

MEMORANDUM OF LAW

DATE: September 17, 1999
TO: Mayor Susan Golding
FROM: City Attorney
SUBJECT: Anti-Gang Loitering Ordinance

QUESTION PRESENTED

Can the City enact a constitutionally sound “anti-gang loitering ordinance” that would allow police officers to order suspected gang members who are observed loitering together or with other persons to disperse?

SHORT ANSWER

Yes. The United States Supreme Court recently struck down an anti-gang loitering ordinance in *City of Chicago v. Morales*, No. 97-1121, 1999 WL 373152 (U.S. June 10, 1999), holding that the ordinance was unconstitutionally vague. However, the Court explained why the language of the ordinance was unconstitutional and described how an ordinance could be drafted to accomplish the same purpose in a constitutional manner.

DISCUSSION

Although the Supreme Court struck down an anti-gang loitering ordinance in *City of Chicago v. Morales*, No. 97-1121, 1999 WL 373152 (U.S. June 10, 1999), and criticized certain aspects of the Chicago ordinance, it also provided guidance to remedy the constitutional infirmities. The following are the Court’s criticisms and suggested remedies:

1. Justice Stevens, writing for the plurality, criticized the ordinance for applying to non-gang members as well as suspected gang members. Specifically, when a police officer observed a suspected gang member loitering with one or more persons, the ordinance allowed the officer to order all of the persons to disperse. *Id.* at 10. An ordinance that states that the officer may only order the suspected gang members to disperse, and not other persons, would remedy this constitutional infirmity.

2. The Court’s most serious concern with the City of Chicago ordinance was the vagueness of the definition of “loitering.” In the ordinance, the term loiter was defined as

“remaining in any one place with no apparent purpose.” *Id.* Justice Stevens criticized this language for giving exceptional discretion to the police officer to determine what an “apparent purpose” is. *Id.*

The Court suggested, in order to fall within constitutionally permissible bounds, an ordinance should include language such as: “Loiter means to remain in any one place with a harmful purpose, such as with an intent to establish control over identifiable areas, to intimidate residents or others from entering those areas, or to conceal illegal activities, or with intent to assist others in such activities.” This list of harmful purposes is taken directly from the concurring opinion of Justice O’Connor. *Id.* at 13. It avoids the unconstitutional vagueness of the Chicago ordinance by informing the citizenry of exactly what activities are prohibited.

CONCLUSION

The Supreme Court’s decision in *Morales* does not mean that an “anti-gang loitering ordinance” is unconstitutional *per se*. Indeed, the Court explained how such an ordinance could be drafted in a manner which defines the specific behavior that is prohibited, and which does not encompass the behavior of non-gang members. Therefore, it is constitutionally permissible for the City to adopt an “anti-gang loitering ordinance,” provided the guidelines set forth in *Morales* are followed.

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