Local Government Law Bulletin

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PUBLICATION OF LEGAL NOTICES

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I. ELIGIBLE NEWSPAPERS

A. Introduction

Local governments are frequently authorized or required to publish legal notices in a newspaper. G.S. 1-597 establishes standards that, in most cases, a newspaper must meet in order to be eligible to be a publication medium. The material that follows traces the requirements of G.S. 1-597 and related statutes.

The purpose of statutes like G.S. 1-597 is to ensure, so far as is possible, that notices and other matters that the General Assembly has intended be made known to the general public through publication in fact reach their intended audience. Because there is no way to be certain that the public will read a published notice, the publication statute, G.S. 1-597, endeavors to increase the likelihood that the notice will be seen by setting some specific requirements about when and where the notice must be published. Generally, to fill the statutory requirements, that notice must appear in a carefully defined publication medium. With a few exceptions, when a local government is required to publish a notice, an advertisement, or some other item, it must use a newspaper that meets the requirements of G.S. 1-597.

G.S. 1-597 is a densely worded statute, difficult to read and to understand. It establishes three requirements designed to ensure that notice does in fact reach the general public. First, the newspaper must have "a general circulation to actual paid subscribers." "General circulation" is a legal term of art encompassing a wide array of characteristics, all intended to indicate those papers to which the public turns for current news and information on public events [see In re Herman, 191 P. 934 (Cal. 1920)]. The reference to subscribers represents a judgment that people are more likely to

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read a paper they have paid for [In re Carson Bulletin, 149 Cal. Rptr. 764 (Ct. App. 1978)]. Second, the newspaper must be admitted as second-class mail in the place where publication is required. The thrust of the federal regulations governing second-class mail is to limit these preferential postage rates to publications that have a public character and paid subscribers. Furthermore, the locational element indicates a link to the relevant community. Third, the newspaper must have been continuously and regularly issued in the county for at least a half-year. The goal here is to select papers with a stable and continuing existence in the community [see City of Plainfield v. Courier-News, 369 A.2d 513 (N.J. 1976)].

Though these requirements are fairly easily stated, G.S. 1-597 is difficult to follow. The statute itself is ambiguous. In addition, its amendments and a related statute, G.S. 1-599, must also be considered. Officials who are responsible for seeing that notices and advertisements are published must be sure that they comply with this complicated array of statutory requirements. The following questions and the accompanying explanations should help them achieve valid publication.

B. Statutory Questionnaire

Unless otherwise indicated, if the answer to any of the first eleven questions that follow is "no," choose another newspaper within the county; if you are certain that there are no newspapers that qualify under questions 1 through 11, then go to question 12.

1. Is any newspaper published in the county? If the answer is no, go to question 12.

G.S. 1-597 provides that if a "notice or any other paper, document or legal advertisement" is authorized or required by law or court order to be published or advertised in a newspaper, it must be published in a newspaper that qualifies under G.S. 1-597. But G.S. 1-599 provides that G.S. 1-597 does not apply in counties in which only one newspaper is published, even if that one newspaper does not qualify under G.S. 1-597. This provision would seem to mean that in such a county notices may be published in that nonqualifying newspaper. However, in some situations legal publication is not only statutorily required but also constitutionally required, and publication in a newspaper that does not meet the minimal requirements of G.S. 1-597 might be constitutionally suspect. Perhaps for that reason, the second paragraph of G.S. 1-597 provides that when no qualified newspaper is published in a county, publication in a qualifying newspaper in an adjoining county will be "deemed sufficient." This bulletin assumes that a unit would always prefer to publish legal notices in a newspaper qualified under G.S. 1-597, even if the county in which the unit is located is excepted from G.S. 1-597 by the provisions of G.S. 1-599. Therefore, it suggests moving through the questionnaire even if the county is excepted from G.S. 1-597 because only one newspaper is published in it. Only if that newspaper is not qualified should the unit publish in a newspaper in an adjoining county.

Before it can be determined whether a county is one in which no qualifying newspaper is published, both "newspaper" and "published" must be defined. Generally, a "newspaper" is a publication issued at regular intervals containing, among other things, current news and items of either general or special interest [Puget Sound Publishing v. Times Publishing Co., 74 P. 802 (Wash.

1903)]. While a publication devoted entirely to advertising is not a newspaper [Hermenet v. Wykle, 314 N.Y.S.2d 204 (Sup. Ct. 1970); see Shoppers Guide Publishing Co., Inc. v. Woods, 547 S.W.2d 561 (Tenn. 1977)], a free publication with at least 97 per cent of its space in advertising has been held to be a paper on the ground that it was not merely a handbill or broadside distributed without periodicity [Hawden, Inc. v. Department of Taxes, 422 A.2d 255 (Vt. 1980), appeal dismissed, 451 U.S. 977 (1981)]. Many judicial definitions of "newspaper" refer to characteristics that are actually relevant to the definition of "general circulation" [see, e.g., Caldor, Inc. v. Herrernan, 440 A.2d 767 (Conn. 1981)]. These are separate definitions in the North Carolina statutory scheme.

The courts have had trouble with the concept of where a newspaper is published. Both dictionaries and legislative intent have been consulted in an attempt to develop a viable definition. "Publication" does not refer to the mechanical process of printing [Southwestern Newspapers Corporation v. Griffin, 267 S.E.2d 21 (Ga. 1980)]. The term "place of publication" refers to the site where the paper is first issued [North Shore Savings and Loan Association v. Griffin, 387 N.E.2d 680 (Ill. 1979)]. More specifically, "place of publication" is a readily ascertainable and usually singular location where the principal offices are situated, where content is determined, where editing is performed, and so on--the "home office" [Beaufort v. Warwick Credit Union, 437 A.2d 1375 (R.I. 1981); Oklahoma Journal Publishing Co. v. City of Oklahoma City, 620 P.2d 452 (Okla. App. 1979); City of Plainfield, supra].

2. *Does the paper's content appeal to the public generally?* If yes, continue.

3. *Are there more than a token number of paid subscribers in the unit where publication is required?* If yes, continue.

4. *Are paid subscribers distributed in more than one geographic section or community within the unit where publication is required?* If yes, continue.

5. *Is the paper available to anyone in the unit where publication is required who wishes to subscribe?* If yes, continue.

The North Carolina Supreme Court recently closely examined the phrase "general circulation to actual paid subscribers" in Great Southern Media, Inc. v. McDowell County [304 N.C. 427 (1981)]. It developed a four-pronged test for the characteristics represented in the phrase. These prongs are reflected in questions 2 through 5.

There was no majority opinion in the case. Three justices joined in one opinion, and two other justices concurred in the result. Two justices dissented. The case involved whether the Old Fort Dispatch was a qualified newspaper under G.S. 1-597. The only issue was whether the paper had a "general circulation to actual paid subscribers in the taxing unit." The clause "in the taxing unit" was relevant because the case also involved another statute, G.S. 105-369(d) (tax lien sales), which requires advertisement in papers that have general circulation in the taxing unit. The Court held that the requirements of both this statute and G.S. 1-597 must be met. The taxing unit in the case was the county, which had approximately 30,000 residents and 15,864 registered voters; 11.7 per cent of these voters resided in Old Fort and 52.4 per cent in Marion, the county seat ten miles to

the east. Of the Old Fort Dispatch's paid subscribers, 382 were in the Old Fort area (220 on rural postal routes), 110 were in Marion (33 on the rural routes), and seven were in other parts of the county. The Court held that the paper did have the requisite circulation. The two concurring justices and the two dissenting justices were all concerned with the way in which the other three justices presented the quantitative tests. Each of the nonplurality justices wanted a clearer statement of the need for generalized distribution. The concurrence was nonetheless satisfied that the Old Fort Dispatch met the test.

Before looking at the separate prongs of the Court's test, it is important to note the significance of the cumulative treatment of the statutes in the case. The reference to a particular location is not unique to the tax statute involved there. G.S. Chapter 160A, for example, contains numerous requirements of published notice. When the area for notice is unspecified, G.S. 160A-1(7) makes it the county or counties in which the city or town is located. Thus, to be qualified for publication under G.S. 160A-1(7), a newspaper must have general circulation to actual paid subscribers in the county(ies) where the unit is located. G.S. 160A-37(b) specifically provides for notice in the city or town, and that will be the relevant area. G.S. 160A-513(c), referring to a newspaper published in the city or town, is more problematic; it could be interpreted as also requiring general circulation in the city or town. It appears more accurate, however, to read the statute as not affecting the "location of 'general circulation'" test. Generally, a local government must comply with all the provisions of both G.S. 1-597 and the particular substantive statute that requires notice.

Comments

Question 2. Consistent with the basic intent to find a medium that reaches the general public, the first and most basic element of "general circulation" is that the newspaper have a content with broad public appeal. In establishing this criterion, the Court noted that the presence of items of general interest indicates a representative audience. Among the "endless possibilities" cited as examples of such items were national, state, or county news; editorials; human interest stories; and advice columns. As long as a newspaper's content is of interest to the general public, it may be directed to a particular locality or group and still have "general circulation" [304 N.C. at 441-42].

In examining the public appeal of newspaper content, the courts have applied many tests. A California court examined a paper whose only local news and news of disasters was material of interest to the building and construction industries alone, with no coverage of social or political news, nor any accounts of "local events, casualties, hotel arrivals or departures, personal items and the like"; the court found that the readership was too specialized to comply with the statutory requirement that it be representative [In re David, 276 P. 419, 421 (Cal. App. 1929)]. On the other hand, items regarding the local American Legion post, a change in the ownership of an insurance business, a veterinarian's advice on tapeworms, a Nursing Homes Association meeting, and unlawful cutting of Christmas trees were sufficient to establish a general content [In re Paradise News Press, 311 P.2d 555 (Cal. App. 1957)]. Similarly, the Florida Supreme Court held the Jewish Floridian to be qualified, stating that it is hard to determine where Jewish interests end and Gentile interests begin and noting that the paper contained a limited

but not negligible amount of news of general character and interest to the community at large [State ex rel. Miami Leathercote Co. v. Gray, 39 So.2d 716 (1949)].

Question 3. The quantitative aspect of "general circulation" is generally de-emphasized [see, e.g., Burak v. Ditson, 229 N.W. 227 (Iowa 1930)]. The peculiar phrasing of the second prong of the Great Southern Media test represented by this question--"more than a de minimis number" (de minimis generally meaning "trivial" or "trifling")--underscores this point. There is, nonetheless, an inescapable quantitative character to the term "general circulation." The requirement that there be more than a token number of subscribers is designed to give effect to that character. The Court plurality that formulated the requirement was careful to state that the number may not be so insignificant that the purpose of reaching the general public fails. This is an important point, for the concern of the concurring justices is partially one of qualifying publications that have a very small circulation.

The statutory requirement of "actual paid subscribers" means that free distributions and nonsubscriber sales may not be considered [304 N.C. at 442, n.8].

The imprecision of the term "general circulation" does not allow a fixed formula for determining what number of subscribers will qualify a paper. A number sufficient for a rural, sparsely settled county would be inadequate for a highly urbanized area. An adequate minimum must be determined in the particular context. One example is the facts of the Great Southern Media case. There the newspaper had 492 paid subscribers in a county with about 30,000 persons (and approximately half that many registered voters). Another example is a case in which a newspaper with 5,000 readers in a fire district with 15,000 qualified voters was held to be of "general circulation" [Barrett v. Cuskelly, 275 N.Y.S.2d 280 (Sup. Ct. 1966)]. On the other hand, 1,000 readers in a city of 242,000 and 12 paid subscribers (the relevant group) in a city of 79,000 were held insufficient in light of the goal of bringing material to the attention of substantial numbers of people in the affected area [Times Printing Co. v. Star Publishing Co., 99 P. 1040 (Wash. 1909); In re Carson Bulletin, supra].

Question 4. The third prong of the "general circulation to actual paid subscribers" test was the key point that split the Court in Great Southern Media. The three-judge plurality saw within the cases reviewed a geographic element to the quantitative aspects of "general circulation." They were unwilling, though, to use this element to create a requirement for even distribution or a preference for the paper with the widest geographical range. They declined to find a legislative intention to eliminate many general-interest newspapers with only limited geographic distributions. What they did require was that the paid subscribers not be concentrated in one area within the relevant unit. The two concurring justices wanted a clearer requirement that the newspaper reach the general body of taxpayers in the unit. (They did feel that the newspaper in question met that test.) The concurring justices' test should be followed, because it will satisfy a majority of the Court.

Question 5. The fourth prong of the Great Southern Media test is essentially a final "net" to strengthen the test's accuracy as a substitute instrument for the statutory requirement. It is intended to ensure that qualifying newspapers are not limited to any particular group (duplicating the

first prong) or to any particular neighborhood or other area (duplicating the third).

6. Is the paper published in a city or town that is located in more than one county? If yes, go to question 8. If no, go to question 7.

The statute provides slightly different second-class mail tests for newspapers that are published in a city or town located in more than one county than for other newspapers. The definition of "publication" discussed under question 1 above should be used here.

7. Is the paper entered as second-class mail in the county or political subdivision in which publication is required? If yes, go to question 9.

8. If publication is required in a county, is the paper entered as second-class mail in that county or in the city or town where it is published? If publication is required in a political subdivision other than a county, is the paper entered as second-class mail there? If yes, go to question 10.

The second general requirement of G.S. 1-597 is that a qualifying newspaper be "admitted to the United States mails as second-class matter" in the unit where publication is required. (If a newspaper is published in a city or town that is located in two or more counties, it is considered for purposes of this requirement to be published in each county in which the city or town is located.) This requirement is a factual matter under the purview of the United States Postal Service. It is instructive, nonetheless, to examine the requirements for second-class publications. Formerly in the federal statutes, they are now found (since 1970) in the regulations of the Postal Service, issued in the Domestic Mail Manual. The basic rules are that only newspapers and periodicals that are published at regular, stated intervals with an intent to continue indefinitely may qualify. The publisher must maintain a known office of publication at the location where second-class mail status was first authorized (original entry). This place must be a public office where the business of publication is transacted during normal business hours.

9. Has the paper been issued in the county in which publication is required for at least one day each calendar week for at least 25 of the 26 weeks immediately preceding the date of first publication of the notice? If yes, the paper is qualified. If no, go to question 11.

10. Has the paper been issued in the county in which publication is required or outside that county but in the city or town where published for at least one day each calendar week for at least 25 of the 26 weeks immediately preceding the date of the first publication of the notice? If yes, the paper is qualified. If not, go to question 11.

The statute mandates that a newspaper have been "regularly and continuously issued in" the county where publication is required. It is obvious from the specific statements of what constitutes continuity and regularity that the thrust of the requirement is to ensure the use of stable publications. There is also an inescapable locational nexus because of the words "issued in." The nature of this part of the requirement is difficult to define. It appears to be broader than "published in," encompassing later distributions [see North Carolina Savings, supra]. Whatever the precise meaning of the language, the

requirement will presumably be met by any paper qualified under the "general circulation" and second-class mail requirements and is, therefore, not functionally independent.

The particular measurement of continuity and regularity is fairly self-explanatory. "Calendar week" is the period from Sunday to Saturday [Syverson v. Saffer, 140 N.Y.S.2d 774 (Sup. Ct. 1955)]. The twenty-sixth week is thus the one ending on the Saturday before the first publication date.

11. In the calendar year, has there been a period exceeding four weeks in which no issues were published? If yes, go to question 12. If no, the paper is qualified.

The statute allows some papers that fail the basic continuity and regularity test to qualify nonetheless. It essentially gives a limited grace period to a paper that misses two or more weeks of issue(s) in the immediately preceding 26 weeks. Only if the paper has not been published for over four consecutive weeks (in the calendar year) will it finally be adjudged insufficiently continuous and regular.

12. (a) Is there a paper in an adjoining county or in the same judicial district that is qualified in its own county? (b) Does the paper have a general circulation in the county where publication is required? (c) If the clerk of superior court in the county where publication is required finds (a) and (b) to be the facts, then the paper is qualified.

The second paragraph of G.S. 1-597 establishes an alternative for situations in which no qualified paper exists in a county. If this alternative is followed, the resulting publication is "deemed sufficient compliance" with the statute or court order authorizing or requiring it. The essence of the alternative is to allow the use of nonlocal newspapers that have general circulation in the county where publication is required. The paradigm is a metropolitan paper with readers in rural counties. Part (a) involves the selection of a paper in the region. The statute requires that the paper "otherwise meet the requirements of this section." Since the provision operates only when no qualified paper is available in the county, it must mean that the newspaper must be qualified within its own county. This would ensure the selection of an adequately situated medium. Part (b) tests the "general circulation" of the paper in the county where publication is required. Because G.S. 1-597 does not refer to "actual paid subscribers," and because the paper will already have met the larger "general circulation" requirement in being otherwise qualified, Part (b) is evidently simply a requirement of generalized geographic distribution. No test is indicated, and none has been developed by the courts. The Great Southern Media geographic criterion is certainly relevant (see question 4 above). Finally, G.S. 1-597 requires that the characteristics of (a) and (b) be found as a fact by the clerk of superior court of the county where the publication is required (c).

The procedure of the second paragraph of G.S. 1-597, unlike that of the first, is not exclusive, as the language "deemed sufficient" indicates. An entity that must publish could presumably attempt another procedure, but that procedure would not have the presumptive sufficiency of the statutory way. Of course, if no paper qualifies under either paragraph, another procedure must be used.

II. COMPUTATION-OF-TIME STATUTES

Legal notices not only must be published in newspapers that qualify under G.S. 1-597 but frequently also must be published according to carefully prepared schedules because of statutory requirements that the notice be published a stipulated number of days before the action involved occurs. The material that follows discusses the rules for computing time requirements of this sort.

Rule 6(a) of the Rules of Civil Procedure provides the blanket rule for the computation of periods of time in North Carolina. The basic thrust of the rule is the inclusion of either the first day of the period or the last and the exclusion of the other. More particularly, the day of the act, event, default, or publication after which the time period begins to run is excluded. The last day of the period is included. An exception to this occurs when the last day is a Saturday, Sunday, or legal holiday, in which case the period will run to the next day that is none of those. When the publication period is less than seven days, Saturdays, Sundays, and legal holidays are not counted in determining whether a sufficient number of days were included. Rule 6(a) is to be followed unless the statute requiring publication expressly provides for some other computation method. For example, if a statute shows a clear intent to have the period include only "whole" days, both terminal dates will be excluded. (However, the phrase "at least"--as in, the notice shall be published at least ten days before the hearing--does not show this intent [Harris v. Latta, 298 N.C. 555 (1979)].

A few examples may be helpful in understanding these rules:

--G.S. 160A-513 (preparation and adoption of redevelopment plans) provides that the first notice of public hearing is to be published or posted not less than 15 days prior to the date of the hearing. Suppose that the hearing was scheduled for Thursday, September 9. That day is included, as are the 14 preceding days. ("Not less" is synonomous with "at least" and thus does not indicate a clear intent for 15 "whole" days.) The day before this 15-day period begins--Wednesday, August 25--is the latest date for the publication or posting.

--G.S. 160A-267 (private sale) requires that notice of the sale be published and forbids the sale to be consummated until ten days after publication. Suppose that the notice was published on Wednesday, August 25. To compute the ten days, August 25 is excluded. The tenth day is then Saturday, September 4. Since September 4 is a Saturday, the period continues to run. It also continues to run through Sunday and Monday (Labor Day--a legal holiday. The sale may then be consummated on Tuesday, September 7.

--G.S. 160A-37 (annexation procedure) requires that posting be done for 30 days prior to the date of the public hearing when it is the method of notice. "Prior to" appears to indicate exclusion of the latter terminal date. Because this provision is contrary to the general rule, it might show an intent for "whole" days. But in Harris v. Latta, supra, in which the statutory language was "at least sixty days prior to," the Court found otherwise. The Court's holding was consistent with excluding one of the two terminal days. Whether it is the first or the last day of the period is irrelevant to the result. For a hearing on Thursday, September 9, either method allows posting as late as Tuesday, August 10.

Another type of time-computation issue may be seen in G.S. 160A-299. This statute, relating to the procedure for street closings, requires that a resolution of intent be published "once a week for four successive weeks prior to" the public hearing. The presumed intent of such language is to indicate calendar weeks (Sunday to Saturday) [Crall v. City of Leominster, 284 N.E.2d 610 (Mass. 1972)]. The phrasing also indicates concern with the frequency and not the duration of publication, so that a notice period of 28 days is not required [Sullivan v. Faria, 308 A.2d 473 (R.I. 1973)]. Finally, it apparently requires the fourth week's publication to be in the calendar week immediately preceding the week in which the public hearing is held. [Sullivan, 308 A.2d at 476, n.2; cf. Pierson Trapp Co. v. Peak, 340 S.W.2d 456 (Ky. 1960) (explicit requirement that last publication be not later than two days before advertised event)]. Therefore, if the hearing were scheduled for Thursday, September 9, publication would be required once on any day of the week during each of the weeks of August 8, 15, 22, and 29.