

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X  
THE TOWN OF YORKTOWN, AND  
WILLIAM D. GREGORY, AS BUILDING  
INSPECTOR OF THE TOWN OF YORKTOWN,

Index No: 15369/09

Plaintiffs,

(Hon. Orazio R. Bellantoni)

-against-

THOMAS DECHIARO, Individually, and  
OLD ST. GEORGE'S LLC, THE WINERY  
AT ST. GEORGE, LLC and ATK CONSULTING,

Defendants.  
-----X

**DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO  
PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER  
AND PRELIMINARY INJUNCTION**

Respectfully submitted,  
CAMPANELLI & ASSOCIATES, P.C

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## **PRELIMINARY STATEMENT**

Pursuant to New York State law utilizing the defendants' property as a for-profit winery is considered a farming operation which is a permitted use on their property as it is currently zoned under the plaintiff Town of Yorktown's Zoning Ordinance.

Thus the plaintiffs' entire basis for commencing the instant action and motion for preliminary relief fails.

By filing the instant action and the instant motion for injunctive relief, plaintiffs, the Town of Yorktown and its building inspector, are using false and deceptive pretext to employ this Court to prevent the defendant, Thomas DeChiaro, from using his property as a winery as a matter of right, and to prevent him from exercising his freedom of speech and assembly rights to hold political fundraisers on his property.

Furthermore, the plaintiff Town is retaliating against Mr. DeChiaro for exercising his constitutional rights by commencing a federal civil rights lawsuit against the plaintiff Town and several Town officials, and for publicly supporting candidates to oppose and unseat the Town's current administration.

If the Court were to grant the plaintiffs' instant application for such broad injunctive relief, it would respectfully effectuate an unconstitutional prior restraint on Mr. DeChiaro's freedom of speech and assembly rights and it would facilitate and legitimize the plaintiffs' unconstitutional retaliation against him for his exercise of such rights.

## **STATEMENT OF FACTS**

For the sake of brevity, for a full recitation of the facts, the Court is respectfully referred to the affidavit of defendant Thomas DeChiaro, submitted herewith.

## LEGAL ARGUMENT

### POINT I

#### **THE PLAINTIFFS ARE NOT ENTITLED TO INJUNCTIVE RELIEF BECAUSE THE DEFENDANTS HAVE NOT VIOLATED THE TOWN'S ZONING ORDINANCE**

##### **A. Pursuant to New York State Law a For-Profit Winery is a Farming Operation Which is a Permitted Use on the Defendants' Property Under the Town of Yorktown Zoning Ordinance**

The plaintiff Town contends that the defendants' use of their residentially zoned property (the Old Stone Church) as a winery is a commercial use in violation of the Town of Yorktown Zoning Ordinance.

However, pursuant to New York State law utilizing the Old Stone Church as a for-profit winery is considered a farming operation which is a permitted use on the property as it is currently zoned by the Town of Yorktown.

The real property upon which the defendants' Old Stone Church is situated is zoned R1-20 under Town of Yorktown Zoning Ordinance.

Yorktown Town Zoning Ordinance §300-21(C)(1)(a)(4) explicitly states that "permitted main uses" of property zoned R1-20 includes:

[4] Farms, farm uses, customary farm operations . . .  
provided that no retail sales space greater than 500 square feet in area is maintained on the premises in connection with their use"

Yorktown Town Zoning Ordinance §300-21(C)(1)(a)(4)

Thus, under the plaintiff Town's zoning ordinance, a farm operation is a permitted use of property zoned R1-20, which means that the owner of property zoned R1-20 can engage in a farming operation upon such property "as a matter of right" under the Town's zoning ordinance §300-21(C)(1)(a)(4).

For over three years, defendant Thomas DeChiaro has been engaged in efforts to create and operate a vineyard and winery within the federally certified Hudson River Region, as a farming operation under Federal and New York State Law. (DeChiaro Aff. ¶9).

Towards that end, Mr. DeChiaro leased real property from the County of Westchester, planted a vineyard on it, and has been growing wine-making grapes there for several years. (DeChiaro Aff. ¶10).

Mr. DeChiaro's intent was to employ the Old Stone Church as the winery portion of his viticulture operation, which would process the grapes into wine for sale, with a retail space not greater than 500 square feet in conformance with Yorktown Town Zoning Ordinance §300-21(C)(1)(a)(4). (See Exhibit B, page 6, DeChiaro Aff. ¶29).

Prior to purchasing the Old Stone Church for this purpose, Mr. DeChiaro sought an opinion from the N.Y.S. Department of Agriculture and Markets as to whether or not use of the Old Stone Church as a winery would constitute a "farming operation" within the purview of New York Agriculture and Markets Law, Article 25-AA §301(11). (DeChiaro Aff. ¶30).

On October 25, 2005, the N.Y.S. Department of Agriculture & Markets confirmed in writing that Mr. DeChiaro's intended use of the Old Stone Church, namely for processing and marketing wine, *would* constitute a farming operation under N.Y.S. Agriculture & Markets law. (See correspondence from Robert Somers, Ph.D., Chief of the Agricultural Protection Unit of the

New York State Department of Agriculture & Markets, annexed hereto as Exhibit “C”).

However, following Mr. DeChiaro’s steadfast refusal to succumb to the demands of several Town officials that he pay graft monies as explicitly detailed in his accompanying affidavit, the Town and specifically plaintiff building inspector William Gregory acting under the direction and control of these nefarious Town officials, refused to issue Mr. DeChiaro a Certificate of Occupancy for his winery. (DeChiaro Aff. ¶¶68-71, *see also*, affidavit of Chris Sciarra, annexed hereto as Exhibit “G” at ¶¶11-20).

The plaintiff Town denied Mr. DeChiaro’s application for a Certificate of Occupancy to operate his permitted use winery under the pretext that, contrary to both New York State Law, and the position of the New York State Department of Agriculture and Markets (*See* Exhibit “C”), Mr. DeChiaro’s intended use was not a “farming operation” because his vineyard and his winery were not on “contiguous parcels of property” thus the winery could not be considered part of the viticulture farming operation.

On the contrary, New York State Law explicitly provides that farming operations which are conducted on noncontiguous parcels of property are still farming operations.

As enacted, New York Agriculture and Markets Law, created a specific definition for a “farm operation” which is explicitly defined as follows:

“11. “Farm operation means the land and on-farm buildings, equipment . . . handling facilities and practices which contribute to the production preparation and marketing of crops . . . as a commercial enterprise . . . Such farm operation may consist of one or more parcels of *owned or rented* land, *which parcels may be contiguous or noncontiguous to each other*”

New York Agriculture and Markets Law §301(11) (emphasis supplied).

Due to the above, Mr. DeChiaro sought to obtain entry into the County's Agricultural District for the specific purpose of securing protection from the New York State Department of Agriculture and Markets, against the Town for unreasonably preventing him from operating his farming operation *as of right*, under the pretext of applying a "more restrictive" definition of a "farming operation," than that which has been adopted by The State of New York. (DeChiaro Aff. ¶77).

Upon filing that application for the specific purpose of securing statutory protections which New York State Laws were intended to afford farming operations such as the defendants' winery, certain Town Board Members became openly enraged, and intensified in their determination to retaliate against the defendants and affirmatively prevent their entry into the County's Agricultural District. (DeChiaro Aff. ¶¶78-79).

Notwithstanding the fact that the Westchester County Agriculture and Farmland Protection Board prepared a formal written report recommending that the defendants' winery be *included* into the County's Agricultural District (*See* Exhibit "J") and the County drafted a resolution to *include* defendants' winery into the Agricultural District which the County Executive submitted to the County Board of Legislators for approval (*See* Exhibits "K" and "L" respectively), several officials of the plaintiff Town interfered to prevent the defendants' inclusion therein as further detailed in Mr. DeChiaro's annexed affidavit. (DeChiaro Aff. ¶¶80-124).

To summarize, it is beyond controversy that farming operations are a permitted use in the zoning district R1-20 wherein the subject property is located. The defendants' winery, with a retail space not greater than 500 square feet, together with the non-contiguous vineyard, would both be considered part of a farming operation pursuant to both New York State Law and the determination of the New York State Department of Agriculture and Markets (*See Exhibit C*).

Therefore, contrary to the plaintiffs' assertions, the defendants have not violated the Yorktown Zoning Ordinance by utilizing their property as a winery.

**B. Because the Plaintiff Town's Application of its Zoning Ordinance is Inconsistent With General New York State Law and Serves to Prohibit Conduct Specifically Permitted by State Law the Town's Application of its Zoning Ordinance Should be Preempted**

Notwithstanding the fact that both New York State Law and the New York State Department of Agriculture and Markets dictate that the defendants' winery is a farming operation and may be comprised of contiguous or noncontiguous parcels of property, the plaintiff Town of Yorktown has applied its Zoning Ordinance in an inherently inconsistent manner, depriving the defendants of their as-of-right farming operation because the vineyard and the winery are not on contiguous parcels of property.

Because the plaintiff Town's application of its Zoning Ordinance in direct conflict with New York State law and prohibits the defendants' as-of-right use of their property which would be specifically permitted by New York State law, the Town's application of its Zoning Ordinance should be preempted leading to a determination that the defendants have not violated the Yorktown Zoning Ordinance by utilizing their property as a winery.

As set forth hereinabove, Article 25-AA of New York State Agriculture and Markets Law, specifically §301(11) explicitly provides that a farm operation may be on one or more parcels which may be contiguous or non-contiguous to each other.

Contrarily, the plaintiff Town unreasonably limits farming operations to solely contiguous parcels.

When a municipality interprets its zoning ordinance in a manner that is in conflict with Article 25-AA of the New York State Agriculture and Markets Law, the zoning ordinance is superceded by Agriculture and Markets Law. *Inter-Lakes Health, Inc. v. Town of Ticonderoga Town Board*, 13 A.D.3d 846, 786 N.Y.S.2d 643 (3d Dept. 2004); *Town of Lysander v. Hafner*, 96 N.Y.2d 558, 733 N.Y.S.2d 358 (2001).

Furthermore, the application of a town zoning ordinance will be limited if the ordinance is inconsistent with any State law. *Zagoreos v. Conklin*, 109 A.D.2d 281, 293, 491 N.Y.S.2d 358, 367 (2d Dept. 1985). Therefore, a municipality may not normally prohibit that which is permissible under State law. *Id.*

Applying these principals to the matter at bar, the plaintiff Town of Yorktown cannot interpret or apply its zoning ordinance to restrict farming operations to solely contiguous parcels of property, when New York State Law clearly provides that a farming operation can be on either contiguous or non-contiguous parcels.

In a matter strikingly similar to the one at bar, *Kinderhill Farm Breeding Assoc. v. Walker*, 54 A.D.2d 811, 388 N.Y.S.2d 43 (3d Dept. 1976), the Appellate Division held that a Town building inspector's determination that the plaintiff did not operate a farm within the meaning of the Town Zoning Ordinance was clearly erroneous and lacked a rational basis when

the Zoning Ordinance in question read in conjunction with N.Y.S. Agricultural and Markets Law demonstrated that the plaintiff's use clearly constituted a farm operation.

Concomitantly, the Town Building Inspector in *Kinderhill Farm Breeding Assoc.* was directed to issue the license the plaintiff was seeking with respect to farm use. *Id.*

**C. The Plaintiffs' Have Offered False Pretext in Support of Their Request for Injunctive Relief**

The plaintiffs make certain primary contentions in support of their request for such broad preliminary relief, to wit, that the defendants have caused wetlands violations on the property, feigned parking and public safety concerns and the fact that the defendants have used the property for a commercial use in violation of the Town's Zoning Ordinance, which is addressed above.

**1. The Supposed Wetlands Violations**

The plaintiffs wildly contend that in an effort to create more parking on the defendants' property, the defendants allegedly "illegally filled-in wetlands." (*See Buckley Affirmation*, ¶39).

However, Howard Orneck, a *member of plaintiffs' own Zoning Board of Appeals* states in a sworn affidavit that these wetlands violations were "fictitious," were "created by the Town of Yorktown and several town officials" and were "only issued to hamper the winery project and were not based on facts." (*See Exhibit P*, ¶9).

The significance of this affidavit from Mr. Orneck cannot be overstated and it respectfully must be seriously considered by this Court when weighing the plaintiffs' credibility and motives.

Mr. Orneck, as a sitting member of the Yorktown Zoning Board of Appeals is an agent of the plaintiffs and pursuant to the plaintiff Town's own zoning ordinance and its website, it is his role to make the "final determination as to all questions involving interpretation of the zoning ordinance." (Annexed hereto as Exhibit "R" is a true copy of the Town's Zoning Board of Appeals web page, as well as §300-201 of the Town's Zoning Ordinance which are the "Powers and duties" of the Zoning Board of Appeals).

Furthermore, Mr. Orneck based his sworn affidavit upon repeated (4 days per week for a nine month period) visits to defendants' property upon which he observed zero wetlands violations caused by the defendants or their agents. (See Exhibit P, ¶¶2-9).

The plaintiffs have previously attempted to use these "fictitious" wetlands violations as an effort to prevent the defendants from opening their winery, and now they are using them as a means to cast the defendants in a bad light and convince this court to grant their extremely broad request for preliminary relief.

## **2. The Feigned Public Safety and Parking Concerns**

The plaintiffs' additionally raise false or exaggerated safety and parking concerns, many of which are undermined and discredited by the plaintiffs' own exhibits annexed to their moving papers.

In an effort to portray the defendants' church/winery as some dilapidated, borderline condemned and dangerous structure, the plaintiffs contend that the defendants' property "has not undergone inspection or repair in the last 20 years." (See Buckley Affirmation, ¶5).

Yet the plaintiffs attach a copy of a certificate of occupancy dated May 23, 2007 which demonstrates the contrary- - that the winery was repaired, improved and certainly inspected by the Town within the last two years. (See Buckley Affirmation, Exhibit D).

The plaintiffs raise parking issues which purportedly creates safety issues for the local residents, stating that persons “*routinely* park illegally along a busy street...” (See Buckley Affirmation, ¶5)(emphasis supplied).

However, in one of the police reports the plaintiffs’ submit as an exhibit, the officer specifically noted “[u]pon our arrival there were no parking violations observed...” (See Buckley Affirmation, Exhibit X)(emphasis supplied).

Moreover, the defendants’ current parking lot could accommodate parking for at least thirty (30) automobiles comfortably and the defendants are in the process of leasing an additional 5,100 sq. ft. parking lot adjacent to their property from the New York State Department of Transportation. (DeChiaro Aff. ¶164).

Of great import, just before Mr. DeChiaro purchased the property in question in 2005, Town council members Bianco and Campisi issued a joint memorandum to various Yorktown town boards and committees indicating a desire to purchase the Old Stone Church for the Town’s use as either a “Visitor Center, Nature Center, Museum, etc. (Annexed hereto as Exhibit “S” is a true copy of this memorandum).

Clearly, these uses are not residential and would create added traffic and parking concerns which the plaintiffs’ are taking issue with herein.

This memorandum also sheds light on another potential motive for the actions taken by the various Town officials against the defendants' property/project, as the Town wanted the property for its own use about six months prior to Mr. DeChiaro's purchase.

Based on the foregoing, the defendants have not violated the Yorktown Zoning Ordinance by utilizing their property as a winery. At the very least, the foregoing demonstrates that the plaintiffs are not likely to succeed on the merits and their request for preliminary injunctive relief should be denied in its entirety.

## POINT II

### **GRANTING THE BROAD INJUNCTIVE RELIEF REQUESTED BY THE PLAINTIFFS WOULD BE AN UNCONSTITUTIONAL PRIOR RESTRAINT ON THE DEFENDANTS' FREEDOM OF SPEECH AND ASSEMBLY RIGHTS**

By seeking such broad preliminary relief enjoining the defendants from "holding any functions open to the public" on their property, the plaintiff Town is seeking to employ this Court to issue an injunction as a form of prior restraint preventing the defendants from exercising their freedom of speech and assembly rights to hold political fundraisers on their property, as they would be permitted to do in their own home.

On July 9, 2009, Honorable Joan B. Lefkowitz, who telephonically conducted oral argument on the plaintiffs' Order to Show Cause for a temporary restraining order, recognized that the defendants had certain constitutional rights with respect to their property for purposes of political assembly.

Accordingly, Justice Lefkowitz limited the plaintiffs' proposed Order, enjoining the defendants from holding any *commercial* functions of more than 25 people on their property.

Based on Point I above and the affidavit of defendant Thomas DeChiaro, it is respectfully submitted that the defendants' use of their property as a winery is not a commercial use. Rather, it is a farming operation which is a permitted use on the defendants' property as it is currently zoned.

Thus, the July 9, 2009 temporary restraining order should respectfully be vacated in its entirety, and the plaintiffs' should not be entitled to any preliminary injunctive relief whatsoever.

Assuming in the alternative that this Court respectfully determines that the plaintiffs are likely to succeed on the merits or determines that there are questions of law or fact that would result in the granting of some form of preliminary relief to the plaintiffs, any preliminary relief respectfully must be carefully and narrowly crafted so as not to infringe or serve as a prior restraint on the defendants' First Amendment Rights to freedom of speech and assembly.

Based on Mr. DeChiaro's experiences with certain of the plaintiff Town's Board Members as fully detailed in his accompanying affidavit, he founded a political action committee entitled People for Honest Government (P4HG) in the Town of Yorktown. (DeChiaro Aff. ¶143).

P4HG is a political action committee with a stated mission to promote candidates to oppose and unseat the current administration in the plaintiff Town of Yorktown and the County of Westchester, members of which are unfit, inept and worst of all, corrupt. (DeChiaro Aff. ¶144, *See Exhibit A*).

The plaintiffs are certainly aware of Mr. DeChiaro's political action committee, as well as

its stated purpose, based upon their intimate knowledge of his website, as referenced throughout their moving papers.

On May 19, 2009 (one of the dates complained of by the plaintiffs), Mr. DeChiaro held a fundraising event for P4HG at his winery and issued a press release regarding same on his website. (DeChiaro Aff. ¶146, annexed hereto as Exhibit “Q” is a true copy of the press release for the political fundraiser).

As reflected in the press release for his political fundraiser (Exhibit Q), Mr. DeChiaro served *complimentary* food and beverages (not wine or any other alcoholic beverage) and did not charge for entry or for food or drink. (DeChiaro Aff. ¶147).

There was a *suggested* donation to Mr. DeChiaro’s political action committee, but it was not mandatory and was not required for entry or in exchange for hors d’oeuvres or non-alcoholic beverages. (DeChiaro Aff. ¶148).

As the plaintiffs contend, the property at issue is zoned residential. Mr. DeChiaro was not doing anything he could not have done if he desired to hold this political fundraiser at his own residence.

Since the plaintiffs have thus far prevented the defendants from operating their winery under the guise that they are using their residentially zoned property as an alleged illegal commercial use, when the defendants attempted to make some sort of viable use of their property to hold non-commercial political fundraisers, as they would be permitted to do in their own home, the plaintiffs herein have sought injunctive relief to stop that as well.

Any prior restraint on expression comes with a heavy presumption against its constitutional validity. *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971). “Prior restraints on speech are strongly disfavored.” *Rosenberg Diamond Development Corp. v. Appel*, 209 A.D.2d 239, 735 N.Y.S.2d 528 (1st Dept. 2002).

Temporary restraining orders and injunctions, i.e. court orders that serve to restrict speech are classic examples of prior restraints. *Alexander v. U.S.*, 509 U.S. 544 (1993). “When a prior restraint takes the form of a court-issued injunction, the risk of infringing on speech protected under the First Amendment increases.” *Metropolitan Opera Association, Inc. v. Local 100, Hotel Employees and Restaurant Employees International Union*, 239 F.3d 172 (2d Cir. 2001).

The plaintiffs advance that the defendants’ alleged prior illegal commercial use of the property should convince this Court to grant their broad request for preliminary relief enjoining the plaintiffs from holding any functions open to the public on their property.

Firstly, as discussed above, the defendants submit that they have not used their property as a commercial use in violation of the Town of Yorktown Zoning Ordinance.

Secondly, and of great significance, even assuming the Court determines that the plaintiffs have previously used their property commercially in violation of the Town zoning ordinance, the United States Supreme Court has repeatedly held that a Court cannot use past conduct as a basis for issuing an injunction the effect of which would be a prior restraint on future speech or conduct.

In *Near v. Minnesota*, 283 U.S. 697 (1931), the United States Supreme Court invalidated Court order which enjoined the defendant who had previously published articles found to violate a state nuisance statute, from producing any future malicious scandalous or defamatory publication.

Similarly in *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980), the United States Supreme Court struck down a Texas statute that authorized courts, upon a showing that obscene films had been shown in the past, to issue an injunction of indefinite duration prohibiting the future exhibition of films that have not yet been found to be obscene.

Thus, this Court respectfully cannot issue such a broad injunction that would prevent the defendants from holding non-commercial, political functions and fundraisers on their property as they see fit.

As such, should this Court issue some form of a preliminary injunction in this matter, the defendants' respectfully request that the Court uses language similar to that of Justice Lefkowitz in her temporary restraining order, which would allow for functions to be held on the defendants' property so long as they were not commercial in nature.

Furthermore, in light of the affidavit of Mr. DeChiaro, which states that his current parking lot could accommodate parking for at least thirty (30) automobiles comfortably and that the defendants are in the process of leasing an additional 5,100 sq. ft. parking lot adjacent to their property from the New York State Department of Transportation (DeChiaro Aff. ¶164), the defendants respectfully request that if an injunction is issued herein, the Court increase the occupancy limit imposed by Justice Lefkowitz from 25 people to 75 people.

**CONCLUSION**

Based upon the foregoing , the defendants respectfully request that the temporary restraining order dated July 9, 2009 be vacated and that plaintiffs' instant application for a preliminary injunction be denied in its entirety.

Dated: Mineola, New York  
August 3, 2009

**CAMPANELLI & ASSOCIATES, P.C.**

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