

IN THE COURT OF COMMON PLEAS, LICKING COUNTY, OHIO

JOHN THORNBOROUGH, et al.,

Appellants,

Case No. 07 CV 1076

v.

Judge Jon R. Spahr

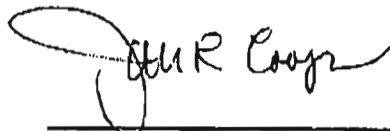
COUNCIL OF THE VILLAGE OF  
GRANVILLE, OHIO, et al.

Appellees.

**MOTION FOR RECONSIDERATION**

Now comes Appellee, Denison University, and hereby respectfully moves the Court to reconsider the decision filed on March 10, 2008, which reversed the decision of the Council of the Village of Granville. The reasons for this motion are set forth in the attached memorandum in support.

Respectfully Submitted,



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## **MEMORANDUM IN SUPPORT**

### **I. INTRODUCTION**

By judgment entry filed March 10, 2008, this Court reversed the decision of the Council of the Village of Granville (hereinafter referred to as "Council") to grant a zoning and architectural permit to Denison University for the purpose of renovating Cleveland Hall. In support of the decision, the Court recited the standard of review set forth in R.C. 2506.04. Appellee Denison University now submits that the Court inappropriately applied this standard of review to the whole record presented from the administrative hearings before the Council.

Denison respectfully submits that the Court improperly considered the findings of fact of the Village Planning Commission in support of its decision. Further, Denison states that the Court did not grant required deference to the Council's interpretation of its own Zoning Ordinances, nor sufficient deference to the Council's findings of fact.

### **II. VILLAGE PLANNING COMMISSION'S FINDINGS**

This Court, in its decision, recited the finding of the Village Planning Commission that "[t]he addition is not similar to other structures to the Village District but protects their historic design by not matching other structures." The Court found this statement "remarkably candid" and "difficult to construe" with the requirements of Granville Village Code Section 1161.02 (a), which requires that any proposed design should be "stylistically compatible" with the Architectural Review Overlay District in the Village.

In addition, this Court noted that the Council stated in its decision that the design "is stylistically compatible with some other institutional buildings in the Village Institutional District." The Court noted that the findings of Council and the Planning Commission appeared inconsistent. In the decision, the Court stated that the Council's

finding "seems to contradict the findings of the Commission that the design was not similar to other structures."

Denison submits that the findings of the Village Planning Commission are inapplicable to the appeal at bar and were therefore improperly considered. The Council, by ordinance, has set itself up as the final arbiter on issues decided by the Planning Commission, and its decisions and findings of fact are not bound by the rationale of the Planning Commission.<sup>1</sup> Thus, the Council's conclusions should have been reviewed without consideration of the Planning Commission's findings.

Section 1137.01 of the Granville Village Code provides that the Council "shall hear and decide appeals from decisions of the Planning Commission... and conduct reviews of administrative decisions or orders." Subsections (d) through (g) of Section 1137.01 require that Council must give notice and an opportunity to be heard to appropriate parties on the appeal. At this hearing, pursuant to subsection (h), those parties to be heard may:

1. Present his or her position, arguments, and contentions;
2. Offer and examine witnesses and present evidence in support of his or her position, arguments, and contentions;
3. Cross-examine witnesses purporting to refute his or her position, arguments and contentions;
4. Offer evidence and testimony to refute evidence and testimony offered in opposition to his or her position, arguments and contentions;
5. Proffer any evidence or testimony into the record if such evidence or testimony has not been admitted by Council.

Following this hearing, Council has been granted authority to "affirm, reverse, revoke, modify or remand for further proceedings the decision or order appealed from or under review." See Section 1137.01 (j).

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<sup>1</sup> The appeal has been brought upon the decision of Council pursuant to R.C. 2506.01, et seq., because the decision was adjudicatory rather than legislative. See *Talbot v. Perrysburg* (1991), 72 Ohio App.3d 475, 479.

The Council was not therefore bound by the decision, findings of fact, and rationale of the Planning Commission. Council conducted, in essence, a *de novo* hearing in accordance with the above-referenced ordinance. Although Council affirmed the ultimate decision of the Planning Commission granting the at-issue permit to Denison, Council would not have been prevented from providing its own independent findings – indeed the Code requires that Council issue its own “decision findings and conclusions of fact.” See Section 1137 (k).

In consideration of the foregoing, this Court's reliance upon the “remarkably candid” findings of the Planning Commission was in error. Therefore, Denison now respectfully asks this Court to reconsider its decision by solely addressing the decision and findings of Council.

### III. APPLICATION OF THE STANDARD OF REVIEW

The Court recited the appropriate standard of review in its decision, provided in R.C. 2506.04. However, the Court did not apply the standard of review to the “whole record” as required.

Courts have consistently held that the decision of an administrative body is presumed valid and the burden upon establishing the invalidity of the administrative action is upon the contesting party. *Consol. Mgt., Inc. v. Cleveland* (1983), 6 Ohio St. 238, 240. Reviewing Courts of Common Pleas are required to give consideration to the entire record, granting due deference to the administrative decision, and may not blatantly substitute the judgment of the administrative body. *Elbert v. Bexley Planning Comm.* (1995), 108 Ohio App.3d 59; See also *Gerstenberger v. Macedonia* (1994), 97 Ohio App.3d 167, 172.

Denison contends this Court's decision did not consider the entire record before Council, and without proper consideration of the whole record, the decision lacked sufficient deference.

In the decision, this Court found that Denison failed to present sufficient evidence before the Council to justify the decision to grant the construction permit at issue. This Court relied upon the language of Granville Village Code Section 1161.02, which states that such proposals "shall be subject to review by the Planning Commission to determine that the proposed new construction, exterior modification or structural alteration:

- (a) Is stylistically compatible with other new, renovated and old structures in the Village District.
- (b) Contributes to the improvement and upgrading of the historical character of the village District.
- (c) Contributes to the continuing vitality of the District.
- (d) Protects and enhances examples of the physical surroundings in which past generations lived."

That the Council subjected the proposal to the above review in consideration of these factors has not apparently been disputed. In its decision, the Council found that "a modern or contemporary design for the addition to Cleveland Hall can contribute to the preservation of the historic character of Cleveland Hall and can be compatible with the historic character of the Village District." See Decision of Council and Findings and Conclusions of Fact, pages 1-2. In addition, the Council found that the proposed renovations to Cleveland Hall contributed to the improvement of the character of the historical district by "preserving the historic character [of Cleveland Hall]." Id. at 2. The Council stated further that the proposal would provide "effective interaction between the campus (of Denison University) and the Village and will tie these two areas closer together." Id.

This Court found that the above statements were not supported in the record, and found that the record was "filled with evidence to the contrary." The decision of this Court relied upon statements in the record that the proposal was "starkly modern" or "not similar." This Court stated that these assertions were not consistent with subsection (a) of Granville Village Code Section 1161.02, which requires review to determine if the proposal is "stylistically compatible" with other structures in the Village District.

The plain language of the above-referenced ordinance section does not demand that the proposal be "similar" or that it cannot be "modern." Indeed, the term "compatible" has been defined as "capable of existing together in harmony." See Webster's New College Dictionary (7<sup>th</sup> Ed., 1965).<sup>2</sup> Therefore, Section 1161.02 should not be read to exclude property use that the Code does not clearly restrict.

There is ample evidence in the whole record to establish that the proposed renovations to Cleveland Hall will exist in harmony with the Village District. John H. Beyer, the professional, expert architect of the renovations, testified before Council at the hearing held June 6, 2007.<sup>3</sup> In his testimony, Mr. Beyer noted that the Secretary of the Interior of the United States has stated the renovations to historical buildings must not confuse what has been preserved with new additions. See page 121 of the Transcript from the June 6, 2007 Hearing before the Granville Village Council. Therefore, in some cases, the renovations to an historical building should be

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<sup>2</sup> Denison respectfully submits that the plain language of the ordinance is clear and does not prohibit modern renovations. In the event the ordinance is determined to be unclear or otherwise ambiguous, Courts must strictly construe restrictions on the use of real property in favor of the property owner. See Mishr v. Poland Bd. Of Zoning Appeals (1996), 76 Ohio St.3d 238, 241; See also Saunders v. Clark Cty. Zoning Dept. (1981), 66 Ohio St.2d 259, 261. The Ohio Supreme Court, addressing this principle in Saunders, stated:

"Zoning restrictions are in derogation of the common law and deprive a property owner of certain uses of his land to which he would otherwise be lawfully entitled. Therefore, such resolutions are ordinarily construed in favor of the property owner. Restrictions on the use of real property by the ordinance, resolution or statute must be strictly construed, and the scope of the restrictions cannot be extended to include limitations not clearly prescribed."

<sup>3</sup> Testimony begins on page 119 of the transcript.

contemporary, as testified to by Mr. Beyer. Id. These differentiations allow for the preservation of the portion of the building which is, in fact, historic.

Mr. Beyer further testified at the hearing in relation to a controversial glass addition to the building as follows:

We believe that it would be inappropriate, architecturally clumsy, to continue the brick structure into the new addition.... That's why the glass concept comes from respecting the historic building by making it stand out that it stands proud exactly as it was originally designed. Id. at pg. 131.

This testimony is illustrative as it relates to this Court's concerns about similarity in style. The professional architect determined, in his expert opinion, that an addition with similar style would demean and water-down the historic qualities of the original Cleveland Hall. Since the additions allow the original building to continue to be identified apart from the additions, Mr. Breyer testified that proposal is in compliance with the mandates of the Secretary of the Interior for the preservation of historic buildings.

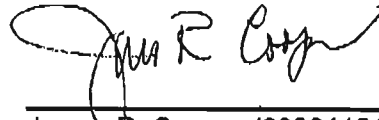
Mr. Breyer was the only architectural expert to present testimony at the hearing. This testimony is available in the record, and confirms that the Council was certainly justified in relying upon his opinion as a basis for determining that the proposed renovation was "compatible" with its surroundings.

Denison submits that the decision of this Court did not consider the whole record of the proceedings before the Council. The Court's decision focused on the final conclusions of the Council, which were based upon the testimony presented at the hearing. The conclusions were well founded based on the evidence submitted about the proposal. The conclusions were also in compliance with the zoning regulations, which do not require that proposed additions must be "similar" or that they cannot be "modern."

**IV. CONCLUSION**

For the reasons stated above, Appellee Denison University respectfully asks the Court to reconsider its decision to reverse the permit granted to it by the Granville Village Council.

Respectfully Submitted,



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## PROOF OF SERVICE

A copy of the foregoing motion was served on Geoffrey R. Graham Judge, 964 N. 21<sup>st</sup> Street, Suite A, Newark, Ohio 43055, Attorney for Appellants, and upon D. Michael Crites, RICH, CRITES & DITTMER, LLC, 300 E. Broad Street, Suite 300, Columbus, Ohio 43215-3452, Attorney for Appellees, by ordinary U.S. mail, postage prepaid, and by facsimile, this 3<sup>rd</sup> day of April, 2008.

Respectfully submitted,

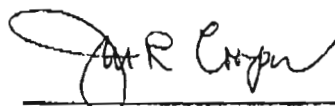


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## NOTICE OF NONORAL HEARING

Please take notice that the Court will hear Appellee Denison University's motion for reconsideration, at nonoral hearing on the 9<sup>th</sup> day of April, 2008, at 8:30 A.M.



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