

8

IN THE COURT OF COMMON PLEAS
LICKING COUNTY, OHIO

COMMON PLEAS COURT

JOHN THORNBOROUGH, ET AL.

2007 NOV -6 P 2: 58

APPELLANTS

-VS-

FILED
GARY R. WALTERS
CLERK
CASE NO. 2007 CV 00076

**COUNCIL OF THE VILLAGE OF
GRANVILLE, OHIO, ET AL.,**

APPELLEES.

MEMORANDUM CONTRA MOTION TO INTERVENE

Appellants strongly oppose the late attempt by Denison University to intervene as an additional Appellee in this action. The motion to intervene was first tendered to counsel for Appellants on October 22, 2007, a mere two days prior to the filing of Appellee's brief which began the period for Appellants' preparation of a final reply brief. The motion to intervene ultimately was filed and served on October 24 with a non-oral hearing date of Wednesday, November 7. The motion to intervene was accompanied by a memorandum but not by a brief. It was not accompanied by a pleading in compliance with Civil Rule 7(A) as mandated in Civil Rule 24(C). See Avanti Corp. v. Morelli Realty Corp., 2005-Ohio-6698, 5th District Court of Appeals of Ohio (Stark County).

The rules which respectively govern intervention as of right and permissive intervention both are predicated on and begin with the requirement of timely application. Civil Rule 24 is patterned after Federal Rule of Civil Procedure 24. (See Staff Notes to Civil Rule 24.) Civil Rule 24(A) states:

Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of this state confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or

impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties. (Emphasis added.)

In State ex rel. First New Shiloh Baptist Church v. Meagher, 82 Ohio St. 3d 501, at 1058, 696 N.E. 2d 1058 (1998), the 1st District Court of Appeals of Ohio (Hamilton County) citing other cases, stated:

Whether a Civ.R. 24 motion to intervene is timely depends on the facts and circumstances of the case. Norton v. Sanders (1989) 62 Ohio App 3d 39, 42, 574 N.E.2d 552, 554; NAACP v. New York (1973), 413 U.S. 345, 366, 93 S.Ct. 2591, 2603, 37 L.Ed.2d 648, 663. The following factors are considered in determining timeliness: "(1) the point to which the suit had progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervenor knew or reasonably should have known of his interest in the case; (4) the prejudice to the original parties due to the proposed intervenor's failure after he knew or reasonably should have known of his interest in the case to apply promptly for intervention; and (5) the existence of unusual circumstances militating against or in favor of intervention." Triax Co. v. TRW, Inc. (C.A.6, 1984), 724 F.2d 1224, 1228.

The application to intervene cannot be considered timely and there are no substantial competing interests which would dictate that the Court overlook the un-timeliness of the filing. These appellate proceedings have been progressing over months. The appeal was filed on July 17, 2007. As a matter of courtesy, that same day one of the Appellants personally informed Seth Patton, Vice President for Finance and Management for Denison University and the appropriate officer for its oversight of this matter. The appellate record was filed by August 21, 2007. Counsel for Appellants filed his initial appearance on August 27, 2007. A motion to dismiss parties was then filed and heard. Appellants filed their brief on September 24, 2007; the answer brief followed on October 24, 2007.

None of this transpired in secrecy. Denison has maintained the same retained counsel throughout. All of Granville has been aware of these proceedings. On July 26, 2007, a story about the filing of the appeal appeared in the Granville Sentinel. (It also appeared in the Newark Advocate.) On August 1, 2007, when it moved to partially close West College Street at the site of Cleveland Hall, Granville Village Council informed Denison University that it must proceed

with construction of the project at its own risk since matters affecting some of it were under appeal. The length of time during which Denison knew or reasonably should have known of its interest in intervening was substantial— over ninety (90) days. Yet, timely application to intervene was not made. Denison appeared to be comfortable with the village law director's representation of his client and satisfied that their interests were being protected in the appellate process.

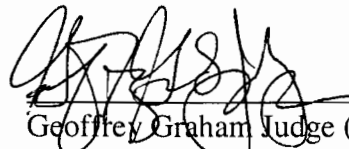
The untimely approach to the Court for intervention is prejudicial to the Appellants. Appellants' reply brief is currently under preparation, but the motion to intervene has caused them already to focus efforts on additional writing and research regarding the motion to intervene. If the Court were to approve this late intervention by Denison, the new Appellee would file an additional brief after a further period of preparation, which in turn would require Appellants to research and write an additional reply brief— and to what result? Appellants are a small group of citizens who would be unduly burdened with delay and the accompanying additional expenses which would cause them substantial hardship. Denison University has considerable assets to easily absorb these kinds of litigation costs and would enter the fray with the primary resulting effects being delay and the duplication of the already able efforts of the village law director, the former United States Attorney for the Southern District of Ohio.

With respect to the application here of the parts of Civil Rule 24(A), no one can argue that Denison does not have an interest in Cleveland Hall. Denison may contend that it is so situated that the disposition of this action may as a practical matter impair or impede its ability to protect that interest, but we argue that the Granville Village Code as interpreted by Appellants cannot possibly so drastically threaten the protection of that interest. The Granville Code does not threaten the Cleveland Hall project, only one aspect or nuance of it which should be adapted

to conform to the Code. Further, Appellants point out that nothing the applicant has brought forth indicates that Denison's interest has not been adequately represented by able counsel for the Village of Granville, and nothing has been brought forth indicating a significant purpose to intervene now which would justify the delay and prejudice. Likewise, we have been presented with no unusual existing circumstances which would militate in favor of intervention after such a delay.

To get to the ultimate consideration of all of these issues though, it must be determined first that the application to intervene at this point has been brought to the Court (and against Appellants) in a timely manner. Nothing has been presented that would suggest that the facts and circumstances here render this motion to intervene timely when we are so late in an appeal process which the applicant has followed since its filing. In conclusion, the motion to intervene by Denison University should be denied.

Respectfully Submitted,



Geoffrey Graham Judge (#0003264)

Attorney for Plaintiffs

964-A North 21st. Street

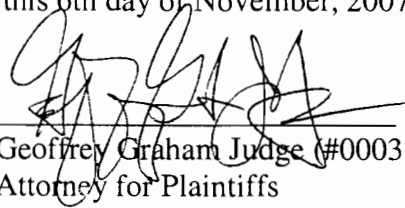
Newark, Ohio 43055

(740) 345-1601

Fax – (740) 366-1194

CERTIFICATE OF SERVICE

The undersigned attorney certifies that a copy of the foregoing document was sent by regular U.S. mail to Attorney Michael Crites, at his office located at 300 East Broad Street, Columbus, Ohio 43215, and Attorney James Cooper, at his office located at 33 West Main Street, PO Box 4190, Newark, Ohio 43058-4190, on this 6th day of November, 2007.

A handwritten signature in black ink, appearing to read 'Geoffrey Graham', is written over a horizontal line.

Geoffrey Graham Judge (#0003264)
Attorney for Plaintiffs