



# City of Denton

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## AGENDA INFORMATION SHEET

**DEPARTMENT:** Development Services

**CM:** Todd Hileman

**DATE:** May 21, 2018

### **SUBJECT**

Receive a report, hold a discussion and give staff direction regarding Denton Development Code Subchapter 13, Tree Preservation and Landscape Standards.

### **BACKGROUND**

The tree preservation regulations are a component of Sec. 35.13.7, of the Denton Development Code (DDC), "Tree Preservation and Landscape Standards." The existing Tree Preservation and Landscape Requirements (inclusive of the tree fund) were adopted in 2004 to promote tree preservation and to facilitate site design and construction that would allow for the long-term viability of trees.

While the current tree preservation regulations served to protect some of the existing tree canopy, more is needed to manage and maintain essential tree canopy and to provide clear guidance for tree preservation and mitigation within the city.

Draft revisions were presented to the Planning and Zoning Commission on four separate occasions (March 23, 2016, July 27, 2016, February 8 & February 15, 2017). As a result of concerns from the development community, no formal action has been taken. Some of the concerns expressed include:

- Use of the term developer vs. applicant; this issue was brought up due to the fact that the draft regulations would apply to property owners, not just developers.
- Requiring a tree removal permit for residents occupying a single family dwelling; the issue was raised that a home owner should be able to remove a tree on their property without having to obtain a permit.
- Financial burden on developers for preserving trees; this issue was raised as a result of 'setting-aside' large portions of a property and not being able to develop it.

Since our last presentation to the Planning and Zoning Commission staff has addressed concern expressed by representatives from the developer community and the Planning and Zoning Commission. However, in further refining the regulations it became clear to staff that the tree preservation regulations must be looked at holistically instead of separately. Accordingly, we have outlined below a number of considerations as well as some overall policy questions.

### **CONSIDERATIONS**

A tree protection ordinance is a management tool used by communities seeking to maintain and grow its tree canopy (or urban forest). By themselves, however, tree ordinances cannot assure that the trees in and around the city will be improved or even maintained. Tree ordinances simply provide the authorization and standards for management activities. If these activities are not integrated into an overall management

strategy, problems are likely to arise. Without an overall strategy, management will be haphazard, inefficient, and ineffective, and the urban forest goals will likely suffer.

Often times, tree protection ordinances are developed in response to public concern over specific or perceived problems. This “quick-fix” approach often leads to ordinances that are not consistent with sound management practices for an urban forest, and may in fact counter good management efforts. As an example, many times public concern has led to the creation of an ordinance established to protect old “heritage” trees. Unfortunately, many of these same ordinances allow the routine destruction of younger trees. The end result may be an unsustainable urban forest, short on young trees and long on old, declining trees. By focusing too narrowly on individual trees, such ordinances may contribute to the degradation of the urban forest over the long term.

In updating the draft of the tree preservation regulations, staff began analyzing the following:

1. HB 7 (Governor’s Tree Bill), 2017 Texas Legislate Special Session

The “Governor’s Tree Bill” was passed during the special session in 2017. This bill, which became effective December 1, 2017, regulates what cities could do for tree preservation, and includes the following:

- Cities are prohibited from requiring that homeowners pay mitigation fees for removing trees that are under 10” in diameter (Over 10” they can apply for a 100% offset).
- It also prescribes who can offset fees (get credit for replanting) and how much that credit can be: 50% for residential developers; and 40% for commercial developers.

This bill has been codified as Section 212.905, of the Texas Local Government Code (see attached as Exhibit 2). Since the enactment of this legislation the City of Arlington is the only city that has adopted new regulations. (See Ordinance attached as Exhibit 6)

2. Takings Clause of the Texas Constitution

In March of 2018, staff from Development Services, Legal, and the City Manager’s Office met to discuss and understand the limits of a municipal tree preservation ordinance that would not violate the Takings Clause of the Texas Constitution. Legal provided the following, based on a 2017 Texas Attorney General (AG) Opinion. The Opinion mentioned the two instances where a taking could occur. Both instances are not considered a new legal analysis. However, as the AG acknowledges, there are no cases analyzing the constitutionality of tree preservation ordinances under the Takings Clause. In summary, here are the two types of taking cases:

1. Taking Per se: Per se occurs when the governmental entity denies all economic benefit or productive use of the land. This type would be relatively easy to analyze.
2. Compensable Regulatory Taking: The AG explained how a Compensable Regulatory Taking can occur when a governmental entity “unreasonably” interferes with a specific landowner’s right to use and enjoy its property. This second type of taking requires review under Penn Central factors, including:
  - (1) Consider whether there was a significant economic impact to the owner (we would compare the value that was taken from the property to the value of the remaining property);
  - (2) Consider whether the owner had reasonable investment expectations (depends on whether landowner acquired the property prior to adoption of the tree ordinance); and
  - (3) Consider whether the ordinance was generally applicable or exclusive to the specific landowner (promotes general/health/safety welfare, etc. vs. specific interference to land owner).

This type of taking is more difficult to analyze given that each specific property must be considered separately.

3. Landscape Standards/Regulations

On a parallel path, staff is in the process of rewriting the landscape requirements which will be a major change. Currently, the DDC has a very prescriptive standard as to what should be where with respect to landscape material. The new landscape regulations will move away from the “one size fits all” approach to regulations that are set up as a point-based system which assigns point values to different types of plant material. This system provides flexibility in design and preference of plant material, while establishing minimum standards for landscaping a site. The intent is to provide a property owner with the ability to be creative but also flexible in their landscape design given the vast array of challenges seen with natural features, utility easements, etc. Additionally, the inclusion of increased canopy for parking lots is also being proposed.

4. Comprehensive Urban Forestry Program

As part of the upcoming work plan, staff proposes that the city develop a comprehensive Tree Management Plan designed to determine where, how, and when trees are planned, planted, and maintained including tree mitigation plantings. The Tree Management Plan would contain a strategy for 2-year, 5-year, and 10-year planting plans and incorporate street tree and median plantings throughout the city.

Consideration should also include tree mitigation banks and conservation easements/preserves. If trees planted or preserved as mitigation are to be maintained in perpetuity to offset tree loss, sufficient reserves must be available to establish a fund to pay for eventual replanting. If in-lieu fees only support a single generation of trees and natural regeneration is not a possibility on a managed site (i.e. mitigation bank, easement or preserve), net canopy loss will occur over the long term. This is especially the case for trees planted only along right-of-way or within parks, which typically have a relatively short life span.

A tree protection ordinance is not a panacea. Nor is it a replacement for a comprehensive urban forestry program. Properly enacted, tree protection ordinances can facilitate good management of a city’s tree resources. Improperly applied, these ordinances can solidify counterproductive practices and undermine the long term success of a city’s urban forestry efforts.

In developing a tree ordinance four (4) basic questions should be answered:

(1) What do we have?

This question was answered through the completion of the State of the Denton Urban Forest, dated October 2016 (attached).

(2) What do we want?

The answer to this question includes the following considerations:

- Increase species and age diversity to provide long-term forest stability;
- Provide sufficient tree planting to keep pace with urban growth and offset tree removal;
- Coordinate tree-related activities of municipal departments; and
- Promote conservation of the urban forest by focusing public attention on all tree age classes, not just large heritage trees.

(3) What are our goals to get us what we want?

The overall strategy would:

- Establish and maintain maximum tree cover;
- Establish and maintain an optimal level of age and species diversity.
- Promote conservation;
- Select, establish, and maintain street trees appropriately to maximize benefits and minimize hazard, nuisance, hardscape damage, and maintenance costs; and
- Promote efficient and cost-effective management of the urban forest.

(4) Are we meeting our goals?

If quantifiable goals are clearly established, evaluating progress will be a relatively straightforward. However, periodic (2-year, 5-year, 10-year) evaluation also provides an opportunity to reassess the needs and goals of the community and adjust the strategy if necessary.

5. Mitigation and Tree Fund

A related problem is that in-lieu fees should be specifically restricted to additional mitigation plantings that are above and beyond the community's regular planting programs. If in-lieu fees are used only as a replacement for tree planting previously supported by the local government's general fund, the total amount of funds available for tree planting might actually be reduced, and public tree planting would be insufficient to mitigate for tree loss in both public and private lands. Prior to establishing specific requirements/recommendations for the tree fund, a number of related policy considerations must be addressed.

**Policy Discussion**

In finalizing the comprehensive rewrite of DDC Subchapter 13, Tree Preservation and Landscape Standards, and based on the aforementioned considerations, staff seeks direction on the following policy considerations:

Comprehensive Urban Forestry Program

1. Should the city develop a comprehensive Tree Management Plan?

As an example, attached is Urban Forest Action Plan Implementation Update (Question 4, are we meeting our goals). These reports are published annually and summarize progress and performance measured for the city's Urban Forest Action Plan. The Action Plan and the Management Plan can be found at, <https://www.portlandoregon.gov/parks/60402>.

Tree Mitigation

1. Where applicable, should the new code defer to Texas Local Government Code Section 212.905 as the governing language?
2. Should all or a percentage of tree mitigation plantings be permitted off-site or as street trees?
  - a. Should the mitigation fee funds be used for the plantings outlined as part of a Tree Management Plan?
  - b. Should a property owner have the ability to plant mitigation trees off-site in conjunction with a Tree Management Plan?
3. Should the planting of trees in an off-site tree bank (i.e. area set aside as a permanent receiver site for tree plantings) be explored?

Tree mitigation banking is the preservation of existing trees to serve as mitigation credits or as a type of off-site mitigation. It is used to protect existing trees that are not otherwise protected by ordinance and would not otherwise be protected.

For example, such a mitigation requirement can contribute to a larger restoration project.

- Hoover, Alabama requires applicants to show existing trees over 2 caliper inches within the tree preservation area on on Tree Conservation Plan. This policy shows a slight preference for preserving existing trees instead of replanting.
- Fairhope, Alabama allows use of existing trees to meet landscape requirements if they are bigger than 8 caliper inches.
- St. Lucie County, Florida allows preservation of trees on site to be used for mitigation if they are in excess of landscaping requirement.
- Another ordinance states that where replacement trees are required but not suitable for the particular site prescribed due to the size of the site, the municipality shall deposit the trees into a community tree bank. Trees deposited into the community tree bank shall be utilized for planting on public lands.

### Preserved Canopy

1. If preserved canopy is credited towards meeting tree canopy requirements as part of the landscape requirements, should it only apply to buffer tree requirements; meaning a developing property would still be required to provide street trees and trees within the parking lot?
2. Should property owners subject to the tree preservation regulations memorialize their tree preservation plan through the use of a development agreement, conservation easements, land use or deed restrictions, or tree preserves/transfer of title to a public agency/entity or other method?

As an example, attached is the City of Fort Worth's Landscaping, Buffers and Urban Forestry code provisions. The City of Fort Worth has provisions for an "Urban Forestry Plan" and an "Urban Forestry Development Agreement".

### **Next Steps**

In response to the direction provided as part of the policy discussion, staff will finalize the comprehensive rewrite of DDC Subchapter 13, Tree Preservation and Landscape Standards including the tree fund and provide the committee with a redline version within 30 days.

### **STRATEGIC PLAN RELATIONSHIP**

The City of Denton's Strategic Plan is an action-oriented road map that will help the City achieve its vision. The foundation for the plan is the five long-term Key Focus Areas (KFA): Organizational Excellence; Public Infrastructure; Economic Development; Safe, Livable, and Family-Friendly Community; and Sustainability and Environmental Stewardship. While individual items may support multiple KFAs, this specific City Council agenda item contributes most directly to the following KFA and goal:

**Related Key Focus Area: Sustainable & Environmental Stewardship**  
**Related Goal: 5.1 Responsibly manage Denton's water, land, and other natural resources**

### **EXHIBITS**

1. Agenda Information Sheet
2. Texas Local Government Code Section 212.905, Regulation of Tree Removal
3. State of the Denton Urban Forest, dated October 2016
4. City of Portland, Urban Forest Action Plan Implementation Update
5. City of Fort Worth's Landscaping, Buffers and Urban Forestry code provisions
6. City of Arlington Landscape Tree Preservation Ordinance

Respectfully submitted:  
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## Director of Development Services

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