



New Jersey Libertarian Party

Preempted Ordinance Repeal Project

John Paff, Chairman

P.O. Box 5424

Somerset, NJ 08875-5424

Phone: 732-873-1251- Fax: 908-325-0129

Email: lpsmc@pobox.com

August 15, 2009

Hon. Bob Smith, Mayor, and members of the
Andover Township Committee
134 Newton Sparta Road
Newton, NJ 07860 (via e-mail vtompson@andovertwp.org)

Dear Mayor Smith and Committee members:

I write, both individually and in my capacity as Chairman of the New Jersey Libertarian Party's Preempted Ordinance Repeal Project, seeking repeal of Chapter 86 (Loitering) and repeal of at least part of Chapter 107 (Peace and Good Order) of the Township Code.

As for the Loitering Ordinance, attached are copies of Andover's present ordinance as well as West Milford's repealed loitering ordinance. Since the two ordinances are virtually identical and since Andover Township Attorney Fred Semrau was West Milford's attorney at the time of the repeal, I think that he will agree that Andover's loitering ordinance is illegal and ought to be repealed. Would you please ask Mr. Semrau to review Andover's loitering ordinance and advise the Committee as to its legality?

As for the Peace and Good Order ordinance, parts of it seek to regulate conduct that is already regulated by the New Jersey Criminal Code. For example, § 107-10 seeks to regulate "Indecent behavior"—which is the same type of conduct that is comprehensively regulated by Chapter 33 in Title 2C of the New Jersey Statutes. As a specific example, § 107-10B makes it illegal for a person to "utter loud and offensive or profane or indecent language in any public street or other public place, public conveyance or place to which the public is invited."

Yet, this is the same type of conduct that the Criminal Code regulates by way of N.J.S.A. 2C:33-2(b), which states:

Offensive language. A person is guilty of a petty disorderly persons offense if, in a public place, and with purpose to offend the sensibilities of a hearer or in reckless disregard of the probability of so doing, he addresses unreasonably loud and offensively coarse or abusive language, given the circumstances of the person present and the setting of the utterance, to any person present.

In State v. Paserchia, 356 N.J. Super. 461, (App.Div.2003), page 466, the Appellate Division found that part of the New Jersey Criminal Code, N.J.S.A. 2C:33, “reveals a policy to comprehensively address street behavior and other conduct in public places which may disturb citizens and disrupt peaceful society.” The Legislature, recognizing the tension between controlling “street behavior” and safeguarding citizens’ free speech and assembly rights, decided to regulate “street behavior” so comprehensively that there was no room left for local regulation of the same conduct.

The bottom line is this: The State of New Jersey has already struck a balance between public assembly and expression rights and the government’s need for peace and good order on the streets. Andover Township, as a subordinate subdivision of the State, is not permitted to strike a different balance between these competing interests through local legislation. Accordingly, § 107-10B is invalid by reason of preemption and should be repealed.

In conclusion, would you please ask Mr. Semrau to review both the Loitering and the Peace and Good Order ordinances and recommend repeal of those sections which he finds to be invalid?

Thank you for your attention to this matter. I look forward to receiving your or your attorney’s response.

Sincerely,

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

John Paff

cc. Fred Semrau, Esq. (*via email only to fcs@dks-law.com*)
w/ enclosures

Andover Loitering Ordinance

§ 86-1 Definitions: As used in this chapter, the following terms shall have the meanings indicated:

LOITERING - Remaining idle or walking aimlessly about in essentially one location.

PARENT or GUARDIAN - Includes any adult person having care or custody of a minor, whether by reason of blood relationship, the order of any court or otherwise.

PUBLIC PLACE - A place to which the public has access and shall include any public building and grounds, street, highway, road, alley, boardwalk or sidewalk. It shall also include the front or the neighborhood of a store, shop, restaurant, tavern or other place of business, and public grounds, areas and parks, as well as parking lots or other vacant private property not owned by or under the control of the person charged with violating this chapter, or in the case of a minor not owned or under the control of his parent or guardian.

§ 86-2 Certain types of loitering prohibited. No person shall loiter in a public place in such a manner as to:

- A. Create or cause to be created a danger of a breach of the peace.
- B. Create or cause to be created any disturbance or annoyance to the comfort and repose of any person.
- C. Obstruct the free passage of pedestrians or vehicles.
- D. Obstruct, molest or interfere with any person lawfully in a public place. This shall include the making of unsolicited remarks of an offensive, disgusting or insulting nature or which are calculated to annoy or disturb the person to, or in whose hearing, they are made.

§ 86-3 Violations and penalties. Any person violating the provisions of § 86-2 shall be ordered to move on by a police officer, failing which he shall be guilty of a violation.

§ 86-4 Loitering by minors; notice; presumption.

- A. No parent or guardian of a minor under the age of 18 years shall knowingly permit that minor to loiter in violation of this chapter.
- B. Whenever any minor under the age of 18 years is charged with a violation of this chapter, his parent or guardian shall be notified of this fact by the Chief of Police or any other person designated by the Chief of Police to give such notice.
- C. If at any time within 30 days following the giving of notice, the minor to whom such notice relates again violates this chapter, it shall be presumed in the absence of evidence to the contrary that the minor did so with the knowledge and permission of his parent or guardian.

§ 86-5 Discretion of police officer.

Whenever any police officer shall, in the exercise of reasonable judgment, decide that the presence of any person in any public place is causing or is likely to cause any of the conditions enumerated in § 86-2B, he may, if he deems it necessary for the preservation of the public peace and safety, order that person to leave that place. Any person who shall refuse to leave after being ordered to do so by a police officer shall be guilty of violation of this chapter.

West Milford Loitering Ordinance (Repealed)

§ 5-3.1 Definition. As used in this section:

A. "Loiter" or "loitering" in this section shall mean any standing, standing around, lingering, lounging, sleeping, wandering, and, in the colloquial phrase, hanging around, or, refusal to move away from any public place or quasi-public place when ordered so to do by any police officer of the Township, when such loitering shall be contrary to the public safety, peace, property, welfare and good order of the Township, or of the inhabitants thereof.

B. "Public place" or "quasi-public place" in this section shall mean any street, sidewalk, curb, park, place or property owned by the Township, or by the board of education or where the public is customarily invited, including alleys and business parking areas, lobbies, shelters, and entrance ways.

C. "Parent" or "guardian" shall mean any adult person having care or custody of a minor, whether by reason of blood relationship, the order of any court or otherwise.

§ 5-3.2 Certain Types of Loitering Prohibited. No person whether as pedestrians, or as occupants or users of any motor vehicle or motorcycle, scooter or bicycle, shall loiter in a public place in such a manner as to:

A. Create or cause to be created a danger of a breach of the peace.

B. Create or cause to be created any disturbance or annoyance to the comfort and repose of any person.

C. Obstruct the free passage of pedestrians or vehicles.

D. Obstruct, molest or interfere with any person lawfully in a public place. This paragraph shall include the making of remarks of an offensive, disgusting or insulting nature or which are calculated to annoy or disturb the person to, or in whose hearing, they are made.

§ 5-3.3 Violation. Any person violating the provisions of subsection 5-3.2, who when ordered to move on by a police officer, and fails or refuses to do so shall be guilty of a violation. If any such person shall, after receiving such order, thereafter return to or re-congregate at such public place within three hours of receipt of such order he shall be guilty of a violation of subsection 5-3.2 of this section, whether or not any further order to disperse or move away from the public place or quasi-place shall first be given by any police officer of the Township.

§ 5-3.4 Loitering by Minors. It shall be unlawful for the parent, guardian or other adult person having the care or custody of any minor under the age of 18 to knowingly permit such minor to loiter in violation of this action. Whenever any minor under the age of 18 is apprehended for violating this section, the chief of police shall notify the parent, guardian or other person having custody of the minor. If it be established that any minor under the age of 18 loitered in violation of this section between the hours of 9 P.M. and 6 A.M. of the following day, prevailing time, then it shall be presumed in the absence of proof to the contrary, that the parent, guardian or other adult person having the care or custody of such minor knowingly permitted such minor to do so. If it be established that the parent, guardian or other adult person having the care or custody of any minor under the age of 18 was duly notified pursuant to this subsection that the minor had been apprehended for a violation of this section, and it be further established that the minor subsequently violated subsection 5-3.2, of this section, then it shall be presumed, in the absence of proof to the contrary, that any such parent, guardian or adult person knowingly permitted such subsequent violation.

TOWNSHIP OF ANDOVER, COUNTY OF SUSSEX, STATE OF NEW JERSEY

ORDINANCE NO. 2009-32

**AN ORDINANCE OF THE TOWNSHIP OF ANDOVER, COUNTY OF SUSSEX AND
STATE OF NEW JERSEY REPEALING CHAPTER 86, "LOITERING" OF THE
REVISED GENERAL ORDINANCES**

BE IT ORDAINED by the Township Committee of the Township of Andover, County of Sussex and State of New Jersey, as follows:

SECTION 1. Chapter 86, Loitering, of the aforesaid Revised General Ordinances is hereby repealed.

SECTION 2. All ordinances of the Township of Andover which are inconsistent with the provisions of this ordinance are hereby repealed to the extent of such inconsistency.

SECTION 3. If any section, subsection, clause or phrase of this ordinance is for any reason held to be unconstitutional or invalid by any court or competent jurisdiction, such decision shall not affect the remaining portion of this ordinance.

SECTION 4. This Ordinance may be renumbered for purposes of codification.

SECTION 5. This Ordinance shall take effect immediately upon final passage, approval and publication as required by law.

Vita Thompson, R.M.C.

Bob Smith, Mayor

INTRODUCED: September 14, 2009
ADOPTED: September 28, 2009
EFFECTIVE DATE: October 02, 2009

TOWNSHIP OF ANDOVER, COUNTY OF SUSSEX, STATE OF NEW JERSEY

ORDINANCE NO. 2009-33

AN ORDINANCE OF THE TOWNSHIP OF ANDOVER, COUNTY OF SUSSEX, AND STATE OF NEW JERSEY REPEALING CHAPTER 107, "PEACE AND GOOD ORDER", SECTION 107-10, "INDECENT BEHAVIOR", SUBSECTION (B), "INDECENT LANGUAGE" OF THE REVISED GENERAL ORDINANCES

BE IT ORDAINED, by the Township Committee of the Township of Andover, in the County of Sussex, and State of New Jersey, as follows:

SECTION 1. Chapter 107, "Peace and Good Order", Section 107-10, "Indecent Behavior", Subsection (B), "Indecent Language", of the aforesaid Revised General Ordinances is hereby repealed in its entirety.

SECTION 2. All ordinances of the Township of Andover, which are inconsistent with the provisions of this Ordinance, are hereby repealed to the extent of such inconsistency.

SECTION 3. If any section, subsection, sentence, clause or phrase of this Ordinance is for any reason held to be unconstitutional or invalid, such decision shall not affect the remaining portions of this Ordinance.

SECTION 4. This Ordinance shall take effect immediately upon final passage, approval, and publication as required by law.

ATTEST:

**TOWNSHIP OF ANDOVER
COUNTY OF SUSSEX
STATE OF NEW JERSEY**

Vita Thompson, Clerk

By: _____
Bob Smith, Mayor