

# The Huntsville Item, Huntsville, TX

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## City: Mediation order will force violation of Open Meetings Act

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HUNTSVILLE — Attorneys for the city of Huntsville have objected to the terms of a federal appeals mediation order with the Huntsville-Walker County Chamber of Commerce over concerns the order would force it to violate the Texas Open Meetings Act.

The mediation order is one more step in a 2 1/2-year dispute over the chamber's use of hotel occupancy taxes, collected from 2000 to 2009 by the city but managed by the chamber and earmarked for use solely on activities promoting tourism.

After an investigation by an outside auditor, the city sued the chamber and some of its executives — including former president Dee Everett — accusing them of misspending thousands of dollars in HOT funds. The chamber was ordered to reimburse the city nearly \$500,000 in misspent funds and litigation fees. The chamber is appealing the verdict, handed down in October 2010 by a Leon County jury.

The 10th Texas Court of Appeals on Feb. 9 ordered mediation between the city and chamber to resolve an appeal of the verdict. The city filed a request for clarification and objection to the mediation order on Feb. 17.

According to the order, all parties must agree on a mediator and all parties must be present during the entire mediation process. Someone who has the authority to agree to the terms of a settlement also must represent each of the parties.

Though the city didn't object to the purpose of the mediation, city officials took issue with the wording of the order. The verbiage in question: "with authority to bind the city."

City attorney Leonard Schneider argues that no representative of the city could agree to a settlement without approval of the Huntsville City Council and a settlement offer would have to be disclosed in open session, which could present a possible Open Meetings Act violation.

"Because of this conflict, the city is presented with a choice to either violate a portion of the court's order, or violate the Texas Open Meetings Act," Schneider said, in the request for clarification.

"Consequently, the city requests the order be modified to allow it to participate in good faith at the mediation by sending representatives with knowledge of the lawsuit and its history, but with the understanding ... that the city representative can only recommend an agreed upon settlement amount contingent upon being presented to, considered and authorized by the City Council at a properly posted meeting."

Schneider also asks the court to withdraw the mediation order because mediation attempts were made prior to the trial in October and because mediation would give the chamber an unfair advantage in negotiations because the city's bottom line offer would have to be discussed by council in open session.

Chamber attorney Levi McCathern, with McCathern, Mooty, Hyde and Grinke in Dallas, filed an objection to the city's objection on Feb. 22.

McCathern said the chamber wants to go forward with mediation and would like the chamber board and City Council work together on a settlement.

"The court ordered mediation because there's belief that the best people to work out disputes are the parties in the dispute," he said. "You have to have folks with the ability to settle a case present. One of the things that has been frustrating from our side is we haven't been able to get formal proposals. They've basically just said no to our proposals."

A case can go into mediation even after a jury has handed down a verdict, Schneider said.

"Settlement can occur at any time there is a live dispute between parties or after a final judgment and after all appeals have been exhausted," he said. "For example, I have a judgment against you for \$5. I start collection efforts, but find out you have hardly any assets. As a cost of business decision and to collect something instead of nothing or very little, I may accept \$3 from you in settlement of the judgment and then release the judgment against you. I do not have to do this, but I have the option."

McCathern said a settlement is what the chamber is hoping for – along with an end to the dispute.

"We're trying to get the decision-makers together to put this thing to bed and for whatever reason, it seems the city is opposed to that," he said. "The chamber is not going to pay the full judgment until they've exhausted all their legal rights."

In the chamber's response to the city's objection, McCathern outlines a way in which the city could participate in mediation and still comply with the Open Meetings Act.

McCathern said three things are required for a mediation to be successful: the parties must participate in good faith, decision-makers with authority to make and accept offers must be present, and the mediator and decision-makers must communicate directly about the strengths and weaknesses of each party's case.

McCathern said the chamber doesn't doubt that the city's representative would act in good faith, but the city hasn't yet met the other two criteria.

"(The) city's motion provides a road map for how, with some slight modifications, the council could comply with TOMA (Texas Open Meetings Act) and satisfy the three criteria for a potentially fruitful mediation," he said. "No. 1. Give the required 72-hour notice of a meeting to conduct mediation of the case, that an open session would be convened at the agreed start time on the day of mediation and that the open session would be adjourned to executive session to discuss settlement of the case with the city attorney and/or the mediator."

McCathern said the notice could also say that the open session would be convened when needed so council could vote on any motion to accept a settlement offer or to adjourn the meeting without agreeing to a settlement.

After previous unsuccessful settlement attempts, McCathern said, it's important the entire City Council is present during court-ordered mediation.

“At no point has there been an opportunity for the chamber executive board, Ms. Everett and the entire City Council to confidentially discuss settlement in person, much less a mediation where any mediator has been able to discuss the strengths and weaknesses of the parties' claims and defenses directly with council members and the chamber executive board,” he said.

McCathern asked the appeals court to deny the city's objections to its order because, “no mediation which is not attended by the entire City Council will lead to a settlement of this case.”

The case continues to be a hot topic at City Council meetings and the cause of tension between recently elected council members and those who were in office in 2009 when the lawsuit was filed. At the last City Council meeting, one citizen, speaking during the public comment period, joked that the city owned the chamber, implying the chamber could not come up with the money the district court awarded to the city.

But Paul Davidhizar, chamber board president, said rumors that the city would bankrupt the chamber with the half-million-dollar judgment are premature.

“The chamber is solvent and has been for a long time. As far as the ‘city owning the chamber,’ all of that is some people's viewpoint, but all of that is up in the air,” he said. “That's what the whole court-mandated (mediation) is about. There is an offer on the table right now. I don't think the City Council is amenable to that offer and that's OK.”

Traveler's Insurance put up a bond for the chamber, which allowed the chamber to begin appeals in the case. It's unclear if Traveler's will pay the full judgment amount if no settlement is reached.

“I don't know what all the available resources would be to settle the suit. We have to get a number first,” Davidhizar said. “Until you get a number, you don't know what options you have or resources you have to meet the number. If the bottom line is the full amount, there are a lot of options. We can keep going through the appeal. We can accept (the full) amount. That's something the chamber board would have to agree upon. I don't know if the full amount is agreeable, and that's why we have to sit down and talk.”

If the court goes through with the mediation order, the parties will have to split the cost of the mediator. The chamber's appeals deadlines are suspended while the mediation order is in place.