



New Jersey Libertarian Party

Preempted Ordinance Repeal Project

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Hon. Judith Hall, Mayor, and
Members of the Edgewater Park Township Committee
984 Tuckerton Rd
Marlton, NJ 08053

(Via email only to ldougherty@edgewaterpark-nj.com)

Dear Mayor Hall and Members of the Township Committee:

I write, both individually and in my capacity as Chairman of the New Jersey Libertarian Party's Preempted Ordinance Repeal Project. I ask that you a) request your Township Attorney to render an opinion on the validity of § 9.04.010 (Disorderly Conduct) of the Township Code and b) introduce an ordinance to repeal those parts that the attorney finds to be invalid.

The ordinance prohibits five types of conduct. All are an invalid exercise of municipal power because the Legislature has already passed comprehensive legislation that intends to regulate this conduct statewide and leaves no room for local legislation on the same topic. See N.J.S.A. 2C:1-5d and State v. Felder, 329 N.J. Super. 471 (App. Div. 2000).

For instance, § 9.04.010(E) states that a person commits a violation if he or she "intentionally obstructs vehicular or pedestrian traffic without lawful authority." Yet, N.J.S.A. 2C:33-7, the ordinance's statutory counterpart, states:

Obstructing Highways and Other Public Passages.

a. A person, who, having no legal privilege to do so, purposely or recklessly obstructs any highway or other public passage whether alone or with others, commits a petty disorderly persons offense. "Obstructs" means renders impassable without unreasonable inconvenience or hazard. No person shall be deemed guilty of recklessly obstructing in violation of this subsection solely because of a gathering of persons to hear him speak or otherwise communicate, or solely because of being a member of such a gathering.

b. A person in a gathering commits a petty disorderly persons offense if he refuses to obey a reasonable official request or order to move:

(1) To prevent obstruction of a highway or other public passage; or

(2) To maintain public safety by dispersing those gathered in dangerous proximity to a fire or other hazard.

An order to move, addressed to a person whose speech or other lawful behavior attracts an obstructing audience, shall not be deemed reasonable if the obstruction can be readily remedied by police control of the size or location of the gathering.

As you can see, Edgewater Park's ordinance prohibits an "intentional obstruction" *per se*, while the statute balances "the First Amendment guarantees of speech and assembly against the need for public safety measures under appropriate circumstances." State v. Greenberg, 179 N.J. Super. 565, 570 (Law Div. 1980).¹

If a person were to speak on a sidewalk in Edgewater Park and a group of citizens were to gather around to hear the speech, the speaker and listeners could arguably be arrested under the ordinance. But, under the statute, no one in the gathering could be arrested unless they first refused a police order to move to a different location.

This hypothetical illustrates why having this ordinance on the books is dangerous. First, it invites police officers, who may not be aware of the distinction between the ordinance and the statute, to wrongly arrest people who are lawfully exercising their free speech and assembly rights. Second, if people are wrongly arrested under the ordinance, the Township might be sued civilly for violating their rights.

The conduct prohibited by each of the other parts of the ordinance are also covered by state statute: Subsections A, B and C are covered by N.J.S.A. 2C:33-2 and 4 and subsection D is covered by N.J.S.A. 2C:33-8.

Unfortunately, getting municipalities to ask their attorneys to opine on an ordinance's validity is often not as easy and straightforward as it may appear. As a representative of the 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 sometimes know, or at least suspect, that some of their ordinances are invalid but are afraid to question them lest they be regarded as "soft on crime." Or, perhaps, more insidiously, they 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 who, by their very presence, cause other people to feel

¹ Here's a more from the Greenberg decision: ". . . the purpose behind this statute is to prohibit the offense of obstruction while balancing First Amendment guarantees of freedom of speech and assembly against the need for public safety measures under appropriate circumstances. In order to effectuate this balance, the act defines obstruction but provides that a person is not guilty of obstruction merely because a group gathers to hear him speak, or because he is a member of a group gathered to hear another speak. The statute goes on to establish the relative obligations of private citizens and the police in public safety terms, when an obstruction occurs. A person must obey a reasonable order to move to prevent obstruction or maintain public safety if he is a part of a gathering dangerously close to a fire or other similar hazard. At the same time, an order to move directed to a person whose speech attracts an obstructing audience will not be considered reasonable if the obstruction can be remedied in a less restrictive way."

uneasy. Hopefully, the Edgewater Park Mayor and Committee will be bold and upfront enough to ask the municipal attorney to render a legal opinion on the validity of these ordinances.

Thank you for your attention to this matter. I look forward to learning whether you are willing to ask your municipal attorney for his opinion on these ordinances.

Sincerely,

A handwritten signature in black ink, appearing to be "John Paff", written in a cursive style with several loops and a long horizontal stroke at the end.

John Paff