



July 1, 2011

Mayor Rudy Fernandez Township of Livingston VIA Fax# 973-535-7967 and U.S. Mail 357 South Livingston Ave. Livingston, NJ 07039-3994	Sharon L. Weiner, Esq. Township Attorney VIA Fax# 973-835-1732 and U.S. Mail 51 Route 23 South P.O. Box 70 Riverdale, NJ 07457
Mary Ann Apostolico, Zoning Inspector Township of Livingston VIA Fax# 973-992-7435 and U.S. Mail 357 South Livingston Ave. Livingston, NJ 07039-3994	Deputy Mayor Stephen A. Santola Township of Livingston 357 South Livingston Ave. Livingston, NJ 07039-3994

Re: Violation of Free Speech in Livingston

Dear Mayor Fernandez, Ms. Weiner, Ms. Apostolico and Deputy Mayor Santola:

Patrick Racaniello contacted the Alliance Defense Fund (ADF) regarding his desire to express his religious beliefs on his private property in Livingston. Mr. Racaniello is a citizen of Livingston who desires to share his religious beliefs to others by displaying a small wooden cross in various locations in the yard in front of his home.

On April 9, 2011, Mr. Racaniello placed a 31 inch x 19 inch wooden cross on a tree in his yard in order to celebrate the season of Lent and to communicate the importance of the cross to those in his neighborhood. A neighbor, however, disagreed with the message of the cross and began screaming at Mr. Racaniello and his family in their yard. Mr. Racaniello then called the police. But the police eventually informed Racaniello that he must remove the cross from the tree because it was on a tree and was located within 8 feet of the curb.

Though Mr. Racaniello did not want to remove the cross, he did so in order to avoid a citation. But Mr. Racaniello still wanted to display his cross somewhere. So he made a new 6 foot x 4 foot wooden cross and displayed that cross in his yard by sticking it in the ground 9 feet from the curb. Unfortunately, Township Officials called Mr. Racaniello and informed him that he could not place the cross in that location because the Township right-of-way extended from the curb 10 feet into his yard.

Eventually, Mr. Racaniello received a formal letter from the Livingston Zoning Inspector demanding that Mr. Racaniello remove the cross from its present location because that location violated Livingston Ordinance 178-11. That ordinance reads as follows:

No person shall post or affix any notice, poster or other paper or device calculated to attract the attention of the public, nor cause, suffer or permit the same to be posted or affixed, to any tree, lamppost, public utility pole or traffic sign, or upon any public building or structure, except as may be permitted or required by law.

The letter from the Zoning Inspector indicated that Racaniello could and would violate this ordinance in two distinct ways. First, Racaniello would violate the ordinance by continuing to place his cross in his yard within the Township right-of-way --- an area that extends 10 feet back from the curb of the street into Mr. Racaniello's yard. Second, Racaniello would violate the ordinance by affixing his cross to any tree. Thus, to avoid violating Ordinance 178-11, the letter demanded that Racaniello "move the cross to another location on your property, outside of the Township right-of-way and not on any tree by Monday, June 6, 2011." (emphasis added).

Racaniello did not want to remove the cross from the tree that he initially put it on. This tree was located within 10 feet of the curb. Nor did Racaniello want to remove the cross from the location in the ground (9 feet from the curb). And finally, Racaniello wants to put the cross on trees in his yard that are farther away than 10 feet from the curb. Yet, Racaniello has refrained from any of these activities because of his interactions with Livingston officials, their letter, and Ordinance 178-11.

LEGAL ANALYSIS

THE FIRST AMENDMENT PROTECTS RACANIELLO'S DESIRED EXPRESSION

Racaniello desires to convey his religious beliefs by displaying a cross. This activity is protected by the First Amendment of the United States Constitution. Religious expression is speech and is entitled to the same level of protection as other kinds of speech. *Capital Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 760 (1995). It is well-settled that the cross communicates a clear Christian message and constitutes protected speech. *See, e.g., id.* at 760-61 (noting that display of Latin cross in park was protected speech); *Congregation Lubavitch v. City of Cincinnati*, 997 F.2d 1160, 1164 (6th Cir. 1993) (noting that displaying cross is protected speech); *Draper v. Logan County Public Library*, 403 F.Supp.2d 608, 621 (W.D.Ky. 2005) ("Indeed, the Christian cross is one of several inherently expressive religious symbols that cannot seriously be considered to ever be devoid of message."). Thus, Mr. Racaniello's desired expression is clearly covered by the First Amendment.

LIVINGSTON MAY NOT USE A VAGUE ORDINANCE TO CENSOR RACANIELLO'S CROSS

As indicated, Racaniello wishes to place a cross in three distinct locations: 1) on a tree located in his yard within 10 feet of the curb; 2) in the ground located in his yard within 10 feet of the curb; and 3) on other trees located in his yard farther away than 10 feet from the curb.

Yet, Livingston has prohibited Racaniello from displaying the cross in all three of these locations. Indeed, Livingston police officers explicitly ordered Racaniello to remove the cross from the tree located in his yard within 10 feet of the curb. And Livingston officials later called Racaniello and ordered him to move his cross from the ground located within 10 feet of the curb. Finally, Ordinance 178-11 prohibits Racaniello from affixing his cross "to any tree." That phrase obviously encompasses any tree located anywhere on Racaniello's property. In fact, the letter from the Zoning Inspector confirmed this interpretation since it ordered Racaniello to remove the cross "outside of the Township right-of-way and not on any tree..." (emphasis added). Thus, the prohibition not only extends within the Township right-of-way, but it also extends to any tree anywhere on Racaniello's property.

The problem with these prohibitions is two-fold. First, Livingston cannot completely ban such a unique mode of expression on private property. For example, in *City of Ladue v. Gilleo*, a city banned residential lawn signs. 512 U.S. 43, 45 (1994). The Supreme Court assumed the ban was content neutral but refused to apply intermediate scrutiny. *Id.* at 53-54. Instead, the Court balanced the ordinance's purpose against its impact upon the affected medium of expression and invalidated the ordinance. *Id.* A similar analysis occurred in *Watchtower Bible*, when a city banned unregistered door to door canvassing. 536 U.S. at 153-56. The Supreme Court refused to specify the level of scrutiny and simply invalidated the law because of its breadth and its impact on a unique medium of expression. *Id.* at 164. In light of these recent decisions, lower courts have applied heightened scrutiny against bans on expression on private property, such as bans on lawn signs. This heightened scrutiny takes the form of a balancing test:

Thus, under these relatively recent decisions, because of the "particular concern with laws that foreclose an entire medium of expression," even if it is content neutral, the reviewing court in such cases must balance the state's interest in regulating speech against the individual and public's interest in protecting it.

Lusk v. Village of Cold Spring, 475 F.3d 480, 490 (2nd Cir. 2007) (applying heightened scrutiny to regulation on residential signs). *See also Serv. Employees Int'l Union v. Municipality of Mt. Lebanon*, 446 F.3d 419, 425 (3d Cir. 2006) ("Our task here, as there [*Watchtower*] described by the Supreme Court, is to look ... to the amount of

speech covered by the ordinance and whether there is an appropriate balance between the affected speech and the governmental interest that the ordinance purports to serve.”) (citation and quotation omitted).

When that scrutiny is applied here, there is no basis for Livingston to ban all signs and symbols from every tree located on private property. In this respect, Livingston’s ban is identical to the ban on residential lawn signs invalidated in *Ladue*. No interest, whether aesthetics or safety, justifies such a broad ban. See *Ladue*, 512 U.S. at 54, 58 (noting that “City’s interest in minimizing the visual clutter” did not justify ban because of the “special respect for individual liberty in the home has long been part of our culture and our law; that principle has special resonance when the government seeks to constrain a person’s ability to speak there.”).

But there is a second problem with Livingston’s actions: Livingston is applying its ordinance in a vague way to prohibit Racaniello’s cross. According to Livingston officials, Racaniello cannot place the cross in the ground 9 feet from the curb because of Ordinance 178-11. But, by its terms, that ordinance does not allow anyone to “post or affix” items “to any tree, lamppost, public utility pole or traffic sign or upon any public building or structure...” Racaniello, however, is not posting or affixing anything. And he certainly is not posting or affixing anything on a tree, lamppost, public utility pole, traffic sign, or upon any building or structure. Racaniello is simply erecting a stand-alone cross in the ground in his yard. The express language in Ordinance 178-11 simply does not prohibit what Racaniello wants to do.

Despite this discrepancy, Livingston still relies on Ordinance 178-11 to bar Racaniello’s cross. But, by applying a regulation that clearly does not regulate Racaniello’s actions, Livingston makes it impossible for Racaniello and others to know how to comply with the law. Not only that, Livingston also retains discretion to apply the regulation in *ad hoc* and discriminatory ways by ignoring the regulation’s text. In so doing, Livingston violates Racaniello’s right to due process. See *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (explaining that a regulation violates the Constitution by failing (1) to define the offense with sufficient definiteness that ordinary people can understand prohibited conduct; and by failing (2) to establish standards to permit police to enforce the law in a non-arbitrary, non-discriminatory manner). See also *Bynum v. United States Capitol Police Bd.*, 93 F.Supp.2d 50, 53 (D.C. 2000) (regulation prohibiting “demonstration” held unconstitutionally vague as applied to prayer because the ban on prayer “is found nowhere in the statute enacted by Congress or even in the regulation promulgated by the Capitol Police Board.”).

DEMAND

I trust this information helps clarify the rights and responsibilities of the City. In summary, the First Amendment does not allow Livingston to enforce Ordinance 178-11 so as to prevent Mr. Racaniello from displaying his cross 1) on trees in his yard within 10 feet of the curb, 2) on trees in his yard outside of 10 feet from the curb, and 3) in the ground in a location within 10 feet from the curb. Because Mr. Racaniello retains a strong desire to display his cross in each of these locations in the future, we demand that you notify us in writing – no later than three weeks from the date of this letter – that you will allow Mr. Racaniello to display his cross in each of these specified locations. If we do not hear from you in writing before the specified deadline, we can only assume that the City approves of and intends to continue its unconstitutional policies by banning Racaniello's cross in each of the distinct locations specified above. Under that scenario, we would have no choice but to take legal action to protect Mr. Racaniello's First Amendment rights.

Sincerely,

A handwritten signature in black ink, appearing to be 'Jonathan Scruggs', written in a cursive style.

Jonathan Scruggs

JAS/mk

cc: Patrick Racaniello