

IN THE
SUPREME COURT OF INDIANA

No. 19A-PL-457

THE CITY OF BLOOMINGTON
BOARD OF ZONING APPEALS,
Appellant-Respondent,

v.

UJ-EIGHTY CORPORATION,
Appellee-Petitioner.

Appeal from the
Monroe Circuit Court VII,

Trial Court Cause No.
53C06-1806-PL-001240,

The Honorable Frank M. Nardi,
Judge.

APPELLANT'S REPLY IN SUPPORT OF TRANSFER

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ARGUMENT

**Bloomington's definition of "Fraternity/Sorority House"
did not infringe on the landowner's due process rights.**

UJ-Eighty's argument has two fundamental flaws: (1) it mistakenly casts Indiana University ("University") as merely a neighboring landowner and not a public institution bound by the due process procedures of the state; and (2) it continues to rely on *Lochner*-era law in to support its position. The University is not merely a neighboring landowner, nor has the City delegated the zoning authority to the University. Nowhere in its briefing does UJ-Eighty address the persuasive case out of Delaware, which is on all fours with this one, *Schweizer v. Bd. Of Adjustment of the City of Newark*, 980 A.2d 379 (Del. 2009). In this omission, UJ-Eighty attempts to shift the argument from its violation of the ordinance—allowing two individuals to reside in its property where no fraternity remained. The University merely exercised its quasi-judicial role related to the fraternity—not to the use of the land or the landowner, just as was the case in *Schweizer. Id.* at 385. As a result, the City did not delegate zoning authority to the University, and the Court of Appeals opinion should be reversed.

The University is correct in its assertion that the only reason the City allows large groups of unrelated students to live together in fraternity and sorority houses is because of the expertise of the University in regulating the students groups and its role in addressing concerns regarding the health, safety and general welfare (Amicus Brief at 11; Appellant's Reply Br. at 9-10). Where the City has referenced State licensing statutes for its zoning definitions, the State is in the best position to

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determine the fitness of the licensed organization and does not exercise any zoning authority. On their face, these code references acknowledge that the State, just like the University, will use whatever procedures within the bounds of constitutionality to determine licensure.

A landlord for a daycare would not have a cause of action against the state based on the removal of the license of the day care itself. The landlord has a contractual agreement with the tenant, but does not have a property interest in the license. Likewise, UJ-Eighty had a lease agreement with a fraternity, not a property interest in its sanction or recognition (App. Vol. II pp.9, 132). The City's paramount interest is to cite, for definitional purposes, to licensing and oversight bodies within its ordinances to ensure the protection of the health, safety, and general welfare. *See City of Bloomington Bd. of Zoning Appeals v. UJ-Eighty Corp.*, No. 19A-PL-457, slip op. at 18 (Ind. Ct. App. Jan. 30, 2020) (Bailey, J. dissenting).

UJ-Eighty's reliance on *Roberge* is inapplicable to this case because *Roberge* involved delegation to citizens of direct veto power over a particular land use. *See State of Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 117-18 (1928). Here, there was no such delegation or veto power over the land use. The University's only role is regulating its own student organizations. Without such regulation, the City would not have sufficient guarantees that such organizations would operate within the bounds of the health, safety and public welfare. *UJ-Eighty*, slip op. at 20 n.5 (Bailey, J. dissenting).

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In analyzing *Matthews v. Eldridge*, 424 U.S. 319 (1976), UJ-Eighty misstates its own property interest and fundamentally disregards the University's status as a public university and the context of the violation here.¹ As to the interest that is at stake, UJ-Eighty incorrectly claims that it has an interest to use the property in whatever way it chooses. However, the record shows that UJ-Eighty purchased the property with a restriction for use only as student housing on the University's campus and was always fully aware of that restriction (Tr. 6, 38-39).² Further, the risk of erroneous deprivation was low because UJ-Eighty had an opportunity to fully present its case to the BZA. Also, the University is a public institution and bound by due process. *See UJ-Eighty*, slip op. at 23-24 (Bailey, J. dissenting). No part of this procedure denied due process to UJ-Eighty. *See, e.g., Schweizer*, 980 A.2d at 385.

The City's enforcement of its Ordinance did not violate UJ-Eighty's substantive due process rights. UJ-Eighty promotes the wrong standard of review, in the cases of zoning ordinance, courts will look to see if the ordinance as a *rational basis* to legitimate governmental interest to show that it is not arbitrary. *See*

¹ The City acknowledges that it took the two subparts of the second *Eldridge* factor—risk of erroneous deprivation and value of additional procedures—and separately enumerated them to analyze four factors. *Eldridge*, 424 U.S. at 335. Regardless, the analysis in the City's petition is precisely the same whether these two points are under one factor, or separately evaluated on their own (Petition for Transfer at 15).

² UJ-Eighty contradicted its testimony before the BZA in subsequent filings to say there was a plat restriction not a deed restriction (App. Vol. II pp.123-24, 174).

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General Auto Service Station v. City of Chicago, 526 F.3d 991, 1000 (7th Cir. 2008).

None of UJ-Eighty's cited case stand for the provision that strict scrutiny applies to this case. *Cf. County of Sacramento v. Lewis*, 523 U.S. 833, 836 (1998) (whether officer violated 14th Amendment by engaging in high speed chase that resulted in the suspect's death); *Zablocky v. Redhail*, 434 U.S. 374 (1978) (class action challenging orders for the noncustodial parent to pay child support); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (private interest between father and children). Bloomington has an undeniable interest in protecting the health, safety, and general welfare by regulating land uses and looking to the appropriate bodies to define whether there is valid sanction. *See Bloomington Bd. of Zoning Appeals v. Leisz*, 702 N.E.2d 1026, 1029 (Ind. 1998) (zoning is a legitimate state interest).

CONCLUSION

Bloomington respectfully requests that this Court grant transfer and reverse the Court of Appeals and trial court.

Respectfully submitted,

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WORD COUNT CERTIFICATE

I verify that this Petition contains no more than 1,000 words pursuant to Ind.
Appellate Rule 44(E).

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CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2020, a copy of the foregoing was electronically filed using the Indiana E-Filing System (IEFS) and was electronically served upon the following person(s) via the IEFS:

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