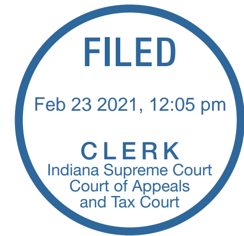

IN THE
Indiana Supreme Court

Supreme Court Case No. 21S-PL-77

City of Bloomington Board of Zoning Appeals,
Appellant (Defendant below),

–v–

UJ-Eighty Corporation,
Appellee (Plaintiff below).

Argued: September 24, 2020 | Decided: February 23, 2021

Appeal from the Monroe Circuit Court,
No. 53C06-1806-PL-1240
The Honorable Frank M. Nardi, Special Judge

On Petition to Transfer from the Indiana Court of Appeals,
No. 19A-PL-457

Opinion by Justice Massa

Chief Justice Rush and Justices David, Slaughter, and Goff concur.

Massa, Justice.

UJ-Eighty Corporation owns a fraternity house at Indiana University (IU) in Bloomington. The house sits within a district zoned by the City of Bloomington to permit limited residential uses. At the relevant time, fraternities and sororities in the district were required to be sanctioned or recognized by IU. UJ-Eighty leased its house to an IU-sanctioned fraternity. Before the lease ended, IU revoked its recognition and approval of the fraternity, meaning no one could reside there. But two residents remained, so Bloomington cited UJ-Eighty for a zoning violation. The City of Bloomington Board of Zoning Appeals (BZA) affirmed.

UJ-Eighty sought judicial review under both the state and federal constitutions, arguing Bloomington impermissibly delegated its zoning authority to IU by allowing it to unilaterally define fraternities and sororities. The trial court granted relief, and an appellate panel affirmed. However, we conclude Bloomington did not delegate any authority to IU; it merely defined fraternities and sororities in zoning law based on their relationship with IU. While this may have had a "collateral effect" on land use, it was not a delegation. Thus, there were no constitutional violations. We reverse.

Facts and Procedural History

In 2002, UJ-Eighty purchased real property located at 1640 North Jordan Avenue in Bloomington. The property—which has been used as a fraternity or sorority house since its construction in 1984—was in Bloomington's "Institutional" zoning district, which allowed twenty-six permitted uses and nine conditional uses. Bloomington, Ind. Mun. Code §§ 20.02.500–10 (2017). There were only five non-conditional residential permitted uses, including "[f]raternity house/sorority house." *Id.* § .02.500. The others were three different types of group care homes and "[u]niversity or college." *Id.*

When UJ-Eighty purchased the property, the governing Ordinance—which defines various zoning terms—defined "[f]raternity or [s]orority" as a "building or portion thereof . . . for groups of unmarried students in

attendance at an educational institution," with "occupancy . . . limited to members of a specific fraternity or sorority." Bloomington, Ind. Mun. Code § 20.02.01.00 (1995). In 2015, Bloomington amended the Ordinance's definition to mandate, in relevant part, that "all students living in the building are enrolled at the [IU] Bloomington campus; and [IU] has sanctioned or recognized the students living in the building as being members of a fraternity or sorority through whatever procedures [IU] uses to render such a sanction or recognition." Bloomington, Ind., Ordinance 15-26 (Dec. 16, 2015) (later codified as part of Bloomington, Ind. Mun. Code § 20.11.020). In other words, the Ordinance at the time UJ-Eighty bought the property limited its use to Greek houses and their members; the 2015 amendment further recognized IU's power to define what constitutes a Greek house in good standing.

In August 2016, UJ-Eighty leased the property, which it had continued to use as a fraternity or sorority house, to the Gamma-Kappa chapter of Tau Kappa Epsilon, Inc. (TKE), a fraternity recognized by IU. The lease ran through May 2019. In February 2018, however, IU revoked its recognition of TKE, shutting down the fraternity on campus. While most of the brothers vacated the property, two remained. Bloomington soon learned of the remaining residents and, on February 22, mailed a Notice of Violation to UJ-Eighty. It mailed a second Notice on February 28. The Notices asserted that because the property no longer met the Ordinance's definition of a fraternity house, UJ-Eighty engaged in "an illegal land use" by continuing to use the property as a residence. Appellant's App. Vol. II, pp. 15–17. While both Notices informed UJ-Eighty it could be fined, no fine has been imposed.

UJ-Eighty unsuccessfully appealed to the BZA. It then sought judicial review in the Monroe Circuit Court, arguing Bloomington committed a regulatory taking[1] and unlawfully delegated zoning authority in violation

[1] The trial court declined to reach the regulatory taking claim. Because UJ-Eighty did not raise this on appeal, we do not address it. *See* Ind. Appellate Rule 46(A)(8)(a) ("The argument must contain the contentions of the appellant on the issues presented, supported by cogent reasoning.").

of Article 4, Section 1 of the Indiana Constitution, the Indiana Code,[2] and the Fourteenth Amendment to the United States Constitution. The court struck down the Ordinance's definition of fraternities and sororities under the state and federal constitutions. The BZA appealed.[3]

A divided Court of Appeals affirmed. The majority found Bloomington "delegated its legislative authority to [IU] to determine whether the [p]roperty was being used by students in a sanctioned fraternity" with "no mechanism for reviewing [IU]'s decision." *City of Bloomington Bd. of Zoning Appeals v. UJ-Eighty Corp.*, 141 N.E.3d 869, 876 (Ind. Ct. App. 2020), *vacated*. The Ordinance's definition was "clearly arbitrary and unreasonable" because it "created a situation where [IU] was allowed to act, but UJ-Eighty would be punished" without taking any "affirmative action to violate the Ordinance." *Id.* at 877. Finding the United States Constitution dispositive, it declined to reach the Indiana Constitution. *Id.* at 871 n.1. Dissenting, Judge Bailey found "there was no delegation" because the Ordinance was "a discernable definition for a fraternity house," and Bloomington "decide[d] whether use of the property complie[d] with the Ordinance," not IU. *Id.* at 879 (Bailey, J., dissenting).

The BZA sought transfer, which we now grant.

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[2] Because UJ-Eighty's Indiana Code argument stems from its Indiana Constitution argument, we address only its constitutional argument.

[3] While the appeal was pending, Bloomington amended the Ordinance's definition. Bloomington, Ind., Ordinance 19-24 (Dec. 18, 2019). This amendment addressed UJ-Eighty's concerns by removing any reference to IU's sanction or recognition. However, the amendment was not retroactive, so while it provided prospective relief, it did not nullify UJ-Eighty's violation. Absent judicial relief, the BZA's decision stands, and Bloomington can fine or otherwise penalize UJ-Eighty. Because the controversy at issue has not been ended or settled, this case is not moot. *See T.W. v. St. Vincent Hosp. and Health Care Ctr., Inc.*, 121 N.E.3d 1039, 1042 (Ind. 2019) (per curiam). Today's holding also makes clear to zoning authorities in Indiana's other college towns that they can rely on a local college or university's judgment in defining Greek houses.

Standard of Review

A court will only grant relief from a zoning decision if the decision prejudiced the challenging party and, relevant here, was "contrary to constitutional right, power, privilege, or immunity." Ind. Code § 36-7-4-1614(d)(2) (2017). The challenger has the burden of demonstrating the decision's invalidity. I.C. § 36-7-4-1614(a).

The "[i]nterpretation of a zoning ordinance is a question of law," *Story Bed & Breakfast, LLP v. Brown Cnty. Area Plan Comm'n*, 819 N.E.2d 55, 65 (Ind. 2004), so we review de novo, *Paul Stieler Enters., Inc. v. City of Evansville*, 2 N.E.3d 1269, 1272 (Ind. 2014). But because zoning ordinances are presumed constitutional, "all doubts are resolved against" the challenger. *Dvorak v. City of Bloomington*, 796 N.E.2d 236, 237–38 (Ind. 2003).

Discussion and Decision

UJ-Eighty's arguments under the state and federal constitutions hinge on the same allegation: Bloomington improperly delegated the unilateral authority to define "fraternity" and "sorority" to IU. Our review of the Ordinance reveals Bloomington never **empowered** IU to define fraternities and sororities, a power IU already clearly possesses. Bloomington, rather—through the legislative process—defined fraternities and sororities based on their relationship with IU. It did not delegate any authority, legislative or otherwise. Because there was no improper delegation or other denial of due process, there were no constitutional violations.

I. Bloomington did not violate the Indiana Constitution because it did not improperly delegate legislative authority to IU.

UJ-Eighty argues Bloomington violated Article 4, Section 1 of the Indiana Constitution. That section provides, in relevant part: "The

Legislative authority of the State shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives." Ind. Const. art. 4, § 1.

For the Ordinance to have violated Article 4, Section 1, there must have been some "unlawful delegation of power." *Welsh v. Sells*, 244 Ind. 423, 436, 192 N.E.2d 753, 760 (1963). "Constitutionally, no one can modify or change the law except the legislature." *Id.* Only Bloomington through its legislative body—acting pursuant to powers granted by the General Assembly—can make or amend its zoning laws. Here, "[t]he establishment of . . . zones and the permitted and prohibited uses in those districts . . . is the pertinent 'legislative' action." *Schweizer v. Bd. of Adjustment of Newark*, 980 A.2d 379, 385 (Del. 2009). Bloomington—not IU—undertook that action when it wrote and enacted the Ordinance. Nothing in the record supports a conclusion that IU made the zoning law in Bloomington.

The Ordinance's definition of "fraternity" and "sorority" was no different than many of its other definitions that referenced an outside entity. *See, e.g.*, Bloomington, Ind. Mun. Code § 20.11.020 (2017) (requiring a "'group care home for mentally ill' . . . be a licensed facility with the state"). Bloomington did not delegate legislative authority to any of these entities. It merely defined certain land uses based on their relationships with relevant outside organizations. While the Ordinance's "through whatever procedures" language for fraternities and sororities was broad, it did not turn a definition into a delegation. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 247 (2012) ("A statute should be interpreted in a way that avoids placing its constitutionality in doubt."). The Ordinance did not obligate IU to act or directly empower it to write zoning law. Rather, it helped define fraternities and sororities by ensuring their relationship with IU was the deciding factor, not the process that created the relationship. That was a permissible legislative judgment, not an impermissible delegation.

II. Bloomington did not violate the United States Constitution because it did not improperly delegate authority to IU or otherwise deprive UJ-Eighty of due process.

Similarly, UJ-Eighty argues Bloomington violated its due process rights under the Fourteenth Amendment to the United States Constitution by delegating to IU the authority to unilaterally define fraternities and sororities without any standards or oversight. The Fourteenth Amendment provides, in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. It "guarantee[s] procedural and substantive due process." *McIntosh v. Melroe Co.*, 729 N.E.2d 972, 975 (Ind. 2000). Procedural due process protects against the "denial of fundamental procedural fairness." *County of Sacramento v. Lewis*, 523 U.S. 833, 845–46 (1998). Substantive due process protects against arbitrary and oppressive government action. *Id.* Here, for Bloomington to have violated either under UJ-Eighty's theory, some improper delegation to IU or procedural irregularity was necessary. Because we find none, we find no violation.

In making its due process arguments, UJ-Eighty relies heavily on *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928), and *Counceller v. City of Columbus Plan Commission*, 42 N.E.3d 146 (Ind. Ct. App. 2015), *trans. denied*. In *Roberge*, a Seattle zoning ordinance required a landowner to obtain the written consent of two-thirds of neighboring landowners within 400 feet of a proposed new home for the elderly. 278 U.S. at 118. The landowner did not, so Seattle denied his building permit. *Id.* at 119. The United States Supreme Court ultimately found the ordinance was an impermissible delegation of power under the Fourteenth Amendment because it gave neighboring landowners final authority "uncontrolled by any standard or rule prescribed by legislative action" without any "provision for review." *Id.* at 122–23. The neighboring landowners were "not bound by any official duty[] but [were] free to withhold consent for selfish reasons or arbitrarily and [could] subject the [landowner] to their will or caprice." *Id.* at 122.

In *Counceller*, a Columbus ordinance required a landowner to obtain "the signed consent of 75% of the owners of property in the existing subdivision" to further subdivide land. 42 N.E.3d at 147–48 (quotation marks and citation omitted). However, it also allowed the governing plan commission to waive the consent requirement. *Id.* at 148. The commission rejected the landowner's application to subdivide his lot because he lacked the necessary consent. *Id.* He sought judicial review, arguing "the [c]ommission improperly abdicated its authority" to his neighbors in violation of the Fourteenth Amendment as interpreted by *Roberge*. *Id.* at 148, 150–51. Our Court of Appeals distinguished *Roberge* because the waiver provision allowed the landowner to take "the neighbors completely out of the equation." *Id.* at 151. Thus, there was no impermissible delegation. *Id.*

Neither case is on point. In both *Roberge* and *Counceller* (absent a waiver), the landowners were **required** to obtain their neighbors' consent to use their land. Here, UJ-Eighty never had to seek IU's consent to use its land. IU had no direct power to prohibit UJ-Eighty from lawfully using its land.

As discussed above in Section I, Bloomington never delegated any authority to IU. IU had no power to make or amend zoning law, and its power to regulate and discipline students and student organizations—including fraternities—comes from the General Assembly, not Bloomington. *See* I.C. §§ 21-39-2-3–4 (allowing IU to govern student conduct and discipline students for violating applicable rules and standards). IU's decision to recognize or sanction a fraternity may have had "**collateral** effects" on land use in Bloomington, but that did "not transform [its] quasi-judicial decision [to revoke its recognition of TKE] into an exercise of [Bloomington]'s legislative function." *Schweizer*, 980 A.2d at 385 (emphasis added).

It was not IU that decided whether UJ-Eighty or any other landowner violated Bloomington's zoning laws. Bloomington, through the BZA, ultimately decided. The members of the BZA were free to exercise their authority as they wished, subject to lawful constraints. If UJ-Eighty is

unhappy with Bloomington's zoning laws or the BZA, it can seek change through the political process.

There is another important distinction between this case and *Roberge* and *Counceller*. There, private landowners influenced land use. But here, when IU regulates students and student organizations—including fraternities—it is a state actor and must abide by the state and federal constitutions. *See Doe v. Univ. of Cincinnati*, 872 F.3d 393, 399 (6th Cir. 2017); *Medlock v. Trs. of Ind. Univ.*, 738 F.3d 867, 871 (7th Cir. 2013); *Trs. of Ind. Univ. v. Curry*, 918 F.3d 537, 554 (7th Cir. 2019) (Hamilton, J., dissenting). IU was constrained when it engaged in the relevant "quasi-judicial act" with a collateral effect on land use. *Schweizer*, 980 A.2d at 385. And despite hinting otherwise,[4] UJ-Eighty has not shown IU acted improperly or disregarded either constitution when it revoked TKE's sanction.

The Delaware Supreme Court has decided a case much more on point than *Roberge* and *Counceller*. In *Schweizer v. Board of Adjustment of Newark*, the University of Delaware suspended a fraternity for four years, triggering this section of the Newark Zoning Code:

> A fraternity or sorority, however, that is suspended by the University of Delaware so that it is no longer approved and/or sanctioned to operate as a fraternity or sorority for a period of more than one year shall vacate the building and the use as a fraternity or sorority shall be terminated immediately upon such University suspension.

[4] When asked by a member of the BZA whether "there is an ulterior motive to move [fraternity members] out so that they would then be forced to go [live] on campus," UJ-Eighty's counsel asserted that "we can't assign motive certainly but it looks odd. I will leave it at that." Appellant's App. Vol. II, p.69. Counsel then acknowledged he did not "know for a fact" that IU had an ulterior motive. *Id.* And on appeal, UJ-Eighty asserted that under the Ordinance, "[IU] may withhold its sanction or recognition of a particular fraternity or sorority for selfish reasons or arbitrarily and may subject a property owner to its own, self-interested caprice. The concern about arbitrary decision-making is substantial . . . particularly given that the [Ordinance's] [d]efinition overtly *invites* [IU] to act arbitrarily." Appellee's Br. at 25–26.

980 A.2d at 383–84 (quoting Newark, Del. Mun. Code § 32-51(b) (2005)). The fraternity house owners challenged the Zoning Code, arguing, among other things, that Newark impermissibly delegated legislative authority and violated their Fourteenth Amendment due process rights. *Id.* at 382. The Delaware Supreme Court found Newark did neither. *Id.* Addressing the Fourteenth Amendment claim, the court concluded the owners "failed to make a record which would support a conclusion that they were precluded from participating in the [u]niversity's proceedings." *Id.* at 386. They also "conceded before the [b]oard that the [u]niversity had the lawful authority to discipline fraternities, and that [the b]oard had no right or obligation to retry the [u]niversity disciplinary proceeding against [the fraternity]." *Id.* Because they "failed to alert the [b]oard to any procedural irregularity in the [u]niversity proceeding, and none [was] apparent on the record," the owners were not denied due process. *Id.*

We agree with *Schweizer*. Just like the landowners there, UJ-Eighty has failed to show it was deprived of due process aside from the alleged delegation. It never establishes it was prohibited from supporting TKE during IU's proceedings. As TKE's landlord, it would have been reasonable to remain aware of any potential problems and support its tenant as necessary. UJ-Eighty also never alleged that IU lacked authority to discipline TKE. And UJ-Eighty failed to identify any procedural irregularities with IU's process for revoking TKE's sanction, including any constitutional or statutory violations. As in *Schweizer*, UJ-Eighty has not established that any action by IU, Bloomington, or the BZA violated the Fourteenth Amendment.

The Ordinance did nothing more than define fraternities and sororities based on their relationship with IU. It was not a delegation of power; rather, it was a legislative decision on how to define a certain land use. And UJ-Eighty failed to establish how, outside the alleged delegation, it was denied due process. Thus, Bloomington did not violate the Fourteenth Amendment.

Conclusion

The impermissible delegation of power and denial of due process strike at the core of our state and federal constitutions. Courts should guard against such significant constitutional violations. However, for there to be a violation, there must be some delegation or lack of due process. Here, there was none. The judgment of the trial court is reversed.

Rush, C.J., and David, Slaughter, and Goff, JJ., concur.

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