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January 13, 2015

VIA HAND DELIVERY AND EMAIL

Bexley City Council
ATTN: Tim Madison, Acting Chairperson
2242 East Main Street
Bexley, Ohio 43209

Re: Bexley City Council Special Meeting to Hear Appeal of
Bexley City Planning Commission Application Number 13-004
*Motion to Dismiss the Appeal of Appellant Larry Matteson/South Bexley
Neighborhood Association*

Dear Mr. Madison:

As you are aware, my firm represents Appellee Capital University ("Capital University") regarding the above-captioned case, a purported appeal, which is scheduled for a hearing on January 20, 2015. Capital University hereby submits, by letter brief, its Motion to Dismiss the Appeal of Appellant Larry Matteson/South Bexley Neighborhood Association (collectively, "SBNA") on the ground that SBNA has no right to appeal the decision of the Bexley Planning Commission (the "Planning Commission") to the Bexley City Council.

On October 27, 2014, the Planning Commission issued a "Decision and Record of Action" (the "October 27, 2014 Decision") which approved, with conditions, Capital University's application to allow the installation of new permanent lights and the replacement of the existing stadium speakers at Bernlohr Stadium. Thereafter, SBNA issued an undated letter to the Clerk of the Bexley City Council seeking to appeal the October 27, 2014 Decision. SBNA purportedly filed the appeal under the Bexley Uncodified Second Amended Ordinance No. 41-08 (the "Uncodified Ordinance No. 41-08" or the "Ordinance"), a copy of which is enclosed with this letter. For the reasons more fully set forth below, the Uncodified Ordinance No. 41-08 did not, and does not, create any independent, substantive right to appeal a decision of the Planning Commission acting under Bexley City Code (sometimes hereinafter, "BCC") Chapter 1224, and

that Chapter itself provides no right of appeal to SBNA or any other party. Therefore, SBNA's appeal should be dismissed by the Bexley City Council.

The Planning Commission reviewed Capital University's application to install permanent lights and to replace its existing stadium speakers at Bernlohr Stadium under BCC Chapter 1224, which applies to property, like Bernlohr Stadium, located within the Campus Planning District. See BCC §1224.02. The review standards for an application relating to property located within the Campus Planning District are set forth in BCC §1224.03. Importantly, once the Planning Commission renders a decision on an application reviewed under BCC §1224.03, the Bexley City Code sets forth no appeal right for the applicant or anyone else:

(c) The [Planning] Commission shall review and approve, approve with modifications or conditions or disapprove each such application. An application may be tabled at the request of the applicant or the [Planning] Commission. The City shall maintain, as an official record of the [Planning] Commission's decision, on an application, minutes of the meeting, at which the application was considered.

BCC §1224.04(c). Notably absent from BCC §1224.04(c) is a right to appeal the decision of the Planning Commission to another administrative body. SBNA's counsel, in a letter to you dated January 9, 2015, has acknowledged this lack of an appeal right from a decision of the Planning Commission to the Bexley City Council: "[N]othing 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." W. Loveland Jan. 9, 2015 letter, at p. 2.¹

In contrast, other similar provisions of the Bexley City Code expressly grant an "applicant" only the right to appeal the decision of the Planning Commission to the Bexley City Council. For example, an applicant, and only an applicant, is expressly granted an appeal right pertaining to a decision of the Planning Commission relating to an application filed under BCC Chapter 1222—the Environmental Review District Chapter. Pursuant to BCC §1222.04(c):

(c) The Board shall review and approve, approve with modifications or conditions or disapprove such applications within forty-five days of the meeting unless the application is tabled at the request of the applicant or Board. The City shall maintain, as an official record of the approval, minutes of the meeting. **Any applicant may appeal the decision of the Board to Council by filing a notice of appeal with the Clerk of Council within fourteen days after the decision of the Board is rendered.** The decision of Council shall be final.

BCC §1222.04(c) (emphasis added). Similarly, in BCC Chapter 1223—the Bexley Architectural Review District Chapter—the applicant, and only the applicant, is granted the right to appeal a

¹ SBNA's counsel's January 9, 2015 letter also addresses issues relating to burdens of presentation and burdens of proof. Capital University will prepare and forward to you a response to the January 9 letter on or before January 16, 2015.

decision of the Board of Zoning Appeals to the Bexley City Council. *See, e.g.*, BCC §1223.04(c) (“Any applicant may appeal the decision of the Board to Council by filing a notice of appeal with the Clerk of Council within fourteen days after the decision of the Board is journalized in minutes approved by the Board.”). Importantly, as noted above and as acknowledged by SBNA’s counsel, this right of appeal language is clearly absent from the section of the BCC which is applicable to the Planning Commission’s October 27, 2014 Decision. *See* BCC §1224.04(c). Therefore, SBNA has no right to appeal the Planning Commission’s October 27, 2014 Decision to the Bexley City Council pursuant to Chapter 1224.

Capital University anticipates that SBNA will claim that it has a right to appeal the Planning Commission’s October 27, 2014 Decision to the Bexley City Council based upon Uncodified Ordinance No. 41-08.² Uncodified Ordinance No. 41-08 was passed in June 2008, and according to its preamble, the intent of the “Ordinance [was] to combine the [former] Planning Commission and the Main Street Redevelopment Commission into one body consisting of nine (9) members with three (3) alternates.” *See* Preamble to Uncodified Ordinance No. 41-08, at ¶ 1. There is nothing in the preamble of Uncodified Ordinance No. 41-08 which indicates that the intention of the Bexley City Council was to grant new appeal rights which do not exist under BCC Chapter 1224. *See* Preamble to Uncodified Ordinance No. 41-08, at ¶¶ 2,3.

Under Section 1 of Uncodified Ordinance No. 41-08, a new, and the current, Planning Commission was created and empowered to “assume the duties specified in the Codified Ordinances of the City of Bexley previously performed by the [former] City Planning Commission and the Main Street Redevelopment Commission.” Uncodified Ordinance No. 41-08, at §1 (emphasis added). Consistent with the intent of combining the two commissions into one, the new Planning Commission, Section 4 of the Uncodified Ordinance No. 41-08 provided that the new “City Planning Commission [was] substituted for the Main Street Redevelopment Commission in Chapter 1224 of the Codified Ordinances, which establishes the Main Street and Campus Planning Districts.” Uncodified Ordinance No. 41-08, at §4.

Therefore, this Ordinance merely substituted the new Planning Commission for the old City Planning Commission and the Main Street Redevelopment Commission. This new, and now current, Planning Commission assumed the duties previously performed by these two other former commissions. In effect, the new Planning Commission simply “stepped into the shoes of” the Main Street Redevelopment Commission and the old City Planning Commission. There were no new powers given to the new Planning Commission that did not previously exist in the Bexley City Code, nor were there any additional substantive appeal rights granted to applicants or persons opposing applications under Chapter 1224 by this Ordinance.

Accordingly, Section 5 of Uncodified Ordinance No. 41-08—which provides that appeals from the decisions of the new Planning Commission may be made to Bexley City Council—is

² Capital University acknowledges that the Bexley City Council’s Agenda relating to this appeal references Uncodified Ordinance 41-08 as the “statutory basis” for the appeal. For the reasons set forth in this letter brief, Capital University respectfully disagrees with that position.

only a procedural section which describes the path of an administrative appeal, if a right to such an appeal already exists in the Bexley City Code. For example, when the Planning Commission is reviewing applications relating to the Bexley Environmental Review District, as it does under BCC §1222.03, an applicant, and only an applicant, may appeal the decision of the Planning Commission to the Bexley City Council, pursuant to BCC §1222.04(c). In contrast, when the Planning Commission is reviewing applications relating to the Campus Planning District, as in the present case under BCC §1224.03, there is no right to appeal the decision of the Planning Commission to the Bexley City Council because no such right of appeal exists in BCC §1224.04(c). Nothing in Uncodified Ordinance No. 41-08 changes this outcome because no additional substantive appeal rights were granted to anyone in the Ordinance.

When the Planning Commission issued its October 27, 2014 Decision, SBNA's appeal right, if any, was to file an appeal to the Franklin County Common Pleas Court under Ohio Revised Code ("ORC") Chapter 2506. Under ORC §2506.01, every decision of a commission of any political subdivision of the state may be reviewed by the court of common pleas of the county in which the principal office of the political subdivision is located. The time period for filing such an appeal is 30 days from the entry of the decision of the commission from which the appeal is taken. *See* ORC §2505.07. Capital University is unaware of any appeal filed by SBNA with the Franklin County Common Pleas Court regarding the October 27, 2014 Decision, and the time period for filing such an appeal has passed.

For the foregoing reasons, Capital University respectfully requests the dismissal of the appeal filed by SBNA with the Bexley City Council. The provisions of the BCC which are applicable to applications, like the present one, reviewed by the Planning Commission under BCC §1224.03 do not provide for an appeal to the Bexley City Council. *See* BCC §1224.04(c). Moreover, Uncodified Ordinance No. 41-08 does not create any additional substantive appeals rights in favor of SBNA. Therefore, the Bexley City Council should dismiss the appeal filed by the SBNA.

Sincerely,



Roger L. Schantz

c: William Loveland, Counsel to SBNA (via email only; w/encl.)
Catherine Cunningham, Special Counsel to the City of Bexley (via email only; w/encl.)
Martha Sweterlitsch, Co-Counsel to Capital University (w/o encl.)

2nd AMENDED ORDINANCE NO. 41-08

By: Mr. Ben Kessler

An Ordinance to combine the City Planning Commission and the Main Street Redevelopment Commission into one body consisting of nine (9) members with three (3) alternates.

Whereas, Article XIII, Sections 56 and 57 of the City Charter were amended on November 6, 2007 to permit City Council to combine the City Planning Commission with the Main Street Redevelopment Commission; and,

Whereas, the two bodies currently have duplicative functions in approving developments and recommending rezoning requests in the city. **NOW, THEREFORE,**

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF BEXLEY, OHIO:

Section 1. That there is hereby created a City Planning Commission which shall assume all the duties specified in the Codified Ordinances of the City of Bexley previously performed by the City Planning Commission and the Main Street Redevelopment Commission.

Section 2. That such Commission shall consist of nine (9) members and three (3) alternate members appointed by the Mayor, with the concurrence of Council, each of which shall be an elector of the City and who shall serve without compensation. The term of each member shall be three (3) years with staggered terms so that in any given year, no more than three members shall have their terms expire.

Section 3. That Sections 286 and 1264.24 of the Codified Ordinances are hereby repealed, and Section 1222.02 is hereby amended to include the Mixed Use Commercial District as part of the Bexley Environmental Review District under the purview of the Planning Commission.

Section 4. That the City Planning Commission shall be substituted for the Main Street Redevelopment Commission in Chapter 1224 of the Codified Ordinances, which establishes the Main Street and Campus Planning Districts.

Section 5. That appeals from any decision made by this newly created City Planning Commission may be made directly to the Bexley City Council.

Section 6. That the effective date for the combination of the two commissions shall be September 1, 2008.

Section 7. That this Ordinance shall be declared an emergency. go into effect and be in force from and after the earliest period allowed by law.

Passed: June 24, 2008

Matthew J. Lampke
President of Council

Attest: [Signature]
Clerk of Council

Approved: 6-24, 2008

John M. Brennan
John M. Brennan, Mayor

First Reading 4/22/08
Second Reading 5/13/08
Third Reading 5/27/08
Tabled 5/27/08
Passed 6-24-08