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July 19, 2017

Via Email: glenrockborough@comcast.net

Doug Young, President
Glen Rock Borough Council
1 Manchester Street
P.O. Box 116
Glen Rock, PA 17327

Re: Lt. Commander Corney “Taps” Broadcast / Borough Nuisance Ordinance Violation

Dear Mr. Young:

Rather than enforcing ordinances that *undermine* its citizens’ First Amendment rights, Glen Rock Borough should work to establish policies that *protect* the liberty of its citizens.

The Rutherford Institute¹ was asked to weigh in before the Glen Rock Borough Council regarding its recent order to Lt. Commander Joshua Corney that he discontinue his amplified broadcast of a recording of the bugle call “Taps,” allegedly because the daily broadcast—which he plays on an outdoor speaker situated on his five-acre residential property—violates the borough’s nuisance ordinance which prohibits sounds that annoy or disturb others,² or be subject to a criminal fine of \$300.

The ordinance in question is overbroad, unduly vague, and unconstitutional as applied to Lt. Commander Corney’s exercise of his First Amendment right to freedom of expression. Government regulations that threaten to inhibit the fundamental right of freedom of speech must be clearly and narrowly drawn and scrupulously limit the

¹ The Rutherford Institute is a national non-profit civil liberties organization that educates the public on civil rights issues and provides assistance to those whose fundamental liberties have been threatened or infringed.

² Witold Walczak, *A Small Town in Pennsylvania is Treading on This Naval Officer’s First Amendment Rights*, ACLU (July 10, 2017), <https://www.aclu.org/blog/speak-freely/small-town-pennsylvania-treading-naval-officers-first-amendment-rights> (last visited July 18, 2017).

government officials' discretion to censor speech.³ Anything else is a clear violation of the First Amendment.

Background

Lt. Commander Corney is an active-duty naval officer who had previously played an amplified broadcast of "Taps" every evening at 8:00 p.m. "Taps" is a military bugle call played at dusk at military installations and at military funerals. Lt. Commander Corney's practice is meant as a poignant and solemn reminder to the public of the great service and sacrifice made by those who are serving or have served in the U.S. military.

Nevertheless, a single complaint triggered the enforcement of the borough's nuisance ordinance against Lt. Commander Corney's tribute. The Borough claims that Lt. Commander Corney's tribute violates the ordinance's provisions that forbid any sound that "annoys or disturbs" others. Consequently, on June 23, 2017, the Borough ordered Lt. Commander Corney to stop playing the recording except on Sundays and "flag" holidays. The Borough threatened that any violation of the order would result in a criminal fine of \$300.

Music is Protected Speech

Unquestionably, Lt. Commander Corney's musical tribute is speech that is protected under the First Amendment to the U.S. Constitution.⁴ "Speech" protected by the First Amendment extends to many non-verbal activities, including the playing or performance of a musical composition.⁵

By severely restricting Lt. Commander Corney's musical tribute to those who have served in the military, the Borough restricts his right to free speech.

The Borough has chosen to use its broad and indefinite nuisance ordinance to restrict an active duty naval officer's tribute, ignoring the liberty afforded to citizens by the First Amendment of the United States Constitution. However, the Borough's chosen tool of censorship is contrary to First Amendment standards.

To be valid under the First Amendment, such restrictions (1) must not be too vague or delegate excessive discretion to enforcement officials, (2) must not be based on the content of the message (3) must be narrowly tailored to serve a significant governmental interest, and (4) must leave open ample alternatives for communication."⁶

³ *Housing Works, Inc. v. Kerick*, 283 F.3d 471 (2d Cir. 2002).

⁴ *Hassay v. Mayor*, 955 F.Supp.2d 505, 518 (D. Md. 2013)

⁵ *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569 (1995).

⁶ *Santa Monica Foods Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1037 (9th Cir. 2006).

The Borough's nuisance ordinance is not only constitutionally suspect under the latter three of these standards, but is unduly vague as applied in this context.

Void For Vagueness

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined."⁷ A municipal ordinance is unconstitutionally vague when it fails to give a person of ordinary intelligence a reasonable opportunity to know what behavior the law in prohibits.⁸ Ordinances containing vague language prevent citizens from engaging in constitutionally-protected activities because they fear violating the ordinance. Thus, vague laws are particularly suspect when they can be applied to First Amendment activities because they may prevent people from exercising their constitutional rights and thus impose a chilling effect on free expression.⁹

The Borough should seek to support the liberty of its citizens rather than thoughtlessly enforcing ordinances that instill fear in the community.

Additionally, vague laws offend the First Amendment because they give enforcement officials too much discretion, allowing them to decide what speech will be allowed and what will be prohibited. In order for a restriction on speech to comply with the Constitution, its terms must contain clear standards to guide officials on the application of the ordinance to prevent arbitrary and discriminatory enforcement.¹⁰

If these guidelines are not followed, the Borough perpetuates a society that wields unlawful authority over its community.

Unbridled Discretion

The Borough's nuisance ordinance clearly fails the test of vagueness because it does not include any objective test or criteria specific enough for either citizens or enforcement officials to decide if the sound constitutes a nuisance. Thus, sound may be considered a nuisance if it "annoys or disturbs a person or normal sensitivities."

In one case, a court ruled that a city's noise ordinance that prohibited "unnecessary noises . . . which are physically annoying to persons" was unconstitutionally vague because it created a subjective standard and failed to constrain

⁷ *Grayned v. City Rockford*, 408 U.S. 104, 108 (1972); *see also Fratiello v. Mancuso*, 653 F.Supp. 775, 790 (D.R.I.1987) (ordinance barring "unnecessary noises ... which are physically annoying to persons, ... or which are injurious to the lives, health, peace and comfort of the inhabitants of the city" is unconstitutionally vague).

⁸ *Com. v. Ebaugh*, 784 A.2d 846 (Pa. 2001).

⁹ *Tanner v. Virginia Beach*, 674 S.E.2d 848, 852 (Va. 2009).

¹⁰ *Fratiello*, 653 F.Supp at 790.

the discretion of enforcement officials.¹¹ Indeed, the Borough's nuisance ordinance allows enforcement upon the whim of a single member of the public who is annoyed or disturbed by the sound at issue.

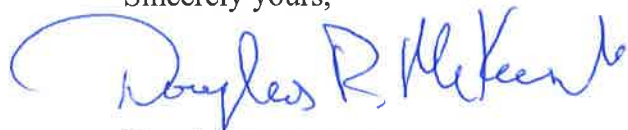
Additionally, the ordinance's provision applying to noise that occurs for an "extended period" is unconstitutionally vague. Again, there is no objective standard or criteria to be applied to determine whether a noise persists for an "extended period" and leaves this entirely to the discretion of enforcement officers. In this case, Lt. Commander Corney's playing of "Taps" lasted only about a minute each evening, yet it has been deemed to last an "extended period" and therefore constitutes a nuisance under the ordinance.

Because of a *single* complaint and a vaguely drafted ordinance, the Borough chose to restrict Lt. Commander Corney's First Amendment rights and threatened him with a criminal fine of \$300. There can be little doubt that the nuisance ordinance the Borough relied upon to prohibit Lt. Commander Corney's tribute to the military is too vague to satisfy the First Amendment and due process.

As such, the Borough's demand under that ordinance that the "Taps" tribute be severely limited violates his constitutional rights.

We urge the Borough to demonstrate its commitment to freedom by withdrawing its cease and desist order to Lt. Commander Corney and allowing him to continue to play "Taps" in tribute to those who have answered their nation's call to serve.

Sincerely yours,



Douglas R. McKusick
Senior Staff Attorney

¹¹ *Id.*