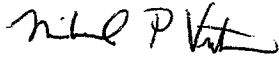


October 31, 2016

MEMO TO: Members of the Policy and Intergovernmental Affairs Committee

F R O M: Michael P. Victorino, Chair 
Policy and Intergovernmental Affairs Committee

SUBJECT: **HOMELESSNESS (PROTECTING AND PRESERVING PUBLIC HEALTH, SAFETY, AND WELFARE)** (PIA-61)

Please find below research points that may be useful in reviewing the five bills on today's agenda:

1. "A BILL FOR AN ORDINANCE AMENDING TITLE 8, MAUI COUNTY CODE, BY ADDING A PROHIBITION MAKING IT UNLAWFUL TO DEFECATE OR URINATE IN OR ON PUBLIC PLACES"

Pending guidance from the Prosecuting Attorney, it appears the existing criminal statute generally prohibiting disorderly conduct may apply to the specific act of defecating or urinating in public. For example, Section 711-1101, Hawaii Revised Statutes, states: "A person commits the offense of disorderly conduct if, with intent to cause physical inconvenience or alarm by a member or members of the public, or recklessly creating a risk thereof, the person . . . Creates a hazardous or physically offensive condition by any act which is not performed under any authorized license or permit . . ."

Depending on the circumstances, existing prohibitions on indecent exposure and public nuisance might also apply.

In addition, some observers have long argued that specific bans on basic human functions are unfair, and perhaps even unconstitutional, in areas where shelter or 24-hour restrooms are not available. Such a view was presented in a 1994 article in the *Yale Law and Policy Review*, titled "A Theoretical and Legal Challenge to Homeless Criminalization as Public Policy." The author stated: "When public facilities are unavailable, the survival process necessarily includes some mode of public defecation."

It does not appear, however, that a court has found prohibitions on public urination and defecation to be unconstitutional.

RECEIVED AT PIA MEETING ON 10/31/16

Municipalities enacting prohibitions on public urination and defecation in recent years include the following:

Municipality	Reference Number and Link	Effective Date
City of Arkansas Pass, Texas	Ordinance 2016-4170: https://docs.google.com/viewerng/viewer?url=https://ap-police.com/wp-content/uploads/2016/10/Ord.-2016-4170-Chapter-18.pdf&hl=en	October 20, 2016
City of College Station, Texas	Ordinance 2016-3775: https://www.municode.com/library/tx/college_station/ordinances/code_of_ordinances?nodeId=774164	June 9, 2016
City and County of Honolulu	Ordinance 14-27: http://www4.honolulu.gov/docushare/dsweb/Get/Document-152426/ORD14-27.PDF	September 16, 2014
City of Lowell, Massachusetts	Section 222-14, Code of Ordinances: http://ecode360.com/30118132	August 13, 2014

2. “A BILL FOR AN ORDINANCE AMENDING CHAPTER 8.21, MAUI COUNTY CODE, RELATING TO LIQUOR IN COUNTY PARKING LOTS AND OTHER PUBLIC AREAS”

This bill’s scope extends well beyond the issue of homelessness. It would ban alcohol consumption at all beaches and other parks, community centers, and all other places owned by the government. The Council has traditionally taken a judicious approach to alcohol bans, imposing them only in specifically identified areas in response to public requests.

3. “A BILL FOR AN ORDINANCE AMENDING TITLE 8, MAUI COUNTY CODE, BY ADDING PROHIBITIONS RELATING TO LYING DOWN ON PUBLIC SIDEWALKS”

This bill was discussed at the Committee meeting of October 3, 2016. I would respectfully refer Committee members to the meeting minutes and materials distributed at the meeting for relevant background.

4. “A BILL FOR AN ORDINANCE AMENDING TITLE 8, MAUI COUNTY CODE, BY ADDING PROHIBITIONS RELATING TO THE TAKING OR ABANDONMENT OF SHOPPING CARTS”

Pending guidance from the Prosecuting Attorney, it appears the existing criminal statutes generally prohibiting theft would apply to the specific act of stealing a shopping cart. For example, Section 708-830, Hawaii Revised Statutes, without limitation states: “A person commits theft if the person . . . Obtains or exerts unauthorized control over property. . .”

There are not many recently published judicial opinions regarding the stealing of shopping carts. The Supreme Court of Vermont, in a 2010 case called *State v. Hughes*, affirmed a defendant’s conviction for the theft of shopping carts. The defendant did not contend that the absence of a law specifically criminalizing the stealing of shopping carts meant that he could not be prosecuted.

Other municipalities have taken different approaches to the problem of shopping-cart proliferation in their communities.

For example, the Lompoc (California) City Council this year enacted Ordinance 1624(16), establishing Chapter 8.32, Lompoc Municipal Code, to regulate shopping carts. The ordinance’s primary policy is to require grocery stores to establish plans to address the problem of abandoned shopping carts. In a report to the City Council dated July 5, 2016, City Manager Patrick Wiemiller stated:

Staff has determined the most cost-effective ordinance is one that requires cart owners to submit a Mandatory Shopping Cart Prevention Plan (Plan) to the City and then to bear the cost of managing their own carts. Often a charge is collected by the city with the submittal of the Plan and there can be administrative, civil and criminal fines imposed when Plans are not submitted or other provisions of the city’s shopping cart regulations are not followed, including a failure to follow the approved Plan. Retailers who provide a valid contract with a shopping cart retrieval service may be provided an exemption from submitting a Plan, so long as their carts are not found abandoned in the city on three or more occasions during a six-month period. That would put the entire onus on the retailers and is the most cost-effective approach to shopping cart management.

The Lompoc report and ordinance are available on the City's website:

<http://www1.cityoflompoc.com/councilagenda/160705/n5.pdf>

5. "A BILL FOR AN ORDINANCE AMENDING TITLE 8, MAUI COUNTY CODE, BY ADDING A PROHIBITION THAT MAKES IT UNLAWFUL TO SOLICIT IN AN AGGRESSIVE MANNER IN PUBLIC PLACES"

An article earlier this year in the *Columbia Law Review*, titled "Panhandling Regulation After *Reed v. Town of Gilbert*" concluded aggressive solicitation bans are likely unconstitutional restrictions on free speech based on recent Supreme Court precedent. As noted in the article, the United States Supreme Court in the *Reed v. Town of Gilbert* case last year adopted a new, broader view of the First Amendment's protection for all forms of expression, concluding that "a government, including a municipal government vested with state authority, has no power to restrict expression because of its message, its ideas, its subject matter, or its content."

At issue in *Reed* was the constitutionality of a sign ordinance, but the Supreme Court's holding has been applied to many other types of laws, including to solicitation ordinances.

For example, shortly after *Reed*, the Supreme Court vacated a lower court's ruling that upheld a solicitation ordinance in *Thayer v. City of Worcester, Massachusetts*. A Federal court in Colorado last year, in a case known as *Browne v. City of Grand Junction*, struck down an ordinance's prohibition on aggressive solicitation, citing *Reed*. Other municipalities that have had solicitation ordinances deemed unconstitutional by courts after *Reed* include the cities of Lowell, Massachusetts; Springfield, Illinois; and Tampa, Florida. These and related cases are reviewed at the Rocky Mountain Sign Law Blog:

<http://www.rockymountainlaw.com/category/panhandling-solicitation/>

The *Columbia Law Review* article noted the Ninth Circuit Court of Appeals, which has jurisdiction over Hawaii, had determined 10 years ago in *ACLU of Nevada v. City of Las Vegas*, that "solicitation is a form of expression

entitled to the same constitutional protections as traditional speech.” So, the Ninth Circuit was skeptical about solicitation ordinances even before *Reed*. But the Ninth Circuit has not considered a solicitation ordinance subsequent to the *Reed* case.

The *Columbia Law Review* article is also available online:

<http://columbialawreview.org/content/panhandling-regulation-after-reed-v-town-of-gilbert/>

It is worth noting the County of Hawaii’s aggressive solicitation ordinance was the subject of litigation in 2014. The case was resolved by settlement after the Hawaii County Council agreed to revise the County Code, through enactment of Ordinance 15-51, and pay \$80,000. The settlement was issued prior to *Reed*. The revised version of Article 13, Chapter 14, Hawaii County Code, “Soliciting for Money or Objects of Value,” has not been tested in court.