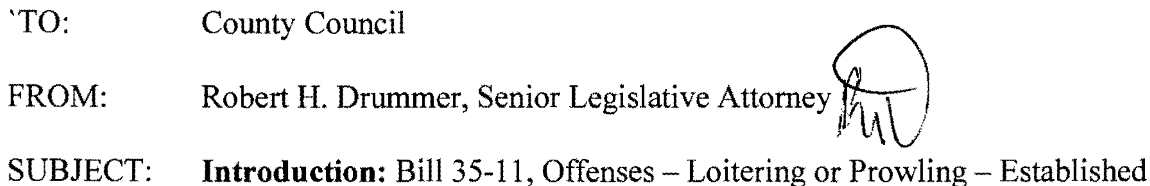
Agenda Item 4.1
October 25, 2011
Introduction

MEMORANDUM

'TO: County Council

FROM: Robert H. Drummer, Senior Legislative Attorney



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

Expedited Bill 35-11, Offenses – Loitering or Prowling – Established, sponsored by Councilmembers Andrews and Leventhal, is scheduled to be introduced on October 25, 2011. A public hearing is tentatively scheduled for November 15 at 7:30 p.m.

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 the purpose of the Bill in an October 19 memorandum at ©5-6.

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. Similar laws based upon the Model Penal Code have been enacted in Georgia[1] and Florida.[2] 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). Despite the 1999 Supreme Court decision in *Morales*, convictions under both of these loitering laws were subsequently upheld in *B.J. v. State of Florida,* 951 So.2d 100 (Fla. App. 2007) and *O'Hara v. State,* 241 Ga. App. 855, 528 S.E.2d 296 (2000).

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[1] *O.C.G.A. § 16-11-36* (2011)

[2] *Fla. Stat. § 856.021* (2011)

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:

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

2 **32-23B. Loitering or Prowling.**

3 (a) **Definitions.**

4 As used in this Section:

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

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

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

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

21 (b) **Prohibitions.**

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

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

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

27 (B) refuses to identify himself or herself; or

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

29 (c) **Enforcement Procedure.**

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

35 (A) to identify himself or herself; and

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

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

41 (d) **Defenses.**

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

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

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

48 (e) **Penalties.**

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

51 (2) A person must not be charged with a violation of this Section
52 unless the arresting officer has first warned the person of the
53 violation and the person has failed or refused to stop the
54 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
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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.