

Borough of Highlands
Code Chapter 3-3 (Loitering)

3-3.1 Definitions.

As used in this section:

a. Loitering shall mean remaining idle in essentially one location and shall include the concepts of spending time idly, loafing or walking aimlessly, lounging, sleeping, and, in the colloquial phrase, hanging around.

b. Public place shall mean any place to which the public has access and shall include any street, highway, road, alley or sidewalk. It shall also include the front or the neighborhood of any store, shop, restaurant or other place of business and public grounds, areas, parks, schools as well as parking lots, shopping centers, or other private property not owned by or under the control of the person charged with violating this section, or in the case of the minor, not owned or under the control of his parent or guardian .

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

3-3.2 Certain Types of Loitering Prohibited.

No person shall loiter in a public place in such a manner as to:

a. Create a danger or a breach of the peace.

b. Create 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 any public place as defined in paragraph 3-3.1b. This paragraph shall include the making of unsolicited audible remarks of an offensive, disgusting or insulting nature which are calculated to annoy or disturb the person to, or in whose hearing, they are made.

3-3.3 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 any of the conditions enumerated in subsection 3-3.2 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 or fail to leave after being ordered to do so by a police officer shall be guilty of a violation of this section.

3-3.4 Loitering by Minors; Notice; Presumption.

No parent or guardian of a minor under the age of 18 years shall knowingly permit that minor to loiter in violation of this section. Whenever any minor under the age of 18 years is charged with a violation of this section, his parent or guardian shall be notified of this fact by the chief of police or any other person, in charge of the police department or any other person designated by him to give such notice. If at any time within 60 days following the given notice, the minor to whom such notice relates again violates this section, 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.



New Jersey Libertarian Party

Preempted Ordinance Repeal Project

John Paff, Chairman

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April 29, 2010

Hon. Anna Little, Mayor and members of the
Highlands Borough Council
171 Bay Ave
Highlands, NJ 07732

(via E-mail only to ddailey@highlandsborough.org)

Dear Mayor Little and Members of the Borough Council:

I write, both individually and in my capacity as Chairman of the New Jersey Libertarian Party's Preempted Ordinance Repeal Project to request the Mayor and Council to ask the municipal attorney to review the Borough's loitering code and similar codes and render an opinion on their validity. We're confident that your attorney will, like the municipal attorneys for Butler (Morris County), Elmwood Park (Bergen County), Long Branch (Monmouth County) and several other municipalities¹, determine that Borough's loitering prohibition is preempted by the New Jersey Criminal Code and is thus invalid.

Here is why. When the Legislature enacted New Jersey's Criminal Code in 1979, it specifically decided to *not* include a loitering prohibition within the Code out of concern that "vagrancy and loitering statutes have long suffered from constitutional infirmity and have been criticized as inviting official harassment and discriminatory enforcement."² It follows, therefore, that no municipality, such as Highlands, is allowed to locally prohibit loitering and vagrancy when the Legislature has decided to decriminalize those acts.³

And, it's not just loitering and vagrancy that have superseded by state law. In 2003, the Appellate Division found that Chapter 33 of the New Jersey Criminal Code "reveals a policy to comprehensively address street behavior and other conduct in public places which may disturb citizens and disrupt peaceful society."⁴ The

¹ Butler, Elmwood Park and Long Branch have loitering codes that are very similar to Highlands's. In Ord. 2008-16, which repealed Butler's loitering code, the Borough Council found that it had been "declared invalid by the New Jersey Supreme Court." In Ord. 05-07, the Elmwood Borough Council found that its loitering prohibition "has been preempted and rendered unenforceable by the New Jersey Code of Criminal Justice." And, in Ord. 27-09, the City of Long Branch found that its loitering prohibitions "do not comply with the court decisions and/or rulings of state agencies." The repeal ordinances for these and several other municipalities are on the project's website at <http://www.lpcnj.org/OGTF/Loiter.html>

² See *State v. Crawley*, 90 N.J. 241, 247 (1982).

³ See *State v. Crawley*, at p. 251.

⁴ See *State v. Paserchia*, 356 N.J. Super. 461, 466 (App.Div.2003).

Legislature, the court found, recognized the tension between controlling “street behavior” and safeguarding citizens’ free speech and assembly rights. Therefore, it decided to regulate “street behavior” so comprehensively at the state level that there was no room left for local regulation of the same conduct.⁵

But, Highlands’s Code § 3-3.2(c), for example, prohibits loitering that could obstruct the free passage of pedestrians or vehicles. This provision, in the hands of an unscrupulous mayor or police chief, could be used as a pretext to prevent peaceful citizens from assembling on a public sidewalk near a municipal building to protest against taxes or upon some other public issue. For this reason, this code provision’s statutory counterpart—N.J.S.A. 2C:33-7⁶—requires the police to accommodate free expression and assembly rights. Under the statute, the police must first try to limit the size of the crowd or move it to a different location. And, in order to prove a violation of the statute, the prosecution must prove that the obstruction was done “purposely or recklessly.” Highlands’s ordinance, however, does not contain any such protections. The ordinance simply declares that it is *per se* illegal for a person to loiter on a Borough sidewalk in a manner that obstructs pedestrians. Do you see how much more discretion the police have under the ordinance as opposed to the statute? Do you understand why giving the police this expansive discretion concerns Libertarians and others who seek to safeguard citizens’ free speech and assembly rights?

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. Highlands, as a subordinate subdivision of the State, is not permitted to strike a different balance between these competing interests through local legislation. Accordingly, your loitering ordinance is invalid and should be repealed to the extent that it attempts to regulate adults’ street behavior. Further, any other code provisions that you have on the books that regulate adult street behavior, such as “peace and good order” and “disorderly conduct” codes are also likely preempted by state law.

⁵ It is likely that there is no such thing as a local code provision that can validly regulate adult street conduct. See, New Jersey Law Journal, "Yet Another Municipal Ordinance Is Struck Down on Pre-emption Grounds" January 13, 2003, by Mary P. Gallagher.

⁶ That statute reads: “**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

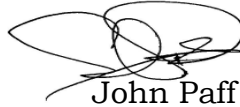
(2) To maintain public safety by dispersing those gathered in dangerous proximity to a fire or other hazard.

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.”

Would you please ask your municipal attorney to review and report on the validity of Highlands's loitering provision, as well as any other code provisions that seek to regulate adult "street conduct" and let me know the results of that review?

Thank you for your attention to this matter. We 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

Borough of Highlands Public Notice

Please take notice that the following ordinance was introduced and passed upon first reading at a meeting of the Governing Body of the Borough of Highlands, in the County of Monmouth, State of New Jersey, on June 16, 2010. It will be further considered for final passage, after public hearing thereon, at a meeting of the governing body to be held at the Municipal Building, 171 Bay Avenue, Highlands, NJ, on July 21, 2010 at 8:00 P.M. At that time, the public is invited to participate in the discussion of the Ordinance. Copies of the Ordinance are available in the Municipal Clerk's Office located at 171 Bay Avenue, Highlands, NJ and are posted on the Display Board at the Municipal Building. Copies are available at no charge to the general public.

O-10-13 AN ORDINANCE AMENDING CHAPTER III, OF THE GENERAL AND LICENSING ORDINANCES OF THE BOROUGH OF HIGHLANDS

WHEREAS, the Governing Body of the Borough of Highlands has had the Borough Ordinances reviewed and have determined that the section entitled "Loitering" is outdated and covered by other provisions of the Municipal Criminal Code and the New Jersey State Criminal Code; and

WHEREAS, it has been determined that deleting that portion of the Borough's Code entitled "Loitering" can be done without impacting the Borough Resident's quality of life and safety given the other provisions that cover the activities within the "Loitering" Ordinance.

NOW THEREFORE BE IT ORDAINED, by the Governing Body of the Borough of Highlands that Chapter III, §3-3 "Loitering", of the General and Licensing Ordinances of the Borough of Highlands is deleted in its entirety.

**Carolyn Cummins
Borough Clerk**

Mr. O'Neil offered a motion and moved on the adoption of the following Ordinance and authorized its publication according to law:

O-10-13
AN ORDINANCE AMENDING CHAPTER III,
OF THE GENERAL AND LICENSING
ORDINANCES OF THE BOROUGH OF HIGHLANDS

WHEREAS, the Governing Body of the Borough of Highlands has had the Borough Ordinances reviewed and have determined that the section entitled "Loitering" is outdated and covered by other provisions of the Municipal Criminal Code and the New Jersey State Criminal Code; and

WHEREAS, it has been determined that deleting that portion of the Borough's Code entitled "Loitering" can be done without impacting the Borough Resident's quality of life and safety given the other provisions that cover the activities within the "Loitering" Ordinance.

NOW THEREFORE BE IT ORDAINED, by the Governing Body of the Borough of Highlands that Chapter III, §3-3 "Loitering", of the General and Licensing Ordinances of the Borough of Highlands is deleted in its entirety.

Seconded by Mr. Francy and adopted on the following roll call vote:

ROLL CALL:

AYES: Mr. O'Neil, Mr. Francy, Mayor Little

NAYES: None

ABSENT: Mr. Nolan, Ms. Kane

ABSTAIN: None

DATE: July 21, 2010

Carolyn Cummings
Borough Clerk

Intro: June 16, 2010

Publish: June 25, 2010 Two River Times

2nd Reading: July 21, 2010

PH/Adoption: July 21, 2010

Publication: July 30, 2010 Two River Times

I hereby certify this to be a true copy of Ordinance #O-10-13 as adopted by the Governing Body of the Borough of Highlands on July 21, 2010.

Borough Clerk/Deputy Clerk