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Honorable Bill Hinkle
Chair, Municipal Research Council
2601 Fourth Avenue #800
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Dear Chairman Hinkle:

You recently inquired as to the validity of various municipal ordinance provisions enacted to address criminal street gangs and gang-related activity.[1] I have paraphrased your questions as follows:

1. Are the ordinance definitions of "criminal street gang" and "criminal gang activity" unconstitutionally overbroad?

2. Is the ordinance provision which makes it unlawful for a member of a "criminal street gang" or a person who is in the company of or acting in concert with a member of a criminal street gang to loiter or idle in a public place, under certain specified circumstances, unconstitutionally vague or overbroad?

BRIEF ANSWERS

Based upon the case law, it cannot be stated with certainty what action a court might take regarding the provisions in question. However, the ordinance definitions of "criminal street gang" and "criminal gang activity" might be found unconstitutionally overbroad, in part, because the terms arguably criminalize some protected expressive activity without requiring any specific intent to cause harm or any specific overt criminal act. In particular, the provision defining "criminal gang activity" as including "any public participation or use of identifiable apparel, name, sign or symbol of any criminal street gang in a manner that creates a threat of harm or

[1] You have referenced a particular city ordinance in your letter, but we have also learned that a number of jurisdictions are considering (or have adopted) similar ordinances. In this opinion, I will use the ordinance you forwarded as a typical example, but this opinion should not be construed as a comment on any specific ordinance. Rather, it is intended as general assistance to public officers and local governments on the issues raised by ordinances of this type.

intimidation to persons or property, or that promotes, furthers, aids, abets or assists any criminal street gang or criminal gang activity" is constitutionally suspect. This, in turn, may further render operative provisions of the ordinance constitutionally suspect (the portions which criminalize the solicitation of persons to participate in "criminal street gang activity and which declare "criminal gang activity" a public nuisance subject to abatement by all available means).

The ordinance provision that criminalizes loitering by a member of a "criminal street gang" or a person in the company of or acting in concert with a gang member under certain circumstances, is also constitutionally questionable because, while it does require the intent to engage in an unlawful act in addition to loitering, it does not require the performance of a specific overt act to demonstrate such intent; nor does it set forth any particular circumstances that might be considered as evidence of such intent.

ANALYSIS

1. Are the ordinance definitions of "criminal street gang" and "criminal gang activity" unconstitutionally overbroad?

Your first question asks whether the ordinance definitions of "criminal street gang" and "criminal gang activity" are unconstitutionally overbroad. Overbreadth analysis measures how enactments that prohibit conduct fit with the universe of constitutionally-protected conduct. A law is overbroad if it sweeps within its prohibitions constitutionally-protected free speech activities. *City of Tacoma v. Luvene,* 118 Wn.2d 826, 839, 827 P.2d 1374 (1992). The First Amendment overbreadth doctrine may invalidate a law on its face only if the law is substantially overbroad. *Id.* Thus, the Court's first task is to determine whether the enactment reaches a substantial amount of constitutionally-protected conduct. The law will be overturned only if the Court is unable to place a sufficiently limiting construction on a standardless sweep of legislation. *Id. at 840*; *City of Seattle v. Webster,* 115 Wn.2d 635, 641, 802 P.2d 1333 (1990).

Turning now to the language in question, the ordinance provides:

> A. "Criminal street gang" means a group that: (a) Consists of three or more persons; (b) has identifiable leadership or an identifiable name, sign or symbol; and (c) on an ongoing basis, regularly conspires and acts in concert mainly for criminal purposes, or whose members individually or collectively engage in or have engaged in criminal gang activity.
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> B. "Criminal gang activity" means: (a) the commission, solicitation to commit, conspiracy to commit, or attempt to commit any crime or violation of law, including, but not limited to, crimes against persons, crimes against property, graffiti, creation and maintenance of public or private nuisances, threats to do harm, intimidation, robbery, burglary, assault, homicide, theft, violation of laws pertaining to controlled substances, and alcohol offenses, with the intent or effect

> to promote, further, aid, abet, or assist any criminal street gang; (b) any intimidation of or harm to any person with the purpose or intent to cause such person to participate in criminal gang activity, or to intimidate or harm any person who has ceased to participate in criminal gang activity; or (c) any public participation or use of identifiable apparel, name, sign, or symbol of any criminal street gang in a manner that creates a threat of harm or intimidation to persons or property, or that promotes, furthers, aids, abets, or assists any criminal street gang or criminal gang activity.

At the outset, I note that the two terms in question are linked in that the first, "criminal street gang," is defined in part by reference to the second, "criminal gang activity." In this respect, the ordinance is similar to the California Street Terrorism Enforcement and Prevention Act, Cal. Code § 186.22(f), and to the Ohio criminal gang statutes, Ohio Rev. Code § 2923.41.[2] I further note that the ordinance does not, by its terms, criminalize membership in a gang itself, either by definition or any other of its operative terms. If it did so, then it would likely be found unconstitutional for impermissibly establishing guilt by association alone. *Robinson v. California,* 370 U.S. 660, 82 S. Ct. 1417, 8 L. Ed. 2d 758 (1962) (law that criminalized status of person as drug addict found unconstitutional); *City of Chicago v. Youkhana,* 277 Ill. App. 3d 101, 114, 660 N.E.2d 34, 43 (1995) (anti-gang ordinance may not punish person for status of being a gang member, as "[g]ang membership itself is not a crime"), *aff'd on other grounds, sub. nom. City of Chicago v. Morales,* 177 Ill. 2d 440, 687 N.E.2d 53 (1997); *United States v. Acosta,* 110 F. Supp. 2d 918, 931 (E.D. Wis. 2000) ("The First Amendment protects individuals' right of free association. Gang membership is not a crime."). *See also State v. Stallings,* 150 Ohio App. 3d 5, 13, 778 N.E.2d 1110 (2002); *Helton v. State,* 624 N.E.2d 499, 508-09 (Ind. App. 1993).

Nevertheless, the ordinance's definition of "criminal street gang" by further reference to "criminal gang activity" is still potentially problematic. Under part (c) of the definition, a gang can include *either* a group that on an ongoing basis regularly conspires and acts in concert

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[2] Cal. Code § 186.22(f) states:

> '[C]riminal street gang' means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated [elsewhere in this code], having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.

Ohio Rev. Code § 2923.41(A) states:

> 'Criminal gang' means an ongoing formal or informal organization, association or group of three or more persons to which all of the following apply: (1) It has as one of its primary activities the commission of one or more of the offenses listed [elsewhere] in this section. (2) It has a common name or one or more common, identifying signs, symbols, or colors; (3) The persons in the organization, association, or group individually or collectively engage in or have engaged in a pattern of criminal gang activity.

mainly for criminal purposes, *or* a group whose members individually or collectively engage in, or have engaged in, "criminal gang activity." Unlike other similar anti-gang statutes, however, the latter term is not defined in the ordinance by reference to specific crimes. The California statutes, for example, rely upon a finding of a "pattern of criminal gang activity," which in turn is defined as the commission or attempted commission of, or conspiracy or solicitation to commit, two or more of 33 specifically-listed criminal offenses within a specific time period. Cal. Code § 186.22(e). The Ohio statutes similarly define a "pattern of criminal gang activity" as the commission or attempted commission of, or conspiracy or solicitation to commit, two or more felonies or other specified offenses within a specified time period. Ohio Rev. Code § 2923.41(B). Hence, while the California and Ohio statutes have been reviewed for other purposes, I have located no cases finding their definition of gang or gang activity to be unconstitutionally overbroad. *See, e. g., People v. Castenada*, 23 Cal. 4th 743, 3 P.3d 278 (2000); *State v. Woodbridge*, 153 Ohio App. 3d 121, 791 N.E.2d 1035 (2003).

The present ordinance's definition of "criminal gang activity," however, is not so limited. One can satisfy the definition by meeting either part (a), (b), or (c). I believe that part (a) of the definition would likely not be found to be overbroad, as it requires the commission, solicitation to commit, conspiracy to commit, or attempt to commit any crime or violation of law, including but not limited to those listed. This would not include constitutionally-protected conduct.

Although your question concerns overbreadth, part (b) of the definition also may be problematic, because it is circular. It defines "criminal gang activity" as "any intimidation of or harm to any person with the purpose or intent to cause such person to participate in criminal gang activity, or to intimidate or harm any person who has ceased to participate in criminal gang activity." The definition thus defines the term "criminal gang activity" in part by reference to itself. Because part (b) does appear to depend upon a finding of wrongful conduct (any intimidation or harm to any person), I believe it would not likely be found to be overbroad. However, one might argue that part (b) is impermissibly vague. A statute is void for vagueness if it is framed in terms such that persons of common intelligence must necessarily guess at its meaning and differ as to its applicability. *Luvene,* 118 Wn.2d at 844. It may be that the intent of part (b) was to include "any intimidation of or harm to any person" with the purpose or intent to cause a person to participate *in the activities listed in part (a) of the definition of criminal gang activity*. Whether a court would read such a limiting and clarifying construction into part (b) of the definition, however, is not clear.

Part (c) of the definition of "criminal gang activity," in my view, causes the greatest level of concern regarding potential overbreadth. It includes "any public participation or use of identifiable apparel, name, sign or symbol of any criminal street gang in a manner that creates a threat of harm or intimidation to persons or property, or that promotes, furthers, aids, abets or assists any criminal street gang or criminal gang activity." In *Tacoma v. Luvene, supra,* the Washington Supreme Court, in considering the constitutionality of a drug loitering ordinance, noted that loitering, in itself, is not a crime. In order to avoid unconstitutional overbreadth, therefore, the Court held that the ordinance must contain two required elements: (1) the specific

intent or purpose to engage in an illicit act; and (2) an overt act requirement, so that the culpable mental state coexists with identifiable, articulable conduct consistent with illegal activity. *Luvene,* 118 Wn.2d at 842-44.

Part (c) of the definition of "criminal gang activity" arguably does not meet either requirement. It forbids the "public participation or use" of apparel, names, signs, or symbols identifiable as associated with a criminal street gang, but it does not require any specific intent or purpose to harm or intimidate others. Rather, it criminalizes any such use, if it is deemed to be "*in a manner that creates a threat of harm* to persons or property," or "*in a manner that . . .* promotes, furthers, aids, abets, or assists any criminal street gang or criminal gang activity." (Emphasis added.) How is this to be determined? The ordinance does not so state. The ordinance does not identify any specific conduct beyond the use of identifiable apparel, names, signs, or symbols as a basis for determining whether there is an intent or purpose to harm or intimidate others. It may well be that the mere wearing of certain colors or insignia that might be associated with a gang by a person or group of persons (the ordinance does not require that there be more than one person) on a street corner might create a perceived threat of intimidation or harm to others, or might be perceived by others to "promote" gang activity.

But wearing perceived gang colors or insignia is not, by itself, a crime. Such conduct is, in fact, protected expressive activity. This was made clear in *City of Harvard v. Gaut*, 277 Ill. App. 3d 1, 660 N.E.2d 259 (1996). The Illinois Court held that an ordinance prohibiting the wearing of "known gang colors, emblems, or other insignia" was unconstitutionally overbroad. The ordinance did not define, list, or explain what constituted a gang color or symbol, and the city acknowledged that almost any color combination or any symbol may be a gang symbol. In *Harvard*, the defendant was wearing a six-pointed star, which was a symbol of a prominent group of gangs, but also a symbol of Judaism. The Court disagreed with the city's assertion that the wearing of such colors or symbols could be banned as unprotected "fighting words." The Court emphasized that the city may punish criminal *conduct* more harshly where the conduct is gang motivated and may prohibit active, intentional, and knowing promotion of criminal gang activity. *Id.* at 264, *citing Wisconsin v. Mitchell,* 508 U.S. 476, 113 S. Ct. 2194, 124 L. Ed. 2d 436 (1993); *Jackson v. State,* 634 N.E.2d 532 (Ind. App. 1994).

Here, there is no overt act specifically required, beyond the use of identifiable apparel, names, signs, or symbols, to show that such use was "in a manner that creates a threat of harm." In *Tacoma v. Luvene, supra,* the Court upheld an ordinance that made it unlawful to loiter "under circumstances manifesting the purpose to engage in drug-related activity". *Luvene,* 118 Wn.2d at 836. However, that ordinance differed significantly from the definition of "criminal gang activity" in part (c) of the present ordinance in that it went on to list 10 circumstances which may be considered to determine if a drug-related "purpose" was "manifested." *Id.* Among those were such overt acts as behaving in certain ways, furtively transferring packages for money, fleeing upon appearance of a police officer, or concealing oneself or some object that could reasonably be involved in drug-related activity. The Court, given these additional factors, interpreted the Tacoma ordinance as having an overt act requirement and, thus, found it not

unconstitutionally overbroad. *Id.* at 842-44. As no such factors are listed in the present ordinance, it is not clear whether a court would construe the part (c) definition of "criminal gang activity" in a similarly favorable way.

Thus, the definitions of "criminal street gang" and "criminal gang activity" in part (c) arguably are overbroad. This creates a potential problem when these definitions are then read in conjunction with the other operative portions of the ordinance that create crimes subject to punishment, including fines and imprisonment. In this regard, I note two sections in particular. First, the ordinance provides in part that "[a]ny person who solicits or recruits another to actively participate in a criminal street gang, with the intent that the person solicited or recruited participate in criminal street gang activity, or with the intent that the person solicited or recruited promote, further or assist in any criminal conduct by members of the criminal street gang, shall be guilty of a gross misdemeanor". To the extent that the ordinance criminalizes soliciting another to "actively participate" in a gang with the intent that the person solicited "promote, further, or assist *criminal conduct"* by the gang, the ordinance would likely be found constitutional. *See State v. Stallings,* 150 Ohio App. 3d 5, 10-13, 778 N.E.2d 1110, 1114-16 (2002) (Ohio statute containing such operative language found constitutional). However, to the extent the ordinance criminalizes soliciting another with the intent that the person participate in "criminal gang activity," including activity falling within part (c) of the definition above, it may be found to be impermissibly overbroad.

Second, the ordinance provides: "Criminal street gangs and criminal gang activity are each declared to be a public nuisance in violation of applicable city codes . . . subject to abatement through all available means." For the reasons stated above, an ordinance which renders the part (c) definitions of "criminal street gang" and "criminal gang activity" unlawful as a public nuisance may also be found to be impermissibly overbroad.[3]

In summary, the definitions of "criminal street gang" and "criminal gang activity" are potentially problematic and might be found to be overbroad, in part, as set forth above.

2. Is the ordinance provision which makes it unlawful for a member of a "criminal street gang" or a person who is in the company of or acting in concert with a member of a criminal street gang to loiter or idle in a public place, under certain specified circumstances, unconstitutionally vague or overbroad?

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[3] I note that the ordinance also provides: "Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in criminal gang activity, and who willfully promotes, furthers, or assists in any criminal conduct by members of that gang, shall be guilty of a gross misdemeanor". Although this part of the ordinance does refer to "criminal gang activity," liability can arise only if a person "actively participates" in a criminal street gang *and* "willfully promotes, furthers, or assists in any criminal conduct." This language parallels that of the California and Ohio statutes (Cal. Code § 186.22(a) and Ohio Rev. Code § 2923.42(A), (B)), both of which have been upheld as constitutional. *People v. Castenada,* 23 Cal. 4th 743, 3 P.3d 278 (2000); *Stallings, supra,* 778 N.E.2d 1110; *State v. Woodbridge,* 153 Ohio App. 3d 121, 791 N.E.2d 1035 (2003).

Your second question asks whether the ordinance provision which makes it unlawful for a member of a "criminal street gang" or a person who is in the company of or acting in concert with a member of a criminal street gang to loiter or idle in a public place, under certain specified circumstances, is unconstitutionally vague or overbroad. The provision in question reads in relevant part:

> A. It is unlawful for any person who is a member of a criminal street gang or who is in the company of or acting in concert with a member of a criminal street gang to loiter or idle in a 'public place' as defined in this section under any of the following circumstances:
>
> 1. With the intent to publicize a criminal street gang's dominance over certain territory in order to intimidate non-members of the gang from entering, remaining in, or using the public place or adjacent area; or
>
> 2. With the intent to conceal ongoing commerce in illegal drugs or other unlawful activity.[4]

Statutes or ordinances prohibiting loitering have been the subject of frequent litigation. None of the cases have invalidated such laws for the failure to define "loiter" or "idle." However, the case law makes clear that loitering in a public place cannot, by itself, be made a crime. The freedom to loiter for innocent purposes is part of the "liberty" protected by the due process clause of the Fourteenth Amendment. *Chicago v. Morales,* 527 U.S. 41, 53, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999). Furthermore, a gang loitering ordinance which prohibited loitering or remaining in one place "with no apparent purpose" was also found unconstitutionally vague by the United States Supreme Court in *Morales.* The vagueness doctrine may invalidate a criminal law, either because the law fails to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits, or because it may authorize or even encourage arbitrary and discriminatory enforcement. *Morales,* 527 U.S. at 56. The Court found the Chicago ordinance violated both of these prongs of the vagueness doctrine.

The Court stated that the Chicago ordinance was impermissibly vague, not because of uncertainty about the normal meaning of "loitering," but because the ordinance failed to distinguish between innocent conduct and conduct threatening harm. *Id.* at 57. It further noted that ordinances which criminalize loitering combined with some other overt act or evidence of criminal intent have been upheld. *Id.* As one example, the Court cited to *Tacoma v. Luvene,* 118 Wn.2d 826, 827 P.2d 1374 (1992). *Morales*, 527 U.S. at 57-58 n.25.

In *Luvene*, the Washington Supreme Court held that a Tacoma ordinance was not impermissibly vague. *Luvene,* 118 Wn.2d at 848. It considered a drug loitering ordinance which

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[4] The definition of "public place," contained in part (B) of this provision of the ordinance, is not relevant to the issues raised by your question and, hence, is not discussed in this opinion.

provided: "It is unlawful to loiter in or near any thoroughfare, place open to the public, or near any public or private place in a manner and under circumstances manifesting the purpose to engage in drug-related activity contrary to any of the provisions of Chapters 69.41, 69.50, or 69.52 of the [RCW]." *Id.* at 836. The ordinance then listed 10 circumstances that may be considered in determining whether such purpose is "manifested." *Id.* The circumstances include overt acts such as behaving in a manner so as to raise a reasonable suspicion that he or she is about to engage in drug-related activity, including acting as a "lookout"; transferring small objects or packages for currency in a furtive fashion; fleeing upon the appearance of a police officer; or endeavoring to conceal himself or herself or any object that could reasonably be involved in unlawful drug-related activity. *Id.* The Court also considered whether the ordinance was impermissibly overbroad.

Luvene held that a loitering ordinance must include both the specific intent to engage in an illicit act, *and* a requirement to engage in an overt act:

> While the potential overbreadth of the ordinance is diminished by the intent requirement, it is critical that the culpable mental state coexist with identifiable, articulable conduct reasonably consistent with the intent to buy, sell, or use illegal drugs. Otherwise, the ordinance does not distinguish between the innocent intent to merely loiter and the culpable intent to engage in unlawful drug-related activity.

Id. at 843-44. The Court held that the Tacoma ordinance was constitutional, because it criminalized loitering "under circumstances manifesting the purpose to engage in drug-related activity". *Id.* at 836. It also included a non-exclusive list of several such circumstances, as noted above. *Id.* Given these facts, the Court interpreted the ordinance to include an overt act requirement. *See also City of Seattle v. Slack,* 113 Wn.2d 850, 784 P.2d 494 (1989) (Court upheld prostitution loitering ordinance that stated: "A person is guilty of prostitution loitering if he or she remains in a public place and intentionally solicits, induces, entices, or procures another to commit prostitution"); *City of Seattle v. Jones,* 79 Wn.2d 626, 488 P.2d 750 (1971) (Court upheld prior ordinance that prohibited loitering "in a manner and under circumstances manifesting the purpose" of soliciting another to commit prostitution, and then identified circumstances that may be considered in determining whether such purpose was manifest). *See also State v. Monschke*, 133 Wn. App. 313, 135 P.3d 966 (2006), in which the Court of Appeals upheld a statute defining the crime of aggravated first-degree murder as including a murder committed to obtain or advance membership in an organization, rejecting vagueness and overbreadth claims.

Turning now to the ordinance raised by your question, while it is certainly more sound than the loitering ordinance struck down in *Morales*, it nevertheless remains problematic. Though it does include a specific intent requirement, it does not include any overt act requirement for either of its two prongs—namely, loitering either (1) with the intent to publicize a criminal street gang's dominance over certain territory in order to intimidate non-members of

the gang from entering, remaining in, or using the public place or adjacent area; or (2) with the intent to conceal ongoing commerce in illegal drugs or other unlawful activity; nor does it set forth any circumstances to determine whether such intent is manifested. It is thus arguable that the intent to "publicize" a gang's "dominance" in order to "intimidate" others under the ordinance could be based entirely on the subjective interpretation of a police officer or bystander, rather than on any actual action taken by the individual or group in question, other than their loitering presence in a certain area. The same difficulty of subjective interpretation could hold true as to the "intent" to "conceal ongoing commerce in illegal drugs or other unlawful activity" if no actual action is required to be observed. Whether a court would interpret this ordinance to include an overt act requirement, thus avoiding questions of overbreadth or vagueness, is not clear.

Other courts that have considered drug loitering ordinances similar to that in *Luvene* have struck them down as vague or overbroad, or both. *Johnson v. Athens-Clarke Cy.*, 272 Ga. 384, 529 S.E.2d 613 (2000) (ordinance that criminalized loitering "under circumstances which cause a justifiable and reasonable alarm or immediate concern that such person is involved in unlawful drug activity" held unconstitutionally vague); *State v. Muschkat,* 706 So. 2d 429 (La. 1998) (ordinance that criminalized loitering "in a manner and under circumstances manifesting the purpose to engage in unlawful conduct in violation of [specified state drug statutes]" held unconstitutionally vague and overbroad); *Akron v. Rowland,* 67 Ohio St. 3d 374, 618 N.E.2d 138 (1993) ("ordinance prohibiting loitering in manner and under circumstances manifesting purpose to engage in drug-related activity" held unconstitutionally vague and overbroad). As the ordinance here does not include a specific overt act requirement, its constitutionality is questionable.

Finally, there may be problems of proof under the gang loitering ordinance, even if a court were to construe it as constitutional in whole or in part. In *In re Daniel G.,* 120 Cal. App. 4th 824, 15 Cal. Rptr. 3d 876 (2004), the Court considered the legality of a conviction under a Los Angeles County gang loitering ordinance with language identical to the first portion of the ordinance in question here (i.e., prohibiting loitering with intent to publicize a street gang's dominance over certain territory in order to intimidate non-members of the gang from entering, remaining in, or using the area). The Court, after noting that there were no reported decisions construing the ordinance, found that the county had not met its burden of proving the specific intent necessary for a conviction under the ordinance. In a footnote, the Court stated that it did not need to reach the question of whether the ordinance was unconstitutionally vague.[5] *Id.* at 833 n.4.

In summary, the Washington Supreme Court has upheld the constitutionality of loitering ordinances that include both a specific intent requirement and an overt act requirement. The

[5] The Court stated that it assumed, *but did not decide*, that the ordinance was constitutional. *In re Daniel G.,* 120 Cal. App. 4th at 833 n.4.

ordinance in question here does not clearly meet the latter requirement. Thus, it is not clear that it would be upheld under *Tacoma v. Luvene.*

I hope you find this information useful. This is an informal opinion that will not be published as an official Attorney General Opinion.

Sincerely,

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