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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

December 17, 2003

Anthony R. Staten, Chief
Saluda Police Department
101 South Jefferson Street
Saluda, South Carolina 29138

Dear Chief Staten:

In a letter to this office you forwarded several proposed town ordinances which you indicate would be useful to clean up certain areas of your town heavily affected by drugs.

S.C. Code Ann. Section 5-7-30 (Supp. 2002) provides in part that

> Each municipality of the State...may enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State, including the exercise of powers in relation to...law enforcement....

As indicated in a prior opinion of this office dated April 28, 1998,

> Any municipal ordinance adopted pursuant to Section 5-7-30...is presumed to be valid...Within the limits of a municipality, an ordinance has the same local force as does a statute...Any ordinance must be demonstrated to be unconstitutional beyond all reasonable doubt...(but)...the presumption of validity applies to legislation relating to a city or a town's police powers....

The first proposed ordinance referenced by you states:

> It shall be unlawful for any person to willfully and knowingly fail or refuse to stop when signaled, hailed, or command to stop by a police officer in the lawful exercise of authority.

The April 28, 1998 opinion, a copy of which is enclosed, dealt with an almost identical ordinance concerning the refusal of an individual to stop when signaled by a law enforcement officers. Reference was made to S.C. Code Ann. Section 56-5-750 which makes it unlawful in this State to "fail to stop when signaled by a law enforcement vehicle by means of a siren or flashing light." The opinion indicated that the referenced ordinance would be complimentary to Section 56-5-750.

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The April, 1998 opinion also dealt with the question as to whether the particular ordinance would be consistent with requirements of the Fourth Amendment. Reference was made to the holding of the United States Supreme Court in Terry v. Ohio, 392 U.S. 1 (1968) which recognized that a police officer may, consistent with the Fourth Amendment, "'stop' and briefly detain a person where no probable cause is present where the officer has articulable and reasonable suspicion of the person's involvement in criminal activity." The opinion concluded that

> ...the proposed ordinance which makes it unlawful to willfully refuse to heed a police officer's command to stop is valid on its face. At the very least, it may be interpreted as a mechanism to enforce Terry v. Ohio...The proposed ordinance simply attempts to make it unlawful to fail to stop when ordered to do so by a police officer. Even if the command to stop is viewed as a "seizure" under the Fourth Amendment (and arguably it is not), a court would ultimately view a "stop" by an officer in light of the parameters of Terry. Thus, this aspect of the ordinance, which must be presumed valid, if enacted would be enforceable until a court concludes otherwise.

The next proposed ordinances deal with a curfew for minors. The first one states in part:

> It shall be unlawful for any minor under the age of seventeen years to be present on foot or by vehicle on any public street, playground, park, public building, place of amusement or other public place between the hours of 11:00 p.m. and 6:00 a.m. of the following day; provided, however, this section shall not apply to a minor on an emergency errand, to a minor in the course of employment, or to a minor traveling home within thirty minutes from an organized school or religious activity. Each violation of this section shall constitute a separate offense.

Another proposed curfew ordinance states:

> It shall be unlawful for any minor under the age of seventeen years to be present on any public street, playground, park, public building, place of amusement, or other public place during normal school hours; provided, however, this section shall not apply to a minor accompanied by a parent or other adult responsible for the minor; to a minor on an emergency errand; to a minor in the course of employment; or to a minor traveling within 30 minutes from school, or an organized school, religious, or civic activity. For the purpose of this ordinance, normal school hours shall be defined as the hours on Monday through Friday, from August through June that school in Saluda County is in session. Days that school is not in session are not included in the definition. Each violation of this section shall constitute a separate offense.

A prior opinion of this office dated March 3, 1994 dealt with the issue of the constitutional validity of ordinances mandating nighttime curfews for juveniles. The opinion, a copy of which is enclosed, examined the constitutionality of curfews from several perspectives commenting that similar ordinances have been attacked on several grounds, such as being void for vagueness, being an infringement on First Amendment rights of association or speech, and being an impairment to the right to travel. The opinion commented that as long as such ordinances are not "impermissibly vague", curfews are constitutional. Criteria to be considered in supporting such ordinances are:

1. Specific hours for the curfew are set by the ordinance, usually from 10:00 p.m. to 5:00 a.m.
2. A specific age for violation is given, usually the ordinance affects persons under the age of 17 or 18 (probably depending on that particular state law).
3. The ordinance usually prohibits being on public streets, in public buildings, and also often covers alleys, playgrounds, places of business or amusement. Many times, the term "public place" is specifically defined.
4. The ordinance contains specific exceptions–the most common being that, if a juvenile is accompanied by a parent, guardian or other person charged with the case and custody of the minor, no violation occurs.
5. Some ordinances contain other exceptions such as where the minor is traveling between his home or place of residence and the place where any approved place of employment, church, municipal or school function is being held. Other exceptions sometimes used are the allowance for a juvenile to engage in interstate travel or to remain on a sidewalk in front of the minor's home;
6. Punishments vary. Some impose a small fine, others impose no sanction other than that the minor must be returned home or back to the parent or guardian or person charged with the minor's care or custody.

The proposed curfew ordinances referenced by you appear to include much of the criteria outlined above and such finding arguably supports their probable constitutionality. I would refer your city attorney to the various cases cited in the enclosed opinion which may be reviewed in resolving any particular questions regarding these curfew ordinances.

Your next ordinance reads as follows:

(a) It shall be unlawful for any person to loiter in or near any thoroughfare, place open to the public or near any public or private place, in a manner and under circumstances, manifesting the purpose to engage in drug-related activity contrary to any of the provisions of Title 44, Chapter 53, Article 3 of the 1976 South Carolina Code of Laws, as amended.

(b) Among the circumstances which may be considered in determining whether such purpose is "manifested" are

(1) Such person is a known drug user, possessor, or seller. For the purpose of this section, a "known unlawful drug user, possessor, or seller" is a person who has, within the knowledge of the arresting officer, been convicted in any court within this State of any violation involving the use, possession, or sale of any of the substances referred to in Title 44, Chapter 53, Article 3 of the 1976 South Carolina Code of Laws, as amended, or a person who displays glassy eyes, slurred speech, loss of coordination or motor skills, or a person who possesses drug paraphernalia.
(2) Such person has been given due notice, either verbal or written on any occasion prior to any arrest, within one block of the area where the arrest occurred, or such person is currently subject to an order or term of probation prohibiting his or her presence in a high drug activity geographic area;
(3) Such person behaves in such manner as to raise a reasonable suspicion that such a person is engaging or is about to engage in an unlawful drug-related activity, either sale, possession or purchase, including by way of example only, such person acting as a "lookout" or flagging down vehicles or pedestrians..
(4) Such person is physically identified by the officer as a member of a gang or association, which has as its principal purpose illegal drug activity.
(5) Such person transfers small objects or packages for currency or any other thing of value in a furtive fashion, which would leave the officer to believe or ascertain that a drug sale has or is about to occur.
(6) Such person takes flight upon the appearance of a police officer.
(7) Such person manifestly endeavors to conceal himself or herself or any object, which reasonably could be involved in an unlawful drug-related activity.
(8) The area involved is by public repute known as an area of drug use and trafficking.
(9) Any vehicle involved is registered to a known drug user, possessor, seller or a person for whom there is an outstanding warrant for a crime involving drug-related activity.

Several courts have construed ordinances similar to the ordinance set forth above dealing with loitering and drug-related activities. In Northern Virginia Chapter, ACLU v. City of Alexandria, 747 F.Supp. 324 (E.D.Va. 1990), the district court determined that a similar city ordinance which prohibited loitering for purposes of engaging in unlawful drug transactions, delineating numerous circumstances "manifesting such purpose", was unconstitutionally overbroad in that it "sweeps too broadly and indiscriminately reaches both protected and unprotected conduct." 747 F.Supp. at 328-329. The opinion noted that "(a)n ordinance is impermissibly overbroad if it deters constitutionally protected conduct while purporting to criminalize unprotected activities." 747 F.Supp. at 326. The court commented that the ordinance did not require engaging in the seven noted

circumstances with unlawful intent to partake in drug-related activities but rather provided that the occurrence of the circumstances manifests intent. The court referenced that "(u)nlawful intent may be derived from the mere occurrence of the seven enumerated circumstances." 747 F.Supp. at 328.

In Akron v. Rowland, 618 N.E.2d 138 (Ohio, 1993), the Ohio Supreme Court construed an ordinance which prohibited loitering "under circumstances manifesting the purpose to engage in drug-related activity...." The Court similarly determined that the particular ordinance was void for vagueness inasmuch as the ordinance did not require proof of any specific intent to engage in drug-related activity. As noted by the Court, "(a)cting under 'circumstances manifesting' a purpose to do something is a far cry from specifically intending to do something." 618 N.E.2d at 144. The Court indicated that most of the circumstances considered in "manifesting" the intent were themselves legal acts on their own. The Court determined that the ordinance was unduly open-ended and "...unconstitutionally vague because it does not give people of ordinary intelligence a reasonable opportunity to know what conduct is prohibited." 618 N.E.2d at 145. The Court noted that the ordinance provided that "Among the circumstances which may be considered in determining whether such purpose of...(drug-related activity)...is manifested". According to the Court, the enumerated circumstances were only examples of drug-related behavior. The Court ruled that

> The word "among" indicates that there are other circumstances, not specified in the ordinance, which may be used to form the basis of an arrest and conviction. It is, of course, unlawful for a citizen to be convicted of a criminal offense not defined by a legislative enactment. We find this lack of specificity to be fatal to the ordinance.

618 N.E.2d at 383. The Court also was troubled by the fact that the ordinance gave law enforcement "unfettered discretion to determine whether a person's conduct 'manifests' drug activity." 618 N.E.2d at 384. The Court further noted that "the case law is legion that people cannot be punished because of their status, the company they keep, of their presence in a public place." 618 N.E.2d at 387.

In Johnson v. Athens-Clarke County, 529 S.E.2d 613 (Ga. 2002), the Georgia Supreme Court dealt with a loitering ordinance which included similar "among the circumstances which may be considered" language. The Court determined that the ordinance did not provide fair warning to persons of ordinary intelligence as to what was prohibited in order that they could act accordingly. The Court further determined that the ordinance permitted speculation by law enforcement and therefore was unconstitutionally vague.

The Louisiana Supreme Court also construed a drug loitering statute which included the "among the circumstances which may be considered" language to be used in determining a purpose to engage in drug-related activity. In State v. Muschkat, 706 So.2d 429 (La. 1998), the Court noted the problem in construing any specific intent requirement in the Louisiana statute. The Court in finding the statute to be unconstitutionally vague reasoned that it did not give adequate notice of the

conduct prohibited nor did it establish sufficient guidelines to govern law enforcement. The Court also found the statute to be overbroad in that "...it criminalizes a substantial amount of constitutionally protected activities." 706 So.2d at 435-436. The Court noting activities covered in the "circumstances which may be considered" determined that a specific intent element could not be read into the activities. In E.L. v. State, 619 So.2d 252 (Fla. 1993), the Florida Supreme Court similarly determined that an ordinance which prohibited loitering for purposes of engaging in drug-related activity was unconstitutionally vague, overbroad and violated substantive due process. But see: City of Tacoma v. Luvene, 827 P.2d 1374 (Wis. 1980) (Court upheld a drug-related loitering ordinance by reading into the statute a specific intent requirement. As stated by the Court, "(t)he practical effect of this intent requirement is to require the police to observe overt conduct that is consistent with the intent to engage in illegal drug-related activity in addition to mere loitering...The police evaluation is based on their observation of articulable, identifiable conduct that is consistent with the buying, selling, and using of illegal drugs, not their personal whim or fancy." 827 P.2d at 1385.).

Referencing the above, a court would probably conclude that the referenced proposed ordinance making it unlawful to loiter in a manner "manifesting the purpose to engage in drug-related activity" would be unconstitutionally overbroad. The proposed ordinance is arguably not specific enough to overcome this problem and reaches into areas that are protected. As noted, the ordinance includes language "among the circumstances which may be considered in determining whether such purpose is manifested". Such language arguably provides too much discretion to law enforcement in considering whether drug-related activity is present.

You next referred to a loitering ordinance which states as follows:

(a) Definition. As used in this section, the term "loitering" shall mean remaining idle in essentially one location, spending time idly, loafing or walking around aimlessly in a public place in such a manner as to:
(1) Create or cause to be created any disturbance or annoyance to the comfort and repose of any person;
(2) Create or cause to be created a danger of a breach of the peace;
(3) Obstruct or hinder the free passage of vehicles or pedestrians;
(4) Obstruct or interfere with any person lawfully in any public place;
(5) Engage in begging;
(6) Engage in gambling;
(7) Engage in prostitution;
(8) Solicit or engage in any business, trade or commercial transaction unless specifically authorized or licensed to do so;
(9) Unlawfully use or possess an unlawful drug; or
(10) Unlawfully use or possess alcoholic beverages, beer or wine.

> (b) Violations. Any person loitering in any public place as defined in subsection (a) of this section may be ordered by any police officer 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 a violation of this section. Nothing in this section shall be construed or enforced in such a manner as to restrict freedom of speech, religion or association.

In examining the ordinance prohibiting loitering, the question of vagueness must be examined. A prior opinion of this Office dated March 25, 1992 noted that loitering ordinances have been invalidated where the ordinance is so indefinite that it fails to "... give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute ... and because it encourages arbitrary and erratic arrests and convictions." The opinion commented that an ordinance is suspect where it "fails to adequately apprise one of when his conduct is forbidden by the ordinance", "fails to set forth any ascertainable standard of guilt by which the police can judge the suspected person's conduct", or "fails to adequately distinguish between innocent conduct and criminal conduct." See: Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).

As expressed by the United States Supreme Court in City of Chicago v. Morales, 527 U.S. 41, 55 (1999)

> Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement.

In that decision, the United States Supreme Court struck down a city ordinance that prohibited criminal street gang members from loitering in public places. Chicago's anti-gang loitering ordinance was found to be too vague because innocent individuals might "unwittingly engage in forbidden loitering if they happened to engage in idle conversation with a gang member." 527 U.S. at 63. While the court recognized the city's interest in reducing gang criminality, the Court nevertheless determined the statute to be void for vagueness because "the definition of 'loiter' provided by the ordinance does not assist in clearly articulating the proscriptions of the ordinance." 527 U.S. at 51. As expressed by the court in its decision, "(t)he freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment." 527 U.S. at 53. As further stated in that decision, "(a)n individual's decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside the frontiers that is 'a part of our heritage'." 527 U.S. at 54.

As noted in the September, 1976 opinion referenced above, another area of concern in examining loitering ordinances is that the ordinance may authorize and even encourage arbitrary and discriminatory enforcement. In City of Chicago, the United States Supreme Court determined that the anti-gang loitering ordinance being examined left too much discretion to individual law

enforcement officers to determine whether an individual was a gang member or was in the presence of a gang member or was loitering.

In the proposed ordinance cited by you, particular manners of conduct are cited. Examples of conduct prohibited by the ordinance are creating or causing to be created any disturbance, creating or causing to be created a breach of the peace, engaging in begging, gambling or prostitution and the unlawful use or possession of an unlawful drug or alcoholic beverage. Loitering statutes have been upheld on allegations of unconstitutional vagueness when prohibiting loitering for a specific, illegal purpose. In State v. Evans, 326 S.E.2d 303 (N.C. 1985) the North Carolina court determined that a statute which prohibited loitering for the purpose of violating statutes prohibiting prostitution was not unconstitutionally vague. Noting that a statute is void for vagueness if it fails to provide proper notice of the conduct prohibited, the Court noted that the key element in the statute being construed was intent, "that the loitering be 'for the purpose of violating...(the prostitution statutes)...." 326 S.E.2d at 306. The court noted that

> A statute may not control activity constitutionally subject to state regulation by sweeping unnecessarily broadly into areas of protected freedom...Mere presence in a public place cannot constitute crime...(However, the statute before the court)...requires proof of specific criminal intent, the missing element in unconstitutional "status" offenses, such as simple loitering....

326 S.E.2d at 306-307. Other cases have reached similar conclusions in construing ordinances which prohibit loitering for specific, illegal purpose. See: People v. Smith, 378 N.E.2d 1032 (N.Y. 1978) (prohibiting loitering for the purpose of prostitution); State v. City Court of Tucson, 520 P.2d 1166 (Ariz. 1974) (prohibiting loitering for the purpose of begging); Tacoma v. Luvene, supra (ordinance upheld which criminalized loitering for the purpose of engaging in drug-related activities); People for Superior Court, 758 P.2d 1046 (Cal. 1988) (upholding ordinance which criminalized loitering for the purpose of engaging in or soliciting a lewd act). In City Court of Tuscon, the court reasoned that

> Loitering alone is not prohibited here, but loitering "for the purpose of begging." When "loitering" is joined with a second specific element, courts have uniformly found that such legislation sufficiently informs a person of common understanding as to what is forbidden.

The Court further stated:

> We hold that the proscription of the act of loitering, when combined with the purpose of begging...puts a reasonable person on notice as to exactly what conduct is forbidden...The subject ordinance does not place "unfettered discretion" in the hands of police ...Before an arrest can be made, the officer must not only have probable

> cause to believe that the suspect is loitering, but also that he has the purpose, or intent to beg.

520 P.2d at 1170. While only a court can conclusively determine whether a statute or ordinance is invalid or unconstitutional, based upon the above, we believe that a court would uphold the loitering ordinance which specifically links such conduct to illegal activities.

If there is anything further, please advise.

Sincerely,

Charles H. Richardson
Senior Assistant Attorney General

Enclosures