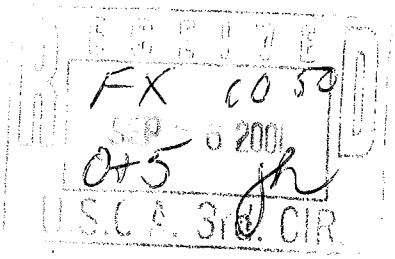
IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT



TENAFLY ERUZ ASSOCIATION, INC. CHAIM BOOK, YOSIFA BOOK, STEPHANIE DARDIK GOTLIEB, and STEPHEN BRENNER

Plaintiffs-Appellants-Movants,

v.

THE BOROUGH OF TENAFLY, ANN MOSCOVITZ, individually and in her official capacity as Mayor of Borough of Tenafly, CHARLES LIPSON, MARTHA B. KERGE, RICHARD WILSON, ARTHUR PECK, JOHN T. SULLIVAN, each individually and in their official capacities as Council Members of the Borough of Tenafly

Defendants-Appellees-Respondents.

Docket No. 01-3301 (cmh)

District Court No.: 00-6051 (WGB)

Sat Below: Hon. William G. Bassler, U.S.D.J.

APPELLEES-RESPONDENTS' OPPOSITION TO APPELLANTS-MOVANTS' MOTION FOR A STAY OR INJUNCTION PENDING APPEAL

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INTRODUCTORY STATEMENT

Defendant-Appellee-Respondent Borough of Tenafly (hereinafter "Appellee" or "Borough") opposes what is essentially a third attempt by the Plaintiffs-Appellants-Movants (hereinafter "Appellants" or "the Eruv Association") to obtain injunctive relief that would require the Borough to allow the plastic strips (Hebrew *lechis*), that are integral to the religious validation of the *eruv* at issue in this case, to remain in place on the Borough's right-of-way.

Appellants have had the benefit of approximately eight months during which the Borough voluntarily consented to continue a temporary restraining order issued by the District Court, even though the Borough at all times maintained that the unauthorized, unlawful placing of the strips on the utility poles violated the 47-year-old content-neutral Tenafly sign ordinance. See Tenafly Ordinance 691(attached hereto as Appendix Exhibit A).[1]

In making his ruling below, Judge Bassler had the opportunity to consider the substantive testimony and demeanor of 10 live witnesses before making his credibility determinations. After considering that testimony, as well as affidavits, extensive briefing, and oral argument, the District Court dissolved its temporary restraining order prohibiting the Borough from removing the lechis and denied Appellants' motion for a preliminary injunction in a lengthy published opinion. See

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[1] Borough of Tenafly Ordinance 691, which was enacted in 1954, provides in relevant part:

> No person shall place any sign or advertisement, or other matter upon any pole, tree, curbstone, sidewalk or elsewhere, in any public street or public place, excepting such as may be authorized by this or any other ordinance of the Borough.
> (Tenafly Ordinance 691 Article VIII(7).).

Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly, 2001 WL 897351 (D.N.J. Aug. 10, 2001). Pursuant to that decision, the town was permitted to have the plastic strips removed.

After the District Court denied the Eruv Association's motion for a preliminary injunction, Appellants sought a stay of the District Court's order pending appeal. The District Court at first denied the request for a stay pending appeal, notifying this Court from the bench that "I want the Circuit to know that I don't think there's any merit in granting this stay." Exhibit C; Motion for a Stay or Injunction Pending Appeal ("Motion I")[2] at Page 18, Lines 7-10. However, at the urging of Plaintiffs, the Court then expressly, solely for "the sake of convenience" of this Court in order to avoid an emergent application, extended existing restraints until this Court decides the instant Motion. Id.; Order, Exhibit B, Motion I. While the Borough left the initial matter of the stay up to the District Judge, the Borough's attorney told the District Court that defendants disagreed with the further application of Plaintiffs for a stay pending this Court's review. Exhibit C, Motion I at Page 16, Lines 4-5. There is no allegation in Appellants' papers that the District Court applied an incorrect standard of review in its denial of interim relief pending appeal.

[2] As the Court is aware, two separate Motions have been filed on behalf of Appellants. This Exhibit is Contained both within the "Motion For a Stay or Injunction Pending Appeal" (hereafter referred to as "Motion I") filed by Weil Gotshal & Manges LLP and Hellring Lindeman Goldstein & Siegal LLP on behalf of the Tenafly Eruv Association, Inc., Stephanie Dardick Gottlieb and Stephen Brenner, and the "Motion for Injunction" filed by Mintz Levin Cohn Ferris Glovsky and Popeo, P.C. on behalf of Chaim Book, Yosifa Book and Stephen Brenner (hereafter referred to as "Motion II").

Moreover, in denying Appellants' stay motion, the District Court reiterated that it was "absolutely convinced that the Plaintiffs are not likely to succeed on the merits." Id. at Page 10, lines 8-9 (emphasis added). The District Court explained that its decision took into account the public interest in favor of implementing "preexisting neutral law," Id. Page 15, Lines 5-7, coupled with the great unlikelihood of success on the merits. The District Court found that these factors outweighed its estimation that there was no substantial injury to the Borough, and its conclusion that, if there were actually to have been a constitutional violation here, that legal fact would amount to irreparable injury. See Id., Pages 10-11.

STANDARD OF REVIEW

Ultimately in this matter, the decision whether to enter a preliminary injunction is committed to the sound discretion of the trial court and will be reversed "only if the court abused its discretion, committed an obvious error in applying the law, or made a serious mistake in considering the proof." Southco, Inc. v. Kanebridge Corp., 258 F. 3d 148, WL 821438 page 2, (3d Cir. 2001) *citing* Loretangeli v. Critelli, 853 F. 2d 186, 193 (3d Cir. 1986). For the purposes of the stay, however, review by this Court is limited, because the grant or denial "is almost always based on an abbreviated set of facts, requiring a delicate balancing of the probabilities of ultimate success at final hearing with the consequences of immediate irreparable injury which could possibly flow from the denial of preliminary relief." United States Steel Corp. v. Fraternal Ass'n of Steelhaulers, 431 F. 2d 1046, 1048 (3d Cir. 1970).

In exercising its limited review of the grant or denial of preliminary

injunctive relief, the appellate court asks: (a) Did the movant make a strong showing that it is likely to prevail on the merits? (b) Did the movant show that, without such relief, it would be irreparably injured? (c) Would the grant of a preliminary injunction substantially have harmed other parties interested in the proceedings? (d) Where lies the public interest? Republic of Philippines v. Westinghouse Electric Corporation, 949 F. 2d 653, 658 (3d Cir. 1991); Commonwealth of Pennsylvania ex. Rel. Creamer v. United States Dep't of Agriculture, 469 F. 2d 1387, 1388 n. 1 (3rd Cir. 1972). The applicant for a preliminary injunction bears the burden of establishing that it has a right to injunctive relief and that it will suffer irreparable injury if relief is not granted. Bancroft & Sons Co. v. Shelley Knitting Mills, Inc., 268 F.2d 569, 574 (3d Cir. 1959).

ARGUMENT

The first element of the standard for an injunction pending appeal is therefore whether Appellants can make a strong showing they are likely to succeed in their claim that the District Court abused its discretion in denying the preliminary injunction. Appellants must also show they will suffer irreparable injury absent a stay; that the stay will not injure other parties; and that the public interest favors the stay.

Appellants must meet the high threshold of showing that they are likely to succeed in convincing this Court that the District Court abused its discretion. It is therefore unsurprising that the substance of Appellants' two motions amounts to neither more nor less than rearguing the merits of the case, with the addition of legal arguments never raised before the District Court, and therefore waived. Tabron v. Grace, 6 F.3d 147, 153 n.2 (3d Cir. 1993). Because Appellants' arguments are mistaken with respect to

the posture of the case, the substance of the District Court's opinion, and certain aspects of the applicable law, the motion for stay pending appeal should be denied.

I. The Status Quo is the Absence of Unlawfully Attached Lechis

A primary purpose of a preliminary injunction is maintenance of the status quo until a decision on the merits of a case is rendered. Acierno v. New Castle County, 40 F. 3d 645, 647 (3d Cir. 1998). Appellants have urged that the "status quo" is the state of affairs that existed after their unlawful installation of the lechis in violation of the ordinance through self-help. Motion I at 7. However, Judge Bassler, in denying the stay application, declared that because the lechis were installed in violation of the Ordinance 691, "the status quo is not the telephone poles with the lechis on them; the status quo should be the telephone poles with the lechis removed." Exhibit C, Motion I at Page 13, Lines 21-25.

The District Court held that Plaintiffs erected the strips in violation of this neutral ordinance, albeit in good faith, and that the Borough properly ordered the strips removed in accordance with the law. The fact that the Borough acted in good faith to permit the strips to remain pending litigation should not now be used misleadingly to characterize this illegal state of affairs as "the status quo." It would be a perverse result if the Borough's good-faith willingness to await the District Court's decision before enforcing its laws were to be used to bind the Borough to tolerating continued violation of its ordinance even after the District Court has entirely vindicated the Borough's legal position.

II. Appellants' Irreparable Injury Argument is Incorrect in Law and Fact

Appellants' arguments with respect to irreparable injury reiterate an erroneous view of the law that contradicts the holding of the District Court. The District Court's conclusion with respect to irreparable injury was simply that a constitutional violation would itself constitute irreparable injury of some kind if a constitutional violation were found to exist here. See Exhibit C, Motion I Page 10, Lines 15-23. Appellants go much further, and argue that absent an injunction, "[w]omen who have infant children will, in all likelihood, be totally unable to attend religious services"; "Families will be unable to visit friends. . . .on the Sabbath," and worshippers "will be unable to carry" prayer books and prayer shawls to the synagogue on Yom Kippur." Motion II at 8.

These arguments restate, in a more implausible form, claims already squarely rejected by the District Court when it held that government was under no obligation to accommodate Plaintiffs' religious practices. Put simply and respectfully, it is Orthodox Jewish law, and not any action or inaction on the part of the District Court, this Court, or the Borough of Tenafly, that affects Appellants' ability to attend synagogue or carry objects on the Sabbath or Yom Kippur. Nothing that this Court can do, would do, or would refrain from doing could render women with infant children "unable" to attend services. The choice to adhere to Orthodox Jewish law resides, as it must under the Free Exercise Clause, with Appellants alone.

Neither government nor the courts is obligated to accommodate Appellants' needs under Orthodox Jewish law. Failure to offer a religious accommodation cannot legally constitute injury of any kind, irreparable or otherwise. As

the District Court put it, "[w]hile the Court is certain that the accommodation argument makes sense to Plaintiffs, the Court is just as certain that it is without merit under existing constitutional jurisprudence." 2001 WL 897351, *35.

Moreover, it is remarkable for Appellants to allege irreparable injury with respect to circumstances that are both easily avoidable and are commonly experienced by Orthodox Jews in the many places in the U.S. and the world, throughout Jewish history, where no eruvs exist. Thus Orthodox Jewish women with infant children might choose to stay at home rather than push their infants in carriages to synagogue, or they might choose to attend synagogue while others—the children's fathers, for instance—minded the children. To put the point simply: the choice between staying at home and attending synagogue is imposed not by the Borough of Tenafly or by any court of the United States, but by Orthodox Jewish law itself. It cannot be irreparable injury under our laws to make such a private, voluntary, constitutionally protected choice. It cannot seriously be maintained that women who make this archetypically private decision are "irreparably harmed" by making it, or else it would be necessary to conclude that Orthodox Jewish women who live where there is not, and has never been, an eruv are "irreparably harmed" every Sabbath.

A family's choice not to visit another family on a given Saturday is also an obviously unconvincing instance of an "irreparable" injury. The other six days of the week remain available, as do those Jewish holidays on which carrying and pushing baby strollers is permitted. What is more, the visit remains possible under Jewish law if infant children remain at home. Beyond these basic factual observations, there is the fact that it is not the Borough of Tenafly, but Orthodox Jewish law that imposes the choice.

Orthodox Jewish families refrain from such visits on the Sabbath the world over, and have always done so where eruvim did not exist or where an Orthodox sect does not recognize eruvim. It would be unprecedented for a court to find irreparable injury under such circumstances, and Appellants provide no precedent to the contrary.

Last, and perhaps most remarkably, Appellants claim that they will be irreparably injured by the inability to carry prayerbooks and religious garments to synagogue on Yom Kippur. But Appellants do not deny that prayerbooks and religious garments such as prayer shawls may be brought to synagogue before Yom Kippur, and left in the synagogue during the Yom Kippur holiday. This has been the normal practice in Orthodox synagogues from time immemorial where no eruv is in place. It can hardly be maintained that Appellees will suffer "irreparable" injury if they must leave their prayerbooks and prayer shawls in synagogue on Yom Kippur as did their forefathers before them, and as Orthodox Jews do on Yom Kippur throughout the world. And once again, the choice to carry prayerbooks or not, like the choice to drive or walk to synagogue on the holiday, is one imposed by Orthodox Jewish law, not by the laws of the Borough of Tenafly.

Appellants' various claims of irreparable injury are therefore unavailing both in terms of legal logic and in terms of any actual "harm." Absent irreparable injury of this sort, the relief requested should be denied.

III. The District Court Correctly Found that the Borough was Motivated by a Desire to Avoid an Establishment Clause Violation that Would Have Resulted Had the Plaintiffs' Request Been Granted.

In the District Court, Appellants raised both free exercise and free speech claims. With respect to free exercise, Appellants claimed, inter alia, that the Borough "discriminatorily applied Tenafly Ordinance 691 . . . because they wanted to keep Orthodox Jews from moving into Tenafly." 2001 WL 897351, *35. In rejecting this claim, the District Court first explained that there was no "animosity or prejudice against Orthodox Jews." Id. at *38.[3] It further explained that the Borough's "fundamental reason" for rejecting Appellants' application for permission to erect the eruv on the municipally controlled utility poles "was that public property should not be permanently allocated to a religious purpose." Id. at *46. The application of Ordinance 691 sought to avoid "permanent religious installations on property to which the public typically does not have the right of access." Id. The Borough was, in other words, motivated by the desire to avoid a violation of the Establishment Clause. This concern was, in the District Court's view, fully justified by the fact that granting the Eruv Association's request would have violated the Establishment Clause:

> Tenafly Ordinance 691 is a neutral regulation of general applicability. Everyone is bound by it. No one has the right to use the poles for either expressive speech or religious exercise. Given this generally applicable restriction, the accommodation of Plaintiffs' request [to erect the eruv] would amount to granting a sectarian religious group preferential access to

[3] It is therefore unavailing for Appellants simply to reassert the same factual arguments regarding bias that were rejected by the District Court. See Motion I at 5-6. The trial court's factual determinations underlying its decision must be accepted unless clearly erroneous. Merrell-National Laboratories, Inc. v. Zenith Laboratories, Inc., 579 F. 2d 786, 792 (3d Cir. 1978).

> governmental property, and would violate the Establishment Clause. See Capitol Sq. Review and Advisory Bd. v. Pinette, 515 U.S. 753, 766 (1995).

2001 WL 897351 at *35 (citation in original; emphasis added).

The District Court therefore concluded that there was no violation of the Free Exercise Clause of the kind that might have existed if the Borough had applied Ordinance 691 with the discriminatory intent to target Appellants' religious exercise.

With respect to free speech, Appellants argued that they were entitled to use the utility poles for their expressive activity. The District Court rejected this claim independently of the free exercise claim. It explained that the utility poles, which it held to be the relevant forum, were a nonpublic forum. "There is no evidence," the District Court said, "that the Borough has ever allowed the utility poles or its right-of-way to be used by the public for unfettered discourse or debate." 2001 WL 897351 at *29.[4] In the

[4] Appellants continue to allege that the forum at issue is the Borough's utility poles and its right-of-way, which they contend are "generally used" for various non-religious secular speech. Motion II at 12. However, the District Court specifically ruled "since Plaintiffs seek access to the utility poles specifically, **the utility poles are the relevant forum, as distinct from the entire municipal right-of-way**." 2001 WL 897351 at *30 (emphasis added) ("[a] Court should take a tailored approach to ascertaining the perimeters of the relevant forum within the confines of government property.") (citing Cornelius v. NAACP Legal Defense Fund, Inc., 473 U.S. 788, 801 (1985). Therefore, although the two church directional signs that Appellants make much of are located within the Borough's right-of-way, the Court ruled that these signs were not located within the forum at issue. But even if they were located within the applicable forum, the Court rejected Appellant's argument that these signs were expressive speech, noting there is no record the Borough had knowledge they were on its right-of-way, the Borough has requested their removal, and any religious symbolism on the signs was marginal to the purpose of the signs, "since no one has questioned their primarily directional purpose." Id. at *33. Appellants argued below that the poles themselves were used for expressive speech with Borough permission each year when the local Chamber of Commerce erects holiday displays of garland on poles in the downtown area. The Court found that these holiday displays were decorations, and did not symbolize symbolic speech. Id. at *32. Although the displays may arguably be considered commercial speech, the Court said they were temporary and of a far different expressive nature than the lechis; if Appellants had wanted to place their own secular holiday displays on the poles, there may have been

nonpublic forum, the District Court held, Tenafly was entitled, indeed obliged, to apply Ordinance 691, which was "a reasonable, facially neutral restriction on access to the right-of-way, that as applied did not have the effect of discriminating against Plaintiffs' viewpoint." Id. at * 35.

Appellants now argue that the Borough's admitted motivation of avoiding an Establishment Clause violation renders the Borough's actions a violation of Appellants' free-speech rights. In support, Appellants cite a line of cases holding that, where government has opened a forum for various kinds of speech, that forum must be opened to religious speech on topics within the scope of the forum. See Motion II at 9-10 (citing Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993); Pinette, Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819 (1995); Good News Club v. Milford Central School, 121 S.Ct. 2093 (2001)). Appellants' argument is incorrect, and its cited cases are inapposite, for two basic reasons.

First, the District Court here expressly held that it would have been a violation of the Establishment Clause to grant Appellants' request to erect the eruv. See id. ("Given this generally applicable restriction, the accommodation of Plaintiffs' request would amount to granting a sectarian religious group preferential access to governmental property, and would violate the Establishment Clause.") (citing Pinette, 515 U.S. at 766) (emphasis added). In Lamb's Chapel, Pinette, Rosenberger, and Good News Club, the Supreme Court held there was no Establishment Clause violation in granting religious speakers access to a forum that had already been opened to non-religious speakers on a

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a claim for viewpoint discrimination. The Court dismissed as "unavailing," Appellants' attempt to make an issue of other examples of pole use, such as ribbons placed on the poles and various signs and house numbers erected by residents. Id. at *32-33.

wide variety of subjects. The reason was that the forum in those cases was freely available to other, non-religious speakers, and so there was "no realistic danger that the community would think that the District was endorsing religion or any particular creed," Lamb's Chapel, 508 U.S. at 395, and no violation of the Lemon test, see id. (citing Lemon v. Kurtzman, 403 U.S. 602 (1971)). See also Rosenberger, 515 U.S. at 841-42 (holding that "there is no real likelihood that the speech in question is being either endorsed or coerced by the State"); Good News Club, 121 S.Ct. at 2106.

Here, however, unlike the Lamb's Chapel line of cases, the granting of access to Appellants would have violated the Establishment Clause. The reason is that, unlike the fora at issue in the Lamb's Chapel line, the utility poles had not been opened to a wide variety of types of speech. Indeed, the District Court found that the Borough had not permitted any speech on the nonpublic forum of the poles. The District Court therefore held that granting access to the poles for religious speech alone would have violated the Establishment Clause, because granting Appellants' request would have given them preferential access to government property for religious purposes. The basis for the District Court's conclusion was the statement in Pinette itself that "[o]f course, giving sectarian religious speech preferential access to a forum . . . would violate the Establishment Clause." Pinette, 515 U.S. at 766. It was the District Court's factual conclusion that granting Appellants' request would have constituted preferential access of the kind barred by Pinette and the Establishment Clause.[5] This conclusion makes perfect

[5] Appellants incorrectly and misleadingly state that the Borough "conceded that the existence of the eruv did not violate the Establishment Clause." Motion II at 10. In fact, the Borough maintained throughout the arguments below that it was justifiable for the Council to have believed that granting the eruv request would violate the Establishment Clause. At the time of the earlier Borough Council meeting, before the decision or the litigation, counsel for the Borough informed the Council that the question was governed

sense in light of the District Court's holding that the utility poles constituted a nonpublic forum to which no speaker had been given access.

The second reason that the Lamb's Chapel line does not lead to the conclusion urged by appellants is that, in Lamb's Chapel, Pinette, Rosenberger, and Good News Club, the Supreme Court has made it clear that, absent viewpoint discrimination, it is perfectly acceptable for government to restrict access to the nonpublic forum. In a nonpublic forum, "control over access. . . can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." Cornelius, 473 U.S. at 806. So long as its action was viewpoint neutral—a question addressed below—the Borough was permitted to restrict access to the poles for any permissible reason. It was therefore entitled to decide, as it did, to apply neutral Tenafly Ordinance 691 so as to continue keep all speech off of the nonpublic-forum poles.

Thus, even if there were only the possibility of an Establishment Clause violation, or of the appearance of such a violation, the Borough could permissibly have chosen neutrally to maintain its closed nonpublic forum on the poles. Unlike the Lamb's Chapel line of cases, where keeping religious speech out of the public forum necessarily constituted an independent free-speech violation, here the decision to keep the nonpublic forum poles free of any speech did not constitute an independent free speech violation.

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by ACLU of New Jersey v. City of Long Branch, 670 F.Supp. 1293 (D.N.J. 1987), which held constitutional an eruv erected under different conditions, and did not address the question of an eruv in a nonpublic forum that was legally closed to all speech.

The decision not to amend a long-standing ordinance that maintains a nonpublic forum by prohibiting any speech differs fundamentally from a decision to exclude only some religious speech from a forum that has been opened to public speech from all other viewpoints. The doctrinal complexity of this point is in complete accord with common sense. A municipality cannot choose to allow a variety of speech viewpoints in a forum while barring religious speech. But a municipality can bar all speech from a given forum by instituting a viewpoint-neutral law, and it can keep that bar in effect even when some group—religious or not—requests that the bar be removed.

IV. The District Court Correctly Found as a Matter of Fact that Tenafly Did Not Engage in Viewpoint Discrimination.

The District Court found as a matter of fact that the Borough did not engage in viewpoint discrimination in applying its facially neutral, forty-seven year old Ordinance 691 to maintain the utility poles as a nonpublic forum. Appellants cannot show that this factual finding was clearly erroneous. They therefore attempt to attack it by raising the accurate, but legally irrelevant point that forum classification must follow a municipality's de facto actions. See Motion II at 12 (citing Gregoire v. Centennial School Dist., 907 F.2d 1366, 1374 (3d Cir. 1990)). The standard for forum classification is irrelevant to the factual finding of viewpoint neutrality. Even in a nonpublic forum, "control over access" must be "viewpoint neutral." Cornelius, 473 U.S. at 806; see also C.H. ex rel. Z.H. v. Oliva, 226 F.3d 198, 211 (3d Cir. 2000) (Alito, J., dissenting). Tenafly Ordinance 691 is viewpoint neutral. The only issue before the District Court was the factual question whether the application of neutral Tenafly Ordinance 691 was also viewpoint neutral.

Appellants' approach therefore amounts to an attempt to shoehorn the factual question of as-applied viewpoint neutrality into the legal rubric of forum classification. The District Court's findings about viewpoint discrimination are factual and clear. The utility poles have been used for seasonal decorations. These decorations, the court held, "are what they are: decorations. They do not constitute symbolic speech as that term is used in a constitutional sense." 2001 WL 897351 at *32. As an alternative holding, the District Court added that even if the decorations had *de minimis* expressive value, they were "arguably commercial speech . . . paid for by local businesses and placed by the Chamber of Commerce, in order to promote a holiday shopping atmosphere." Id.

The Court also declined to find that the Borough either knew about or tacitly approved the symbolic tying of ribbons around utility poles in the past. Id. at *32-*33. That private citizens may have put up "house numbers or lost dog notices," which the Borough has ordered removed when it found them, similarly was found not to constitute viewpoint discrimination. Id. at *36. The District Court concluded that there had been no viewpoint discrimination of the sort that might exist if the utility poles had been designated public so as to be used for other comparable expressive speech but not for religious speech.

V. The District Court Correctly Held that There Was No Free Exercise Violation Because There Was Neither Infringement of the Exercise of Religion Nor Discriminatory Application of Ordinance 691.

The District Court analyzed Appellants' free exercise claims under Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993), by pointing out that, unlike the ordinances in that case, which "were neither neutral nor of general application," Tenafly Ordinance 691 was "a pre-existing, neutral law of general applicability." That ordinance "neither 'intentionally impeded plaintiffs' religious activity,' as in Brown v. Borough of Mahaffey, 35 F.3d 846 (3rd Cir. 1994), nor enacted an ordinance targeting the plaintiffs' religious activity as in Hialeah." 2001 WL 897351 at *36.

Appellants now argue, for the first time in this litigation, that the Free Exercise clause "does not permit a government agency to prohibit conduct that is otherwise lawful when that same lawful conduct is motivated by religious observance." Motion II at 14. As a threshold matter, this argument has been waived, because it was not raised below, although it was fully available to the Plaintiffs when they were before the District Court. Tabron v. Grace, supra. But waiver aside, Appellants' argument is transparently meritless. Ordinance 691 prohibits private persons from erecting signs or other objects on the municipal rights of way, but it does not prohibit the municipality from erecting such objects pursuant to ordinance. The weather-stripping placed on the poles by Verizon in the normal course of business is placed there pursuant to Tenafly Ordinance 1127, which authorizes New Jersey Bell and its successors (now Verizon) to use the poles for telecommunications purposes. See Tenafly Ordinance 1127, attached as Appendix Exhibit B.

If Appellants' argument were correct, it would follow that if government could build a town hall on government property, then any citizen could also erect a building—say, a church—on government property. Lukumi Babalu or the Free Exercise Clause does not intend this absurd result. Under Lukumi Babalu, government may not intentionally single out a religious practice for special statutory prohibition without a compelling interest in doing so. That is all that case law – or the Free Exercise Clause – requires.[6]

VI. The District Court Correctly Found that the Fundamental Purpose of the Borough was to Avoid Violating the Establishment Clause.

The District Court found that "one of the reasons" that some members of the Borough Council voted against granting Appellants' request "was because of the perceived divisiveness and exclusivity that an eruv generate in Tenafly." 2001 WL

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[6] In Motion I, Plaintiffs also re-raise their unsuccessful arguments below that Appellees violated the federal Fair Housing Act, 42 U.S.C. § 3600 et. seq. (hereinafter "FHA"). The FHA provides, in part, that "it shall be unlawful to refuse to sell or rent ... or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. §3604(a). The phrase "otherwise make unavailable" has been interpreted to reach a variety of discriminatory housing practices, including discriminatory zoning restrictions. LeBlanc-Sternberg v. Fletcher, 67 F.3d 412, 424 (2d Cir.1995). However, no court has ever extended the phrase "otherwise make unavailable" to a decision not to grant permission for the construction of a permanent structure on government property to enhance the convenience of some current and potential residents. Recognizing this, the District Court found that "the FHA does not impose on a municipality the affirmative obligation to honor all requests for the use of its right-of-way that might make a community more attractive to a given religious group." 2001 WL 897351 at *45. "Even if the decision of the Borough Council was discriminatory," the District Court said, "this Court cannot conclude that it 'otherwise made unavailable or denied' housing," id., and it therefore ruled that Appellants lacked standing to bring an FHA claim and did not have a likelihood of success on the merits of that claim. For the same reasons cited by the District Court, Appellees believe these arguments must fail and cannot be the basis for injunctive relief.

897351 at *38. The District court characterized this motive as "constitutionally impermissible," id. but went on to say that although this motive was "part" of the Council's motivation, it was not the fundamental reason for the denial. Rather, "the fundamental reason underlying the Borough Council's decision was its concern that public property should not be permanently allocated to a religious purpose." Id. at *46. This motivation was not only the predominant motive, the Court held, but it was also legally justified, because "the accommodation of Plaintiffs' request . . . would violate the Establishment Clause." Id. at *35.

Appellants now claim, also for the first time, that the mere consideration of the religious character of the request to Appellants' detriment by the Borough Council constituted a free-exercise violation. See Motion II at 15-16. Appellants cite no case or statute in support of this unprecedented suggestion, nor could they. Instead they essentially propose a per se liability rule for the Free Exercise Clause that has no basis even in the law of equal protection.

Perhaps more remarkably, Appellants' proposed rule essentially calls for ignoring the dictates of the Establishment Clause altogether. The District Court held that it would have been an Establishment Clause violation to give Appellants preferential access to government property. If so, then how could the Borough have evaluated Appellants' request without taking into account the "religious character of their interest in affixing plastic strips to Verizon's utility poles?" Motion II at 16.

Indeed, Appellants consistently argued to the Borough Council that the religious character of their request was precisely the reason that they ought to be accommodated. Before the District Court, Appellants, not the Borough, insisted on the

religious character of the eruv and its nature as symbolic speech. It would follow from Appellants' argument that the Borough had no choice but to accede to Appellants' request the moment they identified that request as religious in character. That result is clearly absurd, but perhaps it is not surprising in the light of Appellants' overall position here. They maintain that the Borough was under a constitutional duty to accommodate their religious practice. This position is inconsistent with the Free Exercise Clause and the Establishment Clause, and the District Court correctly so held.

In this, as in any other situation where a court finds mixed motives, it is for the fact-finder to make a determination of predominant motive. See e.g. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48, 106 S.Ct. 925, 89 L. Ed.2d 29 (1986) ("the District Court's finding as to 'predominate' intent, left undisturbed by the Court of Appeals, is more than adequate to establish that the city's pursuit of its zoning interests here was unrelated to the suppression of free expression."). This is exactly what the District Court did.

Nor is Appellants' incendiary and legally groundless analogy to race (Motion II at 16-17) helpful to their case. Racial discrimination is barred by law, although race may be taken into account in certain circumstances where affirmative action is permitted. The Establishment Clause, on the other hand, requires government to be eternally vigilant about not expressing preferences for any one religion or for religious uses of non-public-forum property over non-religious uses. There is therefore nothing inherently prejudicial about the Council's consideration of how the Establishment Clause might be violated by preferentially permitting specific religious speech on a non-public-forum right of way. To the contrary, the members of the Council were under an

affirmative constitutional duty to consider religion in deciding whether to grant preferential access to the non-public-forum poles. Had the Council failed to consider religion, it would have violated the Constitution, according to the District Court.[7]

There was no prejudice whatever at work in the Council's consideration religion in this case. The District Court so held, expressly denying the presence of "animosity or prejudice." 2001 WL 897351 at *38. The analogy to race therefore breaks down on this ground as well. Two of the five council members are themselves Jewish and were discussing their own religion; neither they nor the other Council members discriminated against anyone on the basis of religion.

[7] For the purposes of this motion it is not necessary to address the complex constitutional question of the use of race in legislative matters; it will suffice to say that Appellants' analogy is inapt. But it must still be said that Appellants' characterization of the law of racial discrimination is incorrect on its own terms. There are various legal situations where consideration of race is perfectly appropriate for a legislative body, as for example when the body seeks to avoid committing a constitutional violation, or where the body is implementing affirmative action programs that are legal under the Constitution, as for example where there is a well-demonstrated history of local past discrimination.

CONCLUSION

For the foregoing reasons this Court should deny Appellant's request for a stay or injunction of the District Court's ruling pending appeal.

Dated: September 5, 2001

Respectfully submitted,

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BOROUGH OF TENAFLY

ORDINANCE NO. 691

AN ORDINANCE REGULATING STREETS, ROADS, SEWERS, SIDEWALKS, PUBLIC PLACES AND THE IMPROVEMENT AND USE THEREOF.

BE IT ORDAINED by the Mayor and Council of the Borough of Tenafly, County of Bergen and the State of New Jersey, as follows:

ARTICLE I
Definitions

(1) Unless otherwise expressly stated, the following terms whenever used in this ordinance, shall respectively be deemed to mean:

(a) "OWNER" means the person, firm or corporation having the legal title to lands and premises or to personal property.

(b) "OCCUPANT" means the owner, tenant, lessee, or person in charge of or in control of, or in possession of any building or premises, or part thereof, or of any personal property.

(c) "PERSON" means an individual or individuals, or a corporation, or voluntary association.

(d) "DEVELOPER" means any person who engages, either through himself or by an agent or contractor, in a land subdivision or the construction of two or more buildings within the Borough, or undertaking any project involving the construction or improvement of any street.

(e) "STREET" means any dedicated public thoroughfare, road, avenue or highway, whether accepted or unaccepted, including the sidewalk area.

(f) "STREET LINE" means the dividing line between the street and the lot.

(g) "SIDEWALK" means the pavement between the curb line and street line.

(h) "SIDEWALK AREA" means the area between the curb line and the street line, whether paved or unpaved.

(i) "ROADWAY" means that portion of the street lying between the curb lines.

(j) "SUPERINTENDENT OF PUBLIC WORKS" or "SUPERINTENDENT" means the Superintendent of the Dept. of Public Works appointed by the Mayor and Council, or such person or persons as shall succeed to his office, powers and duties.

(k) "SINGULAR" includes the plural: masculine includes the feminine, and also corporation and voluntary associations.

(l) "COUNCIL" means the Mayor and Council of the Borough of Tenafly.

(m) "DRAINAGE" means the run off, natural or otherwise, or any surface or underground water including but not limited to rainfall.

ARTICLE II
General Conditions

(1) No permit authorized by this ordinance shall be granted except pursuant to an application in writing therefor signed by the person desiring such permit, or his agent, which application shall set forth such facts as are hereinafter required by the provisions of this ordinance.

(2) In case any permit shall be refused by any officer authorized to issue the same, an appeal of such officers' determination may be taken to the Mayor and Council, and the Mayor and Council, after hearing the applicant and such officer and such other evidence as may be produced, may either direct the issuance of such permit or sustain the refusal of the officer.

(3) No permit shall be issued until the fee therefor shall have been paid to the officer authorized to issue such permit. The permit fee for all work started prior to the issuance of a permit covering same shall be twice the regular fee as herein required.

ARTICLE III
Street Improvements

(1) No street, highway or public way shall be improved by any person, firm or corporation, until permission shall have been granted by resolution of the Mayor and Council upon formal application in writing as herein provided, accompanied by three complete sets of plans, maps, profiles and specifications for the project. It shall be within the discretion of the Mayor and Council to refuse permission to improve any street, highway or public way unless the same is proposed to be fully improved by grading, the construction of sanitary sewer mains and laterals, storm sewers and catchbasins, gas and water mains and laterals, curbs, sidewalks and pavement therein.

(2) The plans, maps, profiles and specifications shall be referred to the Borough Engineer who shall submit his report and recommendations to the Mayor and Council before approval is granted. done All construction work shall be done under the general supervision of the Borough Engineer, and the applicant shall agree to pay his supervision and inspection fees.

(3) In the construction of new streets, the applicant shall as a part of the improvement install and pay for street name signs at such places as may be designated by the Superintendent of Public Works; and shall likewise plant shade trees in the sidewalk area one foot inside of the street line.

(4) The maps, plans and specifications shall indicate surface contours of the surrounding land, and shall make proper provision for the drainage and run-off of rainfall and surface waters from such lands and streets, indicating the place where the same will be eventually deposited or discharged.

(5) No permit shall be issued for the improvement of any street unless and until adequate provisions are indicated on the map or plans, for the proper drainage thereof and disposition of surface water therefrom.

(6) The applicant shall prior to the issuance of a permit, enter into an agreement with the Borough, setting forth his entire undertaking in connection with the improvement. All legal charges in connection with the preparation of the agreement and the approval of the bond shall be paid by the applicant.

The provisions of the agreement shall be substantially as follows:

(a) That the applicant shall agree to construct the required improvements in the street or streets.

(b) That the applicant shall furnish a bond of a surety company authorized to do business in the State of New Jersey, in an amount agreed upon by the Mayor and Council, to insure the installation of the improvements and the performance of the agreement.

(c) That all work shall be done in a competent and workmanlike manner within a specified period of time.

(d) That the applicant shall agree to comply with the ordinances of the Borough of Tenafly and the laws of the State of New Jersey in the performance of the work, and also shall agree to insure against liability for injury or death by accident to his employees employed upon the work herein provided for as required by the laws of the State of New Jersey.

(e) That the applicant shall agree to maintain the improvement for a period of one year after completion and acceptance thereof by the Borough and to repair or rectify all defects, sinking, wear and tear, washouts or any other condition detrimental to such streets during that period.

(7) No street shall be deemed accepted by the Borough until it has been completely and fully improved as provided for herein, and accepted by ordinance.

(a) The Borough Engineer shall make a final inspection of completed streets immediately upon being notified by the developer of their completion, and report his findings in writing to the Mayor and Council.

(b) The approval of the construction shall be by resolution of the Mayor and Council.

(c) After approval as above set forth the developer shall deposit with the Borough an amount sufficient to defray the costs of drawing, publishing, and recording of the ordinance accepting the street or improvement.

(d) The Mayor and Council shall, upon being satisfied that all of the prerequisites herein provided have been met, introduce an acceptance ordinance.

(e) The passage of an acceptance ordinance shall not in any way be deemed to release the developer from any of the provisions of his contract or from the obligations of his bonds.

(8) The provisions of this Article shall not apply to any general improvement work undertaken by the Borough itself.

ARTICLE IV
Street Openings

(1) All permits required by this article shall be issued by the Borough Clerk following approval of the application by the Superintendent of Public Works, and the submission by the applicant of a bond running to the "Mayor and Council of the Borough of Tenafly" or in lieu thereof a cash bond in the amount sufficient to defray the cost of replacing the pavement excavated in case the applicant fails to replace such pavement in a manner acceptable to the Superintendent. The minimum amount of either bond shall be $100.00. Upon the issuance of such a permit the Borough Clerk shall forthwith notify the Chief of Police of the character of the work authorized.

13-01
150.00

(2) No person shall make any street opening in or tear up or disturb the surface of the roadway of any street, park or public place, without a written permit therefor; provided, however, that any Public Utility corporation having pipes, conduits or rails in any public street or place shall not be required to obtain any other permit than that provided for in Section (6) hereof.

(3) As amended by Ordinance No. 983, adopted October 28, 1969
The following permit fees are established and shall be paid to the Borough Clerk, before the permits are issued.

As amended by Ord. 93-01

(a) For opening any road paved with Portland cement concrete, bituminous concrete, bituminous penetration macadam, water bound macadam with or without bituminous dressing or asphalt surface treated pavement, ~~$10.00~~ per square yard or fraction thereof; minimum fee ~~$100.00.~~ 15.00 150.00

(b) For opening any unimproved road; ~~$5.00~~ per square yard or fraction thereof; minimum fee ~~$25.00~~. 10.00 50.00

The person, firm or corporation to whom such permit is issued shall guard the excavation or excavations by suitable barricades and warning signs by day and suitable barricades and lights by night until the excavation is safely closed. It is the responsibility of the permitee to maintain such road opening in a safe condition for traffic until such time as he replaces the pavement and said pavement replacement shall have been approved by the Superintendent.

(d) The Mayor and Council shall, upon being satisfied that all of the prerequisites herein provided have been met, introduce an acceptance ordinance.

(e) The passage of an acceptance ordinance shall not in any way be deemed to release the developer from any of the provisions of his contract or from the obligations of his bonds.

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(2) No person shall make any street opening in or tear up or disturb the surface of the roadway of any street, park or public place, without a written permit therefor; provided, however, that any Public Utility corporation having pipes, conduits or rails in any public street or place shall not be required to obtain any other permit than that provided for in Section (6) hereof.

(3) The following permit fees are established and shall be paid to the Borough Clerk, before the permits are issued.

(a) For opening any road paved with Portland cement concrete, bituminous concrete, bituminous penetration macadam, water bound macadam with or without bituminous dressing or asphalt surface treated pavement, $5.00 per square yard or fraction thereof; minimum fee $25.00.

(b) For opening any unimproved road; $2.00 per square yard or fraction thereof; minimum fee $5.00.

The person, firm or corporation to whom such permit is issued shall guard the excavation or excavations by suitable barricades and warning signs by day and suitable barricades and lights by night until the excavation is safely closed. It is the responsibility of the permitee to maintain such road opening in a safe condition for traffic until such time as he replaces the pavement and said pavement replacement shall have been approved by the Superintendent.

(4) The permit for any such excavation as aforesaid shall state the maximum time allowed for the completion of the excavation and the back-filling thereof and the back-filling shall be completed within the time stated in such permit. The material to be used for such back-fill shall be earth, or earth and crushed stone in even quantities. No stone larger than 6 inches in diameter, and no shale roack shall be used for such purpose. It shall be within the discretion of the Superintendent to require crushed stone dust if in his opinion the available earth fill is unsuitable. No more than 6 inches of material shall be back-filled at one time. Upon back-filling an amount not exceeding 6 inches, the same shall be thoroughly moistened and tamped and thoroughly compacted before any further back-fill is placed. It shall be within the discretion of the Superintendent to require tamping by means of a pneumatic ram tamper in place of the puddling method. The back-filling shall be continued until the top thereof, after being thoroughly tamped, shall be 1 inch higher than the surface of the pavement. All excess materials shall be removed. Immediately upon the completion of the back-filling the Superintendent shall be notified, and it shall be his duty to make an inspection of the work for compliance with the provisions of this ordinance.

The excavated pavement shall be replaced by the permitee upon notification by the Superintendent, who after completion of the pavement replacement shall make a final inspection and immediately notify the Borough Clerk in writing of his approval in order that the bond may be returned.

(5) Whenever possible, excavations shall be made on either side of the pavement, and pipes to be laid shall be driven from one excavation to the other so as not to disturb the pavement. No boring or tunneling under the pavement of any road shall be done except by special permission of the Superintendent, and under his personal supervision. When necessary to excavate across the entire roadway of any road, the work shall be performed so that at least one-half of such roadway shall remain open to traffic. No person shall permit any street or road to be closed to travel by reason of any excavation made therein in pursuance of this article.

(6) Any Public Utility corporation having the lawful right to construct or maintain pipes, conduits or tracks in any public street or place, may file with the Borough Clerk a bond running to "The Mayor and Council of the Borough of Tenafly," in the sum of $1,000.00 conditioned for the making of all excavations in accordance with the provisions of this ordinance, and further conditioned that it will restore the pavement of any roadway excavated, torn up or disturbed by it, or under its authority to the satisfaction of the Superintendent, within 5 days after notice from such Superintendent, and that in case of its failure so to do, it will upon demand pay to the Borough the cost of restoring such pavement, also to pay a fee of $2.00 for each opening within 30 days after each such opening. Such bond shall be renewed each calendar year. Such corporation, upon filing such bond, shall be entitled to make excavations for the purpose of construction or maintenance of its pipes, conduits or tracks for a period of one year.

ARTICLE V
Sewers

(1) No sewer connection shall be made without a permit therefor by the Department of Health in accordance with the Plumbing Code of the Borough of Tenafly.

(2) No person, firm or corporation shall construct a private sewer in or through any street or portion thereof except under such circumstances as would make it impracticable to extend a main sewer line. Special permission may be granted by the Mayor and Council upon submission of an application containing a description of the unusual circumstances requiring a private sewer line. Such permission shall create no vested rights and shall be revocable by the Mayor and Council at any time.

(3) No person, firm or corporation shall construct an extension of a main sewer line without first having obtained permission therefor from the Mayor and Council by Resolution of said Mayor and Council. Said permission so given shall be subject to the construction of said sewer main or mains under the supervision of the Borough Engineer and in accordance with specifications approved by the Mayor and Council.

Upon application being made for permission to construct a sewer main or mains the Mayor and Council may, in their discretion, require the person so applying to furnish bonds for the proper completion and maintenance of such sewer.

The applicant, its successors, heirs or assigns, shall agree to convey the said sewer and all its appurtenances to the Borough upon acceptance of the construction by the Mayor and Council, at which time the said sewer and all its appurtenances shall become a part of the sewerage system of the Borough of Tenafly.

No house sewer shall be connected to the sewer main until the construction of the sewer main shall have been accepted by the Mayor and Council.

(4) The owner of record of each building lot adjoining all new sewer lines shall pay his proportionate share, as determined by the Mayor and Council, of trunk sewer line and sewerage system charges prior to the issuance of a sewer connection permit by the Department of Health.

(5) The owners or occupants of premises in the Borough of Tenafly shall be responsible for the proper maintenance and repair of all house sewer connections between the dwelling and the main sanitary sewer line.

(6) In case a stoppage in the sanitary sewer occurs, the owner or occupant shall immediately notify the Superintendent, who shall make an inspection of the sewer main line. If the main sewer is obstructed, it shall be the responsibility of the Superintendent to cause the obstruction to be removed. If the main sewer is not obstructed the Superintendent shall, immediately following his inspection, notify the owner or occupant that it is his responsibility to remove the obstruction in the house sewer line.

During the time that any such sidewalk shall be removed, provision shall be made by the permitee for safe and convenient means of passage by pedestrians.

(3) In case any sidewalk becomes out of repair, the owner or occupant of the lands abutting such sidewalk shall forthwith, upon receipt of written notice from the Superintendent of Public Works, repair or cause the same to be repaired and made in a good and passable condition conforming with the requirements of Section (1) of this Article.

(4) No person shall make an opening through a concrete curb for the purpose of connecting a leader drain into the gutter without a permit therefor from the Borough Clerk. The fee for each such opening shall be $1.00.

(5) No person shall place any bridging over any gutter or any pipe or other obstruction in any gutter without first having secured the consent of the Mayor and Council.

(6) No person shall place or permit to be placed upon any sidewalk or sidewalk area any object or thing that shall in any manner encumber or obstruct such sidewalk or sidewalk area or render travel upon such sidewalk or sidewalk area dangerous or unsafe.

No steps , walls, fences, driveway curbs or similar features shall extend into the sidewalk area, nor shall hedges or shrubbery be permitted to project into a sidewalk area so as to obstruct pedestrian traffic.

(7) No person shall place or maintain any drop awning extending over any sidewalk, which when lowered shall be less than 7 feet above such sidewalk.

(8) Temporary awnings may be erected across a sidewalk and permitted to remain for a period not exceeding 24 hours, provided the same shall be securely fastened, and shall be so arranged as to permit travel along the sidewalk.

(9) No person shall lower a concrete curb for the purpose of providing a driveway across a sidewalk without a permit therefor from the Borough Clerk. The fee for such a permit shall be $5.00.

A concrete curb shall not be broken off at pavement level in order to construct a driveway. Sections of the curb shall be removed and a new concrete curb constructed providing a dropped section for the driveway. The minimum thickness of the base of the new curb shall be 9 inches, the minimum depth below the gutter grade shall be 15 inches and the minimum height of the dropped section above the gutter grade shall be 1½ inches. Concrete for curb reconstruction shall be Class B, New Jersey State Highway Specification.

No person shall remove a section of asphalt rolled curb for the purpose of constructing a driveway across a sidewalk without a permit therefor from the Borough Clerk. The fee for such a permit shall be $5.00. The apron shall consist of a compacted stone base course dust-bound not less than 4 inches in depth with a bituminous concrete or penetration macadam surface dourse not less than 1½ inches in depth.

ARTICLE VII
Shade Trees

(1) It shall be the responsibility of the Department of Public Works to exercise jurisdiction over all matters pertaining to parks and shade trees or to the care and preservation thereof, including the maintenance of all parks within the Borough except Roosevelt Common. The Department shall also have jurisdiction over shade trees on the public highways and streets of the Borough, including care, maintenance and preservation of existing trees within the street lines and the planting of new trees within the street lines.

(2) No person in possession of property, as owner or tenant, abutting upon a street shall plant or permit the planting of any bush, vine, hedge, shrub, shade or ornamental tree, or other plant life, within the sidewalk area of any street, without first having secured the approval of the Department of Public Works as to the type of tree and the location of the planting of such bush,vine, hedge, shrub, shade or ornamental tree or other plant life.

(3) Whenever necessary and expedient for the preservation of the public safety, the person in possession of property, as owner or tenant, shall, upon notification by the Chief of Police, trim or cut all bushes, hedges and plant life, except shade trees, to a height of not more than two and one-half ($2\frac{1}{2}$) feet or to remove same if it is located:

(a) In the sidewalk area.
(b) Within a radius of twenty (20) feet of the intersection of the street lines of two intersecting streets.

It shall be the responsibility of the person in possession of property, as owner or tenant, to maintain all shade and ornamental trees, hedges and other plant life growing on private property so that the lowest branches overhanging a sidewalk area are at a height of not less than nine (9) feet above ground level.

(4) No person shall fasten any electric wire or wires upon any shade tree on any public street.

(5) No person shall climb any tree on any of the public streets or places by the use of spurs or other instruments which perforate or injure the bark of such tree. Nor shall any person destroy, mutilate or injure any such tree.

(6) No person shall remove or cut down any shade tree located upon any of the public streets or places, without a permit therefor from the Department of Public Works.

(7) No person shall hereafter plant or permit to be planted any Poplar or Willow tree within fifty (50) feet of any street line or sanitary or storm sewer.

(8) All Poplar or Willow Trees standing within fifty (50) feet of any street are hereby declared nuisances; and all such trees standing on private property within fifty (50) feet of such street shall be removed by the owner thereof, within 30 days after written notice is given by the Superintendent of Public Works.

ARTICLE VIII
Use of Streets

(1) No person shall permit any building, structure, erection or any part thereof, to encroach upon or extend over, under or into any public street or public place, excepting as in this ordinance permitted and authorized.

(2) The owner of every building, structure or erection, which either in whole or in part, encroaches upon or extends over, under or into any public street or place, shall cause such encroachment to be removed within 10 days after receiving written notice from the Superintendent so to do. Every day that such owner shall fail, refuse or neglect to comply with said order after the expiration of said period of ten days, shall constitute a separate and distinct violation of this ordinance.

(3) No person shall obstruct or permit the obstruction of any street or public place by the storage or placing of any building material or other material or merchandise thereon and permitting the same to remain longer than is necessary to convey the same on or into private property, unless a permit therefor shall be obtained from the Borough Clerk. No permit shall be granted which permits the use or obstruction of more than one quarter of the width of the roadway of such street or public place at any point.

The application for such permit shall state the kind and character of material to be stored or placed in such public street or place, the exact location where the same is to be stored or placed, and the maximum length of time that such obstruction shall continue. The Superintendent may impose conditions in any permit issued under this section with respect to keeping the sidewalk open for travel and any other conditions which he shall deem proper in the interest of the public safety and convenience. The fee for such a permit shall be $2.00. Such permit shall be kept posted in a conspicuous place on or near the material, and shall be kept there so as to be readily accessible to inspection.

(4) No cellarway or hoistway shall be constructed in any public street without a permit therefor issued by the Borough Clerk. The fee for such permit shall be $5.00. No permit shall be granted for any such cellarway or hoistway which extends into the street more than 5 feet from the property line. All such cellarways or hoistways shall be covered with iron doors flush with the sidewalk, and when opened shall at all times be protected by either guard rails or chains. No such cellarway or hoistway shall remain open so that the sidewalk or street is obstructed for a longer period than is necessary for the reasonable use thereof.

(5) No person shall move any building or structure across, along or through any street or public place without obtaining a permit therefore from the Borough Clerk. The fee for such permit shall be fifty ($50.00) dollars.

A deposit of $50.00 in cash must accompany any application. From this amount an inspection fee of $4.00 will be charged for each inspection necessary prior to and during the moving of such building, and also regardless of whether permit is granted or rejected, the number of such inspections to be left to the judgement of the Department of Public Works. If in the judgement of the Department of Public Works a larger deposit is necessary, applicant will be so informed and must deposit such additional amount before further action will be taken on such application.

(a) An applicant must fill out all questions in detail on the regular application blank and give all information necessary relating to the moving, without any attempt to minimize the hazards connected therewith.

(b) It shall be required that the Building Inspector shall cause a proper examination to be made of the building to see that same is substantial in every respect for the purpose of moving. The place from which the building is to be moved and the place where the building is to be located is to be approved by the municipal authorities so that it may meet all the requirements of the zoning law or any zoning ordinance which may then be in force.

(c) Permits in writing must be obtained from the utility corporations whose appliances may be interfered with, as the Borough does not assume any responsibility for damage to poles, wires, cross arms, street lights, automatic signals or other structures which may be damaged by such moving.

(d) No wedge, bar or spike shall be driven into the surface of the highways, and no trees shall be cut, trimmed or in any way interfered with and no Borough property shall be used except special permission in writing is granted by the Department of Public Works and full responsibility for any damage thereto be accepted by the applicant for a permit.

No building which is to be on the Borough highways more than five days shall be moved over any Borough highway unless the detour during a Sunday or holiday is conveniently located and in proper condition.

The owner and the contractor moving the building shall jointly and severally be responsible to the Borough for the moving of any building, and both will save the Borough of Tenafly harmless from all damage of every kind and assume full liability for all damages.

(e) The time of moving must be so arranged as will cause the least inconvenience to the public at large. This time will be specified in the permit and must be strictly adhered to. All other requirements specified in the permit which are not part of these rules must also be adhered to, and any deviation therefrom will mean revoking of permit. The route to be taken will be specified in the permit.

(f) Under no circumstances shall an applicant begin moving operations until permit in writing is secured.

(6) No person shall organize or conduct or assist in the organization or conduct of any parade upon any of the public streets or public places, without obtaining a permit therefor from the Borough Clerk.

The Borough Clerk shall not issue any such permit until an application therefor shall have been submitted to the Mayor and Council at a regular or special meeting and such permission has been granted and a permit authorized by a resolution of the Mayor and Council.

(7) No person shall place any sign or advertisement, or other matter upon any pole, tree, curbstone, sidewalk or elsewhere, in any public street or public place, excepting such as may be authorized by this or any other ordinance of the Borough.

(8) No person shall injure, deface, obliterate, remove, take down or disturb, or in any other manner interfere with or disturb any signboard containing the name of any street or public place, or any bulletin board, or sign or notice erected, posted or placed, bearing the name of the Mayor and Council or any officer of the Borough.

(9) No person, firm or corporation shall place or permit to be placed any ashes, garbage, dirt, paper, tree limbs or branches, garden refuse or other waste material upon any street or public place; provided that clean ashes or sand may be placed upon ice which has formed upon any sidewalk.

(10) No person, firm or corporation shall burn any leaves or other waste material or cause same to be burned upon any street or public place.

(11) No person shall throw or place, or permit or aid the throwing or placing of glass, tacks or other like sharp substance upon any public street or public place.

(12) No person shall remove, displace, break or change any sign or lights or signals set up or placed in any street or public place as a warning of danger, or indicating an excavation or obstruction, or showing that any street or public place is closed to traffic; and no person shall between the hours of sunset and sunrise extinguish any light used for any of the purposes aforesaid.

(13) No person shall open any manhole or remove the cover thereof, unless such opening shall be guarded by a guard rail, and shall be so marked by both day and night as to be plainly seen at a distance of 50 feet, which guard rail shall be maintained so long as such manhole shall remain opened or uncovered.

(14) No person shall coast by sleigh or sled upon any street, unless such street or the portion thereof used for coasting shall be closed to vehicular traffic.

(15) The Superintendent of Public Works may close any street or public place or section thereof to public traffic for the purpose of repairing, constructing or reconstructing the same. When any street or public place or portion thereof is closed, there shall be a sign at each end of the portion closed, plainly visible to approaching traffic, reading substantially as follows: "STREET CLOSED."

(16) No person, firm or corporation shall place or erect any electric light, telegraph, telephone or other pole in or upon any street or public place except pursuant to permission granted by the Mayor and Council. No wires shall be run or strung upon any pole at a distance less than 18 feet from the ground.

(17) No person, firm or corporation shall connect foundation drains, sump pumps, surface drains or other constant or semi-constant sources of water into the gutter of any street or public place. Leader drains may be connected into the gutter of a street where no storm sewer exists.

Where a storm sewer exists in a public street such sources of water as noted in the paragraph next above shall be connected to the storm sewer upon the issuance of a permit therfor and the payment of a fee of five ($5.00) dollars. Such connections shall be made under the supervision of the Department of Public Works.

(18) It shall be the responsibility of the Department of Public Works to maintain the pavement and to clear snow from all streets and thoroughfares which have been accepted by ordinance duly adopted by the Mayor and Council of the Borough of Tenafly. The Public Works Department shall not undertake the maintenance or snow removal upon any street or highway which has not been accepted by ordinance except by resolution of the Mayor and Council authorizing such work.

(19) No person, firm or corporation shall cast or throw ice or snow upon a public street or thoroughfare from which snow has been plowed or removed.

(20) It shall be the responsibility of any person, firm or corporation owning or operating trucks from which earth, stones or similar debris has been dumped or spilled upon any street or thoroughfare to remove same.

(21) No mortar, concrete or similar material shall be mixed or placed upon the surface of any street or sidewalk.

ARTICLE IX
Garbage and Rubbish Disposal

(1) Rules and regulations for the collection of garbage and rubbish in the Borough of Tenafly shall be as promulgated by ordinance No. 495 as amended.

(2) Refuse materials, including fill dirt, garden refuse, tree limbs and branches and other similar materials which originate within the Borough of Tenafly only may be disposed of at the Borough dumping grounds. Logs and tree trunks not over six feet in length may be accepted for disposal at the discretion of the Superintendent of Public Works.

No tree stumps shall be accepted for disposal at the Borough dumping grounds except upon approval by the Mayor and Council.

ARTICLE X
Removal of Snow and Ice, Weeds or Grass

(1) The owner or owners, tenant or tenants, of lands abutting or bordering upon a sidewalk in a public street, avenue, highway or public place shall be responsible for the removal of all snow and ice from such sidewalk within 24 hours after the same shall be formed or fall thereon.

(2) The owner or owners, tenant or tenants of lands abutting or bordering upon the sidewalk area of a public street, avenue, highway, or public place, shall be responsible for the removal of all grass, weeds and other impediments from such sidewalk area. All grass and weeds shall be cut to a height of less than 4 inches from the ground.

(3) In case the owner or owners, tenant or tenants, of lands abutting or bordering upon a sidewalk or a sidewalk area in a public street, avenue, highway or public place, shall refuse or neglect to remove all snow and ice from such sidewalk within 24 hours after the same shall be formed or fall thereon; or shall refuse or neglect to remove all grass and weeds and other impediments from such sidewalk area, after three day's notice served upon any of them by the Borough, the Superintendent may cause such work to be done under his direction, and he shall certify the cost thereof to the Council. The cost of such removal as certified by the Superintendent, if found correct by the Council, shall forthwith become a lien upon the lands abutting or bordering any such sidewalks and gutter, and shall be added to and become and form a part of the taxes next to be assessed and levied upon such lands, and shall bear the same interest as taxes.

(4) The Mayor and Council shall, upon receiving a certificate of cost as aforesaid from the Superintendent, examine the same, and if found correct, shall adopt a resolution to that effect, directing that a certified copy thereof be delivered to the Collector of Taxes who shall thereupon collect such charges at the time of collection of the taxes next to be assessed and levied upon such lands and as a part thereof.

ARTICLE XI
Penalties

Any person, firm or corporation violating any of the provisions of this ordinance shall, upon conviction thereof, pay a fine not exceeding $200.00 for each offense, and any person may be imprisoned in the County Jail for a term not exceeding 90 days, or either, or both, in the discretion of the Magistrate before whom any such conviction shall be had. In case of the failure of any person to pay any fine imposed hereunder, such Magistrate may cause such person to be imprisoned in the County Jail for any term not exceeding 90 days.

ARTICLE XII
Repealer

All ordinances and parts of ordinances inconsistent herewith, be and the same hereby are repealed, including the following:

Ordinance No. 221 - adopted March 10, 1922
Ordinance No. 253 - adopted July 20, 1923
Ordinance No. 400 - adopted May 26, 1930
Ordinance No. 576 - adopted Sept. 27, 1949
Ordinance No. 583 - adopted Feb. 28, 1950

ARTICLE XIII
Saving Clause

If any article, section, sub-section, sentence, clause, or phrase of this ordinance is for any reason held to be unconstitutional or invalid, such invalidity shall not affect the remaining portions of this ordinance.

ARTICLE XIV
Effective Date

This ordinance shall take effect immediately upon publication and as required by law.

By order of the Mayor and Council of the Borough of Tenafly.

Introduced: October 13, 1954
Passed and Approved: October 26, 1954

CLIFTON S. FLEET
Mayor

Attest: Edwin B. Phillips

EDWIN B. PHILLIPS
Borough Clerk

BOROUGH OF TENAFLY

ORDINANCE NO. 1127

"AN ORDINANCE GRANTING PERMISSION AND CONSENT TO NEW JERSEY BELL TELEPHONE COMPANY, ITS SUCCESSORS AND ASSIGNS, TO USE ALL OF THE VARIOUS STREETS, ROADS, AVENUES AND HIGHWAYS, BRIDGES AND WATERWAYS AND PARTS THEREOF IN THE BOROUGH OF TENAFLY, BERGEN COUNTY, NEW JERSEY, BOTH ABOVE AND BELOW THE SURFACE THEREOF, FOR THE CONSTRUCTION, MAINTENANCE AND OPERATION OF ITS LOCAL AND THROUGH LINES AND COMMUNICATIONS FACILITIES IN CONNECTION WITH THE TRANSACTION OF ITS BUSINESS, AND PRESCRIBING THE MANNER OF DOING SO."

BE IT ORDAINED by the Mayor and Council of the Borough of Tenafly in the County of Bergen and State of New Jersey as follows:

Section 1. Permission and consent be and the same is hereby granted to New Jersey Bell Telephone Company, its successors and assigns, to erect, construct, reconstruct, remove, inspect, maintain and operate its communications facilities, including underground conduits, subways, cables and related appurtenances, aerial and buried cables, wires and related appurtenances, poles, posts, guys, pedestals, manholes and all other related appurtenances, in, through, upon, along, over, under and across all of the various streets, roads, avenues, highways, bridges, and waterways and parts thereof, throughout their entire length, and to effect necessary street openings and lateral con-

nections to curb poles, property lines and other facilities in this Borough for its local and through lines and communications facilities, in connection with the transaction of its business. All of the various streets, roads, avenues, highways, bridges and waterways and parts thereof, throughout their entire length in this Borough, are hereby designated and prescribed for the uses and purposes of said Company as aforementioned.

Section 2. All poles, posts, or pedestals hereafter to be erected, constructed, reconstructed, maintained and operated shall be located and placed back of and adjacent to the curb lines where shown by official maps of this Borough and within eighteen inches thereof, or as may be mutually agreed to by both parties, and at the points or places now occupied by the poles, posts or pedestals of said Company, its successors and assigns, and where there are no curb lines, at other convenient points or places upon the streets, roads, avenues and highways as may be mutually agreed to by both parties.

Section 3. Underground conduits shall be placed below the surface of said streets, roads, avenues and highways and parts thereof and, with the exception of lateral branches to curb poles and property lines and other facilities, said conduits generally shall not be constructed more than ten feet from the curb line, unless obstructions make it necessary to deviate from such course

or unless the parties mutually agreed to another location. All underground conduits shall be placed at least eighteen inches below the surface.

All manholes shall be located at such points along the line of the subways or underground conduits as may be necessary or convenient for placing, maintaining and operating the cables and other conductors and appurtenances which said Company may from time to time place in said subways or underground conduits and shall be so constructed as to conform to the cross-sectional and longitudinal grade of the surface so as not to interfere with the safety or convenience of persons or vehicles.

Said Company may bury its cables and associated equipment, fixtures and appurtenances within the right of way of the various streets, roads, avenues and highways and parts thereof and at such locations as shall be mutually agreed upon by the parties in this Borough for its local and through lines and communications facilities.

Section 4. Before proceeding with any of the work for which permission and consent is required under this ordinance, said Company shall file with the Mayor and Council of this Borough a map or plan showing the location and size of any such facilities, which map or plan shall be first approved by said Mayor and Council or their authorized representatives.

Prior to the opening or excavating of any streets, roads, avenues and highways and parts thereof for the purpose of laying, maintaining and operating its underground systems after the approval of the map and plan as aforementioned, the said Company shall first obtain a permit for such opening or excavation upon payment of such reasonable fee therefor as may be required to cover the costs of administration and inspection and as provided by any ordinance regulating openings and excavations of streets.

Section 5. That said New Jersey Bell Telephone Company, its successors and assigns, shall indemnify and save harmless the Borough of Tenafly from any and all claims for damages which may at any time arise or occur by reason of the exercise of any of the rights granted under this ordinance to said Telephone Company.

Section 6. The surface of the streets, roads, avenues and highways and any pavement or flagging taken up or soil and/or planting disturbed by said Company in building its lines, shall be restored to as good condition as it was before the commencement of work thereon. Provided, however, if the road opening or similar permit fee shall include a charge for highway restoration by the municipality and/or County the Company shall not be required to do the restoration. No highways shall be encumbered for a longer period than shall be necessary to execute the work. Such restora-

tion shall be subject to the approval of the Borough after an inspection by its authorized representatives upon completion of the work.

Nothing, however, shall be deemed to prohibit the Borough of Tenafly from requiring a performance bond to be posted on behalf of the Company in order to guarantee road repairs and restoration as provided for herein.

Section 7. Wherever the curb line shall be established on streets where one does not now exist or where an established curb line shall be relocated in order to widen and existing street or highway, said Company shall change the location of its poles, pedestals and related appurtenances at its own expense so that the same shall be back of and adjacent to the new curb line so established, upon receipt of notice from the municipal officials that the curb line has been so established, so long as the Borough has acted with reasonable care in establishing the new curb line and providing notice thereof.

Section 8. Upon any of the streets, roads, avenues and highways in this Borough now or hereafter occupied by the poles, posts or pedestals of said New Jersey Bell Telephone Company, its successors and assigns, or any other companies or corporations having legal authority to erect and maintain poles, posts or pedestals, the New Jersey Bell Telephone Company and such other

companies or corporations may use the same poles, posts, or pedestals, provided they can agree so to do.

Section 9. Said Telephone Company shall provide free of charge to this Borough as long as this ordinance continues in effect, space on its poles so long as said poles are occupied by said Company, and space in its main subways (not exceeding one (1) clear duct of standard size) to accomodate the wires or electrical conductors required for signal control in connection with its police patrol, fire alarm telegraph signal systems and traffic signal control systems, but not to include circuits for the supply of electrical energy for the traffic or other signals; provided, however, that such use by the municipality shall not interfere with the equipment or operation of said Company, and said Borough shall indemnify and save harmless said Telephone Company from all claims or suits for damages arising from the attachment to its poles or the location in its main subways of any such crossarms, wires or electrical conductors used by this Borough. Before proceeding with the attachment of its wires to the poles or the placing of its electrical conductors in the main subways or manholes of said Company, either by itself or by a person, firm or corporation engaged to perform such work, this Borough shall give the said Company thirty (30) days notice in writing. All such work shall be performed under the supervision

of said Company. If any or all of the said streets or highways be later taken over by the Board of Chosen Freeholders of the County of Bergen or the State of New Jersey Department of Transportation, then such Board of Chosen Freeholders or the Department of Transportation may use the same clear duct of standard size referred to, for their respective police patrol, fire alarm telegraph and traffic signal control systems in conjunction with the Borough's use thereof for similar purposes, but only after making such satisfactory arrangements as may be necessary with the Borough and the Telephone Company for the full protection of each other's interests.

Nothing herein shall prohibit the Borough of Tenafly from granting a franchise or franchises to companies in order to provide cable television service for the Borough of Tenafly, provided, however, that any Company furnishing cable television in the Borough must obtain a written agreement from the New Jersey Bell Telephone Company for the joint use of any poles in which said Company has an interest in the Borough of Tenafly.

Section 10. Following final passage of this ordinance and acceptance thereof by said Company, the permission and consent granted herein shall continue and be in force for a period of 50 years from the date of its approval by the New Jersey Board of Public Utilities Commission as required by law. Throughout the

full term of this ordinance, said Company, its successors and assigns, shall furnish safe, adequate and proper service within this Borough and keep and maintain its property and equipment in such condition as to enable it to do so.

Section 11. Nothing herein contained shall be construed to grant unto said New Jersey Bell Telephone Company, its successors and assigns, an exclusive right, or to prevent the granting of permission and consent to other companies for like purposes on any of the streets, roads, avenues or highways of this Borough.

Section 12. The term "Borough" as used in this ordinance shall be held to apply to and include any form of municipality or government into which this Borough or any part thereof, may at any time hereafter be changed, annexed or merged, and the term "Borough" or any other term herein used in referring to the governing body of this Borough shall be held to apply to and include the governing body of such other form of municipality.

Section 13. The permission and consent hereby granted shall apply to and cover all existing communications facilities and related appurtenances heretofore erected, constructed, reconstructed, maintained and operated by New Jersey Bell Telephone Company or its predecessors.

In the event that any expansion of facilities requires approval from the Bergen County Planning Board, the Department

of Environmental Protection or any other agency having jurisdiction therefore, the New Jersey Bell Telephone Company agrees to first obtain said consent prior to seeking permission of the Borough of Tenafly.

Section 14. Upon adoption, this ordinance, will cancel and supersede an ordinance enacted May 27, 1947 and June 13, 1927 by the Borough of Tenafly.

Section 15. Said Company shall pay the expenses incurred for advertising done in connection with the passage of this ordinance within thirty (30) days after the date of its going into effect.

Section 16. Upon passage of this ordinance in accordance with law, the Borough Clerk shall provide said Company with written notice thereof by certified mail. Said Company shall file with the Borough Clerk, its written acceptance of said ordinance within 30 days of the receipt of said notice.

INTRODUCED: July 12, 1977

ADOPTED: August 9, 1977

APPROVED:

John G. Manos, Mayor

ATTEST:

Vivian M. Purdy

Vivian M. Purdy, Borough Clerk

CERTIFICATE OF SERVICE

I certify that a true and complete copy of the foregoing Motion for Opposition to Appellants Motion for An Injunction or stay was served this 5th day of September, 2001, upon the following by Federal Express:

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By: Bruce S Rosen
Bruce S. Rosen

September 5, 2001