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Scott Salmon
Town Attorney
Township of Teaneck
818 Teaneck Rd
Teaneck, NJ 07666

Dear Mr. Salmon,

We have been asked to review the constitutionality of Teaneck's proposed ordinance, "Amending the Township Code for the Township of Teaneck to Provide for Additional Regulation on the Time Place and Manner of Special Events within the Township." After reviewing the proposed ordinance, we have identified several items for the council to consider.

Summary Conclusion

The definition of "Special Event "in Chapter 31B is well drafted. However, the council might want to consider a term that is different than "jogging group" to make it clear that a group of two or more bike riders is not included in the definition.

In section 31B-3, the term, "shall find" is ambiguous. The Council might consider a more judicial word like "conclude" or "determine" to replace "shall find."

Section 31B-3 does not contain a timeframe for the town to issue a permit. The Town Administrator should advise how many business days are needed to grant a permit and include it in this section. The safest timeframe to use, if the Administrator thinks it is possible, is to file the application five business days before the proposed event with a permit to be issued within two business days of application.

The hours of conduct in section 31B-4 listed as no earlier "than 8:00 a.m., nor continue beyond the hour of 10:00 p.m." is inconsistent with the hours listed in section 31B-9 (c) that protect the quiet enjoyment of resident's homes. While section 31B-9 specifically addresses noise, the council may want to conform the hours in both sections to avoid confusion.

The council may wish to consider a "breaking news" waiver to the ten-day application deadline to hold an event. If so, Section 31B-8 could be amended as follows:

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"No special event shall occur, and no person shall participate in a special event, absent the issuance of a permit, except if the special event is held in response to breaking news. If a special event is being held in response to breaking news, the ten-day period stated in section 31B-4 may be waived on good cause by the Township Manager in consultation with the Police Chief and the township attorney. The Township Manager shall report the decision to waive the ten-day application deadline to the Council at its next regularly scheduled meeting. All requirements and conditions for a special event permit pursuant to this ordinance need to be satisfied before the event may occur.

The concealed carry prohibition as to guns, which is included in the broader word, "weapon," in Section 31B-9(d) is constitutional as of today. However, this is the case because of a stay issued by the United States Court of Appeals for the Third Circuit. Once the court issues a final opinion, we will advise you.

Sections 31B(f); 31B(g) and 39B(h) all involve all require more specificity as to distance. Section 31B(f) uses the term "immediate vicinity." Section 31B(g) uses the term, "in front of or directly adjacent to a public residence." Section 31B(h) uses a distance of 300 feet.

The Supreme Court used a strict scrutiny standard when they considered the distance of 100 feet from voting booths as an appropriate distance for partisan campaign workers to solicit votes. Religious worship has first amendment protection that would arguably be considered equal to or greater than the political speech of campaign workers. The Council could consider a distance between 100 to 200 feet, but it should be less than 300 feet in Section 31B(h).

Section 31B(f) and 31B(g) use the terms "immediate vicinity" and "in front of or directly adjacent to a particular private residence." Both terms are vague. The Council should consider adding a specific distance not greater than 100 feet for these sections.

The language in Section 31B(f) referencing the determination by the Township Manager should be amended to include "in consultation with the Chief of Police," consistent with section 31B-3.

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The remaining provisions of the proposed ordinance are in accordance with judicial precedent and constitutional jurisprudence interpreting the First and Second Amendments.

Constitutional Framework

The Supreme Court has held a public entity can impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are narrowly tailored. *See Cox v. New Hampshire*, 312 U.S. 569 (1941) (upholding a state statute prohibiting a "parade or procession" upon a public street without special license).

To survive scrutiny, a time, place and manner restriction must "be justified without reference to the content of the regulated speech, narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of information." *Clark v. Cmt'y for Creative Non-Violence*, 468 U.S. 288, 293-94 (1984)(*citing City of Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984*); United States v. Grace*, 461 U.S. 171(1983); *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45-46 (1983)). In addition, the time, place, and manner, restriction "must not delegate overly broad discretion to a government official." *See Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992).

Analysis

I. Regulation of Sound Equipment

(Section 31B-9(c))

Section 31B-9(c) prohibits sound amplification equipment from being used between the hours of 7:00 p.m. and 7:00 a.m. As the regulation is similarly narrowly tailored and provides alternative methods and channels of information, the provisions is a lawful exercise of Teaneck's police power. *See id.*

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However, the Council might want to consider conforming the hours of section 31B-9 c with section 31B-4. The inconsistency could create unintentional or intentional confusion.

That cities and municipalities have "a substantial interest in protecting citizens from unwelcome and excessive noise, even in a traditional public forum such as the park, cannot be doubted." *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). In *Ward*, the Court held a New York City regulation requiring that bandshell performers use sound amplification equipment and a sound technician provided by the city constitutional. 491 U.S. at 784. In doing so, the Court held "[t]he principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Id.* at 791. Therefore, the central inquiry and controlling consideration is the government's purpose in adopting the regulation, with a regulation serving purposes unrelated to content "deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ibid.* As "[t]he principal justification for the sound-amplification guideline is the city's desire to control noise levels at bandshell events, in order to retain the character of the Sheep Meadow and its more sedate activities," the Court discerned the regulation's purpose had nothing to do with content. *Id.* at 792.

Here, the time, place, and manner regulation is motivated clearly by a need to, in the words of Justice Kennedy, avoid amplification's "undue intrusion into residential" areas and eliminate any attendant disturbance of said residents' quiet enjoyment of the premises. *Ibid.* The regulation is clearly aimed at ensuring the safe enjoyment of the community at night hours, and as such is motivated by precisely the content neutrality invoked by the Court. *Ibid.*

Sound amplification regulations are also narrowly tailored to serve a significant governmental interest, as "it can no longer be doubted that government 'has a substantial interest in protecting its citizens from unwelcome noise.'" *Id.* at 796 (citing *Taxpayers for Vincent*, 466 U.S. at 806). An interest in preserving tranquility "is perhaps at its greatest when government seeks to protect the 'well-being,

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tranquility, and privacy of the home,'" with the government equally at liberty to "protect even such traditional public forums as city streets and parks from excessive noise." *Id.* (quoting *Frisby v. Schultz*, 487 U.S. 474, 484 (1988)). Further, a government regulation of sound amplification must be narrowly tailored but "need not be the least restrictive or least intrusive means of doing so." *Id.* at 798. A regulation is narrowly tailored "so long as the . . . regulation promotes a substantial interest that would be achieved less effectively absent the regulation." *Id.* at 799 (citing *United States v. Albertini*, 472 U.S. 675, 689 (1985)).

As "[i]t is undeniable that the city's substantial interest in limiting sound volume is served in a direct and effective way" by limiting sound amplification during evening hours, Teaneck's ordinance provision "is narrowly tailored to serve the substantial and content-neutral government interests of avoiding excessive sound volume" and would survive First Amendment scrutiny. *See id.* at 800; 803.

II. Regulation of Concealed Carry

(Section 31B-9(d))

Section 31B-9(d) prohibits the open carrying of any type of weapon "including, but not limited to, knives (except for pocket knives), bricks, bats, clubs, sticks, and brass knuckles." Guns are included in the word, "weapon," even though the ordinance makes no reference to guns. Alhough the Third Circuit has granted a stay against an order enjoining concealed carry regulations as it pertains to guns in New Jersey, it remains to be seen whether concealed carry restrictions will survive judicial scrutiny.

As of the date of this opinion, the language of this ordinance as drafted is constitutional. We will advise you when the third circuit issues an opinion on the subject of guns.

In *New York State Rifle & Pistol Association, Inc. v. Bruen*, the Supreme Court held New York's proper-cause requirement for granting an unrestricted license to carry a handgun in public violated the Second and Fourteenth Amendments. 597 U.S. 1, 71

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(2022). New York's proper-cause statute required a license applicant wishing to carry a firearm outside his home or place of business for self-defense to demonstrate proper cause exists to issue the license. N.Y. Penal Law § 400.00(2)(f). If an applicant could not make that showing, he or she could only receive a "restricted" license for public carry, which only allows the possession of a firearm for limited purposes, such as hunting, targeting, shooting or employment. *See In re O'Brien*, 87 N.Y.2d 436, 438-39 (1996).

The New York statute did not define proper cause, but New York courts have held an applicant shows proper cause "only if he can 'demonstrate a special need for self-protection distinguishable from that of the general community.'" *Bruen*, 597 U.S. at 12 (citing *In re Kenosky*, 75 App. Div. 2d 716, 717 (1981)). The Court, in an opinion by Justice Thomas, found such a standard demanding, "generally requir[ing] evidence of 'particular threats, attacks, or other extraordinary danger to public safety.'" *Id.* at 12-13 (quoting *In re Martinek*, 294 App. Div. 2d 221, 222 (2022)). As such, the proper-cause statute was vitiated, with the Court holding "that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Id.* at 17. To withstand Second Amendment scrutiny, the burden, the Court held, is on the government to demonstrate a "firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id.* at 19. In articulating the new standard, the Court vitiated the two-step approach focusing on the need for a claimant to demonstrate how a firearms regulation or law "comes to the core of the Second Amendment right and the severity of the law's burden on that right." *See Kanter v. Barr*, 919 F.3d 437, 441 (7th Cir. 2019).

The Court's opinion cautioned, however, that longstanding laws forbidding the carrying of firearms in sensitive places, such as schools and government buildings, were not endangered by the holding. *Bruen,* 597 U.S. at 30. As there were no disputes regarding the lawfulness of weapons prohibitions in legislative assemblies, polling places, and courthouses, "it is settled that these locations were 'sensitive places' where arms carrying could be prohibited consistent with the Second Amendment." *Ibid. Bruen* thus took pains to hold "courts can use analogies to those

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historical regulations of 'sensitive places' to determine that modern regulations prohibiting the carrying of firearms in new and analogous sensitive places are constitutionally permissible." *Ibid.* Though *Bruen* conspicuously declined to define a sensitive place, the Court did caution against defining a sensitive place as "all places where people typically congregate and where law-enforcement and other public-safety professionals are presumptively available." *Id.* at 31 (internal quotation marks omitted).

In the wake of *Bruen*, New Jersey's Legislature passed A. 4769/S. 3214, designating permitted demonstrations, protests, and licensed public gatherings sensitive places and prohibiting handguns within 100 feet of the same. 2022 N.J. Laws, ch. 131, § 1 (g). The United States District Court for the District of New Jersey has held "that prohibitions on carrying firearms at government buildings tend not to violate the Second Amendment, but to the extent that a dispute arises concerning a prohibition at a particular government building, resolution will turn on whether analogies to historical regulations can justify the challenged law." *Koons v. Platkin*, 673 F.Supp.3d 515, 606 (D.N.J. 2023).

The district court held designating permitted demonstrations, protests and licensed public gatherings sensitive places "would stretch the sensitive places doctrine to cover all places of public congregation", precisely the bridge too far *Bruen* warned against. *Id.* at 636 (citing *Bruen*, 597 U.S. at 31). As such, the district court held plaintiffs were likely to prevail on the merits and granted a preliminary injunction barring enforcement of Chapter 31's concealed carry provisions as it related to permitted demonstrations, protests and licensed public gatherings. *Id.* at 670.

On June 20, 2023, the United States Court of Appeals for the Third Circuit granted a stay of the preliminary injunction, permitting Chapter 31's concealed carry ban to remain in effect pending the outcome of the litigation. *Koons v. Platkin*, United States Court of Appeals for the Third Circuit, No. 23-1900, Order Granting Stay in Part and Denying Stay in Part (June 20, 2023), citing Fed. R. App. P. 8. As of this writing, the Third Circuit has yet to release an opinion.

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However, the Second Circuit has held that it is unreasonable to interpret laws banning concealment of weapons at constitutional assemblies or protests to "include every gathering or even every expressive gathering." *Antonyuk v. James*, 120 F.4th 941, 1040 (2d Cir. 2024). The Second Circuit also drew a distinction between peaceful demonstrations that are a "vital part of democratic discourse" and "demonstrations by armed mobs". *Id.* at 1041. Such authority is naturally only persuasive, not binding. Considering the Third Circuit's stay, the language banning concealed carry is permissible until federal appellate precedent clarifies the matter.

III. Regulation of Limited Public Forums

(Section 31B-9(f))

Section 31B-9(f) prohibits special events from being conducted "inside or in the immediate vicinity of a police or fire station, the interior of a Township-owned or Township-controlled building, or other buildings or locations within the Township, as determined by the Township Manager," in the interests of public safety. With further refinement of the term, "immediate vicinity," as suggested below, and adding, "in consultation with the Chief of Police," to make the language in this section consistent with section 31B-3, this section of the ordinance is likely to withstand judicial scrutiny.

In First Amendment jurisprudence, not all public property is the same, with different types of property accorded different treatment. On one end of the spectrum, there are traditional public forums-properties including public streets and parks, that "have immemorially been held in trust for the use of the public, and time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry*, 460 U.S. at 45. Content-based restrictions in traditional public forums receive strict scrutiny, meaning that government must show a compelling state interest and narrow tailoring of measures to achieve that interest, including the absence of least restrictive alternatives. *Ibid.*

There are also designated public forums, properties that have "not traditionally been regarded as a public forum [but are] intentionally opened up for that purpose."

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Pleasant Grove City v. Summum, 555 U.S. 460, 469 (2009). Content based restrictions receive strict scrutiny in designated public forums as well. *Ibid.*

Vicinities such as police and fire stations, as well as most Township buildings, are categories of "government properties that have not, as a matter of tradition or designation, been used for purposes of assembly and communication." *NAACP v. City of Philadelphia*, 834 F.3d 435, 441 (3d Cir. 2016). As such, they enjoy the "least protection under the First Amendment" with content-based restrictions "valid as long as they are reasonable and viewpoint neutral." *Ibid.* Furthermore, unlike with public forums, in which strict scrutiny is applied, a review of a regulation affecting nonpublic forums "does not require narrow tailoring or the absence of less restrictive alternatives. Indeed, the 'Government's decision to restrict access . . . need only be reasonable, it need not be the most reasonable or the only reasonable limitation.'" *Ibid.* (citing *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985)).

Here, the language of the proposed provision prohibits all special events regardless of content, so the ordinance will not be subject to the strict scrutiny of content-based restrictions. *Ibid.* However, the language "in the immediate vicinity" may encompass public streets and parks in which restrictions on speech are subject to the most exacting scrutiny. *Perry*, 460 U.S. at 45. Moreover, the language "all special events", encompassing as it does all manner of events subject to First Amendment scrutiny, could be subject to an overbreadth challenge, facially or as applied. *See Bd. of Airport Commissioners of the City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987) (holding that resolution of board of airport commissioners banning all First Amendment activities within the Central Terminal Area was substantially overbroad, lacking in limited construction, and, by prohibiting nearly all expressive speech, was unconstitutional even if airport was considered a nonpublic forum).

Therefore, instead of "in the immediate vicinity" language, perhaps a specific circumference, such as 100 feet, would be warranted. *See Burson v. Freeman*, 504 U.S. 191 (1992) (holding in part that a 100-foot boundary establishing a campaign free zone around a polling place was constitutional).

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IV. Regulating First Amendment Activity Adjacent to Private Residence
(Section 31B-9(g))

Section 31B-9(g) prohibits picketing or engagement that is disruptive or is undertaken to disrupt and directed and take place directly in front of or directly adjacent to, a particular private residence. The ordinance's provision is in accord with Supreme Court jurisprudence and likely to be upheld. For greater clarity, the council might want to consider the recommendation for amended language as suggested below.

Ordinances prohibiting public picketing in residential areas and public streets often survive strict scrutiny if they are narrowly tailored to "protect[] the well-being, tranquility, and privacy of the home . . . the highest order in a free and civilized society." *Carey v. Brown*, 447 U.S. 455, 471 (1980). Jurisprudence often remarks of the unique nature of the home, "the last citadel of the tired, the weary, and the sick," *Gregory v. Chicago*, 394 U.S. 111, 125 (1969), and recognizes that "[p]reserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value." *Carey,* 447 U.S. at 471. And it is undisputed that "[o]ne important aspect of residential privacy is protection of the unwilling listener." *Frisby*, 487 U.S. at 484. Similarly, "a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions." *Id.* at 484-85.

The ordinance's language prohibiting "picketing or engagement" that is "disruptive or is undertaken to disrupt" a particular private residence is similar to that upheld in *Frisby* prohibiting "any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield." 487 U.S. at 477. However, to be sufficiently tailored to protect "only unwilling recipients of communications" and "eliminate no more than the exact source of 'evil' it seeks to remedy", the language of the ordinance needs to be further refined. *Taxpayers for Vincent*, 466

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U.S. at 808-10. The ordinance can be revised narrower to reflect a prohibition on purposeful picketing that includes obstruction.

The Council might consider language for the ordinance as follows: *"It is prohibited to picket or engage in other activities that have the effect of being disruptive or obstructive or are undertaken to disrupt and are directed at and take place within [50, 75 or 100] feet of a particular private residence."*

V. Time, Place and Manner Restrictions around Religious Establishments
(Section 31B-9(h))

Section 31B-9(h) prohibits picketing or engagement in other activities that are disruptive or are undertaken to disrupt and are directed at and take place within 300 feet of a religious establishment, including a house of worship or religious school, from one hour before any religious program or activity until one hour after it concludes. As the ordinance implicates the free exercise clause, the timeframe is likely to withstand judicial review. However, the distance of 300 feet, which is 1/3 of a football field, is too far.

The establishment of buffer zones around healthcare facilities and religious establishments to impede unnecessary confrontation and proselytizing have been upheld if they are narrowly tailored and do not impose unconstitutional prior restraints on speech. *See Hill v. Colorado*, 530 U.S. 703 (2000). In *Hill*, the Supreme Court upheld a Colorado statute rendering it "unlawful for any person within 100 feet of a healthcare facility's entrance to 'knowingly approach' within 8 feet of another person, without that person's consent, 'for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with [that] person . . .." *Ibid.* As the Colorado statute "simply establishes a minor place restriction on an extremely broad category of communications with unwilling listeners" and served a compelling interest in protecting vulnerable individuals entering health care facilities from unwanted intrusion, the statute was upheld. *Id.* at 729.

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However, the Court has also held invalid a Massachusetts statute rendering it a crime to knowingly stand on a public way or sidewalk within 35 feet outside of an abortion clinic. *See McCullen v. Coakley*, 573 U.S. 464 (2014). By imposing serious burdens on petitioner's speech, the buffer zones "compromise petitioner's ability to initiate the close, personal conversations that they view as essential to 'sidewalk counseling'." *Id.* at 487. The buffer zones, by depriving petitioners of their ability to communicate with patients, "burden substantially more speech than necessary to achieve the Commonwealth's asserted interest" and thus failed to withstand First Amendment scrutiny. *Id.* at 490.

However, in contrast to *McCullen*, another constitutional liberty-the free exercise of religion-is implicated by the ordinance. *See* U.S. CONST., AMEND. I. As the free exercise of religion, and easy ingress and egress to house of religious worship is tantamount, the proposed ordinance would survive constitutional scrutiny.

To ensure the provision survives constitutional scrutiny, we suggest modifying the buffer zone to between 100 feet and 200 feet to better accord with Supreme Court precedent. *See Burson*, 504 U.S. at 208 (holding a 100-foot boundary in a public forum sufficiently tailored to survive strict scrutiny).

In addition, to provide greater scienter, we propose language to the provision prohibiting activity that has the effect of being disruptive or obstructive of public sidewalks. The relevant provision should therefore read, "It is prohibited to picket or engage in other activities that are disruptive or are undertaken to disrupt and are directed at, and take place within, [*200 feet ?]* of a religious establishment, including a house of worship or religious school, from one hour before any religious program or activity commences until one hour after it concludes. *It is prohibited to engage in conduct having the effect of obstructing public rights of way and sidewalks***.** The primary purpose of this provision is the protection and preservation of First Amendment religious liberty rights by ensuring that members of the community are free from targeted harassment and intrusion when attending a religious establishment to engage in the free exercise. *The Township of Teaneck also maintains a compelling*

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interest in ensuring public sidewalks remain unobstructed for the Township's residents."

If you require an additional information or clarification, please feel free to contact me at any time.

Sincerely,

Donald Scarinci
Managing Partner