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WHEN IS A FRATERNITY A NUISANCE?

"The regimes of boarding houses, fraternity houses, and the like present urban problems. More people occupy a given space; more cars rather continuously pass by; more cars are parked; noise travels with crowds."[1]

Fraternity houses located in residential neighborhoods have long been lightning rods for controversy. In the past two decades, several communities have enacted restrictive zoning ordinances in response to fraternities irritating their neighbors. One community, however, has taken more drastic action: The city of Long Beach, California recently obtained an injunction against the activities of the Sigma Pi fraternity chapter located at California State University at Long Beach, alleging that the fraternity constitutes a "public nuisance." The city's legal action follows dozens of police visits to Sigma Pi's house to deal with the fraternity's frequent parties.

California State University at Long Beach (CSULB), a public university with over 30,000 students, hosts 35 fraternities and sororities with a collective membership of over 1,500. There is no on-campus Greek housing and no "row" – instead, fraternity and sorority houses are scattered all over Long Beach. CSULB's Sigma Pi chapter has about 60 members, 14 of whom occupy the chapter's house. That house is located in a residential neighborhood, on a busy street, and directly across from an elementary school.

In December 2001, the city of Long Beach filed a complaint in Los Angeles County Superior Court against Sigma Pi, its alumni house corporation, and its chapter adviser.[2] The Complaint sought to have Sigma Pi declared a public nuisance under California civil and criminal laws. The city alleged that its police department had received 168 complaints about Sigma Pi in the past four years, and had visited the fraternity's house dozens of times to break up loud parties, making 19 arrests. The city requested a permanent injunction against the fraternity, and reimbursement for all costs of its investigation, including attorney's fees.

The city then filed a motion for a preliminary injunction against the fraternity. Offered in support of that motion were declarations from four Long Beach police officers, one from a neighbor of Sigma Pi, and one from the principal of the adjacent elementary school. Those declarations detailed the neighborhood impact of numerous parties held at the Sigma Pi house over the past two years, including noise, trash, and traffic. The declarations contained observations of underage drinking, illegal sales of alcohol, illegal drug use, trespassing, lewd behavior, and partygoers urinating and vomiting in public. An intoxicated Sigma Pi member once shot out a neighbor's window with a pellet gun. Fraternity members were alleged to have "mooned" police officers videotaping one party. The school principal reported that she and her staff often had to collect used condoms and dozens of empty cups and bottles from school property the morning after Sigma Pi parties. The city presented evidence that during September 2001 alone, police were called to the Sigma Pi house on seven (7) separate nights, and that breaking up one of Sigma Pi's parties required over a dozen officers and a helicopter.

Sigma Pi's alumni house corporation[3] and chapter adviser (but not the chapter itself) filed objections to the city's request, but after a hearing on April 9, 2002, the court granted the injunction under virtually the precise terms sought by the city. The court's detailed order directs Sigma Pi not to violate the city's noise ordinances, obstruct traffic, serve alcohol, allow littering, permit the use of illegal drugs, allow its members or guests to trespass on neighboring property or the school, or otherwise disturb the peace of the neighborhood.

In comments made to the *Los Angeles Times* and other newspapers, members of Sigma Pi claimed they were being unfairly singled out for punishment, and that the city was

A recent study conducted by the Harvard School of Public Health and published in the journal "Social Science and Medicine," found that "neighbors living near college campuses were more likely to report a lowered quality of neighborhood life through such secondhand effects of heavy alcohol use as noise and disturbances, vandalism, drunkenness, vomiting and urination." The study suggests that "alcohol outlets are more often located in areas near colleges" and "that dealing with the high density of alcohol outlets and the marketing practices this engenders in neighborhoods immediately surrounding campuses" may be an important strategy. The study, supported by the Robert Wood Johnson Foundation, looked at colleges generally and did not focus on fraternities. The complete study is available at http://www.hsph.harvard.edu/cas/documents/secondhand/.

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exaggerating the extent of the neighborhood problem. They also claimed that the city was ignoring the fraternity's positive contributions to the community. The Long Beach City Attorney claimed that a lawsuit became the city's only alternative after CSULB refused to take action against Sigma Pi. CSULB officials responded that they had attempted to rein in the fraternity through the local IFC, but had not imposed any sanctions on the group because none of its neighbors had ever filed a formal complaint with the university.

A fraternity being subjected to the type of injunction used against criminal street gangs, or to board up crack houses, may be a dubious first. It also places Sigma Pi and its members in serious jeopardy. Violation of the court's injunction would constitute contempt, which could subject the fraternity or its members to fines or jail time. The case also carries the risk of destroying the chapter and its house corporation financially; if the court determines at trial that the fraternity is a public nuisance, it can order the payment of the city's costs and attorney's fees, which if not paid become a lien against the chapter house. The city could then force the sale of the property.

Given the lurid facts of the Sigma Pi case, one might be tempted to dismiss the matter as an aberration. However, other municipal authorities are no doubt monitoring the progress of the case with interest. If Long Beach is successful, there may be more such "nuisance" actions. The case should be taken as a warning of what can occur when fraternities fail to be good neighbors.

• James C. Harvey

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1 *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974).

2 *City of Long Beach v. Beta Omicron Chapter of Sigma Pi*, Los Angeles County Superior Court (South District), Case No. NC031319.

3 In a further embarrassment for the fraternity, the city revealed that the house corporation is not in good standing with California authorities, and therefore cannot appear or oppose the City's lawsuit unless reinstated.

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ALFRED BANS FRATERNITIES

Benjamin Klein, an Alfred University junior, was found dead in a creek behind the Zeta Beta Tau House on February 12, 2002. Three and a half months later, Alfred University's Board of Trustees had voted to eliminate fraternities and sororities.

In the days immediately preceding his death, Klein had been beaten up by a couple of his fraternity brothers for allegedly revealing fraternity secrets. The local District Attorney concluded, however, that "his death cannot be directly attributed to the assault." Within days of Klein's death, the University Trustees established a Trustee Task Force on Greek Life. The Task Force included four trustees, two faculty members, representatives of both the Alumni Association and the Parents Association and the Vice President for enrollment management. There were no students on the Task Force.

The Task Force's report was exceptionally critical of Greek life at Alfred University. As of the past spring semester, there were 12 Greek chapters on campus – eight fraternities and four sororities. Six of them were under sanction for violating University alcohol and hazing regulations. Membership in Greek organizations had fallen from the high of 50% of the student body in the late 30s, to slightly more than 10% in 2002. The size of chapters ranged from the largest of 24 members to the smallest of nine. Of the ten chapter houses, seven had ten or fewer residents and many of those houses were not well maintained.

Both men's and women's groups were consistently below the campus-wide academic averages for their respective genders.

The Task Force reviewed statistics showing that Greek members on campus drink to excess more than any other group on the campus. The percentage of binge drinkers was also significantly higher than nationwide numbers for fraternity members.

> On both public and private campuses, there is no doubt that campus officials have the legal right to enact and enforce regulations that deal with conduct violations, such as hazing, illegal alcohol or drug use, that regulate the condition of houses, and that deal with students who engage in physical intimidation or punishment.

While acknowledging the strong support that Alfred University had received from its Greek Alumni, the Task Force was very critical of the lack of support, both financial and time commitment, that alumni gave to their chapters.

Compounding the lack of alumni support was the fact that Alfred University had an unusually high percentage of local Greek groups with no national affiliation, building structure, training, leadership or continued alumni involvement.

Perhaps most disturbing, particularly in the wake of Benjamin Klein's death, was the concern of physical abuse, not just hazing, but actual physical intimidation. The Task Force reported that: "Though the original intention was to include one or two students [as members], reports of potential intimidation and harassment of those students led us reluctantly to elect not to include students on the Task Force." The Task Force stated that:

> "Some students who freely chose to pledge a Greek house and then freely chose to depledge for whatever reason are harassed and intimidated to the point of transferring out of the University. We were astonished to learn that students may even have to be moved – relocated to safer, undisclosed accommodations – for fear of harm. This was one of the most shocking and abhorrent findings we made during our review of Greek life. One can only imagine the psychological and emotional harm when 'sisters' and 'brothers' turn against each other; it is especially appalling at an institution that prides itself on a safe and nurturing environment."

In spite of the parade of horribles, the Task Force did acknowledge that there were some Greek organizations on campus that were maintaining high standards:

> "The most difficult element in all this is eliminating those chapters that have maintained high standards and original ideals, as well as others that have recognized the plight of their system and initiated reforms . . . We regret very much that some fine Greek chapters will be penalized, while the same fate will befall a few who seem already to have grasped the gravity of the problem and undertaken reforms."

Clearly, no university should put up with any student organization which engages in the overall conduct described by the Task Force. On both public and private campuses, there is no doubt that campus officials have the legal right to enact and enforce regulations that deal with conduct violations, such as hazing, illegal alcohol or drug use, that regulate the condition of houses, and that deal with students who engage in physical intimidation or punishment.

Yet, several questions remain about the legality of Alfred's decision. Alfred is a private university. Therefore, it has a broader ability to regulate student conduct than does a public university. Or is it a private university? Alfred University also has as one of its components the New York State College of Ceramics, a state-supported school. The question is where does the private Alfred begin and the public Alfred end. Public institutions which deprive students of the right to freely associate may be depriving students of their civil rights in violation of both the United States Constitution and the Federal Civil Rights Law, 42 U.S.C. §1983.

As discussed in prior issues of Fraternal Law, even purely private universities which deprive students of their constitutional rights may find that they lose their right to federal support of their educational programs. In 1998, the United States Congress adopted amendments to the Education Act which expressed the sense of Congress that such actions by even private institutions were improper (20 USC 1011, Public Law 105-242). However, to date, there has been no litigation which has interpreted that section or sought to enforce it.

Whatever the legal arguments that might be marshaled against the decision, the sad fact is that the repeated instances of misconduct by some Greek groups may very well have sounded the death knell for all Greek groups at Alfred.

• Timothy M. Burke

BREAKING NEWS

On August 9, 2002, the Klan Alpine Fraternity and Sigma Chi Nu Sorority filed suit against Alfred University and six of its administrators. The suit grows out of university disciplinary action taken last spring against the two Greek groups. According to the University, "Both groups were suspended following disciplinary hearings in which they were determined to have hazed pledges." The lawsuit seeks reinstatement of University recognition for the two groups.

In challenging the University's disciplinary action, the lawsuit claims that Alfred failed to afford the groups due process or to comply with the University's own published procedures. While the suit does not appear to directly challenge the upcoming ban on Greek groups, it alleges that University officials conducted the disciplinary investigations in bad faith in order to create "a desired outcome, the University ... would decide to abolish the 'Greek System' on campus."

An Alfred University statement released after the filing of the suit says the suit does not challenge the University's decision to ban Greek organizations from campus and that even a victory in the suit by the plaintiffs "would not affect the Trustees' decision to ban Greek organizations."

DANGEROUS TIME

The reopening of school each Fall invariably brings reports of needless injuries and too frequently deaths from incidents of illegal hazing and/or alcohol abuse. That sad fact should be kept in mind in planning and running parties and pledge or new member activity this fall.

IN KANSAS — NO SOCIAL HOST LIABILITY

Matthew Prime was a 19-year old pledge of Pi Kappa Alpha Fraternity at the University of Kansas. On Pledge Dad night, Prime consumed alcohol to the point that he lost consciousness. He was taken to the hospital where he was found to have a blood alcohol concentration of .294. He ultimately recovered, having suffered no permanent injuries. Prime sued the Chapter, the House Corporation, the National Fraternity, and five individual members of the Chapter, including his Pledge Dad. The trial court dismissed the local chapter and granted summary judgment in favor of the remaining defendants. On May 31, 2002, the Supreme Court of the State of Kansas[1] put an end to Prime's claims once and for all, unanimously upholding the Trial Court's decisions in favor of all defendants.

On Pledge Dad night, Prime visited six rooms in the fraternity house, asking questions to determine who his Pledge Dad was. Alcohol was available in each room. Prime conceded he was not forced to drink and was told he didn't have to drink. The closest anyone came to encouraging him to drink, according to the court, was that in one room he was told "if you want to drink that would be fine because it will be the time of your life." Prime claimed that he perceived that there was "peer pressure" to consume alcohol that night.

In the last room, where Prime only spent five minutes, Brian Harper, who was Prime's Pledge Dad, gave Prime a bottle of Mad Dog 20/20, the traditional gift Pledge Dads in the Chapter gave to their Pledge Sons. Prime and his Pledge Dad went downstairs to join other fraternity members and pledges in singing fraternity songs. The Pledge Dad shortly went back to his room to study for a test the following morning, but at approximately 1:00 a.m. the Pledge Dad returned to the Chapter living room and found Prime passed out. The Pledge Dad and two other fraternity members took Prime to the hospital.

The court made short work of Prime's claims against the Chapter finding that under Kansas law the Chapter was an unincorporated association which could neither sue nor be sued. The Supreme Court of Kansas spent most of its review on analyzing the claims against the five individual defendants. The court took pains to note that there was no undue pressure brought on Prime to consume alcohol. It noted that in cases from other jurisdictions where liability was imposed on those who supplied alcohol to minors, there were strong elements of coercion "not present in this case" and relied heavily on the fact that Prime was repeatedly told he was not required to consume alcoholic beverages.

While Kansas law prohibits providing alcohol to minors, Kansas does not impose dram shop liability. Unlike in some other states, the supplier of alcohol is not liable for the damages done to the consumer of the alcohol or by the consumer of the alcohol. The court relied, in part, on its prior decision in *Ling v. Jan's Liquors*, 237 Kan. 629 (1985) in which the court refused to hold Jan's Liquors liable for an accident caused by a minor to whom it sold alcoholic beverages. The court also relied on *Mills v. City of Overland Park*, 251 Kan. 434 (1992). Mills, a 19-year old, had been served nine or ten shots of whiskey and four or five beers in the space of an hour or so. He was escorted from the bar due to his conduct. He was found the next morning frozen to death in a drainage ditch behind the bar. Given those relatively recent Kansas cases in which there were severe injuries in one and a death in the other, and yet no liability imposed on the provider of the alcoholic beverages, it is not surprising that no liability would be imposed on the individual defendants in Prime's case.

In considering the liability of the national fraternity, the court noted that the National Fraternity oversees 200 chapters at some 200 different colleges. National had no knowledge of the plans for Pledge Dad Night and was not involved in scheduling, coordinating or directing it in any way. The court noted that some states have imposed liability on national fraternities while others do not. Since Kansas does not impose liability on the supplier of alcoholic beverages to a minor, there was no legal basis for imposing liability on the fraternity member and "for the same reasons, there is no legal basis for imposing liability on the national organization."

Turning to the responsibility of the House Corporation, the court refused to buy Prime's argument that the consumption of alcohol on the house premises and the medical expenses caused by such consumption was "caused by a condition of the real property." Kansas law generally recognizes broad immunity for landlords and found no reason to carve out an exception in Prime's case.

The Kansas decision should be viewed solely for what it is. It applies only to the State of Kansas. There, it can broadly be read as providing significant immunity from liability to chapters, house corporations, national fraternities and members for consumption of alcohol by minor members and pledges. The results of this case could very well be different in other states where dram shop social host liability is imposed. As the Kansas Supreme Court noted, courts in other states have reached very different results on very similar facts. The individuals who gave alcohol to Prime were violating Kansas criminal law. They could have been criminally prosecuted. Civilly, these defendants benefited from the fact that there was apparently no evidence that Prime was coerced into drinking. There is no doubt, too, that there was little sympathy for Prime and that the court found he had a history of consuming alcohol and had no lasting injuries from this incident. The Kansas decision should not be read in any way to endorse the illegal distribution of alcohol to minors, nor should it be viewed as granting immunity to those who do distribute alcohol to minors. Such conduct is criminal in all states, even if in Kansas it does not create civil liability.

• Timothy M. Burke

[1] *Prime v. Beta Gamma Chapter, et al.*, 2002 Kan. Lexis 301.

The Most Frequently Asked Questions Concerning New IRS Guidelines on Fraternity Foundation Funding of Educational Areas In Fraternity Chapter Houses

Introduction:

This article is a follow up to my article in the November 2001 issue of *Fraternal Law* which described the new IRS guidelines issued in July, 2001, concerning the subject of fraternity foundation funding of educational areas in fraternity chapter houses. Since we have been working with these guidelines for approximately a year now, a pattern has emerged of frequently asked questions in connection with the new guidelines. This article will share these questions and will provide my views as to the appropriate answers.

Questions and Answers:

1. What does it mean that a fraternity foundation is permitted to fund educational facilities similar to what the university provides? Does this mean all universities or the particular university where the project is located and how does one document that the university is providing comparable facilities?

> **Answer:** Definitely, the guidestar for this part of the inquiry is the particular university where the project is located and whether it provides comparable educational facilities in its dormitories or other student housing. This is the unique case where the appropriate tax standard relied upon by the IRS could be different from campus to campus, although to date it appears that most universities and colleges today are providing similar facilities and the rule does not appear to be a practical problem so far. I recommend that the particular university's provision of these facilities be documented by a letter from an appropriate university official to this effect.

2. Since these new IRS guidelines have been recently issued, do you recommend that fraternity foundations planning to fund these types of projects seek an IRS private letter ruling or handle the project on a less formal "opinion of counsel" basis?

> **Answer**: The answer to this question really depends on the mind set of the foundation and its degree of conservatism. Since these guidelines are recently issued, it is not likely that they will change soon unless the Service discerns abuses in the area. However, we all know that similar guidelines have changed several times in the past, so for those organizations that are conservative and want absolute assurance, an IRS private letter ruling is the best way to proceed. However, most fraternity foundations seem to be happy to go forward with an opinion of counsel, especially those who have received IRS private letter rulings under the former guidelines. In summary, this is a question that needs to be discussed and resolved between the fraternity foundation and its advisors.

3. Since the new guidelines seem straightforward and fairly precise, is a grant agreement still necessary when a fraternity foundation is funding a housing project?

> **Answer:** The answer to this question is a definite yes in my view. Whenever a Code Section 501(c)(3) charitable organization is making an educational or leadership grant to a non-Code Section 510(c)(3) organization, even if it is tax exempt under another Section, such as a house corporation or local chapter, an appropriate grant agreement is definitely required. This is especially true in a situation like this where the projects are usually sizable and the buildings hopefully will endure for several decades. The grant agreement should be tailored to a housing project and not the type that is used for a non-housing educational grant.

4. I understand that under the new guidelines, grants can be made for fire alarms, smoke detectors and internal sprinkler systems in a fraternity house - is this correct?

> **Answer**: It is correct that grants can be made for this type of safety equipment; however, the grant is limited to educational areas in the chapter house and those areas that are directly servicing or adjacent to educational areas, so that this type of funding is not available on an "entire house" basis.

5. What about fraternity foundation funding of computer network equipment and wiring for the entire house - is this like the safety equipment referenced above or can this be provided throughout the entire house?

Answer: As with all fraternity foundation funding of these projects, the first inquiry is whether the university provides such ubiquitous computer access in its residences. If it does, then the fraternity foundation may indeed fund such equipment and wiring for the entire house. In other words, such funding is not limited to designated educational areas in the way that funding for fire safety equipment is.

6. I have heard that there are some new guidelines on fraternity foundation funding of educational furniture - what are these?

Answer: This is indeed an area where there has been a relaxation of the previous rules. As before, if the university provides these items in its residences, then computers, study desks and chairs, as well as, other types of furniture that are in the designated educational areas may be funded by the fraternity foundation, as long as these items are not personally owned by members. There is a new guideline that as long as these items are not owned by the members, a computer, desk and chair may also be provided in sleeping areas, whether or not these areas are separately designated educational areas.

7. I know that the prior rules required educational areas funded by a fraternity foundation to be 100% educational in use - has there been any relaxation of this standard?

Answer:Here again, there is some good news as to the IRS' view on this question and it has, in my view, taken a more practical approach to this question. In the past, no mixed-use areas such as dining areas and sleeping quarters could be considered educational, but now, a minor social or recreational use such as a reception occasionally held in a library will not be considered to change an educational facility into one of mixed use. This is indeed helpful but caution and good judgment should be exercised in this regard.

8. Has there been any change under the new guidelines as to grants by fraternity foundations being made for annual operating expenses in a chapter house?

Answer: No, grants can still be made for annual operating expenses (insurance, utilities and similar items) relating to dedicated educational areas. In this connection, as well as with the overall funding of educational areas in fraternity houses, any reasonable allocation may be used for determining educational space in the fraternity house.

Conclusion:

This article has necessarily covered only the most commonly asked questions relating to fraternity housing projects funded by fraternity foundations. In my experience, each project is unique and in connection with such a project, numerous questions will arise, with some of them likely to be novel. The best way to proceed in securing accurate answers to these questions is for a foundation involved in such a project to work closely with its fundraising advisors, counsel and architects as a team so as to ensure the success of the project as well as the protection of the foundation's tax exempt status under code Section 501(C)(3).

• Barbara S. Bromberg

WATCH FOR NEWS ON STUDENT RECORDS

This spring two important decisions were announced by courts dealing with the privacy of student records. The United States Sixth Circuit Court of Appeals ruled that student disciplinary records are, generally, private records and the release of such records is prohibited under the Family Education Rights and Privacy Act (FERPA). *U.S. v. Miami University, 2002 U.S. App. LEXIS 12830 (6th Cir.).*

But, a 7-2 decision by the U.S. Supreme Court (*Gonzaga University v. Doe, 122 S. Ct. 2268 (2002)*), held that a student whose records were improperly released had no right to collect damages from the University whose official released those records.

Watch for an article discussing these cases and their implications for the Greek world in the November issue of *Fraternal Law*.

NPC TURNS 100

The National Panhellenic Conference (NPC) celebrates its centennial in Chicago on October 11th and 12th. Seven years older than its male counterpart, the National Interfraternity Conference (NIC), NPC is a conference composed of 26 women's fraternities. Its member groups are autonomous and self-governing. NPC does not control its members, but through a series of Unanimous Agreements, recommends policies of interfraternity interest to its members. Leadership of NPC rotates among representatives of its member organizations. The current Chairman of NPC is Sally McCall Grant, an Alpha Phi.

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The goal of *Fraternal Law* is to provide a discussion of fraternity law, but its contents are not intended to provide legal advice for individual problems of Greek organizations. The latter should be obtained from your attorney.

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