Municipal Technical Advisory Service
INSTITUTE *for* PUBLIC SERVICE

# MEMORANDUM

FROM: Sid Hemsley, MTAS Senior Law Consultant

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RE: Regulating Mailboxes in Rights-of-Way

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You have the following question: Can a municipality in Tennessee through its subdivision regulation authority regulate the construction of masonry type mailboxes within the street rights-of-way outside the city and within its planning region? Apparently, the city plans to pass such regulations by ordinance for the regulation of such mailboxes within the city.

It appears that the *location* of mailboxes is the function of the U.S. Postal Service, and that state and local governments cannot interfere with that function. But state or local government regulations on mailbox construction might be within the police power of municipalities. Surprisingly, there are few cases on that subject.

But I am not sure that a municipality can reach mailbox construction within street-rights-of-way outside the municipality through its subdivision regulation authority. However, Tennessee Code Annotated, title 13, chapter 3, contains the law governing regional planning. Tennessee Code Annotated, ' 13-3-403(a) and (b) provide that:

> [The regional planning commission] shall adopt regulations governing the subdivision of land within its jurisdiction. Such regulations may provide for the harmonious development of the region and its environs; for the coordination of roads within the subdivided land and other existing or planned roads or with the state or regional plan or with the plans of municipalities in or near the region; for adequate open spaces for traffic, light, air and recreation; for the conservation of or production of adequate transportation....Such regulations may include requirements to the extent to which and the manner in which roads shall be graded and improved.

In theory, that authority would support subdivision regulations governing the construction of

mailboxes in the territory within a municipality's planning region outside its municipal boundaries.

**Mailbox Location**

The *location* of mailboxes in street rights-of-way appears to be a U.S. Postal Service function. In the unreported case of Young v. U.S., 2002 WL 313410078 (E.D. Pa.), it is said that for the purposes of the Federal Tort Liability Act, the location of mailboxes is a discretionary function for which the Postal Service was not liable if the location resulted in damage to persons or property:

> Decisions concerning the configuration of mail delivery routes are part and parcel of what Congress described as A...the responsibility of the Postal Service to maintain an efficient system of collection, sorting, and delivery of the mail nationwide. 39 U.S.C. ' 403(b)(1). Each decision made with regard to the level of delivery and service provided to a particular set of postal customers affects the economic efficiency of the Postal Service. Each type of residential postal delivery service (door, box at curb, box across street, cluster box at another location, or general delivery at a post office), has consequences for the Postal Service's economic efficiency, the safety of letter carriers and customers, and the satisfaction of postal patrons. The myriad of administrative decisions of this sort made daily by Postal Service officials are exactly the type of decisions this discretionary function exception was designed to shield from review under the Federal Tort Claims Act. Id. At 858-59. Since the decision of where to place the mailbox for 743 Sackettford Road was a discretionary decision of the United States Postal Service, subject to the discretionary decision exemption to the Federal Tort Claims Act, Plaintiff's negligence claim against the United States is dismissed for lack of subject matter jurisdiction to the extent that it is based upon the location of the mail box....[At 4-5]

Earlier state cases appear to be consistent with Young v. U.S. In Black v. City of Barea, 32 N.E.2d 1 (1941), the Court declared that:

> We are not dealing in this case with a private use of a road. The erection and maintenance of mailboxes upon a post road is a *public use*, being for both the delivery and receipt of mail. Therefore, we must discard all pole and other private-use cases and ascertain to what extent, if any, a municipality may control the erection and maintenance of mailboxes on a post road. [At 3.] [Emphasis is mine.]

The answer to that question was, not much. Acknowledging U.S. Postal Service Rules that required mailboxes to be placed in conformance with the law of the state or the regulation of the officials having supervision over highways, the Court held that such laws or rules had to bow to the paramount postal regulation that mailboxes had to be "accessible to a mail carrier without leaving his vehicle." A postal patron, concluded the Court, could put his mailbox where such accessability was achieved irrespective of any governmental regulations otherwise. Miller v. Nichols, 526 A.2d 794 (Pa. Super. 1987) followed Black, even holding that a postal patron could even put his mailbox within the public right-of-way in which he did not own the underlying fee. In that case the U.S. Postal Service had requested it be placed there to make it accessible for mail delivery.

Even today Postal Service Regulations require that "Boxes must be placed to conform to state laws and highway regulations." and that "Curbside mailboxes must be placed so that they may be safely and conveniently served by carriers without leaving their conveyances...." [**Domestic Mail Manual**, USPS, ' 151.524]

## Mailbox Construction

**Postal Service Regulations**.

But the **Domestic Mail Manual**, also ambiguously addresses the construction of mail boxes. Section 151.523, provides that, "Posts or other supports for curbside mailboxes must be neat and of adequate strength and size....The box may be attached to a fixed or moveable arm." The same regulations also authorize custom boxes with the approval of the postmaster:

> Postmasters are authorized to approve curbside mailboxes constructed by individuals who, for aesthetic or other reasons, do not want to use an approved manufactured box. The custom-built box must conform generally to the same requirements as approved, manufactured boxes relative to the flag, size, strength, and quality of construction. [' 151.521]

It is not entirely clear whether the regulation authorizing postmasters to approve custom-built curbside boxes refers only to the box in which the mail is placed or the structure supporting or containing the box. One thing is clear: "Custom-built" mailboxes of the masonry typeBsome of them quite massive--are common almost everywhere in Tennessee.

**Guide for Erecting Mailboxes on Highways**

There is an excellent mailbox placement *and* construction guide published, circa 1994, by the American Association of State Highway and Transportation Officials: **A Guide For Erecting Mailboxes on Highways**. It covers hazardous mailbox installations, including (but not limited to) masonry type boxes. I suggest the city consider this document as a starting point for

the regulation of mailbox construction in street rights-of-way. In theory, it would help a municipality establish a legal basis for standards for mailbox construction that it adopts. Considering the broad scope of authority and discretion that the postmaster has over mailbox placement, and perhaps even construction, it seems advisable to consult with him, and obtain his buy-in, on any proposed regulations.

## State Law Governing Obstructions on Streets and Highways That Might Support Mailbox Construction Regulations in Street Rights-of-Way

### Generally

It is the law generally that where private activities in or near a street right-of-way pose a hazard to street traffic, a municipality can prohibit or regulate that activity. Indeed, the police power generally pertains to the right of a municipality to impose restrictions on the use of private property through reasonable laws and ordinances that are necessary to secure the safety, health, good order, peace, comfort, protection and convenience of the state or a municipality. That right is broad and well-established. [S & P Enters, Inc. v. City of Memphis, 672 S.W.2d 213 (Tenn. Ct. App. 1983); Rivergate Wine & Liquors, Inc. v. City of Goodlettsville, 647 S.W.2d 631 (Tenn. 1983); Penn-Dixie Cement Corporation v. Kingsport, 225 S.W.2d 270 (Tenn. 1949); Miller v. Memphis, 178 S.W.2d 382 (Tenn. 1944).] The question of whether a police power regulation is reasonable requires a two prong test: First, the regulation must bear some relationship to a legitimate interest protectible by the police powers; second, the regulation may not be unreasonable or oppressive. [Rivergate Wine and Liquors, Inc., v. City of Goodlettsville, above.] Carefully drawn regulations governing obstructions and excavations outside but so near to the traveled portion of the street right-of-way that they are a hazard to traffic safety should meet both prongs of that test.

Unsafe conditions located in street rights-of-way, and outside street rights-of-way but immediately adjacent to it are legitimate traffic safety concerns. In addition, from a risk management perspective, municipalities have repeatedly been held liable for such conditions. [3 A.L.R.2d 6; 98 A.L.R.3d 101; 45 A.L.R.3d 875; 3 A.L.R.4th 770; 60 A.L.R.4th 1249; 95 A.L.R.3d 778; 100 A.L.R.3d 510; 54 A.L.R.2d 1195; 52A.L.R.2d 689; 57 A.L.R.4th 1217; 19 A.L.R.4th 532.]

### Tennessee Tort Liability Act

Tennessee municipalities are liable under the Tennessee Tort Liability Act for unsafe and defective streets and highways, undoubtedly including unsafe and defective shoulders and any other part of the right-of-way. [Tennessee Code Annotated, section 29-20-203. Also see Swafford v. City of Chattanooga, 743 S.W.2d 174 (Tenn. Ct. App. 1987); Baker v. Seal, 694 S.W.2d 948 (Tenn. Ct. App. 1984); Bryant v. Jefferson City, 701 S.W.2d 626 (Tenn. Ct. App. 1985); Fretwell v. Chaffin, 652 S.W.2d 948 (Tenn. Ct. App. 1984); Johnson v. Empe, Inc., 837 S.W.2d 62 (Tenn. Ct. App. 1992).] The Tennessee Tort Liability Act does not define a "street" or "highway." However, a "street" and a "highway" within the meaning of Tennessee Code Annotated, title 55, chapter 8, which contains the state law for the rules of the road, are the same: "the entire width between the boundaries lines of every way when any part thereto is open to the

use of the public for purposes of vehicular travel." [Tennessee Code Annotated, section 55-8-101(21) and (60).] Assuming that the definition of streets and highways is the same for the purposes of the Tennessee Tort Liability Act as it is for Tennessee Code Annotated, title 55, chapter 8, these definitions appear to include the entire street right-of-way.

Municipalities might be liable under the Tennessee Tort Liability Act for injuries or damages arising from a motor vehicle or bicycle striking a masonry type mailbox in or near a street right-of-way. In theory, that liability might be the same as that which applies to utility poles in or near a street right-of-way. In Clayborn v. Tennessee Electric Power Co., 101 S.W.2d (Tenn. 1936), it was held that a power company was not liable for personal injuries caused when a person struck a power pole 26 inches *off the paved edge of the highway*. It is not clear whether the pole was on the shoulder of the street or even still in the right-of-way. The Court reasoned that:

> The general rule established by the modern authorities is that a public utility company lawfully maintaining a pole in or near a public highway is not liable for the damage to a person or property from a vehicle striking a pole, *unless it is erected on the traveled portion of the highway or in such close proximity thereto as to constitute an obstruction dangerous to anyone properly using the highway, and the location of the pole is the proximate cause of the accident*. [Emphasis is mine.]

Utility poles obviously serve a vital public interest by facilitating the delivery of power to homes, businesses and factories, etc. So, too, do mailboxes serve a vital public interest in facilitating the delivery of mail. But there is a difference: the rigidity and strength of utility poles is probably essential to the delivery of power, whereas, the rigidity of masonry type mail boxes is not essential to the delivery of mail. I am not sure what, if anything, the courts would make of such a distinction.

As far as I can determine there has been no case under the Tennessee Tort Liability Act based on damage to a motorist arising from a condition on private property entirely outside the boundary of the street right-of-way. But governments have been held liable for damages arising from such conditions in a significant number of cases in the United States. The same is true with respect to pedestrians in Tennessee in cases that pre-date the Tennessee Tort Liability Act, but that probably still apply to the application of that Act to streets as well as sidewalks. In City of Knoxville v. Baker, 150 S.W.2d 224 (Tenn. 1941), the question was whether the city was liable for injury to a pedestrian who voluntarily stepped off a sidewalk and tripped over a steel water cut-off rod projecting 18 inches above ground, but located 18-21 inches off the sidewalk and entirely upon private property and owned entirely by the property owner. The Tennessee Supreme Court held the city not liable for the injury on the ground that when he was injured, the pedestrian was a voluntary trespasser on private property. But in doing so the Court rejected the city's argument that it was not liable because "its duty of keeping the street and sidewalk clear of obstructions extended only to the limits of the streets 'as made and used'; that it was under no duty to go upon private premises and remove the water cutoff or erect a barrier along the side of the walk to prevent persons from straying off the sidewalk and into a place of danger." The rule

in Tennessee, declared the Court is:

> We think the true rule may be stated to be, that if an obstruction or excavation be permitted which renders the alley, street, or highway unsafe or dangerous to persons or vehicles--whether it lie immediately in or on the alley, street, or highway, *or so near it as to produce the danger to the passer at any time when he shall properly desire to use such highway*,--it is such a nuisance as renders the corporation liable.... [Emphasis is mine.]....A party bound to keep a highway in repair and open for the passage of the public in a city by night or by day, certainly cannot be held to perform that duty by simply keeping the area of the highway free, while along its edge there is a well or excavation uninclosed, into which the passer, *by an inadvertent step or an accidental stumble*, might fall at any time. [Citing Niblett v. Nashville, 59 Tenn. 684, 12 Heisk. 684, 686-689, 27 Am. Rep. 755. [At 226-227.] [Italics the court's.]

The Court pointed to 25 Am.Jur., p.184, section 531, for support:

> As a general rule, the duty of a municipal or quasi-municipal corporation or of a private individual to guard excavations or other dangerous places or hazards and the resulting liability for failure to do so exists only when such places are substantially adjoining the way, or in such close proximity thereto as to be dangerous, under ordinary circumstances, to travelers thereon who, using ordinary care, or, as it is sometimes stated, where they are so located that a person walking on the highway might, by making a false step or movement, or be affected with a sudden giddiness, or by other accident, come into contact therewith. No definite rule can be laid down as to how far a dangerous place must be from the highway in order to cease to be in close proximity to it, but the question is a practical one, to be determined with regard to the circumstances of the particular case. In the determination of the question whether a defect or hazard is in such close proximity to the highway as to render traveling upon it unsafe, that proximity must be considered with reference to the highway 'as traveled and used for the public travel,' rather than as located, and the proper test for determining the necessity for a barrier or liability for injury, is whether the way would be dangerous to a traveler so using it rather than the distance from it of the dangerous object or place. The mere fact that the space adjoining the highway is unsafe for travel is not enough to impose such liability, and none exists, either on the part of the municipality or of the owner of the premises, if, in order to reach the danger, one must become an intruder or voluntary trespasser on the premises of another. The fact that the injury occurs on the

> adjoining premises does not necessarily preclude a recovery, however where the traveler is not a voluntary trespasser. Furthermore, if the traveler is forced to leave the highway in order to pass around an obstruction placed by the landowner, the latter is liable for injury resulting from a dangerous condition on his premises even though the condition was not in such close proximity to the highway as to render him liable under ordinary circumstances. [At 226.]

[Also see Niblett v. Mayor of Nashville, 59 Tenn. 684 (Tenn. 1874); McHargue v. Newcomer & Co., 100 S.W. 700 (Tenn. 1906); Chattanooga v. Evatt, 14 Tenn. App. 474 (1932).]

As City of Knoxville v. Baker suggests, where a motorist suffers damage from an obstruction or an excavation entirely outside the street right-of-way, the question of the obstruction's or excavation's distance outside the street right-of-way is a practical one; there is no hard, fast rule. In that case the plaintiff was injured on private property when he voluntarily left a sidewalk of ample width and in good condition. However, reason dictates that generally, the nearer the excavation to the edge of the right-of-way in general, and to the traveled portion of the street in particular, the more likely it is that municipal liability will be found.

The cases from other jurisdictions on unsafe and defective streets indicate that liability will most likely be found where the obstruction is on the traveled portion of the roadway, including the shoulder, less likely be found where the obstruction is off the shoulder, and even less likely to be found when the obstruction is entirely outside the boundary of the right-of-way. [See 19 A.L.R.4th 532.] The question of liability in any of those categories is complicated by a multitude of factors to the extent that it is difficult to fashion any exact rules governing liability. Many of the cases in which a municipality has been found liable for damages arising from motorists striking obstructions outside the boundaries of the street right-of-way involve dead end streets or sharp curves of which motorists were not warned, and other unusual conditions related to the nature and condition of the traveled portion of the roadway. [See Chattanooga v. Evatt, 14 Tenn. App. 474 (1932).] Generally, it appears that to recover damages for striking an obstruction entirely outside the street right-of-way, the motorist must show that a defect or unsafe condition in the traveled portion of the street itself caused him to strike the obstruction.