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Pennsylvania Appellate Court Issues Two Decisions Protecting Fraternity Houses from New Zoning Requirements

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Increasingly, local zoning codes are being used to attempt to close fraternity and sorority chapter houses. In recent years, some municipalities have added provisions to their zoning codes defining fraternity and sorority houses as requiring the Greek chapters occupying the houses to be recognized by the local universities that the student members attend. It appears that the list of zoning authorities with such requirements is growing. Unsurprisingly, this has led to an increasing number of lawsuits being filed, as the owners of fraternity houses seek to defend their property. Notably, many of these lawsuits have been successful.

Last month, December 12, 2019, the Commonwealth Court of Pennsylvania, a state appellate court, announced two cases upholding lower court decisions in favor of fraternity houses. These decisions came after the fraternity houses were declared (by the local zoning authority) to be illegal uses requiring the houses to be vacated as a consequence of the resident chapters having lost their recognition by Penn State University ("Penn State").[1]

Alpha Chi Rho's house had been continuously occupied as a fraternity house since the 1920s. That was well before any zoning ordinance existed in State College, Pennsylvania, which is where Penn State is located. Indeed, it was not until 2010 that the zoning ordinance requiring university recognition as a condition of meeting the definition of "fraternity house" was added. But on July 28, 2017, the Vice President for Student Affairs at Penn State wrote to the State College Borough, the local municipality, advising that the University had withdrawn Alpha

[1] 425 Prop. Ass'n of Alpha Chi Rho, Inc. v. State Coll. Borough Zoning Hearing Bd., No. 1634 C.D. 2018, 2019 WL 6765776 (Pa. Commw. Ct. Dec. 12, 2019); 329 Prospect Ave. Corp. v. State Coll. Borough Zoning Hearing Bd., No. 1635 C.D. 2018, 2019 WL 6770148 (Pa. Commw. Ct. Dec. 12, 2019).

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Chi Rho's recognition. That action triggered the zoning dispute that followed: State College ordered the use of the property as a fraternity house to cease, Alpha Chi Rho appealed of that order, and the Borough's Zoning Hearing Board subsequently denied of Alpha Chi Rho's appeal.

The Fraternity then appealed the Zoning Hearing Board's decision to the Common Pleas Court of Centre County (the trial court), arguing two major points. First, the use of the property as a fraternity house was a lawful, nonconforming use. That is, the lawful use of the property had been established prior to when the zoning code provisions, under which the Borough was attempting to shut the house down, had been adopted. Courts across the country have long recognized that where a legal use is established, prior to the adoption of a restrictive zoning regulation, the use remains legal, even though it is non-conforming.

The zoning code definition also stated that "university recognition shall be determined by the university through its procedures as may be established from time to time." This, Alpha Chi Rho argued, was an unconstitutional delegation of State Colleges' legislative authority. Essentially, the municipality had given the University the ability to determine which chapters were legal uses and which were not, and to make that determination in any way the University desired. Moreover, the University could change how it made that determination from time to time.

As to the first argument, having established a legal non-conforming use, a property owner has vested rights to continue that use even if a later zoning ordinance or an amendment thereto would prohibit the use. The Court, in agreeing with Alpha Chi Rho, relied heavily on a decision by Pennsylvania Supreme Court, *In Re Appeal of Miller*, 511 Pa. 631 (1986). There, that court "rejected a Township's attempt to extinguish lawful, preexisting uses on a property through an amendment of definitions in the Township zoning ordinance." That is the same thing that occurred in this case, where State College amended its definition of "fraternity houses" to require that the inhabiting chapters be recognized by the University. As the appellate court reviewed the matter, it noted that the fraternity house was first constructed on the property in 1922, and that the property had been continuously used as a fraternity house since then. When built, there was no zoning ordinance. Zoning was apparently first adopted by State College in 1959, it was not amended to include a definition of a "fraternity house" until 1980. And only in 2010 did that include a requirement of university recognition. The critical paragraph from the appellate court is:

> We agree with the trial court that Landowners' prior use of the Property as a fraternity house entitles it to lawful nonconforming use status. When use of the Property as a fraternity house was

> first established, there was no R-2 district in the Zoning Ordinance. Later, when the version of the Zoning Ordinance creating the R-2 district was first adopted in 1959, there was no definition for "Fraternity House." Only in 1980 did the Borough first adopt a definition of "Fraternity House," which was less restrictive than the current definition of Fraternity House, merely requiring Penn State "affiliation" as opposed to "recognition." Because the Property was used as fraternity house for decades before the Borough added the current definition for "Fraternity House" to the Zoning Ordinance, use of the Property as a fraternity house is a lawful, preexisting nonconforming use.[2]

When the trial court had reached the same result, it declined to answer the question of whether the requirement of university recognition and giving the university the ability to define how that was determined, constituted an unconstitutional delegation of legislative authority. It is not unusual for a court to answer only enough questions necessary to decide a case and leave other questions for another day.

But in a somewhat unusual move, the Commonwealth Court did not stop with ignoring the unconstitutional delegation question. Before closing out its decision, it added a lengthy, five-paragraph footnote that begins with the following:

> Because we conclude that use of the Property as a fraternity house was a lawful, nonconforming use, it is unnecessary to address whether the Zoning Ordinance is substantively invalid due to impermissibly delegating regulatory and decision-making powers to Penn State. However, were we to address this issue we would conclude that the Borough has unconstitutionally delegated its authority to determine the existence of a "Fraternity House" under the Zoning Code.[3]

This footnote goes on to provide an explanation for why the court would have reached that decision even though technically it was not doing so.

The companion decision issued that same day by the Commonwealth Court involved property housing the Nu Lambda Chapter of Sigma Alpha Mu. The house involved in that case was newer, having only been used as a fraternity house since it was built in 1989 pursuant to a special exception granted by the Borough of State College under its Zoning Ordinance. At that time, however, the Zoning Ordinance did not include any requirement that a fraternity have recognition from Penn State. The appelleate court was not impressed by the Borough's effort to minimize the non-conforming status of the Sigma Alpha Mu property because it was initially approved as a special exception. The Court made it clear that:

> Just because the Board granted a special exception to permit construction of a fraternity house on the Property does not mean that the Property was not entitled to nonconforming use status after the definition of "Fraternity House" in the Zoning Ordinance was amended in 2010.[4]

[2] *425 Prop. Ass'n*, 2019 WL 6765776 at *8.
[3] *Id.* at *9 n.9.
[4] *329 Prospect Ave.*, 2019 WL 6770148 at *5.

In its holding, the Court adopted the legal rationale more fully articulated in the Alpha Chi Rho case decided the same day, stating that:

> Therefore, for reasons set forth in *425 Property Association*, we conclude that the use of the Property as a fraternity house prior to the adoption of the more restrictive definitions for "Fraternity House" in 2010 entitles the Property to lawful nonconforming use status, which precludes the Board from compelling Landowner to comply with the more restrictive 2010 definition.[5]

It should be noted that the Court was not unaware of the concerns of both Penn State and the Borough's and their efforts to control certain activates in fraternity houses. In fact, the Court added a final footnote in the Alpha Chi Rho case, noting:

> While we appreciate the Borough's and Penn State's attempt to restrict and curtail inappropriate, disapproved, and dangerous social behaviors occurring at fraternities and sororities, these concerns do not provide a sufficient basis for upholding the Board's actions. However, we note that our disposition in this case is not intended to, and does not restrict, the ability of the Borough or Penn State to curtail activities of fraternities and sororities by lawful means.[6]

There is no question that the well-publicized deaths due to hazing and the abuse of alcohol frequently associated with them, have led to increased regulatory and punitive measures against fraternities and sororities. Zoning, however, does not work well as a tool for such regulation. Courts have a difficult time upholding zoning regulations that would essentially turn a property designed as a single, special-use building to house dozens of university students, into an illegal use. These are not properties that could be transformed easily into a single-family home or, for that matter, into an apartment building. They are not designed in a way that allows for that kind of transformation. In essence, a building that may be worth millions of dollars as a fraternity or sorority house given its size and unique design, could lose most, if not all, of its value if the use it was designed for is declared to be illegal.

At this writing, a similar case is pending on appeal in Indiana.[7]

[5] *Id.*
[6] *425 Prop. Ass'n*, 2019 WL 6765776 at *10 n.10.
[7] *See* Gary Founds & Mike Allen, *Bloomington Ordinance Found Unconstitutional*, 158 FRATERNAL LAW 1 (Mar. 2019); Tim Burke, *Hang 'Em All… It Is Easier Than Figuring Out Who Is Guilty*, 159 FRATERNAL LAW 1 (May. 2019).

FIRE Responds to Ohio University's Unconstitutional Restrictions

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The Foundation for Individual Rights in Education (FIRE) weighed in on how Ohio University [OU] initially handled its broad investigation into alleged instances of misconduct by fraternities, three sororities, the University band, and its rugby team, that was previously reported in the November, 2019 issue of Fraternal Law.

FIRE, whose mission is to defend and sustain the individual rights of students and faculty members at America's colleges and universities, has a substantial record of challenging universities who fail to recognize those rights.

A nine page, single-spaced letter to Ohio University President, Marvin Nellis, began:

> FIRE is concerned about the threat to freedom of expression and freedom of association at Ohio University (OU) posed by cease and desist letters issued to several student groups accused of hazing. By restricting these groups from meeting in any capacity or engaging in communication through social media platforms, OU has exceeded the lawful scope of its authority under the First Amendment.[8]

In a broad suspension of student organizations, OU had prohibited virtually all conduct by those groups, including business meetings, and had initially gone as far as attempting to restrict the ability of members of those groups to communicate with one another regarding the groups. One University administrator dictated in writing to each group involved that "I expect there to be no other communication with your members unless it is preapproved by me." Another University document prohibited members from discussing sorority or fraternity matters with one another, and prohibited members who did not live in a chapter house from congregating at their respective chapter houses.

Zachary Greenburg, the Program Officer for FIRE's Individual Rights Defense Program and author of the letter mentioned above, was not amused. His letter carefully documented why OU's actions could not be reconciled with its obligations under the First Amendment, providing numerous legal citations, including two critical U.S. Supreme Court cases. As the letter states,

> It has long been settled that the First Amendment is fully binding on public colleges, like OU. *Widmar v. Vincent*, 454 U.S. 263, 268-69 (1981) ("Our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities."); *Healy*

[8] Letter from Zachery Greenburg, Program Officer, FIRE, to Marvin Duane Nellis, President, Ohio University (Nov. 12, 2019).

> *v. James*, 408 U.S. 169, 180 (1972) ("The precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, 'the vigilant protections of constitutional freedoms is nowhere more vital than in the community of American schools.").

The letter makes the following points that are equally applicable in many of the situations in the last few years when a state university has shut down an entire fraternity system even though most members of the restricted groups were not even accused of misconduct, let alone found responsible for wrongdoing: (1) The groups at OU had a strong interest in their associational freedoms; (2) OU's restrictions substantially interfered with those associational interests; (3) The restrictions were not narrowly tailored to further the University's compelling interests in addressing unlawful hazing; (4) The prohibitions on group activities were unconstitutionally vague; (5) The restrictions on the use of social medial violate the First Amendment as online speech is protected by the First Amendment; (6) The mandate requiring preapproval by a university administrator before communicating with members constitutes an unconstitutional prior restraint on freedom of speech.

OU's then Interim General Counsel, Barbara Nalazek, responded to the FIRE letter, noting that "while not agreeing…that the original directives were constitutionally infirm," the University had lifted or significant modified the limitations and eliminated entirely restrictions on communication.[9]

There is no doubt that colleges and universities are very concerned about hazing-related issues, just as national fraternities and sororities are; too many tragedies have occurred not to take those matters very seriously. But the constitutional rights of fraternities and sororities chapters and their members remain real and substantial, and therefore they must be honored at least by state universities.

NOTE: Additional information about FIRE can be found on its website, www.thefire.org/.

[9] Letter from Barbara U. Nalaek, Interim General Counsel, Ohio University, to Zachery Greenburg, Program Officer, FIRE (Nov. 22, 2019).

Emotional Support Bunny Case Has Settled

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Alpha Omicron Pi Fraternity ("AOPi") and Alpha Omicron Pi Properties, Inc. ("AOPi Properties") have agreed to amend the sorority's no-pet policy as part of a settlement related to a federal discrimination lawsuit filed against the two entities.

Kayla Hicks, a Michigan State University ("MSU") student who suffered from anxiety, sought to bring her emotional support animal ("ESA"), a Netherland Dwarf rabbit named Sebastian, into the AOPi sorority house with her when she began living in the house. Despite submitting to the sorority the required ESA Owner Agreement, documentation of her disability and need for an accommodation, and proof that Sebastian was enrolled as an ESA with the National Service Animal Registry, AOPi informed Kayla that Sebastian presence in the house was not permitted.

After being told that Sebastian's continued presence jeopardized her ability to continue living in the house, Kayla filed complaints with both the Michigan Department of Civil Rights and the U.S. Department of Housing and Urban Development, alleging improper discrimination. She also filed suit in the Western District of Michigan, Southern Division, court against AOPi and AOPi Properties, alleging violations of both the (federal) Fair Housing Amendments Act of 1988 ("FHAA") and the (state) Michigan Persons with Disabilities Civil Rights Acts ("PWDCRA"). She sought both injunctive and compensatory damages.

The Court dismissed the Plaintiff's claims brought under PWDCRA, declining to exercise supplemental jurisdiction on Kayla's state law claims. Fortunately, the parties were able to settle the remaining FHAA claim, the terms of which will remain confidential.

AOP'I will now be amending its no-pet policy, which previously prohibited all pets except for fish (in tanks no larger than ten gallons) and service *dogs*, presumably to include another exception for other types of animals that serve legitimate medical-related needs. Other groups that also currently rely on general pet policies

similar to AOP'Is may want to consider revising their own policies in light of the takeaway from this case: groups cannot rely on blanket "no-pet" policies to prohibit such service/emotional animals.

Defendants in Andrew Coffey Hazing Death Sent Back to Trial Court to Face Felony Charges

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> At the party, the victim's Big Brother provided him with "a family bottle" of bourbon and told him that it was an expectation to finish the family bottle. Many Pledges drank to the point of intoxication including vomiting, blacking out and sadly, the death of the victim. The victim's autopsy indicated his death was the direct result of severe intoxication, with a blood alcohol level of .447 g/dl at the time of the autopsy. Tests indicated his blood alcohol would have been even greater before the autopsy.

So described the First District Court of Appeals for the State of Florida when it announced its January 2, 2020, decision reversing the trial court's dismissal of felony charges against three former students at Florida State University. The three former students had been charged with both felony and misdemeanor hazing as a result of the death of Anthony Coffey in November of 2017, after a Pi Kappa Phi Big Brother "Reveal Party."[10]

An Associated Press Report carried by the New York Times on January 2, 2020, detailed the significance of this decision. Five other members of the chapter have already been sentenced to jail time based on misdemeanor hazing charges. Presumably, those sentences of between thirty and sixty days in jail have already been served. But the three former members who will now see their cases returned to the trial court for trial on both felony and misdemeanor charges could face up to five years in prison.

At the time of Anthony Coffey's death, Anthony Petagine, the named Appellee, was the president of the fraternity chapter. As the appellate court described,

> Mr. Petagine directed all Fraternity activities, including the training and indoctrination of perspective, associate, or conditional members of the Fraternity, also known as Pledges: "He had the organizational and actual authority to stop all acts of hazing conducted by all members of the Fraternity. He presided over the Executive Council and the chapter as a whole . . . he encouraged and assisted and *agreed to all Pledge activities*." … Most critical to our analysis here, he "was

[10] State vs. Petagine, No. 1D18-2086, 2020 WL 20734, *1 (Fla. Dist. Ct. App. Jan. 2, 2020).

> present for a meeting the week of the Big Brother party where the *danger of Pledges becoming intoxicated was discussed* and *encouraged the event to take place* through discussing mitigation of risk strategies and instructions that Pledges would not be forced to drink. (emphasis in original)

The Court acknowledged that Mr. Petagine did not attend the party, but he had "lifted the liquor ban to allow liquor at the party."[11]

It must be noted that the appellate court is not saying that Petagine and his fellow defendants are guilty of felony hazing. Rather,

> when viewed in the light most favorable to the State, with all inferences being resolved against the defendant, the State's statement of particulars alleged sufficient facts to show that a reasonable jury could find that Mr. Petagine committed felony hazing under the principal theory.[12]

Whether or not a jury will actually do that remains to be seen.

This case was a split, two-to-one, decision, with one of the justices writing a long dissent that begins, "the question has been asked since primeval times, "am I my brother's keeper?" and cites to Genesis 4:9. The dissenting judge essentially argued that nothing in the charges indicated that Coffey was forced to consume alcohol; it was his choice. As a result, the dissenting judge would dismiss all charges, both felony and misdemeanor. However, the dissenting judge appears to be out of step with the current view of hazing. After all, numerous state laws make it clear that a pledge's agreement to participate in a hazing activity is not a defense.

Last year, following a growing trend, the state of Florida strengthened its law against hazing, naming its new regulations, "Andrew's Law," just as Pennsylvania and Louisiana had strengthened hazing prohibitions, naming them after victims in those states.

[11] *Id.* at *2.
[12] *Id.*

2020 Fraternal Law Conference Registration Now Open!

We are thrilled to announce that the 2020 Fraternal Law Conference will once again be at Great American Ballpark, the home of the Cincinnati Reds baseball team! The Ballpark has some fantastic meeting and event space in a setting like no other! Our guests will be staying directly across the street from the Ballpark at the AC Hotel by Marriott overlooking the Ohio River in downtown Cincinnati.

The Conference will be all day on Thursday, November 5, 2020, and will conclude at noon on Friday, November 6, 2020. More details to follow.

Register: https://fraternallawconference.regfox.com/2020-fraternal-law-conference

Pricing:

- Early Registration (1/1/2020-5/31/2020): $515
- Standard Registration (6/1/2020-11/4/2020) $540

Stay tuned to fraternallaw.com for more details!

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