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**Via Email and Ordinary Mail**

Bexley City Council
c/o Timothy G. Madison, Esq.
Council Member
39 East Whittier Street
Columbus, Ohio 43206

Subject: Appeal of October 27, 2014 Decision of Bexley Planning Commission
Capital University - Bernlohr Stadium Lighting and Sound Matter
Application No. 13-004 PC

Dear Mr. Madison & Members of Council:

This letter is intended to respond to your e-mail requests, Tim, for a statement of grounds for appeal and/or assignments of error relative to the appeal of Larry Matteson and the South Bexley Neighborhood Association of the decision of the Bexley Planning Commission allowing Capital University to impose, upon the many Bexley residents who own property and live in the areas around the Bernlohr Stadium, an intrusive, disruptive, and unhealthy lighting system, an enhanced sound broadcast system, and an extensive allowance of evening and nighttime use of the problematically located stadium. The neighborhood opposes the changes because they will unquestionably affect it adversely.

Frankly, I am a bit taken back by your request for two important reasons. First, during the pre-hearing conference that you convened and conducted, you were very specific in stating to all participants that City Council would treat this matter as a *de novo* hearing. That means, to me, that the proceedings before the Planning Commission and its decision are legally irrelevant, and not a subject of claims of error or review. *De novo review means that an appellate court must act as if it were considering an issue for the first time - affording no deference to decision below.*

The question of whether this is a *de novo* proceeding, or is instead some other type of appeal, is very important, as it has important consequences, including differing burdens of proof and persuasion. The characterization of the proceeding will also direct the ordering and the presentation of evidence. Frankly, we need to know whether or not this is, in fact, a *de novo* proceeding or some different type of appeal in order to properly prepare.

Unfortunately, of course, nothing in the Bexley Charter or Zoning Code appears to authorize, much less define or structure, the proceeding that we all agree has been initiated, and used before.

Kindly also recognize that our clients do not necessarily agree with the characterization of the proceeding, also announced at the pre-hearing conference, as "quasi-judicial", and therefore administrative - and not legislative. Having reviewed Bexley's Charter and Zoning Code several times, and having looked at the request and approval granted, it is very clear that a decision to allow the Planning Commission, upon an "Environmental Review" proceeding, to allow for an expansion of the intrusive and incompatible athletic facility use must involve the creation of new law, and not the application of existing law.

Just so you know, and to be open with you, our clients have decided to defer initiation of any effort to obtain judicial review of these characterizations of the proceeding until after the hearings take place before City Council, and a determination on the merits is made. Nevertheless, our clients do not waive their right to claim that the characterizations announced are incorrect, and we raise them in this letter so that they will be preserved in the record.

With all due respect, the Appellants in this matter challenge all aspects and attributes of the permission purportedly granted by the Planning Commission. Furthermore, our clients reserve the right to identify additional specific errors as these proceedings continue. Subject to that reservation, our clients contend that the following errors were made:

1. Fundamentally, it is our client's position that under Bexley's existing Charter and Zoning Code, neither the Planning Commission nor City Council has or can have the power to grant permission allowing the additional uses proposed and granted without change or modification of the Zoning Code.

2. The determination of the Planning Commission was made without recognition or appreciation of the commitments that Capital University and the City made when the City allowed for the construction, reconstruction and expansion of Bernlohr Stadium in past zoning and administrative proceedings. We believe that permission was given ***only*** in reliance upon the understanding (or agreement) that the facility would not be lighted, or used at night. The neighbors and the City justifiably relied upon those understandings and/or agreements in granting the permit for the construction/reconstruction of the facility.

Those agreements and understandings were ignored by the Planning Commission.

3. The Decision comprehensively failed to adequately appreciate and recognize the tremendous parking, health, and safety problems sure to arise with frequent nighttime use, lighting, and an expanded sound system.

4. The permission purportedly granted was, in terms of extent and frequency of permissible use of the lights and sound system, substantially in excess of both the permission asked as a part of the application, or the permission developed by the group that discussed the issue for months, without just explanation or reason for the expansions and changes.

5. The decision of the Planning Commission unlawfully imposes upon the City of Bexley expensive and extensive monitoring and enforcement challenges, many of which are impossible to perform, without requiring Capital University to cover those substantial certain future costs.

As noted above, this is certainly not an exhaustive or complete list of our client's concerns, or its objections as to the decision that the Planning Commission made.

It is our position that because City Council has decided to address this proceeding as a "*de novo*" proceeding, all burdens of presentation and all burdens of proof will rest upon Capital University, and not upon the appealing parties. We believe, in the upcoming hearings, Capital University will have the obligation to demonstrate its entitlement and right to expand the uses of the Bernlohr Stadium, and the neighboring streets, residences, and land, without imposing any burden of proof of persuasion upon the appellants. If this is a *de novo* "quasi-judicial" proceeding, then the record of the proceedings before the Planning Commission should be, and is, irrelevant - - and the preparation and distribution to the decision makers of the record is potentially prejudicial.

It is truly unfortunate that neither the Bexley Charter nor the Bexley Zoning Code contain any provisions to assist in determination of the right of appeal, the nature of appeal, or the process to be followed. These voids unquestionably make this challenging proceeding difficult.

In any event, it is my hope that this letter assists somewhat in responding to your request for articulation of our grounds for appeal. Incidentally, when Larry Matteson filed the Notice of Appeal, he and others communicated with several Bexley officials, and were told that no statement of reasons was required. It seems obvious that the right hand may not know what the left hand is doing, or has done.

Please free or write if you have any questions or additional requests as we prepare for the hearing scheduled for later this month.

Respectfully,

William L. Loveland

WLL/dc
cc: Larry Matteson
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Catherine Cunningham, Esq.
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