To Argued by Kenneth C. Klein, Esq.
Time Requested: 10 minutes

STATE OF NEW YORK
COURT OF APPEALS

TOWN OF DELAWARE,

Plaintiff-Respondent,

-against-

IAN LEIFER, Individually and d/b/a THE CAMPING TRIP,

Defendant-Appellant.

BRIEF OF RESPONDENT TOWN OF DELAWARE

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APL-2018-00133

STATEMENT OF STATUS OF RELATED LITIGATION

As of the date of completion of this brief, there is no related litigation.

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STATEMENT OF THE NATURE OF THE CASE AND FACTS

The action underlying the instant appeal was commenced by Respondent in an effort to enforce its Zoning Law by means of a permanent injunction against Appellant, enjoining what Appellant has self-described as an annual 3-day outdoor music festival called "The Camping Trip" ("the Music Festival") on lands owned by him situate within Respondent (R. 74, 111, 113-117).

The relevant and ultimately determinative facts established below are straightforward and impossible to dispute. Appellant is the owner of certain premises situate within the territorial boundaries of Respondent (R. 119-124, 126 at ¶2, 93 at ¶2). Appellant had utilized the premises for the purpose of holding the Music Festival in 2014, 2015 and 2016 (R. 126 at ¶4). Appellant publicly advertised his intent to hold the Music Festival again in 2017 (R. 115) and actively solicited funding for the Music Festival in 2017 (R. 130-134).

Facts also undisputed below are that Respondent is a municipal corporation duly organized and existing under the laws of the State of New York; Respondent has a Zoning Law ("the Zoning Law") that was adopted as Local Law No. 2 of 1996 (codified as Chapter 220 of the Code of the Town of Delaware, accessible in its entirety at http://www.ecode360.com/29999942); Appellant's premises are situate in the RU-Rural District as established by the Zoning Law (see Zoning Law §220-6 and §220-7) and the Zoning Map (R. 137); the Schedule of District Regulations for the RU-Rural District (R. 142-143) does not provide as a specified Principal Permitted Use, Special Use or Accessory Use anything in any manner comprising or contemplating the Music Festival; and pursuant to Zoning Law §220-11, "[w]henever a proposed use is not

specifically permitted by this chapter, it shall be deemed prohibited." The Zoning Law does make provision for a "theater" use in other zoning districts of Respondent (R. 140, 144). The theater use is defined in the Zoning Law as "[a] building or room or outdoor facility for the presentation of plays, films, other dramatic performances, or music" (see Zoning Law §220-5).

Appellant's answer (R. 93-95) is devoid of assertion of a single affirmative defense. Initially, in Appellant's opposition to Respondent's prior application for a preliminary injunction, Appellant contended that the Music Festival is a religious event as to which the Zoning Law is unenforceable by reason of purportedly being in violation of the federal Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") (42 U.S.C. §2000cc et. seq.), and in violation of Appellant's rights under the First Amendment of the U.S. Constitution (R. 147-151). However, in opposition Respondent's motion for summary judgment, Appellant abandoned the RLUIPA defense. Appellant relied on the same arguments that were rejected by the Appellate Division and which are again advanced before this Court.

Supreme Court considered all of the papers submitted on behalf of the parties and entertained extensive oral argument on the motion, particularly on behalf of Appellant (R. 17-55). Supreme Court granted Respondent's motion in its entirety and enjoined Appellant from holding the Music Festival (R. 43-44). The decision (R. 55-64) and order from which Appellant appealed to the Appellate Division (R. 13-15) was affirmed in all respects by the Third Department (R. 5-9). The Memorandum and Order of the Third Department should be affirmed here as the arguments advanced by Appellant on the

instant appeal parrot those asserted below and are entirely unavailing for the reasons set forth in the Appellate Division's Memorandum and Order.

ARGUMENT

POINT I

THE ZONING LAW IS ENTITLED TO A PRESUMPTION OF VALIDITY

When considering Appellant's arguments of unconstitutionality, several well established principles of law must be borne in mind:

> "A zoning ordinance is a legislative act. It represents a legislative judgment as to how particular land should be classified, where zoning boundaries should be drawn, and the nature and extent of the restrictions that should be imposed. The authority to zone the territory of a municipality, and necessarily the authority to determine the nature and extent of such zoning, are vested in the legislative body. Accordingly, a legislative decision in such matters may not be disturbed unless the legislature has exceeded its powers or has acted in an arbitrary or unreasonable manner. The Court of Appeals said that: 'Decision as to how a community shall be zoned or rezoned, as to how various properties shall be classified or reclassified, rests with the local legislative body; its judgment and determination will be conclusive, beyond interference from the courts, unless shown to be arbitrary, and the burden of establishing such arbitrariness is imposed upon him who asserts it.'"

1 New York Zoning Law and Practice §5:09, quoting Rodgers v. Village of Tarrytown, 309 N.Y. 115 (1951).

> "As legislative acts, zoning ordinances are invested with a strong presumption of constitutionality, rebuttable only upon a demonstration of unconstitutionality beyond a reasonable doubt."

Durante v. Town of New Paltz Zoning Board of Appeals, 90 A.D.2d 866, 867, 456 N.Y.S.2d 485, 486 (Third Dept., 1982), emphasis added.

> "The courts frequently say that the wisdom of a zoning ordinance is a matter to be determined by the legislature, not the courts. Within the limits imposed by the constitution, questions of policy are committed to the legislative authority of the municipality, and the courts are without power to interfere. Formally, at least, the courts disavow any authority to interfere with a zoning decision of a municipal legislature unless it is shown to be arbitrary or unreasonable. The burden of demonstrating the arbitrary or unreasonable character of a zoning ordinance is said not to be sustained if the proof does no more than demonstrate that the issue is debatable."

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> "A similar standard of proof was applied by the Appellate Division, Second Department, in a case which involved land in a residential district that was affected by a restaurant which generated sufficient traffic to interfere with normal residential use. An official referee found the zoning ordinance invalid as applied to the land near restaurant, but the court upheld the ordinance because the proof went no further than to create a fairly debatable issue."
>
> "The Court of Appeals upheld this standard, reinforcing that the challenger must rebut the presumption of validity by proof beyond a reasonable doubt, and that such burden is not sustained if the ordinance is fairly debatable."

1 New York Zoning Law and Practice §5:11.

> "There is reason to believe that the courts sometimes enter the area of fair debate in determining issues of constitutionality."

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> "The key issue, said the Appellate Division, Third Department, is whether the limitation is 'reasonable in light of the public necessity involved.' Another New York court stated: '[T]here must be a careful balancing of the essential interests between the individual in the enjoyment of his property rights and the general welfare. The plaintiff's disadvantage and loss incident to a changed condition may not be isolated from the whole of the surrounding facts and circumstances."

1 New York Zoning Law and Practice §5:13.

The Third Department correctly recognized that Respondent invoked the strong presumption of validity and the heavy burden thus imposed upon Appellant to successfully challenge the validity of the Zoning Law (R. 6-7; Town of Delaware v. Leifer, 162 A.D.3d 1350, 1351, 79 N.Y.S.3d 728, 730 [Third Dept., 2018]).

POINT II

THE ZONING LAW IS CONTENT NEUTRAL AND CONSISTENT WITH THE FIRST AMENDMENT BECAUSE IT IS NARROWLY TAILORED AND LEAVES OPEN AMPLE ALTERNATIVE CHANNELS

A. The Zoning Law is Content Neutral

> "Government regulation of expressive activity is content neutral so long as it is '*justified* without reference to the content of the regulated speech.'" *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (emphasis in original) (quoting *Clark v. Cmty. for Creative Non-Violence,* 468 U.S. 288, 293, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984)). Content-neutral regulations may limit the time, place, or manner of protected expression, even in a public forum. *See Costello v. City of Burlington*, 632 F.3d 41, 44 (2d Cir. 2011).

Congregation Rabbinical College of Tartikov, Inc. v. Village of Pomona, 915 F. Supp.2d 574, 623 (S.D.N.Y., 2013), wherein, as a prelude, the Court pointed out "regulation justified by the secondary effects of adult theatres have on the surrounding community was content neutral."[1] Id.

> Content-neutral restrictions, on the other hand, invite intermediate scrutiny. (citation omitted) Under this less stringent test, a content neutral regulation will be upheld if it is narrowly tailored to serve a significant government interest and allows for alternative channels for communication. (citations omitted) To be narrowly tailored, a content-neutral regulation need not be the least restrictive or least intrusive means of achieving the asserted government interest.

Id. at 624.

The entire Zoning Law, particularly its provisions that are pertinent to the Music Festival, is content neutral. There is no reference therein to any form or manner of

[1] By no means does Respondent equate the nature of the content of Appellant's activities to those of an adult theater. However, Congregation Rabbinical College, is most compelling as to the significant government interest analysis that follows. Appellant's Music Festival, which involves outdoor, overnight, electronically amplified musical performances, has a geographic scope of measureable impacts (i.e. noise) that far exceed the geographic scope of the measureable impacts of an adult theater. Those impacts couple with the legitimate health, safety and welfare concerns of Respondent that are associated with a land use activity that involves an assembly of many hundreds of people in a secluded, wooded rural location over multiple days and nights.

religion, speech or expression, so the same could be only incidentally affected thereby, if at all. Appellant has pointed to nothing in the Zoning Law to justify an opposite conclusion. Being content neutral, the question is whether the Zoning Law is narrowly tailored so as to serve Respondent's interests while allowing alternative channels for religious speech and/or expression.

B. The Restriction is Narrowly Tailored to Serve a Significant Government Interest

The Zoning Law's prohibition of Music Festival-like uses in the zoning district where Appellant's premises are located is plainly justified by the legitimate and significant governmental interest in the secondary effects the uses would have on the surrounding rural and residential community (i.e. outdoor dusk-to-dawn electronically amplified music; and health, safety and welfare concerns arising from a mass gathering of hundreds of people over multiple days and nights in a rural, wooded area). The prohibition is valid, even if it is not the least restrictive or least intrusive means of avoiding the impacts. Congregation Rabbinical College, *supra*, at 624.

Additionally, as the Appellate Division correctly observed, Respondent "has a substantial governmental interest in preserving the character of the area and preventing threats to that character, such as excessive noise" (R. 7; Town of Delaware v. Leifer, 162 A.D.3d 1350, 1351, 79 N.Y.S.3d 728, 730 [Third Dept., 2018]). In support of its conclusion, the Third Department appropriately cited Ward v. Rock Against Racisim, 491 U.S. 781, 796-797, 109 S. Ct. 2746, 105 L. Ed. 2d 661(1989); Carew-Reid v. Metropolitan Transportation Authority, 903 F2d 914, 917 (2d Cir. 1990); and Matter of

Town of Islip v. Caviglia, 73 N.Y.2d 544, 554-555, 540 N.E.2d 215, 542 N.Y.S.2d 139 (1989).[2]

By specifically defining theater as "[a] building or room or outdoor facility for the presentation of plays, films, other dramatic performances, or music" (Zoning Law §220-5), Respondent did indeed narrowly tailor the restriction that results by allowing the use in some districts, albeit not in the RU-Rural District where Appellant's premises happen to be located. It cannot be explained more clearly or concisely than did the Appellate Division in the Memorandum and Order from which the instant appeal has been taken.

> "The theater restriction is unambiguously limited to efforts to facilitate the 'presentation of plays, films, other dramatic performances, or music' (Code of Town of Delaware §220-5), and 'to present' means 'to bring (something, such as a play) before the public' (Merriam-Webster Online Dictionary, present, https://www.merriam-webster.com/dictionary/presenting). Its terms do not encompass the type of private activity undertaken by homeowners and, indeed, the zoning code makes clear that 'use[s] customarily conducted entirely within a dwelling and carried on by the inhabitants residing therein' constitute permitted home occupation in the Rural District (Code of Town of Delaware § 220-5; *see* Code of Town of Delaware §220-9). A resident in the Rural District can accordingly worship, watch films, play music, have family and friends visit and engage in other private behavior customarily conducted by homeowners without fear of running afoul of the theater restriction. The theater restriction only prevents a property owner in the same zoning district from setting up facilities for a cultural presentation, such as an outdoor music festival where hundreds of paid ticket holders enter onto his or her land to take part in it. The theater restriction therefore narrowly addresses the latter situation and is valid, even if one could postulate a still narrower way to do so." (R. 7-8, Town of Delaware v. Leifer, 162 A.D.3d 1350, 1352, 79 N.Y.S.3d 728, 731 [Third Dept., 2018])

[2] The specific governmental interest at issue is not new-found by Respondent. The Schedule of District Regulations for the RU-Rural District, and the Zoning Law §220-11 provision that a proposed use not specifically permitted shall be deemed prohibited, were each part of the current version of the Zoning Law when it was adopted twenty-three (23) years ago in 1996. Accordingly, it cannot be said that the prohibition of the Music Festival came to be out of some motivation of animus against Appellant and his religion, or with intent to interfere with Appellant's (or anyone else's) religious speech or expressive association. Respondent has already demonstrated the total absense of such animus or intent on its part to interfere with other similarly affiliated religious uses (R. 78-80). The Zoning Law surely affords ample alternative means by which Appellant or anyone else may exercise religion and express religious speech, even within the RU-Rural District (R. 77-80).

C. The Zoning Law Leaves Open Ample Alternative Channels For Communication

The Zoning Law absolutely provides alternative channels for communication, particularly of nature of Appellant's activities, given theaters (i.e. buildings or rooms or outdoor facilities for the presentation of plays, films, other dramatic performances, or music) are uses specifically allowed in zoning districts of Respondent other than the district wherein Appellant's premises are located (R. 140, 144). In this regard, the Third Department specifically noted that theaters are permitted in more developed areas under the Zoning Law, but not in the Rural District where the stated intent of the Zoning Law is "to preserve areas 'conducive to the mutual existence of agricultural and low-density residential uses as well as certain unobtrusive commercial activities'" (R. 7, 225-226).

Suffice it to say, as did the District Court in Congregation Rabbinical College:

> It is not a violation of the Free Exercise Clause, however, to enforce a generally applicable rule, policy, or statute that incidentally burdens a religious practice, as long as the government can "demonstrate a rational basis for [the] enforcement" of the rule, policy, or statute, and the burden is only an incidental effect, rather than the object of the law.

Id. at 619, citations omitted.

POINT III

THE ZONING LAW IS NOT VOID FOR VAGUENESS OR OVERBROAD

According to Appellant, the Zoning Law makes it a crime in Respondent's RU-Rural District to: perform music or plays in any room or house; or to invite one's friends to watch movies in one's living room; or to sing songs around a campfire; or to sing songs during a backyard party or wedding; or to sing in prayer according to their religion (Appellant's Brief, p. 22). Such a conclusion of law is a patently unreasonable and insupportable interpretation of the Zoning Law.

A person of ordinary intelligence would never read the Zoning Law to prohibit any of the foregoing activities in the RU-Rural District. None of the aforesaid activities described by Appellant is equivalent to a 3-day outdoor music festival attended by several hundred people. However, all of the aforesaid activities cited by Appellant could occur in connection with and as part of any number of principal permitted uses or Planning Board approved special uses allowed in the RU-Rural District under the Zoning Law (R. 234-235). Indeed, and most obviously, all could and certainly do commonly occur at single family detached dwellings, in and beyond the RU-Rural District, without any interference by Respondent.

Appellant also argues that the Zoning Law is void for vagueness "as applied" to Appellant and his event (Appellant's Brief, pp. 26-27). Appellant relies on the phrase "outdoor facility" in the Zoning Law definition of theater (R. 185) in a futile attempt to manufacture vagueness and its application to the Music Festival. According to Appellant, a distinction exists because Appellant utilizes vacant land and has no outdoor performance structure such as an amphitheater or fanshell. There is, however, no such

distinction. To meet the definition of theater under the Zoning Law, a performance structure is not needed. Since "facility" is not otherwise defined, in the construction of a statute terms undefined therein are entitled to their plain meaning. 97 N.Y.Jur.2d (Statutes) §110. A Google search of the term "facility" shows its plain meaning to be "a place, amenity or piece of equipment provided for a particular purpose." In operating his Music Festival, Appellant is plainly using an outdoor place whereon, among other things, he admits that he erects amenities and pieces of equipment such as stages, a water supply, portable toilets, electric service, sleeping accommodations and food services in furtherance of the land use. The patently specious nature of Appellant's argument is underscored by the gross mischaracterization of the Music Festival as "this 'backyard' event" and equating it to a campfire (Appellant's Brief, p. 26). No reasonable person would equate backyard events, such as a party, wedding or other family gathering, to a 3-day, all night music festival attended by many hundreds of people. The attempted analogy taxes credulity, to say the least.

Furthermore, the notion that the Zoning Law fails to provide an ordinary person with adequate or sufficient notice that Respondent's activity is impermissible in the RU-Rural District is entirely unsupportable. For example, in §220-3(F) of the Zoning Law, it provides that one of the purposes of the Zoning Law is to prevent and eliminate nuisances. In §220-10(A) of the Zoning Law, it provides "nor shall any land or building be divided, designed, used or intended to be used for any purpose or in any manner **other than as permitted in the district in which such** building or **land is located**" (emphasis added). In §220-10(A) of the Zoning Law, it provides "[w]henever a proposed use is not specifically permitted by this chapter, it shall be deemed prohibited."

Finally, in the Zoning Law's Schedule of District Regulations, wherein the allowable uses within the RU-Rural District are identified (R. 224-225), it specifically states that the "**INTENT**" of the district "is to identify land environments conducive to the mutual existence of agriculture and low-density residential uses as well as certain unobtrusive commercial activities" (emphasis added). To argue that the Zoning Law does not provide adequate notice that the land use being made by Appellant is unlawful is to turn a blind eye to its clear language and expressly stated purposes and intent.

The foregoing was not lost on the Appellate Division. It found "the theater restriction is limited by its language to indoor and outdoor facilities where cultural performances are staged, and its wording 'invites neither misunderstanding by a person of ordinary intelligence nor arbitrary enforcement by [plaintiff]' (citations omitted) (R. 8-9, Town of Delaware v. Leifer, 162 A.D.3d 1350, 1352-1353, 79 N.Y.S.3d 728, 731 [Third Dept., 2018]).

Appellant's argument that the Zoning Law is overbroad is nothing more than a rehash of the same unavailing analysis made upon Appellant's void for vagueness argument. Once again, Appellant baselessly claims that the Zoning Law prohibits common activities like playing musical instruments, singing songs around a campfire, displaying films in one's living room, rehearsing a school play, singing "happy birthday" at a birthday party, having a band play in a backyard party, having a band play at an outdoor wedding, and having religious observances where singing or music are part of the observance. Of course, as demonstrated above, all of the aforesaid activities mentioned by Appellant are ones that are ancillary to the numerous allowable principal permitted uses and special uses within the RU Rural district (R. 234-235). None of them

are equivalent in nature or scope to the land use being pursued by Appellant. Appellant is urging an unreasonable and thus improper interpretation of the Zoning Law. The law governing statutory interpretation necessitates a reasonable interpretation:

> "A statute will not be declared void because it is unskillfully drafted and will not be held void for indefiniteness or uncertainty where it is capable of reasonable construction. Difficulty in ascertaining its meaning or the fact that it is susceptible of different interpretations will not nullify it. The fact that people may differ in construing the statute or in applying it does not mean that it is void for vagueness because a statute is void only if it specifies no guide or standard at all."

97 N.Y.Jur.2d (Statutes) §222. Obviously, the Zoning Law is capable of reasonable construction such that the clear, reasonable and obvious distinction may be made between the Appellant's 3-day, all night, world wide web advertised Music Festival vis-à-vis typical, substantially smaller scale backyard and household activities.

As the Appellate Division properly held, "the theater restriction legitimately seeks to limit public cultural presentations to areas where they would not have a damaging impact and, as a result, does not 'facially 'prohibit[] a real and substantial amount of' expression guarded by the First Amendment' so as to have a chilling effect (citations omitted)" (R. 8, Town of Delaware v. Leifer, 162 A.D.3d 1350, 1352, 79 N.Y.S.3d 728, 731 [Third Dept., 2018]). Accordingly, Appellant's reliance upon Schad v. Borough of Mt. Ephraim, 452 U.S.61, 101 S. Ct. 2176, 68 L. Ed. 671 (1981), is entirely misplaced. This attempted analogy also fails. The theater use is not prohibited in the entire municipality, only certain districts.

POINT IV

THE SELLING OF TICKETS IS IRREVANT

Although the fact that Appellant publicly offers tickets for sale online to the Music Festival (conveniently portrayed but never proven to be an invitation only event), may be relevant to his motives and/or credibility, it was irrelevant to the issues before Supreme Court. It is for such reason that it was not raised in Respondent's moving papers before Supreme Court as a basis for relief. Whether or not Appellant sells tickets, whether or not the Music Festival is for profit, whether or not the Music Festival is open to the public, and whether or not the Music Festival is religious or secular, are all irrelevant. In each instance and under all of the alternatives, the impact of Appellant's land use on the community and its non-conformity with the Zoning Law would be the same. The Zoning Law is content neutral as to the purpose of Appellant's contemplated land use. The use is simply not permitted in the RU Rural District where Appellant's property is located, regardless of who may be doing it, or who may be attending it, or why it is being done, or how much is being charged.

POINT V

THE INJUNCTION GRANTED IS NOT TOO EXPANSIVE

The injunction is clear on its face as to what Supreme Court enjoined, namely Appellant's Music Festival or the like (R. 14-15). Expressly excluded from the injunction are uses consistent with the single family residence on the Appellant's Premises (R. 15). There is nothing in Supreme Court's Order and Judgment that precludes people from gathering to observe the Sabbath. Indeed, Justice Schick spoke to that on the record (R. 60). Any other activity that may or may not be pursued by Appellant was and remains purely speculative. If Appellant wishes to pursue an alternate use of his land, he need merely develop the particulars thereof, and inquire of Respondent's code enforcement office to ascertain whether it does or does not conform to the Zoning Law and what approvals, if any, are required. If Appellant is dissatisfied with the response, he has recourse under the Zoning Law and the state's enabling legislation (see Article XI and §220-11; Town Law §267-b and §267-c).

CONCLUSION

The Memorandum and Order below should be affirmed, in its entirety.

Dated: Jeffersonville, New York
January 23, 2019

Respectfully submitted,

s/Kenneth C. Klein

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WORD COUNT CERTIFICATION

Pursuant to §500.13(c)(1) of the rules of the Court of Appeals, the undersigned certifies that there are 4,129 words in this brief.

s/Kenneth C. Klein

KENNETH C. KLEIN, ESQ.