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August 2, 2018

New York State Court of Appeals
20 Eagle Street
Albany, New York 12207

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N.Y.S. COURT OF APPEALS

Re: Town of Delaware v. Leifer

May it please the Court:

I am counsel for the Town of Delaware, the respondent named in the Notice of Appeal filed in the above referenced action with respect to the Memorandum and Order of the Appellate Division, Third Department, decided and entered in this action on June 21, 2018. I write in response to the Court's letter of July 26, 2018, advising of its determination to examine subject matter jurisdiction in connection with the appeal.

I respectfully submit that a careful reading of the Third Department's Memorandum and Order, and examination of the record on which it is based, establishes that there is no substantial constitutional question to support an appeal of right therefrom.

"[T]o qualify as substantial, a constitutional question must appear to have colorable merit and not to be advanced solely or primarily as a predicate for appeal as of right. The Court has been vigilant against efforts to invoke mandatory jurisdiction by casting procedural error as a due process violation, or by casting the determination below as a deprivation of property or of other constitutional right." 12 New York Civil Practice, CPLR ¶5601.09.

The Memorandum and Order from which the instant appeal is sought to be taken is well reasoned and articulates in great detail and specificity the total absence of colorable merit in the issues appellant claims to require review by this Court. No basis exists, in fact or law, to support appellant's contentions that the respondent Town's Zoning Law is void for vagueness, overbroad and not narrowly tailored, or that the injunction issued by the court of original jurisdiction is overbroad. As the Third Department determined and the record reflects, the respondent Town's Zoning Law is content neutral, unambiguously limited and narrowly tailored to serve a significant government interest while leaving open ample alternative channels for communication.

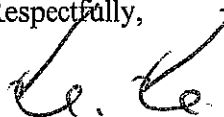
The Memorandum and Order specifically points to the relevant provisions of the respondent Town's Zoning Law, the Town's specific substantial governmental interest in preserving the character of the rural zoning district wherein appellant's property is situated and the specific manner in which the Zoning Law permits alternative channels for communication in other, more developed zoning districts of the Town. In reaching its conclusion, the Appellate Division specifically identified the unambiguous language of the Zoning Law and its plain meaning. The Third Department also expressly noted the respects in which residents in the rural zoning district in which appellant resides can 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 challenged restriction, thus resulting in a narrowly tailored law. Likewise, the Memorandum and Order sets forth in detail the respects in which the Town's Zoning Law is neither overbroad nor void for vagueness, pointing to the legitimate limitation of public cultural presentations to areas where they would not have a damaging impact and the limiting language of the Zoning Law that invites neither misunderstanding by a person of ordinary intelligence nor arbitrary enforcement.

Finally, the assertion that the underlying injunction is overbroad in violation of the First Amendment is belied by specific language contained in the original Order and Judgment. It expressly states "nothing contained herein shall be construed to prohibit uses consistent with the single family residence situate on the Premises." Those are the very same uses identified by the Appellate Division, as noted above (i.e. worship, watch films, play music, have family and friends visit and engage in other private behavior customarily conducted by homeowners).

Considering all of the foregoing, there is plainly no genuine substantial constitutional question to support the instant appeal. The constitutional issues claimed to exist are but naked assertions, designed as a baseless predicate to invoke mandatory jurisdiction under CPLR §5601(b)(1). Accordingly, this is an appropriate instance for the Court to exercise its discretion under §500.10 of the Court's rules and dismiss the appeal.

Thank you for your consideration.

Respectfully,



Kenneth C. Klein

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cc: Russell A. Schindler, Esq.