

The Need to Track Changes

Submitted by a community member

Requested Action

To ensure the community is adequately informed regarding the proposed modifications to the Land Development Code, City staff should accurately and transparently track the changes that have been made to the existing code.

- The simplest way to perform such a task would be to prepare "track changes" documents that compare the existing code sections to their corresponding sections of CodeNEXT (to the maximum extent feasible). It is well understood that there are certain sections of CodeNEXT where tracking line-by-line changes would be impossible or impractical. However, the vast majority of the procedural sections and many other sections were, primarily, copied over from the existing code. The City staff members (or consultants) who worked on these sections should easily be able to identify such sections and prepare the comparison documents in a manner that is discernible.

Once the public has been given adequate tools to comprehensively understand the changes being made within CodeNEXT, we will need additional time to fully evaluate such changes and provide feedback.

Explanation

In the late 1990s, the City of Austin performed a "plain language rewrite" of the City Code. At the time, the amendments were presented as non-substantive modifications to make the code easier to read. To the public's surprise, after it was adopted, it was discovered that some of these modifications went beyond their "non-substantive" label. For example, the density bonuses associated with the then-codified waterfront overlay were deleted in their entirety (which took almost a decade and lengthy public process to restore).

With regard to CodeNEXT, city staff and consultants have made similar statements--certain sections of the code are being presented as having only non-substantive changes. However, throughout the community's review, more and more modifications are being identified that go beyond simple wordsmithing and may have serious, substantive consequences.

Over the last couple months, the community has been asked to "eyeball" a document that is over 1,000 pages and provide comments on a line-by-line basis. This has proven to be an impossible and frustrating task.

To help illustrate the point of this comment, below are some examples which will highlight the importance of tracking changes and how a failure to understand what exactly is changing could have negative consequences that will be difficult to correct.

Example 1. Local Historic Districts.

It is apparent that in some sections of the code, edits have been performed in an attempt to simplify or clarify processes. These sections are being referred to as "carry-over" provisions, where substantive changes are not intended to occur.

One such "carry over" section is the historic zoning process. This is an area of city policy that has been debated substantially over the last decade and an area in which council has give clear directives based on carefully crafted compromises. It was the intent of CodeNEXT, recognizing this history, to leave these provisions alone, with the exception of a few, non-substantive changes to rearrange sections and modify terminology. However, such a task requires an understanding of the context of the section and why certain provisions were drafted as-is.

Hidden in the process of rewording, renaming and reorganizing the historic landmark designation zoning requirements, a substantive change was made: the new code makes the adoption of new local historic districts ("LHDs") functionally impossible.

Try to eyeball the change:

Old Code: The affirmative vote of two-thirds of the members of the Historic Landmark Commission is required to recommend zoning or rezoning property as a historic landmark (H) combining district if a record owner of the property files a written statement protesting the zoning or rezoning.

New Code: If a record applicant of the property files a written statement protesting the zoning or rezoning to an H or HD Overlay Zone, the affirmative vote of two-thirds of the members of the Historic Landmark Commission is required to recommend zoning or rezoning property as a Historic Overlay Zone. (23-4D-7070(F)(6)).

At first glance, these code provisions might appear to be the same. However, the new provisions adds in "HD Overlay" within this provision (note, "HD Overlay" is the new code's term for LHDs).

By including the HD Overlay within this provision, CodeNEXT provides the power to anyone living in a proposed local historic district to protest such district and require a supermajority vote of the Historic Landmark Commission before such local historic district could even proceed through the City's rezoning process. This is entirely inconsistent with the process set forth for local historic districts, which requires the approval of the owners representing 51% of the land area with such boundaries to initiate the LHD. Such a supermajority requirement would not even exist at council, where forcing a valid petition at council requires the protest of owners representing 20% of the land within such local historic district.

Given difficulties with quorum and differences of fundamental philosophies amongst members, this CodeNEXT provision would effectively shut down all new local historic districts in the City. Presumably, this is a mistake, but it serves to illustrate how close the community must review the CodeNEXT draft to ensure that the context and meaning of the existing code remains the same, where it has been told to us that changes are not intended to occur. Track changes would make this an easier task.

Example 2. Vested Rights Determinations.

Article 12 (Vested Rights) is another section of the city code that has been presented to the community as one without substantive modification. However, a closer look at the revised text reveals some substantive differences that go beyond the purported structural changes.

For example, §25-1-541 pertains the process by which an applicant can apply for a vested rights determination. Under the existing code, if a vested rights application is denied, the applicant may apply for a reconsideration. The director's decision under such reconsideration is considered final and not subject to further reconsideration.

However, CodeNEXT, §25-1-541(E) was modified (i) to remove the provisions stating that a director's decision on a reconsideration is final and not subject to further reconsideration and (ii) to add the concept of tolling during the time that an application for vested rights is under reconsideration. Both of these provisions are inconsistent with the existing city code and should be highlighted and discussed at the community level so that the consequences of each are fully understood.

To illustrate the necessity of tracking these changes, please see the following sample redline:

23-2K-2010 Vested Rights Determinations

(D) An applicant may request that the responsible director reconsider a vested rights determination at any time before the application expires under Section ~~2523-1-82 (Application Requirements 2B-1040 (Update and Expiration)).~~ The director's decision on a reconsideration. A request ~~is final and not subject to further~~ for reconsideration tolls the expiration date, as provided in Section 23-2B-1050 (Tolling of Expiration Period).

Without being provided a document that shows what is changing, it is difficult to understand what changes are being made.

Example 3. Initial Zoning Process.

Another concern amongst those in the community reviewing CodeNEXT is that entire sections of the code may just be missing. Important provisions may be deleted, and unless someone has significant time on their hands, to track the existing code alongside the proposed CodeNEXT, line-by-line, important omissions may go unnoticed.

For example, the current draft of CodeNEXT has no process for initial zoning designations. There is a process for annexed property and a process for rezoning, but, without properly tracking the changes from one code to the next, the process for how to handle an initial zoning (eg., the Grove) has been deleted. The tables in 23-2A suggest that there should be a section entitled "Original Zoning", but such a section does not exist anywhere in 23-4B.

Other Examples.

The above-described examples are given to provide some explanation as to why the community is asking for a better tracking system to review the new code. We cannot provide complete comments until we know exactly what is changing from one code to the next.

This is an enormous task, and these comments are not meant to criticize or embarrass the staff (or consultants) who have labored over the new code. These comments are meant to highlight how impossible it is for the community of volunteers to review hundreds and hundreds of pages with no basis for comparison.

Below is a listing of additional changes that have been identified by community members that are not included in the staff's tracking matrix:

- Notification times have been shortened throughout;
- The timeline to file appeals has been shortened throughout;
- Various increases of staff discretion, such as special exceptions and MUPs;
- Use changes that will now only require CUPs;
- Accessory Dwelling Units allowed in LDR despite being prohibited in SF-2;
- ADU regulations (size limits and limitations on short term rentals) apply only in non-transect zones (size limit also changed from 1,100 sq ft or 0.15 FAR whichever is more restrictive to whichever is greater);
- Elimination of Residential Design and Compatibility Standards (subchapter F) in transect zones significantly increases size of what can be built;
- Dwelling Unit Occupancy limits no longer specifies for which zones the rules apply to and does not specify whether it will apply to three-family residences (duplex plus ADU) that are allowed on T3 zones;
- Change from the 51% food requirement for businesses that sell alcohol to 51% total revenue;
- Removal of prohibition of alcohol sales within 300' of a public school, church or public hospital;
- Removal of Neighborhood Plan Overlay;
- Changes to compatibility and setback requirements loosened;
- Additional authority of director to make 10% adjustments to entitlements including height, building coverage and setback;
- Significant parking reduction changes and provisions for fee-in- lieu for parking;
- Broad expansion of Building Official authority to grant noncompliance exemptions without Board of Adjustment review;
- Provision stating the discontinuation of nonconforming Short Term Rental Type 2 by April 1, 2022 is missing;
- Removal and modification of existing limitations on administrative approval for accessory structures to historic landmark;
- Removal of Environmental Board oversight of the removal of trees located on public property and estates;
- Potential changes in measurement points for protected trees;
- Removal of Environmental Board oversight of Urban Watersheds Structural Control Plan;
- Potential removal of council approval of fee structure associated with water quality controls; and
- Addition of trail exemption to critical water quality zones.