



FRATERNAL LAW™

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GREEK HOUSES ON UNIVERSITY LAND

For the last hundred years, many fraternities have built houses on university property, or leased space in university buildings. Years after the relationship began, the parties may find that the terms of the relationship between the educational institution and the Greek organization were not properly documented. In such situations if there develops a desire on the part of one party or the other to change an arrangement that has worked for decades, and it is hard to find out what the original deal was, organizational and legal problems erupt.

As a general rule, it is better for a Greek chapter to occupy a house owned by a related house corporation which has title to the land and the house in fee simple. On the other hand, sometimes local fraternity leaders and campus officials desire to enter into a relationship with regard to a particular chapter.

In one situation, a college built a new dormitory. The college agreed that if a particular fraternity paid to construct, furnish, and maintain a chapter room on the top floor of the building, the college would house members of the fraternity on the floor below. The fraternity expended \$30,000 (in 1930 dollars) in that effort and has incurred numerous costs from time to time since then to maintain and modernize the chapter room.

A hundred years ago, a college offered to rent lots to fraternities for \$10 a year if the fraternities would build houses on the lots. Fraternities built houses which now have a very high market value.

In each case, the fraternities and the college administrators thought they were doing good things for their respective parties, but many years later when the desire to change arose, there was not a clear path as to what were the rights and responsibilities of the college and of the fraternities.

For the fraternity to be a tenant of the university, either on a ground lease or in building space, is to create hazards for both the college and the fraternity. Examples of the issues to be considered are:

- If the fraternity has any religious orientation, and the university is state supported, those institutions

run the risk of a civil rights suit challenging the arrangement because of the First Amendment separation of church and state.

- If an unfortunate incident happens in the fraternity space that leads to a lawsuit, without a clear demarcation of rights and responsibilities, the university may be exposed to a liability suit when it actually had nothing to do with the internal affairs of the chapter that led to the incident.
- An officious university administrator may decide to engage in intrusive regulation of the internal affairs of the chapter, and use the landlord's status as a justification.
- The chapter may go out of existence, and if that is the case, what happens to the assets that the chapter or house corporation has caused to be constructed on university land or in a university building?
- If the fraternity is going to build a structure on university land, how much control can the university have over the design and the appearance of the structure?
- If the fraternity builds a house on university land, who is responsible for the maintenance upkeep of the house?
- What will the term of the lease be?
- Are there options for renewals?

If a Greek organization is going to lease space in a university building, the lease should be for a relatively long term in order to provide stability for the chapter. The mini-

imum length of time should be long enough for the anticipated life of the physical improvements that the fraternity will be making to the interior spaces of the university building.

The problem is far more complicated if the fraternity is building on university land. There was a time when fraternities and colleges made a deal which probably violated Internal Revenue laws. The deal was that the fraternity would induce alumni or alumnae to donate to the college and take tax deductions for those donations. The college, in turn, would agree to use the money for the expense of constructing a fraternity house for the chapter. This seemed like a nice arrangement. The fraternity would get a new house, and the alumni or alumnae would get tax deductions by making contributions to the university. It is a practice that has fallen out of use, because it is generally recognized that it is the kind of practice that could jeopardize the tax exempt status of both the college and the fraternity.

If the fraternity is paying the cost of building a structure on university land, there ought to be a very carefully drafted perpetual lease, 99 years renewable forever. Elements that it should include are as follows:

- Identification of whether the college or the fraternity house corporation is responsible for upkeep and maintenance of the house. Generally, it is less expensive if the house corporation handles the maintenance and upkeep, because institutional maintenance departments often operate at a higher cost than independent contractors that the house corporation could hire in the community.
- There should be a commitment that both the college and the fraternity will collaborate to try to keep the house and the land on which it sits tax exempt under the local real estate taxes. Depending on state law this may not always be possible, but it probably will be easier if it is agreed that the university will be responsible for any real estate taxes, even if there is also a provision that the house corporation will reimburse the university for the taxes on the property if they are assessed and collected.
- There should be a provision in the lease that specifies exactly the extent to which the university may inspect the fraternity house and regulate the fraternity in order to help enforce state law and university policy against practices such as underage drinking and hazing. The lawyers for the university probably would like to have language clearly exempt the university from a duty to enforce the

law, because if such a duty were created it would enhance the university's exposure to personal injury lawsuits. On the other hand, some reasonable inspection and educational effort by the university can probably be defined in a way that does not exaggerate the responsibility of the university, nor does it unreasonably intrude in the internal affairs of the chapter.

- There needs to be general language with regard to the maintenance of fire safety conditions in the house. It has to be sufficiently flexible to allow for new developments over time. For example there was a time when smoke alarms were not commonly found in fraternity houses. Contemporary standards in many communities now require smoke alarms and in many communities require sprinklers if the number of occupants rises above a certain level. The lease cannot anticipate how things will change but should have language to resolve the obligations to modify the fire safety circumstances of the house as fire safety practices evolve through time.
- If there is to be rent paid by the house corporation to the university it should be substantially under the market to recognize that the fraternity in the construction of the house is benefitting the university.
- If the chapter should cease to exist either temporarily or permanently, there should be a clear description of the options for the house corporation to benefit from the investment in the house. This could include such things as the right to lease it to another fraternity, the right to sell it to another fraternity, or a right of the university to buy it at a price determined by a predefined method of appraisal. If none of the foregoing options is practical, then the house corporation should have the right to rent it to students at large in order to generate income for the maintenance of the house.

The important thing to remember in drafting a perpetual lease is that it has to be sufficiently flexible to deal with unknown or unforeseen problems and sufficiently rigid to protect the rights of both the college and the fraternity. This takes a high level of skill.

There is no question that if there is to be a Greek house built with Greek money on university land there should be a perpetual lease that covers the above items and other things. If there is merely going to be the use of a university building, then the lease should cover many of the above

considerations but the duration need only be long enough to enable the Greeks to recoup the value of their investment on interior improvements. There should be provisions for extensions of the lease from time to time even though the initial term may only be for 25 or 30 years when the fraternity chapter is occupying space in a university building.

Prospectively, the dangerous enterprises of having chapters occupy university land or buildings can proceed with fewer hazards if the foregoing recommendations are followed.

Unfortunately in many of the long-term arrangements that have been put together, the colleges and the fraternities have relied upon almost informal arrangements. Sometimes there was a lease, but it was not recorded. Sometimes the lease was recorded, but it was vague as to essential problems and ingredients necessary to deal with a long-term relationship. Sometimes there was no lease, and it was just an informal contract. Sometimes unrecorded documents have been lost and no one knows what the relationship is other than longstanding custom.

There are many arrangements that have existed for decades, if not for a hundred years. Not all these have been well documented. Any house corporation that has a chapter occupying a university-owned structure or house corporation-owned houses on university-owned real estate should periodically inventory records. They should insure that they have copies of all documents that relate to the right to occupy the land or the building. The records that they should have include:

- There should be a chapter history that covers the affairs of the chapter with a particular emphasis on the real estate aspect of the chapter.
- The national office files should be reviewed. There may be records in connection with the construction

of the house that was done in part with a loan from the general fraternity or from a fraternity related foundation. Both the executive office files and the foundation office files should be reviewed.

- Someone should search the local County office where deeds are recorded. In some states it is called the County Recorder's office and in other states it is called the County Registrar of Deeds.
- University records, in particular, minutes of the Board of Trustees from the era when the house was built, are terribly important to review and preserve.
- If the records are not clear at the county courthouse, many states have statutes that authorize the recording of an affidavit to put the world on notice of the relationship. If the relationship can be clearly documented through records, it can be reduced to a written affidavit that would include a description of the land and be recorded in the County Recorder's office or in the Office of the Registrar of Deeds.

It is generally preferable for a chapter to be housed in real estate owned by a related house corporation. There are times when economic realities make this impossible and the only feasible way to have a house is to do it in collaboration with the university. When this occurs it must be done very carefully. When a chapter house corporation or a university realizes that an arrangement made with the university years ago was not done in a careful way, it should do whatever it can to document the relationship and preserve the evidence of the relationship in case a problem should arise in the future.

- Robert E. Manley and Timothy M. Burke

2004 Fraternal Law Conference

November 19-20, 2004 — Cincinnati, Ohio

The 11th national Fraternal Law Conference will take place November 19-20, 2004, at the Kingsgate Marriott Conference Center in Cincinnati, Ohio beginning at 9 a.m. on Friday and continuing through noon on Saturday. The conference is designed to assist national and student fraternity leaders, university officials, and their legal professionals, in ensuring a healthy and vigorous fraternity system effective in preventing legal difficulties.

The general registration fee is \$250 per participant; student fee is \$150. If you have questions about the conference or ideas for topics you would like to see covered at the conference, please direct these to whagen@manleyburke.com.

CATCH UP ON:

- Defining Relations Between Chapters and Their Host Institutions
- Alcohol-Free Housing
- Up-to the -Minute Tax News
- Hazing
- Enforcement of Trademarks
- Faculty Anti-Greek Attitudes, House Corporation Matters, our Problem Solving Roundtable and MUCH MORE!

IMPORTANT PROPOSED LEGISLATION FOR FRATERNITY HOUSING – AN UPDATE AND EVALUATION

Introduction:

Readers who have followed this column over the years and who have a strong interest in Greek housing are aware that for many years the Internal Revenue Service has approved the finding by Code Section 501(c)(3) charitable organizations of educational areas and facilities in Greek housing, as long as certain strict guidelines are followed. Since July 2001, the funded facilities also needed to be similar in nature to those provided by the particular university on whose campus the fraternity house is built. While these rules can be quite workable and have supported many millions of dollars of fraternity house construction and reconstruction over the years, the Greek community has consistently searched for a better alternative.

There is now such an alternative on the horizon in the form of a rather simple provision in HR7, also known as the Care Act. This article will explain what the Care Act will and will not do, discuss its prospects for passage at the present time and set forth some guidelines for utilizing the provisions of the Act when and if passage is obtained.

Statutory Provision:

The section of the Care Act that would effect this change simply states that a Code Section 501(c)(3) organization shall not fail to be treated as such solely because such organization makes "collegiate housing and infrastructure grants" to an organization described in Code Section 501(c)(7) (which would include fraternal organizations), so long as at the time of the grant substantially all of the active members of the recipient organization are full-time students at the college or university with which such recipient organization is associated. Please note that this provision does not state that such grants will constitute a charitable activity, merely that a charitable organization can engage in making such grants without losing its tax exempt status solely for doing so.

The statutory definition of housing and infrastructure grants is that these are grants to provide, improve, operate or maintain collegiate housing and such housing may involve more than an incidental social, recreational or private purpose, so as long as such grants are for purposes that would be permissible for a dormitory of the college or university. There is only one exception to this rule stated in the proposed legislation and that is that a grant to provide physical fitness equipment would not be treated as a housing and infrastructure grant for these purposes.

Because those drafting the statutory language, including the author of this column, were concerned that most Greek housing is not owned by the chapter itself but rather by a

house corporation or similar entity, the definition of such grants would also include one made to an organization exempt under Code Section 501(c)(2) or (c)(7) which holds title to property exclusively for the benefit of such a student organization. The effective date of the statute, as currently drafted, is grants made after December 31, 2003.

Legislative Progress:

Those of us observing the progress of this statutory language were indeed pleased to note its rapid progress through the House where it was overwhelmingly approved as part of the Care Act legislation. It was scheduled to go to a Conference Committee in late 2003, but the Conference Committee process was blocked by various political considerations and in spite of last ditch attempts to resurrect the legislation before Congress recessed, this did not happen. Accordingly, it appears as of this writing that further legislative progress will hopefully take place early in 2004. While the above discussed language is not contained in the Senate version of the legislation, there is much optimism that it will be retained in the final legislation that hopefully will make it to the President's desk before activities surrounding the upcoming election make any further legislative progress impossible.

What The Act Will And Will Not Do:

For the moment, let us assume what we all hope – i.e., that the legislation will be passed in its present form early in 2004. I have heard it expressed that it would then be possible for Code Section 501(c)(7) house corporations to offer charitable deductions for fraternal housing projects. Nothing could be further from the truth. The simple fact is that what the proposed legislation does in terms of the process is to remove the restrictions for charitable funding to educational areas. In other words, one hundred percent of a Greek housing project (minus the physical fitness equipment aspect) could be funded by an affiliated charitable organization. Other than that, it is expected that the process should remain exactly the same as currently.

In other words, if a charitable deduction avenue is sought for a Greek housing project, there will still need to be a Code Section 501(c)(3) organization partner. When a Code Section 501(c)(3) organization partner is involved, there needs to be a paper trail of grant documentation so that it can be established that the housing project fits within the parameters outlined by the statute. Thus, there will still need to be a grant agreement process. I think it is important to sound an early note of warning that the passage of this legislation should not be an invitation to handle such housing projects on an informal basis, as regulations will still have to

be developed under the statute and normal grant parameters observed.

Conclusion:

The passage of the Care Act with the language discussed above will provide a tremendous boost to the fraternal housing situation financially, placing Greek housing almost in parity with university housing. It should enable many older houses that would not otherwise be renovated to be renovated

and also allow new construction to be built. However, it should not be viewed as a panacea that eliminates all need for appropriate compliance with basic Code Section 501(c)(3) – 501(c)(7) principles. Any organization in doubt about what this legislation may mean to its housing program should consult with its professional advisers.

• Barbara Schwartz Bromberg

HAZING — THE CRIMINAL CONSEQUENCES

As has previously been reported in *Fraternal Law*, most states now have laws making hazing a criminal act that can subject the wrongdoer to jail time and fines. While the criminal act of hazing is typically only a misdemeanor with penalties up to only relatively short-term jail sentences, the conduct involved in horrific hazing incidents can constitute much more serious crimes and consequent penalties.

Three relatively recent incidents of hazing have received national attention and led to serious criminal charges.

The December 22, 2003 issue of *Sports Illustrated* carried a "Special Report: Hazing, a High School Tragedy." The article reported on hazing by members of Long Island's Mepham High School football team during their annual pre-season camp. Older team members violently hazed newer team members with a variety of brutal actions, including sodomizing them with, according to *Sports Illustrated*, a broomstick, pine cones and golf balls. Subsequently, two of the ringleaders pled guilty as juveniles to multiple counts of "involuntary deviate sexual intercourse." Their punishment could include any number of options, from probation to incarceration of up to placement in a wilderness boot camp or residency in a treatment center until they reach the age of 21. *Sports Illustrated* reports that a Grand Jury on Long Island continues to investigate whether or not to bring charges against others.

In Texas, eight members of the Alpha Phi Alpha Fraternity at Southern Methodist University could face up to 20 years in prison for forcing pledges to consume gallons of water, drink hot sauce and subject themselves to beatings with wooden paddles. According to a report in the *Dallas Morning News* on December 14, 2003, one new member "went into a coma, suffering from pulmonary edema, a condition in which water enters the lungs, and hyponatremia, a sodium imbalance brought on by excess fluid consumption."

In Plattsburgh, New York, eleven members of a State University of New York fraternity were charged after one new member was forced to drink excessive amounts of water

through a funnel. That new member subsequently died and the students involved were charged with a variety of crimes, including negligent homicide. They ultimately were allowed to plead guilty to hazing.

The unfortunate consequences of hazing too often leave long lasting emotional, as well as physical, scars on the victims. In the most tragic cases, deaths have occurred. As described above, when such events occur, increasingly in states all across this country, criminal consequences are being imposed on the wrongdoers. Prosecutors can increasingly be expected to seek harsh penalties when the conduct is particularly outrageous. However, even misdemeanor hazing convictions can leave the perpetrator with a lot of explaining to do later in life when asked on a job application "have you ever been convicted of a crime?"

• Timothy M. Burke

Fraternal Law Goes Online!

Fraternal Law will be available online in early February 2004. You will soon be able to subscribe and access the Fraternal Law newsletter, as well as update your current subscription information, over the internet. For those who would rather receive the electronic version of Fraternal Law via email as opposed to through the mail, you will have the opportunity of choosing that option for delivery. In addition, past issues of Fraternal Law will be available in the archive section of Fraternal Law's website. Fraternal Law's website address will be: www.fratlaw.com.

TELL ME SOMETHING I DON'T KNOW

Phi Gamma Delta has produced a new powerful video aimed at the problem of binge drinking. It is dedicated to the memory of Scott Krueger "and to the strength and courage of the Krueger family."

Scott Krueger died in the fall of 1997 following a party at the Massachusetts Institute of Technology Phi Gamma Delta House. A series of legal claims followed. Settlements were reached with both MIT (for over \$6 million) and with Phi Gamma Delta. Part of the settlement with the fraternity was an agreement that the fraternity would produce an educational video designed to tell Scott's story in the hopes of discouraging others from engaging in similar conduct.

The video, "Tell Me Something I Don't Know," recently received a 2003 Emmy Award as an outstanding documentary.

A press release announcing the Heartland Emmy Award noted that the film offers "heavy hitting facts about the ramifications of alcohol abuse" and that a sampling of students to whom it is targeted have "called the film 'attention-getting,' 'very real,' and 'not preachy.'"

The video reminds viewers of the tragic consequences of binge drinking and the legal liability that may be imposed,

including criminal proceedings and civil (monetary) liability for those who encourage it, or who know about it but do nothing to stop it. "Tell Me Something" tracks the too frequent ties between hazing and alcohol abuse, alcohol abuse and sexual assault, and alcohol abuse and injury to one's self or to others.

Most dramatically, through the words of Dr. Richard M. Schwartzstein from the Israel Deaconess Medical Center in Boston, who was one of Scott's treating physicians, the story of Scott's death is told from the party through the discovery by his fraternity brothers that Scott could not be aroused and had apparently stopped breathing, to the call by Dr. Schwartzstein to Scott's family and Scott's ultimate death some 72 hours after the party.

Accompanying the video is a facilitator guide to be used in encouraging discussions among groups who view the video.

Copies of the video and the guide may be purchased from the International Fraternity of Phi Gamma Delta, through its web site: www.phigam.org. DVD copies are \$20.00; VHS tapes are \$15.00.

• Timothy M. Burke

NEW HAMPSHIRE DEATH

On October 20, 2003, a sorority woman at Plymouth State University in New Hampshire died when a sport utility vehicle with ten women inside went off the road. Initial reports indicated that six of the women were blindfolded. The women were members and pledges of Sigma Kappa Omega, a local group that was formed in April 2003, when a group of women separated from Alpha Sigma Alpha. The deceased student was Kelly Nester of Coventry, Rhode Island.

The police are investigating to determine whether or not hazing was involved. The reports that six of the ten women were blindfolded raised the suspicion that hazing was involved. There was no blindfold on Kelly Nester when she was found on the ground having been thrown from the vehicle.

The horrible facts speak for themselves. This is one more illustration that thoughtless frolics can be fatal. In New Hampshire, hazing is a crime. The County Attorney's Office was investigating the matter to determine whether any criminal charges will be brought against any of the women. If, in fact, hazing was being practiced and criminal charges are brought, it is possible that the criminal charges could include an accusation of manslaughter. When someone is killed during the commission of a criminal act, the unlawful intent to do the criminal act can carry over to the death. This serves

as a basis for a charge of manslaughter.

In addition to the criminal charges, Plymouth State University initiated disciplinary proceedings against the four sorority members involved in the fatal crash. A hearing was scheduled for November 21, 2003, but that hearing was delayed by a court action filed by the four members. The court papers filed by the four women indicated that the scheduled hearing was too soon after the accident and that the four women were undergoing therapy. In addition, the women were concerned that the findings of the University's hearing could be used in the criminal investigation. The court's order will allow the University to proceed with its disciplinary proceeding after giving at least fourteen days notice to the women. In addition, counsel for the women will be allowed to attend the disciplinary hearings to protect the students' rights against self-incrimination.

Fraternal Law will follow this matter and report on whether criminal charges are filed against these young women.

• Robert E. Manley

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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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