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NORTHWESTERN MANDATES ADA COMPLIANCE

Fraternities and sororities at Northwestern University are experiencing the complexities of operating out of houses owned by the University. There are 29 Greek houses on Northwestern's campus. The University is pushing those organizations which occupy the houses to pay for bringing the houses into compliance with the Americans With Disabilities Act.

If these houses were privately owned by each fraternity and sorority and located off-campus, it is very likely that they would be exempt from compliance with the ADA. (See November 2008 issue of *Fraternal Law*.) A recent article in the *Daily Northwestern* estimates that the cost at Northwestern could be above \$1,000,000.00 per house to provide ramps, elevators and handicap accessible bathrooms and showers.

The chapters who occupy houses at Northwestern may have to make the difficult choice of finding the funds to do the ADA upgrades or to move off campus. The *Daily Northwestern* article quoted Bill Banis, the Vice President for Student Affairs at Northwestern, as saying "they know who they are, and they know the clock is ticking ... if they are not going to be compliant with the terms of their lease, then the University is going to have to determine if they are viable for remaining at Northwestern."

The Greek community has a different take on the situation.

The chapters who occupy houses at Northwestern may have to make the difficult choice of finding the funds to do the ADA upgrades or to move off campus.

"I don't know of a single Greek house that is against ADA compliance," said Kelly Brest van Kempen, president of the Chi Omega house corporation and also of Quadrangles, the consortium of Greek housing organizations at Northwestern. "We all want to be sure that our houses are completely accessible. The big question is how to pay for the necessary renovations. Each House Corporation Board has a discrete pool of money from which to draw for house maintenance, and the pool will vary in size depending on the number of residents it can sleep. A house with a maximum of 38 beds has a much smaller pool than a house with 65 beds, yet each is expected to spend approximately the same amount for the ADA upgrades to its university-owned house. The University, on the other hand, has an aggregate pool of

funds from which to draw to make renovations to university-owned buildings."

Plans for a joint ramp for neighboring houses Alpha Chi Omega and Delta Delta Delta are underway and the two house corporation boards are working together on the project. They will share the costs of construction, including the architect's fees. Northwestern officials have indicated that they are willing to discuss the issues and explore options for financing the necessary improvements, which some houses will want to pursue, including the Chi Omega house corporation board.

Chi Omega is in a unique situation in that it is sharing an ADA ramp project with the University. The Chi Omega house adjoins a former sorority house that is being renovated as upper-class housing. Local ordinances require that any public access building in the city being renovated must meet all ADA requirements. The former sorority house falls into this category and the work must be completed by September 1 to accommodate incoming students. The most cost-effective and best architectural solution for the historically significant buildings is a shared ramp and raised patio between the two houses. The house corporation board has approved the plans and is waiting for a proposal from the University on sharing the costs.

Despite Vice-President Banis's remarks, however, most Greek houses have until the end of their next 10-year lease renewal to comply with ADA requirements. For many houses, including Chi Omega, that deadline is well after 2020.

Fraternities and sororities can always better maintain their independence if they are on their own land and in their own building. But that is often not practical and leasing university accommodations is often a fallback solution. At the very least, in reviewing agreements with colleges and universities, it is critical that there be a full understanding of what obligations come with a lease with the university. Otherwise, it may turn out that what looked like a sweetheart deal with a university is not so attractive after all.

There is no question that every effort should be made to ensure that chapter houses are accessible, both to potential members and their families and guests, but full compliance with the requirements of the ADA can be extremely expensive, especially when trying to retrofit a building constructed long before the requirements of ADA applied.

• Timothy M. Burke

EDUCATION KEY TO IMPLEMENTING CHIA

"When will the law change so that donations to house corporations are tax-deductible?"

We get this question all the time. The answer is never, or at least no time soon.

The question is grounded in a misunderstanding of the legislation commonly known as the Collegiate Housing and Infrastructure Act, or CHIA.¹ In essence, CHIA will facilitate the flow of tax-deductible dollars to recipient house corporations for use in housing projects. So, the misunderstanding underpinning the question is reasonable in that it neatly summarizes the overall effect of CHIA. However, the question itself overlooks a critical component of CHIA in that CHIA requires tax-deductible donations first be made to a charitable fraternal foundation, and only then can funds flow as grants to the house corporations. Overlooking this first critical step could result in serious, adverse tax consequences to the foundation or house corporation involved, but could also have a profoundly negative impact on the industry as a whole. The analysis below describes what CHIA will do, while highlighting the absolute requirement that only a truly charitable foundation can make CHIA grants.

What is CHIA?

The Internal Revenue Code ("IRC") places significant restrictions on using charitable donations to fund construction or improvement of chapter housing. As currently written and interpreted, the IRC restricts charitable spending to (i) educational areas of chapter houses such as libraries or study rooms and (ii) certain improvements deemed "educational" such as internet wiring. The result is that fraternity and sorority foundations are prohibited from funding any improvements other than strictly educational improvements. Unfortunately, strictly educational improvements often comprise a small fraction of a total project cost.

Oddly, the IRC places no such restrictions on universities and colleges wishing to use charitable funds for chapter housing. As a practical matter, this means that colleges and universities may use tax deductible contributions for improvements to non-educational meeting areas and dining facilities. Because, as explained above, fraternal foundations are prohibited from funding similar, non-educational improvements, fraternal foundations operate at a distinct disadvantage to educational institutions.

CHIA would level the playing field, allowing fraternal foundations to use charitable funds for nearly all components of a housing project, much like host colleges and universities do. In addition, CHIA could result in more dollars being available to remediate the aging collegiate housing stock. In short, CHIA would significantly alter, for the better, the way fraternal foundations do business.

Housing Grants are not Charitable under CHIA

Like many provisions of the IRC, CHIA is written in a way that requires the reader to parse the language precisely to understand what CHIA allows. CHIA does not say, "making grants for chapter housing is a charitable activity." CHIA does not say, "contributions to house corporations for housing improvements are tax-deductible." Instead, CHIA describes certain grants that a foundation may make to certain organizations for certain purposes without jeopardizing its exemption. This is an important distinction because a fraternal foundation (like other charities) may only engage in a small amount of non-charitable activities without jeopardizing its exemption. CHIA provides that fraternal foundation housing grants will not be counted as a non-charitable activity, provided the foundation carefully follows the criteria outlined in CHIA.²

Conversely, a foundation must do substantially more than merely make housing grants in order to qualify as a tax-exempt charity. That is, since CHIA does not characterize foundation housing grants as charitable activities in and of themselves, a foundation must engage in substantial other activities that qualify it as a charity irrespective of whether it makes housing grants. To use CHIA properly, a foundation must be charitable in the first instance. Having met that burden, a foundation may make qualifying housing grants without risking the loss of its exemption.

Understanding this concept is vitally important to understanding CHIA. National fraternities and foundations must make sure that (i) local chapters understand that they cannot simply form their own foundations specifically to fund house projects, and (ii) nothing in CHIA authorizes tax-deductible gifts directly to house corporations. Again, simply making housing grants is not a charitable activity. The IRS will look for this precise scenario, and then make the case that CHIA is being abused. While any local foundation or house corporation that runs afoul of CHIA will do so with the best of intentions, intentions do not matter. The IRS will perceive this as an abuse of CHIA, a perception with ramifications for the entire industry.

The authors firmly believe that a proliferation of non-charitable, local foundations making housing grants will result in at least increased scrutiny of the industry, if not a regulatory evisceration of CHIA itself. This prediction is not lawyerly handwringing, but based on the experience of the authors having witnessed the IRS focus on the Greek industry before. Invariably, any IRS crackdown on the Greek industry has arisen from a perceived abuse of the system. CHIA sounds like a simple proposition, so simple that many local foundations will want to "go it alone," without the help and expense of national foundation involvement. Therein lays the risk. All national fraternities and foundations should do their utmost to discourage formation of local foundations created solely to

make housing grants.

As a corollary to discouraging formation of a slew of local foundations, the national foundations should help their affiliated fraternities make local chapters aware that the national foundations are able to provide assistance. Foundations should create and implement an outreach program to (i) discourage creation of local foundations and (ii) encourage chapters to contact the national foundations for help. Education on a local level is imperative to preserving the benefits of CHIA for the long term.

Conclusion.

When passed, CHIA will markedly improve the way fraternal foundations provide housing to Greek undergraduates. There can be no doubt that CHIA is a dramatic, industry-changing piece of legislation that will make a real impact on all fraternal foundations. Our fear is that, despite the best of intentions, someone in the industry goes too far, or is too lackadaisical in their approach. As explained above, stretching CHIA beyond its limits or failing to comply with its strictures poses a threat not just to the individual foundations, but also to

the industry. Any perceived abuse threatens the advance CHIA represents. Our hope, on the other hand, is that education of our local organizations may highlight potential pitfalls in CHIA, so the entire industry operates within the limits of this exciting proposed legislation.

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¹ The 111th Congress adjourned without taking action on CHIA. However, we believe that the bill will be introduced in the new Congress relatively soon, and continue to hope that it will become law in the near future.

² There are a number of other criteria a proper CHIA grant must satisfy. This article is excerpted from a longer analysis of CHIA that examines other CHIA criteria. The authors are happy to forward this more lengthy analysis on request.

CHRONIC NUISANCE PREMISES

Communities throughout the country are adopting chronic nuisance laws that impose fines or even criminal penalties on property owners for nuisance activities occurring on the premises. The purpose of these laws is to reduce the number of police calls to designated properties and to hold the property owner responsible for the actions of tenants, visitors or even trespassers on the premises. Jurisdictions differ on which types of properties are eligible for chronic nuisance classification. Some cities apply the ordinance to all properties in the municipality including single family, multi-family, and commercial, while other jurisdictions only apply the law to multi-family properties. Each community defines nuisance activities differently, but they generally identify conduct such as underage consumption of alcohol, public drinking, illegal possession of drugs, illegal possession or discharge of firearms, disorderly conduct, gambling, assault and battery as nuisance activities subject to the chronic nuisance law. Generally, after a specific number of nuisance events, the municipality will begin billing the property owner for excessive numbers of police calls.

As these chronic nuisance laws are enacted at the local level, each ordinance is unique in what calls for police service qualify for enforcement action. In some jurisdictions, such as Cincinnati, only a police response to a disturbance or a police officer's determination of probable cause is necessary to determine that a nuisance activity has occurred. In other municipalities, such as Pittsburgh, an arrest or citation for an offense is required for the police call to be classified as a nuisance activity. Coaldale and Wilkes-Barr, Pennsylvania have some of the strictest standards, requiring a conviction for the offense in a court of competent jurisdiction.

There are also significant differences in what types of penalties are assessed for violation of the ordinances. The majority of communities begin enforcement with either fines or reimbursement of costs for police services. Although some jurisdictions, including Columbia, Missouri and Milwaukee, Wisconsin, provide additional criminal penalties, including incarceration, either as a punishment for maintaining a chronic nuisance premises or as a penalty for non-payment of fines and costs.

Chronic nuisance premises laws raise the issue of the right of municipalities to charge individual citizens for the receipt of public services. Generally, governments do not charge criminals or their victims for police investigation of criminal activity or the arrest of suspects. Residents of high crime areas of a city are not required to pay higher taxes for police services than other residents of the same jurisdiction. Similar ordinances requiring property owners to pay for public service have been challenged on equal protection grounds. However, these challenges have generally been unsuccessful, as courts have upheld ordinances subjecting property owners to liability for firefighting costs when the fire spread beyond the owner's property.¹ Courts have also upheld an ordinance that imposed garbage fees on a property owner based on the amount of trash a property generated,² as well as one that required citizens who used emergency medical services to reimburse the city for a portion of the actual operational costs of the EMS run.³ These ordinances have been upheld based on a city's police power "to adopt regulations necessary to preserve the health, welfare and safety of its residents."⁴

Communities with large college student populations such as Columbia, Missouri and the Town of Narragansett,

Rhode Island, located near the University of Rhode Island, have enacted ordinances with penalties for tenants and property owners for nuisance parties or unruly gatherings. A recent decision by the United States Court of Appeals for the First Circuit, upheld the Town of Narragansett's ordinance, which had been challenged on constitutional grounds by the University of Rhode Island Student Senate, as well as four students and three property owners who had been affected by the enforcement of the ordinance.⁵ The American Civil Liberties Union represented these Appellants and raised substantive and procedural due process claims, right to association claims, as well as equal protection and void for vagueness challenges.

The Narragansett ordinance empowers the police to intervene at and disperse gatherings that are creating a "substantial disturbance."⁶ The police may only do so when the disturbance involves "a violation of law."⁷ The ordinance outlines what types of unlawful conduct might constitute a violation including such activities as excessive noise, obstruction of public streets, illegal parking, public drunkenness or urination, or the service of alcohol to minors. Once the police have intervened at the premises of the unruly gathering, the police are required to post the property with a ten-by-fourteen-inch bright orange sticker.

Even the court comments on the selection of the color orange as being analogous with Nathaniel Hawthorne's *The Scarlet Letter*, as the sticker is required to remain on the building until the end of the school year. The sticker states that if the police are required to intervene in any additional unruly gatherings during the school year, that the owners, residents, sponsors of the party, and any guests who cause a nuisance will be held jointly and severally liable. Penalties for subsequent violations include monetary fines and community service, with community service being discretionary after the first violation subsequent to the posting of the property, but becoming

mandatory for repeated violations.

Chronic nuisance ordinances are generally enacted to address quality of life issues. The preambles of the legislation outline the intent to preserve the health, safety and welfare of the community. The legislation often has findings that chronic unlawful activity adversely affects the peace and safety of neighboring residents and diminishes the quality of life in the surrounding area. These ordinances establish that the public interest requires property owners to be proactive in preventing nuisance activity and makes the property owner responsible for any illegal activities on the property by tenants, visitors and in some cases even trespassers. Penalties for violations may include monetary fines or charges as well as criminal sentences.

Laws such as the ones enacted by Cincinnati, Pittsburgh, Columbia, and Narragansett have the potential to have large impacts on Greek chapter houses. Once a property is identified as a "chronic nuisance," heavy fines, or worse, are likely. If a chapter runs afoul of a chronic nuisance ordinance, it is advisable to have legal counsel explore a constitutional challenge to the ordinance. Despite the ruling in the *URI Student Senate* case, many chronic nuisance laws may be constitutionally vague, overbroad, or violate due process and equal protection rights.

• Julia B. Carney

¹ *Ventura County v. Southern California Edison Co.* 192 P.2d 512 (Cal. Ct. App. 1948).

² *Nat'l Props, Inc. v. Borough of Macungie*, 595 A.2d 742, (Pa Commw. Ct. 1991).

³ *Rizzo v. City of Phila*, 668 A.2d 236 (Pa Commw. Ct. 1995).

⁴ *Id.* at 238.

⁵ *URI Student Senate v. Town of Narragansett*, 2011 U.S. App. LEXIS 141

⁶ *Id.*

⁷ *Id.*

CHAPTERS AT MARYLAND AND LONGWOOD FACE DISCIPLINE

Numerous Greek chapters at the University of Maryland's Greek are currently facing a variety of disciplinary charges. Seven members of the Zeta Phi Beta sorority were charged with second-degree assault and hazing and the chapter was suspended indefinitely following hazing allegations. Two fraternities, Kappa Alpha Psi and Sigma Beta Rho, were recently suspended, pending the results of an official investigation into hazing allegations. Finally, the University suspended all new member activities for Pi Kappa Alpha, Tau Kappa Epsilon and Delta Chi.

Likewise, several chapters at Longwood University in Farmville, Virginia have had recent reports of hazing. In late February, the University issued a moratorium on new member classes for all seven Interfraternity Council recognized organizations. The University based its decision to temporarily halt

new member classes for all seven groups because at least five of the seven groups had hazing reported against them.

Tim Pierson, the Vice President of Student Affairs, in a quote to Longwood student newspaper, *The Rotunda*, stated, "If there is information that we have that suggests that there are activities going on that are a real danger to students, put yourself in that position. What do you do about it? You got to respond to that."

The incidents at Maryland and Longwood are just two more examples of needless hazing. Despite the best efforts of the national organizations, hazing is still occurring at an alarming level. The national organizations must continue to educate their members about the dangers and consequences of hazing. As a reminder, the National Hazing Hotline (1-888-NOT-HAZE) is available to all Greek students.

“All-Inclusive” Sorority Recognized At Purdue

Gamma Rho Lambda recently received official Pan-hellenic sanctioning at Purdue University. The sorority’s website describes the organization thusly, “Gamma Rho Lambda (GRL) National Sorority is often referred to as a lesbian sorority, however GRL strives to be inclusive of all members, whether they identify as lesbian, bisexual, ally, transgender, questioning, straight, or with no label. GRL is the first all-inclusive, college-based sorority with chapters throughout the United States.”

GRL continues the trend towards more cultural interest Greek organizations. In addition to newly formed gay and lesbian fraternities and sororities, more organizations are being formed for Asian-Americans, Latinos, Muslims, Native-Americans and more.

GRL now has chapters located at six schools and colonies at four additional schools. GRL expects to continue to grow.

- Daniel J. McCarthy

Fatal Shooting at Youngstown State Fraternity

In the early morning hours on Sunday, February 6, Jamail E. Johnson was fatally shot at the Omega Psi Phi fraternity house near the campus of Youngstown State University in Youngstown, Ohio. Mr. Johnson was a 25-year-old senior, member of the fraternity, and had worked part-time to put himself through school.

In addition to Mr. Johnson, 11 other people were shot and wounded. At least 6 of the 11 were students at Youngstown State. According to published reports, the shooting occurred after an argument during an impromptu party at the fraternity house. Two men were asked to leave the party after an altercation. Shortly thereafter, the men returned and fired semi-automatic handguns through the opened front door of the house.

According to witnesses, the two men walked up to the house, opened fire, then fled. Mr. Johnson was apparently trying to play the role of a peacekeeper when he was shot. Shortly after the shooting, two Youngstown residents, Columbus E. Jones and Braylon L. Rogers, were arrested and each charged with 1 count of aggravated murder and 11 counts of felonious assault.

- Daniel J. McCarthy

SUPREME COURT ISSUES IMPORTANT FREE SPEECH CASE

The United States Supreme Court just decided a highly controversial First Amendment Free Speech case. The case, *Snyder v. Phelps*,¹ involved protests that the Westboro Baptist Church frequently conducts at military funerals. This specific case involved a protest at the funeral of Lance Cpl. Matthew A. Snyder, a Marine who was killed in Iraq.

The Westboro Baptist Church, led by Fred Phelps, claims that God is punishing the nation for its continued tolerance of homosexuality. They protested at Mr. Snyder’s funeral with signs that read, among other things, “Thank God for Dead Soldiers” and “You’re going to Hell.” Mr. Snyder’s father sued the protestors, seeking damages for the intentional infliction of emotional distress. At the trial, the jury returned a large verdict for the plaintiff, but the result was overturned on appeal.

The Court agreed with the Court of Appeals, and held that the First Amendment protects hateful speech at military funerals. Chief Justice Roberts, in writing for the 8-member majority (only Justice Alito dissented), stated, “Speech is powerful.” Speech can “stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great

pain.”

However, because of the great importance of free speech to our nation, “we cannot react to that pain by punishing the speaker.” Justice Roberts continued that we must protect “even hurtful speech on public issues to ensure that we do not stifle public debate.”

In his dissent, Justice Alito stated, “Our profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case.”

This case may not have wide-ranging implications for Greek organizations, but it certainly could for free speech issues on college campuses. Colleges may be more hesitant to implement and enforce restrictive speech codes. However, Greek chapters should keep in mind the distinction between what is legally permissible and what is in good taste. Just because a chapter has the constitutional right to host a party with an offensive theme, it does not mean that they should do so.

- Daniel J. McCarthy

¹ *Snyder v. Phelps*, Case No. 09-751.

UPDATES FOR FRATERNAL LAW

Medical Marijuana is not Legal Marijuana

Some 15 states and the District of Columbia have laws purporting to legalize medical marijuana. In spite of that, possession, sale and use of marijuana remains a violation of federal law. As a result, colleges and universities may not authorize even the use of medical marijuana without jeopardizing their federal funds. Fraternities and sororities typically prohibit illegal drugs from being used on their premises or at their events. Should sales of illegal drugs occur on chapter property, it is possible for the federal government to seize the house. They did it some years ago, seizing three fraternity houses at the University of Virginia. Those fraternities had to buy back their houses from the feds.

In those states where medical marijuana has been approved, it is important to make it clear to members who may want to rely on such a law to justify their possession and use of marijuana in the house, that would still be a violation of house rules and federal law.

The University of Montana used this simple explanation to their students:

“Although Montana State law permits the use of medical marijuana, i.e., use by persons possessing lawfully issued medical marijuana cards; federal laws prohibit marijuana use, possession and/or cultivation at educational institutions and on the premises of other recipients of federal funds. The use, possession or cultivation of marijuana for medical purposes is therefore not allowed in any University of Montana housing or any other University of Montana property; nor is it allowed at any University sponsored event or activity off campus.”

National fraternal organizations and their chapters similarly have no obligation to permit the possession or use of medical marijuana on their property or at their events.

CLS: Is the Fallout Beginning?

The *CLS v. Martinez* lawsuit may be over (see Fraternal Law, September 2010, Number 113 and January 2011, Number 115), but the fallout from it may be just beginning. The Student Governments at Ohio State University recently went on record as urging the University to adopt the kind of all-comers policy which the Supreme Court upheld at Hastings Law School in the CLS case. Ohio State had been one of a number of schools that had been challenged by the Christian Legal Society when it was denied CLS recognition because of the beliefs it required of members. Ohio State ultimately settled the suit and recognized CLS. Now

the University is being asked to reverse that position. University officials have indicated they intend to carefully and deliberately review that request. It appears they are not about to rush into anything. For fraternities and sororities, the worst part of the CLS fallout could be if a state university refused to recognize fraternities and sororities because they are selective membership organizations and discriminate on the basis of gender. Should that happen, the Greek organizations on campus will be faced with either attempting to litigate or existing without campus recognition.

Utah State Settles

Michael Starks died as a result of a hazing incident on November 21, 2008. Twelve students were criminally charged. The two Greek organizations involved closed their chapters and settled with the Starks family. Now, Utah State University has settled with the Starks family and the family's wrongful death lawsuit against the University has been dismissed with the University's agreement to take more aggressive steps to combat hazing, alcohol and drug abuse on campus. (See Fraternal Law, January 2009, Number 107.)

Murray State and Sigma Pi Sued

Murray State University, Sigma Pi Fraternity International and its Gamma Upsilon Chapter at Murray State, as well as its members and officers, are defendants in a lawsuit filed last month. The suit, which has not yet been answered, alleges that Shawn Jackson, an African-American, paid to attend a party a year ago at the Sigma Pi Chapter's residence. He says he was harassed verbally and physically and that rocks were thrown at him. He was ultimately forced to leave.

The suit claims that the conduct interfered with his right to contract, violated the Fourteenth Amendment, constituted a conspiracy to interfere with civil rights and a violation of federal and state civil rights laws, as well as outrageous conduct, assault and battery. The Executive Director of Sigma Pi, Mark Briscoe, is quoted in the local press denying the allegations as “absolutely baseless ... to say that our chapter was racist is ridiculous.”

A University spokesperson explained that the University had investigated the accusation, but “Mr. Jackson never filed a formal complaint with the office of Equal Opportunity.”

- Timothy M. Burke

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

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