisdiction within the territory of the court in any civil action as described in division (B)(1) of section 3767.41 of the Revised Code that relates to a public nuisance. To the extent any provision of this chapter conflicts or is inconsistent with a provision of section 3767.41 of the Revised Code, the provision of that section shall control in a civil action described in division (B)(1) of that section.

The Housing Court has been granted by the statute incidental jurisdiction, however. O.R.C. 1901.131 provides:

> Whenever an action or proceeding is properly brought in the housing or environmental division of a municipal court, the division has jurisdiction to determine, preserve, and enforce all rights involved in the action nor proceeding, to hear and determine all legal and equitable remedies necessary or proper for a complete determination of the rights of the parities, including, but not limited to, the granting of temporary restraining orders and temporary and permanent injunctions, to render personal judgment irrespective of amount in favor of any party, and to render any judgments and make any findings and orders in the same manner and to the same extent that the court of common pleas can render a judgment or make a finding or order in a similar action or proceeding.

This Court has held that O.R.C.1901.131 provides the Housing Court jurisdiction to hear additional matters, including common-law-public-nuisance claims. *Cleveland Housing Renewal Project, Inc v. Wells Fargo Bank, N.A.* 188 Ohio App.3d 36, 934 N.E.2d 372, 2010-Ohio-2351. In *Cleveland Housing Renewal Project, Inc.*, this Court cited several other similar incidents: *State ex rel. J.K. & E. Auto Wrecking v. Trumbo* (1992), 64 Ohio St.3d 73, 75, 591 N.E. 2d 1238 (holding that since the housing court had jurisdiction to determine a forcible-entry-and detainer action, it could properly determine a trespass action pursuant to O.R.C. 1901.131); *Hallmark Mgt. v. Tartt* (May 23, 1985), Cuyahoga App. No. 49014, 1985 WL 9036 ("The housing court which heard this case has exclusive jurisdiction for such actions. R.C. 1901.1981. That court has incidental jurisdiction to determine all [rights] which the parties assert by their claims, counterclaims, cross-claims, or third party claims. R.C. 1901.131).

Consequently, the Housing Court's jurisdiction is not as limited as Shaker Heights Apartments Owners, LLC would have this Court believe. Rather, if the parties are properly before the Housing Court, which they are in this matter as the case falls properly within the Housing Court's criminal jurisdiction, the Housing Court can hear anything that a common-pleas

court can hear. This includes the ability to appoint a receiver—at least in terms of a civil, public-nuisance action.

Furthermore, O.R.C. 3767.41 empowers the Cleveland Housing Court to appoint a receiver in a civil public-nuisance action. Although there do not appear to be any cases in which a court has appointed a receiver in a criminal matter, the fact that the Housing Court is authorized to deal with receiverships in civil cases, should allow the Housing Court a similar authority should be afforded to it in a criminal matter if the circumstances call for it. Here, based on the trial court's findings of the conditions at the premises, it was not an abuse of discretion for the trial court to impose the receivership regarding the rents.

Moreover, the trial court's order regarding the deposit of the rents into an escrow account is not really a receivership action. Rather, it an exercise of the rent-deposit procedure provided in R.C. 5321.07. That procedure permits a tenant to deposit their rent with the court after giving the landlord notice of the landlord's failure, among other things, to be in compliance with building, housing, health or safety codes that could affect the health and safety of an occupant.

In *Lakewood v. Novak*, (2000) 111 Ohio Misc.2d 1, 746 N.E.2d 719, the Lakewood Municipal Court imposed as a term of community control the requirement that the tenants deposit their rent with the court based on the landlord's conviction failing to comply with Lakewood's Building and Housing Codes. In *Novak*, the Court stated that one of the primary goals in building and housing cases is to bring the property into compliance with building and housing codes, which is more difficult in a landlord/tenant situation as the landlord does not have to live at the premises. *Id.* at page 4.

The *Novak* Court also stated that the type of violations for which the defendant was found guilty would allow a tenant to deposit rent independent of the community-control term. *Id.* at page 5. Furthermore, in a footnote, the *Novak* Court stated that the notice requirement was met by the violation notice that was sent by the City. Thus, the *Novak* stated that the rent-deposit requirement was nothing more than the application of an available civil remedy to a criminal case. *Id.* The *Novak* Court further stated that the rent-deposit provision assured adequate rights of all involved, including landlord's right to apply for release of the rent upon compliance with the codes under R.C. 5321.09(A), or the partial release for rent for payment of mortgage, insurance, real estate taxes, repairs under R.C. 5321.19(A). *Id* at page 6.

Novak's facts are very similar to those of this case. Likewise, the trial court's community-control requirement for the rents to be deposited is equally appropriate. The imposition of the rent-deposit sanction operates as means to force Shaker Heights Apartments Owner to repair the violations for which they were convicted and given proper notice if they want to be able to receive their rental income. Thus, the trial court did not abuse its discretion when it imposed the rent-deposit sanction as part of the community control terms.

Shaker Heights Apartments Owner did not file a transcript or a Rule 9(C) statement of the evidence from the sentencing hearing. Consequently, this Court cannot review Shaker Heights Apartments Owner's Assignment of Error 3 regarding the community-control sanctions and must assume the regularity of the proceedings in the trial court and the sufficiency of evidence to support the trial court's decision.

The appellant bears the duty to provide a transcript for appellate review. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199, 400 N.E.2d 384. This is so because the appellant bears the burden of showing error by referring to the record. *Id.* Furthermore, in the

absence of a record, this Court has nothing to review and must presume the regularity of the proceedings and the presence of sufficient evidence to support the trial court's decision. *Id.* Moreover, allegations raised in an appellate brief are not sufficient to overcome the presumption of regularity in a trial court's proceedings. *Id.*.

For example, in *Kilroy v. B.H. Lakeshore Company,* (1996) 11 Ohio App.3d 357, 676 N.E.2d 171, the appellant failed to provide a verbatim transcript of the proceedings or a 9(C) or 9(D) statement of evidence. *Id.* at 362. Consequently, this Court held that the appellant could not prevail on the appellant's assignments of errors. *Id.* This Court held that it was constrained to follow the directives of App. R. 12(A)(2) that states the court may disregard any assignment of error presented for review if the party raising it fails to identify in the record the error on which the assignment of error is based. *Id.* Thus, because Shaker Heights Apartments Owner failed to provide a transcript of the sentencing hearing or a statement of the evidence, this Court must presume the regularity of the trial court's decisions, overrule Shaker Heights Apartments Owner's 3rd Assignment of Error regarding the community-control sanctions, and enter judgment in Cleveland's favor.

Nevertheless, the community-control terms imposed by the trial court are not overbroad as they relate to the goals of community control: the need to change the offender's behavior, the need to rehabilitate the offender, and the desire to make restitution to the victim and or the public. Neither are they overbroad because all of the other terms are things that Shaker Heights Apartments Owner is required to do anyway under the City's Codes. Consequently, this Court must overrule Shaker Heights Apartments Owner's Assignment of Error 3.

E. While the Trial Court's Entry Needs to Be Corrected Regarding the Amounts of the Fine Attached to the First Count, the Violations of Cleveland's Building and Housing Codes Are Separate Offenses—Not Allied Offense—Thus The Trial Court Was Correct In Not Merging Them.

Shaker Heights Apartments Owner argues that the criminal counts are allied offenses and should be merged. This Court has previously held that they are not allied offenses and that they should not be merged.

Allied offenses are those that, although they are different offenses, are so aligned in nature as to constitute, for all intents and purposes, the commission of a single offense. *Cleveland v. Go Invest Wisely, LLC*, (8th Dist. Nos 95178, 95181, 95179, 95182, 95180, 95447) 2011-Ohio-3461, ¶13, citing *State v. White*, (8th Dist. No. 92972), 2010-Ohio-2342. In *Go Invest Wisely*, this Court stated that the Cleveland's ordinances make each day for which a violation is not remedied a separate offense. *Id.* Thus, this Court further stated that, since separate offense can be individually punished, they are not allied offenses of similar import. *Id.* Therefore, the trial court did not abuse its discretion when it did not merge the offenses, since they should not be merged as they are not allied offenses.

Shaker Heights Apartments Owner has also argued that the imposition of the sentence is not correct as the Entry combines all of the counts on the first count. This is clearly a clerical error that can be corrected by a nunc-pro-tunc order. The Montgomery Court of Appeals has held that where a judgment entry does not accurately reflect the sentence imposed at a sentencing hearing, the judgment entry generally may be corrected by means of a nunc-pro-tunc entry. *State v. Pacific*, 2nd Dist. No. 28804, 2021-Ohio-973, ¶55. This Court, however, has held that the trial court cannot substantively modify a defendant's sentence via a nunc-pro-tunc entry. *Mayfield*

Hts. v. Barry, 8th Dist. No. 99361, 2013-Ohio-3534, ¶19. The City posits that a correction of the entry to reflect the accurate nature of the fine for each of the three counts is not a substantial modification.

But, even if this Court were to find that the entry could not be corrected, the $5,000 fine would still exist. Likewise, the community-control terms would also still exist. Therefore, the City of Cleveland respectfully requests that this Court overrule Shaker Heights Apartments Owner's Assignment of Error No. 4

III. CONCLUSION

Elevator operations are a closely regulated industry. Consequently, they meet the Burger test and a warrant is not necessary for the periodic inspections required by the City's Codes. Furthermore, the trial court reasonably found that the Inspector had a reasonable belief that the person mopping the floor and picking up trash had sufficient authority to consent to the search of the elevators.

This Court has consistently held that a trial court can impose community-control sanctions on a corporate defendant. This is because O.R.C. 2929.27(C) permits the imposition of community-control terms when a jail term is not mandatory. The imposition of community-control terms on a corporate defendant in Housing Court furthers what this Court has determined is the main goal in such cases: bringing buildings and properties in compliance with city codes.

The imposition of the community-control terms, including the sale prohibition, further the goals of community control: the need to change the offender's behavior, the need to rehabilitate the offender, and the desire to make restitution to the victim and or the public.

Neither are they overbroad because all of the other terms are things that Shaker Heights Apartments Owner is required to do anyway under the City's Codes.

The trial court did not exceed its jurisdiction when it ordered the rent income to be deposited into an escrow account. The Housing Court has extensive jurisdiction and is able to conduct receiverships in a civil matter. Furthermore, the rent deposit order is more akin to a rent-deposit action, which at least one court has found can be used in a criminal, community-control context.

Consequently, the City of Cleveland respectfully requests that this Court overrule all of Shaker Heights Apartments Owner's Assignments of Error.

Respectfully submitted,

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IV. CERTIFICATE OF SERVICE

A copy of City of Cleveland's Appellate Brief has been served, via electronic means through the Court's electronic filing system, upon counsel for all parties on August 11, 2025.

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