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Municipal Authority in the ETJ: You're Not the Boss of Me

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I. Introduction

If a bill were to be introduced in the 2017 legislative session expressly authorizing municipalities to extend their building codes to the extraterritorial jurisdiction (“ETJ”), what arguments would be made by the “pro” side? “Con” side? What evidence or testimony would be introduced conclusively showing that this extraordinary power should be conferred on cities? Has there been a plethora of complaints from County residents about an epidemic of new house construction defect lawsuits in the ETJ? Are county residents attending city council meetings in droves requesting assistance from these cities to extend city ordinances to the ETJ?

The answer to these questions is an obvious “no.” Vegas odds for such a bill being enacted in 2017 would be greater than a Cowboys Super Bowl win. If there clearly is no legislative intent to extend building codes to the ETJ and nobody can point to any significant problem that needs to be remedied, it begs the question as to why municipalities are fighting so hard for this right.

II. The History of ETJ.

Prior to 1963, a Texas municipality could annex territory up to the corporate boundaries of another municipality. The “first in time, first in right” rule that the first to commence annexation or incorporation proceedings was entitled to complete the annexation led to numerous municipal conflicts. The Legislature enacted the Municipal Annexation Act, Tex.Rev.Civ.Stat.Ann. art. 970a, in 1963 (now Chapter 43, TEX. LOC. GOV’T CODE) to address this situation. In addition to regulating annexation activities, the Municipal Annexation Act created the concept of extraterritorial jurisdiction. Since that time, disputes between municipalities and landowners regarding jurisdiction and the ability of cities to regulate certain activities within the ETJ have become commonplace.

The Act established the extraterritorial jurisdiction of cities and towns and authorized the exercise of certain powers by cities and towns in their extraterritorial jurisdiction. TEX. REV. CIV. STAT. art. 970a. When originally introduced in the Legislature, House Bill 13 read in relevant part:

Sec. 2(a) The governing body of any city or town may, by ordinance, extend to all of the extraterritorial jurisdiction defined under the authority of Section 1(f) of this Act, the application of one or more of such city or town’s ordinances relating to: health; sanitation; subdivision development; zoning; building construction, including but not limited to building, plumbing and electrical standards and regulations.

Tex. H.B. 13, 58th Leg., R.S. (1963)(Introduced Version), at p. 6. The enrolled version, which became law, reflected a significantly narrowed scope of municipal authority in the ETJ. Most of the ETJ authority the bill initially set out to grant, including that regarding zoning and building construction, was taken out. The law that was enacted read in relevant part:

Section 4. Extension of Subdivision Ordinance Within the Extraterritorial Jurisdiction. The governing body of any city may extend by ordinance to all of the area under its extraterritorial jurisdiction the application of such city's ordinance establishing rules and regulations governing plats and the subdivision of land. . . .

Tex. H.B. 13, 58th Leg., R.S. (1963)(Enrolled Version), at p.108-109.

Upon the nonsubstantive revision of the Texas statutes for codification in 1987, the law providing for the extension to the ETJ of rules governing platting and subdivisions of land was set out in §212.003 of the Local Government Code. In 1989, an amendment to this statute initially proposed to include a grant of authority to regulate building construction in the ETJ. HB 3187 originally read in relevant part:

Section 212.003 EXTENSION OF RULES TO EXTRATERRITORIAL JURISDICTION, (a) The governing body of a municipality by ordinance may extend to the extraterritorial jurisdiction of the municipality the application of municipal ordinances adopted under Section 212.002 and other municipal ordinances relating to fire safety, the construction of buildings or other structures or improvements, or access to public roads.

Tex. H.B. 3187, 71st Leg., R.S. (1989)(Introduced Version), at p. 13. As stated in the background section of the bill analysis, “Cities have limited authority to regulate traffic and construction of buildings in ETJ areas.” HOUSE COMM. ON URBAN AFFAIRS, BILL ANALYSIS, TEX. H.B. 3187, 71st Leg., R.S. (1989), *Id.* at 15. The follow-up, substitute bill, which became law, read:

Section 212.003 EXTENSION OF RULES TO EXTRATERRITORIAL JURISDICTION, (a) The governing body of a municipality by ordinance may extend to the extraterritorial jurisdiction of the municipality the application of municipal ordinances adopted under Section 212.002 and other municipal ordinances relating to access to public roads,

Tex. H.B. 3187, 71st Leg., R.S. (1989)(House Comm. Substitute), at 48. Comparing the substitute bill to the introduced version, the bill analysis stated “In Section 6, the original bill allowed extension into the ETJ of municipal ordinances relating to fire safety, construction of buildings or other improvements or access to public roads. The substitute allows the extension into the ETJ of ordinances relating to access to public roads only.” HOUSE COMM. ON URBAN AFFAIRS, BILL ANALYSIS, TEX. H.B. 3187, 71st Leg., R.S. (1989), at 17. This statutory history confirms that the Legislature not only took out language specifically authorizing ETJ enforcement of building construction ordinances, but it decided against granting that authority.

III. Courts construe Texas statutes as limitations on cities exercising their governmental powers in the ETJ.

When construing a statute, courts begin with the language. *State v. Shumake*, 199 S.W.3d 279 (Tex. 2006). If the statute is clear, the court must construe the language according to its common meanings. *Crosstex Energy Servs. LP v. Pro Plus, Inc.*, 430 S.W.3d 384 (Tex. 2014).

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