

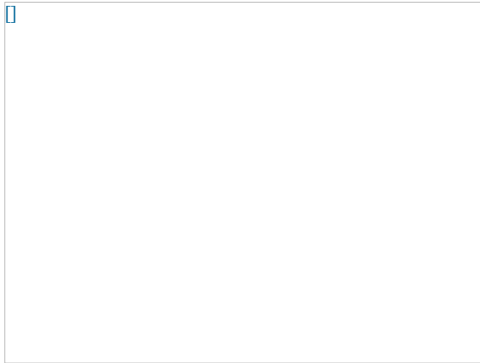


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City takes dim view of junked car 'planter'

Down the street from my house, one of my neighbours has an old bathtub filled with earth sitting on the front lawn. In season, it contains flowering plants and is quite attractive. During the rest of the year, it just looks like an old bathtub.



I was reminded of my neighbour's bathtub when I came across a recent court case from the United States Court of Appeals in Texas.

Michael Kleinman operates a chain of Planet K stores in the San Antonio and Austin, Texas, areas. The stores are what a judge called funky establishments that sell novelty items.

Kleinman has a tradition of celebrating new store openings with a car bash, a charity event at which the public pays a dollar per person for the privilege of sledge-hammering a car to a smashed wreck. The proceeds are donated to charity.

The wrecks have the tires and engine removed, and the roof sawed off. Then they are filled with dirt, planted with cactus and other vegetation, and painted. Placed outside each store, the planters serve as unique advertising devices.

When Kleinman opened a new store on Interstate 35 in San Marcos, Texas, he created a car planter with an Oldsmobile 88. The smashed car was planted with a variety of native cacti and decorated with paintings of life in San Marcos. Incorporated into the painted design are an image of Ralph the Swimming Pig (a local San Marcos attraction), and the phrase Make love not war.

After the conversion of the smashed wreck into a car planter, the city of San Marcos ticketed Planet K and various employees under an ordinance banning the display of junked vehicles.

The ordinance declares junked vehicles to be a public nuisance and prohibits citizens from displaying them on their property.

Kleinman contested the tickets at the municipal court level and lost.

John Furdy Travis was one of the artists commissioned to paint the wreck. At the court hearing, he testified that he intended his images to convey the idea that you could take a junked vehicle, junk canvas and create something beautiful out of it.

Fellow artist Scott Wade said he sought to transform a large gas-guzzling vehicle into something that's more respectful of the planet and something that nurtures life as opposed to destroys it. Wade explained that his intent was to describe American car culture and the link between gasoline and the war in Iraq.

After losing in municipal court and district court, Kleinman and the two artists appealed to the Fifth Circuit Court of Appeals. The issue there was whether the junked-car ordinance violated the freedom of expression rights in the First Amendment to the U.S. Constitution.

In her decision released Feb. 10, 2010, chief judge Edith Jones attacked Kleinman's arguments the same way his customers attacked the Oldsmobile.

She ruled that the car planter was a utilitarian device, an advertisement, and ultimately a junked vehicle. Regulation of junked vehicles, she wrote, is within the city's traditional municipal police powers and the regulation was justified.

The city did not intend to regulate free speech, she ruled, but only to pass a health and safety ordinance. That ordinance achieved the city's legitimate interests with only incidental restriction on freedom of expression.

Planet K, she noted, was still free to display the car planter behind a fence, or indoors, or in a garage enclosure, but not in front of the store.

Since the February court ruling, Kleinman has filed another appeal, asking all 11 judges of the Fifth Circuit Court of Appeals to review the case. If they refuse to hear it, he told a local newspaper, then I guess it's the Supreme Court here we come. In Toronto, section 629 of the Municipal Code requires yards to be kept clean and free from accumulations of rubbish, litter, garbage, dilapidated structures, and wrecked, inoperative, discarded or dismantled vehicles or equipment.

I wonder if my neighbour's bathtub is safe from Toronto's city inspectors.

Kleinman v. City of San Marcos, 2010 WL 447894 (5th Cir. (Tex.) 2/11/2010):

<http://www.ca5.uscourts.gov/opinions/pub/08/08-50960-CV0.wpd.pdf>