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OPINION COMMITTEE

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November 8, 2007

The Hon. Greg Abbott,  
Attorney General of Texas  
c/o Opinion Committee  
P.O. Box 12548  
Austin, Texas 78711-2548

FILE # ML-45441-07  
ID. # 45441

**RQ-0646-GA**

Re: Request for Opinion

Dear General Abbott:

On behalf of the Williamson County Auditor, we are requesting an Attorney General's Opinion or Letter Opinion with regard to the following questions:

**(1) Can a county make disbursements to vendors under the state Low Income Vehicle Repair Assistance, Retrofit, and Accelerated Retirement Program (LIRAP) before such expenditures have been approved by the county's commissioners court, treasurer, and auditor?**

**(2) If the answer to #1 is "No," is the Texas Commission on Environmental Quality (TCEQ) prohibited from reimbursing a county for expenditures under LIRAP when the required review makes payment within five business days impossible?**

Although we will be looking to your decision for a definitive answer, Texas law requires me to submit a proposed opinion for your consideration. I would like you to consider the following:

**Legal Background:** The LIRAP program established by Chapter 382, Health and Safety Code, provides a funding mechanism to assist low-income persons whose vehicles cannot meet emissions standards. The person goes to a participating dealer who makes the repairs or replaces the vehicle. The dealer can receive certain payments from the county under the program, and the county is later reimbursed by the state.

The program was recently amended by SB 12 to include certain provisions that are to go into effect upon adoption of the implementing regulations by the TCEQ. These regulations are

referred to in Sec. 382.210(a) as “guidelines to assist a participating county.” Among the new provisions is a requirement in amended Sec. 382.210(d) that a participating county “shall ensure that funds are transferred to a participating dealer under this section not later than five business days after the date that the county receives proof of the sale from the dealer.” This is a very significant difference from the existing rules, which gave counties up to thirty days to pay dealers. Issuance of the regulations, or guidelines, is imminent.

However, the five-day-payment provision is in conflict with long-standing Texas law that makes it a core duty of the county commissioners court, treasurer, and auditor to review and approve all county expenditures. Because they are not in session every business day, the commissioners court is the primary bottleneck to payment within five days.

The inescapable role of the commissioners court is dictated by their constitutional duty to levy taxes and budget expenditures. As Attorney General’s Opinion JC-0379 (2001) succinctly stated the law

Section 113.041(a) [Local Govt. Code], which directs a county treasurer to disburse county money “as the commissioners court may require or direct” does not permit the treasurer to disburse county money without obtaining the commissioners court’s approval. The commissioners court may not delegate this duty.

The ruling authority for this is *Padgett v. Young County*, 204 S.W. 1046, 1052 (Tex. Civ. App.—Fort Worth 1918, *writ dismiss’d*) which determined that the commissioners court has the non-delegable duty to “audit all claims against the county and order paid those only which are found to be just and legal demands.”

A 1995 letter opinion (LO95-002) issued to Joe F. Grubbs, County and District Attorney of Ellis County, states,

We think it is clear under section 113.041(c) [Local Govt. Code] that the treasurer may not make payments from the treasury without a certificate or warrant for each payment from an officer who is authorized by law to issue it. See, e.g., Attorney General Opinions JM-192 (1984); H-171 (1973); [other authorities omitted]. . . . Further, as Attorney General Opinion JM-986 (1988) noted . . . there are no officers other than the commissioners court authorized to issue such certificate or warrant.<sup>1</sup> (emphasis added)

LO95-002 goes on to point out that the treasurer and the sureties on her official bond can be held personally liable for making payments without the prior approval of the court. See also the various authorities cited in §16.10, David B. Brooks, *County and Special District Law*, Second Edition [35 *Texas Practice Series* 2002], an earlier edition of which was cited in LO95-002.

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<sup>1</sup> In counties of over 190,000 population, other county officers may draw checks on the treasury to pay salaries or expenses, but the LIRAP payments are not the salaries or expenses of a county officer.

**The Practical Problem:** A Texas commissioners court only holds regular sessions on a monthly schedule, and in most counties holds special sessions on no more than a weekly basis. See Local Govt. Code Sec. 81,005. The Texas Open Meetings Act prohibits the court from acting on any matter that has not been placed on its posted agenda at least 72 hours in advance. Govt. Code Sec. 151.041.

The Williamson County Commissioners Court, for example, meets on Tuesdays at 9:30 am, so its agenda must be posted no later than the previous Saturday morning. Since county offices are closed at that time (although the bulletin board where the agenda is posted is accessible to the public), the practical deadline is much earlier. The members of the court (and interested members of the public) need to receive the agenda and supporting materials before the close of business on Friday so they can study it over the weekend before the meeting. By county policy, the deadline for submission of an agenda item is noon on Thursday to allow the preparation and distribution of the printed material and to permit timely posting of the agenda on the county website in compliance with the Open Meetings Act.

However, for the sake of argument let us assume that the relevant county officers could get an item onto the agenda if the dealer provided proof anytime before 9:30 Saturday. Let us further assume that the county's accounting staff in the offices of the County Treasurer and County Auditor could guarantee that they would process every court-approved bill and make a wire transfer before the close of business on Tuesday. Even under those questionable assumptions, payment requests submitted by a dealer on Monday could not possibly be approved and paid until Tuesday of the following week, six business days later—a violation of the LIRAP guidelines. Full compliance is simply impossible. If a court session was cancelled due to a holiday or for the unavoidable lack of an available quorum to attend, a Monday claim could not be paid until at least thirteen days later—eight days late. Since these late payments would not be in compliance with LIRAP, it is possible (perhaps likely) that TCEQ would refuse to reimburse the county for these expenditures, absent guidance from the Attorney General to the contrary.

In the real world, it will take at least a day or two to process the incoming claim to put it on the agenda and another day or two to process the approved expenditure and make the wire transfer. Under Texas law, both the County Treasurer [See Local Govt. Code Sec. 113.041] and County Auditor [See §113.043] have a non-delegable core duty to review each county disbursement, and that—inescapably—takes time. Even with the utmost due diligence, half or more of the incoming dealer claims may fall within a chronological window that makes it impossible to get the required review and approvals from the court, treasurer, and auditor and still wire the payment no later than the fifth business day after submission. The proportion will be much higher in a county with only monthly commissioners court sessions.

**Discussion:** It is my belief that the Legislature did not intend to silently strip the commissioners court, treasurer, and auditor in Texas counties of their authority to review and approve expenditures to be made from county funds. Since these are core duties of those offices, any abrogation of their constitutional responsibilities would have to be made explicit, and might require a constitutional amendment. No note of any such change appears in the bill title to SB 12. The regulations are referred to in Sec. 382.210(a) as "guidelines to assist a participating county," which seems unlikely language to mandate a fundamental change in the duties of several county officers. Therefore, I believe that the normal statutory approvals from the court, treasurer, and auditor are still required before a county makes an expenditure under LIRAP.

In order to reconcile the amended act with existing law, I believe that the five-day payment requirement for the LIRAP program must be construed not as a mandatory requirement, but as an aspirational goal. The regulations are expressly supposed to be "guidelines." In other words, the "shall" in Sec. 382.210(d) can only reasonably be construed as a "should." Payment **should** be made as quickly as practicable, even if it is not possible within five business days. TCEQ should have the power to withhold payment of reimbursements for payments made after the fifth day only when the late payment was avoidable, not when the structure of Texas county government made late payment inevitable.

**Conclusion:** Payments to vendors under the LIRAP program must be reviewed and approved by the commissioners court, treasurer, and auditor like any other county disbursement. When practicable, payment should be made no later than the fifth business day after a claim is submitted. Unavoidable delays due to the required review and approval should not prevent the county from receiving reimbursement from TCEQ.

I look forward to your response. If you need any clarification, please call immediately.

Sincerely,

Jana Duty  
Williamson County Attorney

By:

Dale A. Rye.

Assistant County Attorney

