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November 2, 2017

Sent Via Electronic Mail

Misty Ventura
SHUPE VENTURA
9406 Biscayne Blvd.
Dallas, Texas 75218

Re: City of McKinney August 28, 2017 Meeting and Resolution on Annexation

Dear Ms. Ventura,

You seek an independent legal opinion about whether the City of McKinney's August 28, 2017 Council Meeting complied with the Texas Open Meetings Act (TOMA), Tex. Gov't Code §§551.001 et seq. The short answer to your question is that it did not and that the Annexation Resolution adopted as a result of that meeting is subject to judicial invalidation as a result.

Background

At issue is the notice posted for the McKinney City Council meeting of August 28, 2017.

The two page agenda posted as notice lists four categories: "CALL TO ORDER," "EXECUTIVE SESSION," "ACTION ON EXECUTIVE SESSION ITEMS," AND "ADJOURN." Under the executive session heading, several topics are listed. One of those advises that the Council may go into executive session under section 551.071 of the Texas Open Meetings Act to consult with the City Attorney regarding "SB 6 (Annexation Bill)." Below that, but still under the executive session heading, is the topic regarding "17-853," which advises that the Council will "Consider/Discuss/Act on a Resolution Providing Direction to Staff Regarding Municipal Annexation in 2017."

The draft resolution was apparently made available to the public. The draft referenced two potential actions: In section (1), the identification of "Option A/B/C/D as

the preferred approach for carrying out municipal annexation under the existing provisions of the Texas Local Government Code" and, in section (2), a delegation to the City Manager of the power to delegate to the staff "all necessary activities required to carry out municipal annexation in accordance with Option A/B/C/D." There was no detail regarding what Options A/B/C/D were.

The document labeled as "17-853" contained a description of each of the four options that was so general that it could be misleading. The description in document 17-853 was general in nature, in keeping with the policy-making nature of the notice "to provide direction to staff" regarding the Council's "preferred approach" for carrying out municipal annexation. Moreover, that document was not part of the notice made available to the public. In addition, it was not made available to Council members until shortly before the August 28, 2017 meeting.[1] As a result, Council members were not able to provide copies in a timely manner to their constituents.

The notice referenced "SB 6." "SB 6" from the immediate past Regular Session of the Texas Legislature is not an annexation bill. The notice should have reflected accurately, the proper bill. Because the notice called it an "annexation bill," however, a member of the public arguably would be able to search the public records of the subsequent sessions for relevant bills. There are references in the draft resolution to "Chapter 42" of the Texas Local Government Code. Chapter 42, however, governs municipal extra-territorial jurisdiction, not annexation, which is governed by Chapter 43 of the Code, and not changing municipal boundaries, which is addressed in Chapter 41 of the Code. In short, it would take a lawyer to dissect and interpret the notice.

More important, at no point was notice given to the public that specific parcels of land had been selected for annexation and the general area where those parcels are located. The Resolution adopted as a result of the August 28 meeting was not merely a policy directive. The Resolution includes Exhibit A, which is a specific "Proposed Annexation Area" labeled with "Option D" and with "Option D. Parcels" identified. As indicated, nothing in the notice put persons interested in those parcels on notice that they would be annexed, much less on an expedited basis to avoid the implications of the recent amendments to the Texas Local Government Code. Not just those members of the public interested in the area have an interest; so, too, do all city taxpayers because of the increased services that must be provided within municipal boundaries.

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[1] At least one Council member raised this concern during the open portion of the meeting.

The August 28, 2017 notice raises a number of legal questions.

The Texas Open Meetings Act

I. The TOMA Requires Notice

A. The Content of the Notice Must Disclose the Subjects to be Addressed

The TOMA was enacted to provide public access to and to increase public knowledge of governmental decision-making. *See City of San Antonio v. Fourth Court of Appeals*, 820 S.W.2d 762, 765 (Tex.1991) The general rule under the Texas Open Meetings Act, TEX. GOV'T CODE §§551.001 et seq., (TOMA) is that all meetings, even when a closed or executive session is authorized, must be preceded with notice.

The TOMA requires notice, for open and closed meetings, that will reasonably inform the public of the subjects to be discussed:

> A governmental body shall give written notice of the date, hour, place, *and subject* of each meeting held by the governmental body.

TEX. GOV'T CODE §551.041(emphasis added).

In *Lower Colorado River Authority v. City of San Marcos,* 523 S. W.2d 641, 646 (Tex.1975), the notice at issue stated that the board of directors of the Lower Colorado River Authority would consider "the ratification of the prior action of the Board taken on October 19, 1972, in response to changes in electric power rates for electric power sold within the boundaries of the City of San Marcos, Texas." Stating that the notice was "not as clear as it might be," the Texas Supreme Court held that the notice was adequate under section 551.041 of the TOMA because the description "would alert a reader to the fact that some action would be considered with respect to charges for electric power sold in San Marcos." *Id* (emphasis added). The same cannot be said here, where the notice referenced guidance to staff in annexations, not that power would be delegated to initiate a particular annexation.

In *Cox Enterprises, Inc. v. Board of Trustees*, 706 S.W.2d 956, 957 (Tex. 1986), the board of trustees of a school district posted notices of their executive sessions that listed only general topics such as "personnel," "litigation," and "real estate matters." The Texas Supreme Court concluded that the "advance notice given under [the TOMA] should specifically disclose the subjects to be considered at the upcoming meeting." 706

S.W.2d at 959. The Court held that the board "did not provide full and adequate notice, particularly where the subject slated for discussion was one of special interest to the public." *Id.* Annexations, particularly expedited annexations, are of significant public concern.

In *City of San Antonio v. Fourth Court of Appeals*, the Texas Supreme Court considered the sufficiency of notice that included "the necessity for and authorizing the condemnation of certain property in County Blocks 4180, 4181, 4188, and 4297 in Southwest Bexar County." A property owner contended that this was insufficient notice because it did not identify his specific parcels of land. The Court disagreed, indicating that the purpose for TOMA notice was to put the public on notice, not to serve as individual notice. The Court found that the notice sufficiently apprised the public that the city would consider the condemnation of **certain property in a particular area and would put landowners in that area of the possibility that their land might be included.** In short, the notice described the subject in a way that was "sufficient to ensure that a reader was given adequate notice of the proposed governmental action." 820 S.W.2d at 765–766.

Applying theses decisions to the notice of the August 28 meeting of the City of McKinney, the TOMA might not necessarily require that the City include parcel numbers or attach to its meeting notice the map that was adopted as part of the Resolution. The notice, however, failed to indicate that action would be taken to delegate power to implement a particular annexation, as opposed to simply providing guidance on annexation *policies.* If the City knew before the meeting, that "Option D" consisted of specific parcels and/or areas, at least a general description should have been included, such as that given the *City of San Antonio* case ("County Blocks 4180, 4181, 4188, and 4297 in Southwest Bexar County"). Sufficient notice was not given.

B. Notice must be Timely

The general rule with respect to the timing of notice is that governmental bodies such as cities must give the public 72-hour notice of their meetings. That means 72-hour notice of the topics to be discussed, not just that a meeting will be held. As a result, even assuming that the content of the document entitled "17-853" would have sufficed as notice, providing it just an hour or so prior to the meeting was insufficient. In addition, as indicated above, it also appears that it was provided to Council members but that it was not posted as part of the notice.

Only emergency meetings may be held with less than 72-hour notice. Emergency meetings may be held with only 2-hour notice. An emergency meeting, however, is limited to reasonably unforeseeable matters requiring immediate action and to imminent threats to the public health, safety, and welfare. TEX. GOV'T CODE §551.045; *see* Tex. Atty. Gen. Op. No. JM-1037 (1989) In addition, notice of "emergency" meetings must state the reason for the emergency. *Id.*

As a result, even assuming that the description of Options A/B/C/D contained in document 17-853 was sufficient, it was not part of the public notice and it was not available 72 hours prior to the August 28 meeting.

II. The TOMA Limits Closed Sessions

Under the TOMA, all deliberations of governmental bodies must be open to the public unless a closed or "executive" session is expressly authorized by law. TEX. GOV'T CODE § 551.002; *Acker v. Texas Water Commission*, 790 S.W.2d 299, 300 (Tex. 1990); *Finlan v. City of Dallas*, 888 F. Supp. 779, 782 (N.D. Tex. 1995). If no exception authorizes a closed meeting, then the closed meeting violates the law regardless of compliance with the TOMA's other procedural requirements. *Finlan v. City of Dallas,* 888 F. Supp. at 783 (citing *Martinez v. State*, 879 S.W.2d 54, 56 (Tex. Crim. App. 1994)).

Under the executive session heading of the notice for the August 28 meeting, several topics are listed. One of those advises that the Council may go into executive session under section 551.071 of the TOMA to consult with the City Attorney regarding "SB 6 (Annexation Bill)." Below that, but still under the executive session heading, is the topic regarding "17-853," which advises that the Council will "Consider/Discuss/Act on a Resolution Providing Direction to Staff Regarding Municipal Annexation in 2017." The second topic cannot be discussed in executive session and no action can be taken in executive session.

Under section 551.071, to preserve the attorney-client privilege, a governmental body may meet with its attorney to seek legal advice. The governmental body, however, may not engage in discussion beyond that necessary to obtain legal advice. *Gardner v. Herring*, 21 S.W.3d 767, 776 (Tex. App. – Amarillo 2000, no pet.) For example, a governmental body may seek legal advice about a contract in closed session, but may not discuss the financial or other substantive aspects of the contract or evaluate the merits of competing contracts in closed session. *Olympic Waste Servs. V. City of Grand Saline*, 204 S.W.3d 496, 503-504 (Tex. App. – Tyler 2006, no pet.)

Based on comments from members of the public in attendance at the August 28 meeting, a number of people joined in executive session with Council members. To preserve the attorney-client privilege, a governmental body may have to limit those who attend a closed session. Tex. Atty. Gen. Op. Nos. JC-0506 (2002), JM-100 (1983). Under section 551.071, a governmental body may allow the attendance of staff, agents, or representatives of the governmental body only if their interests are aligned with the interests of the governmental body and their presence is necessary for effective communication between the governmental body and its attorney. It is not clear what purpose allowing a number of individuals' attendance served and whether that limitation on the executive session under section 551.071 was preserved with respect to the August 28 meeting. If they were there to discuss the merits of any proposed annexation policy and not to seek or give legal advice, their inclusion in the executive session could well constitute a violation of the TOMA.

As a result, the City of McKinney is likely within the parameters of the TOMA to seek its attorney's advice about its legal authority with respect to annexation and/or with respect to what annexation powers, if any, the City may delegate. But the policy decision of whether it is a good idea and/or financially feasible to initiate annexations before the end of 2017 is beyond what section 551.071 was intended to authorize. As a result, any such discussions in executive session of that nature were not authorized under the TOMA.

The topic regarding "17-853," also appears under the executive session heading, which advises that the Council will "Consider/Discuss/Act on a Resolution Providing Direction to Staff Regarding Municipal Annexation in 2017." Because the notice also includes the heading "ACTION ON EXECUTIVE SESSION ITEMS," it would appear that no vote took place in executive session. This should be verified. Even when a closed session is authorized, no action or vote may be taken in closed session. TEX. GOV'T CODE ANN. §551.102.

III. Remedies under the TOMA

A real likelihood exists here that the City's action, i.e. the Resolution, could be declared invalid. "The [TOMA] provides civil remedies for violations of its meeting-notice requirements." *City of Elsa v. Gonzalez*, 325 S.W.3d 622, 628 (Tex.2010) (*per curiam*) (citing Tex. Gov't Code Ann. §§ 551.141 – 551.142). "Any action taken by a governmental body in violation of the TOMA is voidable, and '[a]n interested person ... may bring an action by mandamus or injunction to stop, prevent, or reverse a violation [or] threatened violation' of [the TOMA] by members of a governmental body." *Id.*

(quoting Tex. Gov't Code Ann. § 551.142(a)). That includes the determination of whether an emergency exists to justify an emergency meeting. *See Garcia v. City of Kingsville*, 641 S.W.2d 339 (Tex. App. – Corpus Christi, 1982). "Compliance with the Open Meetings Act is mandatory, and actions taken by a governmental body in violation of the statute are subject to judicial invalidation in a suit brought by a person adversely affected by such actions." *Lower Colorado River Authority v. City of San Marcos*, 523 S.W.2d 641, 646 (Tex.1975). A person "adversely affected" would ordinarily include members of the public and landowners in the affected area.

A person who prevails could also recover attorneys' fees because the TOMA contains a waiver of sovereign immunity that expressly authorizes an award of attorneys' fees to successful litigants. Tex. Gov't Code §551.142(b).

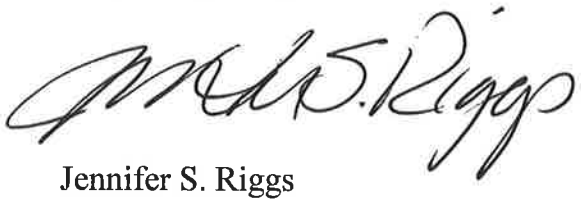
In addition, in this situation, if action is not taken quickly at a meeting that *does* meet the requirements of the TOMA, a risk exists that the City may lose the opportunity to do so because a governmental body cannot "ratify" an illegal act. Although a governmental body may "fix" an action taken in violation of the TOMA by posting proper notice, such an action cannot be given retroactive effect. *Lower Colorado River Authority*, 523 S.W.2d at 647; *Mayes v. City of De Leon*, 922 S.W.2d 200, 204 (Tex. App. –Eastland 1996, writ denied); *Ferris v. Texas Board of Chiropractic Examiners*, 808 S.W.2d 514, 518 (Tex. App.—Austin 1991, writ denied); *Porth v. Morgan*, 622 S.W.2d 470, 475-476 (Tex. App. –Tyler 1981, writ ref'd n.r.e.) As a result, assuming that the City has the authority to pass the Resolution at issue, nothing prevents it from posting sufficient notice of a meeting to rectify the Resolution, a meeting at which all Council members have the opportunity to fully discuss, debate, and vote in open session on the merits (or lack thereof) of the actual "Option D" annexation, but any action will date from that meeting, not from August 28, 2017.

Finally, the TOMA also contains criminal sanctions for a violation of its provisions. Tex. Gov't Code Ann. §551.144(a). Because a violation of the TOMA may also constitute official misconduct, this should be of particular concern to Council members. Re-posting would protect all those involved.

Conclusion

The City of McKinney's August 28, 2017 meeting did not comply with the TOMA. As a result, the August 28 Annexation Resolution is subject to judicial invalidation. Please let me know if you need additional information or if you have questions.

Yours very truly,



Jennifer S. Riggs

Enclosure (firm bio)

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Admitted to Texas Bar, 1984; also admitted to practice before U.S. Supreme Court; U.S. Court of Appeals, Fifth Circuit; U.S. District Court, Western District of Texas. Preparatory education: University of Texas at Arlington (B.A. 1981). Legal education: University of Texas (J.D. 1984). Certified, Administrative Law, Texas Board of Legal Specialization, 1990, recertified 1995, 2000, 2005, 2010, and 2015. Assistant Attorney General, Texas, 1984-92; Chief, Open Government Section, 1987-1989; Chief, Administrative Law Section, 1990-1992. Adjunct Professor, University of Texas School of Law, Texas Government Law, 1992-2002. Frequent author and speaker, including The Attorney General's Handbooks for Board Members, (First Ed. 1990), on the Texas Open Meetings Act, (First and 1989 Eds.), and on the Texas Open Records Act, (First Ed.) Member, Austin Bar Association. Freedom of Information Foundation of Texas (Advisory Board). Life Fellow, Texas Bar Foundation.

Jason Ray

Admitted to Texas Bar, 1997. Preparatory education: Texas A&M University, College Station, Texas (B.A. in Agribusiness, 1992 and B.S. in Economics, 1992). Legal education: Texas Tech University School of Law (J.D. 1996). Legislative Aide to U. S. Congressman Bill Sarpalius, Washington, D.C., 1992. Chief Committee Clerk for House Committee on Public Safety, Austin, Texas, 1995-1996. Vinson & Elkins, Austin, Texas, 1997. Litigation Attorney, Department of Public Safety, Austin, Texas, 1997-2000. Managing Director-Texas for GalleryWatch.com, 2000-2002. Assistant Attorney General, Administrative Law Division, 2002-2006. Certified, Administrative Law, Texas Board of Legal Specialization, 2006. President, Administrative Law Section, Austin Bar Association 2007-2008.