



Office of the Attorney General
State of Texas

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ATTORNEY GENERAL

February 26, 1993

Honorable Ashley Smith
Chairman
Committee on Higher Education
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910

Letter Opinion No. 93-14

Re: Whether application of affirmative vote requirement in section 212.015 of the Local Government Code to a proposed replat satisfying all zoning requirements is lawful (ID# 18028)

Dear Representative Smith:

This letter is in response to your question concerning the application of section 212.015 of the Local Government Code to a particular proposed replat. On the request of your staff, we have discussed our research with the various parties concerned about the replat. They have requested we summarize our research on the relevant issues in a letter to you even though we cannot give a definite answer in this case given the lack of legislative history and case law on the relevant question and our inability to resolve fact issues in the opinion process.

Section 212.015 provides in pertinent part:

(c) If the proposed replat is protested in accordance with this subsection, *the proposed replat must receive, in order to be approved, the affirmative vote of at least three-fourths of all members of the municipal planning commission or governing body, or both.* For a legal protest, written instruments signed by the owners of at least 20 percent of the area of the lots or land immediately adjoining the area covered by the proposed replat and extending 200 feet from that area, but within the original subdivision, must be filed with the municipal planning commission or governing body, or both, prior to the close of the public hearing.

Local Gov't Code § 212.015(c) (emphasis added). The requirement for an affirmative vote of at least three-fourths vote of all members of the governing body or planning commission was added to the legislature in 1989. See S.B. 1075, Acts 1989, 71st Leg., ch. 345, § 3, at 1314-15. The pre-amendment version of the statute provided that, in order for certain replats to take effect, at least two-thirds of the owners of all lots within 500 feet of the lots to be replatted had to approve in writing the replat if it had been protested in writing by at least 20 percent of those owners. The pre-amendment provision

was declared unconstitutional in *Minton v. City of Fort Worth Planning Comm'n*, 786 S.W.2d 563 (Tex. App.--Fort Worth 1990, no writ) on the ground that it unlawfully delegated governmental power to private persons. See also *Williams v. Whitten*, 451 S.W.2d 535 (Tex. Civ. App.--Tyler 1970, no writ) (holding city ordinance invalid for similar reason).

The 1989 amendment eliminated the aspect of the statute found unconstitutional in the *Minton* case. We were unable to locate any legislative history clarifying the application of amended section 212.015 to a proposed subdivision replat satisfying all applicable zoning requirements. Nor were we able to locate a Texas case or a judicial decision from another state discussing a similar stringent voting requirement imposed on a governmental body and its application to a proposed replat that satisfied all applicable zoning requirements. A number of decisions, however, in other states have addressed the validity of such stringent governmental voting requirements in the case of a proposed change to existing zoning requirements. Those cases have routinely ruled that such voting requirements do not violate the constitutional limitations on delegating legislative powers to private parties. See, e.g., *Hope v. Gainesville*, 355 So. 2d 1172 (Fla. 1977); *Trumper v. Quincy*, 264 N.E.2d 689 (Mass. 1970); *Farmer v. Meeker*, 163 A.2d 729 (N.J. Super. 1960); *Zoning: Validity and Construction of Provisions of Zoning Statute or Ordinance Regarding Protest by Neighboring Property Owners*, 7 A.L.R.4th 1732, 1737-41. Compare *City of San Antonio v. Lanier*, 542 S.W.2d 232 (Tex. Civ. App.--San Antonio 1976, writ ref'd n.r.e.) (holding invalid city ordinance inconsistent with two-thirds voting requirement imposed by state law under predecessor statute to Local Gov't Code § 211.006(d) on city council in event 20 percent or more landowners protested zoning change).

We understand that the parties concerned here also ask if it is an abuse of discretion for a city to in effect disapprove a replat that satisfies all applicable requirements by not approving the replat by a three-fourths affirmative vote.¹ Whether in a particular instance such a refusal would constitute an abuse of discretion cannot be determined in the opinion process because we can neither subpoena witnesses nor hear testimony as can a court, and thus, we are unable to resolve the factual issues inherent in such a determination.

¹Texas courts have not yet addressed this issue with regard to section 212.015. Courts from other states addressing in different circumstances whether a city has the discretion to approve or disapprove a plat meeting all applicable requirements have reached conflicting results. Compare *Garvin V. Baker*, 59 So. 2d 360 (Fla. 1952); *Brown v. Joliet*, 247 N.E.2d 47 (Ill. App. 3d 1969) with *Shorb v. Barkley*, 240 P.2d 337 (Ca. D. Ct. App. 1952); *Tuxedo Homes, Inc. v. Green*, 63 So. 2d 812 (Ala. 1953); *State v. Barq*, 89 N.W.2d 269 (Wis. 1958); *Knutson v. State*, 157 N.E.2d 469 (Ind.), *reh. denied*, 160 N.E.2d 200 (Ind. 1959); *Broward County v. Nario Realty*, 359 So. 2d 509 (Fla. App. 1978).

S U M M A R Y

Section 212.015(c) of the Local Government Code, as amended by Senate Bill 1075, Acts 1989, 71st Leg., ch. 345, § 3, does not violate the provisions of article II, section 1, and article III, section 1, of the Texas Constitution which prohibit the legislature from delegating its legislative powers to private parties.

Very truly yours,

A handwritten signature in cursive script that reads "Celeste A. Baker".

**Celeste A. Baker
Assistant Attorney General
Opinion Committee**