



TOWN OF MILLIKEN
TOWN BOARD
AGENDA MEMORANDUM

To: Mayor Woodcock and Town Board of Trustees	Meeting Date:
From: Linda Michow, Town Attorney	Wednesday
Via: Kent Brown, Town Administrator	September 28, 2016

Agenda Item # X	Action: X	Discussion:	Information:
Agenda Title: Ordinance No. 736 Amending Section 10-6-40 of the Milliken Municipal Code Regarding Loitering			
Attachments: Ordinance No.736; and existing Section 10-6-40 with strike-throughs			

PURPOSE:

For Board consideration on the September 28, 2016 agenda is Ordinance No. 736 to amend the loitering provision of the Milliken Municipal Code to bring it into compliance with the First Amendment and other constitutional law.

BACKGROUND:

The Town is one of approximately thirty Colorado municipalities that received a letter from the American Civil Liberties Union (“ACLU”), dated August 31, 2016, in which the ACLU claims that Milliken’s Municipal Code contains an unconstitutional loitering provision. Federal case law supports the ACLU’s assertions, and the Municipal Code should be updated to avoid constitutional challenges.

Currently, Section 10-6-40 (b)(1) of the Municipal Code makes it unlawful to loiter for the purpose of begging. Under federal case law, the First Amendment prohibits content-based restrictions on protected speech. Federal courts have held that a solicitation for charitable donations on behalf of an individual (e.g. begging or panhandling) is speech protected by the First Amendment. Under the language of Milliken’s current ordinance, law enforcement would have to evaluate the content of a person’s message in order to determine whether he or she is begging. This is an unconstitutional restriction on protected speech because whether a violation of the Milliken’s ordinance has occurred depends on the content of a person’s message.

Notably, the safety and welfare of the community will be maintained, as other sections of the Municipal Code address criminal conduct sometimes associated with begging, such as assault, harassment, trespass, interfering with the use of streets or sidewalks, obstructing the highway, and damaging property. CIRSA has retained attorney Josh Marks at no charge to municipalities to communicate with ACLU on this issue. Per the police chief, the Town has no pending loitering cases or problems with this activity.

In addition, Section 10-6-40(b)(2) makes it unlawful to loiter for the purpose of unlawful gambling with cards, dice or other gambling paraphernalia. It is unconstitutional for a criminal law to be so vague that a person of ordinary intelligence would not have fair notice of what is prohibited or to lack guidelines so as to authorize or encourage discriminatory enforcement of the law. The term “gambling paraphernalia” in Section (b)(2) is vague enough that a person of ordinary intelligence may not know whether he or she is violating the ordinance and, without any guidelines, different law enforcement officers may have different interpretations of the term, which could lead to discriminatory enforcement of the ordinance. The term “unlawful gambling” is specific enough to provide notice of what conduct is prohibited, and the list that comes after it is both unnecessary and too vague.

The proposed Ordinance is attached to this memorandum, along with the current Section 10-6-40 showing the strike-through revisions.

BUDGET IMPLICATONS:

None identified.

STAFF RECOMMENDATION:

In order to achieve compliance with First Amendment protections and other constitutional law, it is recommended that Section 10-6-40 be amended as set forth in Ordinance No. 736.

SUGGESTED MOTION:

“I move to approve Ordinance No. 736 Amending Section 10-6-40 of the Milliken Municipal Code Regarding Loitering.”

ORDINANCE NO. 736

**AN ORDINANCE AMENDING SECTION 10-6-40 OF THE MILLIKEN
MUNICIPAL CODE REGARDING LOITERING**

WHEREAS, the Board of Trustees of the Town of Milliken (“Board of Trustees”) has the authority pursuant to C.R.S. § 31-15-401 and its general police powers to pass and enforce regulations which may be necessary or expedient for the promotion of the health, safety and welfare of the citizens of the Town of Milliken (“Town”); and

WHEREAS, the Board of Trustees also has the authority pursuant to C.R.S. § 31-15-401 to restrain and punish loiterers; and

WHEREAS, the Town previously adopted certain regulations concerning loitering as codified in Chapter 10-6-40 of the Milliken Municipal Code (“Municipal Code”); and

WHEREAS, the Board of Trustees wishes to amend the loitering offenses punishable under the Municipal Code to remove certain provisions that have been successfully challenged in federal and state courts on constitutional grounds; and

WHEREAS, it is in the best interest of the people of the Town to update the Municipal Code in order to comply with free speech protections afforded individuals under the First Amendment.

NOW THEREFORE, BE IT ORDAINED BY THE BOARD OF TRUSTEES OF THE TOWN OF MILLIKEN, THAT:

Section 1. Section 10-6-40 entitled Loitering, is hereby amended to read in full as follows:

Sec. 10-6-40. – Loitering.

- (a) The word *loiter* means to be dilatory, to stand idly around, to linger, delay, or wander about, or to remain, abide, or tarry in a public place.
- (b) A person commits the offense of loitering if he or she:
 - (1) Loiters for the purpose of unlawful gambling;
 - (2) Loiters for the purpose of engaging or soliciting another person to engage in prostitution or deviate sexual intercourse;
 - (3) With intent to interfere with or disrupt the school program or with intent to interfere with or endanger schoolchildren, loiters in or about a school building or on school grounds or within one hundred (100) feet of school grounds when persons under the age of eighteen (18) are present in the building or on the grounds, not having any reason or relationship involving custody of, or responsibility for, a pupil or any other specific legitimate reason for being there, and not having written

permission from or having been asked to leave by a school administrator or his or her representative or by a peace officer; or

(4) Loiters with one (1) or more persons for the purpose of unlawfully using or possessing a controlled substance, as defined in Section 10-8-10 of this Chapter.

(c) It shall be an affirmative defense that the defendant's acts were lawful and he or she was exercising his or her right of lawful assembly as part of peaceful and orderly petition for the redress of grievances, either in the course of labor disputes or otherwise.

Section 2: Codification. The Town Clerk is hereby directed to work with the Town's Municipal Code codifier to ensure that the provisions of this Ordinance are included in the next codification of the Milliken Municipal Code.

Section 3: Severability. If any part, section, subsection, sentence, clause or phrase of this ordinance is for any reason held to be invalid, such invalidity shall not affect the validity of the remaining sections of the ordinance. The Board of Trustees hereby declares that it would have passed the ordinance including each part, section, subsection, sentence, clause or phrase thereof, irrespective of the fact that one or more parts, sections, subsections, sentence, clauses or phrases be declared invalid.

Section 4: Repeal. Existing or parts of ordinances covering the same matters as embraced in this Ordinance of the Milliken Municipal Code are hereby repealed and all ordinances or parts of ordinances inconsistent with the provisions of this Ordinance are hereby repealed, except that this shall not affect or prevent the prosecution or punishment of any person for any act done or committed in violation of any ordinance hereby repealed prior to the taking effect of this Ordinance.

Section 5: Effective Date. This Ordinance shall take effect and be in force thirty (30) days after publication following final adoption.

Introduced, read, adopted, signed and ordered published in full by the Board of Trustees of the Town of Milliken this ____ day of _____, 2016.

TOWN OF MILLIKEN

Beau Woodcock, Mayor

ATTEST:

APPROVED AS TO FORM:

Cheryl Powell, Town Clerk

Linda Michow, Town Attorney

Published: _____

Sec. 10-6-40. - Loitering.

(a) The word *loiter* means to be dilatory, to stand idly around, to linger, delay or wander about, or to remain, abide or tarry in a public place.

(b) A person commits the offense of loitering if he or she:

~~(1) Loiters for the purpose of begging;~~

~~(2) Loiters for the purpose of unlawful gambling with cards, dice or other gambling paraphernalia;~~

(3) Loiters for the purpose of engaging or soliciting another person to engage in prostitution or deviate sexual intercourse;

(4) With intent to interfere with or disrupt the school program or with intent to interfere with or endanger schoolchildren, loiters in or about a school building or on school grounds or within one hundred (100) feet of school grounds when persons under the age of eighteen (18) are present in the building or on the grounds, not having any reason or relationship involving custody of, or responsibility for, a pupil or any other specific legitimate reason for being there, and not having written permission from or having been asked to leave by a school administrator or his or her representative or by a peace officer; or

(5) Loiters with one (1) or more persons for the purpose of unlawfully using or possessing a controlled substance, as defined in [Section 10-8-10](#) of this Chapter.

(c) It shall be an affirmative defense that the defendant's acts were lawful and he or she was exercising his or her right of lawful assembly as part of a peaceful and orderly petition for the redress of grievances, either in the course of labor disputes or otherwise.

(Ord. 261 §5-10-106, 1989; Ord. 481 §1, 2003)