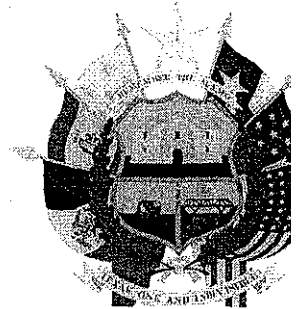


**Ed Walton**  
**Criminal District Attorney**  
 100 W. Mulberry  
 Kaufman, Texas 75142  
 (972) 932-0260



**RECEIVED**

NOV 07 2006

**OPINION COMMITTEE**

November 3, 2006

FILE # ML-45051-06

I.D. # 45051

Office of the Attorney General  
 P.O. Box 12548  
 Austin, Texas 78711

**Via: Certified Mail No.**  
**7002 0860 0007 7932 6531**

**REQUEST FOR ATTORNEY GENERAL OPINION AND BRIEF IN SUPPORT**

**RQ-0552-GA**

Dear Sir/Madame:

I am writing pursuant to § 402.043 of the Texas Government Code to request an opinion of the Attorney General. I am the elected Criminal District Attorney for Kaufman County, Texas.

**Issues**

1. Was an "emergency" meeting held by the Kaufman County Commissioner's Court on September 26, 2006 proper pursuant to § 551.045 of the Texas Government Code?
2. If the meeting of September 26, 2006, referenced above, was not properly held, what are the results of any actions taken by the Commissioner's Court at such meeting?
3. Did the Kaufman County Commissioner's Court properly set the tax rate for fiscal year 2006-2007 pursuant to § 26.05 of the Texas Tax Code?
4. If the Kaufman County Commissioner's Court did not properly set the tax rate for fiscal year 2006-2007, what are the consequences of not doing so?

**Statement of Facts**

The certified appraisal roll was received by Kaufman County on July 25, 2006

On September 25, 2006 at the regular term of the Kaufman County Commissioner's Court (hereafter referred to as "the Court"), a tax rate was adopted for the upcoming fiscal year, 2006-2007. At that meeting:

1. No motion was made to adopt an ordinance, resolution, or order setting a

tax rate that exceeds the effective tax rate made in the following form: "I move that property taxes be increased by the adoption of a tax rate of (specify tax rate);"

2. The ordinance passed did not include in the ordinance, resolution, or order in type larger than the type used in any other portion of the document a statement that "THIS TAX RATE WILL RAISE MORE TAXES FOR MAINTENANCE AND OPERATIONS THAN LAST YEAR'S TAX RATE;"
3. The ordinance passed, although it provided for a tax rate which exceeded the effective maintenance and operations rate, did not include a statement that "THE TAX RATE WILL RAISE TAXES FOR MAINTENANCE AND OPERATIONS ON A \$ 100,000 HOME BY APPROXIMATELY \$(Insert amount); and

Kaufman County maintains an internet website at [www.kaufmancounty.net](http://www.kaufmancounty.net). The home page of the County's internet website did not include the statement that the County has "ADOPTED A TAX RATE THAT WILL RAISE MORE TAXES FOR MAINTENANCE AND OPERATIONS THAN LAST YEAR'S TAX RATE." As stated above, the tax rate passed exceeded the effective maintenance and operations rate. However, the home page of the County's internet website did not include a statement that "THE TAX RATE WILL RAISE TAXES FOR MAINTENANCE AND OPERATIONS ON A \$ 100,000 HOME BY APPROXIMATELY \$(Insert amount)."

During the September 25, 2006 meeting, some of these discrepancies were brought to the attention of the Court by Precinct 3 Commissioner Ken Leonard. Despite these admonitions, it was determined by the Court that there was no need to follow any particular procedure or use any particular motion in adopting the tax rate. Included herewith is a CD with the video and audio recording of the September 25, 2006 meeting.<sup>1</sup>

After the September 25, 2006 meeting, the specific requirements of the Tax Code were pointed out to the members of the Court by Precinct 3 Commissioner Ken Leonard. On the afternoon of September 25, an emergency meeting was called for 3:30 p.m. on September 26, 2006 "to discuss and consider rewording the order setting the tax rate for the FY 2006-2007 budget." A true and correct copy of the notice of the September 26 meeting is attached hereto as "Exhibit A." The CD included also includes the audio of this September 26 meeting. No video recording of the September 26, meeting was held.

---

<sup>1</sup>

The issue of a particular motion be required was first raised 33:52 into the session. Other matters were addressed while the issue was researched. The discussion regarding these issues was resumed at 54:14. The pertinent motion was made at 57:13 and clarified at 58:36.

At the September 26, 2006 meeting, the Court attempted to correct the errors of September 25. However, even at this second meeting of September 26, 2006, no motion was made in the form of "I move that property taxes be increased by the adoption of a tax rate of ..." Rather, the a motion was made to correct "the wording" of the September 25, 2006 meeting to reflect that the proper motion had, in fact, been made. The motion was passed by a vote of two commissioners in favor and one "nay" vote.

As a result of the September 26, 2006 meeting, a document was executed by County Judge Wayne Gent (referred to hereafter as "the first document.") The first document was typewritten and prepared in advance referencing a "special" meeting that was held on September 26. The first document also included a line, immediately above the signature line for the County Judge's signature, stating that it was to be executed on September 26 and that it was to be an "order." The first document actually executed changed (by hand-written inter-lineation) the date from September 26 to September 25 (in two places), changed it from a "special" meeting to a regular meeting, and changed the document from an "order" to a "correction." The first document also stated that voting against was Commissioners Schoen and Leonard. A review of the September 26 audio transcript reveals that Commissioner Leonard was not present. The first document was signed and executed by County Judge Wayne Gent. A true and correct copy of the first document is attached hereto as "Exhibit B."

At some point in time thereafter, a second document was executed (hereafter referred to as "the second document"). The second document reflected that a regular meeting was held on September 25 and that an emergency meeting was held on September 26. A true and correct copy of the second document is attached hereto as "Exhibit C." The second document is likewise signed and executed by County Judge Wayne Gent.

**Issue No. 1** - Was an "emergency" meeting held by the Kaufman County Commissioner's Court on September 26, 2006 proper pursuant to § 551.045 of the Texas Government Code?

Section 551.045 of the Texas Government Code provides for only two circumstances under which an emergency meeting may be called. An emergency meeting may only be called because of 1) an imminent threat to public health and safety or 2) a reasonably unforeseeable situation. *See* § 551.045(b)(1) & (2) TEX. GOVT. CODE.

There has been no allegations of imminent threat to public health and safety. Neither can it be alleged that the situation in question was unforeseeable, reasonably or otherwise. At the September 25, 2006 meeting of the Court, it was specifically pointed out to the Court that they were not complying with the provisions of the Tax Code.

During the September 25 meeting, one Commissioner informed the Court that 1) "a script" was required by law, 2) exact wording was required, 3) no simple motion would suffice, and 4) that the motion under consideration was not a proper motion. The issue was not unforeseeable but was, in fact, foreseen.

The Tax Code sets forth, in great detail, sets forth the requirements for setting a tax rate. There is no way that it can be said that a Commissioner's Court can not foresee the necessity of complying with a statute.

Another requirement is that the notice of an emergency meeting "clearly identify the emergency or urgent public necessity." See § 551.045(c) TEX. GOVT. CODE. There was no attempt to identify any emergency or urgent public necessity of such meeting.

**Issue No. 2** - If the meeting of September 26, 2006, referenced above, was not properly held, what are the results of any actions taken by the Commissioner's Court at such meeting?

"To qualify as an emergency or urgent public necessity, an imminent threat to public health and safety or a reasonably unforeseeable situation which requires immediate action must exist. *Id.* § 551.045(b)." The emergency notice must "clearly identify the emergency or urgent public necessity." *Id.* § 551.045(c). A notice can be invalidated if it does not clearly identify the emergency or an actual emergency does not exist," *Markowski vs City of Marlin*, 940 SW2d 720, 724 (Tex.App. - Waco 1997, writ denied). A meeting can not be held without notice. If the notice is invalidated, clearly any action taken at such meeting would be void. See *Smith County vs Thorton*, 726 SW2d 2 (Tex. 1986).

**Issue No. 3** - Did the Kaufman County Commissioner's Court properly set the tax rate for fiscal year 2006-2007 pursuant to § 26.05 of the Texas Tax Code?

Section 26.05 of the Texas Tax Code provides, in pertinent part, as follows:

"A taxing unit may not impose property taxes in any year until the governing body has adopted a tax rate for that year, and the annual tax rate must be set by ordinance, resolution, or order, depending on the method prescribed by law for adoption of a law by the governing body. The vote on the ordinance, resolution, or order setting the tax rate must be separate from the vote adopting the budget. The vote on the ordinance, resolution, or order setting a tax rate that exceeds the effective tax rate must be a record vote. A motion to adopt an ordinance, resolution, or order setting a tax rate that exceeds the effective tax rate must be made in the following form: "I move that property taxes be increased by the adoption of a tax rate of (specify tax rate)."

§ 26.05(b) TEX. TAX CODE. No such motion was made at the September 25 meeting.

In addition, the Tax Code provides as follows:

"If the ordinance, resolution, or order sets a tax rate that, if applied to the total taxable value, will impose an amount of taxes to fund maintenance and operation expenditures of the taxing unit that exceeds the amount of taxes imposed for that purpose in the preceding year, the taxing unit must:

(1) include in the ordinance, resolution, or order in type larger than the type used in any other portion of the document:

(A) the following statement:

"THIS TAX RATE WILL RAISE MORE TAXES FOR MAINTENANCE AND OPERATIONS THAN LAST YEAR'S TAX RATE."; and

(B) if the tax rate exceeds the effective maintenance and operations rate, the following statement: "THE TAX RATE WILL RAISE TAXES FOR MAINTENANCE AND OPERATIONS ON A \$ 100,000 HOME BY APPROXIMATELY \$(Insert amount)."; and

(2) include on the home page of any Internet website operated by the unit:

(A) the following statement:

"(Insert name of unit) ADOPTED A TAX RATE THAT WILL RAISE MORE TAXES FOR MAINTENANCE AND OPERATIONS THAN LAST YEAR'S TAX RATE"; and

(B) if the tax rate exceeds the effective maintenance and operations rate, the following statement: "THE TAX RATE WILL RAISE TAXES FOR MAINTENANCE AND OPERATIONS ON A \$ 100,000 HOME BY APPROXIMATELY \$(Insert amount)."

§ 26.05(b)(1) and (2) TEX. TAX CODE. While the provisions of § 26.05(b)(1) were ultimately complied with, it was only after the illegal meeting of September 26, 2006 and not pursuant to a proper motion as required by § 26.05(b). Separate and apart, however, from the issue of compliance with § 26.05(b)(1), the requirements pursuant to § 26.05(b)(2) by posting the statutorily required statements on the County's internet home page were never complied with, even to this date.

There is yet another issue which reveals that the actions of the Court was illegal. Section 81.006 of the Local Government Code provides that "a county tax may be levied

at any regularly scheduled meeting of the court when at least four members of the court are present." §81.006(b) TEX. LOC. GOVT. CODE. Thus, the tax rate could not be set at an emergency meeting, even if such emergency meeting was properly called.

**Issue No. 4** - If the Kaufman County Commissioner's Court did not properly set the tax rate for fiscal year 2006-2007, what are the consequences of not doing so?

The Tax Code provides for the consequences of failing to comply with the applicable provisions of the code regarding setting the tax rate.

"The governing body of a taxing unit other than a school district may not adopt a tax rate that exceeds the lower of the rollback tax rate or the effective tax rate calculated as provided by this chapter until the governing body has held two public hearings on the proposed tax rate and has otherwise complied with Section 26.06 and Section 26.065."

§ 26.05(d) TEX. TAX CODE. It would therefore appear that, in this instance, that the tax rate for fiscal year 2006-2007 would be set by default at the lower of the new tax rate or the tax rate effective for fiscal year 2005-2006. However, there is another problem.

The Tax Code further provides that "a taxing unit may not impose property taxes in any year until the governing body has adopted a tax rate for that year, and the annual tax rate must be set by ordinance, resolution, or order, depending on the method prescribed by law for adoption of a law by the governing body." § 26.05(b) TEX. TAX CODE. The code provides that the County, a taxing unit, **may not impose property taxes** until that governing body has adopted a tax rate by ordinance, etc. passed in compliance with § 26.05 and that such compliance must be by "before the later of September 30 or the 60th day after the date the certified appraisal roll is received by the taxing unit." § 26.05(a) TEX. TAX CODE. Both such dates have passed.

The ultimate question therefore becomes whether or not Kaufman County can impose any property taxes on its citizens during fiscal year 2006-2007. Section 26.05(c) of the Tax Code provides that "before the fifth day after the establishment of a tax rate by this subsection, the governing body of the taxing unit must ratify the applicable tax rate in the manner required by Subsection (b)." § 26.05(c) TEX. TAX CODE. The provisions of subsection (b), particularly § 26.05(b)(2) relating to publication on the home page of the internet website, have never been complied with and all applicable time limits therefore have passed.

## **Summary**

The emergency meeting held by the Kaufman County Commissioner's Court on September 26, 2006 was not legal held proper pursuant to § 551.045 of the Texas

Government Code. First, no statutorily permitted reason (imminent threat or reasonably unforeseeable situation) existed for such meeting. Second, the notice for such emergency meeting did not identify the emergency or urgent public necessity for such meeting, if such existed which they did not. Third, it was improper pursuant to section 81.006 of the Local Government Code to set a tax rate at an emergency meeting.

Any actions taken at the September 26 meeting were void.

The Kaufman County Commissioner's Court did not properly set the tax rate for fiscal year 2006-2007 pursuant to § 26.05 of the Texas Tax Code. First, there was no motion made in the required form of "I move that property taxes be increased ...". Second, no ordinance, etc. was passed at a regularly scheduled meeting of the Court which included the requirements of § 26.05(b)(1) of the Tax Code. Third, the Court did not publish on the home page of the County's website the statements required by § 26.05(b)(2) of the Tax Code. Fourth, the tax rate was set at an emergency meeting, not a regularly scheduled meeting of the Court.

The Kaufman County Commissioner's Court is prohibited from imposing any property taxes on its citizens for the fiscal year 2006-2007, for the reasons stated above. This consequence is harsh to the point of being draconian. The author of this request for an opinion is not pleased by such consequence and would prefer to avoid such. The author would point out that this result amounts to something closely akin to the death penalty. However, it unfortunately appears that the intent of the legislature in enacting the current provisions of the Tax Code intended to place an enormous burden on local government in raising taxes and insuring that taxpayers were properly informed regarding the raising of taxes. Toward that end, it seems as though the legislature intended these draconian penalties to avoid any attempt by local government to avoid the provisions of section 26.05.

It is largely due to these consequences that the opinion of the Attorney General is requested.

Sincerely,



Ed Walton,  
Criminal District Attorney  
Kaufman County, Texas  
EW:ns

cc: County Judge Wayne Gent  
Commissioner Pct. 1, Jerry Rowden  
Commissioner Pct. 2, Ken Leonard  
Commissioner Pct. 3, Kenneth Schoen  
Commissioner Pct. 4, Jim Deller

EMERGENCY  
NOTICE OF MEETING OF THE  
COMMISSIONERS' COURT OF KAUFMAN COUNTY, TEXAS

NOTICE IS HEREBY GIVEN THAT AN Emergency MEETING OF THE ABOVE NAMED COMMISSIONERS' COURT WILL BE HELD ON THE 26th DAY OF September, 2006 AT 3:30 P.M., IN THE KAUFMAN COUNTY JUDGE'S OFFICE, 100 WEST MULBERRY ST., KAUFMAN, TEXAS, AT WHICH TIME THE COMMISSIONERS' COURT WILL CONSIDER THE FOLLOWING ITEMS FOR DISCUSSION, TO WIT:

- To discuss and consider rewording the order setting the Tax Rate for the FY 2006-2007 Budget.

FILED FOR RECORD  
KAUFMAN CO. TEXAS  
2006 SEP 25 1 P 4 24  
LAURA A. HUGHES  
COUNTY CLERK  
BY: *L.A.H.* DEPUTY

DATED THIS THE 25th DAY OF September, 2006.

COMMISSIONERS COURT OF KAUFMAN COUNTY, TEXAS

By *Wayne Gent*  
WAYNE GENT, COUNTY JUDGE

I, THE UNDERSIGNED, COUNTY CLERK, DO HEREBY CERTIFY THAT THE ABOVE NOTICE OF MEETING OF THE ABOVE NAMED COMMISSIONERS' COURT, IS A TRUE AND CORRECT COPY OF SAID NOTICE, AND THAT I POSTED A TRUE AND CORRECT COPY OF SAID NOTICE ON THE BULLETIN BOARD AT THE COURTHOUSE DOOR OF KAUFMAN COUNTY, TEXAS AT A PLACE READILY ACCESSIBLE TO THE GENERAL PUBLIC AT ALL TIMES ON THE 25th DAY OF September 2006, AND SAID NOTICE REMAINED SO POSTED CONTINUOUSLY FOR AT LEAST 72 HOURS PRECEDING THE SCHEDULED TIME OF SAID MEETING.

DATED THIS THE 25th DAY OF September, 2006.

LAURA HUGHES, COUNTY CLERK, KAUFMAN COUNTY, TEXAS

By *Laura Hughes*

ANY MEMBER OF THE PUBLIC THAT WISHES TO SPEAK ON AN AGENDA ITEM WILL BE RESTRICTED TO A THREE MINUTE PRESENTATION.

(ANYONE WHO HAS IMPAIRMENTS REQUESTING AID AT THE COMMISSIONERS' COURT OR ANY PUBLIC MEETING MUST CALL THE COUNTY CLERK AT LEAST 72 HOURS PRIOR TO THE MEETING.)

STATE'S  
EXHIBIT



STATE OF TEXAS  
COUNTY OF KAUFMAN

IN THE COMMISSIONERS' COURT  
OF KAUFMAN COUNTY, TEXAS

Be it remembered that on the <sup>25</sup>26th day of September, 2006, at a <sup>Regular</sup> ~~special~~ meeting of the Commissioners' Court of Kaufman County, Texas, the following members being present; County Judge Wayne Gent, Commissioners Jerry Rowden, Ken Leonard, Kenneth Schoen, and Jim Deller, among other things, the following proceedings were had to-wit; There came on to be considered the motion as follows: "I move that property taxes be increased by the adoption of a Tax Rate of: General Operating Fund - .460, Road & Bridge Maintenance Fund - .0680, I & S Rate - .0342; Total Tax Rate - .5622. **THIS TAX RATE WILL RAISE MORE TAXES FOR MAINTENANCE AND OPERATIONS THAN LAST YEAR'S TAX RATE and THE TAX RATE WILL RAISE TAXES FOR MAINTENANCE AND OPERATIONS ON A \$100,000 HOME BY APPROXIMATELY \$19.50.**"

A motion was made by Commissioner *Rowden* and seconded by Commissioner *DILLER*

Whereupon voting for said motion:

Those voting against: *Commissioner Schoen & Commissioner Leonard.*

The above and foregoing ~~order~~ <sup>resolution</sup> was passed in open court with the above named members present on the 26th day of September, 2006.

*Wayne Gent*  
\_\_\_\_\_  
Wayne Gent, County Judge

STATE OF TEXAS  
COUNTY OF KAUFMAN

I, Laura Hughes, Clerk of the County Court, Ex-Officio Clerk of the Commissioners' Court of Kaufman County, Texas, do hereby certify that the above and foregoing order was duly passed in open court at a regular meeting of the Commissioners' Court of Kaufman County, Texas on the 26th day of September, 2006; and that a quorum of said Court was present and the statements as above made are true and correct, I further certify that this is a correct copy of said order which is recorded in Vol. \_\_\_\_\_, Page \_\_\_\_\_, in the minutes of the Commissioners' Court of Kaufman County, Texas.

GIVEN UNDER MY HAND AND SEAL OF OFFICE at Kaufman County, Kaufman, Texas  
this the 26th day of September, 2006.

*Laura Hughes*  
\_\_\_\_\_  
Laura Hughes, Clerk of the County Court, Kaufman County, Texas and Ex-Officio Clerk of the Commissioners' Court of Kaufman County, Texas



STATE OF TEXAS

IN THE COMMISSIONERS' COURT

COUNTY OF KAUFMAN

OF KAUFMAN COUNTY, TEXAS

Be it remembered that on the 25th day of September, 2006, at a regular meeting of the Commissioners' Court of Kaufman County, Texas, the following members being present; County Judge Wayne Gent, Commissioners Jerry Rowden, Ken Leonard, Kenneth Schoen, and Jim Deller, among other things, the following proceedings were had to-wit; There came on to be considered the motion to set the Tax Rate for the budget year 2006-2007 as follows: General Operating Fund - .460, Road & Bridge Maintenance Fund - .0680, I & S Rate - .0342; Total Tax Rate - .5622.

A motion was made by Commissioner Jerry Rowden and seconded by Commissioner Jim Deller.

Whereupon voting for said motion: Commissioner Jerry Rowden, Commissioner Jim Deller, and County Judge Wayne Gent.

Those voting against: Commissioner Ken Leonard, Commissioner Kenneth Schoen.

The above and foregoing order was passed in open court with the above named members present on the 25th day of September, 2006.

Be it remembered that on the 26<sup>th</sup> day of September, 2006, at an Emergency Meeting of the Commissioners' Court of Kaufman County, Texas, the following members being present; County Judge Wayne Gent, Commissioners Jerry Rowden, Kenneth Schoen, and Jim Deller, the following proceedings were had to wit: A motion to reword the order setting the Tax Rate for the FY 2006-2007 Budget to read as follows: "I move that property taxes be increased by the adoption of a Tax Rate of: General Operating Fund - .460, Road & Bridge Maintenance Fund - .0680, I & S Rate - .0342; Total Tax Rate - .5622. **THIS TAX RATE WILL RAISE MORE TAXES FOR MAINTENANCE AND OPERATIONS THAN LAST YEAR'S TAX RATE and THE TAX RATE WILL RAISE TAXES FOR MAINTENANCE AND OPERATIONS ON A \$100,000 HOME BY APPROXIMATELY \$19.50.**"

A motion was made by Commissioner Jerry Rowden and seconded by Commissioner Jim Deller.

Whereupon voting for said motion: Commissioner Jerry Rowden, Commissioner Jim Deller.

Those voting against: Commissioner Kenneth Schoen.

Those Absent: Commissioner Ken Leonard.

The above and foregoing order was passed in open court with the above named members present on the 26th day of September, 2006.

  
\_\_\_\_\_  
Wayne Gent, County Judge

STATE'S  
EXHIBIT

STATE OF TEXAS

COUNTY OF KAUFMAN

I, Laura Hughes, Clerk of the County Court, Ex-Officio Clerk of the Commissioners' Court of Kaufman County, Texas, do hereby certify that the above and foregoing order was duly passed in open court at a regular meeting of the Commissioners' Court of Kaufman County, Texas on the 25<sup>th</sup> day of September, 2006, and that a quorum of said Court was present and the statements as above made are true and correct, I further certify that this is a correct copy of said order which is recorded in Vol. \_\_\_\_\_, Page \_\_\_\_\_, in the minutes of the Commissioners' Court of Kaufman County, Texas.

GIVEN UNDER MY HAND AND SEAL OF OFFICE at Kaufman County, Kaufman, Texas this the 26th day of September, 2006.

*Laura Hughes*

Laura Hughes, Clerk of the County Court, Kaufman County, Texas and Ex-Officio Clerk of the Commissioners' Court of Kaufman County, Texas

*Stamped by Mary Ann Stonewald  
Chief Deputy*