Tree Preservation Ordinance Upheld by Fourth Court of Appeals

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We have all heard the famous poem written by Joyce Kilmer entitled, "Trees" with the familiar line that reads, "*I think that I shall never see, a poem as lovely as a tree*." As a result of a recent Fourth Court of Appeals decision, cities have been given an additional tool to protect trees. The Fourth Court of Appeal ruled in *Milestone Potranco Development, Ltd. v. City of San Antonio,* No. 04-08-00479-CV (Tex. App.—San Antonio 2009, no pet.) that the City of San Antonio's Tree Preservation Ordinance and Streetscape Tree Planting Standards are enforceable against property located in the City's extraterritorial jurisdiction. The Court ruled that the City's Tree Ordinance was properly adopted under § 212.002 of the Texas Local Government Code, and is permitted to extend to the City's ETJ based on § 212.003 of the Texas Local Government Code.

The Fourth Court of Appeals examined this issue on three main points. First, whether the Tree Ordinance was a "rule governing plats and subdivisions of land" that could be adopted under § 212.002 of the Texas Local Government Code. Second, whether the Tree Ordinance was overly broad in how it would be applied. Last, whether the Tree Ordinance improperly regulates the use of property in the City's ETJ in a manner prohibited under § 212.003(a)(1) of the Texas Local Government Code.

The first issue - whether the Tree Ordinance was a rule "governing plats and subdivisions of land" - was answered in the affirmative. The court looked at the Texas Supreme Court's previous holdings that stated "the purpose of platting and subdivision regulations is to 'ensure that subdivisions are safely constructed and to promote the orderly development of the community.'" *City of Round Rock v. Smith,* 687 S.W.2d 300, 302 (Tex. 1985). Using this authority, the court looked at some of the justifications behind the enactment of the Tree Ordinance and found that purposes such as "[t]o preserve trees as an important public resource enhancing the quality of life and the general welfare of the city and enhancing its unique character and physical, historical and aesthetic environment" were in unison with the purposes of rules governing plats and subdivisions that the Supreme Court had previously considered. Thus, the court concluded that the Tree Ordinance was a rule "governing plats and subdivisions of land" and that it is more than an aesthetic regulation, as asserted by the developer in this case.

The next issue was the Plaintiff's argument that the Tree Ordinance was overly broad and that it applied not only to those wishing to plat and subdivide property but also to every person who simply wants to trim or reduce the number of trees on their property. The court looking at the Tree Ordinance as a whole and, based on its context in San Antonio's Unified Development Code, concluded that the ordinance only governs plats and subdivisions of land because it only comes into play when a property owner attempts to plat or subdivide land, and was therefore not overly broad. Furthermore, the overall structure of the City's Code demonstrates that the Tree Ordinance was limited in application to the subdivision of land and land development. Based on this contextual

examination, the court concluded that the Tree Ordinance was narrowly drawn and was not overly broad in its potential application.

The final issue is whether the Tree Ordinance regulates the use of property in the City's ETJ in a manner that is prohibited by § 212.003(a)(1) of the Texas Local Government Code. The court concluded that the Tree Ordinance does not regulate the use of property, based on the fact that § 212.003(a)(1)'s description of ETJ excluded regulations is remarkably comparable to that of zoning regulations which municipalities may adopt, which are found in § 211.003 of the Texas Local Government Code. The court concluded that the similarities between the zoning ordinances a municipality may adopt under § 211.003 and the list of items a municipality is prohibited from regulating under § 212.003, reveal a legislative intent to prohibit a municipality from regulating zoning-type uses in an ETJ. The court bolstered its conclusion by analyzing the legislative history of § 212.003(a), which when originally written had no exceptions, but when first amended the statute read "a municipality may not impose zoning requirements, including those that regulate the use of any building or property, in any area outside its corporate limits." Act of Feb. 8, 1989, 71st Leg., R.S., ch. 1, § 46, 1989 Tex. Gen. Laws 1, 49. Therefore, the court was able to deduce a clear legislative intent to bar zoning type regulations in ETJs and concluded that the Tree Ordinance was not a zoning type regulation.

The *Potranco* case provides significant clarification for exactly what can and cannot be enforced in a city's ETJ. It further provides instructions for municipalities that have yet to enforce certain city ordinances in their respective ETJs to begin doing so, as well as guidance to cities in the manner and scope future ordinances that may warrant enforcement in the ETJ. Based on this case, municipalities can now further plan efforts for the health and welfare of their citizens into their ETJ. The court in this opinion recognized that city ordinances such as the Tree Ordinance have astounding effects on communities and understand that the Texas Legislature did not intend to diminish the effects in cities' ETJs when properly crafted and adopted. This opinion will aid municipalities in looking at "rules governing plats and subdivisions" in a broader context of community growth and welfare.

Finally, while the Potranco decision is a good one for cities, it will give developers further reason to go to the legislature in two years to attempt to have state law modified to prohibit such ordinances from taking effect in the ETJ. I would remind legislators (again utilizing Joyce Kilmer's poem) *that laws are made by fools like me, but only God can make a tree.*