

**The Allentown Village Initiative  
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September 29, 2024

Hon. David F. Bauman, P.J.Ch.  
Monmouth County Courthouse  
71 Monument Street  
Freehold, NJ 07728

**Re: Application for an Order compelling the Borough of Allentown to issue an assembly permit.**

Dear Judge Bauman:

Please accept this letter in lieu of a more formal submission in support of the captioned application. The Allentown Village Initiative (TAVI) is a volunteer community service organization whose efforts focus on historic preservation, the arts and the support of local small businesses. We respectfully ask that this application be considered by the Court on short notice, as it pertains to the intended exercise of assembly and free speech rights on public property on October 12 and 13, 2024. TAVI has exhausted efforts to consensually resolve this matter with the Defendant, Borough of Allentown. Timely judicial intervention is required to avoid the irreparable harm which would be caused by the Defendant's refusal to issue the requested permit in time for a program scheduled to coincide with Allentown's annual Fall Festival on October 12 and 13.

As set forth in the accompanying Verified Complaint and Affidavit, TAVI seeks to conduct a free educational program on public property commonly known as the Old Burying Ground, a cemetery in our community since 1730 of approximately one acre in size just off Main Street, Allentown, containing the graves of notable founding residents. The program consists of local high school students (usually members of the History Honor Society) guiding visitors from grave to

grave with a narration on the life, times and accomplishments of interred individuals. The program has been successfully presented during previous community festivals. While these festivals typically attract crowds in the thousands, past cemetery tours are usually attended by five to ten people at any given time with up to 100 participants over the course of a two-day weekend.

On July 29, 2024, TAVI filed a request with the Defendant, Borough of Allentown (hereinafter the “Borough”) for a permit to again conduct the program described above during this year’s Fall Festival on October 12 and 13, 2024 (*See* Plaintiff’s Affidavit, **Exhibit “A”**). On or about August 13, 2024 the Allentown Borough Council “tabled” the request because of negotiations which it alleges are ongoing with Mark Swal (hereinafter “Swal”) the owner of property adjoining the Old Burying Ground. On August 22, 2024 TAVI asked that the Council grant the assembly permit, since its program was to be wholly conducted within the existing fenced boundaries of the Old Burying Ground and would not impact surrounding areas (*See* Plaintiff’s Affidavit, **Exhibit “K”**). It was also noted that the program is an exercise of the assembly and free speech rights of TAVI members, participating students and the general public. On August 29, 2024 the Defendant advised that the Borough would not grant TAVI’s permit while negotiations involving “dumpster relocation” and other issues were allegedly ongoing (*See* Plaintiff’s Affidavit, **Exhibit “L”**). Although updates were promised, none have been received and, hence, the within application follows.

As residents and volunteers, we are confused and also distressed by the Borough's refusal to allow TAVI's program, an educational community service on ground set aside for over two centuries to remember our community's founders. It pains us to be compelled to bring this action against our own municipality. It is not lost on us, however, that TAVI's program seeks to tell the stories of ancestors who fought to establish the very liberties which the Borough's actions in this matter ignore. TAVI seeks a permit to assemble and freely speak on public property, and cannot in clear conscience stand down, particularly at a time in our history when these fundamental rights remain central to national debate.

Allentown's Borough Code contains what facially appears as content-neutral time, place and manner restrictions to safeguard reasonable government interests. Borough Ordinance 4-4.2 provides:

The Mayor and Council shall forthwith issue a permit upon the application unless a prior application for the time and place shall have been made, in which event the Mayor and Council shall indicate another time and place, and upon the selection of the alternative time and place by the applicant, the Mayor and Council shall forthwith grant a permit therefor; provided, however, that the Mayor and Council may refuse a permit for the meeting, assembly or parade when in its judgment the conditions of vehicular and pedestrian traffic or the effect upon stores, offices or other places of business or upon residents in the vicinity, all considered in relation to the comfort and convenience of the public generally and to peace and good order, shall so warrant.

It is clear that the Ordinance permits denial of an assembly permit application only under specific, limited circumstances:

- If another permit for the requested time and place has already been granted;
- If the applicant's activity would impede vehicular or pedestrian traffic;

- If the “peace and good order” of stores, offices, businesses or residents would be negatively impacted.

TAVI’s permit application cannot be rejected for any of foregoing reasons. The cemetery tours are a free, educational event for a small number of people. There are no noise or vehicle concerns, nor do the tours impact the “peace and good order” of any portion of the community. Nor has any other party previously sought a permit for the same time and place.

It is equally clear that TAVI’s program is constitutionally protected by the First Amendment to the United State Constitution, which provides that “Congress shall make no law....abridging the freedom of speech...or the right of the people peaceably to assemble.” The history entombed with those resting in the Old Burying Ground tells the story of America. It is as relevant today – as the within matter demonstrates – as it was to those who lived it two centuries ago. Citizens need to hear this history, discuss and debate it, and learn how it can be applied to our divisive times. As such, the program for which TAVI seeks an assembly permit clearly falls with the ambit of matters of public concern, as defined by the Supreme Court:

"[s]peech deals with matters of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community' or when it 'is a subject of general interest and of value and concern to the public.'" Snyder v. Phelps, 562 U.S. 443 (2011), citing San Diego v. Roe, 543 U. S. 77, 83 (2004).

The courts have established that the speech in which TAVI seeks to engage “on ‘matters of public concern’ ... is ‘at the heart of the First Amendment’s protection.’ ” Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758–759 (1985), quoting First Nat. Bank of

Boston v. Bellotti, 435 U.S. 765, 776 (1978)). It is entitled to special protection under the Free Speech Clause of the First Amendment because it is at the core of democracy: "the principle that debate on public issues should be uninhibited, robust, and wide-open." New York Times Co. v. Sullivan, 376 U. S. 254, 270 (1964).

In addition, TAVI seeks to assemble and engage in this speech on public property -- an historic cemetery held in the name of the people by the Borough of Allentown. Cemeteries have long been utilized as public forums for protected speech and expression, from Lincoln's Gettysburg address to wreath laying ceremonies at the Tomb of the Unknown Soldier in Arlington National Cemetery. In the within matter, the Old Burying Ground is uniquely such a forum, since TAVI's program specifically relies upon the stories of those entombed there as the basis for the exercise of both the right to assemble and speak to commonalities between the issues of their time and the present day.

Notwithstanding these facts, the Borough has "tabled" TAVI's request for a permit to conduct the same program it approved as recently as October 2023. What has changed, apparently, is that Swal (the neighboring property owner) finds TAVI's assembly and speech to be objectionable. While it is difficult to envision high school honor students speaking about residents dead for up to two centuries to be objectionable, even if it was, such offense is not a legitimate reason to abridge First Amendment rights. The U.S. Supreme Court has held that even content-neutral restrictions on speech are subject to intermediate scrutiny to ensure that they further a substantial government interest, are narrowly drawn and leave ample alternative channels for

communication. Perry Educ. Ass’n. v. Perry Local Educator’s Ass’n., 460 U.S. 37, 45 (1983). The Court has also recognized, however, that even content-neutral time, place and manner restrictions can be applied in a way which violated Constitutional rights. Thomas v. Chi. Park Dist., 534 U.S. 316, 323 (2002).

Such is the case in the within matter. The Borough lacks the discretion to deny TAVI’s permit application on ancillary grounds founded in perception or politics of either the Council or a third party. This would include whatever “negotiations” it alleges have been ongoing with Mark Swal for almost two years without visible or otherwise disclosed results. The Borough cannot effectively extend a “heckler’s veto” to Mr. Swal because he – or anyone else – may be offended by TAVI’s program. (See NAACP v. Claiborne Hardware Co., 458 U.S. 886, 910–11, 932–34 (1982) and Coates v. City of Cincinnati, 402 U.S. 611, 611, 616 (1971).

Nor can the Borough “table” TAVI’s application for some indeterminate period, the practical effect of which is to deny the application and impermissibly abridge First Amendment rights. In reality, tabling TAVI’s permit request unconstitutionally suppresses the free communication of ideas and views, an outcome inimical to the First Amendment. The proffered explanation that TAVI’s permit application has been tabled in order to avoid interference with undisclosed (and apparently lengthy) negotiations with Swal is similarly defective. In Cantwell v. Connecticut, 310 U.S. 296, 308 (1940) the Court noted that “[A] State may not unduly suppress

free communication of views, religious or other, under the guise of conserving desirable conditions.” Id.

“Tabling” also is not a permissible option in the Borough’s permit Ordinance 4-4.2 and, additionally, denies TAVI the formal appeal process within the Borough that would be available when the Borough Council denies a permit application outright. Again, the Supreme Court has considered analogous denials of First Amendment rights and concluded that judicial resolution – not just review – is required. City of Littleton v. Z.J. Gifts D-4 LLC, 541 U.S. 774, 781 (2004). As it stands in the within matter, the Borough has affected a prior restraint of the speech of TAVI, its members, volunteers and the public, which is tantamount to censorship. In Freedman v. Maryland, 380 U.S. 51 (1965) the Court set out three procedural safeguards that must be present for any system of prior restraint to be deemed constitutionally valid. First, the burden of initiating judicial proceedings and proving that the speech may be restricted must rest on the state. Second, the government cannot impose restraints prior to judicial review without a specific brief time period. Third, the speaker must be assured of “a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license.” Id. at 68. The Borough’s unilateral action to quash TAVI’s application through inaction fails all three prongs of the Supreme Court’s test.

Plaintiff has made every effort to resolve this matter without the necessity of bringing the within action before the Court. As set forth in Plaintiff’s Affidavit, TAVI has provided advance

copies of draft pleadings prior to filing in an attempt to point out the Constitutional infirmity of the Borough's position. It has repeatedly attempted to engage the Borough, hoping to clarify that a program featuring high school honor students and others sharing the history of our community's founders could not possibly offend or create safety concerns justifying denial of TAVI's permit request. The Borough's attempt to relocate TAVI's program to the Allentown African American Episcopal Cemetery (hereinafter the "AME cemetery") fails to address any of TAVI's First Amendment concerns and is not a viable alternative to its program in the Olde Burying Ground. The AME Cemetery is removed from the fall festival site on Main Street and does not contain 18<sup>th</sup> Century graves. The Court has held that "the basic test for gauging the sufficiency of alternative channels is whether the speaker is afforded a forum that is accessible and where the intended audience is expected to pass." Ward v. Rock Against Racism, 491 U.S. 781 (1989). The AME Cemetery does neither within the context of the festival audience towards whom TAVI's program is directed.

For all of the foregoing reasons, the Council's denial of TAVI's permit application is an arbitrary and capricious exercise of its regulatory authority and an unconstitutional infringement upon the First Amendment rights of individual TAVI members and participants in TAVI's cemetery tour program. The right to assemble and engage in free speech cannot be abridged in the guise of vague, undefined, alleged government interests of indeterminate duration. Restrictions on the First Amendment's "indispensable democratic freedoms" can only be justified by the "gravest abuses, endangering paramount interests" – "public danger, actual or impending" Thomas v.

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Collins, 323 U.S. 516 (1945). The Council's denial of TAVI's application simply has no such foundation and cannot be permitted to stand as a blotch on the history and reputation of our community. The Plaintiff herein petitions this Court to expeditiously hear this matter and enter an Order compelling the Defendant to grant the Plaintiff's permit application for its program to be held in the Old Burying Ground on October 12 and 13, 2024.

Respectfully,

Martha Ploshay  
Registered Agent  
The Allentown Village Initiative