April 29, 2005

Frederick O. Kiel, Law Director
Anderson Township
7954 Beechmont Avenue
Anderson Township, Ohio 45255-3192

SYLLABUS: 2005-017

1. For purposes of R.C. 731.21, in order for a newspaper to be a "political newspaper," the newspaper must profess to be a newspaper of a particular political party or have an established allegiance to a particular political party.

2. R.C. 504.12 requires that the resolutions adopted by a limited home rule township under its limited home rule powers be published in accordance with the provisions of R.C. 731.21, R.C. 731.22, R.C. 731.24, R.C. 731.25, and R.C. 731.26, which establish publication procedures to be followed by municipal corporations, except that such resolutions "shall be published in newspapers circulating within the township," and in accordance with the provisions of R.C. 7.12 that do not conflict with R.C. 731.21.

STATE OF OHIO
OFFICE OF THE ATTORNEY GENERAL
JIM PETRO, ATTORNEY GENERAL

Opinions Section
30 E. Broad St., 15th Floor
Columbus, OH 43215-3400
Telephone: (614) 752-6417
Facsimile: (614) 466-0013

April 29, 2005

OPINION NO. 2005-017

Frederick O. Kiel, Law Director
Anderson Township
7954 Beechmont Avenue
Anderson Township, Ohio 45255-3192

Dear Law Director Kiel:

You have requested an opinion concerning the manner in which a home rule township must publish its resolutions. Your opinion request asks us to decide whether the township's publication in either or both of two particular newspapers will satisfy the township's duty to publish its resolutions. Although we are unable to determine whether publication in either or both newspapers you mention satisfies the township's statutory duties concerning publication of its resolutions, *see, e.g.*, 2005 Op. Att'y Gen. No. 2005-001 (questions of fact cannot be resolved by means of an opinion of the Attorney General); 1993 Op. Att'y Gen. No. 93-033, at 2-165 (syllabus, paragraph 1) (questions of fact "cannot be determined by means of an Attorney General opinion"), this opinion will explain the statutory requirements with which a limited home rule townships must comply in the publication of its resolutions.

Pursuant to R.C. 504.12, the board of trustees of a limited home rule township must publish any resolutions it adopts pursuant to its home rule powers "in the same manner as provided by [R.C. 731.21, R.C. 731.22, R.C. 731.24, R.C. 731.25, and R.C. 731.26] for municipal corporations, except that they shall be published in newspapers circulating within the township." The type of newspaper in which a township must publish such resolutions is addressed primarily in R.C. 731.21, which states, in pertinent part:

> (A) *Notwithstanding any conflicting provision of [R.C. 7.12]*,[1] each municipal ordinance or resolution, or a succinct summary of each municipal

---

[1] R.C. 7.12 states:

> Whenever any legal publication is required by law to be made in a newspaper *published* in a municipal corporation, county, or other political subdivision, the newspaper shall *also be* a newspaper *of general circulation* in the

> ordinance and resolution, and all statements, orders, proclamations, notices, and reports required by law or ordinance to be published shall be published as follows:
>
> (1) In two English language newspapers of opposite politics, published and of general circulation in the municipal corporation, if there are any such newspapers;
>
> (2) If two English language newspapers of opposite politics are not published and of general circulation in the municipal corporation, then in one such political newspaper and one other English language newspaper published and of general circulation therein;
>
> (3) If only one English language newspaper is published and of general circulation in the municipal corporation, then in that newspaper;

> municipal corporation, county, or other political subdivision, without further restriction or limitation upon a selection of the newspaper to be used. If no newspaper is published in such municipal corporation, county, or other political subdivision, such legal publication shall be made in any newspaper of general circulation therein. If there are less than two newspapers published in any municipal corporation, county, or other political subdivision in the manner defined by this section, then any legal publication required by law to be made in a newspaper published in a municipal corporation, county, or other political subdivision may be made in any newspaper regularly issued at stated intervals from a known office of publication located within the municipal corporation, county, or other political subdivision. As used in this section, a known office of publication is a public office where the business of the newspaper is transacted during the usual business hours, and such office shall be shown by the publication itself.
>
> In addition to all other requirements, a newspaper or newspaper of general circulation, except those publications performing the functions described in [R.C. 2701.09] for a period of one year immediately preceding any such publication required to be made, shall be a publication bearing a title or name, regularly issued as frequently as once a week for a definite price or consideration paid for by not less than fifty per cent of those to whom distribution is made, having a second class mailing privilege, being not less than four pages, published continuously during the immediately preceding one-year period, and circulated generally in the political subdivision in which it is published. Such publication must be of a type to which the general public resorts for passing events of a political, religious, commercial, and social nature, current happenings, announcements, miscellaneous reading matter, advertisements, and other notices. (Emphasis added.)

Pursuant to R.C. 731.21, to the extent of any conflict between R.C. 731.21 and R.C. 7.12, the provisions of R.C. 731.21 prevail.

> (4) If no English language newspaper is published and of general circulation in the municipal corporation, then in any English language newspaper of general circulation therein or by posting as provided in [R.C. 731.25], at the option of the legislative authority of such municipal corporation. Proof of the publication and required circulation of any newspaper used as a medium of publication as provided by this section shall be made by affidavit of the proprietor of either of such newspapers, and shall be filed with the clerk of the legislative authority. (Emphasis added.)

Thus R.C. 731.21(A) lists, in order of preference, the alternatives available to a municipality, and, pursuant to R.C. 504.12, to a limited home rule township, for publication of the political subdivision's legislation.[2]

The preferred method of publication described in R.C. 731.21(A) is publication in two newspapers of "opposite politics" that are "published"[3] *and* "of general circulation" within the

---

[2] Divisions (B) and (C) of R.C. 731.21 concerns the preparation and approval of summaries of legislation that is published and the availability of the full text of any such legislation. The other provisions of R.C. Chapter 731 with which R.C. 504.12 requires a limited home rule township to comply relate to the times publication is required, R.C. 731.22, certification of publication, R.C. 731.24, publication when no newspaper is published in the political subdivision, R.C. 731.25, and the effect of not making publication, R.C. 731.26.

[3] Although the terms "published" and "of general circulation," specifically as used in R.C. 731.21, are not defined by statute, R.C. 7.12 provides that, "[w]henever any legal publication is required by law to be made in a newspaper *published* in a municipal corporation, county, or other political subdivision, the newspaper shall *also be* a newspaper *of general circulation* in the municipal corporation, county, or other political subdivision, without further restriction or limitation upon a selection of the newspaper to be used." As explained in 1991 Op. Att'y Gen. No. 91-059 at 2-291:

> In its broad, general sense, "publish" means "to issue (a printed work, etc.) to the public, as for sale." *Webster's New World Dictionary* 1149 (2d college ed. 1984); *see also Black's Law Dictionary* 1233 (6th ed. 1990) ("to make public; to circulate"). As used in R.C. 7.12, however, the term "publish" obviously refers more narrowly to the *actual printing* of a paper. This narrow usage is evidenced by the distinction made between papers "published in" a county and papers "of general circulation therein" or papers "issued … from a known office of publication." *See, e.g.*, R.C. 7.12 ("[i]f no newspaper is published … then any legal publication required .. may be made in any newspaper of general circulation therein"). (Emphasis added.)

We concur with the reasoning of 1991 Op. Att'y Gen. No. 91-059, and find that, because R.C. 731.21, like R.C. 7.12, describes the newspapers therein not only as those "published," but

municipality, R.C. 731.21(A)(1), or township, R.C. 504.12. Your concern is how one assesses the "politics" of a newspaper for purposes of determining whether two newspapers are "of opposite politics" for purposes of R.C. 731.21(A).

Over the years, various courts throughout the state have examined the question you ask with different results. In the early case of *Reefy v. City of Elyria*, 30 Ohio Ct. App. 273, 274, 1913 Ohio Misc. Lexis 179 (Lorain County 1913), the court determined that the question whether two newspapers are of "opposite politics" "is a matter of fact, to be determined upon all the circumstances of the case." The court then proceeded to examine the newspapers' "conduct and affiliations in the political campaign of 1912, [rather than] their claims and asseverations now." 30 Ohio Ct. App. at 274. The *Reefy* court based its determination of the "politics" of each newspaper upon the conduct and policy of each during the preceding election period, in which national and state offices were decided.

The same approach was taken by the court in *State ex rel. Wooster v. Pethtel*, 19 Ohio Op. 374, 1940 Ohio Misc. Lexis 402 (C.P. Lake County 1940). In deciding whether a particular newspaper was a Republican newspaper or one of independent politics, the *Pethtel* court considered not only statements made by the newspaper's owners and publishers, but also reviewed the newspaper's contents over a period of a year to determine whether the editorials or news items disclosed partiality to a particular political party.

A different analysis, however, was used by the court in *Biddle v. Village of Harrison*, 36 Ohio Misc. 50, 301 N.E.2d 924 (C.P. Hamilton County 1973). In *Biddle*, the Hamilton County Court of Common Pleas, within whose jurisdiction Anderson Township lies, adopted a more direct approach to ascertaining the "politics" of a newspaper for purposes of R.C. 731.21. Relying upon *Ohio State Journal Co. v. Brown*, 10 Ohio Cir. Dec. 470, 471, 1900 Ohio Misc. Lexis 274 (Franklin County 1900), the *Biddle* court concluded that, in order for a newspaper to be "of a political party," the newspaper "must profess to be so or be so known." 36 Ohio Misc. at 52. The *Biddle* court explained its adoption of the *Brown* court's standard, in part, as follows:

> There are cases, *viz. State, ex rel. Wooster, v. Pethtel* (1940), 33 Ohio Law Abs. 267 and *Reefy v. Elyria* (1913), 30 Ohio Cts. App. 273, 45 C.C. 387, which attempt to determine whether a paper is "political" by analyzing the owner's politics, the paper's editorials, preference in news items, support of candidates in the last preceding election, etc. In our judgment this procedure involves the

---

also "of general circulation," within the political subdivision, the General Assembly intended to use the word "published" in its narrow sense, *i.e.*, printed. *Cf.* R.C. 505.10(A)(1) (requiring a board of township trustees to advertise certain public auctions in "a newspaper published, *or* of general circulation, in the township" (emphasis added)); R.C. 5575.01(A) (certain township road repair projects undertaken pursuant to contract must be advertised "in a newspaper *published in the county* and of *general circulation within the township* or, if no newspaper is published in the county, in a newspaper having general circulation in the township" (emphasis added)).

> courts in a sea of shifting facts and is not a correct interpretation of the legislative intent when it speaks of a "political newspaper" or "newspapers of opposite politics."
>
> When these words were placed in the statute there were many newspapers throughout the state which *held themselves out as* "a Democratic newspaper" or "a Republican newspaper." This is what the Legislature had reference to when it used the words "political newspaper."

36 Ohio Misc. at 51 (emphasis added).[4]

A similar approach to analyzing the "politics" of a newspaper was taken by the court in *City of Columbus v. Barr*, 6 Ohio C.C. (n.s.) 151, 1905 Ohio Misc. Lexis 215 (Franklin County 1905). In the *Barr* case, the court specifically considered the meaning of the term "newspapers of opposite politics," as used in R.S. 1536-619 (predecessor of R.C. 731.21), and stated:

> The word politics, when applied to the science of government in this country, means party politics. The people organize themselves into parties for the purpose of imposing upon the government a more or less well defined policy, through the election of chosen candidates under a party name, each party having its own policy and candidates. In the common acceptation, the arena on which these parties contend is the field of American politics.
>
> So in the statute under review the Legislature did not use the words "opposite politics" in any broader sense. It was not intended that the various boards and councils, whose duty it is to provide for the publication, should take upon themselves the duty of determining the politics of any given newspaper, abstractly, from principal. If that were permissible, the board or the council, not the Legislature, would determine the kind of paper in which the publication could be made, and by refinement could defeat the very purpose of the statute. That the municipal council does not have arbitrary power, or even wide latitude, in the selection of a newspaper, is made obvious by the provisions of Section 1536-908 [(currently at R.C. 701.04)],[5] which prescribe when it may depart from the

---

[4] Although the court in *Biddle v. Village of Harrison*, 36 Ohio Misc. 50, 51-52, 301 N.E.2d 924 (C.P. Hamilton County 1973), quoted the portion of *Ohio State Journal Co. v. Brown*, 10 Ohio Cir. Dec. 470, 1900 Ohio Misc. Lexis 274 (Franklin County 1900), which included reputation, *i.e.*, whether a newspaper is "known as" a newspaper of a particular political party, as a means of determining a newspaper's politics, the *Biddle* court utilized the more direct approach and found a newspaper to be politically independent, based upon its holding itself out as such. Because the reputation test is entirely subjective, the outcome of which will vary, depending upon the mindset of the specific person or group making the determination, we are inclined to reject the reputation test as a method for determining the "politics" of a newspaper.

[5] R.C. 701.04 states:

> statutory designation. The kind of newspaper is pre-determined by an *established party allegiance*, which denotes its politics….

6 Ohio C.C. (n.s.) at 154 (footnote and emphasis added). The *Barr* court thus adopted a direct approach to determining the "politics" of a newspaper, whether the newspaper has "an established party allegiance," *id*. Under the *Barr* court's standard, a newspaper's politics are determined by the affirmative actions of the newspaper, rather than by the perceptions of others.

We find the standards adopted by the courts in *Biddle v. Village of Harrison* and *City of Columbus v. Barr* most persuasive and practical in application. Based upon these cases, therefore, we conclude that, in order for a newspaper to be a "political newspaper" within the meaning of R.C. 731.21, the newspaper must profess to be a newspaper of a particular political party or have an established allegiance to a particular political party.

Although there may be few newspapers that profess to be newspapers of a particular political party or that have an established allegiance to a particular political party, R.C. 731.21(A) establishes several publication alternatives in the event that two English language newspapers "of opposite politics" are not published and of general circulation within the pertinent political subdivision.[6] Pursuant to R.C. 731.21(A)(2), if there are not two English language newspapers of opposite politics published and of general circulation within the subdivision, then publication shall be in one such political newspaper and in one other English language newspaper published and of general circulation therein. In the event that there is only one English language newspaper published and of general circulation in the political subdivision, then publication shall be in that newspaper. R.C. 731.21(A)(3). Finally, if there is no English language newspaper published and of general circulation in the political subdivision, then publication shall be "in any English language newspaper of general circulation therein or by posting as provided in [R.C. 731.25], at the option of the legislative authority of such [political subdivision]." R.C. 731.21(A)(4). *See generally* R.C. 7.12 (in part, establishing criteria for newspapers or newspapers of general circulation); note one, *supra*.

> Where in Title VII of the Revised Code a notice is directed to be published in a newspaper, and no such newspaper is published at the place mentioned as provided in [R.C. 7.12], or if the publisher of such newspaper refuses, on tender of the legal charge for printing such notice, to insert it in his newspaper, a publication thereof in any newspaper of general circulation at such place shall be sufficient. This section does not dispense with posters where they are provided for.

[6] Pursuant to R.C. 504.12, the terms of R.C. 731.21, when applied to the publication of resolutions by limited home rule townships, must be modified to refer to "newspapers circulating within the township."

Based upon the foregoing, it is my opinion, and you are advised that:

1. For purposes of R.C. 731.21, in order for a newspaper to be a "political newspaper," the newspaper must profess to be a newspaper of a particular political party or have an established allegiance to a particular political party.

2. R.C. 504.12 requires that the resolutions adopted by a limited home rule township under its limited home rule powers be published in accordance with the provisions of R.C. 731.21, R.C. 731.22, R.C. 731.24, R.C. 731.25, and R.C. 731.26, which establish publication procedures to be followed by municipal corporations, except that such resolutions "shall be published in newspapers circulating within the township," and in accordance with the provisions of R.C. 7.12 that do not conflict with R.C. 731.21.

Respectfully,

JIM PETRO
Attorney General