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Please Reply to: Newark

April 7, 2008

**Via E-Mail**

Mayor Richard J. DiLascio  
Lyndhurst Health Center  
253 Stuyvesant Avenue  
Lyndhurst, New Jersey 07071

***Re: Loitering Ordinance, Section 3-15, et seq.***

Dear Mayor DiLascio:

You have requested that I review the above referenced Ordinance to determine its validity and constitutionality, pursuant to a letter that you and the Board of Commissioners received from the New Jersey Libertarian Party dated March 28, 2008, requesting that the Township consider a repeal of this Ordinance. Specifically, the letter from the Libertarian Party indicated that the Township of West Milford has recently proceeded to repeal its loitering ordinance, which is similar to the provisions of the Lyndhurst Ordinance. Following my review of this matter, it is recommended that the above referenced Ordinance be repealed for the reasons set forth below.

The law delegates to municipalities broad powers to adopt ordinances reasonably related to the public health, safety and welfare. N.J.S.A. 40:48-1, 2. Specifically, municipalities are authorized to adopt ordinances "To preserve the public peace and order; to prevent and quell riots, disturbances and disorderly assemblages; [and] to prevent littering, lounging or sleeping in the streets, parks or public places." N.J.S.A. 40:48-1. However, these broad powers are not without limits. All ordinances must satisfy constitutional requirements. In addition, municipalities may not enact ordinances on matters in which the state has preempted the field (i.e., subject matters in which state law, either expressly or impliedly, was intended to be exclusive).

The Township's loitering ordinance is similar to those enacted by many New Jersey municipalities, including West Milford. It defines loitering as "spending time idly, loafing, or walking about aimlessly." It also includes the expression, "hanging around." Section 3-15.1.

The Ordinance furnishes police officers with the discretion to determine whether or not a person in a public place has created a danger of a breach of the peace; creates any disturbance or annoyance to any person; obstructs the free passage of pedestrians or vehicles; or obstructs, molests, or interferes with any person lawfully in any public place. Specifically, whenever any police officer decides that a person is loitering "in the exercise of reasonable judgment," and if such person refuses to leave after being ordered to do so, such person shall be guilty of loitering. Section 3-15.3.

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In City of Chicago v. Morales, 527 U.S. 41 (1999), the United States Supreme Court held that an ordinance which required a police officer, on observing a person whom he reasonably believed to be a criminal or street gang member loitering in any public place with one or more persons to order all such persons to disperse, and made failure to obey such an order a violation was unconstitutionally vague, overbroad, and in violation of the First and Fourteenth Amendments of the United States Constitution. The Court stated that freedom to loiter for innocent purposes is part of the "liberty" protected by the Due Process Clause, particularly when an ordinance is so vague that it fails to provide the kind of notice that would enable ordinary people to understand what conduct it prohibits, and if it is so standardless that it may authorize and even encourage arbitrary and discriminatory enforcement.

Furthermore, in State v. Crawley, 90 N.J. 241 (1982), the New Jersey Supreme Court held that general municipal loitering ordinances have been preempted and rendered unenforceable by the State Code of Criminal Justice, N.J.S.A. 2C:1-1, et seq. The Crawley Court concluded that in the absence of loitering from the Criminal Code demonstrates a state policy to decriminalize such activity, and therefore prohibited enforcement of a Newark loitering ordinance.

As indicated above, it is my opinion that the Township's Loitering Ordinance is constitutionally invalid, since it is in violation of the Due Process Clause and has been preempted by the New Jersey Criminal Code. As the Court observed in Crawley, if a person's conduct is such that an officer has probable cause to make an arrest, for example, for attempted burglary, or an attempt to buy or sell drugs, an arrest can properly be made, and a loitering ordinance is not necessary to authorize the arrest.

Please be advised that Chief O'Connor has informed me that he has no recollection of any charges having been presented for violation of the Loitering Ordinance in the last thirty years. Notwithstanding that fact, it is recommended that Section 3-15 of the Township's Ordinances be repealed. I have prepared a proposed Ordinance which has been forwarded to the Township Clerk.

Should you or any Commissioner have any questions with regard to the above, please do not hesitate to contact me.

Very truly yours,

Gary J. Cucchiara

GJC/rs

cc: Commissioner Robert B. Giangeruso  
Chief James B. O'Connor  
Helen Polito, Township Clerk

ORDINANCE NO. 2642

**AN ORDINANCE TO AMEND CHAPTER III (POLICE REGULATIONS) OF THE REVISED GENERAL ORDINANCES OF THE TOWNSHIP OF LYNDHURST SO AS TO REPEAL PROVISIONS PERTAINING TO LOITERING.**

**BE IT ORDAINED** by the Board of Commissioners of the Township of Lyndhurst, County of Bergen, New Jersey, as follows:

**SECTION 1.** Chapter III, "Loitering", has been preempted and rendered unenforceable by the New Jersey Code of Criminal Justice, N.J.S.A. 2C:1-1, et seq., and is constitutionally invalid, and therefore is hereby repealed in its entirety.

**SECTION 2.** All ordinances or parts of ordinances inconsistent herewith are hereby repealed.

**SECTION 3.** If any part, sections, provisions, or the total of any of the above-mentioned publications are held to be invalid or unenforceable by any court, the findings or judgments of which court are applicable in the State of New Jersey, that the balance and remainder of such publication shall remain in full force and effect as an Ordinance of the Township of Lyndhurst.

**SECTION 4.** This Ordinance shall become effective twenty (20) days after adoption and publication according to law.

Adopted: May 13, 2008

Commissioner Abruscato  
Commissioner DiMaggio  
Commissioner Giangeruso  
Commissioner Haggerty  
Mayor DiLascio

Ayes	Nays	Absent	Abstain
X			
X			
X			
		X	
X			

\_\_\_\_\_  
Mayor

*Helen Polito*  
\_\_\_\_\_  
Township Clerk