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Bloomington Zoning Ordinance Unconstitutional Says Indiana Court Of Appeals

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To say Indiana University ("IU") aggressively sanctions fraternities and sororities may understate IU's posture. In the 2019–2020 academic year, about half of IU Greek letter organizations, men's and women's groups, found themselves under suspension of one sort of another. While recognition by IU is likely desired by many of these groups, that recognition proved critical to sustainable operations.

Readers of Fraternal Law may remember that the City of Bloomington has a zoning ordinance that conditioned lawful operation of a chapter house on recognition by IU. Specifically, the Bloomington Ordinance required that in order to lawfully operate a chapter house, the following condition must be met:

> all students living in the building are enrolled at Indiana University, Bloomington Campus; and Indiana University has sanctioned or recognized the students living in the building as being members of a fraternity or sorority through whatever procedures Indiana University uses to render such a sanction or recognition.

UJ-Eighty Corporation ("UJ-Eighty") challenged the Ordinance asserting, among other things, that it was an unlawful delegation of Bloomington's municipal zoning authority to IU. The trial court agreed with UJ-Eighty, holding the Ordinance an unconstitutional delegation of authority. (Click here for further discussion of the trial court opinion).

The City of Bloomington appealed the trial court decision to the Indiana Court of Appeals. Of note, IU filed an amicus brief in support of the City's appeal. In its amicus papers, IU explained its disciplinary

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philosophy confirming what many already suspected—IU is committed to punishing groups for the errors of individual members of the group:

> Although IU could try to discipline individual members, this proves to be difficult in practice given the reluctance of individuals to provide information and/or evidence against a single student rather than against an entire organization. It is also inefficient, placing many students at risk, and does not allow IU to effectively mitigate against the risk posed by the problematic culture, attitude, and behavior fostered by the organization.

Stated differently, IU is committed to group, as opposed to individual, discipline.

IU's admitted position is even more troubling when one applies the Bloomington zoning ordinance. Again, the ordinance gave to IU, an entity with a stated bias against student groups, the power to determine not only whether the group was a recognized student organization, but whether its chapter house use was lawful.

We are pleased to report that the Indiana Court of Appeals understood the import of the Bloomington ordinance. Upholding the trial court decision finding the Bloomington ordinance to be an unconstitutional delegation of authority, the Court succinctly wrote as follows:

> Accordingly, we hold that the City, via its Ordinance, impermissibly delegated to Indiana University the authority to decide whether a group of people will be recognized or sanctioned as members of a fraternity or sorority for purposes of determining whether a property owner complies with the Ordinance, in violation of the Fourteenth Amendment. Therefore, we affirm the judgment of the trial court.

We congratulate UJ-Eighty and the attorneys at Mallor Grodner for the victory in this case.

While the City of Bloomington has requested that the Court of Appeals rehear the case, a decision on that request is still pending. The Court of Appeals decision is another brick in a wall of cases establishing that these types of delegatory ordinances cannot sustain constitutional scrutiny. As this line of cases continues to build, we hope that other municipalities may take notice and change their unconstitutional ordinances without litigation. Click here for the full opinion.

Federal Court Dismisses Attack on Single-Sex Membership of Fraternities at Yale

Clark Brown, *General Counsel*, North American Interfraternity Conference

In 2018, several female Yale undergraduates, all members of a student group named Engender, brought claims for discrimination in a place of public accommodation in the Connecticut Commission on Human Rights and Opportunities. The Commission released jurisdiction—or dismissed—those claims in early 2019. The Commission determined that there was "no reasonable possibility that investigating the complaint [would] result in a finding of reasonable cause." That dismissal paved the way for the claimants to pursue their claims in civil court.

In February 2019, the Engender students filed suit in federal district court in Connecticut. In addition to a host of public accommodation claims, they also alleged violations of the federal Fair Housing Act ("FHA") against various fraternity defendants. The suit also included claims against landlord-type entities, whether the typical fraternity house corporation or some other landlord entity. Finally, the plaintiffs brought several Title IX claims against Yale University.

All defendants filed motions to dismiss. After those motions were fully briefed, the court conducted oral arguments. In a resounding victory for the fraternity industry, the court dismissed every claim against the fraternity entities.

The only claim that survived dismissal was a single Title IX claim by one plaintiff against Yale. The court went to great lengths to point out the "limited nature of this claim," even noting that "discovery of this claim should be rather limited."

Though the plaintiffs pursed many claims, the essence of the lawsuit, as stated by both the plaintiffs and by Engender, was an attack on the single-sex membership practices of the fraternities. In fact, Engender's stated mission is "to advocate for the principles of equity and inclusion within Yale's

community." Its "first initiative has been to work toward gender integration of Yale's Greek organizations given their sex-discriminatory nature and disproportionate control over campus social life."

The dismissal briefing is important reading for the fraternity industry. In dismissing the FHA claims for lack of standing, the court noted that "this is not a housing discrimination problem," but rather, "[a]t its core, Plaintiffs' Fair Housing Act claim revolves around the denial of membership by fraternities." The court determined that the plaintiffs lacked standing because "the alleged denial of housing by the Fraternity Defendants is not linked to a policy regarding housing, which the landlords—not the Fraternity Defendants—control, but rather to the Fraternity Defendants decision not to admit women." The court noted that no plaintiffs only sought housing as an "incidental benefit" of fraternity membership.

In dismissing the heart of plaintiffs' claims against fraternities, discrimination in a place of public accommodation, the Court held that the facilities at issue are not places of public accommodation. The court stated that the law requires "more than the conclusory allegations provided by Plaintiffs." The court observed:

> "Plaintiffs do not plead facts that lead to the conclusion that these rental properties are places of public accommodation. They allege no 'goods' offered to the general public, nor services. Instead, Plaintiffs point to open invitations from tenants which allegedly transform private properties into places of public accommodation."

The defendants have now found resounding success at both the state and federal level. The dismissals from the state Commission and the federal court will make pursuing similar claims in other jurisdictions very challenging. As the court stated, all of plaintiffs claims against fraternity entities "lack a strong basis in law," and attempting to amend their pleadings further would almost certainly be "futile."

The First Convictions In The Death Of Collin Wiant Are In – More To Come

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Collin Wiant died on November 12, 2018.

On February 27, 2020, the first three of nine students charged in his hazing-related death plead guilty and were convicted. Dominic Figliola was convicted of hazing and was sentenced to one year of non-reporting probation. Cullen McLaughin was convicted of two fifth-degree felonies for possession of LSD. He was ordered to complete a drug program. Zachary Herskovitz plead guilty to a felony of Permitting Drug Abuse and was convicted by the judge of hazing. His sentence on the felony was delayed pending completion of a rehabilitation program, and he was ordered to serve a year of non-reporting probation and pay a $250 fine on the hazing conviction.

While these sentences may seem light under the circumstances, they are not the end of the story. Other charges against Figliola, including two felonies related to the possession of drugs, have been held in abeyance while he completes a rehabilitation program. Perhaps most importantly, these light sentences were conditioned on each of the three agreeing to testify against others charged in the death of Wiant. Other individuals face charges ranging from felonies of involuntary manslaughter, reckless homicide, trafficking in cocaine, obstructing justice, and tampering with evidence as well as misdemeanors of hazing, assault, and underage drinking.

A civil suit against Sigma Pi and multiple other civil defendants also remains pending.[1]

A press release issued by the Athens County Prosecutor, Keller J. Blackburn, said:

> "Figliola and McLaughlin were part of a cycle of hazing that has existed within the Ohio University Sigma Pi Fraternity for years. Each class, after being hazed, waited

1 See Katherine Schoepflin, Lawsuit Alleges Disturbing Hazing, 159 Fraternal L. (January, 2019).

> until their turn to inflict the same or worse on the next class. Hopefully these cases and legislative changes can end this practice that exists in too many organizations across the county."

"Legislative changes" apparently refers to the fact that the Ohio Legislature is considering strengthening the penalties for hazing-related crimes. The hazing that some of these defendants are charged with, even though it involved a death, is only a misdemeanor. It is likely Ohio will increase that to a felony carrying a sentence of serious jail time.

Those who were responsible for Collin Wiant's death are demonstrating once again the destructive outcome of hazing mixed with alcohol and drugs. In this case, it did not end with the death of a young man. While Figliola, Herskovitz, and McLaughlin may be punished more lightly, others will likely do jail time. All nine of those charged in his death will bear with them for the rest of their lives their responsibility for ending Wiant's life way too prematurely.

Sigma Pi, a fraternity committed to the elimination of hazing, which nationally promotes the highest ideals and core values of fraternalism, has lost a chapter and potentially faces significant exposure in the civil litigation. Sigma Pi's reputation—indeed the reputation of all fraternities and sororities—has been damaged as a result of the actions of those who unthinkingly broke Sigma Pi's rules, the policies of Ohio University, and Ohio criminal law.

Lawsuit Filed Following Tragic Death At Cornell

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To require or cajole a potential new member or pledge to drink anything to the point of being sick, especially alcohol, is the opposite of what brotherhood or sisterhood in a Greek organization should be about. Such conduct has no place in the fraternity world. It violates the rules and policies of every national fraternity and sorority. It breaks the rules of the college or university. It violates the criminal laws of every state regardless of whether the state has a specific crime called hazing, which forty-six states do. Most importantly, such conduct jeopardizes the safety, health, and life of those who are victimized by it.

Tragedy caused by would-be brothers or sisters should never happen. But unfortunately, tragedies continue to happen because some misguided chapter members do not believe that their conduct can cause harm—until it does. By then, it is too late.

Last October, eighteen-year-old Antonio Tsialas was a freshman at Cornell University. On October 24th, he had dinner with his mom who had come in early for parents' weekend. After dinner he headed to the Phi Kappa Psi house for a party he was invited to attend as a potential new member. He had plans to see his mom and dad the next morning. That never happened.

A lawsuit filed in late January 2020 alleges the party he attended was a "dirty rush" party known as a "Christmas-in-October" party, apparently a tradition of the Chapter. What is described in the Complaint was a "meticulously planned" party that allegedly involved the setup of a series of seven drinking rooms including the Beer Room, Wine Room, Milk and Rum Room, and Santa Claus Room, among others. The Complaint states that "by the time the freshmen completed the drinking games in the seven different rooms they were intoxicated, and many were 'black-out drunk.' Many were vomiting and lost all memory of what they did next or how they eventually got back to their room." Antonio never got back to his room.

Cornell University is replete with beautiful but dangerous gorges near campus. After being missing for a little over a day, Antonio Tsialas' body was found at the bottom of one of those gorges on Saturday, October 26, 2019.

The lawsuit names the National Fraternity, its Chapter at Cornell, and seven members of the Chapter including the President, Vice President, Secretary, and a Chapter advisor. Cornell is also named as a Defendant.

The police investigation is ongoing, and if the results of similar analogous tragedies in the last few years are any indication, it is likely that some of those responsible for organizing the party, purchasing the alcohol, and providing it to underage potential new members will likely be criminally charged. If, as has occurred in other cases, the police determine that there has been an effort to hide or destroy evidence, there will be additional charges. Some members of the Chapter may face jail time.

Legislatures and courts around the country are not taking these matters lightly. They are increasing the penalties for hazing. Generally, hazing has been viewed as a misdemeanor crime, but some states have already moved to increase the crime of hazing to a felony when it results in a serious injury or death. Other states are moving to follow suit. Even Congress is considering including efforts to halt hazing in the upcoming Higher Education Reauthorization Bill.

Attorneys for the victims of hazing tragedies are pressing hard to obtain settlements or judgments with responsible parties, including recovering from the homeowner's policies of the parents of the individual perpetrators.

If the facts alleged in the Complaint are true, a likely result is a multi-million dollar settlement prior to trial involving most, if not all, of the defendants.

There is little doubt that the organizers of the Christmas-in-October party anticipated none of this, because they simply did not believe that such a horrific result could happen to one of their future pledges or that a consequence of a death would fall on them. But that is what they were responsible for, and by

engaging in such conduct, not only are they likely to be held responsible for Antonio's death, but they are also likely to be held responsible for the horrific pain they have caused Antonio's parents.

And then there is the damage they have done to the Greek world: they have jeopardized the future of their Cornell Chapter and the financial status of the National Fraternity. All of those committed to ending hazing have suffered a serious setback in those efforts.

Some will argue that the members who organized the party should not be responsible since they did not intend to hurt anyone. But neither does the drunk driver who veers across the road. Those party organizers may be young, but they are adults. They knew what they were doing was illegal. They knew it violated the rules of the Fraternity and the University. Like it or not, they are where the responsibility should lie.

Novel Corona Virus, COVID-19

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You think you've heard enough? No doubt in the days and weeks ahead you will hear a great deal more about the efforts to stop the spread of the disease, the effects of which are now significantly impacting American universities.

It started with the wholesale cancellation of the spring break international study abroad trips. Many colleges called back students who were already overseas. When the State of Washington became the epicenter of COVID-19 American deaths, it was not surprising that universities there would largely shut down.

But that was only the beginning. Day after day universities are announcing they are suspending classroom instruction. Harvard has instructed its students not to return to campus after Spring break ends and instead be prepared to do course work on line. On March 9, Ohio State announced they were

"suspending face-to-face instruction in lectures, discussion sections, seminars and other similar classroom settings and moving to virtual instruction, effective immediately and through at least Monday, March 30."

Joining a growing list that already included Berkley, Fordham and Princeton, on the same day, Vanderbilt announced a similar suspension of classroom teaching and went on to add in a University directive: "In addition, effective immediately and until further notice, we are suspending all University-sponsored non-athletics events and gatherings including events sponsored by any registered student organizations, through April 30." These are only examples, but clearly demonstrate that the impact of COVID-19 extends to fraternity life.

Fraternities and sororities may face difficult choices in the coming weeks with regard to activities planned for the closing weeks of this spring semester. Just as universities are taking an appropriate, conservative approach to protect the health and lives of their students, so too should fraternity chapters with regards to their members. The spring formal may need to be reconsidered. The contract with the hotel may have a *force majeure* clause, which could possibly allow its cancellation without a major financial consequence. That extra cleaning and sanitizing of everything, which is being urged by many physicians, cannot become an excuse for ordering additional cleaning by new members. That is still hazing. And be prepared to act quickly if a member is exposed to or diagnosed with the disease.

Young people may be in less danger from COVID-19 than older adults, but they can certainly spread the virus to those more vulnerable. That is really what the school closures are all about, protecting the public health by helping to control the spread of the virus.

There surely will be more news on this topic as the fraternity world, American higher education, and indeed the entire world, faces a quickening health crisis in ways never before envisioned.

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!

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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