

# Budget Pitfalls

## 2011 Texas City Attorneys Association Summer Conference South Padre Texas

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(Note: this paper solely reflects the opinions of the author and is not an official statement of the City of Austin, or the Austin City Attorney).

## **Introduction**

Over the past three years, as I have been tasked with making sure Austin adopts its budget and tax rate legally, I have called TML so often, they decided perhaps I could share my adventures.

Adopting the budget and the tax rate are two of the most important processes your city will go through each year. The legislature has provided a process for each action that is designed to give citizens notice of each action and of the impact of each action. The process also includes an opportunity for people to speak to city council about the budget and the tax rate. I hope this paper will guide you in helping your city complete each of these processes legally.

Please note, when I refer to “adopting the budget” be mindful that there may be many pieces to “the budget.” For example, our city holds rate hearings for utilities such as solid waste services, drainage, water and waste water, and electric (if increases to the rates are needed). We also adopt ordinances relating to fire and police positions. We have some local government corporations that adopt their budgets at the same time too so notice of their board meetings must be posted and scheduled, and resolutions prepared to adopt those budgets. We adopt the operating budget separately from the capital budget. Finally, since we have a myriad of fees that we charge, unless a statute requires the fee to be in a certain place in the city code, we adopt a “fee ordinance” that contains all the city fees – including any proposed changes to those fees.

When I refer to “adopting the property tax rate: this also includes adoption of any property tax exemptions authorized by state law that the city has elected to offer (such as over 65, homestead, disabled, historic property). Make sure that you are clear on the requirements for adopting these exemptions, both under state law, and under your charter and that the adoption is done in compliance with these requirements. I use the phrase “property tax” instead of “ad valorem tax” because I prefer trying to keep things in as plain English as I can.

When I refer to “hearings” these are mostly hearings that are public hearings at which citizens are specifically allowed to speak as set out in the statutes. After we have had these myriad hearings, with ample public comment, we close the public comment portion of the hearings, continue the

adoption of the actual budget and property tax rate portion to a different day, and conduct the adoption in a properly noticed (in accordance with the requirements of the Tax Code, the LGC, and the Open Meetings Act) public hearing at which no citizens speak.

## **The Statutes**

There are two main statutes that set out the mechanics of adopting a city's tax rate and budget. These are Texas Property Tax Code Chapter 26 and Texas Local Government Code Chapter 102. These Codes are referred to in this paper as "Tax Code" and "LGC." These Codes share two main features. Each has specific notice requirements and each has specific hearing requirements. Conveniently, or diabolically, they don't match. They are also different for small and large cities.

**Practice tip:** refer to schedule on TML web site [http://www.tml.org/legal\\_topics/legal\\_finance.asp](http://www.tml.org/legal_topics/legal_finance.asp)

for a combined schedule of dates for adopting both the budget and the property tax rate. TML has one schedule for large cities and one for small cities. A large city levies over \$500,000 in total property taxes or has a tax rate of over fifty cents per \$100 valuation. (Tax Code 26.052).

If you use the schedule from the State Comptroller's Truth in Taxation information, <http://www.window.state.tx.us/taxinfo/proptax/tnt10/ch05.html> you only get half the picture. That schedule only contains the Tax Code deadlines, not the budget information.

## **Tax Rate/Truth-in-Taxation**

The State legislature does not set the city's property, or "ad valorem" tax rate. However, they have hemmed in the amount that a city can raise its property taxes before leaving the city open to a citizen-initiated election on the rate. These elections are called "rollback" elections because the vote will be whether to "rollback" the rate below the higher rate the city has adopted.

### **Effective and Roll-back Rates:**

Generally speaking, there are two rates that you will hear discussed in reference to the property tax rate. The "effective rate" and the "rollback

rate.” Usually, the effective rate is the property tax rate that would give the city the same amount of money that it had for the past fiscal year. The rollback rate is about 8% higher than the operating effective rate plus mandated or required taxes to pay for general obligations bonds (both principal and interest). If the city goes above that rate, this is what triggers the right of the citizens to initiate a rollback election. The statute contains formulae for calculating these rates. Tax Code 26.04(c). The calculations are also discussed in the Texas Comptroller’s Truth-in-Taxation guide. The Comptroller holds training sessions around the state to walk taxing entities through this process. If there is one in your area, these trainings are free and helpful.

### **Certifying the Rolls:**

The calculations all flow from the chief appraiser, or appraisers, for the taxing district certifying the tax rolls. This is supposed to be completed by July 25<sup>th</sup>. The rest of the notice and hearing dates for the Tax Code flow from this date.

### **Pitfall:**

What if the appraiser does not certify the rolls timely? This happened to Austin and the surrounding cities. The appraiser cannot certify the rolls until more than a certain percent of the total valuation is certified for the County. In Travis County, this percentage is 90% because Travis County has over one million in population. Valuation in protest must continued to be resolved until the required percentage is reached. Tax Code 41.12. In our case, the appraiser certified the rolls in error, this was caught by tax experts in the city and Travis County, and so the rolls were de-certified and re-certified later. The result of failure to timely receive the certified rolls is that all the dates for your notices and hearings for adopting the property tax rate must be recalculated using the 60 day adoption date set out in Tax Code 26.05.

If the appraisal rolls are certified timely, then the next step is for the city or its representative to publish the rollback and effective rates. This must be done no later than by August 7<sup>th</sup> or as soon thereafter as practicable. Tax Code 26.04(e). In our area, this publication is done by the Travis County Tax Assessor/Collector. The form for the notice is established by the State Comptroller. Tax Code 26.04(e).

## **Triggering the Tax Rate Increase Process:**

The Tax Code applies special notice requirements “[i]f 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 exceed the amount of taxes imposed for that purpose the preceding year.” Tax Code 25.05(b). The Tax Code also applies special notice and hearing requirements if the governing body adopts a tax rate that exceeds the lower of the rollback tax rate or the effective tax rate. Tax Code 26.05(d). For purposes of this paper, we assume that all of these requirements will be triggered.

The mechanism Austin uses to set the process in motion is an item on council’s agenda for a resolution to adopt a proposed maximum tax rate that the city will consider and set the date that council will consider adoption of the actual tax rate.

Austin usually adopts the proposed maximum property tax rate in the form of a resolution. Austin adopts the highest rate that keeps us below the trigger for citizens to take action to roll back the rate. Council then can consider various budget scenarios in the upcoming months that may lower the rate needed to generate the revenue for the upcoming fiscal year’s budget, but they know the cap and the cap is public. A sample of this resolution is at <http://www.cityofaustin.org/edims/document.cfm?id=141378>. When we adopt this resolution, we make clear in agenda notice, and in statements made by the Mayor at the agenda adopting this resolution, that the council may ultimately adopt a property tax rate that is lower than the maximum set out in the notice. We adopt the proposed property tax rate using a roll call vote where each person’s vote is recorded after the clerk reads their name. This information is then included in the Notice of Public Hearing discussed below. Including this information is required by Tax Code 26.06(b).

## **More Notices and Hearings:**

If your city adopted a proposed property tax rate that is higher than the lower of the effective rate or the roll-back rate, the city must publish more notices, hold two specific hearings, and adopt the rate using specific statements set out in the Tax Code. To make sure that each action is taken in

compliance with the applicable legal requirements, Austin uses a simple script for each of the council actions.

Notices: The taxing unit must publish Notices for each of the public hearings on the tax increase. Tax Code 26.06(b). The notices must be published at least 7 days before each hearing. The notice has to be a certain size and the contents are specified by the statute. Tax Code 26.06(b).

**Pitfalls:**

The notice cannot be published in the part of the newspaper where the legal notices and classified advertisements appear. If the taxing unit operates a web site, the notice must also be posted on that web site from the date the notice is first published until the second public hearing is concluded. Tax Code 26.06(c). If the taxing unit has free access to a television channel, the taxing unit also has to request that the channel carry a 60 second notice of the public hearing at least 5 times a day between the hours of 7 a.m. and 9 p.m. for a set number of days. The statute states extra requirements for the internet and television notices in Tax Code 26.065. A taxpayer cannot get an injunction to restrain collection of taxes if the taxing unit has, in good faith, attempted to comply with Tax Code 26.065. Tax Code 26.065(f).

Hearings: Each hearing must be held on a weekday that is not a public holiday. Each hearing must be in certain buildings that are open to the public. Tax Code 26.06(a). The second hearing must be at least 3 days after the first hearing. *Id.*

After both these hearings are completed, the governing body of the taxing unit has to vote on the tax increase. This meeting must be at least 3 days after the second hearing, but no later than 14 days after that hearing. Tax Code 26.06(e). The governing body must adopt the tax rate before the later of September 30, or the 60<sup>th</sup> day after the date the certified appraisal roll is received. Tax Code 26.05(a).

**Pitfall:**

Since the Tax Code uses the “phrase” before the later of September 30<sup>th</sup> ...” one might think this refers to whichever is later, “September 30<sup>th</sup> or the 60<sup>th</sup> day after the date the certified roll is received.” However, in an abundance of caution, both the Truth in Taxation guide and the TML

schedule state that the rate must be adopted no later than September 29<sup>th</sup> in case the “before” modifies September 30<sup>th</sup>. So, if you’ve received your certified appraisal role timely, you adopt your tax rate by September 29<sup>th</sup>.

Contents of the adopting document: The ordinance or resolution used to adopt the tax rate must contain specific statements in type that is larger than the rest of the document’s type-size. Tax Cod 26.05(b)(1).

Vote: A vote to adopt the tax rate must be separate from the vote to adopt the budget. Tax Code 26.05(b). The vote has to be a “record vote” with each person’s vote recorded. The motion must follow the exact words of the statute. The word “separate” is not defined to be on a separate day from the budget adoption, so if the dates fall in line, one can simply set these adoptions as separate items on the agenda for one meeting, and take each one up separately. The vote on the budget (and the vote to ratify the property tax increase contained in the budget) must be done before the vote to adopt the property tax rate. LGC 102.006

More Notice: Before imposing the property tax rate for the year, notice of the final rate must be put on the home page of any internet web site operated by the taxing unit. The wording for this notice is set out in Tax Coe 26.05(b)(2). There is not a time frame for how long this notice must be kept on the web site. Austin normally leaves this notice up for several weeks.

**Pitfall:**

Failure to follow the exact mechanism set out in the statute means that the taxing entity has to use the lower of the effective tax rate, or the tax rate adopted the prior year. Tax Code 26.05(e). Even this rate must be “ratified” by the taxing entity within 5 days the tax rate is established using the same script and notice requirements set out in Tax Code 26.05(b).

**Suit to Enjoin Adoption of Tax Rate:**

The Tax Code contains a specific provision authorizing a taxpayer to bring a suit to enjoin the taxing entity from adopting its tax rate if the taxing entity has not computed the tax rate, or followed the publication requirements of the statute, and the failure to comply was not “in good faith.” Tax Code 26.04(g).

One court has held that this suit must be filed before the tax rate is actually adopted. *Hairgrove v. City of Pasadena*, 80 S.W. 3d 703 (Tex. App. Houston [1<sup>st</sup> Dist] 2002, pet. denied).

A case from El Paso defines good faith under this Tax Code provision. *El Paso County Hosp. Dist. v. Gilbert*, 64 S.W. 3d 200 (App. 8 Dist. 2001, reh'g overruled, review denied 2002). In *Gilbert*, the court noted that the Tax Code does not contain a definition of "good faith." *Gilbert at 204*. The court adopted a formulation as follows: ". . . an assessor or designated officer or employee of a taxing unit acts in good faith when he subjectively believes that he has complied with the computation or publication requirements of Section 26.04, if that belief is reasonable in light of existing law." *Gilbert at 205*. The El Paso court concluded that, since the taxing entities involved in this suit had been enjoined before because they failed to include certain funds in their calculations completed pursuant to the "truth in taxation" requirements, their belief that they could continue to exclude these funds was not reasonable and the taxing entities therefore acted in bad faith. *Id.*

**Practice Tip:** I check the TML schedule, and count the days on calendars with the people in our office who prepare the notices and get the hearings set up for council. I usually count days in February at the latest, and check the TML calendar as soon as it comes out.

## **Adopting the Budget**

Texas Local Government Code Chapter 102 contains the requirements for adopting and amending a municipal budget for home rule cities. Chapter 101 has the requirements for Type A General Law municipalities. There are also provisions in Chapter 101 that set out how to define a fiscal year for a plethora of municipalities. The budget adoption description below is for a home rule municipality.

Know Thy Budget Officer: The Mayor is the budget officer for the governing body of a city, unless the city has a city-manager form of government, in which case the city-manager is the budget officer. LGC 102.001. (*See also*, Tex. Atty. Gen'1 Op. JC-0544 (2002) for a description of who may be the budget officer for each type of city).

Budget Officer Responsibilities: The budget officer is responsible for preparing the budget. LGC 102.002. The contents are set out in the statute. LGC 102.003. However, be mindful that your city's Charter may contain additional requirements. Austin's charter, for example, contains a requirement that the ordinances that will be used to adopt the budget be included in the budget. Since we do not know the numbers that go into those ordinances at the time we adopt the budget, we use sample ordinances that are filled in after council adopts the budget and tax rate.

**Pitfall:**

We at times get into discussions about who has responsibility for which part of the budget, the council or the city manager. The line between big-picture policy and the role of the entity adopting the budget versus the day-to-day policy and the role of the person making sure the big-picture policies are carried out in a fiscally responsible manner can be difficult to draw. To the extent that your city has guidance in its Charter or in prior research provided by your city attorney's office, it is helpful to keep this handy.

**Filing with City Clerk and Notice:**

The budget officer must file the proposed budget with the city clerk before the 30<sup>th</sup> day (read, at least 31 days) before the governing body levies (adopts) the tax rate. LGC 102.005(a).

If the budget will require more property tax revenue than the previous year's budget, it must contain a cover page with an 18 point or larger type notice with specific words. LGC 102.005(b). Austin puts this notice on the inside of the cover page.

The proposed budget must be available for inspection by any person. And, if the city maintains a web site, the budget must be posted on that web site. LGC 102.005(c).

**Notices and Hearing for Budget Adoption:**

The provisions in LGC 102 relating to the budget adoption hearing and the notice for the hearing are challenging to read since the requirements

for each piece of this process are interspersed between multiple sections of the code provisions.

The notice requirements are:

A) Date: The notice must be published no earlier than the 30<sup>th</sup> day nor later than the 10<sup>th</sup> day before the hearing. The hearing date for the hearing must be set at least 16 days after the date the budget is filed with the city clerk.

B) Contents: The hearing notice must be published in at least one newspaper of general circulation in the county where the city is located. The notice has to include the statement that must be on the cover of the budget. The type size for this part of the notice has to be the same as the type size for the rest of the notice.

The hearing requirements are:

A) One public hearing: Chapter 102 of the LGC only requires one hearing to adopt the budget. The hearing must be open to the public and any person may attend and participate. LGC 102.006(a). At the conclusion of the public hearing the municipality shall take action on the proposed budget. LGC 102.007(a).

A number of cities do not adopt the budget on the same day that they hear public comment. TML notes on its budget calendar as follows: “**September 28** – last day for **hearing on budget**. LGC § 102.006(b) (hearing shall be before the date of the tax levy). Note, the hearing must be after the 15th day after the proposed budget is filed with the clerk. Also, must take some sort of **action on the budget** at conclusion of hearing. LGC 102.007. This action could be adoption of the budget, or else a vote to postpone the final budget vote. It is generally agreed that the city need not adopt the budget at the end of the hearing.” Austin makes sure that the budget is adopted before the tax rate in order of the items on its agenda, but it does not adopt the budget the day before adopting the property tax rate (although, if the property tax rolls are certified timely, we do all of our actions at least a few weeks before the end of September).

B) Voting requirements: Adoption of the budget must be done as a separate vote that council takes before they adopt the tax rate. LGC

102.006(b). If the city is adopting a budget that requires more property tax revenue than last year, council must *also* vote separately to ratify the tax increase reflected in the budget. LGC 102.007(c).

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The hearing date must be no later than September 29<sup>th</sup> (assuming you've received your tax levy timely). Why? The budget must be adopted before the tax rate. The tax rate must be adopted before September 30<sup>th</sup> (see Tax Code 26.05). Therefore, the budget adoption must also be before September 30<sup>th</sup>.

**Practice Tip:** if your city wants to hear from citizens about the budget on more than one date, and, perhaps, would like to vote on the budget on a date separate from the dates of citizen input, you may decide to begin the hearing on the budget on one or more days, close the public comment portion of the hearing, but continue the hearing and take action on a different day. Be mindful that your city charter may have provisions that impact your process. LGC 102.011 states that charter provisions can control, *if* the city is also complying with the notice and property tax provisions of these LGC sections.

**Requirements after budget is adopted:**

The city must file the budget with the city clerk, and if the city has a web site, the budget must be posted on that web site. LGC 102.008.

Be mindful that if your city budget is adopted by ordinance, it can only be amended by an action of equal dignity – that is, another ordinance. Attempts to amend the budget any other way are “without effect.” Tex. Atty. Gen’l Op. GA-0431(2006) at 2.

**Conclusion**

Adopting the property tax rate and the budget are two of the most important actions a city must take. The requirements for proper adoption are complex and detailed. Make sure you and the staff people working on the budget and property tax rate calculations are on the same page as far as each piece of the schedule and the notices. Also make sure that you are clear

regarding who is responsible for getting the notices published and posted. If you are new to the city, look through prior year's agenda for all the notices and hearings that occur during this time period. And, do not hesitate to contact TML – they are very helpful in thinking through the simplest pieces of the process and the most complex.

