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OPINION COMMITTEE



FILE # ML-46549-10
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State of Texas
House of Representatives

TODD HUNTER
STATE REPRESENTATIVE • DISTRICT 32

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(COUNTIES: ARANSAS, CALHOUN, NUECES (PART), SAN PATRICIO)

August 2, 2010

RQ-0907-GA

The Honorable Greg Abbott
Texas Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

Attention: Nancy Fuller - Chair, Opinions Committee

Dear General Abbott:

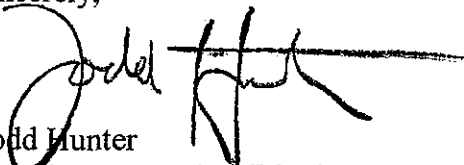
The City of Ingleside, Texas, is seeking an Attorney General's Opinion regarding the following issue:

RE: Request for an Attorney General Opinion concerning: 1) the qualification of a newspaper to be the Official Newspaper of a municipality and, 2) a city charter provision requiring publication of sample election ballots before the election.

I have enclosed a letter written to me by Jim Gray (City Manager - Ingleside, Texas) that details the situation and the need for clarification of the relevant statutes. I have not taken a position in this matter.

I appreciate your attention to this request.

Sincerely,


Todd Hunter
State Representative, District 32



July 2, 2010

The Honorable Todd Hunter
Room E2.808
Capitol Extension
Austin, TX 78701

Re: Request for Attorney General Opinion Concerning: (1) the Qualification of a newspaper to be the Official Newspaper of a municipality and; (2) a City Charter provision requiring publication of sample election ballots before the election

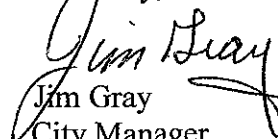
Dear Representative Hunter:

Thank you for reviewing our request to the State of Texas Attorney General asking for opinions about the matters described above.

On behalf of the City of Ingleside, would you please forward the attached letter to the State of Texas Attorney General?

Should you have any questions please feel free to call me at 361-776-2517.

Sincerely,


Jim Gray
City Manager
City of Ingleside



July 2, 2010

State of Texas
Attorney General
P. O. Box 12548
Capitol Station
Austin, TX 78711-2548
ATTN: Opinion Committee

Re: Request for Attorney General Opinion Concerning: (1) the Qualification of a newspaper to be the Official Newspaper of a municipality and; (2) a City Charter provision requiring publication of sample election ballots before the election

Dear Attorney General:

As City Manager of the City of Ingleside, I am submitting this request for a written opinion on questions affecting the public interest, pursuant to Texas Government Code § 402.042. My questions concern the qualification of a particular newspaper to be the official newspaper under 2051.044 Texas Government Code ("TGC") for the City of Ingleside, Texas and compliance with City Charter Section 5.01.C.

Official Newspaper Issue

The City of Ingleside, a home-rule municipality in San Patricio County, Texas, issued a request for proposals for an official newspaper. Two newspapers responded: *The Ingleside Index* and *The Coastal Bend Herald*. At the public meeting when the Council deliberated and made its selection, performance issues were raised relating to the Index failing to timely publish notices when the City was using the Index as its official newspaper. The *Index* was Ingleside's official newspaper prior to the Council's August 2009 selection of the *Herald*. August 2009 the City Council chose the *Herald* and designated it as Ingleside's official newspaper. An issue has been raised as to whether or

not the *Herald* meets the 2051.044(a)(3) statutory requirement that a city's official newspaper "be entered as second class postal matter in the county where published" for purposes of publishing notices required for various governmental actions, such as replatting and zoning, and for purposes of publishing election notices.

Three cities are mentioned herein: Ingleside, Portland and Rockport. All are home rule. Ingleside and Portland are both in San Patricio County. Rockport is in Aransas County. San Patricio County is adjacent to Aransas County.

It is only the Herald's compliance with 2051.044(a)(3) that is at issue. Its compliance with City Charter Section 11.03 which requires that the city's official newspaper be of general circulation in the City (as defined by Attorney General Opinion JC-0223) and its compliance with 2051.044(a)(1), (2) and (4) are not otherwise at issue. It is in San Patricio County, where Ingleside is located, that 2051.044(a)(3) requires that the newspapers to be published in Ingleside be "entered" as second class postal matter.

The Herald has a U.S. Postal Service second class mail permit in Aransas County. It publishes its papers to subscribers in multiple cities in this area, including Ingleside. The Herald emails its content or copy to its printer. The Herald picks up the copies from its printer, takes them back to its offices and places address labels on individual copies for mailing to its subscribers, including those in Ingleside. It bundles its mail according to the city of its destination. Papers destined for Ingleside are delivered by the Herald in a bulk bundle to the post office in Rockport. The U.S. Postal Service transports this bulk bundle from its Rockport post office to the Ingleside

post office where U.S. Postal Service employees there open the bulk bundle, sort and route the individual copies to subscribers as already addressed, and then physically deliver them to the addressee/subscribers in Ingleside.

The authorities interpreting Chapter 2051 TGC have suggested that a substantial compliance standard applies to the § 2051.044(a)(3) requirement that the newspaper be "entered as second-class postal matter in the county where published". Christy v. Williams, 292 S.W.2d 348 (C.A. Galveston 1956, writ dismissed), an election case, involved a newspaper entered as third class, rather than second class mail. The Court held that this statutory requirement of second class mailing was merely directory and not mandatory, that all that was required was substantial compliance and that the use of third class mail substantially complied and was sufficient. The Court noted that "the purpose which the legislature had in mind was duly served because the notice was brought home to the voters in a paper of general circulation". Nine years later, Texas Attorney General in AG Op. C-514 (1965) ruled, in a non-election matter, that the requirement that the newspaper be "entered as second-class postal matter in the county where published" is "at best directory, and not mandatory" and that all that is required is substantial compliance. AG Op. C-514 addressed the question of whether the Ganado Tribune was eligible to publish notices for the State of Texas under a scenario that included the following specific arrangement: "The Ganado Tribune is printed at the [publishing company's] plant at Yoakum in Lavaca County, where individual copies are addressed for mailing to subscribers at Ganado. It is entered as second-class postal matter at Yoakum, where the newspaper is transported in bulk bundles to the post office at Ganado, in Jackson County. The post office at Ganado opens the bulk bundles and routes the individual copies to subscribers as already addressed." In C-514 the Texas Attorney General ruled that newspaper substantially complied and "is legally

eligible to receive paid legal notice publication orders ..." Furthermore, although in C-514 the Attorney General cited a substantial compliance standard, in a subsequent opinion an additional twelve years later the Attorney General went further and ruled that "The newspaper discussed in C-514 in fact strictly complied with the requirements..." Tx. Atty Gen. Op. H-1081 (1977).

The Herald maintains an office in Rockport (in Aransas County) and an office in Portland (in San Patricio County). As to the Portland office, their website shows separate telephone and fax numbers, 529-6443 and 529-6438, both Portland exchanges. It also shows a Portland address at Portland Crescent Center, Suite #6, Portland, Texas 78374. It does not maintain such an office in Ingleside, but the Herald reporter who is and has for 6 years covered Ingleside news lives in Ingleside and works out of his home. He is a full-time reporter. He personally attends Ingleside City Council and Independent School District meetings. He has a computer upon which, while at his home, he drafts his stories. He, while at his home, emails those stories and other communications to his employer and receives emails from his employer. He has business cards upon which he lists his Ingleside telephone number. He receives and reviews, on his computer while at his home, communications from the City of Ingleside and Ingleside School District in the form of agendas which are emailed to him prior to the meeting dates pertaining to said agendas.

The Herald is now and since November 2006 has been the official newspaper of the City of Portland. It seems the only distinction between the relationship of the Herald to Portland and its relationship to Ingleside is the office, and maintenance of an office is not a requirement of 2051.044(a) TGC.

It has been asserted that all actions taken by the City Council, including, but not limited to, platting and zoning decisions and its general election held on May 8, 2010, dependent upon published notice in the Herald are voidable because of its non-compliance with 2051.044(a)(3).

Has the Herald complied with the § 2051.044(a)(3) second-class postal matter requirement?

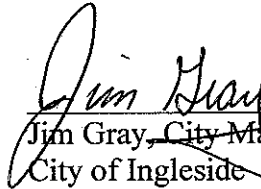
Charter Publication Requirement

This issue relates only to the City's general election. City Charter §5.01.C provides that sample election ballots shall be published in the official city newspaper not less than ten days prior to the election. The election was held May 8, 2010. Notice of the election was published April 22, 2010, but sample ballots, not bring ready for publication on April 22, were not published until April 29, 2010, nine days before the election. Like the *Index*, the *Herald* is published once a week and April 29 was the first publication date after the ballots were ready. Procedural requirements such as this are directory, not mandatory. At most substantial, not literal, strict, absolute compliance, is all that is required. Laws concerning elections are liberally construed to effectuate the will of the people, to uphold the vote, and substantial compliance with procedural requirements concerning an election is sufficient, unless it is shown that failure strictly to comply with the letter of the law materially interfered with the election and the right of the electors freely to participate therein. Christy v. Williams, 292 S.W.2d 348 (C.A. Galveston, writ dismissed); Pollard v. Snodgrass, 203 S.W. 2d 641 (C.A. Amarillo 1947, writ dismissed). In Pollard the Court held that five days notice of an election rather than the six days required by law was substantial compliance with the statute and

was sufficient. Generally, "irregularities in the conduct of an election which cannot be shown to have materially affected the results of the election are immaterial." Day v. Crutchfield, 400 S.W.2d 377 (C.A. Texarkana, 1965, writ dismissed); Des Champ v. Featherston, 886 S.W.2d 536 (C.A. Austin, 1994, no writ). It is difficult to see how this 1 day delay could have materially interfered with the election. Notice of election was timely published on April 22 and more voters cast votes in the May 8, 2010 general election than have done so in any general election in Ingleside since the 1980s.

Does publication of the sample ballots on April 29, 2010 in the Herald, nine days before the May 8, 2010 general election, comply with Charter Section 5.01.C?

Sincerely,



Jim Gray, City Manager
City of Ingleside