

COUNCIL OF THE COUNTY OF MAUI
POLICY COMMITTEE

July 8, 2008

**Committee
Report No.**

08-78

Honorable Chair and Members
of the County Council
County of Maui
Wailuku, Maui, Hawaii

Chair and Members:

Your Policy Committee, having met on May 13, 2008 and June 17, 2008, makes reference to County Communication No. 07-202, from Councilmember Danny A. Mateo, transmitting a proposed bill entitled "A BILL FOR AN ORDINANCE AMENDING SECTION 9.24.030, MAUI COUNTY CODE, RELATING TO CURFEW EXCEPTIONS". The purpose of the proposed bill is to ensure the constitutionality of Maui County's Curfew Ordinance, Chapter 9.24, Maui County Code, (Curfew Ordinance) by establishing new exceptions, consistent with Nunez v. City of San Diego, 114 F.3d 935 (9th Cir. 1997).

By correspondence dated April 25, 2008, Lois K. Perrin, Legal Director of the American Civil Liberties Union of Hawaii (ACLU), asserted that the County "must take substantial steps towards repealing or significantly amending the Curfew Ordinance - and must do so within the next month" in order to avoid a lawsuit.

By correspondence dated May 7, 2008, the Chair of your Committee transmitted the following: (1) correspondence dated March 22, 2007, from Ms. Perrin, Legal Director of the ACLU; (2) correspondence dated March 27, 2007, from the Chief of Police; and (3) correspondence dated April 23, 2007, from the Department of the Prosecuting Attorney, all relating to the proposed bill.

At its meeting of May 13, 2008, your Committee met with the Deputy Chief of Police, the First Deputy Prosecuting Attorney, and a Deputy Corporation Counsel.

Your Committee received oral and written testimony from Laurie Temple, Staff Attorney, ACLU, urging the Department of Police to immediately cease enforcement of the Curfew Ordinance. She urged your Committee to either repeal or significantly amend the Curfew Ordinance. Ms. Temple suggested revisions to the proposed bill, including allowing an exception for minors to travel to and from protected First Amendment activities; requiring police officers to have a reasonable belief that no curfew exceptions apply before making an arrest; requiring that, in any prosecution for violation of the Curfew Ordinance, the State will bear the burden of proving that no exceptions to the

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Curfew Ordinance apply; allowing an exception for minors engaged in interstate travel; and allowing parents to grant verbal and written permission to their children to be present in public places during curfew hours. She recognized that the proposed bill is the first step toward ensuring the constitutionality of the Curfew Ordinance; however, she noted that, without further revisions, the proposal is insufficient to cure constitutional defects.

Your Committee noted that there has never been a constitutional challenge to the Curfew Ordinance, therefore, a court has not found that the Curfew Ordinance violates the Federal or State Constitutions.

Your Committee further noted that the proposed bill is modeled after San Diego's curfew ordinance, enacted in response to the decision in Nunez. Your Committee acknowledged that the proposed bill does not address all of the concerns raised by the ACLU and may need further revisions to ensure the constitutionality of the proposed bill.

Your Committee deferred the matter pending further discussion.

By correspondence dated May 14, 2008, Stephanie Osborne submitted written testimony opposing the ACLU's recommendations and supporting the Curfew Ordinance.

By correspondence dated May 16, 2008, the Chair of your Committee requested that the Department of the Corporation Counsel review and approve as to form and legality a draft bill entitled "A BILL FOR AN ORDINANCE RELATING TO CURFEW EXCEPTIONS". The purpose of the draft bill is to ensure the constitutionality of the Curfew Ordinance, consistent with Nunez. The draft bill amends various sections throughout Chapter 9.24, Maui County Code, in order to address some of the ACLU's concerns and to more closely model the post-Nunez San Diego curfew ordinance.

By correspondence dated May 20, 2008, the Department of the Corporation Counsel transmitted a proposed bill entitled "A BILL FOR AN ORDINANCE AMENDING CHAPTER 9.24, MAUI COUNTY CODE, PERTAINING TO CURFEW". The purpose of the proposed bill is the same as the draft bill transmitted by correspondence dated May 16, 2008.

By correspondence dated May 21, 2008, the Chair of your Committee requested that the Department of Police provide relevant statistical information on curfew violations and other juvenile crimes in Maui County in recent years; comment on the

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written testimony dated May 12, 2008, from the ACLU staff attorney; and comment on the proposed bill.

By correspondence dated May 21, 2008, the Chair of your Committee requested that the Department of the Corporation Counsel and the Department of the Prosecuting Attorney (1) provide opinions explaining the significant similarities and differences between the Curfew Ordinance and San Diego's curfew ordinance, which was the subject of litigation in Nunez; (2) comment on the proposed bill; (3) explain how the proposed bill applies to emancipated minors; and (4) comment on the ACLU's written testimony dated May 12, 2008.

By correspondence dated May 28, 2008, the Chief of Police provided relevant statistical information pertaining to curfew violations and other juvenile crimes for Maui County. The Chief commented that despite the County's efforts to comply with Nunez by proposing exceptions to the Curfew Ordinance, the ACLU is asking for further revisions. He opined that the further revisions recommended by the ACLU are unnecessary.

By correspondence dated May 29, 2008, the Chair of your Committee requested that the ACLU provide written comments on the constitutionality of the proposed bill.

By correspondence dated June 3, 2008, the Department of the Corporation Counsel provided an analysis of the similarities and differences between the Curfew Ordinance and San Diego's curfew ordinance challenged in Nunez. The Department noted that the proposed bill incorporates five main revisions: (1) adding more definitions, (2) adding a new "purpose and intent" section, (3) extensively revising the section pertaining to "curfew exceptions", (4) adding a new "enforcement" section, and (5) revising the penalty section. The Department clarified that the proposed bill would not apply to emancipated minors. The Department asserted that the proposed bill is sufficient to address the concerns raised in the ACLU's written testimony dated May 12, 2008.

By correspondence dated June 9, 2008, the Department of the Prosecuting Attorney provided an analysis of the similarities and differences between the Curfew Ordinance and San Diego's curfew ordinance challenged in Nunez. The Department noted objections to the proposed bill, including the exception to allow a minor to be within 50 feet of the minor's residence during curfew hours and the requirement that the State bear the burden of proof regarding the exceptions. The Department commented that

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the proposed bill will not apply to emancipated minors, and opined that all of the ACLU's concerns are addressed by the proposed bill.

At its meeting of June 17, 2008, your Committee met with a Deputy Corporation Counsel, the Prosecuting Attorney, and the Deputy Chief of Police.

Your Committee considered the proposed bill entitled "A BILL FOR AN ORDINANCE AMENDING CHAPTER 9.24, MAUI COUNTY CODE, PERTAINING TO CURFEW".

Your Committee received oral and written testimony from two individuals. Laurie Temple, Staff Attorney, ACLU, testified that the proposed bill is still inadequate and may leave the County open to liability. She urged your Committee to include an exception for minors engaged in interstate travel, and to allow a parent or guardian to give the minor verbal as well as written permission to be in public places during curfew hours.

Danielle Sears, Deputy Public Defender, testified that the Office of the Public Defender on Maui supports the position of the ACLU, including a complete repeal of the Curfew Ordinance. She also objected to the suggestion of the Department of the Prosecuting Attorney that the proposed exceptions should be made affirmative defenses because the burden of proof would then improperly shift to the minor to prove an exception.

The Deputy Corporation Counsel asserted that the proposed bill is constitutionally defensible. She noted that the proposed bill takes into consideration the court's ruling in Nunez as well as the comments made by the various departments and the ACLU. She further noted that the ACLU, in its correspondence dated April 25, 2008, asserts that the ACLU will not bring a legal challenge if the Curfew Ordinance is significantly amended to meet constitutional guidelines. She further stated that the Department hopes that, should the proposed bill be passed, the ACLU will forgo a constitutional challenge.

The Deputy Chief of Police stated that he does not have any objections to the proposed bill. He noted that the Department takes into consideration the rights of minors and their parents when dealing with minors. He stated that the concern of the Department is the protection of minors when enforcing the Curfew Ordinance.

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The Prosecuting Attorney agreed that the proposed bill is constitutionally defensible; however, he stated that the Department of the Prosecuting Attorney will have difficulties with enforcement of the proposed bill as written. He urged your Committee to amend the language in Section 9.24.055(B) of the proposed bill to make the exceptions contained within Section 9.24.030 of the proposed bill affirmative defenses. He explained that when a defense is affirmative, the burden of proof is placed on the defendant to prove the defense, not on the State.

Your Committee noted that the Curfew Ordinance is important for the protection of minors, and provides parents with extra support when setting guidelines for their children.

Your Committee voted to recommend passage of the proposed bill and deferred the matter pending further discussion.

Your Committee is in receipt of a revised proposed bill entitled "A BILL FOR AN ORDINANCE AMENDING CHAPTER 9.24, MAUI COUNTY CODE, PERTAINING TO CURFEW", incorporating nonsubstantive changes.

Your Policy Committee RECOMMENDS that Bill No. _____ (2008), as revised herein and attached hereto, entitled "A BILL FOR AN ORDINANCE AMENDING CHAPTER 9.24, MAUI COUNTY CODE, PERTAINING TO CURFEW", be PASSED ON FIRST READING and be ORDERED TO PRINT.

Adoption of this report is respectfully requested.

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DANNY A. MATEO Chair

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JOSEPH PONTANILLA Member

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JO ANNE JOHNSON Member

ORDINANCE NO. _____

BILL NO. _____ (2008)

A BILL FOR AN ORDINANCE AMENDING CHAPTER 9.24,
MAUI COUNTY CODE, PERTAINING TO CURFEW

BE IT ORDAINED BY THE PEOPLE OF THE COUNTY OF MAUI:

SECTION 1. Section 9.24.010, Maui County Code, is amended to
read as follows:

"9.24.010 Definitions. For the purpose of this chapter, unless it is plainly evident from the context that a different meaning is intended, certain terms and words are defined as follows:

[A. "Athletic event" means any interscholastic high school football, basketball, or other sports event.]

"Emergency" means an unforeseen combination of circumstances or the resulting state that calls for immediate action. The term includes, but is not limited to, a fire, natural disaster, an automobile accident, or any situation requiring immediate action to prevent serious bodily injury, as defined in section 707-700, Hawaii Revised Statutes, or loss of life.

"Minor" means any person who is under the age of eighteen years, but not persons:

1. On active duty with the armed forces of the United States;

2. Who are married; or

3. Who are otherwise emancipated under the laws of Hawaii or another state.

[B.] "Public place" means any building, park, playground, beach, place of amusement or entertainment, eating place, store or other establishment which is open to the public, whether such establishment is closed or open for business.

[C. "Special school event" means any special occasion sponsored by a school and confirmed in writing by the principal of the school, such as a junior prom, senior prom, or other special function where such event is to take place commencing after seven p.m.]"

SECTION 2. Chapter 9.24, Maui County Code, is amended by adding a new section to be appropriately designated and to read as follows:

"9.24.015 Purpose and intent. A. The purpose of this chapter is to promote public health, safety, and general welfare during late night and school hours. It is also intended to reduce juvenile crime and victimization, especially violent crime committed by, and perpetuated against, juveniles. The purpose of this chapter is not to prohibit, prevent, or interfere with a minor's exercise of first amendment and other rights under the United States Constitution. This chapter preserves those constitutionally protected rights.
B. This chapter is adopted pursuant to section 577-21, Hawaii Revised Statutes, as amended."

SECTION 3. Section 9.24.030, Maui County Code, is amended to read as follows:

"9.24.030 Exceptions. A. [The provisions of section] Sections 9.24.020, 9.24.040, and 9.24.050 of this chapter shall not apply to a minor when the minor:
1. Is accompanied by [his] the minor's parent, guardian, or other adult authorized by such parent or guardian[, or provided such minor is permitted to do so in writing by the parent or guardian of the minor.];
2. Is on an errand at the direction of the minor's parent or guardian, or other adult person having the care and custody of a minor, without any detour or stop;
3. Has written permission to be present in public places or on public streets and roads by the parent, guardian, or other adult person having the care and custody of a minor;
4. Is lawfully engaged in a business, trade, profession, occupation, or employment-related activity; or going to or returning home from the place of employment or the location of the employment-related activity, without any detour or stop;
5. Is involved in an emergency;
6. Is within fifty feet of the minor's residence;
7. Is attending an official school, religious, or other recreational activity

supervised by adults or an organization that takes responsibility for the minor, including traveling to or from the location of such activity, without any detour or stop;

8. Is exercising rights protected by the first amendment to the United States Constitution or article I, section 4 of the Hawaii State Constitution, such as the free exercise of religion, freedom of speech, and the right of assembly, including traveling to and from the location of such activities, without any detour or stop.

B. [The curfew limitations set forth in this chapter shall be extended by operation of law one hour after the termination of the special school event, and in any event to no later than two a.m. of the following day; provided, that the minor shall have filed with the principal of his school a consent in writing permitting such extension from his parent or guardian.] Section 9.24.050 of this chapter shall not apply to any person being the keeper, operator, or person in charge of any public place when that person: (1) promptly notifies the department of police of the minor's presence on the establishment's premises during the hours designated in section 9.24.020 of this chapter; and (2) asks the minor to leave and the minor refuses to do so.

[C. In case an athletic event extends beyond the curfew limitations set forth in section 9.24.020, the curfew limitation shall be extended by operation of law to one hour after the termination of the athletic event.]"

SECTION 4. Section 9.24.040, Maui County Code, is amended to read as follows:

"9.24.040 Responsibility of parents. It is unlawful for the parent, guardian, or other adult person having the care and custody of a minor to permit such minor to be present in public places or in public streets and roads beyond the hours set forth in this chapter[; provided, however, that the provisions of this section shall not apply if the situation falls within one of the exceptions appearing in section 9.24.030]."

SECTION 5. Section 9.24.050, Maui County Code, is amended to read as follows:

"9.24.050 Responsibility of others. It is unlawful for any person being the keeper, operator, or person in charge of any public place to permit any minor to be or remain upon the premises of such public place [contrary to the provisions of] beyond the hours set forth in this chapter."

SECTION 6. Chapter 9.24, Maui County Code, is amended by adding a new section to be appropriately designated and to read as follows:

"9.24.055 Enforcement. A. Before taking any enforcement action, a police officer who has a reasonable suspicion based on articulable facts that the minor, parent, guardian, or other adult person having the care and custody of a minor, or person being the keeper, operator, or person in charge of any public place, is in violation of sections 9.24.020, 9.24.040, or 9.24.050 of this chapter shall ascertain the minor's name, address, and age; the name of the minor's parent or guardian; the reason or purpose for the minor's being in, on, or upon the establishment, public place, or street during the time prohibited by section 9.24.020 of this chapter; and any other information reasonably necessary to determine whether a violation exists. The police officer shall not issue a citation or make an arrest unless the officer has a reasonable belief based on articulable facts that an offense has occurred and that, based on any responses and other circumstances, an exception under section 9.24.030 of this chapter does not apply.

B. In any prosecution for violation of sections 9.24.020, 9.24.040, or 9.24.050 of this chapter, the State shall bear the burden of proof that an exception under section 9.24.030 of this chapter does not apply."

SECTION 7. Section 9.24.060, Maui County Code, is amended to read as follows:

"9.24.060 Violation--Penalty. Any person who [violates] is found in violation of any provision of this chapter shall[, upon conviction,] be punished by a fine of not more than five hundred dollars."

SECTION 8. Material to be repealed is bracketed. New material is underscored. In printing this bill, the County Clerk need not include the brackets, the bracketed material, or the underscoring.

SECTION 9. This ordinance shall take effect upon its approval.

APPROVED AS TO FORM
AND LEGALITY:



ADRIANNE N. HEELY
Deputy Corporation Counsel
County of Maui

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