

H.B. 3167 (2019)
Legal Q&A
Scott Houston

1. What is H.B. 3167?

[House Bill 3167](#) by Rep. Tom Oliverson (R – Houston) is legislation that becomes effective on September 1, 2019. The bill makes numerous changes to the site plan and subdivision platting approval process, and it will require most cities to make changes to their subdivision ordinance, zoning ordinance, and/or unified development code approval processes. A chart of the process required by the bill is included at the end of this Q&A.

2. Why was the bill needed?

The Texas House Land and Resource Management Committee Report states that:

Concerns have been raised regarding the process for plat and land development application approval by political subdivisions. It has been suggested that some political subdivisions circumvent statutory timelines for approving an application by simply denying the application with generic comments that do not fully address specific deficiencies with the application. C.S.H.B. 3167 seeks to provide greater certainty and clarity for the process by setting out provisions relating to county and municipal approval procedures for land development applications.

In other words, the bill is meant to force cities to speed up the site plan/subdivision plat approval process, and to provide more information when a plan or plat isn't approved. In reality, it may create red tape that slows the process down and/or results in substandard planning. A list of witnesses for and against the bill is available at:

<https://capitol.texas.gov/tlodocs/86R/witlistbill/pdf/HB03167H.pdf#navpanes=0>.

3. What types of development applications are subject to H.B. 3167?

The bill applies to plans and plats. It defines a “plan” to mean a subdivision development plan, including a subdivision plan, subdivision construction plan, site plan, land development application, and site development plan. TEX. LOC. GOV'T CODE § 212.001(2). It defines “plat” to include a preliminary plat, general plan, final plat, and replat. *Id.* § 212.001(3).

Many have questioned the meaning of these terms. Does the reference to “site plan” only refer to that term as used in Chapter 212, Subchapter B? And what does the term “general plan” refer to? That term is mentioned in current law in a handful of places. *Id.* §§ 212.010; 212.044; 212.047. As mentioned in those sections, the term may be referring to the city's comprehensive plan. In the context of H.B. 3167, the term is included in the definition of “plat.” The City of Houston's ordinance, which was praised by some developers, defines the term “general plan” as “a site plan submitted for the purpose of establishing a street system for a large tract to be developed in sections. The General Plan is submitted with the subdivision plat for the first section being platted. The General Plan is valid for 4 years and can be extended by planning commission

action. Upon planning commission approval, the General Plan establishes the street system for future development.” Thus, it appears that the term “general plan” in H.B. 3167 means something different than where it appears in other places in Chapter 212.

The bill also provides that the approval procedures as amended by the bill apply to a city regardless of whether it has entered into an interlocal agreement, including an interlocal agreement between the city and county relating to extraterritorial jurisdiction subdivision platting agreement as required by state law. *Id.* § 212.0085.

4. What application materials are included in the definition of “plan?”

Looking at the definitions in the question above, some say that essentially any type of plan that shows the layout of a project is subject to the bill. The bill uses some terms that aren’t common in planning, such as including “general plan” in the definition of “plan.” No one is certain what a “general plan” means, so each city should decide and define that term in its ordinance(s).

The bill amends Local Government Code Chapter 212, which relates to subdivision platting. It seems to insert a “site plan” and “site development plan” into the subdivision plat approval process, but those are traditionally based on the zoning authority in Chapter 211. As such, most attorneys argue that a zoning site plan isn’t subject to the bill’s requirements.

Because of the ambiguity, each city may wish to define certain term(s) in its ordinance for clarity.

5. How does H.B. 3167 change the plan/plat approval timeline?

The bill requires the municipal authority responsible for approving plats to take the following action with regard to the “initial approval” of a plan or plat within 30 days after the date the plan or plat is filed: (1) approve, (2) approve with conditions, or (3) disapprove with explanation. *Id.* § 212.009(a).

Current law defines “the municipal authority responsible for approving plats” as the municipal planning commission or, if the city has no planning commission, the governing body of the city. Also under current law, the governing body by ordinance may require the approval of the governing body in addition to that of the municipal planning commission. *Id.* § 212.006(a).

If an ordinance requires that a plan or plat be approved by the governing body of the city in addition to the planning commission, the governing body shall approve, approve with conditions, or disapprove the plan or plat within 30 days after the date the plan or plat is approved by the planning commission or is approved by the inaction of the commission, and a plan or plat is approved by the governing body unless it is approved with conditions or disapproved within that period.

6. May the city and applicant agree to extend the deadline in the question above?

Yes, but only if the applicant (not the city) requests the extension. The parties may extend the 30-day period described above for a period not to exceed 30 days if: (1) the applicant requests the extension in writing to the municipal authority responsible for approving plats or the governing body of the municipality, as applicable; and (2) the municipal authority or governing body, as applicable, approves the extension request. *Id.* § 212.009(b-2).

7. What does a city do when it approves a plan or plat?

If a plan or plat is approved, the municipal authority giving the approval shall endorse the plan or plat with a certificate indicating the approval. *Id.* § 212.009(c).

8. What if the municipal authority responsible for approving plats fails to approve, approve with conditions, or disapprove with explanation a plan or plat within the prescribed period?

A plan or plat is approved by the municipal authority unless it is disapproved within the periods described above and in accordance with the bill's procedures. *Id.* § 212.009(b).

If that happens, the authority on the applicant's request shall issue a certificate stating the date the plan or plat was filed and that the authority failed to act on the plan or plat within the period. *Id.* § 212.009(d).

9. What must a city do with regard to approval, approval with conditions, or disapproval with explanation?

A municipal authority or governing body that conditionally approves or disapproves a plan or plat shall provide the applicant a written statement of the conditions for the conditional approval or reasons for disapproval that clearly articulates each specific condition for the conditional approval or reason for disapproval. *Id.* § 212.0091(a).

Each condition or reason specified in the written statement: (1) must be directly related to the requirements under the subdivision platting law and include a citation to the law, including a statute or municipal ordinance, that is the basis for the conditional approval or disapproval, if applicable; and (2) may not be arbitrary. *Id.* § 212.0091(b).

10. If the municipal authority approves with conditions or disapproves with explanation, what is the applicant entitled to do?

After the conditional approval or disapproval with explanation of a plan or plat, the applicant may submit to the municipal authority or governing body a written response that satisfies each condition for the conditional approval or remedies each reason for disapproval provided, and the municipal authority or governing body may not establish a deadline for an applicant to submit the response. *Id.* § 212.0093.

11. What must the city do with regard to the applicant's written response?

A municipal authority or governing body that receives a written response shall determine whether to “approve” or “disapprove [with explanation]” the applicant’s previously conditionally-approved or disapproved plan or plat not later than the 15th day after the date the response was submitted. *Id.* § 212.0095(a). Again, a city may not establish a deadline before which the applicant must submit the response. *Id.* § 212.0093

A municipal authority or governing body that receives a response shall approve a previously conditionally approved or disapproved plan or plat if the response adequately addresses each condition of the conditional approval or each reason for the disapproval. *Id.* § 212.0095(c).

A previously conditionally-approved or disapproved plan or plat is approved if: (1) the applicant files a response that adequately addresses each condition of the conditional approval or each reason for disapproval, and (2) the municipal authority or governing body that receives the response does not disapprove the plan or plat on or before the 15th day the response was submitted. *Id.* § 212.0095(d).

The two paragraphs above mean the plan or plat must be approved if: (1) the applicant’s written response addresses all the issues raised in the city’s prior approval with conditions or disapproval with explanation; and (2) no new issues are raised by the applicant’s written response. *Id.* § 212.0095(d)(2). What to do when new issues are raised by the applicant’s written response is the subject of some debate and is addressed in question 12, below.

12. What if the applicant’s written response changes the plan or plat in a way that creates new issues?

At least two schools of thought exist in relation to what happens once the city receives the applicant’s written response: (1) the written response and 15-day decision period of the city continues repeatedly in relation to new issues raised by corrections; or (2) the city must disapprove with explanation a submission that creates new issues, which starts the process from the beginning.

Under the first process, it appears that – if the applicant’s written response raises new issues – a city may, once again, “approve” or “disapprove with explanation” the plan or plat on or before the 15th day the response was submitted. Section 212.0095(d) supports that conclusion:

(d) A previously conditionally approved or disapproved plan or plat is approved if: (1) the applicant filed a response that meets the requirements of Subsection (c); and (2) the municipal authority or governing body that received the response *does not disapprove the plan or plat* on or before the date required by Subsection (a) and in accordance with Section 212.0091.

Disapproval must follow the process spelled out previously:

- A municipal authority or governing body that conditionally approves or disapproves a plan or plat shall provide the applicant a written statement of the conditions for the conditional approval or reasons for disapproval that clearly articulates each specific

condition for the conditional approval or reason for disapproval. *Id.* §§ 212.0095(b); 212.0091(a) (Note that (a) includes the “conditional approval” option, but a city can’t use that. It can only disapprove with explanation because it is limited to doing so by Section 212.0095(d)(2)).

- Each condition or reason specified in the written statement: (1) must be directly related to the requirements under the subdivision platting law and include a citation to the law, including a statute or municipal ordinance, that is the basis for the conditional approval or disapproval, if applicable; and (2) may not be arbitrary. *Id.* §§ 212.0095(b); 212.0091(b) (Again, only disapproval with conditions is allowed at this stage).

Presumably, the approval or disapproval with explanation for new issues within 15 days allows the applicant to once again submit a written response, which once again triggers the 15 day deadline. That process could conceivably continue until all issues have been addressed.

The second process presumes that the applicant’s written submission and the city’s response to it within 15 days is a “one-and-done” proposition. That process interprets Sections 212.0095(b)(2) and (c)-(d) to allow approval if all of the items are corrected or disapproved with explanation if not. The disapproval with explanation would mean that the applicant starts again at the beginning by resubmitting the plan or plat.

13. Does the bill provide for an alternative plan or plat approval procedure?

Yes, but only if they applicant agrees. An applicant may elect at any time to seek approval for a plan or plat under an alternative approval process adopted by a city if the process allows for a shorter approval period than the approval process described in the questions above. *Id.* § 212.0096.

An applicant that elects to seek approval under the alternative approval process described above is not: (1) required to satisfy the requirements of the statutory approval process in the bill above before bringing an action challenging a disapproval of a plan or plat; or (2) prejudiced in any manner in bringing the action described by (1), including satisfying a requirement to exhaust any and all remedies. *Id.* § 212.0096(b).

This alternative approval procedure may be a way to grant more authority to staff and speed up internal processes. An applicant would usually have nothing to lose by trying a city’s alternative process because the applicant could always opt back in to the procedures in the bill.

14. May a city require an applicant to waive any deadlines or procedures in the bill?

Maybe, but only with regard to a plan, not a plat. A municipal authority responsible for approving plats or the governing body of a city may not request or require an applicant to waive a deadline or other approval procedure. *Id.* § 212.0097. The waiver prohibition applies only to “plats” and not to “plans,” which could allow a city to require a waiver for anything other than an actual plat, which is defined in the bill as a preliminary plat, general plan, final plat, and

replat. Of course, the prohibition against establishing a deadline by which the applicant must submit a written response remains in place. *Id.* § 212.0093.

15. What is the burden of proof in a legal action challenging the disapproval of a plan or plat?

In a legal action challenging a disapproval of a plan or plat, the city has the burden of proving by clear and convincing evidence that the disapproval meets the requirements of the subdivision platting law or any applicable case law, and the court may not use a “deferential standard.” *Id.* § 212.0099.

16. May a city require a plan or plat to meet administrative completeness requirements before being considered “filed?” May a city have a submittal calendar that corresponds to the city’s internal meetings process?

The bill doesn’t appear to modify the authority of a city to require an administrative completeness review (i.e., meet a checklist of requirements) prior to being accepted for filing. A city could also continue to have a submittal calendar that corresponds, for example, to planning and zoning commission meetings. In other words, the bill doesn’t make any additions related to acceptance for filing requirements. Thus, if a city believes it had the authority to do so prior to the bill, it should be able to continue those practices.

One exception is that, if a groundwater availability certification is required, the 30-day period begins on the date the applicant submits the groundwater availability certification to the municipal authority responsible for approving plats or the governing body, as applicable. *Id.* § 212.009(b-1).

17. How does the bill interact with Chapter 245 (the “permit vesting statute”)?

Chapter 245, in sections 245.001(a) and (b), provides in relevant part that:

Each regulatory agency shall consider the approval, disapproval, or conditional approval of an application for a permit solely on the basis of any orders, regulations, ordinances, rules, expiration dates, or other properly adopted requirements in effect at the time: (1) the original application for the permit is filed for review for any purpose, including review for administrative completeness; or (2) a plan for development of real property or plat application is filed with a regulatory agency.

Rights to which a permit applicant is entitled under this chapter accrue on the filing of an original application or plan for development or plat application that gives the regulatory agency fair notice of the project and the nature of the permit sought. An application or plan is considered filed on the date the applicant delivers the application or plan to the regulatory agency or deposits the application or plan with the United States Postal Service by certified mail addressed to the regulatory agency. A certified mail receipt obtained by the applicant at the time of deposit is prima facie evidence of the date the application or plan was deposited with the United States Postal Service.

The above means that an applicant could submit something for approval that would trigger vesting, but that doesn't necessarily mean that the application is "filed" for purposes of H.B. 3167. However, Section 245.001(e) provides that:

(e) A regulatory agency may provide that a permit application expires on or after the 45th day after the date the application is filed if:

(1) the applicant fails to provide documents or other information necessary to comply with the agency's technical requirements relating to the form and content of the permit application;

(2) the agency provides to the applicant not later than the 10th business day after the date the application is filed written notice of the failure that specifies the necessary documents or other information and the date the application will expire if the documents or other information is not provided; and

(3) the applicant fails to provide the specified documents or other information within the time provided in the notice.

The subsection above provides additional authority for a city to require "administrative completeness" prior to an application being considered as "filed" for purposes of H.B. 3167.

18. What are best practices and practical tips for compliance with the bill?

The following suggestions were provided by planners and land use attorneys:

- Review ordinances to make sure they: (1) include all grounds for approval with conditions or denial with explanation; and (2) specifically reference/cross-reference the development code, municipal code, charter, criterial manuals, and other rules that may be cited as a result of H.B. 3167.
- Conduct a study of the cost to provide service for the required staffing levels necessary to meet H.B. 3167 timelines. For instance, a city may need additional engineering services. Adopt new fees that require development to cover the associated costs.
- Establish a detailed internal review process with internal deadlines.
- If a city doesn't have both the planning commission and governing body approval process (as allowed in Local Government Code Section 212.006), it should consider adopting such a process so that if one misses something (e.g., an item that needs to be conditionally approved), the other one can address it.
- Define "filed" in the city's ordinance to mean the day the administrative review process is finished and the plan or plat is placed on the planning and zoning commission agenda.
- Create a waiver form and make it available to applicants. The city can't request a waiver for plats, but it arguably can for plans (see question 14, above), and staff could point out that the process may actually be longer without one.
- Develop standard forms with fill-in-the-blanks and have a comment bank that includes citations to point out frequent errors.

- Establish a detailed quality control checklist (with code citations) and require it to be submitted, and stamped by the submitting engineer, as part of the completeness review.
- Host meeting/informational sessions for the development community to roll out process changes.
- Require pre-application conferences before applicants can submit.
- Limit filing to a schedule or certain day(s) of week.
- Consider whether you need to add dates to the planning and zoning commission meeting schedule, and consider what happens to the application if the commission is unable to meet within the 30-day timeframe (e.g., because of a lack of quorum).
- Delegate any applications to staff rather than the “authority responsible for approving plats” to avoid the 30-day provisions.
- Require supporting “studies” (i.e. traffic impact analysis, drainage study, etc.) be submitted prior to the first application for development.
- Consider requiring submission and approval of preliminary utility plans, potentially as part of a service availability determination, separate and prior to any submission of the actual preliminary plan or plat. Consider the same regarding: utility evaluations (city and third party); TxDOT or county road approvals (curb cuts/driveways); traffic impact analysis; variance approvals; and any other submissions that need to be made to the county and ESD (or any other governmental entity that needs to review) prior to filing.
- Do not accept a final plat for review until subdivision construction plans are approved and either a fiscal surety is filed or the infrastructure improvements are constructed.
- Call responses “notices of code deficiency” that state “your submission fails to comply with section _____ regarding _____” or “does not adequately address section _____ regarding _____.”

19. Does the bill contain any beneficial provisions?

Yes. With regard to the approval of replats, the bill provides that:

1. a replat of a subdivision or part of a subdivision may be recorded and is controlling over the preceding plat without vacation of that plat if the replat: (a) is signed and acknowledged by only the owners of the property being replatted; (b) is approved by the municipal authority responsible for approving plats; and (c) does not attempt to amend or remove any covenants or restrictions (*Id.* § 212.014); and
2. for a replat that, during the preceding five years, any of the area to be replatted was limited by an interim or permanent zoning classification to residential use for not more than two residential units per lot or any lot in the preceding plat was limited by deed restrictions to residential use for not more than two residential units per lot: (a) if the proposed replat requires a variance or exception, a public hearing must be held by the municipal planning commission or the governing body of the city and; (b) if a proposed replat does not require a variance or exception, the city shall, not later than the 15th day after the date the replat is approved, provide written notice by mail of the approval of the replat to each owner of a lot in the original subdivision that is within 200 feet of the lots to be replatted according to the most recent municipality or county tax roll; (c) sections (a) and (b) do not apply to a proposed replat if the municipal planning commission or the governing body of the city holds a public hearing and gives notice of the hearing in the

manner provided by section (b); (d) the notice of a replat approval required by section (b) must include: (i) the zoning designation of the property after the replat; and (ii) a telephone number and e-mail address an owner of a lot may use to contact the city about the replat (*Id.* § 212.015).

H.B. 3167 Development Approval Process

