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IN THE INDIANA SUPREME COURT

Case No. 19A-PL-00457

THE CITY OF BLOOMINGTON BOARD OF ZONING APPEALS, Appellant, v. UJ-EIGHTY CORPORATION, Appellee.	)	Appeal from the Monroe Circuit Court VI Trial Court Case No. 53C06-1806-PL-001240 The Honorable Frank M. Nardi, Special Judge.

APPELLEE'S BRIEF IN RESPONSE TO PETITION TO TRANSFER

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Response to Questions Presented on Transfer

The City of Bloomington ("City") Unified Development Ordinance ("UDO") defines "Fraternity/Sorority House" as a building in which all students living in it are enrolled at the 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***."

The first question presented on transfer is whether the City's reliance on Indiana University's ("IU") recognition of a fraternity without providing a standard by which the City can control IU's decision and without providing UJ-Eighty with the right to have IU's decision reviewed is an unconstitutional delegation of planning and zoning authority.

The second question presented on transfer is whether the City has an adequate justification under the strict scrutiny test for its infringement on UJ-Eighty's fundamental right of property.

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I. Background and Prior Treatment of Issues on Transfer

UJ-Eighty agrees with Appellant's *Background and Prior Treatment* with the following addition:

At the Board of Zoning Appeals ("BZA") hearing on UJ-Eighty's appeal of the Notice of Violation ("NOV"), BZA member Beth McManus noted it was her first administrative appeal and asked if there were specific criteria to determine whether something is approved. Anahit Behjou, an attorney from the City's legal department, advised McManus the BZA members were to rely on the UDO to decide whether staff made the determination correctly. Appellant's App. Vol. II pp. 108-09. McManus then asked IU's removal of its recognition was the trigger for the non-conforming use and was told it was. Appellant's App. Vol. II pp. 110-11.

BZA member Barre Klapper commented she had looked online about the relationship between IU and the Greek system and wanted to know more about the relationship "and if the code changed to include the [current] language because of that tight relationship with IU and the existence of sororities and fraternities." Appellant's App. Vol. II pp. 113-14. Behjou told Klapper the UDO was revised to include a correlation between IU and the fraternities and sororities, and the zoning requirements, "[b]ecause fraternity houses and sorority houses are related to universities." Appellant's App. Vol. II p. 114.[1] McManus also made assumptions about what happened between IU and the fraternity and stated: "I don't know why it ceased to exist at IU." Appellant's App. Vol. II p. 121.

[1] A UJ-Eighty representative correctly pointed out that fraternities can continue to exist under the law without recognition by a university and provided supporting caselaw citations. Appellant's App. Vol. II pp. 116-17.

BZA member Jo Throckmorton asked for confirmation the BZA was not a court and was not deciding legal issues. He asked, "So allegations of being legally unconstitutional should be adjudicated perhaps in a court, rather than in a local board of zoning appeal?" The BZA case manager replied: "That would be my opinion, yes." Appellant's App. Vol. II p. 126.

II. Argument.

The Fourteenth Amendment guarantees both procedural and substantive due process rights. *McIntosh v. Melroe Co.*, 729 N.E.2d 972, 975 (Ind. 2000).

Procedural due process asks whether the government has followed the proper procedures when it takes away life, liberty, or property. "Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property." *Carey v. Piphus*, 435 U.S. 247, 259 (1978). The required elements of due process are those that "minimize substantively unfair or mistaken deprivations" by enabling persons to contest the basis upon which a governmental body proposes to deprive them of a protected interest. *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972). The core of these requirements is notice and a hearing before an impartial tribunal. The notice must be sufficient to enable the recipient, *inter alia*, to determine what he must do to prevent the deprivation of his interest. *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970).

Substantive due process asks whether the government's deprivation of a person's life, liberty or property is justified by a sufficient purpose. Substantive due process "bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them." *Zinermon v. Burch*, 494 U.S. 113, 125 (1990).

A. The City's reliance on IU's recognition of a fraternity without providing a standard by which the City can control IU's decision and without providing UJ-Eighty with the right to have IU's decision reviewed is an unconstitutional delegation of planning and zoning authority and a violation of procedural due process.

The City violated both the Indiana and Federal Constitutions by delegating the authority to unilaterally define what constitutes a fraternity to IU without any guidelines or oversight and without providing UJ-Eighty the right to have IU's decision reviewed.

Article 4, Section 1 of the Indiana Constitution vests legislative authority in the General Assembly. Ind. Const. art. IV, § 1. The General Assembly delegated the authority to exercise planning and zoning powers to municipalities and required municipalities to exercise these powers in compliance with Indiana Code chapter 36-7-4. *See* I.C. § 36-7-4-201. The General Assembly also authorized municipalities to delegate certain planning and zoning powers to a plan commission and board of zoning appeals. *See* I.C. ch. 36-7-4. The Indiana Code grants exclusive authority to enact and implement a zoning ordinance to the "legislative body having jurisdiction over the geographic area" covered by that ordinance. I.C. § 36-7-4-601(a). The Indiana Code further provides that the legislative body, in this case the Bloomington City Council, "shall establish a board of zoning appeals" and this board of zoning appeals shall have "territorial jurisdiction over all the land subject to the zoning ordinance." I.C. § 36-7-4-901. By statute, the General Assembly delegated legislative authority to the Bloomington City Council to enact and implement a zoning ordinance and instructed the City Council to delegate enforcement and interpretation to the BZA. *Id.*

In 2015, the City amended the definition of "Fraternity/Sorority House" for purposes of

the UDO.[2] The amended UDO permits a "Fraternity/Sorority House" in the Institutional Zoning District only if it has been sanctioned or recognized by IU "*through whatever procedures Indiana University uses to render such a sanction or recognition*." UDO § 20.11.020 (emphasis added) ("UDO Definition"). Appellant's App. Vol. II p. 37.

The City's delegation of its power to IU to decide whether a given group of people will be considered members of a fraternity for purposes of determining whether a property owner is in compliance with the UDO "*by whatever procedures Indiana University uses to render such a sanction or recognition*"[3] is unconstitutional. The UDO unequivocally allows IU to decide whether a property owner is in compliance without any limitations on IU's exercise of that power. IU has unrestricted power to recognize a fraternity or to withdraw such recognition, thus determining whether a private landowner is in compliance with the UDO without any control or oversight by the City, its Planning Department, or its BZA. *Compare* UDO § 20.11.020, *with Counceller v. City of Columbus*, 42 N.E.3d 146, 150–51 (Ind. Ct. App. 2015), *trans. denied.* In addition, IU may determine what procedures are to be used without any oversight by the City. *Id.*

At the hearing on UJ-Eighty's appeal of the NOV, the City's legal counsel advised the BZA it could not question IU's decision to no longer recognize the fraternity occupying UJ-Eighty's property, but had to rely on the UDO to decide whether staff made the determination correctly or not. Appellant's App. Vol. II pp. 108-09. The BZA was also advised IU's withdrawal of recognition was the sole trigger for the determination the use of the property was non-conforming. Appellant's App. Vol. II pp. 110-11. The City's legal counsel further advised the

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[2] When UJ-Eighty purchased the Property in 2002, it was zoned "Institutional." Appellant's App. Vol. II p. 8. A permitted use by a fraternity or sorority was "limited to members of a specific fraternity or sorority." UDO § 20.07.14.01 (effective May 1, 1995) ("1995 Definition").
[3] UDO § 20.11.020 (emphasis added).

UDO was revised to include a correlation between the University and fraternities and sororities, and the zoning requirements "[b]ecause fraternity houses and sorority houses are related to universities." Appellant's App. Vol. p. 114.

Following this advice from the City's legal counsel, the BZA denied UJ-Eighty's appeal without knowing why the fraternity housed on UJ-Eighty's property was no longer recognized by IU and without considering the allegations made by UJ-Eighty that the UDO Definition was unconstitutional. Appellant's App. Vol. II p. 126. The City did not inform the BZA about, or provide evidence of, any interests advanced by allowing IU to make the decision without oversight by the BZA. Appellant's App. Vol. II pp. 89-126.

In contrast, other residential users,[4] *i.e.*, group care homes for the developmentally disabled, group care homes for the mentally ill, and group home/residential care homes must be licensed by the state and abide by Indiana statutes and "fire codes, building codes, and specific group home regulations." UDO § 20.11.020. The requirements the landowner must meet to have a qualifying use are clearly specified and are not left to the whim of a neighbor. See *id.*; I.C. ch. 12-11-1.1; I.C. §§ 12-22-2-3(2)-(6). A NOV to a group care home for the developmentally disabled must state "[t]he corrective actions required of the provider to remedy the breach and to protect clients of the provider." I.C. § 12-11-1.1-11. The "specific criteria" McManus requested during the BZA hearing are in place. Appellant's App. Vol. II p. 108. If the state determines there is reasonable cause to believe actions by a group home for the mentally ill create an immediate danger of bodily injury or the health of an individual with a mental illness, it may seek injunctive

[4] IU is wrong in asserting "[t]he City *only* allows large groups of unrelated adults to live together because of the expertise and role of IU in helping to regulate concerns related to the public health, safety, and/or general welfare . . . ." *Compare Appellant's Petition for Transfer*, p. 7 & n. 1 (emphasis added) *with Brief of Amicus Curiae*, p.11.

relief. But "[t]here must be an opportunity for an informal meeting with the division of mental health and addiction after injunctive relief is ordered." I.C. § 12-22-2-11(e). The core due process requirements of notice and a hearing before the governmental body deprives a person of a protected interest, in this case the protected interest of property, are provided in the zoning classifications that require licensure as part of the approval of the use. There are no such safeguards in place in the City's delegation of its planning and zoning authority to IU.

Contrary to the City's claim, the Court of Appeals did examine the facts of this case under the *Eldridge* factors. *See generally City of Bloomington Board of Zoning Appeals v. UJ-Eighty Corp.*, 141 N.E.3d 869, 875-77 (Ind. Ct. App. 2020)(hereinafter "*UJ-Eighty*"). The *Eldridge* analysis requires the Court to consider three related factors[5] when determining whether the procedures in place satisfy due process:

> *First*, the private interest that will be affected by the official action; *second*, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and *finally*, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Eldridge, 424 U.S. 319, 335 (1976) (emphasis added). After analyzing the facts of this case in light of *Eldridge*, the Court of Appeals correctly determined the City had violated the Fourteenth Amendment.

Under the first factor, the private interest of UJ-Eighty affected by the official action is UJ-Eighty's right "to devote its land to any legitimate use." *See State of Washington ex rel. Seattle*

[5] The City's interpretation of how many factors *Eldridge* established is incorrect. *Compare Appellant's Petition to Transfer*, at 15 ("*Eldridge* established the proper four-factor test for procedural due process claims") *with Eldridge*, 424 U.S. at 335 ("due process requires consideration of three distinct factors").

Title Trust Co. v. Roberge, 278 U.S. 116, 121 (1928). This is a recognized property right within the protection of the Fourteenth Amendment. *Id.*; *see also Counceller*, 42 N.E.3d at 150–51.

Under the second factor, the risk of erroneous deprivation of UJ-Eighty's right is unconstitutionally high because there is no guidance or reference as to how IU makes its determination on recognizing a group of students as members of a fraternity. The use of the words "whatever procedures" in the UDO Definition leaves the door open for IU to make decisions arbitrarily, capriciously, and for its own self-interest. The risk of an erroneous deprivation of UJ-Eighty's property right is amplified by the lack of any available mechanism in the UDO Definition for BZA review.

The City attempts to liken the "whatever procedures" language in the UDO Definition of "Fraternity/Sorority House" to other definitions contained in that same section. Specifically, the City cites to the UDO definitions for "Day Care Center" and for" Outpatient Care Facility," claiming that those definitions effectively say the same thing as "whatever procedures." However, the City's cursory reference to these other definitions belies the critical disparities which make the UDO Definition unconstitutional.

Looking first to the definition of "Day Care Center," the UDO states in relevant part: "The term 'day care center' shall include facilities defined as 'child care centers' under Indiana Code 12-7.2-28.4 . . . . Where required by state law, day care centers shall be and remain licensed by the state, pursuant to Indiana Code 12-17.2 *et seq.*" UDO § 20.11.020. The phrase "whatever procedures" is conspicuously absent from this definition. Instead, there is a direct citation to Indiana Code. A review of Indiana Code, article 12-7.2 details at length the requirements for licensure, variances, investigation of violations, and discipline, such as suspension or revocation of licensure. Indiana Code, sections 12-7.2-4-10 and 20 expressly provide an affected party with

administrative review for the denial of licensure or the issuance of sanctions. Indiana Code, section 12-7.2-4-10 goes on to codify the ability for judicial review following an adverse ruling for the affected party at an administrative hearing.

The definition of "Outpatient Care Facility" follows a similar model as the "Day Care Center" definition. The UDO defines an "Outpatient Care Facility" as "a facility licensed as an ambulatory outpatient surgery center by the State of Indiana, as defined by Indiana Code 16-18-2-14, that does not provide for patient stays of longer than twenty-four hours." UDO § 20.11.020. As in the previous example, the phrase "whatever procedures" is conspicuously absent from this definition and it contains a direct citation to Indiana Code. Looking at Indiana Code, section 16-18-2-14(a), it is immediately apparent that "ambulatory outpatient surgical centers" are licensed and governed under Indiana Code, section 16-21 *et seq*. Indiana Code, section 16-21-4-1 and 2 codify an affected party's access to administrative and judicial review for adverse actions against their licensure.

The procedural rules and safeguards against erroneous deprivations of rights are easily ascertainable from a review of the UDO definitions for "Day Care Center" and "Outpatient Care Facility." Both cite to the Indiana Code. The actions those administrative agencies take are prescribed by codified law. In both instances, a party adversely affected by an action of its governing agency has statutory administrative and judicial review available to it to prevent an erroneous deprivation of its rights.

These elements are wholly absent from the definition of "Fraternity / Sorority House" contained within the UDO Definition. There is no guidance for UJ-Eighty to determine whatever procedures IU uses to recognize a fraternity. Unlike the statutorily codified levels of administrative and judicial review available to the affected parties under the "Day Care Center"

and "Outpatient Care Facility" definitions identified by the City, the only avenue of review available to UJ-Eighty was to challenge the constitutionality of the ordinance.

UJ-Eighty leased its property to a fraternity that was recognized by IU. Later, through no act on the part of UJ-Eighty, IU revoked the its recognition of UJ-Eighty's tenant. UJ-Eighty could not turn to IU or the BZA for review. Once IU made its determination, the BZA was required to find UJ-Eighty in violation of the UDO. There is not a single procedural safeguard in place to prevent an erroneous or arbitrary deprivation of UJ-Eighty's property rights under the UDO Definition. Therefore, any safeguard would significantly decrease the likelihood of an erroneous deprivation.

Under the third prong, the City has a legitimate public health and safety interest to regulate unrelated adults living in a common house; however, it has unconstitutionally delegated and abdicated its legislative duty to an entity that does not have "territorial jurisdiction over all the land subject to the zoning ordinance." I.C. § 36-7-4-901. In doing so, it abandoned its legislative function and acted only as an enforcement agency for zoning decisions made by IU regarding the property rights of neighboring landowners. Ordinances abdicating planning authority without restriction are unconstitutional. *Counceller*, 42 N.E.3d at 150–51.

Because the City and the BZA have delegated away their legislative function and have not retained any mechanism for review or oversight of the decisions made by IU, *any* procedural safeguard would create some administrative or fiscal burden beyond what currently exists. However, any such burden is constitutionally required. "The constitution recognizes higher values than speed and efficiency." *Stanley v. Illinois*, 405 U.S. 645, 651 n.9 (1972). At a minimum, the UDO Definition could have provided a review mechanism similar to the provision in *Counceller*, which gave the planning commission—the legislative entity having territorial jurisdiction over all

the land subject to the zoning ordinance—the final decision to waive or enforce the decision of the adjoining property owners. *Counceller*, 42 N.E.3d at 151. It does not.

The City misunderstands *Eldridge*. In *Eldridge*, the Court examined the constitutional sufficiency of administrative procedures that occurred "prior to the initial termination of benefits, *pending review*." *Eldridge*, 424 U.S. at 333 (emphasis added). The Court determined those procedures were not a denial of due process because the appeal process provided Eldridge with full access to the information in his case and afforded him ample opportunities to submit additional evidence after the denial. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Id.* (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

UJ-Eighty was not provided the due process to which it is entitled. The BZA denied UJ-Eighty the right to an evidentiary hearing *before* it deprived UJ-Eighty of its property right by delegating its legislative decision-making authority to IU to determine, unilaterally, whether a neighboring private landowner was in compliance with the UDO by "whatever procedures Indiana University uses" without providing any guidelines or standards by which IU was to exercise this delegated power, and without providing any BZA review or oversight for IU's decisions. *Compare with Eldridge*, 424 U.S. at 333-349. And *after* the denial, the BZA did not have the information, and therefore could not provide UJ-Eighty with full access to the information, or afford it ample opportunities to submit additional evidence. *Compare Eldridge*, 424 U.S. at 333 *with* Appellant's App. Vol. II pp. 89-128. The BZA was told it could only rely on the UDO to decide whether staff made the determination correctly. Appellant's App. Vol. II pp. 108-09.

The UDO Definition violates procedural due process because it is an abdication of planning authority without restriction and affords no procedural safeguards or mechanisms for review to

UJ-Eighty to prevent the erroneous deprivation of its property rights. The Court of Appeals properly decided this issue on appeal, and the BZA's petition to transfer should be denied.

B. The City does not have an adequate justification under the strict scrutiny test for its infringement on UJ-Eighty's fundamental right of property.

Substantive due process "bars certain *arbitrary*, wrongful government actions *regardless of the fairness of the procedures used to implement them*." *Zinermon*, 494 U.S. at 125(emphasis added).[6] The Court of Appeals correctly noted that in addition to violating procedural due process the UDO also violated substantive due process because it resulted in an *arbitrary* and unreasonable deprivation of UJ-Eighty's property rights in violation of the Fourteenth Amendment. *UJ-Eighty*, 141 N.E.3d at 877 (emphasis added).

The right to property is a substantive right enumerated in the U.S. Constitution which warrants deference and, absent a powerful countervailing interest, protection. *Stanley*, 405 U.S. at 651. "[T]he Constitution recognizes higher values than speed and efficiency." *Id.* at 656.

> Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.
>
> Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.

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[6] The City and IU misunderstand the distinction between procedural and substantive due process, as shown in their discussion of the holding of *Roberge*. The *Roberge* Court struck down the ordinance at issue in that case because of the unfairness of the procedures used. The ordinance made the construction on the property subject to the approval of third-party property owners "uncontrolled by any standard or rule prescribed by legislative action" and made "no provisions for review," leaving the city and the plaintiff "bound by the decision" of the neighboring property owners. *Roberge*, 278 U.S. at 121-22.

Stanley, 405 U.S. at 656-57.

There is nothing in the record[7] to support the statement made in the dissent that the UDO "rationally relates to the permissible objective of protecting students." *UJ-Eighty*, 141 N.E.3d at 869. In the case cited, *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494 (1977)(citing *Vill. of Euclid, Ohio v. Amber Realty Co.*, 272 U.S. 365 (1926)), Justice Powell noted:

> Euclid held that land-use regulations violate the Due Process Clause if they are "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." [citations omitted.] Later cases have emphasized that the general welfare is not to be narrowly understood; it embraces a broad range of governmental purposes. [citations omitted]. But our cases have not departed from the requirement that the government's chosen means must rationally further some legitimate state purpose.

Id. at 498 n.6.

As previously discussed, when a BZA member asked why the definition of "Fraternity or Sorority" in the UDO was changed in 2015, she was told by the City's legal counsel the Code was revised to include a correlation between IU and the fraternities and sororities, and the zoning requirements "[b]ecause fraternity houses and sorority houses are related to universities." Appellant's App. Vol. II pp. 113-14. No other objective was given in support of the language. Appellant's App. Vol. II pp. 89-128. Any time the government deprives a person of property, the government must provide a sufficient justification.[8] *See, e.g., Sacramento v. Lewis*, 523 U.S. 833,

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[7] "Judicial review of disputed issues of fact must be confined to the board record for the zoning decision." Ind. Code § 36-7-4-1611.

[8] IU's stated justification that the delegation of the City's zoning and planning authority to IU is necessary for it to "be able to exercise oversight responsibility over student organizations" and its "ability to facilitate accountability and to help ensure the safety of students and the campus" would be stifled if Court of Appeals decision is allowed to stand is, at best, disingenuous and, at worst, mendacious. As IU admits, it has the power to discipline all of its students for acts of personal misconduct within and outside of the university community. *Compare Brief of Amicus Curiae*, pp. 5 & 56 *with* p. 15 & n. 9. This power will continue regardless of the outcome of this petition to transfer.

845 (1998)(quoting *Wolff v. McDonnell,* 418 U.S. 539, 558 (1974) ("The touchstone of due process is protection of the individual against arbitrary action of government")) .

"When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978). The City failed to show the relationship between IU and fraternities is a public benefit, and this relationship is not an "important state interest" that supports the City's delegation of its zoning and planning authority to IU in violation of UJ-Eighty's right to substantive due process.

The definition of "Fraternity/Sorority House" contained within the UDO Definition violates UJ-Eighty's substantive due process right under the Fourteenth Amendment and is unconstitutional. The Appellant's petition to transfer should be denied.

III. Conclusion

The City's delegation of its planning and zoning authority to IU to unilaterally define what constitutes a fraternity house under the City's UDO is unconstitutional. The petition to transfer should be denied.

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I certify this brief contains no more than 4200 words.

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I certify that a copy of the foregoing has been electronically filed using the Indiana E-Filing System (IEFS) and that the foregoing documents was served upon the following persons by IEFS using the service contact entered in the IEFS on the 20th day of May, 2020:

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