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Zoning for Off-Campus Fraternity and  
Sorority Houses

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# Zoning for Off-Campus Fraternity and Sorority Houses

*Patricia E. Salkin and Amy Lavine*

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# ZONING AND PLANNING LAW REPORT

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## Zoning for Off-Campus Fraternity and Sorority Houses

Patricia E. Salkin and Amy Lavine

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### I. Introduction

The first collegiate-focused fraternity to be established in the United States was Phi Beta Kappa, which was organized by five William and Mary students in 1776. During the Nineteenth Century, the fraternity movement eventually spread to the Ivy Leagues and other colleges, and sororities were established for women, who were excluded from fraternities. (Because these organizations also discriminated against racial minorities, separate Greek organizations for African-American students were established in the early Twentieth Century.) It wasn't until the years after World War II, however, that fraternities and sororities became a source of student housing.<sup>1</sup> The character of these organizations also changed: "The older organizations, which brought members together for conversation and camaraderie, were transformed into social clubs dedicated primarily to amusement. Poetry readings, literary circles, and dining were replaced with beer, sex, and rock and roll."<sup>2</sup> By 1990, nearly 700,000 students

at hundreds of colleges and universities belonged to fraternities or sororities, and membership has continued to increase.<sup>3</sup> Some colleges and universities allow members of these Greek organizations to live together on-campus, essentially permitting members to occupy rooms on the same floor or section of dormitories. In other cases, fraternities and sororities may own or operate off-campus housing for their members.

*While movies like *Animal House* and *Old School* are not representative of all fraternities and sororities, they are not completely unrealistic.*

As fraternity and sorority houses have proliferated, so have their impacts on the communities where they are located. While movies like *Animal House* and *Old School* are not representative of all fraternities and sororities, they are not completely unrealistic. As the U.S. Supreme Court has noted, "The regimes of boarding houses, fraternity houses, and the like present ur-

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ban problems. More people occupy a given space; more cars rather continuously pass by; more cars are parked; noise travels with crowds.”<sup>4</sup> Fraternities also tend to encourage dangerous drinking behaviors, and, at their worst, they engage in highly offensive and sometimes criminal hazing rituals.<sup>5</sup> Especially when “frat houses” are located off-campus, these activities can create conflicts with community residents and businesses,<sup>6</sup> and in many cases, they have led to local governments enacting restrictive zoning legislation. The Town of Gorham, Maine, for example, recently banned new fraternity and sorority houses, and adopted a set of regulations requiring the two existing houses to pay an annual license fee and undergo semi-annual safety code inspections.<sup>7</sup> In Salt Lake City, Utah, the city is currently at odds with a fraternity house occupying a former Episcopal Church over the need for it to obtain a new use permit.<sup>8</sup> Problems can also arise if a fraternity is suspended and no longer qualifies as a permitted use under zoning that allows fraternities. At the University of Pittsburgh, for example, a fraternity was subject to a drug raid and became a “nonrecognized student organization.” As a result, its occupancy permit was revoked by the city, which meant that it could no longer use its building unless the city issued a new permit. The matter was resolved when the University decided to recognize the fraternity again on a probational basis.<sup>9</sup> Similar zoning issues have arisen in many other cities across the country.<sup>10</sup>

Zoning for fraternities and sororities can present unique challenges, however. Aside from determining the type and severity of regulations that should be applied, fraternity and sorority houses do not easily fit within traditional zoning categories. Many definitions of “family” prevent unrelated groups of people from living in single-family zoning districts, and different designations may need to be created for student housing.<sup>11</sup> This article will discuss some of the more common methods of zoning for fraternity and sororities.

## II. Common Zoning Issues that Arise with Fraternity and Sorority Housing

### Definitions in Zoning Ordinances

Host communities for colleges and universities typically regulate the location and occupancy of

housing specifically limited to members of individual fraternities or sororities. Defining fraternities and sororities, however can be a challenge. For example, municipalities may limit the use of dwellings by these groups to those that are chartered by a national or local organization. In addition, and perhaps even more important, local governments may choose to allow the housing only if the organization is officially recognized by the college or university campus where the members/residents are enrolled. For example, the zoning ordinance of the City of Albany defines a fraternity or sorority as “[a] place of residence other than a hotel, rooming or boarding house or dormitory that is operated by a nationally chartered membership organization or a local chartered organization and used, occupied and maintained for persons enrolled in a college, university or other educational institution and which is recognized and subject to controls by such educational institution.”<sup>12</sup> Similarly, the Code of the City of Long Beach, California provides that a fraternity house or sorority house is “a building, or a portion of a building, occupied by a chapter of a regularly organized college fraternity or sorority officially recognized by an educational institution.”<sup>13</sup> These limitations ensure that should there be unneighborly problems arising from the occupants of the housing, the City has avenues to contact entities who may be able to take appropriate actions to remedy unhealthy situations. For this reason, the Albany and Long Beach approaches are preferable to that of the City of Ithaca, NY, which defines fraternity and sorority houses as “multiple dwelling[s] used and occupied by a cooperating group of college or university students and containing and providing domestic and social facilities and services thereto.”<sup>14</sup> The Minneapolis, Minnesota Code offers yet another approach, defining “fraternity or sorority” as “[a] building which is occupied only by a group of university or college students and support staff who are associated together in a fraternity or sorority, which is officially recognized by a college or university offering an accredited course of study, and who receive from the fraternity or sorority lodging or meals on the premises for compensation.”<sup>15</sup>

While municipalities that allow fraternity and sorority housing typically define them as multiple-family dwelling units, other municipalities make clear that such housing is not included in the definition of “dwelling.” For example, the zoning ordinance of South Pasadena, Florida provides: “The term ‘dwelling’ shall not be deemed to include a motel, rooming

house, tourist home, hotel, hospital, nursing home, dormitory, fraternity or sorority house.”<sup>16</sup>

Other municipalities further limit fraternities and sororities through the definition section by placing distance requirements between the housing and the host institution of higher education. For example, the Wilmington, Delaware Code provides, “*Group home type II* means ... fraternities and sororities that are actively chartered with a specific college or university and located within 1,000 feet of the campus of such college or university.”<sup>17</sup> While this appears in the definition section of the Wilmington Code, other municipalities have similar types of requirements located in other sections of the applicable laws. The City of Minneapolis, for example, provides that a fraternity or sorority must be within one-half mile of the educational facility served.<sup>18</sup>

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### Zoning Restrictions, Generally

Zoning restrictions placed on fraternities and sororities are reviewed under a rational basis standard, and will generally be upheld so long as they are reasonable. *Chico Corp. v. Delaware-Muncie Board of Zoning*,<sup>19</sup> for example, involved certain lot area and setback requirements imposed on fraternities located in the “Student Social Service Zoning District.” The zoning board denied a permit for a fraternity on a lot that was smaller than required under the ordinance, and the fraternity claimed that the regulations were arbitrary and capricious. The court disagreed, explaining that the lot size and setback restrictions were reasonably related to the municipality’s interest in buffering the neighborhood from noise, traffic, and congestion problems.

*Bloomsburg Landlord’s Association v. Town of Bloomsburg*, although not a zoning case, involved a local ordinance that imposed conditions upon landlords of student housing. Among other things, landlords were required to include various restrictions in their lease agreements, and they were also required to respond to any code violations caused by student tenants to prevent recurrences. Landlords who did not comply with the procedural steps outlined in the ordinance to respond to code violations were subject

to various sanctions, including revocation of the license required to rent to students. The court rejected claims that the ordinance was vague and overbroad, and it found no reason why the city could not subject student housing landlords to additional requirements. In reaching its decision, the court noted that “Innumerable decisions have upheld the constitutionality of zoning restrictions on student housing[.] So long as regulations governing the location, amenities, etc., of student housing are rationally related to a legitimate governmental interest, they survive constitutional scrutiny.”<sup>20</sup>

### The Fraternity or Sorority as a Familial Unit

A common technique used to bar fraternity and sorority houses from single-family residential districts is to limit the definition of “family.” The leading Supreme Court case, *Village of Belle Terre v. Boraas*,<sup>21</sup> involved a group of six college students living together in a rented house.<sup>22</sup> The village zoning ordinance prohibited fraternity houses and limited the definition of “family” to no more than two unrelated persons. Although the plaintiffs alleged that this law violated a variety of constitutional rights,<sup>23</sup> the Supreme Court held that defining “family” was primarily a legislative and not a judicial task. Limiting “families” to two unrelated persons did not interfere with anyone’s free association and, according to the Court, was reasonably related to the goal of establishing “[a] quiet place where yards are wide, people few, and motor vehicles restricted[.]”<sup>24</sup>

The lower courts have generally followed *Belle Terre* and held that fraternity and sorority members need not be viewed as constituting “families” as the term is used in single-family zoning ordinances.<sup>25</sup> The Iowa Supreme Court in 2007 upheld a definition of family that specifically excluded fraternities and sororities. In upholding the restriction, the court remarked:

Certainly this ordinance is imprecise and based on stereotypes. Nevertheless, it is a reasonable attempt to address concerns by citizens who fear living next door to the hubbub of an “Animal House.” Significantly, the ordinance is not limited to college students nor does it bar them from living in single-family zones. The City’s definition of “family” is quite flexible and expansive enough to encompass unmarried couples and groups of three unrelated persons.<sup>26</sup>

When a “family” is defined as “a single housekeeping entity,” however, large groups of students may be permitted to live in single-family homes. In *Adams v. Town of Brunswick*, for example, a large home divided into two apartments was found to comply with all of the relevant zoning requirements, despite the fact that it was leased to 11 college students (five in one apartment and six in the other). The neighbors complained, arguing that the building was a boarding house rather than a two-family house. The Supreme Court of Maine disagreed, however, finding no reason why each group of students could not be considered a “housekeeping unit” under the ordinance. In discussing why the apartments were not a boarding house, the court noted that the definition of “boarding housing” included fraternities, and it made a clear differentiation between fraternities and other non formal groups of students.<sup>27</sup>

### Zoning for Student Housing

To deal with the encroachment of student housing into residential neighborhoods, some local governments have enacted student housing ordinances. In some cases, fraternities and sororities are limited to certain zoning districts.<sup>28</sup> Many ordinances deal with smaller groups of students, however. In *Smith v. Lower Marion Township*, for example, the District Court for the Eastern District of Pennsylvania upheld an ordinance that limited “student homes” to no more than three students and subjected them to strict district and special permit requirements. Fraternities and sororities were classified separately, and were permitted only by special exception.<sup>29</sup> In upholding these restrictions, the court explained that the ordinance was aimed at maintaining the township’s residential character, limiting noise and congestion, and maintaining property values, all of which were permissible ends under *Belle Terre*.<sup>30</sup> A similar ordinance was upheld against an equal protection challenge in *Farley v. Zoning Hearing Board*. The court determined that it was reasonable for the board to impose different standards on student homes, given testimony from various people demonstrating that existing student homes created a “dormitory-like” atmosphere with excessive noise, frequent parties, cars parked on sidewalks, congestion, trash, and public urination.<sup>31</sup>

It is not uncommon for municipalities to restrict the number of people who may occupy a single fraternity or sorority house. For example, the City of

Minneapolis restricts the maximum number of people to 32.<sup>32</sup> Other municipalities do not place numerical limits as such in their zoning ordinances, choosing instead to require a minimum square footage for each person. The City of Albany requires 50 square feet per occupant,<sup>33</sup> and the City of Ithaca requires 60 square feet per occupant.<sup>34</sup>

### Special Use Permits

Many zoning ordinances subject fraternities and sororities to special permit requirements, and under this type of restriction municipalities retain a great deal of discretion to grant or deny approval. In *Grand Chapter of Phi Sigma Kappa v. Grosberg*, for example, the petitioner owned a fraternity house in the City of Troy, New York, and sought approval to use an adjoining lot as a dormitory and study hall. The zoning board denied the application, stating that the additional fraternity use would lower property values in the neighborhood and noting that the poor maintenance of the first building did not indicate that any improvement would be made by permitting the dormitory and study hall. The court found this explanation to be reasonable and upheld the denial of the special use permit.<sup>35</sup>

However, to deny a permit application for a fraternity or sorority, a municipality must rely on more evidence than neighborhood opposition. In *Tempo Holding Co. v. Oxford City Council*, the company filed an application for an additional use permit for fraternity and sorority housing in an Urban Business Commercial District. Despite testimony from the city's planning director and a retired building and zoning administrator that the use would be compatible with the surrounding area, the city council denied the permit request based on negative comments made by nearby property owners. The court held that this decision was arbitrary and capricious, as the evidence showed that the area contained a number of residential uses, including multiple-resident student housing complexes, and the comments made in opposition to the application were conclusory and speculative.<sup>36</sup> In a similar case, *Franklin and Marshall College v. Zoning Hearing Board of City of Lancaster*, the city's zoning board rejected a permit to convert a single-family home in a Conversion Apartment district into a fraternity based on community opposition rather than the objective requirements of the ordinance. The court held that there was no substantial evidence that the fraternity would

be incompatible with the surrounding area, because the neighbors did not show how the impact would be any "greater than that normally to be expected from such uses."<sup>37</sup>

### Permission as of Right

However, if an ordinance permits fraternities as of right, an application may not be rejected if it meets all of the technical requirements of the regulation. In *Brooks v. Fisher*, for example, the zoning board denied a permit for a fraternity due to objections by neighbors and because the fraternity did not submit a site plan. The court noted, however, that fraternities were permitted as of right and that the ordinance did not define the necessary contents of a site plan. The court found that the fraternity's application qualified as a site plan, even if it did not include the materials contemplated by the city, and explained that the appropriate response was for the city to impose conditions on the application rather than to deny it. The court's decision was also influenced by the chancellor's comments, which indicated that the decision was premised more on neighbors' concerns than on the technical requirements of the ordinance.<sup>38</sup>

Similarly, in *Delta Eta Corp. v. City Council of Newark*, a fraternity filed for a subdivision in order to renovate three existing houses and build a new 12-unit apartment building. The property was located in a district where fraternity houses were specifically permitted, subject to particular lot area requirements. Despite meeting these requirements, the city rejected the application and shortly thereafter amended the zoning to exclude fraternities. The court held that the city's decision was arbitrary and capricious, as it did not have the discretion to deny the application in this circumstance. The court pointed out, however, that the city did have the ability to impose conditions on the use of the property.<sup>39</sup> After remand, the city did formulate various conditions to address the community concerns that had led it to initially deny the application. Although the city and the fraternity were able to agree on many of these conditions, the fraternity challenged the city's prohibition on the sale, distribution, or consumption of alcoholic beverages. The court agreed, holding that the state did not grant cities the ability to regulate such behavior as part of their zoning powers.<sup>40</sup>

## Parking

Parking is typically at a premium for off-campus housing in neighborhoods, just as it often is on-campus. A number of municipalities provide specific parking requirements associated with housing for fraternities and sororities. For example, the City of Trussville, Alabama requires one parking space per member of a fraternity or sorority (the ordinance does not specify that the space be per occupant of the house, although this seems to be the implication).<sup>41</sup>The City of Carlsbad, California requires 1.25 spaces for each sleeping room in a fraternity house.<sup>42</sup> Chino Hills, California requires one parking space per bed,<sup>43</sup> and the City of Albany requires one off-street parking space for every two occupants.<sup>44</sup> The City of Farmington Hills, Michigan combines both approaches and requires that fraternity and sorority houses have one parking space for each five permitted active members, or one space for each two beds, whichever is greater.<sup>45</sup> This ordinance takes into account that active members who may not reside in the house may routinely visit the premises, causing potential parking problems for non-student residents in host neighborhoods.

## Nonconforming Use Status

Fraternities that were lawfully established before the enactment of zoning regulations that would otherwise prohibit them are treated as nonconforming uses, and are allowed to continue until the use is abandoned, discontinued, or changed, or subject to amortization requirements. In *Matter of Sigma Gamma Fraternity, Inc. v. Barilla*, a fraternity was found to have abandoned its nonconforming use status when it discontinued use of the property for more than a year, as specified in the ordinance.<sup>46</sup>

*Triangle Fraternity v. City of Norman* involved a separate issue: whether a fraternity could continue the nonconforming use status of a building previously used as a boarding house for retired women. Neighbors objected on the basis that the fraternity would create more noise, congestion, and other problems than the women's boarding house, and the city eventually decided that the proposed use of the property was as for a private club, not a boarding house. Under this decision, the fraternity would not be eligible to continue the boarding house's nonconforming use, and would be required to obtain a rezoning. The court, however, decided that the fra-

ternity was entitled to an extension of the nonconforming use permit because its use of the property was substantially similar. Despite evidence that the fraternity would be louder, more intense, and have more social gatherings, the court emphasized that, like a boarding house, it was a residential use providing room and board for extended periods of time to unrelated occupants. As the court explained, "a mere increase in volume, intensity, or frequency of a nonconforming use is generally recognized as insufficient to invalidate it."<sup>47</sup>

## Suspension of Fraternity or Sorority

When fraternities or sororities are suspended by their host universities, this may, under the relevant zoning laws, render them unlawful uses or require them to obtain new land use permits. In *Schweizer v. Board of Adjustment of Newark*, for example, a University of Delaware fraternity named Pi Kappa Alpha was suspended for a term of four years for violating the university's rules of conduct. Under the zoning code, this suspension required the fraternity to vacate the building and also terminated the fraternity's nonconforming use status. The fraternity attempted to preserve the nonconforming use of the property by entering into a lease with another, non-suspended fraternity, but the Supreme Court of Delaware held that the nonconforming use of the fraternity house expired immediately upon the group's suspension.<sup>48</sup>

## Housing on University-Owned Land

As mentioned previously, some college campuses accommodate fraternity and sorority housing on university-owned and controlled property. Some of these schools have sophisticated land use style regulatory regimes in place to address the design and siting of these houses, providing good examples for local governments. For example, the University of South Carolina has established an area on University-owned land designated as "Greek Village," which is comprised of 17 fraternity and sorority houses, with plans for more underway.<sup>49</sup> Each house, which is privately owned by the alumni corporation, is home to up to 36 students.<sup>50</sup> The University has published Greek Village Design Guidelines that address: design review, building construction, location of buildings on lots, walls and fences, outbuildings and auxiliary structures, offensive activities, signage, screening, garbage and refuse disposal, exterior lighting,

building design, landscaping, parking and common areas.<sup>51</sup> In addition, the University has posted a visual site plan depicting the area.<sup>52</sup>

### III. Conclusion

“Town-gown” relationships between institutions of higher education and host municipalities can offer excellent, mutually beneficial opportunities for economic development, community redevelopment and service learning. At the same time, however, if not properly managed from a planning and land use regulatory perspective, the potential exists for uncontrolled encroachment by the campus or campus interests. Perhaps the most obvious example of this is the demand for off-campus housing for students who choose to reside in non-university controlled dwelling units. While many planning and land use control laws may be implicated in the regulation of community-based housing for students, special issues arise when permitting fraternity and sorority houses, since these units typically house larger numbers of students in a concentrated area. The tools and techniques discussed above provide land use practitioners with a glimpse of the varied approaches for effective regulation of community-based fraternity and sorority houses.

#### NOTES

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15. Minneapolis Code of Ordinances 520.160.

16. Zoning Ordinance, City of South Pasadena, Fl., Part I, Article II, Section 130-4 (Definitions) DWELLING.
17. Wilmington, DE Code of Ordinances 48-2.
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20. Bloomsburg Landlords Ass'n, Inc. v. Town of Bloomsburg, 912 F. Supp. 790 (M.D. Pa. 1995), judgment aff'd, 96 F.3d 1431 (3d Cir. 1996).
21. Village of Belle Terre, supra n. 4.
22. For a description of the plaintiffs and residents of the house at issue, see *Boraas v. Village of Belle Terre*, 476 F.2d 806 (2d Cir. 1973), probable jurisdiction noted, 414 U.S. 907, 94 S. Ct. 234, 38 L. Ed. 2d 145 (1973) and judgment rev'd, 416 U.S. 1, 94 S. Ct. 1536, 39 L. Ed. 2d 797 (1974).
23. *Village of Belle Terre*, supra n. 4, 416 U.S. at 7 (“The present ordinance is challenged on several grounds: that it interferes with a person’s right to travel; that it interferes with the right to migrate to and settle within a State; that it bars people who are uncongenial to the present residents; that it expresses the social preferences of the residents for groups that will be congenial to them; that social homogeneity is not a legitimate interest of government; that the restriction of those whom the neighbors do not like trenches on the newcomers’ rights of privacy; that it is of no rightful concern to villagers whether the residents are married or unmarried; that the ordinance is antithetical to the Nation’s experience, ideology, and self-perception as an open, egalitarian, and integrated society.”).
24. Village of Belle Terre, supra n. 4.
25. See, e.g., *City of Schenectady v. Alumni Ass’n of Union Chapter, Delta Chi Fraternity*, 5 A.D.2d 14, 168 N.Y.S.2d 754, 755 (3d Dep’t 1957) (holding that a group of students belonging to a fraternity was not a “family” as the term was used in the single-family zoning regulations); *Brady v. Superior Court In and For San Mateo County*, 200 Cal. App. 2d 69, 19 Cal. Rptr. 242 (1st Dist. 1962) (discussing cases in which fraternities were held not to be “families”); *Cassidy v. Triebel*, 337 Ill. App. 117, 85 N.E.2d 461, 466 (2d Dist. 1948) (explaining that although members may have “fraternal ties,” they are not “families”); *Theta Kappa, Inc. v. City of Terre Haute*, 141 Ind. App. 165, 226 N.E.2d 907, 908 (1967), reh’g denied, 141 Ind. App. 165, 228 N.E.2d 34 (1967) (although where fraternities were permitted in the business district, they were not permitted in single family areas because a fraternity was not a “family” in the way that the ordinance provided); *Pettis v. Alpha Alpha Chapter of Phi Beta Pi*, 115 Neb. 525, 213 N.W. 835, 838 (1927) (explaining that the 30 male members of the Alpha Alpha Chapter of Phi Beta Pi did not constitute a family because they are “exuberant, boisterous, and hilarious, and ... do not normally keep regular hours and are addicted to the use and abuse of vibrant and sonorous musical instruments”).
26. *Ames Rental Property Ass’n v. City of Ames*, 736 N.W.2d 255 (Iowa 2007), cert. denied, 552 U.S. 1099, 128 S. Ct. 908, 169 L. Ed. 2d 729 (2008).
27. *Adams v. Town of Brunswick*, 2010 ME 7, 987 A.2d 502 (Me. 2010).
28. See, e.g., *City of Long Beach v. California Lambda Chapter of Sigma Alpha Epsilon Fraternity*, 255 Cal. App. 2d 789, 63 Cal. Rptr. 419, 25 A.L.R.3d 912 (2d Dist. 1967) (fraternities permitted in commercial districts and multiple-dwelling districts by special permit).
29. *Smith v. Lower Merion Tp.*, 1991 WL 152982 at \*3 (E.D. Pa. 1991).
30. *Smith*, supra n. 29; *Smith v. Lower Merion Tp.*, 1992 WL 112247 (E.D. Pa. 1992), order aff’d, 995 F.2d 219 (3d Cir. 1993).
31. *Farley v. Zoning Hearing Bd. of Lower Merion Tp.*, 161 Pa. Commw. 229, 636 A.2d 1232 (1994).
32. Minneapolis Code of Ordinances 536.20.
33. City of Albany Zoning Ordinance, Art. III, § 231-12.
34. City of Ithaca Zoning Ordinance § 210-8.
35. *Grand Chapter of Phi Sigma Kappa v. Grosberg*, 30 A.D.2d 887, 291 N.Y.S.2d 606 (3d Dep’t 1968).
36. *Tempo Holding Co. v. Oxford City Council*, 78 Ohio App. 3d 1, 603 N.E.2d 414, 415 (12th Dist. Butler County 1992), jurisdictional motion overruled, 65 Ohio St. 3d 1420, 598 N.E.2d 1171 (1992).
37. *Franklin and Marshall College v. Zoning Hearing Bd. of City of Lancaster*, 29 Pa. Commw. 478, 371 A.2d 557, 559 (1977).
38. *Brooks v. Fisher*, 705 S.W.2d 135 (Tenn. Ct. App. 1985).
39. *Delta Eta Corp. v. City Council, City of Newark*, 2003 WL 1342476 (Del. Super. Ct. 2003).
40. *Delta ETA Corp. v. City Council of City of Newark*, 2005 WL 1654581 (Del. Super. Ct. 2005).
41. City of Trussville, Alabama, Code of Ordinances § 2.0.
42. Municipal Code of City of Carlsbad, California § 21.44.020.
43. Municipal Code of Chino Hills, California § 16.34.060.
44. City of Albany, Zoning Code, Art. XIX, § 375-185.
45. Code of Ordinances of City of Farmington Hills, Michigan § 34-540.
46. *Sigma Gamma Fraternity, Inc. v. Barilla*, 27 A.D.3d 1184, 810 N.Y.S.2d 698 (4th Dep’t 2006).

47. Triangle Fraternity v. City of Norman, ex rel. Norman Bd. of Adjustment, 2002 OK 80, 63 P.3d 1 (Okla. 2002), reh'g denied, (Feb. 3, 2003).
48. Schweizer v. Board of Adjustment of City of Newark, 980 A.2d 379, 381-82, 249 Ed. Law Rep. 291 (Del. 2009).
49. University of South Carolina, Greek Village, <http://www.sa.sc.edu/greeklife/GreekVillagePublication.pdf>.
50. University of South Carolina, Greek Village, <http://www.sa.sc.edu/greeklife/GreekVillagePublication.pdf>.
51. University of South Carolina, Greek Housing Development Design Guidelines, <http://www.sa.sc.edu/greeklife/GREEKDESIGNGUIDELINES.pdf>.
52. University of South Carolina, Greek Village Housing Site Plan, <http://www.sa.sc.edu/greeklife/USCGV.pdf>.

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## OF RELATED INTEREST

Discussion of matters related to the subject of the above article can be found in:

- Am. Jur. 2d, Zoning and Planning § 185  
 C.J.S., Zoning and Land Planning §§115, 131  
 Salkin, American Law of Zoning § 9:38  
 Ziegler, Rathkopf's The Law of Zoning and Planning §23:12, 27:13  
 Application of Zoning Regulations to College Fraternities or Sororities, 25 A.L.R.3d 921

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## RECENT CASES

### Billboard ordinance was invalid where city failed to state reasons for adopting it.

The City of St. Paul enacted an ordinance prohibiting all billboard extensions. (A billboard extension is a part of a word or graphic that protrudes beyond the normal rectangular outline of a billboard.) Clear Channel Outdoor, Inc., owned about 390 billboards within the city, and the city demanded that Clear Channel remove its existing billboard extensions and refrain from using new ones. Clear Channel sued the city in federal district court, and the court entered partial summary judgment, declaring the ordinance unenforceable under Minnesota law because the city had failed to articulate any rational basis for it.

On appeal, the U.S. Court of Appeals for the Eighth Circuit affirmed. The court noted that the case turned on Minnesota law, and cited the Minnesota case of *Honn v. City of Coon Rapids*, 313 N.W.2d 409 (Minn. 1981), in which it was said that a municipality, when enacting a zoning ordinance, need not prepare formal findings of fact, but must at a minimum have the reasons for its decision recorded or reduced to writing, and in more than just a conclusory fashion. The city, however, argued that the later case of *Arcadia Development Corp. v. City of Bloomington*, 552 N.W.2d 281 (Minn. Ct. App. 1996), stated the proper application of the "rational basis" test, i.e., that a legislative body is generally not required to state reasons for enacting a statute or ordinance, and that a reviewing court should uphold challenged legislation if it can be supported by any set of facts either known or which could reasonably be assumed.

The court noted that the city had shifted positions on appeal, having maintained in the court below that *Honn* was the controlling precedent. The court then said that it believed that the Minnesota courts would regard *Honn* as governing the case, inasmuch as *Arcadia* did not involve a zoning matter, but rather the adoption and enforcement of an ordinance requiring owners of mobile home parks to pay reasonable relocation costs to displaced residents when such a park closed.

The city also argued that the court below should have afforded it a trial at which it could have stated its reasons for enacting the ordinance. The Court of Appeals, however, noted that the city had told the district court that the record was complete and that the parties' motions for summary judgment were ripe for decision. Moreover, the Minnesota courts have clarified that *Honn* does not require a trial or augmentation of the record where the record is clear and complete, as it was in the instant case. The record of the city council's proceedings regarding the ordinance was not unclear or incomplete; the city simply failed to articulate any rational basis for its action. And although in some Minnesota zoning cases, remand has been directed to allow development of a record that would permit meaningful appellate review, the court distinguished those cases as involving denial of special use permits on an inadequate record. In such cases, remand is proper to avoid forcing a municipality to grant a special use permit for valid but unarticulated reasons. Refusal to remand in the instant case, by contrast, simply restored the

status quo ante; the city could begin the legislative process anew. *Clear Channel Outdoor, Inc. v. City of St. Paul*, 618 F.3d 851 (8th Cir. 2010).

### Relevant market area of sexually oriented business, for purposes of determining whether location restrictions could constitutionally be applied to the business, could not be deemed to include municipality in another state.

35 Club, L.L.C. operated a sexually oriented business featuring live nude dancing in the Borough of Sayreville. The Borough sought to enjoin operation of the business on the grounds that it violated a state law prohibiting operation of a sexually oriented business within 1,000 feet of a public park or residential zone. After a bench trial, the court permanently enjoined Club 35 from operating its business at the location in question, and ordered the injunction to be recorded in the office of the registrar of deeds as a restriction on the use of the property in perpetuity.

On appeal, the Superior Court of New Jersey, Appellate Division, reversed and remanded. The court noted that while it was undisputed that Club 35's business violated the statute, this was only the beginning of the analysis needed to determine whether the law was constitutional as applied to Club 35. Under *Township of Saddle Brook v. A.B. Family Center, Inc.*, 156 N.J. 587, 722 A.2d 530 (1999), the Borough had to prove the adequacy of available alternative avenues of communication within the relevant market area.

The first step in this analysis, continued the court, is to identify the relevant market area, which should include areas located in other municipalities within reasonable proximity to the business against which enforcement of a location restriction is sought. In determining what constitutes reasonable proximity, the court may consider, among other things, regional marketing patterns and availability of public transportation and access by automobiles, and geographical distribution of customers at comparable sexually oriented businesses. The Borough and Club 35 had each offered expert testimony as to the relevant market area in this case, but neither expert had addressed regional marketing patterns of available public transportation. In order to meet its burden of

proof, the Borough had to present expert testimony that tracked the elements identified in *Saddle Brook*.

Having failed to properly identify the relevant market area, the lower court also failed to identify available alternative avenues of communication within that market area. The court had not discussed with any particularity the various local zoning schemes in other municipalities that affected the availability of any given site. And, continued the court, the lower court's inclusion of the municipality of Staten Island, New York within the relevant market area presented an independent basis for rejecting the lower court's analysis as to availability of suitable sites. The court explained that neither the citizens of New Jersey nor the residents of Sayreville had any electoral voice in the affairs of Staten Island, and that "the abridgement of constitutionally protected speech . . . cannot be sustained when the alternative suitable sites for the expression of that speech are located outside the electoral reach of the people affected by such abridgement." The court remanded for application of the *Saddle Brook* factors to the case.

The court also struck down the trial court's order imposing a permanent and recordable deed restriction on the use of the property, saying that there was no express authority to support such a ruling. The court upheld the trial court's refusal to consider the internet as an alternative forum or site for Club 35 to conduct its sexually oriented business, noting that in the view of many people, the live nude dancing experience offered by Club 35 could not be completely replicated in cyberspace. *Borough of Sayreville v. 35 Club, L.L.C.*, 416 N.J. Super. 315, 3 A.3d 1268 (App. Div. 2010).

### "Condemnation blight" was properly taken into account in valuing property condemned by county for use by airport.

The Kenyon County Fiscal Court, on behalf of its Airport Board, condemned land owned by Cordella Baston as part of a plan to construct a new runway for the Cincinnati/Northern Kentucky International Airport. A jury trial was held in circuit court to assess condemnation damages. The central issue was whether the condemned property, although zoned as residential, should be valued according to its value for industrial use. The Airport Board contended that the property was worth about \$45,000 per acre and that it was unsuitable for industrial use because of

the need for costly improvements to the road serving the property before the land could be rezoned for such use. Baston offered expert testimony to the effect that the road was not an insurmountable obstacle to industrial development and that the land was worth \$100,000 per acre. The jury returned a damage award valuing the land at \$85,000 per acre.

On appeal, the Kentucky Court of Appeals reversed the award as excessive and remanded for a new trial. The court characterized the award as contrary to the clear weight of the evidence. The court also indicated that the jury had been tainted by Baston's counsel's references to the fact that the announcement of the runway project had "killed development" in the area, which meant that her appraiser had not valued her property according to comparable sales in the immediate area, but instead had looked at comparable sales in other areas near the airport. This statement by counsel, said the court, violated KRS 416.660, which stated in relevant part that "[a]ny change in the fair market value prior to the date of condemnation which the condemnor or condemnee establishes was substantially due to the general knowledge of the imminence of condemnation or the construction of the project shall be disregarded in determining fair market value."

On discretionary review, the Kentucky Supreme Court reversed the Court of Appeals and reinstated the judgment of the circuit court. The court rejected the Court of Appeals' holding that Baston had failed to show that her property was physically adaptable for industrial use. The testimony of Baston's "well-qualified" engineer was properly admitted, said the court, and once it was admitted it was for the jury, not the Court of Appeals, to determine the weight it was to be given.

The court went on to say that, contrary to the Court of Appeals' view, KRS 416.660 did not mean that the impact of a proposed condemnation or project on property value must be excluded from evidence, but merely codified the established rule that determination of the fair market value of condemned property must be made without regard to any increase or decrease in the property's value resulting from public knowledge of the condemnation or project. The trial court had not abused its discretion by denying the Airport Board's repeated motions for mistrial on the grounds that references to the influence of the airport project had violated KRS 416.660, and the Court of Appeals erred in holding otherwise.

The court concluded by rejecting the contention that Baston's counsel had engaged in improper argument that inflamed the passions of the jury by encouraging the jurors to sympathize with Baston, a widow, and view her as the victim of a rich and heartless corporate entity. Reviewing the statements at issue, the court found them within the bounds of permissible argument. *Baston v. County of Kenton ex rel. Kenton County Airport Bd.*, 319 S.W.3d 401 (Ky. 2010).

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### Storage sheds were not "structures" under zoning ordinance, even though they were wired for electricity, provided with graveled parking areas, and located in landscaped area.

Roderick and Pamela Ratcliff owned 6.27 acres of land within the Town of Culver. They placed five storage sheds on the property. The sheds had been constructed offsite and delivered to the property, where they were placed on skids in an otherwise empty lot with a gravel parking area. The Ratcliffs supplied the sheds with electricity and landscaped the surrounding area. They and their neighbors used the sheds to store seasonal items they used at a nearby lake in summertime. The Ratcliffs charged their neighbors no rent, nor were the sheds open for public use.

Because the lot on which the sheds were located was otherwise empty, the Town cited the Ratcliffs under a provision of its zoning ordinance which provided that accessory buildings could be constructed only after a principal use had been established, and only after a building permit had been obtained for the principal building. After a hearing, the Culver Plan Commission directed the Ratcliffs to remove the sheds or be fined. The Board of Zoning Appeals affirmed that decision, and the Ratcliffs sought judicial review. The trial court entered judgment in favor of the Ratcliffs.

On appeal, the Court of Appeals of Indiana affirmed. The court noted that to be accessory buildings within the meaning of the Town's zoning ordinance, the sheds had to have a "fixed location" and "permanent improvements." The Board argued that because the sheds were in a particular spot, they had a fixed location, but the court rejected this argument, saying that it would apply to all personal property. The only reasonable interpretation of the "fixed loca-

tion” requirement, said the court, was that it served to identify and distinguish appurtenances, which are attached to the land, from personal property, which is movable. The sheds, said the court, were not attached to anything. They rested on skids and could be moved at any time, so they were not in a “fixed location.”

The court went on to say that the sheds were not permanent improvements to the land, nor did they have permanent improvements added to them. Landscaping, said the court, is not a permanent improvement. The court also rejected the contention that wiring the sheds for electricity was a permanent improvement. There was no evidence of the manner in which the electricity was provided to the sheds, and the mere connection of electricity to personal property did not, without more, convert the personal property into an appurtenance or a permanent improvement. There was also no evidence as to whether the electrical facilities were permanent or temporary. *Town of Culver Bd. of Zoning Appeals v. Ratcliff*, 2010 WL 4020553 (Ind. Ct. App. 2010).

### Fact that landowner could have sought special use permit for desired land use did not bar challenge to rezoning as impermissible spot zoning.

The Urquharts sought to have 668 acres of land in the northeast portion of Cascade County rezoned from Agricultural to Heavy Industrial so as to allow Southern Montana Electric (SME) to construct a power plant on the land. The county planning department issued a report stating that while the power plant would be inconsistent with existing land uses in the area, it would not necessarily be inconsistent with land uses allowable in the area, inasmuch as a power plant could be allowed in an agricultural zone if a special use permit were granted. The report determined that rezoning was not necessary, because the proposed use could be approved by special permit.

SME wrote a letter in response to the report, containing 11 proposed “conditions” intended to address points made in the staff report and the planning board’s report to the county board of commissioners. At a public hearing on the rezoning, SME sub-

mitted documentation as to traffic impact, noise, and other matters relating to the proposed construction. The board of commissioners ultimately approved the rezoning.

Plains Grains Limited Partnership went to court, requesting that the court set aside the rezoning on various grounds, among which were that the rezoning constituted impermissible spot zoning. The court upheld the rezoning. Although the court acknowledged that important indicators of spot zoning were present, the court also noted that two internal planning staff reports indicated that the power plant would have been allowed if a special use permit had been sought. As a result, the court determined that the rezoning from agricultural to heavy industrial would not constitute a significantly different use from those prevailing in the area.

On appeal, the Supreme Court of Montana reversed, holding that the rezoning was impermissible spot zoning. The lower court’s determination that the power plant would have been allowed under a special use permit implied that the issuance of a special use permit was a ministerial act as to which the board had no discretion. In fact, noted the Supreme Court, the board possesses considerable discretion as to the granting of a special use permit. Under the applicable county zoning regulations, the board, before it could issue a special use permit, was required to make findings regarding, inter alia, public safety, property values, and whether the proposed use was in harmony with the area, and the board could not be required to issue the permit even if it made those findings. The fact that SME could have sought a special use permit did not undermine Plains Grains’ challenge to the rezoning as spot zoning. (The court went on to hold that the rezoning was impermissible spot zoning, inasmuch as (1) the proposed use would differ significantly from surrounding uses; (2) the area proposed for rezoning was relatively small; and (3) the benefit of the rezoning would inure solely to SME.) *Plains Grains Ltd. Partnership v. Board of County Com’rs of Cascade County*, 2010 MT 155, 357 Mont. 61, 238 P.3d 332 (2010).