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April 3, 2023

The Honorable Paul Bettencourt
Senate Committee on Local Government
P.O. Box 2910
Austin, Texas 78768

Dear Chairman Bettencourt and Members of the Committee:

Thank you, Honorable Chair and Committee members for taking testimony on this bill today; I am submitting this letter in opposition to SB 2147, as I believe the bill is incompatible with and contradicts state and federal court decisions regarding the non-delegable nature of zoning decisions to remove properties from a district that has been created in accordance with the strict notice and public hearing provisions of existing State zoning law.

My name is Kimberley Mickelson, and I am a Senior Assistant City Attorney in the Legal Department of the City of Houston. I have practiced land development and zoning law for approximately 30 years in Texas cities of all sizes, and my primary role at the City of Houston is providing legal support to the Department of Planning and Development, which includes matters of historic preservation. I am also a professor of practice in the graduate urban planning programs at Texas A&M and Texas Southern Universities.

SB2147 is an unneeded attempt to chill local efforts to preserve areas of historical, architectural and cultural significance by amending Chapter 211 of the Tex. Local Gov't Code ("Chapter 211"). The legislature has, in previous sessions, provided significant protections for owners of property who object to the inclusion of their property in a proposed historic district. State law allows property owners to register protests and withdraw previously submitted support for historic districts (Chapter 211, Sec. 211.0065(e)). State law also requires a super-majority vote of both the commission and council—75%--if all property owners do not agree with the district boundaries.

Most importantly, however, Chapter 211 provides for a robust public participation process of notice and public hearings that culminates in a decision by a legislative body. Changes to those decisions must go through the same process (Sec. 211.002). Zoning decisions determining district boundaries and regulations, have been uniformly recognized by state and federal courts as being legislative in nature.¹

¹ *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (Te. 1998) cert. denied; *City of Pharr v. Tippitt*, 616 S.W.2d 173 (Tex. 1981) no writ. See also, *Shelton v. City of College Station*, [780F.2d475, 477](https://www.courtlistener.com/doc/1/7/780F.2d475.477/) (5th Cir. 1986).

Delegations of legislative power to members of the community have been struck down by Texas courts.² If delegations to a percentage of nearby owners is unconstitutional, allowing a single individual to circumvent and take over the legislative process on his own accord is no different.

The attempt to amend Chapter 211 to allow an individual opt out provision tracks language in the Texas Property Code, for the establishment of deed restrictions, which allows an individual property owner to opt out.³ In this instance, however, it is critical to note that the option to opt out is included in the petition, and the other owners are thereby notified.

At a minimum, the bill should be amended to require notice of the opt out filing be delivered to the designated planning official. This change does not correct the delegation problem.

Sincerely,

/s/Kimberly Mickelson
Kimberley Mickelson
Sr. Assistant City Attorney
City of Houston Legal Department

² See, e.g., *Minton v. City of Fort Worth Planning Commission* (App. Dist.—Fort Worth, 1990), 786 S.W.2d 563. (requiring 2/3 of nearby property owners in order to replat was found unconstitutional because it delegated, to a narrow segment of the community, the legislative power given by the people to the legislative body. See also, cases cited in *Arbor Bend Villas Housing, L.P. v. Tarrant County Housing Finance Corp.*, United States District Court, N.D. Texas, Fort Worth Division (March 9, 2005) WL 548104; *Washington ex rel. Seattle Title Trust Co. v. Roberge*, [278 U.S. 116, 49 S.Ct. 50, 73 L.Ed. 210 \(1928\)](#) (finding that an ordinance requiring consent from neighboring landowners in order to obtain a permit violated the Due Process Clause); *Eubank v. Richmond*, [226 U.S. 137, 33 S.Ct. 76, 57 L.Ed. 156 \(1912\)](#) (holding that city ordinance requiring two-thirds resident approval to approve changes to a street was unconstitutional).

³ Texas Property Code Sec. 201.007((a)(7). In this instance, the opt out provision is included in the petition for deed restrictions, so there is notice to the other property owners.