

# ALESHIRELAW

A PROFESSIONAL CORPORATION

700 LAVACA STREET, SUITE 1400  
AUSTIN, TEXAS 78701

**Bill Aleshire**

Bill@AleshireLAW.com

512 320-9155 (call) 512 320-9156 (fax)

---

August 15, 2017

## **ATTORNEY-CLIENT COMMUNICATION**

TO: COUNTY TREASURERS' ASSOCIATION OF TEXAS

As your General Counsel, I have been asked to comment and advise on issues raised by Tex. Att'y Gen. Op. KP-160 issued August 8, 2017. I hope this letter advisory assists you in giving this new opinion proper perspective and helps you figure out, in conjunction with your commissioners court and auditor, how to comply. It is true that KP-160 is "merely" the Attorney General's Opinion, but I find nothing incorrect in the opinion. I would be derelict in my duty to try to protect you if I did anything other than to point out the risk of personal liability that you, as the Treasurer, face if you approve disbursements from the treasury without prior approval by the commissioners court for "each" disbursement.

The Summary of that opinion said:

### SUMMARY

Under sections 113.041, 115.021, and 115.022 of the Local Government Code, the commissioners court must approve claims, and the treasurer and auditor do not have the authority to pay claims without the commissioners court's approval. A commissioners court cannot delegate to the county treasurer the commissioners court's duty and authority to approve payment of county claims. Provided it complies with any statute applicable to the particular subject matter, a commissioners court may review and direct payment of payroll and claims at a meeting called for a day other than the commissioners court's regular meeting day.

This opinion applies most directly in counties with a population of 190,000 or less. In counties with a population more than 190,000, Tex. Loc. Gov't Code sections 113.047 and 154.043(a) authorize the Treasurer to disburse salary and expenses based on a district, county, or precinct officer issuing a warrant for such, and does not require prior commissioners court

approval.

KP-160 merely confirms what has long been the legal procedure for approval of disbursements from the treasury in counties with population of 190,000 or less. In other words, there is really nothing new in KP-160. For example, 34 years ago, Tex. Att’y Gen. Op. H-171 at 5 (1973) said:

“Without the approval of the County Commissioners, the issuance of a county warrant is in violation of the statutory duties of the Treasurer.”

In 1984, Tex. Att’y Gen. Op JM-192 (1984) said:

“We conclude that *each* county warrant paid to an official or employee of the county requires commissioners court approval....

[Citing the 1943 Tex. Att’y Gen. Op. –5049] ...[T]he commissioners court’s duty to audit and settle claims against the county [ ] cannot be delegated to the county auditor under a standing order authorizing the auditor to pay county officials and employees without periodic approval by the commissioners court. In other words, the monthly payroll reports prepared by the respective county officials are turned in to the commissioners court for its approval and its order issuing salary warrants. [ ] The commissioners court cannot delegate this responsibility to the county auditor. In summary, *we conclude that salaries paid to county employees require commissioners court approval before any warrants may be issued.* (emphasis added)

In 1988, Tex. Att’y Gen. Op. JM-986 (1988) addressed the question of whether the commissioners court could delegate payroll approval to the Treasurer and counter-signed by the Auditor for each payroll period. *Id.* at \*6. The Attorney General held that was not authorized:

In a county with a population of 190,000 or less, the commissioners court is responsible for approving the county payroll and issuing warrants in payment of salaries. *These duties may not be delegated to either the county auditor or county treasurer.* (emphasis added)

In 1995, Tex. Att’y Gen. Op. LO-95-002 at 1 (1995) said, “...[I]n counties, like Ellis County, of under 190,000 population, there are no officers except the commissioners court authorized to issue such certificate or warrant.” The Opinion also noted the commissioners court approval “must be done in an open meeting held in compliance with the Open Meetings Act of Government Code chapter 551. *Id.* at 2. This Opinion noted a 1921 court opinion (*Gussett v. Nueces County*, 235 S.W. 857, 860 (Tex. Comm’n App. 1921, judgment adopted) in which “subsequent ratification” of payments made by the Treasurer without prior commissioners court approval “relieved the treasurer of liability on the alleged shortages resulting from those allegedly improper payments.”

But, the Opinion quoted from *Gussett*:

Of course, if the treasurer pays out money without a warrant or other authority of the commissioners court, he necessarily takes a great risk, *for the court may not ratify his payments.* (emphasis added)

The Opinion concluded:

The Ellis County Treasurer may not properly make payments from the county treasury without prior approval by the commissioners court. If he does so, *he is subject to personal liability for such payments if they are not subsequently ratified by the commissioners court.* (emphasis added)

KP-160 came about from a request for an Attorney General opinion (RQ-0150-KP, Feb. 21, 2017) from the Walker County Treasurer and County Auditor. I cannot find any evidence that county commissioners sought any legislative change, in this last Regular Session, to the statutes that require the commissioners courts to approve payroll and expenses in advance of disbursement by the Treasurer. I understand that the angst and consternation that is felt by this opinion in some counties is because they do not comply, and perhaps have not complied for some time, with this interpretation of the legal procedure for such disbursements. In those counties, the payrolls may no longer be monthly (now being bi-weekly or semi-monthly), and the commissioners courts may have chosen not to meet weekly or often enough to accommodate timely authorization for payroll and other disbursements. Had the commissioners courts been fully advised about the consequences of such changes to payroll and their meeting schedules, perhaps the problems they now face in light of KP-160—which is not new law—could have been avoided. In fact, it used to be a criminal offense for a commissioners court to fail to examine, approve and file the required affidavit pertaining to the Treasurer's reports. *See* 35 Tex. Prac. § 16.14, FN 11 (2d ed. 2017)(citing Tex. Penal Code (1925) art. 396.

The problems that arise in these counties is not the fault of any County Treasurer. It is the commissioners courts (in the counties with population of 190,000 or less) who need to make changes to their meeting schedules so they can fulfill their duty of checks-and-balances and comply with Tex. Loc. Gov't Code sections 115.021 and 115.022. It is not your duty, as County Treasurer, to accommodate the commissioners court's desired abbreviated meeting schedule and unlawfully approve expenditures without their prior approval, because it puts you at such personal liability.

In the Walker County request for an opinion, it noted, "Further it has been asserted that claims such as payroll, debt obligations, and utility-related were *previously 'approved' during the annual budget process.*" The District Attorney noted that approving the disbursements merely because they were budgeted would *not* "satisfy either the Treasurer or the [commissioners] Court's

statutory responsibilities.” So, I join in that advice. While it is true that no County Treasurer (regardless of population size) can approve a disbursement that “is not valid as a proper *and budgeted item* of expenditure” (Tex. Loc. Gov’t Code section 113.041(d-1)), you may not rely on the budget as authority to ignore the specific pre-approval requirements of Section 113.041. *See also*, Tex. Loc. Gov’t Code section 113.042(e) (“*Each* check or order for payment issued or drawn by an officer under the provisions of this section is subject to all laws and rules relating to auditing and countersigning.”)

I was also asked if KP-160 (and the requirement for pre-approval of disbursements) also includes investments. The answer is “No.” Tex. Gov’t Code ch. 2256 governs those investments in conjunction with Tex. Loc. Gov’t code ch. 116. In a county that has complied with Chapter 2256, adopted investment policies, and appointed an investment officer, each investment—unlike each payroll or expense checks—does not require prior approval by the commissioners court. *See* Tex. Loc. Gov’t Code section 116.112(a) (authorizing the commissioners court to direct the county treasurer to withdraw excess county funds “and invest those funds as provided by this section....” Section 116.112(b) says, “The funds may be invested in accordance with Subchapter A, Chapter 2256, Government Code.”).

#### CONCLUSION

KP-160 is not a new statement of the law, but, instead, a repetition of long-held requirement that *before* salaries and expenses of the county (with population of 190,000 or less) are disbursed by the County Treasurer it is legal duty of the commissioners court to examine and approve *each* such disbursement. A County Treasurer who approves a disbursement before obtaining such commissioners court approval—which can only be given in a duly noticed meeting in compliance with the Texas Open Meetings Act—takes the risk of being held personally liable for any such expenditures, particularly if the commissioners court decides, after the fact, not to give its approval.

ALESHIRELAW, PC



---

Bill Aleshire