S T A T E O F T E N N E S S E E
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Opinion No. 01-137

Validity of Metropolitan Government's Ordinance Requiring Graffiti Removal

QUESTIONS

1. Does a metropolitan government have the authority to enact an ordinance which requires a property owner to remove "graffiti" from the exterior of a building?

2. Does a metropolitan government have the authority to enact an ordinance which limits the style of painting that a property owner can have on the exterior of a building?

3. If a property owner intentionally places "graffiti" style artwork on the exterior of a building, may a metropolitan government require the property owner to remove the artwork?

OPINIONS

1. A metropolitan government has the authority to enact an ordinance that requires property owners to remove graffiti from their buildings.

2. Within constitutional limitations, a metropolitan government has the authority to enact an ordinance that limits the style of painting that a property owner has on the exterior of his building.

3. The building ordinance quoted in your request does not apply to artwork that the property owner has placed on his building, even if the artwork resembles graffiti.

ANALYSIS

Your request indicates that the above questions relate to the last sentence of the following ordinance, which was recently enacted by the Metropolitan Government of Nashville and Davidson County as part of its building code:

> Defacement of Property. No person shall willfully or wantonly damage, mutilate, or deface any exterior surface of any building or

> structure, located on any private or public property, by placing thereon any marking, carving, or graffiti. It shall be the duty of the owner of the building, structure, and or real property on which the building or structure is located to restore said surface to an approved state of maintenance and repair.

Metro. Gov't of Nashville & Davidson County, Tenn., Code art. V, ch. 16.24.340T (2001).

The Tennessee Supreme Court has recognized that "aesthetic considerations may well constitute a legitimate basis" for a state or local government's exercise of the police power. *State v. Smith*, 618 S.W.2d 474, 477 (Tenn. 1981). Examples of such regulation include statutes that restrict the location of junkyards, *see* Tenn. Code Ann. §§ 54-20-101 to -124 (1998), that limit the establishment of automobile graveyards, *see* Tenn. Code Ann. §§ 54-20-201 to -205 (1998), that restrict the placement of billboards, *see* Tenn. Code Ann. §§ 54-21-101 to -120 (1998 & Supp. 2000), and that authorize zoning commissions, in reviewing work to be undertaken in historic districts, to give prime consideration to aesthetic and other factors. *See* Tenn. Code Ann. § 13-7-408 (1999).

In 1997, the Legislature enacted a statute that declares graffiti to be a public nuisance. *See* 1999 Tenn. Pub. Acts. 347. Similar to statutes enacted by other state legislatures, the Tennessee statute authorizes municipalities to adopt ordinances regulating the removal of graffiti and to pay for such removal with municipal funds. *See* Tenn. Code Ann. § 6-54-127 (Supp. 2000); *see also* Cal. Gov't Code § 53069.3; Okla Stat. Ann. tit. 11, § 22-112.2. As used in the statute, the term "municipalities" includes "incorporated cities and towns and metropolitan governments," such as the Metropolitan Government of Nashville and Davidson County. Tenn. Code Ann. § 6-54-127(b)(3) (Supp. 2000).

Specifically, the statute authorizes municipalities to remove graffiti "from publicly owned real or personal property or privately owned real or personal property visible from publicly owned property and located within the municipality and to replace or repair publicly owned property or privately owned property visible from publicly owned property within that municipality that has been defaced with graffiti or other inscribed material." Tenn. Code Ann. § 6-54-127(c) (Supp. 2000). Prior to removing graffiti from privately owned property, the municipality must obtain the written consent of the property owner and, where applicable, the tenant. *See* Tenn. Code Ann. § 6-54-127(e)(2) (Supp. 2000). In removing the graffiti, the municipality is required to "consult with the property owner or tenant and arrive at a method of removal that does not result in further damage or harm to the property." Tenn. Code Ann. § 6-54-127(g) (Supp. 2000). If the parties cannot agree upon a method of removal, the statute prohibits the municipality from removing the graffiti. *See id*.

If a municipality removes graffiti pursuant to the provisions of section 6-54-127, the municipality must perform such removal at its sole expense. *See* Tenn. Code Ann. § 6-54-127(g) (Supp. 2000). Nevertheless, the statute does not preclude municipalities from requiring property owners to remove graffiti from their property. The Legislature has delegated to municipalities the power to enact and enforce building

codes. *See* Tenn. Code Ann. § 6-2-201(25) (1998); *see also* Tenn. Code Ann. § 6-54-502(a) (1998). Moreover, the graffiti statute provides that "[n]othing in this section shall be construed to impair or limit the power of the municipality to define and declare nuisances and to cause their removal or abatement under any procedure now provided by law for the abatement of any public nuisances." Tenn. Code Ann. § 6-54-127(g) (Supp. 2000).

The statute defines "graffiti" as "any letter, word, name, number, symbol, slogan, message, drawing, picture, writing, or other mark of any kind visible to the public that is drawn, painted, chiseled, scratched or etched on a rock, tree, wall, bridge, fence, gate, building or other structure." Tenn. Code Ann. § 6-54-127(b)(2) (Supp. 2000). The statutory definition specifically excludes, however, "advertising or any other letter, word, name, number, symbol, slogan, message, drawing, picture, writing, or other mark of any kind *lawfully placed on property by an owner of the property, a tenant of the property, by an authorized agent for such owner or tenant, or unless otherwise approved by the owner or tenant*." *Id*. (emphasis added). Thus, like many other state graffiti statutes, the Tennessee statute does not apply to any drawing, picture, writing, or other mark that is placed on a building by the building's owner. *See, e.g.*, Idaho Code § 18-7036; Md. Ann. Code art. 27, § 111; Nev. Rev. Stat. Ann. § 331.145; N.J. Stat. Ann. § 2A:153-4.1; Okla Stat. Ann. tit. 11, § 22-112.2.F; Utah Code Ann. § 76-6-107(1).

1. A metropolitan government has the authority to enact an ordinance as part of its building code that prohibits persons from placing graffiti on building exteriors and that requires property owners to remove graffiti from their buildings. Although the Tennessee statute on graffiti removal authorizes municipalities to use municipal funds for the removal of graffiti, the statute does not preclude a municipality from enacting an ordinance that instead requires property owners to remove the graffiti from their buildings. The Legislature has delegated to municipalities the power to enact and enforce building codes. Moreover, such an ordinance is consistent with the municipality's authority to cause the removal or abatement of a public nuisance.

2. Within constitutional limitations, a metropolitan government has the authority to enact an ordinance which limits the style of painting that a property owner can have on the exterior of his building. The ordinance referred to in your request, however, does not appear to regulate a property owner's painting of his building. The ordinance applies only to markings, carvings, or graffiti that damage, mutilate, or deface the building's exterior surface. The terms damage, mutilate, and deface connote some impairment or harm to the building's exterior. *See The American Heritage Dictionary* 364, 374, 825 (2d college ed. 1985). Unless the property owner's painting can be characterized as damage, mutilation, or defacement, the ordinance does not apply to the painting. This opinion does not preclude the possibility that a metropolitan government could regulate the appearance of a building's exterior through other building code or zoning provisions, provided that these measures did not violate a property owner's First Amendment rights.[1]

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[1]In discussing a government's authority to outlaw graffiti, one United States Supreme Court justice opined that a community's "interests in protecting property from damaging trespasses and in securing beautiful surroundings

3. Inasmuch as the ordinance applies only to markings, carvings, or graffiti that damage, mutilate, or deface the building's exterior surface, the ordinance does not apply to artwork that the property owner intentionally places on the exterior of his building, even if the artwork resembles graffiti. As legally defined in Tennessee and other jurisdictions, graffiti does not include artwork that has been placed on a building by the building's owner. Unless the property owner's painting can be characterized as damage, mutilation, or defacement, the ordinance does not apply to the painting.

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outweigh the countervailing interest in uninhibited expression by means of words and pictures in public places." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 550 (1981) (Stevens, J., dissenting in part). Different interests may be implicated by a property owner's decision to exhibit artwork on his property.