EMAIL to CodeNEXT staff, Mayor and Councll Members
May 27, 2017

Mr.Guernsey and Mr. Rousselin,

The League of Women Voters Austin Area (LWV-AA) appreciates all your hard work on the CodeNEXT project. It was a massive undertaking and one that is badly needed.

At the meetings I have attended, you have asked for comments from the public. I have observed little public input on the process. Most of the few questions from attendees focused on their own personal property. My suspicion is that it reflects the general public's minimal knowledge of land use codes. Only District 10, which has experienced controversial PUDSs, was more vocal and asked more questions about the CodeNEXT process and procedures.

LWV-AA positions call for an open and transparent system of governance We believe the attached CodeNEXT comments and suggestions represent our position and these suggestions will allow more public participation in the land development process and ensure that the public has adequate opportunity to weigh in on decisions. They will provide decision makers more public input to carefully weigh the issues before them.

Austin is governed by representatives of the citizens. Council Members are guided by their constituents. When decisions are made outside of either citizen review and/or Council review, it is not an open and transparent system and does not serve the public.

Thank you for the opportunity to offer comments and suggestions to CodeNEXT process.

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Public Process in CodeNext
Assessments and Recommendations

The draft of CodeNext has brought some enhanced consistency and presentation to some of the procedures for notice to the public and public participation. The reorganization is an improvement to the portions of the relevant sections of the Land Development Code.

However, several elements of the draft significantly erode the ability of the public to participate in the land development processes. These elements must be adjusted to ensure that the public has adequate opportunity to weigh in on decisions and that decision makers have adequate public input to carefully weigh the issues before them.

The problematic procedural changes, in Sections 23-1 and 23-2 in CodeNext.

1. IMPEDIMENTS PUBLIC PARTICIPATION

Several barriers to public participation have been added in scattered sections of CodeNext.

23-1B-2020 (B)(3)(b) Board of Adjustment Appeals Panel
This section creates a seven-member Appeals Panel, as a component of the Board of Adjustment. While this may have been intended to ease the work load of the Board, it is problematic in that not all Council Members/Council Districts would have a representative in the appeals process. Several other issues are left open, for example how would the members of the Panel be selected? 23-1B-2020(D)(2)(b) requires that any decision of the Panel be unanimous, again creating a very limited opportunity for varying perspectives in an appeals case.
Recommendation: Strike this Section. (Either strike this section or entertain a robust public discussion including the Board of Adjustment members to consider its implementation.)

23-2C-2010(B) Notice Required
This section allows for the public process (e.g., hearings) to proceed even if errors in notice are made. There have been many cases of errors in the past resulting in the public not receiving notice. In these instances, in order to ensure fairness to the public, the process should not proceed.
Recommendation: Strike this section.

23-2C-3020 General Notice Procedures, Mailed Notice
This section specifies that a notice letter is "effective on the date a letter is deposited in a depository of the US Post Office."
Concerns are often raised in the community about the amount of time a notice letter from the City takes to reach the intended participant's mailbox. It should be clear that impediments such as a slow City mail room process or substandard postage are not allowed.
Recommendation: Clarify language to ensure expeditious delivery.

23-2D-1020(C) Speaker Requirements at Public Hearings
This requires permission of the presiding officer to speak at a public hearing if the person has signed up after the hearing begins. This should be addressed at the level of the body conducting the hearing, e.g., it is being discussed by Council and should not be included in the Code.

Recommendation: Strike this section.

23-2D-2030(D) Change in Location of Public Hearings
This section allows for a change in the location of a public hearing (for 'good cause' as deemed by presiding officer) if the hearing is delayed a sufficient amount of time for people to get to the new venue. This assumes that getting from the original locale to the new one on the spot is always possible for a member of the public. While this language appears in the current code, it presents an onerous burden especially for those dependent on public transportation.
Recommendation: Strike this section.

23-2F-1(B)(2) Special Exceptions
This section adds a general authority for the Board of Adjustment to grant special exceptions to the code, similar to variances except that a hardship is not required. Different types of special exceptions are delineated in Section 23-4. As drafted, *no* public notice is required when the Board is going to hear a request for a special exception, contrary to the current code (Section 25-2-214) which currently requires public notice and a public hearing in these cases. Given that exceptions can impact the surrounding community, removing this transparency is problematic. The question of whether granting this expanded authority is advisable is a separate question.
Recommendation: Reinstate the requirement for public notice and public hearing for Board of Adjustment consideration of special exceptions.

23-2I-1030 Deadlines for Appeals of Administrative Decisions
The allowable amount of time to appeal an administrative decision has been decreased from 20 days after decision to 14 or 7 depending on whether notice of decision is required (more than the 4 day difference from calendar to 'working day'. See #3 below). (See 25-1-182.)
Recommendation: Reinstate current timing

23-2I-2030 (Appeals) Meeting to Resolve Issue
The meeting to resolve issues has changed from a requirement in the current code for staff to host a meeting open to all parties if requested, to stating that staff 'may' host a meeting if requested and can meet separately. (See 25-1-186.) The current code ensures a fair process that is more transparent and more likely to lead to resolution of issues.
Recommendation: Reinstate the current code requirements.

23-2I-3050(E) Conduct of Appeal Hearing
Currently an appellant has a right to a rebuttal after the testimony. (See 25-1-191(B).) CodeNext leaves this up to the discretion of chair, unnecessarily limiting the public discourse.
Recommendation: Reinstate the current code requirements.

23-2L-1050(A)(2) Interlocal Development Agreement (ILA) Notification Requirements
This section removes the currently required mailed notice to registered organizations in the case of hearing on an areawide ILA. (See 25-1-903(B)(2).) The notice requirement in CodeNext is only for published notice. Current code requires mailed notice to registered organizations as well as published notice (25-1-132(C)) on 11/16 day timeline. Eroding this process is problematic. Council added this in 2008/2009 because ILAs had been processed behind the scenes with no input before (20081208-070), resulting in significant conflict.
Recommendation: Reinstate the current code requirements.

Various Sections Tolling
Several places in CodeNext call for tolling of deadlines under certain circumstances. These situations are often of significant interest to the community and require notice for the initial event. When deadlines are tolled, in order to continue to understand deadlines, the public notice is needed.
Recommendation: For all processes that incorporate the concept of tolling, such provisions should be revised to:
1. Limit the period for which an application can be tollled; and
2. Provide for notifications to interested parties at the beginning and end of each tolling period, stating the purpose of the tolled period and the results of any processes for which the application was tolled.

2. WAIVERS AND OTHER ALLOWABLE ADJUSTMENTS TO REGULATIONS IN CODE NEXT

Several procedures have been added to CodeNext that will move actions with significant implications for the public to processes that do not include any public notice or participation at all, giving additional authority for administrative waivers. In addition a questionable framework has been added to the Board of Adjustment authority for adjustments to the land development regulations without any notice to the public.

CodeNext should not be moving government decision-making further behind closed doors and outside the public realm.

A. Additional Administrative Waivers

23-2F-2020 Exempt Residential Uses and Structures.
This exemption is new, and appears to be a significant expansion and loosening of a concept Council enacted in 2011 to address a problematic situation in a neighborhood where carports long ago had been erected in an area prone to floods. The process was narrowly crafted and was subject to public consideration (see Ordinance 20110526-098, and 25-2-476): it was limited to uses allowed under SF-3 or more restrictive zoning, only for properties where a setback noncompliance existed for more than 25 years, and the process required a review and approval by the BoA.

This section, on the other hand, allows for exemptions to be granted on many more uses (including multi-family and others), with no limitations on the type of nonconformances that have existed since before 2008, and the approval is without any public notice and granted by the Building Official.

Ironically, it appears that 23-4B-4040 captures the original Board of Adjustment special exception that was added to the code in 2011. Section 23-2F-2020 goes well beyond that in authority which suggests that the original Board authority would be unlikely to be used.

This administrative authority allows for administrative exemptions from the code which could be extremely subjective and impactful to nearby properties, without any public review.

Note that the 2011 ordinance mentions that state law gives the BoA the authority to grant exemptions to the code without the hardship criteria. This raises the question of whether granting this code exemption authority to the Building Official in 23-2F-2020 is valid under state law. The Local Government Code is very explicit in processes for adjusting development regulations and there does not appear to be any allowance for granting such authority to staff.
Recommendation:
Gather legal opinions as to whether state law allows this concept.

<Strike this section or…If it is allowed, engage in a robust public discussion as whether any such authority should be granted to the Building Official and if so, under which specific circumstances.>

23-2F-2030 Minor Adjustments
This section allows an administrative approval of up to a 10% increase in certain entitlements (height, building coverage and setback) if errors are made 'inadvertently' in construction. There is a major concern of abuse of this section, allowing construction "errors" to increase entitlements across the city.

As with 23-2F-2020, it needs to be explored whether this is even allowed under state law.

The CodeNext tracking matrix states that 23-2F-2030 Minor Adjustments is 25-2 Subchapter E (Commercial Design Standards (CDS)) Section 1-4, "rolled forward, with modifications, to allow minor deviations from standards based on a specific set of criteria."

This is a gross misstatement. Subchapter E, Section 1.4 allows for minor modifications in order to "protect natural or historic features or to address unusual site conditions" and explicitly prohibits any increase in overall project intensity, density, or impervious cover. In addition, it was not an absolution from "mistakes" but an upfront process at the time of the project application.
Recommendation: Strike this section.

23-2F-2040 Alternative Compliance
Alternative Equivalent Compliance in the current code was part of the Commercial Design Standards. Here applicability is broadened to General through Commercial Non-Transect zones, but it is significantly more expansive than in the CDS.
Recommendation: <Gather input from CAG Member Eleanor McKinney. >

23-2G-2030 Nonconforming Parking
This section allows the Director to allow for continued nonconformance with parking requirements after the nonconforming use is terminated. The Director's decision is based upon whether compliance with parking requirements is "feasible." This is problematic, as it allows a difficult parking situation to continue rather than be phased out like other nonconformances. In addition, this could allow for waivers of large increases in parking requirements, significantly impacting surrounding areas and potentially creating public safety issues.
Recommendation: Strike this section.

23-2G-1050(B)(4) Continuation of Nonconformity, Conversion of Nonconforming Uses in Residential Buildings
This section allows the Director to approve the change from one nonconforming use to another if it is less intense than the existing nonconforming use. While this could be a benefit to nearby properties of a problematic nonconforming use it sets the stage for a longer time that the use remains nonconforming if the original is no longer beneficial to the owner. In addition, the decision of what is a less intense nonconforming use is a subjective decision.
Recommendation: Modify the section to require a public hearing and approval by the Land Use Commission

23-4B-1030 Minor Use Permits
This section allows the Director to approve certain uses according to the same criteria that the Land Use Commission approves Conditional Use Permits. This removes accountability of elected officials from important quality of life decisions.
Recommendation: Strike this section.

23-1A-5020(C) Incomplete Provisions
This appears to be a new concept, giving authority to the director to create new standards if the code is incomplete.

Recommendation: The director should be required to raise an incompleteness issue to the Council, to get Council guidance for how it should be completed in the instance at hand, and to initiate a process to amend the code to complete it.

B. Additional Board of Adjustment Waivers

23-4B-4030 Special Exception Type 1 (by the Board of Adjustment)
This special exception provides the Board authority to grant exceptions to any zoning regulation when a conditional use permit has been granted. The purported purpose is to "facilitate context-sensitive development by providing flexibility" in permitting with approval criteria simply that the exception "will enhance the quality of the proposed use and increase its compatibility with adjoining developments and neighborhoods."
No explanation is given as to why there should be broad authority to waive any zoning regulation just because the situation has a conditional use permit. Access to such a broad array of waivers promises to bring a flurry of requests. In addition, the Special Exception process in 23-2 has removed any requirement for public notice, suggesting that only the applicant and not the impacted public will have input whether the waiver leads to an "enhancement."
Recommendation: Engage a robust and public discussion as to why the case of a conditional use permit should have allotted special consideration to waive any zoning regulation. If it's found that there is a reason, consider limits on which zoning regulations can be waived and include public notice and a public hearing to ensure a transparent decision making process.

23-4B-4040 Special Exception Type 2 (by the Board of Adjustment)
This special exception covers the existing special exception for longstanding setback nonconformances under 25-2-276 except that the requirement for public notice and a public hearing has been removed.
Recommendation: Reinstate the requirement for public notice and a public hearing.

23-4B-4040 Special Exception Type 3 (by the Board of Adjustment)
This special exception provides the Board authority to grant exceptions to permit an existing use that is permitted by the city in error. While the required findings attempt to put constraints against misuse and abuse of this section, the fact is that there is a potential for the surrounding developments and neighborhoods to suffer significantly from inappropriate uses that the City is obliged by code to protect them from, and this is an unfair burden to lay at their feet in the face of City error. In addition, Board consideration of this special exception does not require any public notice or a public hearing.
Recommendation: Strike this section.

3. DECREASED TIME FOR PUBLIC NOTICE AND RESPONSE, OR *NOT?*

CodeNext decreases the number of days required for the City to provide notice to the public of a hearing or other event related to a land development process and for the public to respond to decisions, generally by 4 days.

Staff has posted a note saying that there is an error, that the days were supposed to be qualified as "business days" with the expectation that the timing has not changed. See http://austintexas.gov/department/top-5-corrections-be-addressed-codenext:

Calendar days – 23-1A-5020 (G) (Part 3)– reference to days should be "business days" instead of "calendar days" unless otherwise indicated.