



New Jersey Libertarian Party

Preempted Ordinance Repeal Project

John Paff, Chairman

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Hon. R. Scott Eveland, Mayor and members of the
Florham Park Borough Council

111 Ridgedale Ave

Florham Park, NJ 07932 *(via E-mail only to swilliams@florhamparkboro.net)*

Dear Mayor Eveland 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 Florham Park, 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And, it's not just loitering and vagrancy that have superseded by state law.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Elmwood Park and Long Branch have loitering codes that are very similar to Florham Park's. In Ord. 2008-16, which repealed Butler's loitering code, the Borough Council found that it had been "declared invalid by the New Jersey Supreme Court."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, Florham Park’s Code § 150-2(A)(3), 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.” Florham Park’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. Florham Park, 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 Florham Park'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