

## ARTICLE 13-5: NIMLO MODEL ANTI-GRAFFITI ORDINANCE

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### SECTION 13-501. Purpose and Intent.

The City Council of \_\_\_\_\_ is enacting this Ordinance to help prevent the spread of graffiti vandalism and to establish a program for the removal of graffiti from public and private property. The Council is authorized to enact this Ordinance pursuant to its police powers, as specified in Section \_\_\_\_\_ of the City Charter and \_\_\_\_\_ [state code] that authorize the City, under certain circumstances, to provide for the removal of graffiti from private and public property.

The Council finds that graffiti is a public nuisance and destructive of the rights and values of property owners as well as the entire community. Unless the City acts to remove graffiti from public and private property, the graffiti tends to remain. Other properties then become the target of graffiti, and entire neighborhoods are affected and become less desirable places in which to be, all to the detriment of the City.

The City Council intends, through the adoption of this Ordinance, to provide additional enforcement tools to protect public and private property from acts of graffiti vandalism and defacement. The Council does not intend for this Ordinance to conflict with any existing anti-graffiti state laws.

### SECTION 13-502. Definitions.

For the purposes of this Ordinance, the following words shall have the meanings respectively ascribed to them in this Section, except where the context clearly indicates a different meaning:

(a) *Aerosol paint container* means any aerosol container that is adapted or made for the purpose of applying spray paint or other substances capable of defacing property.

(b) *Broad-tipped marker* means any felt tip indelible marker or similar implement with a flat or angled writing surface that, at its broadest width, is greater than one-fourth (1/4th) of an inch, containing ink or other pigmented liquid that is not water soluble.

(c) *Etching equipment* means any tool, device, or substance that can be used to make permanent marks on any natural or man-made surface.

(d) *Graffiti* means any unauthorized inscription, word, figure, painting or other defacement that is written, marked, etched, scratched, sprayed, drawn, painted, or engraved on or otherwise affixed to any surface of public or private property by any graffiti implement, to the extent that the graffiti was not authorized in advance by the owner or occupant of the property, or, despite advance authorization, is otherwise deemed a public nuisance by the City Council.

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(e) *Graffiti implement* means an aerosol paint container, a broad-tipped marker, gum label, paint stick or graffiti stick, etching equipment, brush or any other device capable of scarring or leaving a visible mark on any natural or man-made surface.

(f) *Paint stick or graffiti stick* means any device containing a solid form of paint, chalk, wax, epoxy, or other similar substance capable of being applied to a surface by pressure and leaving a mark of at least one-eighth (1/8th) of an inch in width.

(g) *Person* means any individual, partnership, cooperative association, private corporation, personal representative, receiver, trustee, assignee, or any other legal entity.

### SECTION 13-503. Prohibited Acts.

(a) *Defacement*. It shall be unlawful for any person to apply graffiti to any natural or man-made surface on any city-owned property or, without the permission of the owner or occupant, on any non-city-owned property.

#### (b) Possession of Graffiti Implements

(1) *By Minors at or Near School Facilities*. It shall be unlawful for any person under the age of eighteen (18) years to possess any graffiti implement while on any school property, grounds, facilities, buildings, or structures, or in areas immediately adjacent to those specific locations upon public property, or upon private property without the prior written consent of the owner or occupant of such private property. The provisions of this Section shall not apply to the possession of broad-tipped markers by a minor attending or traveling to or from a school at which the minor is enrolled if the minor is participating in a class at the school that formally requires the possession of broad-tipped markers. The burden of proof in any prosecution for violation of this Section shall be upon the minor student to establish the need to possess a broad-tipped marker.

(2) *In Designated Public Places*. It shall be unlawful for any person to possess any graffiti

implement while in or upon any public facility, park, playground, swimming pool, recreational facility, or other public building or structure owned or operated by the City or while in or within fifty (50) feet of an underpass, bridge abutment, storm drain, or similar types of infrastructure unless otherwise authorized by the City.

### SECTION 13-504. Accessibility to Graffiti Implements.

(a) *Furnishing to Minors Prohibited*. It shall be unlawful for any person, other than a parent or legal guardian, to sell, exchange, give, loan, or otherwise furnish, or cause or permit to be exchanged, given, loaned, or otherwise furnished, any aerosol paint container, broad-tipped marker, or paint stick to any person under the age of eighteen (18) years without the written consent of the parents or guardian of the person.

#### (b) Display and Storage.

(1) Every person who owns, conducts, operates, or manages a retail commercial establishment selling aerosol paint containers, paint sticks, or broad-tipped markers shall store the containers, sticks or markers in an area continuously observable, through direct visual observation or surveillance equipment, by employees of the retail establishment during the regular course of business.

(2) In the event that a commercial retail establishment is unable to store the aerosol paint containers, paint sticks, or broad-tipped markers in an area as provided above, the establishment shall store the containers, sticks, and markers in an area not accessible to the public in the regular course of business without employee assistance.

(c) *Signage Required*. Every person who operates a retail commercial establishment selling graffiti implements shall:

(1) Place a sign in clear public view at or near the display of such products stating: "Graffiti is against the law." Any person who defaces real or

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personal property with paint or any other liquid or device is guilty of a crime punishable by imprisonment of up to \_\_\_\_\_ days and/or a fine up to \$ \_\_\_\_\_."

(2) Place a sign in the direct view of such persons responsible for accepting customer payment for graffiti implements stating: "Selling spray paint, paint sticks, or broad-tipped markers to persons under 18 years of age is against the law and punishable by a fine of \$ \_\_\_\_\_."

### SECTION 13-505. Penalties.

(a) Fines and Imprisonment. Any person violating this Ordinance shall be punished by a fine of two hundred and fifty dollars (\$250.00) for the first offense; five hundred dollars (\$500.00) for the second offense; and one-thousand dollars (\$1,000.00) for each subsequent offense, or by imprisonment in the City jail for a term not to exceed sixty (60) days, or by both fine and imprisonment at the discretion of the court.

(1) In the case of a minor, the parents or legal guardian shall be jointly and severally liable with the minor for payment of all fines.

(2) Failure of the parents or legal guardian to make payment will result in the filing of a lien on the parents' or legal guardian's property that includes the fine and administrative costs.

(3) Upon an application and finding of indigence, the court may decline to order fines against the minor, parents or guardian.

(b) Restitution. In addition to any punishment specified in this Section, the court shall order any violator to make restitution to the victim for damages or loss caused directly or indirectly by the violator's offense in the amount or manner determined by the court. In the case of a minor, the parents or legal guardian shall be ordered jointly and severally liable with the minor to make the restitution.

(c) Forfeiture of Personal Property. All personal property, including, but not limited to, automobiles, motorcycles and bicycles, used or intended to be used in violating this Ordinance shall be forfeitable to the City. In forfeiting such personal property, the City shall follow the procedures outlined in \_\_\_\_\_ of the City Code concerning forfeitures of personal property. In any forfeiture proceeding under this Section, the court shall not order a forfeiture unless it finds that the forfeiture is commensurate with the severity of the violation to the extent required by the \_\_\_\_\_ [state] and United States constitutions.

(d) Community Service. In-lieu of, or as part of, the penalties specified in this Section, a minor or adult may be required to perform community service as described by the court based on the following minimum requirements:

(1) The minor or adult shall perform at least thirty (30) hours of community service.

(2) At least one parent or guardian of the minor shall be in attendance a minimum of fifty percent (50%) of the period of assigned community service.

(3) The entire period of community service shall be performed under the supervision of a community service provider approved by the Chief of Police.

(4) Reasonable effort shall be made to assign the minor or adult to a type of community service that is reasonably expected to have the most rehabilitative effect on the minor or adult, including community service that involves graffiti removal.

(5) Any minor determined to be a ward of the court under \_\_\_\_\_ [state law] as a result of committing an offense in the City shall be required, at the City's option, to perform community service, including graffiti removal service of not less than thirty (30) hours nor more than eighty (80) hours.

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(e) **Civil Responsibility for Damages for Wrongful Sale, Display or Storage.** Any person who sells, displays or stores, or permits the sale, display or storage, of any graffiti implement in violation of the provisions of this Ordinance shall be personally liable for all costs, including attorney's fees and court costs, incurred by any party in connection with the removal of graffiti, the repair of any property containing graffiti, or such party's prosecution of a civil claim for reimbursement or damages resulting from such graffiti removal or property repair, arising from the use by any person of such wrongfully sold, displayed or stored graffiti implement in violation of the provisions of this Ordinance, provided that such liability shall not exceed \$1,500.

### **SECTION 13-506. Rewards and Reimbursements for Information.**

(a) Pursuant to \_\_\_\_\_ of the City Code, the City may offer a reward in an amount to be established by resolution of the City Council for information leading to the identification and apprehension of any person who willfully damages or destroys any public or private property by the use of graffiti. In the event of damage to public property, the offender or the parents or legal guardian of any unemancipated minor must reimburse the City for any reward paid. In the event of multiple contributors of information, the reward amount shall be divided by the City in the manner it shall deem appropriate.

(b) Claims for rewards under this Section shall be filed with the City in the manner specified by the City Council.

(c) No claim for a reward shall be allowed unless the City investigates and verifies the accuracy of the claim and determines that the requirements of this Section have been satisfied.

(d) The City shall reimburse to any person reporting by means of a mobile or cellular phone an act of graffiti vandalism or existence of graffiti within the City the amount of the direct phone charges, exclusive of taxes, incurred by the person.

### **SECTION 13-507. Graffiti as Nuisance.**

(a) The existence of graffiti on public or private property in violation of this Ordinance is expressly declared to be a public nuisance and, therefore, is subject to the removal and abatement provisions specified in this Ordinance.

(b) It is the duty of both the owner of the property to which the graffiti has been applied and any person who may be in possession or who has the right to possess such property to at all times keep the property clear of graffiti.

### **SECTION 13-508. Removal of Graffiti by Perpetrator.**

Any person applying graffiti on public or private property shall have the duty to remove the graffiti within twenty-four (24) hours after notice by the City or private owner of the property involved. Such removal shall be done in a manner prescribed by the Chief of Police, the Director of the Department of Public Works, or any additional City department head, as authorized by the City Council. Any person applying graffiti shall be responsible for the removal or for the payment of the removal. Failure of any person to remove graffiti or pay for the removal shall constitute an additional violation of this Ordinance. Where graffiti is applied by an unemancipated minor, the parents or legal guardian shall also be responsible for such removal or for the payment for the removal.

### **SECTION 13-509. Removal of Graffiti by Property Owner or City.**

If graffiti is not removed by the perpetrator according to Section 13-508, graffiti shall be removed pursuant to the following provisions:

(a) **Property Owner Responsibility.** It is unlawful for any person who is the owner or who has primary responsibility for control of property or for repair or maintenance of property in the City to permit property that is defaced with graffiti to remain

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defaced for a period of ten (10) days after service by first class mail of notice of the defacement. The notice shall contain the following information:

(1) The street address and legal description of the property sufficient for identification of the property;

(2) A statement that the property is a potential graffiti nuisance property with a concise description of the conditions leading to the finding;

(3) A statement that the graffiti must be removed within ten (10) days after receipt of the notice and that if the graffiti is not abated within that time the City will declare the property to be a public nuisance, subject to the abatement procedures in City Code Section 13-509; and

(4) An information sheet identifying any graffiti removal assistance programs available through the City and private graffiti removal contractors.

(b) Exceptions to Property Owner Responsibility. The removal requirements of subsection (a) above shall not apply if the property owner or responsible party can demonstrate that:

(1) The property owner or responsible party lacks the financial ability to remove the defacing graffiti; or

(2) The property owner or responsible party has an active program for the removal of graffiti and has scheduled the removal of the graffiti as part of that program, in which case it shall be unlawful to permit such property to remain defaced with graffiti for a period of fifteen (15) days after service by first class mail of notice of the defacement.

(c) Right of City to Remove.

(1) Use of Public Funds. Whenever the City becomes aware or is notified and determines that graffiti is located on publicly or privately owned property viewable from a public or quasi-public place, the City shall be authorized to use public funds

for the removal of the graffiti, or for the painting or repairing of the graffiti, but shall not authorize or undertake to provide for the painting or repair of any more extensive an area than that where the graffiti is located, unless the City Manager, or the designee of the City Manager, determines in writing that a more extensive area is required to be repainted or repaired in order to avoid an aesthetic disfigurement to the neighborhood or community, or unless the property owner or responsible party agrees to pay for the costs of repainting or repairing the more extensive area.

(2) Right of Entry on Private Property. Prior to entering upon private property or property owned by a public entity other than the City for the purpose of graffiti removal the City shall attempt to secure the consent of the property owner or responsible party and a release of the City from liability for property damage or personal injury. If the property owner or responsible party fails to remove the offending graffiti within the time specified by this Ordinance, or if the City has requested consent to remove or paint over the offending graffiti and the property owner or responsible party has refused consent for entry on terms acceptable to the City and consistent with the terms of this Section, the City shall commence abatement and cost recovery proceedings for the graffiti removal according to the provisions specified below.

(d) Abatement and Cost Recovery Proceedings.

(1) Notice of Due Process Hearing. The City Manager, or the designee of the City Manager, serving as the Hearing Officer, shall provide the property owner of record and the party responsible for the maintenance of the property, if a person different than the owner, not less than forty-eight (48) hours notice of the City's intent to hold a due process hearing at which the property owner or responsible party shall be entitled to present evidence and argue that the property does not constitute a public nuisance. Notice shall be served in the same manner as a summons in a civil action in accordance with \_\_\_\_\_ of the City Code. If the owner of record cannot be found after a diligent search, the notice may be served by posting a copy thereof in a conspicuous place upon the property for

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a period of ten (10) days and publication thereof in a newspaper of general circulation published in the area in which the property is located pursuant to \_\_\_\_\_ of the City Code.

(2) **Determination of Hearing Officer.** The determination of the Hearing Officer after the due process hearing shall be final and not appealable. If, after the due process hearing, regardless of the attendance of the Owner or the responsible party or their respective agents, the Hearing Officer determines that the property contains graffiti viewable from a public or quasi-public place, the Hearing Officer shall give written notice in an eradication order that, unless the graffiti is removed within ten (10) days, the City shall enter upon the property, cause the removal, painting over (in such color as shall meet with the approval of the Hearing Officer), or such other eradication thereof as the Hearing Officer determines appropriate, and shall provide the Owner and the responsible party thereafter with an accounting of the costs of the eradication effort on a full cost recovery basis.

(3) **Eradication Effort.** Not sooner than the time specified in the order of the Hearing Officer, the City Manager, or the designee of the City Manager, shall implement the eradication order and shall provide an accounting to the Owner and the responsible party of the costs thereof.

(4) **Cost Hearing.** The Owner or responsible party may request a cost hearing before the Hearing Officer on the eradication accounting, and appropriate due process must be extended to the Owner or responsible party. If following the cost hearing or, if no hearing is requested, after the implementation of the eradication order, the Hearing Officer determines that all or a portion of the costs are appropriately chargeable to the eradication effort, the total amount set forth in the eradication accounting, or an amount thereof determined as appropriate by the Hearing Officer, shall be due and payable by the Owner or responsible party within thirty (30) days. Any amount of eradication charges assessed by the Hearing Officer that are less than the

total amount set forth in the eradication accounting shall be explained by written letter from the Hearing Officer to the City Council.

(5) **Lien.** As to such property where the responsible party is the property owner, if all or any portion of the assessed eradication charges remain unpaid after thirty (30) days, pursuant to the authority created by \_\_\_\_\_ [state law], the portion thereof that remains unpaid shall constitute a lien on the property that was the subject of the eradication effort. The Director of Public Works shall present a Resolution of Lien to the City Council, and upon passage and adoption thereof, shall cause a certified copy of the Lien to be recorded with the City Clerk's Office.

### SECTION 13-510. Ease of Removal Provisions.

(a) **Common Utility Colors and Paint-type.** Any gas, electric, telephone, water, sewer, cable, telephone and other utility operating in the City shall paint its above-surface metal fixtures with a uniform paint type and color that meets with the approval of the City Manager.

(b) **Condition Encroachment Permits.** All encroachment permits issued by the City shall, among such other things, be conditioned on:

(1) The permittee's application of an anti-graffiti material to the encroaching object of a type and nature that is acceptable to the City Manager, or the City Manager's designee;

(2) The permittee's immediate removal of any graffiti;

(3) The City's right to remove graffiti or to paint the encroaching object; or

(4) The permittee's providing the City with sufficient matching paint and/or anti-graffiti material on demand for use in the painting of the encroaching object containing graffiti.

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(c) **Condition Tentative Maps.** In approving tentative or parcel maps, conditional use permits, variances, or other similar land use entitlements, the City shall consider imposing any or all of the following conditions, or other similar or related conditions, at the public hearing required by law for approval of the tentative or parcel map, conditional use permit, variance or other similar land use entitlement:

(1) **Use of Anti-Graffiti Material.** Developer shall apply an anti-graffiti material of a type and nature that is acceptable to the City Manager, or the designee of the City Manager, to the publicly viewable surfaces on the improvements to be constructed at the site deemed by the City Manager, or designee, to be likely to attract graffiti;

(2) **Right of Access to Remove Graffiti.** Developer shall grant, prior to resale of any of the parcels that are within the territory of the map, the right of entry over and access to such parcels, upon forty-eight (48) hours posting of notice by authorized City employees or agents, to the City for the purpose of removing or painting over graffiti;

(3) **Supply City with Graffiti-Removal Material.** Developer shall, for a period of two (2) years after the resale of the final lot, provide the City with sufficient matching paint and/or anti-graffiti material on demand for use in the painting over or removal of graffiti; or

(4) **Owner to Immediately Remove Graffiti.** Developer shall, either as part of the general conditions, covenants and restrictions, or separate covenants recorded against individual lots, prior to resale of any of the parcels, covenant in a form satisfactory to the City that the owner of the lots shall immediately remove any graffiti placed thereon.

### SECTION 13-511. Prevention Provisions.

(a) **Design of Potential Graffiti-Attracting Surfaces.** Any applicant for design review approval, conditional use permit, special use permit,

unclassified use permit, development agreement, or other form of development or building permit shall, to the extent deemed feasible by the City Manager, or the designee of the City Manager, have designed any building structures visible from any public or quasi-public place in such a manner to consider prevention of graffiti, including, but not limited to the following:

(1) Use of a protective coating to provide for the effective and expeditious removal of graffiti;

(2) Use of additional lighting;

(3) Use of non-solid fencing;

(4) Use of landscaping designed to cover large expansive walls such as ivy or similar clinging vegetation; or

(5) Use of architectural design to break up long, continuous walls or solid areas.

(b) **Retro-Fit Existing Graffiti-Attracting Surfaces; Non-Residential Structures.** The following provisions may be incorporated in a graffiti eradication order during an abatement hearing, at the discretion of the Hearing Officer.

(1) **At Owner's Expense.** Any surface of a structure on a parcel of land used for non-residential purposes that has been defaced with graffiti more than five (5) times in twelve (12) months shall be declared a public nuisance and required to be retrofitted, at the cost of the property owner, with features or qualities as may be established by the City as necessary to reduce the attractiveness of the surface for graffiti, or as necessary to permit more convenient or efficient removal of graffiti. In exercising the authority hereunder, the City may not impose a cost on the property owner of greater than \$ \_\_\_\_\_.

(2) **At City' Cost.** The owner of property used for non-residential purposes on which is located a surface of a structure that has been defaced with graffiti more than five (5) times in twelve (12) months shall permit the City to enter the property and, at the City's cost, make modifications as necessary to

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reduce the attractiveness of the surface for graffiti, or as necessary to permit more convenient or efficient removal of graffiti.

### **SECTION 13-512. Trust Fund.**

The City Council hereby creates the City of \_\_\_\_\_ Anti-Graffiti Trust Fund. Penalties assessed against violators of this Ordinance shall be placed in the fund, along with any monetary donations received from persons wishing to contribute to the fund. The Council shall direct the expenditures of monies in the fund. Such expenditures shall be limited to the payment of the cost of graffiti removal, the payment, at the discretion of the City Manager, of rewards for information leading to the conviction of violation of the Ordinance, the costs of administering the Ordinance, and such other public purposes as may be approved by the Council by resolution.

### **SECTION 13-513. Severability.**

Severability is intended throughout and within the provisions of the Ordinance. If any section, subsection, sentence, clause, phrase or portion of this Ordinance is held to be invalid or unconstitutional by a court of competent jurisdiction, then that decision shall not affect the validity of the remaining portions of this Ordinance.

## **GRAFFITI: EDITOR'S COMMENTARY**

### **I. Introduction**

#### **A. Graffiti Affects Large and Small Communities**

Graffiti vandalism has grown from an exclusively big city or urban concern to a problem that now affects even the smallest communities. Graffiti vandals, whether acting as members of street gangs or tagging crews or as independent "artists," have inflicted billions of dollars worth of damage on public and private property. According to a 1990 estimate prepared by the National Graffiti Information Network, the cost of cleaning up and replacing graffitied surfaces exceeds \$4 billion annually.

#### **B. The Need for a Comprehensive Approach**

Adopting an anti-graffiti ordinance should be but one part of a local government's comprehensive approach to eradicating or, at least, containing a graffiti vandalism problem. A comprehensive approach involves implementing an anti-graffiti program that contains three essential elements: (1) education and prevention; (2) law enforcement; and (3) community involvement and graffiti removal. To develop and implement such an approach, a local government should create an anti-graffiti department and/or anti-graffiti task force charged with coordinating public and private prevention and removal efforts.

##### **1. Education and Prevention**

Based on statistics that show that most graffiti is created by minors, the education and prevention element of an anti-graffiti program should primarily focus on teaching children that graffiti vandalism is unlawful and to channel their energies toward more constructive activities. Several school systems have adopted an anti-graffiti curriculum that includes classroom programs designed to illustrate the negative impact of graffiti vandalism on a community. Local

governments also have established youth diversion activities including mural programs that encourage artistic expression through a lawful medium.

In addition to education programs aimed at minors, several local governments have enacted "responsible retailer" programs as a supply side measure intended to further restrict the availability of graffiti implements to minors. Those programs, either by ordinance or policy, create graffiti implement display restrictions, require store clerks to check customer age identification, and furnish sample signs for merchants to post that state that the sale of spray paint to minors is unlawful (see NIMLO Model § 13-504).

##### **2. Law Enforcement**

Law enforcement measures rely on both local ordinances and state laws to apprehend and punish graffiti perpetrators and to abate graffiti as a public nuisance. In addition to imposing traditional civil and criminal penalties, many local governments also require graffiti vandals to perform community service. Some local governments also hold the parents or guardians of convicted minors liable for graffiti damage.

##### **3. Community Involvement and Graffiti Removal**

Several communities have established reward programs and "graffiti hotlines" to encourage citizens to report graffiti vandalism. To facilitate prompt removal of graffiti, those communities have created "rapid response" teams of local government employees. Local governments also have recruited volunteers to help with removal efforts and equipped those volunteers with donated paint and other supplies.

#### **C. One Part of the Approach**

The NIMLO Model Anti-Graffiti Ordinance is designed to assist local government attorneys in

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drafting similar regulatory language to address graffiti vandalism issues. As explained above, an ordinance based on the NIMLO Model should be but one part of a local government's comprehensive anti-graffiti program.

### II. Drafting Guidelines and Legal Analysis

The following commentary will summarize the provisions of the NIMLO Model and discuss certain alternative provisions that a drafter may wish to consider. An ordinance that is less or more specific than the NIMLO Model may better serve the needs of the community and still pass legal scrutiny, provided that it contains the essential elements discussed below.

#### A. Purpose and Intent

In this section the drafter may identify and quantify the graffiti problem that the ordinance is intended to address. Often, statements of purpose and intent express concern about the deterioration of the property values of graffitied property and those lands adjacent to graffitied property.

This section also references the local government's authority for enacting the anti-graffiti measures (e.g., pursuant to state law or home rule powers). Although a state law may specifically authorize local governments to enact measures to abate nuisances including graffiti (see, e.g., Cal. Gov't Code §§ 38771, 38773 (West Supp. 1995), other state laws specifically addressing graffiti may preempt similar local legislation. For example, California law contains significant anti-graffiti vandalism provisions: Cal. Penal Code § 594(a)(1) (West Supp. 1995) (graffiti vandalism prohibition); Cal. Penal Code § 594.5 (West 1988) (sale or furnishing to minors of spray paint prohibition); and Cal. Veh. Code § 13202.6 (West Supp. 1995) (suspension or delay of issuance of motor vehicle license to persons age 13 to 21 convicted of graffiti offense).

In *Sherwin-Williams v. City of Los Angeles*, 844 P.2d 534 (Cal. 1993), several paint companies asserted that the California law prohibiting the sale of

aerosol paint cans to minors preempts a Los Angeles ordinance that regulates the retail display of aerosol paint cans and large-tip markers. The California Supreme Court found no preemption because the law defines and addresses the actual transfer and possession of spray paint, while the ordinance only regulates the display of spray paint, as well as markers. *Id.* at 542.

#### B. Definitions

In order to avoid First Amendment concerns, the NIMLO Model's definition of "graffiti" does not include any reference to religious, racial, gender or ethnic based speech but, rather, includes all unauthorized writings, markings, etchings, etc. (see NIMLO Model § 13-502(d)). As one writer has noted, the United States Supreme Court in *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992), struck down a disorderly conduct ordinance that also included a prohibition against graffiti that "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion, or gender." See Thomas M. Canan, *Controlling Gang Graffiti: A Framework for a Public-Private Partnership*, 1995 NIMLO Mid-Year Seminar Paper at page 4. The Court determined that the ordinance's prohibition was content regulation and, therefore, in violation of the First Amendment.

The NIMLO Model's definition of "graffiti" does, however, contain comprehensive language intended to include all types of graffiti vandalism. For example, the definition refers to "etching," a relatively recent type of graffiti whereby graffiti vandals use very hard and sharp objects to etch words, designs, and other markings on glass or other surfaces (see NIMLO Model § 13-502(c),(d)).

To avoid prohibiting legitimate artwork, the Model's graffiti definition only includes markings that are unauthorized or otherwise deemed by the city council to be public nuisances. Thus, a property owner is not absolutely prohibited from authorizing graffiti-type artwork, such as a mural painting, for decorative purposes.

## Graffiti - Editor's Commentary

### C. Prohibitions and Anti-Vandalism Provisions

The NIMLO Model's general prohibition against graffiti vandalism does not raise First Amendment concerns because the ordinance is addressing an illegal activity, the unauthorized defacement of property, that is not shielded by the Constitution. Similar to imposing a total ban on obscenity, which has no First Amendment protection, a local government may absolutely prohibit graffiti vandalism.

As discussed above in the definition section, the NIMLO Model also avoids First Amendment concerns by restricting all unauthorized graffiti, without reference to the graffiti's content. Such neutral restrictions are less vulnerable to constitutional challenge.

### D. Display Restrictions and Limiting Access

An increasing number of local governments are imposing restrictions on the retail display of aerosol paint cans and wide-tip markers to discourage the theft of potential graffiti implements. "Responsible retailer" measures typically require sellers of spray paint and wide-tip markers to only display the items in areas that are continuously observable by store employees. If a retailer cannot comply with that provision, then the seller must store the spray paint or markers in an area only accessible with employee assistance (see NIMLO Model § 13-503).

The effectiveness of the latter "lock-up" restriction is often questioned, as graffiti vandals continue to find a readily available supply of spray paint and markers or they turn to other graffiti implements and techniques, including etching. However, regardless of the effectiveness of the restriction, at least one court has upheld the constitutionality of a lock-up display provision. In *Sherwin-Williams v. City and County of San Francisco*, 857 F. Supp. 1355 (N.D. Cal. 1994), several retailers and manufacturers of markers and spray paint challenged the constitutionality of the city's lock-up requirement, which prohibits retailers from displaying markers or spray paint for sale unless they were maintained in places accessible only

with employee assistance. The retailers asserted that the ordinance violated the Commerce and Equal Protection Clauses of the Constitution and right of substantive due process; exceeded the city's police powers; and was overbroad and vague. *Id.* at 1356.

In response to the Commerce Clause challenge, the court found that the display restriction applies evenhandedly to both interstate and intrastate commerce and the burden that the restriction imposed was minimal in light of the potential benefit to the city. *Id.* at 1369. However, the court noted that the "benefit" of the restriction may only be in discouraging graffiti by less committed taggers who do not seek alternative sources for spray paint and markers. *Id.*

Recognizing that the judiciary must grant a governmental body broad discretion in drafting legislation, the court found that the city had not exceeded its police powers by enacting the display ordinance. *Id.* at 1370. The court concluded that the city reasonably could have concluded that the ordinance would reduce graffiti. *Id.*

For the equal protection and substantive due process claims, the court applied the lower, rational basis test because the ordinance did not affect a suspect class or fundamental right required for a higher level of scrutiny. *Id.* at 1371. The court found that the ordinance was rationally related to a legitimate governmental purpose in rejecting those claims. *Id.* Further, the court stated that the ordinance was not unconstitutionally underinclusive by only restricting spray paint and felt-tip marker displays. *Id.* The city's board had decided to focus its energies on restricting only the most commonly available graffiti implements rather than also prohibiting all available substitutes. *Id.* at 1371-72, quoting *Minnesota v. Cloverleaf Creamery Co.*, 449 U.S. 456 (1935) (finding that legislation is not required to strike at all evils at the same time or in the same manner).

Finally, the court found the overbreadth and vagueness challenges without merit because the ordinance affected no First Amendment rights and the scope of the ordinance's terms and definitions was

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obvious. *Id.* at 1372. The court emphasized that the only activity impacted by the ordinance is the retail sale of the paint and markers, and that such a retail restriction does not implicate speech or expressive activity. *Id.* Further, the court noted that the ordinance did not restrict the lawful use of the materials for First Amendment purposes. *Id.*

As a more extreme measure intended to limit access to, and availability of, certain graffiti implements, the City of Chicago enacted an ordinance that absolutely prohibits the sale of spray paint and jumbo indelible markers. The United States Court of Appeals for the Seventh Circuit upheld that prohibition in *National Paint & Coatings Assoc. v. City of Chicago*, 45 F.3d 1124 (7th Cir. 1995), *petition for cert. filed*, 63 U.S.L.W. 3788 (U.S. April 24, 1995) (No. 94-1739).

Several companies that sell spray paint and the prohibited markers had successfully challenged the Chicago ordinance at the district court level on the grounds that the ban violated the Commerce Clause and principles of substantive due process, and exceeded the city's home-rule powers. *Id.* at 1126. The appellate court, although agreeing with the district court that the ordinance may be a futile effort to stop graffiti, found that the city had sufficient home-rule powers to enact such a prohibition in order to protect public health, safety, morals and welfare. *Id.* at 1128. Further, the court concluded that the companies challenging the ban had no fundamental right to sell the prohibited items, and that the ban does not have a disparate impact on interstate commerce. *Id.* at 1129-1130.

### E. Penalties

A local government's imposition of penalties for the violation of an anti-graffiti ordinance may be determined by the degree of punishment that state law permits. Thus, certain local governments punish graffiti ordinance violations as a criminal misdemeanor while other localities treat the offenses as civil infractions.

In addition to fines and incarceration, many local governments have enacted ordinances that require

community service, parental liability, restitution, and personal property forfeiture (see NIMLO Model § 13-505). Community service provisions generally require ordinance violators to perform a certain number of hours of community work, including graffiti removal, as a penalty in-lieu of, or in addition to, fines and jail time. The NIMLO Model's community service provision also requires at least one parent or guardian of a minor who violates the ordinance to be present when the minor performs the work (see NIMLO Model § 13-505(d)(2)).

Parental liability, restitution and personal property forfeiture provisions are generally more difficult penalties to implement and enforce than fines, imprisonment or community service provisions. State law also may dictate whether a local government has the authority to impose such provisions.

### F. Detection and Rewards

Many local governments have created "graffiti hotlines" to facilitate the reporting of graffiti incidents and the furnishing of information regarding the perpetrators of graffiti vandalism. Similar to "crime-solvers" programs, the hotlines permit anonymous reporting and offer rewards to those individuals who provide tips leading to the arrest of graffiti vandals. Certain cities also provide cellular phone time reimbursement to those individuals who report graffiti-related information via a mobile phone (see NIMLO Model § 13-506(d)).

To fund the rewards, local governments seek private contributions from the community, including paint supply companies. Localities also have established anti-graffiti trust accounts that are funded by the fines assessed against graffiti ordinance violators (see NIMLO Model § 13-512).

### G. Removal and Abatement

#### 1. By the Perpetrator

Ideally, a local government would apprehend the perpetrator of graffiti vandalism and then require that person to remove the graffiti, at little or no cost to the local government or the property owner. The

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NIMLO Model requires the perpetrator to remove the graffiti, or to pay for the removal of the graffiti, pursuant to § 13-508 and the community service provision of § 13-505(d). The latter section specifies that the community service may include the graffiti removal, and may include graffiti created by the person being punished. However, given that many graffiti vandals are never apprehended, the removal burden most often falls on the local government or the property owner.

### 2. By the Local Government

When removing graffiti from private property, a local government must first attempt to obtain the consent of the property owner to enter the property. Failure to obtain that consent or a valid inspection warrant may constitute a violation of the property owner's Fourth Amendment right against unreasonable search and seizure.

If the property owner refuses to grant removal consent, or the local government is unable to contact the property owner because the property is abandoned, the local government may institute public nuisance abatement procedures in order to remove the graffiti. As with any nuisance abatement proceeding, the local government must provide the owner of the graffitied property adequate due process. *See Thain v. City of Palo Alto*, 24 Cal. Rptr. 515 (Cal. Ct. App. 1962) (recognizing general right of a city to abate public nuisance if adequate due process is furnished). Due process must include a proper declaration of the nuisance by the governing body, notice, and opportunity for hearing regarding the abatement (see NIMLO Model § 13-509(d)).

### 3. "Anti-Blight" Provisions

Many local governments require the property owner to remove graffiti within a specified number of days following the vandalism. If the property owner does not comply with that requirement, the local government may institute nuisance abatement procedures, outlined above, and then recover the cost of the removal, placing a lien on the property if necessary (see NIMLO Model § 13-509(d)).

Property owner removal or "anti-blight" provisions are often controversial because property owners may feel that they, the victims of the graffiti, are being victimized again by an ordinance's removal provisions. To avoid the property owners' perception that they are the only ones paying for graffiti vandalism, a local government should fully enforce the ordinance's penalties, including any graffiti removal or restitution provisions, against the graffiti vandals.

Additionally, the local government may offer a hardship exception to the removal requirement for those property owners who demonstrate that they lack the financial means to cover the removal costs (see NIMLO Model § 13-509(b)). The same graffiti trust fund that provides reward money to graffiti tipsters could be used to help fund the graffiti removal in hardship cases (see NIMLO Model § 13-512). Local business and community volunteers also may provide donated paint supplies and labor to facilitate graffiti removal.

## H. Miscellaneous Prevention Provisions

### 1. Mural Program

In order to provide a lawful and potentially beneficial alternative to graffiti vandalism, several local governments have instituted mural programs. Those programs provide graffiti artists or would-be graffiti vandals with designated public or private wall space on which they may paint commissioned works or their own creations. The programs also sometimes furnish donated paint and supplies for the murals.

### 2. Ease of Removal and Design Requirements

As an additional preventative measure, several local governments are requiring applicants for design review approval, conditional use permits, or development agreements to consider the prevention of graffiti in the design and construction of new buildings. Those prevention measures, listed in NIMLO Model §§ 13-510 and 13-511, include the use of protective coatings that facilitate graffiti removal, additional lighting, non-solid fencing,

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landscaping that covers large walls, and architectural designs that break up long, continuous walls or solid areas. For structures that are the target of repeated graffiti attacks, a local government may wish to include a retrofitting provision in its anti-graffiti ordinance that requires the city or the property owner to take certain design measures to prevent future defacement (see NIMLO Model § 13-511(b)).

### I. Severability

The NIMLO Model's severability provision, § 13-513, provides for severability throughout and within the provisions of the ordinance. The severability provision is intended to permit a court to strike a portion of the ordinance that is overbroad, vague or otherwise unconstitutional, while upholding the remainder of the ordinance.

### III. Reference Sources

The NIMLO Model Anti-Graffiti Ordinance is based on provisions contained in the ordinances from the following cities and counties: Chula Vista, Los Angeles County, Redlands, and San Diego, California; Wilmington, Delaware; Dade County and Hollywood, Florida; Aurora and Chicago, Illinois; Boston, Massachusetts; Rochester, Minnesota; and Portland, Oregon. Copies of those ordinances are available from NIMLO.

The following materials may be of assistance in drafting an anti-graffiti ordinance:

(1) Thomas M. Canan, *Controlling Gang Graffiti: A Framework for a Public-Private Partnership*, 1995 NIMLO Mid-Year Seminar Paper (copies available from NIMLO); and

(2) Marisa A. Gómez, *The Writing on Our Walls: Finding Solutions Through Distinguishing Graffiti Art from Graffiti Vandalism*, 26 Mich. J. L. Reform 633 (1993).

NIMLO wishes to thank Robert N. Hills and Faith M. Saber of the National Council to Prevent Delinquency for their special assistance in providing sample anti-graffiti ordinances and other legislative

materials on this topic. To obtain additional graffiti information, cities and counties may contact the National Council at: P.O. Box 16675, Alexandria, Virginia 22302-8675; telephone number (703) 751-9569.

The National Graffiti Information Network also maintains a collection of anti-graffiti materials and may be contacted at: P.O. Box 400, Hurricane, Utah 84737; telephone number (801) 635-0646.