Agenda Item 7
November 15, 2011
Public Hearing

MEMORANDUM

TO: Public Safety Committee

FROM: Robert H. Drummer, Senior Legislative Attorney

SUBJECT: **Public Hearing:** Bill 35-11, Offenses – Loitering or Prowling – Established

Expedited Bill 35-11, Offenses – Loitering or Prowling – Established, sponsored by Councilmembers Andrews, Leventhal, and Rice is scheduled to be introduced on October 25, 2011. A Public Safety Committee worksession is tentatively scheduled for November 17 at 9:00 a.m.

Background

Bill 35-11 would prohibit certain loitering and prowling, provide for certain defenses, and provide enforcement procedures and penalties. Under the Bill, "loitering and prowling means to remain in a public place or establishment at a time or in a manner not usual for law-abiding persons under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity." Councilmember Phil Andrews explained that he sponsored the Bill as an alternative to the curfew proposed by the Executive in Bill 25-11 in an October 19 memorandum at ©5-6.

The Executive's Frequently Asked Questions about the County Executive's Youth Curfew Proposal[1] states:

> Police would confront teens called to their attention due to suspected suspicious, menacing, potentially violent, or violent behavior. The police would not be involved in routinely rounding up minors for the sake of enforcing the curfew law, but the curfew would instead be a tool when encountering suspicious or dangerous behavior either on patrol or when dispatched to a complaint from a citizen. Those individuals would be asked to give their age and purpose for being in a public place or establishment.

The Bill would provide the police with a more focused tool to respond to the situations described by the Executive as the target of the curfew without being limited to minors or certain times of the day.

[1] A complete copy of the document is at ©9-14.

Issues

1. Is the Bill unconstitutional on its face?

Questions have been raised concerning the constitutionality of Bill 35-11. In *Chicago v. Morales*, 527 U.S. 41 (1999), the U.S. Supreme Court held that a Chicago law prohibiting loitering in a public place together with a criminal street gang member was impermissibly vague in violation of the Due Process Clause of the 14th Amendment to the U.S. Constitution. However, the Chicago "gang congregation" ordinance struck down in *Morales* is distinguishable from Bill 35-11.

Bill 35-11 is based upon the American Law Institute's Model Penal Code, §250.6. A copy of the Model Penal Code, §250.6 is at ©7-8. Although ALI drafted this section of the Model Penal Code in 1962, ALI has not updated or modified it since. Council staff contacted ALI and learned that ALI is currently working on updates to other sections of the Model Penal Code, but has no immediate plans to update §250.6. ALI describes itself in its website as:

> The American Law Institute is the leading independent organization in the United States producing scholarly work to clarify, modernize, and otherwise improve the law. The Institute (made up of 4000 lawyers, judges, and law professors of the highest qualifications) drafts, discusses, revises, and publishes Restatements of the Law, model statutes, and principles of law that are enormously influential in the courts and legislatures, as well as in legal scholarship and education. ALI has long been influential internationally and, in recent years, more of its work has become international in scope.
>
> By participating in the Institute's work, its distinguished members have the opportunity to influence the development of the law in both existing and emerging areas, to work with other eminent lawyers, judges, and academics, to give back to a profession to which they are deeply dedicated, and to contribute to the public good.
>
> ALI is a 501(c)(3) nonprofit organization incorporated in the District of Columbia.

Similar laws based upon the Model Penal Code have been upheld in Georgia,[2] Florida,[3] and Wisconsin.[4] The Supreme Court of Georgia upheld the Georgia loitering law in *Bell v. State,* 252 Ga. 267, 313 S.E.2d 678 (1984). The Supreme Court of Florida upheld the Florida loitering law in *Watts v. State,* 463 So.2d 205 (Fla. 1985). The Supreme Court of Wisconsin upheld the Milwaukee loitering and prowling ordinance in *Milwaukee v. Nelson,* 149 Wis. 2d 434; 439 N.W.2d 562 (1989). Despite the 1999 Supreme Court decision in *Morales*, convictions under the loitering laws in Florida and Georgia were subsequently upheld in *B.J. v. State of*

[2] *O.C.G.A. § 16-11-36* (2011)
[3] *Fla. Stat. § 856.021* (2011)
[4] Milwaukee City Ordinance §106-31

Florida, 951 So.2d 100 (Fla. App. 2007) and *O'Hara v. State,* 241 Ga. App. 855, 528 S.E.2d 296 (2000).

The Supreme Court of Georgia, in *Bell v. State,* described the test to decide if a statute is unconstitutionally void for vagueness as:

> 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." 313 S.E.2d at 681.

Although applying the same test to a similar loitering and prowling law based upon the Model Penal Code, §250.6, appellate courts in Washington,[5] Oregon,[6] and Idaho[7] held that the law was unconstitutionally void for vagueness. A similar Omaha, Nebraska ordinance was declared unconstitutionally vague by the United States Court of Appeals for the 8th Circuit in *Fields v. Omaha,* 810 F.2d 830 (8th Cir. 1987). The courts striking down these laws concluded that the law provided too much discretion for a police officer to decide if an individual is violating the law and is therefore susceptible to arbitrary or discriminatory enforcement. It is important to note that a court could use the same theory to conclude that the Executive's proposed enforcement of the curfew is susceptible to arbitrary or discriminatory enforcement. We could not find any Maryland appellate court decisions reviewing a similar law for vagueness. We understand that the County Attorney's Office is currently reviewing Bill 35-11 for legal sufficiency.

2. How would the Bill be enforced?

To determine whether a person is loitering or prowling under the Bill, a police officer *may* consider if the person:

(A) takes flight after the appearance of the officer;
(B) refuses to identify himself or herself; or
(C) attempts to conceal himself or herself or any object.

Unless impracticable, a police officer must give the person the opportunity to dispel the officer's "reasonable alarm or immediate concern for the safety of persons or property in the vicinity" by requesting the person identify himself or herself and explain his or her presence and conduct. In order to issue a citation or make an arrest, a police officer must reasonably believe that the person's conduct justifies alarm or immediate concern for the safety of persons or property in the vicinity. Finally, the officer must first warn the person and the person must fail or refuse to cease the conduct.

The Bill would also provide certain defenses. It would not be a violation if the arresting officer fails to provide the opportunity to explain the conduct or if the explanation given to the officer was true and would have dispelled the alarm or immediate concern.

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[5] *Bellevue v. Miller,* 85 Wn.2d 539; 536 P.2d 603 (1975)
[6] *Portland v. White,* 9 Ore. App. 239; 495 P.2d 778 (1972)
[7] *State v. Bitt,* 118 Idaho 584; 798 P.2d 43 (1990)

3. How is Bill 35-11 different from the County's prior loitering law?

Prior to 2006, the County Code prohibited certain loitering. However, the prior loitering law was not based upon the Model Penal Code, §250.6. Under the former version of Code §32-13, loitering was defined as:

> To circulate, stand around or remain or to park, or remain parked in a motor vehicle at a public place or place open to the public and to engage in any conduct prohibited under this law. Loiter also means to collect, gather, congregate or to be a member of a group or a crowd of people who are gathered together in any public place or place open to the public and to engage in any conduct prohibited under this law.

Bill 15-06, enacted on July 11, 2006, deleted the term "loitering" from the Code and replaced it with the current provision prohibiting certain "disturbing the public peace or disorderly conduct." The legislative history for Bill 15-06 does not indicate that the former loitering law was challenged in court. The deletion of the term "loitering" was made by the Council at the suggestion of the ACLU. See the Council Action packet at ©15-33. County Code §32-14 currently provides:

> **Sec. 32-14. Disturbing the public peace or disorderly conduct—Prohibited conduct.**
>
> An individual must not at, on, or in a public place or place open to the public:
>
> (a) interfere with or hinder the free passage of pedestrian or vehicular traffic; or
>
> (b) incite unlawful conduct, by words or intentional conduct, which is likely to produce imminent unlawful conduct.

Although some behavior may violate both Section 32-14 and the proposed loitering or prowling offense that would be established by Bill 35-11, the removal of the term "loitering" by Bill 15-06 does not affect the legal sufficiency of Bill 35-11.

This packet contains:

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Bill No. 35-11
Concerning: Offenses – Loitering or Prowling – Established
Revised: 10/20/2011 Draft No. 2
Introduced: October 25, 2011
Expires: April 25, 2013
Enacted: _____
Executive: _____
Effective: _____
Sunset Date: None
Ch. _____, Laws of Mont. Co. _____

COUNTY COUNCIL
FOR MONTGOMERY COUNTY, MARYLAND

By: Councilmembers Andrews and Leventhal

AN ACT to:

(1) prohibit certain loitering or prowling;
(2) provide for certain defenses;
(3) establish enforcement procedures and penalties; and
(4) generally amend County law relating to offenses.

By adding
Montgomery County Code
Chapter 32, Offenses
Section 32-23B

Boldface	*Heading or defined term.*
Underlining	*Added to existing law by original bill.*
[Single boldface brackets]	*Deleted from existing law by original bill.*
Double underlining	*Added by amendment.*
[[Double boldface brackets]]	*Deleted from existing law or the bill by amendment.*
* * *	*Existing law unaffected by bill.*

The County Council for Montgomery County, Maryland approves the following Act:

Sec 1. Sections 32-23B is added as follows:

32-23B. Loitering or Prowling.

(a) **Definitions.**

As used in this Section:

Establishment means any privately-owned place of business to which the public is invited, including any place of amusement or entertainment.

Loitering or prowling means to remain in a public place or establishment at a time or in a manner not usual for law-abiding persons under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity.

Public place means any place to which the public, or a substantial group of the public, has access. *Public place* includes any street, highway, and common area of a school, hospital, apartment house, office building, transport facility, or shop.

Remain means to linger, stay, or fail to leave a public place or establishment when requested to do so by a police officer or the owner, operator, or other person in control of the public place or establishment.

(b) **Prohibitions.**

(1) A person must not loiter or prowl in any public place or establishment in the County.

(2) In determining whether a person is violating this Section, a police officer may consider if the person:

(A) takes flight after the appearance of the officer;

(B) refuses to identify himself or herself; or

(C) attempts to conceal himself or herself or any object.

(c) **Enforcement Procedure.**

(1) Unless flight by the person or other circumstances make it impracticable, a police officer must, prior to any arrest for a violation of this Section, give the person an opportunity to dispel any alarm or immediate concern which would otherwise be warranted by requesting the person:

(A) to identify himself or herself; and

(B) to explain his or her presence and conduct.

(2) The police officer must not issue a citation or make an arrest under this Section unless the officer reasonably believes that the person's conduct justifies alarm or immediate concern for the safety of persons or property in the vicinity.

(d) **Defenses.**

(1) It is not a violation of this Section if:

(A) the arresting officer did not comply with the requirements of subsection (c); or

(B) the explanation given to the police officer by the person was true and would have dispelled the alarm or immediate concern.

(e) **Penalties.**

(1) A person who violates this Section has committed a Class B violation.

(2) A person must not be charged with a violation of this Section unless the arresting officer has first warned the person of the violation and the person has failed or refused to stop the violation.

LEGISLATIVE REQUEST REPORT

Bill 35-11
Offenses – Loitering or Prowling – Established

DESCRIPTION:	Bill 35-11 would prohibit certain loitering and prowling, provide for certain defenses, and provide enforcement procedures and penalties.
PROBLEM:	This Bill is an alternative to the youth curfew that would be established by Bill 25-11, Offenses – Curfew – Established.
GOALS AND OBJECTIVES:	The Bill would provide the Police with a more focused tool to prevent problems that may occur as a result of people gathering for the purpose of causing trouble.
COORDINATION:	Police, County Attorney
FISCAL IMPACT:	To be requested.
ECONOMIC IMPACT:	To be requested.
EVALUATION:	To be requested.
EXPERIENCE ELSEWHERE:	Similar laws have been enacted in Florida and Georgia. The Bill is based upon the American Law Institute Model Penal Code, §250.6.
SOURCE OF INFORMATION:	Robert H. Drummer, Senior Legislative Attorney
APPLICATION WITHIN MUNICIPALITIES:	To be researched.
PENALTIES:	Class B Violation

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MEMORANDUM

October 19, 2011

TO: Councilmembers

FROM: Phil Andrews, Chair Public Safety Committee

SUBJECT: A better approach than a youth curfew to addressing crime

Many community members and organizations have voiced opposition or concerns about the County Executive's proposed youth curfew. Regardless of what you think about the County Executive's proposal, there is a better path for the Council to take and a better tool to give County Police to address the same concerns that the County Executive says he wants to address.

The Executive's document "Frequently Asked Questions about the County Executive's Youth Curfew Proposal", states, "Current laws are not adequate to manage large groups of teens that gather for the purpose of causing trouble." The document also says "Police would confront teens called to their attention due to suspected suspicious, menacing, potentially violent, or violent behavior . . . ." and that " . . . the curfew would be "a tool when encountering suspicious or dangerous behavior either on patrol or when dispatched to a complaint from a citizen. Those individuals would be asked to give their age and purpose for being in a public place or establishment."

A far better approach than a youth curfew to address the behavior that the Executive Branch wants to address – behavior that can occur anytime by people of any age -- would be a law prohibiting loitering and prowling modeled after a long-standing and recently upheld state law in Florida. Unlike a youth curfew, a loitering and prowling law wouldn't discriminate based on age, wouldn't be limited to late-night hours when a small percentage of youth crime and overall crime occurs, and would target criminally suspicious behavior by anyone, rather than making it illegal (with exceptions) for certain people (youth) to be out in public after certain hours. Loitering laws can be drafted to withstand a court challenge. In fact, the Florida law prohibiting loitering/prowling recently withstood one. The draft law would enable police to take action if the person moved along but continued the suspicious behavior while lingering in a public place, including any place to which the public has access, including a street. The Class B violations proposed in the law can be civil ($100 for first offense) or criminal, as circumstances warrant.

It is encouraging that crime by youth in our County has steadily declined since 2007, from 3,844 that year to 3,104 incidents in 2010. Gang-related incidents declined by 50% from 2008 to 2010, and youth arrests during the proposed curfew declined 18% from 2009 to 2010 (while increasing significantly during non-curfew hours). In addition, since the Council approved additional police officers for the Third District -- a proven approach to reducing crime -- robberies and aggravated assaults have declined dramatically in the

Silver Spring Central Business District from an average of six per month to an average of 1.5 this August and September, as have robberies and residential burglaries in the Rt. 29 corridor (the Ida sector). Credit is due to the fine work done by County police, as well as to County and non-profit personnel who administer and run our positive youth development programs. But more needs to be done to prevent and suppress crime, including expanding organized activities for youth, helping youth get out of gangs, and increasing police presence in targeted areas.

I invite you to co-sponsor the attached bill prohibiting loitering and prowling. The measure would provide County Police with an effective tool to address suspicious behavior by people of any age and any time of the day. Please let me or Lisa Mandel-Trupp know if you would like to sign on to the bill or have any questions or suggestions. I am hopeful that this is an approach that the Council can unite behind. Thanks for your consideration.

Attachment: Draft bill on loitering and prowling

Model Penal Code

PART II. DEFINITION OF SPECIFIC CRIMES
OFFENSES AGAINST PUBLIC ORDER AND DECENCY
ARTICLE 250. RIOT, DISORDERLY CONDUCT, AND RELATED OFFENSES

Model Penal Code § 250.6

§ 250.6. Loitering or Prowling.

A person commits a violation if he loiters or prowls 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 peace officer, refuses to identify himself, or manifestly endeavors to conceal himself or any object. Unless flight by the actor or other circumstance makes it impracticable, a peace officer shall prior to any arrest for an offense under this section 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 an offense under this Section if the peace officer did not comply with the preceding sentence, or if it appears at trial that the explanation given by the actor was true and, if believed by the peace officer at the time, would have dispelled the alarm.

NOTES:

Explanatory Note for Sections 250.1-250.12

Article 250 covers riot, disorderly conduct, and related offenses. This article deals with a vast area of penal law, which, at the time the Model Code was drafted, had received little systematic consideration by legislators, judges, or scholars. The penalties involved were generally minor, the defendants usually came from the lower social and economic levels, and appeals were consequently infrequent. For these reasons, pressures for legislative reform were minimal. Yet, disorderly conduct and related offenses form a critically important area of the criminal justice system. Offenses in this category affect a large number of defendants, involve a great proportion of public activity, and powerfully influence the view of public justice held by millions of people.

The purposes of Article 250 are the following:

(1) to systematize the chaotic provisions of prior law penalizing a wide variety of petty misbehavior under such vague headings as "disorderly conduct" or "vagrancy";

(2) to provide a rational grading of penalties and especially to limit the discretion of the minor judiciary to impose substantial imprisonment for petty infractions;

(3) to safeguard civil liberty by careful definition of offenses so that they do not cover, for example, arguing with a policeman, peaceful picketing, or disseminating religious or political views;

(4) to minimize the overlap of disorderly conduct offenses and offenses dealt with by more specific provisions of the Model Code so that policies embodied in other offenses will not be disregarded by prosecuting the same behavior as disorderly conduct;

(5) to eliminate obsolete or unconstitutional provisions frequently found in prior law, e.g., against blasphemy, or creating "status crimes," such as being a common scold, common prostitute, common gambler, or common drunkard;

(6) to extend the penal law to new areas of misbehavior involving public or aggravated assault on the feelings of individuals and groups, e.g., by false bomb scares, harassing telephone calls, illegal wiretapping, and other invasion of privacy; and

(7) to improve criminal statistics by requiring prosecuting and reporting agencies to distinguish the widely differing forms of misbehavior often lumped together under the common heading "disorderly conduct."

Section 250.1 defines the offense of riot, which is the only felony in this article, and a subsidiary offense of failure of disorderly persons to disperse upon official order. The objectives of this offense are to provide aggravated penalties for disorderly conduct where the number of participants makes the behavior especially alarming or dangerous and to establish penal sanctions for persons who disobey lawful police orders directing a disorderly crowd to disperse.

Section 250.2 covers the offense of disorderly conduct, which is defined in ways significantly different from prior law. Perhaps most notably, Section 250.2 prohibits only conduct that is itself disorderly and does not punish lawful behavior that prompts others to respond in a disorderly manner. Another significant innovation in the law of disorderly conduct is the reduction of the offense to a violation, which does not authorize imprisonment, unless the actor's purpose is to cause substantial harm or serious inconvenience or unless he persists in disorderly conduct after reasonable warning or request to desist, in which case the offense is a petty misdemeanor.

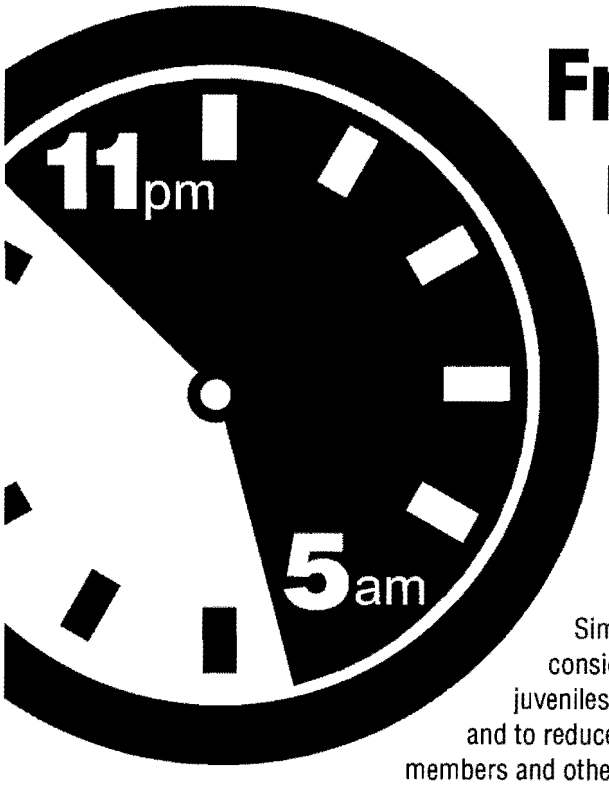
The next six sections of Article 250 deal with special cases of conduct that is disorderly or otherwise constitutes a public nuisance. Section 250.3 punishes false public alarms as a misdemeanor. Section 250.4 defines the petty misdemeanor of harassment. This offense covers a variety of harassing events, including making a telephone call without purpose of legitimate communication, insulting another in a manner likely to provoke violent response, making repeated communications anonymously or at extremely inconvenient hours or in offensively coarse language, and engaging in any other course of harmful conduct serving no legitimate purpose of the actor. Section 250.5 states the Model Code offense of public drunkenness and drug incapacitation. It differs from prior law principally in requiring that the person be under the influence of alcohol or other drug "to the degree that he may endanger himself or other persons or property, or annoy persons in his vicinity." Additionally, Section 250.5 departs from earlier practice in punishing public drunkenness as a violation unless the actor has been convicted twice before within a period of one year, in which case the crime is a petty misdemeanor.

Section 250.6 defines the crime of loitering or prowling. This offense replaces the extremely broad vagrancy laws typical of an earlier time with an offense carefully designed to nip incipient crime in the bud. Specifically, Section 250.6 punishes a person who loiters or prowls "under circumstances that warrant alarm for the safety of persons or property in the vicinity." The section further requires that, save where impracticable, the police officer shall, before making an arrest for this offense, afford the actor an opportunity to dispel alarm for persons or property by identifying himself and explaining his presence and conduct. Section 250.7 punishes the obstruction of highways and other public passages and deals particularly with police control over a person whose speech or other lawful behavior attracts an obstructing audience. Section 250.8 covers disrupting meetings and processions. This offense is distinct from the general provision against disorderly conduct in that it reaches some instances of behavior not in itself disorderly but calculated to outrage the sensibilities of the group involved.

Finally, Article 250 includes several offenses addressed to disparate kinds of conduct that, although not likely to generate disorder, are widely recognized as instances of public nuisance. For example, Section 250.9 punishes the purposeful desecration of venerated objects, including most notably the national flag. Section 250.10 deals with abuse of corpse. Section 250.11 punishes cruelty to animals, and Section 250.12 covers violation of property in a variety of different contexts.

Two comments of a more general nature should also be made at this point. First, it should be noted that regularization of the state penal code will not suffice to bring reform to this area of the law. It will also be necessary to suppress or align innumerable local ordinances under which much prosecution of disorderly conduct and related offenses takes place. Second, the constitutional background of these offenses has changed significantly since promulgation of the Model Code in 1962. In general, judicial concern with the vagueness of penal legislation has increased; and expanding concepts of liberties protected under the first amendment have withdrawn many areas of expressive activity from legislative competence. The various constitutional questions raised by the offenses in Article 250 are discussed in the Comments to specific sections.

For detailed Comment to 250.6, *see* MPC Part II Commentaries, vol. 3, at 383.



Frequently Asked Questions about the County Executive's Youth Curfew Proposal

From the Montgomery County Office of Public Information

▶ Why is Montgomery County considering a curfew?

Simply put, a youth curfew will help protect young people. The County is considering a limited youth curfew as an additional method to improve the safety of juveniles, the safety of residents and visitors to our increasingly urbanized communities, and to reduce juvenile-related crimes. In the past several months police have seen gang members and other young adults coming from neighboring areas that have curfews and engaging in unlawful or violent activities – at times including county youth or directed at them. Current laws are not adequate to manage large groups of teens that gather for the purpose of causing trouble. A youth curfew would complement already existing public safety activities and positive youth development programs to protect underage youth from being the victims of crime or being involved in crime.

▶ What could a curfew accomplish?

A limited curfew could help prevent our youth, other residents, and businesses from becoming victims of unlawful behavior close to and during the curfew hours. It would give the Montgomery County Police Department the same tool that Prince George's County and Washington D. C.'s Metropolitan Police have to prevent unlawful behavior and victimization. It would help manage the influx of youth coming from other curfew-regulated jurisdictions who engage in criminal activity. A by-product could be assisting parents and guardians who have difficulty getting their teens to adhere to family-established curfews. A curfew is a management tool that police could use to disperse large groups of juveniles, such as the approximately 25-member group who participated in the August mass theft at a 7-Eleven store in Germantown just before 2:00 a.m.

▶ What does the curfew law include?

The curfew basically restricts youths under the age of 18 from gathering and remaining in public places between 11:00 p.m. and 5:00 a.m. Sunday through Thursday and between midnight and 5:00 a.m. on Friday and Saturday. Its purpose is to prevent unlawful behavior and safeguard law-abiding teens. It includes a list of exemptions for which it would not restrict minors during a portion of or all of the curfew hours.

▶ Which other jurisdictions have curfews?

According to a survey by the United States Conference of Mayors, more than 500 U.S. jurisdictions have youth curfews, including 84 percent of cities with populations over 180,000.

In our area, two of the largest urban areas, the District of Columbia and Prince George's County have curfew laws. So does Baltimore. Virginia state law allows local jurisdictions the authority to establish curfews for minors between the hours of 10:00 p.m. and 6:00 a.m. In 1996, President Bill Clinton recommended a 9:00 p.m. youth curfew to protect young people from becoming victims. Over 70 cities have **daytime** youth curfew laws to hold parents accountable and keep kids in school. Montgomery County has revitalized or developed urban centers in Bethesda, Clarksburg, Germantown, Rockville, Silver Spring, and Wheaton, so it would make sense to have a **county-wide** curfew.

▶ How will it work?

Police would confront teens called to their attention due to suspected suspicious, menacing, potentially violent, or violent behavior. The police would not be involved in routinely rounding up minors for the sake of enforcing the curfew law, but the curfew would instead be a tool when encountering suspicious or dangerous behavior either on patrol or when dispatched to a complaint from a citizen. Those individuals would be asked to give their age and purpose for being in a public place or establishment.

If they are 17 or younger and their purpose for being out does not fall within the exemptions, the minor would be advised of the curfew law and directed to return home. If the minor leaves, no further action would be taken. If the minor refuses to leave, the minor would be issued a civil citation. If the minor still refuses to leave, he could be "failing to obey the lawful order of a law enforcement officer to prevent a disturbance of the public peace" and could be taken into custody.

The now "juvenile defendant" would be transported to a Police District station and processed for that misdemeanor charge. The defendant's parents and/or guardian would be notified to come and take custody of the minor. If the appropriate adult responds, the juvenile is released to that person pending any follow-up action by the Department of Juvenile Services (DJS). If the parent/ guardian or their designee refuses or is unable to respond to take custody, the DJS is contacted by the arresting officer. The DJS has its own protocols that determine if the juvenile will be placed in a facility pending action the following day. Youth who are repeat offenders and who appear to lack adult supervision and support may be brought to the attention of Montgomery County's Department of Health and Human Services so that some follow up or assessment may be completed and the needs of the youth may be addressed.

▶ What are the penalties?

A curfew violation would be a civil violation punishable by a fine of $100 for the first offense and $150 for a second offense according to amendments the County Executive is proposing to the original bill. As amended, minors would not be ordered to perform up to 25 hours of community service. If arrest authority is needed a juvenile offender could be charged with "failure to obey an order made by a police officer to prevent a disturbance of the public peace."

The penalty for the criminal offense of "failure to obey" is up to 60 days in jail and/or up to a $500 fine.

A parent of a minor commits an offense if he or she knowingly permits, or allows, a minor to remain in any public place during curfew hours. Parents would also be liable for a fine of $100 for the first offense and $150 for a second offense. Parents of a minor cited under the law would not be required to attend parenting classes.

An owner or operator of an establishment commits an offense if he or she knowingly allows a minor to remain on the premises of the establishment within curfew hours.

Any owner or operator of an establishment not exempted under the curfew - after being given a warning - is subject to a fine of $100 for the first offense and $150 for a second offense.

▶ When is a juvenile exempt from the curfew?

1. When accompanied by a parent or guardian.
2. When accompanied by another adult authorized by the parent or guardian to accompany the juvenile for a designated purpose and period of time.
3. When on an errand at the direction of the parent or guardian without any detour or stop until 12:30 a.m.
4. When in a motor vehicle, train, or bus in interstate travel through the County or starting or ending in the County.
5. When going to, engaged in or returning home from employment without any detour or stop.
6. Responding to an emergency.
7. When on the property where the minor lives.
8. On the sidewalk next to the minor's residence or the next-door neighbor's residence if the neighbor does not complain to police about the minor's presence.
9. When attending, or returning from an official school, religious, or other type of recreational activity sponsored by the County, a civic organization, or another similar entity that takes responsibility for the minor at the event.
10. When exercising First Amendment rights protected by the U.S. Constitution, including free exercise of religion, freedom of speech, and the right of assembly.

▶ What additional exemptions are being considered?

The County Executive has proposed an additional exemption when a minor is attending and/or returning from a movie, concert, play, or sporting event.

▶ How can you ensure that a curfew will not cause police to engage in racial and age profiling?

Police would be asked to respond to groups of young people and particular situations that appear threatening or where trouble has erupted. The response would be based on activity, not race. Officers would not be stopping someone solely based on their race or potential juvenile status. There would need to be probable cause to believe that trouble would occur. Montgomery County Police have consistantly been vigilant about not engaging in profiling. There is no reason to believe that a new law would cause that to change. Prevention of any type of profiling is based on hiring the right caliber of officers, giving officers appropriate and continuing training, and having consequences in place for failure to perform to defined standards.

▶ Curfews fail to address the causes of juvenile delinquency. Why doesn't the County put more efforts into prevention programs which would target the offenders, not the law-abiding teens?

The County has invested and does invest in prevention and suppression programs. The County has spent over $8 million in prevention-based programming over the past four years as part of the County Executive's "Positive Youth Development" initiative which includes out-of-school -time programs across the County. Programs are offered throughout the year at both the middle school and high school levels with the goal of providing youth with safe, supervised and constructive activities that prevent negative behavior. The Police, Health & Human Services and Recreation Departments join together with other agencies in efforts to educate about, intervene to prevent, and suppress gang activity in the County.

The youth curfew would complement these and other efforts by government and community and non-profit groups and organizations. The problem of youth violence and victimization needs immediate attention by police who are in need of another means to control unruly groups of minors. The curfew in not meant to take the place of other types of assistance to at-risk teens and their parents.

▶ Why don't you take the money you would spend on administering a curfew and spend it on youth programs to help prevent violence?"

The cost to administer a curfew would be low and offset by the prevention of situations that would tax Police resources even more. The County is already investing in a broad range of positive youth programs.

▶ The crime statistics posted on the police website show that crime is down in the county and that there is a decrease in "youth offenses." Why a curfew when youth crime is down?

Total crime has been on a downward trend in the County for the past four years. That's good news. However, the "juvenile offenses" category of statistics under the Uniform Crime Reporting standards refers only to "runaways, "out of control youth", and "runaways-other jurisdictions" which are exclusive to juveniles. It is not a measure of such crimes as robberies, assaults, sexual offenses, etc. that may be committed by either juveniles or adults.

Still, existing County data shows that the total number of youth arrests increased from 1,548 in 2006 to 2,626 in 2010. Juvenile arrests as a percentage of all arrests increased from 12 percent in 2006 to 21 percent in 2010.

The curfew proposal did not come after a study of statistics that showed a dramatic increase in crimes committed by juveniles. Rather, it came as a proactive measure to address an emerging potentially dangerous situation and to better protect young people from being victims of crime or being involved in criminal activity.

▶ Why not limit curfews to, say, the Central Business Districts in the County?

That would simply cause the problem to shift across the street, just outside the business districts or to other parts of the County. Not all juvenile-related crimes and juvenile victimization occur in Central Business Districts.

▶ Do curfews really cut down on youth crime?

If you do some research you'll find that there are valid studies that say they don't and others that say they do. However, one of the benefits of a curfew is that it can act as a deterrent to crime; and that aspect of a curfew — what **doesn't** happen — can't be statistically measured.

We do know for certain that serious traffic crashes involving our youngest drivers have dropped significantly since Maryland tightened teen driving laws. According to preliminary state data released in June of this year, teen fatalities dropped 25 percent from 48 deaths in 2009 to 36 in 2010. Teen injuries fell by 17 percent, from 5,479 in 2009 to 4,543 in 2010. Teen drivers can't obtain a license without restrictions, including driving between midnight and 5:00 a.m., until they are 18 years old. The curfew would apply the same types of restrictions to teens who are on foot or who use mass transit.

▶ If you are basing the need for a curfew on actual crimes being committed by young people during the overnight hours, why am I not seeing that reflected in the crimes listed in the Recent Crime Summaries that are posted on the police website on each District's webpage?

The Recent Crime summaries are not a listing of every crime reported in the county. The summaries provide a sampling of trends of crimes reported to police. There is no suspect description for the majority of the crimes listed, so the age of a suspect is not known at that phase of reporting Because of that, reviewing what is printed in the crime summaries would not be a means of determining how many crimes are committed by juveniles and/or how many crimes are committed during proposed curfew hours. Those crime listings do not include calls for service that come through the police computer-aided dispatch system. Some of those calls for service do not require that a report be written but still mandate a police response. An example might be a fight in progress or a disorderly conduct incident.

▶ What data do you have on juvenile crime and victimization occurring in the County?

A recent analysis of reported crime regarding juveniles revealed:

- The percentage of juvenile arrests (out of total arrests) increased from 12% in 2006 to 21% in 2010.
- For each year from 2008 through 2010, juvenile victims accounted for approximately 4% of all victims reporting incidents in the county.
- The percentage of robberies occurring between 11:00 p.m. and 5:00 a.m. with any juvenile arrest has increased steadily since 2008. However, the percentage of robberies in that same time period with any juvenile victim has decreased.
- The percentage of assaults occurring between the above hours with any juvenile arrest has increased steadily since 2008, and the percentage of assaults occurring between those hours with a juvenile victim has increased.
- The percentage of weapon offenses occurring between the above hours with any juvenile arrest has increased since 2008.

▶ Don't you think the curfew will cause a loss of revenue to local businesses?

No. Business owners know that groups of rowdy and intimating teens keep their adult customers (who typically spend more) away. Many adults have expressed fear in the presence of groups of young people who speak loudly and act in a threatening manner. Businesses in Prince George's County and in the District of Columbia have been supportive of the youth curfews there, according to the police chiefs in those jurisdictions. Some Montgomery County Chambers of Commerce have already provided their supportive feedback for the curfew.

▶ What about other municipalities like Gaithersburg, Rockville, and Takoma Park — are they going along with the curfew proposal?"

Some municipalities adopt legislation enacted by the County. The governing body of each municipality will likely examine the final proposal and after discussion with their jurisdiction's police department make the determination if they will accept the curfew legislation. Any jurisdiction that does not accept a curfew law may open itself up to becoming a haven for those juveniles who are seeking a gathering place to cause trouble.

From young people affected by the curfew:

▶ "The curfew doesn't seem fair, why penalize the majority of good teens because of the actions of a few?"

We know that the vast majority of our teens are responsible members of our community. That's why with a list of exemptions to the curfew and the manner in which it will be enforced, the curfew is designed to have a minimum impact on our young people who aren't causing any trouble. The curfew's purpose is to protect you and adults from becoming victims of crime, as well as to provide a tool for police to prevent crimes committed by minors who are posing a threat to public safety.

As Police Chief Tom Manger said in his testimony before the County Council: "As a parent and a Police Chief, I do not want to limit the legitimate opportunities for entertainment and interaction for our young people. Nor do I want to stand idly by and not have at our disposal a tool which can help us manage situations before they turn ugly."

▶ "Will teens be able to work past the curfew hours?"

Yes. If you have a job that requires you to work past curfew hours you are exempt from the curfew law. However, when your work shift ends, you would be expected to return directly home without making any other stops along the way.

▶ "Will kids still be able to go to late-night movies?"

Yes, if the movie begins before the curfew hour. It does not have to end before curfew. The current proposal was never meant to be the final product. It was presented to get the process started. Input from members of the County Council and the community, especially our young adult community members, is welcomed as a final drafting of the law is in process.

The County Executive has proposed an amendment to the bill that would exempt minors attending and/or returning from movies, concerts, plays, and sporting events.

▶ "Will kids be able to stop by an open establishment on their way to a Metro or bus stop after curfew hours?"

The goal is compliance with the curfew so try to get what needs to be done prior to the curfew hours. If there is a very particular reason that causes you to need to make a stop on the way home, chances are that will not arouse concern. If you are stopped and asked your age and purpose of being out past curfew, you just need to comply with an officer's or business owner's direction that you are in violation of the curfew and continue home.

▶ "Why does the curfew law apply to youth under age 18?"

One of the goals of the curfew is to provide police with an additional tool to prevent criminal activity committed by juveniles. A juvenile does not legally become an adult until age 18. That's why there are restrictions on the sale of alcohol and the purchase of tobacco products to underage individuals. So it makes sense for the curfew to cover those 17 and under. Once you are 18, adult laws apply to the offender.

▶ "Why can't the County police use the existing laws such as loitering, disorderly conduct, and trespassing, instead of creating a new curfew law?"

Loitering laws are now strictly drawn to comply with recent court decisions. Loitering is now defined only as blocking an entrance or exit to a place or area. Disorderly conduct must be observed by the reponding officer. Trespassing laws are not applicable to public spaces unless that space is explicitly posted as closed between certain hours (such as County parks). The youth curfew is designed to apply to situations where none of these laws are options.

▶ "Don't you think a curfew will foster distrust of police and government by youth?"

No. Young people are providing their input to the proposal; they will have a voice in the final product. Once everyone understands that the curfew is important to improve everyone's safety, and that its enforcement will have little impact on minors who aren't breaking the law, there should be greater acceptance.

▶ "According to the Youth Rights Association, statistical studies don't show a correlation between curfew enforcement and decreased juvenile crime. So why have a curfew if it isn't going to be effective?"

The curfew wasn't proposed based on statistics, it was based on what police are seeing as an emerging concern. We could sit back and wait until the situation gets worse, but the County Executive didn't want to hold back if there was something that could be more quickly done that could make everyone safer.

There are a variety of studies on the subject and studies can be found to both support and that disprove the effectiveness of curfews.

According to a survey by the United States Conference of Mayors, more than 500 U.S. jurisdictions have youth curfews, including 84 percent of cities with populations over 180,000.

A survey by the group of 347 cities with populations over 30,000 found the following:

- 90 percent of jurisdictions with curfews said that enforcing a curfew was a good use of Police time.
- 93 percent said a nighttime curfew was a useful tool for police officers.
- 88 percent said curfews helped make their streets safer for residents.
- 83 percent said curfews helped to curb gang violence.

While comparisons and cause-and-effect can be difficult, San Antonio saw victimization of youth drop 53 percent after enactment of a curfew. The rate in Dallas fell 17 percent. In San Diego, violent crime by juveniles dropped by 20 percent and violent crimes against juveniles fell by 40 percent.

In our region, two of the largest urban areas, the District of Columbia and Prince George's County have curfew laws. So does Baltimore. Virginia state law allows local jurisdictions the authority to establish curfews for minors between the hours of 10:00 p.m. and 6:00 a.m.

The District of Columbia experienced a 50 percent reduction in juvenile victims of violent crime and a 43 percent reduction in juveniles arrested during curfew hours when a 10:00 p.m. curfew was in effect during a 2006 crime emergency.

In 2010, the District of Columbia police had 4,326 cases of curfew violations; Prince George's County had 78 cases. In both jurisdictions this represents only those underage who have refused to go home. Obviously, hundreds and thousands have been told to go home and complied – and/or complied in the first place by not being out after curfew. Those much larger numbers are not reflected in the statistics.

The County Executive and Police Chief Tom Manger spoke directly to Washington D.C.'s Metropolitan Police Chief Cathy Lanier and Prince George's Police Chief Mark Magaw who believe that the youth curfew has been an effective tool in their jurisdictions for protecting young people. Though, as in Montgomery, there were questions raised at the beginning of the process, the youth curfew now enjoys broad support and, according to the chiefs, any public comment now tends toward supporting broader use of the youth curfew.

Police have confirmed that minors in neighboring jurisdictions with curfews are entering Montgomery County and getting into trouble here because there isn't currently a curfew in our county and that issue needs to be addressed

From concerned parents:

▶ "Will parents be able to pick up their children at establishments such as fast food restaurants after curfew hours?"

Yes, in a situation where you are unavoidably delayed. It is expected that parents will support the curfew hours and make arrangements to pick up their children to avoid them being out after those hours. The curfew targets groups of teens in public places who are engaging in menacing or violent actions. A small group of teens eating quietly at a restaurant or waiting to be picked up by a parent, is not likely to cause anyone to call police.

▶ "Why should the government set a curfew, isn't that the right and responsibility of parents?"

Many parents do set and are able to enforce curfews for their children. However, the at-risk teens that this curfew is designed to prevent getting into trouble frequently resist parental control or belong to challenged families where the parents need additional support to manage the actions of their children. The curfew can aid parents in carrying out their responsibilities to reasonably supervise children entrusted to their care. It is important to note again that there has been a de facto motor vehicle operator curfew in effect for many years now – the curfew simply applies that same concept to pedestrians and people traveling by mass transit.

From business owners:

▶ "Can my businesses provide goods and services to teens past the curfew — i.e. sell movie tickets past the curfew; serve them dinner, etc?"

Businesses are expected to support the curfew by not allowing their property to become a gathering place for groups of teens who could potentially cause trouble. There will be exemptions to the curfew and owners of entertainment and sports-related businesses should know those exemptions. A quiet gathering of young people should not pose a problem, but if a group gets rowdy business owners can use the curfew in the same way police officers would, as a means to move the troublemakers out of their establishment. Business managers should not put themselves in harm's way and can also call for police to disperse a group becoming out of control.

▶ "Can my business get into trouble for providing goods and services to teens after the curfew?"

Owners of businesses not exempt from the curfew are obligated to reasonably uphold the curfew. A business owner could be held legally accountable for knowingly providing a location for an unruly group of juveniles to gather during curfew hours.

▶ "Can my business hire a teen when I know that their shift will go beyond the curfew?"

Yes. Teens with jobs are exempt from the curfew.

▶ "Should I notify the police if teens are coming into my establishment after the curfew without an adult, or notify the police if teens are gathering outside of my business after the curfew?"

Business owners should notify police if a group of underage teens is causing trouble inside their establishment or on their property, just as they would be expected to do outside of curfew hours.

For more information go to: http://www.montgomerycountymd.gov/curfew

AGENDA ITEM #4
July 11, 2006

Action

MEMORANDUM

July 7, 2006

TO: County Council

FROM: Sonya E. Healy, Legislative Analyst

SUBJECT: **Action:** Bill 15-06, Offenses - Loitering

On April 18, 2006, the Council President, at the request of the County Executive, introduced Bill 15-06, Offenses - Loitering. The Council held a public hearing on Bill 15-06 on June 13, 2006 and testimony was provided by the ACLU (© 9-11). At the public hearing, Councilmember Subin expressed concern about treating loitering as a criminal offense. **The Public Safety Committee reviewed Bill 15-06 on June 19, 2006, and (2-0) recommended approval with amendments.**

Public Safety Committee Recommendation

As introduced, Bill 15-06 does not regulate all loitering, it only regulates loitering that interferes, impedes, or hinders the free passage of pedestrian or vehicle traffic or that incites by words or other conduct imminent unlawful conduct. **In response to issues raised by the ACLU, the Committee recommended removing all references to the term "loitering" and instead recommended using "disturbing the public peace or disorderly conduct" to describe prohibited activities.** The Committee stated that since loitering, in and of itself, is not a criminal offense, this reference should be eliminated to remove potential confusion for the public.

At the request of the County Attorney's Office, the Committee also added "violating a condition of parole or probation" as a reason for temporary detention (line 70 © 4). This change is consistent with the Nevada "stop and identify" statute, which was upheld by the Supreme Court in *Hiibel v. Sixth Judicial District Court of Nevada,* 542 U.S. 177 (2004).

In addition, the Committee recommended replacing "orderly" with "lawful" to describe picketing (line 86, © 5). If the behavior associated with picketing is unlawful it can be stopped and prosecuted. The Committee also made technical amendments to Bill 15-06 (© 1-5).

Background

Bill 15-06, drafted by the County Attorney's Office, amends the County's existing loitering law to more narrowly define the circumstances under which (1) a police officer may require an individual to produce identification and (2) an individual can be charged with disturbing the public peace. Both changes are needed to assure compliance with constitutional requirements.

Loitering, vagrancy, and disorderly conduct statutes have been challenged in numerous jurisdictions and many have been found to be overbroad or unconstitutionally vague. Statues may be invalidated if they implicate First Amendment rights of freedom of speech or assembly; however, this does not mean that counties may never enact legislation that may impinge to some extent on the exercise of First Amendment rights. For example, counties are "free to prevent people from blocking sidewalks, obstructing traffic, littering streets, committing assaults, or engaging in countless other forms of antisocial conduct." *Coates v. City of Cincinnati*, 402 U.S. 611 (1971).

Loitering as a Criminal Violation

Loitering has long been recognized as a criminal violation. Many statutes are based on the text proposed in the Model Penal Code. According to the Supreme Court in *Hiibel v. Sixth Judicial District Court of Nevada*, "statutes are based on the text proposed by the American Law Institute as part of the Institute's Model Penal Code. *See ALI, Model Penal Code, § 250.6, Comment 4, pp. 392—393 (1980).* The provision, originally designated in § 250.12, provides that a person who is loitering 'under circumstances which justify suspicion that he may be engaged or about to engage in crime commits a violation if he refuses the request of a peace officer that he identify himself and give a reasonably credible account of the lawfulness of his conduct and purposes.'" *Id.* § 250.12 (1961). In some states, a suspect's refusal to identify himself is a misdemeanor offense or civil violation; in others, it is a factor to be considered in whether the suspect has violated loitering laws. In other states, a suspect may decline to identify himself without penalty." *Hiibel v. Sixth Judicial District Court of Nevada*, 542 U.S. 177 (2004).

Some jurisdictions, including Maryland, do not have loitering statutes. Maryland has criminal sanctions for disturbing the peace and disorderly conduct (Maryland Code, Criminal Law § 10-201, © 12-13); trespass (*Id.* § 6-402 & 6-403, © 14-15); and refusal or failure to leave a public building or grounds (*Id.* § 6-409, © 16).

Under County law the difference between criminal and civil sanctions for a Class B violation is as follows: a $200 fine and up to 30 days in jail for a criminal violation, and $100 for a first offense and $150 for a subsequent offense for a civil violation. Chief King from the Police Department told the Committee that it is important for the statute to remain a criminal violation because there are instances where individuals clearly provide police officers with incorrect names (i.e. Santa Clause), and the threat of criminal sanctions can often persuade an individual to provide accurate information. In addition, the State's Attorney can choose to

prosecute a violation as either a criminal or civil offense depending on the facts of a particular case. **In light of the other Committee recommendations, the Committee recommended maintaining the statute as a criminal violation.**

This packet contains:

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Bill No. 15-06
Concerning: Offenses – [[Loitering]] Disturbing the public peace or disorderly conduct
Revised: 6-19-06 Draft No. 4
Introduced: April 18, 2006
Expires: October 18, 2007
Enacted: _____
Executive: _____
Effective: _____
Sunset Date: None
Ch. _____, Laws of Mont. Co. _____

COUNTY COUNCIL
FOR MONTGOMERY COUNTY, MARYLAND

By: Council President at the Request of the County Executive

AN ACT to:

(1) prohibit [[certain types of loitering]] disturbing the peace or disorderly conduct;
(2) require certain persons to provide a law enforcement officer with the person's name;
(3) prohibit certain activity at certain public places;
(4) impose certain penalties; and
(5) generally amend the County loitering law.

By amending
Montgomery County Code
Chapter 32, Offenses – Victim Advocate
Sections 32-13 through 32-17

Boldface	*Heading or defined term.*
Underlining	*Added to existing law by original bill.*
[Single boldface brackets]	*Deleted from existing law by original bill.*
Double underlining	*Added by amendment.*
[[Double boldface brackets]]	*Deleted from existing law or the bill by amendment.*
* * *	*Existing law unaffected by bill.*

The County Council for Montgomery County, Maryland approves the following Act:

Sec. 1. Sections 32-13 through 32-17 are amended as follows:

32-13. [[Loitering]] Disturbing the public peace or disorderly conduct - Definitions.

[For the purposes of sections] As used in Sections 32-14 [[to]] through 32-17, the following terms [shall] have the following meanings [respectively ascribed to them in this section]:

[[***Loiter:*** To circulate, stand around or remain or to park, or remain parked in a motor vehicle, either as an individual or as a member of a group, at a public place or place open to the public and to engage in any conduct prohibited under this law. Loiter also means to collect, gather, congregate or to be a member of a group or a crowd of people who are gathered together in any public place or place open to the public and to engage in any conduct prohibited under this law.]]

Place open to the public: Any place [open to the public or any place to] [[in which]] where the public is invited or permitted [and in, on or around any privately owned place of business, private parking lot or private institution, including places of worship, cemetery or any place of amusement and entertainment whether or not a charge of admission or entry thereto is made. It includes the elevator, lobby, halls, corridors and areas open to the public of any store, office or apartment building.], including:

(a) a place of business;

(b) a parking lot;

(c) a place of worship;

(d) a cemetery;

(e) a place of amusement [[, whether or not admission is charged; and]]; or

(f) an elevator, lobby, or hallway [[in a building where the public is permitted]].

Public place: [Any public street, road, or highway, alley, lane, sidewalk,

crosswalk or other public way, or any public resort, place of amusement, park, playground, public building or grounds appurtenant thereto, school building or school grounds, public parking lot or any vacant lot.]

(a) Any public way, including

(1) a street, road, or highway;

(2) a sidewalk;

(3) an alley or lane; [[and]]or

(4) a crosswalk.

(b) Any public facility, including

(1) a park;

(2) a playground;

(3) a school; [[and]] or

(4) a government building.

(c) Any vacant lot or parcel of land.

32-14. [Same] [[Loitering]] Disturbing the public peace or disorderly conduct- Prohibited conduct.

[(a) It shall be unlawful for any person to] An individual must not **[[loiter]]** at, on, or in a **public place** or **place open to the public** [[in such manner a way that]]:

[(1)] (a) [To interfere, impede or hinder] interfere[[s]] with or hinder[[s]] the free passage of pedestrian or vehicular traffic[.]; or

[(2) To interfere with, obstruct, harass, curse or threaten or to do physical harm to another member or members of the public.

(3) That] (b) incite[[s]] unlawful conduct, by words or intentional conduct, [it is clear that there is a reasonable likelihood a breach of the peace or disorderly conduct shall result] which is likely to produce [[any]] imminent unlawful conduct.

[(b) It shall be unlawful for any person to loiter at a public place or place open to the public and to fail to obey the direction of a uniformed police officer or the direction of a properly identified police officer not in uniform to move on, when not to obey such direction shall endanger public peace.]

32-15. [Same-Identification.] Temporary detention by police officer of an [[person]] individual suspected of criminal behavior.

[It shall be unlawful for any person at a public place or place open to the public to refuse to identify himself by name and address at the request of a uniformed police officer or of a properly identified police officer not in uniform, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety requires such identification].

(a) A police officer may temporarily detain any individual under circumstances that reasonably indicate that the individual [[either]]:

(1) has engaged in conduct prohibited under Section 32-14[[, or]];

(2) has violated or is violating a condition of parole or probation[[,]]; or

(3) has committed, is committing, or is about to commit a crime.

(b) A police officer may detain an individual under this Section only to determine the individual's identity and the circumstances surrounding [[the]] suspected criminal behavior. Any [[person so]] detained individual must truthfully identify himself, but must not be compelled to produce identification or answer any other question from any police officer.

(c) An individual must not be detained under this Section longer than is reasonably necessary to achieve the purposes of this Section[[, and in no case longer than 60 minutes]]. Unless the individual is arrested,

the detention must not last longer than 60 minutes or extend beyond the place, or the immediate vicinity of the place, where the individual was first detained.

32-16. [Same-] Lawful assembly exempted.

Nothing in this Article, except Section 32-23, prohibits [[orderly]] lawful picketing or other lawful assembly.

32-17. [Same] [[Loitering]] Disturbing the public peace or disorderly conduct– Penalties; Warning.

(a) [Any person violating any of the provisions herein shall be subject to punishment for a class B violation as set forth in section 1-19 of chapter 1 of the County Code.] An individual who violates Section 32-14 or Section 32-15 has committed a Class B violation.

(b) [No person shall] An individual must not be charged with a violation of [sections 32-13 to 32-16] Section 32-14 or Section 32-15 unless [and until] the arresting officer has first warned the individual of the violation and [such person] the individual has failed or refused to stop [such] the violation.

Approved:

George L. Leventhal, President, County Council Date

Approved:

Douglas M. Duncan, County Executive Date

LEGISLATIVE REQUEST REPORT

Bill 15-06
Offenses - Disturbing the public peace or disorderly conduct

DESCRIPTION: This bill amends the County's loitering law to more narrowly define the circumstances under which an individual may be required to produce identification and be cited for or charged with disturbing the public peace or disorderly conduct to ensure compliance with constitutional requirements.

PROBLEM: For many years, Section 32-15, which makes it unlawful to fail or refuse to identify oneself when requested by a police officer, has been viewed by judges of the County's circuit and district courts as unconstitutionally vague. There is also a concern that the loitering prohibition does not provide a person of ordinary intelligence adequate notice of what conduct is forbidden by the statute.

GOALS AND OBJECTIVES: To more narrowly define the circumstances under which an individual may be cited for or charged with disturbing the public peace or disorderly conduct. This in turn will adequately advise individuals and police officers alike of the circumstances under which an individual may be required to truthfully provide his or her name to a police officer.

COORDINATION: Department of Police

FISCAL IMPACT: None

ECONOMIC IMPACT: No fiscal impact.

SOURCE OF INFORMATION: Marc Hansen, Chief, Division of General Counsel, (240) 777-6740.
William A. Snoddy, Associate County Attorney, (240) 773-5004.

APPLICATION WITHIN MUNICIPALITIES: Barnesville, Brookville, Chevy Chase Village, Chevy Chase View, Chevy Chase Section 3, Chevy Chase Section 5, Glen Echo, Martin's Additions, North Chevy Chase, Takoma Park

PENALTIES: Subject to Class "B" violation.

OFFICE OF THE COUNTY EXECUTIVE
ROCKVILLE, MARYLAND 20850

Douglas M. Duncan
County Executive

MEMORANDUM

March 21, 2006

TO: George L. Leventhal, President
Montgomery County Council

FROM: Douglas M. Duncan, County Executive

SUBJECT: County Loitering Law - Amendment

Following the Supreme Court's decision in *Hiibel v. Sixth Judicial District*, which upheld a Nevada "stop and identify" statute, an examination of the County's loitering law indicates that it may not pass constitutional muster. More specifically, Section 32-15, which makes it unlawful to fail or refuse to identify oneself when requested by a police officer, has been viewed by judges of the County's circuit and district courts as unconstitutionally vague. The Office of the State's Attorney takes the same position. There is also a concern that the loitering prohibition does not provide a person of ordinary intelligence adequate notice of what conduct is forbidden by the statute.

I am now forwarding for Council action expedited legislation to amend Sections 32-13, 32-14, 32-15 and 32-17. The proposed amendments will modify the definitions of the terms "loitering", "public place" and "place open to the public." This legislation will also more narrowly define the circumstances under which an individual may be cited for or charged with loitering. This, in turn, will adequately advise individuals and police officers alike of the circumstances under which an individual may be required to truthfully provide his or her name to a police officer.

I look forward to working with the Council on this important matter.

DMD:tjs

Enclosure

cc: Bruce Romer, Chief Administrative Officer
J. Thomas Manger, Chief, Department of Police
Charles W. Thompson, Jr., County Attorney

LL 15-06

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OFFICE OF MANAGEMENT AND BUDGET

Douglas M. Duncan
County Executive

Beverley K. Swaim-Staley
Director

MEMORANDUM

May 9, 2006

022588

TO: George L. Leventhal, President
Montgomery County Council

VIA: Bruce Romer
Chief Administrative Officer

FROM: Beverley K. Swaim-Staley, Director
Office of Management and Budget

SUBJECT: Bill 15-06, Offenses - Loitering

The purpose of this memorandum is to transmit a fiscal impact statement to the Council on the subject legislation.

LEGISLATION SUMMARY

The bill amends the County's loitering law to more narrowly define the circumstances under which an individual may be required to produce identification and be cited for or charged with loitering to ensure compliance with constitutional requirements.

FISCAL SUMMARY

The legislation is not expected to have an additional fiscal impact on the County.

The following contributed to and concurred with this analysis: Nicholas Tucci, Department of Police, and Dana Brassell, MNCPPC.

BSS:brg

cc: Nicholas Tucci, Police
Dana Brassell, MNCPPC
Belinda Bunggay, OMB
Jennifer Bryant, OMB

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AN ALL-AMERICA COMMUNITY

Item 16

Testimony

Of

Robert Coe, Board Member
ACLU Chapter of Montgomery County

Before the Montgomery County Council

On

Bill 15-06, Loitering

June 13, 2006

On behalf of the ACLU Chapter of Montgomery County, I would like to share our reservations about Bill 15-06.

Personal autonomy, what Justice Brandeis famously called "the right to be let alone,"[1] is the foundation of our system of limited government. For our purposes today, that means that the individual has a constitutional right to "loiter," as defined by Bill 15-06, provided that he is not violating some other law. In lay terms, "just hanging out" is constitutionally protected activity. For this reason, proposals to criminalize loitering must be viewed with a certain skepticism and carefully scrutinized.

Loitering can appropriately be made the premise for a crime only when it interferes with the rights of others. Bill 15-06 is on solid ground in section 32-14(a) when loitering is coupled with "interfer[ing] with or hinder[ing] the free passage of pedestrian or vehicular traffic." That makes sense because *as a*

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[1] *Olmstead v. United States*, 277 U.S. 438, 478 (1928).

matter of fact loitering can interfere with the ability of others to pass on sidewalks or streets. But it can only be made a crime when it actually does interfere or hinder – the real crime is the interference or hindrance, not the loitering by itself. Indeed, it would be far better if the reference to loitering were removed from the bill. The offense should be interfering with or hindering the free passage of pedestrian or vehicular traffic – an offense that can be committed by someone who is loitering, or by someone who has never loitered.

On the other hand, there is no connection at all between loitering and incitement to unlawful conduct, criminalized in section 32-14(b). Indeed, the active nature of incitement seems quite contradictory to the passive nature of loitering.

There is a large body of law as to when incitement to unlawful conduct may be criminalized based on the Supreme Court's 1969 decision in *Brandenburg v. Ohio*.[2] The Court held that the state may not "forbid or proscribe advocacy of the use of force or law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[3] Section 32-14(b) requires only that the unlawful conduct "incites by word or conduct any imminent unlawful conduct," and omits two elements required by *Brandenburg*: that the conduct be intentional and that it is likely to produce the intended unlawful conduct.

While Section 32-14(b) could perhaps be repaired by adding these missing elements, there is no reason to do so. *As a matter of fact*, there is no

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[2] *Brandenburg v. Ohio*, 395 U.S. 444 (1969).
[3] *Brandenburg*, 395 U.S. at 447.

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connection between loitering and incitement to unlawful conduct. Loitering adds nothing to an unlawful incitement. An incitement is lawful or not without reference to whether the accused was loitering.

We urge the Council to delete section 32-14(b), since there is no reason for it.

As for the offense of disorderly conduct or breach of the peace in the current version of section 32-14, that offense is already more than adequately covered by the Maryland Criminal Code section 10-201(c). Once again, it is irrelevant whether a person was or was not loitering before he engaged in the conduct that constitutes disorderly conduct or breach of the peace

And finally, we have a comment concerning section 32-16: "Nothing in this Article, except Section 32-23, prohibits orderly picketing or other lawful assembly." We suggest the deletion of the word "orderly." If picketing is otherwise unlawful, e.g., it prevents the passage of others on a sidewalk, it can be enjoined or prosecuted. The statute should not suggest to a judge that she may apply her own notions of "orderliness" to determine if picketing is lawful.

Thank you for your consideration of our views. I would be pleased to answer your questions.

(b) *Suspension of fine.* — If a defendant is found guilty of a violation under this part and a fine is imposed, a court may direct that the payment of the fine be suspended or deferred under conditions determined by the court.

(c) *Failure to pay.* — A defendant's willful failure to pay a fine imposed under this part may be treated as a criminal contempt punishable as provided by law.

(d) *Appeal.* — A defendant who is found guilty of a violation under this part, as provided by law for a criminal case, may file:

(1) an appeal;

(2) a motion for a new trial; or

(3) a motion for a revision of a judgment.

(e) *Authority of State's Attorney.* — The State's Attorney for each county may:

(1) prosecute a violation under this part in the same manner as a prosecution of a criminal case, including entering a nolle prosequi or placing the case on violation on a stet docket; and

(2) exercise authority in the same manner prescribed by law for a violation of the criminal laws of the State. (2002, chs. 108, 109.)

SPECIAL REVISOR'S NOTE

Chapters 108 and 109 each added this section as § 10-117 under a new part "Part II. Alcoholic Beverage Consumption or Possession of Open Container in Passenger Area of Motor Vehicle". However, Ch. 213, § 1, Acts of 2002, transferred Article 2B, §§ 22-101 through 22-108, as enacted by Ch. 26, § 4, Acts of 2002, to be §§ 10-113 through 10-120, under the new part "Part II. Alcoholic Beverages Violations". Precedence in numbering has been given to Ch. 213 as the later enactment. *See* Art. 1, § 17. Accordingly, this section appears as § 10-127.

Editor's note. — See Editor's note under § 10-123 of this article.

Subtitle 2. Disturbing the Peace, Disorderly Conduct, and Related Crimes.

§ 10-201. Disturbing the public peace and disorderly conduct.

(a) *Definitions.* — (1) In this section the following words have the meanings indicated.

(2) (i) "Public conveyance" means a conveyance to which the public or a portion of the public has access to and a right to use for transportation.

(ii) "Public conveyance" includes an airplane, vessel, bus, railway car, school vehicle, and subway car.

(3) (i) "Public place" means a place to which the public or a portion of the public has access and a right to resort for business, dwelling, entertainment, or other lawful purpose.

(ii) "Public place" includes:

1. a restaurant, shop, shopping center, store, tavern, or other place of business;

2. a public building;

3. a public parking lot;

4. a public street, sidewalk, or right-of-way;

5. a public park or other public grounds;

6. the common areas of a building containing four or more separate dwelling units, including a corridor, elevator, lobby, and stairwell;

7. a hotel or motel;

8. a place used for public resort or amusement, including an amusement park, golf course, race track, sports arena, swimming pool, and theater;

9. an institution of elementary, secondary, or higher education;

10. a place of public worship;

11. a place or building used for entering or exiting a public conveyance, including an airport terminal, bus station, dock, railway station, subway station, and wharf; and

12. the parking areas, sidewalks, and other grounds and structures that are part of a public place.

(b) *Construction of section.* — For purposes of a prosecution under this section, a public conveyance or a public place need not be devoted solely to public use.

(c) *Prohibited.* — (1) A person may not willfully and without lawful purpose obstruct or hinder the free passage of another in a public place or on a public conveyance.

(2) A person may not willfully act in a disorderly manner that disturbs the public peace.

(3) A person may not willfully fail to obey a reasonable and lawful order that a law enforcement officer makes to prevent a disturbance to the public peace.

(4) A person who enters the land or premises of another, whether an owner or lessee, or a beach adjacent to residential riparian property, may not willfully:

(i) disturb the peace of persons on the land, premises, or beach by making an unreasonably loud noise; or

(ii) act in a disorderly manner.

(5) A person from any location may not, by making an unreasonably loud noise, willfully disturb the peace of another:

(i) on the other's land or premises;

(ii) in a public place; or

(iii) on a public conveyance.

(6) In Worcester County, a person may not build a bonfire or allow a bonfire to burn on a beach or other property between 1 a.m. and 5 a.m.

(d) *Penalty.* — A person who violates this section is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding 60 days or a fine not exceeding $500 or both. (An. Code 1957, art. 27, § 121; 2002, ch. 26, § 2.)

REVISOR'S NOTE

This section is new language derived without substantive change from former Art. 27, § 121.

Subsection (b) of this section is revised as a construction provision for clarity.

In subsection (a)(2)(i) and (3)(i) of this section, the former references to the "general" public are deleted as unnecessary.

In subsection (a)(2)(ii) of this section, the

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(c) *Vehicle.* — "Vehicle" has the meaning stated in § 11-176 of the Transportation Article.

REVISOR'S NOTE

This subsection is new language derived without substantive change from former Art. 27, § 576(c)(1)(i).

Because the term "off-road vehicle" as formerly defined applied to on-road as well as off-road vehicles, contrary to standard usage, the revision of this subtitle uses the newly defined term "vehicle" as well as the redefined term "off-road vehicle" in instances where the former defined term "off-road vehicle" was used.

(d) *Wanton.* — "Wanton" retains its judicially determined meaning.

REVISOR'S NOTE

This subsection formerly was Art. 27, § 576(d). No changes are made.

(An. Code 1957, art. 27, § 576(a), (c)(1), (d); 2002, ch. 26, § 2.)

Arrest in violation of Fourteenth Amendment. — An arrest under former section 577, article 27, by an amusement park's special policeman, acting under color of his dual authority as a deputy sheriff, is State action in enforcing segregation in violation of the Fourteenth Amendment. Griffin v. Maryland, 378 U.S. 130, 84 S. Ct. 1770, 12 L. Ed. 2d 754 (1964).

§ 6-402. Trespass on posted property.

(a) *Prohibited.* — A person may not enter or trespass on property that is posted conspicuously against trespass by:

(1) signs placed where they reasonably may be seen; or

(2) paint marks that:

(i) conform with regulations that the Department of Natural Resources adopts under § 5-209 of the Natural Resources Article; and

(ii) are made on trees or posts that are located:

1. at each road entrance to the property; and

2. adjacent to public roadways, public waterways, and other land adjoining the property.

(b) *Penalty.* — A person who violates this section is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding 90 days or a fine not exceeding $500 or both. (An. Code 1957, art. 27, § 577(a)(1), (b); 2002, ch. 26, § 2.)

REVISOR'S NOTE

This section is new language derived without substantive change from former Art. 27, § 577(a)(1) and (b).

In the introductory language of subsection (a) of this section, the reference to property being posted against "trespass" is substituted for the former reference to property being posted against "trespassers" for clarity and consistency within this subtitle.

In subsection (a)(1) of this section, the phrase "signs placed where they reasonably may be seen" is substituted for the former phrase "[s]igns where they may reasonably be seen" to clarify that the requirement that signs be posted conspicuously applies to the location as well as the content of the signs.

In subsection (a)(2)(i), the reference to regulations that the Department of Natural Re-

sources adopts "under § 5-209 of the Natural Resources Article" is added for clarity.

For the statutory requirement that the Department of Natural Resources adopt regulations that prescribe the type and color of paint to be used for posting private property under the provisions of this section, see NR § 5-209(e). As to the content of the regulations, see COMAR 08.01.05.01.

Defined term:

"Person" § 1-101

Maryland Law Review. — For note discussing whether public works projects should anchor the navigation servitude, see 41 Md. L. Rev. 156 (1981).

University of Baltimore Law Review. — For note, "The 1977 Maryland Wiretapping and Electronic Surveillance Act," see 7 U. Balt. L. Rev. 374 (1978).

§ 6-403. Wanton trespass on private property.

(a) *Prohibited — Entering and crossing property.* — A person may not enter or cross over private property or board the boat or other marine vessel of another, after having been notified by the owner or the owner's agent not to do so, unless entering or crossing under a good faith claim of right or ownership.

(b) *Same — Remaining on property.* — A person may not remain on private property including the boat or other marine vessel of another, after having been notified by the owner or the owner's agent not to do so.

(c) *Penalty.* — A person who violates this section is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding 90 days or a fine not exceeding $500 or both.

(d) *Construction of section.* — This section prohibits only wanton entry on private property.

(e) *Applicability to housing projects.* — This section also applies to property that is used as a housing project and operated by a housing authority or State public body, as those terms are defined in Article 44A of the Code, if an authorized agent of the housing authority or State public body gives the required notice specified in subsection (a) or (b) of this section. (An. Code 1957, art. 27, § 577(a)(2), (b); 2002, ch. 26, § 2.)

REVISOR'S NOTE

This section is new language derived without substantive change from former Art. 27, § 577(a)(2) and (b).

In subsection (a) of this section, the former references to "land" and "premises" are deleted as included in the reference to "private property".

Also in subsection (a) of this section, the former reference to being "duly" notified is deleted as surplusage.

In subsection (d) of this section, the reference to entry "on private property" is added for clarity and consistency with subsection (a) of this section. Correspondingly, the reference to "private property" is substituted for the former reference to "land".

In subsection (e) of this section, the former reference to a "duly" authorized agent is deleted as implicit in the reference to an "authorized agent".

The Criminal Law Article Review Committee notes, for the consideration of the General Assembly, that subsection (d) of this section appears to prohibit only "wanton" entry onto private property, but not "wanton[ly]" remaining on private property after being notified not to do so.

Defined terms:

"Person" § 1-101
"Wanton" § 6-401

University of Baltimore Law Review. — For note, "The 1977 Maryland Wiretapping and Electronic Surveillance Act," see 7 U. Balt. L. Rev. 374 (1978).

§ 6-409. Refusal or failure to leave public building or grounds.

(a) *Prohibited — During regularly closed hours.* — A person may not refuse or fail to leave a public building or grounds, or a specific part of a public building or grounds, during the time when the public building or grounds, or specific part of the public building or grounds, is regularly closed to the public if:

(1) the surrounding circumstances would indicate to a reasonable person that the person who refuses or fails to leave has no apparent lawful business to pursue at the public building or grounds; and

(2) a regularly employed guard, watchman, or other authorized employee of the government unit that owns, operates, or maintains the public building or grounds asks the person to leave.

(b) *Same — During regular business hours.* — A person may not refuse or fail to leave a public building or grounds, or a specific part of a public building or grounds, during regular business hours if:

(1) the surrounding circumstances would indicate to a reasonable person that the person who refuses or fails to leave:

(i) has no apparent lawful business to pursue at the public building or grounds; or

(ii) is acting in a manner disruptive of and disturbing to the conduct of normal business by the government unit that owns, operates, or maintains the public building or grounds; and

(2) an authorized employee of the government unit asks the person to leave.

(c) *Penalty.* — A person who violates this section is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding 6 months or a fine not exceeding $1,000 or both. (An. Code 1957, art. 27, § 578(a), (b), (d); 2002, ch. 26, § 2.)

REVISOR'S NOTE

This section is new language derived without substantive change from former Art. 27, § 578(a), (b), and (d).

In the introductory language of subsection (a) of this section, the reference to "the time" is substituted for the former reference to "those hours of the day or night" for brevity.

In subsection (a)(1) and the introductory language of subsection (b)(1) of this section, the references to the person "who refuses or fails to leave" are added for clarity.

In subsections (a)(2) and (b)(1)(ii) and (2) of this section, the phrase "government unit" is substituted for the former phrase "public agency or institution" for consistency within this article. *See* General Revisor's Note to article.

In subsection (b)(1)(ii) of this section, the reference to "grounds" is substituted for the former reference to "property" for consistency within this section.

Defined term:

"Person" § 1-101