TEXAS MUNICIPAL LEAGUE
Empowering Texas cities to serve their citizens

President **David Rutledge**, Mayor, Bridge City
Executive Director **Bennett Sandlin**

VIA EMAIL
Office of the Attorney General
Attention: Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548
opinion.committee@oag.texas.gov

December 16, 2022

Re: Request for Attorney General Opinion - RQ-0488-KP – Request for Opinion related to H.B. 3176 and application of platting shot clock

Dear Committee Members,

The Texas Municipal League (TML) is a non-profit association of 1,178 incorporated cities. TML provides legislative, legal, and educational services to its members. On November 21, 2022, Representative Ryan Guillen filed a request for an attorney general opinion (RQ-0488-KP). We ask that you consider the following comments when drafting your opinion.

These comments focus the first three questions Representative Guillen raises at the end of his request regarding which municipal land development applications are subject to the timelines introduced by House Bill 3167 (86th Legislature). These comments will not specifically address the bill's amendments to Chapter 232 of the Texas Local Government Code, since that chapter applies specifically to county regulation of subdivisions.

Restating the first three questions, Representative Guillen is requesting an opinion on the following:

- Whether HB 3167 applies to the subdivision and platting process *only*?
- And if not, to which development applications or processes other than subdivision and platting does the bill apply?

Distilled to its most essential parts, HB 3167 introduced to the municipal platting process a more stringent timeline for consideration of certain municipal land planning applications. Essentially, certain plan or plat applications filed with a city must be approved, denied, or denied with conditions within 30 or 60 days of filing with the appropriate authority.[1] Should an application be denied or conditionally denied, the applicant can resubmit the application at any time, and the same

[1] TEX. LOC. GOV'T CODE § 212.009

city authority has 15 days to render a decision.[2] This process has been dubbed the "shot clock." The bill also added requirements that to deny an application, an applicable regulation must exist and must be cited-to at the time of denial.[3] If the city fails to meet these deadlines, the application is deemed approved by operation of law, regardless of the application's *actual compliance* with applicable law, and the developer can take action to move forward with the plans.[4]

In his request, Representative Guillen speaks to some cities displaying a "willful disregard" of HB 3167 in an effort to "circumvent the plain meaning of the amendments enacted by HB 3167." He also cites to a 2019 TML Legal Q&A ("Q&A") related to the bill that contains discussion of the bill's potential effect, areas of confusion that the bill might create, and possible strategies cities could use to comply with the new law. And rest assured that cities across the state have worked hard to comply. To that end, we hope the committee reviews the Q&A. Rather than being proof of collusion between the TML and cities to circumvent the statute, it as a working document attempting to clarify some of the more confusing aspects of HB 3167 – the same aspects that still cause confusion and have likely generated the instant request.[5]

Regardless of the intention of its drafters, HB 3167 is not simple to implement for numerous reasons. For brevity, we will mention two.

The Municipal Authority Responsible for Approving Plats and the Lack of Delegation Authority

Under Chapter 212, most of the important decisions must be made by the "municipal authority responsible for approving plats," which is either the city's planning commission (P&Z) or the city council (Council),[6] and there is very little authority to delegate final decision-making to city staff or other individuals. Both P&Z and Council are subject to the Texas Open Meetings Act, which means, at a bare minimum, the public must receive notice of the items being considered by the body not less than 72 hours before the meeting occurs.[7] Additionally, a Council or P&Z can convene a meeting only when a quorum of the board's members is present. Councils in some cities meet only once a month, and if they meet more often, their schedule is based usually on a day of the week rather than every so many days.[8] Some larger cities have P&Zs that meet regularly several times a month, but most cities in Texas are not large enough to have the number of applications to ask volunteer P&Z members to meet several times a month.[9] The simple change requiring definitive action within 15 or 30 days required many cities (large and small) to find a way to (1) ensure meetings happened at a frequency that would allow for appropriate consideration and (2) ensure that no meeting would be canceled due to failure of a quorum, because a misstep on either

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[2] *Id.* § 212.0095
[3] *Id.* § 212.0091
[4] *Id.* § 212.009(d)
[5] The most recent version of the Q&A was posted to TML's website in January 2021, and differs from the document cited by Representative Guillen to reflect changes in the law: https://www.tml.org/DocumentCenter/View/2463/HB-3167-QA-2021-January_sh_12621.
[6] *Id.* § 212.006
[7] TEX. GOV'T CODE § 551.043
[8] For schedule and calendar purposes, meeting frequency is generally stated as, "the 2nd and 4th Tuesday of the month" or "the 1st, 3rd, and 5th Monday of the month" rather than "every 14 days" or "every 10 days."
[9] The planning commission in most Texas cities are combined with the zoning commission into one planning and zoning commission as allowed by Local Government Code Sec. 211.007.

could lead to automatic approval of applications that fail to follow federal, state, or local regulations.

Note that before an application gets in front of Council or the P&Z, all the application review by the city's planners, engineers, and other technical staff must be completed in time for placement on an agenda so the Council or P&Z has all the information they need to make an informed approval decision. Most cities are working on their meeting agendas well in advance of the 72-hour posting requirement, so in addition to the 30-day shot clock timer and the Open Meetings Act posting deadline, the city staff is also under the time crunch of having to get the review complete in time to meet internal city agenda creation deadlines. There is a lot to manage here just in terms of calendar management, and cities have adopted processes to meet the multiple moving deadlines.

In order to comply with—not circumvent—Chapter 212, cities across Texas have considered and implemented a number of strategies, some of which are found in the Q&A, such as: (1) controlling the days when applications could be submitted in order to ensure timely placement on a P&Z or Council agenda; (2) pre-filing meeting with the city staff to make sure that all prerequisites outside the application process are met;[10] (3) pre-filing completeness check in order to make sure that the application contains at least the basic components that would be necessary to make the approval decision;[11] (4) appointing alternate members to P&Z to make quorum more likely; (5) breaking large, joint applications into separate, stand-alone applications;[12] and others. Note that each of these strategies does not attempt to avoid the application of HB 3167; rather, they are all efforts to comply with the black letter of the law.

Additionally, if cities had more authority to delegate some of the approval decisions to an entity other than the P&Z or Council, many of these decisions would likely be made much more quickly. Unfortunately, delegation authority is limited to a small number of simpler plat applications.[13] Delegation is beyond the scope of this request. We mention it here along with the above explanation to show that cities are trying to do what they can within the structure of Chapter 212 to efficiently and effectively process land development applications.

The Interplay Between Local Planning Processes for Complex Development and Chapter 212: Site Planning

Disagreement exists among some cities and property developers about when to apply the shot clock, especially regarding which applications or processes are subject to it. One example of a source of confusion is whether *every aspect* of a "site plan" is subject to the shot clock. The bill added the term "plan" to Chapter 212 and define it to mean, "a subdivision development plan,

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[10] Zoning, annexation, utility concerns, fiscal security, and other pre-application needs, depending on the development's requirements and applicable law.

[11] The alternative to a completeness check could be more denials based on the city not receiving enough information to guarantee that the application complies with the applicable rules. A completeness check is a method to get to approval faster – not a circumvention of HB 3167.

[12] Rather than allowing for a general "site plan application" which might include everything required to go from raw land to finished construction, the large application could be broken into different pieces, i.e. a plat application, utility approval application, tree conservation plan application, connectivity application, etc. That can help avoid the complexity surrounding which applications run through shot clock and which do not.

[13] TEX. LOC. GOV'T CODE § 212.0065

including a subdivision plan, subdivision construction plan, *site plan*, land development application, and site development plan (emphasis added)."[14] The Texas Code Construction Act definition of "including" states that it is a "term of enlargement and not of limitation."[15] On its face, Chapter 212 appears to apply to a "subdivision development plan," one example of which could be a "site plan," but then it fails to define what a "site plan" is.

Site plans are creatures of local creation, and an application for a site plan in one community is likely different than an application for a site plan in another community. There is no universally-applicable (or statutory) definition of site plan or universal understanding of what a site plan is or should include.[16] Broadly speaking, site planning is a process often used for commercial developments where division of land uses happens but may not subdivide property in a way that requires platting.[17] Depending on the facts of the development, a site plan application can require different information, often including engineering plans, traffic plans, construction plans, master sign plans, drainage studies, utilities work, and more. Depending on the city, the site planning process can be required for large, new retail commercial developments and to minor remodels of existing structures.

Usually, a site plan application is submitted to the city for city engineers and planners to review for compliance with myriad federal, state, and local regulations. Some of the regulations may derive from the "subdivision" power authorized under Chapter 212, but many of the regulations come from outside Chapter 212.[18] Building setbacks and height, for example, can be reflected on site plans, and those regulations generally come from municipal zoning authority – not Chapter 212. If a building is of a sufficient height, for example, the applicable fire code may require additional fire controls, which would likely need to be shown on the site plan – again, not a Chapter 212 power, yet part of site planning. Also, there are subdivision-exempt site plans, i.e. a site plan for a development on property that is exempt from the platting process altogether, so those site plans could fall entirely outside the power authorized by Chapter 212. As cities have attempted to both (1) create a flexible site planning process to efficiently work through different development challenges, while (2) complying with Chapter 212's new shot clock, questions have arisen whether the entire site planning process has to be completed under the shot clock, or whether different aspects of a large site plan application can be broken out with some running per shot clock and others running according to their own timelines.

Municipal zoning is probably the clearest example of this complicated interplay. Chapter 211 of the Texas Local Government Code governs zoning and contains a significant public process related to the adoption, amendment, and variance from zoning regulations. When a landowner wishes to vary from a zoning ordinance, there are public notice requirements, public protest rights, consideration of the request by at least one public body, all of which are governed on a specific

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[14] *Id.* § 212.001
[15] TEX. GOV'T CODE § 311.005
[16] Note that the Q&A highlights the divergent opinions on which development plans might be subject to the shot clock. Instead of advocating for one position or the other, TML provided the following suggestion: "Because of the ambiguity, each city may wish to define certain term(s) in its ordinance for clarity."
[17] *See* TEX. LOC. GOV'T CODE § 212.004
[18] *Id.* § 212.002

statutory timeline which cannot legally be completed within the Chapter 212 shot clock timeframe.[19]

Are site plan applications that would require a change in zoning subject to the shot clock and Chapter 212's automatic approval language? If a city reviewing a site plan misses a shot clock deadline, are zoning and other land use or health and safety errors reflected in the site plan deemed approved by operation of law? Put another way, if a city requires zoning-related regulations to be reflected on a site plan, can errors in an approved site plan effectively change the properties zoning and bypass the Chapter 211 process? Surely not. Surely a statement that the term "plan" under Chapter 212 "includes … site plan" is not sufficient to undercut the public zoning process. The complexity of site planning gives rise to the questions at the heart of the request before the Committee related to which land development applications submitted to a city are subject to shot clock.

The confusion surrounding whether all or only a part of a site plan application is subject to shot clock could take us full circle to the definition of "plan" in Chapter 212. Recall that while "site plan" is included in the list of examples, the term "plan" is defined as "a subdivision development plan." The clearest answer to Representative Guillen's initial questions is that the shot clock applies to plat and plan applications made pursuant to Chapter 212's subdivision authority, and that aspects of a plan application that are not derived from Chapter 212's subdivision authority are not subject to the shot clock.

If you have any questions, or require additional information, please do not hesitate to contact the undersigned at (512) 231-7400 or by email at tad@tml.org.

Sincerely,

Tad Cleaves
TML Legal Counsel

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[19] *Id.* § 211.006