

# Judge discovers Parks & Recreation Board is not incorporated

By Tommy Campbell  
The Choctaw Sun

**BUTLER** — A local board set up to disperse thousands of dollars annually in tax money designed to help local parks and recreation projects will

continue to function as usual while working on taking steps to correct an oversight in which the group was never formally incorporated as required by state law.

Probate Judge D'Wayne May said at the March 5th meeting of the

County Commission that in reviewing some board appointments that will need to be made soon to the Choctaw Co. Parks and Recreation Board and others, he discovered that although the board was authorized by the Commission and board mem-

bers appointed, he cannot find any record of where the group ever filed papers of incorporation.

A spokesperson for the board told the Sun that they have been made aware of the problem and are taking the necessary steps to correct the unin-

tentional oversight. Until that happens the board will continue to meet and transact business as usual unless it is told otherwise.

The Choctaw Co. Tobacco Tax Act, No. 2001-913, was sponsored and passed in the Alabama Legislature by the late Rep. Jeff Dolbare with proceeds earmarked for improving public recreational opportunities in the county.

The taxes include a 10-cents per pack tax on cigarettes, each container of smoking tobacco or chewing tobacco, each can of snuff, individual cigars, and per package of cigarette rolling papers.

For the months of Oct., 2006 through Jan., 2007, the tax has brought in a total of \$42,068, or an average of \$10,517 per month, according to the Treasurer's Office.

Dolbare said in 2001, before the bill became law, that it would include wording that required a board to be set up and incorporated as a non-profit corporation to oversee the disbursement of the tax.

"It must have fallen through the cracks somewhere," May said, adding that there is nothing to indicate that the failure to incorporate was anything other than an honest oversight.

May said officials are still trying to decide exactly how to proceed with the matter, since the tax revenues come in monthly.

May also asked commissioners to be thinking of possible appointments to the board once the matter is straightened out.

"When it comes to the expenditure of funds, I firmly believe we ought to check everything real close," he said.

Commissioner Dandy Brown said he would like for each district to be able to appoint a board member.

May said that the papers that are on file in the Probate Office do not comply with the wording of the statute that authorized the tax and the formation of a governing board.

Commissioner Henry Lovette said that he may err on the side of caution, but that when he doesn't

have all the facts, or still has questions about a board appointment or other issue, he will not vote on it one way or another.

May agreed. "No one needs to vote on something they don't fully understand or don't have the proper information on," he said. "I really appreciate you asking questions, wanting more information."

In separate issues, the board tabled until the March 12 meeting action on the reappointment of William K. Drinkard to the Choctaw-Edna Water Authority for a six-year term.

Drinkard's term expired on March 1st.

The commission can reappoint Drinkard or someone else if it so chooses.

The board also delayed until next week a recommendation to appoint May as a trustee of the county's pension plan.

It is also expected that members of the Choctaw Co. Airport Authority will be present at the March 12th meeting to discuss that board and work that needs to be done at the facility.

On a note related to all boards in the county, May said that state auditors have requested that the county provide them with a list of all boards to which the commission makes appointments.

As a result, and for the Commission's own information, May said the name and status of all members of all boards of directors are needed, along with the terms of their appointments.

"We need to keep up with this," May said. "There are a lot of boards and authorities floating around and I'm not sure some of them are even active." May said that those boards that are non-functional or were never functional to begin with may need to be dissolved.

"If they are not going to operate as a legitimate board, they need to be dissolved," he said. "I've got two or three that I'd like to check out."

## E-911

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began collecting the fees, it immediately began to use the money to map and address the county, purchase equipment, hire employees and take other steps toward establishing the service.

Patsy Allen was hired as executive director in April, 1997.

However, during its efforts to implement the service, a number of unexpected snafus and problems occurred, including problems with the telephone companies and third-party vendors, all of which combined to delay the start of the serve until March 13, 2000 — approximately 40-1/2 months after the date the first service charges were collected.

AAIC initially defended the board in the lawsuit, wherein the plaintiffs demanded judgment against the District for the full amount of any fees collected plus the costs of court and interest, but with a reservation of its rights.

In an odd turn of events, Turner, Hutchinson as well as the E-911 board became co-defendants in the federal court action brought by AAIC.

"The insurance company was the plaintiff and Turner and Hutchinson were considered 'co-defendants' with the E-911 board because the insurance company was trying to say that there was no insurance coverage," Roger Lucas, an attorney for Hutchinson and Turner told the Sun. "They both had an interest in seeing that the insurance coverage the board purchased was made available."

In a series of motions and filings, the E-911 board has from day one contended that the term "on line", as set forth in the Code of Alabama, was ambiguous and did not require the service to be fully operational within the 36-month period, and, furthermore, that all board members and employees sincerely felt that they had "substantially complied with" the law.

During the four and one-half month period in question, the board and its employees were diligently working to get the service operational, testimony revealed.

The Circuit Court of Choctaw County agreed, ruling on behalf of the defendants. The plaintiffs appealed to the Alabama Supreme Court, which tossed the matter to the Alabama Court of Civil Appeals. In 2004, that court reversed the finding of the Choctaw County court, declaring that the E-911 District had not, in fact, complied with the law, and sent the case back to the Circuit Court of Choctaw County for fur-

ther action.

In July of 2005, AAIC filed a Complaint for Declaratory Judgment, seeking a determination that it did not have any responsibility to provide for a defense nor any indemnity to the District in the Turner/Hutchinson lawsuit.

On June 23, 2006, AAIC filed a motion for summary judgment, arguing that it was entitled to the judgment as a matter of law based on a number of exclusions in the policy arising from "fines" and "penalties" and for liability arising from what AAIC claimed was "willful violation" of a state law.

The federal court ruled that the policy exclusions were inapplicable in the case, and as a result, the only issue presented during the Nov. 15, 2006 bench trial was whether the E-911 District willfully violated state law.

Allen testified that she and board members were aware of the 36-month time requirement but believed "at all times" that they had complied with the statute.

The service, she said, was initially expected to be fully operational by May, 1999. However, because of problems associated with assembling the package of computers, radios, telephones and other communications devices, a four-month delay caused by Motorola's inadvertent shipment of some equipment before it had been fully tested, a two-month delay caused by BellSouth's re-routing of telephone trunk lines, delays with various telephone companies caused by the threat of difficulties expected at the turn of the millennium (Y2K issues), problems in getting local residents to complete and return their addressing forms, and the unexpected death of the District's electrician, implementation of the service was delayed.

By Oct. 25, 1999 — the 36-month mark since receipt of the fees started — Allen testified that the District had substantially completed the E-911 service, and that all subsequent delays were caused by third-party suppliers over which the board had no control.

At that point, she said, the E-911 could receive calls and had installed all of the equipment except for the trunk lines, which could only be installed by BellSouth. The District, she said, was ready to begin testing but could not because of this.

She also testified that there are no allegations in the Turner/Hutchinson suit that implies the District misspent any funds.

And, since the statute does not spell out in detail what "on line" means, Allen said that both she and board members wrestled with the question, and even discussed it with

other E-911 centers. Allen said that since she, herself, had no formal training, education or experience with computers or 911 equipment that she felt that would give her special insight as to what the term means.

Allen said she found that there were other counties who had likewise not completed their own E-911 systems but who — like Choctaw County — continued to collect the fees as part of the ongoing process of getting the systems up and running.

Franklin Boney, who is vice chairman of the E-911 board, offered similar testimony.

"We (the board) all thought we were ... right on schedule," he told the federal court.

According to Boney, he considers Oct. 25, 1996 to be the date for determining when the 36-month period begins to run, because that is the date the E-911 district received its first funds from the collection of the fees.

"There is no evidence to suggest that this conclusion was drawn in bad faith or that it is unreasonable in light of the fact that it was not possible for the District to begin establishing E-911 Service until it began receiving the service charges," Judge Hand wrote. "The Court, therefore, concludes that the District believed that the 36-month deadline ended on Oct. 25, 1999."

Further, Judge Hand wrote that AAIC failed to establish "by a preponderance of evidence" that the E-911 District committed a willful violation of the law. To the contrary, he ruled, testimony of Boney and Allen showed that the District sincerely believed that they were in compliance with the law.

"Moreover," Judge Hand wrote, "it can hardly be said that the District's violation of the Statute was without justifiable excuse. The undisputed testimony of Ms. Allen and Mr. Boney establishes that the District's failure to have completed E-911 service by October 25, 1999 was due to delays by Motorola, BellSouth and other third parties, all of whom were outside of the District's control."

"Further," he added, "the final completion of the substantially complete E-911 system by the District resulted in the District being able to provide a valuable public service to the citizens of Choctaw County."

In conclusion, he found that AAIC had presented no evidence to demonstrate that the District willfully ("knowingly", "intentionally", or "without justifiable excuse") violated the state law.

"We are real pleased, the ruling speaks for itself," Boney told the Sun.

AAIC still has the

right to appeal the ruling if it so chooses but it was unclear at presstime if that will happen.

The main Turner/Hutchinson lawsuit must still be heard — again — in the Circuit Court of Choctaw County.

According to records on file in the Circuit Clerk's office, a hearing is set for 9 a.m. on April 19th before Judge Stuart DuBose to determine a motion for class certification.

Lucas said he is concerned that some residents may have been deluded into thinking that insurance coverage is not available, and that if a refund is ordered, it would be detrimental to the E-911 service.

"A petition is being circulated, apparently at the instigation of the (E-911) board or its attorney, asking if people want to receive their portion of any class action refund that is mandated by state law," Lucas told the Sun. "My concern is that there are scare tactics being used to make people believe that this money is being taken away from E-911 and will harm service or force them to close."

Lucas said that with the hearing set for April 19th, he feels that the petition is being used as a ploy to collect signatures to "defeat the certification of the class."

"I don't hear that any of these people are being told that insurance coverage is available for the claims that are being filed," he said. "People might have a different view if they knew this."

What is left, basically, is for the local Court to decide whether to hear the matter as a "class" — thereby including all residents and businesses who actually paid the fees — or whether to limit the scope of the lawsuit to Turner and Hutchinson only.

"It's pretty clear to us that those fees will have to be refunded," Lucas said.

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