METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY

BILL PURCELL
MAYOR

DEPARTMENT OF LAW
METROPOLITAN COURTHOUSE, SUITE 108
P O BOX 196300
NASHVILLE, TENNESSEE 37219-6300
(615) 862-6341
(615) 862-6352 FAX

Legal Opinion 2007-01

To: The Honorable Bill Purcell
Mayor of Metropolitan Government
107 Metropolitan Courthouse
Nashville, Tennessee 37201

Date: February 12, 2007

You requested a comprehensive legal analysis of Substitute Ordinance No. BL2006-1185 to answer the following question:

QUESTION

Whether a court is likely to find Substitute Ordinance No. BL2006-1185 valid under the Constitution of the United States and the Constitution of the State of Tennessee.

ANSWER

It is the opinion of the Department of Law that a court is likely to find that Substitute Ordinance No. BL2006-1185 violates both the Constitution of the United States and the Constitution of the State of Tennessee.

ORDINANCE IN QUESTION

Substitute Ordinance No. BL2006-1185 ("Ordinance") provides:

A. English is hereby established as the official language of the metropolitan government.

B. Except when required by federal law or when necessary to protect or promote public health, safety or welfare, all communications, publications, and telephone answering systems of metropolitan government boards, commissions, departments and agencies shall be in English.

There is no severability clause in the Ordinance.

ANALYSIS

I. BACKGROUND:

Many state and local governments have adopted laws providing that English is the official language.[1] *See In re Initiative Petition No. 366*, 46 P.3d 123, 126 (Okla. 2002) (Found proposed Oklahoma statute providing that "(a)ll official documents, transactions, proceedings, meetings, or publications issued, which are conducted or regulated by, on behalf of, or representing the state and all of its political subdivisions shall be in the English language" would violate the Oklahoma Constitution[2].) These laws fall into two types. They are either

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[1] "Twenty-two states, as well as a number of municipalities, have English only laws. (Ala. Const. amend. 509; Alaska Stat. § § 44.12.300-.380 (1998); Ark.Code. Ann. § 1-4-117 (1987); Cal. Const. art. III, § 6; Colo. Const. art. II, § 30(a); Fla. Const. art. II, § 9; Ga.Code Ann. § 50-3-100 (1996); Haw. Const. art. XV, § 49 ("English and Hawaiian shall be the official languages of Hawaii...."); Ill.Rev.Stat. ch. 5, para. 460/20 (1991); Ind.Code § 1-2-10-1 (1995); Ky.Rev.Stat. Ann. § 2.013 (Baldwin 1984); Miss.Rev.Stat. § 3-3-31 (1987); Mont.Code. Ann. § 1-1-510 (1995); Neb. Const. Art. 1, § 27; N.H.Rev.Stat. Ann. § 3-C:1 (1995); N.C. Gen.Stat. § 145-12 (1987); N.D. Cent.Code § 54-02-13 (1987); S.C.Code Ann. § 1-1-696 (1987); S.D. Codified Laws Ann. § § 1-27-20, 1-27-22 (1995); Tenn.Code Ann. § 4-1-404 (1984); Va.Code Ann. § 7.1-42 (Michie 1996); Wyo. Stat. § 8-6-101 (1996)."

In re Initiative Petition No. 366, 46 P.3d at 126.

In 1984 the State of Tennessee adopted English as the official language of the State. That statute provides:

> English is hereby established as the official and legal language of Tennessee. All communications and publications, including ballots, produced by governmental entities in Tennessee shall be in English, and instruction in the public schools and colleges of Tennessee shall be conducted in English unless the nature of the course would require otherwise.

Tenn. Code Ann. § 4-1-404 (2005).

[2] Article 2, section 22 of the Oklahoma Constitution provides: "Every person may freely speak, write, or publish his sentiments on all subjects, being responsible for the abuse of that right: and no law shall be passed to restrain or abridge the liberty of speech or of the press...."
Article 2, section 3 of the Oklahoma Constitution provides: "The people have the right peaceably to

symbolic (non-prohibitive and brief) or obligatory (restrictive and seek to enforce English as the required language for the conduct of public business).Brian L. Porto, J.D., *"English Only" Requirement for Conduct of Public Affairs*, 94 A.L.R.5th 537, § 1 (2001); *In re Initiative Petition No. 366*, 46 P.3d at 126. While there is no state or federal case from Tennessee or the United States Sixth Circuit Court of Appeals dealing with an English usage requirement that has been found, there are a few cases from other states and other federal circuits that analyze such laws.

- AUTHORITY TO LEGISLATE

The Metropolitan Government is a consolidated government created pursuant to Tenn. Code, Title 7, Chapters 1 through 3 and as authorized by Article XI, § 9, ¶ 9, of the Tennessee Constitution. The Metropolitan Government is authorized "to pass all ordinances necessary for the health, convenience, safety and general welfare of the inhabitants, and to carry out the full intent and meaning" of the Metropolitan Charter. *Metropolitan Charter §* 2.01(40). The Metropolitan Council is "authorized to legislate with respect to the powers of the metropolitan government" and, by ordinance, "to provide for the organization, conduct and operations of all departments, boards, commissions, offices and agencies of the metropolitan government, when the same has not been provided for by (the) Charter." *Metropolitan Charter §* 3.06. The right to exercise the police power is an attribute of sovereignty, necessary to protect the public safety, health, morals, and welfare, and is of vast and undefined extent. *H & L Messengers, Inc. v. City of Brentwood*, 577 S.W.2d 444, 452 (Tenn. 1979) (Ordinance barring distribution of commercial handbills held unconstitutional.)

- PRINCIPALS OF STATUTORY CONSTRUCTION

There are several principals that a court would use in the evaluation of the Ordinance. A court will begin analyzing the Ordinance with a presumption that it is constitutional. *H & L Messengers, Inc. v. City of Brentwood*, 577 S.W.2d at 452. When construing the Ordinance the courts will attempt to ascertain and carry out the legislative intent without unduly restricting or expanding the scope of the Ordinance beyond the intent of the legislative body. *Lavin v. Jordon,* 16 S.W.3d 362, 365 (Tenn. 2000). The courts will use the natural and

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assemble for their own good, and to apply to those invested with the power of government for redress of grievances by petition, address, or remonstrance."

ordinary meaning of the language used and will not use a forced or subtle construction. *Id.* If the language of the Ordinance is clear and unambiguous, a court will interpret the ordinance according to its plain meaning. *Id.* Only if a court finds that the language of the Ordinance is reasonably capable of conveying more than one meaning (ambiguous), will the court resort to rules of statutory construction to try to determine the legislative intent. *Id; Robinson v. LeCorps,* 83 S.W.3d 718, 722 (Tenn. 2002).

Where a court can legitimately construe the Ordinance in a variety of ways, the court will choose a way that results in it being constitutional. *Jordan v. Knox County*, -- S.W.3d ----, 2007 WL 92351, (Tenn. 2007) However, "where the regulation in question impinges on core constitutional rights, the standards of strict scrutiny apply and the burden of showing constitutionality is shifted to the proponent of the regulation." *Ruiz v. Hull*, 191 Ariz. 441, 448, 957 P.2d 984, 991 (Ariz.,1998).(Arizona Supreme Court found Arizona constitutional amendment requiring state and local governments to act only in English violated U.S. Constitution.)

- LEGISLATION AND CASES REGARDING ENGLISH LANGUAGE

The cases dealing with regulation of the use of the English language can be considered in two categories. First there are the cases where an employee's or applicant's ability to speak or understand English is required, as where English is necessary for safety (drivers' licenses) or work place (communication with co-workers) purposes. The other cases deal with the use of English in the operation of the government. The Ordinance deals with the use of English rather than the requirement of an ability to speak English.

As stated above, the cases and legal commentaries are dividing those English usage laws into either the symbolic or the obligatory type. The symbolic laws are characterized as being brief and equate the status of English to the state song, poem, bird or flower and are not mandatory.[3] The obligatory

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[3] North Carolina General Statutes Annotated § 145.12
(a) Purpose.--English is the common language of the people of the United States of America and the State of North Carolina. This section is intended to preserve, protect and strengthen the English language, and not to supersede any of the rights guaranteed to the people by the Constitution of the United States or the Constitution of North Carolina.
(b) English as the Official Language of North Carolina.--English is the official language of the State of North Carolina.

type laws do require the use of the English language. Porto, 94 A.L.R.5th 537, § 2.

- MEANING OF "ALL COMMUNICATIONS ... SHALL"

Use of the word "shall" in a statute is usually construed as mandatory. *JJ & TK Corp. v. Board of Com'rs of City of Fairview*, 149 S.W.3d 628, 631 (Tenn.Ct.App. 2004) "The word 'shall,' on the other hand, ordinarily is imperative, operating to impose a duty which may be enforced, against the party to whom the statute is directed." 82 C.J.S. *Statutes* § 368. While the Ordinance does not overtly prohibit speaking a foreign language, it states in comprehensive, mandatory terms that "all" communications "shall" be in English. The U.S. Supreme Court has held that when a law plainly prohibits the use of a language other than English, even though the law states the prohibition in a mandatory manner (for example, "all" records "shall" be in English) rather than a prohibitory manner (for example, records may not be in Chinese), it will not use a strained construction based on its mandatory language to make the law constitutional. *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 517, 46 S.Ct. 619, 623 (1926). (U.S. Supreme Court held unconstitutional a law requiring private business records to be in English thereby prohibiting Chinese). Therefore, a court is likely to construe the Ordinance as a mandatory restriction on the language to be used in the communications of all employees, officers, and officials of the Metropolitan Government and upon the residents of the Metropolitan Government as they deal with these employees, officers, and officials. It is the opinion of the Department of Law that the Ordinance would fall into the obligatory category of laws and not the symbolic category of laws.

- PUBLIC HEALTH, SAFETY, AND WELFARE EXCEPTION

The authority to promote and protect the public health, safety, and welfare falls within the police powers of the Metropolitan Government. *American Show Bar Series, Inc. v. Sullivan County*, 30 S.W.3d 324, 335 (Tenn.Ct.App. 2000) (" 'protection of public health, safety, and welfare falls squarely within the constitutional police powers of local government' ") The functions of the Metropolitan Government include the authority to exercise police powers. The functions included within public health, safety, and welfare have expanded such that one court has commented that ecological zoning is within this power. *Nattin Realty, Inc. v. Ludewig*, 67 Misc.2d 828, 324 N.Y.S.2d

668 (N.Y.Sup. 1971). (In holding that the municipality base zoning upon ecological factors, the New York court stated: "(t)he definition of 'public health, safety and welfare' surely must now be broadened to include and to provide for these belatedly recognized threats and hazards to the public weal.[4]") The concepts included in the power to legislate with regard to the public health, safety, and welfare is vast and, to an extent, undefined. *H & L Messengers, Inc. v. City of Brentwood*, 577 S.W.2d at 452.

Functions performed by a government may be either governmental functions or proprietary functions. *BellSouth Telecommunications, Inc. v. City of Memphis, Tenn.*, 160 S.W.3d 901, 912 (Tenn.Ct.App. 2004). Some cases and legal commentaries provide that the protections of the public health, safety, and welfare are governmental functions. *Carter v. Chesterfield County Health Com'n*, 259 Va. 588, 593, 527 S.E.2d 783, 786 (Va. 2000). There are Tennessee cases that provide that a city maintains its streets as a proprietary function, not a governmental function. *City of Nashville v. Brown*, 25 Tenn.App. 340, 157 S.W.2d 612, 615 (Tenn.App. 1941). The functions usually considered to be proprietary functions include the provision of water and sewer services, the provision of public transportation, and the provision of entertainment venues.

Analysis of whether an activity under the Ordinance is within the exception for the protection or promotion of a public health, safety, and welfare function will require determining whether it is within the police power/governmental function or the proprietary function. This will necessitate a case-by-case determination. This will be difficult because it will include deciding whether traditionally proprietary functions, such as water and sewer services, are now police power functions, as being based on an ecological analysis, as well as whether traditionally governmental functions, such as maintenance of streets and roads, are now proprietary functions and not subject to a public health, safety, and welfare exception.

[4] "weal ... The welfare of the community; the general good." The American Heritage Dictionary of the English Language, Third Edition, p. 2022.

II. PRACTICAL APPLICATION: OPERATIONS OF METROPOLITAN GOVERNMENT

- EMPLOYEE CONDUCT

Employees of the Metropolitan Government are required to conduct themselves to reflect credit on both themselves and the Metropolitan Government. Rules of Civil Service Commission, § 6.1, "Employee Conduct in General." Included as grounds for disciplinary action of a Civil Service employee are the following actions by an employee:

30. Discrimination on the unlawful basis of race, sex, color, age, religion, national origin, handicap or lawful political or employee group affiliation.

...

32. Any failure of good behavior which reflects discredit upon himself, the department and/or the Metropolitan Government.

33. Conduct unbecoming an employee of the Metropolitan Government.

Rules of Civil Service Commission, § 6.7, "Grounds for Disciplinary Action." A multi-lingual employee, confronted with an inquiry from a non-English speaking resident that the employee understands and to which the employee would voluntarily respond, will be required to decide whether:

> To refuse to communicate with the resident and not answer the question in order to comply with the Ordinance and then be charged with discrimination based upon national origin or behaving in an unbecoming manner in violation of Civil Service Rules, or
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> To communicate with the resident in violation of the Ordinance and be charged with failure of good behavior in failing to follow the mandate of the Ordinance.

- OFFICERS AND OFFICIALS

The broad exception provided in the Ordinance for protecting or promoting public health, safety or welfare or compliance with federal law will require officials and officers of the Metropolitan Government to consider on a

case by case basis each instance where a foreign language may or may not be used in the conduct of the public's business. Given the breadth of both governmental and proprietary services provided by the Metropolitan Government with over 100 boards, departments, and commissions and several thousand employees, the resources that are likely to be consumed in making these determinations will be significant and the potential for inconsistent application of the Ordinance is inevitable.

For example, officials may be called upon to determine:

- Whether non-English assistance may be offered voluntarily by an employee of the Metropolitan Government to a non-English speaking resident seeking to report a water leak in a residence or business.

- Whether signs may be posted on any of the premises of the Metropolitan Government in other than English to encourage the use of the Metropolitan Transit Authority by non-English speaking riders.

- Whether signs announcing an event at the Fair Grounds or the Convention Center may be posted in other than English.

- Whether cleaning crews working under contracts with the Metropolitan Government and in the performance of their duties may speak amongst themselves in other than English.

- Whether a public defender is permitted to speak to a client in other than English when both are capable of speaking in English.

- Whether a police officer, as a liaison with the community, is permitted to speak voluntarily to a non-English speaking resident in other than English except when a crime has been committed or is being investigated.

III. CONSTITUTIONAL ANALYSIS

- EQUAL PROTECTION

Citing the recent U.S. Supreme Court decisions, the Sixth Circuit Court of Appeals has held that "laws that explicitly distinguish between individuals on racial grounds fall within the core of the Equal Protection Clause's prohibition" and no inquiry into legislative intent is needed. *Farm Labor Organizing Committee v. Ohio State Highway Patrol,* 308 F.3d 523, 534 (6th Cir. 2002). The U.S. Supreme Court has indicated that discrimination based upon language usage may be treated as a surrogate for race discrimination and constitute an equal protection violation. *Hernandez v. New York,* 500 U.S. 352, 371-72, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991) ("We would face a quite different case if the prosecutor had justified his peremptory challenges with the explanation that he did not want Spanish-speaking jurors. It may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis.")

In reviewing an "English only" statute passed just after World War I that also included a prohibition on teaching foreign languages to children, the U.S. Supreme Court stated:

> It is said the purpose of the legislation was to promote civic development by inhibiting training and education of the immature in foreign tongues and ideals before they could learn English and acquire American ideals, and 'that the English language should be and become the mother tongue of all children reared in this state.' It is also affirmed that the foreign born population is very large, that certain communities commonly use foreign words, follow foreign leaders, move in a foreign atmosphere, and that the children are thereby hindered from becoming citizens of the most useful type and the public safety is imperiled.
>
> That the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary

> speech, but this cannot be coerced by methods which conflict with the Constitution - a desirable end cannot be promoted by prohibited means.

Meyer v. Nebraska, 262 U.S. 390, 401 43 S.Ct. 625, 627 (1923).

It is the opinion of the Department of Law that a court could determine that the decision to prohibit the use of non-English in all governmental communications (unless they fall within the exception) is a surrogate for racial discrimination and a violation of the Equal Protection Clause.

- DUE PROCESS AND VAGUENESS

A statute is vague and will be found invalid under Due Process principals if it fails to give fair, clearly defined notice of what it prohibits. Vague laws are invalid because:

> First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.
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> Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. ...
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> Third, but related, where a vague statute 'abut(s) upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of (those) freedoms.' Uncertain meanings inevitably lead citizens to "steer far wider of the unlawful zone '. . . than if the boundaries of the forbidden areas were clearly marked.' "

Grayned v. City of Rockford, 408 U.S. 104, 108-109, 92 S.Ct. 2294, 2298-2299 (1972) Due process under Article 1, Section 8 of the Tennessee Constitution requires that laws provide people of ordinary intelligence notice of what is prohibited so they may act accordingly. *City of Knoxville v. Entertainment Resources, LLC*, 166 S.W.3d 650, 655 (Tenn. 2005).

> Vague laws implicating the First Amendment to the United States Constitution and Article I, section 19 of the Tennessee

> Constitution are subject to a more stringent standard than laws in other contexts because of the danger of chilling protected speech. *Davis-Kidd,* 866 S.W.2d at 531. "Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts." *Smith,* 415 U.S. at 573, 94 S.Ct. 1242.

City of Knoxville v. Entertainment Resources, LLC, 166 S.W.3d at 655.

It is the opinion of the Department of Law that a court is likely to find that the Ordinance is unconstitutional under the Tennessee Constitution and the U.S. Constitution due to vagueness. It is vague due to the lack of clarity as to that which constitutes protection or promotion of public health, safety or welfare. Its enforcement in the form of disciplinary action against an employee who violates the Ordinance is likely to be found to be a violation of the employee's due process rights. Further, this vagueness is likely to result in officers and officials of the Metropolitan Government being unable to determine when the Ordinance permits them to use non-English communications and when non-English communication is prohibited leading to a chilling affect as they "steer far wider of the unlawful zone" to avoid breaching their duty to obey the law. *Id.; see also,* 63C Am. Jur. 2d Public Officers and Employees § 250. ("Every public official, whose duties are defined by law, is given the law and must follow it; the law controls the performance of all public officials. An erroneous application of law does not relieve a public official from the obligation to apply and enforce it correctly thereafter.")

- PETITION FOR REDRESS OF GRIEVANCES

The U. S. Supreme Court has held that the right to petition the government for redress of grievances is a fundamental right guaranteed by the First Amendment. *United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass'n,* 389 U.S. 217, 222, 88 S.Ct. 353, 356 (1967). Further, it has held that there is a fundamental right to participate in the political process. *Reynolds v. Sims,* 377 U.S. 533, 562, 84 S.Ct. 1362, 1381 (1964). These First Amendment rights under the U. S. Constitution are applied to the states through the Fourteenth Amendment. *Gitlow v. People of State of New York,* 268 U.S. 652, 666, 45 S.Ct. 625, 630 (1925). The same right is protected in Article I, § 23 of the

Constitution of Tennessee. *State v. Ervin*, 40 S.W.3d 508, 514 (Tenn.Crim.App. 2000).

It is the opinion of the Department of Law that barring non-English speaking residents from communicating with their government infringes upon their rights under both the U. S. Constitution and the Tennessee Constitution, would be presumed unconstitutional, and would require the Ordinance to be subjected to a strict scrutiny analysis. U.S. CONST. amend. I and amend. XIV; TENN. CONST. Art. I, Sec. 23[5]. Further, it is the opinion of the Department of Law that it is unlikely that a court would find the Ordinance was drawn with specificity to meet a compelling governmental interest. *NAACP v. Button,* 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405 (1963); *State v. Ervin*, 40 S.W.3d 508.

- FREE SPEECH

The First Amendment of the U. S. Constitution protects both political speech and political association. *Buckley v. Valeo*, 424 U.S. 1, 14, 96 S.Ct. 612, 632 (1976). Laws that restrict the core First Amendment rights will receive "exacting scrutiny" by the courts. *Buckley v. Valeo*, 424 U.S. at 64. The U.S. Supreme Court held that any law that restricts speech, even if the purpose of the law has nothing to do with communication, will require that the law meet "the high, First-Amendment standard of justification." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 576, 111 S.Ct. 2456, 2465-2466 (1991).

> The First Amendment explicitly protects "the freedom of speech [and] of the press"- oral and written speech - not "expressive conduct." When any law restricts speech, even for a purpose that has nothing to do with the suppression of communication (for instance, to reduce noise, see *Saia v. New York,* 334 U.S. 558, 561, 68 S.Ct. 1148, 1150, 92 L.Ed. 1574 (1948), to regulate election campaigns, see *Buckley v. Valeo,* 424 U.S. 1, 16, 96 S.Ct. 612, 633, 46 L.Ed.2d 659 (1976), or to prevent littering, see *Schneider v. State (Town of Irvington),* 308 U.S. 147, 163, 60 S.Ct. 146, 84 L.Ed. 155

[5] TENN. CONST. Art. I, Sec. 23: That the citizens have a right, in a peaceable manner, to assemble together for their common good, to instruct their representatives, and to apply to those invested with the powers of government for redress of grievances, or other proper purposes, by address or remonstrance.

> (1939)), we insist that it meet the high, First-Amendment standard of justification.

Barnes v. Glen Theatre, Inc., 501 U.S. at 576.

The free speech clause of the First Amendment to the United States Constitution is similar to Article I, section 19 of the Tennessee Constitution. In part, it states that "[t]he free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty." Article 1, section 19 provides protection of free speech rights at least as broad as the First Amendment. *Leech v. Am. Booksellers Ass'n, Inc.,* 582 S.W.2d 738, 745 (Tenn.1979).

> The First Amendment to the United States Constitution and Article I, section 19 of the Tennessee Constitution mandate that laws implicating the area of freedom of expression are required to have a greater degree of specificity than laws in other contexts, so that citizens are not "chilled" from exercising their constitutional right to free expression. *Davis-Kidd Booksellers, Inc. v. McWherter,* 866 S.W.2d 520, 531 (Tenn.1993). "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford,* 408 U.S. 104, 108, 92 S.Ct. 2294, 2298, 33 L.Ed.2d 222 (1972). An ordinance is unconstitutionally vague when a person of "common intelligence must necessarily guess at its meaning." *Broadrick v. Oklahoma,* 413 U.S. 601, 607, 93 S.Ct. 2908, 2913, 37 L.Ed.2d 830 (1973) (quoting *Connally v. General Constr. Co.,* 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926)).

City of Cleveland v. Wade, 206 S.W.3d 51, 58 (Tenn.Ct.App. 2006).

The Ordinance provides that "all communication ... shall be in English." While there are exceptions provided, even if the exceptions were clearly discernable, it is the opinion of the Department of Law that there is a substantial likelihood that the Ordinance will place an undue burden on protected speech due to the overly inclusiveness of the restraint on non-English communications. *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 525 (Tenn. 1993).

> "Overbreadth" is a judicially created doctrine designed to prevent the chilling of protected expression. The doctrine of overbreadth derives from the recognition that an unconstitutional restriction of expression may deter protected speech by parties not before the court and thereby escape judicial review." 16A Am.Jur.2d *Constitutional Law* § 411 (1998). In other words, a statute is overbroad if it "inhibits the First Amendment rights of other parties." *Village of Hoffman Estates*, 455 U.S. at 495, 102 S.Ct. 1186.

Davis-Kidd Booksellers, Inc. v. McWherter, 866 S.W.2d at 525.

As stated above, due to the vagueness of the Ordinance as it relates to the exceptions and the chilling effect that vagueness will have on the speech restricted by the Ordinance as well as the broad sweep of the restrictions required by the Ordinance, it is the opinion of the Department of Law that a court is likely to find that the Ordinance violates the free speech clause.

CONCLUSION

It is the opinion of the Department of Law that a court is likely to find that Substitute Ordinance No. BL2006-1185 is invalid as violative of the Equal Protection Clause of the U.S. Constitution, the Due Process Clause of the U.S. Constitution and the Tennessee Constitution due to its vagueness, the right under both Constitutions to petition the government for the redress of grievances, and the Free Speech provisions of both the Constitution of the United States and the Constitution of the State of Tennessee. As there is no severability clause, it is likely that the entire ordinance is invalid.

THE DEPARTMENT OF LAW OF THE
METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY

Jane B. Cain

Deputy Director of Law
(Acting Director)

cc: Vice Mayor Howard Gentry
Members of the Metropolitan Council