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COURT OF APPEALS

STATE OF NEW YORK

TOWN OF DELAWARE,

Respondent,

-against-

NO. 83

IAN LEIFER,

Appellant.

20 Eagle Street
Albany, New York
October 16, 2019

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The next appeal on this
2 afternoon's calendar is appeal number 83, Town of Delaware
3 v. Leifer.

4 (Pause)

5 MR. SCHINDLER: Good afternoon.

6 CHIEF JUDGE DIFIORE: Good afternoon, Counsel.
7 Do you care to reserve some rebuttal time, sir?

8 MR. SCHINDLER: If it's acceptable to the court,
9 I'll reserve two minutes, please.

10 CHIEF JUDGE DIFIORE: Of course.

11 MR. SCHINDLER: Thank you.

12 CHIEF JUDGE DIFIORE: You're welcome.

13 MR. SCHINDLER: I believe that the statute or
14 zoning ordinance that we've challenged herein it - - - its
15 biggest deficit or - - - under the constitution, is that
16 it's not narrowly tailored to address the significant
17 governmental interest identified by the Town of Delaware,
18 which was to prevent excessive noise, and specifically
19 amplified music, from dusk to dawn.

20 JUDGE STEIN: Where - - - where do you get that
21 that is the limit of what the Town intended to do here? I
22 - - - I don't see that. I - - -

23 MR. SCHINDLER: That brings me back - - -

24 JUDGE STEIN: - - - what the Town says is, is
25 that it is trying to protect and preserve the character of



1 this rural district. They don't say that it is limited to
2 excessive noise or amplified music - - -

3 MR. SCHINDLER: It - - -

4 JUDGE STEIN: - - - or anything like that. Where
5 is that coming from?

6 MR. SCHINDLER: First of all as - - - as the
7 court may be aware, we were deprived of the opportunity to
8 depose the Town Supervisor and the Code Enforcement
9 Officer, because I had consented to Mr. Klein's request for
10 an adjournment of the deposition.

11 JUDGE STEIN: Well, let's - - - let's just talk
12 about what - - - what the statute - - -

13 MR. SCHINDLER: So - - - so I'm limited to - - -

14 JUDGE STEIN: - - - says.

15 MR. SCHINDLER: - - - his paperwork. I didn't
16 get to ask those questions.

17 His - - - Mr. Klein's own paperwork - - - if I
18 recall properly, page 82 of the record - - -

19 JUDGE STEIN: Okay, but - - - but Counselor, the
20 record is what it is before us. We're limited to that, for
21 how - - - however that - - -

22 MR. SCHINDLER: So - - - so page - - -

23 JUDGE STEIN: - - - complete it is.

24 MR. SCHINDLER: - - - 82 of the record is Mr.
25 Klein's own affidavit, when he moved for summary judgment.



1 And he, as the Town Attorney, identifies the purpose of
2 this statute as preventing amplified music from dusk to
3 dawn.

4 JUDGE STEIN: That - - - he limits it to that.

5 MR. SCHINDLER: It's in his - - -

6 JUDGE STEIN: That you're telling - - - okay,
7 well, I'll go back and I'll look at that.

8 MR. SCHINDLER: - - - I'm pretty sure it's his
9 paragraph 16 of his aff - - -

10 JUDGE STEIN: Okay.

11 MR. SCHINDLER: - - - affidavit.

12 JUDGE STEIN: What about the other - - - well, we
13 can - - - I can - - - we can read that, but - - -

14 MR. SCHINDLER: So assuming that's the - - -

15 JUDGE STEIN: - - - so - - - so you're say - - -
16 you're assuming that that's all that the Town intended to -
17 - -

18 MR. SCHINDLER: I'm limited to that - - -

19 JUDGE STEIN: - - - accomplish.

20 MR. SCHINDLER: - - - by his own filing of the
21 motion for summary judgment prior to my having my
22 discovery.

23 JUDGE STEIN: Okay.

24 MR. SCHINDLER: So - - - so that's what limited
25 the record. And that's why it is what it is in the record.



1 JUDGE WILSON: Let me ask you a question about
2 the Town zoning code, and I'll - - - I'll ask Mr. Klein as
3 well. But the way I read it, on Mr. Leifer's property,
4 he's allowed to run a campground, that's a permitted use -
5 - - a special use. It's got a little asterisk, so he has
6 to have at least four acres to be able to do that. And
7 he's got forty, something like that.

8 MR. SCHINDLER: Sixty-eight.

9 JUDGE WILSON: So that he could invite people to
10 camp. They could set up tents. And there's not a limit I
11 saw in the Town code as to the number. Is that right so
12 far?

13 MR. SCHINDLER: That's my understanding.

14 JUDGE WILSON: Okay.

15 MR. SCHINDLER: So - - - and while they're there,
16 though, they're not allowed to sing or play - - -

17 JUDGE FAHEY: So - - - so could he - - -

18 MR. SCHINDLER: - - - any - - -

19 JUDGE FAHEY: - - - so let me ask this. Could he
20 set up a - - - an amusement park on the land?

21 MR. SCHINDLER: Could he?

22 JUDGE FAHEY: Yeah, could he? Could he set up an
23 amusement park?

24 MR. SCHINDLER: Well - - -

25 JUDGE FAHEY: Could he put up rides?



1 MR. SCHINDLER: It's not prohibited by - - -

2 JUDGE FAHEY: How - - -

3 MR. SCHINDLER: - - - this particular challenged
4 ordinance.

5 JUDGE FAHEY: I see. How about building a hockey
6 rink? You could build - - - could you build a recreational
7 facility on there?

8 MR. SCHINDLER: It's not prohibited by this
9 particular section of the zoning - - -

10 JUDGE FAHEY: I thought there were specific - - -
11 I thought it was - - - I thought it was a specific use that
12 was allowed?

13 MR. SCHINDLER: Is it? I - - - I don't recall
14 all the - - -

15 JUDGE FAHEY: I'm counting on you to answer that
16 question.

17 MR. SCHINDLER: - - - allowed uses.

18 JUDGE FAHEY: Slow down. I'm counting on you to
19 answer that question.

20 MR. SCHINDLER: Yes.

21 JUDGE FAHEY: Is it an allowable use in an RU
22 district?

23 MR. SCHINDLER: I would have to search the - - -

24 JUDGE FAHEY: I see.

25 MR. SCHINDLER: - - - statute. I don't know that



1 offhand.

2 JUDGE WILSON: You can find it on page 142 of the
3 record.

4 JUDGE FAHEY: Right. And it is in there, I
5 believe.

6 MR. SCHINDLER: It is in - - - the statute is in
7 the record, yes.

8 JUDGE FAHEY: Yeah. Yes.

9 MR. SCHINDLER: So I - - - and I imagine that if
10 a hockey rink was allowed to have been erected in this - -
11 -

12 JUDGE FAHEY: My point is - - - my point is - - -
13 my question is: is - - - is - - - you have two parts of
14 your argument. One that it's vague - - - the statute; and
15 one part that it's overbroad. So the question is, can a
16 distinction be drawn between theatrical/entertainment and
17 these other activities that are specifically allowed, which
18 seem to involve a large number of people and a public use
19 of the land.

20 Okay, it's all right. If you're - - - if you're
21 not comfortable answering it, don't worry about.

22 MR. SCHINDLER: No. I'm just not sure I - - -

23 JUDGE FAHEY: Yeah.

24 MR. SCHINDLER: - - - understand the question - -
25 -



1 JUDGE FAHEY: That's all right.

2 MR. SCHINDLER: - - - as it relates to our issue
3 here.

4 But to the extent that gatherings are allowed for
5 other purposes, no music would be allowed to have been
6 played - - - you couldn't sing the National Anthem at a
7 hockey event - - -

8 JUDGE FAHEY: Um-hum.

9 MR. SCHINDLER: - - - under this - - - that would
10 - - - it would convert your hockey rink into a theater,
11 because you're playing music - - -

12 JUDGE FAHEY: Since we're on the sports metaphor,
13 my - - - my - - - my question to you was a softball. I
14 wanted you to tell me, yes, Judge, yes, those things would
15 be allowed, but those other things wouldn't.

16 MR. SCHINDLER: Okay.

17 JUDGE FAHEY: That's why I went that way.

18 MR. SCHINDLER: Well, yes.

19 JUDGE FAHEY: All right.

20 MR. SCHINDLER: I do agree - - -

21 JUDGE FAHEY: There you go, all right.

22 MR. SCHINDLER: - - - I certainly agree.

23 In fact, what I - - - what I think of - - -

24 JUDGE STEIN: But they require a special use
25 permit, however - - -



1 JUDGE FAHEY: The judge is right. They would.

2 MR. SCHINDLER: Okay. Well, what about - - -
3 what about a political rally?

4 JUDGE STEIN: Did the petitioner here apply for
5 special use permit for this event?

6 MR. SCHINDLER: No, I believe he had originally
7 applied for a variance as opposed to a special use permit.
8 And I did not represent him in the course of that
9 proceeding. I came in after this proceeding had already
10 commenced to get the injunction that the Town got.

11 JUDGE STEIN: Am I - - - am I incorrect in
12 understanding that under this framework here, that unless a
13 use is specifically permitted, it is - - - it is
14 prohibited?

15 MR. SCHINDLER: Yes, that's - - -

16 JUDGE STEIN: In - - - in a particular district.
17 Okay.

18 MR. SCHINDLER: - - - that is the - - -

19 JUDGE STEIN: Um-hum.

20 MR. SCHINDLER: - - - way the zoning statute is -
21 - - is created.

22 JUDGE STEIN: Um-hum.

23 MR. SCHINDLER: So what I - - - what I submit is
24 that, for instance, the same gathering of people could have
25 involved a political rally and could have generated as much

1 noise, you know, using amplified speaking, but you know,
2 that would have been a permitted use, but the minute that
3 group of people decided, perhaps, to sing a song, or the
4 National Anthem, that then became a misdemeanor under the
5 statute.

6 JUDGE STEIN: I - - - I - - - as I understood it,
7 the - - - the theater restriction, which is what they're
8 basing this on, includes the word "facility", right?

9 MR. SCHINDLER: Yes.

10 JUDGE STEIN: And then defines what a facility
11 is, right?

12 MR. SCHINDLER: Well - - -

13 JUDGE STEIN: So - - -

14 MR. SCHINDLER: - - - it doesn't actually define
15 facility. And that was one of the questions we had, I
16 think, in our - - -

17 JUDGE STEIN: Okay, you - - -

18 MR. SCHINDLER: - - - case - - -

19 JUDGE STEIN: - - - you're right. But the - - -
20 but facility is - - - has a meaning of - - - an ordinary
21 meaning, right?

22 MR. SCHINDLER: Yes.

23 JUDGE STEIN: Okay.

24 MR. SCHINDLER: So that's why I argued that it
25 violated the - - - the vagueness - - - that it was void for



1 vagueness, because who would ever think that just having
2 music or a gathering in an open field is a facility of some
3 kind.

4 JUDGE STEIN: But this didn't - - - that's not
5 what this was? This - - - this had stages and it had
6 bathrooms and it had food, other things that arguably would
7 be considered a facility.

8 MR. SCHINDLER: And - - -

9 JUDGE STEIN: Right.

10 MR. SCHINDLER: - - - but of a temporary nature,
11 perhaps, yes. But it - - - he wasn't constructing a
12 theater in the usual sense like what we - - -

13 JUDGE RIVERA: They were putting up tents. Were
14 there not tents being put up?

15 MR. SCHINDLER: There were tents. They thought -
16 - -

17 JUDGE RIVERA: They were putting up a stage,
18 right?

19 MR. SCHINDLER: There may have been a temporary
20 stage put up. I believe - - -

21 JUDGE RIVERA: There were things that were built
22 to make possible the event as he envisioned it, correct?

23 MR. SCHINDLER: Yes. I agree with that.

24 But I - - - my belief is that the zoning law
25 would apply, for instance, if he had decided to build an



1 amphitheater - - -

2 JUDGE RIVERA: Okay.

3 MR. SCHINDLER: - - - or a drive-in movie
4 theater. That's the type of outdoor facility for the
5 presentation - - -

6 JUDGE WILSON: Well, but why is that - - - why is
7 that fundamentally different from putting up a temporary
8 stage for the period of time you need it and putting up
9 speakers and amplifiers? Why - - - why isn't that the
10 same?

11 MR. SCHINDLER: The difference is whether a
12 person would normally believe that their behavior was
13 prohibited by the law. That's the vagueness statute. And
14 a zoning statute would seem to be a regulation of the uses
15 of the property and the buildings - - - the types of
16 buildings that can be employed, as opposed to a simple
17 gathering of people at which there's ex - - - free
18 expression, and the primary purpose of being at - - -

19 JUDGE RIVERA: So where - - - where did - - -
20 where did the Woodstock event fall, under your definition?

21 MR. SCHINDLER: Well, that's a - - - first of
22 all, that's a mass gathering, which is not applicable here,
23 because it's - - - this was under 5,000 people, so it
24 didn't trigger the mass gathering statute.

25 But that's a sim - - - it's a similar - - -



1 JUDGE RIVERA: Under your description - - -

2 MR. SCHINDLER: - - - kind of event. It's a temp
3 - - - it was a temporary, three-day event that people came
4 to experience, you know, music, to be together and exchange
5 ideas, and - - - and the experience of - - - of the music
6 itself.

7 So it's similar in that regard, because it's a
8 temporary kind of arrangement. He's not building something
9 that would continue on beyond the three-day event. It's
10 not something like an out - - - drive-in movie theater,
11 that would be used regularly, outdoors, to show films.

12 It was just a gathering. You know, we've had
13 conversations with the Supreme Court and so on about the
14 idea that this is also a religious gathering, and the - - -
15 part of our objection here is that the injunction did not
16 say, thou shalt not have a theater. It says you cannot
17 have this event - - - the entire event.

18 So the - - - the part of it that was - - -

19 JUDGE FEINMAN: So - - -

20 MR. SCHINDLER: - - - a Sabbath observance - - -

21 JUDGE FEINMAN: - - - I want to talk to you about
22 that injunction. Let - - - let's say we don't agree with
23 your arguments about vagueness and whether it's narrowly
24 tailored and all of that - - - and overbroad. What's wrong
25 with the specific language of this injunction that requires



1 it to be altered or remitted to the Supreme Court to
2 narrow?

3 MR. SCHINDLER: The - - - the injunction - - - if
4 the court upholds the injunction itself, should just say
5 that Mr. Leifer is enjoined from engaging in music, films,
6 plays, or dramatic performances, because that's what the
7 ordinance prohibits. The ordinance does - - -

8 JUDGE FEINMAN: So your problem is the language
9 that says "any other event of the same kind, nature, or
10 description on the premises"?

11 MR. SCHINDLER: That - - - yes. That part of it
12 I object to. And I object to it applying beyond the
13 playing of music.

14 JUDGE FEINMAN: All right, so - - -

15 JUDGE WILSON: So for example, to overnight
16 camping, which is in the injunction.

17 JUDGE FEINMAN: - - - do we have to send it back.

18 MR. SCHINDLER: It should - - - it should not
19 prohibit the overnight camping, because that's not part of
20 what the definition of theater is. It should not apply - -
21 -

22 JUDGE FEINMAN: Do we have to send it back for
23 that, or do we have jurisdiction to - - - to tailor that
24 language?

25 MR. SCHINDLER: I believe the court can modify



1 the order that - - - that's the subject of this appeal is
2 the - - - the injunction itself.

3 CHIEF JUDGE DIFIORE: Thank you, Counsel.

4 MR. SCHINDLER: Thank you.

5 CHIEF JUDGE DIFIORE: Counsel?

6 MR. KLEIN: Good afternoon.

7 JUDGE WILSON: Could we start with the
8 injunction?

9 MR. KLEIN: Sure.

10 JUDGE WILSON: The scope of it?

11 MR. KLEIN: Well, the - - - the scope - - - the
12 scope of it is - - -

13 JUDGE WILSON: Doesn't it seem a little hard to
14 know what's prohibited, and doesn't it seem to prohibit
15 some things that shouldn't be prohibited?

16 MR. KLEIN: I - - - Your Honor, respectfully, no.
17 And the reason is, it's the appellant who designed his
18 project, his - - - his - - - his program. He developed
19 what he wanted to do on the land use. We're bound, in that
20 regard, to what he was doing.

21 JUDGE WILSON: Why should the injunction - - -

22 MR. KLEIN: All we've - - - and - - - and - - -

23 JUDGE WILSON: - - - why should the - - -

24 MR. KLEIN: - - - just - - -

25 JUDGE WILSON: - - - injunction prohibit him from



1 overnight camping?

2 MR. KLEIN: It doesn't prohibit him from
3 overnight camping, it prohibits from having that type of an
4 event. Everything is completely intertwined: the music,
5 the camping. The - - - it - - - the camping issue by
6 itself, he can't do the overnight camping without going to
7 the planning board and getting a special use permit, which
8 he didn't obtain. It would have to be designated as a
9 campground. That's under the zoning law in the - - - in
10 that RU district. So in that sense, if he had done it
11 without going to the planning board - - - which is what he
12 did, he - - - it would still be appropriate to prohibit it,
13 because he didn't have the requisite permit.

14 JUDGE GARCIA: I want to ask a follow-up on that.
15 It seems - - - and correct me - - - that the Town is
16 relying on the theater use, right? Because this a theater
17 use, it's not a permitted use, it's not a special use for
18 this rural district.

19 Assume the theater use did not apply here, that
20 it didn't meet those terms, would there be other
21 restrictions that would prevent this festival from going
22 forward?

23 MR. KLEIN: Yes, because the zoning law - - - the
24 - - - the analysis started with we look at the zoning law.
25 He's making this use out of his property.



1 JUDGE GARCIA: Right.

2 MR. KLEIN: So we look at the zoning law. Does
3 it fit within the zoning law? So I analyzed first the RU
4 district. I can't find anything in there that - - - that
5 corresponds to the use he's making.

6 JUDGE GARCIA: Right.

7 MR. KLEIN: Then I look at the overall zoning
8 law. And I find there are in two other zoning districts,
9 this use of theater. And it's not what you would
10 contemplate to be theater in its traditional - - - it's not
11 the building down the street. It - - - it's a much broader
12 definition of what constitutes a theater. And what he was
13 doing, fit, out of everything that's defined in the zoning
14 ordinances - - -

15 JUDGE GARCIA: Let's assume it did not - - -
16 let's assume it did not fit within theater.

17 MR. KLEIN: We would be here any - - - we would -
18 - - we would have done - - - taken the exact same action.

19 JUDGE GARCIA: Why? Based on what?

20 MR. KLEIN: Because there is nothing in the
21 zoning law that permits him to do what he was doing.

22 JUDGE GARCIA: So a music festival, let's call
23 it, right, that - - - with these types of attributes, that
24 doesn't fit within any use or - - - permitted use or
25 special use within his district?



1 MR. KLEIN: Not the way he had - - - not the way
2 he had presented it. No, sir.

3 JUDGE GARCIA: So whether or not it fits within
4 the theater use, it would still be prohibited, in your
5 view?

6 MR. KLEIN: Correct.

7 JUDGE GARCIA: So why do we need to talk about
8 the theater use?

9 MR. KLEIN: Just because it - - - to identify
10 that this is the only potential use that it would be
11 allowed in - - - the Town, number one. Number two, that
12 use is not available in that zoning district. And I think
13 also when you look at the - - - at the constitutional
14 argument, it also shows that there are alternative means
15 available for the type of activities that he's complaining
16 are re - - - being - - - the First Amendment argument,
17 those - - - those First Amendment impingements, so to
18 speak, we're not impinging it, because the zoning law makes
19 other avenues available to that particular use.

20 JUDGE RIVERA: So - - - so there are other places
21 where he could hold this event, exactly as he envisions it?

22 MR. KLEIN: I - - - I can't say that, Your Honor,
23 because you have to look at the size and scope of - - - of
24 - - - of what he was doing. This thing was morphing, year
25 after year after year, growing exponentially. It - - - it



1 got up to 400, 500 - - - I think the last version of it may
2 have been 700 people on sixty-five acres, in the middle of
3 the woods, with no - - - with no permanent facilities no -
4 - - no parking facilities, no - - - no sanitary facilities,
5 other than what little things are brought in. No review,
6 no approval - - -

7 JUDGE STEIN: Did you limit your objection to
8 music or amplified music being - - -

9 MR. KLEIN: No, Your Honor - - - Your Honor. In
10 fact I - - - I think - - - and that's, I think, a misnomer
11 too, that - - - that's been perpetuated throughout this
12 record, at least on the appellant's point of view.

13 If you look very early on in the record, the
14 first thing that happened was the Town made an application
15 for a preliminary injunction. That application for a
16 preliminary injunction was resolved by stipulation between
17 the parties. And if you look at - - - in the record, I
18 believe it's page 97, in there you will - - - where that
19 stipulation can be found - - - in there you will see that
20 the Town addressed and made sure that it addressed not just
21 simply noise. We were concerned about sanitary situations,
22 parking. We want - - - this is about health, safety, and
23 welfare.

24 It's not just about the impact on the community
25 from noise or whatever - - - traffic. Hundreds of people



1 were being brought into this facility, so to speak, that
2 wasn't really developed properly. Certainly there weren't
3 adequate sanitary - - -

4 JUDGE STEIN: What if this - - -

5 MR. KLEIN: - - - facilities provided for.

6 JUDGE STEIN: - - - was a family wedding of 1,000
7 people, and they needed a place to stay and they needed to
8 be fed and so on and so forth? Would that be prohibited?

9 MR. KLEIN: In - - - 1,000 people, in this
10 context - - - in this context? I think that it would be
11 very difficult to - - - to practically make that happen.
12 It - - - it's - - - theoretically, I suppose, it wouldn't
13 be prohibited, because if you could do that in your
14 backyard, but what it wouldn't involve - - - typically, a
15 family wedding - - - it wouldn't go on for three days, and
16 the music wouldn't - - - wouldn't commence at sunset and
17 run all the way through to - - - through to dawn.

18 JUDGE FEINMAN: I don't know. I some cultures,
19 the wedding goes on for seven days.

20 MR. KLEIN: Well, perhaps so, Your Honor, but - -
21 -

22 JUDGE FEINMAN: So - - -

23 MR. KLEIN: - - - that's - - - that would be
24 atypical for the experience of the Town of Delaware; I can
25 tell you that.



1 JUDGE RIVERA: So Counsel, am I understanding
2 your correctly that the alternatives that are available
3 cannot provide for this event as he envisions it?

4 MR. KLEIN: I - - - I can't say that, Your Honor,
5 because I'd have to examine - - - there - - - in the two
6 other districts - - - in one of the districts, it's - - -

7 JUDGE RIVERA: Well, you argued to the Appellate
8 Division that there were alternatives, so what - - - I'm
9 asking - - -

10 MR. KLEIN: Well, and the Appellate Division - -
11 -

12 JUDGE RIVERA: - - - I'm asking - - -

13 MR. KLEIN: - - - agreed that - - -

14 JUDGE RIVERA: - - - as he envisions it, where
15 are these alternatives?

16 MR. KLEIN: The alternative would be to find a
17 piece of property - - -

18 JUDGE RIVERA: Yeah.

19 MR. KLEIN: - - - in one of the zoning districts,
20 and - - - and if it's a - - - and in the zoning district
21 where it's a special use, bring a plan to the planning
22 board and obtain a special use permit and site plan
23 approval, allowing that to be done, where you would have to
24 show parking; you'd have to show what your sanitary
25 situation is; you would have a site plan that would show



1 exactly where the - - -

2 JUDGE RIVERA: And what district now exists where
3 he could go and seek out such property?

4 MR. KLEIN: I'm sorry, ma'am?

5 JUDGE RIVERA: What district would he do that in?

6 MR. KLEIN: I - - -

7 JUDGE RIVERA: Because you're saying he can't do
8 it in the rural district.

9 MR. KLEIN: No, you could do it - - - I believe
10 it's the CAL-R-1 and the CAL-B-1 District, and that's all -
11 - - that's all identified on the record.

12 JUDGE RIVERA: Yeah, but you don't know if there
13 is such a property available?

14 MR. KLEIN: I can't say that. No, Your Honor.

15 JUDGE RIVERA: And I already know that there's
16 case law about the market doesn't necessarily have to
17 facilitate it. I understand that argument.

18 JUDGE WILSON: But for the theater requirement in
19 the code, could he have this event, you know, let's say,
20 absent the stage, absent the music, on his own property, if
21 he'd gotten a special use permit?

22 MR. KLEIN: With - - - with the camping and
23 everything else on - - -

24 JUDGE WILSON: With the camping, yeah. With the
25 camping. With some kind of sanitary facilities that the -



1 - - that the Town said are adequate or necessary to grant
2 the permit. But if he's not having amplified music?

3 MR. KLEIN: I believe theor - - - theoretically,
4 I believe he could, if - - - if he applied for a special
5 use permit - - -

6 JUDGE WILSON: On his own - - -

7 MR. KLEIN: - - - as a campgrounds.

8 JUDGE WILSON: - - - on his own property?

9 MR. KLEIN: On his own pro - - - sure.

10 JUDGE STEIN: Could he have had amplified music
11 at some - - - for - - - at some intervals of time?

12 MR. KLEIN: Potentially, sure.

13 JUDGE STEIN: Um-hum.

14 MR. KLEIN: Because that - - - that might well be
15 something that could be an accessory activity associated
16 with a properly permitted campground. But what would have
17 happened in that instance is there would have been planning
18 board review, and they would have taken into account, as
19 they usually do, what's the impact of this.

20 And I would be very surprised if this planning
21 board in the town I represent or any other planning board
22 would allow that extent of overnight music to - - - to - -
23 - to continue on. That's what - - - they would strike a
24 balance. What the - - - what the applicant would
25 reasonably require in order to have his event versus what



1 you - - - how you would mitigate the impact of some of that
2 on the community and the surrounding area.

3 JUDGE RIVERA: So it could have the parts of this
4 event that are sort of the - - - what he calls the
5 religious practices; is that correct?

6 MR. KLEIN: Yeah, I don't think there's anything
7 in - - - in - - - in the zoning code that - - - that - - -
8 the - - - the zoning law is content-neutral. There's
9 nothing in - - -

10 JUDGE RIVERA: So - - - so the - - -

11 MR. KLEIN: - - - there that - - -

12 JUDGE RIVERA: So the point about the number of
13 people, the sanitation, all of that, doesn't matter, if
14 it's just that they're going to exercise - - -

15 MR. KLEIN: Well, it - - -

16 JUDGE RIVERA: - - - religious practices?

17 MR. KLEIN: - - - I have to give you the - - -
18 the lawyer's answer, Your Honor.

19 JUDGE RIVERA: Yes.

20 MR. KLEIN: It depends. It - - - you have to
21 flesh out those facts a little more. If you're having it
22 with the camping associated with it, and it's - - - and
23 it's going on for days on end, then it - - - you have to
24 look, again, at the zoning law and see how does this fit
25 into the zoning law. You - - - the - - - the - - - the



1 appellant makes great moment of trying to equate - - -

2 JUDGE FEINMAN: So let me - - -

3 MR. KLEIN: - - - this act - - -

4 JUDGE FEINMAN: - - - so let me ask you this - -

5 -

6 MR. SCHINDLER: I'm sorry.

7 JUDGE FEINMAN: - - - in the context of this

8 case, all right? He decides to build a sukkah - - -

9 MR. KLEIN: Um-hum.

10 JUDGE FEINMAN: - - - all right, a temporary

11 structure on that property and invite all these people to -

12 - - to come dine in the sukkah, fulfilling the commandment.

13 Now what?

14 MR. KLEIN: Well, Your Honor, I mean, I get it

15 but - - -

16 JUDGE FEINMAN: Can they ta - - - camp out

17 overnight in tents? No music, they're just going to - - -

18 you know - - -

19 MR. KLEIN: It'd be an awful big sukkah to get

20 700 people into it. They'd probably need - - -

21 JUDGE FEINMAN: Well, they go in at times, in

22 intervals. I'm not talking about 700 people. I think he,

23 himself, restricted it to - - - to 400.

24 MR. KLEIN: Even 400. I - - - you know, I mean,

25 you'd be talking about building a structure that needed a



1 building permit. And again, I'd - - - I'd have to analyze
2 that in the context of the zoning law and see how that fit,
3 because you're - - - you're - - - if you're - - - it's much
4 more expansive than what you would traditionally expect to
5 see in a sukkah.

6 It goes back to that same dichotomy that we - - -
7 that we've got here. What, I can't whistle in my backyard?
8 I can't sing a song? I - - - I can't watch a - - - I can't
9 watch a movie on my television? Of course the zoning law
10 doesn't prohibit people in the RU district from doing that.

11 And it's not a reasonable interpretation to argue
12 it that it does.

13 CHIEF JUDGE DIFIORE: Thank you, Counsel.

14 MR. KLEIN: Thank you.

15 CHIEF JUDGE DIFIORE: Counsel?

16 MR. SCHINDLER: I'm glad - - - I'm glad it was
17 brought up about the wedding, because I've always
18 analogized this to having some sort of backyard party or
19 wedding or even - - - you know, I - - - in my brief I
20 mentioned, for instance, that - - - what if he invited the
21 town over for a 4th of July celebration, and they decided
22 to sing or play music? How - - - there's no - - - the - -
23 - the statute really doesn't limit as to like the number of
24 people or the length of time.

25 There's the - - - or it doesn't allow for the



1 playing of music at a gathering for a shorter period of
2 time than a longer period of time.

3 JUDGE STEIN: Well, isn't it sort of self-
4 limiting? Because if you have to provide structures and
5 you have to fo - - - provide sanitary facilities and you
6 have to provide food vendors or - - - you know, or - - -
7 you know, all these other things, isn't that what defines
8 it?

9 Because if you invite some people over for the
10 4th of July, that presumes they're going to stay for
11 several hours or whatever, not for three days.

12 MR. SCHINDLER: Okay.

13 JUDGE STEIN: And they're not going to be eating
14 and - - - you know - - - and all that stuff.

15 MR. SCHINDLER: But - - - but it - - - but that's
16 not the objection that the law applies to. The law applies
17 - - - this particular statute or ordinance - - - to the
18 playing of music. And it doesn't distinguish between
19 amplified or not amplified - - -

20 JUDGE STEIN: I don't see where that is in the
21 law, the - - - the playing of music.

22 MR. SCHINDLER: The - - -

23 JUDGE STEIN: - - - I - - -

24 MR. SCHINDLER: - - - the definition of "theater"
25 is a building or room or outdoor facility for the playing"



1 - - - or "for" - - - I'm sorry - - - "for the presentation
 2 of films, plays, dramatic performances, or music." It
 3 doesn't have any relevance to the amount of sound, you
 4 know, how loud it is, or how soft the sound is, whether
 5 it's indoors or outdoors, whether it's daytime or nighttime
 6 - - -

7 JUDGE STEIN: But it does say that nothing shall
 8 prohibit the uses allowed under the household - - -

9 MR. SCHINDLER: In - - - inside.

10 JUDGE STEIN: - - - right?

11 MR. SCHINDLER: The statute - - - or - - - or the
 12 definition is that - - - that which is usually performed
 13 solely within a house. Well, I could make a lot of noise
 14 solely within my house. I could blast my stereo solely
 15 within my house and put the speakers near the window and
 16 disturb all my neighbors, and it wouldn't violate the
 17 zoning law, which is designed to prevent excessive noise.

18 And the - - - and the Constitution doesn't end -
 19 - -

20 JUDGE STEIN: It might violate other laws. I
 21 don't - - - I mean - - -

22 MR. SCHINDLER: It might. But there's not - - -
 23 there's no noise ordinance, which is what would have
 24 addressed the primary problem here, which was amplified
 25 music from dusk to dawn. It could have been solved with a



1 simple - - -

2 JUDGE RIVERA: Well, he - - - he said that they -
3 - - they identified that there were other issues that
4 concerned them, given the size and the length of time that
5 the event was going - - -

6 MR. SCHINDLER: But that's not what he identifies
7 - - -

8 JUDGE RIVERA: - - - on.

9 MR. SCHINDLER: - - - as the purpose of the
10 statute that's challenged. And the - - - and under the
11 narrow tailoring analysis, you have to identify - - - the
12 government has the burden of both identifying - - -

13 JUDGE RIVERA: Let's - - - let's say we disagree
14 - - - let's say we agree with his description of what
15 they've identified as their concerns raised by the event
16 and what this zoning was meant to address. How does that
17 affect your argument?

18 MR. SCHINDLER: Because first of all, the - - -
19 the - -- the Constitution doesn't end when you leave the
20 house. His - - - the Constitution - - - the First
21 Amendment applies to his entire sixty-eight acres, not just
22 those things you could do within a house.

23 So these people have a right - - - freedom of
24 association - - - to get together. And they have - - - if
25 they want - - - 400 people want to get together in an open



1 field on sixty-eight acres, they have that right.

2 They have the right to worship in that field.
3 They have that right. But the minute somebody plays a song
4 or sings, then they have now created a - - - a theater,
5 which is prohibited by criminal statute. And that's where
6 I think this - - - the - - - this law violates the First
7 Amendment. There's no - - - there's no limitation in terms
8 of - - - as I've said, daytime or nighttime, indoor or
9 outdoor, or amount of sound that's generated or not
10 generated.

11 JUDGE RIVERA: All right. Let's - - - let's say
12 we disagree with you. Is it - - - is it your
13 understanding, if you looked - - - if you haven't I
14 certainly appreciate that - - - that there are
15 alternatives, with respect to the argument that there's - -
16 - there are alternatives?

17 MR. SCHINDLER: Right. So that's where we got
18 into on the brief - - - on the re - - - I'm sorry - - - the
19 respondent's brief and my reply brief, where - - - where
20 Mr. Klein pointed out case law of this court that says
21 well, I have to prove that it's a violation beyond a
22 reasonable doubt. And I cited to Second Circuit case law
23 that says it's the government's burden of proof to
24 demonstrate, not only the nature of the significant
25 governmental interest that the law is supposed to be



1 narrowly tailored to achieve, but also the ample
2 alternative channels.

3 And the - - - the Town did not meet that burden,
4 did not demonstrate where within the Town this could
5 happen; how much of the Town - - - what percentage of the
6 Town? Is it one percent of the Town; five percent of the
7 Town, where these activities are allowed?

8 JUDGE WILSON: But it seems that we don't - - -

9 MR. SCHINDLER: They failed their burden of proof
10 on that.

11 JUDGE WILSON: - - - it seems as if we don't
12 know, because you didn't apply for a special use permit,
13 whether and to what degree some or all of this activity
14 would be allowed on Mr. Leifer's own land. And that makes
15 it sort of difficult to reach to the Constitutional
16 question.

17 MR. SCHINDLER: I understand that. I don't - - -
18 and I think I - - - from my point of view, I don't think
19 they would have granted.

20 I mean, they told him when he was before the
21 board - - - and it's quoted in - - - in the record - - -
22 they told him that music festivals are not permitted. They
23 considered this simply a music festival. They overlooked
24 the religious-observance aspect of this event. And they
25 just told him it's not permitted. And then the - - -



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CHIEF JUDGE DIFIORE: Thank you, Counsel.

MR. SCHINDLER: Okay, thank you.

(Court is adjourned)



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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Town of Delaware v. Ian Leifer, No. 83 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Penina Wolicki

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