

**The Hyde Park and North Hyde Park  
NCCDs:  
Contributions to Density, Commercial  
Development, and  
Missing Middle Housing**

**Submitted by Hyde Park Residents**

Lorre Weidlich, Mity Myhr, Larry Clay, Mark Fishman, Aviva Fishman, Sharon Brown, David Conner, Reid Long, Kristen Remeza, Rimas Remeza, Debbie Wallenstein, Travis Turner, Karen Saadeh, David Matthis, Ellie Hanlon, Ben Deyo, Adrian Skinner, Sarah Cook, Barbara Gibson, Susan Moffat, Kathy Lawrence, Steve Sanderson, John Williams, Claire DeYoung, Karen McGraw, Kevin Heyburn, Susan Marshall, Suzanna Walker, Lynwood C. Krause, W. Kay Krause, Deaton Bednar, Charles Newman, David Anderson, Linda Anderson, Dolly Carswell, Wanda Penn, Sarah R. Wood, Ashley Aarons, Stephen Aarons, Martha K. Smith, Betsy Clubine, Andy Homer, Janet Zeitler, Candyce Rusk

## Executive Summary

The central Austin neighborhood of Hyde Park is characterized by a diversity of housing types (duplexes, ADUs, small multiplexes, condominiums, and more than 45 apartment complexes, many in the neighborhood interior); a concentration of population equivalent to three times the average density of Austin, ranking it second in density among Austin neighborhoods; more affordable rental prices than the Austin average, probably due to its older housing stock; and pedestrian-accessible commercial districts.

In 2002 and 2005, Hyde Park residents created, through an extensive public process that involved countless residents and included detailed negotiations with property owners, two Neighborhood Conservation Combining Districts (NCCDs). NCCDs are city ordinances designed to carry out neighborhood plans (Appendix G of *Imagine Austin*) and to maintain neighborhood character. Because they further the city's interest rather than being artificial, arbitrary, or unnecessary, they do not violate federal Fair Housing standards.

The Hyde Park NCCDs support additional appropriate development, including the continuance of missing middle housing; allow increased densification in appropriate areas; provide for the maintenance of commercial areas; and encourage development of the Guadalupe activity corridor by providing zoning standards that match or are less restrictive than the T5 transect standards specified by CodeNEXT.

The subject of NCCDs, specifically the Hyde Park NCCDs, has become an issue in the larger debate about CodeNEXT. This white paper looks at the various questions raised about the rights, restrictions, and results of those NCCDs.

## Introduction

The city of Austin is currently going through the process of evaluating the first draft of CodeNEXT. As part of that process, the continuing existence of NCCDs has been called into question. This paper is intended to establish the role of two NCCDs, Hyde Park and North Hyde Park, in contributing to both activity corridor development and densification while preserving and protecting an area of value to the city of Austin because of its historic character.

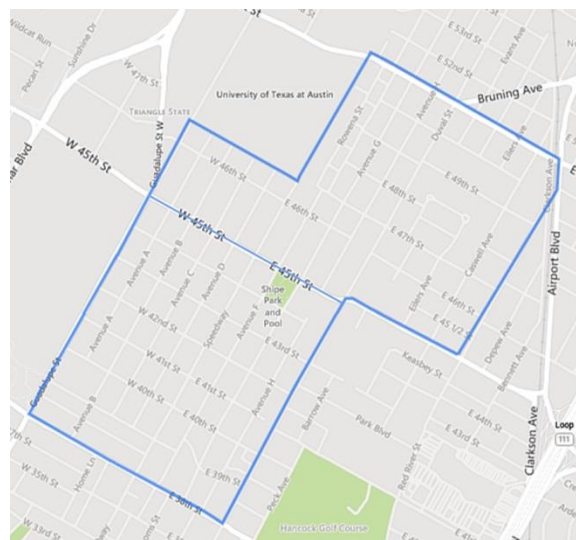
## What is a Neighborhood Conservation Combining District (NCCD)?

According to the City of Austin (January 2010), “The purpose of a Neighborhood Conservation Combining (NCC) District is to establish development regulations for unique neighborhoods in order to preserve their traditional character while allowing for controlled growth to occur. An NCC District clearly defines boundaries separating residential uses from commercial uses, and sets standards for redevelopment that is compatible with the unique character of the neighborhood.”

According to the city website, an NCCD “preserves and protects older neighborhoods by allowing modifications to applicable development regulations in accordance with a neighborhood plan, which for NCCDs is intended to protect neighborhoods that were substantially built out over 30 years ago.”

## Basic Facts about the Hyde Park and North Hyde Park NCCDs

The Hyde Park NCCD was adopted by City Council on January 31, 2002. It covers the area between 38<sup>th</sup> Street and 45<sup>th</sup> Street (south to north) and Guadalupe Street and Duval Street (west to east). The North Hyde Park NCCD was adopted by City Council on August 18, 2005. It covers the area between 45<sup>th</sup> Street and 51<sup>st</sup> Street (south to north) and Guadalupe Street and Red River Street (west to east), with the exception of the UT Intramural Fields area that occupies the north-west corner of that block. Red River Street ends at Airport Boulevard just short of 50<sup>th</sup> Street, so the final block at the north-east corner of the NCCD is bounded by Airport rather than Red River.



Each of these NCCDs divide the total area they cover into a series of *districts*. The standards for each district are specific to that district. Those standards were created based on the characteristics that existed in that district at the time the NCCDs were created.

<b>Hyde Park NCCD Districts</b>	<b>North Hyde Park NCCD Districts</b>
<p><b>Speedway District</b> - from 38<sup>th</sup> Street to 45<sup>th</sup> Street, one-half block on both sides of Speedway</p> <p><b>Duval District</b> - from 40<sup>th</sup> Street to 45<sup>th</sup> Street, between Duval and ½ block to the west of Duval, with an additional half block incursion to the west at 43<sup>rd</sup> and 45<sup>th</sup> Streets</p> <p><b>West 38th Street District</b> – Between 38<sup>th</sup> and 38 ½ Streets, between Guadalupe and Speedway except for one lot on each end</p> <p><b>Guadalupe District</b>- from 38<sup>th</sup> Street to 45<sup>th</sup> Street, between Guadalupe and ½ block to the east of Guadalupe</p> <p><b>Hyde Park Civic District</b><sup>i</sup> – the area covered by (at the time) the Hyde Park Baptist Church and its properties</p> <p><b>Residential District</b> - All area not included in another district</p>	<p><b>Duval Commercial District</b> – 4500, 4510, 5011, and 5012 Duval Street</p> <p><b>Avenue A District</b> – from 45<sup>th</sup> Street to the Intermural Fields, one-half block on both sides of Avenue A</p> <p><b>Guadalupe District</b> –from 45<sup>th</sup> Street to the Intermural Fields, between Guadalupe and ½ block to the east of Guadalupe</p> <p><b>Residential District</b> – All area not included in another district</p>

The Hyde Park NCCDs were created in an extensive public process that involved countless area residents and included detailed negotiations with many property owners, particularly for commercial properties adjacent to the Guadalupe corridor.

### **The Hyde Park NCCDs and Austin Development Code**

An NCCD, in general, can be *more or less* restrictive than base development code. Because its purpose is to preserve the character of a neighborhood, it is carefully crafted to put in place the characteristics that exist in that neighborhood, and because it focuses on a neighborhood that was substantially built out over 30 years ago, it can include characteristics no longer acceptable under zoning current at the time that the NCCD is put into effect.

The Hyde Park NCCDs are no different. For example, the Hyde Park NCCDs allowed for ADUs on 6,000 square foot lots in the Speedway and Avenue A Districts and on 5,900 square foot lots in the Duval District, even though, at the time NCCDs were enacted, city code specified that ADUs could be built only on 7,000 square foot lots. This was in keeping with the character of those parts of the neighborhood.

### **The Hyde Park NCCDs, the Hyde Park Neighborhood Plan, and Imagine Austin**

A neighborhood plan is a *planning* document. It is the responsibility of a neighborhood contact team to work for the implementation of a neighborhood plan, but, depending on the neighborhood, that can be accomplished entirely, partially, or not at all. The Hyde Park Neighborhood Plan is part of *Imagine Austin*, the Austin comprehensive plan. Like all neighborhood plans, it became part of *Imagine Austin* when it was adopted by City Council in 2000. As *Imagine Austin* states (page 223), “The existing neighborhood

and area plans were crafted within context of this code and decisions were reached based upon the assumptions of the continued utilization of its provisions. This includes elements of the Land Development code that are not specifically addressed in neighborhood and area plans but on which decisions were based (e.g., compatibility standards.) The vision of the comprehensive plan can be achieved by retaining these protections and the approaches taken in the neighborhood and area plans.”

An NCCD is a *zoning* ordinance. It is one of many tools that can be used to carry out a neighborhood plan. Not all of Hyde Park’s neighborhood plan could be accomplished using an NCCD. Some of it, for example, historic zoning, required other tools and some of it, for example, sidewalks in certain areas and speed limits on certain streets, remains unrealized. Because the NCCDs carry out the Hyde Park Neighborhood Plan, they also carry out *Imagine Austin*, which states (page 223), “continued protection and preservation of existing neighborhoods and the natural environment must be considered top priorities of comprehensive revisions to the City Code.”

## **The Hyde Park NCCDs, Gentrification, and Affordability**

Hyde Park is experiencing gentrification no less than the rest of the city. Gentrification results from the loss of affordable property – smaller, older houses – and its replacement with larger, more expensive structures. These structures in turn raise the property values for nearby lots.

The Hyde Park NCCDs have no power to prevent demolition; consequently, they have no power to control gentrification. Fortunately, because most of lower Hyde Park is zoned as a Local Historic District, demolitions of contributing structures in that area are fewer than in other parts of the city and values are more stable.

Possibly because Hyde Park has so much older rental housing stock, including missing middle housing, median rental prices are lower than the Austin average: According to city-data.com, the median rent for 2015 was \$903/month in Hyde Park as opposed to \$964/month for the city of Austin. According to ApartmentFinder (<http://www.apartmentfinder.com/Texas/Austin/Hyde-Park-Neighborhood-Apartments/q/?sr=2>), as of the date this paper was written (May 11, 2017), the cheapest studio in Hyde Park is \$670, the cheapest 1-bedroom \$775, and the cheapest 2-bedroom \$1215.

## **Hyde Park NCCDs, Development, and Densification**

The Hyde Park NCCDs do not prohibit new development, as a survey of Hyde Park makes clear. In the area north of 45<sup>th</sup> Street, many older, single-family homes have been demolished and replaced with new structures, including multi-family structures. Also, previously empty lots in both NCCDs have been filled in with new structures, including duplexes. Examples include Duval north of 45<sup>th</sup> Street, where at least one duplex replaced a single-family house; the 3800 block of Duval, where a non-contributing house was demolished and replaced by a duplex; and the empty lot next to that lot, where a duplex was built. Three houses on W. 39 ½ Street are being replaced by an apartment complex.

The Hyde Park NCCDs allow for densification in specified areas: on Avenue A north of 45<sup>th</sup> Street, along West 38th, on Guadalupe where mixed-use development is allowed, on the Post Office site, on the 5-

acre tract at 45th and Duval (Oak Park Apartments), and in other locations. Consequently, the Hyde Park NCCDs achieve goals similar to the City of Austin infill tools, albeit with more care.

Hyde Park (78751) is, in fact, the *second densest* ZIP code in the city of Austin, second only to the West Campus area.<sup>ii</sup> According to city-data.com, Hyde Park already has nearly 3 times as much density as the Austin average (10,816 people per square mile vs. 3,705 per square mile citywide).

Given its current level of density and its allowance for further densification in specified areas, Hyde Park is already contributing more than the majority of Austin neighborhoods to providing housing for Austin residents. If every neighborhood should do its fair share to absorb densification, Hyde Park is already doing that.

## **The Hyde Park NCCDs and Missing Middle Housing**

Hyde Park is the neighborhood that Opticos cites as a prime example of missing middle housing. Hyde Park has duplexes, ADUs, small multiplexes, condominiums, and more than 45 existing apartment complexes, many of which are located in the interior of the neighborhood. The Hyde Park NCCDs have done nothing to eliminate missing middle housing, and Hyde Park is in no danger of losing its missing middle housing.

A few duplexes have been replaced by single family houses, but, as described above, the opposite has occurred as well. If multi-family properties are demolished, their MF zoning allows for their replacement by multi-family properties. In addition, the Hyde Park NCCDs do not prohibit rezoning of property from SF to MF. An example is the three former SF lots on W. 39 ½ Street, which were rezoned to MF to allow the buyer to replace the three single family houses with an apartment complex.

While the Hyde Park NCCDs do not allow ADUs on lots of 5,750 square feet, from their inception they have allowed ADUs on smaller lots (6,000 square feet and 5,900 square feet) in some districts (Speedway, Avenue A, and Duval) *before* the city ADU ordinance of about a year and a half ago reduced the size from 7,000 square feet to 5,750 square feet.<sup>iii</sup>

## **Hyde Park NCCDs, Commercial Areas, and Comparison with CodeNEXT Transects**

The Hyde Park NCCDs specifically retained a great deal of commercial zoning because neighbors liked being able to walk to local businesses. They purposely did not change commercial zoning to mixed use (MU) zoning because MU zoning does not, in fact, preserve or require any ground floor commercial use, including retail and restaurants. In fact, under MU zoning, apartments could have potentially replaced all existing Hyde Park businesses.

In the Guadalupe District, between 38th and 45th streets, the Hyde Park NCCD building standards are roughly equivalent to most T5 standards and, in many cases, the NCCD allows *more intensive* development (greater building coverage, smaller minimum lot sizes, smaller setbacks, etc.) than T5 transect zones would provide.

Following are some details for the 38<sup>th</sup> to 45<sup>th</sup> Street area, where T5N.SS is the most likely transect to apply:

- NCCD minimum lot size is 4000' vs. 5000-7500' minimum lot size in T5N.SS
- NCCD minimum lot width is 25' vs. 50'-100' minimum lot width for multiplexes in T5N.SS
- NCCD Building coverage is 95% vs. 50% for T5N.SS
- NCCD Impervious cover is 95% vs. 60% for T5N.SS
- NCCD side setback is 0' vs. 5' for T5N.SS
- NCCD has a 10' maximum rear setback vs. 20' minimum for T5N.SS
- NCCD height is 60' between 38<sup>th</sup>-40<sup>th</sup> (these blocks back up to larger commercial or multifamily uses). T5N.SS height is 55'.
- NCCD height is 40' height between 40<sup>th</sup>-45<sup>th</sup> (these blocks back up to single family or small multifamily uses so compatibility is "baked in.") T5N.SS height is 55'.

For T5U.SS, the numbers are similar: 4000' minimum lot size in the NCCD vs. 7500' minimum lot size for low-rise block form buildings in the transect; smaller side and rear setbacks in the NCCD than in the transect; greater building coverage in the NCCD than in the transect; and a height maximum of 40-60' under the NCCD vs. 50' in the transect.

Similarly, T5MS requires a 4000' minimum lot size (same as NCCD); minimum lot width of 40'-75' for block form vs. 25' under NCCD; 90% building cover vs. 95% under NCCD. T5MS does theoretically allow greater height (up to 75' with the use of affordable housing incentives) but given the proximity of small residential uses, the T5 stepback provisions would actually cap height at a lower number.

The North Hyde Park NCCD applies to less than one and a half blocks on the east side of the Guadalupe Corridor (the Guadalupe District, between 45th street and the credit union on the north side of 46th). Here, the NCCD provides for four-story VMU, with building standards that are generally equivalent to or more lenient than the T5 transects. In fact, a brand new four-story multifamily structure was recently completed here under the North Hyde Park NCCD. This NCCD also provides for an array of housing types throughout this area. The remaining properties on the east side of Guadalupe between 45th and 51st are not part of the North Hyde Park NCCD, they are large tracts of state-owned land that are currently unzoned and will remain so until and unless the state decides to do something else with them.

## **The Hyde Park NCCDs and Fair Housing**

Arguments that NCCDs violate Federal Fair Housing Standards are not well-rooted in the law and its interpretation by the Supreme Court.

Courts have held that disparate impact can be the basis for a cause of action under the Fair Housing Act's "otherwise make available" clause (804(a)), but the recent Supreme Court decision in *Texas Department of Housing and Community Affairs, et al. v. The Inclusive Communities Project, Inc., et al.* (576 US 2015 (2015)) noted that communities have wide latitude in developing zoning and housing policy.

Furthermore, the majority upheld the precedent set forth in *Griggs, et al. v. Duke Power* (401 US 424 (1971)) that in order for a disparate impact claim to be successful, an arbitrary policy must be identified

that serves no legitimate government or private interest but rather promotes “artificial, arbitrary, and unnecessary barriers.” There is no articulated, fact-based reason to consider NCCDs as artificial, arbitrary, or unnecessary, much less all three. Rather, the NCCD tool allows neighborhoods to propose development patterns that support sustained and continued development in keeping with the characteristics and physical capacity of the neighborhood. In fact, NCCDs serve a legitimate purpose and further the City’s interest in preserving its history as well as guiding development in a manner consistent with existing and proposed infrastructure.

Finally, the majority in *Texas Department of Housing and Community Affairs, et al. v. The Inclusive Communities Project, Inc., et al.* carefully noted that claims under a disparate impact doctrine must be carefully constructed and warned against arbitrarily injecting race into every policy decision, as those opposing NCCDs appear to be doing. The majority noted that displacing legitimate reasons and allowing race to be injected into housing policy as a primary driver would stifle racial equality rather than promoting it.

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<sup>i</sup> The area covered by the Hyde Park Civic District is generally regulated by a separate ordinance, Ordinance No. 900830-Q. If an issue arises that is not addressed by Ordinance No. 900830-Q, the Hyde Park NCCD ordinance applies.

<sup>ii</sup> The West Campus area is under the UNO overlay; it was zoned for maximum development specifically to protect other neighborhoods close to the university.

<sup>iii</sup> Regardless of whether ADUs are permitted, it can be argued that the costs of ADUs make them less desirable than supposed. The following data is cited from “Strategies to Help Homeowners Finance Accessory Dwelling Units in Austin,” student-led research project under Jake Wegmann, Community and Regional Planning (CRP) program, School of Architecture, University of Texas at Austin, May 20, 2016 (That paper cited its data from AURA, “ADU City: How Granny Flats & Garage Apartments Can Help Save Austin,” June 2015).

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Assumptions:

- Potential project cost
- 30 year mortgage at 4.5%
- Tax appraisal at project cost with tax rate at 2.4%
- Rent based on median backyard cottage rents from Austin MLS for past 12 months

	0 Bedroom	1 Bedroom	2 Bedroom
Project Cost	75,000	100,000	150,000
Debt Service	380.01	506.69	760.03
Taxes	150	200	300
Insurance & Utilities	75	100	150
Total Costs	605.01	806.69	1210.03
Rental Rate	950	1072.50	1500
Monthly Income Flow	344.99	265.81	289.97

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There is certainly an income flow for the ADU owner, but the rental rate (\$950-1500) is hardly “affordable.” If rates were to drop to an “affordable” level (as densification proponents claim would result from an increase in density), owners of ADUs would find themselves in the hole. Their monthly income flow would be negative. All this suggests that ADUs are *not* the road to affordability, for either ADU owners or ADU renters. The cost of building makes them unaffordable.