HENRY MCMASTER
ATTORNEY GENERAL

January 28, 2010

Chief S. W. White
City of Union
Public Safety Department
215 Thompson Boulevard
Union, South Carolina 29379

Dear Chief White:

In a letter to this office you requested an opinion regarding the constitutionality of your city's ordinance concerning loitering. Such ordinance reads as follows:

Sec. 16-52.1 Loitering–Definitions.

As used in section 16-52.1:

(a) *Loitering* shall remain remaining idle in essentially one location and shall include the concept of spending time idly to be dilatory; to linger; to stay; to delay; to stand around and shall also include the colloquial expression "hanging around."

(b) *Public place* shall mean any place to which the general public has access and a right to resort for business, entertainment, or other lawful purpose, but does not necessarily mean a place devoted solely to the uses of the public. It shall also include the front or immediate area of any store, shop, restaurant, tavern or other place of business and also public grounds, areas or parks. (Ord. of 4-15-86).

Sec. 16-52.2. Same–Police order to disperse; penalty.

(a) It shall be unlawful for any person to loiter, loaf, wander, stand or remain idle either alone and/or in consort with others in a public place in such manner so as to:

(1) Obstruct any public street, public highway, public sidewalk or any other public place or building by hindering or impeding or tending to

hinder or impede the free and uninterrupted passage of vehicles, traffic or pedestrians.

(2) Commit in or upon any public street, public highway, public sidewalk or any other public place or building any act or thing which is an obstruction or interference to the free and uninterrupted use of property or with any business lawfully conducted by anyone in or upon or facing or fronting on any such public street, public highway, public sidewalk or any other public place or building, all of which prevents the free and uninterrupted ingress, egress, and regress, therein, thereon and thereto.

(b) When any person causes or commits any of the conditions enumerated in subsection (a) herein, a police officer or any law enforcement officer shall order that person to stop causing or committing such conditions and to move on or disperse. Any person who fails or refuses to obey such orders shall be guilty of a violation of section 16-52.2.

(c) Any person who violates any of the provisions of this section shall be subject to punishment as prescribed in section 1-7. Any such violation shall constitute a separate offense on each successive day continued. (Ord. of 4-15-86)

As stated in an opinion of this office dated January 7, 2008, this office recognizes that a municipal ordinance carries with it a presumption of validity. As stated in a prior opinion of this Office dated December 14, 2006,

> ... an ordinance is a legislative enactment and therefore, is presumed constitutional. Town of Scranton v. Willoughby, 306 S.C. 421, 422, 412 S.E.2d 424, 425 (1991). Our Supreme Court "has held that a duly enacted ordinance is presumed constitutional; the party attacking the ordinance bears the burden of proving its unconstitutionality beyond a reasonable doubt. City of Beaufort v. Baker, 315 S.C. 146, 153, 432 S.E.2d 470, 474 (1993). Moreover, "[w]hile this office may comment upon constitutional problems, it is solely within the province of the courts of this State to declare an act unconstitutional.

This office in prior opinions has dealt with the issue of the constitutionality of ordinances dealing with loitering. See: Ops. Atty. Gen. dated January 7, 2008; September 28, 2006; July 26, 2006; December 17, 2003. The July, 2006 opinion dealt with the decision of the United States

Supreme Court in City of Chicago v. Morales, 527 U.S. 41 (1999) which declared as unconstitutional a Chicago ordinance which was designed to deter gang congregation and loitering. That opinion noted that

> [c]onstitutional attacks upon ordinances of the type described in your letter have been made with some frequency over the years. For example, a vagrancy ordinance which employed language, characterized by the Untied States Supreme Court as "archaic," was struck down on vagueness grounds in Papachristou v. City of Jacksonville, 405 U.S. 156 (1972). The Court concluded that the "Jacksonville ordinance makes criminal activities which by modern standards are normally innocent," such as "nightwalking." 405 U.S. at 163. Moreover, the Court found that the ordinance placed "unfettered discretion ... in the hands of the Jacksonville police." Id. at 169. The ordinance was thus struck down as unconstitutional.
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> Subsequently, the Supreme Court addressed the constitutional validity of an anti-loitering statute in Kolander v. Lawson, 461 U.S. 352 (1983). There, the Court concluded that the statute, requiring persons who loiter or wander on the streets to provide "credible and reliable" identification, and to account for their presence when requested by a police officer under circumstances justifying a "stop" under Terry v. Ohio, 392 U.S. 1 (1968), was constitutionally infirm on vagueness grounds. The Supreme Court noted that the test for vagueness rested upon two prongs - actual notice to citizens and the requirement that the law not encourage arbitrary enforcement. According to the Court, however, "the more important aspect of the vagueness doctrine 'is not actual notice, but the other principal element of the doctrine - the requirement that a legislature establish minimal guidelines to govern law enforcement.'" Id. at 358. See also, Shuttlesworth v. City of Birmingham, 382 U.S. 87 (1965). With respect to what constituted "credible and reliable" identification, the Kolander Court found that "... the State fails to establish standards by which the officers may determine whether the suspect has complied with the subsequent identification requirement." Id. at 361. In the Court's mind, the statute "encourages arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute." Id.
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> In 1999, the Supreme Court again invalidated a loitering ordinance in City of Chicago v. Morales, 527 U.S. 41 (1999). Once more, the Court focused upon the unfettered discretion bestowed upon law enforcement officers by the ordinance in question. In Morales, the Court reviewed an ordinance which required a police officer, upon observing a person whom he reasonably believed to be a criminal street gang member loitering in any public place with one or more persons, to order such

persons to disperse. Failure to obey such order was deemed a criminal violation. More specifically, the ordinance was summarized by the Supreme Court as follows:

> [f]irst, the police officer must reasonably believe that at least one of the two or more persons present in a "'public place'" is a "'criminal street gang membe[r].'" Second, the persons must be "'loitering,'" which the ordinance defines as "remain[ing] in any one place with no apparent purpose." Third, the officer must then order "'all'" of the persons to disperse and remove themselves "'from the area.'" Fourth, a person must disobey the officer's order. If any person, whether a gang member or not, disobeys the officer's order, that person is guilty of violating the ordinance ....

527 U.S. at 47. The Ordinance was attacked on a number of constitutional grounds. In the view of the Illinois Appellate Court, "the ordinance impaired the freedom of assembly of nongang members in violation of the First Amendment to the Federal Constitution and Article I of the Illinois Constitution, that it was unconstitutionally vague, that it improperly criminalized status rather than conduct, and that it jeopardized rights guaranteed under the Fourth Amendment." Id. At 50.

In a plurality opinion, the United States Supreme Court concluded that "... like the Illinois courts [we] conclude that the ordinance is invalid on its face ...." The Court noted that two constitutional doctrines existed pursuant to which the ordinance could be attacked upon its face - overbreadth and vagueness. With respect to overbreadth, the Court noted that such doctrine "permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when 'judged in relation to the statute's plainly legitimate sweep.'" In terms of the question of vagueness, the Court recognized that "... even if an enactment does not reach a substantial amount of constitutionally protected conduct, it may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests." Id. at 51.

The Morales Court chose not to "rely on the overbreadth doctrine." Speech was not involved, concluded the Court. However, in this same regard, the Court also emphasized that "the freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment." Remaining in a public place of one's choice is, noted the Court, as much a part of his liberty as the freedom of movement inside frontiers that 'is a part of our heritage.'" Id. at 53-54. Nevertheless, in the Court's view, there was no need to consider the facial

constitutionality of the ordinance pursuant to the overbreadth doctrine because "it is clear that the vagueness of this enactment makes a facial challenge appropriate." Id. at 55. The fact the ordinance was not one which simply regulated business behavior, not contained a scienter or mens rea requirement, yet was also one which infringed upon constitutionally protected rights, made it particularly susceptible to a vagueness challenge.

Such a vagueness challenge, the Court recognized, could be grounded on 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." Id. at 56. In the United States Supreme Court's view, the Chicago ordinance did not survive either of these tests. The Court noted that the Illinois Supreme Court "emphasized the law's failure to distinguish between innocent conduct and conduct threatening harm ..." and that "[i]ts decision followed the precedent set by a number of state courts that have upheld ordinances that criminalize loitering combined with some other overt act or evidence of criminal intent." Id. at 57.

In Morales, the Court focused more specifically upon the dispersal order of the ordinance. The plurality noted that "[b]ecause an officer may issue an order only after prohibited conduct has already occurred, it cannot provide the kind of advance notice that will protect the putative loiterer from being ordered to disperse. Such an order cannot retroactively give adequate warning of the boundary between the permissible and the impermissible applications of the law." Id. at 58.

In addition, Morales emphasized that "... the terms of the dispersal order compound the inadequacy of the notice afforded by the ordinance." The Court found fault with the vagueness of the ordinance's terms in this regard - that the officer "shall order all such persons to disperse and remove themselves from the area." Such terminology left open a plethora of questions about its meaning, noted the Court. While in itself not determinative, the "lack of clarity in the description of the loiterer's duty to obey a dispersal order ... buttress[es] our conclusion that the entire ordinance fails to give the ordinary citizen adequate notice of what is forbidden and what is permitted." Id. at 59-60.

The possibility of arbitrary enforcement weighed heavily in the Court's analysis that the ordinance was unconstitutionally vague. There were no "'minimal guidelines to govern law enforcement ...." In the Morales Court's view,

> [t]he mandatory language in the enactment directs the police to issue an order without first making any inquiry about their possible purposes. It matters not whether the reason that a gang member and his father, for example, might loiter near Wrigley Field is to rob an unsuspecting fan or just to get a glimpse of Sammy Sosa leaving the ballpark; in either event, if their purpose is not apparent to a nearby police officer, she may - indeed, she "shall" order them to disperse.

Id. at 60.

Further examining the language in the ordinance which gave the police officer authority to determine whether a person intended "to remain in any one place with no apparent purpose," the Court concluded that such language afforded the officer virtually unfettered discretion to determine whether the ordinance had been violated. Rejecting the City of Chicago's argument that the ordinance, by its terms, limited the officer's discretion in at least three ways, the Court concluded that such reasons advanced by the City were "insufficient" to save the ordinance. In the Supreme Court's opinion,

> [t]hat the Ordinance does not apply to people who are moving - that is, to activity that would not constitute loitering under any possible definition of the term - does not even address the question of how much discretion the police enjoy in deciding which stationery persons to disperse under the ordinance .... Similarly, that the ordinance does not permit an arrest until after a dispersal order has been disobeyed does not provide any guidance to the officer deciding whether an order should issue. The "no apparent purpose" standard for making that decision is inherently subjective because its application depends on whether some purpose is "apparent" to the officer on the scene.

Id. at 61-62. While the Court acknowledged that the Ordinance required that the officer reasonably believe that the group of loiterers contained a gang member, non-gang members were included in the sweep of the ordinance which "applies to everyone in the city who may remain in one place with one suspected gang member as long as their purpose is not apparent to an officer observing them." Moreover, the Court agreed with the Illinois Supreme Court "that the ordinance does not provide sufficiently specific limits on the enforcement discretion of the police 'to meet constitutional standards for definiteness and clarity.'" The Ordinance "affords too much discretion to the police and too little notice to citizens who wish to use the public streets." Id. at 64.

In addition to Justices Stevens, Souter and Ginsberg, who joined in the plurality opinion, Justice O'Connor, Justice Breyer and Justice Kennedy concurred in the judgment and each joined in various parts of the plurality's opinion. While each of those concurring Justices wrote separate opinions, all agreed that the ordinance in question was unconstitutionally vague.

Justice O'Connor, joined by Justice Breyer, stressed that a criminal law may not permit policemen, prosecutors and juries to conduct "'a standardless sweep ... to pursue their personal predilections.'" In Justice O'Connor's view, if the Ordinance in question "applied only to persons reasonably believed to be gang members, this requirement might have cured the Ordinance's vagueness because it would have directed the manner in which the order was issued by specifying to whom the order could be issued." Justice O'Connor went on to say that

> ... there remain open to Chicago reasonable alternatives to combat the very real threat posed by gang intimidation and violence. For example, the Court properly and expressly distinguishes the ordinance from laws that require loiterers to have a "harmful purpose," ... from laws that incorporate limits on the area and manner in which the laws may be enforced .... In addition, the ordinance here is unlike a law that "directly prohibit[s]" the "'presence of a large collection of obviously brazen insistent, and lawless gang members and hangers-on on the public ways,'" that 'intimidates residents.'

Justice O'Connor suggested that a narrowing interpretation of the Chicago ordinance "would avoid the vagueness problems of the ordinance as construed by the Illinois Supreme Court." 527 U.S. at 68. In her view, a constitutional construction would define "'loiter'" as meaning "'to remain in any one place with no apparent purpose other than to establish control over identifiable areas, to intimidate others from entering those areas, or to conceal illegal activities.'" Id.

Justice Kennedy noted that "[t]he predicate of an order to disperse is not, in my view, sufficient to eliminate doubts regarding the adequacy of notice under this Ordinance." Id. at 69. In his concurring opinion, Justice Breyer further commented that the Chicago ordinance "... leaves many individuals, gang members and nongang members alike, subject to its strictures." Moreover, in Justice Breyer's view, it is "in the ordinance's delegation to the policeman of open-ended discretion to fill in [the] ... blank [of determining when the limitation of a person's being in an area for "no apparent purpose"] that the problem lies." According to Justice Breyer, "[t]o grant to a policeman virtually standardless discretion to close off major portions of the city

> to an innocent person is, in my view, to create a major, not a 'minor,' limitation upon the free state of nature.'" To him, "[t]he ordinance is unconstitutional, not because a policeman applied this discretion wisely or poorly in a particular case, but rather because the policeman enjoys too much discretion in every case. And if every application of the ordinance represents an exercise of unlimited discretion, then the ordinance is invalid in all its applications." Id. at 71.

A subsequent opinion of this office dated September 28, 2006 referenced that the Court in Morales

> ...found that the ordinance in question - which allowed the police to arrest any group of two or more people who remained in a public place 'with no apparent purpose' if the police 'reasonably believed' the group included a gang member and if the loiterers failed to disperse - was constitutionally infirm."...The principal basis for the Morales majority's conclusion of facial unconstitutionality was the unfettered discretion provided the police to determine whether the Ordinance had been violated. In the Supreme Court's view, the Ordinance "applies to everyone in the city who may remain in one place with one suspected gang member as long as their purpose is not apparent to an officer observing them." 527 U.S. at 62. The constitutional infirmity of the ordinance in question was that it did not "... provide sufficiently specific limits on the enforcement discretion of the police 'to meet constitutional standards for definiteness and clarity.'" In other words, the ordinance "affords too much discretion to the police and too little notice to citizens who wish to use the public streets." Id. at 64.

That same opinion dealt with the question of the constitutionality of a proposed ordinance based upon the Model Penal Code's definition of loitering. See, Model Penal Code § 250.6. Such proposed ordinance read as follows:

> TO AMEND SECTION 21-108 OF THE CODE OF THE CITY OF CHARLESTON BY DELETING SECTION 21-108 IN ITS ENTIRETY AND REPLACING IT WITH A NEW SECTION 21-108 THAT PROVIDES THAT LOITERING IS PROHIBITED.
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> BE IT ORDAINED BY THE MAYOR AND COUNCILMEMBERS OF CHARLESTON, IN CITY COUNCIL ASSEMBLED:
>
> WHEREAS, the current municipal law prohibiting loitering in the City of Charleston was enacted in 1975, and,

WHEREAS, since the adoption of the City's anti-loitering ordinance, the Supreme Court of the United States in City of Chicago v. Morales, 527 U.S. 41 (1999), the other cases has held that ordinances prohibiting loitering must employ language that is not vague or overbroad so that the constitutional rights of speech and assembly of citizens are protected; and,

THEREFORE, the City Council hereby finds that a new anti-loitering ordinance should be adopted in lieu of the existing anti-loitering ordinance.

SECTION 1. Section 21-108 of the Code of the City of Charleston is hereby amended by deleting Section 21-108 in its entirety and by replacing it with a new Section 21-108 that reads as follows:

"Sec. 21-108. Loitering.

(A) LOITERING. No person shall loiter or prowl in a place, at a time or in a manner not usual for law abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity. Among the circumstances which may be considered in determining whether such alarm is warranted is the fact that the actor takes flight upon appearance of a police officer, refuses to identify himself or manifestly endeavors to conceal himself or any object. Unless flight by the actor or other circumstances makes it impracticable, a police officer, and prior to any arrest for an offense under this subsection, shall afford the actor an opportunity to dispel any alarm which would otherwise be warranted, by requesting him to identify himself and explain his presence and conduct. No person shall be convicted of violating this subsection if the police officer did not comply with the preceding sentence or if it appears at trial that the explanation given was true and would have dispelled the alarm and disclosed the person's lawful purpose.

The provisions of the two preceding sentences are applicable to this paragraph (a) and each of the subsequent paragraphs (b) through (h) herein.

(b) DWELLING AREAS. No person shall hide, wait or otherwise loiter in the vicinity of any private dwelling house, apartment building or any other place of residence with the unlawful intent to watch, gaze or look upon the occupants therein in a clandestine manner.

(c) PUBLIC REST ROOMS. No person shall loiter in or about any toilet open to the public for the purpose of engaging in or soliciting any lewd or lascivious or any unlawful act.

(d) SCHOOLS AND PUBLIC GROUNDS. No person shall loiter in or about any school or public place at or near which children or students attend or normally congregate. As used in this subsection, "loiter" means to delay, to linger or to idle in or about any said school or public place without a lawful purpose for being present.

(e) BUILDINGS. No person shall loiter or lodge in any building, structure or place, whether public or private, without the permission of the owner or person entitled to possession or in control thereof

(f) RESTAURANTS, TAVERNS. No person shall loiter in or about a restaurant, tavern or other building open to the public. As used in this subsection, "loiter" means to, without just cause, remain in a restaurant, tavern or public building or to remain upon the property immediately adjacent thereto after being asked to leave by the owner or person entitled to possession or in control thereof

(g) PARKING LOTS. No person shall loiter in or upon any public parking surface lot or public parking structure, either on foot or in or upon any conveyance being driven or parked thereon, without the permission of the owner or person entitled to possession or in control thereof. As used in this subsection:

(1) "Public parking structure" means a building enclosure or garage above or under the ground, or any portion thereof, in which automobiles or motor vehicles may be parked, stored, housed or kept, and open to public use with or without charge.

(2) "Public parking surface lot" means five (5) or more ground level parking spaces, or any portion thereof, not located in a structure, upon which automobiles or motor vehicles may be parked, stored, housed or kept, and open to public use with or without charge.

(h) PRIVATE OR PUBLIC RESIDENTIAL PROPERTY. No person shall loiter in or on private or public residential property in residential neighborhoods. As used in this subsection, "loiter" means to, without just cause, linger, remain in or on private or public residential property, or to remain upon the property immediately adjacent thereto after being asked to leave by the owner or person entitled to possession or in control thereof, or where "No Loitering" signs are posted.

(i) REQUIREMENTS OF IDENTIFICATION. A person being asked for identification pursuant to his section shall provide the police officer with his name and address either verbally or by providing the officer with written evidence of the

person's name and address, including but not limited to a driver's license or picture identification.

(j) PENALTY; CONTINUING VIOLATIONS. Any person who is convicted of any violation of this section, the court before whom an offender shall be tried may sentence him to pay a fine not exceeding the maximum fine permitted by law or serve a term not exceeding thirty (30) days in jail, or both. Each day any violation of this ordinance shall continue shall constitute a separate offense.

(k) COURT ORDER ON JURISDICTIONAL LIMITS. In addition to the penalty that may be imposed pursuant to subsection (j) above, any person who is arrested for and/or convicted of violating any provision of this section may be subject to an order of the court which shall impose a jurisdictional limit on said person prohibiting his presence in a specific geographic area of the City of Charleston. Failure to comply with the court order shall constitute a violation of the court order and shall result in the following: (1) in the case of a bond where jurisdictional limits have been imposed, the bond may be revoked and the person shall be incarcerated until trial; and/or (2) in the case of a sentence where jurisdictional limits have been imposed, the suspended sentence may be revoked and the person shall be incarcerated until he has served the original sentence imposed by the court without any portion thereof suspended.

SECTION 2. The section, subsections, paragraphs, sentences, clauses and phrases of this section are severable, and if any phrase, clause, sentence, paragraph, section or subsection herein shall be declared unconstitutional or invalid by the valid judgment or decree of any court of competent jurisdiction, such unconstitutionality or invalidity shall not affect the section and any of the remaining phrases, clauses, sentences, paragraphs and subsections herein, since the same would have been enacted by council without the incorporation of any such unconstitutional or invalid phrase, clause, sentence, paragraph, section or subsection.

SECTION 3. This Ordinance shall become effective upon ratification.

The opinion noted that the Model Penal Code ordinance had been upheld as constitutionally valid in a number of cases, including Schmitty's City Nightmare v. City of Fond du Lac, 391 F.Supp. 2d 745 (E.D.Wis. 2005). The Schmitty's case was decided after Morales and relied to a great extent upon a previous decision of the Wisconsin Supreme Court - City of Wisconsin v. Nelson, 439 N.W.2d 562 (1989). As the Schmitty's Court acknowledged, the Model Penal Code's language limiting loitering to activity occurring "at a time or in a manner not usual for law abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity" removed

much of the discretion of law enforcement officers which was provided by traditional loitering ordinances because it "served to limit the ordinance's applicability to a much narrower subset of activity than would be the case had the ordinance prohibited 'loitering' in a more vague sense." 391 F.Supp.2d at 749.

In Nelson, the Wisconsin Supreme Court reviewed the history of the Model Penal Code proposed ordinance and determined that it was constitutionally valid. The Nelson Court stated that:

> [m]ore specifically, sec. 250.6 of the Model Penal Code underwent thorough analysis before it was approved in its final form by the ALI. In its comments to sec. 250.6, the ALI discusses the constitutional implications of loitering statutes from the United States Supreme Court opinion in Papachristou, et al. v. City of Jacksonville, 405 U.S. 156, 162, 92 S.Ct. 839, 843, 31 L.Ed.2d 110 (1972) to numerous state court decisions concluding that, "[i]f even the Model Code provision is unconstitutionally vague ... then it seems likely that no general provision against loitering can be drafted to survive constitutional review.... [T]here would be no provision to deal with the person who is obviously up to no good but whose precise intention cannot be ascertained." A.L.I. Model Penal Code sec. 250.6, Commentary (hereinafter MPCc) at 396-97. State v. Ecker, 311 So.2d 104, 107 (Fla.1975) noted that the Model Penal Code sec. 250.6 was drawn in a manner to meet the defects and infirmities in earlier vagrancy laws.

However, as noted in the opinion, several courts have held that statutes and ordinances based on this section of the Model Penal Code unconstitutional. See Fields v. City of Omaha, 810 F.2d 830 (8th Cir.1987); (identification portion held unconstitutionally vague); City of Portland v. White, 9 Or.App. 239, 495 P.2d 778 (1972); City of Bellevue v. Miller, 85 Wash.2d 539, 536 P.2d 603 (1975). Other courts, including the Wisconsin Court of Appeals, determined them to be constitutional. State v. Wilks, 117 Wis.2d 495, 345 N.W.2d 498 (Ct.App.1984), aff'd. on other grounds, 121 Wis.2d 93, 358 N.W.2d 273 (1984), cert. denied, 471 U.S. 1067, 105 S.Ct. 2144, 85 L.Ed.2d 501 (1985).

In Nelson, the Wisconsin Supreme Court determined that the ordinance required police to "give the suspect the opportunity to 'dispel any alarm which would otherwise be warranted' prior to arrest if such circumstances are possible. If no such opportunity is given, there can be no conviction of the offense. Ultimately, it is the trier of fact who decides if the suspect's explanation 'would have dispelled any alarm,' not the police officer." 439 N.W. at 567. Nelson also determined that "[o]ther courts that have examined the Model Penal Code section on loitering have held it constitutional." As the Court discussed,

[i]n Bell v. State, 252 Ga. 267, 313 S.E.2d 678 (1984), the Georgia Supreme Court approved an almost identical version of sec. 250.6 against attacks of vagueness. It found the statute in question passed the two necessary requirements for surviving a vagueness attack: "The statute, when read as a whole, passes constitutional muster in advising persons of ordinary intelligence of the conduct sought to be prohibited ... [and] the statute also defines the offense in terms which discourage arbitrary enforcement." Id., 313 S.E.2d at 681. The court reasoned that the "offense of loitering is committed only when the actor engages in conduct 'not usual for law abiding individuals' which creates 'a reasonable alarm or immediate concern for the safety of persons or property in the vicinity.' " Id. To an argument that "usual" is vague, the court responded that the phrase is made clear by the clause which provides that conduct would have to alarm a reasonable person. Id. It stated:

> Initially the investigating officer must determine whether the suspect's conduct poses a danger to persons or property. Section (b) offers guidelines to assist the officer in making this determination. However, these guidelines do not require the officer to make an arrest, even if one or more of the situations suggested therein is present. If, drawing on all his professional experience, the officer concludes the suspect presents a danger to persons or property in the vicinity and arrests him for loitering or prowling, it is then a matter for the trier of fact to determine whether, under all the circumstances revealed by the evidence, the suspect's conduct gave rise to reasonable alarm for the safety of persons or property. In resolving this issue the jury may also consider the guidelines of Section (b). The statutes does not require a conviction if one or more of the listed circumstances is found. We point out that while there are useful guidelines, they do not represent an exhaustive list of factors which may be used in assessing whether the suspect's conduct reasonably warrants alarm. We also point out that under Section (b), no violation occurs if the investigating officer fails to afford the suspect an opportunity to dispel otherwise reasonable alarm by explaining his conduct.
> Id.

In Ecker, 311 So.2d 104 (1975), the Florida Supreme Court upheld a state statute identical to sec. 250.6 against an attack for vagueness. After analyzing cases where similar loitering statutes were upheld and dissimilar statutes had been struck down, the Florida court said as to the similar constitutionally valid statutes, "there is an important common thread in each of the aforementioned cases. In each instance

> either the peace and order were threatened or the public safety was involved." Id., 311 So.2d at 109. It concluded that the words "under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity mean those circumstances where peace and order are threatened or where the safety of persons or property is jeopardized." Id. In reconciling City of Portland v. White, 9 Or.App. 239, 495 P.2d 778 (1972), the Florida court stated the Oregon court "failed to apply the judicial principle of construing the wishes of the legislative body in a manner that would make the legislation constitutionally permissible." Ecker, 311 So.2d at 109. Importantly, the Florida court showed that the officer's discretion can be controlled when it applied the statute to specific cases it was considering in the consolidated appeal. As to one defendant who was hiding among the bushes at a private dwelling at 1:20 a.m., the court found such facts "would cause a reasonable person to be concerned for his safety or the safety of property in the vicinity." Id. at 110. Another defendant was observed in front of an apartment building. When asked for identification he replied he had none. The court found the evidence insufficient to be a threat to the public safety so the charge of loitering could not be upheld. Id. at 111. The court stated that, "while the statute may be unconstitutionally applied in certain situations, this is no ground for finding the statute itself unconstitutional." Id. at 110.

439 N.W.2d at 567-568.

Additionally, the Court in Nelson found that the ordinance based upon the Model Penal Code was not infirm for overbreadth. The defendant had argued that by the ordinance, "a person could be subject to a loitering offense while taking a stroll, sitting on a park bench, seeking shelter from the elements in a doorway, or as a candidate shaking hands while campaigning." Id. at 568-69. However, the Wisconsin Supreme Court rejected such assertion in indicating that

> [w]e find it highly unlikely that someone taking a stroll, sitting on a park bench, seeking shelter in a doorway from the elements, or shaking hands while politically campaigning, would be doing so in a place, at a time, or in a manner not usual for law abiding individuals under circumstances that warrant alarm to police officers for the safety of persons or property within the vicinity. On an overbreadth challenge this court found untenable an argument in the Milwaukee v. K.F. case [426 N.W.2d 329 (Wis. 1988)] that the Milwaukee "Loitering of Minors" ordinance, sec. 106-23, Milwaukee Code of Ordinances, would impermissibly apply to a minor walking home from work or standing while waiting for a bus after the curfew hour. This court held that the curfew ordinance "is to prevent the undirected or aimless conduct of minors during the curfew hours." Milwaukee v. K.F., 145 Wis.2d at 48, 426 N.W.2d 329. Here too, the ordinance is not aimed at constitutionally protected conduct but

> at conduct which causes alarm for the safety of persons or property. This court further said in Milwaukee v. K.F. that "while it is conceivable that a police officer could mistakenly or even willfully apply the ordinance [to someone not within its proscription] the potential of such improper application of the ordinance does not destroy its constitutionality." Id. And in Wilson this court held that a person engaged in political campaigning would not be swept up by the ordinance because that ordinance, the Milwaukee Prostitution Ordinance sec. 106-31(1)(9), Milwaukee Code of Ordinances, requires a showing of specific intent to accomplish the unlawful purpose manifested. Wilson, 96 Wis.2d at 20-21, 291 N.W.2d 452. The ordinance in question here, while not containing an element of intent, does allow the officer to differentiate between conduct which is constitutionally protected from that which is not. The unprotected conduct is that which occurs in a place, at a time or in a manner not usual for law abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity. Further, if the officer is by chance mistaken, the ordinance allows the suspect to dispel alarm when questioned.
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> The Florida Supreme Court in Ecker concluded that its statute, which is also patterned after sec. 250.6 of the Model Penal Code, was not overbroad. Ecker, 311 So.2d at 109. The court reasoned that the cases upholding loitering ordinances contained a common thread; peace and order were threatened or public safety was involved. Id. The Florida court found the Model Penal Code's language, "those circumstances that warrant alarm for the safety of persons or property in the vicinity" to mean those circumstances where the safety of persons or property is jeopardized or where the peace and order is threatened. Id.

In Ecker, supra, the Florida Supreme Court equated the Model Penal Code provisions with the requirements of "stop and frisk" authorized in Terry v. Ohio, 392 U.S. 1 (1968). The Florida Supreme Court determined

> ... Section 856.021, Florida statutes, is not vague or overbroad and specifically the words 'under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity' mean those circumstances where peace and order are threatened or where the safety of persons or property is jeopardized. In justifying an arrest for this offense, we adopt the words of the United States Supreme Court in Terry v. Ohio ... [supra]: '... the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant' a finding that a breach of the peace is imminent or public safety is threatened.

311 So.2d at 109.

The September, 2006 opinion concluded that it was the opinion of this office that if the referenced Charleston ordinance were to be adopted and challenged that "...a court would likely conclude that the ordinance was constitutionally valid on its face." As stated in the opinion,

> while some courts have concluded that a similarly worded ordinance is invalid, a number of other decisions have upheld ordinances similar to the one proposed here. We believe that the decisions which have upheld similar ordinances to the Charleston ordinance are sound and well reasoned.

The opinion concluded that

> [i]In short, the proposed Charleston ordinance is very similar to the one upheld in the Schmitty's case, including the enumeration of many of the same specific areas of emphasis contained in the Fond du Lac ordinance. ..In addition, as in the Model Penal Code ordinance, an officer may not arrest pursuant to the ordinance unless he or she "shall afford the actor an opportunity to dispel any alarm which would otherwise be warranted by requesting him to identify himself and explain his presence and conduct."...This requirement thus allows the officer to investigate, and if the conduct is innocent, to make no arrest.

It was noted however, that one drawback to the Model Penal Code ordinance was that

> ...no intent, mens rea or scienter is expressly required...[T[he Justices in Morales who deemed the Chicago ordinance unconstitutional stressed the need for a mens rea element in the form of an "apparently harmful" intent...However, this lack of express requirement of mens rea did not seem to concern those courts, including Schmitty's, which upheld ordinances based upon the Model Penal Code. These courts' analysis found highly significant the fact that the officer first had to confront the suspect and receive his or her explanation before any arrest could be made. Such is more along the lines of Terry v. Ohio's "articulable suspicion" approach and could be deemed by a court to obviate the need for a mens rea requirement. Moreover, the Model Penal Code ordinance at least impliedly requires scienter by mandating circumstances which warrant "alarm" to the officer.

Of course, as noted in prior opinions of this office, it was stated that "...there is no guarantee that any loitering ordinance will be upheld. However, in our opinion, the proposed Charleston ordinance stands a reasonable chance of being validated by a court."

Another opinion of this office dated December 17, 2003 dealt with an ordinance which stated as follows:

> 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.

The opinion determined that in examining the ordinance prohibiting loitering, the question of vagueness must be considered. A prior opinion of this Office dated March 25, 1992 acknowledged that loitering ordinances have been invalidated where the ordinance is so unclear 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 also stated 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, supra. As noted in the December, 2003 opinion referenced above, "[a]nother area of concern in examining loitering ordinances is that the ordinance may authorize and even encourage arbitrary and discriminatory enforcement."

In the previously-cited ordinance, particular manners of conduct are cited. As stated in the opinion, 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 sustained on grounds 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. Acknowledging that a statute is void for vagueness where 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 results 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

> [l]oitering 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:

> [w]e 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.

As to the particular ordinance referenced by you set forth above, while only a court can conclusively determine whether a statute or ordinance is invalid or unconstitutional, based upon the above discussion, we believe that a court would find that the loitering ordinance does not provide sufficiently specific limits on the unfettered enforcement discretion of police officers in order to meet constitutional standards for "definiteness and clarity." Such ordinance lacks the specificity and detail of the type conduct prohibited as set forth in the Charleston ordinance set forth previously. As a result, in the opinion of this office the ordinance would be susceptible to overbreadth and vagueness challenges on the grounds that it does not provide the type of notice that would allow ordinary citizens an understanding as to what type of conduct is specifically prohibited and may allow arbitrary and discriminatory enforcement. Also, there are not sufficient minimal guidelines to instruct law enforcement in the enforcement of the ordinance.

With kind regards, I am,

Very truly yours,

Henry McMaster
Attorney General

By: Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Deputy Attorney General