



# FRATERNAL LAW

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## GREEK HOUSES ON UNIVERSITY LAND

For the last hundred years, many fraternities have built houses on university property, or leased space in university buildings. Years after the relationship began, the parties may find that the terms of the relationship between the educational institution and the Greek organization were not properly documented. In such situations if there develops a desire on the part of one party or the other to change an arrangement that has worked for decades, and it is hard to find out what the original deal was, organizational and legal problems erupt.

As a general rule, it is better for a Greek chapter to occupy a house owned by a related house corporation which has title to the land and the house in fee simple. On the other hand, sometimes local fraternity leaders and campus officials desire to enter into a relationship with regard to a particular chapter.

In one situation, a college built a new dormitory. The college agreed that if a particular fraternity paid to construct, furnish, and maintain a chapter room on the top floor of the building, the college would house members of the fraternity on the floor below. The fraternity expended \$30,000 (in 1930 dollars) in that effort and has incurred numerous costs from time to time since then to maintain and modernize the chapter room.

A hundred years ago, a college offered to rent lots to fraternities for \$10 a year if the fraternities would build houses on the lots. Fraternities built houses which now have a very high market value.

In each case, the fraternities and the college administrators thought they were doing good things for their respective parties, but many years later when the desire to change arose, there was not a clear path as to what were the rights and responsibilities of the college and of the fraternities.

For the fraternity to be a tenant of the university, either on a ground lease or in building space, is to create hazards for both the college and the fraternity. Examples of the issues to be considered are:

- If the fraternity has any religious orientation, and the university is state supported, those institutions

run the risk of a civil rights suit challenging the arrangement because of the First Amendment separation of church and state.

- If an unfortunate incident happens in the fraternity space that leads to a lawsuit, without a clear demarcation of rights and responsibilities, the university may be exposed to a liability suit when it actually had nothing to do with the internal affairs of the chapter that led to the incident.
- An officious university administrator may decide to engage in intrusive regulation of the internal affairs of the chapter, and use the landlord's status as a justification.
- The chapter may go out of existence, and if that is the case, what happens to the assets that the chapter or house corporation has caused to be constructed on university land or in a university building?
- If the fraternity is going to build a structure on university land, how much control can the university have over the design and the appearance of the structure?
- If the fraternity builds a house on university land, who is responsible for the maintenance upkeep of the house?
- What will the term of the lease be?
- Are there options for renewals?

If a Greek organization is going to lease space in a university building, the lease should be for a relatively long term in order to provide stability for the chapter. The mini-

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imum length of time should be long enough for the anticipated life of the physical improvements that the fraternity will be making to the interior spaces of the university building.

The problem is far more complicated if the fraternity is building on university land. There was a time when fraternities and colleges made a deal which probably violated Internal Revenue laws. The deal was that the fraternity would induce alumni or alumnae to donate to the college and take tax deductions for those donations. The college, in turn, would agree to use the money for the expense of constructing a fraternity house for the chapter. This seemed like a nice arrangement. The fraternity would get a new house, and the alumni or alumnae would get tax deductions by making contributions to the university. It is a practice that has fallen out of use, because it is generally recognized that it is the kind of practice that could jeopardize the tax exempt status of both the college and the fraternity.

If the fraternity is paying the cost of building a structure on university land, there ought to be a very carefully drafted perpetual lease, 99 years renewable forever. Elements that it should include are as follows:

- Identification of whether the college or the fraternity house corporation is responsible for upkeep and maintenance of the house. Generally, it is less expensive if the house corporation handles the maintenance and upkeep, because institutional maintenance departments often operate at a higher cost than independent contractors that the house corporation could hire in the community.
- There should be a commitment that both the college and the fraternity will collaborate to try to keep the house and the land on which it sits tax exempt under the local real estate taxes. Depending on state law this may not always be possible, but it probably will be easier if it is agreed that the university will be responsible for any real estate taxes, even if there is also a provision that the house corporation will reimburse the university for the taxes on the property if they are assessed and collected.
- There should be a provision in the lease that specifies exactly the extent to which the university may inspect the fraternity house and regulate the fraternity in order to help enforce state law and university policy against practices such as underage drinking and hazing. The lawyers for the university probably would like to have language clearly exempt the university from a duty to enforce the

law, because if such a duty were created it would enhance the university's exposure to personal injury lawsuits. On the other hand, some reasonable inspection and educational effort by the university can probably be defined in a way that does not exaggerate the responsibility of the university, nor does it unreasonably intrude in the internal affairs of the chapter.

- There needs to be general language with regard to the maintenance of fire safety conditions in the house. It has to be sufficiently flexible to allow for new developments over time. For example there was a time when smoke alarms were not commonly found in fraternity houses. Contemporary standards in many communities now require smoke alarms and in many communities require sprinklers if the number of occupants rises above a certain level. The lease cannot anticipate how things will change but should have language to resolve the obligations to modify the fire safety circumstances of the house as fire safety practices evolve through time.
- If there is to be rent paid by the house corporation to the university it should be substantially under the market to recognize that the fraternity in the construction of the house is benefitting the university.
- If the chapter should cease to exist either temporarily or permanently, there should be a clear description of the options for the house corporation to benefit from the investment in the house. This could include such things as the right to lease it to another fraternity, the right to sell it to another fraternity, or a right of the university to buy it at a price determined by a predefined method of appraisal. If none of the foregoing options is practical, then the house corporation should have the right to rent it to students at large in order to generate income for the maintenance of the house.

The important thing to remember in drafting a perpetual lease is that it has to be sufficiently flexible to deal with unknown or unforeseen problems and sufficiently rigid to protect the rights of both the college and the fraternity. This takes a high level of skill.

There is no question that if there is to be a Greek house built with Greek money on university land there should be a perpetual lease that covers the above items and other things. If there is merely going to be the use of a university building, then the lease should cover many of the above

considerations but the duration need only be long enough to enable the Greeks to recoup the value of their investment on interior improvements. There should be provisions for extensions of the lease from time to time even though the initial term may only be for 25 or 30 years when the fraternity chapter is occupying space in a university building.

Prospectively, the dangerous enterprises of having chapters occupy university land or buildings can proceed with fewer hazards if the foregoing recommendations are followed.

Unfortunately in many of the long-term arrangements that have been put together, the colleges and the fraternities have relied upon almost informal arrangements. Sometimes there was a lease, but it was not recorded. Sometimes the lease was recorded, but it was vague as to essential problems and ingredients necessary to deal with a long-term relationship. Sometimes there was no lease, and it was just an informal contract. Sometimes unrecorded documents have been lost and no one knows what the relationship is other than longstanding custom.

There are many arrangements that have existed for decades, if not for a hundred years. Not all these have been well documented. Any house corporation that has a chapter occupying a university-owned structure or house corporation-owned houses on university-owned real estate should periodically inventory records. They should insure that they have copies of all documents that relate to the right to occupy the land or the building. The records that they should have include:

- There should be a chapter history that covers the affairs of the chapter with a particular emphasis on the real-estate aspect of the chapter.
- The national office files should be reviewed. There may be records in connection with the construction

of the house that was done in part with a loan from the general fraternity or from a fraternity related foundation. Both the executive office files and the foundation office files should be reviewed.

- Someone should search the local County office where deeds are recorded. In some states it is called the County Recorder's office and in other states it is called the County Registrar of Deeds.
- University records, in particular minutes of the Board of Trustees from the era when the house was built, are terribly important to review and preserve.
- If the records are not clear at the county courthouse, many states have statutes that authorize the recording of an affidavit to put the world on notice of the relationship. If the relationship can be clearly documented through records, it can be reduced to a written affidavit that would include a description of the land and be recorded in the County Recorder's office or in the Office of the Registrar of Deeds.

It is generally preferable to have a deed of real estate owned by a related fraternity or foundation, especially in those states when economic conditions make it the only feasible way to have a house corporation with the university. When this is not possible, a chapter should be particularly diligent to realize that an arrangement that was not done in a careful way should be documented in a written affidavit of the relationship in case a problem should arise in the future.

• Robert F. Manley and Timothy M. Burke

## 2004 Fraternal Law Conference November 19-20, 2004 — Cincinnati, Ohio

The 11th national Fraternal Law Conference will take place November 19-20, 2004, at the Kingsgate Marriott Conference Center in Cincinnati, Ohio beginning at 9 a.m. on Friday and continuing through noon on Saturday. The conference is designed to assist national and student fraternity leaders, university officials, and their legal professionals in ensuring a healthy and vigorous fraternity system effective in preventing legal difficulties.

The general registration fee is \$250 per participant; student fee is \$150. If you have questions about the conference or ideas for topics you would like to see covered at the conference, please direct these to [whagen@manleyburke.com](mailto:whagen@manleyburke.com).

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