

1949

Phi Kappa Iota Fraternity and Dr. Floyd F. Hatch v.
Salt Lake City, Earl J. Glade, Fred Tedesco, John B.
Matheson, L. C. Romney, Cleve Wooley and W. Y.
Tipton : Brief of Appellant

Utah Supreme Court

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1057
Case No. 7357

**IN THE SUPREME COURT
of the
STATE OF UTAH**

PHI KAPPA IOTA FRATERNITY,
a non-profit corporation, and DR.
FLOYD F. HATCH,

Plaintiff,

vs.

SALT LAKE CITY, a municipal corporation, EARL J. GLADE, FRED TEDESCO, JOHN B. MATHE-
SON, L. C. ROMNEY, City Commissioners; CLEVE WOOLEY and
W. Y. TIPTON,

Defendants.

FILED

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BRIEF OF APPELLANT

INDEX

	Page
STATEMENT OF CASE	1
THE FACTS	7
ASSIGNMENTS OF ERROR	14
ARGUMENT	16
A. The Ordinance Unreasonably Discriminates Be- tween Fraternities Affiliated With Public Schools And Fraternities Affiliated With Private Schools.....	17
Public And Private Schools.....	23
B. The Ordinance Unconstitutionally Discriminates Between Two-Family Dwellings And Sorority And Fraternity Houses And Dormitories.....	25
C. The Ordinance Unreasonably Discriminates Against The Property Of Plaintiff Hatch.....	29
D. The Ordinance Is Unreasonably Discriminatory In That It Is Directed Only Against The University Of Utah And Fraternities And Sororities Appur- tenant Thereto	37
E. The 600-Foot Restriction Is Arbitrary, Capricious And Without Any Reasonable Basis.....	39
F. There Is No Constitutional Basis For Segregating From Residential Users, Persons Who Use Resi- dential Property For Fraternity And Sorority Houses	42
CONCLUSION	55

CITATIONS

Acker v. Baldwin, (Cal. S. Ct.) 108 P. 2d 899.....	43
Alpha Rho Alumni Ass'n vs. City of New Brunswick, (N. J.) 18 Atl. 2d 68	24
Applestein v. Mayor of Baltimore, 156 Md. 40, 47, 143 Atl. 666	55
Buffalo Park Land vs. Buffalo, 126 Misc. 207, 294 N.Y.S. 413	40
Cassel Realty Co. v. City of Omaha, 14 N.W. 2d 600.....	44
Catholic Bishop vs. Kingery, (Ill.) 20 N.E. 2d 583.....	23
Christ v. Fent, 16 Okla. 375, 84 P. 1074.....	54
City of Miami Beach vs. State, Ex Rel Lear, 128 Fla., 750, 175 So. 537	24, 54
City of Sherman v. Simms, 143 Texas 115, 183 S.W. 2d 415....	49
Deaver v. Napier, 139 Minn. 219, 166 N.W. 187.....	54
Ellsworth v. Gercke, (Ariz.) 156 P. 2d 242.....	49
Fass v. City of Highland Park, (Mich.), 32 N.W. 2d 375.....	44
Fouss v. McConnel, (Ga.) 157 S.E. 625.....	40
George v. Hall, (Wyo.) 199 P. 2d 815.....	44
Geneva Investment Co. v. City of St. Louis, 87 Fed. 2d 83.....	43

INDEX (Continued)

	Page
Kenney vs. Building Commissioner of Melrose, Mass., 53 N.E. 2d 683	21
Landu v. Levin, 213 S.W. 2d 483 (Mo.).....	44
Merrill vs. City of Wheaton, (Ill.) 190 N.E. 918.....	28
National House vs. Board of Adjustments, (N.J.) 61 Atl. 2d 55	44
Overbrook Farms Club vs. Town Zoning Board, 351 Pa. 77, 40 Atl. 2d 423	49
Pettis v. Alpha Chapter of Phi Beta Pi, 111 Neb. 525, 213 N.W. 835	42
Provo v. Claudin, 91 Utah 60, 63 P. 2d 570.....	22
State Ex Rel Seattle Trust Co. v. Roberge, 278 U.S. 116, 49 S. Ct. 50	35, 45, 53
State Ex Rel Roman Bishop of Reno v. Hill, (Nev.) 90 P. 2d 217	49
State v. Joseph (Ohio) 39 N.E. 2d 515.....	55
Synod of Ohio, United Lutheran v. Joseph, 139 Ohio State 229, 39 N.E. 2d 515.....	49
Village of St. Louis Park vs. Casey, Minn., 16 N.W. 2d 459.....	22
Village of University Heights vs. Cleveland Jewish Orphans Home, Circuit Court of Appeals, 6th Circuit, 20 F. 2d 745	49
Western Theo. Seminary vs. Evanston, 331 Ill. 257, 162 N.E. 863	19, 20, 24
Western Theo. Seminary vs. Evanston, supra, 325 Ill. 511, 156 N.E. 783	21, 52
Women's Kansas City St. Andrews Society vs. Kansas City, 54 Fed. 2d, 1071	41
Women's Kansas City St. Andrew Society vs. Kansas City, Mo. (Circuit Court of Appeals, Eighth Circuit, 58 F. 2d 597	50

TEXTS CITED

Builders Code of Salt Lake City, Section 4710, Chapter 47.....	7
Corpus Juris Secundum, Column 6, Page 139.....	22
Thompson on Real Property, Section 5615, Volume 10.....	44
and Section 5626	49
Corpus Juris, 22, 141	54

STATUTES CITED

Revised Ordinances of Salt Lake City, Utah, 1944.....	2, 8, 14, 26
Section 6715, Chapter 64	
Revised Ordinances of Salt Lake City, Utah, 1944.....	26
Section 6713	
Utah Code Annotated, 1943, Title 104, Chapter 64.....	2
Utah Code Annotated, 1943, 15-8-89.....	42

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PHI KAPPA IOTA FRATERNITY,
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Plaintiff,

vs.

SALT LAKE CITY, a municipal corporation, EARL J. GLADE, FRED TEDESCO, JOHN B. MATHE-SON, L. C. ROMNEY, City Commissioners; CLEVE WOOLEY and W. Y. TIPTON,

Defendants.

Case No. 7357

BRIEF OF APPELLANT

STATEMENT OF CASE

All page references used are those of the record. The parties are referred to as in the court below. All italics are ours, unless otherwise indicated.

This is an action by the plaintiff for a declaratory judgment brought under the permissive authority of Title 104, Chapter 64, Utah Code Annotated 1943. It challenges the validity of a certain Salt Lake City ordinance which restricts the location of fraternity and sorority houses in residential "A" districts. In their complaint the plaintiffs seek to have the court declare the ordinance to be discriminatory, arbitrary, capricious and unconstitutional; and the plaintiffs seek injunctive relief to prevent the enforcement of the ordinance against the plaintiffs.

In the complaint it is alleged that the plaintiff, Phi Kappa Iota Fraternity, is a non-profit corporation, affiliated with the University of Utah; that it owns and occupies a fraternity house as an ordinary appurtenance to the University of Utah; that the plaintiff Floyd F. Hatch, is an owner of real property used for residential purposes by him and his family, which property is located within 600 feet of the University of Utah main campus and is designated as 1363 Butler Avenue, Salt Lake City, Utah.

The complaint further alleges that, pursuant to its corporate purposes, the plaintiff fraternity on the 27th day of August, 1948, purchased a residential unit which they occupy as a fraternity house, designated by the street address of 1175 2nd Avenue; that said fraternity house is located within residential "A" district as defined under Section 6715, Chapter 65, Revised Ordinances of Salt Lake City, Utah, 1944. The complaint

alleges that the plaintiff fraternity has expended large sums of money in purchasing and furnishing said housing unit. The complaint further alleges that the defendants have ordered the plaintiff fraternity to vacate the property, to cease using said property as a fraternity house, and have threatened to issue criminal complaints in the event the order is not obeyed; that the defendants in the past have enforced said ordinance according to their interpretation of its terms and have compelled fraternities and sororities appurtenant to the the University of Utah to locate their establishments within 600 feet of the University of Utah campus; that to the east of the University of Utah campus are mountains upon which there are no utilities for sewage water, electrical power or otherwise and that said land is totally unsuited to housing projects, that to the south of the main University of Utah campus is a cemetery which is not suitable for the occupancy of living persons, that to the west of the University of Utah campus there is not available any property within 600 feet suitable for occupancy by fraternities and sororities; that as a result of such situation a large number of fraternities and sororities have been crowded into an area immediately north of the University of Utah campus, and as a result of such crowding and congestion the public safety, convenience, and health have been greatly endangered; that as a further result thereof the plaintiff Dr. Floyd F. Hatch and other property owners within the area 600 feet north from the University of Utah campus have suffered a diminution of value to their property, that

the use and enjoyment thereof have been lessened because of the crowded streets and the noise and disturbance resulting from the overcrowded conditions. That the property of plaintiff, Dr. Floyd F. Hatch and of the other property owners in the vicinity to the north of the University of Utah campus is all located in residential "A" district under the aforesaid zoning ordinance.

The complaint further alleges that said zoning ordinance is arbitrary, discriminatory and capricious and is not proper exercise of any of the police powers of Salt Lake City, but on the contrary said ordinance results in unsafe streets, inadequate housing conditions, and parking facilities, congestion of people and noise, all of which disturb the peace and quiet of Dr. Floyd F. Hatch and other property owners residing within residential "A" district and within 600 feet of the University of Utah campus; that the said ordinance is arbitrary, discriminatory and capricious in the following particulars:

A. That there is no reasonable basis for permitting fraternity organizations to maintain fraternity houses in residential "A" district and at same time limiting them to locations within 600 feet of the land and premises occupied by the University of Utah to which they are incident, that the enforcement of such a restriction is prejudicial to and discriminatory against the plaintiff Floyd F. Hatch and to the other property owners in residential "A" district who own and oc-

cupy property within 600 feet of the University of Utah campus.

B. That said ordinance expressly permits the construction of schools in all residential "A" districts and also specifically permits any use ordinarily appurtenant to the uses of the property for school purposes including the establishment of dormitories, fraternities, sororities and boarding houses occupied by students and faculty members of the schools; that said ordinance puts no restriction on the location of fraternity and sorority houses incident to or appurtenant to *private* schools and that under the terms of said zoning ordinance, fraternities appurtenant to *private* schools may build their fraternity homes at any location within the residential "A" district; that said ordinance then prohibits the maintenance of fraternity houses incident to *public* schools in all residential "A" districts except within 600 feet of the lands and premises occupied by the institution to which they are incident. That there is no reasonable basis for such distinction between fraternity houses of *public* and fraternity houses of *private* schools, and the same is discriminatory, arbitrary, and capricious, as to the plaintiff fraternity.

C. That there is no reasonable basis to justify the selection of the distance of 600 feet as the area within which fraternity houses must be confined. That said distance or limitation is made by said ordinance without regard to street or property lines and in effect discriminates against fraternities and sororities incident to the

University of Utah only and was designed to confine fraternities and sororities of the University of Utah to the locations existing when said ordinance was enacted, without regard to future growth and development of the school.

D. That the ordinance permits one and two family dwellings in residential "A" district, and there is no limit to the number of persons who may reside on premises described as two family dwellings within a residential "A" district, even though said persons are boarders, lodgers or renters and there is no limitation of the number of persons who may reside on premises described as one family dwellings in residential "A" district, except that no more than six persons may reside therein as lodgers or boarders paying rent. That it is discriminatory, and arbitrary to prohibit the use of one and two family dwellings for residential purposes by members of a fraternity appurtenant to a public school.

E. That there is no reasonable basis for placing fraternities in a restricted classification insofar as the maintenance of a fraternity house is concerned.

The complaint further alleges that since the ordinances restricting fraternities to 600 feet from the premises occupied by the University of Utah was passed, that the University of Utah has more than doubled in size and enrollment. That recently the University of Utah acquired approximately 300 acres of land which was formerly part of Fort Douglas Military Reservation and that thereafter Salt Lake City enacted a new

ordinance by the terms of which all property within six hundred feet of said newly acquired property was placed in the residential district "AA". That the effect of this later ordinance has been to further restrict and concentrate the development of fraternities in the area immediately surrounding the property of the plaintiff Hatch.

In their answer, the defendants allege that the ordinances complained of are within the powers granted to Salt Lake City by law to enact and that the advisability and wisdom of such ordinances are not within the province of the court to review, such matter being solely within the discretion and good judgment of the Board of City Commissioners of Salt Lake City. Upon the issues thus joined, the case was tried before the Honorable Roald A. Hogenson, sitting without a jury and on February 28, 1949 a decree was entered by the trial court deciding the issues in favor of the defendants and against the plaintiffs, no cause of action, dismissing plaintiffs' complaint, and dissolving the temporary injunction. From that decree the plaintiffs have prosecuted this appeal.

THE FACTS

In 1937 a group of residents of Salt Lake City, residing in the residential "A" area involved in this case, petitioned the City Commission of Salt Lake City for an amendment of Chapter 47, Section 4710 of the Building Code of Salt Lake City, restricting the location of

dormitories and fraternity or sorority houses to an area within one-eighth of a mile distance from the lands and premises occupied by the institution to which they were incident. This petition was referred to the City Planning and Zoning commission and by them returned to the Commission on December 16, 1938, with the recommendation that the petition be granted, the distance being modified from one-eighth of a mile to 600 feet (Exhibit A). A hearing was held upon the petition and the Commission ordered the Zoning ordinances changed (Exhibit B), and thereupon Section 6715, Chapter 65, Revised Ordinances of Salt Lake City, 1944 was adopted. That ordinance, so far as material here, reads as follows:

“Section 6715. Residential ‘A’ district.

(a) In residential ‘A’ district no building or premises shall be used or maintained, and no building shall be erected or altered so as to be arranged, intended or designed to be used for other than one of the following uses:

1. One-family dwellings.
2. Two-family dwellings.
3. Schools.

* * *

(b) In a Residential ‘A’ district buildings and uses, such as are ordinarily appurtenant to any of the uses listed above, but not involving the conduct of business, shall be permitted, subject to the limitations herein provided.

1. Accessory uses customarily incident to the above uses.

* * * *

5. In a one-family dwelling the renting of rooms to not more than six (6) persons for lodging purposes only, or the furnishing of table board to not more than six (6) persons, or the furnishing a combination of the above to not more than six (6) persons; *provided, however, that these provisions shall not be applicable to a two-family dwelling.*

6. *Dormitories, fraternity or sorority houses or boarding houses occupied only by the faculty or students of a public educational institution and supervised by the authorities thereof, subject, however, to the express condition that such houses shall not be located or established more than 600 feet distant from the lands and premises occupied by the institution to which they are incident.*

The 600-foot restriction had no application, except with reference to the University of Utah (R. 106-105). That restriction was chosen because the petition first requested one-eighth ($\frac{1}{8}$) of a mile and that distance embraced all existing fraternity and sorority houses, except the one at 51 Wolcott Street and the one at 1371 East South Temple (R. 110). The fact that a "bunch" of people by petition stated they didn't want fraternities in their district and indicated they wanted the distance 600 feet is primarily the reason the distance was so fixed (R. 113). The amendment was directed to the vicinity contiguous to the University and it was in that

particular district alone that they were concerned. When the 600-foot restriction was adopted, no place other than the University area was studied at the time. (R. 114 — Exhibit C). Indeed, there are no schools in Salt Lake City other than the University of Utah that have fraternities or sororities (R. 55).

The City Planning Engineer testified that the zoning work of Salt Lake City had been under his charge ever since it was established except for 1927. He stated that the portion of the A district that is within the 600-foot limit is equally well suited for fine residential homes as the area outside of that limit (R. 93). The only reason for holding the 600-foot restriction was to keep the students close to the campus and to cut down the added traffic congestion incident to fraternity and sorority houses (R. 94). The additional traffic congestion caused by fraternity houses was one of the strong reasons to segregate fraternity and sorority houses, and where they are segregated, like the one at 51 North Wolcott, there is ample parking space and there is no particular parking problem (R. 101-102). Out of the eighteen fraternities that have homes, there is only one aside from the plaintiff that isn't congested within the 600 foot area. There are sixteen fraternities within the 600-foot zone north of the campus (R. 100). In the 600-foot area the streets are more than full with traffic and parking (R. 101). The zoning expert admitted that it would be a disadvantage to the property owners on Butler Avenue (where Plaintiff Hatch re-

sides) to have the five new groups that are looking for homes, locate within the 600-foot zone, which is very congested right now, and yet it is equally well suited to residential purposes as the AA district (R. 104). The more congested and numerous fraternities are around a given house, the more onerous it is (R. 131). Two sorority houses have been built on Butler Avenue since the plaintiff moved there. The congestion and parking along Butler Avenue has increased since 1939. Parking has become solid almost all the way down the street, particularly on Monday and Friday evenings when meetings and parties are held. Even during the time when the University is not in session, at night, and at times when there are no functions at Kingsbury Hall, there is a crowded and congested condition in the evening (R. 135). There is a lot of parking, particularly at the Alphi Phi and Phi Mu houses on Monday and week-ends, and the organizations on First South also park on Butler Avenue (R. 136).

The streets on North Wolcott and Second Avenue are noticeably wider than on Butler Avenue or Federal Way, and there being fewer fraternities on Wolcott and Second Avenue, it is possible to get parking space and there is not so much likelihood of the street being blocked by parking on an angle (R. 139-140). The fraternity and sorority students at the University of Utah own 282 cars in addition to which a number of the students drive cars from time to time belonging to their parents (R. 76). The zoning expert did not think that

all fraternities should be crowded into the 600 foot strip (R. 103).

The second reason given why it was desirable to confine the fraternities and sororities into the 600 foot area was to have them located closer to the campus. The effect of the ordinance is to drive fraternities to the more distant B zones or to crowd them into the already congested area to the north of the campus. East of the campus is closed by the military reservation and south of the campus is closed by the cemetery; the north of the campus is closed beyond the 600 foot strip in the immediate vicinity of Butler Avenue by the AA zoning (R. 103, Exhibit 1, Exhibit D). Along the west side of the campus there are churches and a business section and residences. There is a city water pool and a city park on the northwest corner of the campus. There are no fraternities or sororities located in the area west of 13th East and generally all the fraternity and sorority houses of the University are located in the area beginning on the corner of First South east of Wolcott, north about two blocks to the Phi Kappa house and west to University Street (R. 58-59). There are twelve fraternities and seven fraternities that have houses in the area of First South and Perry Avenue (R. 60). Most of the homes between the Emery House on Second South and Carleson Hall on Fifth South are rather small (R. 109). Other than the 600 foot area to the north, fraternities must look to the more distant B zones. (See zoning map)

It was stipulated that the court may take judicial notice of all the planning ordinances of the City prior to and subsequent to 1939 (R. 79). It was also stipulated that the red line on Exhibit D that goes up through the center of the map is the present 600-foot line from the University campus (R. 79); and the heavy green line that comes up the south side of South Temple and follows the South Side of Federal Way and then on up through the center of the map is the boundary for the AA zone. The location of the various fraternities and sororities are indicated on this map at the houses and addresses noted, and it was stipulated that the map correctly shows what it purports to represent (R. 80).

In the interpretation of its ordinances, the city had denied to a fraternity the right to move into the Carter home which was on a lot that was partially within and partly outside of the 600 foot limit (R. 97).

The witness, Don Ogden, testified that he is president of the plaintiff fraternity (R. 71); that he spent as much time as he could along with the committee, two assistants, to hunt for a suitable house, but that the only house available within the 600 feet limit was the Adams home and the owner wanted \$40,000 cash for that home; that for the entire year, they searched through the areas around the campus for a home, including the area west of the campus (R. 72); that they exhausted every effort within the 600 foot limit and within the Butler district looking for a home (R. 73).

That on August 27th, 1948, the plaintiff fraternity entered into a contract to purchase the property located at 1175 Second Avenue for \$35,000, payable \$500.00 down; \$4500 on possession or on or before September 15th, 1948, and \$2000 on or before three months from the date of possession; that all payments have been kept up on the contract except the last \$2,000 and arrangements were in process in regard to that sum. That the plaintiff fraternity entered into possession on or about September 12th, 1948 (R. 74). It was not necessary to remodel the home to adapt it to fraternity uses. There are four car garages back of the house and a cement patio that will park about 8 cars plus a long driveway that would accommodate another 6 or 8 cars, in addition to the front footage of the house. That 25 students were then residing at the house and the house would amply provide housing for 30 or more (R. 75).

ASSIGNMENTS OF ERROR

1. That the court erred in its finding that the said ordinance Section 6715 of Chapter 65, of the Revised Ordinances of Salt Lake City, Utah, 1944 is not unreasonably discriminatory, arbitrary or capricious in any of the particulars alleged by plaintiffs or otherwise, but is valid and constitutional, in that such finding is not supported by and is against the weight of the evidence.

2. That the court erred in failing to find that as a result of the congestion of the fraternities and sorori-

ties within the 600 foot area immediately north of the University of Utah campus the public safety, convenience and health have been greatly endangered.

3. That the court erred in failing to find that as a further result of the congestion of the fraternities and sororities within the 600 foot area, the plaintiff Dr. Floyd F. Hatch has suffered detriment in the use, enjoyment and value of his property.

4. That the court erred in its finding Number 7 and each part thereof in that such finding is not supported by and is against the weight of the evidence.

5. That the court erred in failing to find that the zoning ordinance is arbitrary, discriminatory and capricious and is not a proper exercise of any of the police powers of Salt Lake City and in failing to find that it, results in congested and unsafe streets, inadequate housing conditions, and congestion of people and noise.

6. That the court erred in failing to find that the allegations of Paragraph IX (a) of plaintiff's complaint are true.

7. That the court erred in failing to find that the allegations of Paragraph IX (b) of the complaint are true.

8. That the court erred in failing to find that the allegations of Paragraph IX (c) of the complaint are true.

9. That the court erred in failing to find that the allegations of Paragraph IX (d) of the complaint are true.

10. That the court erred in failing to find that the allegations of Paragraph IX (e) of the complaint are true.

11. That the court erred in failing to declare the ordinance to be discriminatory, arbitrary, capricious and unconstitutional.

12. That the court erred in refusing to permanently enjoin the defendants from attempting to enforce the ordinance against the plaintiff fraternity or from attempting to enforce the said ordinance so as to compel additional fraternity units to locate within the vicinity of the plaintiff Hatch.

13. That the court erred in its finding Number 6 and each part thereof, said finding being unsupported by and against the weight of the evidence.

ARGUMENT

POINT ONE

The ordinance is unconstitutional because :

A. The ordinance unreasonably discriminates between fraternities affiliated with public schools and fraternities affiliated with private schools.

B. The ordinance unreasonably discriminates between two family dwellings and fraternity and sorority houses and dormitories.

C. The ordinance unreasonably discriminates against the property of Plaintiff Hatch.

D. The ordinance is unreasonably discriminatory in that it is directed only against the University of Utah and fraternities and sororities appurtenant thereto.

E. The 600-foot restriction is arbitrary, capricious and without any reasonable basis.

F. There is no constitutional basis for segregating from residential users, persons who use residential property for fraternity and sorority houses.

A. THE ORDINANCE UNREASONABLY DISCRIMINATES BETWEEN FRATERNITIES AFFILIATED WITH PUBLIC SCHOOLS AND FRATERNITIES AFFILIATED WITH PRIVATE SCHOOLS.

A mere reading of the ordinance will demonstrate that “Schools” may locate anywhere in Residential “A” district. This of course, includes both public schools and private schools.

The ordinance next provides (subsection [b]) that “*buildings and uses*” ordinarily appurtenant to schools may be maintained in Residential “A” district. It thus seems crystal clear that schools, both public and private, together with buildings and uses ordinarily appurten-

ant to schools, public or private, may be located and maintained anywhere in Residential "A" district.

Subsection (a) of the ordinance does not, of course, deal with any appurtenant uses. Subsection (a) contains the list of primary uses. It is then followed with subsection (b) which permits appurtenant uses subject to the "*limitations*" contained therein. Then follow 7 subdivisions, each one of which interprets and limits various types of appurtenant uses. Subdivision 1 of subsection (b) limits other uses to uses "customarily incident." Subdivision 2 limits the business of a physician, musician or other professional person to his dwelling". Subdivision 3 limits the size of signs and their contents. Subdivision 4 also places limitations on signs, their size and location. Subdivision 5 places limitations on the number of lodgers or boarders permitted in a "single-family dwelling." Subdivision 6 limited dormitories, fraternity and sorority houses of public institutions, to houses occupied only by faculty or students and supervised by the institution. Subdivision 7 limits the size of a private garage and its location on the lot.

In short, the ordinance in question sets up this general pattern: Subsection (a) expressly permits certain primary uses in Residential "A" district. Subdivision (b) permits uses ordinarily appurtenant to one of the primary uses set forth in subsection (a). Subsection (b) then proceeds to interpret, define, and limit various appurtenant uses. All uses which are accessory uses and are customarily incident to the primary uses are inter-

puted in the other subdivisions and limitations are imposed thereon. Of course, the general language of subsection (b) would permit other "ordinarily appurtenant uses" even though they were not specified in one of the seven subdivisions and even though no specific limitations were imposed thereon.

There is of course, independent of ordinance, an absolute right on the part of a property owner to utilize it as he sees fit, so long as he does not create a public or a private nuisance. It is therefore, to a certain extent, erroneous to look to the ordinance for the grant of a right to maintain a fraternity house in residential "A" district. Rather, we should look to the terms of the ordinance to see what uses are prohibited because all uses not prohibited, of course, are permitted. No matter how the ordinance quoted above, be construed, it will result in discrimination between public and private schools. By the express terms of the statute schools, both public and private, are permitted to locate in residential "A". Whether Section 6 be considered as a grant of the right to fraternities to locate in residential "A", or as we contend, a limitation on fraternities of public schools, it nevertheless is limited only to fraternities and sororities incident to *public* institutions. Fraternities and sororities incident to *private* schools are not covered at all by Section 6. It is absolutely impossible to escape this conclusion. The reference in subsection (a) to "schools", must be construed to include all schools. See *Western Theo. Seminary vs. Evanston*, 331 Ill. 257, 162 N. E. 863. The reference to fraternity

houses and sorority houses incident to “*public educational institutions*” certainly eliminates those attached to private schools, so that there is a distinction made between fraternity and sorority houses incident to public schools and those incident to private schools. As we will demonstrate by the cases to follow, there is no constitutional basis for such a distinction.

It is common knowledge that dormitories, fraternity houses and sorority houses are “ordinarily appurtenant to” the operation of schools, both public and private. The evidence made that clear, but court cases involving that point are very difficult to find.

We did find one case which clearly holds that dormitories are appurtenant to, and ordinarily incident to the operation of private schools. See the case of *Western Theological Seminary vs. City of Evanston*, 331 Ill. 257, 162 N. E. 863. There, an ordinance permitted in residential “A” district, (1) Single-family houses, (2) Churches and Temples, (3) Libraries, (4) Schools and Colleges. (5) Farming and Truck gardening.

The Western Theological Seminary elected to construct a dormitory in connection with the school. A dispute and a law suit ensued. The city, in opposition to the construction of the dormitory, amended its ordinance under pressure from the local citizens, and in the amended ordinance provided that only such schools as had the power of eminent domain could locate in residential “A”, thus making a distinction between public and private schools. This was held unconstitutional in

a prior case. See *Western Theological Seminary v. City of Evanston*, 325 Ill. 511, 156 N. E. 778. The ordinance was then amended to permit public and private schools but as amended it expressly excluded dormitories. The court in holding that the construction of dormitories was ordinarily incident to schools, and that no ordinance could constitutionally permit schools to exist in residential "A" area, and at the same time prohibit the construction of dormitories, said that dormitories are "buildings ordinarily forming a part of the equipment and plant of colleges, and the fact that dormitories were proposed to be erected, did not justify the passage of the amended ordinance." The ordinance which proposed to permit schools, both public and private, to exist in residential "A" district, but to prohibit the construction of dormitories as an incident thereto, was held to be unconstitutional. The court thus clearly held that the operation of a dormitory was a use ordinarily appurtenant or incident to the operation of a college.

We have been unable to locate any other cases discussing the question of whether or not dormitories and fraternities are ordinarily incident or appurtenant to colleges. We have, however, located several cases discussing the question of appurtenant uses. The case of *Kenney vs. Building Commissioner of Melrose, Mass.* 53 N. E. 2d. 683, held that it was a proper "accessory use" to a class "A" residence to build and operate a small conservatory for the raising of plants and flowers for the personal pleasure of the resident.

In the case of Village of St. Louis Park vs. Casey, Minn., 16 N. W. 2d. 459, the court held that the construction and operation of radio equipment consisting of a large pole and wires located outside of the home, even where the equipment installed in connection therewith, exceeded in cost \$10,000.00, was an accessory use to a class "A" dwelling.

In Provo City vs. Claudin, 91 Utah 60, 63 P. 2d 570, the Utah Supreme Court held that it was so obvious that a funeral home was not an ordinary accessory or incidental use for a dwelling that the matter did not warrant discussion.

These are the only cases we have been able to find which discuss appurtenant uses or ordinary accessory or incidental uses in connection with zoning ordinances. The word, "appurtenant", as it applies generally, is defined in Corpus Juris Secundum, Volume 6 page 139. There are perhaps a hundred different definitions given. We believe that in line with the Illinois holding, fraternities, sororities, and dormitories ordinarily are appurtenant uses to schools. In fact, the Illinois case went so far as to hold that they were so much an appurtenant use thereof, that it was unconstitutional to put schools in residential "A", and prohibit the location of dormitories in residential "A".

PUBLIC AND PRIVATE SCHOOLS

There are numerous cases holding that it is unconstitutional to distinguish between public and private schools.

In one of the later cases, *Catholic Bishop vs. Kingery*, (Ill.) 20 N. E. 2d, 583, the ordinance, according to the court provided:

“Section 3 and 3a of the ordinance provide that no building shall be used or thereafter erected or altered with the ‘A residential’ districts unless otherwise provided by the ordinance except for the necessary use to which anyone of the following places or establishments may be put: Single family dwelling, church or temple, *public* school, library . . .”

In holding this bad the court said:

“Examination of the ordinance before us reveals that it expressly permits a public school to be maintained in the ‘A Residential’ section but prohibits the existence of a private or parochial school. The only question before us then is this: Does an ordinance which permits the maintenance of a public school but excludes the operation of a private school within the same area bear any substantial relation to the public health, safety, morals or welfare?

“The Catholic Bishop of Chicago proposes to erect a parochial school and chapel upon the property in question. We fail to perceive to what degree a Catholic school of this type will be more detrimental or dangerous to the public

health than a public school. It is not pointed out to us just how the pupils in attendance at the parochial school are any more likely to jeopardize the public safety than the public school pupils. Nor can we arbitrarily conclude that the prospective students of the new school will seriously undermine the general welfare.”

In *City of Miami Beach vs. State, ex rel Lear*, 128 Fla. 750, 175 So. 537, the court held that to prohibit private school while permitting public school is arbitrary and invalid. Said the Court:

“It will be noted that the ordinance as amended specifically permits the conducting of public schools within the prescribed zone and prohibits the conducting of private schools of all sorts therein. The prohibiting classification finds no foundation or basis in reason or experience that has been brought to our attention.

“What objectionable characteristic touching the comfort or other general welfare of the surrounding community may obtain as to a private school which would not probably obtain in a greater degree as to a public school has not been suggested, and, we think for the very good reason that none exists. For this reason alone the ordinance as amended, *must* be held to be arbitrary.”

See also *Western Theological Seminary vs. Evanston*, 331 Ill. 257, 162 N. E. 863 to the same effect.

See also *Alpha Rho Alumni Ass’n vs. City of New Brunswick*, (N. J.) 18 A. 2d. 68, which held that it was unconstitutional to distinguish between College fraterni-

ties and other fraternal organizations. There the statute in question, gave a tax exemption for property used in work of or for the purpose of fraternal organizations. The Act then expressly excluded "college clubs, college lodges or college fraternities." The court held that the attempted distinction was invalid because it was without any reasonable basis.

We were unable to find any authority the other way on this point.

B. THE ORDINANCE UNCONSTITUTIONALLY DISCRIMINATES BETWEEN TWO-FAMILY DWELLINGS AND SORORITY AND FRATERNITY HOUSES AND DORMITORIES.

Our next contention is that the ordinance permits unrestricted use of two-family dwellings for the maintenance of roomers and boarders. The evidence shows that the house at 1175 Second Avenue, operated by the plaintiff fraternity was a single-family dwelling. That it is now being occupied by the plaintiff fraternity, without any structural alterations of any kind whatsoever; the only difference being, that instead of a single blood family residing in said home, the occupants thereof now are students at the University of Utah, living together with a common housekeeping unit.

In this connection the ordinance is altogether silent in prescribing rules with respect to the occupants of two family dwellings. There is nothing to prohibit a large

number of people from occupying a two family dwelling without regard to the facilities available in such dwelling, sanitary or otherwise, to accommodate the occupants. An ordinance is altogether ineffective to promote the public welfare, safety, or health, which permits an unlimited number of persons to occupy a two family dwelling without regard to its facilities, and yet prevents a fraternity from occupying a home equipped with ample facilities, sanitary and otherwise, to accommodate its members who reside there while attending the University of Utah. We do not perceive in what manner the public safety, welfare, or health is thus promoted by the ordinance.

Section 6713, of the Revised Ordinances of Salt Lake City, 1944, defines the word family as follows:

“ ‘Family’. Any number of individuals living together as a single housekeeping unit, and doing their cooking on the premises independent of and separated from any other group or family.”

Two-family dwelling is described by the same section as follows, to-wit:

“ ‘Two-family’ dwelling. A building arranged or designed to be occupied by two-families.”

Section 6715, which is the section set out in full above, and the section which is under attack here, expressly permits two-family dwellings in residential “A” district. It also expressly permits all uses which are

ordinary appurtenant to two-family dwellings. In regard to one-family dwellings, Section 5 provides that only 6 persons may be taken for lodging or for board, or for both purposes. And then it is expressly provided as follows:

“Provided, however, that these provisions shall not be applicable to a two-family dwelling.”

In line with our general discussion above relating to the construction of (b) and the divisions thereunder as limitations rather than as grants of the right to occupy premises, there can be little doubt that two-family dwellings are without limitation as to the number of boarders or lodgers who may live under one roof. Certainly it is incidental to the occupation of a home as a two-family dwelling, that boarders and lodgers be permitted to live therein. In fact, the definition of “family” in Section 6713, makes it clear that boarders and lodgers may be included within the family. Reference to the definition shows that any number of individuals living together as a “single housekeeping unit” is a family, and in a two-family dwelling, two of such units may live in the house. In addition to that, all uses which are ordinarily appurtenant, or incidental thereto may also be carried on on the premises. In regard to one-family dwellings, the statute expressly prohibits the renting of rooms or the furnishing of meals or a combination of rooms and meals to more than 6 persons. But it goes on to say expressly that the limitations will not apply to two-family dwellings. Therefore, two-family dwell-

ings may go on unrestricted in the number of renters and boarders that may be taken into the home.

Under the decided cases, this is expressly condemned. The best case on this is *Merrill vs. City of Wheaton*, (Ill.) 190 N.E. 918. In this case an ordinance limited a particular district to single-family dwellings. Two-family dwellings were prohibited. Merrill wanted to change a one-family dwelling to a two-family dwelling and the city would not let him. The court held the ordinance unconstitutional as unreasonable and discriminatory because it permitted one family dwellings to take boarders and thus bring many people under one roof but prohibited two family dwellings. It thus held that there was no reasonable basis for the distinction. The court said:

“Its application here results in unfair discrimination, without any corresponding benefit to the public health, morals, safety or welfare. Certainly the public health is not promoted by an ordinance which restricts the right of one property owner to erect or alter a residence to house two families separately under one roof, and at the same time permits as many as twenty-eight boarders and roomers to legally make use of another residence in the same block. The morals, welfare, and safety of the public are not especially subserved by boarding and rooming houses as compared with two-family residences—at least not to the extent of justifying a legislative act which favors one and forbids the other.”

C. THE ORDINANCE UNREASONABLY DISCRIMINATES AGAINST THE PROPERTY OF PLAINTIFF HATCH.

It appeared without dispute in the evidence that the present ordinance was, in fact, causing the fraternities and sororities incident to the University of Utah, to congest in the 600 foot area to the north of the University campus. It is in this area that Dr. Hatch resides. Within the past nine years, since the 600 foot limitation was imposed, 4 new fraternity and sorority houses have located in the 600 foot district. The testimony of Dean Ballif demonstrates that there are perhaps seven more fraternity groups looking for houses now. The area to the east and to the south is closed to the students. The area to the north is closed except within the 600 foot strip. New fraternal groups as they come upon the campus have two alternatives: (1) They can locate to the west, or (2) They can locate within the 600 foot limit. Regardless of what might be available to the west, the students are in fact, locating within the 600 foot strip. The University has more than doubled in size since 1939, and fraternal groups on the campus are definitely on the increase. The addition of all the fraternal units within this 600 foot strip, without question, results in congested parking, and congested living quarters, and of course, greatly restricts the use by Dr. Hatch of his property. There is no dispute in the evidence concerning the above facts.

Mr. Woolley, who is the chief planner for Salt Lake City, and the only expert who testified, gave it as his opinion, that there was no essential difference in the property to the north of the University campus located within the 600 foot strip and the property located without the 600 foot strip over in Federal Heights area. That all of the property, both that within and that without the 600 foot limit, were equally well adapted to use as selected residential property. Nevertheless, the City has, upon petition by one group of the residents of that exclusive area, drawn a line which has forced the fraternity groups right into the laps of all other property owners in that 600 foot area. There is nothing in the evidence even to suggest a reason why Dr. Hatch should have fraternities on every side of him, and why the other users, immediately adjacent to the 600 foot line in Federal Heights, should to no extent be bothered by such congestion. In fact, the only testimony on this is the testimony of Mr. Woolley who said that there was no difference whatever in the character of the two areas for home property. That they were built up together as a part of the same general development. That each was equally well adapted to home property, and still are equally well adapted. They are contiguous and occupy the same narrow area of the city. Mr. Woolley also admitted that the area has so built up with fraternity houses now, that it would be detrimental to the health, morals and welfare of the people to continue to have that area built up with fraternity homes. That more

homes added to the traffic congestion and general problem would only make the matter worse. (R. 103)

As will be pointed out in more detail hereafter, the only justification for zoning ordinances is that they relate to and tend to promote the public health, safety and welfare. This, they must do without unreasonable discrimination. Whenever a zoning ordinance in its practical application does not promote the health, safety or welfare, or whenever the same is discriminatory, the courts have without hesitation, held the same to be unconstitutional. This will be discussed in considerable detail later. We think the record demonstrates that it does not promote the public health, safety or welfare, to continue to congest the fraternities in the 600-foot area. The only two reasons Mr. Woolley could give why the ordinance was passed and the only two objectives which he said it was intended to meet, was to solve the parking problem and to keep the fraternities closer to the University so that they could be supervised. (R. 94) He now admits that the congestion of fraternities is already bad and that further location of fraternities in this area would be worse. (R. 103) Every witness who testified on the subject admitted that the parking problem is better met by having the fraternity houses dispersed into wider areas rather than congregated into narrow areas. There was positive evidence that the existing fraternities own 281 cars and operate them around the campus and around their homes, or a total of over 17 cars per house. (R. 76) Certainly it would

ignore common sense to contend that the parking problems and congested conditions are better met by having more fraternity and sorority houses crowded into this one congested area. Of course, the city says they could move to the west and farther to the south, where they would be in a "B" zone, but as a practical matter, the fraternities are not doing so. Further the record affirmatively shows that to put them into the "B" areas of the city, where they may permissibly build, and be outside the 600-foot limit forces them to distances far removed from the University. The shaded map introduced by the city shows an area shaded in red where fraternities may locate. This of course, is the 600-foot limit to the north of the University and all of the residential "B" area. To the east, and to the south of the University campus, there is no land within 600 feet where fraternities may locate. To the north there is the narrow 600-foot strip, and everything else to the north of the campus is residential "A" or residential "AA", where fraternities are not permitted. This leaves only the area shaded in red to the west, and far to the south. If fraternities are forced into those areas, it will defeat the second objective of the ordinance — keeping the fraternities close to the University so they can be supervised. Therefore, either way one looks at it, the objective expressed by Mr. Woolley is defeated. The 600-foot limitation causes congestion and crowding because of the fact that there is only one residential "A" district close to the University of Utah, and that is the area to the north. The rest of the area to the north and

to the east, and to the south, is closed. The result is if they stay close to the University, they must crowd within the 600-foot strip and parking problems and congestion results. If they were to move into the area to the west, they would move far distant from the University. As a practical matter, they are congesting the 600-foot area, all to the detriment of Dr. Hatch.

There would appear to be no reason, after having expressly provided that fraternity and sorority houses and dormitories could be constructed and maintained in a residential "A" district, that they would then be restricted to locations within 600 feet of the schools. *Is there anything whatsoever related to the health, morals, safety or general welfare of the community which requires fraternities and sororities to be that close to the school to which they are incident?* That is really the only thing that the ordinance would ostensibly accomplish. They are permitted to build anywhere in residential "A" district so long as they stay within 600 feet of the property occupied by the educational institution. Schools may move about in the "A" district wherever they may elect. Wherever the University goes with its properties, occupied by it for educational purposes, sororities and fraternities may fan out an additional 600 feet throughout the residential "A" district. Therefore, the only possible thing that the ordinance could, and in fact does accomplish is to keep fraternities close to the campus. This causes congestion, parking, and traffic problems. The ordinance, however, does not even assure that result because fraternities are per-

mitted to move 10 miles from the campus in commercial, industrial, or residential "B" districts. Therefore, under the ordinance, they may move to locations which are far removed from the University and there is no possible construction under which fraternities and sororities could be compelled by this ordinance, to locate their houses close to the University campus. The restriction is only that they locate that close if they locate in residential "A" district. This surely could not assure the public safety.

The ordinance also permits the maintenance of fraternity and sorority houses anywhere within a residential "A" district, so long as they are that close to the property occupied by the institution. No one can be assured just which part of the "A" district will inherit the fraternities because schools can move anywhere in the district. No particular portion of any residential "A" district is by ordinance protected against fraternities because of this freedom given to schools. Wherever schools may go — fraternities may follow. This was demonstrated by the recent acquisition of Fort Douglas by the University. With this acquisition, fraternities could have invaded the most exclusive area in Federal Heights. The city blocked this by its new ordinance setting up the double "A" zone. Still the remainder of the "A" districts of the city are open to fraternities if the schools expand into the particular area. The net result of the ordinance is to attempt to keep fraternities in "A" districts close to the campus. This is

unreasonable because fraternities in "B" districts do not need to stay close to the school.

The United States Supreme Court in *Seattle Trust Co. vs. Roberge*, (infra.) indicates that the city has by this ordinance expressed the legislative opinion that it is a proper "A" residential use for fraternities to locate in "A" districts subject to the condition that they remain within 600 feet of the campus. We respectfully submit that there is nothing relating to the health, morals, safety or general welfare which is subserved by permitting fraternities to build homes within 600 feet from the campus in residential "A" district, and prohibiting the construction of a fraternity home 650 feet away from the campus in the same district. Nor is there any basis for a requirement that fraternities stay within 600 feet if they locate in residential "A" districts, but letting them locate miles away if they locate in residential "B". Why a fraternity house located 650 feet from the campus in residential "A" district, is more detrimental to the public health, welfare, morals and safety than a fraternity house located 600 feet from the campus, also in the "A" district, is to us without any explanation.

The 600 foot restriction forces discrimination between persons who live within the residential "A" district. It congests fraternities near residential "A" users like Dr. Hatch, and excludes them from other residential "A" areas. Both areas in residential "A" district have by the city been found to be alike, and to be

entitled to be treated alike in so far as zoning is concerned, for both areas are in residential "A" area. The 600 foot line is simply a capricious effort on the part of the City Commission to favor a group of citizens residing in Federal Heights, who do not want fraternities around them; and in order to escape from having fraternities located around them, they have succeeded in lobbying through the City Commission, an ordinance which forces the fraternities either to locate in "B" districts at points distant from the University or crowds all of them around the other "A" residential users, such as Dr. Hatch. There simply cannot be any reasonable relationship between health, morals, safety and welfare which will permit a fraternity house to locate at a point 600 feet from the campus within residential "A" district, and will prohibit the same fraternity from locating a point 650 feet from the campus in the same residential district within the same city.

This particular discrimination could have been eliminated by excluding fraternities from residential "A" districts entirely. This the ordinance does not do. It expressly permits fraternities to locate in residential "A" — thus finding that such use of property is harmonious with residential "A" uses, and then it limits the places in the "A" district where they may locate. All property owners in an "A" district are entitled to the same treatment. The city has so admitted by putting them in the same district. Mr. Woolley said that he could see no difference in Hatch's property and other

areas in the "A" district for residential use. Then the city discriminates against Hatch and tells him he must have fraternity houses located in his neighborhood and the ordinance assures that more will locate there.

D. THE ORDINANCE IS UNREASONABLY DISCRIMINATORY IN THAT IT IS DIRECTED ONLY AGAINST THE UNIVERSITY OF UTAH AND FRATERNITIES AND SORORITIES APPURTENANT THERETO.

It appears quite clear from the evidence, that the University of Utah was the objective of this particular ordinance. The official minutes of the Zoning and Planning Committee use the words: "This means the University of Utah", in referring to this particular ordinance. It also appears that the ordinance, subdivision 6, was amended to place the 600 foot restriction because of a petition filed by residents of Federal Heights, objecting to the expansion of fraternity houses on Parry Avenue. The matter was referred to the Zoning and Planning Commission, for study. Mr. Woolley, who is the head of the Zoning and Planning Commission, stated that they studied the problem, but he admits that the only area studied was the area north of the University of Utah, and that it is the only area he knew of where there was a fraternity problem (R. 107). In the recommendation made to the City Commission, the Zoning and

Planning Commission said in their official minutes that the 600-foot limitation meant the University of Utah. In addition to this we have the fact that they picked the arbitrary line of 600 feet and when Mr. Woolley was asked why 600 feet was picked, he said that this was done because 600 feet would exactly encompass all existing fraternities at the University of Utah (R. 114). The map introduced shows the 600 foot line at the top of the map cutting immediately behind the fraternity house which is located the farthestest to the north and which was established prior to 1939. Therefore, it seems unmistakably clear that the ordinance was directed toward the University of Utah. The 600-foot limit, the minutes, the study made by the Zoning Commission, the petition which activated and later impelled the passing of the ordinance, all so suggest. It is discriminatory, and class legislation, we contend, to segregate from a city, the fraternity and sorority houses of the University of Utah and pass restrictive zoning ordinances just for them. This is not particularly assigned as an individual ground for declaring the ordinance in question to be unconstitutional. However, when this fact is taken into account, the other points which are urged take an additional weight and meaning. The contention of Dr. Hatch, that the zoning ordinance forces fraternity houses into his "back-yard", is bolstered by the fact that the zoning ordinance was designed to confine fraternities of the University of Utah all within an area close to his home.

E. THE 600-FOOT RESTRICTION IS ARBITRARY, CAPRICIOUS AND WITHOUT ANY REASONABLE BASIS.

It seems clear that the ordinance was designed solely to meet the particular situation existing at the University of Utah. Notwithstanding this, the Zoning Commission drew a line through the area to the north of the campus which went through houses and lots indiscriminately. The line cuts through Dr. Hatch's lot and house and cuts through the houses and lots of many of the other residents of the area. Since the Zoning ordinance was directed toward this particular area, we think that it is highly irregular, arbitrary, discriminatory, and unreasonable for the city to put the line right up through the middle of part of the people's property. We think we have demonstrated under the evidence as set forth above, that the ordinance was directed toward the University of Utah, and the protection of the Federal Heights area. There can be no reasonable justification for the extension of a flat 600-foot line which was directed toward a particular area and yet was directed indiscriminately through houses, and lots. We think that any ordinance that does so is unconstitutional, that it is unreasonable and discriminatory to put one particular building lot half in residential "A" district, and half in a district where fraternities are permitted to live. It is unconstitutional to take a particular house and put half of that

house in an area where fraternities can live and the other half of the house in an area where fraternities cannot live. And this is particularly so where the ordinance in question was directed at this particular area.

There are several cases holding expressly that under such circumstances, the ordinance is unconstitutional and void. The first of these cases is *Buffalo Park Land vs. Buffalo*, 126 Miscellaneous 207, 294 N.Y.S. 413. There, a zoning ordinance divided a 60-foot lot so as to place 40 feet of that parcel in a residential district and the other 20 feet in an apartment hotel district. The ordinance was held to be unconstitutional and unreasonable. This was true, even though the entire block of the city in which said lot was located was so divided by the line, the block was 2200 feet in length and 225 feet in width. The particular zoning ordinance was directed only toward that city block and it was held unreasonable, arbitrary, and discriminatory to so bisect a building lot with a line that 40 feet was in a residential district where only homes could be built and the other part of the lot was in a hotel district where hotels and apartments could be built.

See also the case of *Fouss vs. McConnel*, Ga., 157 S. E. 625. There, by ordinance, the city of Atlanta zoned the first 122 feet of a group of lots into residential use only and the back 100 feet for business. The court

in holding the ordinance unconstitutional said as follows:

“... If the zoning ordinance restricts the use of his lot to residential purposes other than the front 100 feet, then said ordinance, as it seeks to divide his lot into two separate use classes by zoning the first 100 feet to business and restricting the rear 120 feet to residential use is unreasonable, arbitrary, illegal, and unconstitutional.”

This case is strengthened by the fact that it was the University of Utah area at which the city was “shooting”. The courts lay down the uniform rule that in determining the constitutionality of a statute, the locality and the circumstances, are to be considered and the matter is not to be resolved by abstractions. See *Women’s Kansas City St. Andrews Society vs. Kansas City*, 54 Fed. 2d, 1071. Where there is only one group of fraternities and sororities in the city and only one institution to which they are appurtenant, and where the complaint arises over that particular area and the Zoning and Planning Commission in making their study of the city to see where the line should go, studied only the University area, and where in their recommendations to the City Commission, they say we mean the University of Utah, and where the 600-foot line is picked to fit this particular locality and is picked so as to exactly encompass the house farthest removed from the campus, and then the city strikes a line down through the middle of houses and properties, such legislation is

highly unreasonable and arbitrary; and of course, the plaintiff Hatch is in a position to complain because his property and his house are split by the 600-foot line.

F. THERE IS NO CONSTITUTIONAL BASIS FOR SEGREGATING FROM RESIDENTIAL USERS, PERSONS WHO USE RESIDENTIAL PROPERTY FOR FRATERNITY AND SORORITY HOUSES.

In approaching this problem, we must confess that there is not a great deal of law written specifically on the subject of fraternities. The only case which we have been able to find, dealing directly with fraternities, is an early Nebraska case entitled *Pettis v. Alpha Chapter of Phi Beta Pi*, 111 Neb. 525, 213 N. W. 835. This case holds that fraternities are subject to separate classification. The case has not subsequently been cited or followed. We have been unable to find another case directly involving fraternities. Our reasoning on this point must, therefore, be by analogy.

The power of a municipal corporation to enact zoning ordinances is nothing but the exercise of the state police power. Cities have the right to exercise the police power of the state only to the extent that power is expressly delegated by statute. In the case of cities and towns in Utah, the delegation of the police power is contained in Section 15-8-89 Utah Code Annotated, 1943.

The delegation is in broad and sweeping language. Still cities may only exercise the power to zone for the purpose of "promoting health, safety, morals and the general welfare of the community". Without the statutory delegation, there would be no power in the city to zone at all. With the statutory delegation, cities may zone for the purposes set out in the statute. Even without such a statutory limitation, principles of constitutional law would and do prohibit zoning except to promote the health, morals, safety and general welfare of the people. Even though the statute tends to promote one of those objectives, it is unconstitutional if, in doing so, it unreasonably discriminates against any particular class. There are numerous cases to this effect throughout the books. We set forth below comments from some of the most recent cases. Each of the cases cited below is a recent case representing the present state of the law.

The first case, *Geneva Investment Company vs. City of St. Louis*, 87 Fed. 2d, 83, held that zoning ordinances regulating the use of realty under power conferred by statute must tend to promote the public health, safety, or welfare without discrimination. In *Acker vs. Baldwin*, (Cal. S. Ct.) 108 P. 2d. 899, the court said that in considering the validity of zoning ordinances, courts must determine in addition to the need thereof, whether they are arbitrary or discriminatory in their conception and application and whether they have any reasonable tendency to promote the public morals, health, safety or general welfare, and prosperity of the com-

munity. In a recent Nebraska case, *Cassel Realty Co. v. City of Omaha*, 14 N.W. 2d. 600, the court held that a zoning ordinance restricting building uses, must not be discriminatory, unreasonable nor arbitrary, and must bear some relationship to the purposes sought to be accomplished. In *Landu vs. Levin*, a Missouri case, 213 S.W. 2d. 483, the court held that all use restrictions and legislative enactments of a city must not only be reasonable but also must not discriminate and they must further fairly tend to be of value and have substantial relationship to some purpose for which the city may exercise its police power. To the same effect, see *National House vs. Board of Adjustments*, a New Jersey case, 61 Atlantic 2d. 55; *Fass v. City of Highland Park*, a Michigan case, 32 N.W. 2d. 375; *George v. Hall*, Wyoming 199 P. 2d. 815; *Thompson on Real property*, Section 5615, Volume 10. Without laboring this point further we submit that zoning ordinances are only valid if they tend to promote the public welfare, health, morals or safety, and unless this is done without unreasonable discrimination between persons or classes situated alike.

By permitting schools to exist throughout residential "A" districts, and then permitting fraternities and sororities to locate their houses in "A" districts, so long as they stay within 600 feet of the school, the ordinance affirmatively shows that the legislative authority of the city, did not consider the establishment of fraternities in "A" districts to be bad in and of itself. This legislation by the city merely suggests that fraternities and sororities are bad if they locate more than

600 feet from the campus, but are good if they locate within that area in "A" district. *There would be no reason whatever why this fraternity group could not reside in the very house where it now resides if the University of Utah would simply acquire some property within 600 feet of this particular house and maintain thereon an observatory, a greenhouse, a laboratory, a classroom, or any other plant of the University.* In other words, the ordinance does not provide that fraternities and sororities may not reside in residential "A" district. It provides merely that they may only reside in "A" districts if they stay within 600 feet of the campus. The school, of course, may be established in "A" district, anywhere that any school decides that it desires to locate. Without restriction, the University of Utah could move throughout the residential "A" district, and buy, lease or occupy land, and if it did so, fraternity houses could follow it anywhere in Salt Lake City. The ordinance therefore, does not suggest that fraternity and sorority houses are bad, but only that they are bad if located more than 600 feet away from the school property. That such connotation must be read into the ordinance is made clear by the United States Supreme Court in the case of *State Ex Rel Seattle Trust Company v. Roberge*, 278 U. S. 116, 49 S. Ct. 50. In that case the ordinance in question was almost verbatim to the one under construction here, except for the 600-foot limitation. It had, however, one additional provision after permitting fraternities, sororities, and dormitories ordinarily appurtenant to colleges to locate in "A" dis-

tricts, in that it provided that philanthropic homes for children or aged people might be constructed in residential "A" district if the consent of two-thirds of the people within a certain number of feet of the proposed building could be obtained. The Supreme Court held that this language permitting homes for the aged and for children to be constructed in residential "A" affirmatively showed that the legislative arm of the city did not consider the maintenance of such homes in "A" districts to be inconsistent with the use of the districts for residential purposes. In this regard the Supreme Court said:

"The right of the trustee to devote his land to any legitimate use is property within the protection of the Constitution. The facts disclosed by the record make it clear that the exclusion of the new home from the first district is not indispensable to the general zoning plan. And there is no legislative determination that the proposed building would be inconsistent with public health, safety, morals or general welfare. The enactment itself plainly suggests the contrary."

The ordinance is set out in full in the United States Supreme Court opinion, it is almost verbatim to the one under construction here. The United States Supreme Court has construed it as an affirmative indication by the city that the maintenance of such homes in residential "A" districts are not inconsistent with the general zoning plan, nor inconsistent with, nor harmful to the public health, safety, morals or general welfare. There is no escape from the conclusion that the city has

by its legislative enactment determined that the maintenance of fraternity and sorority houses and dormitories in an "A" district is not inconsistent with the maintenance of residences, nor detrimental to the public health, welfare, morals or safety. Otherwise they would not be permitted in such districts.

It is extremely difficult for us to see any reasonable or constitutional basis which makes a fraternity in a residential "A" district a menace to the public health, safety, morals, and general welfare, if it gets beyond 600 feet and yet makes it harmonious with, and helpful to the public health, safety, morals and general welfare to establish fraternity houses in residential "A" district if they stay within 600 feet of the University campus. The ordinance cannot be justified as an attempt to preserve a particular area exclusively for home properties because the ordinance expressly permits in addition to homes, the maintenance of the following uses: (1) Schools, (2) Churches, (3) Libraries and Museums, (4) Public parks, public recreation grounds and playgrounds, (5) Farming and truck gardening, nurseries, greenhouses, railroad or street railway passenger station, and rights of way, including railroad yards or sheds, (6) all public buildings except penal or mental institutions, and (7) telephone exchanges. All of these, and all appurtenant uses to these may be maintained in residential "A" district, and may locate anywhere within an "A" district. The appurtenant uses, as further defined, include the carrying on of the profession of

a physician, musician, or other professional person, the maintenance of rooming and boarding houses, dormitories, fraternity and sorority houses, if they stay within 600 feet of the campus. Since the campus may be extended anywhere throughout the residential "A" district, there is no assurance that any particular area in the "A" district, will in practical operation not be invaded by fraternity and sorority houses. If the University were to acquire or occupy property within 600 feet of the home now occupied by the plaintiff fraternity houses, it would be harmonious, according to the ordinance, with the public health, morals, and welfare, for this fraternity house to be continued exactly as it is, and it would not be injurious to the health, morals or safety of the people who live adjacent to it. Why fraternities are bad in so far as the public health, morals, safety and general welfare are concerned if they locate in an "A" district beyond 600 feet from the campus and good if they stay within that distance, escapes us.

The Illinois case cited above, which holds that it is unconstitutional to permit schools to locate in residential "A" districts, and then prohibit dormitories from locating in the same district, seems to us to be directly in point in this regard.

There are many other cases which we think have an important bearing on this point. The cases uniformly hold that it is improper, unconstitutional, and unreasonable to attempt to exclude churches from a residential "A" district. There is nothing promoting the health,

morals, public safety, or general welfare which creates a residential "A" district, and excludes therefrom churches. All of the cases are to this effect. See Synod of Ohio, *United Lutheran v. Joseph*, 139 Ohio State 229, 39 N.E. 2d. 515; *City of Sherman vs. Simms*, 143 Texas 115, 183 S.W. 2d. 415; *Ellsworth vs. Gercke*, Ariz. case, 156 P. 2d. 242; *Overbrook Farms Club vs. Town Zoning Board*, 351 Pa. 77, 40 At. 2d. 423; *Thompson on Real Property*, Section 5626; *State Ex Rel Roman Bishop of Reno vs. Hill*, a Nevada case, 90 P. 2d. 217. All of these cases are recent cases, several of them decided by western jurisdictions and all of them uniformly hold that it is unconstitutional to attempt to exclude from a residential "A" district, the establishment of churches. All of them are based upon the consideration that to exclude churches has no constitutional relationship between the public health, morals, safety and general welfare, and that an ordinance which excludes churches from a residential "A" district is void.

The next line of cases which we think indicate that a like result ought to obtain in the case of fraternities is the case of *Village of University Heights vs. Cleveland Jewish Orphans Home*. Circuit Court of appeals, 6th circuit, 20 F. 2d. 745, wherein the court says:

"The structural plans of the proposed orphanage comply with all requirements of the village. There is no objection to the buildings per se, but only to the use of them as a home for a large number of children. If they were intended for a private school, or for private residences, their

use as such would and could not be prohibited. The question is whether the proposed use is so different in character from concededly legitimate uses, as to bring it within the scope of the police power of the municipality. That power has been held, as we have seen, to include the right generally to exclude business houses, stores, shops, and apartment houses from strictly residential areas. It has never been held the right to prohibit the use for orphan children of cottages built according to the requirements of the municipality. We can see many valid reasons, affecting the public welfare, that would justify the exclusion of factories, business houses, shops and even apartment houses from the strictly residential districts, but such would not apply to the use of structurally proper cottages for an orphanage; while an orphanage would no doubt be disagreeable to the community in some respects than a private school or private residences, we are unwilling to hold that it is within the power of the village to prohibit the use of cottages of this character for that purpose."

In *Women's Kansas City St. Andrew Society vs. Kansas City, Mo.*, a Circuit Court of Appeals case, eight circuit, 58 F. 2d. 597, the court said:

"The chief objection to plaintiff's coming in to the neighborhood seems to have come from the residents of the Rockhill district, and from the trustees of the various trusts connected with the William Rockhill Nelson Art Gallery. * * * The owner of the adjoining duplexes testified that having an old ladies' home as an immediate neighbor would diminish the value of his property, and it would affect his morals to have it

referred 'to as the old ladies' home next door ' * * * Zoning laws rest upon the police power of the states, and when they are fairly within the well-recognized bounds of such power they are valid, even though they may entail some hardship upon property owners. While such police power is broad, there are limitations to its exercise, which the courts have not attempted to accurately, define. However, restrictions by zoning ordinances imposed upon the use of one's property to be valid must bear some substantial relationship to the public health, safety, morals or general welfare.' The reserved police power of the state must stop when it encroaches on the protection accorded the citizen by the Federal Constitution. * * * Certainly the fact that aged people may have a depressing effect on some people is not sufficient to exclude such people from a district. There is no limit to the causes that may depress people, but they do not furnish a basis for the support of a restriction as to use of one's property. What was said by the Texas court in *Spann vs. City of Dallas et al.*, 111 Tex. 350, 235 S.W. 513, 516, 19 A.L.R. 1387, with respect to the noise and annoyance incident to the operation of a grocery store in a residential district, would apply a fortiori to the so-called 'depressing influence' of elderly residents, viz.: 'It could disturb or impair the comfort of only highly sensitive persons. But laws are not made to suit the acute sensibilities of such persons. It is with common humanity — the average of the people, that police laws must deal. A lawful and ordinary use of property is not to be prohibited because repugnant to the sentiments of a particular class.' * * * There must be limits as to what even a general plan may do, and the mere comprehensiveness of the zoning ordinance

is in itself no justification for each separate restriction that the ordinance imposes. * * * If the restriction here complained of does in fact, however, have no relationship to the fundamentals upon which zoning statutes can be sustained, viz. public health, safety, moral, and general welfare, and is not essential to a general zoning ordinance based on these considerations, then the courts should not hesitate to protect plaintiff from being deprived of the use of its property under the guise of police power. * * * Our conclusion is that the restriction upon the use of plaintiff's property is not an essential of the general zoning plan, and is in its application to plaintiff's property so arbitrary and unreasonable as to be void."

Western Theological Seminary vs. Evanston, *supra*, as the title implies, concerned a theological seminary. Part of the opinion in that case reads as follows (325 Ill. 511, 156 N.E. 783.):

"Both liberty and property are subject to the police power of the state, under which new burdens may be imposed on property and new restrictions placed on its use when the public welfare demands it. The police power is, however, limited to enactments having reference to the public health, comfort, safety, or welfare. An act which deprives a citizen of his liberty or property rights cannot be sustained under the police power unless a due regard for the public health, comfort, safety, or welfare requires it. *Ruhstrat vs. People*, *supra*, (185 Ill. 133, 57 N.E. 41, 49 L.R.A. 181, 76 Am. St. Rep. 30); *Bailey v. People*, 190 Ill. 28, 60 N.E. 98, 54 L.R.A. 838,

83 Am. St. Rep. 116; *Bessette v. People*, 193 Ill. 334, 62 N.E. 215, 56 L.R.A. 558; *People vs. City of Chicago*, 261 Ill. 16, 103 N.E. 609, 49 L.R.A., N.S., 438, Ann. Cas. 1915 A, 292; *Catholic Bishop vs. Village of Palos Park*, 286 Ill. 400, 121 N.E. 561. The legislative determination as to what is a proper exercise of the police power is not conclusive. Whether the means employed have any real, substantial relation to the public health, comfort, safety, or welfare, or are arbitrary and unreasonable, is a question which is subject to review by the courts, and in determining that question the courts will disregard mere forms and interfere for the protection of rights injuriously affected by arbitrary and unreasonable action. *City of Aurora vs. Burns*, supra (319 Ill. 84, 149 N.E. 784)."

The court proceeded to hold unconstitutional an ordinance which permitted schools in an "A" district but excluded dormitories.

A home for aged poor was the subject matter of *State of Washington ex rel. Seattle Title Trust Co. vs. Roberge*, supra. In the opinion of the court in that case, we find the following (278 U.S. 116, 49 S. Ct. 51):

"Zoning measures must find their justification in the police power exerted in the interest of the public. *Euclid vs. Ambler Realty Co.*, supra, (272 U.S. 365), 387 (47 S. Ct. (114) 118 (71 L. Ed. (303), 310, 54 A.L.R. 1016)). 'The governmental power to interfere by zoning regulations with the general rights of the landowner by restricting the character of his use, is not unlimited

and, other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare.' *Nectow v. Cambridge*, supra (277 U.S. 183), page 188 (48 S. Ct. (477), 448, (72 L. Ed. 842, 844)). Legislatures, may not, under the guise of the police power, impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities. * * * It is not suggested that the proposed new home for aged poor would be a nuisance. We find nothing in the record reasonably tending to show that its construction or maintenance is liable to work any injury, inconvenience or annoyance to the community, the district or any person. The facts shown clearly distinguish the proposed building and use from such billboards or other uses which by reason of their nature are liable to be offensive."

In the *City of Miami Beach v. State*, supra, the Supreme Court of Florida was called upon to consider the validity of an ordinance prohibiting private schools in a multiple family district while permitting public schools. The ordinance was held invalid because "it appears to be arbitrary and unreasonable and has no relation to the public safety, health, morals, comfort, or general welfare."

The burden is placed by the courts upon the city to point out the reasonableness of the basis for any discrimination made by an ordinance, see 22 C.J. 141; *Deaver v. Napier*, 139 Minn. 219, 166 N.W. 187; *Christ v. Fent*, 16 Okla. 375, 84 P. 1074; *State v. Joseph* (Ohio)

39 N.E. 2d. 515; Applestein v. Mayor-of-Baltimore, 156 Md. 40, 47, 143 Atl. 666.

We submit that the ordinance in question is invalid both as to this plaintiff fraternity and as to Dr. Hatch. This court should so declare.

CONCLUSION

In view of the foregoing discussion and authorities cited in support thereof, we earnestly urge this honorable court to declare Section 6715, Chapter 65 to be unconstitutional, unreasonable and discriminatory and to reverse the judgment of the trial court accordingly.

Respectfully submitted.

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