



New Jersey Libertarian Party

Preempted Ordinance Repeal Project

John Paff, Chairman

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December 14, 2007

Theresa Casagrande, Administrator

Borough of Spring Lake Heights

555 Brighton Ave

Spring Lake Heights, NJ 07762 *(via fax and email to tcasagrande@springlakehts.com)*

Dear Ms. Casagrande:

I write, both individually and in my capacity as Chairman of the New Jersey Libertarian Party's Preempted Ordinance Repeal Project, seeking review and repeal of certain provisions within Chapter III of the Borough's Ordinances. In sum, I believe that several parts of that chapter, particularly those dealing with loitering¹ and vagrancy², are invalid.

I write to you, as Administrator, because Ord. 2-6.5 provides your office with broad responsibilities regarding "the general management of all business of the Borough." Since continued enforcement of certain parts of Chapter III, and allowing those laws to remain on the books, if they are indeed invalid, impacts upon the Borough, I believe that this letter is properly addressed to you.

I have brought similar issues to the attentions of many towns and all who have seriously considered them (e.g. Flemington Borough (Hunterdon County), Highland Park Borough (Middlesex County) and Elmwood Park Borough (Bergen County)) have elected to repeal their ordinances. I've attached two newspaper articles, "Loitering law may not have a leg to stand on," Herald News, May 18, 2005, and "Highland Park vote allows hanging out," Home News Tribune, November 3, 2005.

¹ "No person shall loiter, sit, lounge, idly stand, or sleep in or on the highways, or other public places after being requested or commanded by an officer to move on, disperse or leave, or being under the influence of intoxicating liquor or in an intoxicated condition, shall loiter, be upon or assemble upon the highways or other public places, or shall indulge in and utter loud, offensive, indecent or profane language, or address or make audible and offensive remarks or comments upon or to any person passing along or being on or in any public conveyance, or shall obstruct or interfere with any person or persons lawfully being on or upon any highway or other public place or conveyance."

² "No person shall go about from door to door, or being on the highway or other public place, accost or annoy any person by begging or soliciting; nor shall wander abroad and lodge in uninhabited buildings or other places and not give a good account of himself. This section shall not affect any person or persons duly licensed by the State of New Jersey to engage in the pursuit of his or their business in the Borough or any person who complies with Section 4-2 of these Revised General Ordinances of the Borough of Spring Lake Heights."

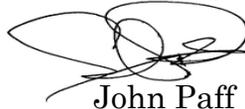
My argument is not that these ordinance are unconstitutional. Rather, as I'll explain, they have been preempted by state law. The New Jersey Legislature, when enacting the Criminal Code in the late 1970s, specifically decided to **not** include certain offenses, such as loitering, within the Code. The Legislature's decision arose out of its concern that "vagrancy and loitering statutes have long suffered from constitutional infirmity and have been criticized as inviting official harassment and discriminatory enforcement."³ Since the Legislature has made this pronouncement, it follows that no municipality is allowed to locally prohibit what the Legislature has decided to decriminalize.⁴

Since Elmwood Park and Highland Park have repealed their loitering ordinances, it would appear that Spring Lake Heights' is likewise invalid. At the very least, it would be prudent for Spring Lake Heights' to ask its municipal attorney to review the loitering and vagrancy ordinances and opine as to their validity. I would further suggest that the attorney not restrict his or her review to only the loitering and vagrancy provisions, but extend it to the rest of Chapter III as well (The "Brawling"⁵ prohibition, for instance is similarly suspect) because a 2003 Appellate Division decision⁶ suggests that all or nearly all municipal ordinances that try to regulate "street conduct" have been similarly preempted by the Code.

Unfortunately, getting municipalities to ask their attorneys to undertake this type of review is often not as easy and straightforward as it may appear. As the representative in New Jersey Libertarian Party who has attempted to get similar ordinances repealed statewide, I have encountered substantial resistance to my efforts. What I've found, bluntly, is that elected municipal officials are often well aware that their ordinances are invalid but are afraid to question them lest they be regarded as "soft on crime." Or, perhaps, more insidiously, council members wish to keep these ordinance on the books so that the local police can use them to harass those who have committed no actual crime, but whose ethnicity, religion or lifestyle are personally objectionable.

Thank you for your attention to this matter. I look forward to learning whether you are willing, as a first step, to work with me in getting the municipal attorney to render an opinion on the legality of Chapter III.

Sincerely,

A handwritten signature in black ink, appearing to read "John Paff", with a large, stylized flourish above the name.

John Paff

³ See, State v. Crawley, 90 N.J. 241, 247 (1982)

⁴ Id. at 251.

⁵ "No person shall revel, quarrel, brawl, or otherwise misbehave in a disorderly manner to the disturbance or annoyance of the peaceful inhabitants of the Borough or be guilty of any other disorderly conduct in or on a highway or other public place."

⁶ State v. Paserchia, 356 N.J. Super. 461 (App.Div. 2003).

Loitering law may not have leg to stand on

Wednesday, May 18, 2005

By HEATHER KAYS
HERALD NEWS

ELMWOOD PARK - Borough Attorney Louis Mangano wants to take a longstanding loitering ordinance off the books, after Police Chief Don Ingrasselino recently questioned its legality.

During an April meeting on the proposed building of a convenience store, Ingrasselino said the loitering law is unconstitutional and could not be enforced.

After learning of the dispute, John Paff, an attorney in Somerset who has fought loitering ordinances in several municipalities contacted Mangano, the mayor and the council.

Paff, a Libertarian Party member who fought and won a case against Flemington's loitering ordinance, agrees with Ingrasselino and is urging the borough to remove the ordinance from its books.

"While I am not sure about Police Chief Ingrasselino's reported statement that Elmwood Park's loitering ordinance is unconstitutional, I do believe that it is unenforceable because it has been preempted by the New Jersey Criminal Code," Paff wrote in a letter to local officials. Paff wrote that the court decision overturning Flemington's ordinance - which he called "virtually identical" to Elmwood Park's - supported his contention.

At Thursday's meeting, Mangano said that the ordinance, which has been around since the 1960s, should be removed.

"The borough cannot have ordinances that are different from what the state is legislating," Mangano said in a phone interview Tuesday. "The state preempts anything that the borough does."

For the most part, members of the council agreed.

"The chief was right on the money," said Democratic Councilman Jack McLaughlin. "We don't want laws on the books that can't be enforced, and we certainly don't want laws on the books that could come back to bite us."

McLaughlin and Ingrasselino both said that if a police officer attempted to use the loitering ordinance to arrest someone, in the end, the borough could be sued and held liable.

"If you are going to stop someone, there should be a distinct reason," said McLaughlin. "A loitering ordinance is too generic."

But according to Republican Mayor Richard Mola, the ordinance should be left alone.

"Personally, I think we should just leave it there," said Mola. "If it doesn't have any bearing, what's the difference?"

The borough would be setting itself up by removing the ordinance, he said.

"I'm just afraid that if we have nothing on the books, then we'll just be standing there naked," said Mola.

The ordinance will be discussed again at this Thursday's meeting.

"The ordinance has to be repealed," said Mangano. "It's going to be done. That's all there is to it."

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Highland Park vote allows hanging out

By **RICK HARRISON**
STAFF WRITER

HIGHLAND PARK: It is perfectly legal to hang out in Highland Park.

The Borough Council voted to repeal its loitering ordinance Tuesday in response to a campaign by Libertarians who say such laws are illegal.

John Paff, a Somerset attorney and secretary of the Central New Jersey Libertarian Party, fought the loitering ordinance as he has in several municipalities, including Flemington, where he won a court case to remove the law.

According to Paff, now 17 of 25 municipalities in Middlesex County have some version of an anti-loitering ordinance.

Citing a 1982 state Supreme Court decision, Paff said that loitering ordinances are illegal remnants from the 1960s and 1970s that need to be

wiped off local code books.

"The court determined that loitering was so precarious, so subject to abuse by law enforcement, that we will not allow it to be prohibited anymore," Paff said. "Police sometimes do have axes to grind. They can persecute someone they don't like."

In its opinion, the court found that Newark's loitering ordinance was pre-empted by the state criminal code, which had no loitering provision. "The exclusion of a loitering provision from the code expresses a state policy not to penalize such conduct," the court said.

The defunct ordinance in Highland Park, adopted in 1972, defined loitering as "remaining idle in essentially one location and shall include

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LOITER

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the concepts of spending time idly, loafing or walking about aimlessly."

The ordinance goes on to state that any police officer "in the exercise of reasonable judgment" can ask someone to leave a public place if that person is "causing or likely to cause any condition which would obstruct or interfere with any person lawfully in any public place."

Diane Dabulas, a lawyer with Highland Park Borough Attorney Daniel McCarthy's firm, Rogut McCarthy Troy LLC, said, "There may be constitutional infirmities with the loitering ordinance, so we decided to act on it and clear it off of the books."

Dabulas would not discuss details of the ordinance nor say if she believed the ordinance was unconstitutional.

Sgt. Joe Vassallo, spokesman for the Highland Park Police Department, said that loitering doesn't amount to a significant problem in the borough, at least not anything that can't be dealt with by other ordinances and the state criminal code.

"I'm not going to say we don't have loitering," Vassallo said. "But most of it is juvenile loitering, and when asked to refrain, they usually comply."

Vassallo said Police Chief Francis Kinney recommended that the ordinance be rescinded based on the 1982 court decision. It might have taken a

while, but "the writing was on the wall for our ordinance," Vassallo said.

Borough Council President Elsie Foster-Dublin said that while she doesn't feel Highland Park has a loitering problem, she is concerned when she comes home late at night and sees children gathered on the streets.

"I've come back to town at 3 a.m., and I see kids hanging out," she said. "I think they should be at home."

But although Foster-Dublin said this was a safety issue that was addressed by the now-repealed loitering provision, she would not support the institution of a curfew.

Ed Barocas, legal director of the American Civil Liberties Union of New Jersey, would agree, warning that juvenile curfews suffer from similar legal problems. Citing a case he said the ACLU won against West New York, Barocas said such laws cover more activity than a town is constitutionally permitted to regulate, trampling on free speech and infringing on parental rights.

"Parents, rather than the town, are proper decision-makers about what their children should and shouldn't be allowed to do," Barocas said, adding that the ACLU successfully challenged similar ordinances in West Orange and East Hanover. "Highland Park has done well," said Paff, the man who stood up for standing around.

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